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ARTICLES

DISMISSAL OF CALIFORNIA PUBLIC SCHOOL EMPLOYEES ENGAGED IN UNION ACTIVITY

Ronald D. Wenkart*

The National Labor Relations Act (NLRA) was enacted by Congress to guarantee the right of workers to organize collectively, form labor unions, and bargain collectively with their employers.¹ At common law no such right had existed.² The NLRA was also designed to prevent employer discrimination against employees engaged in union activity.³ A large number of the unfair labor practice charges filed with the National Labor Relations Board (NLRB) involved allegations of employer discrimination against employees for engaging in union activities.⁴

The language of the Educational Employment Relations Act (EERA), or Rodda Act, is patterned after the language of the NLRA.⁵ The EERA regulates labor relations in the public schools and community colleges of California much as the NLRA regulates labor relations in the private sector. The EERA also seeks to promote improved employer-employee relations and guarantee the right to organize, form, and join labor unions, and the right to bargain collectively with public school employers.⁶ The California Legislature enacted the

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1. 29 U.S.C. §§ 141-166 (1958 & Supp. IV 1976).

2. See GORMAN, *BASIC TEXT ON LABOR LAW* 1-6 (1976).

3. 29 U.S.C. § 158 (1976).

4. See Samoff, *NLRB Priority and Injunctions for Discriminatory Discharges*, 31 *LAB. L.J.* 54 (1980).

5. *CAL. GOV'T CODE* §§ 3540-3549.3 (Deering 1982).

6. *Id.* at § 3540.

EERA to prevent the discharge or dismissal of public school employees for organizing labor unions or engaging in other union activities. Without such a prohibition, workers would be fearful of engaging in union activities.⁷ The California Legislature, however, did not intend (nor did Congress intend) to prevent the lawful discharge or dismissal of employees simply because the employees were union members or may have been engaged in union activity.⁸ Neither the California Legislature nor Congress sought to prevent an employer from discharging an employee or to interfere with the employer's rights to manage his enterprise, be it public or private.⁹

To determine whether an employee has been discharged for lawful reasons, the courts, the NLRB, and the California Public Employment Relations Board (PERB) have adopted "tests" which balance the competing interests of the employer and employee. The PERB test, however, is significantly different than that of the courts and the NLRB. This article will analyze the respective tests and discuss how each balances the competing interests.

I. THE "TEST" IN THE PRIVATE SECTOR—NLRB AND FEDERAL COURT PRECEDENTS

The National Labor Relations Act (NLRA) protects the right of workers to engage in union activities by making it an unfair labor practice, under section 158(a)(1), for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 . . ."¹⁰ or, under section 158(a)(3), for an employer "by discrimination in regard to hire or tenure or employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."¹¹ Section 157 grants to employees the right to self-organization, the right to form, join or assist labor organizations, the right to bargain collectively, and the right to engage in concerted activities (e.g., strikes).¹² The

7. See CAL. GOV'T CODE § 3543.5 (Deering 1982).

8. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965); *Maritori Bros. Distributors v. Agricultural Labor Relations Bd.*, 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981).

9. See *supra* note 8.

10. 29 U.S.C. § 158(a)(1) (1976).

11. 29 U.S.C. § 158(a)(3) (1976).

12. 29 U.S.C. § 157 (1976).

statutory language does not specify how discrimination is to be determined. Employees would argue that the statute prohibits employers from discharging employees solely for their participation in union activities. Employers argue that they have the inherent right to efficiently manage their businesses and public agencies and should not be prevented from dismissing inefficient, unproductive, or insolent employees.

The United States Supreme Court, in *American Ship Building v. NLRB*,¹³ enunciated the role of the courts in determining whether discriminatory conduct had occurred:

[W]hen the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases because of the loss of union leadership and the employees, suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership *Such a construction of Section 8(a)(3) [Section 158(a)(3)] is essential if due protection is to be accorded the employer's right to manage his enterprise.*¹⁴

The Courts have imposed qualifications on the seemingly unqualified language of section 158(a)(1) as well as on section 158(a)(3).¹⁵ Under section 158(a)(1), a showing of intent or anti-union animus on the part of the employer may be required where the employer asserts a legitimate and substantial justification for his actions.¹⁶ The United States Supreme Court, in *NLRB v. Great Dane Trailers, Inc.*,¹⁷ stated:

The statutory language "discrimination . . . to . . . discourage . . ." means that the finding of a violation normally turns on whether the discriminatory conduct was motivated by an antiunion purpose. . . . Some conduct,

13. 380 U.S. 300 (1965).

14. *Id.* at 311 (emphasis added).

15. See GORMAN, *supra* note 2, at 133.

16. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967).

17. *Id.*

however, is so "inherently destructive of employee interests" that it may be deemed proscribed without need for proof of an improper motive. . . . If the conduct in question falls within this "inherently destructive" category, the employer has the burden of explaining away, justifying or characterizing "his actions as something different than they appear on their face" and if he fails, "an unfair labor practice charge is made out."¹⁸

The employee does not need to prove an improper motive when the employer's conduct is "inherently destructive" of employee rights. The burden of proof is merely shifted to the employer, who may still justify his conduct. The courts have not specifically defined "inherently destructive," but they have held that the granting of "super-seniority" or the payment of extraordinary benefits to nonstrikers is "inherently destructive."¹⁹ Discharge or dismissal cases (including layoffs and transfers) have not been held to be "inherently destructive" of employee rights.²⁰ Despite the fact that discharge may tend to discourage union membership, courts perceive a greater need to protect the employer's right to manage its enterprise and make legitimate business decisions.²¹

The courts have held that in discharge cases, anti-union animus must be the motivating or dominant factor for the discharge and that "but for" the employee's union activities he would not have been discharged.²² The Ninth Circuit in *L'Eggs Products, Inc. v. NLRB*,²³ stated: "An employer may discharge an employee for good cause, bad cause, or no cause

18. *Id.* at 33.

19. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

20. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *Berry Schools v. NLRB*, 627 F.2d 692 (5th Cir. 1980); *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 96 (9th Cir. 1980); *Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *NLRB v. Federal Pacific Electric Co.*, 441 F.2d 765 (5th Cir. 1971); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771 (8th Cir. 1969); *NLRB v. Materials Transportation Co.*, 412 F.2d 1074 (5th Cir. 1969); *Reading & Bates, Inc. v. NLRB*, 403 F.2d 9 (5th Cir. 1968); *NLRB v. Red Top Cab & Baggage Co.*, 383 F.2d 547 (5th Cir. 1967); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967); *NLRB v. Superior Sales, Inc.*, 366 F.2d 229 (8th Cir. 1966); *NLRB v. Ace Comb Co.*, 342 F.2d 841 (8th Cir. 1965).

21. 380 U.S. 300, 311 (1965).

22. *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980); *L'Eggs, Inc. v. NLRB*, 619 F.2d 1337 (9th Cir. 1980); *Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967).

23. 619 F.2d 1337 (9th Cir. 1980).

at all . . . as long as his motivation is not antiunion discrimination. . . . it follows that the board [NLRB] has the burden of proving that a discharge was motivated by antiunion animus."²⁴ In *NLRB v. Adams Delivery Service, Inc.*,²⁵ the Ninth Circuit held, "[i]n reviewing the propriety of an employee discharge . . . we inquire whether anti-union animus was the moving cause of the discharge; in essence whether the anti-union animus was the 'but-for' cause of the discharge."²⁶

The Fifth Circuit also uses the motivating factor and "but for" test. In *NLRB v. O. A. Fuller Super Markets, Inc.*,²⁷ the court stated:

[A] discriminatory act on the part of the employer is not in itself unlawful unless intended to prejudice an employee's position because of his union activity, i.e., some element of the antiunion animus is necessary. . . . Thus, in controversies involving employee discharges, the motive of the employer is the controlling factor . . . and, absent a showing of antiunion motivation, an employer may discharge an employee for a good reason, a bad reason, or no reason at all . . . if the specific employee happens to be both inefficient and engaged in union activities, that coincidence standing alone is insufficient to destroy the just cause for his discharge. . . .²⁸

In *Reading & Bates, Inc. v. NLRB*,²⁹ the Fifth Circuit Court of Appeals stated:

If the employee's misdeeds are so flagrant that he would almost certainly have been fired regardless of anti-union animus, then there is no 'discrimination' . . . the board [NLRB] may look to the employer's intent or the dominant motive behind discharge to determine whether discrimination has occurred. No . . . violation occurs . . . unless the employer acts discriminatorily with intent to discourage union membership and such improper motive is a cause without which the employee would not be

24. *Id.* at 1341. In California public schools, employees may only be dismissed for cause. See CAL. EDUC. CODE §§ 44932, 44949, 45113, 87732, 87740, 88013 (Deering 1978 & Supp. 1982).

25. 623 F.2d 96 (9th Cir. 1980).

26. *Id.* at 99.

27. 374 F.2d 197 (5th Cir. 1980).

28. *Id.* at 200.

29. 403 F.2d 9 (5th Cir. 1968).

discharged.³⁰

The courts have held that it is not the role of the labor relations agency to second-guess the employer's policies or actions or substitute its judgment for that of the employer.³¹ The labor relations agency's role is to determine if the employer's dominant motivation was anti-union animus. The agency's finding must be based on substantial evidence. Evidence of the employer's general hostility toward unions or mere suspicion of anti-union motivation is insufficient.³² The Fifth Circuit summarized the applicable case law:

Management decisions are not subject to the second guessing of the board [NLRB] or the Courts unless it is shown by substantial evidence . . . that the decision violates the Act [NLRA] . . . an employer's general hostility to unions without more, does not supply an unlawful motive as to discharges. . . . Business judgment cannot be condemned merely because it coincides with anti-union sentiment. . . . To show discrimination the board must prove that the employee would have been treated differently in the absence of union activity. . . .³³

Thus, there must be substantial believable evidence on the record to support an inference of unlawful employer motivation.³⁴ Even seemingly harsh discharges are not unlawful unless motivated by an intent to discourage union activity.³⁵ Other jurisdictions and the NLRB have adopted a similar standard.³⁶

The employer's knowledge of the employee's union activities is also essential to show discrimination due to union activities.³⁷ Without proof that the employer had knowledge of the

30. *Id.* at 11.

31. *See* NLRB v. Materials Transportation Co., 412 F.2d 1074 (5th Cir. 1969); NLRB v. Ace Comb Co., 342 F.2d 841 (8th Cir. 1965).

32. NLRB v. Materials Transportation Co., 412 F.2d 1074 (5th Cir. 1969).

33. *Id.* at 1078.

34. NLRB v. Federal Pacific Electric Co., 441 F.2d 765, 770 (5th Cir. 1971).

35. *Id.*

36. *See, e.g.,* Columbia County Bd. of Public Instruction v. Public Employees Relations Comm'n, 353 So. 2d 127 (Fla. Dist. Ct. App. 1977); Pasco County School Board v. Florida Public Employees Relations Comm'n, 353 So. 2d 108 (Fla. Dist. Ct. App. 1977); Martori Bros. Distributors v. Agricultural Labor Relations Board, 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981); Wright Line, a Division of Wright Line, Inc., 251 N.L.R.B. 1083 (1980).

37. L'Eggs Products, Inc. v. NLRB, 619 F.2d 1337, 1341 (9th Cir. 1980); NLRB v. Century Broadcasting Co., 419 F.2d 771, 778 (8th Cir. 1969).

employee's union activities, discriminatory conduct cannot be found.³⁸ In *NLRB v. Century Broadcasting Company*,³⁹ the Eighth Circuit noted: "Absent knowledge of union activity, the Company could not have been motivated . . . by anti-union animus. The near coincidence . . . with union activity without more, is not substantially indicative of a discriminatory motive."⁴⁰

In summary, the case law interpreting the National Labor Relations Act has held that, in discharge cases, to sustain an unfair labor practice charge which alleges employer discrimination due to an employee's union activity, anti-union motivation on the part of the employer must be found. The employer's knowledge of the employee's union activities must be established by substantial evidence, and it must be shown by a preponderance of the evidence⁴¹ that "but for" the employee's union activities, he would not have been discharged.

II. CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD PRECEDENTS—ADOPTION OF FEDERAL PRECEDENTS

The language of the California Agricultural Labor Relations Act (ALRA)⁴² is virtually identical to the language of the National Labor Relations Act (NLRA).⁴³ Section 1153 of the California Labor Code states in part:

It shall be an unfair labor practice for an agricultural employer to do any of the following: (a) To interfere with, restrain, or coerce agricultural employees in the exercise of their rights guaranteed in Section 1152. . . . (c) By discrimination in regard to the hiring or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor

38. *NLRB v. Century Broadcasting Co.*, 419 F.2d 771, 777 (8th Cir. 1969).

39. *NLRB v. Century Broadcasting Co.*, 419 F.2d 771 (8th Cir. 1969).

40. *Id.* at 778 (quoting *NLRB v. South Rambler Co.*, 324 F.2d 447, 449-50 (8th Cir. 1963)).

41. *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337, 1341 (9th Cir. 1980); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771, 777-79 (8th Cir. 1969); *NLRB v. Materials Transportation Co.*, 412 F.2d 1074, 1078 (5th Cir. 1969); *NLRB v. Superior Sales, Inc.*, 366 F.2d 229 (8th Cir. 1966); *NLRB v. Ace Comb Co.*, 342 F.2d 841 (8th Cir. 1965). See also CAL. ADMIN. CODE § 32178 (1980).

42. CAL. LAB. CODE §§ 1140-1166.3 (Deering 1976 & Supp. 1982).

43. 29 U.S.C. §§ 141-166 (1976). Both statutory schemes utilize the phrase "in the exercise of rights guaranteed."

organization. . . .⁴⁴

The rights guaranteed in section 1153 are virtually indistinguishable from the rights guaranteed under section 157 of the NLRA. Both acts guarantee the right of employees to self-organize, the right to form, join, and support labor organizations and the right to engage in concerted activities.

The California Supreme Court, in *Martori Brothers Distributors v. Agricultural Labor Relations Board*,⁴⁵ interpreting the language of California Labor Code section 1153, adopted the "but for" test formulated by the federal courts and the NLRB under the National Labor Relations Act.⁴⁶ The court stated that, "[i]n the absence of union discrimination, the purpose of labor legislation does not vest in the administrative board any control over an employer's business policies. . . . The mere fact that an employee is or was participating in union activities does not insulate him from immunity from routine employment decisions."⁴⁷

Furthermore, the court in *Martori Brothers* stated that when an employer is motivated by both an anti-union bias and a legitimate business interest, the discharge of an employee will be upheld unless it can be shown that "but for" the employee's union activities he would not have been dismissed.⁴⁸ In effect, if it is found that the employee would have been discharged in the absence of union activities or if the union activities were disregarded, the discharge will be upheld. The court directed the ALRB to apply the "but for" test in all future cases.⁴⁹

III. DECISIONS OF THE CALIFORNIA PUBLIC EMPLOYMENT RELATIONS BOARD—CONFLICT WITH STATE AND FEDERAL CASE LAW

The language of the Educational Employment Relations Act (EERA)⁵⁰ is similar but not identical to the language con-

44. CAL. LAB. CODE § 1153 (Deering 1976).

45. 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981).

46. *Id.* See also *Wright Line*, a Division of *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980).

47. 29 Cal. 3d at 729, 631 P.2d at 64, 175 Cal. Rptr. at 630.

48. *Id.*

49. *Id.* at 730, 631 P.2d at 65, 175 Cal. Rptr. at 631.

50. CAL. GOV'T CODE §§ 3540-3549.3 (Deering 1982).

tained in the National Labor Relations Act (NLRA)⁵¹ and the Agricultural Labor Relations Act (ALRA).⁵² While both the NLRA and ALRA employ the phrase "in the exercise of their right guaranteed . . .,"⁵³ the EERA utilizes the phrase "because of their exercise of rights guaranteed."⁵⁴ The rights guaranteed in section 3543.5 of the EERA are enumerated in section 3543. These rights include the right to form, join and participate in union activities, the right not to form, join or participate in union activities, and the right of employees to represent themselves individually under certain circumstances.⁵⁵

The California Public Employment Relations Board (PERB) was created by the legislature to administer the EERA.⁵⁶ The Board is empowered to investigate unfair labor practice charges and make determinations as to whether a violation of the act has occurred.⁵⁷ In adjudicating unfair labor practice charges, the PERB must adopt a preliminary construction or interpretation of the act it is administering;⁵⁸ however, it is the duty of the court to render a final determination as to the meaning of a statute.⁵⁹

The PERB, interpreting the language of section 3543.5(a), first held that the legislature's use of language of causation rather than the broader language of the NLRA and ALRA indicated a more restrictive legislative intent.⁶⁰ The PERB in *San Dieguito Union High School District* stated:

51. 29 U.S.C. §§ 158-166 (1976).

52. CAL. LAB. CODE §§ 1140-1166.3 (Deering 1976 & Supp. 1982).

53. 29 U.S.C. § 158(a)(1) (1976); CAL. LAB. CODE § 1153(a) (Deering 1976).

54. CAL. GOV'T CODE § 3543.5 (Deering 1982) states: "It shall be unlawful for a public school employer to: (a) Impose or threaten to impose reprisals on employees to discriminate or threaten to discriminate against employees or otherwise interfere with, restrain or coerce employees *because of* the exercise of rights guaranteed by this chapter" (emphasis added).

55. CAL. GOV'T CODE § 3543 (Deering 1982).

56. CAL. GOV'T CODE §§ 3541-3541.3 (Deering 1982).

57. CAL. GOV'T CODE § 3541(i) (Deering 1982).

58. *Bodinson Mfg. Company v. California Employment Commission*, 17 Cal. 2d 321, 109 P.2d 935, 939 (1941). The court in *Bodinson* held that although an administrative agency charged with the responsibility of administering a statute must adopt a preliminary construction of the statute, such administrative interpretation is not a final one. It is the constitutional duty of the court to state the true meaning of a statute.

59. *Id.*

60. See *San Dieguito Union High School District*, EERB Decision No. 22, 1 Pub. Empl. Rep. Cal. (Lab. Relations Press) 369 (1977).

"Unlike . . . the NLRA, Government Code Section 3543.5(a) seems to make motive or purpose a requirement for a violation. . . . Interference 'because of' is quite different from mere 'interference in'. 'Because of' connotes purposeful or intentional behavior; 'interference in' connotes interference with or without an unlawful intent."⁶¹

After the PERB decision in *San Dieguito*, the NLRB interpreted the less restrictive language of the NLRA to require an examination of the employer's motive in discharge cases and determined that when a lawful business motive existed the employee must prove that "but for" his union activities he would not have been dismissed.⁶² The PERB later reversed itself in *Carlsbad Unified School District*⁶³ and adopted a broader interpretation of the EERA than had been adopted by the NLRB and the courts in interpreting the language of the NLRA.

The PERB misconstrued the applicable NLRB precedents when it stated: "While unlawful intent appears not to be a necessary element of an interference charge under 8(a)(1) [29 U.S.C. 158(a)(1)], it has generally been held to be a necessary ingredient in finding a violation of Section 8(a)(3) [29 U.S.C. Section 158(a)(3)]."⁶⁴ In fact, even under the seemingly unqualified language of section 158(a)(1) the courts have imposed qualifications.⁶⁵ Federal case law has held that under section 158(a)(1),⁶⁶ intent or anti-union motivation by the employer must be proven where the employer asserts a legitimate and substantial justification for his actions.⁶⁷ Under section

61. *Id.* at 373.

62. *See* *Wright Line*, a Division of *Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980); *Martori Brothers Distributors v. Agricultural Labor Relations Board*, 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981).

63. PERB Decision No. 89, 3 Pub. Empl. Rep. Cal. (Lab. Relations Press) 369 (1977).

64. *Id.* at 108.

65. *See* GORMAN, *supra* note 2, at 133.

In effect, Section 8(a)(1) [§ 158(a)(1)] could be written as follows: It shall be an unfair labor practice for an employer to take action which, regardless of the absence of anti-union bias, tends to interfere with, restrain or coerce a reasonable employee in the exercise of rights guaranteed in Section 7 [29 U.S.C. § 1571], provided that action lacks a legitimate and substantial justification. . . .

Id.

66. 29 U.S.C. § 158(a)(1) (1976).

67. *See* *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967).

158(a)(3),⁶⁸ the courts have held that intent or anti-union motivation must be shown in order to sustain a violation.⁶⁹ In cases of discharge or dismissal, intent or anti-union motivation must also be proven.⁷⁰

The *Carlsbad* test is less stringent than the NLRB test despite the more restrictive language of the EERA. The PERB explained its adoption of a standard which varied markedly from the NLRB by stating:

The N.L.R.A. was designed for labor relations in the private sector. PERB will remain open to the possibilities that there may be inherent and necessary distinctions to be drawn for public employment relations in California. Furthermore, the persuasiveness of federal adjudication is mitigated . . . by specific distinctions between the language of the respective statutes.

. . . .

The "because of" language should not be so narrowly read as to preclude one whose rights have been damaged from seeking redress unless intentional harm can be demonstrated. PERB understands that brief phrase to mean only that some nexus must exist between the exercise of employee rights under the EERA and the actions

68. 29 U.S.C. § 158(a)(3) (1976).

69. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965); *Radio Officer's Union v. NLRB*, 347 U.S. 17 (1954); *Berry Schools v. NLRB*, 627 F.2d 692 (5th Cir. 1980); *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980); *Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *L'Eggs Products Inc. v. NLRB*, 619 F.2d 1337 (9th Cir. 1980); *NLRB v. Federal Pacific Electric Co.*, 441 F.2d 765 (5th Cir. 1971); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771 (8th Cir. 1969); *NLRB v. Materials Transportation Co.*, 412 F.2d 1074 (5th Cir. 1969); *Reading & Bates, Inc. v. NLRB*, 403 F.2d 9 (5th Cir. 1968); *NLRB v. Red Top Cab and Baggage Co.*, 383 F.2d 547 (5th Cir. 1967); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967); *NLRB v. Superior Sales, Inc.*, 366 F.2d 229 (8th Cir. 1966); *NLRB v. Ace Comb Co.*, 342 F.2d 841 (8th Cir. 1965).

70. *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *Berry Schools v. NLRB*, 627 F.2d 692 (5th Cir. 1980); *NLRB v. Adams Delivery Service*, 623 F.2d 96 (9th Cir. 1980); *L'Eggs Products, Inc. v. NLRB*, 619 F.2d 1337 (9th Cir. 1980); *Stephenson v. NLRB*, 614 F.2d 1210 (9th Cir. 1980); *NLRB v. Federal Pacific Electric Co.*, 441 F.2d 765 (5th Cir. 1971); *NLRB v. Century Broadcasting Corp.*, 419 F.2d 771 (8th Cir. 1969); *NLRB v. Materials Transportation Co.*, 412 F.2d 1074 (5th Cir. 1969); *Reading & Bates, Inc. v. NLRB*, 403 F.2d 9 (5th Cir. 1968); *NLRB v. Red Top Cab and Baggage Co.*, 383 F.2d 547 (5th Cir. 1967); *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F.2d 197 (5th Cir. 1967); *NLRB v. Superior Sales, Inc.*, 366 F.2d 229 (8th Cir. 1966); *NLRB v. Ace Comb Co.*, 342 F.2d 841 (8th Cir. 1965).

of the employer. . . .⁷¹

In *Carlsbad*, the PERB set forth a "single test" for violations of Section 3543(a) as follows:

1. A single test shall be applicable in all instances in which violations of Section 3543.5(a) are alleged;
2. Where the charging party establishes that the employer's conduct tends to or does result in some harm to employee rights granted under the EERA, a prima facie case shall be deemed to exist;
3. Where the harm to the employee's rights is slight, and the employer offers justification based on operational necessity, the competing interest of the employer and the rights of the employees will be balanced and the charge resolved accordingly;
4. Where the harm is inherently destructive of employee rights, the employer's conduct will be excused only on proof that it was occasioned by circumstances beyond the employer's control and that no alternative course of action was available;
5. Irrespective of the foregoing, a charge will be sustained where it is shown that the employer would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent.⁷²

The PERB's test is, in reality, three or four separate tests and is quite different from the standard used by the NLRB and the courts. The PERB test shifts more of the burden of proof to the employer, away from the employee. Part two of the test states that a prima facie case is established by the employee when the employee shows that the employer's conduct results in some harm to the employee's right granted under the EERA.⁷³ Once a prima facie case is established by the employee, the PERB (under parts three and four of the test) looks to see if the harm to the employee's rights is slight or inherently destructive. If the harm is slight and the employer offers evidence of operational necessity, then the PERB will balance the competing interests of the employer and employee. If the harm is inherently destructive, the employer will have violated the EERA, unless the employer can

71. PERB Decision No. 89, 3 Pub. Empl. Rep. Cal. (Lab. Relations Press) ¶ 10031, at 108.

72. *Id.* at 108-09.

73. CAL. GOV'T CODE § 3543 (Deering 1982).

show that his conduct was beyond his control and no alternative course was available.

Under the PERB test, a determination as to whether an employer's conduct is inherently destructive of employee rights is critical. If it is found that the employer's conduct is inherently destructive, the employer faces the virtually insurmountable task of justifying his conduct. In discharge cases, it would be untenable for an employer to argue that the dismissal of an employee was beyond his control. The case law and NLRB precedent, however, clearly indicate that the discharge of an employee is not inherently destructive of employee rights.⁷⁴ Only the granting of "super seniority" and the payment of extraordinary benefits to non-strikers have been held to be inherently destructive of employee rights.⁷⁵

If the PERB finds that, in discharge cases, the harm to employee rights is slight, then the interests of the employee and employer are balanced. The employer's interest in managing his enterprise is balanced against the employee's right to engage in union activities even when the employer has offered proof of operational necessity (e.g., enforcement of shop rules, insubordination of employee) to justify his actions.

In *NLRB v. Great Dane*,⁷⁶ the United States Supreme Court adopted a different test to be applied where the harm to the employee's rights is slight. The Court stated: "When the resulting harm to employee rights is . . . comparatively slight and a substantial and legitimate business end is served, the employer's conduct is prima facie lawful and an affirmative showing of improper motivation must be made."⁷⁷ That is, "if the adverse effect of the . . . conduct on employee rights is 'comparatively slight' an anti-union motivation must be proved to sustain the charge. . . ."⁷⁸ The PERB test seems to eliminate the need for the employee to prove unlawful motivation by the employer. In this respect, the PERB test dif-

74. See *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965); *Martori Bros. Distributors, Inc. v. Agricultural Labor Relations Bd.*, 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981); *Wright Line, a Division of Wright Line, Inc.* 251 N.L.R.B. 1083 (1980).

75. *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

76. 388 U.S. 26 (1967).

77. *Id.* at 34 (quoting in part *NLRB v. Brown*, 380 U.S. 278, 289 (1965) and citing with approval *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965)).

78. 388 U.S. at 34.

fers markedly from the standard adopted by the California Supreme Court in *Martori Brothers*.⁷⁹

In *Martori Brothers*, the California Supreme Court held that unlawful motivation by the employer is the key element in the employee's burden of proof, and that where the employer has both lawful and unlawful motives for discharging the employee, it must be shown that the employee would not have been discharged "but for" the anti-union motive.⁸⁰ In effect, the anti-union motive must be the moving cause or the key factor in the discharge and the valid business reason must be a pretext for discharge.⁸¹ The Court explained the test as follows:

When it appears that an employee was dismissed because of combined valid business reasons as well as for invalid reasons, such as union or other protected activities, the question becomes whether the discharge would not have occurred "but for" the protected activity.

. . . .
When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities.⁸²

Part five of the PERB test sets forth a "but for" test which differs from the test in *Martori Brothers*. It must be shown that the employer would not have engaged in the conduct alleged in the unfair labor practice charge "but for" an unlawful motivation, purpose or intent. The PERB, however, imposes the burden of proof on the employer. The employer must show that he had no unlawful motive or intent and must negate any evidence of such motive or intent offered by the employee.⁸³ As a result, the PERB test would preclude the employer from prevailing where dual motive actions are found. In this respect, part five of the PERB test differs markedly from the test adopted by the NLRB, the federal

79. 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981).

80. *Id.*

81. *Id.* at 730, 361 P.2d at 65, 175 Cal. Rptr. at 631.

82. *Id.* at 729-30, 361 P.2d at 64-65, 175 Cal. Rptr. at 630-31.

83. Carlsbad Unified School District, PERB Decision No. 89, 3 Pub. Empl. Rep. Cal. (Labor Relations Press) 108-09 (1977).

courts, and the California Supreme Court in *Martori Brothers*.

In *Martori Brothers*, the California Supreme Court found evidence of dual employer motivation yet found that the unlawful anti-union motives of the employer were not the "but for" cause of employee's discharge. In other words, the employer would have discharged the employee for business reasons regardless of the employer's anti-union motive. The court cited the employee's involvement in a wage dispute with the employer immediately preceding the discharge, the employee's testimony at ALRB hearings, and the employee's filing of charges with the ALRB as evidence supporting a possible finding of anti-union motivation.⁸⁴ The court, however, also cited the employee's insubordination, threats against the employer and his family, and the employee's disruptive conduct as evidence which would justify discharge.⁸⁵ The ALRB had rejected the employer's evidence as merely a "pretext" to mask a discharge motivated by unlawful intent and anti-union animus.⁸⁶ The ALRB deemed it significant that the employee was not dismissed immediately after making the threats. The California Supreme Court unanimously reversed the Board's finding of "pretext" or lack of sufficient business justification and ordered the ALRB to apply the "but for" test.⁸⁷ The court explained its holding as follows:

Labor Code Section 1148 provides that "the board shall follow applicable precedents of the National Labor Relations Act as amended." In light of the recent *Wright Line* decision, the ALRB henceforth should apply this "but for" standard in assessing the dual motive for discharge. . . . When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities.⁸⁸

The PERB's decision in *Carlsbad* fails to take into consideration that public school employees may only be dis-

84. 29 Cal. 3d at 730, 361 P.2d at 65, 175 Cal. Rptr. at 631.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

missed for cause⁸⁹ and that an administrative hearing must be held to dismiss an employee.⁹⁰ These additional statutory protections, which employees in the private sector generally do not have, further ensure that public school employees will only be dismissed for cause based on business justification.

IV. CONCLUSION

The dismissal of public school employees in California has been somewhat impeded by the decisions of the California Public Employment Relations Board. The PERB standard for determining whether employee union rights have been violated in discharge cases unfairly shifts the burden of proof to the public school employer. This makes it more difficult for a public school employer to discharge an insubordinate or incompetent employee if the employee is a union member or has engaged in union activity.

The United States Supreme Court, the California Supreme Court, and the National Labor Relations Board have adopted a reasonable standard which balances the interests of the employee and employer. The PERB, despite the more narrowly drawn language of the EERA, has rejected that standard, except in cases where the harm to employee's right is slight, and has adopted a broader test which shifts the burden of proof from the employee to the employer. The PERB test does not require an affirmative showing by the employee of anti-union animus or intent by the employer but requires the employer to show that no anti-union motive or intent was involved in his business decision. In cases of undefined inherently destructive behavior, the employer must meet an insurmountable burden of proof by showing that his conduct was beyond his control. The PERB test unfairly downgrades the employer's showing of business justification and thus hampers the ability of public school employers to manage the taxpayers' dollars efficiently.

When an employee in the private sector alleges a discriminatory discharge due to union activity, the employee has the burden of proving that unlawful anti-union intent was the

89. See CAL. EDUC. CODE §§ 44932, 44949, 45113, 87732, 87740, 88013 (Deering 1978 & Supp. 1982).

90. See CAL. EDUC. CODE §§ 44944, 44949, 45113, 87675, 87740, 88013 (Deering 1978 & Supp. 1982).

moving cause behind his discharge, that any business justification for the discharge asserted by the employer was a mere pretext, and that there was no real business justification for his discharge. The courts have adopted this standard in the belief that labor relations legislation should not interfere with the employer's business judgment or the efficient operation of its enterprises.

Today's taxpayers expect and demand that their public schools be efficiently managed. The PERB's decision in *Carlsbad* impairs the ability of public school employers to manage the public schools efficiently. Public school employees enjoy other statutory protections which insulate them from arbitrary discharges. For these reasons, the PERB should apply the "but for" standard which has been adopted by the federal courts, the California Supreme Court and the National Labor Relations Board.

