

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

In the Matter of:

AMERICAN BAPTIST HOMES OF
THE WEST d/b/a PIEDMONT
GARDENS,

Employer,

Case No. 32-CA-35247,
32-CA-25248, 32-CA-25266,
32-CA-25271 through 32-CA-25308,
32-CA-25498

and

SERVICE EMPLOYEES
INTERNATIONAL UNION, UNITED
HEALTHCARE WORKERS-WEST,

Union.

**RESPONDENT'S BRIEF ANSWERING THE ACTING GENERAL
COUNSEL'S EXCEPTIONS TO THE DECISION AND RECOMMENDED
ORDER OF THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT.

In this permanent replacement case, the Acting General Counsel (“General Counsel”) has abandoned its theory that a group of employees replaced in August 2010 were engaged in an unfair labor practice strike. As detailed at length in the Decision and Recommended Order of Administrative Law Judge Burton Litvack (“ALJ”), that claim was shockingly weak and contrary to all of the credible evidence.

Nonetheless, in its Exceptions to the ALJ, the General Counsel continues to advance its novel theory that Respondent American Baptist Homes of the West (“Employer” or “Respondent”) was prohibited from permanently replacing the strikers because the Employer acted out of some “independent unlawful purpose.”

The Board should reject this theory for two reasons.

First, it relies on a flawed interpretation of the law. No less than the U.S. Supreme Court and the Board, on multiple occasions, have held that motive is legally irrelevant in permanent replacement situations. It has been the law of the land since 1938 that the decision to permanently replace is a legitimate economic weapon that may be deployed by an employer in response to the decision by the employees to strike. It should be viewed as standing on equal footing with the employees’ decision to deploy the strike weapon. As such, it should be no surprise that no precedential Board decision has ever found the permanent replacement of economic strikers to be unlawful. Indeed, any contrary finding would run counter to binding precedent.

Second, even if an employer’s “independent unlawful purpose” could eliminate its *Mackay* rights, no such purpose existed here. To the contrary, the alleged statements demonstrating the Employers’ “independent unlawful purpose” did not betray any unlawful animus whatsoever. Moreover, as the ALJ cogently discusses, the alleged statements related solely to the employer’s decision to

permanently replace strikers and did not reveal any broader, “independent” purpose for the permanent replacement of strikers.

The Board should reject the General Counsel’s theory and affirm the ALJ’s dismissal of the striker-replacement allegations.

II. FACTS

A. **Following Several Months Of Contract Negotiations, Union Members Voted To Authorize An Economic Strike That Commenced On August 2, 2010.**

The Employer operates retirement facilities throughout the United States, including one located in Oakland, Piedmont Gardens. (Tr. at 34:4-7; ALJD at 3:16-19).¹ Piedmont Gardens is comprised of three interconnected buildings where varying levels of services are provided, including independent living, assisted living, and skilled nursing care. (Tr. at 31:10-15; ALJD at 3:19-22).

SEIU, United Healthcare Workers-West (the “Union”) represents approximately one hundred Piedmont Gardens employees for collective bargaining purposes. (Tr. at 40:8-10; ALJD at 4:4-10). These employees are dietary department workers (cooks, cook helpers, wait staff); nursing department workers (certified nursing assistants and activity assistants); housekeeping department workers (housekeepers, janitors and laundry workers); resident services workers, and general/administration workers (receptionists), among others. (Resp. Exh. 17 [Collective Bargaining Agreement], Section 1.1 – Recognition Clause). The parties’ collective bargaining agreement was set to expire on April 30th, 2010. (Tr. at 59:17-22; ALJD at 3:19-22). In anticipation of the contract’s pending expiration, the parties began bargaining sessions in February 2010. (Tr. at 213:21-214:3; ALJD at 4:12-14).

¹References to the official transcript are referred to as “Tr. at ____.” References to the Decision of the ALJ are “ALJD at ____.” General Counsel and Respondent’s exhibits are referred to as “G.C. Exh. ____” and “Resp. Exh. ____” respectively.

The bargaining sessions reached a stalemate in June 2010, with neither party willing to compromise on their bargaining positions on critical economic issues.² (Tr. at 403:3-8; ALJD at 4:17-18). The Union's bargaining team, interested in putting economic pressure on Piedmont Gardens, decided to call for a strike vote on June 17 and 18. (Tr. at 114:13-18; 167:1-168:11; 243:10-244:4; 245:3-6; ALJD at 5:19-30).

Approximately 90 percent of the participating bargaining unit employees voted to authorize a strike. (ALJD at 11:19-20). Contract negotiations on key economic issues subsequently continued without agreement. On July 9, the Union bargaining committee called for the strike to commence on August 2, 2010. The Union sent two letters to the Employer. The first letter stated that the Union would "commence a strike at 9:00 a.m. on Monday, August 2, 2010 and continue such activity unless and until a mutually agreeable resolution has been reached." (ALJD at 14:16-19). The second letter stated that the striking employees "unconditionally offer to return to work at or after 5:00 a.m. on Saturday, August 7, 2010." (ALJD at 14:19-22).³

B. The August Strike Was Motivated By Economic Issues.

The Union commenced its strike on August 2, 2010. All of the evidence indicated that the Union members were striking over economic issues, not to protest unfair labor practices. The Administrative Law Judge correctly found that the Union members engaged in an economic strike in August 2010 (ALJD at 25:9-

²The General Counsel has not argued that the employer's conduct at the bargaining table violated the Act.

³The General Counsel has not argued, either below or in its Exceptions, that these pre-strike letters were unconditional offers to return to work. To the contrary, the Complaint alleged that strikers made their unconditional offer to return when the strike ended on August 7, 2010. Complaint, Para. 10(a) ("On or about 5:00 a.m. on August 7, 2010, the following-named employees . . . unconditionally offered to return . . .").

13), and the General Counsel did not except to this finding. *See* Acting General Counsel's Brief In Support Of Exceptions ("Supporting Brief").

C. The Employer Permanently Replaced Thirty-Eight Of The Economic Strikers.

The Employer initially attempted to use temporary replacements to staff the facility during the strike. The Employer found that the cost to engage a temporary staffing agency was in excess of \$300,000. (ALJD 15:37-16:3). Based on these economic considerations, Piedmont Gardens determined that it had no choice but to hire permanent replacements in order to improve its staffing position in the event of future strikes or in the event the strikers did not return on August 7th. (Tr. at 329:330:10). Management knew that the parties were not close to reaching an agreement at the bargaining table, and that nothing prohibited the Union from striking again and again. If the facility did not have permanent employees ready to work during those subsequent strikes, it would not be able to hire sufficient temporary replacements without raising residents' rates. (Tr. at 420:13-19; ALJD at 16:3-5).

The Employer began hiring permanent replacements on August 3rd, and continued making offers to permanent replacements every day until August 6th. (Tr. at 336:25-337:5; ALJD 15:32-33). The Employer assessed vacancies that were left open due to striking employees, then offered permanent positions to current employees (both temporary and employees who had not gone on strike) and made offers to them. (Tr. at 334:15-19). In making offers for permanent employment to current temporary replacements, the Executive Director hoped that these employees would work if the Union went on strike again, since "they had demonstrated that they were willing to work during the strike" (ALJD at 26:22-26). The Employer made offers of permanent employment to a total of 44 employees. (Tr. at 336:16-19; ALJD at 15:34-36). 38 strikers were replaced by

the permanent replacements. The Employer informed them that they had been replaced on August 6, and informed them that they would be placed on a preferential recall list. (Tr. at 340:24-341:5; 50:8-15; ALJD at 15:20-21).

The Employer also notified the Union's attorney directly that employees had been permanently replaced. On August 6, the Union's attorney, Bruce Harland, called the Respondent's attorney, David Durham, to address rumors that the company had locked out employees. (ALJD at 16:25-29). Mr. Durham told Mr. Harland that he could not confirm or deny the rumors, but he would speak with his client that afternoon and call Mr. Harland back with additional information. (ALJD at 16:29-32). At approximately 6:30 p.m. that evening, Mr. Durham called Mr. Harland back to tell him that employees had been permanently replaced, and that the Employer would provide Mr. Harland with a list of replaced employees with a list later than evening. (ALJD at 16:34-35).

Mr. Harland testified that Mr. Durham told him that the reason for permanently replacing the employees was that "Piedmont Gardens wanted to teach the strikers and the Union a lesson. They wanted to avoid any future strikes, and this was the lesson that they were going to be taught." (ALJD at 16:38-40). Although Mr. Durham denied making these statements to Mr. Harland, the Administrative Law Judge credited Mr. Harland's testimony. (ALJD at 26:11-14).

D. The ALJ Rejected The General Counsel's "Independent Unlawful Purpose" Theory.

The ALJ held that when employees engage in an economic strike against their employer, and the employer exercises its right to hire permanent replacements, whatever factors contributed the employer's state-of-mind in reaching its decision, "*unless designed to accomplish an unlawful, extraneous purpose*, are utterly irrelevant." (ALJD at 27:12:17). Because the Employer's decision to hire permanent replacements was directly related to the August strike,

and not some overarching unlawful purpose, the Administrative Law Judge applied precedent holding that an employer's "underlying motivation for hiring permanent replacements was, and remains, irrelevant." (ALJD at 27:21-22). As a result, the ALJ concluded that the Employer did not violate the Act by permanently replacing the economic strikers, and recommended dismissal of the permanent-replacement allegations in the Complaint.

III. ARGUMENT.

The General Counsel argues in support of its Exceptions that case law recognizes an "exception" to the *Mackay*⁴ rule, whereby an employer's otherwise-lawful decision to hire permanent replacement is vitiated by an "independent unlawful purpose." As will be argued below, no such "exception" to Supreme Court precedent exists, nor is the Board free to recognize one. Moreover, as the ALJ recognizes, any such exception would be limited to situations where the employer literally has an "*independent* unlawful purpose," i.e., reasons extraneous to the strike itself—and no such purpose was proven here.

A. The Act Permits An Employer To Permanently Replace Economic Strikers Regardless Of Motive.

1. An Employer's *Mackay* Rights Have Long Enjoyed Protection Regardless Of The Employer's Motives In Exercising Them.

The United States Supreme Court has endorsed the view that in "collective bargaining economic warfare," both unions and employers may use available legitimate weapons. *See Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 n.4, 147 (1976) ("Resort to economic weapons should more peaceful measures not avail is the right of the employer as well as the employee") (citations and internal quotation marks omitted).

⁴*NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938).

Among these weapons is the employer's right under *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938), to hire permanent replacements to fill positions vacated by economic strikers, regardless of effects on employees' motivation to strike. *TWA, Inc. v. Indep. Fed'n of Flight Attendants*, 489 U.S. 426, 436 (1989) (characterizing permanent replacement as an economic weapon).

A long line of precedent since *Mackay* has reaffirmed that an employer's *Mackay* rights are central to the scheme of American labor law. See, e.g., *TWA, Inc. v. Indep. Fed'n of Flight Attendants* [hereafter *TWA*], 489 U.S. 426, 433-34 (1989); *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963); see also *Detroit Newspapers*, 327 NLRB 871, 871 & 871 n.3 (1999) (quoting *Times Publishing Co.*, 72 NLRB 676, 684 (1947)) (declining to adopt rule that would impose bargaining obligation over terms under which replacement workers are hired, because doing so "would effectively nullify" and "impinge on the employer's *Mackay* rights"). The Supreme Court has stated that it has "no intention of questioning" the vitality of *Mackay*. See *TWA*, 489 U.S. at 433-34 (1989).

Consistent with its characterization of permanent replacement as a legitimate "economic weapon," employers are permitted to hire permanent replacements notwithstanding the deterrent effects on strikes, such as causing employees to abandon the picket line for fear of losing their jobs. *Id.* Indeed, when hiring permanent replacements, the employer is free to act with the specific intent of weakening the union's bargaining position. See *Am. Optical Co.*, 138 NLRB 681, 689 (1962) (ALJ, affirmed and adopted by NLRB). An employer may even threaten striking employees with the prospect of permanent replacement if they do not return to work by a specified deadline. *Chromalloy Am. Corp.*, 286 NLRB 868, 871-72 (1987), *enf. denied on other grounds*, 873 F.2d 1150 (8th Cir. 1989).

In *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), the Supreme Court rejected the proposition that an employer may not hire permanent replacements unless the employer could prove that it was “necessary to secure the manpower to keep the business operating.” *Id.* at 504 n.8. To the contrary, the Court approvingly quoted *Hot Shoppes, Inc.*, 146 NLRB 802, 805 (1964), where the Board stated that permanent replacements could be hired “at will” and that the employer’s motive for hiring them is “immaterial.” *Belknap*, 463 U.S. at 504 n.8; *see also id.* (“the motive for hiring permanent strikers is irrelevant.”); *Choctaw Maid Farms, Inc.*, 308 NLRB 521, 528 (1992) (ALJ, affirmed by NLRB) (“If striking employees are economic strikers, the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant.”).

2. The Board’s *Hot Shoppes* Decision Did Not Carve Out An Exception To *Mackay*.

As the General Counsel acknowledges, the NLRB has never issued a precedential decision finding that an employer hired permanent replacements unlawfully during an economic strike.⁵ Nonetheless, the General Counsel reads *Hot Shoppes*, 146 NLRB at 804-05, to hold that an “independent unlawful purpose” renders otherwise-lawful permanent replacement decisions unlawful.

⁵To be sure, the Office of General Counsel has tried over the years to garner acceptance for this theory, but has never succeeded in persuading the Board to follow it. To the contrary, the Board has given it wide berth, consistently declining to reach “independent unlawful purpose” arguments made by the General Counsel. *Choctaw Maid Farms*, 308 NLRB 521, 528 (responding to the General Counsel’s argument that the hiring of permanent replacements was unlawful, the administrative law judge wrote, and the Board affirmed: “. . . the law allows an employer to hire permanent replacements. What its state of mind might be in exercising that right is irrelevant.”); *Nicholas County Healthcare Center*, 331 NLRB 970 (2000) (Board declined to pass on administrative law judge’s findings of employer’s “unlawful purpose”). This circumspection is warranted, given the irreconcilable conflict between the theory and the *Mackay* doctrine as consistently interpreted by both the Supreme Court and the Board.

This reading of *Hot Shoppes* subordinates the actual holding of the case—that “an employer has a legal right to replace economic strikers at will,” and that its “motive for such replacements is immaterial”—to a dictum that was not even applied in that case. Indeed, in *Hot Shoppes* itself, the NLRB upheld the employer’s right, even before a strike begins, to begin seeking applications from likely replacements, such that the employer could replace its strikers permanently and instantly once the strike actually began. *Hot Shoppes*, 146 NLRB at 804-05. The NLRB found that such conduct was lawful, despite its transparent purpose to facilitate replacement, *in toto*, of a unionized work force. The employer’s motives, the NLRB held, were simply “immaterial.” *Id.* at 805; *see also id.* at 834-35 (rejecting ALJ’s view that the employer had engaged in a “contrived scheme” to “penalize various of the strikers and to defeat their rights to reinstatement”). Thus, *Hot Shoppes* did not apply any sort of “independent unlawful purpose” doctrine and indeed, upheld permanent replacement of strikers despite the employer’s sharp tactics.

Hot Shoppes cited only one authority for its statement about “independent unlawful purpose”: the Board’s prior decision in *Cone Brothers Construction Company*, 135 NLRB 108 (1962) (“*Cone Bros.*”). But *Cone Bros.* was not even a permanent replacement case. Rather in *Cone Bros.*, the employer assigned suspected pro-union truck drivers to a job that would require them to cross a picket line at another business. The employer’s purpose was to provoke a sympathy strike that the employer then exploited to terminate the drivers. The NLRB concluded that this “gambit” violated the NLRA.

In the many years since *Hot Shoppes*, the Board has only applied the “independent unlawful purpose” once, and it did so only in accepting a remand from Second Circuit as “law of the case.” In *Avery Heights*, 350 NLRB 214 (2007), an employer executed a secret plan to hire as many permanent

replacements as possible before the union “caught on.” *New England Health Care Employees Union 1199, SEIU, AFL-CIO v. NLRB*, 448 F.3d 189, 190 (2d Cir. 2006). The court held that this secret plan revealed an independent improper purpose of seeking to break the union by replacing as many workers as possible while depriving the union of the ability to cease the strike. *Id.* at 195-96. The court emphasized that the employer’s secrecy was the key factor, because it is entirely permissible for an employer to hire permanent replacements to gain bargaining leverage with the union and noted that secrecy would typically undermine that goal, suggesting that the employer had an “illicit” goal. *Id.* Notably, the employer offered untrue testimony that it employed secrecy due to fears of union violence, contrary to its own memo that described its strategy as “a well-executed surprise event the day before Christmas” that would put the Union in a “real bind.” *Avery Heights*, 343 NLRB 1301, 1305 (2004). The Second Circuit noted that its opinion was “narrow” and held only that the NLRB erred in not considering the significance of the employer’s secrecy and noted that the NLRB was not barred on remand from “reaching the same result through adequate reasoning.” *New England Health Care*, 448 F.3d at 196.⁶

These non-precedential decisions comprise the sum total of the NLRB’s exposition of the “independent unlawful purpose” doctrine, and they make clear that whether or not such an exception to the right to hire permanent replacements exists, it could not be applied here. In this case, the only conduct in which Piedmont Gardens engaged was to openly hire permanent replacements and to refuse to displace them at the end of the strike. Unlike in *Cone Bros.*, the

⁶The existence of the “independent unlawful purpose” doctrine does not appear to have been litigated at any stage in the *Avery Heights* case. Instead, the parties appear to have assumed its existence and to have litigated only whether it would apply to the facts of their case.

employer here did not provoke employees into a strike as a device to terminate them. Nor did the employer engage in an elaborate and secretive scheme to replace, almost *in toto*, a unionized workforce. Instead, the employer here simply engaged in conduct that prior cases have recognized as lawful.

The General Counsel's view, by contrast, would permit a violation of the law to be found based simply on comments in the context of a strike, an inherently adversarial event. It makes no sense to have a rule that would transform lawful conduct into unlawful conduct simply because an employer thought ill of the union or employees' decision to strike. Indeed, negative consequences for strikers are virtually assured from what the Supreme Court calls the legitimate "weapon" of permanent striker replacement (*see TWA*, 489 U.S. at 436) and an employer's knowledge or appreciation of those consequences should not undermine its right to use that weapon.

Moreover, it would be improper for the Board to recognize an "exception" to a doctrine that the Supreme Court itself has recognized. Notwithstanding the principle of judicial deference, the Board may not re-interpret the Act in a manner contrary to Supreme Court precedent. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992) (refusing to defer to Board's interpretation of the Act that conflicted with Supreme Court's precedent). Here, the Supreme Court has both upheld the importance of an employer's *Mackay* rights, regardless of its effects on union adherence, *see TWA*, 489 U.S. at 433-34, and has also rejected the suggestion that an employer's reasons for hiring permanent replacements should be litigated, *see Belknap*, 463 U.S. at 504 n.8; *see also id.* ("the motive for hiring permanent strikers is irrelevant."). The Board should reject the General Counsel's invitation to hold otherwise.

B. The ALJ Properly Recognizes That Any *Hot Shoppes* Exception Would Be Limited To An “Independent” Unlawful Purpose, Which Was Lacking Here.

The General Counsel argues that the Employer hired permanent replacements with the unlawful goal of “suppressing employees’ future strike activity,” and that this goal constituted an “independent unlawful purpose” for purposes of the alleged *Hot Shoppes* exception. (Brief, p. 13). The Administrative Law Judge disagreed with this argument, and correctly recognized that even if the Employer’s decision to hire permanent replacements was based on a desire to “teaching its striking bargaining unit employees a lesson and its desire to hire individuals [] who would cross a picket line in the event of future strikes” these purposes were “directly related” to the August 2010 strike, and not an “independent unlawful purpose. (ALJD at 27:17-21).

1. The *Hot Shoppes* Exception, If It Exists, Applies Only To “Independent” Unlawful Purposes, Not All Unlawful Motives.

To the extent that *Hot Shoppes* creates any “exception” to an employer’s *Mackay* rights, the Administrative Law Judge was correct to limit it to an “independent” unlawful purpose. As an initial matter, the Board in *Hot Shoppes* did not simply state that any “unlawful purpose” could make permanent replacement illegal, but instead referred specifically to an “independent” unlawful purpose.⁷ Indeed, if any “unlawful purpose” rendered permanent replacement unlawful, then it is hard to imagine that the Board would have reached the same result in *Hot Shoppes*; there, it upheld an employer’s right to engage in a “contrived scheme” (as characterized by the administrative law judge in that case) to permanently replace an entire workforce by hiring a large crew of replacements

⁷Notably, the General Counsel’s brief in support of its Exceptions refers at numerous points only an “unlawful motive,” as if that were the exception created by *Hot Shoppes*.

even before the strike began. It would also be entirely illogical, because the Board held in *Hot Shoppes* that evidence of the employer's motive is actually immaterial.

By contrast, *Cone Bros.*—the case cited in the *Hot Shoppes* dictum — illustrates what an “independent unlawful purpose” might look like. There, the employer provoked unorganized pro-union employees into crossing a picket line so that they would then be replaced, thereby discouraging employees from voting for a union (itself an unfair labor practice).

Here, the General Counsel argues that an independent unlawful purpose was shown by: (1) a statement by Piedmont Gardens' Executive Director Gayle Reynolds that she *hoped* replacement workers would be willing to work during any future strikes the Union might call; and (2) the statement attributed to the Employer's attorney that replacing the strikers would “teach them a lesson.” But neither will support the weight that the General Counsel would have them bear.

2. The Alleged Evidence Of Unlawful Motive Does Not Establish An Independent Unlawful Purpose.

The Gayle Reynolds statement does not betray unlawful animus, let alone an “independent unlawful purpose.” The Administrative Law Judge opined that Reynolds' hope, stated in a later Board affidavit, that permanent replacements would not cross the picket line, was an “important, and I think unlawful, consideration” in deciding to hire replacements. (ALJD at 26:24). But there is no evidence in the record, nor did the Administrative Law Judge find, that Reynolds or anyone else questioned the permanent replacements about their willingness to work in future strikes, or that the Employer otherwise discriminated against prospective replacement workers based on their willingness to strike. Instead, the Executive Director simply expressed a wish that the employees she hired would be “willing to work during the next strike.” (ALJD at 26:25-26). No doubt employers and their management have all manner of wishes during the inherently

tense and confrontational atmosphere of a strike, and it would be surprising if such subjective thoughts and feelings alone could render illegal the otherwise lawful permanent replacement of economic strikers. Moreover, an employer hiring permanent replacements is inherently selecting people to work behind a picket line, making Reynolds' stated hopes little different from that of any other employer selecting permanent replacements.⁸

The Administrative Law Judge cited two cases as supporting the view that Reynolds' statement admitted to an unlawful motive, but neither is apposite. *Planned Building Services*, 347 NLRB 670 (2006) did not concern permanent replacement at all. Rather, the employer there unlawfully refused to hire a predecessor's work force to avoid a bargaining obligation, and had made several admissions to that effect, 347 NLRB at 707-08. Although the employer questioned at least one employee about his willingness to work behind a picket line, 347 NLRB at 672 n.5, he was not, of course, being asked to work as a permanent replacement. *Compare Tidelands Marine Serv., Inc.*, 144 NLRB 176, 181 & 197 n.13 (1963) (employer permitted to question prospective permanent replacements about willingness to report to work during strike). As such, the case is simply not on point.

Similarly, *National Fabricators*, 295 NLRB 1095, 1096 (1989), did not involve the hiring of permanent replacements, but rather an employer who chose

⁸Indeed, the Board has consistently recognized that employers may question prospective strike replacements about their willingness to work behind the picket line, in contrast to the default rule that such questions are improper. *See Tidelands Marine Serv., Inc.*, 144 NLRB 176, 181 & 197 n.13 (1963) (prohibiting employer from "asking prospective employees *other than those sought as replacements for striking employees* whether they are willing to cross picket lines at their own place of employment") (emphasis added); *see also Smith's Complete Market*, 237 NLRB 1424, 1431 (1978); *W. A. Scheaffer Pen Co.*, 199 NLRB 242, 243 (1972); *Roadhome Constr. Corp.*, 170 NLRB 668, 674 (1968).

to layoff its existing employees because they were likely to honor a future union picket line. The Board found that the *Mackay Radio* did not sanction direct coercion of employees to abandon contemplated support for union activity. *Id.* at 1095. However, the Board established no limits in that case on an employers ability to replace employees who “have *actually* vacated their jobs temporarily by going on strike.” *Id.*

Here, the Employer permanently replaced those employees who *actually went out on strike*. Unlike in *Planned Building Services* or *National Fabricators*, a strike had begun and the employer hired employees to work as permanent replacements—i.e., behind a picket line.⁹

In any event, as the Administrative Law Judge recognized, Reynolds’ statement did not confess to an “independent” unlawful purpose. Rather, her statement related purely to the decision to fill the positions vacated by the striking employees, not to the commission of unfair labor practices (such as discriminatory hiring). And, while Reynolds may have wished or desired that the permanent replacements would be less likely to strike than their predecessors—which would be self-evident with regard to any permanent replacement employee)—this desire is a far cry from the baseless accusation in the General Counsel’s brief that the Employer sought to “suppress” strike activity by its employees.

Neither does the Durham statement evidence an independent unlawful purpose.¹⁰ Any desire to “teach a lesson” to strikers or to “deter future strikes”

⁹The General Counsel’s footnoted citations to cases finding an unlawful motive for permanent *subcontracting* of bargaining unit work during a strike (Exceptions Brief at 13 nn. 26 & 27) are even less helpful, as the Board has never found the *Mackay* doctrine (let alone any purported exceptions to it) applicable to permanent subcontracting decisions.

¹⁰The administrative law judge did not find that Durham’s statement evidenced unlawful motive, and found in any event that it was not evidence of an “independent unlawful purpose.”

may be an *explanation* of why an employer chose to hire permanent replacements (its motive) but that is not a confession that the employer wishes to engage in unfair labor practices or other illegal activity (an “independent unlawful purpose”). Moreover, in the context of “economic warfare,” as the Supreme Court has termed it, it seems odd for the General Counsel to argue that frank statements regarding the use of a party’s economic weapons are somehow unlawful.¹¹

Indeed, both the Supreme Court and the Board have recognized that employers may exercise their *Mackay* rights for purposes that would assuredly seem punitive or deterrent, such as weakening the union’s bargaining position, *see American Optical Co.*, 138 NLRB at 689, or inducing employees to abandon the picket line, *see Chromalloy Am. Corp.*, 286 NLRB at 871-72. Under the General Counsel’s theory, however, the employers in those cases would nonetheless have violated the Act if they stated (after permanent replacement were already hired) that they were “teaching the union a lesson” or seeking to “deter” strike activity.

If the Board were to adopt the position urged by the General Counsel then employers would have to feign blindness to the consequences of permanently replacing strikers or risk being accused of acting with an “independent unlawful purpose.” They could permanently replace strikers to weaken the union and/or cause employees to abandon the picket line but, apparently, they could not say that. The Supreme Court has not required employers to pretend that permanent replacements do not have adverse consequences for economic strikers; to the contrary, the law should encourage employers to communicate about such

¹¹ Surely the Union at Piedmont Gardens also desired to “teach a lesson” to management by going on strike and/or to “deter” the Employer from making contract demands that it considered unacceptable. Such desires—whether publicly stated or not—are at the heart of economic warfare, and it makes little sense to design rules of law that require the parties to conceal them.

consequences so that economic strikers may make an informed decision about their exercise of the strike weapon.

IV. CONCLUSION.

If recognized for the first time by the Board, the exception urged by the General Counsel would swallow the rule that employers may hire permanent replacements as an economic weapon in response to a strike. The Board should instead follow its well-settled precedent and uphold the ALJ's dismissal of the permanent replacement allegations in this case.

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Respectfully submitted,

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