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Principles in Collission:

The right to strike v. the right to stay in business

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What is the nature of the right to strike for private sector employees in the United States? Much of the answer to this question can be traced to a case from 70 years ago, *National Labor Relations Bd. V. Mackay Radio & Telegraph Co.* [1] This is an important inquiry because the number of strikes in the U.S. has been declining for several decades.

Early in October 1935 in San Francisco, California, 60 employees at Mackay Radio went on strike. The company was in the business of transmitting telegraph and radio messages to and from centers in the U.S. and internationally. The purpose of the strike was to secure a collective bargaining agreement improving terms and conditions of employment. Negotiations at a national level had been taking place in New York over preceding weeks, but without an agreement being reached.

The strike by local employees in San Francisco was one of several initiated by the union throughout the country, although the San Francisco action was the broadest in terms of participation. Within days, however, the tide was turning against the San Francisco workers. Strikers in other cities began returning to work, undermining the nationwide impact of the coordinated actions. The company also was bringing employees to San Francisco from its other locations. Sensing that the strikers would not prevail, and fearing that jobs would be lost to those brought in to do the work, some of the San Francisco employees met with management representatives to make arrangements for ending the strike.

In the course of these return-to-work discussions, management prepared a list of 11 prominent union activists that the company said should reapply as a condition for reinstatement. After several employees brought to San Francisco during the strike decided not to stay, six of the 11 union activists were put back to work. Five strikers were not reinstated. Instead, their jobs went to those the company brought to San Francisco during the strike.

The union protested the company's refusal to rehire the five strikers by filing a

charge with the National Labor Relations Board, then a newly established agency with administrative oversight for the National Labor Relations Act, [2] a piece of New Deal labor legislation passed by the U.S. Congress in 1935. Under the NLRA, unions can be selected by employees to represent private sector workers in negotiations over wages, hours, and other terms of employment. Section 7 of the NLRA states that employees have the "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." [3] In U.S. labor law parlance, the phrase "concerted activities" is shorthand terminology for strikes and other organized pressure carried out by workers. [4] Interfering with a lawful strike is considered a violation of Section 7 and an unfair labor practice under the NLRA. [5]

To clear up any doubt about the reach of protected concerted activity under Section 7, the NLRA has two additional provisions that reinforce the right to strike. In defining who is covered by the law, the NLRA states that the term "employee" includes, "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute." [6] To drive home this point, a catch-all provision underscores the right of employees to withhold their labor: "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 of qualifications on that right." [7] Viewed as a whole, the NLRA gives statutory approval to the idea that without protection to strike, workers are weaker when it comes to backing up demands in negotiations.

With this statutory background, it is not surprising that the union prevailed on its charge to the NLRB, and that the U.S. Supreme Court eventually upheld the Board's decision three years later. Granted, there was no evidence that the company engaged in bad faith negotiations leading up to the strike, or that the company provoked the strike by other misconduct. However, the company's wrongdoing took place after negotiations and the strike itself, at the time it was asked to reinstate employees. At this stage of events, as recounted by the Supreme Court, there was ample evidence of the company's intent to discriminate against union activists. [8] In particular, there was evidence about statements by management agents telling the rejected workers that their union activities made them undesirable.

Had the Supreme Court stopped with this observation about the company's discrimination against union adherents seeking reinstatement, no shadow would have been cast over the right of workers to strike, at least not at that point in time. However, the court went beyond its core holding that discrimination had been demonstrated, thereby opening the doors to employer counter-measures that, over time, have significantly altered the balance of power in U.S. labor relations. What did the court do to make this possible?

While the court's decision affirmed the right to strike, it noted, almost in passing, that exercising the right to strike carries along with it the risk that employees can be replaced. Acknowledging that strikes are protected under the NLRA, the court said, "it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." [9]

In short, after *Mackay Radio* , workers can go on strike and keep their status as employees under the NLRA, but, at the same time, the employer has a right to keep the business going, and is free to hire permanent replacements who can keep their jobs even if strikers ask to return to work. In effect, employees can win their strike, but lose the chance to get their jobs back.

Why did the court go beyond the narrow holding of discrimination appropriate for the case, and make a more sweeping declaration about an employer's right to keep a business going by hiring permanent replacements? Even in recognizing that employers could keep the business functioning, the court could have stopped short of its broad statement. For example, the court might have limited its comment to the prospect of hiring temporary replacements only until a strike is over, at least absent a showing that temporary replacements could not be found.

Yet the court went further than was needed under the circumstances. Perhaps, since *Mackay Radio* was one of the first Supreme Court decisions dealing with a challenge to the NLRA, the court sought to reassure anxious employers that they were not powerless if they sought to do business in the face of strike activity. Perhaps, too, the court saw that the NLRB's advocates conceded in their brief to the court that employers could use economic forces at their disposal (that is, other workers looking for jobs), and that strikers are not guaranteed reinstatement under the NLRA. [10] In the court's decision, no explanation was provided to reconcile its remarks about using replacement workers with statutory language protecting the right to strike. Whatever the reason underlying the court's broad pronouncement, it has proved, over the years, a decided advantage for employers seeking to head off or defeat a strike.

How does the apparent inconsistency in *Mackay Radio* work out in practice? As a preliminary point, it should be noted that the use of permanent replacements as leverage against strikers did not develop in full blown fashion until the last few decades, even though *Mackay Radio* was decided in 1938. In one notable example, President Reagan authorized the firing of thousands of striking air traffic controllers in 1981. Although this arose under a federal law for public employees, the action set the tone for the larger society.

This approach is not without adverse consequences. Hiring replacements understandably angers striking workers and their supporters. This can prolong conflicts, making strike settlements more difficult to achieve because reinstatement becomes a major demand. Also, in industries with skilled workers, employers shy away from using replacements because they cannot easily step into the shoes of strikers. Hiring replacements has political implications, too, prompting legislative efforts in the U.S. Congress to prevent or limit their use, but these attempts have been unsuccessful.

Still, with the percentage of the private sector unionized workforce plunging from about 35 percent in the early 1950s to about eight percent today, employers are less hesitant to invoke the prospect of hiring permanent replacements. Under the rules that have evolved after the *Mackay Radio* decision, those undertaking a strike for improved economic and working conditions, and who then seek to return to work, have no right to priority status to oust those who work at their old jobs, but only are reinstated when vacancies arise in the employer's workforce. [11]

In contrast, if an employer's unfair practices caused the strike, or led to the strike being prolonged, the striking workers are entitled to immediate

reinstatement, with full back pay and benefits being paid, even if this outcome means that the replacement workers are terminated. [12] Unfortunately, it can take years of administrative and judicial scrutiny to determine whether employees engaging in a strike should be characterized as "economic" or "unfair labor practice" strikers. These characterization disputes can become major litigation battles because peoples' jobs and large amounts of employer liability often are at stake.

In the final analysis, the lesson of *Mackay Radio* goes beyond the issue of striker reinstatement. It was the first of several Supreme Court decisions that, taken together, seriously weaken union power to undertake successful strikes in the face of determined employer opposition. A series of court decisions, for example, have allowed law suits for damages and injunctions when the union chooses to strike during the term of a collective bargaining agreement rather than use arbitration; [13] granted employers the right to head off a potential strike by taking the initiative and locking out workers from their jobs; [14] rejected union attempts to discipline employees who seek to resign as union members in order to return to work during a strike; [15] permitted replacement workers to sue employers after being let go as part of a settlement agreeing to striker reinstatement; [16] and, barred reinstatement of strikers for communications to the general public deemed to be too demeaning toward the employer. [17]

For sure, there are some Supreme Court cases that protect striking employees from discriminatory employer conduct that is unduly punitive against strikers, such as in the *Mackay Radio* situation. [18] However, these decisions do not disturb the basic premise that an employer is free to continue the business while a strike takes place, and, indeed, can use counter-measures that provide weapons to defeat a strike, even before one has been called. A union that is unprepared to maintain broad solidarity in withholding labor has a narrow margin for error in its effort to prevail against an employer committed to defeat it.

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[1] 304 U.S. 333 (1938).

[2] 29 U.S.C. Section 150, et seq.

[3] 29 U.S.C. Section 157.

[4] See, e.g., *NLRB v. Washington Aluminum* , 370 U.S. 9 (1962).

[5] 29 U.S.C. Section 158(a)(1). For public sector government employees, separate U.S. laws, at the federal and the state levels, govern unionizing activity and generally prohibit strikes, except under narrow circumstances. In a leading appellate court decision, the argument was rejected that there is a right to strike protected by the U.S. Constitution. (*Postal Clerks v. Blount* , 325 F.Supp. 879 (D.C. Dist., 1971).)

[6] 29 U.S.C. Section 152(3).

[7] 29 U.S.C. Section 163. Since early in the 20 th century, separate protection is provided to strike activity under U.S. anti-trust laws (29 U.S.C. Sec. 52), as well as a federal law that prohibits injunctions against labor disputes (29 U.S.C. Sec.

101). However, as noted below, judicially created exceptions established over the years limit the extent of these protections.

[8] *Mackay Radio* , 304 U.S. at 346-347.

[9] Id. , 304 U.S. at 345-346.

[10] Getman and Kohler, *The Story of NLRB v. Mackay Radio & Telegraph Co.* , pp. 43-44, in Cooper and Fisk, Labor Law Stories.

[11] *NLRB v. Fleetwood Trainer Co.* , 389 U.S. 375 1967); *NLRB v. International Van Lines* , 409 U.S. 48 (1972); *Trans World Airlines v. Independent Federation of Flight Attendants* , 489 U.S. 426 (1989); *Laidlaw Corp. V. NLRB* , 414 F.2d 99 (7 th Cir. 1969), enf. 171 N.L.R.B. 1366 (1968).

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

[13] *Local 174, Teamsters v. Lucas Flour Co.* , 369 U.S. 95(1962); *Boy's Markets, Inc. V. Retail Clerks Union, Local 770* , 398 U.S. 235 (1970).

[14] *American Ship Building Co. v. NLRB* , 380 U.S. 300 (1965).

[15] *Pattern Makers League v. NLRB* , 473 U.S. 95 (1985).

[16] *Belknap v. Hale* , 463 U.S. 491 (1983).

[17] *NLRB v Local 1229, IBEW,* 346 U.S. 464 (1953).

[18] See, e.g., *NLRB v. Erie Resistor Corp.* , 373 U.S. 221 (1963); *Great Dane Trailers v. NLRB* , 388 U.S. 26 (1967); *Metropolitan Edison Co. v. NLRB* , 460 U.S. 693 (1983).

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