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# Are Permanent Replacements Permanent Anymore?

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The National Labor Relations Board (NLRB) has yet again grabbed the opportunity to sweep away years of precedent in its recent ruling in *American Baptist Homes of the West d/b/a Piedmont Gardens,* 364 N.L.R.B. No. 13 (5/31/16). In *Piedmont Gardens*, the board held that a company violates the National Labor Relations Act (NLRA) if it hires permanent replacements during a strike to allegedly "punish the union" and its members and to "avoid future strikes." In coming to this decision, the board looked to its 1964 decision in *Hot Shoppes Inc.,* 146 N.L.R.B. 802, 55 LRRM 1419 (1964). There, the board held that an employer may permanently replace strikers for any reason so long as that reason was not an "independent unlawful purpose." *Hot Shoppes* cited the U.S. Supreme Court's 1938 opinion in *NLRB v. MacKay Radio & Telegraph Co.,* 304 U.S. 333, for that standard. But as Board Member Philip A. Misimarra noted in his dissent in *Piedmont Gardens, Hot Shoppes* and *MacKay* both clearly required the "independent unlawful purpose" to be "extrinsic" to the bargaining relationship or unrelated to the strike. Instead, the board majority (Chairman Pearce and member Hirozawa) determined that *NLRB v. MacKay* was later "clarified" by the Supreme Court in *NLRB v. Erie Resistor Corp.,* 373 U.S. 221, 53 LRRM 2121 (1963), in which the court noted that an employer's purposes for replacing workers may be "wholly impeached by the showing of an intent to encroach upon protected rights." Therefore, the board concluded if an employer intends to discriminate against workers for their Section7-protected activities, that is an "independent unlawful purpose." That standard does not require the unlawful purpose to be separate from the bargaining relationship or the strike. In this case, the Service Employees International Union (SEIU) struck Piedmont Gardens over bargaining issues. The union eventually made an unconditional offer to return to work, but Piedmont Gardens refused to reinstate the strikers because they had hired permanent replacements. However, the SEIU proffered evidence that the employer had hired the replacements to "teach the strikers and the union a lesson" and to "avoid any future strikes." That revealed the employer's intent, the board held, to punish employees for conduct protected under the Act as well as to evidence its "desire to interfere with employees' future protected activity." The board's decision overturns some 68 years of precedent starting with *MacKay* and raises clear concerns if there can be a situation now where the hiring of permanent replacements would be lawful. As Miscimarra noted in his dissent, "under the majority's decision, it appears that any evidence of antistrike animus will render unlawful the employer's action." In coming to that position, Miscimarra aptly stated that in the highly

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agitated and contentious atmosphere of “economic warfare” that is a strike, it is unreasonable and unrealistic to expect the employer to maintain a “Spock-like” objectivity towards the union or to maintain “a dispassionate state of cool detachment.” A copy of the board’s decision is available here.