

Blunted by the Board: NLRB Weakens Employer's Right to Permanently Replace Strikers

Labor & Employment Law Update

By Beverly Alfon on June 30, 2016

For more than 75 years, employers have had broad access to a powerful weapon to counterbalance a union's ability to engage in an economic strike: the right to permanently replace those economic strikers. On May 31, however, the National Labor Relations Board (NLRB) replaced that powerful weapon with a water gun. In a 2-1 decision, the NLRB held that despite the economic nature of a strike, an employer violated the National Labor Relations Act (NLRA) by permanently replacing strikers because the employer was motivated by "a purpose prohibited by the Act." *American Baptist Homes of the West*, 364 NLRB No. 13 (May 31, 2016). This ruling effectively overruled long-standing NLRB case law which stood for the principle that employer motive to permanently replace strikers is irrelevant in the context of an economic strike.

In this case, the union and employer were engaged in contract negotiations for 4 months before the union issued a notice of intermittent strike (5 days). Picket signs confirmed that the union was striking over economics: health care and pension. After day one of the strike, the employer exercised its right to permanently replace a majority of the economic strikers. In finding that the employer violated the Act, the NLRB focused on the following facts:

- The individual who made the decision to hire the permanent replacements admitted that she was motivated by her desire to avoid another strike at the facility. She "assumed that because these people [temporary workers who the Company extended the permanent job offers to] were willing to work during this strike, they'd be willing to work during the next strike."
- When the union's attorney asked the employer's attorney for an explanation for the permanent replacements, he replied that the employer "wanted to teach the strikers and the Union a lesson."

If this Board decision is upheld by the Courts, it will likely result in a marked shift of power at the bargaining table that will empower unions to use the leverage of a strike (including intermittent strikes) with less risk to its members, while weakening the employer's ability to use the leverage of permanent replacements. As described by the dissenting NLRB member, this decision is "a substantial rearrangement of the competing interests balanced by Congress

when it chose to protect various economic weapons, including the hiring of permanent replacements.”

Bottom line: Since March 2016, NLRB charges involving allegations of unlawful motive in the permanent replacement of economic strikers have been subject to heightened scrutiny. NLRB regional offices are required to send these cases up to the NLRB’s Division of Advice in Washington, D.C. for “centralized consideration.” Accordingly, any employer who may consider permanent replacement of economic strikers should consult with counsel to ensure there are legitimate business reasons to defend the decision to permanently replace strikers.

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