Berkeley Journal of Employment & Labor Law

Volume 3
Issue 4 *Winter 1979*

Article 1

December 1979

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Link to publisher version (DOI)
https://doi.org/10.15779/Z38BK7T

The Truncation of *Laidlaw* Rights by Collective Agreement

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LAIDLAW granted replaced strikers the right to reinstatement under certain conditions. This article discusses the theoretical and practical consequences of allowing these rights to be waived by a collective bargaining agent. The author concludes that LAIDLAW reinstatement rights should not be subject to waiver by the union as part of a strike settlement.

I.
INTRODUCTION

The protection afforded the job rights of replaced economic strikers has significantly changed in the last two decades,[1] from minimal protection to the National Labor Relations Board's decision in *The Laidlaw Corp.*[2] holding that:

> [E]conomic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements: (1) remain employees; (2) are entitled to full reinstatement upon the departure of replacements unless they have in the meantime acquired regular and substantially equivalent employment, or the employer can sustain his burden of proof that the failure to offer full reinstatement was for legitimate and substantial business reasons.[3]

The Board further held that the employer is under an affirmative duty to seek out former strikers as vacancies become available.[4]

The Board has not defined the temporal limit of *Laidlaw* rights;[5] as one critic complained, the *Laidlaw* decision fairly implies that strik-

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1. The caselaw prior to and under *Laidlaw* is fully explored by Martin, *The Rights of Economic Strikers to Reinstatement: A Search for Certainty*, 1970 WIS. L. REV. 1062.

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

3. 171 N.L.R.B. at 1369-70.

4. *Id.* at 1369.

5. It was held, however, that a striker remains an "employee" with reinstatement rights more than twelve months after the commencement of the strike, even though under § 9 of the National Labor Relations Act, 29 U.S.C. § 159(c)(3) (1976), he or she is no longer eligible to vote in a representation election. NLRB v. Hartmann Luggage, 453 F.2d 178 (6th Cir. 1971). Similarly, the Board held that an employer cannot unilaterally limit *Laidlaw* rights to the six-month recall period for employees laid off under the collective bargaining agreement. Brooks Research & Mfg. Co., 202 N.L.R.B. 634 (1973).

ers retain preferential rehiring rights "in perpetuity."[6] The Board has held, however, that a collective agreement may truncate *Laidlaw* rights if certain conditions are met.[7] No court of appeals has passed directly upon that question; the Eighth Circuit implied in dictum that a waiver of *Laidlaw* rights was impermissible,[8] but the Second Circuit left open the possibility that such a limitation might be consistent with the National Labor Relations Act.[9] This article will assess the theoretical justification for, and the practical consequence of, allowing *Laidlaw* rights to be truncated by collective agreement.

II

THE ORIGINS AND THEORY OF THE *LAIDLAW* RULE

The job rights of economic strikers have been regulated primarily by section 8(a)(3) of the National Labor Relations Act,[10] which prohibits employer discrimination "in regard to hire or tenure of employment

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6. Farmer, *Issues and Practical Problems Caused by* FLEETWOOD TRAILER *and* LAIDLAW MANUFACTURING, 4 GA. L. REV. 802, 806 (1970). The Board seems to have said as much. Brooks Research & Mfg. Co., 202 N.L.R.B. 634, 636 (1973) ("We . . . reject the . . . contention that a time limit should be placed on the reinstatement rights of economic strikers.").

7. United Aircraft Corp., 192 N.L.R.B. 382 (1971), *enforced in part sub nom.* IAM v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

8. Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 168 n.9 (8th Cir. 1972).

9. IAM v. United Aircraft Corp., 534 F.2d at 451; *cf.* NLRB v. Murray Products, Inc., 584 F.2d 934, 940 (9th Cir. 1978) ("It is not yet settled whether a labor union has authority to make an agreement on behalf of the members of its bargaining unit waiving or abridging their right to reinstatement."). Most recently, in NLRB v. Penn Corp., 102 L.R.R.M. 2753 (8th Cir., November 2, 1979), the Eighth Circuit prefaced reference to *United Aircraft* with the observation that "reinstatement rights may be limited by a strike-settlement agreement." *Id.* at 2755 n.5. It is unclear whether the court's dictum was intended to approve only procedural limitations agreed to for the exercise of *Laidlaw* rights, or whether it was intended to alter the view the same court expressed in Little Rock Airmotive, Inc. v. NLRB, 455 F.2d 163, 168 n.9 (8th Cir. 1972).

10. 29 U.S.C. §§ 151-169 (1976) [hereinafter referred to as the Act]. An early critic saw the issue largely, but not entirely, in terms of that section:

> [The strikers'] work was presumably satisfactory to the employer since they were displaced only after participation in a strike. Invariably, they have seniority; often they have been on friendly, if not intimate, terms with their employer. What then motivates the preference for new employees as against experienced men to whose employment record participation in a strike constitutes the sole addition?
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> . . . .
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> Regardless of motives . . . a striker denied the right to displace a strikebreaker of defeasible tenure is being penalized because he is on strike. Had it not been for his participation therein, he would still be at work, receiving his regular pay and similar benefits. If such deprivation of employment is permissible, will not employees be restrained in their use of the strike weapon, a restraint proscribed by the Act? And is not this denial of reemployment and this permanent replacement a warning to the strikers and to all other employees?

Boudin, *The Rights of Strikers*, 35 ILL. L. REV. 817, 832 (1941).

The decisions have usually contained pro forma references to § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976). That section prohibits employers from interfering with the right to engage in collective bargaining and "concerted activities," which is guaranteed to employees by § 7. In the normal course of statutory construction one might expect that the rights of economic strikers would be determined primarily by reference to § 8(a)(1) rather than § 8(a)(3); this has not been

to encourage or discourage" union membership. Thus, the Court's 1938 decision in *NLRB v. Mackay Radio & Telegraph Co.*[11] sustained the Board's power under that section to order the reinstatement of economic strikers who had been refused reinstatement because of their union activity. In its opinion, however, the Court discussed the employer's ability to resist an economic strike by hiring strike replacements:

> [I]t 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. . . . The assurance . . . to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice. . . .[12]

This dictum, upon a question that had not been adequately argued to the Court,[13] fast became law. In essence, the employer could hire permanent replacements, without any showing that the assurance of permanence served legitimate or necessary business purposes that could not be served by means less harmful to the interests of striking employees. As a result, strikers who lost an economic contest with their employers would face the added risk of losing their jobs. In effect, *Mackay Radio* exacerbated any existing disparity in bargaining power between employers and unions.[14]

Subsequent cases, however, considerably softened the effect of the *Mackay Radio* dictum. In *NLRB v. Erie Resistor Corp.*[15] an employer, apparently finding even the offer of "permanent" employment insufficient to attract replacements for economic strikers, added the inducement of twenty years of "superseniority" for purposes of layoff. The court of appeals ruled that unless the employer acted with a specific illegal intent, such conduct did not violate section 8(a)(3).[16] The Supreme Court disagreed, concluding that intent may be:

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the case. *See generally* Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1203-05 (1967).

11. 304 U.S. 333 (1938).

12. *Id.* at 345-46.

13. Note, *Replacement of Workers During Strikes*, 75 YALE L.J. 630, 632 (1966).

14. As George Schatzki has pointed out:

> The real effect of the [*Mackay*] doctrine is to give greater strength to those employers who least need it, and to permit those employers to rid themselves of union employees and the union. For example, it is unlikely that an employer of unskilled labor could not find temporary replacements for striking employees in a community with a large unemployed population. If the purpose of allowing replacements—temporary or permanent—is merely to permit the employer to continue operations, why should the striking employees in such a situation be subjected to loss of their jobs?

Schatzki, *Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities*, 47 TEX. L. REV. 378, 384 (1969).

15. NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

16. 303 F.2d 359 (3d Cir. 1962), *rev'd*, 373 U.S. 221 (1963).

> founded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions. . . . [T]he employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended.[17]

To decide whether the employer's motive was legitimate, the Court said, it is necessary to balance "his interest in running his business" against the workers' interest in maintaining an effective strike.[18] Granting superseniority to strike-breakers would so damage the strikers[19] that it could not be justified by any legitimate business purpose. Therefore, awarding superseniority in those circumstances was a violation of the Act.

The implications of *Erie Resistor* were refined in *NLRB v. Fleetwood Trailer Co.*[20] In that case, an economic strike forced the employer to cut back production; when the strike ended, there was no work available for the strikers. When the volume of production increased, however, the employer hired new applicants instead of six of the strikers. The Court held that the reinstatement rights of economic strikers could not be extinguished simply because there was no work at the time the strikers applied for reinstatement. The Court noted:

> It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is

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17. NLRB v. Erie Resistor Corp., 373 U.S. 221, 228 (1963) (emphasis in original).

18. As is not uncommon in human experience, such situations present a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

Id. at 228-29 (citations omitted).

19. Unlike the replacement granted in *Mackay* which ceases to be an issue once the strike is over, the plan here creates a cleavage in the plant continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach is re-emphasized with each subsequent layoff and stands as an ever-present reminder of the dangers connected with striking and with union activities in general.

Id. at 231.

20. 389 U.S. 375 (1967). Just prior to *Fleetwood Trailer* the Court, in *NLRB v. Great Dane Trailers Inc.*, 388 U.S. 26 (1967), extended *Erie Resistor* to an employer's payment of accrued vacation benefits to nonstrikers while denying such benefits to strikers:

> The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity.

388 U.S. at 32.

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."[21]

In *Laidlaw*, the Board merely extended *Fleetwood Trailer* to situations where work is not available because the employer has hired permanent replacements. Once the job becomes available, due to an expansion of production or the exit of permanent replacements, the employer must contact the striker and offer the job unless the striker has found regular and substantially equivalent employment.

These decisions clearly limited the practical impact of *Mackay Radio*. While an employer faced with an economic strike can hire "permanent" replacements, the replacements cannot be granted superseniority.[22] When the dispute is resolved, the strikers are entitled to be reinstated whenever there is work available, and they will retain their positions in the seniority system.[23] Thus in any subsequent layoffs, the permanent replacements may well be the first to go.

What the decisions do not make clear, however, is to what extent the right to reinstatement may be a subject of collective bargaining. In fact, the *Fleetwood Trailer* Court expressly declined to decide whether the union could agree to extinguish the strikers' reinstatement rights.[24]

III

THE WAIVER OF STATUTORY RIGHTS AND THE RATIONALE OF *UNITED AIRCRAFT*

The Court has pointed out that certain rights engendered by the Act "are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for unit members."[25] The right to strike, and the right to require an employer

21. NLRB v. Fleetwood Trailer Co., 389 U.S. at 381.

22. The *Erie Resistor* Court did not flatly prohibit employers from granting superseniority to strikebreakers. *See* 373 U.S. at 237 (Harlan, J., concurring). The Board, however, has since consistently held that such a grant violates the Act. *See, e.g.*, Pittsburg & New Eng. Trucking Co., 238 N.L.R.B. No. 227 (1978).

23. NLRB v. Anvil Products Inc., 496 F.2d 94 (5th Cir. 1974). In another Fifth Circuit case, the employer laid off reinstated strikers before strikebreakers on the ground that it had a "moral obligation" to the permanent replacements. The court held that the *Erie Resistor* prohibition against superseniority for strikebreakers applied even in the absence of a formal seniority system. NLRB v. Transport Co. of Tex., 438 F.2d 258 (5th Cir. 1971).

24. 389 U.S. at 381 n.8.

25. Alexander v. Gardner-Denver Co., 415 U.S. 36, 51 (1974) (distinguishing such collective rights from the protections against employment discrimination granted to the individual under Title VII); *see also* Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50, 62 (1975) ("[these rights] are, for the most part, collective rights . . . protected not for their own sake but as instruments of the national labor policy . . . .")

to bargain with the union before changing terms or conditions of employment, are collective rights that a union may relinquish.[26] On the other hand, some rights under the Act are individual; thus, they may not be bargained away by collective agreement. An employer, for example, violates section 8(a)(3) of the Act, and a union violates section 8(b)(2), by agreeing to provisions of a collective agreement that tie job rights too closely to union membership.[27] Such provisions conflict with the policy of the Act to allow employees to refrain from joining or supporting a union as a condition of employment. Whether a given statutory right is collective or individual is a question of federal labor policy.

Accordingly, one could view *Fleetwood Trailer*, and so *Laidlaw*, as simply redressing the imbalance in bargaining power between labor and management resulting from *Mackay Radio*.[28] From that perspective, *Laidlaw* rights are conferred to advance the collective interest, and may, like other collective rights, be traded off by the collective for the larger good. On the other hand, the statutory purpose underlying *Laidlaw* is to prohibit discrimination against individuals for engaging in activities protected by the Act. Viewed in this way, *Laidlaw* rights are individual rights, protected by section 8(a)(3), which may not be compromised by the collective.[29]

In *United Aircraft Corp.*,[30] the Board embraced the former view:

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26. Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956) (waiver of right to engage in economic strike); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952) (waiver of duty to bargain).

27. Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); *see also, e.g.*, Dairylea Cooperative, Inc., 219 N.L.R.B. 656 (1975), *enforced sub nom.* NLRB v. Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976).

28. Farrand, *Reinstatement: Expanded Rights for Economic Strikers*, 58 CALIF. L. REV. 511, 523 (1970) ("*Laidlaw* should have the additional salutary effect of aiding weak unions without increasing the power of strong ones.")

29. For example, in *Atlas Tack Corp.*, 226 N.L.R.B. 222 (1976), Member Walther argued that "make whole" relief for breach of the duty to bargain ought not to run to the individual employees. Instead, he proposed that it constitute a fund over which the union could bargain in return for other benefits. In so arguing he was at pains to distinguish remedies for violation of § 8(a)(3):

> In assessing this remedy, it must not be forgotten that we are seeking to remedy an 8(a)(5) violation—not an 8(a)(3) violation. The distinction is basic from a remedial standpoint. An 8(a)(3) violation is an *individual* violation and the remedy should be designed to make the individual whole for the losses suffered. An 8(a)(5) violation, on the other hand, is more of a *collective* violation—that is, it interferes with a relationship shared collectively by many individuals—and the remedy should be tailored to restore the collective *status quo ante* rather than the individual *status quo ante* of each affected employee. It is for this reason that in 8(a)(5) situations I view restoration of the union's ability to engage in meaningful collective bargaining to have a higher priority than direct economic restoration of theoretical employee losses.

Id. at 224 (Member Walther, concurring in part and dissenting in part) (emphasis in original).

30. United Aircraft Corp., 192 N.L.R.B. 382 (1971) *enforced in part sub nom.* IAM v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976). After a long and violent strike, the employer and the unions negotiated a strike settlement agreement providing for the reinstatement of strikers as work became available. All reinstatement rights terminated, along

> If, as the Supreme Court has held, an employer can unilaterally terminate the reinstatement rights of economic strikers for legitimate and substantial business reasons, it would seem that such rights should also be terminable by agreement between the employer and the bargaining representative 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. 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 Act which, as we have previously stated, includes as a principal objective encouragement of the practice and procedure of collective bargaining as a means of settling labor disputes.[31]

The Board's reasoning is troublesome. First, it does not follow that because *Laidlaw* rights can be terminated for legitimate and substantial business reasons, they may also be curtailed by collective agreement. In accepting a negotiated limitation on reinstatement rights, the Board obviates any examination of whether business conditions actually made such a limitation necessary.[32] In fact, union agree-

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with the agreement, about four and one-half months after the strike was settled. In 1971—eleven years after the strike—the Board held, *inter alia*, that the employer did not violate the reinstatement rights of the remaining displaced strikers by refusing to extend their reinstatement rights after the settlement agreement expired. On appeal, the Second Circuit did not decide whether *Laidlaw* rights are individual or collective, or if their duration may be determined through collective bargaining. Rather, the court held that because the strike was settled seven years before the *Fleetwood Trailer* decision and eight years before the Board decided *Laidlaw*, the union could not have waived the strikers' reinstatement rights, as such rights did not yet exist. The court declined, however, to apply *Fleetwood Trailer* and *Laidlaw* retroactively. IAM v. United Aircraft Corp., 534 F.2d 422 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976).

31. 192 N.L.R.B. at 388.

32. In *Stauffer Chem. Co.*, 242 N.L.R.B. No. 21 (May 9, 1979), the union negotiated a strike settlement agreement providing for the reinstatement of economic strikers reporting to work by an agreed-upon date; those not reporting, without just cause, were considered to have quit. An employee who had not been given timely notice appeared at the plant shortly after the expiration of the reinstatement period and was denied reinstatement, even though her position had not yet been filled. The Board reasoned that:

> Presumably, Respondent's [Company] concern in negotiating the strike settlement agreement was to enable it to relieve its supervisory personnel by expediting the filling of those vacancies not occupied by returning strikers by June 10. Respondent, for whatever reason, had elected not to replace Anderson by the time of her application on the morning of June 14, the second business day following the termination of the recall period. Thus, Respondent can hardly claim that Anderson's reinstatement would have frustrated its goal, implicit in the settlement agreement, as it had refrained from hiring anyone to replace her. Accordingly, under the limited circumstances of this case, we find that Anderson's reinstatement rights as an unreplaced economic striker were not nullified by the

ment to truncate *Laidlaw* rights in return for some concession implies that business conditions are not such as to foreclose reinstatement; in such a case, the employer need not make any concessions in order to curtail reinstatement rights.

Second, the requirement that the waiver is not "intended to be discriminatory" is puzzling. *Laidlaw* is founded upon the holding in *Fleetwood Trailer* that an employer's refusal to offer reinstatement, absent legitimate and substantial business justifications, is inherently discriminatory regardless of the employer's intent. To allow *Laidlaw* rights to be curtailed save upon a showing of discriminatory intent seems inconsistent with the theory underpinning *Laidlaw*; a violation of section 8(a)(3) is ordinarily no less a violation because a union has acquiesced in it.[33]

Third, the requirement that the limitation on *Laidlaw* rights be the product of good-faith bargaining is similarly puzzling, especially in light of *H.K. Porter v. NLRB*.[34] Under *H.K. Porter*, the Board is forbidden to compel an employer to agree or to make a concession as a

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strike settlement agreement, and that, in the absence of compelling business justification, Respondent's refusal to reinstate her violated Section 8(a)(3) . . . of the Act.

Id. at 5-6.

If *Laidlaw* were read only as imposing a notice requirement upon employers instead of conferring a right to the job, *Stauffer Chemical Co.* would be entirely consistent with *United Aircraft*. But, as *United Aircraft* made clear, what was waived was not simply the right to be notified of the availability of the job, but the right to the job itself—just as the agreement in *Stauffer Chemical Co.* purported to do. Under *United Aircraft*, the replaced striker who appears at the gate after the exit of the replacement and the expiration of the reinstatement period could be denied reinstatement to his old job with previous seniority. Accordingly, it is extremely difficult to reconcile these two decisions, for they imply that a bargained-for limitation on the reinstatement period of the *unreplaced* economic striker cannot foreclose reinstatement, whereas a bargained-for limitation on the reinstatement period for a *replaced* economic striker can foreclose reinstatement. As is not uncommon when the Board takes inconsistent positions in adjudication, the *Stauffer Chemical* opinion reflects no awareness of *United Aircraft*.

33. In *Community Medical Services of Clearfield, Inc. (Clear Haven Nursing Home)*, 236 N.L.R.B. 853 (1978), the Board by a vote of three to two set aside a settlement agreement of unfair labor practice charges that would have reinstated allegedly unfair-labor-practice strikers, but without back pay. The majority pointed out that:

> The dissenters also make much of the 60-14 employee vote in favor of the settlement. We find it not at all surprising that most employees, after having been embroiled in a long and unsuccessful strike allegedly caused by their employer's unlawful conduct, might feel themselves constrained to forego the opportunity for the full vindication of their statutory rights in exchange for a "bargain basement" settlement. And, in any event, statutory rights are not, and cannot be, a matter for referendum vote. For, as we have taken pains to point out herein, there is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual discriminatees.

Id. at 7 (citations omitted). The case, of course, can be distinguished on the ground that the policy of the Act requires that employers who engage in unfair labor practices that result in strikes ought not profit from their wrongdoing. Nevertheless, *Laidlaw* rights are no less statutory rights than the reinstatement rights of unfair labor practice strikers, and under the above reasoning should be no more subject to collective disposition.

34. 397 U.S. 99 (1970).

remedy for an admitted refusal to bargain in good faith.[35] In *United Aircraft*, however, the Board suggests that it would excise from the agreement an otherwise permissible contract term—*i.e.*, a limitation on *Laidlaw* rights—if the employer insisted upon the term in bad faith. In that event, the Board would appear to be interfering in private ordering to the same extent that it did in *H.K. Porter*; that is, the excision of a contract term, not independently offensive to the Act, because the employer insisted upon it in bad faith, seems as much the making of an agreement, forbidden by *H.K. Porter*, as an order to agree to a term resisted in bad faith.[36]

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35. In the words of the Court:

> The Board's remedial powers under . . . the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. . . . [A]llowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under government supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

Id. at 108.

36. *See* Walther, *The Board's Place at the Bargaining Table*, 28 LAB. L.J. 131, 132 (1977).

In discussing this aspect of *United Aircraft*, the Second Circuit apparently assumed that to be effective, a waiver of *Laidlaw* rights must be "knowing and voluntary," adverting to the standard adopted by the Supreme Court for the waiver of due process in criminal cases. IAM v. United Aircraft Corp., 534 F.2d 422, 451 n.46, *citing inter alia* Johnson v. Zerbst, 304 U.S. 458 (1938). The voluntariness adverted to by the court requires that there be a determination that the parties had at least a rough equality of bargaining power. (Johnson v. Zerbst, *supra*, has been extended into the civil setting in *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972), and *Fuentes v. Shevin*, 407 U.S. 67 (1972), the latter decision in particular elaborating on the notion of voluntariness.) The Board, however, has only required that the limitation be the product of good faith collective bargaining. The waiver by collective agreement of admittedly waivable statutory rights, such as the right to strike or the duty to bargain, has been held by the Board to be effective only upon a showing that the waiver was "clear and unmistakable" or a "knowing relinquishment." *See, e.g.*, Clifton Precision Products Division, 156 N.L.R.B. 555, 562, 563 (1966). (In addition to Johnson v. Zerbst, *supra*, the Second Circuit cited *American Bridge Division, United States Steel Corp.*, 206 N.L.R.B. 265 (1973), in support of its position. *American Bridge* merely reiterated the Board's established test for waiver of statutory rights that omits any notion of voluntarism: "A waiver may be defined as the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it." *Id.* at 268, *citing, inter alia, Clifton Precision Products Division.*) The Board has not adopted the element of voluntarism; nor could it. In *NLRB v. Insurance Agents' International Union*, 361 U.S. 477 (1960), the Supreme Court expressly disallowed the Board, in adjudicating whether a union had bargained in good faith, to "introduce some standard of properly 'balanced' bargaining power . . . ." *Id.* at 497. The Court explained, "Our labor policy is not presently erected on a foundation of government control of the results of negotiations. . . . Nor does it contain a charter for the National Labor Relations Board to act at large in equalizing disparities of bargaining power between employer and union." *Id.* at 490.

This language cannot be reconciled easily with the Court's candid observation in *Erie Resistor* that some section 8 (a) (3) cases require precisely a balancing of employer against employee interests. One sense of *Insurance Agents* is that the Board is denied that authority "at large;" that is, although the Board may adopt at least some principles of general applicability, it may not fine tune the respective rights and obligations of particular parties based upon its assessment of their relative bargaining power. Accordingly, were the Board to hinge a limitation of *Laidlaw* rights upon a showing of equality of bargaining power, it would, in effect, be controlling the results of negotiations, giving weak unions all the benefits of the settlement agreement (whatever they might be) while excising the bargained-for truncation in reinstatement rights. Such a result, howsoever

Finally, the Board's requirement that a negotiated limitation of *Laidlaw* rights not be "unreasonably short" is wholly unexplained. The Supreme Court has assumed that rights are either collective (and thus waivable by the union) or individual (and thus not waivable by the union), an assumption which first requires analysis of which category the right properly fits.[37] The Board, however, adopted a hybrid position: although a relinquishment of a collective right such as the right to strike or the duty to bargain is permissible without examination whether the agreement is reasonable, a relinquishment of an individual striker's right to reinstatement is permissible only if the right of reinstatement remaining is not unreasonably short.

IV

THE WAIVER OF *LAIDLAW* RIGHTS AND LABOR POLICY

It could be argued that it is consistent with the Act to allow the Board to limit the life of *Laidlaw* rights under circumstances that buttress the basic policy of the Act, *i.e.*, effectuation of good-faith collective bargaining. To be sure, *Laidlaw* has its most significant impact in situations where, as in *Fleetwood Trailer*,[38] the union is essentially compelled to capitulate. Where there is anything close to equality in bargaining power, the need for *Laidlaw* rights is diminished, for it is unlikely that an employer would readily hire permanent replacements. A relatively weak union, however, is bolstered by the employees' knowledge that the employer's exercise of his privilege to hire permanent replacements cannot divest them of their jobs if they exercise their statutory right to strike.

Accordingly, in the event of an unsuccessful strike, the Board's ap-

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desirable in the abstract, must first be reconciled with the reasoning in *Insurance Agents*. Just as the Board in *United Aircraft* fails to confront *H.K. Porter*, the Second Circuit in *United Aircraft* fails to confront *Insurance Agents*.

37. *See, e.g.*, NLRB v. Magnavox Co., 415 U.S. 322 (1974) (individual right to distribute literature in the plant bearing upon the selection or retention of a union cannot be abrogated by collective agreement). The Court, however, has not been entirely clear either. In NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975), the Court held that an employee's right to have a union representative present in an investigative interview was a section 7 right; for an employer to insist upon conducting an interview without the requested union representative would be a violation of section 8(a)(1). The Court noted that a "single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors." *Id.* at 262-63. Justice Powell pointed out that the majority gives "no indication" whether the individual's "right" can be waived by the union. *Id.* at 275 n.8. Apparently the majority saw no inconsistency in fashioning the right in order to compensate for employee timidity and ignorance while allowing that ignorant or timid employee to waive it. It suffices to say that if the right is a collective right, which the logic of the Court's opinion more than suggests, the union would be empowered to waive it, subject to the appropriate standard for determining the effectiveness of the waiver.

38. 153 N.L.R.B. 425, 427 n.3 (1965) *sub nom.* NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1965).

proach would give a union somewhat greater leverage than it would otherwise be able to exert. The failure to reach a strike settlement would leave the full—that is, indeterminate—weight of *Laidlaw* upon the employer.[39] Further, in bargaining to limit *Laidlaw* rights, it is unlikely that an employer would exercise his bargaining power to an unreasonable extent, for he would be aware that the Board could upset the limitation either by finding a lack of good faith or by deeming the curtailment "unreasonably short."

Nevertheless, these advantages to the union as an institution are purchased at a cost. To hold that reinstatement rights may be curtailed by bargaining (necessarily, with a weak or weakened union) is to relegate back to an imbalanced bargaining situation the determination of the reinstatement rights of strikers, that were fashioned to redress that very balance.

The function of *Laidlaw* is to set the limit of the risk the worker takes when exercising the statutory right to strike.[40] Under the Board's approach, however, employees are faced with uncertainty when they must decide whether or not to support a strike. They could not know if the limit of the risk they run by striking is set by *Laidlaw*, or if their right to reinstatement will be traded away by a union hard pressed to maintain its institutional existence confronting an employer with vastly superior bargaining power.[41] Thus, to whatever extent the power to

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39. The Board has, however, approved a variety of procedural limitations that an employer and a union may adopt governing the manner in which *Laidlaw* rights are to be exercised, intended to minimize the employer's administrative burden. American Machinery Corp. v. NLRB, 424 F.2d 1321, 1328 (5th Cir. 1970); Brooks Research & Mfg. Co., 202 N.L.R.B. 634, 636 (1973):

> Under the agreement reached by the parties herein, the Respondent's burden is slight. Thus, when a vacancy arises recall is to be by telephone with confirmation by letter or telegram. Respondent is required only to use the last known addresses and telephone numbers on file with it. The recalled employee has only 3 working days to report after being notified to return. If an employee refuses an offer of reinstatement or does not respond, his name may be deleted from the list.

But see NLRB v. Penn Corp., 102 L.R.R.M. 2753 (8th Cir., November 2, 1979).

40. In *NLRB v. Industrial Cotton Mills*, 208 F.2d 87 (4th Cir. 1953), the court held that an employer violated § 8(a)(3) by refusing to reinstate an economic striker whom the employer believed, in good faith but wrongly, to have engaged in misconduct during the strike. The court observed:

> The right to reinstatement granted to a blameless unreplaced striker is designed to set the limit of the risk he runs by striking. That limit, which should not be unduly extended, is fixed at replacement by the employer or misconduct by the employee. The limitation is overstepped and the employee is harmed whether the denial of reinstatement results from the employer's mistake or from his blameworthy animus. In either case, the striker has nevertheless lost his job.

Id. at 91. Interestingly, the Court later approved the result on the issue presented in *Industrial Cotton Mills* by relying entirely on § 8(a)(1) rather than § 8(a)(3). NLRB v. Burnup & Sims Inc., 379 U.S. 21 (1964). The arresting language in *Industrial Cotton Mills* was taken from the brief of the late Bernard Dunau. Ratner, *Bernard Dunau*, 62 VA. L. REV. 477, 478 (1976).

41. The Third Circuit has characterized a series of cases as standing for the principle that the union's duty of fair representation is breached by the "arbitrary sacrifice of a group of employees' rights in favor of another stronger or more politically favored group." Gainey v. Brotherhood of

waive reinstatement rights bolsters the union in strike settlement negotiations, to that same extent it enervates the union's strength in negotiations prior to any strike.

Moreover, the effectiveness of the Board's approach depends upon keeping the definition of the "reasonable" period as indeterminate as possible. Only a flexible standard could be expected to create any significant apprehension in the employer, to induce him to be more forthcoming with the union in strike settlement. The Board has, for example, given no hint of what might inform the standard—whether it should vary according to rates of labor turnover (and so according to specific industries' geographic and labor-market considerations), or vary according to current or projected conditions of the economy as a whole. In *United Aircraft*, the Board majority merely declared a limitation of *Laidlaw* rights to a four and one-half month period following the agreement to be a "not unreasonably short period."[42] This seems to suggest a unitary standard of reasonableness, unaffected by considerations that are specific according to industry, labor market, or the economy.[43] It is extremely unlikely, then, that as the Board decides contested cases, the rule regarding the permissible "reasonable" period for a negotiated curtailment of *Laidlaw* rights can long remain indeterminate. The Board will surely be constrained to explain in subsequent cases why a period greater or less than four and one-half months is satisfactory or not. Some courts of appeals might insist that the Board be consistent, or at least adequately explain a departure, even though the Board would be tempted to adhere to an indeterminate, ad hoc approach that imposed continued uncertainty upon the employer.[44] In-

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Ry. & Steamship Clerks, 313 F.2d 318, 324 (3d Cir. 1963). This formulation is criticized more fully in the author's forthcoming article *The Limits of Majority Rule in Collective Bargaining*, 64 MINN. L. REV. 183 (1980). It suffices to say that the Board's determination that it is permissible for the union to sacrifice the interests of replaced strikers in order to obtain other benefits, subject to the limitations of *United Aircraft*, necessarily implies that such a trade-off would not breach the duty of fair representation owed to replaced strikers.

42. 192 N.L.R.B. at 388. Members Fanning and Brown dissented in part. They reserved upon the waivability of *Laidlaw* rights, but concluded that inasmuch as strikers retain voting rights for a year under § 9(c)(3) of the Act, the limitation of *Laidlaw* for any lesser period could not be reconciled with the Act.

43. In *Laher Spring & Elec. Car Corp.*, 192 N.L.R.B. 464 (1971), the Board held that a settlement agreement with a six-month limitation on *Laidlaw* rights had been manipulated by the employer in violation of *United Aircraft*. Members Fanning and Brown, concurring, suggested that the curtailment of reinstatement rights could not be effective "at least until the normal level of prestrike production is reached." *Id.* at 468.

44. Leventhal, *The Courts and Labor Agencies*, 3 U. DAYTON. L. REV. 327, 333 (1978) ("One encounters appellate opinions remanding cases for an explanation of inconsistencies or apparent inconsistencies in Board rulings. No less can be demanded in the interest of even-handed justice.") *Cf.* Lesnick, *The Labor Board and the Courts of Appeals: A Crisis of Confidence*, PROCEEDINGS OF THE NEW YORK UNIVERSITY TWENTY-FIRST ANNUAL CONFERENCE ON LABOR 35, 40 (1969):

> The Board needs to be encouraged [by the courts of appeals] to take in hand specific

asmuch as the employer should be expected to be in a commanding bargaining position, the practical result in most cases would be a surrender of the further reinstatement rights of economic strikers beyond whatever minimum the Board ultimately adopts.

Accordingly, once an employer begins hiring permanent replacements, the Board's approach actually encourages the strikers to abandon the strike, for they might be able to secure both their jobs and whatever benefits the union is able to secure in return for the truncation of the *Laidlaw* rights of other, already-replaced strikers. The replaced strikers could not know whether it would be better to chance reinstatement with whatever benefits the union might be able to secure, and in so doing run the risk of total displacement; but, they would know that if they abandon the *union* in sufficient numbers, the union might lose its majority and so could not bargain their *Laidlaw* rights away.[45] That very uncertainty should be expected to exacerbate the division between those who returned to work and those who were replaced, and to create division among replaced strikers.[46] These considerations should be expected to place enormous pressure on the union to settle as quickly as possible to forestall the loss of a majority. That pressure, of which the employer would surely be aware, should be expected in turn to further diminish the union's remaining bargaining power. Ironically, although the Board's position is premised upon encouraging more stable labor-management relations, it has considerable potential for doing quite the opposite.[47]

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areas productive of heavy litigation and ripe for the task, and to attempt to lay down tolerably clear and workable crystallizations of principle by which the run of litigation may be tested without beginning anew in each case with nothing but a bewildering cross-current of "precedent" to which one can resort . . . .

45. A minority union can act on behalf of its members in making an offer to return to work. NLRB v. I. Posner, Inc., 304 F.2d 773, 774 (2d Cir. 1962), *citing* Consolidated Edison Co. v. NLRB, 305 U.S. 197, 237 (1938) (holding that the Act does not prohibit members-only bargaining in the absence of a majority representative). But an effective collective agreement binding non-members of the union cannot be executed with a union that actually lacks a majority even though the parties believe in good faith that the union enjoys majority support. International Ladies Garment Workers v. NLRB, 366 U.S. 731 (1961).

46. Permanent replacements for economic strikers have been presumed not to support the union. Titan Metal Mfg. Co., 135 N.L.R.B. 196, 215 (1962). The courts of appeals have resisted the Board's recent efforts to alter that presumption. *See, e.g.*, National Car Rental System, Inc. v. NLRB, 594 F.2d 1203 (8th Cir. 1979), and the cases cited therein.

47. After the certification year provided for in § 9(c)(3)of the Act, an employer may refuse to bargain with an incumbent union if there is a good faith doubt of continued majority support based upon objective fact. In view of the rulings in note 46 *supra*, it is unlikely that an employer could justify a refusal to bargain merely because strikers have abandoned the strike; replaced strikers have everything to gain and nothing to lose by continuing to support the union. The incentive to bolt the union created by allowing reinstatement rights to be bargained away, however, makes it much more likely that an employer could avoid dealing with the union on the grounds of objective evidence of lack of majority support, so long as the employer has scrupulously avoided committing any independent unfair labor practices that might result in a bargaining order under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), despite the union's loss of a

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CONCLUSION

The Board's position on the waivability of *Laidlaw* rights cannot be reconciled with the statutory theory underpinning *Laidlaw* or justified by argument to the effectuation of collective bargaining. First, the *Laidlaw* rule draws its sustenance from section 8(a)(3) of the Act, which, like other federal antidiscrimination legislation, is a limit upon employment policy; the limitations it imposes are insulated from disposition by a union. Second, allowing *Laidlaw* rights to be waived adds considerable uncertainty to the calculus of risk that workers must make in deciding whether or not to support a strike. The Board's injection of this degree of uncertainty is inconsistent with the policy (enunciated in *Erie Resistor*) of maintaining the effectiveness of the strike as a significant factor in the regulation of economic activity under section 8(a)(3). Third, to allow a union to sacrifice the jobs of economic strikers in order to maintain its continued institutional existence seems incredibly harsh,[48] especially in view of the Board's opinion, judicially endorsed, that *Laidlaw* imposes no significant burdens upon employers to begin with.[49] Finally, under the Board's approach some economic strikers have greater statutory rights than others—that is, economic strikers whose union has lost a majority are entitled to the full reach of *Laidlaw* while strikers whose union still commands a majority may have something less. This distinction, which is supposed to buttress the institution of collective bargaining, has the more likely potential for engendering instability in labor relations. Accordingly, it is far more in keeping with the statutory and practical considerations underpinning the *Laidlaw* rule not to allow the reinstatement rights of economic strikers to be truncated by agreement between union and employer. The *Laidlaw* rule itself should set the statutory limit of the risk an employee runs by taking part in an economic strike.

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majority. Mere cessation of strike activity, however, does not provide a basis to presume that the employee has also repudiated the union. Allied Industrial Workers Local 289 v. NLRB, 476 F.2d 868, 881 (D.C. Cir. 1973).

48. *Cf.* Schatzki, *supra* note 14 at 403 ("the destruction of one purpose [of the Act] to accomplish another is hardly justified, especially when that destruction is not necessary and, more importantly, is misplaced.")

49. Brooks Research & Mfg. Co., 202 N.L.R.B. 634, 636 ("the alleged burden [of *Laidlaw*] on the employer is neither onerous nor severe"). *See also* American Machinery Corp. v. NLRB, 424 F.2d 1321, 1327-38 (5th Cir. 1970); Note, 82 HARV. L. REV. 1777, 1779 (1969), *quoted in* Laidlaw Corp. v. NLRB, 414 F.2d 99, 105 n.2 (7th Cir. 1969).