

INTERROGATION OF EMPLOYEES CONCERNING UNION MATTERS AS AN UNFAIR LABOR PRACTICE

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There can be any number of reasons why an employer may desire to question his employees concerning union activities. The motivation may run from mere harmless curiosity to an outright attempt to gain information necessary to defeat the union. All too often such interrogation is intended as a none too subtle threat designed to coerce the employee in the exercise of his various statutory rights—or so the employee may interpret it. On the other hand, there are situations where an employer finds it necessary to obtain immediate information about the union in order to solve a legitimate business or labor relations problem.

This writing is an attempt to compile and analyze some of the decisions of the National Labor Relations Board and the Federal Courts to determine under what circumstances an employer can interrogate his employees about union matters.

Statutory Provisions

Nothing in the National Labor Relations Act¹ specifically states that the interrogation of employees is an unfair labor practice. The section of the Act into which such activity falls is 8 (a) (1):² “It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section 7.”³

The Labor Management Relations Act⁴ added section 8 (c), which reads:

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¹ 49 STAT. 449, 29 U.S.C.A. §§ 151-166 (1946).

² Ames Spot Welder Co., 75 N.L.R.B. 352 (1947).

³ *Supra*, note 1, § 157: “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 have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).”

⁴ 61 STAT. 136 (1947), 29 U. S. C. A. § 158 (Supp. 1947).

“The expressing of any views, arguments, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

Statutory Construction

Prior to the passage of section 8 (c), statements or questions by an employer, which were apparently innocent on their face, were held to be in violation of 8 (a) (1) if, when viewed in the surrounding circumstances, they were found to be coercive under the “totality of conduct” doctrine.⁵

The courts are not yet in accord as to the effect that 8 (c) has on the “totality of conduct” doctrine. The intent of Congress is none too clear either. The House version of 8 (c) provided that employer speech was not coercive unless “by its own terms” it threatened reprisals.⁶ The Senate version would have permitted the Board to consider statements and questions “under all the circumstances.”⁷ The final bill retained most of the House provision, except for the requirement that coercion appear in the statement explicitly. Also Senator Taft told his colleagues that certain fact situations under section 8 (c) “involve a consideration of the surrounding circumstances.”⁸

Although it has been argued that section 8 (c) limits the context of surrounding circumstances in which non-coercive speech may be appraised and that such factors as the economic strength of the parties, the previous history of labor relations, and the atmosphere surrounding the speech are excluded from consideration, such argument has not been accepted by the majority of the courts. In *N. L. R. B. v. Kropp Forge Co.*,⁹ the 7th Circuit set forth its construction of the amendment:

“The language of section 8 (c) seems to us no more than a restatement of the principles embodied in the First Amendment. . . . In considering whether such statements or expressions are protected by section 8 (c) of the Act, they can-

⁵ This doctrine was set forth in *N. L. R. B. v. Virginia Electric and Power Co.*, 314 U. S. 469 (1941).

⁶ H. R. REP. No. 245, 80th Cong., 1st Sess. 33, 54 (1947).

⁷ SEN. REP. No. 105, 80th Cong., 1st Sess. 23, 35 (1947).

⁸ 93 CONG. REC. 6446 (1947).

⁹ 178 F. 2d 822, 828 (7th Cir., 1949).

not be considered as isolated words cut off from the relevant circumstances and background in which they are spoken. Therefore, in determining whether such statements or expressions constitute or are evidence of unfair labor practice, they must be considered in connection with the position of the parties, with the background and circumstances under which they are made, and with the general conduct of the parties.”

Although the Board said in the *Burns Brick Co.* case¹⁰ that employers' statements “which do not contain a direct or implied threat of economic reprisal or promise of benefit” are privileged free speech, the word “implied” leaves the way open for the “totality of conduct” doctrine.

Granting that a statement innocent on its face may still be found coercive when viewed in its setting, what is the status of a question?

In *Ames Spot Welder Co., Inc.*,¹¹ the Board indicated that section 8 (c) does not apply to interrogation:

“An employer's interrogation of an employee concerning union membership is coercive and therefore *per se* an unfair labor practice. . . . [A question is] not an expression of any views, arguments, or opinion, or the dissemination thereof.”

Of course any question, or statement, which by its own terms constitutes a threat is a *per se* violation of section 8 (a) (1).¹² And a question may be deemed coercive when considered in connection with its background.¹³ However, the Board's assertion that any interrogation of employees concerning union matters is a *per se* violation requires close scrutiny.

Although the Board has continued to voice its view that “interrogation is not protected by section 8 (c) because it is not an expression of views, arguments, or opinion within the meaning of that section”¹⁴ and has continued to hold that such interrogation is in itself an unfair labor practice,¹⁵ many of the circuit courts have not accepted this position and, at times, the Board itself has added to the confusion by refusing to follow its own doctrine.

¹⁰ 80 N. L. R. B. 389 (1948).

¹¹ 75 N. L. R. B. 352, 355 (1947).

¹² *Sewell Hats, Inc. v. N. L. R. B.*, 143 F. 2d 450 (5th Cir., 1944).

¹³ *Piedmont Shirt Co. v. N. L. R. B.*, 138 F. 2d 738 (4th Cir., 1943).

¹⁴ *Waynline, Inc.*, 81 N. L. R. B. 511, 512 (1949).

¹⁵ *Pecheur Lozenge Co.*, 98 N. L. R. B. No. 84 (1952).

Board's View of Interrogation as Coercive Per Se

Interrogation concerning the following matters has been held coercive by the Board: whether employee was a union member;¹⁶ what were certain activities;¹⁷ whether employee had been solicited to join union;¹⁸ who were the union leaders;¹⁹ why employees wanted union;²⁰ what other employees were members of the union;²¹ who was the union organizer;²² whether there was a union movement on or whether employees had been "talking union";²³ how the union campaign was progressing;²⁴ what was decided at union meeting;²⁵ whether employee voted for union in representation election;²⁶ whether he intended to vote for union;²⁷ whether employee intended to participate in strike;²⁸ whether employees had filed unfair labor practice charges with the Board;²⁹ whether contract had been read to union members;³⁰ whether non-striking employees were represented by union.³¹ In all of the examples cited, the Board adverted to its *per se* doctrine; however, in the majority of those cases the inquiries involved were surrounded by conduct which made them coercive under the "totality of conduct" doctrine anyway.³²

It would seem that if the Board intended to adhere strictly to

¹⁶ Wayline, Inc., *supra* note 14; Shields Engineering and Mfg. Co., 85 N. L. R. B. 168 (1949); Tennessee Coach Co., 84 N. L. R. B. 703 (1949); Eastman Cotton Mills, 90 N. L. R. B. 31 (1950).

¹⁷ Atlas Life Ins. Co., 94 N. L. R. B. 742 (1951); Shields Engineering and Mfg. Co., *supra* note 16; Jacksonville Motors, Inc., 84 N. L. R. B. 181 (1950).

¹⁸ Montgomery Ward & Co., 93 N. L. R. B. 640 (1951); Jacksonville Motors, Inc., *supra* note 17.

¹⁹ Ann Arbor Press, 85 N. L. R. B. 58 (1949).

²⁰ Max Sax, 75 N. L. R. B. 1082 (1948); Cuffman Lumber Co., 82 N. L. R. B. 296 (1949).

²¹ Tennessee Coach Co., *supra* note 16.

²² Jacksonville Motors, Inc., *supra* note 17.

²³ Reeves-Ely Laboratories, Inc., 76 N. L. R. B. 728 (1948).

²⁴ B. & Z. Hosiery Products Co., 85 N. L. R. B. 633 (1949); Tennessee Coach Co., *supra* note 16.

²⁵ Premier Worsted Mills, 85 N. L. R. B. 985 (1949); Morristown Knitting, Inc., 86 N. L. R. B. 342 (1949).

²⁶ J. J. Newberry Co., 88 N. L. R. B. 947 (1950).

²⁷ Hinde-Dauch Paper Co., 78 N. L. R. B. 488 (1948).

²⁸ Westinghouse Electric Supply Co., 96 N. L. R. B. 407 (1951).

²⁹ Advertiser Co., Inc., 97 N. L. R. B. 604 (1951).

³⁰ River Falls Co-op., 90 N. L. R. B. 257 (1950).

³¹ Porto Rico Container Corp., 89 N. L. R. B. 1570 (1950).

³² See for example: Cuffman Lumber Co., *supra* note 20; Premier Worsted Mills, *supra* note 25; Ann Arbor Press, *supra* note 19; River Falls Co-op., *supra* note 30.

the broad proposition that all interrogation is an unfair labor practice *per se*, then a proper case in which to so hold would be one where the question is found in almost complete isolation, separated from any suggestion of coercion or other unfair labor practice. If that is true, then the *per se* doctrine has not met the test. In at least five cases where the Board was squarely presented with isolated questions, it failed to find any coercion or unfair labor practice, thus failing to follow its own doctrine.

In *Silver Knit Hosiery Mills*³³ and in *Commercial Printing Co.*,³⁴ where employees were asked about their attitude toward the union, the Board found the interrogation not to be a violation because it constituted no interference, restraint, or coercion. While this appears to be a just holding, it serves to point out the inconsistency which can result from the use of the Board's *per se* idea. If interrogation as to union affairs is in itself an unfair labor practice, as the Board says it is, then by definition the fact that there was no actual interference should make no difference.

In two other cases, although employees were asked about their union membership, no violation was found.³⁵ In one of these, *West Texas Utilities Co.*, the interrogation was found not to be a violation because the specific inquiry involved was separated in time and otherwise unrelated to other unfair labor practices which had been committed. The grounds on which the Board found this particular query to be non-coercive would seem to be directly contrary to the *per se* idea. For if the doctrine has any meaning at all it would naturally be applied in a situation such as the *West Texas Utilities Co.* case, where the question is found in almost splendid isolation. Where the interrogation is close in time and is related to other unfair labor practices, there is no necessity for any *per se* holding, since the anti-union background would be sufficient to make it coercive. In the other case, *Opelika Textile Mills, Inc.*, although there were other unfair labor practices involved, the Board said that the two isolated incidents of questioning were too trivial to warrant an unfair labor practice finding.

Why does the Board cling to the proposition that any and all interrogation of employees concerning union affairs is a *per se* violation of section 8 (a) (1) and, at the same time, hold that an

³³ 99 N. L. R. B. 422 (1952).

³⁴ 99 N. L. R. B. 469 (1952).

³⁵ *Opelika Textile Mills, Inc.*, 81 N. L. R. B. 594 (1949); *West Texas Utilities Co., Inc.*, 85 N. L. R. B. 1396 (1949).

isolated incident of questioning is not a violation? Perhaps the answer is that the Board needs a convenient peg on which to hang its decision when it is confronted with a case involving extensive interrogation which is unassociated from an anti-union background. This answer would rationalize the isolated question holdings, but it does not justify the *per se* doctrine. In order for extensive interrogation to be covered as an unfair labor practice under section 8 (a) (1), there is no necessity for a broad *per se* doctrine. Section 8 (a) (1) proscribes interference, restraint, and coercion. Interference, as well as restraint and coercion, is a separate offense under the Act. There is no reason why, in a proper case, the Board cannot find that extensive interrogation is at least interference, even if it does not reach the stature of restraint or coercion. This would eliminate the inconsistency of the *per se* view.

In *Boston and Lockport Block Co.*,³⁶ where the employee was asked about his union activities, the Board said that while interrogation was an unfair labor practice *per se*, it would not effectuate the policies of the Act to issue a cease and desist order for a single isolated incident of questioning. While the Board was correct in stating that such an order would not carry out the spirit of the Act, the case serves to illustrate further the uselessness of the *per se* idea.

Under the Act, the standard test of coercion has been a subjective one from the employees' standpoint.³⁷ The test is whether the employee might reasonably have been restrained and interfered with in the exercise of his rights by what was said or asked. "The effectiveness and accuracy of the remarks are not controlling."³⁸ And there can be a violation even though the employees are not in fact coerced.³⁹ To this list of principles, the Board has added, apparently pursuant to its *per se* doctrine, the rule that interrogation is in violation of section 8 (a) (1) regardless of the employer's motive in asking the question.⁴⁰ "Legality of interrogation does not turn on motivation."⁴¹

The principles that coercion can be found regardless of the effectiveness of the interrogation and without regard to the em-

³⁶ 98 N. L. R. B. No. 144 (1952).

³⁷ N. L. R. B. v. Mt. Clemens Pottery Co., 147 F. 2d 262 (6th Cir., 1945).

³⁸ N. L. R. B. v. J. L. Brandeis & Sons, 145 F. 2d 556, 566 (8th Cir., 1944).

³⁹ Minnesota Mining & Mfg. Co., 81 N. L. R. B. 557 (1949).

⁴⁰ Superior Co., 94 N. L. R. B. 586 (1950).

⁴¹ New Jersey Carpet Mills, Inc., 92 N. L. R. B. 604, 605 (1950).

ployer's motive in making the inquiries are in keeping with the Board's *per se* idea. Apart from its holdings in the "isolated question" cases, the Board has held with reasonable consistency that the effectiveness of the attempt to coerce or interfere with by interrogation is immaterial.⁴² In *Standard-Coosa-Thatcher Co.*,⁴³ the employer contended that any interrogation that he made would not coerce his employees, since they all openly wore their union buttons and therefore displayed their lack of fear of management. Although saying that the lack of fear made no difference, the Board bolstered its opinion by saying:⁴⁴

"The employee who is interrogated concerning matters which are his sole concern is reasonably led to believe that his employer not only wants information on the nature and extent of his union interest and activities, but also contemplates some form of reprisal once the information is obtained."

However, in *Socony Vacuum Oil Co.*,⁴⁵ there had been a temporary strike and the employer had asked some of the strikers what role the union had taken as regards the strike and also what certain of them had done on the day of the strike. These interviews with various employees were recorded. But the Board said that no violation of the Act had been committed, because the union officials had been present and had not objected to the interviews. Therefore, the conclusion was that there had been no interference or coercion. While this conclusion was probably correct, this case, like the isolated question cases, appears inconsistent with the idea that all interrogation is a violation of the Act.

As to the employer's motivation in asking about union affairs, the Board seems to have been entirely consistent.⁴⁶ In *Reeves-Ely Laboratories, Inc.*,⁴⁷ the Trial Examiner had found that the interrogation by the employer was justified since there had been a legitimate attempt to ascertain and correct the cause of some dissatisfaction among his employees. The Board rejected this finding and held that the Act had been violated regardless of the motive.

⁴² *Standard-Coosa-Thatcher Co.*, 85 N. L. R. B. 1358 (1949); *Minnesota Mining & Mfg. Co.*, *supra* note 39.

⁴³ 85 N. L. R. B. 1358 (1949).

⁴⁴ *Id.* at p. 1361.

⁴⁵ 78 N. L. R. B. 1185 (1948).

⁴⁶ *Reeves-Ely Laboratories*, *supra* note 23; *Superior Co.*, *supra* note 40; *New Jersey Carpet Mills, Inc.*, *supra* note 41; *Carnegie-Illinois Steel Corp.*, 95 N. L. R. B. 763 (1951).

⁴⁷ *Supra* note 23.

There are certain well recognized exceptions to the Board's strict view on interrogation. Supervisors can be questioned without violation.⁴⁸ Also an employee who holds a position involving a confidential relationship with management may be questioned as to union membership, but not as to voting intention.⁴⁹ And where charges have been filed against a company, it is proper for the company attorney, pursuant to the preparation of a defense, to question employees in regard to the matter in issue.⁵⁰ However, the attorney must keep within reasonable and necessary limits and must not ask unnecessary and coercive questions.⁵¹

Without regard to some of the obvious inconsistencies that have resulted from the Board's decisions on interrogation, it seems that the Board's position is this: interrogation of employees concerning union affairs is an unfair labor practice *per se* and therefore the actual coercive effect of the questioning or the motivation or justification behind it makes no difference; however, there are cases involving isolated incidents of questioning which the Board says do not merit cease and desist orders, but which serve to illustrate the weakness of the Board's position.

How have the circuit courts dealt with this position?

The Circuit Courts and the Per Se Doctrine

Where the question involved is surrounded by a strong anti-union attitude, most of the circuit courts hold it to be coercive.⁵² However, only three circuits (3rd, 8th, & D. C.) appear to have strictly followed the Board's view.⁵³ In *Joy Silk Mills, Inc. v. N. L. R. B.*,⁵⁴ the court said: "Interrogation . . . as to union sympathies carries with it at least the aroma of coercion."

⁴⁸ *Atlantic Stages*, 78 N. L. R. B. 553 (1948); *Pure Oil Co.*, 90 N. L. R. B. 1607 (1950), where a regular employee took over a foreman's job once every week and was held to be a supervisor for the purposes of 8 (a) (1).

⁴⁹ *American Book-Stratford Press, Inc.*, 80 N. L. R. B. 914 (1948).

⁵⁰ *Southern Furniture Mfg. Co.*, 91 N. L. R. B. 1159 (1950).

⁵¹ *May Dept. Stores Co.*, 70 N. L. R. B. 94 (1946); *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732 (D. C. Cir., 1950).

⁵² *N. L. R. B. v. National Plastics Products Co.*, 175 F. 2d 755 (4th Cir., 1949); *Stokely Foods, Inc. v. N. L. R. B.*, 193 F. 2d 736 (5th Cir., 1952); *N. L. R. B. v. Ken Rose Motors, Inc.*, 193 F. 2d 769 (1st Cir., 1952); *N. L. R. B. v. State Center Warehouse Co.*, 193 F. 2d 156 (9th Cir., 1952); *N. L. R. B. v. International Furniture Co.*, 199 F. 2d 648 (5th Cir., 1952); *N. L. R. B. v. Swan Fastener Corp.*, 199 F. 2d 935 (1st Cir., 1952).

⁵³ *N. L. R. B. v. Minnesota Mining & Mfg. Co.*, 179 F. 2d 323 (8th Cir., 1950); *N. L. R. B. v. B. & Z. Hosiery Co.*, 180 F. 2d 1021 (3rd Cir., 1950); *Joy Silk Mills, Inc. v. N. L. R. B.*, 185 F. 2d 732 (D. C. Cir., 1950).

⁵⁴ 185 F. 2d at 743.

Four circuits (2nd, 5th, 6th, & 7th) appear to have repudiated the coercive *per se* view of interrogation.⁵⁵ In *Sax v. N. L. R. B.*,⁵⁶ the employee was asked whether she was "for the union" and if so, "why." The Board held that this was coercive *per se*.⁵⁷ In denying enforcement of the order, the 7th Circuit said:⁵⁸

"Mere words of interrogation or perfunctory remarks not threatening or intimidating in themselves made by an employer with no anti-union background . . . cannot, standing alone, support a finding of a violation of 8 (a) (1). They come instead within the protection of free speech protected by the First Amendment to the Federal Constitution."

In *N. L. R. B. v. Tennessee Coach Co.*,⁵⁹ the 6th Circuit said: "Before inquiries as to union membership . . . can be held an unfair labor practice, they must be shown to have some relation to the coercion or restraint of the employees in their right of self-organization."

The 5th Circuit, as far back as 1943, in *Jacksonville Paper Co. v. N. L. R. B.*,⁶⁰ rejected any *per se* theory, saying: "He [employer] is not precluded by the Act from inquiring or being informed as to the progress of unionism. He had a right to inquire if the union was organized or was washed up."

The 2nd Circuit not only rejected any *per se* notion, but also indicated its belief that section 8 (c) was meant to pertain to questions, as well as statements, by saying:

"Inquiries made by the manager concerning what was being done in behalf of the union, and statements as to his not liking the union, to the extent that they constituted no threat or intimidation or promise of favor or benefit in return for resistance to the union, were not unlawful, particularly after the 1947 amendment of the Act found in section 8 (c)." (Emphasis added.)⁶¹

Both the 6th and 7th Circuits apparently had some difficulty in determining whether to follow the Board's *per se* doctrine or not.

⁵⁵ *N. L. R. B. v. Montgomery Ward & Co.*, 192 F. 2d 160 (2nd Cir., 1951); *Sax v. N. L. R. B.*, 171 F. 2d 769 (7th Cir., 1948); *N. L. R. B. v. Tennessee Coach Co.*, 191 F. 2d 546 (6th Cir., 1951); *Jacksonville Paper Co. v. N. L. R. B.*, 137 F. 2d 148 (5th Cir., 1943).

⁵⁶ 171 F. 2d 769 (7th Cir., 1948).

⁵⁷ 75 N. L. R. B. 1082 (1948).

⁵⁸ 171 F. 2d at 773.

⁵⁹ 191 F. 2d at 554.

⁶⁰ 137 F. 2d at 152.

⁶¹ *N. L. R. B. v. Montgomery Ward & Co.*, *supra*, note 55 at p. 163.

The 6th Circuit, in *N. L. R. B. v. Kingston*,⁶² had held where the employer had conducted a private election among his employees as to their desire for a union that there was no violation of the Act since the employer had acted in good faith. However, in *N. L. R. B. v. Eaton Mfg. Co.*,⁶³ an unfair labor practice was found by the court even though the employer was compelled to investigate into why certain employees had been expelled from the union, since the company was a closed shop. With the *Tennessee Coach Co.*⁶⁴ decision and with *N. L. R. B. v. Superior Co.*,⁶⁵ the 6th Circuit appears to have concluded that employee interrogation is not a *per se* violation of section 8 (a) (1). The employer in the *Superior Co.* case had asked several employees "which side of the fence they were on" in an attempt to discover whether they had been coerced into signing an anti-union petition. The Board held this an unfair labor practice *per se*, even though the employer had a legitimate motive.⁶⁶ The 6th Circuit, in denying enforcement of the order, said that a situation had been created into which the employer might properly inquire, and also that:⁶⁷ "Inquiries unaccompanied by threats of reprisal, express or implied, and without relation to coercion and restraint of the employees in their right of self-organization are not violative of the Act."

The 7th Circuit, as far back as 1941, held that an employer was justified in taking a strike vote of his employees, where he was in a position that he had to know immediately how many employees were willing to continue working, since he had to either accept or reject further orders for his product.⁶⁸ However, in *N. L. R. B. v. Illinois Tool Works*,⁶⁹ the court held that motivation in interrogation could not prevent the finding of an unfair labor practice. With *N. L. R. B. v. Winer, Inc.* and *United States Steel Co. (Joliet Coke Works) v. N. L. R. B.*⁷⁰ the 7th Circuit has rejected any *per se* theory. In the *Winer* case, the court felt that interrogation as to what was going on in the union meetings was not coercive due to a background of good labor relations. The court said:⁷¹

⁶² 172 F. 2d 771 (6th Cir., 1949).

⁶³ 175 F. 2d 292 (6th Cir., 1949).

⁶⁴ *Supra* note 55.

⁶⁵ 199 F. 2d 39 (6th Cir., 1952).

⁶⁶ *Superior Co.*, 94 N. L. R. B. 586 (1950).

⁶⁷ 199 F. 2d at 43.

⁶⁸ *N. L. R. B. v. Algoma Plywood & Veneer Co.*, 121 F. 2d 602 (7th Cir., 1941).

⁶⁹ 153 F. 2d 811 (7th Cir., 1946).

⁷⁰ *N. L. R. B. v. Winer, Inc.*, 194 F. 2d 370 (7th Cir., 1952); *United States Steel Co. v. N. L. R. B.*, 196 F. 2d 459 (7th Cir., 1952).

⁷¹ 194 F. 2d at 372.

“ . . . The courts have not considered isolated remarks or questions, which did not in themselves contain threats or promises, and when there was no pattern or background of union hostility, as coercive of the employees and as a violation of section 8 (a) (1).”

In the *United States Steel Co.* case, where several employees, who had been discharged for cause, were interviewed as to whether they would again commit the same acts that had resulted in their discharge, the Board had found an unfair labor practice. In denying enforcement, the 7th Circuit said:⁷² “If . . . the discharges . . . were for cause, the interrogation as to possible like conduct in the future was not in violation of the Act.”

While the circuit courts that repudiate the *per se* idea do so on the asserted theory that motivation and the lack of actual interference are the controlling factors, realistically they are probably doing nothing more than attempting to strike a balance between the necessity of the employer to be informed on union affairs for legitimate business reasons on the one hand and the right of the employee to be unrestrained in his union activities on the other. Where the legitimate business interest outweighs the interference and coercive effect on the employees, then no violation of the Act will be found.

While the remaining circuits have not explicitly overruled the Board on the *per se* idea, the 4th and 10th have disregarded it by holding that there is no violation of the Act either when the employees are not in fact coerced or interfered with, or when there is a reasonable justification for the interrogation.⁷³ In the *Atlas Life Ins. Co.*⁷⁴ case, the employer tried to find out whether the union represented a majority of the employees so that he would know whether he was obligated to bargain with the union. The 10th Circuit held that the interrogation for that purpose was proper.

The 1st and 9th Circuits have sustained the Board's finding of coercion or interference when the record shows an anti-union background which would tend to make any interrogation coercive.⁷⁵ However, the 1st Circuit indicated that it does not agree with the *per se* view in *N. L. R. B. v. England Bros., Inc.*⁷⁶ In that case

⁷² 196 F. 2d at 467.

⁷³ *N. L. R. B. v. Hinde-Dauch Paper Co.*, 171 F. 2d 240 (4th Cir., 1948); *Atlas Life Ins. Co.*, 195 F. 2d 136 (10th Cir., 1952).

⁷⁴ *Ibid.*

⁷⁵ *N. L. R. B. v. Ken Rose Motors, Inc.*, *supra* note 52; *N. L. R. B. v. State Center Warehouse Co.*, *supra* note 52.

⁷⁶ 31 LRRM 2319 (1st Cir., 1953).

there were three instances of interrogation and the court said that it was squarely faced with the issue whether that was a *per se* violation of the Act. Although saying that section 8 (c) does not apply to questioning, the court said also that it did not feel it was necessary to decide the *per se* issue submitted. However, the court went on to say that the evidence in the record was insufficient to support an unfair labor practice finding. We can infer from this that the 1st Circuit does not take the *per se* view of interrogation. As for the 9th Circuit, there seems to be no indication what result it would reach on the *per se* doctrine.

In a recent case, *Syracuse Color Press, Inc.*,⁷⁷ the Board defended its *per se* doctrine by saying:

“Thus, the basic vice of this type of interrogation is (1) that it is generally a prelude to acts of reprisal for union activity and (2) that whether or not the employer in fact intends to engage in such reprisals, the natural reaction of employees to such questioning is, in any event, an apprehension that such reprisals will follow. . . .”

After recognizing that there was a conflict on its *per se* view and that there were many cases contra to it, the writer for the Board asserted that:

“The Board’s view that interrogation . . . violates 8 (a) (1) of the Act has also met at times with judicial approval. . . . This has been so even where the interrogation has been considered without regard to its relation to other unfair labor practice of the employer.”

In support of the above statement, the Board cites *Joy Silk Mills, Inc. v. N. L. R. B.* (D. C. Circuit),⁷⁸ *N. L. R. B. v. Minnesota Mining & Mfg. Co.* (8th Circuit),⁷⁹ and *N. L. R. B. v. Alcoa Feed Mills* (5th Circuit).⁸⁰ While the 8th and D. C. Circuit cases are recent ones and fairly represent the view of those courts, the 5th Circuit case cited is a 1943 one in which the court found that the interrogation involved was only some evidence of unfair labor practice. A later 5th Circuit decision from the same year clearly shows that that court does not follow the *per se* view.⁸¹

In another recent Board decision, *Waffle Corp. of America*,⁸²

⁷⁷ 103 N. L. R. B. No. 26 (1953).

⁷⁸ *Supra* note 53.

⁷⁹ *Supra* note 53.

⁸⁰ 133 F. 2d 419 (5th Cir., 1943).

⁸¹ *Jacksonville Paper Co. v. N. L. R. B.*, 137 F. 2d 148 (5th Cir., 1943).

⁸² 103 N. L. R. B. No. 41 (1953).

the Trial Examiner had found that the *Winer* case⁸³ controlled the situation where the interrogation was not pursuant to a general pattern or plan of anti-union hostility. In reversing this finding, the Board again asserted its *per se* doctrine.

Conclusion

Enforcement of the Act's condemnation of interference, restraint, and coercion of employees in the exercise of their union activities does not require the broad doctrine that any and all interrogation is an unfair labor practice. While the majority of the incidents of interrogation may be in violation of the Act, this does not justify the Board's unequivocal assumption that all questioning is such. This theory not only results in unnecessary inconsistency and confusion in the state of the law, but also in harsh injustice in many cases.

Interrogation which in itself constitutes a threat is a violation of the terms of the Act. Interrogation which is innocent on its face, but which takes place in an atmosphere of union hostility or unfair labor practice, is a violation under the "totality of conduct" doctrine. Extensive interrogation, even though there is no express or implied threat involved and even without other unfair labor practice, can be found to be at least interference in a proper case. What then is left to necessitate the view that all interrogation is unfair labor practice? It is certainly not the case of the "isolated question" for the Board itself refuses to find this a violation. In only one type of case can there be any possible need for the *per se* theory: where the interrogation is for a legitimate business or labor relations motive and there is no actual proof of interference, restraint, or coercion.

It seems obvious that Congress did not intend that interrogation which does not affect the exercise of the employees' rights should be held violative of the Act. Yet the fact that the Board can find either interference, restraint, or coercion simply by finding interrogation and nothing more achieves this result. In the majority of cases where there has been such a finding, there is probably no injustice. However, where the employer has acted pursuant to reasonable business necessity, the *per se* doctrine goes too far.

Where a legitimate motive for questioning exists, the Board is protecting what it believes to be the employees' rights without

⁸³ *Supra* note 70.

considering any business problems the employer may have. It is not suggested that management should be allowed to pry into all union activities simply because it may have some professed good motive. It is suggested, however, that the Board should attempt to balance the various interests involved, as many of the circuit courts do, rather than to flatly deny the employer any consideration. If the actual coercive effect on the employees is found to outweigh the business interest that brought on the interrogation, then a violation of the Act could properly be found.

Of course, it is arguable that no real hardship exists where the employer acts in good faith, since he will be protected on appeal in most of the circuit courts. But why should the employer be required to run this long judicial race? Would it not be more sensible for the Board to discard its *per se* notion, especially since it is apparent that the majority of the circuit courts do not agree with it?

It is submitted that there is no necessity for such a doctrine. Interrogation which is in derogation of the free exercise of employees' rights can be effectively prohibited without it. The idea that all interrogation is *per se* a violation of the Act serves only to confuse and hamper the employer who desires to act in good faith.