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## The NLRB in Search of a Standard: When Is the Discharge of a Supervisor in Connection With Employees' Union or Other Protected Activities an Unfair Labor Practice?

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### I. INTRODUCTION

In 1947, Congress enacted the Taft-Hartley amendments<sup>1</sup> to the National Labor Relations Act<sup>2</sup> which, *inter alia*, excluded supervisors from the statute's protective ambit afforded to employees who engage in union or other protected concerted activities.<sup>3</sup> As the United

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<sup>1</sup>Labor Management Relations Act (Taft-Hartley Act), 1947, Pub. L. No. 101, 80th Cong., 1st Sess., 61 Stat. 136 (1947) (codified at 29 U.S.C. § 151 (1976)) [hereinafter cited as the "Act"].

<sup>2</sup>National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (current version at 29 U.S.C. § 160 (1976)).

<sup>3</sup>Prior to 1947, the Board interpreted the term "employee" to include supervisors. *NLRB v. North Arkansas Electric Co-op Inc.*, 446 F.2d 602, 605 (8th Cir. 1971). The 1947 Act amended the National Labor Relations Act of 1935 to exclude "any individual employed as a supervisor" from the definition of the term "employee." 29 U.S.C. § 152(3) (1976). Consequently, supervisors are not covered by §§ 7 and 8(a)(1) of the Act, 29 U.S.C. §§ 157 and 158(a)(1) (1976), which protect *employees* from employer interference, restraint, or coercion because they have engaged in protected activities. Section 7 provides in pertinent 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 and shall also have the right to refrain from any or all such activities . . . .

Section 8 of the Act provides in part:

- (a) It shall be an unfair labor practice for an employer—  
(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

29 U.S.C. § 158 (1976).

The Taft-Hartley Act made other changes in the National Labor Relations Act

States Supreme Court has noted, the amendments "freed employers to discharge supervisors without violating the Act's restraints against discharges on account of labor union membership."<sup>4</sup> Yet, the National Labor Relations Board (hereinafter referred to as the "Board") has held in a number of cases that an employer's discharge of a supervisor, in connection with rank-and-file employees' union or other protected concerted activities, violated section 8(a)(1) of the Act.<sup>5</sup> The effect of many of these decisions is to require an employer to reinstate (with back pay) a discharged supervisor whose activities were antagonistic to the interests of higher management. For example, in *Production Stamping, Inc.*<sup>6</sup> the Board found that the respondent-employer had violated section 8(a)(1) by discharging a supervisor who was one of the three principal organizers of a union among the rank-and-file. The Board ordered that the supervisor be reinstated with back pay plus interest and that the employer restore to him all rights and privileges of employment. In cases like this, the Board

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with respect to supervisors. See § 2(11) of the Act, 29 U.S.C. § 152(11) (1976), which defines "supervisor," and § 14(a) of the Act which provides:

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

29 U.S.C. § 164 (1976).

<sup>4</sup>*Beasley v. Food Fair, Inc.*, 416 U.S., 653, 654-55 (1974) (§ 14(a) of the Act barred enforcement of a state law providing for damages as a remedy for the discharge of a supervisor for union membership).

Section 8(a)(3) of the Act, 29 U.S.C. § 158(a)(3) (1976) states that it is an unfair labor practice for an employer to discriminate in "any term or condition of employment to encourage or discourage membership in any labor organization . . ." This provision protects employees, not supervisors, from discharge because they have engaged in union activities. See, e.g., *Fairview Nursing Home*, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973), *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

<sup>5</sup>E.g., *Empire Gas Co.*, 254 N.L.R.B. No. 76 (Jan. 14, 1981); *G & M Lath and Plaster Co.*, 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); *Sheraton Puerto Rico Corp.*, 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); *DRW Corp.*, 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980); *Nevis Industries Inc.*, 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979); *Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979); *Budget Marketing, Inc.*, 241 N.L.R.B. 1108, 101 L.R.R.M. 1068 (1979); *Production Stamping, Inc.*, 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); *East Belden Corp.*, 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978); *Donelson Packing Co.*, 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced* 569 F.2d 430 (6th Cir. 1978); *VADA of Oklahoma, Inc.*, 216 N.L.R.B. 750, 88 L.R.R.M. 1631 (1975); *Fairview Nursing Home*, 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973), *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974); *Krebs & King Toyota, Inc.*, 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972); *Pioneer Drilling Co.*, 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

<sup>6</sup>239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).

has reasoned that the employer's discharge of a supervisor is unlawful because the employer's conduct interfered with, restrained, or coerced nonsupervisory employees in the exercise of the rights guaranteed them by section 7 of the Act. Generally, the Board finds the employer's action to be violative of section 8(a)(1) because it was an integral part of a pattern of misconduct aimed at penalizing employees for engaging in union or other protected concerted activities.

This Article will explore, analyze, and finally, criticize the Board's development of the concept that it is an unfair labor practice to discharge a supervisor in order to discourage union or other protected activities by employees. It appears that in its zeal to protect the rights of nonsupervisory employees, the Board has failed to focus on the congressional determination that an employer must be free to discharge and discipline supervisors in furtherance of its legitimate interest in opposing unionization by lawful means. Moreover, the Board has failed to develop a standard for resolving these cases which emphasizes factors that are germane to the question of whether the discharge of a supervisor *in fact* tends to interfere with, restrain, or coerce employees in the exercise of their statutory rights, which promotes the fair and efficient administration of the Act, and which takes into account the realities of life in the workplace.

## II. THE DEVELOPMENT OF BOARD POLICY

Relatively soon after the Taft-Hartley Act was adopted by Congress, the Board recognized that there were instances in which the discharge or discipline of a supervisor would constitute an unfair labor practice although supervisors were excluded from the Act. Over the years, the Board rendered a series of decisions which established that an employer runs afoul of section 8(a)(1) by discharging or disciplining a supervisor under certain circumstances: because he or she refused to commit unfair labor practices;<sup>7</sup> because

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<sup>7</sup>See, e.g., *American Feather Products*, 248 N.L.R.B. 1102, 104 L.R.R.M. 1185 (1980) (demotion and termination of supervisor for her refusal to unlawfully interrogate employees (her daughters) about union activities violated § 8(a)(1)); *Belcher Towing Co.*, 238 N.L.R.B. 446, 99 L.R.R.M. 1566 (1978), *enforced in material part*, 614 F.2d 88 (5th Cir. 1980) (§ 8(a)(1) violated by discharge of supervisor who refused to engage in unlawful surveillance of his crew's union activities); *Gerry's Cash Markets, Inc.*, 238 N.L.R.B. 1141, 99 L.R.R.M. 1617 (1978), *enforced*, 602 F.2d 1021 (1st Cir. 1979) (employer violated § 8(a)(1) by demoting supervisor because he had failed to enforce invalid no-solicitation rule aimed at stopping conversation relating to union activity); *Russell Stover Candies, Inc.*, 223 N.L.R.B. 592, 92 L.R.R.M. 1240 (1976), *enforced*, 551 F.2d 204 (8th Cir. 1977) (discharge of supervisor for refusing to continue unlawful

the supervisor refused to silently acquiesce in the employer's plan to engage in unfair labor practices;<sup>8</sup> or because the supervisor participated in Board proceedings<sup>9</sup> or in contractually-required grievance or arbitration proceedings.<sup>10</sup>

To be distinguished from these kinds of cases are *Pioneer Drilling* and its progeny discussed below, decisions in which the Board has held it to be an unfair labor practice for an employer to discharge a supervisor in furtherance of its efforts to thwart a union organization drive among its rank-and-file workers or similarly protected concerted activities by employees.<sup>11</sup> For, unlike the earlier kinds of cases, in *Pioneer Drilling* and succeeding decisions, the discharged supervisor often was actively involved in a unionization drive among employees or in similar activities not in higher management's best interests. In these circumstances, the effect of the Board's finding that the supervisor's discharge was unlawful was to compel an employer to reinstate, with back pay, a supervisor who was disloyal in management's eyes. Thus, the policy issues to be addressed here are distinguishable from those of the earlier decisions where the Board first developed the concept that the discharge of a supervisor could violate section 8(a)(1).<sup>12</sup>

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surveillance of employees' union activities violated § 8(a)(1)); Talladega Cotton Factory, Inc., 106 N.L.R.B. 295, 32 L.R.R.M. 1497 (1953), *enforced*, 213 F.2d 209, 215-17 (5th Cir. 1954) (employer's discharge of supervisors, who had reluctantly committed unfair labor practice, for failure to halt unionization violated § 8(a)(1)).

<sup>8</sup>See, e.g., Buddies Super Market, 223 N.L.R.B. 950, 92 L.R.R.M. 1008 (1976), *enforcement denied*, 550 F.2d 39 (5th Cir. 1977) (Board panel held that discharge of a supervisor for exposing employer's scheme to unlawfully fire an employee because of his union affiliation violated § 8(a)(1)).

<sup>9</sup>See, e.g., Oil City Brass Works, 147 N.L.R.B. 627, 56 L.R.R.M. 1262 (1964), *enforced*, 357 F.2d 466 (5th Cir. 1966) (employer's refusal to recall a supervisor from layoff because supervisor had testified adversely to employer at Board hearing violated § 8(a)(1)); Better Monkey Grip Co., 115 N.L.R.B. 1170, 38 L.R.R.M. 1025 (1956), *enforced* 243 F.2d 836 (5th Cir. 1957), *cert. denied*, 355 U.S. 864 (1957) (employer violated § 8(a)(1) by discharging supervisor because he gave testimony adverse to employer's interests at Board hearing).

<sup>10</sup>See, e.g., Illinois Fruit & Produce Corp., 226 N.L.R.B. 137, 93 L.R.R.M. 1224 (1976) (discharge of supervisor for giving truthful testimony adverse to employer at arbitration hearing violated § 8(a)(1)); Rohr Industries, Inc., 220 N.L.R.B. 1029, 90 L.R.R.M. 1541 (1975) (§ 8(a)(1) violated by supervisor's layoff because he had provided union representative with a signed statement supportive of grievant's position in arbitration).

<sup>11</sup>See cases cited note 5 *supra*.

<sup>12</sup>One may not assume that Congress withdrew supervisors from the Act in order to permit employers to compel supervisors to commit unfair labor practices or to acquiesce in their commission. Nor may one assume that Congress excluded supervisors so as to allow employers to stand as obstacles to the Board's or an arbitrator's fact-finding function in vindication of employee rights under the statute or pursuant to a collective bargaining agreement. Thus, there may be no conflict between the congres-

*Pioneer Drilling*<sup>13</sup> is seen as the genesis of that line of cases where the Board evolved the concept that a supervisor's discharge in connection with reprisals against employees' union or other protected concerted activities may violate section 8(a)(1).<sup>14</sup> However, the case may be no more than a logical extension to a unique factual setting of the earlier rule that an employer may not coerce a supervisor into committing unfair labor practices. Indeed, the unusual facts of *Pioneer Drilling* set that decision apart from its progeny and make the Board's reliance on its authority in subsequent decisions questionable.

The litigation in *Pioneer Drilling* arose because of a drilling industry practice which dictated that when a supervisor's employment is terminated, the employment of the rank-and-file workers he supervises also terminates. The employer discharged two supervisors to effect the illegal termination of their crews where union organizational activity was centered. The action taken against supervisors was not based on their own pro-union activity (although both had signed union authorization cards) but was designed to rid the company of the pro-union employees. The supervisors' discharges were found to violate section 8(a)(1) because they were "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."<sup>15</sup>

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sional determination to exclude supervisors from the Act's ambit and the Board's decisions that it is unlawful to fire a supervisor because he refused to commit or opposed unfair labor practices, or because he participated in contractual grievance or arbitration proceedings or in Board proceedings. However, Congress did exclude supervisors from the Act so that an employer could discipline and discharge supervisory personnel and thereby insure their undivided loyalty. See text accompanying notes 52-57 *infra*. Thus, one may find a conflict between congressional intent and the outcome of cases like *Pioneer Drilling*, 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968) and its progeny in which employers were compelled to reinstate supervisors who had assisted employees in establishing a union or who had engaged in other activities adverse to higher management's interests.

<sup>13</sup>162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

<sup>14</sup>In a case prior to *Pioneer Drilling*, *Heck's Inc.*, 156 N.L.R.B. 760, 764-65, 61 L.R.R.M. 1128, 1133 *enforced in part*, 386 F.2d 317 (4th Cir. 1967), a Board panel rejected the contention that the discharge of two supervisors violated § 8(a)(1) because it was not shown "that their discharge was motivated other than by a purpose to discourage their union activities as supervisors. . . ." Although this opinion presages the policy to be enunciated by the Board in subsequent supervisor discharge cases, decisions after *Pioneer Drilling* seem to treat that case, and not *Heck's Inc.*, as significant in the history of Board policy. See, e.g., former Member Truesdale's statement in *DRW Corp.*, 248 N.L.R.B. 828, 93 L.R.R.M. 1506 (1980) that *Pioneer Drilling* is the first in the line of supervisor discharge cases.

<sup>15</sup>162 N.L.R.B. at 923, 64 L.R.R.M. at 1126. The "integral part of a pattern of conduct" language was quoted from *Miami Coca Cola Bottling Co.*, 140 N.L.R.B. 1359, 1361,

The "integral part of a pattern of conduct" rationale of *Pioneer Drilling* might have been applied only to those peculiar cases in which the discharge of a supervisor is the vehicle for unlawful acts committed directly against employees protected by the Act (e.g., where the discharge of a supervisor is the means by which the employer unlawfully discharges nonsupervisory employees). However, the Board did not so limit the application of this rationale.

In 1972, in *Krebs & King Toyota, Inc.*,<sup>16</sup> a Board panel<sup>17</sup> applied the reasoning of *Pioneer Drilling* to a case where the supervisor's discharge was not the means by which the employer effected the unlawful termination of protected employees.<sup>18</sup> However, the Board characterized the facts in *Krebs & King Toyota* to suggest that *Pioneer Drilling* was squarely applicable<sup>19</sup> and found that the

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52 L.R.R.M. 1242 (1963), enforced, 213 F.2d 208 (5th Cir. 1954) in which the Board held unlawful a supervisor's discharge for failing to cooperate in the employer's unlawful plan to discharge union adherents and replace them with new employees.

<sup>16</sup>197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972).

<sup>17</sup>The panel consisted of Board Members Jenkins, Kennedy and Penello. Member Kennedy dissented from the holding that the discharges of the supervisors violated § 8(a)(1). *Krebs & King Toyota, Inc.*, 197 N.L.R.B. 462, 464-65, 80 L.R.R.M. 1570, 1573 (1972).

<sup>18</sup>In *Krebs & King Toyota, id.*, the employer sold cars, operated a service and parts department, and maintained a body shop which employed Supervisor Gallenz and two nonsupervisory employees. When the employees of all departments went on strike, the employer subcontracted its body repair work. During the strike, Supervisor Gallenz, who was pro-union, spoke for striking employees. When the strike was settled and the strikers returned to work, the body shop remained closed and the employer continued to subcontract that work. Contrary to the trial examiner's conclusion, the Board panel held that the employer's subcontracting of the body shop work and its refusal to re-employ the two body shop employees was unlawfully motivated by a desire to discourage union activities and therefore violated §§ 8(a)(1) and 8(a)(3) of the Act. *Id.* at 462-63, 80 L.R.R.M. at 1571-72. Citing *Pioneer Drilling*, a majority of the Board panel further held that the termination of Supervisor Gallenz violated § 8(a)(1). *Id.* at 463 n.4, 80 L.R.R.M. at 1573.

<sup>19</sup>The Board panel created the impression that the facts of *Krebs & King Toyota* were similar to *Pioneer Drilling* (where the supervisors' discharges effected the illegal discharges of pro-union employees) by describing the supervisor's discharge as "effectuating" the employer's discriminatory decision to subcontract the body shop work and not recall employees. *Id.* at 463 n.4, 80 L.R.R.M. at 1572-73. Moreover, the Board panel suggested that the termination of the supervisor and the illegal termination of the employees were related as in *Pioneer Drilling* by noting the employer's understanding that the employees would not return to work without the body shop supervisor. *Id.* at 462 n.2., 80 L.R.R.M. at 1572. The inference to be drawn is that this case is like *Pioneer Drilling* where the employer's termination of a supervisor caused the termination of nonsupervisory employees protected by the Act.

It is debatable how closely the facts in *Krebs & King Toyota* resemble *Pioneer Drilling*. In the former case, the termination of the body shop supervisor may have been seen by the employer as a necessary step in effecting the illegal termination of the body shop employees. The employer subcontracted the body shop work as a

discharge of the supervisor violated section 8(a)(1) as "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."<sup>20</sup>

In *Fairview Nursing Home*,<sup>21</sup> a Board panel<sup>22</sup> broke new ground when a majority of the three-member panel held that it was unlawful for the employer to discharge two supervisors (as well as more than forty rank-and-file employees) in an effort to rid itself of all union adherents.<sup>23</sup> While in *Pioneer Drilling* and in *Krebs & King Toyota* there was, or appeared to be, a causal link between the discharge of the supervisor and the unlawful termination of employees engaged in union activities, in *Fairview Nursing Home* there was no such causal relationship between the discharges of the two supervisors and the unfair labor practices committed directly against the employees.<sup>24</sup> The decision of the administrative law judge, which was adopted by the majority with some modification,<sup>25</sup>

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subterfuge to rid itself of the pro-union employees, the Board panel held. *Id.* at 462-63, 80 L.R.R.M. at 1572-73. To paint a convincing picture that the closing of the body shop was an economic necessity, the employer may have thought it had to lay off all individuals employed in the body shop, including the supervisor. In this sense, then, the termination of the supervisor was a significant step in effecting the termination of rank-and-file employees.

On the other hand, unlike *Pioneer Drilling*, the discharge of the supervisor was not inseparable from the illegal termination of the pro-union employees. The employer could have retained the supervisor in its employ while illegally terminating the body shop employees. Analyzed as separable acts, the discriminatory refusal to recall the employees would be illegal, but the failure to recall the supervisor might be viewed as a legal exercise of the employer's prerogative to fire a supervisor because he engaged in union activities. The *Mousetrap of Miami, Inc.*, 174 N.L.R.B. 1060, 70 L.R.R.M. 1429 (1969) (it is not unlawful for an employer to fire a supervisor because he had engaged in union activities). It should be noted that the Board panel never addressed whether the employer's termination of Supervisor Gallenz was motivated by hostility to the supervisor's active participation in union activities.

<sup>20</sup>197 N.L.R.B. at 463 n.4, 80 L.R.R.M. at 1573.

<sup>21</sup>202 N.L.R.B. 318, 82 L.R.R.M. 1566, *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

<sup>22</sup>The panel consisted of Members Jenkins, Kennedy and Penello. Member Kennedy dissented from the majority's holding that the discharges of two supervisors violated § 8(a)(1). *Id.* at 318 n.2, 82 L.R.R.M. at 1566.

<sup>23</sup>*Id.*

<sup>24</sup>The discharges of the two supervisors neither affected nor effectuated the unlawful discharges of more than forty employees in violation of §§ 8(a)(1) and 8(a)(3) of the Act. The employer's owner simply discharged at one time all individuals (including two supervisors) who had signed union authorization cards. Although the employer's owner drew no distinction between employees and supervisors when she discharged them as a group, the Board might have focused on their differing coverage by the Act. 202 N.L.R.B. at 318, 82 L.R.R.M. at 1566.

<sup>25</sup>The majority of the Board panel affirmed the rulings, findings and conclusions of the administrative law judge and adopted his recommended order. 202 N.L.R.B. at 318, 82 L.R.R.M. at 1569. However, the Board panel corrected the administrative law

emphasized that the discharges of the two supervisors violated section 8(a)(1) because of the context in which they occurred; they were a part of the employer's total strategy to rid itself of the union by committing unfair labor practices.<sup>26</sup>

Many decisions were rendered subsequent to *Fairview Nursing Home* which indicate that the discharge of a supervisor may be considered illegal as an integral part of a pattern of conduct aimed at penalizing employees for exercising their statutory rights if the discharge is factually related, although not causally connected,<sup>27</sup> to other unfair labor practices directed against employees.<sup>28</sup> Three decisions, *Downslope Industries*,<sup>29</sup> *Nevis*

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judge's erroneous conclusion that the discharges of the supervisors violated § 8(a)(3) (as well as § 8(a)(1)) of the Act and former Member Penello stated his own reasons for concurring in the conclusion that the discharges were unlawful. *Id.* at 318 n.2, 82 L.R.R.M. at 1569. See notes 21-36 and accompanying text *supra*.

<sup>26</sup>The administrative law judge stated in pertinent part:

There is no doubt that Mrs. Johnston [employer's owner] intended to and did discharge employees because they signed union cards and that the true purpose of the Respondent was to discourage membership in a labor organization. The discharges of card signers [supervisors] Henderson and Grammer were in furtherance of the same purpose and a part of the Respondent's strategy to rid itself of the Union. Their discharges had a tendency to cause employees to forsake or avoid membership in a union for fear that they would be subjected to the same reprisal. As stated in *Miami Coca-Cola Bottling Company d/b/a Key West Coca Cola Bottling Company* 140 NLRB 1359, 1361, discharges such as those of Henderson and Grammer are "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." (Cited with approval in *Krebs & King Toyota, Inc.*, *supra*).

*Fairview Nursing Home*, 202 N.L.R.B. at 324 n.34, 82 L.R.R.M. at 1571.

<sup>27</sup>A "causal connection" presupposes that the discharge of a supervisor is a necessary and inseparable step in the commission of unfair labor practices which directly affect employees. To say that there is a "factual relation" but not a "causal connection" between the discharge of a supervisor and unfair labor practices directed against the rank-and-file is to say that these acts are separable parts of one entire course of employer conduct; the unfair labor practices could have been committed without the discharge of a supervisor and vice versa.

<sup>28</sup>See, e.g., *DRW Corp.*, 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980); *Southern Plasma Corp.*, 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); *Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979); *Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979); *Production Stamping, Inc.*, 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); *East Belden Corp.*, 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1973); *Donelson Packing Co.*, 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978); *Barnes & Noble Bookstores, Inc.*, 233 N.L.R.B. 1326, 97 L.R.R.M. 1176 (1977) (even if individual held to be employee were a supervisor, his discharge for organizing a union would violate § 8(a)(1) under the "integral part of a pattern of misconduct" rationale).

<sup>29</sup>246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (1979). The case arose from the following facts. Supervisor Helen Scarlett acted as spokesperson for female employees who were subjected to sexual harassment by the employer's manager. When the employees

*Industries*,<sup>30</sup> and *DRW Corporation*,<sup>31</sup> clarify how a majority of the Board (as it was then constituted)<sup>32</sup> viewed the requirements for establishing a violation of section 8(a)(1) in supervisor discharge cases.

Chairman Fanning, Member Jenkins, and former Member Penello found that the discharge of a supervisor violates section 8(a)(1) as an integral part of a pattern of conduct aimed at penalizing employees for the exercise of their statutory rights if, in firing the supervisor, the employer was motivated by hostility toward the employees engaging in union or other protected activities and not by a desire to insure supervisory loyalty.<sup>33</sup> The fact that the employer acted with a hostile motivation in firing a supervisor can be inferred from the

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refused to work in order to bring the problem to higher management's attention, they were fired in violation of § 8(a)(1). Shortly after the protesting employees were discharged, Supervisor Scarlett, who had not participated in the protest, was discharged and no reason was stated for her termination. A majority of the Board held that her discharge violated § 8(a)(1).

<sup>30</sup>246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (1979). In *Nevis Industries*, when the respondent employer took over ownership and control of a hotel complex, it terminated the entire engineering crew (including Supervisor Ernest Brewer, a union member) in an effort to avoid recognizing and bargaining with the union that represented the engineering employees. The Board unanimously agreed with the administrative law judge's finding that the employer had violated § 8(a)(1), (3), 29 U.S.C. § 158(a)(1), (a)(3) (1976), by refusing to retain the nonsupervisory employees because of their union affiliation. A majority of the Board held that the discharge of Supervisor Brewer was an unfair labor practice violative of § 8(a)(1).

<sup>31</sup>248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980). The decision in *DRW Corp.* arose from the following facts. Supervisor David Oatman and employee Bradley Houk were the most active organizers of a union among the rank-and-file. They sounded out employees about their interest in joining the union, contacted a union, arranged for a union meeting with employees at Oatman's home, and distributed union literature and union authorization cards. In response to the union campaign, the employer committed numerous unfair labor practices which were held to violate § 8(a)(1). The employer unlawfully terminated Houk, in violation of §§ 8(a)(1) and 8(a)(3). In addition, the employer discharged Supervisor Oatman and then informed the employees that Oatman and Houk had been fired for being union instigators. A majority of the Board panel held that the supervisor's discharge violated § 8(a)(1).

<sup>32</sup>At the time the three decisions discussed in the text were rendered, the National Labor Relations Board was comprised of Chairman John H. Fanning, Howard Jenkins, Jr., Betty Southard Murphy, John A. Penello, and John C. Truesdale. Members Murphy, Penello and Truesdale no longer serve on the Board.

Board membership changes with some frequency because Board members are appointed to five-year terms by the President of the United States with the advice and consent of the Senate. The President designates the Chairman. 29 U.S.C. § 153(a) (1976).

<sup>33</sup>*DRW Corp.*, 248 N.L.R.B. at 828-29, 103 L.R.R.M. at 1508 (1980) (Jenkins & Penello); *Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, slip op. at 5-6, 103 L.R.R.M. at 1042-43 (1979) (Fanning & Jenkins); *Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, slip op. at 7-9, 103 L.R.R.M. 1036-37 (1979) (Fanning & Jenkins); and, *id.* at 11-12, 103 L.R.R.M. at 1038 (Penello).

context in which the discharge occurred (*i.e.*, the employer committed unfair labor practices in an effort to thwart the employees' exercise of statutory rights).<sup>34</sup> Moreover, if a supervisor's discharge did occur in a context in which the employer engaged in widespread unfair labor practices directed against the rank-and-file, it was held necessary to reinstate, with back pay, the discharged supervisor to offset the coercive effect of the employer's misconduct.<sup>35</sup> The fact that the employer may be compelled to reinstate a disloyal supervisor was not an obstacle to the Board's ordering this remedy; the supervisor's degree of involvement with union activity is of "questionable significance" and is relevant to the issue of the employer's motivation.<sup>36</sup>

A different approach to the supervisor discharge cases might be taken, as shown by the opinions of former Member Murphy and former Member Truesdale in *Downslope Industries*,<sup>37</sup> *Nevis Industries*,<sup>38</sup> *DRW Corporation*,<sup>39</sup> and *Sheraton Puerto Rico Corporation*.<sup>40</sup> They would emphasize the congressional determination to exclude supervisors from the Act and would find a section 8(a)(1) violation based on the discharge of a supervisor only "where it is a means to facilitate a direct violation of employee statutory rights. . ." <sup>41</sup> or "where the discharge . . . was part of a scheme to interfere directly with, or to clear the way for interfering directly with, employees'

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<sup>34</sup>DRW Corp., 248 N.L.R.B. at 828-30, 103 L.R.R.M. at 1508-09 (1980) (Jenkins & Penello); *Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, slip op. at 5-6, 103 L.R.R.M. at 1042-43 (1979) (Fanning & Jenkins); *Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. at 1036-37 (1979) (Penello).

<sup>35</sup>DRW Corp., 248 N.L.R.B. at 829, 103 L.R.R.M. at 1509 (1980) (Jenkins & Penello); *Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, slip op. at 7-9 (1979) (Fanning & Jenkins); *id.* at 11, 103 L.R.R.M. at 1038 (Penello).

<sup>36</sup>DRW Corp., 248 N.L.R.B. at 829 n.11, 103 L.R.R.M. at 1509 (1980).

<sup>37</sup>246 N.L.R.B. No. 132, slip op. at 10-12, 103 L.R.R.M. at 1043 (1979) (Truesdale concurring); *id.* at 12-20, 103 L.R.R.M. at 1044-46 (Murphy dissenting).

<sup>38</sup>246 N.L.R.B. No. 167, slip op. at 13-18, 103 L.R.R.M. at 1039-40 (1979) (Murphy dissenting); *id.* at 19-20, 103 L.R.R.M. at 1040-41 (Truesdale dissenting).

<sup>39</sup>248 N.L.R.B. at 830-34, 103 L.R.R.M. at 1509-13 (1980) (Truesdale dissenting).

<sup>40</sup>248 N.L.R.B. 867, 868-69, 103 L.R.R.M. 1547, 1549-50 (1980) (Truesdale dissenting). The case arose from the following facts. A letter complaining about the general manager's operation of a hotel was drafted, signed, and sent by the hotel's employees and supervisors to company headquarters. The general manager discharged the employees and supervisors who had signed the letter if they understood that it had called for his discharge. He then circulated a letter to employees in which he stated that supervisors had been discharged for their participation in the letter and in which he threatened a similar penalty for such conduct if it occurred in the future. The majority of the Board panel held that the discharges of the supervisors, as well as the discharges of employees, violated § 8(a)(1).

<sup>41</sup>*Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, slip op. at 17, 103 L.R.R.M. at 1045 (1979) (Murphy dissenting).

protected rights or where a supervisor was discharged for engaging in conduct intended to protect employees from interference and discrimination proscribed by the Act."<sup>42</sup> More precisely, they would decide cases by a close factual analysis of whether the supervisor's discharge had a direct impact on the employees' exercise of statutory rights.<sup>43</sup> Neither former Members Murphy nor Truesdale would make the employer's motivation the determinant of whether the discharge violates section 8(a)(1).<sup>44</sup>

Although many decisions since *Pioneer Drilling*<sup>45</sup> have resulted in a finding that the discharge of a supervisor violated section 8(a)(1), there have been many cases where the Board has rejected the contention that such a discharge was illegal. In these cases, the supervisor's discharge was held not to violate section 8(a)(1) for one or more of the following reasons: the supervisor sided with employees in their economic dispute with the employer;<sup>46</sup> the supervisor engaged in union activities or other conduct inconsistent with his status;<sup>47</sup> the employer did not embark on a pattern of misconduct aimed at rank-and-file employees;<sup>48</sup> or the supervisor's discharge did not have the adverse impact on the employees' exercise of statutory

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<sup>42</sup>*Id.* at 14, 103 L.R.R.M. at 1044. Member Truesdale would also decide supervisory discharge cases by applying this standard. *Id.* at 11, 103 L.R.R.M. at 1043 (Truesdale concurring); Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 19, 103 L.R.R.M. at 1041 (1979) (Truesdale dissenting).

<sup>43</sup>*See, e.g.,* Member Murphy's examination of the facts, particularly the timing of the supervisor's discharge and the evidence pertaining to the reason for her discharge, in Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 13 & n.13, at 15 & n.19, at 16 & nn.20 & 21, 103 L.R.R.M. at 1044, 1045 (1979) (Murphy dissenting). Similarly, Member Murphy analyzed the reason for the supervisor's discharge and the timing of the discharge in relation to its impact on employees in Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 14-17, 103 L.R.R.M. at 1039-40 (1979) (Murphy dissenting).

<sup>44</sup>DRW Corp., 248 N.L.R.B. at 830, 103 L.R.R.M. at 1509 (1980) (Truesdale dissenting); Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 17, 103 L.R.R.M. at 1045 (1979) (Murphy dissenting).

<sup>45</sup>162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

<sup>46</sup>*See, e.g.,* Long Beach Youth Center, 230 N.L.R.B. 648, 650, 95 L.R.R.M. 1451, 1453 (1977), *enforced*, 591 F.2d 1276 (9th Cir. 1979); Sibilio's Golden Grill, Inc., 227 N.L.R.B. 1688, 1688, 91 L.R.R.M. 1439, 1440 (1977), *enforced mem.*, 573 F.2d 1302 (3rd Cir. 1978).

<sup>47</sup>In addition to the cases cited note 46 *supra*, *see, e.g.,* L & S Enterprises Inc., 245 N.L.R.B. No. 144, 102 L.R.R.M. 1415 (1979); Twin County Grocers, Inc., 244 N.L.R.B. No. 168, 103 L.R.R.M. 1230 (1979); Daniel Construction Co., 244 N.L.R.B. No. 106, 102 L.R.R.M. 1399 (1979); K. Kristofferson, 184 N.L.R.B. 159, 74 L.R.R.M. 1645 (1970) (United Painting Contractors), *enforced per curiam sub nom. Johnson v. NLRB*, 441 F.2d 266 (4th Cir. 1971); Bowling Corp. of America, 170 N.L.R.B. 1768, 68 L.R.R.M. 1207 (1968); Texas Gulf Sulphur Co., 163 N.L.R.B. 88, 64 L.R.R.M. 1302 (1967).

<sup>48</sup>*See, e.g.,* Stop & Go Foods, 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979); Twin County Grocers, Inc., 244 N.L.R.B. No. 168, 103 L.R.R.M. 1230 (1979).

rights proscribed by section 8(a)(1).<sup>49</sup> These cases are not surprising because they follow from the majority's view that the employer's motivation (generally shown by the context in which the supervisor's discharge occurred) is the determinant of the legality of the supervisor's discharge under the "integral part of a pattern of misconduct" rationale.<sup>50</sup>

In summary, since its 1967 decision in *Pioneer Drilling*, the Board has developed a concept that an employer's discharge of a supervisor in connection with a union organization campaign or similar protected activities by employees violates section 8(a)(1) if it is an integral part of a pattern of conduct aimed at penalizing employees for exercising their statutory rights. A majority of the Board has found that the supervisor's discharge is an integral part of such a pattern of misconduct if the employer acted out of hostility toward the employees' exercise of statutory rights rather than out of a legitimate desire to insure the loyalty of its supervisory personnel. This hostile motivation may be inferred from the employer's commission of other unfair labor practices. It need not be established that the discharge of the supervisor was the means by which the employer committed the unfair labor practices which directly affected the rank-and-file in order for the Board to find the discharge unlawful.

In viewing the development of Board policy, one must ask if it is true, as former Member Truesdale contended, "that the Board has made a quantum leap from a unique factual situation [*Pioneer Drilling*] to a general proposition that supervisors who make common cause with rank-and-file employees and are the recipients of the same treatment meted out to employees share the protection of the Act extended to employees."<sup>51</sup>

### III. BOARD POLICY AND CONGRESSIONAL INTENT

In *Nevis Industries*, Chairman Fanning and Member Jenkins

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<sup>49</sup>See, e.g., *Simpson Electric Co.*, 250 N.L.R.B. No. 35 (1980); *Stop & Go Foods, Inc.*, 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979); *Texas Gulf Sulphur Co.*, 163 N.L.R.B. 88, 64 L.R.R.M. 1302 (1967). See also *Woodline, Inc.*, 231 N.L.R.B. 863, 97 L.R.R.M. 1288 (1977), enforced per curiam, 577 F.2d 463 (8th Cir. 1978) (no evidence that employer forced supervisor to resign, but had employer forced supervisor to resign because he had engaged in union activities, speculative that this would have had chilling effect on employees' protected activities).

<sup>50</sup>The role of the employer's motivation in establishing a violation of § 8(a)(1) is more fully discussed in notes 60-69 and accompanying text *infra*.

<sup>51</sup>*DRW Corp.*, 248 N.L.R.B. at 833, 103 L.R.R.M. at 1510 (1980) (Truesdale dissenting).

considered whether *Pioneer Drilling*<sup>52</sup> and its progeny are in accord with the congressional determination to exclude supervisors from the protection of the National Labor Relations Act:

Initially, we reject their [Member Murphy's and Member Truesdale's] contention that the statute precludes a finding that Respondent violated Section 8(a)(1) when it terminated and refused to rehire Supervisor Brewer. They rely essentially upon Section 2(3) of the Act, which excludes supervisors from the definition of employees. Examination of that section and its legislative history, however, makes plain that this section was added in 1947 to negate the Board's judicially approved policy of certifying bargaining units of foremen by excluding supervisors from the definition of employee. Despite the fact that Congress contemplated and intended to permit an employer to discharge a supervisor for engaging in union activity, there is no evidence that Congress intended to alter the Board's previous policy of providing a reinstatement remedy when a supervisor was discharged for refusing to participate in an unlawful antiunion campaign. Nor is there any evidence that Congress sought to restrict otherwise the Board's authority to grant appropriate affirmative relief whenever an employer's action against a supervisor tends to coerce employees . . . .<sup>53</sup>

There is no evidence that by excluding supervisors from the Act's protection, Congress intended to restrict the Board's authority to order the reinstatement of a supervisor to remedy unfair labor practices. However, there is no evidence that Congress even considered the question of the Board's authority to order the reinstatement of a supervisor in cases like the progeny of *Pioneer Drilling*.<sup>54</sup>

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<sup>52</sup>162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10th Cir. 1968).

<sup>53</sup>246 N.L.R.B. No. 167, slip op. at 4-5, 103 L.R.R.M. at 1036-37 (1979) (citations omitted). Chairman Fanning and Member Jenkins cited sections 2(11) & 14(a) of the Act; *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947); and H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1947) (discussing the seeming inconsistency of according supervisors organizational rights with the policy of assuring employees freedom from domination by supervisors in their own organizing and bargaining and the right of employers to their agents' loyalty).

<sup>54</sup>The Taft-Hartley Act is framed in terms of requiring an employer to reinstate "employees," not supervisors. Section 10(c) of the Labor Management Relations (Taft-Hartley) Act, 1947, provides in pertinent part:

If . . . the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then

Thus, that Congress did not intend to limit the Board's remedial authority is no assurance that the Board's decisions since *Pioneer Drilling* have been consistent with the congressional purpose.

When the Taft-Hartley amendments were considered, Congress focused on whether the National Labor Relations Act should be changed so that no labor organization could use statutory procedures<sup>55</sup> to compel an employer to recognize it and bargain with it as the representative of supervisors<sup>56</sup> or whether the Act should be amended to allow a labor organization which represents only supervisors and is not dominated by rank-and-file employees to avail itself of the statutory processes to gain recognition.<sup>57</sup> Underlying these particular questions was a basic concern with insuring that the employer could insist on the undivided loyalty of its supervisory personnel.<sup>58</sup> The practical effect of the Board's reinstatement of a

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the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including *reinstatement of employees* with or without back pay, as will effectuate the policies of this [Act]: *Provided*, That where an order directs *reinstatement of an employee*, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: . . . No order of the Board shall require the *reinstatement of any individual as an employee* who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

29 U.S.C. § 160(c) (1976) (emphasis added).

The Board has authority to order the reinstatement of a supervisor although § 10(c) of the Act refers only to the reinstatement of employees. *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61 (4th Cir. 1968). However, "[c]ourts have used reinstatement of a discharged supervisor as a remedy sparingly and in only narrowly defined circumstances." *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294 (5th Cir. 1980) (court refused to enforce Board order requiring reinstatement, with back pay, of supervisors who played significant roles in employees' organizational efforts and who were found by the Board to have been discharged as an integral part of a pattern of conduct aimed at penalizing employees for their protected activity).

<sup>55</sup>Section 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 159(a) (1976) provides procedures whereby employees may designate or select an exclusive representative for the purposes of collective bargaining with the employer about rates of pay, wages, hours of employment, or other conditions of employment. For a discussion of the reciprocal rights and obligations of an employer and an exclusive bargaining representative, see Section of Labor Relations Law, American Bar Association, C. MORRIS, *THE DEVELOPING LABOR LAW*, (1971 & Supp. 1975, 1976, 1977, 1978).

<sup>56</sup>H.R. Rep. No. 245, 80th Cong., 1st Sess. 13-17 (1948); S. Rep. No. 105, 80th Cong., 1st Sess. 3-5 (1948); 93 Cong. Rec. 3952 (1947) (remarks of Sen. Taft).

<sup>57</sup>House Minority Report No. 245, 80th Cong. 1st Sess. 72 (1947); Senate Minority Report No. 105, Pt. 2 at 39-40 (1947); 93 Cong. Rec. 4566 (1947) (remarks of Sen. Johnston); 93 Cong. Rec. 5118 (1947) (remarks of Sen. Pepper).

<sup>58</sup>*NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 281 (1974); *Beasley v. Food Fair*, 416 U.S. 653, 659-60 (1974) ("Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were obliged to

supervisor who was involved in union activity on behalf of the rank-and-file is to force the employer to accept as part of its management team someone whose interests are in conflict with its own. This result was not envisioned by Congress, as the Fifth Circuit Court of Appeals has recognized in a recent decision, *N.L.R.B. v. Southern Plasma Corp.*<sup>59</sup>

Quite apart from whether the outcome of the Board's decision making in supervisor discharge cases can be reconciled with congressional intent is the issue of whether the Board's approach in such cases emphasizes factors which promote the fair administration of the Act and which are based on realistic expectations about human behavior.

#### IV. EMPLOYER MOTIVATION IN SUPERVISOR DISCHARGE CASES

The various decisions of the Board make it apparent that the crucial determinant of the legality of the discharge of a supervisor is the employer's motivation.<sup>60</sup> That is to say, the Board will determine supervisor discharge cases by reference to:

the teachings of [*N.L.R.B. v. John Brown*], 380 U.S. 278 (1965), wherein the Supreme Court held that the determination of the legality of employer conduct which could tend to interfere with employee rights but which could also have a legitimate business purpose depends, first, on an evaluation

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be loyal to their employer's interests, and their identity with the interests of rank-and-file employees might impair that loyalty. . . ." (citation omitted); *Carpenters Dist. Council v. NLRB*, 274 F.2d 564, 566 (D.C. Cir. 1959) (The congressional purpose in enacting § 2(3) in 1947 "was to give the employer a free hand to discharge foremen as a means of ensuring their undivided loyalty, in spite of any union obligations.").

<sup>59</sup>In *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294-95 (5th Cir. 1980), the court refused to enforce a Board order requiring reinstatement and back pay for two supervisors who had played a significant part in employees' organizational efforts and whose discharges were found to be an integral part of a pattern of conduct aimed at penalizing employees for their protected, concerted activity. The court stated, "Here the employees and supervisors lost their jobs because they chose to organize. Congress specifically decided not to protect supervisors from *precisely* this kind of conduct. . . . To enforce the Board's order reinstating supervisors Baker and Parker would swallow whole the Congressionally imposed exclusion [from the Act] for supervisors." *Id.* at 1295.

<sup>60</sup>In addition to the authorities cited note 33 *supra*, see *Empire Gas Co.*, 254 N.L.R.B. No. 76, slip op. at 10-13 (Jan. 14, 1981); *G & M Lath and Plaster Co.*, 252 N.L.R.B. No. 137, slip op. at 20, 105 L.R.R.M. 1556 (1980); *Sheraton Puerto Rico Corp.*, 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); *L & S Enterprises*, 245 N.L.R.B. No. 144, slip op. at 3, 102 L.R.R.M. 1415 (1979); *Twin County Grocers, Inc.*, 244 N.L.R.B. No. 168, slip op. at 7, 102 L.R.R.M. 1271 (1979); *Barnes & Noble Bookstores, Inc.*, 233 N.L.R.B. 1326, 1343 n.18, 97 L.R.R.M. 1176 (1977); *Fairview Nursing Home*, 202 N.L.R.B. at 318 n.2, 82 L.R.R.M. at 1566.

of the employer's motive in engaging therein and, second, assuming no evidence of illegal motive, on a balancing of the coercive effects against the asserted business justification. Thus, where there is no evidence of a tainted motive such employer conduct will not be deemed unlawful if its tendency to interfere with employee rights is "comparatively slight, and the employer's conduct is reasonably adapted to achieve legitimate ends."<sup>61</sup>

If an employer committed unfair labor practices and fired a supervisor with an intent to discourage employees from engaging in union or other protected activities rather than out of a desire to discourage such activities by supervisors and to insure supervisor loyalty, the Board will find that the discharge violates section 8(a)(1) as an integral part of a pattern of conduct aimed at penalizing employees for exercising section 7 rights.<sup>62</sup>

Was former Member Truesdale correct in his assertion that "making motivation a touchstone of supervisory discharge cases is wrong as a matter of policy as well as law. . .?"<sup>63</sup>

It is uncertain whether the Board is required, as a matter of law, to find that an employer violated section 8(a)(1) because discharge of a supervisor was motivated by hostility to the employees' exercise of statutory rights (a "hostile motivation").<sup>64</sup> The Board's

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<sup>61</sup>Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 7-8, 103 L.R.R.M. at 1036 (citation omitted).

<sup>62</sup>See cases cited note 33 *supra*.

<sup>63</sup>248 N.L.R.B. at 833, 103 L.R.R.M. at 1512 (Truesdale dissenting).

<sup>64</sup>For a discussion of whether the employer's hostile motivation is an element in establishing a violation of § 8(a)(1) generally, see Christensen & Svano, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269 (1968); Oberer, *The Scierer Factor in Sections 8(a)(1) and (3) of The Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORN. L.Q. 491 (1967).

There are a number of cases which suggest that violation of § 8(a)(1) is determined by the effect of an employer's conduct and not by his motivation. See, e.g., *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 268-69 (1965) ("Naturally, certain business decisions will, to some degree, interfere with concerted activities by employees. But it is only when the interference with § 7 rights outweighs the business justification for the employer's action that § 8(a)(1) is violated . . . . A violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive."); *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964) (employer violated § 8(a)(1) when, in good faith, it discharged several employees engaged in protected activities in the mistaken belief that the employees had engaged in misconduct); *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980) (a supervisor discharge case in which the court, discussing another aspect of the case, stated that § 8(a)(1) "requires weighing the effect on employee rights against the employer's business justification for his actions; discriminatory motive need not be present."); *Crown Central Petroleum Corp.*, 430 F.2d 724, 729 (5th Cir. 1970) (the tendency of an

unquestioning reliance on *Brown*<sup>65</sup> is misplaced. While in that case the Supreme Court did address the issue of what part employer motivation plays in the legality of conduct alleged to violate section 8(a)(1), it did so in a context which was significantly different from the supervisor discharge cases. Hence, the teachings of *Brown* may not apply to supervisor discharge cases.<sup>66</sup> The Court has not established what criteria are to be applied by the Board in determining whether the dismissal of a supervisor violates section 8(a)(1).

The Board's emphasis on motivation ignores the realities of industrial life. One might suppose that almost every employer wishes to discourage union activities among his employees. One might further assume that in discharging a supervisor who is connected with union activities, an employer often acts out of "mixed motives" *i.e.*, to insure supervisor loyalty and to discourage union activities among employees. This state of mind should not render the employer's conduct unlawful.<sup>67</sup>

It may well be asked whether the thrust of the National Labor Relations Act is to prohibit bad thoughts, or to curb harmful conduct. And if the latter, are bad thoughts to be

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employer's action to interfere with Section 7 rights, and not the employer's motive or good faith, is determinative of whether § 8(a)(1) has been violated). However, these cases relate to the issue of whether the employer's good faith is a defense to the § 8(a)(1) charge; the cases indicate it is not. The supervisor discharge cases present a different question, namely, whether the presence of a hostile motive (the absence of good faith) renders the employer's conduct unlawful.

<sup>65</sup>380 U.S. 278 (1965).

<sup>66</sup>In *Brown Food*, the nonstruck members of a multi-employer collective bargaining group had locked out their employees and had continued to operate with temporary replacements in response to a whipsaw strike (*i.e.*, a strike called by a union against one member of a multi-employer group in order to divide the group and thereby cause settlement of a labor dispute on terms favorable to the union). The Court held that the employers' conduct violated neither § 8(a)(1) nor § 8(a)(3) of the Act. 380 U.S. 278 (1965).

*Brown Food* is significantly different from the supervisor discharge cases because in the former decision, the employers' actions arguably violated § 8(a)(3) as well as § 8(a)(1). Unlike § 8(a)(1), whose legislative history and language speak in terms of the impact or effect of the employer's conduct, § 8(a)(3) suggests a *scienter* requirement. *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980); *Oberer*, *supra* note 64, at 510. Thus, the role which employer motivation plays in establishing a violation of the Act should differ depending upon whether the employer's conduct is alleged to violate § 8(a)(3) (from which a violation of the general prohibition in § 8(a)(1) is derived) as in *Brown Food*, or only § 8(a)(1), as in the supervisor discharge cases. *Oberer*, *id.*

<sup>67</sup>In *Sheraton Puerto Rico Corp.*, 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980), the majority of the Board panel stated that their approach to the problem is not dependent on the employer's state of mind. However, the opinion emphasizes that in unlawfully discharging certain supervisors, the employer's general manager was not concerned with supervisor loyalty.

held to make harmless conduct illegal? If the Congress in 1935 intended to punish all employers then harboring unkind views as to unions it invested the Board with a truly Herculean task. It is more probable that Congress attempted to curb employer action rather than employer thought, and that the concern was with injury to employee rights, however pure or impure the motivation for that injury.<sup>68</sup>

The Board's inquiry into whether an employer acted out of a hostile motivation in discharging a supervisor injects difficult problems of proof into the administration of the Act.

Actual motive, a state of mind, being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases, the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book.<sup>69</sup>

In response to the improbability of obtaining direct evidence that an employer fired a supervisor with an intent to chill the employees' union or other protected activities, the Board has to evaluate the context in which the supervisor's discharge occurred to determine the employer's motivation. The Board determines whether unfair labor practices were committed in that the discharge of the supervisor was unlawful as an integral part of a pattern of conduct aimed at penalizing employees for exercising their section 7 rights.<sup>70</sup>

Clearly, supervisory participation in concerted or union activity is not protected and supervisors who engage in such activity do so at their peril. However, the fact that supervisors and employees alike have been discharged and otherwise coerced for engaging in union activity is evidence

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<sup>68</sup>Christensen & Svano, *supra* note 64, at 1326-27.

<sup>69</sup>Shattuck Denn Mining Corp. v. NLRB, 362 F.2d 466, 470 (9th Cir. 1966). This quotation was recited with approval by the Board in Darlington Mfg. Co., 165 N.L.R.B. 1074, 1083 n.16, 65 L.R.R.M. 1391 (1967).

<sup>70</sup>See cases cited note 34 *supra*. See also, e.g., G & M Lath and Plaster Co., 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); Southern Plasma Corp., 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); Production Stamping, Inc., 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); East Belden Corp., 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978); Donelson Packing Co., 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978); Fairview Nursing Home, 202 N.L.R.B. 318, 82 L.R.R.M. 1566, *enforced mem.*, 486 F.2d 1400 (5th Cir. 1973), *cert. denied*, 419 U.S. 827 (1974).

which, under proper circumstances, warrants the inference that the action against the supervisor, like that taken against the employees, was unlawfully motivated. Moreover, when the evidence shows that the respondent has engaged in a widespread pattern of misconduct . . . a remedy which encompasses all individuals affected is appropriate.<sup>71</sup>

The Board's "context approach," in which it judges the legality of a supervisor's discharge by whether unfair labor practices were committed, may be criticized on several grounds.

In many supervisor discharge cases, the context approach conflicts with the way section 8(a)(1) has otherwise been applied. It is established that the discharge of a supervisor (or other employer conduct) does not violate section 8(a)(1) if it merely has an incidental effect on the employees' exercise of statutory rights.<sup>72</sup> Yet, it is in

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<sup>71</sup>248 N.L.R.B. at 829, 103 L.R.R.M. at 1509 (Jenkins & Penello) (citation omitted).

Former Member Penello has articulated this connection between the Board's emphasis on context and the Board's search for a hostile motivation:

[W]hen an employer has engaged in a widespread pattern of misconduct against its employees and supervisors alike, it may be inferred that the action taken against the supervisors was motivated not solely by any concern about the union or concerted activities of its management personnel, but rather by a desire to discourage such activities on the part of its employees in general. . . . [B]y engaging in such a widespread pattern of misconduct against employees and supervisors, an employer, intentionally or otherwise, makes it impossible for its employees to perceive the distinction between its right to prohibit its supervisors from engaging in union or concerted activity and its obligation to permit employees to freely exercise their Section 7 rights. Thus, in the context of such widespread misconduct, the coercive effect upon employees as a result of action taken against the supervisor is not merely an unavoidable consequence of the discharge of an unprotected individual. Indeed, the coercive effect in such circumstances is the same as that arising from the action taken against the employees. Therefore, reinstatement with backpay for the supervisor is "necessary to fully offset the coercive effects of the employer's total course of conduct."

Nevis Industries, Inc., 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. 1035, 1038 (1979) (citations omitted).

<sup>72</sup>Texas Co. v. NLRB, 198 F.2d 540, 544 (9th Cir. 1952) (court concurs in Board's holding that discharge of supervisor for refusing to perform rank-and-file work during a strike is privileged and any discouragement of union membership caused by the discharge would be "incidental and permissible"); Panaderia Sucesion Alonso, 87 N.L.R.B. 877, 881, 25 L.R.R.M. 1146, 1149 (1949) (discharge of a supervisor for union activities had only an incidental effect on employees' exercise of statutory rights and therefore does not cause the employer's privileged conduct to become an unfair labor practice).

The fact that a supervisor's discharge has the incidental effect of causing employees to fear that the same fate will befall them is not a sufficient basis for finding that the discharge violates § 8(a)(1). Stop & Go Foods, 246 N.L.R.B. No. 170, slip op. at 10, 103 L.R.R.M. 1046, 1049 (1979). As the court stated in Oil City Brass Works

those instances where the discharge of a supervisor is most likely to be found illegal *i.e.*, in cases where the employer engaged in widespread unfair labor practices, that the actual impact of a supervisor's discharge on the employees' exercise of section 7 rights will be most minimal or incidental. For example, if as in *Fairview Nursing Home*<sup>73</sup> the employer committed numerous unfair labor practices to thwart unionization and fired more than forty employees because they had signed union cards, it is unlikely that the contemporaneous discharge of two supervisors actually will have had an effect on the employees' protected activities.

Yet, in *Fairview Nursing Home* and similar cases,<sup>74</sup> the Board is more likely to find that the discharge of a supervisor is unlawful than in a case where the discharge is an isolated incident.<sup>75</sup> Moreover, in those cases where the employer has engaged in pervasive unfair labor practices which directly affect employees and has fired one or more supervisors, it is typically not necessary for the Board to order the reinstatement with back pay of the discharged supervisor to dissipate the coercive effect of the employer's conduct.<sup>76</sup> If,

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v. NLRB, 357 F.2d 466, 470 (5th Cir. 1966) (employer's refusal to recall a supervisor from layoff because he had testified at an NLRB hearing violated § 8(a)(1)):

Any time an employee, be he supervisor or not, is fired for union activity, rank-and-file employees are likely to fear retribution if they emulate his example. But the Act does not protect supervisors, it protects rank-and-file employees in the exercise of their rights. If the fear instilled in rank-and-file employees were used in order to erect a violation of the Act, then any time a supervisor was discharged for doing an act that a rank-and-file employee may do with impunity the Board could require reinstatement. Carried to its ultimate conclusion, such a principle would result in supervisory employees being brought under the protective cover of the Act.

<sup>73</sup>202 N.L.R.B. 318, 82 L.R.R.M. 1566.

<sup>74</sup>*G & M Lath and Plaster Co.*, 252 N.L.R.B. No. 137, 105 L.R.R.M. 1556 (1980); *Sheraton Puerto Rico Corp.*, 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980); *Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, slip op. at 11, 103 L.R.R.M. 1035 (1979); *Downslope Industries, Inc.*, 246 N.L.R.B. No. 132, slip op. at 1, 103 L.R.R.M. 1042 (1979); *Southern Plasma Corp.*, 242 N.L.R.B. 1223, 101 L.R.R.M. 1413 (1979), *enforcement denied in material part*, 626 F.2d 1287 (5th Cir. 1980); *Production Stamping, Inc.*, 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979); *East Belden Corp.*, 239 N.L.R.B. 776, 100 L.R.R.M. 1077 (1978).

<sup>75</sup>In *Stop & Go Foods, Inc.*, 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (1979), it was held that the supervisor's discharge did not violate § 8(a)(1) in the absence of evidence that it was a part of a pattern of misconduct aimed at coercing employees; the only question before the administrative law judge and Board was whether the discharge of the supervisor for striking and picketing was unlawful. Similarly, in *Twin County Grocers, Inc.*, 244 N.L.R.B. No. 168, 102 L.R.R.M. 1271 (1979), it was held that the discharge of a supervisor did not violate § 8(a)(1) because it was motivated by an intent to restrict a supervisor from engaging in union activities; the unfair labor practice complaint was dismissed in its entirety because employer's conduct pertaining to the supervisor was the only issue.

<sup>76</sup>*DRW Corp.*, 248 N.L.R.B. at 830-34, 103 L.R.R.M. at 1509-13 (Member Truesdale dissenting).

for example, the Board were to order the reinstatement with back pay of more than forty unlawfully discharged employees, this would adequately demonstrate to the employees the extent of the Act's protection of their right to engage in concerted activities. An order to reinstate a supervisor with back pay would be superfluous so far as the employees' perceptions are concerned.

The Board's "context approach" is to treat the employer's discharge of a supervisor and unfair labor practices directly affecting nonsupervisory employees as a totality rather than as a series of separable acts, the legality of each of which must be determined. Consequently, presumptively lawful conduct, such as an employer's dismissal of a supervisor because he involved himself in union activities,<sup>77</sup> becomes illegal because the employer has violated the Act in other respects at about the same time. In criticism of the Board's approach, it can be said that the employer's "statutory prerogative to select supervisors according to its own criteria . . . should not be diminished because the employer chooses to exercise it about the same time as it unlawfully disciplines or discharges its employees for engaging in protected concerted or union activities."<sup>78</sup>

While the Board emphasizes the context in which the supervisor discharge occurs as indicative of the employer's motivation, it does not closely inquire into whether the discharge was, *in fact*, an integral part of the employer's misconduct directed against nonsupervisory employees. In cases subsequent to *Pioneer Drilling* and *Krebs & King Toyota*, the Board did not seek to find a causal relationship<sup>79</sup> between the supervisor's discharge and the employer's acts of misconduct directed against the rank-and-file.<sup>80</sup> If there was merely a temporal relationship between the discharge and unfair labor practices directed against employees, the Board has been prone

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<sup>77</sup>*Beasley v. Food Fair, Inc.*, 416 U.S. 653, 654-55 (1974) (The Taft-Hartley Act "freed employers to discharge supervisors without violating the [National Labor Relations] Act's restraints against discharges on account of labor union membership."); *Times Herald Printing Co.*, 252 N.L.R.B. No. 43, slip op. at 16 (Sept. 19, 1980) ("a discharge of a supervisor for engaging in union activities does not violate the Act."); *The Mousetrap of Miami, Inc.*, 174 N.L.R.B. 1060, 70 L.R.R.M. 1429 (1969) (discharge of a supervisor for organizing union of rank-and-file employees is lawful).

<sup>78</sup>*Nevis Industries, Inc.*, 246 N.L.R.B. No. 167, slip op. at 17, 103 L.R.R.M. at 1038 (1979) (Member Murphy dissenting).

<sup>79</sup>For a discussion of the concept of a "causal relationship," see note 27 *supra*.

<sup>80</sup>*Cf. J.D. Lunsford Plumbing, Heating & Air Conditioning, Inc.*, 237 N.L.R.B. 128, 99 L.R.R.M. 1109 (1978) in which the Board held that the resignation of a supervisor because he had suffered a loss of contractual benefits and continued representation by a union was not a constructive discharge violative of § 8(a)(1). In finding that the supervisor's resignation was not an integral part of a pattern of misconduct directed against nonsupervisory employees, the administrative law judge emphasized that there was no nexus between the actions directed at the supervisor and illegal acts directed at employees although these acts occurred at the same time.

to conclude that the supervisor discharge is unlawful under its "integral part of a pattern of conduct" rationale.<sup>81</sup> Unless the Board modifies its approach and examines whether, *in fact*, there is more than a mere temporal relationship between the discharge of a supervisor and a pattern of misconduct aimed at nonsupervisory employees, one could agree with former Member Murphy that:

[The Board has adopted] the untenable position that anytime a supervisor is fired in close proximity with employees who are found to have been unlawfully discharged under the Act the supervisor's discharge is also protected. In so doing, they [Chairman Fanning, Member Jenkins and then-Member Penello] are improvidently extending the protection section 7 offers to employees to cover the concerted and union activities of supervisors. Whether this result is desirable or not . . . [it is] a proscribed one which takes congressional action, not decisional fiat, to achieve.<sup>82</sup>

## V. CONCLUSION

In summary, the National Labor Relations Board has evolved the rule that an employer's discharge of a supervisor in connection with employees' activities protected by section 7 of the Act violates section 8(a)(1) if the discharge was an integral part of a pattern of conduct by the employer aimed at penalizing employees for exercising their statutory rights. The Board will find that the discharge of a supervisor is an integral part of such a pattern of conduct and therefore unlawful if the employer's motive in firing the supervisor was hostility to the employees' exercise of section 7 rights and not a desire to insure the loyalty of its supervisory personnel. In most cases, the fact that the employer had such a hostile motivation is inferred from the employer's commission of unfair labor practices which directly affect the rank-and-file.

The Board's approach to supervisor discharge cases can be criticized on several grounds. The Board has not adequately addressed the issue of whether an order compelling an employer to reinstate, with back pay, a supervisor who engaged in union or similar activities is in accord with the congressional determination that supervisors must be excluded from the protection of the National Labor Relations Act. The Board's view of the role employer motivation plays ignores the tendency of employers to fire a supervisor out of "mixed motives". Moreover, the emphasis on motivation introduces difficult problems of proof in the administration of the Act and results in the

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<sup>81</sup>See cases cited notes 70 & 74 *supra*.

<sup>82</sup>Downslope Industries, Inc., 246 N.L.R.B. No. 132, slip op. at 12, 103 L.R.R.M. at 1044 (1979) (citations omitted).

Board giving undue emphasis to the broad context in which the discharge occurred as the determinant of the legality of the discharge. As a consequence, presumptively lawful conduct, such as the employer's discharge of a supervisor for engaging in union activities, becomes unlawful although the discharge bore no causal relationship to the unfair labor practices which were directed against employees. In addition, the Board's proclivity for finding that the discharge of a supervisor violates section 8(a)(1) because the employer also engaged in widespread misconduct conflicts with the well-established principle that employer conduct which merely has an incidental impact on the employees' exercise of section 7 rights will not be found to violate section 8(a)(1).

It appears that the Board has gone astray by treating employer motivation as the determinant of whether the employer violated section 8(a)(1) by discharging its supervisor who, in more cases than not, actively promoted the interests of a union or engaged in activities antagonistic to the goals of higher management.

The Board should instead adopt a balancing approach. That is to say, the Board should consider whether, *in fact*, the employer's discharge of a supervisor tended to significantly interfere with, restrain, or coerce employees in the exercise of their section 7 rights.<sup>83</sup> If the employer's conduct did have this tendency,<sup>84</sup> then the

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<sup>83</sup>In other contexts, the Board has adopted a balancing approach for determining the legality of employer conduct under § 8(a)(1).

In effect, section 8(a)(1) could be rewritten as follows: It shall be an unfair labor practice for an employer to take action which, regardless of the absence of anti-union bias, tends to interfere with, restrain, or coerce a reasonable employee in the exercise of the rights guaranteed in section 7, provided the action lacks a legitimate and substantial justification such as plant safety, efficiency or discipline. Thus construed, *section 8(a)(1) requires that the Board strike a balance between the interests of the employer*—which are not specifically accorded weight in the statute but which Congress surely intended be considered in administering a statute designed to further industrial peace and efficiency—*and the interests of the employees* in a free decision concerning their collective bargaining activities. R. GORMAN, BASIC TEXT ON LABOR LAW 133 (1976) (emphasis added).

See *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980) (§ 8(a)(1) "requires weighing the effect on employee rights against the employer's business justification for his actions . . ."). To establish a violation of § 8(a)(1), it is not necessary for the general counsel to prove that particular employees were restrained, coerced, or interfered with in the exercise of their rights guaranteed them by section 7 of the Act. R. GORMAN, *supra*, at 132. The test of interference, restraint or coercion of employees is not the success or failure of the conduct, but whether it may reasonably be said to tend to interfere with the exercise of rights protected by the Act. *Production Stamping, Inc.*, 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).

<sup>84</sup>The tendency of the discharge to have an adverse effect on the employees' exercise of statutory rights could be discerned by evaluating factors such as: the timing of the supervisor's discharge in relation to other conduct, legal and illegal, which directly affects the protected activities of rank-and-file employees; the content of employer

Board should find that the discharge violates section 8(a)(1) unless the effect of the discharge is outweighed by the business justification for the employer's action.<sup>85</sup> It should do so regardless of whether the employer was motivated, in whole or in part, by a desire to discourage employees from engaging in protected activities.<sup>86</sup> In order to take into consideration the congressional determination that employers must be free to fire a supervisor who has been disloyal, the Board should approach each case in which management was aware of the discharged supervisor's active involvement in union activities with a rebuttable presumption that there was an overriding business justification for the discharge and that it was, therefore, lawful. Even if the Board finds in a particular case that the discharge of a supervisor who actively engaged in union activities was unlawful, it should carefully consider whether, on the facts, it is appropriate to compel the employer to reinstate the supervisor or whether some other remedy, such as a cease-and-desist order or back pay without reinstatement,<sup>87</sup> would be sufficient to accomplish the purposes of the Act.

This balancing approach has an advantage over present Board policy because it considers not merely the employees' right to be free to engage in activities protected by section 7 of the Act, but also the employer's legitimate interest in selecting and retaining loyal supervisory personnel. An analysis of the progeny of *Pioneer Drilling* suggests that too often the Board has overlooked the congressional determination that an employer must be free to discharge supervisors in furtherance of its legitimate interest in opposing unionization by lawful means. It is time for the Board to re-examine the balance it has struck between competing employer and employee interests in supervisor discharge cases.

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communications to employees about the circumstances of the supervisor's discharge; and the extent of employee awareness of the fact that a supervisor was discharged and the perceived reasons therefor.

<sup>85</sup>In determining the weight to be given the employer's business justification for the supervisor's discharge, the Board might consider: the degree of the supervisor's involvement in union or other similar activities; the discharged supervisor's place in the managerial hierarchy; and the needs of the particular business enterprise.

<sup>86</sup>See Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 YALE L.J. 1269, 1326-27 (1968) wherein the authors contend that the Supreme Court's establishment of employer motivation as an essential element in proving a violation of § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976), is a "fictive formality" which obscures the fact that the Court is balancing and choosing between the rival interests of employers and employees.

<sup>87</sup>*Cf.* NLRB v. Brookside Industries, 308 F.2d 224 (4th Cir. 1962) (supervisor discharged in violation of § 8(a)(1) is entitled to back pay, but not to reinstatement, because of conflict of interest created by her dual status as a supervisor and as a wife of a nonsupervisory union employee).