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Labor Law--Boycotts and Strikes--Replaced Economic Strikers Who Apply for Reinstatement Remain Employees and Are Entitled to Reinstatement When Positions Become Available--*Laidlaw Corporation and Local 681, International Brotherhood of Pulp, Sulphite, and Paper Mill Workers, AFL-CIO*

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RECENT DEVELOPMENTS

LABOR LAW—BOYCOTTS AND STRIKES—Replaced Economic Strikers Who Apply for Reinstatement Remain Employees and Are Entitled to Reinstatement When Positions Become Available—*Laidlaw Corporation and Local 681, International Brotherhood of Pulp, Sulphite, and Paper Mill Workers, AFL-CIO**

The collective bargaining agreement between the Laidlaw Corporation and Local 681 of the International Brotherhood of Pulp, Sulphite, and Paper Mill Workers, the certified bargaining agent for Laidlaw's employees, contained a provision for modification of wages during the term of the contract. In October 1965, the union notified the company that, pursuant to this provision, it desired to negotiate a wage increase. On January 10, 1966, after two unproductive bargaining sessions, the union voted to reject Laidlaw's only offer,¹ and two days later approximately seventy employees went on strike.² When no settlement was reached by February 11, forty of the strikers came to Laidlaw's plant and presented written applications to the company offering to return to work immediately and unconditionally. However, by then all but five of the workers' jobs had been taken by replacements, and with respect to the replaced workers, the request was denied. Subsequently the five workers who had not been replaced were offered jobs. Between February 11 and 21, sixteen employees who had not been present at the February 11 meeting made written applications for reinstatement, but Laidlaw rehired only those for whom vacancies existed at the time their ap-

* 171 N.L.R.B. No. 175, CCH 1968 NLRB Dec. ¶ 22,577 (June 13, 1968) [herein-after principal case].

1. The union charged the employer with a violation of § 8(a)(5) of the National Labor Relations Act (NLRA) 29 U.S.C. § 158(a)(5) (1964) for refusing to bargain in good faith, but the Board rejected the local's contention since this practice had been followed in all past negotiations between the parties without objection from the union.

2. On the day before the strike began, the plant manager read a statement to the employees emphasizing that if they went on strike and were replaced, they would lose forever their right to employment with the company. This, however, was not a completely accurate statement of the employees' rights; see note 5 *infra* and accompanying text. The company's refusal to consider the strikers for reemployment at any time would have constituted a violation of § 8(a)(3) which, in part, prevents employer discrimination in hiring practices which would discourage union membership. See note 4 *infra* and text accompanying note 10 *infra*. Although it might be argued that the employer's threat to do an illegal act might constitute an unfair labor practice and thus make the strike an unfair labor practice strike from the beginning, the Board stated that, because the employees did not strike for that reason, the strike remained an economic one as of February 11. Principal case at 29,824.

plications were filed. The company made no attempt to fill subsequent job openings with the strikers who had been refused employment when no jobs were available on the day they applied. Instead, it filled these later vacancies by advertising for and hiring new employees. As a result of the company's actions, the union renewed its strike on February 20.³ It also brought suit before the National Labor Relations Board, alleging that the company's hiring policy constituted an unfair labor practice under sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act⁴ by interfering with the employees' rights, guaranteed by the Act,⁵ of organization, collective bargaining, and striking, and by discriminating with regard to hire or tenure of employment in order to discourage membership in the union.

The trial examiner found for the union, and on appeal to the NLRB the trial examiner's conclusion was affirmed. The Board held that economic strikers who apply for reinstatement when their positions have been filled by permanent replacements remain employees for purposes of the Act⁶ and that consequently their right to reinstatement does not depend on the availability of jobs at the moment they applied. These employees are entitled to an offer of full reinstatement as soon as jobs become available, unless they have in the interim acquired regular and substantially equivalent employment elsewhere, or unless the employer demonstrates legitimate and substantial business reasons for refusing to offer reinstatement.⁷

3. By February 22 a total of ten strikers had been reinstated; eight others had been offered reinstatement, but had declined the offer and remained on strike. The company did not check over the earlier reinstatement applications of February 11 before hiring new employees. Principal case at 29,825.

4. 29 U.S.C. §§ 158(a)(1) and 158(a)(3) (1964). Section 8(a) reads 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 section 7; [See note 5 *infra*].

(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

5. Section 7 of the NLRA, 29 U.S.C. § 157 (1964), reads in pertinent 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 and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by agreement requiring membership in a labor organization as a condition of employment

6. Section 2(3) of the NLRA, 29 U.S.C. § 152(3) (1964), defines "employment" as follows: "The term employee . . . shall include 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 equal employment"

7. The definition of an "employee" under § 2(3) of the NLRA refers to one who loses his job because of a "current" labor dispute. The question arises whether *Laidlaw* gives a right to reinstatement as long as the striker lives (assuming he takes no other job) or only as long as the dispute can be called "current." The Board did

In the principal case, the court found that the employees in question had not acquired other employment and that the employer could not meet his burden of business justification. Consequently, although the initial replacement of the striking employees was proper,⁸ Laidlaw's subsequent refusal to reinstate them when vacancies occurred was held to be an unfair labor practice.⁹

The *Laidlaw* case raises the question of the degree to which the NLRA protects a striking employee's right of reinstatement. The relevant statutory provision is section 8(a)(3) of the NLRA which provides that it shall be an unfair labor practice for an employer to discriminate "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." ¹⁰ Thus, if an employer's refusal to reinstate striking employees who have unconditionally applied discourages union membership within the meaning of this section, the refusal constitutes a violation of the Act. The Supreme Court has held that generally two separate elements must be proved in order to establish an 8(a)(3) violation: (1) an act by the employer that tends to discourage or encourage union membership, and (2) an antiunion intent on the part of the employer.¹¹ Thus, it is possible that a discriminatory act would not be illegal because the second element—intent—is not proved.

Certain employer conduct, however, is so inherently destructive of employee rights that it is presumed to violate the Act without evidence of a specific antiunion intent.¹² In such cases, the burden

not indicate how long this right would last, but it did indicate that the employer's duty to "seek out" the former employees lasts as long as those employees signified an intention to return by means of their applications and their "continuing presence." Principal case at 29,827. However, it seems clear that if, after the termination of a strike, an employer offers reinstatement to an employee, and that offer is rejected, the employer's duty has been discharged. Thus, the obligation to "seek out" ends as soon as the employee accepts equivalent employment elsewhere or rejects an offer of re-employment. It would be highly unusual if neither of these events occurred within a relatively short period of time after the original replacement, and consequently the employer's burden would not be a heavy one.

8. Principal case at 29,827.

9. Principal case at 29,828.

10. See note 4 *supra*.

11. "[T]he finding of a violation normally turns on whether the discriminatory conduct was motivated by an anti-union purpose." *NLRB v. Great Dane Trailers Co.*, 388 U.S. 26, 33 (1967). In *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963) the Court noted that proof of an antiunion motivation may make unlawful certain employer conduct which would in other circumstances be lawful.

12. The Supreme Court has held in *NLRB v. Great Dane Trailers Co.*, 388 U.S. 26, 33 (1967) that some employer conduct is so destructive of employee interests that it violates the Act without proof of an antiunion motive. The Court's rationale was that there is some conduct the consequences of which are so clear that the employer must have intended them. In *American Ship Building Co. v. NLRB*, 380 U.S. 300, 311 (1965) the Court stated that there are employer practices "which are inherently so prejudicial to union interests and devoid of significant economic justification that no special evidence of intent to discourage union membership or other antiunion ani-

is on the employer to show legitimate and substantial reasons for his actions; if he fails to sustain that burden he is deemed guilty of an unfair labor practice.¹³ It has been held that conduct which can trigger this shift in the burden of proof includes the hiring of new employees in the face of outstanding applications for reinstatement from striking employees.¹⁴ Consequently, in a situation like that of the principal case, the fact that replacement of striking employees and refusal to reinstate them clearly discourage union membership¹⁵ is sufficient to establish a violation of the Act, irrespective of intent, unless the employer can justify his actions by legitimate business reasons. Such justification might arise from the employer's right to protect his business during a strike. Since an employer may not ordinarily fire an employee because he is striking,¹⁶ the employer's only means of continuing business is to replace the striking workers for the duration of the strike.¹⁷ In many cases, the only

mus is required." See, e.g., *Erie Resistor* in which the Supreme Court held that when an employer offers a grant of twenty years "super-seniority" both to replacements and to striking employees as an inducement for those striking employees to return to work, such employer will be guilty of an 8(a)(3) violation without a showing of intent. The Court's rationale was that some acts are so inherently discriminatory that the requisite intent to make out the violation may be inferred from the act itself. See also *NLRB v. Brown*, 380 U.S. 278 (1965) in which the Court stated, "[W]hen an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3)."

13. In *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967), the Supreme Court stated that when the employer's conduct "could have adversely affected employee rights to some extent," the employer had the burden of showing that he was motivated by legitimate objectives. 389 U.S. at 380. See also *NLRB v. Great Dane Trailers Co.*, 388 U.S. 26, 34 (1967). But see *Great Dane* at 34, where the Court stated that when "resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must be made."

14. The Court, in *Fleetwood*, stated at 378:

If, after the conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike . . . Under §§ 8(a)(1) and (3) it is an unfair labor practice to interfere with the exercise of these rights. Accordingly unless the employer who refuses to reinstate strikers can show that his action had legitimate and substantial business justification, he is guilty of an unfair labor practice. The burden of justification is on the employer.

If the mere refusal to fire replacements of economic strikers were held to be violative of § 8(a)(3), the balance of power would be shifted completely to the union. Hence, the employer may justify his actions by showing legitimate business reasons for them.

15. See principal case at 29,827. Refusing to rehire strikers when vacancies occur would discourage employees from striking and would weaken a union's ability to enlarge membership since its only effective economic weapon—the strike—would be greatly limited by the increased danger to the employees when they do strike.

16. Firing a striking employee would be a violation of § 8(a)(1) which protects employees from infringement of the right to strike guaranteed by § 7. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 223 (1963) and note 3 *supra*.

17. In this way a balance is struck between the competing, legitimate interests of the parties.

way by which he can attract replacements is by promising them permanent employment.¹⁸ This fact might appear to provide the needed business justification for refusing immediate reinstatement of strikers at the expense of their replacements, thereby defeating an allegation of a section 8(a)(3) violation. In reality, however, the courts have long drawn a distinction between economic strikers, who strike for better wages or working conditions as in *Laidlaw*, and unfair labor practice strikers, who strike to protest illegal employer conduct.¹⁹ In the case of an unfair labor practice strike, the employer has no legitimate economic justification for his initial replacement of the striking employees since the strike arises from his illegal act. The employer in such a situation is, from the beginning, in violation of section 8(a)(3), and when the strike ends the strikers are entitled to immediate reinstatement even if that means that their replacements must be fired.²⁰ In the case of an economic strike, on the other hand, the employer has committed no illegal act and has a legitimate business interest in replacing the strikers. Therefore, although the act of replacement ipso facto discourages union membership,²¹ the act is justified and the employer has a right to retain the replacements who were hired to protect his interest.²² Nevertheless, an employee striking for economic reasons is not totally unprotected by the Act;²³ because he remains an employee

18. See Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 635-36 (1966). However, in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), a similar contention was rejected. The employer claimed in *Erie Resistor* that it was necessary for him to offer replacements not only the guarantee of permanent jobs, but also an immediate twenty years seniority in order to get enough workers to enable him to continue production. The Board rejected this claim and held that such an offer violated § 8(a)(3) of the NLRA.

19. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). When employees strike over what they believe to be an unfair labor practice, but the Board determines there was, in fact, no unfair labor practice, the strike is an economic one and the employees may be permanently replaced. *NLRB v. United Brass Works*, 287 F.2d 689, 695-96 (4th Cir. 1961).

20. *Mastro Plastics v. NLRB*, 350 U.S. 270, 278 (1956). "Under these circumstances the striking employees [ULP strikers] do not lose their status and are entitled to reinstatement with back pay, even if replacements for them have been made." See also *Philip Carey Mfg. Co. v. NLRB*, 331 F.2d 720 (6th Cir. 1963), *cert. denied*, 379 U.S. 888 (1964). If an unfair labor practice striker desires to return prior to the end of the strike, he may do so. *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 245 F.2d 594, 597 (5th Cir. 1957).

21. See note 15 *supra* and accompanying text.

22. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 346 (1938).

23. If an employer commits an unfair labor practice during the course of an economic strike, the strike is immediately converted into an unfair labor practice strike, and any replacements hired after that conversion has taken place must be dismissed, if necessary, to find a place for a returning striker. *Frick and UAW*, 161 N.L.R.B. No. 99 (1966) and *Beverage-Air Co. and International Union of Electrical Workers*, 164 N.L.R.B. No. 156 (1967). In the principal case, the Board found that the strike was converted into an unfair labor practice strike on February 11, and that therefore no striker could have been justifiably replaced after that date. Principal case at 29,826.

under the Act,²⁴ he is, after application, ordinarily entitled to his former job when it again becomes available. The employer, to defeat that right, must show valid justification for not reinstating the replaced employee when the vacancy occurs.

One such justification, which employers have frequently invoked, is that the employee's right to reinstatement expires if no job is available on the date of application. Until 1967, the test for when the right to reinstatement expires was indeed a "date of application" rule.²⁵ If no job opening existed on the date of application, the striker was entitled to no more than nondiscriminatory consideration as an applicant for new employment.²⁶ The employer was under no obligation to seek out the employee when positions became available.

The Supreme Court recently rejected the "date of application" test in *NLRB v. Fleetwood Trailer Company*.²⁷ In that case the employer had curtailed production during an economic strike. Shortly after the strike began, six strikers applied for reinstatement, but their applications were rejected on the grounds that their jobs had been eliminated.²⁸ However, about two months later, full production was restored and the employer hired six new employees for jobs for which the striker-applicants were qualified. Although eventually all the strikers were rehired, the six applicants brought suit for a back pay award alleging that the employer had violated section 8(a)(3) by hiring new employees prior to their own reinstatement. The employer admitted that to deny the employees' right to reinstatement would be an unfair labor practice, but argued that their right had expired on the date of their application since no jobs were available on that date.²⁹ The Court rejected this contention, holding that workers whose jobs had ceased as the result of a labor dispute remained employees under section 2(3) of the Act until they had found equivalent employment.³⁰ Because they remained employees, the Court said, their right to their former jobs, when these jobs became available, was too important to turn on the mechanical

24. See note 6 *supra*.

25. *NLRB v. Brown & Root*, 203 F.2d 139 (8th Cir. 1953) had established the "date of application" test. See also *Atlas Storage Div.*, 112 N.L.R.B. 114, *enf'd sub. nom. Teamsters, Local 200 v. NLRB*, 233 F.2d 233 (7th Cir. 1956).

26. Presumably, the employer could not refuse to rehire a worker merely because the worker had struck. However, a striking employee was not entitled to any favorable treatment just because he had been, and still remained an employee. Under such a standard a replaced worker arguably had no priority over a stranger who had applied for a job prior to the replacement and was still waiting to be hired.

27. 389 U.S. 375 (1967).

28. Permanent elimination of a job is considered to be the same as the permanent replacement of a worker. *Teamsters, Local 200 v. NLRB*, 233 F.2d 233, 238 (7th Cir. 1956). In both situations the need for the services of the former employee has ceased.

29. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 376-77, 380 (1967).

30. See note 6 *supra*.

"date of application" test.³¹ Therefore, the Court held that the replaced economic striker was entitled to an offer of reinstatement whenever a job for which he was qualified became available.³²

With the "date of application" test rejected, the employer in *Fleetwood* was left to defend his actions on the grounds of a legitimate business interest.³³ On this point, the Court found that the employer's hiring of the new employees evidenced an intent to reactivate the jobs as soon as possible,³⁴ and that there was therefore no legitimate reason shown for failure to rehire the employees who had struck.³⁵ The employer's conduct thus constituted a violation of the NLRA and back pay was awarded. Since *Fleetwood*, then, the economic striker who has applied for reinstatement has a right to it when a job for which he is qualified becomes available. This right lasts until the employee takes equivalent employment elsewhere, and only a legitimate business reason for not offering reinstatement can defeat it.³⁶

The *Laidlaw* decision is consistent with the *Fleetwood* rationale. The facts of *Laidlaw*, however, present one significant difference which makes that case an extension of the Supreme Court's decision. *Fleetwood* involved a situation in which the initial replacement of striking economic employees was improper. The strikers in *Fleetwood* applied for reinstatement before the jobs, which had been temporarily eliminated by the strike, again became available. Thus, when those jobs were reinstated, the company's policy of hiring new employees to fill them while there were still applications outstanding could not be justified by legitimate business reasons.³⁷ In *Laidlaw*, however, the initial replacement of the striking employees was justified on legitimate business grounds.³⁸ The question was whether or not the employees had a right of reinstatement to positions which had already been filled once and vacated again. *Laidlaw* therefore extends the *Fleetwood* doctrine by granting protection to

31. See note 25 *supra* and accompanying text.

32. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 381 (1967):

The basic right to jobs cannot depend upon job availability as of the moment the applications are filed. The right to reinstatement does not depend upon technicalities relating to application. On the contrary, the status of the striker as an employee continues until he has obtained other regular and substantially equivalent employment. (29 U.S.C. § 152(3).) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show legitimate and substantial business justifications.

33. See notes 12-14 *supra* and accompanying text.

34. 389 U.S. at 380.

35. See notes 13 and 14 *supra* and accompanying text.

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

37. See text accompanying note 34 *supra*.

38. See text accompanying note 22 *supra*.

an increased number of workers: both those whose jobs have not yet been filled and those whose jobs have been properly filled and subsequently vacated again.

The *Fleetwood* and *Laidlaw* decisions will not affect the reinstatement rights of all strikers. The rights of the unfair labor practice striker, for example, will remain the same, since he has always retained the right to immediate replacement at the termination of the strike.³⁹ Neither will the rights of "wildcat" strikers⁴⁰ be affected. "Wildcat" strikers, unlike economic or unfair labor practice strikers, are engaging in unprotected activity and may be legally discharged by the employer,⁴¹ thus terminating their status as employees. Since the rationale of both *Fleetwood* and *Laidlaw* rests on the proposition that the replaced strikers are entitled to protection because they remain employees,⁴² those decisions do not protect a striker who does not maintain his status as an employee. The same analysis can be made in the case of a striker who is fired for breaking a no-strike clause. Since the employer may legally discharge employees who violate such a clause in their contract, thereby terminating the employment relationship, that employer should have no affirmative duty to reinstate them.⁴³

Replaced economic strikers, however, will benefit from the change in the law. This advantage may come in one of two situations. The first would occur when new jobs become available because of an increase in production⁴⁴ or the departure either of the replacements themselves or of other employees.⁴⁵ When this

39. See note 20 *supra*.

40. A wildcat strike is a strike by a minority of the workers in a bargaining unit without authorization from the union.

41. *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944) held that since a wildcat strike is an unprotected activity, it is proper for an employer to discharge the strikers upon replacement. See also *NLRB v. Sunbeam Lighting Co.*, 318 F.2d 661 (7th Cir. 1963), where the court stated that if workers went on a wildcat strike, they were engaging in an unprotected activity and could be discharged. At 663 the court stated:

[T]he purpose of the [National Labor Relations] act was not to guarantee to employees the right to do as they please but to guarantee to them the right of collective bargaining for the purpose of preserving industrial peace . . . [T]here can be no effective bargaining if small groups of employees are at liberty to ignore the bargaining agency thus set up, take particular matters into their own hands and deal independently with the employer . . . No surer way could be found to bring collective bargaining into general disrepute than to hold that "wild-cat" strikes are protected by the collective bargaining statute.

Citing, *NLRB v. Draper Corp.*, 145 F.2d 199, 203, 205 (4th Cir. 1944).

42. See notes 6, 20, 24, and 30 *supra* and accompanying text.

43. See *UMW v. NLRB*, 257 F.2d 211 (D.C. Cir. 1958), in which the court held, at 214-15, that although a strike in violation of a no strike clause does not constitute an unfair labor practice by the union, it is nevertheless an unprotected activity. The court held that employees who strike in violation of such agreement may be discharged with impunity. See also *Confectionary, Tobacco Drivers & Warehousemen's Union, Local 805 v. NLRB*, 312 F.2d 103, 112 (2d Cir. 1963), in which the court held that a strike in violation of a no strike clause was not a protected activity.

44. *Cf. NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

45. *Cf. the principal case.*

occurs, the replaced strikers who have applied for reinstatement and been denied it initially because their jobs are filled will now have the right to be offered those jobs before the employer can hire any new employees.⁴⁶ This result is quite desirable. An employer having no antiunion intent has no reason to object to filling vacant positions with individuals who are experienced in his business.⁴⁷ Moreover, an employee who was replaced while engaging in protected activity has a clear interest in reinstatement if a position becomes available.

The second situation may arise if, subsequent to replacement, production is curtailed and workers are laid off. When a cut-back occurs, the replacements are the most likely to be laid off because they probably have the least seniority. The question then arises: When the jobs become available again due to an increase in production, who should get them? Since *Laidlaw* determined that the replaced workers, as well as their replacements,⁴⁸ remained employees, the problem is one of deciding which of the two types of employees is entitled to the jobs. If return to work is based on seniority, as it often is, any former strikers who have applied will have preference for these jobs because they have greatest seniority.⁴⁹

This result, however, may be attacked on the ground that it destroys the balance of interests between the employer and the employee. Specifically, the employer could argue that his failure to accord later replacement protection, after a replacement worker is laid off, will discourage persons from becoming replacements during strike periods. According to this argument, then, the employer would be unable to protect his legitimate interest in keeping his business running during an economic strike;⁵⁰ the result would be to give the employee too strong a weapon, thus upsetting the balance of power between the parties.⁵¹

46. See text accompanying notes 6-9, 22-23 *supra*.

47. The employer who does have an antiunion intent should not be allowed to object since he would be required to dismiss a replacement and rehire a striker if the existence of that intent could be proved. See note 20 *supra* and accompanying text.

48. When a replacement is laid off, he clearly remains an employee because he has not been discharged. A lay off is a suspension of work, not termination of employment. *White v. Crane Co.*, 147 S.2d 32, 36 (La. App. 1962). See also *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 286-87 (1946), in which the Supreme Court distinguished between lay off and discharge.

49. See *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), in which the employer attempted to disturb this traditional seniority with a grant to replacements of twenty-years "super-seniority." The Supreme Court refused to let him do so. The protection went to strikers who had not been replaced. With *Laidlaw*, this protection was extended to replaced strikers as well.

50. *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938).

51. Should an employer decide to rehire the replacement instead of the original striker, he might use this argument as a basis for showing the requisite business justification which would exempt him from a violation of § 8(a)(3) of the Act. But see text accompanying note 52 *infra*.

Moreover, the replacement in this situation has a greater interest at stake. Not only

Nevertheless, it is doubtful that this extension of *Laidlaw*, which would allow a striking employee to regain his job over a replacement who had been laid off, will significantly disturb the balance of interests between the employer and the employee. First, the situations in which the problem might arise are very limited. The only industries likely to be affected by it are those which are either cyclical or depressed, because they are the only ones in which the chance of a lay-off is great enough to discourage workers from becoming replacements since they might not be rehired when production is resumed. In these industries, if there is no substantial likelihood that production will be quickly resumed, most of the replaced strikers probably will not want to wait and will find new jobs instead; thus, they will not compete with replacements for positions with the original employer. But even if there is a chance for quick resumption of production, the high rate of employee turnover in the affected industries⁵² should allow the laid-off replacements to be reinstated soon after the former employees. Moreover, the problem presumably will arise only in the very limited context in which the original employees have a weak union. When a strong union exists, there is less chance of an employer attempting to continue production during a strike since all or most of the employees will be absent from their jobs. It is only with a weaker union, in which a core of workers may stay on the job, that continuation of production through replacements is feasible. Thus, the problem created by the priority of the former employees is one that is unlikely to occur.

Second, even if the problem should occur in a particular set of circumstances, a worker would probably not be deterred from becoming a replacement just because he knew he might lose his job to a former employee in the event of a lay-off. Many of the industries affected are fluctuating or depressed, and the very nature of those industries, as well as their high turnover rate, ought to indicate to a replacement that he should not expect permanent employment. Furthermore, in the case of depressed industries, the areas in which these industries exist are characterized typically by unusually high unemployment;⁵³ and it is likely that unemployed persons in such areas would be willing to risk possible short-term employment as opposed to not working at all. They would, of course, hope

has he worked at the job, but he has been promised permanent employment. In fact it was that promise that induced him to accept the job in the first place, thereby enabling the employer to protect his own interests. See note 18 *supra* and accompanying text.

52. See, e.g., U.S. DEPT. OF LABOR, MANPOWER REPORT OF THE PRESIDENT, REPORT ON MANPOWER REQUIREMENTS, RESOURCES, UTILIZATION, AND TRAINING 28 (1964) (construction industry). However, incidence of turnover in many depressed industries appears to be declining. Cf. U.S. DEPT. OF LABOR, REVIEW 107-09 (Jan. 1969) (table B-1).

53. U.S. DEPT. OF LABOR, MANPOWER REPORT OF THE PRESIDENT, REPORT ON MANPOWER REQUIREMENTS, RESOURCES, UTILIZATION, AND TRAINING 139-43 (1968).

to continue as permanent employees, but they would have nothing to lose by accepting a possibly temporary job when there are no other jobs available. Consequently, an employer in a depressed industry should be able to hire replacements and thereby be able to protect his interests. In a cyclical industry that is not depressed, such as the automobile industry, workers may not be willing to risk short-term employment, and therefore an employer may have trouble finding replacements. Nevertheless, the large turnover in cyclical industries⁵⁴ indicates that this situation would rarely be crucial, for both the strikers and the replacements would probably be reinstated soon after full production was resumed.

In light of this analysis, the *Laidlaw* decision appears to accomplish its goal of extending greater protection to the economic strikers without sacrificing, to any great extent, the legitimate interests of either the employer or the replacements.

54. See note 52 *supra* and accompanying text.