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Uniform Analysis for Dual Motive Discharges, A

Michael J. Marshall

NOTES

A UNIFORM ANALYSIS FOR DUAL MOTIVE DISCHARGES

NLRB v. Transportation Management Corp.[1]

Section 8(a)(3) of the National Labor Relations Act[2] (NLRA) makes it an unfair labor practice for an employer to affect membership in any labor organization by "discrimination in regard to hire or tenure of employment or any term or condition of employment."[3] In the past, courts have interpreted this section to require that two elements be proven to constitute a violation: (1) there must be discrimination (disparate treatment); and (2) the discrimination must have the improper effect of encouraging or discouraging union activities.[4] Usually section 8(a)(3) cases turn on whether the employer acted with an improper motive.[5] Motive is of pivotal importance because if improper motive can be proved, it is easily inferred that the employee was discriminated against on the basis of the employer's impermissible motive and that a discharge (or any action adverse to the employee) based on such grounds would discourage other workers from participation in union activities.[6]

Most section 8(a)(3) cases involve an employee discharge which the employee alleges was based on his participation in protected union activities.[7] The employer usually alleges a business justification for the dismissal.[8] When both claims have merit, the determination of whether there has been a violation becomes difficult,[9] especially in light of the courts' reluctance to interfere with

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1. 103 S. Ct. 2469 (1983).
2. 29 U.S.C. §§ 151-169 (1982).
3. *Id.* § 158(a)(3).
4. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 32 (1967); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965); *see also* Mueller Brass Co. v. NLRB, 544 F.2d 815, 819 (5th Cir. 1977) ("The essence of discrimination in violation of section 8(a)(3) of the Act is in treating like cases differently.").
5. *Great Dane,* 388 U.S. at 33; *American Ship,* 380 U.S. at 311; NLRB v. Brown, 380 U.S. 278, 287 (1965).
6. *American Ship,* 380 U.S. at 311.
7. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW (1976).
8. *Wright Line,* 251 N.L.R.B. 1083, 1083-84 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982).
9. *Id.*

the employer's right to discipline his employees.[10] Such cases have been termed "dual motive" discharge cases,[11] and it is to these types of cases that the rule promulgated in the recent Supreme Court case of *NLRB v. Transportation Management Corp.*[12] is directed.[13]

Sam Santillo was a bus driver for the Transportation Management Corporation. A week prior to his discharge, Santillo contacted the Teamsters Union to find out about organizing his fellow drivers to join the union. He distributed union authorization cards to the drivers. Subsequently, one of Santillo's supervisors was overheard making remarks evidencing hostility towards Santillo's union involvement. Three days later, Santillo was fired.[14]

Santillo filed a complaint with the National Labor Relations Board (Board), alleging that he had been discharged because of his union activities, in violation of sections 8(a)(1)[15] and 8(a)(3).[16] The General Counsel of the Board issued a complaint and the matter was tried before an administrative law judge (ALJ).[17] The ALJ found that the employer had an anti-union animus, that the discharge was motivated by a desire to discourage union activities, and that Santillo would not have been fired if not for his union activities. These conclusions were based on findings that the employer had never taken adverse personal action against an employee for such activities in the past, and further, that in Santillo's case the employer had not issued any warnings or

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10. *See American Ship,* 380 U.S. at 311; *see also* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1964) (employer may terminate his business for non-discriminatory reasons); L'Eggs Prods., Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980) ("[E]mployer may discharge an employee for good cause, bad cause, or no cause at all, without violating § 8(a)(3), as long as his motivation is not antiunion discrimination and the discharge does not punish activities protected by the Act.").

11. *Wright Line,* 251 N.L.R.B. at 1084. Dual motive cases are to be distinguished from pretext cases. A pretext case is presented when the employer claims legitimate cause for his actions, but there is nothing to substantiate his claim. He offers a legitimate but "pretextual" reason to cover up the real and illegal reason. For a more detailed discussion of this distinction, see Kelly, Wright Line, A Division of Wright Line, Inc., *The Right Answer to the Wrong Question: A Review of Its Impact to Date,* 14 PAC. L.J. 869 (1983).

12. 103 S. Ct. 2469 (1983).

13. *Id.* at 2472-73. The *Transportation Management* decision dealt with the analysis developed for such cases in the NLRB's *Wright Line* decision. In *Wright Line,* the Board stated that the *Wright Line* test would apply "in all cases alleging violation of § 8(a)(3) or violations of § 8(a)(1) *turning on employer motivation.*" 251 N.L.R.B. at 1089 (emphasis added). Since cases considered solely under section 8(a)(1) rarely turn on motivation, scienter not being a requirement in such cases, *see* NLRB v. Burnup & Sims Inc., 379 U.S. 21 (1964), this Note will focus on violations of § 8(a)(3). For a discussion of the relationship between § 8(a)(1), (3) and which should be applied in cases of overlap, see Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails,* 52 CORNELL L.Q. 491 (1967).

14. *Transportation Management,* 103 S. Ct. at 2474.

15. 29 U.S.C. § 158(a)(1) (1982).

16. 103 S. Ct. at 2471; *see* 28 U.S.C. § 158(a)(3) (1982).

17. 103 S. Ct. at 2471-72.

reprimands before the discharge.[18]

The Board affirmed the ALJ's decision.[19] Applying the test developed in *Wright Line,*[20] the Board found that the employer had failed to prove that it would have discharged Santillo even if he had not been a union organizer.[21] The United States Court of Appeals for the First Circuit denied enforcement of the Board's order.[22] The court relied on its earlier decision rejecting the Board's *Wright Line* test insofar as that test placed the burden of persuasion on the employer to show that he would have fired the employee regardless of his protected activities.[23] The court remanded the case for a determination of whether the General Counsel had proved by a preponderance of the evidence that Santillo would not have been fired had it not been for his union activities.[24] The Supreme Court granted certiorari because of conflicts among the circuits over *Wright Line.*[25]

The Court upheld the Board's *Wright Line* decision and concluded that the First Circuit had erred in refusing to enforce the Board order.[26] In so holding, the Court endorsed the two-part motive analysis advanced in the Board's *Wright Line* decision. Under this analysis, the General Counsel has the burden of persuading the Board that an "anti-union animus" was a motivating factor in the employer's decision to discharge or otherwise discriminate against the employee.[27] If the General Counsel carries this burden, and the employer does not succeed in rebutting it, the employer can still avoid liability by producing a preponderance of the evidence showing "that the employee would have lost his job in any event."[28] The Court noted that the second part of this analysis amounts to an affirmative defense, which places the burden of proof on the employer.[29] If the employer fails to carry its burden on this issue the employer is guilty of an unfair labor practice and is subject to the proper remedies, including reinstatement.[30]

The Court affirmed the Board order, and thus adopted the *Wright Line* test, on the grounds that it was fair, consistent with the relevant provisions and

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18. *Id.*
19. *Id.*
20. 251 N.L.R.B. at 1088.
21. *Transportation Management,* 103 S. Ct. at 2472.
22. NLRB v. Transportation Management Corp., 674 F.2d 130, 131-32 (1982) (per curiam), *rev'd,* 103 S. Ct. 2469 (1983).
23. NLRB v. Wright Line, 662 F.2d 899, 904 (1st Cir. 1981).
24. *Transportation Management,* 674 F.2d at 131.
25. NLRB v. Transportation Management Corp., 103 S. Ct. 372 (1982).
26. 103 S. Ct. at 2475.
27. *Id.* at 2474.
28. *Id.* at 2473.
29. *Id.*
30. *Id.* at 2474. The only change that the Supreme Court made in the *Wright Line* test was to require "a preponderance of the evidence" standard for the General Counsel and the employer in meeting their burdens of proof. *Id.* at 2473. The Board had referred to the General Counsel making a "prima facie showing," and the employer "demonstrating." *Wright Line,* 251 N.L.R.B. at 1089.

policies of the NLRA, and consistent with analyses that the Court had developed in analogous areas.[31] First, the Court found the Board's construction of section 8(a)(3), which required the General Counsel to show only that a discharge was in any way motivated by a desire to frustrate union activity, "plainly rational and acceptable."[32] The Court rejected the court of appeal's finding that the second part of the analysis constituted an impermissible shifting of the burden under section 10(c) of the NLRA.[33] While conceding that under section 10(c) the General Counsel must bear the burden of persuasion by a preponderance of the evidence as to all elements of the unfair labor practice, the Court felt this posed no problem because the unfair labor practice consists simply of a finding that the employee's protected conduct is a "substantial or motivating factor" in the discharge.[34] Though the Board allowed the employer to avoid being found a violator by showing he would have discharged the employee anyway, this does not add to the elements of the offense which the General Counsel has to prove.[35] As a result, the Court found the Board's allocation of the burden of proof to the employer in the second part of the analysis "clearly reasonable."[36] The Court bolstered its finding that the Board's allocation of the burden of proof was correct by finding that the analogy that the Board drew to *Mount Healthy City Board of Education v. Doyle*[37] was fair.[38]

The Court's opinion in *Transportation Management* resolves a dispute among the circuits as to the acceptability of the *Wright Line* analysis of dual motivation cases.[39] Whether this decision actually serves the policies underly-

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31. *Transportation Management,* 103 S. Ct. at 2474-75.
32. *Id.* at 2472-73.
33. 29 U.S.C. § 160(c) (1982).
34. 103 S. Ct. at 2474.
35. *Id.; see* notes 65-69 and accompanying text *infra.*
36. *Id.* at 2475.
37. 429 U.S. 274 (1977).
38. *Transportation Management,* 103 S. Ct. at 2475.
39. The First Circuit agreed with the Board's adoption of what it saw to be a "but for" causation test, but disagreed with the shifting of the burden of proof. *Wright Line,* 662 F.2d at 903-04.

The Second Circuit also disagreed with the Board's shifting of the burden of proof, observing that "shifting the burden of persuasion to the employer frustrates the balance between employer and employee rights struck in the act." NLRB v. New York Univ. Medical Center, 702 F.2d 284, 292 (2d Cir. 1983). The Second Circuit felt that the Board was establishing too high a standard of proof for the employer. The court reasoned that shifting the burden of *persuasion* violated the § 10(c) requirement that the Board prove an unfair labor practice, and the Board's regulations that impose the burden of persuasion on the Board's attorney in such cases. *Id.* at 293-94. In effect, this court saw the question of whether the employee would have been disciplined in the absence of the anti-union animus as an element of the unfair labor practice. The court produced additional support for its decision by quoting from the Administrative Procedure Act: "[E]except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d) (1982). The court essentially saw the procedural shift of the burden of persuasion as an unfair lessening of the "but for"

ing the NLRA, as outlined in earlier decisions in the same area,[40] is questionable.[41] By upholding the Board's test, though, this decision does bring about the uniformity of analysis and predictability which the Board sought to promote when it first formulated the test in *Wright Line*.[42]

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causation test. 702 F.2d at 294.

The Third Circuit voiced similar objections in Behring Int'l v. NLRB, 675 F.2d 83, 84, 87-88 (3d Cir. 1982). The court thought that a more appropriate test was set forth in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), which advocated a shift in the burden of *production* instead of persuasion. 675 F.2d at 88-89; *see* Player, *The Nature of Defendant's Burden in Title VII Disparate Treatment Cases,* 49 MO. L. REV. 17, 17, 26-30 (1984).

The Fourth Circuit, in NLRB v. Burns Motor Freight, 635 F.2d 312 (4th Cir. 1980), declined to specifically take a position on the *Wright Line* test, but seemed to be more in line with the First, Second and Third circuits in requiring that the Board show that the discharges were improperly motivated. *Id.* at 314-15.

The Fifth Circuit has endorsed the *Wright Line* test. *See* Red Ball Motor Freight Inc. v. NLRB, 660 F.2d 626, 627-28 (5th Cir. 1981), *cert. denied,* 456 U.S. 997 (1982); NLRB v. Charles H. McCauley Assocs., Inc., 657 F.2d 685, 688 (5th Cir. 1981); NLRB v. Robin Am. Corp., 654 F.2d 1022, 1025 (5th Cir. 1981).

The Sixth Circuit has cited the *Wright Line* test in several cases, but it is unclear whether the court uses *Wright Line,* or a dominant-motive test. *See* Charge Card Ass'n v. NLRB, 653 F.2d 272, 275 (6th Cir. 1981); NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437-38 (6th Cir. 1981). *But see* NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981) (used *Wright Line* test).

The Seventh Circuit initially adopted the *Wright Line* analysis, in Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981), then it recognized the analysis offered by the Third Circuit in *Behring,* which criticized the shifting of the burden to the employer. NLRB v. Webb Ford, Inc., 689 F.2d 733, 739 (7th Cir. 1982).

The Eighth Circuit once approved the *Wright Line* test. NLRB v. Senftner Volkswagen Corp., 681 F.2d 557, 560 (8th Cir. 1982); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 (8th Cir. 1982). Then, in NLRB v. Alumna Ceramics Inc., 690 F.2d 136, 138 (8th Cir. 1982), the court returned to its pre-*Wright Line* "but for" test, as set out in Mead & Mount Constr. Co. v. NLRB, 411 F.2d 1154, 1157 (8th Cir. 1969).

The Ninth Circuit gave the *Wright Line* test strong support in Doug Hartley, Inc. v. NLRB, 669 F.2d 579, 580-81 (9th Cir. 1982) and NLRB v. Nevis Indus., 647 F.2d 905, 909 (9th Cir. 1981). Unlike the Seventh and Eighth circuits, the court stayed with the rule in later cases. *See, e.g.,* Zurn Indus. v. NLRB, 680 F.2d 683 (9th Cir. 1982).

The Tenth Circuit was indecisive on whether the *Wright Line* test was correct. *See* NLRB v. Carbonex Coal Co.. 679 F.2d 200, 203 (10th Cir. 1982).

The Eleventh Circuit declined to specifically comment on the *Wright Line* test, yet seemed to reject it by stating that regardless of who had the burden of *producing evidence,* the General Counsel had the burden of proving that the illegal motive caused the action taken. *See* Weather Tamer, Inc. v. NLRB, 676 F.2d 483, 491 n.4 (11th Cir. 1982).

40. *See, e.g.,* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 674 (1981); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); American Ship Building Co. v. NLRB, 380 U.S. 300, 316 (1965); NLRB v. Brown, 380 U.S. 278 (1965); NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964); NLRB v. Erie Resistor Corp., 373 U.S. 221, 234 (1963); Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937).

41. *See* notes 70-83 and accompanying text *infra.*

42. *Wright Line,* 251 N.L.R.B. at 1089 ("[W]e believe that this test will pro-

In the past, the Board applied the "in part" rule to dual motive discharge cases.[43] Under this rule, as long as union involvement was a reason for the discharge, a violation would be found.[44] Proof of dominant or controlling lawful motives was immaterial, so long as an unlawful motive also existed.[45] The Board used this rule until it decided *Wright Line* in 1980.[46] Concurrent with development of the "in part" rule, some court and Board decisions undercut its impact by allowing the employer to escape reinstating the discharged employee if it could show that legal motives in fact controlled its decision.[47]

The "in part" test, though used exclusively by the Board, fell into disfavor in several circuits.[48] As each circuit developed its own test, confusion and conflict between the circuits resulted.[49] The most popular test adopted was the

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vide . . . a uniform test to be applied in these 8(a)(3) cases.").

43. *Transportation Management,* 103 S. Ct. at 2472-73. Almost immediately after passage of the Wagner Act, which contained the predecessor of § 8(a)(3), in Consumer's Research, Inc., 2 N.L.R.B. 57 (1936), the Board rejected the employer's argument that proof of a legitimate motive established the lawfulness of the discharge. The Board interpreted the Act as not requiring a showing that the alleged motive was the sole motive. *Id.* at 73. Then, in The Louisville Refining Co., 4 N.L.R.B. 844 (1938), *modified and enforced,* 102 F.2d 678 (6th Cir.), *cert. denied,* 308 U.S. 568 (1939), the Board further articulated the test and held that so long as an anti-union animus was a definite factor, a violation of § 8(a)(3) is established, despite the fact that other factors also existed. *Id.* at 861. Many subsequent cases agreed and the rule came to be that the employer was guilty of a § 8(a)(3) violation if his conduct was motivated "in whole or in part" by an anti-union animus. *See* United Dredging Co., 30 N.L.R.B. 739 (1941); Walter Stover, 15 N.L.R.B 635, 642 (1939), *enforced as modified,* 114 F.2d 513 (10th Cir. 1940).

44. As early as 1938 (only three years after its creation), the Board had developed the in-part rule: "Where the employer has discharged an employee for two or more reasons and one of them is union affiliation or activity, the Board has found a violation." 3 N.L.R.B. ANN. REP. 70 (1938). Thus formulated, the test was simply an inquiry as to whether an anti-union animus played a part in an employer's decision to discharge an employee; if so, a violation of section 8(a)(3) was proven. *Wright Line,* 251 N.L.R.B. at 1084.

45. United Dredging Co., 30 N.L.R.B. 739 (1941); The Dow Chemical Co., 13 N.L.R.B. 993, 1023 (1939) (even where lawful motives are shown to be controlling, proof of such motives is immaterial where an anti-union motive is also found), *enforced in relevant part,* 117 F.2d 455 (6th Cir. 1941).

46. *Wright Line,* 251 N.L.R.B at 1084; *see* Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575 (1976) (using "in part" test).

47. In NLRB v. Remington Rand, Inc., 94 F.2d 862 (2d Cir.), *cert. denied,* 304 U.S. 576 (1938), the court accepted the employer's argument that proof that the discharge would have taken place absent the illegal motive was relevant to and would defeat a remedy of reinstatement where a violation had otherwise been found. Nevertheless, the court made clear that the burden of proof on this issue was on the employer. *Id.* at 872. In Eagle-Pitcher Mining & Smelting Co., 16 N.L.R.B. 727 (1939), *enforced and modified,* 119 F.2d 903 (8th Cir. 1941), the Board treated such a showing as an affirmative defense which, if proved, would altogether avoid a finding of a violation.

48. *Wright Line,* 251 N.L.R.B. at 1084 ("In recent years, various courts of appeals have become increasingly critical of the 'in part' analysis.").

49. Some appellate courts adopted the "in part" test. *See, e.g.,* M.S.P. Indus. v.

"dominant motive" test,[50] which required the General Counsel to prove that the anti-union or anti-protected activity motive was the dominant reason for the discharge.[51] A "but for" test was also commonly used.[52]

To alleviate this confusion, the Board in *Wright Line* borrowed the *Mt. Healthy* test, which it hoped would allow "room for accommodation and clarification" among the varied approaches of the circuits.[53] The *Wright Line-Mt. Healthy* test represented a departure from the "in part" test. It allowed an employer to escape liability if it could prove that even though there was, in part, an illegal motive, there also were sufficient legal motives which would have led to the discharge absent the illegal motive.[54] Nevertheless, the *Wright Line* test was rejected by many of the circuits,[55] thus perpetuating the confu-

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NLRB, 568 F.2d 166, 173 (10th Cir. 1977). Some courts used a "but for" test. *See* NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1366-69 (9th Cir.), *cert. denied,* 454 U.S. 835 (1981); Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978). The Fifth Circuit appears to have followed a "reasonably equal" standard, NLRB v. Aero Corp., 581 F.2d 511, 514 (5th Cir. 1978). A few courts followed both a "but for" test and a "dominant motive" test. *Compare* Lippincott Indus., Inc. v. NLRB, 661 F.2d 112, 115 (9th Cir. 1981) ("but for") *with* NLRB v. Int'l Medication Sys., Ltd., 640 F.2d 1110, 1113 (9th Cir. 1981) (dominant motive), *cert. denied,* 455 U.S. 1017 (1982). The Seventh Circuit asked whether the illegal motive contributed in a "significant way" to the employer's conduct. NLRB v. Pfizer, Inc., 629 F.2d 1272, 1275, 1277 (7th Cir. 1980) (per curiam). The foregoing are only representative of the varied pre-*Wright Line* analyses used by the courts. *See generally* Kelly, *supra* note 11, at 874-79.

50. Kelly, *supra* note 11, at 875.

51. *See* NLRB v. Int'l Medication Sys., Ltd., 640 F.2d 1110, 1113 (9th Cir. 1981); Western Exterminators Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cr. 1977).

52. Under the "but for" test, the General Counsel would have to prove that illegal motive was a cause for the employer's action without which he would not have acted. Analytically, this test differs from a "dominant motive" test, though, in that a "but for" motive could actually play a relatively minor, as opposed to dominant, role in the employer's decision making process. *See* Kelly, *supra* note 11, at 874-75.

53. *Wright Line,* 251 N.L.R.B. at 1086. *Mt. Healthy* involved a refusal to rehire an untenured teacher. The school board gave two reasons for the "discharge": (1) use of obscene language and gestures in the school cafeteria; and (2) an unauthorized communication to a radio station of a change in school policy. Since the Court found the second reason to concern an activity protected by the first and fourteenth amendments, and since the first reason appeared to be a legitimate ground for dismissal, this case represents a true "dual motive" situation. The Court formulated the test that the Board later relied on in *Wright Line*:

> Initially, in this case, the burden was properly placed upon . . . [the employee] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"—or, to put it in other words, that it was a "motivating factor" in the [School] Board's decision not to rehire him. . . . [H]aving carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

429 U.S. at 287, *quoted in Wright Line,* 251 N.L.R.B. at 1086-87.

54. *Wright Line,* 251 N.L.R.B. at 1087.

55. *See* note 39 *infra.*

sion. While most courts agreed with the Board's adoption of what amounted substantively to a "but for" test of causation on the motivation issue,[56] many disagreed with the Board's shifting of the burden of persuasion to the employer to prove that it would have discharged the employee anyway.[57] The Supreme Court's decision in *Transportation Management* resolved the split among the circuits by adopting the Board's *Wright Line* test.

The primary effect of the Court's decision is to set out a standard analysis for section 8(a)(3) dual motive cases. This in itself is an improvement over the prior confused state of the law. *Transportation Management* establishes exactly what the General Counsel must prove to establish a violation, and similarly what the defendant employer must prove to avoid a violation.[58]

First, the Court makes it clear that the General Counsel bears the burden of proving the violation.[59] Because an unfair labor practice consists of adverse action against an employee based on an "anti-union" animus, the General Counsel must prove that the anti-union animus was a "substantial or motivating factor" in the decision to take action against the employee.[60] It is not entirely clear what constitutes a "substantial or motivating" factor, but since the Court's decision represents an endorsement of the Board rule in *Wright Line,*[61] it is quite likely that the Court also intended to adopt the Board's definition of a "motivating factor." In *Wright Line,* the Board indicated that it was only necessary to prove that the unlawful cause was "causally related to the employer action."[62] The words "substantial and motivating factor" would then seem to in reality indicate an "in part" causation burden.[63] Thus, the General Counsel's burden in a section 8(a)(3) dual motivation case is simply

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56. Behring Int'l, Inc. v. NLRB, 675 F.2d 83, 84 (3d Cir. 1982); NLRB v. Wright Line, 662 F.2d 899, 903 (1st Cir. 1981); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981).

57. *See, e.g., Behring,* 675 F.2d at 84; *Wright Line,* 662 F.2d at 905.

58. While there is no doubt as to the analysis established by *Transportation Management,* there are problems reconciling this analysis with traditional unfair labor practice modes of analysis.

59. *Transportation Management,* 103 S. Ct. at 2474.

60. *Id.*

61. *See* text accompanying notes 23-28 *supra.*

62. 251 N.L.R.B at 1089 n.14.

63. In *Wright Line,* the Board rid itself of the "in part" language in order to clear the air, yet asserted that in so doing they were not repudiating the established principles which they had applied in the past. 251 N.L.R.B. at 1089. The modification was, then, actually nothing but a change in terminology. The Supreme Court recognized that the Board had merely been trying to "restate its analysis in a way more acceptable to the Courts of Appeals" in order to gain wider acceptance and enforcement of its decisions by those courts. *Transportation Management,* 103 S. Ct. at 2473. The Court recognized that there was no substantive difference, as is evidenced in the opinion when, after discussing the Board's "in part" test, the Court stated "or as the Board now puts it, that the employer's conduct was a substantial or motivating factor in the adverse action," thus inferring that it is the same test, now traveling under a different name. *Id.* at 2474.

to prove by a preponderance of the evidence[64] that the defendant employer's "anti-union animus" was an "in part" cause of the adverse action taken against the employee.

Once the General Counsel meets its burden, the violation is established unless the employer can prove by a preponderance of the evidence that he would have taken the same action absent his anti-union animus.[65] The Court recognized the Board's characterization of this proof as an affirmative defense.[66] Because it is an affirmative defense, the employer must sustain the burden of proof.[67] The employer's attempted proof on this issue, then, has nothing to do with the actual elements of a violation. Rather, it allows the employer to avoid the violation[68] by making a hypothetical proof that he would still have fired the employee absent the illegal motive. If he is unsuccessful, a violation is found.[69]

The Supreme Court's ratification of the *Wright Line* test breaks with the traditional mode of analysis which it outlined in earlier cases.[70] By adopting this test, the Court sacrificed to some extent much precedent favoring a "weighing and balancing" approach to all labor cases under the NLRA. In any labor case, "the ultimate problem is the balancing of the conficting legitimate interests. . . . [S]triking that balance to effectuate national labor policy is often a difficult and delicate responsibility. . . ."[71] The *Wright Line-Transportation Management* test reformulates historically sound labor law principles, such as the "in part" test, into a formulaic causation test which slights the basic labor law policy approach of balancing conflicting legitimate interests. Prior to *Transportation Management,* in *NLRB v. Great Dane Trailers,*[72] the Court proposed its comprehensive rule in such cases, based on a

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64. "Preponderance of the evidence" is the standard of proof recognized for these cases by the Court in *Transportation Management* as the standard prescribed by § 10(c) of the NLRA, 29 U.S.C. § 160(c) (1982). *Transportation Management,* 103 S. Ct. at 2474.

65. The Court stated that the Board's recognition of the employer's right to avoid being adjudicated a violator "does not change or *add to* the elements of the unfair labor practice that the General Counsel has the burden of proving under § 10(c)." *Transportation Management,* 103 S. Ct. at 2474 (emphasis added).

66. *Id.* at 2473-75.

67. *Id.* at 2475.

68. *Id.* at 2473.

69. The employer also bears the risk of non-persuasion. As the Court stated:

> The employer is a wrongdoer: he has acted out of a motive that is declared illegitimate by the statute. It is fair that he bear the risk that the influence of legal and illegal motives cannot be separated, because he knowingly created the risk and because the risk was created not by innocent activity, but by his own wrongdoing.

Transportation Management, 103 S. Ct. at 2475.

70. *See generally* Jackson & Heller, *The Irrelevance of the* Wright Line *Debate: Returning to the Realism of* Erie Resistor *in Unfair Labor Practice Cases,* 77 NW. U.L. REV. 737 (1983).

71. NLRB v. Truck Driver's Local Union 449, 353 U.S. 87, 96 (1957).

72. 388 U.S. 26 (1967).

synthesis of its earlier decisions on the subject.[73] Recognizing that section 8(a)(3) violations normally turned on whether the discriminatory conduct was motivated by an anti-union purpose, the court focused its attention on motive analysis[74] and devised "several principles of controlling importance."[75] First, if the employer's conduct is inherently destructive of important employee rights, no proof of an anti-union animus is necessary, and the Board can find an unfair labor practice, even if the employer produces evidence of legitimate business reasons for the action. Second, if the adverse effect of employer's conduct is "comparatively slight," and if the employer has produced evidence of a valid business justification, an anti-union animus must be proved to sustain the unfair labor practice charge.[76] The *Great Dane* test allows the Board to explicitly consider the degree to which the employer activity interferes with employee rights in comparison with the validity of the employer's asserted business justification.

In Erie Resistor Co. v. NLRB,[77] one of the cases which the *Great Dane* Court relied on, the Court stated that rather than untangling motives, what really had to be done was to balance the employee interests against the employer interests "in the light of the Act and its policy."[78] The *Erie Resistor* decision indicates that this balancing must be done with consideration as to the effect which the particular action will have on employee rights, as opposed to the effect on the employer if it is not allowed to deal with its employees as it sees fit.[79]

These principles, from *Great Dane* and *Erie Resistor,*[80] indicate that the focus should not be exclusively on the anti-union animus. Rather, all necessary elements of a section 8(a)(3) violation, most importantly the effect that the alleged discriminatory action would have on union organization, should be considered. Since this issue would be a question of fact, the finder of fact would have a great deal of discretion in deciding the case. This allowance of discretion, in turn, reflected the Supreme Court's desire to allow balancing of the interests involved, and its recognition of the Board's "duty to strike the

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73. *Id.* at 32.
74. *Id.* at 33-34.
75. *Id.* at 34.
76. *Id.* at 34.
77. 373 U.S. 221 (1963).
78. *Id.* at 228-29.
79. *Id.*

> [S]uch situations [dual motive cases] present a complex of motives and preferring one motive to another is in reality the far more delicate task . . . of weighting the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.

80. The *Great Dane* and *Erie Resistor* decisions actually represent the teachings of a long line of cases, as the *Erie Resistor* Court acknowledged. 373 U.S. at 230.

proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."[81] In short, while analysis of the specific causal role of the employer's anti-union animus is an important factor, it is neither decisive nor necessary.

While the Board alluded to balancing interests,[82] the test adopted in *Wright Line* does not suit itself to a balancing analysis. Because the Supreme Court adopted this test, all future section 8(a)(3) cases will turn solely on the questions of whether the employer action was caused in part by an anti-union animus and whether it would have been taken in the absence of such animus. In light of the historical method of analysis in this area, this inquiry is too narrow and single-minded as it allows very little room for balancing interests. Rather, it is strictly a causation standard with a procedural shift in the burden of persuasion.[83] According to this test, the Board, or an enforcing court, cannot consider the degree to which the employer action discourages the protected activity. It also does not allow consideration of how important or how valid the employer's business interests are, but merely whether there were business justifications which would have caused the action in any event. It is plausible that in situations where the employee rights are invaded to a great degree, or employer rights are an overriding concern, the *Transportation Management* test would not allow consideration of such factors. Insofar as this test focuses determinations of section 8(a)(3) dual motive cases solely on the result of such a motive-causation analysis, it appears to conflict with a long line of precedent and the general labor law policy of balancing interests which culminated in the *Erie Resistor* and *Great Dane* decisions.

In the *Transportation Management* decision the Supreme Court adopted a two-part test upon which section 8(a)(3) dual motive discharge cases are to be decided. By adopting this test, the Court brings much needed uniformity of analysis to the area. This uniformity, though, comes at a cost. By setting forth this test as *the* test to be used, without discussing its relationship to the analysis for such cases as developed in earlier Supreme Court decisions, the Court has narrowed the analysis too much. The *Wright Line-Transportation Management* test focuses the whole analysis on a determination of motive and causation, whereas historically this determination was only one factor, albeit an important one, in an approach which weighed and balanced the interests of both the employee and the employer.

MICHAEL J. MARSHALL

81. *Truck Drivers Union,* 353 U.S. at 96.
82. *Wright Line,* 251 N.L.R.B. at 1083, 1088.
83. *See* notes 58-69 and accompanying text.