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Employer hiring of permanent replacements for striking workers has been the most contentious labor law issue since the 1980s. Unions have attempted to mitigate the striker replacement doctrine before Congress, the National Labor Relations Board, state legislatures and various appellate courts. Employers have strenuously resisted these efforts.

Unfortunately, employers and unions have made public policy arguments about this doctrine with virtually no empirical information about these strikes. This Article fills a void by presenting data from NLRB and court decisions reporting 299 permanent replacement strikes from 1935-1991. It finds that these strikes have occurred continuously since the National Labor Relations Act was enacted in 1935, but their frequency has varied greatly. In particular, these strikes have occurred at unusually high rates from 1975-1991.

The findings reported here expose two major fallacies in striker replacement arguments. Unions incorrectly assert that employers began only recently to use striker replacements, and employers incorrectly assert that during the 1980s there was nothing unusual about replacement strikes. These findings suggest that a legislative compromise is now needed. The Article concludes by examining a policy that would regulate, rather than ban, employer use of striker replacements.

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For more than 50 years, collective bargaining in this country has been built around the right of employees to withhold their labor when all other means have failed. Under the National Labor Relations Act the strike is the primary method of resolving disputes where a union and employer are unable to agree on the terms of a contract. . . . But sadly, workers today who exercise their right to strike are being fired and permanently replaced at an unprecedented rate.¹

Under current law, employees have the right to strike—the ultimate weapon that unions can bring to the bargaining table. What labor unions are now seeking, however, is not protection of the right to strike. Rather, they want Congress to grant them the right to win any strike.²

I
INTRODUCTION

Since 1988, Congress has considered legislation (the Workplace Fairness Act) that would make employer hiring of permanent striker replacements unlawful.³ By now, it is well known that an employer’s right to hire

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³ A precursor to the bill was introduced as H.R. 4552, 100th Cong., 2d Sess. (1988). The provisions of the Workplace Fairness Act first appeared in H.R. 3936 and S. 2112, 101st Cong., 1st Sess. (1990); and most recently as H.R. 5 and S. 55, 102d Cong., 1st Sess. (1993). The House has passed the bill several times, but the Senate has defeated it by threatened filibusters. See Senate Vote Kills Bill to Restrict the Use of Permanent Striker Replacements, DAILY LAB. REP. (BNA) No. 117, at A-9 (June 17, 1992).

It would amend section 8(a) (29 U.S.C.A. § 158(a) (West 1973 & Supp. 1994)) of the NLRA by prohibiting two employer practices:

(6)(i) to offer, or to grant, the status of permanent replacement employee to an individual for performing bargaining unit work for the employer during a labor dispute; or

(ii) to otherwise offer, or grant, an individual any employment preference based on the fact that such individual was employed, or indicated a willingness to be employed during a labor dispute over an individual who—(A) was an employee of the employer at the commencement of the dispute; (B)
permanent striker replacements emanates from a 1938 U.S. Supreme Court decision, *NLRB v. Mackay Radio & Telegraph Co.*

Mackay Radio hired replacements after its workers began a strike for a new labor agreement. Realizing that the employer was successfully continuing operations, the union offered to return to work. Mackay Radio offered to reinstate all but eleven strikers, stating that it would continue to employ eleven replacements after the strike ended. It then took reemployment applications from all the strikers except five "active union men." The National Labor Relations Board (NLRB) found that the company unlawfully discriminated against these strikers "on account of their union activities."

In an ironic decision, the Supreme Court upheld the Board's ruling that an employer violates the National Labor Relations Act (NLRA) when it punishes returning strikers because they engaged in protected concerted activity. In expansive dictum, the Court then stated a general principle permitting an employer to hire permanent replacements for economic strikers: "[n]or was it an unfair labor practice to replace striking employees with others in an effort to carry on the business." This statement seemed to ignore an express provision of the NLRA admonishing courts not to limit the right to strike, and was reinforced by the Court's conclusion that "it

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5. 304 U.S. at 337.

6. Id.

7. Id. at 338.

8. Id.

9. Id. at 347.

10. Id.

11. Id. The Court concluded that "we cannot say (the Board's) finding is unsupported . . . ."

12. Id. at 345.

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."  

Unions argue that this doctrine must be repealed because of its harmful effects on collective bargaining. The most direct effect, they contend, is that it deprives workers of their rightful equality of bargaining power. This occurs, they claim, because strikers who are permanently replaced effectively lose their jobs; and employers then use this threat to intimidate

that "(n)othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike." Clearly, the Act's use of "construed" reflects Congress' concern that courts would revert to their habit of limiting the right to strike. The Mackay Radio Court seemingly ignored this admonition, because permitting employers to hire permanent striker replacements has a chilling effect on that protected activity.

14. Mackay, 304 U.S. at 345.
15. United Steelworkers of Am., Local Union 14534 v. NLRB, 983 F.2d 240 (D.C. Cir. 1993), illustrates union contentions. During negotiations for a new labor agreement, the employer proposed to reduce wages 30%, its contributions to medical insurance by 50%, and vacations by 50%, citing increased market competition. Id. at 242. The union responded that it would consider granting these concessions if the employer would verify economic necessity by disclosing its financial records. Id. The employer refused this request, terminated negotiations after its fourth meeting with the union, and unilaterally implemented its Draconian proposals. Id. at 242-43. Only then did the union strike; and the employer responded by hiring permanent striker replacements. Id. at 243. Eventually, the D.C. Circuit Court of Appeals affirmed an NLRB ruling that the employer was under no duty to disclose its financial records, and therefore, these were economic rather than unfair labor practice strikers. Id. at 246-47. Thus, these strikers could be permanently replaced. See infra note 17 and accompanying text.

Unions would argue that this case illustrates how the doctrine of permanent replacements creates unfair bargaining leverage for employers. Here, union members were presented the Hobson's choice of accepting an immediate 30-50% reduction in their wages and benefits, or striking for a better economic package while losing their job indefinitely. In sum, employer dictation of terms, rather than substantive collective bargaining, occurred here.

See also Statements and Summaries, infra note 22, at E-2, in which AFL-CIO President Lane Kirkland remarked: "Employers with the power to hire permanent replacements have little incentive to negotiate a decent contract. Why bother with collective bargaining when you can provoke a strike by union workers and then permanently replace them with a lower-paid, non-union workforce?"

16. See Senator Howard Metzenbaum's summary of this view, supra note 1. The idea that employees and employers should have equal bargaining power is reflected in 29 U.S.C.A. § 151, findings and policies, stating:

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate (form), substantially burdens and affects the flow of commerce, and tends to aggravate current business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

The primary sponsor of this legislation, Senator Robert Wagner, explained the rationale for equalizing bargaining power:

due to our industrial growth, it is simply absurd to say that an individual, one of 10,000 workers, is on an equality of bargaining power with his employer in bargaining for his wages. . . . The only way that the worker will be accorded the freedom of contract . . . is by the intrusion of the Government to give him that right, by protecting collective bargaining. When 10,000 come together and bargain collectively with their employer, then there is equality of bargaining power.

Hearings on S. 2926: Hearings before the Senate Comm. on Education and Labor, 73d Cong., 2d Sess. 17 (1934).

17. See Stephen Franklin & Michael Arndt, Time Grows Short in Battle over Striker-Replacement
other workers who would otherwise contemplate striking in support of economic proposals. Unions are alarmed by this because the NLRA and Railway Labor Act (RLA) expressly safeguard the right to strike. Therefore, unions argue, no punishment should attach to that right. In particular, they contend that permanent replacement impinges on workers’ right to strike by effectively resulting in dismissal. Evidence showing that strike frequency has dropped sharply since 1980 supports their claim about Mackay Radio’s chilling effect. In addition, they argue that most Americans

Bill, Chi. Trib., June 14, 1994, at 1, 2 (Section 3) (noting that the AFL-CIO estimates that at least 20,000 strikers have lost their jobs).

18. For example, see testimony of Karen Behnke, a replaced striker: “During the negotiations Curtis Industries repeatedly threatened that if the UAW did not accept these concessions the company would permanently replace all of the workers. To back up this threat the company ran newspaper advertisements and began taking job applications for replacement workers prior to expiration of the contract.” Prohibiting Discrimination, supra note 2 at 67.

19. See 29 U.S.C.A. § 163 (West 1978), providing that “nothing in this act . . . shall be construed so as to interfere with or impede or diminish in any way the right to strike.”

20. Although providing this right, the RLA also places significant procedural restrictions on it “in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carriers and employees . . . .” 45 U.S.C.A. § 152, First.

Thus, when either a union or employer seeks a change in rates of pay, rules, or working conditions, it must give notice and confer with the other party. If the parties cannot agree on new contract terms, they may seek the services of the National Mediation Board (NMB); or the NMB may initiate mediation. 45 U.S.C.A. § 155, First. If there is still no agreement, the Board is required to induce the parties to submit their dispute to arbitration, however, either party is permitted to forego arbitration. 45 U.S.C.A. §§ 155, First, 157. If one or both parties reject arbitration, and if the dispute threatens “substantially to interrupt interstate commerce,” the Board must notify the President, who is empowered to create an emergency board to engage in fact-finding. 45 U.S.C.A. § 160. During this time, neither party may act to change the status quo. 45 U.S.C.A. §§ 152, Seventh, 155, First, 156, 160. Employees may strike only after these procedures have been exhausted. See Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 378 (1969) (quoting Florida E. Coast Ry. v. Brotherhood of Railroad Trainmen, 336 F.2d 172, 181 (5th Cir. 1964), cert. denied, 379 U.S. 990 (1965) (noting that “‘implicit in the statutory scheme . . . is the ultimate right to self-help—the inevitable alternative in a statutory scheme which deliberately denies the final power to compel arbitration.’”)).


In 1976, our members at Alaska Airlines were forced to go on strike, then 23 days into the strike, flight attendants received their first letter from management threatening that striking flight attendants would be permanently replaced. . . . When we learned it was legal to replace people permanently, we quickly signed a back-to-work agreement. . . . (C)learly we had been punished for striking and had to accept some less-than-desirable provisions.

22. See Statements and Summaries of Amendment to S. 55 by Sen. Bob Packwood and AFL-CIO President Lane Kirkland, Daily Lab. Rep. (BNA) No. 114, at E-1 (June 12, 1992): “Current U.S. labor law says you cannot be fired for striking, but you can be ‘permanently replaced.’ That meaningless distinction has cost tens of thousands of workers their jobs and income, their pension and health care, their homes and their dignity.” (statement by Lane Kirkland, emphasis in original).

favor legislation to repeal the striker replacement doctrine.\(^{24}\)

Employers, on the other hand, argue that they have a right to continue operations through a strike, and that hiring of permanent replacements is a legitimate response to a strike.\(^{25}\) American law has recognized the employer right to continue operations since the early 1800s—long before Mackay Radio was decided.\(^{26}\) Moreover, employers contend that there are already significant limitations on this right, including the unfair labor practice (ULP) strike exception,\(^{27}\) the duty to reinstate economic strikers when a replacement vacates her position,\(^{28}\) and the prohibition on discriminating against workers because they are striking.\(^{29}\)

Unions will not abandon the Workplace Fairness Act even though it has been defeated several times.\(^{30}\) This is because they attach such import-

\(^{24}\) Poll Shows Two-Thirds of Americans Oppose Replacing Workers Who Strike, DAILY LAB. REP. (BNA) No. 113, at AA-1 (June 15, 1994) (reporting AFL-CIO announcement of a national opinion survey showing that 65% of respondents disapprove of employers being allowed to permanently replace strikers).

\(^{25}\) "Why does an employer hire permanent replacements? Usually it is because the only alternative is to shut down the operation. Very few employers can keep an operation running for any sustained period of time utilizing supervisory personnel, and temporary replacements are frequently impossible to come by. . . ." Preventing Replacement of Economic Strikers, 1990: Hearing on S. 2112 Before the Subcomm. on Labor of the Senate Comm. on Labor and Human Resources, 101st Cong., 2d Sess. 126 (1990) (statement of James P. Melican, Senior Vice President of International Paper). But see Robert L. Rose, Temporary Heaven: A Job at Struck Caterpillar, WALL ST. J., Nov. 29, 1994, at B-1, B-7 (describing Caterpillar’s use of temporary employment firms to fill thousands of strikers’ jobs).

\(^{26}\) See LeRoy, Changing Paradigms, supra note 4 at 271-90.

\(^{27}\) This important exception provides that when unlawful employer conduct causes or prolongs a strike, strikers have a right to immediate reinstatement upon ending their strike. Judge Learned Hand developed this doctrine the same year Mackay Radio was decided in NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d. Cir. 1938). Affirming a Board order requiring reinstatement of 3,200 strikers, Judge Hand explained that since the employer’s “refusal (to bargain) was at least one cause of the strike, and was a tort . . . it rested upon the tortfeasor to disentangle the consequences for which it was chargeable from those from which it was immune.” Id. at 872.

Although Judge Hand articulated the ULP striker theory, the doctrine was not called as such until Judge Jerome Frank refined it in more litigation involving the same employer, NLRB v. Remington Rand, Inc., 130 F.2d 919, 928 n.8 (2d Cir. 1942). There Judge Frank reasoned: It should be noted that even where a strike which initially involved no unfair labor practice is prolonged or aggravated by an employer’s unfair labor practice, the same rule applies as where the strike is the result of an unfair labor practice, and the employer is bound to reinstate all strikers and discharge all those hired to replace them during the strike.

The Supreme Court endorsed this view in Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). To support this doctrine, it cited a Senate Report stating that “to hold that a worker who because of an unfair labor practice has . . . gone on strike is no longer an employee, would be to . . . deny redress to the individual injured thereby.” Id. at 288 n.23 (citing S. REP. No. 573, 74th Cong., 1st Sess. 6-7 (1935)).

\(^{28}\) This duty was set forth in Laidlaw Corp. and Local 681, Int’l B’hd of Pulp, Sulphite, & Paper Mill Workers, 171 N.L.R.B. 1366 (1968), enf’d, 414 F.2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

\(^{29}\) Mackay Radio provided this protection when it concluded: “The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the [employer’s] officials discriminated against the latter on account of their union activity.” 304 U.S. at 339.

\(^{30}\) After passing by a wide margin in the House, the bill was defeated in July 1994 on a cloture vote in the Senate by a 53-47 vote. Gore Pledges Another Try At Striker Replacement Ban, DAILY LAB.
tance to the bill, and because it has been defeated by only a handful of votes in the Senate. Moreover, alternatives to circumvent Mackay Radio appear much less promising. The U.S. Supreme Court could repeal the striker replacement doctrine, but doing so would mean contradicting its consistent support for the doctrine. Some unions have also sought repeal of Mackay Radio through state legislation, but so far, this has failed.

This Article adds new information to the striker replacement debate. Much of that debate is comprised of union and employer interpretations of the NLRA and Supreme Court decisions construing the right to strike. While interesting, this says nothing new, and consequently, probably persuades no one to change her thinking about the bill. Another part of the debate has examined how replaced strikers and unions have been harmed as a result of employers hiring permanent replacements. While dramatic, this gives no sense about the prevalence of permanent replacement strikes (hereinafter, replacement strikes or strikes). In short, this debate has suffered from a lack of systematic empirical evidence about these strikes.

This Article contributes new information to this debate. Analyzing 293 NLRB and 6 federal court decisions, respectively reporting replacement strikes occurring under the NLRA or RLA, it refutes a key union argument that replacement strikes did not occur—or occurred very infre-

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31. Elmer Chatak, a leading AFL-CIO official, stated at a Senate news conference that unions would win congressional approval of this bill eventually, if not in 1994. *Poll Shows Two-Thirds*, supra note 24, at AA-2. Signaling how unions would approach this legislation in the future, he said: "I look at this issue (as being) much broader than a labor-management relations issue. This is an issue of democracy. This is a basic issue of human rights." *Id.*

32. *See supra* note 30.


> It may be that the (economic) scales have once again become somewhat unbalanced and that in consideration of changes in the economic climate and the escalation of violence in our society, it is time for Congress to revisit the regulation of the use of economic weapons. If, however, there is an imbalance in economic weaponry, it is not a regional problem to be addressed in whatever manner, or not at all, as each state sees fit; it is a national problem which requires uniform treatment by Congress.


36. These are too numerous to cite in totality. For testimony of the harm caused to individuals, see, *e.g.*, *supra* note 18; and for a testimony of the harm caused to unions, see *e.g.*, *infra* note 68 and accompanying text.

37. *See cases listed in Appendix.*
In sum, the Article finds that replacement strikes have occurred continuously since 1935, but with great fluctuations related, to some degree, to unemployment levels.\textsuperscript{40} It also finds that this activity sharply increased in 1975, coinciding with reports that employers turned to labor consultants who advocated confrontational measures for dealing with unions. These empirical findings are important because they refute extreme public policy arguments preferred by unions and employers. Stated differently, both sides have been partly correct in characterizing the history of replacement strikes. In light of the evidence presented here, this Article argues that employer use of permanent striker replacements should be subject to greater regulation but not an absolute ban.\textsuperscript{41}

II

CURRENT EVIDENCE ABOUT REPLACEMENT STRIKES IS SPARSE

In the 1980s and 1990s, major strikes involving replacements affected nationally prominent employers. In transportation this included Continental Airlines, United Airlines, TWA, Eastern,\textsuperscript{42} and Greyhound.\textsuperscript{43} Mining companies included Phelps Dodge,\textsuperscript{44} A.T. Massey,\textsuperscript{45} and Pittston,\textsuperscript{46} while news-
papers included The Chicago Tribune,47 New York Daily News,48 and The Pittsburgh Press.49 Replacement strikes also affected two large commodity processors, Geo. A. Hormel50 and International Paper51; and several large manufacturers, including Colt Industries,52 Ravenswood,53 Caterpillar,54 Bridgestone/Firestone,55 Hoover Group,56 and Arvin Industries.57 These

threatened and intimidated replacements, and damaged company property, and this resulted in civil coercive contempt fines totalling $64 million. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2555-56 (1994).


52. Workers at Colt Industries stayed on the job for ten months after their contract expired before striking. NLRB Administrative Law Judge Finds Colt Strike Caused by Unfair Labor Practices, DAILY LAB. REP. (BNA) No. 177, at A-11 (Sept. 14, 1989). Colt then hired permanent replacements for approximately 1,000 strikers, but later was ordered by an administrative law judge to reinstate the strikers. Colt Told to Rehire 800 Strikers; Back Pay Is to Be in Millions, N.Y. TIMES, Sept. 13, 1989, at B3.


54. Approximately 13,000 Caterpillar workers went on strike in November 1991. See Bob Secter, Caterpillar, UAW Agree to Talks but Cling to Demands, L.A. TIMES, Apr. 11, 1992, at A20. The strike reached a turning point in April 1992 when Caterpillar began to accept applications from striker replacements, and was swamped by tens of thousands of applications. At that point, the union was compelled to end its strike and return to work. See Philip Dine, Job Seekers Beseige Caterpillar; Strikers Resist Urge to Give Up, ST. LOUIS POST-DISPATCH, Apr. 8, 1992, at 10A.

55. AFL-CIO NEWS, September 5, 1994, at 3; Raju Narisetti, URW Offers Key Concessions to Bridgestone, WALL ST. J., Jan. 19, 1995, at B8 (reporting the union’s apparent capitulation to the employer’s bargaining proposals after permanent striker replacements were hired).

56. Three hundred seventy-one members of the United Auto Workers went on strike in August 1988 after the company proposed to cut wages by $2.00 an hour, to compel workers to pay for all increases in their insurance, to lose one week of vacation per year, and to freeze their pension plan. The company hired 150-160 replacements at higher wages than those offered to strikers. See supra note 1, at 56-57.

57. Id. at 57-58. Workers went out on strike after the company demanded concessions that would have reduced wage-rates from $11.50 an hour to $5.00 an hour.
strikes even affected major league baseball umpires. 58 (Although replacements were used in the 1987 National Football League strike, and some of these replacements remained employed following the strike, the NLRB recently ruled that strikers were not permanently replaced). 59

Even though these strikes have occurred in numerous industries and have affected the nation's economy more than once, there are no government statistics about them. The Bureau of Labor Statistics (BLS) regularly collects data about major strikes, 60 but unfortunately, provides no distinct information about permanent replacement strikes. The Federal Mediation and Conciliation Service (FMCS) collects data about more strikes, because its survey includes smaller strikes, 61 but like BLS reports, FMCS surveys provide no distinct information about replacement strikes.

Newspaper accounts and court decisions probably are the best sources of information. Unfortunately, they usually report only one strike at a time, making comparisons of these strikes very difficult. In addition, they do not consistently report basic data about strike characteristics, such as duration and number of strikers and replacements.

The only government report about replacement strikes was produced by the General Accounting Office (GAO) in 1991. Based on 201 strikes occurring in 1985 and 203 strikes occurring in 1989, it found that "[a]bout 45 percent of the employers and 77 percent of the union representatives involved in (these) strikes . . . believe permanent replacements were hired in proportionately fewer strikes in the late 1970s than in the late 1980s." 62 This finding implies that replacement strikes were more numerous in the 1980s than the 1970s. But this survey is grossly inadequate because it is based on respondent perceptions rather than actual strike activity information. Respondent bias is also a problem since union representatives would be disposed to overestimate, and employer representatives underestimate, their answers. Further, the finding says nothing about replacement strikes before the 1970s, and therefore describes a relatively short period of time.

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58. In a strike occurring before the PATCO strike, major league baseball replaced striking umpires in 1979. Umpires Call "Strike"—A Different Kind, U.S. News & World Rep., Apr. 16, 1979, at 8. Replacements were hired from amateur, minor, and semiprofessional leagues.


60. See, e.g., U.S. DEPARTMENT OF LABOR, BUREAU OF LABOR STATISTICS, COMPENSATION AND WORKING CONDITIONS 66, Table D-1 (December 1993) (Work Stoppages Involving 1,000 Workers or More, 1947-93).

61. In its 1990 report, for example, the agency notes: "Strike activity was down as the . . . (BLS) reported a yearly total of 45 major strikes or lockouts affecting units of over 1,000 workers . . . while FMCS recorded 711 strikes affecting units of all sizes for the same period," 43 Fed. Mediation & Conciliation Serv. Ann. Rep. 15 (1990).

In sum, this finding provides virtually no useful information about replacement strikes.

Professors John F. Schnell and Cynthia L. Gramm have produced a much better study on replacement strikes. Using the strikes identified by the GAO study, they supplemented the agency’s survey analysis and concluded “strikes are longer . . . when the employer hires permanent replacements than when the employer does not . . . (and) simply announcing the intent to permanently replace strikers is associated with longer strikes.” This study makes a significant contribution to the striker replacement debate because it conclusively shows that employer adoption of striker replacement strategies leads to longer strikes.

But this study examines only two years, and therefore gives a limited historical view of replacement strikes. And while it answers an important and previously unanswered question, it does not consider other important aspects of replacement strikes, such as their size and outcomes.

Apart from these studies, there have been virtually no other studies about permanent replacements. This Article asks new questions about replacement strikes: How often have they occurred from 1935-1991? Have they occurred in particular patterns or cycles? If so, what possible inferences do these patterns or cycles suggest?

III

There Is Insufficient Evidence to Answer “Why Change a Fifty-Year-Old Doctrine Now?”

Research questions for this Article come from the recurring question raised in Congressional testimony: “Why change a fifty-year-old doctrine now?” United Steelworkers president Lynn Williams offered this typical union response: “Although the Mackay doctrine has been on the books for half a century, it was seldom exploited by employers until the last decade. A study published by the General Accounting Office in January 1991 found that employer and union representatives agree: the use of permanent replacements for strikers was on the rise in the 1980s.” He then related:

That certainly is the experience of the Steelworkers Union. Prior to the 1980s, permanent replacements had been an occasional occurrence at some of the smaller plants where we represent employees, but the instances were sporadic and most often resolved through bargaining. Things changed dra-

64. Id. at 199.
65. See Cynthia L. Gramm, The Determinants of Strike Incidence and Severity: A Micro-Level Study, 39 INDUS. & LAB. REL. REV. 361 (1986) (including a survey of managers about employer strike strategies, including hiring permanent replacements. Her samples were too small, however, to perform rigorous hypothesis tests.).
66. Prohibiting Discrimination, supra note 2, at 47.
67. Id.
matically, however, in the 1980s and into the 1990s. We have increasingly faced both the threat and the use of permanent replacements . . . 68 Edward Potter, president of an employer group called Employment Policy Foundation, countered with what appears to be the best evidence for not changing the Mackay Radio doctrine. His group researched 251 NLRB decisions involving employer hiring of permanent replacements.69 Hoping to refute union claims that employer use of striker replacements greatly increased since 1980, he noted that only 22 of these cases were decided after 1980 and concluded that "it is clear that Mackay replacements were hired on a limited but steady basis prior to the 1980s . . . ."70 Further, he concluded that "(b)oth the Foundation study as well as the GAO study lead to one conclusion: since 1938 employers have had occasion to resort to hiring Mackay replacements on a consistent, albeit low level."71 Evidence for these union and employer conclusions is seriously flawed, however. The GAO data cited by the union is only based on opinion responses and thus provides no direct evidence about the frequency of replacement strikes. This evidence is therefore misleading. Moreover, nothing in the union argument is based on hard evidence of increasing employer use of striker replacements in the 1980s.

The employer argument is strengthened by objective data about striker replacements. This analysis is badly flawed, however, because it reports only the years of NLRB decisions involving strikes with permanent replacements. In virtually all striker replacement cases decided by the NLRB, the Board rendered its decisions at least one, and often two or more years after the strike began.72 This lag is important. Given the appellate jurisdiction the Board exercises,73 significant delay always will occur between the beginning of a replacement strike and the Board's disposition of ULP charges stemming from the strike. In the 1980s, this delay was so pronounced that the Seventh Circuit Court of Appeals caustically called the Board "[t]he Rip Van Winkle of administrative agencies."74 Compounding the foundation's error, Board delay is so variable that one cannot reliably infer when a replacement strike began simply by reference to the Board's decision date.75

68. Id.
69. Prohibiting Permanent Replacements, supra note 21, at 160-84.
70. Id. at 165.
71. Id. at 166.
72. In 1981, 490 days elapsed in a typical unfair labor practice case from the date a charge was filed to the date the Board rendered its decision. 46 N.L.R.B. ANN. REP. 228 (Table 23) (1981). By 1985, this figure rose to 720 days. 50 N.L.R.B. ANN. REP. 202 (Table 23) (1986). This figure again rose to 769 days in 1986. 51 N.L.R.B. ANN. REP. 272 (Table 23) (1986).
75. It must be emphasized that the statistic in note 72, supra, only measures the time elapsed from.
In sum, because occurrence of replacement strikes cannot be reliably extrapolated from the year an NLRB case was decided, the foundation's statistical analysis is worthless. Unfortunately, its report gives a badly misleading impression that the year in which an NLRB case was decided coincided with the year a replacement strike occurred.  

The second misleading aspect of this report is the impression of finality it gives to replacement strikes in the 1980s. This is misleading because the report used 1987 as a cutoff for Board decisions, and a large number of decisions after 1987 reported replacement strikes occurring in the 1980s.

The filing of a ULP charge to Board disposition. It does not measure time elapsed from when a replacement strike began to Board disposition.

To appreciate the importance of this distinction, consider these two replacement strike scenarios. In one scenario, a striking union files an unfair labor practice charge alleging that an employer failed to bargain in good faith, but waits for the Board to decide this matter before striking. It does this to ensure that its strikers are protected under the ULP striker doctrine. See supra note 27. The United Mine Workers did precisely this, waiting 14 months for a Board ruling before starting its major strike against Pittston Coal Group. Here, the replacement strike actually occurred after the Board rendered its decision. See R & H Coal Co., 309 N.L.R.B. 28 (1992) (reporting indirectly on the Pittston strike and cited here because there is no published decision on that strike). But in most instances, the replacement strike occurs before the Board renders a decision. The delay between the start of a strike and Board decision may be short (in this database, see Park Manor Nursing Home, Inc., 312 N.L.R.B. 763, 764 (1993) (reporting a replacement strike beginning on December 13, 1991)), or it may be long (in this database, see Hydrologics, Inc., 293 N.L.R.B. 1060, 1060 (1989) (reporting a strike beginning on May 11, 1981), and Oregon Steel Mills, Inc., 291 N.L.R.B. 185, 187 (1988) (reporting a replacement strike beginning on September 9, 1983)). This discussion conclusively demonstrates the Employment Policy Foundation's gross flaw in using Board decision year as a proxy for when a replacement strike actually occurred.

76. See Prohibiting Permanent Replacements, supra note 21, Figures 1 and 2, at 183-84.

77. The report concludes: "research on legislation to overturn the 1938 Mackay decisions [sic] finds that the contentions of the proponents are not supported by the facts. Thus, Mackay replacements have been used consistently and at about the same low level for 53 years, and there is no evidence of any increase in their use in the 1980's." Id. at 181 (emphasis added).

Research in this Article addresses these flaws by analyzing the actual years a replacement strike started. It therefore measures actual strike activity, rather than an artifact (Board decision year) of that activity. Moreover, unlike the GAO and union analyses, this study is based on actual strikes rather than distant recollections or opinions. This is not to suggest, however, that this study is flawless. Clearly, that is not the case (see Parts IV and VI, infra). But this study presents the best evidence to date concerning the frequency and cycles of permanent replacement strike activity from 1935-1991.

IV
SAMPLE AND METHODOLOGY

A Westlaw keyword search was used to identify strikes involving striker replacements. The list was supplemented by citations in cases referring to other replacement strikes that were not identified by the keyword search. The database consisted primarily of NLRB decisions from 1938 (after the Supreme Court decided *Mackay Radio*) through October 1994. In total, 389 cases were read but 90 were deleted from further analysis because the strikes they reported did not actually involve employer hiring of permanent striker replacements. All 299 cases appear in Appendix I (infra).

There are certain advantages in using this legal database. The information reported in cases is generally accurate because it reflects evidence taken under oath. There is also consistency in the use of terminology, such as strike, striker, and replacement.

The database has some distinct limitations, however. It very likely does not include the entire population of NLRB decisions involving replacement strikes. Some decisions involving these strikes probably did not match the keyword search, nor were identified by supplemental citations. At best, the database is a representative sample of the population of all NLRB decisions reporting permanent replacement strikes.

Even this assumption cannot be validated. These cases primarily involved employers or unions who were charged with committing an unfair labor practice, or breaching some other legal duty, during such a strike. Undoubtedly, some replacement strikes never involved legal proceedings, or were settled at some point short of a published decision.

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79. The keyword search was "MACKAY RADIO" & REPLACEMENT(!) OR "PERMANENT REPLACEMENT!" & STRIKE(!). The symbol (!) extends a root word search. For example, it generates a match for any case mentioning STRIKE, STRIKER, and STRIKES.

80. See Belknap v. Hale, 463 U.S. 491, 493-96 (1983) (involving an employer who hired permanent replacements for 400 striking employees, but later negotiated a strike-settlement agreement providing for the strikers' return). This case never progressed beyond the NLRB regional director's office (id. at 495-96), and therefore did not result in a published Board decision. Moreover, if not for the fact that
this database may be biased to contain a disproportionate share of unlawful activity in these strikes.

In addition, although the NLRA and RLA cover many employees, they do not cover strikes involving federal, state and municipal employees, agricultural employees, and certain health care employees (because of the exclusion of such employees between 1947 and 1974). Conse-
sequently, this database excludes strikes occurring outside the NLRA or RLA.86

On the other hand, coverage under these Acts is broad in the private sector. Also, unlike the U.S. Supreme Court, which exercises discretionary jurisdiction in many cases, the NLRB generally rules on all administrative decisions that are appealed to it. In addition, a separate division of the N.L.R.B. appeals decisions to the Board87 so that meritorious appeals are likely to be made even if strikers or unions lack litigation resources. In short, this database is unlikely to be biased to exclude strikes involving strikers or unions lacking resources to litigate possible ULPs.

Also, because strikes are generally the ultimate employee action to exert economic pressure on an employer, and the hiring of replacements is generally the ultimate employer response to strikes, unions and employers generally have an interest in appealing any adverse administrative decisions to the Board. There is good reason to believe, therefore, that the NLRB decisions analyzed here capture a significant share of the volume of replacement strikes that occur within the confines of the NLRA.

V

FINDINGS AND PRELIMINARY CONCLUSIONS

SEE FIGURE 1, FOLLOWING APPENDIX

Overview of 5 Periods in Figure 1: Figure 1 illustrates replacement strike activity from 1935-1991. Close examination shows that strike frequency varied over five periods. Periods 1 and 2 appear to be characterized by much higher strike activity occurring from 1935-1938, and sharply lower activity from 1939-1945. A sharp and short-term spike is then observed from 1946-1948, indicating Period 3. The next period is more difficult to define. One could define the shorter peaks observed in 1952, 1960, and 1968 as distinct upsurges, and therefore demarcations of separate periods. However, as explained infra, these peaks were relatively small and lasted only one year. They represented only short-term departures from a mean of 5.25 replacement strikes occurring over 57 years observed in this

86. See, e.g., United States v. PATCO, 525 F. Supp. 820, 822 (E.D. Mi. 1981) (reporting the firing of striking air traffic controllers); see generally, Herbert R. Northrup, The Rise and Demise of PATCO, 37 INDUS. & LAB. REL. REV. 167, 178-79 (1984). This exclusion from the database is significant because of the number of strikers and replacements involved (approximately 12,000 strikers), and because unions and their supporters maintain that this case influenced private sector employees during the 1980's and 1990's to follow the government's example of employing permanent striker replacements. See H.R. Rep. No. 57 (Workplace Fairness Act), supra note 35, at 20, stating:

President Reagan's firing and permanent replacement of 12,000 striking air traffic controllers in 1981 had a dramatic impact on the way Americans view strikes, including the view taken by a new generation of corporate managers . . . . President Reagan's action was regarded by many observers as a signal to the employer community that it was acceptable to dismiss striking workers. The events surrounding the air traffic controllers' strike ushered in a much more aggressive, and even hostile, employer strategy toward lawful strikes.

87. See Hardin, supra note 73, at 1773-74.
study. Period 4, therefore, seems to be bounded by 1949 and 1974, when strike activity varied in a comparatively narrow range around the mean of 5 strikes per year.

Clearly, this pattern changed in 1975. Strike activity soared, and although it dropped some in 1978, 1981, 1982, 1984, and 1988, strike frequency remained above average in virtually all of these trough years (except 1988). While the beginning of Period 5 is plainly evident, analysis of its most recent years is problematic. It is possible to argue that the period ended when only 4 replacement strikes—a below average number—were observed in 1988. The problem with this view is that 9 of these strikes (nearly twice the mean) occurred one year later, 6 occurred in 1990, and 5 occurred in 1991. In other words, replacement strike frequency in these last three years was above the 57-year average. This suggests that the low activity observed in 1988 was an aberration and not the beginning of a new period of fewer replacement strikes. Moreover, the lag between the beginning of a strike and publication of NLRB and court decisions clearly suggests that strike figures for the most recent years are still likely to rise.

Three basic conclusions are suggested in viewing the totality of evidence in Figure 1. First, strikes involving permanent replacements have occurred continuously since the NLRA was enacted. This basic finding is important because it never before has been substantiated. Moreover, it refutes union contentions that President Reagan's hiring of replacements for striking air traffic controllers initiated private-sector hiring of striker replacements. The second basic finding is that replacement strikes have occurred at historically high levels from 1975-1991. The importance of this finding is that it refutes employer contentions that replacement strikes have been occurring at customary levels during the 1980s and 1990s. The third basic finding is that replacement strikes occur in cycles. Case data do not explain why these cycles occur, but the coincidence of high and low replacement strike rates with certain periods and events suggest some preliminary conclusions. Whether a period had low or high replacement strike activity is based on average replacement strike frequency. In this sample 299 strikes occurred over 57 years. On average, 5.25 strikes occurred annually. Large departures from this mean suggest unusually high or low activity.

**Period 1 (1935-1938).** This was a period of sharply rising replacement strike activity. Although only 6 and 4 strikes occurred respectively in 1935 and 1936, 9 and 10 strikes occurred in 1937 and 1938. This period coincided with the end of the Depression, when unemployment rates were still

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88. See supra note 38.
89. Data for two of the strikes in this database (ALPA strikes of Continental and United Airlines) were extracted from four decisions. This explains why 302 decisions in this database contain information about 300 strikes.
very high (20.0% in 1935, 18.0% in 1936, 14.3% in 1937, and 19.0% in 1938). Obviously, slack employment would be expected to coincide with increased use of permanent replacements, since the unemployed would constitute a potential source of substitute workers.

In addition, the period was marked by significant labor-management strife. Union strike tactics and employer responses were mutually militant. Data for 1937 and 1938 suggest that more replacement strikes occur when unions and employers have confrontational attitudes and exhibit militant behaviors.

**Period 2 (1939-1945).** This was a period of relatively few replacement strikes. Notably, it occurred immediately after the striker replacement doctrine was validated in Mackay Radio. This suggests that Mackay Radio said nothing new about the right of employers to hire permanent replacements. If the Court’s pronouncements were revolutionary, employers might be expected to have used striker replacements more often. In fact, the opposite happened.

It also is notable that the period coincided with the U.S. war effort. World War II erased unemployment. First, the U.S. produced materiel to support allies, causing labor markets to tighten. Later, when millions of workers were enlisted, surplus labor vanished. Unemployment rates plummeted in the period (17.2% in 1939, 14.6% in 1940, 10.0% in 1941, 4.7% in 1942).

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90. These figures are derived from U.S. Department of Labor, Handbook of Labor Statistics 1947 Edition 36, Table A-12 (Bulletin No. 916). BLS did not report unemployment rates during this period, however, it reported estimated number of unemployed people and estimated number of people in the civilian labor force. I computed unemployment rates by dividing the number of unemployed people by the number of people in the labor force.

91. A contemporaneous publication explained that:

In 1936 the sitdown or stay-in strike became known. The striking workers may stay in plant but refuse to work or permit others to work until an agreement has been reached with the employer . . . . Certainly this kind of strike puts the workers in a much stronger position than they are in when they leave the plant and picket outside. As long as the men are inside the plant, strikebreakers cannot be used, violent methods of action on the part of the employer, or of the police and militia, cannot so readily be used because of the danger to company property, and the almost certain injury and death of men involved in the struggle.


92. In 1935, for example, when a strike was threatened in the rubber industry in Akron, the rubber companies hired the Bergoff Industrial Service. Among Bergoff's activities was one which he described as follows:

The Goodyear, Goodrich, and Firestone Companies, faced by what seemed to be an inevitable strike, approved the Bergoff plan to form a vigilante organization known as the Citizens' Law and Order Association of Summit County. . . . It was to be a departure in strategy, as well as a more economical way of breaking strikes. The Association was to enroll 5,000 citizens of Akron and vicinity. When the strike broke, all the members were to be sworn in as special deputies, thus sparing the companies much of the expense of paying for strikebreakers; and the deputies would all be local people inspired by patriotic motives rather than imported mercenaries.

*Id.* at 92-93.

93. There were 3 strikes in 1939; 4 in 1940; 2 in 1941; 4 in 1942; 1 in 1943; 1 in 1944; 2 in 1945.

1942, 1.9% in 1943, 0.1% in 1944, and 1.9% in 1945). As with Period 1, this period suggests a relationship between unemployment and frequency of replacement strikes.

As Period 1 also suggests, employer and union attitudes may play a role in elevating replacement strike activity. Although thousands of strikes occurred during World War II, few involved permanent replacements. The period was marked by a vague labor-management truce as unions and employers tempered their conflicts to assist with the war. Labor-management disputes were still abundant, but their intensity was muted. The fact that few replacement strikes occurred suggests they are generally absent when unions and employers implicitly agree to settle their disputes without inflicting extreme injury on each other.

It is also quite likely that the War Labor Board played a significant part, not only in resolving these disputes, but in checking their intensity. The Board represented the federal government’s commitment to limiting economic weapons in labor-management disputes. As the war further engaged the U.S. in 1941, and several serious strikes affected American industry,

the National Defense Mediation Board initiated the idea of trying to get strikers back to work before the dispute was settled; asking for a resumption of defense production on the understanding that the case would be submitted to the parties to the tripartite Board for investigation and would be promptly considered by the Board, and that the conditions of employment would continue without change during the period of investigation.

The War Labor Board’s successful containment of labor-management disputes suggests an American precedent for limiting union and employer use of economic weapons today. The Packwood amendment to the Workplace Fairness Act (discussed in text accompanying infra notes 132-149) is consistent with this example. It would alter the long-standing policy permitting employers and unions to liberally use economic weapons in the

95. Id.; see also supra note 90.
96. U.S. NATIONAL WAR LABOR BOARD, TERMINATION REPORT XIII (Vol. 1, 1945) recounts: "The Mediation Board was created because of growing industrial unrest which threatened seriously to interfere with the rearmament program during the winter of 1940-41. The number of strikes and lockouts rose from 147 in December 1940 to 316 in March 1941 . . . ."
97. War Labor Board Chairman Lloyd K. Garrison explained:
The Board was established on January 12, 1942, and expired December 31, 1945. In that period the Board disposed of over 20,800 disputes involving 12.5 million employees . . . .
The Board had no enforcement powers (except in connection with the policing of the wage stabilization regulations). Its only recourse in dispute cases, when voluntary methods of bringing about compliance failed, was to report the facts to the executive branch of the government for such action as the President and his advisors might wish to take. Only about a hundred cases out of some 20,000 had thus to be reported.
Id. at XXII, XXVII.
98. Id. at XIII.
course of bargaining collectively. Although this proposal is arguably radical because it involves government more directly in settling private labor-management disputes, unions agreed to it in 1992.

**Period 3 (1946-1948).** Replacement strikes were much more common immediately after the war. The same factors seemingly affecting replacement strike frequency were visible in this period, when a spike in activity occurred. By then, the War Labor Board was decommissioned. Wartime patriotism that softened labor-management disputes gave way to intensified economic self-interest.

Returning soldiers fed unemployment. It rose sharply to 4.0% in 1946, and leveled off to 3.6% in 1947 and 3.8% in 1948. By today’s standards these rates are low, but they were at least twice as high as the rates for 1943-1945. Moreover, with the Depression still fresh in many minds, people may have felt more compulsion than now to accept any job. Thus, a 4.0% unemployment rate might have a much different meaning compared to today, when labor force participants appear to be more selective about job searches. In sum, a perception and reality of a growing supply of substitute labor to serve as striker replacements may have taken hold.

The period was also marked by renewed union militancy. The United Mine Workers, in particular, captured national attention by defying a presidential order and engaging in a very unpopular strike. In turn, this resulted in passage of the Taft-Hartley Act in 1947, which unions vigorously opposed. One commentator characterized labor’s fighting spirit in 1947:

Their “all or nothing demands” seemed arrogant and unreasonable, especially when contrasted with the deceptively conciliatory proposals of Taft to discuss and, if need be, amend or eliminate any provisions of the existing law that were demonstrably unworkable or prejudicial to labor’s legitimate interests. Whatever slight hope there might have been for popular support of substantial revision of Taft-Hartley was shattered by the unions’ intransi-

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99. See NLRB v. Insurance Agents, 361 U.S. 477, 488-89 (1960) (observing that “[t]he presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized”); TWA v. Independent Fed’n of Flight Attendants, 489 U.S. 426, 437 (1989) (concluding that it “is the inevitable effect of an employer’s use of the economic weapons available during a period of self-help . . . that poststrike resentments may be created); and NLRB v. Erie Resistor Corp., 373 U.S. 221, 234 (1963) (noting that “[w]hile Congress has from time to time revamped and redirected national labor policy, its concern for the integrity of the strike weapon has remained constant.”).

100. Statements and Summaries, supra note 22, at E-1.

101. There were 7 replacement strikes in 1946; 5 in 1947; and 12 in 1948.


104. Hardin, supra note 73, at 32.
In sum, the period was marked by a renewal of labor-management contention and legislative reform similar to Period 1. More replacement strikes in the period may reflect this increased tension and employer and union testing of resolve under new labor policies.

**Period 4 (1949-1974).** This period was remarkable for its duration and quiescent replacement strike activity. An above-average number of replacement strikes occurred in only 5 of these 26 years (6 in 1950, 7 in 1952, 7 in 1960, 6 in 1968, and 6 in 1969).¹⁰⁶

The period is notable for its lack of major legislative change. The Labor-Management Reform and Disclosure Act (1959),¹⁰⁷ and health care institutions amendment (1974)¹⁰⁸ were the only changes made to the NLRA. These changes, while important, did nothing to alter the balance of bargaining power between unions and employers.

In addition, although unemployment rates varied during this prolonged period, they did not reach extreme highs or lows observed during the Depression and World War II. The lowest rate, 2.9%, occurred in 1953, while the highest rate, 6.8%, occurred in 1968.¹⁰⁹ The absence of sustained high unemployment appears to have kept replacement strike frequency within the normal range.

**Period 5 (1975-1991).** Contrary to widely held union beliefs that replacement strikes occurred more often as a result of President Reagan’s hiring of PATCO replacements,¹¹⁰ the data here clearly indicate that this trend began as early as 1975. In 1973 and 1974, only 2 replacement strikes occurred. In contrast, 7 and 10 strikes occurred in 1975 and 1976. These were not aberrations. Unusually high replacement strike activity occurred for most of the rest of the period (8 in 1977, 7 in 1978, 11 in 1979, 9 in 1980, 6 in 1981, 7 in 1982, 12 in 1983, 6 in 1984, 7 in 1985, 11 in 1986, 8 in 1987, 4 in 1988, 9 in 1989, 6 in 1990, and 5 in 1991). Putting these statistics in perspective, although 1975-1989 comprised only 26% of the years in the sample, 40% of the replacement strikes occurred then.

Again, higher unemployment appeared to have contributed to more replacement strikes. In 1974, when only 2 replacement strikes occurred, un-

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¹⁰⁹. HANDBOOK OF LABOR STATISTICS, supra note 102.

¹¹⁰. See, e.g., Prohibiting Permanent Replacement, supra note 21, at 39: "[M]ost labor unions mark the 1981 action of former President Ronald Reagan, when he fired 12,000 striking members of the Professional Air Traffic Controllers as the contemporary beginning of the use of permanent replacement workers . . . ."
employment was 5.6%. One year later, however, unemployment soared to 8.5%111 and 7 replacement strikes occurred. Unemployment remained fairly high throughout the period because of recessions. It was above 6% in every year except 1979 (5.8%), 1988 (5.5%), 1989 (5.2%),112 and 1990 (5.5%).113 In 1982 and 1983, when unemployment reached post-Depression highs (9.7% and 9.6%, respectively),114 the highest two-year total of replacement strikes occurred (7 and 12).

The unemployment figures used here (a composite rate for the national civilian labor force) probably understate the relationship between unemployment and replacement strikes. That is because unemployment was considerably higher in heavily unionized industries.115 Also, the percentage of workers represented by unions fell sharply in the period, thereby creating another favorable condition for employing permanent replacements.116

Other factors may have raised the level of strike activity. Although hard to document, employer use of labor relations consultants increased sometime in the mid-1970s.117 Evidence suggests that employers who had long been organized began at this time to confront unions, departing from their practice of accommodation.118 This may explain why Mackay Radio’s striker replacement dictum, essentially a dormant doctrine since 1938, suddenly sprang to life. Consultants recognizing the inherent bargaining lever-

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111. Supra note 102.
112. Id. (for all rates except 1989). The rate for 1989 is reported in 113 MONTHLY LAB. REV. 74 (July 1990) (Table 4, col. 2).
113. The rate for 1990 is reported in 116 MONTHLY LAB. REV. 76 (January 1993) (Table 6, col. 1).
114. Supra note 112.
116. There are two general reasons for this. First, in a given industry, declining unionization indicates increased competition favoring nonunion over union employers. Unionized employers are likely to feel more compelled to depart from a history of agreeing to expensive and restrictive labor contracts. In this scenario, some unionized employers are likely to view use of striker replacements—previously believed too radical to be considered—as a necessary adjustment to survive increased competition. Second, as an industry moves from being predominantly unionized to non-unionized, workers who move from one employer to another are less likely to have compunctions about respecting a union’s picket line during a strike.

In the short period 1983-1988, unionization rates fell from 62.6% to 43.3% in coal mining; 66.0% to 58.5% in blast furnaces, steelworks, rolling and finishing mills; 47.8% to 39.9% in iron and steel foundries; 70.5% to 35.8% in railroad locomotives and equipment; and 64.0% to 49.0% in telephone communications. Michael A. Curne, Barry T. Hirsch, & David Macpherson, Union Membership and Contract Coverage in the United States, 1983-1988, 44 INDUS. & LAB. REL. REV. 5, 16-17 (1990).

117. See John J. Lawler, UNIONIZATION AND DEUNIONIZATION 94 (1990), stating: "There is general consensus on all sides that consultant use by employers expanded substantially throughout the 1970s and into the 1980s;" see also Martin Jay Levitt, Confessions of a Union Buster (1993) for a consultant’s extraordinary account of his work.
118. See supra notes 42-58. Most, if not all of these strikes, appear to have involved an employer’s first use of striker replacements.
age in a striker replacement doctrine, especially during a prolonged period of surplus labor, probably toughened employer bargaining behavior.

Discussion of this period cannot conclude without emphasizing the fact that more replacement strikes, particularly in the most recent years, are likely to be reported for years to come. In sum, analysis for the more recent years (particularly 1990-1991) is problematic because judicial reporting of replacement strikes may not occur until many years after such strikes begin. Given the significant lag between when a strike begins and when it is reported in NLRB or court decisions, conclusions for recent years should be treated as preliminary and subject to some upward revision.

VI
LIMITATIONS AND CAVEATS

Although this research presents important new findings about replacement strikes, it also has substantial limitations. These extend beyond the possibility that this sample is not representative of the population of replacement strikes.

First, this Article explains replacement strike frequency and cycles in terms of changing unemployment, labor relations climate, legislation, and union density. But it does no more than suggest the possibility of these relationships. To establish that these relationships exist more specific data are needed. In addition, a much more rigorous statistical analysis than the one used here is needed.

To illustrate, this study has no data about unemployment in each employer's relevant labor market at the time a particular strike commenced. It examines only national unemployment figures. In all likelihood, these national rates were irrelevant to employers contemplating use of striker replacements. What probably mattered were the particular characteristics of each employer's labor market when a strike began.

Second, this analysis has no data concerning employer options to work through a strike, such as stockpiling inventory, moving bargaining unit work to another location, reducing operations during a recession, and other alternatives to hiring replacements. Presumably, a struck employer would consider these alternatives to hiring replacements. This is important because replacement strike cycles observed here may be related to these factors.

Third, one cannot assume that law pertaining to striker replacements remained constant throughout the periods analyzed. In fact, it changed on numerous occasions. It is patently wrong to believe, as do some employer and union representatives, that the 1938 Mackay Radio decision and 1981 PATCO strike were the only striker replacement milestones.

For instance, section 9(c)(3) of the Taft-Hartley Act made replaced strikers completely ineligible to vote in decertification elections. This led to charges that the law unfairly penalized strikers. This perception was so widely held that a Republican President, Dwight Eisenhower, campaigned to repeal this so-called "union-busting" provision. In the Labor-Management Reporting and Disclosure Act of 1959, Congress amended this section to permit replaced strikers to vote within one year of commencing their strike.

These changes may have influenced employer decisions to use striker replacements and union behavior to avoid strikes or limit them only to situations where hiring replacements would be especially difficult. The significance of striker ineligibility to vote in decertification proceedings between 1947 and 1959 is that local unions had as much to lose as individual strikers. After 1959, however, unions were provided somewhat greater protection from decertification. Over time this change may have influenced union leaders to assume more risk in exposing individual strikers to replacements than would have been the case from 1947-1959. Nevertheless, this analysis does not specifically measure for this.

Also, this analysis does not examine whether important doctrinal changes in Mackay Radio had any independent effect on replacement strike activity. In its 1956 Mastro Plastics decision, the Supreme Court upheld the Board's policy for ULP strikers. This substantially improved a striker's protection from being permanently replaced. Employer risk resulting from hiring permanent replacements increased because the Board could later rule that strikers were entitled to retroactive reinstatement and backpay during the time they offered to return to work and were denied reinstatement. Because of this increased risk, employer propensity to hire permanent replacements might have declined. Consequently fewer replacement strikes would have occurred as more strikes involved only temporary replacements or other employer adjustments.

120. Taft-Hartley Act, Pub. L. No. 101, ch. 120, 61 Stat. 136, 144 (1947), providing that "(n)o election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

121. During proceedings on the Labor-Management Relations and Disclosure Act, Senator Case of South Dakota stated: "I believe everyone would have to admit that if one loses the right to vote by engaging in a concerted stoppage of work, the right to strike has been effectively curtailed, crippled, and defeated." 150 CONG. REC. 6396 (1959).

122. 150 CONG. REC. 13026 (1959) (quoting President Eisenhower).

123. Pub. L. No. 86-257, 73 Stat. 542 (1959), providing: "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike." Reprinted showing deletions and additions to 29 U.S.C.A. § 159(c)(3) in 2 LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS DISCLOSURE AND REPORTING ACT 1872 (1959).

This study also ignores important external forces, such as deregulation, in the late 1970s and early 1980s. Telecommunications, trucking, and air transportation were key industries affected. Deregulation stimulated labor-cost competition, which may have led to contentious negotiations in which employers sought significant wage and benefit reductions. This, in turn, may have provoked strikes and hiring of striker replacements.

VII

PUBLIC POLICY IMPLICATIONS AND PROPOSAL

Although these findings are preliminary because they are based on only a portion of all replacement strikes occurring in the U.S., this much is clear: replacement strikes have occurred every year since enactment of the NLRA. This elementary fact has never been documented and suggests several important policy implications.

First, a total legislative ban on an employer's right to hire permanent replacements would end a continuous 60-year practice. There may be a policy justification for ending this practice, such as restoring balance to employee bargaining power. But on this evidence no one can argue anymore that employer hiring of permanent replacements should be banned because the practice never occurred before the 1981 PATCO strike. Contrary to union arguments, strike history was never so ideal.

There is another important side to these findings. Other research has shown that replacement strikes have particularly undesirable features: they...


126. See supra note 16.

127. Portions of Senator Wagner’s speech explaining the policy rationale of the NLRA suggest an apt historical analogy between present conditions for workers, and conditions in the 1920s and 1930s:

The primary requirement for cooperation is that employers and employees should possess equality of bargaining power. . . . The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract on employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively . . . is a veritable charter of freedom of contract; without it there would be slavery of contract.

78 CONG. REC. 3678 (1934). Senator Wagner’s thoughts are interesting to contemplate in light of the negotiations described in note 15, supra.
last longer than strikes without replacements, and since the early 1980s involve larger bargaining units. They also involve a much greater percentage of parties with mature bargaining histories. Adding more evidence to the notion that replacement strikes are especially undesirable, cases in this sample also involved considerable strike-related violence.

Considered together, this evidence suggests that more regulation of replacement strikes is needed. Just as unions can no longer argue that replacement strikes are a recent aberration, employers cannot argue that the status quo is acceptable.

High replacement strike activity from 1975-1989 is consistent with union claims of a "sea change" in collective bargaining. It is remarkable that more replacement strikes occurred when general strike activity fell sharply. Thus, this Article presents evidence tending to substantiate union claims that replacement strikes in the 1980s had a chilling effect on strikes.

Only two other periods of high strike activity occurred before 1976 (1935-1938, and 1946-1948). These were very brief, so that harmful effects from these strikes were short-lived. They were also related to extraordinary events, enactment of labor laws affecting the balance of power between employees and employers, and unusual levels of unemployment. In contrast, no major changes in labor law occurred in the recent period. Nevertheless, instead of spiking for one or two years, replacement strike activity has remained high for almost 15 years. This suggests a key difference between earlier periods and the present: more employers are now incorporating use of striker replacements in their personnel strategies. If true, striker replacement doctrine has been stretched beyond the business-necessity justification.

In sum, evidence adduced here exposes two major fallacies in striker replacement arguments. The union fallacy is that permanent replacement strikes are only a recent phenomenon. The employer fallacy is that there was nothing unusual about employer use of permanent replacements in the 1980s. From a historical perspective, the most desirable period was 1949-


129. Id. at 12.

130. See, e.g., Clear Pine Mouldings, 268 N.L.R.B. 1044, 1045 (1983) (describing "40 to 50 pickets outside the plant who were carrying baseball bats, tire irons, and ax handles, and were accompanied by dogs"); International Assn. of Machinists v. Eastern Air Lines, 121 B.R. 428, 431 (Bankr. S.D.N.Y. 1990) (describing strikers who "called passengers 'scab' and 'cheap ass' while telling them to have a 'shit flight,' (and) that they (would) be 'killed' and not to forget their 'body bag' ");

131. See Preventing Replacement, supra note 1, at 39: "there has been a sea change... in the whole climate of industrial relations in this country... [E]mployers have been emboldened by President Reagan's action in the PATCO strike" (testimony of Thomas Donohue).

132. See supra note 23.
1974 because it was long-lasting and had normal replacement strike activity.

Since the reality of replacement strikes is somewhere in the middle of union and employer arguments, this suggests that compromise legislation should be considered. To date, the Workplace Fairness Act has offered two extreme alternatives: ban all employer hiring of permanent replacements, or change absolutely nothing. In 1992 Senator Robert Packwood offered an amendment (a substitute bill) that took a more balanced view of permanent striker replacements.

It proposed to limit when an employer could hire permanent replacements by requiring a union to give at least seven calendar days notice of its willingness “to submit all unresolved (contract) issues in the dispute to a fact-finding board . . . .” Likewise, it required an employer to respond within seven days that it would submit unresolved issues to a fact-finding board, or be prohibited from hiring permanent replacements if struck. In short, it proposed a neutral body to resolve issues over which an employer and union bargained to impasse. This process would coerce participation and settlement by exposing unions to permanent replacements, and by prohibiting employers from using permanent replacements.

The board would be comprised of “one member representing the labor organization, one member representing the employer, and one neutral member experienced in fact-finding and interest arbitration all selected within ten days . . . .” Moreover, “[b]y agreeing to submit all unresolved issues to fact-finding as provided in this section, the parties [would] be deemed to have made an agreement . . . .” This would extend “the parties’ preexisting collective bargaining agreement . . . until the earlier of 45 calendar days after the board is appointed or until the fact-finding board issues its report.” During this period, strikes and lockouts would be prohibited, and the board would issue a “report” of nonbinding “recommendations” that would constitute an enforceable contract if the parties agreed. If only an employer failed to accept these recommendations, it would lose its right to hire permanent striker replacements; if only a union rejected these recommendations and commenced a strike, it would be subject to permanent striker replacements. If both parties rejected the board’s recommendations, the employer would be free to hire permanent replacements.

134. Id. at subsection (iii)(B).
135. Id.
136. Id.
137. Id. at subsection (iii)(B)(i) at D-3.
138. Id. at subsection (iii)(B)(2).
139. Id. at subsection (iii)(C).
140. Id. at subsection (iii)(D).
until the union ended its strike and agreed to the board's impasse recommendations.\textsuperscript{141}

This proposed compromise appears to parallel already existing features in the Railway Labor Act. While that Act permits employees to strike, it postpones exercise of that right until intensive mediation occurs.\textsuperscript{142} If mediation fails, the National Mediation Board attempts to induce the parties to submit their impasse to binding arbitration.\textsuperscript{143} Just as parties under the RLA are offered arbitration without being compelled to submit to it, a union and employer would be free under the Packwood amendment to ignore a settlement suggested by the advisory fact-finding panel.\textsuperscript{144} During the final impasse stage before a strike occurs under the RLA, no party is permitted to alter the status quo by changing wages or working conditions or by striking.\textsuperscript{145} The Packwood amendment contains a similar provision aimed at containing the dispute.\textsuperscript{146} Eventually under the RLA a union is free to strike, but this occurs only after it is subjected to a coercive process designed to induce voluntary settlement of disputes.

It should be noted that the elaborate settlement provisions under the RLA have long generated criticism. A major criticism is that the Act frustrates bargaining by encouraging unions and employers to stall until they reach the end-game in which a presidential emergency board is appointed to propose a settlement.\textsuperscript{147} Referring to this end-game, Professor Benjamin Aaron in 1963 characterized RLA processes as a ritual "as stylized as the courtship dance of the great crested grebe."\textsuperscript{148} This critique is probably overstated for the present context, however, because it assumes that if parties were free to use economic weapons, the immediate imposition of injury would quickly produce a voluntary settlement. A finding in a companion study showing that replacement strikes are lasting much longer than in the past (an average of 177 days from 1982-1990)\textsuperscript{149} clearly suggests that the present strike policy under the NLRA is not achieving early settlements and is not promoting effective collective bargaining.

\textsuperscript{141} Id.
\textsuperscript{142} Supra note 20.
\textsuperscript{143} Id.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} Supra notes 136-37.
\textsuperscript{147} Statement of this position appears in DONALD E. CULLEN, NATIONAL EMERGENCY STRIKES 75 (1968):

\textit{The final count in the indictment against the act is that it has largely paralyzed the bargaining process in major disputes. Since both parties are said to expect these cases inevitably to go to emergency boards and perhaps then to the White House, neither has an incentive to settle voluntarily in private negotiations or in the mediation sessions that must precede the appointment of a board. . . .}

\textsuperscript{149} Supra note 128.
Striker replacement doctrine has been the most controversial aspect of labor law since the 1980s. Unfortunately, policy debate has shed more heat than light. Unions have dramatized the law by showing how it has broken the lives of members who were simply engaging in activity protected by federal law. Employers have made this a gut issue by portraying the Workplace Fairness Act as a law that would hold employers hostage to extreme union demands.

This Article presents concrete evidence refuting key union and employer striker replacement arguments. We now know that replacement strikes have occurred continuously since at least 1935, but also know they have occurred in wide-ranging cycles. In addition, evidence shows that replacement strikes have occurred at sustained and abnormally high levels since 1976. Cumulatively, these findings weaken the union position for a total ban on permanent striker replacements, since this would radically alter nearly 60 years of experience, and the employer position that nothing unusual about replacement strikes has recently occurred.

As debate continues, lawmakers should consider new alternatives. The Packwood amendment is one such plan because it preserves existing worker and employer rights while strengthening collective bargaining. Its virtue is that it retains the economic weaponry set forth in the NLRA and RLA while reducing the probability of their use. If enacted, it probably would lower the number of replacement strikes by increasing "arbitrated settlements" of disputes that otherwise would have some likelihood of resulting in a replacement strike. Importantly, however, it probably would not reduce this number to zero. Other alternatives to taking no action and placing a total ban on hiring permanent replacements should be considered.

By now, this policy debate should be entering a mature phase where more systematic, empirical information is considered. Although individual strikes present compelling stories, changing the law to meet isolated or extreme cases is unwise. Until now no known study has examined the frequency and cycles of permanent replacement strikes from the 1930s to the present. This study contributes such information, albeit preliminary, to the present policy debate.

150. "[A]rbitrated settlement" is accurate, and yet somewhat of a contradiction since arbitration is an adjudicatory procedure that usually ends in an award rendered by a third-party. Coinage of this term reflects the fact that the procedure here uses a tripartite panel common to arbitration to generate a coerced settlement. The bill's provision for stripping employers of their Mackay Radio right for failing to agree to the panel's recommendations, and for exposing workers to permanent replacements for choosing to strike notwithstanding these recommendations, is inherently coercive.
APPENDIX I:
TABLE OF CASES

(Arranged Alphabetically by Decision Year)

Decision Year 1938

*C. G. Conn, Ltd.*, 10 N.L.R.B. 498 (1938).

Decision Year 1939

*Calmar Steamship Corp.*, 18 N.L.R.B. 1 (1939).
*Eagle-Picher Mining*, 16 N.L.R.B. 727 (1939).
*Stewart Die Casting Corp.*, 14 N.L.R.B. 872 (1939).
*Williams Coal Co.*, 11 N.L.R.B. 579 (1939) (2 strikes reported).

Decision Year 1940

*Aladdin Indus., Inc.*, 22 N.L.R.B. 1195 (1940).
*American Shoe Mach. & Tool Co.*, 23 N.L.R.B. 1315 (1940).
*Chicago Casket Co.*, 21 N.L.R.B. 235 (1940).
*Phelps Dodge Corp.*, 19 N.L.R.B. 547 (1940).

Decision Year 1941

*Manville Jenckes Corp.*, 30 N.L.R.B. 382 (1941).
*National Seal Corp.*, 30 N.L.R.B. 188 (1941).
*New York & P.R. Steamship Co.*, 34 N.L.R.B. 1028 (1941).
*Ore Steamship Corp.*, 29 N.L.R.B. 954 (1941).
*Jackson*, 34 N.L.R.B. 194 (1941).
*S. H. Kress & Co.*, 34 N.L.R.B. 1152 (1941) (2 strikes reported).
*The Ohio Calcium Co.*, 34 N.L.R.B. 917 (1941).

Decision Year 1942

*A. Sartorius & Co.*, 40 N.L.R.B. 107 (1942).
Poultrymen’s Serv. Corp., 41 N.L.R.B. 444 (1942).
The Barrett Co., 41 N.L.R.B. 1327 (1942).
The Cleveland Worsted Mills Co., 43 N.L.R.B. 54 (1942).

Decision Year: 1943

American Bread Co., 51 N.L.R.B. 1302 (1943).
Berkshire Knitting Mills, 46 N.L.R.B. 955 (1943).
Field Packing Co., 48 N.L.R.B. 850 (1943).
Western Cartridge Co., 48 N.L.R.B. 434 (1943).

Decision Year: 1944

No cases are in sample.

Decision Year: 1945

Fairmont Creamery Co., 64 N.L.R.B. 824 (1945).

Decision Year: 1946

No cases are in sample.

Decision Year: 1947


Decision Year: 1948


Decision Year: 1949

Kansas Milling Co., 86 N.L.R.B. 925 (1949).
Myers Product Corp., 84 N.L.R.B. 32 (1949).
Decision Year: 1950

Greenville Cotton Oil Co., 92 N.L.R.B. 1033 (1950)
Luzerne Hide & Tallow Co., 89 N.L.R.B. 989 (1950).

Decision Year: 1951

Celanese Corp. of Am., 95 N.L.R.B. 664 (1951).
The Office Towel Supply Co., 97 N.L.R.B. 449 (1951).
The Texas Co., 93 N.L.R.B. 1358 (1951).
West Coast Casket Co., 97 N.L.R.B. 820 (1951).

Decision Year: 1952

Longview Furniture Co., 100 N.L.R.B. 301 (1952).

Decision Year: 1953


Decision Year: 1954


Decision Year: 1955


Decision Year: 1956


Decision Year: 1957

California Date Growers Ass’n, 118 N.L.R.B. 246 (1957).

Decision Year: 1958


Decision Year: 1959


Decision Year: 1960


Decision Year: 1961


Decision Year: 1962

Park Edge Sheridan Meats, Inc., 139 N.L.R.B. 748 (1962).
Decision Year: 1963


Decision Year: 1964


*Shell Oil Co.*, 149 N.L.R.B. 283 (1964).


Decision Year: 1965


Decision Year: 1966


Decision Year: 1967

*Davis Wholesale Co.*, 165 N.L.R.B. 297 (1967).

*Georgia Highway Express, Inc.*, 165 N.L.R.B. 514 (1967).

*Local Union 8280, United Mine Workers*, 166 N.L.R.B. 271 (1967).

Decision Year: 1968


Decision Year: 1969


Decision Year: 1970


Decision Year: 1971


Restaurant Ass'n of the State of Wash., 190 N.L.R.B. 133 (1971).

Decision Year: 1972


Decision Year: 1973

Ramona’s Mexican Food Prods., 203 N.L.R.B. 663 (1973).

Decision Year: 1974


Decision Year: 1975


Decision Year: 1976


Decision Year: 1977


Decision Year: 1978

Decision Year: 1979

M.C.C. Pac. Valve, 244 N.L.R.B. 931 (1979).

Decision Year: 1980

Associated Grocers, 253 N.L.R.B. 31 (1980).
Harowe Servo Controls, 250 N.L.R.B. 958 (1980).

Decision Year: 1981


Decision Year: 1982

Heads & Threads Co., 261 N.L.R.B. 800 (1982).

Decision Year: 1983


Decision Year: 1984

Harvey Eng’g, 270 N.L.R.B. 1290 (1984).

Decision Year: 1985


Decision Year: 1986

Air Line Pilots Ass’n v. United Air Lines, 802 F.2d 886 (7th Cir. 1986) (combined with Rakestraw (1992) and counted as one strike).

Decision Year: 1987


Decision Year: 1988

Decision Year: 1989

O'Neill v. Air Line Pilots Ass'n, 886 F.2d 1438 (5th Cir. 1989) (combined with Continental (1990) and counted as one strike).

Decision Year: 1990

Continental Airlines (In re), 901 F.2d 1259 (10th Cir. 1990).

Decision Year: 1991

REGULATING STRIKER REPLACEMENTS

Decision Year: 1992

R & H Coal Co., 309 N.L.R.B. 28 (1992) (also contains information on United Mine Workers/Pittston strike; two strikes reported).
Rakestraw v. United Airlines, 981 F.2d 1524 (7th Cir. 1992).

Decision Year: 1993


Decision Year: 1994

Marchese Metal Indus., Inc., 313 N.L.R.B. No. 179 (1994).
Figure 1: Replacement Strikes by Year

NLRA and RLA Strikes, 1935-1991

Legend
- Number of Strikes