Vanderbilt Law Review

Volume 34
Issue 2 *Issue 2 - March 1981*

Article 4

3-1981

Discharge of Supervisors for Union-Related Activity: An Examination of "Pattern of Conduct" Analysis

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NOTES

Discharge of Supervisors for Union-Related Activity: An Examination of "Pattern of Conduct" Analysis

I. INTRODUCTION

The National Labor Relations Board has frequently confronted the issue of when, if ever, the discharge of a supervisor for union-related activity violates the National Labor Relations Act. Even though Congress specifically excluded supervisors from the protection of the Act in the Taft-Hartley Amendments of 1947,[1] the Board held recently in *Brothers Three Cabinets*[2] that the discharge of a supervisor who arranged a union meeting at his house and passed out union cards and literature violated the Act. The Board found that the discharge was an "integral part of a pattern of conduct" aimed at penalizing employees for their protected activities.[3]

Recent Board decisions such as *Brothers Three Cabinets* suggest that the Board has frequently contravened congressional intent by extending the protection of the Act to cover supervisors.[4] This Note begins with an examination of the legislative history of the Taft-Hartley Amendments, focusing upon the congressional intent behind the exclusion of supervisory personnel from the protection normally afforded employees under the Act. The Note then traces the historical development of supervisory discharge law and analyzes the development of the "pattern of conduct" standard. Finally, the Note investigates the inherent analytical problems with the "pattern of conduct" standard, examines the inconsistent application of the standard, and criticizes the theoretical underpinnings of the standard. The Note concludes that the Board should abandon the "pattern of conduct" paradigm and return to the

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1. *See* note 11 *infra* and accompanying text.
2. DRW Corp. (Brothers Three Cahinets), 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980).
3. *Id.*
4. *Id.* (Truesdale, M., dissenting).

traditional "directly affect" test to determine whether a supervisor should be reinstated after discharge for union-related activities.

II. Legislative History of the Supervisory Exclusion

A. *The Interpretation of "Supervisor" Prior to the Taft-Hartley Amendments*

Congress enacted the National Labor Relations Act[5] on July 5, 1935. The statute declared that "the policy of the United States" was to encourage the practice of collective bargaining and the full freedom of worker self-organization as a means of facilitating the free flow of interstate commerce.[6] Congress granted to employees covered by the Act the right to organize and bargain collectively, and it effectuated this right by characterizing certain types of employer conduct vis-à-vis unionism as unfair labor practices. The Act adopted the principle of majority rule among employees in selecting union representatives and vested in a three-member National Labor Relations Board [NLRB] the authority to settle representation questions and to prosecute violations of the Act's unfair labor practice provisions.[7]

Section 2(3) of the 1935 Act provided that "[t]he term 'employee' shall include any employee. . . ."[8] The NLRB, after much vacillation, interpreted this term to include supervisors.[9] The Supreme Court sustained the Board in *Packard Motor Car Co. v. NLRB*.[10] Congress, however, reacted by enacting the Taft-Hartley Amendments, amending sections 2(3) and 2(11) to exclude specifically supervisors from the protections of the Act.[11]

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5. National Labor Relations (Wagner) Act, ch. 372, §§ 1-16, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-169 (1976 & Supp. III 1979)).

6. *Id.* § 1 (current version at 29 U.S.C. § 151 (1976)).

7. *Id.* § 9. Section 7 of the Act provides in part that "[e]mployees 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 concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." *Id.* § 7 (current version at 29 U.S.C. § 157 (1976)). Section 8 of the Act provides in part that "(a) [i]t shall be an unfair labor practice for an employer—(1) [t]o interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7. . . ." *Id.* § 8 (current version at 29 U.S.C. § 158 (1976)).

8. *Id.* § 2(3).

9. *See* text accompanying notes 12-15 *infra*.

10. 330 U.S. 485 (1947).

11. Labor Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 151-166 (1976 & Supp. III 1979)) [hereinafter referred to as the "Amendments"]. The three Amendments relevant to this Note provide as follows:

Prior to the enactment of the Amendments, the Board vacillated in its approach to the issue of whether supervisors should be protected under the Act and thus treated in the same fashion as rank-and-file employees. The Board originally excluded supervisors from units of rank-and-file employees.[12] In *Union Collieries Coal Co.*,[13] however, it certified a separate bargaining unit composed of supervisors who were to be represented by an independent union. Shortly thereafter, in *Godchaux Sugars, Inc.*,[14] the Board approved a unit of supervisors whose union was affiliated with a union of rank-and-file employees. Just one year later, however, the Board held in *Maryland Drydock Co.*[15] that supervisors, although literally "employees" under the Act, could not be organized in any unit. Finally, the Board overruled *Maryland Drydock* in *Packard Motor Car Co.*,[16] holding that foremen could constitute an appropriate unit for collective bargaining. The Supreme Court upheld the Board's ruling in a five-to-four decision.[17] Justice Jackson, writing for the majority, held that foremen and other supervi-

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§ 2(3). The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, *or any individual employed as a supervisor*, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

61 Stat. 137-38 (1947) (current versions at 29 U.S.C. § 152(3) (1976)) (emphasis supplied).

§ 2(11). The term 'supervisor' means 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 judgment.

61 Stat. 138 (1947) (current version at 29 U.S.C. § 152(11) (1976)).

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

61 Stat. 151 (1947) (current version at 29 U.S.C. § 164(a) (1976)) (emphasis supplied).

12. Mueller Brass Co., 39 N.L.R.B. 167, 171, 10 L.R.R.M. 8, 9 (1942).
13. 41 N.L.R.B. 961, *supplemented*, 44 N.L.R.B. 165, 11 L.R.R.M. 114 (1942).
14. 44 N.L.R.B. 874, 11 L.R.R.M. 129, *supplemented*, 11 L.R.R.M. 269 (1942).
15. 49 N.L.R.B. 733, 12 L.R.R.M. 126 (1943).
16. 64 N.L.R.B. 1212, 17 L.R.R.M. 163 (1945).
17. Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947).

sory employees were "employees" within the meaning of section 2(3) of the Act and were entitled as a class to the rights of self-organization, collective bargaining, and other concerted activities guaranteed to employees generally.[18] In response to the employer's assertion that management was entitled to the complete loyalty of supervisors acting in its behalf, the Court concluded that even supervisors have an interest in improving their wages and working conditions, and that any exclusion of supervisors from the Act's protection is a matter of policy to be implemented by Congress through specific statutory language.[19]

In light of the subsequent legislative rejection of the *Packard* decision, Justice Douglas' dissent offered a prophetic look at the policy considerations that confronted Congress:

> The present decision . . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy.
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> . . . [I]f foremen are "employees" within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents. . . . If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application. But once vice-presidents, managers, superintendents, foremen all are unionized, management and labor will become more of a *solid phalanx* than separate factions in warring camps. . . .
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> . . . My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none.[20]

B. The Taft-Hartley Amendments and the Exclusion of Supervisors from the Act

Alarmed by the spectre of a "solid phalanx"[21] of labor and management, Congress reacted to the *Packard* decision by amending sections 2(3) and 2(11) of the Act and by enacting section 14(a).[22] The Taft-Hartley Amendments specifically excluded supervisory personnel from the Act,[23] reversing the position taken by the Board and the Court in *Packard*.[24] The Senate and House Re-

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18. *Id.* at 488-90.
19. *Id.*
20. *Id.* at 494-95 (Douglas, J., dissenting) (emphasis supplied).
21. *See id.*
22. *See* note 11 *supra*.
23. *Id.* at § 2(3).
24. Beasley v. Food Fair, Inc., 416 U.S. 653 (1974); *see* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

ports voiced grave concern over the blurred distinction between management and the work force created by the Board's broad interpretation of "employee."[25] The House Report specifically criticized the Board's expansive reading of the Act's definition of the term and noted that the concern of Congress in passing the Labor Act was "with the welfare of 'workers' and 'wage earners,' not of the boss."[26] The provisions of the Amendments relieved employers of the obligation to recognize and bargain with unions composed solely or partially of supervisors, because supervisors were considered part of management and thus were obligated to be loyal to their employers' interests.[27]

The legislative history of the Taft-Hartley Amendments illustrates the congressional emphasis on the basic policy rationale for excluding supervisors from the protections of the Act. Stressing the legitimate management need for loyalty from its supervisors, the House Report stated:

> Management, like labor, must have faithful agents. If we are to produce goods competitively and in such large quantities that many can buy them at low cost, then, just as there are people on labor's side to say what workers want and have a right to expect, there must be in management and loyal to it persons not subject to influence or control of unions, not only to assign people to their work, to see that they keep at their work and do it well, to correct them when they are at fault, and to settle their complaints and grievances, but to determine how much work employees should do, what pay they should receive for it, and to carry on the whole of labor relations.[28]

The Senate Report repeated the same theme—that unionization of supervisors threatened realization of the basic objective of the Act to increase the output of goods by promoting labor peace.[29] The Report referred to the NLRB rulings that included supervisors in the definition of "employees" as "[a] recent development which probably more than any other single factor has upset any real balance of power in the collective-bargaining process."[30] Addi-

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25. H.R. REP. No. 245, 80th Cong., 1st Sess. (1947); S. REP. No. 105, 80th Cong., 1st Sess. (1947).

26. H.R. REP. No. 245, 80th Cong., 1st Sess. 13 (1947).

27. Beasley v. Food Fair, Inc., 416 U.S. 653, 659-60 (1974).

28. H.R. REP. No. 245, 80th Cong., 1st Sess. 16 (1947); *see* Beasley v. Food Fair, Inc., 416 U.S. 653, 660 (1974).

29. S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947); *see* Beasley v. Food Fair, Inc., 416 U.S. 653, 661 (1974).

30. S. REP. No. 105, 80th Cong., 1st Sess. 3 (1947). In order to emphasize this point, the Report made the following observation:

> The folly of permitting a continuation of this policy is dramatically illustrated by what has happened in the captive mines of the Jones & Laughlin Steel Corp. since supervisory employees were organized by the United Mine Workers under the protection of

tionally, the House Report noted that unionization of supervisors had deprived employers of the loyal representations to which they were entitled.[31] Congress perceived that, without absolute supervisory loyalty to the goals and objectives of management, an inherent conflict of interest would develop in the role of the supervisor. The House Report concluded that the change in the law would eliminate this conflict, so that "[n]o 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."[32]

Congress was also concerned with the possible blurring of the distinction between rank-and-file employees and supervisors, the latter being "management people" who abandoned "collective security" to pursue individual opportunity.[33] The House Report emphasized that supervisors, who achieve that position because they demonstrate initiative, ambition, and ability to get ahead, should not be subjected "to the leveling processes of seniority, uniformity and standardization" associated with unionism.[34] Thus, in addition to its concern over the division in the allegiances of supervisors, Congress was also worried about the potential reduction in managerial initiative if supervisors joined the union.

An analysis of the legislative history of the Taft-Hartley Amendments compels the conclusion that Congress' main purpose in amending sections 2(3) and 2(11) and in enacting section 14(a) "was to redress a perceived imbalance in labor-management relationships."[35] The legislative reports emphasize that Congress wished not only to insure that rank-and-file employees could unionize and select their leaders free from any undue influence by supervisors in the union, but also to insure that supervisors "would not fall into league with or become accountable to the employees whom they were charged [by the employer] to supervise."[36] Congress was deeply concerned with solving the inherent problems that resulted from placing supervisors in the untenable position of

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the act. Disciplinary slips issued by the underground supervisors in these mines have fallen off by two-thirds and the accident rate in each mine has doubled.

Id. at 4.

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

32. *Id.* at 17 (emphasis in original).

33. *Id.* at 16-17.

34. *Id.* The House Report noted that the Supreme Court, in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944), had recognized that the "fundamental principles" of unionism were the leveling processes of seniority, uniformity, and standardization.

35. Beasley v. Food Fair, Inc., 416 U.S. 653, 661-62 (1974).

36. R. GORMAN, BASIC TEXT ON LABOR LAW 34 (1976).

serving two masters with conflicting interests.[37] Congress thus attempted to remedy this problem by excluding supervisors from the protection of the Act.[38]

III. Historical Development of Supervisory Discharge Law

The traditional rule established after the enactment of the 1947 Amendments was that section 2(11) supervisors could not claim per se protection from discharge or other discipline for engaging in union-related activity.[39] Under this rule, the Board recognizes an employer's right to discourage such activity among its supervisors.[40] Thus, if an employer discharged a supervisor because of a legitimate need to insure the loyalty of its management personnel, and if its action were "reasonably adapted" to that legitimate end, then the Board would hold that such conduct does not violate section 8(a)(1) of the Act.[41]

The Board, however, has under limited circumstances prohibited the discharge of a supervisor for union-related activity. The emergent general rule is that supervisors may be reinstated only when the reinstatement would result in the protection of the section 7 rights of employees. In the isolated cases in which supervisors have been afforded section 8(a)(1) immunity for union-related activity, the Board has focused on the effect upon *employees* of management's discharge of the supervisor. Thus, under this approach any protection afforded supervisors stems not from any statutory provisions concerning supervisors, but rather from the section 7 rights of employees.[42] The occasional inclusion of supervisors within section 8(a)(1) is merely a Board-created exception to the section 2(11) exemption.

Traditionally, the Board has been willing to find a violation of section 8(a)(1) when the supervisor's discharge directly interfered with, restrained, or coerced nonsupervisory employees in the exercise of their statutory rights.[43] An obvious example of unlawful management interference with employee rights is the discharge of

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37. *See* notes 28-32 *supra* and accompanying text.

38. *See* note 11 *supra* and accompanying text.

39. DRW Corp. (Brothers Three Cabinets), 248 N.L.R.B. 828, 828, 103 L.R.R.M. 1506, 1508 (1980); R. Gorman, Basic Text on Labor Law 34-35 (1976).

40. 248 N.L.R.B. at 828, 103 L.R.R.M. at 1508.

41. *Id.*

42. *See, e.g., id.*

43. *See, e.g.,* Vail Mfg. Co., 61 N.L.R.B. 181, 16 L.R.R.M. 85 (1945), *enforced,* 158 F.2d 664 (7th Cir.), *cert. denied,* 331 U.S. 835 (1947). *Vail* was one of the first Board decisions dealing with the reinstatement of a discharged supervisor for union-related activity.

a supervisor for failure to prevent unionization. In *Talladega Cotton Factory, Inc.*[44] management exerted great pressure on its supervisory employees to halt a union organizational effort. The Board upheld the Trial Examiner's finding that the supervisors' discharge for failure to wage a sufficiently effective preelection antiunion campaign constituted unlawful interference with the section 7 rights of nonsupervisory employees.[45] The Fifth Circuit enforced the Board's order to reinstate the supervisors, noting that "[t]he contention that the discharge of supervisors for refusal to violate the Act may be effected with impunity because of their supervisory status evinces undue preoccupation with the statutory definition, rather than with the underlying purpose and intent of the Act as a whole."[46]

Similarly, the Board has frequently ordered a supervisor's reinstatement when the employer bas discharged the supervisor for failing to commit unfair labor practices. In *Jackson Tile Manufacturing Co.*[47] the Board found that the employer had illegally discharged a supervisor when the supervisor became reluctant to commit further unfair labor practices on the employer's behalf. The Board reiterated its stance that such a discharge constituted an invasion of the self-organizational rights of rank-and-file employees because it demonstrated graphically to employees the extreme measures to which the offending employer would resort in order to thwart their desire to join or assist a labor organization.[48]

In *General Engineering, Inc.*[49] the Board elaborated on the rationale for extending section 8(a)(1) protection to supervisors who refuse to participate in management's unfair labor practices. The Board upheld the Trial Examiner's finding that the employer violated section 8(a)(1) by terminating a supervisor for refusing to support as true the employer's pretext for the discriminatory firing of an employee. According to the Board, the net effect of tbe su-

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44. 106 N.L.R.B. 295, 32 L.R.R.M. 1479 (1953), *enforced*, 213 F.2d 209 (5th Cir. 1954). *See also* I.D. Lowe (Thermo-Rite Mfg. Co.), 157 N.L.R.B. 310, 61 L.R.R.M. 1338 (1966), *enforced*, 406 F.2d 1033 (6th Cir. 1969). In *Thermo-Rite* the court sustained the Board's finding that one of the reasons for the discharge of the supervisor was his "failure or refusal to oppose the union in the manner and to the extent desired by the general manager," and, accordingly, it enforced the Board's order for the supervisor's reinstatement. *Id.* at 1035.

45. 106 N.L.R.B. at 295, 32 L.R.R.M. at 1480.

46. NLRB v. Talladega Cotton Factory, Inc., 213 F.2d 209, 217 (5th Cir. 1954). *See also* Miami Coca-Cola Bottling Co. (Key West Coca-Cola Bottling Co.), 140 N.L.R.B. 1359, 52 L.R.R.M. 1242 (1963).

47. 122 N.L.R.B. 764, 43 L.R.R.M. 1195 (1958), *enforced*, 272 F.2d 181 (5th Cir. 1959).

48. *Id.*

49. 131 N.L.R.B. 648, 48 L.R.R.M. 1105 (1961).

pervisor's discharge was to cause employees reasonably to fear that the employer would take similar action against them if they continued to support the union.[50]

In *Buddies Super Markets*[51] the Board extended the protections of section 8(a)(1) to a supervisor who, although not committing an unfair labor practice himself, informed an employee that the employer planned to discharge him for union activity.[52] Despite the employer's warning to the supervisor not to inform the employee of his possible termination, the supervisor disclosed the planned termination to the employee, and the employer discharged him for breach of confidentiality. The Board[53] found the discharge unlawful since such conduct tended to confirm the fact that the employer would pursue its unlawful aims without the employees' awareness and without any interference from its supervisors.[54] Thus, the Board concluded that punishment of the supervisor for breaching management's improper order of silence was unlawful interference within the meaning of section 8(a)(1).[55]

In a similar decision, *Belcher Towing Co.*,[56] the Board held that an employer unlawfully discharged a supervisor for failing to enforce an invalid no-solicitation rule.[57] The employer had directed the supervisors to report immediately any union entry onto the company's vessels. Upon learning of a supervisor's failure to report a union representative's visit to one of the company's boats, the employer discharged the supervisor.[58] The Board found that the employer fired the supervisor because he failed to comply suffi-

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50. *Id.*

51. 223 N.L.R.B. 950, 92 L.R.R.M. 1008 (1976), *enforcement denied*, 550 F.2d 39 (5th Cir. 1977).

52. The employer informed the supervisor that the employee would be discharged because he had held a union card 18 months before. When the supervisor asked if he would be required to assist in building a case against the employee, the employer ruled out the need for his assistance. The employer, however, did tell the supervisor that under no circumstances was he to tell the employee anything about the termination. *Id.* at 951 (Waltham, M., dissenting).

53. Member Waltham dissented on the ground that the employer had not urged the supervisor to commit any unfair labor practices or to do anything unlawful. The only order to the supervisor was to remain silent. *Id.* at 952 (Waltham, M., dissenting).

54. As the dissent pointed out, the employee was never actually discharged. *Id.* Thus, while an unfair labor practice may have been contemplated, it was never consummated by discharging the employee for union activity. The majority maintained that the scheme was foiled due to the supervisor's intervention. *Id.* at 950.

55. *Id.*

56. 238 N.L.R.B. No. 63, 99 L.R.R.M. 1566 (Sept. 27, 1978).

57. *Id.* The Board overruled the Trial Examiner's ruling that the discharge was valid.

58. *Id.*

ciently with the employer's illegal demands and because he failed to enforce an invalid no-solicitation rule prohibiting access and discussion for union purposes.[59] Two members of the Board dissented,[60] noting that the majority had stretched the Act to find that the employer committed a violation by discharging a supervisor who failed to fulfill his legitimate obligation arising out of his supervisory status.[61] According to the dissent, the impetus for the discharge was the supervisor's refusal to supply the employer, as lawfully directed,[62] with information that he had obtained legitimately in the course of performing his supervisory duties; the dissent therefore maintained that the discharge was not unlawful.[63]

The final area in which supervisors have been granted reinstatement for union-related activity involves a supervisor's participation in testifying at a labor hearing contrary to the wishes of management. The Board has consistently held unlawful the discharge of a supervisor under these circumstances in order to assure employees that their supervisors will not be coerced into withholding evidence vital to the employees' exercise of their statutory rights. In *Modern Linen & Laundry Service, Inc.*[64] the Board approved the Trial Examiner's finding that the employer discharged a supervisor because he gave testimony at an NLRB proceeding.[65] Holding that the supervisor's discharge had an adverse effect on

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59. *Id.*

60. *Id.* at ___, 99 L.R.R.M. at 1569 (Penello, M., & Murphy, M., dissenting).

61. *Id.*

62. The supervisor, according to the dissent, was only directed to report information to the company that he might legally obtain in the performance of his duties. *Id.* at ___, 99 L.R.R.M. at 1569-70.

63. *Id.*

64. 116 N.L.R.B. 1974, 39 L.R.R.M. 1126 (1956). *See also* Rohr Indus., Inc., 220 N.L.R.B. 1029, 90 L.R.R.M. 1541 (1975). Analogously, the Board has held that an employer may not discharge supervisors for providing an affidavit to a Board member. *See, e.g.*, NLRB v. Electro Motive Mfg. Co., 389 F.2d 61 (4th Cir. 1968); Professional Ambulance Serv., Inc., 232 N.L.R.B. 1141, 97 L.R.R.M. 1109 (1977); General Nutrition Center, Inc., 221 N.L.R.B. 850, 90 L.R.R.M. 1736 (1975).

65. The testimony, which the supervisor delivered at an unfair labor practice hearing, was adverse to the employer. 116 N.L.R.B. at 1975, 39 L.R.R.M. at 1126. In a concurring opinion, Members Bean and Murdock argued that, in addition to violating section 8(a)(1), the employer's conduct constituted a violation of section 8(a)(4) of the Act. That section provides

> (a) It shall be an unfair labor practice for an employer—
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> . . .
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> (4) to discharge or otherwise discriminate against an employee because he has filed charges or *given testimony* under this [Act]. . . .

National Labor Relations (Wagner) Act, ch. 372, § 8, 49 Stat. 452-53, (current version at 29 U.S.C. § 158(a)(4) (1976)) (emphasis added).

nonsupervisory employees, the Board found the discharge unlawful and ordered the supervisor reinstated.[66]

The Board explored further the analysis supporting the inclusion of supervisors who testify at labor hearings under the section 8(a)(1) umbrella in *Dal-Tex Optical Co.*[67] The Trial Examiner summarized the Board's position on the protection of supervisors in this area:

> In our opinion, the net effect of (the supervisor's) discharge was to cause nonsupervisory employees reasonably to fear that the Respondent [employer] would take the same action against them if they testified against the Respondent in a Board proceeding to enforce their guaranteed rights under the Act. 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 their employer.[68]

Following *Dal-Tex*, the Board extended the rule prohibiting the discharge of supervisory personnel for testifying at NLRB proceedings to include testimony at grievance proceedings conducted under a contract. In *Ebasco Services, Inc.*[69] the Board held that the employer unlawfully interfered with the rights of employees when it demoted supervisory personnel for being absent from work to give testimony at a grievance hearing. The employer had warned the supervisors about the possibility of demotion in the event of their absence from work. Despite the employer's admonition, the supervisors testified and the employer demoted them from supervi-

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66. 116 N.L.R.B. at 1976, 39 L.R.R.M. at 1127.

67. 131 N.L.R.B. 715, 48 L.R.R.M. 1143 (1961), *enforced*, 310 F.2d 58 (5th Cir. 1962).

68. *Id.* at 731. *See also* Oil City Brass Works, 147 N.L.R.B. 627, 56 L.R.R.M. 1262 (1964), *enforced*, 357 F.2d 466 (5th Cir. 1966). In *Oil City* the Board noted that if employers could discharge supervisors for giving adverse testimony, then "employees [could] . . . reasonably believe a similar fate would befall them if they gave testimony in a Board proceeding." *Id.* at 630. The Board stated that employees were entitled to vindicate their rights in a Board proceeding through the testimony of supervisors who have knowledge of the facts, without the supervisors risking discharge or other penalty for giving testimony adverse to their employer. *Id.* Judge Rives, writing for the Fifth Circuit in enforcing *Oil City*, agreed with the Board, stating:

> Rank-and-file employees have a right to have their privileges secured by the Act vindicated through the effective administrative proceedings provided by Congress. Included in this privilege is the right to have witnesses testify without fear of being penalized by their employer. As in the instant case, it may often be necessary to have supervisory personnel testify. It follows, therefore, that any discrimination against supervisory personnel because of testimony before the Board directly infringes the right of rank-and-file employees to a congressionally provided, effective administrative process. . . .

357 F.2d at 471.

69. 181 N.L.R.B. 768, 73 L.R.R.M. 1518 (1970).

sory status.[70] The Board held that the testimony of the supervisors was pertinent to the grievance proceedings[71] and that the employer's refusal to allow the supervisors to testify without risk of demotion interfered with the rights of the grievants to a full and fair hearing.[72]

In summary, although Congress clearly excluded supervisory employees from the statutory protections of the Act,[73] the Board has traditionally afforded section 8(a)(1) privileges to supervisors in certain limited situations. When employers have discharged supervisors for failing to prevent unionization,[74] or for refusing to commit unfair labor practices,[75] or for testifying at NLRB proceedings,[76] the Board has consistently ordered reinstatement. Historically, however, the Board has ordered reinstatement of supervisors only when the discharge of the supervisor has directly interfered with, restrained, or coerced the section 7 rights of employees and when reinstatement is essential to vindicate those employee rights. Traditionally, therefore, the sole emphasis in the supervisor discharge cases has been upon the protection of *employee* rights, and not upon extending section 8(a)(1) protection to supervisory employees.

IV. Development of "Pattern of Conduct" Analysis

As discussed previously, the Board has traditionally ordered reinstatement of a discharged supervisor when reinstatement was essential for the protection of the statutory rights of rank-and-file employees. The general test for determining whether reinstatement was the proper remedy was whether the supervisory discharge "directly interfered" with or "directly affected" the protected rights of employees. Thus, the Board has found it unlawful

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70. The employer argued that Employment Stabilization Board agents had already interviewed the supervisors and thus it was unnecessary for the supervisors to appear at the hearing. The employer also maintained that the absence of the supervisors would close down the project, since the contract provided that no work could be done without foremen. *Id.* at 769-70, 73 L.R.R.M. at 1519.

71. The Trial Examiner concluded that the Employment Stabilization Board requested the appearance of the supervisors, and that it must be assumed that the Board made the request in good faith. The Trial Examiner also found that the employer failed to prove that the absence of the foremen actually stopped production on the day of the hearing. *Id.* at 769, 73 L.R.R.M. at 1519.

72. *Id.*

73. *See* note 11 *supra* and accompanying text.

74. *See* notes 44-46 *supra* and accompanying text.

75. *See* notes 47-63 *supra* and accompanying text.

76. *See* notes 64-66 *supra* and accompanying text.

to discharge a supervisor for such activities as testifying at a Board proceeding[77] and refusing to commit unfair labor practices.[78] Reinstatement was necessary in these cases in order to to safeguard the right of employees to engage in protected activities without fear of unlawful conduct directed toward them.

In 1967 the Board articulated a new standard for determining whether a supervisor should be afforded section 8(a)(1) protection. In *Pioneer Drilling Co.*[79] the employer discharged two "drillers"—admitted supervisors who had sigued union authorization cards—after they refused to accept a transfer to another drilling site. Under the prevailing custom in the drilling industry, drillers were allowed to select their own crew; the discharge of a driller resulted in the automatic discharge of the entire crew.[80] In *Pioneer Drilling Co.* the drillers and their crew actively supported union organizational efforts. When the employer terminated the drillers because of their prounion sympathies, the nonsupervisory crew members were likewise terminated. The Trial Examiner found that antipathy toward unionization, rather than the exigencies of the business, was the reason for the employer's insistence that the drillers transfer to another location.[81] The Trial Examiner also found that the employer took advantage of the established practice of automatically terminating a crew along with its driller. The Board upheld the Trial Examiner's ruling that the discharge of the supervisors was in reality motivated by antiunion animus, and that the discharges were an "integral part of a pattern of conduct" aimed at penalizing employees for their union activities.[82] The Board thus concluded that such conduct was violative of section 8(a)(1).

The Board has frequently used the "pattern of conduct" analysis first articulated in *Pioneer Drilling* to reinstate supervisors who were discharged, often with other nonsupervisory employees, because of prounion activities. Although never holding that supervisory participation in concerted or union activity is per se protected, the Board has frequently reinstated supervisors upon a finding that the employer's action was motivated not by the super-

77. *See, e.g.*, Ebasco Servs., Inc., 181 N.L.R.B. 768, 73 L.R.R.M. 1518 (1970).

78. *See, e.g.*, Vail Mfg. Co., 61 N.L.R.B. 181, 16 L.R.R.M. 85 (1945).

79. 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961 (10tb Cir. 1968).

80. *Id.* at 921, 64 L.R.R.M. at 1126.

81. *Id.* at 926.

82. *Id.*

visor's own activity but by a desire to stifle employees' exercise of section 7 rights, and when the action was part of an "overall scheme" designed to achieve successfully that result. Board decisions, however, are unclear concerning what factual scenarios constitute an "overall scheme" or a "pattern of conduct."

In a speech delivered to an American Bar Association labor law seminar,[83] Board Member John Truesdale[84] noted that the "pattern of conduct" standard has resulted in the development of two inconsistent, if not contradictory, lines of cases. The Board has applied the standard in seemingly similar factual situations to reach incompatible results. In one line of cases, typified by *Krebs & King Toyota, Inc.*,[85] the Board has found *unlawful* the termination of a supervisor who participated along with nonsupervisory employees in union-related activities, holding either that the discharge was an "integral part" of discouraging unionization or that the discharge served as a "conduit" for the employer's unfair labor practices directed at employees. In the other line of cases, typified by *Sibilio's Golden Grill, Inc.*,[86] the Board has found *lawful* the termination of a supervisor who engaged in union activity but was "concerned only with advancing her own and the employees' job interests."[87]

Pioneer Drilling represents both the inception of the test and the cause of the ensuing confusion.[88] While the Board used the test in *Pioneer Drilling* to reach an appropriate result under the unique facts of that case, it later extended the test to cover situations to which it was never intended to apply. The supervisor's discharge in *Pioneer Drilling* directly affected the nonsupervisory employees since the action resulted in their automatic termination from employment. In later cases, however, the Board has reached the same result even when the employees were only affected indirectly as a result of the "coercive atmosphere" created by the dis-

83. Speech by Member Truesdale, ABA National Institute on "Labor Law in the New Decade," in New Orleans (May 1, 1980) (copy on file at VANDERBILT LAW REVIEW).

84. Member Truesdale resigned from the Board on January 26, 1981. Truesdale was serving on the Board by virtue of a Presidential appointment during a congressional recess. Upon his resignation, the Board appointed him Executive Secretary of the Board, a position that he had held for five years prior to his Board appointment in September 1977. Truesdale's resignation leaves the NLRB with three members—Chairman John H. Fanning, Howard Jenkins, Jr., and Don A. Zimmerman. [1981] 1 LAB. REL. REP. (BNA) (106 L.R.R.M.) 83.

85. 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972).

86. 227 N.L.R.B. 1688, 94 L.R.R.M. 1439 (1977).

87. *Id.* at 1688, 94 L.R.R.M. at 1440.

88. *See* notes 79-82 *supra* and accompanying text.

charge of the supervisor. The Board has never recognized or defended this critical distinction.

A brief survey of these cases will reveal that the Board has applied the "pattern of conduct" analysis inconsistently with confusing results. It is very difficult to discern any set of common factors that will result in a finding of a "pattern of conduct" that violates the Act; therefore, it becomes almost impossible to predict when, and under what circumstances, the Board will invoke the "pattern of conduct" test. Although the very language of the standard is amorphous and difficult to translate into practical terms, the Board has never bothered to define a "pattern of conduct" and merely assumes that its meaning is apparent. The only common denominator that may be discerned from these cases pertains to the characterization of the activity engaged in by the supervisor and by other employees. The Board's willinguess to find a "pattern of conduct" apparently depends upon the *type of union activity* and the supervisor's involvement in it.

For analytical purposes this Note will discuss three broad categories of cases, representing different types of concerted activity, in which the Board has invoked the standard. The first category covers cases in which a supervisor has complained to either the Board or to higher management about working conditions or management conduct. Of the five cases considered by the Board in this category, three resulted in the reinstatement of the supervisor. Cases in this category are the least consistent and therefore do not offer a basis for accurately predicting the Board's action. The Board, however, decided two of the three reinstatement cases in 1979, thus suggesting a trend in the direction of extending protection to supervisors in a category one context. The second category of cases involves supervisory participation in a purely economic dispute. The Board decided three cases in this category with consistent results: it allowed the supervisory discharge to stand. The third and largest category of cases covers the discharge of a supervisor who either participated in the organization of a union or was already a member of the union. In these cases the employer has discharged the supervisor and other union adherents in an apparent effort to chill the union's organizational efforts. The Board has consistently construed this factual situation to constituto a "pattern of conduct" that violates the Act. Accordingly, the Board has held that reinstatement of the supervisor is necessary to offset the employer's antiunion efforts.

A. Complaints About Working Conditions or Managerial Conduct

The first category of cases involves the discharge of supervisors because of protests about working conditions or some aspect of managerial conduct. In *United Painting Contractors*,[89] for example, the Board refused to reinstate a supervisor discharged by his employer for protesting unsafe working conditions. The supervisor and other employees had complained to a State Roads Commission official and to the employer about unsafe rigging on the bridge where the men were working. In addition, one of the employees lodged the same complaint in a letter to his congressman and was interviewed on television news about the unsafe conditions on the bridge. The employer immediately discharged all three employees, including the supervisor. The Board affirmed without opinion the Trial Examiner's holding that the discharge of the supervisor was lawful because a supervisor has "no protected right to engage in concerted activity, either in his own behalf, or on behalf of employees."[90] His conduct was therefore "inconsistent with his status as a supervisor."[91]

In a closely analogous case, *General Nutrition Center*,[92] the Board affirmed a Trial Examiner's finding that a supervisory discharge was unlawful after the supervisor and four nonsupervisory employees left work to go to the Board office to complain about their working conditions.[93] The Trial Examiner, finding the supervisory discharge unlawful, stated the applicable test as follows:

> discharge of or other reprisals directed against a supervisor for engaging in conduct protected in an employee violates Section 8(a)(1) if (1) under all the circumstances, such punishment tends to lead rank-and-file employees reasonably to fear that the employer will punish them for engaging in like conduct; and (2) the employer has failed to take reasonable and timely steps to reassure his rank-and-file employees that they will not be punished for such conduct.[94]

Based upon this test, the Trial Examiner concluded that "this case falls generally within the scope of prior cases finding unlawful the

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89. Karl Kristofferson (United Painting Contractors), 184 N.L.R.B. 159, 74 L.R.R.M. 1645 (1970), *enforced sub nom.* Johnson v. NLRB, 441 F.2d 266 (4th Cir. 1971).

90. *Id.* at 163.

91. *Id.*, 74 L.R.R.M. at 1646.

92. 221 N.L.R.B. 850, 90 L.R.R.M. 1736 (1975).

93. The supervisor and the four employees constituted the sales force of a heated store in a covered but unheated arcade. The employees were concerned about the cold and about the constant pressure to produce sales. *Id.*

94. *Id.* at 859.

discharge of supervisors in connection with the discharge of employees for concerted activity."[95] The Board summarily affirmed the Trial Examiner's findings and opinion without comment.[96] *General Nutrition* thus exhibited a marked divergence from prior supervisory discharge decisions by stating that the discharge of a supervisor is unlawful whenever rank-and-file employees may reasonably fear similar action in response to concerted activity on their part. Furthermore, *General Nutrition* was the first decision to impose explicitly upon employers an affirmative duty to reassure employees that they will not be punished for such conduct. Finally, *General Nutrition* extended the earlier rule by holding that the discharge of a supervisor is unlawful whenever the supervisor is discharged contemporaneously with other nonsupervisory employees for concerted activity. The Board, however, has never again supported this broad interpretation, and in fact specifically rejected it in a later case.[97]

In *Stop and Go Foods, Inc.*[98] the Board overruled a Trial Examiner's decision that an employer should reinstate a supervisor discharged for participating in a strike. The supervisor, who was manager of a convenience store closed the store and went on strike in protest of the employer's failure to repair the store's air conditioning equipment. The employer reinstated the nonsupervisory employees after the strike, but refused to reinstate the supervisor. The Trial Examiner, relying on *General Nutrition Center, Inc.*[99] and *Production Stamping, Inc.*,[100] found that the supervisor's discharge tended to lead rank-and-file employees to fear that the employer would punish them for engaging in similar conduct, and that the employer failed to take reasonable and timely steps to reassure them otherwise. Moreover, the Trial Examiner opined that a showing that the supervisor's discharge constituted an "integral part of a pattern of conduct" was not necessary to the finding of a violation. Thus, the Trial Examiner concluded that the employer's failure to reassure the employees that it would not take similar action against them transformed a presumably lawful discharge into a violation of section 8(a)(1).[101]

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95. *Id.*
96. The Board issued no opinion other than the Trial Examiner's decision.
97. *See* notes 102-03 *infra* and accompanying text.
98. 246 N.L.R.B. No. 170, 103 L.R.R.M. 1046 (Dec. 14, 1979).
99. 221 N.L.R.B. 850, 90 L.R.R.M. 1736 (1975).
100. 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).
101. 246 N.L.R.B. No. 170 at ___, 103 L.R.R.M. at 1047.

The Board overruled the Trial Examiner's decision and reinstated the supervisor. Noting that it had never held that the discharge of a supervisor for concerted activity violated the Act merely because an incidental effect upon employees was fear of the same fate, the Board distinguished the *General Nutrition* decision. According to the Board, the employer's "failure to reassure" in *General Nutrition* "was not crucial to the result therein" and was not a controlling factor in the determination of whether a supervisory discharge violates section 8(a)(1).[102] Thus, the Board held that the employer discharged the supervisor solely for joining the employees in their dispute with the employer over the delay in repairing the air conditioning equipment. There was no evidence, according to the Board, of a "pattern of conduct" aimed at penalizing the employees for engaging in the strike.[103]

In *Sheraton Puerto Rico Corp.*[104] the Board again addressed the issue of the discharge of supervisory personnel for their protests against managerial conduct. The manager of a hotel had discharged several supervisory and nonsupervisory employees for signing and sending a letter to the home office complaining about the working conditions and suggesting that the manager be replaced.[105] The Board ordered the employer to reinstate all the employees, including the supervisors. According to the Trial Examiner the signing and sending of the letter constituted legitimate concerted activity by the employees, and the discharge of the supervisors was unlawful because of the "natural tendency of [these discharges] . . . to discourage *employees* from exercising the rights guaranteed them in Section 7."[106]

The last case decided in the first category was *Downslope Industries, Inc.*,[107] in which the Board held that an employer unlawfully discharged a supervisor for protesting against the sexual harassment of herself and other employees on the job. Noting that the Act generally does not protect supervisors, the Board pointed to earlier Board and court decisions holding that discrimination directed against a supervisor violates the Act when it infringes upon the statutory rights of employees. Thus, the discharge of a supervisor violates section 8(a)(1) when it is an "integral part" of a

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102. *Id.* at ___, 103 L.R.R.M. at 1049-50, n.25.
103. *Id.* at ___, 103 L.R.R.M. at 1049-50.
104. Sheraton Puerto Rico Corp., 248 N.L.R.B. 867, 103 L.R.R.M. 1547 (1980).
105. *Id.*
106. *Id.* at 875, 103 L.R.R.M. at 1550 (emphasis added).
107. 246 N.L.R.B. No. 132, 103 L.R.R.M. 1041 (Dec. 14, 1979).

scheme used by an employer to punish its employees for their participation in protected concerted activities or to discourage their engaging in such activities.[108]

Member Murphy dissented from the Board's decision that the discharge was unlawful. In determining the applicable test, she distinguished between a discharge that facilitates a direct violation of employee statutory rights and one that has only an indirect impact on employee rights.[109] Murphy found no evidence of any discernible "overall plan" to violate employees' protected rights; rather, the evidence showed that the employer discharged the employees, as well as the supervisor, for engaging in concerted activities the participation in which is protected with respect to employees but not with respect to supervisors. Murphy concluded that the Board's decision represented both an unwarranted extension of the "pattern of conduct" analysis and a "long and impermissible step" toward conferring upon the Board jurisdiction over supervisors which the Act precludes. Murphy criticized the Board's position that a supervisor is protected from discharge whenever management fires the supervisor in close proximity to the firing of employees engaged in concerted activities. Murphy concluded that the net effect of the Board's decision was to extend the protection of section 7 to the concerted and union-related activities of supervisors.[110]

Member Truesdale concurred in the result but stated in a separate opinion that he agreed with the principles expressed in the dissent as to the applicable supervisory discharge law.[111] Truesdale specifically took issue with the "pattern of conduct" analysis, arguing that the Board should not construe the standard in an overly broad manner in light of the exclusion of supervisors from the protection of the Act. Truesdale thus agreed with the dissent that the finding of a Section 8(a)(1) violation based upon the discharge of a supervisor is properly limited to situations in which the discharge is part of a scheme designed to interfere *directly* with, or to facilitate direct interference with, the protected rights of employees. Truesdale, however, found that in this case the employer's discharge of the supervisor constituted a direct interference with employees' rights because the employer fired the supervisor for "not preventing the employees from engaging in their lawful Section 7

108. *Id.* at ___, 103 L.R.R.M. at 1042.
109. *Id.* at ___, 103 L.R.R.M. at 1044 (Murphy, M., dissenting).
110. *Id.*
111. *Id.* at ___, 103 L.R.R.M. at 1043 (Truesdale, M., concurring).

activity."[112]

In each of the five cases in the first category, an employer discharged a supervisor for participating in concerted activity—specifically, for voicing complaints about working conditions or management behavior. In each case the employer fired other participating employees along with the supervisors, and the discharges were the sole basis for the charge against the company. Yet in seemingly similar cases involving the same general facts and principles, the Board ordered reinstatement in three cases and allowed the discharge to stand in the other two. The Board's supposed rationale for these inconsistent results was that a "pattern of conduct" existed in three of the cases but not in the two cases in which it enforced the discharge. A close examination of the factual patterns of these five cases, however, does not reveal which particular facts in the three reinstatement cases led the Board to find a "pattern of conduct." Thus, absent greater clarification from the Board, the "pattern of conduct" test remains a confusing standard and dictates inconsistent results in cases involving discharge of supervisors for lodging complaints about working conditions or management conduct.

B. Economic Disputes

In the second category of cases, involving supervisory participation in purely economic disputes, the Board has decided three cases with consistent results. In *Sibilio's Golden Grill*[113] the Board reversed the Trial Examiner's order to reinstate a discharged supervisor. Prior to her discharge, the supervisor in *Sibilio's* had been the employees' spokesman in an economic dispute with the employer. In finding that the discharge of the supervisor violated the Act, the Trial Examiner noted that the action taken against the supervisor was identical to that taken against an employee, that her status as a supervisor was irrelevant to the discharge, and that the employer did not defend on this ground.[114] In reversing the Trial Examiner, the Board made the following observation:

> [The supervisor] was not acting to protect or vindicate employees' statutory 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 [the employer] by which it sought to strike through her at its employees for their turning to protected concerted activities or by

112. *Id.*
113. 227 N.L.R.B. 1688, 94 L.R.R.M. 1439 (1977).
114. *Id.*, 94 L.R.R.M. at 1440.

which it sought through her otherwise to discourage their engaging in such activities.[115]

In distinguishing *Pioneer Drilling* and *Krebs & King Toyota,* the Board in *Sibilio's* held that the discharge of the supervisor "was not a ploy to facilitate or cover up the contemporaneous and subsequent unlawful discharge of employees."[116]

In *Long Beach Youth Center, Inc.*[117] the Board refused to reinstate a supervisor discharged along with sixteen nonsupervisory employees for engaging in a work stoppage.[118] The Board declared that the stoppage was wholly economic in its inception and that there was no evidence that the employer had discharged the supervisor because of his attempts to protect employees from the employer's unfair labor practices or because of his refusals to infrmge upon employees' statutory rights. According to the Board, the supervisory discharge was not a tactic resorted to by the employer to cover up or facilitate taking unlawful action against rank-and-file employees. Thus, the Board concluded that the sole motive for the discharge was the supervisor's engaging in, or sympathizing with, the employees' activities in connection with the economic dispute—supervisory activities that the Act fails to protect.[119]

In the final case in this area, *L & S Enterprises, Inc.,*[120] the Board overruled the Trial Examiner and refused to reinstate a discharged supervisor. The supervisor was an active proponent of the union; she helped to formulate, circulate, and present a grievance petition regarding the wages, hours, and working conditions of employees, and acted as spokesman for the employees.[121] The employer discharged her because "he could no longer trust her with confidential information."[122] The Board found the discharge valid, distinguishing it from the cases in which an employer terminates a supervisor for protecting or vindicating employees' statutory rights or for refusing to commit unfair labor practices. Furthermore, the Board remarked that the supervisor was unable to prove that the termination was an "integral part of a pattern of conduct" aimed at penalizing employees for their concerted activities, an "inpor-

115. *Id.*
116. *Id.* at 1688 n.3, 94 L.R.R.M. at 1440 n.3.
117. Long Beach Youth Center, Inc., 230 N.L.R.B. 648, 95 L.R.R.M. 1451 (1977).
118. The employers protested working conditions and lack of adequate fringe benefits, while also expressing their desire to be represented by a union. *Id.*
119. *Id.*
120. 245 N.L.R.B. No. 144, 102 L.R.R.M. 1415 (Sept. 28, 1979).
121. *Id.*
122. *Id.*

tant element in the employer's total strategy to rid itself of a union," or the manifestation of "a desire to discourage employee's concerted activities in general" as opposed to a concern about the supervisor's participation in the concerted activities.[123] The Board concluded that the employer had discharged the supervisor because it considered her participation in concerted activities incompatible with a continued reliance on her as a member of its supervisory team; thus, the employer's actions were not unlawful.[124]

The Board has made it clear that it will not tolerate supervisory participation in economic disputes. The Board apparently has determined that the discharge of supervisors for such participation will not discourage union activity or interfere with the protected rights of rank-and-file employees. Accordingly, the Board will not find a "pattern of conduct" in economic activity cases. The Board's reluctance to reinstate supervisors in this context is entirely justified; supervisory participation in concerted economic activity was the specific type of conduct that Congress intended to exclude from the Act's protections by enacting the Taft-Hartley Amendments. Therefore, in the area of supervisory participation in economic disputes, the Board has not used the "pattern of conduct" analysis to thwart congressional aim.

C. Supervisor as Union Member or Organizer

The third category of cases involves the discharge of a supervisor who is either the organizer or the member of a union. In these cases the employer has discharged the supervisor and other union adherents in an effort to chill the union's organizational efforts. The Board has consistently construed this factual situation to constitute a "pattern of conduct" that violates the Act and necessitates reinstatement of the supervisor in order to offset the employer's antiunion efforts.

In *Pioneer Drilling*,[125] the first of the "pattern of conduct" cases, the Board found that the employer unlawfully discharged a supervisor because his crew was union-oriented and because the elimination of the supervisor would result in the automatic discharge of the crew and the elimination of the union.[126] Similarly, in

123. *Id.*

124. *Id.*

125. 162 N.L.R.B. 918, 64 L.R.R.M. 1126 (1967), *enforced in material part*, 391 F.2d 961, 963 (10th Cir. 1968); *see* text accompanying notes 79-82 *supra*.

126. *Id.*

Consolidated Foods Corp.[127] the Board held unlawful the discharge of a supervisor whose wife,[128] a co-worker, was leading a union organizational campaign. The Board found that the employer was aware of the wife's prounion activities and that an antiunion animus motivated the discharge of her and her husband.[129] The employer had also discharged other employees because of their organizational efforts, warning all employees that it would penalize union activity with immediate discharge.[130] Using traditional section 8(a)(1) analysis, the Board ordered the employer to reinstate all employees, including the supervisor. Although not specifically using "pattern of conduct" analysis, the Board employed a line of reasoning similar to the *Pioneer Drilling* decision, holding that the reinstatement of the supervisor was required since "under the circumstances, the employees could reasonably apprehend that the employer would take similar action if they continued their organizing activities."[131]

Five years later, in *Krebs & King Toyota,*[132] the Board expanded the "integral part of a pattern of conduct" analysis first announced in *Pioneer Drilling.* After learning of the impending organization of its employees, the employer in *Krebs* closed its shop and discharged all employees, including the shop foreman. The Board concluded that the employer's discharge of the foreman effectuated its decision to close down the shop. Thus, the discharge "was an integral part of its pattern of retaliatory conduct" in violation of section 8(a)(1).[133] In a dissenting opinion, Member Kennedy argued that the foreman's discharge was lawful. He noted that:

> When the discharge of a supervisor has been held unlawful the rationale is not that the discharge puts rank-and-file workers in fear (for that could apply to any discharge situation) nor that it is part of a pattern of conduct, but rather that it *interferes directly* with the workers' section 7 rights. The foreman here was not discharged as a pretext for getting rid of his prounion workers. He was discharged solely for his union activities. The case falls

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127. 165 N.L.R.B. 953, 65 L.R.R.M. 1470 (1967), *enforced in part,* 403 F.2d 662 (6th Cir. 1968).

128. The employer operated all of his stores with husband and wife teams. *Id.*

129. *Id.*

130. The Trial Examiner stated that "[a]ll the elements of a classical discriminatory discharge are present in this case . . . . There was animus on the part of the discharging [employer], union activity on the part of the [supervisor] and knowledge of the activity by the employer." *Id.* at 954.

131. *Id.*

132. 197 N.L.R.B. 462, 80 L.R.R.M. 1570 (1972).

133. *Id.* at 463, 80 L.R.R.M. at 1572.

squarely within the rule that such a discharge is lawful.[134]

In *Fairview Nursing Home*[135] the Board affirmed the Trial Examiner's finding that two supervisors, discharged for signing union cards and joining an union organizational drive, should be reinstated. The Board found that the discharges, made in the "context of pervasive unfair labor practices," were "part and parcel" of a "*pattern* of conduct" aimed at penalizing employees, not supervisors, for their union activities.[136] Member Kennedy again dissented based upon his conclusion that there was no basis for the Board's use of a "pattern of conduct" analysis.[137]

The Board announced a slight variation of the "pattern of conduct" analysis in *VADA of Oklahoma, Inc.*[138] The Board ordered reinstatement of a supervisor whom the employer had laid off, along with a number of nonsupervisory employees, because of his union-related activity. Finding that the employer had interrogated the supervisor about his active alliance with the union,[139] the Board held that the layoff was a "conduit" through which the employer sought to intimidate nonsupervisory personnel and to channel actions aimed at interfering with the rights of employees.[140] Although the Board used the "conduit" language instead of the "pattern of conduct" standard, the underlying rationale was the same: the employer's action, directed toward the supervisor, was part of a pattern of conduct designed to influence the employees and therefore necessitated reinstatement of the supervisor.

In *Donelson Packing Co.*,[141] decided the same year as *VADA of Oklahoma*, the Board ordered the reinstatement of a supervisor discharged in the wake of broad company violations of the Act. Following a union request for recognition, the company discharged or laid off union adherents, including a statutory supervisor, conditioned their rehiring on their willingness to abandon union membership and support, and temporarily closed one plant.[142] The Trial Examiner specifically found that the employer knew of the

134. *Id.* at 464, 80 L.R.R.M. at 1573 (Kennedy, M., dissenting) (emphasis added).

135. 202 N.L.R.B. 318, 82 L.R.R.M. 1566 (1973).

136. *Id.* at 318 n.2, 82 L.R.R.M. at 1569.

137. *Id.* (Kennedy, M., dissenting). *See* text accompanying note 134 *supra*.

138. 216 N.L.R.B. 750, 88 L.R.R.M. 1631 (1975).

139. During interrogation in the company president's office, the supervisor denied any union involvement. *Id.* at 759.

140. *Id.*

141. 220 N.L.R.B. 1043, 90 L.R.R.M. 1549 (1975), *enforced*, 569 F.2d 430 (6th Cir. 1978).

142. *Id.*, 90 L.R.R.M. at 1550.

supervisor's prounion sympathies and that it discharged him at approximately the same time that it hegan its antiunion course of unfair labor practices.[143] Conceding that the discharge of a supervisor for prounion sympathies does not normally violate section 8(a)(1), the Board found that the supervisor's discharge was an important element in the employer's total strategy designed to rid itself of the union through unlawful means. Accordingly, the Board held that the supervisor's discharge was an "integral part of a pattern of conduct" aimed at penalizing employees for their union activities and therefore violated section 8(a)(1).[144]

In 1979 the Board decided three cases in which employers discharged supervisors for participating in organizational efforts with other employees. In the first of these cases, *Production Stamping, Inc.*,[145] the Board held that an employer unlawfully discharged a union-organizing supervisor in conjunction with the firing of other organizing employees, since the purpose or effect of the discharge would be to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under the Act. The Trial Examiner found that the discharge of the supervisor was "part of a program" designed to penalize employees who engaged in union activity.[146] Thus, the inevitable effect of the discharge was to impress upon the employees the possible adverse consequences of their engagement in union activity. In addition, the Trial Examiner held that the lack of testimony by any employee that he was intimidated or coerced by the supervisor's discharge did not constitute a defense. The test of interference, restraint, or coercion of employees is not the success or failure of the conduct, but whether it may *reasonably* be said to tend to interfere with the exercise of rights protected by the Act.[147]

In another case issued the same day, *Fresno Townehouse*,[148] the Board reinstated a supervisor after a successor employer had discharged all of the union employees of its predecessor in an effect to "go non-union." The Board held that the supervisor's termination was not merely an action contemporaneous with the ter-

143. *Id.* at 1045, 90 L.R.R.M. at 1550.

144. *Id.*

145. 239 N.L.R.B. 1183, 100 L.R.R.M. 1141 (1979).

146. The discharge of the supervisor occurred simultanously with other unfair lahor practices and unlawful conduct on the part of the employer. *Id.* at 1186.

147. *Id.* The Board thus announced an objective standard to determine whether the employer's conduct would have the effect of interfering with, restraining, or coercing employees' § 7 rights.

148. Nevis Indus., Inc., 246 N.L.R.B. No. 167, 103 L.R.R.M. 1035 (Dec. 14, 1979).

minations of the other union members, but rather was an "integral part" of the employer's scheme to eliminate all union adherents.[149] The Board surveyed its earlier decisions in this area and noted that reinstatement is necessary to offset an employer's antiunion motives when supervisors are discharged along with prounion employees, not because of the employer's desire to assure the loyalty of its supervisors, but pursuant to "an unlawful plan to rid the employer's facility of any and all union adherents—in short, where the supervisors' discharges were 'an integral part of a pattern of conduct' aimed at penalizing employees for their union activities and ridding the plant of union adherents."[150]

Two members of the Board dissented in separate opinions.[151] Member Murphy wrote that it was "sheer sophistry" to argue that the discharge of the supervisor was an "integral part of a pattern of conduct" designed to facilitate a direct violation of the employee's statutory rights.[152] According to Murphy, the discharges of the supervisor and of the employees were two separate and distinct events, with the supervisor's discharge in no way affecting the employees' rights. Murphy concluded that there was no evidence that the employer did anything other than exercise its statutory prerogative to select supervisors according to its own criteria, and that the employer's prerogative should not be diminished merely because the employer chooses to exercise it simultaneously with the unlawful discharge of employees for engaging in concerted activities.[153]

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149. Member Penello, in a concurring opinion, wrote that the Board had always recognized a distinction between cases in which an employer discharged a supervisor because of "personal" union activity, and those in which the discharge was part of an "unlawful scheme" or pattern of conduct aimed at quashing employees' § 7 rights. In the former cases, according to Penello, the Board had held that the employer was exercising its prerogative to discourage such activity among its supervisors, and that the mere fact that rank-and-file employees might fear the same fate was insufficient to reinstate the supervisor. If, however, a "pattern of misconduct" can be shown, the Board will infer that the action taken against the supervisor was motivated by a desire to discourage union or concerted activities on the part of its employees in general. Moreover, by engaging in a pattern of misconduct, the employer makes it impossible for its employees to perceive the distinction between its right to prohibit its supervisors from engaging in union-related activity and its obligation to permit employees to freely exercise their § 7 rights. Under these circumstances, Penello reasoned that reinstatement of the supervisor is necessary to fully offset the coercive effects of the employer's total course of conduct. *Id.* at ___, 103 L.R.R.M. at 1038 (Penello, M., concurring).

150. *Id.* at ___, 103 L.R.R.M. at 1035.

151. Members Murphy and Truesdale dissented.

152. *Id.* at ___, 103 L.R.R.M. at 1039 (Murphy, M., dissenting).

153. *Id.*

In 1980 the Board decided *Brothers Three Cabinets*[154] which involved the discharge of a supervisor who had held a union meeting at his house and passed out union cards and literature. A divided Board held that the employer had engaged in a "wide-spread pattern of misconduct"[155] aimed at discouraging union activities and coercing employees in the exercise of their section 7 rights. Thus, the majority held that the employer had "intentionally created an atmosphere of coercion" in which employees could not perceive the distinction between the employer's right to prohibit union activity among supervisors and the employee's right to engage freely in such activity themselves. The Board found that restoration of the *status quo ante* was necessary to dissipate completely the coercive effect of the employer's conduct and therefore ordered reinstatement of the supervisor.[156]

In a lengthy dissent, Member Truesdale disagreed with the majority's position that the discharge had directly interfered with the protection of employees' rights. Conceding that the reinstatement of a discharged supervisor is justified in some instances,[157] the dissent maintained that the "pattern of conduct" or "conduit" cases differed from the other supervisory discharge cases in two respects:

> (1) unlike cases where the supervisors were only tangentially involved in the organizational activity, the supervisors in these cases were, themselves, more or less active for the union seeking to organize the rank-and-file employees; (2) whereas the governing principles in the other categories generally have been uniformly applied by the Board, this category includes cases where essentially similar factual settings have resulted in decisions which are difficult to reconcile.[158]

The dissent examined a number of the recent Board decisions, beginning with *Pioneer Drilling* in 1967, and concluded that the "pattern of conduct" or "conduit" line of cases had produced confusing and inconsistent decisions, with "no clear guidelines articulated" as to when supervisory participation in protected union or

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154. DRW Corp. (Brothers Three Cabinets), 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980).

155. *Id.* at 830, 103 L.R.R.M. at 1509. In addition to discharging the supervisor, the employer discharged a number of nonsupervisory employees, questioned other employees about their union status, and threatened to close the plant if a union ever represented the employees.

156. *Id.* at 829, 103 L.R.R.M. at 1508.

157. The dissent agreed that an employer may not discharge a supervisor for testifying at a Board proceeding, for refusing to commit unfair labor practices, or for failing to stop unionization. *Id.* at 831, 103 L.R.R.M. at 1510. (Truesdale, M., dissenting).

158. *Id.*

concerted activity along with rank-and-file employees is or is not protected. Truesdale maintained that the *sui generis* factual pattern of *Pioneer Drilling* was responsible for the confusion,[159] and that no case before or after *Pioneer Drilling* supported the conclusion that the discharge of the supervisor was designed to thwart unionization among rank-and-file employees. In the unique factual situation of *Pioneer Drilling*, it was not unreasonable for the Board to find that the discharge of the supervisors was a pretext used to disguise the employer's efforts to rid itself of union adherents in general. The Board, however, has extended the *Pioneer Drilling* rationale to other cases involving "a pattern of pervasive unfair labor practices," with the inevitable result that these cases are no longer conceptually reconcilable. Truesdale recognized this development and maintained that the Board had used the "pattern of conduct" analysis to extend the section 8(a)(1) protections to supervisors, contrary to specific statutory language and congressional intent. Truesdale proposed a simpler test that would be consistent with the statutory exclusion of supervisors: the discharge of supervisors—either by themselves or in conjunction with rank-and-file employees—as a result of their participation in union or concerted activity is not unlawful, unless the discharge *directly* interferes with the protection of employees' statutory rights.[160]

Truesdale also took issue with the remedy ordered by the majority in *Brothers Three Cabinets*. He maintained that reinstatement of the supervisor was unwarranted because, "[f]rom a remedial standpoint, reinstatement with back pay is all that is needed to convey to other employees the extent to which the Act protects their right to organize and bargain collectively."[161] Moreover, to the extent that the discharge created a coercive atmosphere, the supervisor could simply post a notice informing employees of their rights and of the distinction between the protections afforded employees and supervisors.[162]

An analysis of the cases in the third category reveals that the Board has been most willing to invoke the "pattern of conduct" analysis in situations in which the supervisor has been discharged, in the context of other employer misconduct, due to his status as a union member or organizer. Ostensibly, the Board's concern has been with the effect of a supervisory discharge upon the employ-

159. *See* text accompanying notes 79-87 *supra*.
160. 248 N.L.R.B. at 834, 103 L.R.R.M. at 1513.
161. *Id.*
162. *Id.*

ees' union activities. The Board has thus found it necessary in these cases to reinstate the supervisor in order to reassure employees that their concerted activity is protected under the Act.

V. Analysis and Conclusion

A. Application of the Standard

A perusal of recent supervisory discharge decisions makes it clear that the Board's application of a "pattern of conduct" analysis has been inconsistent and has created unnecessary confusion.[163] The critical factor associated with this standard has not been the presence or absence of other unlawful employer actions accompanying a discharge, but rather the characterization of the particular activity engaged in by the supervisor as one that merits protection, and thus reinstatement of the supervisor. The Board will therefore discover a "pattern of conduct" when an employer has discharged a supervisor, along with other nonsupervisory personnel, for prounion status or organizational efforts; based upon the same general factual context of employer actions, the Board will not find a "pattern of conduct" when the employer has discharged the supervisor for engaging in a purely economic dispute.

The characterizations of the supervisor's activity and the motive for the discharge are obviously critical. If the Board finds that the supervisor's union status served as the motivation for his discharge by an antiunion employer, then the Board will almost certainly find a "pattern of conduct" and order reinstatement. On the other hand, if the Board characterizes the discharge as having been motivated by the supervisor's participation in a purely economic dispute or strike, then it will allow the discharge to stand. If the Board perceives that the discharge was a result of the supervisor's complaints concerning working conditions or management behavior, then it is difficult to predict what the Board will decide. Admittedly, these categories are not clear-cut, but they do represent an analytical framework with which one may reasonably predict the Board's behavior. As the foregoing examination of the case law indicates, however, the Board's behavior has not been uniform. Thus, one obvious difficulty with this proposed framework lies in predicting how the Board will characterize the supervisor's conduct.

The problems associated with characterizing the supervisor's

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163. *Id.*

activity exemplify the thesis of this Note: the "pattern of conduct" standard has proven unworkable and therefore should be abandoned. The Board has applied it inconsistently, leaving employers and supervisors confused concerning what specific supervisory activity is proscribed and under what circumstances an employer may discharge a supervisor for union activities. As noted previously, a "pattern of conduct" arguably may be found in most, if not all, of the supervisory discharge cases. None of the discharges occurred in isolation; all were accompanied by varying degrees of unlawful or questionable conduct on the part of management. The Board has used the finding of a "pattern of conduct" as a pretext to protect certain types of concerted supervisory activity. As a result, "pattern of conduct" is an ambiguous legal standard that does not lend itself to consistent application by Trial Examiners, the Board, or appellate courts. Moreover, since the extent of the employer's wrongdoing is not the true issue, searching for a "pattern of conduct" is an inadequate method for predicting the Board's disposition of any particular supervisory discharge. Instead, an examination of the *type of conduct* engaged in by the supervisor provides a more accurate and reliable means by which to analyze these cases and to predict results. Thus, from a purely jurisprudential perspective, the "pattern of conduct" standard has proven problematical and should be rejected. Practical considerations, however, are not the only argument for the development of a different standard.

B. Theory of the Standard

The "pattern of conduct" standard should also be rejected on policy grounds. The test evinces an unreasonable concern over the effect of a supervisory discharge upon rank-and-file employees. The underlying rationale of the "pattern of conduct" cases has been that the net effect of the supervisor's discharge would be to cause nonsupervisory employees reasonably to fear that the employer would take similar action against them if they engaged in protected concerted activities. Thus, the Board has ordered the employer to reinstate the supervisor in order to reassure employees that their rights are immune from employer retaliation. As the Fifth Circuit has pointed out, however, this rationale has injected a "false issue" into the analysis:

> Any time an employee, be he supervisor or not, is fired for union activity rank-and-file employees are likely to fear retribution if they emulate his example. But the Act does not protect supervisors, it protects rank-and-file em-

> ployees in their exercise of rights. If the fear instilled in rank-and-file employees were used in order to erect a violation of the Act, then any time a supervisor was discharged for doing an act that a rank-and-file employee may do with impunity the Board could require reinstatement. Carried to its ultimate conclusion, such a principle would result in supervisory employees being brought under the protective cover of the Act. Congress has declined to protect supervisors and the courts should not do by indirection what Congress has declined to do directly.[164]

Thus, the Board's excessive concern with the impact upon employees of an otherwise lawful supervisory discharge has resulted, in many cases, in the extension of the protective mantle of the Act to cover supervisors.

The "pattern of conduct" standard also violates legislative intent. The legislative history reveals without question the congressional intent that management have the right to discharge union supervisors for *any* reason.[165] Congress noted that management has the legitimate prerogative to employ supervisors allied with and loyal to management. The Board oversteps its role and function when it insists that management retain supervisors who are union adherents or organizers. In a broader sense it is an impermissible intrusion into the private sector for government, in the form of the NLRB, to dictate to employers the union orientation of their representatives. Congress has declared, and business judgment confirms, that management has the right to be antiunion and to resist unionization with all lawful means. Management should thus have the right to choose agents who are loyal to its lawful goals; if one of these goals is to resist unionization, then the Board should not bamper those efforts by interfering with the choice of the management team. Unions certainly have the right to remove union agents who were antiunion in philosophy and in fact allied with management. Basic fairness dictates that in an adversarial context, such as that of labor and management, each side should have the right to choose members loyal to its lawful objectives. This analysis necessarily involves a balancing approach: the policy choice is between the retention of management's privilege to choose its own supervisors and to insist on supervisory loyalty, and the need to reassure employees that the supervisory discharge does not affect their section 7 rights. Recent Board decisions reveal an excessive solicitude

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164. Oil City Brass Works v. NLRB, 357 F.2d 466, 470 (5th Cir. 1966). The court concluded that the "real issue" is whether the company directly interfered with, restrained, or coerced rank-and-file employees in the exercise of their guaranteed rights through the discharge of the supervisor. *Id.*

165. *See* notes 30-31 *supra* and accompanying text.

for the marginal effect of a supervisory discharge upon employee's rights at the expense of the employer's right to demand allegiance from its supervisors.

The Board's use of the reinstatement remedy reveals its philosophical bent. If the goal is to insure that employees are aware of their section 7 rights and to prevent management from restraining, coercing, or interfering with employees in the exercise of those rights, then reinstatement of the supervisor does not maximize this goal. The proper remedy is not reinstatement, but a simple notice to employees describing the reason for the discharge and drawing a distinction between the rights of employees and supervisors. Reinstatement of the nonsupervisory employees discharged with the supervisor for union activity should also serve as ample notice to all employees that concerted activity is indeed protected.[166] Therefore, reinstatement of the supervisor alone does not further the ostensible goal of protecting employees' rights. The notice remedy, on the other hand, would alleviate any coercive effect of the supervisory discharge without encroaching upon the managerial province of supervisory selection.

The Board has used the "pattern of conduct" analysis to reinstate supervisors discharged, along with nonsupervisory employees, for union-related activities. The net effect of recent decisions, regardless of Board-issued denials to the contrary, has been to extend section 8(a)(1) protections to any supervisor discharged in close proximity with other nonsupervisory employees for union-related activity. Thus, "pattern of conduct" analysis is merely an instrument used by the Board to implement a policy objective. The Board uses this instrument most frequently when an employer has discharged a supervisor purely as a result of his status as a union adherent or organizer. Ironically, this is precisely the type of discharge sanctioned by Congress with the enactment of the Taft-Hartley Act.

C. Conclusion and a Proposal

The Board-created extension of section 8(a)(1) protection to union supervisors is unwarranted and unwise. Not only is it contrary to the express intent of Congress, but it also unjustly infringes upon legitimate management prerogatives. The Board has extended "pattern of conduct" analsysis—which emerged from the

166. *See* DRW Corp. (Brothers Three Cabinets), 248 N.L.R.B. 828, 103 L.R.R.M. 1506 (1980) (Truesdale, M., dissenting).

unique factual pattern of one decision—to employer actions for which it was never intended. As such, the standard is not only unwieldy but also philosophically unjustified and contrary to congressional mandate. Accordingly, the Board should abandon the standard and return to pre-*Pioneer Drilling* analysis by reinstating supervisors only when the discharge has "directly affected" employees' statutory rights and when reinstatement is absolutely necessary to protect those rights. Thus, the Board should reinstate a supervisor only when the discharge was motivated by such actions as the supervisor's refusal to commit unfair labor practices, by his failure to prevent unionization, or by his testifying at a Board proceeding.

In those situations in which an employer discharges a supervisor in close proximity with other nonsupervisory employees for union-related activities, the coercive effects of the discharge on the section 7 rights of employees could be alleviated by the issuance of a notice to all employees informing them of the distinction between the relative rights of supervisory personnel and nonsupervisory personnel. Accompanied by the reinstatement of nonsupervisory employees, the notice should provide ample reassurance to nonsupervisory personnel that a supervisory discharge does not affect their protected rights. A return to this traditional, "directly affect" standard would eliminate the analytical difficulties inherent in the "pattern of conduct" standard and provide a workable legal doctrine capable of uniform application. More importantly, the "directly affect" test would conform Board doctrine to congressional intent, while restoring management's legitimate interest in choosing, and retaining, supervisors loyal to their employers.

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