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Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality

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The legal maxim *Actus non facit reum nisi mens sit rea* is not a phrase in constant use among attorneys whose practice is concerned with federal regulatory agencies. The forms of conduct with which federal regulatory statutes are concerned are much more amenable to flat "thou shalt nots" than to prohibitions hinging upon a state of mind. Horizontal mergers, for example, may or may not violate the anti-trust laws, but their illegality is not dependent upon the motives of their promoters. The absence of any necessity for proof of motive in such prohibitions is probably fortunate for all concerned. Introducing such an element—whether it be called motive, intent, scienter, malice, or that old, odd complex, *mens rea*—into either a criminal or civil offense places an onerous burden on the adjudicatory system—examination of the mind of the actor as well as the more easily ascertainable effects of his actions.

It is, therefore, both curious and significant that motive and intent (if not, indeed, a form of *mens rea*) have, over the past two decades, assumed a growing and increasingly troublesome role in the adjudication of cases arising under one of the most important of the federal regula-

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tory statutes, the National Labor Relations Act.[1] It has long been recognized that many actions will be held to constitute unfair labor practices per se, whatever the state of mind which accompanies them. Representatives of labor and management are also aware, however, that the legality of certain types of conduct may be dependent upon an analysis of motive. The subject matter of the cases which have turned upon such an analysis—terminations of employment, fringe benefits, hiring halls, lockouts, union security, plant closures—underlines the grave importance of the motive question to both management and labor. The same decisions also disclose the existence of a wide divergence of views among the members of the Court as to the proper role of motive in unfair labor practice cases, a divergence which has not only led to confusion as to the proper tests of the legality of a wide range of employer and union conduct but which also touches upon the most fundamental problems of policy in the administration of our federal labor laws.

Not long ago, in reviewing the labor law product of a recent term of the Court, Professor Clyde Summers caustically accused the Court of "driving into the darkness of lightless language the actual grounds for its decision."[2] It is significant that the specific cases which drew this rebuke from such a respected observer were controversies which intimately involved problems of motive and proof of motive. It is the thesis of this article that over the years the proper role of motive in determining what constitutes an unfair labor practice has been warped from the original statutory design; furthermore, that both motive and the requisite proof of motive are factors which, in current usage, often disguise rather than clarify the thrust of the prohibitions contained in the Act and unnecessarily hamper its proper administration. Finally, it is the conclusion of this study that the Court must reassess both motive and its necessary evidentiary support in terms which will better disclose what Professor Summers terms the "actual grounds" of decision.

I. The Problem and Its Source

Section 8 of the National Labor Relations Act[3] sets forth, *inter alia*, those categories of employer and union conduct which constitute prohibited unfair labor practices. Prohibitions relating to employer conduct are contained in subsection (a), those pertaining to union acts are

1. 29 U.S.C. §§ 151-67 (1964).
2. Summers, *Labor Law in the Supreme Court: 1964 Term*, 75 YALE L.J. 59, 73-74 (1965).
3. 29 U.S.C. § 158 (1964).

listed in subsection (b), and special rules applicable to both labor and management are set forth in subsections (d) and (e). As to a number of these provisions, motive or intent[4] has been clearly and consistently regarded as irrelevant. An employer who recognizes or bargains collectively with one of two competing unions,[5] or who honestly but mistakenly punishes an employee for alleged misconduct relating to protected concerted activities,[6] is guilty of violating the statute no matter what his motivation.[7] Similarly a union which compels an employer to designate, against his will, an employer association as his representative in collective bargaining will be held to violate the statute whatever the reasons impelling the demand.[8] The focus of this study, however, is upon that group of unfair labor practices in which the intent of the actor has been found to be a critical factor in determining the legality of employer or union conduct.[9] Within this category, the treatment of motive has been particularly significant—and particularly

4. While "motive" and "intent" are, under some circumstances, distinguishable terms, they have been used as though they were synonymous by both the National Labor Relations Board and the courts in the case law under study. Accordingly, this analysis does not attempt to distinguish between the two and will use them interchangeably.

5. Midwest Piping & Supply Co., 63 N.L.R.B. 1060 (1945). As subsequently revised and stated in Shea Chem. Corp., 121 N.L.R.B. 1027 (1958), the *Midwest Piping* rule holds that "upon presentation of a rival or conflicting claim which raises a real question concerning representation, an employer may not go so far as to bargain collectively with the incumbent (or any other) union unless and until the question concerning representation has been settled by the Board." *Id.* at 1029.

6. NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 23 (1964).

7. *See, e.g.*, Air Master Corp., 142 N.L.R.B. 181 (1963), *enforcement denied*, 339 F.2d 533 (3d Cir. 1964) (fear of economic reprisal); Swift & Co., 128 N.L.R.B. 732 (1960), *enforcement denied*, 294 F.2d 285 (3d Cir. 1961) (honest mistake); Novak Logging Co., 119 N.L.R.B. 1573 (1958) (favoritism). In B.M. Reeves Co., 128 N.L.R.B. 320 (1960), the Board specifically noted that:

> [T]he element of intent or motive . . . is immaterial. The employer's conduct is illegal only if the recognition and contract were accorded a minority union or accorded the union at a time when a real question concerning representation existed.

Id. at 322. *See also* NLRB v. Burnup & Sims, Inc., 379 U.S. 21, 22 (1964).

8. Metropolitan Dist. Council (McCloskey & Co.), 137 N.L.R.B. 1583 (1962).

9. Perhaps the most prominent of such situations, other than those discussed herein, is in the area of certain Section 8(a)(5) violations bearing upon the issue of good faith. That section requires an employer to recognize a union (even without certification after a Board-conducted secret ballot among the involved employees) if he has no good-faith doubt as to its majority support in an appropriate unit. Determination of that central issue of good-faith doubt necessarily involves the Board in an examination of employer motivation. *See, e.g.*, Snow & Sons, 134 N.L.R.B. 709 (1961), *enforced*, 308 F.2d 687 (9th Cir. 1962).

There are other areas of Section 8 where the role of motive as a necessary element of an unfair labor practice must rest upon the breadth of definition of that term. Section 8(b)(4), for example, condemns both strikes and union coercion if the union's conduct has as "an object" one of the forbidden aims listed in the four subparagraphs of the section. Determination of whether a strike is called or conducted to achieve, at least in part, one of these "objects" might be considered in some degree equivalent to an examination of motive. See, for example, Glazier's Local 513 (Cupples Products Corporation), 148 N.L.R.B. 1648 (1964), where the Board was required to find whether picketing was for organizational purposes or to induce a work stoppage in order to force an employer to stop using nonunion products.

subject to judicial disagreement and modification—in cases involving the complementary restrictions of Sections 8(a)(3) and 8(b)(2). This analysis, accordingly, will concentrate on these sections, with some reference to, and comparison with, the provisions of Section 8(a)(1).

The basic thrust of Section 8(a)(3)[10] is stated almost too concisely in its opening phrase: "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." The section thus postulates three elements of a basic violation. The action must constitute "discrimination," it must take effect in the particular area of "hire, tenure of employment or any term or condition of employment" and it must be "to encourage or discourage membership in any labor organization." This basic prohibition is followed by complex provisos creating a limited exemption as to certain union security contract clauses. Section 8(b)(2),[11] in turn, forbids a union "to cause or attempt to cause" an employer to violate Section 8(a)(3) or to discriminate against an employee whose non-membership results from any factor other than failure to pay dues and initiation fees. The essential aim of these sections is clear:

> The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were 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.[12]

Though the purpose is clear and the statutory language is brief, few provisions of the Act have so troubled the Board and the courts in their application.

The problem of motive arises under Sections 8(a)(3) and 8(b)(2) because it is only discrimination "to encourage or discourage" union membership that is forbidden. The phrase "to encourage or discourage" can, of course, be read to require only that an *effect* of encouragement or deterrence of membership be shown to result from the dis-

10. 29 U.S.C. § 158(a)(3) (1964).
11. 29 U.S.C. § 158(b)(2) (1964).
It shall be an unfair labor practice for a labor organization or its agents . . . to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . .
12. Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954).

crimination. But other readings are equally plausible. Briefly, the statutory language may be interpreted as requiring (a) an *effect* of encouragement or discouragement; (b) an *intention* to achieve that effect; (c) *both* effect and intent; or (d) *either* effect or intent.[13] Analysis of these alternatives and their various implications is not a futile scholastic exercise. Such a study is essential because the consequences of selecting any one of these alternatives in a given case are significant but not immediately apparent.[14]

Such consequences are not, moreover, restricted to a few unique situations; they extend to a wide variety of both management and union actions. And the substantial range of conduct affected frequently touches upon the most intimate aspects of the power balance between unions and employers in our society. In the past three decades, the National Labor Relations Board and the courts have demonstrated an increasing awareness of the political and economic consequences of a choice between the competing interpretations. The most recent attempt of the Supreme Court to resolve the problems involved[15] is but another strand in a web of long devising, a web which has become so entangled over the years as to make a retracing of its origins and construction essential.

II. The Tangled Web

A. *Stage One—Motive as Evidence of Discrimination*

Five months after the National Labor Relations Act became law, the new National Labor Relations Board issued its first decision, a decision which, appropriately enough, touched upon motivation in discrimination cases. In *Pennsylvania Greyhound Lines, Inc.*[16] the Board was re-

13. In each case, of course, there is the further problem of the quantum of evidence necessary to sustain the finding.

14. This can be illustrated by a not-uncommon example. An employer's production and maintenance employees are represented by a union with which it has an amicable relationship. The employer desires, for reasons possibly having nothing to do with the presence of the union, to institute a pension plan with substantial benefits for its unrepresented clerical and administrative staff, a plan which is not in effect or offered for the unionized group. Institution of the plan, under these circumstances, can easily be alleged to be discriminatory: non-union employees receive different and more favorable treatment than union personnel. The discrimination takes place in the area of terms and conditions of employment. Affirmative evidence of a motive to discourage would, however, be lacking. On the other hand, it could easily be alleged that an effect of discouragement was either explicit or implicit in the disparate treatment. Accordingly, whether or not institution of the plan would result in a violation of Section 8(a)(3) must necessarily depend upon—and vary with—the selection of the alternative requirements set forth in the text.

15. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967); NLRB v. Fleetwood Trailers, 389 U.S. 375 (1967).

16. 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).

quired to determine whether the discharge of a number of employees had been the result of their union membership and activity. In the course of its decision, the Board commented as follows:

> Here, as generally, in discharging these employees the respondents did not openly state that they were being discharged for union membership or activity, so that standing by themselves the actual discharges constitute equivocal acts in the light of the conflicting reasons that are advanced. In reaching a decision between these conflicting contentions, the Board has had to take into consideration the entire background of the discharges, the inferences to be drawn from testimony and conduct, and the soundness of the contentions when tested against such background and inferences. . . . [A]s the Supreme Court has stated "Motive is a persuasive interpreter of equivocal conduct."[17]

Having previously found evidence of a pervasive hostility on the part of the employer with respect to the union, the Board concluded that a substantial number of the discharges had been in violation of the Act.

Pennsylvania Greyhound Lines, apart from its historical significance, deserves special attention because it aptly displays the role accorded to the employer's state of mind in early discrimination cases. While an occasional employer was so badly advised as to state to his departing victim, "Jack, if you want to know why you are fired, the reason is the Union,"[18] such rough honesty was not the rule.[19] In the normal case, where direct evidence was lacking that protected activity had caused the economic punishment, the Board turned to an examination of the employer's mental processes. Proof of an overall anti-union animus was, in many instances, considered sufficient to demonstrate that the reason (*i.e.*, "motive") for a termination or demotion was union activity rather than some other, independent cause for discipline.

In *Pennsylvania Greyhound* neither an *intention* to discourage union membership nor the actual *existence* of such an effect was the subject of direct Board inquiry or explicit finding. Instead, the Board used the somewhat simplistic equation that punishment because of union activity must equal discrimination to discourage union membership. It was not the employer's ultimate intent, as such, that was the focus of inquiry; rather, motive played the limited role of a "persuasive inter-

17. 1 N.L.R.B. at 23.
18. Club Troika, Inc., 2 N.L.R.B. 90, 93 (1936).
19. As the Board noted in its Second Annual Report, "In no case has a respondent admitted in its pleadings or at the hearing that it has discriminated against employees because of their union activity. Frequently, however, clear evidence of discrimination has gone uncontradicted." 2 NLRB ANN. REP. 70 n.9 (1937).

preter of equivocal conduct." It was treated not as an essential element of the substantive violation, but as an evidentiary aid in determining whether protected union activity had in fact been the cause of the terminations.

Of course, where discipline clearly constituted retribution for union activity, the Board could reasonably have concluded that the employer had consciously or unconsciously intended to discourage union membership and that such discouragement had in fact resulted. Both *intent* and *effect*, as possible statutory requirements, accordingly would have been established. But (and the caveat is of consequence) the early Board approach did not consider whether these were essential elements of an unfair labor practice.

The Supreme Court's early approach paralleled that of the Board. In sustaining the constitutionality of the Act in *NLRB v. Jones & Laughlin Steel Corp.*,[20] the Court had occasion to discuss briefly the role of motivation in discharge cases.

> The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. *The true purpose is the subject of investigation with full opportunity to show the facts.*[21]

While this statement has since been cited as establishing a requirement that the Board must find a motive to discourage or encourage union membership in Section 8(a)(3) cases, it is clear from the context that the Court did not mean to advance any such proposition. The Court was dealing with problems of proof, not enunciating the legal elements of an unfair labor practice. A discharge resulting from union activity is discriminatory and hence illegal; one based upon cause is not. Where the circumstances are equivocal, inquiry must be made as to the probable causation.

20. 301 U.S. 1 (1937).

21. *Id.* at 45-46 (emphasis added). In a companion case decided on the same date, Associated Press v. NLRB, 301 U.S. 103 (1937), the Court again found a violation to have been established because the "actual reason" for a discharge was the union activity of the terminated employee. In doing so, the Court commented that, while the statute "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).

Thus in their early applications of Section 8(a)(3),[22] both the Board and the Supreme Court regarded motive as an evidentiary tool rather than a statutory requirement. In the first cases to come before it, the Board contented itself with asking "Did you or did you not discharge this employee because he engaged in union activity?" It did not ask the further question "And when you did so, did you intend to discourage union membership?" By not recognizing any need for an explicit finding as to intent, the Board at least left open (if indeed it did not negate) the element of intent to discourage as a requisite of the violation.

It is true that on occasion the language of a particular Board decision referred in a discrimination case to the existence of an intention to discourage union membership. None of these references, however, appeared to treat motive as an essential element of the violation.[23] Instead, when the Board did pay special attention to the element of discouragement in this early period, it was frequently noting the existence of the effect rather than demonstrating any visible interest as to whether that particular result had been intended.[24]

The same concentration upon impact rather than motivation became even more apparent as cases were presented to the Board in which the existence of an affirmative intent to encourage or discourage membership was actively rebutted. Thus in *NLRB v. Star Publishing Co.*[25] the Ninth Circuit, affirming a Board order reinstating transferred employees in their former positions, held that the Act "prohibits unfair

22. While Section 8(a)(3) was, during the period from 1935 to 1947, designated as Section 8(3), present designation has been used throughout this study to avoid unnecessary confusion.

23. An illustrative case is Agwilines, Inc., 2 N.L.R.B. 1, *enforcement denied in part*, 87 F.2d 146 (5th Cir. 1936), where the Board found that certain employees were "discharged and discriminated against in regard to hire and tenure of employment *for the purpose* of discouraging membership in the Union." *Id.* at 13 (emphasis added). The Board went on, however, to make it clear that it was merely determining whether "cause" or union activity had impelled the discharge rather than mounting a separate investigation into whether there was a desire to discourage membership. *Id. See also* Quidnick Dye Works, Inc., 2 N.L.R.B. 963 (1937), where the brother of a union adherent was discharged along with his activist sibling. Under the circumstances, the Board could not treat the termination as caused by the dischargee's own union activity, but found that it was "calculated to and did have the necessary effect of discouraging membership in the Union." *Id.* at 968. The same case was subsequently described by the Board as standing for the proposition that "all that is necessary is that . . . [the] discharge have a necessary effect of discouraging membership in the union." 2 NLRB ANN. REP. 74 (1937).

24. *See, e.g.*, Highway Trailer Co., 3 N.L.R.B. 591 (1937), *enforced*, 95 F.2d 1012 (7th Cir. 1938). There a collective bargaining contract allowed a union to obtain the discharge of any employee found by it to be "undesirable." Without separate inquiry into the intent of the parties, the Board concluded that "[b]y establishing as a condition of employment the liability to discharge at the whim of the shop committee . . . the respondent has discriminated in favor of the [union] and its members. Such discrimination encourages membership in the [union], and by virtue of the arbitrary power vested in the [union], discourages membership in any other labor organization." *Id.* at 610.

25. 97 F.2d 465 (9th Cir. 1938).

labor practices without regard to the factors causing them," and observed that there is no immunity "because the employer may think that the exigencies of the moment" require a specific action.[26] The Board later summarized this holding by stating that "the law is well settled that 'when it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives,' even where it is shown that the employer 'has not wilfully violated' the Act."[27]

Further evidence that the Board and the courts were reading the Act as not requiring a specific showing of intent to discourage or encourage membership is provided by the Board's treatment of discharges resulting from the breach of invalid company rules. In these cases, although the rules were not shown to have been promulgated as anti-union measures, they were nonetheless found to interfere with the exercise of Section 7 rights. Penalties inflicted upon employees for their breach were, in the Board's view, necessarily violations of Section 8(a)(3) despite the absence of any evidence that the intent behind either the institution or the enforcement of them had been to discourage union membership. Such intent was irrelevant if the rule in question otherwise violated the Act. As the Board stated in *Republic Aviation Corp.*,[28] a case involving company rules prohibiting solicitation and distribution of literature on company property, "it is now established that, in the absence of special circumstances, a rule prohibiting union activity on company property outside of working time constitutes an unreasonable impediment to self-organization, and that discharges for violation thereof are discriminatory."[29] The Supreme Court, in affirming the Board's order, was equally convinced that proof of motivation was irrelevant:

> [P]etitioner urges that irrespective of the validity of the rule against solicitation, its application in this instance did not violate § 8(3) because the rule was not discriminatorily applied against union solicitation but was impartially enforced against all solicitors. It seems clear, however, that if a rule against solicitation is invalid as to union solicitation on the employer's premises during the employee's own time, a discharge because of violation of that

26. *Id.* at 470.
27. Eureka Vacuum Cleaner Co., 69 N.L.R.B. 878, 879 (1946). The Board cited NLRB v. Hudson Motor Car Co., 128 F.2d 528 (6th Cir. 1942), and NLRB v. Gluck Brewing Co., 144 F.2d 847 (8th Cir. 1944).
28. 51 N.L.R.B. 1186 (1943), *enforced*, 142 F.2d 193 (2d Cir. 1944), *aff'd*, 324 U.S. 793 (1945).
29. *Id.* at 1187. *See also* LeTourneau Co., 54 N.L.R.B. 1253, *enforcement denied*, 143 F.2d 67 (5th Cir. 1944), *rev'd*, 324 U.S. 793 (1945)

rule discriminates within the meaning of § 8(3) in that it discourages membership in a labor organization.[30]

Although such terms as "motive," "purpose," "intent," and "effect" were scattered with some largess throughout the texts of the early decisions,[31] the usage was usually casual and without any observable attempt to define the statutory requirements of the violation. Nevertheless, certain conclusions can be drawn from the general pattern of the decisions of this era. Once it had established the existence of punishment based upon union activity, the Board did not, at this stage, require a separate finding of an intent or an effect of discouragement or encouragement of union membership. In those instances where such an impact clearly attached to an employer's action, not only was the absence of a motive to discourage found irrelevant, as in *Republic Aviation*, but affirmative evidence of independent economic motivation, as in *Star Publishing*, was found not to bar an unfair labor practice finding.[32]

30. Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945).

31. The Board's carelessness as to precision of language is illustrated, to choose one example from many, by its decisions in May Dep't Stores Co., 59 N.L.R.B. 976 (1944), *enforced*, 154 F.2d 533 (8th Cir. 1946), *cert. denied*, 329 U.S. 725 (1946), and Carl L. Norden, Inc., 62 N.L.R.B. 828 (1945). Both cases involved discharges for what the employers claimed were breaches of valid no-solicitation rules. Operating on the premise that discriminatory application of such a rule (*i.e*, applying it only to union solicitation) would make enforcement of even a valid rule unlawful, the Board found that the employers in both cases had violated the Act in this manner. In *May Dep't Stores*, the Board additionally observed that

> [t]he failure to conduct a fair investigation coupled with the respondent's general antipathy to the Union, clearly evidenced the respondent's eagerness to rid itself of union adherents and strongly suggests that the real motive underlying the discharges and lay-offs was the respondent's anti-union animus, rather than any sincere belief on its part that the employees in question had violated the rule. . . .

59 N.L.R.B. at 982. Similarly, in the *Norden* case, the Board observed that the "true motive" for the discharge was "a desire to interfere with, discourage, and restrain . . . union activities." 62 N.L.R.B. at 831. Motive in the sense of anti-union animus and a desire to interfere with union activity was thus adverted to in the same manner as in the cases described above when the actual cause for punishment was the central issue. The references clearly do not purport to make a finding of intent a requisite for *any* discrimination violation. These same decisions, however, were subsequently described in the Board's Tenth Annual Report as standing for the proposition that

> where the evidence establishes that an employer's true motive in discharging an employee is to discourage membership in a labor organization, the Board has refused to permit the employer to effectuate his unlawful motive under the guise of . . . [lawful] rules and regulations.

10 NLRB ANN. REP. 42 (1945).

32. The Board treatment of Section 8(a)(3) cases drew early critical comment. Chester Ward, in a 1939 study, stressed the problems which could arise if the Board continued to read the statutory term in Section 8(a)(3) of "union membership" as though it were equivalent to the phrase "union activities."

> If it is possible to "discriminate because of union activities" without "encouraging or discouraging membership in a labor organization," it would seem to be the duty of the Board in each case of an allegation of violation of Section 8(3) to look for "substantial" evidence that the employer's conduct had the effect of such encouragement or discouragement. And the possibility of "discrimination" without "discouragement" is potential in both the type of union activities concerned and in the manner in which the discrimination is effected.

B. *Stage Two—Motive as an Essential Finding*

In 1947 Congress drastically revised the basic thrust of the National Labor Relations Act through enactment of the Labor Management Relations Act.[33] Section 8(a)(3) was substantially modified with respect to the provisos exempting union security contracts, but the introductory language containing the overall prohibition was left unchanged. Two other new provisions, however, adverted to the discrimination theme of the section. Section 8(b)(2)[34] set forth a new unfair labor practice forbidding unions to cause or attempt to cause an employer to violate Section 8(a)(3). Section 10(c),[35] relating to the procedures and restrictions applicable to unfair labor practice proceedings, was amended to include the direction 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."

Neither of the new provisions required any appreciable change in the established treatment of motive in unfair labor practice cases. Motive was, in fact, scarcely mentioned in connection with Section 8(b)(2). The new restrictions of that section were clearly a response to legislative concern that union power was being utilized to punish employees by means of contracts containing union security clauses.[36] But neither the reports and debates nor the text of Section 8(b)(2) disclosed any indication of a legislative decision as to what part, if any, a motive to encourage or discourage union membership was to play under either Section 8(a)(3) or the new section.[37]

Ward, *"Discrimination" Under the National Labor Relations Act*, 48 YALE L.J. 1152, 1158 (1939).

> Moving from the issue of effect to that of intent, he had a further warning:
> The strictest interpretation of Section 8(3) would, of course, require not only proof that membership in a union was in fact encouraged or discouraged, but also a specific intent to bring about that result. *Such an intent could not be shown by substantial evidence in the union activities-employer discipline cases considered above.*

Id. at 1166 (emphasis added). The problems thus suggested were more latent than real at the time of Ward's analysis. Fifteen years later they could no longer be ignored and, in Radio Officers' Union v. NLRB, 347 U.S. 17, 43 n.47 (1954), the Supreme Court accorded his perception a footnote nod of recognition.

33. 61 Stat. 136 (1947), 29 U.S.C. §§ 141-87 (1964).

34. 29 U.S.C. § 158(b)(2) (1964).

35. 29 U.S.C. § 160(c) (1964).

36. The Senate Report on the proposed new Section 8(b)(2) noted that it was "designed to protect individual employees from discrimination in employment induced by a labor organization which has a union-shop contract with an employer. . . ." S. REP. No. 105 on S. 1126, 80th Cong., 1st Sess. 21 (1947), in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 427 (1948) [hereinafter cited as LEG. HIST. LMRA]. References to the section in the debates centered upon instances in which employees in disfavor with their union were subsequently punished by loss of employment through enforcement of closed shop and union shop contracts. In this regard, see comments by Senators Taft and Ball, 2 LEG. HIST. LMRA 1010, 1094, 1199-1200, 1420.

37. This is, of course, apart from the references to motive in the pretext cases where,

Motive, on the other hand, was the subject of considerable discussion with respect to the amendment of Section 10(c). The congressional concern with motivation, however, was limited to the Board's use of "motive" in the sense of anti-union animus on the part of an employer, in deciding whether or not a given disciplinary measure had in fact resulted from participation in protected concerted activity. Furthermore, in spite of congressional attempts to curb the Board's authority to rely on motive in making such determinations, the amendment which was finally enacted had no such effect.[38] As Senator Taft summarized the effect of the Section 10(a) amendment on cause:

as discussed in note 38 *infra*, the issue before the Board is whether an individual has been punished because of some other, unrelated cause.

38. The Board was heavily criticized for its decisions in cases where it found union activity to be the operative reason for discipline notwithstanding the employer's allegation that employee misconduct or other "cause" had impelled that discipline. The Hartley bill in the House of Representatives attempted to curb the Board in such instances by requiring that no reinstatement or back pay could be ordered "unless the weight of the evidence" showed that the suspension or discharge was not for cause. H.R. 3020, 80th Cong., 1st Sess. (1947), in 1 LEG. HIST. LMRA 69. The House Report, in this regard, charged that "[i]n the past, the Board, admitting that an employee was guilty of gross misconduct, nevertheless frequently reinstated him, 'inferring' that, because he was a member or an official of a union, this, not his misconduct, was the reason for his discharge." H.R. REP. No. 245, 80th Cong., 1st Sess. (1947), in 1 LEG. HIST. LMRA 333. Under its proposed change, the Report continued, the Board would not be able to "'infer' an improper reason when the evidence show[ed] cause for discipline or discharge." *Id.* 334. In the final text of the legislation, however, the requirement as to the "weight of the evidence" was deleted and Senator Taft described the change in Section 10(c) as not altering "the present rule and the present practice of the Board." 2 LEG. HIST. LMRA 1595. At a prior point in the colloquy which gave rise to this statement, Senator Taft presented a justification for inclusion of an amendment which would not alter the Board's approach:

> When we have a conference with the House and the House yields on all the major points, if the House conferees want certain language in, and the language does not do any more than state the existing law, it is a little hard to refuse to put it in. That is why we put it in. For the purpose of the RECORD, I am glad to make that statement, because there is no intention whatever to change the existing law on this particular question.

Id. at 1594. The House Conference Report, H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. (1947), in 1 Leg. Hist. 559, noted that "[t]he Conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence . . . ." Professor Archibald Cox, in a subsequent analysis of the 1947 amendments, concluded that the basic thrust of Section 8(a)(3) had not been altered by the addition of the "cause" language of Section 10(c). Professor Cox, it is true, referred to motive, in this respect, as a key element of Section 8(a)(3) violations:

> The reason the employer's motive is decisive is plain. Imposed legal duties are usually a compromise between conflicting interests, the aggressor being privileged to invade the victim's interest to protect his own, so far as the law recognizes it. Hence, when the aggressor is not actuated by a desire to protect a recognized interest, the basis for his excuse disappears. This philosophy is embedded in Section 8(3). If an employer discharges an employee to protect his interest in building up an efficient working force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back. On the other hand, if the employer's action springs from a desire to discourage organization, the privilege is lost and the discharge is unlawful.

Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 20-21 (1947). While these comments were subsequently cited by the Court in *Radio Officers' Union*, 347 U.S. 17, 43 n.47 (1954), as support for the proposition that an intent to discourage or encourage membership is essential to the violation in all instances, it is clear

> The Board will have to determine—and it always has—whether the discharge was for cause or for union activity, and the preponderance of the evidence will determine that question.[39]

The Board's decisions under the amended statute accordingly continued to utilize motive as a guide when the evidence was otherwise ambiguous as to whether an economic penalty had been inflicted in reprisal for union activity. Even here, however, the Board was not always consistent. Thus in *Shell Oil Co.*,[40] it found no violation in a refusal to extend a wage increase to unionized employees during negotiations for a new contract, since the record failed to demonstrate any anti-union motivation for the refusal.[41]

By way of contrast, in *General Electric Co.*,[42] the employer at the conclusion of an economic strike classified its employees into two groups on the basis of their willingness to work during the stoppage. The strikers, unlike the nonstrikers, were denied "continuous service credit" for the period of the strike with resultant impact upon vacation and retirement benefits and upon seniority standing. The Board, without mentioning motive, found that denial of the credit for vacations and retirement was not "discriminatory" as merely reflecting normal loss of remuneration while on strike. As to seniority, however, the Board found a violation because " the effect of the Respondent's action with respect to seniority was to penalize the strikers because of their concerted activities."[43] Whatever the merits of this distinction, it is plain that it was the effect of the employer action in *General Electric* rather than its motivation which was found controlling.[44]

from the context of the Cox analysis that it was concerned only with the situations previously discussed where the cause of a particular act of discipline was placed in dispute.

39. 2 LEG. HIST. LMRA 1595. Much the same conclusion was reached by the Supreme Court a number of years later in interpreting the thrust of the 1947 amendments:

> The legislative history of that provision [the limitation in Section 10(c) as to reinstatement of individuals discharged for cause] indicates that it was designed to preclude the Board from reinstating an individual who has been discharged because of misconduct. There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.

Fibreboard Paper Products v. NLRB, 379 U.S. 203, 217 (1964).

40. 77 N.L.R.B. 1306 (1948).

41. In the language of the Board itself:

> As the record otherwise fails to establish that the wage increases were withheld for anti-union considerations, the Trial Examiner's finding of discrimination is without support and is hereby reversed. *Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees, at a time when his other employees are seeking to bargain collectively through a statutory representative.

Id. at 1310.

42. 80 N.L.R.B. 510 (1948).

43. *Id.* at 513.

44. The same conclusion was reached in other types of discrimination cases. Thus in Atlantic Towing Company, 75 N.L.R.B. 1169 (1948), *enforcement denied*, 180 F.2d 726

In its 1950 *Annual Report*, however, the Board not only ignored the possibility that its approach to Section 8(a)(3) was dichotomous as to the factor of intent but strongly suggested that "an illegal motive" was essential to a violation of that provision:

> The Board recognizes that the act does not circumscribe the right of an employer to select, discharge, or discipline his employees, or to otherwise alter their employment status, for reasons other than those forbidden by the act. *In each case, therefore,* the Board scrutinizes the facts to determine whether or not the treatment of the employee involved was motivated by a desire on the part of an employer to encourage or discourage union membership or other activities protected by the statute. For the Board to find a violation of this section, a preponderance of the evidence must show that the employer acted from an illegal motive. A "strong presumption" is not enough.[45]

Taken literally, this statement is obviously incorrect. The cases discussed in the preceding sections of this study amply demonstrate that the Board *did not,* up to this point, "in each case" assess whether or not an illegal motive was present.[46]

In its next *Annual Report,* indeed, the Board retreated from its untenable position. Its restatement admitted the existence of "non-

(5th Cir. 1950) the discharge of an employee who made false statements about the company's attitude toward unions was held unlawful. The discharge was, so far as the Board's decision shows, solely motivated by the employer's conclusion that he did not want a "liar" working for him. The Board found, however, that under all the circumstances the erroneous statements by the dischargee were a part of protected concerted activity and that his termination was "discriminatory as tending to discourage membership in the Union." *Id.* at 1173.

45. 15 NLRB ANN. REP. 104 (1950) (emphasis added).

46. The decisions cited in the Report to support the quoted passage were Punch & Judy Togs, Inc., 85 N.L.R.B. 499 (1949); Louisville Title Agency, 85 N.L.R.B. 1344 (1949); Strachan Shipping Co., 87 N.L.R.B. 431 (1949); Pacific Tel. & Tel. Co., 88 N.L.R.B. 1142 (1950); and W.C. Nabors Co., 89 N.L.R.B. 538 (1950), *enforced,* 196 F.2d 272 (5th Cir.), *cert. denied,* 344 U.S. 865 (1952). An examination of their individual holdings, however, is instructive. Each of these cases involved a discharge or transfer in which the employer's defense—that the action was taken for a reason other than the employee's union activity—was accepted by the Board. *Strachan Shipping* is worth further mention. In that case, the discharge was allegedly impelled by union pressure on the employer. A contention that Section 8(a)(3) had been violated was dismissed without discussion and the case was handled as a Section 8(a)(1) matter. It is possible, although one can only speculate, that the fact that the alleged discriminatee was a union member was, at this point, viewed by the Board as militating against any finding that his membership was or could be "encouraged or discouraged."

In short, motive was alluded to in these decisions in the same context in which it had been raised in the Board's initial decision in *Pennsylvania Greyhound Lines, Inc.,* 1 N.L.R.B. 1 (1935), *i.e.,* to determine whether discipline resulted from union activity or some independent cause. By contrast, no reference was made to cases in which some economic penalty was evident but a motive to encourage or discourage membership by means of that penalty was not. Yet it is impossible to conclude that the Board intended this summary as a rejection of its prior decisions in cases such as *Republic Aviation, Star Publishing* and *General Electric,* where violations were held to have been committed despite the obvious absence of the proscribed motive.

motive" cases: "a preponderance of the evidence [must] show an employer's illegal motive in order to show a violation of 8(a)(3) *except in cases of per se violations such as the discharge of an employee admittedly because of activities protected by the statute.*"[47] The Board also quoted, approvingly, its earlier statement that:

> The employer is at all times free to discharge an employee for any reason or for no reason, provided only that the discharge is not *for the purpose of* encouraging or discouraging union membership, *or does not have the effect of* otherwise interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.[48]

Either motive or effect, accordingly, was posited as satisfying all statutory requirements as to "encouragement or discouragement" of membership.[49]

It is important to an understanding of the sweeping language of the 1950 *Annual Report* to bear in mind the circumstances in which that Report was written. A large percentage of the discrimination cases coming before the Board in the early years of Taft-Hartley still involved an issue of fact, *i.e.*, was a discharge the result of joining a union or, for example, lack of ability? The Board utilized motive (most fre-

47. 16 NLRB ANN. REP. 162 (1951) (emphasis added).
48. *Id.* (emphasis added), quoting from Fairchild Cafeteria, 92 N.L.R.B. 809 (1950).
49. The implicit reservation thus expressed was perhaps necessitated by the fact that the same Report in the same section highlighted a series of cases in which employer discipline of employees was held to be a violation despite the plain absence of any Board finding as to a motivation of encouraging or discouraging membership in a union. 16 NLRB ANN. REP. 171-73 (1951). Of these cases, in Hoover Co., 90 N.L.R.B. 1614 (1950), *enforcement denied in part*, 191 F.2d 380 (6th Cir. 1951), the employer's reason for imposing certain discipline was that employees had engaged in a consumer boycott and were attempting to gain recognition under circumstances which would expose the employer to charges of a violation of Section 8(a)(2). The Board, in finding a Section 8(a)(3) violation, did not, so far as the record shows, contest the fact that this was the motive for the discipline but decided the case solely on the issue of whether the employee activity concerned was "protected" within the meaning of the Act. In American Shuffleboard Co., 92 N.L.R.B. 1272, *enforced sub nom.* Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951), an employee was discharged on the ground that he had made false statements to the shop committee concerning "fantastic earnings" of the employer. The Board held that it was "immaterial that the Respondent may have acted upon a good faith belief" that the statements were deliberately and maliciously false. In Electronics Equipment Co., 94 N.L.R.B. 62 (1951), *enforcement denied*, 194 F.2d 650 (2d Cir. 1952), 205 F.2d 296 (2d Cir. 1953), a discharge for allegedly false and malicious statements was similarly treated. In none of these cases did the Board attempt to construct an explicit or implicit illegal motivation; its focus was essentially upon whether or not the discipline attached to engagement in protected activity. Indeed, in Midland Broadcasting Co., 93 N.L.R.B. 455 (1951), discussed at the same point in the *Sixteenth Annual Report*, this was made even clearer. In that case an employee was discharged because he had used profane and abusive language in speaking with his employer. The Trial Examiner specifically found that there was no showing of "anti-union animus" on the part of the employer. The Board affirmed his dismissal of the complaint in this respect but added the caveat that it was not determining the legality of such a discharge had the abusive language been uttered solely in the course of grievance committee meetings or other protected activity.

quently in the sense of general anti-union animus) to resolve that *fact* question. In the course of debates on the 1947 amendments, Congress indicated its concern that the Board was too frequently translating general animus into specific causation of a particular action. The Board, defensive in the face of this criticism, made valiant attempts to defend the propriety of its resolution of this type of dispute by emphasizing that it did not conclude an individual had been discharged because of his union activities in a dubious situation unless anti-union motivation was well established. An unfortunate result of the Board's defensiveness was a set of over-statements which could be and were misread. The Board's claim that it did not resolve questionable fact situations without inquiry into motivation was taken as an affirmation of reliance upon motivation as a necessary element of any violation of Section 8(a)(3).

It was at this point that the Supreme Court, in *Radio Officers' Union v. NLRB*,[50] first addressed itself directly to the problem. *Radio Officers* constituted the title case of a group of three decisions issued simultaneously by the Court, each of which touched in some degree upon the elements of Sections 8(a)(3) and 8(b)(2). Their fact patterns are deserving of detailed review.

Radio Officers. William Christian Fowler, a member of the Radio Officers' Union, accepted an offer of employment from the Bull Steamship Company without a clearance for the assignment from his union. The union considered this otherwise insignificant personnel change of some consequence; first, Fowler's employment meant the "bumping" or loss of income of another union member and second, such individual arrangements conflicted, in the union's opinion, with its contractual right to supervise such placements. The contract, in this respect, committed the company to "select such Radio Officers who are members of the Union in good standing" whenever a vacancy occurred. The contract also allowed the company a "right of free selection" providing those it hired were in good standing with the union; the union agreed to grant clearances to such members and to notify an employer when an individual no longer possessed "good standing." Fowler undeniably possessed such standing at the time he accepted the assignment with Bull. He was, nevertheless, suspended from membership because of the "bumping" and the absence of clearance. Fowler, as a "company stiff," was subsequently barred by the union from any future employment with Bull although he was cleared for jobs with other employers. A

50. 347 U.S. 17 (1954).

majority of the Board found that this action by the union violated both Sections 8(b)(1)(A) and 8(b)(2); Fowler did not charge the company with any unfair labor practices.

Teamsters and Gaynor News. The companion cases likewise involved union actions adversely affecting terms and conditions of employment of individual employees. In *NLRB v. International Brotherhood of Teamsters,*[51] a union member's seniority standing was reduced by his employer on demand of his union because of delinquency in dues payments. The contract between the employer and the union granted the latter ultimate authority to determine seniority standing although it did not contain a lawful union security provision. The Board found that the union's action in increasing the charging party's vulnerability to layoff because of his failure to meet his union obligations was a violation of Sections 8(b)(2) and 8(b)(1)(A). In *Gaynor News Co. v. NLRB,*[52] an employer was the respondent. The charging party, who was not a member of the union, had been denied certain wage and vacation payments made exclusively to union members under the terms of the collective bargaining contract. The Board concluded that this denial violated Section 8(a)(3) as well as Sections 8(a)(1) and (2).

All three of the cases before the Court, accordingly, involved economic punishment inflicted upon an individual employee by an employer because of union action. Whether the punishment constituted "discrimination" in the sense of disparate treatment was at least arguable in *Radio Officers* and *Teamsters;* the charging parties were, after all, not treated any differently than any other employee who "bumped" a fellow union member or neglected to pay his dues on time.[53] The Court, however, apparently interpreted "discrimination" as more properly definable in the sense of punitive action, concluding briefly that "involuntary reduction of seniority, refusal to hire for an available job, and disparate wage treatment are clearly discriminatory."[54] In disposing of an even thornier problem, the Court also gave a broad reading to the phrase "to encourage or discourage membership in a labor organization." Since the employees in both *Radio Officers* and *Teamsters*

51. *Id.*
52. *Id.*
53. The proper definition of "discrimination," indeed, is a matter worthy of study as an issue in itself. No attempt has been made herein to isolate and discuss in detail the question of whether "discrimination" has been applied uniformly as a term of reference by either the NLRB or the courts. For some of the complexities of the problem, see Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice,* 32 U. CHI. L. REV. 735, 737-38 (1965). *See also* Radio Officers' Union v. NLRB, 347 U.S. at 39-40 & n.39.
54. 347 U.S. at 39.

were union members both before and after the union action giving rise to their complaint, under a literal interpretation of the statute their membership was neither encouraged nor discouraged. The Court, however, found this an overly restrictive view and held that efforts designed to ensure compliance with union obligations and practices are encompassed within the term "encouragement."[55]

These questions settled, the Court turned to the place and proof of motive in Section 8(a)(3) and 8(b)(2) violations, issues which had given rise to conflicting views at the circuit court level:

> The Court of Appeals for the Eighth Circuit . . . [in *Teamsters*] held that express proof that employer discrimination had the effect of encouraging or discouraging employees in their attitude toward union membership is an essential element to establish violation of this section. That holding conflicts with the holdings of the Second Circuit . . . [in *Radio Officers* and *Gaynor*] that such employee encouragement or discouragement may be inferred from the nature of the discrimination . . . . In reaching its decision in *Gaynor*, the Second Circuit also rejected the contention, which contention is supported by many decisions of the Courts of Appeals, that there can be no violation of § 8(a)(3) unless it is shown by specific evidence that the employer intended his discriminatory action to encourage or discourage union membership.[56]

Two quite separate questions were thus posed. First, must the Board furnish "express proof" that discrimination resulted in actual encouragement or discouragement of union membership? Second, must the Board furnish "specific evidence" that this result was intended? In short, are either *effect* or *a motive to secure that effect* (or both) elements of the statutory prohibition which can be furnished by inference and by expertise, or must they be established by evidence spread upon a record?

By presenting these questions as issues of proof, of course, the Court implicitly accepted both motive and effect as essential elements of a violation of Section 8(a)(3); the nature and quantum of their evidentiary support would otherwise be of little consequence. Justice Reed, writing for the majority of the Court, proceeded to spell out these elements in some detail. In a section headed "Necessity for Proving Employer's Motive," he first observed that the "relevance" of motivation in cases of discrimination had been consistently recognized. This rela-

55. 347 U.S. at 39-40. In *Gaynor*, moreover, the possibility was suggested that the union did not wish to accept any new members. *Id.* at 38.
56. *Id.* at 20-24.

tively mild statement was quickly followed by a far broader conclusion: "That Congress intended the employer's purpose in discriminating to be *controlling* is clear."[57] Justice Reed's authority for this flat statement was a wide range of Board, judicial and congressional references.[58] As has been pointed out, however, these references concerned a very different proposition than that for which Justice Reed cited them. Statements that a violation exists *if* there is improper motive are quite different from decisional or legislative authority for the proposition that improper motive *must always* exist. Justice Reed's opinion, nonetheless, assumed otherwise.[59]

Having posited "motive" as an essential element of Section 8(a)(3) violations, Justice Reed was confronted with two further questions. The first was how to account for previous decisions which had found violations of that section without reference to motive. The second was the question of the type and quantum of evidence necessary to prove motive in Section 8(a)(3) cases. His attempts to dispose of these issues required consideration of another aspect of the controversy, the relationship between motive and effect.

> [I]t is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of § 8(a)(3). . . . Both the Board and the courts have recognized that proof of certain types of discrimination satisfies the intent requirement. This recognition that specific proof of intent is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common-law rule that a man is held to intend the foreseeable consequence of his conduct. [citations omitted] Thus an employer's protestation that he did not intend to encourage or discourage must be unavailing where a natural consequence of his action was such encouragement or discouragement. Concluding that encouragement or discouragement will result, it is presumed that he intended such

57. *Id.* at 44.

58. *See* pp. 1282-83 *supra*. Prime reliance was placed upon quotations from the Senate Report on the Wagner Act such as: "Of course nothing in the bill prevents from advancing him for special aptitude; or from demoting him for failure to perform." S. REP. No. 573, 74th Cong., 1st Sess. 11. *The Fifteenth Annual Report*, however, was referred to immediately before Justice Reed's quoted finding that motive is "controlling" and was presumably also relied upon. Prior to these references, Justice Reed cited a number of circuit court decisions as well as, among other authorities, the articles by Professor Cox, *supra* note 36, and Chester Ward, *supra* note 32.

59. There was, of course, some excuse for the Court's confusion as to these two aspects of motivation. Infliction of a penalty against a man because he has joined a union may well normally subsume an intent to discourage his membership. That an action imposing some disadvantage relating to union activity might not so implicitly enfold a desire to discourage membership in a labor organization was perhaps not so clear at the time Justice Reed wrote as it is at the present.

> consequence. In such circumstances intent to encourage is sufficiently established.[60]

Republic Aviation was relied upon to sustain this principle. In the Court's retrospective view of that case, it did not matter that the employer "did not intend to discourage membership since such was a foreseeable result."[61] Applying the same approach to *Gaynor* the Court concluded: "No more striking example of discrimination so foreseeably causing employee response *as to obviate the need for any other proof of intent* is apparent than the payment of different wages to union employees doing a job than to nonunion employees doing the same job."[62]

The Court thus held, at a minimum, that once "certain types" of discrimination have been shown to exist, no separate evidence of motivation need be shown because the foreseeable consequences of the discrimination necessarily supply the requisite intent. Justice Reed did not indicate with any clarity what "types" of discrimination supplied their own proof of motivation nor, among other matters, whether the intent so established was always, never, or sometimes rebuttable. Leaving these questions unanswered, if it saw them at all, the Court moved to the further issue of what proof of *effect*, apart from proof of *motive*, is essential to a finding of violation of Sections 8(a)(3) or 8(b)(2).

> Petitioners in both *Gaynor* and *Radio Officers* contend that the Board's orders in these cases should not have been enforced by the Second Circuit because the records do not include "independent proof that encouragement of Union membership actually occurred." The Eighth Circuit subscribed to this view that such independent proof is required in *Teamsters* when it denied enforcement of the Board's order in that proceeding on the ground that it was not supported by substantial evidence of encouragement. The Board argues that actual encouragement need not be proved but that a tendency to encourage is sufficient, and "such tendency is sufficiently established if its existence may reasonably be inferred from the character of the discrimination."[63]

Here again, as in the case of motive, Justice Reed concluded that both the legislative history and prior interpretations of the statute disclosed no need for direct evidence of the result of an act of discrimina-

60. 347 U.S. at 44-45.
61. *Id.* at 46.
62. *Id.* (emphasis added).
63. *Id.* at 48.

tion. In the Court's view, this conclusion was reinforced by both the nature of the administrative process[64] and the nature of the prohibition itself.

> Encouragement and discouragement are "subtle things" requiring "a high degree of introspective perception." . . . But, as noted above, it is common experience that the desire of employees to unionize is raised or lowered by the advantages thought to be attained by such action. Moreover, the Act does not require that the employees discriminated against be the ones encouraged for purposes of violations of § 8(a)(3). Nor does the Act require that change in employees' "quantum of desire" to join a union have immediate manifestations.[65]

Applying this analysis to the three fact patterns before it, the Court concluded that a "natural result" of disparate wage treatment, denial of an available job, and reduction of seniority would be an increase in the desire of the discriminatees and their fellow employees to join a union or to perform obligations of union membership. Therefore:

> Since encouragement of union membership is obviously a natural and foreseeable consequence of any employer discrimination at the request of a union, those employers must be presumed to have intended such encouragement. It follows that it was eminently reasonable for the Board to infer encouragement of union membership, and the Eighth Circuit erred in holding encouragement not proved.[66]

The Court's conclusions as to motive and effect as announced in *Radio Officers* thus established the following broad rules:

Both an intent to secure, and an effect of, encouragement or discouragement of union membership are essential elements in the violation.

But, either motive or effect may be established without need of specific evidence where the "natural and foreseeable consequence" of the discriminatory act will be to increase or decrease the desire to achieve membership or to submit to union rules and discipline.

Further, the employees discriminated against need not be those found to be encouraged or discouraged; nor need an immediate effect of discouragement or encouragement be shown.

Justices Black and Douglas, in dissent, flatly challenged the majority conclusion as to the Board's authority to avoid direct proof of motive. They read the statute as forbidding discrimination only when it is

64. *Id.* at 48-49.
65. *Id.* at 51.
66. *Id.* at 52.

utilized "*in order to*" encourage or discourage union membership.[67] As none of the three fact patterns before the Court showed any such specific intent and, indeed, perhaps controverted it, the dissenters would have denied enforcement of the Board order in each.

Justice Frankfurter concurred in a separate opinion in *Radio Officers*. After recasting the issues dealt with by the majority, he adopted an approach that, taken literally, seemed to require only a showing of effect and to be unconcerned with motivation. Indeed, he commented that "[i]n many cases a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling *that a further and separate finding characterizing the employer's state of mind would be an unnecessary and a fictive formality.*"[68] Justice Frankfurter's happy talent for phrasemaking sometimes delights the ear while simultaneously clouding the vision. If motive may be disregarded, for purposes of Board findings, when it is a "fictive formality," the implication is that it may not be so disregarded where it is not; in short, it remains an essential element of the violation except where it seems implicit in the result of the discrimination itself. If the latter is the case, there is little to differentiate the Frankfurter position from that stated for the Court by Justice Reed. And, indeed, Justice Frankfurter concludes his concurrence with the comment that "[w]hat I have written and the Court's opinion, as I read it, are not in disagreement."[69]

The real significance of the concurring opinion, however, is that Justice Frankfurter, unlike Justice Reed, specifically acknowledged the possibility that an inference as to motive or effect might be rebuttable:

> In sum, any inference that may be drawn from the employer's alleged discriminatory acts is just one element of evidence, which may or may not be sufficient, without more, to show a violation. But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board must take into consideration.[70]

Thus, while a raise in wages given only to union members is prima facie suspect, Justice Frankfurter suggested that "the employer, by

67. *Id.* at 57-58.
68. *Id.* at 56 (emphasis added).
69. *Id.* at 57.
70. The Board's task is to weigh everything before it, including those inferences which, with its specialized experience, it believes can fairly be drawn. On the basis of this process, it must determine whether the alleged discriminatory acts of the employer were such that he should have reasonably anticipated that they would encourage or discourage union membership.
Id. at 56-57.

introducing other facts, may be able to show that the raise was so patently referable to other considerations, unrelated to his views on unions and within his allowable freedom of action, that the Board could not reasonably have concluded that his conduct would encourage or discourage union membership."[71] His opinion, however, does not indicate with any certainty whether such evidence would dispel an inference of effect, or of motive, or an inference as to both. Indeed, the possibility exists that Justice Frankfurter viewed effect and motive as inseparable.

C. *Stage Three—Motive by Inference from Effect*

While *Radio Officers* thus identified motive as an essential element of a Section 8(a)(3) violation, the Board was not slow to take advantage of the corollary holding that the required intent could be supplied by inference from the effect of particular types of discrimination. The usage the Board made of such inference is aptly illustrated by two different lines of decision. The first of these involved employer lockouts in response to "whipsaw" strikes. The second concerned union supervision over the hiring process through the device of the hiring hall.

As of 1954 the lockout, as an employer weapon in labor-management disputes, had been found by the Board in most circumstances to constitute a violation of the Act.[72] In that year, however, in *Buffalo Linen Supply Co.*,[73] the Board acknowledged an important exception for a lockout in response to a "whipsaw" strike called against one employer (but not conducted against other companies) in a multi-employer bargaining unit. The question for decision was whether the lockouts had been defensive in nature and hence privileged, or retaliatory and unlawful. Lacking proof of actual motive, the Board turned to inference. The necessary and even calculated implication of a strike against one employer, it found, was a threat of future strike action against other members of the employer bargaining unit. Emphasizing the lack of evidence of any antiunion motivation, the Board found it "more reasonable" to believe that the lockout was impelled by real fear of fragmentation of the bargaining unit than a desire to punish

71. *Id.* at 56.

72. For a comprehensive survey of the Board's approach in this area, *see* Meltzer, *Single-Employer and Multi-Employer Lockouts Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956); Meltzer, *Lockouts Under the LMRA: New Shadows on an Old Terrain*, 28 U. CHI. L. REV. 614 (1961); Meltzer, *Lockouts: Licit and Illicit*, in N.Y.U. 16TH ANN. CONF. ON LABOR 19 (1963).

73. 109 N.L.R.B. 447 (1954), *enforcement denied sub nom.* Truck Drivers Local 449 v. NLRB, 231 F.2d 110 (2d Cir. 1956), *rev'd*, 353 U.S. 87 (1957).

employees for resorting to a strike.[74] The Second Circuit refused to accept this conclusion and found that, as there was "no economic justification for the lockout," it constituted an interference with the right to strike, "thereby" discouraging membership in the union.[75]

This decision was reversed with Justice Brennan writing for a unanimous Court.[76] Adopting without question the Board's finding that the lockout had not been precipitated by anti-union motivation, Justice Brennan focused his attention on an evaluation of the respective interests sought to be protected by the weapons of self-help used by the parties—the strike and the lockout. Examination of the legislative history of the Wagner Act and its 1947 amendments revealed no congressional intent to prohibit the lockout per se[77] or to condemn the practice of multi-employer bargaining:[78] conversely, the Court recognized the undisputed right of employees to initiate an economic strike to secure disputed contract benefits. Thus, since both the strike and the lockout constituted economic weapons not in themselves outlawed by the statute, the Court concluded that the legality of the employer's conduct could be determined only by a "balancing of the conflicting legitimate interests."[79] Taking the view that the "difficult and delicate" responsibility of striking this balance had been delegated primarily to the National Labor Relations Board subject to limited judicial review, the Court concluded that the Board in *Buffalo Linen* had properly executed the congressional mandate.

Beyond characterizing the case as one involving no explicit evidence of anti-union animus, Justice Brennan did not mention, as such, the factor of motivation. Focus upon the presence of "legitimate" interests, of course, could constitute a form of inquiry into motive or intent, particularly if the alleged economic justifications for union and employer conduct must be inferable from that conduct itself, as Justice Brennan's opinion suggests. But the basic thrust of the decision in *Buf-*

74. *Id.* at 448.
75. Truck Drivers Local 449 v. NLRB, 231 F.2d 110, 118 (2d Cir. 1956).
76. NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).
77. *Id.* at 92-93.
78. *Id.* at 95.
79. Although the Act protects the right of the employees to strike in support of their demands, this protection is not so absolute as to deny self-help by employers when legitimate interests of employees and employers collide. Conflict may arise, for example, between the right to strike and the interest of small employers in preserving multi-employer bargaining as a means of bargaining on an equal basis with a large union and avoiding the competitive disadvantages resulting from non-uniform contractual terms. The ultimate problem is the balancing of the conflicting legitimate interests.
Id. at 96.

falo Linen is plainly on *effect* rather than *motive*. The case turned upon a choice between competing economic interests uncomplicated by the necessity of inferring an unlawful intent not visible on the printed record.

In contrast to the Board's approach in *Buffalo Linen*, decisions dealing with union hiring halls during the same period relied heavily upon both an inferred effect of encouragement of union membership and an inferred motive to encourage the same. In *Mountain Pacific Chapter*,[80] certain contractors signed a collective bargaining agreement making recruitment of employees "the responsibility of the Union." While the contract did not, on its face, limit employment to union members or give them preference, the union admitted that in fact its hiring practices were designed to give its members precedence.[81] Nonetheless, the Board chose to decide the case without reference to this evidence of discrimination in the actual hiring practice.[82] Relying on *Radio Officers*, the Board concluded that, without the inclusion of certain specific safeguards in a hiring hall agreement,[83] a contract granting a union control of hiring must necessarily encourage union membership in violation of the statute:

> The Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC

80. Mountain Pac. Chapter of Associated Gen. Contractors, Inc., 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959).

81. The Union admitted that in doing the hiring for the Employers it always hires its members in preference to non-members, and that whenever a member is not immediately available, it attempts to locate one, and only failing in the search does it ever refer a non-union member to any assignment.
Id. at 894 n.3.

82. *Id.* In NLRB v. Mountain Pac. Chapter of Associated Gen. Contractors, Inc., 270 F.2d 425 (9th Cir. 1959), enforcement of the Board's original decision and order was denied and the case remanded to it for further findings. The Board, upon reconsideration, again found a violation, but did so on the basis of findings of actual discrimination. It noted, however, that it did not agree with the Ninth Circuit's rejection of the per se approach. Mountain Pac. Chapter of Associated Gen. Contractors, Inc., 127 N.L.R.B. 1393 (1960), *enforcement denied in part*, 306 F.2d 34 (9th Cir. 1962).

83. These safeguards consisted of explicit provision in the hiring hall agreement that
(1) Selection of applicants for referral to jobs shall be on a non-discriminatory basis and shall not be based on, or in any way affected by, union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.
(2) The employer retains the right to reject any job applicant referred by the union.
(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.
119 N.L.R.B. at 897.

> chapters, the inference of encouragement of union membership is inescapable.[84]

The inference, however, proved not so "inescapable" to the Supreme Court.

Teamsters Local 357 v. NLRB[85] was the eventual test case for Supreme Court review of the *Mountain Pacific* doctrine. *Local 357* involved a collective bargaining contract by which the signatory employers were required to use the union's hiring hall for employment of casual employees. Unlike the agreement in *Mountain Pacific*, the contract in *Local 357* specified that dispatching from the hall was to be determined by the relative seniority of men on an "available list," "*irrespective of whether such employee is or is not a member of the Union.*"[86] Lester Slater, a member of the union, procured employment from a signatory employer without recourse to the hiring hall. The conditions precedent to hiring outside the hall were not operative in his case, and he was discharged on union demand. Since the contractual safeguards[87] which it had posited as essential in *Mountain Pacific* were admittedly lacking in the agreement under which Slater was discharged, the Board found the contract and the termination in violation of the Act without further inquiry into the facts of the discharge itself.

Except that *Local 357* involved a true hiring hall contract, plainly requiring use of the union's dispatching service, the unauthorized hiring and union-procured discharge in the case closely resembled the facts of *Radio Officers*.[88] Justice Douglas, however, writing for the majority of the Supreme Court, took an approach in *Local 357* which marked a critical if subtle withdrawal from the broad holding of the earlier case. While not directly disturbing the holding in *Radio Offi-*

84. *Id.* at 896.

85. 365 U.S. 667 (1961). In a companion case, Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961), the Court rejected the broad-gauge "remedy" which the Board had applied in cases where an illegal hiring hall was found to exist under Mountain Pacific. In *Brown-Olds*, 115 N.L.R.B. 594 (1956), the Board had held that in such instances the union was to be required to refund dues, assessments, and fees to all employees who had made such payments to the union under the contract, rather than limiting reimbursement to those individuals who were directly shown to have been coerced. The Court considered such an order to be punitive rather than remedial and thus beyond the scope of the Board's powers. "Where no membership in the union was shown to be influenced or compelled by reason of any unfair labor practice, no 'consequences of violation' are removed by the order compelling the union to return all dues and fees collected from the members; and no 'dissipation' of the effects of the prohibited action is achieved." 365 U.S. at 655.

86. 365 U.S. at 668.

87. *See* note 86 *supra*.

88. In both cases a union member obtained employment by individual action although a collective bargaining agreement existed which the union interpreted as giving it the right to supervise such hiring. In both cases the employer capitulated to a union demand that the employment be terminated.

cers that both motive and effect are essential but provable by inference rather than direct evidence, the Douglas view constituted a warning that the power to infer was not unlimited.

In *Radio Officers,* a union demand that one of its members be denied employment was accepted as constituting "discrimination." The resulting loss of earnings due to union action was then found to be an inherent encouragement of union membership in the sense of impelling greater obedience by the member. Having thus established discrimination with an inherent effect of encouragement of membership, *Radio Officers* completed the formula by inferring the requisite motive from the effect. In *Local 357,* however, Justice Douglas undercut the chain of inference by refusing to assume that union-dictated termination necessarily constituted discrimination. Taking the view that the term "discrimination" referred to different treatment of union and non-union members rather than to disparate treatment of any two groups of employees generally,[89] Justice Douglas found that while the Board could properly conclude that a hiring hall would encourage union allegiance, it could not, without other evidence, infer that a union would necessarily distinguish between members and non-members in the process of dispatching employees. At least, such an inference could not be drawn in this particular situation; "surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against 'casual employees' because of the presence or absence of union membership."[90]

Taken at its narrowest, *Local 357* stands for the proposition that an inference of discrimination (or, possibly, effect and motive) is rebuttable. The Board, however, appears to have interpreted the decision in far broader fashion. As summarized by former General Counsel Rothman,[91] the reaction of the agency was to conclude that *Local 357*

89. Justice Clark, dissenting in *Local 357* together with Justice Whittaker, noted this departure from the definition employed in *Radio Officers* and urged a return to the broader view of that case. "Discrimination," he asserted, means "to distinguish or differentiate." 365 U.S. at 689. Such discrimination in *Local 357* was supplied by the existence of two groups of men differently affected by the hiring hall: those who received referral cards and those, including Slater, who did not. Thus the only real question was whether such discrimination "is designed to, or inherently tends to, encourage union membership." *Id.* at 690. The answer Justice Clark found amply established by both the testimony of Lester Slater and the Board's expertise. *Id.* at 691-92. He concluded, accordingly, following *Radio Officers,* that once two groups of employees are treated differently, all that is necessary for a violation is an intended or implicit effect of encouragement or discouragement of membership.

90. *Id.* at 675.

91. Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements,* 48 VA. L. REV. 871 (1962).

required independent evidence of discrimination as to individual employees in all hiring hall cases. In short, the Board construed the decision as requiring (or allowing) it to ignore even a plainly discriminatory hiring hall contract unless it could separately prove that an individual's specific discharge or failure to be dispatched was, of itself, discriminatory.[92] That construction, obviously, not only ignored Justice Douglas' specific statement that "discrimination may at times be inferred by the Board" but also disregarded the fact that it was the contractual disclaimer of discrimination which was found to be controlling by the majority opinion in *Local 357*.

A concurrence filed in *Local 357* by Justice Harlan, and joined by Justice Stewart, is worthy of special notice.[93] Justice Harlan agreed with the majority that this particular contract would not allow the Board to infer an "intent on the part of employer or union to discriminate in favor of union status."[94] Unlike the majority, however, the concurring Justices went on to consider what limits might also attach to the Board's authority to infer the elements of motive and effect as to encouragement and discouragement of union membership. In so doing, Justice Harlan advanced a new and restrictive view of the Board's powers. While not challenging the propriety of inferring an effect of encouragement of membership through the hiring hall, the

92. *See, e.g.*, Pan Atlantic S.S. Co., 132 N.L.R.B. 868 (1961) where, despite the fact that the hiring hall was clearly unlawful, the Board concluded that the failure of the hall to dispatch the charging party was not due to any unlawful discrimination.

93. The separate opinion observed that it was made necessary by the need to give "explicit articulation" to certain considerations felt to be "implicit" in the majority determination. 365 U.S. at 677.

94. 365 U.S. 679. The statement by Justice Harlan as to an "intent to discriminate" is somewhat puzzling. The majority opinion was directed to the absence of record evidence as to the fact of discrimination rather than an absent desire to discriminate. Analysis of Justice Harlan's views is also made difficult by the fact that his opinion (like that of the majority) uses the term "discrimination" as though it only referred to differences in treatment of union and non-union employees. "Discrimination," however, as *Radio Officers* itself indicated, *see* note 89 *supra*, may take place in other contexts. The confusion thus created is illustrated by the following passage from the concurrence:

> For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation, as well as in the limited scope of the heretofore recognized exceptions to this general requirement, is a realization that the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees . . . . We must determine whether the Board's action is consistent with the balance struck by the Wagner and Taft-Hartley Acts between protection of employee freedom with respect to union activity and the privilege of employer and union to make such nondiscriminatory decisions as seem to them to satisfy best the needs of the business and the employees.

Id. at 682. If the actions to which Justice Harlan was referring are, in fact, nondiscriminatory, Sections 8(a)(3) and 8(b)(2) are by their own terms inapplicable and the problem he posed does not exist. The most plausible conclusion is that Justice Harlan used "nondiscriminatory" in the sense of an act which is not intended to encourage or discourage union membership but which may do so in actual effect.

concurring opinion rejected the possibility of inferring motive from that effect unless the hiring hall could be found to be "without substantial justification in terms of legitimate employer or union purposes."[95] In sum, the concurrence required the Board to establish the requisite motive either by direct evidence or by an effect of encouragement *plus* an absence of any "legitimate" explanation for the discrimination.

While Justice Frankfurter's clouded caveat in *Radio Officers* as to the possibly rebuttable nature of inferences drawn from effect was not mentioned, it was this possibility which was obviously the center of the Harlan analysis. Justice Harlan's premise was that

> a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects.[96]

He suggested two criteria for judging what actions should be immunized from the illegality which would otherwise flow from their inherent effect upon union membership. First, the action must have a "business justification." Second, it must be for a "significant" and "legitimate" purpose.

The sources cited for these criteria were questionable, to say the least. *Republic Aviation*[97] and three circuit court decisions[98] were mustered in support of the assertion that only in the absence of business justification will effect be allowed to supply motivation by inference. Yet in each of the cases cited, the employer had strenuously and plausibly argued that the action in question had been taken for a normal business purpose.[99] Even so, in each of these cases the requisite

95. *Id.* at 684.
96. *Id.* at 679.
97. P. 1277 *supra.*
98. NLRB v. Industrial Cotton Mills, 208 F.2d 87 (4th Cir. 1953); Cusano v. NLRB, 190 F.2d 898 (3d Cir. 1951); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947).
99. In *Republic Aviation,* for example, the employer's claim was that his no-solicitation rule was designed to keep all solicitors off his property in order to protect his business. In the companion *LeTourneau* case, the Court itself noted that the rule had been adopted to "control littering and petty pilfering from parked autos. . . ." 324 U.S. at 797. In the other decisions relied upon by Justice Harlan, company action was based upon a desire to retain control over alleged supervisors (Allis-Chalmers Mfg. Co. v. NLRB, note 98 *supra*), an honest but mistaken belief that an employee had uttered false statements as to the company's profits (Cusano v. NLRB, note 98 *supra*) and an honest but mistaken belief that an employee had thrown tacks in the street before the company's plant (NLRB

motive had been established by inference under the *Radio Officers* thesis. Justice Harlan's second criterion—that the action be for an aim both significant and legitimate—was supported by similarly shaky precedent. The authority relied upon was *Gaynor News*,[100] in which the payment of different wage scales to union and non-union employees had been held to be a violation of Section 8(a)(3). It is true that, in terms of the Harlan thesis, such disparate treatment might be said to serve an illegitimate end. Yet neither the text of the decision in *Gaynor* nor that of its companion case *Radio Officers* indicates that the Court was either explicitly or implicitly following the criterion which the Harlan opinion projects.

Particular attention has been paid to the concurring opinion in *Local 357* because its essential inquiry—the weighing of conflicting interests in the absence of direct evidence of motive—has subsequently become the basis for the competing views which have developed as to the proper construction of Section 8(a)(3). Unless the opportunity for the Board to infer motive from effect is narrowly limited, Justice Harlan pointed out, the Court would be approving "a broad expansion of the power of the Board to supervise nondiscriminatory decisions made by employer or union."[101] Apart from the fact that "nondiscriminatory" decisions would not—under the explicit terms of the statute—constitute violations of Sections 8(a)(3) and 8(b)(2), it is plain that Justice Harlan feared that the power to draw inferences would amount to the power to control action. His concern, in this regard, as to the extent to which the Board should be able to intervene on one side or the other of labor disputes in a free industrial society was obviously shared by other members of the Court. Only shortly before, the Board's reliance upon inference and expertise in the area of good faith bargaining had attracted the critical attention of the Court.[102] Clearly, both the

v. Industrial Cotton Mills, note 98 *supra*). It is difficult, in short, to find an absence of "business justification" in any of these situations. Justice Harlan, in a subsequent case, NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964), again found "no business justification" in *Cusano* and "little business justification" in *Industrial Cotton Mills*. 379 U.S. at 25 n.2.

100. 347 U.S. 17 (1954).

101. 365 U.S. at 685.

102. In NLRB v. Insurance Agents Int'l Union, 361 U.S. 477, 498 (1960), Justice Brennan had cautioned that

> [i]t is one thing to say that the Board has been afforded flexibility to determine, for example, whether an employer's disciplinary action taken against specific workers is permissible or not, or whether a party's conduct at the bargaining table evidences a real desire to come into agreement. The statute in such areas clearly poses the problem to the Board for its solution. [citing *Buffalo Linen*] And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole. It is quite another matter, however, to say that the Board has been afforded flexibility in picking and

majority opinion and the concurrence in *Local 357* reflected a similar concern with excessive "flexibility" on the part of the Board in unfair labor practice areas as well.

D. *Stage Four—The Balancing Process and the Thumb upon the Scale*

The question raised by Justice Harlan's first criterion—whether a "business justification" is sufficient to override an inferred intention to encourage or discourage union membership—was the basic issue when the Court next considered the question of motivation under Section 8(a)(3). In *NLRB v. Erie Resistor Corp.*,[103] the company, "under intense competition and subject to insistent demands from its customers to maintain deliveries,"[104] attempted to restore production during a strike by announcing that replacements and strikers who returned to work would receive twenty years of additional seniority for credit against future layoffs. The device was a success, and the union, forced to capitulate, pressed charges that the "superseniority" plan violated Sections 8(a)(1) and (3). The Board found that the plan was unlawful because it was inherently destructive of the right to strike, and ruled that no specific evidence of the company's motivation was necessary to sustain a Section 8(a)(3) violation in these circumstances.

The Third Circuit relied heavily upon the Harlan approach of *Local 357* in refusing to enforce the Board order. It concluded, in disagreement with at least one other circuit,[105] that superseniority plans were not unlawful absent evidence of an illegal motive in their promulgation and enforcement. The determining factor, in the Third Circuit's view, was the presence of a legitimate business reason for the challenged act coupled with an absence of any Board finding of unlawful intent.[106] The Supreme Court disagreed, finding that "the Court of Appeals erred in holding that, in the absence of a finding of specific illegal intent, a legitimate business purpose is always a defense to an unfair labor practice charge."[107]

Justice White, writing for the Court, pointed out that under the *Radio Officers* test intent can be proven either by direct evidence or

choosing which economic devices of labor and management shall be branded as unlawful.

103. 373 U.S. 221 (1963).

104. *Id.* at 222-23.

105. *See* Swarco, Inc. v. NLRB, 303 F.2d 668 (6th Cir. 1962), *cert. denied*, 373 U.S. 931 (1963). *See also* NLRB v. Potlatch Forests, Inc., 189 F.2d 82 (9th Cir. 1951).

106. Erie Resistor Corp. v. NLRB, 303 F.2d 359, 364 (3d Cir. 1962).

107. 373 U.S. at 227.

by inference. If direct evidence is available, "business justifications," he found, become irrelevant. Where the element of motivation is sustained only by inference, however, "business justifications" become a key issue. If the employer fails to justify his actions, an unfair labor practice charge is made out. If, on the other hand, he counters by explaining that his actions were taken in pursuit of legitimate business ends, and that his dominant purpose was not to discriminate or to invade union rights, his conduct requires further analysis. Whatever the claimed overriding justification may be, the unavoidable consequences of the employer's conduct—which he must have foreseen and must be held to have intended—remain.[108] In such circumstances the inquiry becomes a matter of balancing the interests involved.

> As is not uncommon in human experience, such situations present a complex of motives and *preferring one motive to another is in reality the far more delicate task . . . of weighing the interest of employees* in concerted activity *against the interest of the employer* in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct.[109]

Utilizing this approach, and agreeing with the Board that the superseniority plan in *Erie Resistor* had had a highly destructive impact upon the strike, the Court concluded that "because the Board's judgment was that the claimed business purpose would not outweigh the necessary harm to employee rights . . . it could properly put aside evidence of respondent's motive and decline to find whether the conduct was or was not prompted by the claimed business purpose."[110]

While still addressing the problem as one of "motive," then, *Erie Resistor* candidly acknowledged that the real basis of judgment is a weighing of conflicting interests. The Court explicitly accepted the Harlan thesis that business justifications could rebut an inference of intent where actual motive to encourage or discourage union membership was not otherwise established. The presence or absence of a violation in such circumstances must rest upon the Board's expert assessment of the impact of the discrimination on employee rights and upon its determination as to whether or not that impact is outweighed by the employer interests concerned.[111]

108. *Id.* at 227-28.
109. *Id.* at 228-29 (emphasis added).
110. *Id.* at 236-37.
111. It must be observed that Justice White's opinion repeatedly refers to *intent to discriminate* as well as *intent to encourage or discourage union membership* as though the

The October 1964 term of the Court brought new, if hardly definitive, treatments of the basic problem. *NLRB v. Burnup & Sims, Inc.*[112] was the hors d'oeuvre for what became a groaning banquet board of litigation. In that case two employees, who had been active in an attempt to organize the respondent's plant, were discharged as a result of the employer's sincere but mistaken belief that they had threatened to dynamite his plant if the organizational drive was unsuccessful.[113] Justice Douglas, writing for the Court, saw no need to reach the issue of motive under Section 8(a)(3). A discharge for alleged misconduct arising out of protected activity, he found, constitutes a violation of the broader provisions of Section 8(a)(1) without reference to Section 8(a)(3), no matter what the employer's motive, when it is shown that the misconduct never in fact occurred.[114] The cases marshalled in support of this proposition were, however, all cases in which the Board had found *both* Sections 8(a)(1) and 8(a)(3) to have been violated.[115] Justice Douglas did not bother to explore the circumstances in which a discharge might be tested under the first of these two sections alone; we have only his vague statement that "[w]e are not in the area of management prerogatives" to explain the non-applicability of Section 8(a)(3) to the case before him.[116]

two were interchangeable in meaning. It is probable that Justice White considered the former to mean "intent to discriminate because of union membership or activities."

112. 379 U.S. 21 (1964).

113. The Board concluded that both Sections 8(a)(1) and 8(a)(3) had been violated. The court of appeals refused to enforce the Board order in the absence of evidence that the employer had intended to discourage protected activity by the discharge. In the view of the Fifth Circuit, this was not a situation where, under the doctrine of *Radio Officers*, motive could be inferred from effect; a "discharge does not inherently discourage union membership." NLRB v. Burnup & Sims, Inc., 322 F.2d 57, 61 (1963). The Fifth Circuit's opinion comes close to an assumption that even a discharge which has a substantial effect upon encouragement or discouragement of membership will never be a violation without proof of a motive to obtain that end:

> Discharging an employee is not in itself discouraging to organizational or other protected activities. In fact if it does discourage the discharged employee or his fellow workers, it is not a violation of the Act if the employer's motivation was not discriminatory. Wage and benefit differentials inherently discourage; a discharge does not inherently discourage. The difference is crucial. In the latter situation, motivation is determinative; in the former it is irrelevant. In this case the motivation was the belief that men had threatened to dynamite property; the intent was to rid the plant of those from whom the threat was believed to have emanated. We think it cannot be said that this was discrimination discouraging protected activity.

Id. at 61. If the foregoing stands for the proposition that motive must always be directly proven in discharge cases, it is in marked contrast to the approach of *Radio Officers*. The latter decision was, interestingly enough, cited by the Fifth Circuit in *Burnup & Sims*. It was distinguished, however, on the ground that it involved institution of discriminatory wage increases. That, of course, was the fact pattern of *Gaynor News*, a companion case, rather than *Radio Officers*.

114. 379 U.S. at 22-23.

115. Mid-Continent Petroleum Corp., 54 N.L.R.B. 912 (1944); Standard Oil Co., 91 N.L.R.B. 783 (1950); Rubin Bros. Footwear, Inc., 99 N.L.R.B. 610 (1952), *enforcement denied*, 203 F.2d 486 (6th Cir. 1953).

116. 379 U.S. at 24. Justice Harlan both concurred and dissented in part. His opinion

Two other decisions delivered during the same term dealt squarely with the issue of motive under Section 8(a)(3). The source of the litigation in both instances was an employer lockout. In *American Ship Building Co. v. NLRB*[117] the shutdown occurred after an impasse had been reached in negotiations for a new collective bargaining contract. *NLRB v. Brown*[118] involved the temporary replacement of employees who had been locked out by the non-struck members of a multi-employer bargaining unit in response to a whipsaw strike. In both cases the Board found that Section 8(a)(3) had been violated. In both cases, the Supreme Court reversed. The decision of the majority in each case, however, elicited separate opinions demonstrating a deep division within the Court as to the place and role of motive.

Justice Stewart wrote for the majority in *American Ship*. As to Section 8(a)(1), he found no evidence that the employer was hostile to unions or that the lockout had been impelled by a desire to destroy or frustrate collective bargaining. He held that, absent such a motive, Section 8(a)(1) was not violated. The lockout is not "one of those acts which is demonstrably so destructive of collective bargaining that the Board need not inquire into employer motivation."[119] As to Section 8(a)(3), Justice Stewart again concluded that some proof of unlawful motivation was both necessary and absent. While in some cases "the employer's conduct carries with it an inference of unlawful intention so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose,"[120] a bargaining lockout after impasse is not such a case.[121]

In the Stewart view, accordingly, there is little if any difference in the analysis of Section 8(a)(1) and 8(a)(3) violations. In both cases, failure to prove an unlawful motive is fatal absent some inherent, severe effect upon the exercise of Section 7 rights. The decision suggests, without explicitly stating, that the presence of such a severe effect

can be interpreted as suggesting that motive cannot be regarded as irrelevant under either Section 8(a)(1) or Section 8(a)(3). His position, however, was not clear. Finding that "business justifications" existed for the employer's action in *Burnup & Sims*, he contented himself with stating that "I do not believe that this case presents the rare situation in which the Board can ignore motive." *Id.* at 25.

117. 380 U.S. 300 (1965).

118. 380 U.S. 278 (1965).

119. 380 U.S. at 309. Justice Stewart added: "we cannot see that the employer's use of a lockout solely in support of a legitimate bargaining position is in any way inconsistent with the right to bargain collectively or with the right to strike." *Id.* at 310.

120. *Id.* at 311-12.

121. Justice Stewart's reasoning was that "[t]he purpose and effect of the lockout was only to bring pressure upon the union to modify its demands." *Id.* at 312. There was no discernible, let alone cataclysmic effect of discouragement of union membership nor was the lockout without significant employer interest of an innocent variety.

would establish a violation of Section 8(a)(1) without further inquiry. Under Section 8(a)(3), such an effect would lead to a finding of violation (without actual proof of motive) unless a weighing of the legitimate business ends claimed to be served impelled a contrary conclusion.

Justice White, in concurrence, found Justice Stewart's emphasis upon the absence of requisite proof of motive far too restrictive an approach. In his view, "[t]he balance and accommodation of 'conflicting legitimate interests' in labor relations does not admit of a simple solution and a myopic focus on the true intent or motive of the employer has not been the determinative standard of the Board or this Court."[122] Impact, rather than motive, is crucial where direct interference with Section 7 rights results from an employer's attempt to protect his economic position. In such instances, a balancing of the respective interests is the proper basis of decision.[123]

Justice Goldberg also concurred separately in an opinion joined by the Chief Justice. Justice Goldberg took particular exception to the majority requirement that motivation, under Sections 8(a)(1) and (3), must be separately established unless the challenged conduct is "demonstrably so destructive of collective bargaining" or "so prejudicial to union interests and so devoid of significant economic justification" as to overcome all protestations of innocent purpose. This construction Justice Goldberg found in conflict with "both the letter and the spirit of numerous prior decisions of the Court"; "the correct test for determining whether § 8(a)(1) has been violated in cases not involving an employer anti-union motive is whether the business justification for the employer's action outweighs the interference with § 7 rights involved."[124] Where there is no significant business justification but the action has an effect on Section 7 rights, it may be prohibited by Section 8(a)(1) even though less than "demonstrably . . . destructive of collective bargaining." *Radio Officers* and *Erie Resistor*, to Justice Goldberg, established a similar test for Section 8(a)(3). Even without direct proof of motive, violations of that section can occur apart from those "extreme situations" where, in the language of the majority, the challenged conduct is "inherently prejudicial to union interest" and

122. 380 U.S. at 325.

123. Justice White noted in addition that this balancing process is one which the Board is particularly equipped to perform, and cautioned that while it must of course be liable to judicial review it should not be subject to judicial displacement. Justice Goldberg's concurrence made the same point.

124. *Id.* at 339.

"devoid of significant economic justification."[125] A violation is established without proof of motive whenever the effect on Section 7 rights, whether great or limited, outweighs the actual (or alleged) justification in the needs of the business.[126]

Much the same conflict of views was evident in *NLRB v. Brown*. There the Court, through Justice Brennan, again found absence of proof of improper motivation fatal to a Board finding of violations of Sections 8(a)(1) and (3). Applying the *American Ship* tests, Justice Brennan concluded that there was no Section 8(a)(1) violation, absent proof of anti-union animus, because the use of replacements to keep the locked-out stores in operation was neither "demonstrably so destructive of employee rights" nor "so devoid of significant service to any legitimate business end" that it could not "be tolerated consistently with the Act." Likewise there was no violation of Section 8(a)(3). As no anti-union motivation had been shown, the replacements could not be considered unlawful unless the only "reasonable inference" was that the lockout had been directed against employees because of their exercise of Section 7 rights and was "inherently destructive" of those rights. This inference, the Court held, was not justified.

Several aspects of Justice Brennan's opinion in *Brown* deserve special emphasis. At the very outset Justice Brennan reiterated the warning previously voiced by the Court in *Insurance Agents*[127] that the Board, in an attempt to achieve a fairer balance of power between unions and employers, is not authorized to increase or decrease the economic pressure either party can bring to bear in a labor dispute. Union and employer conduct must be judged on the basis of how far it may impede or extinguish the exercise of a right under Section 7; it cannot be judged on the basis of whether it will render concerted activity more or less successful in achieving its economic ends. Though the Court acknowledged that the use of replacements might have decreased the possibility that the union could obtain the new contract terms it sought, it found no violation because there had been no inherent or proven inducement of employees to abandon collective bargaining as such. The decision concluded by reiterating its preliminary caveat: "Congress has not given the Board untrammelled authority to catalogue which economic devices shall be deemed freighted with indicia of unlawful intent."[128]

125. *Id.* at 340.
126. *Id.*
127. *See* note 99 *supra*.
128. 380 U.S. at 292.

Justice Goldberg and Chief Justice Warren again concurred on the ground that the damage, if any, resulting to employee rights through the use of temporary replacements was outweighed by the employer's economic interest in preserving the multi-employer bargaining unit from fragmentation. While they agreed, accordingly, that there had been no violation in *Brown*, the concurring Justices served notice that their analysis of the requirements of Section 8(a)(3) would not always permit a similar result. Their concurrence specifically observed that "[t]here would be grave doubt as to whether locking out employees and hiring permanent replacements is justified by any legitimate interest of the nonstruck employers,"[129] an issue which the majority had set aside as not presently before the Court.[130]

Textile Workers v. Darlington Manufacturing Co.,[131] decided in the same term, provided a further analysis of motive and effect in a decision which apparently but unaccountably represented the unanimous view absent in *American Ship* and *Brown*.[132] *Darlington* deserves the designation of a "celebrated" case on many grounds. Not the least of these, of course, is the basic issue which it posed: can an employer with impunity terminate his business rather than deal with a union? The principals involved were each receptive to making organization of a local textile mill the theatre for a labor-management Armageddon; an industry fleeing southward for lower production costs and a union in hot pursuit of the jobs of its members could not help but be vitally interested in the outcome of the struggle.[133]

Darlington was one of seventeen manufacturers controlled and oper-

129. *Id.* at 293.

130. 380 U.S. at 292 n.6. Justice White dissented in *Brown* after concurring in the result in *American Ship*. The difference in his disposition of the two cases was not a matter of approach but of the results obtaining from that approach. He again emphasized that, as to both Section 8(a)(1) and 8(a)(3) violations, the damage done to employee rights must be weighed against the service rendered to employer interests, a balancing task which is primarily the responsibility of the Board. Where, as in *American Ship*, the Board failed properly to explicate the basis on which it had struck the balance, its decision could not be sustained. In *Brown*, however, Justice White concluded that the Board had fully established a reasonable basis for its conclusion that the use of replacements was more injurious to employee rights than it was protective of employer interests.

131. 380 U.S. 263 (1965).

132. Justices Stewart and Goldberg, however, did not participate in the decision in *Darlington*.

133. The case also, in this regard, provides a classic example of the difficulties of effective government regulation of labor-management relationships. The organizing drive which gave rise to the dispute commenced in March, 1956. Twelve years later, the dispute is yet to be finally resolved. At the end of the fifth hearing before him in the case, Trial Examiner Lloyd Buchanan prefaced a seventy-three page review of the proceedings with the comment that "these proceedings, unquestionably monumental, may become a monument to monumental futility" and further observed that "Darlington may yet become an eponym for divagation and delay." Trial Examiner's Supplemental Decision, August 15, 1966 (TXD-488-66), at 1, 2.

ated by Deering Milliken and Company, a New York "selling house" for the marketing of textiles. Six days after the Textile Workers Union had been selected as the plant's exclusive bargaining representative by a narrow majority of Darlington's employees, the Board of Directors voted to close the plant and liquidate the corporation. Their action was admittedly impelled by the conclusion of Roger Milliken, the company's president, that unionization would prevent the plant from remaining "competitive." The union charged, and the Board found, that the Darlington closing had been in violation of Sections 8(a)(1) and 8(a)(3).[134] A majority of the Board concluded that the shutdown had been impelled by anti-union animus and that the larger Deering Milliken enterprise was liable for the effects of the violation. The Fourth Circuit reversed on the ground that an employer possesses an absolute right to close out a part or all of his business regardless of his motives.[135]

Justice Harlan's opinion for the Court marked a significant narrowing of the roles of motive and effect in establishing violations of Section 8(a)(3). He began by determining that the case must be within the ambit of Section 8(a)(3) restrictions rather than those of Section 8(a)(1). Section 8(a)(1), he asserted, is violated

> only when the interference with § 7 rights outweighs the business justification for the employer's action . . . . A violation of Section 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive.[136]

An employer's decision to terminate his business, however, is "so peculiarly a matter of management prerogative" that it would never, taken alone, be held to be outweighed by its impact upon Section 7 rights. Only the added element of a motive to discriminate will suffice to render the closing unlawful. And such action, if discriminatorily moti-

134. The Board also concluded that Darlington had committed a violation of Section 8(a)(5) by refusing to bargain with the union following the latter's certification. The Court, however, brushed aside this aspect of the case on the ground that the refusal to bargain was bottomed on the illegality of the plant closure and that "no argument is made that Section 8(a)(5) requires an employer to bargain concerning a purely business decision to terminate his enterprise." 380 U.S. at 267 n.5.

135. 325 F.2d 682 (1963).

136. 380 U.S. at 268. This is in marked contrast to Justice Harlan's prior comments (in his separate opinion in *Burnup & Sims*) that it was only in a "rare situation" that the Board may ignore motive. *See* note 116 *supra*. It is in even further marked contrast to his opinion, for the full Court, in NLRB v. Exchange Parts Co., 375 U.S. 405 (1964), in which a basic Section 8(a)(1) violation was ostensibly made totally dependent upon motive. In *Exchange Parts* the Court held that a grant of economic benefits to employees immediately prior to an NLRB-conducted election was invalid if it was "for the purpose of inducing employees to vote against the union." *Id.* at 409.

vated, comes squarely under the terms of Section 8(a)(3)'s prohibition.[137] Thus where "business justifications" constitute "peculiarly matters of management prerogative," only Section 8(a)(3) properly applies. Section 8(a)(1) and its balancing of interests cannot be used in such a closing case because the employer action, no matter how devastating to the exercise of Section 7 rights, is so completely a managerial prerogative as to immunize all but deliberate intent to curb those rights.

The distinction thus drawn between the two sections is of critical importance. The relationship of Section 8(a)(3) to the broader mandate of Section 8(a)(1) is made dependent upon the simplistic and highly subjective standard of those management and union actions which are "peculiarly" essential to the running of the enterprise. If the Board—or eventually the Court—senses that a particular action involves the life of the enterprise deeply enough, motivation—together with the remaining requirements of Section 8(a)(3)—becomes a determinative factor as to the legality of that act. No guides are suggested for the approach taken to this enormously complex problem;[138] the decision, instead, comes perilously close to establishing administrative or judicial "intestinal fortitude" as the controlling factor. Furthermore, the weighing of which subjects are "peculiarly matters of managerial prerogatives" is a process intimately involving the power balance between employee and employer interests—an area which the Court had previously declared to be beyond the proper scope of Board and judicial control.[139]

In any case, Justice Harlan, as noted above, viewed the *Darlington* shutdown as solely a Section 8(a)(3) problem. In applying the terms of that section to the fact pattern before the Court, his decision added an entirely new gloss to prior rulings as to motive and effect. On its face the case certainly seemed to present all the elements of an 8(a)(3) violation. That there was "discrimination" seems hardly contestable whatever definition of that term is used; the Darlington employees were accorded significantly different treatment after choosing to be

137. 380 U.S. at 269.

138. *See, e.g.*, the long and intricate struggles of both the Board and the Court with the issue of what constitutes "mandatory" as opposed to "non-mandatory" subjects of bargaining. Citation of even the major decisions in this struggle would consume entirely too much space herein. A few classic cases such as Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964); NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958), and NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952), are illustrative of the basic difficulties. *See also* Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

139. *See* notes 127-28 *supra*.

represented by a union. The discrimination took place as to their tenure of employment. It was probably motivated by their selection of a union. As to those employees who lost their jobs, accordingly, there can be no question that their act of becoming union members resulted in punishment. Nor can it be doubted that the termination of their employment discouraged the dischargees in their affiliation with the union. The case, accordingly, would appear to be a classic situation in which both the motive and the effect of discouragement were incontestably present.

The opinion in *Darlington*, however, adopted a premise which necessarily required a revision of these otherwise accepted principles: "A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act."[140] Neither such legislative intent nor unequivocal judicial precedent were found by the Court.[141] In examining certain potentially relevant precedents, however, Justice Harlan propounded a new test for the applicability of Section 8(a)(3). His rejection of the contention that Darlington's shutdown was no different legally, although more severe in effect, than a lockout or a removal of operations designed to frustrate unionization rested upon a novel point of distinction—whether or not the employer gained any "future benefit" from the act of discrimination. Having created the hitherto unknown requirement of benefit, the decision was forced to reinterpret prior law to accommodate it. Under the reinterpretation, the "closing of an entire business, even though discriminatory" and for anti-union motives, is entirely removed from the category of violations of Section

140. 380 U.S. at 270. It is somewhat startling to see the Court inquiring into details of legislative intent in such circumstances. The Court has not infrequently observed that in the case of the National Labor Relations Act, Congress laid down broad, basic rules to be given specific application and definition by an administrative agency with special expertise as to their implications:

> The Wagner Act did not undertake the impossible task of specifying in precise and unmistakable language each incident which would constitute an unfair labor practice. On the contrary that Act left to the Board the work of applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms. Thus a "rigid scheme of remedies" is avoided and administrative flexibility within appropriate statutory limitations obtained to accomplish the dominant purpose of the legislation.

Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945), *citing* Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).

141. The Board, before the Fourth Circuit, had acknowledged that "there [was] no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." 325 F.2d at 686.

8(a)(3) because "the force of such a closing is entirely spent as to that business when termination of the enterprise takes place."[142]

Had the decision gone no further, *Darlington* would merely represent a dubious exception—applicable only in the special circumstances of an industrial suicide—to rules otherwise uniformly interpreted and applied as to Section 8(a)(3).[143] Having introduced the concept of "benefit," however, Justice Harlan found it necessary to go much further. Benefit should, after all, be examined in the context of an employer's entire business enterprise. By analogy to runaway shop and temporary closing cases, Justice Harlan declared that if certain conditions were fulfilled, even the closing of an entire plant might constitute a Section 8(a)(3) violation.[144]

> If the persons exercising control over a plant that is being closed for antiunion reasons (1) have an interest in another business, whether or not affiliated with or engaged in the same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will also be closed down if they persist in organizational activities, we think that an unfair labor practice has been made out.[145]

142. 380 U.S. at 274. As a factual conclusion, the statement is subject to debate. As the Board noted on remand, 165 N.L.R.B. No. 100, 65 L.R.R.M. 1391, 1404 (June 27, 1967), "our decision might possibly have been simplified by finding a 'future benefit' other than the chilling of unionism, on the theory that, by liquidating Darlington and investing the retrieved capital elsewhere in a functioning textile enterprise, the Millikens achieved a substantial 'future benefit' at the expense of unionism while continuing to operate and utilize the Darlington capital within the framework of an employer-employee relationship."

143. Trial Examiner Buchanan, in his lengthy supplemental decision, *supra* note 133, at 11, put the matter plainly if emotionally:

> The Act forbids an employer to affect the employment relationship by discrimination as described. It does not as an exception permit such discrimination where it is committed to the limit of destroying completely the hire and tenure relationship. Discriminatory discharge of one employee completely destroys the relationship as to him and is recognized as violative. The basis is not clear (it is certainly not in the Act) for a *volte face* declaration that the same statute permits multiplication of the offense to the point of totality. Thus Section 2(3) of the Act unambiguously continues in employee status those "whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. . . ." This provision of the statute is amended, deleted, and indeed reversed by the Supreme Court's declaration: "The closing of an entire business, even though discriminatory, ends the employer-employee relationship. . . ." Furthermore, having recognized a closing as "discriminatory," how can we deny that it is violative, whether there be a remedy or not?

Nonetheless, as the Trial Examiner further observed, the Harlan opinion in *Darlington* composed a dirge for the victims of industrial warfare; "*Requiescat a malis* without resurrection or reincarnation." And, it might be added, without rationale.

144. *Id.* at 274-75.

145. *Id.* at 275-76.

Justice Harlan was quick to add a highly significant qualification, however. Neither the motive requirement set forth in the second of these conditions nor the effect made necessary by the third would be satisfied by inference rather than direct evidence:

> It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect [citing *Local 357* and the concurrence of Justice Harlan therein]. In an area which trenches so closely upon otherwise legitimate employer prerogatives, we consider the absence of Board findings on this score a fatal defect in its decision.[146]

The case was, accordingly, remanded to the Board.

Justice Harlan's opinion in *Darlington* thus added new dimensions to both the element of motive and the element of effect. Both were made irrelevant absent evidence that a "future benefit" would be gained. The Court's prior ruling that the individuals discriminated against need not be those encouraged or discouraged was modified to require a specific motive and effect as to the non-discriminatees.[147] Finally, in cases involving the undefined area of "legitimate employer prerogatives," *Darlington* ruled that motive cannot be inferred from effect nor effect from motive; both require objective proof.

The inevitable problem of what constitutes such objective proof was dramatized by the supplementary decisions made necessary by the Court's remand in *Darlington*. The Trial Examiner, in his fifth hearing on the case, held, *inter alia*,[148] that there was insufficient evidence in the record to demonstrate that the closing at Darlington had been motivated by a desire to discourage unionization at other Deering Milliken plants, or that it was either realistically foreseeable or independently proven that employees at such other plants would fear loss of employment if they persisted in organizational activities. The Board reversed,[149] finding adequate evidence of both the purpose and effect of

146. *Id.* at 276.

147. *Radio Officers*, of course, had stated specifically that "the Act does not require that the employees discriminated against be the ones encouraged for purposes of violations of § 8(a)(3)." 347 U.S. at 51.

148. Readers of the supplemental decision will, it is believed, regard use of the term "*inter alia*" as unavoidable.

149. 165 N.L.R.B. No. 100, 65 L.R.R.M. 1391 (June 27, 1967).

"chilling." In doing so, however, it plainly anticipated an attack upon its decision as lacking in specific as opposed to inferential proof:

> Respondents argue that the Supreme Court is requiring ". . . concrete, specific, independent proof . . ." of a purpose to chill unionism. Insofar as this formulation is intended to be a restatement of the Court's standard that there must be ". . . a showing of motivation which is aimed at achieving the prohibited effect," we concur. But the requisite motivation may be proved by something less than direct evidence, rarely obtainable in cases of this kind. In this branch of the law, as in all others, proof of motive may be supplied by circumstantial evidence which affords a sound basis for drawing inferences.[150]

The same conclusion was reached as to the necessary evidential support for a finding of the prohibited effect.[151]

150. *Id.* at 1400-01. In this respect, the Board pointedly cited and quoted the observation of the Ninth Circuit that:

> Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.

Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966). The Board then continued:

> In pursuance of the delicate duty of discriminating between, or "sifting," separate antiunion motives, we have attempted to ascertain, as precisely as possible, the motivation of Roger Milliken, as revealed by his conduct preceding the election at Darlington, the manner and the circumstances of his behavior in making and implementing the decision to close, the significant use to which he later put the closing, and the inferences derivable therefrom. This, we believe, is far removed from simply equating foreseeable consequences with prior motivation.

65 L.R.R.M. at 1402.

151. The Board concluded:

> (1) that the news of the Darlington closing would be communicated to other Deering Milliken employees, (2) that these other employees would be aware of the connection between Darlington and their mills, and (3) that the circumstances of the closing would cause these employees to fear a similar consequence from any union activity in which they might engage.

65 L.R.R.M. at 1403. The evidence sustaining these conclusions was primarily circumstantial; for whatever reasons (possibly including an icy estimate on the part of Milliken employees of how best to continue being employed at a Milliken operation) the record lacked a neat succession of employees who still held jobs testifying that they had heard of the Darlington closing and thereupon felt an immediate chill in the presence of union organizers.

The alternative contentions urged on the Board as to the Court's requirements in the way of "effect" are worth some attention. As the Board observed:

> The parties offer differing constructions of what the Court means by "effect." General Counsel argues that, once a chilling purpose is found, the answer to the question of whether the employer "may reasonably have foreseen that [the closing] would likely have a 'chilling effect' flows almost by necessity" from the affirmative answer to the first question. [Citations omitted.] In other words, it would be only reasonable to concur in an employer's judgment that his action, intended to be chilling, would have the desired result. The Trial Examiner apparently would have rested on the tendency of the closing adversely to affect employees elsewhere, but, having received some evidence bearing on the actual effect on other employees, he felt that any inference he might otherwise have drawn was dispelled by the unpersuasive charac-

Two years after *Darlington*, while the Board was still struggling with the implications of that decision, the Court once more turned to the problem of motive, effect, and inference under Section 8(a)(3). In *NLRB v. Great Dane Trailers, Inc.*,[152] an employer's refusal to pay strikers the vacation benefits accorded nonstrikers was held by the Board to be a violation of Sections 8(a)(3) and (1). The Fifth Circuit refused enforcement of the Board order[153] on the ground that there had been no affirmative showing of an unlawful motivation.

Chief Justice Warren's opinion for a majority of the Court, while less than clear on the point, accepted the premise that different treatment of strikers and nonstrikers constituted "discrimination."[154] He further concluded that "the act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity."[155] With discrimination and an effect of discouragement of union membership thus established,[156] the Chief Justice turned to the issue of motivation. The difficulty which *Great Dane Trailers* presented in this regard was, once again, an absence of any affirmative evidence as to what had impelled the employer to engage in the action under challenge. The Fifth Circuit, in these circumstances, had relied upon its own expertise in concluding that the action *might* have been motivated by such unimpeachable intentions as a desire to reduce costs, to encourage longer tenure or to discourage absences immediately before vacation periods. Such speculation was not, in the view of Chief Justice Warren, enough. His opinion construed the Court's prior holdings in *Erie Resistor, American Ship* and *Brown* as establishing two categories of Section 8(a)(3) violations.[157] The first category comprises situations in which the

ter of the evidence adduced. The Respondents contend that there must be a showing of "actual effect" upon the employees.
65 L.R.R.M. at 1402 n.21.

152. 388 U.S. 26 (1967).

153. 363 F.2d 130 (5th Cir. 1966).

154. The claim of the strikers could be bottomed on either a "vested" right arising out of the expired contract or a non-contractual "right" to any benefits established as a condition of employment. The majority opinion is not clear as to which of these bases is relied upon as sustaining the strikers' position although its use of the word "accrued" might well import a contractual claim. It was this possible judicial (as opposed to arbitral) construction of the agreement's terms which drew a major share of the attention of the dissent.

155. 388 U.S. at 32.

156. The Court's use of the phrase "discouraging effect on concerted activity" rather than direct reference to discouragement of union membership would seemingly equate the two. *Cf.* Ward, *supra* note 32.

157. We noted in *Erie Resistor* . . . that proof of an antiunion motivation may make

discriminatory conduct is "inherently destructive of important employee rights." In such cases no proof of anti-union motive is necessary, and a violation can be found even if the employer introduces affirmative evidence of business justifications. Chief Justice Warren's second category comprises situations in which "the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight.' " As to this group of cases, an anti-union motive must be made out "*if*" (and the word is emphasized in the Court's opinion) "the employer has come forward with evidence of legitimate and substantial business justifications for the conduct."[158] Since in the case at hand Great Dane had failed to advance such "justifications" or "business considerations," the Court did not consider it necessary to classify the company's action as falling in either category; whatever the classification, the Board's action was sustainable.

Justices Harlan and Stewart dissented.[159] They too found prior decisions had established two categories of Section 8(a)(3) violations; their delineation of these categories, however, constitutes a far different disposition of the interests involved. The dissenters' first category included both violations based on actions serving no legitimate business purpose and violations arising out of conduct "inherently severely destructive of employee rights." As to this latter group Justices Harlan and Stewart asserted that improper motive could be inferred from the actions themselves, and that even a legitimate business purpose could be held by the Board not to justify the employer's conduct.[160] The dissenters' second category included violations based on actions *not* "demonstrably . . . destructive of employee rights" or "devoid of significant service to

unlawful certain employer conduct which would in other circumstances be lawful. Some conduct, however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an underlying improper motive [citing *Brown* and *American Ship*]. That is, some conduct carries with it "unavoidable consequences which the employer not only foresaw but which he must have intended" and thus bears "its own indicia of intent" [citing *Erie Resistor*]. If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face," and if he fails, "an unfair labor practice charge is made out." . . . And even if the employer does come forward with counter-explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. . . . On the other hand, when "the resulting harm to employee rights is . . . comparatively slight, and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful," and an affirmative showing of improper motivation must be made. 388 U.S. at 33-34.

158. *Id.* at 34.

159. The dissenters' central concern was with the majority's treatment of "accrued" rights. *See* note 154 *supra*.

160. The dissenters cited *Erie Resistor* in support of this proposition. 388 U.S. at 38.

any legitimate business end." In these cases independent evidence of the employer's anti-union animus would be required to find a violation.[161] In the Harlan-Stewart view, the conduct of Great Dane Trailers was clearly in the second of these categories. Accordingly, the absence of proof of an unlawful motive plus the possibility of an inference of legitimate motive destroyed the requisite basis for the violation charged.

The dissent in *Great Dane Trailers* accused the majority of having adopted either a burden of proof test of minor but deviant character, or of having restructured precedent to allow the Board to tamper with the balance of economic power in labor-management struggles. Whatever the majority's intent, the following term of court brought confirmation that *Great Dane Trailers* had in any case marked a deliberate restatement of the motive test in operation. *NLRB v. Fleetwood Trailer Co.*[162] involved Section 8(a)(1) and 8(a)(3) charges resulting from an employer's hiring of new employees rather than reinstating certain strikers. The Ninth Circuit denied enforcement of a Board order requiring reinstatement, on the grounds that the record showed no evidence of a motive on the part of the employer to discourage union membership by the employment of new personnel.[163] The Supreme Court reversed and remanded on the authority of *Great Dane Trailers*:

> A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments. And because the employer here has not shown "legitimate and substantial business justifications," the conduct constitutes an unfair labor practice without reference to intent.[164]

III. Summary Analysis and Conclusions

A detailed history is necessary to any real understanding of why and how "motive" has become an essential (albeit ambiguous) element in employer discrimination cases. Yet the length and complexity of that history may also serve to obscure what it should illustrate. The convolutions of the three decades of litigation summarized in the foregoing pages establish, it is submitted, three basic conclusions of considerable

161. *Id.*
162. 389 U.S. 375 (1967).
163. 366 F.2d 126 (1966).
164. 389 U.S. at 380. Predictably, Justice Harlan (joined by Justice Stewart) registered a separate statement of views finding the case determinable on the simple basis of a mistake of law on the part of the employer, *i.e.*, erroneously regarding strikers who have made application for reinstatement as being in an equal or indistinguishable posture with individuals previously having no contact with the enterprise.

import. First, the Supreme Court, contrary to the original legislative design, has established motive as the ostensibly controlling element of the violation. Second, the result has been to create an untenable division of approach between Sections 8(a)(3) and 8(b)(2) on the one hand, and other, broader proscriptions of the statute on the other. Third, establishment of motive as the benchmark of the violation has obscured the actual basis of decision, and the process of decision has been warped by the necessity to frame results in terms of motive. These conclusions and their substantive support are the subject of the final section of this study.

A. *Motive and Effect in the Original Design of the Statute*

It is well established that Congress enacted Section 8(a)(3) of the Wagner Act in order "to insulate employees' jobs from their organizational rights."[165] This aim could, no doubt, have been accomplished in a variety of ways. Thus Congress could have worded the prohibition in terms of motive, by prohibiting discrimination "with the intent" to discourage union membership or non-membership.[166] It could also have defined unfair labor practices in terms of effect, by forbidding discrimination "which" encourages membership or non-membership.[167] Either of these approaches might have better identified what was essential to a finding of violation. In the final text of the legislation, however, Congress defined the violation as "discrimination . . . to encourage or discourage membership in any labor organization."[168] As Chester Ward's early, perceptive analysis observed:

> In each of subsections (1), (2), (4) and (5) the definition of the substantive unfair labor practice follows immediately the word "to"; that is, the conduct which is made the *basis* of liability for violation of the Act is described after the word "to" in four out of the five subsections. There is no reason to believe that that is not also true in the fifth case, that of subsection (3). The unfair labor practice under subsection (3), then—the basis of liability—is for an

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

166. It is of some interest, in this regard, that Section 703(h) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h) (1964), in dealing with conduct of a discriminatory nature, specifically uses the benchmark of intent in defining the protection to be accorded a "bona fide seniority or merit system" or incentive schedule. The statute notes that the different treatment accorded various employees under such systems must not be "the result of an *intention* to discriminate because of race, color, religion, sex, or national origin" (emphasis added). Ability tests are likewise protected in the section if they are "not designed, intended or used to discriminate" on the forbidden grounds.

167. It was this phraseology which was used in the 1934 bill which failed of passage. *See* note 38 *supra*.

168. 29 U.S.C. § 158(a)(3) (1964).

> employer "to encourage or discourage *membership* in a labor organization." The words preceding "to" in subsection (3) must be given effect, then, as a *condition* to liability, not as a *basis* of liability. In other words, "discrimination" is the proscribed *means* of encouragement or discouragement, but the prohibited *conduct* is the encouragement or discouragement.[169]

The point deserves special emphasis. Strictly construed, the statutory prohibition is directed against any encouragement or discouragement of membership which is accomplished by discrimination; it plainly does not proscribe only such discrimination as is intended to create that effect.

The first references to motive by the Board and the Court were consistent with such an interpretation. In its initial decision under the Wagner Act, the Board quoted approvingly a Supreme Court reference to motive as "a persuasive interpreter of equivocal conduct,"[170] to be distinguished from an essential element of the substantive violation. At that time, and for some period thereafter, the ordinary Section 8(a)(3) case hinged upon a determination of whether punishment or reward was the consequence of union activity or of some other cause. The Board operated on the simple and not untenable presumption that if an employee was discharged because he had solicited for a union rather than because he had committed some other infraction of rules a violation of the Act was established. Accordingly, the Board utilized motive only to determine which of the two causes was the impelling reason for the termination. "Motive," indeed, was equated with anti-union animus rather than being treated in terms of an intention to obtain a particular result.

The Board, in sum, initially read Section 8(a)(3) as prohibiting any punishment or reward (discrimination) which was set in motion by the union activities of an employee. Once it found such a connection the Board did not, normally, conduct any separate inquiry as to whether or not there had been an actual result of encouragement or discouragement of membership. Nor, except in rare cases, did it inquire into or make a separate finding as to the existence of an intent to create that result. In the vast majority of discrimination cases coming before it at that time, of course, either of these two inquiries might well have been superfluous. When an employee is discharged because he has joined a union, a result of discouragement of membership and an intent to

169. Ward, *supra* note 32, at 1156.
170. Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 23 (1935).

achieve that result may be ineluctable. *Radio Officers* made the mistake of assuming that these cases therefore demonstrated that the element of intent, because it was frequently present, was always critical. *But,* and the caveat is an essential one, the fact that an act which punishes a person for union activity normally subsumes a desire to discourage union membership does not of itself establish that such a desire is a necessary ingredient of the prohibited conduct. *Radio Officers* to the contrary notwithstanding, the Board's use of motive was in the area of findings of fact rather than conclusions of law. Where, as in many instances, issue was joined as to whether punishment or reward was the result of union activity, "motive" was utilized to resolve that fact question and that fact question only rather than to establish, separately, an intent to increase or decrease adherence to the labor organization.

Not only did the early litigation under the Act fail affirmatively to establish intent to discourage or encourage membership as an essential element of a Section 8(a)(3) violation, but both the Board and the Supreme Court gave explicit recognition to the opposite conclusion. Discrimination which discouraged union membership was held to constitute a violation of the statute even in circumstances negating any showing of an intent to achieve that aim. *Republic Aviation,* together with the other cases referred to above, make this evident beyond contest. In those cases any motive to discourage or encourage was either absent, as a matter of record evidence, or was contradicted by the record evidence. The result—the impact of discouragement—was nonetheless accepted as fulfilling the requirements for the violation.

B. *The Motive Requirement as Developed by the Court*

It is apparent in retrospect, then, that when, in *Radio Officers,* Justice Reed posited a "purpose" to encourage or discourage union membership as a "controlling" factor in employer discrimination cases, his assertion was not justified by a careful reading of either the statute or existing precedent. It is not surprising that in order to avoid reversing such cases as *Republic Aviation* in which a motive to discourage was not proven (or was directly controverted), he was forced to create an exception to the requirement which he had just established. The accommodation device he used was to supply the missing or rebutted motive by inference. The procedure was deceptively simple in statement. Unlike motive itself, Justice Reed observed, "specific evidence" of such intent is not "an indispensable element" of the violation. There are "certain types of discrimination" which must "inherently" discourage or encourage. When that result is foreseeable, "it is presumed" that the

employer or union intended such a consequence. Intent, in short, can be supplied by certain types and forms of discrimination rather than by independent evidence.

The majority opinion in *Radio Officers,* accordingly, did not reverse the line of cases exemplified by *Republic Aviation*; it preserved their results by revising the premises on which they had been decided. Yet it was that procrustean attempt to restructure past results in terms of new theories of decision which became the source of future difficulties. Under *Radio Officers,* acts of discrimination which would result in encouragement or discouragement of union membership remained the general subject of prohibition. Henceforth, however, each such action was required to be analyzed from the standpoint of motive. In a situation where direct proof of motive was absent or controverted, the Board could no longer be content with a conclusion that the effect of the discrimination would be a perceptible increase or diminution of employee desire to join and remain a member of a union. It was required to find that such an effect was not only present but was so evident and so powerful as to support an inference of intent to achieve it.

If the shift in emphasis brought about by *Radio Officers* was a subtle one, it nonetheless has had important and far-reaching consequences. One of its most significant effects has been to force the Board to make largely artificial judgments in many labor dispute situations. It is a rare employer or union which is now unsophisticated enough to leave any kind of direct evidence of its "motive" in taking an action which conceivably can be challenged under Sections 8(a)(3) or 8(b)(2). Thus, while such evidence might have been adduced in *Local 357,*[171] the Board could only speculate about the motives underlying the lockout in *American Ship,* the replacement policies in *Erie Resistor* and *Brown,* and the alteration in vacation benefits in *Great Dane.* In addition, the increasing complexity of industrial relations and the growth of sophistication on both sides of the bargaining table have inexorably brought a constantly widening range of actions within the possible application of Sections 8(a)(3) and 8(b)(2). These actions may well frequently be the result of intentions which are beyond the reach of record evidence. Indeed, they may be the result of pressures or goals which, in their inception, have nothing whatever to do with union membership or non-membership, although they ultimately have substantial impact thereon. The Board, nonetheless, has been required to apply standards

171. *See* p. 1294 *supra,* note 178 *infra.*

of "motive" to records barren (whether deliberately or unavoidably) of any direct evidence of intent.

The problems and complications thus engendered became initially apparent in *Local 357*. There the Board attempted to treat the general subject of hiring halls and union controls of employment opportunities on the basis of its expert knowledge and long experience as to their impact upon the exercise of employee rights. "Motive," whether or not provable by direct evidence, was established by inference on the basis of administrative expertise. The Court, in rejecting this approach, made it evident that the Board's power to infer any element of the violation was sharply circumscribed. Justice Harlan's concurrence underlined the degree to which this restraint could curtail the Board's authority in the specific area of motive. In his opinion, the power to establish an illegal motive to encourage or discourage membership by inference rather than direct evidence is a closely limited power, operative only where the record shows no "significant" and "legitimate" justification for the action claimed to be illegally motivated. Justice Harlan's treatment of "business justifications" as negating an inference of illegal motive demonstrated the extent of *Radio Officers'* influence. "Business justification," of course, is but another label for a specific type of motive which, if proffered by an employer or a union and found to be both significant and legitimate, can outweigh the implied motive of encouragement or discouragement based upon the known effect of the discrimination.

Under Justice Harlan's gloss, accordingly, the category of discrimination cases in which motive could not be proven by direct evidence was made subject to very special standards of judgment. Although a prohibited result—in the sense of apparent encouragement or discouragement of union membership—might be evident, the proscription of such injury became dependent upon a weighing of the alleged justification against the implied unlawful intent. It must be observed, of course, that there was and is other precedent for a determination that a legitimate counter-interest will save an action from what would otherwise be a literal violation of the statute. Such limits, however, have been most clearly necessary and most easily justified where the statutory language is so broad as to necessitate some narrowing by judicial interlineation. This has been particularly true in the case of Sections 8(a)(1) and (5).[172] Justice Harlan's "weighing process," however, went

172. Thus permanent replacement of employees on strike for higher wages may, construed broadly, amount to an interference with or restraint of their right to strike as con-

far beyond this precedent in imposing a similar gloss upon a violation as to which Congress had been specific rather than general.

The weighing process described by Justice Harlan in *Local 357* was subsequently adopted by the Court, although without agreement as to its precise form. The division in viewpoint became plain in *Erie Resistor, American Ship* and *Brown*. In each of these cases there was action by an employer which arguably reduced the desires of employees to become or remain members of a union. No affirmative evidence of a motive to discourage union membership, however, was present in the record; on the contrary, the employer argued in each case that the action had been taken in his own legitimate economic interest. Thus, under *Radio Officers'* requirement that unlawful motive must be inferred from the challenged action and Justice Harlan's *Local 357* balancing test, the Court was impelled to find the action lawful or unlawful in terms of unrevealed and unprovable "intent" balanced against a claimed business justification. That the members of the Court demonstrated deep disagreement as to the proper standards for doing so is hardly surprising.

The variety of separate opinions in these cases reveal two basic versions of the "balancing test." In *Erie Resistor,* Justice White suggested that the process was a simple balancing of harm to employee rights against legitimate gain for the employer. Indeed, his opinion strongly suggested that terming this an inquiry into motive misstated the actual decision being made, a choice between rival interests. In *American Ship,* however, Justice Stewart, writing for the majority, stated that, when there is an absence of direct evidence of unlawful motivation, the inference of an intent to discourage membership must be "so compelling" as to make an innocent purpose improbable. To Justice Stewart, accordingly, the process was not a simple measurement of possible harm to employees against the claimed legitimate interest of the employer; rather the former must be so strong as virtually to obviate the possibility that the latter could be valid. Justice White, the Chief Justice, and Justice Goldberg all registered disagreement with this proposition. They found the proper test, as in *Erie Resistor,* to be a weighing

demned by Section 8(a)(1). Yet the employer's interest in maintaining his business in a purely economic battle with his employees has been held to obviate the presence of a Section 8(a)(1) violation in such a case. NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938). Likewise, the refusal of an employer to accede to union contract demands could be, in a broad sense, considered a refusal to bargain in good faith; judicial limits on such an approach, however, were not only instituted by the courts themselves but received explicit congressional approval in the amendment of Section 8(d) of the Act in 1947.

of the comparative interests rather than the requirement of an almost irrebuttable presumption. Nonetheless, in *Brown*, Justice Brennan's majority opinion not only approvingly repeated the severe limits on inference of motive contained in *American Ship* but suggested in addition that a motive to discourage or encourage cannot be supplied absent record evidence unless it is the only "reasonable inference."

In none of the three cases just discussed would the result reached by the Court probably have been affected by a different choice between these two quite disparate approaches to the requirements of Section 8(a)(3). That fact, however, should not obscure the depth of the division on the Court and the possibly decisive effect of the choice of approach in other situations. *Great Dane Trailers* clearly illustrates the problem. It would have been difficult in that case to contend that the employer action under attack was of a nature so devastating to Section 7 rights as to render a motive to discourage union membership the only reasonable inference. Under the majority's test in *American Ship* and *Brown*, accordingly, no violation would be established in the absence of direct evidence of unlawful intent. On the other hand, a simple weighing of management and union interests as advocated by Justice Goldberg might well have allowed a contrary result. The majority opinion in *Great Dane Trailers* side-stepped this confrontation. It avoided the implications of *American Ship* by holding its test inapplicable to a situation where no showing of legitimate purposes (business justifications) has been made by the respondent.

The two-category approach to Section 8(a)(3) violations adopted by a majority of the Court in *Great Dane Trailers* and reaffirmed in *Fleetwood Trailer* can be interpreted as an implied partial rejection of the motive requirement in, at least, its *Radio Officers* form. Where the effect of an action upon Section 7 rights is major, motive becomes irrelevant. The Board need not establish a purpose to encourage or discourage membership; conversely, legitimate motive—a business justification—will not avail even if affirmatively proven. Where the effect upon Section 7 rights is minor, motive will be inferred (despite the absence of any devastating effect) unless major and legitimate interests of the respondent are shown by the record to have been served by the action. Plainly, the latter situation merely parallels the result which would be reached by a simple weighing of relative damage and benefit. If the Court intended such a rejection, however, it failed to accomplish the full measure of its goal. *Great Dane Trailers* and *Fleetwood Trailer* rest heavily, if not primarily, upon the failure of respondent's counsel to offer an affirmative justification for the act in question. Future

pleaders will, it is assumed, have this in mind together with the obvious conclusion that plausible justification can frequently be advanced whether or not it actually played any part in the formulation of the decision under contest.

C. *The Impact of the Motive Requirement*

1. *The Creation of a Dichotomous Approach*

As has been suggested previously, one effect of the "motive" requirement has been to disguise and distort the original congressional design as to discrimination cases under the statute. That effect will be dealt with in some detail in the concluding portions of this summary. Before proceeding to such an analysis, however, it is worth noting the impact of the motive test in another area, that of Section 8(a)(1). It is submitted that the elevation of motive to the status of an indispensable element in Section 8(a)(3) and 8(b)(2) violations has forced the Court to create an artificial and untenable dichotomy in the statute. Further, as a result of this dichotomy, the disposition of discrimination cases may well vary depending upon which unfair labor practice section, Section 8(a)(1) or Section 8(a)(3), is given precedence. This conclusion is amply supported by a comparison of the Court's decisions in *Burnup & Sims* and *Darlington.*

The motive of the employer in *Burnup & Sims* was, so far as the record shows, unimpeachable; he wished to rid himself of individuals whom he mistakenly but honestly believed had threatened the use of dynamite to blow up his property. Disposition of the case under Section 8(a)(3) in the context of motive, accordingly, would have been difficult; difficult, at least, from the standpoint of protecting employees whose organizational activity had led, however inadvertently, to their discharge. Record proof of an unlawful motive was clearly absent. To infer it, in the face of the employer's protestations and the circumstances of the case, might well strain even judicial imagination. Under the restrictive tests subsequently set forth by the majority in *American Ship,* in fact, such an inference may well have been beyond the Board's reach. Justice Douglas, accordingly, avoided motive and its complications by treating the controversy as one involving only the restrictions of Section 8(a)(1). Under the broad proscriptions of that provision he could reasonably conclude that when employees are in fact punished for the exercise of Section 7 rights rather than some assumed misconduct, it does not matter whether the assumption of misconduct was a matter of good or bad faith on the part of the employer.

In *Darlington* the challenged punishment was again severance from active employment. In contrast to the approach of *Burnup & Sims*, however, Section 8(a)(3) and its restrictions were held applicable. Justice Harlan, in *Darlington*, without citing *Burnup & Sims*, made it plain that while some employer actions may be litigable under Section 8(a)(1) without attention to motive, those which trench closely upon employer interests may only be resolved under Section 8(a)(3). We must conclude then that, as to a certain class of actions which the Court considers (or may in the future consider) to be of particular importance, Section 8(a)(3) and the test of motivation will be controlling; as to others the non-motive approach of *Burnup & Sims* will remain applicable. No precise delineation of the two separate categories is offered by the Court except an ambiguous reference to "management prerogatives," a designation which can be fairly applied to practically all of the actions taken by the employers in the plethora of cases previously discussed.

The importance of *Darlington* and *Burnup & Sims*, however, is not merely that the Court has failed to describe standards for determining when an action "trenches" so closely upon essential interests as to require a different standard of restriction. These cases are also notable because they accept a basic division of approach between Sections 8(a)(1) and 8(a)(3), a division which clashes directly with the congressional design. At the time the original legislation was under consideration, Senator Wagner explained the relationship between the broad restrictions of Section 8(a)(1)—then Section 8(1)—and the four detailed prohibitions which follow it:

> Experience over a considerable period of time . . . has made it clear that . . . general declarations of freedom have little effect unless they are accomplished by a specific catalog of forbidden practices. Therefore, the succeeding four unfair-labor-practice provisions, *without narrowing in any way the widest possible application of the first*, enunciate with particularity the concrete acts which have been the most fertile source of trouble in the past.[173]

The Senate Report on the proposed legislation emphasized the same point:

> The four succeeding unfair-labor-practices are designed not to impose limitations or restrictions upon the general guarantees of

173. 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT—1935 2332-33 (1949) (emphasis added).

> the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome.[174]

Since 1935, indeed, it has been universally recognized that any violation of Sections 8(a)(2), (3), (4), and (5) must also, automatically, constitute a violation of Section 8(a)(1). Some acts, it is true, may infringe only the latter section. In *Darlington*, however, a new theory was adopted—that some actions cannot be a violation of Section 8(a)(1) *unless* they also violate Section 8(a)(3). The holding ignores the clear instruction of Congress that the latter section was not to "narrow in any way," or "to impose limitations or restrictions" upon the broader prohibition. One can rationalize Justice Harlan's position in *Darlington* with the statutory design only, in fact, if the restrictions which he finds in Section 8(a)(3) are considered to be equally applicable under Section 8(a)(1). Yet the latter reading is in clear conflict with both the holding in *Burnup & Sims* and Justice Harlan's own statements in *Darlington*. In the latter case, while not citing *Burnup & Sims*, Justice Harlan recognized its impact by acknowledging that a violation of Section 8(a)(1) "presupposes an act which is unlawful even absent a discriminatory motive."[175] He then created a class of actions (those trenching closely upon management prerogative) which were to be immune from the reach of Section 8(a)(1) unless unlawful under the motive standard of Section 8(a)(3). It is impossible to avoid the conclusion that *Darlington*—despite the congressional instructions—makes Section 8(a)(1) distinct from and subservient to the latter section.

While it is a precarious business, indeed, to predict the course of future opinions of the Court, there is considerable reason to believe that, ultimately, the dichotomy created by *Burnup & Sims* and *Darlington* must and will be rejected. Both the majority and the concurring opinions in *American Ship* and *Brown* separately analyzed the employer actions under attack, first under Section 8(a)(1) and then under Section 8(a)(3). In neither the majority nor the concurring opinions, however, was it suggested that substantially different sets of criteria were applicable under the two subsections. It seems probable that this retreat from formal differentiation will continue. Quite apart

174. S. REP. No. 573, 74th Cong., 1st Sess. (1935), in 2 LEG. HIST N.L.R.A. 2309.

175. 380 U.S. at 268. Justice Harlan, however, in his separate opinion in *Burnup & Sims*, appeared to believe that it was a "rare" case in which motive could be ignored even under Section 8(a)(1). 379 U.S. 21, 25 (1964). *But see* his concurring opinion in NLRB v. Fleetwood Trailers, 389 U.S. 375, 381 (1967), in which, although violations of both Section 8(a)(1) and Section 8(a)(3) were charged, Justice Harlan concluded that "[t]he problems of 'employer motivation' and 'legitimate business justification' are not . . . involved." 389 U.S. at 383.

from legislative history, the administrative and judicial difficulties which are inherent in the differentiation adopted in *Darlington* make common criteria essential.

2. *The Fictive vs. The Real Basis for Decision*

While the statutory dichotomy created in *Darlington* is significant, the most important effects of the motive requirement have appeared in other areas. The substance of the decisions which have occupied the major portions of this study is illustrative of the great variety of highly important employer and union activity which now takes place under circumstances which makes proof of actual motive either artificial or impossible. Establishment and enforcement of plant rules (*Republic Aviation*), employer countermeasures against strikes (*Brown* and *Erie Resistor*), allocation of benefits (*Gaynor News* and *Great Dane Trailers*), control over hiring (*Local 357*) and lockouts (*Buffalo Linen* and *American Ship*) all involve conduct as to which the "true" motive of the employer or the union is highly unlikely to have been registered in a form capable of direct proof. In such instances "motive" must normally be a matter of speculation.

It is difficult to disagree with Justice White's observation in *Erie Resistor* that, in determining the legality of such conduct, what the Board and the Court are really doing is resolving the tension between the employer's ability to continue his business successfully and the employee's exercise of rights guaranteed under Section 7. Indeed, in *Buffalo Linen* the nature of the decision to be made—a choice between conflicting interests—was openly acknowledged by the Court, as was the Board's superior ability initially to make that choice. When, however, as in the cases just discussed, this choice between conflicting interests was converted into an analysis of competing and frequently unprovable motives, the essence of what was to be decided became obscured and the process of adjudication was basically altered. The resulting concealment of the real issues involved may help account for the obvious attraction of the motive concept to a majority of the Court. It is a difficult and delicate matter to state to the Board that the Supreme Court disagrees as to the assessment the agency has made of the value of a lockout or a hiring hall to employers or unions, respectively. It is far easier to assert that the Board has erred as to the legal concept of motive than that the Court takes a different view of the respective importance of the economic interests at stake.

The point is aptly illustrated by *American Ship*. There the Board concluded that a lockout barring employees from their normal eco-

nomic livelihood so long as they continued to demand greater benefits might well decrease their desire to adhere to the union. The conclusion is at least plausible. Substantially all of the Court, however, found that this impact of discouragement was more a possibility than a fact, at least in the circumstances of that case. Conversely, the employer's fears of damage to its customer relations in the case of a sudden strike as well as its understandable desire to limit the cost of a new contract were regarded by the Court as of substantial weight. Several approaches were thus open to the Court. The Board finding of a violation could have been overturned on the ground that an effect of actual discouragement was rebutted by the weight of the evidence. Or, in the fashion of *Buffalo Linen*, the question could have been viewed as a choice between competing interests and the Board reversed because it had not established a valid basis for its determination. Or, as a majority of the Court elected, the question could be treated as one involving a weighing of the proffered pure and the implied impure motivation of the employer.

It seems plain that use of motivation as the essential point of reference in such situations merely obscures the actual determination being made—a choice between rival interests. Let us assume, for the purposes of illustration, that an industrious investigator preparing for trial in a case identical to *American Ship* uncovers a memorandum from the employer's files in which one executive describes to another the economic forces justifying a lockout but adds the phrase "and going without a paycheck for a while will teach the lousy sons of bitches a lesson." Under the motive test apparently all members of the Court would agree that evidence of such an intent would invalidate the lockout.[176] Presumably, then, the foregoing memorandum would have converted a lockout which all members of the Court found to be in the valid, economic interests of the employer and with little or no impact upon union membership into an action condemned by the statute. Perhaps; but the net result would strike many as coming perilously close to conviction for a state of mind rather than an attempt to remedy any real evil. It may well be asked whether the thrust of the National Labor Relations Act is to prohibit bad thoughts, or to curb harmful conduct. And if the latter, are bad thoughts to be held to

176. The majority opinion in *Brown* noted, in this regard, that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." 380 U.S. at 288. And in *American Ship* the majority concluded that the lockout was lawful if it was for the "sole" purpose of bringing economic pressure to bear upon the union. 380 U.S. at 318.

make harmless conduct illegal? If the Congress in 1935 intended to punish all employers then harboring unkind views as to unions it invested the Board with a truly Herculean task. It is more probable that Congress attempted to curb employer action rather than employer thought, and that the concern was with injury to employee rights, however pure or impure the motivation for that injury.

The masking accomplished by the motivation approach is most evident, oddly enough, in *Darlington*. The convoluted, tortuous decision by Justice Harlan in that case was based upon a simple choice between two incompatible interests. In making that choice, however, it provided a vivid example of the difficulties which the motive test inevitably raises. In *Darlington*, discrimination, motive, and effect were all amply established. Nonetheless, the Court concluded that no violation of Section 8(a)(3) had yet been proven. No violation was considered established because the employer action—going out of business—was not one which the Court was willing to allow the Board to regulate. The decision in *Darlington* represented, in effect, a conclusion by the Court that an employer's right to cease operation of his entire enterprise takes precedence over the statutory rights of the employees who thereby lose employment. Whether Justice Harlan was right or wrong in his estimate of the congressional wishes in this regard, the essential fact is that it was a weighing of competing interests, not an inquiry into motive, which was at issue.

Darlington, in its refusal to find a violation despite the plain presence of discrimination provably intended to discourage membership, is but the clearest example of a conclusion which is also implicit in the remaining decisions discussed above. Those cases demonstrate that motive is, indeed, the "fictive formality" which Justice Frankfurter, in *Radio Officers*, suspected it to be. It is true that Justice Frankfurter's reference was restricted to those instances in which "a conclusion by the Board that the employer's acts are likely to help or hurt a union will be so compelling that a further and separate finding characterizing the employer's state of mind"[177] would be unnecessary. The phrase would thus encompass only cases falling within the first of the two categories of Section 8(a)(3) violations posited by Chief Justice Warren in *Great Dane Trailers*, those in which the discriminatory conduct is "inherently destructive of important employee rights." It requires only brief reflection, however, to see that motive is equally a fiction, so far as the true basis of decision is concerned, in the second of the Chief

177. 347 U.S. at 56.

Justice's categories. That group comprises those instances in which the discrimination has only a "comparatively slight" effect on employee rights and may be justified by legitimate and substantial business justifications.

Three possible situations can arise in such cases. If no legitimate and substantial interests are shown on the record to be served by the action under attack, motive is implied—an obvious formality and a patent fiction. If legitimate and substantial interests are set forth in the record, the determination made will plainly be a balancing of respective interests—statutory versus economic. In such instances, the injury to statutory interests being admittedly slight, the balance presumably will always be struck on the side of the economic interests. Unless, that is, as in the third possible situation, evidence of legitimate and substantial economic interests is then met by actual evidence of an intent to impede statutory rights. It is only as to this last alternative, accordingly, that motive would play any realistic part in the decisional process. The Court does not, however, make reference to any instance in which a "slight" injury to statutory rights accompanied by a proven intent to discourage union membership was also supported, on the record, by legitimate and substantial business justifications. It is appropriate to inquire, accordingly, whether all complaints alleging discrimination should be governed by a requirement of motive which can have meaning only as to an insignificant fraction of the total. Even as to that fraction, moreover, it is questionable whether a federal agency should prohibit action admittedly supported by legitimate employer or union interests on the basis of a finding as to state of mind where the injury inflicted is designated as "slight."

3. *Motive in Its Impact on the Weighing Process*

It is of ironic significance that in only two of the post-*Radio Officers* cases discussed above was a motive to encourage or discourage union membership actually or probably provable. In *Darlington*, of course, the employer's intention to extinguish unionization along with the enterprise itself was well established. In *Local 357*, while not a part of the record, evidence might well have been available as to the intention of the union to encourage membership by establishing the hiring hall.[178] The irony is supplied by the outcome in both cases—a finding of no violation.[179] It would be erroneous, however, to conclude on this

178. *See* p. 1294 *supra*.

179. This is, of course, apart from the possibility left open in *Darlington* of a violation as to employees other than those terminated at the liquidated plant.

basis that the motive element, although fictive and a formality, has not affected the process of decision in discrimination cases.

Under the *Radio Officers* rule, where direct evidence of motive is absent from the record, a finding of violation requires that an unlawful intention be established by inference. If inference then becomes essential, the basis on which the inference can be sustained becomes even more vital. In *Radio Officers* the Court relied upon the ancient doctrine that one may be held to "intend" the foreseeable consequences of his actions. Under that approach, it is perfectly understandable that a majority of the Court has, from time to time, considered that the results of an action must be dramatic and devastating in their impact on Section 7 rights in order to supply an inferred intention to interfere with their exercise. In the words of Justice Stewart in *American Ship*, the impact on those rights must be "so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose."[180] It must be "demonstrably so destructive of collective bargaining"[181] or "so prejudicial to union interests and so devoid of significant economic justification"[182] as to allow only an implication (and no other) of illegal intent. This, of course, is in vivid contrast to the conclusion of *Buffalo Linen* that the ultimate problem in discrimination cases is "the balancing of the conflicting legitimate interests,"[183] and to Justice White's observation in *Erie Resistor* that "preferring one motive to another is in reality the far more delicate task . . . of weighing the interest of employees in concerted activity against the interest of the employer in operating his business in a particular manner. . . ."[184]

The decisions in *American Ship* and *Brown* seem to indicate that, if a weighing process is indeed at the heart of "non-motive" discrimination cases, a majority of the Court considers it a balancing which requires a thumb upon the scales. Because an "implied" motivation must be supplied indicating that the respondent must have wished to affect union membership, something more than a simple weighing is necessary. It requires more than a slight edge in relative gains and losses to establish convincingly that an act resulted from malice aforethought. In the White-Warren-Goldberg view, by contrast, the motive requirement is reduced to a far less restrictive device. The

180. 380 U.S. at 311-12.
181. 380 U.S. at 309.
182. 380 U.S. at 311.
183. 353 U.S. at 96.
184. 373 U.S. at 228-29.

essence of the determination to be made is whether any legitimate interest of the employer or union is sufficient to outweigh whatever damage is done to employee rights by the discrimination. Unlawful "motive" is implicitly assumed to exist, for purposes of a technical reading of the Act, whenever the balance rests upon the side of employee rights. While intent is thus still a technical consideration, it is patent that this test grants the Board far greater authority to condemn or approve challenged conduct. Indeed this flexibility may well have been a factor in the rejection of that test by a majority of the Court in *American Ship* and *Brown*. Justice Brennan, at least, is deeply concerned with the possible use of Board powers to influence the amount of economic pressure which may be brought to bear on either side of the labor-management confrontation.[185]

The importance of this disagreement within the Court as to the manner in which the motive requirement is to be applied in cases where direct proof of illegal intent is absent deserves some final emphasis. From *Local 357* to *Brown* that disagreement, while becoming more and more apparent, was a division in approach rather than one requiring a different conclusion in any of the cases under study. Apart from the dissent by Justices Clark and Whittaker in *Local 357* and Justice White's dissent in *Brown*, the two major factions on the Court did not disagree as to the eventual outcome in this series of decisions. *Great Dane Trailers*, however, demonstrated that cases must arise in which proof of the respondent's illegal motive is absent, and in which the presence or absence of unfair labor practices will depend upon the question of how that motive is to be implied. Justice Harlan's dissent in *Great Dane Trailers* demonstrates that application of what has been characterized as the "thumb on the scales" approach, requiring overwhelming impact as the supplier of implied motive, would have meant dismissal of the complaint in that case.

It is not at all clear that Chief Justice Warren's opinion for the majority in *Great Dane Trailers* marked a rejection of the "thumb upon the scales" approach in favor of a straight balancing of interests. The Warren approach was restricted in scope; in the case of "slight" restraints upon Section 7 rights, the imputation of an illegal motive is a formality unless affirmative evidence of business justifications is established on the record. It is instinct more than confident legal analy-

185. In NLRB v. Insurance Agents Int'l Union, Justice Brennan had warned the Board that it was not to act as an "arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." 361 U.S. at 497.

sis which suggests that the Court, in *Great Dane Trailers*, paused for consideration of the implications of adoption of either of the two contending approaches in the "non-motive" situations which are certain to occur with increasing frequency and with increasingly important effects.

If the foregoing is correct and, in *Great Dane Trailers*, the Court has held open the door of final decision rather than slamming it on the fingers of either faction, some final words of respectful advice may not be out of place. As has been shown, the rule in *Radio Officers* is not supported either by a careful reading of the statute or by the Board and judicial precedents relied upon in the *Radio Officers* opinion. Its legacy, whether or not intended at the time, has been a conversion of the question of what limits are to be placed upon the power of employers and unions into one which must be determined within the form of an inquiry into motive. The increased latitude which this mode of inquiry has allowed the courts has been matched by a corresponding decrease in the authority of the Board to operate with a confidence based upon its real or presumed expertise. All of which suggests, but also veils, the nature of the struggle involved. That conflict concerns the limits to be placed upon the power of the Board to act when it finds, in its judgment, that the goals of the National Labor Relations Act are endangered by an action whose motivation is either clouded or unprovable. The White-Warren-Goldberg approach requires, in such circumstances, that the Board assess the degree to which encouragement or discouragement of membership will result, the degree to which employer or union interests are involved, and to reach a judgment as to which of the two factors has greater weight. That this is neither an easy task nor one readily yielding predictable results is obvious. It is, however, a process of judgment which openly grapples with that which is truly in dispute—the relative advantage or disadvantage which is to be accorded one of the contestants in an economic battle. It is a process of judgment, moreover, which at least attempts the creation of objective standards rather than placing reliance upon the fictions of judicial imagination.

It is not possible, of course, for the outside observer to determine whether and to what extent the recent decisions of the Court in *Great Dane Trailers* and *Fleetwood Trailer* represent a rejection of prior approaches. Both decisions ostensibly rest upon existing doctrine despite the fact that both clearly represent an avoidance of motive as a decisive element in discrimination cases. Both decisions, furthermore, ignore the inevitable confrontation which will surely be created by

attorneys now alert to the necessity of affirmatively proving a "justification" for any contested business action whether taken by management or by a union. That confrontation—where an action less than devastating to Section 7 rights is nonetheless injurious to them although apparently justified by separate economic considerations—will finally test whether the Court still chooses to view the fictive formality as the decisive element in discrimination cases, or whether it prefers to weigh advantage against disadvantage free from the haze of unprovable intent. Whatever the merits of the two approaches, it is indisputable that the final choice between them will immunize or condemn a wide range of action and broaden or circumscribe the authority of the Board to supervise the conduct of labor-management relations. In making that choice, the Court would do well to consider the words of one of its members:

> It is sometimes thought to be astute political management of a shift in position to proclaim that no change is under way. That is designed as a sedative to instill confidence and allay doubts. . . . Precedents, though distinguished and qualified out of existence, apparently have been kept alive. The theory is that the outward appearance of stability is what is important. . . .
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> But the more blunt, open, and direct course is truer to democratic traditions. . . . A judiciary that discloses what it is doing and why it does it will breed understanding. And confidence based on understanding is more enduring than confidence based on awe.[186]

186. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).