

Detroit Newspaper Agency, d/b/a Detroit Newspapers, The Detroit News, Inc., and The Detroit Free Press, Inc. and CWA/ITU Negotiated Pension Plan. Case 7-CA-38184

March 15, 1999

SUPPLEMENTAL DECISION AND ORDER

**BY CHAIRMAN TRUESDALE AND MEMBERS
FOX, LIEBMAN, HURTGEN, AND BRAME**

On August 27, 1998, the National Labor Relations Board issued a Decision and Order, reported at 326 NLRB No. 64, in which the Board addressed numerous unfair labor practice issues but granted a motion to sever and to address separately the unfair labor practice issue raised in paragraphs 48, 49, and 50 of the complaint in Case 7-CA-38184. The issue reserved for separate resolution is whether the judge correctly found that the Respondents did not violate Section 8(a)(5) of the Act by unilaterally setting the terms and conditions of employment for strike replacements. We now turn to the adjudication of this issue.

In their exceptions and supporting briefs, the General Counsel and the Unions acknowledge that current Board law holds generally that struck employers have no obligation to bargain about employment terms for replacements during an economic strike. See *Service Electric Co.*, 281 NLRB 633 (1986). They contend that the Board should overrule this precedent and, in any event, should not apply it in unfair labor practice strike situations.

We decline to overrule the *Service Electric* rule to the extent that it permits an employer unilaterally to set different terms and conditions for striker replacements during a strike.¹ We adhere to the Board's well-established doctrine that an employer need not bargain with a union with regard to the terms and conditions of employment for strike-replacements hired during a strike.² There are at least two major reasons for this principle of law.

First, an employer has a right to hire the replacements. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). Of necessity, these replacements must be hired at *some* wage level. If our dissenting colleagues' view were adopted, the employer would have to bargain to impasse or agreement before setting that wage. In a strike situation, the employer does not have the luxury of postponing the hiring for that indefinite period. Thus, to require bargaining by a struck employer, in circumstances that frequently necessitate rapid operational ac-

commodation of strike exigencies, would effectively "nullify the [employer's] right to hire replacements." *Times Publishing Co.*, 72 NLRB 676, 684 (1947). We would not so impinge on the employer's *Mackay* right.³

Second, we agree with the observation of the judge in *Service Electric* that

[F]rom the standpoint of the overall bargaining process, it hardly advances the statutory objectives of minimizing industrial strife and of facilitating the bargaining process to suddenly inject an entirely new and controversial subject into an ongoing bargaining process for a new contract. That, of course, is precisely what will happen if the parties are obliged to divert their bargaining efforts from a course of attempting to reach agreement on the terms of a new collective-bargaining contract to the entirely unrelated path of trying to reach agreement on the employment terms of replacements who probably will work only until resolution of the underlying contractual dispute, at which point "the strikers will return to work and the strike replacements will be out of a job." *Leveld Wholesale*, [218 NLRB 1344, 1350 (1975)]. Indeed, even if replacements continue working after the underlying contractual dispute has been resolved and the strike has ended, their status as strike replacements also will have ended. They assume the same status as other unit employees and their employment terms become governed by the newly negotiated contract. In either event, whether they are replaced by returning strikers or continue working, their employment terms as replacements are rendered no more than a footnote to the overall bargaining process that led to agreement between the parties. [281 NLRB at 639-640.]

In addition to the general delay and disruption that would result from bargaining about strike replacements, there is at least a reasonable concern that the union would not be a vigorous bargainer for the replacement employees because of the direct conflict of interest between the strikers and their replacements. These em-

¹ We are not presented here with the issues of continuation of different terms and conditions of employment for replacements after a strike has ended or of the unilateral setting of different terms and conditions of employment for "crossovers" who abandon the strike and return to work. We therefore do not address or pass on that part of *Service Electric* as well as other precedent relating to these issues.

² *Service Electric*, 281 NLRB 633. As our dissenting colleagues concede, the doctrine is over 50 years old, going back to *Times Publishing*, 72 NLRB 676, 684 (1947).

³ Of course, as noted by the dissent, the employer *could* hire the replacements at the same wage rate and under the same terms and conditions of employment that prevailed under the old contract. However, there is no legal requirement that the employer do so. Just as the employer does not have to provide a justification for hiring the replacements, so too the employer does not have to prove a justification for hiring them at a given rate. Moreover, the circumstances of the strike frequently dictate the need for different terms and conditions of employment. Our colleagues concede as much by stating that they would provide a "limited exception" from bargaining "for what might be called strike exigencies." The problem with their approach is that employers and unions would have no certainty as to the scope of mandatory bargaining about strike replacement issues. Their proposal for case-by-case proof of an employer's need to act unilaterally suffers the same infirmity as the General Counsel's alternative proposal, discussed below, to impose the bargaining obligation on employers only during unfair labor practice strikes. These proposals do not encourage the collective-bargaining process. They are instead an invitation to repetitive litigation.

employees are the persons who have crossed the union's picket line during the union's economic battle with the employer. Our dissenting colleagues would commission the union as their representative with respect to the terms and conditions of employment that they will enjoy during the period in which they have undermined the Union's cause. One can reasonably be skeptical as to whether the union will ardently seek better terms and conditions for them.

Our dissenting colleagues challenge the proposition that replacement employees would necessarily reject union representation.⁴ However, that is not the issue here. The issue here is whether a union could be relied upon to bargain effectively on behalf of the replacements.⁵

Finally, our colleagues attempt to draw analogies between a struck employer under the Railway Labor Act and a struck employer under the NLRA. The differences are obvious and substantial. The RLA employer must continue the contract, unless it can justify a departure therefrom. The NLRA employer is not bound to the contract, and need not justify departures therefrom. Thus, the RLA proscription against unilateral changes as to the terms and conditions of employment for replacements is simply a part of a broader RLA obligation to continue to adhere to the contract. By contrast, there is no broader obligation under the NLRA.

We also reject the General Counsel's alternative contention that the *Service Electric* rule should not apply in unfair labor practice strike situations. There is no comparable limitation on the *Mackay* right to hire replacements in order to continue operations during an unfair labor practice strike. (There is, of course, a clear obligation to reinstate unfair labor practice strikers who have ended their work stoppage and unconditionally offered to return to work.) Moreover, there can be no determination of a strike's economic or unfair labor practice causation contemporaneous to its occurrence. We would invite protracted litigation and foster instability in labor relations, possibly continuing long after a strike's end, if we were to hold that an employer's right to set the terms and conditions for replacements turns on such a determination.

⁴ The dissent cites *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790–791 (1990), to support its position. That case addressed issues concerning poststrike representation where job rights had already been settled, and thus is inapposite to the situation here focusing on an employer's obligation to bargain during a strike with the striking union over employment terms for striker replacements. *Curtin Matheson* at 792.

⁵ Our colleagues correctly note that currently a union may bargain with respect to the return of the strikers—and that this presents a similar conflict of interest. Concededly, such bargaining can have an impact on the replacements. However, such bargaining is on behalf of the strikers; the impact on the replacements is simply a consequence of the bargaining on behalf of the strikers.

In sum, for all the reasons stated above, we think it unwise to depart from a principle that is over a half-century old. We would not do so here. Based on the foregoing, we affirm the judge's finding that the Respondents did not act unlawfully by unilaterally setting terms and conditions of employment for striker replacements.

ORDER

The recommended Order of the administrative law judge in Case 7–CA–38184, as to whether the Respondents unlawfully failed to bargain about the terms and conditions of employment for strike replacements, is adopted and those complaint allegations pertaining to the issue are dismissed.

MEMBERS FOX AND LIEBMAN, dissenting.

We dissent from the majority's decision adopting the judge's dismissal of the complaint's allegation that the Respondents violated Section 8(a)(5) by unilaterally setting terms and conditions of employment for striker replacements hired in August 1995 and thereafter.

In their exceptions and supporting briefs, the General Counsel and the Unions acknowledge that current board law holds generally that struck employers have no obligation to bargain about employment terms for replacements during an economic strike. See *Service Electric Co.*, 281 NLRB 633 (1986).¹ While the Board has not had reason to consider the application of that rule in the case of replacements for unfair labor practice strikers, the administrative law judge assumed that the rule would apply in that case as well, as does the majority. We agree that the issue concerning the unilateral setting of new employment terms applicable to the striker replacements in this case turns on whether the Board adheres to what has come to be called the *Service Electric* rule. In our view, however, *Service Electric* and the earlier precedents which it followed² are inconsistent with the basic policies underlying Section 8(a)(5) of the Act. For

¹ Following *Service Electric*, the Board held that an employer may violate Sec. 8 (a)(5) if the terms it sets for the striker replacements are not limited to the duration of the strike, but rather are intended to last beyond the end of the strike and to embrace the unit generally. *River City Mechanical*, 289 NLRB 1503, 1505 (1988); *Schmidt-Tiago Construction Co.*, 286 NLRB 342, 342–343 (1987). The strike at issue here had not ended when this case was litigated and the General Counsel did not pursue any theory of violation based on those cases.

² For a review of these precedents, see the decision of the administrative law judge in *Service Electric*, 281 NLRB at 637–641. As the judge therein noted, the law with respect to the duty to bargain about employment conditions for striker replacements “meandered down a twisting, sometimes tortured path” for nearly 50 years following the decision in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), that employers had the right to hire replacements for employees engaged in economic strikes. One line of cases appeared to hold that the ability to unilaterally set employment terms for replacements is a necessary incident to the underlying right to hire replacements, while another, inconsistent line of cases found a duty to bargain at least as to employment terms for replacements more favorable than those proposed to the union in negotiations.

the following reasons we would overrule them, and we would find that the Respondents violated Section 8(a)(5) and (1) when they unilaterally established wages and benefits for the striker replacements that were different from the wages and benefits required to be paid to unit employees under the Respondent's expired collective-bargaining agreements with the Unions.³

As a general rule, absent the existence of a bargaining impasse, "an employer's unilateral change in conditions of employment under negotiation is . . . a violation of Section 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of Section 8(a)(5) as much as does a flat refusal." *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (footnote omitted). The bargaining obligation covers employees in the bargaining unit, and when an employer hires permanent replacements during a strike, the bargaining unit is expanded to the extent that it consists of "nonstrikers, strikers, returning strikers, and striker replacements." *National Upholstering Co.*, 311 NLRB 1204, 1210 (1993). What the Respondents claim here, on the basis of current Board law, is a very broad exception to its obligation to bargain concerning the wages, hours, and working conditions of its unit employees. In our view, the precedent on which they rely rests on dubious reasoning.

In *Times Publishing Co.*, 72 NLRB 676, 684 (1947), the Board held that, while the respondent employers were "under a continuing obligation to bargain collectively with the Union upon request as to the issues between them," it did not "construe this obligation as requiring the respondents to negotiate with the Union the conditions under which [employees] were to be hired to replace the strikers" because "so to hold would be to nullify the respondents' right to hire replacements." No rationale beyond that *ipse dixit* was given for the holding. In subsequent cases, the Board advanced two additional reasons for finding no obligation to bargain, namely (1) an expressed concern that a striking union would not be readily able "to bargain simultaneously in the best interests of both strikers and their replacements,"⁴ and (2) that

³ The Respondents hired about 1400 replacements during the course of the strike, and it is undisputed that the Respondents acted unilaterally in setting their terms and conditions of employment. Most of the replacements were paid wages that were less than the wages required to be paid under the expired collective-bargaining agreements with the Unions, and the Respondents made no contributions on behalf of the replacements to any of the fringe benefit funds provided for under those agreements. In contrast, the Respondents continued to apply the terms of the expired agreements to unit employees who did not go on strike and "crossovers"—i.e., unit employees who struck but later abandoned the strike and returned to work. As the judge found, in accordance with current law, those individuals were paid at the wage rates set out in the expired agreements, worked under the conditions set out in those agreements and had fringe benefit fund contributions made on their behalf in accordance with those agreements. See *Chicago Tribune Co.*, 318 NLRB 921, 928 fn. 30.

⁴ *Service Electric*, 281 NLRB at 641. This rationale was first advanced in *Leveld Wholesale, Inc.*, 218 NLRB 1344, 1350 (1975), and

the "overall bargaining process" would be impaired because the injection of "new and controversial" subjects (the working conditions of the replacements) would "divert [the parties'] bargaining efforts" from reaching an overall bargaining agreement.⁵ We do not find any of these reasons persuasive.

As to the original reason advanced, we acknowledge that *NLRB v. Mackay Radio*, 304 U.S. 333 (1938), affords employers the ability to continue operations during a strike by hiring replacements for striking employees. That a struck employer has the "right to protect and continue his business by supplying places left vacant by strikers," *id.* at 345, does not, however, mean that the employer must also have the right to ignore the terms and conditions established through collective bargaining with its employees' representative and conduct its operations on whatever terms it deems most advantageous to itself. As the Supreme Court has said in a related context:

Were a strike to be the occasion for a [rail] carrier to tear up and annul, so to speak, the entire collective agreement, labor-management relations would revert to the jungle. A carrier could then use the occasion of a strike over a simple wage and hour dispute to make sweeping changes in its work-rules so as to permit operation on terms which could not conceivably have been obtained through negotiation. Having made such changes, a carrier might well have little incentive to reach a settlement of the dispute that led to the strike. It might indeed have a strong reason to prolong the strike and even break the union. The temptation might be strong to precipitate a strike in order to permit [the employer] to abrogate the entire collective bargaining agreement on terms most favorable to it.

Railway Clerks v. Florida East Coast Railway Co., 384 U.S. 238, 247 (1966).

In holding in that case that rail carriers must, with limited exceptions, apply existing contractual terms to replacement workers hired during strikes, the Court expressly noted that carriers have not just a right but a statutory duty to continue operations during a strike. 384 U.S. at 244–245 and fn. 6. Yet clearly the Court did not regard its decision as "nullifying" either their right to hire replacements or their ability to operate during strikes. We therefore reject any suggestion that the right to unilaterally set compensation for striker replacements is a necessary incident to the right to hire replacements, or that overruling *Service Electric* would prevent employers covered by the NLRA from exercising their right to continue operations during strikes.⁶

followed in *Capitol-Husting Co.*, 252 NLRB 43, 45 (1980), *affd.* 671 F.2d 237 (7th Cir. 1982).

⁵ *Service Electric*, 281 NLRB at 639.

⁶ Although the decision in *Railway Clerks v. Florida East Coast Railway Co.*, dealt with the duty of railroads covered by the Railway Labor Act to apply existing contract terms to striker replacements, the

We also reject the majority's claim that a bargaining obligation should be excused because a union would face a conflict of interest if required to bargain on behalf of strikers and striker replacements simultaneously.⁷ As the Supreme Court observed in *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 790–791 (1990), the interests of the union and those of the striker replacements are not necessarily always at odds. A striker replacement may oppose the strike but nevertheless want the union to continue as the unit's bargaining representative after the strike is over. It also cannot necessarily be presumed that the unions have hostility to the strike replacements. Particularly where it appears likely that the replacements will remain after the strike, the union has a significant interest in winning their support.

Representation by a union of two groups of employees with antagonistic interests does not, in any event, automatically raise a conflict of interest, even if the leadership supports one group and opposes the other. A union should not "be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining . . . [process]." *Humphrey v. Moore*, 375 U.S. 335, 349–350 (1964).⁸

By definition, unions are political organizations whose representatives are elected to office,⁹ often in the face of heated opposition. Resolving conflicts or accommodat-

ing competing interests among union or unit members is a normal part of the daily routine. In collective bargaining, unions often represent employees with divergent interests.¹⁰ During negotiations, activities routinely take place which are designed to manage intra-group conflict and achieve consensus within the union negotiating team and among its constituents. Contract ratification votes frequently evoke vigorous differences of opinion. Thus, even in the nonstrike situation, unions are no strangers to internal dissension. While representing striker replacements would perhaps pose a challenge, it would not create an automatic conflict of interest disqualifying a union from bargaining on their behalf and warranting an exception to the duty to bargain.

As the General Counsel has argued, whatever difficulty may be presented to a union in representing replacement employees is no greater than the difficulty presented in representing nonstriking employees or returning strikers who, under current law, must be represented by the union and whose terms and conditions may not be unilaterally changed. But as the Board has previously stated, "[W]e are unwilling to presuppose, as Respondent would have us do, that the Union would be unable to accommodate the apparently conflicting interests of the striking and nonstriking employees, particularly in light of the Union's statutory duty of fair representation requiring it to serve the interests of all bargaining unit employees fairly and in good faith." *Pennco, Inc.*, 250 NLRB 716, 718 fn. 17 (1980).

The final rationale advanced for relieving employers of the general statutory bargaining obligation when they are dealing with striker replacements essentially represents a concern for practicalities of the bargaining process. In our view, this concern would be better met by a limited exemption for what might be called strike exigencies than by the across-the-board exemption recognized in *Service Electric* and its predecessors and embraced by our colleagues in the majority. We acknowledge that operations during a strike are, almost by definition, not normal operations. It is likely, for example, that when an employer is trying to operate the business with fewer employees or new, untrained employees, rules about the amount of bargaining unit work that can be performed by supervisors or the degree to which lines between job classifications must be maintained are honored in the breach, if it all.¹¹ Because of security concerns or other

concerns expressed by the Court about the consequences of allowing an employer to use the occasion of a strike to unilaterally set terms and conditions for striker replacements have as much force in the context of the industries covered by the National Labor Relations Act as they do in the context of the railroad industry.

⁷ The labor organization must represent all unit "members, the majority as well as the minority, and it is to act for and not against those whom it represents." *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. 192, 202 (1944). After a strike has been called, "[t]he union remains the bargaining representative of all the employees . . . whether union members or not," *Railway Clerks v. Florida East Coast Railway Co.*, 382 U.S. at 246, "strikers and replacements alike." *Id.* at 249 (White, J. dissenting) (citing *Steele*).

⁸ "[W]e are not ready to find a breach of the collective bargaining agent's duty of fair representation in taking a good faith position contrary to that of some individuals whom it represents nor in supporting the position of one group of employees against that of another. 'Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. . . .'" *Humphrey v. Moore*, 375 U.S. 335, 349 (1964), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

"[T]he exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177. (1967)

⁹ "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . . but it has also imposed on the representative a corresponding duty . . . to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." *Steele v. Louisville & Nashville Railroad Company*, 323 U.S. at 202–203.

¹⁰ "*Vaca v. Sipes* applies to a union in its negotiating capacity." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 77 (1991) (alleged "discrimination between striking and working pilots in allocation of positions does not constitute a breach of the duty of fair representation"). "A rational compromise on the initial allocation of the positions was not invidious 'discrimination' of the kind prohibited by the duty of fair representation." *Id.* at 81.

¹¹ In some instances, supervisors themselves function as strike replacements, and we acknowledge that the *Mackay* right to hire permanent replacements would appear to include the right to choose who would be employed as replacements.

circumstances unique to the strike, an employer might find it necessary in order to maintain operations to provide temporary housing or transportation to replacement workers, or to provide them with meals on site. It would do little damage to the fundamental policies underlying the statutory bargaining obligation to permit employers to make unilateral changes of this type in the working conditions of the replacements without requiring prior negotiations over such matters.

This exigent circumstances exception would be strictly construed. Any unilateral changes made pursuant to this exception would be limited to the duration of the strike and would require specific proof of the necessity for unilateral action. But we do not envision that the exception would allow unilateral changes by the employer in the basic wages and benefits granted replacements. If, pursuant to its general obligation to maintain the status quo until impasse or an agreement on new terms is reached, an employer offers to employ replacements on prestrike terms (or the terms of an offer lawfully implemented after an impasse), there is no reason to presume that sufficient numbers of replacements will not be willing to work on those terms,¹² or that any of the other harms which the *Service Electric* rule is supposedly crafted to

avoid will occur. No conflict of interest on the part of the bargaining representative would be thereby created; and it would have no effect at all on the process of reaching agreement on the terms of a new contract. It would, however, avoid the obvious derogation of the bargaining representative which occurs when an employer unilaterally raises or lowers the wages and benefits of unit employees. If the replacements are unilaterally granted much better wages and benefits, the message to the striking employees is that the employer might give them a better deal if they were unrepresented. If an employer can take advantage of a strike to lower wages and benefits drastically all at once, without bargaining to impasse, then it may have no incentive at all to negotiate a strike-ending agreement. Indeed, it may have an incentive to prolong a strike. In *Florida East Coast Railway*, the Supreme Court expressed similar concerns in holding that a struck carrier under the Railway Labor Act should be permitted to “make only such changes as are truly necessary in light of the inexperience and lack of training of the new labor force or the lesser number of employees available for continued operation.” 384 U.S. at 248.

Accordingly, in the absence of any showing that strike exigencies justified their failure to bargain over the terms and conditions of employment for striker replacements hired in August 1995 and thereafter, we would find that the Respondents violated Section 8(a)(5) and (1) of the Act.

¹² In this case, for example, most of the replacements agreed to work for *less* than what the employees whom they replaced had been paid under the expired contracts. Undoubtedly they would also have accepted employment at the higher, contractual rates had the Respondents been required to maintain the established terms and conditions.