

NLRB Clarifies “Wright Line” Test

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By: Tom H. Luetkemeyer

When motive is at issue in resolving certain unfair labor practices under the National Labor Relations Act (NLRA), the National Labor Relations Board (the Board) utilizes the burden-shifting framework established under *Wright Line* to make a determination. In *Tschiggfrie Properties, Ltd.*, the Board took the opportunity to clarify the initial burden of proof required by the General Counsel in light of what it perceived to be confusion over a number of its recent decisions, as well as criticism from a number of federal courts, including, most recently, the Eighth Circuit.

The General Counsel of the Board must demonstrate that protected conduct was a motivating factor in an employer’s decision to terminate or take action. The question is whether the General Counsel meets the initial burden with evidence of *any* animus or hostility toward the union, or whether the General Counsel must show sufficient evidence of animus to support a finding of a causal relationship between the employee’s protected activity and the employer’s adverse action. In *Tschiggfrie Properties*, Case 25-CA-161304, the Board confronted a situation where an employee supporting a union organizing drive eventually was terminated. The Board addressed and clarified the appropriate proof paradigm under *Wright Line*, 251 NLRB 1083 (1980).

In *Tschiggfrie Properties*, the Board traced the release of a number of significant decisions beginning with *Wright Line* to the present. Under *Wright Line*, the General Counsel first must make a *prima facie* showing support of the inference that protected conduct was a “motivating factor” in the employer’s decision. Once established, the burden shifts to the employer to



demonstrate that the same action would have taken place even in the absence of protected conduct. The Board referred to this framework as a “causation test”, and referred to its “task” as determining whether a causal relationship exists between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect employment.

As noted, the Eighth Circuit has taken the Board to task on multiple occasions for not applying the appropriate proof paradigm under *Wright Line*. Likewise, the Seventh Circuit has held the General Counsel, under a *Wright*

Line analysis, must establish “a causal connection between the employer’s anti-union animus and the specific adverse employment action on the part of the decision maker.” The Board believed clarification was necessary because a number of cases may have been interpreted to suggest that any evidence of anti-union animus may trigger burden-shifting framework under *Wright Line*. Thus, the Board expressly overruled those cases, including *Libertyville Toyota*, 360 NLRB 1298 2014.

The Board was careful to note that it was not holding that the General Counsel must produce *direct* evidence of animus against an alleged employee’s union or other protected activity. Instead, an unlawful motive may be inferred from all of the surrounding circumstances. The decision clarifies the General Counsel’s initial evidentiary burden under *Wright Line*, and provides meaningful arguments for employers in the defense of unfair labor practice cases. Notably, stray comments and other evidence unrelated to protected activity and an adverse action against an employee may be insufficient to trigger the burden-shifting framework. The Board now has made *crystal clear* there must be some evidence—direct or circumstantial—demonstrating that anti-union animus was a motivating factor in the adverse action at issue before the burden shifts to the employer to demonstrate the same action would have been taken in the absence of the unlawful motive.

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