THE RAILWAY LABOR ACT MEETS THE MACKAY
DOCTRINE: TRANS WORLD AIRLINES V.
INDEPENDENT FEDERATION OF
FLIGHT ATTENDANTS

INTRODUCTION

Two primary statutory schemes govern labor relations in the private sector in the United States. The Railway Labor Act (RLA) covers the railway and airline industries, while the National Labor Relations Act (NLRA) governs labor relations in most other private sector industries. The statutes were enacted at different times and were designed to operate quite differently. Despite these differences, courts sometimes borrow principles developed under the NLRA, with its larger and more comprehensive body of law, to provide analogies to cases arising under the RLA.

As a result of the 1938 United States Supreme Court decision in NLRB v. Mackay Radio & Telegraph Co., employees have faced the risk of losing their jobs for engaging in a lawful strike. As applied to cases arising under the NLRA, the Mackay doctrine allows an employer to hire permanent replacements for striking employees in order to continue operations during an economic strike.

1. See infra notes 2-4 and accompanying text.
4. See 29 U.S.C. § 152(2) and (3) (1982). Certain classes of employees and employers are specifically exempted from coverage under the NLRA. Examples are agricultural laborers; employees in industries governed by the RLA; federal, state, and local government employers and employees; and independent contractors. Id. See F. Bartosic & R. Hartley, Labor Relations Law in the Private Sector § 4.03 (2d ed. 1986) (discussing exempted employers and employees).
6. Brotherhood of R.R. Trainmen v. Jacksonville Terminal Co., 394 U.S. 369, 383 (1969). A good example of the rationale behind applying principles developed under the NLRA as a national labor policy or federal common law relating to labor to cases arising under the RLA is found in the district court opinion deciding the action brought by the IFFA against TWA. In determining whether TWA’s crossover policy was lawful, the district court stated, “In the present context it seems desirable to draw on NLRA experience rather than to create novel principles applicable only in the Railway Labor Act context.” Independent Federation of Flight Attendants v. TWA, 643 F. Supp. 470, 475 (W.D. Mo. 1986).
7. 304 U.S. 333 (1938).
8. See infra notes 132-46 and accompanying text.
9. R. Gorman, Labor Law 341-43 (1976). The Mackay rule that allows an employer to permanently replace strikers applies only to strikers considered to be economic strikers, not unfair labor practice strikers. Id. Unfair labor practice strikers are
In Trans World Airlines v. Independent Federation of Flight Attendants,\textsuperscript{10} (TWA) the United States Supreme Court was asked to determine whether, in a labor dispute under the RLA, an employer may offer strikers preferential guarantees of job permanency if they agree to leave the strike and return to work.\textsuperscript{11} The Court determined that an employer was allowed to replace strikers with "others" — a category that includes both permanent replacements and members of the pre-strike workforce.\textsuperscript{12} The Court found that Trans World Airlines (TWA) was allowed to fill vacancies created during the strike and any pressure this put on the remaining striking employees to abandon the strike was a secondary effect.\textsuperscript{13} The Court also rejected the argument that the RLA provides greater protection to striking employees than does the NLRA, and that TWA's offers to the pre-strike workforce should be found unlawful under the RLA regardless of whether the NLRA would allow the conduct.\textsuperscript{14}

This Note discusses the scope of the Mackay doctrine and its treatment in previous Supreme Court decisions.\textsuperscript{15} This Note also discusses the differences between the RLA and the NLRA.\textsuperscript{16} This Note analyzes the decision of the Supreme Court in TWA in light of the background of the Mackay doctrine and the differences between the RLA and the NLRA.\textsuperscript{17} Finally, this Note suggests that the use of Mackay doctrine principles by the Court in TWA should be limited to cases arising under the RLA.\textsuperscript{18}

**FACTS AND HOLDING**

In March of 1984, Trans World Airlines (TWA) and the Independent Federation of Flight Attendants (IFFA) began negotiations, as prescribed under section six of the Railway Labor Act (RLA),\textsuperscript{19} to change their existing collective bargaining agreement

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\textsuperscript{11} Id. at 1230-31.
\textsuperscript{12} Id. at 1230-32.
\textsuperscript{13} Id. at 1232.
\textsuperscript{14} Id. at 1233-35.
\textsuperscript{15} See infra notes 132-82 and accompanying text.
\textsuperscript{16} See infra notes 83-131 and accompanying text.
\textsuperscript{17} See infra notes 184-295 and accompanying text.
\textsuperscript{18} See infra notes 297-300 and accompanying text.
\textsuperscript{19} 45 U.S.C. § 156 (1982). Section six of the RLA requires a notice of intent to begin negotiations to change an existing collective bargaining agreement. Id.
which was due to expire July 31, 1984.\textsuperscript{20} The negotiations centered on wages and working conditions.\textsuperscript{21} The parties bargained unsuccessfully for two years, exhausting the dispute resolution mechanisms of the RLA.\textsuperscript{22} The union went on strike March 7, 1986.\textsuperscript{23} Approximately 6500 flight attendants were working for TWA just before the strike began and all were union members.\textsuperscript{24}

TWA was able to continue operations during the strike by hiring and training permanent replacement flight attendants and by utilizing "crossovers."\textsuperscript{25} Crossovers are those union members who chose not to strike or abandoned the strike before it ended and went back to work for TWA.\textsuperscript{26} TWA informed the strikers that any job and domicile assignments filled as a result of vacancies created by the strike would remain in effect after the strike had ended, and that the strikers could be left without an opportunity to return to work.\textsuperscript{27} The strike ended after 72 days with the union's unconditional offer to return to work.\textsuperscript{28} By the end of the strike approximately 2350 new flight attendants had been trained and hired, approximately 1280 crossovers were working, and another 463 trainees were completing training to become permanent replacement flight attendants.\textsuperscript{29} Over five thousand union members had stayed out on strike for the full term.\textsuperscript{30}

A declaratory judgment action was brought by the union to determine the rights of full-term strikers to return to work and to displace the 1220 permanent replacements hired during the strike and

\textsuperscript{21} Id.
\textsuperscript{22} Id. Under the RLA, parties to a labor dispute may not resort to economic self-help until certain dispute resolution procedures, including negotiation and mediation, have been exhausted. Arouca & Perritt, Transportation Regulation: Is the Railway Labor Act of the National Labor Relations Act the Better Statutory Vehicle?, 36 LABOR L.J. 145, 156 (1985).
\textsuperscript{23} Independent Federation of Flight Attendants v. TWA, 819 F.2d 839, 841 (8th Cir. 1987).
\textsuperscript{24} Friday & Pauly, A Fatal Flight Takes Its Toll, NEWSWEEK, Sept. 8, 1986, at 38. The terms of the existing collective bargaining agreement required all flight attendants to be union members. \textit{TWA}, 819 F.2d at 841.
\textsuperscript{25} \textit{TWA}, 109 S. Ct. at 1228-29.
\textsuperscript{26} \textit{TWA}, 819 F.2d at 841 n.1.
\textsuperscript{27} \textit{TWA}, 109 S. Ct. at 1228. A flight attendant's domicile assignment is that flight attendant's base of operation. \textit{Id}.
\textsuperscript{28} Id. Two reporters, commenting on the lack of success enjoyed by the strikers, stated that, "[r]arely in the modern history of American labor has a union walkout backfired so powerfully against the participants." Friday & Pauly, NEWSWEEK, Sept. 8, 1986, at 38.
\textsuperscript{29} \textit{TWA}, 109 S. Ct. at 1228; \textit{TWA}, 819 F.2d at 841.
\textsuperscript{30} \textit{TWA}, 109 S. Ct. at 1228.
the 463 trainees that had begun work just after the strike ended.\textsuperscript{31} The union also claimed that full-term strikers with seniority should be able to displace "‘junior crossovers.’"\textsuperscript{32} On cross motions for partial summary judgment, the United States District Court for the Western District of Missouri held that the 1220 new hires were permanent replacement workers and, under the doctrine of \textit{NLRB v. Mackay Radio & Telegraph Co.},\textsuperscript{33} the returning strikers were not entitled to replace them.\textsuperscript{34} The district court held that the \textit{Mackay} doctrine principles also applied to protect crossovers from replacement by senior full-term strikers.\textsuperscript{35} The court further rejected an argument that the RLA afforded the returning strikers more protection than the NLRA and \textit{Mackay} allowed.\textsuperscript{36} Finally, the district court ruled that trainees not deemed to be working flight attendants at the time the strike ended would not have priority over returning full-term strikers and that the returning strikers would be allowed to displace the trainees.\textsuperscript{37} TWA appealed the portion of the decision regarding the trainees and the union cross-appealed as to new hires and crossovers.\textsuperscript{38}

The United States Court of Appeals for the Eighth Circuit upheld the district court order granting preference to new hires and the denial of such preference to trainees.\textsuperscript{39} However, the Eighth Circuit reversed the district court order pertaining to crossovers.\textsuperscript{40} Distinguishing crossovers from permanent replacements, the Eighth Circuit found that crossovers "cannot be granted permanent replacement status because such action discriminates on the basis of union activity."\textsuperscript{41} The court found that allowing crossovers permanent positions in favor of full-term strikers was giving the crossovers a reward and inducing them to abandon the strike.\textsuperscript{42} The court con-

\textsuperscript{31} Independent Federation of Flight Attendants v. TWA, 643 F. Supp. 470, 471-72 (W.D. Mo. 1986). Because TWA had contacted prospective flight attendants about employment before the strike began, the union argued that 1220 of the 2350 permanent replacements hired during the strike should be characterized as “permanent additions” to the workforce and not as permanent replacements, and thus returning strikers should have the right to displace those hired as “permanent additions.” \textit{Id.} at 475.

\textsuperscript{32} \textit{Id.} at 471-72. Junior crossovers are those employees who returned to work before the strike concluded and who had less seniority than those employees that stayed out on strike full-term. \textit{Id.}

\textsuperscript{33} 304 U.S. 333 (1938).

\textsuperscript{34} \textit{Id.} at 474-75.

\textsuperscript{35} \textit{Id.} at 475.

\textsuperscript{36} \textit{Id.} at 475.

\textsuperscript{37} \textit{Id.} at 475.

\textsuperscript{38} \textit{Id.} at 480.

\textsuperscript{39} \textit{Id.} at 471-72.

\textsuperscript{40} \textit{Id.} at 841-42.

\textsuperscript{41} \textit{Id.} at 847.

\textsuperscript{42} \textit{Id.}
cluded that the reward or benefit conferred on the crossovers by TWA was similar to the situation in NLRB v. Erie Resistor Corp., in which an employer's grant of super-seniority to permanent replacements and crossovers was found to be unlawful and barred by the NLRA. The Eighth Circuit held that unreinstated full-term strikers were entitled to displace crossovers with less seniority because it found that TWA's crossover policy unlawfully discriminated among employees on the basis of union activity.

The United States Supreme Court reversed the Eighth Circuit decision regarding the right of full-term strikers to replace crossovers by a six to three vote. Justice O'Connor's majority opinion cited Mackay for the proposition that an employer may replace striking employees with "others" in order to "carry on the business" during a strike and not be guilty of an unfair labor practice.

The Court rejected what it termed "this effort to expand Erie Resistor." Distinguishing TWA from Erie, the Court found no loss of seniority or benefits of seniority to the employees who struck full-term because "once reinstated, the seniority of full-term strikers [was] in no way affected by their decision to strike." Any disadvantages caused by a "cleavage" created between crossovers and reinstated strikers because crossovers with less seniority would have more desirable job assignments normally reserved for more senior flight attendants was dismissed as a natural result of the crossover's right not to go out on strike. The Court stated that not only do the NLRA and RLA safeguard an employee's right to make the decision not to strike but the statutes also protect the employee's right to benefit from that decision.

in virtually every strike situation there will be some employ-

43. 373 U.S. 221 (1963).
44. TWA, 819 F.2d at 844.
45. Id. at 843.
46. TWA, 109 S. Ct. at 1230.
47. Id. at 1230 (quoting Mackay, 304 U.S. at 345-46). Chief Justice Rehnquist and Justices White, Stevens, Scalia, and Kennedy joined in the majority opinion. Id. at 1227.
48. Id. at 1232.
49. Id. at 1231.
50. Id. at 1231-32 (quoting Erie Resistor, 373 U.S. at 231). A cleavage exists when an employer's action causes a division between employees that continues after the strike has ended. See Erie Resistor, 373 U.S. at 231. According to the collective bargaining agreement between TWA and the IFFA in existence at the time of the strike, those flight attendants with the greatest seniority would have the best opportunity to obtain the most preferable domicile and job assignments when vacancies should occur. TWA, 109 S. Ct. at 1228. The existing bargaining agreement also insured that flight attendants with the most seniority would be the least affected by any furloughs or reductions in the flight attendant workforce. Id.
51. Id. at 1232.
ees who disagree with their union's decision to strike and who cannot be required to abide by that decision. It is the inevitable effect of an employer's use of the economic weapons available during a period of self-help that these differences will be exacerbated and that poststrike resentments may be created. Thus, for example, the employer's right to hire permanent replacements in order to continue operations will inevitably also have the effect of dividing striking employees between those who, fearful of permanently losing their jobs, return to work and those who remain stalwart in the strike. ⁵²

The Court determined that at the conclusion of a strike the positions filled by crossovers were to be treated the same as the positions filled by permanent replacements. ⁵³ Thus, an employer could refuse to displace crossovers from their new positions in order to reinstate full-term strikers. ⁵⁴ Those positions held by crossovers and permanent replacements were "simply not 'available positions'" for the reinstatement of full-term strikers. ⁵⁵ The Court concluded that TWA had not discriminated against the full-term strikers on the basis of union activity because the positions were not "available" to full-term strikers. ⁵⁶

The Court also found that to distinguish crossovers from permanent replacements with regard to the reinstatement rights of returning full-term strikers would penalize those employees who had decided not to strike so that the striking employees could be benefited. ⁵⁷ According to the Court, those who do not "gamble" on the success of a strike should not have to "suffer the consequences when the gamble proves unsuccessful." ⁵⁸

The Court determined that the RLA had not prohibited TWA's crossover policy. ⁵⁹ The Court rejected the union's argument that specific provisions of Section Two Fourth of the RLA made TWA's conduct unlawful. ⁶⁰ The Court found that Section Two Fourth of the RLA focused on union organization and selection of a bargaining rep-

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⁵² Id.
⁵³ Id. at 1232.
⁵⁴ Id. at 1230. As Justice O'Connor explained the situation, "All that ha[d] occurred [was] that the employer ha[d] filled vacancies created by striking employees. Some of these vacancies w[ould] be filled by newly hired employees, others by doubtless more experienced and therefore more needed employees who either refused to strike or abandoned the strike." Id. at 1232.
⁵⁵ Id. (quoting TWA, 109 S. Ct. at 1238 (Brennan, J., dissenting)).
⁵⁶ Id. at 1232.
⁵⁷ Id. at 1233.
⁵⁸ Id.
⁵⁹ Id. at 1233-35.
The Court noted that the RLA was designed for limited judicial intervention and did not put explicit limits on the range of self-help available after the dispute resolution mechanisms mandated by the Act were exhausted. The Court stated that self-help measures taken after the dispute resolution procedures of the RLA had been followed should only be limited when these measures were "a fundamental blow to union or employer activity and the collective bargaining process itself." The Court found nothing in the RLA or applicable analogies drawn from the NLRA that would make TWA's conduct unlawful.

Justices Brennan and Blackmun dissented. Justice Brennan noted an "unarticulated hostility toward strikes" in the majority opinion and stated that the majority had not given full effect to the protection Congress had given employees in exercising the right to strike. Justice Brennan found no penalty or risk being forced on crossovers by allowing senior full-term strikers to be reinstated in favor of junior crossovers. Justice Brennan's dissent characterized this replacement as a consequence of a lost strike and a recognition that junior employees were most vulnerable and would be laid off first in any situation. Justice Brennan stated that allowing junior crossovers to have jobs instead of reinstating senior full-term strikers was, in effect, a penalty on full-term strikers for staying out on strike. Thus, according to Justice Brennan, TWA's plan was discrimination on the basis of union activity and was not allowed under the NLRA.

Justice Brennan stated that the principles of *Erie Resistor* prevented TWA's action because of the "'inherently destructive'" na-

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61. *TWA*, 109 S. Ct. at 1234. The RLA established the National Mediation Board which has a primary function of mediating labor disputes under the RLA and servicing the parties as they follow the dispute resolution mechanisms of the RLA. 45 U.S.C. § 154 and 155 (1982). In addition, the Board has the responsibility of conducting representative elections and certifying the bargaining representative for the various crafts and classes of employees. 45 U.S.C. § 152 Ninth (1982).
64. *Id.*
66. *Id.* at 1237 (Brennan, J., dissenting).
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at 1237-38 (Brennan, J., dissenting).
ture of the conduct. Justice Brennan found TWA’s conduct so destructive of employee rights that TWA’s policy was prohibited regardless of the necessity of the conduct for TWA to continue operations during the strike.

Justice Brennan found the situation only superficially related to the situation in Mackay and thus not a proper case for application of the Mackay rule. Justice Brennan stated that the Mackay rule allowing an employer to replace strikers with permanent replacements during a strike had always been a narrow exception to the principle that an employer could not discriminate against employees for engaging in a strike. According to Justice Brennan’s analysis, an employer could not discriminate when recalling workers at the conclusion of a strike and could not give preferential treatment to either crossovers or strikers in filling available positions. Justice Brennan argued that the employer had to reinstate on the basis of a neutral principle. Seniority, according to Justice Brennan, offered such a neutral principle on which to base the recall of employees at the end of a strike.

Justice Blackmun’s dissent found a far greater protection for striking workers under the RLA than the majority was willing to recognize. Justice Blackmun also disagreed with the majority opinion as to the rights of full-term strikers under the NLRA and under Mackay and its progeny. Justice Blackmun found that, under the RLA, an employer must prove a business necessity to offer permanent jobs to crossovers or permanent replacements. Justice Blackmun, however, disagreed with Justice Brennan that the conduct of TWA was so destructive as to fall under the holding in Erie Resistor. Accordingly, Justice Blackmun would have remanded the case to the Eighth Circuit for a finding on whether the offer of permanency to the crossovers was necessary for TWA’s continued opera-

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71. Id. at 1238-39 (quoting Erie Resistor, 373 U.S. at 231-32) (Brennan, J., dissenting).
72. Id. at 1239 n.5 (Brennan, J., dissenting).
73. Id. at 1238 (Brennan, J., dissenting).
74. Id.
75. Id. at 1239 (Brennan, J., dissenting).
76. Id.
77. Id. Justice Brennan stated that seniority was well established as a neutral basis for making decisions in labor relations. Id. at 1239 n.6. Under certain circumstances, Justice Brennan stated, other neutral principles, such as “the employer’s need for [employees with] particular skills,” could serve as a neutral basis for deciding which employees to recall at the conclusion of a strike. Id.
78. Id. at 1240-41 (Blackmun, J., dissenting).
79. Id. at 1242-44 (Blackmun, J., dissenting).
80. Id. at 1244-46 (Blackmun, J., dissenting).
81. Id. at 1247 (Blackmun, J., dissenting).
tions while the strike was in progress.82

BACKGROUND

THE RAILWAY LABOR ACT

Enacted in 1926, the Railway Labor Act83 (RLA) was the result of a cooperative effort between railroad management and labor to develop a scheme that would limit the potential for disruption of commerce by labor disputes in the railroad industry.84 The airline industry was added to the Act in 1936.85 The RLA provides a statutory scheme intended to facilitate the voluntary settlement of labor disputes.86 As Justice Brennan has stated, the basic design and function of the RLA has been to facilitate “settlement through conciliation, mediation, voluntary arbitration, presidential intervention, and finally, in case of ultimate failure of the statutory machinery, resort to traditional self-help measures.”87 The bargaining process under the RLA involves different steps with each step designed to bring different pressures into play and induce the parties to reach a voluntary settlement.88

Bargaining agreements under the RLA do not terminate at the end of a specific period.89 In order to change the existing agreement,
the party wishing a change must provide written notice to start the bargaining process. The parties must then engage in direct negotiation or conference in an attempt to settle the dispute. The next step involves mediation with the help and service of the National Mediation Board (NMB). The NMB must attempt to convince the parties to commit to binding arbitration if no agreement is reached in mediation. The parties are required to wait thirty days before engaging in any self-help measures if the parties fail to agree to arbitration. Further, in the event the NMB concludes that the dispute threatens to interrupt interstate commerce to a substantial degree, the NMB may recommend to the President that an emergency board be created to report on the labor dispute. If an emergency board is appointed by the President, the parties are not allowed to engage in economic self-help until thirty days after the emergency board issues a report.

Through the use of these dispute resolution mechanisms the NMB controls when self-help may be exercised by the parties engaged in a labor dispute. No self-help measures may be taken by either party until the dispute resolution mechanisms of the RLA have been exhausted. Thus, concerted employee activity, such as a

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or the National Labor Relations Act the Better Statutory Vehicle?, 36 LABOR L.J. 145, 156 (1985). Theoretically, agreements under the RLA are open for bargaining once the notice requirements of § 6 of the RLA have been complied with. See 45 U.S.C. § 156 (1982). However, often the parties to an agreement under the RLA agree to forego opening subjects to bargaining for a specified period of time, thus bringing more stability to the collective bargaining process. 90. See Arouca & Perritt, 36 LABOR L.J. at 156.


92. See 45 U.S.C. § 155 First (1982). The National Mediation Board (NMB) was established by § 4 of the RLA. See 45 U.S.C. § 154 (1982). The basic duties of the three member board include acting as mediators in major disputes, encouraging arbitration, and informing the President of the United States of emergency disputes. Unlike the function of the NLRB in regards to the NLRA, the NMB is not responsible for interpreting the statutory provisions of the RLA. Arouca & Perritt, 36 LABOR L.J. at 150-51. The function of the NMB under the RLA is to help facilitate a voluntary settlement to labor disputes. See Perritt, 16 PEPPERDINE L. REV. at 518-21.


95. See 45 U.S.C. § 160 (1982). An emergency board has thirty days in which to issue its report to the President. Id. In the past, the reports frequently led to intervention by either Congress or the President in the dispute. Perritt, 16 PEPPERDINE L. REV. 501, 538-43. The President has discretion in the number of persons who will make up the emergency board. The only limit is that the President may not appoint someone with an interest in the dispute. 45 U.S.C. § 160 (1982).


98. Id. at 520-21, 550-51.
strike, is not allowed until the parties have complied with the dispute resolution processes of the Act. 99 Similarly, employers in industries covered by the RLA may not engage in self-help activities or change the status quo of the existing terms and conditions of employment until the dispute resolution procedures have been exhausted. 100 The lengthy dispute resolution process is intended to encourage voluntary settlement. 101

The right of the parties to engage in self-help after the exhaustion of the dispute resolution mechanisms plays an important role in the function of the statutory scheme. 102 The knowledge that economic pressures may be exerted in the self-help stage provides an impetus for the parties to compromise and voluntarily settle the dispute while participating in the mandated dispute resolution procedures of the RLA. 103

SECTION TWO FOURTH OF THE RAILWAY LABOR ACT

The language of Section Two Fourth of the RLA states that “[e]mployees shall have the right to organize and bargain collectively through representatives of their own choosing.” 104 Most of the lan-

99. Id. at 520-21.
100. Id. at 520-21, 550-53.
104. 45 U.S.C. § 152 Fourth (1982). Section 2 Fourth of the RLA states:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions: Provided, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Id.
guage of Section Two Fourth clearly deals with union organizing, or
the pre-certification rights of employees in selecting a bargaining rep-
resentative. Section Two Fourth makes it unlawful for an em-
ployer covered by the RLA or a representative of the employer “to
influence or coerce employees in an effort to induce them to join or
remain or not to join or remain members of any labor
organization. . .”

The United States Court of Appeals for the Third Circuit determined in *International Association of Machinists v. Northwest Airlines* that Section Two Fourth should provide only limited employee rights outside of the context of the selection of a bargain-
ing representative. The court explained that in the pre-certifica-
tion stage no bargaining representative or union contract was in
place and the normal statutory machinery providing arbitration for
settling minor labor disputes could not go forward. An example of
protection granted by Section Two Fourth was protection from
wrongful discharge for taking part in union organizing. In *Independent Union of Flight Attendants v. Pan Am World Airways*, the United States Court of Appeals for the Second Circuit determined that, in general, rights under the RLA were restricted to rep-
resentational and organizational rights. The court contrasted this
with the NLRA and the broader “concerted activity” employee rights
under that Act.

**The National Labor Relations Act**

Congress attempted to protect labor by limiting the intervention
of the federal government in labor disputes until the mid-1930's. Labor and management were both free to employ their strongest eco-
nomic weapons to pressure the opposition. The employees’ chief

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105. *Id.* Pre-certification refers to the time before a class of employees has an au-
Ninth of the RLA outlines the procedure for the NMB to certify the authorized bar-
gaining representative for employees, or classes of employees, under the RLA. 45 U.S.C. § 152 Ninth (1982). When there is a dispute as to the authorized bargaining rep-
resentative the NMB will hold an election by secret ballot to determine the authorized

106. *Id.*

107. 673 F.2d 700 (3d Cir. 1982).

108. *Id.* at 707.

109. *Id.*

110. *Id.*

111. 789 F.2d 139 (2d Cir. 1986).

112. *Id.* at 141 n.2.

113. *Id.*


115. *Id.*
weapon was the strike, and the employer's counterweapon was the ability to discharge those employees engaged in the strike.\textsuperscript{116}

In 1935, Congress enacted the National Labor Relations Act (NLRA)\textsuperscript{117} which changed the course of labor-management relations.\textsuperscript{118} In an effort to provide equality in the relative bargaining powers of employees and employers, and to encourage collective bargaining, the NLRA granted certain rights to employees.\textsuperscript{119} The NLRA additionally placed limits on actions an employer is allowed to take in retaliation for concerted activities of employees that are protected by the NLRA.\textsuperscript{120}

Section seven of the NLRA grants employees the right to organize and bargain collectively and gives employees the right to engage in concerted activities.\textsuperscript{121} Section thirteen of the Act specifically recognizes the right to strike.\textsuperscript{122} Under section 2(3) of the NLRA striking workers are considered employees of the company they are striking.\textsuperscript{123} Section eight of the NLRA contains language that makes

\textsuperscript{116} Id.
\textsuperscript{118} R. Gorman, supra note 114, at 296.
\textsuperscript{119} See 29 U.S.C. § 151 (1982). Section one of the NLRA announces “Findings and Policies,” including a finding that the inequality of bargaining power between unorganized employees and organized employers burdens the flow of commerce. Id. Section one of the NLRA declares it a policy of the United States to eliminate and mitigate certain obstructions to the free flow of commerce “by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” Id.
\textsuperscript{120} R. Gorman, supra note 114, at 296.
\textsuperscript{121} 29 U.S.C. § 157 (1982). In the relevant parts, § 7 states, “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid and protection. . . .” Id. For a discussion of activities considered to be “concerted” and for “the purpose of collective bargaining or other mutual aid and protection,” see R. Gorman, supra note 114, at 297-302. Gorman cites four requirements for protected concerted activity: “(1) there must be a work-related complaint or grievance; (2) the concerted activity must further some group interest; (3) a specific remedy or result must be sought through such activity; and (4) the activity should not be unlawful or otherwise improper.” Id. at 297 (quoting Shelly & Anderson Furniture Mfg. Co. v. NLRB, 497 F.2d 1200 (9th Cir. 1974)). Generally, such actions as wildcat strikes, sit-down strikes, and actions that cause damage to the employer's business or plant are not protected. R. Gorman, supra note 114, at 297 (quoting Boeing Airplane v. NLRB, 238 F.2d 188 (9th Cir. 1956).
\textsuperscript{122} 29 U.S.C. § 163 (1982). Section 13 states, “Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.” Id.
\textsuperscript{123} 29 U.S.C. § 152(3) (1982). Section 2(3) states that the term “employee” as used in the Act “shall include any individual whose work has ceased as a consequence of, or
it an unfair labor practice for an employer to interfere with employee rights outlined in section seven.\footnote{124} Under section eight it is also an unfair labor practice for an employer to discourage union membership by discriminating among employees.\footnote{125} Thus, it is a violation of an employee's right to strike and an unfair labor practice under Sections 8(a)(1) and 8(a)(3) for an employer to discharge an employee for engaging in a protected strike.\footnote{126}

The NLRA was amended by the Taft-Hartley Act in 1947,\footnote{127} adding language to section seven that gave employees a specific right to refrain from engaging in concerted activities.\footnote{128} In addition, the amendments made it an unfair labor practice for a union to interfere with an employee's right to refrain from concerted activities and restricted the use of secondary boycotts by unions involved in labor disputes.\footnote{129} The amendments were added to the NLRA by Congress apparently to balance a scheme that was perceived as too favorable to organized labor.\footnote{130} Because more case law has developed under the NLRA than the RLA, courts often refer to NLRA cases when deciding cases under the RLA.\footnote{131}

\textbf{THE MACKAY DOCTRINE: THE EMPLOYER'S RIGHT TO REPLACE STRIKERS}

The \textit{NLRB v. Mackay Radio & Telegraph Co.}\footnote{132} decision was one of the earliest decisions under the NLRA.\footnote{133} The issue before the
United States Supreme Court was whether a company could, at the conclusion of an economic strike, use participation in union activities as a basis for determining which employees should be reinstated to available positions.\textsuperscript{134} The Court determined that the Mackay Radio and Telegraph Co. had not committed an unfair labor practice during the strike, but had committed an unfair labor practice in using union activity as a basis for determining which strikers would be reinstated at the conclusion of the strike.\textsuperscript{135} The employer's actions were found to be discriminatory and an unfair labor practice under section eight of the NLRA.\textsuperscript{136} However, the language in which the Mackay doctrine was announced came not in the holding of the case, but in dictum in which the Court was discussing conduct of the employer that was \textit{not} an unfair labor practice.\textsuperscript{137} The Court stated that:

\begin{quote}
...it [was not] an unfair labor practice to replace the striking employees [sic] with others in an effort to carry on the business. Although [section thirteen] provide[d], "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike," it d[id] not follow that an employer, guilty of no act denounced by the statute, ha[d] lost the right to protect and continue his business by supplying places left vacant by strikers. And he [was] not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the Mackay Radio and Telegraph Co.] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled.\textsuperscript{138}
\end{quote}

The doctrine that resulted from the above language was based on the premise that an employer had the right to continue operations during a strike.\textsuperscript{139} The doctrine is further based on the premise that

\begin{itemize}
\item \textsuperscript{134} \textit{Mackay}, 304 U.S. at 339-40. In \textit{Mackay}, the San Francisco branch of the Mackay Radio & Telegraph Co. was struck by employees who were members of the American Radio Telegraphists Association. The company used workers from different Mackay Radio branches around the country to fill in during the strike, promising the fill-in workers that if they desired they could remain in San Francisco at the conclusion of the strike. At the conclusion of the strike five elected to remain, thus five strikers, all prominent in union activities, were not reinstated. The Court upheld an NLRB ruling that the company had interfered with rights guaranteed by the NLRA. \textit{Id.} at 336-43 (1938).
\item \textsuperscript{135} \textit{Id.} at 346.
\item \textsuperscript{136} \textit{Id.}
\item \textsuperscript{137} \textit{Id.} at 345-46. \textit{See also} Estreicher, \textit{Striker and Replacements}, 38 \textit{Labor L.J.} 287, 289 (1987).
\item \textsuperscript{138} \textit{Mackay}, 304 U.S. at 345-46.
\item \textsuperscript{139} \textit{Id.} Although the \textit{Mackay} Court apparently premised the employer's right to hire permanent replacements on a right to continue in business, it should be noted
in order to attract the replacement workers needed to continue in business during the strike, it is necessary for an employer to offer permanent rather than temporary jobs to the replacements.\textsuperscript{140} The employer's right to replace strikers is characterized as a counterweapon to balance the employees' right to strike.\textsuperscript{141}

An employer violates Sections 8(a)(1) and 8(a)(3) of the NLRA and commits an unfair labor practice by discharging an employee for engaging in a lawful strike.\textsuperscript{142} However, according to the Supreme Court's decision in \textit{Mackay}, an employer was free to permanently replace economic strikers during a strike and was only required to reinstate the returning strikers to the extent their positions had not been filled by permanent replacement workers hired during the strike.\textsuperscript{143} The \textit{Mackay} doctrine forbade an employer to discharge striking employees, yet allowed the employer to rid himself of the employees by hiring permanent replacements during the strike.\textsuperscript{144} The effect of \textit{Mackay} in many situations is that employees exercising their protected right to strike face the risk of permanently losing their jobs.\textsuperscript{145} One commentator has stated that, despite an articulated distinction that under the current reading of \textit{Mackay} the employer's motive for hiring the permanent replacements is immaterial. Beiknap, Inc. v. Hale, 463 U.S. 491, 504 n.8 (1983). Thus, an employer has a right to replace economic strikers at will. \textit{Id.} The employer has a conclusive presumption that the hiring of permanent replacements and subsequent failure to reinstate the economic strikers was done because of business needs. Gillespie, \textit{Mackay and Business Necessity}, 50 TEX. L. REV. 752, 755 (1972).

\textsuperscript{140} See Janes, 54 TEX. L. REV. at 126. Schatzki, \textit{Some Observations and Suggestions Concerning a Misnomer—"Protected" Concerted Activities}, 47 TEX. L. REV. 378. The employer must have offered permanent jobs to the replacements, and may deny reinstatement to returning strikers only if the replacements have been hired on a permanent, rather than temporary, basis. \textit{Beiknap}, 463 U.S. at 503. In \textit{Beiknap}, the Court determined that if an employer hires permanent replacements during an economic strike and subsequently displaces them with returning strikers at the conclusion of the strike, the displaced workers may have a cause of action against the employer for breach of promise. \textit{Id.} at 503-04.

\textsuperscript{141}. \textsc{J. Atleson, Values and Assumptions in American Labor Law} 29 (1983). Neither the Court nor the NLRB has ever explained the precise rationale for the \textit{Mackay} doctrine. Schatzki, 47 TEX. L. REV. at 383. According to one commentator, the doctrine has "bedeviled legal scholars" since the ruling was announced, and the doctrine "flies in the face" of any logical interpretation of §§ 7, 8, and 13 of the NLRA. \textsc{J. Atleson, supra} note 141, at 24. \textit{See also} Gillespie, 50 TEX. L. REV. at 783 (stating that the \textit{Mackay} decision clashed with standard interpretations of the NLRA). Despite the difficulties with the doctrine, and its inconsistencies with the NLRA, the vitality of the \textit{Mackay} doctrine goes unquestioned by the courts. \textit{See TWA v. Independent Federation of Flight Attendants, — U.S. —,} 109 S. Ct. 1225, 1230 (1989) (stating that on various occasions the Court has "reaffirmed the holding of \textit{Mackay}"). \textit{See also} \textsc{J. Atleson, supra} note 141, at 19 ("the \textit{Mackay} doctrine has survived over forty years despite vigorous scholarly criticism."). As one commentator noted, stare decisis has given the doctrine "the dignity of hornbook truth." Gillespie, 50 TEX. L. REV. at 783.

\textsuperscript{142}. 29 U.S.C. § 158(a)(1) and (a)(3). \textit{See R. Gorman, supra} note 114, at 341.

\textsuperscript{143}. \textit{Mackay}, 304 U.S. at 345-46.

\textsuperscript{144}. Schatzki, 47 TEX. L. REV. at 383.

\textsuperscript{145}. \textsc{J. Atleson, supra} note 141, at 30.
between discharge and permanent replacement, the Mackay doctrine invites the employer "to rid himself of union adherents and the union." \footnote{146. Schatzki, 47 TEX. L. REV. at 383.}

\textbf{Erie Resistor: A Limit to Mackay}

The United States Supreme Court holding in \textit{NLRB v. Erie Resistor Corp.} \footnote{147. 373 U.S. 221 (1963).} placed some limits on the employer's right to replace economic strikers as a means of protecting the employer's business. \footnote{148. Id. at 232.} In \textit{Erie Resistor}, the Court upheld a finding by the NLRB that it was an unfair labor practice for an employer to offer a twenty-year seniority credit to permanent replacements and employees for working during a strike. \footnote{149. Id. at 235-37.} The Court found that in the event of future layoffs, the replacements and crossovers would be able to use the "super-seniority" to avoid losing their jobs, with the effect of pushing the layoffs onto the employees who had stayed out on strike. \footnote{150. Id. at 223.} The employer in \textit{Erie Resistor} argued that the granting of super-seniority should be considered a corollary of the employer's Mackay right to replace strikers. \footnote{151. Id. at 225.} The Erie Resistor Co. insisted that business necessity justified the grant of super-seniority and that the purpose of the grant was to continue operations during the strike. \footnote{152. Id. at 225.} The NLRB found that the grant of super-seniority exceeded any rights an employer had to replace strikers under the Mackay doctrine. \footnote{153. Id. at 225-26.} The Supreme Court held that some conduct was so "inherently discriminatory or destructive" that no specific finding of illegal motivation on the part of the employer was necessary and the intent could be found in the conduct itself. \footnote{154. Id. at 227-29.}

The Court distinguished the super-seniority grant from merely hiring permanent replacements because the offering of super-seniority to strikers operated as an inducement to abandon the strike and also operated to the exclusive detriment of only those employees who engaged in the strike. \footnote{155. Id. at 230.} The Court found that long-term union strength and future collective bargaining would be affected by the "cleavage" created between those who crossed the picket line to take advantage of the super-seniority grant and those employees who had
stayed out on strike full-term. The Court reasoned that, unlike the effects of permanent replacement under Mackay, this cleavage would continue long after the conclusion of the strike.

Thus, the Court in Erie Resistor held that when the conduct of an employer was inherently discriminatory and destructive the fact that the employer may be motivated by legitimate business purposes was no defense. The Court found that when the employer’s conduct took on such inherently destructive aspects, any claim of a legitimate business purpose on the part of the employer would not outweigh the harm to employee rights and the NLRB could find an unfair labor practice.

Great Dane and Fleetwood Trailer

In NLRB v. Great Dane Trailers, Inc., the Court provided a test that attempted to balance the rights of employees under section seven of the NLRA against the employer’s legitimate business interests. During a strike, the Great Dane Trailer Co. paid accrued vacation benefits to crossover employees but refused a demand to pay the accrued benefits to striking employees. The employer claimed it was paying the benefits as a new policy and not pursuant to the expired collective bargaining agreement. The striking employees brought a charge of unfair labor practice against the employer, claiming a violation of sections 8(a)(1) and 8(a)(3) of the NLRA. In deciding the case, the Court looked at whether the discriminatory conduct of the employer was fueled by an anti-union motive.

The Court reviewed past decisions, found several controlling principles, and announced a formula for determining the circumstances under which an anti-union motive by the employer must be proved. If the employer’s conduct was classified as inherently de-

156. Id. at 231.
157. Id. The Court stated that the super-seniority plan would create a cleavage in the workforce by dividing it into two camps: those who stayed out on strike and those who crossed over and took advantage of super-seniority. The cleavage would be emphasized with subsequent layoffs and stand as a reminder of the risks involved in striking and other union activities. When strikers are replaced under Mackay, the Court stated, the issue ended with the strike. Presumably, because those most affected were no longer a part of the workforce. Id.
158. Id. at 236-37.
159. Id.
161. Id. at 34. See also Gillespie, 50 Tex. L. Rev. at 783-84.
162. Great Dane, 388 U.S. at 29.
163. Id.
164. Id. at 30.
165. Id. at 33-35.
166. Id. at 34. See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965) (finding that unlawful employer discriminatory conduct normally turns on an anti-union
structive, a charge of unfair labor practices could be sustained without proof of an anti-union motive by the employer. The unfair labor charge would be upheld regardless of whether the employer showed evidence of a legitimate business purpose for the conduct. Conversely, if the employer's discriminatory conduct was classified as having a "comparatively slight" adverse effect on important rights of employees, the employer had to present evidence of a legitimate business justification. If this was shown then the employees had to show an anti-union motive by the employer to sustain a charge of unfair labor practice. The Court concluded in *Great Dane* that because the employer had shown no evidence of a legitimate business purpose, the employer had not met its burden of proof and the unfair labor practice charge was sustained.

Less than a year later, in *NLRB v. Fleetwood Trailer Co.*, the Supreme Court applied the analysis from *Great Dane* and determined that an employer's failure to reinstate striking employees was an unfair labor practice unless the employer was able to show that the failure to reinstate was because of legitimate business reasons. The Fleetwood Trailer Co. failed to reinstate six returning strikers at the conclusion of a strike because production had been cut back during the strike. After production picked up, the employer hired six new employees for positions the strikers could have filled. In determining whether the employer's failure to reinstate the strikers when positions became available constituted an unfair labor practice, the Court noted that, under section 2(3) of the NLRA, strikers remain employees of the employer until they have obtained substantially equivalent employment. The Court held that by refusing to reinstate employees who had participated in a strike, an employer was discouraging the employees from exercising their protected rights to organize and strike. Therefore, the employer's refusal to reinstate the strikers violated sections 8(a)(1) and 8(a)(3) of the

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167. *Great Dane*, 388 U.S. at 34.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 34-35.
173. *Id.* at 378.
174. *Id.* at 376-77.
175. *Id.* at 377.
176. *Id.* at 378.
177. *Id.*
The Court stated that "unless the employer who refuse[d] to reinstate strikers c[ould] show that his action was due to 'legitimate and substantial business justifications,' he [was] guilty of an unfair labor practice."179

The Fleetwood Court used Mackay as an example of a recognized business justification.180 The Court stated that an employer could refuse to reinstate economic strikers "when the jobs claimed by the strikers [were] occupied by workers hired as permanent replacements during the strike in order to continue operations."181 According to the Court, other business justifications for a failure to reinstate returning strikers existed when an employer had eliminated jobs for reasons other than labor relations.182 In Fleetwood Trailer, the employer brought forth no evidence to justify the discriminatory conduct and, just as in Great Dane, was found to have committed an unfair labor practice.183

ANALYSIS

APPLYING LABOR LAW DEVELOPED UNDER THE NLRA TO CASES ARISING UNDER THE RLA

Courts draw analogies from labor case law developed under the NLRA to cases arising under the RLA when it is helpful in determining applicable principles of labor law on a certain point.184 In Trans World Airlines v. Independent Federation of Flight Attendants,185 both the United States District Court for the Western District of Missouri and the United States Court of Appeals for the Eighth Circuit applied analogies from case law developed under the NLRA to determine whether TWA's crossover policy was lawful.186 The majority opinion of the United States Supreme Court was also based on analogies from principles developed under the NLRA.187 A caveat emphasized by courts while engaging in this practice has been that "the National Labor Relations Act cannot be imported wholesale

178. Id.
179. Id. (quoting Great Dane, 388 U.S. at 34).
180. Id. at 379.
181. Id. (citing Mackay, 304 U.S. at 345-46).
182. Id. at 379. The Court cited a change in business conditions or a need to improve efficiency as examples of justifications not relating to labor relations. Id.
183. Id. at 380-81.
into the railway labor arena.\footnote{188}

The majority opinion in \textit{TWA} suggested two situations in which judicial intervention into the self-help stage of the dispute resolution process of the RLA could be necessary.\footnote{189} The first was when a party had been engaged in conduct that prohibited the collective bargaining process contemplated by the RLA from working properly.\footnote{190} The second was when the form of self-help engaged in by an employer or union was inherently destructive of the activity of the other.\footnote{191} The Court's suggestion that it was only inherently destructive conduct that should be limited in the self-help period of an RLA dispute appeared to be directly applicable to the Court's discussion of \textit{NLRB v. Erie Resistor Corp.}\footnote{192} and TWA's conduct under NLRA principles.\footnote{193} Because of the differences between the NLRA and RLA it may be that the Court limited its analogies borrowed from the NLRA to those cases that would allow it to determine if TWA's conduct should be considered inherently destructive.\footnote{194} This limitation was necessary because the Court only considered prohibiting self-help methods in the context of inherently destructive behavior.\footnote{195} Because the NLRA contains a more detailed set of rights and obligations and would tend to put more restrictions on employer or union conduct, a limited analysis under the RLA is consistent with the differences between the statutory schemes and the caveat against wholesale importation.\footnote{196}

\textbf{TWA AND THE SCOPE OF THE MACKAY DOCTRINE}

Returning economic strikers have a right to reinstatement only to the extent that positions are "available."\footnote{197} The Court, in \textit{TWA}, declared that "positions occupied by newly hired replacements, employees who refused to strike, and employees who abandoned the strike, [were] simply not 'available positions' to be filled."\footnote{198}

According to the Court in \textit{NLRB v. Fleetwood Trailer Co.},\footnote{199} an employer who has not reinstated strikers at the conclusion of a strike

\begin{footnotes}
\item[188] \textit{Jacksonville Terminal Co.}, 369 U.S. at 383.
\item[189] \textit{TWA}, 109 S. Ct. at 134-35.
\item[190] \textit{Id.} at 1235.
\item[191] \textit{Id.}
\item[192] 373 U.S. 221 (1963).
\item[193] \textit{TWA}, 109 S. Ct. at 1235. \textit{See Erie Resistor}, 373 U.S. at 231 (describing conduct of an employer found to be inherently destructive).
\item[194] \textit{See infra} notes 245-53 and accompanying text.
\item[195] \textit{TWA}, 109 S. Ct. at 1235.
\item[196] \textit{See Jacksonville Terminal}, 394 U.S. at 383.
\item[197] \textit{See supra} notes 53-56 and accompanying text.
\item[198] \textit{TWA}, 109 S. Ct. at 1232 (quoting \textit{TWA}, 109 S. Ct. at 1238 (Brennan, J., dissenting)).
\item[199] 389 U.S. 375 (1967).
\end{footnotes}
can defeat an unfair labor practice charge only if the employer had legitimate business justifications for the failure to reinstate.200 Thus, positions were available to returning economic strikers unless the employer had a legitimate business purpose, such as a refusal to fire permanent replacements hired during the strike, for denying reinstatement to the strikers.201 The majority opinion in TWA did not consider whether TWA's offers of permanency and job assignments to the crossovers were motivated by a legitimate business purpose.202

The doctrine of NLRB v. Mackay Radio & Telegraph Co.203 gives an employer a blanket justification for replacing economic strikers.204 In TWA, the Court applied this blanket justification beyond the hiring of permanent replacements to cover TWA's crossover policy.205 As the majority opinion construed the Mackay doctrine to apply under the RLA, it allows an employer to replace strikers with "others," including new hires and crossovers, without the need for showing a legitimate business purpose for the action.206

The dissenting opinions point out that there are good reasons why crossovers should be distinguished from permanent replacements in determining the scope of allowable self-help on the part of the employer.207 Perhaps the most obvious reason to distinguish crossovers from permanent replacements is the fact that crossovers, unlike permanent replacements, are a part of the pre-strike employee workforce and take part in the collective decision to strike.208 Offers of incentives to members of the pre-strike workforce to abandon the strike involve discriminatory conduct as defined under section 8(a)(3) of the NLRA and require an analysis to determine whether the employer's motive was to discourage union membership.209 Instead of simply incorporating crossovers into the category of "others," the Court should have recognized the differences be-

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200. Id. at 378-79.
203. 304 U.S. 333 (1938).
205. See TWA, 109 S. Ct. at 1232 (explaining that TWA may fill vacancies created by the strike with new hires or crossovers).
206. See TWA, 109 S. Ct. at 1232.
207. TWA, 109 S. Ct. at 1238, 1243-44 (Blackmun, J., and Brennan, J., dissenting).
208. See Id. at 1328 n.4 (Brennan, J., dissenting) (stating that "[fundamental to] our labor law, is the principle of majority decision — even where such decisions may impose costs on the dissenting minority."); Id. at 1243 (Blackmun, J., dissenting) (arguing that "[t]he right to remain a member of the collectivity but to opt out of certain decisions when the going gets rough [was] not a normal incident of participation in the democratic process").
tween crossovers and permanent replacements and applied the test established in *NLRB v. Great Dane Trailers* to determine the legitimacy of TWA's motive for its discriminatory conduct.

To apply the analysis from *Great Dane* to determine the motivation of an employer's discriminatory conduct, the first step would be to categorize the effect of TWA's crossover policy as either "inherently destructive" or "comparatively slight." Arguably, the most important factor in finding an employer's conduct inherently destructive is the offer of an extraordinary reward or exceptional lure inducing employees to abandon the strike. The super-seniority grant offered by the employer in *Erie Resistor* is an example of an employer's offer to strikers found to be an extraordinary inducement by the Court.

The majority opinion distinguishes TWA's offers and incentives to crossovers from the situation in *Erie Resistor* and the conduct of the Erie Resistor Corp. which was found to be inherently destructive. The Court gave a very narrow reading to the holding of *Erie Resistor*. The Court in *TWA* dismissed analogies with the super-seniority grant of the employer in *Erie Resistor* by finding that full-term strikers lost no seniority relative to crossovers or new hires and that any cleavage that would result from TWA's crossover policy was a natural incident of a strike.

The majority in *TWA* ignored entirely a number of factors that were relevant in *Erie Resistor*. TWA's offer of permanency and better job assignments operated to the detriment of strikers as compared to nonstrikers, and the offer was made to induce the pre-strike bargaining unit members to abandon the strike, just as did the em-

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211. See id. at 33-34. The test in *Great Dane* was used to determine when an NLRB finding of an unfair labor practice based on an employer's discriminatory conduct should be sustained. *Id.* While in *TWA* the Court was not deciding whether to sustain an NLRB finding, the categories and principles provided by the Court in *Great Dane* provide a starting point for any analysis of discriminatory conduct under the NLRA. See *Id.* at 32-33 (describing inquiry under § 8(a)(3) of NLRA).
212. *Id.* at 34.
216. See infra notes 218-22 and accompanying text.
218. See *Erie Resistor*, 373 U.S. at 230-32. The Court listed characteristics of Erie Resistor Corp.'s super-seniority plan that the NLRB had found made it unlawful. Among the pertinent factors was that the super-seniority plan discriminated against those who participated in the strike, that it severely hampered the strike effort of the employees, and that it created a division among the employees that would continue after the conclusion of the strike. *Id.* at 230-31.
ployer's offer in *Erie Resistor*. The *TWA* Court made no effort to determine the effect of TWA's crossover policy on the collective bargaining process or the strike effort in general, both issues which were considered relevant in *Erie Resistor*. The Court in *TWA* limited inherently destructive conduct in the context of the RLA to conduct that would have to affect seniority in a manner similar to the super-seniority grant of *Erie Resistor*.

It is possible, as Justice Blackmun found, that TWA's offers of job security and choice assignments are not so extraordinary in a strike situation as to place them into the category of inherently destructive discriminatory conduct. Nevertheless, the conduct did discriminate on the basis of participation in union activity, and should have at least been analyzed under the second prong of the *Great Dane* test, the category of comparatively slight impact. Analysis under this category depends on the business justification the employer had for the discriminatory conduct. The impact of the discriminatory conduct is to be measured against legitimate employer interests. In any case, the employer has the burden of showing at least some business purpose for his conduct.

Under *Mackay*, a legitimate business purpose is presumed for the hiring of permanent replacements. The Court's posture in *TWA* that an employer may replace strikers with either new hires or crossovers apparently applies the *Mackay* presumption of business necessity to TWA's crossover policy. The *TWA* opinion suggests that, under *Mackay*, crossovers should not be distinguished from permanent replacements. However, offers to crossovers present a much more obvious form of discriminatory conduct based on participation in union activity than the hiring of permanent replacements from outside the workforce. If under the RLA the Court was attempting to draw a full analogy from the NLRA, the Court should have analyzed TWA's crossover policy under recognized NLRA precedent to determine whether TWA's discriminatory policy was unlawful.

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219. *Id.*. See also *TWA*, 109 S. Ct. at 1232.
222. *See TWA*, 109 S. Ct. at 1231.
223. *Id.* at 1247 (Blackmun, J., dissenting).
225. *Id.*
227. *Great Dane*, 388 U.S. at 34.
228. *See supra* note 139 and accompanying text.
230. *See id.* at 1235.
231. *See supra* notes 207-11 and accompanying text.
under the NLRA. Based on TWA, not only may an employer governed by the RLA hire permanent replacements during an economic strike, but the employer may make certain “guarantees” to the strikers that have the effect of inducing them to abandon the strike and still fall within the scope of allowable employer self-help during a strike.

The Abstentionist Policy of the Railway Labor Act

The union’s second argument in TWA was that the Court should find a greater protection for employees under the RLA than that afforded by the NLRA. The IFFA argued that TWA’s conduct in regard to crossovers amounted to coercion that was designed to influence union members to abandon the union. The union alleged that this coercion was prohibited by Section Two Fourth of the RLA.

The majority opinion concluded that there was little support for the argument that the RLA provided greater protection for employees in a period of self-help than the NLRA did. The majority opinion noted that the focus of Section Two Fourth of the RLA was on the pre-certification rights of employees to organize and select a bargaining representative. The Court then determined that Section Two Fourth of the RLA did not prohibit TWA’s crossover policy during the self-help stage of a labor dispute.

The RLA and the NLRA are designed with very different schemes for the resolution of labor disputes. The RLA was designed for an industry that was heavily unionized and had been practicing collective bargaining for a number of years. The RLA was drafted by railroad labor and management and was ratified by Congress. Although enacted only nine years after the RLA, the NLRA was the product of a much different political climate. The NLRA was New Deal legislation, and one goal of the NLRA was to promote collective bargaining in industries in which the practice was

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232. See Great Dane, 388 U.S. at 32-35.
233. TWA, 109 S. Ct. at 1235.
234. Id. at 1233.
235. Id. at 1234.
236. Id.
237. Id. at 1233-35.
238. Id. at 1234.
239. Id. at 1235.
241. Id.
242. Id.
243. Id. at 150.
not as well accepted as in the railroad industry.\textsuperscript{244}

The most important conceptual differences between the RLA and the NRLA are found in the amount of government intervention anticipated in the labor-management dispute settlement process.\textsuperscript{245} The intent of the RLA is to facilitate a voluntary settlement of major disputes within the framework of the RLA's dispute resolution mechanisms.\textsuperscript{246} The NLRA, on the other hand, is designed as a more detailed set of rights and obligations with the National Labor Relations Board (NLRB) playing an important role in interpreting the statute.\textsuperscript{247}

Generally, the framework of the RLA provides an approach that is abstentionist in terms of government involvement in the process once the dispute resolution procedures have been followed.\textsuperscript{248} The NLRA provides an approach that is interventionist and calls for a higher degree of government involvement.\textsuperscript{249} Dispute settlement under the RLA is designed to be voluntary and the statute contains very few judicially enforceable provisions.\textsuperscript{250} The RLA, for example, does not attempt to define unfair labor practices or provide an agency for enforcement as the NLRA does.\textsuperscript{251} The duties of labor and management under the RLA involve compliance with the dispute resolution procedures.\textsuperscript{252} While federal courts can require the parties to follow the procedures, settlement under the RLA is strictly voluntary.\textsuperscript{253}

Conceptually, the IFFA's argument was difficult to reconcile with the abstentionist nature and design of the RLA.\textsuperscript{254} The RLA is a less detailed set of rights and obligations than the NLRA, and the enforceable duties found in the RLA are primarily concerned with seeing that the dispute resolution procedures are complied with so that a voluntary settlement of the labor dispute may be facilitated.\textsuperscript{255} Implicit in the design of the RLA is the right of the parties who have exhausted the major dispute resolution procedures to resort to eco-
The threat of economic warfare in this final stage of dispute resolution encourages settlement in the earlier stages of dispute resolution under the RLA. The TWA and the IFFA had exhausted the dispute resolution procedures of the RLA and were in the period of self-help contemplated by the framework of the statute. Except for limited circumstances, the RLA is not designed for interference by a court in this stage of dispute resolution. If the parties were not free to engage in economic warfare in this period of self-help, the effect would be to discourage voluntary settlement in the earlier stages of dispute resolution under the RLA by allowing parties to seek redress in the federal courts rather than bargain to a voluntary agreement. The IFFA's second argument attempted to find language in Section Two Fourth of the RLA that would allow for adjudication of a claim in a manner similar to the much more detailed and specific language of the NLRA. The abstentionist concept of the RLA suggests that this second argument by the IFFA was not well founded, and that any limits to TWA's conduct would more likely have come from principles devised under the NLRA.

Although rejecting Section Two Fourth as a source of limits on employer conduct, Justice O'Connor was careful to point out that the range of self-help activities parties could engage in during this stage was not limitless. However, according to Justice O'Connor, the silence of Congress in this area meant that courts "should hesitate to imply limitations on all but those forms of self-help that strike a fundamental blow to union or employer activity and the collective bargaining process itself." Justice O'Connor suggested two situations in which judicial intervention in the RLA scheme of dispute resolution could be proper: 1) when union or employer conduct prevented the dispute resolution mechanisms of the RLA from working, or 2) when the conduct of an employer or a union was inherently destructive of the activity of the other. Under the statutory concept contemplated by the RLA, conduct outside the realm of these two areas

257. See supra notes 102-03 and accompanying text.
258. TWA, 109 S. Ct. at 1228.
259. See supra notes 102-03 and accompanying text.
261. TWA, 109 S. Ct. at 1233-35.
262. See supra notes 248-53 and accompanying text.
263. TWA, 109 S. Ct. at 1234-35.
264. Id. at 1235.
265. Id.
should not call for judicial intervention into the major dispute resolution process of the RLA.\textsuperscript{266}

**THE DISSENTING OPINIONS**

Justice Brennan and Justice Blackmun strongly disagreed with the majority opinion in regard to the majority’s interpretation of analogies drawn from the NLRA and also to the majority’s analysis under the RLA.\textsuperscript{267} The dissents, however, came to somewhat different conclusions.\textsuperscript{268} Justice Brennan found that Section Two Fourth of the RLA should be interpreted to limit TWA’s crossover policy, and also found this to be a proper case in which to refer to the NLRA in order to determine what limits the law could impose on TWA’s conduct.\textsuperscript{269} Justice Brennan would have found TWA’s offers to the crossovers to be inherently destructive and unlawful using the NLRA precedent.\textsuperscript{270}

Justice Blackmun’s dissenting opinion took a different course.\textsuperscript{271} Like Justice Brennan, Justice Blackmun also found limits to TWA’s conduct in Section Two Fourth of the RLA.\textsuperscript{272} Justice Blackmun, however, did not find TWA’s conduct to be as destructive of employee rights as Justice Brennan.\textsuperscript{273} By drawing analogies from *Great Dane*, and by excerpting principles from certain cases decided under the RLA, Justice Blackmun would have remanded the case for a determination as to whether TWA’s crossover policy was necessary to continue in operations.\textsuperscript{274} Justice Blackmun would have found TWA’s conduct lawful if it was necessary for continued operation.\textsuperscript{275}

Justice Brennan found that the language in Section Two Fourth

\textsuperscript{266} See id. at 1234-35.
\textsuperscript{267} *TWA*, 109 S. Ct. at 1235-40 (Brennan, J., dissenting); *Id.* at 1240-48 (Blackmun, J., dissenting).
\textsuperscript{268} *Id.* at 1246-47 (Blackmun, J., dissenting). See *id.* at 1235-1240 (Brennan, J., dissenting).
\textsuperscript{269} *Id.* at 1235-37 (Brennan, J., dissenting).
\textsuperscript{270} *Id.* at 1238-39 (Brennan, J., dissenting).
\textsuperscript{271} See *id.* at 1241-42 (Blackmun, J., dissenting).
\textsuperscript{272} *Id.* (Blackmun, J., dissenting).
\textsuperscript{273} *Id.* at 1247 (Blackmun, J., dissenting).
\textsuperscript{274} *Id.* at 1244-45, 48 (Blackmun, J., dissenting).
\textsuperscript{275} *Id.* at 1245 (Blackmun, J., dissenting). However, Justice Blackmun made it clear that the truly necessary test he proposed would require a strict standard and that it would be a rare case in which an employer could prove that gravely destructive conduct was truly necessary to continue in operations. *Id.* at 1247 (Blackmun, J., dissenting). Justice Blackmun contrasted this strict standard with the standard arising under interpretation of the NLRA. *Id.* at 1245-46 (Blackmun, J., dissenting). Unlike the standard established under the NLRA, under which the employer is given a presumption that the hiring of permanent replacements during a strike was done for business reasons and to continue operations, Justice Blackmun sees no reason for a presumption of business necessity under the RLA for an employer’s offer of permanence to crossovers or new hires. *Id.* at 1246 n.4 (Blackmun, J., dissenting).
of the RLA\textsuperscript{276} provided a textual anchor for a prohibition against an employer's discriminatory conduct that was similar to the prohibitions found in the express language of the NLRA.\textsuperscript{277} Justice Blackmun criticized the majority for finding a pre-certification focus for Section Two Fourth,\textsuperscript{278} and like Justice Brennan, found that Section Two Fourth of the RLA should have been interpreted to contain a broad prohibition against discriminatory conduct on the part of an employer.\textsuperscript{279}

However, the RLA is a statutory scheme quite different than that of the NLRA with a different process for settling disputes.\textsuperscript{280} Under the RLA, many of the disputes involving the alleged discriminatory conduct of an employer would probably be termed minor, or grievance, disputes and thus be subject to the mechanisms for binding arbitration set out in the scheme of the RLA.\textsuperscript{281} If Section Two Fourth of the RLA applies at all stages, an invitation is given to the both the carrier and the union to bypass the particular mechanisms of the RLA for settling major and minor disputes, and instead attempt to enforce rights and obligations in the courts.\textsuperscript{282} While the NLRA contemplates this type of adjudicative dispute resolution process, the RLA does not.\textsuperscript{283} Given the nature of the statutory scheme for settling both major and minor disputes, it would seem best to limit broad prohibitions and judicial intervention into the RLA processes.\textsuperscript{284} While perhaps the philosophical distinctions between the RLA and the NLRA have tended to blur over time, nevertheless, they still exist.\textsuperscript{285}

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\bibitem{277} \textit{TWA}, 109 S. Ct. at 1236 (Brennan, J., dissenting).
\bibitem{278} \textit{Id.} at 1241 (Blackmun, J., dissenting). Justice Blackmun noted that the majority opinion placed the post-certification right of employees to refrain from striking in § 2 Fourth of the RLA while the majority also maintained that § 2 Fourth had a pre-certification focus. \textit{Id.} (Blackmun, J., dissenting).
\bibitem{279} \textit{Id.} at 1241-42 (Blackmun, J, dissenting).
\bibitem{280} \textit{See supra} notes 240-53 and accompanying text.
\bibitem{281} \textit{See supra} notes 171-80 and accompanying text. Minor disputes should be subject to judicial intervention only where the arbitration mechanisms created by the statute would prove ineffective. \textit{Independent Union of Flight Attendants v. Pam Am World Airways}, 789 F.2d 139, 141-42 (2d Cir. 1986).
\bibitem{282} \textit{See supra} notes 240-53 and accompanying text.
\bibitem{283} \textit{See supra} notes 245-53 and accompanying text.
\bibitem{284} \textit{See supra} notes 240-53 and accompanying text.
\bibitem{285} Arouca & Perritt, 38 \textit{LABOR L.J.} at 149. Despite the differences in design and operation of the NLRA and RLA, the two statutes have been said to be "converging." \textit{Id.} The convergence is taking place because of judicial application of principles developed under the NLRA to cases arising under the RLA. \textit{Id.} Courts find it necessary to determine a "national labor policy" when the RLA and precedent developed directly under that statute are silent on a particular issue. \textit{Jacksonville Terminal}, 394 U.S. at 383. By applying NLRA principles to cases arising under the RLA, interpretation of the RLA has become more interventionist in certain areas, and philosophical distinc-
Another area criticized by the Justice Brennan was the majority opinion's statement that allowing senior full-term strikers to displace junior crossovers would amount to penalizing crossovers for not striking. Justice Brennan could find no basis in the labor case law for either group to be penalized, and he determined that the majority opinion, in effect, allowed TWA to penalize those employees who had stayed out on strike the longest and participated to the greatest degree in the concerted activity. Justice Brennan's view appears to be supported by a logical interpretation of sections seven and eight of the NLRA which protects both the right to engage in and to refrain from concerted activity and also prohibits employer discrimination against employees on the basis of participation in lawful union activity.

Perhaps the most important point stressed by the dissenting opinions was the majority opinion's disregard for the damaging effect that a crossover policy such as that employed by TWA could have on collective bargaining. Under the majority opinion, union members were allowed to participate in the collective decision to strike and then were allowed to abandon the strike, and the consequences of collective action, at the time it would be to their greatest advantage and individual benefit. The dissents found the majority opinion to run contrary to the concept of majority-rule that was necessary in a system of collective bargaining.

The importance the Court placed on the maintenance of collective bargaining in *Erie Resistor* suggests that employer conduct that has such a damaging effect on the collective bargaining process should be an important factor in determining whether an employer's conduct should be considered inherently destructive. The majority opinion also mentioned damage to the collective bargaining process as one of the few cases in which self-help under the RLA should be limited. Because of the narrow reading given *Erie Resistor* by the majority opinion, the majority did not consider the effect of TWA's...
crossover policy on the ability of the employees to act as a collective unit or the effect on the bargaining relationship. As Justice Brennan noted, while individual injustices could exist in a system of collective bargaining, weight had to be given to the fact that it was the individuals as members of the unit that made the decision to strike.

CONCLUSION

The differences between the RLA and the NRLA may have caused the majority in *Trans World Airlines v. Independent Federation of Flight Attendants* to engage in a limited analysis applying *NLRB v. Mackay Radio & Telegraph Co.* principles in an RLA setting. Thus, this analysis might have little application in a case arising under the NLRA. If the opinion is to apply only to the RLA, it appears that those employees covered by that statute will have fewer rights to reinstatement at the conclusion of a strike than those employees in industries governed by the NLRA.

In reaching its decision, the majority appears to recognize the abstentionist nature of the RLA, and apparently determines that self-help in a labor dispute arising under the RLA should not be limited unless the parties engage in conduct that is inherently destructive of union or employer activity. However, in using analogies drawn from the NLRA, the Court interpreted the holding of *NLRB v. Erie Resistor Corp.* far too narrowly in the context of determining whether conduct of an employer should be considered inherently destructive of employee rights. Because of the strength the Court gives to the employer's rights under the Mackay doctrine, and because of its narrow reading of *Erie Resistor*, the majority opinion in *TWA* is not a good sign for labor groups, regardless of the labor statute under which they happened to be organized.

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294. See supra notes 217-22 and accompanying text.
297. 304 U.S. 333 (1938).
298. See supra notes 197-233 and accompanying text. Because of the Court's extensive use of NLRA cases and principles in this context however, it is virtually certain that attempts will be made to incorporate some of *TWA's* grant of power to employers into NLRA cases.
300. 373 U.S. 221 (1963).