LOS ANGELES COUNTY

EMPLOYEE RELATIONS COMMISSION

In the Matter of JOINT COUNCIL OF LACEA, LOCAL 660, SEIU and LACEU, LOCAL 434, SEIU Charging Party v. LOS ANGELES COUNTY MUSEUM OF NATURAL HISTORY Respondent	UFC 56.6

DECISION AND ORDER

The charge in this case was filed by Joint Council of LACEA, Local 660, SEIU and LACEU, Local 434, SEIU (Charging Party or Union) against the Los Angeles County Museum of Natural History (Respondent or County) alleging that the County had committed unfair employee relations practices within the meaning of Sections 4, 12(a)(1), and 12(a)(3) of the Employee Relations Ordinance when it suspended Weldom Odom from the position of Custodian, effective November 15, 1979, and thereafter converted this suspension to discharge. Custodian Odom also was a Union Steward at the time involved.

The matter was duly referred to Hearing Officer Edna E. J. Francis, who held hearings on June 3 and July 29, 1980. The parties were present during these hearings and were afforded full opportunity to offer argument and evidence, and to examine and cross-examine witnesses. Post-hearing briefs were filed. Hearing Officer Francis submitted her Report on October 15, 1980. The County filed Exceptions to the Report and the Union filed a statement in opposition to these Exceptions.

Hearing Officer Francis dismissed the County's motion that the Employee Relations Commission (ERCOM) lacked jurisdiction in this case because the Civil Service Commission (CSC) had the Odom discharge matter pending before it and that ERCOM also lacked jurisdiction on other grounds. We concur with this ruling. The CSC's record of the Odom matter is incorporated in this record, however, and was examined by Hearing Officer Francis. (The Civil Service Commission upheld Odom's discharge subsequent to Mrs. Francis' ruling.)

To the extent not inconsistent herewith, we adopt Hearing Officer Francis' summary of the evidence on the merits of this case, her summary of the parties' contentions, and her recommendations that the Section 12(a)(3) alleged violation be dismissed. However, we are unable to agree with her conclusions on the remainder of this case.

Steward Odom appeared at the back of the Museum between 5:30 p.m. and 6:00 p.m. on Saturday, October 13, 1979, the date of the incident precipitating his suspension and subsequent discharge. He was not scheduled to work at the Museum that date but was wearing garments resembling his official custodial uniform. Upon appearing, Steward Odom resumed his discussion with Custodian Jones about some grievances Jones had previously filed. The latter was outside the Museum with Custodian Bonnie Sapp, either collecting trash cans or taking a break from the loud music of the USC band. Odom was not wearing the uniform prescribed by the Museum because of the difficulty experienced by the custodial force in receiving their official uniforms back from the cleaners.

When Custodian Jones walked into the building with Steward Odom, Security Officer Charles W. Shackelford inquired whether the latter was going to enter the building, and Odom replied that he was not going to enter at that time. He walked back toward the door and chatted with Kevin Johnson, his immediate supervisor, Ms. Berry, and Ms. Berry's sister. Berry, who was Charles Miller's secretary, was in charge of collecting money for the tickets sold for the event and of locking this money in the Personnel Office. While Supervisor Johnson was speaking with Odom, according to Johnson's testimony, he inquired why Odom was wearing his uniform, and the latter replied that he had helped someone out. Supervisor Johnson had dealt with Odom on prior occasions in his capacity

as a Steward but Odom did not state he had been speaking (or was about to speak) with Jones on grievance matters, nor did he ask for permission to enter the building to do so.

Soon after Supervisor Johnson departed, Steward Odom signed in at 6:30 p.m. and proceeded to the main floor to speak with Custodian Jones. According to his testimony, Odom conferred with Jones while the latter was performing his custodial duties. Although Odom testified that he spoke with Ms. Sapp and with certain other individuals inside the Museum, he did not account for the one hour and twenty-eight minutes elapsed time between his signing in and signing out at the security station at the back entrance.

The Museum discharged Steward Odom on the ground that he had violated two specific rules of the Policy Manual for the Custodian Unit--Rule 56 and Rule 3 on Page 51 of the Manual. Rule 56 reads: "Entering County buildings or facilities without proper authorization during or after working hours." This is one of several rules which provide for discharge for the first offense. (A partial list of other rules providing for discharge on the first offense is: "Stealing or improperly using private or County property" (Rule 19); "signing daily work sheet for another employee" (Rule 38); "immoral conduct or indecency on County property" (Rule 40); and "intimate relations with employees of the opposite sex during working hours" (Rule 54).)

Rule 3 on Page 51 of the same Manual reads in pertinent part: "Employees are not to wear their uniforms except during working hours."

We conclude that Steward Odom violated both of the above rules. He also violated the provision in the Memorandum of Understanding between these parties which reads in pertinent part (Article 29, Section 3): "Upon entering other work locations, the steward shall inform the cognizant supervisor of the nature of his business. Permission to leave the job will be granted promptly to the employee involved unless such absence would cause undue interruption of work. If the employee cannot be made available, the steward will be informed when the employee will be made available." The Memorandum of Understanding language quoted above is carefully drawn to enable stewards to contact their co-workers without unduly interrupting their work.

The Union stresses the allegation that Odom was discriminatorily treated because he was discharged while none of the other employees present at this affair were disciplined. Kevin Johnson was present to ensure that the custodians he had assigned to duty for this affair (Jones and Sapp) were doing their work. Gwen Berry was present for the purpose stated above. She brought her sister along as a guest. As Head of Staff Services, Charles Miller was present in his administrative capacity. Shackelford, Jones,

and Sapp were performing their assigned duties as indicated. Charles Muse (phonetic) also was performing his assigned tasks. At least one other employee was present, Security Officer Lucy Carillo. Her work hours had expired, she was out of uniform and mingling with the guests at the party. Her status during this period is not indicated in the record.

The Museum contains many exhibits of incalcuable value which requires the adoption of stringent security requirements, such as the Custodial Policy governing unauthorized entrance. While the discipline imposed on Odom was severe, it comported with the penalty prescribed in Rule 56 of the Custodial Policy Manual. Since the record is silent as to whether other custodial employees have with impunity entered the building unauthorized and for the reasons discussed above, we conclude that the County did not commit unfair employee relations practices within the meaning of Sections 4, 12(a)(1), and 12(a)(3) of the Ordinance by suspending and then discharging Weldom Odom.

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O R D E R

IT IS HEREBY ORDERED that the charge as filed by the Union on March 11, 1980, as amended on April 15, 1980, be dismissed.

DATED at Los Angeles, California, this 13th day of April, 1981.

Lloyd H. Bailer
LLOYD H. BAILER, Chairman

JOSEPH F. GENTILE, Commissioner

FREDRIC N. RICHMAN, Commissioner

NOTES - UFC 56.6

1. It is immaterial whether other Museum employees who entered the building on October 13, 1979, followed proper sign-in procedures. Odom was discharged for unauthorized entrance into the Museum building, not for violating the sign-in procedure.

2. Although the record indicates that other Museum employees not scheduled to work on October 13 were present inside the building, the ERCOM hearing record is silent as to whether there was a legitimate business reason for their presence. In the report of the Civil Service Hearing Officer, arguably legitimate reasons for their presence were advanced for Miller, Berry, and Johnson.

3. Record discloses that Custodian Supervisor Johnson had no knowledge of any occasion where custodians have entered the Museum building without authorization.

4. The record is lacking as to whether other Museum divisions have established prohibitions against unauthorized entrance similar to that of Rule 56 of the Custodial Manual of Rules.

5. The Hearing Officer analyzed the instant case against the NLRB test developed by the Board in Wright Line, 105 LRRM 1169. In Wright Line, the Board applied the standard developed by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle to decide a dual motive discharge case of a school employee. Mt. Healthy itself does not constitute a construction of the National Labor Relations Act.

   It should be noted that Wright Line is a recent case and that the test developed has not been reviewed by the Circuit Courts.

6. In my judgment, for the Union to prevail in this case it would have to prove either:

   A. That despite the existence of the Custodian Division's policy prohibiting unauthorized entrance, other custodians have entered the Museum building unauthorized and did not suffer disciplinary action as a result thereof, or

B. That Miller, Berry, and Johnson entered the Museum building unauthorized, that they were subject to a policy imposing discipline for such unauthorized entrance, and that they were not disciplined.

WRIGHT LINE—

WRIGHT LINE, A DIVISION OF WRIGHT LINE, INC., Worcester, Mass. and BERNARD R. LAMOUREUX, an Individual, Case No. 1-CA-14004, August 27, 1980, 251 NLRB No. 150

Robert P. Redbord and Richard D. Zaiger, for General Counsel; Julius Kirle, Chestnut Hill, Mass., for employer; Bernard R. Lamoureux, Dudley, Mass., appearing for himself; Administrative Law Judge Lowell Goerlich.

Before NLRB: Fanning, Chairman; Jenkins, Penello, and Truesdale, Members.

DISCRIMINATION Sec. 8(a)(3)

—Causality ▶ 52.16

In cases involving alleged violations of Section 8(a)(3) of LMRA, NLRB will examine "causality" — the relationship between employees' protected activities and employer actions that detrimentally affect their employment — though an analysis akin to that used by U.S. Supreme Court in Mt. Healthy City School District v. Doyle (429 U.S. 274).

—'Prextext' v. 'dual motive' cases ▶ 52.01 ▶ 52.2751

"Pretext" cases — in which an employer's asserted justification for discipline is a sham and no legitimate business justification for discipline in fact exists — may be distinguished from "dual motive" cases, in which decision to discipline involves two factors — (1) legitimate business reason, and (2) employer's reaction to employees' engaging in union or other protected activities.

—'In part' v. 'dominant motive' test ▶ 52.16 ▶ 52.2751

Issue of what "causation test" is to be used in determining whether LMRA has been violated in "dual motive" cases is now in a position where some view the "in part" test — under which a discharge violates Act if it is motivated in part by employee's protected activities, even if legitimate business reason also was relied on — as standing at one extreme, while the other extreme is represented by "dominant motive" test, which states that where both a "good" and a "bad" reason for discharge exists, General Counsel has burden of proving that discharge would not have taken place in absence of protected activities.

DISCRIMINATION Sec. 8(a)(3) INTERFERENCE Sec. 8(a)(1)

—Causality ▶ 50.15 ▶ 52.16

In all cases alleging violations of Section 8(a)(3) of LMRA or violations of Section 8(a)(1) turning on employer motivation, NLRB will employ the following "causation test": (1) General Counsel must make prima facie showing sufficient to support inference that protected conduct was a "motivating factor" in employer's decision; (2) once this is established, employer has burden of demonstrating that same action would have taken place even in absence of protected conduct. NLRB is abandoning use of term "in part," which it previously used in determining relationship, if any, between employer action and protected employee conduct.

DISCRIMINATION Sec. 8(a)(3)

—Discharge ▶ 52.2752 ▶ 52.2696 ▶ 52.2729

General counsel has made prima facie showing that union activity was motivating factor in decision to discharge employee, despite contention that discharge was for violating rule against knowingly altering or falsifying production time reports, payroll records, or time cards. Employer had union animus, and discharge occurred shortly after latest NLRB election; employer departed, in sudden and unexplained fashion, from its usual practice of declining to discharge employees for their first violation of nature involved here; employee had admirable work record, and discrepencies on his timesheet neither inured to his benefit nor detrimentally affected employer's production control system.

—Discharge ▶ 52.2696 ▶ 52.2729 ▶ 52.2752 ▶ 52.2756

Employer violated LMRA when it discharged employee, allegedly for violating rule against knowingly altering or falsifying production time reports, payroll records, or time cards, since (1) General Counsel has made prima facie showing that union activity was motivating factor in decision to discharge employee, and (2) employer has failed to demonstrate that it would have taken same action against employee in absence of his union activities.

[Text] Respondent excepted, inter alia, to the Administrative Law Judge's conclusion that it violated Section 8(a)(3) and (1) of the Act when, on December 30, 1977, it discharged Bernard Lamoureux. We agree with the result reached by the Administrative Law Judge, but only for the reasons that follow.

In resolving cases involving alleged violations of Section 8(a)(3) and, in certain instances, Section 8(a)(1), it must be determined, inter alia, whether an employee's employment conditions were adversely affected by his or her engaging in union or other protected activities and, if so, whether the employer's action was motivated by such employee activities. As discussed infra, various "tests" have been employed by the Board

and the courts to aid in making such determinations. These tests all examine the concept of "causality," that is, the relationship between the employees' protected activities and actions on the part of their employer which detrimentally affect their employment.

The Administrative Law Judge's Decision in the instant case reveals some uncertainty regarding the appropriate mode of analysis for examining causality in cases alleging unlawful discrimination. Indeed, similar doubts as to the applicable test appear to have become widespread at various levels of the decisional process primarily as a result of conflict in this area among the courts of appeals and between certain courts of appeals and the Board.

After careful consideration we find it both helpful and appropriate to set forth formally a test of causation for cases alleging violations of Section 8(a)(3) of the Act. We shall examine causality in such cases through an analysis akin to that used by the Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

It is our belief that application of the Mt. Healthy test[3] will maintain a substantive consistency with existing Board precedent and accommodate the concerns expressed by critics of the Board's past treatment of cases alleging unlawful discrimination. We further find the Mt. Healthy test to be in harmony with the Act's legislative history as well as pertinent Supreme Court decisions. Finally, in this regard, enunciation of the Mt. Healthy test will alleviate the confusion which now exists at various levels of the decisional process and do so in a manner that, we conclude, accords proper weight to the legitimate conflicting interest in this area, thereby advancing the fundamental objectives of the Act.

I. The Distinction Between Pretext and Dual Motive: It is helpful, initially, to distinguish between what are termed "pretext" cases and "dual motive" cases because it is in the dual motive situation where the legitimate interests of the parties most plainly conflict. Consequently it is in such situations that the existing controversy and confusion in this area are highlighted.[4]

In modern day labor relations, an employer will rarely, if ever, baldly assert that it has disciplined an employee because it detests unions or will not tolerate employees engaging in union or other protected activities. Instead, it will generally advance what it asserts to be a legitimate business reason for its action. Examination of the evidence may reveal, however, that the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. When this occurs, the reason advanced by the employer may be termed pretextual. Since no legitimate business justification for the discipline exists, there is, by strict definition, no dual motive.

The pure dual motive case presents a different situation. In such cases, the discipline decision involves two factors. The first is a legitimate business reason. The second reason, however, is not a legitimate business reason but is instead the employer's reaction to its employees' engaging in union or other protected activities. This latter motive, of course, runs afoul of Section 8(a)(3) of the Act. This existence of both a "good" and a "bad" reason for the employer's action requires further inquiry into the role played by each motive and has spawned substantial controversy in 8(a)(3) litigation.[5]

II. The "In Part" Test: For a number of years now, when determining whether the Act has been violated in a dual motivation case, the Board has applied what is termed the "in part" causation test. In its present form the "in part" test provides that if a discharge is motivated, "in part," by the protected activities of the employee the discharge violates the Act even if a legitimate business reason was also relied on. The Youngstown Osteopathic Hospital Association, 224 NLRB 574, 575, 92 LRRM 1328 (1976). This "in part" analysis has taken various forms with the "in part" language being modified while the underlying concept remains intact. Thus, the Board has used the following terms in dual motivation cases: "the motivating or moving cause," The Bankers Warehouse Company, 146 NLRB 1197, 1200, 56 LRRM 1045 (1964); "the motivating factor," Tursair Fueling, Inc., 151 NLRB 270, 271, fn. 2, 58 LRRM 1426 (1965); "the substantial, contributing factor," Erie Sand Steamship Company, 189 NLRB 63, fn. 1, 76 LRRM 1542 (1971); "motivated principally," P.O.G. Industries, Inc., 229 NLRB 713, 95 LRRM 1366 (1977); "a substantial cause," Broyhill Company, 210 NLRB 288, 296, 86 LRRM 1158 (1974); "a substantial or motivating ground," KBM Electronics, Inc., t/a Carsounds, 218 NLRB 1352, 1358, 89 LRRM 1728 (1975); "in substantial part," Central Casket Co., 225 NLRB 362, 92 LRRM 1547 (1976).

Since its inception, the "in part" test has been perceived by some to be, at least conceptually, at odds with the oftrepeated idea that:

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[3] For case of reference, we shall refer to this test of causality as the Mt. Healthy test. We note, however, that Mt. Healthy itself does not constitute a construction of the National Labor Relations Act and, accordingly, our Decision here is not compelled by Mt. Healthy. We do not view Mt. Healthy as at odds with our previous construction of the Act.

[4] As is demonstrated herein, under the Mt. Healthy test, there is no real need to distinguish between pretext and dual motive cases. The distinction is nonetheless useful in setting forth the controversy surrounding dual motive cases.

[5] Unfortunately, the distinction between a pretext case and a dual motive case is sometimes difficult to discern. This is especially true since the appropriate designation seldom can be made until after the presentation of all relevant evidence. The conceptual problems to which this sometimes blurred distinction gives rise can be eliminated if one views the employer's asserted justification as an affirmative defense. Thus, in a pretext situation, the employer's affirmative defense of business justification is wholly without merit. If, however, the affirmative defense has at least some merit a "dual motive" may exist and the issue becomes one of the sufficiency of proof necessary for the employer's affirmative defense to be sustained. Treating the employer's plea of a legitimate business reason for discipline as an affirmative defense is consistent with the Board's method of deciding such cases. See Bedford Cut Stone Co., Inc., 235 NLRB 629, 98 LRRM 1003 (1978).

"Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids." [N.L.R.B. v. MaGahey, 233 F.2d 406, 413, 38 LRRM 2142 (5th Cir. 1956). See also Klate Holt Co., 161 NLRB 1606, 1612, 63 LRRM 1481 (1966). Compare Shattuck Denn Mining Corporation v. N.L.R.B., 362 F.2d 466, 62 LRRM 2401 (9th Cir. 1966).]

A conflict between this concept and the "in part" rationale is seen because in a dual motivation case, the employer does have a legitimate reason for its action. Yet, an improper reason for discharge is also present. Thus, the employer's recognized right to enforce rules of its own choosing is viewed as being in practical conflict with the employees' right to be free from adverse effects brought about by their participation in protected activities. Critics of the "in part" test have asserted that rather than seeking to resolve this conflict and accommodate the legitimate competing interests, the analysis goes only half way, in that once hostility to protected rights is found, the inquiry ends and the employer's plea of legitimate justification is ignored.

III. The Advent of the "Dominant Motive" Test and the Law of the Circuits: In recent years, various courts of appeals have become incresingly critical of the "in part" analysis. The earliest, most outspoken critic of the "in part" test has been the First Circuit, which in N.L.R.B. v. Billen Shoe Co., Inc., 297 F.2d 801, 68 LRRM 2699 (1st Cir. 1968), examined the Board's application of the "in part" analysis and found it lacking.[6] Fundamental to its rejection of the "in part" test is the court's view that the test ignores the legitimate business motive of the employer and places the union activist in an almost impregnable position once union animus has been established.

In an effort to remedy what it viewed as the inequities of the test, the First Circuit began to advance its own process of analysis in dual motivation cases. Thus, in Billen Shoe, supra, the First Circuit stated that:

"When good cause for criticism or discharge appears, the burden which is on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose a bad one. The mere existence of anti-union animus is not enough." [397 F.2d at 803.]

In other opinions, the First Circuit has termed its test a "dominant motive" (see fn. 6, supra) or a "but for" test. Coletti's Furniture, Inc. v. N.L.R.B., 505 F.2d 1293, 94 LRRM 3071 (1st Cir. 1977). For our purposes, this test will be referred to as the "dominant motive" test, which, in its most simple form provides that when both a "good" and "bad" reason for discharge exist, the burden is upon the General Counsel to establish that, in the absence of protected activities, the discharge would not have taken place. Coletti's Furniture, supra at 1293, 1294; N.L.R.B. v. Fibers International Corporation, 439 F.2d 1311, 1312, fn. 1, 76 LRRM 2798, 2928 (1st Cir. 1971).

Conflict between the Board and the First Circuit in this area has escalated to the point where in Coletti's Furniture, supra at 1293, the court stated that "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." In addition, the conflict over which test to apply in dual motive cases has now spread throughout the circuit courts to the extent that a review of the tests currently applied by the Board, our Administrative Law Judges, and the various courts of appeals reveals a picture of confusion and inconsistency.[7]

Thus, the District of Columbia Circuit, in Allen v. N.L.R.B., 561 F.2d 976, 982, 95 LRRM 3158 (D.C. Cir. 1977), applied an "in part" test, stating that:

"[T]he cases are legion that the existence of a justifiable ground for discharge will not prevent such discharge from being an unfair labor practice if partially motivated by the employee's protected activity . . . ."[8]

Several months later, another panel applied the "dominant motive" test as propounded by the First Circuit in Billen Shoe, supra, holding that:

"The burden on the Board is not simply to discover some evidence of improper motive, but to find an affirmative and persuasive reason why the employer rejected the good cause and chose an illegal one." [Midwest Regional Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. N.L.R.B., 564 F.2d 434, 440, 95 LRRM 2821 (D.C. Cir. 1977).][9]

Similarly, the Ninth Circuit has applied both a "dominant motive" and an "in part" test.[10] Then, in Polynesian Cultural Center

[6] Actually, as early as 1953, in N.L.R.B. v. Whitin Machine Works, 204 F.2d 883, 885, 32 LRRM 2201 (1st Cir. 1953), that circuit court expressed disagreement with Board analysis in 8(a)(3) cases. Yet, it was not until 1963 that Judge Aldrich of the First Circuit formally initiated the "dominant motive" or "but for" test. See N.L.R.B. v. Lowell Sun Publishing Co., 320 F.2d 835, 842, 53 LRRM 2480 (1st Cir. 1963).

[7] Although it is responsible for the advent of the "dominant motive" test, which now is found in various forms in the Circuits, the First Circuit, in its recent decision in N.L.R.B. v. Eastern Smelting and Refining Corporation, 598 F.2d 666, 101 LRRM 2328 (1st Cir. 1979), appears to have moved away from the "dominant motive" test as earlier expressed. In Eastern Smelting, the First Circuit articulated and applied for the first time the Mt. Healthy test set forth in this opinion. In Eastern Smelting, however, the First Circuit did not explicitly abandon its "dominant motive" test, nor did it abate its criticism of the "in part" test.

[8] An "in part" test has also been applied by the Sixth, Seventh, and Tenth Circuits. See N.L.R.B. v. Retail Store Employees Union, Local 876, Retail Clerks International Association, AFL-CIO, 570 F.2d 586, 590, 97 LRRM 2465 (6th Cir. 1978), cert. denied 439 U.S. 819, 99 LRRM 2600; N.L.R.B. v. Gogin, d/b/a Gogin Trucking, 575 F.2d 596, 601, 98 LRRM 2250 (7th Cir. 1978); M. S. P. Industries, Inc., d/b/a The Larimer Press v. N.L.R.B., 568 F.2d 166, 173-174, 97 LRRM 2403 (10th Cir. 1977).

[9] This "dominant motive" test has also been applied by the Fourth Circuit. See Firestone Tire and Rubber Company v. N.L.R.B., 539 F.2d 1335, 1337, 93 LRRM 2625 (4th Cir. 1976).

[10] Compare Western Exterminator Company v. N.L.R.B., 565 F.2d 1114, 1118, 97 LRRM 2187 (9th Cir. 1977), with Penasquitos Village, Inc. v. N.L.R.B., 565 F.2d 1074, 1082-83, 97 LRRM 2244 (9th Cir. 1977).

v. N.L.R.B., 582 F.2d 467, 473, 99 LRRM 3416 (9th Cir. 1978), that court noted that:

"Several of our cases have said that the discriminatory motive must be the moving cause for the discharge. . . . On the other hand, this court has indicated that it too, on occasion, employs the but-for approach."

Tests which have been applied by other circuit courts fit neatly into neither the "in part" nor "dominant motive" category. For example, in Waterbury Community Antenna, Inc. v. N.L.R.B., 587 F.2d 90, 98, 99 LRRM 3216 (2d Cir. 1978), the Second Circuit stated its test as follows:

"The rule of causation applied in this Circuit is that 'the General Counsel must at least provide a reasonable basis for inferring that the permissible ground alone would not have led to the discharge, so that it was partially motivated by an impermissible one.' . . . The magnitude of the impermissible ground is immaterial . . . as long as it was the 'but for' cause of the discharge . . . ."

The Third Circuit stated in Edgewood Nursing Center, Inc. v. N.L.R.B., 581 F.2d 363, 368, 99 LRRM 2036 (3d Cir. 1978), that:

"[T]he employer violates the Act if anti-union animus was the 'real motive' . . . . If two or more motives are behind a discharge, the action is an unfair labor practice if it is partly motivated by reaction to the employee's protected activity . . . . On the other hand, if the employee would have been fired for cause irrespective of the employer's attitude toward the union, the real reason for the discharge is nondiscriminatory . . . . Thus, if the employer puts forward a justifiable cause for discharge of the employee, the Board must find that the reason was a pretext, and that anti-union sentiment played a part in the decision to terminate the employee's job."

The Fifth Circuit, in N.L.R.B. v. Aero Corporation, 581 F.2d 511, 514-515, 99 LRRM 2800 (5th Cir. 1978), ruled that:

"[T]he Board is not required to establish substantial evidence that the conduct is motivated solely by anti-union animus. It is sufficient if substantial evidence shows that the force of anti-union purpose was 'reasonably equal' to the lawful motive prompting conduct."

Finally, the Eight Circuit has held that:

"[T]he mere existence of valid grounds for a discharge is no defense to a charge that the discharge was unlawful, unless the discharge was predicated solely on those grounds, and not by a desire to discourage union activity." [Singer Company v. N.L.R.B., 429 F.2d 172, 179, 74 LRRM 2669 (8th Cir. 1970).]

We note that our citation of the foregoing cases is intended neither to explain nor vindicate the position expressed by any particular circuit court. Rather, it is intended to demonstrate that in an area fundamental to the Act, namely, Section 8(a)(3), disagreement and controversy are rampant among the various decisionmaking bodies.

IV. The Mt. Healthy Test: As the preceding two sections have demonstrated, the issue of what causation test is to be used to determine whether the Act has been violated in dual motivation cases is now in a position where some view the "in part" test as standing at one extreme, while the other extreme is represented by the "dominant motive" test first advanced by the First Circuit. Despite this perceived polarization, room for accommodation and clarification does exist in the test of causality set forth in the recent Supreme Court decision of Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274.

The Mt Healthy case arose when Doyle, an untenured teacher, brought suit against the Mt. Healthy School Board, alleging that it had wrongfully refused to renew his contract. The school board presented Doyle with written reasons for their refusal. The two reasons cited were: (1) Doyle's use of obscene language and gestures in the school cafeteria, and (2) Doyle's conveyance of a change in the school's policies to a local radio station. In his suit, Doyle alleged that the refusal to renew his contract violated his rights under the first and fourteenth amendments. He sought reinstatement and backpay.

The district court found that of the two reasons cited by the school board, one involved unprotected conduct while the second was clearly protected by the first and fourteenth amendments. The district court reasoned that since protected activity had played a substantial part in the school board's decision, its refusal to renew the contract was improper and Doyle was, therefore, entitled to reinstatement and backpay. The court of appeals affirmed, per curiam.

The Supreme Court reversed. In a unanimous opinion, the Court rejected the lower court's application of such a limited "in part" test and ruled that the school board must be given an opportunity to establish that its decision not to renew would have been the same if the protected activity had not occurred. The Court reasoned as follows:

"A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with the rule enunicated by the District Court is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision — even if the same decision would have been reached had the incident not occurred. The constitutional principle at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct. A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But that same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decisions." [429 U.S. at 285-286.]

From this rationale, the Court fashioned the following test to be applied on remand:

"Initially, in this case, the burden was properly placed upon respondent [employee] to show that his conduct was constitu-

tionally protected, and that this conduct was a 'substantial factor' — or, to put it in other words, that it was a 'motivating factor' in the [School] Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." [429 U.S. at 287.]

Thus, the Court established a two-part test to be applied in a dual motivation context. Initially, the employee must establish that the protected conduct was a "substantial" or "motivating" factor. Once this is accomplished, the burden shifts to the employer to demonstrate that it would have reached the same decision absent the protected conduct.

This test in Mt. Healthy is further explicated by the Court in Village of Arlington Heights v. Metropolitan Housing Development corp., 429 U.S. 252 (1977), a case decided the same day as Mt. Healthy. A brief discussion of Arlington Heights is helpful in examining the parameters of the Mt. Healthy test.

Arlington Heights involved an effort by a real estate developer to obtain a zoning change enabling it to construct a housing development. During the zoning hearing, it became apparent that the new development would be racially integrated. The Village ultimately denied the rezoning and, in response, a group brought suit seeking injunctive and declaratory relief alleging that the decision was racially motivated. The Supreme Court ruled that plaintiffs had "failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision." (429 U.S. at 270.)

In reaching its decision, the Court invoked the Mt. Healthy test. Thus, the Court, citing Mt. Healthy, stated that:

"Proof that the decision by the Village was motivated in part by a racially discriminatory purpose would not necessarily have required invalidation of the challenged decision. Such proof would, however, have shifted to the Village the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered." [429 U.S. at 270–271, fn. 21.]

The Arlington Heights decision is instructive in one other respect as well. For in its decision, the Court recognized that efforts to determine what is the "dominant" or "primary" motive in a mixed motivation situation are usually unavailing. In this regard, the Court stated that a plaintiff is not required

"to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one." [429 U.S. at 265.]

Assuming for the moment that the Mt. Healthy test is applicable to dual motive discharges under Section 8(a)(3), it is evident that Mt. Healthy represents a rejection of an "in part" test which stops with the establishment of a prima facie case or at consideration of an improper motive. Indeed, rejection of such an "in part" test is implicit in the Supreme Court's reversal of the district court's application of such an analysis.

The "dominant motive" test fares no better under Mt. Healthy. While a surface similarity between Mt. Healthy and the "dominant motive" test exists in that both reject a limited "in part" analysis and both require proof of how the employer would have acted in the absence of the protected activity, the similarity ends there. For the Mt. Healthy test and the "dominant motive" test place the burden for this proof on different parties.

As has been noted, under the "dominant motive" test it is the General Counsel who, in addition to establishing a prima facie showing of unlawful motive, is further required to rebut the employer's asserted defense by demonstrating that the discharge would not have taken place in the absence of the employees' protected activities. However, it is made abundantly clear in Mt. Healthy (and was specifically reiterated in Arlington Heights) that after an employee or, here, the General Counsel makes out a prima facie case of employer reliance upon protected activity, the burden shifts to the employer to demonstrate that the decision would have been the same in the absence of protected activity. This distinction is a crucial one since the decision as to who bears this burden can be determinative.

The "dominant motive" test is further undermined by the Arlington Heights decision. As noted above, the Court in Arlington Heights eschewed the "dominant motive" analysis by specifically stating that it is practically impossible to examine a dual motivation decision and arrive at a conclusion as to what was the "dominant" or "primary" purpose or motive. Arlington Heights, 429 U.S. at 265. Finally, the shifting burden analysis set forth in Mt. Healthy and Arlington Heights represents a recognition of the practical reality that the employer is the party with the best access to proof of its motivation.

V. Application of the Mt. Healthy Test to Section 8(a)(3): In the final analysis, the applicability of the Mt. Healthy test to the NLRA depends upon its compatibility with established labor law principles and the extent to which the test reaches an accommodation between conflicting legitimate interests. For, as the Supreme Court noted, in unfair labor practice cases:

"The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review." [N.L.R.B. v. Truck Driver's Local Union No. 449, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, 353 U.S. 87, 96, 39 LRRM 2603 (1957).]

Initially, support for the Mt. Healthy test of shifting burdens is found in the 1947 amendment of Section 10(c). That amendment provided that:

"No order of the Board shall require the reinstatement of any individual as employee who has been suspended or discharged, or

the payment to him of any backpay, if such individual was suspended or discharged for cause."

While the amendment itself does not address the "in part" or "dominant motive" analysis or the allocation of burdens, the legislative history does. In explaining the amendment Senator Taft stated:

"The original House provision was that no order of the Board could require the reinstatement of any individual or employee who had been suspended or discharged, unless the weight of the evidence showed that such individual was not suspended or discharged for cause. In other words, it was turned around so as to put the entire burden on the employee to show he was not discharged for cause. Under provision of the conference report, the employer has to make the proof. That is the present rule and the present practice of the Board." [93 Cong. Rec. 6678; 2 Leg. Hist. 1595 (1947).]

The principle that "the employer has to make the proof" is also found in the Supreme Court's decision in N.L.R.B. v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). In that case the Court was concerned with the burden of proof in 8(a)(3) cases. It first noted that certain employer actions are inherently destructive of employee rights and, therefore, no proof of antiunion motive is required. Of course, the discharge of an employee, in and of itself, is not normally an inherently destructive act which would obviate the requirement of showing an improper motive. In this context, the Court in Great Dane stated that:

"[I]f 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. Thus . . . once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to *some* extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." [388 U.S. at 34 (emphasis in the original)]

Thus, both Congress and the Supreme Court have implicitly sanctioned the shift of burden called for in Mt. Healthy in the context of Section 8(a)(3).[11]

Indeed, as is indicated by the above quotation of legislative history and the citation of Great Dane, the shifting burden process in Mt. Healthy is consistent with the process envisioned by Congress and the Supreme Court to resolve discrimination cases, although the process has not been articulated formally in the manner set forth in Mt. Healthy. Similarly, it is the process used by the Board. Thus, the Board's decisional process traditionally has involved, first, an inquiry as to whether protected activities played a role in the employer's decision. If so, the inquiry then focuses on whether any "legitimate business reason" asserted by the employer is sufficiently proven to be the cause of the discipline to negate the General Counsel's showing of prohibited motivation.[12] Thus, while the Board's process has not been couched in the language of Mt. Healthy, the two methods of analysis are essentially the same.

Perhaps most important for our purposes, however, is the fact that the Mt. Healthy procedure accommodates the legitimate competing interests inherent in dual motivation cases, while at the same time serving to effectuate the policies and objectives of Section 8(a)(3) of the Act. As the Supreme Court noted in N.L.R.B. v. Erie Resistor Corp., 373 U.S. 221, 53 LRRM 2121 (1963), it is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of

"weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." [373 U.S. at 229.]

Mt. Healthy achieves this goal.

Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context, it is the employer which has "to make the proof." Under this analysis, should the employer be able to demonstrate that the discipline or other action would have occurred absent protected activities, the employee cannot justly complain if the employer's action is upheld. Similarly, if the employer cannot make the necessary showing, it should not be heard to object to the employee's being made whole because its action will have been found to have been motivated by an unlawful consideration in a manner consistent with congressional intent, Supreme Court precedent, and established Board processes.

Finally, we find it to be of substantial importance that our explication of this test of causation will serve to alleviate the intolerable confusion in the 8(a)(3) area. In this regard, we believe that this test will provide litigants and the decisionmaking bodies with a uniform test to be applied in these 8(a)(3) cases.[13]

Thus, for the reasons set forth above, we shall henceforth employ the following cau-

[11] It should be noted that this shifting of burdens does not undermine the established concept that the General Counsel must establish an unfair labor practice by a preponderance of the evidence. The shifting burden merely requires the employer to make out what is actually an affirmative defense (see fn. 6, supra) to overcome the prima facie case of wrongful motive. Such a requirement does not shift the ultimate burden.

[12] The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case. See e.g., Shattuck Denn Mining Company v. N.L.R.B., 362 F.2d 466, 62 LRRM 2401 (9th Cir. 1966).

[13] Still an additional benefit which will result from our use of the Mt. Healthy test is that the perceived significance in distinguishing between pretext and dual motive cases will be obviated.

sation test in all cases alleging violation of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.[14]

Finally, inherent in the adoption of the foregoing analysis is our recognition of the advantage of clearing the air by abandoning the "in part" language in expressing our conclusion as to whether the Act was violated. Yet, our abandonment of this familiar phraseology should not be viewed as a repudiation of the well-established principles and concepts which we have applied in the past. For, as noted at the outset of this Decision, our task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment. Indeed, it bears repeating that the "in part" test, the "dominant motive" test, and the Mt. Healthy test all share a fundamental common denominator in that the objective of each is to determine the relationship, if any, between employer action and protected employee conduct. Until now, in making this determination we frequently have employed the term "in part." But in so doing it only was a term used in pursuit of our goal which is to analyze thoroughly and completely the justification presented by the employer. It is, however, our considered view that adoption of the Mt. Healthy test, with its more precise and formalized framework for making this analysis, will serve to provide the necessary clarification of our decisional processes while continuing to advance the fundamental purposes and objectives of the Act.

VI. Application of the Mt. Healthy Test to the Facts of the Instant Case: In the instant case, the General Counsel alleges that Respondent discharged Bernard Lamoureux in violation of Section 8(a)(3) and (1) of the Act. Respondent denies this allegation, asserting that Lamoureux was discharged for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." The Administrative Law Judge found that Respondent's discharge of Lamoureux violated Section 8(a)(3) and (1) of the Act. For the reasons set forth below, we agree.

The record reveals that at the time of his discharge, Lamoureux had been employed by Respondent for over 10 years. He had occupied the position of inspector for two years and was considered a better than average employee. Indeed, at the hearing, his work was described as admirable. On the day prior to his discharge, Lamoureux's supervisor, Forte, was instructed by the plant superintendent to "check" on Lamoureux, who had been observed entering a restroom carrying a newspaper.[15] The next morning, Forte discovered certain discrepancies in Lamoureux's timesheet. The timesheet indicated that Lamoureux had been working on certain jobs at the time when Forte had been looking for him the previous day but had been unable to find him at his work station.[16] Upon reporting this finding to his own supervisor, Forte was told that "the offense was a dischargeable offense."

Thereafter, Forte was instructed to ask Lamoureux for an explanation. Although Forte did so, the record reveals that Lamoureux's final check had already been prepared when Forte confronted him with the discrepancy. Respondent then rejected Lamoureux's explanation, in which he conceded that he may not have performed the jobs at the times indicated on his timesheet but maintained that the jobs had in fact been performed that day. Lamoureux was promptly dicharged, purportedly for violating a plant rule against "knowingly altering, or falsifying production time reports, payroll records, time cards." Respondent conceded that Lamoureux was not discharged for being away from his work station or for not performing his assigned work.[17]

In presenting his prima facie case of wrongful motive, the General Counsel demonstrated that Lamoureux had become a leading union advocate, beginning in 1976. During both the 1976 and 1977 election campaigns, both of which were lost by the Union, Lamoureux actively solicited support for the Union among his fellow employees. It is undisputed that Respondent was well aware of his sympathies and activities. Thus, during the 1977 campaign, which like the 1976 campaign appears to have included aggressive electioneering on both sides, Lamoureux was reprimanded by management, allegedly for pressuring an employee regarding the Union.[18] Also, during the 1977 campaign, Respondent's supervisors on several occasions directed gratuitous remarks regarding the Union toward Lamoureux, once calling him the "union kingpin." We also note that the discharge took place just two months after the 1977 election.

In addition, it can scarcely be disputed that Respondent harbored animus toward

[14] In this regard we note that in those instances where, after all the evidence has been submitted, the employer has been unable to carry its burden, we will not seek to quantitatively analyze the effect of the unlawful cause once it has been found. It is enough that the employees' protected activities are causally related to the employer action which is the basis of the complaint. Whether that "cause" was the straw that broke the camel's back or a bullet between the eyes, if it was enough to determine events, it is enough to come within the proscription of the Act.

[15] Respondent never contended that such conduct violated shop rules.

[16] It was conceded that Lamoureux's work activities might legitimately have carried him to other parts of the plant. Nevertheless, Forte did not use the paging system to try to locate Lamoureux, or even check the men's room where Lamoureux was last seen.

[17] In this connection, we note that Respondent did not seek to determine where Lamoureux had been when Forte discovered him absent from his work station, nor did Respondent seek to verify whether Lamoureux had, as he claimed, performed the inspections indicated on his timesheet. Rather, Respondent simply informed Lamoureux that he was no longer worthy of Respondent's trust.

[18] Respondent's witness later conceded that the word "pressure" was too strong.

both the Union and union activists, including Lamoureux. Respondent's antiunion campaign included, inter alia, references to the murder indictment of an official of one of the Union's sister locals in another State, as well as an unsupported claim that Respondent's "chances for survival and growth would be seriously hurt by the presence of a union." In view of the tone of the campaign, along with Respondent's remarks directed specifically to Lamoureux, we agree with the Administrative Law Judge that Respondent displayed considerable animus toward Lamoureux, whom it considered to be the "union kingpin."

The General Counsel also demonstrated that Respondent never previously had discharged an employee under these circumstances, although, as detailed by the Administrative Law Judge, the record shows that employees commonly completed timesheets as Lamoureux had and that such discrepancies had no effect on the accuracy of the system of production control. It also appears that, of the only two other employees ever discharged for violating the rule regarding the falsification of company records, one was discharged for embezzlement and the other for deliberate forgery of sales records in order to collect fraudulent sales commissions.[19] Furthermore, two employees who had deliberately violated the same rule by falsifying their timecards were issued warnings and were not discharged.

From the foregoing, we conclude that the General Counsel made a prima facie showing that Lamoureux's union activity was a motivating factor in Respondent's decision to discharge him. Our conclusion is based on Respondent's union animus, as reflected in the hostility directed toward Lamoureux resulting from his active role in the union campaign as well as the timing of the discharge, which occurred shortly after completion of the latest union election. Also of significance is Respondent's sudden and unexplained departure from its usual practice of declining to discharge employees for their first violation of this nature. Such action here is especially suspect in light of Lamoureux's admirable work record and the fact that his timesheet discrepancies neither inured to his benefit nor served to affect detrimentally Respondent's production control system.

We further find that Respondent has failed to demonstrate that it would have taken the same action against Lamoureux in the absence of his engaging in union activities. In this regard we note that the record discrepancies were only discovered by Forte following the plant supervisor's directive to "check" on Lamoureux, despite the fact that Respondent had no reason to believe that Lamoureux was untrustworthy. Under the circumstances, such actions suggest a predetermined plan to discover a reason to discharge Lamoureux and thus rid the facility of a union activist.[20] Further undermining Respondent's defense is the evidence which demonstrates disparate treatment. As noted previously, the only instances where discharge was imposed by Respondent as a result of "record discrepancies" were where the employee in question sought to embezzle funds or collect fraudulent sales commissions. Lamoureux's infraction clearly did not rise to such a level. Indeed, the record demonstrates that such record discrepancies were commonplace and generally resulted in no discipline whatsoever. In those instances where discipline was imposed, Respondent issued warnings or other forms of discipline short of discharge.

Accordingly, for the reasons noted above, we find that Respondent's discharge of Bernard Lamoureux violated Section 8(a)(3) and (1) of the Act.

JENKINS, Member, concurring:

[*Text*] I am willing to apply the shifting burden-of-proof standard my colleagues adopt for determining whether a discharge was caused by an unlawful purpose where the discharge may have had more than one cause, not all of them unlawful. This standard may suffice for most cases. However, there may remain a residue, perhaps small, of cases of mixed motive or cause, where the purposes are so interlocked that it is not possible to point to one of them as "the" cause. All of them, both lawful and unlawful, may have combined to push the employer to the decision he would not have reached if even one were absent. In such cases, it is plainly not the latest event, the most recent purpose, which is the cause of the discharge; rather, it is all of them together, from earliest to latest, which cause the discharge.[21]

Where the evidence does not permit the isolation of a single event or motive as the cause of the discharge, then plainly the unlawful motive must be deemed to be part of the cause of the discharge, and the discharge is unlawful. By definition, it took all of these straws to break the camel's back, so each of them provides a contribution "but for" which the camel would have survived. It is fair that the party who created this situation, in which isolation of a single cause is impossible, bear the burden created by his venture into an area prohibited by the Act. Thus, the "in part" standard, as distinguished from the "but for" and "dominant motive" tests, is the only criterion which will effectuate the purposes of the statute. As my colleagues note, the legislative history shows plainly that Congress itself struck this balance, and I read Mt. Healthy as also in effect adopting this standard.

Thus, my only reservation now is the way in which the shifting burden-of-proof standard may be applied to prevent unlawful conduct. If experience shows it to be inade-

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[19] Unlike these employees, it was conceded that Lamoureux could not have benefited financially from the discrepancies on his time sheet.

[20] See, e.g., Lipman Bros., Inc., et al., 147 NLRB 1342, 1376, 56 LRRM 1420 (1964), enfd. 355 F.2d 15, 21, 61 LRRM 2193 (1st Cir. 1966).

[21] It is the difficulty in singling out one individual cause in such situations which has led to criticism and rejection of a "but for" standard as a measure of cause; there is no logical way to apply a "but for" standard in such cases except to fasten upon the most recent event or motive. See Prosser, "Handbook of the Law of Torts" at 238–239, 4th ed. (1971); LaFave and Scott, "Handbook on Criminal Law," at 249–251 (1972).

quate in application, modification may be required.

LARSEN SUPPLY CO.—

LARSEN SUPPLY CO., INC., Santa Fe Springs, Calif. and LOCAL 598, TEAMSTERS, et al., Case Nos. 21-CA-17833, et al., September 8, 1980, 251 NLRB No. 175

Carolyn M. Yee, for General Counsel; A. Patrick Nagel, Newport Beach, Calif., for employer; Administrative Law Judge David G. Heilbrun.

Before NLRB: Fanning, Chairman; Jenkins and Penello, Members.

INTERFERENCE Sec. 8(a)(1) DISCRIMINATION Sec. 8(a)(3) REFUSAL TO BARGAIN Sec. 8(a)(5)

—Change in lunch breaks ▶ 50.601 ▶ 52.74 ▶ 54.673

Employer that permitted its truck drivers to take their lunch breaks at any convenient time during delivery trips violated LMRA when, following union's victory in election but before union's certification, employer instituted new policy requiring drivers to take lunch from 12 to 12:30 p.m. only. (1) New policy was implemented in retaliation for pro-union vote and was result of employer's generally hostile attitude toward union; (2) employer does not contend that there was economic justification for change in lunch break, it did not consult union before instituting change.

[*Text*] The Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act by implementing changes in the lunch breaks of its truckdriver employees. We agree with this finding, but for the reasons below we also find that these changes violated Section 8(a)(3) and (5) of the Act.

Prior to the election, Respondent permitted its truckdrivers to take their lunch breaks whenever it was convenient during the course of their deliveries. Following the election, Respondent initiated a new policy requiring them to take lunch from 12 to 12:30 only. It is well settled that an employer violates Section 8(a)(3) of the Act when it initiates changes in employees' working conditions in order to retaliate against them for selecting a union as their bargaining representative. In Albert's Inc., 213 NLRB 686, 692-693, 87 LRRM 1682 (1974), the employer reacted to a union election victory by instituting a new policy permitting employees to smoke and drink coffee only during designated break times, in contrast with the previous policy of allowing such activity whenever employees were not busy. The Board adopted the Administrative Law Judge's finding that the changes were instituted because of the election outcome and hence violated Section 8(a)(3) and (1) of the Act.[2] In the instant case, the Administrative Law Judge similarly found that the new policy on lunch breaks was implemented in retaliation for the prounion vote and was a result of Respondent's generally hostile attitude toward the Union. We therefore find that Respondent violated Section 8(a)(3) and (1) of the Act by changing the lunch breaks of its truckdriver employees.

It is also well established that, absent compelling economic considerations for doing so, an employer acts at its peril in making unilateral changes in terms and conditions of employment during the period between an election and a union's certification.[3] Here, Respondent does not contend that there was an economic justification for the lunch break changes, and it did not consult and bargain with the Union prior to instituting the changes. We therefore find that Respondent's unilateral action violated Section 8(a)(5) and (1) of the Act.

SUPERVISOR Sec. 2(11)

—Secretary to management official ▶ 42.306

Secretary to management official is not supervisor within meaning of LMRA. (1) Secretary merely introduced her sister to her boss, who hired sister on the spot; (2) secretary's comments on employment applications are either routine confirmation of data or superficial opinion of first impression; (3) secretary signed termination notice in vague "personnel" capacity; (4) her initialing of employee timecard is "intrinsically inconsequential."

INTERFERENCE Sec. 8(a)(1)

—Coercive conduct ▶ 50.601

Distributor of plumbing supplies did not violate LMRA when it instructed its truck drivers to call in more frequently during delivery trips and to have customers indicate delivery time on delivery papers, since this instruction has such meagre significance that it does not rise to level of unfair labor practice.

—No-solicitation rule ▶ 50.181

Employer did not violate LMRA when, in response to employees' heckling of co-worker who was disinterested in union, it told employees that they should carry out their work and that it did not want to hear about union. It is contended that this conduct amounted to promulgation of improper no-solici-

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[2] See also Robert G. Purcell and Robert M. Purcell, a Partnership, d/b/a Finnical Tire Company, 171 NLRB 242, 245, 68 LRRM 1094 (1968).

[3] Mike O'Connor Chevrolet-Buick-GMC Co., Inc., and Pat O'Connor Chevrolet-Buick-GMC Co., Inc., 209 NLRB 701, 703 — 704, 85 LRRM 1419 (1974); Albert's Inc., supra at 693.