



# Labor Shocker: Strike Replacements Struck Down

NLRB REJECTS PERMANENT REPLACEMENT WORKERS IN GROUNDBREAKING RULING

Insights

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In an unprecedented 2-1 decision, the National Labor Relations Board recently held that a California continuing care facility violated the National Labor Relations Act by hiring permanent replacements during an economic strike to punish striking employees and to avoid future strikes. In so holding, the Board overturned decades of precedent allowing employers to hire permanent replacements during an economic strike, regardless of motive. This decision could have a significant impact on your labor relations strategy – unless you navigate through this area carefully, you could also run afoul of the new Board standard (*American Baptist Homes of the West*).

## Case Background: Employer's Hand Forced By Costly Strike

American Baptist Homes of the West runs a continuing care facility known as Piedmont Gardens in Oakland, California. The workforce at the facility includes a contingent of unionized employees represented by the Service Employees International Union (SEIU). The employer and union began negotiating a successor contract in February 2010. In May 2010, the parties still remained at odds over significant issues, including healthcare, pensions, and disciplinary policies. The union began picketing outside the employer's facility on May 25, and by August 2, 2010, approximately 80 of 100 employees went out on strike.

To prepare for the strike, the employer engaged a staffing agency and extended temporary employment offers to approximately 60 to 70 employees, at a cost in excess of \$300,000. The employer began permanently replacing striking employees on August 3, and within a matter of days made approximately 44 offers of permanent employment. These hiring decisions were challenged by the union, and the subsequent case eventually went to an NLRB hearing.

At that hearing, the facility's Executive Director testified that she made the decision to hire permanent replacements because she did not believe the employer could afford to repeatedly engage the staffing agency if the bargaining unit employees decided to engage in future strikes. The Executive Director also stated in a Board affidavit that, because the permanent replacements were willing to work during the present strike, they would probably also be willing to work during any future work stoppages.

The hearing judge determined that the employer's motivation for hiring the permanent replacements – essentially to teach the strikers "a lesson" – did not violate the National Labor

Relations Act. However, on May 31, 2016, the Board reversed the judge's ruling and handed down a surprising decision, ruling that the permanent replacement workers were not permitted under the law.

### **Board Decision: "Permanent Replacements Not Acceptable"**

To reach this conclusion, the majority of the Board dusted off a 1964 NLRB decision holding that the motive for hiring permanent replacements was usually immaterial, but evidence of an "independent unlawful purpose" could lead to a different outcome (*Hot Shoppes*). Prior to the holding in *American Baptist*, the 1964 decision had largely been ignored because it has long been held an employer may hire replacement workers so as to carry on its business.

The Board majority held that an "independent unlawful purpose" does not mean the purpose must be unrelated or extrinsic to the parties' bargaining relationship or underlying strike. Instead, the majority held "independent unlawful circumstances" includes any intent to punish striking workers and other "retaliatory" motives related to the economic strike and parties' bargaining relationship.

### **What Does This Mean For Employers?**

This case raises serious concerns about the lawfulness of ever using permanent replacement workers during an economic strike. As the dissent aptly noted, "[U]nder the majority's decision, it appears that any evidence of antistrike animus will render unlawful the employer's action" of hiring permanent replacements. However, this decision does not mean that you will never be able to retain such replacements.

Under the new standard, when evaluating the decision to hire permanent replacement workers instead of temporary replacement workers, it is important for you to focus on your operational need to continue business. You should avoid focusing your attention on the administrative challenges in hiring a temporary workforce. Where the employer in *American Baptist* went astray, according to the Board, was by communicating to the union that it was hiring permanent replacements to avoid future strikes and punish the employees. If an employer is motivated by these interests, the Board will now order that employer to rehire the striking workers and make them whole. You should avoid making the same mistake.

An appeal of this decision is likely, but such a procedural maneuver could take a significant amount of time, and any outcome is uncertain. For now, you should consider this decision to be the new standard to follow until you hear otherwise.

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