Fordham Law Review

Volume 53 | Issue 3 Article 7

1984

Discriminatory Discharge in a Sports Context: A Reassessment of the Burden of Proof and Remedies Under the National Labor Relations Act

Jeffrey Goore

DISCRIMINATORY DISCHARGE IN A SPORTS CONTEXT: A REASSESSMENT OF THE BURDEN OF PROOF AND REMEDIES UNDER THE NATIONAL LABOR RELATIONS ACT

INTRODUCTION

In a field such as the sports industry where employment decisions are highly discretionary and not conducive to objective evaluation,[1] it is often difficult to determine whether the dismissal of a union-affiliated employee constitutes an unfair labor practice[2] in violation of the National Labor Relations Act (NLRA or Act).[3] Section 8(a)(3) of the Act makes it unlawful for an employer to dismiss an employee because of his union activity.[4] At the same time, however, it is well settled that management is entitled to substantial discretion in making employment decisions,[5] es-

1. Scoville, *Labor Relations In Sports*, in Government and the Sports Business 203 (R. Noll ed. 1974).

2. "Unfair labor practice" is a statutory designation referring to any practice by an employer or union that, because of its tendency to impair the peaceful resolution of industrial disputes, is prohibited by § 8 of the National Labor Relations Act (NLRA or Act). *See* 29 U.S.C. §§ 151, 152(8) (1982). For example, an employer is prohibited from dominating or interfering with the formation or administration of any labor organization, *id.* § 158(a)(2), or from refusing to bargain collectively with the employees' representatives, *id.* § 158(a)(5). Similarly, a union is barred by the Act from, inter alia, striking or inducing a strike in support of a secondary boycott. *Id.* § 158(b)(4).

3. Ch. 372, §§ 1-16, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

4. *See* National Labor Relations Act §8(a)(3), 29 U.S.C. § 158(a)(3) (1982). This section makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.* It was intended, among other things, to prevent employers from using the threat of discharge as a weapon to repress union activism among their employees. *See id.* § 151; *see also* 79 Cong. Rec. 7668 (1935) (remarks of Sen. Walsh) (discussing the use of economic power and other subtle means of coercion against employees).

This section does not, however, prevent an employer from discharging or otherwise punishing a union member for engaging in conduct that, although under union auspicies, is not protected by the Act. *See, e.g.*, American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280, 1284 (9th Cir. 1982) (discharge of employee who had engaged in illegal strike); Caterpillar Tractor Co. v. NLRB, 658 F.2d 1242, 1248-49 (7th Cir. 1981) (discharge of union officials who had engaged in illegal strike); Indiana & Mich. Elec. Co. v. NLRB, 599 F.2d 227, 230 (7th Cir. 1979) (same); Gould, Inc. v. NLRB, 612 F.2d 728, 732-33 (3d Cir. 1979) (discharge of employees who had engaged in illegal strike), *cert. denied*, 449 U.S. 890 (1980). Section 8(a)(3) is derivative of § 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [§ 7]." National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982). Section 7, in turn, protects an employee's right to engage in concerted activities for the purpose of self-organization and collective bargaining. *See* National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

5. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Paramount Mining Corp. v. NLRB, 631 F.2d 346, 348 (4th Cir. 1980); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978); NLRB v. Knuth Bros., 537 F.2d 950, 953-54 (7th Cir. 1976).

pecially where such decisions are based on elusive, subjective criteria.[6] Thus, there is a tension[7] between an employer's right to discharge an employee for cause [8] and an employee's right to engage in union activities without fear of management retaliation.[9]

Because of the high level of management discretion found in sports employment decisions[10] and the importance of nonobjective criteria in such decisions,[11] it is appropriate to reconsider the traditional allocation of the burden of proof in section 8(a)(3) cases.[12] Similarly, the circumstances peculiar to sports labor cases invite a reassessment of the traditional remedies[13] used to redress a discriminatory discharge and to effectuate the purposes of the Act.

Part I of this Note analyzes the traditional burden of proof allocation in section 8(a)(3) cases. It concludes that in situations, such as sports cases, in which an employer's reasons for dismissing the employee are

---

6. *See* WNAC-TV, 264 N.L.R.B. 216, 221 (1982); *see also* St. Ann's Episcopal School, 230 N.L.R.B. 99, 102 (1977) (court acknowledges that evaluations may rest on subjective criteria, but evidence in case reveals sufficient objective factors to support dismissal).

7. *See* NLRB v. Erie Resistor Corp., 373 U.S. 221, 228-29 (1963); *see, e.g.*, NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 813 (6th Cir. 1983); Republic Die & Tool Co. v. NLRB, 680 F.2d 463, 465 (6th Cir. 1982); NLRB v. Nevis Indus., 647 F.2d 905, 909 (9th Cir.1981).

8. *See* Associated Press v. NLRB, 301 U.S. 103, 132 (1937); Marathon LeTourneau Co. v. NLRB, 699 F.2d 248, 252 (5th Cir. 1983); NLRB v. Knuth Bros., 537 F.2d 950, 954 (7th Cir. 1976); NLRB v. Red Top, Inc., 455 F.2d 721, 726 (8th Cir. 1972) (quoting NLRB v. Ace Comb Co., 342 F.2d 841, 847 (8th Cir. 1965)).

9. *See* De Queen Gen. Hosp. v. NLRB, 744 F.2d 612, 614 (8th Cir. 1984); NLRB v. Steinerfilm, Inc., 669 F.2d 845, 848 (1st Cir. 1982).

The tension is best illustrated in so-called "dual-motive" cases. *See* Republic Die & Tool Co. v. NLRB, 680 F.2d 463, 465 (6th Cir. 1982); Doug Hartley, Inc. v. NLRB, 669 F.2d 579, 580 (9th Cir. 1982); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 (8th Cir. 1982); NLRB v. Nevis Indus., 647 F.2d 905, 909 (9th Cir. 1981). As the name suggests, these cases implicate two plausible causes for an employee's discharge: the employer's argument that the individual's dismissal was motivated by a legitimate business reason versus the employee's contention that his discharge was caused predominantly by the employer's objection to the employee's union activity. *See* Wright Line, 251 N.L.R.B. 1083, 1084 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The adjudicatory body, in order to determine if there has been a violation, must determine which of the two asserted justifications actually motivated the termination. *See* Marathon LeTourneau Co. v. NLRB, 699 F.2d 248, 252 (5th Cir. 1983).

10. *See* Scoville, *supra* note 1, at 203; *see, e.g.*, Cotton, *I Just Want to Have Fun*, Sports Illustrated, Nov. 30, 1981, at 28, 29 (claiming there was no sound reason for management to change coaches of winning team) [hereinafter cited as Cotton I]; Wulf, *This Time George Went Overboard*, Sports Illustrated, May 10, 1982, at 40, 45 (discussing owner's disassembling of team after successful season). See *infra* notes 55-62 and accompanying text.

11. Scoville, *supra* note 1, at 203.

12. The current method of allocating the burden of proof in these cases was enunciated in Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and approved by the Supreme Court in NLRB v. Transportation Management Corp., 103 S. Ct. 2469, 2474-75 (1983). See *infra* notes 14-21 and accompanying text.

13. See *infra* notes 94-100 and accompanying text.

grounded in peculiarly subjective criteria, the employer should only have to articulate—not prove—a legitimate reason for the employee's discharge as an affirmative defense to the prosecuting party's prima facie showing of discrimination. Part II then suggests the remedy that should be applied if adjudications in the sports context are to further the purposes of the Act. It concludes that the employer should be ordered to pay front pay to a union pension fund when the offending employer might otherwise elude the the sanctions of the National Labor Relations Board (NLRB or Board).

I. THE BURDEN OF PROOF IN SPORTS CASES

In cases involving violations of section 8(a)(3), the burden of proof is typically allocated according to the test enunciated by the Board in *Wright Line*.[14] The test, approved by the Supreme Court in *NLRB v. Transportation Management Corp.*,[15] requires first that the General Counsel[16] make out a prima facie case showing that the employee's protected activity was a motivating factor in the employee's dismissal.[17] Once this showing is made, the burden shifts to the employer to prove that the employee would have been dismissed despite the protected activity[18]—for example, because of his failure to obey factory rules[19] or meet

14. 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

15. 103 S. Ct. 2469 (1983).

16. The General Counsel of the National Labor Relations Board (NLRB or Board) is authorized by statute to investigate and prosecute unfair labor practice cases arising under the Act. 29 U.S.C. § 153(d) (1982). These cases are tried in court-like proceedings before an administrative law judge, whose decisions are appealable to the Board. *See* R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 8 (1976). Because prosecution of the charge is an enforcement, not a civil, proceeding, the aggrieved employee is not a party to the action. *See id.* For the purposes of this Note, the prosecuting party will be referred to as the General Counsel, although prosecution is typically conducted by attorneys from the appropriate regional offices of the NLRB. *See id.* at 8.

17. Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see, e.g.*, Republic Die & Tool Co. v. NLRB, 680 F.2d 463, 464 (6th Cir. 1982); NLRB v. Fixtures Mfg. Corp., 669 F.2d 547, 550 (8th Cir. 1982); NLRB v. Nevis Indus., 647 F.2d 905, 909 (9th Cir. 1981).

18. Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see, e.g.*, Zurn Indus. v. NLRB, 680 F.2d 683, 687 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 3110 (1983); Doug Hartley, Inc. v. NLRB, 669 F.2d 579, 581 (9th Cir. 1982); NLRB v. Lloyd A. Fry Roofing Co., 651 F.2d 442, 446 (6th Cir. 1981); NLRB v. Consolidated Freightways Corp., 651 F.2d 436, 437 (6th Cir. 1981).

19. *See, e.g.*, Texas Instruments, Inc. v. NLRB, 637 F.2d 822, 825 (1st Cir. 1981) (dismissal due to breaking disclosure of information rule; no violation); Florida Steel Corp. v. NLRB, 587 F.2d 735, 741 (5th Cir. 1979) (dismissal due to negligent work habits; no violation); DC Int'l, Inc. v. NLRB, 385 F.2d 215, 220 (8th Cir. 1967) (dismissal due to failure to follow company rules regarding reporting to work; no violation). *Wright Line*, which established this standard, arose out of the discharge of an employee for allegedly violating plant rules against altering time reports, payroll records and time

minimum performance requirements.[20] Such a showing amounts to an affirmative defense and shifts the burden of proof to the employer.[21] The old test had required the General Counsel to prove only that the employee's protected conduct was responsible "in part" for his dismissal.[22] Under *Wright Line*, in contrast, the employer is allowed to come forward with evidence that the employee would have been dismissed for legitimate business reasons regardless of his union activity.[23]

The *Wright Line* test was developed to balance the competing interests of employees and employers[24] in an industrial setting.[25] Ordinarily, eval-

---

cards. *See* 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

20. *See, e.g.*, EEOC v. National Academy of Sciences, 12 Empl. Prac. Dec. (CCH) ¶ 11,010, at 4751 (D.C. Cir. 1976) (excessive periods away from work area); Hanover Indus. Mach. Co., 270 N.L.R.B. No. 123, slip op. at 7 (May 22, 1984) (work performed in unsatisfactory manner).

21. NLRB v. Tranportation Management Corp., 103 S. Ct. 2469, 2473 (1983); Wright Line, 251 N.L.R.B. 1083, 1088 n.11 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

22. *See* Ajax Magnethermic Corp., 227 N.L.R.B. 477, 477 (1976); Youngstown Osteopathic Hosp. Ass'n, 224 N.L.R.B. 574, 575 (1976), *enforcement denied on other grounds*, 574 F.2d 891 (6th Cir. 1978). It should be noted that under this test it was irrelevent that the employer had a valid reason for discharging the employee. *See* Jefferson Nat'l Bank, 240 N.L.R.B. 1057, 1073 (1979); O & H Restaurant, Inc., 232 N.L.R.B. 1082, 1083 (1977).

Another test used by some circuit courts at the time was the dominant motive test, which, when both proper and improper grounds for the discharge were alleged, placed the burden on the General Counsel "to find affirmatively that the discharge would not have occurred but for the improper reason." Coletti's Furniture, Inc. v. NLRB, 550 F.2d 1292, 1293-94 (1st Cir. 1977); *see* Midwest Regional Joint Bd. v. NLRB, 564 F.2d 434, 440 (D.C. Cir. 1977); NLRB v. Fibers Int'l Corp., 439 F.2d 1311, 1312 n.1 (1st Cir. 1971).

23. *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

24. *See* Wright Line, 251 N.L.R.B. 1083, 1088-89, *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert.* denied, 455 U.S. 989 (1982); *accord* NLRB v. Magnetics Int'l, Inc., 699 F.2d 806, 813 (6th Cir. 1983); Republic Die & Tool Co. v. NLRB, 680 F.2d 463, 465 (6th Cir. 1982); NLRB v. Nevis Indus., 647 F.2d 905, 909 (9th Cir. 1981); *see also* Note, Wright Line *and Wrongful Discharge Actions: A Uniform Standard of Review*, 33 Case W. Res. L. Rev. 404, 425 (1983) (test balances interests of employers and employees) [hereinafter cited as *Wrongful Discharge Actions*]; Note, NLRB v. Transportation Management Corp.: *Allocation of the Burden of Proof in Section 8(a)(3) Mixed Motive Discharge Cases*, 33 Cath. U.L. Rev. 279, 310 (1983) (test balances competing legitimate interests of employee's right to engage in protected activities and employer's right to fire unworthy employee) [hereinafter cited as *Burden of Proof*]; *cf.* NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963) (recognized need to weigh, in light of Act's policies, interest of employees in concerted activity against interest of employer in operating business).

25. For the purposes of this Note "industrial" refers to a workplace where goods are manufactured or services are provided. Both *Wright Line* and *Transport Management* arose in industrial contexts. *See* NLRB v. Transportation Management Corp., 103 S. Ct. 2469, 2471 (1983) (bus driver dismissed for allegedly taking unauthorized breaks and leaving keys in bus); Wright Line, 251 N.L.R.B. 1083, 1089 (1980) (factory employee dismissed for allegedly violating plant rule against altering production time reports, payroll records and time cards), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

uations of employees in such a setting are not complicated: An employee generally must meet some minimum output requirement and some type of quality standard.[26] Therefore, unless an employer can prove that the employee failed to satisfy these standards or obey the rules, the discharge of an employee engaged in union activity is presumed to be discriminatory.[27]

Wright Line's allocation of the burden of proof is apparently based on the assumption that the employer's legitimate business reasons for discharging an employee are objectively and readily provable. This assumption is based on the premise that the accused employer has a fair opportunity to refute the employee's charges.[28] Concomitantly, failure to marshal sufficient justification once given the opportunity to present concrete proof would demonstrate that the employer's defenses are mere pretext[29] and that the employee was in fact discharged for unlawful reasons.[30]

---

26. *See, e.g.*, NLRB v. Collins & Aikman Corp., 146 F.2d 454, 456 (4th Cir. 1944); EEOC v. National Academy of Sciences, 12 Empl. Prac. Dec. (CCH) ¶ 11,010, at 4751 (D.C. Cir. 1976); Hanover Indus. Mach. Co., 270 N.L.R.B. No. 123, slip op. at 7 (May 22, 1984); Fabricut, Inc., 238 N.L.R.B. 768, 779 (1978); *see also Wrongful Discharge Actions*, *supra* note 67, at 426 ("[e]mployers typically present evidence of an employee's violation of plant rules or company policies, similar disciplinary action in prior cases, and an employee's poor work record").

27. *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). Discharge under these circumstances would necessarily amount to a § 8(a)(3) violation because the lack of permissible grounds for dismissal would vitiate an employer's claim that the employee would have been dismissed despite his union activity. However, mere union activity does not shield an incompetent employee from discharge. *See id.* at 1086 (quoting Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 285-86 (1977)).

28. *See, e.g.*, NLRB v. Instrument Corp. of Am., 714 F.2d 324, 328-29 (4th Cir. 1983) (employer claimed reason for dismissal was "business necessity"); NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1139 (7th Cir. 1983) (employer claimed economic reason for dismissal); Republic Die & Tool Co. v. NLRB, 680 F.2d 463, 464 (6th Cir. 1982) (employer claimed reason for dismissal was employee's violation of numerous company rules, including one requiring the use of safety goggles); Liberty Men's Formals, Inc., 258 N.L.R.B. 1303, 1306 (1981) (employer claimed reason for dismissal was employee's failure to work the required 40 hour week); Red Ball Motor Freight, Inc., 253 N.L.R.B. 871, 871-72 (1980) (employer claimed reason for dismissal was employee's tardiness and poor work attitude), *enforced*, 660 F.2d 626 (5th Cir. 1981), *cert. denied*, 456 U.S. 997 (1982); *see also Wrongful Discharge Actions*, *supra* note 67, at 425 ("[t]he shifting burdens of proof allow both parties to present their case with equal force"); *Burden of Proof*, *supra* note 67, at 301 (*Wright Line* provides framework for establishing legitimate justifications enabling employer to overcome General Counsel's prima facie case).

29. *See, e.g.*, NLRB v. Instrument Corp. of Am., 714 F.2d 324, 328-29 (4th Cir. 1983); NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1139 (7th Cir. 1983); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 692 (7th Cir. 1982); NLRB v. Spielberg Mfg. Co., 673 F.2d 244, 246 (8th Cir. 1982).

30. *See* NLRB v. Instrument Corp. of Am., 714 F.2d 324, 328-29 (4th Cir. 1983); NLRB v. Industrial Erectors, Inc., 712 F.2d 1131, 1139 (7th Cir. 1983); NLRB v. Berger Transfer & Storage Co., 678 F.2d 679, 692 (7th Cir. 1982).

A. *Problems with the Current Test*

1. Absence of Clear Standards in the Sports Industry

In section 8(a)(3) cases arising in an ordinary industrial setting, the employer's alleged grounds for dismissal usually derive from disciplinary rules[31] or other clear, objective standards, such as the speed or quality of the employee's work.[32] In certain professions, however, no clear standards exist. Employees are hired and fired because of intangible qualities[33] that might be highly valued by one employer but not by another,[34] or because circumstances dictate weighing certain employment criteria more heavily than others.[35] This problem is particularly acute in the sports industry. Although, as a threshold matter, an athlete's performance is evaluated on the basis of precise statistics and ratings, his employment status on a given team is also largely controlled by intangible factors[36] that supplement or even outweigh the objective evidence provided by performance statistics.[37] For example, an athlete may be fully

31. *See, e.g.*, Smith v. Kerrville Bus Co., 709 F.2d 914, 915 (5th Cir. 1983) (failure to report cash fares); NLRB v. Collins & Aikman Corp., 146 F.2d 454, 456 (4th Cir. 1944) (insubordination); Jacob E. Decker & Sons, 202 N.L.R.B. 640, 640 (1973) (violation of absenteeism rule); *see also Wrongful Discharge Actions*, *supra* note 67, at 426 (*Wright Line* burden of proof satisfied where employer presents evidence of employee's violation of plant rules or similar prior disciplinary action).

32. *See, e.g.*, NLRB v. Collins & Aikman Corp., 146 F.2d 454, 456 (4th Cir. 1944) (poor quality of work); Hanover Indus. Mach. Co., 270 N.L.R.B. No. 123, slip op. at 7 (May 22, 1984) (work performed in unsatisfactory manner); Fabricut, Inc., 238 N.L.R.B. 768, 779 (1978) (low productivity).

33. *See* Hazlewood School Dist. v. United States, 433 U.S. 299, 302 (1977) (hiring of teacher based on such intangibles as personality and disposition in dealing with people).

34. *See* Canes, *The Social Benefits of Restrictions on Team Quality*, in Government and the Sports Business 83-84 (R. Noll ed. 1974); Noll, *The U.S. Team Sports Industry: An Introduction*, in Government and the Sports Business 6, 7 (R. Noll ed. 1974).

35. *See, e.g.*, WNAC-TV, 264 N.L.R.B. 216, 221 (1982) (personnel decision reflected employer's effort to capture larger share of Boston television market); Cotton, *Storm Cloud Over a Sitting Bull*, Sports Illustrated, Jan. 9, 1984, at 44, 45 (discussing need to trade star player who failed to get along with coach) [hereinafter cited as Cotton II]; Cotton I, *supra* note 10, at 28, 29 (discussing dismissal of coach of winning team by owner who felt change was needed).

36. *See* R. Lipsky, How We Play the Game 47-48 (1981) (discussing, for example, the importance of players who are willing to perform "menial tasks" or who can substitute in key situations); Deford, *A Team That Was Blessed*, Sports Illustrated, Mar. 29, 1982, at 58, 64 (discussing how team's least known player, by performing unpleasant tasks, became most important player on team); Fimrite, *Angels in Full Flight*, Sports Illustrated, Oct. 4, 1982, at 16, 18 (discussing how veteran pitcher gave pitching staff needed experience); Kaplan, *The Padres' Persnickety Papa*, Sports Illustrated, June 28, 1982, at 22, 23 (contrasting objectively low value of individual statistics against team's success); Newman, *Starring, but Not Starting*, Sports Illustrated, Feb. 8, 1982, at 83, 83 (discussing the value of reserve players); *A Catcher's Worth: Measuring the Unmeasurable*, Sport, Aug. 1984, at 63, 63 (discussing "inestimable value" of a catcher to his baseball team).

37. *See* Scoville, *supra* note 1, at 191 (noting that player who has limited ability, but who has good attitude, is of enormous value to team); Deford, *supra* note 36, at 64 (noting that " 'the key' " player on team was the one who performed "grubby" tasks); Kaplan, *supra* note 36, at 23 (manager dismissing value of individual statistics in light of team's overall performance because players did things not reflected in statistics).

qualified for his position in an objective or absolute sense, but may nevertheless be legitimately subject to discharge[38] because of his failure to interact well with his teammates[39] or to adapt to the coach's style of play.[40] When such an athlete alleges that he was unlawfully discharged in violation of section 8(a)(3), the element of subjectivity in player evaluations often makes it difficult for an employer to support his defense of legitimate business reasons with concrete, unambiguous proof.[41]

Although all professions involve subjective employment criteria to some degree,[42] few rely as heavily as the sports industry on management's discretionary assessment of subjective criteria in making employment decisions. Unlike those in an ordinary factory setting, personnel changes on sports teams occur frequently[43] and with only passing regard for objective standards.[44] For example, a team may release one player in favor of another with a measurably inferior performance record because of management's amorphous but sincerely held belief that the second player offers leadership[45] or other qualities lacking on the team.[46] A player's worth is therefore essentially relative to the particular team.[47]

38. For the purposes of this Note the trade of a player due to his union activity is equivalent to a discharge and is included in the treatment of unlawful dismissals.

39. Dissension and discord may have an adverse effect on a team. R. Lipsky, *supra* note 36, at 52-53; *see* Looney, *New Philadelphia Story*, Sports Illustrated, June 20, 1983, at 32, 33 (discussing resentment players felt toward teammate who received more public attention); Wolff, *Bye-Bye, Pine Brothers*, Sports Illustrated, Jan. 9, 1984, at 48, 50 (discussing ill effects that the quitting of two players had on teammate); *cf.* A. Beisser, The Madness in Sports 152 (1967) (discussing problems an athlete faces, including accomodation with teammates).

40. *See* Cotton II, *supra* note 35, at 44, 45 (discussing need to trade player who does not get along with coach); *see, e.g.*, Cotton I, *supra* note 10, at 28-29 (discussing players' failure to adapt to coach's system of play, although it was the coach who was dismissed); Looney, *supra* note 39, at 33 (discussing how problems between player and coach affected team); McCallum, *Doing a Number on No. 1*, Sports Illustrated, Sept. 21, 1981, at 58, 58 (example of disagreement between player and coach over what position player should play); *cf.* A. Beisser, *supra* note 39, at 152 (discussing athlete's need to accommodate his coaches).

41. *See* Elmer Nordstrom, No. 2-CA-19101, at 44 (Nov. 23, 1983) (decision by administrative law judge (ALJ)) (appeal pending) (discussing whether Seattle Seahawks of National Football League traded for wide receiver Roger Carr because of need or as excuse to dismiss wide receiver Sam McCullum) (available in files of *Fordham Law Review*).

42. *See, e.g.*, Ford Motor Co. v. EEOC, 458 U.S. 219, 225 n.7 (1982) (automobile industry); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973) (aerospace and aircraft industry); Holsey v. Armour & Co., 743 F.2d 199, 214 (4th Cir. 1984) (meat processing industry); Grubb v. W.A. Foote Memorial Hosp., Inc., 741 F.2d 1486, 1495 (6th Cir. 1984) (medical industry); Hearn v. R.R. Donnelley & Sons Co., 739 F.2d 304, 308 (7th Cir. 1984) (printing industry).

43. *See* R. Lipsky, *supra* note 36, at 50 (discussing instability of work community where players are cut and traded).

44. *See, e.g.*, Cotton I, *supra* note 10, at 29; Wulf, *supra* note 10, at 45.

45. *See* R. Lipsky, *supra* note 36, at 48-49 (noting that an essential characteristic of organization is leadership); Newman, *Sonic Boom Turns to Gloom*, Sports Illustrated, Feb. 7, 1983, at 56, 56 (attributing team's problems to lack of leadership).

46. See *supra* note 37.

47. *See* Scoville, *supra* note 1, at 187 (noting that stardom is measured in relation to

Determining a player's value is made even more difficult by the fact that each player's performance is affected by the performance of others.[48] This characteristic of employee interaction is thus of much greater significance in the sports industry than in a factory setting.

The *Wright Line* test appears to be inappropriate in these circumstances because it would require an employer to establish by objective evidence a legitimate business reason that may rest entirely on subjective grounds. An employer in the sports industry may have a legitimate reason for dismissing a particular player, but because of its subjective nature, that reason, however legitimate, may not seem to another person to be a compelling cause for dismissal. Nor would it necessarily rise to the level of proof required as an affirmative defense under *Wright Line* to rebut the General Counsel's prima facie case.[49] Although all employers in section 8(a)(3) proceedings run the risk that their legitimate business reasons may be rejected by the Board,[50] sports is one of the few professions in which an employer is expected to prove the cause for the dismissal when producing a concrete reason may be impossible.

---

other players); Edwards, *The Home-Field Advantage*, in Sports, Games, and Play: Social and Psychological Viewpoints 428 (J. Goldstein ed. 1979) (discussing how other players, coaches, officials, and even fans can influence player).

48. *See, e.g.*, Cotton I, *supra* note 10, at 31 (discussing how player's enthusiasm spread to his teammates); *In Theory, the A's Owe '81 to the Outfield*, Sports Illustrated, May 10, 1982, at 100, 100 (discussing how outfield helped improve pitching staff); *The Unraveling Red Sox*, Newsweek, Apr. 6, 1981, at 87, 87 (discussing how catcher's play had beneficial effect on his team's pitchers).

49. *See, e.g.*, Elmer Nordstrom, No. 2-CA-19101, at 58-59 (Nov. 23, 1983) (ALJ decision) (appeal pending) (available in files of *Fordham Law Review*). The *Nordstrom* case presents a good example of how difficult it may be to determine whether a player has been dismissed in violation of § 8(a)(3). The case involved the dismissal of Sam McCullum, a starting wide receiver and player representative for the Seahawks, prior to the commencement of the N.F.L. strike in September 1982. *Id.* at 11. The Seahawks claimed they needed a "deep threat" to help free their all-pro wide receiver, Steve Largent. *Id.* at 27 ("deep threat" is a player who is fast enough to outrun defenders and who must therefore be carefully defended by opposing team; as a result, other receivers cannot be defended as tightly). They noted that they had two young, promising receivers, *id.* at 36, and that they had traded for a fast receiver, Roger Carr, *id.* at 23. Carr's career, however, was fading. *Id.* at 32. Furthermore, Largent had caught more passes than ever before during the previous season with McCullum in the line-up. *Id.* at 13. McCullum also offered numerous examples of confrontations with members of the coaching staff relating to his union activity. *Id.* at 14-22.

The Seahawks' decision was highly subjective, and the Seahawks were not able to substantiate their belief that they suddenly needed a "deep threat." *See id.* at 44. The ALJ concluded that the Seahawks failed to establish that they would have discharged McCullum even if he had not engaged in union activity. *Id.* at 59. They therefore were held to have violated § 8(a)(3). *Id.*

50. *See* NLRB v. Chem Fab Corp., 691 F.2d 1252, 1261-62 (8th Cir. 1982); NLRB v. Collins & Aikman Corp., 146 F.2d 454, 456 (4th Cir. 1944); Martin-Brower Co., 263 N.L.R.B. 194, 225 (1982), *enforced*, 711 F.2d 420 (D.C. Cir. 1983); Fabricut, Inc., 238 N.L.R.B. 768, 768 (1978); *cf.* Sioux City Foundry, 241 N.L.R.B. 481, 481-82 (1979) (§ 8(a)(1) case).

2. Importance of Employer Discretion in Professional Sports

The subjectivity of employee evaluations in the sports industry makes it necessary that management have broad discretion in its employment decisions.[51] Management discretion in this area is consistent with the policies behind the Act.[52] As the Supreme Court noted in *NLRB v. Jones & Laughlin Steel Corp.*:[53] "The Act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."[54] In the sports context this means that "coaches are presumed to be the best judges of their material and must live with their decisions, [so] they have the undoubted right to sift out the unwanted . . . and even to err in their judgments."[55]

The importance of managerial discretion has been recognized in other professions in which subjective evaluations may similarly obscure an allegedly wrongful discharge.[56] The difficulty in evaluating an employee in the broadcasting industry was evident in *WNAC-TV*,[57] which involved the alleged discriminatory discharge of a television broadcast journalist.[58] The administrative law judge stated:

> [I]t is important to bear in mind that the standards for measuring acceptable performance in the industrial world do not translate well to the TV industry. Factors such as length of service or bare competency which might be sufficient to assure continued employment for an assembly line worker, are hardly likely to guarantee job security for the TV reporter. Evaluations of a TV performer necessarily involve subjective judgment based on elusive criteria. . . . Reasons for preferring one performer over another do not lend themselves to written rules or precise quantification. In these circumstances, where wide differences of opinion can flourish among well-intentioned experts, [the employer] surely is entitled to judge for itself the standards it finds desirable in its

51. See *infra* notes 55-62 and accompanying text.

52. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45-46 (1937); Paramount Mining Corp. v. NLRB, 631 F.2d 346, 348 (4th Cir. 1980); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978); NLRB v. Knuth Bros., 537 F.2d 950, 953-54 (7th Cir. 1976). The Act states: "It is the purpose and policy of this chapter . . . to prescribe the legitimate rights of both employees and employers in their relations affecting commerce . . . ." 29 U.S.C. § 141(b) (1982). The policies of the NLRA include deterring unfair labor practices, NLRB v. Otis Hosp., 545 F.2d 252, 257 (1st Cir. 1976); 79 Cong. Rec. 7572 (1935) (statement of Sen. Wagner), making employees whole for losses resulting from such practices, *Otis Hosp.*, 545 F.2d at 257, and protecting victimized employees, Dayton Tire & Rubber Co. v. NLRB, 591 F.2d 566, 570 (10th Cir. 1979); *see* 79 Cong. Rec. 7570 (1935) (statement of Sen. Wagner).

53. 301 U.S. 1 (1937).

54. *Id.* at 45; *accord* Paramount Mining Corp. v. NLRB, 631 F.2d 346, 348 (4th Cir. 1980); Sioux Quality Packers v. NLRB, 581 F.2d 153, 156 (8th Cir. 1978); NLRB v. Knuth Bros., 537 F.2d 950, 953-54 (7th Cir. 1976).

55. National Football League Management Council, No. 2-CA-13379, at 63 (June 30, 1976) (ALJ decision) (available in files of *Fordham Law Review*).

56. *See* WNAC-TV, 264 N.L.R.B. 216, 221 (1982) (television broadcasting); St. Ann's Episcopal School, 230 N.L.R.B. 99, 100 (1977) (education).

57. 264 N.L.R.B. 216 (1982).

58. *Id.* at 220.

> employees. . . .[59]

Similarly, in *St. Ann's Episcopal School*,[60] which involved the failure to renew a teacher's contract allegedly because of his union activity,[61] the Board noted:

> It is no doubt true that an evaluation of a classroom teacher's performance based upon personal observation may frequently be determined by subjective factors. There are probably wide differences of opinion among educators on the question as to who is a good teacher, but that is not in issue in this case. Respondent is surely entitled to determine for itself the standards it seeks in teachers.[62]

Thus, the Board has recognized that in certain employment situations management must retain the right to make employment decisions based on subjective criteria. Inasmuch as decisions in the sports context are at times similarly made without the benefit of objective criteria, latitude in this regard should be conferred as generously on sports management.[63]

B. *The Need for a Different Burden of Proof*

1. The Dynamics of a New Approach

In recognition of the onerous problems that *Wright Line* poses for an employer in the sports industry,[64] the Board should adopt a different standard for such cases: The burden of proof should at all times remain with the General Counsel. This means that the General Counsel has the burden of proving by a preponderance of the evidence that union activity was a motivating factor in the dismissal. If the General Counsel succeeds in proving his prima facie case, the burden of production shifts to the defendent to articulate as an affirmative defense some legitimate, nondiscriminatory reason for the employee's discharge. Should the employer carry this burden, the General Counsel must then have an opportunity to prove that the explanations offered by the defendant were not in fact its true reasons, but rather were a pretext for discrimination. Thus, the ultimate burden of persuading the trier of fact that the employer intentionally discriminated against the employee remains at all times upon the General Counsel.

Under this standard, as under *Wright Line*, an employer is prohibited from violating section 8(a)(3) by dismissing an employee solely for his union activities. Although the ultimate burden remains with the plaintiff, the alleged wrongdoer is nevertheless still required to articulate a legitimate reason for the action and to frame the factual issue with suffi-

59. *Id.* at 221.
60. 230 N.L.R.B. 99 (1977).
61. *Id.* at 99.
62. *Id.* at 102.
63. The proposed burden of proof, see *infra* notes 64-71 and accompanying text, may be applicable to other professions involving equally subjective criteria.
64. See *supra* notes 31-62 and accompanying text.

cient clarity. The General Counsel thus has the same information available to prove his case as he would have had under *Wright Line*, while the employer is protected from having to sustain such a difficult burden of proof in rebuttal.

As the Supreme Court has noted in another employment discrimination context, the fear that the employer may fabricate a reason for the discharge when he is required only to articulate, not prove, a legitimate, nondiscriminatory motivation for his actions is exaggerated.[65] The employer's explanation of his legitimate reasons must be clear and reasonably specific[66] in order both to rebut the inference of discrimination contained in the plaintiff's prima facie case[67] and to satisfy the requirement that the General Counsel be afforded a full and fair opportunity to demonstrate pretext.[68] Furthermore, although the employer does not bear the formal burden of persuasion,[69] he nevertheless retains every incentive to present credible reasons for his actions in order to persuade the trier of fact that the employment decision was lawful.[70]

It is true that, by reducing the amount of proof needed to form the employer's affirmative defense, this proposal forces the General Counsel to overcome the same obstacles previously deemed too onerous for the employer. This disparate treatment, however, is required if the employer is to be free to make employment decisions based on necessarily subjective factors.[71] There is a risk that some enforcement proceedings on behalf of unlawfully discharged players will not satisfy this shifted burden of proof, but the overall need for management flexibility in making employment decisions in professional sports outweighs the difficulties presented in occasional, isolated cases.

2. Policies Supporting the New Approach

This proposed reallocation of the burden of proof is consistent with the general trend in Board policy toward giving the employer a greater opportunity to overcome the allegation of a section 8(a)(3) violation.[72] The

65. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 257-58 (1981) (Title VII case).

66. *Id.* at 258.

67. *Id.*

68. *Id.*; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 578 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1973).

69. *Cf., e.g.*, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) (Title VII case); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (same); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (same).

70. *Cf.* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981) (holding that imposing burden of proof on employee in Title VII case does not preclude thorough examination of facts). There may be some question as to the applicability of Title VII cases in this area. See *infra* notes 380-95 and accompanying text.

71. *See, e.g.*, WNAC-TV, 264 N.L.R.B. 216, 221 (1982); St. Ann's Episcopal School, 230 N.L.R.B. 99, 100 (1977).

72. *See* Herman Bros. v. NLRB, 658 F.2d 201, 208 (3d Cir. 1981). *Compare* Ajax Magnethermic Corp., 227 N.L.R.B. 477, 477 (1976) (violation even where dismissal was motivated only *in part* by unlawful reasons), *enforced*, 591 F.2d 1209 (6th Cir. 1979) *with*

trend is evidenced by *Wright Line* itself, which superseded the "in part" test.[73] That test unfairly disadvantaged the employer by preventing him from coming forward with exculpatory evidence.[74] *Wright Line* was inspired by the Board's need to determine the employer's true motive in dismissing the employee[75] and to provide an opportunity for the employer to come forward with such evidence.[76] This attempt to correct a perceived imbalance in the Act's application is also evidenced by the Taft-Hartley amendments to the Act,[77] which, by prohibiting unfair labor practices by unions, indicated Congress' increased willingness to recognize employer interests.[78] Thus, freeing the sports employer from an onerous burden of proof follows the pattern of recognizing management's need for the freedom to make the employment decisions it deems necessary.

Assigning the burden of proof in this manner is also consistent with the reasoning behind the *Wright Line* test.[79] In that case the Board, quoting the Supreme Court, observed:

> [I]t is fundamental in "situations present[ing] a complex of motives" that the decisional body be able to accomplish the "delicate task" of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and of balancing in the light of the Act and its policy the intended

---

Wright Line, 251 N.L.R.B. 1083, 1089 (1980) (violation only where employer fails to prove that employee would have been discharged regardless of protected conduct), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

73. Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). See *supra* note 60 and accompanying text.

74. *See* Wright Line, 251 N.L.R.B. 1083, 1084 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); *see also* Zurn Indus. v. NLRB, 680 F.2d 683, 686-87 (9th Cir. 1982) (under "in part" test General Counsel only had to show presence of prohibited motives); Herman Bros. v. NLRB, 658 F.2d 201, 208 (3d Cir. 1981) (under "in part" test employer violates § 8(a)(3) if only part of reason for dismissal was unlawful).

75. *See* Wright Line, 251 N.L.R.B. 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

76. *Id.*; *see* NLRB v. Transportation Management Corp., 103 S. Ct. 2469, 2474 (1983).

77. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187 (1982)).

78. *See* 29 U.S.C. § 158(b) (1982). The Supreme Court has recognized the role of the Taft-Hartley Act in balancing management prerogative in employment decisions against the right of employees to be free from discrimination based on their union affiliation. As Justice Felix Frankfurter observed in *Local 1976, United Bhd. of Carpenters v. NLRB*:

> It is relevant to recall that the Taft-Hartley Act was, to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests.

357 U.S. 93, 99-100 (1958).

79. *See* Wright Line, 251 N.L.R.B. 1083, 1088-89 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982); Jackson & Heller, *The Irrelevance of the* Wright Line *Debate: Returning to the Realism of* Erie Resistor *in Unfair Labor Practice Cases*, 77 Nw. U.L. Rev. 737, 744 (1983).

> consequences upon employee rights against the business ends to be served by the employer's conduct."[80]

In a factory setting—where employees can be measured by objective standards—placing the burden of proof on the employer to make out an affirmative defense after the General Counsel makes its prima facie case successfully balances the interests of employers and employees.[81] However, where there are no such standards to which the employer may refer in assessing an employee's performance, the balance praised by *Wright Line* is skewed against the employer.[82] Eliminating the requirement that the employer prove rather than merely articulate an affirmative defense[83] would therefore limit the harm that can result from a misinterpretation of the employer's motives. This allocation of the burden of proof achieves a new balance dictated by the circumstances and as such is responsive to and consistent with the considerations underlying *Wright Line*.[84]

This shift is also consistent with the allocation of the burden of proof in Title VII cases, which, like section 8(a)(3) violations, concern the discriminatory discharge of employees.[85] Moreover, both Title VII and the NLRA are intended to discourage employers from engaging in employment discrimination and to compensate discrimination victims.[86] In Title VII cases, the ultimate burden of proof remains with the plaintiff at all times.[87] The employee is charged first with proving his prima facie case of discrimination[88] and then with rebutting any nondiscriminatory explanation the employer presents for the dismissal.[89] This allocation of the burden of proof seems to be motivated primarily by the court's respect

80. Wright Line, 251 N.L.R.B. 1083, 1089 (1980) (quoting NLRB v. Erie Resistor Corp., 373 U.S. 221, 229 (1963)), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

81. See *supra* notes 25-30 and accompanying text.

82. See *supra* notes 49-50 and accompanying text.

83. See *supra* note 35 and accompanying text.

84. See *supra* notes 75-76 and accompanying text.

85. Civil Rights Act of 1964 tit. 7, 42 U.S.C. § 2000e (1982).

86. *See* Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976) (discussion of purposes of Title VII); Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (same); Thompson v. Sawyer, 678 F.2d 257, 286 (D.C. Cir. 1982) (same); Di Salvo v. Chamber of Commerce, 568 F.2d 593, 598 (8th Cir. 1978) (same). For a discussion of the purposes of the NLRA, see *supra* note 52 and accompanying text.

87. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981); *see* Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984); Casillas v. United States Navy, 735 F.2d 338, 342 (9th Cir. 1984); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1307 (8th Cir. 1984).

88. *See* Segar v. Smith, 738 F.2d 1249, 1267 (D.C. Cir. 1984); Fowler v. Blue Bell, Inc., 737 F.2d 1007, 1010 (11th Cir. 1984); Robinson v. Polaroid Corp., 732 F.2d 1010, 1014 (1st Cir. 1984); EEOC v. Westinghouse Elec. Corp., 725 F.2d 211, 222 (3d Cir. 1983), *cert. denied*, 53 U.S.L.W. 3236 (U.S. Oct. 2, 1984) (No. 83-1779).

89. *See* McDowell v. Avtex Fibers, Inc., 740 F.2d 214, 219 (3d Cir.), *petition for cert. filed*, 53 U.S.L.W. 3326 (U.S. Oct. 30, 1984) (No. 84-578); Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393, 1395 (3d Cir.), *cert. denied*, 53 U.S.L.W. 3436 (U.S. Dec. 11, 1984) (No. 84-601); Johnson v. Yellow Freight Sys., Inc., 734 F.2d 1304, 1307 (8th Cir. 1984); White v. Vathally, 732 F.2d 1037, 1040 (1st Cir.), *cert. denied*, 53 U.S.L.W. 3324 (U.S. Oct. 30, 1984) (No. 84-307).

for management discretion in the selection and discharge of employees and reflects the principle that the court will interfere with such discretion only after the employee has proven a strong case of discrimination.

The Supreme Court has not resolved the issue of whether the Title VII burden of proof may be used by analogy to support a similar allocation in labor cases. In a footnote to its decision in *NLRB v. Transportation Management Corp.*,[90] which involved a standard industrial setting,[91] the Court found a Title VII case proffered by the employer to support such a shift to be "inapposite."[92] However, it did not seem to object to the value of the Title VII analogy generally; rather, it questioned the employer's use of a pretext discrimination case to illuminate the dual motive case before it.[93]

Thus, shifting the burden of proof in dual motive cases in the sports context can be justified on the strength of its similarity to civil rights remedial legislation, its consistency with the principles underlying *Wright Line* and its compatibility with general trends in the field of labor law.

II. REMEDIES

A. *Problems with Traditional Remedies*

Once the Board finds a violation, section 10(c)[94] allows it to order any remedy appropriate to rectify the offense.[95] Reinstatement and back pay are the typical remedies for a violation of section 8(a)(3):[96] The employee is reinstated to his former position and is awarded back pay for the period of time between his dismissal and his reinstatement.[97] The

90. 103 S. Ct. 2469 (1983).

91. *Id.* at 2470 (dismissal of bus driver).

92. *Id.* at 2473 n.5.

93. *See id.* The Court did not foreclose the use of the Title VII burden of proof in § 8(a)(3) cases if analogy were drawn to a Title VII dual or mixed motive case. It therefore would appear that the Supreme Court has left open the possibility of using the Title VII burden of proof under § 8(a)(3) in the future. For a discussion of Title VII dual or mixed motive cases see Brodin, *Standard of Causation in the Mixed-Motive Title VII Action: A Social Policy Perspective*, 82 Colum. L. Rev. 292, 292-326 (1982). *But see Burden of Proof*, *supra* note 24, at 308 (issue in Title VII case is whether actual cause of dismissal was illegal motive, while in § 8(a)(3) dual motive case existence of illegal motive and violation are already established).

94. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1982).

95. *Id.* See *infra* notes 139-44 and accompanying text.

96. Sure-Tan, Inc. v. NLRB, 104 S. Ct. 2803, 2814 (1984); *see* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188-89 (1941). For a general discussion of reinstatement and back pay, see D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 81-121 (1976).

97. *See, e.g.*, Polynesian Cultural Center, Inc. v. NLRB, 582 F.2d 467, 475 (9th Cir. 1978) (when employees are discriminately discharged, back pay obligation normally runs until employer makes unconditional offer of reinstatement); NLRB v. Southern Greyhound Lines, 426 F.2d 1299, 1303 (5th Cir. 1970) (same); *see also* R. Gorman, *supra* note 16, at 138-39 (explaining reinstatement and backpay); D. McDowell & K. Huhn, *supra* note 96, at 81-84 (same).

employer is also required to post a notice in a conspicuous place in the plant for sixty days informing employees of the violation and the remedy,[98] including the employer's duty to cease and desist from his wrongful conduct.[99]

These traditional remedies are intended to return the employee to the position he would have enjoyed had the violation not occurred.[100] They are highly suited to industrial settings where re-employment and back pay will, without more, adequately compensate for the wrong. In a sports setting, however, the consequences of a violation are not as easily rectified. Reinstatement is rarely a viable remedy and back pay may be minimal, if, for example, the discharged athlete is soon hired by another team.[101] Therefore, reinstatement and back pay cannot be relied upon to prevent future unfair labor practices.

Reinstatement is particularly inappropriate in a sports setting. The delicate interplay of team chemistry, the uniqueness of talent and the harmful effects of delaying relief makes these objections, although implicated in other industries, virtually insurmountable in the sports context.

One problem arises from the inevitable delay between the actual violation and the Board's reinstatement order.[102] Because most playing careers are heavily dependent on the athlete's physical condition and age, reinstatement after the period of adjudication would often be ineffectual and counterproductive. Reinstatement cannot re-establish the pre-violation status quo if the passage of time has diminished an athlete's employable skills.[103] Moreover, if a player is hired by another team after he is unlawfully dismissed but before adjudication of his grievance, reinstate-

98. NLRB v. Express Publishing Co., 312 U.S. 426, 438 (1941); R. Gorman, *supra* note 45, at 138; D. McDowell & K. Huhn, *supra* note 96, at 73; *see, e.g.*, Wells, Inc. v. NLRB, 162 F.2d 457, 460 (9th Cir. 1947) (upheld Board's order to post notice); NLRB v. Trojan Powder Co., 135 F.2d 337, 339-40 (3d Cir. 1943) (same).

99. *See* NLRB v. Express Publishing Co., 312 U.S. 426, 432 (1941); NLRB v. Local 445, Int'l Union of Elec. Workers, 529 F.2d 502, 505 (2d Cir. 1976); NLRB v. Scenic Sportswear, 475 F.2d 1226, 1227 (6th Cir. 1973).

100. NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969); Nathanson v. NLRB, 344 U.S. 25, 27 (1952); *see* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 197 (1941).

101. See *infra* notes 115-16 and accompanying text.

102. *See, e.g.*, Elmer Nordstrom, No. 2-CA-19101, at 11, 61 (Nov. 23, 1983) (ALJ decision) (appeal pending) (McCullum dismissed in September 1982 and reinstatement ordered in November 1983); National Football League Management Council, No. 2-CA-13379, at 61, 69 (June 30, 1976) (ALJ decision) (players dismissed during summer of 1974 and reinstatment ordered June 1976). A one or two year delay may not appear to be onerous at first glance; however, in a league such as the N.F.L., in which the average length of a professional career is 4.5 years, National Football League Players Ass'n, *The Check-Off* Vol. 9, No. 2, at 2 (Aug. 20, 1984) (average player career lasts 4.5 years) (available in files of *Fordham Law Review*), even a one year delay would amount to a substantial loss for the employee.

103. *Cf.* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 297 (1st Cir. 1978) (reinstatement impractical in view of lapse of ten years and employee's suffering heart attack); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 292 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970) (six year delay made reinstatement impractical).

ment would interfere with his new contractual arrangement. This would in effect require his new employer—without any wrongdoing on its part—to surrender the player's services if the player elects to be reinstated.[104]

Even if the decision is handed down quickly or if the player has not joined another team, the problem of animosity between the coaching staff and the reinstated player may inhibit the effective implementation of reinstatement as a remedy.[105] Employees and their supervisors in a factory setting are not a team in the sense that players and coaches are. In a factory, employees join together to produce a product; how they interact with one another does not, in relative terms, appreciably affect their output.[106] Players and coaches, on the other hand, are joined together to produce an amorphous product: victories. Next to talent, teamwork is the most important ingredient of that product.[107] Animosity is thus anathema to a sports team: A successful team must function as a unit, in which each member, including the coaches, respects the other's ability to perform his job. When tensions arise between members of a team, the

104. The problem of reinstating a player to one team while he is under contract to play for another team was recognized in National Football League Management Council, No. 2-CA-13379, at 65 (June 30, 1976) (ALJ decision) (available in files of *Fordham Law Review*). The ALJ held that the players who were discriminated against were

> entitled to the opportunity denied them in 1974 to make their respective teams, if they wish[ed] to avail themselves of it. Whatever legal complications [might have been] involved as a consequence of transfer of any of them to other clubs, [was] a matter which the Oilers, Eagles, and Steelers [would] have to work out. Having created the problem, it is their responsibility to unravel it.

Id.

105. *Cf.* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984) (reinstatement inappropriate in Age Discrimination Employment Act cases where animosity exists); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984) (same); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983) (same); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.) (same) *cert. denied*, 459 U.S. 859 (1982); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (reinstatement denied in Title VII case due to animosity between parties); EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979) (same), *affirmed*, 676 F.2d 1272 (1982).

106. Although harmonious interaction between employees and management and among employees themselves is beneficial, *see* T. Pempel, Policy and Politics in Japan 90-131 (1982); M. Saso & S. Kirby, Japanese Industrial Competition to 1990 12-18 (1982); T. Uchino, Japan's Postwar Economy: An Insider's View of Its History and Its Future 233-37 (1978), it does not affect output to the extent that it does in a sports context, *see* R. Lipsky, *supra* note 36, at 49-51.

107. *See Laker Talent, Celtic Team*, Time, June 25, 1984, at 60, 60 ("better team," not team with most talent, won); *see, e.g.*, Axthelm, *A Season for the Shrink*, Newsweek, Sept. 14, 1981, at 98, 99 (discussing team "known for getting the least out of the most talent"); Deford, *supra* note 36, at 64 (discussing how players' close interaction on the court enables each to know exactly what the other is doing); Fimrite, *A Well Matched Set*, Sports Illustrated, Mar. 10, 1982, at 90, 90 (discussing how each member of a particular outfield is "capable of extraordinary individual exploits, but it is as a unit . . . that they excel"); Kaplan, *Heavenly Days for the Angels*, Sports Illustrated, Aug. 2, 1982, at 16, 16-25 (discussing cohesiveness and relaxed atmosphere that existed on first place team); McCallum, *supra* note 40, at 58 (citing example of a coach trying to create team unity on losing club). See *supra* notes 47-48 and accompanying text.

mutual respect that bonds each member to his team is eroded and players are distracted from their jobs.[108] For example, a coach who has unlawfully dismissed a player will probably not interact well with him when that player is reinstated. The harmony of the team is disrupted, to the detriment not only of the coach and the returning player, but also of the other team members for whose ultimate protection the Act was designed.[109]

Nor does reinstatement in a sports setting achieve the NLRA's purpose of benefiting the victimized employee.[110] Intended to make the wronged employee whole,[111] reinstatement to an unappreciative team may instead undermine that objective. After being reinstated, the player is likely to see little playing time, either because of deteriorated skills caused by the delay in reinstatement[112] or because of his coach's animus, pride or reluctance to admit error should the player perform well. The reinstated player would thus probably languish on the bench. As he does, his value as a player declines: His skills may erode from disuse and his professional visibility—necessary if he wishes to seek employment on another team—would diminish. Reinstatement would therefore be counter-productive to the player as well as to the team.

B. *The Alternative: Front Pay*

An alternative to reinstatement as a remedy for section 8(a)(3) violations in the sports industry is front pay. The purpose of front pay is to put the injured party in the same position in which he would have been had he been reinstated.[113] In the sports context this would mean that the player is paid an amount equal to the remainder of the unelapsed con-

108. *See* Looney, *supra* note 39, at 33 (discussing the annoyance of players over the attention received by another player); Wolff, *supra* note 39, at 50 (discussing reaction of player to quitting of teammates); *see also* Cotton II, *supra* note 40, at 44, 45 (reasoning that because coach was not using the player, trading player would be best thing for all parties); *cf.* Wulf, *The Fight is Over the Red Sox, Not in Them*, Sports Illustrated, June 20, 1983, at 24, 27-31 (discussing how problems in front office affected team). See *supra* notes 39-40. *But see Straight A's*, Newsweek, Oct. 28, 1974, at 66 (world championship team had "little respect for their manager, open contempt for their owner—and no particular affection for one another").

109. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956); NLRB v. Intertherm, Inc., 596 F.2d 267, 271 (8th Cir. 1979); Mosher Steel Co. v. NLRB, 568 F.2d 436, 442 (5th Cir. 1978); NLRB v. Midwest Hanger Co., 474 F.2d 1155, 1159 (8th Cir.), *cert. denied*, 414 U.S. 823 (1973).

110. *See* Mosher Steel Co. v. NLRB, 568 F.2d 436, 442 (5th Cir. 1978).

111. *See* Dayton Tire & Rubber Co. v. NLRB, 591 F.2d 566, 570 (10th Cir. 1979); NLRB v. Otis Hosp., 545 F.2d 252, 257 (1st Cir. 1976). See *supra* note 100 and accompanying text.

112. See *supra* note 102 and accompanying text.

113. EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982); *see* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 728 (2d Cir. 1984); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984); Koyen v. Consolidated Edison Co., 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

tract[114] measured from the date he would have been reinstated had reinstatement been feasible until the date when the contract would ordinarily terminate.

It may happen that an athlete discharged in violation of section 8(a)(3) will be hired by another team soon after his unlawful discharge; in fact, this occurred in the two reported cases involving section 8(a)(3) in a sports context.[115] In that situation, the aggrieved player would still be entitled to back pay for the short time during which he was unemployed. But because his contract would most likely be assumed or renegotiated at a similar wage level by his new employer, he would generally suffer no additional pecuniary injury resulting from his dismissal.[116] Therefore, a front pay award to that player would serve no compensatory function. In fact, it would result in a windfall: The player, in effect, would receive payment on the same contract from both his old and new employers. At the same time, however, failure to order a front pay award in that situation would allow the employer to violate the Act with virtual impunity.[117]

To avoid awarding double recovery to the player on the one hand, and to prevent the employer from escaping the consequences of the violation on the other, the Board should order the guilty employer to make a front pay award in the amount remaining due on the old contract to the relevant player's association pension fund (pension fund). This contribution would not be designated for receipt by the dismissed player at some future date, but would rather be for the fund's general membership. It

114. Professional athletes who play for a team are required to be under contracts. *See, e.g.*, Major Indoor Soccer League Players Ass'n, Collective Bargaining Agreement 14 (1982) (available in files of *Fordham Law Review*); National Basketball Ass'n Players Ass'n, Collective Bargaining Agreement 2 (1980) (available in files of *Fordham Law Review*).

115. *See* Elmer Nordstrom, No. 2-CA-19101, at 23 (Nov. 23, 1983) (ALJ decision) (appeal pending) (player cut after preseason was hired by another team just prior to second regular season game) (available in files of *Fordham Law Review*); National Football League Management Council, No. 2-CA-13379, at 60 (June 30, 1976) (ALJ decision) (cut player was picked up by another team three weeks later) (available in files of *Fordham Law Review*). A player whom the Board finds to have been unlawfully discharged a fortiori possesses talents that would qualify him to continue playing. It is therefore reasonable to assume that other teams would seek to employ those talents when they become available.

116. Under the general remedial principles of § 10(c), a player's former team is obligated to pay the wronged player an amount equal to the difference, if any, between the contract wage he receives from his new employer and the wage he would have earned under his original contract with the former team. *See, e.g.*, NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 347 (1953) (quoting Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 51 (1935)), *enforced*, 303 U.S. 261 (1938)); NLRB v. Brown & Root, Inc., 311 F.2d 447, 452 (8th Cir. 1963); *cf.* Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 956-57 (10th Cir. 1980) (employee awarded front pay for five years, representing difference between her old salary and salary she recieved at new job).

117. See *infra* notes 122-32 and accompanying text. If the player is traded instead of being unlawfully dismissed due to his union activity, the team receives another player in exchange, despite having committed an unfair labor practice.

would also be entirely separate from any regular contributions made by the employer to the pension fund pursuant to a collective bargaining agreement with the union. Under this plan, the player would be paid on the contract only by his present team; at the same time, the payments by the violating employer to the fund would serve to deter future violations and simultaneously benefit the members of the labor union.[118]

1. Front Pay is Consistent with the General Purposes of the Act

Although not necessary to make the injured player whole,[119] the front pay proposal accomplishes other general purposes of the Act, such as deterring unfair labor practices[120] and protecting employees in the exercise of their section 7 rights.[121]

In a situation in which a player contracts to play for another team soon after his dismissal, a front pay award to the pension fund would act as a deterrent to future violations. In the absence of the front pay alternative, an employer who has committed an unfair labor practice would suffer only negligible remedial sanctions for his misconduct.[122] As noted above, the guilty employer would be required to pay the employee only back pay for the time between his dismissal and his signing with a new

118. In the situation where a player fails to obtain reemployment with another team following his wrongful discharge, the player would be entitled to standard contractual remedies. *See* J. Calamari & J. Perillo, Contracts § 14-18, at 544 (2d ed. 1977). Damages for breach of contract would be paid by his former employer, Vaca v. Sipes, 386 U.S. 171, 197 (1967); Ruzicka v. General Motors Corp., 523 F.2d 306, 312 (6th Cir. 1975), *cert. denied*, 104 S. Ct. 424 (1983); *see* Tymshare, Inc. v. Covell, 727 F.2d 1145, 1155 (D.C. Cir. 1984), in the amount of his contract as measured from the date of his wrongful dismissal to the expiration date of his contract, *see In re* Arbitration between National Basketball Ass'n and National Basketball Ass'n Players Ass'n, at 20 (June 22, 1978) (arbitration ruling) (available in files of *Fordham Law Review*). In such a situation front pay would be unnecessary. The issue whether a player is entitled to be paid on the remainder of his contract if he declines reinstatement or if he fails to make the team after reinstatement is beyond the scope of this Note, as are the antitrust issues that would arise if a player who is a union activist is blacklisted by all the teams after his wrongful discharge. The Note's discussion is limited to the situation in which a player is hired by another team after his unlawful dismissal.

119. See *supra* note 116.

120. *See, e.g.*, Sheet Metal Workers' Int'l Ass'n, Local No. 355 v. NLRB, 716 F.2d 1249, 1259 (9th Cir. 1983); Golden Day Schools, Inc. v. NLRB, 644 F.2d 834, 840 (9th Cir. 1981); Hedstrom Co. v. NLRB, 629 F.2d 305, 317 (3d Cir. 1980) (en banc), *cert. denied*, 450 U.S. 996 (1981); Mosher Steel Co. v. NLRB, 568 F.2d 436, 442 (5th Cir. 1978); International Bhd. of Elec. Workers, Local 1547, 225 N.L.R.B. 331, 346 (1976), *enforced*, 96 L.R.R.M. (BNA) 3413 (D.C. Cir. 1977).

121. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1982); *see, e.g.*, Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 287 (1956); NLRB v. Intertherm, Inc., 596 F.2d 267, 271 (8th Cir. 1979); Mosher Steel Co. v. NLRB, 568 F.2d 436, 442 (5th Cir. 1978); NLRB v. Midwest Hanger Co., 474 F.2d 1155, 1159 (8th Cir.), *cert. denied*, 414 U.S. 823 (1973). Section 7 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 . . . ." 29 U.S.C. § 157 (1982).

122. See *infra* text accompanying notes 124-30.

team, and the salary differential,[123] if any, between his old and new contracts. At the same time, the employer would probably also be able to evade his reinstatement obligation, because the injured employee is permitted to decline reinstatement[124] and is likely to do so when he faces animosity or inactivity[125] or when he is under contract elsewhere. In this situation, the traditional remedies falter, and the violating employer thus has little incentive to refrain from future violations of the Act.[126]

In theory, deterrence may be sacrificed in ordinary factory settings as well. A situation allowing an employer to elude the Act could thus be said to have been within the contemplation of Congress when it fashioned these limited remedies.[127] The typical factory setting, however, virtually ensures that traditional labor remedies accomplish their deterrent purposes. An employee in a typical industrial setting can often expect to be out of work for some time after discharge.[128] As a result, the employer may be forced to make a large back pay award. This expenditure would amount to a fine from the employer's perspective (whatever its compensatory effects on the employee) because he is required to pay for labor

123. This amount is likely to be relatively insignificant, because an athlete is generally paid what the market will bear. Therefore, there should be little differential between the two contracts. If there is a significant decrease in salary it may be that the player was dismissed for lawful reasons. See *supra* notes 115-16 and accompanying text.

124. *See* S.E. Nichols of Ohio, Inc., 258 N.L.R.B. 1, 2 (1981), *enforced*, 704 F.2d 921 (6th Cir.), *cert. denied*, 104 S. Ct. 275 (1983); Atlantic Business & Community Dev. Corp., 236 N.L.R.B. 1529, 1529 n.3 (1978); De Marco Concrete Block Co., 224 N.L.R.B. 86, 86 (1976).

125. *Cf.* Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2d Cir. 1984) (discussing the inappropriateness of reinstatement where animosity exists in case arising under the Age Discrimination Employment Act); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984) (same); Dickerson v. Deluxe Check Printers, Inc., 703 F.2d 276, 281 (8th Cir. 1983) (same); Chancellier v. Federated Dep't Stores, 672 F.2d 1312, 1319 (9th Cir.) (same), *cert. denied*, 459 U.S. 859 (1982); Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945, 957 (10th Cir. 1980) (reinstatement inappropriate in Title VII case); EEOC v. Pacific Press Publishing Ass'n, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979) (same) *aff'd*, 676 F.2d 1272 (1982). See *supra* notes 106-09 and accompanying text.

126. Upon finding a violation of the NLRA, the Board will typically order an employer to cease and desist from unlawful conduct, *see* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 263 (1969); Nathanson v. NLRB, 344 U.S. 25, 27 (1952), in addition to any other remedy the Board may impose. An employer who repeatedly violates the Act in defiance of the cease and desist order will be held in contempt, *see* NLRB v. J.P. Stevens Co., 563 F.2d 8, 13 (2d Cir. 1977); C-B Buick, Inc. v. NLRB, 506 F.2d 1086, 1096 (3d Cir. 1974); Dallas Gen. Drivers, Local Union No. 745 v. NLRB, 500 F.2d 768, 771 (D.C. Cir. 1974); NLRB v. Waumbec Mills, Inc., 114 F.2d 226, 235 (1st Cir. 1940), but the consequences are insubstantial, *see* NLRB v. J.P. Stevens, Co., 563 F.2d 8, 21-22 (2d Cir. 1977) (company thought it profitable to ignore the court's decrees); NLRB v. Waumbec Mills, Inc., 114 F.2d 226, 234 (1st Cir. 1940) (employers can make mockery of Act if all Board can do is issue cease and desist order). As a result, the cease and desist order will not by itself accomplish the purposes of the Act.

127. *See generally* 2A N. Singer, Sutherland Statutory Construction § 46.04, at 55 (C. Sands rev. 4th ed. 1984) (when legislature fails to take action it is presumed they have recognized the situation).

128. *See* Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States, 1984, at 422 (104th ed. 1984) (average amount of time of unemployment in 1982 was 15.6 weeks).

never received. In practical effect, this could operate to deter future violations.[129] In a sports setting, on the other hand, a wrongfully discharged athlete can often find employment with another team quickly;[130] in fact, if he cannot, it is possible there was no violation in the first place.[131] Front pay, as a financial outlay related to his unfair labor practice, would therefore operate in the same manner as a sizable back pay award in a factory context. If the Board's remedial orders lack this deterrence element, the Act becomes a hollow shell.[132]

Front pay would also advance the purposes of the Act by reducing the chilling effect on union activity[133] that the dismissal of a player representative may produce.[134] An unpunished dismissal would likely discourage employees from engaging in protected activities in the future because of their fear of reprisals[135] and because past experience demonstrates that the employer incurs few remedial sanctions despite violating the Act.[136]

---

129. See *supra* note 120 and accompanying text.

130. *See* Elmer Nordstrom, No. 2-CA-19101, at 23 (Nov. 23, 1983) (ALJ decision) (appeal pending) (player cut after preseason was hired by another team just prior to second regular season game) (available in files of *Fordham Law Review*); National Football League Management Council, No. 2-CA-13379, at 60 (June 30, 1976) (ALJ decision) (coach said dismissed player "was 'totally incapable' of playing football," but the player was picked up by another team three weeks later and played for that team throughout the year) (available in files of *Fordham Law Review*).

131. It is possible that a player who is dismissed for being a union activist will be blacklisted by the other teams. In that event the player would recover ordinary contractual damages and front pay would be unnecessary. See *supra* note 118.

132. *See* Scoville, *supra* note 1, at 204 (discussing the need for action against management in the sports industry).

133. *Cf.* J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969) (recognizing need to remedy chilling effect); Concord Furniture Indus., 241 N.L.R.B. 643, 648 (1979) (same), *enforced*, 110 L.R.R.M. (BNA) 2225 (1st Cir. 1982); Turtle Creek Convalescent Centres, Inc., 235 N.L.R.B. 400, 404 n.11 (1978) (same); Hydra Tool Co., 222 N.L.R.B. 1113, 1121 (1976) (same); George Lithograph Co., 204 N.L.R.B. 431, 431-32 (1973) (same); Plastics Transp., Inc., 193 N.L.R.B. 54, 58 (1971) (same).

134. *See* Scoville, *supra* note 1, at 208 (noting that player representative has greater chance of being waived or demoted).

135. *See, e.g.*, United Credit Bureau of Am., Inc. v. NLRB, 454 U.S. 994, 995-96, 998 (1981) (Rehnquist, J., dissenting from denial of certiorari) (discussing need to avoid discouraging employees from exercising their rights); J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969) (discussing employee's need for reassurance after persistent violations); *cf.* Wellman Indus. v. NLRB, 490 F.2d 427, 431 (4th Cir.) (discussing unlikelihood of employee talking freely for fear of reprisals if content got back to employer), *cert. denied*, 419 U.S. 834 (1974); Intertype Co. v. NLRB, 401 F.2d 41, 45 (4th Cir. 1968) (same), *cert. denied*, 393 U.S. 1049 (1969); NLRB v. National Survey Serv., 361 F.2d 199, 206 (7th Cir. 1966) (same).

136. *See* S.E. Nichols of Ohio, Inc., 258 N.L.R.B. 1, 1 n.3 (1981) (company's history of unfair labor practices led Board to modify ALJ's order to include broad injunctive language in remedy), *enforced*, 704 F.2d 921 (6th Cir.), *cert. denied*. 104 S. Ct. 275 (1983); *see also* NLRB v. Local 3, Int'l Bhd. of Elec. Workers, 730 F.2d 870, 881 (2d Cir. 1984) (dealt with recidivist union); NLRB v. Union Nacional de Trabajadores, 540 F.2d 1, 12 (1st Cir. 1976) (same), *cert. denied*, 429 U.S. 1039 (1977); Containair Sys. Corp. v. NLRB, 521 F.2d 1166 (2d Cir. 1975) (same); J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969) (finding repeated violations had chilling effect). In *Containair Systems*, the court stated:

The prospect of front pay would deter employer misconduct enough to make employees feel more secure in the exercise of their section 7 rights.

In addition, front pay ultimately benefits the employees whom the Act was designed to protect,[137] because the money paid to the pension fund will eventually be distributed to the players after they have retired. The front pay remedy thus advances the goals of deterring unfair labor practices and protecting employees from such practices. Moreover, in view of the unsuitability of reinstatment in the sports setting, it is the only remedy that can effectuate those policies. As such it falls well within the pale of permissible section 10(c) remedies.

2. Front Pay is Consistent with Section 10(c)

The front pay proposal is consistent with the remedial provisions of the Act. Section 10(c) allows the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."[138] The use of the word "including" means that "the Board has wide discretion in ordering affirmative action; its power is not limited to the example of one type of permissible affirmative order, namely reinstatement with or without back pay."[139] This indicates that the drafters of the Act anticipated that certain situations might require variations on traditional remedies and encouraged the Board to employ them.

In *J.P. Stevens and Co. v. NLRB*,[140] for example, the Second Circuit upheld the Board's imposition of a company-wide remedial order,[141] which represented a significant deviation from typical remedies that are aimed primarily at redress for the injured employee. The Board ordered the employer to take affirmative steps in all its forty-three plants in North and South Carolina, not only in the twenty where unfair labor practices

---

> Without doubt the Board has a duty in a litigated case to employ broader and more stringent remedies against a recidivist than those usually invoked against a first offender particularly where normal remedies have proved to be ineffective after earlier proceedings. Otherwise the Board might fail to carry out the mandates of § 10(c) of the Act . . . .

Id. at 1171.

137. Protection of employees is a well-recognized purpose of the Act. *See* Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 286 (1956); NLRB v. Intertherm, Inc., 596 F.2d 267, 271 (8th Cir. 1979); Mosher Steel Co. v. NLRB, 568 F.2d 436, 442 (5th Cir. 1978); NLRB v. Midwest Hanger Co., 474 F.2d 1155, 1159 (8th Cir.), *cert. denied*, 414 U.S. 823 (1973).

138. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1982).

139. Virginia Elec. & Power Co. v. NLRB, 319 U.S. 533, 539 (1943); *see* NLRB v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-63 (1969); Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 216 (1964); NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953); Phelps Dodge Corp v. NLRB, 313 U.S. 177, 188-89 (1941); International Union of Elec. Workers v. NLRB, 426 F.2d 1243, 1248-49 (D.C. Cir.), *cert. denied*, 400 U.S. 950 (1970); Dixie Bedding Mfg. Co. v. NLRB, 268 F.2d 901, 907 (5th Cir. 1959); NLRB v. Talladega Cotton Factory, Inc., 213 F.2d 209, 216-17 (5th Cir. 1954).

140. 380 F.2d 292 (2d Cir.), *cert. denied*, 389 U.S. 1005 (1967).

141. *Id.* at 305.

had been found.[142] The Board ordered this remedy because it believed that reinstatement and back pay alone would not overcome the employees' fear of reprisals, given that the employer had regularly committed unfair labor practices.[143] As the court noted, "[A] back pay award should not be a 'license fee for union busting' and . . . remedial orders should not be disapproved merely because they are imaginative."[144]

Although not expressly authorized by the statute, the proposed front pay award to the union pension fund falls within the Board's wide discretion to take whatever affirmative action may be required to effectuate the policies of the Act.

3. Punitive Aspects of Front Pay Effectuate the Act's Purposes

In its most common application—ordering the employer to make payments to the pension fund in cases in which the wronged employee is already fully compensated because of employment elsewhere—front pay assumes a somewhat punitive function. Although ordinarily prohibited on the reasoning that such awards thwart the conciliatory purposes of the Act,[145] punitive remedies in unfair labor practice cases are not themselves forbidden by section 10(c).[146] Whether characterized as punitive or compensatory, the remedy's legitimacy depends ultimately on whether it effectuates the purposes of the Act.[147] Reinstatement may not be needed to redress the economic loss of a worker who has obtained an equally profitable job after discrimination, but the Supreme Court has held that to "limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act,

142. *Id.* at 303.

143. *Id.*

144. *Id.* at 303-04 (quoting Staff of Subcomm. on NLRB, House Comm. on Education and Labor, 87th Cong., 1st Sess., Administration of Labor Management Relations Act by NLRB 2 (Comm. Print 1961)).

145. *See* Local 60, United Bhd. of Carpenters v. NLRB, 365 U.S. 651, 655 (1961); Republic Steel Corp. v. NLRB, 311 U.S. 7, 11-12 (1940); Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-36 (1938); NLRB v. Haberman Constr. Co., 641 F.2d 351, 361-62 (5th Cir. 1981); NLRB v. Fort Vancouver Plywood Co., 604 F.2d 596, 602 (9th Cir. 1979), *cert. denied*, 445 U.S. 915 (1980); Local 777, Democratic Union Organizing Comm. v. NLRB, 603 F.2d 862, 890 (D.C. Cir. 1978).

146. *See* 29 U.S.C. § 160(c) (1982).

147. *See* NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346, 348 (1953); United Steelworkers of Am. v. NLRB, 646 F.2d 616, 630 (D.C. Cir. 1981). The Supreme Court in *Seven-Up* said, "It is the business of the Board to give coordinated effect to the policies of the Act. We prefer to deal with these realities and to avoid entering into the bog of logomachy, as we are invited to, by debate about what is 'remedial' and what is 'punitive.'" 344 U.S. at 348. The court in *United Steelworkers* recognized the danger that "purely 'compensatory' remedies may fail in some cases to effectuate fully the purposes of the Act." 646 F.2d at 630. The court noted the possibility that reinstatement and back pay in an unlawful discharge case may amount to a mere "license fee for union busting." *Id.* (quoting Staff of Subcomm. on NLRB, House Comm. on Education and Labor, 87th Cong., 1st Sess., Administration of Labor Management Relations Act by the NLRB 2 (Comm. Print 1961)); *accord* J.P. Stevens & Co. v. NLRB, 380 F.2d 292, 303 (2d Cir.) (same), *cert. denied*, 389 U.S. 1005 (1967).

directed as that is toward the achievement and maintenance of workers' self-organization."[148] The Board does not exist for the adjudication of private rights; it acts in a public capacity to give effect to the policies of the Act.[149] Therefore, when the goal of reconciliation is unattainable, as in sports cases, it is proper to fashion remedies to accomplish the equally compelling goal of deterrence.[150] The front pay alternative effectuates this purpose.[151] In fact, because of the failure of the traditional remedies to accomplish either reconciliation or deterrence, a broad ban on punitive remedies would actually obstruct the policies of the Act in sports cases. Front pay thus emerges as the only viable remedy to secure the public's interest in the effective enforcement of its labor laws in the sports industry.

CONCLUSION

In an industry in which employment decisions are highly discretionary and in which wide variations concerning the value of each employee exist among the industry's employers, the employers should be given much latitude in hiring and firing their employees. This is particularly true in sports cases when an employer is accused of dismissing an employee for union activity. The burden of proof currently used in section 8(a)(3) cases does not give such an employer the needed leeway, because in order to exculpate himself from the charge he must prove a subjective motive by objective evidence. The burden of proof proposed in this Note gives the employer the opportunity to defend his conduct because it requires only that he articulate a legitimate reason for the dismissal.

The unique nature of the sports industry also requires the adoption of new remedies for section 8(a)(3) violations. The traditional remedies of reinstatement and back pay are ineffective and consequently cannot be expected to discourage a guilty employer from continuing to commit unfair labor practices. The front pay remedy provides the needed deterrence and ensures that the policies of the NLRA are fully effectuated in the sports context.

Jeffrey Goore

148. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 192-93 (1941).

149. *Id.* at 193; National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1941); Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 267-68 (1941).

150. See *supra* note 121 and accompanying text.

151. See *supra* notes 119-37 and accompanying text.