

STEWARD'S *corner*

The Hows, Whys, and Whats of ULP Strikes

by Robert M. Schwartz

As nurses at St. Vincent Hospital in Massachusetts discovered last year, one of the most critical moments that can arise during a strike is an employer announcement that it intends to hire permanent replacements. Of course, the employer may be bluffing. But, if it follows through, strikers' jobs may be in serious jeopardy.

An employer that hires permanent replacements is likely to harden its bargaining stance. For example, it may insist on ending dues checkoff arrangements or seek to remove the contract's union security guarantees.

The employer may also encourage the replacements (and any line-crossers) to file a union decertification petition—leading to a National Labor Relations Board election in which, if the strike is more than one year old, displaced strikers may be barred from casting ballots.

Permanent replacement announcements generate understandable worries. Some workers may press the union to settle the strike quickly by modifying bargaining demands or accepting employer offers. Others may cross the picket line to save their jobs.

What can a union do to deter an employer from pursuing a permanent replacement strategy?

One tactic is to immediately end the

walkout, report for work, and commence a relentless inside campaign including work-to-rule activities, short-term work disruptions, rallies, boycotts against customers, suppliers, banks, and other entities linked to the employer, and attempts to influence stock prices. If the employer counters by locking out the union, it will be barred by law from hiring permanent replacements. [For more on lockouts, see Chapter 15 of *No Contract, No Peace*, published by Labor Notes].

A MORE PROTECTED STRIKE

Another way to protect strikers is to attempt to position a walkout as an unfair labor practice (ULP) strike. As recently emphasized in a tweet by Jennifer Abruzzo, the new NLRB General Counsel, "The NLRB's permanent replacement doctrine allows an employer to permanently replace workers striking for 'economic' reasons under limited circumstances. But don't get confused—**an employer can never permanently replace workers striking to protest an unfair labor practice.**"

An employer that precipitates a ULP strike must immediately reinstate strikers if the union submits an unconditional offer to return to work—even if this can only be accomplished by terminating the permanently hired replacements.

If the employer delays or refuses, the NLRB can order it to rehire the strikers and reimburse them for back wages from the time reinstatement should have taken place.

A walkout is labeled a ULP strike if a union hits the bricks, or stays out, to protest an employer violation of the National Labor Relations Act. The NLRA violation (see examples below) need not be flagrant. Nor must it be the sole or even the most important cause of the strike. If illegal employer conduct is one of the reasons employees stop work, the walkout qualifies as a ULP strike.

Strikers have more protection if an unfair labor practice is among the reasons they walked out.

A strike to win higher wages or improve working conditions is classified as an "economic strike." Economic strikers cannot be fired for going out, but due to the NLRB's interpretation of a 1938 Supreme Court decision (*Mackay Radio*), an employer can refuse to reinstate them to jobs held by replacements hired permanently. In that case, the strikers must wait for openings on a preferential recall list.

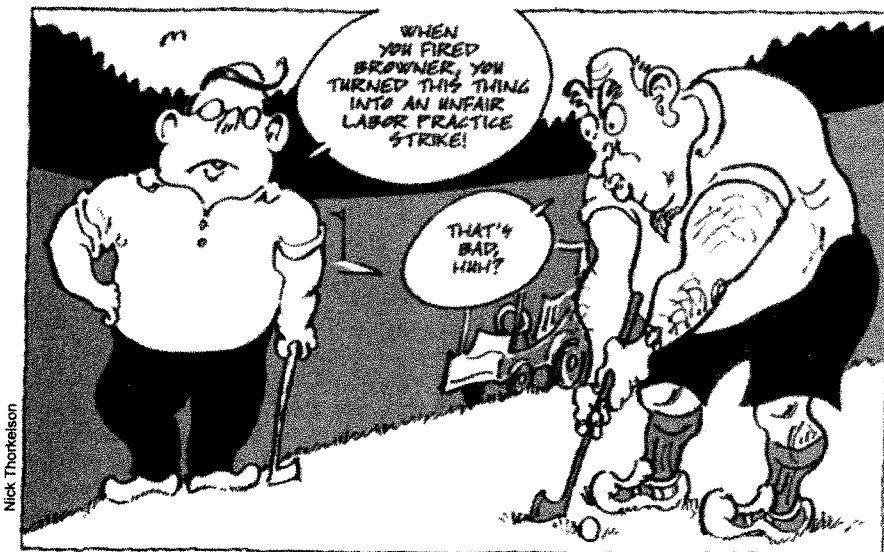
Note: An economic strike can "convert" to the more protected status of a ULP strike if the employer commits an NLRA violation during the walkout that hinders bargaining or hardens workers' resolve to stay out.

COMMON ULPs

One way to position a walkout as a ULP strike is to place demands to correct NLRA violations at the top of the union's bargaining list. For example, if an employer refuses a request for benefit records, the union can demand that the information be provided.

Other conduct that can trigger a ULP strike includes:

- Disciplining employees for wearing union buttons or shirts
- Videotaping union rallies
- Bypassing the union to deal directly with employees



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d. Refusing to bargain at reasonable times and locations

e. Implementing a disputed proposal before bargaining to a good-faith impasse

The more aggressive a union is during the pre-strike period, the more likely the employer will respond with ULPs. An extensive "inside campaign" of buttons, rallies, informational and residential picketing, and appeals to customers is almost guaranteed to provoke retaliatory work rules, warnings, and personnel actions.

Conduct by the employer that can convert an economic to a ULP strike includes:

- a. Refusals to meet with the union
- b. Discharging strikers for comments on the picket line
- c. Causing strikers to be wrongly arrested
- d. Bribing strikers to return
- e. Granting super-seniority to non-strikers or replacements

The union can help to frame its walk-out as a ULP strike by thoroughly discussing the employer's conduct during strike-vote meetings and by phrasing the ballot question as follows: "Do the members agree to strike [or continue to strike] because the employer is violating the NLRA by _____ and _____, as well as failing to negotiate a fair collective bargaining agreement?"

Union signs and handouts should highlight employer ULPs. The violations should also be featured in press releases and letters to customers, local officials, and clergy.

Charges should be filed at the NLRB promptly after ULPs are discovered. If a strike is in progress, the union should allege that the employer's actions caused or prolonged the walkout. If the employer has already hired permanent replacements, the charge can include a request that the NLRB seek a court injunction against further hiring.

With new Board members and a labor-friendly General Counsel appointed by President Biden in 2021, the NLRB is likely to be more receptive to union claims.

QUESTIONS AND ANSWERS

Q. Is it always illegal to designate replacement workers as permanent during a ULP strike?

A. No. Hiring workers on a permanent basis during a ULP strike is not illegal in itself. The employer only violates the law if it uses the hires as a reason to deny strikers their jobs back following an unconditional offer to return to work.

Note: An exception applies if evidence proves that the employer hired the replacements not for legitimate business reasons but to break the union or to dissuade workers from taking part in future strikes.

Union signs and handouts should highlight employer ULPs.

Q. In the second week of the strike, our company fired the local president for "abusive" conduct on the picket line (calling a line-crosser a "f---g scab"). The members are furious and are refusing to end the strike unless the firing is reversed. If the union files a charge right away, how soon might the NLRB certify this as a ULP strike?

A. The NLRB may issue a complaint seeking to overturn the discharge but will probably refrain from deciding the legal status of the strike unless the employer hires permanent replacements and refuses to allow strikers to return to their positions. This may delay a ULP strike designation for years.

Q. If it is going to take years to get our walkout classified as a ULP strike,

what good does it do us now?

A. Framing a walkout as a ULP strike can strengthen the union's position from the get-go. For one thing, knowing that the union may be able to win substantial back pay after the strike may discourage the employer from hiring permanent replacements. For another, if the employer does hire replacements, members will be less likely to lose faith in the strike.

Q. Our employer is offering to settle a ULP charge that we filed before hitting the bricks. Any risk if the union accepts?

A. Yes. The settlement may convert the walkout from a ULP strike to an economic strike. If the employer later hires permanent replacements, it may be able to deny reinstatement if the union calls off the strike. To avoid losing job rights, unions should insist on settlement language reserving the union's and the NLRB's right to cite the ULP in future proceedings.

Q. We have consistently asserted that we are on a ULP strike. If a union member gives an interview to the local press and, when asked the reasons for the walkout, only talks about low wages and staffing problems, could this affect our chances of winning ULP status?

A. Yes. Loose lips can sink ships. Unions should educate members on how to explain the reasons for going out. Employers sometimes call rank-and-file workers as witnesses in NLRB proceedings in the hope they will contradict the union's contentions. □

[Robert Schwartz is a retired union attorney in Massachusetts. He is the author of several Labor Notes books including *The Legal Rights of Union Stewards*, *Just Cause*, *How to Win Past Practice Grievances*, and *No Contract, No Peace: A Legal Guide to Contract Campaigns, Strikes, and Lockouts*.]