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Labor Law—Superseniority Policies—Relevance of Employer's Motive.—Erie Resistor Corp. v. NLRB

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mind, and further noted that the act was intended to strengthen management's position at the bargaining table.[24] In view of the instant court's basing its decision on a distinction between dues and assessments, yet failing to show why this point is determinative, some reference to the overall purpose of the act could and should have been made. However, considering the Board's position and the Court of Appeals' decisions in the *Guided Missile Lodge* and *Food Fair* cases, with the implicit reluctance to add to the bargaining power of the union in construing 8(a)(3) and 8(b)(2) of the act, it appears that any solution will have to come from Congress.

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Labor Law—Superseniority Policies—Relevance of Employer's Motive. —***Erie Resistor Corp. v. NLRB.***[1]—During an economic strike, the Company, after a sharp decline in business and loss of important orders, hired replacements including new employees and returning strikers, and offered tenure to replacements over strikers returning upon settlement of the strike as an inducement to cross picket lines. The Company established a superseniority policy to implement its assurances of tenure under which the replacements were to receive twenty years added to their regular length of service. After settlement of the strike, the Company filled still-vacant places with returning employees according to seniority. Several months later a number of employees were laid off for economic reasons, including some recalled strikers whose seniority was now comparatively low because of the superseniority plan. The Union's complaint that the preferential seniority plan was an unfair labor practice was recommended for dismissal as the evidence did not support a determination that the Company's action was prompted by an improper motive. The Board ruled, however, that the adoption of preferential seniority was inherently discriminatory, the Company's motive being wholly irrelevant.[2] In denying enforcement of the Board's cease and desist order, the Court of Appeals for the Third Circuit HELD: The implementation by the Company of a superseniority plan, although discriminatory, is not a violation of section 8(a)(3)[3] of the National Labor Relations Act unless motivated by a desire to discourage or encourage membership in a labor organization. The adoption of preferential seniority to assure tenure to replacements is proper if the Company is motivated solely by necessity to protect and continue its business.

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[24] Id. at 660.

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[1] 303 F.2d 359 (3d Cir.), cert. granted, 83 Sup. Ct. 48 (1962).

[2] 132 N.L.R.B. 621, 48 L.R.R.M. 1379 (1961).

[3] 49 Stat. 449 (1935), as amended by, 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1958), as amended by Pub. L. 86-257, § 201(e), 29 U.S.C. § 158(3)(i) (1959), provides:

Section 8(a) It shall be an unfair labor practice for an employer—

. . .

(3) by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization . . . .

It was soon decided after the passage of the National Labor Relations Act that the employer would not be required to stand idly by during a strike while his business was being ruined. To allow such to happen would give grossly disproportionate power to the unions by forcing the employer to accept any and all demands of the unions or face complete ruin. In 1938 the United States Supreme Court ruled in *NLRB v. Mackay Radio & Tel. Co.*[4] that during an economic strike[5] the employer did not lose his right to protect and continue his business and that it was not an unfair labor practice to implement this right by hiring replacements and giving assurances of permanent tenure as against returning strikers. Further, it was a legitimate exercise of an attempt to protect his business for an employer to reinstate only those returning strikers whose places remained vacant.

How far an employer may go in the legitimate exercise of his right to protect his business has been the subject of litigation concerning the granting of preferential seniority to replacements during an economic strike. It is important to note at the outset that the courts have not given full consideration to the implications involved in the granting of superseniority. In no case have the courts mentioned the economic impact of superseniority or its effects on reinstated strikers, two relevant and important factors in determining whether an act of the employer has tended to encourage or discourage union activity. The courts have, instead, extended the language of the *Mackay* case, which was intended for a narrow fact situation, to mean that the controlling factor in the actions of the employer is his motive. In *NLRB v. Potlatch Forests, Inc.*,[6] the Ninth Circuit upheld the employer's adoption of preferential seniority in favor of replacements where it was imposed "for a legitimate business purpose." The fact that the inevitable consequence was discrimination against union activity was not sufficient to find an unfair labor practice. The court rejected the Board's position that an offer of superseniority is inherently illegal.[7]

> While the employer may know that hiring replacements tends to dissipate the effects of the strike, and thereby tends to discourage union activities, such conduct is regarded as a legitimate weapon of economic warfare. . . . because the benefit conferred upon the

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[4] 304 U.S. 333 (1938).

[5] There are two kinds of strikes which must be distinguished: (1) an unfair labor practice strike; (2) an economic strike. In an unfair labor practice strike employees are striking because of action of the employer which is in violation of the rights of the employees under NLRA. In this instance the employer must reinstate all striking employees upon termination of the strike. An economic strike results when the employer and employees dispute provisions of a contract between them as to such matters as wages or conditions of employment. The courts have been consistent in not requiring the employer to reinstate all striking employees once the strike is over, but that the employer need only reinstate those employees not replaced during the strike. Id. at 344.

[6] 189 F.2d 82 (9th Cir. 1951).

[7] 87 N.L.R.B. 1193, 25 L.R.R.M. 1192 (1949). The Board affirmed the rulings of the Trial Examiner that the establishment of preferential seniority does not come within the *Mackay* decision since preferential seniority impairs the *reinstated* employees' employment relationship which the court in *Mackay* found to be a prohibited action.

> replacements is a benefit reasonably appropriate for the employer to confer in attempting 'to protect and continue his business . . . .'[8]

If an employer could show that he was motivated by the desire to protect and continue his business, superseniority was permissible.

The Fourth Circuit, in *Olin Mathieson Chem. Corp. v. NLRB*,[9] emphasized certain criteria to determine the validity of the employer's conduct, which placed strict limitations on the broad language of the *Potlatch* case. The court made the holding in *Mackay* more explicit, stating that

> with a strike in progress, the primary concern of the employer is to keep his plant in operation. It is then proper for an employer, who might be unable to procure replacement save upon a promise of permanent tenure, to promise such tenure to replacements. But when the strike is over, when the plant is in operation, then the imposition of the superseniority policy in favor of the replacements and against the strikers is quite a different matter.[10]

Unless the superseniority had been promised during the strike as an inducement to accept employment in order to keep the plant in operation, the adoption of a superseniority policy once the strike is over, and there is no impelling economic reason for adopting such a policy, clearly indicates that the employer seeks to punish the strikers for participating in union activities. The court, therefore, upheld the Board's ruling, but did not rule directly that superseniority was illegal per se. The same rationale of *Olin Mathieson* was adopted by the Ninth Circuit in *NLRB v. California Date Growers Ass'n*[11] in upholding a Board finding that the employer engaged in an unfair labor practice by adopting preferential seniority after the strike was settled as a penalty for striking. The court indicated that the granting of superseniority would be permissible under the National Labor Relations Act in particular situations. Thus, as in *Olin Mathieson*, the court did not hold that superseniority was illegal, but rather, because the employer sought to implement the policy when there was no need for it, there was a clear indication that the employer was motivated by a desire to punish the strikers.

The National Labor Relations Board has been quite adamant in holding the employer to strict observation of section 8(a)(3) in cases involving superseniority, but the courts have consistently avoided the problem by deciding the cases on points other than the inherent legality of superseniority. Such an approach seems to indicate that superseniority is not illegal per se, but that the particular facts of each case must be considered in determining the validity of preferential seniority, and the employer's motive is a crucial factor in such determination. The case law points out that if the evidence indicates that the employer's business is in danger of ruin, if inducements are necessary to attract replacements and if the employer is motivated by a desire to protect and continue his business

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[8] Supra note 6, at 86.

[9] 232 F.2d 158 (4th Cir. 1956), aff'd per curiam, 352 U.S. 1020 (1957).

[10] Id. at 161-62.

[11] 259 F.2d 587 (9th Cir. 1958).

and not to punish the strikers, the courts would sanction the employer's establishment of preferential seniority for replacements.[12] Thus, when the Board in the instant case ruled "that superseniority however motivated was an illegal discrimination against strikers,"[13] the Third Circuit found on review that it was too well established that, given the appropriate circumstances, preferential seniority would be proper.[14]

In the *Erie Resistor* case, the Board claimed support for holding superseniority illegal per se in *Radio Officer's Commercial Telegraphers Union v. NLRB*,[15] where the Supreme Court stated that "specific evidence of intent to encourage or discourage is not an indispensible element of proof of violation of section 8(a)(3)." This applied to situations "inherently conducive to increased union membership." The Board in *Erie Resistor* found the superseniority policy to be discriminatory and on its face clearly discouraging strike activities and union membership. "Such was the inevitable result of a preference granted *for all time* to those who did not join the Union's strike activities."[16] (Emphasis supplied.) The Board interpreted the *Radio Officer's* case as giving it wide latitude to determine that certain actions of the employer are illegal per se if, as a consequence of such actions, there was discrimination based on protected union activities regardless of the reason for such conduct. This Board view was rejected by the Ninth Circuit in *Pittsburgh-Des Moines Steel Co. v. NLRB*[17] where it stated:

> Where criteria other than union membership or activity are used as the basis for an employer's discrimination, the exceptional rule of *Radio Officer's* does not apply since the kind of discrimination which impelled the rule is absent. It is then up to the Board to predicate a conclusion of unlawful intent upon more specific evidence; a showing of the discriminatory treatment plus its natural and foreseeable consequences will not suffice.[18]

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12 Comment, 27 U. Chi. L. Rev. 368, 376 (1960). The writer sums up the criteria as follows:

> To allow an employer to use permanent tenure or superseniority as a weapon against striking employees or to reward non-strikers would clearly be beyond the Mackay doctrine. Only where the employer can prove that promises of permanent tenure or seniority to replacements were reasonably necessary to induce replacements to cross picket lines during a strike, and that such promises were made at such a time that they would act as an inducement should the employer be allowed to adopt and implement a superseniority plan.

13 Supra note 2, at 625.

14 The court stated:

> We are of the opinion that inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy which will assure the replacements of some form of tenure, provided the policy is adopted SOLELY to protect and continue the business of the employer.

Supra note 1, at 364.

15 347 U.S. 17 (1954).

16 Supra note 2, at 630.

17 284 F.2d 74 (9th Cir. 1960).

18 Id. at 83.

The court further stated:

> That [a] protected union activity is the direct cause of a business condition upon which an employer actually predicates discrimination among his employees does not mean that the basis for discrimination is the protected union activity.[19]

Thus, according to this view, the fact that the union's right to strike is a protected activity would not prevent the employer from exercising his right to hire replacements, based on economic conditions, to protect and continue his business even though such conditions are created by the strike. The fact that the employer's conduct is foreseeably discriminatory does not bring the conduct within the *Radio Officer's* rule. It appears that the courts do not give much weight to the argument of the Board that even though an employer may be allowed to hire replacements, the preferred treatment here utilized goes beyond protecting replacements against lay-off when the strike is terminated, and in effect destroys the right to strike.

The climax of the litigation as to granting preferential seniority has been precipitated by the Court of Appeals for the Sixth Circuit. In the case of *Ballas Egg Prod., Inc. v. NLRB*,[20] the court did not rule, nor did the Board, that adoption of a superseniority policy was inherently illegal, but rather that the employer's motivation was improper. This case follows the *Olin Mathieson* and the *California Date Growers* cases in circumventing the question of the inherent illegality of preferential seniority. In *Swarco, Inc. v. NLRB*,[21] however, the court met head on with the issue and sustained the Board's ruling that the adoption of preferential seniority by the employer was illegal, the court in effect holding that it was illegal per se. It stated that whether granting superseniority is a violation of section 8(a)(3) is a question of fact to be decided on the particular facts of the case, and, by basing its decision largely on *NLRB v. Bradley Washfountain Co.*,[22] it reached the conclusion that the adoption of the superseniority policy by

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[19] Id. at 84. One of the situations not intended to be covered by the rule not requiring specific evidence of intent was expressed by the court as follows:

> Discussion in [*Olin Mathieson Corp.* and *California Date Growers Ass'n*] indicates that when in order to obtain replacements for economic strikers, it is necessary for an employer to promise seniority to the replacements, the denial of seniority status to those strikers who are reinstated is not an unfair labor practice, although the business condition which actuated the employer to deny seniority status to reinstated strikers was directly caused by the strike itself.

[20] 283 F.2d 871 (6th Cir. 1960).

[21] 303 F.2d 668 (6th Cir. 1962).

[22] 192 F.2d 144 (7th Cir. 1951). The court held the communications between employer and employees to be protected by the First Amendment of the U.S. Constitution, so long as there are no threats of reprisal or promise of benefit. "If the communications are fair in their description of the situation and they do not offer the returning employees greater benefits than will be extended to those remaining on strike, they do not support a finding of unfair labor practices." Id. at 153. The court, however, refers to the *Mackay* case primarily to show that an employer may replace economic strikers and refuse to lay off replacements upon termination of the strike. In so doing, portions of the *Mackay* decision are included, which stated that an employer may promise replacements permanent tenure, which appears to be a definite benefit over those who remained on strike.

Swarco "constituted an inducement to give up the strike and a threat of reprisal to those who continued the strike,"[23] and was thus illegal. The court made the point quite emphatic when it cited the *Radio Officer's* case implying that the adoption of superseniority did fall within the *Radio Officer's* rule, and is thus inherently illegal. " 'Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement.' "[24]

It is to be noted that all the other cases dealing with preferential seniority were decided on facts which clearly established that the employer was impelled by anti-union sentiments. Other than *Potlatch*, which the *Swarco* court distinguishes, *Swarco* for the first time attacks the validity of superseniority policies and agrees with the Board that the consequences of such policy go beyond the legitimate exercise of the employer's right to protect his business. Although previous cases have indicated that superseniority would be valid if adopted to induce replacements to cross picket lines, this indication is found in dicta.

The Court of Appeals for the Third Circuit, within eight days of the *Swarco* decision, handed down its ruling on the same question dealt with in *Swarco*, but came up with the opposite result. The court in the *Erie Resistor* case overruled the Board, holding that the motive of the employer is the crucial consideration in determining whether the adoption of a superseniority policy is proper. The court did not decide whether the employer was improperly motivated, the question being one of fact for the Board. Particular emphasis was placed on the *Radio Officer's* case, and implicit in the *Erie* court's discussion of that case was the interpretation of *Radio Officer's* expressed in the *Pittsburgh-Des Moines Steel Co.* case. The court felt there that specific intent need not be found where discrimination is based on union membership. However, in *Erie*, as in the *Pittsburgh-Des Moines* case, the employer adopted a preferential seniority policy based on economic necessity, not on union membership or union activity, and therefore the *Radio Officer's* rule does not apply. The decision in *Erie* gives authority to the implications found in *Olin Mathieson* and *California Date Growers* that if the employer is impelled by the desire to protect and continue his business, and if the inducement is given to replacements during the strike, preferential seniority would not be an unfair labor practice.

From a review of the cases previous to *Erie*, the decision in *Erie* is not too surprising, and it would seem that the cases follow in logical sequence. The *Swarco* case, however, unsettles any definitive status of the question of the validity of superseniority policies. While the decision of the *Swarco* court distinguishes the previous cases the rationale for its result is rather obscure. It is implicit that the court is persuaded by the Board's argument,[25] but does not make that argument clear in its opinion, thereby not availing

[23] Supra note 21, at 673.

[24] Ibid.

[25] Supra note 2. See also Griffin Pipe Div. of Griffin Wheel Co. v. NLRB, 136 N.L.R.B. No. 144, 50 L.R.R.M. 1049 (1962), pending on petition to review in Court of Appeals for the Seventh Circuit.

itself of the opportunity to indicate the possibly erroneous approach taken by the courts in regard to superseniority.

It is one thing to assure replacements that they will not lose their jobs upon termination of the strike by granting permanent tenure to that time; it is another thing to give seniority which will secure replacements against possible lay-off in the future because of economic conditions not directly related to the strike. This latter point seems to go beyond the *Mackay* doctrine. The Board has made the point quite clear:

> *Mackay* itself holds that, as 'employees,' strikers may not be discriminated against in the manner of, and the terms of, their reinstatement. Yet, giving 20 years or any other special seniority to strike replacements necessarily deprives unreplaced strikers of an important aspect of their prestrike status, for seniority is by its nature relative; giving to one necessarily takes away from another. In essence, therefore, an award of superseniority to strike replacements renders one important requirement of *Mackay* —nondiscriminatory and complete reinstatement of unreplaced strikers—an actual impossibility.[26]

This argument should not be overlooked because it points up a latent defect in the reasoning and meaning given to a preferential seniority policy by the courts. While the attempt is being made to secure the employer's right to protect and continue his business, the union is left, however unintentionally, without such ability to protect and continue its purposes and activities. It seems more logical that the court in *Mackay* intended to allow, as an inducement to cross picket lines, the granting of job security to replacements over the returning strikers upon termination of the strike, and that the replacements, as well as all other employees, would be subject to lay-off due to future economic conditions according to seniority actually accrued. To interpret the *Mackay* decision as holding that the promise of tenure will apply as to future economic conditions seems grossly inaccurate. The Supreme Court is now directly faced with the problem,[27] and its decision should do much to clear up the confusion on the question of superseniority and the effect of the employer's motive.

EDWARD BOGRAD

Labor Law—Unfair Labor Practices— Interference, Restraint or Coercion—Unconditional Pre-Election Benefits.—*NLRB v. Exchange Parts Co.*[1]—Two weeks before a scheduled union representation election, the Exchange Parts Company, in a letter urging employees to vote against the union, announced the granting of extra vacation periods and increased holiday overtime pay. Some of the benefits had been settled on prior to

[26] Supra note 2, at 626.

[27] Certiorari was granted to the Board in the *Erie* case, 83 Sup. Ct. 48 (1962). Petition for certiorari has been filed in the *Swarco* case.

[1] 304 F.2d 368 (5th Cir. 1962).