[Vanderbilt Law Review](https://scholarship.law.vanderbilt.edu/vlr)

Volume 36
Issue 4 *Issue 4 - May 1983*

Article 6

5-1983

National Labor Relations Act: The Roles of the NLRB and the Courts of Appeals After Pullman-Standard in Determining Employer Motivation in Section 8 (a)(3) Dual Motive Cases

William E. Anderson

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vlr

Part of the Labor and Employment Law Commons

Recommended Citation

William E. Anderson, National Labor Relations Act: The Roles of the NLRB and the Courts of Appeals After Pullman-Standard in Determining Employer Motivation in Section 8 (a)(3) Dual Motive Cases, 36 *Vanderbilt Law Review* 1095 (1983)
Available at: https://scholarship.law.vanderbilt.edu/vlr/vol36/iss4/6

This Note is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Law Review by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

NOTES

National Labor Relations Act: The Roles of the NLRB and the Courts of Appeals After *Pullman-Standard* in Determining Employer Motivation in Section 8(a)(3) Dual Motive Cases

I. INTRODUCTION ... 1096

II. HISTORICAL DEVELOPMENT OF DUAL MOTIVE CASES UNDER SECTION 8(a)(3) ... 1100

A. *Guidance from the Supreme Court*—Great Dane ... 1100

B. *The Intolerable Confusion: Aftermath of* Great Dane ... 1102

C. *The Board's Attempt to Provide Consistency in Section 8(a)(3) Dual Motive Cases*: Wright Line ... 1103

D. *Discriminatory Intent After* Wright Line ... 1104

III. *Pullman-Standard* AND DISCRIMINATORY INTENT UNDER TITLE VII ... 1107

IV. APPLICATION OF THE *Pullman-Standard* TITLE VII MODEL TO SECTION 8(a)(3) DUAL MOTIVE CASES ... 1111

A. *Justifications for Application of the Pullman-Standard Model in Section 8(a)(3) Dual Motive Cases* ... 1111

1. Parallel Development of Section 8(a)(3) and Title VII Discrimination ... 1112

(a) *Parallel Developments in Legislative Histories* ... 1112

(b) *Parallel Development in Judicially Developed Doctrines* 1112
(1) Section 8(a)(3) "Inherently Destructive" and Title VII "Disparate Impact" Cases 1113
(2) Section 8(a)(3) "Comparatively Slight" and Title VII "Disparate Treatment" Cases 1114
(c) *Interchangeable Use of NLRA and Title VII Doctrines* 1115
2. Historical Justifications: The *Hartsell Mills* Pure Question of Fact Concept..... 1117
3. Furtherance of Congressional Intent...... 1120
4. Current Application of *Pullman-Standard* Outside the Title VII Area 1122
B. *Section 8(a)(3) Dual Motive Cases After* Pullman-Standard 1123
1. General Implications.................... 1123
2. Appellate Courts' Deference Due the Board's Discriminatory Intent Findings... 1123
V. CONCLUSION.................................... 1125

I. INTRODUCTION

Section 8(a)(3)[1] of the National Labor Relations Act (the NLRA)[2] proscribes employment discrimination undertaken to encourage or discourage labor union membership. An employer violates section 8(a)(3) by discharging or disciplining an employee as punishment for participation in lawful union activity. A problematic situation commonly occurs when an employer had lawful and unlawful motives to discipline or discharge an employee. Courts and commentators call this situation a dual motive case.[3] Dual motive cases typically arise when an employer does not state specifically an illegitimate reason for its employment decision, but instead relies upon a "just cause" defense to legitimize its action.[4]

---

1. 29 U.S.C. § 158(a)(3) (1976). Section 8(a)(3) prohibits employers from discriminating "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

2. 29 U.S.C. §§ 151-69 (1976 & Supp. V 1981).

3. *See, e.g.*, Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, 1083-84 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

4. The "just cause" defense is a generic term that describes all legitimate reasons for which an employer can discharge an employee. Employee inefficiency and misconduct are

Consequently, when employer motivation in employment decisions is unclear, parties routinely ask the National Labor Relations Board (the Board) to decide whether an employer acted pursuant to legitimate or illegitimate reasons.[5]

The proper substantive approach to determine whether an employer acted discriminately in section 8(a)(3) dual motive cases has been the subject of prolonged disagreement, inconsistency, and confusion among the courts of appeals,[6] which have appellate jurisdiction over the Board. The Board has attempted to resolve this confusion,[7] but uncertainty still remains because the United States Supreme Court has failed to provide a clear and consistent approach for finding discrimination in dual motive cases.[8] The conflict among the courts of appeals primarily concerns two issues: whether an employer's burden of proof to establish a business justification for challenged action is a burden of production or persuasion, and whether the courts of appeals should give much or little deference to the Board's findings of employer motivation. Courts[9] and commentators[10] have considered only the issue concerning an employer's burden to prove business justification and have ignored the proper roles of the Board and the courts of appeals in determinations of employer motivation.

---

two possihle legitimate reasons for discharging an employee.

5. *See, e.g.,* Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. at 1084-86.

6. *See id. See infra* text accompanying notes 46-57.

7. *See infra* text accompanying notes 38-45.

8. *See infra* text accompanying notes 18-37.

9. Two Supreme Court justices recognized the need to resolve the conflict that exists between the courts of appeals and the Board concerning the procedural nature of an employer's burden of proof. In Red Ball Motor Freight, Inc. v. NLRB, 660 F.2d 626 (5th Cir. 1981), *cert. denied,* 102 S. Ct. 2282 (1982), Justice White and Justice Rehnquist joined in dissent to the Court's denial of certiorari. They focused on the conflicting views in the circuits concerning whether an employer has a burden of production or persuasion to prove a business justification for disciplining or discharging an employee in a § 8(a)(3) dual motive case after the Board's general counsel establishes a prima facie case showing discriminatory action. The dissent stated: "In order to resolve this conflict on what is obviously a recurring issue tbat should be resolved, I would grant the writ of certiorari." *Id.* After *Red Ball,* the Court granted certiorari in NLRB v. Transportation Management Corp., 674 F.2d 130 (1st Cir. 1982), *cert. granted,* 103 S. Ct. 372 (1982) to resolve the burden shifting problem.

10. This Note does not consider the question of which burden of proof shifts to an employer after the general counsel establishes a prima facie case of discriminatory action. This Note considers only the proper roles of the NLRB and the courts of appeals in determining an employer's motivation for disciplinirg or discharging an employee in a § 8(a)(3) dual motive case. Professor Robert Belton has explored in detail the procedural nature of an employer's burden of proof to establish a business justification for challenged action. *See* Belton, *Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice,* 34 VAND. L. REV. 1205 (1981).

This Note advocates that the proper roles of the Board and the courts of appeals in determining employer motivation in section 8(a)(3) dual motive cases depends on whether the courts of appeals classify discriminatory intent as a question of fact or law. Classification of discriminatory intent as a question of fact for initial determination by the Board requires the courts of appeals to review deferentially the Board's findings under the "substantial evidence" standard of review set forth in section 10(e)[11] of the NLRA. Classification of discriminatory intent as a question of law, however, subjects the Board's findings on this issue to much broader review by allowing the courts of appeals to substitute their judgment for that of the Board.

A situation analogous to section 8(a)(3) dual motive cases occurs in employment discrimination actions brought under Title VII of the Civil Rights Act of 1964.[12] Title VII proscribes employers from discriminately discharging or disciplining an employee because of that employee's race, color, religion, sex, or national origin. Title VII cases arise when an employer discharges or disciplines an employee, usually without specifically stating an illegitimate reason for its action. This stituation, as in section 8(a)(3) dual motive cases, presents the question whether an employer must act with discriminatory intent to violate Title VII.

The confusion that surrounds the proper roles of the Board and the courts of appeals in determining discriminatory intent in section 8(a)(3) dual motive cases does not exist in Title VII cases because the Supreme Court, in *Pullman-Standard v. Swint*,[13] established a clear analytical solution that courts can implement under Title VII.[14] In *Pullman-Standard* the Court held that dis-

---

11. 29 U.S.C. § 160(e) (1976). Section 10(e) of the Act states, in pertinent part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." *Id.*

12. 42 U.S.C. §§ 2000e—2000e-17 (1976). Section 703(a) states:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

13. 102 S. Ct. 1781 (1982).

14. *See* Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and* Weber, 59 N.C.L. Rev. 531 (1981).

criminatory intent is purely a question of fact reserved for the district court's determination.[15] A court of appeals, therefore, may reverse a district court's finding of discriminatory intent only if it concludes that the finding is "clearly erroneous" under Federal Rule of Civil Procedure 52(a).[16] If the court of appeals holds the lower court's decision to be "clearly erroneous," it must remand the case to the district court unless the trial record permits only one conclusion of the discriminatory intent issue.[17]

This Note advocates use of the *Pullman-Standard* Title VII model to define the proper roles of the Board and the courts of appeals in determining discriminatory intent in section 8(a)(3) dual motive cases. Part II of this Note discusses the current confusion concerning the amount of discretion a court of appeals owes the Board's finding of discriminatory intent in dual motive cases. Part II also traces the Supreme Court's failure to define clearly the proper roles of the Board and the courts of appeals in finding discriminatory intent, the confusion this failure has caused, and the Board's unsuccessful attempt to clarify this confusion. Part III develops the Title VII model through a discussion of the *Pullman-Standard* resolution of the proper roles of the district courts and the courts of appeals in determining discriminatory intent in Title VII cases. Part IV argues that courts properly may apply the *Pullman-Standard* Title VII model to section 8(a)(3) dual motive cases. Part IV presents a four-part analysis to justify application of the *Pullman-Standard* model. First, it demonstrates that because the legal doctrines in both areas have experienced parallel and analogous developments, section 8(a)(3) sufficiently relates to Title VII to warrant application of the *Pullman-Standard* model. Second, it discusses former circuit court characterization of discriminatory intent as a question of fact and advocates a return to this position. Third, it argues that application of the *Pullman-Standard* model will further Congress' intention that the Board assume final responsibility for development of national labor policy subject only to limited federal appellate court review. Last, it demonstrates that the Court has characterized intent as a question of fact outside the Title VII area and has used *Pullman-Standard* to define the proper scope of appellate review. Part IV then discusses the implications of applying the *Pullman-Standard* model to sec-

15. *See infra* text accompanying notes 83-89.
16. *See infra* text accompanying note 86.
17. *See infra* text accompanying note 87.

tion 8(a)(3) dual motive cases and concludes that discriminatory intent should be a question of fact reserved for the Board's initial determination and subject to only limited federal appellate court review. In addition, Part IV argues that application of the *Pullman-Standard* model will require the courts of appeals to give the Board's findings of discriminatory intent in section 8(a)(3) cases greater deference under the "substantial evidence" standard of review than they currently must give the district courts' findings in Title VII cases under the "clearly erroneous" standard.

II. Historical Development of Dual Motive Cases Under Section 8(a)(3)

A. *Guidance from the Supreme Court*—Great Dane

Commentators have described the part that an employer's motive plays in determining the existence of section 8(a)(3) employment discrimination which encourages or discourages union membership as a "tangled web."[18] The courts variously have viewed an employer's illegitimate motive as: (1) evidence of a section 8(a)(3) violation; (2) an essential element of a section 8(a)(3) violation; (3) an element of a section 8(a)(3) violation that courts could infer from the effect of an employer's action; and (4) an element in the balancing process for the competing interests of employers and employees.[19]

The Supreme Court in *NLRB v. Great Dane Trailers*[20] announced the current formula that establishes the necessity for and the method of proving an employer's discriminatory intent in section 8(a)(3) dual motive cases.[21] Despite its vagueness the *Great*

18. Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269, 1273 (1968).

19. *Id.* at 1273-1314.

20. 388 U.S. 26 (1967). In *Great Dane*, an employer violated § 8(a)(3) of the NLRA by granting vacation benefits to employees who worked during a strike and denying these benefits to workers who struck.

21. *Id.* at 32-34. An historical analysis of the Court's major § 8(a)(3) decisions indicates the development of its position concerning the necessity for proving discriminatory intent and the permissibility of asserting a business justification for discriminatory action in § 8(a)(3) cases. In NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333 (1938), the Court held that permanent replacement of employees who struck for economic reasons did not violate § 8(a)(3). The Court reasoned that the employer's interest in continuing its business was a sufficient business justification for its discriminatory action. 304 U.S. at 345. In Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945), the Court held tbat an employer's rule which promoted plant efficiency and safety by prohibiting union solicitation during nonworking time lacked sufficient business justification for the discriminatory action even though the rule discouraged solicitation without an illegitimate motive. 324 U.S. at 805. In

Dane formula has shaped the course of Board and lower court decisions since its introduction.[22] It establishes guidelines concerning the necessity for and the method of proving discriminatory employer motivation in two types of section 8(a)(3) dual motive cases. First, if the employer's action is "inherently destructive" of an employee's section 7 right to participate in lawful labor union activity,[23] the courts of appeals cannot require an employee to prove that an employer acted with an unlawful motive.[24] Second, if an employer's action has only a "comparatively slight" effect on an employee's section 7 rights, the judicial analysis varies depending upon whether the employer introduces evidence of a legitimate and substantial business justification for its discriminatory action.

Radio Officers' Union of the Commercial Telegraphers Union, AFL v. NLRB, 347 U.S. 17 (1954), the Court held that an employer violated § 8(a)(3) by acting discriminately to encourage union membership. The Court reasoned that while unlawful motive and discriminatory effect were elements necessary to establish a § 8(a)(3) violation, courts could infer motive and intent from an employer's conduct. 347 U.S. at 42-52. In NLRB v. Erie Resistor Co., 373 U.S. 221 (1963), the Court held that the consequences of awarding superseniority to nonstriking workers and replacements for striking workers, but not to striking workers, was so destructive to the rights of striking workers that the employer could not avoid violation of § 8(a)(3) by claiming a business justification for its discriminatory action. 373 U.S. at 227-36. In Textile Workers Union v. Darlington Manufacturing Co., 380 U.S. 263 (1965), the Court held that certain legitimate employer activity could be a violation of § 8(a)(3) only if a party could show that the employer acted with an illegal motive and effect. 380 U.S. at 274-77. In American Ship Building Co. v. NLRB, 380 U.S. 300 (1965), the Court held that an employer lock-out designed to induce employee agreement to an employment contract was not a violation of § 8(a)(3). The Court reasoned that the lock-out was not sufficiently destructive of employee rights to warrant consideration of employer motivation. The Court also emphasized that the employer's business purposes for the lock-out justified its action. 380 U.S. at 308-18. *See* R. GORMAN, BASIC TEXT ON LABOR LAW 326-38 (1976). *See generally* Christensen & Svanoe, *supra* note 18, at 1269; Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. CHI. L. REV. 735 (1965); Oberer, *The Scienter Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORN. L.Q. 491 (1967); Note, *Intent, Effect, Purpose and Motive as Applicable Elements to § 8(a)(1) and § 8(a)(3) Violations of the National Labor Relations Act*, 7 WAKE FOREST L. REV. 616 (1971); Janofsky, *New Concepts in Interference and Discrimination Under the NLRA: The Legacy of* American Ship Building *and* Great Dane Trailers, 70 COLUM. L. REV. 81 (1970).

22. R. GORMAN, *supra* note 21, at 335.

23. Section 7 of the National Labor Relations Act provides:

> Employees shall have the right to self-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, and shall also have the right to refrain from any or all of such activities except . . . that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3). . . .

29 U.S.C. § 157 (1976).

24. *Great Dane*, 388 U.S. at 34.

When an employer does not introduce evidence of a legitimate and substantial business justification, the Board may find a violation of section 8(a)(3) without proof that the employer acted with an unlawful motive. If an employer, however, does introduce evidence of a legitimate and substantial business justification, the Board's general counsel must prove unlawful employer motivation.[25]

The *Great Dane* formula, however, fails to answer four significant questions. First, it does not specify proper roles of the NLRB and the courts of appeals in determining employer motivation in comparatively slight cases, and it fails to clarify whether discriminatory intent is a question of fact or law. Second, the *Great Dane* formula fails to determine if the Board may balance the substantiality of the employer's business justification with the severity of the impact on the employee's section 7 rights to decide section 8(a)(3) comparatively slight cases. Third, the *Great Dane* formula does not establish criteria for determining whether an employer's conduct is inherently destructive or comparatively slight. Last, the *Great Dane* formula does not specify if the burden of proof that shifts to the employer in section 8(a)(3) is a burden of persuasion or simply a burden of production. The Court's failure to answer these questions has caused considerable confusion within the Board and among the courts of appeals concerning the proper method for analyzing these issues in dual motive cases.[26]

B. The Intolerable Confusion: Aftermath of Great Dane

After *Great Dane*, the Board and the courts of appeals adopted three different standards for the proper procedures to find and weigh discriminatory intent and business justifications in section 8(a)(3) dual motive cases.[27] First, the Board and five circuits[28] applied variations of the traditional "in part" standard.[29] The in part standard requires a court to find a section 8(a)(3) violation if an employee's participation in lawful union activity in any manner or degree motivates the employer to discharge or discipline that employee. Therefore, once the Board's general counsel makes a prima facie showing of an unlawful motive,[30] the employer cannot

25. *Id.*

26. *See* Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. at 1084-86.

27. Lewis & Fisher, Wright Line—*An End to the Kaleidoscope in Dual Motive Cases?*, 48 TENN. L. REV. 879, 881-89 (1981).

28. *Id.* at 884-85.

29. *Id. See, e.g.*, Youngstown Osteopathic Hospital Ass'n., 224 N.L.R.B. 206 (1976).

30. Lewis & Fisher, *supra* note 27, at 885..

escape liability by showing a legitimate business reason for its action.[31] Second, the United States Court of Appeals for the Fifth Circuit[32] established the "reasonably equal" test. A section 8(a)(3) violation under this standard occurs when an employer's illegitimate motive is reasonably equal to its legitimate business reasons for discharging or disciplining an employee. An employer can avoid liability under the reasonably equal test only when the legitimate business justification for its action outweighs its discriminatory motive.[33] Last, five circuits adopted variations of the "dominate motive" test.[34] A violation of section 8(a)(3) under this standard occurs only when the Board's general counsel proves that illegitimate motives outweigh the legitimate reasons for an employer's actions.[35] Application of the dominant motive test has engendered considerable disagreement between the Board and the courts of appeals. For example, the First Circuit became so incensed by the Board's use of a standard inconsistent with the dominant motive test that it stated that it would refuse to enforce the Board's future decisions unless the Board conformed.[36] If this disagreement remains unresolved the courts of appeals likely will reach inconsistent decisions in similar factual situations.[37]

C. The Board's Attempt to Provide Consistency in Section 8(a)(3) Dual Motive Cases: Wright Line

The Board attempted to clarify the confusion that *Great Dane* created by introducing a new formula in *Wright Line, A Division of Wright Line, Inc.*[38] which purportedly would provide litigants and decision making bodies with a uniform test for section 8(a)(3)

31. *Id.*

32. *Id.* at 885-86.

33. *See, e.g.*, NLRB v. Longhorn Transfer Serv., Inc., 364 F.2d 1003, 1006 (5th Cir. 1965).

34. Lewis & Fisher, *supra* note 27, at 886.

35. *Id.* at 886-88. The First, Second, Fourth, Ninth, and District of Columbia Circuits applied the "dominant motive" test.

36. In Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292 (1st Cir. 1977), the First Circuit remarked: "[T]here can be little reason for us to rescue the Board hereafter if it does not both articulate and apply our rule." *Id.* at 1293.

37. Lewis & Fisher, *supra* note 27, at 888-89.

38. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). In *Wright Line* the Board's general counsel alleged that the employer discharged the employee in violation of § 8(a)(3) because the employee was a leading union advocate in prior election campaigns. Wright Line denied this allegation, asserting that it discharged the employee for violation of a plant rule against knowingly altering or falsifying production time reports, payroll records, and time cards. The employee conceeded that he did not perform the jobs at the times that his timesheet indicated but claimed that he performed the jobs on that day. *Id* at 1089-90.

dual motive cases.[39] The Board relied upon *Mt. Healthy City School District Board of Education v. Doyle*,[40] a nonlabor Supreme Court decision, to formulate this procedure. In *Mt. Healthy* an untenured teacher claimed that the school board unlawfully refused to renew his contract because he had revealed the substance of a memorandum on teacher dress and appearance to a local radio station.[41] The teacher claimed that the first and fourteenth amendments protected his right to communicate this information to the radio station.[42] The Court agreed that the first and fourteenth amendments protected the teacher's communication. The Court, however, reasoned that once the teacher had shown his constitutionally protected conduct was a motivating factor in the school board's decision, the school board deserved the opportunity to demonstrate that it would have reached the same decision in the absence of the protected activity.[43] In *Wright Line* the Board adopted the *Mt. Healthy* burden-shifting test for section 8(a)(3) dual motive cases. It held that once the Board's general counsel makes a prima facie showing that an employee's participation in labor union activities motivated an employer's decision to discharge or discipline the employee, the burden of proof[44] shifts to the employer to demonstrate that it would have taken the same action in the absence of the employee's lawful conduct.[45]

D. Discriminatory Intent After Wright Line

Despite the Board's formulation in *Wright Line* of a procedure that shifts between employers and employees the burdens of proving discriminatory intent and business justifications concerning an employer's action in section 8(a)(3) dual motive cases, the issue of the degree of deference that courts of appeals owe a

39. *Id.* at 1089.

40. 429 U.S. 274 (1977).

41. *Id.* at 282.

42. *Id.* at 283.

43. *Id.* at 287.

44. In *Wright Line*, the Board arguably attempted to clarify the *Great Dane* formula by holding that the burden of showing a legitimate business justification for its action, which shifts to the employer in § 8(a)(3) dual motive cases, was a burden of persuasion. *See* Belton, *supra* note 10, at 1275-80. The Board also provided that it could balance the competing interests of employers and employees in "comparatively slight" cases by comparing the substantiality of the employer's business justification with the severity of the impact on the employee's § 7 rights. Wright Line, A Division of Wright, Line, Inc., 251 N.L.R.B. at 1089.

45. Wright Line, A Division of Wright Line, Inc., 251 N.L.R.B. 1083, at 1089.

Board's finding of discriminatory intent remains unanswered.[46] The importance of this controversy lies in the Board's inability to enforce its decisions. Because it has no independent authority, the Board must petition the appropriate federal circuit court to obtain enforcement.[47] Resolution of this issue depends on the reviewing circuit court's characterization of the issue of discriminatory intent as a question of fact or a question of law. If the courts characterize it as a question of law, they can substitute their judgment of whether discriminatory intent motivated an employer to discipline or discharge an employee for the decision of the Board[48] If the courts characterize it as a question of fact, however, the "substantial evidence" standard found in section 10(e) of the NLRA[49] requires the courts of appeals to defer significantly to the Board's finding of discriminatory intent.[50] The courts would owe this degree of deference to the Board's fact findings even in factual areas

---

46. The *Great Dane* opinion created a similar lack of resolution. *See supra* notes 18-26 and accompanying text.

47. The NLRA does not provide for appeal of Board decisions to the federal courts of appeals. If a party desires appellate review of a Board decision, he must refuse to comply with the Board's order. The Board's general counsel then has the final authority to petition the proper court of appeals for enforcement of the Board's order. *See* 29 U.S.C. § 160(e) (1976).

48. *Id.*

49. *See supra* note 11.

50. In Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), the Court concluded that the § 10(e) substantial evidence standard was not

> intended to negative the function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo. Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that tbe evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the hody of evidence opposed to the Board's view.

Id. at 488. *See, e.g.*, Sioux Products, Inc. v. NLRB, 684 F.2d 1251, 1257 (7th Cir. 1982) (stating that, even under the *Wright Line* dual motive case analysis, "a reviewing court is bound to a substantial evidence standard and may not reject, absent the most exceptional circumstances, [the Board's] properly supported findings of fact. . . ."); Zurn Industries, Inc. v. NLRB, 680 F.2d 683, 694 (9th Cir. 1982) (emphasizing that the courts of appeals must defer to the derivative inferences the Board draws from evidence because of its experience and expertise); NLRB v. Permanent Label Corp., 90 Lab. Cas. (CCH) ¶ 12,496, at 26,406 n.5 (3d Cir. 1981) (remarking that the Third Circuit accepts the Board's inferences and conclusions if the Board supports them with "substantial evidence on the record as a whole" even though the substantial evidence standard does not require mechanical adoption of the Board's and ALJ's findings).

outside the Board's particular expertise.[51]

After *Wright Line* the courts of appeals continued to display confusion about whether discriminatory intent in section 8(a)(3) dual motive cases was a question of law or fact, a question of ultimate fact,[52] or a mixed question[53] of law and fact.[54] A partial explanation of this uncertainty is that the Supreme Court's interpretation of the substantial evidence standard in *Universal Camera Corp. v. NLRB*[55] does not require the courts of appeals to characterize discriminatory intent as a question of fact or law. Additionally, the Court arguably encouraged overreaching appellate court review of the Board's findings by remarking that it would intervene in such appellate review only when the courts misunderstood

---

51. *Universal Camera Corp.*, 340 U.S. at 488.

52. *Pullman-Standard*, 102 S. Ct. at 1788-89 n.16. Professors Cox, Bok, and Gorman contend that:

> The principles which guide appellate courts in reviewing questions of law and fact are plainly of a very general nature leaving much to the discretion of the judges involved. In exercising this discretion, courts will presumably be influenced to some degree by such other factors as the respect they hold for the capabilities and impartiality of the Board and the cogency and comprehensiveness of the arguments made by that agency in support of its conclusions. These factors are unavoidably subjective and may therefore cause considerable variation from one court to another concerning the nature of review. It is for this reason, perhaps, that there is often a significant disparity among circuit courts in their rates of affirmance of NLRB decisions. For example, in the Board's 1979 fiscal year, 84.6 percent of its decisions reaching the Third Circuit court were affirmed in full there, while the Second Circuit court affirmed in full only 44.8 percent of the Board decisions it reviewed . . . . [T]hese [statistics] suggest that the principles governing the scope and nature of judicial review should be taken as providing only the most general indication of the nature of review to be accorded by any given court in a particular case.

A. Cox, D. Bok, & R. Gorman, Cases and Materials on Labor Law 111-12 (9th ed. 1981).

53. One source explains the notion of a mixed question as follows:

> Certain decisions, for example, involve "mixed questions of law and fact," as in NLRB v. Hearst Publications, 322 U.S. 111 (1944), where the Board was interpreting the statutory term "employee" but in so doing considered various factual questions, such as the business relationship of newsboys to the newspaper and the economic power of the former in dealing with the latter. Other decisions which appear to involve pure questions of fact, may actually contain principles of law. For example, if the Board should conclude that employers who grant a wage increase during a representation campaign interfere with the free choice of the employees in voting for or against the union, the Board is not merely deciding the factual question of the effect of the increase upon the minds of the employees; the Board is also laying down a principle of law that the risk of interference in the generality of cases is sufficiently large that such increases should be prohibited entirely without requiring the burdensome and perhaps impractical task of investigating the effects of the employer's action in each case.

A. Cox, D. Bok, & R. Gorman, *supra* note 52, at 110-11.

54. *See infra* text accompanying notes 130-49.

55. 340 U.S. 474 (1951); *see supra* note 50.

or grossly misapplied the substantial evidence standard.[56] Consequently, the courts of appeals have refused to enforce the Board's findings in many post-*Wright Line* dual motive cases, partially or solely because they have bypassed the substantial evidence standard through characterization of discriminatory intent as something other than a pure question of fact.[57]

III. *Pullman-Standard* AND DISCRIMINATORY INTENT UNDER TITLE VII

Prior to the Supreme Court's decision in *Pullman-Standard v. Swint*[58] the federal district and appellate courts experienced as much uncertainty concerning their proper roles in determinations of discriminatory intent in Title VII cases[59] as the Board and the courts of appeals are currently experiencing in section 8(a)(3) dual motive cases. This confusion existed in Title VII cases because the courts of appeals classified discriminatory intent as a question of ultimate fact.[60] This classification allowed the courts of appeals to

56. *Universal Camera Corp.*, 340 U.S. at 490-91.

57. Recent § 8(a)(3) dual motive decisions suggest that the courts of appeals classify discriminatory intent as something other than a question of fact and do not defer to the Board's discriminatory intent finding in many cases. *See, e.g.*, Cedar Coal Co. v. NLRB, 678 F.2d 1197, 1198-99 (4th Cir. 1982) (enforcement denied and remanded with instructions) (holding that the general counsel did not demonstrate a prima facie violation of § 8(a)(3)); Weather Tamer, Inc. v. NLRB, 676 F.2d 483, 491 n.4, 491-93 (11th Cir. 1982) (enforced in part and denied in part) (stating: "[W]e are simply not willing to hold on this record that such an intent has been demonstrated." *Id.* at 493); NLRB v. Cumberland Farms Dairy, Inc., 674 F.2d 943, 949 (1st Cir. 1982) (enforced in part and reversed in part) (concluding that the record was "without substantial evidence to support the Board's finding that these terminations were caused by anti-union sentiment."); NLRB v. Eldorado Manufacturing Corp., 660 F.2d 1207, 1214 (7th Cir. 1981) (enforcement denied) (reasoning that "To ascribe any motive to these discharges other than a long overdue intolerance of . . . [the employees'] acts would be to indulge in unwarranted speculation."); TRW, Inc. v. NLRB, 654 F.2d 307, 310 (5th Cir. 1981) (enforcement denied) (holding that the Board did not support with "substantial evidence" its determination that the real motive for the company's actions was retaliation for the employee's prounion activities); NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437-38 (6th Cir. 1981) (enforcement denied) (rejecting an administrative law judge's finding that the employer had at least a mixed motive for not hiring the employee); Peavey Co. v. NLRB, 648 F.2d 460, 461-62 (7th Cir. 1981) (enforced in part and denied in part) (holding summarily that the "substantial evidence" standard did not support the Board's findings concerning the employee's discharge).

58. 102 S. Ct. 1781 (1982).

59. *See supra* text accompanying notes 12-13.

60. The Fifth Circuit in *Pullman-Standard* combined the issues of the employer's actions and the legal consequences of those actions into a single issue labeled discrimination. It classified the issue of discrimination as a question of "ultimate fact," and accordingly, made independent determinations of the employee's allegations of discrimination. Swint v. Pullman-Standard, 624 F.2d 525, 533 n.6 (5th Cir. 1980), *rev'd*, 102 S. Ct. 1781 (1982) (citing East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975)). Thus, the Fifth Circuit did not

avoid the "clearly erroneous" standard of review set forth in Federal Rule of Civil Procedure 52(a),[61] ignore the district court's findings, and make independent findings of discriminatory intent. In *Pullman-Standard*, however, the Supreme Court resolved this conflict in Title VII Cases by classifying discriminatory intent as a question of fact reserved for initial determination by trial courts and subject to only limited appellate court review under the Rule 52(a) clearly erroneous standard.

In *Pullman-Standard* black employees challenged the validity of a seniority system maintained by Pullman-Standard and the United Steelworkers of America, the labor union that served as the bargaining representative of many Pullman-Standard employees at its Bessemer, Alabama, plant.[62] Prior to Title VII's effective date, the company pursued a racially discriminatory job assignments policy,[63] and both the company and the union adopted the challenged seniority system.[64] The system measured seniority by an employee's length of service in a particular department, and employees forfeited all seniority rights if they transferred to another department.[65] The seniority system remained unchanged after Title VII became effective.[66]

The courts analyzed *Pullman-Standard* under the applicable statutory langnage of section 703(h) of Title VII. Section 703(h) protects the use of seniority systems provided that employers do not establish different terms, conditions, privileges of employment, or different standards of compensation with the intent to discriminate against certain employees because of their race, color, religion, sex, or national origin.[67] The wording of section 703(h) expressly proscribes discriminatory intent, but does not address discrimina-

---

classify discriminatory intent as a question of pure fact.

61. FED. R. CIV. P. 52(a). Rule 52(a) states, in pertinent part: "Findings of fact shall not be set aside unless clearly erroneous . . . ."

62. 102 S. Ct. at 1783.

63. *Id.* at 1785.

64. *Id.*

65. *Id.*

66. *Id.*

67. Section 703(h) of Title VII which pertains to seniority systems, provides in pertinent part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

tory effect. Thus, an employee cannot successfully challenge the Title VII validity of a seniority system solely by showing it disparately affects employees, even if this result perpetuates pre-Act discrimination.[68]

Four findings supported the district court's holding that Pullman-Standard's seniority system did not intentionally discriminate.[69] First, it held that the seniority system was "facially neutral" and that it "applied equally to all races and ethnic groups."[70] Second, the district court found the seniority system rational in light of general industry practice.[71] Third, it found that although Pullman-Standard engaged in discriminatory employment practices,[72] the seniority system had no relation to those discriminatory practices.[73] Last, the court carefully examined the seniority system's detailed history of negotiation sessions and contracts and held that discriminatory purpose did not taint it.[74] Thus, the District Court concluded that the seniority system was lawful under section 703(h) of Title VII because it did not operate with discriminatory intent.[75]

On appeal the Fifth Circuit rejected the district court's discriminatory intent findings and invalidated Pullman-Standard's seniority system after an independent consideraton of the same factors that the district court examined.[76] First, the Fifth Circuit purported to correct the legal standard under which the district court evaluated the evidence by finding that it erroneously disregarded the qualitative differences between employment departments comprised primarily of black employees and those departments predominated by white workers.[77] Thus, the Fifth Circuit found that Pullman-Standard did not operate its seniority system

---

68. *Pullman-Standard*, 102 S. Ct. at 1784.

69. *Id.* at 1785. The district court examined the issue of discriminatory intent with a test that the Fifth Circuit suggested in James v. Stockham Valves & Fitting Co., 559 F.2d 310 (5th Cir. 1977). In *James*, the Fifth Circuit stated that courts should examine the totality of circumstances surrounding the development and maintenance of a seniority system in determining whether it intentionally discriminated against employees. *Id.* at 352. *James* then set forth the four factors that the district court applied in *Pullman-Standard. Id.*

70. *Pullman-Standard*, 102 S. Ct. at 1785.

71. *Id.* at 1786.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

equally.[78] Second, although not purporting to correct legal error or to review expressly the district court's findings under the "clearly erroneous" standard, the Fifth Circuit reversed the district court by finding that the seniority system was inconsistent with general industry practice.[79] Third, it contradicted the district court by finding that racial considerations permeated the seniority system's negotiation and adoption, and that the company and union discriminatory practices, therefore, affected the seniority system.[80] Last, the Fifth Circuit concluded that Pullman-Standard operated its seniority system with discriminatory intent and invalidated it under section 703(h) of Title VII.[81] Unhampered by the clearly erroneous standard of Rule 52(a), the Fifth Circuit made independent judgments concerning the issue of whether Pullman-Standard's seniority system operated with intent and suggested that it did not classify discriminatory intent as a pure question of fact.[82]

The Supreme Court reversed the Fifth Circuit's decision and held that discriminatory intent in Title VII cases is a pure question of fact.[83] The Court noted that Rule 52 does not apply to conclusions of law.[84] It felt, however, that the issue of whether a seniority system operates with discriminatory intent under section 703(h) is clearly a question of fact proper for initial district court determination subject to only limited appellate court review under the clearly erroneous standard of Rule 52(a).[85] The Court, therefore, concluded that the Fifth Circuit could reverse the district court's discriminatory intent finding only if it concluded that the finding was clearly erroneous under Rule 52(a).[86] In addition, the Court held that if findings are infirm because of an erroneous view

---

78. *Id.* at 1786-87.

79. *Id.* at 1787.

80. *Id.*

81. *Id.* at 1788.

82. The court of appeals explained clearly its view of the appellate function in determination of discriminatory intent in Title VII cases:

> Although discrimination *vel non* is essentially a question of fact it is, at the same time, the ultimate issue for resolution in this case, being expressly proscribed by . . . [§ 703(a)]. As such, a finding of discrimination . . . is a finding of ultimate fact . . . .In reviewing the district court's findings, therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are themselves not clearly erroneous.

Id. (quoting Swint v. Pullman-Standard, 624 F.2d 525, 533 n.6 (5th Cir. 1980) (quoting East v. Romine, Inc., 518 F.2d 332, 339 (5th Cir. 1975))).

83. *Id.* at 1788-89.

84. *Id.* at 1789.

85. *Id.* at 1790-91.

86. *Id.* at 1791.

of the law, the court of appeals should remand the case to the district court unless the record permits only one resolution of the factual issue.[87] The courts of appeals have applied *Pullman-Standard* extensively in the short period of time since it was decided.[88] In addition, courts have utilized *Pullman-Standard* outside the Title VII area in trademark violation and bankruptcy cases.[89]

IV. Application of the *Pullman-Standard* Title VII Model to Section 8(a)(3) Dual Motive Cases

A. *Justifications for Application of the Pullman-Standard Model in Section 8(a)(3) Dual Motive Cases*

The Supreme Court's classification of discriminatory intent as a question of fact in *Pullman-Standard* settled the controversy surrounding the proper roles of the federal district and appellate courts in finding discriminatory intent in Title VII employment discrimination cases. Several justifications exist for applying the *Pullman-Standard* model in section 8(a)(3) dual motive cases to resolve the analogous issue concerning the proper roles of the Board and the courts of appeals in finding intent under the NLRA. First, the doctrine in section 8(a)(3) and Title VII employment discrimination law has experienced parallel and analagous developments. Second, two circuits formerly characterized discriminatory intent as a question of fact in section 8(a)(3) cases, and *Pullman-Standard* justifies a return to this position. Third, application of the *Pullman-Standard* model will further one of Congress' intentions underlying enactment of the NLRA—that the Board assume final responsibility for development of national labor policy subject to only limited federal appellate court review. Last, the Supreme Court already has used *Pullman-Standard* outside the Title VII area by implicitly classifying a district court finding concerning intent in a trademark infringement suit as a question of fact.[90] Thus, application of the *Pullman-Standard* model in section 8(a)(3) dual motive cases is reasonable because intent in labor law disputes is more analogous to intent in employment discrimination cases than

---

87. *Id.* at 1792.

88. *See, e.g.,* Chaline v. KCOH, Inc., 693 F.2d 477 (5th Cir. 1982). In *Chaline*, the court commented that, "[a]lready the Fifth Circuit offspring of *Pullman-Standard* abound." *Id.* at 480 n.3.

89. *See, e.g.,* Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 102 S. Ct. 2182 (1982) (applying *Pullman-Standard* in a trademark dispute); Bittner v. Borne Chem. Co., Inc., 691 F.2d 134 (3d Cir. 1982) (applying *Pullman-Standard* in a bankruptcy dispute).

90. *See Inwood Laboratories, Inc.*, 102 S. Ct. 2182 (1982).

in trademark actions.

1. Parallel Development of Section 8(a)(3) and Title VII Discrimination

Section 8(a)(3) and Title VII doctrines have experienced parallel and analogous developments in three related areas: (1) the legislative histories of the Title VII and NLRA statutes; (2) the judicially developed doctrines that have evolved from interpretation of the two statutes; and (3) the interchangeable use by some courts of NLRA and Title VII doctrine. These developments suggest that the doctrines in these two areas relate sufficiently to warrant application of the *Pullman-Standard* model in section 8(a)(3) dual motive cases.

(a) Parallel Developments in Legislative Histories

Several factors historically connect the NLRA and Title VII. The purposes of the NLRA to prohibit unfair labor practices,[91] and Title VII, to proscribe discriminatory employment practices,[92] are very similar. In addition, the Acts create administrative agencies and, although each agency wields significantly different amounts of authority,[93] they both enforce the statutory provisions. The agencies also have independent offices of general counsel that conduct litigation.[94] The framers of Title VII, in addition, specifically used the NLRA as a model for provisions in Title VII,[95] and the Supreme Court explicitly has recognized relationships between the two Acts.[96]

(b) Parallel Developments in Judicially Developed Doctrines

The Supreme Court in *Great Dane* developed a broad formula for adjudicating section 8(a)(3) dual motive cases. This formula

---

91. 29 U.S.C. § 158 (1976).

92. 42 U.S.C. §§ 2000e-2 to 3 (1976).

93. *Cf.* 29 U.S.C. §§ 153-56, 161 (1976) and 42 U.S.C. § 2000e-4 to 5 (1976). The NLRA created the National Labor Relations Board and Title VII created the Equal Employment Opportunity Commission to implement these statutes. The Equal Employment Opportunity Commission, however, is not responsible for the judicial function of hearing and deciding complaints. For a discussion of the legislative history of the Equal Employment Opportunity Commission, see J. Vaas, *Title VII: Legislative History*, 6 B.C. INDUS. AND COM. L. REV., 431, 434-37.

94. *Cf.* 29 U.S.C. § 153(d) (1976) and 42 U.S.C. § 2000e-4(b)(1) (1976).

95. *See infra* note 129 and accompanying text.

96. *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 803-04 (1973).

distinguishes between conduct that is inherently destructive of an employee's NLRA section 7 right to participate in lawful organized labor activities and conduct that has a comparatively slight affect on these rights.[97] In *Great Dane*, the Court held that once an employee shows that an employer's action was inherently destructive of his right to participate in union activity, the employer assumes the burden of "explaining away, justifying or characterizing" its action as different from its facial appearance.[98] The Board will find a violation of section 8(a)(3) if the employer fails to justify its conduct, even though the employee does not show that the employer acted with discriminatory intent.[99]

The Court has developed an analogous theory under section 703(a) of Title VII for adjudicating employment discrimination cases. Section 703(a)(1) prohibits discriminatory treatment of employees, and section 703(a)(2) proscribes employment practices that discriminatorily affect employees because of their race, color, religion, sex, or national origin.[100] The Supreme Court under section 703(a)(1) developed the "disparate treatment" theory of employment discrimination and, under section 703(a)(2), it developed the "disparate impact" theory of employment discrimination.[101]

(1) Section 8(a)(3) "Inherently Destructive" and Title VII "Disparate Impact" Cases

In disparate impact cases, once an employee or class establishes a prima facie case of discrimination, the burden shifts to the employer to show that its actions or policies are related to business necessity or the employee's job performance.[102] If the employer meets this burden, the employee may rebut the employer's job relatedness or business necessity justifications by demonstrating that they are merely a pretext for discrimination.[103]

The disparate impact Title VII cases are analogous to the section 8(a)(3) inherently destructive cases. The Supreme Court in *International Brotherhood of Teamsters v. United States*[104] de-

97. *See supra* text accompanying notes 20-25.

98. *Great Dane*, 388 U.S. at 33.

99. *Id.* at 33-34.

100. 42 U.S.C. § 2000e-2(a) (1976).

101. *See* Furnco Constr. Corp. v. Waters, 438 U.S. 567, 581-85 (1978) (Marshall, J. concurring in part and dissenting in part).

102. Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971).

103. Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975).

104. 431 U.S. 324 (1977).

scribed disparate impact cases as claims concerning employment practices that appear facially neutral, but which effectively treat some groups of employees more harshly than others.[105] As in section 8(a)(3) inherently destructive cases, the disparate impact cases do not require a showing of discriminatory intent or motivation to find prohibited conduct. In fact, discriminatory intent is irrelevant in both types of cases. Instead, these cases focus on the adverse effects of an employer's action, and the employer has an extremely difficult burden in both types of cases to rebut the plaintiff's prima facie case. In section 8(a)(3) inherently destructive cases, the Board may find an unfair labor practice even if the employer introduces evidence that business considerations motivated its conduct.[106] Similarly in Title VII disparate impact cases the employer has an equally difficult task of rebutting the plaintiff's prima facie case by showing job relatedness or business necessity justifications for its action.[107]

(2) Section 8(a)(3) "Comparatively Slight" and Title VII "Disparate Treatment" Cases

Title VII disparate treatment cases are analogous to section 8(a)(3) comparatively slight cases. The Board held in *Wright Line*[108] that in comparatively slight cases, once the Board's general counsel makes a prima facie showing that an employee's lawful participation in union activities motivated an employer to discharge or discipline that employee, the employer must assume the burden to prove that it would have taken the same action in the absence of the employee's activity.[109] Disparate treatment cases arise when an employer treats some employees less favorably than others because of their race, color, religion, sex, or national origin.[110] Both section 8(a)(3) comparatively slight and Title VII disparate treatment cases require a showing of discriminatory intent or motivation to find prohibited employer conduct.[111]

The burden-shifting procedure that *Wright Line* established for section 8(a)(3) comparatively slight cases is virtually identical

105. *Id.* at 335 n.15.

106. *Great Dane*, 388 U.S. at 34.

107. *See* Comment, *The Business Necessity Defense to Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

108. *See supra* text accompanying notes 38-45.

109. *Id.*

110. International Brotherhood of Teamsters v. United States, 431 U.S. at 335 n.15.

111. *Id.*

to the burden-shifting procedure that *McDonnell Douglas Corp. v. Green*[112] formulated for Title VII disparate treatment cases.[113] In *McDonnell Douglas* the Court held that a complainant employee carries the initial burden of establishing a prima facie case of discrimination.[114] As in comparatively slight cases, once a complainant establishes a prima facie case in disparate treatment actions, the burden of proof shifts to the employer to articulate a legitimate, nondiscriminatory reason for its challenged action.[115] If the employer successfully rebuts the employee's prima facie case, the burden shifts back to the employee to show that the reasons the employer stated for its action were only a pretext for discrimination.[116]

(c) *Interchangeable Use of NLRA and Title VII Doctrines*

Application of the *Pullman-Standard* Title VII model to section 8(a)(3) dual motive cases is justifiable because courts frequently use Title VII and NLRA doctrine interchangeably. For example, in *Wright Line* a section 8(a)(3) dual motive case, the First Circuit horrowed Title VII doctrine to determine whether the burden of proof that an employer must fulfill to rebut an employee's

---

112. 411 U.S. 792 (1973). In *McDonnell Douglas*, the corporation discharged a black civil rights activist during a general reduction in its work force. The discharged employee protested vigorously that racial considerations motivated McDonnell Douglas to discharge him. *Id.* at 794. McDonnell Douglas, however, argued that it discharged the employee because he illegally participated in a "stall-in" by parking his car in a place "designed to tie up access to and egress from [its] plant at a peak traffic hour." *Id.* at 794-95.

113. *See* C. SULLIVAN, M. ZIMMER, & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 16-33 (1980); Belton, *supra* note 10, at 1223-50; Belton, *Discrimination and Affirmative Action: An Analysis of Competing Theories of Equality and Weber*, 59 N.C.L. REV. 531, 552-60 (1981).

114. *McDonnell Douglas*, 411 U.S. at 802. Although the requirements of prima facie proof vary depending on the facts of each case, the Court held the employee in *McDonnell Douglas* could establish a prima facie case of discrimination by showing that: (1) he belongs to a racial minority; (2) he applied and was qualified for a job for which the employer sought applicants; (3) the employer rejected him despite his qualifications; and (4) after his rejection, the position remained open and the employer continued to seek qualified applicants from persons of his qualifications. *Id.* at 802.

115. *Id.*

116. *Id.* at 804. The *Wright Line* burden-shifting test does not designate explicitly a procedural step in which an employee can demonstrate that an employer's justifications for its challenged action were only a pretext for discrimination. Under this test, however, an employee may introduce evidence of pretext either while establishing a prima facie case or after the employer attempts to rebut the employee's prima facie proof. Not all courts view the Title VII burden-shifting procedure as requiring three distinct steps. For example, some courts require Title VII plaintiffs to introduce evidence of pretext while establishing their prima facie case or suffer forfeiture of this opportunity. *See* Sime v. Trustees of California State Univ. & Colleges, 526 F.2d 1112 (9th Cir. 1975).

prima facie case, by showing a business justification for its action was a burden of production or a burden of persuasion.[117] In *Wright Line* the Board characterized this burden as one of persuasion.[118] When the Board sought to enforce its decision in the First Circuit, however, the First Circuit adopted the analysis set forth in *Texas Department of Community Affairs v. Burdine*,[119] a Title VII employment discrimination case, and characterized the employer's burden as the burden of production.[120]

The Third Circuit decided *Behring International, Inc. v. NLRB*[121] after the *Wright Line* decision and also imported this Title VII doctrine and characterized the employer's burden in section 8(a)(3) dual motive cases as a burden of production.[122]

Because Title VII applies only to employers with fifteen or more employees,[123] courts have employed the NLRA aggregation of employees of multiple entities doctrine to determine whether Title VII applies to a particular employer. The courts of appeals and the EEOC frequently have utilized this doctrine to allow complainants to aggregate employees of multiple entities, such as a parent company and its franchises, subsidiary corporations, and employer associations, to meet the quota necessary to bring an action under Title VII.[124]

Courts also have applied the Board-developed disloyalty doctrine, which concerns an employer's justifications for disciplining or discharging an employee, in Title VII cases. The disloyalty doctrine reflects Congress' intent that the NLRA allow employers to discharge or discipline employees who participate in unlawful or disruptive acts against it.[125]For example, in *McDonnell Douglas*, a Title VII action, the Court utilized the disloyalty doctrine and held that McDonnell Douglas justified its refusal to rehire a discharged black civil rights activist by showing that he had intentionally and illegally used his car to block an entrance and exit road to the

---

117. *See supra* note 10 and accompanying text.

118. *Wright Line*, 662 F.2d at 902.

119. 450 U.S. 248 (1981).

120. *Wright Line*, 662 F.2d at 907.

121. 675 F.2d 83 (3d Cir. 1982).

122. In *Behring*, the Third Circuit stated: "We believe that the more appropriate precedent is found in the line of recent Supreme Court decisions outlining the procedure to be followed in Title VII employment discrimination cases." *Id.* at 88.

123. 42 U.S.C. § 2000e(b) (1976).

124. B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 846-47 & n.66 (1976).

125. *McDonnell Douglas Corp.*, 411 U.S. at 804.

plant during a peak traffic hour.[126]

The issue concerning awards of back-pay to reinstated employees provides a final example of the interchangeable use of NLRA and Title VII doctrine. THE NLRA contains a "make whole" policy that allows the Board to award full compensation to workers for losses resulting from an employer's unfair labor practice.[127] To promote this policy, the NLRA allows the Board to award back-pay to improperly discharged employees.[128] When Congress enacted Title VII, it modeled Title VII's backpay provision after a similar NLRA provision and also borrowed the NLRA's make whole policy.[129]

2. Historical Justifications: The *Hartsell Mills* Pure Question of Fact Concept

Historical justifications exist for applying the *Pullman-Standard* Title VII model to section 8(a)(3) dual motive cases to classify the issue of discriminatory intent as a question of fact and to define the scope of federal appellate review of Board findings of discriminatory intent. Traditionally, discussion concerning the scope of appellate review of a fact finder's decision has concentrated upon whether the issue before the reviewing court was a question of fact or a question of law.[130] For example, Professor Kenneth Davis explains that appellate "courts should decide questions of law but limit themselves to determining whether findings of fact are reasonable" and whether a fact finder has abused its discretion.[131]

A determination of whether an employer "discriminated"

---

126. *Id.* at 803-05. The Court in *McDonnell Douglas* relied on the opinion in NLRB v. Fansteel Corp., 306 U.S. 240 (1939). In *Fansteel,* the Court upheld an employer's act of discharging employees who had illegally seized and forcibly retained the employer's factory buildings in an illegal sit-down strike. The Court discussed the employer's disloyalty justification for its action as follows:

> We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property . . . . Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression.

NLRB v. Fansteel Corp., 306 U.S. at 255.

127. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-20 (1975).

128. *Id.* at 420.

129. *Id.*

130. K. DAVIS, ADMINISTRATIVE LAW TEXT 525 (1972).

131. *Id.*

against an employee in a section 8(a)(3) comparatively slight case raises two separate questions: what constituted the employer's actions, and whether the employer's actions fall within the realm of unlawful discrimination. The first question is a question of fact, and the second question is a question of law. Triers of fact and appellate courts, however, often do not distinguish between the terms "discriminatory intent" and "unlawful discrimination." The question of fact includes the issue of whether the employer acted with discriminatory intent or motive. The question of law concerns the question of whether the employer's discriminatory intent, together with the other facts in a case, support an ultimate finding of unlawful discrimination. In a particular case, then, the question whether the defendant discriminated may be a question of fact or of law or both. Resolution of this problem depends whether the parties dispute what motivated the employer, or whether they agree about the employer's actions but dispute that the action constitutes unlawful discrimination, or both.[132]

Generally, once an employee presents evidence sufficient to demonstrate that an employer acted with discriminatory intent, the employee has established a prima facie case of unlawful discrimination as a matter of law, unless the employer demonstrates that the same action would have taken place even in the absence of the protected conduct.[133] An employee, however, rarely would present evidence sufficient to demonstrate discriminatory intent, but have other facts support a legal conclusion of no unlawful discrimination.[134]

Although establishment of the facts of an employer's action may be relatively easy in most cases, demonstration of discriminatory intent is often more difficult. Employers seldom admit that discriminatory intent motivated their actions. Thus, the Board typically must infer this intent from the evidence that parties present to it at an administrative hearing. This method of determining discriminatory intent is also a question of fact because, as Professor Davis contends, "the heart of the fact finding process often

---

132. *See id.* at 545.

133. *See Wright Line,* 251 N.L.R.B. at 1089.

134. The rare situation in which an employee established a prima facie case of discriminatory intent, but other facts supported a finding of no unlawful discrimination hypothetically could arise in Title VII cases and section 8(a)(3) dual motive cases. This could occur when an employer clearly had an illegitimate motive for disciplining or discharging an employee but showed that the illegitimate motive played no part in its decision to discipline or discharge and established a "just cause" defense for that action.

is the drawing of inferences from the evidence."[135]

The Supreme Court recently distinguished between discriminatory intent and unlawful discrimination in a Title VII case.[136] Two federal courts of appeals, however, implicitly made this distinction during the 1940's and 1950's when they characterized as a fact finding process the Board's method of inferring discriminatory intent from circumstantial evidence in section 8(a)(3) cases.[137] For example, in *Hartsell Mills Co. v. NLRB*[138] the Fourth Circuit considered whether discriminatory intent motivated an employer to fire an employee who served as president of the local chapter of a labor union that Hartsell Mills disliked and who participated in various acts of misconduct prior to his discharge.[139] The Board found that the employee's lawful election as president of the disfavored union's local chapter was the primary motive for Hartsell Mills's decision. Consequently, it held that Hartsell Mills violated section 8(a)(3) of the NLRA.[140] The Fourth Circuit upheld the Board's order by reasoning that the Board's findings of discriminatory intent were pure questions of fact.[141] Further, the court decided that because direct evidence of discriminatory intent is rarely available in section 8(a)(3) cases, the Board could resolve this factual question by drawing inferences of this intent from circumstantial evidence.[142] The Fourth Circuit concluded that the Board's legitimately drawn findings of discriminatory intent bind the courts of appeals.[143] The Fourth Circuit continued to cite *Hartsell Mills* for the "pure question of fact" proposition until 1957.[144] The Eighth Circuit also followed *Hartsell Mills*, albeit less frequently, until 1954.[145] The *Hartsell Mills* pure question of fact proposition fell into disuse after 1957, although no court ever over-

135. K. DAVIS, *supra* note 130, at 532-33.

136. In Connecticut v. Teal, 102 S. Ct. 2525 (1982), Justice Brennan's majority opinion distinguished between unlawful discrimination and discriminatory intent under Title VII. He specifically classified discriminatory intent as a factual question, and left little doubt that the majority felt that unlawful discrimination was a question of law. *Id.* at 2535.

137. *See* NLRB v. International Union of Operating Engineers, 216 F.2d 161, 164 (8th Cir. 1954); Hartsell Mills Co. v. NLRB, 111 F.2d 291 (4th Cir. 1940).

138. 111 F.2d 291 (4th Cir. 1940).

139. *Id.* at 292.

140. *Id.* at 292-93.

141. *Id.* at 293.

142. *Id.*

143. *Id.*

144. *See* NLRB v. Southern Desk Co., 246 F.2d 53, 54 (4th Cir. 1957).

145. *See* NLRB v. International Union of Operating Engineers, 216 F.2d 161, 164 (8th Cir. 1954).

ruled it.

Two possible explanations exist for the apparent demise of *Hartsell Mills'* classification of discriminatory intent as a pure question of fact in section 8(a)(3) cases. The first explanation is the Court's creation of the "ultimate facts" concept in *Baumgartner v. United States.*[146] The Supreme Court defined ultimate facts as a higher order of facts that effectively receive the same standard of judicial review as questions of law. The ultimate facts concept, however, in light of *Pullman-Standard's* reversal of *Baumgartner* and its classification of discriminatory intent as a pure question of fact in Title VII cases,[147] no longer justifies characterization of discriminatory intent as something other than a pure question of fact in section 8(a)(3) dual motive cases. A second possible explanation for the disappearance of the *Hartsell Mills* pure question of fact proposition is the recent judicial trend to deemphasize the law-fact distinction.[148] *Pullman-Standard,* however, arguably reversed this trend for purposes of finding discriminatory intent and prohibits federal appellate courts from characterizing discriminatory intent as anything other than a pure question of fact in Title VII cases.[149] Thus, because the Court's opinion in *Pullman-Standard* undercut possible explanations for judicial abandonment of the *Hartsell Mills* pure question of fact characterization, the courts can justify adopting the *Pullman-Standard* model and recharacterizing discriminatory intent as a pure question of fact in section 8(a)(3) dual motive cases.

3. Furtherance of Congressional Intent

Utilization of the *Pullman-Standard* model to resolve the question concerning the roles of the Board and the courts of appeals in finding discriminatory intent in section 8(a)(3) dual motive cases will further Congress' intent that the Board assume final responsibility for development of national labor policy subject to only limited federal appellate court review. The Supreme Court occasionally has discussed the role that Congress intended the Board to fulfill under the NLRA. For example, in *NLRB v. Truck Drivers Local Union No. 449 [Buffalo Linen],*[150] the Court considered whether "the nonstruck members of a multi-employer bargaining

146. 322 U.S. 665 (1944).
147. 102 S. Ct. at 1788, 1789 n.16.
148. K. Davis, Administrative Law of the Seventies 688 (1976).
149. 102 S. Ct. at 1789.
150. 353 U.S. 87 (1957).

association committed an unfair labor practice when, during contract negotiations, they temporarily locked out their employees as a defense to a union strike against one of their members which imperiled the employers' common interest in bargaining on a group basis."[151] The Board upheld the employers' actions as lawful, but the Second Circuit reversed.[152] The court reversed the Second Circuit's judgment and held that the Board properly had balanced the legitimate interest of both the employers and employees by upholding the lock-out.[153] The Court reasoned that although the function of properly balancing sensitive, legitimate interests to effect national labor policy is often a difficult and delicate responsibility, Congress committed this duty primarily to the Board, subject to only limited judicial review.[154] Likewise, in *NLRB V. Erie Resistor Corp.*,[155] the Court reversed the Third Circuit and affirmed the Board's order that prohibited an employer from granting superseniority rights to strike replacements and returning workers.[156] Again, the Court reasoned that although the function of balancing legitimate employer and employee interests to formulate national labor policy is a difficult task, Congress delegated primary responsibility to the Board, and intended only limited federal appellate court review of its decisions.[157]

Application of the *Pullman-Standard* Title VII model to section 8(a)(3) dual motive cases would further Congress's desire that the Board play the leading role in developing national labor policy. The *Pullman-Standard* model would require the courts of appeals to defer significantly to Board findings of discriminatory intent. It would also demand that the courts of appeals remand cases in which the Board failed to make a finding of fact because it erroneously interpreted the law unless the record permits only one resolution of the factual issue.

151. *Id.* at 89 (footnote omitted).

152. *Id.* at 89.

153. *Id.* at 96-97.

154. *Id.* at 96.

155. 373 U.S. 221 (1963).

156. *Id.* at 236-37.

157. *Id.* at 236.

4. Current Application of *Pullman-Standard* Outside the Title VII Area

The Supreme Court in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*[158] demonstrated its willingness to apply *Pullman-Standard* principles to substantive legal areas less closely related to Title VII employment discrimination than NLRA section 8(a)(3). In *Inwood Laboratories* the Court considered whether Inwood, a generic drug manufacturer, violated section 32 of the Trademark Act of 1946[159] by intentionally contributing to pharmacist mislabeling of its prescription drugs as drugs that the respondent, Ives, manufactured and held under a registered trademark. Ives alleged that Inwood intentionally induced pharmacist mislabeling by copying the general appearance and color of Ives' drug capsules when Inwood began manufacturing its drug after Ives' patent expired.[160] The District Court held that Ives failed to show sufficiently by either direct of circumstantial evidence that Inwood intentionally induced mislabeling by pharmacists.[161] The Second Circuit, however, rejected the district court's findings and decided that the district court failed to give sufficient weight to the evidence that Ives introduced to show a pattern of illegal substitution and mislabeling of generic drugs in the locality where the action arose.[162] Consequently, the Second Circuit held that Inwood intentionally induced pharmacists to mislabel drugs in violation of the Trademark Act.[163]

The Supreme Court reversed and remanded the case, holding that the Second Circuit erred in rejecting the district court's findings of fact.[164] The Court relied on *Pullman-Standard* to reason that the clearly erroneous standard set forth in Federal Rule 52(a) prohibits a reviewing court from substituting its interpretation of evidence for that of the trier of fact solely because it " 'might give the facts another construction, resolve the ambiguities differently, [or] find a more sinister cast to actions which the District Court apparently deemed innocent.' "[165] The Court's reasoning in *Inwood Laboratories* suggests that the district court's findings concerning

158. 102 S. Ct. 2182 (1982).
159. 15 U.S.C. § 1114 (1976).
160. *Inwood Laboratories*, 102 S. Ct. at 2184-86.
161. *Id.* at 2187-88.
162. *Id.* at 2189.
163. *Id.* at 2188.
164. *Id.* at 2190.
165. *Id.* at 2190 (quoting United States v. Real Estate Boards, 339 U.S. 485 (1950)).

Inwood's intent to induce pharmacist mislabeling were findings of fact. Thus, the Court implicitly has extended its *Pullman-Standard* characterization of issues of intent as factual questions beyond the Title VII area. Because the relation between intent in trademark law disputes and discriminatory intent in Title VII cases is conceptually weaker than the connection between discriminatory intent in Title VII and NLRA section 8(a)(3) contests, courts can justify applying the *Pullman-Standard* characterization to section 8(a)(3) dual motive cases.

B. Section 8(a)(3) Dual Motive Cases After Pullman-Standard

1. General Implications

Four basic ramifications result from application of the *Pullman-Standard* model to section 8(a)(3) dual motive cases. First, the courts of appeals will classify the issue whether an employer acted with discriminatory intent as a question of fact reserved for initial determination by the Board. Second, this application will require the courts of appeals to review deferentially the Board's findings of discriminatory intent under the substantial evidence standard set forth in section 10(e) of the NLRA. Third, it will force the courts of appeals to defer significantly to Board findings of discriminatory intent regardless of whether the credibility of witnesses or only documentary evidence form the basis of its findings. Last, it will require the courts of appeals to remand cases in which they feel the Board made improper fact findings because the Board erroneously interpreted the law, unless the record permits only one resolution of the factual issue.

2. The Degree of Deference that Appellate Courts Owe to the Board's Findings of Discriminatory Intent

Utilization of the *Pullman-Standard* Title VII model in section 8(a)(3) dual motive cases will require the courts of appeals to classify discriminatory intent as a question of fact. Unlike federal appellate review of district court fact findings in Title VII discrimination cases, which the circuit courts undertake pursuant to the clearly erroneous standard set forth in Federal Rule 52(a), NLRA section 10(e) requires the courts of appeals to review Board fact findings in section 8(a)(3) cases under the substantial evidence standard.[166] Some courts mistakenly have interpreted the clearly

166. Federal appellate review of Board fact findings under the "substantial evidence"

erroneous and substantial evidence standards to grant the federal circuit courts equal degrees of judicial review of fact findings.[167] "[P]olicy, authority [,] and history," however, demonstrate that the clearly erroneous standard gives appellate courts broader reviewing authority than the substantial evidence formula.[168]

The different historical and policy considerations that underlie principles of appellate review of administrative and jury trial fact findings on one hand, and judicial bench trial fact findings on the other hand, are responsible for the different degrees of judicial review that the clearly erroneous and substantial evidence standards authorize.[169] Congress based the substantial evidence standard in section 10(e) of the NLRA on the significantly different policies that underlie judicial deference to the fact finding of juries and administrative officials.[170] Reviewing courts give factual findings by juries considerable deference to allow decision-making by persons who possess an "underlying sense of fairness of the community," rather than to extend this authority to single persons who, no matter how expert "might have arbitrary notions of [their] own."[171] To the contrary, reviewing courts defer to administrative fact finding to reap the benefits of the expertise and specialization that administrative officials offer.[172] Although these policies differ significantly, they both mandate conclusions that reviewing courts should not substitute their views for agency and jury fact findings except in extraordinary circumstances.[173]

The clearly erroneous standard in Federal Rule 52(a) is based upon the unique policies that govern appellate review of judicial

---

standard, although vague in meaning, ensures that the Board collects and evaluates in a careful and workmanlike manner all relevant data concerning a factual issue. In reviewing the "whole record" of a Board hearing, courts may examine evidence that supports or contradicts the Board's findings. SEN. DOC. No. 248, 79th Cong., 2d Sess. 214, 280 (1946). *See* K. DAVIS, *supra* note 130, at 530-31. Thus, as Judge Leventhal observed in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971), the "substantial evidence" standard forces the Board to take a "hard look" at all "salient" factual issues before it.

167. *See, e.g.*, NLRB v. Sun Drug Co., Inc., 359 F.2d 408, 416 (3d Cir. 1966); NLRB v. Southern Transport, Inc., 355 F.2d 978, 985 (8th Cir. 1966); NLRB v. Browning, 268 F.2d 938, 940 (10th Cir. 1959).

168. Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70, 80-89 (1944).

169. *Id.* at 80-81.

170. *Id.* at 81.

171. *Id.* (*citing* Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 116 (1924)).

172. *Id.* at 81-82.

173. *Id.* at 82.

fact finding in bench trials, which are distinguishable from those governing judicial review of agency and jury fact finding.[174] The judiciary draws both individual trial court judges and panels of appellate judges from the same population; therefore, except for the difference in numbers, trial judges are no more representative of the general community than appellate panels.[175] Both groups ordinarily specialize only in law, and because appellate judges occupy a superior position in the legal system, in most cases they probably possess at least as much expertise as trial judges.[176] Thus, the underlying necessity for deferential appellate review of judicial fact finding, although still present, is less compelling than in judicial review of agency and jury fact finding. These considerations have caused courts to interpret the clearly erroneous standard to authorize broader judicial review than the substantial evidence standard.[177] Consequently, application of the *Pullman-Standard* model to NLRA section 8(a)(3) dual motive cases will require the courts of appeals to give greater deference to the Board's findings of discriminatory intent under the substantial evidence standard than they currently must give district court fact findings in Title VII discrimination cases under the Rule 52(a) clearly erroneous standard.

V. Conclusion

Neither the United States Supreme Court nor the Board has defined clearly the degree of deference the courts of appeals owe Board findings concerning employer motivation in section 8(a)(3) dual motive cases. The answer to this question depends upon whether the courts of appeals classify the question of discriminatory intent as a question of fact or law. If the courts of appeals classify discriminatory intent as a question of fact, the substantial evidence standard of review set forth in section 10(e) of the NLRA will require them to review deferentially the Board's discriminatory intent findings. If the courts of appeals classify discriminatory intent as a question of law, however, they may subject the Board's discriminatory intent findings to much broader appellate review than the substantial evidence standard permits.

The Supreme Court, in *Pullman-Standard v. Swint*, however,

---

174. *Id.* at 82, 86-87.

175. *Id.* at 82.

176. *Id.*

177. *See, e.g.*, District of Columbia v. Pace, 320 U.S. 698, 701. *See also* K. Davis, Administrative Law Treatise 518-19 (Supp. 1982).

held that the issue of discriminatory intent in Title VII employment discrimination cases is purely a question of fact reserved for the district court's initial determination and subject to only limited review by the courts of appeals. The courts of appeals should apply the Court's *Pullman-Standard* Title VII model in section 8(a)(3) dual motive cases for the following reasons. First, section 8(a)(3) relates sufficiently to Title VII to warrant application of the *Pullman-Standard* model because the legal doctrines in both areas have experienced parallel and analogous developments. Second, federal circuit courts historically have classified discriminatory intent as a question of fact, and the *Pullman-Standard* decision justifies a return to this position. Third, application of the *Pullman-Standard* model will further Congress' intent for enacting the NLRA that the Board assume final responsibility for development of national labor policy subject to only limited federal appellate court review. Last, the Supreme Court already has characterized intent as a question of fact outside the Title VII area, and has applied *Pullman-Standard* to define the proper scope of appellate review of lower court findings of intent.

Four basic ramifications result from applying the *Pullman-Standard* model to section 8(a)(3) dual motive cases. First, the courts of appeals will classify the issue whether an employer acted with discriminatory intent as a question of fact reserved for initial determination by the Board. Second, it will require the courts of appeals to review the Board's findings of discriminatory intent under the "substantial evidence" standard set forth in section 10(e) of the NLRA. Third, it will force the courts of appeals to defer significantly to Board findings of discriminatory intent regardless of whether the credibility of witnesses or only documentary evidence are the basis of its findings. Last, it will require the courts of appeals to remand cases in which they feel the Board made improper fact findings by erroneously interpreting the law unless the record permits only one resolution of factual issues.

Application of the *Pullman-Standard* Title VII model to section 8(a)(3) dual motive cases would produce desirable results. The *Pullman-Standard* model would help to clarify section 8(a)(3) law, and consequently, contribute to the finality of judgment, reduce delay in adjudication of disputes, decrease the caseload burden on the federal appellate courts, and promote consistency among the circuits concerning the determination of discriminatory intent. More important, however, application of the *Pullman-Standard* model, by clarifying the roles of the Board and the courts of ap-

peals in finding discriminatory intent in section 8(a)(3) dual motive cases, would enable practicing attorneys to advise their clients with greater certainty about what constitutes an unfair labor practice under section 8(a)(3) dual motive doctrine.

WILLIAM E. ANDERSEN*

* The author would like to express his appreciation to Professor Robert Belton, Professor of Law, Vanderhilt University School of Law, for his invaluable suggestions during the preparation of this Note. The author would also like to thank Edwin O. Norris, to whom the author owes much, particularly his interest in labor and employment law.