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NLRB v. Transportation Management Corp.: Allocation of the Burden of Proof in Section 8(a)(3) Mixed Motive Discharge Cases

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NLRB v. TRANSPORTATION MANAGEMENT CORP.: ALLOCATION OF THE BURDEN OF PROOF IN SECTION 8(a)(3) MIXED MOTIVE DISCHARGE CASES

Section 7 of the National Labor Relations Act (N.L.R.A.) guarantees employees the right to self-organization.[1] Section 8 of the Act protects this right by proscribing in subsection 8(a)(3) discrimination intended to encourage or discourage union membership because of activities protected by section 7.[2] Enforcement is authorized in section 10 empowering the National Labor Relations Board (the Board or the NLRB) to "prevent any person from engaging in [an] unfair labor practice [listed in section 8(a)(3)] . . . ."[3] If the Board finds by a preponderance of evidence that an employer has engaged in an unfair labor practice, section 10(c) allows the Board to order reinstatement of aggrieved employees with or without back pay.[4] A 1947 amendment to section 10(c),[5] however, prohibits the Board from ordering reinstatement of an employee who has been discharged for cause.[6]

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1. National Labor Relations Act (Wagner Act) § 7, 29 U.S.C. § 157 (1976) [hereinafter N.L.R.A.] provides in part: "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 purpose of collective bargaining or other mutual aid or protection . . . ."

2. N.L.R.A. § 8(a)(3), 29 U.S.C. § 158(a)(3) provides in part: "It shall be an unfair labor practice for an employer . . . ; (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ;"

3. N.L.R.A. § 10(a), 29 U.S.C. § 160(a).

4. N.L.R.A. § 10(c), 29 U.S.C. § 160(c) provides in part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . .

5. The amendment was added by the Labor Management Relations Act of 1947 (Taft-Hartley) § 10(c), Pub. L. No. 86-257, 61 Stat. 136 (codified as amended at 29 U.S.C. § 160(c) (1976)) [hereinafter cited as L.M.R.A.] The L.M.R.A. incorporated the N.L.R.A., *see supra* note 1, as title I.

6. L.M.R.A. § 10(c), 29 U.S.C. § 160(c) (1976) also provides: "No order of the Board

The crux of a section 8(a)(3) violation is finding discriminatory motive.[7] This means the NLRB General Counsel must establish a causal nexus between the employer's decision to discipline or take other adverse action against an employee, and the employee's protected union activities.[8] Often employers assert legitimate business reasons for employee discipline. If the NLRB credits the asserted business justification and finds no additional unlawful motive for the adverse action, the section 8(a)(3) complaint against the employer will be dismissed.[9] Conversely, the NLRB will find a violation of section 8(a)(3) if it determines that protected union activities constitute a motive for the adverse action against the employee and discredits the alleged "legitimate" reasons as pretextual.[10] Difficulties arise when *both* the employee's claim of unlawful motive and the employer's asserted business justification are found to be of merit. Courts are split over the proper treatment of these "mixed motive" cases.[11]

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shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause."

7. *See* Radio Officers' Union v. NLRB, 347 U.S. 17, 43 (1954) (The motivation of the employer in proving prohibited discrimination has been consistently recognized.). *See generally* F. BARTOSIC & R. HARTLEY, LABOR RELATIONS LAW IN THE PRIVATE SECTOR 15-17 (1977). An unfair labor practice action begins when an employee files a written charge with the Regional Director in the district in which the violation occurred within the six month statute of limitations. If a preliminary investigation shows sufficient evidence to substantiate the charge, the Regional Director issues a complaint and a formal hearing is conducted before an administrative law judge (ALJ) who prepares findings of fact, conclusions of law, and a recommended order. If the Board takes no exceptions, it affirms the ALJ's order. Because Board orders are not self-enforcing, the employee must seek enforcement from a federal court of appeals if the employer refuses to comply. *See also* 29 C.F.R. §§ 102.1-102.51 (NLRB's administrative regulations); N.L.R.A. § 10(e), 29 U.S.C. § 160(e) (1976) (Board may petition a court of appeals for enforcement); N.L.R.A. § 10(f), 29 U.S.C. § 160(f) (1976) (an aggrieved party may seek review by a court of appeals).

8. *See* NLRB v. Great Dane Trailers, 388 U.S. 26, 33 (1976) ("[T]he finding of a violation [under § 8(a)(3)] normally turns on whether the discriminatory conduct was motivated by an antiunion purpose."), (citing American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965)); *see generally* Note, *Mixed Motive Discharges-An Attempt to Formulate a Consistent Test-NLRB v. Wright Line*, 31 U. KAN. L. REV. 328, 336 (1983) ("The ultimate question in a mixed motive case is whether there is a causal link between any discriminatory motive possessed by the employer and the discharge.").

9. Essential elements in finding that an employer's adverse action violates § 8(a)(3) include: (1) employer knowledge that the employee engaged in union activity, *see, e.g.*, Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981); and (2) the existence of a discriminatory motive, *see, e.g.*, NLRB v. Consolidated Diesel Elec. Co., 469 F.2d 1016 (4th Cir. 1972).

10. *See, e.g.*, NLRB v. Nevis Indus., Inc., 647 F.2d 905, 910 (9th Cir. 1981), *infra* notes 126-137 and accompanying text; Red Ball Motor Freight v. NLRB, 660 F.2d 626 (5th Cir. 1981), *cert. denied,* 456 U.S. 997 (1982), *infra* notes 120-25 and accompanying text.

11. *Compare* Behring Int'l v. NLRB, 675 F.2d 83 (3d Cir. 1982) (holding that the General Counsel must prove absence of legitimate business reasons for the disciplinary action),

The NLRB and some federal courts of appeals have held that a prima facie section 8(a)(3) case has been established once the General Counsel proves that a motivating reason for the discipline was an employee's protected section 7 activities.[12] The employer may then avoid liability by demonstrating, as an affirmative defense, legitimate and sufficient business reasons for the discharge—that is, that the employee would have been disciplined absent his participation in protected union activities.[13]

Other courts have held that the General Counsel, in addition to establishing discriminatory motivation, must also prove that legitimate business reasons for the employer's disciplinary action are pretextual.[14] Courts following this methodology have required the employer to articulate a legitimate business reason for the adverse action, after which the General Counsel must prove the reason to be insufficient. These courts have acknowledged that this approach is the same as the analysis applied under title VII of the Civil Rights Act of 1964 for proving discriminatory intent.[15] They reason, however, that section 10(c) of the N.L.R.A. precludes the Board from shifting to the employer the burden of proving a legitimate and sufficient business justification.[16]

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infra notes 76-114 and accompanying text *with* NLRB v. Nevis Indus., Inc., 647 F.2d 905 (9th Cir. 1981) (holding that the employer has the opportunity to establish legitimate business justification for the disciplinary action as an affirmative defense), *infra* notes 126-37 and accompanying text.

12. *See* Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982) ("[W]e shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision."); *see also* Red Ball Motor Freight v. NLRB, 660 F.2d 626 (5th Cir. 1981), *cert. denied*, 456 U.S. 997 (1982), *infra* notes 120-25 and accompanying text; Zurn Indus. v. NLRB, 680 F.2d 683 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3110, (1983), *infra* notes 138-47.

13. *Wright Line,* 251 N.L.R.B. at 1089 ("Once [the prima facie case] is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."); *see, e.g.*, Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981) (The employer showed that the employee would have been discharged even in the absence of protected conduct.).

14. *See, e.g.*, Behring Int'l v. NLRB, 675 F.2d 83 (3d Cir. 1982), *infra* notes 76-88 and accompanying text. The court held that a § 8(a)(3) violation may be established if an employee would not have been discharged "but for" his union activity. *Id.* at 84. This rule requires the NLRB to prove the "real motive" or "real cause" of the employee's discharge, *id.* at 87, which necessarily requires the General Counsel to prove that legitimate business reasons were not the true reasons for the adverse action. *Id.* at 89; *see also* NLRB v. Webb Ford, Inc., 689 F.2d 733 (7th Cir. 1982), *infra* notes 90-98 and accompanying text; NLRB v. New York Univ. Medical Center, 702 F.2d 284 (2d Cir. 1983), *infra* notes 100-12 and accompanying text.

15. *See, e.g.*, *Behring*, 675 F.2d at 88-89.

16. *See id.* at 88. Federal courts have therefore been divided over the elements of a § 8(a)(3) violation. The disagreement stems from whether the N.L.R.A. requires the *em-*

In *NLRB v. Transportation Management Corporation,*[17] the United States Supreme Court addressed this conflict and affirmed the Board's approach. The Transportation Management Corporation discharged bus driver Sam Santillo shortly after he had distributed union authorization cards.[18] Santillo filed an unfair labor practice charge with the Board alleging a section 8(a)(3) violation. His employer claimed he was discharged for leaving his keys in the bus and taking unauthorized breaks.[19] The Board determined that a comment made by Santillo's supervisor—that he would "get even" with Santillo for his union activity—established a prima facie case of discriminatory intent.[20] Futhermore, the Board found that because the employer had not disciplined other employees for similar behavior and had violated the company procedure of issuing three written warnings before discharging an employee, the employer failed to demonstrate that it would have fired Santillo in the absence of this protected conduct.[21] The Board concluded, therefore, that Transportation Management Corporation had violated section 8(a)(3) and ordered Santillo's reinstatement.[22]

The United States Court of Appeals for the First Circuit denied the Board's enforcement order, holding that the Board had no authority under the N.L.R.A. to impose on the employer the burden of proving the asserted legitimate business justification as an affirmative defense.[23] The court of appeals reasoned that section 10(c), requiring the Board to find by a preponderance of evidence that an employer engaged in an unfair labor practice, prohibits the Board from requiring the employer to prove a legitimate and sufficient business reason for the discharge.[24] The First Circuit relied on its earlier opinion, *NLRB v. Wright Line* (*Wright Line II*) that repudiated the Board's approach to section 8(a)(3) mixed motive cases.[25]

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ployer to show that the employee would have been discharged in spite of his union activity, or whether the *General Counsel* must prove that the employee would not have been discharged "but for" his protected activities.

17. 103 S. Ct. 2469 (1983).

18. *Id.* at 2471.

19. *Id.*

20. *Id.* at 2472.

21. *Id.*

22. *Id.*

23. NLRB v. Transportation Management Corp., 674 F.2d 130, 131 (1st Cir. 1982), *rev'd*, 103 S. Ct. 2469 (1983).

24. 674 F.2d at 132.

25. The Board set forth its § 8(a)(3) analysis in Wright Line, Inc. 251 N.L.R.B. 1083 (1980) [hereinafter cited as *Wright Line I*], *see infra* notes 55-72 and accompanying text. An employee sought enforcement of the Board's order in *Wright Line I*. The United States Court of Appeals for the First Circuit, although granting enforcement, repudiated the Board's approach set forth in *Wright Line I* as being contrary to the provisions of § 10(c) of

In *Wright Line II,* the First Circuit held that the employer's burden was merely to introduce *some* evidence of a legitimate business justification in order to rebut the General Counsel's prima facie case.[26] The court reasoned that because section 10(c) requires the General Counsel to prove the existence of a violation by a preponderance of evidence,[27] the General Counsel must prove that the employer's asserted business justification is pretextual. The First Circuit's view, that under section 10(c) the ultimate risk of nonpersuasion remains with the General Counsel,[28] requires the General Counsel to prove both the existence of discriminatory intent and the absence of a legitimate cause for discipline.[29] Until the General Counsel proves that the business reason is pretexual, no violation is established. In the *Wright Line II* court's view, a true affirmative defense obviates the existence of a violation that has already been established. The court, therefore, concluded that the Board had "mislabeled" the employer's burden as an affirmative defense.[30]

The Supreme Court, in a unanimous opinion, agreed with the First Circuit that the burden of persuasion remains with the General Counsel to prove by a preponderance of evidence that antiunion animus motivated the discharge.[31] The Court disagreed, however, with the First Circuit's contention that the Board erred in requiring the employer to prove a legitimate and sufficient business justification once the NLRB General Counsel has established a prima facie case.[32] By approving the Board's characteri-

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the N.L.R.A. because the Board improperly placed the burden of persuasion on the employer. NLRB v. Wright Line, 662 F.2d 899, 904 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) [hereinafter cited as *Wright Line II*]. For a discussion of the controversy created by the *Wright Line* case, see Lederer, *"W"right Line or Spur Track*? 22 LAB. L.J. 67 (1982); Note, *supra* note 8; Note, *The First Circuit Court Adopts a New Burden of Proof Scheme for Section 8(a)(3) Dual Motive Discharge Actions,* 16 SUFFOLK U.L. REV. 226 (1982).

26. 662 F.2d at 904.

27. *Id.*

28. *Id.* at 905 n.9.

29. *Id.* at 905.

30. *Id.* at 905 n.9 ("The Board appears to recognize that the general counsel must always establish the existence of an unfair labor practice by a preponderance of the evidence, but then confuses the issue by mislabeling the employer's burden as an 'affirmative defense.' "). An affirmative defense is a matter that the defendant may allege to defeat the plaintiff's claim. *See* 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1270 (1969). Procedurally, an affirmative defense places the burden of pleading, production and persuasion upon the defendant. *See id.* § 1271, at 311-16. The First Circuit maintained that an affirmative defense addresses only the issue of remedy, *see Wright Line II*, 662 F.2d at 906, but it can also be determinative on the issue of liability. *See, e.g.*, Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 VAND. L. REV. 1205, 1250 (1981).

31. *Transportation Management Corp.*, 103 S. Ct. at 2474.

32. *Id.*

zation of the employer's burden as an affirmative defense, the Court settles both the narrower issue of the exact nature of the employer's burden and the broader issue of the elements of proof the General Counsel must present to establish a prima facie case.

This Note will analyze the *Transportation Management Corp.* decision in relation to the conflicting interpretations of the N.L.R.A. and the Board's method of handling mixed motive discharge cases. An examination of the legislative history of section 10(c) reveals that requiring the employer to prove legitimate motives once the NLRB General Counsel proves a prima facie section 8(a)(3) violation comports with legislative intent.

I. Development of the Controversy Over the Allocation of the Burden of Proof in Mixed Motive Cases

A. The Legislative History of the Controversy

Section 8(a)(3), which defines one of five employer unfair labor practices enumerated in the N.L.R.A., has remained virtually unchanged since its promulgation in 1935.[33] Significantly, the Act only vaguely describes the elements of a section 8(a)(3) violation,[34] and only obliquely speaks to the question of burden of proof in section 10(c).[35]

Section 10(c) of the Wagner Act initially provided that the Board, if it

33. The L.M.R.A., *see supra* note 5, amended § 8(3) in the original N.L.R.A. of 1935 by adding a proviso prohibiting the "closed shop," an agreement between the employer and union that the employer will hire only union members; but since 1935 the basic proscription against discrimination in hiring or tenure of employment has remained unchanged. *Compare* S. 1958, 74th Cong., 1st Sess. § 8(3) (1935), *reprinted* in 2 NLRB, Legislative History of the National Labor Relations Act of 1935, at 3243-44 (1949) *with* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act of 1947, at 510 (1948) (The prohibition against "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" went unchanged between the Wagner Act in 1935 and the Taft-Hartley amendments in 1947.).

34. *See* Note, *Determining a Standard of Causation for Discriminatory Discharges Under Section 8(a)(3) of the National Labor Relations Act,* 59 Wash. U.L.Q. 913, 922 (1981) (Courts have fluctuated regarding the elements and burdens of proof required to establish a § 8(a)(3) violation.). *Compare* 93 Cong. Rec. 6678 (1947), *reprinted in* 2 NLRB, Legislative History of the Labor Management Relations Act of 1947, at 1595 (1948) (employer must prove absence of discrimination) *with* H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 55 (1947), *reprinted in* 1 NLRB, Legislative History of the Labor Management Relations Act of 1947, at 559 (1948) (General Counsel must prove that unfair labor practice occurred).

35. N.L.R.A. § 10(c), 29 U.S.C. § 160(c) states in part:

> *If upon the preponderance of the testimony taken the Board shall be of the opinion* that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue

found that an employer was committing an unfair labor practice, could either order the employer to cease and desist or order reinstatement with or without back pay to effectuate the policies of the Act.[36] The 1947 Taft-Hartley amendments to the Wagner Act readjusted the focus of national labor policy[37] by extending the section 7 rights of employees to include the right to refrain from concerted activities[38] and defining a variety of union unfair labor practices. In addition, the amendments provided protection for employers' business interests[39] by adding a controversial provision to section 10(c) which prohibited the Board from requiring reinstatement of an employee who had been suspended or discharged for cause.[40] In a Senate floor debate prior to passage of the 1947 Taft-Hartley Act, Senator Taft and Senator Pepper debated whether the "for cause" proviso to section 10(c) placed the burden on the employer to prove the existence of legitimate justification for employee discipline or on the General Counsel to prove the absence of legitimate cause.[41] Unfortunately, the colloquy is subject to differing reasonable interpretations.[42] The lack of clear guidance from the statute or its legislative history has created a controversy

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and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . .

Id. (emphasis added).

36. *Id. See supra* note 4.

37. *See* R. Hartley, *The Framework of Democracy in Union Government,* 32 CATH. U.L. REV. 13, 45-48 (1982).

38. *See* N.L.R.A. § 7, 29 U.S.C. § 157 (1976).

39. *See* Hartley, *supra* note 37, at 45-48. Following the enactment of the Wagner Act, unions prospered, tripling in size between 1933 and 1941. Employer groups met the growth of unionism with strong opposition both in the form of noncompliance with the Wagner Act at the workplace and political opposition in Congress. Arguments that legislation was required to limit the power of unions culminated in a Congressional override of a Presidential veto of the 1947 Taft-Hartley amendments to the Wagner Act. *See supra* note 5. The amendments placed a concomitant duty of restraint on unions to recognize the legitimate but conflicting interests of the employer by enacting prohibitions on various union unfair labor practices. However, the amendments also reaffirmed the employees' right to self-organization and sought to effectuate this right by protecting the process of collective bargaining by leaving the prohibitions against employer unfair labor practices virtually unchanged.

40. *See supra* note 6.

41. *See* 93 CONG. REC. 6678 (1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANGEMENT RELATIONS ACT of 1947, 1593-95 (1948). In the colloquy during the conference debate between Senator Taft, who supported the amendment to § 10(c), and Senator Pepper, who opposed the amendment, Pepper argued that the conference version of the bill placed the burden of proving that an employee was not discharged for cause on the General Counsel. Taft argued that the conference version left the burden of proving legitimate cause on the employer where, according to Taft, it had always been. At best, this portion of the legislative history appears inconclusive, and its ambiguity contributed in part to the current controversy concerning the burden of proof in § 8(a)(3) dual-motive cases.

42. *See infra* note 109 and accompanying text for further discussion of the legislative history of the "for cause" proviso.

over the proper elements and allocation of the burden of proof in section 8(a)(3) mixed-motive cases.[43]

B. The Case Law History of the Current Controversy

1. The NLRB's In-Part Test

Long before conflict over the proper allocation of the burden of proof arose within the appellate courts, the issue of the proper standard of causation to apply in mixed motive section 8(a)(3) cases produced a bitter controversy between the Board and the courts.[44] Prior to *Wright Line I,* in which the Board set forth its current methodology for analyzing mixed motive section 8(a)(3) cases, the Board used an "in-part" causation standard.[45] Under this standard, if antiunion animus contributed in *any* part to the employee's discharge, the employer was found to have violated the N.L.R.A., even though the employer may have possessed a legitimate reason for the discharge.[46]

Although some appellate courts endorsed and applied the Board's "in-part" causation standard,[47] other courts found the test in conflict with the employer's section 10(c) right to discharge an employee for cause.[48] They

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43. For discussion of how the controversy arose, see Lederer, *supra* note 25; Note, *supra* note 8; Note, *supra* note 25.

44. *See generally* Lewis & Fisher, *Wright Line-An End to the Kaleidoscope in Dual Motive Cases*? 48 TENN. L. REV. 879 (1981) (The courts were divided over the amount of evidence of antiunion motive necessary for the Board to find a § 8(a)(3) violation.).

45. *See* Lewis & Fisher, *supra* note 44, at 882-84.

46. *See, e.g.*, P.P.G. Indus., Inc., 229 N.L.R.B. 713 (1977); Erie Sand Steamship Co., 189 N.L.R.B. 63 (1971); Tursair Fueling, Inc., 151 N.L.R.B. 270 (1965).

Although the words used to express the "in-part" test varied, the Board asserted that the underlying concept remained intact. *Wright Line I*, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). *See, e.g.*, Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. at 574 (1976) ("Under Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act."), *enforced in part,* 574 F.2d 891 (6th Cir. 1978); O&H Restaurant, Inc., 232 N.L.R.B. 1082, 1083 (1977) ("[T]he decision to terminate [the employee] was based in substantial part on [the employee's] support for the Union").

47. *See, e.g.*, NLRB v. Gogin, 575 F.2d 596, 601 (7th Cir. 1978), *enforcing* 229 N.L.R.B. 529 (1977); NLRB v. Townhouse T.V. & Applicances, Inc., 531 F.2d 826, 828 (7th Cir. 1976), *enforcing in relevant part* 213 N.L.R.B. 716 (1974); Jeannette Corp. v. NLRB, 532 F.2d 916 (3d Cir. 1976), *enforcing* 217 N.L.R.B. 653 (1975); NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586, 590 (6th Cir.), *cert. denied*, 439 U.S. 819 (1978), *enforcing* 219 N.L.R.B. 1188 (1975); Singer Co. v. NLRB, 429 F.2d 172, 179-80 (8th Cir. 1970), *enforcing in part* 176 N.L.R.B. 1089 (1969).

48. The Board in *Wright Line I* addressed opponents' criticisms of the "in-part" test:

> [I]n a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by

reasoned that the "in-part" standard allowed the Board to find a section 8(a)(3) violation on the strength of a prima facie case alone even though the employer may have had a sufficient legitimate business reason for the discharge.[49] The First Circuit, which later rejected the Board's analysis in *Transportation Management Corp.,* was the leading critic of the "in-part" test as well.[50] To remedy what it viewed as a misallocation of the burden of proof, the First Circuit developed its own method of analyzing mixed motive section 8(a)(3) cases. Termed the "dominant motive" test, the court required the NLRB General Counsel to prove that an employee's union involvement was the primary motive for the employer's discipline.[51] In an attempt to abate confusion over the distinction between the Board's "in-part" standard and its own "dominant motive" test, the First Circuit subsequently abandoned the test for a more exacting "but for" causation standard. This "but for" standard became synonymous with the earlier "dominant motive" test: the General Counsel must establish a prima facie case by proving that discrimination was a motivating factor; following the employer's assertion of a legitimate business justification, the General Counsel must then prove that the employee would not have been discharged "but for" his union activity.[52] In other words, to find a violation, the General Counsel must not only prove the prima facie case but must also *disprove* the employer's asserted legitimate business reasons for the discipline. The disagreement between the Board and the courts over the

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their participation in protected activities. Critics of the 'in-part' test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

Wright Line, Inc., 251 N.L.R.B. 1083, 1084 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

49. *See Wright Line I,* 251 N.L.R.B. at 1089.

50. *See, e.g.*, NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 669-71 (1st Cir. 1979) ("in part" test unduly favors employee); NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968) ("in part" test overly protective because employee need only plead existence of antiunion animus); NLRB v. Lowell Sun Pub. Co., 320 F.2d 835, 842 (1st Cir. 1963) (partial motive test may lead "militant union man" to behave as he pleases).

51. The foundation of the "dominant motive" test was laid in 1953 in NLRB v. Whitin Mach. Works, 204 F.2d 883, 885 (1st Cir. 1953); Lowell Sun Publishing Co., 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring); *see also* NLRB v. Billen Shoe Co. 397 F.2d 801 (1st Cir. 1968); NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1311-12 (1st Cir. 1971); NLRB v. South Shore Hosp., 571 F.2d 677, 684-85 (1st Cir. 1978).

52. *See, e.g.*, NLRB v. Eastern Smelting & Ref. Corp., 598 F.2d 666, 669-72 (1st Cir. 1979); Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293 (1st Cir. 1977); *cf.* Lewis & Fisher, *supra* note 44, at 886-88 (the "dominant motive" test became synonymous with the "but for" test); *see also supra* note 14 for a discussion of the "but for" test.

burden of proof in section 8(a)(3) law[53] spread throughout the circuit courts, creating further confusion and uncertainty.[54]

2. *The Impact of the Board's Wright Line Decision*

In an attempt to both resolve the conflict and accommodate the concerns of the critics of the Board's in-part test, the Board issued the *Wright Line I* decision.[55] The *Wright Line I* decision relied predominantly on the rationale of *Mt. Healthy City School District Board of Education v. Doyle,*[56] a first amendment case decided by the Supreme Court in 1977. Although *Mt. Healthy* addressed a dual motive discharge in the context of first amendment guarantees, it raised issues of causation applicable to the labor context. In *Mt. Healthy,* the Mt. Healthy School Board decided not to renew an untenured teacher's contract in part because he had informed a radio station of a new school policy.[57] The Supreme Court, reversing the lower court ruling, held that the School Board's action, although unlawful, did not necessarily warrant a remedy if supported by legitimate and sufficient reasons.[58] The Court reasoned that where such legitimate bases exist, a discharged employee should not be put "in a better position as a result of the exercise of constitutionally protected conduct than he would have oc-

53. *See Coletti's Furniture*, 550 F.2d at 1293 ("[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule.").

54. *Compare* Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977) ("A discharge is unlawful if motivated even in part by antiunion animus.") *and* Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074 (9th Cir. 1977), *denying enforcement of* 217 N.L.R.B. 878 (1975) (applied "in part" analysis) *with* Midwest Regional Joint Bd., Amalgamated Clothing Workers v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) ("[T]he Board must find that the employee would not have been discharged but for his union activity.") *and* Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 n.3 (9th Cir. 1977) (union activities must be dominant or moving cause).

Some courts refused to apply either test. *See, e.g.*, Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978) (anti-union animus must be the "real motive"); NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978) (antiunion bias must be "reasonably equal" to lawful motive to establish a violation).

55. Wright Line, Inc., 251 N.L.R.B. 1083 (1980), *enforced,* 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

56. 429 U.S. 274 (1977).

57. *Id.* at 281-83. Doyle, an untenured teacher in Mt. Healthy, Ohio, and President of the local Teacher's Association, actively worked to change teachers' working conditions. He informed a local radio station's disc jockey of the contents of a memorandum from the school's principal regarding teacher dress codes. The disc jockey broadcast the adoption of the dress code as a news item. The following month, the School Board denied renewal of Doyle's contract, citing the radio station incident as partial reason for its decision. (The School Board also cited an incident where Doyle apparently made an obscene gesture at two students). Doyle brought suit seeking reinstatement, alleging that the Board had violated his first amendment rights.

58. *Id.* at 287.

cupied had he done nothing."[59]

Because of the analogous causation issue, the Board relied on *Mt. Healthy* in *Wright Line.* Bernard Lamoureux, a shop inspector employed by Wright Line, solicited support from plant employees to establish a union.[60] Shortly following two union election campaigns at the plant, a supervisor noted that Lamoureux had been absent from his assigned department on two separate occasions and had failed to report these absences on his time card.[61] Invoking a little-used rule against altering time records, the supervisor had Lamoureux's final paycheck prepared and subsequently discharged him.[62] Acting on Lamoureux's section 8(a)(3) charge, the Board found that the General Counsel had established a prima facie violation by showing that the employer's invocation of a little-used disciplinary rule occurred in close sequence to the most recent union election.[63] Furthermore, the Board found that the employer failed to sustain its burden of demonstrating a legitimate and sufficient reason for the discharge.[64]

In a lengthy opinion, the Board expressly rejected the "in-part" test but

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59. *Id.* at 285.

60. *See Wright Line I,* 251 N.L.R.B. at 1090.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 1091. An employer's failure to sustain the burden of demonstrating a proper reason for the discharge does not dispose of the case. The employee through the General Counsel must show that the employer's action was the causal factor in the injury suffered by the employee—that is, that disciplinary action discriminated with a purpose of discouraging union activities. *See supra* note 2 and accompanying text. As the Supreme Court explained in Radio Officer's Union v. NLRB, 347 U.S. 17 (1954), § 8(a)(3) only prohibits discrimination intended to discourage union activities. Whether discrimination is prohibited is a factual question to be determined by an administrative law judge. *See id.* at 42-45, 50. The requirement in title VII analysis that the plaintiff prove the actual cause of the discriminatory action stems from the "but for" standard of causation applied in tort law. *See* Brodin, *The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective*, 82 COLUM. L. REV. 292, 311-16 (1982). Under this tort concept the judge or jury must determine that the injury would not have occurred in the absence of the defendant's conduct. *Cf.* Brodin, *supra*, at 313. ("[T]he test calls upon the judge or juryman to determine what would have happened if the defendant had not been guilty of the conduct charged against him."). The "but for" standard of causation is required to prove discriminatory intent under title VII. *Id.* at 302.

Moreover, the "but for" rule of causation requires more than simply proving that the conduct complained of was "a factor"; the conduct must be "a factor that makes a difference." *See* Belton, *supra* note 30, at 1255-56. Thus, under the Board's approach, relief is granted each time the General Counsel proves by a preponderance of the evidence that discrimination was a factor in the adverse action. Under title VII "but for" analysis, relief is granted only if discrimination made the difference in the adverse action—that is, if the plaintiff can prove that discrimination was the true reason for the employer's adverse action. *Cf.* Brodin, *supra* note 30, at 302.

maintained many of the principles underlying that test.[65] The Board stated that such principles have traditionally involved analyzing the employer's asserted justification to determine whether it is sufficiently proven "to negate the General Counsel's showing of prohibited motivation."[66] According to the Board, establishing an unfair labor practice "require[s] that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision."[67] Once the Board establishes a prima facie case, "the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct."[68] The Board noted that it was adopting a test which places the burden of proving the existence of an independent and sufficient basis for the decision on the employer, rather than on the General Counsel.[69] In a footnote, the Board characterized this requirement as an affirmative defense, concluding that the ultimate burden of establishing the presence of an unfair labor practice remains with the General Counsel.[70]

Subsequent courts criticized the Board's affirmative defense characteri-

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65. *Wright Line I*, 251 N.L.R.B. at 1089.

> [I]nherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the 'in part' language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past.

Id.

66. *Id.* at 1088 (footnote omitted).

67. *Id.* at 1089. Commentators have noted, however, that the "motivating factor" language is no greater a quantum of proof than the "in part" test applied previously by the Board. *See, e.g.*, Lewis & Fisher, *supra* note 44, at 894-96. The Board itself has stated in commentary that "Wright Line . . . does not . . . alter the standard by which the Board determines whether a litigant has carried its burden of proof." Truesdale, *Recent Trends at the NLRB and in the Courts*, 32 LAB. L.J. 131, 134 (1981).

68. *Wright Line I*, 251 N.L.R.B. at 1089 (footnote omitted).

69. *Id.* at 1087. The Board stated that the employee is required only to show initially that the employer's adverse decision was motivated in part by discriminatory intent. The employer must then establish its asserted legitimate justification. The issue of which party bears the burden of proving the existence of an independent justification is crucial because it may determine the outcome of the case. *Id.*

70. *Id.* at 1088 n.11. The Board went on to state:

> It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense . . . to overcome the *prima facie* case of wrongful motive. Such a requirement does not shift the ultimate burden.

See also infra note 112 for discussion of courts' criticisms of the Board's characterization of the employer's burden as an affirmative defense.

zation. The courts asserted that labeling the employer's burden an affirmative defense suggested that the entire burden of persuasion shifted to the employer to prove it had not violated the Act. The practical effect of the Board's *Wright Line* decision was, however, to require an administrative law judge, or the Board, to consider an employer's legitimate business reasons when determining whether to order reinstatement, rather than simply ending the inquiry after the General Counsel establishes a prima facie case.[71] Although the Board intended the *Wright Line* decision to "alleviate the intolerable confusion in the section 8(a)(3) area,"[72] the Board's language generated controversy among the circuit courts as to whether the methodology was a permissible allocation of the burden of proof in section 8(a)(3) discrimination cases.

a. Circuit Courts Rejecting the Board's Wright Line Analysis

Initially, critics of the Board's "in-part" test welcomed the *Wright Line* decision, viewing it as an alignment of the Board's approach with their own.[73] By 1983, however, the First, Second, Third and Seventh Circuits had clearly repudiated the Board's *Wright Line* rule.[74] The First Circuit was the first court clearly to reject imposing a requirement on the employer to prove the existence of a legitimate and sufficient cause for the discharge.[75] Six months later, the United States Court of Appeals for the Third Circuit in *Behring International v. NLRB* rejected the Board's *Wright Line* test as improperly shifting the burden of proof on the issue of the Company's motive.[76] The decision thoroughly outlines the court's reasoning for rejecting the Board's methodology.

In *Behring*, eight employees were laid off shortly after a union election,

71. *See Wright Line I*, 251 N.L.R.B. at 1084 (Courts criticized the "in part" test because it terminated the inquiry as to the existence of a violation with the establishment of a prima facie case.); *accord* Lewis & Fisher, *supra* note 44, at 883; *see also supra* notes 44-54 and accompanying text.

72. *Wright Line I*, 251 N.L.R.B. at 1089.

73. *See* Statler Indus., Inc. v. NLRB, 644 F.2d 902 (1st Cir. 1981). This case followed *Wright Line*'s requirement that the employer assert legitimate cause for its action but vigorously denied that the *Wright Line* test required the employer to prove legitimate cause in order to avoid N.L.R.A. penalties. *See also* Lederer, *supra* note 25, at 76-77.

74. *See, e.g.*, *Wright Line II*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), *supra* notes 25-30 and accompanying text; Behring Int'l v. NLRB, 675 F.2d 83 (3d Cir. 1982), *infra* notes 76-88 and accompanying text; NLRB v. Webb Ford, Inc., 689 F.2d 733 (7th Cir. 1982), *infra* notes 90-98; NLRB v. New York Univ. Medical Center, 702 F.2d 284 (2d Cir. 1983), *infra* notes 100-12 and accompanying text.

75. *See Wright Line II*, 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982); *see also supra* notes 25-30 and accompanying text.

76. *Behring*, 675 F.2d at 88 ("The shifting burden of persuasion undermines the 'but for' test and reintroduces the confusion which *Wright Line* purported to eliminate.").

and the company subcontracted with an outside firm for replacement labor.[77] The company argued that its actions were necessary because of a severe decline in business, but evidence showed that the employer's agents had discouraged the employees' union organization drive. An administrative law judge found that the General Counsel established a prima facie case by showing that the employer had granted substantial benefits to employees prior to the union election, had threatened plant closure if the union were voted in, and had interrogated an employee to discover names of union organizers.[78] The Board found that although the employer asserted that a severe decline in business necessitated laying off workers and subcontracting labor to reduce costs, the company was motivated in part by a desire to reduce the likelihood of another union election.[79] The Board found violations of sections 8(a)(1) and 8(a)(3) because the company's economic defense was insufficient to rebut the General Counsel's prima facie case.

The Third Circuit, in denying enforcement, remanded the case, ordering the Board to consider whether the employer's asserted business justification was sufficient to preclude reinstatement in light of evidence that the layoffs were neither limited to union activists nor were they in close proximity to a future union election.[80] The court maintained that requiring the employer to prove a legitimate and sufficient reason for the discharges contravened section 10(c) of the N.L.R.A., the Board's own administrative regulations,[81] and section 7(c) of the Administrative Procedure Act[82] because these statutory provisions impose the burden of proving an unfair labor practice solely on the General Counsel, not on the employer.[83] The Third Circuit rejected the Board's approach, arguing that it vitiated the

77. *Id.* at 84.

78. *Id.* at 85.

79. *Id.*

80. *Id.* at 90-91.

81. *See* 29 C.F.R. § 101.10(b) (1981) which provides that "[t]he Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act."

82. *See* Administrative Procedure Act, 5 U.S.C. § 556(d) (1976) which provides in part: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

83. In explaining its reasoning, the court stated:

> [I]n establishing a *prima facie* case, the General Counsel need not prove that antiunion discrimination was the 'real cause' of the employee's discharge. Instead, the *Wright Line* procedure only requires the General Counsel to show that antiunion animus was 'a' motivating factor in the employer's decision. If the employer then proffers a legitimate reason for its action, but does not do so with enough weight to carry the burden of persuasion, the Board would rule that the § 8(a)(3) charge had been proved. This would be so despite the fact that two factors—neither outweighing the other—had been advanced as causes, and the Board never determined

General Counsel's duty to prove the unfair labor practice by no longer requiring the General Counsel to prove that antiunion motive was the "real cause" of the discipline. The court criticized the Board's rule because a violation would be found if, after the General Counsel has demonstrated that antiunion motive was a factor, the employer fails to respond with enough evidence to outweigh the prima facie showing. This, in the court's view, required the employer to prove the "real cause," rather than the General Counsel.[84]

The court, instead, adopted the procedural methodology of title VII discrimination cases.[85] This procedure requires that after the complainant establishes a prima facie case of discriminatory conduct, the respondent need only come forward with some evidence showing that a legitimate business reason motivated its action.[86] If the employer meets this burden, the burden then shifts to the complainant to prove that the employer's proffered legitimate reason is not the true reason.[87] Concluding that the ultimate burden of proof may not shift to the employer at any stage, the court remanded the case to the Board for a determination of whether the "General Counsel ha[d] proved by a preponderance of the evidence that the employer's antiunion animus was the real cause of the discharge."[88]

The United States Court of Appeals for the Seventh Circuit, like other circuit courts, had initially adopted the Board's *Wright Line* test.[89] The

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which was the real one. As such, the procedural aspect is plainly at odds with the 'but for' test.

Behring, 675 F.2d at 88.

84. *See supra* note 64 for a discussion of the "but for" standard of causation.

85. The Third Circuit relied on Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978). In these cases, the Court had outlined the procedures to be followed in title VII employment discrimination cases. The Third Circuit preferred this approach to the Board's *Wright Line* analysis because, under title VII analysis, the defendant need only articulate a legitimate business reason for its adverse action and need not prove justification by presenting enough evidence to outweigh the plaintiff's prima facie case. To establish a statutory violation, the burden then shifts back to the plaintiff to prove that the legitimate reason offered by the employer is not the true reason. *Behring*, 675 F.2d at 88-89.

86. *Behring*, 675 F.2d at 89.

87. *See Burdine,* 450 U.S. at 252-53 (citing McDonell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1983)). For a further discussion of title VII analysis and a comparative analysis to the Board's § 8(a)(3) analysis, see *supra* note 64.

88. *Behring*, 675 F.2d at 90. This reasoning was affirmed in a later Third Circuit case where the court also held that the Board had misallocated the burden of persuasion. *See* United Parcel Serv. v. NLRB, 113 L.R.R.M. (B.N.A.) 2174 (3d Cir. Apr. 18, 1983).

89. *Cf.* Peavey Co. v. NLRB, 648 F.2d 460 (7th Cir. 1981). The *Peavey* court held: "We have reviewed the decisions and have decided to follow the *Mt. Healthy/Wright Line*

court, however, in a subsequent case, *NLRB v. Webb Ford, Inc.*,[90] rejected the *Wright Line I* approach in favor of the Third Circuit's rationale in *Behring*. A new collective bargaining agreement between Webb Ford and its mechanics and body shop employees had created problems in the method of computing pay.[91] Two service department mechanics, Jeffery Goffe and Randall VanderWoude, pressed for resolution of the wage disputes.[92] Because the employees were union activists, the company service manager reassigned the two employees to warranty work, in direct conflict with a company policy.[93] As a result of their work reassignments, both Goffe and VanderWoude received numerous warning letters for failure to accumulate billable time and were each subsequently discharged.[94] The Seventh Circuit reversed the administrative law judge's finding of a violation, holding that the timing of a discharge alone is "too slender a reed" to support a finding of a prima facie case. The court therefore concluded that the General Counsel had failed to establish a prima facie case of unlawful motivation.[95] Although not faced with the issue, the court went on to consider the procedural burden of proof issue to assist the administrative law judge on remand.[96] In the Seventh Circuit's view, shifting the burden of persuasion to the employer to show a legitimate and sufficient reason for the discharge contravened section 10(c) of the N.L.R.A.[97] Like the Third Circuit, the court adopted the procedural methodology used in title VII cases which requires only that the employer rebut the prima facie case by asserting a legitimate reason for its action, while "the burden of demonstrating that reason pretextual remains with the Board."[98]

Immediately following the Board's *Wright Line* decision, the United States Court of Appeals for the Second Circuit adopted the Board's approach,[99] but later rejected *Wright Line I* as imposing an "improper stan-

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test in 'dual motive' cases in this Circuit. Our review of the record as a whole convinces us that Peavey Company met its burden under the *Wright Line* decision." *Id.* at 461.

90. 689 F.2d 733 (7th Cir. 1982).

91. *Id.* at 735.

92. *Id.* at 736.

93. *Id.*

94. *Id.*

95. *Id.* at 739.

96. *Id.*

97. *Id.*

98. *Id.* The court explained the reasons for its "about-face" saying:

> [T]o the extent a formulation of the [*Wright Line*] test imposed upon an employer the burden of persuasion to show that it would have discharged the employee even in the absence of the protected conduct, it ran afoul of the Labor Act's strictures on burdens of proof as found at 29 U.S.C. § 160(c) (1976).

Id. (footnote omitted).

99. *See* Consolidated Edison Co. v. Donovan, 673 F.2d 61 (2d Cir. 1982). The case

dard of proof" in *NLRB v. New York University Medical Center.*[100] During a campaign to choose delegates to a national convention of the National Union of Hospital and Health Care Employees, three employees who belonged to a splinter political organization initiated an aggressive leafletting campaign to garner votes.[101] The text of the leaflets criticized the Hospital Center's racial employment practices. As a result, the Center issued warning letters to all three employees, suspended two, and discharged one because of his leafletting activities.[102] The Second Circuit, reversing the Board's finding of a section 8(a)(3) violation, held that the Board's *Wright Line* analysis exceeded its statutory authority by permitting the finding of an unfair labor practice when the evidence is in equipoise. The Court thus concluded that the Board's approach contravened the allocation of proof set forth in section 10(c) of the N.L.R.A.[103]

In the most thorough analysis by a circuit court of appeals of the procedure required under section 10(c), the Second Circuit argued that the Board may not allocate the burden of proof on the issue of motive to the employer because "shifting the burden of persuasion to the employer violates [the] statutory mandate [of section 10(c)]."[104] The court would have permitted a requirement that an employer rebut the showing of unlawful motivation by introducing evidence of independent legitimate justification for its action. This would bring all possible reasons for the employer's disciplinary action before the Board for its consideration in determining

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arose under the Energy Reorganization Act but the Second Circuit nonetheless applied the Board's *Wright Line* test used in N.L.R.A. dual motive cases. Citing *Mt. Healthy*, the court allocated the burden of proving legitimate cause to the employer. Without analysis, the court stated that "we should adopt the rule enunciated in the *Mt. Healthy* case which places the burden on the employer to show by a preponderance of the evidence that it would have reached the same decision as to the employee's dismissal even in the absence of the protected conduct." *Id.* at 62-63. Based on the evidence, the court concluded that "a review of the testimony in conjunction with the findings made by the ALJ compels the conclusion that Con Edison has failed to sustain its burden of proof." *Id.* at 63.

100. 702 F.2d 284 (2d Cir. 1983). The court distinguished the earlier *Consolidated Edison* case by noting that it had arisen under the Energy Reorganization Act and therefore the court had no statutory counterpart comparable to § 10(c) requiring proof by a preponderance of the evidence. *Id.* at 294 n.10.

101. *Id.* at 286.

102. *Id.* at 287-88.

103. *Id.* at 293-94. The court explained that because the Board's *Wright Line* test does not require the General Counsel to prove that unlawful motive is the "but for" cause, the employer is forced to present enough evidence to convince the trier of fact that the " 'real' motivation for the discipline" is the employer's legitimate business reason. The court reasoned that assigning this "ultimate burden of persuasion" to the employer is error. *Id.* at 294.

104. *Id.* at 293.

whether discriminatory intent actually caused the discipline.[105] The court held, however, that the Board's methodology improperly shifted the ultimate burden of persuasion to an employer, thus creating an imbalance between employer and employee rights in contravention of the N.L.R.A.[106] In the court's view, the Board's method shifted the ultimate burden of persuasion in contravention of section 10(c) so that any case in which both parties had presented evidence of equal weight would result in a finding that the employer had violated section 8(a)(3). Under the Second Circuit's approach, evidence in equipoise should result in a finding that the General Counsel failed to establish a violation by a preponderance of the evidence.[107]

The court examined in detail the legislative history of section 10(c) and found it inconclusive. The Senate colloquy between Senator Taft and Senator Pepper, relied on by the Board to support its *Wright Line* analysis, merely reflected uncertainty of the effect of section 10(c).[108] Moreover, the Second Circuit maintained that Congress intended to limit the discretion exercised by the Board under the N.L.R.A.,[109] and the Board's *Wright Line* analysis evidenced an absence of such limitation on the Board's discretion, because it did not require the General Counsel to prove that the employer's antiunion motive was the "real" or "but for" cause.[110] According to the Second Circuit, Congress feared the Board might automatically reinstate union activists without fully analyzing whether legitimate reasons

105. *See id.* at 292-94.

106. *Id.* at 292.

107. *Id.* at 294.

108. *See New York Univ. Medical Center*, 702 F.2d at 295-98; *see also supra* note 41 and accompanying text.

109. *But see supra* note 41 and accompanying text.

The court in *New York Univ. Medical Center*, 702 F.2d 284 (2d Cir. 1983), noted that Congress, by enacting the Taft-Hartley Act, sought to limit the discretion exercised by the Board under the Wagner Act. The original House bill placed the burden upon the General Counsel to prove that an employee had not been discharged for cause. The court inferred that the Members of the House wished to require the General Counsel to determine whether the employer's unlawful motive was the "real" reason for the discipline, rather than merely to infer discriminatory motive from the fact of the disciplinary act. The Senate amendments, however, omitted the provision requiring the General Counsel to show "cause." The Second Circuit observed, however, that the conference version of the bill reinserted the "for cause" proviso to § 10(c) reformulated to expressly prohibit the Board from reinstating an individual who had been discharged for cause. The court, therefore, interpreted the conference committee's version of the "for cause" proviso as merely a restatement of the House bill's original requirement that the Board should bear the burden of proving that a legitimate motive was not the actual basis for discharge. *See New York Univ. Medical Center*, 702 F.2d at 295.

110. *New York Univ. Medical Center*, 702 F.2d at 294.

existed for discipline.[111] It would logically follow that Congress must also have meant to require the General Counsel to prove that an employee was not discharged for cause.[112]

Together, these circuit courts have advanced the view that the Board's *Wright Line* test contravened the legislative strictures of section 10(c) requiring the General Counsel to bear the risk of nonpersuasion in a mixed motive case. Specifically, the courts objected to the Board's *Wright Line* methodology as violating section 10(c) by placing a portion of the burden of proof on the employer. These courts further objected to allowing the General Counsel to prevail solely on the strength of a prima facie showing of prohibited motivation should the employer fail to prove its affirmative defense.[113] These circuit courts maintained that permitting *such slight* evidence of discriminatory motive to establish a violation would unreasonably displace the section 10 burden of proving discriminatory motive from

111. *Accord* H.R. REP. NO. 245, 80th Cong., 1st Sess. 42 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1947, at 333 (1948) (employers have been required to reinstate employees who have destroyed property and assaulted other employees). Members of the House attempted to limit the Board's discretion in reinstating employees; they were concerned that in some cases the Board had inferred discriminatory motive from the employer's adverse action without determining the "real cause" for the action.

112. *See New York Univ. Medical Center*, 702 F.2d at 297. The court in *New York Univ. Medical Center* also attacked the Board's characterization of the employer's burden as an affirmative defense. *See* 702 F.2d at 294 n.9; *see also supra* note 30 and accompanying text. In the court's view, an affirmative defense clearly shifts the burden of persuasion of a particular issue and is usually reserved for those situations in which a defendant must prove a fact which bears no necessary relationship to an element of the charged offense. *Id.* The court reasoned that because the Board's methodology forced the employer to negate the prima facie element of motivation, the employer's burden in a mixed motive case could not be an affirmative defense. *Id.* The court stated:

> [T]here is no question that an affirmative defense at least shifts the burden of persuasion on the particular issue—in this case whether the employer had a legitimate reason for reaching the decision to discipline the employees . . . . But the burden [of proof] shifts in this case on the issue of 'causation' which lies at the heart of the 8(a)(1) charge—was the unlawful motive a 'but for' cause of the decision to discipline? Thus, it is quite unpersuasive to claim that the burden is shifted on only the one issue and that the ultimate burden rests with the Board—there is no other issue in the case.

Id. Thus, by characterizing the employer's burden as an affirmative defense, the Board, according to the Second Circuit, reallocated the burden of persuasion. In effect, the employer rather than the General Counsel must prove the prima facie element of causation or else lose the case. *See generally* Belton, *supra* note 30, at 1207 (This commentator notes that the "[b]urden of proof govern[s] the process of fact-finding." The burdens of production and persuasion are both elements of the burden of proof. The burden of persuasion determines the party who must convince the trier of fact or lose the case. The burden of production determines the timing of the presentation of evidence.).

113. *See* Zurn Indus. v. NLRB, 680 F.2d 683, 688 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983), *infra* notes 138-47.

the General Counsel to the employer.[114]

This view reflected both a strong concern for the employer's section 10(c) right to discharge for cause and an antipathy for the Board's practice of inferring an overriding unlawful motive without an adequate showing by the Board's General Counsel of evidence from which to infer discriminatory motive. Moreover, these decisions suggest that when the evidence is in equipoise, the balance should be struck in favor of the employer because, although the employer has acted unlawfully, the General Counsel has not established that unlawful motives were the preponderant cause of the employer's action. According to these courts, the absence of a demonstrated and overriding intent to "encourage or discourage union membership" should preclude finding a violation.

b. Circuit Courts Accepting the Board's Wright Line Analysis

The Fifth,[115] Sixth,[116] Eighth,[117] and Ninth[118] Circuits have either ex-

114. *See Transportation Management Corp.*, 674 F.2d 130, 132 (1st Cir. 1982), *rev'd*, 103 S. Ct. 2469 (1983).

115. *See infra* notes 120-25 and accompanying text.

116. A series of cases from the United States Court of Appeals for the Sixth Circuit have cited *Wright Line I* with approval but without thorough analysis of the contested burden of proof issue. *See, e.g.*, Borel Restaurant Corp. v. NLRB, 676 F.2d 190 (6th Cir. 1982); Charge Card Ass'n v. NLRB, 653 F.2d 272 (6th Cir. 1981); NLRB v. Consolidated Freightways Corp., 651 F.2d 436 (6th Cir. 1981); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442 (6th Cir. 1981); NLRB v. Allen's I.G.A. Foodliner, 651 F.2d 438 (6th Cir. 1981).

In Borel Restaurant Corp. v. NLRB, 676 F.2d 190 (6th Cir. 1982), for example, a restaurant manager fired a waiter, Patrick Passante, an active union organizer, for allegedly drinking while on the job. *Id.* at 192. The Sixth Circuit affirmed the Board's holding that the employer failed to demonstrate legitimate and sufficient reason for the discharge. *Id.* at 193. The evidence showed that Borel failed to discharge a second employee known to be drinking with Passante during the same incident. *Id.* On this basis, the court expressly approved the Board's *Wright Line* rule requiring the employer to show cause and found that Borel failed to carry its burden of presenting sufficient evidence to show legitimate cause for discipline. *Id.*

117. The United States Court of Appeals for the Eight Circuit approved *Wright Line I*, and specifically rejected the First Circuit's criticism of the Board's approach. *See* NLRB v. Fixtures Mfg. Corp., 669 F.2d 547 (8th Cir. 1982). In *Fixtures*, two union activists were discharged, one for allegedly failing to cooperate in a company investigation of thefts, and the other because the results of a forced polygraph test implicated him in the thefts. *Id.* at 549. The Board ordered both employees reinstated because it found that the polygraph tests had been administered to retaliate against the employees' union organization activities. *Id.* at 549-50. The Eighth Circuit enforced the order in part, but remanded the case to the Board to determine whether the conduct of the employee implicated in the thefts justified his dismissal in spite of the employer's impermissible conduct. *Id.* at 552. The court concluded without analysis that placing a burden on the employer to prove legitimate cause for the discharge is within the Board's authority to structure its fact-finding process. *Id.* at 550 & n.4.

Eight months later, in NLRB v. Senftner Volkswagen Corp., 681 F.2d 557 (8th Cir. 1982),

plicitly or implicitly accepted the Board's *Wright Line* test.[119] All but the Ninth Circuit have accepted the Board's methodology without detailed analysis, which suggests a summary rejection of critics' objections to the Board's rule. In *Red Ball Motor Freight v. NLRB,*[120] the United States Court of Appeals for the Fifth Circuit, despite earlier indications to the contrary,[121] endorsed the Board's approach without detailing its analysis. A clerical employee who had protested certain employment practices by Red Ball Motor Freight, Inc., was suddenly discharged for allegedly refusing to start work on time.[122] The Board found that after the General Counsel had made a prima facie showing that the employee's protected section 7 activities had been a motivating factor in the discharge, Red Ball had failed to establish a legitimate and sufficient reason for the discharge.[123] The Fifth Circuit affirmed the Board's methodology.[124] Red Ball argued that the Board's *Wright Line* approach improperly requires the employer to prove its innocence in derogation of management's right to discharge for cause under section 10(c).[125] By rejecting this argument, the court implied that the employer's proof of "good cause" is independent of

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the court followed *Wright Line I* but held that because no evidence was introduced to support the employer's alleged reason for discharge, the reasons were pretextual. Again, the court failed to reach the burden of proof issue. *Senftner*, 681 F.2d at 560.

118. *See infra* notes 126-47 and accompanying text; *but see* Royal Development Co. v. NLRB, 703 F.2d 363 (9th Cir. 1983). Despite the Ninth Circuit's adherence to *Wright Line I*, the *Royal Development Co.* court rejected the argument that Board interpretations of the N.L.R.A. must be given deference by the courts. Instead it relied on pre-*Wright Line* cases to reject the requirement that the employer prove legitimate cause. The court found it unnecessary to determine which party properly bore the burden of proof because the evidence supported a § 8(a)(3) violation and the employer was unable to justify its conduct. *Id.* at 370, 372.

119. *See infra* notes 120-51 and accompanying text.

The Fourth Circuit also accepted shifting the burden of proof but it did not rely on *Wright Line I* for this holding. *See* NLRB v. Kiawah Island Co., 650 F.2d 485 (4th Cir. 1981). The Court in *Kiawah* characterized the employer's burden of showing legitimate cause as simply a weighing of the evidence. The court concluded that, if the evidence of employer animus is unrebutted, the Board must find a § 8(a)(3) violation, as long as the Board's evidence constituted more than suspicion and conjecture. *Id.* at 491.

120. 660 F.2d 626 (5th Cir. 1981), *cert. denied*, 456 U.S. 997 (1982).

121. *See* TRW, Inc. v. NLRB, 654 F.2d 307 (5th Cir. 1981). The court held that the employer need only articulate a legitimate business reason for its action after which the General Counsel must prove that antiunion animus was the "moving cause" of the discipline. *Id.* at 310. The court apparently did not rely on *Wright Line I*, citing it in a footnote for the limited proposition that when an employer advances a legitimate reason for its action, the case cannot properly be considered a pretext case. *Id.* at 312 n.3.

122. 660 F.2d at 627.

123. *Id.*

124. *Id.*

125. *Id.* Two other Fifth Circuit cases recited the *Wright Line I* rule but without comment. *See* NLRB v. Robin Am. Corp., 654 F.2d 1022, 1025 (5th Cir. 1981), *modified and*

the prima facie case of discriminatory intent which the General Counsel must prove in order to establish a violation.

Among the courts accepting *Wright Line I,* the Ninth Circuit is the only one to have set forth its rationale in detail. In *NLRB v. Nevis Industries, Inc.,*[126] the company acquired a hotel whose engineering employees were represented by Stationary Engineers, Local 39.[127] Nevis refused to bargain with Local 39 regarding the retention of its engineers and conditioned retention of one employee on his resignation from the union.[128] Futhermore, Nevis attempted to persuade other service employees to withdraw from the union. A company supervisor stated that he wanted the hotel to be nonunion and, therefore, refused to employ the entire engineering crew.[129] The company claimed that its decision was based on the engineers' poor work attitudes.[130] Based on this evidence, the Ninth Circuit labeled as pretext the employer's asserted reason for discharging the employees,[131] thus never reaching the burden of proof issue.

The court did, however, discuss as dicta its reasons for adopting *Wright Line I.* The Ninth Circuit asserted that the Board's interpretations of the N.L.R.A. are entitled to considerable deference[132] and that the Board's *Wright Line* rule is a "reasonably defensible interpretation of the Act. . . ."[133] The court apparently based its conclusion on an analysis of the Senate colloquy between Senator Taft and Senator Pepper,[134] and concluded without explicit analysis that the colloquy revealed an intent to impose the burden of proving "good cause" on the employer, rather than the General Counsel.[135] Furthermore, the court noted that the employer is likely to have better access to proof of motivation.[136] In the Ninth Circuit's view, the Board's approach maintained a proper balance between employee and employer rights. A showing by a preponderance of the evidence that antiunion motive was a contributing factor establishes a section

enforced, 667 F.2d 1170 (1982); NLRB v. Charles H. McCauley Assocs., 657 F.2d 685, 688 (5th Cir. 1981).

126. 647 F.2d 905 (9th Cir. 1981); *but see supra* note 118 (The Ninth Circuit changed its approach in 1983.).

127. *Id.* at 907.

128. *Id.*

129. *Id.* at 909.

130. *Id.* at 910.

131. *Id.*

132. For a discussion of the respective roles of the Board and the courts in interpreting the federal labor laws, see *infra* note 148.

133. *Nevis*, 647 F.2d at 909.

134. *See supra* note 41 and accompanying text.

135. *Nevis*, 647 F.2d at 909.

136. *Id. See also infra* note 204 and accompanying text.

8(a)(3) violation, thus protecting employees' section 7 rights. The employer, however, retains an opportunity to present evidence to avoid a violation in furtherance of its right to discharge employees for cause.[137]

A year later in *Zurn Industries v. NLRB,*[138] the court again affirmed the Board's *Wright Line* approach but detailed the reasoning behind some of its conclusions in *Nevis*. In *Zurn*, workers constructing concrete cooling towers at a nuclear power plant complained for several months of the lack of safety devices on the job site.[139] A supervisor threatened the employees that continued complaints would result in loss of their jobs.[140] The company subsequently discharged the employees, asserting that the workers had improperly poured concrete,[141] but later admitted that the employees' safety complaints had provided additional motivation for the discharges.[142] The Board found that because the General Counsel had established a prima facie case and the employer's asserted reason was pretextual, the employees were to be reinstated.[143] The Ninth Circuit, though not faced with a true mixed motive case, again argued in dicta that the adoption of *Wright Line I* is a "reasonably defensible interpretation of the Act consistent with its purposes."[144] In an extensive analysis of the colloquy between Senator Taft and Senator Pepper concerning placement of the burden of proving legitimate cause for discipline,[145] the court held that the colloquy placed a sufficient gloss on section 10(c) to sustain the Board's placement of a burden on the employer to prove cause.[146] Noting that the *Wright Line* rule does not relieve the General Counsel of its burden of proving an unfair labor practice by a preponderance of the evidence, the Ninth Circuit explained its approach as providing a framework for establishing legitimate justifications so that the employer may avoid the violation established by the General Counsel's prima facie case.[147]

The courts accepting the Board's *Wright Line* rule have based their con-

137. *Nevis*, 647 F.2d at 909.
138. 680 F.2d 683 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983).
139. *Id.* at 685.
140. *Id.*
141. *Id.* at 685-86.
142. *Id.* at 686.
143. *Id.*
144. *Id.* at 689.
145. *See supra* note 41 and accompanying text.
146. *Zurn*, 680 F.2d at 690-93.
147. *Id.* at 693. Four other cases within the Ninth Circuit have adopted *Wright Line I* but without analysis. *See* Doug Hartley, Inc. v. NLRB, 669 F.2d 579, 580-81 (9th Cir. 1982); NLRB v. Brooks Cameras, Inc., 691 F.2d 912, 915 (9th Cir. 1982); Anja Eng'r Corp. v. NLRB, 685 F.2d 292, 296 n.10 (9th Cir. 1982); Lippincott Indus. v. NLRB, 661 F.2d 112, 115 (9th Cir. 1981).

clusions partly on deference to the Board's interpretation of the N.L.R.A.[148] They characterized their approach not as shifting the burden of persuasion but rather as a means for both sides to present evidence which the fact-finder must then weigh. The end result of this approach is that when the evidence is in equipoise the General Counsel prevails because the employer has failed to show an independent and sufficient justification for its wrong. These circuit courts have determined that the rule is grounded in equity, because the employer is required to prove information that is more readily within its knowledge.[149] The rule comports with section 10 of the N.L.R.A. because requiring an employer to establish an independent defense does not obviate the General Counsel's duty to prove that discriminatory intent was a motive for the discharge.[150] Moreover, the employer is always a wrongdoer in mixed motive cases, because the occasion for an employer to establish sufficient cause never arises until the General Counsel first establishes a prima facie case sufficient to allow the fact finder to infer that the type of discrimination prohibited by section 8(a)(3) has occurred. Accordingly, it is reasonable to require the employer to establish any defense it might have. The approach adopted by the Board and supporting circuit courts places special importance on maintaining the balance between competing employer and employee interests in favor of the employee.[151] The Board's approach protects this balance by ensuring that proof of discriminatory motive will establish a violation

148. The NLRB has primary responsibility for filling the gaps in our federal labor laws. *See, e.g.*, NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956) (Responsibility for accommodating the competing interests of employers and employees rests with the Board. "Its rulings, when reached on findings of fact supported by substantial evidence on the record as a whole, should be sustained by the courts unless its conclusions rest on erroneous legal foundations." (footnote omitted)); *see also* F. BARTOSIC & R. HARTLEY, *supra* note 7, at 3 (The Board's interpretations of the law will be accepted by the courts as long as, pursuant to § 10(e) of the N.L.R.A., 29 U.S.C. § 160(e) (1976), its factual assumptions are supported by "substantial evidence on the record as a whole," and its conclusions are not based on erroneous legal foundations or policy assumptions.). By parity of reasoning, any application of the law consistent with the underlying policy assumptions is a valid application of the law. *Cf.* NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957) (The Board is responsible for striking the balance between conflicting legitimate interests in order to effectuate national labor policy.).

149. For a discussion of the principles of fairness in allocating burdens of proof, see *infra* note 204-05 and acompanying text.

150. *See supra* note 35.

151. The fundamental difference between the two approaches for allocating the burden of proof in discriminatory discharge cases may be seen most clearly when the evidence is evenly balanced. Under the Board's *Wright Line* approach, if the evidence is in equipoise the trier of fact will find for the General Counsel. Under the First Circuit's approach, the court will find for the employer. *See* NLRB v. Transportation Management Corp., 674 F.2d 130, 132 (1st Cir. 1982).

without also requiring the General Counsel to disprove the employer's asserted business justification.

The emergence of distinct positions on the issue of the allocation of the burden of proof prompted the Supreme Court to grant certiorari in *NLRB v. Transportation Management Corp.*[152]

II. The Supreme Court's Response to the *Wright Line* Critics

A. Affirmation of the Mt. Healthy/Wright Line Approach

In *Transportation Management Corp.,* the United States Supreme Court resolved this protracted and sometimes acrimonious debate among the courts of appeals. The Court began its analysis by tracing the Board's and the courts' interpretations of the elements required to establish an unfair labor practice violation under section 8(a)(3). The Court noted that the Board decisions "have consistently held that [an] unfair labor practice consists of a discharge or other adverse action that is based in whole or *in part* on antiunion animus"[153]—or, as the Board restated in *Wright Line,* that the employee's protected conduct was a "substantial or motivating factor" in the adverse action.[154] The Court held that the General Counsel must prove antiunion animus under section 10.[155] In an analysis of precedent predating section 10(c), the Court noted that the Board's practice had always been to find a section 8(a)(3) violation if the weight of the evidence demonstrated that the discharge was motivated in any way by antiunion animus.[156]

The Court also noted that the Board's decision in *Wright Line* was meant to abate the criticism that the Board's methodology could be used to infer anti-union motive without any consideration of an employer's legitimate reasons for discipline. By setting up the possibility of an affirmative defense, the employer could escape a finding of a violation if it could establish a legitimate and sufficient reason for its otherwise unlawful action.[157] Moreover, the Court suggested that the Board need not have gone that far—that in fact its old "in-part" test was permissible under the

152. 103 S. Ct. at 2472.

153. *Id.* at 2474 (emphasis added).

154. *Wright Line I*, 251 N.L.R.B. at 1089.

155. *Transportation Management Corp.*, 103 S. Ct. at 2474.

156. *Id.* at 2473. The court relied on Republic Creosoting Co., 19 N.L.R.B. 267 (1940); Dow Chemical Co., 13 N.L.R.B. 993 (1939), *enforced in relevant part*, 117 F.2d 455 (6th Cir. 1941); Louisville Refining Co., 4 N.L.R.B. 844 (1938), *enforced*, 102 F.2d 678 (6th Cir.), *cert. denied*, 308 U.S. 568 (1939); Consumers Research, Inc., 2 N.L.R.B. 57 (1936).

157. 103 S. Ct. at 2474.

N.L.R.A.[158] Writing for the Court, Justice White emphasized that extending this right to the employer as an affirmative defense does not add to or change the elements of the section 8(a)(3) unfair labor practice.[159] Though the Court acknowledged that the Board's characterization of the employer's responsibility as an affirmative defense does in fact require the employer to prove the existence of legitimate and sufficient cause,[160] it concluded that, although such a construction is not required by the Act, it is "at least permissible under it."[161] Underlying this determination is the presumption articulated in earlier circuit court opinions that the employer, acting in part because of an illegal motive, is a wrongdoer and, therefore, must bear the risk that a legitimate cause for discharging an employee cannot be separated from unlawful motives.[162] The Court concluded by endorsing the Board's reliance on the Supreme Court's own *Mt. Healthy* rule: once the plaintiff has established a prima facie case, the burden shifts to the employer to prove the same action would have been taken for a legitimate and sufficient business reason.[163]

By affirming the Board's reliance on *Mt. Healthy* in *Wright Line,* the Court's decision in *Transportation Management Corp.* unanimously affirms

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158. *Id.* at 2474-75. The Court stated:

> We also assume that the Board might have considered a showing by the employer that the adverse action would have occurred in any event as not obviating a violation adjudication but as going only to the permissible remedy, in which event the burden of proof could surely have been put on the employer. The Board has instead chosen to recognize, as it insists it has done for many years, what it designates as an affirmative defense that the employer has the burden of sustaining. We are unprepared to hold that this is an impermissible construction of the Act.

Id.; *see also supra* note 46 and accompanying text.

159. 103 S. Ct. at 2474. The Court explained:

> [T]he Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation. It extends to the employer what the Board considers to be an affirmative defense but 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).

Id. (footnote omitted).

160. *Id.* (The employer carries the burden of proving that the discharge occurred for valid reasons.).

161. *Id.* at 2475 (quoting NLRB v. Weingarten, Inc., 420 U.S. 251, 266-67 (1975) (citations omitted)).

162. *Id.* 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.

Id.

163. *Id. See supra* notes 57-59 and accompanying text for a discussion of the facts and rationale of *Mt. Healthy*.

the Board's approach of characterizing the employer's responsibility as an independent affirmative defense, rather than as a shifting burden of persuasion.[164] In so doing, the Supreme Court has clarified the uncertainty that has plagued section 8(a)(3) law.

B. Clarification of the Elements Required to Establish a Section 8(a)(3) Violation

Transportation Management Corp. affects section 8(a)(3) law in two major ways. First, it clarifies the prima facie elements necessary to establish a section 8(a)(3) violation and the procedure for allocating the burden of proof in such an action. Second, it distinguishes dual motive analysis under the N.L.R.A. from title VII analysis, an approach used by some lower courts in their rejection of *Wright Line I*.[165]

As noted, the Court's decision affirms the Board's view that a prima facie violation exists when the General Counsel proves that antiunion animus contributed in any part to the discharge.[166] Moreover, the General Counsel's burden of persuasion of proving antiunion bias does not, at any time, shift.[167] It is in the Court's explicit recognition of agreement among the Board and the courts on this issue that the error in the First Circuit's reasoning becomes clear.[168] Although the lower courts have consistently held that the General Counsel possessed the ultimate burden of proving the elements of an unfair labor practice, the courts rejecting *Wright Line* required the General Counsel to prove an additional element: that a discharged employee would not have been fired "but for" the employer's unlawful motive.[169] The Supreme Court clearly disavowed this requirement in *Transportation Management Corp.*, stating that the employer's burden

164. 103 S. Ct. at 2475. *See supra* note 30 and accompanying text for a discussion of the procedural effect of an affirmative defense.

165. *See supra* notes 85-87 and accompanying text.

166. 103 S. Ct. at 2474-75. *Compare supra* text accompanying notes 153 & 156 *with Wright Line II*, 662 F.2d at 906 nn.11 & 12 (The General Counsel must prove two elements: that the employer had an unlawful motive *and* that the employer had no sufficient and valid reason for the discharge.).

167. 103 S. Ct. at 2474. *Compare supra* note 28 and accompanying text *with* note 155 and accompanying text. The Board and the lower courts had always agreed that the General Counsel bore the ultimate burden of persuasion. They disagreed, however, on the elements of a violation that the General Counsel was required to prove by a preponderance of the evidence to establish a § 8(a)(3) violation. *Compare supra* notes 113-14 and accompanying text *with supra* notes 83-84 and accompanying text.

168. *See Transportation Management Corp.*, 103 S. Ct. at 2474 ("We are quite sure, however, that the Court of Appeals erred in holding that § 10(c) forbids placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons.").

169. *See supra* note 166.

"does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under [section] 10(c)."[170] Thus, the Court has rejected the requirement that the General Counsel prove the legitimate business reason pretextual, a requirement some lower courts and commentators had read into *Wright Line*.[171] In so holding, the Court resolved the issue of whether the General Counsel must prove that the employer's discriminatory motive was the true reason or whether he must prove only that the discriminatory motive was *a* reason to establish a violation.[172]

The Court also clearly affirmed the Board's characterization of the employer's burden as an affirmative defense, holding that once sufficient evidence of antiunion animus has been introduced from which the fact finder may infer prohibited discrimination, a section 8(a)(3) violation is established.[173] The employer may then assert a legitimate and sufficient justification which, if successful, will shield that employer from liability.[174] The courts rejecting *Wright Line I* criticized this approach as unfairly requiring the employer to establish his innocence. However, under the Board's *Wright Line* analysis, now approved by the Supreme Court, the General Counsel establishes a prima facie case once an unlawful motive is established by a preponderance of the evidence, thus demonstrating the employer to be a wrongdoer.[175] The employer's "burden of persuasion" is, therefore, a true affirmative defense, because it allows the employer to avoid the violation by proving a fact unrelated to the prima facie elements of the violation.[176]

Furthermore, *Transportation Management Corp.* is, as the Court notes,

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170. *Transportation Management Corp.*, 103 S. Ct. at 2474 (footnote omitted). *See also supra* note 159 and accompanying text.

171. *See, e.g.*, *Wright Line II*, 662 F.2d at 906 n.12.

> Our disagreement with the Board may reduce to this: the Board apparently feels that the Act is violated by a showing of antiunion sentiment in connection with a discharge. It would then impose an affirmative defense upon the employer to negate the violation. In our view, by contrast, the Act is violated only when an employer with antiunion animus discharges an employee he would not have fired 'but for' the employee's union activities.

See also supra note 69 and accompanying text.

172. *Transportation Management Corp.* establishes that the General Counsel must prove by a preponderance of the evidence that antiunion animus contributed at least in part to the adverse action. 103 S. Ct. at 2474-75. Ironically, this appears to be an affirmation of the Board's original in-part test. *See also supra* note 64 for a comparison of the "in-part" and "but-for" quantum of proof.

173. 103 S. Ct. at 2474.

174. *Id. See also supra* notes 156-59 and accompanying text.

175. 103 S. Ct. at 2475.

176. *See supra* note 30 and accompanying text.

consistent with the Supreme Court's decision in *Mt. Healthy*.[177] The Court in *Mt. Healthy* determined that an employer accused of interfering with an employee's first amendment rights must prove legitimate cause for its adverse action in order to avoid the allegation.[178] Although *Mt. Healthy* arose in the context of first amendment guarantees, it raised issues similar to those in *Transportation Management Corp.* In *Mt. Healthy* the trial court had already determined that a constitutional violation had occurred when it gave the employer an opportunity to prove a legitimate reason for its action.[179] The Court, reasoning that an employee should not be able to insulate himself from discipline by merely engaging in constitutionally protected activity, gave the employer a means of avoiding the consequences of the violation.[180] The courts rejecting *Wright Line I* criticized the Board's reliance on *Mt. Healthy* in a labor context, because the section 10(c) requirement that the General Counsel prove the elements of a prima facie case is not applicable in a constitutional context. Therefore, the *Mt. Healthy* Court was free to require the employer to prove legitimate reason for its action. As the Supreme Court noted, however, the proof requirements of section 10(c) do not apply to the employer's burden of proving legitimate cause. Rather, section 10(c) applies only to the General Counsel's burden of proving that an employee's protected conduct was a motivating factor in the employer's adverse action.[181] Thus, as in *Mt. Healthy,* once the General Counsel in *Transportation Management Corp.* showed that antiunion bias contributed to the discharge, the burden that devolved upon the employer merely provided an opportunity to obviate the violation.[182] Because the two cases presented analogous issues, the Supreme Court in *Transportation Management Corp.* affirmed the Board's reliance on *Mt. Healthy*.[183]

In sum, the primary effect of the Supreme Court's affirmation of the *Mt.*

177. 103 S. Ct. at 2475.

178. *Mt. Healthy*, 429 U.S. at 287. *See also supra* notes 57-59 and accompanying text.

179. *Mt. Healthy*, 429 U.S. at 283, 287.

180. *Id.* at 285-86. *See supra* note 68-69 and accompanying text.

181. *Transportation Management Corp.*, 103 S. Ct. at 2474 n.6. As the Court observed, both the Act, *see supra* note 4, and the legislative history, *see supra* notes 40-42 and accompanying text, were silent on the procedural requirements for proving an affirmative defense. "The language [of § 10(c)] . . . requiring that the Board act on a preponderance of the testimony taken . . . places the burden on the General Counsel only to prove the unfair labor practice, not to disprove an affirmative defense." 103 S. Ct. at 2474 n.6. *See also supra* note 64, discussing proof of the "discrimination" element of § 8(a)(3).

182. 103 S. Ct. at 2474 ("[T]he Board's construction of the statute permits an employer to avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation.") *Id.*

183. 103 S. Ct. at 2475.

Healthy/Wright Line test is to reaffirm the "in-part" test of causation used explicitly prior to *Wright Line I* and implicitly by the Board since *Wright Line I,* and to extend to the employer an administratively created defense that allows the employer to avoid liability despite its section 8(a)(3) violation.

Of lesser consequence, the Court in *Transportation Management Corp.* clarified the distinction between the proof analysis used under title VII and the mixed-motive analysis applied under the N.L.R.A.[184] The Court, in a footnote, explained that the issue in title VII litigation is whether the actual cause of the adverse action is an illegal discriminatory motive; in a mixed motive case, the Board, if it adduces sufficient evidence, has already established the presence of an illegal motive and the existence of a violation.[185] The issue is not, therefore, whether discrimination occurred, but whether the employer would have taken the same adverse action in spite of its discriminatory motive, thereby excusing the employer under the "for cause" limitation in section 10(c). Consequently, in a mixed-motive case, determining whether the employer's asserted reason is a pretext is not at issue because both antiunion motive and legitimate business reasons have already been established as contributing to the adverse action.[186]

Thus, the Court concludes that title VII analysis is inapposite to section 8(a)(3) mixed motive cases.[187] The courts and commentators suggesting that title VII analysis should apply in all statutory discrimination cases reason that the ultimate burden of proving discriminatory intent should always remain on the complainant.[188] Furthermore, they argue that the

184. *See Transportation Management Corp.*, 103 S. Ct. at 2473 n.5. *Compare supra* notes 85-87 and accompanying text *with supra* notes 7-13 and accompanying text.

185. 103 S. Ct. at 2473 n.5. *See supra* note 64 for a comparison of title VII methodology with § 8(a)(3) analysis.

186. The presence of sufficient evidence from which the fact finder may infer antiunion animus is the determinative factor in finding a violation, not the sufficiency of the employer's asserted legitimate motive.

The Board, in a mixed motive discharge case under the N.L.R.A., is not concerned with the "real" or "true" cause as in title VII pretext analysis. *See supra* notes 85-87 and accompanying text. Instead, the Board has adopted the "camel's back" theory: if unlawful motive contributed in any part to the discharge (i.e., the motive that broke the camel's back), then a violation is established. *See Wright Line I*, 251 N.L.R.B. at 1091 (Member Jenkins, concurring). Member Jenkins, although the first to label the theory as the "camel's back" concept, merely stated the methodology that the Board had applied since passage of the N.L.R.A. *See supra* note 156 and accompanying text for Board precedent adopting the "in-part" standard. *See also* Truesdale, *supra* note 67, at 132; Note, *supra* note 25, at 232 n.34; NLRB v. Charles Batchelder Co., 646 F.2d 33, 42 (2d Cir. 1981) (Pretext analysis asks "What happened?" Mixed motive analysis asks "What would have happened if the unlawful motive were absent?"); *see also supra* note 64.

187. *Transportation Management Corp.*, 103 S. Ct. at 2473 n.5.

188. *See supra* notes 75-114 and accompanying text.

Supreme Court has advanced no plausible explanation for applying different procedural methodologies in different types of discrimination cases.[189] The Supreme Court, however, in *Transportation Management Corp.*, summarily rejected the notion that the procedural methodology of title VII universally applies to all types of discrimination cases. One commentator noted that application of the same standard of causation in all areas of discrimination "reflects an apparent failure to recognize the significant distinctions between the types of discrimination involved and the different legislative goals underlying these similarly worded enactments."[190] The Court's footnote recognizes that proof of the actual cause of the adverse action, as required by title VII analysis, was not the intent of Congress in enacting section 10.

The Court analyzed the legislative goals of the N.L.R.A. and determined that the NLRB's methodology, requiring only that a discriminatory motive be a factor in the adverse action, comports with the Act.[191] Although the purpose of the N.L.R.A. is to remedy the imbalance of power between employers and employees,[192] Congress sought to achieve this goal primarily by protecting the collective bargaining process.[193] The 1947 Taft-Hartley amendments to the N.L.R.A. were enacted, however, in part to preserve the employer's right to fire employees for cause, in the interests of maintaining an "efficient and productive" work force.[194] Specifically, the "for cause" amendment to section 10(c) was enacted at least in part because of Congressional disapproval of the Board's practice of inferring antiunion animus and reinstating employees who had engaged in gross

189. *See* Belton, *supra* note 30, at 1209; Note, *supra* note 8, at 334. This Note argues that the Board's *Wright Line* decision adopted a "but for" test requiring the General Counsel to prove "that the employee would not have been discharged 'but for' his protected union activities." The author concludes that the Board needs to move even further away from its "in-part" test, because it is inconsistent with the N.L.R.A., and the Board should adopt a procedure similar to title VII analysis.

190. *See* Brodin, *supra* note 64, at 310 n.80.

191. *See supra* notes 115-151 and accompanying text.

192. *See* S. REP. NO. 2926, 73d Cong., 2d Sess. 1 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 1 (1949) (The purpose of the N.L.R.A. is to "equalize the bargaining power of employers and employees . . . ."); *see also* American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 316-17 (1965) (purpose of N.L.R.A. is to remedy imbalance of power between employer and employee).

193. *See* DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle Upon the NLRA*, 66 GEO. L.J. 1109, 1115-16 (1978).

194. *See supra* note 111; *see also e.g.*, H.R. REP. NO. 1147, 74th Cong., 1st Sess. 19 (1935), *reprinted in* 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 3046, 3069 (1949); DuRoss, *supra* note 192, at 1116-17.

misconduct.[195] As the Court points out, section 10(c) governs standards of proof for the establishment of any unfair labor practice, not just mixed motive discharges.[196] In fact, the legislative history discusses only which party bears the burden of proving an unfair labor practice. It does not address the issue of affirmative defenses to violations, nor does it define how these defenses are to be established.[197] Thus, lower courts relied on legislative history which was silent on this issue.

Transportation Management Corp. is a permissible interpretation of congressional intent underlying section 10(c) in its provision for a means by which an employer may avoid the penalty of a section 8(a)(3) violation: demonstrating legitimate and sufficient business cause for its actions. This holding recognizes and balances the legitimate but competing interests of an employer's right to fire unworthy employees and an employee's right to engage in protected union activities.[198] In so doing, the Court adequately addressed the legitimate concerns of courts rejecting *Wright Line I,*[199] that the Board avoid sustaining unmeritorious claims.

In a section 8(a)(3) unfair labor practice complaint, the NLRB does not "weigh the various motives once it has been established that the employer's decision was tainted by animus."[200] Instead, the Board finds a violation if by a preponderance of the evidence the discharge was in any way motivated by antiunion bias. The Board's policy reflects the belief that "union activities, even if only the 'straw that broke the camel's back' should not deny employment to even a marginal employee."[201] Thus, the

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195. *See supra* note 111.

196. *See supra* note 181.

197. *Id.*

198. *Accord* Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978) (Thornberry, J., concurring). Judge Thornberry stated:

> [C]ompeting interests exist in the labor setting, but there Congress has already established a balance by passing the labor laws. That balance favors the employee, for Congress clearly recognized the superior bargaining position of the employer. . . . The 'but for' standard significantly restrikes this balance in favor of the employer, and such a test is contrary to Congressional policy . . . .

Id. at 1265. *But see* Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 22 (1947) (section 8(a)(3) analysis should apply the "but for" test to bring about closer scrutiny of the Board's findings on appeal and avoid erroneous reinstatement orders); Note, *supra* note 8, at 341.

199. *See, e.g., supra*, text accompanying note 107.

200. *See* Truesdale, *supra* note 67, at 132.

201. *Id.* Truesdale explains that:

> Implicit in the 'in part' concept is the conclusion that the employee's work-related difficulties and his union activities were *both* factors considered by the employer in deciding the appropriate discipline to be imposed, and that neither can be said to have been a sufficient cause for the discipline.

Id. (emphasis in original).

Board in administering the legislative intent of the N.L.R.A. has created a presumption in favor of employee protection. Requiring the General Counsel to prove the absence of an affirmative defense would destroy that presumption and improperly tilt the balance toward the employer[202] in contravention of established statutory labor policy. The Court's holding instead provides an impetus for both employers and employees to scrutinize carefully their actions in the workplace.[203]

Other important policy considerations underlie the holding of *Transportation Management Corp.* Allocating the burden of proof to the employer to demonstrate an affirmative defense comports with principles of fairness.[204] A requirement that the General Counsel prove an absence of legitimate cause would both add an element to the prima facie case not contemplated by section 10 of the N.L.R.A., and require the General Counsel to prove facts about which the employer has superior knowledge.[205]

Finally, the Supreme Court exercised judicial deference to the Board's interpretation of legislative intent, consistent with sound principles of judicial review.[206] Agencies charged with implementing complex legislative schemes, such as the N.L.R.A., are generally considered competent arbiters of disputes concerning their mandate.[207]

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202. *See* Comment, *The Motivation Requirement in Single Employee Discharge Cases*, 11 LOY. U. CHI. L.J. 501, 511-12 (1980). This author criticizes the "but for" analysis advocated by the First Circuit as destroying the N.L.R.A.'s presumption in favor of employee rights. The author states, "[u]nder the First Circuit's approach, if a legitimate reason for firing the employee exists apart from any antiunion motivation, the discharge does not violate the Act. Therefore, where an employer is found to have mixed motives for the discharge, he is presumed to have acted for a legitimate reason." *See also* Note, *supra* note 25, at 240.

203. *See* Brodin, *supra* note 64, at 318.

204. *See* Belton, *supra* note 30, at 1218 ("Considerations of fairness . . . are concerned with the possibility that evidence on a particular element may lie more within the knowledge or control of one party than another. A court's concern for fairness may lead it to allocate the burdens on that question to the more knowledgeable party." (citation omitted)).

205. *Accord* NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (proof of motivation is most accessible to the employer); 9 J. WIGMORE, EVIDENCE § 2486, at 290 (Chadbourne rev. ed. 1981) (plaintiff does not carry burden of persuasion when defendant has superior access to evidence).

206. *See, e.g.*, Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979) ("Since Congress has assigned to the NLRB the primary task of marking out the scope of the statutory language . . . the NLRB has special expertise . . . . The NLRB's judgment is subject to judicial review, but if its construction of the statute is reasonably defensible, it should not be rejected . . . ."); NLRB v. International Harvester Co., 618 F.2d 85, 87 (9th Cir. 1980) ("The Board's order will be enforced if the Board correctly applied the law and if the Board's findings of fact are supported by substantial evidence.").

207. *See, e.g., Ford Motor Co.*, 441 U.S. at 495 (The Board's "judgment as to what is a mandatory bargaining subject is entitled to considerable deference.").

III. CONCLUSION

In recognizing the "burden" cast upon an employer as an affirmative defense, the court has quieted the debate over whether the N.L.R.A. permits shifting the burden of persuasion to an employer. As even the lower courts rejecting *Wright Line* noted, the burden of persuasion remains at all times with the General Counsel under section 10(c).[208] Under the Supreme Court's analysis, if, after the General Counsel establishes the prima facie case by a preponderance of evidence, the employer's evidence fails to show that the employee would have been disciplined regardless of union activities, the court must find against the employer.[209] Consequently, the burden of persuasion has not shifted because the prima facie elements have already been established by the NLRB General Counsel.[210] Rather, the employer is charged with establishing an affirmative defense. What the lower courts had claimed was a shifting of the burden of persuasion was in fact confusion regarding the prima facie elements of a section 8(a)(3) violation and the Board's terminology used in *Wright Line*. The courts misinterpreted the *Wright Line* test as requiring proof of "but for" causation to establish a prima facie case, refusing to accept the Board's established "in-part" test in analyzing mixed-motive section 8(a)(3) charges.

Transportation Management Corp. reaffirmed the NLRB's long-standing interpretation of section 8(a)(3) and section 10 of the N.L.R.A., which provides substantially more protection for employee rights than does the methodology advocated by the First Circuit. The presumption in favor of employee rights is explicit in the legislative history of the N.L.R.A. and is reflected in NLRB decisions since passage of the Act. The Court endorsed the Board's interpretation of national labor policy and rejected an approach that would have markedly tipped the balance in favor of the employer. Significantly, however, it also recognized that the Board's *Wright Line* analysis reflects the legitimate but competing interest of the employer in firing employees for cause to maintain an efficient work force. By allowing the employer to establish an affirmative defense unrelated to the prima facie elements, the Court has maintained the balance created by Congress and endorsed the national labor policy goals set forth in the N.L.R.A.

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208. *See supra* notes 167-68 and accompanying text.

209. *Transportation Management Corp.*, 103 S. Ct. at 2474. *See supra* note 151.

210. *See Transportation Management Corp.*, 103 S. Ct. at 2474-75. The argument that the burden of persuasion shifts is only apposite if, as the courts rejecting *Wright Line I* held, the prima facie case includes two elements, both antiunion animus and "but for" causation. The Court, however, rejected this approach. 103 S. Ct. at 2474. *See supra* notes 166-72 and accompanying text.