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EXPANSION OF THE RIGHTS OF ECONOMIC STRIKERS TO REINSTATEMENT

In considering the reinstatement rights of striking employees, the rule has been that those who strike in protest of unfair labor practices[1] have an absolute right to reinstatement[2] even if they have been permanently replaced.[3] The reinstatement rights of employees who strike over economic issues, however, have been interpreted differently.[4] Ever since its decision in *Bartlett-Collins Co.*[5] in 1954, the National Labor Relations Board has held that economic strikers who are permanently replaced are entitled only to nondiscriminatory treatment as applicants for *new* employment.[6] Under this rule a permanently replaced economic striker lost any right to reinstatement in his job and could enjoy no competitive advantage in attempting to regain his previous position.

With its recent decision in *Laidlaw Corp.*,[7] however, the Board explicitly rejected its earlier rule and expanded the rights of economic strikers to reinstatement. Approximately seventy employees struck when the employer and the union failed to reach agreement during contract negotiations. About a month later some forty strikers made unconditional written applications to return to work, but an employer spokesman stated that at that time many of the strikers had been "...permanently replaced and [were] not entitled to re-

[1]"Unfair labor practices" are proscriptions provided by the National Labor Relations Act, 49 Stat. 452 (1935), *as amended*, 29 U.S.C. § 158 (1965). Note 9 *infra*.

[2]Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). *See, e.g.*, Snow v. NLRB, 308 F.2d 687, 694 (9th Cir. 1962).

[3]NLRB v. Thayer Co., 213 F.2d 748, 752 (1st Cir.), *cert. denied*, 348 U.S. 883 (1954).

[4]Economic strikers have only a limited right to reinstatement since the employer may permanently replace them. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); *see, e.g.*, Philip Carey Mfg. Co. v. NLRB, 331 F.2d 720, 725 (6th Cir.), *cert. denied*, 379 U.S. 888 (1964).

[5]110 N.L.R.B. 385 (1954). In *Bartlett-Collins*, a short economic strike resulted in the permanent replacement of nearly all of the strikers prior to the termination of the strike. When the strikers then applied for reinstatement, the employer placed their names on a list and stated that they would be called if and when there were future openings. The Board refused to characterize the employer's action as constituting any sort of preferential hiring agreement, and held that permanently replaced economic strikers were not entitled to preferential status in hiring and were simply in the position of applicants for new employment. *Id.* at 397-98.

[6]*See* Brown & Root, Inc., 132 N.L.R.B. 486 (1961); Atlas Storage Div., 112 N.L.R.B. 1175 (1955).

[7]68 L.R.R.M. 1252 (1968). Appeal to the United States Court of Appeals for the Seventh Circuit is pending.

instatement."[8] During the next few days, the employer reinstated some of the strikers while continuing to hire and advertise for *new* applicants. Also during this time, the employer sent termination notices to those strikers not reinstated or offered reinstatement. These notices stipulated that they had been replaced as of the date of their original applications and that no jobs were available. The strikers, including some of those who had been reinstated, then renewed the strike protesting the termination notices as being an allegedly unfair labor practice.

The union filed charges including, among others, that the employer had violated sections 8 (1) and (3) of the National Labor Relations Act[9] by discriminating against the strikers in refusing reinstatement even though replacements filled most of their positions at the time they first sought to return to work. The Board agreed with the Trial Examiner in finding that the employer's conduct[10] was

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[8]*Id.* at 1255. The offer was made on behalf of all of the strikers even though they all did not appear and submit individual applications for reinstatement. Strikers who had not submitted individual applications for reinstatement and subsequently did so, were either reinstated or offered reinstatement if vacancies existed; otherwise, they were considered permanently replaced if there were then no jobs available.

[9]Sections 8 (1) and (3) of the NLRA, 49 Stat. 452 (1935), *as amended,* 29 U.S.C. §§ 158(a) (1) and (3) (1965), provide:

> It shall be an unfair labor practice for an employer—
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> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [Section 7 of the NLRA] of this title;
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> ....
>
> (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 ....

Section 157 provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection ....

[10]In characterizing the employer's conduct here as violative of the NLRA, the Board relied on NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967), for its provisions laying down a general test of the nature of employer conduct determinative of an unfair labor practice. The *Great Dane Trailers* test is divided into two parts, depending upon the degree to which employee rights are affected, and each part is predicated on a threshold finding of discriminatory employer conduct. In the first part, if the employer's discriminatory conduct may be termed "inherently destructive" of employee rights, an unfair labor practice is made without the usually required showing of antiunion motivation, even if the employer has introduced business justifications for his actions. Under the second part, if the employer's discriminatory conduct carries only a slight adverse effect upon employee rights, independent evidence of antiunion motivation is required in finding an unfair labor practice if the employer shows business reasons for his conduct. *Id.* at 34. Thus, discriminatory conduct which adversely

indicative of an unfair labor practice since he had discriminated against the strikers in not fairly considering them even as applicants for *new* employment.[11] Yet the Board further stated that even if there had been no conversion of the strike from an economic one to an unfair labor practice strike, and the strikers had remained economic strikers throughout, they still would have had a right to reinstatement when the depature of the permanent replacements created the subsequent vacancies.[12]

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affects employee rights to any extent raises a presumptive unfair labor practice which the employer may or may not overcome when business justifications are shown. In either case, a per se violation of section 8 (3) results where the employer fails to bring forth evidence of legitimate business motives for his conduct. This formula for measuring employer conduct was developed by the Supreme Court as an adaptation of language from its recent decisions which had considered employer motivation in the context of alleged violations of the NLRA. *See* American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 278 (1965); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963). The Court in *Great Dane Trailers* found it unnecessary to consider any question of the *degree* of harm produced by the employer's conduct since there was no showing of business justification whatsoever. Hence, there was a per se violation, and the Court avoided having to categorize the employer's conduct under the "inherently destructive" label. *Great Dane Trailers* thus furnishes no particular guidance as to what employer conduct may be termed "inherently destructive" of employee rights. Such guidance, however, has been provided elsewhere. In NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963), where an employer awarded superior seniority rights to both new employees who replaced strikers and to strikers who left the strike and returned to work, the Court held such conduct to be of the "inherently destructive" variety. The Court in other cases has merely suggested definitive examples of this category of employer conduct. *See, e.g.*, American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 312 (1965) (many employees have broken established rules, but union leaders alone are discharged); Radio Officers Union v. NLRB, 347 U.S. 17, 46 (1954) (disparate wage treatment among employees is based solely upon their status as union members). In *Laidlaw,* however, the Board went awry when it erroneously predicated its finding of conduct "inherently destructive" of employee rights on the employer's failure to show any business justifications for his action. Under the first part of the *Great Dane Trailers* test involving "inherently destructive" conduct, any showing of business reasons is irrelevant.

[11]68 L.R.R.M. at 1256. The evidence substained this finding in that the employer had, in effect, threatened his employees that if they struck they would "lose forever" their right to employment by his company. Futher discrimination was found from the fact that the employer had disregarded the availability of older, more experienced employees (the replaced strikers) while continuing to advertise for and hire new workers to fill vacancies. Such practices were proscribed under the old rule which stated that permanently replaced economic strikers were entitled to be free of discrimination as applicants for *new* employment.

[12]*Id.* at 1257. As the Board found an unfair labor practice had been committed, the strike was thus converted from an economic one into an unfair labor practice strike. Consequently, from the time of the conversion, the strikers were unfair labor practice strikers and had an absolute right to reinstatement. *See* notes 2 and 3 *supra.* For an analysis of the strike conversion process, see Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice* I & II, 45 VA. L. REV. 1322 (1959), 49 VA. L. REV. 1297 (1963).

Discarding its established rule, the Board found that the strikers remained employees whose preferential rights to reinstatement were not destroyed by the fact that permanent replacements occupied their jobs at the time they first applied to return to work.[13] *Barlett-Collins* and other cases[14] similarly holding to the effect that permanently replaced economic stirkers are entitled only to nondiscriminatory treatment as applicants for new employment were specifically overruled by the Board.[15]

The new rule in *Laidlaw* provides that permanently replaced economic strikers retain their preferential status as employees and may be entitled to full reinstatement if and when future vacancies occur. These rights may not be defeated unless the strikers have in the meantime acquired similar jobs elsewhere, or unless the employer is able to establish substantial business reasons for his refusal to offer reinstatement.[16]

In rejecting its established rule that the permanent replacement of economic strikers extinguished their preferential status in hiring, th Board in *Laidlaw* relied primarily upon a recent Supreme Court ruling in *NLRB v. Fleetwood Trailer Co.*[17] The employer in *Fleetwood Trailer* based his refusal to reinstate certain economic strikers on the lack of available jobs owing to what was shown to have been merely a temporary production adjustment (cutback) occasioned by the strike itself.[18] Interpreting section 2(3) of the NLRA,[19] the Court reasoned that the strikers remained employees throughout the strike and were thus entitled to preferential treatment and reinstatement.[20]

There are, however, indications that the Court did not intend its rule as to the reinstatement of economic strikers to encompass situations where economic strikers have been permanently replaced. Defining circumstances indicative of proper business objectives, the Court stated:

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[13]68 L.R.R.M. 1252 (1968).

[14]Cases cited note 6 *supra*. The Board additionally overruled all other cases of similar import.

[15]68 L.R.R.M. at 1258.

[16]*Id.*

[17]389 U.S. 375 (1967).

[18]*Id.* at 376.

[19]Section 2(3) of the NLRA, 49 Stat. 450 (1935), *as amended*, 29 U.S.C. § 152(3) (1964) provides:

> The term "employee" shall include any employee, and ... any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment....

[20]389 U.S. at 378.

> In some situations, 'legitimate and substantial business justifications' for refusing to reinstate employees who engaged in an econmic strike have been recognized. One is when the jobs which the strikers claim are occupied by workers hired as *permanent* replacements during the strike in order to continue operations.[21]

While the Court in *Fleetwood Trailer* specifically found the employer guilty of an unfair labor practice without reference to intent *solely because of his failure to show any legitimate business reasons for his conduct,*[22] it further stated that hiring workers as permanent replacements in order to continue operations would in and of itself be a business justification.[23]

Laidlaw, as opposed to *Fleetwood Trailer,* specifically concerns the rights of *permanently* replaced economic strikers to reinstatement. In order to transcend the barrier of its previous rule which terminated the employee status of permanently replaced economic strikers, the Board reasoned that the situation in *Fleetwood Trailer* was of sufficient similarity to allow application of the same rules in *Laidlaw.*[24] Thus, the permanently replaced strikers remained "employees" and were entitled to reinstatement when vacancies occurred.

The difference between the nature of the temporary production adjustment in *Fleetwood Trailer* and the permanent replacement of strikers in *Laidlaw,* however, would seem to preclude the analogy upon which the Board relied. The Board's finding that the permanently replaced strikers remained employees thus rests upon the tenuous ground of an equation of dissimilar situations.[25]

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[21]*Id.* at 379 (emphasis added). In this context, the Court cited the following cases: NLRB v. Mackay & Tel. Co., 304 U.S. 333 (1938); NLRB v. Plastilite Corp., 375 F.2d 343 (8th Cir. 1967); Brown & Root, 132 N.L.R.B. 486 (1961). In *Brown & Root,* the Board held that economic strikers were not entitled to reinstatement since permanent replacements had been hired in their positions and no vacancies existed for them *at the time* they first applied for reinstatement.

[22]389 U.S. 375 (1967).

[23]In his concurring opinion in *Fleetwood Trailer,* Mr. Justice Harlan stated, in effect, that the temporary production adjustment was not the equivalent of the permanent replacement of strikers which destroyed their rights to preferential rehiring. NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 382-83 (1967) (concurring opinion). This difference between the two situations has been noted elsewhere. *See* NLRB v. Fleetwood Trailer Co., 366 F.2d 126, 131-32 (9th Cir. 1966) (dissenting opinion); 45 TEXAS L. REV. 785 (1967).

[24]68 L.R.R.M. at 1256-57.

[25]The dissimilarity may be further suggested by the Court's citation of *Brown & Root,* see note 21 *supra. Brown & Root* was specifically overruled by the Board in *Laidlaw* based upon the ruling in *Fleetwood Trailer.* Certainly the Court would not have cited with approval a case contradicting its basic holdings, and the fact that it did so is indicative that both *Brown & Root* and *Laidlaw,* which *are* similar, cannot be equated with *Fleetwood Trailer.*

Since *Fleetwood Trailer* indicated that the rights of permanently replaced economic strikers to reinstatement were not within its holding, the Board's new rule in *Laidlaw* extending these rights to permanently replaced strikers seems to be analytically unwarranted. The Board's improper analysis, however, does not necessarily signify an improper result. If the Board had refrained from insistence upon *Fleetwood Trailer* as justification for its new rule, and, instead, had based its decision on the policy behind the NLRA itself, the basis for the result in *Laidlaw* could have been measurably solidified.

In effect, the declared policy and purpose of the NLRA is to insure an unobstructed national commercial environment, in part, through the protection of specified employee rights.[26] The Act expresses a congessional purpose to emphasize the public importance under modern economic conditions of protecting the rights of employees to organize into unions and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.[27] The sanctions imposed by the Act are not punitive measures directed against the employer, but rather are designed to insure that the rights of employees are protected.[28]

Inevitably, then, the business interest served by allowing the termination of an economic striker's right to preferential reinstatement when he is permanently replaced (the pre-*Laidlaw* rule) must be compared with its impact on employee rights granted by the Act. In other words, the replacement rules contemplated by the Board should be judged in light of sections 8 (1) and (3) of the NLRA which define allowable employer practices.[29] The prohibition against the employer's discrimination in terms of employment to discourage union membership includes discouraging participation in concerted activities such as a legitimate strike.[30] Obviously, an employee will be discouraged from striking over economic issues where he may

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[26]The National Labor Relations Act, 49 Stat. 449-50 (1935), *as amended*, 29 U.S.C. § 151 (1965), provides in part:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce ... by encouraging ... collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing ....

[27]Allen Bradley Co. v. Local 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 805 (1945). *See, e.g.*, Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Indiana & Mich. Elec. Co., 318 U.S. 9 (1943).

[28]NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941).

[29]*See* note 9 *supra*.

[30]NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

apprehend not only permanent replacement, but also deprivation of any preferential status when he seeks reinstatement in vacancies occurring subsequent to this replacement.

Any business interests to be served in allowing the continuing vitality of the old rule would not seem to justify the resultant discouragement of the employee's basic right to strike. It has long been recognized that the primary business interest in allowing an employer to permanently replace economic strikers is that the continuance of his operations may be facilitated when he can offer permanent employment as an inducement to potential replacements.[31] However, this interest could be preserved under the *Laidlaw* rule because even though economic strikers retain their preferential status and reinstatement rights when subsequent vacancies arise, they may still be permanently replaced.[32]

The *Laidlaw* rule offers the conformity with the policy and purposes of the Act which was heretofore lacking, and although the means to this end seem defective from the standpoint of a strict legal analysis, the end itself is desirably ameliorative.

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[31]NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

[32]An argument against the rule allowing the permanent replacement of economic strikers appears in Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966).