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# NO PERMANENT REPLACEMENT OF STRIKING EMPLOYEES

**House Bill 4501 as passed by the House**
**Second Analysis (9-5-97)**

**Sponsor: Rep. Vera Rison**
**Committee: Labor and Occupational Safety**

## *THE APPARENT PROBLEM:*

The strike is generally considered the strongest weapon possessed by workers in labor disputes when negotiations break down. However, the effectiveness of a strike depends on whether or not the employer is able to fire striking workers, hire replacement workers, and resume normal production. The federal Taft-Hartley Act makes certain types of strikes and picketing unlawful, but also extends job protections to employees engaged in certain other kinds of strikes, picketing, and other concerted activities. The degree to which workers are protected from discharge and replacement, if any, depends on what kind of strike is involved: "economic," "(employer) unfair labor practice," or "unprotected/illegal."

The federal National Labor Relations Board distinguishes three broad categories of strikes: the "economic" strike, which is concerned with demands regarding hours of work, wages, and working conditions; the "protected activity" or "employer unfair labor practice"strike, a strike caused or prolonged, in whole or in part, by unfair labor practices of the employer; and "unprotected activity" or "union unfair labor practice" strike, which include those made unlawful under the 1947 Taft-Hartley Act and the 1959 Landrum-Griffin Act, activities in violation of no-strike agreements, and other proscribed interferences with legitimate collective bargaining activity.

The greatest degree of protection to workers from discharge or loss of employment to replacement workers is extended to "protected" or "employer unfair labor practice" strikes. In these kinds of strikes, replacement workers may be hired to fill the strikers' jobs, but only for the period until the strikers seek to return to work. Thus, striking workers are entitled to reinstatement in their jobs upon an unconditional offer to return to work, even though it may be necessary to discharge replacements to make room for the returning workers. Since the 1938 Supreme Court decision in *NLRB v Mackay Radio and Telegraph Co.* [304 U.S. 33(1938)] employers have been allowed to hire permanent replacements for "economic" strikers. Under *Mackay*, then, an employer can refuse to reinstate strikers at the conclusion of an economic strike if the employer has replaced them with permanent employees, and economic strikers have only limited reinstatement rights: they may claim their former jobs only if permanent replacements have not been hired. Finally, "unprotected" strikers have no reinstatement rights; they lose their reinstatement rights and are not protected against discharge by their employer.

The issue of replacement workers has become prominent in Michigan in the wake of the nearly two-year-long strike by employees of the Detroit News, the Detroit Free Press, and the joint operating agreement (JOA) corporation, Detroit Newspapers Inc. The strike, which began on July 13, 1995, ended when the six striking unions made an unconditional offer to return to work in February 1997. The two newspapers have said that they will not discharge their replacement workers to reinstate strikers, who have made an unconditional offer to return to their jobs. The unions, however, are claiming that the strike was an (employer) unfair labor practice strike, and therefore that they should be reinstated. Currently, this dispute over the type of strike reportedly is before an NLRB administrative law judge.

Although the Detroit newspaper strike falls under federal, not state, law, legislation reportedly has been proposed at the federal level to ban permanent replacements for strikers. Some people believe that similar legislation should be enacted on the state level.

## *THE CONTENT OF THE BILL:*

The bill would prohibit employers of striking employees from permanently replacing the striking employees. More specifically, the bill would amend Public Act 176 of 1939, which regulates labor disputes and employment relations, to prohibit employers from permanently employing (or offering permanent employment to) employees who had performed bargaining unit work for the employer during a labor dispute, or from otherwise offering or granting an individual any employment

preference -- based on the fact that the individual was employed or indicated a willingness to be employed during a labor dispute -- over someone who (1) had been employed by the employer at the beginning of the labor dispute, (2) had exercised his or her right to strike ("to join, assist, or engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection through the labor organization involved in the labor dispute"), (3) was working for (or had unconditionally offered to return to work for) the employer, and hadn't been convicted of threatening or stalking an employer or an employer's family. In addition, the bill would prohibit employers, their officers, or agents, from using religion, race, sex, color, ethnicity, or national origin as a criterion for either discriminating against, or granting preferential treatment to, one or more individuals in the return of striking workers.

Legislative intent. The bill also would specify that it was the intent of the legislature to allow private citizens to engage in secondary boycotts.

MCL 423.16

## *FISCAL IMPLICATIONS:*

According to the House Fiscal Agency, the bill has no fiscal implications. (4-16-97)

## *ARGUMENTS:*

### *For:*

Pro-labor advocates argue that some much-needed and long overdue balance needs to be restored to the relationship between labor and management. Beginning in the early 1980s there has been a steady erosion of organized labor's ability to protect workers' rights, especially through the use of strikes in response to harsh and regressive bargaining positions taken by employers. Although the reasons for this erosion are complex, and involve such factors as the growth of transnational corporations and the exporting of jobs, labor advocates point to President Reagan's decision to permanently replace the striking air traffic controllers in 1981 as a turning point in the use of permanent striker replacements -- and union busting -- under the 1938 U.S. Supreme Court *Mackay* decision that prohibits employers from discharging workers engaged in lawful economic strikes, but allows employers to permanently replace those striking workers. Labor advocates argue that this court decision encourages employers to seek confrontations with their employees for the sole purpose of destroying union representation at the workplace, since it undermines the system of collective bargaining by allowing employers to provoke strikes and then to permanently replace the striking workers. It tips the balance of bargaining power between employers and workers decidedly, and unfairly, in favor of the employer. This, say union representatives, is precisely what happened at the Detroit Newspaper Association strike, which now has turned into a lockout by the employers, Gannett (headquartered in Alexandria, Virginia) and Knight-Ridder (headquartered in Miami, Florida). In February of this year, striking workers at the Detroit News and the Detroit Free Press made an unconditional offer to return to work while they continue to negotiate for a fair contract, but both newspapers reportedly have said they will not fire the some 1,200 replacement workers they hired during the strike to make room for the more than 1,000 strikers who have made an unconditional offer to return to their jobs.

Even representatives of the Roman Catholic Church, which has a long tradition of giving great weight to what it calls "the dignity of the worker," have voiced support for the Detroit newspaper strikers. For example, Cardinal Adam Maida publicly expressed his belief that hiring replacement workers is morally wrong and effectively denies unions their right to exist "[b]ecause if you take the strike initiative out of the union bargaining position, then you in effect have gutted the strength of the union." (Quoted in the December 22, 1996, issue of the Detroit Sunday Journal.) And Bishop Gumbleton of Detroit has been arrested for participating in public protests against the Detroit newspapers and in support of the strikers.

Because the National Labor Relations Board (NLRB) has jurisdiction over most private workplaces, individual states cannot prohibit permanent replacements for most private workplaces. (Apparently, Minnesota passed such a law, but it was overturned by the courts.) However, the National Labor Relations Act (NLRA) doesn't cover certain workers (including those in particular industries or those working for employers with a volume of business under a prescribed level, which varies with the field of business), and the NLRB has the discretion to decline the exercise of jurisdiction over any class or categories of employers. These workers are covered by Michigan's labor mediation act, which the bill would amend. The ability of employers to hire permanent replacement workers during a strike effectively vitiates the collective bargaining process by removing the right of workers to lawfully withhold their labor without being threatened by the permanent loss of their jobs. Although much of the work to fix this problem must take place at the federal level, it is important for the state of Michigan to do what it can to correct the basic unfairness of this loophole in labor law.

Legislation supported by President Clinton that would ban permanent replacements reportedly was overwhelmingly passed twice by the U.S. House of

Representatives, but died in the U.S. Senate when a vote to end a filibuster against the bill fell three votes short of the 60 votes needed. Furthermore, reportedly most major civilized countries already have such laws, including Canada, Japan, Germany, and France. Prohibiting the permanent replacement of striking workers is a basic question of fairness, and it's time for both the state and federal governments to adopt this position.

### *Against:*

Business proponents argue that far from restoring balance to the relative positions of labor and management in labor disputes, the bill would unbalance the current balance of power in favor of labor. As the Department of Consumer and Industry Services analysis points out, historically, hiring replacement workers has been an option for employers unable to otherwise resolve a labor dispute. Although such an action is not frequent, there have been cases -- such as the recent Detroit newspaper strike -- in which an employer or employers have hired other workers to replace workers on strike. The department's analysis further points out that the state's public policy on labor disputes should not favor either labor or employers, and asserts that removing the option of replacing striking workers would unbalance the scales in labor disputes in favor of labor.

Business proponents further point out that more than 50 years of national labor policy have been based on a balance of economic powers that employers and employees may exercise in advancing their respective interests, and that, unlike many of American employers' international competitors, American workers have the unconditional right to strike. This right to strike has been balanced by the right of employers to continue operations during economic strikes by using permanent replacements. These rights and attendant risks have encouraged successful negotiations in most cases, and have served the interests of employers, employees, and the nation. The bill, if enacted, would overturn more than a half century of well-settled precedent and lead to more strikes. Over the last four years, Michigan has seen a turnaround in its economy and with its attitude towards job providers. The bill not only would send the wrong message to employers, it could be detrimental to Michigan's economic recovery, especially combined with the legislature's earlier approval of a state minimum wage hike.

Finally, representatives of small businesses point out that the bill would introduce another element of government micromanagement into the workplace that would disproportionately affect small business owners, who are creating the majority of new jobs in Michigan. Small employers must keep their ability to employ permanent replacement workers when they are unable to meet the demands of organized labor, for they cannot afford the protracted and costly litigation process that accompanies many labor-related disputes. For the vast majority of small business owners, the ability to replace striking workers is the only advantage they have against a large, well-financed union. Small business owners believe that the current burden of proof already favors the employee in almost all areas of labor law and employer-employee relations, and that to further shift this burden to the employer -- and vest more power in big unions -- is not sound public policy.

## *POSITIONS:*

The Michigan State AFL-CIO (a federation of 62 unions) supports the bill. (9-2-97)

The Michigan Catholic Conference supports the bill. (8-25-97)

The United Auto Workers Union supports the bill. (9-5-97)

The Department of Consumer and Industry Services vigorously opposes the bill. (9-5-97)

The National Federation of Independent Businesses adamantly opposes the bill. (8-22-97)

The Michigan Manufacturers Association opposes the bill. (9-2-97)

The Small Business Association of Michigan opposes the bill. (8-22-97)

The Michigan Chamber of Commerce opposes the bill. (8-22-97)

The Michigan Retailers Association opposes the bill. (8-22-97)

Analyst: S. Ekstrom

■This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.