All *Mackay* Says:

Why the National Labor Relations Board should replace its hard-to-justify interpretation of the "*Mackay* rule"[a]

by Mark Kaltenbach[b]

I. Introduction

Technically, the Supreme Court has never considered the question of whether it is lawful for an employer to permanently replace economic strikers. However, its dicta in *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), stating that an employer does not violate the National Labor Relations Act when it permanently replaces economic strikers in an effort to carry on its business has been acknowledged as having "vitality" in subsequent Supreme Court decisions.[1] E.g., *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963). The National Labor Relations Board interpreted *Mackay* in *Hot Shoppes, Inc.*, 146 NLRB 802 (1964), and that interpretation still prevails. While the *Hot Shoppes* rule has itself never been fully fleshed out, it is best understood as having established a presumption that an employer's permanent replacement of economic strikers is undertaken to serve the employer's legitimate interest in maintaining operations during a strike absent some affirmative showing of unlawful purpose by the union, employee, or General Counsel. The Supreme Court has acknowledged that *Hot*

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[a] This is a working draft of an expected formal article on this topic.

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[1] Supreme Court and Board cases draw distinction between the permanent replacement of employees striking purely as a means of applying pressure in a dispute over economic matters ("economic strikers") and those striking in protest of an employer's unfair labor practice ("unfair labor practice strikers"). *Mastro Plastics Corp. v. Nat'l Labor Relations Bd.*, 350 U.S. 270, 278 (1956); *Covington Furniture Mfg. Corp.*, 212 NLRB 214, 219 (1974). Employers are not permitted to permanently replace unfair labor practice strikers, and an elaborate body of law has evolved surrounding the unfair labor practice strike. This paper is confined to a discussion of the permanent replacement of economic strikers.

Shoppes is permissible under Supreme Court precedent, thereby implicitly recognizing both that the Court's decisions do not mandate the *Hot Shoppes* doctrine and that the Board has significant discretion in interpreting *Mackay*. See *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 fn 8 (1983).

In this paper I summarize the often-misstated law surrounding the permanent replacement of economic strikers and argue that, particularly given the vast changes in U.S. labor relations in recent decades, the *Hot Shoppes* doctrine is out of keeping with both the Supreme Court's rulings on what the Act requires in this context and the Act's text. Consequently, I recommend that the Board overturn *Hot Shoppes*. In its place, the Board should find that when an employer refuses to reinstate economic strikers because their places have been filled by permanent replacements, the employer has the burden of establishing that offers of permanence were necessary for it "to protect and continue [its] business by supplying places left vacant by the strike." See *Mackay Radio*, 304 U.S. at 345-46. Such action by the Board would ensure that it is adequately meeting its "responsibility…to strike the proper balance between the [employer's] asserted business justifications [for actions during an economic strike] and the invasion of employees' rights in light of the Act and its policy." See *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967).

Because *Mackay* remains the Supreme Court's only direct analysis of an employer's ability under the Act to permanently replace economic strikers, I begin by recounting that decision. I then discuss the Board's interpretation of *Mackay* in *Hot Shoppes* and the Supreme Court's subsequent acknowledgment in *Belknap* that this interpretation is permitted, though not required, by Supreme Court precedent. I next consider *Hot Shoppes*'s continuing validity and wisdom in light of the current state of U.S. labor relations and the Supreme Court's instructions to the Board that, when resolving cases involving employer behavior during an economic strike, the Board must undertake the "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." *Erie Resistor*, 373 U.S. at 228-29. After concluding that *Hot Shoppes* is out of keeping with Supreme Court precedent and the Act, I recommend replacing it with a rule that would require an employer using permanent replacements to affirmatively show that doing so was necessary to maintain operations during the economic strike.

II. *NLRB v. Mackay Radio & Telegraph Co.*

a. Factual and procedural background

Just a few months after President Franklin Roosevelt signed the National Labor Relations Act into law, the National Labor Relations Board—the body created by the Act to serve as the primary arbiter of its provisions—issued its decision in the case of *Mackay Radio & Telegraph Company*.[2] Thomas C. Kohler and Julius G. Getman, "The Story of NLRB v. Mackay Radio & Telegraph Co.: The High Cost of Solidarity," p. 13 in *Labor Law Stories*, New York: Foundation Press, 2005. When negotiations between the American Radio Telegraphists' Association (a union) and Mackay Radio & Telegraph Company (a major telecommunications company with a national and international presence) for a first contract for radio operators at the company's San Francisco location stalled, the union called a nationwide strike at the company. *Mackay Radio*, 1 NLRB at 205-06. While strike participation and enthusiasm was initially extremely strong at the San Francisco office and those offices very close by, Mackay employees in Portland, Oregon were the only others to really heed the strike call. *Id.* at 206-07. At other locations—Los Angeles, New Orleans, Chicago, New York, and elsewhere—employees by and large did not

[2] I derive most of the historical information regarding the *Mackay* decision from Kohler and Getman's excellent chapter relating in much greater detail the political and legal history of the *Mackay* decision. I also rely heavily on the Board's extensive factual findings in its decision in *Mackay*, 1 NLRB 201 (1936), the appeal of which ultimately led to the Supreme Court's decision.

participate in the strike, and where they did participation quickly fizzled. *Id.* The company, for its part, took aggressive action to maintain operations in San Francisco. *Id.* at 206. It re-routed communications to run through its Los Angeles location wherever possible. *Id.* And for those lines that could not be re-routed, the company brought in employees from other locations to do the work of the strikers. *Id.* Nine came from Los Angeles, two from Chicago, and seven from New York. See *id.* at 206; 216.

News of the impending arrival of the strikebreakers and of the lukewarm (to put it mildly) participation at other locations, along with rumors that the company planned to close or severely curtail its West Coast operations and the urgings of Mackay supervisors and managers, deflated the San Francisco strikers. *Id.* at 206. Within a few days, they were ready to go back to work. *Id.* at 206-207.

Ellery Stone, Mackay's vice-president of operations, had either personally or through an agent promised the strikebreakers from Los Angeles, New York, and Chicago that they would be permitted to remain permanently in San Francisco if they so desired. *Id.* at 213. Stone apparently decided that if any of the replacements accepted this offer, a coordinate number of the strikers would not be permitted to return to work once the strike ended; in other words, they would be permanently replaced. *Id.* As it turned out, five of the eighteen transferred employees ultimately decided to stay in Los Angeles, meaning five striking workers would not be permitted to return to work. *Id.* at 216. After a great deal of behind-the-scenes machinations by the company higher-ups, the five strikers ultimately ousted included the four employees most deeply involved with the union and a supervisor who was a member of the union and had participated in the strike. Kohler and Getman, supra at 33; 34 fn. 48. The displaced employees, through the

union, charged Mackay with violating Sections 8(a)(1) and (3) of the Act, bringing the matter to the Board. *Id.* at 34.

At the time, the Board faced an existential threat from the Supreme Court. In *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), decided only a couple of months before the events that gave rise to *Mackay*, the Court had struck down as unconstitutional a large portion the National Industrial Recovery Act. *Id.* at 35. That decision, striking down as it did much of the statute that served as the direct predecessor and imperfect prototype to the National Labor Relations Act, put the survival of the NLRA in serious doubt even as Congress was in the process of passing it. *Id.* In those early days, the Board carefully screened the cases it brought in an effort to maximize the likelihood that the federal courts would provide favorable answers to questions of the Act's constitutionality and the fundamental interpretation of its provisions. *Id.* at 37-38. In *Mackay*, which so obviously involved interstate commerce, the Board recognized an excellent potential test case. *Id.*

With one eye on the justices, the Board apparently saw two means of resolving the substantive charge in the case—one thorny, the other routine. The first would be to find that Mackay's very act of permanently replacing the strikers "was a discrimination in regard to tenure of employment of the type forbidden by [Section 8(a)(3)]." *Mackay*, 1 NLRB at 216. The second would be to find that Mackay had breached the Act by discriminatorily choosing the strikers whom the replacements would displace on the basis of union involvement. *Id.* at 216-17. The remedy for either violation would be the same. The Board, "find[ing] that a decision on [whether permanently replacing strikers is itself violative of the Act] is not necessary to the final judgment in this case," elected "not [to] decide the matter." *Id.* That is, the Board took the routine path and left the thorny one for another day, thereby hopefully ensuring that the Court,

ever sensitive to the rights of employers, would focus on the overarching constitutional and statutory questions the Board wanted addressed without getting distracted by the actual substantive violation at issue. The Board went on to find ample evidence that Mackay had contrived to ensure that the five workers displaced were five of the leading proponents of the union. *Id.* at 218; 225. The Board held that this was a clear violation of Section 8(a)(1) and (3) and ordered Mackay to cease and desist its unlawful behavior, to reinstate the five strikers and pay them backpay, and to post a notice advising employees of the Board's decision and promising to abide by it. *Id.* at 234-35.

On appeal, a three-judge panel of the Ninth Circuit Court of Appeals issued three separate opinions. The lead opinion in particular sheds considerable light on the political and judicial context in which the case was being considered. In it, Judge Curtis D. Wilbur found that, while the Act was not necessarily wholly unconstitutional and while the strikers were unquestionably "employees" within the meaning of the Act, the Board's order that they be reinstated violated the employer's Fifth Amendment guarantee to due process of law. *Mackay Radio*, 87 F.2d 611, 621; 628-29 (1937). His essential rationale was that an employer has a right, unassailable by government as a constitutional matter, to reign as the "Master of the operation of his business," and the Act as applied by the Board would render him not so. *Id.* at 630. In a concurring opinion, Judge Clifton Mathews found that it was unnecessary to reach the constitutional questions raised by Mackay because the Board's order was beyond its statutory authority. *Id.* at 631. In a series of conclusory statements, Mathews found that the Employer had not technically been charged with having discharged the strikers and so could not be ordered to cease and desist from doing so; that the striking employees were not "employees" within the meaning of the Act despite Section 2(3)'s definition of that term which seemed to plainly include

them; and that the Board lacked the power to order the company to post a notice because this would not "effectuate the policies of the Act." *Id.* at 631-32. Judge Francis A. Garrecht addressed each of his colleagues' contentions in his dissent and argued that the Act was constitutional and that the Board's ruling was supported by evidence and consistent with the Act's provisions.[3] *Id.* at 632-41. Notably absent from any of the opinions was any discussion of the thorny question that the Board had explicitly sidestepped: whether Mackay violated the Act by permanently replacing the striking workers in the first place.

b. Mackay *at the Supreme Court*

On the issues actually before it, a unanimous Court (with the gravely ill Benjamin Cardozo and the newly confirmed Stanley Reed not participating) ruled uniformly with the Act and the Board. Justice Owen Roberts's opinion announced the following holdings: (1) the strikers remained "employees" and thus under the protective auspices of the Act during the strike, which involved a "labor dispute" within the meaning of Section 2(3) whether or not the Company had given the workers good reason to stop work; (2) the Board's finding that the Company "discriminate[ed] in reinstating striking employees by keeping out certain of them for the sole reason that they had been active in the Union" was supported by evidence; (3) "such discrimination" constituted an unfair labor practice prohibited by Section 8; (4) the Board's

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[3] The Ninth Circuit panel granted rehearing and issued a supplemental opinion when the Supreme Court affirmed the Act's constitutionality in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), which it decided shortly after the Ninth Circuit issued its decision in *Mackay*. Kohler and Getman, supra at 41. While Judges Mathews and Garrecht adhered to their earlier opinions, Judge Wilbur, who had relied on the Fifth Amendment to find against the Board, consider the case anew. He recanted his previous assertion that the strikers were "employees" within the meaning of Section 2(3), finding that they had voluntarily terminated their employment when they struck for economic reasons, thus removing them from the Act's protections. *Id.* The employment relationship thus terminated, the Constitution forbade the government from requiring the employer to reinstate—or, in Judge Wilbur's interpretation, to reemploy—the strikers. *Id.*

remedial order complied with the Constitution's due process requirement, as did its procedure in disposing the case; and (5) the affirmative relief ordered by the Board was not arbitrary or capricious but was "adapted to the situation which calls for redress" and therefore valid. See generally, *Mackay Radio*, 304 U.S. 333. And, consistent with these holdings, the media, the Board, and the union hailed the decision as a "complete vindication of the three-year fight of the union" (from the union's president) and a decision "[p]rotect[ing] American [w]orkers" (from a headline in the *Boston Evening Globe*). Kohler and Getman, supra at p. 14.

But, as every first-year labor law student knows, the *holdings* of *Mackay* are not its main claim to import. Instead, *Mackay* is known today for five or so sentences of dicta that continue to serve as the foundation for an employer's ability to permanently replace employees striking for better economic conditions under at least some circumstances. After addressing a procedural matter and finding that the strikers were "employees" under the Act, the Court turned to the question of whether Mackay committed an unfair labor practice at any point during the events in question. *Mackay*, 304 U.S. at 345-46. Mysteriously, the Court began by considering possible unfair labor practices of which the Board had *not* found the company guilty. *Id.* This portion of the opinion reads almost as if Justice Roberts were organizing his thoughts as he approached the question before him. The Court first observed that "[t]here is no evidence and no finding that [Mackay] was guilty of any unfair labor practice in connection with the negotiations" for a new contract; "[o]n the contrary, it affirmatively appears that the respondent was negotiating with the authorized representatives of the union." *Id* at 345.

Having dealt squarely with one issue not before it, the Court turned to another. "Nor was it an unfair labor practice to replace the striking employees with others in an effort to carry on

the business." *Id.* This is the issue that the Board explicitly declined to consider because it was unnecessary to resolving the case. *Mackay Radio*, 1 NLRB at 216. The Court continued:

> Although section 13 of the act, 29 U.S.C.A. s 163, provides, 'Nothing in this Act (chapter) shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice, nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.

Mackay Radio, 304 U.S. at 345-46. In support of its statements the Court included exactly one citation, a "Compare" cite to the Fifth Circuit's decision in *NLRB v. Bell Oil & Gas Co.*, 91 F.2d 509 (1937), with no citation to a particular portion of the decision and no explanation of the relevance of the case.[4] See *id* at 345-46 fn 7.

[4] In *Bell Oil*, at some point during or after an economic strike, the company altered its operations for business efficiency reasons such that a task that had previously required three workers now required only two. *Id.* at 514. Two strikers were brought back to fill the positions, and a third was discharged. While there were replacements brought in during the strike, they were all discharged with the consolidation of the work. The Fifth Circuit found that if the company discriminated in deciding which of the three strikers would take the two existing positions based on union activity, it committed an unfair labor practice. *Id.* But if the Board was ordering the company to hire a third man for work requiring only two, that was beyond its powers under the Act. *Id.* So in *Bell Oil* it was not that the Company refused to reinstate a striker because his position was filled with a permanent replacement but that they discharged the striker because the position, for business reasons, no longer existed at all. The Fifth Circuit did not consider what the Act would require had the third position existed but sat occupied by a permanent replacement.

This permanent replacements diversion out of the way, the Court then turned to the only unfair labor practice of which the company had been found guilty—discrimination in regard to reinstatement—and upheld the Board's decision in its entirety.

III. ***Hot Shoppes*: the Board interprets *Mackay Radio***

Most legal literature analyzing *Mackay Radio* addresses the core message of its dicta: an employer facing a strike over economic conditions who has not committed an unfair labor practice may "protect and continue his business by supplying places left vacant by strikers" and "is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them." *Mackay Radio*, 304 U.S. at 345-46. Articles frequently argue that permanently replacing economic strikers is per se an unfair labor practice, no matter the interests it serves, and that the Supreme Court or Congress should invalidate the *Mackay* dicta.[5] See, e.g. Kohler and Getman, supra at 50; William Feldesman, *Dictum Carried to Extremes: Mackay Radio Revisited*, 12 Lab. Law. 197, 206 (1996). Here, I do not address the issue of whether the Supreme Court or Congress should invalidate the *Mackay* dicta. Instead, I address the oft-neglected but extremely important

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The *Mackay* Court's citation to *Bell Oil* sheds light on its dicta's meaning. *Bell Oil* stands for the proposition that when a striker's position no longer exists for some legitimate business reason, the Board cannot force the employer to create a position for the striker. The *Mackay* Court said that when an employer needs to extend permanent offers to induce replacements to come work so as to continue operations during a strike, that is a legitimate business reason for "eliminating" the striker's position, the same as consolidating positions because of a new business model. And when a striker's position is gone for such a legitimate business reason, the business need not create a new position for him.

[5] There was a flurry of interest in this topic in the early 1990s, when strong majorities in two consecutive Houses of Representatives passed the Workplace Fairness Act, which would have banned the use of permanent replacements for economic strikers by employers. Michael H. LeRoy, *Employer Treatment of Permanently Replaced Strikers, 1935-1991: Public Policy Implications*, 13 Yale L. & Pol'y Rev. 1, 2 (1995). The Act also enjoyed the support of a large majority of Senators on both occasions, but Republican filibusters stalled the bill each time and the Senate never passed it. *Id.*

question of what *Mackay* actually means. The task of answering this question has been left to the National Labor Relations Board.

The first question for *Mackay*'s dicta pronouncements on permanent replacements was whether they would be followed. For a quarter-century after the decision, the Supreme Court did not address this issue head-on. During this period, the Court, as one would expect, frequently cited *Mackay* for one of its several landmark *holdings*; its dicta went largely unacknowledged. See, e.g. *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 297 (1939) (*Mackay* stands for the proposition that the Board may order reinstatement and backpay as a remedy); *Inland Empire Dist. Council, Lumber & Sawmill Workers Union, Lewiston, Idaho, v. Millis*, 325 U.S. 697, 710 fn 14 (1945) (*Mackay* stands for the proposition that due process does not require a hearing to be held at any particular point in an administrative proceeding).

But when the Erie Resistor Corporation used not only offers of permanent positions but also of super-seniority purportedly to induce workers to take the place of economic strikers, the Court for the first time directly acknowledged the vitality of the *Mackay* dicta, which the Court termed the "*Mackay* rule" and contextualized within the framework of the Act as interpreted by the Court. *Erie Resistor*, 373 U.S. at 222-25; 232. First, the Court held that (1) "specific evidence of a subjective intent to discriminate or to encourage or discourage union membership" may convert otherwise innocuous employer behavior surrounding an economic strike into an unfair labor practice, *id.* at 227-28; and (2) when employer's conduct in this context is "inherently discriminatory or destructive" the employer is held to have intended the consequences of its actions, though it may counter that it was motivated by a legitimate business purpose as well as illicit ones, and that in these cases the Board and the courts must "balance[e] 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. The Court then analyzed the super-seniority scheme under the latter mixed-motive framework and found that the employer's purported business interest in continuing operations during the strike could not outweigh the extreme destructiveness of the scheme to employee rights under the Act. *Id.* at 235-37. The Court distinguished the *Mackay* dicta regarding permanent replacements, explaining that in *Mackay* it had found that the "employer's interest" in "operat[ing] his plant during a strike" "must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Id.* at 232. In other words, the Court held that, when there is no specific evidence of unlawful purpose and the use of permanent replacements for economic strikers therefore fell under the mixed-motive analytical framework, *Mackay* stood for the proposition that an employer's need to offer permanent positions to replacements so as to continue the operation of its business during the strike outweighed the inherent destructiveness of such an action to employees' rights under the Act. *Id.*

Just under a year after the *Erie Resistor* Court acknowledged the *Mackay* dicta's vitality and indicated how it fit into the framework for employer behavior during an economic strike, the Board weighed in. During strained negotiations, the International Brotherhood of Teamsters, which represented employees of Hot Shoppes, threatened to strike. *Hot Shoppes, Inc.*, 146 NLRB No. 93, slip op. at 1 (1964). The company, in turn, promised employees that all strikers would be permanently replaced, began processing applications for potential permanent replacements, and retained temporary replacements. *Id.* A few days later, employees walked out and began picketing. *Id.* The company immediately began extending permanent offers to replacement workers. *Id.* Just under two weeks after the strike began, the strikers decided to

abandon the effort and offered to return to work. *Id.* at 2. Hot Shoppes rejected that offer, saying that the strikers had been permanently replaced. *Id.*

The Trial Examiner found that the company's hiring of permanent replacements was a "contrived scheme" to punish the strikers and break the union and was not undertaken for the legitimate purpose of protecting and continuing the company's business during the strike, citing as evidence the company's announcement during negotiations that it would replace all strikers permanently in the event of any strike and the meticulous (and unusual for the company) way it documented the "permanence" of the offers to the replacements in anticipation of a challenge. *Id.* at 40-41. Citing *Erie Resistor*, the Trial Examiner found that "the real issue in every case is indeed whether the employer has acted only to preserve efficient operation of his business." *Id.* at 41. The Trial Examiner found that there was specific evidence of an illicit motive on the part of the company for hiring permanent replacements—punishing and ridding itself of strikers—which under *Erie Resistor* was sufficient to render the action an unfair labor practice. *Id.*

The Board disagreed. While its exact reasoning is somewhat ambiguous, the best reading of the Board's opinion is that (1) the evidence cited by the Trial Examiner did not establish an illicit motive, meaning the use of permanent replacements would have to be analyzed under *Erie*'s mixed-motive framework; and that (2) under that framework, when an employer hires permanent replacements, it does not have to show that it did so to "preserve efficient operation of his business." *Id.* at 2-3. Instead, such a lawful purpose is presumed. It is only when there is "evidence of an independent unlawful purpose," the Board concluded, that a permanently replacing employer will be guilty of an unfair labor practice. *Id.* at 3. In sum, under the *Hot Shoppes* doctrine, when (1) specific evidence of an unlawful purpose is shown, the use of permanent replacements is an unfair labor practice; but when (2) no such specific evidence is

introduced, the Board will presume that the company permanently replaced employees to serve the *Mackay* and *Erie*-recognized legitimate interest in "operat[ing] [its] plant during the strike," which interest the Court had found outweighed the damage to employee rights under the Act. *Erie Resistor*, 273 U.S. at 232.

It is hard to understand the Board's decision to establish this evidentiary presumption. As the *Erie Resistor* Court had explained, the Employer's ability to use permanent replacements could only be justified on the ground that the "employer's interest" in "operat[ing] his plant during a strike" "must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers." *Erie Resistor*, 373 U.S. at 232. A demonstration that the hiring of permanent replacements—clearly "inherently destructive" of employee rights—was necessary to further that legitimate interest of the employer's is therefore essential to the legality of the employer's action. Yet the Board declined to require such a demonstration, instead electing to presume that the interest was served in every case unless the union, employee, or General Counsel came forward with specific evidence that the employer had some other, illicit motive.

IV. The Supreme Court on *Hot Shoppes*

The Board's *Hot Shoppes* decision was not reviewed by an appellate Court—apparently the union, against whom the *Hot Shoppes* Board had unswervingly ruled, decided not to appeal the decision. A Supreme Court majority has only considered the Board's *Hot Shoppes* decision on one occasion, in *Belknap, Inc. v. Hale*. 463 U.S. 491 (1983). In *Belknap*, a five-justice majority[6] held that the Act did not preempt state law misrepresentation and breach-of-contract claims brought by economic striker replacements against an employer who had promised them permanent placements and then displaced them in a deal with the union to end the strike. *Id.* at

[6] Justice Blackmun concurred in the judgment and filed a separate opinion, and Justices Brennan, Marshall, and Powell dissented.

512. There, addressing its characterization of statements made by the concurrence and dissent, Justice White for the majority wrote:

> The dissent and the concurrence suggest that if offers of permanent employment are not necessary to secure the manpower to keep the business operating, returning strikers must be given preference over replacements who have been hired on a permanent basis. That issue is not posed in this case, but we note that the Board has held to the contrary.

Id. at 504 fn 8. The Court then quoted the portion of *Hot Shoppes* interpreting *Mackay*, which I explain above, and noted that the Board had not overturned the decision. *Id.* "There are no cases in this Court that require a different conclusion." *Id.*

Implicit in the Court's discussion of *Hot Shoppes* are the following: (1) as a matter of Supreme Court precedent, whether *Mackay* and its progeny require a showing by the employer that offers of permanence were necessary to keep the business operating during the strike is an open question; (2) the Board has interpreted those cases such that no such showing is necessary—rather, it is presumed unless the union, employee, or General Counsel introduces specific evidence showing an illicit purpose; and (3) the Board's interpretation is permissible under Supreme Court precedent, though it is not mandated by that precedent. See *id.*

While *Hot Shoppes* remains the prevailing rule today,[7] the Board could regulate employer behavior during an economic strike in other ways and remain faithful to *Mackay* and its progeny. In fact, particularly given the dramatic changes to U.S. labor relations in the half-century since *Hot Shoppes* was decided, alternative rules would be *more* faithful to Supreme

[7] The Board applied but did not alter the *Hot Shoppes* doctrine in 2004's *Avery Heights* decision. See *Church Homes, Inc. d/b/a Avery Heights*, 343 NLRB 1301, 1305 (2004), vacated and remanded, *New England Health Care Employees Union v. NLRB* 448 F.3d 189, 195 (2d. Cir. 2006).

Court doctrine and would certainly come closer to realizing the vision of the Act. Though it has never ruled directly on the question of whether the necessity of permanent offers must be proved by the employer or can be presumed, the Court has elucidated certain principles related to economic strikes that should inform the Board's analysis as to the continuing propriety and wisdom of *Hot Shoppes*.

First, the employer "has the burden of explaining away, justifying, or characterizing" actions that are inherently destructive of employee rights under the Act "as something different than they appear on their face, and if he fails, an unfair labor practice is made out." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967). There can be no question that refusing to reinstate strikers at the conclusion of a strike is inherently destructive of employee rights—the Supreme Court has ruled so unequivocally. "If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike," and under Sections 8(a)(1) and (3) "it is an unfair labor practice to interfere with the exercise of these rights." *Fleetwood Trailer*, 389 U.S. at 378. Therefore, when an employer permanently replaces strikers, he has the burden of proving that his action was due to a "legitimate and substantial business justification." *Id.*

Second, *Mackay*'s significance is that it recognized one such justification: "when the jobs claimed by the strikers are occupied by workers hired as permanent replacement during the strike *in order to continue business operations*." *Id.* at 379 (emphasis added). *Mackay* is not a separate doctrine running parallel to the Court's general doctrine in the economic strike context; it is a part of that general doctrine. See *id.* As with any other behavior during an economic strike that is inherently destructive of employee rights, an employer who permanently replaces striking workers must explain why some legitimate business interest was served by doing so. See *id.* In

Mackay, the Supreme Court did nothing more than recognize that continuing operations is one such legitimate interest, and that protecting that interest is worth the damage to employee rights caused by the use of permanent replacements. See *Erie Resistor*, 373 U.S. at 232. The Board's *Hot Shoppes* doctrine relieves an employer of the crucial part of its burden—establishing that its interference with employee rights was justified because it served the recognized "legitimate and substantial business justification" of continuing operations during the strike. The Board presumes this essential fact, coming perilously close to reading the words "in order to continue business operations" out of the Supreme Court's decisions and establishing an absolute right to permanently replace economic strikers.[8]

Finally, the Board is entitled to great deference from the courts when it comes to balancing "business justifications and the invasion of employee rights in light of the Act and its policy." *Fleetwood Trailer*, 389 U.S. at 378. As the Supreme Court has explained, striking this balance "is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." *Erie Resistor*, 373 U.S. at 236. Applying this principle to the use of permanent replacements for economic strikers, the Board is obliged to carefully consider the harm to employee rights done by permanent replacements, and to "delicate[ly]" weigh that harm against the employer's legitimate interest in maintaining operations during the strike. If the Board's current approach to resolving cases results in unjustified harm to employee rights—unjustified because the harm serves no legitimate interest of the employer—it is the duty of the Board to take corrective action. Reviewing courts, meanwhile, are obligated to respect the Board's judgment.

[8] The Board has not completely read out these words because it has left open the possibility that a union, employee, or the General Counsel could prove that the employer did *not* act for the purpose of continuing its business but instead for some other, illicit purpose. See *Hot Shoppes*, 146 NLRB slip op. at 3.

V. Replace *Hot Shoppes*, restore the balance

The Board's *Hot Shoppes* decision strained Supreme Court jurisprudence and the plain language of the Act when it was issued in 1964. Today, it is almost impossible to defend. It is difficult to puzzle out why an employer engaging in activity that is unquestionably extremely destructive of employees rights should not have to prove that its destructive action serves a legitimate countervailing purpose. The *Hot Shoppes* Board gave almost no explanation for its pronouncement. See 146 NLRB slip op. at 3. It may be that, as with evidentiary presumptions in other contexts, the Board based the *Hot Shoppes* presumption on its "estimate of the probabilities of the situation." John William Strong, ed., *McCormick on Evidence*, Sec. 337 (4th ed. 1992). The idea here is that the *Hot Shoppes* Board was attempting to place the burden of proof on "the party who contends that the more unusual event has occurred." *Id.* Maybe, then, the Board believed that in the U.S. labor market of 1964, it would usually be the case that an employer needed to make permanent offers to induce replacements to come work so as to continue operations during the strike, and the union, employee, or General Counsel should therefore have to carry "the burden of showing the idiosyncratic course of events" in which the employer was not acting to carry on the business but instead for some illicit purpose like punishing strikers or ousting the union. See *21 Federal Practice & Procedure: Evidence*, Sec. 5122, at 557 (1977).

Whatever the validity of this assessment of probabilities in 1964, it is certainly no longer true. As early as 1969, commentators were arguing that many employers would not need offers of permanence to continue operations during a strike.[9] Schatzki, *Some Observations and*

[9] Schatzki observed that "in communities where the employer holds the economic power, it seems highly unlikely that he needs the promise of permanency to hire replacements." He also noted that "it is unlikely that an employer of unskilled labor could not find temporary

Suggestions Concerning a Misnomer—"Protected" Concerted Activities, 47 Texas L. Rev. 378, 384 (1969); see also Gillespie, *The Mackay Doctrine and the Myth of Business Necessity*, 50 Texas L. Rev. 782, 794 (1972).[10] In 1964, the year the Board decided *Hot Shoppes*, roughly 29% of people in the U.S. were union members. Hirsch, Barry T. and MacPherson, David A. and Vroman, Wayne G., *Estimates of Union Density by State*, p. 5 (April 2001). Available at SSRN: http://ssrn.com/abstract=285493 or http://dx.doi.org/10.2139/ssrn.285493. As of 2014, that percentage had dropped to 11.1%. Bureau of Labor Statistics, *Union Members Summary*. Available at www.bls.gov/news.release/union2.nr0.htm. With far fewer Americans in or represented by labor unions, it is more socially acceptable for a worker to replace a striker, making it easier for employers to obtain temporary replacements. Kohler and Getman, supra at p. 49. In many cases, greater automation makes it easier for an employer to compensate for employees' absences with technology. See *id.* And an entire industry has sprung up that specializes in providing temporary replacements for absent employees (including strikers), rendering procuring "temps" affordable and easy. See *id.*; see also Christopher S. Rugaber, "Temporary jobs becoming a permanent fixture," *USA Today*, (2013). Available at www.usatoday.com/story/money/business/2013/07/07temporary-jobs-becoming-permanent-fixture/2496585/. Finally, today's workers have a much lower expectation of permanence than those of the past; put differently, workers, to a large extent, assume that employment positions

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replacements for striking employees in a community with a large unemployed population." 47 Texas L. Rev. at 384.

[10] Gillespie mistakenly argues that "[t]he *Mackay* Court found as a matter of law that employers who hire permanent replacements during economic strikes do so because of legitimate and substantial business needs—protecting their businesses and continuing operations." 50 Texas L. Rev. at 795. As I have explained, the Court did no such thing, either in *Mackay* or later. Rather, the Court merely found that when an employer permanently replaces economic strikers *for* the purpose of continuing operations, that interest outweighs the damage done to employee rights. It was the Board who developed the (hard-to-rebut but technically rebuttable) presumption that an employer who permanently replaces strikers did so for the purpose of continuing operations.

will be relatively short-term when they accept them. Jeanne Meister, "Job hopping is the new normal for Millennials: Three ways to prevent a human resource nightmare," *Forbes.com* (2012). Available at http://www.forbes.com/sites/jeannemeister/2012/08/14/job-hopping-is-the-new-normal-for-millennials-three-ways-to-prevent-a-human-resource-nightmare/. Together, these factors point overwhelmingly to the idea that in most situations an employer will not need to extend permanent offers to attract replacement employees to continue operations during a strike. Under the typical rules of evidentiary presumption and burden-placing, therefore, the Board should presume that the use of permanent replacements does not serve the legitimate interest of continuing operations during a strike, and the employer should have the burden of showing that it does. See *McCormick on Evidence*, supra at Sec. 337.

The ability of an employer to permanent replace striking workers without having to show that doing so served its legitimate interest of continuing operations has been enormously damaging to employee rights under the Act. First, there is the obvious damage to employees' Supreme Court-recognized "right to strike" for improved economic conditions. *Erie Resistor*, 373 U.S. at 233-34. One struggles to imagine a more effective means of eviscerating a labor right than the threat of being effectively discharged for exercising it. Kohler and Getman, supra at 14. But the destructiveness of permanent strike replacements also spreads throughout every major facet of the Act. The presence of permanent replacements and the conspicuous absence of those replaced serves as a chilling, continuing reminder to both reinstated strikers and new employees of the potential consequences of participating in the union. Also, during organizing drives, today's employers frequently emphasize that (1) they "will bargain hard in the event of unionization, and that the only way for the union to force it to give benefits is through the strike," and (2) "in the event of a strike, [the employer] has the right…permanently to replace the

strikers." *Id.* at 49. The message to employees is "unionize and lose your job"—an extremely effective deterrent to employees who would otherwise like to exercise their Section 7 right to bargain collectively. And if employees do form a union, the option to permanently replace workers without explanation creates perverse incentives for an employer when it confronts its statutory obligation to bargain in "good faith" with the union. 29 U.S.C. Sec. 158(a)(5); (d). The employer who wishes to rid itself of the union and of employees who actively seek improved conditions can simply refuse reasonable or even generous offers from the union in the desire to provoke a strike, and then when the union takes the bait can permanently replace the workers.[11]

The destructive nature of permanent replacements is clear, and the Supreme Court has even explicitly recognized it (though it probably understated the degree of violence the practice does to the Act). *Fleetwood Trailer*, 389 U.S. at 378. Again, *Mackay*'s significance, as interpreted by later cases, is that the cost of this damage is outweighed by the employer's interest in continuing operations. *Erie Resistor*, 373 U.S. at 232. It is the Board's duty to take measures to keep these two interests delicately balanced. E.g., *id.* at 236. As explained above, *Hot Shoppes* enhances the damage to employee rights—by allowing an employer to permanently replace employees without explanation, it undoubtedly makes this practice more common, allows an employer to credibly threaten organizing workers with job loss in the event of unionization, and discourages true good faith bargaining. And, on the other side of the balance,

[11] True, if the union can show that the employer breached its duties under the Act, including by bargaining with the bad faith intention of provoking a strike, and that the strike was in response to a violation, the employer is not entitled to permanently replace the striking workers. *Mastro Plastics*, 350 U.S. at 278. Still, under the *Hot Shoppes* system, employers have an incentive to push resistance in negotiations to the limit of what could be considered "good faith"; their hope would be that the union would grow frustrated and strike, and the Board would not find an unfair labor practice, rendering the strikers economic and subject to permanent replacement (absent a specific showing of illicit intent).

Hot Shoppes does nothing to further the employer's interest in continuing its business during a strike; if the *Hot Shoppes* presumption were removed, the employer who legitimately needed to extend offers of permanence to continue operations would still be permitted to do so provided it demonstrated its need. Finally, *Hot Shoppes* runs backward to typical rules of evidentiary presumptions and burden-placing, such that the idiosyncratic circumstance is presumed and the most probable one must be proved by specific evidence. It therefore cannot be justified on some sort of administrative efficiency or evidentiary fairness ground. In short, *Hot Shoppes* is out of keeping with Supreme Court precedent, well-settled rules of evidence, the Act, and the realities of the modern workplace. The Board should replace it.

VI. In place of *Hot Shoppes*

In formulating a better interpretation of *Mackay* to replace *Hot Shoppes*, the Board should pay special attention to the Supreme Court's instructions on what the Act requires in the context of employer behavior during an economic strike. The best interpretation, which protects employee rights under the Act while faithfully adhering to the Supreme Court's recognition that those rights may be checked in order to protect an employer's legitimate interest in continuing operations during the strike, is: (1) when an employer permanently replaces economic strikers, it "discourage[s] employees from exercising their rights to organize and to strike guaranteed by [Sections] 7 and 13 of the Act" and so commits an unfair labor practice under Sections 8(a)(1) and (3) of the Act, *Fleetwood Trailer*, 389 U.S. at 378, unless (2) the employer carries its burden of showing that the infringement on employee rights was justified because it actually served the employer's Court-recognized interest in "operat[ing] [its] plant during a strike," *Erie Resistor*, 373 U.S. at 232. If the employer fails to carry its burden, it is guilty of violating Sections 8(a)(1) and (3) and the Board may issue an appropriate remedy, including ordering the reinstatement of

the strikers with backpay. In addition, any "specific evidence of a subjective intent to discriminate or to encourage or discourage union membership" is "sufficient to destroy the employer's claim of a legitimate purpose, if one is made, and" supports the finding of an unfair labor practice. *Id.* at 227-28. And, under *Belknap*, if the employer must discharge unlawfully hired permanent replacements to make way for the reinstated strikers, those replacements are permitted to bring any state law breach of contract or other claims available to them. 463 U.S. 491 (1983). This test will ensure that employers who legitimately need to issue offers of permanence in order to maintain operations during a strike are able to do so, and that those who do not cannot exploit the *Mackay* rule for the illicit purpose of defeating employee rights under the Act—thus restoring the "delicate balance" between the competing interests that the Court has mandated the Board to effect. *Erie Resistor Corp.*, 373 U.S. at 236.

This test is the same as in other situations where an employer engages in activity inherently destructive of employee rights and must show that its actions were due to legitimate and substantial business justifications. When permanent replacements quit, and an employer hires new employees rather than extending offers of reinstatement to the replaced strikers, the Board does not presume that its action served some legitimate and substantial business justification and require the employee or union or General Counsel to come forward with specific evidence showing that the employer was punishing the strikers or trying to discourage union activity. See *Laidlaw Corp.*, 171 N.L.R.B. 1366, 1369-70 (1968). Instead, the Board requires the employer to show that it needed to hire new employees rather than reinstate old ones to serve some legitimate business need, and if the employer does not do so, it has committed an unfair labor practice and the strikers are entitled to reinstatement with backpay. *Id.* In evaluating whether the employer's action served some legitimate business end, the Board must

determine whether the asserted business purpose is "legitimate and substantial," and, if it is, must then critically evaluate the employer's evidence in light of the specific facts of the case to ascertain whether its destructive action was in fact related to that legitimate and substantial justification. The *Mackay* Court recognized continuing operations during a strike as a legitimate and substantial purpose, and it has recognized that using permanent replacements can sometimes serve that legitimate and substantial purpose. But it has never recognized as a matter of law that permanent replacements *presumptively* serve the purpose of continuing operations. That presumption was the Board's doing. See *Hot Shoppes*, 146 NLRB slip op. at 3. In every other circumstance, the Board requires the employer to establish the connection between its infringing action and the asserted legitimate business purpose. The rule I propose would simply bring its treatment of situations where permanent replacements are used allegedly to continue operations—currently an anachronism—into line with the entire rest of its law in this area.

To illustrate how this might work in practice, let's take a version of the facts of *Mackay* itself. An operator of an international telecommunications network faces a strike in its largest West Coast office. Much of the office's work can be technologically re-routed through other cities, but some cannot be, and to continue the operation of those lines requires labor. Moreover, the labor is specialized and technical (operating telecommunications equipment) and requires some training, the industry is competitive, and the employer faced declining financial conditions even before the strike. Finally, the office is located in an area with high union density and commensurate prevalent social stigma against replacing strikers, and a low unemployment rate. Further, let's imagine that the employer introduces evidence showing that it made a good faith attempt to procure temporary replacements to perform the work, but that an affordable and readily available temporary employee agency with employees skilled in operating this equipment

did not exist nearby. Also, the employer claims that it concluded that, given the culture and employment statistics in the area, advertising for temporary workers was unlikely to be successful or would take a length of time that would be financially unacceptable, and this conclusion was supported by substantial evidence. Moreover, the employer reasonably does not think skilled workers will be willing to suddenly leave their lives in other parts of the country and come work at the struck location when the appointment might only last as little as a day or two. Lastly, let's assume that the union, employee, or General Counsel does not introduce any specific evidence of a motive to punish strikers, discourage unionization, or achieve some other illicit objective.

The Board might look at this evidence and conclude that the employer needed to extend offers of permanence to maintain operations during the strike. The employer sought to maintain operations without resorting to the extremely destructive act of permanently replacing strikers but concluded, based on substantial evidence, that the less destructive alternatives would not allow it to maintain business operations. To obtain the number of workers needed, the employer would need to draw from other parts of the country, and to draw from other parts of the country would require offers of permanent positions. There is no record evidence of an illicit motive on the part of the employer. This is the sort of situation where permanent replacements are appropriate under Supreme Court precedent. The harm done to the strikers' rights as well as the rights of employees at this facility in the future is justified as necessary to uphold the employer's legitimate interest in continuing operations.

VII. Conclusion

It will be the rare case where an employer permanently replacing economic strikers will be able to carry its burden of showing that its action served its interest in maintaining operations

during the strike. This conforms to reality, as in an era where temporary work for skilled and unskilled labor alike is extremely common, it *is* the rare case where offers of permanence are necessary to induce workers to replace strikers. Under the prevailing *Hot Shoppes* rule, the Board has abdicated its duty to maintain the delicate balance between employee rights under the Act and the legitimate business interests of the employer. It has established a system where an employer may do great violence to the rights of employees—snuffing out nascent organizing drives with threats of permanent replacement, discouraging strikes for better economic conditions, purging those who participate in the union and replacing them with workers whose very presence serves as a reminder to future and reinstated employees of what exercising one's rights brings, and provoking strikes by avoiding peaceable contract and grievance resolutions—even when doing so bears no relation to any legitimate interest. The Board should exercise its power to replace this destructive doctrine with one that better conforms to Supreme Court jurisprudence and that protects employee rights while still respecting an employer's legitimate interest in continuing operations during a strike.