ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-168

TITLE NATIONAL LABOR RELATIONS BOARD,
v.
TRANSPORTATION MANAGEMENT CORP.

PLACE Washington, D. C.

DATE March 28, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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NATIONAL LABOR RELATIONS BOARD, :

Petitioner :

v. : No. 82-168

TRANSPORTATION MANAGEMENT CORP. :

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Washington, D.C.

Monday, March 28, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 o'clock a.m.

APPEARANCES:

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the Petitioner.

MARTIN AMES, ESQ., Chelmsford, Massachusetts; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in National Labor Relations Board against Transportation Management Corporation.

Mr. Wallace, you may proceed whenever you are ready.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. WALLACE: Mr. Chief Justice, and may it please the Court, for the third time this term I am here to discuss burdens of persuasion and burdens of production, this time in the context of the National Labor Relations Board's allocation of burdens of proof in a proceeding under Section 8(a)(3) of the Act charging a discharge of an employee for anti-union animus.

If the Court please, I would like to proceed with my argument first by describing briefly but comprehensively the overall allocation of burdens of proof in such a proceeding which we believe to be correct and which we believe to be a fair distillation of the Board's decisions and practice.

I do this because we believe that much of the confusion in this area stems from incomplete analysis and from an effort to force all categories of cases into

an analytical framework that suits only some categories of cases.

And after that, I would like to focus on the aspect of the allocation that is at issue here, and show that as to this, the Board faithfully follows the Congressional intent, and that its practice is consistent with principles reflected in this Court's decisions, and then show that these principles were properly applied to the facts of this case.

QUESTION: Have you decided what time you will receive questions from the bench?

MR. WALLACE: Well, of course, I am just explaining why I am not starting with the facts, Mr. Justice. Questions from the bench are welcome at any time.

(General laughter.)

QUESTION: Well, at least they are received, even if not welcomed.

(General laughter.)

MR. WALLACE: To begin with in such a proceeding the general counsel, of course, has a burden of production and a burden of persuasion to show that -- we'll talk about discharges here, although this applies to any 8(a)(3) case and to many 8(a)(1) cases involving other adverse action, but to show that the discharge was

improperly motivated, that anti-union animus generally was a motivating factor in the meaning of this Court's decision.

If he establishes that with his evidence, and that evidence is uncontroverted, of course, he has established his case. So in that sense, if he -- if his evidence establishes that, there is a burden of production on the employer to controvert it in some way, and the usual manner of controverting it is to show that there was a legitimate reason or reasons for the discharge. There may be other evidence introduced as well by the employer.

That evidence usually serves two purposes, the evidence of a legitimate reason. One, to rebut the evidence that there was an improper motivation, or two, to show that the discharge would have occurred in any event even in the absence of the improper motivation. Occasionally, that evidence is introduced for only the latter purpose. There are cases, and we have cited some, in which the employer admits that an improper purpose was a motivating factor, but nonetheless defends on the ground that the same result would have been reached in any event.

Now, if what the employer introduces is inherently incredible, or insubstantial on its face,

that doesn't really change the case, and in that sense his burden of production has not been satisfied. But if he has introduced something plausible, as was the case here, he has satisfied that burden of production, and then the burden of persuasion remains on the general counsel to do at least one of two things.

One, he might try to persuade the tribunal that the proferred legitimate reasons, and I use "legitimate" only in the sense of non-prohibited, not a value judgment, that the proferred legitimate reasons were not in fact a motivating factor at all. If he carries that burden of persuasion, that is a true pretext case, and he has shown that only the improper motivation was present, and the case remains what it was before that evidence was introduced.

But if he is unable to do that, then the question is whether in light of the evidence introduced by the employer, the general counsel can still satisfy the burden of persuasion which is on him by a preponderance of the evidence that the improper reason was also a motivating factor.

If in light of all the evidence, including the evidence introduced by the employer, the general counsel still succeeds by a preponderance of the evidence in showing that anti-union animus was a motivating factor,

then --

QUESTION: Mr. Wallace, does the Board actually conduct the presentation of testimony in this kind of segmented way?

MR. WALLACE: It is not -- it is not segmented this way. We are segmenting it only for analytical purposes.

QUESTION: Why does it help the Board, if I might ask, to have these various presumptions and burdens of persuasion? Wouldn't it be just as easy for them to hear from one side and then hear from the other and then decide the factual question?

QUESTION: Well, that is what they -- what they really do, but I am trying to specify the analysis used in allocating who had the burden of persuasion on what in issuing their decisions, in analyzing the evidence that has been introduced.

QUESTION: Well, I can see how that would be useful if the Board directed a verdict against someone saying that, you know, we are going to stop the proceeding right here because even believing your evidence, it's not enough to even warrant a fact finding, but in proceedings that have gone to completion, and the Board has heard all the evidence, how does this rather structured and somewhat artificial

form of analysis move the ball?

MR. WALLACE: Well, it's arguable that the ball would move with greater ease without it, but this is what the Board has been doing to explain its decisions, and it is the context against which Congress legislated in Taft-Hartley in revising the law. I don't think what they did on this subject in Taft-Hartley can be understood without recognition that it was done against this background, and it is the background against which the Courts of Appeals have divided in their views.

I think to understand what has occurred in this field, we have to recognize how the Board has been analyzing these cases, even if it might have been possible to proceed differently.

And I am almost at the end of this overview. I was saying, if the general counsel was unable to show that it was a pretext, the clearest way of doing that would be to show that the reason didn't exist at all factually, or as was the case with one of the reasons here, that the employer didn't know about it until after the discharge decision was made.

Or there can be other ways of showing it was a pretext, such as by showing that this was commonly done with impunity by other employees to the knowledge of the

employer. In any event, if he doesn't succeed in showing that it was a pretext, but nonetheless carries his burden of persuasion, showing by a preponderance of the evidence that anti-union animus was also a motivating factor, then we have a true dual motive case, and we have a case in which the general counsel has satisfied his burden of persuasion that a violation of Section 8(a)(3) occurred by showing that the adverse action, the discharge took place for a prohibited reason, because from the beginning, if the discharge took place in whole or in part for a prohibitive -- for a prohibited reason, that was sufficient to show a violation.

Part of the confusion stems, however, from the fact that the Board still refers to this showing as a prima facie case, and the reason it does that is because it recognizes the possibility of the employer still establishing an affirmative defense, by showing with respect to a hypothetical question that the discharge would have occurred for the legitimate reasons even in the absence of the improper motivation for the discharge.

And on that question, the Board has consistently placed the burden of persuasion as well as of production on the employer, and the Board has

referred to this as an affirmative defense, and the issue in this case, the difference between the Board and the court of appeals in this case focuses solely on this phase of the analysis.

Now, whether it is proper for the Board to place the burden of persuasion on this question on the employer, or whether the burden of persuasion must remain with the general counsel on this question, and this is a matter that was addressed with great specificity in the legislative history of Taft-Hartley, and unlike some cases in which the Board appears before the Court, where we are contending that the Board's interpretation of the Act on a specific matter is a reasonable interpretation among reasonable alternatives, and therefore should be sustained, this, it seems to us, is an interpretation required by the legislative history of the revision of the Act in Taft-Hartley.

And I would like to turn to the pertinent materials. It was well established, as we have shown in cases collected starting at Page 15 of our brief, prior to Taft-Hartley, that if the discharge was motivated in whole or in part by the improper motivation, a violation had been shown, and that the burden was on the employer to prove as a defense that he would have reached the same result in the absence of the improper motivation.

Many Board opinions, and we have quoted one on Page 16, referred to language used in a well known Second Circuit opinion, NLRB against Remington Rand, which is cited at the bottom of Page 16 of our brief, in which Learned Hand rejected the defense factually, although he said it was a proper defense for the employer to make, in language that was quoted and requoted many times, that it rested upon the tort feasor, as he called the employer, because the general counsel had shown that he had acted out of improper motivation. It rested upon the tort feasor to disentangle the consequences for which it was chargeable from those for which it was immune.

And that interpretation was made clear in annual reports to Congress which we have cited in Footnote 9 on Page 18, and was criticized in the House hearings quite specifically. We have referred to that also in Footnote 9. And a change in the law was advocated, and indeed the House bill would have changed the law specifically in that respect, and on Page 18 of our brief we have described the provision that was in the House bill to change the law on that question.

That provision was not in the Senate bill, and the conference committee struck it in favor of retaining the existing practice before the Board. This was one of

many examples, as we have reminded the Court from time to time, in which the strategy of the conference was against making particular changes because they had in mind larger objectives to be achieved in Taft-Hartley. It was the first time that the Act was going to specify categories of unfair labor practices by unions, for example. They wanted to overrule this Court's Packard decision, which had included foremen within bargaining units, and they knew they had to anticipate a veto from President Truman, so they had to keep together a broad-based coalition that would be able to override the veto, and other matters were not being changed because of their desire to accomplish these major objectives.

And Senator Taft, in an extended interchange on the floor in reporting the conference bill, and we have quoted pertinent portions of it on Page 20 of our brief, an extended interchange with Senator Pepper, who was raising this problem that the House had tried to shift the burden of proof away from the employer on this issue, kept pointing out repeatedly that this was struck by the conference committee from the House bill, and as we say at the conclusion of the excerpt we have here, under provision of the conference report, the employer has to make the proof.

This is the present rule and the present

practice of the Board.

QUESTION: In that respect, does the Board call it its Wright-Line test? Is it the Wright-Line test?

MR. WALLACE: It is the Wright-Line test now.

QUESTION: But that is a 1980 --

MR. WALLACE: That is correct.

QUESTION: And when was the earliest -- what was the earliest Board's case that articulated that?

MR. WALLACE: Well, the first one that we cite is Dow Chemical in 1939, and the one that we have quoted on Page 16 is also a 1939 case, and --

QUESTION: And was it changed at all in Wright-Line?

MR. WALLACE: We don't think Wright-Line meant to change the standard at all, but it meant to articulate it with the help of this Court's opinion in Mt. Healthy.

QUESTION: Well, it didn't need any help if it was so clear from the statutory language and history, did it?

MR. WALLACE: Well, it wasn't always articulated well by the Board, and the reason for this is that until Wright-Line, in the cases in which the Board was ruling for the general counsel and holding

that the employer did not sustain its burden of proving that the discharge or other adverse action would have occurred anyway, the Board tended to articulate the dual motive aspect of the case.

But when the Board was ruling for the employer in these cases, it tended not to articulate that it was a dual motive case. It tended just to say that the general counsel did not sustain his burden, often saying that he didn't make out his prima facie case, which caused even more confusion. It was hard to tell in those cases whether the Board really thought it was a dual motive case at all.

We have collected in our brief, in the footnote on Page 37, Footnote 25, numerous cases in which the Board has sustained the employer and said that he has met his burden of proving that the adverse action would have taken place anyway, but they are all cases from 1981 and 1982, because it was only after Wright-Line specified that the Mt. Healthy analysis should be used that the Board began explicitly in ruling for the employer to recognize which cases were dual motivate cases where the employer had carried that burden.

I think Wright-Line was an effort to articulate the standard more clearly, and to bring about

better consistency of practice from case to case before the Board. It wasn't meant to be a change in the Board's rule or practice.

QUESTION: Mr. Wallace, how far from the position taken by the AFL-CIO in its brief is the Board's position?

MR. WALLACE: It is very similar, but the Board has chosen not to issue a remedy at all in cases in which the employer has sustained the burden. The Board would do what the AFL-CIO is advocating, issue a cease and desist order in a hypothetical case, in a fairly narrow category of cases.

For example, in our own case, it was shown that one of the reasons given by the employer, that he had left his keys in the bus, was something that the employer did not know until after the discharge had taken place. It was a pretext in that sense. If that had been -- it turned out that in this case that was something commonly done, it was found. It would not have justified the discharge anyway. But if that had been a more substantial infraction, something that would have justified a discharge, that he had his hand in the till or something of that sort, and yet the discharge took place because of anti-union animus before the employer knew of that, the Board would find a violation,

and issue presumably a cease and desist order, but would not order reinstatement in a situation like that, because an affirmative defense in the sense of something to mitigate the remedy had been shown.

But they treat the legitimate reason for the discharge at the time the discharge took place as an affirmative defense that negates a violation. They probably could have gone either way on this question consistently with the legislative history, but that has been their practice.

QUESTION: You are speaking now of the Board or the hearing examiner?

MR. WALLACE: The Board. The Board could have, and this is --

QUESTION: How about the hearing examiner?

MR. WALLACE: Well, they follow --

QUESTION: Is it the same?

MR. WALLACE: Of course it's the same, Mr. Chief Justice.

QUESTION: May I ask a similar question, Mr. Wallace, right on this? How different is your view from the view of Judge Briar? In other words, assume we don't have an affirmative defense, but just a question whether there is any motivating factor at all, and the evidence is in perfect equipoise. Who wins?

MR. WALLACE: Well, it depends on the evidence of what.

QUESTION: Evidence on the issue of whether or not actual anti-union animus was a motivating factor.

MR. WALLACE: On that, the general counsel has the burden of proof, and he must satisfy the Board by a preponderance of the evidence.

QUESTION: Well, then, does the general counsel differ from Judge Briar's view of the case?

MR. WALLACE: Well, I have to regard Judge Briar's opinion as an example of trying to fit all categories of cases into a framework that is suitable only for some categories, and not recognizing that there is this other category of cases where the general counsel has persuaded the Board that there was a true dual motivation, and the question is then who has the burden of proof of persuasion on the question of whether hypothetically the discharge would have occurred anyway.

QUESTION: Well, but in the category, not the Mt. Healthy affirmative defense category, but the other, there is no difference, as I understand you, between Judge Briar and the general counsel.

MR. WALLACE: That is correct. That is correct.

QUESTION: Well, is it that the general

counsel must prove a discriminatory motive or anti-union bias? How much of one does he have to prove?

MR. WALLACE: He has to prove that it was a motivating factor.

QUESTION: A motivating factor.

MR. WALLACE: A motivating factor, as this Court used that term in Arlington Heights and in Mt. Healthy.

QUESTION: Would it be enough if the evidence showed that the employer was generally hostile to having a union organized?

MR. WALLACE: By and large, that would not be enough. We have again collected a number of cases in another footnote in our brief, Footnote 19 on Page 31, to show that speculation or suspicion of this kind has not been enough to sustain the general counsel's burden of proof before the Board. We anticipated that this question would come up, and we have collected pertinent examples there.

You don't always have to have a smoking gun in which you have testimony that I was doing it to get even with him for the union, but in a case where you don't have to have a smoking gun, the circumstantial evidence has to be pretty strong that the employer's conduct was unchanged from what it had been for years, and the only

difference is his union activity, and others were doing the same thing, and no adverse action was taken against them, supported by testimony, that kind of thing.

You can prove cases by circumstantial evidence, but --

QUESTION: Mr. Wallace, I thought there had been some suggestion in the cases, anyway, that what the general counsel has to prove is that the employee would not have been fired but for the union activity.

MR. WALLACE: There is the way that some of the Courts of Appeals have expressed a disagreement with the Board on who has the burden of persuasion as to the affirmative defense. They articulate the burden of persuasion being on the general counsel to negate the affirmative defense by showing that but for the improper motivation, the discharge would not have taken place, and that is precisely the issue in this case, and the matter that we think was resolved by the legislative history, and the other thing in the legislative --

QUESTION: Well, now, on the legislative history, I guess the Court of Appeals for the Second Circuit would read it and come to a conclusion different than yours.

MR. WALLACE: Well, I am aware of that, but to me the most dispositive thing in the legislative history

I have not yet gotten to, and I want to point out to the Court, and that is something quoted on Page 20 from Senator Ball, right beneath the quotation that we have of Senator Taft. What we didn't make clear in the brief is the context in which Senator Ball's remarks were made.

Senator Taft's remarks were made in reporting what the conference did prior to the vote on the conference report. Senator Ball made his remarks in the debate on whether to override President Truman's veto, and he was on the team of proponents, and Senator Taft yield 20 minutes of debate time for the proponents to Senator Ball for the purpose of rebutting certain specific items in President Truman's veto message.

And the fifth of those items was, as the President said, "The bill would make it easier for an employer to get rid of employees whom he wanted to discharge because they exercised their right of self-organization guaranteed by the Act," and Senator Ball said, "Mr. President, what that refers to is an explicit provision inserted in the bill in conference saying that if the employer proves to the satisfaction of the Board that he discharged an employee for cause, he cannot be held guilty of an unfair labor practice in discharging him."

That is exactly the rule which the courts now require the National Labor Relations Board to follow. It would be hard to improve upon this as a statement of burden of persuasion that would be meaningful to both lawyers and non-lawyers, and this is not impromptu remarks in the heat of debate. This is obviously a carefully prepared statement to fulfill an assignment on behalf of the proponents of the override, and it was stated just before the legally significant vote, the vote to override the veto.

I would like to reserve the balance of my time.

QUESTION: May I just ask you one question, Mr. Wallace? You never got to this case. Do you think the Board's findings in this case are entirely consistent with your explanation of what they should be?

MR. WALLACE: I believe they are, but that is debatable.

CHIEF JUSTICE BURGER: Mr. Ames.

ORAL ARGUMENT OF MARTIN AMES, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. AMES: Mr. Chief Justice, and may it please the Court, the issue in this case involves the proper allocation of the burden of proof when an

employer is charged with discriminatory employment conduct in violation of Section 8(a)(3) of the National Labor Relations Act.

I will determine -- I will discuss with you this morning that the First Circuit Court of Appeals correctly concluded that the Board exceeded its statutory authority when it required this respondent to overcome rather than to neutralize the general counsel's prima facie case. I will show this by indicating that the Board misapplied the role of a prima facie case, failed to adhere to the statutory mandate of Sections 10(b) and 10(c) of the Act, and failed to reconcile with the teachings of this Court what it considers an employment discrimination test as in its holding in Wright-Line.

QUESTION: Mr. Ames, how do you respond to the legislative history argument based on Senator Ball's statement as articulated by Mr. Wallace?

MR. AMES: I think the legislative history, Justice O'Connor, is not ambiguous on the issue as to who has the ultimate burden of proof. That, I think, is clear in the history of the statute. I think where the --

QUESTION: Well, how do you deal with Senator Ball's language specifically?

MR. AMES: I believe that when you deal with Senator Ball, there is a comment that is contra to the legislative language itself. When you look at 10(c), which is intended to ensure that a deserving employee can seek relief, and that is the way 10(c) is structured, and you read it in conjunction with the rules of evidence, which are clearly articulated in 10(b), which we see in Rule 301 of the federal rules, and made applicable to the Board, I think we must look at the language of the statute and say that it is very clear on its face, and that what Congress was concerned with was the ultimate burden of proof, and not concerned with the shifting burden, the shifting burden that rises in the presumption of the original prima facie showing, which would be a burden of production that devolves upon the employer.

We recognize that some burden devolves upon the employer. We do not think it is a burden of persuasion. We believe that it is a burden of production, to come forward as a prima facie case would normally require the employer to come forward, to give a reason or reasons for his conduct. Should he not do that, he runs the risk, the risk of not meeting the presumption raised by the prima facie case, and thereby not dispelling the inference of harboring or possessing

an impermissible discriminatory motive.

QUESTION: If the statement that Justice O'Connor has just referred to had been made by Senator Taft rather than another Senator, would that give you more trouble?

MR. AMES: Senator Taft's statements, I believe -- No, it would not. I believe Senator Taft's statements in the debates are very clear. He was talking about ultimate burden. I believe he was talking about that the Board must be of the opinion, based upon only the preponderance of the evidence, that the employer either acted permissibly or otherwise, that the nature of the shifting burden was never really addressed by Congress in 1947.

What was specifically addressed in '47 was a bit of a course correction, if you will. Congress had before it some 12 years of history of the Board's conduct under the Act, and it recognized that it was in fact practicing an in part test, that once a motivating factor was shown, notwithstanding the employer's proferred reason for his conduct, the Board would find the employer having harbored some discriminatory motive predicated on an anti-union purpose, and would find him as violating Section 8.

The amendment of '47 corrected that course, so

that the Board cannot use the in part motive, such that the Board must be of an opinion completely based upon a preponderance of the evidence. That compelled the general counsel, I might note, not to be a lazy participant.

If you follow logically what the Board has done in its Wright-Line holding, it has allowed the general counsel to come forward with a prima facie case based upon a showing of motivation, of protected union activity, some knowledge of that in the employer, and a closeness in time, if you will, between the employer's conduct and the employer's protected activity. That establishes a prima facie case.

There is no specific authority for that, but that is the way it operates in industrial relations cases before the Board. The Board recognizes that. In its own Wright-Line test, in its own holding, it says general counsel shall raise the inference. The employer now must come forward. This is the way the Act is structured. If he doesn't come forward, he loses, because there is nothing before the trier of fact to suggest to rebut a presumption, and the inference raised by that prima facie cases is not vitiated, and it would be reasonable for the trier of fact to find that it was more likely than not that the employer acted because of

his anti-union animus.

QUESTION: The employer could respond certainly in two different ways. One, he could say, I am going to meet the evidence of any discriminatory bias or any anti-union bias. He could say, perhaps the employer made out a prima facie case, and raised an inference, but I am going to meet that inference. I am going to put up enough evidence to at least neutralize that evidence.

Or, he could say, well, even if there is an inference of anti-union bias, I would have fired him anyway. And it's only the latter that the board claims the employer has the burden of proving.

MR. AMES: Justice White, I think the Board in all honesty is confused. They get confused with the handles they try to apply to cases, whether it is pretext, dual motive, or any other thing they are talking about. Section 8 is a -- and specifically 8(a)(3) addresses the issue of discrimination. What you call it is really not material. What is material is that the Board must raise an inference, a motivating factor for conduct. The employer must come forward with a reason or some reasons to show what he has done.

QUESTION: Well, he could come forward and say, I didn't do it at all. I didn't have any

anti-union bias. Somebody just lied.

MR. AMES: Yes, he might, and in fact I might --

QUESTION: And he might win on that basis.

MR. AMES: In fact, I might comment, Justice White, that that is what happens generally in these cases. The Board makes a charge, or a complaint comes forward, and the employer says, I didn't do it. It is sort of like, if I might use a hypo in this particular case --

QUESTION: Well, if he does that, the general counsel still has the burden of proof.

MR. AMES: Of course. In the hypo I was going to use in response to that, in the prima facie case, is what we see in tort law all the time. Two cars have a collision at an intersection. A sues B. And A claims that but for the negligence of B, I would not have suffered property damage or personal injury. B says, I didn't do it. We understand it. A must now prove that but for the negligence of B, I wouldn't have suffered any property damage or personal injury. That's the role of the prima facie case.

The Board violates that important role, and in fact violates the mandate of Congress in its burden of proof it established in 10(c) in the way it structured

its -- the Board's Wright-Line test.

QUESTION: Mr. Ames, I am not sure you have responded to the second half of Justice White's question. Assume you have a case in which the employer even admits, or the evidence is so clear that one of the reasons that motivated his decision was anti-union bias. He doesn't like the union. He doesn't want him to organize, and so forth, and that is established, but he nevertheless says, I would have fired him anyway, because I subsequently discovered that he is a thief.

Now, in that case, would you not agree that the burden would be on the employer to prove that affirmative defense?

MR. AMES: No, Justice Stevens, I would not agree.

QUESTION: No?

MR. AMES: Because the employer doesn't come forward and say anything other than, I fired him -- before he does that, he denies that he has done anything wrong.

QUESTION: I am assuming a case in which he admits the anti-union bias. There are such cases. And nevertheless says, I would have fired this gentleman anyway because he is a thief. You say that he doesn't have the burden of proving that?

MR. AMES: The numbers of cases that occurs are very small, I would say.

QUESTION: Well, I know, but I am asking you about that hypothetical case.

MR. AMES: If he confesses that he harbored the improper motivation --

QUESTION: And that that was part of his decision.

MR. AMES: -- and that led to -- that was part of his decision, and he also had evidence of thievery --

QUESTION: No, he didn't even have the evidence of thievery until after he had fired him, just to make it a really clearcut case. The day after he fired him, he found out that he was a thief, and he said, had I known that at the time, I would have fired him anyway, and therefore you cannot order reinstatement. Wouldn't you say he has to have the burden of proof on that issue?

MR. AMES: I would think I would refer then back to what I think Section 8(a)(3) is all about, Justice Stevens. 8(a)(3) is structured in some way to accomplish two things. On the one hand, to ensure that an employee's employment status is not going to be adversely affected for his engagement in protected activity. On the other hand, it is not intended, we

believe, to provide him a safe harbor should he engage in employment misconduct.

QUESTION: Right.

MR. AMES: In the hypothetical you have presented to me, in fact, he might harbor this impermissible discriminatory motivation, but he now has some showing to make that the employee engaged in misconduct. The act was not intended to take sides. The act was intended to --

QUESTION: Under Justice Stevens' hypothetical the employer found out about the thievery after he had fired the guy. Now, wouldn't the Board at least say you had to have the reason as of the time you fired him?

MR. AMES: Yes.

QUESTION: It just wouldn't be a defense. Whatever you want to call it, it just -- he couldn't possibly claim that when he fired him, that he would have fired him for another reason, because the reason -- he didn't even know about it.

MR. AMES: In the hypo as I understand it now, that is correct, but in the instant at bar, the evidence of misconduct occurred or came to the attention of the respondent prior to even any engagement in protected union activity.

QUESTION: Right. Right. Right.

MR. AMES: And in fact the respondent put in motion the wheels to capture the evidence to show that in fact Mr. Santola was cheating and thereby getting overcompensated. To --

QUESTION: My hypothetical is intended to parallel the Mt. Healthy case, in which a person is discharged for making a speech somewhere, and then the school board wants to prove, well, yes, that's true, but upon reviewing his qualifications, we can prove we were not going to renew his contract anyway, because he is such a bad teacher, and there's an affirmative defense, and I thought in that situation the Board had the burden of proving the affirmative defense, and I thought the same might well apply in the labor context, but I guess you say no.

MR. AMES: It might apply if in fact it occurs that the employer comes forward with two reasons.

QUESTION: Right.

MR. AMES: As in Mt. Healthy, and in Mt. Healthy, when you discuss affirmative defense, you are really talking about the concept of confession and avoidance. In industrial relations cases before the Board, and there are well over 40,000 a year that come to their attention, you generally do not have that situation. You have a situation where the employer

denies that he has done anything wrong and he can generally proffer a reason for his conduct, thereby not allowing the board to shift from what they consider a motivating factor which occurs in the prima facie showing to the motivating factor --

QUESTION: Well, but don't --

MR. AMES: -- which is nothing different than in part. Excuse me.

QUESTION: Don't respondents in Board proceedings do the same thing that respondents in many other proceedings do, defend on the ground, A, I have no anti-union bias, B, if I had anti-union bias, it wasn't the proximate cause of the discharge?

MR. AMES: Judge Rehnquist, I think this case is rather typical when you look at the fact pattern and the evidence before the Court. The employer put forth just his reasons for terminating the employee involved in protected activity. He denied, of course, the allegation that he violated 8(a)(3), and then in the evidentiary stage of this litigation he articulated the reasons for terminating the employee.

And that's all he did, simply, and what's happening in this particular contest is that the Board is confusing what happens at the litigation stage, the two-part which was mentioned earlier, with the Burdine

structure, which is really a three-structured concept in which the plaintiff employee in the Title 7 matter must establish, one, that she is in a protected class, on the ground of sex, and --

QUESTION: How did the proof in this case go before the Board? Did the general counsel produce witnesses to suggest anti-union animus before the employer's witnesses testified?

MR. AMES: In fact, a close reading of the appendix will show you, Justice Rehnquist, that the Board not only produced the employee to allege his union activity --

QUESTION: You say --

MR. AMES: -- but general counsel --

QUESTION: You say allege. Do you mean testify to?

MR. AMES: Testify to. But general counsel also called the agent for the employer, and on direct examination, elicited from the respondent's agent the grounds for the termination, which was cheating on his time card, and thereby being overcompensated. And in fact in this case the general counsel did both things.

QUESTION: So at the close of the general counsel's presentation, the employer's testimony as to the reason for discharge was in, and the employee's

testimony as to why he was discharged.

MR. AMES: Yes, the trier of fact had the entire matter, and the issue raised is that as the Board concluded, the employer didn't overcome the prima facie case. We think that is error.

QUESTION: May I give you one other hypothetical. Supposing you've got three people who make -- a committee to make discharge decisions, and they are very candid about their reasons, and it takes all three of them to fire somebody. Two of them say, I am firing this man because he is late to work every day. The third one says, I am firing him because he belongs to the union. And that is the three-man decision. Who wins?

MR. AMES: The Board, I believe, Justice Stevens, has the burden to prove -- and incidentally, in this process, compels the general counsel to come forward with sufficient evidence to establish --

QUESTION: Well, I am assuming the facts are undisputed in my hypothetical. It is an easy question to answer.

MR. AMES: It would be our contention that the employer prevails.

QUESTION: In other words, the concurring opinion has about the same status as a concurring

opinion in a multi-member court.

(General laughter.)

QUESTION: No, a unanimous decision is required in my hypothetical.

MR. AMES: I think that the confusion really occurs when the Board attempts to reconcile its Wright-Line test, articulated by the Board, with Burdine, and the confusion is very simple. The Board says, and specifically on Page 10 of its brief on the merits, that its test is fully consistent with Burdine, fully consistent, having recognized that the prima facie case is an inference, and that compels an employer now to have an affirmative defense.

And yet when you look at the history of the Board's Wright-Line, it bases its understanding of an employment discrimination test on Mt. Healthy. You cannot have an employer with an affirmative defense and also suggest that your employment discrimination test is also consistent with this conceptual approach of a three-part system where the plaintiff employee ultimately must bear the burden persuasively to show that but for the employer's impermissible discriminatory motive, he will not have acted as he did.

That is the mandate of the Act. The Act in 10(c) and generally intends to make it relatively easy

and best serves the parties in this regard if it is easy for them to raise a prima facie case. That accomplishes two things principally. On the one hand, it does not create a heavy burden for the employee in his quest for relief. He can come forward, show that he was involved in some protected union activity, and he has created a motivation for the employer. The inference is there.

The employer, on the other hand, cannot sid idly by. He must be an active participant in this litigation. He must come forward and proffer a reason or reasons. If he does, then he is assisted in posturing a Section 8 case in a very correct way. He joins the factual dispute. 10(c) now mandates that the Board, by compelling the general counsel to do its work, and the Board has indicated that, in fact, in its own rules, the general counsel should have the burden of proof in all Section 8 cases, to come forward with evidence to show that the Board can find on a preponderance of the evidence that the employer either acted permissibly or otherwise.

In other words, the Board must find the causal relationship between the employee's conduct and the employer's conduct, such that it can be said justifiably that but for that employee's engagement in protected activity, he would not have suffered adversely as a

result of the employee's conduct.

That is the mandate of the Act, to balance competing interests.

I might point out that the balancing of these interests occurred long before Wright-Line came out of the Board in 1980. I think it came out of to some extent what this Court tried to say in Great Dane in '67, which was shortly after the adoption of the amendments.

There, the Court, in speaking to the issue that a violation of 8(a)(3) normally turns on a discriminatory conduct motivated by anti-union activity or attitude specifically addressed the issue of burden of proof, not the issue of burden of persuasion.

And if you would just allow me for a moment, I would like to quote what we consider the critical language in that teaching out of Great Dane. It is at Page 34 of 388. "If the adverse effect of the discriminatory conduct on employee rights is comparatively slight, an anti-union motiviation may be proved to sustain the charge if the employer has come forward" -- I'm sorry, "is comparatively slight, if the employer has come forward with evidence of legitimate and substantial business justification for the conduct."

The Court even as early as '67 recognized that

the ultimate burden of proof is upon this Board. Section 8 cases must be structured in this way. It is an ordered approach to joining a factual dispute and best serves the parties which this Act intended, but more importantly, it compels the Board to maintain a degree of neutrality such that that mandate can be carried out.

Thank you.

CHIEF JUSTICE BURGER: You have two minutes remaining, Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE PETITIONER - REBUTTAL

MR. WALLACE: I would just like to point out to the Court that this is not a case in which the evidence was thin. There were two days of hearings conducted in which the general counsel called numerous witnesses. The employer's evidence was mostly by cross examination of those witnesses. And it was something of a smoking gun case, in which the area manager was quoted as saying that the discharged employee was "two-faced for joining the union, and I'll get even with him."

And I think in response to the question Justice Stevens asked me at the end, that the findings of the Administrative Law Judge would certainly be more than adequate to dispose of this case properly, and we

quote in our reply brief on Page 6, in the first footnote paragraph on that page, we quote those pertinent -- the crucial findings, that a preponderance of the evidence establishes that the decision to discharge him was motivated by a desire to discourage union activities, and respondent would not have fired him but for his union activities.

Now, the Board adopted those findings, but said, as clarified herein, and what the Board apparently was concerned about was that the Administrative Law Judge wrote shortly before the Board's Wright-Line decision, and the Board was attempting to clarify it by putting it in terms of the Wright-Line decision, and they may well have been worried that the Administrative Law Judge's formulation of the but for his union activities might have meant that the general counsel had had the burden of persuasion on that issue.

QUESTION: Well, how could an Administrative Law Judge really make an error like that, if things had been so clear all these years?

(General laughter.)

MR. WALLACE: Well, as I say, part of the mission of the Wright-Line decision was to attempt to --

QUESTION: Was to clarify what hadn't been so clear.

MR. WALLACE: To get more uniformity of application of what the rule had been right along and what Congress had approved in Taft-Hartley.

QUESTION: Mr. Wallace, how would you respond to Justice Stevens' question as to the situation in which the employer discovered the day after that the employee was a thief?

MR. WALLACE: Well, I think that would be an affirmative defense that would go to remedy, and would show that reinstatement would not be appropriate, even though a violation had occurred, because at the time of the discharge it was solely for improper purpose.

QUESTION: What about back pay?

MR. WALLACE: Back pay, I am not positive what the Board would do, but they certainly would not award back pay for more than the one day.

QUESTION: One day.

QUESTION: Will you tell me, then, if that is the case, what is the nature of the Mt. Healthy affirmative defense?

MR. WALLACE: Well, it was --

QUESTION: In the Board -- in this context.

MR. WALLACE: It is to prove the hypothetical that the discharge would have occurred even in the absence of the improper motivation, just as it was in

Mt. Healthy.

QUESTION: And does it apply when there is proof that the Board accepts that there was in fact an actual anti-union animus?

MR. WALLACE: Yes, that is -- that is where it applies. That is a dual motive case.

QUESTION: Why is that different from my thief case? I don't understand.

MR. WALLACE: Well, in the thief case, the discharge took place before they knew that he was a thief, so there wasn't a dual motive for the discharge, but there now would be a legitimate reason in retrospect for the discharge.

QUESTION: I see, but you would say the difference is, if you knew he was a thief at the time you discharged him, but the thievery was only one of the reasons.

MR. WALLACE: Yes, but if you could show that it would have been a sufficient reason in itself, and would have produced the same result.

QUESTION: Let me clarify something at least for my own reactions. The employer discharges for union activity, and after he has given the notice of discharge and carried it out, when they audit the man's books, they find that he has embezzled $25,000. Now, what do

they do? Reinstate him for having been fired for the wrong reason, and then fire him for the right reason?

MR. WALLACE: I doubt that the Board would reinstate him at all in that situation, but they would probably issue a cease and desist order telling the employer to cease and desist for taking adverse action against employees because of their union activities, as they did in this case. It was proven that they did that.

QUESTION: But -- I take it the Board's Wright-Line test in this very case would not -- it would not result in a conclusion by the Board that there had been an unfair labor practice if the employer carries his burden.

MR. WALLACE: That is correct.

QUESTION: And you wouldn't -- so that he couldn't be posted or there couldn't be a cease or desist order.

MR. WALLACE: That is the Board's --

QUESTION: Under the AFL-CIO position, there could be a cease and desist order --

MR. WALLACE: Yes, Your Honor.

QUESTION: -- and there could be posting.

MR. WALLACE: Then that is -- well, there is a practice under Title 7 that an injunction would issue

even though the same result would have been reached for legitimate reasons. On the other hand, in the final footnote of this Court's Arlington Heights opinion, it indicated that there wouldn't be a violation.

QUESTION: Well, that may be, but the Board's view is that if the employer carries his burden, there has been no unfair labor practice.

MR. WALLACE: That is correct. That has been the Board's view and practice.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:58 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

National Labor Relations Board, Petitioner

v. Transportation Management Corp. No. 82-168

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BY Pierce Hammond

(REPORTER)