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INTRODUCTION

Section 8(a)(3) of the National Labor Relations Act¹ makes it an unfair labor practice for an employer to encourage or discourage union membership by discriminating against employees.² However, the statute does not specify the degree of discriminatory intent which must be shown in order to find a violation. In 1937, in its first decision dealing with the Act, the Supreme Court recognized that the employer's "true purpose is the subject of investigation"³ in a discriminatory discharge case. Over forty years later, the degree of antiunion motivation needed to find a section 8(a)(3) violation is still at issue in cases where a single employee, or a very small number of employees, is discharged, and it is alleged that the discharge was discriminatory. The employer often claims that the discharge was founded on reasons unassociated with the employee's union activity—for instance, for absenteeism or some violation of work rules.

If the employer's action was not taken because of union activity, it is not unlawful. Where there is evidence of both proper and improper reasons, the test used to determine the motive will determine the outcome of the case. Because the major portion of unfair labor practice charges filed against employers allege discrimination or illegal discharges,⁴ a clear statement of the principles to be applied in such cases is of special significance.

Currently there is conflict among the courts of appeals concern-

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² 29 U.S.C. § 158(a)(3) (1970). Under the NLRB's administrative regulations, any person may file a charge alleging an unfair labor practice. The regional office of the NLRB decides whether to issue a complaint on a charge filed. If a complaint is issued, a hearing is conducted before an administrative law judge, who prepares a recommended order. Exceptions to the recommended order are filed with the NLRB. See 29 C.F.R. §§ 102.1-102.51.
⁴ NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937).
⁵ In fiscal 1978, the percentage was 63%, or 17,125 of 27,056 charges. 43 NLRB Ann. Rep. 9 (1978).
Some of the courts apply a "but for" test, finding a violation only if the employee would not have been discharged but for his union activity. An employer with mixed motives for firing an employee thus commits no unfair labor practice as long as valid cause for the discharge exists apart from any other motive. Other circuits, and the NLRB, use a "partial motivation" test, holding that if the discharge is motivated in any part by antiunion animus, section 8(a)(3) has been violated.

This note will analyze the theory and application of these tests in the mixed-motive setting in order to determine which test is most consistent with the motivation requirement and evidentiary burdens established for section 8(a)(3) violations generally.

**THE "BUT FOR" TEST**

The "but for" test is best examined through the line of decisions in the First Circuit which developed it. It is one interpretation of the "true purpose" dicta in the Supreme Court's 1937 decision in *NLRB v. Jones & Laughlin Steel Corp.* The First Circuit has applied this test consistently and forcefully to single employee mixed-motive discharge cases.

Early First Circuit cases simply balanced the employer's proper and improper motives to determine which one controlled. For example, in *NLRB v. Whitin Machine Works,* the court held that a discharge for a mixture of reasons would be discriminatory if an employee's union activity weighed more heavily in the decision to fire than did the employer's dissatisfaction with work performance. A similar conclusion was reached in *NLRB v. Lowell Sun Publishing Co.*, in which the court determined that legitimate business reasons were the employer's "impelling motive." The concurring opinion of Judge Aldrich, however, stated that although the "true purpose" was the proper subject of investigation, the discharge would violate section 8(a)(3) only if the improper motive

5. The courts of appeals are charged with reviewing the NLRB's orders on findings of unfair labor practices. See note 2 supra.
7. 204 F.2d 883 (1st Cir. 1953).
8. Id. at 883, 885.
9. 320 F.2d 835 (1st Cir. 1963).
10. Id. at 841.
were the dominant one.11 The First Circuit has applied the “dominant motive” test as recently as 1976.12

Although the “dominant motive” test had previously been applied in a pure balancing fashion, it crystallized in a somewhat different form in the First Circuit’s decision in NLRB v. Fibers International Corp.13 The court there explained that by “dominant” it meant the controlling or effective motive, but went on to remark in a footnote that there would be a violation only if there would have been no discharge in the absence of the employee’s union activity.14 Having thus cast the test in “but for” terms, the First Circuit continued to enforce its interpretation without any manifestation of approval by the Supreme Court.15 When the Court handed down its decision in Mt. Healthy Board of Education v. Doyle,16 the court of appeals quickly latched on to the analysis used therein.

In Mt. Healthy, the Board of Education decided not to rehire Doyle, a high school teacher. In making that decision, the school considered several instances of work-related misconduct and also considered a phone call made by Doyle to a local radio station. In that phone call, Doyle had related the substance of a memorandum circulated to teachers dealing with a teacher dress code. A disc jockey announced the dress code as a news item.17

Doyle claimed that he had a right to reinstatement because the decision not to rehire him was based on his exercise of first amendment freedoms.18 The Court agreed that the phone call was protected by the first amendment, but held that even if this activity had played a substantial part in the school board’s decision not to rehire Doyle, he had no absolute right to reinstatement. Only if Doyle would have been rehired in the absence of his exercise of

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11. Judge Aldrich reasoned that this refinement was necessary because if general anti-union animus alone would suffice to make a discharge discriminatory, “a militant union man would feel that he could safely behave as he chose.” Id. at 842 (concurring opinion of Aldrich, J.).
13. 439 F.2d 1311 (1st Cir. 1971), reh. denied, 439 F.2d 1315 (1st Cir. 1971) (per curiam).
14. Id. at 1312 n. 1.
15. This despite the NLRB’s repeated refusals to follow the “dominant motive” test. See Judge Aldrich’s remarks in Fibers International, 439 F.2d at 1312.
17. Id. at 282.
18. Id. at 283-84.
protected liberties could he be ordered reinstated. If, because of misconduct, Doyle would not have been rehired anyway, his exercise of first amendment rights could not prevent the school board from refusing to rehire him. In cases decided after Mt. Healthy, the First Circuit held that the Supreme Court's rationale applied by analogy to discriminatory discharge cases under the NLRA, and cited the decision as support for the "dominant motive" test, phrased in "but for" terms.

Formulations similar to the "but for" or "dominant motive" test have been used in the Fourth, Fifth, and Ninth Circuits. Re-

19. Id. at 285-86. The Court remanded the case for a determination of whether the school board would have decided not to rehire Doyle in the absence of any consideration of his phone call to the radio station.

For an expansive interpretation of this decision as it relates to the discriminatory discharge area, see DuRoss, Toward Rationality in Discriminatory Discharge Cases: The Impact of Mt. Healthy Board of Education v. Doyle upon the NLRA, 66 Geo. L.J. 1109 (1978) [hereinafter cited as The Impact of Mt. Healthy.]

20. The Mt. Healthy decision was, of course, outside the scope of the Act because it involved a public sector employee. See 29 U.S.C. § 152(1) (1970). Doyle based his claim on the first and fourteenth amendments.

21. See, e.g., Texas Instruments, Inc. v. NLRB, 599 F.2d 1067 (1st Cir. 1979); NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979); Liberty Mutual Ins. Co. v. NLRB, 592 F.2d 595 (1st Cir. 1979); Hubbard Regional Hosp. v. NLRB, 579 F.2d 1251 (1st Cir. 1978); NLRB v. Rich's of Plymouth, Inc., 578 F.2d 800 (1st Cir. 1978); NLRB v. South Shore Hosp., 571 F.2d 677 (1st Cir. 1978); Colett's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977) (per curiam). In Colett's Furniture, the court remarked that it was "marrying [Mt. Healthy] to [its] previous cases." 550 F.2d at 1293.


22. See, e.g., NLRB v. Appletree Chevrolet, Inc., ___F.2d___, 103 L.R.R.M. 2067 (4th Cir. 1979); Florida Steel Corp. v. NLRB, 601 F.2d 125 (4th Cir. 1979); American Mfg. Assoc., Inc. v. NLRB, 594 F.2d 30 (4th Cir. 1979); Firestone Tire & Rubber Co. v. NLRB, 583 F.2d 1268 (4th Cir. 1978); NLRB v. Patrick Plaza Dodge, Inc., 522 F.2d 804 (4th Cir. 1975) (Aldrich, J. sitting by designation).

In each of the cited cases, the Fourth Circuit denied enforcement of a NLRB order, finding no § 8(a)(3) violation. In Neptune Water Meter Co. v. NLRB, 551 F.2d 588 (4th Cir. 1977), the court upheld a Board finding of a violation, using a "but for" analysis, where the employer told the discharged employee that his union activity was the basis for his decision.

23. In Frosty Morn Meats, Inc. v. NLRB, 296 F.2d 617 (5th Cir. 1961), the Fifth Circuit held that a discharge for insubordination was not a violation of § 8(a)(3) despite the employer's statements of intention to fire union organizers. The court stated that the discharge would have been unlawful if in the absence of a discriminating motive the employee would not have been fired. Although this standard is analytically identical to a "but for" approach, subsequent Fifth Circuit decisions do not consistently follow this reasoning. Compare NLRB v. Florida Steel Corp., 586 F.2d 436 (5th Cir. 1978); Federal-Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978); Mueller Brass Co. v. NLRB, 544 F.2d 815 (5th Cir. 1977); NLRB v. Whitfield Pickle Co., 374 F.2d 576 (5th Cir. 1967), with NLRB v. Aero Corp., 581 F.2d 511 (5th Cir. 1978); NLRB v. Big Three Indus. Gas & Equip. Co., 579 F.2d 304 (5th Cir. 1978); cert. denied, 440 U.S. 960 (1979). The court most recently held that "the burden
cent decisions in the Second and Third Circuits indicate that those courts are changing their approach, having formerly used the partial motivation standard.25

The "Partial Motivation" Test

A clear statement of this formula appears in a Second Circuit case decided in 1954: "If employees are discharged partly because of their participation in a campaign to establish a union and partly because of some neglect or delinquency, there is nonetheless a violation . . . ."26 At about the same time that the First Circuit was putting the final touches on its "dominant motive" theory,27 the Second Circuit reiterated that if a discharge was even partly motivated by antiunion animus, it was discriminatory.28

Unlike the "dominant motive" approach, the "partial motivation" test does not require that the antiunion reasons outweigh the legitimate reasons. The existence of an improper reason will taint the discharge,29 and a determination of good cause will not pre-
clude the finding of a violation. The "partial motivation" test has gained wide acceptance and is currently applied in the Sixth, Seventh, and Tenth Circuits. 30 The Circuit for the District of Columbia probably still uses this approach. 31

The issue of which test should apply in single employee mixed-motive discharge cases has not been decided by the Supreme Court. In the area of section 8(a)(3) violations generally, however, the Court has defined the motivation requirement and provided special standards of proof in a line of cases culminating in NLRB v. Great Dane Trailers, Inc. 32

THE DEVELOPMENT OF THE MOTIVATION REQUIREMENT IN SECTION 8(a)(3) CASES

Although section 8(a)(3) does not specify that intent is an element of a violation, 33 the Court has interpreted the Act as calling

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30. See, e.g., M.S.P. Indus. Inc. v. NLRB, 568 F.2d 166 (10th Cir. 1977); NLRB v. Montgomery Ward & Co., 554 F.2d 996 (10th Cir. 1977); Bette Baking Co. v. NLRB, 380 F.2d 199 (10th Cir. 1967); NLRB v. West Side Carpet Cleaning Co., 329 F.2d 758 (6th Cir. 1964).

A recent Seventh Circuit opinion appeared to be leaning towards the "but for" test, see NLRB v. Campbell "66" Express, Inc., 609 F.2d 312 (7th Cir. 1979), but in a later decision the court specifically stated that the Seventh Circuit has never endorsed "but for." Chicago Magnesium Castings Co. v. NLRB, 612 F.2d 1028, 1034 (7th Cir. 1980). The "partial motivation" test had consistently been applied in cases prior to Campbell "66". See, e.g., Electri-Flex Co. v. NLRB, 570 F.2d 1327 (7th Cir.), cert. denied, 439 U.S. 911 (1978); NLRB v. Townhouse T.V. & Appliances, Inc., 531 F.2d 826 (7th Cir. 1976); NLRB v. Fairview Hosp., 443 F.2d 1217 (7th Cir. 1971); NLRB v. Symons Mfg. Co., 328 F.2d 835 (7th Cir. 1964).

In Nacker Packing Co. v. NLRB, ___F.2d___, 103 L.R.R.M. 2634, 2639 (7th Cir. 1980), the court clearly reiterated that the partial motivation test is the applicable standard.

31. The Circuit for the District of Columbia uses a partial motivation rationale; see, e.g., Allen v. NLRB, 561 F.2d 976, 982 (D.C. Cir. 1977) (antiunion animus was "at least part" of the motivation; finding of violation upheld); Ridgely Mfg. Co. v. NLRB, 510 F.2d 185 (D.C. Cir. 1975); Teamsters Local 152 v. NLRB, 343 F.2d 307 (D.C. Cir. 1965). But see Amalgamated Clothing Workers v. NLRB, 564 F.2d 434 (D.C. Cir. 1977), in which the court used a "but for" analysis in upholding a NLRB finding of a violation.

The most recent Eighth Circuit decision seems to fall more closely within the partial motivation category. See Berbiglia, Inc. v. NLRB, 602 F.2d 839 (8th Cir. 1979) (valid grounds no defense unless discharge solely for those grounds). In R.J. Lallier Trucking v. NLRB, 558 F.2d 1322 (8th Cir. 1977), the court upheld a finding of discrimination without clearly articulating the applicable standard. Earlier panel decisions are not easily classified. See Singer Co. v. NLRB, 429 F.2d 172 (8th Cir. 1970), applying a clear partial motivation test; but see Mead & Mount Construction Co. v. NLRB, 411 F.2d 1154 (8th Cir. 1969); NLRB v. Arkansas Grain Corp., 392 F.2d 161 (8th Cir. 1968) (union activity cannot protect employee from discharge for cause).


33. Section 8(a)(3) provides in pertinent part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." 29 U.S.C. § 158(a)(3) (1970).
for deference to the employer's discretion in the absence of unlawful motivation. In Radio Officers' Union v. NLRB the Court recognized the relevance of motivation but held that specific evidence thereof is not "an indispensable element of proof of violation of § 8(a)(3)." Specific proof of intent is unnecessary, the Court reasoned, where employer conduct inherently encourages or discourages union activity.

In NLRB v. Erie Resistor Corp. the Court took a further step and held that intent could be inferred from "the inherently discriminatory or destructive nature of the conduct itself." However, the Court recognized that the employer's legitimate business purposes must be considered in determining intent. The case involved a union which had bargained with a multiemployer group. After a deadlock in contract negotiations with one employer in the group, the union struck that employer. The struck employer continued to operate using supervisors and tem-

34. "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45 (1937).

The 1947 Taft-Hartley amendments revised § 10(c) of the Act to provide that an employee discharged for cause cannot be ordered reinstated. 29 U.S.C. § 160(c) (1970). Senator Taft explained that the Jones & Laughlin Steel rule had not been changed, and referred to "cause" in a context unmistakably synonymous with employee misconduct. 93 Cong. Rec. 6678 (1947), reprinted in II NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1595 (1948).

For a view that the amended § 10(c) supports the rationale of the "but for" test as applied to § 8(a)(3), see The Impact of Mt. Healthy, supra note 19 at 1122-25. See generally Christensen and Svanoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269, 1280 (1968) [hereinafter cited as The Fictive Formality].


36. Id. at 43.

37. Id. at 44. See The Fictive Formality, supra note 34 at 1286-91 (since the Court treated motivation as a matter of proof, the motivation requirement was not expressly approved).

38. 347 U.S. at 45. "[This rule] is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct . . . ." Id.


40. Id. at 228. The employer had effectively broken a strike by offering superseniority to strike replacements and strikers who returned to work. This conduct was held to be "inherently destructive" of the employees' statutory rights to self-organization. See note 42 infra. See generally Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938); Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1 (1935), enforcement denied in part, 91 F.2d 178 (3d Cir. 1937), rev'd, 303 U.S. 261 (1938).

41. 380 U.S. 278 (1965).
temporary replacements. In order to exert economic pressure on the striking union, the other employers in the group locked out their employees and continued to operate, also employing temporary replacements. The nonstruck employers informed their regular employees that they would be recalled when the strike ended. After the strike was settled, all regular employees were reinstated. The NLRB found that the use of replacements during the lockout by nonstruck employers was a violation of sections 8(a)(1)\(^42\) and 8(a)(3). The Supreme Court disagreed, holding that where the employer's conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, and the tendency of the conduct to discourage union membership is comparatively slight, the employer's improper motivation cannot be inferred but must be established by independent evidence.\(^43\)

The Court's final distillation of the doctrine of these decisions came in *NLRB v. Great Dane Trailers, Inc.*\(^44\) The case involved an employer's refusal to pay accrued vacation benefits to striking employees. In upholding the NLRB's finding of a section 8(a)(3) violation, the Court devised a two-tiered test for dealing with the motivation problem.

The first tier analysis is used if the employer's discriminatory conduct is "inherently destructive" of employee rights. If the employer comes forward with evidence of legitimate business justifications, the NLRB must balance these against the interference with employee rights. The NLRB can infer antiunion animus and find a violation without proof of unlawful motivation. If the employer does not come forward with business justifications, the NLRB must find a violation.

The second tier analysis is used if the discriminatory conduct has a "comparatively slight" effect on employee rights. If the em-

42. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1) (1970). A similar prohibition applies to unions, 29 U.S.C. § 158(b)(2). The rights guaranteed in section 7 are the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of [the employees'] own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157 (1970). Employees also have the right to refrain from any or all of such activities. *Id.*

43. 380 U.S. at 287-88. Since neither the NLRB nor the union had asserted that any improper antiunion motivation existed, no violation of § 8(a)(3) could be found. *Id.* at 289. *See also* Textile Workers v. Darlington Mfg. Co., 380 U.S. 263 (1965) and American Ship Bldg. Co. v. NLRB, 380 U.S. 300 (1965), both decided on the same day as *Brown.*

44. 388 U.S. 26 (1967).
employer comes forward with substantial business reasons, an anti-union motivation must be proved to find a violation. If the employer does not offer evidence of a substantial business reason, the NLRB must find a violation. Using either tier, the burden is on the employer once discriminatory conduct which has some adverse effect on employee rights has been proved.45

APPLICATION OF Great Dane TO SINGLE EMPLOYEE, MIXED-MOTIVE DISCHARGE CASES

One underlying problem with using the Great Dane approach in single employee discharge cases relates to matters of proof. Although an inference of antiunion animus can readily be drawn from a mass discharge, establishing improper motivation becomes more difficult when only one or a few employees are fired. In addition, an examination of the two-tiered approach as applied to mixed-motive cases reveals that it is inadequate to settle the question of which of two proven employer motivations will be legally recognized.

As a threshold matter, in order for Great Dane to apply, the employer’s conduct need only “have adversely affected employee rights to some extent.”46 Certainly, the firing of a union activist could have some such adverse effect on other employees’ union activity.47 The initial determination then would become whether the


46. 388 U.S. at 34 (emphasis by the Court).

47. Contra, The Impact of Mt. Healthy, supra note 19, at 1118-19. Nothing in the Great Dane decision indicates that its holding does not apply to single employee discharge cases. See Janofsky, supra note 45, at 96.

In Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 97 (2d Cir. 1978), the court held that “there is nothing inherently discriminatory or destructive about the discharge of a single employee for cause, even if that employee is a union activist.” (emphasis added). This conclusion is not helpful in determining whether Great Dane should apply
effect of the discharge was inherently destructive or comparatively slight. 48

If the discharge were found to be inherently destructive, the first tier analysis would apply. Assuming that the employer produces convincing evidence of a legitimate business justification for the firing ("cause"), the NLRB would be required to balance the justification against the interference with employee rights. Presumably, this balance has already been struck, because an employer is permitted by the Act to discharge an employee for legitimate reasons. 49 However, because the first tier analysis also allows an inference of antiunion animus, the NLRB could find that the employer had mixed motives.

If the effect of the discharge is comparatively slight, and again assuming that the employer comes forward with a substantial business reason, such as employee misconduct, antiunion animus must be shown in order to find a second-tier violation. Once such antiunion animus is established by independent evidence, the case is in the same posture as the "inherently destructive" mixed-motive case. Neither tier of the Great Dane analysis takes the next step and decides which motive should be recognized as the legally con-
trolling "real" motive.\(^5\) This is precisely the point on which the "but for"-"partial motivation" issue turns. In choosing the proper test, however, the principles established in *Great Dane* should not be overlooked.

In this context, it should be noted that *Great Dane* did lay down some fundamental precepts. The decision shows a definite tendency to further the protection of employee rights. Justice Harlan, in his dissent, was careful to point out that the holding created a presumption in favor of the employee. This presumption, he wrote, would give the NLRB new power to evaluate the employer's business purposes.\(^6\)

It is plain from the most basic application of the *Great Dane* test that such a presumption exists. If the conduct fits into either category, and the employer does not come forward with substantial business justifications, there must be a finding of an unfair labor practice. This will be the result even though the conduct has only a comparatively slight effect on the exercise of employee rights and no discriminatory motivation has been shown. The effect of this presumption is to shift the burden of proving motivation to the employer. Although the *Great Dane* test does not decide the issue in mixed-motive cases, its presumption in favor of the employee should be preserved if the purposes of the NLRA are to be effectuated.

**"But For" v. "Partial Motivation"**

The *Mt. Healthy* decision,\(^5\) which applied a "but for" test in an analogous employment situation, should not apply to mixed-motive discharge cases under the Act. The case can be distinguished on the basis of the statutory presumption in favor of the employee which provides the underlying rationale for the *Great Dane* decision. Such a presumption does not exist in the first amendment area.

The Act was intended to cure the historical inequality of bargaining power between employers and employees\(^5\) and to guarantee the rights of employees to engage in protected organizational

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50. See note 6 supra. Of course, if the purported "legitimate reason" is pretextual, there is no problem in finding a violation based on antiunion animus. In a mixed-motive case, by definition, the employer will always be able to point to a legitimate reason.
52. See text accompanying notes 16-21 supra.
activities.\textsuperscript{54} It is for this reason that the Supreme Court has read into section 8(a)(3)'s prohibition of discrimination a presumption in favor of employee rights.

The "but for" analysis destroys this presumption. By tipping the balance back in favor of the employer, the test takes away the protection which the Act affords the employee\textsuperscript{55} by effectively creating a presumption in favor of the employer. Under the First Circuit's approach, if a legitimate reason for firing the employee exists apart from any antiunion motivation, the discharge does not violate the Act.\textsuperscript{56} Therefore, where an employer is found to have mixed motives for the discharge, he is presumed to have acted for a legitimate reason.\textsuperscript{57} This analysis ignores the existence of antiunion animus if cause can be found for the discharge.\textsuperscript{58} In so doing, it may often fail to discern the employer's "true purpose."

The "partial motivation" test provides much more substantial protection for employee rights. Since any antiunion motivation will taint the discharge, the employer is required to act for reasons totally unassociated with the employee's union activity. By preserving the presumption in favor of the employee, the "partial motivation" approach tips the balance in favor of the employee. The

\textsuperscript{54} See note 42 supra.
\textsuperscript{55} See Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1263-65 (5th Cir. 1978) (concurring opinion of Thornberry, J.), discussing the balancing of interests in the Mt. Healthy case:

Similar competing interests exist in the labor setting, but there Congress has already established a balance by passing the labor laws. That balance favors the employee, for Congress clearly recognized the superior bargaining position of the employer . . . . The "but for" standard significantly restrains this balance in favor of the employer, and such a test is contrary to Congressional policy . . . .


\textsuperscript{56} See cases cited in note 21 supra. See also The Impact of Mt. Healthy, supra note 19 at 1117 nn. 41-43, citing the legislative history of the Taft-Hartley amendments in support of the employer's unfettered right to discharge. The cited sections are inconclusive as to mixed-motive cases.

\textsuperscript{57} The burden then shifts to the NLRB to overcome this presumption by clearly showing that the employer acted for an improper reason. "[T]he Board has the burden of establishing by substantial evidence an affirmative and persuasive reason why the employer rejected the good cause and chose the bad one." Liberty Mut. Ins. Co. v. NLRB, 592 F.2d 595, 602 (1st Cir. 1979).

Such a requirement impinges on the area of the NLRB's expertise. The NLRB's particular knowledge entitles it to make findings of fact as to employer motivation without having to overcome an additional burden of proof imposed without legislative sanction. \textit{See} note 64 \textit{infra}, and accompanying text.

\textsuperscript{58} Federal-Mogul Corp. v. NLRB, 566 F.2d 1245, 1265 (5th Cir. 1978) (opinion of Thornberry, J. concurring).
balance, however, has been tipped too far.

Once the NLRB has proven that an unlawful motivation played some part in the decision, the "partial motivation" test is satisfied and legitimate reasons will not legitimize the discharge. By effectively ignoring the employer's proper motives, this approach presumes that the employer acted only for improper ones. Such a test comes no closer to approximating the "real motive" than does the "but for" test.

**Actual Motive**

Neither of these tests effectively deals with the tension which exists between the employees' right to self-organization and the employer's right to run his business. Normally, the employer has the right to fire any employee for any reason.60 Problems arise when a prohibited motivation enters the picture. The Act, with its strong policies favoring the protection of employees, then comes into play. If there exists a complex set of motives, determining which should be recognized as the "true purpose" is a delicate task.

In light of the tension created by the existence of these two opposing and equally valid concerns, a balancing test is particularly appropriate. The actual motivation can best be characterized as the motive which weighs more heavily in the employer's decision to discharge. If the antiunion motivation is the weightier one, the discharge violates section 8(a)(3). On the other hand, if proper reasons weigh more heavily in the decision, the discharge is not an unfair labor practice.60

This test is the one previously applied by the First Circuit.61 The difference between this formulation of the "dominant motive" test and the "but for" approach is a fine but important distinction.62

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59. "It is well accepted law that an employer may discharge an employee for any reason, reasonable or unreasonable, so long as it is not for a reason prohibited by the Act." NLRB v. Standard Coil Products Co., 224 F.2d 465 (1st Cir. 1955). It might be added that many collective bargaining agreements prohibit discipline or discharge except for "cause." However, such limitations are imposed voluntarily through the bargaining process, not by statute.

60. There is some support for a balancing test in the Supreme Court decisions. Great Dane suggests such an approach, at least in its first tier analysis; the Court states that it is the duty of the NLRB to "strike the proper balance . . . in light of the Act and its policy." 388 U.S. at 33-34. See also NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963) (preferring one motive to another is a weighing task).

61. See notes 7-11 supra.

62. The distinction is a matter of degree. While the balancing test makes the amount of
Suppose that an employee has broken a shop rule which often, but not always, leads to discharge. When the employer learns of the violation, he goes to talk to the employee. The employer notices that the employee is wearing a union sticker. The employer, who in the past has made known his intense dislike for the union, says to the employee "I told you about that union. You are fired."

If a "but for" test is applied, there will probably be no finding of a violation. The focus of the inquiry will be on the existence of cause. Since the employer had a good reason for discharging the employee, he is presumed to have acted for that reason. His statement is useful to the employee only if the NLRB can show that the employer abandoned the proper reason and chose an improper one. This is a difficult burden, and the NLRB is not likely to carry it.

If a "partial motivation" test is used, there will probably be a finding of a violation. The focus of the inquiry will be on the existence of an antiunion motivation. The NLRB will draw an inference of antiunion animus from the employer's known dislike for the union and the statement he made to the employee. Because the employer had an improper reason for firing the employee, he is presumed to have acted for that reason. The employer can win only if he shows that the discharge was motivated solely by proper reasons. This, too, is a difficult burden, and the employer is not likely to carry it.

If a balancing test is applied, the focus of the inquiry is to determine which motivation weighed more heavily in the decision to discharge. Such a factual determination is no simple task, but it remains the only way to recognize the actual motivation. The motivation which weighs more heavily in the balance most closely fits the description "true purpose." Here, too, the NLRB will draw an inference of antiunion motivation from the surrounding circumstances. The presumption in favor of the employee permits such inferences. The NLRB must then balance the inference along with any independent evidence of improper motivation against the employer's evidence of good cause. The weightier motivation should be given legal effect.

The balancing test is more likely to produce results which accu-
rately reflect the employer’s intent. The employer cannot protest that good cause existed if his actions were actually prompted by unlawful considerations. On the other hand, the employee’s union activity will not immunize him from discharge. If the discharge was motivated more by legitimate reasons than by antiunion animus, there will be no violation despite some causal connection between the improper reason and the firing. This balancing will adequately reflect the legitimate tension created by the Act.

The NLRB is well equipped to apply such a balancing test. The NLRB has the “special function of applying the general provisions of the Act to the complexities of industrial life.” Its expertise enables it to make a choice between “two fairly conflicting views,” a task necessary to perform the delicate balancing required here.

Proof of Motivation

Once a legal standard is chosen for single employee mixed-motive discharge cases, the closely linked problem of proving the various motivations must be considered. The NLRB can consider only motivations which are supported by substantial evidence. The real difficulty lies in determining what sort of evidence the NLRB can use to support an inference of antiunion motivation. Since employers rarely make overt statements showing such intent, the NLRB must depend on circumstantial evidence. Under Great Dane, if the discharge were inherently destructive, the NLRB could draw an inference of antiunion motivation from the discharge itself. Although it is possible that the firing of one employee could warrant such treatment, the more common situation probably only involves conduct with a comparatively slight effect. The NLRB would therefore be required to show motivation by independent evidence. Because it is more difficult to draw an inference from a single discharge than from a mass lay-off, the Great Dane categorization should be avoided.

The lessons of the Great Dane line of cases should not be overlooked, however. The NLRB has the power to draw important inferences, and a special area of labor expertise has been granted.

66. Id.
67. The NLRB may base its findings on the testimony of witnesses or its informed judgment on matters within its special competence or both. Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951). See also Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966) (trier of fact may infer motive from the total circumstances).
The NLRB should therefore be able to draw inferences from all the facts and have its decisions reviewed in the limited fashion allowed for under the *Universal Camera* decision.

A final problem in discharge cases is the proper allocation of the burden of proof. Under the "but for" and "dominant motive" tests, the shifting burden has been carefully spelled out. The NLRB makes a prima facie showing of a discriminatory firing. The employer may counter by presenting evidence of good cause for the discharge. The burden then shifts to the NLRB to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one.

Under the balancing approach suggested, this shifting burden analysis can be largely circumvented. The NLRB would put forth its case, and the employer would attempt to show that the firing was based on legitimate reasons. There would then be no need for the NLRB to attempt to show an affirmative reason why the employer acted for an improper motive. Since the establishment of good cause does not explain away the existence of improper motive, there is no need to shift the burden back to the NLRB. Functionally, each side need only put forward their best case with the normal opportunity to rebut opposing evidence.

**Conclusion**

Resolving the current conflict over the standard to be applied in single employee mixed-motive discharge cases will require careful consideration of both the underlying policies served by the Act and

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68. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), the Supreme Court articulated the standard of review by the courts of the NLRB's findings of fact, holding that the reviewing courts must adhere to the "conventional judicial function." *Id.* at 490. A reviewing court may not "displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice." *Id.* at 488.

For recent discharge cases illustrating the wide range of deference accorded by the courts of appeals to the NLRB's findings, compare *Electri-Flex Co. v. NLRB*, 570 F.2d 1327 (7th Cir.) cert. denied, 439 U.S. 911 (1978), with *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 604-06 (1st Cir. 1979). This variance may subside when the controlling legal standard is clearly established. In *NLRB v. Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979), the First Circuit renewed its challenge to the NLRB to take the issue to the Supreme Court. In an address to the ABA Section of Labor and Employment Law, former NLRB General Counsel John S. Irving commented that "the Board's expertise does not entitle it to ignore a Supreme Court decision as compelling as Mt. Healthy appears to be. If the Board considers Mt. Healthy to be inapplicable, it must say so, and say why, or it will lose the issue by default." *Reprinted in* 103 Lab. Rel. Rep. (BNA) 204, 208 (1980).

69. See *Liberty Mut. Ins. Co. v. NLRB*, 592 F.2d 595, 602 (1st Cir. 1979); *NLRB v. Fibers International Corp.*, 439 F.2d 1311, 1315 (1st Cir. 1971).

70. *NLRB v. Billen Shoe Co.*, 397 F.2d 801, 803 (1st Cir. 1968).
the practical problems of allocating the burden of proof in a complaint case. The NLRB has thus far failed to obtain a decision on these issues before the Supreme Court.

The motivation requirement should harmonize with the general principles embodied in the statute and articulated in Great Dane. A balancing approach is the favored means of dealing with the competing interests of employers and employees under the law. The employer's weightier or "dominant" motive for discharging an employee should be given legal effect. Only inferences supported by substantial evidence should enter into the balance, for the Act is not a proscription against general antiunion sentiment. Finally, the burden of proof should be allocated without placing upon the NLRB a burden unwarranted by a sound interpretation of the statute.

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