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Julius G. Getman and Thomas C. Kohler

The Story of *NLRB v. Mackay Radio & Telegraph Co.*: The High Cost of Solidarity

Few cases in the labor law canon have generated more vigorous debate or sparked more heated criticism than the Supreme Court's 1938 *Mackay* opinion.¹ The decision represents one of the Court's earliest interpretations of the provisions of the National Labor Relations Act. On its way to holding that an employer may not discriminate on the basis of union activity in reinstating employees at the end of a strike, the *Mackay* Court also instructed that an employer enjoys the unrestricted right under the statute permanently to replace strikers.

Although stated as dictum, the latter proposition, which quickly became known to lawyers and scholars as the "*Mackay* doctrine," has remained an important, if highly controversial, aspect of American labor law. After nearly seven decades, the doctrine continues to provoke the notice and the nearly universal condemnation of scholars. Commentary on the case in the classroom and in the literature tends to run from bewilderment ("Why did the Court reach for an issue not properly before it?") to the more darkly suggestive ("*Mackay* seems to represent the triumph of entrenched property rights thinking on the part of the justices over new notions of workers' rights"), to the flatly condemnatory ("The case stands as a prime example of the judicial de-radicalization of the Wagner Act"). The criticism is understandable.

The *Mackay* doctrine, as it has emerged, effectively hollows out the protections the Act affords strikers. The rule forbids employers to discharge workers who engage in a legal strike. At the same time, it allows employers to hire other workers to take their jobs. The replaced

¹ *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

striker remains an employee, but one who enjoys only a preferential claim to the prior position, if and when it becomes vacant, and only if the former striker has been unable to find comparable work. This distinction between discharge and replacement, critics charge, is the sort that only a lawyer could love—or even have imagined. To most contemporary observers, the doctrine undermines the right to strike, a right given special acknowledgment in the Act. *Mackay*, they note, makes it a peculiar right, the exercise of which may lead to the loss of one’s job. Critics also point out that by weakening the right to strike, *Mackay* inadvertently undermines the institution of collective bargaining. As the Supreme Court has observed, the strike is “part and parcel of the system” the NLRA established, and constitutes “a prime motive power for agreements in free collective bargaining.”² Critics also argue that the rule upsets the neutrality toward the parties that the Act’s framers intended the statute to embody.

Although the majority of contemporary commentators denounce *Mackay*, in 1938 it was heralded as a great victory for the National Labor Relations Board.³ The Board’s General Counsel, Charles Fahy, described it as a “gratifying” result which settled crucial constitutional and statutory interpretation issues, while the Union’s President, Mervyn Rathborne, hailed it as a “complete vindication of the three-year fight of the union for reinstatement of the locked-out workers involved.”⁴ End-of-the-Court-Term assessments of the opinion by newspaper analysts⁵ and the relatively small amount of law review commentary the case produced regarded *Mackay* as an important victory for the Wagner Act and for workers’ rights.

As surprising as it may seem to us, the decision’s striker-replacement language received little notice from observers at the time. The first piece critical of *Mackay* did not appear until 1941, three years after the decision was announced.⁶ It would remain the sole critical piece for some

² *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477 (1960).

³ *E.g.*, *Decision Protects American Workers*, *The Boston Evening Globe*, May 16, 1938, at 1; *Court Backs Strike Right—Labor Board Scores in Mackay Case—Job Not Forfeit by Walk Out*, *The Boston Morning Globe*, May 17, 1938, at 1; *The Shape of Things*, *The Nation*, May 21, 1938, at 573.

⁴ Lauren D. Lyman, *High Court Upholds NLRB in Mackay Radio Strike; Reopens Republic Case*, *N.Y. Times*, May 17, 1938, at 1, 12.

⁵ Dean Dinwoodey, *Labor Law Wins High Court Tests*, *N.Y. Times*, May 22, 1938, at 62; Lewis Wood, *Court Again Helps New Deal*, *N.Y. Times*, May 29, 1938, at 40.

⁶ Leonard B. Boudin, *The Rights of Strikers*, 35 *Ill. L.Rev.* 817 (1941) (The author of this piece would become one of the best-known civil rights lawyers of the 1960’s, who represented, among others, Paul Robeson, Benjamin Spock, Daniel Ellsberg and the Cuban government. He was the great-nephew of Louis Boudin, a prominent labor lawyer and Karl

time. Serious and sustained criticism of the *Mackay* rule did not appear in the literature until the 1960's.

What accounts for this? If it is of such moment, why was so little mention made initially of *Mackay's* striker-replacement rule? Why does the case hold such different significance for us than it did for our predecessors? Why was it accepted at a time when the cause of labor was a primary concern of academics and liberals, but not today, a time when organized labor is in disarray and has far less support from intellectuals? The answers lie partly in the history of the case, but more significantly in the development of labor law and industrial relations in the years since *Mackay* was decided.

The holding of the case is relatively straightforward. Its history, however, takes some surprising turns and recounting it may reveal some of the basic problems and tensions that underlie the scheme of the National Labor Relations Act and the social understandings on which the statute rests.

Social and Legal Background

1. THE STATUS OF STRIKERS AT COMMON LAW

The NLRA became law on July 5, 1935. Now a mature statute with its basic principles well-established, one easily can forget the difficult choices its drafters confronted in framing its language, and the number of unforeseen problems that were left to be worked out through the process of what Justice Frankfurter called "elucidating litigation." It is also easy to forget that concepts very familiar to us had to be puzzled out over time by workers, their employers, the courts and other actors. Among these concepts are some that today hardly seem problematic at all: the definition and significance of a strike, the legal status of strikers, and the determination of when a strike ends.⁷ We can best comprehend the problems the drafters faced concerning these issues by looking briefly at the basic common law doctrines that informed their thinking.

Any discussion of basic principles of American labor and employment law must take the employment at-will rule into account. That rule exerts a deep and often unnoticed gravitational pull on every aspect of

Marx scholar, and the father of two children who took rather different paths with regard to the law. His daughter, Kathy Boudin, was a member of the radical Weather Underground group that was implicated in a series of bombings across the U.S., including the Pentagon, the Capitol building, and the headquarters of the New York Police Department. She served twenty years for the robbery of an armored truck during which a police officer was killed. Louis' son, Michael, became a prominent conservative jurist and a judge of the United States Court of Appeals for the First Circuit.)

⁷ For two examples of cases where such determinations were legally significant, see *West Allis Foundry Co. v. State*, 186 Wis. 24, 202 N.W. 302 (1925); *Dail-Overland Co. v. Willys-Overland, Inc.*, 263 F. 171 (N.D. Ohio 1919).

the structure and operation of our employment regulatory schemes. It also conditions our ideas about the status and rights of strikers and their relationship with their employer.

Without doubt the most famous statement of the at-will rule comes from the Tennessee Supreme Court's 1884 opinion in *Payne v. The Western and Atlantic R.R. Co.*⁸ There, the defendant railroad, presumably to protect its company-owned stores from competition, threatened to discharge any of its employees who bought goods from an independent merchant. The merchant, whose highly successful business was thereby destroyed, brought an action in tort against the railroad. The railroad, arguing in part that it "had the right to discharge employees because they traded with plaintiff, or for any other cause," successfully moved the trial court to dismiss the complaint.

The Tennessee Supreme Court affirmed the trial court's conclusion that the merchant's complaint stated no cause of action. If a master can direct his domestic servant not to trade with a merchant, the court reasoned, how could it be censurable if a master forbade a greater number from doing so? And if the law permits a master to withdraw his trade from a firm, how could it be unlawful for that master to order his servants to cease their trade, even if doing so will result in the failure of the company's business? The railroad's threat to discharge employees who continued to shop at the plaintiff's stores, the court concluded, also constituted no wrong. Employers, the court stated, "may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong."

Notions of mutuality justified this rule. The right the employer enjoys "is a right which an employee may exercise in the same way, to the same extent, for the same cause or want of cause as the employer. He may refuse to work for a man or company, that trades with any obnoxious person, or does other things which he dislikes. He may persuade his fellows, and the employer may lose all his hands and be compelled to close his doors..." In this way, the Court declared,

The great and rich and powerful are guaranteed the same liberty and privilege as the poor and weak. All may buy and sell when they choose; they may refuse to employ or dismiss whom they choose, without being thereby guilty of a legal wrong, though it may seriously injure and even ruin others.

The writer Anatole France parodied such formalized notions of evenhandedness in his 1894 book, *The Red Lily*, as the "majestic equality" of

⁸ 81 Tenn. 507 (1884). (The spelling of the word "employee" in quotes from the opinion has been modernized.)

the law “which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread.”⁹ Adam Smith expressed a similar skepticism about the law’s symmetry. In contests between masters and servants, he observed,

It is not . . . difficult to foresee which of the two parties must, upon all ordinary occasions, have the advantage in the dispute, and force the other into compliance with their terms. . . . In all such disputes the masters can hold out much longer. . . . Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long-run the workman may be as necessary to his master as his master is to him; but the necessity is not so immediate.¹⁰

Unions soon would temper the rigors of the at-will rule through the inclusion of language in collective bargaining agreements that required an employer to have just cause to discharge an employee. Clauses limiting an employer’s ability to discharge employees began to appear in collective agreements during the 1880’s.¹¹ But the court in *Payne* did not elaborate on the rights of employees who accepted the invitation and withheld their work as a group to protest their employer’s decisions. Had they not voluntarily quit their jobs? Could not the employer offer to others the positions the strikers had surrendered?

By the beginning of the twentieth century, common law courts largely had settled these issues. In his frequently cited concurrence in the 1908 case of *Iron Molders’ Union v. Allis-Chalmers Co.*, for example, Judge Grosscup instructed that

A strike is cessation of work by employees in an effort to get for the employees more desirable terms. A lock out is a cessation of the furnishing of work to employees in an effort to get for the employer more desirable terms. Neither strike nor lock out completely terminates, when this is its purpose, the relationship between the parties.¹²

As the Seventh Circuit subsequently would observe in *Michaelson v. United States*, when workers strike, “[t]hey are no longer working and receiving wages; but in the absence of any action other than . . . looking to a termination of the relationship, they are entitled to rank as

⁹ Anatole France, *The Red Lily* 91 (Winifred Stephens, trans., Wm. H. Wise & Co. 1930).

¹⁰ Adam Smith, 1 *An Inquiry into the Nature and Causes of the Wealth of Nations* 83–84 (R. H. Campbell and A. S. Skinner, eds., Oxford Univ. Press 1976).

¹¹ Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 *Comp. Lab. Law* 85, 121–22 (1982).

¹² 166 F. 45, 52 (7th Cir. 1908) (Grosscup, J., concurring).

‘employees,’ with the adjective ‘striking’ defining their immediate status.”¹³

The discussions of the status of strikers in the *Iron Molders’* and *Michaelson* cases, like that in other court decisions dealing with the issue, were incidental to appeals testing the granting or the limits of a labor injunction. The question of the employment status of the strikers was crucial to the question of their legally-protected right to picket and to engage in other activities seeking to persuade others not to take jobs with the struck employer. As employees, strikers had the right to make such appeals because the end sought—the betterment of their wages and working conditions—was lawful. In contrast, strangers with no employment-related interests to protect would be presumed to be acting out of malevolent and hence legally actionable motives.

The *Iron Molders’* opinion well illustrates these points. While enjoining threats of violence, the use of abusive or vile language and like acts, the court permitted the union to picket all the foundries in the city and county of Milwaukee in furtherance of a dispute over wages and working conditions. It also refused to enjoin striking members of the union from following work that had been transferred from the struck employers to foundries in other cities. As the court explained,

[i]f appellee [the struck employers] had the right (and we think the right was perfect) to seek the aid of fellow foundrymen to the end that the necessary element of labor should enter into appellee’s product, appellant [the union members] had the reciprocal right of seeking the aid of fellow molders to prevent that end. To whatever extent employers may lawfully combine and co-operate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen to combine and co-operate to control the supply and the conditions of the labor that is necessary to the doing of the work.¹⁴

The formal equality of the parties under the law, and their equal freedom to act in pursuit of their self-interest, governs the rationale and outcomes of these cases. As the *Michaelson* court explained, “In the industrial combat the two sides must have equal and reciprocal rights in exerting economic pressure . . . the strike was only tolerated as a weapon on one side because the other side was armed with an equivalent weapon.” The “mutual freedom” of employers and employees to bring economic pressure on one another, the court instructed, “is the vitals of ‘collective bargaining’ or any bargaining.”¹⁵

¹³ 291 F. 940, 943 (7th Cir. 1923).

¹⁴ 166 F. at 52.

¹⁵ 291 F. at 943–44.

The formal equality of the law did not require effective equality. The common law did not seek to limit employer exercise of its economic power. The at-will rule, then-regnant concepts of contractual freedom, and formalized ideas of equality permitted employers to use devices such as yellow-dog contracts, by which employees agreed, as a condition of their employment, not to join a union or to attempt to organize fellow employees. Employers also remained free to discriminate against or discharge employees suspected of union activity, to use spies and to maintain blacklists, to establish company unions and representation plans to frustrate attempts at unionization and to employ other tactics designed to undermine strikes and to thwart other self-help efforts undertaken by their employees.

Commenting on the state of the law as it existed on the eve of the New Deal and the passage of the National Industrial Recovery Act of 1933, the labor historian Irving Bernstein noted that

It was not true, however, as sometimes charged, that the law was tilted in the favor of employers. Labor relations law, statutory and, to a lesser extent, decisional, was characterized by a spirit of toleration. In theory there was essential equality. Workers might lawfully organize and bargain collectively, while employers with equal legality might frustrate freedom of association and refuse to bargain. In the realities of the market place this hypothetical balance gave the employer the advantage.¹⁶

Labor economist William Leiserson, who among many other activities in a very busy life was an arbitrator; the Executive Secretary of the National Labor Board (1933); the Chairman of the NLRB (1939–1943); a professor of economics at several schools including Johns Hopkins; and an advisor to Senator Robert Wagner, characterized the equality of the parties' rights under the law somewhat more pungently. "The law," Leiserson said, "recognized the equal freedom of the employers to destroy labor organizations and to deny the right of employees to join trade unions. . . . All that the employees had," Leiserson continued, "was a right to try to organize if they could get away with it; and whether they could or not depended on the relative economic strength of the employers' and employees' organizations."¹⁷

The short-lived National Industrial Recovery Act (NIRA) was passed in June 1933, a few months after the Roosevelt administration assumed office. The NIRA had many goals: its labor provisions were intended to promote effective equality under law between employers and employees

¹⁶ Irving Bernstein, *The New Deal Collective Bargaining Policy* 7–8 (1950).

¹⁷ William M. Leiserson, *Right and Wrong in Labor Relations* 26–27, quoted in Bernstein, *The New Deal Collective Bargaining Policy* at 8.

by protecting the right of workers to organize and “to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.” These provisions, set forth in § 7(a) of the NIRA,¹⁸ anticipate the language of § 7 of the NLRA. The construction given the NIRA’s labor provisions would establish important “common law” principles that would be carried over to the framing and administration of the terms of the NLRA.

2. STRIKERS, STRIKER REPLACEMENTS, AND THE NIRA

When enacted by Congress, the NIRA established no procedures for enforcement of its labor provisions. To remedy this problem, President Roosevelt authorized the creation of the National Labor Board (NLB) on August 5, 1933, which had the duty to investigate and mediate industrial disputes, and later to conduct representation elections. The following year, Congress passed Public Resolution No. 44 authorizing the President to create a three-member National Labor Relations Board. The President subsequently issued the Executive Order establishing the NLRB on June 29, 1934. The Order gave the Board the power to investigate controversies, to hold hearings and make findings regarding complaints of discrimination or discharge of employees under § 7(a), to conduct elections, and to arbitrate disputes when requested. The Order also empowered the NLRB to establish regional offices throughout the United States, staffed with examiners and labor mediators and headed by regional directors, to assist the Board members in administering the NIRA.

The NLB and NLRB were unencumbered by any body of precedent save that they established for themselves, and their decisions have a certain inventively ad hoc quality about them. On issues involving the status of strikers and striker replacements, however, the NLB and the NLRB quickly adopted a familiar set of rules. When a strike occurred in reaction to an employer’s breach of the terms of § 7(a), the NLB and the NLRB would order the reinstatement of the strikers, if necessary,

¹⁸ Section 7(a) provided that:

Every code of fair competition, agreement, and license approved, prescribed, or issued under this title shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.

displacing workers hired as their replacements.¹⁹ In its decision in *L. Mundet & Sons, Inc.*, for example, the NLRB explained that, “Where violations of Section 7(a) have provoked a strike, the appropriate restitution is reinstatement of all the strikers in preference to men hired during the strike.”²⁰ In contrast, where the strike was economically-based, the strikers had no claim to reinstatement at the close of their job action. As the NLRB observed in its *Fischer–Jones Co.* decision, “We have held on a number of occasions that in the absence of a violation of Section 7(a) the company is under no obligation to discharge employees taken on during the course of a strike to replace striking employees.”²¹

The Board’s *Century Electric Co.* case provides a good illustration of these principles. There, discrimination charges were filed on behalf of strikers who were not reinstated following the end of a strike over wage rates. The Board found no evidence of bad faith bargaining on the company’s part or of any discrimination practiced by it against any individuals, including members of the strike committee. The Board also noted that the company continued to reinstate strikers as the need for employees arose. “The case for the employees,” the Board observed, “seems reduced to the contention that the . . . [replacements] who were hired during the strike should be dismissed to make way for . . . strikers who have not been reinstated.” Such a complaint was legally insufficient. “In the absence of persuasive evidence that a violation of Section 7(a) by the company has caused all or some of . . . [the replaced employees] to be out of work, there is no legal basis for requiring the company to make room for them by discharging other employees.”²²

Like the opinions of courts in civil law countries, Board decisions of this era appeared without dissents. The view of the NLRB about the reinstatement rights of economic strikers, however, may not have been unanimous. Board member Edwin S. Smith seems to have taken a stance that diverged from that of his colleagues, Harry A. Millis (a University of Chicago economist) and Lloyd Garrison (the Dean of the University of Wisconsin Law School).²³ A former newspaper reporter, researcher for the Russell Sage Foundation, personnel director for Filene’s Department Store (a famously progressive Boston employer) and Commissioner of Labor and Industries in Massachusetts, Smith quickly gained a reputation as the most pro-labor NLRB member.

¹⁹ *E.g.*, *A. Roth & Co.*, 1 N.L.B. 75 (1934); *Eagle Rubber Co.*, 2 N.L.B. 31 (1934).

²⁰ 2 N.L.R.B. 198, 199 (1935).

²¹ 2 N.L.R.B. 236, 239 (1935).

²² *Century Electric Co.*, 1 N.L.R.B. 79, 81 (1934).

²³ Garrison remained on the Board only for a short period, and was replaced as Chairman by Francis Biddle, a Philadelphia lawyer with a background in corporate law.

In a memorandum he circulated to the other NLRB members, Smith put forth the position that replaced economic strikers should be entitled to reinstatement at the end of a strike. The threat of a strike and the strike itself, Smith maintained, “are properly included within the bargaining process.” A striker “must therefore be regarded still as an employee who is attempting by voluntary abstention from work . . . to influence the employer to broaden the terms of the bargain.” It follows, Smith argued:

If at any time during the progress of the strike a worker, or group of workers, go to the employer and state they are willing to resume their working relationship . . . the employer must receive them back, displacing if necessary other workers who may have been hired during the period of the strikers’ absence from work. . . . When strikers have declared their willingness to return to work on the employer’s own terms, the utility of the strike breaker to the employer has ended. As a tool the strike breaker can be discarded—as an employee, dismissed.²⁴

Smith failed to convince his colleagues to depart from the established doctrine regarding the rights of replaced economic strikers. Early versions of a bill that would evolve into the National Labor Relations Act, however, would for a time reflect his viewpoint.²⁵

3. “EMPLOYEE,” STRIKER REPLACEMENTS, AND THE LABOR DISPUTES BILL OF 1934

At the urging of the American Federation of Labor, Senator Robert Wagner took up the issue of the recall rights of economic strikers in his doomed labor disputes bill of 1934. The direct precursor of the National Labor Relations Act, the bill intended “[t]o equalize the bargaining power of employers and employees” and “to encourage the amicable settlement of disputes” between them. The bill addressed the issue of the recall rights of strikers in an indirect fashion, by providing that the term “employee” as used in the statute “shall not include an individual who has replaced a striking employee.”²⁶

²⁴ Edwin S. Smith, *The Status of Strikers as Employees*, National Archives, RG 25 (Records of the National Labor Relations Board) *quoted in*, John A. Logan, *The Striker Replacement Doctrine and State Intervention in Labor Relations, 1933–38*, Industrial Relations Research Association Series, 1 *Proceedings of the Fiftieth Annual Meeting* 347, 349–50 (1998).

²⁵ For accounts of the shortcomings of the NIRA’s labor provisions and the many problems confronted by the first NLRB in enforcing the terms of § 7(a) of the NIRA, see Section 1 under Prior Proceedings *infra*.

²⁶ Labor Disputes Act, S. 2926, 73d Cong. § 3(3) (1934).

Not surprisingly, the exclusion of strikebreakers from the protections the bill afforded employees drew a torrent of criticism from employer groups. The exclusion, they argued, would lead to a variety of problems. For example, striker replacements, no matter how long they might work for an employer, could never gain employee status under the bill's terms. Consequently, it appeared that they would be permanently barred from enjoying the legally-protected right to bargain collectively with their employer.²⁷ Likewise, replacements could never participate in a union election, while those whom they replaced seemingly would retain an indefinite right to vote, even if they long since had gone to work for a different employer.²⁸ James Emery of the National Association of Manufacturers complained that the bill made the replacement worker "a legal cipher" and that this was done "by those who express profound interest in human right [sic]."²⁹

Academic advisors to Wagner made similar points concerning the limbo to which the bill's definition of employee consigned replacement workers. Professor John Fitch of the New York School of Social Work, for example, noted that the bill would cause someone taking a job as a strikebreaker "to retain his non-employee status permanently." Fitch advised Wagner that no "harm would be done by dropping . . . [the] reference to strike-breakers altogether." Wagner replied that Fitch's criticisms were "exceptionally well taken" and that they "will be invaluable to me when I attempt to iron out this legislation."³⁰

The discrimination practiced against black workers by many unions further muddled the striker-replacement issue. T. Arnold Hill of the National Urban League, who wrote to Wagner expressing the League's "unqualified approval of any measure that seeks to equalize the bargaining power of employers and employees," nevertheless objected to the labor disputes bill because its language would permit labor organizations to exclude African-Americans from membership and it failed to protect them from acts of racial discrimination by labor unions. The bill also would deny to African-American "workers the status of 'employees' when they are engaged as strike-breakers in occupational fields where they are prohibited from joining the striking union." To remedy this

²⁷ 1 NLRB *Legislative History of the National Labor Relations Act, 1935* at 535 (Henry I. Harriman, President, United States Chamber of Commerce) (hereinafter *Legislative History*).

²⁸ *Id.* at 721 (Leslie Vickers, American Transit Association).

²⁹ *Id.* at 406.

³⁰ John A. Logan, *The Striker Replacement Doctrine and State Intervention in Labor Relations, 1933-38*, Industrial Relations Research Association Series, 1 *Proceedings of the Fiftieth Annual Meeting* 352 (1998).

wrong, Hill recommended that the bill's definition of employee be revised to read:

The term "employee" shall not include an individual who has replaced a striking employee, except when the labor organization either by direct constitutional or ritualistic regulation and/or by practices traceable to discriminatory policies bars an individual from joining such labor organization or restricts rights, privileges, and practices usually accorded members of such labor organizations.³¹

In an internal Urban League memorandum, Hill warned that if Wagner's labor disputes bill "passes in its present form, the power and influence of the labor movement will be greatly enhanced with the consequent danger of greater restrictions being practiced against Negro workers by organized labor." As presently framed, Hill continued, "the bill favors labor organizations, but does not benefit employees who replace striking employees." The discriminatory practices of unions, Hill observed, forced African-Americans "to work as strikebreakers when strikes are called by unions that bar them. As strikebreakers, they have no rights under the proposed" statute. Consequently, their "position will be made worse as that of other workers is enhanced."³²

In response to their arguments, Wagner promised the leadership of the League that he would give "sympathetic consideration" to their concerns and that he remained "very receptive" to any language that would assist the League in accomplishing its objectives. Wagner professed that he was shocked "to find a measure which I have introduced to protect all working men [might be] used as an instrument to discriminate against some of them, and I shall examine my bill with the utmost care to prevent any such eventualities."³³

The criticisms had effect. When Wagner introduced a revised version of the bill, the striker replacement exclusionary language was gone. It would not reappear, nor would any further reference be made concerning the status of striker replacements in Wagner's National Labor Relations Act, legislation he introduced in the next session of Congress in February 1935.

³¹ 1 *Legislative History* at 1058-59.

³² T. Arnold Hill, Acting Executive Secretary, National Urban League, April 3, 1934, Memorandum to all Coworkers, Library of Congress, NAACP Papers, Group 1, C-257, quoted in John A. Logan, *The Striker Replacement Doctrine and State Intervention in Labor Relations, 1933-38*, Industrial Relations Research Association Series, 1 *Proceedings of the Fiftieth Annual Meeting* 352 (1998).

³³ Letter of Robert F. Wagner to Lloyd Garrison, April 14, 1934; letter of Robert F. Wagner to Dr. D. Witherspoon, quoted in John A. Logan, *The Striker Replacement Doctrine and State Intervention in Labor Relations, 1933-38*, Industrial Relations Research Association Series, 1 *Proceedings of the Fiftieth Annual Meeting* 353 (1998).

4. STRIKER REPLACEMENTS AND THE NLRA

By the time Wagner introduced S. 1958 in the 74th Congress, the bill that would become the National Labor Relations Act, § 2(3) of the statute, which defines the term “employee,” had assumed its present form.³⁴ It reads, in pertinent part: “The term ‘employee’ shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.” William Leiserson, who in 1934 had become the first Chairman of the National Mediation Board, was among those who submitted suggested amendments to the Senate Committee on Education and Labor concerning the language of the proposed statute. Leiserson also had prepared for the Committee an exhaustive analytical comparison of the terms of the failed labor disputes bill and the language of S. 1958. The memorandum dwelt at some length on the provisions of § 2(3).

Leiserson noted that some “extremely important changes” had been made in the new bill’s definition of the term “employee” to bring within the proposed Act’s coverage “employees whose work has ceased under particular circumstances.” These changes were intended to conform the language of the bill to existing law. Consequently, Leiserson explained, the revisions embodied in § 2(3) included within the definition of employee “one whose work has ceased because of any unfair labor practice.” The new language also ensured that economic strikers would be treated as employees and receive the Act’s protections. The language of a previous committee draft, Leiserson pointed out, may have left economic strikers with no protections against “interference, restraint, or coercion,” and would likely have left them without the “protection of the act if certain of their members, the strike leaders, for example, were discriminated against in reinstatement after all had agreed to return to work on the employer’s terms.” Such a result would contradict established doctrine. “The Textile Board . . . and the National Labor Relations Board have both ruled that discrimination against particular strikers under the above circumstances is a violation of the present Section 7(a).”

Leiserson’s memorandum reviewed the case law to assure the lawmakers that the language of § 2(3) broke no new ground. The courts, he noted, long had recognized both the legitimacy of the use of strikes as an economic weapon and that a strike did not terminate the employer-employee relationship. This case law, Leiserson admitted, did raise “the problem of when a strike is ‘terminated’ or ‘lost,’ ” but, he continued,

³⁴ The 1947 Taft-Hartley Amendments did not change the existing wording of § 2(3), but did add language specifically excluding supervisors and independent contractors from the definition of employee.

“S. 1958 provides that the labor dispute shall be ‘current,’ and the employer is free to hasten its end by hiring a new permanent crew of workers and running the plant on a normal basis.” Leiserson further explained that:

The broader definition of “employee” in S. 1958 does not lead to the conclusion that no strike may be lost or that all strikers must be restored to their jobs, or that an employer may not hire new workers, temporary or permanent, at will. All that is protected here is the right of those in a current labor dispute or strike to participate in elections, to be free from discrimination in reinstatement after they have agreed to return on the employer’s terms, to collective bargaining, to freedom from interference, restraint, or coercion, etc.³⁵

Although desultory comments on various parts of the language of § 2(3) can be found sprinkled throughout the legislative history of the Act, the status of strikers and their reinstatement rights generated neither discussion nor debate during the hearings over the Act. Leiserson’s memorandum provided the Committee and Congress with the only comprehensive and substantive review of significance of the section’s terms.

Determined to get his legislation enacted, Senator Wagner planned the course of his bill through the Congress with considerable care.³⁶ In keeping with his strategy, the hearings over the terms of S. 1958 occurred during a compact period of time—March 11 to April 2, 1935—and took place chiefly before the Senate Labor Committee. The debate before the full Senate over the bill’s terms absorbed only a day, and took place on May 15, 1935. The following day, on a vote of 63 to 12, with 19 abstentions, S. 1958 was passed by the Senate. Throughout the discussions on the Act’s terms, Wagner constantly reiterated that the bill simply restated or in some cases extended concepts already established in the law.

Wagner’s Act went to conference on June 20, 1935. A week later, the House accepted the conference report on a 132 to 42 vote and the Senate adopted it the same day. After some failed attempts to find a convenient date, President Roosevelt signed the Act on Friday, July 5, 1935, using two pens that he presented, respectively, to Senator Wagner and to William Green, the President of the American Federation of Labor. Congress had embedded the striker replacement problem into the terms of the Act. A case presenting the issue would not be long in arriving.

³⁵ 1 *Legislative History* at 1346.

³⁶ On Wagner’s legislative strategy and for details of the bill’s progress through the Congress, see Irving Bernstein, *The New Deal Collective Bargaining Policy* 100–128 (1950).

Factual Background

In the mid-1930's, the Mackay Radio and Telegraph Company constituted a not insignificant presence in the international wireless telecommunications industry. The company, a part of what was known as the Mackay system, traced its beginnings to 1883 when John Mackay, an Irish immigrant who had made a fortune in silver mining in the Comstock Lode in Nevada, entered into a partnership with James Gordon Bennett, the publisher of the *New York Herald*, to form a telegraph company to compete with the transatlantic service of Western Union Company, then controlled by Jay Gould.³⁷ The company the two formed began laying transatlantic cable³⁸ and it built up its North-American system in part by buying and merging bankrupt firms. One of the Mackay system's companies, Commercial Cable, also participated in a joint-venture to lay the first transpacific telegraph cable, which became operative in 1904.³⁹ The Mackay-owned Postal Telegraph Company represented the Western Union Company's only significant competitor, but by the late 1920's, it held only about a fifth of the domestic market for telegraphic services.

³⁷ Bennett's interest in cable is easy to explain. At the time, Western Union held a monopoly on transatlantic cable transmissions and charged \$2.50 per word, making the telegraphic transmission of news reports from Europe prohibitively expensive. At various times, Mackay unsuccessfully attempted to gain control of its much larger rival, Western Union and of the American Telephone and Telegraph Company (AT&T). On the history of Mackay, see Interview by Frank Polkinghorn with Ellery W. Stone, retired Vice-President of International Telephone and Telegraph Company, IEEE History Center, Rutgers University, available at <http://www.ieee.org/organizations/history_center/oral_histories/transcripts/stone9.html>; Timothy W. Sturgeon, *How Silicon Valley Came to Be* in *Understanding Silicon Valley: Anatomy of an Entrepreneurial Region* (Martin Kenney, ed., 2000); Robert Sobel, *ITT: The Management of Opportunity*, 58-61 (1982).

³⁸ Mackay system companies eventually would lay and operate seven transatlantic cables. A Mackay-owned cable-laying ship, the Mackay-Bennett, sailing out of Halifax, Nova Scotia was chartered by the White Star Lines and employed in the effort to recover bodies from the sinking of its ship, the Titanic, in April, 1912. The Mackay-Bennett's crew eventually retrieved the remains of 306 victims.

³⁹ American Telephone and Telegraph (AT&T), which until the 1980's was the dominant provider of telephone service in the U.S., began providing transatlantic telephone service in 1927, and transpacific telephone service (initially between the U.S. and Japan) in 1934. Such service was carried by radio signal, its sound quality was dependent upon atmospheric conditions, and it was quite expensive. In 1927, a transatlantic call cost \$75.00 for the first three minutes. Seven years later, a call to Japan cost \$39.00 for the first three minutes. The transmission of telephone conversations by cable presents considerably greater technical challenges than those posed by the transmission of telegraphic signals. The first transatlantic telephone cable was not laid until 1956, while the first transpacific telephone cable did not go into service until 1964. In 1962, AT&T launched Telstar I, the first active communications satellite. Today, because of their lower cost and longer lifespan, lightweight submarine fibre-optic cables largely have displaced satellites as the carriers of communications traffic of all sorts.

Although the telegraph industry enjoyed substantial growth throughout the 1920's, it was by then in the process of becoming a dated technology, and by 1928, even the mighty Western Union Company found itself in trouble. Rates for long distance telephone use were declining and technical innovations had improved service. Moreover, new devices had entered the market, like the teletypewriter that used telephone lines to transmit written messages on leased equipment housed in the customer's own facilities, which made its debut in 1931.

Wireless communication by radio also posed a growing challenge to communication by conventional telegraph. This was particularly true for trans-oceanic communication, which could be accomplished by radio without the need of expensive submarine cable.⁴⁰ Guglielmo Marconi had transmitted the first radio telegraph signals in 1895, and the first transatlantic signals in 1901, but the radio industry remained in its infancy until after the First World War.⁴¹ Complicated patent and licensing arrangements for the technology made entry into the wireless telegraphy market difficult, but by the mid-1920's, the Mackay Radio & Telegraph Company had been organized. Along with competitors like Globe Wireless and the giant Radio Corporation of America (RCA), Mackay Radio became an important provider of wireless communication services with Pacific Rim countries.

In addition to furnishing "point-to-point" communications between land-based wireless-sending facilities, like RCA, Mackay Radio also played a prominent role in supplying wireless marine radio service. Commercial vessels leased radio service and the equipment to provide it from Mackay or one of its competing service providers. The equipment was operated by the service providers' own employees, who sailed as radio officers on the vessels leasing the service. Mackay radios quickly became a familiar fixture on ships, and Mackay radio officers manned crews on vessels around the world.

By the mid-1930's, Mackay Radio's principal West Coast office was in San Francisco, and it had other sending facilities in several cities along the coast, as well as in Hawaii and Manila. These facilities transmitted and received both telegraph and radio messages. From the San Francisco facility, the company maintained point-to-point radio

⁴⁰ Static and other technical difficulties made wireless telegraphy over land a less financially attractive alternative to communication by conventional telegraph, as did opposition from established telegraphic firms.

⁴¹ An almost unanticipated development, commercial radio broadcasting exploded as an industry in the post-war period. In the U.S., the number of in-home radio receivers increased from a mere 5,000 units in 1920 to 25 million sets only four years later, while the number of commercial broadcasters grew from eight in 1921 to 564 the following year. A holder of many of the key patents for this technology, RCA benefitted greatly from this development.

circuits with Los Angeles, Seattle, New York, Honolulu, Tokyo, and Shanghai, among other cities. Despite its extensive network, however, the Mackay system long had been in weak financial condition and by the mid-1930's, its corporate parent stood under considerable strain.⁴² Disturbed by cutbacks in their working conditions and changes in employment policies, among other things, the radio operators in Mackay's San Francisco office quietly began a union-organizing effort in the early part of 1934. Their efforts mirrored those undertaken by Mackay employees at other facilities.

* * *

At about 8:30 p.m. on the evening of Friday, October 4, 1935, Leo K. Bash, an employee of Mackay Radio and Telegraph and the acting chairman of San Francisco Local 3 of the American Radio Telegraphists' Association (ARTA), called to order a meeting of the organization's membership.⁴³ The ARTA had initiated contract discussions with Mackay Radio in June, hoping to obtain its first system-wide agreement with the company.⁴⁴ Bash announced to the twenty-one members in attendance that the news was not good. Mackay's representatives had stalled and the Local now should be prepared to strike. During these talks, the union acquiesced to a company request to "let the agreement slide for a little while," because the parent corporation of Mackay had been contemplating the filing of a bankruptcy petition. In early September, the union once again presented Mackay with contract demands, eager to have the company agree to terms similar to those the union recently had concluded with RCA. The Local, which represented Mackay's San Fran-

⁴² Wooed by many investors during late 1920's, Clarence Mackay, the son of the company's founder (and, incidentally, the father-in-law of Irving Berlin), sold the Mackay companies to the newly-organized International Telephone and Telegraph Company (IT&T) in 1928. A fast-expanding conglomerate, IT&T had become over-extended and was by the mid-1930's in rather precarious condition.

⁴³ Unless otherwise identified, this account of the strike is drawn from the testimony and exhibits from the hearing before the Trial Examiner contained in the Transcript of Record in *NLRB v. Mackay Radio & Telegraph Co.*, October Term 1937, No. 706, and the Board's decision, reported at 1 NLRB 201 (1936).

⁴⁴ This agreement was to cover all of the land-based, or "point-to-point" operators in the Mackay Radio system. In the meantime, the ARTA also had been attempting to negotiate an agreement to apply to Mackay's marine radio operators serving on ships at sea. In September 1935, the marine and point-to-point operators agreed to unite for joint action, resolving that Mackay would have to settle both agreements for either to be effective. Local 3 had been organized in early 1934 and divided into two divisions, which represented marine radio operators and land, or point-to-point operators respectively. The point-to-point division itself was divided into three groups, one for the operators employed by the three large cable and wireless companies operating on the West Coast: Mackay Radio, Globe Wireless, and RCA. Only Local 3's Mackay Radio group was involved in the matter described here.

cisco based operators, had authorized a strike against the company should their demands not be met by September 23.⁴⁵ The deadline had passed. The men were resolute. The meeting was brief.

The job action against Mackay was to be nation-wide, and Bash told the membership that the walk-out was scheduled to begin at midnight, San Francisco time. After a short exchange, the members elected a strike committee and adjourned the meeting. Many of those not in attendance received telephone calls informing them of the situation. At the stroke of midnight, the entire operating force on duty in Mackay's San Francisco office abandoned their stations and began picketing, leaving a single supervisor to attempt to continue service. For the duration of the strike, only three of the San Francisco office's sixty-three operators continued to work.

Unfortunately for the members of the San Francisco Local, and particularly for their leadership, the solidarity they demonstrated did not display itself nationally. The strike at Mackay's Seattle office lasted but a few hours, while in Los Angeles, only one radio operator left work. At Mackay's offices in Washington, D.C., in New Orleans, in West Palm Beach, and in Rockville, Maine, the strike call went entirely unheeded. In Chicago, a few operators left their stations, but their number proved too small to have any effect on the office's ability to handle communications traffic. Meanwhile, the operators at Mackay's New York City office walked out when the strike began at 3:00 a.m. on Saturday, but before the day was out, most had returned. Portland, Oregon proved to be the only Mackay facility where dedication to the strike matched that demonstrated by the operators employed at the company's San Francisco office.

According to a report published in the Sunday, October 6th edition of *The New York Times*, union officials "asserted that the strike was so effective at some stations that it had paralyzed communications across both the Atlantic and Pacific." These officials also "estimated that 200 out of 300 radio operators had walked out." Service at the company's offices on Long Island, the union officials told the paper, was being maintained only because supervisors were working twenty-four hours a day, and because the company had resorted to the use of non-licensed operators. Company officials dismissed the union's claims as "gross exaggerations." "The strike is a washout," Ellery W. Stone,⁴⁶ Mackay's

⁴⁵ The union, *The New York Times* reported, was demanding "recognition, a contractual wage and working hours agreement, a forty-eight-hour week, and an average increase of \$24 a month for radio operators now averaging \$165 a month, according to the union." *Radio Operators Begin Walkout: Union Asserts that Pacific and Atlantic Traffic is Paralyzed by its Strike*, *N.Y. Times*, Oct. 6, 1935, at 45.

⁴⁶ Stone had been the President of the Federal Telegraph Company, the firm that had sold Mackay rights to patents that allowed it to enter the radio telegraphy business. During

vice president and chief negotiator told *The Times*. “The boys are licked and they know it. . . . The union was all set to strike yesterday afternoon without notice, but we were prepared for it. The men are coming back faster than we can put them to work.”⁴⁷

Mackay was as ready for the strike as the union was unprepared to conduct it. While Mackay’s transcontinental traffic could be maintained by transferring San Francisco communications to its Los Angeles office, San Francisco was crucial because it handled the company’s trans-Pacific circuits. Desperate to keep them in service, Mackay flew two operators from its Los Angeles office who arrived in San Francisco on the morning of Saturday, October 5. On Monday, October 7, another plane arrived carrying seven operators from Mackay’s New York office and two others from its Chicago facility.

Morale remained strong among the San Francisco strikers throughout the weekend. By Monday, however, it had started to flag. Rumors were circulating that the company planned to abandon its circuits along the coast; that eighty-four operators in New York had returned to work along with seventy to eighty percent of the strikers in Portland, Oregon; and that the plane from New York carrying more replacements soon would arrive.

Late on Monday afternoon, a number of the strikers met informally at the union hall where one of the operators and a supervisor, both union members, exhorted the men to save their jobs and return to work. Others, sensing a spreading panic, counseled against bolting from the strike. One member, seeking to calm his fellows, plaintively observed that the “Wagner bill” required the company to recognize and bargain with the union. Supporters of the job action narrowly succeeded in convincing the others not to abandon the strike that evening and to postpone any decisions until the regularly scheduled morning strike meeting.

Local 3’s leadership had planned to telephone New York late Monday evening to get an update on the status of the negotiations and of the job action on the East Coast. Several Local 3 members, including Robert Hatch, the chief electrician for Mackay’s San Francisco facility, and Charles Burtz, one of the radio operators, had filtered back to the union hall to learn the latest. The news was not good, and the men listened dispiritedly as they heard the Local’s leadership recommend to the union’s New York negotiating team that they contact Mackay officials

an eventful career, Stone achieved the rank of Admiral in the U.S. Navy and became Vice-President of IT&T.

⁴⁷ *Radio Operators Begin Walkout: Union Asserts that Pacific and Atlantic Traffic is Paralyzed by its Strike*, N.Y. Times, Oct. 6, 1935, at 45.

the following morning and arrange for the striking operators to return to work pending further negotiations.

As they left the hall at about ten o'clock that evening, Hatch dejectedly told Burtz that he believed the strike had been lost and suggested that they call Andrew Jorgeson, the traffic manager of the company's San Francisco office immediately and ask to return to work. In response to their call, Jorgeson conferred with H.L. Rodman, Mackay's general superintendent, who instructed him to reinstate the strikers. "But remember," he told Jorgeson, "you are to take care of the men from New York and Los Angeles, but handle that your own way." This direction left Jorgeson with eleven extra operators should the nine replacements from New York and Chicago and the two from Los Angeles elect to stay in San Francisco. Uncertain how many of the group might ultimately choose to remain, Jorgeson quickly drew up a list of eleven strikers whom he thought the least desirable candidates for reinstatement. Once the replacements had made their decisions, Jorgeson planned to fill any remaining positions by selecting from among the eleven on "an all things being considered" basis.

As arranged, Jorgeson arrived at Hatch's apartment about half an hour after their telephone conversation, bringing with him a list of employee addresses and telephone numbers. He told Hatch and Burtz that eleven of the men would have to re-apply for employment, and that their applications would be subject to the approval of Ellery Stone at Mackay's headquarters in New York. Hatch and Burtz then proceeded to contact as many of the other San Francisco operating employees as possible, directing them to meet at a downtown hotel where Jorgeson would explain the company's position. Meanwhile, Jorgeson arranged for a two-room suite in which to hold the meeting and for a police detail to remain in discreet reserve in case the need for intervention arose. The invitees understood that Local 3 had neither called nor sanctioned the assembly.

At about 4:30 on the morning of Tuesday, October 8, with thirty-six operators present, the meeting began. After some initial discussion, Jorgeson entered the meeting from the second room of the suite. The company, Jorgeson assured the assembly, would forget the strike and that all but eleven of the employees could return to work. The excluded group, he said, would have to reapply for employment, and their applications would be forwarded to New York for review by company vice-president Stone. The names of the eleven then were read twice, and a rather tense discussion followed.

Some among the eleven had learned of the meeting and were in attendance, including Alonzo B. Loudermilk. One of the most active members of Local 3, Loudermilk had played a major role in organizing

the operators in Mackay's San Francisco and New York offices, and he had engaged in numerous discussions with company officials over the operators' terms and conditions in New York and Chicago. A strike leader, Loudermilk also was one of the San Francisco office's most skilled and highly paid operators.

Loudermilk pointedly told the men that they should consider the question on which they were about to vote in the following terms: "Are you prepared to go back to work immediately and leave eleven men out on a limb?" After some wrangling, the attendees concluded that a two-thirds vote should decide the issue and that operators whose names appeared on the list could cast a ballot. The results revealed twenty-two votes to return to work, six votes against the proposal, and eight abstentions. Loudermilk later testified that when the results were announced, Robert Hatch excitedly shouted, "Hooray! Let's all go down and get our names on the pay roll." The meeting, and with it Local 3's strike against Mackay, came to a close at about 6:00 a.m. Later that day, at one o'clock local time, the ARTA's vice president in New York telephoned Ellery Stone and informed him that the nationwide job action against the company had ended.

By late Tuesday afternoon, only four of the San Francisco operators who participated in the strike had yet to be reinstated: Leo Bash, Alonzo Loudermilk, Glenn Palmer, and Lon Rone. All four had played important roles in organizing the union, all had held leadership positions in Local 3, and all had figured prominently in the strike. All four also were "Class A" operators and paid at the top of the company's pay scale.

The four also were the last of the strikers to apply for reinstatement. After some difficulties in gaining a meeting with H.L. Rodman, the general superintendent of the San Francisco office, Loudermilk and Palmer made their applications late on Tuesday, while Rone and Bash filed their requests the following day. At the time they applied, each was told that no vacancies then existed, but that their applications would be forwarded to New York for Stone's consideration. When Loudermilk asked about his chances for approval, Rodman replied that they were not "very good," and reminded him that he had "a national reputation for causing us trouble."

Stone returned the applications at the end of October, noting as to each of them that "there is no objection to favorable consideration being given this application when a vacancy occurs at San Francisco." Jorgeson told one of the men that he did not believe any openings would exist until the following summer. At the time the NLRB issued its decision in the case in February 1936, none of the men had been reinstated.

Prior Proceedings

1. CONSTITUTIONAL UNCERTAINTY AND STATUTORY NOVELTY: THE NEW NLRB AND ITS INAUGURAL CASES

The ARTA filed charges against Mackay Radio on October 15, 1935, and the Board's regional office in San Francisco issued a complaint on November 9, alleging that the company's refusal to reinstate the four operators, as well as the manager of its downtown branch office,⁴⁸ constituted violations of §§ 8(1) and (3) of the Act.⁴⁹ In considering *Mackay*, it helps to keep in mind the context in which the case arose. *Mackay* was among the first matters that the fledgling NLRB handled. At the time the Board tried and argued it, the Agency's procedures were novel and untested and every decision the Board issued made new law. When regarded from the perspective of an observer in 1935, neither the prospects for the Act's passage nor for its survival at the hands of the Supreme Court exactly appeared to be lead-pipe cinches.

To begin with, the Roosevelt Administration did not regard the Wagner Act as a central part of its New Deal programs.⁵⁰ Despite appeals by Senator Wagner and the AFL, Roosevelt had declined to back the NLRA in Congress and did so only at the very last moment, when developments gave him little other choice. Frances Perkins, his Secretary of Labor, also showed at best a cool detachment toward the bill. The statute owed its existence to Wagner's stubborn determination to get it passed, and not to any prestige or support lent by the Administration. A contemporary observer summed up the situation by noting that "We who believed in the Act were dizzy with watching a 200-to-1 shot come up from the outside."⁵¹

⁴⁸ The manager, P.D. Phelps, was a member of the union but not an activist. The Board would conclude that the company discriminated against Phelps by refusing to reinstate him based in part on the admission of the general superintendent that "we did not approve of a commercial man, in charge of an office, becoming a member of an organization such as ARTA."

⁴⁹ The complaint also alleged a violation of Section 8(2), which the Board dismissed.

⁵⁰ For President Roosevelt, labor law reform was never a priority among his New Deal initiatives. Moreover, he feared that labor legislation would incur Supreme Court challenges and also threaten his coalition with business interests necessary to support his agenda of social and economic legislation. The information in the following paragraphs about the early days of the NLRB are drawn from accounts and quotations in Peter H. Irons, *The New Deal Lawyers*, 203-53 (1982); James A. Gross, 1 *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1933-1937), 109-88 (1974); and Irving Bernstein, *The New Deal Collective Bargaining Policy* 84-128 (1950).

⁵¹ Malcolm Ross, *Death of a Yale Man* 170 (1939), quoted in Irving Bernstein, *The New Deal Collective Bargaining Policy* 1 (1950).

The executive branch's lukewarm attitude toward the statute did not represent its only source of difficulty. Less than a month before Congress acted on the NLRA, the Supreme Court decided *Schechter Poultry Corp. v. United States*,⁵² which cast grave doubt in the minds of many on the constitutionality of the proposed Act's terms. The case hung like a pall over the NLRA both during its consideration by Congress and during the period between its passage and the Court's declaration of its constitutionality two years later in *NLRB v. Jones & Laughlin Steel Corp.*⁵³ Wagner and his legislative assistants were forced to redraft portions of the statute to respond to concerns raised by *Schechter*, and, especially during the first year of the Act's existence, the Board spent many of its resources litigating employer requests for injunctions to restrain the agency from enforcing its terms. It is one of history's little ironies that *Schechter*, actually may have assisted the Act's passage. The case permitted congressional opponents of the NLRA quietly to drop their opposition to it, thereby allowing them to gain credit with constituents who supported the statute while being privately convinced that the Court would void the law at the first opportunity.

The widespread belief that the Court would find the Act's terms unconstitutional also made it difficult to find individuals willing to serve as members of the new NLRB. Nearly two months passed between the signing of the Act and the Senate's confirmation of the first three NLRB members who would make initial rulings under the new law. Confirmed on August 24th, the new members assumed their offices three days later.

⁵² 295 U.S. 495 (1935). (In *Schechter*, the Court invalidated the terms of the NIRA, ruling in part that the application of the Act to intrastate activities exceeded the powers of Congress under the commerce clause. *Schechter* involved convictions for violation of the wage, hour, and trade practice regulations contained in the Code of Fair Competition for the Live Poultry Industry for the New York City metropolitan area, which had been promulgated pursuant to the terms of the NIRA. The Court concluded that Schechter's business, which involved the slaughter and sale of poultry to retailers and butcher shops in New York City, did not constitute interstate commerce even though nearly all the poultry Schechter handled came from out-of-state. Rejecting "stream of commerce" and "affecting commerce" arguments, the Court, through Chief Justice Hughes, stated that the interstate character of the transactions ended when the live poultry reached Schechter's slaughterhouse. Neither the slaughtering nor the subsequent sale of the poultry, the Court stated, were transactions in interstate commerce. To accept the argument that hours and wages affect prices and commerce generally, Justice Hughes warned, would allow Congress to reach nearly all aspects of business transactions. The Court dismissed arguments that "efforts to enact state legislation establishing high labor standards have been impeded by the belief that unless similar action is taken generally, commerce will be diverted" to states without such regulation. "It is not the province of the Court to consider the economic advantages or disadvantages of such a centralized system," Hughes wrote, and the "Federal Constitution does not provide for it." A year later, in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court invalidated the Bituminous Coal Conservation Act of 1935, which established a scheme for wage and hour regulation in mining.)

⁵³ 301 U.S. 1 (1937).

Commenting on their appointments, *Business Week* magazine observed that “the feeling is that the President had to hunt a long time and drop down below the upper bracket to find anyone who would take a chance, the past history of labor boards being what it is.” The three willing to take the risk were J. Warren Madden, a law professor from the University of Pittsburgh, who became the Chairman; John M. Carmody, an industrial engineer who at the time of his appointment was a member of the National Mediation Board; and Edwin S. Smith, a holdover from the old NLRB, who soon would become a highly controversial figure.

They were a diverse lot. A torts and property teacher, Madden came to the Board with scant experience in labor relations. A series of chance connections brought him to the Administration’s attention as a candidate for the position. In 1933, the Governor of Pennsylvania, Gifford Pinchot, appointed Madden to a commission to study the use of private police forces by coal and steel companies. There, Madden became well-acquainted with Francis Biddle, a Philadelphia corporate law specialist who in late 1934 became Chairman of the old NLRB. Biddle, in turn, had been recruited for the Board position by his predecessor, Lloyd K. Garrison, who, eager to return to academic life, had told Roosevelt that he would serve in the post no longer than four months. Madden had developed a friendly relationship with Garrison during the summer of 1933 when they served as visiting faculty at Stanford Law School. Madden’s third recommender was Charlton Ogburn, counsel for the AFL, who had been impressed with Madden when he arbitrated a wage dispute for the Pittsburgh street railway. During his pre-appointment interview with Frances Perkins, Madden rather disarmingly confessed that he “just didn’t know anything about labor law” or “anything really about this board and the statute.” Perkins was unfazed. “Well, that is fine,” she reassuringly replied. “You will not have any preconceptions about it and you can just start it from the ground up and learn it as you go.”

Despite his slim labor relations background, Madden quickly established himself as the intellectual and moral leader of the Board. Nathan Witt, a Frankfurter protégé and an assistant to Charles Fahy, the Board’s first General Counsel, characterized Madden as “basically a conservative man . . . certainly a liberal as far as civil liberties are concerned and certainly a conservative as far as basic economic issues are concerned.” Madden would remain Chairman until 1940, guiding the Agency through some of its most dramatic and tumultuous years.

Carmody’s appointment came at the recommendation of Senator Wagner, who described him “as a solid man who had his feet on the ground and had a lot of experience in labor relations.” Prior to his service on the National Mediation Board, Carmody had chaired the National Bituminous Coal Labor Board under the NIRA and served as

chief engineer of the Civil Works Administration. Committed to mediation rather than litigation, Carmody quickly became frustrated with “what he regarded as a lot of legal rigmarole.” Witt described Carmody as “impatient” with legal issues and said that he “just wasn’t the kind of personality who belonged on the Board.” Evidently, Carmody agreed. He participated in the Board’s *Mackay* decision, but resigned his post after a year and took an appointment with the Rural Electrification Administration.

The third member of the Board, Edwin Smith, was the sole holdover from the old NLRB. Like Carmody, he was not a lawyer, but unlike him, Smith enjoyed discussing legal issues and litigation strategy. Smith’s positions and his “intemperate, radical, public utterances” quickly made him the Board’s most controversial member and served to instigate considerable criticism of the Agency and its rulings, especially from the business community. Madden much later told an interviewer that Smith “quite certainly was a communist,” although subsequent congressional investigations failed to substantiate such charges.

The new NLRB assumed the staffs and regional offices that the old NLRB had assembled. This, however, did not leave the new agency fully prepared to undertake its tasks under the NLRA. The old NLRB’s regional staffs spent much of their time investigating and mediating disputes. In contrast, Congress intended the new agency to fulfill its now familiar prosecutorial and quasi-judicial roles. As of September 1, 1935, the agency had only thirteen lawyers in the Washington, D.C. office, and only one assigned to any of the Board’s regional offices. Nathan Witt noted that the Board encountered “a hell of a time building up staff and getting qualified people” because potential applicants were “convinced that [the Board would] be put out of business by the Supreme Court” and because the pay scale was low. Fahy delegated the recruiting and hiring of lawyers to Witt and to Thomas Emerson, another Frankfurter protégé who later would become a law professor at Yale and one of the best-known civil rights lawyers of his era. Both Witt and Emerson had served on the staff of the old NLRB.

By October 14, 1935, sufficient staff had been assembled to permit Fahy to direct his lawyers to “start sending in their cases.” To assist the regional offices in getting established, nearly all of the Board’s Washington legal staff had been dispersed to the field. In conducting their work, Nathan Witt later explained, “we were under special instructions to look for test cases, since we knew that we were headed for the Supreme Court.” Circumstances provided them with much from which to choose. By March 1936, the Board had handled 729 cases involving 165,792 employees.

Until January 1936, the Board prohibited regional directors from issuing a complaint in any matter until the General Counsel's office had reviewed and approved it. The Board also took care in timing the issuance of its decisions. Benedict Wolf, the Board's Secretary, justified the policy to a frustrated regional director. "The delay in issuing decisions," he explained, "is not caused solely by the inability to issue them at a particular time. It was extremely important that the Board be able to control to some extent the test cases which would first get to the Circuit Courts and the Supreme Court." It is better to contend with the parties' restiveness, Wolf continued, than to have the Board "find itself in the Supreme Court with a case which is not particularly strong on interstate commerce and involves a company so small that the courts would be disinclined to believe that company's business could possibly affect interstate commerce."

2. *MACKAY RADIO* AS SUPREME COURT LITIGATION VEHICLE: THE BOARD'S DECISION

Because it so clearly involved interstate commerce, the *Mackay* case quickly came to the Board's attention. A complaint in the matter issued on November 9, 1935, and the Board conducted hearings in San Francisco before a trial examiner from the second to the twentieth of December. The day before the hearings concluded, the Board, on its own motion, transferred the proceedings to itself. Several weeks later, on February 20, 1936, the Board issued its decision in *Mackay*. Within days, the Board filed a petition for enforcement of its order with the Ninth Circuit and the court set the case for argument on April 16.

The Board's decision in *Mackay* was straightforward—the company had discriminated against the employees named in the complaint. The Board ordered their reinstatement with backpay. In so doing, it dismissed the company's contentions that the employees had not been reinstated because their positions were no longer available, having been filled by replacements brought by the company to San Francisco from other locations. The replacements, the Board observed, "were really strikebreakers." The company "is therefore contending that such strikebreakers are entitled to the four positions in question in preference to the men who held them at the time the strike had commenced and who because of union activity had temporarily severed their active work on those jobs but not their status as employees." "It might be argued by these four operators," the Board admitted, "that the granting of such a preference to the strikebreakers" constituted forbidden discrimination. "However," the Board continued, "since we find that a decision on the point is not necessary to the final judgment in this case, we will not

decide the matter.”⁵⁴

In defending itself against the charge of discrimination, the company asserted that it was completely fortuitous that the only four operators not reinstated happened to be union leaders. The four simply were the last to apply for reinstatement, and they did so after all the positions had been filled. The results would have been different, the company insisted, had they been among the first to request reinstatement.

“The difficulty with this contention,” the Board stated, “is that it was the respondent who chose the standard of time.” Moreover, the company “chose that standard on Tuesday afternoon at a time when the four leaders had not as yet reapplied but it deliberately shifted to that standard at that point.” Jorgeson himself, the Board noted, had testified that the reinstatement of the employees named on the list “was not to be a case of ‘first come, first served.’” Instead, “Jorgeson and not time was to do the selecting.” The company only shifted to that standard “on Tuesday afternoon coincident with the realization that the full quota had been reached” and the union leaders had not yet formally applied for reinstatement. Company officials, the Board concluded, “perceived that circumstances had provided them with an excellent opportunity to rid the respondent of the leaders of the Local which had just caused it to pass through a costly strike, and it did not fail to make the most of the opportunity.” By taking advantage of that chance, the Board ruled, the company violated the Act.

Additionally, the company had induced each of the four to understand that he would not be reinstated. Believing that they were blacklisted, the Board found that it was not surprising that the four “would delay their request for reinstatement.” In these circumstances, the application of a “first come, first served” principle to determine reinstatements constituted a violation of the statute.

The exquisite care with which the Board handled *Mackay* and the lengths to which it went in explaining its reasoning reflect the value the Agency put on the case as a means for testing the constitutionality of the Act. As the reader will have noticed, however, the point for which we know *Mackay*—the right it grants employers permanently to replace strikers—represents an issue the Board specifically declined to address. Rather, it treated the case as a discrimination matter. So, how did the issue of an employer’s right to respond to an economic strike find its way into the Supreme Court’s opinion in *Mackay*?

3. THE BEST LAID PLANS: FRUSTRATION BEFORE THE NINTH CIRCUIT

Although the Ninth Circuit heard the case in mid-April 1936, it did not render its decision denying enforcement of the Board’s order until

⁵⁴ 1 NLRB at 216.

the following January. This confounded an assessment made by General Counsel Charles Fahy who, in deciding to proceed with the case, thought that the court would not “unreasonably delay this decision,” thereby allowing it quickly to reach the Supreme Court.⁵⁵

The three deeply divergent and at times confusing opinions the Ninth Circuit eventually produced may explain why deliberations in *Mackay* dragged on so long.⁵⁶ Judge Curtis D. Wilbur, who had presided as the Chief Justice of the California Supreme Court and as the Secretary of the Navy under Calvin Coolidge, wrote the lead opinion. He found that the Act was not wholly unconstitutional and that the strikers were employees for the purposes of the statute. Nevertheless, relying on *Adair v. United States*⁵⁷ and *Coppage v. Kansas*,⁵⁸ he concluded that the order to reinstate them violated the due process clause of the Fifth Amendment because it required the company to employ persons with whom it chose not to deal, thereby interfering with the employer’s constitutionally-protected freedom of contract. Wilbur also found that the Act offended the guarantees of the Seventh Amendment insofar as it authorized the Board to assess damages without a jury trial.

Judge Clifton Mathews, a Roosevelt appointee to the Ninth Circuit, concurred in the result. However, unlike Wilbur, he concluded that the Board had not shown that the strikers were employees within the meaning of the Act. In Mathews’ view, the discriminatees had not been discharged through the company’s failure to reinstate them. Instead, he found that they had quit their jobs voluntarily when they went out on strike. In light of this, he found it unnecessary to consider Mackay’s contention that the § 2(3) definition of employee as including strikers was unconstitutional or to make any rulings on the additional constitutional issues raised by the company.

Another Roosevelt appointee, Francis A. Garrecht, dissented. Noting that many lower courts and some of the circuit courts of appeals had sustained the constitutionality of the Act, he stated that “it cannot be said that there exists between the Constitution and this law and beyond all reasonable doubt a clear and unmistakable conflict.” He also disagreed with Mathews’ view that the strikers were not employees for the purposes of the Act. “[T]o reach such a conclusion,” he said of Mathews’ construction of § 2(3) of the statute, “is to ignore the declaration of the act itself that employees on a strike are to be considered still as employees.” Congress had the power under the commerce clause to pass

⁵⁵ Peter H. Irons, *The New Deal Lawyers* 263 (1982).

⁵⁶ Reported at 87 F.2d 611 (9th Cir. 1937).

⁵⁷ 208 U.S. 161 (1908).

⁵⁸ 236 U.S. 1 (1915).

the Act, Garrecht wrote, and nothing in the Board's actions or its order in *Mackay* offended the Constitution.

In mid-April 1937, a few months after the Ninth Circuit decided *Mackay*, the Supreme Court handed down its landmark decision in *NLRB v. Jones & Laughlin Steel Corp.*, in which it upheld the constitutionality of the NLRA.⁵⁹ The Ninth Circuit granted the Board's petition for rehearing in *Mackay*, but in a decision issued in October, the court again refused enforcement of the Board's order. Judges Mathews and Garrecht adhered to the views they previously had expressed. In his opinion, however, Judge Wilbur retreated from his conclusion that strikers retained their status as employees under the Act. He now asserted that the Constitution permitted the Board to order reinstatement of employees only when they had ceased work by reason of an unfair labor practice. Employees who voluntarily went on strike quit their positions, and consistent with the constitutionally-protected liberty of contract, Congress has no power to compel parties to enter into new contracts of employment. Accordingly, he ruled, the Board lacked the power to order the reinstatement of the Mackay strikers. This view of the Act, Judge Garrecht retorted in his dissent, represented "a strained construction designed to nullify the National Labor Relations Act in an important field of its operations."

The Board agreed with Judge Garrecht's characterization of the matter. As it argued in seeking a writ of certiorari in *Mackay*, the NLRB, as well as its predecessors, "have uniformly ruled that discrimination in reinstatement of striking employees must be remedied by restoring the victims to their jobs."⁶⁰

The Supreme Court Decision

Because it had languished on appeal, *Mackay* was not among the first cases employed by the Board to test the Act's constitutionality. Nevertheless, *Mackay* involved critically important issues concerning the Board's remedial powers. The Supreme Court granted the Board's petition for a writ of certiorari in February 1938, and heard arguments in early April. The following month, it handed down its opinion.

Charles Fahy, the Board's general counsel and its chief legal tactician, participated in briefing and arguing the case before the Court. Fahy came to the Board in August 1935 from the Department of the Interior, where he had served as Chairman of the NIRA-established Petroleum Administrative Board. He was recommended for the post by Calvert

⁵⁹ 301 U.S. 1 (1937).

⁶⁰ Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit at 25-26, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (No. 37-706).

Magruder, the general counsel of the old NLRB, who had been eager to leave Washington to resume his position at Harvard Law School. Stanley Surrey, a young Board lawyer who later would become a leading tax law scholar and law professor at Harvard, characterized Fahy as “liberal in a rugged, fundamentalist sense, a very cautious lawyer, a very careful and methodical type.” Fahy and Board Chairman J. Warren Madden became close friends, and one Board lawyer later stated that Madden “was certainly more swayed by Charlie Fahy’s views than that of any other single person.” Like Madden, Fahy remained at the Board during its first five years, and was responsible for shaping the Agency’s crucial litigation strategy. He later served as Solicitor General and as a member of the U.S. Court of Appeals for the District of Columbia Circuit.⁶¹

As framed by the Board, *Mackay* presented the Court with several issues: whether economic strikers are employees within the meaning of the Act; whether discrimination in reinstatement of economic strikers because of their union activities constitutes an unfair labor practice, and whether the Act authorizes the Board to order the reinstatement of such discriminatees; and finally, whether the Act, construed to permit the Board to order reinstatements, violates the Fifth Amendment. In addition, Mackay contended that the evidence did not support the Board’s factual findings, and its petition for review was not timely filed.

In a terse and business-like opinion, Justice Owen Roberts, writing for a unanimous Court, quickly disposed of all of Mackay’s jurisdictional arguments and its objections to the Board’s decision. Holding that “the Board’s order is within its competence and does not contravene any provision of the Constitution,” the Court ruled in the Agency’s favor on all the issues it raised on appeal.⁶²

The language in *Mackay* best known to us appears in a portion of the decision where the Court answers the company’s contention that because it had not committed any unfair labor practices, the Board lacked jurisdiction in the case altogether. The Court started with a quote from § 8(3) and then proceeded with a serial review of the events leading up to the charge of discrimination. “There is no evidence and no finding,” the Court said, “of any unfair labor practice in connection with the negotiations in New York.” Rather, the company did negotiate with representatives of the union. “Nor,” the opinion continued, “was it an unfair labor practice to replace the striking employees with others in an effort to carry on the business.” Noting that § 13 of the Act provides

⁶¹ See Peter H. Irons, *The New Deal Lawyers* 234, 235 (1982); James A. Gross, 1 *The Making of the National Labor Relations Board: A Study in Economics, Politics, and the Law* (1933–1937), 170–71 (1974).

⁶² 304 U.S. at 343.

that nothing in the statute should be construed to impede or diminish the right to strike, the Court stated that:

it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.⁶³

In contrast, the Court observed that Mackay had engaged in unlawful discrimination by refusing to reinstate certain strikers on the basis of their union activity. Because strikers retain the status of employees, “[a]ny such discrimination in putting them back to work is, therefore, prohibited” by the Act.

It is noteworthy that in denying reinstatement rights to strikers, the Court ignores the language of both § 2(3), which defines employees as including strikers, and § 13, which states that nothing in the Act “shall be construed so as either to interfere with or impede or diminish in any way the right to strike.” Additionally, the Court does not analyze the employer’s conduct in terms of the unfair labor practice provisions of the Act. Instead it simply restates doctrines developed by common law courts and adopted by the NLRB’s predecessor labor boards.

It is true that the Board itself did not reach the question of whether an employer engages in unlawful discrimination by permanently replacing strikers. The Board, however, conceded the point in its reply brief. In answering Mackay’s assertion that the Agency’s construction of the Act “guarantees the striker his job whenever he wants it,” the Board responded that the company’s “argument rests upon a gross misstatement of the Board’s position and the issues involved here.” “The Board,” the brief declared,

has never contended, in this case or any other, that an employer who has neither caused nor prolonged a strike through unfair labor practices, cannot take full advantage of economic forces working for his victory in a labor dispute. The Act clearly does not forbid him, in the absence of such unfair labor practices, to replace the striking employees with new employees or authorize an order directing that

⁶³ *Id.* at 345–46, *citing* NLRB v. Bell Oil & Gas Co., 91 F.2d 509 (1937).

all the strikers be reinstated and new employees discharged. Admittedly the strikers are not “guaranteed” reinstatement by the Act.⁶⁴

As the Board further noted, citing several recent cases that had been enforced by various circuit courts, where a “strike is not caused by an unfair labor practice, but where, during the strike, the employer commits an unfair labor practice,” the Board has ordered reinstatement “only to the extent that the strikers had not been replaced at the time of the unfair labor practice.” The other replaced strikers are placed on a preferential hiring list, and “the employer is not required to discharge any new employees hired prior to the commission” of the unlawful act.

The Supreme Court’s *Mackay* opinion squared on all fours with the Board’s argument in the case, and it authoritatively restated for the law under the NLRA the doctrine governing the rights of economic strikers that common law courts and earlier labor boards had developed. It is also entirely consistent with the typically restrained approach taken by Madden and Fahy to the construction of the Act, an approach dictated not only by attitudes of lawyerly caution and reticence that characterized both men, but by a deeply shared concern that an assertive reading and application of the statute would provoke the Court into finding it unconstitutional. It also is consistent with the intent of the drafters of the Act insofar as such intent can be divined from William Leiserson’s analytical memorandum that compared the terms of Wagner’s failed 1934 labor disputes bill with the provisions of the NLRA. Nevertheless, does an employer’s ability to grant permanent status to replacements discriminate against strikers by discouraging employees from engaging in protected activities? Does the *Mackay* doctrine actually undermine the collective bargaining system its framers intended to establish through the Act?

The Impact of Mackay

REEVALUATING THE *MACKAY* DOCTRINE

The *Mackay* doctrine was not a judicial effort to minimize the pro-labor goals of the original Wagner Act. It was, in fact, consistent with the law as understood by its framers, by the Board and by organized labor itself. The goal of the law was to promote free collective bargaining and all of the major players understood collective bargaining to be a system of private ordering in which the government’s role would be minimal. The natural play of economic forces would regulate its operation and limit the extent to which either side could ignore the interests of the other. Both labor and management wanted to avoid a system in which the state and political actors chose collective bargaining outcomes. The

⁶⁴ Reply Brief for NLRB at 15, *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (No. 37-706).

state was to provide a framework for private ordering, but not the substance of that order.

State intervention was thought to be the opponent of free collective bargaining. Thus, Mary van Kleeck, a leading industrial relations scholar and a strong proponent of collective bargaining, opposed Wagner's 1934 labor disputes bill. She thought attempts to equalize the bargaining power of the parties were doomed to failure, and she presciently feared that government intervention into the process of collective bargaining would lead to the regulation of unions.⁶⁵

Of course, collective bargaining under the Act never was intended to be entirely a laissez-faire system. State regulation was understood as necessary to protect the integrity of the system. It was obvious that the goal of protecting the integrity of the bargaining process without influencing its substantive results presented the Board and the courts with a difficult and subtle task. But it was not surprising that they concluded that the employer's ability to hire permanent replacements did not threaten the basic integrity of the system.

The basic rights of workers were protected by the definition of unfair labor practices in the Act. The section of the Act that was intended to protect job rights of union workers was § 8(3), which was violated only when the employer engaged in "discrimination . . . to discourage union membership." The language was far from self-explanatory, but to make out a violation of its terms, it seemed to require that the employer treat union members and supporters differently from other employees and that it do so for the purpose of discouraging union membership. Neither of these conditions was obviously met in the hiring of replacements. The employer in *Mackay* was seeking to continue its business, not discourage union membership. And as already noted, *Mackay* was decided at a time when even minor limitations on an employer's right to hire and fire were thought to stretch the limits of government power.

It was not as if unions lacked effective techniques for making the hiring of permanent replacements costly. In basic industries unions were strong and both sides understood that they would become stronger. This gave employers a strong motive for avoiding no-holds-barred battles. The Act did not prevent unions from coming to the support of each other. Hiring permanent replacements not only meant the loss of top quality union workers but it was likely to prolong and spread the scope of a strike. It was also bound to lead to at least minor acts of violence and prolonged antipathy from those not replaced. And if the strike was caused by an unfair labor practice, something often difficult to determine, the workers would be reinstated with back pay by the Board.

⁶⁵ See Irving Bernstein, *The New Deal Collective Bargaining Policy* 67 (1950).

Thus in the presence of a strong labor movement with a broad right to strike one might conclude that using permanent replacements would be an employer threat but not a major feature of collective bargaining. And for many years this was true. But the National Labor Relations Act and reality have both changed significantly since the *Mackay* doctrine was first announced and today it constitutes an anomaly in the law, an invitation to employers to bargain in bad faith, and a danger to workers and unions.

MACKAY AND THE DEVELOPMENT OF THE NLRA

By the mid 1960's, the *Mackay* doctrine had become obviously inconsistent with the interpretation of § 8(a)(3) developed by the Board and the courts. Very early on, the Supreme Court announced two important basic principles about the goal of the section. First, it articulated the policy of free choice that lay behind the language of the subsection—"to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."⁶⁶ Second, it held that to "encourage or discourage membership" as used in the Act means also to encourage or discourage participation in union activities or fulfillment of union obligations.⁶⁷

Similarly, the Court, early in the Act's development, made clear that discrimination could occur even when an employer did not treat union members and non-union members differently. The key case was *Republic Aviation v. NLRB*,⁶⁸ in which employees were discharged for violating a company rule against solicitation. The company argued that it did not discriminate against union members because it would have discharged any employee who violated its rule for whatever purpose. The Court rejected the argument, and in effect concluded that the discrimination consisted of treating these employees differently from the way the company would have treated them had they not engaged in union solicitation.⁶⁹

The key issue in developing a consistent theory of § 8(a)(3), however, was whether the section required that the employer act for the specific purpose of discouraging union membership or activity. Although most cases alleging violations of § 8(a)(3) claim that employers have acted to discourage union activity, the first full discussion by the Court

⁶⁶ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

⁶⁷ *Id.* at 39-42.

⁶⁸ 324 U.S. 793 (1945).

⁶⁹ For analysis of this position, see Julius Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. Chi. L. Rev. 735 (1965).

of the requirement of motive under § 8(a)(3) was in *Radio Officers' Union v. NLRB*,⁷⁰ where one of the consolidated cases alleged that an employer had reduced an employee's seniority for his failure to pay union dues, thereby acting to encourage union membership. The Court rejected the employer's defense that it had no purpose to encourage union membership. Although the Court reaffirmed the requirement of proof of motive and quoted approvingly from statements made in other contexts concerning the importance of motive, it said that no proof of specific intent was required where "employer conduct inherently encourages or discourages union membership." It approved the position of the NLRB and the appellate courts that had found that proof of "certain types of discrimination satisfies the intent requirement." Unfortunately, the basis for the Court's holding was not made clear.

The Court's language was bound to lead to confusion in subsequent cases. The *Radio Officers'* decision was cited both for the proposition that a finding of improper motive is necessary under § 8(a)(3) and for the proposition that it is not. The Court largely cleared up the confusion in *NLRB v. Erie Resistor Corp.*,⁷¹ in which it upheld the Board's determination that the grant of superseniority to strike replacements violated § 8(a)(3). The employer argued, *inter alia*, that because it was not motivated by a desire to discourage union membership, its action was privileged. The Court rejected this argument in language which foretold the end of any motive requirement under the section.

[A]s often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. . . . [W]hatever the claimed overriding justification may be, [the employer's conduct] . . . carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task, reflected in part in decisions of this Court, of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct. This essentially is the teaching of the Court's prior cases.⁷²

⁷⁰ 347 U.S. 17 (1954).

⁷¹ 373 U.S. 221 (1963).

⁷² *Id.* at 228–30.

The Court in *Erie Resistor* summed up its conclusion in language which would have been at least equally applicable had it been analyzing the legitimacy of hiring permanent replacements: “[S]uper-seniority by its very terms operates to discriminate between strikers and nonstrikers, both during and after a strike, and its destructive impact upon the strike and union activity cannot be doubted.”⁷³

The Court reaffirmed the conclusion that impact alone may justify a finding of violation in *NLRB v. Great Dane Trailers, Inc.*⁷⁴ In that case, the employer granted vacation pay to non-strikers but not to strikers. The employer argued that it was motivated by business concerns in so doing, not the desire to punish employees who engaged in concerted activity. The Court rejected this argument because the action was inherently destructive of the employees’ rights under the statute.

The same method of analysis was subsequently used to conclude that replaced strikers are entitled to reinstatement when the employer increases its workforce after a strike.⁷⁵ And in *Laidlaw Corp. v. NLRB*⁷⁶ the Court refused to review the Board’s conclusion that replaced economic strikers are entitled to priority in rehiring. Thus, the application of § 8(a)(3) today involves balancing employer rights and interests against the impact of the employer’s conduct on employee statutory rights.

The law has changed significantly since the time that Congress framed the Act and the Court announced its decision in *Mackay*. Union economic pressure then unregulated is now subject to severe and complex regulation. The passage of the Taft–Hartley⁷⁷ and Landrum–Griffin amendments⁷⁸ seriously restrict the ability of unions to call upon one another for assistance in putting economic pressure on an employer or in making common cause to improve workers’ terms and conditions generally. When it outlawed secondary activity by unions Congress significantly altered the balance of power between labor and management—the

⁷³ Although Justice White, who wrote the opinion in *Erie Resistor*, emphasized balancing, he recognized that motive plays an important role in the balancing process. The basic premise of the opinion is that existence of a legitimate business purpose, though relevant, is not necessarily dispositive if achieving such purpose would require serious interference with union rights. Moreover, as the opinion makes clear, if an employer is motivated by anti-union animus his action will be held to violate § 8(a)(3) even though it serves a valid business purpose and would otherwise have been permissible.

⁷⁴ 388 U.S. 26 (1967).

⁷⁵ *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

⁷⁶ 397 U.S. 920 (1970), *declining to review*, 414 F.2d 99 (7th Cir. 1969).

⁷⁷ 61 Stat. 136 (1947).

⁷⁸ Pub. L. No. 86–257 (1959).

balance that made the *Mackay* decision acceptable to labor and its supporters.

The Continuing Importance of Mackay

MACKAY'S IMPACT ON FREEDOM OF CHOICE

The *Mackay* doctrine gives employers a powerful argument against unionization. In almost every union organizing election conducted by the NLRB, the employer mounts a campaign against representation in which it makes two points. Firstly, it will emphasize that it will bargain hard in the event of unionization, and that the only way for the union to force it to give benefits is through the strike. Secondly, the employer will point out that in the event of a strike, it has the right—which it is likely to use—permanently to replace the strikers. This is an argument that many employees interested in unions would be well advised to take seriously.

In addition, the hiring of replacement workers will often mean and will always threaten the termination of the union representation desired by the replaced employees. Under the Act, the replacement workers will be able to vote in a decertification election on whether they wish to continue representation. Such elections almost always lead to union decertification. *Mackay* thus provides employers with an incentive to seek a strike as a union-avoidance technique. There is reason to believe that this tactic was widely employed during the 1980's in several major industries, papermaking in particular.

MACKAY AND UNION POWER

The Supreme Court intimated in *Mackay* that employers need the right to permanently replace employees in order to continue operations during a strike. If that were ever true, it is no longer. The ability of employers in general to cope with a strike without hiring permanent replacements has significantly improved since the time of the *Mackay* decision.⁷⁹ The weakened state of the labor movement has made strike breaking more socially acceptable so that temporary replacements are easier to obtain. Provisions of the Act outlawing secondary union activity

⁷⁹ Contemporary commentators are not unanimous on how or, in some cases, whether the *Mackay* rule should be modified. For one proposal that also summarizes other positions, see Samuel Estreicher, *Collective Bargaining or "Collective Begging"?: Reflections on Antistrikebreaker Legislation*, 93 Mich. L. Rev. 577 (1994). Professor Estreicher suggests that employers must in some circumstances have an opportunity to replace strikers to provide "a market-based check on unreasonable union demands at the bargaining table." *Id.* at 599. He, however, proposes that employers be permitted to use permanent replacements after a strike has continued for more than six months and an employer can demonstrate business necessity. For a sense of the debate among economists over whether the holding of *Mackay* is efficient, see Seth D. Harris, *Coase's Paradox and the Inefficiency of Permanent Strike Replacements*, 80 Wash. U. L.Q. 1185 (2002).

and increased automation have all weakened the position of unions in economic strikes. There are now companies that specialize in providing replacement workers temporarily or permanently to struck companies.

The policies favoring free collective bargaining and freedom of choice are overlapping and mutually dependent. Successful collective bargaining is the culmination of the decision to unionize, and employees must feel free to support the union for collective bargaining to be successful. That employees who participate in the process in the manner contemplated by the law do so at the risk of their jobs seems contradictory and indifferent to the interests of the employees whose rights are supposedly at the heart of our labor relations laws.

There is little doubt that if the balancing of interests now called for under § 8(a)(3) were applied to the hiring of permanent replacements, the *Mackay* doctrine would be overturned. However, to this day, the Court has never analyzed the *Mackay* doctrine under contemporary standards. And despite the critical assessments to which the rule has been subjected, the Court has shown not the slightest inclination to moderate its effects.⁸⁰ The *Mackay* rule remains every bit as authoritative as the day the Court announced it.

THE IMPACT OF *MACKAY* WHEN USED

There have been few detailed studies of the impact of the *Mackay* doctrine. But what information we have paints a sad picture of human misery and community destruction. One of the most carefully studied strikes in this regard is the strike of 1200 replaced papermakers at the Androscoggin Mill of International Paper Company in Jay, Maine, from June of 1987 to October of 1988.⁸¹ The strike lasted sixteen months before the union capitulated. The story of the Jay strike is a cautionary tale about the *Mackay* doctrine in the contemporary economy. In the aftermath of the strike, the hostility between former strikers, company management, and replacement workers harmed the quality of the paper produced. The former strikers, once exemplary paper workers, continued to see the company as the enemy and the quality of their work inevitably deteriorated. As one of the former strikers stated, “I go in every day with the same thought, just because I’ve got my job doesn’t mean it’s over. I’ve still got 600–800 friends on the outside and until they’re back I

⁸⁰ One effort to overturn *Mackay* legislatively nearly succeeded. In 1990, the President of the paperworkers union local whose members had been replaced during its strike in Jay, Maine, persuaded a local congressman to introduce a bill that would have required employers to wait sixty days before hiring replacements. The bill was embraced by organized labor and passed overwhelmingly in the House of Representatives, but defeated by a filibuster in the Senate. Subsequent efforts to revive the legislation during the Clinton Administration also failed. Julius Getman, *The Betrayal of Local 14* 102–04 (1998).

⁸¹ *Id.* All subsequent quotes about the strikers and the community are contained therein.

refuse to be friendly with these people.” Remaining loyal to those on the outside was crucial to the self-respect of those who returned to the mill. Bruce Moran, a millwright, stated, “every time you see a brother or sister that hasn’t got their job back you feel a very sick feeling knowing the only way they will get their job is if a scab dies or quits.”

Concern with loyalty meant that scabs were not to be helped. Brent Gay, a senior machine operator, explained:

Some of them come ask you about problems. “What do you think the problem is?” I tell them, “I don’t know.” Finally told one guy, “I could tell you how to solve that. I’m not gonna. Every time I do that, I’m cutting a guy’s throat on the outside, and I’m not gonna do that.” “Oh, I understand.” He never asked me again after that.

The greatest anger continued to be directed at “crossovers,” strikers who had abandoned the strike and crossed over the picket line. Five years after the strike ended, one of the crossovers explained his bitter view of the strike and its outcome.

Some people won’t speak to me that I’ve known for twenty years. I can meet them face to face and they still don’t speak. That’s their choice. A lot of times, I wave or I’ll say hi, and that doesn’t matter if it is on the street or if it’s in the mill. I will ask them how their day’s going or say good morning to ’em and they’ll answer you back. But there is a few that to this day, they don’t speak at all. I see two, a company, and the union that has spent millions of dollars. They both lost the battle. Nobody won. There’s like a spirit of hatred and bitterness in this valley. There’s no peace in this valley.

And things are just not improving, and I’m looking for other opportunities. I’ve been praying about it, and I think the Lord’s gonna tell me what’s gonna happen, but he said the first thing I had to do was sell my house, and I got it up for sale and I’ll sell it. And after that’s sold, I’ll work . . . something out.

A short time later he moved to Alaska.

Laurier Poulin, who was the last person to walk the picket line, left the mill in 1993. One of the scabs said, “You gonna shake my hand before you leave?” And I said “No, I didn’t shake your hand when I came here, and I sure as hell am not gonna do it on the way out.” He said, “What are you gonna do, carry it to the grave?” I says, “Yep, I told my wife to put it right in the paper, in the obituaries. I want it in my obituary that I’m not a scab.”

Ray Pineau, a former striker, who testified before the Maine Legislature’s labor committee, stated that being permanently replaced was more upsetting than walking into an ambush in Vietnam. Pineau’s statement was made six years after the strike ended. The hiring of permanent replacements fundamentally changed the once cohesive mill

community both inside and outside the plant. Six years after the strike ended, a former mill worker stated: "It has put brother against brother, friend against friend, and neighbor versus neighbor. It will take many generations before the hurt and anger will heal." Another former striker stated that the impact of the strike has been "devastation, break up of families and friendships. This generation will never see a complete healing."

Ken Finley, the town undertaker, described how the continued division affected the funeral of a woman whose son Norman was a supervisor at odds with his brothers, who were strikers.

It was a large family, and totally divided. Norm was very supportive of the scabs, to the point where he got punched out a couple of times. And when the funeral was happening, he basically was in one area and the other family members were in another area. Not one of the strikers went to see him. You could see the demarcation. It's not unique; you see the bitterness, even in death.

When asked if the passage of time was easing the bitterness he was emphatic. "No, in five years it hasn't changed . . . it'll go a hundred years. The only change is people moving in and moving out."

The papermakers were used to thinking of themselves as helpful, cooperative, decent people, and productive members of the community. The aftermath of the strike put this comfortable self-image into serious doubt. One former striker was surprised by his own reaction to the death of one of the replacement workers as the result of an accident, six years after the strike ended. "Normally I am a compassionate man with sympathy for those with misfortune. However, after reading the article, my remark to my wife was, 'I guess there'll be one less scab in the mill.' Not that I rejoice in the man's death but sympathy for a scab comes hard." Another senior papermaker described the change in himself in this regard as "unbelievable."

I was the type of person that anybody needed help I'm there. Two years ago a car drove over the road up here, on the bank. The guy was still in the car, upside down. He had to tell me who he was, where he was from and where he worked before I'd touch him. If he'd given the wrong answers I'd walked back over the bank and done nothing. That's bitter. That's damn bitter. That's what they created.

The stress involved in learning to deal with the world in a new way caused illnesses, divorce, alcoholism and even death. In 1994, six years after the strike ended, Ken Finley, the town undertaker, stated sarcastically, "The strike is still creating business for me."

Town residents and former strikers agree that the strike was responsible for increases in alcoholism and divorces. Henry Lerette stated that:

All during the strike and since its end, I drank with increasing regularity. . . . My wife threatened to leave me if I refused to seek help. I am now in therapy and attend AA meetings frequently. At one recent AA meeting there were five other former strikers present. . . . I hesitate to blame the strike for my drinking problems, but it sure didn't help. I still harbor intense hatred for [International Paper] and the scabs that descended like rats to steal our jobs when we left the mill. I will take that hatred to my grave.

The devastating impact of the strike on the community was inevitably linked to the *Mackay* doctrine. Charles Noonan, the former city manager made it the central point of his congressional testimony in favor of the bill seeking to overturn *Mackay*.

Christmas, birthdays, and other family occasions will never be the same for many families in Jay. . . . I suggest that before you pronounce the permanent replacement issue "not broke" and working well, you journey to Jay.⁸²

I don't have a lot of experience with strikes, and I certainly hope I never have to go through another one—but I have been talking to a number of town managers who have seen strikes, and the difference appears to be when you add that element of the permanent replacement worker that the level of violence, the bitterness, the desperation on those picket lines goes up considerably because every one of those replacement workers who goes in is taking someone's job.

Conclusion

One point about *Mackay* is clear. Despite what many of its critics have maintained, the rule the case announced is one intended by its framers and for which the Board itself argued. A deeper problem that any consideration of *Mackay* raises is the one that caused the strike in that case to founder: the need for solidarity. The willingness of individuals prudently and responsibly to make cause with others, to make some personal sacrifice for the common good even when they may not directly benefit from it, is the *sine qua non* for the labor movement. Such habits also are central to the survival of any democracy. No change in the law and no judicially-developed doctrine can instill those attitudes or act as a facile replacement for them. They require discipline and must come from the people themselves. But the Jay strike demonstrates that, even with remarkable solidarity and willingness to sacrifice, unions may be defeated by a combination of vast employer economic power and use of the *Mackay* doctrine.

⁸² The "not broke" comment was a response to a previous witnesses' testimony, who had argued against changing the law on the grounds that "if it's not broke don't fix it."

