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The MacKay Doctrine: The Grand Dame of Labor Law Clashes with the Current State of the Union

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I. Introduction

EASTERN AIRLINES CLOSED its doors at midnight, January 18, 1991, ending a bitter labor dispute. The resulting financial difficulties that lasted nearly two years forced the carrier into bankruptcy. If the current labor-management climate continues, Eastern may serve as an example of the fate awaiting other companies using permanent replacement workers to continue operations during a strike. Other recent examples include the Greyhound Lines bus strike and the New York Daily News strike. Greyhound, in a strike plagued by violence, has already filed for bankruptcy. The crippling Daily News strike has also moved replaced workers to violence and led to a takeover of the paper by British pub-

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5 Baker, supra note 2, at D1.

Newsstands that have tried to sell the paper have been burned down. Men wielding baseball bats have attacked delivery trucks driven by replacements brought in by management. A vendor said that two men who visited his Manhattan stall last week said they would "put my eyes out" if he sold the News again. So far . . . there have been
lisher Robert Maxwell. These three strikes represent a disturbing trend in labor-management relations prompted in part by a weakening labor movement in the United States: strikes triggering financial disaster in labor intensive, competitive industries.

The use of permanent replacement workers to continue operations during a strike is controversial. Labor advocates blame use of replacements for the erosion of the strike's power as an economic bargaining tool. Industry proponents maintain that replacements simply balance power between the economic tools utilized by both sides during labor disputes. Business leaders further argue that disallowing permanent replacements eliminates the employer's most significant economic weapon for protecting his business interests during a strike. The issue of whether permanent replacements should be used during a strike "captures the essence of labor-management relations" by pitting a "worker's right to strike over economic disputes without being fired, against a company's right to continue operating by hiring permanent replacements."

The National Labor Relations Act (NLRA) governs nearly 100 reported acts of violence and intimidation and more than 20 arrests.

Id.


11 Samborn, supra note 4, at 28.

the establishment of labor bargaining units and the methods by which these units can negotiate with their employers. Historically, one of the labor's stronger negotiating tools was the unequivocal right to strike, found in section 7 of the NLRA, coupled with limitations upon employers' responses in section 8. The statute's language on its face appears to forbid any attempt by an employer to replace an employee who chooses to participate in a strike.

The right to strike is a fundamental labor law principle; yet, despite its theoretical importance, it was arguably undermined somewhat shortly after its statutory guarantee.

Labor relations for railroads and airlines. Interestingly, NLRA decisions are often analogized to the RLA. See, e.g., Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426, 432 (1989) ("We have observed in the past that carefully drawn analogies from the federal common labor law developed under the NLRA may be helpful in deciding cases under the RLA. . . . [L]ower courts that have examined the reinstatement rights of strikers under the RLA have turned to NLRA precedents for guidance.") For a general discussion of the relationship between the RLA and the NLRA see Arouca & Perrit, Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?, 1985 LAB. J. 145.


The motive that ultimately persuades employers to accept union contract proposals is the fear of the consequences of a strike. What persuades the union to make compromise proposals is the potential harm to the union and its members that may accrue from a strike. Union members who strike are risking their jobs and are necessarily giving up their pay during the period of the strike. The system works as well as it does because the consequences of failing to reach agreement are potentially harmful to both sides.

Id. at 138.

29 U.S.C. § 157. This section states in pertinent part that "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. . . ."

This Act further provides:

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 157; . . . (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. . . .

Id. § 158(a)(1), (3).

See id.
In 1938, the Supreme Court decided *NLRB v. MacKay Radio & Telegraph Co.*, an innocuous case on its face that quite possibly marked the beginning of the end of the strike's effectiveness as a bargaining tool. The *MacKay* holding allows strike-riddled organizations to hire permanent replacement workers to take the place of striking workers. Upon termination of the strike, the replacement workers do not have to be fired in order to restore striking workers to their old jobs.

The *MacKay* doctrine is entrenched in American labor law despite over fifty years of criticism and calls to overturn it. Until recently, industry, granting great deference to labor unions, limited the use of replacement workers during strikes. The prevailing trend, however, suggests that this deference is eroding, if not completely forgotten. Widespread disagreement exists as to when and why use of permanent replacements went from being unusual to being the norm. Some observers believe that President Reagan's harsh treatment of the air traffic controllers' strike that sent a clear signal that striking unions should not look to the government for sympathy or support caused the change. Others believe it was simply a

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17 304 U.S. 333 (1938).
18 Weinstein, *Will You be a Union Man or Will You be a Scab?*, CAL. LAW., Apr., 1987, at 44, 47. "Ironically, when the *MacKay* decision was handed down by a unanimous Supreme Court... it was not perceived by everyone as a great victory for management." Id. at 46.
19 See generally J. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1983).
21 Id. at 345-46.
23 Samborn, supra note 4, at 28.
24 Id. Commentators argue over the exact date and the cause of this increased use of permanent replacement workers, but they generally agree that the last decade witnessed a dramatic rise in their use by companies being struck. Id.
25 Id. In 1981, Present Reagan fired the striking members of the Professional Air Traffic Controllers Organization (PATCO). Many believe firing the striking controllers, and hiring permanent replacements for them, led to the demise of PATCO. Id. See also Castro, *Labor Draws an Empty Gun*, TIME, Mar. 26, 1990, at 56,
combination of intense international competition and unreasonable labor contracts which combined to make American companies less competitive at home and abroad.26

Any solution to the dilemma of whether business should continue to use permanent replacements, if there is one, must come from Congress, because the Supreme Court shows no inclination toward overturning its classic dicta.27 The stage is set for a dramatic fight between business and labor on the issue, as evidenced by recent strikes that have ended in financial disaster for both the company,28 and the striking unions;29 a recent Supreme Court decision further expanding MacKay;30 and pending legislation.31 In many business and labor leaders' minds, the

57. "'Other employers, public and private, interpreted this as a declaration of open season on unions and went all-out to block, weaken or be rid of them,' says Thomas Donahue, secretary-treasurer of the AFL-CIO." Id.

26 Samborn, supra note 4, at 29. In addition to the intense international competition and unreasonable labor contracts, other factors prevented labor from effectively fighting the use of permanent replacements. For instance, many of the almost 19 million new jobs created in the 1980's existed in the non-organized service and small business sector which is traditionally not unionized. Job security became increasingly more important at the same time large companies such as TWA, Phelps Dodge, Boise Cascade, International Paper and others "cracked down hard" on their unions by imposing pay cuts, decreasing benefits and increasing the length of workdays. Castro, supra note 25, at 57. The unions dared not oppose their employers for fear of harming their members' interests. When unions did oppose employer's actions, they usually lost. Id.

27 See infra notes 37-44 and accompanying text for a discussion of the MacKay doctrine as dicta. The Supreme Court most recently extended the MacKay rule in Trans World Airlines, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989). In TWA, the Supreme Court held that the Railway Labor Act, by analogy to the National Labor Relations Act, does not require employers to terminate junior crossover employees after a strike to reinstate senior full-term strikers. Id.

28 For example, Eastern Airlines dissolved, Greyhound filed bankruptcy and the Daily News faces bankruptcy or dissolution. See supra notes 1-6 for a further discussion.

29 Clearly, when the struck companies fail or enter into bankruptcy, the union members suffer. See, e.g. Cooper, A Career Goes Down in Flames, Newsday, Jan. 27, 1991, at 70 (a lifetime career at Eastern Airlines is destroyed by the airline's failure); Baker, supra note 2, at D1. (Greyhound strikers face hardships as the strike continues).

30 TWA, 489 U.S. at 426.

31 Ward, Replacement of Strikers Dulls Labor's Top Weapon, The Courier-Journal, Apr. 16, 1990, § B, at 18. The House and Senate have before them bills S. 55 and
use of replacement workers and crossovers\textsuperscript{32} in the event of a strike will be the key labor issue in the coming decade.\textsuperscript{33} 

II. HISTORY AND DEVELOPMENT OF THE MACKAY DOCTRINE

Few decisions in labor law have generated as much controversy as the MacKay decision.\textsuperscript{34} Since its inception, the MacKay doctrine has been fraught with criticism. At its most simplistic, the rule is said to deprive the labor union of the power of its most drastic labor tool—the strike.\textsuperscript{35} At its most complex, unions allege that management is using replacement workers to oust unions, end negotiations, and win decertification.\textsuperscript{36}

The great irony of MacKay is that the court did not need to address whether employers can hire permanent replacements in the event of a strike to settle the issue directly before them.\textsuperscript{37} The employer in MacKay used

\textsuperscript{32} A crossover is a term the Supreme Court used to describe the workers who struck, but who later returned to work before the strike officially ended and those who decided not to strike in the first place. See supra notes 175-188 and accompanying text for further discussion of the pending legislation.

\textsuperscript{33} H.R. 5, sponsored respectively by Senator Howard Metzenbaum (D-Ohio) and Representative Bill Clay (D-Mo.), which would ban both the hiring of permanent replacements during a strike and discrimination against returning workers when the strike is finished. See infra notes 175-188 and accompanying text for further discussion of the pending legislation.

\textsuperscript{34} Miller, Next Year's Big Labor Issue, \textit{Industry Week}, July 2, 1990, at 56. "Every so often, industry and organized labor engage in one of their time-honored, no-holds-barred power struggles in Congress... Now the two sides are marshaling forces for a new showdown—this one over a labor-instigated proposal that would prohibit companies from hiring permanent replacements during economic strikes." \textit{Id.}

\textsuperscript{35} Castro, supra note 25, at 56.

\textsuperscript{36} Weiler, supra note 22, at 393.

\textsuperscript{37} See Samborn, supra note 4, at 28.

replacements during its union's economic strike.\textsuperscript{38} At the strike's end the employer offered permanent employment to those who had replaced the strikers. Five replacements decided to stay and thus the employer had to decide which five strikers would not be reinstated.\textsuperscript{39} The employer chose the five employees most active in the union. The legality of this discrimination against those five strikers was the issue before the court.\textsuperscript{40} The National Labor Relations Board (NLRB) did not ask the court to address the right to replace strikers.\textsuperscript{41} The court found that MacKay's method of choosing the strikers who would not be reinstated was discriminatory.\textsuperscript{42}

In reaching its decision, however, the court, in dicta, commented:

>[n]or was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business. Although § 13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike, it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.\textsuperscript{43}

In these few sentences the Court laid down a labor law principle with potentially profound effects upon labor-management relations during a strike. With no more explanation than given in the quoted paragraph, the Supreme Court set the tone for more than half of a century of labor disputes. Thus, ironically, one of the most influential labor law doctrines in history is based upon

\textsuperscript{38} Wilson, The Replacement of Lawful Economic Strikers in the Public Sector in Ohio, 46 Ohio State L.J. 639, 643 n.41 (1985). "An economic strike is one that is neither caused nor prolonged by an employer's unfair labor practice." \textit{Id.}

\textsuperscript{39} \textit{MacKay}, 304 U.S. 333, 339 (1938).

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id. at 347.}

\textsuperscript{43} \textit{Id. at 345-46.}
dicta and despite its questionable genesis, the rule has not been overturned.

Since the MacKay decision, the Supreme Court has decided a line of cases both substantiating the replacement worker rule and limiting it. The result is a strange mixture of cases which forbid assessing a number of lesser penalties upon the striking union, yet reinforce the employer's right to permanently replace striking workers. One commentator posits that the law in this area allows for "killing but not wounding." A brief look at the cases demonstrates this concern.

Mastro Plastics Corp. v. NLRB makes the important distinction between the reinstatement rights of economic strikers and unfair labor practice strikers. The MacKay doctrine only applies to economic strikers. Thus, only economic strikers do not have a right to displace permanent replacements at the end of a strike to get their old jobs back. Because of the nature of unfair labor strikes, the rule set forth in Mastro Plastics is different.

The court in Mastro Plastics held that unfair labor practice strikers are entitled to unequivocal reinstatement and any replacements who took their place can be fired to reinstate them. Although some critics disagree with the

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44 Weiler, supra note 22, at 388-89. "These seemingly causal dicta about the legality of the most important economic weapon in the employer's arsenal remain virtually untouched to this day." Id.; see also, Estreicher, supra note 37, at 298. "The statement about the right to hire permanent replacements is classic obiter dictum, but the rule announced has survived and flourished for a half-century." Id.

45 J. Getman & B. Pogrebin, supra note 14, at 141.

46 350 U.S. 270 (1956).

47 Wilson, supra note 38, at 643.


49 MacKay, 304 U.S. at 344. "Under the findings the strike was a consequence of, or in connection with, a current labor dispute . . . [since] there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment . . . cannot be denied." Id.

50 Mastro Plastics, 350 U.S. at 278.

In the absence of some contractual or statutory provision to the contrary, petitioners' unfair labor practices provide adequate ground for
distinction, strikers protesting unfair labor practice arguably merit more protection than strikers who desire to improve their own economic situation. The Mastro Plastics Court stated that failure to allow a strike protesting an unfair labor practice would "seriously undermine the primary objectives of the Labor Act." The use of such strong language by the Court suggests heightened importance for unfair labor strikers which helps explains the divergent treatment of economic and unfair labor practice strikers after replacements.

The issue presented in NLRB v. Great Dane Trailers Inc. concerned the dispositions of vacation benefits to striking workers. The employer paid accrued vacation benefits to replacement workers, returning strikers, and nonstrikers who had been at work on a certain date. Vacation benefits were not paid to the strikers. The Court held this was a violation of Section 8(3) of the NLRA because the employer's conduct would likely discourage participation in protected activities.

In its Great Dane analysis, the Court established a test for balancing an employee's right to strike against the employer's right to protect its business. If an employer's

the orderly strike that occurred here. Under those circumstances, the striking employees do not lose their status [as employees] and are entitled to reinstatement with back pay, even if replacements for them have been made.

Id. See also NLRB v. International Van Lines, 409 U.S. 48, 51 (1972) (unfair labor strikers are entitled to reinstatement and back pay even if they have been replaced); Harding Glass Indus. v. NLRB, 672 F.2d 1330, 1338 (10th Cir. 1982) (unfair labor practice strikers are entitled to reinstatement regardless of whether they have been replaced); NLRB v. West Coast Casket Co., 205 F.2d 902, 908 (9th Cir. 1953) (unfair labor strikers entitled to reinstatement even if replacement workers must be fired).

Id. See also, The Illusion of Permanency for MacKay Doctrine Replacement Workers, 54 Tex. L. Rev. 126, 127 (1975).

Mastro Plastics, 350 U.S. at 278.

388 U.S. at 278.

29 U.S.C. § 158(a) (1988) reads, in pertinent part, "It shall be an unfair labor practice for an employer—

(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. . . ."

Id.

Great Dane, 388 U.S. at 32.
conduct is "inherently destructive" to vital employee
rights then the employer must establish a "legitimate and
substantial business justification" for the conduct.\(^5\) If the
employer proves such a justification and the effect upon
employee rights is "comparatively slight," the NLRB must
show the employer to be anti-union to find a Section 8(3)
violation.\(^5\)

The Supreme Court reiterated its Great Dane holding in
\(NLRB\ v. \ Fleetwood\ Trailer\ Co.\)\(^5\) when it held that an em-
ployer must show a "legitimate and substantial business
justification" for refusal to reinstate strikers or else face
liability for violation of an unfair labor practice.\(^5\) The
Court once again recognized the distinction between the
illegal discharge of employees for strike activities and the
legal replacement of strikers to continue operations. The
court, however, reaffirmed MacKay when it further held
that hiring permanent replacements to continue business
operations satisfied a legitimate and substantial business
justification.\(^6\)

Building upon the foundations set forth in Great Dane
and Fleetwood Trailers, the Seventh Circuit in Laidlaw Corp.
v. NLRB\(^6\) decided that if permanent replacements leave
after the strike, the employer must attempt to rehire strik-
ers.\(^6\) Thus, the striking employee's status as replaced
rather than discharged is important. The Seventh Circuit
held that an employer cannot refuse to reinstate the strik-
ers based on the "legitimate and substantial business jus-

\(^5\) Id. at 34.
\(^7\) Id.
\(^8\) 389 U.S. 375 (1967).
\(^9\) Id. at 378. "If, after 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 ... [then] it is an unfair labor practice to interfere
with the exercise of these rights." Id.
\(^6\) Id. at 379. "In some situations, 'legitimate and substantial business justifica-
tions' for refusing to reinstate employees who engaged in an economic strike have
been recognized. One is when the jobs claimed by the strikers are occupied by
workers hired as permanent replacements during the strike in order to continue
operations." Id.
\(^6\) Id. at 105.
tification” standard adopted from Fleetwood Trailers. As a result, the use of permanent replacements does not remove all of a striker’s claims to his former job. If a striker’s position has not been filled at the end of a strike he can apply for that job, and if the employer receives an unconditional request for reemployment, he must employ the striker if a vacancy remains. If the striker has been replaced, he must be put on a preferential hiring list and given priority when a future opening occurs.

Included within the realm of forbidden activities for the employer lies the granting of “super-seniority” status or any similar action which could cause long-lasting rifts between returning strikers and replacements according to NLRB v. Erie Resistor Corp. In Erie Resistor, the employer awarded twenty years of “super-seniority” to new hires and crossovers. The Supreme Court distinguished Mac-

63 Id.
64 J. Getman & B. Pogrebin, supra note 14, at 140; Wilson, supra note 38, at 647. "In summary, under the NLRA as it has been construed by the NLRB and the courts, the economic striker is guaranteed her employee status, although not necessarily her job." Id.
65 In order to be eligible for reinstatement rights, economic strikers who have not been replaced must either personally, or through their union, make a specific, unconditional application for reinstatement. See Swearington Aviation Corp. v. NLRB, 568 F.2d 458, 463-64 (5th Cir. 1978); Bryan Infants Wear Co., 235 NLRB Dec. (CCH) 305, 1306 (1978); Michael Muldoon Elder, 227 NLRB Dec. (CCH) 46 (1976).
66 Wilson, supra note 38, at 645.
67 Id. at 646. When reinstatement occurs, it must be with all benefits and seniority that the employee possessed before the strike. See Globe Molded Plastics Co., 204 NLRB Dec. (CH) 041 (1973). The former economic striker must receive the equivalent pay and benefits he received before the strike began. See Northwest Oyster Farms, Inc., 173 NLRB Dec. (CCH) 72, 876 (1968). Furthermore, the striker has the right to be reinstated for any position he is qualified for, not just the exact one he held before the strike. See Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 168 n.7 (8th Cir. 1972). Moreover, there is no time limit placed upon the duration of reinstatement rights, unless limited by negotiations between the employer and the union and set forth in a strike agreement. See Brooks Research & Mfg., Inc., 202 NLRB Dec. (CH) 34 (1973); United Aircraft Corp., 192 NLRB 382 Dec. (CH) 1971), enforced in part sub nom. International Ass’n of Machinists v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976).
69 Id. at 223.

[T]he company informed the union that it had decided to award 20
Kay and held that this practice constituted an unfair labor practice under the NLRA. According to the Court, "super-seniority by its very terms operates to discriminate between strikers and non-strikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted."  

Erie Resistor argued that awarding super-seniority was a legitimate business purpose protected as a corollary of MacKay's right of replacement, because it was necessary to attract replacement workers to keep their operations running. The court rejected this alleged "legitimate business purpose" for implementing the practice, stating that just because the "employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement." The Court simply could not justify the employees' additional seniority both to replacements and to strikers who returned to work, which would be available only for credit against future layoffs and which could not be used for other employee benefits based on years of service.

*Id.* The strikers voted to continue despite this threat from Erie Resistor's management. *Id.*

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70 *Id.* at 231. The Court reached its decision in part based upon the findings of the National Labor Relations Board (NLRB) which held that Erie Resistor's plan had the following characteristics: (1) super-seniority affects the tenure of all strikers whereas MacKay, properly applied, only affects those strikers who are actually replaced; (2) an award of super-seniority operates to the detriment of those who participated in the strike as against those who did not participate; (3) offering super-seniority in effect offers an inducement to abandon the strike; (4) giving super-seniority benefits to striking union employees in addition to new replacement employees deals a crippling blow to the strike effort by diluting senior employee status and improving junior employee status; and, (5) unlike the replacement issue in MacKay which is no longer an issue after the strike ends, granting super-seniority renders future bargaining very difficult for future union representatives. *Id.* at 230-31.

71 *Id.* at 225.

72 *Id.* at 225-26.

73 *Id.* at 231.

74 *Id.* at 228. "Conduct which on its face appears to serve legitimate business ends . . . is wholly impeached by the showing of an intent to encroach upon protected rights." *Id.*

75 *Id.* at 232.
employer's conduct in this case.

In Belknap v. Hale,76 the court added a new twist to the state of the law. The Court upheld the right of permanent replacement workers to sue the employer in state court for breach of contract if they are fired at the conclusion of a strike.77 The Court, in so holding, "suggested that employers should make only conditional offers to potential replacements, subject to possible NLRB orders or union contract settlements."78 Allowing the replacements to sue for state breach of contract claims raises the stakes for the employers deciding whether to hire permanent replacements. According to one commentator, the "ruling makes the decision to employ permanent replacements an act of great significance"79 due to the inevitably strained relationship the returning strikers will have with the remaining replacements.80

Belknap also demonstrates that replacements supposedly hired on a "permanent" basis are realistically no more assured of permanency than the strikers they are replacing.81 If the strike is transformed from an economic

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77 Id. at 499-500. The Court was "unpersuaded" by Belknap's arguments that permitting suits of this type would:
upset the delicate balance of forces established by the federal law. . . . It is true that the federal law permits, but does not require, the employer to hire replacements during the strike, replacements that it need not discharge in order to reinstate strikers if it hires the replacements on a 'permanent' basis within the meaning of the federal labor law. But when an employer attempts to exercise this very privilege by promising the replacements that they will not be discharged to make room for returning strikers, it surely does not follow that the employer's otherwise valid promises of permanent employment are nullified by federal law and its otherwise actionable misrepresentations may not be pursued.

Id.
78 Weiler, supra note 22, at 392 n.138.
79 J. GETMAN & B. POGREBIN, supra note 14, at 141.
80 Id. "The hiring of permanent replacements . . . makes eventual settlement with the union problematic since a fundamental union demand in any settlement is the reinstatement of the strikers. The issue of what to do with the replacements is likely to become a stumbling block inhibiting successful completion of the negotiations." Id.
81 Janes, supra note 51, at 126. "An examination of [permanent replacements']
strike into an unfair labor strike, the permanent replacement becomes a temporary one. In addition, the striking union usually demands reinstatement of all striking workers as part of a settlement agreement to end the strike. In either of these situations, the permanent replacement is only protected to the extent he or she could claim a state cause of action under Belknap.

The most recent union setback in this area occurred in 1989. In Trans World Airlines v. Independent Federation of Flight Attendants, the airline vowed to hire permanent replacements for its striking flight attendants, to continue employing flight attendants who chose not to strike, and to rehire any flight attendants who abandoned the strike. TWA warned the strikers that any available job or domicile vacancies created by the strike would be filled according to the seniority bidding system by attendants.

Rights reveals that permanency is illusory and that replacements are potentially unwitting victims of the federal, union-oriented labor scheme." Id.

See NLRB v. International Van Lines, 409 U.S. 48 (1972) (if a strike continues after the employer commits unfair labor practices, the original economic strike becomes an unfair labor practice strike).

J. Getman & B. Pogrebin, supra note 14, at 141.

463 U.S. at 502-03. Belknap argued that the balance of power shifts if an otherwise permanent replacement offer is really nonpermanent because the Board could force reinstatement of strikers or could bargain with their union to reinstate strikers. The Court responded:

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 a displacement by a striker over the employer's objection during or at the end of what is proved to be a purely economic strike.

Id.


Id. at 429.

Id. An important feature of the existing collective bargaining agreement between TWA and the union was an intricate seniority bidding system which, although not disputed at the time, would become an issue later in the case. The bidding system ensured that the flight attendants with the most seniority were given preferential treatment with respect to job assignments, flight schedules and domiciles and it also protected flight attendants from the periodic furloughs common to the industry. For example, Los Angeles is a popular domicile. When a job vacancy appears there, the most senior qualified flight attendant who bids on it gets the position. Furthermore, if a job reduction occurs in Los Angeles, a fur-
who were working at the time and that such assignments would remain effective after the strike's end.

As a result of TWA's policy, senior strikers who did not come back to work until the dispute was settled could not displace permanent replacements or junior attendants who chose not to strike.88 The full-term strikers returned to work with the same amount of seniority they had before the strike began.89 The employees that were senior before the strike, however, lost their positions to junior employees who chose not to strike or who abandoned the strike before it ended.90

Basing its decision on the right not to strike found in both the RLA and the NLRA, the Court refused the union's request to expand Erie Resistor to assuage fear of a "cleavage" between the full-term strikers and the replacements and crossovers after the strike ended.91 One commentator states that TWA

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88 Id.  

89 Id.  

90 Id. at 436.  

91 Id. The majority recognized that allowing replacements and crossovers to remain after the strike did leave many full-term strikers without work. The Court, however, did not believe that the employees who chose not to strike should have been punished. The Court stated: "[w]e see no reason why those employees who chose not to gamble on the success of the strike should suffer the consequences when the gamble proves unsuccessful." Id. at 438.
can be viewed as either a movement by the Supreme Court toward the preservation of individual rights or as a shift in the balance of power between employers and labor unions. ... [T]he crossover policy can have a profound effect by increasing the employer’s economic tools at the expense of unions [although] the extent to which the balance of power shifts will vary among situations.  

_TWA_ continued the Court’s trend, beginning with _MacKay_, toward decreasing the power of the strike as an effective and powerful labor tool. The trend encourages junior employees to remain on the job in order to garner favorable job slots while senior employees who leave those lucrative positions when they opt to strike are punished.

The decisions following _MacKay_ are diverse and lack a common theme. On the one hand, a series of cases including _Mastro Plastics_, _Great Dane_, and _Laidlaw_ strengthen labor’s position by attempting to remedy the imbalance of power allegedly tilted in favor of the employer in _MacKay_. On the other hand, cases such as _Belknap_, _TWA_, and _Fleetwood Trailers_ expand the classic case further. The Supreme Court has not successfully articulated a demonstrable difference between allowing strikers to be replaced in order to continue operations as a viable economic

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92 Comment, _Trans World Airlines v. Independent Federation of Flight Attendants: Introducing a New Economic Weapon in the Labor Law Arena_, 38 _KANSAS L. REV._ 1061, 1082-83 (1990). The author goes on to list considerations which will determine the strength of the crossover policy as a labor tool including:

(1) What is the relationship between the employer and the employees? Are they likely to strike or will their differences be resolved through negotiation?; (2) How effective have prior negotiations been? Has the union negotiated a favorable [collective bargaining agreement]?; (3) How large is the plant? Can the employer induce enough employees to return and continue operations in an economic climate where replacements are hard to find?; (4) What degree of expertise do the striking employees have? Can the employer find replacements with the same expertise? ... and (5) What kind of relationship does the union have with its members? Do the members have a strong sense of loyalty? Does the union have the resources to help its members survive a strike?

_Id._ at 1083. See also R. GORMAN, _supra_ note 48, at 342. The same factors can be utilized to determine the employer’s ability to hire _MacKay_ replacements. _Id._
weapon and the granting of super-seniority forbidden in *Erie Resistor* or the denial of vacation benefits in *Great Dane*. Therefore, such replacement arguably "should not warrant special exemption from the carefully articulated Section 8(a)(3) analysis."94

### III. CRITICISM OF THE MACKAY DOCTRINE

*MacKay* is widely criticized on many grounds. Ostensibly, the decision simply upholds the employer's right to maintain operations during a strike.95 The underlying assumption is "that without the ability to permanently replace strikers, employers will be unable to operate during strikes."96 According to legal commentators, this so-called business justification rationale may not be necessary or sound for several reasons.97 First, hiring replacements is not the only weapon in the employer's arsenal.98 Second, the fact that replacements have only been used in the recent past suggests that they are unnecessary to continue business operations during a strike. Third, the courts have never demanded empirical proof to substanti-

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95 J. Getman & B. Pogrebin, *supra* note 14, at 139.

96 Id.

97 Gillespie, *supra* note 94, at 788. "MacKay owes its firm entrenchment in the law to the lack of any clear disproof of its assumption that employers must hire permanent replacements to protect and continue their business." Id. See also Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 Tex. L. Rev. 378, 383-85 (1969). "The unspoken premises of the MacKay doctrine appear to be . . . the factual assumption that the employer is unable to continue his business during the strike without the opportunity to offer replacements permanent employment (a rather significant and unsubstantiated factual assumption to go unarticulated)." Id.


ate the assumption that replacements are necessary to continue operations during a strike or to avoid serious economic consequences. 100

*MacKay* has other weaknesses. The most glaring deficiency is the opinion's apparent contradiction of the plain meaning of the NLRA. Another problem is the bargaining advantage proffered to employers as a result of their ability to maintain operations during a strike. Finally, a union's status when the strike ends is jeopardized by replacing striking union members with replacement workers who are prone to be anti-union. Combined, all of these factors demonstrate *MacKay*'s alleged threat to organized labor in this country.

Since an employer has many options available with which to fight a strike without resorting to hiring permanent replacements, 101 *MacKay*'s underlying assumption that replacements are necessary for an employer's survival is questionable. One possibility is to use non-strikers, returning strikers, and managerial and supervisory personnel to supplant striking workers. 102 Work normally done by the strikers may also be subcontracted to outside workers. 103 To preserve the enterprise without continuing operations, the employer can use strike insurance,

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100 J. Atleson, *supra* note 19, at 25. The Court's ruling [in *MacKay*], however, does not turn on evidence that the employer required replacements, permanent or temporary, because no showing of economic necessity was required. . . . In addition, employers need not prove that the business could not continue with temporary (as opposed to permanent) replacements. Employers may hire permanent replacements—and thereby remove the strikers, and often the union, from the scene—even if other alternatives exist to avoid serious economic dislocation. *Id.* (emphasis added).

101 Gillespie, *supra* note 94, at 790. “Employers commonly have a number of alternative weapons available that allow them to continue operations during strikes without resorting to permanent replacements.” *Id.*


103 Gillespie, *supra* note 94, at 790; see also, Hawaii Meat Co. v. NLRB, 321 F.2d 397 (9th Cir. 1963).
arbitration, or can institute a lock-out.\textsuperscript{104} Any one or a combination of these options may serve the same business purpose as hiring permanent replacements without the detrimental effect on the striking union members.\textsuperscript{105}

Courts have historically upheld an employee's right to use replacement workers without demanding any proof that the practice is essential to protect the enterprise from unreasonable harm stemming from the strike. The only known empirical study on the subject comes from the Wharton School of Business. The Wharton Study surveyed fifteen companies that operated successfully during strikes,\textsuperscript{106} and found several factors that these companies had in common. First, they primarily relied upon salaried workers to take up the slack of the strikers.\textsuperscript{107} Second, the

\textsuperscript{104} Gillespie, supra note 94, at 790-91.

\textsuperscript{105} Id. at 791. The effectiveness of these alternatives will depend upon such factors as: the skill level of the work force, the size of the striking group, the strength of the union organization, the size of the union strike funds, the length of the strike, the seasonal or nonseasonal nature of the work, the community attitude toward organized labor, the tightness of the labor market, the presence of competitors, the use of industry-wide bargaining, the degree of automation in the business, the size of the plant, and the wealth of the business being struck. Id. at 791-94.

\textsuperscript{106} C. Perry, supra note 102, at 3.

\textsuperscript{107} Id. at 54. "The most readily available supply of potential replacement workers willing to cross a picket line ... is a company's own managerial and supervisory employees. This pool of labor generally is the preferred and primary source of replacement labor among firms that operate during strikes." Id.
companies limited their use of outside replacements.\textsuperscript{108} Finally, the companies purposefully avoided recruiting permanent replacements.\textsuperscript{109} Furthermore, these companies did not wish to oust their unions, but rather wanted to settle with them.\textsuperscript{110}

The findings help support the conclusion that the broad scope of the legal rule is not empirically justified.\textsuperscript{111} Indeed, absent a study that proves employers need permanent replacements to continue operations during a strike, “there appears to be little justification for the rule that an employer subjected to an economic strike may employ permanent replacements and thereby rid himself of his striking employees and, of course, the union.”\textsuperscript{112} Thus, “[s]ince only permanent replacements have an anti-union effect, the MacKay rule could be justified only if permanent replacements serve a business purpose which could not be served by temporary replacements.”\textsuperscript{113}

Perhaps the strongest, and the most basic, criticism of MacKay is its seeming incompatibility with the language of the NLRA itself.\textsuperscript{114} The “unmistakable intent” of the NLRA is that an employer may never retaliate against a striking employee by firing him.\textsuperscript{115} Despite the seemingly

\textsuperscript{108} Id. at 63. “The hiring of replacements for bargaining-unit employees . . . was not an integral element in the operating plans of the firms studied.” Id.

\textsuperscript{109} Id. at 64. About one-half of the companies studied “reported some recent effort to replace striking workers . . . Most of those firms, however, consciously avoided the use of permanent replacements whether by explicitly stating that they were hiring only temporary replacements or by being silent on the subject of whether replacements were temporary or permanent.” Id.

\textsuperscript{110} Id. at 68.

\textsuperscript{111} Weiler, supra note 22, at 391 n.132.

\textsuperscript{112} Schatzki, supra note 98, at 385.

\textsuperscript{113} Note, Replacement of Workers During Strikes, 75 Yale L.J. 630, 636 (1966).

\textsuperscript{114} Schatzki, supra note 97, at 385; see J. Atleson, supra note 19, at 24; Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act, 115 U. Pa. L. Rev. 1195, 1204 (1967).

\textsuperscript{115} Wieler, supra note 22, at 389. Note, however, that the legislative history surrounding the NLRA does not support this view. See Comment, supra note 10, at 881-82 (“Nowhere can a report or comment be found expressing this view of the regulatory scheme. . . . The risk-free economic strike theory is contrary to this fundamental objective of the Act [accepting the consequences of a decision to strike] and cannot withstand scrutiny.”)
express meaning of the NLRA, MacKay allows the hiring of permanent replacements during a strike which, practically speaking, is tantamount to firing a striking employee. The only difference is the subjective nature of the employer's decision; this technical distinction is cold comfort to the average rank-and-file worker who will not understand or care about the legal nuances when faced with unemployment.116

Moreover, neither the NLRB nor the courts attempt to determine what the subjective motivation of the employer is when he hires replacements.117 The NLRB instead has formulated a mechanical test to decide whether an employer has hired a legal replacement or has illegally discharged a striker.118 An employer cannot flagrantly single out for replacement an employee known to be active in union activities; however, an employer can permanently replace any striking employee so long as the official action is not designed to deter old employees from returning to work after a strike.119 Unfortunately, there is no method by which the Board could realistically ascertain an employer's hidden motives, assuming they exist.120 At the

116 Id.; see also Samborn, supra note 4, at 29.
117 J. Getman & B. Pogrebin, supra note 14, at 140.
118 Id.

Unless it can be demonstrated that the employer has singled out for replacement those whom he knows to be active union members, he is permitted to lay off permanently any striking employees, as long as they are not notified that they are replaced or treated as having been replaced before new employees are hired. Employees are improperly discharged if before replacements are hired, official action is taken to indicate that the old employees may not return to work after the strike. This test . . . is related only occasionally to the employer's reasons for acting. It is more likely to indicate whether the employer had competent counsel.

Id.; see also J. Atleson, supra note 19, at 27. "The harm to the strikers is the same, whatever the intent of securing replacements, and . . . [s]o long as the employer does not selectively replace employees on the basis of union leadership or strike militancy, for instance, the theoretical violation vanishes given the difficulty of proof of motive." Id.

119 J. Getman & B. Pogrebin, supra note 14, at 140. This test has been approved by the courts. See, e.g., Bonnar-Vawter, Inc. v. NLRB, 289 F.2d 133 (1st Cir. 1961).
120 J. Getman & B. Pogrebin supra note 14. "[A]n inquiry into the employer's
very least, the rule devised by the Board clarifies what the employer can and cannot do and prohibits blatant attempts to punish protected activity.\textsuperscript{121}

Yet another complaint levelled against \textit{MacKay} is its effect upon the negotiation process between the employer and the bargaining unit on strike. Being able to continue operations during a strike will likely result in a bargaining agreement favoring the employer.\textsuperscript{122} Thus, hiring permanent replacements puts the collective bargaining process itself in doubt since the employer can avoid the pressure exerted by the union through its strike.\textsuperscript{123} But once strikers have returned to work, they have the knowledge that ground lost at this juncture may be made up at another time.\textsuperscript{124} The replacements do not share this viewpoint since they will probably be anti-union.\textsuperscript{125}

Finally, \textit{MacKay} profoundly affects the status of a union following a strike. Permanent replacements have full voting rights under the NLRA in any decertification process, but the strikers’ can only vote up to twelve months past the beginning of a strike.\textsuperscript{126} Therefore, the \textit{MacKay} decision places the union in danger of decertification, since replacements are generally anti-union.\textsuperscript{127} One bright spot in the replacement’s effect on the union’s stability came in a recent 5-4 Supreme Court decision which held that employers cannot assume replacements oppose the union for the purpose of removing the union.\textsuperscript{128} The Court held that employers cannot break off negotiations with the striking union just because a majority of their workers are now replacements and the replacement workers are as-

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\begin{itemize}
\item state of mind in such situations [when hiring replacements] would be difficult and the probable results equivocal.” \textit{Id.} at 140.
\item \textit{Id.}
\item Weiler, \textit{supra} note 22, at 390.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\item Weiler, \textit{supra} note 22, at 390.
\end{itemize}
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sumed to be opposed to the union. 129 This decision makes it more difficult for employers to use replacements as a tool for eliminating the union. 130

One final, more indirect, criticism of MacKay relates to the diverse treatment of economic and unfair labor strikers. Unfair labor strikers must be reinstated regardless of whether replacements have taken their place. 131 This dichotomy causes many practical difficulties for employers and strikers. For example, when the decision is made to hire replacements, the employer must be extremely cautious in the manner and timing of his decision to announce the hiring of permanent replacements. Otherwise, the employer's actions will convert the strike. 132 The Belknap decision has further complicated this issue by allowing fired permanent replacements to bring common law suits challenging their dismissal. 133

The dissimilar treatment of economic and unfair labor strikers produces anxiety on the part of both employer and striker because neither will know where it legally stands, possibly until the middle or end of a strike. 134 In a strike caused by multiple factors, if an unfair labor practice had any part in prompting the strike, the strike will be characterized as an unfair labor strike. 135 Furthermore, an economic strike can become an unfair labor strike in midstream if an employer commits unfair labor practices dur-

129 Id.
130 The Supreme Court, 1989 Term: Leading Cases, 104 HARV. L. REV. 349, 355 (1990). "The Curtin Matheson Court's affirmation of the Board's no-presumption rule is an important victory for labor unions." Id. See also Marcus, Ruling Makes Unions Busting During Strikes More Difficult, Washington Post, Apr. 18, 1990, at A5. According to Walter Kamiat, associate counsel for the AFL-CIO, the decision forces companies "to find a reason to believe—beyond simply the fact that they've replaced the [striking] workers—that the [permanent replacements] do not want to be unionized... This makes it somewhat more difficult for employers to wash their hands" of their unions. Id.
133 Belknap, 463 U.S. at 491.
135 See American Cyanamid Co. v. NLRB, 592 F.2d 856 (7th Cir. 1979); NLRB v. Moore Business Forms, Inc., 574 F.2d 835 (5th Cir. 1978).
ing the economic strike.\textsuperscript{136} When the nature of the strike changes it puts the employer in a dilemma because he now has to fire all replacements he hired since unfair labor strikers are entitled to unconditional reinstatement. Thus, striking union members should be treated the same whether engaged in an economic strike or an unfair labor strike to avoid these problems.\textsuperscript{137}

IV. DEFENSE OF THE {	extsc{MacKay}} DOCTRINE AS IT STANDS

Not all commentary about {	extsc{MacKay}} is negative. One line of thought regards the decision as an essential balancing of power between labor and management. A rational explanation for the doctrine suggests it:

is based on the concept of balancing economic weapons of the parties engaged in the collective-bargaining battle. To allow the union to strike to accomplish its economic ends and then to prevent the employer from carrying on his business in any meaningful fashion by outlawing all permanent replacements would place the balance of power too heavily in the hands of the union.\textsuperscript{138}

Business leaders adamantly contend that {	extsc{MacKay}} balances the scales during a strike and does not tip them in their favor as labor contends.\textsuperscript{139} Rather, allowing workers to

\textsuperscript{136} Note, supra note 113, at 640.  
The existence of this rule [unfair labor strikers are entitled to reinstatement] and the permanent replacement rule for economic strikes makes it difficult for either party to know its rights when the unions claim management has committed an unfair labor practice during an economic strike. The unions would claim that the strike was an unfair labor practice strike, and management would claim it was an economic strike. . . . Since the definition of an unfair labor practice is an uncertain matter, and since the NLRB and courts may not decide the case finally for years after the claimed violation, management and labor are forced to bargain about the strike settlement without knowing their precise legal relationship.  

\textit{Id.} (footnotes omitted).

\textsuperscript{137} Id. "A replacement rule which would apply equally to unfair labor practice and economic strikes is desirable." \textit{Id.}

\textsuperscript{138} Schatzki, supra note 8, at 487-88.

\textsuperscript{139} Weinstein, supra note 18, at 47.  

'[The ability to hire replacements] is probably the most critical element,' comments Martin F. Payson, a partner in the White Plains,
strike and then forbidding the employer from operating in any fashion would give the union too much power.\textsuperscript{140}

Another justification for MacKay stems from the employer's property rights.\textsuperscript{141} Shutting down an employer's business takes away his right to continue operations. Specifically, "[m]anagement has the right to attempt to continue the operation of its business when subjected to an economic strike. While the MacKay Court did not develop the origin of this right, it clearly flows from the 'right of property' guaranteed under both federal and state constitutions."\textsuperscript{142} Viewed from this vantage point, the MacKay doctrine does seem "ordinarily quite moral."\textsuperscript{143}

Business does not necessarily exclude the union's interests from consideration when deciding to continue operations during a strike. Despite labor's accusations to the contrary, management does not always desire to "bust" the union when it decides to hire permanent replacements.\textsuperscript{144} Factors such as competence of the union leadership, competitive conditions in the industry, economic survival of the company,\textsuperscript{145} and overall economic conditions in the country\textsuperscript{146} affect the employer's decision whether to replace striking workers. MacKay allows an

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\textsuperscript{140} Schatzki, \textit{supra} note 97, at 390-91.

\textsuperscript{141} Unkovic & Hardy, \textit{supra} note 102, at 63.

\textsuperscript{142} \textit{Id.}; see U.S. CONST. amend. XIV, § 1.


\textsuperscript{144} \textit{Id.}; see also Thompson, \textit{An Anti-Worker Labor Bill}, Wall St. J., Aug. 31, 1990, at A10, col. 4. "It is far more truthful to recognize that foreign competition and consumer demands compel management to take hard bargaining positions. American management can often no longer afford to shut down their companies' operations during strikes." \textit{Id.}

\textsuperscript{146} Unkovic & Hardy, \textit{supra} note 102, at 64-65.

\textsuperscript{146} Thompson, \textit{supra} note 144, at A10, col. 4. In today's economic climate "[r]ecession looms... [and] labor is obliged to come to the bargaining table in times like these ready to consider sacrifices." \textit{Id.}
employer to replace its striking workers when economic necessity so demands and it is therefore prudent to do so.

Prohibiting replacements per se might also burden the enterprise with harsh economic consequences.\textsuperscript{147} It is often in society's best interest to have a business continue operations during a strike. For example, continued operations would decrease the economic waste inherently caused by a strike.\textsuperscript{148} The employer may also face extinction if the strike continues for a long period of time (or even a short period of time in some instances).\textsuperscript{149} Closing a business permanently is not the best interest of either the strikers or the business and should be avoided. Finally, injury to society caused by closing certain businesses for any period of time is greater than the injury to the displaced workers who lose their jobs to replacements.\textsuperscript{150}

Furthermore, use of replacements is usually management's last resort because of problems it spawns. Thus, their use may not be as widespread or as vindictive as labor contends. Practical considerations keep employers from replacing their strikers for several reasons.\textsuperscript{151} First, hiring replacements almost guarantees a violent response from the union.\textsuperscript{152} Replacements also complicate settlement with the union since every union is going to demand reinstatement of all strikers at the end of the strike.\textsuperscript{153} In addition, even if settlement can be reached, relations will be strained at best between returning strikers and permanent replacements.\textsuperscript{154}

Industry is faced with other problems when trying to
hire permanent replacements to keep their doors open. One fear is getting inexperienced or inferior replacement workers. The quality of the work performed by replacements may be substandard compared with the work performed by more experienced workers and, thus, customers may turn elsewhere for their products. Hiring replacements also consumes a substantial amount of the employer's time and resources. Moreover, an employer's workforce is often as valuable to him as the plant and equipment which they use. Accordingly, given that employers have such difficulty using replacements and rely on them only as a last resort (much like the strike is a last resort for the union), it seems patently unfair to deny them this bargaining tool to counter powerful and destructive strikes.

V. Proposed Solutions and Compromises to the MacKay Quandary

The most drastic solution to the MacKay quandary proposed by legal commentators goes hand in hand with recently proposed legislation: abandon MacKay

155 Comment, supra note 10, at 883. “The expertise of the employees is often as crucial to the success of the business as more tangible assets such as plant and equipment.” Id.; see also Unkovic & Harty, supra note 102, at 66. (“Since [striking employees] includes persons in whom the company has large training and skill investment, it is very desirable from the company's point of view that these people return.”)

156 Castro, supra note 25, at 56.

157 Comment, supra note 10, at 883. “[T]o actually replace an entire workforce permanently is an extremely expensive and time-consuming task.” Id.


A strike denies the company the use of its productive equipment while overhead costs continue. In a sense that is by no means purely figurative, part of that production equipment consists of the strikers. The most advanced techniques of personnel selection, placement, and training have gone into getting them together and fitting them into management's grand design that makes the factory work as a whole a smooth, efficient apparatus of production. They represent the know-how that the company has developed over the years. The cost in time, money, and organizing efforts of replacing them at once would be staggering.

Id.
altogether. If the basic premise behind the MacKay decision is that employers must have the ability to hire permanent, as opposed to temporary replacements, then, at the very least, employers should have to prove their ability to survive in the event of a strike absent permanent replacements. An employer whose business would literally cease to exist should be allowed to hire permanent replacements. The costs to society are too high in that type of situation. Simply losing business, however, should not suffice because that is a purpose of a strike and does not justify replacing the strikers.

Proving that a business will fail unless permanent replacements are hired, however, is a difficult task. The NLRB would have to decide such intangibles as what constitutes a "serious threat" to the business, the availability of a temporary replacements, and the financial status of the employer. Further complicating the issue, the NLRB would be evaluating the situation after the strike. Thus, it is unlikely that any rational attempt can be made to determine whether an employer will be destroyed before the end of a strike, which means MacKay must either be reaffirmed or rejected.

Since it is questionable whether MacKay will be flatly overturned at this late date, other possible solutions

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159 Schatzki, supra note 97, at 392. Abandonment may be required because intermediate approaches are impractical.
160 Id. at 390. [Society has a considerable and legitimate interest in having the business continue during the strike. First, if the economic waste that all strikes produce can be avoided by allowing business to continue, surely there is something to be said for allowing replacements. Secondly, the employer may be threatened with extinction if the strike is prolonged, and that is a high price for the employer and society to pay. Moreover, the injury to society caused by destruction of the business usually will be considerably greater than the injury to society caused by the termination and resulting displacement of the strikers.
161 Id. at 390-91.
162 Id. at 392.
163 Id.
164 Id.
should be examined which deal with the operation of the rule rather than the rule itself. The use of temporary rather than permanent replacements is a suggested compromise.\textsuperscript{165} Another possibility is to institute a balancing test similar to the one set forth in \textit{Great Dane} and its progeny.\textsuperscript{166} A final solution would be amendment of the NLRA.\textsuperscript{167}

Use of temporary replacements rather than permanent ones is a valid option assuming that employers can lure away workers without offering job security. Many of the companies in the Wharton study discussed earlier used only temporary replacements and successfully continued operations during their strikes.\textsuperscript{168} Moreover, no empirical studies exist that probe whether temporary replacements will suffice, which suggests that the possibility of using provisional replacements should not be completely discounted.\textsuperscript{169} Even sharp critics of \textit{MacKay}, however, will admit that under certain circumstances it is necessary to use permanent, as opposed to temporary, replacements.\textsuperscript{170} Even so, these categories of employers do not justify the broad scope of the rule and the refusal to force employers to rely more upon temporary replacements.\textsuperscript{171}

If use of temporary replacements is not a realistic option in most circumstances, an alternative solution is to apply a balancing test similar to the one employed in \textit{Great Dane} to limit \textit{MacKay}.\textsuperscript{172} \textit{Great Dane} balances the needs of the employer to maintain operations during a strike with the employees' rights to strike. If the employer's actions are “inherently destructive” of the employee's rights, the Board can find a violation of section 8(3) without the req-

\begin{footnotesize}
\begin{enumerate}
\item[165] \textit{Id.} at 391.
\item[166] Gillespie, \textit{supra} note 94, at 784.
\item[167] See \textit{infra} notes 216-218 and accompanying text for a discussion of this option.
\item[168] C. Perry, \textit{supra} note 102, at 65.
\item[169] Comment, \textit{supra} note 10, at 882. Note, however, that this lack of statistical information does not by itself disprove the \textit{MacKay} thesis. \textit{Id.} at n.161.
\item[170] Schatzki, \textit{supra} note 97, at 384.
\item[171] \textit{Id.} at 385.
\item[172] Gillespie, \textit{supra} note 94, at 784.
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\end{footnotesize}
uisite antiunion intent. If the employer only slightly harms the employee's rights and has a "substantial business justification" for the infringement, the Board must find antiunion motivation for an 8(3) violation.

The Great Dane test protects the interest of both business and labor in a reasonable manner, unlike MacKay's broad, overarching approval of permanent replacements. Under Great Dane, if the employer faces dire economic circumstances or if the employer is in an industry whose shutdown would cause great harm to the public, permanent replacements are allowed. On the other hand, the striking employees are not threatened with unnecessary replacement on a permanent basis. Their bargaining power is thus enhanced, but not at the expense of their employer's business interests.

A final solution to the problems caused by the use of permanent replacements is a bill currently before the House and Senate which threatens to overturn MacKay. The bill, S. 551 and H.R. 5, is sponsored in the Senate by Senator Howard Metzenbaum (D-Ohio) and in the

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174 Id.
175 102d Cong., 1st Sess. (1991). The bill as it stands before the Senate reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled,

Section 1. Prevention of Discrimination During and at the Conclusion of Labor Disputes.

Section 8(a) of the National Labor Relations Act (29 U.S.C. 158(a) of the National Labor Relations Act (29 U.S.C. 158(a)) is amended—

(1) by striking the period at the end of paragraph (5) and inserting "; or"; and

(2) by adding at the end thereof the following new paragraph:

"(6) (i) to offer, or to grant, the status of a permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute; or

(ii) to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a labor dispute over an individual who—

(A) was an employee of the employer at the commencement of the dispute;

(B) has exercised the right to join, to assist, or to engage in other concerted activities for the purpose of collective bargaining or
House of Representatives by Representative Bill Clay (D-Mo.). The bill will amend the NLRA to provide that any time two or more workers leave the job to protest terms or conditions of employment, the employer must rehire them in the same position and any replacements hired in their place must be fired. The legislation is the "top priorit[y]" of the Teamsters Union and is supported in concept, if not in detail, by other unions, including the Air Line Pilots Association. The bill presently "ap-

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other mutual aid or protection through the labor organization involved in the dispute; and

(C) is working for, or has unconditionally offered to return to work for, the employer."

Section 2. Prevention of Discrimination During and at the Conclusion of Railway Labor Disputes.

Paragraph Fourth of section 2 of the Railway Labor Act (45 U.S.C. 152) is amended—

(1) by inserting "(a)" after "Fourth."; and

(2) by adding at the end the following:

"(b) No carrier, or officer or agent of the carrier, shall—

(1) offer, or grant, the status of a permanent replacement employee to an individual for performing work in a craft of class for the carrier during a dispute involving the craft or class; or

(2) otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed, during a dispute over an individual who—

(A) was an employee of the carrier at the commencement of the dispute;

(B) has exercised the right to join, to organize, to assist in organizing, or to bargain collectively through the labor organization involved in the dispute; and

(C) is working for, or has unconditionally offered to return to work for, the carrier."

Id.


177 Miller, supra note 33, at 56. "Under terms of the legislation . . . any time two or more workers walk off the job to protest conditions . . . they'd have to be rehired at the same level. Replacements would have to be fired." Id.

178 The Teamsters will also withhold contributions from any politician who does not sign as a co-sponsor of the bill. Teamsters Head McCarthy Takes Firm Stand on Striker Replacement Bill, 236 BNA DAILY LAB. REP., Dec. 7, 1990, at A-7.

179 Id.

180 See ALPA Supports Bill to Prohibit Permanent Hiring of Replacement Workers, 300 AVIATION DAILY 463 (1990). The airline industry, however, unalterably opposes the legislation. A study introduced by the Air Transport Association states that over eighty percent of its members' pilots, flight attendants, and mechanics are unionized. The study also reveals that the industry has endured seven strikes
pears to be sliding through Congress along party lines, but faces probable veto should it reach the White House.”

Business leaders vehemently oppose the Metzenbaum/Clay legislation, arguing that it would be a “radical departure from existing law that would shift the delicate balance of power in labor disputes in favor of unions” and would force businesses to “accede to union demands or curtail or cease operations.” Some smaller, more vulnerable businesses may even “disappear from the horizon” if the bill becomes law. An absolute ban on permanent replacements would put a “mighty sword in the hands of labor and dent or destroy the shield of employers.” Furthermore, the underlying purpose of the legislation is simply to increase union power since the bill would take away the employer’s only effective weapon against union’s unreasonable demands. As such, the

since 1981, and that permanent replacements were utilized in five of those strikes. The study indicates that, for a major carrier with a strong financial position, a strike without the use of permanent replacements could bankrupt a carrier in as little as nine months. Robert Aranson, President of the Air Transport Association, believes the bills would remove an airline’s ability to control its labor costs, thus forcing consumers to take resulting fare increases “on the chin” and returning the country to the “jet set days.” 


White House Confrontation Expected on Striker Replacement Bill, 6 REGIONAL AVIATION WEEKLY Apr. 19, 1991 at 143.

Miller, supra note 33, at 56. (comments from the U.S. Chamber of Commerce and the National Association of Manufacturers).


Thompson, supra note 145, at A10; see also House Hearing, supra note 9, at 25 (testimony of Hon. Harris W. Falwell).

[W]hen we say that an employee can’t be fired for exercising his right to strike, which we all would agree should be the law and is the law: but consider an economic strike, where the issue is whether the company can afford the union’s demands and has, in good faith, a
bill is "hostile to business, American competitiveness and the individual worker."  

Passing this legislation poses the danger of dramatically increasing the use of strikes and putting the union's interest above that of the shareholders, creditors, customers and the workers themselves.

Labor, on the other hand, lauds the legislation, stating that the use of permanent replacements "has tilted the balance in collective bargaining negotiations towards employers, making it easier for them to engage in surface or sham bargaining . . . [and to] bust labor unions."  Furthermore, Thomas Donahue, Secretary-Treasurer of the AFL-CIO, argues that MacKay poisons the entire collective bargaining process and that H.R. 5/S. 55 is necessary to bring equity back into the system and to save the strike from extinction.  To emphasize their stance and to garner votes for the upcoming House vote, organized labor has "launched an intensive, grass roots lobbying campaign" in support of the bill.

Both labor and industry are probably overly apocryphal in their predictions. H.R. 5 and its Senate counterpart, however, do threaten to realign power between labor and management. Whether the bill can pass or withstand an almost guaranteed presidential veto remains to be seen. The increasing tension between business and labor on the issue, however, makes it clear that, whatever the outcome of the vote on H.R. 5, the issue will arise again in the near future.

different view as to the economic effects if they were to accept the demands, keeping in mind that they have responsibilities to a board, to stockholders, to other employees that more and more whom are now, in this day and age, not union.

Id.

Id.

Id.

Miller, supra note 33, at 56 (comments of Owen Bieber, president of the United Auto Workers).

House Hearing, supra note 9, at 7.


Miller, supra note 183, at 66.
VI. THE STATE OF THE UNION WITH AND WITHOUT THE MacKay RULE

The full force of the MacKay rule's effect on labor has only been felt in the last decade.¹⁹² Until recently, "most companies, fearing reprisals, shunned [replacements] like lepers . . . ."¹⁹³ Even steel magnate Andrew Carnegie refused to hire replacements stating "[t]o expect that one dependent on his daily wage for the necessaries of life will stand by peaceably, and see a new man employed in his stead is to expect much. . . . Calling upon strange men should be the last resort."¹⁹⁴ Mr. Carnegie spoke prophetic words. For just one example, look to the violence that has plagued the Greyhound strike since its beginning; much of it has been linked to the companies' aggressive use of replacement workers.¹⁹⁵

For better or worse, industry's use of replacements is unwavering and absent specific statutory intervention by Congress, the MacKay rule will govern the issue.¹⁹⁶ Two important factors in the labor management equation thus remain: 1) the viability of the strike as a labor tool, and 2) the degree of influence exerted by unions stripped of their most formidable bargaining weapon. The impact of these factors on the overall equation depends, of course, upon which of the parties answers the question. The unions object to a loss of power while business leaders

¹⁹² J. GETMAN & B. POGREBIN, supra note 14, at 140. "Until quite recently the right to permanently replace has not been widely used and striking employees have sometimes been unaware of their legal jeopardy." Id.
¹⁹³ Samborn, supra note 4, at 1.
¹⁹⁴ Id. at col. 2.
¹⁹⁵ Id. at 28, col. 1.
One has to look no further than the often violent bus strike by more than 9,400 members of the Amalgamated Transit Unions to find an example of the robber baron's concern being realized. . . . Violence during the Greyhound strike can be explained as "either coincidence or strike-related, and it's hard to stretch coincidence so far," says John W. Noble, Jr., a management attorney. Id. at 1, col. 2.
¹⁹⁶ "The Supreme Court in several decisions has reaffirmed Mackay Radio, . . . . Also . . . Congress has unequivocally ratified the ruling . . . . It is simply too late in the day to reopen Mackay Radio." Estreicher, supra note 37, at 289.
maintain that the *MacKay* doctrine balances the overall ledger between the sides. Underlying these surface arguments, however, are two broader issues. First, the possibility that the union have lost their effectiveness, and second, that even if the unions continue to play an important role, perhaps it can or should do so without the strike.

Membership in labor unions peaked in 1954 when more than thirty-eight percent of the working force were members.\textsuperscript{197} By 1980, an estimated twenty-one percent of the private work force placed membership in a union\textsuperscript{198} and it is estimated that the number has dropped further since then.\textsuperscript{199} Additionally, the Bureau of Labor Statistics reports that during the 1970's there was an average of 289 strikes per year involving at least 1,000 workers each and in the last five years that average has dropped to 52.\textsuperscript{200} One commentator postulates that "[t]hese are bad times for unions. Union membership is in decline . . . and unions continue to lose an increasing number of strikes."\textsuperscript{201}

The union as an organization may be an anachronism which served its primary purpose many years ago. Certainly the Supreme Court’s labor decisions in the past half-century do not demand this conclusion, but with the strife plaguing organized labor since the early 1980's, it seems questionable whether unions in their present form will exist by *MacKay*'s one hundred year anniversary. If unions are still necessary, the next question is whether the strike as an effective labor tool is obsolete.\textsuperscript{202}

\begin{footnotes}
\item[198] Id.
\item[200] Samborn, *supra* note 4, at 29, col. 1.
\item[202] Swoboda, *Unions Rethinking Role of the Strike*, Wash. Post, Mar. 18, 1990, at H3, col. 3. "After a decade of watching members permanently lose their jobs to nonunion 'replacement' workers, the nation's labor leaders are seriously rethinking the role of the strike. More and more, unions are beginning to view the strike as a weapon of last resort." \textit{Id.}
\end{footnotes}
Strikes take a hefty toll on both the labor unions and the businesses they affect. 203 Considering that the Supreme Court has steadily diminished the strike's power base over the past fifty-three years, one wonders if the risks and benefits of striking are still beneficial. Certainly the stakes are higher now for both parties involved. The United States is now part of a global business community haunted by fierce competition, making it questionable whether a strike can serve its purpose to win concessions from the employer. 204 But just as permanent replacements are not the only arrow in business' quiver, neither is the strike the last resort left to labor.

Labor unions are using strikes less frequently today than in the past. 205 In industries where a ready labor supply is available, it is difficult to strike effectively because of replacement use. 206 Moreover, there is a growing trend in labor to use creative methods of solving labor-management problems. 207 Use of non-traditional strikes, 208 boy-

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203 Weiler, supra note 22, at 388. “Indeed, having employees suffer the economic pain of a lost paycheck is an inherent feature of the strike weapon.” Id.; see also Samborn, supra note 4, at 28. “‘It may appear that management has leverage, but nobody wins in a strike situation,’ says Mr. [Robert Lee] Ballow, who currently is representing the New York Daily News in negotiations with several of its 10 unions that have been working without a contract since March 30.” Id.

204 Samborn, supra note 4, at 28.

Companies are recognizing that an international economy, coupled with the deregulation of many domestic industries, requires being competitive, particularly in labor costs. . . . The historical union response to almost any management request for a concession remains the threat of a strike. However, strikes which unions have used successfully for decades, are losing the potency that they once enjoyed. Shutting down a company, much less whole industries, is now almost impossible.


206 Id.

207 Id.

208 Id. One example is the union’s strategy at Hartson Medical Services. They planned a strike, but to keep the ambulances running for the community agreed to offer city residents ambulance services on a voluntary basis. Hartson would lose money because the union would not work for them directly, but the city would not lose ambulance services. The union did not have to carry out its plan. Id.
cotts, work-by-the-rule concepts\textsuperscript{209} corporate buyout plans,\textsuperscript{210} and the corporate campaign\textsuperscript{211} are among the new techniques unions endorse since strikes are now effectively impotent.

Unions' continued effectiveness may depend upon de-emphasis of the strike and increased reliance upon these alternate methods. The strike has always been the powerhouse in labor's arsenal, but now some labor leaders see it as "suicide."\textsuperscript{212} Several factors influence the new attitude, including: an increasingly global market where companies export jobs to countries with cheap labor; and, a hostile, anti-labor political climate which surfaced in the 1980's under Reagan and which continues today as evidenced by conservative appointments to the NLRB and federal courts.\textsuperscript{213} Robert Turcotte of the International Association of Machinists and Aerospace Workers states that labor "[has] nothing to bargain with now. Labor has an empty gun."\textsuperscript{214} It also seems that for "more and more workers, the time-honored concept of labor unity means sharing that pain without the gains."\textsuperscript{215}

\section*{VII. Conclusions and Recommendations}

If the strikes at Greyhound, Eastern Airlines, and the Daily News are any indication, resolution of the permanent replacement workers debate is imperative. The fight is impassioned on both sides with both labor and industry presenting valid points for consideration. Several commentators have proposed solutions and compromises.

\textsuperscript{209} Id. A work-by-the-rule plan instructs workers to only do tasks specifically required in their job descriptions. \textit{Id.}
\textsuperscript{210} Id. Some unions buy shares to exercise influence in the company. \textit{Id.}
\textsuperscript{211} Castro, \textit{supra} note 25, at 57. The corporate campaign entails bringing pressure on customers, outside corporate directors and political leaders. One example is at Midland Steel Products in Cleveland, Ohio where replaced United Auto workers members are visiting customers like General Motors and Navistar to argue that Midland Steel's quality has deteriorated since they were replaced. \textit{Id.}
\textsuperscript{212} Id. at 56.
\textsuperscript{213} Weglarz, \textit{supra} note 202, at 18.
\textsuperscript{214} Castro, \textit{supra} note 25, at 56.
\textsuperscript{215} Id. at 59.
which attempt to ensure involved parties are treated equitably. What is important to bear in mind is labor's goal from the outset: fair representation and the right to organize without fear of reprisal.

Unfortunately for labor, the business atmosphere in this country has changed dramatically during the past half-century. The American economy is driven by the service, rather than the manufacturing industry; global competition is entrenched; and, it is extremely difficult to incapacitate a given American industry by striking. Realizing this, labor is decreasing its reliance on the strike, instead using unorthodox tactics in an attempt to stimulate sagging union membership, and trying novel ways to put economic pressure on employers.

The MacKay doctrine is unlikely to be overturned. It has survived fifty years of "Congresses [which] have repeatedly turned back efforts to overthrow" it. A compromise, therefore, seems to be the best answer. A promising solution exists in H.R. 2620, sponsored by Rep. William F. Goodling (R-Pa.). H.R. 2620 proposes allowing the use of permanent replacements only after a certain amount of time passes after a strike begins. This solution addresses the concerns of both labor and industry. Unfortunately, the House Education and Labor Committee rejected an almost identical version of H.R.

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216 Sheets, Labor's Agenda for the '90's, U.S. News & World Rep., Mar. 19, 1990, at 57. "Hoping to reverse the trend [of declining membership], unions have begun to offer prospective members a variety of consumer services ranging from low-cost credit cards and life insurance to mail-order prescription plans." Id.

217 See supra note 202-208 and accompanying text for a further discussion.

218 Seligman, supra note 143, at 112.

219 Goodling Introduces Substitute to Striker Replacement Legislation, Daily Labor Rep. (BNA) No. 115, at A-3 (June 14, 1991). The bill prohibits the recruiting and hiring of permanent replacements for the first eight weeks of a strike. H.R. 2620 further requires bargaining unit approval in a secret ballot for strikes by a majority. Finally, the bill amends the Taft-Hartley Act by extending the time from 12 to 18 months in which strikers are eligible to vote in representation elections after a strike begins and by calling for the National Labor Relations Board to reduce delays in case processing after a strike. Id.
2620 when it approved H.R. 5 in April 1991. The Goodling proposal, however, deserves attention.

The bill provides labor with sufficient bargaining power to make a strike worth risks involved. For a period of time, labor would have free reign to set forth their demands with no threat of losing their jobs. A solution of this sort might actually shorten strikes. If both sides realize use of permanent replacements is on the horizon, mitigation of the strike would be expeditiously pursued. Labor should be motivated to settle before job loss becomes a serious threat and business should want to settle before they are forced to hire and train replacements, thereby incurring heavy economic costs and jeopardizing future relations with their bargaining unit.

The Goodling legislation would also benefit business because it protects the enterprise from being destroyed, which could result if hiring replacements per se was outlawed. Furthermore, nothing in the bill forbids the use of temporary or managerial personnel replacements to continue operations, another strength for the employer without a concurrent drain on labor's power. The employer would incur less outrage among its union members if they knew the employer will bargain in good faith and will not attempt to replace them.

Furthermore, the Goodling legislation addresses industry's fear of giving labor the upper hand by permitting use of permanent replacements if and when all compromise efforts fail. The labor union is similarly under duress to bargain. The union members may even be under more pressure to bargain knowing that stonewalling on their part only brings them closer to being permanently replaced. Thus, this legislation serves to better facilitate the bargaining relationship without diminishing either party's power.

Labor must understand that its ability to stay in power

220 Id. Goodling will likely introduce H.R. 2620 as a substitute for H.R. 5 on the House floor if the Rules Committee allows amendments. Id.
221 Id.
and influence industry will depend on a shift in attitude. Long gone are the days when labor could expect to have industry give in to the majority of its demands. Most likely, the union can continue to be a viable organization as the year 2000 draws closer; the question remains, however, in what form will the union survive. Workers will always need a voice to protect themselves and improve their working conditions. At this juncture, however, American labor must understand that its glory days are quickly diminishing. Its impact may be limited since the market has become globalized, competition brutal, and traditional labor dispute tools are beginning to backfire on the workers they were designed to protect.

Both manufacturing and service industries, on the other hand, need to rethink how they treat their employees as the turn of the century draws near. Business leaders should consider the disastrous effects that the use of replacement workers has on employees' lives and morale. Employers should contemplate the importance of the human factor in their workforce. Replacing loyal, long-term employees who strike is a drastic solution to a temporary problem. The amount of time and money spent training employees and instilling company loyalty are considerations to ponder before replacing them with newcomers.

_MacKay_ will probably not be overturned. Besides, it is questionable whether overruling _MacKay_ is the best available alternative. Other solutions exist, however, and it is up to the creativity and wisdom of Congress to implement a compromise package that accomplishes the NLRA goal: place the power equally in the hands of labor and industry and allow for the speedy and fair resolution of labor disputes.