South Carolina Law Review

Volume 9 | Issue 3 Article 6

Spring 1657

Nature and Proof of Discriminatory Discharge

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LAW NOTES

NATURE AND PROOF OF DISCRIMINATORY[1] DISCHARGE

In the development of legislation which seeks to establish a balance in the relative economic bargaining positions of labor and management, it was apparent that the employer must retain some prerogative in respect to tenure and conditions of employment.[2] However, it was also recognized that to allow this constitutionally protected right to be enjoyed free of all restraint was to ring the "death knell" on all organizational overtures made by labor. Thus, the doctrine has become firmly entrenched in labor-management relations that an employer may discharge for good cause, bad cause, or for no cause at all, so long as such discharge is not merely an artifice for the thwarting of union activity or membership. But though the recognition of the right and the limitation exists amid relatively little dispute, the question of how the employer may lawfully exercise the right, as opposed to those circumstances in which its application constitutes a violation of the National Labor Relations Act as amended,[3] has been the subject of incessant and heated debate.

Since the limitation is couched in words to the effect that the employer may discharge for any reason so long as such reason is not a denial of the employee's rights as guaranteed

1. Discrimination as here used involves the attempt to distinguish, relative to treatment of employees, between those who are members of a union or engaged in union activities, and those who are not, thereby encouraging or discouraging union membership. The discrimination is based solely on their union membership and no distinction is made on the basis of whether the jobs are comparable or non-comparable. Montgomery Ward & Co., Inc. v. NLRB, 107 F. 2d 555 (7th Cir. 1939); Botany Worsted Mills, 4 NLRB 292 (1937), enforced as modified, 106 F. 2d 263 (3rd Cir. 1939).

2. The Congressional prohibition of discrimination which interferes with the employee's exercise of their fundamental rights does not contravene the due process clause of the Fifth Amendment because it does not interfere with the employer's right to hire and fire, but only prohibits those acts which are coercive with respect to those employee rights which are protected by the Act. Phelps Dodge Corp. v. NLRB, 313 U. S. 177 (1941); NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).

3. Labor-Management Relations Act, 61 Stat. 136 (1947), 29 U. S. C. § 141 *et seq.* (1956).

by sections seven[4] and thirteen[5] of the Act, perhaps it is best that the problem be viewed from the standpoint of the requirements for establishing a violation rather than to resort to a search for types of conduct which may be violative of the Act. Were the scope of the problem so restricted that it could be resolved by a determination of just what an employer may not do, it would long since have been sent packing by the promulgation of a list of those acts which constitute violations. However, the ultimate issue is often confounded with matters subjective in nature, such as the employer's intent, thereby necessitating an examination of evidentiary matters bearing on the establishment of a violation. Consequently, in order to treat the subject adequately the problem is hereinafter divided into segments which will allow: first, a general study of the nature of the discrimination discharge; second, an insight into the elements of proof of a violation; and third, a study of those circumstances wherein there lie both valid and invalid motives for discharge.

SCOPE AND NATURE OF DISCRIMINATION DISCHARGES

While the Act does not compel an employee to join any union organization, it does guarantee him the right to join or not to join at his discretion. It is, *inter alia*, the purpose of the Act to guarantee that in the event an employee does choose to affiliate with such an organization, he may do so without fear of interference, restraint, or coercion.[6] Thus, the provisions of the Act prohibit an employer from discriminating against an employee in any connection of the employment because of the latter's affiliation with, or his refusal to join, any particular labor union or group. However, an employee

4. " . . . Employees shall have the right to self-organization, to form, join, or assist labor organization, 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 except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) . . . " Labor Management Relations Act, 61 Stat. 140 (1947), 29 U. S. C. § 157 *et seq.* (1956).

5. " . . . Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications of that right . . . " Labor Management Relations Act, 61 Stat. 140 (1947), 29 U. S. C. § 163 *et seq.* (1956).

6. Labor Management Relations Act, 61 Stat. 141 (1947), 29 U. S. C. § 158(a)(1) (1952).

may be discharged for good reason, bad reason, or for no reason at all, so long as such discharge does not violate the provisions of the Act. The NLRA, as amended, makes it unlawful to discharge an employee where such discharge is motivated merely by a desire to encourage or discourage union membership or activity.[7] It is quite evident that when such discharge is considered in the light of the employee's right to engage in, or refuse to engage in, union activities, it has a coercive effect on all employees as well as the dischargee. Likewise, to discharge an employee for refraining from union activities would have a similar effect.

These prohibitions do not mean that the employer may no longer control his employment practices.[8] The management prerogatives are restricted only to the extent that they may not engage in acts which would operate to defeat the legislative intent, i.e., the protection of the employee's right of self-organization or the right to refrain therefrom.[9] Thus, the employer may take any action he desires so long as such action does not take a form which is motivated by anti- or pro-union design.

The most obvious and clear-cut violation of the Act is when an employer discharges an employee for union activity and that alone. More often, however, the motives are not clear and there exists little or no evidence to indicate the true reason for which the employee was discharged. Seldom does the employer admit that his discharge of an employee was predicated upon anti-union design, and in such cases the anti-union history of the employer is subjected to close scrutiny. Circumstantial evidence is sometimes so strong as to provide little doubt that the discharge was grounded on illegal motive. Where one has been often praised for his good work and loyalty and shortly after his affiliation with a union he is discharged, it is obvious that the motive was to discourage union activity.[10]

When the motivating factor on the part of the employer is not clearly defined, unlawful motivation may be indicated by a variety of circumstances. Among those factors which have been held to show an attempt to encourage or discourage

7. Labor Management Relations Act, 65 Stat. 601 (1947), 29 U. S. C. § 158(a)(3) (1951).
8. NLRB v. Jones & Laughlin Steel Corp., 301 U. S. 1 (1937).
9. *Ibid.*
10. Illinois Tool Works, 65 NLRB 1181 (1946).

union membership or activity are the following: timing of the discharge,[11] a past history of interference, restraint and coercion,[12] threats of disciplinary action,[13] surveillance prior to the discharge,[14] expressed satisfaction with the work of the dischargee,[15] employment of new workers immediately after discharge,[16] absence of any good cause for discharge and the presence of one of the above factors.[17]

Employers have the right to make rules governing the employees' conduct with reference to company property, and have the right to discipline those who violate such rules.[18] The only time company rules may be found to be unlawful is when such rules are anti-union from their inception or when there is an absence of equality in their enforcement due to union membership or activity. Additionally, violations have been found where the dischargee violated rules characterized as follows: rules that are seldom enforced,[19] ambiguous,[20] vague,[21] rules that are used as a trap,[22] and where the rule is not generally known.[23]

The burden of proof of a discriminatory discharge rests on the NLRB General Counsel,[24] and in order to sustain such burden he must establish by a preponderance of the evidence that such discharge was unlawfully motivated. Where the General Counsel makes out a strong *prima facie* case of discrimination, the employer must then convincingly show that the discharge was predicated on non-discriminatory reasons.[25] The probative value of the testimony thus offered by the

11. NLRB v. Burnette Castings Co., 177 F. 2d 203 (6th Cir. 1949).
12. NLRB v. Servel, Inc., 149 F. 2d 542 (7th Cir. 1945); NLRB v. Bear Brand Hosiery Co., 131 F. 2d 731 (7th Cir. 1942).
13. NLRB v. Marquette Metal Products Co., 152 F. 2d 964 (6th Cir. 1946); NLRB v. Winter, 154 F. 2d 719 (10th Cir. 1946).
14. NLRB v. Baltimore Transit Co., 140 F. 2d 51 (4th Cir. 1944).
15. NLRB v. Rock Hill Printing & Finishing Co., 131 F. 2d 171 (4th Cir. 1942).
16. NLRB v. El Paso-Ysleta Bus Line, Inc., 190 F. 2d 261 (5th Cir. 1951); Warren Co., 90 NLRB 689 (1950), enforced, 197 F. 2d 814 (5th Cir. 1952).
17. Reeves-Ely Laboratories, 76 NLRB 728 (1948).
18. NLRB v. Mylan-Sparta Co., 166 F. 2d 485 (6th Cir. 1948).
19. NLRB v. Harbinson-Walker Refractories Co., 135 F. 2d 837 (8th Cir. 1943).
20. Fellows d.b.a. American Patrol Service, 75 NLRB 662 (1947).
21. NLRB v. Dixie Shirt Co., 176 F. 2d 969 (4th Cir. 1949).
22. NLRB v. Polson Logging Co., 136 F. 2d 314 (9th Cir. 1943).
23. Selig Mfg. Co., 79 NLRB 1144 (1948).
24. NLRB v. Radio Officers Union, 196 F. 2d 960 (2nd Cir. 1952).
25. Sawyer Downtown Motors, 103 NLRB 1735 (1953), enforced, 213 F. 2d 514 (7th Cir. 1954); Treadway, 109 NLRB 1045 (1954), enforced, 222 F. 2d 719 (5th Cir. 1955).

employer is a matter within the determination of the Board, and may be rejected if the evidence or the circumstances substantially contradict such testimony.[26] As a general rule, such finding by the Board will not be overthrown by the court merely because there is conflicting testimony.[27] Thus, in those cases where justifiable cause is alleged as a defense, the weight of the evidence is the controlling factor. If the Board finds that the weight of the evidence is in favor of the employer then no violation will be found. But where the justification offered by the employer is found to be a mere pretext, though the justifiable cause does exist, the conduct will be deemed unlawful. A finding that a discharge was discriminatory is usually accompanied by a reinstatement order and an award of back pay. The Board derives the power to order such affirmative action from section 10 (c) of the Act.[28]

Unions may be guilty of an unfair labor practice if they force an employer to discriminate against an employee for unlawful reasons.[29] However, the fact that the union has violated the Act does not relieve the employer of liability for his conduct. Where a violation has been established and the employee is reinstated with back pay, both the employer and the union must contribute equally to such amount, though either may be solely liable where only one of them is charged. It should be noted that in only two instances is the union justified in inducing an employer to discharge an employee. The first is for the failure on the part of the employee to pay union dues; and the second, for failure to pay initiation fees.[30]

Establishing a Violation

In the foregoing discussion the nature and general characteristics of a discriminatory discharge have been brought to light and the problem areas denominated. Considering now that there has, in fact, been a violation of the Act due to an unlawful discharge by an employer, it is necessary to inquire

26. NLRB v. Wiltse, 188 F. 2d 917 (6th Cir. 1951).
27. NLRB v. Tri-State Casualty Ins. Co., 188 F. 2d 50 (10th Cir. 1951).
28. Labor Management Relations Act, 61 Stat. 147 (1947), 29 U. S. C. § 160(c) (1952).
29. Labor Management Relations Act, 61 Stat. 141 (1947), 29 U. S. C. § 158(b)(2) (1952). This section makes it an unfair labor practice for a labor organization "To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)."
30. *Ibid.*

into the nature of proof required to establish the violation. There are three elements of proof which must be considered in the light of their respective significance insofar as unlawful discrimination is concerned. First, knowledge on the part of the employer that the dischargee was actually engaged in protected union activity. Second, that the motive behind the discharge was to encourage or discourage union membership or activity. And third, the necessity for the conduct to have *actually* encouraged or discouraged protected union activity.

(1) In order for the Board to find that the discharge is discriminatory within the meaning of the Act, it must be shown that the employer knew, or under the circumstances may be charged with knowledge, that the dischargee had actually participated in protected concerted activity.[31] This knowledge constitutes an indispensable element of proof, for unless it can be established there can be no showing of anti-union motive behind the discharge.[32] Where, as is often the case, there is no evidence available which would tend to prove knowledge on the part of the employer, it may be established by inference from accompanying circumstances.[33] However, such proof may not be supplied by inference in the absence of substantial evidentiary support.[34]

Suppose a situation arises wherein there is a discharge and the employer defends on the grounds that he had no knowledge of union activity on the part of the dischargee. Knowledge may be considered to have been established where the evidence indicates that the employer has made anti-union statements, or has cooperated with other employers in obtaining resignations of the latter's employees from the union.[35] Activities such as photographing picket lines, keeping attendance records during a strike, or the sending of letters to dischargees urging them to return to work, may also operate to establish that the employer did have knowledge of the dischargee's activity. However, in the absence of such direct

31. NLRB v. Shen-Valley Meat Packers, 211 F. 2d 289 (4th Cir. 1954); NLRB v. Booker, 180 F. 2d 727 (5th Cir. 1950).
32. Hancock Trucking Co., 109 NLRB 80 (1954); Soerens Motor Co., 106 NLRB 652 (1953).
33. Angwell Curtain Co. v. NLRB, 192 F. 2d 899 (7th Cir. 1951); Hartland Plastics, Inc., 93 NLRB 439 (1951).
34. Indiana Metal Products Corp. v. NLRB, 202 F. 2d 613 (7th Cir. 1953); NLRB v. Smith Transportation Co., 193 F. 2d 142 (5th Cir. 1951).
35. Editorial "El Emparcial" Inc., 99 NLRB 8 (1952); Wallick & Schwalm Co., 95 NLRB 1262 (1951), enforced, 198 F. 2d 477 (3rd Cir. 1952).

circumstantial evidence, he may be charged with constructive notice due to the surrounding employment conditions. Constructive knowledge has been charged where the discharge took place in a small community or in a small plant,[36] or where there has been ample opportunity for the employer to observe open union activity.[37]

(2) Though knowledge of protected union activity is an essential element in the proof of an unlawful discharge, it must be coupled with proof of anti-union motivation before a violation may be established. Unlawful motive is the very essence of an unlawful discriminatory discharge, as is indicated by the fact that it has been well established that employer prerogatives, relative to tenure of employment, are limited only to the extent that he may not discharge for the purpose of encouraging or discouraging union membership or activity.[38] If the motive behind the discharge is based on cause, there is no violation; the motive must be grounded on anti-union animus. Thus, since the motive is the controlling factor, the problem of just what will constitute a sufficiency of proof of an unlawful motive is of paramount importance.

This problem of sufficiency of evidence is made more difficult by the fact that motive is a subjective matter, and there exists a natural tendency to "grasp at straws" in order to establish its illegality. Consequently, great care must be exercised in identifying that on which the conduct is predicated, lest the broad policies of the Act be lost from view or submerged in a myriad of technicalities whereby they become dissipated by the resulting "hair-line" distinctions.

In order that this danger may be accurately studied and evaluated it is necessary to understand the general nature and operation of the National Labor Relations Board, as well as its policy in relation to employer motive. The Board was established to act in the capacity of, and in the same manner as, any other administrative tribunal. That is, to act as a panel of experts which is better able to deal with the highly specialized problems which arise in the labor-management

36. S. S. Coachman & Sons, 99 NLRB 670 (1952), enforced, 203 F. 2d 109 (5th Cir. 1953); Connecticut Chemical Research Corp., 98 NLRB 160 (1952).

37. Mooresville Mills, 99 NLRB 572 (1952), enforced as modified, 204 F. 2d 87 (4th Cir. 1953); Keeshin Poultry Co., 97 NLRB 467 (1951).

38. Labor Management Relations Act, 65 Stat. 601 (1947), 29 U. S. C. § 158(a)(3) (1956).

field. By virtue of their expert knowledge, there is little doubt that the Board has the power to draw inferences, or to infer consequences from the particular fact situations before them. However, it is of the utmost importance that these inferences be supported by substantial and credible evidence, for otherwise their decisions would be the result of idle speculation or conjecture, which is no more acceptable on their part than it would be if engaged in by the courts.

Since the Board has the power to draw inferences, the question arises relative to the advisability of allowing the Board to find a motive unlawful by inference, in the light of the dangers previously mentioned. In other words, should an unlawful motive be found by inference alone or must it be established by a preponderance of the evidence. A recent decision of the Supreme Court, while it evidences the uncertainty in this area, may be utilized to determine the intent of the Congress in this respect.[39]

The decision was rendered after the hearing of three cases together, all of which involved employer conduct as a result of union pressure. The fact that the employer's acts were committed entirely because of this union pressure was admitted or conceded. These cases, which were brought before the Supreme Court on certiorari, were: *NLRB v. International Brotherhood of Teamsters*, 197 F. 2d 1 (8th Cir. 1952); *NLRB v. Gaynor News Co.*, 197 F. 2d 719 (2nd Cir. 1952); and, *NLRB v. Radio Officer's Union*, 196 F. 2d 960 (2nd Cir. 1952). In all three cases the court agreed that the motive of the employer in discriminatory conduct was the controlling factor. However, the court pointed out:

> . . . It is also clear that specific evidence of intent to encourage or discourage is not an indispensable element of proof of violation of section 8(a) (3). . . . 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 forseeable consequences of his conduct.[40]

There are at least three possible interpretations of this language, which in turn represent three different interpretations of section 8(a) (3) of the Act. The first of the pos-

39. 347 U. S. 17 (1954).
40. 347 U. S. 17, 44, 45 (1954).

sible interpretations is that in the establishing of an unlawful discriminatory discharge, it is never *essential* to prove the motive of the employer to be unlawful. Without a doubt this is not the meaning the court had in mind, for to so hold would be to impute a guilt to the employer which the Congress did not intend to outlaw. The Act makes only that discrimination unlawful which is directed toward discouraging or encouraging union membership or activity, and does not prohibit discrimination simpliciter.[41]

The second interpretation, is that in those cases where the conduct has an inherent "tendency" to encourage or discourage, then intent is not a necessary element of proof. This so-called "tendency" test appears on the surface to be reasonable when grounded on the argument that the proof of motive is too difficult in that it involves a subjective element which does not lend itself readily to the scrutiny of a court or administrative body. But while the theory is in some measure sound, its application proves most impractical and would tend to defeat the intendment of the Act. By way of illustration, suppose an employer has not taken cognizance of the fact that an employee is engaged in protected union activity, and it happens that the employee is discharged for cause, or for that matter, for no cause at all. The fact that an actively engaged union member is discharged would be interpreted by some, and most assuredly by the dischargee himself, as the manifestation of anti-union animus. Insofar as the intendment of the Congress is concerned there has been no violation, yet, it may be found that the discharge had an inherent "tendency" to encourage or discourage union or concerted activity. The premise that gives birth to this view is that it is impossible, or at least impractical, to evaluate the motive of the employer due to its inherent subjectivity, yet advocating the evaluation of the inherent effect, or "tendency," of the conduct with regard to its possible encouraging or discouraging affect on union activity. This latter undertaking involves the evaluation of the resulting attitude of dozens, or even hundreds, of employees which is an even more confounding subjective study. Thus, the application of this "tendency" test is in itself a contradiction.

To follow this interpretation further, it is obvious that the immediate effect of its application is to place the employer at

41. See note 38 *supra*.

a greatly inferior position in the economic conflict. Any act on his part could be construed to encourage or discourage some one or some group in their relation to protected concerted activity. It places a premium on the avoidance of any affirmative act by the employer and thereby inhibits the exercise of his constitutionally protected right to engage in business enterprises and to operate and manage them in the manner which he deems economically necessary. Additionally, the application of this view would encounter the hazards of distortion as there is no administrative framework within which it could be safely operative.

By the third interpretation, the employer's motive in perpetrating the discriminatory act is controlling, *except* where the reason for the act is conceded by the parties. In other words, proof of motive is insignificant only in those cases in which the true purpose behind the act is admitted either to get a Board determination of its legality or for purposes of confession and avoidance. This would seem to be the preferred interpretation when considered in the light of the circumstances in the three cases, and represents a valid exception to the general rule that motive is always an essential element in the proof of a violation. From a practical standpoint, the recognition of this exception constitutes a striking down of technical defenses and thereby allows the court or Board to focus its attention more readily on the unadorned merits of the case.

This interpretation receives further support from two National Labor Relations Board Annual Reports. In the first, 12 NLRB Ann. Rep. 29 (1947), it was stated:

> Where the fact of unlawful discrimination existed, the Board held motive immaterial.

Thus it is stated that there is no necessity to prove a motive which after its proof adds nothing to the case in question. The rationale undoubtedly is that where the unlawful discriminatory conduct has been admitted, consumption of the Board's or court's time with that which has already been established would be to call too heavily on its patience.

In 15 NLRB Ann. Rep. 104 (1950), the fact that the above circumstance represents an exception was further established when the Board said:

> For the Board to find a violation of this section, a pre-

ponderance of the evidence must show that the employer acted from illegal motive.

When these two reports are read together, the conclusion necessarily follows that it is necessary to prove by the preponderance of the evidence that the motive of the employer was unlawful in all cases where the anti-union intent is not admitted. To hold otherwise would be to allow the employee virtually complete immunity in the commission of acts in defiance of the employer's lawful orders or regulations. To tie the hands of one of the parties in the economic scale would not effectuate the policies of the Act, but would instead open the gates to protected harassing.

(3) The last element of proof relative to establishing a violation resolves itself into the question of whether the conduct must have the *actual effect* of encouraging or discouraging membership in labor organizations. In a vast majority of the cases the Board and courts have acted, without treating the issue explicitly, as though proof of discriminatory motive was sufficient in itself to establish a violation. However, a few cases have met this question squarely and have resulted in conflicting decisions.[42]

The predominant view seems to be that it is not necessary that the record show independent evidence that the unlawful discriminatory discharge had the actual effect of discouraging unionism.[43] Nor is actual evidence of encouragement or discouragement of employees essential since discrimination necessarily discourages union membership insofar as the dischargee is concerned.[44] The Supreme Court has implied that a violation of the Act could be established by the presentation of substantial evidence that the discriminatory act was motivated by a desire to encourage or discourage union membership or activity, without having to show that the *actual*

42. NLRB v. Air Associates, Inc., 121 F. 2d 586 (2nd Cir. 1941). In this case the court held that section 8(a) (3) required that the discrimination discharge have both the purpose and *effect* of discouraging or encouraging union activity. However, the same judge in the later case of NLRB v. Cities Service Oil Co., 129 F. 2d 933 (2nd Cir. 1942), indicated that the doctrine should be "very narrowly limited." Compare: NLRB v. Radio Officers Union, 196 F. 2d 960 (2nd Cir. 1952); Western Cartridge Co. v. NLRB, 134 F. 2d 240 (7th Cir. 1943); and Rapid Roller Co. v. NLRB, 126 F. 2d 452 (7th Cir. 1942).

43. NLRB v. Boswell Co., 136 F. 2d 585 (9th Cir. 1943); Phelps Dodge Corp. v. NLRB, 313 U. S. 177.

44. NLRB v. Boswell Co., 136 F. 2d 585 (9th Cir. 1943).

effect of the employer conduct was in fact to discourage or encourage such organized activities.[45]

Thus, it would appear that insofar as this element of proof is concerned, the Board may reasonably infer from the fact that the discrimination was illegally motivated, that the *actual effect* of the discrimination was to encourage or discourage union activities.[46] To require its proof would without a doubt create an unnecessary hardship on the General Counsel due to the fact that the results of such an act are often difficult to accurately evaluate even in retrospect. This view would seem to be in accord with the intendment of the Act as it merely makes illegal the particular act of discrimination when predicated on the desire to discourage or encourage union activities, and does not expressly or impliedly concern itself as to whether the desired result was accomplished by such employer conduct.[47] In other words, it is the conduct itself that is forbidden, and a violation is not contingent on the success or failure of such conduct.

As a result of the foregoing discussion of the elements of proof of a violation, it appears that as a general rule the Board always has the burden of proof of a violation.[48] However, the establishment of a prima facie case shifts the burden of going forward with the evidence to the employer, who must then establish an affirmative defense.[49] The resulting decision of the Board, if based on the preponderance of the evidence from the record in its entirety, is conclusive on a reviewing court.

Where Dual Motive is Involved

The problem of dual motive exists in those cases, where upon examination of the facts, it appears that there are two possible motives either of which may be assigned as the reason for the discharge. One of these motives is predicated on anti-union animus, while the other is grounded on an actual violation by the dischargee of a valid company rule which has in the past justified discharge. The first constitutes a violation of the provisions of section 8(a)(1), while the

45. NLRB v. Fansteel Metallurgical Corp., 306 U. S. 240 (1939).
46. NLRB v. Vail Mfg. Co., 158 F. 2d 664 (7th Cir. 1947).
47. See note 7 *supra*.
48. NLRB v. Reynolds International Pen Co., 162 F. 2d 680 (7th Cir. 1947); Montgomery Ward & Co. v. NLRB, 107 F. 2d 555 (7th Cir. 1939).
49. Montgomery Ward & Co. v. NLRB, *supra* note 48.

latter is a valid exercise of an employer prerogative and would not support an unfair labor practice charge. The dual motivation situation is distinguished from a "pretext" discharge in that the alleged justification for the discharge in the latter case is merely an attempt to relabel an actual discriminatory discharge which was in fact entirely predicated on anti-union motivation.

If, in the examination of an alleged unfair labor practice based on discriminatory conduct, it is found that dual motivation exists, there are several possible ways in which the matter could be resolved. The first basis on which the case may be decided is that where there exists an unlawful motive, an unfair labor practice will be found notwithstanding the fact that the preponderance of the evidence may indicate that the discharge was for valid reasons. Second, where a valid motive is established the Board may not consider the possible existence of an anti-union motive. And third, that both motives shall be weighed and the determination made on the basis of a preponderance of the evidence. Or, in other words, where there is a balancing of the evidence offered by the parties, the Board may not find an unfair labor practice.

In determining which of the above mentioned criterian is to be utilized, such determination must be made on the basis of which one is in the greatest accord with the intendment of the Act. In order to find such intendment, resort must be made not only to the Act itself but also to the court and Board decisions rendered thereunder. Two sections of the Act are controlling and must be considered together. The first, section 8(a)(1), makes interference, restraint, and coercion of employees in the exercise of their rights under section 7 an unfair labor practice.[50] And the second, section 10(c), grants the Board power to order reinstatement with back pay in cases where section 8(a)(1) through (5) is violated.[51] The cases under the original section 10(c) held that discharge "for cause" fails to provide grounds for reinstatement, and subsequent to these decisions, the section

50. See note 6 *supra*.

51. " . . . the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the Act . . . " Labor-Management Relations Act, 61 Stat. 147 (1947), 29 U. S. C. § 160(c) (1952).

was amended to include this "for cause" proviso.[52] The purpose in making such an amendment when the section had been accorded similar interpretation by the courts has been the subject of much confusion, and this confusion has manifested itself particularly in the area of dual motivation. It is obvious that to resolve this confusion is to prescribe the manner in which the Board is required to treat the dual motivation cases.

Senator Taft expressed the view that the amendment was made merely to state the then existing rule that where there was a discharge for cause there would not be reinstatement, but that where discrimination because of union activities was evidenced then reinstatement would be ordered, and that in all events such cases constituted controversies of fact for the determination of the Board.[53] Little can be said to criticize this view; however, a more basic reason underlies the promulgation of the amendment. This is made apparent by the fact that in the past the Board has approached these cases involving dual motivation from the standpoint of determining if in fact the discharge was motivated, at least in part, by anti-union animus. Where it was found that anti-union feeling did constitute at least a part of the motivation, then reinstatement was ordered.[54] As a result, a number of cases radiate the implication that union affiliation provides immunity from discharge regardless of the seriousness of the alleged conduct.[55] Consequently, though the general attitude is to uphold the Board's decisions,[56] several court decisions under the original NLRA criticized the Board, at least by way of implication, for their extreme zeal in respect to the finding of unlawful motive and refused to enforce the reinstatement orders when they were inconsistent with the weight of the evidence.[57] These court decisions are reflected in the statement of the House Committee which revised section 10(c) when they stated:

52. " . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause . . . " Labor-Management Relations Act, *Ibid.*

53. 93 Cong. Rec. 6518 (1947).

54. 7 Geo. Wash. L. Rev. 797 (1939).

55. Hearst, 10 NLRB 1299 (1939), herein is found an extreme decision.

56. NLRB v. Nabors, 196 F. 2d 272 (5th Cir. 1952).

57. Wyman-Grodon Co., 62 NLRB 561 (1945), denying enforcement of Board's reinstatement order in 153 F. 2d 480 (7th Cir. 1946); NLRB v. Montgomery Ward and Co., 157 F. 2d 486 (8th Cir. 1946).

> . . . A third change in section 10(c) forbids the Board to reinstate an individual unless the weight of the evidence shows that the individual was not suspended or discharged for cause . . .[58]

This statement considered in the light of the court decisions refusing to enforce the reinstatement orders of the Board would seem to indicate that the *primary purpose* of the amendment was to promulgate a more rigid standard relative to the burden of proof.[59] If this be true, then the Board is required to make its decision in dual motivation cases on a basis of the preponderance of the evidence. Thus, it may well be assumed that this theory represents the underlying reason for the new note of awareness of its duty in establishing proof of discriminatory motive, for in at least two of the Board's recent decisions it has shown a tendency to disregard suspicion and inference as being an acceptable substitute which will fulfill the duty of proof.[60]

It must be noted, however, that a recent case has again injected some doubt into this area due, primarily, to the fact that its decision is subject to varying interpretations. The case is *NLRB v. Huber & Huber Motor Express,* (5th Cir. 1955) 223 F. 2d 748. Therein an employee was discharged for failure to submit certain required reports on at least two occasions. The NLRB found that the employee had been discriminatorily discharged as a result of his union activities. In an action brought by the Board to enforce their reinstatement order the court denied enforcement saying:

> . . . Where the Board could as reasonably infer a proper collateral motive as an improper one, the act of the management cannot be set aside as being improperly motivated . . .[61]

Taking the statement literally, it would seem to import that where there are two possible motives behind the discharge, one being "for cause," and the other to discourage union activity, the Board may not find as a matter of law that the employer violated the Act. This is directly opposed to the view taken by the Board under the original

58. H. Rep. 245, 80th Cong., 1st sess., p. 42 (1947).
59. Labor Management Relations Act, 61 Stat. 147 (1947), 29 U. S. C. § 160(c) (1952).
60. Milwaukee Nash Co., 105 NLRB 684 (1953); Radio Industries, Inc., 101 NLRB 912 (1952).
61. NLRB v. Huber & Huber Motor Express, Inc., 223 F. 2d 748 (5th Cir. 1955).

section 10(c) and seems unreasonable because if such were the case, the Board could not look at the motive of the employer in any case wherein dual motives are involved even though the unlawful motive greatly outweighed the alleged just cause. On the other hand, the language could indicate that the court interpreted the amended section to mean that while the Board may find a discriminatory discharge, they may not issue a reinstatement order. This interpretation is invalidated by the fact that the purpose of section 10(c) is to give the Board sufficient authority to prevent unfair labor practices, and would thus contradict the terms of the Act.

More likely than those possibilities heretofore mentioned is the view that the court felt that where there is a balancing of the evidence which tends to indicate a proper, as well as an improper, motive, then substantial evidence has not been presented which is sufficient to meet the requirement of preponderance.[62] Thus, this case is found to be in accord with others under the amended section as well as with the purpose of the amendment as expressed by the House Committee, and consequently represents the most accepted interpretation of the Act with regard to the requirements of proof in the area of dual motivation.

CONCLUSION

In the foregoing discussion consideration has been given to those situations in which the proper relationship between the employer's right to hire and fire, on the one hand, and the employee's right to engage in concerted union activity on the other, is particularly difficult to maintain. It has been noted that this difficulty is attributable, at least in part, to the fact that the legality of the particular discharge is governed by, and interwoven with, the surroundings in which it takes place. The result is that the determination, as to whether the discharge was predicated upon anti-union animus or upon some reason not violative of the Act, must be based upon the preponderance of the evidence as derived from the surrounding circumstances rather than upon inference and suspicion.

Since the decision is based on the factual situation in each particular case, no attempt was made to review all possible

62. An identical rationale was used in, NLRB v. Houston Chronicle Publishing Co., 211 F. 2d 848 (5th Cir. 1954).

variations which could arise under the Act. Instead, an attempt was made to advance principles, derived from a study of the cases in conjunction with the current legislation, which would be applicable to the vast majority of the discrimination problems which currently arise. In advancing these principles it was the writer's intent to present them in a form sufficiently flexible to encompass as much of the field as possible, while retaining sufficient substance to meet the requirements of exactness and utility. If this purpose has been achieved, then perhaps these principles will constitute a frame of reference which will facilitate the determination of the extent to which an employer may enjoy his right to regulate his employment practices while adhering to the legislative limitations placed upon this right by the National Labor Relations Act.

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