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PROCEEDINGS BEFORE

THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: TRANS WORLD AIRLINES, INC., Petitioner V. INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS

CASE NO: 87-548

PLACE: WASHINGTON, D.C.

DATE: November 7, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

TRANS WORLD AIRLINES, INC., :

Petitioner :

v. : No. 87-548

INDEPENDENT FEDERATION OF :

FLIGHT ATTENDANTS :

Washington, D.C.

Monday, November 7, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

MURRAY GARTNER, ESQ., New York, N.Y.; on behalf of the Petitioner.

LAWRENCE S. ROBBINS, ESQ., Assistant to the Sol. Gen. Dept. of Justice; Washington, D.C.; as amicus curiae supporting Petitioner.

JOHN P. HURLEY, ESQ., Kansas City, Mo.; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this afternoon in No. 87-548, Trans World Airlines v. Independent Federation of Flight Attendants.

Mr. Gartner, you may proceed whenever you're ready.

ORAL ARGUMENT OF MURRAY GARTNER, ESQ.

ON BEHALF OF THE PETITIONER

MR. GARTNER: Mr. Chief Justice, and may it please the Court:

This case arises from an economic strike against TWA by the union representing its flight attendants, known as IFFA.

When the strike was called off by the union in May of 1986, after more than two months, TWA was operating a full schedule with a workforce consisting of 2,800 new hires and some 1,200 incumbents, or crossovers -- that is, pre-strike flight attendants who chose to remain at work or to resume working during the strike.

At that time, there were only 200 vacancies. TWA filled them by re-hiring unreinstated strikers in seniority order.

Since that time, more than 2,500 strikers have been rehired to fill additional vacancies. Upon rehire,

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they have been credited with their full pre-strike seniority.

The Eighth Circuit, however, held that TWA had violated the Railway Labor Act when the strike ended because it did not remove incumbents from their jobs and replace them with strikers who had more pre-strike seniority. Since the court below, however, affirmed the right of new hires under the Railway Labor Act to keep their jobs against the claims of unreinstated strikers, the question raised by its decision is why the Railway Labor Act, unlike the NLRA, requires a carrier at the end of a strike to treat some 1,200 incumbent employees less favorably than new hires.

QUESTION: Maybe they were wrong about new hires.

MR. GARTNER: I don't think they were, Justice Scalia. There's 50 years of precedent which says they're right, and the Solicitor General has filed a brief on behalf of the National Labor Relations Board which says that they were right.

The District Court thought they were right and I think -- I think they're right.

(Laughter)

MR. GARTNER: To the extent that that decision, however, was based on the Eighth Circuit's

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view of the NLRA decisions, I will leave the argument that the Court misapprehended long-established NLRA law to the Solicitor General, who is here on behalf of the National Labor Relations Board.

I will address the arguments about the RLA, which the Respondent now makes without any support from the decision below. Respondent says that the RLA section 2 Fourth -- and this Court's decision in Florida East Coast Railway, require that the risk of job loss inherent in any strike much be shifted from those who choose to remain on strike to those employees who choose to work.

Neither the statutory section, we believe, nor the Court's decision, separately or together, lead to that result.

Section 2 Fourth clearly is focused, as its first sentence reveals, on the employees' "right to organize and bargain collectively through representatives of their own choosing." It does not mention strikes, strikers, or concerted activities.

By contrast, the NLRA has Section 23, which defines strikers as employees until they secure substantially equivalent employment. RLA section 1 Fifth, however, contains no such definition. Section 7 and 8(a)(1) of the NLRA taken together like RLA section

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2 Fourth prohibit interference or coercion in the employees' right to form or join unions or not to do so.

But in addition, those sections specifically and broadly protect concerted activities, and have no counterpart in the RLA.

NLRA Section 13 also without any counterpart in the RLA specifically protects the right to strike. RLA section 2 Fourth, therefore, cannot reasonably be thought to give more protection to strikes and strikers than the specific provisions of the NLRA dealing with those subjects. If anything, it must give less.

Most of the decisions of the lower courts construing it, in fact, as the amicus brief of the Air Conference shows, have confined that section to pre-certification interference with the organization of unions, or with an egregious threat to the representation function of a union.

Certainly Respondent cites no case in which Section 2 Fourth has been construed as broader in scope than the NLRA provisions. And this Court's decisions under the NLRA have made it very clear that even though the filling of places left vacant by strikers may have a coercive effect on the exercise of the right to strike, it is not prohibited coercion.

Congress permitted that effect as part of the

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intended balance between the exercise of self-help by employer and employees.

The remainder of Respondent's argument about the RLA is that this Court's decision in Florida East Coast Railway -- of course the Court is familiar with that decision, and the discussion of it which we had in the case which we refer to as TWA 1, which is still pending, petition for rehearing in this Court. The Respondent says that that decision requires the continuation of pre-strike working conditions into and beyond the self-help period.

Respondent argues that therefore the seniority system as it refers to it, in the 1981-84 contract between TWA and IFFA, which the District Court held did not include any right of unreinstated strikers to displace incumbents -- that that seniority system somehow expands because of the statute to confer that right of displacement after the expiration date of the contract.

In other words, Respondent says that a right conferred neither by contract nor by statute somehow is born from the interplay of that contract and that statute.

QUESTION: You would argue that even if you lose TWA 1, you win this?

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MR. GARTNER: Yes, sir.

QUESTION: But even if the -- even if the contract does subsist, there is no right in that contract of the sort that was the basis for the decision here?

MR. GARTNER: Yes, Your Honor, yes, Justice Scalia, we would.

As a matter of fact, we argued in TWA 1, as Your Honor is aware, that FEC does not require the continuation of contracts which have expired by their terms. But even if it did, it could not impose on the carrier the obligation to observe a seniority right not granted by the contract.

And clearly if this Court should hold that the contract including all of the seniority provisions which it did have has expired, there then cannot be any basis on which to say that because those particular and limited seniority provisions once existed, seniority principles in Respondents' words require the carrier in the self-help period to allow unreinstated strikers to displace incumbent employees.

QUESTION: Mr. Gartner, I got the impression that the Eighth Circuit decision in what you called TWA 1 depended more than its decision in this case did upon its construction of the contract. Am I right or wrong

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on that?

MR. GARTNER: Your Honor, we thought you were wrong, and we argued that at that time, that the Eighth Circuit clearly said in that decision that the construction of the contract was driven by its interpretation of the statutes.

QUESTION: Yes, I remember that from TWA 1, I think. But I didn't read the Eighth Circuit's opinion in this case as putting that much emphasis on the contract.

MR. GARTNER: Oh, well, I'm sorry. I misunderstood the question.

I think that's correct. The Eighth Circuit, however, relied upon the survival of the Union Security Clause, which was one result of its decision in TWA 1. But the Respondent has now disavowed that ground for the decision. Respondent says in his brief that that's irrelevant, and we agree.

The -- as things stand, it appears that Congress left the resolution of whatever disputes remain after the stage of economic warfare to agreement by the parties, and here there was no back-to-work agreement.

As this Court said in Burlington Northern, if the statute does not deal with the subject, it is for Congress, not for this Court, to establish rules to

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govern the exercise of self-help.

On the other hand, if the Court discerns in some language of the RLA some intent by Congress to confer rights on strikers, in the absence of expressed language, legislative history or other guidelines, and in view of the different provisions in the two statutes, Congress cannot have intended those rights to be greater than the rights which the Court has held exist under the NLRA.

QUESTION: Well, in your view, could you have entered a contract requiring replacement of the crossover strikers by the full-time strikers?

MR. GARTNER: Would we have? No.

QUESTION: Could you have?

MR. GARTNER: Could we have? Yes, but we would not have, because --

QUESTION: No, could you have, legally?

MR. GARTNER: Yes, I think so. I think --

QUESTION: Well, how is that consistent with your position that the crossover strikers have a right to reinstatement?

MR. GARTNER: Well, they have a right in the absence of an agreement. If there is -- the union has the right to --

QUESTION: Well, if they have a right under

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the statute, your contract can't trump the statute.

MR. GARTNER: Well, they don't have -- I'm sorry, I miss you somewhere, because I'm not --

QUESTION: Well, I thought your brief was --

MR. GARTNER: -- saying they have a right under the statute.

QUESTION: Well, you say that by contract, you could require replacement of the crossover strikers.

MR. GARTNER: Yes.

QUESTION: There's -- in the hypothetical case that you ended.

MR. GARTNER: Yes.

QUESTION: Well, then it doesn't follow that by statute there's a right to -- to reinstatement.

The statute by itself doesn't grant that right, because if it did, you couldn't contract, and you've conceded that you could contract to replace those crossover strikers.

MR. GARTNER: I don't see how that has impact on the statute. If the statute --

QUESTION: Well, neither did I. That's why I'm asking.

You say that you -- you could make a contract, in the hypothetical case --

MR. GARTNER: Yes.

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QUESTION: To require that those crossover strikers be displaced.

MR. GARTNER: If the union chooses to represent its people in that way.

QUESTION: And if both parties have agreed on the contract.

MR. GARTNER: Right. Yes.

QUESTION: All right. Then it must follow that the statute does not give a right to the crossover strikers to be reinstated.

MR. GARTNER: I have not -- I haven't argued that the -- that the statute gives them a right to be reinstated. I would say the statute gives them a right to stay in their job. It's not a question of reinstatement. They are in the jobs at the end of the strike.

QUESTION: Well, did they have a right to those jobs, when they sought them?

MR. GARTNER: Of course. They were permanent employees when they were -- before the strike, and they came back to their jobs.

QUESTION: I don't see how that's consistent with your view that by contract you could have stipulated otherwise.

MR. GARTNER: Because the union is the

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representative, or it claims to be the representative, of all of the employees, and if the union decides that it wants to negotiate to favor some of its people on the basis of seniority, if that's the basis of which they choose, they are the representative. They have the right to enter into that kind of an agreement.

That does not mean that the company would not still be liable in state court for the promises which it made to the new hires and the crossovers that we would not enter into such a contract. That was the promise that we made, that TWA made to them, that we would not enter into such a contract.

And we're not -- we are not arguing that the crossovers have a statutory right to their job. We're simply saying that they are in the job, and the union has no claim to displace them by statute.

QUESTION: But if you -- let's take it a step further. If you acceded at this point to the union's demand, just on the facts of this case, with no contract provision, there would be no statutory violation?

MR. GARTNER: There might be a violation of the duty to represent, to fairly represent the employees.

QUESTION: So far as the employer, the employer would not be violating the statute?

MR. GARTNER: I don't -- from the standpoint

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of the employer, I don't believe there would be a statutory violation.

QUESTION: So then this is not a case where the employer is caught between two conflicting duties?

MR. GARTNER: Well, it is, because he's caught between the conflicting obligation which he has to the crossovers and to the new hires that he had promised them that he would not enter into such a contract.

It's one phase of Belknap v. Hale.

QUESTION: All right, then the duty arises only because of the promise that the employer makes, and that doesn't tell us whether or not what the employer promised was legally binding.

QUESTION: Mr. Gartner, were there any employees here who were on strike and then volunteered to come back to work, but couldn't be hired because there were no vacancies?

MR. GARTNER: Not while the strike was on, Justice O'Connor.

I have -- I'd like to reserve the rest of my time, if I may, simply with the comment that there has not been any sound reason advanced why the rule as to the rights of crossovers to their jobs should be different under the RLA and under the NLRA, creating a dichotomy in national labor policy.

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QUESTION: (Inaudible)

MR. GARTNER: No, Your Honor, that's unfortunately not here. You didn't take it.

(Laughter)

QUESTION: Thank you, Mr. Gartner.

We'll hear now from you, Mr. Robbins.

ORAL ARGUMENT OF LAWRENCE S. ROBBINS

AS AMICUS CURIAE FOR THE PETITIONER

MR. ROBBINS: Thank you, Mr. Chief Justice, and may it please the Court:

Justice Kennedy, I'd like to begin by addressing the question that you were asking at the outset to my co-counsel.

The fact is that although the statute does plainly create a right in the crossovers to return to their job, a right that we think is fairly entailed by this Court's decision in Fleetwood and in the Board's decision in Laidlaw, that right, like many other rights, are waivable, and it is waivable by virtue of the union's duty to represent all employees, crossovers, full time strikers alike.

The collective bargaining agreement is the form in which the waiver takes place, and if the waiver is articulated in that collective bargaining agreement, the crossovers have no claim, unless it's a claim

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against their union for a breach of their duty to represent all employees fairly and equitably.

But the mere fact that an agreement, a collective bargaining agreement can waive that right does not mean that there's no underlying right to be waived, and it's our position that indeed there is. There's no inconsistency. I think this point is fairly implicit in this Court's decision in Belknap, and in particular footnote 8 of Belknap. And the Board has recognized in some of its decisions that this is a right that's waivable, and yet the right exists.

QUESTION: Is it waivable only by contract?

MR. ROBBINS: I believe that the only circumstances that I know of, or that the employer may displace the crossovers if he agrees to do so by collective bargaining agreement, or alternatively -- and this is of course not this case -- if the strike was an unfair labor practice strike, in which case the unfair labor practice strikers have a right of reinstatement and a right to bump the crossovers or the new -- and the new hires, notwithstanding the Mackay decision.

We are here today on behalf of the Labor Board because the Court of Appeals for the Eighth Circuit, although this case arises under the Railway Labor Act, decided it under principles established by the National

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Labor Relations Act.

Now, Respondents may well be correct to disown that basis for the decision, but assuming that the NLRA principles do apply, it is the Labor Board's view that the Court of Appeals applied that statute in an odd and untenable way.

In this Court's Mackay decision, and for 50 years since, two propositions have been firmly settled under the NLRA. First, an employer is entitled to hire replacements for economics strikers and to offer them permanent status.

Second, the employer is not obligated to dismiss those replacements at the end of the strike by bumping them, as it were, in favor of strikers who wish to return. Rather, as the Mackay case makes clear, an employer need only reinstate -- and I'm quoting -- "so many of the strikers as there were vacant places to be filled."

In our view, the Court of Appeals misunderstood those principles by drawing a distinction for purposes of the Mackay rule, between so-called crossover employees and new hires.

The Court of Appeals held that TWA could indeed lawfully replace the strikers with new hires, but that it could not do so in the case of the crossover

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employees, who in the Court's view had to be discharged to make room for the returning full-time strikers.

We believe that distinction cannot be squared with the Mackay decision. Certainly it finds no basis in the facts of Mackay, because in Mackay, after all, the strikers in that case were replaced by other company employees who were based in other company offices, at a time when the entire workforce of the company was supposed to be on strike.

And it's fair to say, therefore, that Mackay itself dealt with crossovers, yet there's no intimation in this Court's opinion in Mackay that that fact made any difference at all. Nor, we think, does the Court of Appeals' distinction find any basis in the purpose of the Mackay ruling.

The Mackay rule, as the Court said in the decision, is based on the employer's "right to protect and continue his business by supplying places left vacant by strikers." That purpose, we suggest, does not justify drawing the distinction that the Court of Appeals drew. An employer may well need to draw on both sources of employees to run his business during an economic strike.

Indeed, in an industry like the airline industry, which is of course safety sensitive and

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effected with an important public purpose, it's rather odd to suppose that the employer is relegated only to replace the strikers with new hires -- people who've never worked in the industry before, perhaps, instead of making use of the experienced pre-strike workers who either stayed on the job or returned early.

Now, the Court of Appeals based its decision not on these principles, but on a notion of discrimination. It viewed the decision of TWA as in effect a discrimination on the basis of union activity. That thesis, we believe, makes no sense once you recognize that MAckay itself involved the same kind of discrimination -- a discrimination in favor of new hires who were replacing the full-term strikers.

And it's impossible to see how the Court of Appeals decision would not equally apply to the decision to replace the full-term strikers with new hires. So, too, in that case, could it be said that that is a discrimination on the basis of union activity, but no one, not the Respondents nor the Court of Appeals is pressing that proposition on this Court today.

The Court of Appeals anchored its decision in Erie Resistor, but we believe the analogy cannot hold. There, unlike here, the employer chose a novel and rather extreme form of, in a sense a punishment, by

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awarding 20 years' of super-seniority, which worked against all strikers, not just those who were replaced and had a long term effect on the workforce, both before and after the strike was completed.

What's more, the Court of Appeals' decision has the anomalous consequence, we believe, of treating crossover employees who may have many years on the job, more unfavorably than new hires. The new hires, the Court of Appeals concluded, were entitled to permanent status -- the crossovers were not, despite the many years they may have had on the job.

We can find no basis in the Mackay decision for that kind of result.

Indeed, the crossovers have a claim that the new hires do not. They have a claim of right. They were permanent employees before the strike, they are permanent employees after the strike, and as we read the Fleetwood decision and the Laidlaw decision of the Board which followed on this Court's Fleetwood decision, it would have in fact been an unfair labor practice for the employer to have denied the crossover employees their jobs back, to have deprived them of full-term status.

And the Court of Appeals' construction of the NLRA, assuming it is indeed applicable here, has the curious feature of requiring the employer to violate the

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law in order to avoid this discrimination that is alleged to persist. We think it makes no sense to turn the statute so inside-out as to reach a result of that sort.

In short, we believe, there is simply no warrant under the NLRA for ousting the crossovers from the permanent positions that they had always enjoyed.

QUESTION: (Inaudible) seniority, that had more seniority than they did.

MR. ROBBINS: That's correct. They were not ousted in favor of the new hires, it's true, but they were ousted from a job that they had always had, and in that way, in effect, the burden of the strike and the foreseeable --

QUESTION: But they didn't get hurt any more than they would have if there had been a big layoff? No strike, but a big layoff.

MR. ROBBINS: That's true, but a layoff affects all persons and is a decision of the employer. In this case, what you have are the foreseeable consequence of other people's striking decisions being visited on a group of people who exercise their right under the NLRA not to strike.

QUESTION: But you have to get down to saying that you're entitled, with respect to the crossovers --

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you're entitled to treat them as, because they continued to work, as having, as being able to overcome their lack of seniority?

MR. ROBBINS: Well, no, we don't think that it operates in quite that way. They --

QUESTION: Well, the employer kept them on. They wanted to stay on, and they stayed on.

MR. ROBBINS: That's correct, and we believe that that was their right under the statute. The only reason they've been ousted is because other employees, exercising their rights to be sure, let the strike go on long enough to be replaced themselves.

Now, at the end of the strike, in the absence of a back-to-work agreement, they would have the foreseeable consequences of that NLRA protected decision, be in a sense reallocated to other employees who themselves were exercising their right not to strike.

QUESTION: But they have to claim, in order to overcome the returning strikers' seniority, they have to use the same argument that the new hires use, I suppose? They really have to -- they really have to rely on what the employer's entitled to do when you have a war.

MR. ROBBINS: No, I don't think so. I think their claim is greater than the new hires', because they were employees protected under 2(3) before the strike

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even began, and their rights are not --

QUESTION: But they weren't -- they weren't protected against people with more seniority.

MR. ROBBINS: I think the finding of the District Court, Justice White, is that the seniority rights in the contract did not apply to pre-strike reinstatement, and therefore had no bearing on this particular decision.

Thank you.

QUESTION: Thank you, Mr. Robbins.

Mr. Hurley, we'll hear now from you.

ORAL ARGUMENT OF JOHN P. HURLEY

ON BEHALF OF THE RESPONDENT

MR. HURLEY: Thank you, Mr. Chief Justice, and may it please the Court:

I'd first like to try to set a couple of things straight, based on what I heard on the other side here this afternoon.

First of all, we are not attempting to claim that under the RLA, the right to strike should have a greater protection than it does under the NLRA. We are -- neither are we necessarily disowning, as the Solicitor General put it, NLRA precedent that the Eighth Circuit utilized in its decision in finding that TWA violated the RLA.

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For, as this Court knows, NLRA precedent, especially in an area where under the RLA case authority has not sufficiently developed, can be quite useful, can be conceptually useful as long as careful analogies are drawn. And I think it bears repeating that the NLRA precedent utilized by the lower court, in our opinion, was right on point, especially the case of Erie Resistor and the parallels that the lower court drew from this Court's decision in that particular case.

Now, having said that, we readily acknowledge that the RLA does not contain express limitations in the Act concerning the parties' use of self-help measures. But this Court has held that the parties' use of self-help is not totally unlimited. As a matter of fact, in the Jacksonville Terminal decision, this Court held that while the parties may utilize the full measure of peaceful economic action as self-help, it cannot do os if that self-help conflicts with any other statutory obligation.

QUESTION: Would you just -- you say that's the holding of Florida East Coast?

MR. HURLEY: Well, I --

QUESTION: You said "held."

MR. HURLEY: I'm sorry. If I said Florida East Coast, I misspoke. I was talking about

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Jacksonville Terminal, as far as the Court's holding that as long as the self-help measures do not conflict with any other statutory obligation. Florida East Coast I will later visit, but I misspoke.

Now, one of these statutory obligations, we maintain, and apparently we have a very fundamental disagreement with counsel for TWA -- one of these statutory obligations, we maintain, is the right to strike. It is protected under the RLA, and under section 2 Fourth this Court again, in Jacksonville Terminal, made it quite clear that the employees' right to strike is a core RLA right. It is integral to the Act.

In fact, other courts have described the right to strike in an RLA context as it has in the NLRA -- one of the union's more cherished weapons.

So, we maintain that there can be no question of the obligation under section 2 Fourth on the part of a carrier to avoid influencing or coercing the employees' right to strike through the use of self-help measures.

QUESTION: You mean like hiring replacements?

MR. HURLEY: Well, hiring permanent replacements is an exception to the statutory rule under 2 Fourth, as it is under the NLRA section 883. It has

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been deemed --

QUESTION: Why is it?

MR. HURLEY: Because when this Court, in Mackay, balanced the two conflicting rights, it deemed -- and I would parenthetically note, indicted, in that case -- it nevertheless deemed that the right of the employer to operate its business by hiring new hire replacements --

QUESTION: That's what really gives the new hires their position against the strikers -- namely, the employer's right?

MR. HURLEY: At the conclusion of the strike, yes, Justice --

QUESTION: And wouldn't that -- why isn't that the same with respect to the crossovers?

MR. HURLEY: Because we have a different set of factual circumstances.

QUESTION: Well, the point is the right, though, to run his business is still there.

MR. HURLEY: I think the employer's right to run his business --

QUESTION: Well, that justifies the new hires staying on.

MR. HURLEY: But I think it has to be carefully balanced, against the expressed statutory

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right that employees have to be free from employer retaliation when it engages in one of the critical aspects of union --

QUESTION: But the Court balanced that in Mackay.

MR. HURLEY: That's correct, Mr. Chief Justice, and I have no quarrel with the balance at this point that this Court drew in Mackay.

We're not talking about the right of the permanent new-hire replacements to have and keep jobs at the conclusion of the strike.

QUESTION: Your opponent says that the people who were used as replacements in Mackay were actually employees of the company, not just people taken off the street.

MR. HURLEY: I disagree with that assessment, and I've looked at the facts as carefully as I can in Mackay. It's not particularly clear when you read both the Board's decision in the original Mackay case and this Court's decision, exactly what the facts were. But if I could quote in the NLRB's Erie Resistor decision, which this Court approved, it interpreted -- the Board interpreted -- Mackay as follows:

"An employer during an economic strike, is permitted to secure new employees or employees outside

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the bargaining unit to work permanently at unit jobs. In Mackay's case, these were employees outside of the bargaining unit. They were not employees in the particular striking workforce that they were brought in to replace."

QUESTION: But they were employees of Mackay?

MR. HURLEY: They were employees at other far reaching locations.

QUESTION: What about in Erie? Weren't there crossovers involved in Erie?

MR. HURLEY: There were crossovers involved.

QUESTION: Weren't they allowed to keep their jobs?

MR. HURLEY: Yes, they were. This issue --

QUESTION: They were. And the only problem there was super-seniority.

QUESTION: Well, that was quite a problem.

QUESTION: Well, I agree, I agree.

(Laughter)

QUESTION: But the crossovers could keep their jobs.

MR. HURLEY: That's correct, Justice --

QUESTION: And returning strikers couldn't boot them out.

MR. HURLEY: Well, that issue is not before

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the Court in Erie Resistor.

QUESTION: Well --

MR. HURLEY: The issue of super-seniority and the devastating effect that that particular benefit that was promised to the crossovers was at issue.

QUESTION: Well, I know, but on your theory, the crossovers in Erie shouldn't have kept their jobs at all.

MR. HURLEY: That's correct. If it had been raised, that's what the counsel for the union, I think, would have been arguing. But it was not raised.

Now, I think it's clear --

QUESTION: Did the Court in, perhaps, dictum say anything about that?

MR. HURLEY: I wish that it had, Your Honor, but it had not. It did not.

(Laughter)

QUESTION: Would you explain to me -- never mind the precedent -- why it is that hiring a new employee impermissibly trenches upon the right to strike of those that have chosen to do so?

MR. HURLEY: Hiring a new hire?

QUESTION: Yes, impermissibly interferes with that right to strike but keeping on a crossover who chooses to stay on -- I'm sorry, does not impermissibly,

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whereas keeping on a crossover does. Why does -- why is the one worse than the other?

MR. HURLEY: Because I think in the latter case, the case, the question we're arguing, where promises are made to crossovers who are members of the pre-strike working force and the striking community -- those promises unlike the promise of permanence to the new hires, an outside group -- those promises to the crossovers, they impact upon the striking group seeking to divide that group and to create individual competition among the striking group, to abandon the strike.

QUESTION: Well, that's a different argument. That isn't punishing somebody for striking, any more than something else. This is an argument that it -- well --

MR. HURLEY: Well, the result of promising that they would be able to retain their jobs in the post-strike workforce, that result is that when full-term strikers who exercise their right to fully engage in strikes ask for reinstatement, they are denied that reinstatement because of the previous -- what we maintain -- illegal promises made to these crossovers by the employers.

QUESTION: Is there a right not to strike, as

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well as --

MR. HURLEY: Yes. There is an individual right that employees have under both Acts to refrain from engaging in union activities.

QUESTION: Don't you think it punishes the right -- exercises the right not to strike, to tell somebody you're welcome not to, but you're going to pay whatever cost the strike entails anyway, whether you choose not to or not. Doesn't the punish the exercise of the right not to strike?

MR. HURLEY: No, I don't think the arguments that we make infringes upon the individual right to refrain, because number one, the employee is free to refrain from striking at any time and return to his or her job and earn his or her livelihood during the pendency of the strike. And if he or she has sufficient seniority or whatever neutral basis the employer should use, that person may very well remain in the active workforce after the strike.

QUESTION: Maybe, but surely the biggest risk of a strike for an employee is that the employee will be replaced entirely and there will be no job left when the strike is over -- isn't that the biggest risk?

MR. HURLEY: That is one of the risks.

QUESTION: And you are telling the employee

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who stays on, and chooses not to strike, that even though you stay on, and choose not to strike, the biggest risk of the strike will be visited upon you. If you are the last in the order of seniority, and there is one new hire or one new employee put, one new hire, you're the one who's going to be bounced because of it. Now, why isn't that punishing that employee's decision not to strike?

MR. HURLEY: Well, because, to put the shoe on the other foot, if the employer is also telling those who want to exercise fully their right to strike that they will most likely not only be replaced by permanent, new hire replacements, but also by early returning strikers because they chose to show fealty to the company at an earlier point, that they will not be allowed to keep their jobs, is blatant discrimination for engaging in union activities.

And so this balancing has to occur, and we argue in this case that the violation is because TWA did not use a neutral basis in determining, in distributing the post-strike active workforce jobs, beyond those in which permanent new hire replacements were in, and could not be displaced. And we argue that seniority as the lower court used, was the most appropriate neutral basis that they could have utilized.

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TWA did not do so, and indeed trumpeted the fact even before the strike began that they were not going to use any neutral basis, or continue to use the seniority system. They announced early that they were going to use a system that would favor the early abandonment of the strike. If you did not go in and get your job early, you might risk the chance of losing it for engaging in the strike full-term.

So, we really feel that the real question here is not whether this activity, this conduct on the part of TWA is coercive, as we clearly think it is, but whether there is any reason that this type of coercion should be somehow privileged under the RLA as the hiring of new hire replacements under the Mackay rule would appear to be under the RLA.

QUESTION: Mr. Hurley, can I interrupt you with a question?

MR. HURLEY: Yes, Justice Stevens.

QUESTION: As I understand it, a crossover with a great deal of seniority might retain the job even under the Court of Appeals' holding. Is that right?

MR. HURLEY: Yes, absolutely.

QUESTION: Do we know how many of the crossovers -- under the Court of Appeals' holding, how many of the crossovers will retain their jobs, and how

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many will lose them to strikers?

MR. HURLEY: Based upon the application of seniority?

QUESTION: Yes.

MR. HURLEY: The numbers were not gone into during the litigation, in terms of the breakdown.

It's difficult for me to speculate, although I would represent that there would be a significant number of crossovers, not an insignificant number, at least, that would have remained, based upon their seniority standing.

QUESTION: On the theory that they would -- by remaining, they would in effect jump ahead of those who otherwise would have seniority over them?

MR. HURLEY: Well, under the theory that we argue, and which the lower court upheld, I was answering your question.

QUESTION: Yes.

MR. HURLEY: But there would be a significant number of crossovers that would not have been displaced.

QUESTION: Yes.

MR. HURLEY: As I said earlier, I think that the -- unlike under the NLR, where the NLRB balances these conflicting interests, the Federal Courts are called upon, under the RLA, to engage in this

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balancing. And I think one has to not only refer to NLRA precedent, as I previously mentioned, in this balancing process, but one has to refer to the Florida East Coast case, that I earlier had misspoken about.

The Florida East Coast case provides a conceptual backdrop for our argument. The Florida East Coast decision illustrated the strong Congressional concern that Congress had for labor stability under the RLA.

It clearly emphasized in regard to this labor stability concern that it was served by certain continuity factors -- continuity of the existing rules governing the striking community that had not been previously placed in the Act's bargaining processes, which is the TWA 1 case earlier argued; continuity of the employer/employee relationship, of seeking to avoid mass turnover of the experienced employees, even during a work stoppage.

QUESTION: Could the -- could the employer have refused to accept crossovers? Here's a strike, he wants to run his plant, he hires -- he's hiring new employees. Could he discriminate against the crossovers, if they wanted to come back?

MR. HURLEY: During the strike, if they offered to come back, if they are -- if the employer

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would be refusing to allow the crossover to come back to work for his union activities, then I think that would be a violation.

QUESTION: Well, he just says "I'm not hiring crossovers. I'm not going to take back crossovers. I'm afraid they'll have to get rid of them later. You know, that case the Supreme Court decided."

(Laughter)

MR. HURLEY: I'm not certain under those circumstances, Justice White, whether that would be necessarily a violation. I can't conceive that the employer would not take crossovers back on the basis that they should, that the reinstatement of these crossovers to jobs may be subject to defeasance, namely if the crossover's seniority or any other basis that is fair, say, would not hold that person's position.

QUESTION: Well, could he take them back subject to being replaced by a returning striker with more seniority?

MR. HURLEY: I certainly think that's what we're arguing for.

QUESTION: I mean he could expressly?

MR. HURLEY: I think so. I think that could be made clear, that when a crossover comes back, he has no guarantees but rather may be subject to displacement

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based on some neutral basis that the employer is going to utilize, and I certainly think seniority would be one of those.

QUESTION: So it's really plausible to have this sort of conversation between two union members, one of whom has a lot of seniority and one of whom has virtually none. The latter does not want a strike, and the former tells him, "Well, you're welcome to go back in, if you want, but you'll just be holding my job for me, because as soon as this strike's over, I'm going to take it, and you'll be laid off."

MR. HURLEY: That would depend upon whether there were any permanent replacements, new hire permanent replacements hired.

QUESTION: Quite so.

MR. HURLEY: And essentially that's true, because in most industrial situations, most plants or whatever, especially having collective bargaining agreements, when there are not enough jobs to go around, usually collective bargaining agreements provide for seniority to determine who gets the available job, and not any basis such as what TWA used.

In that vivid example that you put forth, I think that basically the senior striker is saying "I'm not going to be penalized merely because you go in early

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to take my job, while I stay out on the picket line and engage in my right to strike."

QUESTION: It's a matter of not being penalized, he's actually being rewarded for the other workers' refusal to strike. He should encourage the fellow to go and say, you know, "I want to strike, but I urge you to go back to hold my job, because otherwise --"

(Laughter)

QUESTION: Otherwise he may put in a new hire, and I wouldn't be able to get my job back.

MR. HURLEY: I disagree with that, Justice Scalia.

QUESTION: That's sort of a weird system.

MR. HURLEY: I don't know of too many strikers who would urge their fellow pre-strike workforce employers to go back in. After all, striking is a part of economic warfare. The union is trying to put as much pressure on the employer as it can, and vice versa. The employer by trying to operate his business --

QUESTION: Yes, but if there is a pool of available -- sometimes there isn't a pool of replacements available. If you do have a pool of new flight attendants out there who are willing to take up the jobs, it would follow, then, that it would be worse for the striker to have an entirely new replacement

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hired than to have a junior striker go back.

MR. HURLEY: Well, I think that we are not saying that there is no case, especially under the RLA, in which a carrier cannot, in accordance with the dictates of the Florida East Coast decision, cannot demonstrate that there is a real need to offer permanence to crossovers, because perhaps they are not able to get new hire replacements in order to operate.

QUESTION: Well, when you say the Florida East Coast, the dictates of the Florida East Coast decision, I mean, the sky is the limit under that thing, if you take all the dicta.

MR. HURLEY: Well, I'm not so sure --

QUESTION: It's just a creative circus.

MR. HURLEY: I'm not so sure that I would characterize it in those words, Mr. Chief Justice.

(Laughter)

MR. HURLEY: I think it provides a very clear conceptual framework for the RLA.

QUESTION: But the holding is an extremely narrow one, that a court may, under certain circumstances in order to prevent the shutdown of a railroad change some of the terms in a collective bargaining agreement.

MR. HURLEY: Well, and as you know, Mr. Chief

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Justice, it involved the description of how important it was, even during the temporary interruption of a strike, for all of these continuity concerns to --

QUESTION: Yes, I've read the opinion.

MR. HURLEY: I understand.

I simply think that it cannot be read so narrowly that Florida East Coast then becomes just a decision based on its own facts. I think it clearly indicates that under the RLA, there are very legitimate concerns that Congress had with keeping this stability.

QUESTION: But then you -- at least Mackay is a rule that you know in advance what you're doing. You can replace striking workers with, as you say, new hires. But under the situation you describe, if Florida East Coast is the law, the employer is never going to know whether he can replace a striking worker with a crossover, if it's a little of this and a little of that.

MR. HURLEY: Well, I think that under Florida East Coast if the carrier can demonstrate that there is a need for giving crossovers --

QUESTION: So it'll depend on an ultimate Court ratification of whatever the employer did, or refusal to ratify it? You know, like three or four years later?

MR. HURLEY: I think that a carrier can go in

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at the very beginning of the strike and seek a district court, a federal district court permission to make these type of promises that are challenged in this case. I don't think there necessarily has to be lengthy litigation over something like that.

There may well be, but otherwise I don't know how to read Florida East Coast any other way than that there was this concern that there would be no alteration of the existing rules governing the striking community other than those submitted to the bargaining process.

I might mention, as we did in our brief, that while this question before the Court does not challenge Mackay under either the RLA or the NLRA, we have a separate count in the lawsuit that the union originally started this action with, that does call into question whether the Mackay rule is nevertheless an absolute rule -- where it is an irrebuttable presumption in all cases.

We intend to convince the court that even under Mackay, in an RLA context, there may be situations in which the union having the burden of proof can demonstrate there was not a reasonably necessary -- there was not a need, reasonably founded on fact, to --

QUESTION: Intend to convince us, or some other court?

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MR. HURLEY: We're going to try to convince the district court that it is pending before, and if necessary, certainly, Mr. Chief Justice, we will take it as far as we need to.

(Laughter)

MR. HURLEY: We believe that this Court has never held that the Mackay rule is such an absolute rule, and that that is an open question, as a matter of fact, before this Court, even though in a case called Hot Shoppes, the National Labor Relations Board appears to have indicated in their thinking that you can replace strikers with new hires at will -- absolutely. We disagree under the RLA.

Now, I would like to also address briefly the notion that counsel for TWA and the Board raises concerning the fact that there seems to be some sort of anomalous result created by the ruling below.

I want to emphasize that what we urge here -- what we argue for -- is the application of one standard approach, or analysis, but to diverse circumstances, two entirely different sets of circumstances.

We are talking about the promises made to crossovers which involve different factual matters, and which call for a different, but certainly not an anomalous, result.

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Even the NLRB recognizes certain fundamental distinctions under the NLRA in the way an employer can treat new hire permanent replacements during a strike versus its treatment of crossovers who cross over and also work during a strike. The NLRB has held that an employer can unilaterally alter conditions pertaining to the new hire replacements and does not commit an unfair labor practice, but cannot do so with respect to crossovers, where the Board finds that the crossovers have a community of interest with the pre-strike workforce.

QUESTION: But that's in effect a holding that the employer must treat crossovers better than new hires.

MR. HURLEY: I don't read it as that.

QUESTION: But -- but that's the result.

MR. HURLEY: I think the result is that the Board says that crossovers must be treated under the terms that exist even throughout the strike that were established in the previous collective bargaining agreement -- that no alternations can be made in those terms as they apply to working crossovers unless they are bargained about with the crossovers' collective bargaining rep.

QUESTION: Whereas you wouldn't have to treat new hires that favorably?

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MR. HURLEY: During the strike, that is correct, Mr. Chief Justice.

We say that the Mackay rule created an apparently permissible division or conflict between a group of outside workers, outside people, and the striking workforce as a whole, in competition for post-strike jobs. The balance tipped in that instance in favor of the employer for the reasons I've already spoke.

But the decision below recognized that Mackay was not intended to allow the employer to also create, or in addition create a division among the striking workforce, and that's where they analyzed and applied the principles in Erie Resistor, and we think correctly.

In the post-strike distribution of jobs in the active workforce, the employer has to use a neutral basis, a non-discriminatory basis, and that's exactly what TWA did not do here.

Under the decision below, the result is that neither the crossovers nor the full-time strikers are totally shut out of post-strike jobs in the active workforce. Some crossovers will be prevented from having an active job at the immediate conclusion of the strike, but so will many full-term strikers. If seniority is used, it will depend upon seniority and not how long you stayed out on strike versus how soon you

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came back in.

Now, also implicit, it seems to me, in both the Board and TWA's argument against the Eighth Circuit's decision is the fact that they argue there are no vacancies available. The crossovers are filling those vacancies. Therefore, how can there be discrimination when the employer simply says, "I'm sorry, there are no vacancies, and we can't reinstate you until there are some"?

To the union, that is a circular argument. It is begging the essential question, namely, whether or not the employer can make the initial promise that he seeks to keep at the end of the strike, the initial promise that these crossovers can remain in the post-strike workforce no matter what. No matter seniority or any other neutral basis.

We feel that this is a result-oriented argument and should be rejected. Even if an employer does not, in fact, make promise of permanency to either new hires or crossovers, especially with respect to crossovers, then the law is clear that he cannot refuse to reinstate full-term strikers at that point, at the end of the strike. He has to make the promise of permanency to the new hires to create the legitimate substantial business purpose that Fleetwood recognized.

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QUESTION: Thank you, Mr. Hurley.

Mr. Gartner, you have four minutes remaining.

REBUTTAL ARGUMENT OF MURRAY GARTNER

ON BEHALF OF THE PETITIONER

MR. GARTNER: Thank you, Mr. Chief Justice.

QUESTION: Do you want to -- could you -- do you agree with the last statement that had there been no promise of permanent employment here --

MR. GARTNER: No. No, there was no promise. The question is not a question of promise of permanent employment, it was a promise that the company would not enter into an agreement waiving the rights which these people had with the union. These people had permanent jobs. This is -- they -- the company did not have to give them a promise that they would have permanent jobs. They had permanent jobs before the strike began.

QUESTION: But they didn't have as much seniority as some of the strikers.

MR. GARTNER: But the seniority --

QUESTION: And they had permanent jobs too.

MR. GARTNER: -- is not an issue in this case. As Mr. Hurley said, seniority is a creature of collective bargaining agreement, and normally what happens after a strike is that you have a collective bargaining agreement known as a back-to-work agreement.

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There was no such back-to-work agreement here. The District Court found that the original contract, whether it expired or not doesn't matter, did not contain this seniority right. Seniority is not something which is a neutral principle, as Mr. Hurley says. Seniority is something that unions fight for, and if they get it in a contract, the contract specifies what it can be used for.

There's nothing in the contract that says that you can use seniority to come back from a strike. The seniority analysis is completely false in this situation. What these people did, the crossovers did, was to take the vacancies that existed during the strike. They took the jobs, and there was no question of a reassignment or realignment of jobs after the strike. There was no need to assess a pool of applicants, and determine on what basis to give them or not give them jobs.

The strikers who remained out by their own choice for the full term of the strike had lost their jobs because their jobs were filled. If -- there is no question, for example, that if the Court should announce such a rule as the union is arguing for, then perhaps in the next strike the crossover, the man who wants to exercise -- or woman -- who wants to exercise his right

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not to strike will simply resign his job and come back to work as a new hire.

Now, that is something that Laidlaw says is an unfair labor practice, to force a crossover to come back as a temporary employee or to give up his seniority rights when he comes back, and yet that's what the union says has to happen in this case. Anybody who wants not to strike must give up his seniority rights and all that he's earned during the time that he's been employed, and come back as a new employee. Then he's unassailable -- then the union can't use their so-called seniority.

They can't use it anyhow, because it doesn't apply in this situation, and there is no discrimination analysis applicable either, because as this Court has said, in Mackay, with respect to new hires, discrimination does not apply.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Gartner.

The case is submitted.

(Whereupon, at 1:56 o'clock p.m., the case in the above-titled matter was submitted.)

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