The Shocking State of the Board’s Section 8(a)(3) Decisions

Robin Kowal*

The Child’s Toys and the Old Man’s Reasons
Are the Fruits of the Two Seasons.
The Questioner, who sits so sly,
Shall never know how to Reply.
He who replies to words of Doubt
Doth put the Light of Knowledge out.

William Blake

The function of an agency is to develop knowledge—that is expertise—in the areas in which it operates. The National Labor Relations Board (the Board), however, does not function as an expert. This is seen in the Board’s 8(a)(3) decisions.

Section 8(a)(3) of the National Labor Relations Act states that it is an unfair labor practice for an employer to discriminate in regard to hire or any condition of employment in order to encourage or discourage membership in a labor organization. Most 8(a)(3) cases deal with the disciplining (often discharge) of a union activist during a union campaign.

Section 8(a)(3) is of central importance to the American labor movement. It protects the critical right of labor unions—the right to organize—and, as such, is involved in every organizing drive. Section 8(a)(3) cases form the bulk of the Board’s employer unfair labor practice work. In the Board’s fiscal year 1979, 17,220 8(a)(3) charges were filed, constituting 59% of the total unfair labor practice charges against

* B.A. 1971, Simmons College; J.D. 1975, Suffolk University Law School. The author wishes to thank her father and law partner, Harold M. Kowal; this article expresses many of his ideas. Mr. Kowal was with the National Labor Relations Board for thirty years, ten as regional attorney in Region 1. To him, the author owes her deep interest in labor law. The author also wishes to thank Katherine Stone, David Kern, and Esther Kowal.

3. A union activist is an employee who wants the union to represent the employees and shows this in some way, for example, by speaking favorably about the union or by signing an authorization card.
employers. 4

In 1977, Harold M. Kowal and I studied 120 8(a)(3) decisions drawn randomly from May 22, 1976 through December 3, 1976. 5 We found two-thirds of these were based on credibility reasoning. We were surprised; for centuries, judges have attempted to base decisions on more "objective" evidence. We wondered how the Board, relying on credibility reasoning, could fulfill its role as an expert. We were faced with the following questions: are there types of objective evidence that can be used by the Board in 8(a)(3) cases that would avoid the use of credibility reasoning? If so, does this type of evidence appear in the cases we studied? And, can such evidence be clearly described?

We found there are types of objective evidence that can be used in 8(a)(3) cases. They are present in the cases we studied; they can be described.

The first type of objective evidence, and that which is most glaringly absent from 8(a)(3) decisions, is the evidence of employer records of discipline and discharge. These records reveal the disciplinary system that each employer must have in order to correct deficiencies, and the standards by which these deficiencies are judged. In an 8(a)(3) case, the issue is always whether an employee was disciplined because of her union activity. The evidence of the employer's past practice, therefore, is crucial in evaluating the employer's justification.

For example, an employer may state that it discharged a union activist for absenteeism. The employer's records show that the employee had been absent three times; yet many other employees also had been absent three times without being discharged. The Board can conclude that the employee was discharged for union activity. The only alternative is to assume that the employer departed from its past practice to institute a new rule. The Board could test this alternative justification by inquiring into the employer's past methods of instituting rules.

Judging an employer by its own records is the antithesis of judging an employer by how it performs at trial. Judging an employer by its own records requires an acknowledgement that employers must operate within an economic system with clearly defined rules. The predominant economic rules are that employers must make a profit, and that they make this profit by employing productive workers. These rules form a second type of objective evidence. Employer records document these rules and derive their validity from the inexorable nature of these rules.

There is a third type of objective evidence. It reflects an agency's

recognition of its experience, which is the process by which expertise is developed. Such evidence is most clearly seen in the forms of inferences and presumptions, although it has other forms. The Board uses this evidence, but only sporadically. It has used it, for example, in 8(a)(3) cases in connection with the word "attitude." In *Helena Laboratories Corporation*, the Administrative Law Judge (ALJ) wrote:

The Board has frequently found that the use of the word "attitude" by an anti-union employer to describe union activists in an adverse light is merely an oblique way of criticizing pro-union sentiment.7

The Board's experience has shown that when a union activist has been fired for "attitude," that employee has been fired for union activity. This experience conforms with the general economic truth that workers are judged by what they produce, not by their attitude. In any particular 8(a)(3) case, this experience could be confirmed by an examination of the employer's records to see if any but the union activists had been discharged for "attitude."

Although the Board at times has given the word "attitude" significance, it does not always do so. In many 8(a)(3) cases involving "attitude," there is no use of the Board's experience.8 Objective evidence is thus reduced to a gnomic utterance.

Credibility reasoning is an examination of personality; the objective evidence I have described is an examination of an economic system. Credibility reasoning in 8(a)(3) cases is the negation of the idea that an economic system makes evaluations of personality—that is, credibility reasoning—useless.

*Spalding, Division of Questor Corp.*9 is an 8(a)(3) case typical in its use of credibility reasoning and its failure to use objective evidence.10 Spalding is a manufacturer and distributor of sporting goods. It opened a warehouse in Indianapolis in June of 1975. Among those hired to staff the warehouse was Randall Wing, 18 years old. Wing's father was a salesman for Spalding and a friend of the regional manager.

At the end of October, Wing and two other employees started talking about a union. A leadman who also participated in these conversations reported the conversation to the warehouse supervisor. At the end of November and the beginning of December, Wing and the two

7. Id. at 267, 93 L.R.R.M. at 1420.
8. Of the 120 cases we studied, 15 involved discharges for "attitude." The relationship between "attitude" and union activity was recognized in only two of these cases.
9. 225 N.L.R.B. 946, 93 L.R.R.M. 1017 (1976). All facts referred to in the text were found in the ALJ's findings, which were adopted by the board.
10. This case is typical of both the cases we studied and those decided today. For a recent example, see *International Medication Sys., Inc.*, 247 N.L.R.B. No. 190, 103 L.R.R.M. 1317 (Feb. 22, 1980).
other employees spoke with a Teamster's business representative. On December 2, the regional manager and personnel representatives from the Respondent's home office conducted a meeting with all employees. On December 3 and 4, individual meetings were held, at which the employee's job performance was discussed. Wing's meeting took place on December 3. It is not clear what in particular was said at this meeting. However, on December 5, the warehouse supervisor reported to the regional manager that Wing's performance had not improved and recommended firing Wing. The regional manager, who stated at the trial that he had already been thinking of firing Wing, did so that same day, after conferring with a vice-president of the Respondent. At the trial, the Respondent maintained that Wing was fired because he had "a terrible attitude which manifested itself in poor, slow, and sloppy work. . ." The complaint alleged that Wing's discharge violated section 8(a)(3), and, in addition, that certain remarks made by the Respondent violated section 8(a)(1).

The ALJ began his analysis of the allegations by stating:
The principal issue here concerns the discharge of Randall Wing on December 5, 1975. The question is not whether the Company should or not have discharged him. Nor is the question whether Wing was a good, poor, or average employee. The issue is whether Wing's discharge was precipitated at least in part by his union activity. Regardless of whether or not the Company had good reasons, if his activity on behalf of the union was a motivating cause for his eventual discharge then under the clear proscription of the Act, and thousands of Board determinations, the Company violated section 8(a)(3).

The ALJ resolved the "principal issue" by making credibility resolutions.

From my observation of Wing, both during his testimony and throughout the hearing, I conclude that the Company's evaluation of him is not only reasonable but is correct. Wing seems an intelligent young man; however, he does have a superior attitude. It is easy to see how he

11. The Teamsters Union was the charging party.
12. 225 N.L.R.B. at 948.
13. National Labor Relations Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1976). Section 8(a)(1) states: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7]." Section 7 states in relevant part: "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. . . ." National Labor Relations Act § 7, 29 U.S.C. § 157 (1976).
14. 225 N.L.R.B. at 947-48. Under Wright Line, the General Counsel must present prima facie evidence that union activity was a "motivating factor" of the employer's action. Then, the employer must prove that it would have acted in the same way even if there had been no union activity. 251 N.L.R.B. No. 150, slip op. at 20, 105 L.R.R.M. 1169, 1173 (August 27, 1980). This new standard, based on Mount Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), has replaced the "in part" standard formerly used by the Board.
would be a very difficult employee to supervise and would be an employee whose attitude could affect others. From Wing's testimony it is clear that he feels he was an outstanding employee; indeed, superior to his supervisors and that he should not have been fired. It is therefore Wing's conclusion that the Company must have fired him for some reason other than his performance and attitude—his union activity.

I do not find this to be the case. Again based on his demeanor, crediting the Company's witnesses and noting Wing's testimony, it is clear that the Company had substantial justification for effecting his discharge. It is also believable that the decision to discharge him was very difficult because his father was a friend of [the regional manager].

Later in the decision, the ALJ asserted that:

To find that the General Counsel has sustained his burden of proving that a motivating cause for Wing's discharge was his union activity would require discrediting all of the Respondent's witnesses. . . . It would require totally crediting Wing's testimony concerning his own work activity which I found to be somewhat exaggerated. Based upon my observation of the witnesses, I am not willing to discredit all of the Respondent's witnesses in favor of Wing. In this credibility resolution, I do not necessarily have to find that Wing was deliberately attempting to mislead me. I rather conclude that he is a young man with an attitude described by the Company . . . who seeks vindication and who, within the context of this situation, necessarily testified in a light most favorable to himself.

This is the thrust of the ALJ's reasoning; he found no violations. On appeal from the ALJ's decision, the Board left this reasoning undisturbed and agreed with the ALJ that Wing's discharge did not violate section 8(a)(3).

The Spalding decision is based on credibility reasoning. There is no use of objective evidence, although objective evidence in some form was certainly available. The Board could have subpoenaed the Respondent's records of discipline and discharge in an attempt to ascertain the meaning, in the Respondent's system, of a "terrible attitude which manifested itself in poor, slow and sloppy work. . . ." Further, the Board could have evaluated "attitude" in terms of its meaning in the Board's experience. Helena was decided just prior to Spalding, yet there is no mention of Helena in Spalding.

15. 225 N.L.R.B. at 950.
16. Id.
17. Id.
18. Id. at 946, 93 L.R.R.M. at 1017. The Board did find, contrary to the ALJ, that the Respondent threatened its employees with layoffs if a union was voted in, thereby violating section 8(a)(1). See note 13 supra.
20. 225 N.L.R.B. 946, 93 L.R.R.M. 1017. Additional objective evidence ignored in Spalding,
I have presented this case not because it is egregious, but because it is characteristic of the Board's method. The criteria of an 8(a)(3) decision changes almost from case to case, thereby creating terrible confusion. Not only are the tools used primitive and unreliable, but also, and above all, the Board refuses to use the types of knowledge that will enable it to understand the world it governs, the world in which it must be an expert. In the world of credibility reasoning, the Light of Knowledge flickers weakly.

These defects are of interest in themselves; however, they also have the greatest relevance in that they cripple the union movement.