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NOTES AND COMMENTS

THE REINSTATEMENT RIGHTS OF ECONOMIC STRIKERS: LAIDLAW FIVE YEARS AFTER

In this comment the author discusses the effect of the Laidlaw doctrine upon an economic striker's right to reinstatement. The author traces the historical development of the doctrine and addresses the four principal issues surrounding it: the duration of the right to reinstatement; the limitation of the right by agreement; the doctrine of substantially equivalent employment; and the so-called "business justification" rule.

Laborers may strike for many lawful reasons; labor lawyers recognize but two—the advancement of “economic” ends¹ and the protest of an employer’s unfair labor practice.² The distinction matters in large part because the rights of strikers differ according as the categories of their strikes differ.³ Most significantly, the unfair-labor-practice striker enjoys an unconditional right to reinstatement upon the termination of

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1. The goal of an economic strike may be anything which concerns wages, hours, or working conditions, and which is prohibited neither by law nor by collective bargaining agreement. See, e.g., *NLRB v. Transport Co. of Texas*, 438 F.2d 258, 262 n.6 (5th Cir. 1971); *NLRB v. Herman Wilson Lumber Co.*, 355 F.2d 426, 430 (8th Cir. 1966); Note, *Reinstatement: Expanded Rights for Economic Strikers*, 58 CALIF. L. REV. 511, 512-13 (1970). The National Labor Relations Board (hereinafter the “Board”) and the federal courts use the term “economic strike” to mean any lawful strike which is not an unfair labor practice strike.
 2. An unfair labor practice is a violation of § 8 of the National Labor Relations Act (hereinafter the “Act”), 29 U.S.C. § 158 (1970), and an unfair labor practice strike is one caused or prolonged by an employer’s unfair labor practice. For an extended examination of such strikes see generally Note, *The Unfair Labor Practice Strike: A Critique and a Proposal for Change*, 46 N.Y.U.L. Rev. 988 (1971).
 3. The categories are far from static. What begins as an economic strike, for instance, may not always end up as one for, if during the course of the strike the employer commits an unfair labor practice (such as firing the strikers or refusing to bargain), the strike is from that moment on transformed into an unfair labor practice strike and all of the rights and responsibilities attendant to such a strike immediately attach. The commission of an unfair labor practice is, of course, a matter for the Board to decide, and until the Board does decide neither the strikers nor their employer can be entirely certain where they stand. Thus, too, if workers strike over their employer’s presumed unfair labor practice and the Board subsequently exonerates the employer, the strike is generally considered an economic one from the beginning. The loser of this sort of industrial wager may find himself in rather close circumstances, and unions are understandably quite attentive to an employer’s conduct during a strike. See generally Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice: II*, 49 VA. L. REV. 1297 (1963); Stewart, *Conversion of Strikes: Economic to Unfair Labor Practice*, 45 VA. L. REV. 1322 (1959).

his part in the strike,⁴ while his brother, striking for economic reasons, enjoys at best a qualified right.⁵ The nature of the unconditional right, in the former instance, has never caused much controversy.⁶ The qualified right of the latter—with which this note is concerned—has caused a great deal.

THE OUTLINES OF THE LAW: LAIDLAW IN BRIEF

Since mid-1968, the economic striker's rights to reinstatement have been governed by the National Labor Relations Board's decision in *The Laidlaw Corp.*⁷ Reduced to essentials, *Laidlaw* makes two demands of an employer following a strike: (a) if a lawful economic striker's former, or equivalent, position is still available upon his unconditional offer to return to work, the striker must be reinstated without prejudice in that position; and, more to our interests, (b) if the striker's former, or equivalent, position is for legitimate business reasons *not* then available to him, the striker (if himself still available) must be sought out whenever such a position does open up and must be given preference in filling it—unless the employer can show some other "legitimate and substantial business justification" for refusing to do so. The first of these two requirements was far from new with *Laidlaw*, having been acknowledged over some 30 years of prior statutory labor practice.⁸ The second, which was new, and which overruled a significant body of precedent established by that practice, constitutes the "*Laidlaw* doctrine" today.

The traditional reason why an economic striker's former position might not be available upon his return lies in the employer's presumed right to attempt to carry on his business by hiring permanent replacements for his striking employees.⁹ Part of the familiar wisdom of labor law has long been the assumption that the guarantee of permanent employment is a necessary inducement in obtaining striker replace-

4. So long as his former job or one substantially equivalent to it still exists, the striker is entitled to full reinstatement, and any replacements hired during the strike must be discharged, if need be, to make room for him. *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. Remington Rand, Inc.*, 130 F.2d 919, 927-28 (2d Cir. 1942).

5. The chief qualification lies in the fact that an economic striker who has been "permanently" replaced must wait until the replacement leaves (or another similar job opens up) before he can be reinstated. See notes 9 & 10 *infra* and accompanying text.

6. Thus, no one has yet sought to maintain that an unfair-labor-practice striker should be penalized for his employer's misconduct. *But see* Note, *supra* note 2, wherein the author does argue for an amendment to the Act which would encourage greater reliance upon Board procedures and less resort to the strike in settling unfair labor practices.

7. 171 N.L.R.B. 1366 (1968), *enforced*, 414 F. 2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970).

8. See *Republic Steel Corp. v. NLRB*, 114 F.2d 820 (3rd Cir. 1940).

9. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). These replacements must, of course, have obtained whatever rights they claim to their positions prior to the strikers' own unconditional requests for reinstatement. See *H. & F. Binch Co. v. NLRB*, 456 F.2d 357 (2d Cir. 1972).

ments in the first place;¹⁰ and it was the tension between, on the one hand, the employer's right to permanently replace his striking workers and, on the other, the workers' right to abandon their strike and return to their jobs which precipitated the many years of unrest leading up to *Laidlaw*.¹¹ Curiously enough, the seeds for both sides of the conflict lay, as is now generally recognized, in a single case: *NLRB v. Mackay Radio and Telegraph Co.*¹²

THE SOURCES OF THE LAW: FROM MACKAY RADIO TO FLEETWOOD TRAILER

The notion that economic strikers may be denied reinstatement after having been permanently replaced finds its earliest and highest judicial support in *Mackay Radio*. The employer in *Mackay* had hired replacements for its striking employees and in so doing had assured 11 of the replacements that, if they wished, their jobs might be permanent. When the strike ended, five of the 11 chose to stay on. Thereafter, in determining which five of the returning strikers were to be denied reinstatement, the employer happened upon those five "who were prominent in the activities of the union and in connection with the strike."¹³ En route to its holding that the strikers were statutorily protected employees, and that such discrimination was prohibited by the National Labor Relations Act, the Supreme Court paused to observe that the permanent replacement of economic strikers was not in itself unlawful, and that an employer "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."¹⁴ What the employer in this case was bound to do, the Court held, was simply to refrain from denying to certain of the strikers, "for the sole reason that they had been active in the union,"¹⁵ such opportunities for reinstatement as it might offer others. The declaration of the employer's right to permanently replace strikers, while admittedly fundamental to the Court's holding, was nevertheless not at issue and has been criticized as dictum.¹⁶ Yet the dictum quickly became doctrine, and *Mackay* became the universal citation for the proposition that

10. This assumption, along with the conclusions built upon it, has not gone unchallenged. See generally Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 382-92 (1969); Comment, *The Mackay Doctrine and the Myth of Business Necessity*, 50 TEX. L. REV. 782 (1972).

11. An abbreviated discussion of this period follows in the text. For more detailed treatments, see generally Hirsch, *Laidlaw—The Mackay Legacy*, 4 GA. L. REV. 808 (1970); Martin, *Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 WIS. L. REV. 1062 (1970).

12. 304 U.S. 333 (1938).

13. *Id.* at 339.

14. *Id.* at 345-46.

15. *Id.* at 346.

16. See, e.g., Note, *Replacement of Workers During Strikes*, 75 YALE L. J. 630 (1966).

economic strikers need not be reinstated once their jobs have been filled by permanent replacements.¹⁷

Subsequent readings of *Mackay* concerned themselves less with examining the doctrine than with entrenching it. While the Court had expressly recognized that former strikers who had neither been reinstated nor "obtained any other regular and substantially equivalent employment" remained "employees" under § 2(3) of the Act,¹⁸ it had offered no opinion on whether this employee status would endure permanent replacement.¹⁹ To many, that seemed enough to say that it did not. Thus, Representative Hartley's 1947 bill to amend the Act specifically excluded from the § 2(3) definition of "employee" any striker who had been "replaced by a regular [i.e., permanent] replacement"²⁰—the exclusion being presented as legislative adoption of *Mackay*.²¹ The House approved the exclusion, but the Senate deleted it and prevailed in conference.²² Recognition that strikers could be denied reinstatement, however, was written into the Act (albeit without comment on their status as employees) as new § 9(c)(3), where with some modification it remains today.²³

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17. *Adams Bros.*, 17 N.L.R.B. 974 (1939), appears to represent the Board's first use of "the *Mackay* rule." More recently, the Supreme Court again recited the rule with approval ("It is settled that . . .") in *NLRB v. International Van Lines*, 409 U.S. 48, 50 (1972).
 18. NLRA § 2(3), 29 U.S.C. § 152(3) (1970), provides: "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 . . ." The definition reads the same today as it did in *Mackay's* time (1938).
 19. One might speculate, however, that the Court's choice of language consciously reflected a continuing, rather than a severed, employer-employee relationship. Commenting on the legitimate means available for selecting strikers to be reinstated, the Court said: "[The employer] might have resorted to any one of a number of methods of determining which of its striking employees *would have to wait* because five men had taken permanent positions during the strike . . ." 304 U.S. at 347 (emphasis added).
 20. I *Legislative History of the National Labor Relations Act, 1947*, 34 (GPO ed., 1948).
 21. "The Board now says that an employer may replace an 'economic' striker, one who strikes for higher pay or other changes in working conditions. The bill writes this rule into the act, saying that a striker remains an 'employee' 'unless such individual has been replaced by a regular replacement' . . ." *Id.* at 303, H.R. REP. NO. 245, 80th Cong., 1st Sess. (1947).
 22. The legislative history of the Act contains no clear statement of the reasons for rejecting Rep. Hartley's interpretation of *Mackay*. It would appear, however, that the effect of writing that interpretation into the Act was not misunderstood: "Here again the employer is given the power to terminate the status of a striker by replacing him." *Id.* at 359, H.R. MIN. REP. NO. 245, 80th Cong., 1st Sess. (1947), discussing the proposed amendment to § 2(3).
 23. Section 9(c)(3) provides:
 No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees [on] *engaged in an economic* strike who are not entitled to reinstatement shall [not] be eligible to vote[.] . . . *in any election conducted within twelve months after the commencement of the strike* . . .
 29 U.S.C. § 159(c)(3) (1970). Bracketed material was deleted, and italicized material added, by the Labor-Management Reporting and Disclosure Act of 1959 (the "Landrum-Griffin Act"), Pub. L. No. 86-257, § 702, 73 Stat. 519.

But if Congress had left the question at least arguably open, the courts, with the Board close behind, soon moved in to close it. Shortly after the Taft-Hartley amendments became law, the 7th Circuit, in *Sax v. NLRB*,²⁴ found in *Mackay* support for its holding that economic strikers ceased to be employees at the moment they applied for reinstatement and were, because permanently replaced, denied it. The Board itself had found no need to inquire whether Sax's replaced strikers remained employees (although its trial examiner had concluded they did not²⁵), and had instead thrown most of its weight into holding that the strikers' application for reinstatement was a continuing one²⁶ and should not have been dismissed by the employer merely because no jobs were available on the day the strikers applied. The court disagreed. To honor the Board's decision, it said, would be "to relieve the strikers of their duty to apply when a job is available, and to shift the burden to the employer of seeking out one of the strikers to fill the job or be guilty of discrimination."²⁷ The court made clear its opinion that neither the Act nor the circumstances of the case warranted any such result. Ignoring the history and even the bare language of § 2(3) altogether, and reading *Mackay* to equate the permanent replacement of a striker with the termination of his employment, *Sax* in fact prefigured the holdings of both the courts and the Board during the 1950's and early 1960's.

Following *Sax*, the striker's position continued, inexorably, to erode. In *Bartlett-Collins Co.*²⁸ the Board agreed that permanently replaced economic strikers "merely have the right not to be penalized for their concerted activity, and are not entitled to preferential status in hiring."²⁹ Replaced strikers, it was clear, shared the same rights—no more and no less—as any other applicants for new employment. In *Atlas Storage Division*³⁰ the Board found that the elimination "for

24. 171 F.2d 769 (7th Cir. 1948), *denying enforcement of* Container Mfg. Co., 75 N.L.R.B. 1082 (1948).

25. The examiner's reasoning apparently proceeded thusly: in the language of § 2(3), an individual whose work has ceased remains an employee only if the cessation stems from "a current labor dispute." The current labor dispute in this instance, having taken the form of a strike, ended when the strike ended—yet the strikers who had been replaced were still out of work. Left high and dry, as it were, their "continued unemployment then was attributable, not to the existence of a current labor dispute, but rather to the fact that they had been legitimately replaced," and so "their status as employees actually ended . . ." 75 N.L.R.B. 1082, 1106 (1948). This reading of the Act was evidently intended to counter *Mackay's* recognition that strikers remained employees until they obtained "other regular and substantially equivalent employment." See also *Textile Workers Union of America v. Arista Mills Co.*, 193 F.2d 529, 534 (4th Cir. 1951). The *Mackay* interpretation, of course, carried the greater judicial authority.

26. 75 N.L.R.B. at 1106, citing *Matter of Republic Steel Corp.*, 62 N.L.R.B. 1008, 1028-29 (1945).

27. 171 F.2d at 771.

28. 110 N.L.R.B. 395 (1954), *enforced sub nom.*, *American Flint Glass Workers Union v. NLRB*, 230 F.2d 212 (D.C. Cir. 1956), *cert. denied*, 351 U.S. 988 (1956).

29. 110 N.L.R.B. at 397.

30. 112 N.L.R.B. 1175 (1955), *enforced sub nom.*, *Chauffeurs, Teamsters & Helpers Local 200 v. NLRB*, 233 F.2d 233 (7th Cir. 1956).

economic reasons"³¹ of a striker's former job left him in the same position as if he had been permanently replaced—which was to say, in no position at all. And by the time *Brown and Root, Inc.*³² was decided in 1961 it had become entirely settled that the determination whether a striker was to be reinstated or not was to be made only on the day he applied for reinstatement, and that if the employer had no need for him on that day (either because he had been permanently replaced or his job had been legitimately abolished) then all duty owed him as an employee ceased.³³

The pace of reversal began the following year when, in *Philanz Oldsmobile, Inc.*,³⁴ the Board chose to distinguish between the permanent and temporary absorption of a striker's former job. Finding that the employer's business had "declined substantially following the strike,"³⁵ and that therefore permanent replacements could not have been hired for all of the strikers, the Board posited an obligation to reinstate the unreplaced strikers as soon as production built up and work once more became available—unless it appeared that the employer could advance other nondiscriminatory business reasons for refusing to do so.

Philanz never went to court for enforcement but another case quite similar to it did—and resulted in the first Supreme Court pronouncement on economic reinstatement rights since *Mackay*. The case was *Fleetwood Trailer Co.*³⁶ and it grew out of a two-week economic strike during which the employer both cut back production to one-half the prestrike level and hired a number of replacements. Upon the strikers' request for reinstatement, the employer refused, maintaining that "the plant was not in need of employees and that no strikers could be given immediate employment."³⁷ Subsequently, however, as production began climbing back to normal, the employer hired six new employees, all nonstrikers, for work which six of the jobless strikers were qualified and waiting to perform. Eventually the six strikers were themselves put back to work (as new employees), but upon their charge of discrimination a complaint issued.

The trial examiner, finding that the employer had at all times intended to increase production to its full prestrike level as soon as practicable, determined that the shortage of jobs following the strike was no more than temporary, and, rejecting *Brown and Root*³⁸ in favor

31. In this case the striker's job was absorbed, because of a decline in business, by other employees. The absorption was apparently assumed to be permanent. 112 N.L.R.B. at 1180.

32. 132 N.L.R.B. 486 (1961), *enforced as modified*, 311 F.2d 447 (8th Cir. 1963).

33. 132 N.L.R.B. at 494. This soon became known as the so-called "day-of-application" rule.

34. 137 N.L.R.B. 867 (1962).

35. *Id.* at 871.

36. 153 N.L.R.B. 425 (1965), *enforcement denied*, 366 F.2d 126 (9th Cir. 1966), *vacated and remanded*, 389 U.S. 375 (1967).

37. 153 N.L.R.B. at 426.

38. "[Brown and Root] arises in a different factual setting. I find that holding concerning the right of reinstatement of economic strikers to jobs not open at the time of application not controlling here." *Id.* at 427 n.4 (Royster, Tr. Exam.).

of *Philanz*, concluded that the strikers should have been reinstated before the new employees were hired. The Board adopted the trial examiner's report without comment; but the 9th Circuit, in a sharply worded 2-1 decision,³⁹ declared that the distinction between permanent and temporary job shortages was of no moment, that *Brown and Root* still controlled, and that, in effect, the employer in this case was entitled to hire anyone he chose.

The Supreme Court vacated and remanded.⁴⁰ In a wide-ranging opinion, Mr. Justice Fortas affirmed the strikers' continuing status as employees under § 2(3) of the Act, dismissed as a technicality the old day-of-application rule imposed by *Brown and Root*, and introduced the relatively new doctrine of business justification to striker reinstatement cases.⁴¹

Depending largely upon how one felt about strikes and strikers to begin with, the decision in *Fleetwood* was either long overdue or largely overdone. Those taking the first position could point out that, after all, *Mackay* itself had long ago recognized that strikers remained statutory employees until they obtained "other regular and substantially equivalent employment," and, all of the intervening cases notwithstanding, no one had ever really explained how the Act could be read otherwise.⁴² If this much were granted, as it seemingly had to be, then the "technicality" upon which *Brown and Root* was founded had only its age to support it; its pedigree, reaching back to *Sax*, amounted to nothing more than a history of misapplication of the Act and of *Mackay*. Moreover, if the act of refusal to reinstate an economic striker was *prima facie* evidence of discrimination, as Mr. Justice Fortas had announced it now was, then the recently solidified rule of business

39. The court said:

The trial examiner referred to this case [*Brown and Root*] and held that it was not controlling, without discussing why it was not controlling. . . . We cannot agree with the trial examiner. We find it difficult to approve the Board's cavalier use of precedent when it desires to follow it, and the disregard of it when it wishes to achieve a different result. On the basis of the Board's own policy as stated in *Brown and Root*, *supra*, we hold that whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike.

366 F.2d at 129.

40. 389 U.S. 375 (1967).

41. Justice Fortas said:

It was clearly error to hold that the right of strikers to reinstatement expired on August 20, when they first applied. This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application. On the contrary, the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment." (29 U.S.C. § 152(3).) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications."

Id. at 380-81.

42. *But cf.* note 25 *supra*.

justification, which required an employer to come forward and explain his apparent discrimination to the satisfaction of the Board, must come automatically into play.

This reading of *Fleetwood*, which we might call the expansive one, seemed certainly consistent with the opinion. The restrictive reading, on the other hand, sought to distinguish the opinion from the case and to rely exclusively on the latter. Those who adhered to it⁴³ would maintain that much, if not most, of Justice Fortas' decision was excessive of the issue before the Court—that issue, as Mr. Justice Harlan appeared to recognize in his concurrence,⁴⁴ being limited to whether the Board's own decision could be supported by substantial record evidence. Were the Fleetwood Company strikers "employees," to whom their employer owed a duty of reinstatement, or were they not? They were, under all prevailing standards (including those of *Brown and Root*), if they had not yet been permanently replaced and if their jobs had not yet been permanently abolished when they asked to return to work. Since no one contended that the strikers had been replaced, the only remaining question concerned the status of their jobs. The Board itself had never proposed—and has never proposed to this day—that strikers' rights to reinstatement must outlive the genuine abolishment of their jobs,⁴⁵ or that *Brown and Root's* day-of-application rule would have been improper had the jobs in fact been abolished. Its position, rather, was that these strikers' jobs still existed and had only been rendered temporarily unavailable because of conditions following the strike—a determination of fact which the Board was unquestionably empowered to draw and which, if warranted by the evidence, should have been routinely upheld.⁴⁶ The effect of reversing the 9th Circuit then, under this view, was merely one of affirming the Board's determination that *Brown and Root* had nothing to do with the facts of the case, and that the employer had, as Justice Harlan put it, "simply failed, for whatever reason, to recognize"⁴⁷ that the strikers remained statutorily protected employees.

The Board, as it turned out, took the expansive view and with it in short order fashioned the final tomb not only of *Brown and Root* but of *Bartlett-Collins*, *Atlas Storage*, and "all other cases of similar import"⁴⁸ as well. The instrument of its choice was *Laidlaw*.

THE LAIDLAW CORPORATION AND ITS PROGENY

Laidlaw started out as yet another permanent replacement case, not particularly different from the many such cases preceding it. As in the

43. See, e.g., Scallon, *Preferential Hiring Rights of Economic Strikers*, 19 LAB. L. J. 195, 197 (1968); Comment, *Preferential Hiring Rights of Economic Strikers*, 73 DICK L. REV. 322, 328 (1969).

44. 389 U.S. at 381.

45. Brief for NLRB at 10, 18-19, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

46. Cf. *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

47. 389 U.S. at 383.

48. *The Laidlaw Corp.*, 171 N.L.R.B. 1366, 1370 (1968).

previous cases, the employer had replaced economic strikers and then refused them reinstatement. Subsequently, as certain of the replacements departed, the employer hired new workers.^{4 9} In finding that an unfair labor practice had been committed, the Board, citing *Fleetwood*, not only rested upon the proposition that a striker's protected status as an employee extended beyond the date on which he was lawfully refused reinstatement, but also announced that an employer bore the positive duty to *seek out* such a striker in the event his old job, or a similar one for which he was qualified, later opened up. It was this duty which the employer in *Laidlaw* had breached by hiring new applicants rather than former strikers.^{5 0} Again borrowing a page from *Fleetwood*, the Board made it clear that the only saving device available to an employer caught up in this situation was a showing that the failure to reinstate strikers proceeded from a legitimate and substantial business justification. Absent such showing, a prima facie "inherently destructive"^{5 1} violation of the Act would be found. The 7th Circuit agreed with the Board's result^{5 2} and the Supreme Court denied certiorari.^{5 3}

Duration of Reinstatement Rights

Today, *Laidlaw* is clearly the rule in the majority of Circuits,^{5 4} and even in those which have not yet spoken no counsel would advise that it be ignored. Once past this point, however, most counsel may grow rather more cautious in their advice—for *Laidlaw* itself offers little instruction in the affirmative duties it imposes. One issue, for instance, quite frequently alluded to by the cases and the commentary, concerns

49. The trial examiner had found that the main body of strikers (about 40) applied for reinstatement on February 11. All but five had been replaced by that date, and these five were duly reinstated. Over the next 10 days some 16 additional strikers, who had not applied on February 11, made written application for reinstatement. As the Board described it:

On the dates these later applications were received Respondent checked to see if vacancies existed at that time, and, if they did, some of the applicants were hired. However, new applicants were hired if the vacancies exceeded the number of striker applicants. . . . The Respondent did not check over the earlier reinstatement applications of February 11 before making new hires, and reinstatement applications were considered only on the date of application.

Id. at 1369.

50. The Board summed up its point of view as follows:

A refusal to consider or reinstate strikers once they have been replaced when vacancies thereafter occur is in effect a "delayed" discrimination which does not assume a mantle of lawfulness merely because certain lawful conduct, the hiring of a permanent replacement, intervened.

Id. at 1369 n.16.

51. *Id.* at 1369.

52. 414 F.2d 99 (1969).

53. 397 U.S. 920 (1970).

54. See, e.g., *Retail Store Union v. NLRB*, 466 F.2d 380 (D.C. Cir. 1972) (dictum); *H. & F. Binch v. NLRB*, 456 F.2d 357 (2d Cir. 1972); *Little Rock Airmotive, Inc. v. NLRB*, 455 F.2d 163 (8th Cir. 1972); *NLRB v. Hartmann Luggage Co.*, 453 F.2d 178 (6th Cir. 1971); *NLRB v. Johnson Sheet Metal*, 442 F.2d 1056 (10th Cir. 1971); *American Machinery Corp. v. NLRB*, 424 F.2d 1321 (5th Cir. 1970). The remaining circuits have not considered the question.

that of how long a permanently replaced striker will retain his right of preferential rehire. Inferentially, the right is perpetual so long as the striker does not himself put an end to things by such means as refusing a proper offer of reinstatement or by obtaining other "regular and substantially equivalent" employment. This is, in fact, the Board's express view⁵⁵—although not everyone else feels comfortable with it. Former Board Chairman Farmer, as one who does not, has suggested that any time period in excess of 12 months would appear inconsistent with § 9(c)(3) of the Act,⁵⁶ but this limitation has since been rejected by the Board and, at least, the 6th Circuit.⁵⁷

If the employer's obligation under *Laidlaw* to maintain and follow his preferential hiring list in fact carries no time limitation of its own, can the employer in any way himself construct such a limitation and thereby terminate his obligation short of fulfillment? Until recently, the answer appeared to be that he could. Judge Wisdom, writing for the 5th Circuit in *NLRB v. American Machinery Corp.*,⁵⁸ was "not impressed" with the employer's contention that its conduct was justified by "the difficulty of seeking out strikers 'several months' or 'five years' after the application for reinstatement . . ."⁵⁹ He did, however, offer this suggestion:

[An employer] might notify the strikers when they request reinstatement of a reasonable time during which their applications will be considered current and at the expiration of which they must take affirmative action to maintain that current status. A reasonable rule would not contravene *Fleetwood's* assertion that "[t]he right to reinstatement does not depend upon technicalities relating to application."⁶⁰

Evidently, then, a striker who failed to take "affirmative action" prior to the employer's announced deadline would find that his rights to reinstatement had lapsed. In commenting on the suggestion the Board said:

[A]lthough we find it unnecessary to consider at this time . . . [Judge Wisdom's proposal] . . . we see no reason why the Respondent cannot at reasonable intervals request the employees on the preferential hiring lists to notify it whether they desire to maintain their recall status.⁶¹

55. Brooks Research & Mfg., Inc., 202 N.L.R.B. No. 93, at 7-8 (March 27, 1973). This case, touching upon a number of issues, contains the Board's most detailed discussion of the *Laidlaw* doctrine to date.

56. Farmer, *Issues and Practical Problems Caused by Fleetwood Trailer and Laidlaw Manufacturing*, 4 GA. L. REV. 802 (1970). Section 9 (c) (3) is set forth in note 23, *supra*.

57. *NLRB v. Hartmann Luggage*, 453 F.2d 178 (6th Cir. 1971).

58. 424 F.2d 1321 (5th Cir. 1970).

59. *Id.* at 1327-28.

60. *Id.* at 1328.

61. Brooks Research & Mfg., Inc., 202 N.L.R.B. No. 93, at 9 (March 27, 1973).

The reason which the Board had not seen appeared shortly. Faced with a typical *Laidlaw*-type situation, the employer in *Food Service Co.*⁶² had acknowledged the union's unconditional request for reinstatement with a letter which, first, claimed that no work was available and, next, attempted to set forth what the employer apparently considered a reasonable application of Judge Wisdom's *American Machinery* proposal. After advising that all strikers should report to the employer's office and either execute new application forms or examine their old ones "to assure that the information contained therein is accurate,"⁶³ the employer went on to state that the applications would remain current for 30 days, during which period, if vacancies occurred, those employees eligible for reinstatement would be notified. Once the 30 days expired, however, the employees who had not yet been reinstated would have 10 more days "during which to either notify the Company in writing or to personally come to the office of the Company and indicate"⁶⁴ their desire to renew their applications. If the strikers did so, their applications would "then be renewed for an additional thirty (30) day period and the procedure discussed above [would] then be repeated."⁶⁵

The Board, speaking through its Administrative Law Judge, concluded that an unfair labor practice had been committed.

I find that the imposition of the notification and registration requirements is of sufficient concern to the former strikers . . . as to constitute a mandatory subject for collective bargaining with their representative, whether or not the requirements were reasonable. I therefore find that the Respondent's unilateral action also violated Section 8(a)(5) and (1) of the Act.⁶⁶

Thus, *Laidlaw*'s collateral effect on an employer's duty to bargain concerning the return of economic strikers who had been permanently replaced or whose jobs had been absorbed had apparently gone unexamined, the old rule quite naturally having held that no such duty existed.⁶⁷ Whether the new rule is to become as conversely rigid as the old remains to be seen. The decision in *Food Service* does not clearly state whether the bargaining requirement runs only to the employer's demand for periodic notice from the strikers or whether it also includes

62. 202 N.L.R.B. No. 107 (March 30, 1973).

63. *Id.* at 22 (decision of Administrative Law Judge).

64. *Id.*

65. *Id.*

66. *Id.* at 38 (citation omitted).

67. According to the trial examiner in *Coca Cola Bottling Co.*, 166 N.L.R.B. 134 (1967):

[The return of permanently replaced strikers] of course is not a mandatory subject of bargaining, inasmuch as an employer is under no obligation whatever to provide employment for an economic striker who has been permanently replaced. Therefore no unfair labor practice can be predicated on an employer's refusal to bargain about his return.

Id. at 140.

the initial "request" that new applications be filed and old ones be brought up to date.⁶⁸ Indeed, the Administrative Judge's language could be argued in either direction. Reason and some slight precedent,⁶⁹ however, would suggest that an employer ought to be able to freely obtain at least the information it needs in making good-faith reinstatements: current addresses and telephone numbers, certainly, and perhaps other job-related information as well. The proper test of bargainability, then, would seem to rest upon whether requirements imposed by the employer act only to reasonably assist in carrying out the duty to reinstate or whether they may be calculated to abridge in some manner the strikers' already vested rights. In *Food Service*, for instance, the employees would most likely have lost nothing by ensuring that their files were accurate and up to date, while they stood to lose quite a bit (through inconvenience at best, forfeiture of status at worst) if they assumed the burden of keeping their names alive on the employer's list.

There is little to indicate how much bargaining activity really takes place when it comes to applying *Laidlaw*, although certainly nothing suggests the practice is at all widespread. It may be interesting to see, in this respect, whether the effect of classifying such negotiations as mandatory will impel more employers to insist upon clarifying or delimiting their duties through agreement. Those who decide to try should consider the Board's treatment of such agreements in two cases: *United Aircraft Corp.*⁷⁰ and its companion *Lahe Spring & Electric Car Corp.*⁷¹

The employer in *United Aircraft* had entered into a strike settlement agreement which provided, *inter alia*, for both the immediate reinstatement of those strikers whose former or similar positions were still available and for the creation of a preferential hiring list from which the remaining strikers would be reinstated as work increased. The parties had agreed, the Board found, that this hiring list would remain in effect only until the end of the year (about four and one-half months), and that the preferred status of any unrecalled strikers left on the list at that time would expire. After the end of the year, the employer abandoned the list and began hiring the remaining strikers as new employees. The General Counsel argued (and the trial examiner found) that the employer had thereby violated the strikers' rights as set out in

68. Of course, if the employer's intention was to unilaterally deny reinstatement to any striker who might fail to complete a new application, or to review his old one, then the requirement would be obviously invalid.

69. *Bargain Town of Ponce, Inc.*, 200 N.L.R.B. No. 149 (1972), at least recognizes the use of "*Laidlaw* forms" (current address and information sheets filled out by the strikers at the time they request reinstatement) as a means of assisting the employer in contacting the strikers. An employer may not, however, go so far as to require the union to furnish a list of strikers desiring reinstatement and to rest upon the union's failure to do so as relieving the employer of its obligations to the strikers. *The Rogers Mfg. Co.*, 197 N.L.R.B. 180 (1972).

70. 192 N.L.R.B. 382 (1971).

71. 192 N.L.R.B. 464 (1971).

Laidlaw, but the Board, with two members dissenting,⁷² held otherwise. Noting past decisions in which the Board had either upheld union waivers of certain statutory rights (including the § 13 right to strike⁷³), or had deferred the adjudication of unfair labor practice charges in favor of the parties' own arbitration agreements, the majority concluded that the public policy of encouraging the resolution of disputes through collective bargaining would uphold this agreement as well. Moreover, the Board felt there might be practical reasons why such an agreement would be desirable:

If, as the Supreme Court has held, an employer can unilaterally terminate the reinstatement rights of strikers for legitimate and substantial business justifications,⁷⁴ it would seem that such rights should also be terminable by agreement between the employer and the bargaining representatives of the strikers. They are in the most favored position to know the business needs of the employer and the prospects of substantially equivalent employment elsewhere. A union may also by agreement obtain other benefits for employees in return for a concession as to a reinstatement cutoff date.⁷⁵

The Board took care, however, to point out that its approval was purely discretionary, that it was not to be bound as a matter of law by

72. Members Fanning and Brown, dissenting, construed the recall agreement as providing that "all strikers who had registered for reinstatement would be recalled until the Respondent reached its prestrike complement, which occurred on April 30" of the following year. The members noted that, even if they were able to find that the unrecalled strikers' rights had terminated under the agreement at the end of the year, "we would be compelled to hold that such a result was repugnant to the purposes and policies of the Act." In addition, the members saw such an agreement as creating:

a serious conflict with Section 9(c) (3) of the Act which provides for the eligibility of economic strikers to vote in a representation election for a period of 12 months after the commencement of a strike. Because of [this] factor alone, it seems doubtful that the Board should honor any strike settlement with a terminal date of less than 1 year.

The dissenters did not address the question whether a union was qualified to waive strikers' rights in the manner of this agreement, saying only that "[e]ven if there may exist a limited area in which the parties could waive strikers' recall rights, this is not an appropriate case in which to approve such a waiver." 192 N.L.R.B. 382 (1971) (citation omitted).

73. Section 13 of the Act provides:

Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

29 U.S.C. § 163 (1970). This right is frequently waived (usually in conjunction with the employer's waiver of the right to lock out) in collective bargaining agreements.

74. This assertion may be overly absolute. An employer may refuse to take back strikers who for one reason or another are unqualified for reinstatement (who have, in other words, no actionable reinstatement rights to begin with) and may thereby terminate their status as employees, but about the only way in which he can terminate the rights of strikers who are qualified for reinstatement is by permanently eliminating their jobs (for bona fide reasons) or by going out of business altogether (for any reason). See generally pp. 107-08, *infra*.

75. 192 N.L.R.B. 382, 388 (1971).

any private adjustment of rights guaranteed by the Act, and that any agreement of this sort would be expected to meet certain standards before authority would be granted it. For those agreements which did meet the Board's standards, the outlook appeared encouraging:

So long, therefore, as the period fixed by agreement for the reinstatement of economic strikers is not unreasonably short, is not intended to be discriminatory, or misused by either party with the object of accomplishing a discriminatory objective, was not insisted upon by the employer in order to undermine the status of the bargaining representative, and was the result of good-faith collective bargaining, the Board ought to accept the agreement of the parties as effectuating the policies of the Act⁷⁶

The Board found that the *United Aircraft* agreement met these standards, and that the employer had entered into and had performed its obligations under the agreement in good faith. But, as the Board also noted, the agreement itself had been executed some eight years prior to the decision in *Laidlaw*—at a time when the thinking reflected in *Brown and Root* held undisputed control. Thus, by extending preferred hiring status to the strikers for even four and one-half months (in itself “a not unreasonably short period”), the Board found that “Respondent gave [the strikers] reinstatement rights which exceeded the requirements of the law as it was then understood.” That much was certainly clear, and, partly because it was, the Board declined to apply *Laidlaw* retroactively. What was not so clear, however, was the effect such an agreement might have been given if entered into *after* the decision in *Laidlaw*—for it would then of course act not as an extension of the strikers' basic rights but as a knowing restriction of them. On this point, the Board made no direct comment.

Laher Spring, for its part, did concern a settlement and recall agreement executed after *Laidlaw*. But while the Board rejected the agreement it also managed to sidestep the issue left open in *United Aircraft*. Without considering the intrinsic validity of the recall agreement itself,⁷⁷ the Board found that it constituted merely an element in

76. *Id.*

77. The trial examiner, however, found the agreement void. Characterizing the right to reinstatement as a public (rather than merely an individual) right, created (rather than merely protected) by statute, the examiner rejected the employer's contention that the right could, like the right to strike or to establish terms of seniority, be waived by the bargaining representative. He commented:

It is difficult to see how the Union, or the bargaining representative here, could waive or bargain away the right to reinstatement given by the statute to the individual striker because the bargaining representative, as such, has no right, title or interest in that right to reinstatement created by Section 2(3) of the Act. In fact Section 2(3) is one of the protections which the individual enjoys against both his employer and his union. Without Section 2(3) of the Act, the individual striker would be completely at the mercy of unscrupulous employers and unions in situations such as the present. With Section 2(3) the striker is entitled to reinstatement regardless of his employer or his bargaining representative.

192 N.L.R.B. 464, 475 (1971).

the employer's scheme to avoid reinstating the strikers. Specifically, the Board found that the employer, taking advantage of the six-month limitation set forth in the agreement, had deliberately refrained from rebuilding its work force and had substantially increased the amount of overtime assigned during that period. This plus the "dramatic increase" in new hires following the six-month expiration date led the Board to conclude that the employer had entered into the agreement only in order to lend a contractual "cloak" to its intended evasion of duty. Citing its decision in *United Aircraft*, the Board again stressed the understanding, "[i]mplicit in any strike settlement agreement," that "all parties will make a good-faith effort to comply with its terms." Here, however, instead of good faith, the Board found only "discriminatory manipulation"—and so set the agreement aside.

Thus, while it is clear that good faith will constitute the dominant element of any recall agreement which the Board chooses to accept, neither of these two cases will stretch so far as to support a flat assertion that strikers' rights under *Laidlaw* are freely alienable. The most one can say is that, in the words of *United Aircraft*, "the Board ought to accept" a sufficiently fair-minded agreement as dispositive of these rights. Yet the contrary view, as exemplified in the trial examiner's discussion from *Laher Spring*, is not entirely without force of its own. Neither, of course, is "good faith" the most certain of standards. In this rather unemphatic context, the deliberate phrasing "ought to accept" may seem to the conservative-minded to take on the appearance of a flashing yellow light at a particularly tricky intersection.

Substantially Equivalent Employment

If the employer is, in most instances, precluded from singlehandedly abridging a striker's reinstatement rights, obviously the striker himself is not. Should he, for example, at any time prior to reinstatement obtain other regular and substantially equivalent employment he will by force of statute terminate his former employer-employee relationship—and along with it his right to reinstatement. Any answer to the question whether a given striker has in fact obtained such employment must, however, be distilled from the circumstances of his own case. And, as these circumstances are bound to be unique, so is the answer. Thus, in *Little Rock Airmotive, Inc.*,⁷⁸ the Board, disclaiming the existence of any "mechanistic" test for settling the issue, observed:

The question of what constitutes "regular and substantially equivalent employment" . . . must be determined on an *ad hoc* basis by an objective appraisal of a number of factors, both tangible and intangible, and includes the desire and intent of the employee concerned. Without attempting to set hard and fast guidelines, we simply note that such factors as fringe benefits

78. 182 N.L.R.B. 666 (1970), *enforced as modified*, 455 F.2d 163 (8th Cir. 1972).

(retirement, health, seniority for purposes of vacation, retention and promotion), location and distance between the location of the job and an employee's home, differences in working conditions, et cetera, may prompt an employee to seek to return to his old job.⁷⁹

So saying, the Board turned its attention to a sheet metal worker who had returned from a recent operation to light-duty work only two days prior to joining the strike. Having then been permanently replaced, the striker had taken another job elsewhere, also as a sheet metal worker, at 5¢ an hour more than his old rate. He was, however, still physically unable to carry a normal workload and so quit the new job after a week. Later, with the departure of one of the replacements, the striker's old job again opened up—but no offer of reinstatement was ever made to him. Should one have been? The trial examiner thought not: in his opinion the striker had clearly obtained other equivalent employment (even if only for a week) and had thereby severed whatever ties remained with his former employer. The Board disagreed, reasoning that, because the striker *was* able to perform the temporarily limited duties of his former job as they existed prior to the strike, he could not have obtained regular and substantially equivalent employment by taking on work which he could *not* perform.⁸⁰ The 8th Circuit, in its turn, reversed the Board, stating that both the striker's "new job and his regular job were as a sheet metal worker," and that if he "could not perform those duties for his new employer he was incapable of performing them for the [former employer] as well."⁸¹ The court went on to intimate that the point was not one of equivalent employment at all but rather of the striker's basic unfitness for reinstatement under any conditions. "If anything," the court said, the striker's physical disability "stands as a legitimate and substantial business reason for refusing reinstatement."⁸²

Whatever the true message of *Little Rock Airmotive*, the fact of three mutually inconsistent views on a single issue probably advises against spending too much time in any given case arguing over substantially equivalent employment. The outcome is likely to be too unpredictable to rely upon—although, from the infinitude of possible factors which the Board appears ready to consider, one might conclude that the chances of establishing any actual equivalency of employment are rather small. Of course, nothing precludes a striker from taking temporary employment while awaiting reinstatement (indeed, he may have no choice but to do so), and, irrespective of the characteristics of his new job, if the striker himself considers it only temporary, and is

79. 182 N.L.R.B. at 666.

80. The Board also attached considerable significance to its finding that the striker had, during this period of outside employment, repeatedly informed his former employer of his desire for reinstatement. *Id.* at 668.

81. 455 F.2d at 169.

82. *Id.*

willing to say so at the hearing, the job will most likely be found only temporary and not equivalent. From a practical standpoint, then, all this amounts to a fairly strong, if unspoken, presumption against any striker obtaining substantially equivalent employment prior to being reinstated. Perhaps because this is so, the issue is not frequently raised: *Little Rock Airmotive*, in fact, appears to represent the most notable of the few cases in which it has played any significant part.

Business Justification

As initially developed, the business justification rule had nothing to do with the reinstatement of strikers. It was conceived, instead, as a means of positioning the burden of proof in those § 8(a)(3) cases^{8 3} which normally hinged upon the employer's motive.^{8 4} Thus, in the classic § 8(a)(3) proceeding, a violation would be made out only if the employer could be shown to have intended to discriminate against and thus discourage union membership. Such intent, if not inferable from the "inherently destructive" or otherwise completely unjustifiable nature of the conduct itself, would normally require some measure of independent evidence: *i.e.*, some opening demonstration by the Board's General Counsel that the conduct was undertaken from hostile or antiunion motivation. In the latter instance, where intent was at issue, the employer would typically seek to counter the General Counsel's contentions by showing that his conduct was warranted by legitimate business (*i.e.*, nondiscriminatory) considerations—that he would, in effect, have done the same thing even if there were no union. The rule changed things somewhat by making the employer responsible for putting on his evidence of justification first, and while failure to rebut the *prima facie* case against him would normally result in a conclusive finding of violation, the converse (that a convincing display of business justification would absolve the employer) was not necessarily true—for his justification could still be overbalanced, in the Board's view, by the General Counsel's own demonstration of unlawful intent.^{8 5} Thus, under the rule, the employer could be assured of escaping § 8(a)(3)

83. Section 8 of the Act provides:

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

.....

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

29 U.S.C. § 158 (1970).

84. For discussions of the role of motive in establishing violations of § 8(a) (3), *see generally* Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 *YALE L.J.* 1269 (1968); Janofsky, *New Concepts in Interference and Discrimination under the NLRA: The Legacy of American Ship Building and Great Dane Trailers*, 70 *COL. L. REV.* 81 (1970); Oberer, *The Scierter Factor in Sections 8(a) (1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs, and Tails*, 52 *CORNELL L. Q.* 491 (1967).

85. Thus, as the Court had noted earlier, in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 at 228 (1963), "[c]onduct which on its face appears to serve legitimate business ends . . . is wholly impeached by the showing of an intent to encroach upon protected rights."

liability only if his burden were sustained and the General Counsel's were not.⁸⁶

Both *Fleetwood* and *Laidlaw* claimed to place great weight upon the rule, and upon the respective employers' failure to advance any satisfactory evidence under it; but neither the Board nor the courts in either instance offered any insight into what sort of evidence the employers might have shown—or, indeed, into the ultimate question of whether they might have been able to show anything at all. The only support for assuming that they could have shown anything, and that the rule could work in reinstatement cases, came from two wholly nonrelated examples of "business justification" identified by Mr. Justice Fortas in *Fleetwood*:

In some situations, "legitimate and substantial business justifications" for refusing to reinstate striking employees who engaged in an economic strike have been recognized. One is when the jobs claimed by the strikers are occupied by workers hired as permanent replacements during the strike in order to continue operations. [Citing *Mackay, NLRB v. Plastilite Corp.*,⁸⁷ and *Brown and Root*.] . . .⁸⁸

A second basis for justification is suggested by the Board—when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example "the need to adapt to changes in business conditions or to improve efficiency."⁸⁹

86. As the formula was expounded by Mr. Chief Justice Warren in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967):

First, if it can reasonably be concluded that the employer's discriminatory conduct was "inherently destructive" of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations. Second, if the adverse effect of the discriminatory conduct on employee rights is "comparatively slight," an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct.

Id. at 34. And so the rule:

Thus, in either situation, once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.

Id. (Emphasis in original.)

87. 375 F.2d 343 (8th Cir. 1967).

88. The citation to *Brown and Root* is something of a puzzle here, unless the Court perhaps intended to show that its invalidation of the day-of-application rule was not to be construed as affecting permanent replacement cases.

89. 389 U.S. at 379, quoting from Brief for NLRB at 15. The Board clearly found no difficulty in accepting the possibility that jobs might be abolished:

An employer might, for example, anticipate a reduction in business for an indefinite period because of general economic or other business conditions. That re-trenchment plan might be put into effect during a strike, with the consequent abolition of some jobs. . . . Similarly, during the period of a strike but for substantial business reasons independent of it, an employer might decide that a particular production line was inefficient and should be automated or eliminated. Apart

Both these themes had been heard before. The first, of course, was simply another restatement of *Mackay*—which the Court had never shown any inclination to discard anyway.⁹⁰ The second dated back to (and beyond) the surviving portions of *Atlas Storage*.⁹¹ Neither had anything to do with the case at hand, and if the object of the Court had been merely the reaffirmation of established teachings it could easily have accomplished that much without wrapping them in new doctrine. As it was, *Laidlaw* soon enough unwrapped the practice of permanent replacement by announcing that it would only defer, and no longer defeat, reinstatement. But by that time *Fleetwood's* purpose to establish the doctrine had apparently been served—so much so, in fact, that even after eliminating the only one of its two “justifications” which the employer might conceivably have shown, the Board in *Laidlaw* could still insist that he show something else. That there was nothing else to show, however, seems borne out by the five years of cases which have followed: for in no other instance where the Board has found that jobs were open and qualified strikers were still available to fill them has any employer succeeded in justifying his refusal to let the strikers return to work.⁹² Indeed, the theory seems to be that once the Board can reasonably conclude that a true reinstatement situation obtains—i.e., that (a) a former striker, seised of *Laidlaw*-type rights, is available and (b) that the striker's former or equivalent job, for which he is still qualified, is also available—then justification for not reinstating the striker simply no longer exists. The employer who reaches this point,

from duty-to-bargain considerations and assuming no antiunion motivation, there would be no unfair labor practice in refusing to reinstate strikers whose jobs had thus been abolished.

Brief for NLRB at 16–17, *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375 (1967).

90. In point of fact, however, an employer's exercise of his *Mackay* prerogative seems hardly a “justification” in the strict *Great Dane* sense, for, so long as the Board and the courts remain unwilling to inquire into the reasons for replacement, neither the exercise itself nor the resultant refusal to reinstate is impeachable by a showing of antiunion motivation. Motivation, indeed, is apparently irrelevant where *Mackay* is at work. See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 311 (1965).
91. Saying that one shows “business justification” for his conduct by proving that he acted “for substantial and bona fide reasons other than considerations relating to labor relations” sounds rather like saying that one upholds the law by not acting illegally. At least insofar as motive is an issue under § 8(a) (3), *anything* an employer does to a striker or his job, if done solely for good reasons not connected with labor relations, should qualify as fair play. To the same effect is the often quoted bromide that an employer may fire an employee for a good reason, a bad reason, or no reason at all—just so long as he does not impinge upon rights protected by the Act.
92. In addition to cases cited note 54 *supra*, see generally *NLRB v. Transport Co. of Texas*, 438 F.2d 258 (5th Cir. 1971); *C. H. Guenther v. NLRB*, 427 F.2d 983 (5th Cir. 1970), *cert. denied*. 400 U.S. 942 (1970); *NLRB v. Duncan Foundry & Machine Works, Inc.*, 435 F.2d 612 (7th Cir. 1970). In addition to the Board decisions discussed elsewhere herein, see generally *Krebs & King Toyota, Inc.*, 197 N.L.R.B. No. 74 (1972); *Wahl Clipper Corp.*, 195 N.L.R.B. No. 104 (1972); *Laura E. Weber, dba Weber Nursing Homes*, 194 N.L.R.B. No. 69 (1971); *LaGrange Land Corp.*, 184 N.L.R.B. No. 80 (1970); *Ace Drop Cloth Co.*, 178 N.L.R.B. 664 (1969); *Cartriseal Corp.*, 178 N.L.R.B. 272 (1969); *Downtowner of Shreveport, Inc.*, 175 N.L.R.B. 1106 (1969); *Northwest Oyster Farms, Inc.*, 173 N.L.R.B. 872 (1968).

and who does not make at least a valid offer of reinstatement, will be found per se in violation of the Act.⁹³

For this reason the notion of business justification in reality contributes very little to anyone's understanding of striker reinstatement cases—for the employer's real objective in such cases is hardly ever one of balancing off the strikers' rights against his own business needs, but rather one of simply preventing the Board from reaching the conclusion that a reinstatement situation exists in the first place. The employer's purpose, in other words, amounts to denying the presence of any duty to reinstate rather than justifying his failure to live up to it. And this denial invariably reduces to one of two assertions: either the job in question is not available to be filled, or no qualified striker is available to fill it. For example, the only point which *Fleetwood's* two illustrations of supposed business justification really prove is that reinstatement is not in order when there are no jobs at hand (because they are all occupied by permanent replacements or were eliminated for sound, nonlabor related reasons) to which a striker could be reinstated. Similarly, in other cases, an employer may concede that a particular job is available (by hiring someone to fill it) but deny that the striker in question is qualified to return. Physical disability, as noted by the court in *Little Rock Airmotive*, affords an obvious example of personal disqualification, as does manifest incompetence.⁹⁴ A striker may be just as effectively disqualified by operation of law, as well. Failure to make a genuinely unconditional request to return,⁹⁵ for instance, will also serve to block reinstatement—as will participation in misconduct during the strike.⁹⁶ And, of course, the striker must be available. Reinstatement cannot be made when he cannot be found,⁹⁷ or when he has obtained (if possible) regular and substantially equivalent employment somewhere else.

These examples, like *Fleetwood's*, have all been pressed into service as specimens of business justification at one time or another—which points up the collateral problem encountered when, each time a striker is legitimately denied reinstatement, it becomes structurally necessary to support the denial by searching out and identifying some exercise of "justification." The problem is that the justifications identified do not always make sense. What does one say, for instance, when an economic striker suddenly engages in misconduct on the picket line one day and is therefore lawfully refused reinstatement? Perhaps an employer's business needs do justify him in refusing to take back a known troublemaker—but the result would be the same if the man had been a model

93. Inasmuch as the Board in *Laidlaw* rested its finding of "inherent destruction" upon the employer's failure to come forth with any business justification, the statement that no justification exists in a reinstatement situation requires this result.

94. *Colour IV Corp.*, 202 N.L.R.B. No. 22 (1973).

95. *U.S. Oil & Refining Co.*, 193 N.L.R.B. 654 (1971).

96. *Firestone Tire & Rubber Co.*, 187 N.L.R.B. 54 (1970).

97. *Little Rock Airmotive, Inc. v. NLRB*, 455 F.2d 163, 168 n.8 (8th Cir. 1972).

employee for 20 years. The result would *still* be the same if he were also the chief shop steward for the union and the employer's true objective in refusing him reinstatement lay in a private desire to frustrate union activities. Unless the employer is simultaneously welcoming back nonunion adherents who engaged in the same sort of misconduct, or is otherwise obviously discriminating against the union, then no justification is necessary. By engaging in prohibited conduct the striker has simply lost the protection of the Act—has, in effect, legally disqualified himself for reinstatement regardless of whatever real reasons the employer may have for not returning him to work. Suppose, too, that another striker leaves town prior to reinstatement, gives no new address, and in fact never returns or is heard from again. Is it really necessary to declare that an employer's business considerations excuse him from the burden of reinstating someone who cannot be found (perhaps because staffing a plant with nonexistent employees represents unpreferable management), or is it sufficient merely to admit that an absent striker cannot be reinstated—again, regardless of whatever real reasons the employer might have for not bringing him back if he could be found? In neither instance does a true reinstatement situation exist (nor does one exist in the other examples mentioned above), and the demand for business justification in such circumstances results at best in needless excursions down uncertain roads.

SUMMARY AND CONCLUSION

Replaced economic strikers, as *Laidlaw* says, "remain employees" under the Act; and so long as they remain employees their right to reinstatement remains alive. The result is the same as obtains, under *Fleetwood*, when strikers return to find their jobs rendered temporarily unavailable by business conditions. In either case, the right to reinstatement endures until the replacements leave or the jobs are revived—at which time the right must be realized or (presumably) lost. What is important about both cases is that they do not in terms alter the requirements for reinstatement but merely defer their reckoning. The traditional formula—that the capacity for reinstatement of both a given striker and a given position be adjudged together—has not been changed; only the moment of judgement has been changed, and that, so far, only where permanent replacements or the temporary suspension of work is concerned.

It may be worth noting here, by way of speculation only, that both *Fleetwood* and *Laidlaw* focus upon the temporary unavailability of *jobs* rather than of strikers to fill the jobs. The Board has not yet reached the question of what happens when a *striker* becomes temporarily disqualified for reinstatement—as, for instance, by illness. The right to reinstatement is, however, a two-part equation, and if its exercise can be deferred until one of the parts (the job) becomes

available, there may be support for deferring it until the other (the striker) becomes available as well. In other words, there may be circumstances under which a striker's name would be retained on the employer's preferential hiring list even beyond the date on which his former or equivalent job became available.^{9 8}

The duration of a striker's right to reinstatement under *Laidlaw* is now apparently beyond argument: if it exists at all, it exists forever—or at least until the striker himself relinquishes it. The Board has yet to squarely answer the question whether strikers may empower their bargaining representative to waive or otherwise negotiate any limits or conditions to their *Laidlaw* rights. Whether they may or not, however, the Board has made clear that neither the bargaining representative nor the employer may bind the Board through any private agreement—even though they may, as between themselves, be answerable for failing to negotiate with one another on such an agreement. For those parties who wish to attempt agreement the Board has outlined the sort of resolution which it at least “ought to accept.”

For the theoretician, *Laidlaw* offers interesting prospects. As a descendant in the *Great Dane-Fleetwood* line of § 8(a)(3) thinking, the case falls heir to a great deal of learned judicial examination of motive and intent among employers—and yet, at least in application, *Laidlaw* and its progeny seem to show little concern for questions of motive. Indeed, once an actionable reinstatement situation is determined to exist, motive becomes of no importance: the employer either reinstates or he does not—he is either guilty of discrimination or he is not. And once a reinstatement situation is found *not* to exist, then, unless the employer through discrimination somehow caused it not to exist, motive offers little inducement for requiring him to fulfill an obligation which has not yet been created. The analytical problems posed by attempting to reconcile this realization with the pre-existing § 8(a)(3) doctrine of business justification can perhaps best be resolved by saying that a refusal to reinstate, *in a reinstatement situation*, amounts to a *prima facie*, “inherently destructive” violation of the Act, under which circumstances questions of proof of motive and business justification are irrelevant. As a result, the real question turns out to be the factual one of whether or not a reinstatement situation exists at any given time. If it does, and if the employer refuses to grant reinstatement, no further inquiry is needed.

98. Cf. *American Gypsum Co.*, 182 N.L.R.B. 89 (1970), wherein a striker who was legitimately refused reinstatement because of a newly discovered hernia subsequently underwent surgery to have the hernia repaired—but without informing the employer. By the time the striker returned, postoperatively, to again seek reinstatement, the employer had exhausted the preferential hiring list from which the striker had first been recalled and had made commitments to other, nonstriker applicants for jobs which the striker himself might have filled. The Board exonerated the employer. What result if the striker *had* informed the employer beforehand of the operation and of his desire to return to work thereafter?

Laidlaw has matured, necessarily, on a case-by-case basis. Its requirements are by now reasonably well defined and should be well on their way to becoming familiar fixtures of the law. As far as the practicing attorney is concerned, it should also be fairly clear by now that *Laidlaw* and its kin do not constitute traps for the unwary so much as for the employer seeking to cut corners slightly closer than he equitably should. Honest compliance is relatively a simple matter in the end, and the *Laidlaw* doctrine is, ultimately, a livable one.

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