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NOTES

EMPLOYER MOTIVATION UNDER SECTION 8(A)(3) OF THE NATIONAL LABOR RELATIONS ACT

I. Introduction

Under section 8(a)(3) of the National Labor Relations Act, it is an unfair labor practice for an employer to encourage or discourage membership in a labor organization "by discrimination in regard to hire or tenure of employment. . . ."¹ This provision of the Act was designed "to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."² Protection of the right of employees to engage, or not to engage, in union activity is essential to an effective national labor policy. The importance of such protection was recognized not only in the present Act but also in the earlier Railway Labor Act³ and in the National Industrial Recovery Act,⁴ both of which contained provisions similar to section 8(a)(3). Since the passage of the Wagner Act in 1935⁵, Congress has not substantially changed section 8(a)(3).⁶ The major arena for the development of this provision of the Act has been the Supreme Court.

The focal point of the majority of cases that have arisen under section 8(a)(3) has been the determination of the standard of proof required to establish a violation. While it is clear that a specific showing of pro-union or anti-union motivation on the part of an employer is sufficient to sustain the finding of an 8(a)(3) violation,⁷ the extent to which a violation can be found absent such independent evidence of unlawful motivation is unclear. Certain general standards, however, serve as guidelines. Unlawful motivation may be inferred and an 8(a)(3) violation may be found, if an employer's conduct is such that it has an inherently destructive effect on employee organizational rights.⁸ Similarly, even when an employer's conduct has only a comparatively slight effect on employee organizational rights, but the employer cannot show

1 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 158(a)(3) (1964).

2 *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954).

3 44 Stat. 578 (1926), *as amended*, 45 U.S.C. § 152 (1964). *See Texas & N.O. R.R. v. Brotherhood of Ry. & S.S. Clerks*, 281 U.S. 548 (1930).

4 48 Stat. 198-99 (1933).

5 49 Stat. 449 (1935), *as amended*, 29 U.S.C. § 141 (1964).

6 Pub. L. 86-257, § 201(e), eliminated the following words from the original provision: "and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with sections 9(f), (g), (h)." 73 Stat. 525 (1959).

7 *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938). *See Associated Press v. NLRB*, 301 U.S. 103 (1937); *NLRB v. American Mfg. Co.*, 351 F.2d 74 (5th Cir. 1965); *NLRB v. California Date Growers Ass'n*, 259 F.2d 587 (9th Cir. 1958); *Allis-Chalmers Mfg. Co. v. NLRB*, 162 F.2d 435 (7th Cir. 1947).

8 *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954); *See Great Lakes Carbon Corp. v. NLRB*, 360 F.2d 19 (4th Cir. 1966); *NLRB v. Local 50, American Bakery & C.W.U.*, 339 F.2d 324 (2d Cir. 1964), *cert. denied*, 382 U.S. 827 (1965).

that it was motivated by sufficiently significant business reasons, the Board may find an 8(a)(3) violation.⁹ This Note will show that the unlawful motivation of the employer is the real basis for finding an 8(a)(3) violation in all cases, even if the latter test is applied. In any case in which the Board finds even the slightest discriminatory effect on employee organizational rights, a presumption is raised that the employer's conduct was unlawfully motivated.¹⁰ This presumption may be rebutted only by evidence indicating that the employer was motivated by "significant business reasons."¹¹

II. Proof of Unlawful Motivation

Although motivation of an employer is not specifically mentioned in section 8(a)(3) of the Act, the courts have attached a great deal of significance to it. In light of the legislative history surrounding the adoption of section 8(a)(3), such emphasis is probably not unwarranted.¹² The anti-union motivation of the employer was the basis for the finding of an 8(a)(3) violation in *NLRB v. Mackay Radio & Telegraph Company*,¹³ the first case in which the Supreme Court considered this section of the Act in depth. In this case, the Board had found that the employer had discriminated on the basis of union activity in rehiring strikers after an unsuccessful walkout.¹⁴ Mr. Justice Roberts, speaking for the Court, noted that although an employer has the right to replace economic strikers, he cannot refuse to rehire union officials after a strike "on account of their union activities"¹⁵

Similarly, in *Phelps Dodge Corporation v. NLRB*¹⁶ the Board had found that an employer had refused to hire certain men because of their affiliations with a labor union.¹⁷ The Supreme Court, holding that the employer's discrimination violated section 8(a)(3), stated:

The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which . . . is recognized as basic to the attainment of industrial peace.¹⁸

It appears that this pervasive policy of the Court, proscribing employer conduct that adversely affects employee organizational rights, caused a gradual relaxation of the standard of proof required to establish an 8(a)(3) violation. It was in this context that the Court in *Radio Officers' Union v. NLRB*¹⁹

9 *NLRB v. Great Dane Trailers, Inc.*, 87 S. Ct. 1792, 1798 (1967); *NLRB v. Brown*, 380 U.S. 278, 289 (1965); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 228-29 (1963).

10 *NLRB v. Great Dane Trailers, Inc.*, 87 S. Ct. 1792, 1798 (1967).

11 *Id.*

12 "[A]nything that is in motive discrimination, either as to promotion, reduction of force, or discharge is unlawful." 79 Cong. Rec. 2333 (1935) (remarks of Rep. Boland).

13 304 U.S. 333 (1938).

14 *Mackay Radio & Tel. Co.*, 1 N.L.R.B. 201 (1936).

15 304 U.S. at 347. *Cf. NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

16 313 U.S. 177 (1941).

17 *Phelps Dodge Corp.*, 19 N.L.R.B. 547 (1940).

18 313 U.S. at 185.

19 347 U.S. 17 (1954); *see Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961).

established the standard that has become known as the "foreseeable consequences" test. Under this standard, the effect that the employer's conduct could reasonably be foreseen to have on employee organizational rights is determinative of whether there has been an 8(a)(3) violation. As is apparent, this test is analogous to the foreseeable consequence test common in tort litigation.²⁰

The Court applied this standard to three cases decided in *Radio Officers'*. Two of the cases, *NLRB v. Teamsters Local 41*²¹ and *NLRB v. Radio Officers' Union*,²² involved section 8(b)(2) of the Act, which makes it an unfair labor practice for a labor organization "to cause or attempt to cause an employer to discriminate against an employee . . .,"²³ and derivatively section 8(a)(3). In *Teamsters Local 41* the Board adopted the finding of the trial examiner that the union had violated section 8(b)(1)(A) and (2) of the Act by forcing an employer to reduce an employee's seniority status because of his failure to pay union dues.²⁴ The trial examiner suggested that "[t]he normal effect of the discrimination . . . was to encourage nonmembers to join the Union, as well as members to retain their good standing in the Union. . . ."²⁵ The Eighth Circuit refused enforcement of the Board's order on the ground that the discrimination against the employee did not have the effect of encouraging or discouraging his adherence to the union.²⁶

In *Radio Officers'* the Board adopted the finding of the trial examiner that the union had violated sections 8(b)(1)(A) and (2) by forcing an employer to refuse to employ a union member because of a previous failure of the member to follow union rules in obtaining employment.²⁷ The trial examiner noted that the normal effect of this discriminatory conduct was to enforce compliance with the union rules on the part of all union members, not just the particular member who was denied employment.²⁸ Moreover, the effect of this discrimination was to encourage membership in the union because of its apparent strength in causing this employee to be, in effect, punished by the employer for a breach of union rules.²⁹ In enforcing the Board's order, the Second Circuit determined that the effect of the discrimination was substantial in that the "conduct displayed to all non-members the union's power and the strong measure it was prepared to take to protect union members."³⁰

In *Gaynor News Company*,³¹ the final case in this trilogy, the Board found that the employer had violated sections 8(a)(1), (2) and (3) of the Act by granting retroactive wage increases and vacation benefits to union employees

20 Cf. RESTATEMENT (SECOND) OF TORTS § 289 (1965); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 505 (1967).

21 196 F.2d 1 (8th Cir. 1952).

22 196 F.2d 960 (2d Cir. 1952).

23 61 Stat. 141 (1947), as amended, 29 U.S.C. § 158(b)(2) (1964).

24 *Teamsters Local 41*, 94 N.L.R.B. 1494 (1951).

25 *Id.* at 1506.

26 *NLRB v. Teamsters Local 41*, 196 F.2d 1 (8th Cir. 1952).

27 93 N.L.R.B. 1523 (1951).

28 *Id.* at 1545.

29 *Id.*

30 *NLRB v. Radio Officers' Union*, 196 F.2d 960, 965 (2d Cir. 1952).

31 93 N.L.R.B. 299 (1951).

while denying these benefits to nonunion employees. The Second Circuit enforced the order and disposed of the argument that the employer did not intend to encourage union membership as being unpersuasive since the conduct was "inherently conducive to increased union membership."³²

The Supreme Court, in finding unfair labor practices in each of the three preceding cases, offered the following rationale:

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. . . . Concluding that encouragement or discouragement will result, it is presumed that he intended such consequence.³³

Since "the desire of employees to unionize is directly proportional to the advantages thought to be obtained from such action,"³⁴ the employer's conduct in each of these cases was clearly violative of section 8(a)(3).

Radio Officers' was an explicit statement of a rule that was often only implied in prior decisions.³⁵ As a result of this holding, the Board had explicit authority to determine, through its expertise in labor matters, that certain employer conduct was of its very nature destructive of employee rights. Thus, it was not surprising that, in light of the factual account of *Radio Officers'*, the Board should conclude that certain agreements between employers and unions, such as union hiring hall arrangements, were per se unlawful because of their natural tendency to encourage union activities. In *Teamsters Local 357 v. NLRB*³⁶ the Board had found that a union hiring hall agreement was of its very nature violative of section 8(a)(3) through its discriminatory effect on casual employees who failed to seek employment through the hall. The Supreme Court refused to order enforcement of the Board's order and, relying on the legislative history of the Act, rejected the notion that union hiring halls are outlawed by section 8(a)(3).³⁷ The Court emphasized the fact that the hiring hall agreement specifically provided that there was to be no discrimination against casual labor.³⁸ Apparently, the Court did not consider whether the hiring hall *in fact* operated so as to discriminate against casual labor and nonunion labor.

Mr. Justice Clark, in his dissenting opinion, stressed this very point. Relying on *Radio Officers'*, he argued:

To test the contract here, I look to probable and anticipated "employee response" to it, . . . recognizing that "[e]ncouragement and discouragement are 'subtle things' requiring 'a high degree of introspective perception.'" . . . Just as in cases of his interference with protected activities, the escape valve of the employer's "true purpose" and "real motive" is to be tested

³² *NLRB v. Gaynor News Co.*, 197 F.2d 719, 722 (2d Cir. 1952).

³³ *Radio Officers' Union v. NLRB*, 347 U.S. 17, 45 (1954).

³⁴ *Id.* at 46.

³⁵ "Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement." *Id.* at 45 & n.53.

³⁶ 365 U.S. 667 (1961).

³⁷ *Id.* at 674.

³⁸ *Id.* at 675.

by the "natural consequences" and "foreseeable result" of his resort, however justifiably taken, to an institution so closely allied to the closed shop. I believe, as this Court has recognized, that "the desire of employees to unionize is directly proportional to the advantages *thought to be* obtained. . . ."³⁹

On this premise, Mr. Justice Clark suggested that the natural effect of the hiring hall agreement was to unlawfully encourage union membership.⁴⁰ The "self-serving declaration" of the hiring hall agreement, disclaiming any intention to unlawfully discriminate against casual labor, is of little consequence when compared with the effect on nonunion employees of the apparent union control of the employer's hiring practices.⁴¹

Mr. Justice Clark's argument is not without merit. The *effect* of a hiring hall is to encourage membership in the union. The fact that a stated *purpose* of the hiring hall agreement is to avoid unlawful discrimination is irrelevant if this purpose is not effectuated. *Radio Officers'* apparently gave the Board a *carte blanche*, subject to the substantial evidence rule, to determine whether employer conduct is inherently destructive of employee rights. *Teamsters Local 357*, however, operates as a limitation on this authority.

The possible effect of *Radio Officers'* was further limited by the requirement that the Board may consider conduct inherently discriminatory only in situations where the alleged discrimination was based solely on the employee's union activity.⁴² Thus, in *Pittsburgh-Des Moines Steel Company v. NLRB*⁴³ the Second Circuit refused enforcement of an order based on a finding by the Board that an employer had violated section 8(a)(3) by his failure to pay a Christmas bonus to employees who had engaged in a protracted strike. The court pointed out that "the true intent of the employer [is] irrelevant for all practical purposes *only* in situations where the employer's discrimination is based *solely* on union membership or activity."⁴⁴ (Emphasis added.) In this case, the employer had traditionally used a "Five Factor Formula" in determining the eligibility of employees to receive a Christmas bonus.⁴⁵ One of the factors considered in applying this formula was group productivity which, of course, is diminished during a strike. The court felt that it was reasonable to infer that the Christmas bonus was not paid to striking employees for a legitimate business reason — they had not earned it. Since the foreseeable consequence test of *Radio Officers'* could not be used to establish an 8(a)(3) violation, the Board's order could only be predicated on an actual finding of anti-union motivation.⁴⁶

39 *Id.* at 690-91 (dissenting opinion).

40 *Id.* at 693.

41 *Id.* at 692.

42 This requirement appears to be a fair inference from Mr. Justice White's opinion. The opinion consistently refers to the fact that unlawful union encouragement was the sole basis of the employers' conduct. 347 U.S. at 46, 47, 52. *But see Stark Ceramics, Inc. v. NLRB*, 375 F.2d 202, 205-06 (6th Cir. 1967); *NLRB v. Electric Steam Radiator Corp.*, 321 F.2d 733, 738 (6th Cir. 1963).

43 284 F.2d 74 (9th Cir. 1960).

44 *Id.* at 83.

45 *Id.* at 77.

46 *Id.* at 83.

A specific finding of unlawful motivation is often difficult to establish.⁴⁷ When the *Radio Officers'* test cannot be used, the Board often considers the circumstances surrounding the employer's conduct and any prior history of strife between employer and union as indicative of the employer's motive.⁴⁸ In *NLRB v. Savoy Laundry, Incorporated*⁴⁹ the Second Circuit enforced a Board order based on a finding by the Board that an employer had violated section 8(a)(3) by permanently closing part of his business after a union walkout. The employer's plea that the closing was due to business reasons was rejected because of his "frequent anti-union statements and repeated refusals to bargain. . . ."⁵⁰ Even under this method of proving motive, it is often difficult to establish that an employer has violated section 8(a)(3). This difficulty, however, was alleviated in part by the holding in *NLRB v. Erie Resistor Corporation*.⁵¹

III. The Balancing Test

In *Erie Resistor*, a landmark case in the history of section 8(a)(3), the employer, in an effort to maintain business operations during a strike, offered to allow a twenty-year seniority credit to strike-replacements and employees who abandoned the strike.⁵² Although it was clear that the employer had the right to replace economic strikers,⁵³ the union contended that the inducement used by the employer in obtaining replacements violated section 8(a)(3). This contention was based on the argument that, since the seniority standing of those workers who persisted in the strike was prejudiced, they were discouraged from participating in legitimate union activities. In fact, the union soon abandoned the strike under the pressure of this company tactic.⁵⁴ Without making findings as to the real motivation of the employer or of his business justifications under the circumstances, the Board found that the employer had violated sections 8(a)(1) and (3) since

[t]o excuse such conduct would greatly diminish, if not destroy, the right to strike guaranteed by the Act, and would run directly counter to the guarantees of Section 8(a)(1) and (3) that employees shall not be discriminated against for engaging in protected concerted activities.⁵⁵

The Third Circuit, however, failed to agree with the Board that a preferential

47 See *NLRB v. I. V. Sutphin, Co.*, 373 F.2d 890 (5th Cir. 1967); *NLRB v. National Seal*, 336 F.2d 781 (9th Cir. 1964); *NLRB v. Neiderman*, 334 F.2d 601 (2d Cir. 1964); *NLRB v. Murray Ohio Mfg. Co.*, 326 F.2d 509 (6th Cir. 1964); *Quality Castings Co. v. NLRB*, 325 F.2d 36 (6th Cir. 1963); *NLRB v. Dalton Brick & Tile Corp.*, 301 F.2d 886 (5th Cir. 1962); *NLRB v. Lewin-Mathes Co.*, 285 F.2d 329 (7th Cir. 1960).

48 *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197, 200 (5th Cir. 1967); *NLRB v. Austin Powder Co.*, 350 F.2d 973, 976 (6th Cir. 1965); *NLRB v. Murray Ohio Mfg. Co.*, 326 F.2d 509, 515 (6th Cir. 1964); *Quality Castings Co. v. NLRB*, 325 F.2d 36, 43 (6th Cir. 1963); cf. *Pepsi-Cola Bottling Co.*, 72 N.L.R.B. 601 (1947).

49 327 F.2d 370 (2d Cir. 1964).

50 *Id.* at 372.

51 373 U.S. 221 (1963).

52 *Id.*

53 *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345 (1938).

54 373 U.S. at 224.

55 *Erie Resistor Corp.*, 132 N.L.R.B. 621, 630 (1961).

seniority policy is a per se violation of section 8(a)(3),⁵⁶ and even suggested that "inherent in the right of an employer to replace strikers during a strike is the concomitant right to adopt a preferential seniority policy. . . ."⁵⁷

The Supreme Court, in affirming the Board, enunciated a balancing test that was to greatly lessen the difficulty of proving unlawful employer motivation and to transform section 8(a)(3) into a more powerful weapon in the union arsenal.⁵⁸

As is not uncommon in human experience, such situations [where employer conduct tends to discourage union activities] present a complex of motives and preferring one motive to another is in reality the far more delicate task . . . 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 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.⁵⁹

Applying this test, the Court found that the seniority plan offered by the employer was, by its very terms, discriminatory and not outweighed by any overriding business purpose.⁶⁰

Erie Resistor authorized the Board to make use of its expertise to balance the relative weight of employer business justifications with the effect on employee organizational rights. The granting of this authorization, however, did not entail a guarantee that the Board had untrammelled freedom to balance away certain management prerogatives. In *American Ship Building Company v. NLRB*⁶¹ the Board had found that an employer who had locked out his employees after a bargaining impasse had violated section 8(a)(3).⁶² The employer operated a highly seasonal drydock business in several port cities on the Great Lakes. A strike by the union during a peak business period would have rendered the employer unable to resist the union's demands. To obviate this possibility, the employer attempted to put pressure on the union by temporarily closing his operations during a slack season. The Board did not find any union hostility on the part of the employer, but rather rested its finding on the tendency of the lockout to discourage union activity while not being justified by any significant business reason.⁶³

The Supreme Court, in denying enforcement of the Board's order, recognized that certain management prerogatives could not be ignored by the Board.

There is of course no question that the Board is entitled to the greatest deference in recognition of its special competence in dealing with labor problems. In many areas its evaluation of the competing interests of employer and employee should unquestionably be given conclusive

56 *Erie Resistor Corp. v. NLRB*, 303 F.2d 359 (3d Cir. 1962).

57 *Id.* at 364.

58 One commentator has suggested that the "balancing test" was in use long before *Erie Resistor*. Oberer, *supra* note 20, at 503. See also 373 U.S. at 229 n.7.

59 373 U.S. at 228-29.

60 *Id.* at 231-32.

61 380 U.S. 300 (1965).

62 *American Ship Bldg. Co.*, 142 N.L.R.B. 1362 (1963).

63 *Id.* at 1362-63.

effect in determining the application of §§ 8(a)(1), (3) and (5). However, we think that the Board construes its functions too expansively when it claims general authority to define national labor policy by balancing the competing interests of labor and management. . . .

The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.⁶⁴

Mr. Justice White, the author of the Court's opinion in *Erie Resistor*, concurred with the majority in *American Ship Building*, but noted: "[The Court's] function is not to reject the Board's reasoned assessment of the impact of a particular economic weapon on employee rights. It is certainly not to restrike the balance which the Board has reached."⁶⁵

Following the same trend of limiting the power of the Board to balance away employer rights, the Court in *NLRB v. Brown*⁶⁶ rejected the Board's finding that an employer had violated section 8(a)(3) by using a lockout as a defensive tactic against whipsaw strikes directed against members of a multi-employer bargaining unit. The Court cautioned the Board not to act as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands."⁶⁷ Similarly, in *Textile Workers Union v. Darlington Manufacturing Company*⁶⁸ the Court suggested that at least one of management's prerogatives is absolute — the right to go out of business. When the employer, faced with the possible unionization of his plant, closed his business, the Board found that the closing was unlawfully motivated and, therefore, that the employer had violated section 8(a)(3) of the Act.⁶⁹ In refusing to order enforcement, the Court noted that the Act does not preclude an employer from closing his entire business "even if the liquidation is motivated by vindictiveness toward the union. . . ."⁷⁰ But, since the employer's plant was apparently a subsidiary of a larger enterprise, the case was remanded to the Board for further findings as to the purpose and effect of the closing.⁷¹ In cases involving certain management prerogatives, such as *Darlington* and *American Ship Building*, the Court has wisely circumscribed the balancing power of the Board.

Following this lead, Courts of Appeal have not hesitated to undertake independent evaluation and to reach a balancing analysis of their own when the Board has impinged upon employer rights.⁷² Thus, in *NLRB v. Lassing*⁷³

64 380 U.S. at 316-18.

65 *Id.* at 327 (concurring opinion).

66 380 U.S. 278 (1965).

67 *Id.* at 283.

68 380 U.S. 263 (1965). For an excellent comment on *Darlington*, see Bart & Kingston, *The Specter of Darlington — Reflections on an Employer's Right to Make a Change in his Business Operations*, 8 B.C. IND. & COM. L. REV. 55 (1966).

69 *Darlington Mfg. Co.*, 139 N.L.R.B. 241 (1962).

70 380 U.S. at 274.

71 *Id.* at 277.

72 *NLRB v. National Seal*, 336 F.2d 781 (9th Cir. 1964); *NLRB v. Murray Ohio Mfg. Co.*, 326 F.2d 509 (6th Cir. 1964); see Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 740 (1965); Note, *Proving an 8(a)(3) Violation: The Changing Standard*, 114 U. PA. L. REV. 866, 877 (1966).

73 284 F.2d 781 (6th Cir. 1960), *cert. denied*, 366 U.S. 909 (1961).

the Sixth Circuit held that a petroleum company may legitimately contract out its trucking operations even though this had the effect of eliminating the jobs of three employees. The court did not accept the finding of the Board that the employer had not acted for significant business reasons, even though one of these reasons was the desire to avoid the increased cost of operation due to unionization.⁷⁴

Generally, the balancing test of *Erie Resistor* has enabled the Board to more easily establish 8(a)(3) violations.⁷⁵ Apparently, the test was introduced simply because the motive of the employer was often difficult to establish.⁷⁶ The fact that certain management decisions are protected eliminates, to a certain extent, possible mischief in the application of the test.

The ultimate effect of the *Erie Resistor* balancing method was perhaps jeopardized by *NLRB v. Burnup & Sims, Incorporated*,⁷⁷ a pre-*Darlington* case based on section 8(a)(1). In *Burnup & Sims* the Supreme Court managed to avoid the necessity of considering whether section 8(a)(3) was violated by an employer who had discharged two employees who were active in union affairs and had allegedly threatened to dynamite the employer's plant. The Board had found that both sections 8(a)(1) and (3) had been violated.⁷⁸ The Fifth Circuit refused enforcement of the Board's order on the ground that the employer had acted in good faith in discharging the two employees.⁷⁹ The Supreme Court ordered enforcement of the Board's order and based this holding solely on a consideration of section 8(a)(1).⁸⁰

Burnup & Sims, as one writer has suggested, represents an "end run" around the unlawful motivation requirement of section 8(a)(3).⁸¹ If the decision were to be followed to its logical result, cases involving employer conduct that effectively terminates the employer-employee relationship, such as was involved in *Mackay Radio* and *Erie Resistor*, could now be resolved without consideration of the motivation requirement of section 8(a)(3).

Professor Oberer, in a persuasive article,⁸² has suggested that the Court's later opinion in *Darlington* indicates that the more particular requirements of section 8(a)(3) control where that section is applicable. This argument appears to have merit. *Darlington* was decided on section 8(a)(3) even though the more general section 8(a)(1) was also applicable.⁸³ The violation of the latter was derived from a finding of a violation of the former.⁸⁴ *Darlington*, however, goes no further than to say that the particular section 8(a)(3) controls the

74 *Id.* at 783.

75 *See e.g.*, *Stark Ceramics, Inc. v. NLRB*, 375 F.2d 202 (6th Cir. 1967); *New York Mailers' Union, Number Six v. NLRB* 327 F.2d 292 (2d Cir. 1964).

76 Cases cited note 47 *supra*.

77 379 U.S. 21 (1964).

78 *Burnup & Sims, Inc.*, 137 N.L.R.B. 766 (1962).

79 *NLRB v. Burnup & Sims, Inc.*, 322 F.2d 57 (5th Cir. 1963).

80 379 U.S. at 22.

81 Note, 114 U. PA. L. REV., *supra* note 72, at 878.

82 Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 501-02 (1967).

83 *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 267, 269 (1965); *see NLRB v. I. V. Sutphin, Co.*, 373 F.2d 890, 894 (5th Cir. 1967).

84 380 U.S. at 268-69.

general section 8(a)(1) in cases involving management prerogative.⁸⁵ But Professor Oberer suggests that since section 8(a)(3) controls in some cases, it should control in all.⁸⁶ Although *Burnup & Sims* has never been overruled, it has not had a profound effect on the unlawful motivation requirement of section 8(a)(3). However, the extent to which the tail, section 8(a)(1), will be allowed to wag the dog, section 8(a)(3), remains unclear.

IV. The Latest Development

The most recent pronouncement by the Supreme Court on the standard of proof required to establish an 8(a)(3) violation is *NLRB v. Great Dane Trailers, Incorporated*.⁸⁷ Involved was the question of whether an employer could unilaterally change his method of determining eligibility for vacation pay so as to deprive striking employees of vacation benefits. The Board adopted the finding of the trial examiner that the imposition of such a plan by the employer was in violation of section 8(a)(3) in that the conduct itself indicated that the employer had acted through anti-union motivation.⁸⁸

The Fifth Circuit denied enforcement of the Board's order on the ground that the finding of anti-union motivation was not supported by substantial evidence.⁸⁹ Basing this decision on the fact that anti-union motivation was not the *only* inference that could be drawn from the employer's conduct,⁹⁰ the court noted:

Although the record does not reveal any . . . alternative motives, we find it reasonable to infer that the Company might have acted (1) to reduce expenses; (2) to encourage longer tenure among present employees; or (3) to discourage early leaves immediately before vacation periods. We see nothing irregular about the failure of the Company to come forward with such evidence, although it might have benefitted their cause.⁹¹

This speculation by the Fifth Circuit as to what business reasons might have motivated the employer was rejected by the Supreme Court as an unauthorized extension of appellate review of Board findings of fact.⁹² The Court, per Mr. Chief Justice Warren, held that the failure of the employer to introduce any evidence of business justification for his conduct precluded an appellate court, and the Board, from guessing as to what his justification might have been.⁹³ The Court explained that

85 Mr. Justice White noted in *Darlington*: "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)." *Id.* at 269.

86 Oberer, *supra* note 82, at 502.

87 87 S. Ct. 1792 (1967).

88 *Great Dane Trailers, Inc.*, 150 N.L.R.B. 438 (1964).

89 *NLRB v. Great Dane Trailers, Inc.*, 363 F.2d 130, 135 (5th Cir. 1966).

90 *Id.* at 134.

91 *Id.*

92 87 S. Ct. at 1798.

93 "As the Court of Appeals correctly noted, the company came forward with no evidence of legitimate motives for its discriminatory conduct The company simply did not meet the burden of proof. . . ." *Id.*

once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that it was motivated by legitimate objectives since proof of motivation is most accessible to him.⁹⁴

Under this test, the Court did not consider whether the employer's conduct was inherently destructive of employee rights or whether it only affected these rights to "some extent."⁹⁵ In the absence of evidence showing business justification for the conduct, the fact that the Board could legitimately infer that one of the effects of the conduct was to discourage union activities required the finding of an 8(a)(3) violation.⁹⁶

Mr. Justice Harlan, in dissent, suggested that the requirement that the employer come forward with evidence of legitimate and substantial business justification is an "alteration" of the usual burden of proof in 8(a)(3) cases.⁹⁷ In *Erie Resistor*, however, the Court had declared that an employer can be held to intend the foreseeable consequences of his conduct 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."⁹⁸

Great Dane Trailers also involved the question of whether the conduct of the employer was inherently discriminatory.⁹⁹ There was no attempt either at the Board level or in the appellate court to balance the effect of the conduct against the possible business justifications for it. The Fifth Circuit was of the view that conduct could be considered inherently discriminatory only if the sole inference which could be drawn from the conduct is that of anti-union animus of the employer. The court then engaged in speculation as to other possible inferences in an attempt to show that the conduct in this case was not *per se* discriminatory.¹⁰⁰

The Supreme Court, however, went beyond a consideration of inherently discriminatory conduct. With a sweeping stroke, the opinion in *Great Dane Trailers* demanded that the employer introduce evidence of business justification in any case involving conduct prejudicial to employee organizational rights.¹⁰¹ This is apparently a reasonable requirement. Since evidence of business justification is usually available only to the employer, it is not an undue burden to require that he produce it. With such evidence available, the Board can more easily evaluate conduct and balance value than it could by engaging in speculation. Although the argument can be made that the requirement came as a surprise to the employer in the present case,¹⁰² the ultimate enforcement of the

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* at 1800 (dissenting opinion).

98 373 U.S. at 228.

99 "The sole act of the Company upon which the Board made its finding of anti-union sentiment was the refusal to pay the vacation benefits. In effect, the Board held this act to be an *ipso facto*, *per se* violation." 363 F. 2d at 134.

100 *Id.*

101 87 S. Ct. at 1798.

102 Mr. Justice Harlan, in his dissent, argued:

Such a penalty seems particularly unfair in view of the clarity of our recent pronouncements that "the Board must find from evidence independent of the mere

Board's order does not appear unfair. Even if the deprivation of vacation pay to certain strikers might not have affected the current strike, it is reasonable to conclude that it could have the long-term effect of discouraging union activities by, in effect, punishing those employees who had engaged in strikes in the past.¹⁰³

V. Conclusion

It is suggested that the distinction between the inherently discriminatory conduct test and the balancing test is largely illusory. The common denominator of the two is unlawful motivation. In the former, the conduct is such that unlawful motivation is apparent immediately. In the latter, such motivation is often unclear, but present nonetheless. The effect of the balancing test is that, if an employer cannot adequately justify his conduct when the conduct has some discriminatory effect, a presumption of anti-union motivation that has been in effect raised by the Board is not rebutted. *Great Dane Trailers* lends validity to this proposition. Thus, even though the difficulty of proving this motivation has significantly decreased since *Mackay Radio*, the unlawful motivation of an employer is still the basis of an 8(a)(3) violation.

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conduct involved that the conduct was primarily motivated by an antiunion animus" . . . and that "the Board must find that the employer acted for a proscribed purpose." *Id.* at 1800 (dissenting opinion).

103 *Cf. NLRB v. California Date Growers Ass'n*, 259 F.2d 587, 589 (9th Cir. 1958).