

# Striker Replacements: A Human Rights Perspective

LANCE COMPA

United States labor law on workers' right to strike meets international human rights standards—up to a point. The law does not ban strikes in the private sector. Unlike many countries that nominally allow strikes but create onerous procedural obstacles (Mexico is a prime example), the United States, aside from modest notice requirements, lets workers decide to strike. In a handful of states, public-sector workers can strike.

So far, so good. But beyond this point, U.S. labor law and practice deviate from international standards. In the public sector, most strikes are prohibited even with no threat to public health or safety (the main proviso developed by the International Labor Organization). In the private sector, employers' power to permanently replace workers who exercise the right to strike effectively nullifies that right.

## Firmly Established

The right to strike is not expressly mentioned in Conventions 87 and 98 of the International Labor Organization (ILO), the main instruments delineating workers' freedom of association. But the right to strike has been carefully considered by the ILO Committee on Freedom of Association and other supervisory bodies for many decades and is now firmly established as "an intrinsic corollary

of the right of association protected by Convention No. 87."<sup>1</sup>

In 1991, the ILO committee took up a complaint against the United States filed by the AFL-CIO on the permanent-replacement doctrine. It concluded:

The right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests. The Committee considers that this basic right is not really guaranteed when a worker who exercises it legally runs the risk of seeing his or her job taken up permanently by another worker, just as legally. The Committee considers that, if a strike is otherwise legal, the use of labor drawn from outside the undertaking to replace strikers for an indeterminate period entails a risk of derogation from the right to strike which may affect the free exercise of trade union rights.<sup>2</sup>

The committee's conclusion was couched in soft diplomatic language. Under its mandate, it does not "level charges at, or condemn, governments."<sup>3</sup> But within these bounds, the committee clearly found the U.S. permanent-replacement

doctrine contrary to the free exercise of workers' human rights.

The committee found that the American labor-law distinction between an *unfair labor practice* strike and an *economic* strike "obfuscates the real issue, . . . [which is] whether United States labor law and jurisprudence (the so-called Mackay doctrine) are in conformity with the freedom of association principles." The committee noted, "a determination of unfair labor practice . . . may take several years until the last appeal option has been exhausted."<sup>4</sup>

The right to strike is firmly established as a "corollary of the right of association."

A federal court of appeals usually decides whether workers were "unfair labor practice" strikers or "economic" strikers. But

by then, even with a decision in workers' favor, the strike is often long broken and workers are scattered to other jobs.

## The Phelps-Dodge Case

An ultimate legal ruling can be wrong, too. In June 1983 at Phelps-Dodge Corporation's Arizona copper mines, 1,200 miners went on strike. In August, the company began hiring permanent replacements, protected by the mobilization of several hundred state troopers and national guardsmen. In a National Labor Relations Board (NLRB) vote



in October 1984, replacement workers decertified the union. In a 1986 decision, the Reagan labor board rejected appeals by union members and ruled that they undertook an economic strike, not an unfair labor practice strike.

Years later, too late to vindicate workers' rights, Jonathan Rosenblum's *Copper Crucible* exposed Phelps-Dodge's unlawful conduct.<sup>5</sup> In a 1990 interview, company president Richard Moolick told Rosenblum that as of August 1983, "I had decided to break the union." This is significant because Phelps-Dodge was under a continuing legal obligation in August 1983 to bargain in good faith with the union. Moolick's decision to "break" the union when he was obligated to bargain with what the NLRB calls "a sincere desire to reach an agreement" (the test of good faith) evinces an unlawful refusal to bargain.

By then it was too late. In an interview shortly before his death, John Boland, who served as Phelps-Dodge's attorney in the strike, told Rosenblum, "You must keep in mind that dear to the heart of Moolick was to get rid of the unions. . . . I'm sure that the decisions by Moolick as the strike progressed were influenced by his long-range decision to obtain a union-free shop. In other words, if a

decision is doubtful about 'do this or don't do this'—and the possibility of ultimately getting rid of the union was a factor anywhere in there—why that's the one he'd choose."

### Inherently Intimidating

The permanent-replacement doctrine is used not only against workers' exercise of the right to strike. Employers aggressively use the threat of permanent replacement in workers' organizing campaigns, raising the prospect of permanent replacement in written materials, captive-audience meetings, and one-on-one meetings between supervisors and workers.

The *permanence* in permanent replacement is inherently intimidating. Workers' freedom of association does not abide abstractly in human rights instruments or national laws. It arises in a real world of sometimes converging and sometimes clashing interests among workers, employers, governments, and other forces in society.

Where workers have formed a union, exercise of the right to freedom of association is not static or episodic. It is rooted in a relationship over time between two parties. Parties in this relationship accept that in the course of collective bargaining, they might resort to economic ac-

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tion—a realization that creates a powerful force for resolving their differences through mutual agreement.

Coexistence, conflict, and compromise are more beneficial to the parties and society than the alternatives of government control of employment relations or unilateral employer power. But this basis of mutuality is destroyed when employers can seize on workers' exercise of the right to strike as an opportunity to permanently take away their jobs.

### NOTES

1. International Labor Organization, *General Survey on Conventions 87 and 98*, para. 194 (Geneva, 1994).
2. International Labor Organization, Committee on Freedom of Association, *Complaint Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)*, para. 92, report no. 278, case no. 1543 (Geneva, 1991).
3. International Labor Organization, "Procedure for the Examination of Complaints Alleging Infringements of Trade Union Rights," para. 23 (Geneva, 2000). Available at [www.ilo.org/public/english/standards/norm/sources/cfa\\_proc.htm](http://www.ilo.org/public/english/standards/norm/sources/cfa_proc.htm).
4. ILO 1991.
5. See J. D. Rosenblum, *Copper Crucible* (Ithaca, NY: Cornell University Press, 1995).



Lance Compa

Lance Compa is a senior lecturer at Cornell University's School of Industrial and Labor Relations.