

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

OMNOVA SOLUTIONS, INC.,)	
)	
Employer,)	
And)	Case No. 26-RD-1182
)	
HADEN SELF,)	
)	
Petitioner,)	
And)	
)	
UNITED STEELWORKERS)	
INTERNATIONAL, LOCAL 748L)	
)	
Union.)	

**OMNOVA SOLUTIONS, INC.'S
BRIEF IN OPPOSITION TO THE UNION'S EXCEPTIONS TO HEARING OFFICER'S
REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS**

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I. INTRODUCTION

This decertification case has its roots in an economic strike that began on May 21, 2010 and continues to this day. The most recent collective bargaining agreement between OMNOVA Solutions, Inc. (“Company”) and Steelworkers Local 748L (“Union”) expired on May 15, 2010. Following unsuccessful bargaining for a successor contract, Union-represented employees went on strike and the Company thereafter replaced the strikers, first with temporary and then with permanent replacement workers.

The decertification election was conducted more than 12 months after the strike started. The election was a mixed manual and mail ballot election: manual balloting took place on July 13, 2011, and mail balloting ended July 28, 2011. Every ballot was challenged by the parties. The Union claims that: (1) the Company’s replacement workers are temporary and not eligible to vote; and (2) the striking employees are eligible to vote despite the fact that the election was conducted more than 12 months after the strike started. The Company maintains precisely the opposite. It claims that: (1) its replacement workers are permanent and eligible to vote; and (2) the striking employees have been permanently replaced and are not entitled to vote pursuant to Section 9(c)(3) of the National Labor Relations Act.

The Union has conceded early and often that it has no case unless the National Labor Relations Board (“Board”) discards settled law and reverses not one, but two Board cases: *Wahl Clipper Corp.*, 195 NLRB 634 (1972) and *Jones Plastic & Engineering Co.*, 351 NLRB 61 (2007). As set forth in more detail below, the Hearing Officer easily and correctly determined that the facts of this case fit perfectly within the framework of established Board law and fully support the Company’s positions. First, the undisputed facts show that the Company offered, and each replacement worker accepted, employment on terms that established permanent striker replacement status. It does not matter, as the Union contends, that replacement workers were “at

will.” Under *Jones Plastic, J.M.A. Holding* and other cases, including the U.S. Supreme Court’s decision in *Belknap v. Hale*, 463 U.S. 491 (1983), at-will status is perfectly consistent with, and does not preclude, permanent replacement status.

Second, the facts and law regarding the strikers’ voting eligibility are straightforward. The strikers have been continuously engaged in an economic strike for over 18 months, and they were permanently replaced over 14 months ago. Under the clear language of Section 9(c)(3) of the Act, *Wahl Clipper*, and long-standing Board precedent, these permanently replaced economic strikers are not eligible to vote because the election occurred more than 12 months after the start of the strike. Consequently, the Board should affirm the Hearing Officer’s Report and Recommendations, sustain the Company’s challenge to the ballots of the striking employees, and reject the Union’s challenge to the ballots of the permanent replacement workers.

II. RELEVANT FACTS AND PROCEDURAL HISTORY

A. Background.

The Union and the Company have been parties to successive collective bargaining agreements since 1964. May 24 Tr. 21.¹ The most recent collective bargaining agreement expired on May 15, 2010. May 24 Tr. 17; Tr. 31-32.² On May 21, 2010, all bargaining unit employees initiated an economic strike, and the strike is on-going. May 24 Tr. 17-18; Tr. 32-34.

¹ References to the transcript of the May 24, 2011 hearing are designated as “May 24 Tr. ___.” References to the Board’s exhibits, Employer’s exhibits, and the Union’s exhibits offered at the May 24 hearing are designated as “May 24 Bd. Ex. ___,” “May 24 Er. Ex. ___,” and “May 24 Un. Ex. ___,” respectively. At the September 13 post-election hearing, the parties agreed to include the transcript from the May 24 hearing as Joint Exhibit 1. Tr. 41-43.

² “Tr. ___” references are to pages of the September 13, 2011 post-election hearing. References to the Employer’s exhibits, Union’s exhibits and joint exhibits offered at the September 13 hearing are designated as “E. ___,” “U. ___,” and “Jt. ___,” respectively.

B. All replacement workers hired before September 13, 2010 were initially hired as temporary replacements, but were converted to permanent replacements as of September 13.

Shortly after the strike started, the Company began to hire replacement employees. At first, the striker replacements were temporary. Tr. 19-20; *see e.g.*, E. 1(a)(offer letter from the Company to replacement worker Christopher Aldridge). Upon hire, such temporary replacement workers signed a two-page document attesting to their status. *See e.g.*, E. 1(a)(employee Aldridge); E.1(c)(employee Thomas Alexander); E. 1(e)(employee Bell). All of the employees whose names appeared on the Excelsior List (Jt. 7, pp. 1-3; Tr. 20, 47-49) and who were hired before September 13 signed the same letter attesting to their temporary status.³

On September 7, 2010, Company Human Resources Director Mike Rauco, who was the Company's lead negotiator, informed Union Staff Representative Kevin Johnsen (the Union's lead negotiator) that the Company had decided to offer all temporary replacement workers the opportunity to convert to permanent status effective September 11, and that all future hires would be permanent replacements. Jt. 4 (second page). In response to a request from the Union, the Company delayed its decision to convert employees to permanent status until September 13. Jt. 4; Jt. 5.⁴

On September 13, the Company confirmed to the Union that it had offered permanent replacement status to all 70⁵ of the replacement employees and that all of the replacements had

³ Copies of all of those letters are included in Employer Exhibit 1 and its multiple subparts. E. 1(a) – E. 1(jjjjj).

⁴ No facts support the Union's claim that the Company did not give the Union time for a membership meeting. *Un. Exceptions*, p. 2. In fact, the Company gave the Union six days notice before converting the employees—even though it had no legal obligation to do so. The record does not indicate if the Union held or attempted to hold a meeting during that period.

⁵ The Union claims that the Company hired 100 temporary replacement workers, and cites to page 6 of the Hearing Officer's Report and Recommendations on Challenged Ballots. *See Un. Exceptions*, p. 2. Neither the Hearing Officer's Report nor the facts support the Union's claim. The Company hired 70 temporary replacement workers before September 13, and all of them accepted the Company's offer to become permanent replacement workers. *See* Tr. 20-21; Tr. 20-21; E. 1(a) – E. 1(jjjjj).

accepted the Company's offer. Jt. 6. The Company also provided the Union with a copy of the templates it used in offering temporary and permanent replacement status to its employees. *Id.*

When the Company offered its temporary replacement employees the opportunity to convert to permanent status on September 13, it did so by way of a document that was presented to each employee which set forth the terms and conditions of permanent replacement employee status. Tr. 20; *see e.g.*, E. 1(b) (Aldrige); E. 1(d)(Thomas Alexander); E. 1(f)(Bell). Each employee signed the document, attesting that they understood and accepted the Company's offer.

The template for the one-page document provided as follows:

To: <Employee Name>

From: Kathy Brown
Human Resources Manager
OMNOVA Solutions, Inc. – Columbus, MS Plant

Re: Permanent Replacement Employee Status

On behalf of OMNOVA Solutions, Inc. (the "Company"), this letter is to confirm that you have been offered and have accepted a position at the Company's Columbus, Mississippi plant as a permanent replacement for striking employees, effective as of the date and time indicated below. Although the Company originally hired you as a temporary replacement, the Company has now decided to offer you a position as a permanent replacement.

Additionally, following 90-days of continuous service with the Company, you will be eligible for the following benefits (subject to and in accordance with the provisions of the applicable plan):

- Comprehensive Health Care
- Dental Care
- Vision Care
- Life Insurance
- 401(k)
- Paid time off to include vacation time and designated holidays

Nothing herein will be deemed to preclude OMNOVA from changing or terminating any employee benefit plan or practice applicable to you and other employees or require OMNOVA to employ you for any specific period of time. Participation in some of these plans is voluntary and requires employee contributions.

Other than the above changes, the terms and conditions under which you were originally hired by the Company remain unchanged, as set forth in the offer letter provided to you by the Company at the time you were hired.

Your status as a permanent replacement means that you will not be displaced from your position solely because the current strike ends. You also will not be displaced from your position solely because a striking employee who previously held your job offers to return to work. At the same time, we want to be very clear that this letter is not a contract of employment for a defined period of time. Your transition to permanent replacement status does not constitute a promise of “permanent employment” and does not make you a “permanent employee.” You may voluntarily resign your employment with the Company at any time, for any reason. Similarly, the Company may terminate your employment for any lawful reason at any time, including as a result of a strike settlement agreement reached between the Company and the United Steelworkers Union, Local 748-L, or by order of the National Labor Relations Board.

Please acknowledge your understanding and acceptance of this offer by signing in the space provided below. We appreciate your continued service and dedication to OMNOVA.

Employee Signature

Date

Time

Jt. 6 (second page) (emphasis added).

In sum, on September 13, the Company offered permanent replacement worker status to its 70 then-temporary replacement employees, all of whom signed the offer letter and thus converted to permanent replacement status. Jt. 6 (first page).⁶

⁶ To summarize Employer Exhibit 1, it consists of the temporary replacement offer letter and the permanent replacement offer letter for each of the 70 employees who converted from temporary to permanent status on September 13. Tr. 20.

C. All replacement workers hired after September 13, 2010 were hired as permanent replacements for striking employees.

After September 13, the Company hired only permanent replacement workers. Tr. 21. Post-September 13 hires signed a document that set forth the terms and conditions of permanent replacement status. *See e.g.*, E. 2(a)(Jonathan Alexander); E. 2(b)(Ayers); E. 2(c)(Babiarz). All 70 employees whose names appeared on the Excelsior List (Jt. 7, pp. 1-3; Tr. 47-49) and were hired after September 13 signed the same letter, attesting that they understood and accepted the offer to be permanent replacements.⁷ The template for the one-page document signed by post-September 13, 2010 hires, stated in relevant part, as follows:

Dear [employee name]:

On behalf of OMNOVA Solutions, Inc. (the "Company"), I am pleased to extend to you an offer of employment at OMNOVA's Columbus, MS facility, subject to the terms and conditions set forth below:

1. *You will be employed as a permanent striker replacement worker on a full time basis, effective on [date]. You agree that you will devote your full time and best efforts to the performance of the duties as directed by management.*
2. *You have been advised and understand that an economic strike is currently underway on the part of the Company's production and maintenance employees at the Columbus facility, who are represented for purposes of collective bargaining by a union. Accordingly, if you accept this offer of employment, you will be replacing an economic striker.*
3. *As noted above, we are offering you employment as a permanent striker replacement. Your status as a permanent replacement means that you will not be displaced from your position solely because the current strike ends. You also will not be displaced from your position solely because a striking employee who previously held your job offers to return to work. At the same time, we want to be very clear that this letter is not a contract of employment for a defined period of time. Your status as a permanent striker replacement does not constitute a promise of "permanent employment" and does not make you a "permanent employee." You may voluntarily resign your employment with the Company at any time, for any reason. Similarly, the Company may terminate your employment for any lawful reason at any time, including as a result of a strike settlement agreement reached between the Company and the United Steelworkers*

⁷ Copies of all of those letters are included in Employer Exhibit 2 and its multiple subparts. E. 2(a) – E. 2(rrr).

Union, Local 748-L, or by order of the National Labor Relations Board. .

..

6. Following the 90-days of continuous service with the Company, you will be eligible for the following benefits (subject to and in accordance with the provisions of the applicable plan):
 - Comprehensive Health Care
 - Dental Care
 - Vision Care
 - Life Insurance
 - 401(k)
 - Paid time off to include vacation time and designated holidays . . .

14. *You understand and agree that your employment with the Company is "at will," meaning that either the Company or you may terminate the employment relationship at any time and for any lawful reason, with or without notice, and with or without cause. There is no requirement that you be warned or suspended before being discharged. You understand and agree that there is no specified duration for your employment with the Company. You further understand and agree that this document is not a contract, that no individual except the Plant Manager is authorized to enter a contract with you, and that any such contract must be in writing and signed by both parties. . . .*

16. By signing this document below, you affirm that you have read, fully understand and agree to all of the terms set forth above.

We are looking forward to having you join our team and to the contributions you will make in helping OMNOVA achieve its business objectives and serve its customers. If this offer of employment is satisfactory to you, please indicate your complete understanding and agreement to the above terms by signing this document in the space provided below and returning a copy to the Company's Human Resources representative.

Sincerely,

Company Representative.

Agreed and accepted this ___ day of [date]

Employee signature

Print Full Name

See e.g., E. 2(a) – E. 2(rrr) (emphasis added).

D. The Union withdraws its only unfair labor practice charge against the Company.

On October 1, 2010, the Union filed an unfair labor practice charge against the Company. Jt. 2. In its charge the Union alleged, among other things, that the Company had “cause[d]/converted an unfair labor practice strike” and had violated the Act by “hiring permanent replacement workers.” *Id.* The Union amended its charge on November 22, 2010. Jt. 3. The amended charge included the same allegations regarding the unfair labor practice strike and the permanent replacement workers. *Id.* On December 29, 2010, the Union withdrew its charge. *See Hearing Officer’s Report & Recommendation on Challenged Ballots (“H.O.’s R. & R.”)*, p. 10. This is the only unfair labor practice charge filed by the Union for the duration of this dispute.

E. May 24, 2011 preelection hearing.

Petitioner filed this decertification petition on May 10, 2011. The Board conducted a preelection hearing on May 24. At that hearing, the Union claimed that the strikers, who are unquestionably economic strikers, were eligible to vote, but that the permanent replacement employees were not. *See* May 24 Tr. 9-12. The Company argued that the permanent replacement employees were eligible to vote, but that the economic strikers were not because they have been permanently replaced, they have been on strike for more than 12 months, and the strike

continues. *See* May 24 Tr. 31.⁸ At the May 24 hearing, the Union also moved to dismiss the decertification petition on the basis that it was filed by a temporary replacement rather than a permanent employee. *See* May 24 Tr. 10-12.

The Regional Director rejected the parties' preelection arguments and directed an election in which all strikers and replacement employees would be permitted to vote subject to challenge. *R.D. Dec. & Dir. Election*, June 10, 2011, p. 3. The Regional Director based his decision on the Board's "well-established consistent policy which provides that striker and replacement employee eligibility issues are to be resolved by post-election challenge procedure." *Id.* The Regional Director also denied the Union's motion to dismiss because "Petitioner, at a minimum, is an individual acting in behalf of employees who are currently employed at the Employer's facility," and under the clear language of the Act, such an individual may file a decertification petition. *Id.* at 4.

F. The election and challenged ballots.

Region 26 conducted the manual election on July 13, 2011. *R.D.'s Suppl. Dec. on Challenged Ballots & Notice of Hearing*, August 18, 2011, p. 2. Mail ballot voting concluded on July 28. *Id.* Two-hundred ninety-four ballots were cast, and all were challenged. *Id.* The Union challenged the ballots of all 136 manual ballots cast by the Company's replacement employees on the ground that they are temporary replacements not eligible to vote. Tr. 9-10. The Company challenged the ballots of the 158⁹ strikers who voted by mail on the ground that they had been

⁸ The Hearing Officer did not allow either party to present any witnesses and did not admit any proffered exhibits into evidence, on the grounds that a preelection hearing was not the appropriate venue for determining the voting eligibility of strikers and replacements. May 24 Tr. 12.

⁹ The Hearing Officer thought there were votes cast by 157 strikers. Tr. 11. The Company submits that there were 158 mail ballots cast by striking employees. The Tally of Ballots shows 294 votes cast. The Union challenged 136 votes. Thus, there had to have been 158 votes cast by strikers that were challenged by the Company.

permanently replaced and are not eligible to vote. Tr. 11.¹⁰ The Regional Director ordered a post-election hearing to resolve the challenged ballots.

G. The September 13, 2011 post-election hearing and the Hearing Officer's Report and Recommendations.

The Region conducted the post-election hearing on September 13. All parties participated and had the opportunity to present evidence and argument. The parties agreed to admit documents into evidence and to stipulate to specific facts, and did not present any witnesses. Tr. 1-52.

The Hearing Officer issued his Report and Recommendations on Challenged Ballots on November 2, 2011. *H.O.'s R. & R.*, p. 32. The Hearing Officer concluded that there was a mutual understanding between the Company and the replacement workers that they were permanent replacements and all were eligible to vote in the election. *Id.* at 14-15. The Hearing Officer relied on the Board's ruling in *Jones Plastic*, but also noted that the Company's language went "beyond the language in *Jones Plastic* in its efforts to prove the replacement employees are permanent," because the Company's documents clearly "explain[ed] that permanent replacement status means [the replacement workers] will not be displaced solely because the current strike ends or because a striking employee offers to return to work at their pervious job." *Id.* at 14.

The Hearing Officer also found it "undisputed" that the replaced strikers had been on economic strike for more than 12 months before the election. *Id.* at 17. The Hearing Officer concluded that under clearly established Board precedent, the strikers were therefore ineligible to vote in the election. *Id.* at 17-18.

¹⁰ The Company also challenged six strikers' ballots on the ground that they have retired and are ineligible to vote. Tr. 13-16. The Union stipulated that one of the six strikers had retired, but contested the voter eligibility of the remaining five strikers. Tr. 15-16. The Hearing Officer found that the five strikers retired before the election and were ineligible to vote. *H.O.'s R. & R.*, p. 24. The Company also challenged four other strikers' ballots because they failed to sign the mail ballot envelope. Tr. 16-17, 27-30. The Hearing Officer agreed and found these four strikers ineligible to vote. *H.O.'s R. & R.*, p. 30. The Union does not contest either finding in its Exceptions to the Hearing Officer's Report and Recommendations.

H. The Union's Exceptions to the Hearing Officer's Report and Recommendations.

On November 30, 2011¹¹ the Union filed two Exceptions to the Hearing Officer's Report and Recommendations. *Union Exceptions to the Hearing Officer's Report & Recommendations* ("*Un. Exceptions*"), pp. 3-10. First, the Union first asks the Board to ignore the clear language of Section 9(c)(3), overrule its long-standing rule in *Wahl Clipper*, and proclaim a new rule that replaced strikers should be eligible to vote in any election (regardless when it is held) as long as there is a possibility that they might be reinstated. *See id.* at 4-7. The Union goes so far as to claim that even if a position does not exist, the replaced strikers should still be able to vote if there "is an opportunity for such a position in the future." *Id.* at 7. In other words, even though the specific language of Section 9(c)(3) prohibits replaced strikers from voting in an election held more than 12 months after the election, the Union asks the Board to read that language out of the Act.

Second, the Union urges the Board to overrule *Jones Plastic* to the extent that it allows "individuals who have replaced strikers but have been given conditional, at-will employment to vote in a representation election in lieu of the striking employees." *Id.* at 9. At the heart of the Union's argument is the claim that at-will employees can never be "permanent replacements." *Id.* at 10. This argument is without merit. Not only does it contradict the Board's decision in *Jones Plastic* and other settled cases, it also contradicts the Supreme Court's ruling in *Belknap*. Moreover, *Target Rock*, the very case on which the Union bases one of its exceptions, completely undermines the Union's arguments here. Consequently, both of the Union's exceptions must be rejected.

¹¹ The Union's Exceptions were due 14 days after the Hearing Officer issued his Report and Recommendations, but the Board granted an extension to November 30, 2011.

III. ARGUMENT

A. Long-settled Board law, the clear language of Section 9(c)(3) of the Act, and the legislative history show that the permanently replaced strikers are not eligible to vote in an election held more than 12 months after the start of the strike.

Section 9(c)(3) of the Act states, "Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within twelve months after the commencement of the strike." For over 50 years (and immediately after Section 9(c)(3) reached its current form), the Board has consistently interpreted Section 9(c)(3) to mean that permanently replaced economic strikers are not eligible to vote in an election that is held more than 12 months after the strike starts. *Thoreson-McCosh, Inc.*, 329 NLRB 630, 632 (1999); *Gulf States Paper Corp.*, 219 NLRB 806, 806 (1975); *Wahl Clipper Corp.*, 195 NLRB 634, 635-636 (1972); *W. Wilton Wood, Inc.*, 127 NLRB 1675, 1676 (1960). Indeed, the Board has adhered to this principle even where the strikers make an unconditional offer to return to work before the 12 month period expires, if the strikers have been permanently replaced and are not reinstated. *Thoreson-McCosh, Inc.*, 329 NLRB at 632.

Here, the relevant facts are simple and uncontested. The Union is engaged in an economic strike. As explained in more detail below, the strikers have been permanently replaced and are not entitled to reinstatement. The strike started on May 21, 2010, included all unit employees, and continues to this day. May 24 Tr. 17-18; Tr. 32-34. The Union has never made any kind of an offer to return to work. The manual portion of the election was conducted on July 13, 2011 and mail balloting concluded on July 28, 2011. Thus, both portions of the election were conducted more than 12 months after the strike started, and long after all of the strikers had been permanently replaced. Under these undisputed facts, there is no basis under Section 9(c)(3) or long-standing Board law to permit the strikers to vote.

The Union ignores the clear language of Section 9(c)(3) and the Board's long-standing, consistent interpretation of it.¹² Instead, the Union claims that *Wahl Clipper* should be overruled and that permanently replaced economic strikers should be allowed to vote in an election held more than 12 months after the start of the strike. The Union's claims must be rejected for several reasons.

First, the Union completely misreads the legislative history of section 9(c)(3). The Union incorrectly claims that the legislative history "reveals that workers who are entitled to reinstatement ([i.e.,] any strikers who have not taken positions elsewhere and maintain a claim to their current position) should be entitled to vote in any election at any time." *Un. Exceptions*, p. 5. The Board has repeatedly rejected this argument because it is simply wrong on both counts. *Wahl Clipper*, 195 NLRB at 635; *Thoreson-McCosh*, 329 NLRB at 631. Section 9(c)(3) clearly sets a 12-month limitation on strikers who are not entitled to reinstatement, and the legislative history clearly shows that "not entitled to reinstatement" refers to strikers who have been permanently replaced, and not (as the Union argues) only to strikers who have abandoned their jobs.

The Union's analysis of the legislative history is incomplete. The Union's reluctance to acknowledge the full legislative history is regrettable, but understandable, given that it exposes the flaws in the Union's argument. The Taft-Hartley Act originally prohibited all replaced economic strikers from voting in an election. *Wahl Clipper*, 195 NLRB at 634. Specifically, it provided that "[e]mployees on strike who are not entitled to reinstatement shall not be eligible to vote." *Wilton Wood*, 127 NLRB at 1676 n.2. This prohibition applied to all replaced strikers, regardless when the election occurred. *See id.* at 1677; *Thoreson-McCosh*, 329 NLRB at 631

¹² The Union's head-in-the-sand failure to even acknowledge *Thoreson-McCosh*—a case that is directly on point and directly at odds with the Union's arguments—is particularly egregious.

(“The Taft-Hartley Act overruled the Board’s interpretation and directed that strikers whose jobs had been permanently filled by replacements were ineligible to vote.”).

Congress amended the Act on September 14, 1959. *Wilton Wood*, 127 NLRB at 1676. The amendment provided that “[e]mployees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote . . . in any election conducted within twelve months after the commencement of the strike.” *Id.* at 1676. As the Board held nine months later, “[i]t is clear from the language of the statute, and we hold, that this provision eliminates the voting disability of replaced economic strikers which existed under the Taft-Hartley Act and gives them eligibility to vote, subject to Board regulation, in any election conducted within the first 12 months of the strike.” *Id.* at 1677.

The amendment was a compromise between various political factions, members of Congress, and President Eisenhower. *See Wahl Clipper*, 195 NLRB at 635; *Jeld-Wen of Everett, Inc.*, 285 NLRB 118, 119-121 (1987). As the Board has repeatedly explained in extensive detail, the legislative history shows that as a compromise, the 1959 amendment created a 12-month limitation on replaced strikers’ eligibility to vote:

[T]he resolution instructing the Senate conferees . . . described the compromise as follows: “The proposal follows the Goldwater bill and the Administration’s recommendations, except that economic strikers would not be permitted to vote after 1 year.”

Note the flat 1-year limitation in that statement. Even more specific was Representative Griffin’s description of the conference agreement on this compromise, in which he stated: “Section 702 relaxes the present ban on voting by economic strikers in representation elections. Two limitations are imposed: First, economic strikers are not to be eligible to vote after 12 months from the commencement of the strike; and second, they shall be eligible prior to that time only in accordance with regulations established by the Board consistent with the purposes of the act. . . .”

Similarly, Representative Barden described the compromise as follows: . . . “[S]ection 702 does not give employees engaged in an economic strike who are

not entitled to reinstatement an unqualified right to vote. Rather, this section provides that they shall be eligible to vote only . . . if the election is conducted within 12 months after the commencement of the strike.”

The legislative history . . . lends considerable support to the view that the 12-month limitation was established as a maximum period of voting eligibility for economic strikers. Furthermore, while the reference . . . to employees “who are not entitled to reinstatement” at first blush seems to qualify the limitation . . . neither the *Laidlaw* Board decision nor the Supreme Court’s decision in *N.L.R.B. v. Fleetwood Trailer*, 389 U.S. 375 (1967), had been handed down at the time of this 1959 amendment. *A review of the congressional debates strongly indicates that Congress at that time was under the impression that a striking employee who had been replaced had no remaining job rights or any entitlement to reinstatement where the strike was economic in character. Thus, the reference to employees “not entitled to reinstatement” . . . more probably was intended only as a further description of economic strikers, to distinguish them from unfair labor practice strikers.*¹³

Wahl Clipper, 195 NLRB at 634-635 (internal citations omitted).

Fifteen years later, the Board once again explained that the legislative history clearly supported its interpretation:

The Conference Committee’s analysis states that Section 9(c)(3) was amended “. . . so as to permit employees engaged in an economic strike, even though they have been replaced, to vote in a representation election, under regulations promulgated by the Board. Such strikers are entitled to vote during the first 12 months after the commencement of the economic strike.”

The debate preceding this final compromise language suggests that the adopted 12-month period stemmed primarily from two concerns. The first was the length of time replaced economic strikers would be vested with the right to vote on an equal basis with replacements and thus empowered to affect the results of an election. The second was the “factual and practical question of the extent of the genuine interests of replaced economic strikers in the issues which will be determined in the election.”

¹³ Since the phrase “not entitled to reinstatement” described all economic strikers, arguably the 12-month time limit in Section 9(c)(3) applies to both replaced and non-replaced strikers. *See Thoreson-McCosh*, 329 NLRB at 632 (noting that if read on its face, without regard to legislative history, Section 9(c)(3) would subject both replaced and non-replaced strikers to the 12-month limitation on voting eligibility). This issue was not before the Board in *Wahl Clipper*, and the Board did not address it. *See Wahl Clipper*, 195 NLRB at 634-636. The Board decided the issue in *Gulf States Paper*, holding that “not entitled to reinstatement” referred only to economic strikers who had been replaced. *Gulf States Paper Corp.*, 219 NLRB at 806-807. This aligns with the Board’s first decision analyzing the amendment to the Act in 1960, where the Board held that the amendment allowed replaced economic strikers to vote in the 12-month period after the strike commenced. *Wilton Wood*, 127 NLRB at 1677. Thus, for over 50 years the Board has consistently held that “not entitled to reinstatement” is synonymous with “permanently replaced” strikers.

Senator Javits of New York, a proponent of restoring the right of replaced economic strikers to vote, admitted finding troublesome and difficult the question how long that right should continue. He said, "Ultimately we may be receptive to some limitation of time, but the problem of time has not arisen practically. What has happened practically is that when an unreasonable time has elapsed, people float away, and as a practical matter, are not sufficiently interested to come forward and vote."

. . . Senator Case called the time within which the right to vote may be exercised, a substantive matter, and went on to say: "*I do not want them [replaced economic strikers] to forfeit the right to vote too soon; but I think there should be a time limit*"

These statements are instructive in formulating a rule which balances Congress' primary objective to grant replaced economic strikers the right to vote in Board elections during the strike with its desire to impose reasonable time limitations on that right. Given the concerns which prompted the 12-month eligibility period, we read Section 9(c)(3) as requiring that replaced economic strikers be empowered to affect the results of an election for at least 12 months after the commencement of a strike.

Jeld-Wen of Everett, Inc., 285 NLRB 118, 119-121 (1987) (emphasis added).

The Board has never waived from its interpretation of the legislative history, and has consistently applied it for over 40 years. In its most recent case addressing the issue, the Board once again reiterated that its consistent, long-standing rule is based on the clear legislative history:

The 12-month period for replaced economic strikers was based on two concerns: (1) the length of time replaced economic strikers would be vested with the right to vote on an equal basis with replacements and thus empowered to affect the results of the election; and (2) the factual and practical question of the extent of the genuine interests of replaced economic strikers in the issues which will be determined in the election. Reflecting these concerns, the legislative history indicates that Congress intentionally limited replaced economic strikers' voting eligibility to elections held "during the first 12 months after the commencement of the economic strike."

Thoreson-McCosh, 329 NLRB at 631-632.¹⁴

¹⁴ To support its claim that Congress "clear[ly]" intended that the 12-month limit not apply to replaced strikers, the Union cites a general quote by Senator Kennedy much earlier in the legislative process—five months before the

Second, the Union's argument contradicts the statutory history of the language in the Act. The Union admits that under the Taft-Hartley Act, which said that employees "not entitled to reinstatement shall not be eligible to vote," all replaced employees were ineligible to vote. *See Un. Exceptions*, p. 4; *see also Thoreson-McCosh*, 329 NLRB at 631 (noting that all permanently replaced strikers were ineligible to vote under the original Taft-Hartley Act). Employees "not entitled to reinstatement" therefore referred to all permanently replaced strikers. Since this is the same phrase used in the amended Act, Congress must have intended the original meaning of the phrase to remain the same, *i.e.*, "not entitled to reinstatement" means "all permanently replaced strikers" in both the original and amended versions of the Act. *See Gulf States Paper Corp.*, 219 NLRB at 806-807 (holding that the reference to employees "not entitled to reinstatement" in the amended Act referred specifically to permanently replaced strikers); *Wilton Wood*, 127 NLRB at 1677 (same). Consequently, the only plausible interpretation of Section 9(c)(3) as amended is that permanently replaced strikers are only eligible to vote in an election if it is held within 12 months of the start of the strike. There is nothing in the legislative history or the statutory history of the language that support's the Union's claim that "not entitled to reinstatement" refers to only those strikers (whether replaced or not), who have abandoned their jobs or have no possibility of returning to work.

The Union relies on *Laidlaw Corp.*, 171 NLRB 1366 (1968) and *N.L.R.B v. Fleetwood Trailer*, 389 U.S. 375 (1967), purportedly to show Congressional intent that employees "not entitled to reinstatement" includes only the strikers who have abandoned their jobs or have no possibility of reinstatement. *Un. Exceptions*, p. 7. That argument cannot be correct because

final amendment was passed. *Un. Exceptions*, p. 5. This does not show the congressional intent behind the final version of the bill. Furthermore, Senator Kennedy's statement only reflects his intent, not the intent of all of Congress. *See Wahl Clipper*, 195 NLRB at 635 (holding that the legislative history shows that Senator Kennedy's perspective was not the viewpoint of Congress as a whole).

Laidlaw and *N.L.R.B. v. Fleetwood Trailer* were decided almost ten years after Congress amended the Taft-Hartley Act, so Congress could not have based the statutory language on these cases. *Wahl Clipper*, 195 NLRB at 635. Indeed, the legislative and statutory history cited above makes it clear that Congress understood that the language referred to permanently replaced strikers well before the Union's cited cases were decided.

Moreover, under the Union's proposed interpretation, all economic strikers would have the right to vote under any circumstances, as long as there was any remote possibility of reinstatement. This boundless interpretation cannot be squared with Section 9(c)(3). To the Union, it does not matter if the economic strikers have been permanently replaced; it does not matter if they have not offered to return to work; and it does not matter if the election is held more than 12 months after the strike started. All that matters to the Union is that as long as reinstatement is theoretically possible at any time in the future, strikers may vote. The Union ignores that engaging in an economic strike has consequences and argues that strikers should always be eligible to vote, regardless of the circumstances. But Section 9(c)(3) imposes consequences and nothing in the legislative history even hints that Congress intended otherwise.¹⁵

Lastly, although the Union asks the Board to adopt Member Fanning's dissent in *Wahl Clipper*, that would not help the Union here. In his dissent, Member Fanning was concerned about the impact of the majority's decision on "former economic strikers" and strikers who had "all sought unconditional reinstatement." See *Wahl Clipper*, 195 NLRB at 636. Here, no such

¹⁵ As a legal matter, the Union's argument is fatally flawed. As a matter of fact, it is unsupported. The Union claims that none of the striking employees have found regular and substantially equivalent employment. *Un. Exceptions*, p. 7. No record facts support this assertion. The Union also guesses that there is "little doubt" that the strikers can reasonably expect that they will be reinstated when a position becomes available. *Un. Exceptions*, p. 8. Again, no facts support this claim. Furthermore, this unsupported assertion is disingenuous because the Union has never made an offer to return to work—they are still on strike—so they cannot reasonably expect to be reinstated if a position becomes available.

concerns arise because the strike continues to this day and there has been no unconditional offer to return. Moreover, Member Fanning conceded the “12-month limitation was established as a maximum period of eligibility to vote for economic strikers, but I construe the limitation as applying [only] to those who continue on strike for more than a year and are still on strike at the time the election is held.” *Id.* at 637 n.8. Thus, even under Member Fanning’s dissent, Section 9(c)(3) renders the strikers in this case ineligible to vote.

The same can be said for former Chairman Liebman’s dissent in *Thoreson-McCosh*. There, she expressed the view that the 12-month limitation under Section 9(c)(3) only applied to employees actively on strike at the time of the election, and not to employees who had offered to return to work but could not return because they had been replaced. *Thoreson-McCosh*, 329 NLRB at 635-636. Yet, even under the rationale of her dissent, there would be no basis to conclude that the strikers in the present case are eligible to vote because it is undisputed that they are currently on strike, have been for more than a year at the time of the election, and have not offered to return to work.

Thus, Section 9(c)(3) is clear as applied to the undisputed facts in this case—permanently-replaced economic strikers do not have the right to vote in an election held more than 12 months after the start of the strike. The Union’s argument that the permanently replaced economic strikers in this case who are on strike now and have been for 18 months are somehow eligible to vote simply cannot be harmonized with Section 9(c)(3) if that language means anything at all.

B. The Company's replacement workers are permanent replacements and are eligible to vote in the election.

1. The undisputed facts establish a mutual understanding between the Company and its employees that they are permanent replacements.

In order to establish permanent replacement status, there must be a mutual understanding between the employer and its replacements that their employment is permanent. *Jones Plastic & Engineering Co.*, 351 NLRB 61, 64 (2007). In this context, "permanent" means the employee "will not be displaced by returning strikers when the strike is over." *Id.* at 64; *Capehorn Industry*, 336 NLRB 364, 365 (2001).

Here, the *only* evidence in the record clearly establishes the required mutual understanding that the replacements were permanent.¹⁶ Every employee whose name appeared on the Excelsior List signed a document, which was counter-signed by a Company representative, that unequivocally explained that they were either being converted to permanent replacement status (*see, e.g.*, E. 1(b)) or were being hired in the first instance as a permanent replacement worker (*see, e.g.*, E. 2(a)).

Moreover, each and every letter contained the following language:

Your status as a permanent replacement means that you will not be displaced from your position solely because the current strike ends. You also will not be displaced from your position solely because a striking employee who previously held your job offers to return to work.

See e.g., E. 1(b), E. 2(a).

By signing the document, each employee attested that they accepted and understood the terms of their employment. *See e.g.*, E. 1(b), E. 2(a). Thus, the documents signed by every Company employee are enough by themselves to establish the required mutual understanding

¹⁶ The parties stipulated that the replacement employees replaced 140 of the strikers. (Tr. 49). In its brief, the Union argues that under *Jones Plastic*, the employees in this case are not permanent replacements because the Company did not notify the replacements about which strikers they were replacing. *Un. Exception*, p. 11. That is not the law. In *Jones Plastic*, the Board found permanent replacement status even for those replacements who were not notified that they were replacing a named striker. *Jones Plastic*, 351 NLRB at 64.

and permanence. *Supervalu, Inc.*, 347 NLRB 404, 416 (2006) (permanent status found based on employees' signature on form acknowledging that they were permanent replacements); *Associated Grocers*, 253 NLRB 31, 32 (1980) (mutual understanding that employees were converted from temporary to permanent status established based on signed acknowledgement); *see also Jones Plastic*, 351 NLRB at 66 (permanent status found where employer had each employee sign an employment form which stated that the employee was a permanent employee, one replacement told he was a permanent employee and employer notified striking employees that it would hire permanents); *J.M.A. Holdings, Inc.*, 310 NLRB 1349, 1349 (1993) (finding replacement workers were permanent replacements because the employer advised them that they were hired on a permanent basis, the replacements relied on this communication, and at no time did the employer indicate they were temporary or would be terminated at the end of the strike). In fact, as the Hearing Officer observed, the language in the Company's forms "goes beyond the language in *Jones Plastic* in its efforts to prove the replacement employees are permanent." *H.O.'s R. & R.*, p. 14.

Other record evidence supports the Company's position. For example, the Company notified the Union in advance that it was going to convert its temporary workers to permanent status and thereafter hire permanent replacements, and even provided the Union with the templates for its permanent employment offers to employees. Jt. 4; Jt. 6. *See Jones Plastic*, 351 NLRB at 64 (employer's notice to striking employees that it had begun hiring permanent replacements contributed to finding that replacements were permanent).

Indeed, the Union conceded the Company's replacements were permanent when, after having seen the Company's permanent offer letter templates and with the knowledge the

Company had converted and hired permanent replacements, it alleged under oath in the charge it filed that the Company violated the Act by hiring permanent replacements. Jt. 2; Jt. 3.

The Company's offer of certain employment benefits to its permanent replacements further supports the Company's position that there was a mutual understanding between it and its permanent replacement employees. *Gibson Greetings, Inc. v. N.L.R.B.*, 53 F. 3d 385, 391 (D.C. Cir. 1995). Here, the Company's permanent employment offer provided that employees would be eligible for health and life insurance, dental and vision care, a 401(k), and paid time off. *See e.g.*, E. 1(b), E. 2(a). In contrast, temporary employees were not eligible for Company benefits. *See e.g.*, E. 1(a). Where an employer offers benefits in this context, the "clear implication, particularly of the benefits, is that the jobs were being offered not for temporary but permanent employment and applicants ... would surely have so understood." *Gibson Greetings, Inc.*, 53 F.3d at 391.

Finally, the record is telling for what it lacks. The Union did not even attempt at the hearing to introduce evidence that the Company made any statements or engaged in any conduct that would detract from permanent replacement status or that there was any misunderstanding on the part of any replacement employee regarding their status. Accordingly, the record facts and established authority compel the conclusion that all of the Company's replacement workers are permanent and that they are eligible to vote.

2. "At-will" employees can be permanent replacements under the Act.

The Union does not dispute the facts above. Its only argument is that because the permanent replacements are "at-will" employees,¹⁷ they cannot be permanent replacements. *Un. Exceptions*, pp. 9-10. To that end, the Union urges the Board to overrule *Jones Plastic* "to allow

¹⁷ The Union leads its argument with the claim that "at-will employees are . . . not employees under the Act." *Un. Exceptions*, p. 8. This is clearly incorrect. *See* 29 U.S.C. §§ 152(2 & 3), 157. The Act covers all employees (whether union or non-union, at-will or otherwise) that meet the statutory definition.

individuals who have replaced strikers but have been given conditional, at-will employment to vote in a representation election in lieu of the striking employees.” *Id.* at 9. The Union does not seek a subtle change in the law. Instead it seeks to take a sledge hammer to the well-established law on striker replacements by advocating for a rule that employment offers “must be unconditional” for the employee to be a permanent replacement. *Id.*

The Union claims that the Supreme Court’s ruling in *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983), and the Board’s decision in *Target Rock Corporation*, 324 NLRB 373 (1997) support its overhaul of the law. *Belknap*, however, does not support the Union’s position—indeed, it supports the opposite conclusion. Similarly, *Target Rock* does not support the Union’s extreme position. Furthermore, the Board has made it clear that to the extent *Target Rock* suggests any support for the Union’s position, it has been overruled.

Importantly, *Belknap* is a preemption case and did not involve at-will language in an employer offer to a strike replacement worker. There, the U.S. Supreme Court addressed whether permanent replacements could bring breach of contract and misrepresentation claims against an employer who had promised them unconditionally that they were permanent employees. 463 U.S. at 498. The Court concluded that they could, and in doing so, it explicitly rejected the argument that “conditioning offers . . . will render replacements non-permanent employees subject to discharge to make way for strikers at the conclusion or settlement of a purely economic strike” *Id.* at 502. The Court held that such conditions do not render a replacement employee a temporary replacement. *Id.* at 503. As the Court explained in further detail in a footnote, all employment offers are conditional (whether express or implied) and there is no reason that express conditions should prevent replacements from being permanent, if (as the Board recognized) implied conditions do not:

That the offer and promise of permanent employment are conditional does not render the hiring any less permanent if the conditions do not come to pass. All hirings are to some extent conditional. . . .

The dissent and the concurrence make much of conditional offers of employment, asserting that they prevent replacements from being permanent employees. As indicated in the text, however, the Board's position is that even unconditional contracts of permanent employment are as a matter of law defeasible, first, if the strike turns out to be an unfair labor practice strike, and second, if the employer chooses to settle with the union and reinstate the strikers. *If these implied conditions, including those dependent on the volitional act of settlement, do not prevent the replacements from being permanent employees, neither should express conditions which do no more than inform replacements what their legal status is in any event.*

Id. at 504 n.8 (emphasis added).

The Court then addressed an argument by Justice Blackmun. *Id.* Justice Blackmun claimed that the Board's position was that "employment conditioned on an employer settling with the union is not a permanent arrangement," and that the Court should defer to the Board's position. *Id.* The majority disagreed, explaining that there was no clear Board rule that conditional offers cannot be offers of permanent employment:

[T]he Board's position in this Court is equivocal at best: "[S]uch a conditional offer *might well* render the replacements only temporary hires ...". (Emphasis added). NLRB Br., at 17. This case is thus a far cry from [*NLRB v. Transportation Management, Incorporated*] where we were reviewing a clear rule of the Board. Here there is no firm position of the Board that deserves deference. [*Covington Furniture Manufacturing Corporation*] is not to the contrary. There the replacements could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if he discharged some of them to make way for returning strikers, even if the employer was not required to do so by the terms of a settlement with the union.

Id.

The Supreme Court distinguished the Board's rule in *Covington*. *Id.* There was no at-will disclaimer in *Covington* and in that case the Board (which merely adopted the ALJ's decision) never addressed, let alone decided, whether at-will conditions preclude replacements from being

permanent replacements. *Covington Furniture Mfg. Corp.*, 212 NLRB 214, 220 (1974). The issue in *Covington* was far more basic. The employer had hired strike replacements, but never made any promise or indication that they were permanent replacements. *Id.* at 220. The employer had even hired two trainees for most vacant positions, waited to see how the trainees performed, and then discharged the poorer performer. *Id.* The ALJ noted that to be permanent employees, the “hiring offer must include a commitment that the replacement position is permanent and not merely a temporary expedient subject to cancellation” *Id.* Such a commitment was lacking.

The Union claims that by distinguishing *Covington*, the Supreme Court held that at-will employees are not permanent replacements. *Un. Exceptions*, p. 9. This is clearly not the case, as the Board recently explained at length:

[T]he Court in *Belknap* did not “make clear” that at-will employment status was inconsistent with permanent employment. That issue was not even presented in *Belknap*. There was no “at will” disclaimer in *Belknap*.

Nor was there an “at will” disclaimer in *Covington*. . . . It was the absence of any promise of permanent status, not any evidence of atwill [sic] employment status (for none was cited in the case), that was dispositive in *Covington*.

Consistent with the above, the Court in *Belknap* did not, and could not, have construed *Covington* in the manner suggested by the *Target Rock* majority. Neither *Belknap* nor *Covington* addressed at-will employment in any way. Instead, the Court considered *Covington* in connection with its rejection of the claim that the Board had determined that an offer subject to settlement with the union was not a permanent employment arrangement. The Court stated that “[in *Covington*] the replacements could be fired at the will of the employer for any reason; the employer would violate no promise made to a replacement if he discharged some of them to make way for returning strikers” But the reason the employer “would violate no promise” was, as discussed above, that it never made any promise of permanent employment at all, not that it affirmatively told employees that their employment was “at will.”

Jones Plastic, 351 NLRB at 65 (emphasis in original) (internal citations omitted).

On appeal, the Seventh Circuit affirmed the Board’s interpretation of the holding in *Belknap*. *United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv.*

Workers Int'l Union v. NLRB, 544 F.3d 841, 854 (7th Cir. 2008). The Seventh Circuit rejected the union's argument that *Belknap's* reference to *Covington* meant that an employer could not hire a permanent replacement unless it offers the replacement a contract that is binding under state law (*i.e.*, and therefore not at-will). *Id.*

The Union also claims that *Jones Plastic* should be overruled in favor of a return to *Target Rock*. In support of this claim, the Union incorrectly cites *Target Rock* for the proposition that "an offer of permanent employment . . . must be unconditional," *i.e.*, that at-will replacement employees are temporary replacements *per se*. *Un. Exceptions*, p. 9.

Target Rock is a "mutual understanding" case. There, the Board found there was no mutual understanding between the employer and replacement workers regarding permanent replacement status. *Target Rock Corp.*, 324 NLRB 373, 373 (1997). The Board based its conclusion on several factors. First, the employer's advertisement for replacements said that "[a]ll positions could lead to permanent full-time [positions] after the strike," indicating that they were temporary. *Id.* at 374. Second, the evidence showed that the employer did not intend the replacements to be permanent. *Id.* During negotiations with the union, the employer repeatedly told the union's negotiators and picketers that the replacements were temporary and were not permanent, and repeatedly offered to discharge the replacements if the parties reached an agreement or the union offered to return to work. *Id.* The employer's director of human resources even signed an affidavit for the Board, expressly referring to the replacement workers as temporary replacements. *Id.* Third, the evidence showed that the replacements had clear doubts as to whether they were permanent employees, and these doubts persisted throughout the strike. *Id.* In response, the employer introduced evidence that when the employees were hired, they were told that they were "permanent at-will employees, unless the National Labor Relations

Board considers you otherwise, or a settlement with the Union alters your status to temporary replacement.” *Id.*

Based on the evidence, the Board found that the employer did not intend them to be permanent replacements. *Id.* Further, because of the way the employer phrased the offer, it was clear that the employer “anticipated the prospect of the Board’s intervention . . . and in the first instance was willing to accept as authoritative [the Board’s] determination that the replacements be regarded as temporary employees.” *Id.* In other words, the employer’s “offer” of permanent at-will employment was illusory because the employer left the ultimate determination up to the Board. Contrary to the Union’s claim,¹⁸ the Board never held that at-will employment precludes replacement workers from being permanent replacements. *See id.* In fact, this was recognized by both the majority and dissent in *Jones Plastic*. The majority in *Jones Plastic* recognized that *Target Rock* merely “suggests that [the employer’s] at-will disclaimers . . . detract from [a] showing of permanent replacement status,” but that the only basis for this suggestion was a misreading of *Belknap*. *Jones Plastic*, 351 NLRB at 63-65. In their dissenting opinion, Members Liebman and Walsh were even more explicit in rejecting the argument now proffered by the Union:

Target Rock does not state that an employer’s declaration that replacements are “at-will employees” precludes a finding that those replacements are permanent. Nor has that ever been the law. . . .

¹⁸ Tellingly, the Union repeatedly cites the ALJ’s decision (which starts at page 378), not the Board’s decision, to support its claim that permanent replacements cannot be at-will employees. *Un. Exceptions*, p. 9 (“In order for an employee to be considered permanent, there can remain no conditions to their employment. [*Target Rock*] at 382.... It has been well-settled for decades that the essence of an offer of permanent employment is that a position [sic] must be unconditional. *Target Rock*, 324 NLRB at 382.”). The Board did not adopt this portion of the ALJ’s findings. The ALJ’s findings were affirmed only as modified by the Board. *Target Rock*, 324 NLRB at 373. Although the ALJ opined that “the essence of permanence is that the promise must be unconditional,” the Board did not adopt this claim. *Id.* at 375. Instead, the Board recognized that the ALJ’s finding potentially conflicted with *Belknap*. *Id.* at 375. The Board then assumed that such conditions do not negate an offer of permanent employment, but nonetheless upheld the ALJ’s order because the remaining facts showed that the employer intended the workers to be temporary replacements. *Id.*

Prior to *Target Rock*, the Board had held that at-will employment was *not* incompatible with permanent replacement status. *J.M.A. Holdings*. In *Target Rock*, the Board did not overrule *J.M.A. Holdings* or even mention it. In the final analysis, neither *Target Rock* nor any other case stands for the proposition that the majority purports to overrule. In our view, the majority's strained effort to overrule a nonexistent holding can be explained only by its desire to reverse precedent.

Id. at 67, 69.

Furthermore, even if the Union's proposed interpretation of *Target Rock* were correct, the Board "overruled [*Target Rock*] to the extent it suggests that at-will employment is inconsistent with or detracts from an otherwise valid showing of permanent replacement status."

Jones Plastic, 351 NLRB at 67.¹⁹

The Board reached this conclusion after thoroughly examining Board and federal court decisions, and concluding that "as a matter of law, at-will disclaimers do not detract from other evidence proving the replacement's status as 'permanent employees' for the purpose of Federal labor law." *Id.* at 66. The Board also noted that holding otherwise would violate clearly established Board principles:

Indeed, as the briefs filed in this case make clear, *Target Rock* has even been read to *preclude* at-will employment for permanent replacements. To hire permanent replacements under this view, the Respondent would have had to offer them tenure rights superior to those enjoyed by the strikers (who would remain at-will employees) in contravention of the Act's fundamental principles. See *NLRB v. Erie Resistor*, 373 U.S. 221 (1963) (award of superseniority to nonstrikers was unlawful and inherently destructive of Section 7 rights because it permanently penalized employees for striking in a manner that created continuing obstacles to the future exercise of those rights). [This proposed interpretation] would effectively preclude the lawful hiring of permanent replacements in any case where strikers are employed on an atwill [sic] basis. This result cannot be

¹⁹ Even if the Board abandons *Jones Plastic*, the replacements in this case are permanent replacements. Unlike the facts in *Target Rock*, the undisputed facts in this case establish that the Company clearly and unequivocally intended the replacements to be permanent replacements, and consistently communicated this to the replacements and to the Union. Furthermore, the undisputed facts show that the replacements mutually understood that they are permanent replacements. There is nothing in the record that indicates that the Company ever informed the Union or the replacements that they were only temporary replacements.

reconciled with the well-established doctrine permitting the hiring of permanent replacements under *Mackay Radio*.

Id. at 66.

Lastly, the Union's flawed argument rests on a misunderstanding of "temporary replacement" and "permanent replacement," which are terms of art in labor law, with very specific meanings. "Permanent replacement" does not mean (as the Union's argument suggests), that the replacements will always be employees and may never be discharged. *See Gibson Greetings, Inc.*, 310 NLRB 1286, 1293 (1993) *aff'd in part and rev'd in part* 53 F.3d 385 (D.C. Cir. 1995) (Member Raudabaugh concurring and dissenting in part) ("[I]n the lexicon of labor law . . . 'permanent' does not mean 'forever.'"). Nor does it mean that the employer guarantees that the replacements will be employed under a good-cause or just-cause standard (which is the inevitable outcome under the Union's argument). "Permanent replacement" simply indicates an intention to retain replacements even after the strikers have unconditionally offered to return to work. *Jones Plastic*, 351 NLRB at 64; *Capehorn Industry*, 336 NLRB 364, 365 (2001); *Id.* (Member Raudabaugh concurring and dissenting in part) ("It means only that the intention is to retain the replacement even after the strike is over.").²⁰ In this case, the Company's offer clearly shows that it intends to retain the replacements even if it receives an unconditional return to work offer from the strikers. Consequently, the replacements in this case were undisputedly permanent replacements. *See* Jt. 6; E. 1(a) – E. 1(jjjjj); E. 2(a) – E. 2(rrr).

IV. CONCLUSION

The Union does not challenge the Hearing Officer's findings of fact or his application of current law to the facts. Instead, the Union only pleads for the Board to change the law based on the claim that the long-standing rules at issue in this case inexplicably "erod[e] the right to

²⁰ In contrast, "temporary replacement" refers to an employee who is hired only for the duration of the strike. *Gibson Greetings*, 310 NLRB at 1293 (Member Raudabaugh concurring and dissenting in part).

organize and the danger posed to our society as a consequence.” *Un. Exceptions*, p. 12. But this is not a legitimate reason to radically change the law. The Board’s responsibility is to interpret and administer the Act, not to react to perceived claims that the Act as passed “erodes” the right of strikers. In effect, the Union asks the Board to place its thumb on the scale, to give the Union a significant advantage—one that directly contradicts Congressional intent, the Supreme Court’s rulings, and long-standing Board law. Consequently, the Union has failed to raise a substantial and material issue, and its exceptions must be dismissed.

Based on the facts, authorities and arguments set forth above, the Board should therefore: (1) reject both of the Union’s exceptions; and (2) adopt the Hearing Officer’s Report and Recommendations on Challenged Ballots in its entirety.

Respectfully submitted,

OMNOVA Solutions, Inc.

Dated: December 7, 2011

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that he caused a copy of the foregoing **OMNOVA SOLUTIONS, INC.'S BRIEF IN OPPOSITION TO THE UNION'S EXCEPTIONS TO HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS** to be served upon the following, via electronic filing and e-mail, on December 7, 2011:

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