1983

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Diane Madenci

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LABOR LAW—EMPLOYER VIOLATES SECTION 8(a)(3) OF NLRA IF EMPLOYEE WOULD NOT HAVE BEEN DISCHARGED BUT FOR UNION ACTIVITY—BURDEN OF PERSUASION REMAINS WITH EMPLOYEE

Behring International, Inc. v. NLRB (3d Cir. 1982)*

In 1977, Teamsters Local No. 478 (Union) initiated a campaign to organize the warehouse employees of Behring International, Inc. (Behring), in Edison, New Jersey.1 The Union lost a representation election conducted by the National Labor Relations Board (Board) on April 25, 1977.2 Shortly after the election, Behring laid off eight employees and subcontracted with an outside firm to provide the services which the employees had performed.3 The Union subsequently filed unfair labor practice charges against Behring, alleging, inter alia,4 that the layoffs violated section 8(a)(3) of the National Labor Relations Act (NLRA)5 because Behring had acted in retaliation for the organized campaign.

* Editor’s Note: As a matter of policy, the Villanova Law Review generally treats decisions of the United States Court of Appeals for the Third Circuit in a single annual Third Circuit Review issue. This note is being published separately in view of the fact that the United States Supreme Court currently has sub judice the case of NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3373 (U.S. Nov. 16, 1983) (No. 82-168) on the issue of whether the burden of proving a § 8(a)(3) violation may be properly shifted to the employer.

1. Behring Int’l, Inc. v. NLRB, 252 N.L.R.B. 354, 356, rev’d in part and remanded, 675 F.2d 83 (3d Cir. 1982). Behring is engaged in the business of warehousing, and has locations in various parts of the U.S. Id. Only the Edison, New Jersey, warehouse was involved in this case. Id.

2. Id. No objections to the election were filed by the Union. Id.

3. 675 F.2d at 84. Three of the 14 warehouse employees were laid off about ten days after the election, and five more on June 3, 1977. Id. Behring subcontracted with an outside firm to provide replacement labor on May 26, 1977. Id.

4. In addition to the § 8(a)(3) charge, the Union alleged that Behring had committed several violations of § 8(a)(1) of the NLRA. 252 N.L.R.B. at 355. Section 8(a)(1) declares it to be an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 [§ 7] of this title.” 29 U.S.C. § 158(a)(1) (1976). For a discussion of the rights guaranteed by § 7, see note 13 infra.

Specifically, the Union charged that Behring violated § 8(a)(1) by granting wage increases and other benefits in order to undermine Union support, by interrogating several employees about their support of the Union, and by warning employees they would be discharged if they became or remained Union members. 252 N.L.R.B. at 355.

5. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(3) of the NLRA provides:

(a) It shall be an unfair labor practice for the employer . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discharge membership in a labor organization . . . .

Id.
the employees' support of the Union.  

At the hearing before an Administrative Law Judge (ALJ), Behring claimed that the employees were laid off solely for economic reasons.  

While accepting the economic motivation for the layoffs, the ALJ found that Behring had violated section 8(a)(3) in that the discharges were prompted “at least in part” by antiunion sentiments and that the company did not adequately support its economic defense “with probative evidence that it would have subcontracted out its operations at the time it did had it not feared the resumption of organizational activity.”  

The Board affirmed the finding of a section 8(a)(3) violation on the ground that Behring had failed to rebut the prima facie case of discrimination since, despite plausible economic motivation, it could not justify the timing of the discharges.

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6. See 252 N.L.R.B. at 366 n.43. Two of the laid-off employees were known by Behring to be union activists. Id. The Board, affirming the Administrative Law Judge’s finding of a § 8(a)(3) violation, noted that the laid off employees had either supported the Union actively or had not opposed the Union, while two employees who had attempted to call off the union representation election were retained. Id. at 345.

7. Id. at 362. Behring produced evidence at the hearing before the ALJ that it had first considered subcontracting in 1975. Id. Due to financial problems which developed during the latter part of 1976, subcontracting was then considered more seriously. Id. A study done by management in May, 1977 (shortly after the unsuccessful organizing campaign) indicated a possible savings of $50,000 per year to the company through subcontracting. Id.

8. Id. at 366. The ALJ stated that he was “prepared to accept [Behring’s] position that subcontracting the warehouse labor ultimately could be financially beneficial.” Id. The Board agreed with this finding. Id.

9. Id. (footnote omitted). A Behring supervisor testified before the ALJ that the layoffs were partially motivated by a desire to avoid future labor union problems. Id. at 362.

The ALJ found that “[t]he Respondent violated Section 8(a)(3) of the Act by permanently laying off or terminating [the eight employees] because of their support for and activities on behalf of the Union.” Id. For a discussion of the ALJ’s justifications for finding § 8(a)(3) violations, see note 6 supra.

10. The ALJ issued his order in June 1979, basing his finding of a § 8(a)(3) violation on the then applicable standard of whether the discharges were motivated in part by antiunion animus. 252 N.L.R.B. 354. For a discussion of the “in part” test, see notes 27-29 and accompanying text infra. In August 1980 the board formulated a new test of causation applicable to § 8(a)(3) cases, requiring the employer to rebut a prima facie case of discrimination with proof that legitimate motivation constituted “but for” causation of the discharge. Wright Line, A Div. of Wright Line, Inc., 251 N.L.R.B. 1083, 1089 (1980), enforced in part, 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982). For a discussion of the Wright Line test, see notes 35-50 and accompanying text infra. Thus, when the Board reviewed the ALJ’s findings in Behring in September 1980, it applied the Wright Line test. 252 N.L.R.B. at 354 & n.6. Despite the different standards applied, the Board affirmed the ALJ’s finding of a § 8(a)(3) violation. Id. at 354.

The Board found that the discharges occurred shortly after employer violations of § 8(a)(1). Id. The Board also noted that the laid-off employees had been praised for the quality of their work shortly before the discharges. Id. at 354. Finally, the Board deemed relevant the finding of the ALJ that two employees who had actively
On appeal, the United States Court of Appeals for the Third Circuit reversed in part and remanded, holding that once the General Counsel establishes that anti-union animus was a motivating factor in a discharge decision, the burden of producing evidence of a legitimate business reason for the discharge shifts to the employer, but the burden of persuasion remains upon the employee. Behring International, Inc. v. NLRB, 675 F.2d 83 (3d Cir. 1982).

In 1935, Congress enacted the NLRA, granting employees the right to organize and to bargain collectively. The NLRA protects employee exercise of these rights by prohibiting employers from engaging in certain unfair labor practices. For example, section 8(a)(3) of the NLRA prohibits an employer from encouraging or discouraging membership in a labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment." An employer violates section 8(a)(3) opposed the union were retained in essentially the same positions at higher rates of pay. Id.

The Board affirmed the ALJ's findings of fact and conclusions of law, but modified the ALJ's recommended order. Id. Deciding that the company's violations went "to the very heart of the Act" the ALJ granted injunctive relief ordering Behring to refrain from interfering "in any manner" with § 7 rights. Id. at 366-67. The Board had recently decided that such broad injunctive relief is warranted only when the employer has been "shown to have a proclivity to violate the Act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights." Hickmott Foods, Inc., 242 N.L.R.B. 1357, 1357 (1979). Because Behring's conduct did not meet this test, the Board modified the ALJ's order to proscribe only "like or related" conduct. 252 N.L.R.B. at 354 n.5.

11. The case was heard by Judges Gibbons, Weis and Garth. Judge Weis wrote the opinion of the court.

12. 29 U.S.C. §§ 150-169 (1976). The NLRA governs employers in businesses "affecting commerce," excluding federal, state, or municipal corporations, Federal Revenue Banks, and employers subject to the Railway Labor Act. Id. § 152(2). The NLRA protects the rights of employees of covered employers; excluded from the definition of "employee" are workers subject to the Railway Labor Act, independent contractors, domestic servants, workers employed by a parent or spouse, agricultural workers, and supervisors. Id. § 152(3).

13. Id. § 157. Section 7 of the NLRA provides in pertinent part: Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities. . . .

14. Id. § 158. Under § 8, the following employer conduct constitutes unfair labor practices: interference with or coercion of employees in exercise of rights guaranteed under the NLRA; domination of any labor organization; discrimination in terms of conditions of employment in order to encourage or discourage labor organization membership; discharge of or discrimination against an employee because he has filed charges under the NLRA; and refusal to bargain collectively with employee representatives. Id.

15. Id. § 158(a)(3). For the complete text of § 8(a)(3), see note 5 supra. See also S. REP. NO. 1184, 73 Cong., 2d Sess. 6 (1934). The report explains the purpose behind § 8(a)(3) as follows:

[I]f the right to join or not to join a labor organization is to have any real
when it engages in discriminatory conduct motivated by antiunion animus\(^6\) and may defend such a charge by asserting a legitimate business reason for its conduct.\(^7\)

meaning for an employee, the employer ought not to be free to discharge an employee merely because he joins an organization or refuse to hire him merely because of his membership in an organization. Nor should an employer be free to pay a man a higher or lower wage solely because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers.

*Id.*

*See also* Radio Officer's Union v. NLRB, 347 U.S. 17 (1954). In *Radio Officer's Union*, the Supreme Court explained the purpose of \(\S\ 8(a)(3)\): "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus \(\S\ 8(a)(3)\) is 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." *Id.* at 40 (footnote omitted).

16. *See, e.g.*, NLRB v. Brown, 380 U.S. 278, 286-87 (1965) (an employer violates \(\S\ 8(a)(3)\) if motivated by antiunion animus). Evidence of antiunion animus has been found in an employer's inconsistent application of employment practices. *See, e.g.*, Maple City Stamping Co., 200 N.L.R.B. 743, 753, 755 (1972) (employer's practice of assigning employees to maintenance work during slack time contradicted claim that union organizer was fired due to lack of work); E.I. du Pont de Nemours, 199 N.L.R.B. 1044, 1048-49 (1972) (shortly after union election employer made good on his threat to end longstanding practice of allowing employees failing promotional test to remain in the lower position).

Antiunion animus has also been found in the content of an employer's declarations after discharge of an employee. *See, e.g.*, Fred Stark, 213 N.L.R.B. 209, 212-16 (1974), *aff'd*, 525 F.2d 422 (2d Cir. 1975), *cert. denied*, 424 U.S. 967 (1976) (employer's statement, made four days after discharge, that union membership of employees was the cause of their discharge relevant to discriminatory motive); Loray Corp., 184 N.L.R.B. 557, 755 (1970) (employer's statements to union members on day following discharge indicated antiunion motivation behind discharge); Woody Pontiac Sales, Inc., 175 N.L.R.B. 218, 221 (1969) (employer's post-discharge statements revealed discriminatory motive behind discharge and discredited asserted legitimate reasons).

Surrounding circumstances may also be indicative of antiunion animus and imply the discriminatory motive. *See, e.g.*, Leon Ferenbach, Inc., 213 N.L.R.B. 373, 374-76 (1974) (coercive interrogation of employees, threats to close the business and discharge employees in the event of unionization, and creation of an impression of surveillance indicated a discriminatory motive in firing a known union supporter); Ace Tool Eng'g Co., 207 N.L.R. 104, 112-17 (1973) (employer's known antipathy to unions, knowledge of the discharged employee's union activities, and absence of any legitimate reason for the discharge indicated discriminatory motive); GTE Lenkurt, Inc., 204 N.L.R.B. 921, 950-1008 (1973) (management's instructions to supervisors to report the names of employees believed to be pro-union, and unlawful grant of benefits indicative of employer's discriminatory motive).


The reason for discharge advanced by an employer may be found to be untrue or, though true, a pretext for the prohibited action. *See, e.g.*, Leon Ferenbach, Inc., 213 N.L.R.B. 373, 374-76 (1974) (Board found that discharged employees, active in union, had performed adequately on the job; employer's claims to the contrary held to be pretextual); Warren Chateau Hall, Inc., 214 N.L.R.B. 351, 352 (1974) (Board found employer's claim that employees who had participated in union organizing were fired for allegedly reporting to work when unauthorized to be pretextual since a supervisor had signed their time cards); South Shore Pontiac Co., 203 N.L.R.B. 928, 934 (1973) (Board found employer's vague, trivial, and shifting reasons for the sudden discharge of an employee with an excellent record, shortly after a union election.
In *NLRB v. Great Dane Trailers, Inc.*, the Supreme Court sustained a charge of a violation of section 8(a)(3) where an employer denied accrued vacation benefits to strikers, while granting them to employees who had not joined the strike or had abandoned it before a certain date. The *Great Dane* Court held that in section 8(a)(3) cases, "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 he was motivated by legitimate objectives." Since the employer in *Great Dane* failed to produce any evidence of legitimate motivation after its conduct was established as discriminatory, it was found to have violated section 8(a)(3) of the NLRA.

Although *Great Dane* appeared to place some burden upon the employer, it was unclear whether this was the burden of producing evidence or the burden of persuasion. Additionally, *Great Dane* did not resolve the proper standard for judging an employer's actions which are motivated by

victory, incredible and pretextual); Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943) (where employer had tolerated alleged drunkenness and failure to work regularly for years, the firing of the employee upon joining the union was pretextual).


20. Id. at 34 (emphasis in original). The *Great Dane* holding distinguished employer conduct which is "inherently destructive" of important employee rights from conduct whose adverse effect on employee rights is "comparatively slight." Id. In the former case, an unfair labor practice can be found despite any evidence introduced by the employer of legitimate motivation. Id. In the latter case, if the employer offers evidence of legitimate motivation, antiunion motivation must be proved in order to find an unfair labor practice. Id.

It has been suggested that the *Great Dane* holding has been limited to cases where, as in *Great Dane*, an employer's overall policy is at issue. See DuRoss, *Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle Upon the NLRA*, 66 GEO. L. REV. 1109, 1127 n.90 (1978) ("no Board or court decision has directly applied the *Great Dane* standard to the discharge of a single employee"). See also *NLRB v. Wright Line, A Div. of Wright Line, Inc.*, 662 F.2d 899, 904 n.8 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982) (*Great Dane* is inappropriate to a case of a single discharge); Behring Int'l, Inc. v. NLRB, 675 F.2d 83, 89 (3d Cir. 1982) (*Great Dane* applies only to challenges to an employer's overall policy).

21. 388 U.S. at 34-35. The Court reasoned that proof of motivation is more accessible to an employer. Id. at 34. See also 9 J. WIGMORE, EVIDENCE, § 2486 (Chadbourn rev. 1981) (the common law has often imposed the burden of proof on the party who has peculiar means of knowledge, and who is thus in a better position to prove truth or falsity.)

22. 388 U.S. at 34. Enunciating the standard to be applied, the *Great Dane* Court stated that "once it has been proved that the employer engaged in discriminatory conduct . . . the burden is on the employer to establish that he was motivated by legitimate objectives." Id. Applying that standard to the facts of *Great Dane*, the Court concluded the employer had failed to meet its burden of proof since it had offered no evidence of legitimate motivation. Id. See also note 76 infra.
both legitimate and antiunion reasons. Since Congress did not intend section 8(a)(3) to interfere with an employer's prerogative to discipline or discharge an employee for reasons unrelated to the exercise of rights under the NLRA, the employer's "real motive" must be determined in order to sustain a charge of an 8(a)(3) violation. Several tests have been formulated to

23. Id. Since the employer did not offer any evidence of legitimate motivation, Great Dane did not consider the dual motive problem. Id.

For a discussion of dual motive employer conduct, see, e.g., Lippincott Indus., Inc. v. NLRB, 661 F.2d 112, 114-15 (9th Cir. 1982). In Lippincott, the court discussed the distinction between pretext and dual motive cases and concluded:

The perceived distinction [between pretext and dual motive cases], is more semantical than substantive. In either instance, the employer has asserted justifiable, legitimate business reasons for the discharge. The difference is that in a pretext case the employer's reasons are discredited or otherwise rejected, leaving only the impermissible reason, while in a mixed motive case the relative causative force of the employer's reasons is compared against the impermissible reason to determine whether the latter is the moving cause behind the discharge.

Id. at 114-15.

24. See S. REP. NO. 573, 74th Cong., 1st Sess. 11 (1935), reprinted in 2 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935 at 2311 (1935). The report states that "[N]othing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform." Id.

See also NLRB v. Condenser Corp. of Am., 128 F.2d 67, 75 (3d Cir. 1942) ("the employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute [NLRA] are not violated").

Section 10(c) of the NLRA emphasizes the fact that the Act does not interfere with an employer's decisions regarding his employees when those decisions are not based on antiunion sentiments. This section provides that "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." 29 U.S.C. § 160(c) (1976).

25. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46 (1936). In Jones & Laughlin, the union charged that the company had discharged several employees because of their union activities. Id. at 29. The Court affirmed a Board finding of violations of § 8(a)(3) stating that the employer's "true purpose is the subject of investigation." Id. at 46.

See also Associated Press v. NLRB, 301 U.S. 103 (1936). In Associated Press, the Court found that an employee was actually discharged due to his labor union activities and not due to poor performance as alleged by the employer, stating, "[t]he statute [NLRA] does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner." Id. at 132 (emphasis added). Used interchangeably with the term "real motive" are "real cause," and "moving cause." See NLRB v. Rubber Rolls, Inc., 388 F.2d 71, 74 (3d Cir. 1967); Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977). See generally Christensen & Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269 (1968).

An exception to the rule that real motive determines whether § 8(a)(3) has been violated has been created in the case of conduct which is "inherently destructive" of important employee rights. See NLRB v. Great DaneTrailers, Inc., 388 U.S. 26, 33 (1967). For a discussion of Great Dane, see notes 18-23 and accompanying text supra.
govern these dual motive cases. 26

In the early years in which it administered the NLRA, the Board established an extremely liberal standard which became known as the “in part test” 27 and which was accepted by most courts of appeals. 28 Under this test, the Board found a violation of section 8(a)(3) if antiunion sentiment motivated the decision in any part, despite the concurrent existence of legitimate reasons. 29 In NLRB v. Whitin Machine Works, 30 the First Circuit rejected the

26. For a discussion of the causation tests applied by the Board and circuit courts, see notes 27-34 and accompanying text infra.

27. See 3 NLRB Annual Report 70 (1938). The Report noted that “[w]here the employer has discharged an employee for two or more reasons, and one of them is union affiliation or activity, the Board has found a violation.” Id. See also 4 NLRB Annual Report 60 (1939). The 1939 Report found that employer conduct does not violate the Act “so long as the employer’s conduct is not wholly or in part motivated by anti-union cause.” Id.

28. The Sixth, Seventh, Eighth and Tenth Circuits applied the “in part” test consistently. See, e.g., NLRB v. Gogin, 575 F.2d 596, 601 (7th Cir. 1978); NLRB v. Retail Store Employees Union Local 876, 570 F.2d 586, 590 (6th Cir. 1978), cert. denied, 439 U.S. 819 (1978); Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970).

29. The Fourth, Ninth, and D.C. Circuits have applied both the “in part” and “dominant motive” tests in different cases. Compare Penaqutos Village, Inc. v. NLRB, 565 F.2d 1074, 1082-83 (9th Cir. 1977) and Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977) and Neptune Water Meter Co. v. NLRB, 551 F.2d 568, 569 (4th Cir. 1977) (in part) with Western Exterminator Co. v. NLRB, 565 F.2d 1114, 1118 (9th Cir. 1977) and Midwest Regional Joint Bd., Amalgamated Clothing Workers of Am. v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977) and Firestone Tire & Rubber Co. v. NLRB, 539 F.2d 1335, 1337 (4th Cir. 1976) (dominant motive).

30. The Second and Third Circuits have applied the “in part” test together with a “dominant motive” or but for test. See Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978) (General Counsel must establish that antiunion animus motivated the discharge at least in part. “The magnitude of the impermissible ground is immaterial ... as long as it was the ‘but for’ cause of the discharge.”); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978) (the discharge violates § 8(a)(3) if “it is partly motivated by reaction to the employee’s protected activity ... On the other hand, if the employee would have been fired for cause irrespective of the employer’s attitude toward the union, the real reason for the discharge is nondiscriminatory.”).

The Fifth Circuit has applied the “in part” test with recent modifications. See NLRB v. Southeastern Stages, Inc., 423 F.2d 878, 879 (5th Cir. 1970) (in part); NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978) (discharge is discriminatory if it is shown that the force of the antiunion purpose was “reasonably equal” to the force of the lawful motive).

29. See, e.g., Youngstown Osteopathic Hosp. Ass’n, 224 N.L.R.B. 574, 575 (1976), rev’d, 574 F.2d 891 (6th Cir. 1978). In Youngstown, the employer alleged he had discharged the employee because she was frequently absent and had fallen seriously behind in her work. Id. at 574. The employee was discharged shortly after the employer learned she had circulated a petition protesting another employee’s discharge, conduct which is protected by the Act. Id. at 574-75. In finding the employer had violated § 8(a)(3) the Board noted that the discharge could be found lawful only if the employee’s laxity were found to be the sole motivation, and stated that “[u]nder Board precedent if part of the reason for terminating an employee is unlawful, the discharge violates the Act ... That the employer has ample reason for discharging an employee is of no moment ... If the discharge is partly in reprisal for protected concerted activity, it is unlawful.” Id. at 575.

30. 204 F.2d 883 (1st Cir. 1953). In Whitin, the employer admitted that the
“in part” test in favor of a “dominant motive” standard.\textsuperscript{31} The Whitin court held that a discharge violates section 8(a)(3)\textsuperscript{32} only if, despite the assertion of legitimate reasons, “other circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire [an employee] than did dissatisfaction with his performance.”\textsuperscript{33} Nonetheless, the application of the “in part” test persisted before the Board and most other circuits until 1980 when the Board made a radical departure from its previous standard.\textsuperscript{34}

In \textit{Wright Line, A Division of Wright Line, Inc.},\textsuperscript{35} the Board adopted a “but employee’s solicitation of other employees’ names for union organizational purposes was a factor that “accelerated” the employee’s discharge. \textit{Id.} at 886-87. In light of this fact, the court found that the employee’s protected organizational activity was a “substantial or motivating reason, despite the fact that other reasons may exist” for the discharge. \textit{Id.} at 885.

31. \textit{Id.} The First Circuit rejected the “in part” standard on the ground that it insulated union adherents from discharge despite the presence of employee conduct which would constitute legitimate cause for dismissal. \textit{Id.}

32. \textit{Id.} at 888. The Whitin court affirmed the Board’s finding of a discriminatory discharge based on the court’s “dominant motive” test. \textit{Id.} See note 30 supra.

33. 204 F.2d at 885. \textit{See also} NLRB v. Billen Shoe Co., 397 F.2d 801 (1st Cir. 1968); NLRB v. Lowell Sun Publishing Co., 320 F.2d 835 (1st Cir. 1963). In Lowell, the First Circuit reversed the Board’s finding that an employee had been discriminatorily discharged, stating that “[t]he mere fact that [the employee] was a Union adherent does not immunize conduct, which would otherwise be grounds for discharge.” \textit{Id.} at 841. In Billen, the employer alleged he had discharged a union organizer for being “overbearing, insolent and insubordinate.” \textit{Id.} at 801. Although the Board found a § 8(a)(3) violation because the discharge had been based on the employee’s union activities, the First Circuit disagreed and refused to enforce the Board’s order, stating

It is all too easy to say that adequate cause for discipline was seized upon as pretextual in the case of union representatives. The fact that adequate cause for discharge is of peculiarly legitimate concern in such instances; management cannot run its plant if union organizers can ride roughshod on the basis of their position.

\textit{Id.} at 803.

The First Circuit later equated its “dominant motive” test with a “but for” standard of causation. \textit{See} Coletti’s Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977) (per curiam). In Coletti’s, the Board’s finding of discriminatory discharge was enforced, but based on “dominant motive” rather than the Board’s “in part” standard. \textit{Id.} at 1293-94. The First Circuit urged the Board to adopt the “but for” standard enunciated by the Supreme Court. 550 F.2d at 1293 (citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). The Board subsequently adopted the \textit{Mt. Healthy} “but for” standard as well as its procedural scheme. \textit{See} Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980), \textit{enforced on other grounds}, 662 F.2d 899 (1st Cir. 1981), \textit{cert. denied}, 102 S. Ct. 1612 (1982). For a discussion of the Board’s \textit{Wright Line} decision, see notes 35-50 and accompanying text infra.

For a discussion of the “dominant motive” causation test, see DuRoss, \textit{supra} note 20.

34. For a discussion of the Board’s \textit{Wright Line} test, see notes 35-50 and accompanying text infra.

35. 251 N.L.R.B. 1083 (1980), \textit{enforced on other grounds}, 662 F.2d 899 (1st Cir. 1981), \textit{cert. denied}, 102 S. Ct. 1612 (1982). The employer in \textit{Wright Line} asserted he had discharged the employee for falsifying his production time report. \textit{Id.} at 1094. The General Counsel gave evidence of the employer’s antiunion animus, including a
for” causation test which required a showing that the same action would have taken place even in the absence of Union activity. The Board found this test to be an appropriate compromise between the two positions represented by the “in part” and “dominant motive” tests, and better suited to accommodating the legitimate competing interests of the employer and employee. In addition, the Board required a shifting of the burden of proof to the employer.

Both the substantive “but for” test and the procedural shifting burden concept were based on the standard formulated by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, which involved an allegedly unconstitutional dual motive discharge. In Mt. Healthy, a teacher claimed that a school district decision not to rehire him, based in part on his exercise of first amendment rights, violated the constitution. The Court explained that its “but for” standard of causation, coupled with a shift in showing of hostility toward the discharged employee due to his active role in a union election two months earlier, the fact that the discharge occurred shortly after the election, and the employer’s previous practice of not discharging employees committing similar violations. Id. at 1093-96. The Board found that the employer failed to demonstrate that it would have taken the same action against the discharged employee in the absence of his union activities, and ruled that the discharge violated § 8(a)(3) of the Act. Id. at 1091.

36. Id. at 1089.
37. Id. at 1086-89. For a discussion of the “in part” test, see notes 27-29 and accompanying text supra. For a discussion of the “dominant motive” test, see notes 30-34 and accompanying text supra. The Board noted that the Supreme Court had rejected the “in part” test, because its analysis stops once a prima facie case of discrimination is established, without considering the possible existence of legitimate employer motivation. 251 N.L.R.B. at 1087 (citing Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). The Board pointed out that the “dominant motive” test had also been rejected by the Supreme Court due to the impracticability of determining which employer motive was “dominant” or “primary” in the decisionmaking process. Id. (citing Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977)). For a discussion of Mt. Healthy, see notes 39-44 and accompanying text infra.
38. 251 N.L.R.B. at 1086-89 (citing Mt. Healthy, 429 U.S. 274 (1977)). For a discussion of Mt. Healthy, see notes 39-44 and accompanying text infra.
40. Id. at 281-83.
41. Id. at 276. The school district conceded that its decision not to rehire Doyle was based on two reasons: (1) Doyle's communication to a radio station of the school's dress code for teachers (protected by the first amendment); and (2) his use of an obscene gesture in the school cafeteria (unprotected conduct). Id. at 282-83. Doyle claimed his rights under the first and fourteenth amendments were violated by the school district's decision. Id. at 276.
42. Id. at 286-87. The Supreme Court rejected the causation test employed by the district court which required a finding of a violation if the impermissible reason played a substantial part in the decision to discharge. Id. In formulating its own test of causation, the Court sought to avoid insulating the employee from a legitimate discharge based on his unprotected activity, while ensuring that the employee would be "placed in no worse a position than if he had not engaged in the conduct." Id. at 285-96. Thus, the Mt. Healthy Court held that in order for the employee to establish a prima facie case, he was required to show that he had engaged in conduct protected by
the burden of persuasion to the employer,\textsuperscript{43} would adequately protect the employee's rights while avoiding undue interference with the employer's right to discipline employees for any legitimate reasons.\textsuperscript{44} The Board in \textit{Wright Line} saw merit to this approach\textsuperscript{45} and accordingly adopted the rule that once an employee demonstrates his protected activity was a motivating factor in the employer's decision,\textsuperscript{46} the employer must show by a preponderance of the evidence\textsuperscript{47} that the same decision would have been made even if

the first amendment, and that this conduct had been a substantial or motivating factor in the employer's discharge decision. \textit{Id.}

43. \textit{Id.} Once the employee had shown that his protected conduct was a motivating factor in the employer's decision not to rehire him, the Court held that the burden would shift to the employer to show "that it would have reached the same decision \ldots even in the absence of the protected conduct." \textit{Id.} at 287.

44. \textit{Id.} at 285-87. The Court explained,

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

\textit{Id.}

45. 251 N.L.R.B. at 1086-89. The Board denied that the \textit{Mt. Healthy} procedure would shift the ultimate burden of proof from the General Counsel to the employer. \textit{Id.} at 1088 n.11. The Board stated that the General Counsel must still establish a violation of § 8(a)(3) by a preponderance of the evidence, and characterized the burden which shifts to the employer as an "affirmative defense" necessary to "overcome the \textit{prima facie} case of wrongful motive." \textit{Id.}

46. A survey of post-\textit{Wright Line} cases before the Board reveals that the General Counsel can establish a \textit{prima facie} case by showing (1) the employer knew of the discharged employee's participation in protected conduct, and (2) the timing of the discharge coincided with either the employer's becoming aware of the protected activity, or with particular conduct by the employee protected by § 7 of the NLRA. Such evidence may be supported by a showing of the employer's general antiunion animus. \textit{See, e.g.,} Guerdon Indus., 255 N.L.R.B. 610, 617 (1981) (\textit{prima facie} case established by showing employer's awareness of discharged employee's union activities); Bronco Wine Co., 256 N.L.R.B. 53, 53-54 (1981) (employer's statements established that employee's union activities were factor in discharge); Pace Oldsmobile, Inc., 256 N.L.R.B. 1001, 1005-09 (1981) (employer's awareness that employee signed union authorization (card day before discharge and general antiunion animus sufficient to establish \textit{prima facie} case); Heartland Food Warehouse, 256 N.L.R.B. 940, 941 (1981) (employer aware employees not content and probable that attempt at union organizing imminent, sufficient to establish a \textit{prima facie} case); S. Alleghenies Disposal Serv., 256 N.L.R.B. 852, 852-53 (1981) (\textit{prima facie} case established with proof that discharges occurred two days after employees discussed union and obtained authorization cards, activities of which employer was aware); Sanitas Cura, Inc., 255 N.L.R.B. 1164, 1181 (1981) (employer's general antiunion animus and knowledge that employee had signed authorization card sufficient); Magnetics, Int'l., 254 N.L.R.B. 520 (1981) (employer aware that employee had filed employment-related lawsuit; employee fired shortly after absence to attend court proceedings).

47. \textit{See} note 46 \textit{supra.} It is clear the employer must do more than merely articulate plausible and lawful motives for the discharge in order to rebut the \textit{prima facie} case. The employer's justifications fail most often due to inconsistent application of employment policies, insufficient proof of consistent policies, or contradictory reasons.
the employee had not engaged in protected activity. The Board found its adoption of the procedural shifting of the burden of proof of Mt. Healthy to be amply supported by the legislative history of section 10(c) of the NLRA which bars reinstatement of any employee discharged for cause.

Prior to the Third Circuit's decision in Behring, a majority of the circuit courts of appeals which were confronted with the issue accepted both the substantive (but for) and procedural (burden shifting) aspects of the Board's Wright Line test. For example, the Ninth Circuit in *NLRB v. Nevis Indus-*

48. For examples of successful rebuts of the General Counsel's prima facie case, see, e.g., Pacific Intermountain Express Co., 264 N.L.R.B. No. 47 (1982); Garay & Co., 261 N.L.R.B. No. 74 (1982). In *Pacific*, the General Counsel's prima facie case was based on the employer's awareness that the employee had filed OSHA complaints, and on statements by the employer that he would get rid of the employee. The employer alleged the discharge was due to the employee's disobeying instructions to cease undergoing physical therapy at the employer's expense, in accordance with a workers' compensation arbitration agreement. The ALJ found no connection between the latter incident and the filing of OSHA complaints, and thus the prima facie case was rebutted. *Id.* at —. In *Garay*, an employee was discharged shortly after the employer became aware she was the daughter of a union organizer. This prima facie case was rebutted due to lack of evidence of antiunion animus and uncontradicted evidence that the company was on the verge of financial disaster, which alone necessitated discharges. *Id.* at —.

49. One commentator, writing before the Wright Line decision was issued by the Board, criticized the Mt. Healthy test as a totally inappropriate model for a causation test in § 8(a)(3) dual motive discharge cases because the procedural test in Mt. Healthy is relief-oriented, coming into play only after a causal connection has been proved between the discriminatory motive and the discharge. Wolly, *What Hath Mount Healthy Wrought?*, 41 Ohio St. L.J. 385, 390-98 (1980).

50. 251 N.L.R.B. at 1088. Section 10(c) of the NLRA was amended in 1947 to add the statement that "[n]o 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." 29 U.S.C. § 160 (1976).

The legislative history of the 1947 amendments to the Wagner Act includes a debate between Senators Pepper and Taft, in which Senator Pepper asserts that the effect of the "discharged for cause" statement would be to require the employer to bear the burden of proof in a discriminatory discharge case. 93 Cong. Rec. 6678 (1974), reprinted in 2 LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, at 1594-95 (1948). Senator Taft, a chief sponsor of the 1947 amendments to the Wagner Act, denied that the statement would have the effect of placing the burden of proof on the employee, and further explained that the final bill rejected an earlier House version of the amendment which was intended to put the burden of persuasion on the employee. *Id.* at 6677-78. The result, according to Senator Taft, was that the intent of the legislation in passing the final version of § 10(c) was to leave the burden of proof on the employer in a discriminatory discharge case. *Id.*

51. See, e.g., Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626, 627-28 (5th Cir. 1981), cert. denied, 102 S. Ct. 2282 (1982); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981); Peavey Co. v. NLRB, 648 F.2d 460, 461 (7th Cir. 1981); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 549-51 (8th Cir. 1982); NLRB v. Nevis Indus., Inc., 647 F.2d 904, 909 (9th Cir. 1981). For a discussion of the change in heart seen in opinions of the Second, Fifth, Sixth, Seventh, and Ninth Circuits on the issue of burden of persuasion subsequent to Behring, see notes 104-08 and accompanying text *infra*.

The Second Circuit has applied the Wright Line test, by analogy, to a dual
tries, Inc., applied the Wright Line test, finding it to be consistent with the legislative history of the NLRA and to protect the rights of both employers and employees.

On appeal of the Wright Line decision itself, however, the First Circuit accepted only the substantive "but for" aspect of the test, rejecting the Board's shifting of the burden of persuasion to the employer. The First Circuit held that only the burden of coming forward with evidence of a legitimate motive falls on the employer, while the ultimate burden of proving that the employee would not have been dismissed but for the discriminatory motive of the employer remains at all times with the employee. In rejecting the Board's procedural formulation, the First Circuit found that section 10(c) of the NLRA and the Board's regulations thereunder placed the

motive discharge case brought under the Energy Reorganization Act (42 U.S.C. § 5851 (1977)), which prohibits discharge of any employee due to the employee's participation in proceedings under the Act. See Consolidated Edison Co. v. Donovan, 673 F.2d 61, 62-63 (2d Cir. 1982). Furthermore, although the issue of the shifting of the burden of proof was not addressed, the Second Circuit enunciated the "but for" test as the substantive standard applicable in a § 8(a)(3) dual motive discharge case. NLRB v. Charles Batchelder Co., 646 F.2d 33, 38 (2d Cir. 1981).

52. 647 F.2d 905 (9th Cir. 1981). Nevis acquired a hotel and retained all employees except the engineers, who were unionized. Id. at 909-10. The Ninth Circuit affirmed the Board's finding of a § 8(a)(3) violation based on the employer's pre-discharge statements indicating his intention to fire unionized employees to avoid a duty to bargain, and on the employer's failure to "show that it would have acted as it did absent the protected conduct." Id.

53. 647 F.2d at 909. The court also cited the Great Dane case as support for the shifting burden procedure, and noted that the procedure conforms to "the reality that the employer has the best access to proof of motivation." Id. The Ninth Circuit showed considerable deference to the Board's judgment, limiting its role to a determination of whether the Wright Line rule was rational and consistent with the NLRA. Id. Having found the rule to be "a reasonably defensible interpretation of the Act" the court accepted and applied it. Id.


55. Id. at 901-03. The First Circuit noted that the concern which prompted the Supreme Court to apply the "but for" standard in Mt. Healthy, a constitutional dual-motive discharge case, was identical to that which caused the First Circuit to reject the "in part" test, namely, "that the employee who engaged in protected conduct would thereby be placed in a better position than he would have held if he had not done so, and his employer's freedom to apply legitimate performance standards would be impaired by the activist's favored position." Id. at 903.

56. Id. at 904-07.

57. Id.

58. Id. at 909 n.8. For a discussion of the legislative history of § 10(c), see note 50 supra. The First Circuit viewed the 1947 amendment to § 10(c) which barred reinstatement of any employee discharged for cause as irrelevant to the issue of burden of proof. 662 F.2d at 904 n.8. However, the First Circuit cited separate language in § 10(c) as support for a requirement that the General Counsel prove the violation by a preponderance of the evidence:

If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint was engaged in or is engaging in any such unfair labor practice, then the Board shall state its
burden upon the General Counsel59 and also relied upon section 7(c) of the Administrative Procedure Act (APA), which places the burden of proof on the proponent of an order.61

Although the Supreme Court has not yet decided the standard and allo-

findings of fact and shall issue an order dismissing the said complaint.” Id. (quoting 29 U.S.C. § 160(c) (1976)).

The court distinguished Great Dane, where the employer’s “overall policy” discrimi-
nated against unprotected conduct, from the situation where the issue is whether a single discharge was in fact discriminatory, and asserted that Great Dane could have no application to the latter situation. Id. at 671 n.8. See also DuRoss, supra note 20. For a discussion of Great Dane, see notes 18-23 and accompanying text supra.

59. 662 F.2d at 903-05 (citing 29 C.F.R. § 101.10(b) (1981)). The regulations provide that “The Board’s attorney has the burden of proof of violations of section 8 of the National Labor Relations Act.” 29 C.F.R. § 101.10(b) (1981).

60. 662 F.2d at 903-05 (citing 5 U.S.C. § 556(d) (1976)). Section 7(c) provides that “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d) (1976). The meaning of § 7(c) of the APA has not been construed in the context of proving discriminatory discharge in a dual motive case arising under § 8(a)(3) of the NLRA. It has been construed in other areas of labor law. See NLRB v. Atlanta Coca-Cola Bottling Co., 293 F.2d 300 (5th Cir. 1961); NLRB v. Mastro Plastics Corp., 354 F.2d 170 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). The Coca-Cola court recited § 7(c) of the APA, without analysis, as support for the principle that the burden of persuasion in a § 8(a)(3) case remains on the General Counsel as proponent of the order. 293 F.2d at 309 n.15. The court in Mastro held that, although the General Counsel is the proponent of a back pay order, § 7(c) of the APA does not preclude imposing upon the employer the burden of going forward with evidence on the issue of job availability, viewing this as an affirmative defense of the employer. 354 F.2d at 176. Thus, the Mastro court was not concerned with the issue of ultimate burden of proof. Id.

61. 662 F.2d at 903-04. Despite the Third Circuit’s reliance on § 7(c), the legislative history of the APA and case law in areas other than labor law indicate that the burden allocated by § 7(c) is the burden of going forward with evidence, and not the burden of ultimate persuasion. See S. Rep. No. 752, 79th Cong., 1st Sess. 22 (1945), reprinted in S. Doc. No. 248 at 208. The Senate Committee Report on the APA states that the proponent of a rule or order has the burden of proof means not only that the party initiating the proceeding has the general burden of coming forward with a prima facie case but that other parties, who are proponents of some different result, also for that purpose have a burden to maintain.

Id. See also H.R. Rep. No. 1980, 79th Cong., 2d Sess. 36 (1946), reprinted in S. Doc. No. 248 at 270. The House Report notes that “this section means that every proponent of a rule or order or the denial thereof has the burden of coming forward with sufficient evidence therefor.” Id. (emphasis added).

See Environmental Defense Fund, Inc. v. EPA, 548 F.2d 998 (D.C. Cir. 1976). Environmental Defense Fund is the leading case on this issue, due to its thorough examination of the meaning of § 7(c) and review of precedent. Id. at 1004-05, 1012-15. In Environmental Defense Fund the court noted that the legislative history of the APA indicates that § 7(c) refers to the allocation of the burden of going forward with evidence, and not the “burden of ultimate persuasion.” Id. at 1004. In reviewing cases which apply § 7(c), the court concluded that the cases also treat “burden of proof” as the “burden of producing evidence.” Id. at 1013-14 (citations omitted). See also National Airlines, Inc. v. CAB, 300 F.2d 711 (D.C. Cir. 1962). The National Airlines court concluded that the burden of proof may shift from the proponent of an order to the respondent on an affirmative defense. 300 F.2d at 715 n.12. However, the problem which remains is that of characterizing what is an “affirmative defense” for this pur-
cation of proof in a dual motive action under the NLRA, the Court has determined this issue in employment discrimination actions under Title VII of the Civil Rights Act of 1964. In Texas Department of Community Affairs v. Burdine, the Court, construing Title VII, held that an employee retains the burden of persuasion at all times, while the employer's burden is one of production only.

Against this background, the Third Circuit reviewed the history of the dual motive issue, and the conflict among the Board and courts of appeals pose. See NLRB v. Mastro Plastics Corp., 354 F.2d 170, 176 (2d Cir. 1965), cert. denied, 384 U.S. 972 (1966). For a discussion of Mastro, see note 60 supra.

See generally 3 K. Davis, Administrative Law Treatise § 16:9 (2d ed. 1980) ("burden of proof" as used in § 7(c) is synonymous with burden of going forward with evidence).

62. Certiorari has been granted in a case presenting the issue whether the Board's Wright Line decision adopts the appropriate standard in § 8(a)(3) violations. See NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982), cert. granted, 51 U.S.L.W. 3373 (U.S. Nov. 16, 1982) (No. 82-168).


64. 450 U.S. 248 (1981).

65. Id. at 253. The Burdine Court explained the nature of the employer's burden: "The defendant need not persuade the court that it was actually motivated by the proffered reasons . . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." Id. at 254 (footnote omitted). See also Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Although not cited by the Supreme Court in Burdine, there is support in the legislative history of Title VII for the proposition that the employee retains the burden of proof in a Title VII action. See Senator Dirksen's reply to Senator Clark's objections to the House version of Title VII, 110 Cong. Rec. 7218 (1964) ("The Commission must prove by a preponderance [of the evidence] that the discharge or other personnel action was because of race."). See generally Brodin, The Standard of Causation in the Mixed Motive Title VII Action: A Social Policy Perspective, 82 Colum. L. Rev. 292 (1982).

66. 675 F.2d at 86. Before turning to the issue of the § 8(a)(3) violations, the Third Circuit rejected the Company's contention that it was denied a fair hearing. Id. Behring claimed that the ALJ improperly revoked the Company's subpoena of a Board agent who had investigated earlier charges against the Company and whose testimony would have been used to discredit witnesses called by the General Counsel. Id. The ALJ revoked the subpoena on the ground that the information to be given fell within the "limited evidentiary privilege which protects the informal investigatory and trial-preparatory processes of regulatory agencies such as the NLRB." Id. (quoting Stephen's Produce Co., Inc. v. NLRB, 515 F.2d 1373, 1376 (8th Cir. 1975)). The Behring court noted that no substantial prejudice resulted from the quashing of the subpoena since the company was given access to the witnesses' prior statements. Id.

Although Behring contested the findings of fact of the ALJ, the Third Circuit limited its review of the § 8(a)(1) violations to determining whether there was substantial evidence in the record to support the findings. See 29 U.S.C. § 160(e) (1976) ("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."). See also Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 365 (3d Cir. 1978) (credibility determinations rest with the ALJ so long as all relevant factors are considered and
over the appropriate standard. The Behring court examined the substantive prong of the Board's Wright Line test, finding that aspect of the test "a welcome development which should reduce the confusion in this controversial area of labor law." The Court found that the Wright Line "but for" standard satisfied the requirement that a section 8(a)(3) violation be based on the real motive behind the discharge, and that it was consistent with Third Circuit precedent.

The Third Circuit, however, rejected Wright Line's procedural scheme of shifting the burden of proof to the employer stating that "[t]hе shifting burden of persuasion undermines the 'but for' test and reintroduces the confusion which Wright Line purported to eliminate." The Behring court found the Board's reliance in Wright Line upon the Supreme Court's decision in Mt. Healthy to be unjustified. Mt. Healthy, the court stated, was inapposite because the Board was bound by statutory limitations not applicable to a case arising under constitutional law. The court observed that section 10(c) of the NLRA and the regulations thereunder specifically impose the burden of proving an unfair labor practice on the General Counsel, not on the employer. The Third Circuit rejected the Board's argument that the legislation is sufficiently explained. Finding "substantial evidence" to support the ALJ's finding, the Behring court upheld the finding of § 8(a)(1) violations. 675 F.2d at 85-86.

67. 675 F.2d at 87. For a discussion of the conflict among the courts and the Board regarding the appropriate standard, see notes 27-34 and accompanying text supra.

68. 675 F.2d at 87.

69. Id. (citing NLRB v. General Warehouse Corp., 643 F.2d 965, 972 (3d Cir. 1981); Gould, Inc. v. NLRB, 612 F.2d 728, 734 (3d Cir.), cert. denied, 449 U.S. 890 (1980); Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978)).

70. 675 F.2d at 87. See, e.g., Edgewood Nursing Center, Inc. v. NLRB, 581 F.2d 363 (3d Cir. 1978). Although the Edgewood decision recites the "in-part test" as the standard to be applied in a dual motive discharge case, the Edgewood court qualified that standard by stating: "On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory." Id. at 368.

71. 675 F.2d at 88. The Behring court explained that placing the burden of persuasion on the employer would impede determination of the "real motive" because if an employer asserts a nondiscriminatory reason, but fails to persuade the trier of fact, a violation of § 8(a)(3) would be found based on the General Counsel's prima facie case; however that prima facie case would have only established that discrimination was "a motivating factor," and not necessarily the real motive. Id. The Behring court found that this procedure would lead to a finding of § 8(a)(3) violation "despite the fact that two factors—neither outweighing the other—had been advanced as causes, and the Board never determined which was the real one." Id. As a result, the Third Circuit concluded, the procedural scheme was at odds with the "but for" test, which is aimed at determining the employer's real motive. Id.

72. Id. For a discussion of Mt. Healthy, see notes 39-44 and accompanying text supra.

73. 675 F.2d at 88.

74. Id. For a discussion of § 10(c) of the NLRA, see notes 50 & 58 and accompanying text supra. The Third Circuit cited § 101.10 of the Board's regulations and § 7(c) of the APA as support for its view that § 10(c) of the Act imposes the burden of
tive history of section 10(c) mandated a different result, finding the legislative history to be inconclusive on the subject of burden of proof,

and concluding that the clarity expressed by the statute and regulations obviated the need to inquire into the legislative history of the NLRA.

In addition, the Behring court found that section 7(c) of the APA, which allocates the burden of proof to the proponent of a rule or order, also prevented the adoption of Mt. Healthy's shift of the burden of proof.

The Third Circuit reasoned that the procedure established by the Supreme Court in Burdine for employment discrimination cases under Title VII was a more appropriate precedent because "[d]iscrimination in employment because of race, religion, or nationality is often as subtle and as difficult to ferret out as that resulting from union bias." Thus, the Third Circuit held that once the General Counsel has established a prima facie case of discrimination, the employer has the burden of coming forward with evidence of a legitimate motive for the discharge. The burden of persuasion, however, remains with the General Counsel on the crucial issue of establishing that antiunion animus constituted "but for" causation of the discharge. Accordingly, the court remanded the case for reconsideration in light of its

proof on the General Counsel. 675 F.2d at 88. For a discussion of § 101.10 of the Board's regulations, see note 59 and accompanying text supra. For a discussion of § 7(c) of the APA, see notes 60-61 and accompanying text supra.

75. 675 F.2d at 90 n.5. For a discussion of the First Circuit's comparable view of the pertinent legislative history of the NLRA, see note 58 and accompanying text supra.

76. 675 F.2d at 90 n.5. For a discussion of § 7(c), see notes 60-61 and accompanying text supra. For a discussion of § 101.10, see notes 59 and accompanying text supra.

The third Circuit also rejected the Board's reliance upon finding Great Dane inapplicable to a single discharge. The Behring court further distinguished Great Dane because that case did not explicitly address the distinction between burden of proof and burden of production of evidence. The Third Circuit thus found that Great Dane posed no precedential barrier to an insistence that the burden of proof remain with the General Counsel. Furthermore, the Behring court noted that, while the language of Great Dane indicated that the burden of proof shifted to the employer once the employee had established a prima facie case of discrimination, in applying that test to the facts of the case, the Great Dane Court found the employer had committed an unfair labor practice because he failed to produce any evidence of legitimate motivation. Id. at 89. Thus, the Third Circuit found the burden of proof language in Great Dane "[n]otably lacking... the precision the [Supreme] Court later applied in Burdine." 674 F.2d at 89. For a discussion of the Great Dane case, see notes 18-23 and accompanying text supra.

77. 675 F.2d at 88. For a discussion of § 7(c) of the APA, see notes 60-61 and accompanying text supra.

78. 675 F.2d at 88. For a discussion of the causation analysis used in Title VII cases, see notes 63-65 and accompanying text supra.

79. 675 F.2d at 89. The Behring court noted that it had previously applied the reasoning of the Burdine case in deciding a case arising under Title VI of the Civil Rights Act of 1964. Id. at 89 n.4 (citing NAACP v. Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981)).

80. 675 F.2d at 88-90.

81. Id.
ruling that the burden of proof may not shift to the employer.\textsuperscript{82}

In reviewing the \textit{Behring} decision, it is submitted that the Third Circuit correctly adopted the substantive "but for" standard of causation. The "but for" test satisfies the statutory requirement of section 10(c) of the NLRA that an employee discharged for legitimate cause not be reinstated,\textsuperscript{83} and the mandate established by case law that a section 8(a)(3) violation be based on the employer's real motive.\textsuperscript{84} Furthermore, the "but for" standard accommodates the sometimes conflicting rights of employees to exercise their rights guaranteed by section 7 of the NLRA and of the employers to manage their businesses in any manner not in conflict with the NLRA.\textsuperscript{85}

However, it is submitted that the Third Circuit erred in concluding that it is impermissible to shift the burden to the employer of establishing legitimate "but for" causation,\textsuperscript{86} since neither the NLRA nor the APA requires the General Counsel to retain the burden of persuasion in discriminatory discharge cases. Despite the \textit{Behring} court's assertion that section 10(c) of the NLRA clearly allocates the burden of persuasion to the General Counsel,\textsuperscript{87} the statute is in fact silent on the issue, merely requiring the Board to base its decision on the preponderance of the evidence.\textsuperscript{88} On the other hand, the legislative history provides a reasonably reliable basis for concluding that the employer properly bears the burden of proof in a discriminatory discharge case.\textsuperscript{89} In a senatorial debate over the effect of the 1947 amendments to section 10(c), Senator Taft, a chief sponsor of the amendments, clearly indicated that the intent of the legislature was to place the burden of proof on the employer charged with discriminatory discharge.\textsuperscript{90}

It is further submitted that the \textit{Behring} court's reliance on section 7(c) of the APA to allocate the burden of proof to the employer is also misplaced. The legislative history of the APA and case law in areas other than labor law indicate that the burden allocated by section 7(c) is the burden of producing

\textsuperscript{82} \textit{Id.} at 90. Though comment on the facts of the \textit{Behring} case was not necessary in light of its remand, the court indicated that, in its view, the timing of the discharges shortly after the union election was not indicative of discriminatory motive, and thus the employer was not required to justify the timing of the discharges. \textit{Id.} The court further observed that the company's assertion of legitimate motivation based on economic considerations was credible, and had been substantiated by ALJ's findings and the subsequent closing of the warehouse. \textit{Id.} at 90-91.

\textsuperscript{83} \textit{See} \textsection 10(c) of the NLRA. 29 U.S.C. \textsection 160(c) (1976). For a discussion of \textsection 10(c), see note 24 and accompanying text \textit{supra}.

\textsuperscript{84} For a discussion of the real motive as the basis for a \textsection 8(a)(3) violation, see note 25 and accompanying text \textit{supra}.

\textsuperscript{85} For a discussion of the policy considerations behind \textsection 8(a)(3), see notes 24-25 and accompanying text \textit{supra}.

\textsuperscript{86} \textit{See} 675 F.2d at 88-90.

\textsuperscript{87} \textit{Id.} at 88.

\textsuperscript{88} For a discussion of \textsection 10(c) of the NLRA, see note 58 and accompanying text \textit{supra}. For a discussion of \textsection 7(c) of the APA, see notes 60-61 and accompanying text \textit{supra}.

\textsuperscript{89} \textit{See} note 50 and accompanying text \textit{supra}.

\textsuperscript{90} \textit{Id.}
evidence, and not the burden of ultimate persuasion.\textsuperscript{91} They further indicate that section 7(c) imposes the burden of production not only on the party initiating the proceedings, but also on the party opposing the relief sought.\textsuperscript{92} Thus, it is submitted that section 7(c) does not preclude the allocation of the burden of persuasion to the employer.

The Behring court found the procedural scheme applied in the employment discrimination area, which shifts only the burden of production to the employer, to be a more appropriate model.\textsuperscript{93} However, this conclusion ignores the indications of congressional intent to place the burden of persuasion on the employer in a discriminatory discharge case under the NLRA.\textsuperscript{94} Evidence of such a legislative intent is lacking for Title VII.\textsuperscript{95} Thus, while the test established in the Burdine case may be appropriate to Title VII discharge cases, it does not follow that the same procedure must apply to cases arising under the NLRA, despite the similarity in facts underlying assertions of discriminatory discharge under both statutes.

It is submitted that, in light of the lack of statutory restriction on the matter of burden of proof, the legislative history of the NLRA indicating the intent of the law to impose a burden of proof on the employer, and because of the Board’s expertise in administration of the NLRA,\textsuperscript{96} the Wright Line shifting-burden procedure should have been accepted by the Third Circuit. Such a scheme is consistent with the goal of establishing the employer’s real motive since the employer is the only party with access to proof of his own motivation.\textsuperscript{97} It is further submitted that the Third Circuit misconstrued the effect of the Wright Line test in stating that, if the employer asserts some legitimate reason, but fails to carry the burden of proving that the legitimate reason constituted “but for” causation, a violation will be found based on a finding that discrimination was a motivating factor (prima facie case) but

\textsuperscript{91} For a discussion of the legislative history § 7(c) of the APA and relevant case law, see notes 60-61 and accompanying text supra.

\textsuperscript{92} Id.

\textsuperscript{93} For a discussion of the Third Circuit’s adoption of the procedure formulated in Title VII employment discrimination cases, see notes 63-65 and accompanying text supra.

\textsuperscript{94} See notes 50, 90-91 and accompanying text supra.

\textsuperscript{95} For a discussion of the legislative history of Title VII which indicates the congressional intent to place the burden of persuasion on the employee in a Title VII discriminatory discharge case, see note 65 supra.

\textsuperscript{96} The Supreme Court has frequently deferred to the Board’s judgment in interpretation of the NLRA. See, e.g., NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) (“the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . “); \textit{id.} at 177 (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969)). See also Ford Motor Co. v. NLRB, 441 U.S. 488, 497 (1979); NLRB v. Iron Workers, Local No. 103, 434 U.S. 335, 350 (1978); NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963); NLRB v. United Steelworkers of Am., 357 U.S. 357, 362-63 (1958).

\textsuperscript{97} For a discussion of the principle that the burden of proof is often placed on the party with peculiar knowledge of the facts, see notes 21-22 supra.
not necessarily the real motive. If, as the court postulates, an employer is unsuccessful in convincing the court his legitimate reason constituted "but for" causation, the Board's conclusion will be that the discriminatory motive established in the *prima facie* case is the real motive, and that, although somewhat credible legitimate reasons existed, the discriminatory rather than the legitimate motives were the "but for" cause of the discharge. Thus, both the "but for" standard and the shifting burden of proof serve to advance the goal of determining the employer's real motive.

In assessing the impact of the *Behring* decision on Third Circuit dual motive discharge cases, it is submitted that application of the "but for" test as the substantive standard will clarify the inquiry and facilitate review of Board decisions based on the same standard. While the finding of a section 8(a)(3) violation was made more difficult by the Board's adoption of the "but for" standard, that effect was somewhat mitigated by placing the burden of proof of motivation on the employer. The Third Circuit's refusal to shift the burden to the employer represents an additional difficulty for an employee in a discriminatory discharge case. In light of the employee's relative lack of access to proof of the employer's motive, the increased burden on the employee imposed by the Third Circuit may hinder the effectiveness of section 8(a)(3) as a guarantee of employees' section 7 rights.

The impact of the *Behring* decision on the state of labor law in this area is to support the First Circuit's refusal to allow the burden of proof to shift to the employer, thus intensifying the dispute which the Board's *Wright Line* decision was intended to resolve. In fact, since the Third Circuit issued its opinion in *Behring*, the Second, Fifth, Sixth, Seventh, and

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98. For a discussion of the view of the *Behring* court that the shifting burden test undermines the "but for" analysis and impedes inquiry into the real motive, see note 71 and accompanying text supra.

99. For a discussion of the Board's *Wright Line* test, see notes 35-50 and accompanying text supra.

100. For a discussion of the Third Circuit's refusal to impose the burden of persuasion on the employer in a § 8(a)(3) discriminatory discharge case, see notes 71-81 and accompanying text supra.

101. For a discussion of the rights guaranteed by § 7 of the NLRA, see note 13 and accompanying text supra.

102. For a discussion of the First Circuit's rejection of the shifting burden aspect of the *Wright Line* test, see notes 56-61 and accompanying text supra.

103. For a discussion of the conflict between the Board and circuit courts of appeals prior to *Wright Line*, see notes 27-34 and accompanying text supra.

104. NLRB v. New York Univ. Medical Center, 96 Lab. Cas. (CCH) ¶13,995 (2d Cir. 1983) (section 10(c) of NLRA does not permit shifting the burden of persuasion to the employer).

105. Marathon LeTourneau Co. v. NLRB, 96 Lab. Cas. (CCH) ¶14,083 (5th Cir. 1983) (court finds it unnecessary to decide the propriety of the *Wright Line* test; no reference to previous acceptance of the test).

106. Boich v. Federal Mine Safety and Health Review Comm'n No. 81-3186, slip op. (6th Cir. 1983) (burden of proof may not shift to employer in a discriminatory discharge case arising under the Mine Safety and Health Act; in dicta stated
Ninth\textsuperscript{108} Circuits have reconsidered their support for the \textit{Wright Line} shifting burden approach, and have either rejected it outright or have indicated strong reservations concerning their previous acceptance of the procedure. It appears at this point that only Supreme Court review of the causation test applicable to dual motive discharge cases will bring the decisions of the Board and the courts of appeals into harmony.\textsuperscript{109}

\textit{Diane Madenci}

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\textsuperscript{107} NLRB v. Webb Ford, Inc., 689 F. 2d 733 (7th Cir. 1982) (only burden properly placed on employer is one of production; previous Seventh Circuit cases adopting \textit{Wright Line} test did not reach procedural issues).

\textsuperscript{108} Royal Dev. Co. v. NLRB, 96 Lab. Cas. (CCH) ¶14,056 (9th Cir. 1983) (although Ninth Circuit has followed \textit{Wright Line} in its entirety, no en banc panel has overruled court's precedent where burden of persuasion placed on employee; dicta suggests \textit{Wright Line} procedure inconsistent with NLRA).

\textsuperscript{109} See NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982), \textit{cert. granted}, 51 U.S.L.W. 3373 (U.S. Nov. 16, 1983) (No. 82-168).
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