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Discharge of Supervisors Held Lawful Regardless of Intended Effect on Employee Rights: *Parker-Robb* Overrules Pattern of Conduct Theory

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The National Labor Relations Act of 1935 was amended in 1947 expressly to exclude supervisors from its purview. As such, supervisors are not afforded the same protections as other employees, and they may be discharged for engaging in union activity. Accordingly, the National Labor Relations Board as a general rule will find no violation of the Act when a supervisor is discharged. An important exception to this rule developed as a result of the 1967 Pioneer Drilling Co. case in which the Board found that the discharge of a supervisor was effectively used to terminate other employees who were engaged in union activity. In this landmark case, the board held that this discharge was a violation of the Act because it interfered with the protected rights of the non-supervisory employees.

Over the next fifteen years the Board developed guidelines whereby a violation would be found, and reinstatement ordered, when the discharge of a supervisor was an integral part of an employer's overall pattern of conduct aimed at penalizing employees for their union activities. In each of these "pattern of conduct"...
cases, the Board inquired into the employer's motive to see whether the discharge was motivated by the legitimate desire of assuring the loyalty of management personnel, or by the unlawful desire of coercing employees in the exercise of their protected rights. In Parker-Robb Chevrolet, Inc., decided in June 1982, the Board overruled this entire line of authority and held that since supervisors are not protected by the Act, their discharge does not constitute a violation of the Act regardless of the employer's motive or any coercive effect on the employees' exercise of their statutory rights.

This Comment focuses on the rationale behind the "pattern of conduct" theory and its effort to protect the rights of employees. The Parker-Robb decision is criticized for its assertion that the pattern of conduct cases were merely an indirect way of bringing supervisors under the protection of the Act. Through an overreliance on the fact that supervisors are excluded from the protections of the Act, Parker-Robb completely ignored those situations where the employer can effectively use the supervisory discharge as

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8. See, e.g., DRW Corp., 248 N.L.R.B. 828 (1980), where the Board held that § 8(a)(1) was violated when an employer discharged a pro-union supervisor and then used this as an example and a threat to the rank-and-file employees as to what would happen to them if they engaged in union activity.

9. 262 N.L.R.B. No. 58, 110 L.R.R.M. 1289 (June 23, 1982), petition for review denied sub nom. Automobile Salesmen's Union v. NLRB, 711 F.2d 383 (D.C. Cir. 1983). In denying the petition for review of the Board's decision, the D.C. Circuit held that the Board had acted within the bounds of its authority in reversing its policy and that its decision was therefore not subject to review by the court. The court made it clear that it was not passing on the merits of the Board's decision when it stated: "[T]he standard of review in this case is quite narrow. The Board's construction of the Act must be enforced if it is reasonably defensible, even if the court might prefer a different interpretation." 711 F.2d at 385. The court further stated that the Board should only be reversed if its construction has no reasonable basis in law, is fundamentally inconsistent with the structure of the Act, or moves into a new area of regulation which Congress has not committed to it. Id. at 386. The court felt that the Board's construction was not vulnerable on any of these grounds, and it was therefore compelled to affirm the Board. The court held that the Board's decision in this case was a reasonable exercise of its discretion, and it found comfort in the fact that the Board explained in full detail why it decided to change course. Id. at 388. Accordingly, the petition for review was denied.

Parker-Robb now stands as the governing authority for supervisory discharge cases brought before the Board. The United States Supreme Court recently acknowledged this fact in Local 926, Int'l Union of Operating Eng'r's v. Jones, 103 S.Ct. 1453 (1983). Parker-Robb is recognized by the majority in this case. Id. at 1460, n.9. It is also quoted by the dissent and utilized for the proposition that the discharge of a supervisor who is active in a union is not unlawful since supervisors do not have rights protected by the Act. Id. at 1466 (Rehnquist, J., dissenting).
a means of interfering with the protected rights of the rank-and-file employees.\(^\text{10}\)

Where the employer's true motive cannot be immediately ascertained from the facts surrounding the supervisor's discharge, this Comment proposes that a formal motive test be used to determine whether a violation has occurred. In virtually all cases the employer will be able to come up with some legitimate motive for the discharge, and in many cases the employer's actions will in fact have been motivated at least in part by legitimate concerns. Because of this, it is proposed that a dominant motive test, with a shifting burden of proof standard, be employed by the Board in all such cases.

Finally, this Comment will discuss the reasons why, in most of these cases, reinstatement of the discharged supervisor is the appropriate remedy when violations are found.

I. THE PATTERN OF CONDUCT CASES

In response to the United States Supreme Court's decision in Packard Motor Car Co. v. NLRB,\(^\text{11}\) which held that supervisors were entitled to the protections of the National Labor Relations Act, Congress amended the Act in 1947 expressly to exclude super-

\(^{10}\) It is a violation of §§ 7 and 8(a)(1) of the Act for an employer to interfere with or coerce employees in the exercise of their protected right to engage in union activity. For the text of these sections, see infra note 16. An employer can, however, effectively use the discharge of a supervisor to interfere directly with employee rights in a number of ways. For example, if the employer has a pro-union supervisor he can discharge him for the purpose of holding this out as an example to the employees of what will happen to them if they engage in union activity. This can be a very effective means of curbing the union activity of many employees. See, e.g., DRW Corp., 248 N.L.R.B. at 828; see also infra text accompanying notes 36-45. The employer also may abuse certain customs or peculiarities of an industry and indirectly terminate union-active employees by discharging their supervisor. See, e.g., Pioneer Drilling, 162 N.L.R.B. at 918; see also infra text accompanying notes 22-24. Alternatively, the employer may choose to discharge one or more supervisors (and perhaps other employees also) contemporaneously with the discharges of union-active employees in an attempt to cover up these unlawful discharges. While these are just a few of the many possible examples, they suffice to show that it is very possible for an employer to use supervisors and supervisory discharges to interfere effectively and directly with the union activity of employees.

\(^{11}\) 330 U.S. 485 (1947). This 5-4 decision upheld the Board's decision in Packard Motor Car Co., 64 N.L.R.B. 1212 (1945). The Supreme Court construed the term "employer" as not to include foremen or supervisors. NLRA § 2(2) reads: "The term 'employer' includes any person acting in the interest of an employer, directly or indirectly. . . ." NLRA § 2(2); 29 U.S.C. § 152(2) (1976).
visors from its coverage. The principal reason for this legislation was the desire to guarantee employers the right to demand total loyalty from their supervisors. Union membership was considered inconsistent with such loyalty since unionized supervisors would be subject to influence and control by the rank-and-file, thus depriving employers of the "undivided loyalty" of their management personnel.

Supervisors are consequently left unprotected by the Act. Unlike the rank-and-file employees, supervisors remain under the concept of employment-at-will, and employers may discharge them for engaging in union activity, or for any other reason, or for no reason at all, without violating the Act. However, a number of narrow areas have developed where the discharge of a supervisor is held to violate the Act because it directly interferes with the protected employees' section 7 rights to engage in union activity. Accordingly, a supervisor may not be discharged for refusing to commit unfair labor practices, for failing to prevent unionization, or

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12. See NLRA §§ 2(3), 2(11), and 14(a); 29 U.S.C. §§ 152(3), 152(11), and 164(a) (1976). These sections define the term "supervisor," and state that supervisors are not employees and are accordingly outside the scope of the Act.

13. See H.R. Rep. No. 245, 80th Cong., 1st Sess. 14 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 305 (1948). A second stated reason for excluding supervisors from the Act was a concern that allowing supervisors to unionize would be inconsistent with the policy of assuring workers freedom from control by their supervisors in their organizing and bargaining activities. Id. However, it seems unlikely that the anti-union Congress of 1947 actually had this goal in mind. The actual language of the amendments support this assertion since supervisors are not forbidden from joining unions, but merely are denied the Act's protections. Section 14(a) of the Act states:

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 subchapter 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.


16. Section 7 of the Act 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 concerted activities, for the purpose of collective bargaining or other mutual aid or protection. . . ."

Section 8(a)(1), makes it "an unfair labor practice for an employer" to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

17. Miami Coca Cola Bottling Co., 140 N.L.R.B. 1359 (1963), enforced in pertinent part, 341 F.2d 524 (5th Cir. 1965); Vail Mfg. Co., 61 N.L.R.B. 181 (1945), enforced, 158 F.2d
for giving testimony adverse to an employer's interest at an NLRB proceeding or during the processing of an employee's grievance under the collective bargaining agreement. 19

These exceptions show the Board has recognized that, while supervisors owe a duty of loyalty to their employers, they also have a duty, as do their employers, to act in accordance with the law and to respect the rights guaranteed to employees by the Act. Supervisors must be allowed to perform their duties without fear of reprisal for refusing to violate the law. 20 Otherwise supervisors would be forced to decide between unlawfully interfering with employee rights or risking the loss of their job. Given this choice, it is not unreasonable to assume that the degree of interference with employees' protected rights would increase, as would the number of grievances filed with the NLRB. Clearly, this is not what Congress had in mind when it amended the Act to exclude supervisors. 21

The pattern of conduct line of cases developed out of this policy of finding supervisory discharges unlawful when they interfere with employees' protected rights. The initial case in this line was Pioneer Drilling, Co., 22 decided by the NLRB in 1967. The Board found that the employer discharged two drillers who were supervisors in order to take advantage of the drilling industry custom that when a driller is terminated, his crew likewise is terminated. It also found that this action was taken to eliminate union activity which was centered in these crews. 23 The Board therefore held this to be

664 (7th Cir. 1947).
20. See Oil City Brass Works, 357 F.2d at 471.
21. Congress amended the Act to allow employers to demand loyalty from their supervisors, and to give employers the right to discharge supervisors who engaged in union activity. See supra notes 13-15 and accompanying text. However, Congress by these actions did not grant employers the legal power to use supervisors to infringe upon the protected rights of employees. The amendments merely excluded supervisors from the coverage of the Act. There is nothing to suggest that they in any way lessened the degree of protection afforded by the Act to the rights of covered employees.
22. 162 N.L.R.B. 918 (1967), enforced in pertinent part, 391 F.2d 961 (10th Cir. 1968).
23. Even though these supervisor-drillers had engaged in union activity and had signed union authorization cards, and even though the employer had a legitimate business reason
a violation of section 8(a)(1) of the Act because it interfered with, restrained, and coerced employees in the exercise of their section 7 rights to engage in union activity. Reinstatement of the discharged supervisors and their crews was ordered. The Tenth Circuit affirmed, stating the employer's acts were not motivated by the pre-union activities of the supervisors, but by those of the employees. Therefore, the supervisors were not the object, but rather a conduit of the employer's unlawful acts, namely the squelching of protected union activity by the employees. 24

In 1972, in Krebs & King Toyota, Inc., 25 the Board expanded the rationale of Pioneer and held that the discharge of a supervisor was unlawful where it was "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." 26 Subsequent cases further expanded this pattern of conduct rationale. In Fairview Nursing Home, 27 the Board held that the discharge of a supervisor was unlawful where it was an important part in the employer's strategy designed to rid itself of the union. 28 Then, in
Donelson Packing Co., 29 the Board held that a supervisor's discharge was unlawful where it was closely tied to the unlawful discharge of an employee, as this made it an "important element in the . . . [employer's] total strategy designed to rid itself of the union." 30 Again focusing on the motive of the employer, as it did in all of the pattern of conduct cases, the Board in VADA of Oklahoma, Inc. 31 held unlawful a supervisory discharge effected in order to coerce the employees and chill their rights, rather than to punish the supervisor for his union activities. 32 Throughout the pattern of conduct cases the Board's emphasis was on protecting the rights of employees; it was not attempting indirectly to bring supervisors under the protection of the Act. 33 This assertion was manifested in a number of alleged pattern of conduct cases in which the Board held the supervisory discharge lawful after finding that it did not interfere with employee rights. 34

30. Although the employer had knowledge of the supervisor's pro-union sympathies, the supervisor's discharge was nevertheless held unlawful because it occurred at the start of the employer's anti-union campaign, because it was in part due to his attempt to procure the reinstatement of the unlawfully discharged employee, and because it was, in general, part of the employer's pattern of conduct involving flagrant unfair labor practices. Id. at 1043.
32. The supervisor in question had warned an employee who was a union organizer that the plant owner would try to make him quit by giving him unpleasant work. After a series of events, the plant was shut down, and 38 employees, including the supervisor, were laid off. Since the employer had a suspicion that the supervisor was involved in the union campaign, the Board held that the employer fired him in order to coerce employees and chill them in the exercise of their rights. Id. at 759.
33. The Board articulated this distinction most clearly in DRW Corp., when it stated: The Board has never held that supervisory participation in concerted or union activity is protected. Rather, reinstatement of supervisors in these cases has been ordered only when, and precisely because, the respondent's action is found to have been motivated, not by the supervisor's own activity, but by a desire to stifle employees' exercise of section 7 rights and is part of an overall scheme designed to achieve successfully that result. . . . [V]indication of employees' section 7 rights, not protection of supervisors engaging in union or concerted activity, is the basis for a finding that a respondent has violated section 8(a)(1) and that the circumstances require reinstatement of the discharged supervisor. 34
248 N.L.R.B. at 1509.
34. See, e.g., Stop and Go Foods, Inc., 246 N.L.R.B. 1076 (1979) (after discharging supervisor and unlawfully discharging all store employees, the employer asked the employees back and tried to minimize any possible coercive effect on them due to the supervisor's discharge by talking individually with each of them); Long Beach Youth Center, Inc., 230 N.L.R.B. 648 (1977) (discharge of supervisor for siding with employees in economic dispute
For there to be a violation there had to be some showing that the discharge was aimed at penalizing employees or interfering with their rights. If the discharge was intended to punish the supervisor for being disloyal and engaging in union activity, then there was no violation of the Act.\textsuperscript{35}

The Board made its final definitive statement upholding the pattern of conduct rationale in \textit{DRW Corp.},\textsuperscript{36} decided in 1980. There, a supervisor and an employee who both played significant roles in a union-organizing campaign were discharged. During the next few weeks the employer's officials made a point of announcing that these two were fired for their union activities, that the other employees would be discharged if they joined the union, and that the plant would be closed if the employees chose to have the union represent them. The Board held that, along with other violations, the discharge of the supervisor violated section 8(a)(1) of the Act.\textsuperscript{37} It held that an employer may discharge a supervisor out of a legitimate desire to assure the loyalty of its management personnel, if the action is "reasonably adapted" to that end.\textsuperscript{38} However, when an employer engages in a widespread pattern of misconduct against employees, including numerous unfair labor practices, and the discharge of a supervisor occurs in this context, the evidence may be sufficient to warrant a finding that the employer's actions were motivated by a desire to discourage union activities among its employees in general.\textsuperscript{39} This would violate the Act since it constitutes a part of a pattern of conduct aimed at coercing employees in the exercise of their section 7 rights.\textsuperscript{40}

The Board further held that when a pro-union supervisor is discharged in this type of situation, the employer "has intentionally created an atmosphere of coercion in which employees cannot be expected to perceive the distinction between the employer's

with employer, and for making public statements in support of the employer is lawful); Sibilio's Golden Grill, Inc., 227 N.L.R.B. 1688 (1977) (discharge of supervisor for engaging in union activity while concerned only with advancing her own job interests rather than with vindicating employee rights or refusing to impinge on those rights is lawful); Karl Kristofferson and Sigvald Kristofferson, Co-partners, 184 N.L.R.B. 159 (1970) (supervisor's participation in concerted union activity is inconsistent with his supervisory status).

\textsuperscript{35} See Stop and Go Foods, 246 N.L.R.B. at 1076.

\textsuperscript{36} 248 N.L.R.B. at 828.

\textsuperscript{37} For the text of § 8(a)(1), see supra note 16.

\textsuperscript{38} DRW Corp., 248 N.R.L.B. at 828.

\textsuperscript{39} Id. at 828-29.

\textsuperscript{40} Id. at 829.
right to prohibit union activity among supervisors and their right to engage freely in such activities themselves.\textsuperscript{41} Therefore, the coercive effect on employees resulting from the supervisor's discharge is not unavoidable and incidental to the discharge of an unprotected individual. As a result, the remedy required to fully dissipate this coercive effect is the restoration of the status quo ante. The Board felt this could not be fully accomplished without the reinstatement of all affected individuals, including supervisors.\textsuperscript{42}

The Board was again careful to point out that findings of violations in supervisory discharge cases are premised on the vindication of employees' section 7 rights, not on protection of the supervisor.\textsuperscript{43} It is not the discharge of a supervisor for engaging in union activity that violates the Act. Rather, the violation in \textit{DRW Corp.} was that the employer discharged the supervisor and then used this as an example and a threat to employees of what would happen to them if they supported the union.\textsuperscript{44} This conduct suggested that the employer's true motive for the discharge was a desire to interfere with the union activity of his employees, not a desire to punish his supervisor for disloyalty. This conduct was therefore a violation of the Act since it was a major component in the employer's overall scheme aimed at coercing employees in the exercise of their section 7 rights.\textsuperscript{45}

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} \textit{Id.}

\textsuperscript{43} \textit{Id.} at 830.

\textsuperscript{44} \textit{Id.} at 828. \textit{See also} Sheraton P.R. Corp., 248 N.L.R.B. 867 (1980), \textit{enforcement denied}, NLRB v. Sheraton P.R. Corp., 651 F.2d 49 (1st Cir. 1981). There, seven supervisors and four employees were discharged for their participation in the production and distribution of a letter to the company's president complaining of the working conditions and suggesting that the problems could be alleviated by replacing the General Manager. Soon thereafter, the General Manager sent a letter to all employees emphasizing that the supervisors had been discharged for criticizing local management and participating in the letter, and implying that all employees could anticipate a similar penalty if they engaged in such activity. The Board held the discharges unlawful because they, together with the follow-up letter, clearly worked (as they were intended to) to discourage employees from exercising the rights guaranteed them by the Act. 248 N.L.R.B. at 867-68. The First Circuit, however, stated that the case was a dispute "among managerial employees into which several non-supervisory employees were drawn," and that there was no substantial evidence of interference with the \$ 7 rights of the other employees. 651 F.2d at 54.

\textsuperscript{45} \textit{DRW Corp.}, 248 N.L.R.B. at 828.
II. PARKER-ROBB

The pattern of conduct line of cases covered a span of fifteen years. The Board erased this long line of precedent in *Parker-Robb Chevrolet, Inc.*,\(^7\) decided June 23, 1982.\(^8\) This case overruled all decisions which in any way followed the "integral part" or "pattern of conduct" test.\(^8\) It held that the employer’s motive was irrelevant to the issue, and that the discharge of a supervisor is always lawful unless it falls under one of the three narrow well-established exceptions.\(^9\)

The supervisor in *Parker-Robb* was discharged after he got into a heated discussion with his superior concerning the discharges of three employees who had been involved in an organizational meeting of the union.\(^50\) The administrative law judge relied on *DRW Corp.* and found this discharge to be part of the employer’s overall plan to discourage its employees’ support of the union, and therefore unlawful.\(^51\) The Board disagreed with this conclusion, and held that the supervisor’s discharge was lawful.\(^52\)

The Board initially stated that the discharge of a supervisor violates the Act when it interferes with the exercise of employees’

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\(^{46}\) 262 N.L.R.B. No. 58, 110 L.R.R.M. 1289 (June 23, 1982).

\(^{47}\) A significant number of cases were decided soon thereafter in reliance upon *Parker-Robb*. See *Diaz Enters., Inc.*, 264 N.L.R.B. No. 26, 111 L.R.R.M. 1299 (Sept. 27, 1982); *Bentley Hedges Travel Servs., Inc.*, 263 N.L.R.B. No. 184, 111 L.R.R.M. 1238 (Sept. 21, 1982); *Boro Management Corp.*, 263 N.L.R.B. No. 56, 111 L.R.R.M. 1029 (Aug. 16, 1982); *Roma Baking Co.*, 263 N.L.R.B. No. 4, 110 L.R.R.M. 1523 (July 30, 1982); *Rain-Ware, Inc.*, 263 N.L.R.B. No. 8, 111 L.R.R.M. 1004 (July 30, 1982).

\(^{48}\) 110 L.R.R.M. at 1292 n.20. In this footnote, the Board specifically overruled ten of the pattern of conduct cases and then generally expanded this to overrule all of them. It stated: "To the extent that they are inconsistent with our decision here today, [these ten cases], and other decisions following the 'integral part' or 'pattern of conduct' line of cases are hereby overruled." *Id.*

\(^{49}\) See *supra* text accompanying notes 17-19.

\(^{50}\) 110 L.R.R.M. at 1294 (Member Jenkins, concurring). The supervisor, crew chief Terry Doss, along with another crew chief, attended an organizational meeting of the union. Doss engaged in no other union activities, and declined to sign an authorization card. The day after this meeting the three employees were fired. Upon learning of this, Doss went to the Used Car Sales Manager to find out why, since he felt one of the men was "among the best men we’ve got in the place." *Id.* at 1289. The Used Car Sales Manager said they had to cut back. Doss then went to the New Car Sales Manager and received the same response. *Id.* The two then got into a heated discussion and used obscenities. The Manager then informed Doss that he, too, was discharged. *Id.* at 1294. (Member Jenkins, concurring).

\(^{51}\) See *id.* at 1290.

\(^{52}\) *Id.*
section 7 rights. However, it severely limited this proposition by holding that this only occurs when a supervisor is discharged for testifying at a Board hearing, refusing to commit an unfair labor practice, or failing to prevent unionization. The Board insisted that the pattern of conduct cases unduly extended this principle, yet it gave no clear explanation as to why the interference with employee rights in the pattern of conduct cases was any different than the interference caused by discharges falling within one of these three narrow categories. Instead it merely stated that the pattern of conduct cases tended to protect supervisors who themselves participated in union activity. It also stated that the pattern of conduct test resulted in inconsistent decisions leaving no clear guidelines as to when supervisors may and may not be lawfully discharged, and that this resulted in conflict with the 1947 amendments which expressly excluded supervisors from the protections of the Act. The confusion was deemed to stem from an improper extension of the rationale of Pioneer Drilling, which the Board stated was a unique factual situation whose rationale should not be applied to supervisory discharge cases.

After stating that a supervisory discharge should be held unlawful if it interferes with employees' rights, the Board asserted that the pattern of conduct cases disregarded "the fact that employees, but not supervisors, are protected against discharges for engaging in union or concerted activities." However, the Board seemingly ignored the whole premise of the pattern of conduct cases which were directed towards the vindication of employee

53. Id. at 1293-94.
54. Id. at 1290.
55. Id.
56. Id.
57. Id. at 1290-91. See also supra text accompanying notes 22-24.
58. Parker-Robb, 110 L.R.R.M. at 1291 n.12. The Board felt that the peculiar custom of the drilling industry, whereby the termination of a supervisor also resulted in the termination of his crew, made Pioneer Drilling a "novel" case whose holding should have been strictly limited to its unique facts. Id. However, this summary disposition of Pioneer Drilling ignores the fact that the supervisory discharge was held illegal solely because it was used by the employer as a means of interfering with the employees' protected rights. Thus, despite its peculiar custom or "novel" facts, Pioneer Drilling stands for the proposition that an employer may not intentionally discharge a supervisor and thereby interfere with the protected rights of employees. Since this is the precise concern of the pattern of conduct cases, the Board's statement that these cases were an improper extension of Pioneer Drilling cannot be justified.
59. Id. at 1291 (emphasis original).
rights, not the protection of supervisors.

Relying upon its statement that the discharge of a supervisor "is not unlawful for the simple reason that employees, but not supervisors, have rights protected by the Act," the Board then rejected the use of a motive test for these cases. It argued that since the discharge is itself lawful, an employer's motive or expectation as to its effect on employees is irrelevant to the issue, since this cannot change the character of this otherwise lawful conduct. Even if the employer later used this discharge to threaten employees, this would not alter the lawfulness of the discharge itself. In such a case, the Board felt the discharge and the threat should be considered separately. The threat would be a section 8(a)(1) violation, but the discharge would still be lawful, and therefore, the appropriate remedy should be a cease and desist order, not reinstatement of the supervisor.

This argument that a supervisory discharge is of itself lawful, thereby rendering a motive test irrelevant, results in a logical inconsistency with the Board's prior statement that supervisory discharges which fall into one of the three narrow exceptions will be held unlawful. The rationale behind these exceptions is that in certain circumstances the discharge of a supervisor does unlawfully interfere with employee rights. In order to make this determination the Board occasionally must, at least implicitly, make an inquiry into the employer's motive. For example, if a supervisor is discharged shortly after refusing to commit an unfair labor practice, the employer is unlikely to admit that this refusal was the reason for the discharge. Instead it will argue that the discharge was the result of some other factor, such as economic necessity, a need to cut back, or even disloyalty. Since a supervisor may lawfully be discharged for any of these reasons, a faithful adherence to Parker-Robb would result in the Board finding no violation of the Act in this case. In order to classify this case under one of the exceptions, and thereby find the discharge unlawful, the Board would have to disregard the employer's stated justification, inquire into his true motivation, and conclude that the true purpose or motivating factor behind the discharge was a desire to get rid of

60. Id. at 1292.
61. Id. at 1291.
62. See id. at 1291 n.19.
63. See supra text accompanying notes 17-19.
the supervisor for refusing to commit the unfair labor practice. In finding a violation the Board would therefore be holding that the actual motive was to discharge the supervisor for refusing to carry out the employer's desire to unlawfully interfere with employee rights. This intention to interfere with the employees' exercise of their protected rights is precisely the motive which the pattern of conduct cases held unlawful, and which Parker-Robb now ironically declares irrelevant.

Member Jenkins, concurring in the result of Parker-Robb but dissenting in regard to the overruling of the pattern of conduct cases and the elimination of the motive test, posed a strong argument that Parker-Robb was not even a pattern of conduct type of case, and was therefore an improper vehicle for overruling this long line of cases. Jenkins found no evidence to suggest that the supervisor's discharge was contemplated by the employer prior to the other discharges of employees. Instead, the evidence showed that the supervisor was discharged solely for using obscenities while engaging in a heated discussion with his superior. There was no evidence that his discharge was aimed at penalizing employees, a ploy to facilitate or cover up the unlawful discharge of employees, or even in furtherance of an unlawful plan to rid the employer's facility of all union adherents. In Jenkins' view the discharge was lawful because no violation was shown under the pattern of conduct test. However, he saw no reason to abandon fifteen years of settled Board precedent.

III. BALANCING THE RIGHTS OF EMPLOYER AND EMPLOYEE

Parker-Robb and the pattern of conduct theory both stress two things: (1) that the Act's protections extend only to employees, not to supervisors; and (2) that the discharge of a supervisor should only be held unlawful if it interferes with the employees' exercise of their protected rights. The major conflicts revolve around when employee rights are unlawfully interfered with, whether motive is the proper test, and what the appropriate remedy is. These conflicts result from an attempt to balance the sometimes competing rights of employers and employees, namely the

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64. 110 L.R.R.M. at 1294-96 (Member Jenkins, concurring).
65. Id. at 1294 (Member Jenkins, concurring).
66. Id. at 1295 (Member Jenkins, concurring).
employer's right to demand loyalty from its management personnel, and the employees' right to engage in protected activity free from interference by the employer.

The proper standard for governing the area of supervisory discharges must be one which takes account of these competing interests and accommodates both to the fullest extent possible. Parker-Robb, however, focused solely on the employer's interests by insisting that any inquiry into the potential illegality of a supervisory discharge be foreclosed if the supervisor had been engaging in union activity. This blanket rule ignores the interests of the employees. It also fails to recognize that if an employer desires to use a supervisory discharge to interfere with employee rights, the discharge of a pro-union supervisor is the most effective means of accomplishing this. By discharging a pro-union supervisor, the employer is then able to hold this out to the employees as an example of what will happen to them if they engage in union activity. The employer can convey this threat by continually emphasizing to the employees that the supervisor was fired for union activity. By thus blurring the distinction between the employees' protected right to engage in union activity and the supervisor's lack of similar protection, the employer can effectively use this discharge to restrain the employees in the exercise of their rights. The fact that the employer is trying to interfere with employee rights, not punish his pro-union supervisor for disloyalty, suggests that this is the proper issue in these cases, not merely whether or not the supervisor was pro-union.

Congress' main purpose for excluding supervisors from the protection of the Act was to grant to employers the right to demand the undivided loyalty of their management personnel, such loyalty being deemed inconsistent with union membership. This exclusion must be read in accordance with the overall goals of the Act in general which were to protect the rights of employees to organize and engage in collective activity, to eliminate obstructions to the free flow of commerce, and to promote industrial peace. The Act itself is first and foremost. The later exclusion of supervi-

67. See supra text accompanying notes 12-15.
68. See supra note 16 for §§ 7 and 8(a)(1) of the Act.
69. See supra text accompanying notes 36-45. See also supra note 44.
70. See supra notes 14 & 15.
sors from its coverage must be read in relation to the Act’s primary goals. One of these goals is the protection of the employees’ right to engage in union activities free from interference by the employer. Even though supervisors are excluded from the Act, this does not mean that employers can use them to interfere with the other employees’ rights. Section 8(a)(1) still prohibits this.

The Board recognized this in *Parker-Robb* by holding that the discharge of a supervisor may violate the Act in certain narrow circumstances. It also recognized that supervisory discharges cannot be held unlawful every time they have any kind of incidental effect on employee rights. To do so would be tantamount to holding unlawful every discharge of a supervisor with pro-union sympathies, even if the employer acted in good faith, since any time anyone is fired employees are likely to fear that they will suffer the same fate if they engage in similar conduct. This would destroy the employer’s right to demand loyalty from its supervisors by taking away its right to discharge them even when union activity and disloyalty actually were the motives for the discharge. Such a result would, in effect, indirectly bring supervisors under the protection of the Act.

This is precisely what the Board felt was happening in the pattern of conduct cases. And, in fact, a number of the pattern of conduct cases did come close to doing this, and they were properly overruled by *Parker-Robb*. However, by classifying all of the pattern of conduct cases in this way, and overruling all of them, *Parker-Robb* went too far. If supervisory discharges falling under

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72. Id. See also §§ 7 and 8(a)(1) of the Act, supra note 16.
73. See supra note 16.
74. See supra text accompanying notes 17-19.
75. See *Oil City Brass Works*, 357 F.2d at 470.
76. See VADA of Okla., Inc., 216 N.L.R.B. 750 (1975) (supervisor who was involved in union campaign was discharged along with 38 employees); Downslope Indus., Inc., 246 N.L.R.B. 948 (1979) (supervisor and all employees discharged for protesting about actions of a plant manager); Nevis Indus., Inc., 246 N.L.R.B. 1053 (1979) (successor corporation taking over another business refused to retain any unionized employees or their supervisor because it wanted to be non-union).

In each of these cases the discharge of the supervisors was held unlawful. However, while the discharge of the employees for engaging in union or concerted activity was in fact unlawful, the discharge of the supervisors for engaging in this same concerted activity was entirely within the employer’s rights and should have been held lawful. The discharge of the pro-union supervisor in each case may have had an incidental effect on the employees, but the employer did nothing to increase this incidental interference.
one of the three categories discussed in Parker-Robb\textsuperscript{77} are held to unlawfully interfere with employee rights, then why, in appropriate pattern of conduct cases, should supervisory discharges used by employers to interfere with employee rights not also be unlawful?

Employers should not be allowed to take advantage of the fact that supervisors may be discharged for union activity by using these discharges as a means of interfering with employees' protected rights. Where the relevant facts create a strong inference that the supervisory discharge was used as a weapon by the employer to strike at employees, the discharge should be an automatic violation of the Act, just as in the three categories accepted by Parker-Robb. This would cover cases such as those mentioned above\textsuperscript{78} where an employer discharges a pro-union supervisor under the guise of disloyalty, and then uses this discharge as an example and a threat to employees. This subsequent use of the discharge creates a very strong inference that the discharge was the initial part of a plan designed to coerce and restrain employees in the exercise of their protected rights. Although the supervisor could be fired for union activity, and although the employees should know this, the employer in this type of case has intentionally created an atmosphere where employees can no longer reasonably be expected to make this distinction.\textsuperscript{79} A discharge under these circumstances must be held to violate the Act. Similarly, a supervisory discharge should be automatically unlawful if the facts strongly suggest it was used as a ploy to facilitate or cover up the taking of unlawful action against employees, as was the case in Pioneer Drilling.\textsuperscript{80}

The potential conflict between the employer's right to demand loyalty from its supervisors and the employee's right to engage in protected activity free from interference by the employer requires that supervisory discharge cases be governed by a standard capable of accommodating both of these interests. An absolute statement, as in Parker-Robb, that supervisors are unprotected by the Act,

\textsuperscript{77} See supra text accompanying notes 17-19.  
\textsuperscript{78} See supra text accompanying note 69.  
\textsuperscript{79} See DRW Corp., 248 N.L.R.B. at 829.  
\textsuperscript{80} See supra text accompanying notes 22-24. Another technique for covering up the unlawful discharge of an employee is to discharge a few other employees or supervisors along with this employee in order to cover up or draw attention away from the original unlawful discharge.
and may therefore be discharged for any reason or purpose, regardless of the intended effect on employees, grants too much to the employer at the expense of the employees. In contrast, a procedure which finds every discharge of a pro-union supervisor unlawful because of the incidental effect this may have on the employees would virtually work to deprive the employer of his acknowledged right to demand loyalty from his supervisors. A compromise between these two extremes, which recognizes the employer's right to demand loyalty while still prohibiting employers from intentionally using a supervisory discharge as a weapon against the rights of employees, would best serve to accommodate these often competing interests of employer and employee.

When the relevant facts surrounding a supervisory discharge strongly suggest that the employer's action was indeed taken to punish the supervisor for disloyalty, not to somehow interfere with employee rights, the discharge must be held lawful. An employer has the right to demand loyalty from his supervisors, including the right to punish or discharge them for engaging in union activity. However, where the relevant facts create a strong inference that the employer was using the supervisory discharge as a technique for interfering with employee rights, the discharge should be an automatic violation of the Act. Such uses of supervisory discharges constitute clear and direct interference with employee rights. Holding unlawful this intentional infliction of harm upon employees is entirely consistent with the Act and its amendments. In these situations the fact that supervisors are not protected by the Act is irrelevant because the employees who suffer the harm are protected. The mere fact that a non-protected individual is used as the conduit through which this harm is inflicted should not detract from the fact that rights protected by the Act have been violated.

Where, as in the above instances, the relevant facts are suffi-

81. While the Parker-Robb decision purports to hold that the discharge of a supervisor is unlawful when it interferes with employees' § 7 rights, by limiting this only to cases where the discharge was for giving adverse testimony at a Board hearing, or for refusing to commit unfair labor practices, 110 L.R.R.M. at 1291-92, the Board renders this partial holding virtually meaningless.

82. See supra text accompanying note 75. A number of the pattern of conduct cases seem to have been decided on virtually the same standard and, as such, were properly overruled by Parker-Robb. See supra note 76.

83. See supra text accompanying notes 11-15.

84. See supra text accompanying notes 77-80.
cient for determining the true purpose of the discharge, a formal inquiry into the motive of the employer need not be undertaken. However, in cases where the facts do not on their face lead to a conclusion one way or the other as to what the employer was attempting to achieve, some type of formal motive test should be employed to make this determination. Typically the employer in such cases acts upon mixed motives, that is, a desire to punish the supervisor for disloyalty together with the hope or expectation that this action will deter union activity among the employees in general. Consequently, the appropriate test is one which inquires into which of these two motives was the dominant one influencing the employer's action.

IV. DETERMINING WHEN VIOLATIONS HAVE OCCURRED: THE THREE STAGE DOMINANT MOTIVE TEST

Presently, the Board applies the shifting burden of proof standard set forth in Wright Line\(^85\) to all dual motive cases arising under sections 8(a)(1)\(^86\) and 8(a)(3).\(^87\) Under this test, there must first be a prima facie showing sufficient to support the inference that interference with protected conduct was a "motivating factor"\(^88\) in the employer's decision. Once this is established, the burden shifts to the employer to demonstrate, as an affirmative defense, that he would have taken the same action even in the absence of the protected conduct.\(^89\)

In the supervisory discharge context, this test would first require that there be a showing sufficient to support the inference that interference with employees' section 7 rights, and the squelching of union activity, was a "motivating factor" in the employer's decision to discharge the supervisor. Once this was established, the discharge would be held unlawful unless the employer could

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86. While motivation is not ordinarily considered in discussing violations of § 8(a)(1), there have been 8(a)(1) cases where the Board found it necessary to inquire into motive. See NLRB v. Exchange Parts Co., 372 U.S. 405 (1964); Youngstown Osteopathic Hosp., 224 N.L.R.B. 574 (1976).
87. "It shall be an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . . " NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1976).
88. Wright Line, 251 N.L.R.B. at 1089.
89. Id.
demonstrate that he would have discharged the supervisor even if he knew this action would have no substantial effect on the employees' exercise of their section 7 rights. In other words, for his action to be held lawful, the employer would have to show that he discharged the supervisor for the legitimate and lawful purpose of assuring the loyalty of his management personnel, and not for the unlawful purpose of using this discharge as a weapon against employees, or as a conduit for getting at employees and coercing them in the exercise of their protected rights.

The *Wright Line* test involves a number of problems which would limit the effectiveness of its use for analysis of mixed-motive supervisory discharge cases. Most significantly, *Wright Line* would make it very difficult ever to prove a violation because the employer would always be able to come up with a "valid" reason for the discharge even if an invalid one could also be shown. By failing to provide a formal framework for an attack of the employer's asserted justification, *Wright Line* weights the balance too much on the employer's side and frustrates attempts to delve into a true analysis of the employer's dominant motive.

To remedy this problem, a true dominant motive test should be applied to mixed-motive supervisory discharge cases. Such a test would have three components, the first two of which would be the same as in *Wright Line*. First, there would have to be a showing that protected conduct was a motivating factor in the employer's decision. Second, the burden would shift to the employer to state a legitimate reason for the discharge, and to show that this was the main factor leading to his decision. Finally, after the employer's justification, the third component would shift the burden back to the NLRB General Counsel to introduce evidence aimed at showing the employer's justification was merely a guise or a pretext, and that interference with protected employee rights was really the main motive for the discharge.90 Such evidence could in-

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90. This three-step, shifting burden of proof, dominant motive test would operate in much the same way as the test for violations of Title VII of the Civil Rights Act of 1964 operates in the employment discrimination context. Civil Rights Act of 1964, Pub. Law No. 88-352, 78 Stat. 241 (codified at 42 USC §§ 2000e to 2000e-17 (1976)). Under the intent test for alleged Title VII violations, the plaintiff must first make out a prima facie case by setting forth facts suggestive of discrimination based on race or sex. The second stage is the rebuttal, where the employer must articulate some legitimate, non-discriminatory reason for his actions. The third and final stage is the sur-rebuttal, where the plaintiff tries to show that the employer's reason is a mere pretext, that is, the stated reason is not the real reason.
clude a showing that the discharge occurred in connection with numerous unfair labor practices and other interference with employee rights. It could also include a showing that the employer actually rehired the discharged supervisors after it got rid of the employees it wanted to get rid of or achieved the desired effect.91 Or, if it could be shown that the supervisor had never even engaged in union activity, or if he did, that the employer had no knowledge of this,92 this could be used to contradict an employer's assertion that it discharged the supervisor for disloyalty.

At the conclusion of this three stage inquiry, the Board would make its determination as to whether the dominant motive of the employer was the lawful one of punishing a supervisor for disloyalty, or the unlawful one of attempting to restrain employees in the exercise of their protected rights. This dominant motive test would preserve the employer's right to discharge supervisors for disloyalty when this action is taken in good faith, while also preserving the employees' right to be free from intentional interference with their protected conduct. In contrast, the Board's complete elimination of the motive test in Parker-Robb virtually authorizes employers to use supervisors as weapons if they see fit, and intentionally to discharge supervisors for the purpose of interfering with the employees' exercise of their protected rights. While an inquiry into the subjective intent of employers may be a difficult procedure, the Board should not turn its back on these cases merely because they may be difficult to resolve.93

V. THE APPROPRIATE REMEDY

Even when the discharge of a supervisor is found unlawfully to interfere with protected employee rights, the question still remains as to whether the reinstatement of the supervisor is a necessary and proper remedy. Section 10(c) of the Act states that when an employer commits an unfair labor practice the Board should issue

91. See Pioneer Drilling, 162 N.L.R.B. at 918. See also Donelson Packing Co., 220 N.L.R.B. 1043 (1975) (employer offered to rehire the supervisor just seven weeks after he discharged him for supposedly being incompetent).
92. See, e.g., Fairview Nursing Home, 202 N.L.R.B. 318 (1973) (supervisor had signed a union card but there was no evidence that the employer had any knowledge of his pro-union sympathies).
93. See Parker-Robb, 110 L.R.R.M. at 1295 (Member Jenkins, concurring).
a cease and desist order, and should also take such affirmative action, including reinstatement of employees, as will effectuate the policies of the Act.\textsuperscript{94} The key to finding the discharge of a supervisor unlawful is a finding that the discharge interfered with the protected rights of employees. Since the policies of the Act include preventing unfair labor practices and protecting employee rights, the remedy in this area should be one which effectuates these goals.

The first possibility would be to issue a cease and desist order with nothing more. This is what the Board in \textit{Parker-Robb} suggested as the appropriate remedy even where the employer used the supervisor's discharge to threaten and coerce employees.\textsuperscript{95} While this would prohibit the employer from engaging in such unlawful conduct in the future and in that sense would work to protect employee rights, a cease and desist order would do nothing to eliminate the already present coercive effect on the employees' exercise of their protected rights. It is therefore clear that this only lays the foundation for the total remedy and that more is required.

The second possibility would be to require the posting of a full explanatory notice in an attempt to eliminate this coercive effect on employee rights.\textsuperscript{96} Such a notice would be directed to all employees and would clearly state that the NLRB has found that the employer committed an unfair labor practice by discharging the supervisor in order to interfere with employee rights. It would then have to explain fully that the employees are free to engage in union or concerted activities and that they may not be disciplined in any way for such activity.\textsuperscript{97}

Although this would help to eliminate the coercive effect on

\begin{footnotes}
\item[94] NLRA § 10(c), 29 U.S.C. § 160(c) (1976).
\item[95] 110 L.R.R.M. at 1291 n.19.
\item[96] It is standard practice for the Board to require employers to post some type of informational notice at its offices and plants when the employer is found to have committed an unfair labor practice. Generally this notice is drawn up by the Board and attached as an Appendix at the end of the decision in the case. For some examples of this, see VADA of Okla., Inc., 216 N.L.R.B. at 765; Fairview Nursing Home, 202 N.L.R.B. at 326; Krebs & King Toyota, Inc., 197 N.L.R.B. at 465.
\item[97] This type of full explanatory notice would be much more extensive than the usual informational notice. The standard informational notice, which the Board generally requires an employer to post, usually consists only of a listing of the specific unfair labor practices found, coupled with a statement by the employer that he will no longer commit these practices, and that he will reinstate, with backpay, all personnel who were unlawfully discharged. For examples, see \textit{supra} note 96.
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the employees, it may not be totally removed since this remedy does not include the simultaneous reinstatement of the discharged supervisor. To remedy this problem, the notice would have to explain that since supervisors are not protected, and since the Act is designed to protect employee rights only, the supervisor was not entitled to reinstatement. The notice should then reiterate that this in no way is meant to restrict the previous statement that the employees are free to engage in union activities without fear of being disciplined for this.

This remedy would serve to both protect employee rights and eliminate much of the coercive effect caused by the unlawful discharge. It would also stop short of actually reinstating the discharged supervisor, an act which many find objectionable. Nevertheless, this remedy involves some problems which limit its ability to fully effectuate the policies of the Act. First, there is no significant deterrent factor since the employer need only post this notice, and since he may continue to reap the benefits from any remaining effect on employees as a result of the coercive atmosphere he originally created. As such, the goal of the Act to prevent similar unfair labor practices in the future may not be effectuated.

Second, this remedy may not be a fully effective means of advising employees of their rights and eliminating the coercive atmosphere. It is not unreasonable to suggest that many employees will never actually read such a posted notice. Moreover, even those who do read it may not fully understand it. Unless the notice is extremely clear it may not serve the purpose of eliminating the coercive effect on the employees. Since it is the employer who intentionally created this "pervasive atmosphere of coercion," it is reasonable to impose upon him a remedy with a greater likelihood of eliminating this condition.

Consequently, the remedy which would appear to most fully effectuate the policies of the Act is reinstatement of the unlawfully discharged supervisor. A complete return to the status quo

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100. Section 10(c) speaks only of the reinstatement of "employees." However, given the fact that the Board has the power to provide any remedy which is necessary to effectuate
would, to a greater extent than the other remedies, serve to eliminate the prevailing coercive atmosphere, protect employees in the exercise of their protected rights, and prevent similar unfair labor practices in the future. The reinstatement of the supervisor would affirmatively demonstrate to the employees that the employer cannot get away with committing unfair labor practices, and that he cannot lawfully interfere with their protected rights. This demonstration should help to convince the employees that their rights are indeed protected, and that the employer truly cannot interfere with their section 7 rights to engage in union activity. In this way, it should eliminate the coercive effect of the illegal discharge to the greatest possible extent. Ordering reinstatement of supervisors in these cases will also act as a much greater deterrent on the employer since he will realize that the status quo ante will be restored and that in the long run he will gain nothing. This will further the policy of preventing similar unfair labor practices in the future.

It is not known whether or not the discharged supervisor will in each case accept reinstatement. Even if reinstatement is accepted, it is not certain what the supervisor's future with the firm will be. However, these are problems which simply must be accepted in a system where the types of remedies available are somewhat restricted. Given the available choices, reinstatement of the unlawfully discharged supervisor is the best remedy in these types
of cases.104

It is argued, however, that reinstating supervisors in such cases comes perilously close to extending the protections of the Act to supervisors, thereby defeating Congress' action in excluding them from the protection of the Act.105 However, it is difficult to see how reinstatement of the supervisor does this any more than finding a violation in the first place. It is also argued that there exists the greater danger of employers losing the right to demand and rely upon the loyalty of their supervisors.106 By focusing mainly on the supervisors themselves, rather than on the employees whose rights have been violated, both of these arguments miss the point. The policy of reinstating supervisors is not premised on protecting the supervisor himself, since he has no rights under the Act to protect. Rather, this remedy is aimed at protecting employees from actions designed to coerce them in the exercise of their section 7 rights, and protecting employees from such coercion is a primary obligation of the Board.107 This remedy does not extend the protection of the Act to supervisors; supervisors remain unprotected and may still be lawfully discharged for union activity and disloyalty whenever this is the legitimate operative motive of the employer.

The availability of this proposed remedy for the discharged supervisor would not endanger the employers right to demand and rely upon the loyalty of their supervisors. The employer remains absolutely free to demand the loyalty of his supervisory personnel. He also remains free to discharge a supervisor at any time for disloyalty or for engaging in union activity. What the employer may not do is intentionally discharge a supervisor, or intentionally use this discharge, to unlawfully interfere with, restrain, or coerce employees in the exercise of their section 7 rights. The result is merely a removal of this potentially powerful weapon from the employer's still formidable anti-union arsenal.

104. This is evidenced by a hypothetical case in which an employer discharges a pro-union supervisor and then uses this discharge as an example and a threat to employees of what fate will befall them if they engage in union activity. Assuming no other employees were discharged, how could the coercive atmosphere created by the employer be better eliminated than by ordering the reinstatement of the unlawfully discharged supervisor?
105. See Parker-Robb, 110 L.R.R.M. at 1289; DRW Corp., 248 N.L.R.B. at 828 (Member Truesdale, dissenting).
106. Lederer, supra note 98, at 103.
107. Parker-Robb, 110 L.R.R.M. at 1295 (Member Jenkins, concurring).
CONCLUSION

One of the NLRB's primary responsibilities under the National Labor Relations Act is the protection of the employees' right to engage in union and concerted activity. When an employer discharges a supervisor for the purpose of infringing upon these protected rights the Board should act in accordance with its responsibilities, declare this action unlawful, and order the remedy which is most effective at eliminating the coercive effect of this unlawful action. The complete overruling of the pattern of conduct line of cases and the elimination of a motive test are inconsistent with this responsibility. Such drastic action is not necessary to preserve the employer's right to demand loyalty from its management personnel.

While Parker-Robb has been hailed for its "forthright approach" to supervisory discharge cases, the fact remains that the decision virtually authorizes employers to use the discharge of supervisors as a weapon against employees. This will have the effect of allowing employers another means for restricting employees in the full exercise of their protected statutory rights. A refinement and clarification of the "pattern of conduct" theory would seem to be a better course of action than merely ignoring the difficulties of this problem and exposing the rights of employees to potential infringement.

In most cases the discharge of a supervisor is a lawful and legitimate exercise of the employer's rights. However, where the facts surrounding the discharge create a strong inference that the employer intended to interfere with employee rights, the discharge should automatically be held a violation of the Act. The best example of this occurs when an employer discharges a supervisor and uses this as a threat to the employees. An employer should not be free to interfere directly with the employees' protected rights simply because the weapon he chooses to use is a non-protected supervisor.

Where the facts do not create such a strong inference of illegality, a three-stage dominant motive test should be used to deter-

110. See supra text accompanying note 69.
mine whether or not the employer was attempting to unlawfully interfere with employee rights. This test would provide the opportunity for an attack upon the employer’s asserted justification and would thereby provide a formal framework to take account of the interests of the employees. It would also protect the interests of the employer by preserving the right to discharge supervisors for disloyalty whenever the facts support the conclusion that this motive predominated. By adopting this type of framework the Board could eliminate some of the confusion surrounding the analysis of supervisory discharge cases, without taking the extreme route of Parker-Robb and completely ignoring the rights of employees.

Daniel J. Venuti