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the conduct is arbitrary? Did the court intend to use a different test to indicate a different position, or do the two tests mean the same thing? After fifty-two years of silence on this issue by the Supreme Court, a more thorough analysis would have been helpful. It would seem desirable for the Supreme Court to re-evaluate its stand on this entire issue and establish a workable standard reflecting present day attitudes toward insurers.²⁹

Larry J. Gunn

LABOR LAW—EMPLOYER INTERROGATION

Upon learning that a union campaign was under way in his business establishment the employer inquired of an employee whether or not she had signed a union card. After receiving a negative reply the employer stated that he knew that union cards had been passed around the day before. Later that day the employer questioned a second employee as to how many cards she had in her possession. He then proceeded to inform her that if the employees' complaint was the need for more money they had a raise coming anyway, and, that having a union does not necessarily guarantee higher wages. The trial examiner for the National Labor Relations Board concluded that, as there was no reasonable justification for such interrogation, it was a violation of Section 8(a) (1) of the National Labor Relations Act.¹ The court of appeals refused to enforce the trial examiner's order, holding that in order to violate the Act the "interrogation must rise to the level of coercion or restraint." Furthermore, the burden of proof rests upon the General Counsel. The employer need not "justify each innocuous inquiry about a union cam-

29. The judicial attitude toward insurance contracts has changed greatly over the years because of the realization that these contracts are written by the insurer and that the insured has no real bargaining position.

1. National Labor Relations Act (Wagner Act), 49 Stat. 449 (1935), as amended by Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), and Labor-Management Reporting and Disclosure Act (Landrum-Griffin Act), 73 Stat. 519 (1959), 29 U.S.C. §§ 141-187 (1964). NLRA § 8(a) (1), 29 U.S.C. § 158(a) (1) (1964) provides: "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." NLRA § 7, 29 U.S.C. § 157 (1964) states: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all or such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a) (3)."

paign." *NLRB v. Welsh Industries, Inc.* 385 F.2d 538 (6th Cir. 1967).

The earliest decisions in regard to employer interrogation were to the effect that it is coercive per se and thus violative of Section 8(a) (1) of the Act. In *Standard-Coosa-Thatcher Co.*² the Board held that any inquiry by the employer into any aspect of union activity was violative of the Act, since it constituted interference with the employees' rights. Furthermore, the effect of interrogation was tantamount to restraint or coercion as the employee would reasonably be led to believe that the employer was contemplating reprisals. In addition, interrogation should be forbidden as the information gained thereby may be used in committing other unfair labor practices—such as discrimination or discharge.

While interrogation was generally held to be per se coercive there was one recognized exception. It was held by the NLRB in *May Dep't Stores*³ that where the employer was preparing his defense to a complaint against him in court he was privileged to interview employees to discover facts "within the limits of the issues raised by the complaint." Of course he was forbidden to go beyond the necessities of preparation for trial and discuss or inquire into union activity or dissuade employees from joining a union. This Board standard was accepted in *Joy Silk Mills v. NLRB*⁴ and *NLRB v. Katz Drug Co.*⁵

The per se doctrine itself was destined to be relatively short-lived. As early as 1948 the Seventh Circuit rejected it in favor of a more flexible approach. The court stated:

"Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background and not associated as a part of a pattern or course of conduct hostile to unionism or as a part of espionage upon employees cannot, standing alone and naked, support a finding of a violation of Section 8(a) (1)."⁶

This approach was adopted in 1954 by the Board in *Blue*

2. 85 N.L.R.B. 1358 (1949).

3. *May Dep't Stores Co.*, 70 N.L.R.B. 94, 95 (1946).

4. 185 F.2d 732 (D.C. Cir. 1950).

5. 207 F.2d 168 (8th Cir. 1953).

6. *Sax v. NLRB*, 171 F.2d 769, 773 (7th Cir. 1948). See also *NLRB v. Syracuse Color Press, Inc.*, 209 F.2d 596 (2d Cir. 1954); *NLRB v. England Bros, Inc.*, 201 F.2d 395 (1st Cir. 1953).

*Flash Express, Inc.*⁷ Instead of finding the interrogation coercive per se the Board ruled that the coercive nature of employer interrogation must be determined individually in each case. Although the Board did not set forth definitive tests by which such a determination was to be made in each situation, it did indicate what the legitimizing factors were in this case. These were: (1) a legitimate employer purpose which was communicated to the employee; (2) assurances which were given against reprisal; and (3) a background of the interrogation which was free of employer hostility toward the union. This case-to-case determination of coerciveness approach was accepted by the Eight Circuit in *NLRB v. Protein Blenders, Inc.*⁸ where it was held that whether or not interrogation could be found to be a violation depended upon "the setting, the conditions, the methods, the incidents, the purpose, or other probative context of the particular situation." In *NLRB v. Firedoor Corp. of America*⁹ the court was more specific as to the relevant factors in determining whether coercion was present. These factors were whether there was a background of antiunionism by the employer; whether the information sought was such that the employer in good faith needed—such as to check a union's claim to a majority; whether the identity of the interrogator and the place and method of the interrogation were such as to create an atmosphere which might intimidate the employee; and, to a lesser extent, whether the employee answered truthfully.¹⁰

The Board, in cases subsequent to *May*, had developed a test of coerciveness very similar to that enunciated in *Firedoor*. In *Johnnie's Poultry*,¹¹ it was held that to legitimize employer interrogation, there must be a lawful purpose. Two such purposes have been recognized—verification of a union's claimed majority status and preparation for trial. If the employer has one of these two purposes then he is free to interrogate employees but only subject to several specific safeguards. First, he must inform the employee of the purpose, assure him against reprisal, and obtain his voluntary participation. Second, the background of the interrogation must be free of employer hostility toward the union and the nature of the interrogation itself must not be coercive.

7. 109 N.L.R.B. 591 (1954).

8. 215 F.2d 749, 750 (8th Cir. 1954).

9. 291 F.2d 328 (2d Cir. 1961).

10. *Id.* at 331. These tests were essentially reaffirmed in *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

11. 146 N.L.R.B. 770 (1964). Enforcement was denied on the ground that the Board's order was not warranted by substantial evidence. *NLRB v. Johnnie's Poultry Co.*, 344 F.2d 617 (8th Cir. 1965).

Third, the questioning must be restricted to the necessities of the legitimate purpose.

One main difference between the Board and the *Firedoor* tests is that the court specifically referred to the identity of the interrogator and the place and method of the interrogation as a relevant factor while the Board only referred generally to the fact that the nature of the interrogation must not be coercive. Furthermore, the court assigned some weight to the truthfulness of the employees' replies while the Board has been silent as to this factor. On the other hand, the Board has been very specific about the fact that the employer must inform the employee of the purpose of the interrogation and assure him against reprisal while the *Firedoor* court did not so require.

As recently as 1967 the danger of coerciveness in employer interrogation was still being emphasized by both the court and the Board. In *NLRB v. Neuhoff Bros., Packers Inc.*¹² it was pointed out that, while not all interrogation is coercive, it must be carried out very carefully to avoid infringing on employees' rights. The principle of *Johnnie's Poultry* was expressly affirmed, and the court noted that it did not view the reversal of *Johnnie's Poultry* by the Eighth Circuit as a repudiation of that principle. The Board was even more emphatic in *Struknes Construction Co.*¹³ in which it undertook a revision and strengthening of the *Blue Flash* criteria. In order to be legitimate a poll of employees must not only have as its purpose checking the union's claim to a majority, the communication of that purpose to the employee, the giving of assurance against reprisal and an atmosphere free of coerciveness, but the poll must also be conducted by *secret* ballot.

The instant case appears to be a departure from the approaches represented in the cases reviewed above. The court in *Welsh* held that interrogation alone is not offensive, and the employer is under no duty to justify it, since the burden of proof rests upon the General Counsel. This, in effect, is a third approach to the problem of employer interrogation. It is a complete reversal of the earliest approach which held that interrogation was coercive *per se*. Furthermore, it is a marked shift from the second line of cases which held that while employer interrogation does not automatically violate the Act it is nevertheless highly

12. 375 F.2d 372 (5th Cir. 1967).

13. 165 N.L.R.B. No. 102 (1967).

suspect, and fairly rigorous safeguards must be met in order to justify it.

The lack of consistency among the Circuits in dealing with the question of employer interrogation suggests the need for a definitive ruling from the Supreme Court. Such a ruling should reject both the first and third approaches mentioned above. The *per se* doctrine is too inflexible and would not seem to be required by the Act. On the other hand, the third approach does not sufficiently appreciate the great danger inherent in employer interrogation and lacks specific guidelines by which conduct can be tested. The most reasonable view is to recognize that interrogation can sometimes be useful and harmless, but that it can very easily lend itself to abuse. Thus, any definitive ruling should lay down the requirements to be met in order to justify such interrogation. Some of the cases discussed above suggest several which should certainly be included; the purpose must be legitimate (and the legitimate purposes should be spelled out); there should be no background of employer hostility toward the union; the employee should be apprised of the purpose of the inquiry and assured against reprisal; the interrogation must not be coercive by its nature (to be considered here are the identity of the interrogator and the place and method of interrogation); and, finally, the interrogation must be confined to the necessities of the legitimate purpose.

Philip R. Riegel, Jr.

OPEN HOUSING—1866 CIVIL RIGHTS ACT—1968 CIVIL
RIGHTS ACT—THIRTEENTH AMENDMENT

In *Jones v. Alfred H. Mayer Co.*¹ petitioner alleged that respondents refused to sell petitioner a home for the sole reason that he was Negro, and prayed for an injunction under 42 U.S.C. Section 1982. The United States District Court denied relief,² and the Court of Appeals for the Eighth Circuit affirmed.³ The Supreme Court granted certiorari and reversed on the ground that Section 1 of the Civil Rights Act of 1866, now 42 U.S.C. Section 1982, was intended to reach private acts of discrimination and that the act was constitutional under the thirteenth amendment. This Note offers a comparison of the Civil Rights Act of 1866

1. 892 U.S. 409 (1968).

2. *Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115 (E.D. Mo. 1966).

3. *Jones v. Alfred H. Mayer Co.*, 379 F.2d 33 (8th Cir. 1967).