Transportation Management: The Validation of Wright Line

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COMMENT

TRANSPORTATION MANAGEMENT: THE VALIDATION OF WRIGHT LINE

INTRODUCTION

Section 8(a)(3) of the National Labor Relations Act (NLRA or the "Act") makes it an unfair labor practice for an employer to encourage or discourage union membership by discriminating against employees. An indispensable element of an alleged §8(a)(3) violation is employer motivation. There are four prerequisites for establishing a violation of §8(a)(3): the union activity; the employer's knowledge of an employee's union activity; the employer's animus towards an employee's union activity; and, a causal connection between the employee's union activity and the employer's discriminatory conduct. A violation occurs when an employer discharges or imposes a lesser penalty against an employee because of that employee's membership in or support for the union. Classic examples of §8(a)(3) violations include: unlawfully discharging an employee who is known to be active in a union organizing campaign; unlawfully discharging an employee who refuses to work scheduled overtime when the real reason for discharge is the employee's union activity; transferring a day-shift employee to night-shift work to discourage union activity; and,

1. 29 U.S.C. §158(a)(3) (1976). Section 8(a)(3) provides, in pertinent part: "It shall be an unfair labor practice for an employer—... (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."
unlawfully discharging two non-unit employees who fail to attend an anti-union rally.\(^{10}\)

The Act does not specify the degree of “discriminatory intent” necessary to make out a §8(a)(3) violation. If the employer’s action is completely divorced from union activity, it is lawful. An employer may fire any employee for any cause, good or bad—or no cause at all—as long as anti-union sentiment is absent from the decision.\(^{11}\) However, where there is evidence of both proper and improper reasons for termination or other discriminatory conduct, the test used to determine the employer’s motive will likewise determine the outcome of the case.

There are two contexts in which a §8(a)(3) violation may occur: the “pretext” case and the “dual motive” case. Labor law commentators and practitioners concur that an employer rarely will declare that an employee was disciplined solely because of an abhorrence of unions or because it simply “will not tolerate employees engaging in union or other protected activities.”\(^{12}\) Instead, the employer ordinarily claims that the discipline was enacted for a legitimate business reason or for “work-related reasons, such as incompetence or insubordination; the employee or the union, however, contends that the discharge [or other disciplinary action] was a product of anti-union animus.”\(^{13}\)

Careful inspection of the evidence concerning the employer’s intent or motive\(^{14}\) may disclose that the business justification asserted by the employer was nonexistent or was not relied upon by the employer. In fact, this purported rationale is a sham—nothing “more than an after-the-fact cover-up for discipline which is discriminatorily motivated.”\(^{15}\) Thus, the employer’s stated motive was a mere “pretext”.

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10. Id.
11. See Radio Officers’ Union, 347 U.S. at 42-45. See also Firestone Tire & Rubber Co. v. NLRB, 449 F.2d 511 (5th Cir. 1971) (employer lawfully discharged employee engaged in an economic strike for shouting obscenities and using vulgar hand signs); Federal Mogul Corp. v. NLRB, 566 F.2d 1245 (5th Cir. 1978) (employer lawfully discharged employee for excessive absenteeism during the course of a union campaign).
14. The terms “intent” and “motive” are often used synonymously by both the Board and the courts. See Christensen and Svance, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 Yale L.J. 1269, 1271 n.4 (1968); Oberer, The Sciener Factor in Sections 8(a)(1) and (3) of the Labor Act: of Balancing, Hostile Motive, Dogs and Tails, 52 Cornell L.Q. 491 (1967) (intent and motive represent distinguishable concepts and should be used as such).
A "dual motive"\textsuperscript{16} case exists where both a legitimate business reason and an anti-union animus contribute to the employer's discipline of the employee.\textsuperscript{17} The coexistence of both "lawful" and "unlawful" reasons for the employer's action requires "further inquiry into the role played by each motive and has spawned substantial controversy in §8(a)(3) litigation."\textsuperscript{18}

Though, as a matter of fact, the distinction between "pretext" and "dual motive" cases persists, the National Labor Relations Board's (NLRB or the "Board") 1980 Wright Line decision purports to nullify this distinction.\textsuperscript{19}

The degree of anti-union motivation needed to support a §8(a)(3) violation has remained as divergent as the motives themselves.\textsuperscript{20} From the Act's inception, the NLRB, empowered to enforce the federal labor laws,\textsuperscript{21} has utilized a variety of causation tests\textsuperscript{22} to analyze employer motivation in §8(a)(3) cases. Because of the multitude of causation tests employed by the Board, a great deal of confusion has ensued among the circuit courts. The vexation of §8(a)(3) litigation was apparently quieted when the Board, in Wright Line,\textsuperscript{23} adopted a causation test which it hoped would unify the courts.

Against this background, the Wright Line causation test was conceived. The test itself is clear:

First, we shall require that the General Counsel make a \textit{prima facie} showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.\textsuperscript{24}

\begin{footnotesize}
16. This also is commonly referred to as a "mixed motive" case.
17. 1980 LAB. REL. REP. YEARBOOK (BNA) 171 (address by former Board Member Truesdale). \textit{See also} Wright Line, 251 N.L.R.B. 1083, 105 L.R.R.M. 1169 (1980).
19. \textit{Id.} at 1083 n.4, 1089 n.13, 105 L.R.R.M. at 1170 n.4, 1174 n.13. The drafters of §10(c) of the Labor Management Relations Act of 1947 assumed that an employee was discharged either "for cause" or as retribution for union activity. It was presumed that the employer acted with unlawful intent in the absence of any legitimate business reason. The notion of a "dual" or "mixed" motive discharge, \textit{see supra} notes 16-18 and accompanying text, was not contemplated. Hence, the Act's silence on dual/mixed motive discharges. \textit{See also infra} notes 141-42 and accompanying text (referring to the "for cause" proviso, §10(c), of the Act).
20. \textit{See supra} notes 7-10 and accompanying text.
22. \textit{See infra} notes 36-37 and accompanying text.
24. \textit{Id.} at 1089, 105 L.R.R.M. at 1175 (citation omitted).
\end{footnotesize}
In practice, however, the test is aloof, disjointed and often spurned. The circuit courts did not unanimously approve this test and thus remained sharply divided in their treatment of §8(a)(3) cases.  

The United States Supreme Court ended the legal debate and approved the Board’s standard in *NLRB v. Transportation Management Corporation*. In essence, the Court held that the employer has the burden of proof to establish whether an employee was discharged for union activities or for legitimate business reasons. Prior to the Supreme Court’s decision, the ultimate disposition of a §8(a)(3) allegation depended on the fortuity of the case’s jurisdictional/geographical location. This was not a desirable situation.

This comment briefly examines the pre-*Wright Line* causation analyses used by the Board, and how the Board’s widely used “in part” test and the renegade “but for” test clouded the issues of §8(a)(3). Ultimately, the Board developed the *Wright Line* standard to clarify the confusion of §8(a)(3) causation analysis, due primarily to the divergent treatment it received by the circuit courts. The result was the Supreme Court’s decision in *Transportation Management*.

*Transportation Management*, which sanctioned the *Wright Line* approach, will be critically examined from three perspectives: constitutional versus statutory applications of causation analysis; evidentiary rules; and the policy of judicial deference. Finally, an alternative causation analysis for §8(a)(3), the “true purpose/actual motive” test, will be considered.

"IN PART" VERSUS "BUT FOR"

Prior to its decision in *Wright Line*, the Board applied the “in part” causation test to determine whether the Act had been violated in a

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25. See infra notes 83-94 and accompanying text.
27. Certainty and predictability of the law, based on legal precedent, are important elements of a legal system. The doctrine of *stare decisis* is founded upon the “important policy considerations . . . in favor of continuity and predictability in the law . . . Such considerations are present and, in a field as delicate as labor relations, extremely important.” Boys Markets, Inc. v. Retail Clerk’s Union, Local 770, 398 U.S. 235, 257 (1970) (Black, J., dissenting).
28. See infra notes 36-52 and accompanying text.
29. See infra notes 53-54 and accompanying text.
30. See infra notes 66-95 and accompanying text.
31. See infra notes 96-157 and accompanying text.
32. See infra notes 158-78 and accompanying text.
33. See infra notes 179-207 and accompanying text.
34. See infra notes 208-20 and accompanying text.
35. See infra notes 221-33 and accompanying text.
§8(a)(3) dual motivation case. The “in part” test reasons that “if a discharge is motivated, ‘in part,’ by the protected activities of the employee the discharge violates the Act even if a legitimate business reason also was relied on.” The Board’s ad hoc approach in dual motive cases yielded numerous variations on this “in part” language and created considerable confusion among the circuits. The Sixth, Seventh, Tenth and, on occasion, the Ninth and District of Columbia Circuits, have applied the “in part” analysis to dual motive cases.

Several of the circuits, most notably the First, were highly critical of the Board’s “in part” analysis. In response, the First Circuit enunciated its own causation test for analyzing dual motive cases. This test provides that “when both a ‘good’ and ‘bad’ reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities, the discharge would not have taken place.” This test was designated the “dominant motive” or “but for” standard. Following the lead of the First Circuit were the Fourth and, on occasion, the Ninth and District of Columbia Circuits.


38. See infra notes 39-52 and accompanying text.


40. See, e.g., *Nacker Packing Co.* v. *NLRB*, 615 F.2d 456, 459-60 (7th Cir. 1980).

41. See, e.g., *M.S.P. Indus.*, d/b/a *The Larimer Press* v. *NLRB*, 568 F.2d 166, 173-74 (10th Cir. 1977).

42. See, e.g., *Penasquitos Village, Inc.* v. *NLRB*, 565 F.2d 1074, 1082-83 (9th Cir. 1977).

43. See, e.g., *Allen v. NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977).

44. *Wright Line*, 251 N.L.R.B. at 1085, 105 L.R.R.M. at 1172. See *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (Aldrich, J., concurring); *Coletti’s Furniture, Inc.* v. *NLRB*, 550 F.2d 1292, 1293 (1st Cir. 1977). But see *NLRB v. Eastern Smelting and Refining Corp.*, 598 F.2d 666 (1st Cir. 1979) (Although the court applied the *Mt. Healthy* standard, the court did not explicitly abandon its “but for” analysis nor did it embrace the “in part” standard. The court merely concluded that the “Board’s decision may be correct for the wrong reason.”). Namely, but for the protected activity the employee would not have been discharged.


46. See, e.g., *Western Exterminator Co.* v. *NLRB*, 565 F.2d 1114, 1118 (9th Cir. 1977); *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980).

Some circuits, particularly the Second,\textsuperscript{49} Third,\textsuperscript{50} Fifth,\textsuperscript{51} and Eighth,\textsuperscript{52} rejected the established nomenclature and utilized their own causation tests to analyze dual motive cases.

Thus, the Board in\textit{ Wright Line} attempted to "alleviate the confusion which [existed] at various levels of the decisional process" regarding causality in cases alleging unlawful discrimination.\textsuperscript{53} The effort to bring harmony into this area of the law met varying degrees of success.\textsuperscript{54}

\textit{Mt. Healthy}

The NLRB, seeking guidance and support, grafted the causation test promulgated by the Supreme Court in\textit{ Mt. Healthy City School District Board of Education v. Doyle}\textsuperscript{55} onto NLRA cases. The Board believed that this test, couched in First Amendment protected activity and public sector employment language, was the appropriate test for mixed-motive §8(a)(3) allegations.

The\textit{ Mt. Healthy} case arose when Doyle, an untenured public school teacher, filed suit against the Mt. Healthy, Ohio school board for wrongfully refusing to renew his contract and award him tenure. The school

\begin{footnotes}

\item[49] See, e.g., Waterbury Community Antenna, Inc. v. NLRB, 587 F.2d 90, 98 (2d Cir. 1978) (a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, thus, it was partially motivated by an impermissible one). But see NLRB v. Midtown Serv. Co., 425 F.2d 665, 671 (2d Cir. 1970) (the employer "would not have been discharged but for her anti-union activity" where the employer supported the union in a decertification movement) (emphasis added).

\item[50] See, e.g., Edgewood Nursing Center v. NLRB, 581 F.2d 363, 368 (3d Cir. 1978) ("[T]he employer violates the act if anti-union animus was the 'real motive' . . . or the 'real cause', . . .") (citations omitted) (emphasis added). But see NLRB v. Eagle Material Handling, Inc., 558 F.2d 160, 169 (3d Cir. 1977) ("[a]n employer violates section 8(a)(3) and (1) of the Act . . . if the action is motivated at least in part by anti-union considerations.") (citations omitted) (emphasis added).

\item[51] See, e.g., NLRB v. Aero Corp., 581 F.2d 511, 514-15 (5th Cir. 1978) ("substantial evidence shows that the force of anti-union purpose was 'reasonably equal' to the lawful motive prompting conduct."). But see Syncro Corp. v. NLRB, 597 F.2d 922 (5th Cir. 1979) (based on the lack of substantial evidence supporting the findings, the court denied enforcement of the Board's order that anti-union animus was the motivating cause of the employee's discharge).

\item[52] See, e.g., Singer Co. v. NLRB, 429 F.2d 172, 179 (8th Cir. 1970) ("discriminatory treatment of employees by their employer, motivated in whole or in part by their union protected activities, violates §8(a)(3) and (1) and that [t]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity.") (quoting NLRB v. Symons Mfg. Co., 328 F.2d 835, 837 (7th Cir. 1964) (citation omitted)).

\item[53] \textit{Wright Line}, 251 N.L.R.B. at 1083, 105 L.R.R.M. at 1170.

\item[54] See infra notes 83-95 and accompanying text.


\item[56] "It is our belief that application of the \textit{Mt. Healthy} test will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination." \textit{Wright Line}, 251 N.L.R.B. at 1083, 105 L.R.R.M. at 1170 (footnote omitted).

\end{footnotes}
The Validation of Wright Line

board cited two incidents for denying renewal. One incident was the teacher's use of obscene language and gestures toward female students in the school cafeteria. The other episode consisted of Doyle's telephone call to a local radio station, discussing the adoption of a new teacher dress and appearance code.

The Court of Appeals for the Sixth Circuit affirmed, in an unpublished opinion, the district court's finding that of the two reasons cited by the school board, the first involved unprotected conduct and the second was plainly protected by the First and Fourteenth Amendments. The court reasoned that because protected activity (i.e., the telephone call) played a substantial part in the school board's decision to discharge the teacher, the board's refusal to renew the contract was unlawful.

The Supreme Court, in a unanimous opinion, reversed the judgment of the court of appeals and remanded the case for further proceedings. The Court held that after it was shown that an improper motive entered into the school board's decision, the school board must be afforded the opportunity to establish that it would have reached the same decision even if the protected activity had not occurred. The Court formulated a two-part causation test to be employed in dual-motive cases. Initially, the burden is placed on the employee to show that "his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, . . . a 'motivating factor'" in the employer's decision not to rehire him. After the employee meets that burden, the burden shifts to the employer to demonstrate "by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the protected conduct."

The NLRB, seeking to buttress its position and corral wayward circuit courts, adopted the Mt. Healthy causation test for a §8(a)(3) violation.

Wright Line

In Wright Line, Bernard Lamoureux filed charges with the Board alleging that he was discharged because of his union activity, in violation

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57. Mt. Healthy, 429 U.S. at 281–82.
58. Id.
60. Mt. Healthy, 429 U.S. at 283–85.
61. Id. at 284–85.
62. Id. at 287.
63. Id. at 285–86.
64. Id. at 287 (citation omitted).
65. Id.
of §8(a)(3) and (1) of the Act. Lamoureux, an activist in two unsuccessful Teamster campaigns to organize Wright Line's employees, was a shop inspector who was considered a "better than average employee." The employer asserted that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards."

The Administrative Law Judge ("ALJ") found that the employer had discharged Lamoureux in violation of §8(a)(3) and (1) of the Act. The Board affirmed the ALJ's decision. In a lengthy opinion, the Board analyzed the causation tests used by the Board and by the circuits, adopted the Mt. Healthy two-tier causation analysis test, and applied it to dual motivation cases arising under the NLRA. The Board found that a §8(a)(3) and (1) violation had occurred because: the General Counsel had made a prima facie showing that Lamoureux's union activity was a motivating factor in the employer's decision to discharge him, and the employer had failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his union activities.

This rule adequately resolved the fact pattern presented in Wright Line. However, the Board's use of a "shifting burden of proof" standard was highlighted and criticized by the First Circuit when it was called upon

67. Id. at 1090, 105 L.R.R.M. at 1175.
68. Id. at 1089, 1094, 105 L.R.R.M. at 1175. Specifically, Lamoureux submitted inaccurate records of the times at which he made inspections. Forte, Lamoureux's immediate supervisor, was told by the plant superintendent to "check" on Lamoureux. Id. at 1090, 1093, 105 L.R.R.M. at 1175. Forte, upon examining Lamoureux's timesheet, discovered that Lamoureux recorded times at which he was working on certain jobs at the identical times when Forte had been unable to find him at his work station. Id. at 1090, 1094, 105 L.R.R.M. at 1175. Management officials concede that Lamoureux "was not discharged for being away from his work station or for not performing his assigned work," Id. at 1090, 105 L.R.R.M. at 1175 (footnote omitted), but for violating the plant rule. Id. at 1089, 1094, 105 L.R.R.M. at 1175.
69. Wright Line, 251 N.L.R.B. at 1083, 1098, 105 L.R.R.M. at 1169, 1175.
70. Id. at 1083, 105 L.R.R.M. at 1169.
71. See supra notes 64-65 and accompanying text.
72. Wright Line, 251 N.L.R.B. at 1083, 1088-89, 105 L.R.R.M. at 1169, 1174-75. Substantive criticisms of this causation analysis are addressed infra at notes 158-220 and accompanying text.
73. A "prima facie showing creates a kind of presumption that an unfair labor practice has been committed," Wright Line, 662 F.2d at 905, "and can be overcome only by a preponderance of competent, credible rebutting evidence." National Auto. and Casualty Ins. Co., 199 N.L.R.B. 91, 92, 81 L.R.R.M. 1183, 1184 (1972).
74. Wright Line, 251 N.L.R.B. at 1090, 105 L.R.R.M. at 1176. The Board's conclusion is based on evidence of the employer's anti-union animus directed toward Lamoureux because of his active role in union campaigns, and the timing of the discharge, which occurred shortly after the latest union election.
75. Id. at 1091, 105 L.R.R.M. at 1176 (citation omitted).
76. See supra note 24 and accompanying text.
to enforce the Board's order. The court upheld the Board's ultimate decision, but focused on and subsequently rejected the Board's newly formulated causation standard. In lieu of the Board's standard, the First Circuit proposed that "once the General Counsel has established a basis for finding an improper motive, the employer must merely, 'come forward with enough evidence to convince the trier of fact that... there is no longer a preponderance of evidence establishing a violation'". Once the General Counsel establishes a prima facie showing of an employer's improper motive, the employer has the burden of "production," rather than "persuasion," to rebut or meet the General Counsel's prima facie case. The burden of persuading the trier of fact that the discharge would not have taken place "but for" the protected activity "remains always with the [G]eneral [C]ounsel.

The First Circuit's opinion, rejecting the Board's analysis, added to the confusion of causation analysis in dual motive cases. A polarization of the circuit courts resulted. The First, Second, and Third Circuits opposed the Board's Wright Line standard, and the Fourth and District of Columbia Circuits implicitly rejected that standard. On the other hand, the Fifth, Sixth, Eighth, and Ninth Circuits embraced the Board's burden-shifting analysis. The Seventh Circuit had conflicting...
views and the Tenth and Eleventh Circuits remained undecided. Thus, the conflict among the courts of appeal necessitated Supreme Court review of the burden allocation issue in \textit{NLRB v. Transportation Management Corporation}.\footnote{95}

**TRANSPORTATION MANAGEMENT**

\textit{The Board}

Sam Santillo was a special education bus driver for the Transportation Management Corporation located in Springfield, Massachusetts. In mid-March, 1979, Santillo and a fellow employee spoke to officials of the Teamsters Union about organizing the drivers at Transportation Management.\footnote{96}

After the meeting with Teamster officials, Santillo returned to work and spoke with other drivers who were interested in supporting the Union.\footnote{97} He distributed authorization cards and obtained seven signed cards from the employees.\footnote{98}

Four days after Santillo met with Teamster officials, George Patterson, Santillo's supervisor, spoke with Joseph Baer, a driver and mechanic at Transportation Management.\footnote{99} Patterson told Baer that he (Patterson) heard that Santillo had “started the Union,”\footnote{100} that Santillo was “two-faced,” and that “he [Patterson] was going to get even with Santillo.”\footnote{101}

93. See, e.g., \textit{NLRB v. Carbonex Coal Co.}, 679 F.2d 200, 203 (10th Cir. 1982) ("Whether Wright Line cleared up a gray area, or, on the contrary, compounded the entire problem, is debatable").
94. See, e.g., \textit{NLRB v. Lummus Indus., Inc.}, 679 F.2d 229, 233, n.6 (11th Cir. 1982) ("We note in passing that this is not a 'mixed-motive' discharge case, and therefore we are not required to analyze the application of \textit{Wright Line} . . . .") (citation omitted).
98. \textit{Id.}
99. The night before in a local restaurant, Patterson asked Baer if he had heard anything about the union. Baer replied that he had not. \textit{Id.}
100. \textit{Id.} at 103, 107 L.R.R.M. at 1171.
101. \textit{Id.} The Administrative Law Judge held, and the Board affirmed, that these conversations between Patterson and Baer "constitute unlawful threats of reprisal as well as create the impression of surveillance of employee's union activities" in violation of §8(a)(1) of the Act. \textit{Id.} at 107, 107 L.R.R.M. at 1171-72 (citing \textit{Goodyear Aerospace Corp.}, 234 N.L.R.B. 539, 97 L.R.R.M. 1322 (1978)).}
On the same evening, Patterson spoke with Ed West, a driver at Transportation Management and Santillo’s brother-in-law, about Santillo’s union activity. During this conversation, Patterson said that he took Santillo’s actions personally and that he would remember Santillo’s actions when Santillo asked for a favor.

Soon thereafter, a union meeting was scheduled at the local union hall. That morning, union officials were outside the employer’s premises distributing leaflets “announcing the union meeting to be held that evening.” Santillo stopped and briefly spoke to the union representatives outside Transportation Management. Later that same day, Santillo was discharged. Patterson informed Santillo that he was being fired for “leaving his keys in the bus, and taking unauthorized breaks.”

Santillo filed charges with the Board and the Regional Director issued a complaint against Transportation Management alleging that it discharged Santillo in violation of Section 8(a)(3) and (1) of the Act. The Administrative Law Judge found, and the Board affirmed, that Santillo’s discharge was, in fact, violative of the Act.

At trial, the General Counsel established a prima facie case: the employee was engaged in union activity; evidence clearly established the employer’s knowledge of the employee’s union activity; the employer demonstrated a strong antiunion animus; and, the employee’s discharge came the day after the employer threatened to “get even” with the employee. The burden then shifted to the employer to demonstrate that Santillo would have been discharged “without regard to these considerations.”

102. Id. at 103, 107 L.R.R.M. at 1171.
103. Id. Santillo telephoned Patterson the following day and spoke with Patterson at Transportation Management. Santillo told Patterson “not to take it personally” and added that the dispute “was really between the Union and Transportation Management Corporation.” Id.
104. Id. at 104, 107 L.R.R.M. at 1171.
105. Id. “There is no evidence in the record that any management officials saw Santillo speaking with these union officials. Patterson admits that he saw the union officials distributing leaflets on that day and that he read them and was therefore aware that a union meeting was scheduled to be held that evening.” Id.
106. Id. The unauthorized breaks fell into two categories: “stealing time” by taking unauthorized coffee breaks and “stealing time” by stopping off at home before reporting back to the garage. Id. at 101, 105, 107 L.R.R.M. at 1171.
107. Id. at 101, 109, 107 L.R.R.M. at 1171–72.
108. Id. at 101, 102, 107 L.R.R.M. at 1171–72.
109. Id. at 108, 107 L.R.R.M. at 1171.
110. Id.
111. Id.
113. Id. at 101, 107 L.R.R.M. at 1171.
The Employer cited three reasons necessitating Santillo's discharge: leaving his keys in his bus; taking unauthorized coffee breaks; and stopping off at home. However, the Board found that although Santillo had left his keys in his bus on the day of his termination, a dischargeable offense, it was common practice for the drivers to do so. The Board dismissed the infraction as "nothing more than a purely pretextual reason which does more to detract from the lawfulness of the discharge than to support it." The Board also rejected Transportation Management's contention that Santillo's unauthorized coffee breaks were a dischargeable offense. Santillo concedes taking these breaks, but not only was this "a normal practice among the drivers," but "in no such instance is there any evidence of disciplinary action being taken, much less any suspension or discharge." Finally, Santillo's unauthorized stops at home were discredited by the Board as evidence of a dischargeable act. The Board confirmed that Santillo did take these breaks, but he was never confronted nor warned of possible consequences. Santillo's summary discharge did not comport with the employer's regular procedure of three written warnings before discharge.

The Board applied the controversial Wright Line test and concluded that the employer failed to "meet its burden of overcoming the General Counsel's prima facie case by establishing by competent evidence that Santillo would have been discharged even absent his union activities."

The Circuit Court

The Board sought enforcement of its order in the Court of Appeals for the First Circuit. The court, a vocal critic of the Wright

114. Id. at 101, 104-05, 107 L.R.R.M. at 1171; see also supra note 106.
115. Id. at 101, 107 L.R.R.M. at 1171.
116. Id.
117. Id.
118. Id.
119. Id.
120. Id. at 101-02, 107 L.R.R.M. at 1171.
121. Id. at 102, 107 L.R.R.M. at 1171.
122. Id. at 101, 107 L.R.R.M. at 1171; see also supra note 24 and accompanying text.
123. Id. at 102, 107 L.R.R.M. at 1171.
124. Id. at 102, 109-10, 107 L.R.R.M. at 1171. Transportation Management was ordered to cease and desist from engaging in §8(a)(1) and (3) unfair labor practices and, to reinstate Santillo to his former position.
125. NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982).
Line test, denied enforcement of the Board's order although it found that there was sufficient evidence to conclude that "Patterson's threats were union-oriented, gave an impression of surveillance, and constituted unlawful coercion" in violation of §8(a)(1) of the Act. Expressing its disdain for Wright Line, the court reiterated that it would reject "any effort by the Board to impose a greater burden" of proof upon the employer as "outside the Board's statutory authority." The court remanded the case to the Board for reconsideration.

The Supreme Court

The United States Supreme Court granted certiorari in Transportation Management, thereby ending years of speculation and confusion among the Circuit Courts of Appeal and the Board with regard to §8(a)(3) causation analysis. In a somewhat cryptic opinion, the Court reversed the First Circuit and held that the burden of proof placed on the employer under the Board's Wright Line decision is both reasonable and consistent with §§8(a)(1) and (3) of the Act.

After a lengthy review of the facts, Justice White, writing for a unanimous Court, focused on the early case history interpreting the Act and §8(a)(3) violations. The court cited several pre-1940 Board decisions and concluded that the Board has consistently adhered to the notion that "to establish an unfair labor practice the General Counsel need show by a preponderance of the evidence only that a discharge is in any way motivated by a desire to frustrate union activity." If an

126. Id. at 132.
127. Id. at 131 (citations omitted).
128. See NLRB v. Wright Line, A Division of Wright Line, Inc. 662 F.2d 899 (1st Cir. 1981); NLRB v. Amber Delivery Serv., 651 F.2d 57 (1st Cir. 1981); NLRB v. Cable Vision, 660 F.2nd 1 (1st Cir. 1981).
129. Namely, a burden greater than "neutralizing the implication of sufficient anti-union motive arising from the General Counsel's prima facie case." Transportation Management, 674 F.2d at 131 (citations omitted) (emphasis in original).
130. Id.
131. Id. at 131-32.
135. Id. at ___, 103 S.Ct. at 2473.
employer possesses and exhibits an anti union animus, the employer would nevertheless be innocent of a §8(a)(3) and (1) violation by proving that he would have taken the same action for "wholly permissible reasons." The Court concluded that Wright Line was merely the Board’s attempt to restate its analysis in verbiage “more acceptable to the Courts of Appeals.” Thus, the Board’s position was clarified: “proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence.”

The Supreme Court then addressed the elements and proof of an unfair labor practice. Throughout the adjudication of an alleged unfair labor practice, the General Counsel carries the burden of proving the elements of the unfair labor practice charge. Under Wright Line, the employer is given the opportunity to prove his innocence by showing that his actions would have been the same regardless of his improper motive: the so-called affirmative defense. Here, the Court held that the Board’s creation of an affirmative defense “does not change or add to the elements of the unfair labor practice that the General Counsel has the burden of proving under §10(c).” The Court did not cite any Board or lower court opinion in support of this proposition. Instead, the Court relied on the legislative history of the Act which it conceded is silent on the subject of mixed-motive cases. The Justices acknowledged that the Board could have construed the Act in the manner requested by the court of appeals. The Court, however, deferring to the Board’s expertise, condoned the Board’s designation of an affirmative defense that the employer has the burden of sustaining.

136. Section 8(a)(1) makes it an unfair labor practice for an employer to “interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.” 29 U.S.C. § 158(a)(1) (1976). This broad prohibition on employer interference is violated whenever an employer commits any of the other employer unfair labor practices. Thus, a violation of §8(a)(2) (domination or illegal assistance and support of a labor organization), §8(a)(3) (discrimination against employees for membership in a labor organization), §8(a)(4) (discrimination against employees for Board-related activity), or §8(a)(5) (employer’s refusal to bargain in good faith) also violates §8(a)(1). These unfair labor practices are commonly referred to as derivative violations of §8(a)(1).

137. Transportation Management, __ U.S. ___, 103 S.Ct. at 2473 (citations and footnote omitted).

138. Id. at ___, 103 S.Ct. at 2473.

139. Id.

140. See Administrative Procedure Act §7(c), 5 U.S.C. §556(d) (1982). See also N.L.R.A. §10(b), 29 U.S.C. §160(b) (1976); Fed. R. Evid. 301. See also infra notes 147–53 and accompanying text (discussing the application of these rules and statutes).

141. Transportation Management, __ U.S. ___, 103 S.Ct. at 2474 (footnote omitted).

142. Id. at ___, 103 S.Ct. at 2474 n.6. See supra note 19.

143. Id. at ___, 103 S.Ct. at 2474.

144. "The Board's construction here, while it may not be required by the Act, is at least permissible under it . . . , and in these circumstances its position is entitled to deference," Id. at ___.
The opinion next analyzed the shifting burden of proof set out in *Wright Line*. The Court depicted the Board's allocation of the burden of proof as "clearly reasonable." The Court stated that the employer is a wrongdoer and, as such, should "bear the risk that the influence of legal and illegal motives cannot be separated." Transportation Management posited that placing the burden of persuasion on the employer contravenes §10(b) of the Act and §7(c) of the Administrative Procedure Act. Section 10(b) provides that the Federal Rules of Evidence are applicable to Board proceedings, and Federal Rule 301 requires that the burden of persuasion rests on the General Counsel. Section 7(c) of the Administrative Procedure Act provides that the proponent of an order retains the burden of proof. The Court's interpretation of Rule 301 and §7(c) dissolves this position. The Court held that Rule 301 "in no way restricts the authority of a court or an agency to change the customary burdens of persuasion in a manner that otherwise would be permissible." The Court added that §7(c) "determines only the burden of going forward, not the burden of persuasion." Justice White's opinion continued with a brief discussion of *Mt. Healthy* and affirmed its burden allocation scheme, "which the Board heavily relied on and borrowed from in its *Wright Line* decision."
Court simply noted that the analogy to *Mt. Healthy* "drawn by the Board [in *Wright Line* and utilized in *Transportation Management*] was a fair one."  

The Court reversed the First Circuit, concluding that the Court of Appeals "erred in refusing to enforce the Board's orders which rested on the Board's *Wright Line* decision." Hence, the *Wright Line* causation analysis now controls §8(a)(3) litigation.

**WRIGHT LINE/TRANSPORTATION MANAGEMENT: CRITICISMS**

The *Wright Line* causation analysis is one theoretical framework in which an alleged §8(a)(3) violation may be investigated. However, despite the unanimity of the Supreme Court's decision, the analysis and its sanctioning in *Transportation Management* are flawed.

**Constitutional v. Statutory Application:**

*The First Amendment and the NLRA*

There is both a legal and a factual distinction differentiating causation analysis employed in a constitutional or labor context. The Board, in *Wright Line*, adopted a legal causation test tailored to protect First Amendment activity and insure adherence to the equal protection clause of the Fourteenth Amendment. The *Mt. Healthy/Wright Line* test adequately protects these fundamental rights, however, an inherent difference exists between Constitutional and statutory rights. The rights conferred by the Constitution should be afforded the highest degree of protection by the government. Free speech and the guarantee of a free press are qualitatively superior to §7 rights under the NLRA or any similar statutory right.

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156. *Id. at __*, 103 S.Ct. at 2475 (footnote omitted).
157. *Id.*
158. *See supra* notes 55-65 and accompanying text (referring to *Mt. Healthy*).
159. Fundamental rights are those principles of constitutional law deemed essential and which have their origin in the express or implied terms of the Constitution. *Black's Law Dictionary* 149, 607 (rev. 5th ed. 1979). The Supreme Court has utilized this causation test in cases involving the first and sixth amendments, the equal protection clause, and Title VII of the Civil Rights Act of 1964. Although the latter deals with statutory rights, these rights are closely associated with constitutional rights and privileges. See Note, *Wright Line: The NLRB Adopts the Mt. Healthy Test for Dual Motive Discharge Cases Under the LMRA*, 32 MERCER L. REV. 933, 939-40 (1981); Remar, *Climbing Mt. Healthy: In Search of the "Wright Line" on Mixed-Motive Discharges Under Section 8(a)(3)*, 4 INDUS. REL. L.J. 636, 660 (1981).
160. 29 U.S.C. §157 (1976). Section 7 provides: "Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."
161. *See infra* note 159.
This logic does not necessitate the conclusion that rights conferred by the Act are trivial. Congress expressed its desire to balance the competing interests in the labor setting by enacting the NLRA and its subsequent amendments. These laws establish rights augmenting the position of the employee against the clearly recognized superior position of the employer.

The balance struck by the Court in *Mt. Healthy*, in a constitutional setting, is similar to that struck by Congress in the NLRA in a labor setting. Despite the similarities, the test used in First Amendment cases may not be appropriate in the labor context. Even the Board concedes that *Mt. Healthy* "does not constitute a construction of the NLRA" and therefore is not controlling in §8(a)(3) disputes. The Board was not alone in questioning the applicability of *Mt. Healthy* on the Act.

In *Transportation Management*, the Supreme Court acknowledged that the Board "heavily relied on and borrowed from" a case "implicating the Constitution" in its *Wright Line* decision. Yet, the Court depicted the allocation of the burden of proof merely as "prudent" and added that the "analogy to *Mount Healthy* drawn by the Board was a fair
one. The Court cited the Administrative Procedure Act and the Federal Rules of Evidence as support for its position. The Court never addressed the ramifications of a Constitutional/statutory dichotomy.

A factual distinction also exists between First Amendment and NLRA cases. In Mt. Healthy, the employer admitted that he fired the employee for activity which was later found to be protected under the First Amendment. The employer's claim "was thus a true affirmative defense which went to the appropriateness of the remedy . . . rather than to the existence of a violation." In the conventional labor case, as illustrated in Transportation Management, the employer and employee dispute the reason or reasons for the discharge. Thus, a test which shifts the burden of proof onto the employer to establish an affirmative defense would not be effective in deciding the ultimate issue of "whether or not an unfair labor practice has actually occurred—i.e., for deciding if the determining motive of the discharge was anti-union animus or some valid business reason."

Burden of Proof

The process of establishing a §8(a)(3) violation should be clear and precise. The burden of proof is on the moving party, i.e., the General Counsel, and the requisite quantum of proof is the familiar "preponderance of the testimony [evidence]" standard. The Mt. Healthy/Wright Line/Transportation Management causation test shifts this burden from one party to the other. The net result is a "shell game" leaving the litigants, as well as the courts, in a quandary as to which party has what burden and when. The Supreme Court legally resolved the issue by endorsing the Wright Line test in Transportation Management. However, as a practical matter, it is difficult for the courts and the parties to reconcile and use this burden shifting analysis.

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172. Id. (footnote omitted).
173. Id. at 103 S.Ct. at 2475 n.7. See infra note 150.
174. Id. See infra note 149.
175. Mt. Healthy, 429 U.S. at 282-84.
176. Wright Line, 662 F.2d at 906.
177. See id. See also infra note 13 and accompanying text.
178. Wright Line, 662 F.2d at 906.
179. 29 U.S.C. §160(c) (1976). Section 10(c) provides, in pertinent part: "upon the preponderance of the testimony taken."
180. See infra notes 64-65 and accompanying text.
181. See infra notes 31, 157 and accompanying text.
182. See Lederer, "Wright Line or Spur Track?, 33 LAB L.J. 67, 76 (1982): "Under the Board's Wright Line formula, it is difficult to see how the employer could assume an affirmative defense burden without also having to carry the ultimate burden of persuasion — normally assumed throughout by the General Counsel."
Evidentiary rules provide for two separate burdens of proof: the burden of production, i.e., the burden of “going forward” to produce evidence; and the burden of persuasion, i.e., the ultimate burden of “persuading the trier of fact that the alleged fact is true.”\(^{183}\) The *Wright Line* causation test requires the General Counsel to make a *prima facie* showing that the Act was violated, and then the burden shifts to the employer to show that it would have discharged the employee anyway.\(^{184}\) In the absence of more explicit language, it appears that this shifting burden is the burden of persuasion.\(^{185}\)

The commentators of evidentiary law reject this concept. Professor McCormick states that the burden of persuasion “does not shift from party to party . . . because it need not be allocated until it is time for a decision. When the time for a decision comes,\(^{186}\) . . . if the party having the burden of persuasion has failed to satisfy that burden, the issue is to be decided against him.”\(^{187}\)

Professor Wigmore differentiates between the rebuttal of a *prima facie* case and the ultimate burden of persuasion. “[A] *prima facie* case . . . need not be overcome by a preponderance of the evidence, or by evidence of greater weight; but the evidence needs only to be balanced, put in equipoise, by some evidence worthy of credence; and if this be done, the burden of the evidence has been met. . . .”\(^{188}\) The Federal Rules of Evidence\(^{189}\) and the Administrative Procedure Act,\(^{190}\) both applicable to NLRA litigation, are in accord. Additionally, the Board’s own rules and regulations provide that the General Counsel has the burden of proof in §8 violations.\(^{191}\)

The First Circuit, in *Wright Line*, concluded that the “employer in a section 8(a)(3) discharge case has no more than the limited duty of pro-
ducing evidence to balance, not to outweigh, the evidence produced by the [G]eneral [C]ounsel.192 This position was rejected by the Board and dismissed by the Supreme Court in Transportation Management.

In Transportation Management, the Supreme Court bifurcated the burden of persuasion. The first burden dealt with the threshold question of whether the employer fired the employee, at least in part, because he engaged in protected activities;193 the second with the Board-created affirmative defense.194 The former must be sustained by the General Counsel and the latter by the employer.195 Although the Board insisted that this affirmative defense “does not shift the ultimate burden,”196 this theory is inconsistent with evidentiary law, the Federal Rules of Evidence and Board procedure.197

The Board, in Wright Line, pointed to NLRB v. Great Dane Trailers198 as an implicit sanction for the burden shifting of Wright Line. Wright Line did not quote any rule or language from Great Dane mandating the shift of the burden of persuasion.199 The Supreme Court in Great Dane held, inter alia, that certain employer conduct which is “inherently destructive” of employee statutory rights may violate §8(a)(3) absent proof of an anti-union animus or unlawful motivation. On the other hand, when employer conduct causes “comparatively slight” harm to employee rights, the court would require proof of unlawful motivation.200 The Great Dane approach determined that “once it has been proved that the employer engaged in discriminatory conduct . . ., the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him.”201

Although Great Dane apparently shifted some portion of the burden of proof onto the employer, the extent of this shifting and the scope of the

192. Wright Line, 662 F.2d at 905. See also NLRB v. Amber Delivery Serv., Inc., 651 F.2d 57, 69 (1st Cir. 1981) (“[this shift [referring to the burden of proof] does not impose an overall burden upon Amber [the employer] of proving itself ‘innocent’ of violating the statute. Rather, Amber must simply come forward with enough evidence to convince the trier of fact that, . . . there is no longer a preponderance of evidence establishing a violation.” (emphasis added)). The burden of going forward and producing evidence requires a party to meet or rebut the prima facie case, not necessarily to overcome it.

193. Transportation Management, ___U.S. at ___, 103 S.Ct. at 2473 n.5.
194. Id. at ___, 103 S.Ct. at 2473 (quoting Wright Line, 251 N.L.R.B. at 1084 n.5, 1088 n.11, 105 L.R.R.M. at 1170 n.5, 1174 n.11).
195. Id. at ___, 103 S.Ct. at 2474–75.
196. Wright Line, 251 N.L.R.B. at 1088 n.11, 105 L.R.R.M. at 1174 n.11.
197. See infra notes 183–92 and accompanying text.
199. See Wright Line, 251 N.L.R.B. at 1088, 105 L.R.R.M. at 1174.
200. Great Dane, 388 U.S. at 34.
201. Id.
burden is unclear. A reasonable interpretation of the language indicates that Great Dane established the parameters of the burden of production for the employer and is not a directive by the Court ordering a shift in the ultimate burden of persuasion. Furthermore, Great Dane may not be relevant to the fact pattern of Wright Line or Transportation Management where a single discharge, as opposed to an overall policy of the employer, was questioned.

The Board also relied on the Act's legislative history in upholding its Wright Line decision. In Wright Line, the Board cited a statement made by Senator Taft explaining the 1947 amendments to the Act. Senator Taft's quote revealed that the original House version of the amendment "put the entire burden on the employee to show he was not discharged for cause. [However][,] under provision of the [adopted] conference report, the employer has to make the proof."

A thorough reading of Taft's comments casts doubt on the Board's conclusion that the remark bolsters its position sanctioning the shifting burden of proof. Taft continued: "[T]he Board will have to determine—and it always has—whether the discharge [under §8(a)(3)] was for cause or for union activity, and the preponderance of the evidence will determine that question." Senator Taft's comments, taken as a whole, are inconclusive as to whether Congress intended to shift the burden of proof from the General Counsel to the employer.

Deferral to the Board

Assuming arguendo that Transportation Management is the proper legal analysis employed in §8(a)(3) violations, on what rationale is it based? The most compelling rationale is the Court's deferral to agency
The Supreme Court stated that "the Board's construction here, while it may not be required by the Act, is at least permissible under it . . .", and in these circumstances its position is entitled to deference.209

Deferral to agency expertise is a settled rule of law applicable to labor cases arising under the Act. The Supreme Court has stated that decisions by the Board should be accorded considerable deference and has designated the "substantial evidence test" as the standard for judicial review of Board decisions.210 The policy of judicial deference to the Board's findings is codified in §10(e) of the Act.211 Section 10(e) provides that the courts have the primary responsibility for determining questions of law related to the agency's undertakings.212 Thus, the reviewing court must defer to the Board's findings of fact if supported by substantial evidence.213 However, a court may affirm the Board's legal analysis, but it is not required to adopt the Board's legal causation test under the rubric of the substantial evidence standard. The mere fact that the Board found this burden shifting analysis "administratively useful" in §8(a)(3) cases does not validate its use.214

208 Commentators and litigants have drawn an analogy to §8(a)(3) discrimination in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976). See Alberman Paper Co. v. Moody, 422 U.S. 405 (1975) (Title VII class action seeking backpay and elimination of pre-employment tests). The Supreme Court subsequently established a three-part causation test to analyze employment discrimination under Title VII: first, the plaintiff establishes a prima facie case of discrimination; second, the employer must then produce evidence of a legitimate nondiscriminatory reason for its employment decision; and third, the plaintiff must show that the proffered reason was not the true reason for the employer's decision. The plaintiff retains the burden of persuasion at all times. The employer has only a burden of production to rebut the presumption of discrimination. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (sex discrimination action under Title VII). Accord, Behring Int'l, Inc. v. NLRB, 675 F.2d 83, 89 (3rd Cir. 1982) (in §(a)(3) dual motive cases, "only the burden of production, and not persuasion, shifts to the defendant. Since the same considerations are present where the discrimination is based on union activity [as in Title VII cases], the Board should follow the Burdine procedure . . ."). However, if judicial deference is the primary rationale of Transportation Management, the Title VII analogy, albeit logical and consistent, is irrelevant.

209 Transportation Management, ___ U.S. at ___, 103 S.Ct. at 2475 (quoting NLRB v. J. Weingarten, Inc., 420 U.S. 251, 266-67 (1975); NLRB v. Eric Resistor Corp., 373 U.S. 221, 236 (1963)). See Universal Camera Corp. v. NLRB, 340 U.S. 474, 491 (1951) (the courts must determine "whether on the record as a whole there is substantial evidence to support agency findings . . .").

210 Section 10(e) of the Act, 29 U.S.C. §160(e) (1976), provides, in part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." (emphasis added).

211 Id. See also infra note 220 and accompanying text.


213 See Transportation Management, 674 F.2d at 133 (Breyer, J., concurring). But see NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550-51 n.4 (8th Cir. 1982) (burden allocation is an issue best left to the agency).
Even adamant critics of *Wright Line* do not suggest that the Board's expertise should be entirely circumvented by the courts. An appellate court "cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." On the other hand, this should not be construed as giving the administrative agency "carte blanche" to promulgate rules.

Judge Breyer, in a concurring opinion in the First Circuit's *Transportation Management* decision, wrote that burden allocation is not a question "to which a court should defer to agency views." Breyer reasoned that such an issue is a "pure question of law," and, characterized as such, should not be afforded immunity from judicial scrutiny. Congressional intent, as evidenced by the Administrative Procedure Act, supports a factual-versus-legal-review distinction to be followed by the courts.

Thus, Congress made its intentions clear in determining that the General Counsel retains the ultimate burden of persuasion in proving a §8(a)(3) violation. The Supreme Court, in *Transportation Management*, opted instead for the deferral theory and acquiesced to the Board's expertise without confronting the legal issues sustaining the legitimacy of *Wright Line*.

**True Purpose/Actual Motive Test:**
*An Alternative Causation Analysis*

The "in part" and the "but for" causation tests fail to achieve an equitable balance between the employee's right to organize and the employer's right to run a business. Likewise, the *Wright Line/Transportation Management* causation test is inadequate in effectuating a rational and uniform mode of analysis for alleged §8(a)(3) violations.

The solution is a simple one-step procedure which determines whether an unlawful motive, or a legitimate business rationale, plays a role in the employer's alleged discriminatory action. The quantum of

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216. In *Wright Line*, the First Circuit rejected the Board's causation analysis but conceded that "the Board's adoption of the *Mt. Healthy* test, to the extent that it establishes a new standard or set of legal presumptions, is a ruling of law which we review for legal error, giving due deference to the Board's expertise in interpreting the act it administers." *Wright Line*, 662 F.2d at 902 n.2.

217. Securities and Exchange Comm'n v. *Chenery Corp.*, 318 U.S. 80, 88 (1943) ("[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment.").

218. *Transportation Management*, 674 F.2d at 133 (Breyer, J., concurring).

219. *Id.*

220. Title 5 U.S.C. §706 (1976) provides, in part: "The reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action."
proof necessary to prove a §8(a)(3) violation under this alternative approach would be the familiar "preponderance of the evidence" standard. The proposed alternative causation test may be summarized as follows:

(1) the General Counsel presents its evidence showing that the employer's activity has violated the Act's provisions;

(2) the employer is given the opportunity to rebut the Board's evidence and to produce evidence showing that a violation has not occurred; and,

(3) the Board employs a causation test to determine, by the preponderance of all the credible and relevant evidence, what role the employer's true purpose or actual motive played in the incident.

The true purpose/actual motive test determines which motive weighed more heavily in the employer's decision. If an anti-union animus is found to be the employer's true purpose/actual motive, then the action violates §8(a)(3). However, if legitimate business reasons are the true purpose/actual motive for the employer's action, an unfair labor practice has not been committed.

The true purpose/actual motive test omits the complexity, burden shifting and legal sophistry of Wright Line. This alternative analysis avoids the problems inherent in transplanting a causation test, designed to protect fundamental rights, onto labor cases and achieves the balance sought by the Act.

The language of the true purpose/actual motive causation test is unambiguous and eschews the problems generated by the shifting burden paradigm. Under the proposed test, the Board puts forth its case and the employer attempts to show that his actions were based on legitimate business concerns. The onerous requirement of establishing an affirmative defense is irrelevant. Both parties need only put forward their evidence and retain the normal opportunity to rebut opposing evidence. The Board is well equipped to resolve a §8(a)(3) dispute using this proposed causation test.

Support for this approach to §8(a)(3) cases is found in the Act's legislative history and early Supreme Court decisions. Senator Pepper of Florida, in a debate with Senator Taft of Ohio regarding the Taft-Hartley

221. See supra notes 158-78 and accompanying text.
223. See supra notes 141-44, 194-97 and accompanying text.
224. The Board has the "special function of applying the general provisions of the Act to the complexities of industrial life." NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963) (citations omitted).
Bill, set forth a discussion on the utilitarian value of a true purpose/actual motive test. Pepper stated that the fundamental question at issue before the Board is “what was the real reason for the discharge of the employee.” This real reason, evidenced by the employer’s motive, can be determined by applying the proposed true purpose/actual motive test. The Board examines all the evidence and has “a trial, the way a court would, to determine what was in the mind of the employer when he fired the worker.” Furthermore, this alternative eliminates the need to distinguish “pretext” from “dual-motive” cases.

Support for the true purpose/actual motive test is also evident in NLRB v. Jones & Laughlin Steel, the first case interpreting the Act to be heard by the Supreme Court. Chief Justice Hughes, delivering the opinion of the Court, stated that the employer’s “true purpose is the subject of the investigation with full opportunity to show the facts.” On the same day that Jones & Laughlin was decided, the Court held in Associated Press v. NLRB that the employer’s “real motive” was decisive in the employer’s discharge of the employee. The Court added that the “Act permits a discharge for any reason other than union activity or agitation for collective bargaining.”

The Supreme Court also held in subsequent cases that the test for determining union bias under §8(a)(3) is the “true purpose” or “real motive” of the employer and that the “real motive” of the employer in an alleged violation is decisive.

Pre-Wright Line cases have successfully applied nearly identical causation language to the true purpose/actual motive test. But since that time, both the Board and the courts have drifted away from and ultimately abandoned this methodology.

225. See supra notes 204-07 and accompanying text. See generally 93 CONG. REC. 6513-22 (1947), reprinted in LEGISLATIVE HISTORY, supra note 204, at 1586-98.
226. 93 CONG. REC. 6514 (1947), reprinted in LEGISLATIVE HISTORY, supra note 204, at 1590.
227. Id. See also Du Ross, supra note 166, at 1125-26. The author compares the §8(a)(3) causation test to the “an object” test mandated for §8(b)(4) boycotts. Du Ross continues that the failure of Congress to amend §8(a)(3) “suggests that Congress intended to leave intact the ‘true purpose’ test, which reflected in its very language the goal of identifying the employer’s controlling motivation.” In an explanatory footnote: “Indeed, the House Report explicitly approved the Supreme Court’s reading of Section 8(a)(3) in the Jones & Laughlin case.” H.R. REP. No. 245, 80th Cong., 1st Sess. 42-43 (1947), reprinted in LEGISLATIVE HISTORY, supra note 204, at 292, 333-34.
228. 301 U.S. 1 (1937) (upheld the constitutionality of §8(a)(3)).
229. Id. at 46.
230. 301 U.S. 1 (1937).
231. Id. at 132.
232. Radio Officers’ Union v. NLRB, 347 U.S. 17, 42-43 (1954) (quoting Jones & Laughlin, 301 U.S. at 46; Associated Press, 301 U.S. at 132). This standard, albeit in a case dealing with union-caused employer discrimination, is applicable to the typical §8(a)(3) allegation where the employer’s actions are the primary subject of inquiry.
CONCLUSION

The Board's Wright Line decision produced the opposite of its intended result: the escalation of divergency and confusion among the circuit courts ruling on §8(a)(3) cases. The Supreme Court's decision in Transportation Management, despite its legal fallibilities, unquestionably resolves the dispute surrounding §8(a)(3) causation analysis. Transportation Management unconditionally approves the burden shifting analysis of Wright Line.

Transportation Management enables employers and employees to be cognizant of their rights, as well as the repercussions of their respective actions, under §8(a)(3) of the Act. Practitioners also benefit by the certainty established in the context of legal causation of §8(a)(3).

The long-term benefit of Transportation Management, despite its imperfections, is the consistency and predictability it will generate in §8(a)(3) cases. However, the virtue of establishing such certainty is overshadowed by the Court's perfunctory opinion. The absence of a substantive legal analysis tarnishes the Court's decision. Perhaps the appropriate conclusion drawn from Transportation Management is, as Justice Brandeis once wrote in dissent, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."234

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