Employee Interrogation as Inherently Destructive Conduct: A New Approach

Howard D. Venzie Jr.
EMPLOYEE INTERROGATION AS "INHERENTLY DESTRUCTIVE" CONDUCT: A NEW APPROACH

I. INTRODUCTION

Section 7 of the National Labor Relations Act grants to those employees under its regulation the substantive right of self-organization for the purpose of collective bargaining or other forms of mutual aid or protection.¹ To protect these rights, the National Labor Relations Board [the Board] has established a system of ground rules to govern the pre-election conduct of employers.² One small segment of this regulation is directed at an employer's interrogation of his employees. The need to control this form of employer conduct will be more clearly understood after an examination of its characteristics and legal significance.

Generally speaking, employee interrogation involves the employer's efforts to elicit from his employees information about the status of union organizational activities.³ In most cases the employer questions the employee about his personal inclinations toward or his affiliations with unionization.⁴ However, in some instances an employee may also be questioned about the union sentiments or activities of his fellow employees.⁵ The scope of an interrogation naturally varies in each case. It may range from a short mild inquiry as to the nature and scope of an unidentified disruptive force among the employees to an extensive formal polling of their desire for union representation.⁶ An interrogation may be conducted for legitimate informative purposes or to intimidate and coerce the employees in their organizational activities. It may be directed to

---

¹. Section 7 of the National Labor Relations Act provides in part that:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities...."


². For an exhaustive analysis of NLRB regulation of pre-election conduct, see Bok, The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act, 78 HARV. L. REV. 38 (1964).


⁶. E.g., Struksnes Constr. Co., 165 N.L.R.B. No. 102, 65 L.R.R.M. 1385 (June 26, 1967); Anderson Air Activities, Inc., 128 N.L.R.B. 698 (1960). There is a definitional distinction between the questioning and the polling of an employee which should be recognized. Questioning is inquisitive in nature while polling calls for the employee to take an affirmative stand for or against the union. Blue Flash Express, Inc., 109 N.L.R.B. 591, 596-97 (1954) (dissenting opinion). Both of these are forms of employee interrogation. This distinction is somewhat fine but it is warranted in light of the fact that the Board and the courts have freely interchanged them in the formulation of their doctrinal approaches to this problem.
employees that are relatively inactive in the union's organizational campaign and who are friendly toward the employer or it may be directed to active campaign leaders who are essentially antagonistic. 7

The basic reason for the regulation of this form of pre-election conduct is that fundamental employer and employee interests come into conflict, thus creating a disruptive effect upon the natural evolution of employee unionization. 8 On the one hand there exists those genuine employer interests in obtaining information about the nature and extent of the organization of his employees. These interests may be legal, business, personal or strategic in nature. On the other hand there exists the employee's interest in the unrestrained exercise of his right to self-organization for the purpose of participating in an industrial form of government. This interest is basically a manifestation of economic, social, and industrial-political interests which are more fundamental in nature. Necessarily, when these antagonistic interests come into conflict, injury to some of them will result. To the extent that this injury is inconsistent with the policy of the National Labor Relations Act to provide the employee with a free chance as to whether he desires to be represented by a union in a collective bargaining process with his employer, employee interrogation must be regulated. The nature and form which this regulation should take is the focal point of this Comment.

The legal significance of employee interrogation pivots around three unfair labor practice provisions of the Act — sections 8(a)(1), 8(a)(3) and 8(a)(5). 11 Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of their section 7 rights. 12 This section relates directly to the problem of employee interrogation because the ultimate determination made by the Board is whether the interrogation did interfere with, restrain, or coerce the employees. Section 8(a)(3) provides that it shall be an unfair labor practice for an employer to encourage or discourage membership in any labor organization by discrimination in regard to hire or tenure of employment. 13 Its relevance to employee interrogation is in the causal connection between the information obtained during the interrogation and subsequent discrimination against the interrogatee. In many cases the

8. See Bok, supra note 2, at 106, 112.
12. Section 8(a)(1) of the National Labor Relations Act provides:
   (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].
13. Section 8(a)(3) provides in relevant part:
   (a) It shall be an unfair labor practice for an employer — . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .
Board has used a section 8(a) (3) violation to justify a finding that employee interrogation was in fact coercive.\textsuperscript{14} Section 8(a) (5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of his employees.\textsuperscript{15} This section is relevant to the problem of employee interrogation since the employer often raises the duty to bargain as a justification for polling his employees.\textsuperscript{16} His argument usually states that the interrogation was necessary to determine whether the union demanding recognition actually was the authorized collective bargaining representative of an appropriate bargaining unit. The merits of this argument will be discussed at a later point, but it is sufficient for now to recognize that it is pertinent.

Another provision of the Act which often appears in discussions of employee interrogation is section 8(c).\textsuperscript{17} This section, popularly referred to as the “employers free speech” provision, provides that an employer may express his views, arguments, or opinions concerning unionization and it will not constitute an unfair labor practice provided that these expressions contain no threats of reprisal, force or promise of benefit.\textsuperscript{18} This section is often relied upon by employers as a defense to charges that their interrogation of employees constituted a section 8(a) (1) violation.\textsuperscript{19} However, this argument is misplaced. Section 8(c) is not really relevant to the issue of the legality of an employee interrogation, since interrogation is an effort by the employer to elicit information from the employee, and not an expression of his views, arguments or opinions.

The basic purpose of this Comment is to analyze those approaches taken by the Board and the courts to the problem of employee interrogation, and to suggest a new approach based on an evaluation of the attendant conflicting employer–employee interests and their need for legal recognition. Part II will consider first the various approaches taken by the Board in determining whether an employee interrogation is violative of section 8(a) (1) and then the subsequent courts of appeals discontent

\textsuperscript{14} 15 NLRB \textit{Ann. Rep.} 95 (1950).
\textsuperscript{15} Section 8(a) (5) states in part that “It shall be an unfair labor practice for an employer --- (5) to refuse to bargain collectively with the representatives of his employees. . . . “ 29 U.S.C. § 158(a) (5) (1964).
\textsuperscript{16} For an example of this employer argument, \textit{see} NLRB \textit{v.} Gissel Packing Co., 395 U.S. 575, 609 (1969).
\textsuperscript{17} 29 U.S.C. § 158(c) (1964).
\textsuperscript{18} Section 8(c) states that:
  The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force of promise of benefit.
\textsuperscript{19} Precision Fabricators, Inc. \textit{v.} NLRB, 204 F.2d 567 (2d Cir. 1953); NLRB \textit{v.} Jackson Press, Inc., 201 F.2d 541 (7th Cir. 1953); NLRB \textit{v.} Minnesota Mining & Mfg. Co., 179 F.2d 323 (8th Cir. 1950); Standard–Coosa–Thatcher, 85 N.L.R.B. 1358 (1949); Ames Spot Welder Co., 75 N.L.R.B. 352 (1947). A similar defense sometimes raised by employers is that prohibition of employee interrogation is a violation of their first amendment rights. This argument has received limited acceptance to the extent of protecting random inquiries. \textit{See} Sax \textit{v.} NLRB, 171 F.2d 769 (7th Cir. 1948); Jacksonville Paper Co. \textit{v.} NLRB, 137 F.2d 148 (5th Cir. 1943).
with each approach. Part III will evaluate the strength of each of those interests that come into conflict because of the interrogation and balance these interests to determine which should receive legal recognition. Part IV will then suggest a new approach that could be taken to this problem. This suggestion will be based upon the balancing test applied in Part III and will incorporate the present Board approach enunciated in the *Struksnes Constr. Co.* case.

II. BOARD DOCTRINE IN THE COURTS — A STRUGGLE FOR STANDARDS

Since the enactment of the National Labor Relations Act the Board has experienced a doctrinal evolution marked by three distinct approaches to the problem of employer interrogation. The first approach is recognized as the *Standard–Coosa–Thatcher Co.* doctrine. Under this doctrine, the Board considered employee interrogation to be unlawful *per se*, notwithstanding a narrow exception for isolated and sporadic questioning. The second approach, outlined in *Blue Flash Express, Inc.*, encompassed a broad flexible rule which considered the surrounding circumstances of the interrogation to be the determinative factor of coercive effects upon the employees. The third and present Board approach was enunciated in *Struksnes Constr. Co.* It provides that in the absence of unusual circumstances an employer’s poll of his employees will constitute an 8(a)(1) violation unless five specific safeguards are strictly observed. These safeguards are designed to eliminate the coercive effects of polling upon employees. Although this approach seems limited to polling, an argument can be made that it was intended to apply to other forms of interrogation as well.

Notwithstanding the *Struksnes* rule because of its youth, the Board’s doctrinal approaches have encountered various degrees of judicial discontent among the circuits. As a result, separate bodies of judicial criteria have emerged, generally for the purpose of examining all the variable factors in each case in an effort to make a more accurate determination of the actual coercive effect of an interrogation upon the employee’s free exercise of their section 7 rights. The inconsistency of this judicial
response, coupled with the Board’s efforts to adjust its doctrine to these criteria, has resulted in a labyrinth of varying standards. An examination of each of these doctrinal approaches and the subsequent judicial response to them will provide a good reference point from which to begin the search for a new approach.

A. The STANDARD-COOSA-THATCHER Doctrine

Prior to its decision in Standard–Coosa–Thatcher Co., the Board took a rather restrictive approach toward employee interrogation and consequently, in most cases it was found to be an 8(a)(1) violation.27 This approach was objective in nature in that the employer’s intent to coerce the employees was not determinative.28 Rather, the test was whether the conduct was reasonably calculated or tended to interfere with the employees free exercise of their section 7 rights.29

In Standard, the Board established an almost absolute prohibition of employee interrogation. After rejecting the respondent’s argument that interrogation is protected by section 8(c), it held that interrogation of employees as to union matters was per se a violation of 8(a)(1).30 The Board concluded that:

[W]e believe that interrogation of employees as to union matters constitutes, at the very least, interference with the rights protected by Section 7. Whenever an employer directly or indirectly attempts to secure information concerning the manner in which or the extent to which his employees have chosen to engage in union organization or other concerted activities, he invades an area guaranteed to be exclusively the business and concern of his employees.31

The underlying rationale for this strict doctrine appears to be the Board’s fear that the danger to employee rights of self-organization is inherent in the interrogation itself and not just a factor of the surrounding circumstances. This is supported by its reference to the employees’ right to privacy in their union affairs and the fact that the very nature of an interrogation is to invade this privacy.32 Further support is found

1964); NLRB v. Larry Faul Oldsmobile Co., 316 F.2d 595 (7th Cir. 1963); S.H. Kress & Co. v. NLRB, 317 F.2d 225 (9th Cir. 1963); NLRB v. Firedoor Corp. of America, 291 F.2d 328 (2d Cir. 1961); NLRB v. Superior Co., 199 F.2d 39 (6th Cir. 1952).
29. Id.
30. 85 N.L.R.B. 1358, 1362 (1949). The Board did not use the word per se, but its strong prohibitory language is equivalent in meaning. Furthermore, the Board has referred to its decision in Standard as a per se rule. See, Struksnes Constr. Co., 165 N.L.R.B. No. 102, 65 L.R.R.M. 1385, 1386 (June 26, 1967).
32. Id. at 1360–61.
in the Board's reference to the subtle but effective psychological restraints experienced by the interrogatee and the subsequent practices of discrimination that result from the information obtained.\(^8\)

If, after the Standard rule was announced, there was any doubt as to the Board's prohibitive policy toward employee interrogation, it was removed in the \textit{Katz Drug Co.}\(^3\) case. In this case, Local \#688 of the Warehouse and Distribution Workers union was engaged in recognitional picketing at several of the employer's Missouri stores.\(^5\) The employer filed suit in Missouri state court seeking an injunction pursuant to a state statute which made picketing by a non-majority union unlawful.\(^6\) In preparation for the injunction hearing and to meet his burden of proof on the issue of whether the union did in fact represent a majority, the employer asked his employees to read and sign, if they wished, an affidavit which stated that they were not members of the organizing union.\(^7\) The union filed charges with the Regional Director who subsequently issued a complaint alleging that respondent had unlawfully interrogated his employees in violation of 8(a)(1).\(^8\) The trial examiner found no violation, but the Board reversed, holding that the employer had committed an 8(a)(1) unfair labor practice because the interrogation of his employees was a \textit{per se} interference with and coercion of the employees in the free exercise of their section 7 rights.\(^9\) In a footnote to their opinion, the Board pointed up the scope of this doctrine:

[Our] concern in interdicting interrogation is with the coercive effect which such conduct has upon employees, and with the manner in which interrogation injects the employer into an area guaranteed by the Act as the exclusive concern of employees. As such, neither the lack of an unlawful intent nor the absence of threats or promises is material. That is precisely what [we have] meant when [we have] so often characterized interrogation as unlawful \textit{per se}.\(^4\)

The Board had previously created a narrow exception to this rule in the case of \textit{May Department Stores Co.}\(^4\) There it was provided that an employer may lawfully interrogate his employees when it is a necessary part of his defense to unfair labor practice charges and when it is strictly limited to the scope of the issues raised.\(^2\) On a few occasions the Board also made an exception to its \textit{per se} rule for sporadic and innocuous questioning.\(^3\)

\begin{footnotes}
33. \textit{Id.} at 1360.
34. 98 N.L.R.B. 867 (1952).
35. \textit{Id.} at 875.
36. \textit{Id.}
37. \textit{Id.} at 868.
38. \textit{Id.} at 873.
39. \textit{Id.} at 870.
40. \textit{Id.} at 870 n.6.
41. 70 N.L.R.B. 94 (1946).
42. \textit{Id.} at 95.
43. \textit{See, e.g., Waffle Corp. of America, 103 N.L.R.B. 895 (1953); Commercial Printing Co., 99 N.L.R.B. 469 (1952); United States Gypsum Co., 93 N.L.R.B. 966 (1951).}
\end{footnotes}
With the exception of three circuits, judicial response to the *Standard* rule was antagonistic. What seemed to bother the courts was the Board’s failure to consider the many variable factors in each case which might influence a conclusion that the interrogation interfered with and coerced the employees. The thrust of judicial discontent with the *per se* approach revolved around 7 factors which were considered important in assessing the effect of any employee interrogation. These factors included: (1) the existence of an employer background of anti-union animus and/or conduct; (2) the attempt to use the information gathered from the employees to subsequently interfere, restrain, or coerce them; (3) the fact that section 8(c) provides at least limited protection to the employer; (4) the employer’s first amendment right of free speech permits reasonable inquiries into the status of unionization; (5) the existence of actual threats or attempts at coercion; (6) the existence of a general pattern of interrogation; (7) whether the words were in and of themselves intimidating.

It would appear, from an examination of these indicia, that the circuits were employing some form of a “totality of conduct” test to determine whether the interrogation did in fact have a coercive effect upon the employees.

44. The three circuits included the District of Columbia Circuit, the Third Circuit and the Eighth Circuit. See *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732 (D.C. Cir. 1950); *Bochner v. NLRB*, 180 F.2d 1021 (3d Cir. 1950); *NLRB v. Minnesota Mining & Mfg. Co.*, 179 F.2d 323 (8th Cir. 1950).

45. See *NLRB v. England Bros., Inc.*, 201 F.2d 395 (1st Cir. 1953). In this case the court said:

> Since there is no finding of an illegal anti-union attitude or background on the part of the respondent and since the trial examiner found that the conduct of vice president England was free from any taint of unfair labor practice, the Board cannot rely on an “aroma of coercion” as evidence upon which to base its finding in this case.

*Id.* at 398.

46. See *Wayside Press, Inc. v. NLRB*, 206 F.2d 862, 864 (9th Cir. 1953).

47. See *NLRB v. Montgomery Ward & Co.*, 192 F.2d 160 (2d Cir. 1951). The court held in this case that a manager’s inquiries about what was being done on behalf of the union and his statements about his animus toward the union were not violate of section 8(a)(1) to the extent that they did not constitute a threat or intimidation. This, the court said, was *particularly so since the enactment of section 8(c) of the Taft-Hartley amendment.* *Id.* at 163.

48. See *Sax v. NLRB*, 171 F.2d 769 (7th Cir. 1948). The court, in denying enforcement of a Board order based on a finding that the employer violated section 8(a)(1) when he randomly interrogated some of his employees as to their union memberships and activities, stated:

> Such perfunctory, innocuous remarks and queries, standing alone as they do in this case, are insufficient to support a finding of a violation of Section 8(1). They come instead within the protection of free speech protected by the First Amendment to the Federal Constitution.

*Id.* at 772 (emphasis added).

49. See *NLRB v. Superior Co.*, 199 F.2d 39 (6th Cir. 1952). In this case the court said:

> The evidence does not disclose any threat or attempt at coercion. The incident was not part of any general pattern of interrogating employees generally about union affiliation and activities. In our opinion, such limited interrogation, justified by the acts of the employees themselves, was not a violation of the Act.

*Id.* at 44.

50. *Id.* See also *Sax v. NLRB*, 171 F.2d 769, 773 (7th Cir. 1948).

51. *Sax v. NLRB*, 171 F.2d 769, 773 (7th Cir. 1948).

52. This test was created by the Supreme Court in *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). The test was applied in that case to the...
B. The Blue Flash Express Doctrine

The courts of appeals' dissatisfaction with the Standard doctrine prompted the Board to reconsider its position, with a significant impetus to change being the Second Circuit's decision in NLRB v. Syracuse Color Press, Inc.\(^\text{53}\) In that case, the employer's supervisors interrogated several "key" employees about their union membership, the union membership of some of their fellow employees, their attendance at union meetings, and the location of such meetings.\(^\text{54}\) It was evident from the findings of the field examiner that the employer favored one competing union over the other and that the interrogation was for the purpose of interfering with the activities of the unpreferred union.\(^\text{55}\) The court, in upholding the Board's finding of an 8(a)(1) violation, said that the language of the questions was not intimidating in and of itself and therefore the coercive effect of the interrogation would have to be determined by an examination of the record as a whole.\(^\text{56}\) The court went on to enumerate those factors that it considered determinative of the questions of whether or not an interrogation has or is likely to have a coercive or restraining effect upon the employees. These factors included: (1) timing of the interrogation; (2) the place; (3) the personnel involved; (4) the nature of the information sought; and (5) the employers conceded preference.\(^\text{57}\)

In Blue Flash Express, Inc.,\(^\text{58}\) the Board finally responded to the many signals for change and announced a new and much broader test for determining whether employee interrogation is violative of the Act. This test was "whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with the employees in the exercise of rights guaranteed by the Act."\(^\text{59}\) After expressly overruling the Standard doctrine, the Board found that the employer's poll of his employees as to whether they had signed union authorization cards was not violative of the Act because; (1) the employer communicated the purpose of the questioning to his employees; (2) the purpose was to ascertain if the union really did represent the majority they claimed; (3) he assured them they would not receive any reprisals; and (4) the polling occurred against a background free from employer hostility to unionization.\(^\text{60}\) Furthermore, the Board expressly adopted the Second Circuit's Syracuse Color Press tests for determining whether a particular interrogation does in fact interfere with, restrain or coerce the employees. As a further clarification of this new doctrine, the Board also emphasized the fact that interrogation

\(^{\text{53. 209 F.2d 596 (2d Cir. 1954).}}\)
\(^{\text{54. Id. at 597.}}\)
\(^{\text{55. Id. at 599.}}\)
\(^{\text{56. Id.}}\)
\(^{\text{57. Id.}}\)
\(^{\text{58. 109 N.L.R.B. 591 (1954).}}\)
\(^{\text{59. Id. at 593.}}\)
\(^{\text{60. Id. at 593-94.}}\)
is systematic, does not in and of itself impart a coercive character to it and does not have to be accompanied by other unfair labor practices before it can be violative of the Act.\textsuperscript{61}

In the interim period between the Blue Flash doctrine and the Struksnes doctrine, the Board crystallized three of the determinative facts in the Blue Flash case into operative standards by which it determined the legality of an interrogation. These standards included the following inquiries: (1) was there a legitimate purpose for the questioning; (2) were the employees so informed of this purpose; and (3) were there assurances against reprisals.\textsuperscript{62} The Board’s strict application of these standards in numerous cases constituted a movement away from the more broad and flexible totality of the circumstances test that it had originally announced.\textsuperscript{63} Perhaps this apparent inconsistency can be rationalized by assuming that the Board in exercising its expertise found that when these three factors were not present the employees were most likely to be intimidated.

Comparing the Blue Flash doctrine with those factors announced by the circuits in response to the Standard rule, one might reasonably conclude that the Board had achieved a judicially acceptable approach. However, this proved not to be the case. In a series of five major cases, four circuit courts of appeals — the Second, Fifth, Seventh and Ninth — adversely responded to this doctrine. As a result of this discontent, the courts evolved their own body of standards which they considered to be determinative of the legality of an interrogation.

The Ninth Circuit expressed its discontent with the Blue Flash doctrine in S.H. Kress & Co. v. NLRB.\textsuperscript{64} In this case, the Board found that the employer had violated section 8(a)(1) in polling his employees for the purpose of ascertaining how many of them had signed union cards, after the union had petitioned the Board for an election.\textsuperscript{65} The Board’s rationale was that an employer poll under these circumstances has no legitimate purpose and is, in effect, a usurpation of the Board’s function.\textsuperscript{66} The court’s response to this argument was threefold. First, it held that the Board’s legitimate purpose requirement is not determinative of the coercive character of an interrogation.\textsuperscript{67} Secondly, the test in every case is “whether the purpose . . . [of the interrogation] would appear to the employees to constitute reasonable grounds for an interrogation.”\textsuperscript{68}

\textsuperscript{61} Id. at 593.
\textsuperscript{62} See Bok, supra note 2, at 107.
\textsuperscript{64} 317 F.2d 225 (9th Cir. 1963).
\textsuperscript{65} Id. at 226-28.
\textsuperscript{66} Id. at 228.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
Thirdly, if the purpose of the interrogation appears legitimate to the employees, then the fact that it occurred "would carry no sinister implication to the employees." 69

The Seventh Circuit similarly responded in *NLRB v. Larry Faul Oldsmobile Co.* 70 by refusing to enforce a Board order based on a finding that the employer had unlawfully interrogated his salesman when he asked several of them if they had signed union authorization cards, even though the union had demanded recognition and requested that bargaining begin. 71 The *Faul* court held that the employer's failure to assure his employees of no reprisals was not determinative of the legality of the poll, 72 but was only one circumstance which was not to be considered to the exclusion of all others. 73

About a year later, the Second Circuit voiced its dissatisfaction with the *Blue Flash* doctrine in *Bourne v. NLRB.* 74 There the court refused to enforce that portion of the Board's order based on the finding of an 8(a)(1) violation because the employer interrogated some of his employees as to their union activities. The court held that "interrogation not itself threatening, is not held to be an unfair labor practice unless it meets fairly severe standards." 75 It then listed five standards which must be considered before there can be a proper finding of "interference or coercion." These include:

1. The background, *i.e.*, is there a history of employer hostility and discrimination?

2. The nature of the information sought, *e.g.*, did the interrogator appear to be seeking information on which to base taking action against individual employees?

3. The identity of the questioner, *i.e.*, how high was he in the company hierarchy?

4. Place and method of interrogation, *e.g.*, was employee called from work to the boss's office? Was there an atmosphere of "unnatural formality"?

5. Truthfulness of the reply. 76

Nine months later, the Fifth Circuit in *NLRB v. Camco, Inc.*, 77 registered its discontent with *Blue Flash* by enumerating several factors that it felt were determinative of whether or not an employee interrogation was intimidating or coercive. The court said that the answer to the question of what effect an interrogation has on the employees must be

69. *Id.*

70. 316 F.2d 595 (7th Cir. 1963).

71. *Id.* at 597.

72. *Id.* at 598.

73. *Id.*

74. 332 F.2d 47 (2d Cir. 1964).

75. *Id.* at 48.

76. *Id.*

77. 340 F.2d 803 (5th Cir. 1965).
found in an examination of the context in which the questions were asked. Those factors which the court considered relevant to defining this context included: (1) the employer's stated position on unionization of his employees; (2) the nexus between the interrogatees and their union activities; (3) the close connection between the interrogations and subsequent terminations of employment; (4) the systematic and intensive nature of the interrogations; and (5) the truthfulness of employee responses. After evaluating all these considerations and giving due recognition to the Board's finding that the employer had violated two of its standards by not explaining the purpose of the interrogations to the employees and not giving them assurances against reprisals, the court concluded that the employer had violated 8(a)(1).

The last major case to discredit the Blue Flash doctrine was NLRB v. Lorben Corporation. In this case the Second Circuit again refused to enforce a Board order based on unlawful employee interrogation. The Board supported its finding of an 8(a)(1) violation on the ground that the employer had not complied with its enumerated standards for a lawful poll. It found that because the employer failed to communicate the purpose of the poll to his employees and did not assure them against reprisals, the poll was an unlawful interference prohibited by 8(a)(1). The court held that the problem of delineating what is "coercion by interrogation" has resisted any set rules or specific limitations and in light of the surrounding circumstances of this case the absence of these two factors failed to show coercion.

The judicial response to the Board's Blue Flash doctrine in one respect parallels the judicial response to its Standard–Coosa–Thatcher doctrine. Both responses seem to point up the efforts of the judiciary to achieve, as close as possible, a "perfect" answer in each case and their reluctance to accept anything less than adequate recognition of all the variables that might affect the outcome in any given case. The new standards formulated by the circuits seem to accentuate the apparent inconsistency in the Board's approach to the varying circumstances in each case. Thus, the need for clarification of standards and consistency among the Board and the courts became ever more current.

C. The Struksnes Doctrine

In 1964, the Board decided the Struksnes Constr. Co. case in which the primary question was whether an employer poll of his employees for...
the purpose of ascertaining the majority status of a union seeking recognition constituted an 8(a)(1) violation. The polling procedure utilized by the employer consisted of each employee signing a paper and indicating by a "yes or no" whether he wished to be represented by the union. The Board, applying its Blue Flash standards, found the poll to be lawful because it was for a legitimate purpose, there was no anti-union animus, and there were assurances against reprisals. On appeal, the Court of Appeals for the District of Columbia remanded the case to the Board for reconsideration because of apparent inconsistency with some of the Board's prior applications of Blue Flash. The particular inconsistency which was troubling the court was the finding that the poll conformed to Blue Flash standards despite the fact that the employer had failed to communicate its purpose to the employees and despite the fact that he had a permanent record of the votes which could be used for subsequent discrimination. In its remand, the court pointed out that the Blue Flash doctrine, as applied in this case, did not adequately protect the employees' section 7 rights. It suggested that what was needed were minimum well defined standards which could be more readily understood and applied.

In 1967, after the Board reconsidered its prior position on employer polling, it announced what has come to be known as the Struksnes doctrine. This states that:

absent unusual circumstances, the polling of employees by an employer will be violative of section 8(a)(1) unless the following safeguards are observed: (1) The purpose of the poll is to determine the truth of a union's claim of majority; (2) this purpose is communicated to the employees; (3) assurances against reprisals are given; (4) the employees are polled by secret ballot and; (5) the

87. Id. at 1370.
88. Id. at 1371.
89. Int'l Union of Operating Eng'r, Local No. 49 v. NLRB, 353 F.2d 852 (D.C. Cir. 1965).
90. Id. at 855. The court was particularly troubled by the apparent inconsistency of its finding in Struksnes with Johnnie's Poultry Co., 146 N.L.R.B. 770 (1964), and The Lorben Corp., 146 N.L.R.B. 1507 (1964). In Johnnie's Poultry, the Board stated that there are only two reasons why an employer may interrogate his employees: verification of union's claim of majority status or investigation of facts concerning issues raised in a complaint in which employer must prepare a defense. The Board stated further that there were specific safeguards which must be followed to minimize the coercive effect of the interrogation. These included: (1) communicating to the employee the purpose of the questioning; (2) assure him that no reprisals will take place; (3) obtain participation on a voluntary basis; (4) questioning must occur in a context free of employer hostility to the union and must not be itself coercive in nature; and (5) the questions must not exceed the necessities of the legitimate purpose. 146 N.L.R.B. at 775. In Lorben Corp., the Board upheld the trial examiners findings that the employer violated 8(a)(1) because: (1) there was no legitimate purpose for the poll since the union had not yet sought recognition; (2) respondent did not explain the purpose of the poll to all employees; and (3) he did not offer or provide any assurances to the employees that their rights under the Act would not be infringed. 146 N.L.R.B. at 1511-12.
91. 353 F.2d at 856.
employer has not engaged in unfair labor practices or otherwise created a coercive atmosphere.\footnote{92. Struksnes Constr. Co., 165 N.L.R.B. No. 102, 65 L.R.R.M. 1385, 1386 (June 26, 1967).}

The Board also expressed the further limitation that any poll taken while a petition for a Board election is pending is unlawful.\footnote{93. Id. at 1387.}

Up to the time of the writing of this Comment, the \textit{Struksnes} doctrine has been reviewed only by the Eighth Circuit. In \textit{NLRB v. Harry F. Berggren & Sons, Inc.},\footnote{94. 406 F.2d 239 (8th Cir. 1969).} the court strictly applied the \textit{Struksnes} safeguards, holding that even though the employer had complied with four of the five safeguards, his failure to comply with the requirement that he give his employees assurances against reprisals justified the Board's finding of an 8(a)(1) violation.\footnote{95. Id. at 244-45.96. Id. at 245 n.9.97. Id. at 247 (Blackmun, J., dissenting).} However, the \textit{Berggren} court carefully pointed out in a footnote to its opinion that its holding was being confined to a systematic polling situation and was therefore distinguishable from the three isolated instances of informed questioning in the \textit{Paul} case.\footnote{98. Id.} The dissent rejected the majority's strict application of \textit{Struksnes} and argued that the requirement of assurance against reprisals was not necessary when the "totality of the circumstances" are examined.\footnote{99. Struksnes Constr. Co., 165 N.L.R.B. No. 102, 65 L.R.R.M. 1385, 1387 (June 26, 1967).}

It was suggested that a requirement that the employer actually utter the words is meaningless if there exists an atmosphere of coercion.\footnote{100. This argument is strengthened by the Board's reference in \textit{Struksnes} to a revision of the \textit{Blue Flash} doctrine. This can be interpreted to mean that those aspects of \textit{Blue Flash} that applied to polling were revised by \textit{Struksnes} while the doctrine remains controlling over other forms of interrogation such as questioning. 65 L.R.R.M. 1385, 1386 (June 26, 1967).}

Although the \textit{Struksnes} doctrine may appear to be a more satisfactory approach to the problem of employee interrogation than its predecessors, two fundamental questions concerning it remain unanswered. First, how does this rule affect the prior law on employee interrogation, and secondly, how does it line up with the criteria previously announced by the circuits? The answer to the first question must begin with a determination of the meaning and scope of this doctrine. Strictly construed, \textit{Struksnes} would seem to apply only to polling or the formal balloting of employee union sentiments.\footnote{101. This argument is strengthened by the Board's reference in \textit{Struksnes} to a revision of the \textit{Blue Flash} doctrine. This can be interpreted to mean that those aspects of \textit{Blue Flash} that applied to polling were revised by \textit{Struksnes} while the doctrine remains controlling over other forms of interrogation such as questioning. 65 L.R.R.M. 1385, 1386 (June 26, 1967).}

If that is the case, then it would seem that this doctrine would not be applicable to other forms of interrogation such as questioning that concerns the status of a union organizational campaign. Carrying this reasoning one step further, it could be said that if \textit{Struksnes} is only applicable to polling, then the \textit{Blue Flash} doctrine must still be controlling as to other forms of interrogation.\footnote{102. This argument is strengthened by the Board's reference in \textit{Struksnes} to a revision of the \textit{Blue Flash} doctrine. This can be interpreted to mean that those aspects of \textit{Blue Flash} that applied to polling were revised by \textit{Struksnes} while the doctrine remains controlling over other forms of interrogation such as questioning. 65 L.R.R.M. 1385, 1386 (June 26, 1967).} This proposition seems particularly strong in light of the fact that the Board held \textit{Struksnes} to be a revision...
of the Blue Flash doctrine, which was applied to all forms of employee interrogation. Inherently, this uncertainty rests with the failure of both the Board and the courts to properly define the distinction between polling and other forms of interrogation.

An immediate response to the second inquiry of how does Struksnes line up with those standards previously announced by the circuits would be that it is inconsistent. The circuit courts' considerations would seem to preclude any form of rigid approach to both the polling and questioning aspects of interrogation. More specifically, the Second Circuit in Bourne and Lorben emphasized that many circumstantial factors determine whether an interrogation has a coercive effect on the employees and the absence or presence of any one of them is inconclusive. The five considerations announced by the Fifth Circuit in Camco underline its emphasis upon the context of the questioning as being the critical factor. Struksnes, however, makes no recognition of these considerations, unless its "coercive atmosphere" element can be construed to include them. The "legitimate purpose" test announced by the Ninth Circuit in Kress directly conflicts with the sole purpose approach in Struksnes. The Kress test declared that the question to be asked in every interrogation case is "whether the purpose would appear to the employees to constitute reasonable grounds for an interrogation," while Struksnes on the other hand, declares that the only legitimate purpose for polling employees is to "determine the truth of a unions claim of majority." The Eighth Circuit's strict requirement in Berggren that all of the Struksnes safeguards must be complied with, coupled with a similar attitude by the Board, is inconsistent with the Seventh Circuit's holding in Faul. The court said in Faul that the employer's failure to assure his employees against reprisals is only one of the many factors to be considered, but "not to the exclusion of all others." Just how the Struksnes doctrine will be received by the circuits, particularly those most dissatisfied with the Board's doctrinal approaches in the past, is still an open question. But what does seem likely is that litigation over the legality of employee interrogation will remain trapped in the Blue Flash "thicket" of uncertainty and confusion.

The conflicts and inconsistencies that emerge from the foregoing historical and prospective analysis suggest a need for a new perspective of the entire problem of employee interrogation. It is submitted that this new perspective may be best obtained by turning to a foundational analysis conducted on two levels: The first concerning the definition and balancing

101. 317 F.2d at 228.
102. 65 L.R.R.M. at 1386.
103. NLRB v. Larry Faul Oldsmobile Co., 316 F.2d 595, 598 (7th Cir. 1963). The Board's strict application of its Struksnes rule by requiring that all of the safeguards be complied with parallels the Eighth Circuit's application in Berggren. See, e.g., Wallace Co., 174 N.L.R.B. No. 73, 70 L.R.R.M. 1235 (Feb. 12, 1969); Alco Mining Co., 169 N.L.R.B. No. 69, 67 L.R.R.M. 1345 (Jan. 30, 1968).
104. The term "Blue Flash thicket" was used by Judge Wisdom in his majority opinion in Camco, 340 F.2d at 804; See also id. at 804 n.6.
of the individual employer and employee interest that are related to employee interrogation and the second involving a recognition of the policy considerations underlying the National Labor Relations Act.

III. BALANCING THE INTERESTS — THE FOUNDATION FOR A NEW APPROACH

The balancing of interests test is well recognized as a fundamental juristic approach to understanding the legal foundations of a society.105 Social order demands that a legal system identify, value, balance, and then secure various human interests.106 This four step process for determining those competing interests which should receive legal recognition pervades the legislative, administrative, and judicial processes. An example of the application of this test may be seen by looking to the National Labor Relations Act itself. Section 7 grants to those employees within its jurisdiction the substantive right of self-organization and engagement in concerted activities for the purpose of collective bargaining. Section 8(c), on the other hand, recognizes the employers right to express his views, arguments, or opinions on the issue of unionization so long as his expressions contain no threat of reprisal or force or promise of benefit. Through this legislative mandate Congress has given recognition and value to these interests. When they come into conflict, as for example when an employer has launched an intensive anti-union campaign in an effort to ward off employee organization, the Board and possibly even the courts will be called upon to balance and ultimately secure these interests.107 This approach would seem to be an appropriate principle upon which to evaluate the interests which come into conflict during an employee interrogation. The results from the application of this balancing test should reveal those interests which warrant legal recognition. The nature of these interests will then determine the form which this legal recognition should take. Subsections A and B will identify those interests that come into conflict during an interrogation and subsection C will attempt value and balance these interests.

A. Employer Interests

Traditionally the employer's interests in interrogating his employees about their union sentiments or activities have fallen into four general categories. One category includes his interests in fulfilling those legal obligations imposed upon him because of his status as one of the parties

106. Id. at 22.
in an industrial relationship which is regulated by law. These duties include, for example, his 8(a)(5) duty to bargain and his duty to prepare a defense against a Regional Director's complaint alleging unfair labor practices. A second category includes those legitimate business interests which might require an interrogation. An example of this kind of interest which the Board has recognized is an employer's need to know if a majority of his employees will desire a union in the near future so he may accurately compute his business costs in preparation of a public bid to be submitted before unionization has reached the recognition stage. A third category would include his personal interests in satisfying a genuine curiosity about the nature and scope of an unknown force among his employees and how it will affect the status quo. An example of this type of interest is disension among the work force. The final category of employer interests would include his need to know the scope and intensity of union activity so that he may formulate a campaign strategy to adequately express his views and opinions on the issues of unionization. This interest is exemplified in the situation where the employer anonymously learns of union organizational activity and subsequently interrogates some of his employees about it and learning from them that the union has been having difficulty recruiting members, and then decides to sit back and leave well enough alone.

B. Employee Interests

Ultimately, the employee interests related to the problem of employee interrogation originate from his need and desire to participate in an industrial form of government. Generally speaking, his desire for self-organization is a manifestation of more fundamental interests — economic, social, and industrial-political in nature. Economically, his orientation is toward income stability and job security. Socially, his interests are to participate in group life and share a community of interests with others. His industrial-political interests stem from his need to participate in the exercise of power and control over his life in an industrial society. However, within the specific context of employee interrogation, his basic interest is to remain free in the exercise of his section 7 rights to self-organization. This interest is divisible into the more specific interests of

108. For an exhaustive analysis of an employer's duty to bargain and the scope of that duty, see H. WELLINGTON, LABOR AND THE LEGAL PROCESS 52-90 (1968). See also May Department Stores Co., 70 N.L.R.B. 94 (1946).
110. See Anderson Air Activities, Inc., 128 N.L.R.B. 698 (1960). This case involved mild interrogation to determine the source and scope of disension among a work crew.
111. The employer's argument here is that he has a legitimate need to know the intensity of unionization so he may fully exercise his 8(c) rights by developing an adequate campaign strategy. See NLRB v. Gissel Packing Co., 395 U.S. 575 (1969); Excelsior Underwear, Inc., 156 N.L.R.B. 1236 (1966).
112. H. WELLINGTON, supra note 108, at 27.
participation in union organizational campaigns without fear of subsequent employer discrimination, union memberships, and the sharing of the rewards of the collective bargaining process.

C. The Valuation and Balance

The valuation of those employer and employee interests identified above will pivot around four factors. They include the situs of power in the pre-union employment relationship, the potential for abuse of that power, the situs of injury when competing interests come into conflict, and the availability of reasonable alternatives for effectuating those interests. Both the employer and employee interests will be considered in light of the above mentioned factors to determine which of them should receive legal recognition and security. These four valuation factors have been selected because they are indicia of two fundamental elements in every relationship — power and injury. These two elements become determinative of which group of interests should receive legal recognition when those interests become antagonistic and the relationship is one of necessity as in the case of the employment relationship.

The first factor — the situs of power — concerns the identification of the party which has the right to define and control the nature and form of the employer-employee relationship. Under the terms of the normal pre-union employment contract, there is little question as to the location of the situs of power. It is situated with the employer. He sets the terms and conditions of employment, notwithstanding any minimal bargaining that might occur because of some strategic position which the employee has managed to obtain.

The second factor, being directly related to the first, also rests with the employer. Since the power to regulate the pre-union employment relationship rests with the employer, he then is the potential source of abuse of that power. This is not to say that inevitably all employers will abuse their power over an employee, but only that considerations of motive and intent run in his direction. It can be argued that the employee does retain some power to affect his employment relationships and that this power is subject to abuse also. Such a consideration would probably include employee disregard of certain employment terms such as the hours of work or level of expected production. However, it is suggested that this power is negligible and does not begin to create a balance in the relationship.

The question of the situs and the extent of injury that is experienced by either group of antagonistic interests as a result of their conflict relates directly to the social value assigned to these interests. If one particular group of interests is deemed to be of a higher societal value than the other, then those interests of higher value will be the principal subject

113. The employee interest in being able to freely exercise his section 7 rights is not without protection at the present time. Section 8(a) unfair labor practices and the Board's regulation of pre-election conduct provide him with some protection.
of legal recognition and security. The situs of the injury resulting from an employee interrogation is situated with the employee. The source of this injury flows from the interference or coercive effect that the employer's questioning or poll will have upon the employee. In most cases, the actual restraint upon the employee's free exercise of his section 7 rights will result from a fear of employer retribution and discrimination. The magnitude of this fear may be more fully understood by looking to the realities of the employment relationship. The Supreme Court in NLRB v. Gissel Packing Co. emphasized the nature of this fear when it said:

[A]n employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in § 7 and protected by 8(a)(1). . . . And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick-up intended implications of the latter that might be more readily dismissed by a more disinterested ear.

The magnitude of this fear will, of course, vary with the degree of economic dependence, but the risks of injury to his interests are considerable. The extent of this injury will depend upon the degree of restraint upon his efforts to effectuate those interests. The fact that the situs of injury is situated with the employee does not mean that the employer's interests will not be injured. If the interrogation of his employees to obtain information for a legitimate purpose is absolutely prohibited and there are no available alternatives for acquiring this needed information, then his interests have been effectively restrained. However, under the present state of the law this is not the case and, consequently, the injury runs in the direction of the employee.

The final valuation factor to be considered is the availability of reasonable alternative channels of interests realization. This factor is designed to reveal which of the groups of antagonistic interests could utilize alternative channels of realization to mitigate the dimensions of the conflict. An example of this concept is the alternative cause of action available to the employer for the realization of his legal interests in fulfilling his duty to bargain when he is confronted with a union demand for recognition. Under the Board's current practice as announced in Aaron Brothers, considerations of employer good faith are no longer relevant in determining whether he has failed to fulfill his 8(a)(5) duty to bargain. In the past, when an employer entertained a good faith doubt as to the validity of a union's

115. For a good overview of employee fear as a necessary consequence of an interrogation and its effect upon the employee's section 7 rights, see the dissenting opinion of Board members Murdock and Peterson in Blue Flash Express, Inc., 109 N.L.R.B. at 595-600.
117. Id. at 617.
claim of majority status, he would have to interrogate his employees on this point, using the results of the interrogation as affirmative reasons for his refusal to bargain.\textsuperscript{120} But now the employer has two alternative courses of action available to him in which he can satisfy his doubts of the union's claim without risking the issuance of a bargaining order.\textsuperscript{121} He can insist that the union go to an election, regardless of his motive, so long as he does not commit any serious unfair labor practices that interfere with the election processes, or he can poll his employees in strict accordance with the safeguards enumerated in \textit{Struksnes}.\textsuperscript{122} In either case, the interests of both parties are protected and the conflict is avoided.

The application of the reasonable alternative factor to both the employer's and the employee's interests reveals that the availability of alternative courses of action is situated with the employer. It is conceded that some of the employer's interests will probably not find alternative realization, such as his need to know the status of unionization for the purpose of designing his campaign strategy. However, it seems reasonable to conclude that at least some of his interest can be alternatively realized. The employee's interests, on the other hand, have no alternative channels of realization since the only way that a conflict with employer interests could be avoided is if the employer knew nothing about the unionization of his plant until the union was certified. If this were possible, the interrogation problem would be non-existent because by definition it involves pre-election conduct.

It is submitted that on the basis of the foregoing valuation, the balance runs in the direction of the employee.\textsuperscript{123} This conclusion seems totally consistent with the policies behind the National Labor Relations Act. Section 7 reflects congressional recognition of the employee's interests in

120. For a good analysis of the employer's Hobson's choice argument, see NLRB v. Dan River Mills, Inc., 274 F.2d 381 (5th Cir. 1960).

121. NLRB v. Gissel Packing Co., 395 U.S. 575, 609 (1969). Section 10 of the National Labor Relations Act, 29 U.S.C. § 160(a) (1964), empowers the Board "to prevent any person from engaging in unfair labor practices" enumerated in section 8. Under section 10(c), 29 U.S.C. § 160(c) (1964), the Board is empowered to issue cease and desist orders from unfair labor practices and to take affirmative action necessary to effectuate the policies of the Act. The Board derives its power to issue bargaining orders from this latter section. A bargaining order compels the employer to negotiate a collective bargaining agreement with the certified union. It is a strong remedy which the Board employs when it feels that it is necessary to compensate for unlawful practices of the employer.

122. 395 U.S. at 609.

123. A different type of analysis, put forth in legal process terms, which has been offered as a justification for active legal protection of the employee's rights to organize and bargain collectively, states: (1) it is desirable to have an industrial democracy to prevent the dehumanization of the worker and this requires a union democracy; (2) interests groups are a favorable institution in the life of a democracy because it is a source of individual interest realization and maintains a diffusion of political power; (3) the establishment and maintenance of the collective bargaining institution will substantially reduce the economic strife created by industrialization because it offers negotiations over class conflict; (4) it is necessary because of inequality of bargaining power between the employer and the unorganized employee. H. WELLINGTON, supra note 108, at 26-27.

balancing the power in the industrial community. The Act created and is
designed to protect the fundamental right of every employee through an
elected representative to bargain on an equal basis with his employer as
to the terms and conditions of his employment. Therefore, if this right
is to be realized, the embryonic stages of unionization must be insulated
from employer interference.

IV. Great Dane and Struksnes —

THE BASIS FOR A NEW PRESUMPTIVE RULE

In the preceding section it was pointed out that the inherent problem
with an employer’s interrogation of his employees as to their union
sympathies and activities is the difficulty of determining its real effect
upon the employee’s free exercise of his right of self-organization. This
is the problem that created the milieu of standards advocated by the courts
of appeals. Those standards represented judicial efforts to determine in
every case whether the employees were in fact restrained or coerced by
the interrogation. But it is submitted that the impossibility of determining
when such a subjective element as fear has actually been evoked plus the
high degree of risk of injury to vital employee interests leads to the
reasonable conclusion that this form of employer conduct is inherently
dangerous to the employee’s rights and must be severely proscribed. 124
This is not to say that it should be absolutely prohibited, because there
are some legitimate employer interests at stake. However, it is submitted
that in any scheme designed to regulate employee interrogation, the thrust
of legal protection must be in the direction of the employee’s interests.

A. “Inherently Destructive Conduct”

It is submitted that a new approach to this problem may be formu-
lated by the merging of two already existing labor law doctrines. The
first is the “inherently destructive conduct” doctrine enunciated by the
Supreme Court in NLRB v. Great Dane Trailers, Inc. 125 Although the
issue in that case was employer discrimination in violation of 8(a)(3),
the Court’s doctrinal approach seems similarly applicable to employee
interrogations. The rationale behind the “inherently destructive” concept
is that some employer conduct by its very nature is destructive of the
employee’s interests and because of this it is proscribed without any con-
sideration of employer motive. 126 A form of conduct is deemed to be

124. The following quote from K. Davis, HUMAN RELATIONS AT WORK: THE
DYNAMICS OF ORGANIZATIONAL BEHAVIOR 340 (3d ed. 1967), points up the inherent
misunderstandings in communications between manager and worker when the purpose
of the interrogation is not understood and inferences are thus drawn:

The meaning which a worker gets from a manager’s communication depends
upon the confidence he has in the communicator’s purpose. The worker searches
between the lines, wondering, “why did he say that?” . . . “What was his purpose?”
It is suggested that an employee participating in underground organizational efforts
has little confidence that the employer’s questioning is in good faith.

126. Id. at 33.
"inherently destructive" because it necessarily produces "unavoidable consequences." If the employer conduct in question falls within this category, then he has the burden of justifying his actions as being something other than they appear on their face. It is submitted that employee interrogation could be categorized as employer conduct which is "inherently destructive." That being the case, once the fact of interrogation is shown, an 8(a)(1) unfair labor practice would be presumed and the burden would then fall upon the employer to show some legitimate purpose for his actions.

B. "Legitimate Purpose" as a Defense

To protect those employer interests which cannot find alternative channels of realization, an affirmative defense to the "inherently destructive" rule is necessary. It is submitted that the Struksnes doctrine will provide a good foundation upon which to develop this defense and will provide the employer with a reliable standard for meeting his burden of proof. It is further suggested that the Struksnes rule be expanded to permit employee interrogation for any "legitimate employer purpose," including those Part III interests enumerated in Part II, while basically retaining the other safeguards as they are. Employing the Struksnes rule in modified form as a permissible method of interrogation will provide the employer with a last resort for obtaining needed information when he has exhausted all his reasonable alternative methods of inquiry, and, at the same time, afford the employee with adequate insulation from employer interference.

C. A New Presumptive Rule

The merger of these two doctrines as modified above can serve as a new rule for determining whether employee interrogation constitutes an 8(a)(1) violation. The new presumptive rule is stated as follows:

An employer’s interrogation of his employees concerning their union sympathies, activities, or other related union matters, or those of their fellow employees is presumed to be "inherently destructive" conduct and will result in an 8(a)(1) violation unless the employer has strictly complied with all of the following safeguards:

(a.) It is for a legitimate purpose;

(b.) A legitimate purpose exists when (1) the employer has no reasonable alternative means of acquiring this information and (2) a substantial and legitimate employer end is served;

127. Id.
128. Id.
129. See pp. 704-05 supra.
130. A presumptive rule, as the Board uses that term, is a rule that creates a rebuttable presumption. For examples of other Board "presumptive rules" which have been upheld, see NLRB v. United Steelworkers and Nutone, Inc., 357 U.S. 357 (1958); NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956); Republic Aviation Corp. v. NLRB, 324 U.S. 793 (1945).
(c.) The purpose for the interrogation is communicated to the employee;

(d.) The employee is given adequate express assurance against any reprisals;

(e.) If the interrogation is in the form of an employee poll it must be by secret ballot. If the interrogation is in the form of questioning the employer must (1) inform the employee that he does not have to participate in the interrogation if he does not wish to do so and (2) that if he does desire to participate, he may still refuse to answer any specific question;

(f.) The employer has not otherwise engaged in unfair labor practices or created a "coercive atmosphere."

Under this rule employee interrogation would be deemed to be a prima facie violation of section 8(a)(1). The burden is placed upon the employer to prove to the Board that his interrogation strictly complied with all the enumerated safeguards and if he fails to do so, he will be faced with Board remedial action.181

V. CONCLUSIONS

Ultimately the Board and the courts will have to find some common ground for agreement as to what will be the proper approach to the problem of employee interrogation. It is a fair guess that the Board's present approach under *Struksnes* is doomed to the same ill fate in the circuits as its predecessor, *Blue Flash*. There is merit, however, in the current rule as far as it extends to polling. Perhaps the Board intended it to be applied to all forms of employee interrogation, but this seems doubtful.182 Nevertheless, any new solutions that the Board might entertain should adequately consider the inherent danger of employee interrogation to the employee's fundamental rights of self-organization and participation in concerted activities and the almost insurmountable difficulty of ascertaining its actual effect upon these rights.

Howard D. Venzie, Jr.

131. *See* note 130 *supra*.
132. *See* note 100 *supra*.