The Supervisor as an American Hostage: Belcher Towing Company v. NLRB

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statute should be amended to shorten the liberative prescriptive period to a shorter limit, such as one year. However, the fact that illegitimates now will be able to bring suit based on this statute should not control the disposition of the retroactivity issue.

In light of the factors of equity to similarly situated litigants, the more limited effect the decision would have on stability of land titles and the orderly disposition of property, the avoidance of stale claims in proceedings to establish filiation, and minimal interference with the rights of third persons, it is respectfully submitted that the date of Sidney Brown's death is the most logical and most equitable choice available.

It should be recognized that the decision in Brown, whatever its ultimate application, can be viewed as a substantial development in the area of illegitimate's rights in Louisiana intestate succession law. The case's impact on intestate successions certainly will be realized and probably will influence changes in related areas of the law, including testate successions and the concept of forced heirship. In view of these far-reaching effects, it is extremely important that the extent of retroactive effect of the decision in Succession of Brown be clarified as soon as possible.

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Captain Frank Mosso of the Belcher Towing Company was discharged after failing to report union activity aboard the company-

77. In this way a third person would obtain good title in one year from the date of the judgment of possession rather than ten years. This limited period would help to remove some of the uncertainty surrounding title to immovable property.

78. Succession of King, No. 7,612 (La. App. 3d Cir. 1980), would present a difficult factual situation to the court. An illegitimate child, whose birth certificate named King as the father, and who had always been recognized publicly as King's child, claimed she was an acknowledged illegitimate and attacked the constitutionality of article 919. The Third Circuit Court of Appeal did not decide the issue of the constitutionality of the provision, finding that such a constitutional challenge must be raised at trial. The court dismissed the child's claim. It appears that the court would consider the case res judicata as to the child in King and would deny any rights in her father's intestate succession.

owned vessel that he commanded. One aspect of the no-solicitation rule that the Belcher Towing Company enforced was a requirement that supervisory employees, such as tugboat captains like Mosso, report all union activity aboard the Belcher vessels that they commanded. In an action brought by Mosso’s union against the towing company, the hearing examiner found that Mosso indeed had been discharged for failing to report union activity to the Belcher management. Nevertheless, the hearing examiner reasoned that Mosso’s discharge could not be termed a violation of section 8(a)(1) of the National Labor Relations Act without a “prior definitive and final finding that [Belcher’s] alleged unlawful ‘no-solicitation’ rule was in fact an unfair labor practice.” The National Labor Relations Board adopted the hearing examiner’s conclusions about the reason

1. On October 6, 1975, while Mosso was ashore making a telephone call, Mr. Wayland Burgess climbed aboard Mosso’s tug. At the time, the tug was docked in Port Everglades, Florida. Burgess was a union organizer, a representative of Local 333 of the United Marine Division of the International Longshoremen’s Association, AFL-CIO. When Mosso returned, Burgess introduced himself. After chatting with Burgess for a short time, Mosso asked him to leave: “For crying out loud, come on, get out of here before you get the crew in trouble.” NLRB v. Belcher Towing Co., 238 N.L.R.B. No. 63 (Sept. 27, 1978), at 37. Mosso did not report Burgess’ visit to the Belcher management, although he knew that making such a report was one of his duties as a supervisor. Mosso had reasons for failing to mention Burgess’ visit: “I had believed it was against the Constitution and the laws to inform on the men who were trying to get a union to protect them.” Id. at 36. Mosso was fired on October 10, 1975. Id. at 35.

2. Id. at 35.

3. Mosso was represented by the International Longshoremen’s Association. The union complained that Mosso’s dismissal represented a violation of section 8(a)(1) of the National Labor Relations Act. Besides this complaint, several other allegations of unfair labor practices were made against Belcher. The Marine Engineers Beneficial Association, also an AFL-CIO affiliate, claimed that Belcher had committed multiple violations by warning employees that any caught signing union pledge cards would be fired, by instructing its captains to keep employees under surveillance through the use of time logs and other reports, and by requesting that employees report any contacts that they had with unions. Also, two employees who claimed that they had been discharged because of their union activities alleged section 8(a)(3) discriminatory discharge violations. A complaint consolidating these individual allegations was filed with the National Labor Relations Board on April 26, 1976. Id. at 3.

4. Id. at 38.


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 such activities.

6. 238 N.L.R.B. No. 63 (Sept. 27, 1978), at 35.
for Mosso's discharge, but decided that there was no need for a "prior definitive and final finding" that the towing company's no-solicitation rule was an unfair labor practice. The Board determined that Belcher's no-solicitation rule was "invalid" and that Mosso's discharge represented an 8(a)(1) violation. Affirming the Board's decision, the Court of Appeals for the Fifth Circuit held that although supervisors are excluded from the protections that the Act affords to non-supervisory employees, the discharge of a supervisor still violates section 8(a)(1) of the Act when a supervisor's discharge interferes with employee exercise of guaranteed organizational rights or when the discharge is motivated by a supervisor's refusal to commit an unfair labor practice. Belcher Towing Company v. N.L.R.B., 614 F.2d 88 (5th Cir. 1980).

Congress' stated purpose in passing the National Labor Relations Act of 1935 was to provide legal protection of the "right of employees to organize and bargain collectively." There were economic justifications for providing employees these protections:

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial

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7. Id.
8. Id.
9. Id. at 5. The Board also observed that it could not be "gain-said that [Belcher] unlawfully required its captains to commit unfair labor practices." Id.
10. Id. at 6. The Board ordered Mosso reinstated with backpay. Id. at 7.

[The national labor relations bill does not break with our traditions. It is the next step in the logical unfolding of man's eternal quest for freedom. For 25 centuries of recorded time before the machine age we sought relief from nature's cruel and relentless tyranny. Only 150 years ago did this country cast off the shackles of political despotism. And today, with economic problems occupying the center of the stage, we strive to liberate the common man from destitution, from insecurity, and from human exploitation.

In this modern aspect of a time-worn problem the isolated worker is a plaything of fate. Caught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with other of his group.

Id. at 215-16. Unlike Ahab, and happily for Wagner, Wagner saw the consummation of his dream in the passage of the Act in 1935. Ahab, of course, was delivered a damp and unfulfilling death, a victim rather than a victor.]
strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce . . . .12

Congress reasoned that this bargaining inequality resulted in lowered wages and depressed purchasing power for employees.13 Accordingly, the Act prohibited an employer to "interfere with, restrain, or coerce" employees in the exercise of their guaranteed rights. Moreover, the Act prohibited an employer to "encourage or discourage membership in any labor organization" by "discrimination in regard to hire or tenure . . . or any term or condition of employment . . . ."15 These specific prohibitions upon employer actions rendered inviolable the employee's right to join a union.

The Act's weaknesses were immediately apparent. Most obvious to employers was the fact that while the Act prohibited employer interference with protected employee rights, no such complementary restrictions were placed on unions.16 A less apparent and

12. National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1976)). This is not quite the present language of the statute. In 1947, the modifier "some" was added before the word "employer" in both instances in which it appears in the first sentence of the section. The section now reads: "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining . . . ." Management Labor Relations Act, ch. 120, Title 1, § 101, 61 Stat. 136 (1947) (29 U.S.C. § 151 (1976)).


The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Id.


15. National Labor Relations Act, ch. 372, § 8, 48 Stat. 452 (1935) (current version at 29 U.S.C. § 158(a)(3) (1976)) provides: "(a) It shall be an unfair labor practice for an employer—(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in a labor organization . . . ." This language also represents that of the original version of the Act.

16. See National Labor Relations Act, ch. 372, § 8, 49 Stat. 452 (1935) (current version at 29 U.S.C. § 158 (1976)). In its original form the N.L.R.A. was not given to an equal division of employer and labor union prohibitions. The subsections 8(a), which defines the restrictions placed upon employer actions, and 8(b), which defines the restrictions placed upon actions by labor unions, did not exist. These distinctions were made in 1947, when the Taft-Hartley Act amended the N.L.R.A. of 1935. See Labor Management Relations Act, ch. 120, Title I, section 101, 61 Stat. 140 (1947)
more complicated problem was that of determining who qualified for the protections of the Act. The Act contrasted "employees," who were subject to its protections, with "employers," who were not. It defined "employer" to include anyone acting in an employer's interest. Clearly, an individual formally acting in an employer's interest was not an "employee" subject to the Act's protections. Yet, the matter of determining at what point an individual began acting in management's interest was a problem that defied satisfactory resolution.

The position of supervisor was the focal point for determining where labor's interests ended and where management's interests began. In 1947, in Packard Motor Car Company v. N.L.R.B., the United States Supreme Court decided that labor's interests did not end just short of the supervisory figure. The Court allowed that for the purposes of the Act, supervisors were to be considered as

(current version at 29 U.S.C. § 158 (1976)). Until 1947, section 8 of the Act concerned only those employer actions that would affect employees in the free exercise of their guaranteed rights.

In 1947, Congress provided for the addition of subsection 8(b). This subsection described those actions on the part of a labor organization that would define an unfair labor practice. In large part, the restrictions placed on labor organizations mirrored the restrictions that had been placed already on employers. For instance, 8(b)(1) made it an unfair labor practice for a labor organization to "restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 or . . . (B) (to restrain or coerce) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." 29 U.S.C. § 158(b)(1) (1976). And section 8(b)(2) prohibited a union to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . ." 29 U.S.C. § 158(b)(2) (1976). In line with these changes, Taft-Hartley also added a paragraph to section 1 of the Act. The language of this paragraph describes how unfair labor practices on the part of some labor organizations have the effect of obstructing commerce:

Experience has . . . demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights guaranteed herein.


18. 330 U.S. 485 (1947). This decision was soon legislatively negated by the passage of the Taft-Hartley Act of 1947.
employees, rather than as management figures.\textsuperscript{19} In dissent, Justice Douglas claimed that the majority view tended to "obliterate the line between management and labor."\textsuperscript{20} Douglas reasoned that if supervisors could be considered as employees within the meaning of the Act, so could "vice-presidents, managers, assistant managers, assistant superintendents," and anyone else, save company directors.\textsuperscript{21}

The \textit{Packard Motor Car Company} decision particularly, and the structural imbalance of the Act to the disadvantage of employer rights in a more general sense, influenced the passage of the Labor Management Relations Act, or the Taft-Hartley Act, of 1947.\textsuperscript{22} Taft-Hartley amended the National Labor Relations Act significantly, specifically excluding supervisors from the protections of the Act\textsuperscript{23} and placing unions under several of the same restrictions that the earlier version of the Act had placed on employers.\textsuperscript{24} At the same time, Taft-Hartley broadened the protected rights of employees by securing for them the right to refrain from participating in any organizational or bargaining activities.\textsuperscript{25}

The practical reason that the \textit{Packard Motor Car Company} decision frustrated employers and employer sympathizers was that the Court had made it impossible for employers to consider any employees, especially supervisors, as loyal to the employers. Both the Senate and the House Reports on Taft-Hartley focused on the

\begin{itemize}
\item \textsuperscript{19} \textit{Id.} at 488.
\item \textsuperscript{20} 330 U.S. at 494 (Douglas, J., dissenting). Douglas argued that the majority view tended to "emphasize that the basic opposing forces in industry are not management and labor but the operating groups on the one hand and the stockholder and bondholder group on the other." \textit{Id.} Douglas was concerned that the result of the decision would be that the "struggle for control or power between management and labor [would become] secondary to a growing unity in their common demands on ownership." \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{23} Taft-Hartley added language to section 2(3) of the Act, which removed from the definition of "employee" "any individual employed as a supervisor." Labor Management Relations Act, ch. 120, Title I, § 101, 61 Stat. 137 (1947) (current version at 29 U.S.C. § 152(3) (1976)).
\item \textsuperscript{24} See note 16, supra.
\item \textsuperscript{25} See 29 U.S.C. § 157 (1976). Taft-Hartley expanded the protected rights of employees originally listed in section 7 by adding language that guaranteed employees the right to "refrain from any or all of such activities . . ." Labor Management Relations Act, ch. 120, Title I, section 101, 61 Stat. 140 (1947) (current version at 29 U.S.C. § 157 (1976)).
\end{itemize}
need for a loyal agent, regardless of whether he represented management or labor.26

The Board and the reviewing courts came to recognize that though supervisors were excluded from the Act's protections, an employer action against a supervisor as significant as a dismissal might nevertheless constitute an unfair labor practice. The theory developed that such an unfair labor practice occurred when the dismissal of a supervisor had a coercive effect on employees in the exercise of their guaranteed rights of organization and bargaining.27

But just when the dismissal of a supervisor coerces employees in the exercise of their guaranteed rights is a question that remains to be resolved with any certainty.

The reason that the question has not been resolved satisfactorily is that the Board and the reviewing courts have used dissimilar tests to determine when the dismissal of a supervisor has coerced employees in the exercise of their protected rights. Under one view, there is no coercion until an employer dismisses a supervisor who has refused to obey the employer's instructions to commit an unfair


The House Report on Taft-Hartley openly criticized the Board for changing the law in Packard Motor Car Co. As the Senate Report, the House Report focused on the need for a loyal agent:

What this bill does is to say what the law has always said until the Labor board, in the exercise of what it modestly calls its “expertness,” changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any reason, he does not trust.


27. NLRB v. E. Anthony & Sons, Inc., 70 N.L.R.B. 717, 720-21 (1946), enforced, 163 F.2d 22 (D.C. Cir. 1947). Since the Board found that several supervisors had been discharged discriminatorily, technically only an 8(3) violation was involved. 70 N.L.R.B. at 720. Still, the Board went on to observe that:

The discharge of supervisory employees under circumstances which suggest no motivation other than hostility to any union activity, as such, operates as a warning to all employees of the danger attached to adherence to a union, and hence generally discourages union membership. The effect of the discharges of [the supervisors] was to discourage union membership among all employees.

Id. at 720-21. For a chronological overview of the Board's actions in cases involving the effects of the discharge of a supervisor on employees, see Hament, Are Instructions to Supervisors to Commit Unfair Labor Practices Unlawful Per Se?, 26 Lab. L.J. 281 (1975).
NOTES

The crucial elements of this view are the dismissal, the supervisor's refusal, and the instructions to commit an unfair labor practice. At times the Board and the courts have maintained that even if the supervisor were dismissed for refusing to commit an unfair labor practice, as long as the employees did not know the reason for the dismissal, there was no coercion. At other times the


More significantly, there have been cases wherein a supervisor has not been fired for refusing to commit an unfair labor practice. The Board has decided that absent a dismissal for such a refusal there is no violation. See NLRB v. Bedford Discounters, Inc., 204 N.L.R.B. 509, 513 n.21 (1972); NLRB v. Florida Builders, Inc., 111 N.L.R.B. 786 (1955) (affirmed by NLRB v. General Engineering, Inc., 131 N.L.R.B. 648, 649 (1961)).

The concern, both in cases where a supervisor has and has not been fired, is with the coercive effect on employees. In NLRB v. E. Anthony & Sons, Inc., 70 N.L.R.B. 717 (1946), the Board noted that the dismissal of the supervisors operated "as a warning to all employees of the danger attached to adherence to a union." Id. at 720. In Vail Mfg. Co., the Board considered the small size of the plant and decided that the employees probably knew of the reason for the dismissal of the supervisor, 61 N.L.R.B. at 183. Thus, there was coercion. Id. In the instant case, the Board reasoned that because of both Mosso's discharge and the "obvious and necessary effects of this action on employees (particularly those under Mosso's supervision)," 238 N.L.R.B. No. 63 at 6, there was prohibited employee coercion. Id. Yet, when the supervisor's refusal has not resulted in a dismissal, the Board has not found coercion. For example, when a supervisor failed to comply with his employer's orders to supply him with the names of pro-union employees, the Board found no employee coercion, probably because he was not dismissed for this failure. NLRB v. Empire Pencil Co., 86 N.L.R.B. 1187, 1190 n.6 (1949), enforced, 187 F.2d 334 (6th Cir. 1951).

29. In NLRB v. General Engineering, Inc., 131 N.L.R.B. 648 (1961), enforced as modified, 311 F.2d 570 (9th Cir. 1962), the Board considered a situation wherein a supervisor was fired for refusing to support the pretext that his employer advanced to explain what actually was a discriminatory discharge. The Board decided that the dismissal of the supervisor represented an 8(a)(1) violation:

It is well settled that the discharge of a supervisor for refusing to engage in the unfair labor practice of thwarting the employees' union activities violates Section 8(a)(1) of the Act, as the net effect thereof is to cause employees reasonably to fear that the employer would take similar action against them if they continued to support the Union.

131 N.L.R.B. at 650. The Ninth Circuit Court of Appeals refused to impute employee knowledge of the reason for the supervisor's discharge and reversed the Board: "[T]he record evidence is insufficient to support a finding or to sustain an inference that any
Board and the courts have found the dismissal itself, apart from any evidence of employee knowledge, sufficient to define coercion. So, under either view of employee knowledge, the operative theory is one of effective coercion. It is this discrete employer action of dismissing the supervisor that causes and defines the coercion. What is most significant about this theory is that the mere giving of instructions to a supervisor to commit an unfair labor practice does not constitute a violation. Beyond that, if the supervisor refuses to carry out the instructions, there is still no coercion until the employer dismisses him.

The alternative theory that the Board and the courts have employed is one of attempted coercion. Under this theory, the mere giving of instructions to commit an unfair labor practice is sufficient to define a coercion of employee rights. There need be no employee knew or could have known of the motivation for [the supervisor's] discharge." 511 F.2d at 574.

30. When a supervisor was dismissed for refusing to spy on the union activities of company employees, the Board found that the dismissal was unlawful "without regard to employee knowledge" (of the reason for the dismissal). NLRB v. Elder-Beerman Stores Corp., 173 N.L.R.B. 566, 566 (1968), enforced, 415 F.2d 1375 (6th Cir. 1969). In a footnote the Board overruled NLRB v. General Engineering, Inc., 131 N.L.R.B. 648 (1961), to the extent that it was inconsistent with its opinion in this decision. 173 N.L.R.B. at 566 n.4. Later, in a similar situation—supervisor dismissed for refusing to engage in unlawful surveillance—the Board quoted Elder-Beerman Stores, Corp. for the proposition that such a dismissal is an unfair labor practice without regard to employee knowledge of the reason for dismissal. NLRB v. GTE Automatic Electric, Inc., 204 N.L.R.B. 716, 722 (1973).

31. The Board has found an 8(a)(1) violation when an employer instructed a supervisor to commit an unfair labor practice. NLRB v. Cannon Electric Co., 151 N.L.R.B. 1465 (1965); NLRB v. H.N. Thayer Co., 99 N.L.R.B. 1122 (1952), enforced as modified, 213 F.2d 748 (1st Cir. 1954) (decision was also rejected by NLRB v. Florida Builders, Inc., 111 N.L.R.B. 786, 787 (1955), which rejection was affirmed by NLRB v. General Engineering, Inc., 131 N.L.R.B. 648, 649 (1961), enforced as modified, 311 F.2d 570 (9th Cir. 1962); NLRB v. Dixie Shirt Co., Inc., 79 N.L.R.B. 127 (1948), enforced, 176 F.2d 969 (4th Cir. 1949) (decision rejected by implication when H.N. Thayer Co. was rejected by Florida Builders, Inc.).

32. In NLRB v. Dixie Shirt Co., Inc., 79 N.L.R.B. 127 (1948), enforced, 176 F.2d 969 (4th Cir. 1949), the Board observed that such instructions described an unfair labor practice because the employer's conduct in giving the instruction was "reasonably calculated . . . to interfere with the free exercise of employee rights under the Act." 79 N.L.R.B. at 128. This view was echoed in NLRB v. H.N. Thayer Co., 99 N.L.R.B. 1122 (1952), enforced as modified, 213 F.2d 748 (1954). The H.N. Thayer Co. Board clearly stated that regardless of whether the instructions to engage in unlawful surveillance were carried out, the instructions themselves were unlawful because "they constitute(d) an attempt to obtain the kind of information which can be used . . . for no other purpose than to interfere with the employees' right to self organization." 99 N.L.R.B. at 1125. Finally, in NLRB v. Cannon Electric Co., 151 N.L.R.B. 1465 (1965), the Board considered an employer's instructions to his supervisors and said that "the tendency of [the employer's] conduct justifies outlawing it." Id. at 1469.
dismissal, as the employer's manifested intention to commit an unfair labor practice through the person of the supervisor signifies prohibited coercion. Under this theory the Board has been satisfied to focus on the implications of such employer conduct: "The test is whether [the employer] engaged in conduct reasonably calculated or tending to interfere with the free exercise of employee rights under the Act."³³

Even before Taft-Hartley was passed, the Board recognized that the dismissal of a supervisor could have a coercive effect on employees. In 1945, in N.L.R.B. v. Vail Manufacturing Company, the Board faced a situation wherein a supervisor was dismissed for failing to falsify the voting list from a union representation election. Because the plant was small, the Board said, it was reasonable to assume that the employees knew why the supervisor had been dismissed.³⁵ And once employee knowledge was inferred, the Board noted that it also was reasonable to assume that the employees would thereafter be hesitant to engage in union activities for fear of being fired.³⁶ In practical terms Vail established a standard of effective interference. By imputing employee knowledge of the reason for the supervisor's dismissal, the Board decided that the dismissal had the effect of coercing employee rights to the extent prohibited by section 8(a)(1) of the Act.³⁷

Yet, three years later, when the Board decided N.L.R.B. v. Dixie Shirt Company, Inc., not only did the standard for establishing coercion change, but employee knowledge was not even mentioned as a factor to be considered. In Dixie Shirt a supervisor who had been directed to find which employees had been responsible for starting an employee union refused to carry out those orders. The supervisor was not fired. Still, the Board found an 8(a)(1) violation by focusing on the employer's intent, rather than on the effect of his actions:

The [employer] . . . attempted to interfere with its employee's right to self-organization, for the information sought could have been used for no other purpose but such interference. The fact

³⁴. 61 N.L.R.B. 181 (1945), enforced, 158 F.2d 664 (7th Cir. 1947).
³⁵. 61 N.L.R.B. at 183.
³⁶. Id.
³⁷. Id.
³⁸. 79 N.L.R.B. 127 (1948), enforced, 176 F.2d 969 (4th Cir. 1949) (decision rejected by implication when NLRB v. H.N. Thayer Co, 99 N.L.R.B. 1122 (1952), enforced as modified, 213 F.2d 748 (1st Cir. 1954), was rejected by NLRB v. Florida Builders, Inc., 111 N.L.R.B. 786 (1955)).
that the [employer's] attempt did not succeed does not excuse the violation. The test is whether the employer engaged in conduct reasonably calculated or tending to interfere with the free exercise of employee rights under the Act.\textsuperscript{39}

The departure from Vail is unmistakable. In Dixie Shirt the Board adopted an attempted interference standard on the theory that the intention to commit an unfair labor practice constructively coerces employees in the exercise of their protected rights.\textsuperscript{40}

Within a year the Board had disregarded the language of Dixie Shirt. In N.L.R.B. v. Empire Pencil Company,\textsuperscript{41} a 1949 case, a supervisor failed to supply his employer with the names of pro-union employees, despite the employer's request that he do so. The employer had made the same request to several other supervisors, who complied with the request. The Board found no 8(a)(1) violation in the one supervisor's refusal to perform the unlawful surveillance,\textsuperscript{42} but did find an 8(a)(1) violation in the actions of the supervisors who performed the surveillance.\textsuperscript{43} In Empire Pencil, unlike Dixie Shirt, giving instructions to commit an unfair labor practice did not constitute an 8(a)(1) violation until those instructions actually were carried out. If Empire Pencil had employed the logic of Dixie Shirt, the Board would not have distinguished the supervisor who failed to perform surveillance from those supervisors who did perform surveillance, as the employer's instructions alone would have been an 8(a)(1) violation. Instead, in Empire Pencil, the Board revived the effective interference requirement first supplied by Vail.\textsuperscript{44}

The effective interference standard, as revived by Empire Pencil, held the Board's attention until 1952, when in N.L.R.B. v. H.N. Thayer Company,\textsuperscript{45} the Board overruled Empire Pencil.\textsuperscript{46} In Thayer the Board returned to the attempted interference standard of Dixie Shirt.\textsuperscript{47} Thayer involved a number of supervisors who had been instructed to determine which employees where pro-union. The Board

\textsuperscript{39} 79 N.L.R.B. at 128.
\textsuperscript{40} Id.
\textsuperscript{41} 86 N.L.R.B. 1187 (1949), enforced, 187 F.2d 334 (6th Cir. 1951) (decision overruled by NLRB v. H.N. Thayer Co., 99 N.L.R.B. 1122 (1952), enforced as modified, 213 F.2d 748 (1st Cir. 1954)).
\textsuperscript{42} 86 N.L.R.B. at 1190 n.6.
\textsuperscript{43} Id. at 1190.
\textsuperscript{44} See note 34, supra, and accompanying text.
\textsuperscript{45} 99 N.L.R.B. 1122 (1952), enforced as modified, 213 F.2d 748 (1st Cir. 1954) (decision was also rejected by NLRB v. Florida Builders, Inc., 111 N.L.R.B. 786 (1955), which rejection was affirmed by NLRB v. General Engineering, Inc., 131 N.L.R.B. 648 (1961), enforced as modified, 311 F.2d 570 (9th Cir. 1962)).
\textsuperscript{46} 99 N.L.R.B. at 1123 n.15.
\textsuperscript{47} See notes 38-39, supra, and accompanying text.
found an 8(a)(1) violation and said that whether the instructions were carried out was immaterial:

[S]uch instructions are unlawful... whether or not the instructions are ever carried out... because they constitute an attempt to obtain the kind of information which can be used by the employer for no other purpose than to interfere with the employees' right to self-organization...

Notwithstanding the firmness and clarity of this statement, the Board rejected Thayer just three years later. When a number of supervisors failed to carry out an employer's instructions to engage in unlawful surveillance, the Board in N.L.R.B. v. Florida Builders, Inc. refused to find 8(a)(1) employee coercion. The Board rejected Thayer specifically and said that the mere act of giving instructions to commit an unfair labor practice does not necessarily constitute a violation of the Act. In other words, the effective interference standard reappeared.

In one subsequent decision, the Board required not only the dismissal of a supervisor, but employee knowledge of the reason for the dismissal as well. This view was articulated by the Board's 1961 decision in N.L.R.B. v. General Engineering, Inc. in which a supervisor was fired for refusing to dismiss certain employees responsible for union organizing efforts. The Board was careful to point out that simply giving instructions to commit an unfair labor practice did not constitute an 8(a)(1) violation when those instructions remained unexecuted: "[U]nexecuted instructions to a supervisor to discriminate against employees who are unaware of the instructions do not have any impact upon the employees and therefore cannot interfere with exercise of the rights guaranteed by... the Act." However, inasmuch as the supervisor was fired for this refusal,

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48. 99 N.L.R.B. at 1125.
49. Id.
50. NLRB v. Florida Builders, Inc., 111 N.L.R.B. 786 (1955). Technically, the Board did not overrule H.N. Thayer Co., but rejected that decision: "We do not adhere to the Board's doctrine enunciated in the Thayer case that an employer's mere instructions to supervisors to ascertain information concerning the union activities of employees is violative of the Act, whether or not the instructions are accompanied by a direction that unlawful means be used to obtain the information, and whether or not the instructions are ever carried out."
51. Id. at 787. Later, the rejection was affirmed in NLRB v. General Engineering, Inc., 131 N.L.R.B. 648, 649, enforced as modified, 311 F.2d 570 (9th Cir. 1962).
52. Id. at 786 (1955).
53. Id. at 787. Significantly, none of the supervisors were discharged for their failures.
54. Id. at 648 (1961), enforced as modified, 311 F.2d 570 (9th Cir. 1962).
there was 8(a)(1) coercion, as the Board believed that the employees in this situation either knew or could have known of the reason for the discharge.\(^{56}\)

But the Thayer doctrine was soon revived. In 1965, the Board confronted *N.L.R.B. v. Cannon Electric Company*,\(^{58}\) wherein several supervisors had complied with their employer's orders to submit the names of employees thought to be union activists. Though the Board imputed employee knowledge of the employer's instructions to the supervisors, the Board nevertheless determined that there was coercion apart from any necessary finding of employee knowledge.\(^{57}\) The Board went one step further and resurrected Thayer, at least to the extent of saying that instructions to supervisors to find the names of union sympathizers was itself a violation of the Act.\(^{58}\)

If *Cannon Electric* resurrected the attempted interference theory, the decision did not necessarily do so at the expense of the effective interference theory. When a supervisor was fired for refusing to commit an unfair labor practice, the Board, in 1968, said that the firing represented an 8(a)(1) violation, apart from any evidence of employee knowledge either of the instructions or of the reason for the discharge.\(^{59}\) Four years later the Board cited *Florida Builders* as

\(^{55}\) *Id.* at 650.

\(^{56}\) 151 N.L.R.B. 1465 (1965).

\(^{57}\) *Id.* at 1468.

\(^{58}\) *Id.* at 1469. In a footnote, the Board declined to decide whether its decision overruled *General Engineering, Inc.*; in *H.N. Thayer Company*, the instructions were not carried out, while in this case they were. *Id.* at 1469 n.7.

\(^{59}\) *NLRB v. Elder-Beerman Stores Corp.*, 173 N.L.R.B. 566 (1968), enforced, 415 F.2d 1375 (6th Cir. 1969). The Board argued that instructions to the supervisor to engage in the unlawful surveillance "were an integral part of a plan to discover the identity of employees engaged in union activity ... and the discharge of [the supervisor] was designed to enforce such instructions and thus insure the success of the plan." 173 N.L.R.B. at 566. The Board concluded that both the instructions to carry out the surveillance and the dismissal of the supervisor for refusing to comply with the instructions "interfered with the rights of employees guaranteed by section 7, and were violative of section 8(a)(1) of the Act." *Id.*

This is a curious statement. It seems that *Elder-Beerman Stores Corp.* can be used as authority for two propositions: (1) it is unlawful to dismiss a supervisor if he refuses to commit an unfair labor practice; and (2) it is unlawful to instruct a supervisor to engage in prohibited activities. This is not the case. The Board qualified its statement that instructions to commit an unfair labor practice are unlawful: "We find it unnecessary in this case to determine the effect on employees' Section 7 rights of instructions to supervisors to engage in surveillance where employees are not aware of the instructions and they are neither executed nor enforced by discharge." *Id.* at 566 n.4. In other words, the instructions are a violation when they are executed by the supervisor or when a supervisor is discharged for refusing to comply with the instructions. The Board found that the instructions to the supervisor in this case "were an integral part of a plan to discover the identity of employees engaged in union activity."
authority for the proposition that the Act is not violated when a supervisor fails to comply with an employer’s instructions to commit an unfair labor practice. One month later, the Board cited Cannon Electric as support for the proposition that instructions to a supervisor to commit an unfair labor practice violate the Act, even absent evidence of supervisor compliance.

In Belcher Towing the supervisor, Captain Frank Mosso, had been instructed to report all union activity aboard his vessel. The Board determined that, given the general context of the company’s behavior, the instructions to Mosso represented instructions to engage in unlawful surveillance. The Board noted that a supervisor cannot be fired for refusing to commit an unfair labor practice and that Mosso was fired “precisely because he failed to comply sufficiently with (Belcher’s) illegal demand.” Because of Mosso’s dismissal and the “obvious and necessary effects of this action on employees (particularly those under Mosso’s supervision),” the Board found that the company had violated section 8(a)(1) of the Act. As authority, the Board relied on N.L.R.B. v. I.D. Lowe and on N.L.R.B. v. Talladega Cotton Factory, Inc., which involve the dismissal of a supervisor who refused to commit an unfair labor practice.

The Fifth Circuit Court of Appeals affirmed the Board’s decision by reiterating that though supervisors are not protected directly by the Act, the dismissal of a supervisor still can constitute a violation when motivated by the supervisor’s refusal to commit an unfair labor practice.

173 N.L.R.B. at 566. It is rare that an employer’s instructions to a supervisor to commit an unfair labor practice are not part of a plan to interfere with or coerce employees in the exercise of their protected rights. And if the discharge of a supervisor who refuses to comply with the employer’s instructions is not an attempt to carry out the employer’s specific scheme—which, under Elder-Beerman Stores Corp., defines a situation when the instructions themselves become a violation—that discharge is still a violation under a normal effective interference analysis. It makes no difference whether the discharge was done specifically to effect an unlawful scheme, or if the discharge simply resulted from a supervisor’s refusal to commit an unfair labor practice. If a supervisor is dismissed for refusing to commit an unfair labor practice, there is a violation. It is not important how closely related the dismissal is to effecting the particular unlawful scheme that the employer intended.

Also, the Board overruled General Engineering, Inc., to the extent it was inconsistent with the Board’s view of employee knowledge. Id.

62. 238 N.L.R.B. No. 63, at 5.
63. Id. at 6.
64. Id.
66. 106 N.L.R.B. 295 (1953), enforced, 213 F.2d 209 (5th Cir. 1954).
labor practice. The court also agreed with the Board's observation that the instructions to Mosso represented instructions to engage in unlawful surveillance. The court said that it was reasonable to "infer that the employer's use of knowledge obtained by surveillance enabled him to commit some of the other unfair labor practices detailed in [the] complaint." So, in the view of the court, "Mosso's discharge was motivated by his refusal to participate in unlawful surveillance . . . ."

Belcher Towing is an unexceptional application of the current theory that when a supervisor is dismissed for refusing to commit an unfair labor practice, employee rights are effectively coerced, and 8(a)(1) is violated. Since the decision defines employee coercion as the result of a dismissal, rather than as the result of a manifested intention to coerce employee rights, the standard articulated by Belcher Towing must be classified within the category of effective interference. Still, the Board could just as easily have relied on Cannon Electric to employ the attempted interference standard that case articulated. In other words, since the Board found that Belcher had instructed Mosso to commit an unfair labor practice, those instructions alone would have constituted prohibited 8(a)(1) coercion under the Cannon Electric rationale.

The logical implications of the Belcher Towing standard demand consideration. Under Belcher Towing, there is no 8(a)(1) coercion if an employer simply instructs a supervisor to commit an unfair labor practice. Nor is there 8(a)(1) coercion if an employer refrains from dismissing a supervisor who refuses to execute the employer's instructions to commit the unfair labor practice. Clearly, under Belcher Towing, it is possible for an employer to absolve himself after he has made a commitment to violate the protected rights of his employees. An employer can avoid being charged with an 8(a)(1) violation simply by refraining from firing the supervisor who has disobeyed the employer's instructions.

This analysis of Belcher Towing gives way to other criticisms. The motivation for amending the National Labor Relations Act to exclude specifically supervisors from the category of protected employees was to guarantee employers the loyalty of their supervisors. However, in the same way that an employer can now expect

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67. 614 F.2d at 91.
68. Id. at 91 n.4.
69. Id.
70. Id. at 92.
71. Under the attempted interference standard, these instructions would describe an 8(a)(1) violation. See notes 31-32, supra, and accompanying text.
loyalty from his supervisors, a supervisor should be able to expect that his employer will not ask him to violate the provisions of the Act. Though a supervisor ultimately must answer to management, he must work on a daily basis with rank-and-file employees. His efficiency, which is in the employer's undeniable interest, is improved by a productive relationship with those employees who work directly with him. If an employer asks a supervisor to commit an unfair labor practice, such as the unlawful surveillance that was requested of Mosso in Belcher Towing, the supervisor is compromised immediately. His relationship with those rank-and-file employees who work directly with him is endangered if he does carry out the orders; and his relationship with his employer is endangered if he does not. Under the Belcher Towing rationale, a supervisor conceivably could be made very uncomfortable by an employer who refrains from dismissing him for a refusal to commit an unfair labor practice.

The effective interference standard of Belcher Towing fails in two notable ways. It allows an employer to benefit from his wrongdoing by refraining from dismissing a supervisor who has refused to carry out anti-union orders. Also, the Belcher Towing standard provides an employer no disincentive to instruct supervisors to commit 8(a)(1) violations. As a result, a supervisor can be compromised without his employer's suffering unfair labor practice charges. Neither situation would occur under the attempted interference theory of Cannon Electric. The Cannon Electric theory maintains that once an employer instructs a supervisor to commit an unfair labor practice, there is an imputed coercion of employees in the exercise of their protected rights. The Board has reasoned that giving such instructions implies a tendency to interfere with employees in the exercise of their rights.

The structural problem with the attempted interference standard is that the language of the Act invites the effective interference approach, at least in view of employer actions against employees. In both sections 8(a)(1) and 8(a)(3) of the Act, there is no mention of an "intent" or "attempt" to coerce or discriminate. Prohibited conduct is defined in terms of effective coercion or discrimination. Some writers even have suggested that there are advantages in the fact that the Act requires no proof of intent or motive, because a less onerous burden is placed on the adjudicatory system. In a perfectionist's vacuum, this might be so. In practice,
however, the Board and the courts have viewed anti-union animus either as an element of an 8(a)(3) violation or as a factor to be considered in determining an 8(a)(1) violation. For instance, in *N.L.R.B. v. Erie Resistor Corp.*, the Court decided that proof of anti-union motivation could turn an apparently lawful employer practice into an 8(a)(3) violation. Similarly, in *N.L.R.B. v. Brown*, the court ruled that absent findings of "hostile motive," an apparently legitimate employer action could not be translated into an 8(a)(1) violation.

The *Belcher Towing* situation—an employer's instructing a supervisor to commit an unfair labor practice—does not involve an apparently lawful employer practice. The problem of divining

73. For instance, in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967), the Supreme Court noted that the determination of an 8(a)(3) violation "normally turns on whether the discriminatory conduct was motivated by an antiunion purpose." *Id.* at 33. And in *American Ship Bldg. Company v. NLRB*, 380 U.S. 300 (1965), the Court allowed that "[i]t has long been established that a finding of violation under this section (8(a)(3)) will normally turn on the employer's motivation." *Id.* at 311. See Christensen & Svanoe, supra note 85; Shieber & Moore, Section 8(a)(3) of the National Labor Relations Act: A Rationale—Part II Encouragement or Discouragement of Membership in any Labor Organization and the Significance of Employer Motive, 33 LA. L. REV. 1 (1972).

Strictly speaking, there need not always be an inquiry into motive to prove an 8(a)(3) violation. In *NLRB v. Brown*, 380 U.S. 278 (1964), the Court said that the Board "need not inquire into employer motivation to support a finding of an unfair labor practice where the employer conduct is demonstrably destructive of employee rights and is not justified by the service of significant or important business ends." *Id.* at 282.

74. *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965), provided the Court the opportunity to determine whether an employer's use of a temporary layoff of employees after a bargaining impasse was an 8(a)(1) violation or a valid means of bringing economic pressure to support the employer's bargaining position. The Court was concerned specifically with the problem of hostile motive on the part of the employer: There was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so. It is therefore inaccurate to say that the employer's intention was to destroy or frustrate the process of collective bargaining.

*Id.* at 308-09. The Court then said that it was important to distinguish employer intention to support his bargaining position from employer hostility to the collective bargaining process: "Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful." *Id.* at 309. Finding that the lockout was a legitimate bargaining tactic and that there was no evidence of employer hostility toward the employees, the Court determined that no 8(a)(1) violation had been committed. *Id.* at 311.

75. 373 U.S. 221 (1963).
76. *Id.* at 227.
77. 380 U.S. 278 (1964).
78. *Id.* at 286.
motivation to prove a violation does not exist when an employer has committed himself to violating, through a supervisor, the protected rights of the employees. By giving the instructions, the employer not only has manifested an intention, but also has done all that he possibly can to bring about the violation. The success of the effort depends on whether or not the supervisor obeys the employer's orders. Despite this, the effective interference standard, as employed in *Belcher Towing* and the line of cases before it, disregards the important fact that the employer's manifested intention is at the same time an act that tends to violate the protected rights of employees. And the tendency to violate employee rights has long been sufficient to constitute an 8(a)(1) violation.  

The *Belcher Towing* standard is problematical. It does nothing other than provide the employer an opportunity to avoid violating the Act by refraining from dismissing the supervisor who refuses to obey his instructions. For the employer who is willing to risk Board charges if a supervisor does follow instructions to commit an unfair labor practice, the *Belcher Towing* standard provides something like an incentive. The employer knows that if his supervisor refuses to follow the instructions, the employer can avoid unfair labor practice violations by keeping the supervisor on the payroll. At the same time, *Cannon Electric* and its theory of attempted interference remains operative. A blanket application of *Cannon Electric* not only would remove employer incentive to coerce employees through the actions of a supervisor, but also would remove employer opportunity for self-absolution. In the area of labor law, absolution remains in the exclusive province of the Board.

*David Michael Hunter*

*League of Women Voters v. The City of New Orleans: STANDING OR POLITICAL QUESTION?*

The League of Women Voters of New Orleans, a nonprofit organization, and two New Orleans taxpayers sued for a writ of manda-

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79. In 1948, the Sixth Circuit Court of Appeals said that the test for determining an 8(a)(1) violation is whether "the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." NLRB v. Ford, 170 F.2d 735, 738 (6th Cir. 1948). This proposition was reiterated by the seventh circuit eleven years later: "No proof of coercive intent or effect is necessary under section 8(a)(1) of the Act, the test being 'whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'" Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 99 (7th Cir. 1959).