# Severance of Bargaining Relationships During Permanent Replacement Strikes and Union Decertifications: An Empirical Analysis and Proposal to Amend Section 9(c)(3) of the NLRA

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## INTRODUCTION

Strikes in which employers hire or threaten to hire replacements have received much attention lately. The 1995 baseball season nearly opened with replacements.[1] In both 1992 and 1994, Congress came close to enacting a law prohibiting employer hiring of permanent striker replacements.[2] In the aftermath of this failed legislation, President Clinton signed a controversial

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[1] Silverman v. Major League Baseball Player Relations Comm., Inc., 880 F. Supp. 246, 252 (S.D.N.Y. 1995).

[2] The Workplace Fairness Act would have made it unlawful for an employer "to hire a permanent replacement for an employee" who was an employee of the employer at the commencement of the dispute and who has exercised the right to engage "in concerted activities for the purpose of collective bargaining or other mutual aid or protection through" the labor organization involved in the dispute. The Act would also have made it unlawful to withhold any other employment right to such an employee in favor of a replacement if the employee had unconditionally offered to return to work. H.R. 5, S. 55, 103d Cong., 1st Sess. (1993). The legislation was slowed in the Senate in 1991 by an anticipated filibuster. *Striker Replacement Bill Faces Uncertain Future in Senate,* Daily Lab. Rep. (BNA) No. 143, at A-17 (July 25, 1991). Consequently, S.55 was not brought before the full Senate until nearly a year later. President Bush's administration dampened prospects for passing the bill by threatening to veto it. *Administration Policy Statement on S.55 Workplace Fairness Act,* Daily Lab. Rep. (BNA) No. 112, at F-1 (June 10, 1992). The Administration stated that the bill "would destroy a prime component of the economic balance between labor and management in collective bargaining." *Id. See also Defeat of Striker Replacement Bill a Victory for Business Coalition,* Daily Lab. Rep. (BNA) No. 133, at AA-1 (July 14, 1994); *Senate Vote to End Filibuster on Striker Replacement Fails 53-47,* Daily Lab. Rep. (BNA) No. 132, at AA-1 (July 13, 1994).

executive order subjecting most federal contractors to debarment if they hire permanent striker replacements.[3] Academics have written much about these strikes.[4]

During this period, much has also been written about the decline of American labor unions. There has been open speculation concerning the continuing relevance of unions.[5] Even labor leaders fueled this speculation in 1995 by publicly feuding over the presidency of their federation, the AFL-CIO, for the first time this century,[6] and by merging the Auto Workers, Steelworkers, and Machinists in response to falling membership rolls.[7] Declining union membership has resulted in part from unions' relatively poor performance in representation elections,[8]

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[3] Exec. Order No. 12,954, 60 Fed. Reg. 13,023 (1995). Employers are currently challenging this Order. *See* Chamber of Commerce of United States v. Reich, 57 F.3d 1099, 1101 (D.C. Cir. 1995) (ruling that employers met fitness and hardship requirements for standing to sue).

[4] *See, e.g.*, Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 421 (1992) ("[I]t is clear that the *Mackay Radio* decision severely undermined the statutorily protected right of employees to strike."); Daniel Pollitt, Mackay Radio*: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295, 306 (1991) ("[T]he *Mackay Radio* doctrine is an increasingly effective tool with which employers can undermine employees' efforts to organize themselves and to meaningfully bargain with their employer."); Note, *One Strike and You're Out? Creating An Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669, 674 (1993) ("Employers currently abuse the right of hiring permanent replacements in order to rid themselves of unions, thus destroying the benefits that unions provide.").

[5] *See, e.g.*, Robert L. Rose, *Labor: New Labor Chief's Top Job: Resuscitation*, WALL ST. J., Oct. 23, 1995, at B1 (reporting Professor Leo Troy's observation that "[i]ndividual leadership can't overcome the economic forces and the market forces working against unionism around the world"); *Uncle Sam Gompers*, WALL ST. J. , Oct. 25, 1995, at A14 ("The real meaning of this labor fight is the ongoing union evolution from a movement that represented working folk of all stripes into one that is more and more a spokesman for government employees.").

[6] *See* Warren Cohen, *What Have You Done For Us Lately? Labor's New Leaders Confront Old Problems; Is the Party Over?*, 119 U.S. NEWS & WORLD REP. 40, 40 (1995); John Hoerr, *A Kinder, Gentler Labor That Will Fight*, NEWSDAY, Nov. 2, 1995, at A51; Robert L. Rose & Asra Q. Nomani, *AFL-CIO Fight for Presidency Becomes Bitter*, WALL ST. J. , Oct. 25, 1995, at A4.

[7] *See* Stephen Franklin, *Will Unions' Merger Build Clout or Mask Problems? Steelworkers, Machinists, UAW to Unite by 2000*, CHI. TRIB., July 28, 1995, at 1 (reporting that Auto Workers membership fell from 1.5 million in 1979 to 800,000 in 1995, Machinists membership fell from 1.2 million in 1967 to 490,000 in 1995, and Steelworkers membership fell from 1.3 million in 1974 to 700,000 in 1995).

[8] *See* Gary N. Chaison & Dileep G. Dhavale, *A Note on the Severity of the Decline in Union Organizing Activity*, 43 INDUS. & LAB. REL. REV. 366, 369 tbl. 1, col. 2 (1990) (Union Orgainizing Activity and Success in NLRB Representation Elections, 1975-87, Number of Elections in New Units). Union representation elections for new units fell from 7,093 in

and also from a sharp increase since the early 1970s in elections to decertify unions as employee representatives.[9]

This Article presents what may be the first study establishing an empirical relationship between these decertification elections and strikes involving permanent replacements. Its primary contribution is the identification and analysis of 114 strikes in which employers hired permanent replacements while also attempting to sever a bargaining relationship with a union (hereinafter referred to as replacement-severance strikes).[10]

The empirical findings lead to the conclusion that at least some employer hiring of permanent striker replacements is related to a more general strategy of decertifying unions and support union claims that employers have turned the strike weapon against them.[11] Thus, not only may strikers be permanently replaced, but in addition, their unions — and with these unions, striker voices — may be permanently silenced.

This Article relates these findings to section 9(c)(3) of the National Labor Relations Act (NLRA).[12] When that provision was enacted in 1947, it completely barred all replaced economic strikers from voting in a union decertification election. Congress amended this law in 1959, in response to bipartisan suggestions that this provision encouraged employers to engage in "union-busting" practices. The amended policy, still in effect, permits replaced economic strikers to vote in a union decertification election occuring within one year of the beginning of a strike.

Based on its empirical findings, this Article suggests that the one-year voter eligibility rule should be repealed so that replaced economic strikers would be eligible to vote with the workers who replaced them. The reason for this proposed amendment to the NLRA is that the evidence suggests that employers are prolonging replacement strikes beyond the first

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1975, 8,054 in 1976, and 8,212 in 1977, to 3,582 in 1985, 3,429 in 1986, and 3,331 in 1987. *Id.*

[9] *See infra* note 201.

[10] *See infra* Appendix for a complete list of these cases.

[11] *See Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland*, Daily Lab. Rep. (BNA) No. 114, at E-1 (June 12, 1992) ("Employers with the power to hire permanent replacements have little incentive to negotiate a decent contract. Why bother with collective bargaining when you can provoke a strike by union workers and then permanently replace them with a lower-paid, non-union work force?").

[12] 29 U.S.C. § 159(c)(3) (1994).

anniversary of a strike's inception. Under current law, these employers are entitled to a union decertification election in which all the replaced strikers are ineligible to vote.

## I. BACKGROUND

### *A. The Decline in Strike Activity and the Factors Contributing to It*

American labor unions have declined steadily since 1954, when union membership as a percentage of the non-agricultural labor force peaked at 34.7%.[13] This decline continued through the 1980s, when the percentage of workers who were union members dropped in every private sector of the economy.[14] Unions lost public acceptance in the late 1970s and early 1980s, and have failed to recover much of it.[15] More recently, they have lost electoral[16] and legislative[17] influence.

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[13] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2070, HANDBOOK OF LABOR STATISTICS 412 tbl. 165, col. 7 (1980) (Union Membership as a Proportion of the Labor Force, 1930-78, Membership Exclusive of Canada as a Percentage of Employees in Nonagricultural Establishments). Union membership dropped to about 16% in 1993. *See Union Membership: Data for 1994 Shows Membership Held Steady at 16.7 Million*, Daily Lab. Rep. (BNA) No. 27, at D-1 (Feb. 9, 1995) (reporting results of Bureau of Labor Statistics study showing that union membership as proportion of labor force continued to decline, from 15.8% in 1993 to 15.5% in 1994). Professor Leo Troy has observed that "'(i)n the case of the private sector, there has been an uninterrupted decline since 1953 in the percentage of workers organized.'" *Id.*

[14] *See* Gary N. Chaison & Joseph B. Rose, *The Macrodeterminants of Union Growth and Decline*, *in* THE STATE OF THE UNIONS 3, 15 tbl. 1, col. 3 (George Strauss et al. eds., 1991). Professors Chaison and Rose report that between 1980 and 1989, the proportion of workers represented by unions dropped in all private sectors of the economy, from 32.0% in mining to 17.5%, from 30.9% to 21.5% in construction, from 32.3% to 21.6% in manufacturing, from 48.4% to 31.6% in transportation, communications, and utilities, from 10.1% to 6.3% in wholesale and retail trade, from 3.2% to 2.3% in finance, and from 8.9% to 5.8% in services. *Id.* tbl. 1, cols. 1, 2.

[15] *See* Pamela Mendels, *Labor in the 90s: A Special Report*, NEWSDAY, Sept. 7, 1992, at 21 (reporting that Gallup Poll approval ratings of unions peaked in 1957 at 76%, dipped to 55% in 1979 and 1981, and then rose slightly to 60% by 1991).

[16] *See* Robert Axelrod, *Where the Votes Come From: An Analysis of Electoral Coalitions, 1952-1968*, 66 AM. POL. SCI. REV. 11, 15 (1972); David B. Patton & John J. Marrone, *The Impact of Labor Endorsements: Union Members and the 1980 Presidential Vote*, 9 LAB. STUD. J. 3 (1984); David B. Patton et al., *Unions and Politics: 1984 and Beyond*, *in* INDUSTRIAL RELATIONS RESEARCH ASS'N, PROCEEDINGS OF THE THIRTY-EIGHTH ANNUAL MEETING 490 (1985).

[17] Perhaps the best analysis of unions' decline in legislative influence appears in John T. Delaney & Marick F. Masters, *Unions and Political Action*, *in* THE STATE OF THE UNIONS, *supra* note 14, at 313, 327, which offers this informative summary of labor's legislative efforts in the 1980s:

With the global village becoming more of a reality, many unions have been run out of American towns. Several major trends since the 1970s have contributed to this. More open trade policies[18] and deregulated industries and markets[19] have exposed unions to the intense pressure of international labor markets. As a result, union workers find themselves competing with low-wage workers in relatively poor, developing countries.[20]

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A review of COPE records covering the years 1977-1988 indicates that unions have achieved more legislative successes in the U.S. House of Representatives than in the Senate. With the exception of one year (1981), unions won at least 55 percent of the votes COPE defined as key House votes during that period. Unions were less successful in the Senate, especially during the 1981-86 period, when Republicans were the majority party. This illustrates the extent to which unions' legislative goals depend on Democratic control of Congress, as well as the fact that success in one chamber of Congress, or one branch of government, does not ensure the achievement of labor's political agenda.

A defining moment of this lost influence in the 1990s occurred when labor's titanic struggle to defeat the North American Free Trade Agreement (NAFTA) failed. Just one year after he was elected with labor's help, President Clinton supported this trade agreement, which unions found totally unacceptable. Adding insult to injury, during the days leading up to the Senate vote on the trade agreement, Clinton invoked an ugly stereotype of union lobbying tactics as "muscle-bound." David S. Cloud, *Decisive Vote Brings Down Trade Walls with Mexico*, 51 CONG. Q. WKLY. REP. 3174 (1993). Underscoring this grand defeat of labor, Rep. Newt Gingrich praised Clinton's "muscle bound" metaphor, stating that "'[i]t said to a lot of our guys that, if he's going to take that kind of risk in taking on labor unions, how can I turn my back on him?'" *Id.*

[18] NAFTA, the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (1993), and GATT, the General Agreement on Tariffs and Trade, are prime examples of such policies. A Joint Economic Committee analysis showed that from January through September 1994, net exports to Mexico fell $483 million. *See Net Job Loss of Up to 10,000 May Be Due to More Mexican Imports, JEC Analysis Says*, Daily Lab. Rep. (BNA) No. 230, at D-13 (Dec. 2, 1994). Thus, while U.S. exports created 127,000 new jobs in the period, Mexican imports eliminated 137,000 jobs, prompting Sen. Dorgan to say that "'NAFTA and GATT are trade agreements that make it easier for American jobs to go where labor is cheap.'" *Id.*

[19] Some examples include: Surface Freight Forwarder Deregulation Act of 1986, Pub. L. No. 99-521, 100 Stat. 2993; Bus Regulatory Reform Act of 1982, Pub. L. No. 97-261, 96 Stat. 1102; Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895; Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793; Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, 92 Stat. 3117; Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705. Commentary on employment effects associated with deregulation appears in the following: Barry G. Cole, *Introduction* to AFTER THE BREAKUP: ASSESSING THE NEW POST-AT&T DIVESTITURE ERA 1 (Barry G. Cole ed., 1991); Harold M. Levinson, *Trucking, in* COLLECTIVE BARGAINING: CONTEMPORARY AMERICAN EXPERIENCE 99 (Gerald G. Somers ed., 1980); Leslie A. Nay, *The Determinants of Concession Bargaining in the Airline Industry*, 44 INDUS. & LAB. REL. REV. 307 (1991); James Peoples & Lisa Saunders, *Trucking Deregulation and the Black/White Wage Gap*, 47 INDUS. & LAB. REL. REV. 23 (1993).

[20] *See* G. Pascal Zachary, *Unions Talk Tough But Face Big Hurdles*, WALL ST. J., Jan. 22,

Compounding matters, union picket lines are less honored by neighbors and business patrons than a generation ago, leaving fewer "union towns."[21]

In practical terms, this has contributed to a series of reversals in the context of collective bargaining, in which unions have represented or attempted to represent workers.[22] When organizing new workers, unions have confronted employer threats to close operations.[23] When negotiating contracts for workers they represent, unions have faced similar threats.[24]

Unions contend that no problem has diminished their effectiveness to represent workers more than employers' willingness to hire permanent replacements for strikers.[25] For years, union

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1996, at A1.

[21] *See* Stephanie N. Mehta, *Declining Power of Picket Lines Blunts New York Maintenance Workers' Strike*, WALL ST. J., Jan. 17, 1996, at B1 (reporting that picket lines remain effective in only handful of towns, such as Pittsburgh, Milwaukee, and Detroit). In many places, the picket line "appears to be losing its legs." *Id.* Kate Bronfenbrenner, a Cornell labor education professor, observes: "'There used to be families that grew up believing that crossing a picket line is the equivalent of pushing an old lady off a curb' . . . 'But there's been a change in our culture.'" *Id.*

[22] *See* Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 364 (1990) ("[T]he most effective 'hardnosed' company tactic was to have supervisors campaign intensely against the union.").

[23] *See, e.g.*, G.B. Elec., Inc., 319 N.L.R.B. No. 88 (Nov. 13, 1995); Grand Canyon Mining Co., 318 N.L.R.B. No. 92 (Aug. 25, 1995); Sumo Container Station, Inc., 317 N.L.R.B. 383 (1995).

[24] *See, e.g.*, Virginian Metal Prods. Co., 306 N.L.R.B. 257 (1992).

[25] *See Prohibiting Discrimination Against Economic Strikers, 1991: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources*, 102d Cong., 1st Sess. 66 (1991) (statement of replaced striker Karen Behnke). Behnke asserted: "During the negotiations Curtis Industries repeatedly threatened that if the UAW did not accept these concessions the company would permanently replace all the workers. To back up this threat the company ran newspaper advertisements and began taking job applications for replacement workers prior to the expiration of the contract." *Id.* at 67. *See also Prohibiting Permanent Replacement of Striking Workers, 1991: Hearing on H.R. 5 Before the Subcomm. on Aviation of the House Comm. on Public Works and Transportation*, 102 Cong., 1st Sess. 39 (1991) [hereinafter *Hearing on H.R. 5*] (statement of Juliette Lenoir, Vice President of Association of Flight Attendants). Lenoir stated:

> In 1976, our members at Alaska Airlines were forced to go on strike, then 23 days into the strike, flight attendants received the first letter from management threatening that striking flight attendants would be permanently replaced.
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> . . . When we learned it was legal to replace people permanently, we quickly signed a back to work agreement. . . . [C]learly we had been punished for striking and had to accept some less than desirable provisions.

workers were paid a substantial premium above unorganized workers in their industry with similar skills.[26] For reasons still not clearly understood, an increasing number of employers in the mid-1970s responded to economic strikes, in which workers temporarily cease their production to achieve better compensation or working conditions at the bargaining table with their employer, by hiring permanent striker replacements.[27] They did so pursuant to the Supreme Court's 1938 decision in *NLRB v. Mackay Radio & Telegraph Co.*[28]

Evidence suggests that this practice has greatly diminished unions' exercise of their right to strike.[29] As unions have lost this bargaining leverage, their ability to negotiate better wages and benefits has declined.[30] Numerous commentators have suggested that this particular employer practice has weakened the

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*Id.*

[26] *See* H. GREGG LEWIS, UNION RELATIVE WAGE EFFECTS (1986); Richard Edwards & Paul Swaim, *Union-Nonunion Earnings Differentials and the Decline of Private-Sector Unionism*, AM. ECON. REV., May 1986, at 97; Peter Linneman et al., *Evaluating the Evidence on Union Employment and Wages*, 44 INDUS. & LAB. REL. REV. 34 (1990).

[27] *See* Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes 1935-1991*, 16 BERKELEY J. EMPLOYMENT & LAB. L. 169 (1995).

[28] 304 U.S. 333 (1938).

[29] *Compare* LeRoy, *supra* note 27, at 189 (showing that replacement strike activity was abnormally high in late 1970s and throughout 1980s) *with* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR COMPENSATION & WORKING CONDITIONS 76 tbl. D-1 (May 1995) (Work Stoppages Involving 1,000 Workers or More, 1947-94). The Bureau of Labor Statistics's data shows that strikes involving large bargaining units fell from 187 in 1980 to 145 in 1981, 96 in 1982, 81 in 1983, 62 in 1984, 54 in 1985, 69 in 1986, 46 in 1987, 40 in 1988, 51 in 1989, 44 in 1990, 40 in 1991, 35 in 1992, 35 in 1993, 45 in 1994, and 7 through April 1995. *Id.*

[30] Isolating the period from 1980-1991, the compounded rate of inflation was 77.2%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CPI DETAILED REPORT 81 tbl. 24 (Jan. 1992) (Historical Consumer Price Index for All Urban Consumers (CPI-U): U.S. City Average, All Items). During this same period, mean compensation under collective bargaining agreements lagged far behind, at only 52.8%. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPENSATION & WORKING CONDITIONS 123 tbl. B-23 (Mar. 1992) (Average Changes in Compensation (Wage and Benefit) Rates Under Collective Bargaining Settlements Covering 5,000 Workers or More, 1966-91).

The inflation statistic was arrived at by inserting CPI data into a formula which compounds annual increases from 1980 through the end of 1991. First, the difference between the CPI figures for 1991 and 1980 was calculated. This result was then divided by the product of the CPI figure for 1980 (which is stated as a percentage) multiplied by 100. An identical formula was used with Bureau of Labor Statistics wage and benefits data to arrive at the statistic for mean compensation under collective bargaining agreements during the relevant period.

institution of collective bargaining.[31] This Article joins this commentary at a point that, so far, has not been carefully researched: severance of a bargaining relationship between a union and an employer after an employer has permanently replaced some or all of its striking workers.

### *B. Legal Principles that Entitle an Employer to Decertify a Union in the Context of a Permanent Replacement Strike*

#### 1. The *Mackay Radio* Doctrine Permits Employers to Hire Permanent Striker Replacements and Is Affected by Both Case Law and the NLRA

A paradox surrounds an employer's right to hire permanent replacements under the NLRA. As the following discussion shows, the NLRA provided employees the right to strike, and it safeguarded this right from diminution by federal courts. No provision was made in the law for employer hiring of permanent striker replacements. Three years after this law was enacted, however, the Supreme Court stated in dictum that employers are entitled to respond to strikes by hiring such replacements. Even though this employer right is rooted in dictum, no one today would seriously question that employers have such a right. In addition to discussing this doctrinal development, this section explores the distinction between permanent and temporary replacements, and also shows how the striker replacement doctrine relates to various provisions in the NLRA.

There are numerous ways for an employer to respond to a strike, including affecting the strike's timing so that it occurs when production requirements are low,[32] staffing positions with supervisors and managers,[33] stockpiling inventory in advance of the strike,[34] closing a struck facility and transferring its produc-

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[31] *See supra* note 4.

[32] *See, e.g., Boeing Workers on Strike*, S.F. CHRON., Oct. 7, 1995, at D1 (reporting that Boeing was in relatively good position to absorb strike in October 1995 because jet orders were at an 11-year low (235 planes) and were only about half of orders for 1992 (446 planes)).

[33] *See, e.g.*, Jeff Cole, *Boeing Machinists Reject Pay Offer and Vote to Strike*, WALL ST. J., Oct. 6, 1995, at A2 (reporting Boeing's initial plan to "'continue producing airplanes using supervisory personnel'").

[34] *See, e.g., Chrysler, Union Reach Tentative Accord*, L.A. TIMES, Nov. 5, 1995, at 18 (report-

tion to another location,[35] and subcontracting struck work.[36] Hiring replacements for strikers is another method, and this involves two approaches. One is to hire temporary replacements. The disadvantage for an employer using this method is that there may not be enough people who are willing to cross a picket line of usually angry strikers for only for a temporary job. This is not always the case, however, as the 1994-1995 United Auto Workers (UAW) strike of Caterpillar shows.[37] When employers are able to locate an adequate supply of qualified temporary replacements, this approach has the advantage of limiting an employer's potential liability when the replacements are dismissed.[38]

A second approach is to hire permanent striker replacements. The permanent nature of a replacement's employment often

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ing that "it appeared that Chrysler had stockpiled enough in the weeks leading up to the walkout to keep its assembly plants running through the weekend" in anticipation of strike by 1,000 workers who made windshields and other automotive glass).

[35] *See, e.g.*, Fuchs v. International Bhd. of Teamsters, Local 115, 427 F. Supp. 742 (D. Conn. 1977) (describing company's closure of manufacturing facility and establishment of new facility in reaction to strike).

[36] *See, e.g.*, Robert L. Rose, *Caterpillar May Be Overstaffed If Strike Ends*, WALL ST. J., Nov. 21, 1995, at A3, A4 ("The strike forced Caterpillar to quickly seek outsourcing alternatives in an effort to keep up production. At the company's components plant in York, [Pennsylvania] . . . 227 jobs have been cut by sending work to outside suppliers. . . . "); *see also* C.H. Guenther & Son, Inc., 174 N.L.R.B. 1202, 1202 (1969) (noting that employer's attorney told union agent that strikers would be recalled once subcontracting was discontinued); Empire Terminal Warehouse Co., 151 N.L.R.B. 1359, 1364-65 (1965) (distinguishing permanent and temporary subcontracting during economic strikes).

[37] In the 1994-1995 UAW strike of Caterpillar, Caterpillar was successful in locating many skilled employees working in the South, where wages are relatively low compared to the Midwest. *See* Robert L. Rose, *Temporary Heaven: A Job at Struck Caterpillar*, WALL ST. J., Nov. 29, 1994, at B1, B7 (describing Caterpillar's use of labor contractors to hire, and house in hotels, replacement workers from Mississippi to work in its Illinois factories). Although Caterpillar did not hire permanent replacements, it nevertheless earned record profits during this most recent strike. Robert L. Rose, *Caterpillar Continues To Stand Tough As Strikers Return*, WALL ST. J., Dec. 8, 1995, at B1 (reporting that Caterpillar made record profits in 1995 while employing 5,600 temporary striker replacements and 4,100 UAW crossovers).

[38] *See* Belknap, Inc. v. Hale, 463 U.S. 491 (1983). After Belknap hired permanent replacements for 400 strikers, the NLRB threatened legal action and thereby prodded the company to settle with the union and reinstate the replaced strikers. *Id.* at 494-96. This resulted in the discharge of at least 12 permanent replacements, each of whom sued Belknap for $500,000 in damages resulting from a breach of contract for permanent employment. *Id.* at 496-97. The Supreme Court affirmed the Kentucky Court of Appeals' holding that the NLRA did not preempt these replacement workers' breach-of-contract claims. *Id.* at 512.

depends on an employer creating this condition.[39] Moreover, courts have found that the burden of proof is on employers to show that the striker replacement who has been hired is indeed a permanent replacement.[40] Since the early 1980s, it appears that a growing number of employers have responded to strikes by hiring permanent replacements.[41]

Although an employer's entitlement to hire permanent striker replacements is important, interestingly, the NLRA does not expressly provide this right.[42] It springs, instead, from dictum in *Mackay Radio*.[43] As the following discussion on section 9(c)(3)

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[39] *See, e.g., Belknap*, 463 U.S. at 494-95. The employer in *Belknap* had striker replacements sign a form stating: "I, the undersigned, acknowledge and agree that I as of this date have been employed by Belknap, Inc. at its Louisville, Kentucky, facility as a regular full time permanent replacement to permanently replace _____ in the job classification of _____." *Id.*

[40] *See, e.g.*, NLRB v. Murray Prods., Inc., 584 F.2d 934, 939 (9th Cir. 1978).

[41] *See* Bruce E. Kaufman, *Research on Strike Models and Outcomes in the 1980s: Accomplishments and Shortcomings, in* RESEARCH FRONTIERS IN INDUSTRIAL RELATIONS AND HUMAN RESOURCES 77 (David Lewin et al., eds., 1992); LeRoy, *supra* note 27.

[42] Ironically, § 13 of the NLRA provides that "nothing in this [Act] . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike." 29 U.S.C. § 163 (1994). The Act's use of the term "construed" is ironic because a generation of courts before 1935 had swiftly sided with employers in ending strikes by issuing injunctions. *See* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 17-24 (1930). Three years before Congress provided this broad protection of the right to strike, it enacted the Norris-LaGuardia Act, which divested federal courts of jurisdiction to issue injunctions in most labor disputes. Norris LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)). The bill's author, Rep. Fiorello LaGuardia, explained:

> Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. If the courts had been satisfied to *construe* the law as enacted by Congress, there would not be any need of legislation of this kind. If the courts had administered even justice to both employers and employees, there would be no need of considering a bill of this kind now. If the courts had not emasculated and purposely *misconstrued* the Clayton Act, we would not today be discussing an anti-injunction bill.

75 CONG. REC. 5478 (1932) (statement of Rep. LaGuardia) (emphasis added).

Given this history, when Congress used the word "construed" in reference to the right to strike, it intended to admonish federal judges, including Supreme Court justices, to avoid abridging the right to strike under the NLRA. The irony is that only three years after Congress stated this admonition, the Supreme Court seemingly undercut the right to strike when it stated in *Mackay Radio*'s dictum that employers have a right to hire permanent striker replacements. *See* NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

[43] While ruling that strikers are still employees under the NLRA and therefore cannot

of the Taft-Hartley Act shows, however, Congress effectively ratified the *Mackay Radio* doctrine in 1947 when it enacted legislation affecting permanently replaced strikers.[44] This history shows that striker replacement law is governed by two sources. One is caselaw, that is, NLRB or federal court decisions that construe the limits and applications of the *Mackay Radio* doctrine in the absence of specific statutory law. The other source is the NLRA, which affects the *Mackay Radio* doctrine by defining who is an employee under the Act, the voting rights of replaced strikers, and related matters. The following three cases illustrate the effect of caselaw and the NLRA on striker replacement law.

In *John W. Thomas Co.*,[45] an employer challenged the eligibility of replaced strikers to vote in a decertification election. A majority of the Board concluded that the challenged voters, "having been permanently replaced prior to the election, . . . were not eligible to vote."[46] Their reasoning was based on a strict reading of section 9(c)(3) of the NLRA, which stated from 1947-1959 that "(e)mployees on strike who are not entitled to reinstatement shall not be eligible to vote," and their application of *Mackay Radio*'s principle that "economic strikers lose their right to reinstatement upon being permanently replaced in a specific job."[47]

A dissenting Board Member would have ruled these voters eligible, however, because the record showed that turnover had occurred among the replacements.[48] Therefore, under Board

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be discriminated against for engaging in protected activities such as striking lawfully, the *Mackay Radio* Court said:

> Although [the Act] 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 [Act], has lost the right to protect and continue his business by supplying places left vacant by strikers.

*Mackay Radio*, 304 U.S. at 345. The view that the *Mackay Radio* rule began as dictum is explained in Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547. For an appellate court decision characterizing the *Mackay Radio* doctrine as dictum, see NLRB v. American Mach. Corp., 424 F.2d 1321, 1324 (5th Cir. 1970).

[44] *See* discussion *infra* part I.B.2.

[45] 111 N.L.R.B. 226 (1955).

[46] *Id.* at 229.

[47] *Id.*

[48] *Id.* at 231-32 (Member Peterson, dissenting).

caselaw, this Member concluded that there was insufficient proof that these strikers had been *permanently* replaced.[49] This being so, he reasoned that section 9(c)(3) could not operate to disqualify these strikers because that provision applies "*only if* [being otherwise eligible] they 'are not entitled to reinstatement,' i.e., have in fact been permanently replaced."[50]

In *Pacific-Gamble Robinson Co.*,[51] an employer had filed a section 9(c)(3) petition to hold a decertification election. The Board did not rule directly on this matter, though, because it determined that the replaced strikers were unfair labor practice (ULP) strikers, and therefore, were entitled to immediate reinstatement.[52] Thus, it ruled that the employer could not sever its relationship with the union and was under a continuing duty to bargain with it.[53]

To understand this ruling, it must be remembered that even though *Mackay Radio* stated a broad principle permitting employers to hire permanent replacements, the Court's dictum also limited this right to situations in which an employer had committed no unfair labor practice.[54] A caselaw doctrine therefore

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[49] *Id.* at 232 (citing Pipe Mach. Co., 79 N.L.R.B. 1322, 1325 (1948)). The Member then cited numerous Board cases that had provided definitional refinement to *Mackay Radio*'s concept of a permanent replacement:

> [T]he Board has considered, among other things, such factors as what was said to replacements regarding the tenure of their employment when hired; the replacements' ability to perform the work as appraised by their supervisors; whether the employer would rehire the strikers or reinstate them in preference to the replacements if, as and when the strikers offered to return to work; and, where the job of a striker has allegedly been eliminated for economic reasons, whether the records of the employer substantiate the alleged economic considerations, or, whether other positions for which the economic striker is qualified are open.

*Id.* (citations omitted).

[50] *Id.* at 231. Here, it should be noted that the Supreme Court and the NLRB have broadened the reinstatement rights of replaced strikers. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); Laidlaw Corp., 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Thus, replaced strikers now "(1) remain employees[,] and (2) are entitled to full reinstatement upon the departure of replacements." *Id.* at 1369-70.

[51] 88 N.L.R.B. 482 (1950).

[52] *Id.* at 484-88.

[53] *Id.* at 489.

[54] This assessment comes from that part of *Mackay Radio* stating that "it does not follow that an employer, *guilty of no act denounced by the [Act]*, has lost the right to protect and

developed that drew from and elaborated on this principle.[55] Eventually, the Supreme Court approved the principle that an unfair labor practice striker is entitled to reinstatement, even if she is permanently replaced.[56] Thus, when the Taft-Hartley Act amended the NLRA in 1947 so as to provide for the decertification of a union[57] and so as to state that "strikers not entitled to reinstatement shall not be eligible to vote" in these elections,[58] Board caselaw creating a right to immediate reinstatement for ULP strikers affected how section 9(c)(3) would apply.

*Martin Bros. Container & Timber Products Corp.*[59] provides another illustration of the interaction between statutory law and caselaw. In 1959, Congress, by enacting the Landrum-Griffin Act, removed the total ban on replaced strikers voting in decertification elections and permitted them to vote within one year of going out on strike.[60] The 1959 amendment, however, did not address the status of replaced strikers who abandoned their strike before the first anniversary and offered unconditionally to return to work.

*Martin Bros.* resolved this issue, not by referring to caselaw, but simply by examining Congressional intent in enacting the 1959 amendment. The Board paid special attention to Senator John Kennedy's view that "[o]ur purpose is to permit economic strikers to vote *while there is a lawful strike in progress.*"[61] Ruling in the employer's favor in a dispute over the voting qualifications of eighteen replaced strikers who had offered within a year of starting their strike to return to work, the Board concluded that "the intent of Congress appears to be clear that a qualification of the right of economic strikers to vote is that they be on

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continue his business by supplying places left vacant by strikers." *Mackay Radio*, 304 U.S. at 345 (emphasis added). For a more complete quotation from the relevant portion of *Mackay Radio*, see *supra* note 43.

[55] *See, e.g.*, Mastro Plastics Corp., 103 N.L.R.B. 511, 515 (1953).

[56] *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956).

[57] *See* discussion *infra* part I.B.2.c.

[58] *See* S. MINORITY REP. NO. 105, 80th Cong., 1st Sess., pt. 2, at 10 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 463, 472 (1948) [hereinafter LMRA LEGISLATIVE HISTORY].

[59] 127 N.L.R.B. 1086 (1960).

[60] *See* discussion *infra* part I.B.3.

[61] *Martin Bros.*, 127 N.L.R.B. at 1088 (citing 105 CONG. REC. 5864 (1959) (statement of Sen. Kennedy)) (emphasis added).

strike at the time of the election."[62] This outcome was ludicrous because it supposed that Congress wanted to create an incentive for strikers and unions to stay out on strike in order to preserve strikers' voting eligibility. Nevertheless, this is an example of a Board doctrine supplying necessary interpretation in the absence of clear statutory language.

2. The Taft-Hartley Act

*a. The Taft-Hartley Act Amended the NLRA by Increasing the Rights of Individual Employees and Employers While Diminishing the Collective Rights of Unions*

The 1947 Taft-Hartley amendments to the NLRA, providing for union decertification and disenfranchisement of replaced strikers, were part of a series of broad reforms aimed at curbing union power. Public sentiment favoring unions through the 1930s and early 1940s tilted in favor of employers as the nation was hampered by a strike wave following World War II. By 1947, the monopolistic powers of certain unions seemed comparable to those exercised by the robber-barons during the turn of the century. The Republican-controlled Eightieth Congress made a populist campaign of curbing unbridled union powers. The following discussion shows that decertification legislation was rooted in a broader context of empowering the individual employee at the expense of a union's collective power.

In its original form, the NLRA contained no provision for the severing of a bargaining relationship between a union and employer. As the end of World War II neared and was reached, a wave of strikes occurred.[63] As a result, unions overestimated their public support, especially when a newly elected Republican

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[62] *Id.*

[63] *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 916, HANDBOOK OF LABOR STATISTICS 136 tbl. E-3, col. 2 (1948) (Extent of Work Stoppages, 1916-47). Strikes rose sharply from 2,772 in 1938, 2,613 in 1939, 2,508 in 1940, 4,288 in 1941, 2,968 in 1942, and 3,752 in 1943 to 4,956 in 1944, 4,750 in 1945, and 4,985 in 1946. *Id.*

Congress in 1947 undertook a major legislative overhaul of the NLRA in the Taft-Hartley Act.[64]

The 80th Congress believed it was championing the rights of the ordinary worker, who, Republicans claimed, was oppressed by coercive union practices.[65] Ensuring a worker's freedom to chose not to be represented by a union was a consistent though not exclusive theme throughout the Taft (Senate) and Hartley (House of Representatives) bills. So, for example, the House bill proposed a new set of rights for workers, including the right to vote by secret ballot to approve a strike,[66] the right to refrain from engaging in union activities,[67] the right to be free from unreasonable or discriminatory financial demands of their union, and the right to speak freely to their union without being

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[64] *See* Benjamin Aaron, *Amending the Taft-Hartley Act: A Decade of Frustration*, 11 INDUS. & LAB. REL. REV. 327, 330 (1958). Professor Aaron comments on labor:

> Their "all or nothing" demands seemed arrogant and unreasonable, especially when contrasted with the deceptively conciliatory proposals of Taft to discuss and, if need be, amend or eliminate any provisions of the existing law that were demonstrably unworkable or prejudicial to labor's legitimate interests. Whatever slight hope there might have been for popular support of substantial revision of Taft-Hartley was shattered by the unions' intransigent position.

*Id.*

[65] The House Committee Report stated:

> For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will.

HOUSE COMM. ON EDUCATION AND LABOR, LABOR-MANAGEMENT RELATIONS ACT, 1947, H. REP. NO. 245, 80th Cong, 1st Sess. 4 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 292, 295.

[66] *See* H.R. 3020, 80th Cong., 1st Sess., sec. 101, § 2(11)(B)(vi)(a)-(g) (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 158, 164-66. The House bill provided for an elaborate procedure before a union could go on strike, culminating with a secret ballot sent by registered mail to all employees posing the question: "Shall the employer's last offer of settlement of the current dispute be rejected and a strike be called?" *Id.* This proposal was meant to circumvent the leadership of the local and national union, who may have had better information about prevailing conditions in relevant labor markets.

[67] *See id.* § 7(a) at 176 (adding to employees' rights to self-organization, collective bargaining, and participation in concerted activity "the right to refrain from any or all of such activities").

disciplined.[68] It also provided for the abolition of union shops,[69] the right of free speech in union matters,[70] and the right to decertify a union as a bargaining representative.[71] Many of these proposed reforms were enacted in the Labor-Management Relations Act of 1947 (also known as the Taft-Hartley Act), albeit with modifications. Nevertheless, in protecting individual employment and political rights, these changes also undermined the collective strength of union organization.[72] Moreover, beneath the surface of protecting these individual liberties, it appeared that reformers had a more practical motive: creating rules to facilitate the severance of collective bargaining relationships, thereby freeing employers of unwanted unions.

Three major changes in the NLRA instituted by the Taft-Hartley Act made severance of bargaining relationships possible,

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[68] *See id.* § 7(b). The bill specifically stated:

> Members of any labor organization shall have the right to be free from unreasonable or discriminatory financial demands of such organization, to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action by the organization, and to have the affairs of the organization conducted in a manner that is fair to its members and in conformity with the free will of a majority of the members.

*Id.*

[69] *See id.* § 8(c)(7) at 181-82. The bill made it unlawful for a union:

> to take any action or make any arrangements that would have the effect of requiring an employer to deny employment to, or terminate the employment of, any individual (A) to whom membership in such organization was not available on the same terms and conditions as those applicable to other members, or (B) to whom membership in such organization was denied on some ground other than failure to tender the initiation fees and dues uniformly required as a condition of acquiring or retaining membership therein[.]

*Id.* This proposal was aimed at the union practice of requiring employers to hire only members of the union.

[70] *See id.* § 7(b) at 176 (providing that union members shall have right "to freely express their views either within or without the organization on any subject matter without being subjected to disciplinary action").

[71] *See* discussion *infra* part I.B.2.c.

[72] For example, § 8(b)(4)(A)-(C) of the Act prohibited a union with no labor dispute from helping another union with a labor dispute by joining in various forms of secondary boycotts. Labor Magagement Relations (Taft-Hartley) Act, 1947, Pub. L. No. 101, § 8(b)(4)(A)-(C), 61 Stat. 136, 141-42 [hereinafter Taft-Hartley Act], *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 7. These provisions, therefore, diminished union strength by reducing the amount of economic pressure they could exert against employers. For an overview of these changes, see 1 THE DEVELOPING LABOR LAW 40-45 (Charles J. Morris ed., 2d ed. 1983).

as the following discussion will show. First, statutory law essentially codified the Supreme Court's *Mackay Radio* dictum, thereby strengthening the legal basis for employers to hire permanent striker replacements. Second, both employees and employers were granted the right to petition the NLRB for an election to decertify a union that had an exclusive right to represent bargaining unit employees. Finally, replaced strikers were completely denied the right to vote in these decertification elections from 1947-1959, and thereafter were granted only a limited eligibility period (one year).

### *b. The Taft-Hartley Act Effectively Codified* Mackay Radio*'s Dictum Permitting Employers to Hire Permanent Striker Replacements*

By 1947, Republicans viewed the *Mackay Radio* doctrine as vulnerable to revision by the NLRB and federal courts. Some Board and court decisions had already created an important limitation on the striker replacement doctrine by finding that unfair labor practice strikers are entitled to immediate reinstatement upon offering to return to work. Thus, as part of Taft-Hartley's broad approach to providing employers relief from strikes, certain proposals were aimed at codifying this doctrine, and then, enlarging its scope.

In proposing to narrow the definition of an "employee" under the NLRA, Republicans seemed intent on penalizing strikers to deter strike activity. Under the NLRA, the definition of an employee has always been important, because only employees are entitled to the Act's legal protections.[73] In its original form, the NLRA broadly defined employee to include "any employee . . . whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment."[74] Consequently, the Act pro-

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[73] Section 2(3) of the NLRA, for example, excludes from its definition of "employee" a striker who "obtained any other regular and substantially equivalent employment." 29 U.S.C. § 152(3). Such a striker thus has no right under the *Laidlaw* doctrine to be reinstated to the job she left as a result of going on strike because she fails to meet the first test of remaining an employee. *See supra* note 50 (setting out *Laidlaw* doctrine).

[74] *See* National Labor Relations Act, 1935, ch. 372, § 2(3), 49 Stat. 449, 450, *reprinted in*

tected employees engaged in a lawful strike. But House Republicans in 1947 proposed important limitations on the definition of employee with reference to striking.

First, they proposed to codify *Mackay Radio*'s dictum entitling employers to hire permanent striker replacements:

> The Board now says that an employer may replace an "economic" striker, one who strikes for higher pay or other changes in working conditions. The bill writes this rule into the act, saying that a striker remains an "employee" "unless such individual has been replaced by a regular replacement"; and, at the end of the subsection, it defines a "replacement" as being an individual who replaces a striker "if the duration of his employment is not to be determined with reference to the existence or duration of such labor dispute." Thus, "strikebreakers" may not be regarded as "replacements."[75]

This proposal was not enacted, however. House Democrats argued that this provision, combined with a procedure to decertify a union, was extreme because it virtually made strikes illegal.[76] In their view, this provision equated exercise of the right to strike with forfeiture of employment. Senate Democrats also saw great inequity in this part of the bill because strikers were entirely removed from the NLRA's protection, while employers who violated the law were afforded administrative protection under the law.[77]

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2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3270, 3271 (1985) [hereinafter NLRA LEGISLATIVE HISTORY].

[75] H. REP. NO. 245, *supra* note 65, § 7(a), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 303. This discussion referred to § 2(3)(A) of the NLRA.

[76] The House Minority Report stated that the creation of new union unfair labor practices:

> read together with other sections of this bill are so drastic as to make virtually every strike illegal. Thus, even if a labor organization goes on strike because of disagreement as to the terms or conditions of employment, the strikers cease to be employees if, while they are engaged in such strike they are replaced, or receive unemployment compensation from any State. Since they would hereafter no longer be "employees," their strike becomes illegal.

H.R. MINORITY REP. NO. 245, 80th Cong., 1st Sess. 95 (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 355, 386.

[77] The Senate Minority Report noted that the bill imposed new procedural requirements on a union before a strike is made lawful. It also noted:

> A union or an employer failing to observe each of the foregoing steps could be found by the National Labor Relations Board to have been guilty of an unfair labor practice. . . . In addition, however, an employee engaging in a strike

Second, Republicans also proposed to narrow a striker's legal protection by making her receipt of unemployment compensation while she was on strike a condition for excluding her as an employee under the Act.[78] This was in response to a growing number of state laws and court decisions entitling permanently replaced strikers to unemployment compensation.[79] The House

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> during the 60-day period would lose his status as an employee under sections 8, 9, and 10 of the National Labor Relations Act. . . .

S. MINORITY REP. NO. 105, *supra* note 58, at 21, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 483. Underscoring the unequal treatment of employers and employees under this bill, the Report continued:

> We can see no reasonable grounds for discriminating against the employees by providing an additional penalty which will cause them to lose their status as employees under the National Labor Relations Act. An order to the employer to cease and desist issued months after the violation cannot be compared in severity with the loss to the employee of his job. We feel that the treatment of employees as against employers, as provided in this section, is strikingly disparate.

*Id.*

[78] *See* H.R. 3020, *supra* note 66, § 2(3), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 161 (defining "employee" as any employee "whose work has ceased as a consequence of a current labor dispute (unless such individual has been replaced by a regular replacement, or has obtained other regular and substantially equivalent employment, or is receiving unemployment compensation from any State)").

[79] *See, e.g.*, Magner v. Kinney, 2 N.W.2d 689, 693 (Neb. 1942) (stating that "(o)bviously, if those leaving work are immediately replaced, or if the dispute does not otherwise interfere with production or operation and these are not diminished, there is no stoppage of work and hence no disqualification" for strikers to receive unemployment benefits); *see also* Sakrison v. Pierce, 185 P.2d 528, 533 (Ariz. 1947) (holding that striking hotel employees were not disqualified from unemployment compensation when hotel resumed normal operations); Carnegie-Illinois Steel Corp. v. Review Bd., 72 N.E.2d 662, 667 (Ind. App. 1947) (holding that unemployment benefits begin when check in production operation occurs and end when operations are resumed on normal basis); Saunders v. Unemployment Compensation Bd., 53 A.2d 579 (Md. 1947) (holding that strikers are not entitled to unemployment benefits for period immediately following strike when employer has no work for them); Lawrence Baking Co. v. Michigan Unemployment Compensation Comm'n, 13 N.W.2d 260, 263-64 (Mich. 1947) (determining that Michigan's unemployment compensation statute disqualifies emplyees from benefits only when unemployment was caused by voluntary stoppage of work and thus replaced employees are entitled to compensation); Deshler Broom Factory v. Kinney, 2 N.W.2d 332, 336 (Neb. 1942) (concluding that unemployment at issue resulted from work stoppage caused by labor dispute and thus claimants were not entitled to unemployment compensation); *In re* Steelman, 13 S.E.2d 544, 547 (N.C. 1941) (concluding that benefits are withheld under North Carolina unemployment compensation law only upon showing that employee is not disqualified from benefits). For a contemporaneous analysis of these cases, see Milton I. Shadur, *Unemployment Benefits and the "Labor Dispute" Disqualification*, 17 U. CHI. L. REV. 294 (1950).

characterized these state policies as "a perversion of the social security laws, which Congress intended to provide for unemployment compensation for those out of work involuntarily and through no fault of their own."[80]

These proposed changes did not become law,[81] but ironically, were later perceived as having become law. An important 1994 Minnesota Supreme Court decision considered this legislative history in concluding that Congress intended to codify the *Mackay Radio* doctrine.[82] Opponents to a recent proposal to amend the NLRA by repealing the *Mackay Radio* doctrine argued that Congress approved that doctrine when it passed the Taft-Hartley Act.[83] In addition, even though the unemployment disqualification proposal was not enacted, some state courts used the reasoning behind this proposal to deny unemployment benefits to strikers.[84]

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[80] H. REP. NO. 245, *supra* note 65, at 12, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 303.

[81] *See* Comparison of the National Labor Relations Act of 1935 with Title I of the Labor Management Relations Act of 1947, § 2(3), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 1661, 1662.

[82] *See* Midwest Motors Express v. Local 120, 512 N.W.2d 881, 890 (Minn. 1994). The Minnesota Supreme Court concluded:

> In addition to major revisions of the basic federal labor statute in 1947 and 1959, Congress has frequently demonstrated its capacity to amend the [NLRA] to conform with its regulatory intention. But Congress has never seen fit to limit in any respect the employer's right to hire permanent replacements for striking employees.

*Id.*

[83] *See* HOUSE COMM. ON EDUC. AND LABOR, REPORT ON WORKPLACE FAIRNESS ACT, H.R. REP. NO. 57, 102d Cong., 1st Sess., pt. 3, at 44-45 (1991) (Minority Views). The opponents argued:

> As to organized labor's contention that the right to strike is burdened by the *Mackay* doctrine and is inconsistent with Congressional intent, it has obviously overlooked the legislative history of the Wagner Act and the overwhelming evidence that the Taft-Hartley Congress in 1947 endorsed the *Mackay* doctrine. The House bill of the Taft-Hartley Congress attempted and failed to extend the *Mackay* doctrine to *unfair labor practice strikes*, leaving undisturbed the *Mackay* doctrine with regard to economic strikers. Furthermore, the *Mackay* doctrine is consistent with section 2(3) of the NLRA, [and with] the definition of "employee". . . . Accordingly, it is explicitly clear that the "*Mackay* doctrine" was dealt with by the Congresses of 1935, [and] 1947 . . . , and is consistent with legislative enactments.

*Id.*

[84] For example, in Frank Foundries Corp. v. Review Bd., 88 N.E.2d 160, 162 (Ind. App.

### c. *The Taft-Hartley Act Provided Employers and Individual Employees the Right to Decertify a Union as an Exclusive Bargaining Representative*

Republicans in the Eightieth Congress believed that unions forced themselves on workers who had no real power to resist such representation. Their attention was focused in part on unions that called workers out on strike, without involving workers in that very important decision. In addition, Republicans believed that a root cause of union abuses was that unions could never be subjected to another test of majority support after they were certified to represent employees. Republicans believed that providing a legal means for subjecting unions to a test of continued majority support would make unions more responsive to their members. By this reasoning, if there was a legal process to decertify unions, unions would moderate their behavior. While the following discussion explains the Republicans' view, it also shows that Democrats mistrusted this view, believing that it masked an actual intention to wrest economic power from workers and their organizations.

Among Taft-Hartley's many changes, providing for the decertification of unions as representatives for employees was among the most important. The Act provided separate means for employees[85] and employers[86] to do this. House Democrats bitterly

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1949), the court ruled that strikers are not eligible to receive state unemployment benefits. The court explained:

> The purpose of the Act is to provide benefits for those who are *involuntarily* out of employment. In other words, it is intended to benefit those who are out of employment because the employer is unable, for reasons beyond the employees' control, to provide work, or the proffered working endangers the health, safety and morals of the employee, or the working conditions or wages are below the standards prevailing in the community for the same type of work. It is not intended to finance those who are willingly refusing to work, when work is available, because of a labor dispute.

*Id.*

[85] Section 9(c)(1) provided:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
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> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees . . . (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining

complained that "[n]o provision could more clearly serve to point up the dominant purpose of this legislation; to break up trade-unions as rapidly and with as few impediments as possible."[87] Senate Democrats maintained that this procedure would destabilize settled bargaining relationships by encouraging recognized unions to make extreme bargaining demands at each contract negotiation so as to retain the loyalty of their members.[88]

Republicans offered several reasons for proposing an election process for decertifying a union. Senator Taft argued that "[t]oday if a union is once certified, it is certified forever; there is no machinery by which there can be any decertification of that particular union."[89] Senator Morse viewed decertification elections as a healthy antidote to a tendency by national unions to dictate bargaining strategy to local unions.[90] Finally, Senator

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representative, is no longer a representative. . .

. . . .

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice.

Taft-Hartley Act, *supra* note 72, § 9(c)(1), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 9. Section 9(e)(2) provided for a secret ballot election that could result in decertification of a union. *Id.* § 9(e)(2) at 10.

[86] Section 9(c)(1) provided:

Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

. . . .

(B) by an employer alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition. . . .

*Id.* § 9(c)(1) at 9.

[87] H.R. MINORITY REP. NO. 245, *supra* note 76, at 86, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 377.

[88] *See* S. MINORITY REP. NO. 105, *supra* note 58, at 11 ("[U]nions would be compelled to engage in election campaigns at the close of each bargaining term and would be tempted to make unreasonable demands in order to retain the allegiance of the employees."), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 473. The Senate Minority Report also noted that "[u]nder the guise of protecting the freedom of workers the section would furnish employers with a useful device for undermining the position of the bargaining agent and for delaying collective bargaining." *Id.* at 473-74.

[89] 93 CONG. REC. 3954 (1947), *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 1013.

[90] *Id.* at 1296. Sen. Morse elaborated that the decertification provision "is going to

Ball believed that decertification elections would counteract the oppressive behavior of some unions.[91]

### *d. The Taft-Hartley Act Completely Disenfranchised Replaced Strikers in Decertification Elections*

While Republicans pointed to abuses of union power, Democrats raised good questions about the real intent of reforms under the Taft-Hartley Act. In particular, they objected to a provision within the proposed decertification procedure that would disqualify replaced strikers from voting in these elections. How could the aim of improving employee freedom of choice be maximized, they argued, when workers who lawfully exercised their right to strike were barred from voting in an election to determine if their union would continue to represent them? The following discussion examines the basis for section 9(c)(3)'s striker-disqualification rule, as well as Democratic arguments that the actual intent behind this legislation was to create an incentive for employers to hire replacements for their striking employees.

When the Senate amended H.R. 3020, it included within the newly defined procedures for decertifying a union a broad disqualification of strikers in such elections: only unfair labor practice strikers were made eligible to vote.[92] This meant that replaced economic strikers were completely disenfranchised, from the first day that their replacement was hired. This proposal created a surface appeal of fairness by mimicking the NLRB's

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protect the local union if an international union seeks to impose arbitrary practices upon the local union, because it gives the local union the right to go to the National Labor Relations Board and say, 'We are fed up. We want to affiliate with another union.'" *Id.*

[91] *Id.* at 1498. Sen. Ball argued that the decertification provision would "restore to individual employees and to the small employers who have been the major victims of that concentration of power and its ruthless use by some union leaders." *Id.*

[92] *See* S. 1126, 80th Cong., 1st Sess. § 9(c)(3) (1947), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 99, 119. The Senate bill provided:

> No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote unless such strike involves an unfair labor practice on the part of the employer.

*Id.*

doctrine of insulating ULP strikers from permanent replacement.

The Senate passed this provision,[93] but the final language passed by the Congress stripped even this slender protection afforded to unions whose replaced strikers were found by the NLRB to be ULP strikers.[94] Senator Taft's majority report explicitly cited the *Mackay Radio* doctrine and reasoned that "[i]t appears clear that a striker having no right to replacement should not have a voice in the selection of a bargaining representative, and the committee bill so provides."[95]

Democrats strongly objected to this provision. Senator Pepper viewed this as an invitation to employers to provoke strikes and thereby invoke the decertification process to rid themselves of unions.[96] Senator Morse was concerned that this provision would destabilize not only collective bargaining relationships, but also protocols for settling labor disputes.[97] Senator Murray had

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[93] S. 1126 passed on a 68-24 vote on May 13, 1947. *See* 93 CONG. REC., *supra* note 89, at 5298, *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 1522.

[94] Section 9(c)(3) of the final version of the Taft-Hartley Act provided that in an NLRB election to determine whether or not employees will be represented by a union "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote." Taft-Hartley Act, *supra* note 72, § 9(c)(3), *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 10.

[95] S. REP. NO. 105, 80th Cong., 1st Sess. 25, *reprinted in* 1 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 407, 431.

[96] Sen. Pepper made his argument using a hypothetical scenario:

> Let us take, for example, a corporation of the State of West Virginia, we will say a coal mine. If the workers of that mine strike because they are dissatisfied with the wages they receive, the employer can recruit labor in West Virginia and put it in the mine. Then he can notify the National Labor Relations Board that he wants another election, and if there has not been an election in a year, he can get an election, under the bill, and the only ones who can vote in the election are the new employees, the strikebreakers, as it were. Of course, they will vote the old union out and vote the new representation in, and the old union will be effectively disposed of. So, under the bill all an employer has to do is to provoke his workers to strike, recruit replacements, and put them in permanent status, and call for an election . . . , and his new strikebreakers would elect new representatives, and the old union would be effectively disposed of altogether.

93 CONG. REC., *supra* note 89, at 6686, *reprinted in* 2 LMRA LEGISLATIVE HISTORY, *supra* note 58, at 1606.

[97] Sen Morse's argument assumed a hypothetical scenario in which an employer's new management provokes a strike with a union that had been representing the employees for 15 years by refusing to negotiate wages:

a similar concern about an election procedure that, paradoxically, would oust the employee representative organization at a time when its involvement in negotiations was most needed, thereby prolonging industrial disputes.[98] In vetoing the Taft-Hartley Act, President Truman said this provision would grant employers a powerful new strategic weapon.[99]

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> The moment the workers strike, the employer tells all of his employees to come back to work. They refuse. He then brings in strikebreakers. Under S. 360, these strikebreakers are now the only employees of the employer. Those out on strike are mere outsiders with no rights; they cannot even be termed "striking employees," as at the common law. If they continue to strike after the employer has ordered them back to work, then the employer may seek an injunction under section 13 to break the strike. This follows because the dispute is no longer a labor dispute. If a United States conciliator is called, he cannot settle the strike by mediating between the union and the employer, since the union no longer represents a majority of the employees. We would thus, by removing a striker from the concept of employee, do irreparable injury to the collective-bargaining process.

*Id.* at 956.

[98] Sen. Murray noted:

> [The election procedure] enables an employer to secure the rejection of an established bargaining agent at the very time that the public interest makes it particularly urgent that collective bargaining continue. The employer can in some case achieve this result merely by filing a petition for an election — or encouraging a dissident group to file such a petition — as soon as his employees go out on strike. In such an election, the strikers who normally would constitute the bulk of the union's adherents could not vote. The defeat of the bargaining agent is thus assured. Antiunion employers are thus encouraged to refuse settlement of disputes in order to bring about strikes and thereby secure the defeat of the collective-bargaining representative. We can think of few provisions in this bill better calculated to produce and prolong strife and to defeat collective bargaining.

*Id.* at 1041.

[99] Truman's veto message to Congress stated:

> The bill would . . . put a powerful new weapon in the hands of employers by permitting them to initiate elections at times strategically advantageous to them. It is significant that employees on economic strike who may have been replaced are denied a vote. An employer could easily thwart the will of his employees by raising a question of representation at a time when the union was striking over contract terms.

*Id.* at 917.

### 3. The Landrum-Griffin Act Amended the NLRA by Making Replaced Strikers Eligible to Vote in Decertification Elections Within One Year of Going On Strike

From the outset, section 9(c)(3) appeared to be a reform that went to the other extreme in exposing unions to decertification. Democratic predictions that section 9(c)(3) would become a union-busting tool were realized by the early 1950s. Employer exploitation of this provision became such a problem that even the leading Republican, President Dwight Eisenhower, spoke out against it on several occasions.[100] In a Senate Report on the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), proposing to modify section 9(c)(3) under the Taft-Hartley Act, Senator John Kennedy provided this persuasive example:

> The unfairness of the rule can be demonstrated by many hypothetical examples. But one recent dramatic instance is that involving the O'Sullivan Rubber Corp.'s Winchester, Va., plant. In April 1956 the United Rubber Workers AFL-CIO was certified to represent the production employees after a Board-conducted election in which the union polled a majority 343 to 2. Thereafter O'Sullivan and the union commenced negotiations. After more than a month of fruitless negotiations, the union called a strike and all but 8 of the 420 employees in the plant failed to report for work. Thereafter while some number of strikers returned to work, the company undertook to recruit replacements. By July the company had a total of 345 employees on the job, of whom 265 were new employees and 72 returned strikers. Under these circum-

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[100] Eisenhower actually campaigned against this provision during his 1952 presidential campaign. S. REP. NO. 187, 86th Cong., 1st Sess. at 32, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR- MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 397, 428 (1977) [hereinafter LMRDA LEGISLATIVE HISTORY]. In a special message to labor in 1954, then-President Eisenhower said:

> As the act is now written, employees who are engaged in an economic strike are prohibited from voting in representation elections. In order to make it impossible for an employer to use this provision to destroy a union of his employees, I recommend that, in the event of an economic strike, the National Labor Relations Board be prohibited from considering a petition on the part of the employer which challenges the representation rights of the striking union.

*Id.* He then repeated this appeal in a special labor message to the 85th Congress in 1958. *Id.*

> stances, normal production was resumed. Picketing continued and so did fruitless negotiations; the union indeed was in no position to exert any bargaining strength since the plant was in full production. On April 27, 1957, approximately 1 year after the first election the company filed for a new election. This election was held in October 1957 and the results showed that 288 votes were cast against the union and but 5 in its favor. The strikers were not permitted to vote pursuant to the rule under section 9(c)(3).[101]

A more reasonable approach would have been to allow for decertification during or after replacement strikes, provided that both replacement workers and strikers were eligible to vote.

In 1959, Congress again amended the NLRA when it enacted the LMRDA, also called the Landrum-Griffin Act. Most of the amendments were aimed at improving union democracy, checking union infiltration by Communists, and requiring management consultants to report their activities to the federal government. One part culminated in a partial repeal of section 9(c)(3)'s voter-disqualification rule by permitting replaced strikers the right to vote in a decertification election held within a year after a strike began.[102]

### 4. Caselaw Doctrines On Employer Severance of Collective Bargaining Relationships During Replacement Strikes

The foregoing historical analysis shows that several statutory changes affected union representation during replacement strikes. Congress, however, was not the only source for laws concerning employer severance of a bargaining relationship during a replacement strike. The NLRB and federal appellate courts, including the U.S. Supreme Court, made important modifications to this changing statutory regime.

The doctrinal rules grew out of Board caselaw following *Mackay Radio* but preceding Taft-Hartley's creation of a union decertification procedure. By way of background, it is important to understand that the NLRB did not articulate the permanent

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[101] *Id.* at 428-29.

[102] *See* Labor-Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, sec. 702, 73 Stat. 519, 542 [hereinafter Landrum-Griffin Act], *reprinted in* 1 LMRDA LEGISLATIVE HISTORY, *supra* note 100, at 1, 24.

replacement doctrine, and it has seemed troubled by its broad sweep. It should also be remembered that *Mackay Radio*, apart from effectuating the NLRA's prohibition against discriminating against employees on the basis of lawful concerted activities, did little else to protect strikers in the context of being permanently replaced. So, over the years, the Board has developed various exceptions and limitations to *Mackay Radio.*

For example, if an employer's unfair labor practice causes or prolongs a strike, Board caselaw requires an employer to reinstate a replaced striker immediately, provided that the striker agrees to return unconditionally.[103] The Board's *Laidlaw* doctrine is another important limitation on the *Mackay Radio* doctrine, requiring an employer to reinstate a replaced striker once a suitable vacancy occurs.[104]

In addition to these significant protections for replaced strikers, the NLRB has developed its own rules for striker eligibility to vote in representation elections. Its earliest rules did not involve severance of a bargaining relationship, but a closely related issue: Are employees who seek union representation, but who are opposed by their employer and then strike for recognition, entitled to vote in a representation election even though they have been permanently replaced? The Board ruled in *A. Sartorious & Co.* that strikers — and not their replacements —

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[103] *See* Mastro Plastics Corp., 103 N.L.R.B. 511 (1953). Judge Learned Hand appears to be the original source of this doctrine. In a case decided the same year as *Mackay Radio*, he adapted tort theory to a conflict between replaced strikers and an employer who committed an unfair labor practice. NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir. 1938). Affirming a Board order requiring reinstatement of 3,200 strikers, Judge Hand explained that since the employer's "refusal [to bargain] was at least one cause of the strike, and was a tort . . . it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune." *Id.* at 872.

The ULP doctrine was not called as such until Judge Jerome Frank refined it in more litigation involving this employer. *See* NLRB v. Remington Rand, Inc., 130 F.2d 919, 928 n.8 (2d Cir. 1942). Judge Frank reasoned:

> It should be noted that even when a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer's unfair labor practice, the same rule applies as where the strike is the *result* of an unfair labor practice, and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike.

*Id.*

[104] *See* Laidlaw Corp., 171 N.L.R.B. 1366, 1369 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *and cert. denied*, 397 U.S. 920 (1970).

were eligible to vote in such an election.[105] It reasoned that the replacements' employment was more tenuous than the strikers.[106] But the Board reversed itself in a 1941 case, *Rudolph Wurlitzer Co.*, on the ground that replacements and replaced strikers both had lawful claims to their jobs.[107] Thus, the Board determined that its role in these elections should be neutral, rather than protecting strikers seeking union representation from potential defeat by replacements.[108]

These two cases set the foundation for the Board's doctrines concerning employer withdrawal of union-recognition during replacement strikes. Here, it should be noted that such withdrawal differs only in process, but not in consequence, from a section 9(c)(3) decertification election because each process terminates an employer's bargaining relationship with a union.[109] *A. Sartorious* and *Wurlitzer* show that during a strike, the NLRB must determine who is still an employee in the bargaining unit. Because employer withdrawal of union recognition occurs without an election, the Board must then consider whether strikers are presumed to want union representation, and whether replacements are presumed to oppose such representation.

Since 1959, when striker eligibility to vote in decertification elections was last addressed by Congress, the Board and federal courts have used three different presumptions concerning support for striking unions: (1) striker replacements oppose union representation (the anti-union presumption); (2) striker replacements favor union representation in the same proportion as the strikers whom they replace (the pro-union presumption); and (3) the no-presumption policy (employers must provide objective

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[105] A. Sartorious & Co., 10 N.L.R.B. 493, 494 (1938).

[106] *Id.* at 494-95.

[107] The Rudolph Wurlitzer Co., 32 N.L.R.B. 163, 169 (1941) (supplementary opinion).

[108] *Id.* at 168.

[109] The equivalence of formal decertification of a union and employer withdrawal of recognition from a union was noted in ARCHIBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW 361 (11th ed. 1991). The authors stated: "Under the Board's current doctrine, an employer must prove a 'good faith doubt' about the union's continuing majority in order to withdraw recognition, or in order to petition for an election, or in order to poll employees regarding their support for the union."

evidence that striker replacements and strike crossovers[110] oppose union representation).

In *Stoner Rubber Co.*,[111] its first decision following enactment of the Landrum-Griffin Act in 1959, the Board set forth its anti-union presumption policy. This case appeared to overturn a Board presumption that turnover in the bargaining unit caused by hiring of striker replacements did not change the percentage of employees who favored union representation.[112] As the following analysis illustrates, the anti-union presumption policy means that the Board presumes that striker replacements oppose the striking union's continued representation of all employees in the bargaining unit:

> On July 29 the plant was operating with a complement of 18 permanent replacements for the strikers and 18 former strikers. . . . In view of the fact that 27 employees had voted against the Union['s strike vote] it was not unreasonable for [the company] to assume that few if any of the 18 early returning strikers were union adherents; nor was is it unreasonable to assume that none of the 18 permanent replacements were union adherents.[113]

Two Board Members dissented in this case, however. Their criticism of the anti-union presumption laid the foundation for the pro-union presumption.[114] They reasoned that the

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[110] The term "strike crossovers" refers to pre-strike bargaining unit members who, either at the beginning of a strike or sometime while the strike occurs, return to work, usually crossing over the union's picket line. For more on this subject, see Michael H. LeRoy, *Strike Crossovers and Striker Replacements: An Empirical Test of the NLRB's No-Presumption Policy*, 33 ARIZ. L. REV. 291 (1991).

[111] 123 N.L.R.B. 1440 (1959).

[112] National Plastic Prods. Co., 78 N.L.R.B. 699 (1948) appeared to be a forerunner of the pro-union presumption. In that case, the employer withdrew recognition from a striking union on the ground that high-turnover in the bargaining unit had eroded support for the union. *Id.* at 706. The Board, however, rejected this view, reasoning that "[m]ere substantial turnover . . . can certainly not be regarded as an indication that the Union's previously established majority was thereby impaired; on the contrary, the reasonable presumption is that, throughout the changes of personnel in the unit, the Union maintained the same proportion of adherents." *Id.* (footnotes omitted).

[113] *Stoner Rubber*, 123 N.L.R.B. at 1443-44.

[114] The dissenting Board Members viewed the majority presumption as flawed because of its "conjectural examination of numbers of union adherents." *Id.* at 1448 (Members Jenkins and Fanning, concurring in part and dissenting in part). In addition, they saw this presumption as "no more than a fiction of rationalization. . . . It ignores not only the existence of the union's incumbency, but the indisputable fact of the union's continuing claim giving rise to a question of representation which only a Board election could resolve." *Id.* at

majority's rule encouraged employers to manufacture doubts about the incumbent union's continuing support and cast "an impossible burden on the certified union of being perpetually prepared after the certification year, without notice, to furnish independent documentary proof of its majority as of any given moment selected by the employer."[115]

The Board applied its anti-union presumption in cases[116] until 1975, when, in *James W. Whitfield*,[117] it reversed this doctrine in favor of the pro-union presumption. While four of its employees were on strike, an employer hired three replacements, and it counted these employees plus a supervisor who continued to work as numerical evidence that a majority of bargaining unit employees no longer supported the union.[118] Analyzing how much support the union had lost among replacements and the lone crossover, the Board concluded that the company "produced no evidence to indicate their voting preferences. . . . Furthermore, there is no presumption that an employee has rejected the union . . . when the employee elects not to support the strike."[119] With one minor exception to this pro-union presumption,[120] the Board continued this policy in a series of cases[121] exemplified by *Pennco, Inc.* .[122] Only rarely did the Board

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1450.

[115] *Id.*

[116] *See, e.g.*, S & M Mfg. Co., 172 N.L.R.B. 1008 (1968); Jackson Mfg. Co., 129 N.L.R.B. 460 (1960).

[117] 220 N.L.R.B. 507 (1975).

[118] *Id.* at 508-09.

[119] *Id.* at 509.

[120] The Board was not willing to presume that a union enjoyed continuing support among striker replacements when, over a lengthy period, the union took no affirmative action to represent any members of the bargaining unit. *See* Arkay Packaging Corp., 227 N.L.R.B. 397 (1976); *see also* Windham Community Memorial Hosp., 230 N.L.R.B. 1070, 1070 (1977) (explaining that Board would follow *Arkay* exception only in "unique circumstance[s] [in which] the union . . . apparently abandon[s] the bargaining unit").

[121] An incomplete list of these cases includes: I T Servs., Div. of I T Corp., 263 N.L.R.B. 1183 (1982); Garrett R.R. Car & Equip., Inc., 255 N.L.R.B. 620 (1981); Libbie Convalescent Ctr., 251 N.L.R.B. 817 (1980); National Car Rental Sys., Inc., 237 N.L.R.B. 172 (1978); Windham Community Memorial Hosp., 230 N.L.R.B. 1070 (1977); Randle-Eastern Ambulance, 230 N.L.R.B. 542 (1977); Surface Indus., Inc., 224 N.L.R.B. 155 (1976).

[122] 250 N.L.R.B. 716 (1980), *supplementing* 242 N.L.R.B. 467 (1979). Although the union won a certification election by a 114-62 vote in October 1976, it could not reach agreement with the employer on a collective bargaining agreement, prompting 109 workers to strike in May 1977. *Id.* at 716. Pennco then hired more replacements than strikers, swelling the workforce from a pre-strike total of 173 to 257. *Id.* Based on this oversupply of replace-

find that an employer presented enough evidence to rebut this presumption.[123]

In 1987, the Board overturned the pro-union presumption and created an entirely new standard for determining employee support of union representation in *Buckley Broadcasting Corp.*[124] After five radio engineers went on strike, their employer assigned their work to employees represented by a rival union, and it withdrew recognition from the striking union.[125] Citing a hornbook principle in evidence, the Board said that a legal presumption should arise only when "proof of one fact renders the inference of the existence of another fact so probable that it is sensible and timesaving to assume the truth of the inferred fact until it is affirmatively disproved."[126]

Using this principle, the Board swept aside its pro-union presumption, noting that "permanent replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements."[127] The Board resisted returning to its anti-union presumption, however. It recognized that by crossing a picket line, a replacement or crossover may not necessarily oppose union representation, but "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation."[128] The Board also stated an important public policy reason for not returning to the anti-union presumption: "[A]doption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement

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ments, Pennco withdrew its recognition from the union in November 1977. *Id.* The Board concluded, however, that the company had "failed to meet its burden of establishing a good-faith doubt based on objective considerations of the Union's majority status as of the time it withdrew recognition from the Union." *Id.* at 718. The Board then stated the public policy rationale for its pro-union presumption: "First, it promotes continuity in bargaining relationships. . . . Second, [it] protects the express statutory right of employees to designate a collective-bargaining representative of their own choosing, and [prevents] an employer from impairing that right. . . . " *Id.* at 716-17.

[123] *See, e.g.*, Beacon Upholstery Co., 226 N.L.R.B. 1360 (1976).

[124] 284 N.L.R.B. 1339 (1987).

[125] *Id.* at 1339-40.

[126] *Id.* at 1344 (quoting CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 343, at 807 (2d ed. 1972)).

[127] *Id.*

[128] *Id.*

the risk of loss of the bargaining representative. . . . "[129] This set the stage for the most recent doctrinal development, namely, the Supreme Court's approval of the Board's no-presumption policy in *NLRB v. Curtin Matheson Scientific, Inc.*[130] It should be noted that although the Court's decision was unanimous, its approval of the no-presumption policy was no more than tepid.[131] Nevertheless, the Court affirmed that this policy promoted a valid statutory aim, namely, the maintenance of existing collective bargaining relationships.[132]

### *C. Increase in Replacement Strikes in the 1980s and 1990s*

This section adds an important dimension to my analysis of replacement-severance strikes. These strikes are merely a subset of a more general class of strikes involving employer hiring of permanent replacements. Here I present detailed evidence suggesting that this general type of strike has occurred more frequently since the 1970s. In addition, some of this evidence suggests that during this period, employers hired permanent striker replacements not simply to continue their operations but also to marginalize union supporters and their unions. Thus, replacement-severance strikes may not be an isolated phenomena, but instead may be part of a more general employer strategy to deunionize.

Recent evidence shows that replacement strikes have been occurring more frequently, though the beginning of this upsurge has not been clearly identified. Union leaders and some elected officials believe that President Reagan's hiring of over 11,000 permanent replacements for striking air traffic controllers in 1981 marked the beginning of this period.[133] My earlier re-

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[129] *Id.*

[130] 494 U.S. 775 (1990).

[131] The Court reasoned that it had "accorded Board rules considerable deference. [It would] uphold a Board rule as long as it [was] rational and consistent with the Act, even if [it] would have formulated a different rule had [it] sat on the Board." *Id.* at 786-87 (citations omitted).

[132] The Court concluded that "[r]estricting an employer's ability to use a strike as a means of terminating the bargaining relationship serves the policies of promoting industrial stability and negotiated settlements." *Id.* at 794-95.

[133] Union perceptions that President Reagan's hiring of Professional Air Traffic Controllers Organization (PATCO) striker replacements caused other employers to hire striker replacements appear in *Hearing on H.R. 5*, *supra* note 25, at 39 (statement of Juliette

search on 299 replacement strikes reached a different conclusion: these strikes began to increase in the mid-1970s.[134] Another study and a rare expose indirectly support this finding by presenting evidence of increasing influence of union-busting consultants during the 1970s.[135]

The only U.S. government study on replacement strikes adds to the ambiguity of when this trend began. Using a crude research design asking union negotiators to compare the frequency of these strikes in the 1970s and 1980s, the study concluded that these strikes occurred more often in the latter decade.[136] Case studies also suggest that these strikes became significant in the 1980s.[137]

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Lenoir, Vice President of Association of Flight Attendants). Lenoir stated: "[M]ost labor unions mark the 1981 action of former President Ronald Reagan, when he fired 12,000 striking members of the Professional Air Traffic Controllers as the contemporary beginning of the use of permanent replacement workers . . . ." *See also* H.R. REP. NO. 57, *supra* note 83, at 20. This Report reflected the following union testimony:

> President Reagan's firing and permanent replacement of 12,000 striking air traffic controllers in 1981 had a dramatic impact on the way Americans view strikes, including the view taken by a new generation of corporate managers. . . . President Reagan's action was regarded by many observers as a signal to the employer community that it was acceptable to dismiss striking workers. The events surrounding the air traffic controllers' strike ushered in a much more aggressive, and even hostile, employer strategy toward lawful strikes.

*Id.* For more objective information about this important strike, see United States v. Professional Air Traffic Controllers Org., 525 F. Supp. 820, 822 (E.D. Mich. 1981) (reporting firing of striking PATCO members). *See also* Herbert R. Northrup, *The Rise and Demise of PATCO*, 37 INDUS. & LAB. REL. REV. 167 (1984).

[134] *See* LeRoy, *supra* note 27, at 184-91 (showing that replacement strikes sharply increased in 1975 and remained at abnormally high levels through end of sample period in 1991).

[135] *See* JOHN J. LAWLER, UNIONIZATION AND DEUNIONIZATION 94 (1990) ("There is general consensus on all sides that consultant use by employers expanded substantially throughout the 1970s and into the 1980s."). A consultant's personal account appears in MARTIN J. LEVITT, CONFESSIONS OF A UNION BUSTER (1993).

[136] *See* U.S. GEN. ACCOUNTING OFFICE, LABOR MANAGEMENT RELATIONS: STRIKES AND THE USE OF PERMANENT STRIKE REPLACEMENTS IN THE 1970S AND 1980S, at 4 (1991) ("About 45 percent of the employers and 77 percent of the union representatives involved in [these] strikes . . . believe permanent strike replacements were hired in proportionately fewer strikes in the late 1970s than in the late 1980s.").

[137] A detailed analysis of the meatpacking industry shows how one firm's use of striker replacements eventually broke an industry-wide pattern agreement and led competitor firms to also adopt this tactic. *See* Charles Craypo, *Meatpacking: Industry Restructuring and Union Decline, in* CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR 63 (Paula Voos ed., 1994). Professor Craypo explains:

While the beginning of this trend has not been clearly identified, it is more evident that these strikes affected large employers in certain industries. These included meatpacking and food processing (at Geo A. Hormel,[138] Monfort of Colorado,[139] Cook Family Foods,[140] and Diamond Walnut[141]), paper products (Boise Cascade[142] and International Paper[143]), newspapers and printing presses (Detroit Free Press,[144] Chicago Tribune,[145] New York Daily News,[146] Pittsburgh Press,[147] San

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> Five more rounds of bargaining at Dakota City between 1969 and 1986 completed the process. Each ended in a lengthy dispute, ranging in duration from four to fourteen months. Each arose from IBP's refusal to follow industry settlements and often from its insistence on wage freezes or cuts. Each also ended with the company remaining below the base wages paid by traditional union packers. The union lacked the power to force IBP into pattern bargaining because it could not strike the Dakota City plant effectively against the use of striker replacement workers and the company's alternative sources of beef production.

*Id.* at 72.

[138] *See Hormel Plants Dismiss Hundreds*, N.Y. TIMES, Jan. 28, 1986, at A15; *Hormel Reports Hiring Completed At Strikebound Minnesota Plant*, N.Y. TIMES, Feb. 13, 1986, at B16; William Serrin, *Hormel Plant Shuts as Troops Arrive and Strikers Thin Ranks*, N.Y. TIMES, Jan. 22, 1986, at A12; William Serrin, *Hormel Reopens Plant As Guardsmen Bar Strikers*, N.Y. TIMES, Jan. 23, 1986, at A12 [hereinafter Serrin, *Hormel Reopens Plant*]; William Serrin, *Strike by Meatpackers Splits Family Loyalties*, N.Y. TIMES, Jan. 25, 1986, at A7; *see also* HARDY GREEN, ON STRIKE AT HORMEL: THE STRUGGLE FOR A DEMOCRATIC LABOR MOVEMENT (1990); DAVE HAGE & PAUL KLAUDA, NO RETREAT, NO SURRENDER: LABOR'S WAR AT HORMEL (1989).

[139] *See* Monfort of Colorado, 298 N.L.R.B. 73 (1990).

[140] *See Strike Highlights Problem of Low Pay in Eastern Kentucky*, CINCINNATI ENQUIRER, June 6, 1994, at 9 (reporting that, before employees went on strike and were replaced, their annual pay was so low ($14,000) that they qualified for welfare); *Union Reinstated at Grayson Ham Plant*, THE COURIER-J. (Louisville), Oct. 10, 1995, at 5B (reporting on end of 17-month strike in which Conagra subsidiary hired replacements for 350 strikers).

[141] *See* Diamond Walnut Growers, 316 N.L.R.B. 36 (1995); Diamond Walnut Growers, 312 N.L.R.B. 61 (1993) (reporting that employer hired replacements for 500-600 strikers); *Striker Replacements: Diamond Walnut Should Be Sanctioned Under Striker Order, Teamsters Say*, Daily Lab. Report (BNA) No. 78, at A-12 (Apr. 24, 1995).

[142] *See* Adrienne Eaton & Jill Kriesky, *Collective Bargaining in the Paper Industry: Developments Since 1979*, *in* CONTEMPORARY COLLECTIVE BARGAINING IN THE PRIVATE SECTOR, *supra* note 137, at 25, 45 (reporting company's hiring of 342 replacements in 1986 strike).

[143] *See* Adrienne M. Birecree, *Capital Restructuring and Labor Relations: The International Paper Strike*, 1 INT'L CONTRIBUTIONS TO LAB. STUD. 59, 72-73 (1991).

[144] *See Around the Nation*, WASH. POST, Sept. 11, 1995, at A7 (reporting on management's use of helicopters to airlift newspapers over 1,500 angry strikers and supporters); Nichole M. Christian, *Some Staffers Return to Detroit Paper After Permanent-Replacement Threat*, WALL ST. J., Aug. 11, 1995, at B3 (reporting on Detroit Free Press's intention to replace up to 2,500 striking newsroom, truck, mail, and press employees).

[145] *See* Chicago Tribune Co., 304 N.L.R.B. 259 (1991).

Francisco Chronicle,[148] and Doraville Press[149]), coal and copper mines (Phelps Dodge,[150] A.T. Massey,[151] Decker Coal,[152] and Pittston Coal Group[153]), airline and bus carriers (Continental Airlines,[154] United Airlines,[155] TWA,[156] Eastern Airlines,[157] American Airlines,[158] and Greyhound[159]), tire

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[146] *See Permanent Replacement Workers Called Key Issue as Daily News Strike Continues*, Daily Lab. Rep. (BNA) No. 210, at A-13 (Oct. 30, 1990).

[147] *See* Michael D. Hinds, *Pittsburgh Papers Publish, But Strikers Block Trucks*, N.Y. TIMES, July 29, 1992, at A8; *see also* Pittsburgh Press Co. v. Preate, 797 F. Supp. 436 (W.D. Pa. 1992), *aff'd*, 981 F.2d 1248 (3d Cir. 1992).

[148] *See San Francisco Papers Threaten to Replace Striking Employees*, Daily Lab. Rep. (BNA) No. 213, at A-5 (Nov. 7, 1994).

[149] *See* Richard Greer, *Jesse Jackson Calls for "Jobs, Justice and Family Security,"* ATLANTA CONST., Sept. 21, 1993, at F1 (reporting that 300 strikers were replaced when they refused to accept one-third cut in pay).

[150] *See* United Steelworkers v. Phelps Dodge Corp., 833 F.2d 804 (9th Cir. 1987); JONATHAN ROSENBLUM, THE COPPER CRUCIBLE (1995); *End Near for Copper Strikers*, CHI. TRIB., July 7, 1985, at 5A.

[151] *See* Donald P. Baker, *Bitter Coal Strike Settled*, WASH. POST, Dec. 22, 1985, at A3 (reporting on replacement strike involving 2,500 miners in West Virginia). The employer, while housing replacements in barracks, posted armed guards and attack dogs around the mines, patrolled the skies with helicopters, and photographed striking miners and their families. *Id. See also* Tall Timber Coal Co. (Apr. 4, 1992) (LeRoy, Arb.) (unpublished decision on file with author) (stating that company hired permanent replacement workers during "long, bitter, and violent" strike).

[152] *See* Tom Howard, *Decker: One Year Later*, BILLINGS GAZETTE (Mont.), Oct. 2, 1988, at D1 (reporting that Decker Coal, division of Peter Kiewit, large multinational corporation, hired replacements for 270 strikers, and ensuing violence victimized "replacement workers, striking miners, innocent bystanders, and lawmen"); *see also* Tom Howard, *Strike's High Price: Decker Dispute Drags On*, BILLINGS GAZETTE (Mont.), May 15, 1988, at A1 (reporting that replacement strike transformed Sheridan, Wyoming from quiet town into one in which people barricaded their homes and routinely began to carry guns).

[153] After Pittston hired permanent striker replacements, picket line violence broke out, notwithstanding the Mine Workers' efforts to use civil disobedience as a means of protest. As a result, a local court levied a $64 million coercive civil contempt fine against the Union. *See* International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552 (1994); *see also* Ratification of Pittston Contract Hailed by Union Leaders, Daily Lab. Rep. (BNA) No. 35, at A-7 (Feb. 21, 1990); B. Drummond Ayers, Jr., *Coal Miners' Strike Hits Feelings That Go Deep*, N.Y. TIMES, Apr. 27, 1989, at A16; Michael D. Hinds, *Bitter Coal Strike May Be At An End*, N.Y. TIMES, Dec. 23, 1989, at A17.

[154] *See In re* Continental Airlines Corp., 901 F.2d 1259 (5th Cir. 1990); O'Neill v. Air Line Pilots Ass'n, 886 F.2d 1438 (5th Cir. 1989).

[155] *See* Rakestraw v. United Airlines, Inc., 981 F.2d 1524 (7th Cir. 1992); Air Line Pilots Ass'n, Int'l v. United Airlines, Inc., 802 F.2d 886 (7th Cir. 1986).

[156] *See* TWA, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989).

[157] *See* Air Line Pilots Ass'n, Int'l v. Eastern Air Lines, Inc., 869 F.2d 1518 (D.C. Cir. 1989); Eastern Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 744 F. Supp. 1140 (S.D. Fla. 1990).

[158] American Airlines came close to hiring thousands of permanent replacements

makers (Bridgestone/Firestone[160] and Pirelli Armstrong[161]), assorted manufacturers (Colt Industries,[162] Ravenswood,[163] and Caterpillar[164]), and professional sports (major league umpires).[165]

What is more remarkable, these strikes have been much more disorderly and violent than non-replacement strikes. Replaced strikers in diverse industries have threatened replacements and customers,[166] sabotaged equipment,[167] littered roads with tire-

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during the brief flight attendants' strike in 1993. *See* Terry Maxon, *American Strives to Restore Flights; Strikers Claim Edge*, DALLAS MORNING NEWS, Nov. 21, 1993, at 30A (reporting that American received 6,000 applicants for permanent replacement positions and that airline could train them within 10 days); *Travelers Sit Tight, While Foes Sit Silently*, HOUS. CHRON., Nov. 21, 1993, at 12 (reporting that American had long lines of applicants for replacement positions that would pay $14,000 annual starting salary).

[159] *See* Greyhound Lines, Inc., 319 N.L.R.B. No. 76 (Oct. 31, 1995); *Proposed Greyhound Settlement Includes $22 Million in Back Pay*, Daily Lab. Rep. (BNA) No. 75, at C-1 (Apr. 21, 1993).

[160] *See* Raju Narisetti, *Bridgestone Says Not All Strikers Can Return to Work*, WALL ST. J., Jan. 16, 1995, at A4; Raju Narisetti, *Bridgestone/Firestone Begins to Hire Permanent Replacements for Strikers*, WALL ST. J., Jan. 5, 1995, at A3.

[161] *See Strike at Pirelli Armstrong Plants Set to End March 13 with Return to Work*, Daily Lab. Rep. (BNA) No. 47, at A-9 (Mar. 10, 1995) (reporting that 850 strikers were permanently replaced after beginning strike on July 15, 1994, but they were later offered reinstatement when NLRB found that company's unilateral implementation of contract terms converted this economic strike into unfair labor practice strike).

[162] *See NLRB Administrative Law Judge Finds Colt Strike Caused Unfair Labor Practices*, Daily Lab. Rep. (BNA) No. 177, at A-11 (Sept. 14, 1989); *Colt Told to Rehire 800 Strikers; Back Pay Is to be in Millions*, N.Y. TIMES, Sept. 13, 1989, at B3.

[163] *See Special Report: Anatomy of A Corporate Campaign*, 46 Union Lab. Rep. (BNA) No. 18, at 144 (May 7, 1992).

[164] In 1992, Caterpillar threatened to hire thousands of permanent striker replacements, and it came close to succeeding before the UAW called off its strike. *See* Philip Dine, *Job Seekers Besiege Caterpillar; Strikers Resist Urge to Give Up*, ST. LOUIS POST-DISPATCH, Apr. 8, 1992, at 10A; Gregory A. Patterson & Robert L. Rose, *Showdown: Labor Makes a Stand in Fight for Its Future at Caterpillar Inc.*, WALL ST. J., Apr. 7, 1992, at A1; Robert L . Rose, *Thousands Respond to Caterpillar Ads to Replace Striking Workers in Illinois*, WALL ST. J., Apr. 8, 1992, at A3; Bob Secter, *Caterpillar, UAW Agree to Talks but Cling to Demands*, L.A. TIMES, Apr. 11, 1992, at A20. In 1994, the UAW renewed its strike, but Caterpillar responded by hiring temporary replacements. *See* Robert L. Rose, *Work Week*, WALL ST. J., May 23, 1995, at A1 (reporting that 5,600 temporary workers and retirees were filling in for strikers); *see also* Stephen Franklin, *He's Not One to Give In Easily*, CHI. TRIB., May 21, 1995, at B1 (presenting Caterpillar's assertion that it has no difficulties running plants with temporary hires and white-collar workers).

[165] *See* Jack Curry, *When the Umps Were Replaced*, S.F. CHRON., Dec. 24, 1994, at B4.

[166] *See* International Ass'n of Machinists v. Eastern Air Lines, 121 B.R. 428, 431 (S.D.N.Y. 1990) (describing replaced strikers calling passengers "'scab' and 'cheap ass' while telling them to have a shit flight, [and] that they would be 'killed' and not to forget

puncturing jack rocks,[168] blocked work entrances,[169] damaged cars transporting replacements to work[170] and attempted to force these cars off the road while giving chase,[171] and, less frequently, have rioted,[172] shot,[173] bombed,[174] burned,[175] assaulted,[176] and killed.[177] Occasionally, replacement workers

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their 'body bag'"); Keco Indus., Inc., 276 N.L.R.B. 1469, 1474 (1985) (describing replaced striker who struck car of employee crossing picket line with rock and who confronted driver and his passengers by yelling, "I'll blow your fucking heads off").

[167] *See Fuels PP&L, Decker Offering $500,000 for Info on Coal-Strike Sabotage*, ELECTRIC UTIL. WK., May 2, 1988, at 20 (reporting on sabotage of two electrical transformers and power lines likely committed by strikers and causing approximately $750,000 in damage).

[168] *See* International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2554 (1994) (levying $64 million civil coercive contempt fines against union for, inter alia, littering county highways with jack rocks); *Mine Workers Chief Says Pittston Strike Underscores Need for Overhaul of Labor Law*, Daily Lab. Rep. (BNA) No. 160, at A-9 (Aug. 19, 1989) (reporting Pittston Official's account that strikers had destroyed 3,000 tires since strike began).

[169] *See* Domsey Trading Corp., 310 N.L.R.B. 777, 809 (1993) (stating that replaced strikers blockaded bus carrying replacement workers and pushed leaving workers' bus away from plant, causing it to appear "that this strike more resembled a battlefield"); *Hormel Strikers Close Plant Again*, N.Y. TIMES, Feb. 1, 1986, at 54 (reporting that stikers barricaded entrances of plant with their cars, focing its closure).

[170] *See* Circuit-Wise, Inc., 308 N.L.R.B. 1091, 1100 (1992) (reporting that replaced striker damaged car crossing picket line with pipe); Mohawk Liqueur Co., 300 N.L.R.B. 1075, 1091 (1990) (reporting that replaced strikers sprayed replacements' cars with paint solvent as they crossed picket line).

[171] *See* Gibson Greetings, Inc., 310 N.L.R.B. 1286, 1303 (1993) (asserting that replaced striker tried to force replacement's car off road); *Cook Striker Gives Alford Plea*, DAILY INDEPENDENT (Ashland, Ky.), Dec. 24, 1993, at 7 (reporting striker's conviction for wanton endangerment after attempting to drive replacements off of road).

[172] *See Hormel Strikers Close Plant Again*, *supra* note 169 (describing disturbance caused by striking meatpackers); Serrin, *Hormel Reopens Plant*, *supra* note 138 (reporting that police officers and National Guardsmen helped control strikers).

[173] *See Two Striking Greyhound Drivers Arrested on Federal Firearms Charges*, Daily Lab. Rep. (BNA) No. 72, at A-4 (Apr. 13, 1990) (reporting that two replaced strikers were arrested on federal charges in connection with two shooting incidents near St. Louis); *Shots Fired at Cook's; No Injuries Reported*, GRAYSON J.-ENQUIRER (Grayson, Ky.), Dec. 22, 1993, at 1 (describing shots fired at trailer during strike).

[174] *E.g.*, *Report from the Picket Lines: Rubber Strike Starting to Burn*, LAB. TRENDS, Dec. 3, 1994, at 1 (reporting that striker was charged with bombing home of replacement in Polk County, Iowa).

[175] *See* Chicago Tribune Co. v. NLRB, 965 F.2d 244, 246 (7th Cir. 1992).

[176] *See* Diamond Walnut Growers, Inc., 312 N.L.R.B. 61, 64 (1993) (reporting that replacement worker was "severely beaten" by two or three men who were probably replaced strikers); General Chem. Corp., 290 N.L.R.B. 76, 77 (1988) (describing baseball bat violence and shouting of "motherfucker" by strikers); *San Francisco Newspaper Employees Ratify Five-Year, Strike-Ending Pacts*, Daily Lab. Rep. (BNA) No. 218, at A-12 (Nov. 15, 1994) (reporting that guard was stabbed in abdomen during strike); *Union-Represented Driver*

have been violent.[178] A federal appeals court found that violence is so inherent in replacement strikes that it rejected an NLRB doctrine permitting unions to obtain a list of names and addresses of striker replacements.[179]

One further development may add to the incendiary nature of replacement strikes: some employers seem to be using race or immigrant-status as a hiring criterion, perhaps to divide any potential alliance between strikers and their replacements.[180]

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*Killed During Strike at San Francisco Papers*, Daily Lab. Rep. (BNA) No. 214, at A-9 (Nov. 8, 1994) (reporting that strikers pulled replacement driver from truck and beat him [death reported in headline was accidental electrocution and unrelated to strike violence]).

[177] *See Williams Calls for Quick Legal Action in Picket Line Deaths in Alabama Strike*, Daily Lab. Rep. (BNA) No. 173, at A-5 (Sept. 9, 1993) (reporting on replacement strike in Alabama in which two strikers were killed by tractor-trailer crossing picket line at high rate of speed); *Shooting Investigation*, CHAMPAIGN-URBANA NEWS-GAZETTE, July 24, 1993, at A8 (reporting shooting death of striker replacement as he crossed picket line to work for Arch Mineral Corp. in West Virginia).

[178] *See* United Steelworkers v. Phelps Dodge Corp., 833 F.2d 804, 807 (reporting that replacements attacked strikers by slashing their tires, breaking striker's jaw with rifle butt, and making threatening calls to striker's wife); International Paper Co., 309 N.L.R.B. 31, 40 (1992) (stating that nonstriker attacked replaced striker with baseball bat).

[179] In Chicago Tribune Co. v. NLRB, 965 F.2d 244, 247 (7th Cir. 1992), Judge Posner rejected the Board's "clear and present danger" test for granting a union's request for names of striker replacements. He reasoned:

> The pattern of violence that marked the strike was bound to arouse concern in [the replacement workers'] minds about their personal safety should their names be disclosed. It is not as if the union had stood virtuously aloof from the violence: after a riot outside one of the company's facilities the union was enjoined from engaging in violent picketing . . . .
>
> Where the Board got the idea that a union's demand for the names of replacement workers is to be handled not like any other discovery request but by placing on the company an insuperable burden of proving that the union will in fact use the information to harass the workers beats us.

*Id.*

[180] In a 1992 strike, contractors hired illegal aliens as permanent striker replacements in southern California. *See* Gregory Crouch, *INS Probe of Strikers Puts Spotlight on Hiring Habits*, L.A. TIMES, July 12, 1992, at A1 (reporting ironic drywallers' strike by hundreds of Mexican immigrants, many of whom were hired as replacements during drywallers' strike 10 years before; immigrant strikers walked out on their jobs when their demands for better pay were not met and were then replaced by newer immigrants); *see also* Melissa B. Weiner & Jonathan Volzke, *149 Drywall Strikers Arrested*, ORANGE COUNTY REG., July 3, 1992, at A1 (describing arrest of strikers for kidnapping strike-breakers). More recently, the Detroit Free Press hired minorities to replace mostly white strikers. *See* Doug Durfee, *Newspapers' Staff Includes 40% Women, 42% Minorities*, DETROIT NEWS, Nov. 30, 1995, at C6 (reporting that The Detroit Free Press had replaced its "overwhelmingly white" strikers with large mix of minorities). This followed the Chicago Tribune's practice in 1986 of replacing mostly

This practice was more common before the NLRA was enacted, and it tragically destroyed entire communities.[181]

## II. EMPIRICAL FINDINGS FOR REPLACEMENT STRIKES INVOLVING EMPLOYER ATTEMPTS TO SEVER COLLECTIVE BARGAINING RELATIONSHIPS

### *A. Research Methods*

The study reported here is part of my continuing research on replacement strikes. This research is intended to fill an informational void about these strikes. Two U.S. government agencies have reported strike data; however, these reports are lacking.

The Bureau of Labor Statistics (BLS) has reported two annual measures of strikes, one for large bargaining units (with 1,000 or more employees),[182] and another for overall strike activity.[183] There are two significant problems with each report. Neither one provides any information about strikes involving permanent replacements, so that the particular characteristics of these strikes cannot be analyzed over time. In addition, neither reports strike data continuously since the NLRA was enacted in 1935. The large bargaining unit report was begun in 1947, and therefore misses data from 1935-1946, while the overall strike activity report was ended in 1981, using a terminal data-point of 1979, thereby missing data for more recent strikes.

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white strikers with mostly African-American and Hispanic workers. *See* Kevin Klose, *Tribune Strike Continues*, WASH. POST, May 11, 1986, at F1.

[181] Possibly the worst American race riot before the Rodney King riot in Los Angeles occurred in 1917, when white strikers in East St. Louis, Illinois killed scores of African-Americans brought in from the South to replace them. Details of this strike are retold in Candace O'Connor, *A Lesson Never Learned: Simmering Racial Tension Led to the East St. Louis Riot of 1917; Competition for Jobs Fueled Riot*, ST. LOUIS POST-DISPATCH, July 2, 1992, at 1E ("The riot was rooted in many factors, but tension over job competition, with business leaders using black workers as strikebreakers, brought it to a flash point. . . . Officially, 39 blacks died in the riot, but the numbers probably were much higher."). This is far from an isolated example. *See, e.g.*, Laurie Goering, *Racial Stew Boils Over in Indiana*, CHI. TRIB., Jan. 5, 1992, at 1 (tracing current racial tensions in northwest Indiana to large steel strikes in which African-Americans were brought in from South to replace white strikers).

[182] For example, see BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, COMPENSATION AND WORKING CONDITIONS 66 tbl. D-1 (Dec. 1993) (Work Stoppages Involving 1,000 Workers or More, 1947-93).

[183] *See, e.g.*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 2092, ANALYSIS OF WORK STOPPAGES, 1979 (1981).

The Federal Mediation and Conciliation Service (FMCS) has also provided an annual report on strike activity.[184] This measure has been broader than BLS's large bargaining unit report and smaller than BLS's overall strike activity report. Like BLS reports, however, these reports have provided no information about replacement strikes, and they have failed to report these data continuously over time.[185]

Recently, two sources have provided some information to fill this void about replacement strikes. The Government Accounting Office prepared a one-time report on replacement strikes.[186] Although better than nothing, this report offered very limited information about these strikes. It surveyed strike activity in only two years, 1985 and 1989;[187] and it attempted to provide data about replacement strikes in the 1970s by asking union respondents in this survey to estimate whether replacement strikes had increased or not since that time.[188] This kind of data is virtually worthless because union respondents presumably would be biased to answer this question affirmatively, even if their personal experience did not support such an estimate. In addition, this information is extremely crude because it fails to measure how much replacement strikes may have changed from the 1970s to the 1980s.

Thus, government reporting on strikes has been inconsistent and has virtually ignored replacement strikes. Recognizing this

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[184] *See, e.g.*, 43 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 15 (1990) ("Strike activity was down as the [BLS] . . . reported a yearly total of 45 major strikes or lockouts affecting units of over 1,000 workers . . . , while FMCS recorded 711 strikes affecting units of all sizes for the same period.").

[185] Because the agency was created under the Taft-Hartley Act, it did not exist until 1947, and it therefore had no strike experience to report before that year. Then, in its first five annual reports, the agency included data about work stoppages. *See* 1 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 33 tbl. 7 (1948) (reporting 1,296 work stoppages); 2 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 22 tbl. 10 (1949) (reporting 1,102 work stoppages); 3 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 19 tbl. 10 (1950) (reporting 1,025 work stoppages); 4 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 15 tbl. 9 (1951) (reporting 1,431 work stoppages); 5 U.S. FEDERAL MEDIATION & CONCILIATION SERVICE, ANNUAL REPORT 40 tbl. 9 (reporting 1,453 work stoppages). Without explanation, however, this reporting was discontinued beginning in the agency's sixth annual fiscal year report.

[186] *See* U.S. GEN. ACCOUNTING OFFICE, *supra* note 136.

[187] *Id.* at 4.

[188] *Id.*

information void, a private research firm, the Bureau of National Affairs (BNA), has begun to assemble a database about these strikes using newspaper accounts.[189] While this offers a significant improvement in coverage of these strikes, I have created my own database using NLRB, federal, and state court decisions involving these strikes.

Certainly, my approach has serious limitations. Perhaps the most serious is the creation of a biased sample that fails to represent the universe of replacement strikes. Arguably, I have collected data only for the most contentious of these strikes, in short, only replacement strikes that also involved litigation to the point of an agency or court ruling. Possibly, many replacement strikes settle without litigation and therefore fall outside the reporting conventions that create the cases I have read to assemble my database.

There is also a patch-like quality to the cases I have assembled that makes for inconsistent data collection. Most of my cases come from NLRB decisions and involve a variety of legal issues such as the reinstatement rights of replaced strikes,[190] striker misconduct,[191] employer withdrawal of recognition,[192] and section 9(c)(3) decertification issues.[193] The diversity of legal issues presented in these cases means that some decisions tend to emphasize particular facts, such as the picket-line behavior of particular strikes, with less reporting on the general characteristics that surround the strike, while other decisions report those characteristics more fully (for example, in a failure-to-bargain case) because the dispute centers on the negotiation and strike history.

Not all striker replacement cases are reported by the NLRB. Some permanent replacement strikes have occurred in the rail or air transport industries and are therefore regulated by the

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[189] This service is available through BNA Plus (call 1-800-452-7773).

[190] *E.g.*, Aqua-Chem, 288 N.L.R.B. 1108 (1988); Kurz-Kasch, Inc., 286 N.L.R.B. 1343 (1987); Lehigh Metal Fabricators, 267 N.L.R.B. 568 (1983); Bryan Infants Wear Co., 235 N.L.R.B. 1305 (1978).

[191] *E.g.*, Clear Pine Mouldings, Inc., 268 N.L.R.B. 1044 (1984); W.C. McQuaid, Inc., 237 N.L.R.B. 177 (1978); Blades Mfg. Co., 144 N.L.R.B. 561 (1963).

[192] *E.g.*, Whisper Soft Mills, 267 N.L.R.B. 813 (1983); Mark Twain Marine Indus., 254 N.L.R.B. 1095 (1981); Burlington Homes, Inc., 246 N.L.R.B. 1029 (1979).

[193] *E.g.*, Diamond Walnut Growers, Inc., 308 N.L.R.B. 933 (1992); Jeld-Wen of Everett, Inc., 285 N.L.R.B. 118 (1987); Pacific Tile & Porcelain Co., 137 N.L.R.B. 1358 (1962).

Railway Labor Act.[194] These strikes are reported by the National Mediation Board (NMB)[195] or federal courts.[196] Then there are state law cases involving private-sector permanent replacement strikes. These are primarily unemployment compensation cases.[197] The benefit in broadening my database to include these cases is that my database comes closer to capturing the universe of replacement strikes by including virtually all private-sector industries. The chief drawback, however, is that while the number of my cases increases, so do holes in my data, when, for example, a state court decision fails to give any of the relevant bargaining history surrounding such a strike.

There is also the problem of actually determining whether a dispute involved the hiring of permanent, and not merely temporary, striker replacements. In reading these cases, I had to be convinced that this basic criterion was met. When I doubted this, the case was not included in my database. To illustrate, some cases did not expressly state that an employer hired permanent replacements, but rather, reported a strike in which replacements were hired (they could have been temporary replacements). I then examined the facts carefully to determine if the employer had reinstated any strikers after the strike ended (if no strikers were reinstated, I almost always concluded that they had been permanently replaced), if the employer had discharged all or most of the strikers (creating a reasonable inference that they had been permanently replaced), or if the Board had ordered the employer to reinstate strikers (implying that they had been permanently replaced). The point here is that a degree of subjectivity is necessarily involved in categorizing cases

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[194] Although providing employees the right to strike, the RLA also places significant procedural restrictions on it "in order to avoid any interruption to commerce or to the operation of any carrier growing out any dispute between the carrier and employees thereof." 45 U.S.C. § 152 First (1988).

[195] *See, e.g., In re* Professional Cabin Crew Ass'n, 15 N.M.B. 11 (1987).

[196] *See, e.g., In re* Continental Airlines, 901 F.2d 1259 (5th Cir. 1990); Airline Pilots Ass'n v. United Airlines, Inc., 802 F.2d 886 (7th Cir. 1986).

[197] These cases almost always involve a judicial determination of whether an employer's hiring of permanent replacements involuntarily severs the striker's employment for purposes of receiving state-administered unemployment compensation. *See, e.g.,* Sakrison v. Pierce, 185 P.2d 528 (Ariz. 1947); Robert S. Abbott Publishing Co. v. Annunzio, 112 N.E.2d 101 (Ill. 1953); Lawrence Baking Co. v. Michigan Unemployment Compensation Comm'n, 13 N.W.2d 260 (Mich. 1944).

involving permanent striker replacements, and it is possible that I erroneously included some cases that do not meet the threshold criterion that an employer hired one or more permanent striker replacements. To address the reader's possible concern about this matter, a list of permanent replacement strikes used in this analysis appears in the Appendix.

In sum, the database used here is obviously flawed, but these flaws are outweighed by the fact that so little information about these strikes is centrally collected, reported, and analyzed. Moreover, as the federal government retreats in gathering and reporting information about collective bargaining,[198] privately created databases like this will necessarily grow in value.

### *B. Findings*

The analysis in this Article isolated 115 cases involving an employer's attempt to sever its bargaining relationship with a union during a permanent replacement strike.[199] Attempted severance was used instead of actual severance because most cases did not report the latter. For example, some cases involved the issue of eligibility of particular replaced strikers to vote in decertification elections without reporting how these challenged votes determined the outcome of a dispute. This criterion — permanent replacement strike cases involving an employer's attempt to sever a bargaining relationship — is useful because it serves as a close proxy for measuring employers' efforts to exploit these strikes to oust unions from their workplace.

Two basic kinds of bargaining-severance cases were combined to make the broken line in Figure 1: those involving decertification election issues, and those involving employer attempts to withdraw recognition from striking unions. All of these cases were reported by the NLRB. Three state cases were added to this group because they reported (without deciding) facts indicating that a union was decertified in the context of a replace-

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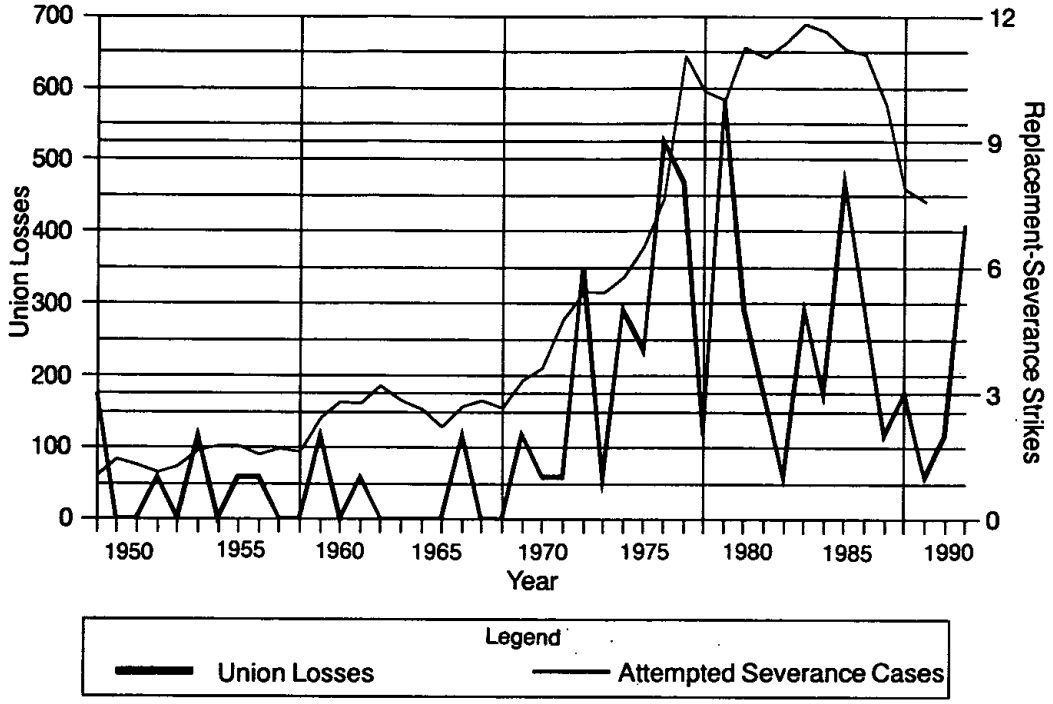
[198] *See Bureau of Labor Statistics to End Bargaining Report*, WALL ST. J., Dec. 7, 1995, at A16 (reporting that BLS will end its quarterly report on collective bargaining settlements and is considering eliminating other reports before the Republican-controlled Congress eliminates them).

[199] At the time I analyzed these cases, 518 replacement strike cases from 1938-1995 involving a variety of legal issues were in my database.

ment strike.[200] Among the 518 replacement strikes in this database in December 1995, 115 (or 22%) involved an attempted employer severance of a bargaining relationship.

Figure 1: Union Decertification Losses & Replacement-Severence Strikes




For analytical purposes, I then compared this annual frequency distribution to the number of union losses in decertification elections from 1948 through 1989, the last year data for union decertification losses reported by the NLRB is available. The NLRB reports decertification data annually as a function of its

[200] The three state cases added to the group were Four Queens, Inc. v. Board of Review of Nev. Employment Sec. Dep't, 769 P.2d 49 (Nev. 1989), Hi-State Beverage Co. v. Ohio Bureau of Employment Servs., 603 N.E.2d 274 (Ohio Ct. App. 1991), and Cannonsburg Gen. Hosp. v. Unemployment Compensation Bd. of Review, 628 A.2d 503 (Pa. Commw. Ct. 1993).

statutory duty to conduct these elections.[201] This format permits an annual comparison of union losses through decertification elections and employer attempts to sever bargaining rela-

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[201] This data is reported in the NLRB's annual reports. *See* FOURTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 5 (1949); FIFTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 234 (1950); SIXTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 305 (1951); SEVENTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 292 (1952); EIGHTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 108 (1953); NINETEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 170 (1954); TWENTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 172 (1955); TWENTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 177 (1956); TWENTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 173 (1957); TWENTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 156 (1958); TWENTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 174 (1959); TWENTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 193 (1960); TWENTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 233 (1961); TWENTY-SEVENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 275 (1962); TWENTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 179 (1963); TWENTY-NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 20 (1964); THIRTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 20 (1965); THIRTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 19 (1966); THIRTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1967); THIRTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 13 (1968); THIRTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 19 (1969); THIRTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16 (1970); THIRTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16 (1971); THIRTY-SEVENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 20 (1972); THIRTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16 (1973); THIRTY-NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16 (1974); FORTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 16 (1975); FORTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 19 (1976); FORTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 17 (1977); FORTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 15 (1978); FORTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 17-18 (1979); FORTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 18 (1980); FORTH-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 18 (1981); FORTY-SEVENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 13 (1982); FORTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 15 (1983); FORTY-NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 11-12 (1984); FIFTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 13-14 (1985); FIFTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1986); FIFTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1987); FIFTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1988); FIFTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1989); FIFTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 12 (1990). Figures from each year's report are entered in Fig. 1 for the preceding year because the annual reports were made for the federal fiscal year ending on June 30. Thus, each annual report contained data that was collected for July 1 through December 31 of the preceding year.

tionships during the course of replacement strikes.[202] As this Article shows, both union decertification elections and striker eligibility in these elections are regulated by section 9(c)(3). This statistical comparison is therefore reasonable and makes it possible to determine whether or not these strikes and union decertification losses moved in unison at any time.

Figure 2 compares two annual frequency distributions: the replacement-severance strikes in this database, and, for each year from 1968-1991, the number of days these strikes lasted on average. Cases involving replacement-severance strikes that began before 1968 often failed to indicate how many days a strike lasted, and because these data are extremely spotty before 1968, means for these years are not reflected in Figure 2. Even after 1968, the reporting of this information continued to be inconsistent. But because replacement-severance strikes occurred more often from 1968-1990, averages for all these years were calculated and plotted against the annual frequency distribution of these strikes. Finding 7, discussed below, refers to Figure 2.

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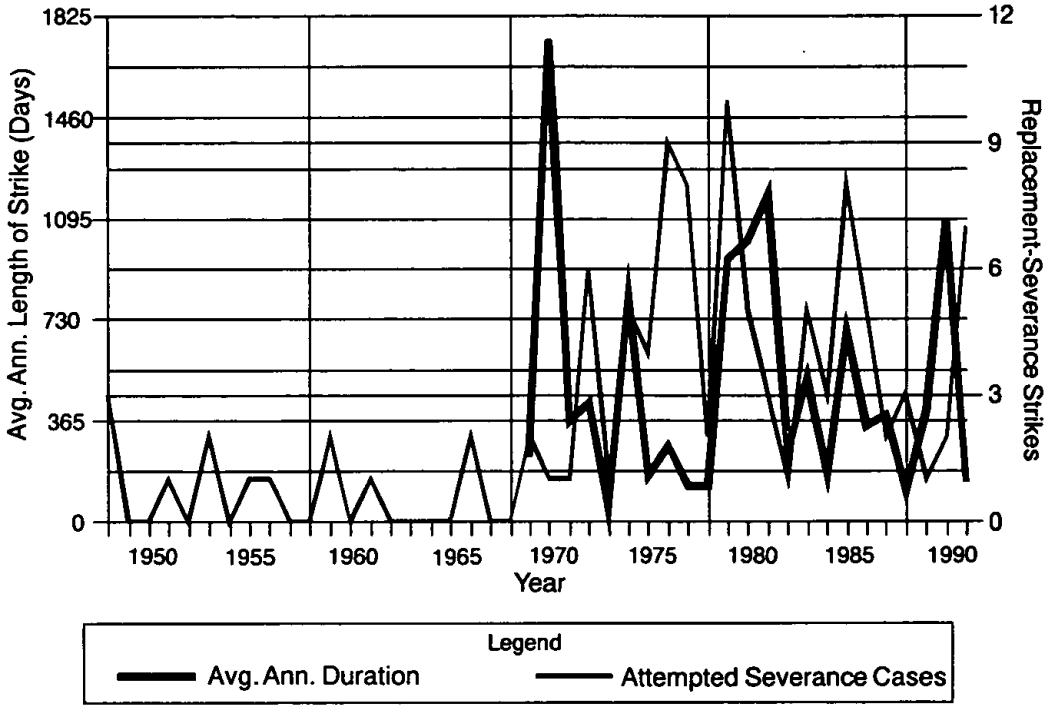
[202] Attempted-severance replacement strikes are entered into Fig. 1 by the year a strike began. In contrast, the cases in the Appendix are organized by the year the NLRB or a court decided each case. There was always a lag in time from when a strike started to when a decision was rendered, and often this lag was several years. Among the 115 strikes listed in the Appendix, 111 are included in Fig. 1 (3 in 1948, 0 in 1949, 0 in 1950, 1 in 1951, 0 in 1952, 2 in 1953, 0 in 1954, 1 in 1955, 1 in 1956, 0 in 1957, 0 in 1958, 2 in 1959, 0 in 1960, 1 in 1961, 0 in 1962, 0 in 1963, 0 in 1964, 0 in 1965, 2 in 1966, 0 in 1967, 0 in 1968, 2 in 1969, 1 in 1970, 1 in 1971, 7 in 1972, 1 in 1973, 5 in 1974, 4 in 1975, 9 in 1976, 9 in 1977, 3 in 1978, 10 in 1979, 5 in 1980, 3 in 1981, 1 in 1982, 6 in 1983, 3 in 1984, 8 in 1985, 5 in 1986, 2 in 1987, 3 in 1988, 1 in 1989, 2 in 1990, and 7 in 1991). Three cases involved strikes beginning from 1992 through 1994. These were not included in Fig. 1 because most cases in this database involve a several-year lag from the date a strike began to the date a decision occurred. Thus, as of 1995, it was quite likely that strikes beginning from 1992 through 1994 had not yet been reported. If these three strikes were shown, therefore, this would have created a probably erroneous impression that attempted-severance replacement strikes have dropped sharply in the most recent period when, in fact, this may not be the case.

Figure 2: Replacement-Severence Strikes & Thier Average Annual Duration




FINDING 1: Employer attempts to sever collective bargaining relationships during replacement strikes varied closely with union losses in NLRB decertification elections. As Figure 1 shows, the number of cases in each class reached a small peak in 1948 before tracking lower throughout the 1950s. The numbers peaked again in 1959 before tracking lower again from 1960-1967. Beginning in 1968, decertification losses and replacement-severance strikes trended sharply higher and they peaked in the late 1970s. Activity in both classes then tracked somewhat lower throughout the 1980s but remained at levels well-above the period from 1948-1968.

Figure 1 does not depict a cause-and-effect relationship between replacement-severance strikes and union decertification losses. Many of the replacement-severance strike cases involved employer withdrawal of recognition from a striking union, a severance method that bypasses a section 9(c)(3) election. Also, an undetermined number of the hundreds of union decertification losses occurring from 1970 through the 1980s probably occurred when there was either no strike or a strike that did not involve hiring of permanent replacements. The co-variation

of replacement-severance strikes in these data with overall decertification losses suggests, however, that one or more common influences acted on these separate phenomena. One possibility this Article explores is that management consultants who urged employers to use more confrontational tactics in collective bargaining caused more replacement strikes and more decertification losses to occur.[203]

FINDING 2: Just after the Taft-Hartley Act became law in 1947, union decertification losses and replacement strikes with attempted severances hit early historical peaks. Three replacement strikes involving an attempted severance began in 1948, and then only one such strike began in the period from 1949-1952 (in 1951). In 1948, unions lost sixty-two decertification elections, and, one year later, this number jumped sharply to eighty-three (a thirty-four percent increase) before falling to seventy-five, sixty-six, and seventy-four losses over the next three years. This activity is low compared to the 1970s, 1980s, and early 1990s; but the 1930s and 1940s provide a more appropriate comparison because prior to enactment of Taft-Hartley, decertifications did not occur at all. Thus, the short peaks reported in this finding may have seemed like portents of much more contentious labor-management relations to observers in the 1950s and may be responsible for the widely-held perception in the 1950s that section 9(c)(3) was promoting union-busting.[204]

FINDING 3: In the period from 1949-1959, severance strike activity was very low. It reached another early peak in 1959, however, when there were two strikes after no such strikes in 1957 or 1958. Union decertification losses increased sharply from 94 in 1958 to 142 in 1959 (an increase of fifty-one percent). This sharp increase may mean that employees were suddenly becoming unhappy with union representation. It may also be explained, however, by employers anticipating legislative reform following President Eisenhower's call for policy moderation. Fearing a weakened ability to decertify unions, a growing number of employers may have exploited replacement strikes before policy changes occurred.

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[203] *See* discussion *infra* part III.A.2.

[204] *See supra* note 100 and accompanying text (describing President Eisenhower's denunciation of § 9(c)(3)).

FINDING 4: Severance strikes occurred even less frequently from 1960-1968 (with only three strikes in this period) than in the 1950s, but union decertification losses reached a new, substantially higher plateau. From 1950-1958, an average of eighty-nine losses occurred, but the number rose to 142 the next year, when Landrum-Griffin was enacted. Average annual losses then increased to 159 from 1960-1968. There is no certain explanation for this increase. The figure might have been expected to drop because the change in section 9(c)(3) increased an employer's waiting period for disenfranchising replaced strikers to one year from the start of a strike. Perhaps the figure increased because, ironically, the legislative reforms alerted many employers who previously did not know about the obscure provisions of section 9(c)(3).

FINDING 5: Replacement-severance strikes and union decertification losses increased very sharply from 1969-1977. The strikes soared from zero in 1967 and 1968 to nine in 1977, while decertification losses ballooned from 165 and 156 in 1967 and 1968, respectively, to 445 in 1976 and 645 in 1977. Average annual decertification losses more than doubled, from 159 in 1960-1968 to 347 in 1969-1977, while average annual replacement-severance strikes increased more than ten-fold, from 0.3 in 1960-1968 to 4.3 in 1969-1977. Although there was one statutory change in labor policy in this period,[205] this was limited to the health care industry and very likely did not account for this change. One possible explanation is that management consultants, who apparently were more prominent in formulating employers' labor relations strategies during this period, influenced employers to be less accommodating during negotiations. For some employers this strategy may have involved taking more strikes while responding by hiring permanent striker replacements and then severing bargaining relationships. In addition, by this time, the fact that over 1,400 local unions had been decertified from 1959 through 1968 may have increased competitive pressures for accommodative employers to take a more confrontational approach toward their unions. In short, by this

[205] A change in labor policy occurred when Congress extended coverage of the NLRA to employers in the health care industry. *See* Act of July 26, 1974, Pub. L. No. 93-360, § 1(a), 88 Stat. 395 (codified at 29 U.S.C. § 152(2) (1994)).

time the momentum of employer hiring of permanent replacements, as well as orchestration of decertification elections, may have begun to feed on itself.

FINDING 6: Union decertification losses continued to soar, while replacement-severance strikes plateaued, in the most recent period, 1978-1991. An annual average of 4.2 strikes occurred in this period, while annual union decertification losses continued to mount, to an average of 655. The latter represented an 88.8% increase, although it was tempered somewhat by the fact that losses dropped sharply in the last two years for which figures are available (1988 and 1989, with losses totalling 459 and 441, respectively). This data suggests that even more employers took a hard-line against unions during this period. After replacement-severance strikes trended down from 1985-1990 (with eight in 1985, five in 1986, two in 1987, three in 1988, one in 1989, and two in 1987), they spiked again in 1991 at seven.

FINDING 7: As Figure 2 shows, the duration of replacement-severance strikes varied greatly from 1969-1991, ranging from an annual average of 43 days in 1973 to 1,738 days in 1970. It is hard to generalize from such a wide range; but within this range, average annual strike duration was greater than 365 days in 11 of these 23 years.[206] This statistic is relevant because section 9(c)(3) would render replaced strikers ineligible to vote in a decertification election occurring in an average strike beginning in these years.

The other remarkable aspect of Figure 2 is the excessive duration of many of these strikes. While a high finding in any single year can be dismissed as an outlier, Figure 2 shows that average annual strike duration exceeded two years quite often (in 1970, 1974, 1979, 1980, 1981, and 1990).

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[206] The years in which annual average strike duration was more than 365 days were 1970 (1,738 days), 1972 (424 days), 1974 (809 days), 1979 (948 days), 1980 (1,010 days), 1981 (1,183 days), 1983 (516 days), 1985 (682 days), 1987 (380 days), 1989 (400 days), and 1990 (1,089 days). In two other years, average strike duration lasted close to one year (361 days in 1971, and 342 days in 1986). The mean was well below 365 days in 1969 (232 days), 1973 (43 days), 1975 (164 days), 1976 (270 days), 1977 (128 days), 1978 (128 days), 1982 (250 days), 1984 (170 days), 1988 (110 days), and 1991 (139 days).

## III. ANALYSIS AND POLICY PRESCRIPTIONS

### *A. Analysis*

This Article offers the best empirical evidence to date of an apparent linkage between replacement-severance strikes and union decertifications by showing that both have grown almost simultaneously by several hundred percent since the late 1950s. This remarkable growth is even more astounding when one considers that collective bargaining had reached a mature phase by that time. Professor Dubin summed up this golden age of labor-management relations as follows:

> As collective bargaining becomes an established feature of our society both sides come to realize that each conflict created disorder is inevitably succeeded by a reestablished order and that permanently disruptive disorder may materially impede the resolution of a conflict. Thus, collective bargaining tends to produce self-limiting boundaries that distinguish permissible from subversive industrial disorder.[207]

But as the evidence presented here shows, this assessment is no longer true. To the contrary, the explosion in replacement-severance strikes and decertification losses shows that labor-management relations have been deeply subverted.

These findings provide new and powerful documentation of two key elements of this decline, but they do not explain why this subversion has occurred. Contextual evidence points, however, to three changes since the 1950s that may account for these developments: (1) employer attitudes toward unions have become sharply confrontational; (2) consultants who advise employers how to free themselves of unions have increased their influence on employer labor relations practices; and (3) changes in the law on striker replacement have helped to convert the economic strike from a union to an employer weapon.

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[207] Robert Dubin, *Constructive Aspects of Industrial Conflict*, *in* INDUSTRIAL CONFLICT 37, 45 (Arthur Kornhauser et al. eds., 1954).

### 1. Employer Attitudes Toward Unions Have Become Sharply Confrontational

Direct evidence of hardened employer attitudes is difficult to come by because the NLRB often penalizes employers who openly show anti-union animus.[208] If, however, an employer has enough self-restraint to cloak these sentiments with some economic rationale, there is virtually no limit to what that employer can do in combatting a union.[209] In short, behaving on the basis of unlawful attitudes does not create liability under the NLRA; only verbalizing such an attitude does. Therefore, only untutored employers reveal their attitudes openly, and union-busting attitudes are therefore driven below the surface. This makes it difficult to conclude that union decertifications are due to employer attitudes and implementing strategies and to rule out the possibility that these decertifications are due to genuine employee desires to be free of union representation.

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[208] *See, e.g.*, United Hydraulics Servs., Inc., 271 N.L.R.B. 107 (1984).

[209] United Steelworkers, Local Union 14534 v. NLRB, 983 F.2d 240 (D.C. Cir. 1993) illustrates how an employer can successfully employ an anti-union strategy behind an economic justification. During negotiations for a new agreement with a union which had represented employees for over 30 years, the employer proposed to reduce wages 30% and its contribution to medical insurance and vacations by 50%. *Id.* at 242. The union said that it would consider making these concessions if the employer could justify this need by demonstrating economic necessity, and therefore, the union requested that the employer disclose its finances. *Id.* The employer refused this request, terminated negotiations after its fourth meeting with the union, and unilaterally implemented its Draconian wage-and-benefit package. Only then did the union strike, and the employer immediately hired permanent replacements. *Id.* at 242-43. The D.C. Circuit Court of Appeals affirmed the NLRB's ruling that the employer had no duty to disclose this financial information because the employer justified its bargaining position in terms of wanting to remain "competitive." *Id.* at 244. Therefore, the court found that the employer committed no unfair labor practice during negotiations, and consequently, the union workers were economic rather than unfair labor practice strikers. *Id.* at 246-47. Thus, it was lawful for the employer to permanently replace these strikers. This case suggests that the employer wanted to provoke a strike and replace its union-represented employees, but wisely, it justified its negotiations in terms of remaining competitive.

### 2. Consultants Who Advise Employers on Ridding Themselves of Unions Have Increased Their Influence on Employer Labor Relations Practices

Masking anti-union intentions is so imperative for employers that, ironically, the term "union-busting" has given way to more polite, even Orwellian euphemisms such as "preventive labor relations" or "union avoidance."[210] The respectability of this activity stems in part from the fact that lawyers have entered this field,[211] replacing spies and provocateurs who broke up unions in an earlier age,[212] at least to a degree.[213] As part of this transformation, employers have rejected crude methods such as blacklisting workers[214] in favor of informational campaigns that

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[210] *See When the Boss Calls This Expert in, the Union May Be in Real Trouble*, WALL ST. J., Nov. 19, 1979, at A1.

[211] *See* Andrew J. Kahn, *Problems of Professional Ethics in Labor Law*, 1987 DET. C.L. REV. 731, 733 ("[M]anagement attorneys commonly conduct well advertised seminars on how to prevent unionization, or to defeat or to decertify unions.").

[212] *See Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73d Cong., 2d Sess., 300-01 (1934) (statement of Richard W. Hogue, Director of Workers' Education, Pennsylvania Federation of Labor), *reprinted in* 1 NLRA LEGISLATIVE HISTORY, *supra* note 74, at 27, 330-31. Hogue testified:

> [W]e have in America commercialized strike-breaking agencies, where one side in the industrial world, by the power of finance, employs representatives of this recognized agency in Chicago, New York, and elsewhere, in order to break down the right of other men to organize and express themselves through the power of collective bargaining. I have seen these spies, I have talked to them, I have seen a street-railway strike broken up, strike breakers brought in specially guarded trains from New York, 1,000 of them.
>
> I have seen when those men got out of the station in Altoona then destroy everything in sight that they could not eat or smoke. . . .

*Id.*

[213] *See* Donovan v. West Coast Detective Agency, Inc., 748 F.2d 1341 (9th Cir. 1984) (involving detective agency engaged by employer to spy on employees' union organizing activities).

[214] *See Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess., 180 (1935) (statement of Francis Biddle, Chairman of the NLRB), *reprinted in* 2 NLRA LEGISLATIVE HISTORY, *supra* note 74, at 2473, 2654. Rep. Lesinski stated during Biddle's testimony:

> [W]e know in our territory that if a man is employed in one of the automotive industries and he either through his labor organization or any other type of organization in that plant is blackballed in that industry as a Communist or a red when he goes to another plant to apply for a job they will ask him where he worked. He will say he worked at such and such a plant. They will immediately communicate with the other plant and they receive the information that this man is a labor agitator or a Communist and he never will get a job in

prey on workers' extraordinary ignorance of unions and employee rights under the NLRA.[215] The role of these attorneys has been defended by suggesting that they do not create or feed employers' anti-union attitudes but merely translate them into lawful conduct.[216] In sum, although attorneys are known to play a role in helping employers confront unions, few empirical studies actually measure their actual impact.[217]

In fact, management attorneys are only part of a larger cadre of advisors who consult employers on union avoidance tactics. By the most recent estimate, these consultants were part of a $100 million industry.[218] The most disturbing aspect of this advising is its tendency to encourage law-breaking behavior.[219] NLRB

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Detroit.

*Id.*

[215] *See* Peter D. Chiara, *The Right to Know: An Argument for Informing Employees of Their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 455 (1995) ("Despite this clear right of employees not to strike, management consultants advise employers to tell their workers during union organizing drives that '[a] union is capable of calling you out on strike and making you walk a picket line.'").

[216] *See* Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255, 261 (1990). Professor Gordon argues:

> Management lawyers might merely claim they simply are responding to the de facto revision of the conventional ground rules of capital-labor conflict, which has been going on since the late 1960s. Even in traditionally organized sectors, employers no longer accept the unions as a necessary evil, but treat them as obstructions to be moved away from, subcontracted around, or broken through aggressive resistance or decertification.

*Id.*

[217] Perhaps the best empirical study on this issue is John J. Lawler & Robin West, *Impact of Union-Avoidance Strategy in Representation Elections*, 24 INDUS. REL. 406 (1985).

[218] Jules Bernstein, *The Evolution and Use of Management Consultants in Labor Relations: A Labor Perspective*, 36 LAB. L.J. 292, 296 (1985) (citing AFL-CIO estimates that "75% of all employers hire consultants today at an annual cost of over $100,000,000 to guide employer efforts in seeking to avoid unionization during union organizing campaigns").

[219] *See* Terry Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives*, 79 NW. U. L. REV. 506 (1984); Robert W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 61 (Sheldon Friedman et al. eds., 1994); Charles T. Joyce, *Union Busters and Plant-Line Supervisors: Restricting and Regulating the Use of Plant Line Supervisory Employees by Management Consultants During Union Representation Campaigns*, 135 U. PA. L. REV. 453 (1987); Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 954-69 (1987). For accounts of this activity by practitioners, see MARTIN J. LEVITT & TERRY CONROW, CONFESSIONS OF A UNION BUSTER (1993) and ALFRED T. DEMARIA, HOW MANAGEMENT WINS UNION ORGANIZING CAMPAIGNS (1980).

data showing a dramatic increase in employer unfair labor practice charges, from a range of 3,522 to 4,472 in 1950-1957, [220] to a range of 17,361 to 31,281 in 1973-1981,[221] suggests a connection between management consultancy and strategic law-breaking. Moreover, commentators have suggested that, because penalties for violating the NLRA are so weak, employers have a financial incentive to flout the law,[222] and that certain cases decided under the NLRA are open invitations for employer

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[220] There were 4,154 charges against employers in fiscal year 1949 (FOURTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 159 tbl. 3 (1949)); 4,472 in fiscal year 1950 (FIFTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 222 tbl. 3 (1950)); 4,164 in fiscal year 1951 (SIXTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 294 tbl. 2 (1951)); 4,306 in fiscal year 1952 (SEVENTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 281 tbl. 2 (1952)); 4,409 in fiscal year 1953 (EIGHTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 95 tbl. 2 (1953)); 4,373 in fiscal year 1954 (NINETEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 157 tbl. 2 (1954)); 4,362 in fiscal year 1955 (TWENTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 161 tbl. 2 (1955)); 3,522 in fiscal year 1956 (TWENTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 165 tbl. 2 (1956)); and 3,655 in fiscal year 1957 (TWENTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 163 tbl. 2 (1957)).

[221] There were 17,361 charges against employers in fiscal year 1973 (THIRTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 206 tbl. 2 (1973)); 17,978 in fiscal year 1974 (THIRTY-NINTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 198 tbl. 2 (1974)); 20,311 in fiscal year 1975 (FORTIETH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 205 tbl. 2 (1975)); 23,496 in fiscal year 1976 (FORTY-FIRST ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 208 tbl. 2 (1976)); 26,105 in fiscal year 1977 (FORTY-SECOND ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 269 tbl. 2 (1977)); 27,056 in fiscal year 1978 (FORTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 241 tbl. 2 (1978)); 29,026 in fiscal year 1979 (FORTY-FOURTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 268 tbl. 2 (1979)); 31,281 in fiscal year 1980 (FORTY-FIFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 243 tbl. 2 (1980)); and 31,273 in fiscal year 1981 (FORTY-SIXTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD 176 tbl. 2 (1981)).

[222] *See* Robert J. Flanagan, *Compliance and Enforcement Decisions Under the National Labor Relations Act*, 7 J. LAB. ECON. 257, 278 (1989) ("The board's remedial awards appear to have little influence on behavior, and the analysis confirms the meager incentives for employer compliance in the absence of stronger remedies."); *see also* Michael Gottesman, *In Despair, Starting Over: Imagining a Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 62-63 (1993). Professor Gottesman observes:

> While the NLRA purports to outlaw employer discharges against employees for unionizing, the Act catches but a fraction of the caught, even then only too late, and ultimately visits sanctions on those culprits that are so small as to make union busting the economically rational choice. Not surprisingly, union busting is going full tilt.

*Id.*

noncompliance.[223] Proposals to regulate this perverse form of advising have no real impact,[224] and this consultancy continues to grow.[225]

The irony of this situation is that in 1959, Congress already recognized these consultants as a harmful influence on collective bargaining, identifying them in strong terms such as "union-busting middlemen."[226] A Senate Report noted: "[I]n almost every instance of corruption in the labor-management field there have been direct or indirect management involvements. The report of the McClellan committee describes management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization."[227] The committee then identified these consultants' objectionable practices: "In some cases they work directly on employees or through committees to

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[223] *See* G. Pascal Zachary, *Labor: Long Litigation Often Holds Up Union Victories*, WALL ST. J., Nov. 17, 1995, at B1 (reporting that Pilgrim's Pride Corp. failed to renew labor agreement when it expired, unilaterally raised employee contributions for medical benefits in 1988, was found in violation of NLRA for this action in 1991, and had refused to comply with this order as late as November 1995); *see also* NLRB v. Thill, Inc., 980 F.2d 1137 (7th Cir. 1992). In *Thill*, a majority of 70 employees voted in 1980 to have a union represent them, but the employer did not come to terms with the union for a first contract. *Id.* at 1138. The union later filed ULP charges, and two years later, an ALJ ruled in its favor. *Id.* The employer then appealed to the NLRB, which, for some unexplained reason, sat on the case until 1990. *Id.* By this time, all but 10 of the original 70 employees had left the company, and so the company challenged the Board's affirmance of the ALJ's bargaining order on the ground that the union no longer enjoyed majority support. *Id.* at 1142. Judge Posner was persuaded by the employer's argument, and, calling the NLRB the "Rip Van Winkle of administrative agencies," refused to enforce the Board's order. *Id.* at 1142-43.

[224] *See* J. Ralph Beaird, *Employer and Consultant Reporting Under the LMRDA*, 20 GA. L. REV. 533 (1986) (evaluating viability of LMRDA's reporting provisions); Charles B. Craver, *The Application of the LMRDA "Labor Consultant" Reporting Requirements to Management Attorneys: Benign Neglect Personified*, 73 N.W. L. REV. 605 (1978) (analyzing degree to which parties comply with labor consultant reporting requirements); Note, *The Liability of Labor Relations Consultants for Advising Unfair Labor Practices*, 97 HARV. L. REV. 529, 540-41 (1983) (arguing that effectuation of NLRA policy aims would be improved by subjecting consultants who willfully counsel employers to violate law to legal sanctions). *But cf.* Lynn D. Moffa, *Reporting Nonpersuasion Under the LMRDA*, 1986 DET. C.L. REV. 759, 767 (arguing that attorney-consultants who advise clients, but do not persuade employees, should not be subject to LMRDA reporting requirements).

[225] *See* JOHN LAWLER, UNIONIZATION AND DEUNIONIZATION (1990); *see also* Jules Bernstein, *Union Busting: From Benign Neglect to Malignant Growth*, 14 U.C. DAVIS L. REV. 3, 17-36 (1983) (surveying growth of union-busting consultants).

[226] S. REP. NO. 187, *supra* note 100, at 10, *reprinted in* 1 LMRDA LEGISLATIVE HISTORY, *supra* note 100, at 406.

[227] *Id.*

discourage legitimate organizational drives or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices."[228] The Senate Report specially emphasized the kind of activities that have continued to subvert labor-management relations: "[L]arge sums of money are spent in organized campaigns on behalf of some employers for the purpose of interfering with the right of employees to join or not to join a labor organization of their choice, a right guaranteed by the National Labor Relations Act."[229]

Congress attempted to regulate these activities in the Landrum-Griffin Act, not by outlawing consulting, but by requiring that this activity be reported.[230] Congress believed that con-

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[228] *Id.*

[229] *Id.* The Report continued:

> Sometimes these expenditures are hidden behind committees or fronts; however the expenditures are made, they are usually surreptitious because of the unethical content of the message itself. The committee believes that this type of activity by or on behalf of employers is reprehensible. These expenditures may or may not be technically permissible under the National Labor Relations or the Railway Labor Acts, or they may fall in a gray area. In any event, where they are engaged in they should be exposed to public view, for if the public has an interest in preserving the rights of employees then it has a concomitant obligation to insure the free exercise of them.

*Id.* at 407.

[230] In requiring that consulting be reported, Congress defined a "labor relations consultant" as "any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities." Landrum-Griffin Act, *supra* note 102, § 3(m), *reprinted in* 1 LMRDA LEGISLATIVE HISTORY, *supra* note 100, at 3. The Act then imposed the following reporting duty on employer consultants:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—
>
> (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; . . .
>
> . . . .
>
> shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement.

*Id.* § 203(b) at 9. This same section also required reporting of the consultants' receipts for

sultants should report their activities because "most of them are disruptive of harmonious labor relations and fall into a gray area."[231] Congress created a significant limitation in this reporting requirement, however, by exempting attorney-client communications.[232] More recently, a significant federal court decision expanded this exemption for lawyers who advise employers on union-avoidance while avoiding direct activities to persuade employees.[233] Consequently, the Department of Labor is now proposing a rule to narrow the scope of reporting under the Landrum-Griffin Act.[234] Thus, earlier court rulings subjecting management attorneys to this reporting requirement appear to be nullified.[235]

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"labor relations advice or services" and "disbursements of any kind in connection with such services." *Id.*

[231] S. REP. NO. 187, *supra* note 100, at 12, *reprinted in* 1 LMRDA LEGISLATIVE HISTORY, *supra* note 100, at 408.

[232] Section 204 provides that "[n]othing contained in this Act shall be construed to require an attorney . . . to include in any report required to be filed . . . any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." Landrum-Griffin Act, *supra* note 102, § 204, *reprinted in* 1 LMRDA LEGISLATIVE HISTORY, *supra* note 100, at 10.

[233] *See* Donovan v. Rose Law Firm, 768 F.2d 964 (8th Cir. 1985). The law firm vindicated in this attorney-client privilege controversy is now at the heart of a more notable attorney-client privilege controversy, involving President Bill Clinton and his deceased advisor, Vince Foster. *See* Glenn R. Simpson, *Clintons' Lawyer Got Foster Papers, D'Amato Alleges*, WALL ST. J., Dec. 12, 1995, at B5.

[234] *See* 60 Fed. Reg. 60266 (1995) (to be codified at 29 C.F.R. § 406.3) (proposed Nov. 28, 1995).

[235] *See, e.g.*, Humphries, Hutcheson & Moseley v. Donovan, 568 F. Supp. 161 (D.C. Tenn. 1983), *aff'd*, 755 F.2d 1211 (6th Cir. 1984) (rejecting law firm's attorney-client privilege defense under Landrum-Griffin Act). However, the holding of Wirtz v. Fowler, 372 F.2d 315 (5th Cir. 1966), that lawyers who were engaged by their clients to persuade employees were not exempt from reporting requirements under the Landrum-Griffin Act, may still be valid because the law firm there was directly involved with persuading activities.

Commentary on this general issue appears in Benjamin Boyd, Donovan v. Rose Law Firm*: Limiting the Scope of Attorney Reporting Requirements Under the Labor-Management Reporting and Disclosure Act of 1959*, 39 ARK. L. REV. 687 (1986); Naomi Braude, *The Labor-Management Reporting and Disclosure Act: The Extent of Disclosure Required under Sections 203(B) and (C)*, 61 CHI.-KENT L. REV. 751 (1985); Dorothy P. Whelan, *Extent of Disclosure Required Under Section 203 of the LMRDA:* Donovan v. Rose Law Firm, 28 B.C. L. REV. 112 (1986).

### 3. Changes in the Law on Striker Replacement Have Helped to Convert the Economic Strike from a Union to an Employer Weapon

An earlier study on my database of replacement strikes showed that in the period from 1961-1990, they lasted an average of 143 days,[236] and more recently, they lasted even longer. (From 1971-1990, they lasted an average of 156 days, and from 1982-1990, they lasted 177 days.)[237] Finding 7 in this Article examined replacement-severance strike duration and found that these strikes often last more than a year. Taken together, these data suggest that when Congress amended section 9(c)(3) in 1959, it unwittingly created perverse employer incentives to sever bargaining relationships with unions. In addition to these empirical findings, particular cases strengthen this conclusion.[238]

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[236] *See* Michael H. LeRoy, *The Changing Character of Strikes Involving Permanent Striker Replacements, 1935-1990*, 16 J. LAB. RES. 423, 428 fig. 2 (1995) (Replacement Strike Duration).

[237] *Id.*

[238] Jeld-Wen of Everett, Inc., 285 N.L.R.B. 118 (1987), and E.A. Nord Co., 276 N.L.R.B. 1418 (1985), two decisions involving the same replacement-severance strike, suggest how important the first anniversary of an economic strike is in formulating both a union's and an employer's strike strategies. The union and the employer had a 40-year bargaining history, but when contract negotiations failed to produce a new agreement, approximately 500 employees walked off their jobs on July 14, 1983. *Id.* at 1419. The company operated with approximately 700 striker replacements and crossover employees. *Id.*

Management consultants represented the company throughout the strike. *Id.* As early as September 8, the company informed the union that it had reason to doubt that the union had majority support in the bargaining unit (now swelled with replacement strikers), and that it was therefore withdrawing recognition. *Id.* Eventually, the union put this assertion to a test by petitioning for an NLRB election on April 11, 1984, just three months before its striking members would become ineligible under § 9(c)(3) of the amended NLRA. *Id.* The election was held July 11, 1984, only three days before the ineligibility rule would have barred replaced strikers from voting. *Id.*

The management consultants used unethical tactics to influence replacement workers to vote against the union. During pre-election meetings, they announced that any replacement worker who voted in the decertification election would be eligible to win one of five raffle tickets worth $252. *Id.* at 1426-27. Replaced strikers were expressly excluded from this raffle, and the raffle winnings were explicitly equated to "the amount of Union dues strikers pay to the Union each year." *Id.* at 1427. In a pre-election flyer distributed to replacement workers, the consultants waged a campaign of fear and distortion, claiming that if replacements voted for the union, the union "could tell you were [sic] to get food stamps since they've run out of strike funds," and if they remained outside the union while the strikers returned to work, the union could force their expulsion from work and put them through the "Union's internal Kangaroo Court proceedings" that "in attorney fees alone . . . [would cost] $10,000." *Id.* at 1420. Testimony from replacement workers who

One of section 9(c)(3)'s perverse incentives is to promote employer hiring of permanent, rather than temporary, striker replacements because it explicitly disenfranchises only replaced (that is, permanently replaced) strikers.[239] Its second perverse incentive is the prolonging of strikes by creating an apparent employer reward on the occasion of the strike's first anniversary. In sum, even though an employer has a right after the first year of a union's certification to file a decertification petition,[240] the odds of winning such an election appear to increase sharply when a strike occurs (or is provoked), permanent replacements are hired, and replaced strikers are disenfranchised after one year from commencing their strike. These employer incentives are perverse because the NLRA expressly states a policy favoring expeditious settlement of labor disputes.[241]

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attended pre-election meetings run by the consultants indicated that the consultants equated voting "yes" for union representation with the loss of jobs for replacements, bankruptcy for the company, and closure of the mill. *Id.* at 1421-23.

As a result of this campaigning, the decertification election had a "carnival atmosphere." *Id.* at 1426. Evidence showed that a management consultant released hundreds of replacement workers at a time to report to the polls; as these workers waited in line to vote, they repeatedly heckled union representatives who were lawfully challenging voters and frequently shouted anti-union remarks. *Id.* The ALJ concluded that "[a] fair election [could not] be conducted under such circumstances" and set aside the election results. *Id.* at 1427. The Board affirmed this ruling. *Id.* at 1418.

A second election was held, although not until almost one and a half years after the first election. *Jeld-Wen*, 285 N.L.R.B. at 118. The employer then objected to the eligibility of 464 economic strikers who voted in the election on the ground that the strike was continuing, and had lasted over a year, and therefore, § 9(c)(3) disqualified all these voters. *Id.* at 119. The Regional Director of the NLRB sustained these challenges, but the union appealed. *Id.* While the case was on appeal before the Board, E.A. Nord Co. was sold in bankruptcy proceedings to Jeld-Wen of Everett, Inc., and E.A. Nord argued to the Board that the representation proceeding had become moot because its successor could not be bound to this bargaining relationship. *Id.* at 118 n.1. By raising this nearly pointless objection, E.A. Nord succeeded in further delaying the Board until the Regional Director held another hearing, on December 18, 1986, which resulted in a ruling that Jeld-Wen was indeed a legal successor. *Id.* Finally, in a decision issued July 31, 1987—over three years after the first tainted election occurred—the Board overruled the Regional Director and ordered that the challenged ballots be counted. *Id.* at 122.

[239] *See supra* note 95 and accompanying text.

[240] The rule that an employer can file a decertification petition only after the first year of a union's ceritification is set out in § 9(c)(3), which provides: "No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held." 29 U.S.C. § (9)(c)(3).

[241] *See id.* § 172 (creating Federal Mediation and Conciliation Service); *id.* § 173(b) (directing Service to "*promptly* . . . put itself in communication with the [unions and employers] and to use its best efforts, by mediation and conciliation, to bring them to

### *B. Policy Prescriptions*

Some commentators deny that current striker replacement policies are a problem,[242] but their arguments lack the kind of empirical data presented here. Others argue for a major change in these policies, primarily, a total ban on employer hiring of permanent striker replacements.[243] The policy prescriptions offered here join moderate proposals recognizing that some abuses under the present *Mackay Radio* doctrine have occurred and are thereby subverting collective bargaining.[244]

The findings presented here suggest that some employers have gone far beyond the business necessity rationale of the

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agreement" (emphasis added)).

[242] *See Hearing on H.R. 5*, *supra* note 25, at 160-84 (statement of Edward E. Potter, president of Employment Policy Foundation, an employer interest group); Peter G. Nash & Jonathan R. Mook, *Striker Replacement Legislation: If It Ain't Broke, Don't Fix It*, 16 EMPLOYEE REL. L.J. 317 (1990). *See generally* Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Laws and Its Prospects*, 51 U. CHI. L. REV. 1012 (1984) (characterizing scholarly criticism of *Mackay Radio* doctrine as radical).

[243] *See* WILLIAM B. GOULD IV, AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONS AND THE LAW 182-203 (1993); Pollitt, *supra* note 4; William D. Turner, *Restoring Balance to Collective Bargaining: Prohibiting Discrimination Against Economic Strikers*, 96 W. VA. L. REV. 685 (1994).

[244] *See* Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 387 (1995) (proposing to limit employers' exercise of their right to hire permanent striker replacements by making exercise of this right mandatory subject of bargaining); William A. Corbett, *Proposal for Procedural Limitations on Hiring Permanent Striker Replacements: "A Far, Far Better Thing" Than the Workplace Fairness Act*, 72 N.C. L. REV. 813, 866 (1994) (proposing temporary ban on employer hiring of permanent striker replacements until NLRB determines, under expedited proceedings, that strike is economic in nature); Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 MICH. L. REV. 577, 581-82 (1994) (suggesting that employer should have to prove business necessity before hiring permanent striker replacements, and also supporting American adoption of Ontario law which, at that time, permitted replaced strikers to return to work within six months before losing right to immediate reinstatement); Samuel Estreicher, *Labor Law Reform in a World of Competitive Product Markets*, 69 CHI.-KENT L. REV. 3, 38 (1993) (endorsing use of advisory interest arbitration as substantial limitation on employer's right to hire permanent striker replacements); Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of Executive Order 12954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. (forthcoming Mar. 1996) (supporting Executive Order that deters federal contractors from hiring permanent striker replacements by threatening debarment on ground that federal government should model constructive labor relations practices); Douglas E. Ray, *Some Overlooked Aspects of the Striker Replacement Issue*, 41 U. KAN. L. REV. 363, 400 (1992) (recommending legislative repeal, or Board or appellate court reversal, of recent NLRB decisions limiting reinstatement rights for replaced strikers).

*Mackay Radio* doctrine and have used that doctrine as a union-busting tool in the context of decertification elections. To address the abuse, this Article proposes that section 9(c)(3) of the NLRA be amended to remove the one-year voter eligibility rule for replaced strikers.

The 1959 amendment that produced this rule has no particular logic. Congress arbitrarily determined that after one year, a replaced striker presumably has lost interest in his struck job.[245] Perhaps this reasoning made sense when nearly one in three jobs was unionized,[246] and therefore, replaced strikers might find a new employer who would pay union wages and benefits. In the 1980s and 1990s, however, permanently replaced strikers have reported that their living standards declined sharply.[247] Moreover, anecdotal evidence suggests that many of these strikers are older workers, some nearing retirement.[248] There-

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[245] *See* Jeld-Wen of Everett, Inc., 285 N.L.R.B. 118, 119-20 (1987).

[246] *See supra* note 13 and accompanying text.

[247] *See* John Carlson, *Their War Over, Strikers Say They'll Accept Union's Orders*, DES MOINES REG., May 22, 1995, at 1 (reporting that many strikers who were permanently replaced by Bridgestone/Firestone lost their homes because most could find only menial new jobs); *see also* Gary Blonston, *Changes Surface in Labor Market*, HARRISBURG PATRIOT & EVENING NEWS (Harrisburg, Pa.), Apr. 19, 1992, F1 (explaining that 12,600 Caterpillar strikers returned to work when threatened with permanent replacement because "[t]he job market has become a buyers' market for the nation's employers"). Blonston concludes: "[T]he global competition that is driving U.S. corporations to cut payrolls and other costs has created a heightened level of competition among workers as well — witness the tens of thousands of strike-replacement job applicants who showed Caterpillar how happy they would be with the wages the United Auto Workers first refused." *Id.*

[248] *See* Barry Bearak, *After A Long Tug of War, Labor Slips*, L.A. TIMES, May 14, 1995, at A1 (reporting on how older strikers at Caterpillar were unprepared to deal with prospect of being permanently replaced). Bearak states:

> Older workers well knew the drill. They postponed their car payments to the credit union. Picket signs twirled beneath the sun.
>
> Then, 21 weeks into the walkout, a stunning letter arrived at each home. Hands began to quiver as eyes slid down the page. Cat was doing something that had been unthinkable for Big Business only a decade before. Dear Fellow Employee, the letter said: Report to work or we will permanently replace you.
>
> Most of the workers were in their mid-40s, with just enough seniority to have ducked the storm of layoffs; more than half were within six years of retirement. Could all that effort toward a full pension suddenly be wiped away?

*Id.* Jon Pepper, *News Columnist Calls For End to Strike*, DETROIT NEWS, July 26, 1995, at A4, reports on the following appeal to fellow union members made by one striker threatened with permanent replacement during the Detroit Free Press strike: "To walk out . . . has risked the livelihood of those our guild should protect the most, e.g. older workers nearing

fore, it no longer seems reasonable to assume that these strikers have disavowed interest in being reinstated.

Moreover, this Article presents substantial evidence of employer abuse of section 9(c)(3)'s disenfranchisement rule. It shows that replacement-severance strikes did not increase until the one-year rule was enacted. Almost immediately after the rule became law, complaints of employer unfair labor practices proliferated, and they continued to grow until they peaked in the late 1970s and early 1980s. As these complaints grew, so did the number of replacement-severance strikes in this survey, as well as strike duration and union decertification losses. The convergence of these trends suggest that during the late 1970s and early 1980s, employers focused on deunionization strategies utilizing hiring of permanent striker replacements and petitioning for decertification elections. Although all of these negative measures of constructive labor-management relations have declined in the 1980s and 1990s, the drop has been small. In addition, adjusting for the sharp decline in workers covered by collective bargaining agreements during the last decade,[249] these deunionization activities may be occurring with the same relative frequency as they did during the peak period.

Abolishing the one-year eligibility rule should provoke much less controversy than the Workplace Fairness Act, a bill defeated in 1992 and 1994 that would have banned employer hiring of permanent striker replacements. This proposal extinguishes no employer right; moreover, employers would continue to have ample opportunity to resist unions by petitioning for decertification elections. They could still greatly influence the outcome of these elections by hiring more replacements than replaced strikers, and by continuing to hold captive audience meetings with replacements to inform them of the advantages of decertifying a union.

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retirement . . . [and] people with significant health problems. . . . Such people are not likely to fare well in a tough job environment, yet this strike could very well expose them to that possibility." Dick Marlowe, *Older Workers Have Tough Time After Layoffs*, DAYTON DAILY NEWS, June 13, 1994, at 12, reports that the angry workers now include "older women . . . [who] were permanently replaced in their jobs nearly three years ago when they walked out of the Diamond Walnut canning plant claiming unfair demands by the company."

[249] *See supra* note 14 and accompanying text.

Several comparisons underscore the moderate nature of this proposal. President Eisenhower's proposal to bar the NLRB from acting on all employer petitions to hold a decertification election after strikers are replaced[250] was much more more far-reaching, as it would have partially nullified an employer's right to petition for such an election under the Taft-Hartley Act. My proposal does nothing to nullify this employer right. A recent change in Canadian law also provides a useful benchmark. Ontario enacted legislation in 1995 to repeal a 1993 ban on employer hiring of permanent striker replacements, and this law also permits workers who want to decertify a union to call an election when only forty percent of their co-workers support such a petition.[251] The law, however, also provides for dismissing a decertification election if there is proof that an employer "intimidates" workers into supporting this drive.[252] In short, Eisenhower's proposal and the new Ontario law are similar because each forfeits an employer's right to participate in decertification proceedings. In contrast, my proposal affects only voter eligibility in a decertification election, and it at no point penalizes employer conduct.

Caselaw under the Railway Labor Act (RLA), though, may provide the best comparison. As an outgrowth of the strike by TWA flight attendants in which the airline hired 2,800 permanent replacements,[253] these replacements formed an organization to rival the striking union and petitioned for an election to be certified as the new representative for TWA flight attendants.[254] The issue presented to the National Mediation Board was "whether the former strikers who are presently on a preferential rehire list, should be included as potential eligible voters."[255] Deciding in favor of the replaced strikers, the Mediation Board "decline[d] to disenfranchise the former strikers."[256] In reaching this decision, the Board cited

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[250] *See supra* note 100.

[251] Rob Ferguson, *Strikebreakers Now Legal in Ontario: "A Big Step Forward," or "War"?*, WINDSOR STAR, Nov. 11, 1995, at A1.

[252] *Id.*

[253] *See In re* Professional Cabin Crew Ass'n, 15 N.M.B. 11, 14 (1987).

[254] *Id.* at 11.

[255] *Id.*

[256] *Id.* at 16.

numerous precedents.[257] Summarizing this authority, it stated that "the Board has held . . . that such individuals may be eligible voters even if the employer hires replacement workers."[258]

There is no good or sensible reason for providing replaced strikers covered by the NLRA less right to vote in a decertification election than replaced strikers covered by the RLA. The Supreme Court has said that while "the National Labor Relations Act cannot be imported wholesale into the railway labor arena,"[259] it has frequently "referred to the NLRA for assistance in construing the Railway Labor Act."[260] Furthermore, it recently used an important precedent under the NLRA to interpret the reinstatement rights under the RLA of strikers who were permanently replaced.[261] Thus, the Court sees no basic difference in the rights of replaced strikers under the NLRA and RLA.

The primary aim of this proposal would be to remove an unhealthy employer incentive to prolong replacement strikes simply to disenfranchise replaced strikers. There is no legitimate policy reason for encouraging this strategy, unless Congress harbors "an unarticulated hostility toward strikes."[262] Moreover, employers stand to lose little from this rule change. Management consultants would have the most to lose because this change would remove a key strategy from their arsenal of manipulations. Even their loss, though, would be minimal under this proposal because it would not limit the number or timing of decertification elections, and it would neither strengthen the

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[257] *See id.* at 16 (citing El Al Israel Airlines, 12 N.M.B. 238 (1985); Altair Airlines, 7 N.M.B. 507 (1980); Wein Air Alaska, 6 N.M.B. 701 (1979); Florida East Coast Ry., R-3869 (1967) and R-3819 (1966)).

[258] *Id.*

[259] Brotherhood of R.R. Trainmen v. Jacksonville Terminal, 394 U.S. 369, 383 (1969).

[260] *Id.*

[261] *See* TWA, Inc. v. Independent Fed'n of Flight Attendants, 489 U.S. 426 (1989). The majority used an NLRA precedent, NLRB v. Erie Resistor, 373 U.S. 221 (1963), in deciding that TWA did not violate the rights of replaced strikers under the RLA to displace replacements and crossovers who worked during the strike. *Id.* at 434-39. It noted: "We reject this effort to expand *Erie Resistor.* Both the RLA and the NLRA protect an employee's right . . . not to strike. . . . " *Id.* at 436.

[262] *Id.* at 447 (Brennan, J., dissenting).

weak penalties for egregious employer misconduct nor limit the speech rights of these consultants.

Unfortunately for the American public, middle-ground is elusive whenever amendments are proposed to the NLRA. The last time section 9(c)(3) was amended was an exception. It was amended with good intentions by Democrats in Congress and a Republican President who agreed that a provision promoting union-busting was unhealthy for the nation. Their solution was good for 1959, but it no longer works. Unless section 9(c)(3) is amended to remove the one-year voter eligibility rule, decertification elections in which employers cynically maneuver to disenfranchise strikers will continue to occur.

## CONCLUSION

The Taft-Hartley Act's provision of a process to decertify unions was defensible because in the absence of such legislation, the NLRB had rejected decertification petitions by employees unhappy with their union's representation.[263] In 1950, a leading analysis of the Act aptly described its numerous amendments to the NLRA as complex and multi-faceted, and therefore, it concluded that the law "meant many things to many men."[264] This analysis was probably correct in characterizing some of the amendments as needed equalizers, redressing the imbalance of economic power conferred upon unions in the original NLRA,[265] and others as unjustified interferences with collective bargaining and administration.[266] This analysis grouped the Act's decertification provisions in the latter category, noting:

> Highly effective weapons were given to an employer who sought to break a union or to break a strike. . . . [F]iling of an employer petition or instigating a decertification petition filed by employees, with strikers not eligible to vote if it had been possible to replace them, . . . added up to substantial aid and comfort to an employer who undertook to fight a

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[263] *See In re* Tabardrey Mfg. Co., 51 N.L.R.B. 246 (1943).

[264] HARRY A. MILLIS & EMILY C. BROWN, FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS 655 (1950).

[265] *See id.* at 656-58.

[266] *See id.* at 659-64.

> union with all the help he could obtain from the law. . . . [T]his invited conflict rather than reliance upon collective bargaining and peaceable means of settling disputes.[267]

Following by forty-six years this analysis's publication, this Article offers disturbing confirmatory evidence. Paradoxically, even though unions struck employers with much less frequency in the 1980s and early 1990s, evidence presented here suggests that strikes involving employer hiring of permanent replacements increased in this period. Moreover, a pattern appears to have emerged in which replacement strikes involving employer attempts to decertify or withdraw recognition from a union increased since the early 1970s.

The ultimate test of section 9(c)(3)'s propensity to encourage struck employers to fight back by decertifying unions is whether these strikes are lasting over a year. Evidence presented here showed that in eleven of the most recent twenty-three years analyzed, the average duration of replacement-severance strikes has exceeded one year.

Section 13 of the NLRA expressly safeguards the right to strike from interference, impedance, and diminution; but it is "undisputed that the NLRA preserves to employers the right to permanently replace economic strikers as an offset to the employees' right to strike."[268] Be that as it may, it does not follow that the NLRA should, in addition to providing this employer "offset," also provide a strategic tool for permanently severing a bargaining relationship with a striking union. Until section 9(c)(3) is modified to permit strikers to vote shoulder-to-shoulder with the workers who replace them, the right to strike in the United States is little more than a pretense, and the NLRA's supposed neutrality between employers and unions is a fiction.

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[267] *Id.* at 663.

[268] Chamber of Commerce of United States v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996).