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REPLACING STRIKING EMPLOYEES BECOMES EVEN MORE RISKY – NLRB CHANGES THE PLAYING FIELD

For nearly 68 years, the general understanding was that in collective bargaining, both sides have access to weapons in the game of economic warfare. Unions and employees have the right to strike, and employers have the right keep the doors open by replacing the striking employees – either temporarily or permanently. There were exceptions of course. Unions and employees were not allowed to engage in sit-down strikes. Employers were not allowed to permanently replace strikers who were protesting unfair labor practices. Indeed, it has long been the law that unfair labor practice strikers were entitled to reinstatement (even if replaced) if they were to unconditionally offer to return to work. Strikers who were engaging in an economic strike (as opposed to an unfair labor practice strike) had no right to be reinstated if they had been permanently replaced (as opposed to temporarily replaced). In a 2-to-1 decision handed down on May 31, the NLRB has significantly changed that long-held understanding and has shifted the playing field to the advantage of unions, according to the strong dissenting member.

HIRING PERMANENT REPLACEMENTS TO "TEACH THE STRIKERS AND THE UNION A LESSON"

This case began in 2010 where the employer, a continuing care facility, and its union were engaged in tense collective bargaining for a new contract. The union threatened to strike and then made good on that promise. The employees carried picket signs referring to wages, pensions and health care reductions. There was no indication that the strike was about anything other than economics. In other words, the strike was not an unfair labor practice strike. At the outset of the economic strike, employer representatives commented that permanent replacements would be hired because it would be too costly if the union were to strike in the future to hire temporary replacements through a temporary agency. The employer's attorney, in commenting to the union's attorney, also said that the employer "wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught."

PERMANENTLY REPLACED ECONOMIC STRIKERS DENIED REINSTATEMENT

The strike eventually ended, and the strikers sought to return to work. However, only the strikers who had been temporarily replaced were reinstated. The permanently replaced economic strikers were put on a preferential hiring list for future openings. The union filed an unfair labor practice charge alleging, among other things, that the permanent replacements were hired to restrain strikers from exercising their protected rights. In 2011, the administrative law judge recommended dismissal of the charge. Relying on long-established precedent, the judge concluded that the employer's motivation for permanently replacing the strikers – to teach the strikers "a lesson" and ensure that employees would not strike again – was related to the underlying strike and, therefore, did not constitute an "independent unlawful purpose."

EMPLOYER MOTIVATION IN HIRING PERMANENT REPLACEMENT IS NOW KEY

Now, five years after the judge's recommendation to dismiss the charge, the NLRB decided that the administrative law judge was wrong. The two members of the Board held that an employer's motivation in hiring permanent replacements is the key regardless of its relationship to the strike or on going collective bargaining. From now on, according to the NLRB, an employer will be found in violation if the hiring of permanent replacements was motivated by a purpose prohibited by the NLRA. In this case, which spanned six years, the NLRB ordered the employer to reinstate any striker who was denied a position due to a permanent replacement and to make those strikers whole with the payment of back pay going back to 2010.

The dissenting member found fault with his colleagues' interpretation of existing precedent and expressed concern about the future of labor relations that had been so finely balanced by Congress when the NLRA was passed. He states that "…the majority's subjective standard will effectively preclude many employers from using permanent replacement as a legitimate economic weapon, contrary to Supreme Court precedent stretching back almost to the enactment of the Wagner Act itself. Any stray comment that reflects negativity towards strike participants—whether made by an executive, manager or supervisor—could create a risk of potentially ruinous financial liability. The risk of such liability will no doubt sharply curtail the lawful use of permanent replacement as a legitimate economic weapon."

HEADS-UP FOR EMPLOYERS

This case is another in a line of cases where the NLRB has taken an opportunity to re-interpret long-standing precedent. For employers, unionized or not, great care must be taken to ensure that the reasons expressed for hiring permanent replacement workers during a strike or walkout over economic issues don't suggest a desire to restrict employee rights to engage in protected activity, including strike activity. The standard, based on subjective motivation, opens employers up to substantial risk in deciding to hire permanent replacements and denying reinstatement if the strikers ask to return. If the employer's motivation is questionable then back pay looms large. As the dissenting member points out, prudence might indicate use of temporary replacements instead of permanent replacements in response to an economic strike. Unfortunately for employers, that is a risk that need not have been weighed over the past six decades.

Reference: American Baptist Homes of the West d/b/a Piedmont Gardens and Service Employees International Union, United Healthcare Workers-West; (NLRB May 31, 2016).

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