

Strike Replacement Limbo Looms As UAW Action Expands

By **Braden Campbell**

Law360 (September 22, 2023, 7:57 PM EDT) -- As work stoppages by the United Auto Workers and other unions draw attention to strikes, the National Labor Relations Board is considering a request by the agency's chief prosecutor to make it tougher for employers to permanently replace workers who walk off the job.



Abruzzo aims to put more force behind workers' most powerful economic weapon by narrowing the circumstances in which employers may replace striking workers. (Al Drago/Bloomberg via Getty Images)

General counsel Jennifer Abruzzo has urged the board to reverse nearly 60-year-old precedent generally permitting employers to permanently replace — and essentially fire — striking workers, and make employers prove that they can't continue operating by enlisting temps or managers to pick up the slack.

If the board is bold enough to make this monumental change, it may encourage unions to call more strikes by mitigating members' greatest risk, experts say.

"As we've seen, the NLRB is not shy about reversing precedent, but this is a very big precedent that at least arises out of a Supreme Court case ... and [that] for essentially the lifetime of anybody alive and involved in business or in law right now, has been the law," said Hugh Murray, the chair of the employment practice at McCarter & English LLP.

Abruzzo's initiative aims to put more force behind workers' most powerful economic weapon by narrowing the circumstances in which employers may replace striking workers.

When hit with a strike, employers have several options, depending on their circumstances. If they've been able to stockpile product ahead of a threatened stoppage or have ample enough cash reserves, they can shutter the struck portion of their operation and try to weather the storm. They can try to get by through reassigning nonstriking employees or leaning on managers to fill the gaps. Or, if the labor market allows it, they can replace some or all of the striking workers, temporarily or permanently.

Permanent replacement is a rare "escalation from conventional to nuclear war," Murray said. But the threat can be enough to deter workers, he added.

"When someone is going on strike, the employer will often say to people, 'You have the right to strike and you have the right not to strike. ... Here are some facts, the company has a right to continue to operate its business, and the company can permanently replace you,'" Murray said.

The board's replacement doctrine is rooted in a 1938 U.S. Supreme Court ruling called **Labor Board v. Mackay Radio**. In Mackay, the court held that it is not an NLRA violation "to replace ... striking employees with others in an effort to carry on the business," and that employers are not obligated to fire permanent replacements when unions call off their strikes.

The board interpreted this decision in a 1964 case called Hot Shoppes, holding that employers do not violate the law when they permanently replace strikers unless they do so with an "independent unlawful purpose," such as to punish or discourage union membership. Abruzzo is seeking to raise that bar.

Last August, Abruzzo's office urged the board to revisit Hot Shoppes in a case involving a strike at environmental services company Inland Waters Pollution Control. Prosecutors argued that Hot Shoppes struck the wrong balance between employers' business interests and workers' rights to strike, pushing the board to make employers point to a "legitimate and substantial business reason" for replacing strikers permanently.

Abruzzo has argued that Mackay Radio does not give employers as much leeway to permanently replace striking workers as Hot Shoppes suggests it does. While the court held that it was not a violation for Mackay Radio to replace the strikers in order to carry on its business, it did not define the scope of an employer's right to "protect and continue [its] business," the general counsel argued. Rather, it has left open whether employers may retain replacements over strikers where "offers of permanent employment are not necessary to secure the manpower to keep the business operating," the general counsel added.

Michael MacHarg, a partner at Adams and Reese LLP who represents employers in labor disputes, said he doesn't view Mackay Radio to have the wiggle room Abruzzo proposes it does.

"The National Labor Relations Act had just been passed, it was only three years old, and the Supreme Court was full of what we would consider now left wing liberals, and notwithstanding that, the Supreme Court came to the conclusion that businesses have a fundamental right to operate," MacHarg said.

But even if the board's Democratic majority buys Abruzzo's case, the courts may not, he said.

McCarter & English's Murray said the general counsel has a plausible argument that Mackay Radio leaves the door open for the board to require a showing of necessity. But doing so would upset several decades of settled precedent, giving likely challengers ammo to argue in court that the change is arbitrary, he said.

"It's been a bedrock piece of the law for a long time, and so it would be a big deal to change it, just from a legal, administrative law point of view, forgetting the practicing piece of things," Murray said.

Mark Gaston Pearce, an Obama-era NLRB chairman who is now the executive director of the Workers' Rights Institute at Georgetown University Law Center, said Hot Shoppes was a misstep that negates workers' strike rights by presuming employers have a business interest in permanently replacing them.

Satisfying the current standard is "often an insurmountable task" for the general counsel because it essentially requires her to prove mens rea — ill intent — on the part of an employer, Pearce added. Some smaller, unsophisticated employers may occasionally expose themselves, but most will have the wisdom not to be so transparent, especially when they're represented by counsel, he said.

"I parallel permanent replacement with giving some pedestrians the right to cross the street and the car the right to run anybody over in his way," Pearce said. "That's like not having a National Labor Relations Act at all."

The standard Abruzzo proposes would be tougher for employers to beat, but it's hard to tell just how tough it would be with no history to go on, Murray said.

For example, in a tight job market, an employer may struggle to convince would-be replacements to take indefinite, temporary gigs even if they heighten pay. It may be enough for the employer to present a labor market analysis and testimony showing replacements wanted assurances that they'd have permanent positions, he said.

"You could perhaps pull it off, but it would just be a lot harder," Murray said. "It wouldn't really do if, say, your HR manager comes in and says, 'Well, I think it will be easier [to hire permanently].' You need some evidence."

But while it's unclear how the revised test will play out, the proposed change would "100%, for sure, result in more strikes," MacHarg said. By mitigating replacement as a risk, unions will be more apt to call strikes, and workers more likely to follow through.

The prospect of forgoing a paycheck for meager strike pay may still temper enthusiasm for walking off the job, but activity will likely tick up overall, he said.

"What you will see is unions more aggressive, and quicker to strike, and more likely to strike, but for shorter durations," MacHarg said.

--Editing by Abbie Sarfo and Nick Petruncio.