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***EMPLOYER WEAPONS IN LABOR-MANAGEMENT
RELATIONS: Are they Relevant (and Practical) in the Case of
Labor-Management Disputes in Professional Sports?***

Commissioner Roger Goodell stated with reference to the 2011 NFL lockout, "We haven't had any discussions or considerations of replacement players." He continued: "It's not in our plans." [March 22, 2011]

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Abstract

What actions are permissible to an employer in a case of a labor-management dispute? This article addresses the variety of options available to an employer in the context of a labor dispute, in general, and, in particular, in professional sports. Considered will be actions ranging from the hiring of replacement workers during a strike, the imposition of a full or partial lockout by the employer, the refusal of the employer to rehire workers who had been replaced during a strike, and whether the rules established for replacement workers equally apply where management has engaged in a lockout of its workers. A discussion of the importance of *NLRB v. Mackay Radio and Telegraph Co.* in the context of professional sports will be undertaken.

1. INTRODUCTION TO ISSUES REGARDING EMPLOYEE REPLACEMENTS

Consider this scenario. Players on the South Bend, Indiana, Femi Yankees, a team in the United States Women's Professional Frisbee League [USWPFL], go on strike against their employer when the League and the union representing players fail to reach an agreement on the contract by the start of the 2012 Professional Frisbee Season. The Femi Yankees, contemplating financial ruin if the season doesn't begin (having spent thousands of dollars on a brand-new, indoor Astroturf field complex that seats 12,000), decide to begin the season with replacement players. After a five week strike by the players, followed by a five week lockout by team management, the league manages to reach agreement with its union and eight players of the twelve who had been replaced seek reinstatement. The Femi Yankees refuse to accept the striking players back and the players seek the assistance of the local NLRB to reclaim their jobs.

In the field of labor-management relations, the employer is often placed at a disadvantage if a strike results in the closing of the workplace. In order to protect its business interest by remaining open, an employer may decide to hire replacement workers. The same reality exists in the context of professional sports—but with a variety of quite different considerations than exist in a typical “non-sports” workplace environment. While it is a separate question whether such a strategy will be successful in a practical sense, given the realities of the market structure, fan acceptance of replacement players,¹ and ticketing policies of professional sports,² the legal

¹¹ See James R. Devine, *The Legacy of Albert Spalding, the Holdouts of Ty Cobb, Joe DiMaggio, and Sandy Koufax/Don Drysdale, and the 1994-95 Strike: Baseball's Labor Disputes are as Linear as the Game*, 31 AKRON L. REV. 1 (1997) (citing John Lowe & Gene Guidi, *Who the Heck Are These Guys? Prepare for Replacements- And Some Bad Baseball*, DETROIT FREE PRESS, Feb. 27, 1995, at Sports 1D and noting comments by then-acting MLB Commissioner Bud Selig, “It is far from a perfect solution. Nobody knows that better than me. It’s just fulfilling the need to play.”). See also Mark Maske, *Relief Is All Too Comic: Replacements are a Far Cry from Major Leaguers*, WASHINGTON POST, Feb. 26,

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issues are still important from the standpoint of the broader context of labor-management relations in the United States.

Mackay: The Hiring of Replacement Workers

1995, at Sports D11. On the practical side, Lattinville, Boland & Speyer, in addressing the conundrum, have noted:

Professional athletes are some of the highest-skilled workers in the world. They possess natural physical abilities, honed by years of practice, which cannot be easily duplicated with mere hard work or good fortune. Owners of professional sports franchises, even when faced with the revenue losses that may accompany a strike or lockout, rarely consider using temporary or permanent replacements.

Robert H. Lattinville, Robert A. Boland & Bennett Speyer, *Labor Pains: The Effect of a Work Stoppage in the NFL on its Coaches*, 20 MARQ. SPORTS L. REV. 335, 345 (2010).

² See, e.g., Grant M. Hayden, *Some Keys to the NBA Lockout*, 16 HOFSTRA LAB. & EMP. L.J. 453 (1999):

And though replacement players were used for three games during the 1987 professional football strike, the effort was not very successful, and probably only possible because football players, with the exception of star players in the skill positions, are relatively anonymous in comparison to their counterparts in baseball, basketball, and hockey. Professional athletes operate in what is essentially a closed labor market, which gives them a tremendous advantage over their counterparts in other occupations.

See also Murray Chass, *As Trade Unions Struggle, Their Sports Cousins Thrive*, N.Y. TIMES, Sept. 5, 1994, at 1.

It is interesting to note that after originally telling Congress that baseball fans would be given the option to get a full refund of season tickets if replacement players were used—without losing rights to future seats—the Commissioner’s office later indicated that this was not a major league policy and that this decision would be left to individual clubs. See *First-Pitch Replacements for Clinton*, DETROIT FREE PRESS, Feb. 17, 1995, at Sports 5C.

The often discussed and much maligned case of *NLRB v. Mackay Radio & Telegraph*³ provides an interesting insight into the practices and practicalities hiring replacement workers.⁴ A brief discussion and review of the case is in order.

Following the failure of negotiations to come to an agreement with respect to the terms and conditions of employment, employees of Mackay Radio & Telegraph, a company engaged in the transmission and receipt of radio, telegraph, and cable messages—both interstate and foreign—went on a strike. In order to keep its business in operation, the company brought employees from its offices in other cities to take the places of the strikers. After the strike ended, all but five of those who had been on strike were taken back into the employ of the company. These five employees then sought reinstatement. A proceeding was initiated before the National Labor Relations Board [NLRB] upon a complaint against the company charging that Mackay’s refusal to re-employ the five was a discrimination against them based on their union activities and that the company was guilty of unfair labor practices [ULPs] under the National Labor Relations Act [NLRA].⁵ After a hearing, and

³ 304 U.S. 333 (1938).

⁴ For a general critique of the ruling in *Mackay*, and the inclusion of dictum as, in effect, the holding of the case, see James Gray Pope, *How American Workers Lost the Right to Strike, and Other Tales*, 103 MICH. L. REV. 518, 533-34 (2004).

⁵ Pub.L. 74-198, 49 Stat. 452, codified as amended at 29 U.S.C. § 151–169 (1994). Three sections of the NLRA are especially relevant. Section 8(d) of the NLRA mandates a duty to bargain collectively in good faith. Section 8(a)(1) declares it an unfair labor practice for employers to prevent employees from exercising their rights given to them under Section 7 of the NLRA. Section 8(a)(5) declares it an unfair practice for employers to refuse to bargain collectively with employees. In *NLRB v. Major League Baseball*, the Players Association had maintained, and the Administrative Law Judge agreed, that the owners’ decision to break off negotiations and to insert replacement players violated Sections 8(a)(1) and (5) of the NLRA. See *NLRB v. Major League Baseball*, 880 F. Supp. 246, 252 (S.D.N.Y. 1995).

As Professor Boucher noted:

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upon findings of fact and conclusions of law, the Board ordered Mackay Radio to cease and desist from discharging or threatening to discharge any of its employees because of their membership in the union or on account of protected union activities; to refrain from interfering with, restraining or coercing its employees in respect of self-organization and collective bargaining; required the company to reinstate to their former positions the five men who had not been reemployed with back pay; and to post notices to the effect that members of the union would not be discriminated against in the future.

The case eventually reached the United States Supreme Court on appeal. A summary of the holding of the Court reveals the following:

- Under the findings, the strike was a consequence of, or in connection with, a "labor dispute" as defined in section 2(9) of the National Labor Relations Act. The Board was not

Although not addressed in the court's opinion, by forcing both sides back to the bargaining table, the court decided that an impasse in negotiations had not occurred. By not addressing this issue, it can only be concluded that the court decided an impasse was not possible. If an 'impasse' in negotiations was reached, the owners would have been free to initiate unilateral changes, such as inserting replacement players. Because the owners failed to bargain in good faith by unilaterally changing a mandatory subject of the bargaining agreement (players salaries/salary cap), an impasse was impossible. This struck a final blow against the owners' attempt to take back the control they lost when the reserve clause was eliminated and demonstrated the strength the Players Association had gained as a labor organization by enforcing its rights under the NLRA.

Gregory Boucher, *Baseball, Antitrust and the Rise of the Players' Association*, 4 U. DENV. SPORTS & ENT. L.J. 121, 133-35 nn.75-77 (2008).

required to find what the state of the negotiations was when the strike was called, nor that a "labor dispute" existed.⁶

- Their work having ceased as a consequence of, or in connection with, a current labor dispute, under section 2(3), the strikers remained "employees" of the company for the purposes of the Act, and were thus protected against any unfair labor practices prohibited by the Act.⁷
- Discrimination in reinstating employees who had been on strike by excluding certain of them for the sole reason that they had been active in the union was an unfair labor practice prohibited by section 8 of the Act.⁸
- However, it was *not an unfair labor practice* for the company to replace its striking employees with other employees in an effort to carry on the business; nor was the company bound later to discharge other employees in order to reinstate the strikers.⁹

In sum, as to the core issue of the replacement of the five employees, the Court concluded:

Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on business. Although section 13 provides "Nothing in this Act (chapter) shall be construed so as to interfere with or impede or diminish in any way the right to

⁶ *Mackay*, 304 U.S. at 344.

⁷ *Id.* at 345.

⁸ *Id.* at 346.

⁹ *Id.* at 345. In a related matter, after the cancellation of its 2004-2005 season, the NHL was considering the possibility of using replacement players for the 2005-2006 season. Under the NLRA, it would have been possible, in accordance with a complex legislative mechanism, to use replacement workers, or "scabs" in the case of a deadlock in negotiations. *See* 29 U.S.C. § 158.

strike,” it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to *protect and continue his business* by supplying places left vacant by strikers. And, he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.¹⁰

2. DEVELOPMENTS SINCE *MACKAY*

Returning to the context of professional sports,¹¹ it is interesting to note that NFL Commissioner Roger Goodell stated with reference to the 2011 NFL lockout, “We haven't had any discussions or considerations of replacement players.” He continued: “It's not in our plans.”¹² This statement, however; begs

¹⁰ *Mackay*, 304 U.S. at 345-46 (emphasis added).

¹¹ An interesting compilation of the ten most significant professional sports' strikes and/or lockouts has been provided by Josh Tinley. These include (in reverse order):

- 1992 NHL players strike
- 1984 Association of Volleyball Professionals strike
- 1981 Major League Baseball players strike
- 1979 Major League Baseball umpires strike
- 1998–99 NBA lockout
- 1994–95 NHL lockout
- 1982 NFL players strike
- 1987 NFL players strike
- 1994–95 Major League Baseball players strike
- 2004–05 NHL lockout

See Josh Tinley, *The 10 Most Significant Pro Sports Strikes and Lockouts*, Oct. 13, 2011, at www.midwestsportsfans.com.

¹² Alex Marvez, *NFL Not Planning on Replacement Players*, March 22, 2011, at msn.foxsports.com.

the larger question whether the use of replacement employees (in this case: *players*) in a case where the employer has locked out the employees or where the workers have engaged in a strike action is permissible? This article begins with a discussion of replacement workers [players] in the context of a strike and will return to the issue once again in the context of an employer [*league-wide*] lockout.

Several developments since the Supreme Court decided *Mackey* are relevant to the determination of this question and to a further refinement of the practice in the case of a strike.¹³

The situation in the general labor market, while not containing many of the practical problems associated in arena of professional sports, changed markedly during the 1980s in the United States as the American economy suffered from the twin economic inefficiencies of recession and burgeoning deindustrialization.¹⁴ *Deindustrialization*, in fact, began in the United States, with the share of manufacturing employment falling from a peak of 28 percent in 1965 to only 16 percent in 1994.¹⁵ The 1980s also saw the use of permanent replacements in order to break

¹³ See generally Grant M. Hayden, *Some Keys to the NBA Lockout*, 16 HOFSTRA LAB. & EMP. L.J. 453 (1999).

¹⁴ Professors Golden and Fazili note: “The 1980s saw the rise of neoliberal economic policies, leading to a flight of well paying manufacturing jobs, increased worker insecurity, and stagnating real wages.” Robin S. Golden & Sameera Fazili, *The Worst of Times: Perspectives on and Solutions for the Subprime Mortgage Foreclosure Crisis: Raising the Roof: Addressing the Mortgage Foreclosure Crisis Through Collaboration Between City Government and a Law School Clinic*, 2 ALB. GOV'T L. REV. 29, 56 (citing Carl H. Nightingale, *Globalization and Deindustrialization*, in POVERTY IN THE UNITED STATES: AN ENCYCLOPEDIA OF HISTORY, POLITICS, & POLICY 345, 347-50 (Gwendolyn Mink & Alice O'Connor eds., 2004)). Of course, none of these were considerations in the continued growth of professional sports during this same period—indicating that professional sports was virtually immune from the consequences of general deindustrialization that gripped the United States.

¹⁵ Robert Rowthorn & Ramana Ramaswamy, *Deindustrialization—Its Causes and Implications*, Sept. 1997, at www.imf.org/external/pubs/ft/issues10.

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unions in a number of very high-profile labor disputes, perhaps the most notable of which was the Reagan Administration firing of hundreds of striking air traffic controllers in 1981.¹⁶ Just two years

¹⁶ See, e.g., Herbert Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984). On August 3, 1981 nearly 13,000 of the 17,500 members of the Professional Air Traffic Controllers Organization (PATCO) walked off the job. Their stated purpose was to effect a major disruption of the nation's transportation system in order to put pressure on management (the United States government) to secure agreement to their demands. President Reagan responded almost immediately with an ultimatum: return to work within 48 hours or face immediate termination. As are all federal employees, the air traffic controllers were in violation of a "no-strike" clause of their employment contracts. The union was demanding an across-the-board wage increase of \$10,000/yr for controllers, whose pay ranged from \$20,462 to \$49,229; the reduction of a five-day, 40-hour work week to a four-day, 32-hour work week; and full retirement after 20 years service. The government estimated that the package would cost taxpayers \$770 million. The Federal Aviation Administration [FAA], PATCO's adversary in the collective bargaining process, made a \$40 million counteroffer, which included a shorter work week and a 10 percent pay hike for night shifts and for those controllers who doubled as instructors. However, when the contract offer was submitted to the membership, 95 percent of PATCO's membership rejected the final settlement. Upon this rejection, the FAA began work on a contingency plan that would go into effect if a strike occurred in order to assure that air traffic would not adversely affected.

The impact on the American economy was both real and immediate. Jason Manning reports that by the 1980s, air transportation was a \$30 billion-a-year business—every day 14,000 commercial flights carried 800,000 passengers, with 10,000 tons of air cargo transported daily. American carriers employed 340,000 people. From the outset, public support for the strikers was minimal. In fact, it seemed that the American public sided with the government and "exhibited little sympathy for individuals whose earnings were already well above the national average." The government took decisive steps to end the strike and to punish its ringleaders. The Department of Justice indicted seventy-five controllers. Federal judges levied fines amounting to \$1 million a day against the union for every day that the strike lasted. Finally, more than 11,000 strikers were terminated. In October, the Federal Labor Relations Authority (FLRA) decertified PATCO. See Jason Manning, *The Air Traffic Controller's Strike* (2000), at www.eightiesclub.tripod.com/id296.htm (last visited Jan. 18, 2012). See also JOSEPH MCCARTIN, *COLLISION COURSE: RONALD REAGAN, THE AIR TRAFFIC CONTROLLERS, AND THE STRIKE THAT CHANGED AMERICA* (2011) (arguing that

the fall of PATCO's ushered in a sustained period of labor decline and as an indication of the campaign against public sector unions).

The requirements for decertification of a union are (1) at least a year must have passed since the employees elected or the employer recognized the union (the so-called "one year bar rule"), and (2) there must not be a collective bargaining agreement in effect (though employees may file a decertification petition in a brief window between 90 and 60 days before the expiration of the collective bargaining agreement in most industries and between 120 and 90 days in the case of a health care institution). *See* § 9(c)(3), 29 USC § 159(c)(3); General Cable Corp, 139 N.L.R.B. 1123, 1124-25 (1962) (stating the "contract bar" rule). Section 9(c)(1), which regulates action on petitions to the NLRB, provides:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board--(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in Section 9(a) . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

29 USC § 159(c)(1).

The process of decertification is rather a simple one. At least 30 percent of the employees represented by a union must sign either a petition or individual [*authorization*] cards asserting that they no longer want to be represented by the union. The petition is filed with the NLRB. The NLRB will verify the validity of the petition and will schedule an election. If the union receives 50 percent or less of the votes in this election, decertification of the union is complete. *See* 29 USC § 159.

In addition, notes Catherine Meeker:

after PATCO, another strike that had attracted national attention was broken at the Phelps Dodge refinery in Arizona. The matter was resolved when the workforce was essentially deunionized.¹⁷ A third

Also, even while a collective bargaining agreement is in effect, an employee-initiated petition for decertification signed by the majority of the employees may oust the union. While invalid as a means of directly removing the union, the petition may be used by the employer as evidence that he has a good faith doubt of the union's continuing majority status that justifies his withdrawal of recognition for the negotiation of future agreements. Indeed, the employer may stop bargaining even before a petition is filed or granted if he has a reasonable belief that a majority of the workers no longer wish to be represented by the union.

Catherine Meeker, *Defining "Ministerial Aid": Union Decertification Under the NLRA*, 66 U. CHI. L. REV. 999, 1001 n.5 1999 (citing *Vic Koenig Chevrolet, Inc v NLRB*, 126 F.3d 947, 948 (7th Cir 1997); *Rock-Tenn Co v NLRB*, 69 F.3d 803, 808 (7th Cir 1995)).

¹⁷ See, e.g., JONATHAN ROSENBLUM, *COPPER CRUCIBLE: HOW THE ARIZONA MINERS' STRIKE OF 1983 RECAST LABOR MANAGEMENT RELATIONS IN AMERICA* (1998).

On April 7, 1982, Phelps Dodge announced that it would lay off 3,400 of its workers in operations in Texas and Arizona. In May 1983, it began negotiations with the United Steelworkers and other unions in Phoenix, Arizona. The unions agreed to make a series of concessions, including freezing members' wages for three years. The union, however, continued to insist on a Cost of Living Adjustments (COLA) and to other measures designed prevent job combinations that would result in a loss of employment for many of its members. These demands were in line with agreements which had been accepted by other major mining corporations, including Kennecott, Asarco, Magma Copper, and Inspiration Consolidated Copper. However, the management of Phelps Dodge maintained that it was facing intense competition from overseas producers and could not enter into similar agreements.

The subsequent collective bargaining negotiations with the unions failed to produce an agreement. On midnight of July 30, a strike began, which included workers from operations in Morenci, Ajo, Clifton, and Douglas, Arizona. A picket line appeared at the Morenci Mine in Arizona. The next day, Phelps Dodge

reacted by increasing security in and around the mine. Miners were later subjected to what were characterized as unlawful arrests, firings, evictions, and undercover surveillance by the Arizona Criminal Intelligence Systems Agency. *See Arizona Copper Mine Strike of 1983*, www.connexions.org/.../Docs/CxP-Arizona_Copper_Mine_Strike_of_1983.htm.

At the beginning of August, Phelps Dodge announced that they would be hiring permanent replacement workers for the striking workers at the Morenci Mine. Phelps Dodge took out many large ads seeking new workers in newspapers in both Tucson and Phoenix. Interestingly, the local government, in obvious support of a major area employer, sought and obtained injunctions which limited both picketing and demonstrations at the mine.

The situation reached a seeming crescendo when, on Monday, August 8, approximately 1,000 strikers and their supporters gathered at the gate to the mine in response to both company and local governmental actions. Phelps Dodge stopped production and, later that day, Arizona Governor Bruce Babbitt, a “liberal” Democrat generally regarded as being friendly to union concerns, flew in to meet with company representatives. Phelps Dodge agreed to a *10-day moratorium* on hiring replacement workers. The company and its union counterparts also agreed that a federal mediator would be called in for any future negotiations. [The Labor-Management Relations Act of 1947, better known as the “Taft-Hartley Act,” established the *Federal Mediation and Conciliation Service*, with the purpose of assisting management and labor in resolving disputes through the introduction of a federal mediator. *See* 61 Stat. 153, 29 U.S.C.A. § 172 (1947)].

Despite these conciliatory efforts, on the morning of August 19, “military vehicles, tanks, helicopters, 426 state troopers and 325 National Guard members arrived in Clifton and Morenci as part of ‘Operation Copper Nugget’ to break the strike.” *See Arizona Copper Mine Strike of 1983*, www.connexions.org/.../Docs/CxP-Arizona_Copper_Mine_Strike_of_1983.htm.

Governor Babbitt had turned out not to be the friend labor expected! Strikers, who were manning the picket lines at the main gate, were unsuccessful in preventing the replacement workers from entering the mine. On August 27, 10 strikers were arrested in Ajo and charged with rioting. It became apparent that the strike had lost much of its momentum. The strike continued, but the introduction of replacement workers clearly changed the dynamics of the controversy. The strike officially ended on February 19, 1986, when the National Labor Relations Board rejected appeals from the unions who were attempting to halt decertification

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case of the use of replacement workers occurred at the Hormel meat packing plant in Austin, Minnesota—an actions that resulted in hundreds of strikers losing their jobs.¹⁸

based upon the fact that the union could no longer count on a representation majority in the workplace.

¹⁸ See PETER RACHLEFF, *HARD-PRESSED IN THE HEARTLAND: THE HORMEL STRIKE AND THE FUTURE OF THE LABOR MOVEMENT* (1993).

In August 1985, workers at the Hormel corporate headquarters in Austin, Minnesota, went on strike. In the early 1980s, the twin issues of recession and deindustrialization began to impact on the meatpacking industry, forcing several companies to go out of business. Others stayed in business—just barely—by either declaring bankruptcy or severely reducing workers' benefits and wages. When Hormel management demanded a 23% wage cut from its 1,500 workers, the workers decided to strike. The strike was called with the support of the local of the United Food and Commercial Workers [UFCW], P-9—but without the support of the international or parent union. The strike gained national attention and led to a widely publicized boycott of Hormel products.

As the strike wore on, a significant number of strikebreakers crossed the picket line, provoking what were termed as riots in the city of Austin. On January 13, 1986, Hormel opened the plant to *scabs*—the term often used by union supporters to describe those who crossed the picket line to work. On January 21, 1986, Rudy Perpich, the Democratic Governor of Minnesota, called out the Minnesota National Guard in order to protect the strikebreakers. This brought protests against the governor's actions, and the National Guard was withdrawn from Austin. In March, the UFCW international ousted the local leadership of the local P-9 by placing the local under trusteeship and declaring the strike over.

The strike *officially* ended in June 1986, after lasting 10 months. As a result, over 700 of the workers did not return to their jobs, refusing to cross the picket line. In the end, however, Hormel succeeded in hiring replacement workers at significantly lower wages. By the fall of 1986, a radically different union ratified the terms of the new contract. See Erin Galbally, *Nearly 20 years later, the Hormel strike lives on*, Jan. 29, 2004, at news.minnesota.publicradio.org/.../2004/01/29_galballye_hormelstrike.

Peter Rachleff reported that:

In 1987, a strike resulted in the total replacement of striking workers at the International Paper Company in Jay, Maine.¹⁹
Implications of Mackay: Firing Strikers vs. Permanent Replacements

In the legal context, there are several important distinctions between *firing* employees who are on strike, an action prohibited by law, and *permanently replacing* them, a practice permitted under *Mackay*. There are three important considerations present in this dichotomy.²⁰ First, strikers do not technically lose their jobs until their replacements are in fact actually hired. Indeed, until a replacement worker has actually been hired, an employer may not inform a striking worker that he or she has been replaced. It is also improper for an employer to refuse to reinstate a striking employee who has made an “unqualified” offer to return to work. Second,

Local P-9 was ultimately defeated by an array of powerful forces: corporate obstinacy, an ability to shift production to other plants and support from other business interests including those banks; a series of hostile court decisions and injunctions; the intervention of the Minnesota National Guard, under orders from Governor Rudy Perpich; an unsympathetic media and its own international union, which was supported by a labor bureaucracy at the highest reaches of the state’s and the nation’s unions.

Peter Rachleff, *Hormel Strike key to nation’s labor history*, Aug. 23, 2010, at finance-commerce.com/2010/08/hormel-strike-key-to-nations-labor-history.

¹⁹ See, e.g., JULIUS GETMAN, *THE BETRAYAL OF LOCAL 14* (1998). See also Michael H. LeRoy, *Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA*, 29 U.C. DAVIS L. REV. 1019, 1051-69 (1996). International Paper, a company that amassed record profits and gave generous bonuses to corporate executives in 1987, demanded that its employees agree to a substantial cut in wages, agree to sacrifice hundreds of jobs, and forego many paid holidays—including Christmas. At the Adroscoggin Mill in Jay, Maine, twelve hundred workers responded by going on strike that extended from June 1987 to October 1988. Eventually, International Paper brought in permanent replacement workers and the strike was ultimately abandoned.

²⁰ Adapted from KENNETH G. DAU-SCHMIDT, ET AL, *LABOR LAW IN THE CONTEMPORARY WORKPLACE* 614-15 (2009).

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according to NLRB procedures, a striking worker who has been replaced will retain the right to vote in any union election for a period of one year from the date the strike begins.²¹ Third, under the NLRB's decision rendered in *Laidlaw Corp.*,²² a permanently replaced striker has a qualified right to reinstatement when vacancies again become available.²³

Laidlaw contains a number of interesting points that greatly impact on the issue of replacing striking workers. Under *Laidlaw*, a striking worker seeking reinstatement must make what is termed as an "unconditional offer" to return to work and may not have "abandoned the employ [of the employer] for substantial and equivalent employment."²⁴ Once a striker makes such an offer to unconditionally return to work, it is then "incumbent on [the employer] to seek them out as positions [are] vacated."²⁵ An

²¹ "Employees engaged in an economic strike who are not entitled to reinstatement (because they have been replaced, etc.) shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike." (parenthetical statement added in the original). See *C.H. Guenther & Son, Inc. v. NLRB*, 427 F.2d 983 (5th Cir.), cert. denied, 400 U.S. 942 (1970) (enforcing a Board order based upon section 159(c)(3)).

²² *NLRB v. Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968).

²³ *Id.* at 1369-70. The violations of the National Labor Relations Act which the Board found were: section 8(a)(1), by threatening to deny employment forever to its employees if they struck and were replaced and by maintaining an invalid no-distribution rule; and section 8(a)(3) and (1), by failing and refusing to offer a replaced striker full reinstatement to his former job, by terminating the employment status of a large number of other replaced strikers following their unconditional offer to return to work, and by later failing and refusing to offer them reinstatement. The Board's order was enforced by the Seventh Circuit Court of Appeals in *Laidlaw Corp. v. NLRB*. 414 F.2d 99 (1969).

²⁴ *Id.*

²⁵ *Id.*

employer may counter such a request to be reinstated by offering the justification that the striking work does not then possess the skills necessary to fulfill the requirements for the job as it is presently constituted.²⁶ Any striker who is entitled to reinstatement under *Laidlaw* must be reinstated with full seniority, but a worker's seniority may not be used to get a preferred job or any preferable shift assignment.²⁷

After the Hormel strike was resolved to the disadvantage of its workers when the company hired permanent replacement workers, the Minnesota state legislature reacted by enacting a statute that *banned* the use of permanent replacements. However, in *Employers Ass'n v. United Steelworkers*,²⁸ the court of appeals declared that federal labor law, as expressed in *Mackay*, preempted state striker replacement law. The court of appeals noted that the

²⁶ See also *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967). In *Fleetwood*, the Supreme Court said that "unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice." *Id.* at 378. The Court went on to observe that in some situations, "legitimate and substantial business justifications for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations." *Id.* at 379. This rule is often termed the "*business justification*" rule.

²⁷ See *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 489 U.S. 426 (1988) (holding that an employer is not required by the Railway Labor Act to lay off junior crossover employees in order to reinstate more senior full-term strikers at the conclusion of a strike). The Supreme Court held that "TWA's decision to guarantee to crossovers the same protections lawfully applied to new hires was a decision to apply the pre-existing seniority terms of the collective bargaining agreement uniformly to all employees. That this decision had the effect of encouraging prestrike workers to remain on the job during the strike or to abandon the strike before all vacancies were filled was simply an effect of TWA's lawful exercise of its peaceful economic power." *Id.* at 443.

²⁸ 32 F.3d 1297 (8th Cir. 1994).

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district court had found that the Minnesota law violated principles of *preemption* enunciated in *Machinists v. Wisconsin Employment Relations Committee*,²⁹ because the Minnesota Striker Replacement Law interfered with an area which Congress had intended to leave essentially unregulated. The district court also indicated that the statute failed under the seminal case of *San Diego Building Trades Council v. Garmon*.³⁰

It may be interesting to note that when President Clinton attempted to intervene in the larger controversy by issuing an Executive Order³¹ banning the use of permanent replacement workers by government contractors, the matter once again wound up

²⁹ 427 U.S. 132 (1976) (prohibiting state and municipal regulation of areas that have been left to be controlled by the free play of economic forces, preserving Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests).

³⁰ 359 U.S. 236 (1959) (forbidding state and local regulation of activities that are "protected by Sec. 7 of the [NLRA], or constitute an unfair labor practice under Sec. 8"). *Garmon* pre-emption prohibits regulation even of activities that the NLRA only *arguably* protects or prohibits. However, in a related case, where an employer had promised replacement workers that they would be made permanent, the employer terminated them in order to make room for reinstated strikers. The case filed by the replacement workers, based on state claims of misrepresentation and breach of contract, were held *not* to be preempted. *See* *Belknap v. Hale*, 463 U.S. 491 (1983).

³¹ President Clinton issued Executive Order No. 12,954, 60 Fed. Reg. 13,023 (1995), on March 8, 1995, pursuant to his authority under the Federal Property and Administrative Services Act, 40 U.S.C. § 471 et seq. (the Procurement Act), which declares:

It is the policy of the executive branch in procuring goods and services that, to ensure the economical and efficient administration and completion of Federal Government contracts, contracting agencies shall not contract with employers that permanently replace lawfully striking employees.

Order at 13,023, § 1.

in court. In *Chamber of Commerce v. Reich*,³² the D.C. Circuit held that the NLRA preempted the Executive Order because the use of permanent replacement workers was a *right* that was now firmly guaranteed under the NLRA.

³² 74 F.3d 1322 (D.C. Cir. 1996). Upon a petition for a rehearing, the court of appeals stated:

But, it does prevent any government action—certainly any action by a government entity other than the NLRB interpreting the NLRA—that is predicated upon (implicitly or explicitly) a substantive policy view as to the appropriate balance of bargaining power between organized labor and management and that attempts to promote a governmental objective by a generic shift in that balance. Such an action is ‘regulatory’ within the meaning of *Machinists* ‘preemption.’

83 F.3d 439, 441 (D.C. Cir. 1996) (citing *Machinists*, 427 U.S. at 143-44, 149-50). The Court of Appeals also stated: “Almost 60 years ago, the Supreme Court explained that an employer retained the right “to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.” *Mackay*, 304 U.S. at 345-46. The D.C. Circuit continued:

The Court has repeatedly approved and reaffirmed *Mackay Radio*. See, e.g., *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790, 108 L. Ed. 2d 801, 110 S. Ct. 1542 (1990); *Trans World Airlines, Inc. v. Independent Fed’n of Flight Attendants*, 489 U.S. 426, 433-34, 103 L. Ed. 2d 456, 109 S. Ct. 1225 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504-05 n.8, 77 L. Ed. 2d 798, 103 S. Ct. 3172 (1983); *NLRB v. International Van Lines*, 409 U.S. 48, 50, 34 L. Ed. 2d 201, 93 S. Ct. 74 (1972); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379, 19 L. Ed. 2d 614, 88 S. Ct. 543 (1967); *NLRB v. Brown*, 380 U.S. 278, 292 & n.6, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232, 10 L. Ed. 2d 308, 83 S. Ct. 1139 (1963); *NLRB v. Truck Drivers Local Union No. 449*, 353 U.S. 87, 96, 1 L. Ed. 2d 676, 77 S. Ct. 643 (1957).

Chamber of Commerce v. Reich, 74 F.3d at 1332 (citations from the original).

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In an interesting development, the Supreme Court distinguished cases where workers were replaced during a so-called “economic strike”—one in which employees were protesting an employer’s economic demands—from one in which employees were striking in order to protest the “unfair labor practices” or ULPs, which are specific violations of the NLRA.³³ These types of strikers

³³ The NLRB has the authority to investigate and remedy unfair labor practices, which are defined in Section 8 of the Act. UNFAIR LABOR PRACTICES:

Sec. 8. [29 U.S.C. 158(a) (1994)]. [Unfair labor practices by employer] It shall be 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 [section 157 of this title];

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that subject to rules and regulations made and published by the Board pursuant to section 6 [section 156 of this title], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(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: Provided, that nothing in this Act [subchapter], or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act [in this subsection] as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a) [section 159(a) of this title], in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) [section 159(e) of this title] within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, that no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally

are termed as “unfair labor practice strikers.”³⁴ In these types of strikes, so-called “unfair labor practice strikers” may be temporarily replaced, but upon the ending of the strike and upon the strikers’ “unconditional offer to return to work,” the employer must re-employ the strikers regardless of the fact that the employer may have engaged replacement workers or even in a case where the employer has subcontracted out the work formerly performed by the strikers.³⁵

applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

See General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308, 1311 (D.C. Cir. 1991) (“Strikes by employees covered by the NLRA are either economic or unfair labor practice strikes.”); Gatliff Bus. Prods., 276 N.L.R.B. 543, 563 (1985) (discussing “two types of strike activity, one of which is called an “economic strike,” and the other of which is termed an “unfair labor practice strike”); Crossroads Chevrolet, Inc., 233 N.L.R.B. 728, 729 n.4 (1977) (“In labor law, strikes are either economic strikes or unfair labor practice strikes.”); Masdon Indus., 212 N.L.R.B. 505, 509 (1974) (referring to “two kinds of strikes, economic and unfair labor practice strikes”).

³⁴ *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

³⁵ *See* Cynthia Estlund, *The Ossification of America Labor Law*, 102 COLUM. L. REV. 1527, 1538 n.50 (2002) (“‘Unfair labor practice strikers,’ whose strike is provoked or prolonged by the employer’s illegal conduct, are not subject to permanent replacement.”). *See* Midwest Motor Express v. International Bhd. of Teamsters, Local 120, 494 N.W.2d 895, 899 n.4 (Minn. Ct. App. 1993) (observing that “permanent replacements are employees whom the employer need not discharge even if the strikers offer to return to work unconditionally”), *rev’d*, 512 N.W.2d 881 (Minn. 1994); Gloversville Embossing Corp., 297 N.L.R.B. 182, 182 (1989) (observing that “an employer may permanently replace economic strikers”). *See also* Keller Mfg. Co., 272 N.L.R.B. 763, 786 (1984) (“Economic strikers are

A further complication was described by Michael Moberly in a seminal article in the *Berkeley Journal of Employment and Labor Law*³⁶ where he notes that a strike that begins as an economic strike may be *converted* to an unfair labor practice strike,³⁷ "notwithstanding the continuation of the economic issues that

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."); *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 application 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 pre-strike 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 pre-strike position does not extinguish the statutory right to subsequent reinstatement to a vacant pre-strike position or a substantially equivalent one." *Id.*

³⁶ Michael Moberly, *Striking a Happy Medium: The Conversion of Unfair Labor Practice Strikes to Economic Strikes*, 22 BERKELEY J. EMP. & LAB. L. 131 (2001).

³⁷ See, e.g., *Sunol Valley Golf Club*, 310 N.L.R.B. 357, 371 (1993) ("It is settled ... that if an employer's unfair labor practice prolongs an economic strike, it converts the strike into an unfair labor practice strike."), *enforced sub nom. Ivaldi v. NLRB*, 48 F.3d 444 (9th Cir. 1995); *Trumbull Memorial Hosp.*, 288 N.L.R.B. 1429, 1449 (1988) ("Even where a strike has been held not to be an unfair labor practice strike at its inception, an employer's unlawful actions that prolong the strike may convert the strike into an unfair labor practice strike."); Michael H. LeRoy, *Institutional Signals and Implicit Bargains in the ULP Strike Doctrine: Empirical Evidence of Law as Equilibrium*, 51 HASTINGS L.J. 171, 219 (1999) ("The Board may ... rule that an economic strike converted to [an unfair labor practice] strike ...").

constituted the original basis for the strike,"³⁸ and even if the economic issues are "more important than the unfair labor practice activity."³⁹ However, continues Moberly, "an unfair labor practice does not convert an economic strike to an unfair labor practice strike unless a causal connection is established between the unlawful conduct and the prolongation of the strike."⁴⁰ He concludes: "The dispositive question is whether the employees, in deciding to remain on strike, were motivated in part by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have [continued to strike] for some other reason."⁴¹

³⁸ *Rose Printing Co.*, 289 N.L.R.B. at 275. See also *Superior Nat'l Bank & Trust Co.*, 246 N.L.R.B. 721, 724 (1979) (indicating that a strike is converted "if the unfair labor practices can be shown to have been a factor in prolonging the strike, even if there were still economic goals"). See generally *Burns Int'l Sec. Servs.*, 324 N.L.R.B. 485, 492 (1997) (observing that "dual motivation does not deprive employees of the status of unfair labor practice strikers"), *enforcement denied*, 146 F.3d 873 (D.C. Cir. 1998).

³⁹ *Burns Int'l Sec. Serv.*, 324 N.L.R.B. at 492. See also *Head Div., AMF, Inc.*, 228 N.L.R.B. 1406, 1417 (1977) (stating that "a strike's being 'primarily' economic does not preclude its having unfair labor practice implications.") (quoting *Larand Leisures, Inc.*, 213 N.L.R.B. 197, 197 (1974)), *enforced*, 593 F.2d 972 (10th Cir. 1979). See generally *Domsey Trading Corp.*, 310 N.L.R.B. 777, 791 (1993) ("Board law is firmly established that a strike is an unfair labor practice strike if the employer's unfair labor practice had anything to do with causing the strike."), *enforced*, 16 F.3d 517 (2d Cir. 1994).

⁴⁰ *Robbins Co.*, 233 N.L.R.B. 549, 549 (1977). See also *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.").

⁴¹ Moberly, *supra* note 36, at 137 (citing *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319-20 (7th Cir. 1989); see also *Decker Coal Co.*, 301 N.L.R.B. 729, 746 (1991) (quoting *Northern Wire* with approval). In this regard, the Board has indicated that "the usual ... effect of an unfair labor practice committed during a strike is not to prolong [the] strike but to shorten it" See *Mackay Radio & Tel. Co.*, 96 N.L.R.B. 740, 762 (1951).

3. THE CONTEXT OF THE LOCKOUT

In terms of rules of general application which may be applied to the area of sports, courts took a traditional view that there were both permissible and impermissible lockouts. An “offensive lockout” is one initiated by the employer *without* the employer having any reason to believe that a strike by employees was imminent. An offensive lockout is generally initiated by an employer for the sole purpose of pressuring a union during negotiations. Offensive lockouts were deemed to be ULPs because they inherently coerced employees based on their section 7 rights to bargain collectively. Thus, the Board had long held that “both the lockout and the use of temporary replacements were unfair labor practices”⁴² in such circumstances.

A “defensive lockout” is one in which the employer locks out employees in *anticipation* of an imminent strike. Defensive lockouts were held not to be an ULP and were permissible by an employer in one of three circumstances. The first instance occurred where employees were conducting so-called *whipsaw strikes* of multiple employers in the same industry. “A ‘whipsaw strike’ occurs when a union strikes one employer at a time, focusing its resources on one target so that that employer succumbs to the union's demands, allowing the union to then move on to the next.”⁴³ A defensive lockout was also permissible when the union was engaged in what are termed “*quickie strikes*.” A “quickie strike” is an “intermittent work stoppage or a slowdown by which workers attempt to exert

⁴² DAU-SCHMIDT, ET AL., *supra* note 20, at 640.

⁴³ Anthony B. Sanders, *Multiemployer Bargaining and Monopoly: Labor-Management Collusion and a Partial Solution*, 113 W. VA. L. REV. 337, 345 (2011) (citing Michael H. LeRoy, *Lockouts Involving Replacement Workers: An Empirical Public Policy Analysis and Proposal to Balance Economic Weapons Under the NLRA*, 74 WASH. U. L. Q. 981, 999-1000 (1996)). See also NLRB v. Truck Drivers Local Union No. 449 (*Buffalo Linen Case*), 353 U.S. 87 (1957).

pressure on the employer without calling an all-out strike.”⁴⁴

Finally, a defensive lockout was permitted when the union had timed and scheduled a strike in order to coincide with an employer’s *peak season* in a seasonal industry in order to inflict the greatest amount of harm to the employer’s business in a defined or limited period of time.⁴⁵ In such cases, the Board held that the *temporary replacements* of locked out employees was permissible.

These distinctions have been largely eroded as the United States Supreme Court decided that the hiring of temporary replacement workers to continue operations during a lawful lockout does not constitute an unfair labor practice, provided that the employer is not motivated by an antiunion or pro-union purpose.⁴⁶ The purpose of such an action is to simply keep the business in operation. In *American Ship Building v. Labor Board*,⁴⁷ the United States Supreme Court expressly held that a lockout for the purpose of applying pressure on the union, after an impasse has occurred in negotiations, is not an unfair labor practice under sections 8(a)(1) and (3). However, hiring permanent replacements during a lockout to *avoid bargaining* obligations has been held to be an ULP and thus unlawful.⁴⁸ The D.C. Circuit noted: “When an employer locks out

⁴⁴ See generally Timothy M. Gill, *Public Employee Strikes: Legalization Through the Elimination of Remedies*, 72 CAL. L. REV. 629, 641 (citing ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW 318 (1976)).

⁴⁵ See, e.g., Duluth Bottling Ass’n, 48 N.L.R.B. 1335, 1359-60 (1943) (describing how an employer locked out its employees before they could strike in hopes of preventing a “spoilage of materials”). It would be fair to characterize the lockout of players in cases proximate to the start of the season as a “peak season” lockout—at least from the perspective of the team owners—especially if the players association had indicated its clear intention to strike once an impasse in negotiations was reached.

⁴⁶ Local 825, Intern. Union of Operating Eng’rs v. NLRB, 829 F.2d 458 (3d Cir. 1987).

⁴⁷ 380 U.S. 300 (1965).

⁴⁸ Pankratz Forest Industries, 269 N.L.R.B. 33, *aff’d*, 762 F.2d 1018 (9th Cir. 1985).

its employees for the purpose of evading its duty to negotiate with the employees' bargaining representative," or to "coerce the [u]nion to accept the [employer's] unilaterally implemented final offer," the employer violates the Act.⁴⁹

Interestingly, the Court expressly stated no view as to the *consequences* which would follow if the employer replaced the employees with permanent replacements or temporary help,⁵⁰ although the Board still held to its view that the use of replacement workers was illegal. What developed in a series of enforcement actions was a conflict among the circuit courts of appeals as to the question of whether an employer engaged in a lockout may hire temporary replacements for the sole purpose of bringing economic pressure in support of its legitimate bargaining position. The Seventh Circuit has held that a bargaining lockout accompanied by continued operation with temporary replacement labor is *per se* an interference with protected employee rights and an unfair labor practice.⁵¹ However, the Third Circuit has adopted the contrary view.⁵² The District of Columbia Circuit, like the Third Circuit, has ruled that an employer that has lawfully locked out its permanent employees does not act unlawfully by operating with temporary replacement workers in order to bring *economic pressure* on the union in support of its bargaining position, since such an employer action is not inherently destructive of employee rights, and any

⁴⁹ Teamsters Local Union No. 639 v. NLRB, 924 F.2d 1078, 1085 (D.C. Cir. 1991). *See also* Anderson Enters., 329 N.L.R.B. 760, 766 (1999) (holding a lockout unlawful when "utilized to enable [the employer] to implement its own bargaining position without . . . genuine impasse"), *enfd*, 2 Fed. App'x 1 (D.C. Cir. 2001).

⁵⁰ *American Ship Building*, 380 U.S. at 308 n.8.

⁵¹ *Inland Trucking Co. v. NLRB*, 440 F.2d 562 (7th Cir. 1971).

⁵² *Local 825, Intern. Union of Operating Engineers v. NLRB*, 829 F.2d 458 (3d Cir. 1987).

effect on the parties' relative bargaining power, so long as it does not substantially impair the employees' ability to organize and to engage in concerted activity, is *not* regulated by the NLRA.⁵³

Refusing to adopt the *per se* rule formulated in *Inland Trucking*, the Eighth Circuit in *Inter-Collegiate Press, Graphic Arts Division v. NLRB*⁵⁴ found no violation of section (a)(1) where the company hired temporary employees during a lockout. The court reasoned that while there is coercion present when an employer locks out his employees, and the coercion may be magnified when the employer continues to operate with temporary employees, the coercion is to force acceptance of the employer's bargaining position, not to foreclose the employees' opportunity to exercise protected rights.⁵⁵ Citing *American Ship Building*, the court stated:

Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining. . . .⁵⁶

However, in *Harter Equipment, Inc.*,⁵⁷ a divided NLRB had changed its mind and upheld the legality of hiring temporary replacements during an offensive lockout. At that point, the courts of appeals accepted this new view of the Board concerning the

⁵³ *International Bhd. of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, AFL-CIO, Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988) (referring to 29 U.S.C.A. § 158(a)(1) and (3) and upholding the use of temporary replacements during a lockout).

⁵⁴ *Inter-Collegiate Press, Graphic Arts Division v. NLRB*, 486 F.2d 837 (8th Cir. 1973), *cert. denied*, 416 U.S. 938 (1974).

⁵⁵ *Id.* at 846.

⁵⁶ *Id.*

⁵⁷ 280 N.L.R.B. 597 (1986).

legality of using temporary replacement workers during an offensive lockout in two cases: *Local 825, Int'l Union of Operating Engineers v. NLRB*⁵⁸ (1987) and *International Brotherhood of Boilermakers v. NLRB*⁵⁹ (1988). It thus appeared that any distinction between offensive and defensive lockouts had largely disappeared. Employers were able to hire temporary replacements regardless of the nature of the lockout.

As a practical matter, the NLRB has continued to permit the use of temporary workers during a lawful lockout, in instances where the employer had previously entered into a series of three-year agreements with the union, was not motivated by specific anti-union animus, eventually reached an agreement containing higher wage rates, and had reasonably demanded a three-year agreement to enable it to continue smooth operations after the union had refused to accede to a no-strike clause;⁶⁰ or where the employer had intended to perform clerical work with non-union employees at the outset and hired temporary replacements, whom it terminated when an agreement was reached, only after an increase in clerical workload, and there was no evidence of anti-union animus.⁶¹

The use of replacement workers may also be lawful where the replacements are expressly hired only for the duration of the labor dispute, a definite date is given for their termination, the employees have the option of returning to work on the employer's terms, which are better than those in the old contract, and the employer has already agreed to continue a union security clause that is in effect;⁶² or where the replacements are expressly used for the

⁵⁸ 829 F.2d 458 (3rd Cir. 1987).

⁵⁹ 858 F.2d 756 (D.C. Cir. 1988).

⁶⁰ *Georgia-Pacific Corp.*, 281 N.L.R.B. 1 (1986).

⁶¹ *Marquette Co.*, 285 N.L.R.B. 774 (1987).

⁶² *Inter-Collegiate Press, Graphic Arts Div. v. N.L.R.B.*, 486 F.2d 837 (8th Cir. 1973).

duration of the labor dispute only, and the lockout does not have a great tendency to discourage union membership.⁶³

After a lockout has ended, an employer's refusal to use regular union employees and its continued operation with temporary replacements may be deemed to constitute unlawful discrimination and thus an ULP.⁶⁴

⁶³ Ottawa Silica Co., 197 N.L.R.B. 449 (1972).

⁶⁴ NLRB v. Brown, 380 U.S. 278 (1965). There is also a management tactic, termed as a “partial lockout,” during which it will seek to operate its business during the lockout. In some cases, management will use supervisory personnel, independent contractors, or some temporary employees in order to “stay open.” See *Midwest Generation*, 343 N.L.R.B. 69 (2004) (the NLRB decision); *Local 15, I.B.E.W. v. NLRB* 429 F.3d 651 (2005) (7th Cir. 2005). For an extensive discussion of the two viewpoints presented in *Midwest Generation*, see C. Quincy Ewell, *The Key to Unlocking the Partial Lockout: A Discussion of the NLRB's Decisions in Midwest Generation and Bunting Bearings*, 112 PENN. ST. L. REV. 907 (2008).

In the appellate case, the court reached the following conclusions: 1. Operational needs did not justify the partial lockout; 2. The partial lockout was not justified as a lawful means of economically pressuring holdouts; and, 3. Midwest [the employer] displayed anti-union animus.

The court concluded:

A partial lockout is a significant measure that requires a justification beyond economic effectiveness. The fact that employees could avoid partial lockouts by agreeing to employer demands would in effect validate all partial lockouts. Undoubtedly, this would render ineffective the requirement of a legitimate and substantial business justification for discriminatory employer action and would be in derogation of nearly four decades of employee protection.

Local 15, I.B.E.W., 429 F.3d at 661 (citing *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967)). See also 29 U.S.C. §§ 157, 158(a)(1)). Accordingly, the Seventh Circuit reversed the findings of the Board in *Midwest Generation* and remanded the case to the Board with instructions to find that the partial lockout was an unfair labor practice.

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The use of *permanent replacements* during a lockout is a different matter. While, as noted, courts have permitted the use of temporary replacements during either a defensive or an offensive lockout, the question may evince a different response, as indicated by the D.C. Circuit in *International Brotherhood of Boilermakers v. N.L.R.B.*⁶⁵ when it noted that permanently replacing locked out workers “might too easily become a device for union busting.”⁶⁶ In

As to the issue of the role of an appellate court in reviewing the decisions of the NLRB, the Seventh Circuit noted: “Board Rulings are ‘entitled to considerable deference so long as [they are] rational and consistent with the [National Labor Relations] Act.’” *Local 15, I.B.E.W.*, 429 F.3d 651 (2005) (7th Cir. 2005). *See also* *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787, (1990); *NLRB v. United Food, Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987). The Seventh Circuit added in *Local 15, I.B.E.W.*: “This Court, however, is not ‘obliged to stand aside and rubberstamp [its] affirmance of administrative decisions that [it] deems inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.’” *See also* *NLRB v. Brown*, 380 U.S. 278, 291 (1965)). These cases represent the conundrum of an NLRB and a Court of Appeals that may have a very different view of the rights and prerogatives of labor and management in a labor dispute.

⁶⁵ 858 F.2d 756 (D.C. Cir. 1988).

⁶⁶ *Id.* at 769 (quoting Bernard D. Meltzer, *The Lockout Cases*, 1965 Sup. Ct. Rev. 87, 104). In *Boilermakers*, the circuit court noted: “We do not mean to suggest that a lockout followed by permanent replacements would necessarily be a lawful tactic under the Labor Act. We express no opinion on that question, as it is not before us today, except to note that it raises somewhat different concerns than those suggested by a *strike* with permanent replacements.” *Id.* (emphasis in original). *See also* *Elliott River Tours*, 246 N.L.R.B. 935 (1979 (allowing temporary subcontracting during a lockout only upon the showing of “business necessity”); *Land Air Delivery v. NLRB*, 862 F.2d 354 (D.C. Cir. 1988) (upholding the Board’s determination that an employer had committed an ULP by permanently contracting out a bargaining unit during a strike without notifying and bargaining with a unit); *International Paper Co. v. NLRB*, 115 F.3d 1045 (D.C. Cir. 1997) (concluding that economic reasons as put forth by International Paper through permanent subcontracting constituted legitimate and substantial business justifications and which had a comparatively slight effect on employee rights under the Act).

International Paper v. NLRB, referencing *Boilermakers*, the D.C. Circuit Court continued:

The point we made in *Boilermakers* suggests that an employer may have greater difficulty precipitating a strike if the labor market can provide permanent instead of temporary replacements. Nonetheless in both instances the identical concern exists that the employer will attempt to precipitate a strike while purporting to be engaged in good faith bargaining. Thus both cases raise the problem of employer brinkmanship that may ‘poison the atmosphere’ of collective bargaining.⁶⁷

4. REPLACEMENT WORKERS/PLAYERS IN THE CONTEXT OF PROFESSIONAL SPORTS

Professors Dau-Schmidt, Malin, Corrada, Cameron, and Fisk note: “From 1938 until 1980, it was rare for companies to permanently replace striking workers.”⁶⁸ Among the reasons for this conclusion include: hiring striking replacements makes strikers extremely unhappy which might tend to “galvanize support for the strike” and which can prolong it rather than shorten it,⁶⁹ replacement workers made it harder to settle a strike, as the underlying dispute would now have another contentious issue relating to the “fate of the replacement workers and the returning strikers”,⁷⁰ and, relations between any strikers and any replacement

⁶⁷ *Int’l Paper*, 115 F.3d 1045, 1051(D.C. Cir. 1997) (quoting Meltzer, *The Lockout Cases*, 1965 Sup. Ct. Rev. at 105).

⁶⁸ KENNETH G. DAU-SCHMIDT, ET AL, *supra* note 20, at 614 (2009).

⁶⁹ *Id.*

⁷⁰ *Id.*

workers retained after the strike was concluded would “likely to be hostile for months and years after the end of the strike.”⁷¹

These general observations hold true in the area of professional sports. As Professor Hayden noted: “During the Major League Baseball strike in 1994, some of the owners embarrassed themselves by toying with the idea of continuing the season using replacement players.”⁷² The situation was also complicated by the fact that the NLRB had concluded that the strike had undergone a legal metamorphosis and had been transformed into an unfair labor practice strike *before* the date on which any replacement players were hired.⁷³ It should also be noted that while replacement players were used for three games during the 1987 professional football strike, “the effort was not very successful, and probably only possible because football players, with the exception of star players in the skill positions, are relatively anonymous in comparison to their counterparts in baseball, basketball, and hockey.”⁷⁴ Professor Hayden concludes (perhaps the obvious) that “Professional athletes operate in what is essentially a closed labor market, which gives

⁷¹ *Id.* In addition, and in relation to the NFL strike, several of the players who crossed the picket line were major “super stars” such as Joe Montana, Tony Dorsett, Steve Largent, Lawrence Taylor, and Doug Flutie. All of these players—with the exception of Doug Flutie—are members of the Football Hall of Fame! It is also interesting to see a *managerial* perspective on the use of replacement players in professional baseball. See, e.g., Tim Kukjian, *Who's On First, Joe? The Cardinals' Joe Torre, Like Other Managers, Finds Replacement Players to Be Excess Baggage*, SPORTS ILLUSTRATED, Mar. 6, 1995 (cited in Ed Edmonds, *At the Brink of Free Agency: Creating the Foundation for the Messersmith- McNally Decision 1968-1975*, 34 S. ILL. U.L.J. 565, 574 (2010)).

⁷² Hayden, *supra* note 2, at 462 (citing Steven Greenhouse, *Power Bargaining: Walking the Picket Line in Gucci Loafers*, N.Y. TIMES, Nov. 22, 1998, at 4).

⁷³ DAU-SCHMIDT, ET AL, *supra* note 19, at 617 (citing WILLIAM B. GOULD, LABORED RELATIONS (2002)).

⁷⁴ *Id.* (citing Murray Chass, *As Trade Unions Struggle, Their Sports Cousins Thrive*, N.Y. TIMES, Sept. 5, 1994, at 1).

them a tremendous advantage over their counterparts in other occupations.”⁷⁵

Further, in the arena of sports, the choice to hire replacement players involves a traditional analysis involving both economics⁷⁶ and the integrity and continuity of the sport; in essence, to utilize replacement players or to shut down operations. But the decision cannot be made unilaterally, as with a single manufacturing operation.⁷⁷ Since a team is a member of a league, the *league* will

⁷⁵ *Id.*

⁷⁶ For example, as Jake Fisher reports: “According to the Nielsen ratings, in 2008, five of the top 10 single-event television broadcasts were NFL-related. Because of this, television networks pay a premium for NFL contests.” See Jake Fisher, *Television and the Potential NFL Lockout*, Harv. Sports Analysis Collective, Nov. 18, 2009, <http://harvardsportsanalysis.wordpress.com.ezproxy.shu.edu/2009/11/18/television-and-the-potential-nfl-lockout>.

⁷⁷ It seemed however, that two-thirds of the league teams found replacement players, while the striking players, on the other hand, had limited financial reserves and the union had no "strike fund" prepared. See generally Paul D. Staudohar, *The Football Strike of 1987: The Question of Free Agency*, 111 MONTHLY LAB. REV. 26, 29 (1988).

Concerning the NFL strike action in 1987, Adam Marks reported:

Soon after the failed strike of 1982, Gene Upshaw replaced Ed Garvey as the executive director of the NFLPA. Upshaw's first renegotiation of the collective bargaining agreement took place during the summer of 1987, and, like the previous renegotiations, resulted in a strike. Similar to 1982, the league was in control of the strike from the beginning, but unlike during previous strikes, the teams had signed replacement players to ensure that the regular season games would not be affected by the striking players union. [The replacement players were mostly comprised of players already cut during the 1987 preseason.] Although Upshaw was able to garner some support among organized laborers in NFL cities, the NFLPA had not prepared to support its players financially during a prolonged strike. Over the course of the strike, the players lost approximately \$80 million and, as in 1982, veteran players crossed the picket line before the end of the strike, destroying any strength the union had in negotiations. Gene Upshaw's first negotiation as head of

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need to balance the short-term financial/revenue impact “resulting from a lack of games with the potential long-term effects of producing an inferior product for the fans and passing it off as the same quality of entertainment and competition.”⁷⁸ In addition, as Mr. Tyras asserts, “Hiring replacement players also raises important issues, such as the potential presence of local labor laws prohibiting the use of replacement workers when the normal workforce is being locked out, and the long-term effects on the game's fan base from passing off such games as ‘major league.’”⁷⁹

the players union, and first opportunity to return the union to prominence, was a disaster.

Adam S. Marks, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union's Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1588 nn.43-281 (2008).

⁷⁸ Jonathan C. Tyras, *Players Versus Owners: Collective Bargaining and Antitrust After Brown v. Pro Football, Inc.*, 1 U. PA. J. LAB. & EMP. L. 297, 334(1998). In addition, there was a real concern that fans might react quite negatively in the long-run if replacement players took the field. See, e.g., *Poll: Strike Has Eroded Interest: Sharp Decline in Attendance Is Projected if Replacements Are Used*, SACRAMENTO BEE, Feb. 28, 1995, at Sports D8.

⁷⁹ In March 1995, the Maryland General Assembly passed legislation precluding teams from playing baseball in Oriole Park at Camden Yards in Baltimore if more than twenty-five percent of their player roster had not been on major league rosters in 1994. See MD. CODE ANN., FIN. INST. § 13-723(b) (1992 & Supp. 1995). See Peter F. Giamporcaro, *No Runs, No Hits, Two Errors: How Maryland Erred in Prohibiting Replacement Players from Camden Yards During the 1994-95 Major League Baseball Strike*, 17 LOY. L.A. ENT. L.J. 123, 123 (1996).