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Michael E. Caples

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EMPLOYER CONCERTED ACTIVITY PROTESTING
THE DISCHARGE OF A SUPERVISOR: A
REVIEW AND A CALL FOR REFORM

MICHAEL E. CAPLES

I. INTRODUCTION

EMPLOYERS, AS A GENERAL PROPOSITION, should be
entitled to the loyalty of their supervisory personnel.1 Likewise, they should be able to take action with regard to their super-
visors which will ensure this loyalty.2 This proposition is sup-
ported by a common sense understanding of life in the marketplace. Supervisors, depending on their precise position in the organiza-
tional hierarchy, are charged with a whole range of managerial responsibilities, the carrying out of which is inconsistent with the idea of aligning their economic and job security interests closely with those of a union.3 Rightly or wrongly, the interests of unions are at least perceived as being, if they are not in fact, inconsistent with the profit and administrative interests of employers. An em-
ployer should not, therefore, be required to employ a supervisor

1. This general proposition has been endorsed by both Congress and the
United States Supreme Court. See notes 8 & 118 and accompanying text infra.

2. See note 8 infra.

3. The term "supervisor," as defined in § 2(11) of the National Labor Rela-
tions Act, includes:

[A]ny individual having authority in the interest of the employer, to
hire, transfer, suspend, lay off, recall, promote, discharge, assign, re-
ward, or discipline other employees, or responsibly to direct them, or
to adjust their grievances, or effectively to recommend such action, if
in connection with the foregoing the exercise of such authority is not
of a merely routine or clerical nature, but requires the use of inde-
pendent judgment.

(1976).

(455)
who perceives the policies and procedures which he is charged with enforcing as being antagonistic to his interests and those of his unionized “cohorts.”

This proposition is further evidenced, as a matter of legislative policy, by the provisions of the National Labor Relations Act (the NLRA or Act). Supervisors are expressly excluded from the definition of “employee” in section 2 of the Act. Thus, supervisors are not granted any of the rights which are guaranteed to employees under section 7 of the Act, nor are they protected from the employer conduct otherwise proscribed by section 8(a) of the Act. Additionally, it is an unfair labor practice under section

4. For the historical background of the treatment of supervisors by Congress and the United States Supreme Court, see R. Gorman, Basic Text on Labor Law 33-34 (1976).


7. Section 7 of the Act provides 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.” National Labor Relations (Wagner) Act § 7, 29 U.S.C. § 157 (1976).

In Western Sample Book & Printing Co., 209 N.L.R.B. 384 (1974), the National Labor Relations Board (Board) stated that supervisors are not entitled to these § 7 rights: “[S]upervisors, regardless of their low status in the hierarchy, cannot form, join, or assist any union organization without the employer’s condonation or acquiescence. Neither can they engage in any concerted activities to protect their jobs, income or status.” 209 N.L.R.B. at 390. The Board cited the legislative history of the Act in support of this statement. See id.

8. Section 8(a) of the Act provides in pertinent part:

(a) It shall be an unfair labor practice for the employer—

(1) to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 7;

(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 . . . ; [or]

(5) to refuse to bargain collectively with representatives of his employees, subject to section 9(a).

National Labor Relations (Wagner) Act § 8(a), 29 U.S.C. § 158(a) (1976). The United States Supreme Court has stated that supervisors cannot claim the protection of § 8(a):

While supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, the right to discharge such supervisors because of their involvement in union activities or union membership, and the right to refuse to engage in collective bargaining with them.
8(b)(1)(B) of the Act for a labor organization to "restrain or coerce ... an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Since supervisors commonly, if not universally, have authority to adjust grievances, it seems likely that the terms of section 8(b)(1)(B) would further protect employer actions regarding supervisors.  

Despite these provisions, however, it is apparent that employers do not have absolute freedom in their employment decisions regarding supervisors. This follows from the fact that the express provisions of the NLRA must necessarily be read in a manner which is consistent with both the policy underlying the Act and, where possible, with the other provisions of the Act. Thus, a question arises as to what actions an employer may take with regard to supervisors, and when these actions may be taken with impunity. A corollary question that arises is when, if ever, work actions by employees to protest employer actions against supervisory personnel may be characterized as protected concerted activity.

The National Labor Relations Board (the NLRB or Board) and the courts have generally held that the degree of protection


10. See Florida Power & Light Co. v. Local 641, IBEW, 417 U.S. 790 (1974). In Florida Power & Light, the Court cautioned that the legislative history of § 8(b)(1)(B) "makes it clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment." Id. at 803. The Court nonetheless suggested that § 8(b)(1)(B) might do more than merely protect an employer's initial right to select his collective bargaining agent without union coercion. For instance, it noted that "a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8(b)(1)(B) only when that discipline may adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer." Id. at 804-05. See also notes 89 & 90 and accompanying text infra.

11. See Didde-Glaser, Inc., 223 N.L.R.B. 765, 769 (1977). In Didde-Glaser, the National Labor Relations Board (Board) noted that the key question in determining whether the discharge of a supervisor violates the Act is "whether employees were coerced by events affecting their supervisor and whether this derivatively subjected them to the vice of Section 8(a)(1)." Id. at 769. The Board pointed out that several different forms of supervisor dismissals constitute violations of § 8(a)(1). Id. In Better Monkey Grip Co., 115 N.L.R.B. 1170 (1956), enforced, 243 F.2d 856 (5th Cir.), cert. denied, 355 U.S. 864 (1957), it was held that an employer's dismissal of a supervisor for testifying before a Board proceeding violated the Act since the dismissal's net effect was "to cause nonsupervisory employees reasonably to fear that the Respondent would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act." 115 N.L.R.B. at 1171. See also notes 61-67 and accompanying text infra.
to be accorded to concerted activity should depend upon the circumstances surrounding the discharge of the supervisor.\textsuperscript{12} Thus, if the discharge is determined to be an unfair labor practice, it would follow that a strike by employees protesting the discharge would be protected as an unfair labor practice strike.\textsuperscript{13} To this extent, the concerted activity can be viewed as protesting a wrong inflicted upon the employees themselves, with the supervisor merely the medium used by the employer to harm his employees.\textsuperscript{14} Where the discharge itself is not an unfair labor practice, however, the answer is less clear-cut. Thus, concerted activity to protest such a discharge could be either unprotected or protected economic action.

The purpose of this article is to examine the conditions under which the discharge of a supervisor will constitute an unfair labor practice such that concerted employee activity protesting the discharge will be protected. The question of whether and when concerted activity protesting the discharge of a supervisor under conditions not constituting an unfair labor practice should be protected will also be explored.

\section*{II. Limitations on Employer Discipline of Supervisors}

In examining the limitations placed upon an employer's freedom to discipline his supervisors, one must start with the general proposition that supervisors are not protected by the NLRA.\textsuperscript{15} As the Administrative Law Judge (ALJ) observed in \textit{Western Sample Book & Printing Co.}: \textsuperscript{16}

\begin{quote}
As I view current Board law upheld by the courts, there has been established a class of employees, meeting the statutory definition of supervisors, who can be brow beaten, harassed, threatened, and discharged for failure to prevent the unionization of the establishment where they are employed [or] if the employer concludes that such supervisors have exerted insufficient energy in discovering information concerning the union and thereby failed to assist the employer's antiunion campaign. Moreover, such supervisors, regardless of their low status in the hierarchy, cannot form, join, or assist any union organization without the employer's condonation or acquiescence.
\end{quote}

\textsuperscript{12} See notes 18 & 19 and accompanying text infra.
\textsuperscript{13} See notes 71-75 and accompanying text infra.
\textsuperscript{14} See note 19 and accompanying text infra.
\textsuperscript{15} See notes 5-10 and accompanying text supra.
\textsuperscript{16} 209 N.L.R.B. 384 (1974).
Neither can they engage in any concerted activities to protect their jobs, income or status.17

Nevertheless, some limitations to employer discipline of supervisors exist. Typically, the rationale for those limitations is that in certain circumstances the employer's conduct amounts to a violation of section 8(a)(1) of the Act,18 and as such is forbidden not because of the effect of the action on the supervisor but rather because of the direct and deliberate effect of the action on employees.19

An examination of the many cases dealing with this issue turns up three broad categories of employer conduct proscribed as violations of section 8(a)(1).20 These categories include: 1) employer

17. Id. at 390. In reaching this conclusion, the ALJ referred to the legislative history of the Act and specifically to the following statement attributed to Senator Taft:

The bill provides that [supervisors] shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act. It is felt very strongly by management that [supervisors] are part of management; that it is impossible to manage a plant unless the [supervisors] are wholly loyal to management.

Id. See also notes 102-05 and accompanying text infra.

18. For the text of § 8(a)(1), see note 8 supra. See also note 11 supra.

19. See, e.g., Gerry's Cash Markets, Inc. v. N.L.R.B., 602 F.2d 1021 (1st Cir. 1979); N.L.R.B. v. Talladega Cotton Factory, Inc., 213 F.2d 209 (5th Cir. 1954); VADA of Okla., Inc., 216 N.L.R.B. 750 (1975). In Gerry's Cash Markets, the court found that an employer had violated § 8(a)(1) by demoting a supervisor who refused to enforce the employer's unlawful "no solicitation" rule since "if employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results in direct interference with the affected rank-and-file employees in the exercise of their § 7 rights." 602 F.2d at 1023. In Talladega Cotton Factory, the discharge of two supervisors who refused to commit unfair labor practices at their employer's behest was held to constitute a § 8(a)(1) violation because the "net effect" of the discharges was to cause nonsupervisory employees "reasonably to fear" that the employer would take similar action against them if they continued as union supporters. 213 F.2d at 213 n.4 & 217. And, in VADA of Oklahoma, the Board found a § 8(a)(1) violation in an employer's discharge of a supervisor who represented the "classic supervisory conduit" through whom the employer "channeled actions aimed at interfering with, restraining and coercing its bargaining unit employees in the exercise of rights protected by section 7." 216 N.L.R.B. at 759.

20. See Krebs & King Toyota, Inc., 197 N.L.R.B. 462, 464 (1972) (Kennedy, Member, concurring and dissenting). Member Kennedy separately categorized cases in which a supervisor is discharged because the employment of rank-and-file employees depends upon his employment. Id. Thus, such a supervisor is discharged not only because of his own pro-union activities, but also to discharge rank-and-file employees along with him. Id. Member Kennedy's category covering this conduct is included in this article's category
conduct which is part of a pattern of conduct aimed at stifling union activity, sometimes characterized as an effort to penalize employees for their union activity; 21 2) employer conduct which is an effort to penalize or discourage supervisor testimony before the Board; 22 and 3) employer conduct which is in retaliation for a supervisor's refusal to commit unfair labor practices on behalf of his employer. 23 These categories, though treated separately in this article, often overlap in the Board and court decisions. This leads to some confusion in trying to decipher the factual circumstances in which an employer will be able to discipline a supervisor.

A. Employer Attempts to Stifle Union Activity

The circumstances in which disciplining a supervisor will lead to the finding of a section 8(a)(1) violation are not terribly clear. This is due in large part to a penchant on the part of the Board and the courts for using broad, imprecise language in their decisions. The adherence to such formulations, if allowed to get out of hand, could lead to a situation in which the exception would swallow the rule. 24

The general rule that the Board has developed is that discipline of supervisors will be forbidden if it is an “integral part of number one since such situations appear to be relatively rare. For an example of one such case, see Pioneer Drilling Co., 162 N.L.R.B. 918, 923 (1967), enforced in relevant part, 391 F.2d 961 (10th Cir. 1968) (because dismissal of well driller, who is supervisor under Act, leads automatically to termination of his crew, discharge of driller violates § 8(a)(1) when it is part of pattern to penalize employees for union activity). Cf. Krebs & King Toyota, Inc., 197 N.L.R.B. at 463 n.3 (discharge of supervisor who spoke for striking employees violated § 8(a)(1) because it was an “integral part of a pattern of conduct aimed at penalizing employees for their union activity”).

21. See notes 24-46 and accompanying text infra.
22. See notes 47-62 and accompanying text infra.
23. See notes 63-70 and accompanying text infra.
24. Indeed, this seems to have been the concern of former Board Members Truesdale and Murphy. See Sheraton Puerto Rico Corp., 248 N.L.R.B. 867 (1980), enforcement denied, 651 F.2d 49 (1st Cir. 1981). Member Truesdale criticized the Sheraton majority of the Board for proceeding from a “general premise that supervisors (or managerial employees) who join rank-and-file employees in participating in what is otherwise protected activity and are subjected to the same treatment meted out to employees somehow share the Act’s protection which extends to employees.” 248 N.L.R.B. at 868-69 (Truesdale, Member, dissenting). See also DRW Corp., 248 N.L.R.B. 828, 830-81 (1980) (Truesdale, Member, concurring and dissenting); Nevis Indus., Inc., 246 N.L.R.B. 1053, 1056-58 (1979) (Murphy, Member, concurring and dissenting), enforcement denied in relevant part, 647 F.2d 905 (9th Cir. 1981); Downslope Indus., Inc., 246 N.L.R.B. 948, 951-52 (1979) (Murphy, Member, concurring and dissenting).
a pattern of conduct aimed at penalizing employees for their union activities and ridding the plant of union adherents.\textsuperscript{25} This standard, however, should not be applied mechanically. Rather, the competing interests of the employer and of his employees should be kept in mind and a result should be reached which best protects all interests. Thus, the employer should be protected from being shackled with a “disloyal” supervisor, while at the same time he should be prevented from using his supervisors as tools with which to coerce or restrain his employees in the exercise of their section 7 rights.

The clearest cases, of course, are those at the extremes. Thus, it seems clear that when a supervisor is actively campaigning for unionization, in contravention of the wishes of his employer, he may be discharged or disciplined by the employer.\textsuperscript{26} Likewise, it is clear that an employer may not discharge an otherwise unoffending supervisor merely as a predicate to discharging rank-and-file employees because of their union sympathies.\textsuperscript{27} Nor can retaliatory action be taken against a supervisor simply because of his personal or family relationship to a union adherent.\textsuperscript{28}

Between the extremes are a myriad of cases which provide little guidance to those trying to practice preventive labor law. Even

\textsuperscript{25} Miami Coca Cola Bottling Co., 140 N.L.R.B. 1359, 1361 (1963), enforcement denied in relevant part, 341 F.2d 524 (5th Cir. 1965). See also Production Stamping, Inc., 239 N.L.R.B. 1183, 1193 (1979); East Belden Corp., 239 N.L.R.B. 776, 797 (1978); Barnes & Noble Bookstores, Inc., 233 N.L.R.B. 1326, 1343 n.18 (1977); Trustees of Boston Univ., 224 N.L.R.B. 1385, 1393 (1976), enforced, 548 F.2d 391 (1st Cir. 1977); General Nutrition Center, Inc., 221 N.L.R.B. 856, 859 (1975); Donelson Packing Co., 220 N.L.R.B. 1043 (1975), enforced, 569 F.2d 430 (6th Cir. 1978); Fairview Nursing Home, 202 N.L.R.B. 518, 524 n.34 (1975), enforced, 84 L.R.R.M. 9010 (5th Cir. 1973). In Fairview Nursing Home, the ALJ stated that the discharge of two supervisors constituted a violation of §8(a)(3) as well as of §8(a)(1) of the Act. 202 N.L.R.B. at 524 n.34. This, it would seem, must have been an error, but the Board, in affirming, made no mention of it. See also Krebs & King Toyota, Inc., 197 N.L.R.B. 462, 463 n.4 (1972); Pioneer Drilling Co., 162 N.L.R.B. 918, 923 (1967), enforced in relevant part, 391 F.2d 961 (10th Cir. 1968).


\textsuperscript{27} Pioneer Drilling Co., 162 N.L.R.B. 918, 923-24 (1967), enforced in relevant part, 391 F.2d 961 (10th Cir. 1968). See note 20 supra.

some cases which would seem to fit into one of the extreme categories have unpredictable results. Thus, in *Production Stamping, Inc.*, in which an employer discharged a supervisor who helped to initiate a unionization campaign in his plant, the employer was nevertheless held to have violated section 8(a)(1) since the discharge was "part of a program of [the employer of] penalizing employees who organized the Union, or who engaged in significant or suspected union activity." As is evident from the foregoing quote, however, there were numerous other employer unfair labor practices involved in *Production Stamping*.

Likewise, in *VADA of Oklahoma, Inc.*, an employer who discharged a supervisor who "actively allied himself with the Union" was found to have violated section 8(a)(1). Again, however, there was a course of employer conduct violating the Act. Even in a case in which a supervisor was the spokesman for striking employees, taking up the cause of the strikers against their employer, the discharge of the supervisor was found to violate section 8(a)(1) because it was an "integral part of a pattern of conduct aimed at penalizing employees for their union activities."

What emerges from these cases is an uncertain, *ad hoc* application of a vague and indefinite rule which fails to put employers

30. Id. at 1193. See also DRW Corp., 248 N.L.R.B. 828 (1980). In *DRW Corp.*, the supervisor "sounded out the other employees as to whether they were interested in the Union, contacted the Union and arranged a meeting with union officials at [his] house, and passed out union cards and literature." Id. at 828. Cf. Sheraton Puerto Rico Corp., 248 N.L.R.B. 867 (1980), enforcement denied, 651 F.2d 49 (1st Cir. 1981). The employer in *Sheraton* was held to have violated §8(a)(1) when he discharged his supervisors for signing a letter that complained of working conditions, because the "natural tendency" of such discharges was to "discourage employees from exercising rights guaranteed them" in §7. 248 N.L.R.B. at 867.
31. 239 N.L.R.B. at 1194. The Board concluded that the employer had discharged some employees and deprived others of overtime because of their union activities. Id. In addition, the employer had engaged in unlawful interrogation of employees and in surveillance of union activity. Id. The Board also found that the employer had threatened reprisals against those who testified before Board proceedings. Id.
33. Id. at 759.
34. Id.
35. Id. at 763. Specifically, the Board concluded that the employer violated §8(a)(3) by laying off 37 employees in an effort to discourage their support of a union. Id. The Board also concluded that the employer violated §8(a)(1) by interrogating an employee about his support of the union and by "threatening employees with plant closure and discharge if they became or remained members of the union." Id.
on notice of what actions may be taken with regard to recalcitrant supervisors and when such action may be taken. The ambiguity of this rule and its uncertain application obviously have not been cured through any consistent and reasonable application of it in varied fact situations.

Nor is the rule clarified by examining either the elements of the rule or its underlying rationale. The rule, as stated, seems to have four elements: 1) a discriminatory discharge or discipline; 2) which is an integral part; 3) of a pattern of conduct or a plan; 4) aimed at penalizing employees for their union activities and ridding the plant of union adherents.\(^{37}\) The first element creates no special problems, but the others are less clear. When does discipline become an "integral part" of a pattern of conduct? Is it possible that disciplining a supervisor might be part of a "plan" but still only spring from some vague motivation so that the action is not the proscribed "integral part" of an anti-union course of employer conduct? These questions seem trivial until one is faced with advising or defending a client. How much evidence, and what kind, does it take to support a finding that an employer has engaged in a proscribed pattern or course of conduct? Can a finding of such a pattern be sustained in the absence of other unfair labor practices? That the conduct is aimed at penalizing employees for union activity would seem to indicate that other unfair labor practices must exist. But what of the situation in which there are no unfair labor practices, but the object is clearly to rid the plant of the union? Is there nevertheless the proscribed pattern? If so, it would seem to make mere opposition to unionization proscribed. But that result would be ludicrous.\(^{38}\) Again, the answers are unclear, and there is little guidance provided by the cases.

\(^{37}\) See note 25 and accompanying text supra.

\(^{38}\) The Board seems to place an inordinate amount of emphasis on the motivation behind an employer's discipline of a supervisor, to the extent that motivation seems to be the primary concern while other circumstances are relegated to mere background material. See DRW Corp., 248 N.L.R.B. 828, 830-34 (1980) (Truesdale, Member, concurring and dissenting). In DRW Corp., the Board noted:

It is . . . commonplace that Section 2(11) supervisors are not per se [sic] accorded protection under the Act from discharge . . .

It is quite another matter, however, when an employer engages in a widespread pattern of misconduct against employees and supervisors alike. For, under those circumstances, the evidence may be sufficient to warrant a finding that the employer's conduct, as a whole, including the action taken against its supervisors, was motivated by a desire to discourage union activities among its employees in general and thus constitutes what the Board has characterized as a
Nor does an examination of its underlying rationale, preventing the interference, restraint, or coercion of employees in the exercise of their section 7 rights, facilitate the analysis of this rule. This is especially true in view of the fact that the Board's General Counsel need not show actual intimidation or coercion of employees. Rather, the test is whether the conduct "may reasonably be said to ten[d] to interfere with the exercise of rights protected by the Act." 36 Thus, it would appear that any employer conduct meeting the test would violate section 8(a)(1) even if the conduct involves the discharge of a supervisor for obvious and known pro-union sympathies or activity, and even if the dismissal is not an integral part of a pattern of conduct aimed at penalizing employees for their union activity.40 This, however, is not actually the case since the firing of a supervisor because of his union activity is consistently upheld in the absence of other conduct violating the Act.41 However, common sense says that the impact on the rank-and-file employees' exercise of their section 7 rights may be substantial whenever the discharged supervisor is a known union supporter, even without other employer misconduct. Thus, simply looking to the underlying policy of the Act is of no particular help.

[36] Id. at 828-29 (footnotes omitted). Member Truesdale took exception to this analysis, arguing that "making motivation the touchstone of supervisory discharge cases is wrong as a matter of policy as well as law and can serve only to add chaos to confusion." [Id. at 833 (Truesdale, Member, concurring and dissenting). See also Nevis Indus., Inc., 246 N.L.R.B. 1055, 1055 (1979), enforcement denied in relevant part, 647 F.2d 905 (9th Cir. 1981) citing N.L.R.B. v. Brown, 380 U.S. 278 (1965); Downslope Indus., Inc., 246 N.L.R.B. 948, 949 (1979). The Nevis Board interpreted Brown as holding 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 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." 246 N.L.R.B. at 1055.

[39] Production Stamping, Inc., 239 N.L.R.B. at 1193. See also Barnes & Noble Bookstores, Inc., 233 N.L.R.B. 1526, 1343 n.18 (1977). Cf. Miami Coca Cola Bottling Co., 140 N.L.R.B. 1359, 1361 n.3 (1963) (Rodgers, Member, dissenting), enforcement denied in relevant part, 341 F.2d 524 (5th Cir. 1965). The Board has held that the dismissal of a supervisor for refusing to discharge union adherents is a § 8(a)(1) violation, whether or not the employees knew of the true reason for the dismissal, because such a discharge interferes with employee rights guaranteed by the Act. 140 N.L.R.B. at 1360-61. Member Rodgers, however, dissented in Miami Coca Cola because, in his opinion, "to establish the violation it was essential that the General Counsel prove that the employees knew or could have known of the motivation for [the supervisor's] discharge." Id. at 1361 n.3 (Rodgers, Member, dissenting).

[40] See note 25 and accompanying text supra.

[41] See note 26 supra and authorities cited therein.
The most reasonable and realistic approach to the problem of employer discipline of supervisors who have neither refused to commit unfair labor practices nor given testimony before the Board is to allow employers to discharge or discipline them regardless of the surrounding circumstances. If there is no other objectionable employer conduct, the action should be upheld. The mere possibility that there may be accompanying employer misconduct should not transform otherwise lawful conduct into unlawful conduct. When such other violations exist, the Board has the law and the procedures to deal with them. If they are serious enough to warrant a remedy from the Board, the effectiveness of the remedy will not be impaired simply because it does not include the supervisor. If the accompanying misconduct is not that serious, there will be no violation to begin with. Moreover, and particularly in the unionization setting, in which advice from the union is available to the employees, there is no reason not to charge the union and the employees with the same knowledge as that with which the employer is charged. Thus, in the unionization context, there is every reason to assume that employees know that disciplinary action against supervisors may be taken although it cannot be taken against them.

If, on the other hand, employees are deemed to be in need of more protection, an approach which is less satisfactory than the one

42. This seems to have been the result in Dairy Farm Flight Servs., Inc., 258 N.L.R.B. No. 31 (Sept. 21, 1981), in which the findings and rulings of the ALJ therein were adopted by the Board without modification.

Dairy Farm involved the discharge of two supervisors, who had actively engaged in unionizing their employer's plant, for participating in and permitting the distribution of union authorization cards at the plant. Id., slip op. of the ALJ at 5-4. The ALJ upheld the employer's action since, because statutory supervisors generally have no protected right to engage in concerted activity, the discharges did not violate the NLRA in the absence of "special circumstances" such as a refusal by the supervisors to commit unfair labor practices at the employer's behest. Id., slip op. of the ALJ at 9. Significantly, the ALJ reached this decision in spite of the fact that the employer had engaged in other unfair labor practices, such as addressing a letter to employees threatening a loss of certain job benefits, unlawful interrogation, and solicitation of grievances with an implied promise to settle them. See id., slip op. of the ALJ at 13-16.

The difficulty with the Dairy Farm decision is its implication that supervisors may have a protected right to engage in concerted activity under "special circumstances." See id., slip op. of the ALJ at 9. On the contrary, supervisors never have a right to engage in concerted activity, whatever the circumstances. See notes 6 & 17 supra. These rights belong to statutory employees only. See notes 6 & 7 supra. If there is any limitation to the power of an employer to discipline or discharge his supervisors for engaging in concerted activity, it stems from the effect of such employer actions on his employees' protected rights, not from the effect on his supervisors. See note 19 and accompanying text supra.
described above, but which is better than the approach currently used by the Board, was described in General Nutrition Center, Inc., in which the ALJ stated:

I believe that the discharge of or other reprisals directed against a supervisor for engaging in conduct protected in an employee violates Section 8(a)(1) of the Act if (1) under all the circumstances, such punishment tends to lead rank-and-file employees reasonably to fear that the employer will punish them for engaging in the like conduct; and (2) the employer has failed to take reasonable and timely steps to reassure his rank-and-file employees that they will not be punished for such conduct.

Thus, an employer would be free to exercise the rights guaranteed him by the NLRA and made clear in the legislative history of the Act. Moreover, he could protect himself, and presumably assuage the fears of his employees, by reassuring them that they will not suffer the supervisor's fate.

43. 221 N.L.R.B. 850 (1975).
44. Id. at 859 (emphasis added) (footnote omitted).
45. See note 17 supra and note 118 infra.
46. The disadvantages of this approach are that it will be distasteful to employers to have to make such announcements, and that it places a condition upon the exercise of employer rights which should already be protected by the Act.

There are two interesting variations to this issue. One variation is that in which an employer discharges or disciplines a supervisor during a unionization campaign in response to employee complaints about the supervisor and in an effort to placate the complaining employees. In N.L.R.B. v. Eagle Material Handling, Inc., 558 F.2d 160 (3d Cir. 1977), a case involving similar facts, the Third Circuit upheld the Board's finding of an 8(a)(1) violation although the discharge of the supervisor was characterized as an attempt to entice, rather than coerce, anti-union votes. Id. at 164-65. Thus, discharging a supervisor was analogous to granting any other benefit in the course of an organizational campaign, and the employer was put in the anomalous position of having to keep an unsatisfactory supervisor.

The other variation is the situation in which an employee, presently a supervisor, is discharged because of union activity he had previously engaged in as a rank-and-file employee. In Daniel Constr. Co., 244 N.L.R.B. 704 (1979), the Board noted that the employees therein moved freely and frequently from the rank-and-file to supervisory jobs, and held that an employer violated § 8(a)(1) by discharging a supervisor for union activity he had engaged in prior to his promotion. Id. at 719. At first glance this seems reasonable, but whether the discharge is a violation should probably turn on whether the move into a supervisory job is voluntary. If so, discharging a supervisor under such conditions should not violate the Act since the only effect on rank-and-file employees would be to make supervisory jobs less attractive, and employees would not be discouraged from joining unions. Discouraging promotions to supervisory jobs is not prohibited by the NLRA. If, on the other hand, such moves are not voluntary, then the Board reached the correct result since, by exercising one's rights as a rank-and-file employee, one would be jeopardizing his job in the future.
B. Supervisor Testimony Before the Board

It is universally held that disciplining or discharging a supervisor in retaliation for his testimony in a Board proceeding is a violation of section 8(a)(1) of the Act. As a concomitant of this, and in an effort to fully effectuate the policies underlying this rule, this general rule has been extended to cover giving signed statements to the Board voluntarily, giving information to the Board before a complaint is issued, participating in filing charges against an employer, and giving testimony in grievance arbitration proceedings.

The rationale underlying this rule was stated most comprehensively in N.L.R.B. v. Southland Paint Co., in which Judge Wisdom wrote:

[T]his Court [has] held that among the rights protected from management interference is the right to have the privileges secured by the Act vindicated through the administrative procedures of the Board, and that "any discrimination against supervisory personnel because of testimony before the Board directly infringes the right of rank-and-file employees to a congressionally provided, effective administrative process, in violation of section 8(a)(1)."

In order to effectuate this policy, which is merely a specific application of the more general policy that "the Board should be required to utilize every source at its command to protect wit-
nesses . . . who have been placed in jeopardy because the Board has required them to appear and give testimony," 53 the Second 54 and Fifth 55 Circuits have held that "the Board's protective powers under sections 8(a)(1) and 8(a)(4) are coextensive with its subpoena powers." 56

Attempts to distinguish cases in which supervisors cooperate voluntarily with the Board from those in which they are compelled to give information have generally failed. As the court noted in N.L.R.B. v. Electro Motive Manufacturing Co.: 57 "The effect of the discharge, in either event, is to tend to dry up legitimate sources of information to Board agents, to impair the functioning of the machinery provided for the vindication of the employees' rights and, probably, to restrain employees in the exercise of their protected rights." 58

Similarly, attempts to distinguish cases in which a supervisor participates in the actual filing of charges from the situation in which the supervisor provides information to the Board before a complaint is issued have also failed. Thus, as the Board noted in General Nutrition Center: "Just as the vindication of employee rights requires the protection of supervisors who testify at formal hearings and during investigations, so also does this policy require the protection of the Board's sources of information before the investigation begins." 59

Finally, an extension of the rule to supervisor testimony in contractual grievance proceedings was deemed a logical and necessary step for the protection of employees' rights guaranteed by the Act. Thus, in Ebasco Services, Inc., 60 the Board stated:

It is well settled that discharge of a supervisor for testifying in proceedings under the Act is a coercion of nonsupervisory employees in violation of Section 8(a)(1). . . . General Counsel argues that the same rule should apply where employees resort to contract grievance

54. Id. at 417-20.
55. Oil City Brass Works v. N.L.R.B., 357 F.2d 466, 471 (5th Cir. 1966).
56. Id. See also Pedersen v. N.L.R.B., 234 F.2d 417, 420 (2d Cir. 1956).
57. 389 F.2d 61 (4th Cir. 1968).
58. Id. at 62.
59. 221 N.L.R.B. at 858 (citation omitted).
procedures to vindicate their rights under such contract, and supervisors take it on themselves to appear before tribunals created under those procedures. This argument has merit, for the Act itself recognizes and favors employees' right to use, and actual use of, contract grievance procedures to settle labor disputes, and so do the courts. The Board has specifically protected employees from employer interference with their right to resort to such procedures under contracts, as well as procedures before outside tribunals, to enforce contract rights, on the theory that the filing of claims by employees in either instance was a form of implementation of the collective bargaining agreement and thus an extension of the concerted activity which gave rise to that agreement. In addition, the Board has long followed the statutory policy by withholding its process in deference to an arbitrator's award under contract procedures where the arbitral process meets certain standards of fairness and regularity. Therefore, it appears to be no more than a reasonable extension of the above principle and Board policy to say that employees have a corollary right to a full and fair hearing on their grievances under contract procedures which must likewise be protected from interference or limitation.\textsuperscript{61}

Upon analysis, it is clear that each of these extensions is reasonable. Each is designed, ultimately, to protect the rights of employees guaranteed by section 7 of the Act. With the exception of the extension to arbitration proceedings, each is also designed to ensure the integrity of Board procedures. This goal is reasonably effectuated by the application of these rules, with no undue imposition upon the rights or expectancies of employers resulting. Although employers do have a right to expect loyalty from their supervisors and to keep their supervisors free of conflicts of interest which may conceivably hinder their work performance, they do not have a right to force their supervisors to violate the law, nor may they reasonably expect to be able to inhibit the processes of the law.\textsuperscript{62}


\textsuperscript{62} This rule would seem to be an almost necessary concomitant to § 8 (a)(4) of the Act, which makes it an unfair labor practice for an employer to "discharge or otherwise discriminate against an employee because he has filed charges or given testimony" in a proceeding under the Act. National Labor Relations (Wagner) Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1976).
C. Supervisor Refusal to Commit Unfair Labor Practices

As was the case with supervisor testimony before the Board, it is universally held that the disciplining of a supervisor because of his refusal to commit unfair labor practices on behalf of his employer is a violation of section 8(a)(1) of the Act. The policy behind this rule was clearly stated in Gerry's Cash Markets, Inc. v. N.L.R.B.: 64

The underlying theory is not, of course, that the Act protects the supervisor, which it does not, nor even that disciplining a supervisor for union activities instills fear in rank-and-file employees that their own protected union activities may subject them to a similar fate. Rather, the theory is that if employers are allowed to force supervisors to engage in unfair labor practices, this necessarily results in direct interference with the affected rank-and-file employees in the exercise of their § 7 rights.

The ALJ succinctly stated the rule as follows: "[A]n employer's enlistment of a supervisor in its unfair labor practices as the price for retaining his job unlawfully coerces the statutory employees in the exercise of their Section 7 rights." 65

This policy was illustrated by the Board in Elder-Beerman Stores Corp. 66 In Elder-Beerman, the trial examiner had found an 8(a)(1) violation based upon his inference that the employees therein knew that a supervisor had been discharged due to his refusal to commit unfair labor practices as ordered by his employer. 67 However, the Board found a violation without regard to the knowledge of the employees. 68 Thus, even when no fear is instilled in the employees, a violation of section 8(a)(1) may be found under such circumstances. Of course, when employee knowledge is shown and

64. 602 F.2d 1021 (1st Cir. 1979).
65. Id. at 1023 (citations omitted).
67. 173 N.L.R.B. at 566.
68. Id.
III. EMPLOYEE CONCERTED ACTIVITY PROTESTING EMPLOYER DISCIPLINE OF A SUPERVISOR

A. Discipline as a Violation of Section 8(a)(1)

The cases dealing with concerted employee activity in response to the disciplining of a supervisor do not speak in terms of employer conduct constituting a violation of the Act. Rather, they speak in terms of the interests of the employees in the identity of their supervisors and whether the employee action is thus protected by section 7 of the Act in that it is for the employees' "mutual aid or protection." 72

The concerted activity commonly resorted to by employees in such disputes is a strike, which is generally considered to be protected concerted activity under section 7.73 Moreover, when a strike is engaged in to protest an employer's unfair labor practices and a causal relation can be shown, it will be characterized as an unfair labor practice strike.74 Thus, when an employer has disciplined a supervisor in violation of the section 7 rights of his employees, the employees' concerted activity to protest the action would clearly seem to be protected by section 7 of the Act. Moreover, when a strike is engaged in under such circumstances, the


70. See Elder-Beerman Stores Corp., 173 N.L.R.B. at 566. In Elder-Beerman, the Board indicated that the discharge of the supervisor therein was designed to further the employer's intent to commit unfair labor practices, thereby rendering the discharge itself an unfair labor practice. Id.

71. See notes 76-98 and accompanying text infra.

72. Id.

73. See American Ship Bldg. Co. v. N.L.R.B., 580 U.S. 300 (1965). The Court stated in American Ship that the right to strike is guaranteed by §7 of the Act. Id. at 308. For the text of §7, see note 7 supra.

74. See Winn-Dixie Stores, Inc. v. N.L.R.B., 448 F.2d 8, 11 (4th Cir. 1971).
strikers will benefit from all of the rights generally enjoyed by unfair labor practice strikers.75

B. Concerted Activity Protesting Discipline

The rule generally applied by the Board to determine when employees may protest the hiring, discharge, or disciplining of a supervisor provides:

Whether concerted actions by employees to protest an employer's selection or termination of a supervisor fall within the purview of Section 7 of the Act depends on the facts of each case. In this regard the Board has consistently held that where facts establish that the identity and capability of the supervisor involved has a direct impact on the employees' own job interests they are legitimately concerned with his identity and thereby have a protected right to protest his termination.76

This position was first articulated by the Board in Dobbs Houses, Inc.,77 and has been consistently applied by the Board in all its subsequent cases.78 Despite the Board's adherence to this general rule, the approach of the circuit courts in dealing with this type of employee activity has been rather confused and inconsistent.79

1. History

The issue of whether employee activity protesting the disciplining of a supervisor is protected by the Act was addressed by the Seventh Circuit in N.L.R.B. v. Reynolds International Pen Co.80

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75. See generally N.L.R.B. v. Mackay Radio & Tel. Co., 304 U.S. 333 (1938); N.L.R.B. v. International Van Lines, 473 F.2d 1036 (9th Cir. 1973). These rights include the right to unconditional reinstatement in the event of termination or replacement. See generally R. Gorman, supra note 4, at 341-49.


77. 135 N.L.R.B. 885 (1962), enforcement denied, 325 F.2d 531 (5th Cir. 1963).


79. See notes 80-98 and accompanying text infra.

80. 162 F.2d 680 (7th Cir. 1947).
In Reynolds, the court stated that "employees who walked out because they were dissatisfied with the change of a foreman . . . were not protected by the Act." 81 This rule was followed by the courts and the Board until the Board's 1962 decision in Dobbs Houses. 82 Since then, the Board's Dobbs Houses rule has received mixed treatment from the courts. 83 It would appear, thus far, that no court has accepted the flat application of the Dobbs Houses rule without modification. 84 Thus, while it may be that some forms of concerted activity protesting the discharge of a supervisor may be approved by the courts, two tests must generally be met in order for such activity to be protected. The first test requires that the underlying reasons for the protest must be reasonable in relation to the circumstances involved. 85 This test of reasonableness was first stated by the Fifth Circuit in denying enforcement of the Board's order in Dobbs Houses. 86 And, as the Fifth Circuit noted in Dobbs Houses, the second test which must be met to determine whether the employees' activity is protected is that the means chosen must be "reasonably related to the ends sought to be achieved" by the employees. 87 This second test has been rejected by the Board. 88

81. Id. at 684.

82. See American Art Clay Co. v. N.L.R.B., 328 F.2d 88, 89-90 (7th Cir. 1964); Cleaver-Brooks Mfg. Corp. v. N.L.R.B., 264 F.2d 657, 641 (7th Cir. 1959).

83. See notes 85-86 and accompanying text infra. See generally Abilities & Goodwill, Inc. v. N.L.R.B., 612 F.2d 6, 9-10 (1st Cir. 1979).

84. Generally, the courts of appeals have grafted onto the Board's Dobbs Houses rule the requirement that the employee activity must be reasonable in the context of the surrounding circumstances. See, e.g., Henning & Cheadle, Inc. v. N.L.R.B., 522 F.2d 1050 (7th Cir. 1975); N.L.R.B. v Okla-Inn, 488 F.2d 498 (10th Cir. 1973); Dobbs Houses, Inc. v. N.L.R.B., 325 F.2d 531 (5th Cir. 1963). Cf. Horgopian & Sons, Inc. v. N.L.R.B., 395 F.2d 947, 952-53 (6th Cir. 1968) (reasonableness test not specifically discussed; court appeared to require only that employees' conduct not be "unlawful," "insubordinate," "violent," or "indefensible"). See generally Annot., 30 A.L.R. Fed. 626 (1976).


86. 325 F.2d 531, 538 (5th Cir. 1963).

87. Id. at 538.


[We] must respectfully disagree with any rule which would base the determination of whether a strike is protected upon its reasonableness in relation to the subject matter of the "labor dispute." When a "labor dispute" exists, the Act allows employees to engage in any concerted activity which they decide is appropriate for their mutual aid and protection, including a strike, unless . . . that activity is
Another limitation placed upon the right to engage in concerted activity to protest actions taken with regard to supervisors stems from the proscription contained in section 8(b)(1)(B) of the Act.\(^\text{89}\) Thus, whenever a particular supervisor's functions include the adjustment of grievances or participation in collective bargaining, it is likely that employee activity protesting his discharge or discipline will be forbidden.\(^\text{90}\)

Some courts have wholly rejected the idea that employees may engage in concerted activity to protest the discharge of a supervisor.\(^\text{91}\) However, many of these cases were decided before the Board's decision in *Dobbs Houses*.\(^\text{92}\) More significantly, even those which were decided after *Dobbs Houses* generally have involved only the use of strikes.\(^\text{93}\) Thus, there is a whole range of concerted activity which has not been expressly proscribed by those courts. Even the Seventh Circuit, which has shown a certain antagonism toward the Board's *Dobbs Houses* rule, would apparently permit such mundane concerted activity as letter writing.\(^\text{94}\)

The rule seems to have reached its zenith, or nadir, depending on one's point of view, in *Puerto Rico Food Products Corp.*\(^\text{95}\) In *Puerto Rico Food*, the Board held that a walkout by a number of employees, done not to protest the discharge of a supervisor but rather to force the employer to explain why the supervisor was discharged, was protected under the Act\(^\text{96}\) irrespective of the fact

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specifically banned by another part of the statute, or unless it falls within certain other well-established proscriptions.

153 N.L.R.B. at 183 (footnotes omitted). For one court's reaction to the Board's attitude toward circuit court holdings, see note 150 infra.


90. See N.L.R.B. v. Puerto Rico Rayon Mills, Inc., 293 F.2d 941 (1st Cir. 1961). The court in *Rayon Mills* implied that if a collective bargaining or grievance adjustment function is included in a supervisor's duties, employees cannot protest the discharge of that supervisor. See id. at 945.

91. See American Art Clay Co. v. N.L.R.B., 328 F.2d 88, 90 (7th Cir. 1964); N.L.R.B. v. Ford Radio & Mica Corp., 258 F.2d 457 (2d Cir. 1958); N.L.R.B. v. Coal Creek Coal Co., 204 F.2d 579 (10th Cir. 1953); N.L.R.B. v. Walick, 198 F.2d 477 (3d Cir. 1952).

92. See note 91 supra and authorities cited therein.

93. See American Art Clay Co. v. N.L.R.B., 328 F.2d 88 (7th Cir. 1964); Puerto Rico Food Prods. Corp., 242 N.L.R.B. 899 (1979), enforcement denied in relevant part, 619 F.2d 153 (1st Cir. 1980).

94. See American Art Clay Co. v. N.L.R.B., 328 F.2d 88, 90 (7th Cir. 1964); N.L.R.B. v. Phoenix Mutual Life Ins. Co., 167 F.2d 983 (7th Cir. 1948).

95. 242 N.L.R.B. 899 (1979), enforcement denied in relevant part, 619 F.2d 153 (1st Cir. 1980).

96. 242 N.L.R.B. at 900-01.
that the supervisor was discharged during his probationary period. In summarizing the evidence justifying its conclusion that the discharge affected the employees' job interests, the Board noted:

[F]rom the outset of his employment, [the supervisor] sought and, despite his brief tenure, was able to obtain the confidence and loyalty of those under his immediate supervision.

To this end [the supervisor] made an extra effort to meet with his employees, sharing his personal time at breaks and meals. . . . [T]he discussions at these meetings were not limited to the manner of performing work. Rather, [the supervisor] counseled the employees on what they should and should not do regarding future strikes and distribution of propaganda.

2. Analysis and a Proposal

The rule currently followed by the Board with regard to employee concerted activity protesting employment decisions affecting supervisors is wholly unsatisfactory. In view of the legislative history of the Act and the provisions of the Act dealing with supervisory employees, the very broad language used in stating the rule makes it no more than a bootstrap argument used by the Board to catapult supervisors into the *de facto* position of statutory employees, thereby circumventing the express language of the Act and the clear intent of its framers.

As was cogently observed by the Seventh Circuit in focusing on the Board's simple requirement that the identity and capabilities of the supervisor need only have a direct impact on the employees' own job interests, "it is difficult to imagine a case in which the identity and capabilities of a supervisor cannot be said to have a direct impact on the employees' job interests and work performance." The extreme efforts of the Board to fit supervisors within its *Dobbs Houses* rule, and the potentially unlimited application of the rule, led Member Murphy to note that the Board was holding, in effect, that employees enjoy a protected right to strike any time there is a supervisory change that is not to their liking. He also

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97. *Id.* at 899-900.

98. *Id.* at 900.


100. Puerto Rico Food Prods. Corp., 242 N.L.R.B. at 904 (Murphy, Member, concurring and dissenting). In denying enforcement in *Puerto Rico Food*, the circuit court stated:

To conclude on the present record, as the board did, that the employee protest was in fact a protest over the actual conditions of
felt that the Board was announcing a rule that protests over the discharge of any supervisor are protected *per se*, and that a presumption was being created that supervisory status, standing alone, is the litmus test for a direct impact on employee working conditions.\(^{101}\) These objections are well taken.

In trying to determine the appropriate rule, it is helpful to first consider a comment made by Senator Taft:

[Supervisors] are subject to discharge for union activity. . . .

It is felt very strongly by management that [supervisors] are part of management; that it is impossible to manage a plant unless the [supervisors] are wholly loyal to management. We tried various in-between steps, but the general conclusion was that *they must either be a part of management or a part of the employees*.\(^{102}\)

It is clear that supervisors are part of management. This fact, together with section 8(b)(1)(B) of the Act,\(^{103}\) necessarily requires one to begin with the proposition that supervisors are accorded no protection whatsoever by the Act.\(^{104}\) Rather, they are a part of management itself, with their activities governed by section 8(a) of the Act, which enumerates the unfair labor practices of employers.\(^{105}\) Thus, employment decisions affecting management personnel, made by management in the best interests of management, are generally strictly a management prerogative. This must be the starting point.

In proceeding from here, it must be borne in mind that the NLRA is designed to protect both employers' and employees' rights.\(^{106}\) Of necessity, various provisions of the Act will come into conflict when applied in specific fact situations. This follows

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101. Puerto Rico Food Prods. Corp., 242 N.L.R.B. at 904 (Murphy, Member, concurring and dissenting).

102. See Western Sample Book and Printing Co., 209 N.L.R.B. at 390 (quoting Senator Taft) (emphasis added).

103. For the text of § 8(b)(1)(B), see note 9 and accompanying text *supra*.

104. See note 17 and accompanying text *supra*.

105. See note 8 *supra*.

106. See Labor Management Relations (Taft-Hartley) Act § 1(b), 29 U.S.C. § 141(b) (1976). In declaring the purpose of the NLRA, Congress stated: "It is the purpose and policy [of the Act] to prescribe the legitimate rights of both employees and employers. . . ." *Id.*
naturally from the fact that management and employee interests often conflict in the real world. However, the terms of the Act grant neither party preference over the interests of the other party.\textsuperscript{107} Nor does preferential treatment of either party find support in the legislative history of the Act or its amendments. Therefore, when a conflict between provisions arises, the conflict should be resolved by giving the fullest possible effect to both competing interests, realizing that absolute accommodation of each may not be possible.\textsuperscript{108}

The fact situation considered here which gives rise to a conflict between provisions of the Act is an employment decision made with regard to a supervisor, a member of management, to which rank-and-file employees object. As a result, the employees engage in concerted activity to protest the decision. On the one hand, sections 2(11)\textsuperscript{109} and 8(b)(1)(B)\textsuperscript{110} of the Act support the management prerogative. These provisions are in conflict with section 7, which supports employee concerted activity,\textsuperscript{111} and with the section 8(a)(1) prohibition against management interference with employees' section 7 rights.\textsuperscript{112}

The clearest resolution of this conflict would seem to occur when the discharge of the supervisor constitutes a section 8(a)(1) unfair labor practice.\textsuperscript{113} In such a case, the employees have suffered a direct wrong and should be protected when engaging in concerted activity, including a strike, to protest the supervisor's dismissal.

When the employment decision does not constitute an unfair labor practice, however, the resolution of the conflict is more difficult. In considering the rights of management as well as those of employees, the approach taken by most courts of appeals, which includes a consideration of the reasonableness of the concerted

\textsuperscript{107} See id.

\textsuperscript{108} See N.L.R.B. v. Lion Oil Co., 352 U.S. 282, 288 (1956). The Court in \textit{Lion Oil} stated: "In expounding a statute, we must . . . look to the provisions of the whole law." \textit{Id.} at 288.

\textsuperscript{109} For the text of §2(11), which provides the statutory definition of the term "supervisor," see note 3 supra.

\textsuperscript{110} For the text of §8(b)(1)(B), see note 9 and accompanying text supra.

\textsuperscript{111} For the text of §7, see note 7 supra.

\textsuperscript{112} For the text of §8(a)(1), see note 8 supra.

\textsuperscript{113} See notes 7-38 and accompanying text supra.
activity, is the approach which should be adopted.\textsuperscript{114} The present approach of the Board should be rejected as overbroad.\textsuperscript{116}

Since employees do have an interest in the identity and capability of their supervisors, they should not be banned completely from engaging in some forms of concerted activity. Permitting some form of concerted employee activity will serve two functions. First, it will allow employees to make known to management, without fear of reprisal, their concerns about supervision. Secondly, concerted employee actions convey information to management which it probably needs and wants to know in order to run the operation effectively. There could be no reprisals by management against either employees or supervisors since such reprisals would constitute a violation of section 8(a)(1) of the Act.\textsuperscript{116}

The next question to be addressed is which types of concerted employee activities should be protected in the context of the discharge or discipline of a supervisor which does not violate section 8(a)(1). The competing interests of employees and their employer would best be served by strictly limiting the employees to non-coercive activities which are designed to convey information and concerns. This type of activity includes letters to the company or to newspapers, dialogue with their employer, advertising campaigns, and leafletting. None of these activities are coercive by nature, nor do they interfere with management rights. Yet they do serve to inform management of employee grievances and they apply some degree of pressure on management.

 Strikes, on the other hand, should be deemed to be illegal \textit{per se} in this setting. This follows most specifically from the provisions of section 8(b)(1)(B), which forbids a labor organization from restraining or coercing an employer in the selection of his representatives for the purposes of collective bargaining or grievance adjustment.\textsuperscript{117} That a particular supervisor at a particular time is not involved in grievance procedures or collective bargaining should not control. Although the supervisor may not perform those functions then, the employer may call upon him in the future to per-

\textsuperscript{114} For a discussion of the approaches taken by the courts of appeals, see notes 84-94 & 99-101 and accompanying text \textit{supra}.

\textsuperscript{115} For a discussion of the Board's approach, see notes 76-79 & 95-98 and accompanying text \textit{supra}.

\textsuperscript{116} If the employee activity is found to be protected activity under § 7 of the Act, the reprisals would be an 8(a)(1) violation. \textit{See} notes 7 & 112 and accompanying text \textit{supra}.

\textsuperscript{117} For the text of § 8(b)(1)(B), see note 9 and accompanying text \textit{supra}.
form them. To allow employee strikes with regard to such a supervisor would have the effect of limiting the employer’s options in the future selection of his representatives, hampering his ability to adapt and to run his operation due to the coercive effects of the employees’ strike.

More importantly, to allow employees to strike over this issue is to allow them to exercise a dubious right in complete derogation of the rights of management to run its operation as it sees fit. Employees should be no more able to strike over the selection of supervisors than should management be able to stage a lock-out over internal union decisions which may have a direct impact upon the enterprise, such as the selection of stewards or internal union hiring hall practices.\textsuperscript{118} If employees complain that this may result in subjecting them to abusive situations in which their only recourse is a letter writing campaign, there is a ready answer. If the actual conditions of work justify a strike, the employees can strike over the conditions.\textsuperscript{119} Management is then free to take whatever action it desires regarding the conditions, whether or not the action to be taken will involve the supervisor.\textsuperscript{120} As long as the conditions themselves are remedied, the employees should not

\textsuperscript{118} See S. Rep. No. 105, 80th Cong., 1st Sess. 5 (1947) (employer needs undivided loyalty); H.R. Rep. No. 245, 80th Cong., 1st Sess. 16-17 (1947) ("Management, like labor, must have faithful agents. . . . [N]o . . . employer . . . need have as his agent [one] whom, for any reason, he does not trust") (emphasis in original). See also Beasley v. Food Fair, 416 U.S. 653 (1974). Writing for a unanimous Court in Beasley, Justice Brennan described one objective of the Act as to remove supervisors from NLRB jurisdiction, stating:

Employers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were management obliged to be loyal to their employer’s interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation. Thus, the House Report stated: "Management, like labor, must have faithful agents."

\textit{Id.} at 659-60 (footnote omitted) (emphasis by the House).

\textsuperscript{119} Section 7 of the Act gives employees the right to "engage in . . . concerted activities for the purpose of . . . mutual aid or protection." See note 3 supra. This provision has been interpreted by the courts as giving employees the right to strike to advance their own interests. See N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9 (1962); N.L.R.B. v. Solo Cup Co., 237 F.2d 521 (8th Cir. 1956).

\textsuperscript{120} A good example of a case in which this approach would be appropriate is Bide-A-Wee Home Ass’n, 248 N.L.R.B. 854 (1980). In Bide-A-Wee, the ALJ applied the "impact of the identity and capability of the supervisor" test to uphold a strike precipitated by the discharge of a statutory supervisor for insubordination. \textit{Id.} at 858. Some reliance was put upon testimony by some of the strikers that the discharge of the supervisor, coming one week after assurances had been given by management that no employees were going to
be allowed to demand that the supervisor be reinstated or otherwise made whole for the employer's action.

This approach gives the Board and the courts some guidance in reviewing these cases, and this review should be as thorough as was the circuit court's review in *Puerto Rico Food.* Such a high level of scrutiny on the part of the courts would serve to prevent sham claims by employees. In addition, this should help calm some of the concerns expressed by the First and Second Circuits in considering this issue.

To hold otherwise would impermissibly strike a balance in favor of employees' rights and against management's rights, even though the Act was designed to protect both interests equally. Such a result would also create in employees a right to select those who will direct their work on behalf of their employer. This is a right which employees have never had in the entrepreneurial system

be discharged, caused them to fear for their jobs. *Id.* Moreover, the impact upon and interest of the employees in the identity of the supervisor was seen to arise from the fact that, as the ALJ stated:

[The supervisor] supervised other technicians and worked in close proximity to them. Further, [he] became "upset" and "boisterous" in voicing objections to higher management officials about changes in the technicians' working conditions. The record reveals that [he] further aligned himself with the technicians by promoting their efforts to unionize and encouraged them to sign union cards.

*Id.*

In addition to the discharge of the supervisor, other unfair labor practices were found to arise from the employer's illegal interrogation of the employees and his discriminatory discharges of strikers in a unionization context. *Id.* Since these violations by the employer alone were enough to warrant a strike by the employees, it was unnecessary for the ALJ to approve the strike, as he seems to have done, even though it may have been solely over the discharge of the supervisor. See *id.* at 864 (Truesdale, Member, concurring). Without the further violations by the employer, and particularly in view of the fact that the discharge was for the insubordination of the supervisor, who had become "upset" and "boisterous" toward management, there should have been no right to strike accorded to the employees. To allow such a strike would permit employees to use economic pressure for the sole purpose of forcing their employer to retain a disloyal and unsatisfactory supervisor. Since there was a union involved in *Bide-A-Wee,* the employees should have been charged with the knowledge that they could not be discharged for similar union adherence, and, though not particularly a satisfactory solution for management, management could calm the concerns of its employees simply by assuring them they were not in the same position as the supervisor. The efficacy of this remedy is supported by the fact that the Board, in affirming the ALJ, did not view the inhibition of the employees as being so strong as to warrant reinstatement of the discharged supervisor. See *id.* at 860.

121. For a discussion of *Puerto Rico Food,* see notes 95-98 and accompanying text *supra.*

122. See note 100 *supra.*

123. See note 99 and accompanying text *supra.*
existing in this country. Nor is it a right which can reasonably be said to have been intended by the framers of the NLRA.

IV. Conclusion

The National Labor Relations Board has been steadily adopting an approach to the handling of employee concerted activity in protest of employment decisions regarding supervisors which amounts to almost a de facto recognition of low level supervisors as statutory employees under the NLRA. Moreover, the Board's ad hoc approach to determining when the disciplining of supervisors will constitute an unfair labor practice as to rank-and-file employees provides employers with very little guidance as to what action they may take and when such action may be taken to rid themselves of disloyal supervisors. The current approach leads to the result that the more successful a supervisor is in ingratiating himself with employees, and the more successful he is in subverting the interests of management, of which he is supposedly a part, the more protection will be afforded him by the Board. This approach is clearly contrary to the letter and intent of the NLRA.

The courts have generally accepted the principle that management does not have unfettered discretion in its treatment of supervisors when such actions would have a substantial impact on its employees' working conditions. However, the courts have tried to limit the rule used by the Board. Nevertheless, the Board has "declined" to follow the more reasoned approach of the courts.

124. See notes 76-79 & 95-98 and accompanying text supra.
125. See notes 36-42 and accompanying text supra.
126. See notes 95-98 and accompanying text supra.
127. For a discussion of the intent of the framers of the NLRA, see notes 102-08 and accompanying text supra.
128. See notes 11-14 and accompanying text supra.
129. See notes 82-94 and accompanying text supra.

Apparently, it is a practice of the Board to refuse to follow unfavorable decisions from the Courts of Appeals even in instances such as this where it is likely that the case will come up for review before the very court with which the Board disagrees.

The position of the Board is one in which we cannot acquiesce. While deference is to be given to an agency's interpretation of the statute it administers, it is the courts that have the final word on matters of statutory interpretation.

623 F.2d at 228 (citations omitted).
A more reasonable approach, one which takes into account the equal but competing interests of the various parties, would be to allow certain kinds of employee concerted activity to protest management actions taken with regard to supervisors, but to make strikes over such decisions unfair labor practices *per se.*