

Tilting The Battlefield: NLRB Makes it Easier for Unions to Challenge use of Permanent Replacements

4 min read

Sep 7, 2016

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The National Labor Relations Board (“Board”) recently denied review of its ruling in [American Baptist Homes](#). That ruling upended the decades-old bright line test that an “independent unlawful purpose” is established only when an employer’s hiring of permanent replacements is unrelated to, or extrinsic to, the strike. Specifically, the Board ruled the General Counsel is not required to show an employer was motivated by an unlawful purpose extrinsic to the strike; he need only show the hiring of permanent replacements was “motivated by a purpose prohibited by the Act.” What constitutes a “prohibited purpose” is open to interpretation, and *American Baptist Homes* strongly signals employers could be exposed to unfair labor practice charges if there is any allegation that the use of permanent replacements is motivated by an intent to interfere with the exercise of Section 7 rights.

The Competing Economic Weapons of Unions and Employers

It has long been recognized that the strike is an economic weapon available to a union and its bargaining unit members, and that the union oftentimes employs this tactic to inflict economic pain, and sometimes irreparable damage, on the employer. Employers had their own weapons: lock outs and permanent replacements. As the law developed, courts and the Board recognized the use of such tactics is designed to exert economic pressure on the other, and the motives behind the use of such tactics by unions and employers alike are often inflamed by the give and take of negotiations.

It was for this very reason courts and the Board historically refused to consider the motivations of employers in hiring permanent replacements. Even assuming the employer’s intent “was to break the union’s solidarity in the economic battle . . . such an objective [was] not unlawful.” The only exception was if the employer’s unlawful motive was extrinsic to the strike. For example, an employer could not grant permanent replacements super-seniority rights because doing so has the clear effect of discouraging union membership.

American Baptist Homes Tilts the Battlefield in Favor of Unions

That is not the way Board looks at the world of labor relations these days, however. In *American Baptist Homes*, the union and employer found themselves at odds over several key bargaining terms, such as pension, health care and disciplinary policies. The union sent two letters to the employer, one of which informed the employer it was intending to engage in a strike from August 2, 2010, until a “mutually agreeable resolution could be reached.” The second letter indicated the bargaining unit members would “unconditionally offer to return to work on or after 5:00 a.m. on Saturday, August 7, 2010.” The union was true to its word and went on strike on August 2. The employer then attempted to operate the business through a variety of means, including engaging a temporary staffing agency at significant cost to provide personnel. The employer also began the process of hiring permanent replacements. The lawyer for the employer wrote to counsel for the union that the employer wanted to “teach the strikers and the union a lesson.” They wanted to avoid any future strikes, and this was the lesson “they were going to be taught.” Although common in the rough and tumble world of labor negotiations, as it turned out, such language on the part of the employer’s counsel would prove unfortunate to the employer.

The Board majority held it will now interpret the phrase “independent unlawful purpose” to include an employer’s intent to discriminate or to discourage union membership, and it will not, as part of its new interpretation, require that the General Counsel of the Board to prove that the unlawful purpose is unrelated to the parties’ bargaining relationship or the underlying strike. In applying this new rule, the Board held the employer’s stated purpose of hiring permanent replacements—punishing the strikers and avoiding future strikes—was independent and unlawful.

Going Forward

It’s no secret employers usually hire permanent replacements in reaction to the union’s decision to strike and the employer’s desire to continue its operations. Nor is it a secret that hiring permanent replacements will discourage unions and employees from striking by forcing the union to accede to the employer’s bargaining position. That is what economic weapons are designed to do. The unfortunate result of this case is an employer’s lawful use of permanent replacements could be challenged by a union on the basis that it discourages concerted activity under Section 7. If the use of this tactic is alleged to discourage employees and their union from taking aggressive positions at the bargaining table and hence unlawful, then unlawful labor practice charges could be made in most situations where permanent replacements are utilized. Cases may turn on speculation about an employer’s intent in using permanent replacements.

In addition, an independent unlawful purpose may mean any anti-union or any anti-strike animus. As the dissent in *American Baptist Homes* indicates, the employer’s motive in hiring permanent replacements should be irrelevant except where the employer has an independent unlawful purpose. Otherwise, the exception swallows the rule, and the use of such replacements could be challenged in almost every instance. The very nature of economic warfare, as the dissent points out, makes it virtually impossible to distinguish self-preservation from anti-strike motives. Since any hiring of permanent replacements could be deemed as anti-strike, and therefore restricting rights protected under Section 7 to engage in concerted action, it could be found unlawful by this Board.

It is no mystery why unions hate permanent replacements. The tactic is a powerful weapon. This Board now makes the exercise of that right a move fraught with risk for any employer. Employers must proceed with caution.

This dispute is likely headed to the United States Court of Appeals. Tune into the Employment Law Observer for updates. In the meantime, employers must proceed knowing there is new and expanded unfair labor practice exposure with respect to the use of permanent replacements in the event of an economic strike. If you have questions about the effect of American Baptist Homes and how it may affect your business, please contact Tom Luetkemeyer or your regular Hinshaw attorney.

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Topics

National Labor Relations Board (NLRB), Unions, Section 7, Unfair Labor Practice, Strike, Collective Bargaining, Permanent Replacement Employees

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