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"PERMANENT" REPLACEMENTS OF STRIKERS AFTER *BELKNAP*: THE EMPLOYER'S QUANDARY

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INTRODUCTION

To maintain production during a labor strike an employer may recruit workers to fill the jobs vacated by the striking employees. Hiring such replacements is problematic, but is often necessary for the struck employer who seeks to counter the pressure exerted upon his company by the strike. The difficulties surrounding the replacement process are manifold. To ensure quality labor and minimum production delays, replacements must be recruited with both care and speed. The replacements may report to work at the employer's facility amid potentially hostile concerted activity such as picketing.[1] They may be completely inexperienced in the performance of the jobs assigned to them and may require extensive training. Under the established judicial interpretation of the National Labor Relations Act (NLRA or Act),[2] the character of the replacements' employment, "temporary" or "permanent," may change with the character of the strike. This is dependent upon whether the strike is economic or continues because of the employer's unfair labor practices.[3] Therefore, significant shifts in terms for the hiring of replacements may be required where the strike's purpose changes.

Posing a "Catch-22" to the employer, the timing of hiring replacements may in itself determine whether the employer has committed unfair labor practices, potentially leading to a government order that the replaced employees be given reinstatement.[4] Additionally, if the employer decides to discharge the replacements, he must handle the delicate personnel aspects of implementing that

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1. "[S]trikes frequently cause hard and bitter feelings and are not normally accompanied by chivalry on the part of strikers." Arrow Indus. Inc., 245 N.L.R.B. 1376 (1979).

2. 29 U.S.C. § 151 *et seq.* (1982).

3. Certain practices by employers are forbidden under section 8(a) of the National Labor Relations Act, 29 U.S.C. § 158(a) (1982) [hereinafter cited as NLRA]; *see infra* note 14.

4. *See, e.g.*, NLRB v. Vanguard Oil & Serv., 106 LRRM 2294 (1980); Sedloff Publications, 265 N.L.R.B. 962 (1982). Occasionally the timing poses no problem. *See infra* text accompanying note 63.

decision. The recruitment, employment, and possible dismissal of strike replacements are currently accompanied by a growing uncertainty as a result of a heightened awareness in state courts, as well as in the public consciousness, of common law protection in certain circumstances from unjust discharge.[5]

Against this background, the Supreme Court decided, in *Belknap v. Hale*,[6] that common law claims challenging the dismissal of permanent strike replacements are not preempted under the NLRA. A struck employer is thus confronted with perhaps the most significant challenge to its use of replacement workers. This article will identify both confusion and inequity in the law of permanent replacements, and will show that *Belknap* aggravated rather than mitigated such confusion and inequity. This article will conclude that abolition of the "permanent replacement" standard will redress the improperly balanced distribution of rights currently extant among employers, striking employees and their replacements.

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5. Causes of action for breach of contract of permanent, lifetime or continuous employment are not new. Molitor v. Chicago Title and Trust Co., 325 Ill. App. 124, 59 N.E.2d 695 (1945); Lord v. Goldberg, 81 Cal. 596, 22 P. 1126 (1889); Perry v. Wheeler, 75 Ky. 541 (1877). Within recent years, however, they have been met with less judicial resistance. Plaintiffs' rights have expanded, eating away at the "at-will" doctrine that an employment contract of indefinite duration may be terminated by either party for any reason at any time. Novosel v. Nationwide Ins. Co., 721 F.2d 894 (3d Cir. 1983); Touissant v. Blue Cross and Blue-Shield of Michigan, 79 Mich. App. 429, 262 N.W.2d 848 (1977), *rev'd*, 408 Mich. 579, 292 N.W.2d 880 (1980). *See* Comment, *NLRA Pre-emption of State Wrongful Discharge Claims*, 34 HASTINGS L.J. 635 (1983), for a survey of the emerging law of common law employment contract.

The courts, whether the plaintiff wins or loses, have considered the notion of a permanent employment contract with caution, showing a reluctance to find that permanent means for life, or eternal, or even until retirement. According to the Supreme Court of Kansas, it means a "steady job of some permanence" in contrast with temporary employment. Johnson v. National Beef Packing Co., 220 Kan. 52, 58, 551 P.2d 779, 783 (1976); *see also* Toussaint v. Blue Cross and Blue-Shield of Michigan, 408 Mich. 579, 262 N.W.2d 880 (1980) (except for situations where an additional consideration is given, contracts of permanent or lifetime employment are contracts at will); Mau v. Omaha Nat'l Bank, 207 Neb. 308, 299 N.W.2d 149 (1980). More typical measurements of time are the definite duration contract, or a term which is capable of determination. Ryan v. J.C. Penney Co., 627 F.2d 836 (7th Cir. 1980). Where the plaintiff asserts permanent employment rights, the courts, to determine enforceability, look for something more in the contract than the mere exchange of labor for compensation. *See, e.g.*, Clink v. Board of County Road Comm'rs, 96 Mich. App. 524, 294 N.W.2d 209 (1980), *vacated*, 411 Mich. 892, 306 N.W.2d 103 (1981). A promise of lifetime employment, occasionally viewed by the judges as synonymous with permanent, binds the maker if there is detrimental reliance by the promisee. Smith v. Board of Educ. of Urbana, 708 F.2d 258 (7th Cir. 1983). This is consideration additional to the rendering of services by the promisee. Weiner v. McGraw-Hill, Inc., 57 N.Y.2d 458, 443 N.E.2d 441 (1982). There is a presumption against personal lifetime contracts; if the plaintiff fails to meet the burden of proving it, the contract is considered terminable at will. Moorhouse v. Boeing Co., 501 F. Supp. 390 (E.D. Pa. 1980), *aff'd*, 639 F.2d 774 (3rd Cir. 1980).

6. 103 S. Ct. 3172 (1983).

THE BOARD LAW OF REPLACEMENT

An Employer's Right to Replace Economic Strikers

The right of labor to wage economic war with management by means of the strike was articulated prophetically prior to this century.[7] Since then our national policy of promoting industrial peace has evolved through the collective bargaining process, fundamental to which is the exertion of economic pressure by employers and unions against each other to achieve bargaining objectives. As the Supreme Court noted almost twenty-five years ago: "The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized."[8]

Employers may lawfully take the initiative in this economic struggle by implementing a "lockout" of the workers, as long as the purpose is to exert bargaining pressure and not to discriminate against union employees.[9] More frequently, however, the union takes the first step in the form of an economic strike against its members' employer, which is a protected concerted activity expressly guaranteed under the Act.[10] An employer may, and often will, fight back by filling the jobs vacated by such strikers with long-term replacement workers. According to the Supreme Court, the conflict between the labor strike and the employer's long-term replacement of strikers represents the pressure and counter-pressure left almost exclusively to the control of the "free play of eco-

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7. Massachusetts Supreme Judicial Court Justice Oliver Wendall Holmes stated in a famous dissent:

> One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one hand is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . . I feel pretty confident that [the public] . . . will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is dissociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages.

Vegelahn v. Guntner, 167 Mass. 92, 100-01, 44 N.E. 1077, 1081-82 (1896) (Holmes, J., dissenting). As an aside, Holmes dissented from a majority opinion affirming his own injunction against strikers that he entered prior to ascending to the Supreme Judicial Court.

8. NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 489 (1960).

9. Section 7 of the Act provides, in part: "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. . . ." Section 13 of the Act also provides for the right to strike.

10. American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965); Loomis Courier Serv., 235 N.L.R.B. 534 (1978), *enforcement denied*, 595 F.2d 491 (9th Cir. 1979).

nomic forces."[11]

Coincident with the employer's right to replace economic strikers is the ancillary right to refuse reinstatement to replaced strikers. The law does not, however, vest management with unfettered discretion. Strikers continue to be employees unless they have obtained "regular and substantially equivalent employment" elsewhere.[12] This status, along with the protection secured to the striking employee under section 7 of the Act, places a special burden on the employer to justify the denial of reinstatement of a striker. For example, the employer must prove a "legitimate and substantial business justification,"[13] to justify denial of reinstatement of a striking employee. Where management fails to meet this burden, it is liable under the unfair labor practice provisions of the NLRA.[14]

In a long line of adjudicative rulings, the National Labor Relations Board[15] has held that an employer's refusal to reinstate economic strikers is lawful where the jobs in question are occupied by workers hired during the strike as "permanent" replacements.[16]

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11. Belknap v. Hale, 103 S. Ct. 3172, 3176 (1983). The employment of strike replacements is not a recent development in management strategy. *See* Vegelahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896).

12. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); § 2(3) NLRA, 29 U.S.C. § 152 (3).

13. NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Mars Sales & Equip. Co., 626 F.2d 567, 572-73 (7th Cir. 1980); Leon Ferenbach, Inc., 212 N.L.R.B. 896 (1974).

It is significant that this burden may also be met by a showing of 1) adaptation to changes in business conditions, and 2) improvement of efficiency. *See, e.g.*, N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 379 (1967). The standard of proof in cases where an employer is on trial for discriminating against employees was first adopted in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

14. The National Labor Relations Act, §§ 8(a)(1) and (3), 29 U.S.C. §§ 158(a)(1) and (3) (1982) provide in part:

(a) 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 Sec. 7;

. . .

(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. . . .

15. The administrative agency charged with enforcing the Act is the National Labor Relations Board [hereinafter the "Board" or the "NLRB"], established under section 3 of the NLRA, 29 U.S.C. § 153 (1982).

16. *See, e.g.*, Hill Eng'g, Inc., 171 N.L.R.B. 472 (1968); Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964); Flippin Material Co., 132 N.L.R.B. 486 (1961), *enforced sub nom.* NLRB v. Brown & Root, Inc., 311 F.2d 447 (8th Cir. 1963). Courts have agreed with this determination. *See, e.g.*, NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Murray Prods., 584 F.2d 934 (9th Cir. 1978); NLRB v. Plastilite Corp., 585 F.2d 343 (8th Cir. 1978).

In this sentence "permanent" is in quotes, as it is in the title of this article, to connote the special definition conferred upon it by the N.L.R.B., in contrast

The employer, however, must prove the need to permanently replace strikers.[17] Where the Board determines that the employer committed unfair labor practices in violation of section 8 which had the effect of causing the strike to continue, the strike is said to have converted to an unfair labor practice strike as of the date of the violation. Strikers replaced permanently prior to this date have no right to immediate reinstatement; those replaced after the conversion are entitled to return to the struck jobs.[18]

The Meaning of "Permanent" Under Board Law

The doctrine of the permanent replacement evolved out of the Board's policy of balancing the competing rights of labor and management during economic conflict. The Board has reasoned that the striker is entitled to protection from an anti-union animus that expresses itself in a refusal to reinstate him because of his participation in a work stoppage. Under the "substantial business justification" doctrine, however, the employer is entitled to maintain production with the help of a substitute workforce.[19] Weighing these competing interests, the Board initially shaped an undifferentiated replacement doctrine, but subsequently adopted tests to determine whether the employer's purpose for replacement was lawful temporary replacement or permanent replacement. The rights of the replacement employee *qua* replacement essentially were and have been ignored.

A survey of Board cases dealing with the replacement issue reveals that the term permanent has never been clearly defined, although judicial and Board decisions have consistently maintained that the whole area of strike replacements is well settled.[20] To the Board, the apparent sense of permanent is something "more than temporary." Its approximate meaning has been dynamic but nevertheless suggests long-term employment. In some cases this meaning includes an implied condition of the employee's duty to perform

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to standard definitions. Where "permanent" is discussed throughout this article in the context of the special Board definition, the quotes should be assumed.

17. "The business justification of replacing strikers is an affirmative defense, and the burden of establishing that replacements were bona fide is upon Respondent." J.E. Stiegerwald Co., 263 N.L.R.B. 483, 492 (1982).

18. *See, e.g.*, NLRB v. Int'l Van Lines, 409 U.S. 48 (1972); NLRB v. Mackay Radio & Tel., 304 U.S. 333 (1938). Even if replacements have been hired, unfair labor practice strikers are entitled to reinstatement upon an unconditional offer to return to work. Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956). Legally the economic striker can become an unfair labor practice striker only after the Board has found that the employer broke the law. This determination will be made months, perhaps years, after the replacements are hired. *See* Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630 (1966).

19. *See supra* note 13 and accompanying text.

20. *See, e.g.*, Vulcan Hart Corp. v. NLRB, 718 F.2d 269, 274 (8th Cir. 1983) ("The legal parameters of an employer's replacement rights are well defined").

satisfactorily without an underlying employer motive under section 8(a)(3) to deprive the replaced striker of section 7 rights.[21]

To understand the evolution of the Board's approach, it is necessary to begin with a seminal United States Supreme Court ruling from the New Deal era on section 8(a)(3) discrimination. The law of replacements has its genesis in *NLRB v. Mackay Radio & Telegraph Co.*,[22] in which the Court held that replacing striking employees with others in an effort to carry on the business was legal. After employing substitute workers, the employer reinstated some but not all of the strikers. Justice Roberts ruled that, although the right to strike was statutory, "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 by strikers."[23] He added that no employer is "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,"[24] and that Mackay had not broken the law by offering replacements possible permanent places. The last element of Roberts' discussion of replacements merely buttressed the ruling.

Nowhere in *Mackay*, which examined the right to refuse reinstatement of replaced economic strikers, is there a discussion, much less a holding, about the concept of permanent replacement. Rather, the Court referred to it in *dictum*, incidental to a separate ruling in *Mackay*, that the employer had discriminatorily denied reinstatement to five striking employees because they were union activists. The permanency was first articulated as an afterthought, with no link to the issue of the terms of hiring strike replacements:

> As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the ground of skill or ability, but the Board found that it did not do so. *It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike*, but it is found that the preparation and use of the list, and the action taken by respondent, were with the purpose to discriminate against those most active in the union. There is evidence to support these findings.[25]

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21. A central element in the proof of discrimination under section 8(a)(3) is an anti-union motive, or animus, on the part of the employer. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); E.I. DuPont de Nemours & Co. v. NLRB, 480 F.2d 1245 (4th Cir. 1973); Karl's Farm Dairy, 223 N.L.R.B. 211 (1976).

22. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

23. *Id.* at 348.

24. *Id.*

25. *Id.* at 350 (emphasis added). The Ninth Circuit has held that *Mackay* approved of a choice by an employer of offering permanent tenure to lure replacements if it wished to do so. "The Supreme Court in . . . Mackay . . . was concerned not so much with an explicit promise of permanent tenure as with

Adams Brothers Manifold Printing Co.,[26] an early Board decision which relied upon *Mackay*, omitted the characterization of permanent replacements and permitted the employer's seemingly unqualified recruitment of new employees to take the place of the strikers.[27] In scores of other Board decisions which followed, an employer was held to commit no discrimination under section 8(a)(3) by replacing strikers and refusing their subsequent request for reinstatement. The Board ignored any distinction between the temporary or permanent nature of the replacement's employment.[28] Instead, the Board in these cases simply applied the *Mackay* standard to resolve the conflict created when management had filled vacant jobs with new workers, and then denied strikers reinstatement. The economic striker had no right to return to his struck job once his place had been filled by an uncharacterized replacement.[29]

Concern over the pretextual nature of hiring replacements, with the apparent ulterior purpose of breaking the union through discriminatory denials of reinstatement, prompted the Board to qualify the *Mackay* protect-and-continue-the-business[30] standard of supplying vacated jobs to replacements. In *Republic Steel Corp.*,[31]

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the propriety of the employer's concern for that tenure." NLRB v. Pottach Forests, 189 F.2d 182, 186 (9th Cir. 1951). This reasoning begs the question of whether an employer must offer permanent tenure to avoid the obligation of strikers' reinstatement.

26. 17 N.L.R.B. 974 (1939).

27. Adams Bros. Manifold Printing Co., 17 N.L.R.B. 974, 979-80 (1939); *see also* Firth Carpet Co. v. NLRB, 129 F.2d 633, 636 (2d Cir. 1942) (court upheld finding that no replacements were made, only transfers; "to rely on the *Mackay* case it would have been necessary to convince the Board that the reason for refusal to rehire was that the jobs had been immediately filled").

28. *See, e.g.*, Kroger Grocery & Baking Co., 27 N.L.R.B. 250, 259 (1940); American Shoe Mach. & Tool Co., 23 N.L.R.B. 1313 (1940); Lansing Co., 20 N.L.R.B. 434, 444 (1940); Camar Steamship Corp., 18 N.L.R.B. 1, 11-12 (1939); Good Coal Co., 12 N.L.R.B. 136, 148 (1939), *enforced*, 110 F.2d 501 (6th Cir. 1940); C.G. Conn, Ltd., 10 N.L.R.B. 498, 506 (1938), *enforcement denied*, 108 F.2d 390 (1938). The absence of a characterization in these cases of the replacement's tenure demonstrates the Board's unwillingness to apply the *Mackay* dicta using the term "permanent" as if it had legal significance under the Act. Occasionally, more recent Board cases on point have ignored the temporary-permanent dichotomy. Hood River Memorial Hosp., 235 N.L.R.B. 455, 456 (1978), *enforced*, 601 F.2d 603 (9th Cir. 1979); Brooks, Inc., 228 N.L.R.B. 1365, 1368 (1977).

29. Solvay Process Co., 47 N.L.R.B. 1113, 1123 (1943) (no duty to reinstate striker who had been replaced as a result of the employer making appropriate arrangements for the production of work); Hazel-Atlas Glass Co., 34 N.L.R.B. 346, 416 (1941); Cleveland Worsted Mills Co., 43 N.L.R.B. 545, 571 (1942); Mooremack Gulf Lines, Inc., 28 N.L.R.B. 869, 881 (1941).

In turn, there was strong judicial endorsement of the rule that striker reinstatement could be lawfully denied if the striker's place had been filled. *See, e.g.*, Home Beneficial Life Ins. Co. v. NLRB, 159 F.2d 280, 285 (4th Cir.), *cert. denied*, 332 U.S. 758 (1947).

30. NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

31. 62 N.L.R.B. 1008 (1945).

the Board established that in order to find that there was no discrimination against strikers in denying reinstatement, it was first necessary to determine that those who took their places did so through normal promotion practices.[32] It then had to be determined that the replacements were not placed in the strikers' jobs with a limitation on their tenure of employment.[33] Additionally, the Court held that it must be ascertained at the time of the Board proceedings whether three out of four of the replacements were still employed.[34] In *Fafnir Bearing Co.*,[35] an economic striker was entitled to return to work absent a showing that he was validly replaced.[36]

Unions, to attack employers' denials of striker reinstatement, began in mid-1940's Board cases to label illegitimate replacements in terms other than permanent. A 1945 decision, *Columbia Pictures Corp.*,[37] involved a strike followed by the extensive employment of replacements. The Board conducted a certification election to determine whether the union commanded continued support by a majority of the combined pool of replacement and reinstated workers. The union challenged the eligibility of the replacements to vote on the grounds, *inter alia*, that they were not bona fide permanent replacements but were employed temporarily for the purpose of defeating the union in the election. The union asserted that the replacements were temporary because the company had conditioned their permanent employment upon satisfactory performance.[38] Despite this condition, the Board found that the replacements were "bona fide replacement employees"[39] and noted that the law has "recognized that the jobs of those who replace strikers are tenuous. . . ."[40]

As an apparent shortcut to separate the true *Mackay* cases from the cases where replacements were hired for the purpose of union breaking, the Board adopted as a yardstick the "permanent" characterization. In *Kansas Milling Co.*,[41] the employer had refused to reinstate 107 strikers. Following a remand order from the Court of Appeals for the Tenth Circuit to determine whether the replacements were temporary or permanent,[42] the Board looked for

32. *Id.* at 1026.
33. *Id.* at 1027.
34. *Id.* at 1026-27.
35. 73 N.L.R.B. 1008 (1947).
36. *Id.* at 1013-14.
37. 64 N.L.R.B. 490 (1945).
38. *Id.* at 493.
39. *Id.* at 519.
40. *Id.* at 521 n.54.
41. 97 N.L.R.B. 219 (1951).
42. Kansas Milling Co. v. NLRB, 185 F.2d 413 (10th Cir. 1950).

guidance to the collective bargaining agreement in effect immediately prior to the time of the strike. The contract provided that a temporary employee was one employed on a probationary basis for thirty days or less.[43] Most of the replacements had passed beyond this testing period successfully.

The Board held that, although the majority of the replacements were temporary employees under the contract, they had become permanent.[44] As to those who did not survive the thirty-day temporary period, the Board found them to be potentially permanent, and thus other than permanent replacements of the strikers.[45]

In the decade and a half that followed, the Board found permanent replacement had occurred even though the employer had imposed a probationary period at the beginning of a replacement's employment or had otherwise conditioned the replacement's tenure upon satisfactory performance.[46] In determining permanence in one case, the Board relied on the fact that by the time the matter was decided the replacements had been employed for over two years since the onset of the strike.[47] In another case, *Titan Metal Manufacturing Co.*,[48] the Board decided that the employer had not acted discriminatorily under section 8(a)(3) of the Act by reinstating only some of the strikers at the end of an economic strike. The Board reasoned that the timing of the replacements' hiring was crucial to determine permanence, and ultimately to determine

43. Kansas Milling Co., 97 N.L.R.B. 219, 223 (1945) (stated as a finding of fact in supplemental intermediate report of Board).

44. *Id.* at 226. When they were hired they were assured that they would retain their jobs not for a period of limited duration but indefinitely, *provided only that they proved themselves qualified.* True, the ultimate determination of whether they were to be retained on a temporary or permanent basis was deferred. But when the qualifying condition was met with the passage of thirty days' employment, it established their status *ab initio* as that of permanent replacements for the striking employees.

45. *Id.* at 226. Perhaps historically, the employers themselves have contributed to the idea of "permanent" in strike replacement law. In *Kansas Milling Co.*, the employer had notified strikers in writing that it had promised replacements "permanent jobs." Kansas Milling Co. v. NLRB, 185 F.2d 413, 418 (10th Cir. 1950); *see also* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938).

46. Bowman Transp., Inc., 142 N.L.R.B. 1093, 1098 (1963) ("the test whether replacements are permanent is not their length of service on the job but rather the circumstances under which they were hired"); Pacific Tile and Porcelain, 137 N.L.R.B. 1358, 1363 (1962) (Board found replacements were impliedly permanent employees based on presumption); Sherman Lumber Co., 121 N.L.R.B. 1488 (1958) (strike led to decertification election; union unsuccessfully challenged eligibility of replacements on theory they were temporary).

47. Sherman Lumber Co., 121 N.L.R.B. 1488, 1490 (1958) (permanent status of replacements was supported by fact that they worked at plant for over two years).

48. 135 N.L.R.B. 196 (1962).

whether section 8(a)(3) had been violated.[49]

In *Hot Shoppes, Inc.*,[50] a Teamsters local, the exclusive bargaining agent of a unit of flight equipment handlers, dispatchers, and other workers at an airline commissary, went on strike after collective bargaining broke down. The employer had warned employees prior to the stoppage that all strikers would be permanently replaced.[51] Within one week after the strike began twenty-two new hirees replaced the same number of strikers. Subsequently, an unconditional request for reinstatement by the strikers was refused, and the union filed charges with the NLRB.

The Board overturned a trial examiner's finding that the strikers were never permanently replaced and ruled the employer's intention was critical to the determination of permanence, even where a good behavior standard was built into the terms of hire. According to the Board, there was no evidence that the employer had acted contrary to its usual hiring practices. The replacements were told at the time they were hired "that their employment would be *permanent during good behavior*, for the entire complement of strikers."[52] Additionally, the Board noted that no special skill or experience was necessary, and the fact that some replacements had to be trained who subsequently did not remain permanently did not reflect upon the employer's intent at the time they

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49. According to the Court:

> Very little, however, has been said about the meaning of the expression 'permanently replaced.' [P]roof of the assurance [there would be no termination] at the end of the strike is not proof alone. . . . In order to assure non-discrimination in the [reinstatement] of returning economic strikers, the Board requires [a showing] that the replacement actually is employed in the position formerly occupied by the economic striker at the very time when the economic strikers unconditionally offer to return; for otherwise, the Board held, the economic striker has not lost his right to reinstatement.

Id. at 211.

An economic striker is never *discharged* under such circumstances, he is replaced. Congress has legislated a continued employment relationship for any individual whose "work has ceased as a consequence of, or in connection with, any labor dispute." Section 2(3) of the NLRA, 29 U.S.C. § 152 (1982).

The distinction, in terms of reinstatement opportunities, is more than semantic:

> [A] worker who has been permanently replaced jumps to the head of the [applicant] queue; in addition, he is entitled to notice of job openings; most important [sic], he retains his seniority. If an employer can protect the reasonable needs of his business by permanently replacing a worker he has no right to go further and discharge him. . . .

NLRB v. Browing-Ferris Ind. Chem. Serv., 700 F.2d 385, 389 (7th Cir. 1983).

50. 146 N.L.R.B. 802 (1964).

51. *Id.* at 803.

52. *Id.* at 804 (emphasis added). The Board has ruled that if an employer has not told the replacements they are permanent and terminates them upon the strikers' return to work, the replacements were not hired as permanent replacements. Cagle's Inc., 234 N.L.R.B. 1148, 1155 (1978).

were hired.[53]

The Board, however, seemed to change its mind in *Cyr Bottle Gas Co.*,[54] where it rejected probation as an element of permanent employment. It found that workers were temporary replacements of strikers because management at the time of hire "could not promise job tenure; [the hirees] might work two weeks, a month, or maybe years."[55] The findings were also supported by the employer's admissions to the replacements that "a lot depended on how well they worked, how the strike was resolved, and whether the Board would order the strikers reinstated."[56] The Board also found that the employer's failure to notify the strikers until three weeks after they had unconditionally offered to return to work was further evidence that the replacements were not hired as permanent replacements.[57]

In *Covington Furniture Manufacture Corp.*,[58] the Board, citing *Cyr Bottle Gas Co.*, articulated the employer's burden of proving permanent replacements. The Board determined that "the employer's hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation if the employer so chooses."[59] In *W.C. McQuaide, Inc.*,[60] the permanency of *transfer*, and not of employment, was the decisive factor. The Board, disagreeing with the administrative law judge, was persuaded that transfers of employees to fill the strikers' places were permanent, rather than representing the interchangeability of the jobs out of which the transfers had occurred.

> [T]he Administrative Law Judge held that they were not bona fide replacements primarily because Respondent had not filled the jobs they vacated upon their transfers. The Administrative Law Judge reasoned that, because the transferees were moved from one job to another, the jobs must be interchangeable, and, therefore, that the jobs vacated via transfer should have been available to former strikers upon their offers to return. He concluded that, since these jobs were left unfilled, the employees transferred to the dock from other jobs were not bona fide permanent replacements for the strikers. We disagree, for the Administrative Law Judge's conclusion is not supported by the record.
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> The mere fact that an employee transfers from one job to another does not inescapably lead to the conclusion that the jobs are therefore interchangeable. In the instant case, both Hutchison and Gurchik

53. Hot Shoppes, Inc., 146 N.L.R.B. 802, 804 (1964).
54. 204 N.L.R.B. 527 (1973), *enforced*, 497 F.2d 900 (6th Cir. 1974).
55. *Id.* at 527.
56. *Id.*
57. *Id.*
58. 212 N.L.R.B. 214 (1974).
59. *Id.* at 220.
60. 237 N.L.R.B. 177 (1978), *enforced*, 617 F.2d 349 (3d Cir. 1980).

> were clerical employees prior to the strike. Nothing in the record indicates, and there is no reason to assume, that any of the striking dockworkers could have performed their clerical duties. *Furthermore, the fact that the former positions of several of the employees transferred to the dock remained vacant does not necessarily indicate that these employees were not permanent replacements.*[61]

In 1979, the Board, relying on an appellate court's reasoning that management "must have latitude in hiring replacements sufficient to the end of preserving production,"[62] held that two employees were permanent strike replacements even though they had commenced work after the strike became an unfair labor practice strike.[63] The Board found that "[s]ince a mutual understanding and commitment had been made which included the time these two employees would actually start work, [the employer] gave them sufficient assurances that their positions were permanent."[64]

The Shortcomings of Board Policy

The Board's policy on permanent replacement evolved from the notion of a lawful means of filling production needs where there was no underlying purpose to break the union or punish union activists. The older cases, under *Mackay*, held that economic strikers, protected from losing the right to reinstatement to their struck jobs, lost this right when the employer filled the strikers' places for reasons of production exigencies.[65] Eventually, as an apparent result of union assertions that the motivation behind filling strikers' places was illegal, the use of temporary replacements failed to satisfy the *Mackay* standard. The Board required proof of hire for a length of time other than the duration of the stoppage. Currently, proof of innocence under section 8(a)(3) requires more than that the purpose of making replacements was in response to compelling business needs without intent to punish protected concerted activity. The concept of permanency proves the intent for the act of replacing.

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61. *Id.* at 178-79 (emphasis added).

62. H. & F. Binch Co. v. NLRB, 456 F.2d 357, 360 (2d Cir. 1972). The nature of the replacement is defined not by the terms of the employment relationship between the new employee and the employer, but rather by the tension between striking workers' rights as a group and managerial power over manning and production. Thus, the conceptual link between the employer's permanent replacement of strikers and the strikers' rights under section 7 reflects a national policy to place collective rights of labor above individual rights. The section 7 rights secured to strike replacements have historically been ignored by the Board and the courts, except that replacements hired before economic strikers offer unconditionally to return to work are eligible to vote in Board supervised representation elections. *In re* Wurlitzer Co., 32 N.L.R.B. 163 (1941).

63. Superior Nat'l Bank & Trust Co., 246 N.L.R.B. 721, 722 (1979).

64. *Id.*

65. This assumes the employer's intent at the time of hiring was other than to tread upon section 7 rights.

Unfortunately, the NLRB has never approached the task of applying its permanent replacement doctrine with the lucidity necessary to preclude a literal construction of the adjective "permanent."[66] Combined with the new dynamism in common law employment litigation, it was only a matter of time before the permanent replacement concept tied to section 8(a)(3) would break through its confinement under the NLRA and aspire to become a permanent replacement with rights of its own under the common law. In the hands of the Supreme Court, an already ambiguous concept of permanency became even more ambiguous and indistinct. *Belknap v. Hale*[67] lies at the intersection of the paths taken under the NLRA on permanent replacements and the common law cases establishing or envisioning a cause of action for breach of contract of permanent employment. Its holding exacerbates the uncertainty already existing in the area.

BELKNAP V. HALE

In 1975 Belknap, Inc., a hardware and building material business, executed a collective bargaining agreement with a Teamsters local representing its warehouse and maintenance workers. Just prior to the expiration of this contract in January, 1978, the parties entered into abortive negotiations for a new agreement. On February 1, 1978, the bargaining unit employees went on strike.[68] Soon thereafter, Belknap advertised in the newspaper for permanent employees.[69] Each replacement hired was presented with a statement reciting that he or she had been employed as a "regular full-time permanent replacement."[70]

In response to a unilateral wage increase implemented by Belknap, the union filed unfair labor practice charges with the Board on March 7. On April 4, the company sent a letter to the replacements, which stated, in pertinent part: "You will continue to be permanent replacement employees so long as you conduct yourselves in accordance with the policies and practices that are in effect

66. The word derives from the latin *permanere*, which means "to endure, remain." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1683 (3d ed. 1981). Permanent means "continuing or enduring without fundamental or marked change; not subject to fluctuation or alteration; fixed or intended to be fixed; lasting; stable." *Id.* Webster's provides the example of somebody elected as permanent "chairman of the convention." According to Webster's, there are other shades of meaning. "Permanent wave" is a coiffure that is "long-lasting," but a "permanent tooth" "typically persists into old age." *Id.* The Board doctrine at issue embraces permanent waves, not permanent teeth.

67. 103 S. Ct. 3172 (1983).

68. *Id.* at 3174.

69. *Id.*

70. *Id.* at 3175.

here at Belknap. . . ."[71] The NLRB issued a complaint against the employer, which alleged that its unilateral wage increase was unlawful. In settlement of the complaint the strikers were allowed to return to work, resulting in the dismissal of the replacements.

Twelve of the replacements brought suit in the circuit court asserting that Belknap had breached a contract of employment, and that it had knowingly misrepresented to each plaintiff that the employment was permanent. Each plaintiff sought $250,000.00 in compensatory damages and the same amount in punitive damages.[72] The trial court granted summary judgment in Belknap's favor, finding that the complaint was preempted by the NLRA. An appeals court reversed, finding that since the claims arose under common law and not the unfair labor practice section of the Act, the state court litigation was proper. The Kentucky Supreme Court affirmed. On a petition for certiorari, the United States Supreme Court affirmed.[73]

The central issue before the Court was whether the NLRA preempted common law contract and tort claims asserted by the strike replacements against Belknap. Under the settlement terms of the Board complaint, and under the potential threat of a finding of an economic strike, Belknap had agreed to reinstate the strikers that the employer allegedly had guaranteed were permanently replaced. Belknap, joined by the NLRB and the AFL-CIO as *amicus curiae*, argued that Hale's lawsuit was preempted by the NLRA. The employer asserted that the state court litigation would upset the "delicate balance of forces" established under the Act, and would "regulate and burden one of the employer's primary weapons during an economic strike . . . the right to hire permanent replacements."[74] Belknap and the Board added that allowing the state

71. *Id.* at 3176. It would appear very likely that the plaintiffs in this case were hired under terms of permanent employment in the first place only because of the Board's insistence that employers make such offers to defeat section 8(a)(3) charges that the replacements were brought in to break unions. If the Board had never imposed the amorphous standard, Hale *et al* would have been hired, probably, on a straightforward, at-will basis.

72. *Id.* at 3177.

73. *Id.* at 3176-77.

74. *Id.* at 3177. The precise extent to which federal labor law preempts state regulation of labor-management relations has puzzled the courts for decades. *See, e.g.*, Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (federal labor laws preempt state libel laws to the extent that the state laws attempt to allow an action for defamatory statements made without knowledge of their falsity); Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966) (a state remedy for malicious libel statement made by an employee about his employer did not impinge the national labor policy under the NLRA); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959) (the NLRA precluded a state court from awarding damages for economic injuries to peaceful picketers under state law despite the fact that the NLRB declined to exercise jurisdiction); UAW v. O'Brien, 339 U.S.

proceedings to go forward would deter offers to permanent replacements. Additionally, they asserted that the recruiting of replacements generally would be impaired, thus weakening any employer counter pressure during a strike.

Justice White, writing for a majority, denied that an employer or union was "free to injure innocent third parties without regard to the normal rules of law governing" employer-employee relationships.[75] Responding to the argument that denying preemption would dilute an employer's bargaining power, the Court reasoned with a sense of paradox that, as a practical matter, an offer of permanent work was actually less than that:

> If serious detriment will result to the employer from conditioning offers so as to avoid a breach of contract if the employer is forced by Board order to reinstate strikers or if the employer settles on terms requiring such reinstatement, much the same result would follow from Belknap's and the Board's construction of the Act. Their view is that, as a matter of federal law, an employer may terminate replacements, without liability to them, in the event of settlement or Board decision that the strike is an unfair labor practice strike. *Any offer of permanent employment to replacements is thus necessarily conditional and nonpermanent.* This view of the law would inevitably become widely known and would deter honest employers from making promises that they know they are not legally obligated to keep. Also, many putative replacements would know that the preferred job is, in important respects, non-permanent and may not accept employment for that reason.[76]

The question of whether a replacement could be considered "permanent" but still be subject to certain conditions was answered this way:

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454 (1950) (a Michigan statute requiring employee to submit to a state authorized arbitration procedure was found to conflict with the NLRB); Hill v. Florida, 325 U.S. 538 (1945) (a Florida statute placing restrictions on which persons could be business agents for a local union was deemed invalid as it contradicted the NLRA). Justice Frankfurter laid down this general rule in *San Diego Bldg. Trades Council*:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by Sec. 7 of the National Labor Relations Act, or constitute an unfair labor practice under Sec. 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 239 (1959).

The question of whether the Court in *Belknap* correctly ruled against preemption is beyond the scope of this article. *See* Pincus & Gillman, *The Common Law Contract and Tort Rights of Union Employees: What Effect After the Demise of the "At Will" Doctrine?*, 59 CHI.-KENT L. REV. 1007 (1983) (examination of circumstances under which common law rights won by at will employer should be provided to union employees and whether an extension of common law protection after unionization is compatible with federal labor policy).

75. *Belknap*, 103 S. Ct. at 3178.

76. *Id.* at 3178-79 (emphasis added).

> An employment contract with a replacement promising permanent employment, subject only to settlement with its employees' union and to a Board unfair labor practice order directing reinstatement of strikers, would not in itself render the replacement a temporary employee subject to displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike. . . . Those contracts, it seems to us, create a sufficiently permanent arrangement to permit the prevailing employer to abide by its promises.[77]

While ruling that the Kentucky trial court was empowered to hear the plaintiff's complaints, the Supreme Court nevertheless cautioned that the state court could not order specific performance of the permanent replacements' contracts. Additionally, the Court determined that the trial court could not enjoin Belknap's alleged fraud and order the plaintiffs' reinstatement, if doing so would require the dismissal of a striker entitled to a job under the NLRA.[78]

Belknap represented an opportunity for the Court to examine the permanent replacement concept anew, within the framework of section 8(a)(3) and the underlying policies of the Act. Here was an occasion to strike a more realistic and equitable balance between management and labor by disposing of an imposition by the Board that would vest greater rights in replacements than in the strikers they replaced.

The majority opinion in *Belknap*, however, embarked on a markedly different course, first by straightaway rejecting the petitioner's preemption argument, and then, quite unnecessarily, by adopting a hybrid permanent standard with troublesome inconsistencies—the permanent replacement that is non-permanent and conditional. The outlook for the struck employer, in consequence, is even more muddled. The *Belknap* hybrid standard, furthermore, deprived each party involved—Belknap, the Board, and the plaintiffs—of rights, and left each to search for a coherent legal relationship with the others. It took from the employer the freedom to hire permanent replacements as a strike weapon. It took from the Board the standard of permanence as a yardstick to determine whether section 8(a)(3) has been violated, and substituted a new connection with common law permanent employment. Although it granted them power to litigate under common law, *Belknap* took from the replacements the extraordinary remedies of specific per-

77. *Id.* at 3179.

78. *Id.* at 3183. This admonition perhaps was designed to reserve some power with the Board or with the employer and union, as collective bargaining partners, to safeguard against state court orders to cause the discharge of strikers. One can perceive that the Court implicitly held that no state court ruling could conflict with striker rights to reinstatement. If this perception is accurate, the Court thereby admitted, in considering the remedies available to dismissed replacements, what the Court denied in considering the cause of action: That the NLRA, at least partially, preempted the Kentucky courts.

formance and injunctive relief where the remedies thereunder would cause strikers to be discharged.

In dissent, Justice Brennan was troubled by the majority's revisionist approach to the meaning of permanent under the Act.[79] He too, however, demonstrated a less than pellucid insight into the Board's law on the subject.

> The fact that the court feels compelled to announce a new standard of permanency under federal law highlights the need to preempt respondents' misrepresentation claim in this case. The Court is in effect adjusting the balance of power struck by the Act between labor and management. The right to strike is so central to the Act that an employer can refuse to reinstate returning economic strikers only if he can show a legitimate and substantial business justification for the refusal. One such justification is the need to offer permanent employment to replacements in order to continue his business operations. If the employer has not had to offer employment to replacements on a permanent basis then there is no justification for refusing to reinstate the strikers. The Court's change in the law of permanency weakens the rights to strikers and undermines the protection afforded those rights by the Act. Such adjustments in the balance of power between labor and management are for Congress, not this Court.[80]

According to Justice Brennan, "the real problem in the case . . . is that the words 'permanent replacement' have a special meaning within the context of federal labor law."[81] The dissent, however, passed over the vague but consistent line of Board cases that explicitly or implicitly defined permanent employment. Instead Justice Brennan explained the rule by pointing to what permanent did not mean.[82] If the NLRB finds there was an unfair labor practice strike, resulting in the mandatory reinstatement of strikers, or if the employer capitulates and agrees with a victorious union to take the strikers back to work, there is no permanent replacement.[83] The historical development of the law, from *Mackay*, with its dicta allowing employees the freedom to offer replacements permanent tenure, to the Board rule requiring such an offer to defeat the right of strikers to be reinstated, was left unexamined.

A Proposal to Reform the Existing Standards

The Board's policy of determining whether an unfair labor practice has occurred by characterizing strike replacements as temporary and permanent, and the Supreme Court's ill-fated struggle with this policy, demonstrate that the concept of permanent replacement serves only to unduly burden employers. To obligate

79. *Id.* at 3190 (Brennan, J., dissenting).
80. *Id.* at 3198-99 (citations omitted).
81. *Id.* at 3199.
82. *Id.* at 3199-3200.
83. *Id.*

management to offer virtual lifetime employment to any applicant who serves to replace a striker, to meet the "substantial business justification" test, hampers a free labor market and promotes inefficiency in production. The *Belknap* hybrid rule, conditioning an offer of permanent employment upon settlement of an adverse Board order, only defers the imposition of this burden if there is no settlement or if the Board decides favorably. In the meantime, gross uncertainty would cloud the legal relationship between the employer, the strikers, and the replacements.

A solution is to abolish the temporary and permanency standards altogether and return to the literal *Mackay* rule. In the strike replacement context, the best approach is to place the burden on the employer to prove facts demonstrating that the replacement was hired for reasons other than to hold a struck job during the strike or to otherwise undermine the strikers' rights. An employer under these circumstances would be held to the same requirements of proof as any other employer defending section 8(a)(3) claims.

There are several considerations which avoid any emphasis on the permanent/temporary dichotomy that the Board and the Supreme Court have dealt with, that dictate the revamping of the current law and a return to the *Mackay* rule. The Board's initial concerns about contrived replacements can be satisfied without applying the permanent criterion to section 8(a)(3) striker replacement cases. The term permanent is too vague and overbroad to reasonably inform employers of what is expected of them. The Board, without even hinting at the actual duration or terms of permanent employment, nevertheless looks to evidence of unconditional, non-probationary employment. While such employment may constitute evidence of non-discrimination, it should not be the measure of lawful conduct. The Board, however, simply has never articulated an exact definition. *Belknap*, rather than clarifying the laws, has introduced a new, more unworkable definition. To require the employer to show permanent replacement in order to prove that the replacements were hired for substantial business reasons, rather than to discriminate against strikers, is impractical. Such a showing requires the parties to prove and the Board to weigh, in a section 8(a)(3) proceeding, more than is necessary to resolve the discrimination issue. Furthermore, there is no difference between the right to reinstatement of an economic striker upon the departure of a replacement, and the right to reinstatement of an economic striker upon the departure of a *permanent* replacement. Under the model standard this article proposes, an economic striker would not have the right to displace a replacement unless there was a showing that the replacement was hired in violation of section 8(a)(3).

Moreover, the Board imposes a much heavier burden on an employer who replaces strikers, and who uses this substitution as a defense to a charge of a discriminating denial of reinstatement, than it imposes on an employer who raises other defenses for denying reinstatement. Employer justifications such as eliminating the struck job, improving efficiency, or adapting to changes in business conditions,[84] require less stringent proof and markedly contrast with the acute inefficiency inherent in requiring that replacements be employed permanently. The Board frequently assumes, when announcing its rules for economic strikers' reinstatement rights, that a permanent replacement may leave the job shortly after being hired.[85] This assumption demonstrates the Board's true insight into the replacement as a hiree, a true *replacement*, and not a pawn in the game.

It should be noted that lockouts and strikes, as acts of economic war, are cousins; the employer initiates the one and the employees, acting collectively, initiate the other. The standard for evaluating the proper replacement of workers in lockouts under *NLRB v. Brown*[86] is two-pronged: first, whether the harm to employees was comparatively slight, and second, whether the replacement served a substantial and legitimate business interest.[87] There is no rational basis for imposing a harsher standard on employees in strike situations than on an employer in a lockout situation. Moreover, because strikers lose the right to reinstatement if they have acquired "regular and substantially equivalent employment" elsewhere, strikers should also lose the right to reinstatement if they have been replaced not by permanent workers but by regular and substantially equivalent job holders.[88] The *Mackay* rule requires the employer to prove no more than any other section 8(a)(3) claim—that he hired the replacement for reasons other than undermining the strikers' rights—and is consistent with the policy of nondiscriminatory replacement of strikers.

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84. *See* Atlantic Creosoting Co., 242 N.L.R.B. 192, 193 (1979) (no discrimination found if substantial business justification for eliminating a job); Pillows of California, 207 N.L.R.B. 369 (1973) (after strike, an economic striker retains his status as an employee and is entitled to reinstatement absent substantial business justification).

85. *See, e.g.*, Arrow Indus., Inc., 245 N.L.R.B. 1376, 1377 (1979).

86. 380 U.S. 278 (1965).

87. *Id.* at 285.

88. *See, e.g.*, Brooks Research & Mfg., Inc., 202 N.L.R.B. 634 (1973) (by ending seniority and hiring rights, employer unlawfully discriminated against unreinstated employees who had applied for reinstatement at the end of strike); The Laidlaw Corp., 171 N.L.R.B. 1366 (1967) (employer engaged in unfair labor practices by failing to reinstate workers when vacancies arose after their unconditional request for reinstatement), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

CONCLUSION

Because the Board in striker reinstatement cases has required evidence of the permanent employment of strike replacements, employers have tendered offers of permanent employment to strike replacements to avoid reinstatement of strikers and to withstand section 8(a)(3) complaints. These offers have not contemplated the common law import of "permanent." In recent years, a burgeoning wave of common law litigation focusing on the employer-employee relationship has expanded employee rights and has moved cases of permanent employment contract breach into the foreground. The Supreme Court, in *Belknap v. Hale*,[89] announced that "permanent" under Board law means permanent in the common law sense even when the terms of employment are conditioned upon striker reinstatement as a term of a strike settlement or an unfair labor practice complaint settlement. *Belknap* portends that employers must be prepared to retain strike replacements permanently, in a literal sense, or at the least defend state court litigation for their alleged wrongful discharge.[90] This is an inequitable situation, particularly when strikers are attempting to bend or break the employer's economic posture. The Board should return to the unqualified replacement standard of *Mackay*.

89. 103 S. Ct. 3172 (1983).

90. Of course, the employer must determine (as do the discharged replacements) whether the state involved recognizes a cause of action for breach of permanent employment contract, or any other theory on which the discharged replacements may seek relief.