Section 8 (a) (3) of the National Labor Relations Act: A Rationale - Part II (Encouragement of Discouragement of Membership in Any Labor Organization and the Significance of Employer Motive

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SECTION 8 (a) (3) OF THE NATIONAL LABOR RELATIONS ACT: A RATIONALE—PART II

ENCOURAGEMENT OR DISCOURAGEMENT OF MEMBERSHIP IN ANY LABOR ORGANIZATION AND THE SIGNIFICANCE OF EMPLOYER MOTIVE

Benjamin M. Shieber* and Shelby H. Moore, Jr.**

"[T]he office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress the subtle inventions and evasions for continuance of the mischief..., and to add force and life to the cure and remedy, according to the true intent of the makers of the Act ...." Heydens Case, 26 Eliz., 3 Coke 7, 8.

INTRODUCTION

Section 8 (a) (3) of the National Labor Relations Act makes it an "unfair labor practice for an employer ... by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization ...." In an earlier article one of the authors concluded that, for the purposes of Section 8 (a) (3), discrimination is employer treatment of employees affecting their employment conditions caused by employee exercise of Section 7 rights, e.g., the rights to engage in self-organization and collective bargaining.

To complete a rationale of Section 8 (a) (3), we here consider the "encourage[ment] or discourage[ment] [of] membership in any labor organization," and the significance of the employer's motive in determining whether employer conduct constitutes an unfair labor practice under Section 8 (a) (3). Completion of the rationale of Section 8 (a) (3) facilitates examination of the extent

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3. Id. at 70-77.
to which that section and Section 8(a)(1) overlap. The article therefore concludes with an examination of this overlap.

I. ENCOURAGEMENT OR DISCOURAGEMENT OF MEMBERSHIP IN ANY LABOR ORGANIZATION

A. "Membership in Any Labor Organization"

It is clear that the labor organization referred to in Section 8(a)(3) is not necessarily a labor union. The term "labor organization" as defined in the Act is not limited to labor unions but includes:

"any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."4

Furthermore, the Board and the courts have not limited employer violations of Section 8(a)(3) to interference with employees actually joining a labor organization, but to any interference with concerted employee activities protected by the Act. Thus, in NLRB v. Great Dane Trailers, Inc., the Supreme Court said:

"Discouraging membership in a labor organization 'includes discouraging participation in concerted activities... such as a legitimate strike.'... Erie Resistor Corp., 373 U.S. 221, 233 (1963)."5

Although the Supreme Court's decisions in this area involve cases in which a labor organization existed or was being formed,6 the decisions of the Board and the courts of appeal have not been so limited.7 Thus, in a 1943 case, the Board, overruling one of its trial examiners, held:

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6. See note 5 supra.
"We are of the opinion and we find that, irrespective of whether such concerted activity resulted from any interest or activity in a labor organization, such discrimination has the effect of discouraging the formation of and membership in a labor organization, which is the customary instrument utilized by employees in exercising the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed by Section 7 of the Act, and constitutes an unfair labor practice within the meaning of Section 8(3) of the Act."

Such decisions appear logical since any employer interference with the exercise of Section 7 rights must necessarily have some effect upon employee membership in a labor organization when an employee has an opportunity to become a member. Further, these decisions seem consistent with Congress' intention to protect employees not only from interference in actually joining a labor organization, but from employer interference in the exercise of the rights of self-organization in general. This is clear from the Senate Report on Section 8(3) of the Wagner Act, the original enactment containing these provisions of Section 8(a)(3):

"[I]f the right to be free from employer interference in self-organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work."

Thus, the prohibition of Section 8(a)(3) on employer encouragement or discouragement of "membership in any labor organization" includes any employer interference with employee exercise of Section 7 rights.

B. Proof of Actual Encouragement or Discouragement Not Required

In the leading case of Radio Officers' Union v. NLRB, the
employers argued that their acts had not in fact encouraged any employees to join a labor union because all the employees were either union members or desired to join or were ineligible to do so. The Supreme Court held that there need be no showing that any employee was in fact encouraged to join any labor organization:

"The Board relies heavily upon the House Report on § 8(3), which stated that the section outlawed discrimination 'which tends to "encourage or discourage membership in any labor organization,"' for its conclusion that only a tendency to encourage or discourage membership is required by § 8(a) (3). We read this language to mean that subjective evidence of employee response was not contemplated by the drafters, and to accord with our holding that such proof is not required where encouragement or discouragement can be reasonably inferred from the nature of the discrimination."

In a recent case the employer argued that its actions were not violative of Section 8(a) (3) because 95% of its employees were union members and there had been no showing that its actions had actually discouraged any employee from joining a union. The Sixth Circuit held that such a showing was not required. It quoted with approval from the opinion of the Board's trial examiner that, "'[i]t is enough that the behavior complained of, or the rules of conduct unilaterally imposed and enforced by the employer, tend in that direction.'" This tendency, and not proof of actual discouragement, is all that is required.

C. Section 8(a)(3) Does Not Prohibit All Employer Encouragement or Discouragement of Employee Exercise of Section 7 Rights

It is clear that not all employer actions that encourage or discourage membership in a labor organization are violative of Section 8(a) (3). For example, an employer who follows a general policy of providing its employees with better wages and

11. Id. at 52-51.
13. 401 F.2d at 686.
working conditions than those received by employees working under collective bargaining agreements in the same industry may thereby discourage his employees from seeking membership in labor organizations. But certainly such employer action does not violate Section 8(a)(3).14 Similarly,

"[A]n employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. . . . Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity."15

What then distinguishes employer actions that discourage (or encourage) union membership and do not violate Section 8(a)(3) from those that discourage (or encourage) and are violative of that section?16

The language of Section 8(a)(3) makes it clear that, "the only encouragement or discouragement of union membership banned by the Act is that which is 'accomplished by discrimination.'"17 As the Court unequivocally stated in Radio Officers':

"The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited."18

And since to constitute discrimination for purposes of Section 8(a)(3), employer action must be caused by employee exercise of

16. Employer conduct that is "discrimination" and that encourages union membership may also be violative of Section 8(a)(3). Radio Officers' Union v. NLRB, 347 U.S. 17 (1954). Because analysis of when such employer conduct is violative of Section 8(a)(3) would be similar to analysis of when "discrimination" that discourages union membership is violative of Section 8(a)(3) and because relatively few cases involve employer encouragement of union membership, this article generally speaks only of discouragement of union membership.
Section 7 rights, neither a liberal wage policy nor the discharge of an employee union organizer because of his inadequate job performance offends Section 8(a)(3) because neither is prompted by employee exercise of Section 7 rights.

However, the presence or absence of discrimination does not fully resolve the problem of differentiating legal from illegal employer actions under Section 8(a)(3). Leading cases show that some employer actions that constitute discrimination and discourage union membership are not violative of Section 8(a)(3).

In *NLRB v. Mackay Radio & Telegraph Co.*, the employer refused to reinstate striking employees who had been permanently replaced during an economic strike. This was discrimination, since it was adverse treatment of employees caused by the exercise of their Section 7 right to engage in a concerted activity, a strike. The effect of this refusal "to reinstate striking employees . . . is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act . . . ." Here, the employer's action constituted discrimination that discouraged employees from exercising their right of self-organization. Yet, the Supreme Court held that this action did not violate Section 8(a)(3).

Similarly, in *Textile Workers Union of America v. Darlington Manufacturing Co.*, the employer closed a plant because the majority of employees voted for union representation, clearly discrimination. That the effect of this discrimination was to discourage the employees in this and other plants from exercising their right to join labor organizations was obvious and was not questioned. Yet, the Supreme Court held that the employer's

21. The fact that the employer would have treated employees who absented themselves from work for reasons unrelated to exercise of Section 7 rights in the same way does not change the fact that the cause of its treatment of these employees was their exercise of Section 7 rights and was therefore "discrimination" for the purposes of Section 8(a)(3). See Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); and see the discussion of this point in *Shieber: Part I.*, supra note 2, at 74-76.
23. Since *Mackay* was decided before the 1947 amendments to the National Labor Relations Act, the opinion refers to Section 8(3) rather than Section 8(a)(3). Congress did not change the language defining the unfair labor practice under Section 8(3) when it amended the statute in 1947 and changed the number of the Section to 8(a)(3).
action was not an unfair labor practice in violation of Section 8(a)(3).\(^{25}\)

We offer the following analysis to explain why the employers' actions in Mackay and Darlington were not violative of Section 8(a)(3).

D. A Rationale to Distinguish Prohibited from Permissible Employer Encouragement or Discouragement

We believe that only employer actions that constitute discrimination and unduly interfere with employee exercise of Section 7 rights are Section 8(a)(3) unfair labor practices. Further, whether particular discriminatory employer action does or does not unduly interfere with employee exercise of Section 7 rights can only be determined by weighing the social utility of the employer's action, its business justification, against its social disutility, the resulting interference with employee exercise of Section 7 rights. When the utility of the action outweighs its disutility, the discriminatory action is lawful; when the contrary is true, the employer's action is held to "encourage or discourage membership in any labor organization" and is thus an unfair labor practice in violation of Section 8(a)(3).

Some of the elements of utility and disutility can be identified and measured. Identifying these elements is important in resolving individual cases because it minimizes the possibility that the Board and courts will base their decisions on unsupported conclusions about the utility of an employer's actions or will overlook elements of its utility and disutility. An appreciation of these elements helps us understand why the same employer action may constitute an unfair labor practice in one set of circumstances while in other situations it is permissible; for example, why an employer's denial of reinstatement to unfair labor practice strikers is an unfair labor practice, while denial of reinstatement to economic strikers is not.

We believe that the measure of the social utility of an em-

\(^{25}\) That all employees were adversely treated because some of them had exercised their Section 7 right of self-organization does not change the fact that the cause of the employer's treatment of its employees was employee exercise of Section 7 rights and was therefore "discrimination" for the purposes of Section 8(a)(3). See Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947); and see the discussion of this point in Shieber: Part I, \textit{supra} note 2, at 71-72.
ployer's action is the extent to which it tends to enhance management’s ability to make an enterprise efficient and profitable. The measure of the social disutility of the action is the extent to which it tends to increase (1) employee alarm about adverse employer treatment resulting from their exercise of Section 7 rights, and (2) the danger that the employer and others will, by later actions, interfere with employee exercise of those rights.26

The decisions relating to employer treatment of employees who engage in a lawful strike show that the process of weighing utility and disutility provides a rational basis for distinguishing between legal and illegal employer conduct. In Mackay,27 the Court determined that the utility of permitting an employer to continue its operations by hiring permanent replacements for economic strikers outweighed the disutility of the interference with the employees’ exercise of the right to conduct an economic strike. The business justification for continuing operations with permanent replacements is indeed great. Without the power to hire permanent replacements, management would be unable to continue production or would be required to rely on temporary employees whose efficiency is minimized by the fact that they have no interest in the long-run success of the enterprise. However, the interference with exercise of employees’ Section 7 rights is also great. The possibility of permanent loss of employment resulting from his participation in an economic strike must act as a powerful brake on an employee’s readiness to participate in such a strike.28 But the fact that the weight on each side of the

26. Our analysis follows Bentham in measuring the social disutility of the employer's discriminatory conduct by the alarm and danger that the conduct creates. Bentham divides the "mischief" of an act into two categories, "the primary, which is sustained by an assignable individual, or a multitude of assignable individuals . . . [and] the secondary, which taking its origin from the former, extends itself either over the whole community, or over some other multitude of unassignable individuals." The secondary mischief consists of (1) "alarm," which Bentham defines as "a pain of apprehension: a pain grounded on the apprehension of suffering such mischiefs ... as it is the nature of the primary mischief to produce" and (2) "danger," which "is the chance . . . which the multitude it concerns may in consequence of the primary mischief, stand exposed to, of suffering such mischiefs." J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORAALS AND LEGISLATION 143-44 (J.H. Burns & H.L.A. Hart, eds., 1970).


28. That it does have this effect is evidenced by the fact that employer pre-election campaigns stress this possibility as one of the dire consequences of choosing to be represented by a union. See, e.g., Texas Industries, Inc. v. NLRB, 336 F.2d 128, 130 (5th Cir. 1964); Dal-Tex Optical Co., 137 N.L.R.B. 1782 (1962); and C. Kotbe, INDIVIDUAL FREEDOM IN THE NON-UNION PLANT 172 (1967).
balance is heavy does not lessen the necessity of deciding which is the heavier, and the Mackay Court held that the business justification for continuing operations with permanent replacements had greater social utility than non-interference with employees' right to participate in an economic strike.

The balance is struck differently when the employees are engaged in an unfair labor practice strike. The utility of the employer's action, the importance of continuing production with permanent employees, remains, but the disutility of interfering with the employees' Section 7 right to strike is increased and now outweighs the business justification. This increase in disutility is due to increased danger that employers will engage in unfair labor practices. The danger is increased because if employers could permanently replace unfair labor practice strikers, some employers might decide that it was advantageous for them to commit unfair labor practices in order to provoke a strike and thereby secure an opportunity to permanently replace the strikers. Thus, there is greater social disutility in denying reinstatement rights to unfair labor practice strikers than to economic strikers, and the different rules applicable to them are attributable to this difference in disutility.

The balance is also struck differently when an employer grants superseniority to permanent replacements for economic strikers, even when necessary to enable "the employer . . . [to] operat[e] its plant during the strike . . . ." Since we are concerned here with an employer who grants replacements for economic strikers superseniority "SOLELY to protect and continue the business of the employer," it is clear that the business justification for the employer's action is exactly the same as the business justification for simply hiring permanent replacements; by hypothesis he cannot obtain suitable replacements without granting superseniority. But the disutility of the employer's

33. Id. at 226.
actions is greater because the adverse effects on employees' exercising Section 7 rights are increased. Even if reinstated, strikers are liable to lay-off before their replacements and therefore have more reason to be alarmed about exercise of Section 7 rights. Such increased alarm results in the disutility of the employer's actions outweighing its utility.

Thus, we see that knowledge of the weighing process and of the measurable elements of social utility and disutility of employer actions provides a rational basis for distinguishing between legal and illegal employer discriminatory actions. This knowledge also provides a rational basis for the decision of future cases. For example, it provides a means for determining whether lockouts intended "merely to bring about settlement of a labor dispute on favorable terms" should be held violative of Section 8(a)(3).

In *American Ship Building Co. v. NLRB*, the Supreme Court held that a lockout "solely as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached" was not an unfair labor practice in violation of Section 8(a)(3). Although the opinion contains some broader language, the Court expressly limited its holding to bargaining lockouts "after a bargaining impasse has been reached" and "intimate[d] no view whatever as to the consequences which would follow had the employer replaced

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34. This was the explicit basis for the decision in *Erie Resistor*, holding the grant of super-seniority to replacements for economic strikers an unfair labor practice under Section 8(a)(3): "Under the decision in . . . [Mackay] an employer may operate his plant during a strike and at its conclusion need not discharge those who worked during the strike in order to make way for returning strikers. It may be, as the Court of Appeals said, that 'such a replacement policy is obviously discriminatory and may tend to discourage union membership.' But Mackay did not deal with super-seniority, with its effects upon all strikers, whether replaced or not, or with its powerful impact upon a strike itself. Because the employer's interest must be deemed to outweigh the damage to concerted activities caused by permanently replacing strikers does not mean it also outweighs the far greater encroachment resulting from super-seniority in addition to permanent replacement." 373 U.S. at 232.


38. Id. at 308.

39. Id. at 313.

40. Id. at 315.
its employees with permanent replacements or even temporary help.\textsuperscript{41}

The alarm caused by a post-impasse lockout is that the employees will suffer a temporary loss of earnings if they exercise their Section 7 right to adhere to the bargaining demands of their union. In \textit{American Ship Building}, the Court held, in effect, that the creation of such alarm did not outweigh the business justification for the employer's action.

What of lockouts in other contexts, e.g., pre-impasse, post-impasse with temporary replacements, and post-impasse with permanent replacements? The employer's business justification for all of these lockouts is the same as its business justification for the post-impasse lockout without replacements, i.e., to obtain a "bargaining victory,"\textsuperscript{42} "a settlement of a labor dispute on favorable terms . . . ."\textsuperscript{43} This is certainly of substantial importance to the efficient operation of an enterprise because of its impact on competitive position and profitability. Its social utility is therefore substantial.

What of the employee alarm generated among employees with respect to their exercise of Section 7 rights in pre-impasse contexts? Unlike the employer's business justification which remains the same, the alarm varies with the context. A pre-impasse lockout creates alarm about continuing to engage in collective bargaining once the employer has stated his position. For if an employer is free to employ a pre-impasse lockout, the mere fact that negotiations are continuing after the employer stated its position gives rise to the apprehension that its employees will suffer a temporary loss of earnings if they exercise their Section 7 rights to continue negotiating about the employer's proposals instead of accepting them.\textsuperscript{44}

The alarm created by a post-impasse lockout combined with

\textsuperscript{41} Id. at 308 n. 8.
\textsuperscript{42} Id. at 323 (White, J., concurring).
\textsuperscript{43} Id. at 313.
\textsuperscript{44} The Board has held that pre-impasse lockouts are not violative of Section 8(a)(3). Unfortunately, the Board's decision was not based on any analysis of the different extents to which pre-impasse and post-impasse lockouts interfere with the exercise of employee rights that the Act is intended to protect. Instead, the Board based its decision on the verbal formula used by the Court in \textit{American Ship Building}, i.e., that the lockout was "neither inherently prejudicial to union interests nor devoid of significant economic justification." See Darling & Co., 171 N.L.R.B. 801 (1968), aff'd on other grounds sub nom., Lane v. NLRB, 418 F.2d 1208 (D.C. Cir. 1969).
permanent replacements is even greater. Employees have every reason to fear permanent loss of their jobs (not just a temporary loss of earnings) if they exercise their Section 7 rights to adhere to the bargaining demands made by their union. Further, they may fear that any bargaining may reach an impasse and empower their employer to permanently replace them.

Somewhere in between is the alarm caused by a post-impasse lockout with temporary replacements. The employee fears not only temporary loss of earnings but that the tenure of the temporary replacements may ripen into permanence if the employees continue to adhere to the bargaining demands made by their union.45

This examination of the extent of interference with Section 7 rights resulting from different lockouts indicates that the alarm resulting from either pre-impasse lockouts or post-impasse lockouts with temporary or permanent replacements exceeds the alarm created by post-impasse lockouts without replacements. Hence, the social disutility of the former ones is greater than that of a post-impasse lockout without replacements. Faced with pre-impasse lockouts, or post-impasse lockouts coupled with replacement, whether permanent or temporary, we submit that the Board should weigh the impact of employee alarm about the exercise of Section 7 rights in each of these instances against the employer's business justification in order to determine their lawfulness under Section 8(a)(3).46

45. In NLRB v. Brown, 380 U.S. 278 (1965), the Court held that a post-impasse lockout with temporary replacements did not violate Section 8(a)(3). In that case, the extent of the social utility of the employers' conduct was increased since it was measured not only by the business justification of obtaining a favorable settlement of a labor dispute, but also by the business justification of preserving the integrity of a multi-employer bargaining unit. The case is therefore not a holding on the lawfulness of a post-impasse lockout with temporary employee replacements in situations where this additional business justification is not present. Such a lockout is a Section 8(a)(3) unfair labor practice. Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir. 1971). But cf. Note, 50 Tex. L. Rev. 552, 558 (1972).

46. Cf. Meltzer, The Lockout Cases, 1965 Sup. Cr. Rev. 87, 103-05. This weighing process has long been applied to determine violations of Section 8(a)(1). See Central Hardware Co. v. NLRB, 22 S. Ct. 2238, 2241 (1972); Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 269 (1965) ("[T]he only time the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated."); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 797-98 (1945). The significance of the fact that the same test is used to determine whether employer conduct is an undue interference with exercise of Section 7 rights and therefore violative of Section 8(a)(1) or an undue discouragement of membership in
E. The Proposed Rationale and the Prior Section 8(a)(3) Jurisprudence

The courts have explicitly recognized that the weighing process must be employed in some cases in which a Section 8(a)(3) violation is charged. In NLRB v. Great Dane Trailers, Inc., the Chief Justice Warren, writing for seven members of the Court, divided employer conduct into two categories. One category contained employer conduct "inherently destructive of employee interests"; the other, conduct from which "the resulting harm to employee rights is . . . comparatively slight . . ." The Court made it clear that when employer conduct is in the "inherently destructive" category and there is "no proof of an antiunion motivation," the weighing process is to be employed. In such cases "the Board may . . . exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy" and could hold such conduct violative of Section 8(a)(3).

However, whether the weighing process is to be used in cases in the "comparatively slight" category was left unclear, since the Court said, "if the adverse effect of the discriminatory conduct on employee rights is 'comparatively slight,' an antiunion motivation must be proved to sustain the charge if the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." The Court did not indicate which business justifications are to be considered "legitimate and substantial."

Does finding that an employer's business justification was "legitimate and substantial" require a prior determination that the utility of the employer's actions outweighs its disutility? The difficulty with an affirmative response is that it eliminates any reason for distinguishing between the "inherently destructive" and "comparatively slight" categories because the rules applicable to the two categories become identical. Whether an employer's discriminatory conduct is categorized as "inherently

\[\text{any labor organization for the purposes of Section 8(a)(3) is discussed in Section III of this article dealing with the relationship between Section 8(a)(3) and 8(a)(1). See pp. 51-59 infra.}\]
destructive" or "comparatively slight," whenever there is no proof of employer antiunion animus, its legality under Section 8(a)(3) would be determined by whether the utility of the business justification for the conduct outweighed the disutility of the interference with employee rights resulting from the conduct.

The Court apparently adopted an affirmative response in NLRB v. Fleetwood Trailer Co.,\(^{51}\) when it ignored the distinction between "inherently destructive" and "comparatively slight" employer conduct and empowered the Board to employ the weighing process whenever "the employer's conduct 'could have adversely affected employee rights to some extent.'"\(^{52}\)

In Fleetwood Trailer the employer had hired new employees instead of reinstating economic strikers after the end of a strike because no jobs were available on the date that the strikers applied for reinstatement. When jobs later became available, the new employees were hired because they had applied for them before the strikers. The Court said:

"If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act . . . . Under §§ 8(a)(1) and (3) . . . it is an unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to 'legitimate and substantial business justifications,' he is guilty of an unfair labor practice. NLRB v. Great Dane Trailers, 388 U.S. 26, 34 (1967)."\(^{53}\)

The burden of proving justification was placed on the employer, and the Court held that it is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."\(^{54}\)

This language dispenses with any need to characterize employer conduct that interferes with the exercise of Section 7

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\(^{51}\) 389 U.S. 375 (1967).

\(^{52}\) Id. at 380.

\(^{53}\) Id. at 378.

rights as either "inherently destructive" or "comparatively slight." In all cases when discriminatory employer conduct interferes with the exercise of Section 7 rights it is an unfair labor practice under Section 8(a) (3) "unless the employer . . . can show that his action was due to 'legitimate and substantial business justification'. . . ."\(^5\) Whether or not the employer's justification is "legitimate and substantial" is primarily for the Board to determine by doing what the Court previously in Great Dane had said the Board was empowered to do only when the employer conduct was "inherently destructive of employee interests"; i.e., by striking the "proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."\(^6\)

While the Board and the courts of appeal have continued to be bemused by the "inherently destructive"-"comparatively slight" dichotomy,\(^7\) Great Dane and Fleetwood Trailers have been read as authorizing the Board to weigh business justification against interference with employee rights when the employer was not motivated by antiunion animus, even in the "comparatively slight" situations. Thus, the Court of Appeals for the District of Columbia has said:

"The Court, therefore, has established two categories of Sections 8(a) (1) and 8(a) (3) violations which do not require proof of antiunion animus. First, employer conduct which is 'inherently destructive' of employee rights is an unfair labor practice whether or not such conduct was based upon important business considerations. Second, employer conduct which has only a 'comparatively slight' impact on the rights of employees will also be held an unfair labor practice unless the employer comes forward with evidence of 'legitimate and substantial' reasons to justify his conduct. Perhaps the most significant part of this test is the Court's requirement that the reasons advanced be substantial. Apparently, the

\(^6\) As for the absence of proof of antiunion motivation, if the "employer . . . has not shown 'legitimate and substantial business justifications,' the conduct constitutes an unfair labor practice without reference to intent." Id. at 380.
employer must demonstrate that his interest in pursuing the conduct at least balances the harm inflicted on the rights of the employees. Otherwise, the Court will find that an unfair labor practice has been made out with no proof of an anti-union motive. Only if the employer meets his burden will the Court require proof of an antiunion animus."

Thus, there is substantial authority that in all cases in which there is no proof of employer antiunion animus, whether in the "inherently destructive" or "comparatively slight" category, the weighing process should be used.

We believe that our proposed rationale is equally applicable to cases in which an employer's conduct is motivated by anti-union animus. Whatever the employer's motive for discriminatory conduct which discourages exercise of Section 7 rights, such conduct violates Section 8(a) (3) only when it is undue. Whether it is undue or not is determined by whether the social utility of the business justification for the employer's conduct (measured by the extent to which it contributes to management's ability to make the enterprise efficient and profitable) outweighs the social disutility of the interference with employee exercise of Section 7 rights (measured by the extent to which the conduct tends to increase employee alarm about exercise of Section 7 rights and danger of future employer interference). Thus viewed, employer antiunion animus is neither a "fictive formality" nor an "added element" that is required to establish a violation of Section 8(a) (3). It is but one factor to be weighed in the determination of whether a particular discouragement of employee exercise of Section 7 rights resulting from "discrimination" is undue and thus violative of Section 8(a) (3).

58. Lane v. NLRB, 418 F.2d 1208, 1211 (D.C. Cir. 1969). Accord, Inland Trucking Co. v. NLRB, 440 F.2d 562 (7th Cir. 1971); NLRB v. Hudson Transit Lines, Inc., 429 F.2d 1223 (3d Cir. 1970). (The Court of Appeals in Hudson Transit used the Great Dane-Fleetwood Trailer analysis in a Section 8(a)(1) case and upheld the Board's finding "that the adverse impact of the economies clearly outweighed the business justification for the economies offered by the employer," 429 F.2d at 1232.) See NLRB v. Alamo Express, Inc., 430 F.2d 1032, 1036 (5th Cir. 1970); NLRB v. Gotham Industries, 406 F.2d 1306 (1st Cir. 1969). In his dissent in Great Dane, Justice Harlan recognized that the decision might be interpreted in this way. See 388 U.S. at 39.


As yet, neither the Board nor the courts have recognized antiunion animus as only one factor in the weighing process. Instead, the Supreme Court has said that "the added element of unlawful intent" is "also required" along with "both discrimination and a resulting discouragement of union membership" under Section 8(a)(3); and that "to find a violation of Section 8(a)(3) . . . the Board must find that the employer acted for a proscribed purpose" and that "finding of a violation normally turns on whether the discriminatory conduct was motivated by an anti-union purpose." Furthermore, other statements are to the effect that given discrimination and resulting discouragement, anti-union animus is itself a sufficient basis for finding a violation of Section 8(a)(3). Indeed, the Court so stated in NLRB v. Brown:

"[W]here, as here, the tendency to discourage union membership is comparatively slight, and the employers' conduct is reasonably adapted to achieve legitimate business ends or to deal with business exigencies, we enter into an area where the improper motivation of the employers must be established by independent evidence. When so established, antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice . . . . Erie Resistor Corp., supra, at 227, and cases there cited."

Given the importance attached to employer antiunion animus in these statements, it is hardly surprising that the Board and the courts have concluded that when an employer discourages membership in a labor organization by discrimination, a violation of Section 8(a)(3) is established ipso facto once it is found that the "employer was actuated by a desire to discourage membership . . . ." For example, the Supreme Court in American Ship Building rested its conclusion that a post-impasse lockout was not violative of Section 8(a)(3) on the fact that "the intention proven [was] merely to bring about a settlement of a labor dispute on favorable terms . . . ." It is clear that if the Court had found "that the employer was actuated by a desire to discourage

68. Id.
membership in the union as distinguished from a desire to affect the outcome of the particular negotiations in which it was involved," it would have held the post-impasse lockout violative of Section 8(a)(3) without any further inquiry. And, in one case, the Fifth Circuit reasoned that it need not determine whether the employer's justification for discriminatory conduct "would qualify as a 'substantial and legitimate business end,' . . . sufficient to defeat an unfair labor practice charge in the absence of an affirmative showing of improper intent for we hold that substantial evidence supports the Board's finding of an unlawful motivation." The court assumed that an unfair labor practice violative of Section 8(a)(3) had been established solely because the employer's discriminatory conduct was motivated by anti-union animus.

However, this conclusion and the statements on which it rests are incorrect. It is clear that the law is to the contrary; that given both discrimination and discouragement, employer antiunion animus is not per se a sufficient basis for finding that discriminatory conduct is violative of Section 8(a)(3). The Supreme Court so held in Textile Workers Union of America v. Darlington Manufacturing Co. 71

Discrimination and discouragement of employee exercise of Section 7 rights were both present in Darlington. The employer permanently terminated all operations at one of its plants because a majority of the employees in that plant had voted in a Board election for union representation. The effect was to discourage employees both in that plant and in the employer's other plants from exercising Section 7 rights in the future. It was found as a fact that the employer's actions were motivated by antiunion animus. 72

Assuming first "that Darlington was to be regarded as an

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69. Id.
71. 380 U.S. 263 (1965). See U.S. Stamping Co., 5 N.L.R.B. 172, 186 (1938): "We believe the evidence clearly establishes the fact that Riggs and Bane were relieved of their duties as watchmen because the respondent feared they were too sympathetic towards the Union's cause to be trustworthy watchmen. However, we do not believe an employer, who during a strike relieved a watchman from his duties as such for this reason, has engaged in an unfair labor practice within the meaning of § 8(3) of the Act."
72. 380 U.S. at 276.
independent unrelated employer," the Court held "that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice." It is therefore clear that in the case of complete liquidation of a business, antiunion animus is not sufficient of itself to make that act an unfair labor practice under Section 8(a)(3).

We believe that the actual (though unstated) basis for the Court's ruling was its conclusion that the social utility of an employer's power to liquidate its business, even if motivated by a desire to destroy its employees' Section 7 rights outweighs the social disutility of interfering with employee exercise of Section 7 rights. This belief is based on the apparent respect with which the Court viewed an employer's power to completely liquidate its business and the sheer inadequacy of the Court's stated reasons for its ruling.

The Court's high opinion of this management power is evidenced by the fact that even a partial closing was viewed by the Court as "an area that trenches so closely upon otherwise legitimate employer prerogatives" that protection of the rights guaranteed by the Act to the employees against whom the discrimination was practiced was made to depend on the employer's motive with respect to exercise of Section 7 rights by other employees. It is also apparent from the Court's statement that:

"A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act."

Thus, the Court considered the "innovation" so "startling" that although it explicitly recognized that an employer's decision "to terminate his business . . . if discriminatorily motivated, is encompassed within the literal language of § 8(a)(3)," it still required "the clearest manifestation of legislative intent" to find

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73. Id. at 270.  
74. Id. at 273-74.  
75. Id. at 276.  
76. Id. at 270.  
77. Id. at 269.  
78. Id. at 270.
it violative of that section. In so doing, the Court inverted the usual process of statutory interpretation that requires legislative history to show "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers."79

And, the inadequacy of the stated reasons for the Court's decision is obvious upon an examination of those reasons. First, the Court relied on the fact that it could not find the "clearest manifestation of legislative intent or unequivocal judicial precedent"80 to support a ruling that the total shutdown of a business motivated by antiunion animus and resulting in discouragement of employee exercise of Section 7 rights was violative of Section 8(a)(3). As shown above, given the admitted fact that such discriminatory action was "within the literal language of § 8(a)(3)," accepted canons of statutory interpretation required that if it was to be excepted from proscription by that section, legislative history showing that it was "not within the statute, because not within its spirit, nor within the intention of its makers"81 was required. No such showing was even attempted.82

79. See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 619 (1967) (quoting from Holy Trinity Church v. United States, 143 U.S. 457, 459 (1892)); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 184, 217 (1967). The criticism that Justice Harlan directed at the Court in dissenting from its decision in another case is at least as applicable here: "In the light of these assertions, it is indeed remarkable that the Court not only substantially acknowledges that the statutory language does not itself support this distinction . . . but cites no report of Congress, no statement of a legislator, not even the view of any of the many commentators in the area in any way casting doubt on the applicability of § 8(b)(4)(ii)(B) to picketing of the kind involved here." NLRB v. Fruit & Vegetable Packers Local 760, 377 U.S. 58, 83-84 (1964).
82. There is some legislative history supporting the Court's holding that a discriminatory total shutdown of a business is not an unfair labor practice. During the Senate debate on the Wagner Act, Senator Walsh, Chairman of the Senate Committee on Education & Labor and floor manager of the bill, said: "Mr. President, there are some fundamental rights an employer has, just as there are rights an employee has. No one can compel an employer to keep his factory open. . . . "No one can keep an employer from closing down his factory and putting thousands of men and women on the street. So in dealing with this bill we have to recognize those fundamental things, and we have not gone into that domain. All we do is to remove the barriers that have kept employees away from their employers, which have prevented collective bargaining, which have resulted in strikes without any attempt to negotiate. All we have done is to promote the orderly processes of collective bargaining." 79 Cong. Rec. 7673 (1935).
Second, the Court distinguished the discriminatory total shutdown of a business from admittedly unlawful employer conduct like a runaway shop on the ground that "a complete liquidation of a business yields no . . . future benefit for the employer . . . ."\(^8\) Without such a future benefit, the Court indicated that:

"The personal satisfaction that such an employer may derive from standing on his beliefs and the mere possibility that other employers will follow his example are surely too remote to be considered dangers at which the labor statutes were aimed."\(^8\)

This argument lacks substance. Remote or not, when a discriminatory total shutdown of a business occurs, it is a massive affront to the declared:

"[P]olicy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing . . . ."\(^8\)

Indeed, the Court itself recognized the invalidity of the argument of remoteness when, in a footnote to its "surely too remote" sentence, it indicated that an unfair labor practice would be made out in an even more remote situation by saying, "different considerations would arise were it made to appear that the closing employer was acting pursuant to some arrangement or understanding with other employers to discourage employee organizational activities in their businesses."\(^8\)

In any event, an employer can expect future benefit from a discriminatory total shutdown in the form of a highly effective deterrent to employee exercise of Section 7 rights in any enterprise he may thereafter control. Furthermore, the Court's holding that such a shutdown is not an unfair labor practice creates the far from remote possibility that the stated policies of the Act

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84. Id.
86. 380 U.S. at 272 n. 15 (emphasis added).
will be frustrated by employer threats to employees that they will lose their livelihoods if they exercise the rights guaranteed them by the Act. The Court states that such threats in the compelling form of an employer's "announcing a decision to close already reached by the board of directors or other management authority empowered to make such a decision" are a lawful means to "discourage the employees from voting for the union, and thus his decision may not have to be implemented."87 Ironically, the threat to close a plant that is made in a less compelling form continues to be "a basic violation of § 8(a) (1)."88 Finally, the fallacious argument that because the Act does not prohibit "employees to quit their employment en masse, even if motivated by a desire to ruin the employer," "[t]he employer's right to go out of business is no different,"89 requires only the obvious answer that the fact that the Act does not prohibit all conceivable employee acts damaging to an employer or, for that matter, all conceivable employer acts damaging to employees, is totally irrelevant to the issue of whether it does prohibit the specific employer act of a discriminatory total shutdown.

We therefore believe that rather than these inadequate stated reasons for the Court's decision in the Darlington case, the real basis for that decision was the great importance that the Court attached to management's power to completely liquidate a business. Apparently, the Court decided that the utility of this management power outweighed its disutility even when motivated by a desire to discourage employee exercise of Section 7 rights.

Thus, Darlington is authority for the proposition that even when employer discriminatory conduct that discourages employee exercise of Section 7 rights is motivated by antiunion animus, it is violative of Section 8(a) (3) only when the discouragement is undue, i.e., when the disutility outweighs the utility.90 As we have seen, the same test is used to determine whether employer discriminatory conduct that is not motivated by antiunion animus is violative of Section 8(a) (3). It is therefore our belief that, irrespective of employer antiunion animus, whether discriminatory conduct that discourages employee exercise of

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87. Id. at 274 n. 20.
89. 380 U.S. at 272.
90. See U.S. Stamping Co., note 71 supra.
Section 7 rights is violative of Section 8(a)(3) is determined by weighing the social utility of the conduct against its social disutility.

But this does not mean that employer antiunion animus is inconsequential. On the contrary, in this weighing process employer antiunion animus is of great significance. When an employer is motivated by antiunion animus, the danger of interference with and the alarm that employees will feel about the exercise of Section 7 rights is always increased. When an employer is thus motivated, the danger and alarm extend not only to the particular mode of exercising Section 7 rights that caused the employer to treat its employees adversely but to any exercise of Section 7 rights. The fact that the employer was motivated by antiunion animus puts employees on notice that the particular mode of exercising Section 7 rights that caused their employer to treat them adversely was merely the occasion for the adverse treatment. Since the employer is motivated by antiunion animus, any exercise of Section 7 rights is just as likely to provide it with an equally appropriate occasion. Thus, when an employer's discriminatory conduct is motivated by antiunion animus, employee alarm about exercise of Section 7 rights and the interference with exercise of those rights, extends to any exercise of Section 7 rights.

Although we are not able to subject alarm to precise measurement, there is a clearly perceptible quantitative difference in the extent of alarm about exercise of Section 7 rights experienced by employees when their employer's discriminatory conduct is motivated by antiunion animus and when it is not. For example, the alarm experienced by the employees affected by the employer's discriminatory conduct in Republic Aviation Corp. v. NLRB, in which the employer was not motivated by antiunion animus, was less than the alarm experienced by the employees affected by the employer's discriminatory conduct in the J. P. Stevens v. NLRB cases, in which the employer was

92. 324 U.S. 793 (1945).
motivated by antiunion animus. For, while the Republic Aviation employees had reason to be alarmed only about union solicitation on plant premises during free time, those of J. P. Stevens & Co. had reason to be alarmed about any indication of interest in self-organization by themselves or even by members of their families.94

Since “discrimination” accompanied by antiunion animus results in danger of interference with and employee alarm about any exercise of Section 7 rights, in almost all cases its presence is sufficient to make the disutility of the employer’s conduct outweigh its utility. Indeed, the effect of employer antiunion animus is so great that it will cause the disutility to outweigh the utility even when the balance would have been struck differently if the employer had not been motivated by antiunion animus.95 For example, an employer that is not motivated by antiunion animus may lawfully deny to its employees a productivity bonus even if that denial is caused by the employees having engaged in an economic strike which caused the employees' reduced productivity. Such a denial is “discrimination” since it is employer adverse treatment of employees caused by employee exercise of a Section 7 right, the right to strike. But if the same denial caused by the same economic strike was motivated by antiunion animus, it is an unfair labor practice violative of Section 8(a)(3).96 Similarly, the Court has indicated that even an employer’s right to hire per-


94 See the treatment accorded Jess Cudd because of his son’s union activities. See 157 N.L.R.B. 869, 905-07 and 380 F.2d 292.

95. Wells, Inc. v. NLRB, 162 F.2d 457 (9th Cir. 1947). In this case, the employer’s discharge of a supervisor was held to be violative of Section 8(a)(3) solely because the employer was motivated by antiunion animus. Both the Board and the court recognized that the social disutility of a discharge for this reason was the alarm that it caused other employees to feel about the exercise of Section 7 rights. Thus, in upholding the Board’s finding that the motive for the discharge was “an attitude of hostility of Wells’ part toward the organizational activities of the Machinists,” the court quoted the following from the Board’s decision: “That a discharge of an active adherent of a union under circumstances which suggest no motivation other than hostility to the union, operates as a warning to all employees of the danger attached to adherence to the union, hence generally discourages union membership, can not be denied.” 162 F.2d at 459. See NLRB v. Exchange Parts Co., 375 U.S. 405 (1864); J.P. Stevens & Co. v. NLRB, 461 F.2d 490 (4th Cir. 1972).

96. Pittsburgh-Des Moines Steel Co. v. NLRB, 284 F.2d 74 (9th Cir. 1960); cf. Shell Oil Co., 77 N.L.R.B. 1306 (1948).
manent replacements for economic strikers depends on "absence of proof of unlawful motivation."\textsuperscript{97}

F. The Proposed Rationale Assures Optimal Achievement of Congressional Intent

The following discussion of Section 8(a)(3) appears in the House Report:

"Nothing in this subsection prohibits [permits?] interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination."\textsuperscript{98}

This reveals two Congressional purposes: to prevent employers from "interfer[ing] with the exercise by employees of their right to organize and choose representatives," but also to avoid undue restriction of employers' powers to manage their enterprises\textsuperscript{99} shown by the express disclaimer of any intent to interfere "with the normal exercise of the right of employers to select their employees or to discharge them."\textsuperscript{100} In Phelps Dodge Corp.

\textsuperscript{97} See NLRB v. Brown, 380 U.S. 278, 283 (1965). It appears that the Board would not ascribe such significance to an employer's "unlawful motivation" in hiring permanent replacements for economic strikers. See Hot Shoppes, Inc., 146 N.L.R.B. 802 (1964). In its 29th Annual Report, the Board stated that in Hot Shoppes, "the Board disagreed with the premise that an employer may replace economic strikers only if it is shown that he acted to preserve efficient operation of his business." In arriving at its conclusion, the Board construed the Supreme Court's decision in Mackay Radio & Telegraph Co., and cases thereafter, as holding that "the motive for such replacements is immaterial, absent evidence of an independent unlawful purpose." 29 NLRB ANN. REP. 72 (1965) (emphasis added).


v. NLRB\textsuperscript{101} and American Ship Building Co. v. NLRB,\textsuperscript{102} the Court gave explicit recognition to this purpose when it said:

"Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise."

And:

"[W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e.g., ... Mackay Radio & Telegraph Co., 304 U.S. 333, 347. Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See Textile Workers v. Darlington Mfg. Co., ante, p. 263."\textsuperscript{104}

In order to achieve both Congressional purposes, the second—avoidance of undue restriction of employers' powers to manage their enterprises—must act as a limiting qualification on the first—prevention of employer interference with employee exercise of Section 7 rights. This requires a determination of when outlawing employer conduct that interferes with employee exercise of Section 7 rights will result in an undue restriction on employer management power. Such a determination is to be made only by weighing the societal value of preventing the interference with employee exercise of Section 7 rights resulting from the employer conduct against the importance to society of avoiding the restriction on employer management power that would result if that conduct were outlawed, i.e., by use of the weighing process described herein.

To neglect using the weighing process ignores the purposes that Congress sought to achieve in enacting Section 8(a)(3). To substitute other considerations, e.g., presence of antiunion animus, for the weighing process must serve purposes other than those Congress intended to further. Neither Constitutional

\textsuperscript{101} 313 U.S. 177 (1944).
\textsuperscript{102} 380 U.S. 300 (1965).
\textsuperscript{103} Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 182 (1941).
requirements nor other Congressional priorities justifying any such disregard for achieving the purposes of Section 8(a)(3)—prevention of employer interference with employee exercise of Section 7 rights and avoidance of undue restriction on employers' management powers.

The weighing process is the only means to carry out the policies Congress sought to achieve when it enacted Section 8(a)(3). When the weighing process is used, employer discriminatory conduct is held to violate Section 8(a)(3) if it constitutes "discrimination," and such discrimination results in undue "encouragement or discourage[ment] of membership in a labor organization." Inquiry into whether an employer was motivated by antiunion animus is not required. If the employer was so motivated, its antiunion animus is but one factor to be weighed. Thus, whether an employer was motivated by antiunion animus or not, use of the weighing process assures optimal achievement of the congressional purposes, because employer conduct is held to violate Section 8(a)(3) only when the social disutility of the interference with employee exercise of Section 7 rights outweighs the social utility of the business justification for the employer's conduct.

G. Importance of Using the Weighing Process

On the whole, had the weighing process been avowedly used in the decisions construing Section 8(a)(3), the results would not differ from those reached in the cases. We saw this in analyzing the rules dealing with employer treatment of employees who participate in strikes.

Indeed, at times, the Supreme Court has stated that the weighing process should be employed in deciding whether employer conduct violates Section 8(a)(3). For example:

"If the conduct in question falls within this 'inherently destructive' category, the employer has the burden of explaining away, justifying or characterizing 'his actions as

105. See NLRB v. Fruit & Vegetable Packers, Local 760, 377 U.S. 58, 76 (1964) (Black, J., concurring).
108. See pp. 8-10 supra.
something different than they appear on their face,' and if he fails, 'an unfair labor practice charge is made out.' Id., \[Erie Resistor\] at 228. And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy. Id., at 229."\[109\]

But the Court has insisted that antiunion animus also be found. Thus, in NLRB v. Brown, the Court said:

"Under that section [8(a)(3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary."\[110\]

Even in Great Dane, in which the Court stated that the weighing process is to be used in the "inherently destructive" category when the employer succeeds in proving that he was not in fact motivated by antiunion animus, the Board must apparently "nevertheless draw an inference of improper motive from the conduct itself . . . ."\[111\] before using the weighing process. Similarly, in NLRB v. Erie Resistor Corp., the Court stated that the employer's intent or motive to discriminate or to interfere with union rights was "necessary for an unfair labor practice,"\[112\] and indicated that the weighing process was a means of deducing such employer "intent . . . founded upon the inherently discriminatory or destructive nature of the conduct itself."\[113\]

As is to be expected, the Board formulation follows the Court. The Board states:

"Section 8(a)(3) prohibits an employer from discriminating against employees 'in regard to hire or tenure of employment
or any term or condition of employment' for the purpose of encouraging or discouraging membership in any labor organization."\(^{114}\)

Regardless of the similarity of results in most cases, with or without explicit use of the weighing process, certain undesirable consequences result from the formulations that state that employer antiunion animus is an element of a Section 8(a)(3) violation. One is the necessity of a legal fiction; another is the use of a basis for decision that is not rationally related to the purposes of Section 8(a)(3).

The need, in some cases, for a legal fiction of employer antiunion animus was exemplified in \textit{Erie Resistor} and approved in \textit{Great Dane}. \textit{Erie Resistor} held that the grant of superseniority to replacements for economic strikers violates Section 8(a)(3) even if the employer acts without antiunion animus and "'SOLELY to protect and continue'" its business during an economic strike.\(^{115}\) The Board and Court also held that an employer who grants superseniority to replacements for economic strikers may not introduce evidence that it was not motivated by antiunion animus. Despite these holdings, the Court stated that antiunion animus was a required element of a Section 8(a)(3) unfair labor practice. It found this element, "intent or motive to discriminate or to interfere with union rights," present saying that it could be "founded upon the inherently discriminatory or destructive nature of the conduct itself."\(^{116}\) In \textit{Great Dane}, the Court indicated that when an employer's discriminatory conduct fell within a category of "inherently destructive," there was nothing the

\(^{114}\) See, e.g., 34 \textit{NLRB ANN. REP.} 74 (1970) (emphasis added). One must go back to the 14th Annual Report for fiscal 1949 to find an Annual Report formulation of the prohibition of Section 8(a)(3) that avoids indicating that employer antiunion animus is an element of the violation. 14 \textit{NLRB ANN. REP.} 59 (1949) reads: "Section 8(a)(3) of the Act, as amended makes it an unfair labor practice for an employer to encourage or discourage membership in any labor organization by discriminating in regard to hire or tenure of employment or any term or condition of employment.'"

\(^{115}\) 373 U.S. 221, 226.

\(^{116}\) Id. at 227, 228. In \textit{American Ship Building} the fiction is carried to the point of denying the facts upon which the holding in \textit{Erie Resistor} was based. The case was based on an assumption that the employer's purpose was not antiunion animus and that this fact did not prevent its conduct from being violative of Section 8(a)(3). Nevertheless, the Court in \textit{American Ship Building} cites \textit{Erie Resistor} as a case in which "an inference of unlawful intention [is] so compelling that it is justifiable to disbelieve the employer's protestations of innocent purpose." 380 U.S. at 311-12.
employer could do to avoid a finding of antiunion animus: "Even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself . . ."117 Thus by operation of a fiction, antiunion animus is held to be present even if the employer proves its absence or is precluded from offering such proof.118

As with any other fiction, this leads to disrespect for the law and the agencies that enforce it, since persons are held to have violated the law on the basis of facts which do not exist or which are presumed to exist without their being given an opportunity to disprove them.119

Furthermore, the Supreme Court has not as yet provided a test for distinguishing, in advance, those cases in which the fiction is to be employed, from those in which it is not. Does the fiction apply to a pre-impasse lockout or to a case involving a post-impasse lockout with hiring of permanent replacements? To say that the fiction applies if the employer's conduct is "inherently destructive of employee interests"120 explains nothing because all discriminatory employer conduct that discourages employee exercise of Section 7 rights is "inherently destructive of employee interests," yet the fiction is not applied in all cases in which such conduct is proven. Even if we interpret "inherently destructive of employee interests" as meaning creating "serious" interferences with employee exercise of Section 7 rights, there is still no reliable basis for applying the fiction. Permanent replacement of economic strikers creates a "serious" interference with employee exercise of the Section 7 right to strike, yet, the fiction is not applied to such circumstances.121

117. 388 U.S. at 33.
118. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 29 (1967). See also Justice Black's dissent in Radio Officers: "[H]ere there is no finding that Gaynor acted in order to encourage union membership. Indeed, the Board concedes that Gaynor had no such purpose, and this concession is fully supported by the evidence." 347 U.S. at 58.
Thus, the availability of fictional employer antiunion animus when there is in fact no such animus, contributes to uncertainty of when employer conduct will be held violative of Section 8(a) (3).

Failure to use the weighing process also causes the courts and the Board to disregard the Congressional intent behind Section 8(a) (3). For example, in American Ship Building, once the Supreme Court decided that a post-impasse lockout did not have "the natural tendency . . . severely to discourage union membership while serving no significant employer interest," it made no effort to determine what holding on the legality of post-impasse lockouts would best achieve the purposes of Section 8(a) (3). Instead, the Court held that the legality of a post-impasse lockout hinged on whether "an intention to discourage union membership or otherwise discriminate against the union," i.e., antiunion animus, was present, and concluded that where it was not present a post-impasse lockout was not violative of Section 8(a) (3). The Court did not indicate in what way the presence or absence of antiunion animus related to the purposes of Section 8(a) (3). Similarly, in Darling & Co., a Board majority held that having found that a pre-impasse lockout was "neither inherently prejudicial to union interests nor devoid of significant economic justification," the legality of such conduct depended upon whether the employer intended "to discourage union activity or to avoid its bargaining obligation." Again, no effort was made to square this holding with the purpose of Section 8(a) (3), nor was any indication given of how employer animus was relevant to achieving the purposes of Section 8(a) (3) when an employer engaged in a pre-impasse lockout.

In cases involving a partial shutdown motivated by antiunion animus, this neglect of the purposes of Section 8(a) (3) (prevention of employer interference with employee exercise of Section 7 rights and avoidance of undue restrictions on employer
management power) has resulted in a rule which is not rationally related to achieving those purposes and which has had tragic consequences on employees who attempt to exercise the right to self-organization guaranteed them by the Act.127 Darlington128 involved both a partial and a total shutdown of a business. Regarding a total shutdown, we earlier concluded that the actual though unstated basis for the Court's decision was its conclusion that the social utility of the employer's power to completely liquidate a business outweighed the social disutility of the interference with employee exercise of Section 7 rights resulting from the exercise of this employer power even when the employer was motivated by antiunion animus.129 Though this decision has been questioned,130 it is clear that it relates to the purposes of Section 8(a)(3). The social utility of the employer's power is measured by the extent to which it contributes to management's ability to make the enterprise efficient and profitable. In this case it is very great. An employer decision to completely liquidate a business denotes that the employer is no longer interested in investing its capital and its management efforts in the enterprise. Without such interest there is no incentive for management to exercise its abilities to make the enterprise either efficient or profitable. However, the disutility of the interference resulting from this decision, particularly when motivated by antiunion animus, it also substantial. This is measured by the danger that other employers will act similarly and by the alarm that employees will tend to feel about any exercise of Section 7 rights at that time or in the future. That alarm is somewhat reduced by the realization that for the employer to act on its decision will probably entail financial sacrifice that may well be substantial. And this factor of financial sacrifice reduces both the danger that other employers will pursue the same course of action and the alarm that employees of other employers are likely to experience on learning of the employer's decision. In determining that the social utility of the employer's power to entirely shut down outweighed the social disutility of the inter-

129. See pp. 18-22 supra.
ference with employee exercise of Section 7 rights, the Court's decision relates to the purposes of Section 8(a)(3) by resolving the tension between protection of employee exercise of Section 7 rights and prevention of undue interference with the employer management powers in favor of management powers. Indeed, legislative history indicates that this resolution of the tension may well be in accord with Congressional intent.\footnote{131}

However, analysis of the Court's decision as to the legality of a partial shutdown of a business motivated by antiunion animus indicates that it does not serve the purposes of Section 8(a)(3) and, indeed, is not even rationally related to achieving those purposes. Let us use the weighing process again. The social utility of the employer's power continues to be very great. It is not as great as that of the total shutdown power because the employer is willing to continue to invest in the other parts of the enterprise and is therefore interested in making those other parts efficient and profitable. This should influence its actions with respect to operation of the part of the business that it decided to close. But even assuming that the social utility of the employer's partial shutdown power is equal to that of a total shutdown, the social disutility where the partial shutdown is motivated by antiunion animus far exceeds the social disutility of a total shutdown. In the partial shutdown situation the alarm and danger are not reduced by the realization that the shutdown will entail financial sacrifice to the employer. The employer, its employees, and other employers and their employees realize that instead of financial sacrifice, a partial shutdown of operations motivated by antiunion animus may well result in a financial benefit to the employer since employees in other parts of the employer's enterprise will be deterred from exercising their Section 7 rights on learning of their employer's response to exercise of Section 7 rights in one part of its enterprise.\footnote{132}

\footnote{131. See the statement of Senator Walsh quoted at note 82 supra.}
\footnote{132. This financial benefit was probably realized by the employer in the Darlington case since the total number of hourly paid employees employed by the employer in 25 mills located in three southern states was more than 14,000. Assuming a 40-hour workweek, a 50-week workyear and a saving of five cents per hour per employee in those 25 mills for the 13 years from the shutdown of the Darlington plant in 1956 to the Supreme Court's denial of certiorari in 1969, the total labor cost saving to Deerings Milliken attributable to its deterring unionization of those employees amounts to $18,200,000. It is doubtful that the loss (including backpay to the employees) sustained from the closing of the Darlington plant, where 553 employees had...}
The Supreme Court, apparently realizing this difference, fashioned a different rule for a partial shutdown. The Court held

"that a partial closing is an unfair labor practice under § 8(a)(3) if motivated by a purpose to chill unionism in any of the remaining plants of the single employer and if the employer may reasonably have foreseen that such closing would likely have that effect."¹³³

The facts that the employer was motivated by a desire to discourage the exercise of Section 7 rights by its employees in the closed plant and that its employees in its other plants knew that the closing was so motivated were held to be insufficient, and employer motive to discourage exercise of Section 7 rights by the employees in the other plants was held to be essential.¹³⁴ This requirement was imposed by reason of the Court's formulation of the elements of a Section 8(a)(3) violation as "generally" requiring "a showing of motivation which is aimed at achieving the prohibited effect" "of discouraging concerted activities." The Court said:

"Thus, the Board's findings as to the purpose and foreseeable effect of the Darlington closing pertained only to its impact on the Darlington employees. No findings were made as to the purpose and effect of the closing with respect to the employees in the other plants comprising the Deering Milliken group. It does not suffice to establish the unfair labor practice charged here to argue that the Darlington closing necessarily had an adverse impact upon unionization in such other plants. We have heretofore observed that employer action which has a foreseeable consequence of discouraging concerted activities generally does not amount to a violation of § 8(a)(3) in the absence of a showing of motivation which is aimed at achieving the prohibited effect. . . . In an area which trenches so closely upon otherwise

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¹³³ 380 U.S. 263, 275.
¹³⁴ Id. at 276.
legitimate employer prerogatives, we consider the absence of Board findings on this score a fatal defect in its decision.135

It is the requirement of proving that the employer was motivated by antiunion animus directed at the employees in its other plants which bears no rational relationship to achieving the purposes of Section 8(a)(3). Neither the social utility of the employer partial shutdown power nor the social disutility of the interference with employee exercise of Section 7 rights is increased if the employer is thus motivated. If the employer states that his antiunion animus is directed only at the exercise of Section 7 rights in the closed plant, the employees’ alarm is the same whether they work in the closed plant or in the plants continuing in operation. To say that the alarm of the employees in the other plants is lessened by this statement, is to believe that they are not intelligent enough to know that their turn will come when and if they exercise Section 7 rights.136

If, as the Darlington Court held, the social disutility of the interference outweighed the social utility of the employer power when the employer was motivated by antiunion animus directed at the employees in the plants that it had decided to keep operating, there is no reason, insofar as achieving the purposes of the Section 8(a)(3) is concerned, for it to have held that the social disutility did not outweigh the social utility of the employer power when the employer was motivated by antiunion animus solely directed at the employees in the plant it had decided to close. If it is not an undue interference with management power to hold a partial shutdown a violation of Section 8(a)(3) when the antiunion animus is proven to extend to employees in other plants, it is not an undue interference with management power to hold that a partial shutdown violates Section 8(a)(3) when the employer is proven to have been motivated by antiunion animus directed only at the employees in the plant to be closed.

135. Id.
136. Morrison Cafeterias Consolidated, Inc., 177 N.L.R.B. 591 (1969) illustrates an employer’s use of this tactic. In that case the Board held that an employer may make the closing threat explicit to the employees, if it does so after the other part of the business was closed. Such statements according to the Board are “no more than attempts to take advantage of the closing to persuade employees at the Mobile cafeteria to resist the organizational activities of the Union.” Id. at 598.
Thus, the Court's insistence on a formulation that identifies employer antiunion animus as an essential element of a Section 8(a)(3) violation and its failure to explicitly adopt the weighing process as the means for determining when a violation of that section has occurred are important. They have resulted in decisions in which achievement of the Congressional purposes in enacting Section 8(a)(3) were neglected and even thwarted by the need to satisfy the requirements of the formulation's antiunion animus element.\textsuperscript{137} The weighing process should be explicitly adopted as the method for determining when a violation of Section 8(a)(3) has occurred in order to correct prior neglect of the purposes of Section 8(a)(3), including overruling the Darlington partial closing rule, and to assure that such neglect will not occur in the future.

It may be argued that the Board and the courts do not have the ability to use the weighing process to determine the legality of all discriminatory employer conduct that interferes with employee exercise of Section 7 rights. This argument is easily refuted. First, weighing the social utility of the employer's conduct against the social disutility of the interference with employee exercise of Section 7 rights is required in all Section 8(a)(1) cases.\textsuperscript{138} If it is not beyond the abilities of the Board and courts in cases involving Section 8(a)(1), there is no reason to believe it to be beyond their abilities in cases involving Section 8(a)(3). Second, since the Board is capable of exercising primary responsibility to strike the balance between the conflicting policies in Section 8(a)(3) cases involving employer conduct that is "inherently dangerous" to employee exercise of Section 7 rights,\textsuperscript{139} surely the Board is not incapable of striking that balance in the

\textsuperscript{137} The Board's decision in \textit{Morrison Cafeterias Consolidated, Inc.}, 177 N.L.R.B. 591 (1969), illustrates how the Darlington partial shutdown rule thwarts achievement of the Congressional purposes. When the case was first decided by the Board in 1964, the Board's order included effective remedies that would protect employee exercise of Section 7 rights and deter employers from engaging in discriminatory partial shutdowns motivated by antiunion animus. The Board's order after the remand caused by the Darlington partial shutdown rule replaces those remedies with ones that do not protect employee exercise of Section 7 rights since they are ineffective to deter employer interference with employee exercise of those rights. Compare 148 N.L.R.B. 148-49 (1964) \textit{v.} 177 N.L.R.B. 591 (1969).


\textsuperscript{139} NLRB \textit{v. Great Dane Trailers, Inc.}, 338 U.S. 29 (1967).
lesser cases where the employer's conduct has only a "comparatively slight" adverse effect on employee exercise of Section 7 rights. Third, since the Board and the courts are capable of striking the balance when employers are not motivated by antiunion animus, there is no reason to believe that they will not be able to strike the balance when employers are motivated by antiunion animus, which is merely one factor that increases the social disutility of the employer's conduct.

II. THE SIGNIFICANCE OF EMPLOYER MOTIVE IN SECTION 8(a)(3) CASES

In Section I of this article, we clarified the significance of employer antiunion animus in determining whether the employer's conduct unduly "encourage[d] or discourage[d] membership in any labor organization." We will now endeavor to fully assess the significance of employer motive in Section 8(a)(3) cases.

The word "motive" has two principal meanings: (1) "the consideration or object influencing a choice or prompting an action" and (2) "something within a person . . . that incites him to action." In their determinations whether employer conduct constituted an unfair labor practice under Section 8(a)(3), the Board and the courts have been concerned with both of


141. The weighing process requires the Board and the courts to determine when employer discriminatory conduct constitutes an undue encouragement or discouragement of employee exercise of Section 7 rights by weighing the social disutility of the interference resulting from the employer conduct against the social utility of that conduct. There are several sources to which the Board and the courts look in making this determination. They are the Act itself (e.g., 29 U.S.C. § 158(a)(3), 158(f)(2) (1970); Colgate-Palmolive-Peet Co. v. NLRB, 338 U.S. 355, 350-63 (1949)); other legislation (e.g., 29 U.S.C. § 186(a)(3) (1970)); policies implicit in the Act or other legislation (e.g., Teamsters Local 357 v. NLRB, 365 U.S. 667, 675-76 (1961); Ford Motor Co. v. Huffman, 345 U.S. 300, 339 (1953); Aeronautical Ind. Dist. Lodge 727 v. Campbell, 337 U.S. 521 (1949); 29 U.S.C. §§ 171(b), 173(d), 185 (a) (1970)); legislative history (e.g., Teamsters Local 357 v. NLRB, 365 U.S. 667, 673-74, 675 (1961); Radio Officers' Union v. NLRB, 347 U.S. 17, 47 n. 54 (1954)) and the Board's own judgment, subject to judicial review, on what decision would best achieve the purposes of Section 8(a)(3) (e.g., NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967); NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33-34 (1967); NLRB v. Brown Food Store, 380 U.S. 278, 291 (1965); NLRB v. Hudson Transit Lines, Inc., 429 F.2d 1223, 1231 (3d Cir. 1970)).

these meanings of "motive," at times using the word to refer to both meanings in the same opinion.\footnote{148}

143. Thus, the Court was referring to the "consideration prompting an action" meaning of "motive" when it made the following statements: "The Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees. The actual reason for this discharge, as shown by the unattacked findings of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner. The Act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who falls faithfully to edit the news to reflect the facts without bias or prejudice." Associated Press v. NLRB, 301 U.S. 103, 132 (1937) (emphasis added), and "We agree with the court below that the record warrants the Board's finding that the strikers were denied reemployment because of their union activities." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 189 (1941) (emphasis added).

And, in the following statements the Court was referring to the "something within that incites to action=motive": "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion. The true purpose is the subject of investigation." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937) (emphasis added). "Under that Section [8(a)(3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary. . . ." We have determined that the 'real motive' of the employer in an alleged § 8(a)(3) violation is decisive, Associated Press. . . . 301 U.S. 103, 132; if any doubt still persisted, we laid it to rest in Radio Officers' Union . . . where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling." NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 33 (1967) (emphasis added). 

At times the Court and the Board have referred to both "consideration prompting an action=motive" and "something within that incites to action=motive" in the same paragraph. For example, in Jones & Laughlin, the Court said: "The order of the Board required the reinstatement of the employee who were found to have been discharged because of their 'union activity' and for the purpose of 'discouraging membership in the union,'" 301 U.S. at 47 (emphasis added). In Radio Officers', the Court said: "Since the rules were no defense and the employers intended to discriminate solely on the ground of such protected union activity, it did not matter that they did not intend to discourage membership since such was a foreseeable result," 347 U.S. at 46 (emphasis added). And, in its 16th Annual Report, the Board said: "Upon scrutiny of all the facts in a particular case, the Board must determine whether or not the employer's treatment of the employee was motivated by a desire to encourage or discourage union membership or other activities protected by the statute. The Board requires that a prepon-
It is clear from the statements by the Board and the Court concerning employer motive that first, the issue of whether or not the "consideration prompting an action=motive" of an employer was employee exercise of Section 7 rights and second, the issue of whether or not the "something within that incites to action=motive" of an employer was antiunion animus are both relevant in determining whether the employer's conduct was violative of Section 8(a)(3).

What is not clear from these statements and has often been overlooked in analyses of Section 8(a)(3), is that these two issues are different. Justice Harlan's analysis of Section 8(a)(3) in Teamsters Local 357 v. NLRB exemplifies the confusion of these two issues:

"What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of a violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. See Labor Board v. Universal Camera Corp., 190 F.2d 429. Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity." 1

In this statement, Justice Harlan seeks to prove the relevance of "something within that incites to action=motive" by the authority of a case which supports the relevance of "consideration prompting an action=motive." The issue in Universal Camera Corp. was not whether the employer was motivated or "unmo-
tivated by an intent to discourage union membership," i.e., whether the “something within that incites to action=motive” of the employer was antiunion animus. It was the different and independent issue of whether the employer was motivated by the employee’s insubordination or by his union activities, i.e., whether the “consideration prompting an action=motive” of the employer was employee exercise of Section 7 rights. The same confusion is exhibited in Justice Harlan’s opinion in Darlington. Just as an employer may discharge an inefficient union organizer employee because “he is not performing his work adequately” even though the employer is antiunion, an employer violates Section 8(a)(3) of the Act when it discharges an equally inefficient union organizer employee because he is supporting the union. What determines whether the employer’s conduct was violative of Section 8(a)(3) in discharge cases is not its antiunion animus but whether its “consideration prompting an action=motive” for the discharge was employee exercise of the Section 7 right to support a union, or the employee’s inefficiency. If it was the former, the discharge is violative of Section 8(a)(3) even though the employer was not motivated by antiunion animus; if it was the latter, the discharge is not violative of Section 8(a)(3) even though the employer was virulently opposed to unions.

Another example of the confusion of these two issues is provided by the Court’s opinion in Radio Officers where Part II.A of that opinion was devoted to the subject “Necessity for Proving Employer Motive,” referring to “something within that incites to action-motive.” However, the court’s examples of “real motive” and “the employer’s purpose” in that part of its opinion were all examples of “consideration prompting an action=motive”.

145. See 179 F.2d 749 (2d Cir. 1950), rev’d, 340 U.S. 474 (1951) and 190 F.2d 429 (2d Cir. 1951).
146. See 380 U.S. at 269 n. 10, 276.
148. E.g., Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945); Allis-Chalmers Mfg. Co. v. NLRB, 162 F.2d 435 (7th Cir. 1947); NLRB v. Gluek Brewing Co., 144 F.2d 847 (9th Cir. 1944); NLRB v. Star Publishing Co., 97 F.2d 465 (9th Cir. 1938).
149. E.g., NLRB v. Winn-Dixie Stores, Inc., 410 F.2d 1119 (5th Cir. 1969); Barnwell Garment Co. v. NLRB, 398 F.2d 777 (6th Cir. 1968); NLRB v. Billen Shoe Co., 397 F.2d 801, 803 (1st Cir. 1968); Shattuck Denn Mining Corp. v. NLRB, 382 F.2d 466 (9th Cir. 1966).
tive.” Thus, in citing NLRB v. Associated Press\footnote{301 U.S. 103 (1937).} the Court said: “In another case the same day we found the employer’s ‘real motive’ to be decisive and stated that ‘the Act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . .”\footnote{Radio Officers’ Union v. NLRB, 347 U.S. 17, 43 (1954).} And it supported the statement that “Congress intended the employer’s purpose in discriminating to be controlling” by quoting the following Senate Report statement: “Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform.”\footnote{Id. at 44.} All of these are examples of “consideration prompting to action=motive” rather than “something within that incites to action=motive.” Thus, the Court mistakenly accepts as proof of a “necessity for proving employer’s [something within that incites to action= ] motive” authorities which require proof that an employer’s “consideration prompting an action=motive” was employee exercise of Section 7 rights.

The confusion of these two meanings of “motive” would not be of practical significance if the forms of the two meanings relevant for Section 8(a)(3) purposes were conjoint. But they are not. For while it is true that the two meanings are coexistent, i.e., that whenever a person has a “consideration prompting an action=motive,” he also has a “something within that incites to action=motive”; the form of “consideration prompting an action=motive” that is relevant for purposes of Section 8(a)(3), employee exercise of Section 7 rights, is not necessarily conjoint with the form of “something within that incites to action=motive” that is relevant for purposes of Section 8(a)(3), i.e., antiunion animus.\footnote{The fact that the two Section 8(a)(3) relevant meanings of “motive” are not conjoint creates some of the most difficult factual issues in Section 8(a)(3) cases. These are cases in which the evidence proves the existence of general employer antiunion animus and the issue is whether this antiunion animus incited the employer to take the particular action that is alleged to be violative of Section 8(a)(3). Congress’ belief that the Board relied too heavily on general employer antiunion animus to prove that an employer’s actions were incited by antiunion animus and that the employer’s “consideration prompting an action=motive” was therefore employee exercise of Section 7 rights led to the amendment to Section 10(c) that reads: “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.”} An employer’s “consideration prompting an ac-
tion=motive” may be employee exercise of Section 7 rights at the same time that the employer’s “something within that incites to action=motive” is not antiunion animus. For example, in Republic Aviation the employer’s “consideration prompting an action=motive” was employee exercise of the Section 7 right to solicit other employees to become union members, but the employer’s “something within that incites to action=motive” was admittedly not antiunion animus. The Board had found that one employee was discharged for infraction of “a general rule against soliciting” adopted “well before any union activity at the plant... without discrimination on the part of the employer toward union activity” and that the discharges of three other employees for wearing union steward buttons were “not... motivated by opposition to the particular union or... to unionism.”155 It was on the basis of these findings that the Court upheld the Board’s ruling that the discharges violated Section 8(a)(3).156 In American Ship Building when an employer locked out its employees, its “consideration prompting an action=motive” was the employee exercise of the Section 7 right of adhering to the contract demands made by their union to point of impasse, but the employer’s “something within that incites to action=motive” was not antiunion animus but an intention “to bring about a settlement of a labor dispute on favorable terms.”157

Since the Section 8(a)(3) relevant forms of the two mean-

See Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 21-22 (1947). It is clear that general employer antiunion animus is not sufficient to support a finding that an employer’s action was caused by employee exercise of Section 7 rights and was therefore “discrimination” for the purposes of Section 8(a)(3). See cases cited note 149 supra. 155. 324 U.S. at 794-95.

156. Republic Aviation makes it clear that the following statements are incorrect: “If an employer discharges an employee to protect his interest in building up an efficient work force, he does not commit an unfair labor practice, even though the discharged employee is a union leader and organization is thereby set back.” Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 21 (1947). “It has long been established that a finding of violation under this section will normally turn on the employer’s motivation... Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization.” American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 311 (1965). In Republic Aviation, the employer discharged the employees “to protect his interest in building up an efficient work force” and “purely in disinterested defense of shop discipline.” Yet, its conduct was held violative of Section 8(a)(3).

ings of "motive" are not necessarily conjoint, we shall examine
the significance of each of them separately.

A. **The Significance of Employer "Motive" ("Consideration
Prompting an Action")**

Employer motive in the sense of "the consideration or object
influencing a choice or prompting an action" is always relevant
in determining whether employer conduct violated Section
8(a)(3) because an employer's conduct can only be found vio-
lative of Section 8(a)(3) when it was caused by employee exer-
cise of Section 7 rights. If the "consideration prompting an
action=motive" for the employer's conduct was anything else,
whether "business, animosity, or . . . sheer caprice,"
168 that con-
duct cannot be violative of Section 8(a)(3). This follows from
the fact that there can be no violation of Section 8(a)(3) unless
the "encouragement or discouragement of membership in a
labor organization" is accomplished "by discrimination."169 "Dis-
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[Note numbers and references are not transcribed for brevity.]

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[For the full citation, please refer to the original document.]

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employee "right to . . . be good, bad, or indifferent" union members.

The requirement that an employer's "consideration prompting an action=motive" be employee exercise of Section 7 rights in order for the employer's conduct to be held violative of Section 8(a)(3) is fully supported by the legislative history of Section 8(a)(3) and the cases under that section. Thus, the Senate Report cited by the Court in Radio Officers' to support the proposition that "Congress intended the employer's purpose in discriminating to be controlling" indicated that it was only when the employer's "consideration prompting an action=motive" was employee "exercise" of the right of "self-organization or to join or refrain from joining a labor organization" that its conduct could be held violative of Section 8(a)(3). The Report read:

"Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self-organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." And in 1947, when Congress added the proviso to the Act that "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," Senator Taft indicated that a Board finding that an employee had been adversely treated because of "union activity" had been and would continue to be required for the Board to hold that an employer had violated Section 8(a)(3). The Senator said: "The Board will have to determine—and it always has—whether the dis-

166. Id. at 44.
charge was for cause or for union activity, and the preponderance of the evidence will determine that question."

That this was the Board's position from the start of its administration of the Act is clear from the Board's 3d Annual Report. In that Report, the Board referred to the holding of the first case it had decided under the Act, that employer conduct was not violative of Section 8(a) (3) because "the effective cause" of that conduct had not been employee "union membership or activity." And, after reviewing numerous cases, the Board concluded:

"The foregoing cases represent the Board's construction of the scope of section 8(3). Briefly, it forbids the employer to affect or change an employer relationship because of the employee's union membership or activity."

The Supreme Court explicitly stated that an employer's "consideration prompting an action=motive" must be employee exercise of Section 7 rights in Associated Press:

"The actual reason for his discharge, as shown by the unattacked findings of the Board, was his Guild activity and his agitation for collective bargaining. The statute does not preclude a discharge on the ostensible grounds for the petitioner's action; it forbids discharge for what has been found to be the real motive of the petitioner.

"The act permits a discharge for any reason other than union activity or agitation for collective bargaining with employees . . . ."

It is therefore clear that employer "motive" in the sense of "the consideration or object influencing a choice or prompting an action" is of the highest significance in Section 8(a) (3) cases. The Board must examine the employer's "consideration prompting an action=motive" in all Section 8(a) (3) cases in which the employer denies that it was employee exercise of Section 7 rights. And in order for the Board to hold the employer's conduct violative of Section 8(a) (3), it must find that the employer's "consideration prompting an action=motive" was employee exercise of Section 7 rights.

171. 3 NLRB ANN. REP. 66 (1939).
172. Id. at 81 (emphasis added).
B. The Significance of Employer "Motive" ("Something Within That Incites to Action")

The same degree of relevance does not attach to employer "motive" in its second meaning, i.e., "something within a person . . . that incites him to action." It is settled that an employer may be found to have violated Section 8(a)(3) irrespective of what his "something within that incites to action-motive" was. Proof that this kind of motive was antiunion animus is not required in order for the employer's conduct to be held violative of Section 8(a)(3). This was well stated by Judge Paul R. Hays in contrasting Section 8(a)(3) with certain provisions of the Selective Service Act:

"But the rule as to discrimination which encourages or discourages union membership is clearly different from the rule as to discrimination against veterans. Under the National Labor Relations Act there is no requirement of hostility, bad faith or dishonesty of purpose. Where the action involved is discriminatory and serves to encourage or discourage union membership it is inhibited by the statute regardless of motive."174

There are numerous cases holding that employers violated Section 8(a)(3) when their "something within that incites to action=motive" was not antiunion animus. In Republic Aviation, although the employer's conduct was "found not to be motivated by opposition to the particular union or, we deduce, to unionism,"175 the employer's enforcement of long established general company rules against employees engaged in union solicitation was held violative of Section 8(a)(3).176 In NLRB v. Star Publishing Co.177 and NLRB v. Gluek Brewing Co.,178 employers

175. 324 U.S. at 795.
176. Prior to Republic Aviation, company rules prohibiting union solicitation on the employer's premises during an employee's free time were upheld by the courts as legitimate exercises of management power. As one court said, "[t]here is evidence in the record indicating that discussions of such matters between employees even during their rest periods became acrimonious, bitter and provocative. If the solicitation for union membership on its premises during working hours gave rise to bickering, disputes, ill-will and lack of harmony among its employees, thus affecting their efficiency, it would not be unreasonable to adopt such a rule as would tend to remove the causes which lowered their efficiency." Carter Carburetor Corp. v. NLRB, 149 F.2d 714, 716 (8th Cir. 1944).
177. 97 F.2d 465 (9th Cir. 1938), enforcing 4 N.L.R.B. 498 (1937).
178. 144 F.2d 847 (8th Cir. 1944).
were held to have violated Section 8(a)(3) when they adversely affected their employees’ working conditions though in each case the employer’s “something within that incites to action=motive” was economic survival when faced with a jurisdictional dispute. In *Erie Resistor*, the employer was held to have violated Section 8(a)(3) although it was assumed that the “something within that incites to action=motive” for its superseniority policy was “SOLELY to protect and continue the business” during an economic strike. And, in *Great Dane*, the Court stated that with respect to one category of Section 8(a)(3) cases employer conduct could be held violative of Section 8(a)(3) without proof that the employer’s “something within that incites to action=motive” was antiunion animus:

“From this review of our recent decisions, several principles of controlling importance here can be distilled. First, if it can reasonably be concluded that the employer’s discriminatory conduct was ‘inherently destructive’ of important employee rights, no proof of an antiunion motivation is needed and the Board can find an unfair labor practice even if the employer introduces evidence that the conduct was motivated by business considerations.”

It is therefore clear that under Section 8(a)(3) of the Act there is no requirement that it be proved that the “something within that incites to action=motive” for an employer’s conduct was antiunion animus in order to sustain a charge that by that

179. The fact that the employer in *Star Publishing* was not motivated by antiunion animus is emphasized by the concurring opinion of Judge Stephens, who said: “I think it right and just for this court to say that, so far as the record goes, Respondent has endeavored to live up to the letter and spirit of the Wagner Act . . . . and that its violation was solely because of the very serious dilemma into which Respondent was precipitated by the demand that forthwith its . . . [employees] should be Teamster Union men instead of Guild members.” 97 F.2d at 471.

In *Gluek Brewing*, the court said, “It is clear that it [the employer] had no purpose—in the sense of animus or desire—to injure one or to help the other. Its underlying and compelling purpose was to save itself.” 144 F.2d at 853.

180. 373 U.S. at 226.

181. 388 U.S. at 34. As stated earlier, we believe that the Court eliminated any requirement of proving antiunion animus in all cases in which an employer’s discriminatory conduct discouraged employee exercise of Section 7 rights in *Fleetwood Trailer*. See pp. 14-15 supra.
conduct the employer violated Section 8(a) (3).\textsuperscript{182} The dicta to the contrary are based on an incorrect reading of the statutory language or on the mistaken belief that statements that require proof of "consideration prompting an action=motive" pertained to "something within that incites to action=motive." Thus, the statement that:

"The statutory language 'discrimination . . . to . . . discourage' means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose"\textsuperscript{183}

misreads the statutory language. It is clear from the syntax of Section 8(a) that the word "to" in subsection (3) does not mean "in order to" or "for the purpose of" but is simply part of the infinitives "to encourage or [to] discourage." Section 8(a) provides that "[i]t shall be an unfair labor practice for an employer—(1) to interfere . . . . . ; (2) to dominate or interfere . . . . ; (3) . . . to encourage or discourage . . . ; (4) to discharge or otherwise discriminate . . . ; (5) to refuse . . . . ."\textsuperscript{184} Any other reading of Section 8(a) (3) makes it incomplete since it does not then have a verb expressing what action performed by an employer is proscribed as an unfair labor practice.\textsuperscript{185}

As for the confusion of the two meanings of "motive" and the mistaken reliance on authorities requiring that an employer's "consideration prompting an action=motive" be employee exercise of Section 7 rights to support statements that an employer's "something within that incites to action=motive" must be anti-union animus in order that the employer's conduct may be held violative of Section 8(a) (3), we have already exemplified them.\textsuperscript{186} One more example will be given here. In NLRB v. Brown the Court said:


\textsuperscript{186} See pp. 39-41 supra.
"Under that section [8(a) (3)] both discrimination and a resulting discouragement of union membership are necessary, but the added element of unlawful intent is also required. . . . The discriminatory act is not by itself unlawful unless intended to prejudice the employees' position because of their membership in the union; some element of antiunion animus is necessary. . . . We have determined that the 'real motive' of the employer in an alleged § 8(a) (3) violation is decisive. Associated Press . . . 301 U.S. 103,132; if any doubt still persisted we laid it to rest in Radio Officers' Union . . . where we reviewed the legislative history of the provision and concluded that Congress clearly intended the employer's purpose in discriminating to be controlling."

As was indicated earlier, the reference in Associated Press to the "real motive" of the employer was to the "consideration prompting an action=motive," i.e., whether the "actual reason" for the discharge of an employee was "union activity or agitation for collective bargaining with employees" or incompetence and failure "faithfully to edit the news to reflect the facts without bias and prejudice." And the legislative history reviewed by the Court in Radio Officers' also referred to the employer's "consideration prompting an action=motive," for the Senate Report quoted by the Court stated: "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform." Thus, in Brown the authorities cited as establishing the supposed requirement that "some element of antiunion animus is necessary" to prove a violation of Section 8(a) (3), do not refer to antiunion animus at all but to whether an employer's "consideration prompting an action=motive" was employee exercise of Section 7 rights.

Clearly, then, proof that an employer's "something within that incites to action=motive" was antiunion animus is not required to sustain a finding that the employer's conduct was violative of Section 8 (a) (3). But the fact that it is not required, does not mean that it can not be relevant. Employer antiunion

187. 380 U.S. at 286-87.
189. 347 U.S. at 44.
animus can be relevant in proving the existence of the two elements of a violation of Section 8(a) (3), “discrimination” and discouragement of “membership in any labor organization.” In order for an employer’s conduct to constitute “discrimination” the employer’s “consideration prompting an action=motive” must be employee exercise of Section 7 rights. Frequently, proof that an employer’s “something within that incites to action=motive” was antiunion animus is relevant in proving that its “consideration prompting an action=motive” was employee exercise of Section 7 rights. And, although general antiunion animus is not a sufficient basis for the holding that an employer’s conduct violated Section 8(a) (3),190 it is “properly a factor in evaluating conduct, particularly in the area of motivation . . . .”192 Thus, when a senior employee with a good record is discharged for a minor infraction of company rules shortly after the employer becomes aware of the employee’s union activities, the employer’s general attitude of antiunion animus is relevant in determining whether its “consideration prompting an action=motive” for the discharge was employee exercise of Section 7 rights or the rule infraction. The relevance of antiunion animus to the issue of whether employer conduct was “discrimination” was well stated by the Court of Appeals for the Fourth Circuit:

“The conclusion is inescapable that the company’s attitude toward the union was one of animosity and hostility at the time of the layoffs in question. The significance of such bias in determining an employer’s motive for conduct which allegedly violates section 8(a) (3) has been recognized by the courts. [Citations omitted.]

“The coalescent factors—the company’s antiunion bias, its knowledge of the union activities of Rinaca and Lucas and its prior discrimination against them—were sufficient, in our view, to establish prima facie violations of section 8(a) (3) and, in order to overcome the resulting presumption of discrimination, the company must assume the burden of show-


191. See cases cited note 149 supra.

192. Waycross Sportswear, Inc. v. NLRB, 403 F.2d 832, 833 (5th Cir. 1968) (Brown, C.J.).
ing a justifiable or nondiscriminatory reason for the lay-offs.\textsuperscript{198}

The fact that an employer's "something within that incites to action=motive" was antiunion animus makes it more probable that its conduct will be held to be an undue discouragement of employee exercise of Section 7 rights. It has this effect because by increasing the danger of interference with employee exercise of Section 7 rights and the alarm that employees will tend to feel about exercising them, it increases the social disutility of the employer's conduct. Since the social disutility of the employer's conduct is increased, the Board and the courts are more likely to conclude that this social disutility outweighs its social utility, its business justification, and therefore results in an undue discouragement of "membership in any labor organization."

Thus, while proof that an employer's "something within that incites to action=motive" was antiunion animus is not required to establish that employer conduct was violative of Section 8(a)(3), such proof is frequently relevant in proving the existence of one or both of the required elements of a Section 8(a)(3) violation.

III. The Relationship Between Section 8(a)(3) and Section 8(a)(1)

Having completed the examination of Section 8(a)(3), we are now in a position to examine the relationship between that section and Section 8(a)(1). We have seen that there are two elements to a Section 8(a)(3) violation: "discrimination" and undue discouragement of employee exercise of Section 7 rights. Section 8(a)(1) is more simple. It provides that: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [Section 7]."\textsuperscript{194}

Thus, according to its language there is only one element to a Section 8(a)(1) unfair labor practice: interference with employee exercise of Section 7 rights. But, not every interference with the exercise of Section 7 rights is violative of Section 8(a)(1). It is only when the interference with employee exercise

\textsuperscript{193} Maphis Chapman Corp. v. NLRB, 368 F.2d 298, 304 (4th Cir. 1966).
of Section 7 rights is undue that the employer's action is violative of Section 8 (a) (1). Both the validity of this statement and the method for determining whether any given interference with employee exercise of Section 7 rights is undue are indicated by the Court's statements in Darlington and Republic Aviation. In Darlington, the Court said:

"Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8 (a) (1) is violated." 195

And in Republic Aviation, the Court said:

"These cases bring here for review the action of the National Labor Relations Board in working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments. Like so many others, these rights are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." 196

Thus, the single element of a violation of Section 8 (a) (1) is undue interference with employee exercise of Section 7 rights. And whether or not an employer's conduct resulted in an undue interference with employee exercise of Section 7 rights is determined by the same weighing process that determines whether its conduct was an undue discouragement of employee exercise of Section 7 rights for purposes of Section 8 (a) (3). 197 And, just as employer "something within that incites to action=motive" is relevant under Section 8 (a) (3), since danger to and employee alarm about exercise of Section 7 rights are increased when an

employer’s “something within that incites to action=motive” is antionion animus, so it is relevant under Section 8(a) (1).

This can be seen from the cases holding that it is an unfair labor practice under Section 8(a) (1) for an employer “to prohibit union solicitation on company premises during working hours . . . when it is demonstrated that the prohibition was adopted for the purpose of discouraging union activity . . . .”\textsuperscript{198} In these cases, despite the fact that there is no Section 7 right to engage in union solicitation during working hours\textsuperscript{199} the fact that the employer's motive for prohibiting such solicitation was anti-union animus increases employee alarm sufficiently to make the social disutility of the prohibition outweigh its social utility, i.e., the importance to an enterprise that management have the power to require that work time be for work. The interference with employee exercise of Section 7 rights is therefore undue and violative of Section 8(a) (1).

We therefore see that Sections 8(a) (3) and 8(a) (1) have one element in common. Under either section employer conduct will be held an unfair labor practice only if the Board and the courts conclude that the employer's conduct was an undue interference with employee exercise of Section 7 rights. The fact that there can be no violation of Section 8(a) (3) unless the undue interference with employee exercise Section 7 rights was caused “by discrimination” distinguishes Section 8(a) (3) from Section 8(a) (1). Let us see the effect of the absence or presence of “discrimination” in determining whether employer conduct that interfered with employee exercise of Section 7 rights is violative of Section 8(a) (1), Section 8(a) (3), or both.

First, let us assume that employer conduct interferes with employee exercise of Section 7 rights and that it is not “discrimination.” Obviously, that conduct cannot be violative of Section 8(a) (3) which requires that the employer conduct be “discrimination” before an unfair labor practice under that section can be found. However, that conduct may be violative of Section 8(a) (1) which has no such requirement. The leading case is

\textsuperscript{198} Steelworkers v. NLRB, 393 F.2d 661, 663 (D.C. Cir. 1968), enforcing 165 N.L.R.B. 54 (1964). See also Mason & Hanger-Silas Mason Co., Inc. v. NLRB, 405 F.2d 1 (5th Cir. 1968); NLRB v. Electro Plastic Fabrics, Inc., 381 F.2d 374, 376 (4th Cir. 1967).

\textsuperscript{199} Republic Aviation Corp. v. NLRB, 324 U.S. 793, 803 n.10 (1945).
NLRB v. Burnup & Sims, Inc.\textsuperscript{200} In that case the employer discharged two employees because of its honest but mistaken belief that they had threatened to dynamite the plant if the union that they were supporting was not chosen to represent the employees. The Board found that the employees had not made the alleged threat and held that their discharge violated Sections 8(a)(1) and 8(a)(3). The court of appeals denied enforcement of the Board's order on the ground that the employer's action was not "discrimination discouraging protected activity."\textsuperscript{201} The Supreme Court, reversing the court of appeals, held that the employer's conduct was an unfair labor practice under Section 8(a)(1), and found it unnecessary to determine whether it was also violative of Section 8(a)(3).

The Supreme Court's refusal to find a violation of Section 8(a)(3) was plainly correct since the employer's conduct was not "discrimination." "Discrimination" for the purposes of Section 8(a)(3) is employer treatment of employees caused by employee exercise of Section 7 rights. Thus, to have "discrimination" an employer's "consideration prompting an action=motive" must be employee exercise of Section 7 rights. In Burnup & Sims the employer's "consideration prompting an action=motive" was not the employees' union activities but rather their supposed threat to use unlawful violence against the employer's property. Since the employer treatment of employees in Burnup & Sims was not caused by employee exercise of Section 7 rights, it was not "discrimination" and the employer's conduct could therefore not be held violative of Section 8(a)(3).\textsuperscript{202}

Moreover, in our opinion, the Court's conclusion that the employer's action violated Section 8(a)(1) correctly strikes the balance between the social utility of the business justification for the employer's action and the social disutility of the interference with employee exercise of Section 7 rights resulting from that action. While it is true that the social utility was substantial, since the employer acted "to avoid dynamiting of a silo,"\textsuperscript{203} the alarm and danger resulting from the employer's action, the measure of its social disutility, were also great. As the Court pointed

\textsuperscript{201} 322 F.2d 57, 61 (5th Cir. 1963).
\textsuperscript{203} 379 U.S. 21, 25 n.2 (Harlan, J., dissenting).
out, allowing the discharge of innocent employees for alleged acts of misconduct engaged in the course of a protected activity would result in

"the protected activity los[ing] some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those discharges to weaken or destroy the § 8(a) (1) rights that is controlling."^204

We agree with the Court's conclusion that the social disutility of employer conduct that creates this degree of danger to and alarm about employee exercise of Section 7 rights outweighs the social utility of the employer's power to act on the basis of an honest but mistaken belief that its property is threatened.205

Another situation in which the discharge of an employee would be violative of Section 8(a) (1) but not violative of Section 8(a) (3) would be one in which the employee was discharged because of his race. The discharge could be held violative of Section 8(a) (1) as an undue interference with employee exercise of Section 7 rights on the basis of the reasoning in Packinghouse Workers v. NLRB.206 The Board could conclude that the discharge of an employee because of his race was an undue interference with employee exercise of Section 7 rights because it

"sets up an unjustified clash of interests between groups of workers which tends to reduce the likelihood and the effec-

204. Id. at 23-24. See J.P. Stevens & Co., Inc., 157 N.L.R.B. 869, 895-902 (1966) (trial examiner's decision). The danger that other employers will interfere with employee exercise of Section 7 rights by inventing charges of misconduct against active union supporters is also very great. This danger adds to the social disutility of the employer's action.

205. Since the decision in Burnup & Sims, the Board has relied on Section 8(a)(1) to hold that an employer's refusal to reinstate employees based on its honest but mistaken belief that they had engaged in misconduct during a strike was an unfair labor practice. See Plastic Applicators, Inc., 150 N.L.R.B. 123 (1964). The court of appeals denied enforcement of the Board's order on the ground that the Board had failed to prove that the "misconduct did not in fact occur." NLRB v. Plastic Applicators, Inc., 369 F.2d 495, 498 (5th Cir. 1966).

tiveness of their working in concert to achieve their legitimate goals under the Act; and . . . creates in its victims an apathy or docility which inhibits them from asserting their rights against the perpetrator of the discrimination.\textsuperscript{207}

Of course, a discharge of an employee because of his race could not be an unfair labor practice under Section 8(a)(3) since the discharge would not have been caused by employee exercise of Section 7 rights and the employer's conduct would therefore not be "discrimination" for purposes of Section 8(a)(3).

\textit{Burnup & Sims}, holding employer conduct violative of Section 8(a)(1) when it is not violative of Section 8(a)(3), is in accord with the intended scope of Section 8(a)(1). Congress intended Section 8(a)(1) to provide "general guaranties" for the protection of employee exercise of Section 7 rights. This is clear from the Committee reports on that section. Thus, the House Report stated:

"The succeeding unfair labor practices are intended to amplify and state more specifically certain types of interference and restraint that experience has proven require such amplification and specification. These specific practices, as enumerated in subsections (2), (3), (4), and (5), are not intended to limit in any way the interpretation of the general provisions of subsection (1).\textsuperscript{208}

We see therefore, that one aspect of the relationship between Sections 8(a)(3) and 8(a)(1) is that while the absence of "discrimination" prevents a finding that employer conduct was violative of Section 8(a)(3) it does not bar a finding of an unfair labor practice under Section 8(a)(1).

The other aspects of the relationship between these two sections appear when we examine cases in which the employer's conduct was "discrimination." The cases fall into two categories: (1) cases in which the employer's conduct was "discrimination"
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and it is found that the conduct resulted in an undue interference with employee exercise of Section 7 rights and (2) cases in which the employer's conduct was "discrimination" and it is found that the conduct did not result in an undue interference with employee exercise of Section 7 rights.

A typical case in the first category is one in which an employer discharges an employee who is both inefficient and a union leader because of his union activities. In this case, there is "discrimination" since the discharge was caused by employee exercise of the Section 7 right to be an active union man, and there is undue discouragement of employee exercise of Section 7 rights since the social disutility outweighs the social utility of the management power to discharge inefficient employees because of their union activities. Since the two elements of Section 8(a)(3) violation are present, the employer's conduct is also an unfair labor practice under Section 8(a)(1) which requires only the element of undue interference with employee exercise of Section 7 rights. But it is only a violation of Section 8(a)(1) because of the presence of the element of "discrimination"; it would not be a violation of Section 8(a)(1) to discharge an inefficient employee who is a union leader because of his inefficiency, even though the discharge would interfere with and cause alarm about employee exercise of Section 7 rights. Since the presence of the element of "discrimination" is necessary to make the employer's conduct in this case a violation of Section 8(a)(1), this is the type of case to which Justice Harlan referred in Darlington when he said:

"Whatever may be the limits of § 8(a)(1), some employer decisions are so peculiarly matters of management prerogative that they would never constitute violations of § 8(a)(1), whether or not they involved sound business judgment, unless they also violated § 8(a)(3). Thus, it is not questioned in this case that an employer has the right to terminate his business, whatever the impact of such action on concerted activities, if the decision to close is motivated by other than discriminatory reasons. But such action, if dis-

criminarily motivated, is encompassed within the literal language of § 8(a)(3).\textsuperscript{211}

We see therefore that another aspect of the relationship between Sections 8(a)(3) and 8(a)(1) is that when both "discrimination" and undue interference with employee exercise of Section 7 rights are present, the employer's conduct is violative of both of these sections.

There are numerous cases in the second category, i.e., where the employer's conduct is "discrimination" and it is found that the conduct does not result in an undue interference with employee exercise of Section 7 rights. Examples include \textit{Mackay},\textsuperscript{212} \textit{Buffalo Linen},\textsuperscript{213} \textit{Brown},\textsuperscript{214} \textit{American Ship Building}\textsuperscript{215} and \textit{Darlington}.\textsuperscript{216} In each of these cases the employer's conduct was "discrimination" since it was caused by employee exercise of Section 7 rights to strike, to adhere to the collective bargaining demands pressed by their union, or to choose to be represented by a union. Yet in each of these cases, it was decided that the employer's conduct did not violate Section 8(a)(3) because it was not an undue interference with employee exercise of Section 7 rights. As we have seen, this conclusion is based on the courts' judgment that the social utility of the business justification for the employer's conduct outweighs the social disutility of the interference with employee exercise of Section 7 rights resulting from that conduct. In this type of case, it follows, \textit{a fortiori}, from a finding of no violation of Section 8(a)(3) that there is no violation of Section 8(a)(1). If an employer's conduct is not an undue interference with employee exercise of Section 7 rights when it is "discrimination," certainly that conduct would not be considered an undue interference with employee exercise of Section 7 rights if it were to be examined as non-discriminatory conduct. This is true because employee alarm about and danger of interference with exercise of Section 7 rights will tend to be lessened when the employer does not use the exercise of Section 7 rights as a basis for its treatment of employees. And since employee alarm about and danger to exercise of Section 7

\begin{itemize}
\item \textsuperscript{211} 380 U.S. at 269.
\item \textsuperscript{212} 304 U.S. 333 (1938).
\item \textsuperscript{213} NLRB v. Teamsters Local 449, 353 U.S. 87 (1957).
\item \textsuperscript{214} 380 U.S. 278 (1965).
\item \textsuperscript{215} 380 U.S. 300 (1965).
\item \textsuperscript{216} 380 U.S. 263 (1965).
\end{itemize}
rights is the measure of the social disutility of the interference with exercise of those rights, the social disutility of the employer's conduct will always be less when it is not "discrimination." Given this lessened social disutility of the interference with employee exercise of Section 7 rights when the employer's conduct is not "discrimination" and the fact that the social utility of the business justification for the employer's conduct remains the same, discriminatory conduct that was found not to be an undue discouragement of employee exercise of Section 7 rights for purposes of Section 8(a)(3) could not then be found an undue interference with employee exercise of those rights for purposes of Section 8(a)(1).

Thus, where there is no "discrimination" there can be no violation of Section 8(a)(3), but there can be a violation of Section 8(a)(1) if the employer's conduct is an undue interference with employee exercise of Section 7 rights; where there is "discrimination" and undue interference with employee exercise of Section 7 rights, there is a violation of both Sections 8(a)(3) and 8(a)(1); and where there is "discrimination" and no undue interference with employee exercise of Section 7 rights, there can not be a violation of either Section 8(a)(3) or 8(a)(1).

CONCLUSION

The analysis of Section 8(a)(3) contained in this article and in the article on "discrimination" indicates that there are two elements of a violation of that section. They are "discrimination" and "encourage[ment] or discourage[ment] [of] membership in any labor organization." "Discrimination" is employer treatment of employees affecting their working conditions caused by employee exercise of Section 7 rights. And "encourage[ment] or discourage[ment] [of] membership in any labor organization" caused by "discrimination" is violative of Section 8(a)(3) only when it is undue.

In determining whether the encouragement or discouragement resulting from employer conduct is undue and hence violative of Section 8(a)(3), "the true grounds of decision are considerations of policy and of social advantage ..." Discour-
agement will be held to be undue when the Board and the courts conclude that the social disutility of the interference with employee exercise of Section 7 rights caused by the employer's discriminatory conduct outweighs the social utility of the business justification for that conduct.

And the measures of social utility and disutility of employer conduct are, respectively, the extent to which the conduct tends to enhance management's ability to make an enterprise efficient and profitable and the alarm about and danger to employee exercise of Section 7 rights caused by the conduct.

By distinguishing between two meanings of "motive," the analysis contained herein also clarifies the significance of employer motive for purposes of Section 8(a)(3). Motive means "the consideration prompting an action." It also means "something within a person that incites him to action." Determination of what the employer's motive was, in the sense of the "consideration prompting an action," is always relevant for purposes of Section 8(a)(3). Since discrimination for purposes of Section 8(a)(3) is employer conduct caused by employee exercise of Section 7 rights, the employer's "consideration prompting an action=motive" must be employee exercise of Section 7 rights for that conduct to be discrimination. If an employer's "consideration prompting an action=motive" is something other than employee exercise of Section 7 rights, that conduct is not discrimination and therefore cannot be violative of Section 8(a)(3).

However, Section 8(a)(3) does not require determination of what the employer's motive was in the sense of something within the employer that incites him to action. There is no requirement that the "something within that incites to action=motive" of an employer be antiunion animus in order for the employer's conduct to be violative of Section 8(a)(3). As we saw, there are numerous cases in which this kind of employer motive was not antiunion animus and the employer conduct was nevertheless held to be an unfair labor practice under Section 8(a)(3).

But although there is no requirement that an "employer's something within that incites to action=motive" be antiunion animus, when it is antiunion animus that may be relevant to a finding of a violation of Section 8(a)(3). First, the fact that an employer's "something within that incites to action=motive
was antiunion animus is some evidence that its "consideration prompting an action=motive" was employee exercise of Section 7 rights. Second, when an employer's "something within that incites to action=motive" is antiunion animus, the social disutility of the employer's conduct is increased because the danger of similar action by him and other employers and the alarm that conduct creates among his employees is increased. As we saw, in almost all cases this increased social disutility is sufficient to outweigh the social utility of the business justification for the employer's conduct and is therefore sufficient to cause that conduct to be considered violative of Section 8(a)(3) as an undue discouragement of membership in any labor organization.