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THE SCIENTER FACTOR IN SECTIONS 8(a)(1) AND (3) OF THE LABOR ACT: OF BALANCING, HOSTILE MOTIVE, DOGS AND TAILS*

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In the lockout decisions of 1965, the Supreme Court equated sections 8(a)(1) and (3) with respect to the hostile-motive requirement. The author examines the implications of this equation, contrasting the redundant role played by section 8(a)(1) in the lockout cases, where the focus was properly upon 8(a)(3), with the independent role played by 8(a)(1) in other cases. Where 8(a)(1) is merely the tail on the 8(a)(3) dog, the former should follow the latter, he concludes, since the policies which dictate the requirement of hostile motive in 8(a)(3) cases should apply equally to 8(a)(1) in its secondary, redundant role. But where 8(a)(1) is independently involved, different values are at stake and should lead to different treatment.

I

THE PROBLEM OF REDUNDANCY

Section 8(a)(1) of the Labor-Management Relations Act provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 . . . ."[1] In view of the encompassing nature of this protection, one wonders at the function of the other four subdivisions of section 8(a),

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[1] The Labor-Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964), amending 49 Stat. 452 (1935), provides:

> 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, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

which merely particularize some segment of the overall proscription contained in 8(a)(1).[2] Conversely, one also wonders at the function of 8(a)(1) itself where it overlaps with 8(a)(2), (3), (4), or (5).

The occasion for this wonderment is rooted in the legislative history of section 8(1) of the Wagner Act, the predecessor of section 8(a)(1). As stated by Senator Wagner:

> The first unfair labor practice in substance forbids an employer to interfere with, restrain, or coerce employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.
>
> This language follows practically verbatim the familiar principles already embedded in our law by section 2 of the Railway Labor Act of 1926, section 2 of the Norris-La Guardia Act, section 77 (p) and (q) of the 1933 amendments to the Bankruptcy Act, section 7 (a) of the National Industrial Recovery Act, and section 7 (e) of the act creating the office of the Federal Coordinator of Transportation.
>
> *Long experience has proved, however, that courts and administrative agencies have difficulties in enforcing these general declarations of right in the absence of greater statutory particularity.* Therefore, *without in any way placing limitations upon the broadest reasonable interpretation of its omnibus guaranty of freedom,* the bill refers in greater detail to a few of the practices which have proved the most fertile sources for evading or obstructing the purpose of the law.[3] [Emphasis added.]

The converse of the congressional concern over supporting the general declaration of right with particularizations is stated elsewhere in the legislative history:

> Section 8(1): This is a blanket unfair labor practice, to protect the rights cited in section 7 . . . . *Such a general unfair practice is necessary, since the courts may emasculate or construe very narrowly some one of the following specific unfair practices.* Furthermore, employers will doubtless find methods of interference, etc., which are not specifically recited in the other unfair practices, but are just as effective in impeding self-organization

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[2] The Labor-Management Relations Act (Taft-Hartley Act) § 8(a), 61 Stat. 140 (1947), 29 U.S.C. § 158(a) (1964), amending 49 Stat. 452-53 (1935), provides in part:

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ;

(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 . . . ;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

[3] Hearings on H.R. 6288 Before the House Committee on Labor, 74th Cong., 1st Sess. 13 (1935), reprinted in 2 Legislative History of the National Labor Relations Act 1935, at 2487 (1949) (published by the NLRB) [hereinafter cited as "Legislative History."].

and collective bargaining. Thus, subdivisions (2), (3), and (4) and [*sic*] are not exclusive, *and, furthermore do not limit the general scope of subdivision (1)*.[4] [Emphasis added.]

The concern of Congress to protect the unfair labor practice provisions of the Wagner Act against emasculation by the courts may be better understood if one recalls the judicial environment of the first three and a half decades of this century. In the eyes of many members of Congress in 1935, the courts had frustrated congressional intent in interpreting enactments affecting organized labor. Thus, the Sherman Anti-Trust Act of 1890[5] had been applied in highly questionable fashion to strike and boycott activities of unions.[6] And when Congress sought to rectify this judicial error in the Clayton Act of 1914,[7] hailed by Samuel Gompers as labor's Magna Charta, the Supreme Court thwarted the legislative purpose by interpreting sections 6 and 20 as merely codifying the common-law *status quo*.[8] Indeed, the unfriendliness of the Supreme Court of the mid-thirties to the will of Congress produced one of the gravest crises the American constitutional experiment has yet known, culminating in the ill-famed "Court-packing" plan of President Roosevelt.

What we have, then, in section 8(a)(1) is a blanket provision which protects all of the employee rights of section 7 against everything which the following four subdivisions of 8(a) more specifically protect against, and, in addition, affords independent protection against employer offenses not specifically covered by any of the other four subdivisions. When any one of the other four subdivisions is violated, 8(a)(1) is also violated; but

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[4] Comparison of S. 2926 (73d Cong., 2d Sess.) and S. 1958 (74th Cong., 1st Sess.): Memorandum of March 11, 1935, prepared for Senate Committee on Education and Labor, 74th Cong., 1st Sess. 26-27 (Comm. Print 1935), reprinted in 1 Legislative History 1351-52.

The House Committee Report on the Wagner Act, though more briefly stated, is in substantial accord. It reads in pertinent part:

> The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proved require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).

H.R. Rep. No. 969, 74th Cong., 1st Sess. 15 (1935), reprinted in 2 Legislative History 2924. Similarly, the Senate Committee Report states:

> The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome.

S. Rep. No. 573, 74th Cong., 1st Sess. 9 (1935), reprinted in 2 Legislative History 2309.

[5] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

[6] Loewe v. Lawlor, 208 U.S. 274 (1908), was the first case in which the Supreme Court held that the Sherman Act applied to combinations of workers. The case is discussed in Gregory, Labor and the Law 206-09 (2d rev. ed. 1958).

[7] Clayton Act §§ 6, 20, 38 Stat. 731, 738 (1914), 15 U.S.C. § 17 (1964), 29 U.S.C. § 52 (1964).

[8] Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), discussed in Gregory, supra note 6, at 162-72.

a violation of 8(a)(1) does not necessarily entail a violation of any other subdivision.

A moment's reflection will demonstrate the problem of redundancy here. Either 8(a)(1) occupies the field, in which event, once its contours are established, the other four subdivisions become irrelevant, or each of the other four occupies its particular field, in which event 8(a)(1) becomes irrelevant in the areas of overlap. Neither of these alternatives has, as yet, established supremacy. Instead, the NLRB and the courts have rocked along in a kind of non-definitive approach to the line of demarcation between the blanket provision of 8(a)(1) and the narrower ambit of the other four subdivisions. For a dozen years or so after the Wagner Act became law in 1935, there was no real problem of demarcation because of the breadth of discretion accorded the Board by the courts in determining when an unfair labor practice had been committed by an employer. The Taft-Hartley Act of 1947 was designed, however, to limit the Board's discretion by broadening judicial review of its determinations.[9] By a process of natural development thereafter, the scope of 8(a)(1) has come under a gradually increasing scrutiny. The problems inherent in a blanket provision which covers all that particularized provisions cover, and then some, have been brought into a sharpening focus.

II

The Confusing Lesson of the Lockout Cases

The focus has never been sharper than in the lockout cases, *American Ship Building*[10] and *Brown Food*,[11] and the companion case, *Darlington*,[12] all three decided by the Supreme Court in March of 1965. In the lockout cases, the Board's power under 8(a)(1) was equated in one very significant respect with its power under 8(a)(3). While this equation was not explicitly stated by the Court, analysis of the opinions in the two cases leads to this conclusion.[13]

In *American Ship Building*, the employer had locked out its employees for bargaining leverage after an impasse had been reached in negotiations

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[9] Compare Labor-Management Relations Act §§ 10(b), (c), (e), (f), 61 Stat. 146 (1947), 29 U.S.C. §§ 160(b), (c), (e), (f) (1964), with National Labor Relations Act, ch. 372, §§ 10(b), (c), (e), (f), 49 Stat. 453 (1935). The most important change was in §§ 10(e) and (f): "The findings of the Board with respect to questions of fact if supported by *substantial* evidence *on the record considered as a whole* shall be conclusive." The italicized language was added by Taft-Hartley. For a discussion of the effect of this change on judicial review, see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).

[10] American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965).

[11] NLRB v. Brown (d/b/a Brown Food Store), 380 U.S. 278 (1965).

[12] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).

[13] See, e.g., Oberer, "Lockouts and the Law: The Impact of American Ship Building and Brown Food," 51 Cornell L.Q. 193 (1966).

for a contract renewal. In *Brown Food,* the nonstruck members of a multiemployer bargaining unit had locked out their employees in response to a whipsaw strike; when the struck employer hired temporary replacements, the locking-out employers did likewise. In both of these cases the NLRB found violations of 8(a)(1) and (3).[14] In both cases the Supreme Court denied enforcement of the Board's orders.

The basis of the Court's action in each case was the same. Both 8(a)(1) and (3) require, the Court indicated, a "hostile motive" on the employer's part for a violation to be found. Accordingly, there must be affirmative evidence of such a motive *except where* the action of the employer is "inherently destructive of employee rights and is not justified by the service of important business ends . . . ."[15] As more fully stated by Mr. Justice Brennan in *Brown Food:*

> We recognize that, analogous to the determination of unfair practices under § 8(a)(1), when an employer practice is inherently destructive of employee rights and is not justified by the service of important business ends, no specific evidence of intent to discourage union membership is necessary to establish a violation of § 8(a)(3). This principle, we have said, is "but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct."[16]

This hostile-motive requirement (sometimes described as "antiunion" or "antistatutory") makes more sense as applied to 8(a)(3) than as applied to 8(a)(1). As stated by Mr. Justice Brennan in *Brown Food:* "We have determined that the 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive . . . ."[17] The necessity for this determination is explained by Mr. Justice Stewart in *American Ship Building:*

> Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. . . . Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. . . . Such a construction

[14] American Ship Bldg. Co., 142 N.L.R.B. 1362 (1963); John Brown (d/b/a Brown Food Store), 137 N.L.R.B. 73 (1962).
[15] NLRB v. Brown, supra note 11, at 287.
[16] Ibid.
[17] Ibid.

of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise.[18]

Both legislative history[19] and a substantial body of precedent[20] support this interpretation of 8(a)(3). The opposite is the case with respect to 8(a)(1). There is no necessity for reading a state-of-mind requirement into 8(a)(1). Its very purpose, as illuminated in the legislative history, is to serve as a blanketing protection, reaching beyond the limitations of 8(a)(3) and the other 8(a) subdivisions. Put otherwise, the purpose of 8(a)(1) is to afford the Board a vehicle for dealing with employer practices which "interfere with, restrain, or coerce" employees in the exercise of their statutory rights *without* running afoul of any of the other, more particularized subdivisions of 8(a). It undercuts this purpose to saddle 8(a)(1) with a state-of-mind requirement appropriate for 8(a)(3). In no case prior to *American Ship Building* and *Brown Food* has the Supreme Court sought so clearly to engraft the hostile-motive requirement on section 8(a)(1). Indeed, in *Burnup & Sims*,[21] a 1964 case in which the employer discharged two union activists in the honestly mistaken belief that they had threatened to dynamite his property if the union did not get in, the Court expressly stated:

> We find it unnecessary to reach the questions raised under § 8(a)(3) for we are of the view that in the context of this record § 8(a)(1) was plainly violated, whatever the employer's motive. Section 7 grants employees, *inter alia*, "the right to self-organization, to form, join, or assist labor organizations." Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias.[22]

The lockout cases demonstrate the dilemma confronting the Court in dealing with section 8(a)(1) as it relates to section 8(a)(3). From the standpoint of judicial review, an amorphously stated blanket provision is an unhappy thing to have lying around. By definition its confines are less sharply marked than those of narrower statutory standards. The tendency is to deal with the narrower standard at the expense of the broader. In cases of overlap between 8(a)(3) and 8(a)(1), the focus is typically on 8(a)(3). Where 8(a)(3) is found to have been violated, 8(a)(1) is accorded perfunctory, derivative treatment. Even where 8(a)(3) is found not to have been violated, a tendency is discernible in some cases of over-

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18 American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965).

19 The legislative history of § 8(a)(3) is reviewed in Local 357, Int'l Bhd. of Teamsters v. NLRB, 365 U.S. 667, 682-84 (1961) (concurring opinion of Mr. Justice Harlan).

20 E.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Associated Press v. NLRB, 301 U.S. 103, 132 (1937); Radio Officers' Union v. NLRB, 347 U.S. 17, 42-44 (1954); Local 357, Int'l Bhd. of Teamsters v. NLRB, supra note 19, at 674-77; NLRB v. Erie Resistor Corp., 373 U.S. 221, 227-28 (1963).

21 NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).

22 Id. at 22-23. [Footnote omitted.]

lap to deny any independent force to 8(a)(1); since 8(a)(3) is not violated, neither is 8(a)(1).[23] While this development is understandable and even makes sense in cases of overlap, the danger inheres that the derivative content given to 8(a)(1) in such cases will qualify it even where there is no overlap.

In this respect the scheme of the Wagner Act, unaltered by the Taft-Hartley amendments, leaves something to be desired. A blanket provision particularized in narrower provisions but not delimited by them is a legislative bull in a judicial china shop. Unless the particular controls the general in the areas of overlap, the particular is read out of the statute. At the same time, however, if the particular controls the general, the general is, in areas of overlap, read out of the statute; it becomes, to that extent, redundant.

The Supreme Court is very much aware of this dilemma even though it has not seen fit as yet to admit the fact. In *Darlington*, for example, decided at the same time as the lockout cases, Mr. Justice Harlan, writing for the Court, sought to evade the sticky 8(a)(1) questions involved by glibly treating the Board's disposition of the case as premised solely upon 8(a)(3). He stated:

> Preliminarily it should be observed that both petitioners argue that the Darlington closing violated § 8(a)(1) as well as § 8(a)(3) of the Act. We think, however, that the Board was correct in treating the closing only under § 8(a)(3).[24]

Accordingly, he limited his review of the case to an 8(a)(3) frame of reference. Actually, the Board found the closing to violate both 8(a)(3) and 8(a)(1), although the former received the focus of the Board's attention.[25] Section 8(a)(3) had been more definitively defined by the Board and the courts, however, so review on the 8(a)(3) basis was more convenient.

Similarly, in *Erie Resistor*,[26] the Court, Mr. Justice White writing, found it convenient to deal with the question before it as one of "whether an employer commits an unfair labor practice under § *8(a)* . . . when he extends a 20-year seniority credit to strike replacements and strikers who leave the strike and return to work."[27] [Emphasis added.] Sections 8(a)

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[23] See, e.g., Local 357, Int'l Bhd. of Teamsters v. NLRB, supra note 19; Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); Getman, "Section 8(a)(3) of the NLRA and the Effort To Insulate Free Employee Choice," 32 U. Chi. L. Rev. 735, 758-59 (1965). Burnup & Sims is an obvious departure from the pattern. It will be discussed in this regard infra.

[24] Textile Workers Union v. Darlington Mfg. Co., supra note 23, at 268.

[25] Darlington Mfg. Co., 139 N.L.R.B. 241, 252 (1962).

[26] NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).

[27] Id. at 221-22.

(1) and (3) could thus be dealt with fungibly, again avoiding the sticky questions presented by any differences in coverage between them.

These differences are substantial. Ignoring them does not make them go away. On the contrary, the felt need to ignore them demonstrates their importance. The importance of the differences is illustrated in the Supreme Court's still viable precedents dealing with section 8(a)(1) alone. Thus, in *Republic Aviation*[28] and *Babcock & Wilcox*,[29] the Court recognized the necessity in 8(a)(1) cases for the Board to balance the conflicting interests of the employees in their section 7 rights and of the employer in his property rights. Hostile motive was not a required element of the Board's finding of a violation of 8(a)(1). *Burnup & Sims*, as already seen, constituted a 1964 nailing down of the Court's view that employer motive is not an essential element in 8(a)(1) cases.

III

An Interpretation: Seeking Order in Disorder

How, then, can we justify the *American Ship Building* and *Brown Food* equation of 8(a)(1) and (3) with respect to the hostile-motive requirement? At the risk of over-simplification, I intend to essay this task. The Supreme Court's concern in *American Ship Building* and *Brown Food* was presaged in its decision of 1960 in the *Insurance Agents* case.[30] There it held that the Board had wrongfully injected itself into the substantive aspects of the collective bargaining between the employer and the union by ruling the union's slowdown or on-the-job strike a per se violation of the union's duty to bargain. The Act did not specifically outlaw slowdowns or half-strikes. Therefore, depriving the union of this economic weapon amounted to a tying of the union's hands with respect to free collective bargaining. This tying-of-hands flew in the face of the national labor policy favoring free collective bargaining, which entails the freedom of bringing pressure to bear upon the other party so long as the pressure has not been specifically outlawed. Similarly, in the lockout cases the Board had interjected itself between the parties in their collective bargaining by denying to the employers economic weapons not specifically barred by the Act.

All of this makes sense since the national labor policy, as declared by Congress, favors *free* collective bargaining. *But* the condition precedent to such bargaining is that the employees of a given employer be free to organize. Freedom to organize requires affirmative protection by the

28 Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
29 NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
30 NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960).

national government through the NLRB. What the right to organize must be protected against is employer power. Once the employees are organized, the right to bargain collectively does not require the same degree of affirmative protection. Indeed, protection of the employees at the bargaining stage against the exercise of employer *bargaining* power derogates from the freedom of collective bargaining, since it entails a Board thumb on the employee side of the bargaining scales. Of course, employer power may be used even at the bargaining stage for union-destroying (*i.e.*, anti-organization-right) purposes. For this reason, employer motive for the exercise of power is a vital factor at the bargaining stage.

Viewed in this fashion, the protection which the Board should properly extend to the employees qualitatively changes at the stage where the employees have become organized and recognition has been accorded to their union. The Board's involvement in the give-and-take of bargaining should be less than its involvement in the setting and preserving of the stage for collective bargaining.

Little disagreement is apt to be registered with this dichotomy between the Board's proper role in protecting the right of self-organization and its proper role in the bargaining process.[31] Unfortunately, however, it is a distinction more easily made in theory than in practice. Two obstacles impede the application of the theory. The first is that the language of section 8(a)(1) remains constant whatever the section 7 right involved. If employer conduct devoid of hostile motive constitutes an "interference with" the right of self-organization, as in *Republic Aviation*, by some sort of balancing process conducted by the Board, why should not the same statutory language permit the same balancing process where the right involved is that of bargaining collectively? The second obstacle is that all cases do not fall neatly into the one category or the other. The lockout cases, for example, reached the Court under sections 8(a)(1) and (3) only, whereas what really was at issue were the rights and duties of the parties in the process of collective bargaining. The fundamental 8(a)(5) charges had been mooted by the execution of new contracts while the cases were pending before the Board.[32]

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[31] The distinction is expressly noted by the Court in American Ship Building:

> The central purpose of these provisions [sections 8(a)(1) and (3)] was to protect employee self-organization and the process of collective bargaining from disruptive interferences by employers. Having protected employee organization in countervailance to the employers' bargaining power, and having established a system of collective bargaining whereby the newly coequal adversaries might resolve their disputes, the Act also contemplated resort to economic weapons should more peaceful measures not avail. Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party's bargaining power.

American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 317 (1965).

[32] Id. at 306 n.5. The Supreme Court made it quite clear in American Ship Building that

In the face of these two obstacles, what the Court has been striving to develop is a formula which is flexible enough to facilitate a circumscribing of the Board's power where circumscription is in order. The old balancing test was too loose a standard for accomplishing this in collective bargaining situations. The Board could weigh the section 7 right of the employees to engage in self-organization against the employer's right to run his business, as in the "no-solicitation rule" cases, and achieve the purposes of the Act, which are, most basically, to encourage collective bargaining. But when the Board applied the same balancing test to collective bargaining pressures, as in the lockout cases, it thwarted collective bargaining.

The new formula which the Court is evolving seeks to preserve what is good in the balancing test, while weeding out what is bad. At the same time, it seeks to accommodate prior decisions of the Court, premised upon the balancing approach, by means of a new rationalization of the "true" basis for such decisions. The new rationalization may entail two correlative theses. The first is that where sections 8(a)(1) and (3) overlap in their application to a problem presented, the more particular criteria of 8(a)(3) control. 8(a)(3) is the dog, and 8(a)(1) the tail. The second is that in cases where mere balancing produces an unsatisfactory result because too invasive of free collective bargaining or of management prerogatives, independent evidence of a hostile motive on the part of the employer is an essential ingredient of the unfair labor practice.

A. *The Dog-and-Tail Thesis*

In cases of overlap between sections 8(a)(1) and (3)—indeed, between 8(a)(1) and any other subdivision of 8(a)—there is strong reason for equating the general provision with the particular. Otherwise, the particular is read out of the statute. If, for example, the elements of 8(a)(3) properly include scienter, the same scienter must be required for 8(a)(1) in cases of overlap. Otherwise, the reason justifying the requirement of scienter in 8(a)(3) would be defeated; all prosecutions in such cases of overlap would be under 8(a)(1), the requirements of which would be satisfied by proof of the elements necessary under 8(a)(3) with the exception of the scienter element. Having found the commission of an unfair labor practice under 8(a)(1), the Board could grant the same relief as under 8(a)(3), since the Court has scotched any notion that the Board's remedial power under 8(a)(3) is greater than under 8(a)(1). *Burnup & Sims* constitutes a square holding to this effect.[33] The Board

its decision in favor of the employer would have been a fortiori under section 8(a)(5) by reason of the Insurance Agents case, supra note 30. Ibid.

[33] NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). See also NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962).

ordered the reinstatement of two discharged union activists on the basis of findings of violations of both 8(a)(3) and (1). The Supreme Court upheld the Board on the basis of 8(a)(1) alone, leaving the Board's remedial order intact.

Burnup & Sims does present some problems for the dog-and-tail thesis, but these can be reconciled, I believe, on the grounds that the wherewithal for the dog-and-tail analysis had not been fully provided by the Supreme Court until *Darlington* and the lockout cases, decided a year later, and that the hostile-motive requirement of the 8(a)(3) dog is itself a flexible requirement, subject to considerable judicial manipulation in appropriate cases. Because of this flexibility, the decision in *Burnup & Sims* would have been the same under 8(a)(3) as it was under 8(a)(1), as we shall see shortly.

Darlington is particularly instructive on the dog-and-tail point. The Board found the employer's closing of a plant in which a union had just won a representation election to be a violation of 8(a)(1) and (3).[34] But the Board's analysis of the closure question centered upon 8(a)(3), with 8(a)(1) thrown in as a tag-on, as it so frequently is. The Supreme Court, as we have seen, reviewed the case on the basis of 8(a)(3) alone. In so doing, however, the Court made it quite clear that its decision would have been the same under 8(a)(1), through what may be characterized as an application of the dog-and-tail principle. Mr. Justice Harlan, writing for the Court, stated:

> A violation of § 8(a)(1) *alone* . . . presupposes an act which is unlawful even absent a discriminatory motive. *Whatever may be the limits of § 8(a)(1)*, some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, *unless they also violated § 8(a)(3)*. Thus it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons. *But such action, if discriminatorily motivated, is encompassed within the literal language of § 8(a)(3). We therefore deal with the Darlington closing under that section.*[35] [Emphasis added.]

Thus it would appear that the incipient dog-and-tail theory with respect to 8(a)(3) and (1) is not confined in its potential to overlap cases where a finding of violation is *upheld* under 8(a)(3), and where, as a consequence, the violation of 8(a)(1) is established *derivatively* (one aspect of the dog-and-tail analysis). The Board's 8(a)(3) determination was *not* upheld in *Darlington;* instead, the case was ordered remanded to the Board for further findings as to whether the purpose and effect of the closing was to "chill unionism" in other plants of a multi-corporation

[34] Darlington Mfg. Co., 139 N.L.R.B. 241, 252 (1962).
[35] Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965).

structure. Nor would it seem that the Board can control whether a given case is to be reviewed under 8(a)(3) or 8(a)(1) by the choice it makes of the section to proceed under. In *Darlington*, it proceeded under both sections (although the finding under 8(a)(1) was apparently derivative), but the remand was confined to 8(a)(3) and the "chilling unionism" issues. If the Court had considered the 8(a)(1) question open to the Board despite the overlap with 8(a)(3), it is reasonable to conclude that its remand would have left the Board free to reconsider the case under *both* sections.

The only conclusion fairly to be drawn from the Court's handling of the *Darlington* case is that at least in *some* situations of overlap between sections 8(a)(3) and (1) the Board *must* proceed under the more particular provision, even if the Board's finding under 8(a)(3) turns out to be that no violation was committed. The derivative implication of such a finding would be that 8(a)(1) was not violated either. If this should be true in *any* situation of overlap, strong argument can be made that it should be true in *all;* important management prerogatives are at stake in all 8(a)(3) cases, in contrast to independent 8(a)(1) cases.

A definitional problem exists, to be sure, in determining when "overlap" is really present. Some cases will lie at the very periphery of 8(a)(3)'s scope—perhaps within, perhaps without—while falling more clearly within the broader compass of 8(a)(1). The question will arise as to whether the criteria of 8(a)(3) or of 8(a)(1) ought to control in such cases. But this is a problem of line-drawing, inherent in the law. Where the determination is properly made that the criteria of 8(a)(3) are applicable to a given case, strong reason exists to give those criteria pre-emptive force.

The logic which supports the equation of 8(a)(1) and (3) in areas of overlap likewise supports the equating of 8(a)(1) and the other subdivisions of 8(a) in areas of overlap. Again, unless the particularized dogs of 8(a)(2), (4), and (5) wag the generalized tail of 8(a)(1), the former will be read out of the statute. The Board will proceed along the line of least resistance, and this will be 8(a)(1). In cases of overlap between 8(a)(1) and 8(a)(5), for example, the state-of-mind requirement for an 8(a)(1) violation should be the same as that for 8(a)(5).[36]

Where there is no overlap, 8(a)(1) need not be chameleonic with respect to the state-of-mind requirement, but instead should have an independent coloration, determined by the character of the problem involved. The considerations pertinent to this proposition will be examined in a later section.

[36] See, e.g., Getman, supra note 23, at 758-59.

The alternative to the dog-and-tail interpretation of the lockout cases is that the Court has embarked upon an across-the-board equation of sections 8(a)(1) and (3) with respect to the hostile-motive requirement, intending to apply the latter in independent 8(a)(1) cases as well as in cases of overlap with 8(a)(3). While the Court may, indeed, have started down this path, there is reason to question the propriety of such a course. In any event, the contours of the hostile-motive doctrine must be examined.

B. *The Hostile-Motive Doctrine (With Escape Hatch)*

In determining whether employer conduct constitutes a violation of sections 8(a)(1) and (3), the Board has long engaged in weighing the prejudice to the section 7 rights of the employees against any legitimate business purpose sought to be served by the employer action. Where the former has outweighed the latter, the Board has found unfair labor practices to have been committed. This weighing process has been called the "balancing test." It has received the approval of the Supreme Court in a number of well-known decisions.[37]

At the same time, however, that the balancing approach was being formulated and approved, a parallel development was taking place with respect to section 8(a)(3). The motive of employer conduct which allegedly violated that section was coming under increasing scrutiny.[38] The two developments traveled a collision course.

The *Radio Officers* case[39] in 1954 provided the first occasion for the Supreme Court to clarify in definitive fashion the requirements of 8(a)(3). The Court held that while it is essential for a violation of 8(a)(3) that the employer's motive in discriminating against an employee be to encourage or discourage membership in a labor organization, "specific evidence of intent to encourage or discourage is not an indispensable element of proof . . . ."[40] The Court explained:

> Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequences of his conduct.[41]

This formulation of the state-of-mind requirement for 8(a)(3), and of the character of proof necessary to establish state-of-mind, was re-

[37] E.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); NLRB v. Truck Drivers Union, 353 U.S. 87 (1957) ("Buffalo Linen").

[38] See, e.g., cases cited in note 20 supra.

[39] Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

[40] Id. at 44.

[41] Id. at 45. [Footnote omitted.]

endorsed at some length by the Court in 1963 in *Erie Resistor*, the super-seniority case. However, the balancing power of the Board remained viable. As stated in *Erie Resistor*, the necessary intent may be:

> [F]ounded upon the inherently discriminatory or destructive nature of the conduct itself. The employer in such cases must be held to intend the very consequences which foreseeably and inescapably flow from his actions and if he fails to explain away, to justify or to characterize his actions as something different than they appear on their face, an unfair labor practice charge is made out. [Citing *Radio Officers.*] But, as often happens, the employer may counter by claiming that his actions were taken in the pursuit of legitimate business ends and that his *dominant* purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless, his conduct *does* speak for itself—it *is* discriminatory and it *does* discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. As is not uncommon in human experience, such situations present a complex of motives and *preferring one motive to another is in reality the far more delicate task*, reflected in part in decisions of this Court, *of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct*. This essentially is the teaching of the Court's prior cases dealing with this problem and, in our view, the Board did not depart from it.[42]
> [Some emphasis added.]

Erie Resistor constitutes, then, an attempted reconciliation of the hostile-motive requirement and the balancing test in 8(a)(3) cases. The balancing process becomes a means for establishing motive, for "preferring one motive to another." Most sympathetically viewed, what this seems to mean is that where there is no independent evidence of hostile motive, the Board may infer the motive if the employer interest on the scales is outweighed by the section 7 rights of the employees. Less sympathetically viewed, what is involved is the pinning of a fictitious hostile-motive label on the product of the balancing process. Whether one judges this "reconciliation" to be a laborious exercise in judicial obfuscation or an ingenious clarificaton, it set the stage for the "hostile-motive-doctrine-with-escape-hatch" which emerges, full blown, in the lockout cases.

1. *Intent and Motive Distinguished*

A slight digression may be in order at this point. A close reading of the foregoing passage from *Erie Resistor* reveals a distinction between employer *intent* and *motive* which is frequently overlooked in the analysis of

[42] NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-30 (1963). [Footnote omitted.] The words "does," "is," and "does" in the sentence beginning "Nevertheless" are italicized in the original.

section 8(a)(3). The two terms are often used interchangeably by the Court (and others) in the 8(a)(3) context,[43] or smudged together under more generic rubrics, such as "scienter"[44] or "animus."[45] Clear analysis requires that intent and motive be segregated with respect to 8(a)(3) in view of the Court's reliance upon the "common-law rule that a man is held to *intend* the foreseeable consequences of his conduct," a reliance first announced as to 8(a)(3) in *Radio Officers*[46] and reiterated in *Erie Resistor*[47] and *Brown Food*.[48]

This common-law rule applies most classically to cases such as this: *A* points a gun which he knows to be loaded at a vital part of *B*'s anatomy and pulls the trigger, killing *B*. From this, without more, it may be presumed that *A* intended to kill *B*. However, it is open to *A* to seek to "explain away" or "justify" his act by showing, for example, that he shot in self-defense. If *A*'s motive *was* self-defense, then his intentional killing of *B* is justified or privileged; *A* has committed no offense.[49]

Similarly, if an employer discharges an employee who is actively engaged in seeking to organize the employer's plant, the employer may be presumed to *intend* to discourage union membership, since the latter follows not only foreseeably but, it would seem, inescapably from the employer's act, however much he might regret it, because of the loss of union leadership and the fear and suspicion generated among his employees. However, if the real *motive* for the discharge is shown to be a breach of shop rules by the employee, the discouragement of union membership is justified or privileged; the employer has committed no offense, despite the unavoidable, and hence *intended* (pursuant to the common-law presumption), consequence of discouraging union membership.

If it be objected that the consequence of discouraging union membership does not flow *utterly* unavoidably from the employer's act, the answer is that the same is true in the example of *A*'s shooting of *B*; instances where shootings, which fit the description of the deadly-weapon illustration above, do *not* eventuate in death are not uncommon. Nonetheless, the presumption (or inference) of the intent to achieve that which *almost* invariably follows from one's volitional act is part and parcel of the common-law rule the Court relies upon in seeking to bring harmony

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[43] See, e.g., Radio Officers' Union v. NLRB, supra note 39, in which, under the heading "Proof of Motive," the Court proceeds to discuss the "intent requirement." Id. at 44-45. The two terms are loosely used throughout the two lockout cases of 1965.

[44] See, e.g., ILGWU v. NLRB, 366 U.S. 731, 739 (1961).

[45] See, e.g., NLRB v. Brown, 380 U.S. 278, 286 (1965).

[46] See text accompanying note 41 supra.

[47] See text accompanying note 42 supra.

[48] NLRB v. Brown, supra note 45, at 287.

[49] For a discussion of the common-law rule as applied to deadly weapons, see Oberer, "The Deadly Weapon Doctrine—Common Law Origin," 75 Harv. L. Rev. 1565 (1962).

to its disparate precedents.[50] Any artificiality involved is the Court's and the common law's, not mine.

If the analogy to the common-law rule, as classically illustrated in the deadly-weapon example, is to hold true, the burden should fall upon the employer at least to raise the issue of his justifying motive by the presentation of supporting evidence.[51] Otherwise the trier of fact (the Board) is entitled to find against him on the basis of what is at minimum a prima facie case. Of course, employer justification may appear on the very face of the action he has taken. Indeed, this was the situation in the lockout cases, the justifiable employer motive being the utilization of *bargaining* pressures not specifically made unlawful by the statute. In such situations, the prima facie case is not made out, and the burden of countering the apparent justification, via independent evidence of hostile motive, is upon the "prosecution."

The foregoing discussion may make clearer the relation between intent and motive in 8(a)(3) cases. It may also demonstrate that what is really required to be present for a violation to be found under the evolving scienter doctrine is an employer *purpose* to undercut section 7 rights, rather than to serve legitimate employer interests. This "purpose" need not be demonstrated by independent evidence in all cases. Where it need not be so demonstrated, it is necessarily the product of inference or presumption—if, indeed, it is not a mere fictitious requirement, introduced in an effort to reconcile prior decisions, based upon the old balancing test where employer purpose was not in issue, with the emerging hostile-motive requirement. This requirement of a wrongful employer "purpose" is more accurately described in terms of "motive" than "intent," for reasons already stated.

2. *The "Escape Hatch": The Balancing Test Redefined*

Be this as it may, the "state-of-mind" requirement of 8(a)(3), as the Court reaffirms in the lockout cases, does not require specific evidence in all cases. In some cases, the very character of the employer's conduct

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[50] Ibid. The distinction between "presumption" and "inference" in the application of the rule is discussed id. at 1573-76.

[51] Two different varieties of motive are asserted by employers in defense against 8(a)(3) charges, as Professor Getman has pointed out, and the failure of the courts to distinguish between them has been the source of "long-standing confusion":

> The typical 8(a)(3) case involves the discharge or discipline of an employee active in union activities. The employer defends on the grounds that the discharge was not based on union activity, but on poor work or misconduct. In the second type of case the employer seeks to defend action admittedly taken in response to union activity on the grounds that it was intended to serve a proper business purpose.

Getman, supra note 23, at 743. The first variety of motive defense has always been recognized and is clearly legitimate. The second is less persuasive and raises delicate balancing problems.

will carry "its own indicia of improper intent."[52] As I read the lockout cases, employer conduct will carry such indicia in two situations: (*1*) where the employer has no significant legitimate business reason for actions which undercut the section 7 rights of his employees; (*2*) where the employer does have a significant business purpose, but his actions, nevertheless, are so destructive of employee rights as not to be "tolerated consistently with the Act."[53] While my interpretation is by no means self-evident from a reading of the opinions,[54] it is supported by the most tenable statement of the evolving doctrine to be found in the lockout cases. As formulated by Mr. Justice Brennan in *Brown Food*:

> When the resulting harm to employee rights is thus comparatively slight, *and* a substantial and legitimate business end is served, the employers' conduct is prima facie lawful. Under these circumstances the finding of an unfair labor practice under § 8(a)(3) requires a showing of improper subjective intent.[55] [Emphasis added.]

Moreover, my interpretation serves to accommodate *Republic Aviation* and *Erie Resistor*, both treated by the Court as still alive and kicking.[56] *Republic Aviation* qualifies under the first exception to the requirement of independent evidence; *Erie Resistor* qualifies under the second.

One way of describing what the Court has done in the lockout decisions, then, is to say that it has merely redefined the balancing test.[57] The purpose of the balancing is to ascertain whether independent evidence of hostile motive is necessary. If, weighing the interest served by the employer conduct against the harm done to employee rights, the employee interest is much weightier, there is an unfair labor practice, without more. In such a situation it may be said that an inference of hostile motive is supported by the evidence. The new definition requires, simply, that the scales be more out of balance than was necessary under the old balancing test, sufficiently so that an inference of hostile motive is more solidly based. The requisite basis should exist in the two situations previously delineated. In the first, it is more reasonable to infer a wrongful

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[52] NLRB v. Brown, 380 U.S. 278, 287 (1965).

[53] Id. at 286.

[54] For a fuller discussion of this problem of interpretation, see Oberer, supra note 13, at 214.

[55] NLRB v. Brown, supra note 52, at 289. But see Mr. Justice Stewart's extreme and contrary view, writing for the Court in American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309 (1965):

> Nor is the lockout one of those acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation, as *might* be the case, for example, if an employer permanently discharged his unionized staff and replaced them with employees known to be possessed of a *violent* antiunion animus. [Emphasis added.]

[56] See, e.g., Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 269 & n.10 (1965); NLRB v. Brown, supra note 52, at 283, 287, 288, 291 & n.5; American Ship Bldg. Co. v. NLRB, supra note 55, at 309, 312.

[57] For a fuller discussion of this point, see Oberer, supra note 13, at 212-15.

employer purpose than a purpose to serve an *in*significant employer interest; *nothing* of significance in the way of justification appears on the employer's side of the scales. In the second, the employer interest served, while significant, is not adequate to justify an action "inherently destructive of" employee interests. *Erie Resistor* is the prime example here. As explained in *Brown Food*:

> The only reasonable inference that could be drawn by the Board from the award of superseniority—*balancing the prejudicial effect upon the employees against any asserted business purpose*—was that it was directed against the striking employees because of their union membership; conduct so inherently destructive of employee interests could not be saved from illegality by an asserted overriding business purpose pursued in good faith.[58] [Emphasis added.]

3. *Squaring the New Test With Precedent*

A question arises as to whether this new balancing test or hostile-motive-doctrine-with-escape-hatch applies not only to 8(a)(3) cases and to 8(a)(1) charges which fall in the area of "overlap" with 8(a)(3), but also to independent 8(a)(1) cases. Since the 8(a)(1) charges involved in the lockout cases were of the overlap variety, the holding of the Court, narrowly interpreted, reaches only overlapping 8(a)(1) cases.

But even if a broader interpretation of the lockout cases is indulged, so as to extend their reach to independent 8(a)(1) violations, there still is a substantial enough "escape hatch" for the Board to be able to reach the same employer conduct it has traditionally proscribed under 8(a)(1). One way of verifying this conclusion is to examine the cases cited by Justices Goldberg and White in their separate opinions in the lockout cases as being in conflict with the hostile-motive requirement. Representative of their position is the following quote from Mr. Justice Goldberg's concurrence in *American Ship Building*:

> The Court states that employer conduct, not actually motivated by antiunion bias, does not violate § 8(a)(1) or § 8(a)(3) unless it is "demonstrably so destructive of collective bargaining" . . . or "so prejudicial to union interests and so devoid of significant economic justification," . . . that no antiunion animus need be shown. This rule departs substantially from both the letter and the spirit of numerous prior decisions of the Court. [Citing *Buffalo Linen, Republic Aviation, Babcock & Wilcox,* and *Burnup & Sims.*]
>
> These decisions demonstrate that the correct test for determining whether § 8(a)(1) has been violated in cases not involving an employer antiunion motive is whether the business justification for the employer's action outweighs the interference with § 7 rights involved. In *Republic Aviation* . . . for example, the Court affirmed a Board holding that a company "no-solicitation" rule was invalid as applied to prevent solicitation of employees on

[58] NLRB v. Brown, 380 U.S. 278, 287 (1965).

company property during periods when employees were free to do as they pleased, not because such a rule was "demonstrably . . . destructive of collective bargaining," but simply because there was no significant employer justification for the rule and there was a showing of union interest, though far short of a necessity, in its abolition. . . .

A similar test is applicable in § 8(a)(3) cases where no antiunion motive is shown. [Citing *Radio Officers* and *Erie Resistor*.][59]

While the force of Mr. Justice Goldberg's position must be conceded, it would appear that none of the cases cited by him in opposition to the Court's hostile-motive doctrine, as declared in the lockout cases, need be *decided* any differently under that doctrine, however different the *rationalization* might have to be. The Board's decision in *Buffalo Linen*[60] in favor of the locking-out employers was upheld by the Court on the basis of the Board's balancing power. This decision would be *a fortiori* under the hostile-motive test.

Republic Aviation would fall within the exception to the requirement of independent evidence of hostile motive since no significant business justification was shown for a rule barring union solicitation during non-work time. Accordingly, the only reasonable inference to be drawn is one of hostile motive on the part of the employer, despite the fact that the rule was not discriminatorily applied against union solicitation.

Babcock & Wilcox,[61] in which the Court concluded that the Board had *in*correctly found the section 7 rights of the employees to outweigh the employer's rights where union solicitation by *non*-employees on employer property was involved, would also be an *a fortiori* case under the hostile-motive doctrine. If a showing were to be made, as it was not, that other channels of communication between the non-employee organizers and the employees they sought to reach were not reasonably available, the decision should go the other way under *either* the old balancing doctrine *or* the new one with the hostile-motive facade.

Burnup & Sims,[62] the case presenting the most obvious difficulty under the hostile-motive doctrine, can be reconciled on the basis that firing union leaders on the ground of a mistaken belief that they have been guilty of dischargeable offenses is "demonstrably so destructive of employee rights and so devoid of significant service to any legitimate business end that it cannot be tolerated consistently with the Act."[63] The case therefore qualifies for the escape hatch formulated in the lockout cases. In the first place, a *mistaken* belief (particularly one based upon hear-

[59] American Ship Bldg. Co. v. NLRB, supra note 55, at 339-40. [Footnote omitted.]
[60] NLRB v. Truck Drivers Union, 353 U.S. 87 (1957).
[61] NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956).
[62] NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964).
[63] NLRB v. Brown, supra note 58, at 286.

say) is not a "significant" employer justification. Secondly, to treat such a mistake as an adequate ground for retaliation by the employer would subject the *discharged* employees to the ultimate penalty for activities rooted in section 7, and would also open the door to spurious claims of "mistake," difficult to disprove and "inherently destructive of" employee rights. In other words, the requirement of independent evidence of hostile motive should not be carried to a degree so destructive of section 7 rights.

The same rationale is applicable to *Radio Officers* and *Erie Resistor*, both of which are cases to which the hostile-motive doctrine was applied by the Court and found satisfied.

4. *Summary*

In summary, then, the hostile-motive doctrine is the product of section 8(a)(3), not 8(a)(1). Even as to 8(a)(3), the doctrine should permit the Board to find a violation, without the support of specific evidence of hostile purpose, in any case where *either* (*1*) no significant legitimate business purpose appears for employer action which undercuts section 7 rights, *or* (*2*) in any event, the employer action is "inherently" or "demonstrably" "destructive of" section 7 rights. In these two situations, the purpose of the employer to discourage or encourage union membership (and, therefore, derivatively to "interfere with" section 7 rights) is presumed.

IV

INDEPENDENT 8(a)(1) VIOLATIONS

The propriety of extending the hostile-motive doctrine in mechanical fashion to all section 8(a)(1) cases, in the interests of symmetry and ease of review, is subject to question. What is right for section 8(a)(3) is not necessarily right for section 8(a)(1). The legislative history would seem to make this clear, as would the very language of 8(a)(1). What that section proscribes is "interference with, restraint, or coercion of" employees in the exercise of the rights guaranteed to them under section 7. In contrast to section 8(a)(3), no hint of a scienter requirement is present here. As stated by the Supreme Court in the *International Ladies' Garment Workers* case in 1961: "We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices [8(a)(1) and (2)] here involved."[64] *Burnup & Sims*, as previously seen, is to the same express effect.

This is not to say that motive is, or should be deemed, irrelevant in all 8(a)(1) cases. It is clearly relevant where it operates, for example, to

[64] ILGWU v. NLRB, 366 U.S. 731, 739 (1961).

deprive an employer of a privilege he would otherwise have to interfere with section 7 activities, as in the case of an apparently valid no-solicitation rule which is vitiated by evidence of an antiunion purpose in its promulgation or application.[65] Moreover, as we have seen, where 8(a)(1) overlaps with 8(a)(3), the scienter requirement of the latter should exist also for the former, on the dog-and-tail analysis. Similarly, in those independent 8(a)(1) cases which analogize closely to 8(a)(3), the motive apparatus of 8(a)(3), replete with "escape hatch," becomes relevant, usually because discharges or related disciplinary action is involved and a significant management prerogative therefore at stake.

For example, where the employer discharges employees for engaging in protected concerted activities which are unrelated to any union or unionizing effort, it is hard to make out an 8(a)(3) case. Discrimination is clearly present, but the added requirement of encouraging or discouraging union "membership," which includes union activities,[66] is apparently not involved, no union being on the scene. The case must therefore be dealt with under 8(a)(1) alone. Frequently, no serious problem of motive is present in such a case; the crucial question is whether the activity is protected. An example is *Washington Aluminum*,[67] where a group of unorganized employees engaged in a concerted refusal to work during a cold spell because the employer was not supplying enough heat. In upholding the Board's finding of an 8(a)(1) violation, the Supreme Court summarily rejected the employer's contention that:

> [B]ecause it admittedly had an established plant rule which forbade employees to leave their work without permission of the foreman, there was justifiable "cause" [under section 10(c)] for discharging these employees, wholly separate and apart from any concerted activities in which they engaged in protest against the poorly heated plant.[68]

No express motive analysis was indulged by the Court, although the consideration and rejection of the employer's contention that the discharges

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[65] See, e.g., Wm. H. Block Co., 150 N.L.R.B. 341 (1964). The proposition is broadly stated in NLRB v. Erie Resistor Corp., 373 U.S. 221, 227 (1963):

> When specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found, many otherwise innocent or ambiguous actions which are normally incident to the conduct of a business may, without more, be converted into unfair labor practices.

[66] See, e.g., Associated Press v. NLRB, 301 U.S. 103, 132 (1937); Radio Officers' Union v. NLRB, 347 U.S. 17, 39-40 (1954); American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 313 (1965).

[67] NLRB v. Washington Aluminum Co., 370 U.S. 9 (1962). See also NLRB v. Local 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464 (1953) ("Jefferson Standard"), a particularly interesting case because of the play between §§ 8(a)(1) and (3) evidenced in its history. The Trial Examiner and Board dealt with the case under *both* 8(a)(1) and (3), 94 N.L.R.B. 1507, 1508-12 (1951), as did the D.C. Circuit, 202 F.2d 186, n.2 (D.C. Cir. 1952), union activities being involved. But as the case was presented to the Supreme Court, it was premised on 8(a)(1) *alone*, for reasons not specified in the Court's opinion.

[68] NLRB v. Washington Aluminum Co., supra note 67, at 16.

were for "cause" under section 10(c)[69] entailed substantially the same analytical process. Obviously, the failure of the employees to obtain their foreman's permission to engage in a concerted work stoppage could not be deemed a justifiable "cause" for discharge, because of the implicit destruction of the right to strike. Similarly, it could not be deemed a justifiable "motive" for discharge. Whether a case like *Washington Aluminum* is analyzed in terms of the "cause" provision of section 10(c) or the hostile-motive doctrine of 8(a)(3), the result is thus the same.

While the "cause" or "motive" question was easily answered in *Washington Aluminum*, it may be presented in more difficult fashion in related situations. The employer may claim one of two justifications for the discharges: (*1*) that the discharges were for some cause unrelated to the protected concerted activity, such as incompetence; (*2*) that the discharges were for the very reason of engaging in the protected activity but under circumstances which should privilege the termination of employment. An example of the latter type of justification is the *Redwing Carriers* case.[70] There, the employer discharged and replaced teamsters who refused to cross a picket line set up by the Chemical Workers Union at a customer's plant. The Board found the employees' concerted refusal to be a protected activity under section 7, but, nonetheless, held that, in the absence of evidence of antiunion animus, the employer's action was privileged as a means of continuing the interrupted business relationship.[71] Accordingly, section 8(a)(1) was not violated, by analogy to *Mackay Radio*.[72] The Supreme Court denied the petition of the Teamsters Union, on behalf of the dismissed employees, for certiorari.[73]

This case, however, and others like it, would seem to fall, with little prodding, in the area of overlap with section 8(a)(3) and to be subject,

[69] The Labor-Management Relations Act § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964), provides in pertinent part: "No order of the Board 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."

[70] Redwing Carriers, Inc., 130 N.L.R.B. 1208 (1961), on remand, 137 N.L.R.B. 1545 (1962), aff'd sub nom. Teamsters Union v. NLRB, 325 F.2d 1011 (D.C. Cir. 1963), cert. denied, 377 U.S. 905 (1964).

[71] In its original decision, the Board found the concerted refusal to cross the picket line to be an unprotected activity under § 7, relying upon its prior decision in Auto Parts Co., 107 N.L.R.B. 242 (1953), an 8(a)(3) case. 130 N.L.R.B. at 1211. On reconsideration after remand from the D.C. Court of Appeals (on the Board's uncontested motion), the Board held that the activity was protected, but that, nonetheless, the employer was privileged to attempt to run its business "despite the sympathetic activities of the drivers here involved." 137 N.L.R.B. at 1547 (citing and relying upon NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938)). In so holding, the Board abandoned the distinction it had previously drawn in such cases between "replacement" and "discharge," quoting the Supreme Court's characterization of that distinction "in this context . . . as unrealistic and unfounded in law" in NLRB v. Rockaway News Supply Co., 345 U.S. 71, 75 (1953). 137 N.L.R.B. at 1547-48.

[72] NLRB v. Mackay Radio & Tel. Co., supra note 71.

[73] See note 70 supra.

therefore, to hostile-motive analysis on the dog-and-tail principle.[74] Discharge of employees for engaging in concerted *union* activities is surely discriminatory and, absent a justifying motive, would be presumed to be for the purpose of discouraging such activities. Had the discharged drivers in *Redwing Carriers* contended (as they apparently did not) that they had refused to cross another union's picket line because of their own union principles, section 8(a)(3) would seem to have been squarely involved. As the case is reported, the degree of involvement, if any, of the Teamsters Union in the refusal to cross the Chemical Workers' picket line does not appear.[75] The reason which was advanced for the refusal to cross was the fear of the drivers that physical harm would befall them at the hands of the picketers, and refuge was sought in section 502's "abnormally dangerous conditions of work" provision, which made their concerted refusal, they contended, not a strike.[76] The Board rejected this contention on the ground that other Redwing drivers had crossed the picket line with impunity "about 3,600 times."[77]

An examination of other categories of independent 8(a)(1) violations demonstrates little function for a hostile-motive gloss, other than to muddy-up waters which are now relatively clear and to render it a bit more difficult for the Board to protect the most fundamental section 7 right of self-organization.

The Fourteenth Annual Report of the Board, covering the fiscal year ending June 30, 1949, presents a representative, if not exhaustive, catalogue of independent 8(a)(1) violations:

> [S]urveillance of union activities; interrogation of employees concerning their membership in, or activities on behalf of a labor organization; polling employees with respect to their union views; threatening economic or physical reprisal for union activity; promising or granting wage increases

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[74] The Auto Parts case, supra note 71, on which the Board relied in its original Redwing Carriers decision, was dealt with under 8(a)(3). Moreover, in Sherry Mfg. Co., 128 N.L.R.B. 739 (1960), a case much like Washington Aluminum except that excessive heat instead of excessive cold prompted the concerted protected activity, the Trial Examiner found a violation of 8(a)(3). The Board, however, found an independent 8(a)(1) violation, stating: "unlike the Trial Examiner, we do not find Ramos' discharge to be a violation of Section 8(a)(3) of the Act. Ramos' action [in protesting the excessive heat] . . . was not related to union activities of any sort [the plant was unorganized], and, in the circumstances, her discharge, we find, in no way encouraged or discouraged membership in a labor organization." Id. at 740.

See also the history of the "Jefferson Standard" case in note 67 supra.

[75] The Board did, however, characterize the discharged drivers' refusal to cross the picket line as "sympathetic activities." Redwing Carriers, Inc., 137 N.L.R.B. 1545, 1547 (1962).

[76] The Labor-Management Relations Act § 502, 61 Stat. 162 (1947), 29 U.S.C. § 143 (1964), includes the following provision: "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act."

[77] Redwing Carriers, Inc., 130 N.L.R.B. 1208, 1211. This fact would seem to demonstrate that the refusal of the discharged drivers to cross the picket line was, indeed, motivated by *union* considerations. Thus it is arguable that 8(a)(3) applies.

> or other benefits to discourage union or other concerted activity; assaulting union supporters or organizers; blacklisting employees because of their union affiliations; assisting in the circulation of antiunion petitions; promoting resignations from a union or the withdrawal of a union's bargaining authority; attempting to deal individually with strikers in disregard of their duly designated exclusive bargaining agent; interfering with the attendance of employees at union meetings by rearranging work schedules or similar devices; and extending favored treatment to antiunion employees or to one of two rival unions.[78]

The Annual Report for the fiscal year ending in 1965 contains only two significant types of employer conduct not present in the foregoing independent 8(a)(1) catalogue: discharges for engaging in concerted activities protected under section 7, and no-solicitation-rule cases.[79]

A review of this 8(a)(1) catalogue demonstrates that, with few exceptions, what 8(a)(1) protects independently is the right to organize, free of employer "interference, restraint, or coercion." Since this right is the bedrock of the national labor policy, it merits particularly sensitive protection by the Board. Moreover, little in the way of legitimate management prerogative is ordinarily at stake in such cases, in contrast to cases falling within section 8(a)(3) or (5).

Some of the "independent" 8(a)(1) categories listed in the foregoing catalogue would seem to entail overlap with section 8(a)(3) and to be subject to hostile-motive analysis, anyway, on the dog-and-tail basis—*e.g.*, extending favored treatment to antiunion employees or to one of two rival unions; promising or granting wage increases or other benefits to discourage union activity.[80]

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[78] 14 NLRB Ann. Rep. 50-52 (1949).

[79] 30 NLRB Ann. Rep. 56-62 (1965).

[80] Whether the promising or granting of wage increases or other benefits to discourage union activity is properly to be dealt with under 8(a)(3) depends upon whether "discrimination" may be said to be involved. Clearly the other requisite for an 8(a)(3) violation—discouragement of union membership or activities—is present. By analogy to the lockout cases (Buffalo Linen, American Ship Building, Brown Food), the requisite element of discrimination would seem to be present. In those cases the discrimination requirement of 8(a)(3) is deemed to be satisfied if the employer acts for the purpose of discouraging union activities. Proof of the latter purpose satisfies also the discrimination requirement, despite the fact that the *entire* work force is treated in the *same* fashion. Why is it not, then, also discriminatory to grant a wage increase to an entire work force where the motive for doing so is shown to be to discourage union membership? On the *discrimination* point, both situations would seem to be the same: *all* of the employees are discriminated against in the sense that they are treated differently from the way in which they would be treated if it were not for their union activities.

This equation of discrimination with discouragement "denies any separate meaning to the former. . . . Discrimination as thus used includes any employer action taken in response to union activity." Getman, "Section 8(a)(3) of the NLRA and the Effort To Insulate Free Employee Choice," 32 U. Chi. L. Rev. 735, 737 (1965). The author discusses other cases in which the same *general* "discrimination" has been held to satisfy the requirements of 8(a)(3) and concludes that:

> The policy of insulating employees' jobs from their union activity or membership usually applies with as much force to cases of general retaliation as to cases in which the employer singles out those who engaged in union activity for special treatment.

Id. at 738.

Another category entails overlap with section 8(a)(5): attempting to deal individually with strikers in disregard of their duly designated exclusive bargaining agent.[81]

The balance of the categories of independent 8(a)(1) violations, not yet discussed, fall into two groupings: (*1*) threats of economic or physical reprisals; assaults; blacklisting; promoting antiunion petitions and resignations; (*2*) surveillance; interrogation; polling; no-solicitation-rule cases. The categories in the first of these groupings carry antistatutory hostility on their faces; requiring a hostile motive as to them would accomplish nothing. The real problem area, then, if the hostile-motive doctrine is extended to independent 8(a)(1) cases, is the second grouping.

Legitimate employer interest in the latter situations is so slight, and illegitimate employer interest so strong, as to deny any valid function to a hostile-motive requirement here. The old balancing-of-conflicting-legitimate-interests test has worked reasonably well in such cases. What that test amounts to is the rule of reason. It affords adequate protection to the employer interests on the scales and has the virtue of relative simplicity. No need exists for the engrafting of a hostile-motive requirement, the real purpose of which is to circumscribe Board power; if the Board finds the employer conduct to be violative, the remedy is merely a cease and desist order which protects the section 7 right with minimal invasion of any legitimate employer interest.[82] Typically, where the employer conduct reaches the stage of discharge or related disciplinary action, section 8(a)(3), with its prerogative-protecting motive paraphernalia, becomes involved.

Indeed, because of this minimal impact upon management prerogatives, even if the hostile-motive doctrine is extended to such independent 8(a)(1) cases, they should fall in the escape-hatch area where no independent evidence of hostility is required. This is another way of saying that the doctrine, soundly applied, would have no function here, other than to obscure analysis and lengthen opinions. Unsoundly applied, it

[81] With respect to 8(a)(5) (also 8(a)(2) and 8(a)(3)) overlaps with 8(a)(1), see id. at 758-61.

> The cases could be most easily harmonized and future developments made more rational if the rule were adopted that employer conduct affecting a change in hire, wages or working conditions, in response to union activity, does not violate section 8(a)(1) if it does not violate section 8(a)(3) or section 8(a)(5).

Id. at 761.

[82] This distinction between the impact on the employer of a cease and desist order and an order to reinstate with back pay is reminiscent of the Fifth Circuit's old "Tex-O-Kan" rule (NLRB v. Tex-O-Kan Flour Mills Co., 122 F.2d 433 (5th Cir. 1941)), rejected by the Supreme Court in NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962). The basis of the Court's rejection was that "there is no place in the statutory scheme for one test of the substantiality of evidence in reinstatement cases and another test in other cases." Id. at 407. This concern should not be present where the issue involved is the proper interpretation to be given to the language of § 8(a)(1) as distinguished from the different language of § 8(a)(3).

would have a most mischievous potential, endangering the protection traditionally accorded the seminal right of self-organization.

In summary, then, while motive is relevant in some independent 8(a)(1) cases, hostility to employee rights should not be a required element in all such cases. Perhaps the simplest and safest way to deal with motive in independent 8(a)(1) cases is to treat it as *presumptively irrelevant*, in contrast to 8(a)(3) cases and overlapping 8(a)(1) cases where it may be said to be *presumptively relevant*. If this approach were adopted, the extension of the hostile-motive doctrine, so modified, to independent 8(a)(1) cases would be subject to little objection. The Board, courts, labor bar, employers, and unions would know where they stand, since the traditional handling of such cases would be reaffirmed. No necessity would arise for a tortured "accommodation" of precedents, such as *Republic Aviation*, on the basis of a dubious inference or presumption of hostile employer purpose.

Conclusion

The hostile-motive doctrine is the product of section 8(a)(3), as to which it makes some sense. Application of the doctrine to overlapping 8(a)(1) cases makes sense also, since the alternative is to read 8(a)(3) out of the statute. On the basis of the legislative history of section 8(a)(1) and a textual reading of its language, the generic engrafting of the hostile-motive requirement on independent 8(a)(1) charges does not make sense. The purpose of the hostile-motive requirement is two-fold: (*1*) to protect the employer's prerogative "to select, discharge, lay-off, transfer, promote, or demote his employees for any reasons other than those proscribed by the act;"[83] (*2*) to keep the Board's thumb off the bargaining scales in order to preserve free collective bargaining. Neither of these purposes is typically served with respect to truly independent 8(a)(1) charges. The latter entail, most saliently, employer interference with the right of self-organization, a right which must be affirmatively protected if the national labor policy in favor of collective bargaining is to be effectuated, and which can be so protected with no significant sacrifice of legitimate employer interests.

Withal, extension of the hostile-motive doctrine to independent 8(a)(1) cases, pursuant to an interpretation of the lockout decisions which gives the doctrine generic 8(a)(1) application, need have no substantial effect upon existing Board policy *if* proper play is judicially afforded to the "escape hatch" of the doctrine. If a re-rationalization by the Board in such cases is the sole cost for circumscribing the Board's power to place

[83] 14 NLRB Ann. Rep. 59 (1949).

a thumb on the bargaining scales in situations akin to the lockout cases, and for protecting significant management prerogatives in 8(a)(3) cases where 8(a)(1) has merely redundant applicability, as in *Darlington*, the Supreme Court's price is not too steep to pay. But mere symmetry is hardly a compelling reason for extending a cumbersome doctrine developed for other cases and purposes to cases where it serves no legitimate function—where, indeed, it may do violence to legislative intent, statutory language, substantial precedent, and clarity of analysis. Both symmetry and sense might, however, be served by application of the doctrine to independent 8(a)(1) cases in a form so modified as to treat motive as presumptively irrelevant in such cases, in contrast to 8(a)(3) and overlapping 8(a)(1) cases where it may be said to be presumptively relevant. This approach would *assure* an expansive application of the "escape hatch" in independent 8(a)(1) cases and a consequent confinement of the requirement of specific evidence of hostile motive in such cases to the relatively few situations where significant employer prerogatives are involved.

In any event, the Court has still before it the problem of coming explicitly to grips with the scope of 8(a)(1), as related to 8(a)(3), in the light of the legislative history. The Board, invited by the ambiguity which presently enshrouds the scope of 8(a)(1), as compared to 8(a)(3), will likely afford the Court the opportunity to provide this clarification.