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cretion in the trial judge to eliminate some evidence.[31] However, until the North Carolina court further elucidates the nature of this "plenary power" and the "bounds of reason," the answer in this jurisdiction is uncertain.

The argument has been made that if the legislature labels certain conduct a crime, it is indicative of the moral tenor of society, and he who violates that law should thereafter be accountable for impeachment purposes in a court of law.[32] It should not be forgotten, however, that "there may be convictions of violations of hundreds of police regulations, which in no real sense can be taken as tending to make one so convicted unworthy of belief."[33] No one would contend that, with traffic fatalities mounting each year, traffic laws should be regarded lightly, but the law makes provision for punishment of such offenders, and the witness stand is not the proper place. Veracity and honesty should be the criteria as to the type of criminal convictions permitted in evidence. The trial judge should have discretion to eliminate evidence of convictions that are irrelevant, remote and abusive. Only when these prerequisites are met will the jury have testimony that can be weighed with intelligence rather than emotion.

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Labor Law—Decreasing Importance of Employer Motivation as an Element of Unfair Labor Practice

Though inquiry under section 8(a)(3) of the National Labor Relations Act[1] specifically requires a finding of discrimination and a

[31] The court followed the decision in Niemeyer v. McCarty, 221 Ind. 688, 700-01, 51 N.E.2d 365, 370 (1943) where the court held that the trial judge was not authorized to exclude entirely evidence of a prior criminal conviction even though the extent to which cross examination may be carried is within his sound discretion. 129 Ind. App. 11, 150 N.E.2d 765, 767 (1958).

[32] State v. Johnson, 76 Utah 84, 116, 287 P. 909, 921 (1930).

[33] Burgess v. State, 161 Md. 162, 173, 155 A. 153, 157 (1931).

[1] 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 158(a) (1964): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of rights guaranteed under section 157 of this title; . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 61 Stat. 140 (1947), *as amended*, 29 U.S.C. § 157 (1964): "Employees shall have the right to self-

resulting discouragement of union membership, such finding has normally turned on whether the discriminatory conduct was motivated by antiunion purpose or animus.[2] Where the employer's conduct is "inherently destructive" of important employee rights and is largely without legitimate business justification, courts have had no difficulty in holding that antiunion purpose can be inferred from the conduct itself.[3] However, the necessity of an affirmative showing of the employer's antiunion purpose in activities not "inherently destructive" of employee interests has been a source of continuing uncertainty in the interpretation of sections 8(a)(1) and (3).[4]

The means of combatting union activity are becoming increasingly sophisticated. The clever and well-advised employer can find many ways to conceal his antiunion purpose, to camouflage antiunion purpose with purported business justifications. Thus, instead of discharging employees who are sympathetic to the union, the employer may reassign them to jobs with dangerous equipment, give more desirable assignments to non-union men, or direct strict enforcement of certain theretofore loosely enforced shop rules. It cannot be said that these activities are "inherently destructive" of employee rights, nor does the employer have difficulty in making a case for the contention that the action was necessitated by legitimate business reasons. Consequently courts have been caught in the semantic tangles of requiring an affirmative showing of antiunion purpose on one hand, and an inclination to balance conflicting legitimate interests on the other.

The courts have interpreted section 8(a)(3) to mean "discrimination . . . [with intent] to encourage or discourage membership in a labor organization," and employer responses to union activity have been considered primarily under this section.[5] The most emphatic statement of the importance of employer intent or motiva-

organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

[2] *See* NLRB v. Brown, 380 U.S. 278 (1964); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[3] Local 357, Teamsters Union v. NLRB, 365 U.S. 667 (1961).

[4] *See* Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735, 743 (1965).

[5] *See*, Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1198 (1967).

tion is contained in *American Ship Building Company v. NLRB.*[6] The Court, however, has not chosen to continue the reasoning of *American Ship Building,* and the decisions in *NLRB v. Great Dane Trailers, Incorporated*[7] and *NLRB v. Fleetwood Trailer Company*[8] have diminished the importance of employer motivation as an element of unfair labor practice.[9]

The question in *American Ship Building* was whether an employer commits an unfair labor practice when he temporarily lays-off or locks-out his employees in support of his economic position after reaching a bargaining impasse. In anticipation of a contract expiration the employer, a shipyard owner, entered into a series of negotiating sessions with the union, but failed to reach a new agreement. There was no strike at the expiration of the contract, but the employer's experience with the union caused him to fear that a strike would occur later during his peak repair season. The employer felt that such a strike would do serious harm to his business. The contract expired during the employer's "off" season, and, by laying off his employees and shutting off his operation the employer took advantage of an opportunity to deny the initiative to the union.[10]

In holding that the employer had not violated the statute, the Court gave careful consideration to the importance of antiunion animus in violations of 8(a)(1)[11] and 8(a)(3).[12] While admitting that some acts are so damaging to legitimate employee interests that inquiry into actual motivation is unnecessary, the court stated that in most cases an affirmative showing of antiunion animus is required.[13] Moreover, the Court agreed that the employer's action discriminated against the employees and to some extent interferred with the exercise of their rights under the act. Nevertheless, the Court did not feel that the discrimination or the interference with employee rights was sufficient to label the activity an unfair labor practice absent a showing of antiunion purpose.[14]

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[6] 380 U.S. 300 (1965).
[7] 388 U.S. 26 (1967).
[8] 389 U.S. 375 (1967).
[9] The Court also seems less concerned with employer motivation under section 8(a)(5). *See* NLRB v. Katz, 369 U.S. 736 (1962), where the Court states that affirmative showing of a failure of subjective good faith is unnecessary in making out a charge of refusal to bargain.
[10] American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 303-4 (1965).
[11] *Id.* at 305.
[12] *Id.* at 308.
[13] *Id.* at 311.
[14] *Id.*

The lines of the controversy over employer intent are drawn with particular clarity by the concurring opinions. Three members of the Court reject the majority's contention that an affirmative showing of antiunion animus is necessary under section 8(a)(3) unless the activity complained of is "inherently destructive" of important employee rights.[15] One concurring opinion would eliminate consideration of employer intent or motivation and rely completely on the test of whether the legitimate business interests of the employer justify his interference with employee rights.[16]

In *NLRB v. Great Dane Trailers, Incorporated,*[17] the employer allowed strike breakers and replacements to collect accrued vacation benefits on the same basis as would have been allowed under the expired contract, while at the same time denying accrued vacation benefits to strikers. There was no finding that the employer acted with an antiunion purpose, intending his action to discourage the strikers' activity.[18] After carefully reviewing the Supreme Court's reasoning in *American Ship Building,* the circuit court held that the employer's activity was not so destructive of employee interests as to make inquiry into motivation unnecessary. Thus, the court held that the Board had erred in finding a violation of 8(a)(1) or (3) without making an affirmative showing of antiunion animus.[19]

The Supreme Court reversed. Though purporting merely to review cases involving antiunion motivation in order to distill a general rule, the Court apparently reconsidered the reasoning of *American Ship Building*:

> 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 conduct was motivated by business considerations. Second, 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 justification for his conduct.[20]

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[15] *Id.* at 323 (concurring opinion of White, J.); *compare* NLRB v. Brown, 380 U.S. 278 (1964) (dissenting opinion of White, J.), *with* NLRB v. Erie Resistor, 373 U.S. 221 (1963).

[16] 380 U.S. at 340 (concurring opinion of Goldberg and Warren, J.J.).

[17] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967.)

[18] *Id.* at 34.

[19] NLRB v. Great Dane Trailers, Inc., 363 F.2d 130 (1966).

[20] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

Under this rule, the employer has the burden of showing that he was motivated by business considerations whenever he is found to have engaged in discriminatory activity "which could have adversely affected employee rights to *some* extent. . . ."[21] Dissenting, Mr. Justice Harlan points out that this reasoning is a considerable deviation from that of *American Ship Buildding.*[22]

In *NLRB v. Fleetwood Trailer Company,*[23] the union lost an economic strike. Due to cutbacks in the work schedule and the hiring of some permanent replacements, the employer was not immediately able to rehire all the strikers who wished to return to their jobs. It was shown that the employer had every intention of returning to pre-strike production levels as soon as possible. Six of the strikers continued to be available for rehire. Several weeks later the employer filled the jobs formerly held by these employees with new personnel.[24] The circuit court held that the right of the strikers to be rehired must be determined at the time when the strike ends, and, following *American Ship Building,* held that the employer's action did not constitute an unfair labor practice absent a showing of anti-union motivation.[25]

The Supreme Court disagreed on both counts,[26] and citing *Great Dane,* stated that the facts were sufficient to sustain a finding of unfair labor practice irrespective of the Court's holding as to when a striker looses his right to rehire.[27] The Court found that the workers in question were available at the time the employer filled

[21] *Id.*

[22] Prior to today's decision, § 8(a)(3) violations could be grouped into two general categories: those based on actions serving no legitimate business purposes or actions inherently severely destructive of employee rights where improper motive could be inferred from the actions themselves, and in the latter instance, even a legitimate business purpose could be held by the Board not to justify the employer's conduct; . . . and those not based on actions 'demonstrably so destructive of employee rights and so devoid of significant service to a legitimate business end,' where independent evidence evincing the employer's antiunion animus would be required to find a violation.

Id. at 37.

[23] NLRB v. Fleetwood Trailer Co., 389 U.S. 375 (1967).

[24] *Id.* at 377.

[25] NLRB v. Fleetwood Trailer Co., 366 F.2d 126 (1966). The circuit court decided *Fleetwood* prior to the Supreme Court's ruling in *Great Dane.*

[26] Significantly, the Court commented on the issue of employer motivation though it was unnecessary in reaching the majority's result. *See* NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 383 (1967) (concurring opinion of Harlan, J.).

[27] NLRB v. Fleetwood Trailer Co., 389 U.S. 375, 378 (1967).

their jobs with new personnel. He could have rehired the strikers; he did not. Nor did he give any justification for not rehiring them. Under these facts the employer committed an unfair labor practice and no inquiry into his motivation was necessary. The employer was obliged to come forward with legitimate business justification for his action. Only then would there have had to be an affirmative showing of antiunion animus.

Thus, under *Great Dane* and *Fleetwood Trailers,* inquiry into the employer's motivation is required only if (1) the activity complained of damages employee interests to a "comparatively slight" degree, and (2) the employer comes forward with evidence of substantial business justification for the activity. Unfortunately this rule does not completely close the door to confusion, and employers may still be afforded opportunity to discriminate with impunity against employees because of union activity, disguising discrimination with "legitimate business reasons."

The semantic tangles and inconsistencies which consideration of motivation has produced are not very useful in establishing unfair labor practice. No matter what is said about employer motivation, in the final analysis the business interests of the employer must be balanced against the organizational and bargaining rights of the employees. Nor is the balancing of conflicting interests anything new under the act. The Board has engaged in this balancing process since its inception.

The objectionable feature of the *Great Dane* rule is the necessity of determining whether the employer's conduct interferes with employee interests to a "substantial degree" or to a "comparatively slight" degree before weighing the employer's economic interests against the rights of the employees under the act. There is a better and simpler rule. Alleged violations of section 8(a)(1) and (3) can be grouped into two categories: (1) those activities which are so inherently harmful to employee interests that no economic justification is sufficient to redeem them, and (2) those activities where, once the employer has come forward with legitimate economic justification for his action, it is appropriate to balance the economic justification of the employer against the conflicting rights of the employees. Problematical attempts to produce evidence of the employer's state of mind or subjective intent would be completely unnecessary.

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