What to Do When Employers Discriminate Against Unions (Part 1)

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An employer's good faith mistake is no defense to liability if the employee's organizing activity falls within the protective zone of the National Labor Relations Act.

SECTION 158(a)(3) OF THE National Labor Relations Act ("Act") makes it an unfair labor practice for an employer "by discrimination in re-
tion.” (Unless otherwise indicated, all section references will be to the Act as codified in 29 U.S.C. §151 et seq.) Provisos to section 158(a)(3) permit an employer to enter into a union shop agreement with the union and thereby to discriminate against an employee who will not pay periodic union dues and initiation fees. Section 158(b)(2) of the Code is a corollary to section 158(a)(3). It prohibits unions from causing or attempting to cause an employer to discriminate against an employee in violation of section 158(a)(3).

It is essential to distinguish the elements of a section 158(a)(3) violation from those constituting a section 158(a)(1) violation. Section 158(a)(1) protects the exercise of section 157 rights—engaging in concerted activities for mutual aid or protection—even if no union is involved. Generally, in cases involving section 158(a)(1), employer motivation is irrelevant. If, for example, an employer knows that an employee has engaged in protected activity and mistakenly, but in good faith, believes that the employee has been guilty of misconduct justifying discharge, such as threatening to dynamite company premises, it is nonetheless unlawful under section 158(a)(1) for the employer to fire the employee because of the alleged misconduct. NLRB v. Burnup & Sims, Inc., 379 U.S. 21 (1964). The Court in Burnup & Sims reasoned that:

- Protected activity would have precarious status if innocent employees engaging in it could be discharged;
- Their discharge on false charges, even in good faith, could have a deterrent effect on other employees; and
- “It is the tendency of those discharges to weaken or destroy the section 158(a)(1) right that is controlling.” Id. at 23-24.

The normal order of proof is that the General Counsel of the National Labor Relations Board (“Board”) first shows that at the time of discharge the employee was engaged in protected activity and the employer knew it. The burden then shifts to the employer to show an “honest belief” the employee engaged in misconduct and, for that reason, was discharged. The burden then shifts to the General Counsel to show the employee did not engage in the conduct alleged or that it was protected. Gen. Tel. Co., 251 N.L.R.B. 737 (1980), aff’d, 109 LRRM 2360 (D.C. Cir. 1981).

In contrast, section 158(a)(3) has a different reach: Proof of violation requires a showing of both discrimination and encouragement or discouragement of union membership. The relationship of these elements was succinctly stated in Radio Officers’ Union v. NLRB, 347 U.S. 17, 42-43 (1954). Section 158(a)(3) “does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accom-
plished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.”

**Encouraging or Discouraging Union Membership** • Fundamental to understanding section 158(a)(3) is understanding its concept of discrimination. See *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 675 (1961) (section 158(a)(3) violation requires existence of “the kind of discrimination to which the Act is addressed”). First, section 158(a)(3) discrimination is not limited to disparate treatment but includes the broader concept of adverse action taken against one or more employees. See *Midstate Tel. Corp. v. NLRB*, 706 F.2d 401, 406 (2d Cir. 1983). Second, the adverse action contemplated includes not only hiring and layoff decisions and the normal forms of discipline, such as discharge, suspension, and demotion, but also action adversely affecting any term or condition of employment. See, e.g., *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *Champion Parts Rebuilders, Inc., Northeast Div. v. NLRB*, 717 F.2d 845 (3rd Cir. 1983).

**The Importance of Motive**

Most importantly, the discrimination prohibited by section 158(a)(3) is a motive-based concept. It is limited to those adverse actions taken because employees engaged in concerted activities protected by section 157. This motive limitation in the section 158(a)(3) concept of “discrimination” is often referred to as adverse action based in whole or in part on antunion animus. The Supreme Court, more precisely defining the motive element, has adopted the Board’s articulation: A finding of discrimination requires proof that “the employee's protected conduct was a substantial or motivating factor in the adverse action.” *NLRB v. Transp. Management Corp.*, 462 U.S. 393 (1983).

**Intending the Foreseeable Consequences**

As noted, “only such discrimination as encourages or discourages membership in a labor organization is proscribed.” *Radio Officers' Union v. NLRB*, 347 U.S. 17, 43 (1954). The Supreme Court has explained that discouraging “membership in [a] labor organization . . . includes discouraging participation in concerted activities . . . such as a legitimate strike.” *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). See *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 313 (1965) (“union membership” not to be discouraged includes participation in protected union activities). In most cases, this element of section 158(a)(3) does not control the outcome because specific evidence of intent to encourage or discourage is not an indispensable element of proof. If "a natural and foreseeable conse-
quence" of an employer's discrimination is encouragement or discouragement, it "must be presumed" that the employer intended such consequence. Radio Officers' Union v. NLRB, 347 U.S. at 52. Since a "natural and foreseeable consequence" of "discrimination," properly understood as adverse action taken because employees engaged in protected conduct, will normally discourage that protected conduct, most section 158(a)(3) cases turn on a single issue: whether protected conduct was a substantial or motivating factor in the employer's adverse action.

**Burden of Proof**

The Board's General Counsel bears the burden of proving by a preponderance of the evidence that the employee's protected conduct was a substantial or motivating factor in an employer's adverse action. This proof constitutes a prima facie case of violation. If the employer presents no evidence to rebut or if the reasons an employer proffers to explain the adverse action are rejected as pretextual, the prima facie case is a sufficient basis for a violation without further inquiry. See NLRB v. Townsend & Bottom, Inc., 722 F.2d 297 (6th Cir. 1983); Champion Parts Rebuilders, Inc. Northeast Div. v. NLRB, 717 F.2d 845, 853 (3d Cir. 1983).

**Mixed Motive Cases**

Often, however, an employer will offer evidence of lawful motive that cannot be rejected as pretextual but is insufficient to rebut the General Counsel's proof that the employee's protected conduct was a substantial or motivating factor in the adverse action. These are referred to as mixed motive cases. The employer in these circumstances can avoid being held in violation of section 158(a)(3) by proving by a preponderance of the evidence, as an affirmative defense, that the adverse action also rested on some legitimate business justification and that the adverse action would have been taken independently of the employee's protected conduct. NLRB v. Transp. Management Corp., 462 U.S. 393, 401 (1983) (upholding the Board's position advanced first in Wright Line, 251 N.L.R.B. 1083 (1980), 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S 989 (1982) and ruling that the Code permits "placing the burden on the employer to prove that absent the improper motivation he would have acted in the same manner for wholly legitimate reasons").

Courts of appeals have ruled that the employer's burden in mixed motive cases is to prove that on the day the adverse action occurred, it would have been taken irrespective of the employee's protected conduct and not that it could have been taken for legitimate reasons. Presbyterian/St. Luke's Medical Center v. NLRB, 723 F.2d 1468, 1479 (10th Cir. 1983); Boston Mut. Life Ins. Co. v. NLRB, 692
WHEN EMPLOYERS DISCRIMINATE AGAINST UNIONS

The Wright Line-Transp. Management shifting-burdens doctrine similarly controls analyses of section 158(b)(2) violations and discrimination because of employee concerted activity arising in nonunion settings. See Painters, Local 227 v. NLRB, 717 F.2d 237, 244 (6th Cir. 1983); Mr. Steak, Inc., 267 N.L.R.B. 553 (1983) (Wright Line analysis used to find section 158(a)(1) violation arising from discharge or unorganized employee's protesting working conditions).

Overt, direct evidence showing that employee protected conduct was a substantial or motivating factor in the adverse action is not a prerequisite to proving a prima facie case under section 158(a)(3). Because such direct evidence is “a rarity at best,” the Board may make credibility resolutions and rely on circumstantial evidence to draw reasonable inferences whether an adverse action was impermissibly motivated. See NLRB v. Brookwood Furniture, 701 F.2d 452, 464-65 (5th Cir. 1983); see also NLRB v. Instrument Corp. of Am., 714 F.2d 324, 328 (4th Cir. 1983).

Proving Employer Knowledge

Indispensable to proving unlawful motive, however, is proving the employer’s knowledge that the employee subjected to an adverse action engaged in protected conduct. When direct evidence is unavailable, circumstantial evidence may suffice to impute knowledge, for example, when employees openly engage in the protected conduct and “it strains . . . credibility . . . to suppose that [employer] could have missed what was going on under its nose.” NLRB v. Acme Die Casting Corp., 728 F.2d 959, 961 (7th Cir. 1984), and when “the smallness and openness of the plant” makes it unlikely the protected conduct would “remain secret.” NLRB v. Instrument Corp. of Am., 714 F.2d 324, 329 (4th Cir. 1983). Moreover, a prima facie case requires more than proof of knowledge, even more than knowledge combined with evidence of employer hostility to employees engaging in protected conduct. Id. at 328.

No exact calculus governs what additional circumstantial evidence warrants an inference of unlawful motive. The “garden variety” section 158(a)(3) case involves employee discipline. The General Counsel claims that an employee has been disciplined because of protected conduct, and the employer contends the discipline was imposed for inefficiency, insubordination, or other misconduct. See, e.g., Edward G. Budd Mfg. Co. v. NLRB, 138 F.2d 86 (3d Cir. 1943). In these cases, after knowledge has been proved, making a prima facie case of unlawful motive will usually require proof of one or more of the following:
• Background evidence of employer hostility to employee protected conduct;

• Employee had a good work record;

• Employee had not been a good worker, but employer condoned employee's conduct until the advent of employee's protected activities;

• Employer has historically condoned alleged misconduct when engaged in by other employees or disciplined others more leniently;

• Coincidence in time between discipline and employee's protected activity;

• Implausible, discredited, or shifting reasons suggesting post hoc rationalization to clothe discriminatory discipline in legitimacy; or

• Departure from established practice in administering discipline indicating a cover for bad motive.

In assessing motive, an employer's coercive statements, not protected by section 158(c), are admissible but the Board may not admit as evidence of motive "unrelated, non-coercive expressions of opinion on union matters." See Pittsburgh S.S. Co. v. NLRB, 180 F.2d 731 (6th Cir. 1950), aff'd as NLRB v. Pittsburgh Steamship Co., 430 U.S. 498 (1951). See also Indiana Metal Prod. Corp. v. NLRB, 202 F.2d 613 (7th Cir. 1953); Darlington Mfg. Co., 165 N.L.R.B. 1074 n.7 (1967) (quoting legislative history). Statements protected by section 158(c) that would ordinarily be deemed relevant and admissible in courts of law may be introduced, however, to show background, motivation, or context. NLRB v. Gen. Elec. Co., 418 F.2d 736, 760 (2d Cir. 1969). See also Linn v. Plant Guard Workers, 383 U.S. 53, 62 n.5 (1966) (section 158(c) adopted to prevent Board from attributing antiunion motive to employer on the basis of past statements).

**BUSINESS JUSTIFICATION** • In the course of a labor dispute, an employer may react to employees having engaged in section 157 conduct by taking responsive actions likely to affect adversely protected employee interests but explained by business justifications. For example, an employer in response to a lawful economic strike may replace strikers to maintain production or may grant superseniority to lure strikers back to work or to attract striker replacements. Moreover, in the face of a threatened strike or to strengthen its bargaining position, the employer may lock out employees. Or in response to a strike that violates a contractual no-strike pledge, the employer may discipline union leaders more severely than other strikers because union officers breached a perceived duty to uphold the contract. If the methods of proof described in the previous section enable the General Counsel to make a prima facie case of an intent to interfere with employees'
protected rights, those methods, of course, control the legal analysis.

As the Supreme Court has recognized, however, these responsive actions taken in the course of a labor dispute may present "a possible complex of motives" often making it "difficult to identify the true motive." Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 701 (1983). Thus this type of case presents the issue whether the Board may draw inferences of unlawful motive by means other than those described in the previous section. The Supreme Court, however, sustained the Board's position, first stating that clearly "[w]hen specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found . . . [c]onduct which on its face appears to serve legitimate business ends . . . is wholly impeached . . . ." Id. at 227-28. Furthermore, and more significantly, even without specific evidence of subjective intent, a violation may be found by reason of the "inherently discriminatory or destructive nature of the conduct itself." Id. at 228. Relying on the Radio Officers' rationale, the Court reasoned that the employer in these cases must be held to intend the natural consequences that foreseeably and inescapably flow from its actions.

After subsequently evaluating this issue in several cases involving lockouts, the Court further developed its Erie Resistor rationale in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). The employer had refused to pay striking employees accrued vacation benefits during a strike, while strike replacements and strikers who abandoned the strike and returned to work. There was no evidence of subjective intent to discriminate to discourage concerted activities. The court of appeals reversed the Board's finding of a section 158(a)(3) violation, holding that, absent a finding of a specific unlawful intent, a legitimate business purpose is always a defense to an unfair labor practice charge. The Supreme Court, however, sustained the Board's position, first stating that clearly "[w]hen specific evidence of a subjective intent to discriminate or to encourage or discourage union membership is shown, and found . . . [c]onduct which on its face appears to serve legitimate business ends . . . is wholly impeached . . . ." Id. at 227-28. Furthermore, and more significantly, even without specific evidence of subjective intent, a violation may be found by reason of the "inherently discriminatory or destructive nature of the conduct itself." Id. at 228. Relying on the Radio Officers' rationale, the Court reasoned that the employer in these cases must be held to intend the natural consequences that foreseeably and inescapably flow from its actions.

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making payment to employees replacing strikers, nonstrikers, and strikers who had returned to work. Disagreeing with the Board, the court of appeals found no violation. Although the employer had presented no evidence of legitimate motive, the Board failed affirmatively to show an unlawful motivation to discourage union membership or to interfere with the exercise of protected rights. The Supreme Court reversed, holding that "once it has been proved that the employer engaged in discriminatory conduct, which could have adversely affected employee rights to some extent, the burden is on the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." Id. at 34 (emphasis in original). Since the General Counsel had proved that the employer's conduct carried the potential of adverse effect upon employee rights and the employer "simply did not meet the burden of proof" of a proper motive, the Board properly found a violation of section 158(a)(3).

"Inherently Destructive" Employer Action

Even more significantly, the Court confirmed in dicta that if the employer does introduce evidence of "legitimate and substantial business justification," the Board may still find a violation of section 158(a)(3), depending on whether the Board reasonably concludes the employer's conduct is "inherently destructive" of important employee rights or has a "comparatively slight" adverse effect on them. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967). This distinction was reaffirmed and explicated in Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 701 (1983) (absent explicit contractual duty to take affirmative steps to end unlawful work stoppage, disparate punishment of union officers when participating in unlawful strike, because they fail to take such affirmative steps, violates section 158(a)(3) because "inherently destructive" of protected employee interests). As the Court reasoned in Metropolitan Edison, conduct "inherently destructive of employee interests" carries a strong inference of impermissible motive. Hence even in the face of employer evidence of legitimate and substantial business justification, the Board "may nevertheless draw an inference of improper motive from the conduct itself . . ." Id. at 701 (quoting Great Dane Trailers). Whether drawing this inference in these cases is appropriate depends on the Board's exercise of "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." Id. In contrast, if the adverse effect on employees of the employer's conduct is "comparatively slight," no inference of unlawful motive from the conduct itself is permissible "if the employer has come forward with evidence of legitimate and substantial business justifications
for the conduct.'” *Id.* (emphasis in the original). Then, no violation may be found unless, through the methodology discussed in the previous section, the General Counsel proves by a preponderance of the evidence that the employer’s conduct was unlawfully motivated.

As the *Erie Resistor-Great Dane-Metropolitan Edison* analysis clearly suggests, the definition of “inherently destructive” conduct can be critical. The only guidance offered by the Supreme Court is that conduct is “inherently destructive” if it carries with it “unavoidable consequences which the employer not only foresaw but which he must have intended” and thus bears “its own indices of intent.” *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33 (1967) (quoting *Erie Resistor*). Formulated at such a high level of abstraction, this is not very helpful. Two other articulations, widely used, are more helpful:

- Conduct “with far-reaching effects which would hinder future bargaining, or conduct which discriminated solely on the basis of participating in strikes or union activities.” *NLRB v. Sherwin Williams Co.*, 714 F.2d 1095, 1101 (11th Cir. 1983) (adopting standard and citing approval in other circuits); or
- Conduct that “creates ‘visible and continuing obstacles’ to the future exercise of employee rights.” *NLRB v. Kaiser Steel Corp.*, 700 F.2d 575, 577 (9th Cir. 1983).

Definitions aside, focusing on the Supreme Court’s reference in *Metropolitan Edison* to the Board’s “duty” to strike a “proper balance” between business necessity and coercive effects on employee rights “in light of the Act and its policy” may be the most realistic guide. *Metropolitan Edison Co. v. NLBB*, 460 U.S. 693 (1983). So viewed, section 158(a)(3) analysis, in some circumstances, enjoys a remarkable similarity to section 158(a)(1) analysis. But see *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176, 1183-84 & n.11 (5th Cir. 1982) (sections 158(a)(1) and 158(a)(3) differ: The former requires balancing of employer business necessity and employee rights and the latter a showing of unlawful motive or “inherently destructive” conduct).

**Superseniority of Union Officers**

Cases involving superseniority for union officers provide a useful insight into the operation of the “inherently destructive” rule as a policy-making device. After almost a decade of uncertainty, in *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406, 409 (1983), *enforced sub nom. IUE, Local 900 v. NLRB*, 727 F.2d 1184 (D.C. Cir. 1984), the Board held that collective bargaining agreements granting superseniority to union officers presumptively violate sections 158(a)(3) and 158(b)(2) of the Code unless limited to:

- Layoff and recall; and
"Employees who, as agents of the union, must be on the job to accomplish their duties directly related to administering the collective-bargaining agreement." Id. at 266 N.L.R.B. 409.

No proof of subjective intent to discriminate to encourage or discourage union membership was proffered or required because all superseniority arrangements were seen as "inherently discriminatory" and "at odds with [section 157] of the Act." Id. at 408. The Board's labeling all superseniority as inherently "at odds" with employee protected interests was critical. More instructive, however, was the decision to allow some "inherently discriminatory" conduct, "[i]n consideration of the underlying purpose of the Act," while disallowing other superseniority arrangements.

The Board had stated in an earlier case that "the issue is ultimately one of justification." Dairylea Coop., Inc., 219 N.L.R.B. 656, 658 (1975), enforced sub non. NLRB v. Milk Drivers & Dairy Employees Local 338, 531 F.2d 1162 (2d Cir. 1976). But "justification," of course, is a question of policy as Justice Holmes early recognized. Velgahn v. Guntner, 167 Mass. 92, 44 N.E. 1077 (1896) (dissenting opinion). See IUE, Local 900 v. NLRB, 727 F.2d 1184, 1189 (D.C. Cir. 1984) (Board's superseniority rule ultimately turns on "question of policy."); see also UAW Local 1384 v. NLRB, 756 F.2d 482 (7th Cir. 1985) (reviewing and collecting cases). Accordingly, the Erie Resistor-Great Dane Trailers-Metropolitan Edison doctrine, refined over several decades of litigation, stands as a potent tool for shaping the contours of labor policy.

(To be continued)

Employer participation in efforts to repudiate a currently recognized or certified union raise important free speech issues. The issue is described well by the court in Texaco v. NLRB, 722 F.2d 1226, 1231 (5th Cir. 1984):

The employer must maintain complete neutrality of action, as contrasted with expression of views, in regard to its employees' decision to become or remain unionized. Thus, an employer may not act by way of preference, but may voice preference for a particular union or its preference that the employees remain non-union . . . . Further, it is equally clear that an employer may furnish information upon request . . . . (emphasis in original)

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