


1982

# The NLRB and the Discharge of Supervisors: Parker-Robb Brings Questionable Reform

Terry A. Bethel

*Indiana University Maurer School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Administrative Law Commons](#), and the [Labor and Employment Law Commons](#)

---

## Recommended Citation

Bethel, Terry A., "The NLRB and the Discharge of Supervisors: Parker-Robb Brings Questionable Reform" (1982). *Articles by Maurer Faculty*. Paper 957.

<http://www.repository.law.indiana.edu/facpub/957>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

UNIVERSITY OF  
**COLORADO LAW REVIEW**

---

Volume 54, Number 1

Fall 1982

**THE NLRB AND THE DISCHARGE OF  
SUPERVISORS: *PARKER-ROBB* BRINGS  
QUESTIONABLE REFORM**

BY TERRY A. BETHEL

In *Parker-Robb Chevrolet, Inc.*,<sup>1</sup> the National Labor Relations Board<sup>2</sup> announced that an employer does not violate the National Labor Relations Act<sup>3</sup> when it discharges a supervisor for engaging in union or other concerted activity. On its face the decision seems uncomplicated. Supervisors<sup>4</sup> are expressly excluded from the protection the Act affords employees<sup>5</sup> who engage in such activity.<sup>6</sup> Moreover,

---

1. 262 N.L.R.B. No. 58, [5 Labor Relations] LAB. L. REP. (CCH) (1981-82 NLRB Dec.) ¶ 19,087, at 30,960 (June 23, 1982).

2. The National Labor Relations Board (hereinafter referred to as the Board or NLRB) is the agency created by Congress to administer the National Labor Relations Act, 29 U.S.C. §§ 151-159 (1976 & Supp. IV 1980). The Board's powers are set forth in 29 U.S.C. § 153 (1976).

3. 29 U.S.C. §§ 151-169 (1976 & Supp. IV 1980) (hereinafter referred to as the Act).

4. Section 2(11) of the Act, 29 U.S.C. § 152(11) (1976), defines a supervisor as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, 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 independent judgement.

The existence of supervisory status is a frequently litigated issue. Although it was an issue in some of the cases to be discussed, *infra*, a detailed discussion of the problem is beyond the scope of this article.

5. Thus, the definition of employee in section 2(3) of the Act, 29 U.S.C. § 152(3) (1976), provides, in part: "The term 'employee' shall include any employee . . . but shall not include . . . any individual employed as a supervisor . . . ."

6. Section 7 of the Act, 29 U.S.C. § 157 (1976), provides: "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 legislative history of the Act reveals that the exclusion was largely premised on a high expectation of supervisor loyalty to management.<sup>7</sup> Thus, it may seem routine for the Board to conclude that the supervisor in *Parker-Robb*, who had vigorously protested the discharge of an employee during a union organizational campaign, was outside the protection of the Act. The problem presented by *Parker-Robb*, however, is not that simple. In order to uphold the discharge, the Board had to overrule a controversial and inconsistently applied doctrine of some fifteen years standing.

Despite the language of the Act, the Board has often held that an employer violates section 8(a)(1)<sup>8</sup> of the Act when it discharges a supervisor who acts in concert with employees, even if the concerted activity is union based and even, in one case, when the supervisor spearheaded the union drive.<sup>9</sup> Frequently, the Board has reasoned that the discharge threatens the free exercise of employee rights, often as an integral part of a pattern of unlawful conduct.<sup>10</sup> To the contrary are several cases which seem factually indistinguishable (i.e., supervisor participation in union or concerted activity) but which reach the opposite result.<sup>11</sup> Posing a similar, though not precisely analogous, problem are cases in which a supervisor's discharge was motivated by action taken in support of employee rights. These cases typically arise when a supervisor either refuses to discharge an employee on account of union activity<sup>12</sup> or testifies in support of em-

---

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 . . . ."

7. For a detailed discussion of the legislative history, see *infra* Section I.

8. Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1) (1976), provides: "It shall be an unfair labor practice for an employer — to interfere with, restrain, or coerce employees in the exercise of rights guaranteed in section 7."

To demonstrate the interference, restraint, or coercion sufficient to violate section 8(a)(1), the General Counsel of the Board (the prosecutor in unfair labor practice cases, see 29 U.S.C. § 153(d) (1976)) usually does not have to establish motive. A charge can be sustained by demonstrating that an employer engaged in conduct that has the effect of coercing employees, whether or not the employer intended any such effect. Moreover, it is not necessary to establish that any particular employee was actually coerced. See R. GORMAN, *BASIC TEXT ON LABOR LAW* 132-37 (1976). In the supervisor discharge cases, the Board seeks to establish a violation by demonstrating that the discharge of the supervisor could have the effect of coercing employees. Although motive is not a necessary element in most section 8(a)(1) cases, the Board has paid particular attention to it in the supervisor discharge cases. See *infra* Sections II C and III. See also *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965).

9. See, e.g., *DRW Corp.*, 248 N.L.R.B. 828 (1980) and the discussion of similar cases in Section II C, *infra*.

10. *Id.*

11. See *infra* discussion in Section II C.

12. See *infra* discussion in Section II A.

ployees at National Labor Relations Board or arbitration proceedings.<sup>13</sup>

The stated purpose of *Parker-Robb* was to clean up the confusion generated by past Board decisions.<sup>14</sup> The Board decided that in cases in which the supervisor's discharge resulted from adverse testimony or the refusal to commit an unfair labor practice, a violation of section 8(a)(1) could be sustained because the discharge "interferes with the exercise of employees' Section 7 rights."<sup>15</sup> The Board also held, however, that no violation occurs when supervisors engage in union or concerted activity ("either by themselves or when allied with rank-and-file employees")<sup>16</sup> because supervisors have no rights protected by the Act.<sup>17</sup> The Board's litmus test is the involvement of the supervisor in concerted activity. Presumably, once this criterion is satisfied, the effect of the discharge on employees is inconsequential. All questions of employer motivation become irrelevant.<sup>18</sup> What of those cases, however, in which the Board has found that even though the supervisor was involved in concerted activity, he or she also acted to protect the statutory rights of employees?<sup>19</sup> In *Parker-Robb*, the Board did not analyze the cases in which the supervisor was fired for testifying or refusing to commit an unfair labor practice, other than to conclude that a violation could be sustained because the supervisor acted to protect employee rights. Is the violation negated if, in the course of the supervisor's effort, he acts in concert with employees?

Although the Board correctly perceived in *Parker-Robb* that something had to be done to remedy its haphazard treatment of supervisor discharge cases, the decision fails to accomplish much reform. This article will examine the *Parker-Robb* decision and its progeny in light of the historical development of the supervisor exclusion and the Board's treatment of supervisor discharge cases. It will conclude that although much of the result of *Parker-Robb* is correct, both its reasoning and the standard it adopts are too simplistic to insure the complete effectuation of employee rights.

---

13. See *infra* discussion in Section II B.

14. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,962-63.

15. *Id.* at 30,962.

16. *Id.* at 30,963.

17. *Id.*

18. *Id.*

19. See *infra* discussion in Section III B.

## I. HISTORY OF THE SUPERVISOR EXCLUSION

In order to understand the Board's action in supervisor discharge cases, one must first examine the historical treatment of supervisors both by Congress and the National Labor Relations Board. The original legislation made no mention of supervisors. The Wagner Act<sup>20</sup> merely recited that "[t]he term 'employee' shall include any employee . . ." and excluded only domestic workers, agricultural laborers, and certain relatives of the employer.<sup>21</sup> There is nothing in the legislative history which indicates that any consideration was given to either including or excluding supervisors from the Act's protection.<sup>22</sup>

Union representation of supervisors existed following passage of the Wagner Act,<sup>23</sup> but it was not until 1942 that the Board considered a case in which supervisors sought to create a unit for purposes of collective bargaining. In *Union Collieries Coal Co.*<sup>24</sup> the Board rejected an employer's contention that supervisors were not employees for purposes of the Act because they belonged to the "employer's group" and held that it was "well settled" that supervisors were employees and discrimination against them because of union activities was unlawful.<sup>25</sup> The Board relied on an earlier series of decisions that considered the employee status of supervisors, even though the prior decisions did not arise in the context of attempts by supervisors to organize and bargain collectively. Thus, in only the fourth case it reported,<sup>26</sup> the Board found the discharge of a union-activist supervisor violated section 8(3).<sup>27</sup> Although the existence of employee status

---

20. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1976)).

21. National Labor Relations (Wagner) Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152(3) (1976)).

22. See I, II LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935 (1949).

23. See, e.g., H.R. REP. NO. 245, 80th Cong., 1st Sess. 13 (1947).

24. 41 N.L.R.B. 961 (1942).

25. *Id.* at 965.

26. *Fruehauf Trailer Co.*, 1 N.L.R.B. 68 (1935), *enforcement denied on other grounds*, 85 F.2d 391 (6th Cir. 1936), *rev'd*, 301 U.S. 49 (1937); see also *American Potash & Chemical Corp.*, 3 N.L.R.B. 140 (1937), *enforced*, 98 F.2d 488 (9th Cir. 1938).

27. National Labor Relations (Wagner) Act, ch. 372, § 8(3), 49 Stat. 452 (1935). Following the 1947 Taft-Hartley Amendments, this section corresponds to § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976). The text provides, in part, that it is an unfair labor practice for an employer "[b]y 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 . . ." The most common violation of section 8(a)(3) involves the discharge of an employee in retaliation for membership in or activity on behalf of a union. See R. GORMAN, *supra* note 8, at 137-42.

was necessary to support its decision, the Board did not discuss the issue in its opinion.

The Eighth Circuit considered the issue, however, in *NLRB v. Skinner and Kennedy Stationery Co.*,<sup>28</sup> when it enforced a Board order requiring the reinstatement of a supervisor who had been discharged for his union activities. The employer had advanced a position that was common before 1947: since the definition of employer in section 2(2)<sup>29</sup> included those individuals who acted "in the interest of an employer," supervisors were more properly characterized as employers than employees. The court rejected this argument:

There is no inconsistency in these provisions when facts are taken into consideration. A foreman, in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of section 2(2) of the Act. Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master.<sup>30</sup>

The Board's *Collieries* decision, as well as a subsequent case which held that supervisors could be represented by the same union that represented their subordinates,<sup>31</sup> provoked a legislative attempt to change the law.<sup>32</sup> While the bill was pending, however, the Board itself reversed course in *Maryland Dry Dock Co.*<sup>33</sup> when it held that the interest of supervisors in organizing and bargaining collectively was outweighed by "the dangers inherent in the commingling of management and employee functions [and by] its possible restrictive effect upon the organizational freedom of rank and file employees."<sup>34</sup> The opinion did not deny the employee status of supervisors, but it questioned that conclusion by noting that there was nothing in the legislative history to indicate that Congress had ever considered the issue.<sup>35</sup> That concern was short lived, however, since the Board, following a change in membership, reversed itself again in *Packard*

---

28. 113 F.2d 667 (8th Cir. 1940), enforcing 13 N.L.R.B. 1186 (1939).

29. National Labor Relations (Wagner) Act, ch. 372, § 2(2), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152(2) (1976)).

30. 113 F.2d at 671.

31. *Godchaux Sugars, Inc.*, 44 N.L.R.B. 874 (1942).

32. See H.R. 1996, 78th Cong., 1st Sess. (1943).

33. 49 N.L.R.B. 733 (1943).

34. *Id.* at 740.

35. *Id.* at 738.

*Motor Car Co.*<sup>36</sup> in which it declared that supervisors were employees who could organize and bargain collectively with their employers. It characterized supervisors as mere industrial "traffic cops"<sup>37</sup> enforcing ready-made policies. Collective bargaining would therefore not "prove incompatible with the foreman's faithful performance of his duties."<sup>38</sup>

The Supreme Court affirmed the Board's action in *Packard Motor Car Co. v. NLRB*,<sup>39</sup> concluding that there was no basis in the Act for excluding supervisors from the protections of section 7. The Court said that the employer's real contention was that bargaining with units of supervisors was "inadvisable" because of the fear that supervisors would be "governed by interests of their own . . . rather than by the company's interest."<sup>40</sup> The Court rejected that position since it was

rooted in the misconception that because the employer has the right to wholehearted loyalty in the performance of the contract of employment, the employee [supervisor] does not have the right to protect his independent and adverse interest in the terms of the contract itself and the conditions of work. But the effect of the National Labor Relations Act is otherwise, and it is for Congress, not for us, to create exceptions or qualifications at odds with its plain terms.<sup>41</sup>

Congress, obviously disturbed at the action of the Board and the Court, immediately set about creating such an exception. In 1947 Congress passed the Labor Management Relations Act<sup>42</sup> which significantly amended the Wagner Act in several respects, including an express exclusion of supervisor from the definition of "employee." The legislative history demonstrates congressional motivation for the exclusion. The House Report,<sup>43</sup> for example, began its explanation of the amendment by observing: "When Congress passed the [Wagner Act], we were concerned . . . with the welfare of 'workers' and 'wage-earners,' not of the boss. It was to protect workers and their

36. 61 N.L.R.B. 4 (1945), *enforced*, 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947).

37. 61 N.L.R.B. at 10.

38. *Id.* at 19.

39. 330 U.S. 485 (1947).

40. *Id.* at 490.

41. *Id.*

42. Labor Management Relations (Taft-Hartley) Act, ch. 120, tit. I, § 101, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-197 (1976)).

43. H.R. REP. No. 245, 80th Cong., 1st Sess. (1947).

unions against foremen, not to unionize foremen, that Congress passed the Act."<sup>44</sup>

The Report also demonstrates that supervisor loyalty was a major congressional concern. It asserted that allowing supervisors to organize would subject them to the control of unions that also represented employees. Employers, the Report said, had a right to expect their agents to be loyal to them and free from any influence by unions or labor.<sup>45</sup> While the House Report noted that the bill did not forbid unionization by supervisors, it established that union organization need not be tolerated by the employer because "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust."<sup>46</sup> The Senate Report<sup>47</sup> echoes the same concern for supervisor loyalty. It noted testimony that in one company the issuance of disciplinary slips by foremen fell off dramatically after the organization of supervisors,<sup>48</sup> and concluded that absent congressional action, "management will be deprived of the undivided loyalty of its foremen."<sup>49</sup>

While the legislative history correctly asserts that the statute does not prohibit supervisors from engaging in concerted activity,<sup>50</sup> it is clear that any such action would be perilous without the protection of section 7. The House Committee acknowledged as much, yet observed that such treatment involved no fundamental unfairness since "[n]o one forced them to become supervisors. They abandoned the 'collective security of the rank and file voluntarily . . .'"<sup>51</sup> Whether or not that statement accurately described the facts, it certainly described the impact of the amendment: supervisors are no longer among those workers who enjoy the protection of federal law to organize and bargain collectively with their employers.<sup>52</sup>

44. *Id.* at 13.

45. *Id.* at 14-16.

46. *Id.* at 17 (emphasis in the original).

47. S. REP. NO. 105, 80th Cong., 1st Sess. (1947).

48. *Id.* at 410.

49. *Id.* at 411.

50. H.R. REP. NO. 245, 80th Cong., 1st Sess. 17 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 5 (1947).

In fact, section 14(a), 29 U.S.C. § 164(a) (1976), provides that no individual "employed as a supervisor" is prohibited by the Act from membership in a labor organization. However, the section also says that "no employer . . . shall be compelled to deem . . . supervisors as employees for the purpose of any law . . . relating to collective bargaining." *Id.*

51. H.R. REP. NO. 245, 80th Cong., 1st Sess. 16 (1947).

52. The Supreme Court has recognized the impact of the 1947 amendments on supervisors in two recent cases. In *Florida Power & Light v. International Brotherhood of Electrical*



## II. SUPERVISOR DISCHARGES — THE BOARD'S THEORY

Even though supervisors have been excluded from employee status, the Board has continued to find violations for employer action directed against them. Although the Board has considered a number of different factual settings and described them with a myriad of conclusory phrases, most of the cases can be fairly classified into one of three categories: 1) those in which the supervisor is discharged for refusing to assist an employer's unlawful campaign practices or otherwise violate employee rights (the refusal cases);<sup>53</sup> 2) those in which the supervisor was discharged for testifying before or otherwise furnishing information to the National Labor Relations Board or to an arbitrator (the testimony cases);<sup>54</sup> and, 3) those in which the supervisor was discharged after allying himself with employees in a union organizational effort or other concerted activity intended to protest employer practices (the concerted activity cases).<sup>55</sup>

In each of these categories, the Board has found that supervisor discharges violated section 8(a)(1) because of their effect on employee rights. Most often, notably in the refusal and testimony cases, the Board has concluded that the supervisor's discharge threatened employees by putting them in fear of exercising their own protected rights. The same analysis has appeared in the concerted activity cases; the Board frequently has outlawed the supervisor's discharge as "an integral part of a pattern of unlawful conduct aimed at penalizing employees."<sup>56</sup> The precise contours of the "integral part" test remain a mystery, but it apparently contained some remnant of the

---

Workers, Local 641, 417 U.S. 790 (1974), the Court considered a union's right to discipline supervisor-members for crossing a picket line. While reviewing the legislative history, the Court said:

Thus, 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, [citations omitted], the right to discharge such supervisors because of their involvement in union activities or union membership, [citations omitted], and the right to refuse to engage in collective bargaining with them . . . ."

*Id.* at 808.

Similarly, in *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (1974), the Court began its opinion by saying that the "Taft-Hartley amendments of the National Labor Relations Act excluded supervisors from the protection of the Act and thus freed employers to discharge supervisors without violating the Act's restraints against discharges on account of union membership." *Id.* at 654-55.

53. See *infra* Section II A.

54. See *infra* Section II B.

55. See *infra* Section II C.

56. See, e.g., *Krebs & King Toyota, Inc.*, 197 N.L.R.B. 462, 463 n.4 (1972).

threat test used in the refusal and testimony cases. It was this test that the Board discarded in *Parker-Robb*. In order to understand the significance of the Board's action, including its affirmance of the refusal and testimony cases, it is necessary to review the development of each category of these cases.

#### *A. The Refusal Cases*

The view that an employer violates 8(a)(1) when it discharges a supervisor for failing to commit an unfair labor practice originated before the 1947 amendments. For example, in *Vail Manufacturing Co.*,<sup>57</sup> the employer discharged two supervisors who refused to cooperate with an unlawful attempt to list them as eligible voters in an upcoming representation election. In a holding that was reversed by the 1947 amendments, the Board found that the discharges constituted unlawful discrimination under section 8(3).<sup>58</sup> More importantly, the Board also said the discharges violated section 8(1)<sup>59</sup> because of the possible effect on the other employees:

[I]n a small plant such as the respondent's, where the employees are aware of the respondent's opposition to the Union, the discharge of supervisory employees for refusing to aid the respondent in its campaign against the Union would come to the attention of the ordinary employees, [and] would cause such employees reasonably to fear that the respondent would take similar action against those who favored the Union . . . .<sup>60</sup>

Since *Vail* preceded the 1947 exclusion, the Board must have been influenced in part by employer retaliation against workers who enjoyed section 7 protection. Even following the 1947 exclusion of supervisors from employee status, however, the Board continued to find an unfair labor practice when a supervisor was discharged for

---

57. 61 N.L.R.B. 181, 182 (1945), *enforced*, 158 F.2d 664 (7th Cir. 1947), *cert. denied*, 331 U.S. 835 (1947).

58. Unlike in section 8(a)(1), motive is ordinarily thought to be a necessary element in a section 8(a)(3) violation. See R. GORMAN, *supra* note 8, at 137-42; see also *Wright Line*, 251 N.L.R.B. 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981). *But see* *NLRB v. Great Dane Trailer, Inc.*, 388 U.S. 26 (1967).

59. 61 N.L.R.B. at 183. Following the 1947 amendments, section 8(1) corresponded to section 8(a)(1).

60. 158 F.2d 664 (7th Cir. 1947). See also *Richter's Bakery*, 46 N.L.R.B. 447 (1942), *enforced*, 140 F.2d 870 (5th Cir. 1944), in which the Board found a section 8(a)(1) violation for the discharge of a supervisor who failed to support the employer's unlawful campaign. The Board concluded that such a discharge "itself discourages union membership among other employees . . . ." 46 N.L.R.B. at 450.

refusing to interfere with the self-organizational rights of employees. The two cases that have been the most influential are *Inter-City Advertising Co.*<sup>61</sup> and *Talladega Cotton Factory*.<sup>62</sup>

In *Inter-City* the discharged supervisor was not only sympathetic to the union effort but also involved in it. The employer discharged the supervisor after criticizing him for failing to report the organizational attempt to management.<sup>63</sup> Despite the absence of evidence indicating that the employer had ordered the supervisor to engage in unlawful surveillance, the Board affirmed its trial examiner's conclusion that the supervisor was discharged for failing to spy on employees.<sup>64</sup> In particular, the trial examiner decided that the supervisor had refused to become "a tool or instrument through which the employer could impinge upon the section 7 rights of the employees."<sup>65</sup> The Board agreed, citing *Vail* as authority that the discharge of a supervisor for refusing to aid an unlawful campaign violated section 8(a)(1) because of its effect on the non-supervisory employees.<sup>66</sup> The Board said it had recognized before the amendment that such discharges could inhibit the exercise of employee rights and concluded that "there . . . [is nothing] in the legislative history to

---

61. 89 N.L.R.B. 1103 (1950), *enforcement denied in pertinent part*, 190 F.2d 420 (4th Cir. 1951).

62. 106 N.L.R.B. 295 (1953), *enforced*, 213 F.2d. 209 (5th Cir. 1954).

63. 89 N.L.R.B. at 1122-23.

64. The trial examiner reached his conclusion by reasoning that the employer's criticism of the supervisor for failing to report the union activity was "conclusive that the Respondent considered it to be part of [the supervisor's] duties to discover and to report . . . any attempt by . . . rank-and-file employees to exercise the rights guaranteed them by the Act . . ." *Id.* at 1131. He said that such an implicit requirement for supervisors must "necessarily interfere with and restrain the rank-and-file employees in the free exercise of the right to join unions . . . for the knowledge that the supervisory force is acting under such instructions will, of necessity, restrain an employee . . . from exercising his right to join a union freely . . ." *Id.*

In his dissenting opinion, however, Member Reynolds said: "Nowhere in [the] reported and credited testimony do I find a demand, express or implied, that [the supervisor] engage in surveillance of the union activities of the employees . . . or . . . engage in any other proscribed anti-union activity." *Id.* at 1113 (Reynolds, Member, dissenting).

*But see* *Western Sample Book & Printing Co.*, 209 N.L.R.B. 384 (1974), where the Board upheld the discharge of supervisors who had not revealed to the employers "substantial information concerning the union." *Id.* at 389. The Board affirmed the Administrative Law Judge's conclusion that the employer had successfully avoided "a direct request" to spy, *id.*, and his further conclusion that "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 employer] . . . or . . . if the employer concludes that such supervisors have exerted insufficient energy in discovering information . . ." *Id.* at 390.

65. 89 N.L.R.B. at 1133.

66. *Id.* at 1106.

indicate that Congress intended to make any change in the law."<sup>67</sup>

The Board's remedy in *Inter-City* was even more controversial than the violation. It ordered the supervisor reinstated, overruling employer objections that the 1947 amendments excluded supervisors from such remedial action. The Board concluded that the 1947 exclusion was concerned "only with the relative advisability of barring or continuing the statutory protection formerly accorded to supervisors who wished to join unions."<sup>68</sup> Since the supervisor in *Inter-City* was not discharged for pressing the organizational rights of supervisors, the Board said the 1947 amendment was "immaterial" to the case, and that a reinstatement order was proper to dissipate the threat to employee rights.<sup>69</sup> The Board acknowledged that the remedial language in section 10(c)<sup>70</sup> spoke to "reinstatement of employees" but, citing the Supreme Court's opinion in *Phelps Dodge Corp. v. NLRB*,<sup>71</sup> decided that that language was merely illustrative and placed no limitation on the Board's authority to remedy violations in order to "effectuate the policies of the Act."<sup>72</sup>

This obvious attempt to limit the significance of the supervisor exclusion is of questionable validity. While the amendment was motivated in part by decisions like *Packard* which allowed the organization of supervisory bargaining units, Congress also was concerned with supervisor loyalty. Thus, the amendment did not merely outlaw supervisor bargaining; it excluded supervisors from any section 7 protection. The Board's grudging opinion in *Inter-City*, however, seemed not to concede that fact. For example, the Board concluded that an employer could not justifiably require a supervisor to reveal information about union organizational activities because it might have been "obtained by the [supervisor] in the course of his activities as a prospective union member, rather than in the course of his duties as a supervisor."<sup>73</sup> That distinction sounded a familiar theme. It was similar to the pre-amendment contention that supervisors act as the employer in relation to other employees but as employees them-

---

67. *Id.* at 1108.

68. Consequently, the Board concluded that the exclusion of supervisors "did no more than effectuate [Congress's] decision to remove any compulsion upon employers to bargain collectively with unions of supervisors or to respect the rights of supervisors to organize." *Id.* at 1107.

69. *Id.* at 1108.

70. 29 U.S.C. § 160(c) (1976).

71. 313 U.S. 177, 188 (1941).

72. 89 N.L.R.B. at 1108.

73. *Id.* at 1107.

selves in relation to the employer. If that position ever had any validity, it was extinguished in 1947. The supervisor in *Inter-City* had no protected right to be a "prospective union member." Whatever the Board's perception of congressional motivation for the amendment, the statutory language is unambiguous: supervisors are not employees and do not share the rights protected by section 7.

The Fourth Circuit Court of Appeals was not impressed by the Board's analysis of either the facts or the law in *Inter-City*. The court said the record did not support a finding that the supervisor was fired for failing to commit an unfair labor practice. Instead, it found that the employer justifiably fired the supervisor because of his union activities, thereby implicitly rejecting the Board's apparent conclusion that the Act somehow shielded that activity.<sup>74</sup>

In *Talladega* the Board rejected the recommendation of its trial examiner and found that the employer violated section 8(a)(1) when it discharged two supervisors because they only "half-heartedly" participated in an unlawful anti-union campaign. The Board found that the discharges, which immediately followed the union's election victory, "plainly demonstrated to rank and file employees that this action was part of [the employer's] plan to thwart their self-organizational activities and evidenced a fixed determination not to be frustrated . . . by any half-hearted or perfunctory obedience from . . . supervisors."<sup>75</sup> Citing *Inter-City* and *Vail*, the Board said the employer violated section 8(a)(1) because "the net effect of this conduct was to cause nonsupervisory employees reasonably to fear that the Respondent would take similar action against them if they continued to support the Union."<sup>76</sup> The Board acknowledged that the Act no longer protected supervisors, but cited *Inter-City* as authority that the 1947 amendments did not change prior law which grounded a violation on the effect the discharge had on the rank and file em-

---

74. *NLRB v. Inter-City Advertising Co.*, 190 F.2d 420, 422 (4th Cir. 1951). Section 10(e), 29 U.S.C. § 160(e), and section 10(f), 29 U.S.C. § 160(f), authorize the courts of appeals to enforce (on motion of the Board) or review (at the request of an aggrieved party) any final order of the Board. Findings of fact are to be conclusive "if supported by substantial evidence on the record considered as a whole." *Id.* For a general discussion of judicial review of NLRB orders, see R. GORMAN, *supra* note 8, at 10-15.

75. 106 N.L.R.B. at 297. The Board upheld its trial examiner's refusal to credit evidence intended to support the employer's claim that the supervisors were fired for pro-union activity. *Id.* at 295. The trial examiner, however, had concluded that the discharges did not violate section 8(a)(1). He was influenced, at least in part, by the supervisors' actual participation in the unlawful campaign. *Id.* at 321.

76. *Id.* at 297.

ployees and not on the rights of supervisors.<sup>77</sup> The touchstone of the Board was that action directed against supervisors would inhibit employees in their willingness to exercise section 7 rights, thereby constituting the restraint, coercion, or interference prohibited by section 8(a)(1). In order to remedy the violation, the Board ordered the supervisors reinstated. Such action, the Board concluded, was essential "to restore to the non-supervisory employees their full freedom to fully exercise" section 7 rights.<sup>78</sup>

*Talladega* and *Inter-City* announced two controversial, though related, principles. First, the discharge of a supervisor not protected by section 7 of the National Labor Relations Act could constitute an unfair labor practice; second, the Board had the power to order the reinstatement of the supervisor. With respect to the latter principle, the Board correctly interpreted *Phelps Dodge* to mean that the statutory language authorizing reinstatement of employees was not the outer reach of the Board's remedial power. In *Phelps Dodge*, the Supreme Court had upheld the reinstatement of applicants who had never been employed.<sup>79</sup> Nonetheless, the problem is more complicated in supervisor discharge cases, not only because of the express exclusion of supervisors, but also because of the pronouncement in the legislative history that an employer need not have as his agent "one whom for any reason, he does not trust."<sup>80</sup> In light of this policy, an order requiring an employer to retain a management representative against its will should be premised on something more than the Board's normal power to restore the status quo.

That issue was considered by the Fifth Circuit in its review and enforcement of *Talladega*.<sup>81</sup> The court conceded that the 1947 amendment freed employers to discharge supervisors because of their concerted activities. It agreed, however, with the Board's conclusion that the amendments were not intended to lessen the protection afforded rank and file employees. The court said any contention that supervisors could be discharged with impunity because they failed to violate the rights of employees "evinces undue preoccupation with

---

77. *Id.*

78. *Id.* at 299.

79. The Court said that a refusal to hire based on union affiliation was "a dam to self organization at the source of supply," 313 U.S. at 185, and authorized reinstatement by holding that the statutory language which permitted the Board to take affirmative action "including reinstatement of employees with or without back pay," section 10(c), 29 U.S.C. § 160(c), was merely illustrative of the Board's remedial power. 313 U.S. at 187-89.

80. See *supra* text accompanying note 46.

81. 213 F.2d 209 (5th Cir. 1954).

the statutory definition, rather than with the underlying purpose and intent of the Act as a whole."<sup>82</sup> Thus, when the discharge of supervisors coerces employees in the exercise of their rights, the Board has the discretion to reinstate the supervisor in order to dissipate the coercive effect of the employer's action. The court said the Board should have "the same remedial power to redress acts of indirect interference" as it had for "acts of direct interference."<sup>83</sup>

Although both the Board and the court reached the correct result in *Talladega*, their rationale for sustaining the violation fell short of the mark. In both *Talladega* and *Inter-City* the Board premised the section 8(a)(1) violation on its inference that the discharge of a supervisor would cause employees to fear a similar fate if they attempted to exercise their section 7 rights. Even though a recent study questions the Board's ability to predict employee behavior,<sup>84</sup> one might assume that employees would perceive the discharge of a supervisor as a threat to their own ability to engage in organizational activities. Even if that assumption is valid, however, it alone cannot support a violation. If the only requirement for a section 8(a)(1) violation is the generation of fear among employees, then one need question if it is *ever* possible to discharge a supervisor in the context of an organizational campaign. In its review of the *Talladega* case, the Fifth Circuit acknowledged that employers could discharge supervisors for engaging in union activity; in *Inter-City*, the Board conceded that supervisors no longer had any right to press organizational rights on their own. Even those kinds of supervisor discharges, however, could generate fear among employees and inhibit them in the exercise of their section 7 rights. Since the Board has acknowledged that those discharges are not unlawful despite any effect on the employees, the discharge of a supervisor for refusing to commit an unfair labor practice cannot be unlawful merely because it might produce a similar inhibiting effect. A "threatening effects" test, then, is overly broad and can ignore legitimate employer interests.

The Board's decision in *Miami Coca Cola Bottling Co.*<sup>85</sup> illustrates the absurdity of a threatening effects test. A branch manager was discharged after he disregarded his employer's instructions to

82. *Id.* at 217.

83. *Id.*

84. J. GETMAN, S. GOLDBERG & J. HERMAN, UNION REPRESENTATION ELECTIONS, LAW AND REALITY, 111-30 (1976) [hereinafter cited as Getman Study]. See also Goldberg, Getman and Brett, *The Authors Respond to the Critics*, 79 MICH. L. REV. 564 (1981).

85. 140 N.L.R.B. 1359 (1963), *enforcement denied in pertinent part*, 341 F.2d 524 (5th Cir. 1965).

“clean house” of union adherents following the union’s victory in a representation election.<sup>86</sup> The Board affirmed the trial examiner’s conclusion that the discharge violated the self-organizational rights of employees.<sup>87</sup> Appearing to cling to *Talladega*, the trial examiner held that the action was “a clear signal to the employees that different tactics would be . . . employed” to discourage union activity in the future.<sup>88</sup> The holding was questionable since it did not appear that the employees knew the reason for the discharge. A two member Board majority said it “inferred” that the employees knew, but asserted that knowledge was not essential to a violation.<sup>89</sup> The obvious question is how a supervisor’s discharge could frighten employees in the exercise of their rights if they fail to understand that the discharge was related to their activity. Nonetheless, the majority said that the discharge “interfered” with employee rights and observed that it was “an integral part of a pattern of conduct aimed at penalizing employees for their union activities and ridding the plant of union adherents.”<sup>90</sup> The quoted language is important for two reasons: first, it formulates a different test than that applied in *Talladega*, though there, too, the Board characterized the discharge as “part of a plan to thwart” employee rights; second, the same justification resurfaced to support section 8(a)(1) violations in the concerted activity cases.<sup>91</sup>

In *Miami Coca Cola Bottling*, the Board did not explain what it meant by its “integral part” test. Nonetheless, fear generated among employees seemed less important than the fact that the discharge occurred in a context of an overall unlawful plan. The discharge was unlawful not merely because of its threatening effect on employees (a position the Board seemed to embrace), but also because it warned the other supervisors that they had to violate the Act or risk their jobs: “At the very least, other supervisors were made aware that they must engage in the discriminatory conduct as they did in this case, or risk their own discharge. Thus, the discharge tended to

---

86. 140 N.L.R.B. at 1368.

87. *Id.* at 1361.

88. *Id.* at 1375.

89. The Board’s opinion said that the supervisor’s discharge interfered with employee section 7 rights “whether or not the employees knew of Respondent’s true reason . . . .” *Id.* at 1360. In a footnote the Board concluded that knowledge could be inferred from the timing of the discharge. *Id.* at 1361 n.4.

90. *Id.* at 1361.

91. See *infra* discussion in Section II C.



insure the success of the plan to rid the plant of union adherents."<sup>92</sup>

Although the Fifth Circuit refused to enforce the Board's order in *Miami Coca Cola Bottling*,<sup>93</sup> the Sixth Circuit approved the Board's threat test in *NLRB v. Lowe*<sup>94</sup> when, without discussing the theory, it upheld adoption of a trial examiner's conclusion that the employer had violated section 8(a)(1) by discharging a supervisor who refused to violate the organizational rights of employees. Relying on *Talladega*, the trial examiner said that the employer's action was "a signal to the employees that the most extreme measures would be invoked to defeat their self-organizational efforts."<sup>95</sup> The Board's theory also met with the apparent approval of the Fifth Circuit in *Jackson Tile Manufacturing Co. v. NLRB*.<sup>96</sup> There, the employer discharged a supervisor who had balked at the discharge of an employee thought to be a union sympathizer even though he had cooperated previously with an unlawful anti-union campaign. The Board determined that the discharge violated section 8(a)(1) because: "it demonstrated graphically to rank-and-file employees the extreme measures to which the offending employer will resort in order to thwart them in their desire to join or assist a labor organization."<sup>97</sup> On review, the court merely held that the employer's petition to set aside the order was not meritorious; it did not discuss the Board's conclusion that the discharge had the effect of coercing employees in the exercise of their section 7 rights.<sup>98</sup>

In recent years the National Labor Relations Board has continued to find a section 8(a)(1) violation in cases where supervisors are discharged for failing to participate in unlawful action.<sup>99</sup> It is not

92. 140 N.L.R.B. at 1361.

93. The court noted that prior to the union's election victory the discharged supervisor had engaged in unfair labor practices against the employees contrary to the direction of his superiors. That, combined with other facts, convinced the court that the Board's conclusion that the supervisor was fired for refusing to participate in the unlawful campaign was not supported by substantial evidence on the record considered as a whole, the standard of review set forth in subsections 10(e) and 10(f), 29 U.S.C. § 160(e), (f) (1976). 341 F.2d 524, 526 (5th Cir. 1965).

94. 406 F.2d 1033 (6th Cir. 1969), enforcing 157 N.L.R.B. 310 (1966).

95. 157 N.L.R.B. at 322. Although the court of appeals enforced the Board's order it neither cited any cases, discussed the Board's test, nor articulated any other theory justifying the discharge.

96. 272 F.2d 181 (5th Cir. 1959), enforcing 122 N.L.R.B. 764 (1958).

97. 122 N.L.R.B. at 767.

98. 272 F.2d at 181-82.

99. Many cases have involved retaliation against supervisors who have refused to spy on employees. See, e.g., *St. Anthony's Center*, 227 N.L.R.B. 1777 (1977) (Board upheld Administrative Law Judge's conclusion that the employer violated section 8(a)(1) when it gave a supervisor a lie detector test and questioned him concerning his union activities); *Russell Sto-*

always clear, however, what theory the Board uses to sustain its action. For example, in *Belcher Towing Co.*,<sup>100</sup> the Board found a section 8(a)(1) violation for the discharge of a supervisor who failed to enforce the employer's invalid no-solicitation rule. A majority of the Board concluded that the supervisor was fired because he had failed to violate the rights of employees: "[r]espondent's discharge of [the supervisor] and the obvious and necessary effects of this action on employees (particularly those under [his] supervision), violates section 8(a)(1) of the Act."<sup>101</sup> The reference to the employees of the discharged supervisor suggests a Board determination that the discharge threatened the employees. Two days later in *Gerry's Cash Markets, Inc.*,<sup>102</sup> the Board upheld an Administrative Law Judge's determination that a supervisor's demotion under similar circumstances violated section 8(a)(1) because it "unlawfully coerce[d] the statutory employees in the exercise of their section 7 rights."<sup>103</sup> Although the Administrative Law Judge offered no explanation for his holding, he did cite *Miami Coca Cola Bottling* in which the Board propounded its threat test and introduced its "integral part of a pattern of conduct" analysis. The Fifth Circuit refused to enforce the Board's conclusion that a supervisor's discharge could violate section 8(a)(1) because it instilled fear in rank-and-file employees, but nonetheless sustained the violation on another theory: "if employers are

---

ver Candies, 223 N.L.R.B. 592 (1976), *enforced*, 551 F.2d 204 (8th Cir. 1977) (Board found a section 8(a)(1) violation for the discharge of a supervisor who refused to spy on employees). On review, the Eighth Circuit said that the discharge demonstrated to employees "the extreme measures to which the employer will resort in order to thwart unionization efforts." 551 F.2d at 206; *Brookside Indus.*, 135 N.L.R.B. 16 (1962), *enforced in pertinent part*, 308 F.2d 224 (4th Cir. 1962); *Transition Electronic Corp.*, 129 N.L.R.B. 828 (1960), *enforced in part and remanded*, 48 L.R.R.M. (BNA) 2616 (1st Cir. 1961); *Alamo Express Inc.*, 127 N.L.R.B. 1203 (1960). *But see* *Western Sample Book & Printing Co.*, 209 N.L.R.B. 384 (1974).

100. 238 N.L.R.B. 446 (1978), *enforced in pertinent part*, 614 F.2d 88 (5th Cir. 1980).

101. 238 N.L.R.B. at 447. The Fifth Circuit enforced the Board's order with respect to the supervisor's discharge, even though it remanded the case on the question of the legality of the no-solicitation rule. The court determined that the supervisor had been discharged, not necessarily for refusing to enforce an invalid rule, but for refusing to engage in unlawful surveillance. 614 F.2d at 92.

102. 238 N.L.R.B. 1141 (1978), *enforced*, 602 F.2d 1021 (1st Cir. 1979).

103. 238 N.L.R.B. at 1151. Section 10(b) of the Act, 29 U.S.C. § 160(c) (1976), authorizes the Board to delegate the conduct of its unfair labor practice hearings to an agent. Board rules provide that the hearing shall be conducted by an Administrative Law Judge. 29 C.F.R. § 102.34 (1981). Following the hearing, the Administrative Law Judge is directed to prepare a decision containing findings of fact, conclusions, and recommendations as to the disposition of the case, including, if appropriate, a recommended remedial order. *See id.* § 102.45(a). The case is then transferred to the Board for its consideration. *See id.* § 102.46. Prior to 1972 the Administrative Law Judges were called trial examiners.

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."<sup>104</sup>

Finally, the Board avoided application of its threat test in a recent case that expanded the category of supervisor discharges subject to Board sanction. In *Buddies Super Markets*,<sup>105</sup> the employer violated section 8(a)(1) when it discharged a supervisor who advised an employee-union member that the employer was "building a case" against him. The Board acknowledged that the case did not "fit neatly" into any of the categories of discharges it had previously considered, but concluded that finding a violation fostered the policy of insulating employees "from employer [action] directed at them through supervisors."<sup>106</sup> The Administrative Law Judge had relied, in part, on prior Board cases that applied the threatening effects theory.<sup>107</sup> The Board, however, said that it was not necessary to consider that test.<sup>108</sup> Instead, echoing, but not citing, its opinion in *Miami Coca Cola Bottling*, the Board said the supervisor's discharge "served as an example to other supervisors" thereby apparently insuring future supervisory cooperation in its unlawful plans. The Board concluded that "an order to keep confidential an unlawful design to violate the Act is improper, and punishing for breaching this confidentiality is unlawful interference within the meaning of Section 8(a)(1)."<sup>109</sup> The Board's opinion in *Parker-Robb* expressly overruled *Buddies*, although without much explanation. The Board simply listed it in a group of overruled cases that applied the integral part test, an analysis not expressly used in *Buddies*.<sup>110</sup>

104. 602 F.2d at 1023.

105. 223 N.L.R.B. 950 (1976), *enforcement denied*, 550 F.2d 39 (5th Cir. 1977).

106. 223 N.L.R.B. at 950. The Board compared the case to those in which the supervisor refused to commit an unfair labor practice:

Conceptually, there is little difference between a supervisor refusing to engage in unfair labor practices and refusing to stand by in silence while his employer embarks on a planned course of action toward that end. In the first situation the supervisor acts out of conscience against becoming a party to violating the law. In the second, the supervisor will not knowingly allow the law to be violated if he can prevent it. In both instances, the supervisor, insofar as he is capable of doing so, will not countenance a violation of the law.

*Id.* at 950 n.2.

107. See cases cited in 223 N.L.R.B. at 956 n.4 and accompanying text. The Administrative Law Judge concluded that the "employees would 'perceive in the treatment of the supervisor a reliable indication of what would befall them' if they chose to engage in union activities." *Id.* at 957 (quoting *King Radio Corp. v. NLRB*, 398 F.2d 14, 22 (10th Cir. 1968)).

108. 223 N.L.R.B. at 950 n.3.

109. *Id.* at 950.

110. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,964.

As noted earlier, in *Parker-Robb*, the Board endorsed its previous rulings in the refusal cases. For example, the Board cited with approval *Vail*, *Inter-City*, *Jackson Tile*, *Miami Coca Cola Bottling*, *Talladega*, and *Belcher*.<sup>111</sup> With respect to these decisions, however, the Board said only that the violation stemmed not from any statutory protection for the supervisors, "but rather from the need to vindicate employees' exercise of their Section 7 rights."<sup>112</sup> The only consistent theme in any of the refusal cases approved by the Board was the threat test. It appeared in *Vail*, the earliest case cited by the Board, and was the apparent justification for *Belcher*, the most recent case the Board cited. Presumably, the Board decided that the refusal cases vindicate employee rights by safeguarding them from the threat of reprisals for their concerted activities.

### B. The Testimony Cases

*Parker-Robb* also approved the testimony cases, in which a supervisor is discharged for having disclosed information adverse to the employer, most often in retaliation for participating in National Labor Relations Board proceedings. Section 8(a)(4)<sup>113</sup> prohibits an employer from discharging or otherwise discriminating against "an employee" for either filing charges or giving testimony.<sup>114</sup> Despite the clear statutory language, there have been suggestions that section 8(a)(4) prohibits even supervisor discharges. In *Better Monkey Grip Co.*,<sup>115</sup> the trial examiner asserted that a discharge in retaliation for a supervisor's adverse testimony violated section 8(a)(4) because Congress did not intend to terminate the employee status of supervisors for the purposes of that section.<sup>116</sup> That position is not totally without merit.

The 1947 amendments did not change the language of section

---

30,969 n.20.

111. *Id.* at 30,968 n.7.

112. *Id.* at 30,962.

113. 29 U.S.C. § 158(a)(4) (1976). The text of the section reads: "It shall be an unfair labor practice for an employer . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . ."

114. The language of section 8(a)(4) has received liberal interpretation. For example, even though the statute protects only employees who have "filed charges or given testimony," it is a violation to discharge an employee who has provided a sworn statement to an NLRB field examiner. See *NLRB v. Scrivener*, 405 U.S. 117 (1972).

115. 115 N.L.R.B. 1170 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957).

116. "So far as the trial examiner can find, no word appears in the committee reports, or was said on the floor of either House of Congress, which would indicate any intention to remove the protection of Section 8(a)(4) from an employee of any employer called to testify under the Act." 115 N.L.R.B. at 1181.

8(a)(4). Prior to 1947, supervisors were included within the sweep of section 8(a)(4)<sup>117</sup> since they were considered employees. The legislative history of the 1947 amendments contains no indication that Congress even considered the effect that the exclusion of supervisors from the definition of employee would have on the operation of section 8(a)(4). The House Report, for example, merely says: "In the language of present section 8(4), this forbids employers to discriminate against employees for filing charges or testifying under the Labor Act."<sup>118</sup> Nor does the portion of either the House or Senate Report explaining the motivation for the exclusion indicate its intention to strip supervisors of section 8(a)(4) protection.<sup>119</sup> Thus, it might well be contended that failure to amend section 8(a)(4) was an oversight and Congress did not intend "that any supervisor, called under subpoena to give testimony in a Board proceeding, could be discharged for so testifying, or run the risk of contempt proceedings against him for refusing . . ."<sup>120</sup> The obvious problem, however, is that the plain language of the statute restricts such protection to employees.

Although urged by its trial examiner to apply section 8(a)(4) to supervisor discharges, the Board, at least until recently,<sup>121</sup> managed to avoid that construction and yet achieve the same result. In *Better Monkey Grip*, for example, the Board applied a familiar test when it held that the employer violated section 8(a)(1) by discharging a supervisor in retaliation for his adverse testimony in a Board proceeding: "the net effect of [the supervisor's] discharge was to cause non-supervisory employees reasonably to fear that the respondent would take the same action against them if they testified against the respondent . . ."<sup>122</sup> Despite the dissimilarity in facts, the Board adopted the same threat test used in *Talladega, Vail*, and *Inter-City*.

117. National Labor Relations (Wagner) Act, ch. 372, § 8, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 158(4) (1976)). The text was identical with that quoted in note 113, *supra*.

118. H.R. REP. NO. 245, 80th Cong., 1st Sess. 30 (1947). The Senate report does not mention section 8(a)(4). S. REP. NO. 105, 80th Cong., 1st Sess. (1947). The Conference report says only that "[n]either the House bill nor the Senate amendment changed the wording of the provisions of section 8(4) of the existing act, and the conference agreement in section 8(a)(4) follows the provisions of existing law." H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 41 (1947).

119. H.R. REP. NO. 245, 80th Cong., 1st Sess. 13-17 (1947); S. REP. NO. 105, 80th Cong., 1st Sess. 3-5 (1947).

120. *Better Monkey Grip Co.*, 115 N.L.R.B. at 1181.

121. See *infra* text accompanying notes 135-144.

122. 115 N.L.R.B. at 1171.

In addition to the threat of reprisal, the Board referred to another potential effect on employee rights:

Clearly inherent in the employees' statutory rights is the right to seek their vindication in Board proceedings. Moreover, by the same token, rank-and-file employees are entitled to vindicate these rights through the testimony of supervisors who have knowledge of the facts without the supervisors risking discharge or other penalty for giving testimony under the Act adverse to the employer.<sup>123</sup>

Under either theory, the Board focused on the impact of the employee discharge on employee rights. This approach made the case appropriate for consideration under section 8(a)(1) and rendered unnecessary any consideration of section 8(a)(4).

The strength of the Board's argument in *Better Monkey Grip* was its assertion that employees should be able to vindicate their rights through relevant information known to supervisors. Otherwise, an employer might effectively insulate itself from discovery of certain unlawful activities. The credibility of the threat test, however, is just as suspect in these testimony cases as it is in the refusal cases discussed above. For example, in *Oil City Brass Works*,<sup>124</sup> the Board found a section 8(a)(1) violation over the recommendation of its trial examiner who had concluded that the failure to recall a supervisor from layoff status in retaliation for his adverse testimony was not threatening because the employer did not discriminate against employees who also testified adversely. Given the employer's toleration of adverse employee testimony, the trial examiner felt that the distinction between the rights of employees and the rights of supervisors should have been clear, and that employees could not reasonably believe that the employer would discharge them for testifying adversely to its interest.<sup>125</sup> The Board disagreed. It noted that the employees knew the reason for the supervisor's discharge and could believe that a similar fate awaited them if they testified. Without explaining its reasoning, the Board merely concluded that the "evidence adduced in the . . . hearing showing retention and reinstatement of employ-

---

123. *Id.*

124. 147 N.L.R.B. 627 (1964), *enforced*, 357 F.2d 466 (5th Cir. 1966).

125. The trial examiner found that the supervisor's discharge threatened the employees, citing *Better Monkey Grip* and *Dal-Tex Optical Co.*, 131 N.L.R.B. 715 (1961), *enforced*, 310 F.2d 58 (5th Cir. 1962). 147 N.L.R.B. at 638. In a supplemental proceeding, however, the trial examiner concluded that the retention of employees who had testified "negative[d] the formation" of any fear, or, at least "dilute[d] the effects." 147 N.L.R.B. at 647.

ees who testified was not of such a substantial nature to completely eradicate the coercive effect of [the supervisor's] discharge upon employees."<sup>126</sup> This case, then, expands the threat test even beyond its usage in the refusal cases. While it is questionable to guess about the impact on employees as a result of employer action, it is absurd to presume the existence of a threat in the face of direct evidence to the contrary. Perhaps with this criticism in mind, the Board also justified its decision by referring to the language in *Better Monkey Grip*, which stated that employees are entitled to vindicate their rights through supervisor testimony without subjecting the supervisor to penalty.<sup>127</sup>

Just as controversial as the threat test was the Board's reinstatement order in both *Better Monkey Grip* and *Oil City Brass Works*. Even if the discharges did threaten employees, or otherwise interfere with their rights, the Board might have avoided the necessity for reinstatement by issuing a cease and desist order<sup>128</sup> and by ordering the employer to inform the employees that their rights to testify were secured by law.<sup>129</sup> The Board could have justified a refusal to reinstate by reference to section 8(a)(4) and to the statement in the legislative history that employers should not be required to maintain as an agent one who is unacceptable for any reason.<sup>130</sup> Nonetheless, without any discussion of the issue, the Board, as it did in *Tal-ladega*, ordered the employer to reinstate the discharged supervisor. It stated that such reinstatement was necessary "in order to restore to these employees their full freedom to exercise these rights

...<sup>131</sup>

The Board has expanded the two-pronged analysis of *Better Monkey Grip* and *Oil City Brass Works* to situations in which supervisors have testified in other labor related hearings. For example, in *Ebasco Services, Inc.*,<sup>132</sup> the Board held that the employer violated section 8(a)(1) when it demoted several supervisors who an-

126. 147 N.L.R.B. at 630.

127. *Id.* See also *Dal-Tex Optical Co.*, 131 N.L.R.B. 715 (1961), *enforced*, 310 F.2d 58 (5th Cir. 1962); *Modern Linen & Laundry Serv.*, 116 N.L.R.B. 1974 (1956).

128. Section 10(c) of the Act, 29 U.S.C. § 160(c) (1976), authorizes the Board to effectuate its decisions, in part, by issuing "an order requiring [an offender] to cease and desist" from an unfair labor practice. *Id.*

129. In *DRW Corp.*, 248 N.L.R.B. 828 (1980), former Member Truesdale suggested such a notice. *Id.* at 834.

130. See *supra* text accompanying note 46.

131. *Better Monkey Grip Co.*, 115 N.L.R.B. at 1172; *Oil City Brass Works*, 147 N.L.R.B. at 631.

132. 181 N.L.R.B. 768 (1970).

nounced their intention to testify at a grievance hearing. The trial examiner said such action was a reasonable extension of the policy announced in *Better Monkey Grip* because "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."<sup>133</sup>

Although the Board has applied section 8(a)(1) to most cases in which supervisors were disciplined for resorting to Board processes,<sup>134</sup> several recent cases indicate the applicability of section 8(a)(4) as well. For example, in *Hi-Craft Clothing Co.*<sup>135</sup> a supervisor complained to management that he was "going to the labor board" unless he received a disputed Christmas bonus. His supervisor subsequently discharged him, explaining that "if the man goes to the Labor Board, he can no longer work for this firm."<sup>136</sup> The Administrative Law Judge said the discharge interfered with the strong public policy promoting free and unimpeded access to the Board and "threatened employees in the exercise of their section 7 rights."<sup>137</sup> The Board agreed, with its routine adoption order supplemented only by a brief footnote.<sup>138</sup>

In *Hi-Craft*, the Administrative Law Judge based his conclusion on two other recent cases, *General Nutrition Center*<sup>139</sup> and *General Services, Inc.*<sup>140</sup> In *General Nutrition*, a supervisor and four employees were discharged after they left the work place to file an unfair labor practice charge protesting certain employer sales policies.<sup>141</sup>

---

133. *Id.* at 770. See also *Illinois Fruit & Produce Corp.*, 226 N.L.R.B. 137 (1976); *Rohr Indus.*, 220 N.L.R.B. 1029 (1975).

134. See, e.g., *Professional Ambulance Serv., Inc.*, 232 N.L.R.B. 1141 (1977); *Carter Lumber, Inc.*, 207 N.L.R.B. 391 (1973), *enforced*, 507 F.2d 1262 (6th Cir. 1974); *Casino Operations, Inc.*, 169 N.L.R.B. 328 (1968); *King Radio Corp.*, 166 N.L.R.B. 180 (1967), *enforced*, 398 F.2d 14 (10th Cir. 1968); *Electro Motive Mfg. Co.*, 158 N.L.R.B. 534 (1966), *enforced*, 389 F.2d 61 (4th Cir. 1968) (reinstating a supervisor who was discharged for providing the Board with an affidavit); *Leas & McVitty, Inc.*, 155 N.L.R.B. 389 (1965), *enforcement denied*, 384 F.2d 165 (4th Cir. 1967).

135. 251 N.L.R.B. 1310 (1980), *enforcement denied*, 660 F.2d 910 (3d Cir. 1981).

136. 251 N.L.R.B. at 1316 (Intermediate Report).

137. *Id.* at 1317 (Intermediate Report).

138. The Board said it agreed with the Administrative Law Judge's conclusion that the "policy favoring free access to the Board's procedures" required a finding that a violation had occurred. It said that the case was governed by *General Services, Inc.*, 229 N.L.R.B. 940 (1977), discussed below. 251 N.L.R.B. at 1310 n.2.

139. 221 N.L.R.B. 850 (1975).

140. 229 N.L.R.B. 940 (1977), *enforcement denied mem.*, 575 F.2d 298 (5th Cir. 1978).

141. 221 N.L.R.B. at 851-53. The employees did not file a charge concerning their working conditions because a Board agent informed them that their grievances did not consti-



The employees' discharges clearly violated sections 8(a)(1) and 8(a)(4).<sup>142</sup> In a poorly reasoned opinion, the Administrative Law Judge found the supervisor's discharge to violate the same sections, citing *Better Monkey Grip* as authority that a supervisor cannot be discharged "for participating in the filing of a charge . . . [with] the National Labor Relations Board relevant to an employee charge or complaint."<sup>143</sup> Since *Better Monkey Grip* dealt only with section 8(a)(1), the Administrative Law Judge buttressed her conclusion by asserting that the discharge of a supervisor for engaging in what would be protected concerted activity as to employees was unlawful if it would cause employees to fear that an employer would take similar action against them. She said that the supervisor's discharge was "an indistinguishable part of the personnel action against all five women;" that the supervisor believed she was protected under the Act; and that since the employer never had distinguished between the rights of supervisors and the rights of employees, "this case is in reality the same as if all five women had been employees, instead of only four of them."<sup>144</sup> The Board affirmed her finding of both section 8(a)(1) and section 8(a)(4) violations for the supervisor's discharge.

Equally bizarre was the Board's opinion in *General Services* in which a supervisor was discharged for soliciting union authorization cards from employees.<sup>145</sup> The supervisor initially filed section 8(a)(1) and section 8(a)(3) charges, but withdrew them after employer assurances of reinstatement. The employer reneged and, five months later, the supervisor refiled the same charges only to have them dismissed by the Regional Director who had found the charging party to be a supervisor in an intervening representation case. The supervisor then filed a section 8(a)(4) charge claiming, as was true, that he was not reinstated because of his original section 8(a)(3) charge.<sup>146</sup>

The Board said the supervisor was unsure of his status at the time he filed his original section 8(a)(3) charge, notwithstanding his testimony that he "was hired as a supervisor"<sup>147</sup> and notwithstanding

---

tute unfair labor practices. While at the Board office, however, they filed charges complaining about their discharge for engaging in protected concerted activity. *Id.* at 853.

142. The Administrative Law Judge concluded that the employees were engaged in protected concerted activity when they left work to visit the NLRB. *Id.* at 855-57.

143. *Id.* at 858.

144. *Id.* at 859.

145. In his original section 8(a)(3) charge, the supervisor alleged that the employer discharged him for soliciting signatures on union authorization cards. 229 N.L.R.B. at 946.

146. *Id.* at 940.

147. *Id.* The Board noted, however, that the supervisor alleged on the charge form that he was first informed of his supervisory status two weeks before his discharge.

reinstitution of the same charge even after the Regional Director had determined his supervisory status. Citing the broad public policy favoring free and unimpeded access to its processes and the equally compelling need to protect its "channels of information," the Board concluded that "for the purpose of processing his [Section 8(a)(4)] charge [the supervisor] must be considered as an 'employee' within the meaning of Section 8(a)(4)."<sup>148</sup> The Board said any other result would have effectively given the employer, not the Board, the power to determine the merit of the original section 8(a)(3) charge. It asserted that the "critical ruling" on employee status was to be made solely by the Board, and that the supervisor should suffer no discrimination as a result of his charge.<sup>149</sup> In an apparent pass at the threat test, the Board added that a contrary ruling "would clearly discourage the filing of charges and thus reduce the Board's ability to remedy unfair practices."<sup>150</sup> The Board ended its opinion by reviewing the legislative history of section 8(a)(4) and concluded that "the protection afforded supervisors under section 8(4) of the 1935 Act was not removed by the Taft-Hartley Amendments of 1947 . . . ."<sup>151</sup>

As indicated previously, the legislative history, as opposed to the explicit statutory language, would support an argument that Congress did not intend to oust supervisors from section 8(a)(4) protection. However, neither the interests protected by section 8(a)(4) nor the Board's traditional tests under section 8(a)(1) warrant a violation in either *Hi-Craft* or *General Services*. In both cases, the Board asserted that section 8(a)(4) protects free and unimpeded access to its processes. The section also preserves the integrity of the Board's administrative functions by shielding those who furnish information concerning unlawful employer activity. Those interests were not,

---

148. *Id.* at 941.

149. *Id.* at 941-42.

150. *Id.* at 942. The Board relied, in part, on *Modern Linen & Laundry Serv.*, 110 N.L.R.B. 1305 (1954), *supplemented*, 114 N.L.R.B. 166 (1955), *enforcement denied sub nom.*, *Pederson v. N.L.R.B.*, 234 F.2d 417 (2d Cir. 1956), *supplemented*, 116 N.L.R.B. 1974 (1956), where the employer violated section 8(a)(1) when it discharged a supervisor in retaliation for his adverse testimony. The Second Circuit chastized the Board for originally refusing to assert jurisdiction over the case: "Unless there is a clear Congressional mandate to the contrary the Board should be required to utilize every resource at its command to protect witnesses . . . who have been placed in jeopardy because the Board has required them to appear and give testimony." 234 F.2d at 420.

On remand the Board apparently utilized the threat test when it concluded that the discharge violated the Act because of its effect on employees. 116 N.L.R.B. at 1975. The trial examiner had concluded that employees "would have every good reason to fear the same treatment." 116 N.L.R.B. at 1987 (Intermediate Report).

151. 229 N.L.R.B. at 943.

however, imperiled in either *Hi-Craft* or *General Services* because supervisor resort to the Board was not intended to preserve rights protected by the Act. In *Better Monkey Grip*, and even in *General Nutrition*, the supervisors disclosed information in an attempt to protect the statutory rights of employees. Supervisors have no such rights. Yet in both *Hi-Craft* and *General Services* the original charges did not allege any violation of employee rights — they complained solely of action taken against supervisors. The only effect of the decisions is to protect supervisors who file invalid charges, and to safeguard a “channel” of information irrelevant to normal Board processes.<sup>152</sup>

Nonetheless, the Board claimed its decision was necessary because a supervisor could be confused about his status under the Act and because a different result would allow the employer, not the Board, to make that determination. In response to the former premise, Member Truesdale’s dissent in *Hi-Craft* correctly asserts that the Board has spurned any such subjective test in other areas by requiring parties to “proceed at their peril.”<sup>153</sup> As to the latter premise, Truesdale said:

In addition to being somewhat disingenuous, this portion of the majority opinion has a “Catch-22” aspect to it. Thus, the Board cannot make the determination it claims it has the sole power to make unless a [section 8(a)(4)] charge is filed — an eventuality which will not be forthcoming unless the employer acts first by effectuating the discharge.<sup>154</sup>

Although Truesdale embraced the policy of free access to the Board, he concluded that it was “not an incantation that can somehow transform a supervisor into an employee . . . ,”<sup>155</sup> which is exactly what the Board did in order to bootstrap itself into jurisdiction over the cases.

152. As the Third Circuit said in its opinion denying enforcement to the Board’s order in *Hi-Craft*, “No rank and file employees’ interests were even tangentially at stake . . . .” 660 F.2d at 918.

153. For example, Member Truesdale asserted that an employer proceeds at his peril when it discharges an employee with a good faith belief that he has engaged in strike misconduct, *NLRB v. Burnup & Simms, Inc.*, 379 U.S. 21 (1964), when it erroneously concludes in good faith that a salesman is not an employee, *NLRB v. Bardahl Oil Co.*, 399 F.2d 365 (8th Cir. 1968), or when it determines that a refusal to cross a picket line is unprotected, *Capital Times*, 234 N.L.R.B. 309 (1978). 251 N.L.R.B. at 1312 (Truesdale, Member, dissenting). John Truesdale resigned from the Board on January 26, 1981.

154. 251 N.L.R.B. at 1313 (Truesdale, Member, dissenting).

155. *Id.*

Despite the Board's assertion to the contrary, it is difficult to reconcile its traditional threat test with *Hi-Craft* or *General Services*. The theory of *Better Monkey Grip* admittedly protects supervisors who file charges protesting interference with employee rights, but no such rights were at stake in these cases. Instead, each supervisor complained of action taken against him alone. In neither case did the employer directly threaten employee rights or interfere with Board processes calculated to protect those rights. The most one can say is that employees, simply by virtue of their knowledge of the discharge, would feel threatened. The possibility of such a reaction, however, cannot support an unfair labor practice for the discharge of a superior as the courts, and on occasion even the Board, have recognized.<sup>156</sup>

In *Parker-Robb*, the Board provided little guidance as to the future of the testimony cases. It did cite with approval *Better Monkey Grip*, *Oil City Brass Works*, *Ebasco*, and several other cases, all of which were based, at least in part, on the threat test.<sup>157</sup> The Board simply ignored *General Nutrition*, *General Services* and *Hi-Craft*. While the holding of *Hi-Craft* was not directly at issue in *Parker-Robb*, the Board's failure even to mention *General Nutrition* and *General Services* points out one of the failings of its decision. In both cases the Board found the supervisor's discharge unlawful in order to safeguard the rights of employees. The same reasoning led the Board to approve *Better Monkey Grip* and similar cases in *Parker-Robb*. In both *General Services* and *General Nutrition*, however, the supervisors had engaged in concerted activity and filed unfair labor practice charges against their employers. It is unclear whether *Parker-Robb's* per se test would sustain the discharge or whether reinstatement would still be essential to the vindication of employee rights. Though not alluded to in *Parker-Robb*, in *Better Monkey Grip* and *Oil City Brass Works*, both expressly approved by the Board, the discharged supervisors had been active participants in employee unionization efforts.<sup>158</sup> In light of *Parker-Robb's* pronouncement that any supervisor can be fired with impunity as a result of concerted activities, it is questionable whether either case can stand.

---

156. See, e.g., *Oil City Brass Works v. NLRB*, 357 F.2d 466, 470 (5th Cir. 1966); *Stop and Go Foods*, 246 N.L.R.B. 1076, 1078 (1979). There is also some question concerning the Board's ability to predict what kind of employer conduct will threaten employees. See Getman Study, *supra* note 84, at 111-30.

157. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,097, at 30,962, 30,968 nn.5-6.

158. See *infra* discussion in Section III B.

A case decided since *Parker-Robb* raises some further questions. In *Boro Management Corp.*,<sup>159</sup> the supervisor was part of the bargaining unit and subject to the same collective bargaining agreement that covered employees. When a dispute about retroactive pay developed, the supervisor filed a grievance under the contract.<sup>160</sup> The Board agreed with the Administrative Law Judge's determination that the supervisor was discharged for attempting to enforce the contract. Nonetheless, the Board, citing *Parker-Robb*, found no violation. It held that the supervisor's activity was taken in his own behalf and that although his discharge was insufficient to overcome the statutory exclusion it could have some effect on the employees.<sup>161</sup>

The facts in *Boro* are, perhaps, closer to *Hi-Craft* than to those cases in which the supervisor testified adversely to employer interests. It is true that, just as in *Hi-Craft*, the supervisor acted in his own interest and not necessarily to safeguard employee rights. One might assume, then, that *Hi-Craft* would be decided differently were it to arise today, even though the Board simply ignored the issue in *Boro*. The case also demonstrates another problem with the Board's new approach. Granted that the supervisor in *Hi-Craft* acted solely for himself, the supervisor in *Boro* was attempting to enforce employer compliance with a contract that also covered employees. The Board's application of *Parker-Robb*, however, foreclosed any consideration of the importance of that fact. Once supervisor concerted activity is found, all other questions appear unimportant.

### C. Concerted Activity Cases

The most controversial cases, and those most directly affected by *Parker-Robb*, are those in which the employer's motivation for the supervisor's discharge was the supervisor's involvement in concerted activity with employees. The cases provoked controversy for at least two reasons. First, they often resulted in the reinstatement of a supervisor who was deeply involved in an employee unionization effort, despite the fact that supervisors have no organizational rights. Second, the Board's opinions were hopelessly inconsistent. Although the Board became sensitive to this situation prior to *Parker-Robb* and took some steps to explain its actions,<sup>162</sup> it did little more than

---

159. 263 N.L.R.B. No. 56, [5 Labor Relations] LAB. L. REP. (CCH) (1982-83 NLRB Dec.) ¶ 15,116, at 25,405 (Aug. 16, 1982).

160. *Id.* at 25,406.

161. *Id.*

162. See, e.g., *DRW Corp.*, 248 N.L.R.B. at 829; *Nevis Indus.*, 246 N.L.R.B. 1053, 1054-55 (1979), *enforced in pertinent part*, 647 F.2d 905 (9th Cir. 1981).

generate additional confusion. A review of the development of the Board's theory, and analysis of several cases applying it, will demonstrate the point.

The starting point in any examination of cases dealing with supervisors and concerted activity is usually conceded to be *Pioneer Drilling Co.*,<sup>163</sup> where the employer violated section 8(a)(1) when it discharged two supervisors. Although both supervisors had signed union authorization cards, the trial examiner (whose opinion the Board adopted with only minor modification)<sup>164</sup> determined that this fact had played no part in the employer's decision. Instead, he ruled that the employer discharged its supervisors in order to take advantage of an industry custom whereby the supervisor (called a driller) selected his own crew whose continued employment depended upon the tenure of the driller.<sup>165</sup> During the organizational effort the employer searched the employees' lockers and found blank authorization cards at the site where the two drillers were employed. The trial examiner concluded that the employer wanted to rid itself of the "center of union activity" by discharging all of the employees at that site and effected that decision by discharging the supervisors.<sup>166</sup>

The discharge of the employees was a clear violation of section 8(a)(3). In addition, the trial examiner, with Board concurrence, found the supervisors' discharge to violate section 8(a)(1).<sup>167</sup> Since the supervisors had been discharged *in order to* interfere with the organizational rights of employees, the employer action did seem to contravene the statute. Ordinarily, motive is not a necessary element in a section 8(a)(1) case. The discharge of the supervisors for a valid business reason, however, probably would not have violated the Act, even though the discharges would have also terminated the organizing employees and affected their rights. The vice of *Pioneer Drilling* was not only the supervisors' discharges, but the employer's intention to use those discharges to rid itself of the union organizers. The supervisors were conduits for the employer's unlawful design to interfere with employee section 7 rights.

The trial examiner, however, did not engage in this analysis. He

---

163. 162 N.L.R.B. 918 (1967), *enforced in pertinent part*, 391 F.2d 961 (10th Cir. 1968).

164. The modification was not relevant to the supervisor discharge issue. 162 N.L.R.B. at 919.

165. "[W]hen the driller is terminated or terminates employment the crew is likewise terminated." *Id.* at 921.

166. *Id.* at 923-24.

167. *Id.* at 923.

acknowledged that the supervisors were fired in order to discharge the employees and, without any explanation, concluded that the discharge of the supervisors "was an integral part of a pattern of conduct aimed at penalizing employees for their union activity."<sup>168</sup> Because of that phrase, *Pioneer Drilling* is often credited as the case which initiated the so-called "pattern of conduct" or "integral part" analysis frequently used in supervisor discharge cases<sup>169</sup> and expressly overruled in *Parker-Robb*. The opinion itself rebuts that contention, however, since the trial examiner quoted the language<sup>170</sup> from *Miami Coca Cola Bottling*<sup>171</sup> which concerned the discharge of a supervisor who had refused his employer's instructions to "clean house" of union adherents. Even in *Miami Coca Cola Bottling* it is not entirely clear what importance the "pattern of conduct" analysis had. The Board merely observed that the employer "had embarked upon a campaign to rid the plant of unionism,"<sup>172</sup> and the discharge of union adherents by supervisors apparently was an integral part of the design. Thus, the discharge of a recalcitrant supervisor furthered the overall plan since it coerced other supervisors into violating employee rights.<sup>173</sup> The supervisor's discharge was intended to insure the success of a larger unlawful plan directed against employee rights.

It does not appear that the trial examiner in *Pioneer Drilling* saw himself as creating a new category of supervisor discharge cases. Instead, he apparently saw a parallel between *Miami Coca Cola Bottling*, in which the Board referred to the supervisor as "an obstacle" whose removal would facilitate the discharge of union adherents, and *Pioneer Drilling*, in which the discharge of the supervisor also resulted in the discharge of the organizing employees. Even though the cases are not factually identical, there was enough simi-

---

168. *Id.*

169. See, e.g., *DRW Corp.*, 248 N.L.R.B. at 831 (Truesdale, Member, concurring and dissenting); Note, *Discharge of Supervisors for Union-Related Activity: An Examination of "Pattern of Conduct" Analysis*, 34 VAND. L. REV. 361, 382 (1981) [hereinafter cited as Vanderbilt Note].

170. 162 N.L.R.B. at 923.

171. 140 N.L.R.B. at 1361. See *supra* text accompanying notes 85-92.

The integral part language had surfaced in at least one other context even before *Miami Coca Cola Bottling*. In *Texas Co.*, 93 N.L.R.B. 1358 (1951), *rev'd*, 198 F.2d 540 (9th Cir. 1952), the Board, in discussing solicitation of striking employees, noted that in each case where such solicitation had been unlawful, it was "an integral part of a pattern of illegal opposition" to unionization. 93 N.L.R.B. at 1361.

172. 140 N.L.R.B. at 1360.

173. *Id.* at 1361.

larity between them for the *Pioneer Drilling* trial examiner to be guided by *Miami Coca Cola Bottling*.<sup>174</sup> The Board's treatment of the case does nothing to relieve the confusion since it avoided the difficult analytical problem by adopting the hazy conclusion of the trial examiner.

Regardless of the intention of the trial examiner in *Pioneer Drilling*, the decision was not regarded by the Board as a mere application of *Miami Coca Cola Bottling*. Indeed, the case was credited with creating an entirely new category of supervisor discharges that violated section 8(a)(1). *Krebs and King Toyota, Inc.*<sup>175</sup> furnishes an appropriate example. In *Krebs*, the employer maintained two locations, a sales and service operation and a body shop. When the employer suspended an employee during the course of an organizational campaign, the employees, including those in the body shop, went on strike.<sup>176</sup> During the course of the strike, the employer asked the body shop supervisor, who was on the picket line with the employees, if he and the two body shop employees would return to work. The supervisor initially refused to return without union representation, but later offered to return to work along with the two employees if the employer would "let the [National Labor Relations Board] settle it."<sup>177</sup> The employer thereupon announced that he was closing the body shop. The closing resulted in the discharge of both the supervisor and the two employees.<sup>178</sup>

Disagreeing with its trial examiner, the Board found that the body shop closing was discriminatorily motivated. It held that the termination of the employees violated section 8(a)(3) and that the

---

174. The trial examiner might also have looked for guidance to *Golub, Golub & Golub*, 140 N.L.R.B. 120 (1962), where a supervisor was discharged because her husband was a union activist. The trial examiner's opinion concluded that the discharge violated section 8(a)(1) because it would cause employees to "fear that the employer would take similar action against them if they continued to support the union." *Id.* at 127 (quoting *Talladega Cotton Factory*, 106 N.L.R.B. at 297).

The Board might have viewed the case, however, as one in which the wife was discharged in order to retaliate against her husband for his union activity, thus making her a conduit for the employer's unlawful design. The theory would be even more appropriate here since the supervisor's husband worked on her crew and she had previously been ordered not to employ him. *Id.* at 125-26. However, neither the trial examiner nor the Board cited the case in *Pioneer Drilling*. See also *Consolidated Foods Corp.*, 165 N.L.R.B. 953 (1967), *enforcement denied*, 403 F.2d 662 (6th Cir. 1968).

175. 197 N.L.R.B. 462 (1972).

176. The trial examiner found that the employee's suspension was not discriminatory. Thus, the work stoppage was an economic strike and not an unfair labor practice strike. *Id.* at 469 (Intermediate Report).

177. *Id.* at 462.

178. *Id.*



termination of the supervisor violated section 8(a)(1).<sup>179</sup> In a footnote, the Board said that since the employer realized the supervisor spoke for the body shop employees, it was able to effectuate its plan to close the shop by terminating the supervisor. The Board also noted that the supervisor's discharge was "an integral part of a pattern of conduct aimed at penalizing employees for their union activities."<sup>180</sup>

Although the precise meaning of the Board's integral part theory was never adequately explained, it is clear that the test devised in *Pioneer Drilling* had no application in *Krebs*. Unlike *Pioneer Drilling*, there was no suggestion that the continued employment of body shop employees was somehow dependent upon retention of their supervisor. Nor did the employer discharge the supervisor in order to effect the discharge of the employees. Instead, all three workers were terminated by the unlawful shutdown. Since the shutdown was motivated by union activity, the discharge of the employees was unlawful.<sup>181</sup> No such conclusion follows for the supervisor. He was acknowledged by the Board to have been the spokesman for the body shop employees in their organizational efforts. He picketed with the employees; he refused to return to work without union representation; and he made an offer to bring the employees back if the matter would be referred to the Board. Unlike the activity of the employees, the supervisor's activity was not shielded by section 7. If the employer's action was in retaliation for the concerted activities of those employed at the body shop, as the Board expressly found, it seems likely that the supervisor's plight was the result of his own union activity. As such, his discharge fell outside the protection of the Act. Moreover, even if the Board could determine that the supervisor's discharge was not prompted by his involvement in concerted activity, it does not follow that the employer violated section 8(a)(1) since the discharge itself was not shown to affect the rights of employees.<sup>182</sup>

The Board, however, did not consider this analysis. After conceding the supervisor's activity, it relegated treatment of his case to a brief footnote. Rather than analyze the facts or interpret the law, it merely recited from rote the "pattern of conduct" language it used

---

179. *Id.* at 462-63.

180. *Id.* at 463 n.4.

181. The Board found a section 8(a)(3) violation for the termination of the employees since their union activity had influenced the employer's decision to close the body shop. *Id.* at 462-63.

182. Unlike *Pioneer Drilling*, for example, it was not necessary to discharge the supervisor in order to reach the employees.

in *Miami Coca Cola Bottling* and *Pioneer Drilling*, both of which involved a different issue. In both of those cases, the employer had an illegal scheme aimed at ousting the union and its followers. In both cases, the discharge of a supervisor was an important element in the operation of the plan. In *Miami Coca Cola Bottling*, the supervisor interfered with implementation of the scheme and had to be removed. In *Pioneer Drilling*, the supervisors' discharges were a necessary act to ensure removal of the employees. One might legitimately characterize each discharge as an "integral part of a pattern of conduct aimed at penalizing the employees . . . ," at least if one concedes that "pattern of conduct" and "plan" are synonymous. In *Krebs*, however, the supervisor's discharge was not a necessary, or even important, part of the "plan" to oust the union. Even if the supervisor's discharge was not prompted by his involvement in concerted activity, the most one can say is that he lost his job when the employer closed the work place in order to penalize employees. The Board did not explain why such a discharge violated the Act. Since it ordinarily disclaims any intention to protect supervisors, presumably the Board perceived some threat to employees from the supervisor's discharge. No threat to employee rights was apparent from the facts or alluded to by the Board. It merely took sanctuary in its familiar, and apparently eclectic, "integral part" theory.

Despite its shallow reasoning, and vigorous dissents from several members,<sup>183</sup> the Board continued to apply the integral part theory to produce section 8(a)(1) violations for supervisor discharges.<sup>184</sup> In several cases, the Board attempted unsuccessfully to rationalize its

---

183. See, e.g., *DRW Corp.*, 248 N.L.R.B. at 830 (Truesdale, Member, concurring and dissenting); *Downslope Indus.*, 246 N.L.R.B. 948, 951 (1979) (Murphy, Member, concurring and dissenting); and *Krebs & King Toyota, Inc.*, 197 N.L.R.B. at 464 (Kennedy, Member, concurring and dissenting).

184. In addition to the cases cited in the text, see, e.g., *Beech Branch Coal Co.*, 260 N.L.R.B. No. 122, [5 Labor Relations] LAB. L. REP. (CCH) (1981-82 NLRB Dec.) ¶ 18,804, at 30,392 (Mar. 12, 1982); *Dairy Farm Flight Serv., Inc.*, 258 N.L.R.B. No. 31, [5 Labor Relations] LAB. L. REP. (CCH) (1981-82 NLRB Dec.) ¶ 18,483, at 29,946 (Sept. 21, 1981); *Empire Gas, Inc. of Denver*, 254 N.L.R.B. No. 76, 1980-81 NLRB Dec. ¶ 17,870, at 28,847 (1981); *G & M Lath and Plaster Co., Inc.*, 252 N.L.R.B. 969 (1980), *enforced*, 670 F.2d 550 (5th Cir. 1982); *Sheraton Puerto Rico Corp.*, 248 N.L.R.B. 867 (1980), *enforcement denied*, 651 F.2d 49 (1st Cir. 1981).

See also *Southern Plasma Corp.*, 242 N.L.R.B. 1223 (1979), *enforcement denied in pertinent part*, 626 F.2d 1287 (5th Cir. 1980) (Board ordered the reinstatement of three supervisors who had participated in the formation of a labor union and had presented a proposal to management on behalf of themselves and the employees); *Production Stamping, Inc.*, 239 N.L.R.B. 1183 (1979) (Board ordered the reinstatement of a supervisor who had participated in a union organizational drive).

theory. It seems clear that the threat test propounded in the refusal and testimony cases influenced the development of the theory. In *Fairview Nursing Home*<sup>185</sup> the Board adopted a trial examiner's opinion that the employer violated section 8(a)(1) when it discharged two pro-union supervisors contemporaneously with the discharge of all other employees. The trial examiner used the familiar "integral part of a pattern of conduct" language and said that the discharges "were in furtherance of . . . and a part of the Respondent's unlawful strategy to rid itself of the union."<sup>186</sup> He also concluded that the discharges violated section 8(a)(1) because they would have the effect of causing employees to "foresake or avoid membership in a union for fear that they would be subjected to the same reprisal."<sup>187</sup> Similarly, in *VADA of Oklahoma, Inc.*,<sup>188</sup> the Board adopted a trial examiner's conclusion that an employer violates section 8(a)(1):

when it discharges or otherwise discriminates against a supervisor for union-related considerations because such action has the necessary and intended effect of interfering, not with the rights of the supervisors, but with the rights of the nonsupervisory employees who become aware of the discrimination and are thereby coerced in the enjoyment of their own statutorily protected rights.<sup>189</sup>

---

185. 202 N.L.R.B. 318 (1973).

186. *Id.* at 324 n.34 (Intermediate Report).

187. *Id.*

188. 216 N.L.R.B. 750 (1975).

189. *Id.* at 759. Indeed, the Administrative Law Judge noted that the fate of the supervisor was "largely indistinguishable" from that of the discharged employees. *Id.*

The same Administrative Law Judge used identical language two months later in *Donelson Packing Co.*, 220 N.L.R.B. 1043, 1051 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978), when he concluded that a supervisor's discharge had been prompted by his union adherence. The Board agreed, noting the proximity of the discharge to the start of the employer's anti-union campaign and the supervisor's efforts to win the reinstatement of a discharged union activist. It upheld the Administrative Law Judge's order, finding the supervisor's discharge to be "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." 220 N.L.R.B. at 1043 (quoting *Pioneer Drilling*, 162 N.L.R.B. at 923).

In both *VADA* and *Donelson* the Administrative Law Judge merely quoted the pattern of conduct language from either *Miami Coca Cola Bottling* or *Pioneer Drilling*, without explaining its meaning or its applicability to the facts at issue. Moreover, in *VADA* the Administrative Law Judge supported his conclusion by borrowing analysis from factually disparate cases, thus indicating a failure to grasp the fundamental distinction between the cases at issue and the ones used to support the decision. Among others, the Administrative Law Judge cited *Miami Coca Cola Bottling Co.*, 140 N.L.R.B. 1359 (1963) (a refusal case); *Dal-Tex Optical Co.*, 137 N.L.R.B. 1782 (1962) (a testimony case); and *Oil City Brass Works, Inc.*, 147 N.L.R.B. 627 (1964) (a testimony case). 216 N.L.R.B. at 759 n.14.

The same threat test influenced some recent decisions under the integral part theory, albeit with a new twist. For example, in *DRW Corp.*<sup>190</sup> the employer discharged a supervisor for his active role in a union organization effort. The Board acknowledged that an employer could discharge a supervisor if it had a legitimate desire to insure supervisor loyalty,<sup>191</sup> but it ruled that this discharge was part of a pattern of conduct which was intended to coerce employee rights by creating such a coercive atmosphere that employees would be unable to distinguish "between the employer's right to prohibit union activity among supervisors and [the employees'] right to engage freely in such activity themselves."<sup>192</sup> In short, the presumed ignorance of employees and their assumed tendency to perceive threats from employer action would suffice to obliterate the statutory distinction between supervisor and employee.

In addition to the threat test, improper employer motive played a role in the integral part theory. In *DRW Corp.*, for example, the supervisor's discharge violated section 8(a)(1) because it was not "reasonably adapted" to a legitimate employer desire to insure supervisor loyalty.<sup>193</sup> Indeed, the very formulation of the test implies the importance of motive. A supervisor's discharge ordinarily violated the Act because it was an integral part of a *plan* which was calculated to discourage the free exercise of employee rights. The existence of any such plan indicates a deliberate design by the employer and, by definition, the supervisor's discharge was a necessary, or at least important, part of that plan.

The importance of motive and the necessity of the supervisor's discharge have been demonstrated for *Pioneer Drilling*, the first of the integral part cases. Less obvious is how the Board determined the employer's unlawful motive in cases like *Krebs*, assuming its relevance at all. Several recent cases provide a key to the Board's reasoning. In *Downslope Industries, Inc.*<sup>194</sup> the Board found a section 8(a)(1) violation for the discharge of a supervisor who had acted as

---

Also, in *Donelson* the Administrative Law Judge cited testimony cases, refusal cases, and concerted activity cases without any apparent recognition of the differing fact patterns. 220 N.L.R.B. at 1051 & n.11.

190. 248 N.L.R.B. 828 (1980).

191. *Id.*

192. *Id.* at 829. For a similar test see *Nevis Indus.*, 246 N.L.R.B. at 1056 (Penello, Member, concurring).

193. 248 N.L.R.B. at 828.

194. 246 N.L.R.B. 948 (1979), *enforced in pertinent part*, 676 F.2d 1114 (6th Cir. 1982).

spokesperson for an employee protest and participated in a brief work-stoppage.<sup>195</sup> Most important to the Board's conclusion was the fact that all employee participants in the protest and the supervisor were discharged at the same time: "Since [the supervisor's] discharge was contemporaneous with those discharges, and was in reprisal for her participation and support of the employees' protest, we find that her discharge was an integral part of Respondent's overall plan to discourage employees from engaging in such protected activity and, therefore, was also unlawful."<sup>196</sup> Similarly, in *DRW Corp.*, where a supervisor was also discharged contemporaneously with employees the Board said that "the fact that supervisors and employees alike have been discharged and otherwise coerced for engaging in union activity is evidence which, under proper circumstances, warrants the inference that the action taken against the supervisor, like that taken against the employees, was unlawfully motivated."<sup>197</sup>

If the Board's attempts at definition did little to clarify its integral part theory, the matter was further complicated by the Board's inconsistency. For example, in *Kristofferson and Kristofferson (United Painting Contractors)*,<sup>198</sup> the employer discharged a supervisor and two employees for complaining publicly about unsafe working conditions. Since the two employees were involved in concerted activity, the employees' discharges violated section 8(a)(1).<sup>199</sup> The supervisor's discharge did not, however, even though, as in *Krebs* and other cases, he had acted as spokesman for the group and was discharged at the same time as the employees.<sup>200</sup> The trial examiner rejected the often repeated argument that the supervisor's discharge

---

195. 246 N.L.R.B. at 948.

196. *Id.* at 949.

197. 248 N.L.R.B. at 830. In addition, there are some cases that cannot be explained under either a threat or motive analysis. For example, in *Fort Vancouver Plywood Co.*, 235 N.L.R.B. 635 (1978), the employer violated section 8(a)(1) when it discharged three supervisors contemporaneously with all other employees in order to defeat a union organizational effort. The supervisors' discharge would appear not to have threatened the employees, since none of the supervisors were involved in any union or concerted activity. For the same reason, any analysis centering on the employer's motive to secure loyalty would be irrelevant. Similarly, in *East Belden Corp.*, 239 N.L.R.B. 776 (1978), the employer simultaneously discharged employees as well as non-union supervisors. Although the Administrative Law Judge concluded that the employer's action was "an important element in Respondent's total strategy to rid itself of the union," *id.* at 797, the supervisors were, in fact, little more than innocent bystanders who suffered as a result of the employer's unlawful discrimination against employees.

198. 184 N.L.R.B. 159 (1970), *enforced sub nom.*, *Johnson v. NLRB*, 441 F.2d 266 (4th Cir. 1971).

199. 184 N.L.R.B. at 162.

200. *Id.* at 160-62.

would put employees in fear of exercising their own rights. He said it did not follow that employees would fear similar action or that, if they did, there would be a violation, "[f]or if that were true every discharge of a supervisor for engaging in union activity would be a violation of section 8(a)(1), a result plainly at variance with the intent of Congress in creating a dichotomy between 'employees' and 'supervisors.'"<sup>201</sup>

The Board's inconsistency was also evident in *Sibilio's Golden Grill*,<sup>202</sup> in which a supervisor led a work-stoppage involving several employees, made contact with the union, and signed an authorization card. The Board found that the discharge of employees who had joined the union violated section 8(a)(3), but rejected the trial examiner's recommendation that the supervisor's simultaneous discharge violated section 8(a)(1).<sup>203</sup> The Board said that at the time of, and just prior to, the discharge, the supervisor had been acting as spokesperson for employees in what amounted to an economic dispute. Moreover, she was the one who had initiated contact with the union:

[She] was not acting to protect or vindicate employees' statutory rights; nor was she refusing to infringe on those rights; rather she was concerned only with advancing her own and the employees' job interests. Further, her discharge was not an integral part of a scheme resorted to by Respondent by which it sought to strike through her at its employees for their turning to protected concerted activities or by which it sought through her otherwise to discourage their engaging in such activities.<sup>204</sup>

---

201. *Id.* at 163. The trial examiner also noted that the supervisor had not been discharged for refusing to commit an unfair labor practice or testifying in a Board proceeding. He observed, in dicta, that an employer would not violate the Act if he discharged a supervisor for participating in an organizational campaign "[e]ven though some employees might regard such a discharge as an indication that . . . employees could expect a similar fate." *Id.*

202. 227 N.L.R.B. 1688 (1977), *enforced mem.*, 99 L.R.R.M. (BNA) 2633 (3d Cir. 1978).

203. The trial examiner confronted the issue only in a brief footnote. Though his theory is unclear, he cited *VADA* and observed that the dischargee's supervisory status had not "entered the picture at all." 227 N.L.R.B. at 1692 n.6.

204. 227 N.L.R.B. at 1688. *See also* Long Beach Youth Center, Inc., 230 N.L.R.B. 648 (1977), *enforced*, 591 F.2d 1276 (9th Cir. 1979), in which the supervisor was discharged after participating in a work stoppage to protest working conditions, attending a press conference, and making a televised statement critical of the employer. The Board concluded that the supervisor's discharge was prompted by his support of the employees, and was not part of any employer plan to interfere with employee rights. "In short, [the supervisor] was discharged solely for siding with the employees in their economic dispute with the Respondent, but as he was a supervisor his engaging in, or sympathizing with, such concerted activities was not pro-

These two cases, which were issued at about the same time as cases applying the integral part theory,<sup>206</sup> demonstrate the futility of efforts to reconcile Board decisions prior to *Parker-Robb*. In neither *Kristofferson* nor *Sibilio's* did the Board explain why the employees would not perceive the same threat to section 7 rights that it had discerned in *Fairview Nursing Home*. Nor did it indicate why the contemporaneous discharges which were crucial in *Downslope* and *DRW Corp.* failed to exhibit the employer's unlawful intention to interfere with employee rights. All the Board really did in both cases was conclude that the integral part theory did not apply, which is at least consistent with its analytical effort in *Krebs* and similar cases in which it merely concluded that the same theory *did* apply.<sup>206</sup>

### III. *Parker-Robb* AND ITS PROBLEMS

A review of the development and application of the "integral part of a pattern of conduct" analysis demonstrates that some re-

ected by the Act." 230 N.L.R.B. at 650. See also *Royal Fork of Washington, Inc.*, 179 N.L.R.B. 185 (1969).

205. For example, on the same day that it decided *Nevis* and *Downslope*, the Board also decided *Stop and Go Foods, Inc.*, 246 N.L.R.B. 1076 (1979). In *Stop and Go*, the supervisor was discharged after participating in a work stoppage with employees. The Board upheld the discharge, concluding that the supervisor was discharged "for siding with the employees in their dispute" with the employer. *Id.* at 1079. Although the Board made no attempt to distinguish either *Nevis* or *Downslope*, it did conclude that there was "no evidence that Respondent was engaged in a pattern of conduct aimed at penalizing the employees . . ." *Id.* The Board failed to mention *Stop and Go* in either the *Nevis* or *Downslope* opinions.

See also *L & S Enter.*, 245 N.L.R.B. 1123 (1979), where the Board upheld the discharge of a supervisor who had served as the spokesperson for a group of employees protesting certain working conditions. The Board concluded that:

the General Counsel has not met his burden of proving that [the supervisor's] termination was an integral part of a pattern of conduct aimed at penalizing employees for their concerted activities, an important element in Respondent's total strategy to rid itself of a union, or motivated by a desire to discourage employees' concerted activities in general rather than a concern about [the supervisor's] participation in these activities."

*Id.* The Board did not indicate how the General Counsel could have met that burden. Nor did it adequately distinguish the case from *Krebs* which seems factually indistinguishable. Subsequently, however, in its opinion in *Downslope* the Board sought to explain the disparate results by saying: "While Board members may differ on legal significance of the facts of a particular case, neither the Board as an entity nor any of its members has ignored the explicit exclusion of supervisors from the definition of 'employee' under the Act." 246 N.L.R.B. at 950 n.10. See also *Daniel Constr. Co.*, 244 N.L.R.B. 704 (1979); *Woodline, Inc.*, 231 N.L.R.B. 863 (1977), enforced, 577 F.2d 463 (8th Cir. 1978); cf. *Twin County Grocers, Inc.*, 244 N.L.R.B. 1028 (1979).

206. In *Sibilio's*, the Board merely concluded that the discharge "was not a ploy to facilitate or cover up the contemporaneous and subsequent unlawful discharges of employees," citing *Krebs* and *Pioneer Drilling* and concluding that they "are not applicable to the present case." 227 N.L.R.B. at 1688 & n.3.

form was needed. The Board's application of the theory had virtually obliterated the statutory exclusion of supervisors from section 7 protection, and the Board's analytical efforts fell far short of explaining its actions. The response was *Parker-Robb*, in which one long-time Board member<sup>207</sup> reversed course and joined with three new members<sup>208</sup> to abandon the test for nearly all purposes. Although the rule established in *Parker-Robb* is facially more attractive than the indefinable integral part theory, the Board's attempt to solve all of its prior confusion with the adoption of what amounts to a per se rule will pose significant problems in application. Analytically, the Board's new rule is only marginally better than its old one.

#### A. The Board's Opinion

The facts of *Parker-Robb* demonstrate the Board's eagerness to abandon the integral part theory since they bear little relationship to prior cases applying the theory. Two of the employer's supervisors attended a union organizational meeting where one of them, Doss, observed that it would be difficult for the union to represent the employees. Previously Doss had declined an invitation to sign a union authorization card. During the meeting, the supervisors were informed that they were ineligible for inclusion in the bargaining unit.<sup>209</sup> None of the three opinions issued in the case mentioned any further involvement in union activity by Doss.<sup>210</sup> Shortly after being presented with a demand for recognition, the employer discharged three employees. Doss vigorously protested the discharges to the used car manager, commenting with respect to one of them that "He's one of the best men we've got . . ." <sup>211</sup> Doss later carried his protest to the new car sales manager and, in the course of their conversation, "lost his temper and used obscenities."<sup>212</sup> The manager then fired him.

The Administrative Law Judge did not refer to Doss's protest

---

207. Member John Fanning, first appointed to the Board by President Eisenhower on December 20, 1957, had been in the majority in both *Downslope* and *Nevis*.

208. Chairman John R. Van de Water is currently serving in his second recess appointment. Member Robert P. Hunter was appointed by President Reagan on August 14, 1981. Member Don A. Zimmerman was appointed by President Carter on September 17, 1980.

209. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,961-62.

210. The three opinions are the majority opinion, Member Jenkins's concurring opinion, *id.* at 30,965, and the Intermediate Report of the Administrative Law Judge, JD-(SF)-144-81 (May 20, 1981).

211. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,962.

212. *Id.* at 30,966 (Jenkins, Member, concurring).



on behalf of the discharged employees.<sup>213</sup> He merely recounted Doss's attendance at the organizational meeting, observed that his discharge occurred at about the same time as the unlawful discharge of the employees, and, in the best tradition of the integral part theory, concluded that the discharge was "part of [the employer's] overall plan to discourage its employees' support of the union and avoid recognizing the bargaining and the union."<sup>214</sup>

In a concurring opinion, Member Jenkins asserted that there was nothing in the record to indicate that the employer knew about Doss's attendance at the organizational meeting, and no evidence that the employer intended to discharge Doss prior to his confrontation with the new car manager.<sup>215</sup> Thus, while Jenkins concurred with the result reached by the majority, he would not have characterized the discharge as an integral part of a pattern of unlawful conduct.<sup>216</sup> Jenkins considered the discharge a response to Doss's conduct with a superior and therefore unrelated to his participation in concerted activity. The only indicia of unlawful conduct on the part of the employer was the closeness in time of Doss's and the employees' discharges. Jenkins asserted that, in order to make out a violation, the General Counsel also had to establish that the supervisor's discharge was in reprisal for his participation in concerted activity.<sup>217</sup>

Conversely, the Board majority had no difficulty finding a reprisal for concerted activity. The Board said that Doss's protest of the employee's discharge to the used car manager constituted "Doss' sole involvement in organizational activity."<sup>218</sup> Apparently, then, the Board concluded that Doss's complaint was in furtherance of the union's organizational effort, rather than a protest of the loss of "one of the best men we've got . . .," and that his discharge resulted from that activity.

The Board reviewed the history of the supervisor exclusion and noted that it had consistently held that supervisors "may be discharged for union activity."<sup>219</sup> Despite the exclusion, the Board rec-

---

213. *Id.* at 30,962.

214. Decision JD-(SF)-144-81 (May 20, 1981), slip op. at 8.

215. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,966 (Jenkins, Member, concurring).

216. *Id.* at 30,967.

217. *Id.* at 30,966.

218. *Id.* at 30,967 n.2.

219. *Id.* at 30,962. The Board's action, however, was not entirely consistent. For example, in *David-Anna Corp.*, 208 N.L.R.B. 628 (1974), Member Fanning acknowledged that the

ognized that in some cases a supervisor's discharge would violate section 8(a)(1) and cited several refusal and testimony cases.<sup>220</sup> Those cases, it said, did not depend on statutory protection furnished supervisors "but rather [on] the need to vindicate employees' exercise of their Section 7 rights."<sup>221</sup> A discharge in reprisal for testifying or a refusal to abridge employee rights, the Board said, interferes with employee rights.<sup>222</sup> The Board acknowledged that the discharge of a supervisor for engaging in union or concerted activity "almost invariably has a secondary or incidental effect on employees,"<sup>223</sup> but it noted that this incidental effect was "insufficient to warrant an exception to the general statutory provision excluding supervisors . . . ."<sup>224</sup>

The Board concluded that the integral part cases had unduly extended the circumstances in which a supervisor's discharge could violate the Act because "[s]upervisors in the 'integral part' or 'pattern of conduct' cases were, themselves, active for the union or participated in the concerted activity."<sup>225</sup> Indeed, participation by supervisors in concerted activity has become the key to the Board's new approach:

In the final analysis, the instant case, and indeed all supervisor discharge cases, may be resolved by this analysis: The discharge of supervisors is unlawful when it interferes with the right of employees to exercise their rights under Section 7 of the Act, as when they give testimony adverse to their employers' interest or when they refuse to commit unfair labor practices. The discharge of supervisors as a result of their participation in union or concerted activity — either by

---

supervisor's discharge was motivated by his union activity. *Id.* at 629. Nonetheless, he would have reinstated the supervisor because of the "impact . . . on the employees." *Id.* at 631. He concluded that the supervisor's discharge was "an integral part of [activity] discouraging . . . the exercise of . . . section 7 rights . . ." *Id.*

*See also* Donelson Packing Co., 220 N.L.R.B. 1043 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978), where the Administrative Law Judge found that the supervisor was discharged "because of his adherence to and support of the union," 220 N.L.R.B. at 1052, but nonetheless recommended his reinstatement. The Board agreed, finding that the supervisor's discharge was "an integral part of a pattern of conduct aimed at penalizing employees for their union activities"; *Id.* at 1043 (quoting Pioneer Drilling Co., 162 N.L.R.B. at 923).

220. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,962, 30,968 nn.5-8.

221. *Id.* at 30,962.

222. *Id.*

223. *Id.* at 30,963.

224. *Id.*

225. *Id.* at 30,962.

themselves or when allied with rank-and-file employees — is *not* unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act.<sup>226</sup>

Unlike its stance in previous rulings, the Board will no longer be concerned with employer motivation or with contemporaneous discharges. Whether the employer's motive is merely to preserve supervisor loyalty or to threaten employees in the exercise of their protected rights is irrelevant.<sup>227</sup> The sole inquiry is whether the supervisor participated in concerted or union activity.

### *B. An Analysis of Parker-Robb*

One must seriously question the Board's assertion that motive has no role to play in supervisor discharge cases and that all such cases can be solved by the "simple" reasoning that supervisors have no right to engage in concerted activity. Since the Board acknowledged in *Parker-Robb* that *some* supervisor discharges violate the Act, it is clear that the supervisor exclusion does not give the employer freedom to discharge supervisors at will. What the Board does in *Parker-Robb* is establish a *per se* rule that, whatever the effect on employees, an employer is free to discharge a supervisor who has engaged in concerted activity. Since some supervisor discharges do violate the Act because of their impact on employee rights, one must ask why those prompted by concerted activity, which the Board acknowledged to have some impact on employee rights, do not. Any such analysis must return to Congress's prime motivation for excluding supervisors: the legitimate expectation of supervisor loyalty. Prior to *Parker-Robb* the Board often acknowledged this concern. More often, however, it determined that the supervisor's discharge was not "legitimately adapted" to that end but was a weapon to be used against employee organizational rights. In *Parker-Robb*, the Board abandoned any attempt to discover the subjective motivation of an employer, an effort that had produced some hopelessly inconsistent cases. Nonetheless, motive played a role in the development of the *Parker-Robb* test, which adopts a virtual irrebuttable presumption that an employer who discharges a supervisor involved in concerted activity has acted in retaliation for disloyalty. In effect, the General Counsel<sup>228</sup> is precluded from demonstrating that the employer acted

---

226. *Id.* at 30,963 (emphasis in the original).

227. *Id.*

228. The General Counsel of the Board prosecutes unfair labor practice cases. See section 6(d) of the Act, 29 U.S.C. § 156(d) (1976).

with any other purposes.

The presumption in *Parker-Robb* favoring the legitimacy of supervisor discharges is, however, questioned by the decision itself. In its opinion, for example, the Board approved the testimony and refusal cases, indicating that those discharges interfered with employee rights and that reinstatement was essential to vindicate those rights. The Board expressly approved *Better Monkey Grip*, *Oil City Brass Works*, and *Leas & McVitty, Inc.*<sup>229</sup> as instances in which the supervisor's discharge violated section 8(a)(1). Yet in *Better Monkey Grip*, the supervisor was a union member who had been active in the union's behalf;<sup>230</sup> in *Oil City Brass Works* the supervisor belonged to the union and had attended union meetings;<sup>231</sup> and in *Leas & McVitty* the supervisor was the "instigator and chief mover of the Union's organizing drive . . . [and] acted as . . . 'contact man' for employees who were engaged in solicitation, and was known throughout the plant as one of the leading exponents of union organization."<sup>232</sup> In each of these cases, as well as in others approved by the Board,<sup>233</sup> the supervisor had engaged in union activity. Indeed, each supervisor would appear to have been more active than the supervisor was in *Parker-Robb*. How is it that these cases withstand analysis under the per se rule developed by the Board in *Parker-Robb*?

In *Oil City Brass Works* the Board concluded that the supervisor's discharge was in retaliation for his adverse testimony, not his union membership.<sup>234</sup> Even so, if this case survives *Parker-Robb*, and the Board has so indicated, then clearly motive is important. The Board would have to determine whether it was union activity or some other factor (like adverse testimony) that influenced the employer. Any such formulation of employer motive, however, would appear to violate the guidelines staked out by the Board in *Parker-Robb*. It also raises a significant question. In *Oil City Brass Works* and similar cases, how is the Board able to tell that it was the super-

---

229. 155 N.L.R.B. 389 (1965).

230. The supervisor also told the president of the company that "he was in favor of the Union." See 115 N.L.R.B. at 1176 (Intermediate Report).

231. 147 N.L.R.B. at 629, 636 (Intermediate Report). The trial examiner discounted the employer's testimony that he was unaware of the supervisor's union activity prior to the hearing since an earlier card check revealed that the supervisor had signed an authorization card. 147 N.L.R.B. at 637.

232. 155 N.L.R.B. 389, 390 (1965).

233. See *Dal-Tex Optical Co.*, 131 N.L.R.B. 715 (1961), *enforced*, 310 F.2d 58 (5th Cir. 1962).

234. 147 N.L.R.B. at 629.

visor's testimony, rather than his concerted activity, that prompted the discharge? If the Board can determine that the threat to employee rights outweighed the fact of supervisor concerted activity, why shouldn't it make that same determination when the employer allegedly discharges an activist supervisor in order to interfere with employee rights? Since the Board has disclaimed its ability to make the latter distinction, it would also seem disabled from making the former.

A similar problem exists with some of the refusal cases, where supervisors were also involved in concerted activity. In *Inter-City*, for example, the employer violated section 8(a)(1) when it discharged a supervisor for failing to monitor the organizational activity of employees.<sup>235</sup> In *Downslope*, a supervisor's discharge violated the Act when she participated in an employee protest against sexual harassment.<sup>236</sup> Finally, in *Belcher* the employer violated section 8(a)(1) by discharging a supervisor for failing to spy on employees. The supervisor had been a union member for twenty-one years, had reaffirmed his support during the organizational campaign by signing an authorization card, and had allowed a union delegate on board his boat.<sup>237</sup>

Interestingly, *Parker-Robb* expressly overrules *Downslope*<sup>238</sup> and expressly approves *Belcher* and *Inter-City*,<sup>239</sup> even though all three cases involved supervisor concerted activity and were decided on the same theory. Presumably, the Board applied its per se concerted activity test to *Downslope* (even though management was unaware of the activity), but somehow determined that the supervisor's concerted activity did not influence the employer's action in either *Belcher* or *Inter-City*. *Parker-Robb* reveals no hint of how that determination was made.

*Parker-Robb* is obviously hobbled by some of the same inconsistencies and analytical difficulties present in the integral part theory. Despite the fact that the *Parker-Robb* rule appears to apply to supervisor discharges "as a result of" concerted activity, it seems clear

---

235. 89 N.L.R.B. at 1106.

236. Although the Board premised *Downslope* partly on the pattern-of-conduct theory, it also made the case fit within the framework of the refusal cases. Thus, it concluded that since the official responsible for the discharge was aware of the employees' concerted activity, but was unaware of the supervisor's involvement in it, she must have been discharged for failing to interfere with the protest. 246 N.L.R.B. at 950.

237. 238 N.L.R.B. at 466 (Intermediate Report).

238. *Parker-Robb*, [5 Labor Relations] LAB. L. REP. (CCH) ¶ 19,087, at 30,969 n.20.

239. *Id.* at 30,962, 30,968 n.7.

that the Board often will be satisfied by the mere existence of such activity. In *Parker-Robb* itself there is nothing to indicate that the employer knew that Doss had attended a union meeting or that his defense of discharged employees might be related to that activity (and even if it was, one might ask why a supervisor who can testify in favor of employees and otherwise refuse to violate their section 7 rights cannot protect their rights by questioning patently unlawful employer activity). Similarly, in *Downslope* the Board found that the employer was unaware of the supervisor's involvement in concerted activity at the time of her discharge. In both cases, then, it was the *fact* of involvement that influenced the Board to find a violation, not a finding that the employer had acted "as a result of" the activity.

### C. A Proposal

The vice of *Parker-Robb* is the Board's attempt to solve a difficult and complex problem through the adoption of a per se rule. In its zeal to fashion a rule that provides "clear guidelines as to when supervisors may be lawfully discharged,"<sup>240</sup> not an uncommon Board theme of late,<sup>241</sup> the Board has virtually abandoned its adjudicatory function by foreclosing consideration of the particular facts of each case. Indeed, the cases following *Parker-Robb* indicate that the Board has done little more than look for some evidence of concerted activity on the part of discharged supervisors.<sup>242</sup>

Prior to *Parker-Robb*, several Board members,<sup>243</sup> and at least

---

240. *Id.* at 30,963.

241. *See, e.g.*, *Bruckner Nursing Home*, 262 N.L.R.B. No. 115, [5 Labor Relations] LAB. L. REP. (CCH) (1981-82 NLRB Dec.) ¶ 19,102, at 31,005 (July 16, 1982), in which the Board modified its *Midwest Piping* doctrine (*Midwest Piping & Supply Co.*, 63 N.L.R.B. 1060 (1945)) because its previous decisions had not "provide[d] employers, unions, and employees alike with clear standards . . .," *id.* at 31,008, and adopted a new rule calculated to "establish a clearly defined rule of conduct . . ." *Id.* *See also* *Midland Nat'l Life Ins. Co.*, 263 N.L.R.B. No. 24, 110 L.R.R.M. (BNA) 1489 (1982) in which the Board decided that its on again, off again, on again regulation of campaign misrepresentation was off again. The majority concluded that it had adopted a "clear, realistic rule of easy application which lends itself to definite, predictable, and speedy results." 110 L.R.R.M. at 1493.

242. *See, e.g.*, *Rain-ware, Inc.*, 263 N.L.R.B. No. 8, [5 Labor Relations] LAB. L. REP. (CCH) (1982-83 NLRB Dec.) ¶ 15,073, at 25,294 (July 30, 1982); *Roma Baking Co.*, 263 N.L.R.B. No. 4, [5 Labor Relations] LAB. L. REP. (CCH) (1982-83 NLRB Dec.) ¶ 15,086, at 25,324 (July 30, 1982); *Sahara Reno Corp.*, 262 N.L.R.B. No. 95, [5 Labor Relations] LAB. L. REP. (CCH) (1982-83 NLRB Dec.) ¶ 15,011, at 25,143 (July 13, 1982). In each case the Board simply looked for supervisor involvement in concerted activity and upheld the discharges, citing its opinion in *Parker-Robb*.

243. *See, e.g.*, dissenting opinions of Member Truesdale in *DRW Corp.*, 248 N.L.R.B. at 830 and *Puerto Rico Sheraton Hotel*, 248 N.L.R.B. at 868. *See also* dissenting opinion of Member Murphy in *Nevis Indus.*, 246 N.L.R.B. at 1056.

two commentators,<sup>244</sup> had suggested reform of the Board's integral part theory. Most often, the suggestion was that the Board find a section 8(a)(1) violation for those discharges that directly interfere with employee rights, but ignore those that result in only indirect interferences.<sup>245</sup> The problem with that test is the lack of any standard for distinguishing between direct and indirect interference. Prior to *Parker-Robb*, for example, a majority of the Board obviously felt that the discharge of a union-activist supervisor during an organizational campaign would have a direct impact on employee rights.

Faced with the problem of weighing the facts and circumstances of each case to determine the severity of employer action, the Board responded to a difficult problem with what appeared to be an easily applied rule. The application of a litmus test of supervisor involvement in concerted activity, however, could seriously handicap the free exercise of employee rights. If facts similar to *Better Monkey Grip* or *Belcher* were to arise today, the Board would have to uphold the employer's action, despite its professed interest in the vindication of section 7 rights. The Board must adopt a rule that will allow it to sustain its prior rulings in the testimony and refusal cases, yet allow employers freedom to demand loyalty from their supervisory staffs.

At the outset, the Board should completely abandon its discredited threat test in supervisor discharge cases. As demonstrated previously, the threat test played a significant role in the development of the integral part test. Given the Board's single minded pursuit of threats to employees, the progression from *Talladega* to *DRW Corp.* was inevitable. If one starts with the assumption that a supervisor's discharge can threaten employees or otherwise interfere with their

---

244. See generally Vanderbilt Note, *supra* note 169; Brod, *The N.L.R.B. in Search of a Standard: When is the Discharge of a Supervisor in Connection With Employees' Union or Other Protected Activities an Unfair Labor Practice?*, 14 IND. L. REV. 727 (1981).

245. See, e.g., *DRW Corp.*, 248 N.L.R.B. at 831 (Truesdale, Member, dissenting) and Vanderbilt Note, *supra* note 169, at 382. In Brod, *supra* note 244, the author suggests that the Board should approach the concerted activity cases with a presumption that the supervisor's discharge was for a justifiable business reason and, therefore, lawful. *Id.* at 750. She would allow the presumption to be rebutted if "in fact" the discharge significantly interfered with, restrained, or coerced employee rights. *Id.* at 749. Apparently, such a significant effect would be demonstrated by reference to the traditional threat test. Thus, she cites with apparent approval the testimony and refusal cases which apply the threat test, *id.* at 729-30, and indicates that significant interference could be demonstrated by the timing of the discharge, the employer's communication to employees about the discharge, and the employees' perception of the reason for the discharge. *Id.* at 749-50 n.84. Though the language of Brod's test differs from that utilized by the Board, it is little more than a variant of the direct-indirect test and subject to the same criticisms.

rights, one can logically, though not necessarily rationally, conclude that the employer must reinstate a supervisor who was the leader of the employee organizational effort. Ironically, the Board has abandoned the threat test in those cases where a threat to employee rights seems most likely — the concerted activity cases — but retained it in the refusal and testimony cases where the facts seldom support its application.

The Board's general reliance on the threat test can only be considered a mistake. As the Fifth Circuit said in its review of *Oil City Brass Works*:

If the fear instilled in rank-and-file employees were used in order to erect a violation of the Act, then any time a supervisor was discharged for doing an act that a rank-and-file member may do with impunity the Board could require reinstatement. Carried to its ultimate conclusion, such a principle would result in supervisory employees being brought under the protective cover of the Act. Congress has declined to protect supervisors and the Court should not do by indirection what Congress has declined to do directly.<sup>246</sup>

Rather than premise its regulation of supervisor discharges on fear, the Board's analysis should assess the consequences of failing to intervene in the relationship between supervisor and employer. For example, the Board has said that the employer's action in refusal cases like *Talladega* violates the Act because discharging a supervisor for failing to commit an unfair labor practice threatens employees. This violation is questionable. More to the point, if fear generation were the only factor to be considered, the case could have been remedied by letting the discharge stand and requiring the employer to post a notice informing employees that their rights were secured by the Act. The consequences of nonintervention, however, mandate not only a violation, but also reinstatement. Otherwise, employers could demand loyalty even to the point of unlawful conduct, thus leaving employees at the hands of supervisors who had no choice but to violate the law or be fired. Moreover, insulating employers from legal sanction could effectively hinder the Board in its efforts to insure that self-organizational rights are pursued in an atmosphere free of restraint and coercion.

Much the same argument can be made in testimony cases like *Better Monkey Grip* where the Board again relied on the threat test

---

246. *Oil City Brass Works v. NLRB*, 357 F.2d 466, 470 (5th Cir. 1966).



but failed to explain why fear could not have been dissipated by a notice. Failure to intervene, however, would produce an impact not only on the employees, but also on the Board itself. As even the Board has recognized, discharging a supervisor for offering testimony in an National Labor Relations Board or arbitration hearing would deny employees the ability to secure full implementation of their rights through whatever relevant information the supervisor possesses.<sup>247</sup> Failing to intervene also would frustrate the administrative and adjudicative function of the Board itself, and hinder the Board's ability to effectuate section 7 rights. In short, Board orders in the testimony cases are "an inherent protection of [the Board's] source of information necessary to protect rank-and-file employees in the exercise of their statutory rights."<sup>248</sup>

In the concerted activity cases, the Board must be more aggressive in safeguarding the free exercise of employee rights. Even so, the Board should not outlaw employer action merely because of the possibility of a threat to employee rights. Even if one discounts the significant findings of Professors Getman and Goldberg<sup>249</sup> with respect to the potential impact of employer action on employees, the fact remains that the Act expressly excludes supervisors from the protection of section 7. Despite the exclusion, however, the Board's responsibility is to weigh the facts of each case carefully to determine if they warrant governmental intervention into the unregulated relationship between employer and supervisor. When the discharged supervisor has been involved in union or concerted activity, the Board is justifiably influenced by the strong congressional statement favoring the right of employers to demand loyalty. The inquiry, however, should not end there. Given our national policy of safeguarding the right of employees to engage in concerted activity free from employer coercion or interference, the Board must determine if employee rights are jeopardized by the employer's actions. In short, the Board must decide whether or not there are situations in which the section 7 rights of employees outweigh the managerial interests of employers, the same determination it often makes in other factual settings.<sup>250</sup>

---

247. See, e.g., *Better Monkey Grip Co.*, 115 N.L.R.B. 1170, 1171 (1956), *enforced*, 243 F.2d 836 (5th Cir. 1957).

248. *Oil City Brass Works v. NLRB*, 357 F.2d 466, 471 (5th Cir. 1966).

249. See Getman Study, *supra* note 84, at 111-30.

250. For example, the Board permits employees to solicit union members on company property, despite the managerial and property interests of the employer. See, e.g., *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945). In some instances the importance of employee

It is obvious that the discharge of a supervisor in retaliation for adverse testimony or for refusing otherwise to infringe on employee rights violates section 8(a)(1). The Board should reach the same decision, however, in some cases in which the discharged supervisor had also engaged in union or concerted activity. In those cases the Board must do what it disclaimed in *Parker-Robb* — it must determine the reason for the discharge. Even though motive is often not an element in section 8(a)(1) cases, the nature of the balancing test involved here demands its consideration. Since section 2(3) leaves supervisors wholly outside the protection of the Act, action taken against them should constitute a violation of the Act only in those instances in which the employer uses the supervisor's discharge to achieve some illegal purpose. Thus, if the Board finds that the concerted activity of the supervisor was tolerated by the employer prior to his adverse testimony, or prior to his refusal to spy on employee organizational meetings, or if it finds that the supervisor's discharge was intended to effect the employee's discharge, as in *Pioneer Drilling*, a violation should follow. If, however, the facts indicate nothing other than the potential of a threat to employee rights from the discharge of a fellow activist, no violation should issue. In that event, the employer's motive is not relevant since the mere possibility of a threat to employee rights will not outweigh either the statutory exclusion or the employer's managerial interest.

Obviously, problems of proof are inherent in any balancing test. Such problems no doubt prompted the Board to adopt the *per se* rule of *Parker-Robb*. The function of an adjudicative agency, however, is to *apply* the law to the particular facts of each case, not merely to promulgate rules that ignore competing interests of the litigants. The very nature of the adjudicative process demands that value judgments be made. While the balancing test proposed here may not provide the objective certainty desired by the Board, no *per se* rule can insure consideration of the disparate interests represented in supervisor discharge cases. The test proposed here will not only avoid the inconsistencies and unfairness of the integral part theory, but also will insure an effort to accommodate the interests of employees, employers, and the statutory language.

---

section 7 rights overcomes an employer's interests even to the extent of allowing non-employee union organizers on company property, *see* *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105 (1956); *NLRB v. S & H Grossinger's Inc.*, 372 F.2d 26 (2d Cir. 1967). Protection of section 7 rights can even outweigh an employer's interest in closing part of its business, *see, e.g.,* *Textile Worker's Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965).

## CONCLUSION

In a perceptive dissenting opinion in *Charles D. Bonanno Linen Service, Inc. v. NLRB*,<sup>251</sup> Justice O'Connor criticized the Board for reasoning by definition and applying "a general rule without analysis of the particular factual situation." She asserted that while "rule[s] may be efficient," per se application "does not contribute to principled decision making."<sup>252</sup> The same observations apply to the Board's decision in *Parker-Robb*. Once the Board identifies supervisor concerted activity, it loses all interest in gauging the effect of employer retaliatory action on employee rights. The Board, however, should not abdicate its adjudicative function merely in the interest of objective certainty. Rather, its obligation is to safeguard employee rights by establishing a balancing test that allows it to consider employee, as well as employer, interests.

---

251. 102 S. Ct. 720 (1982).

252. *Id.* at 733.