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## Inadvisable Advice: Limits on Employers' Counseling of Employees with Regard to Unfair Labor Practice Proceedings

John W. Teeter Jr

*St. Mary's University School of Law*, [jteeter@stmarytx.edu](mailto:jteeter@stmarytx.edu)

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### Recommended Citation

John W. Teeter, Jr., *Inadvisable Advice: Limits on Employers' Counseling of Employees with Regard to Unfair Labor Practice Proceedings*, 12 *Indus. Rel. L.J.* 292 (1990).

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# Inadvisable Advice: Limits on Employers' Counseling of Employees with Regard to Unfair Labor Practice Proceedings

John W. Teeter, Jr.†

*The National Labor Relations Board frequently interviews or subpoenas employees to help determine whether an employer has committed an unfair labor practice. Many employers, however, have advised their employees that they may refuse to cooperate with the Board's efforts. Professor Teeter argues that such advice has an inherent tendency to coerce employees and to frustrate the Board's vindication of their statutory rights. After reviewing the inconsistent approaches tribunals have taken to this problem, the author recommends that employers be prohibited from counseling employees regarding their participation in the Board's proceedings. Professor Teeter concludes that the Board itself should be the one to inform employees of their rights and obligations in cases against the employer.*

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† Associate Professor, St. Mary's University School of Law. A.B. 1982, University of Illinois at Chicago Circle; J.D. 1985, Harvard Law School. The author would like to thank the Kerr Foundation for its generous research grant and his Labor Law students for their insights and encouragement.

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### INTRODUCTION

Suppose that a union or individual employee files charges with the National Labor Relations Board (the "Board") alleging that an employer has violated the National Labor Relations Act (the "Act").<sup>1</sup> One of the Board's first steps will be to interview members of the employer's work force to determine whether they can provide information concerning possible unfair labor practices.<sup>2</sup> Then, if the matter proceeds to a hearing, the Board may seek to compel the workers' testimony by serving them with subpoenas.<sup>3</sup> At both the prehearing interviews and the hearing itself, the employer is at risk since employees may divulge information indicating that the employer engaged in an unlawful act. For that reason, the employer may attempt to bribe or threaten employees into remaining silent or making false statements.

Such conduct is plainly unlawful. Section 7 of the Act<sup>4</sup> guarantees, inter alia, the right of employees to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) of the Act<sup>5</sup> provides that it is an unfair labor practice for employers "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" in section 7. Furthermore, section 8(a)(4)<sup>6</sup> states that it is unlawful for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony" pursuant to the Act. The Board and courts repeatedly have applied these provisions to forbid employers from coercing employees to remain silent, urging employees to commit perjury, or retaliating against employees who cooperate with Board investigators or obey their subpoenas.<sup>7</sup>

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1. Codified as amended at 29 U.S.C. §§ 151-169 (1988).

2. See NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART ONE) UNFAIR LABOR PRACTICE PROCEEDINGS (1989) §§ 10056-10056.7 (stating procedures and guidelines for interviewing the charging party's witnesses, potential discriminatees, the respondent and its agents, rank-and-file employees, and unbiased third parties).

3. The Board's power to issue subpoenas is conferred by 29 U.S.C. § 161(1) (1988), which states in relevant part: "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application." Furthermore, 29 C.F.R. § 102.31(a) (1990) provides that "[a]ny member of the Board shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control . . . ."

4. 29 U.S.C. § 157 (1988).

5. 29 U.S.C. § 158(a)(1) (1988).

6. 29 U.S.C. § 158(a)(4) (1988).

7. See, e.g., *NLRB v. Scrivener*, 405 U.S. 117 (holding that employer violated section 8(a)(4) by discharging employees because they gave sworn statements to Board agent investigating unfair labor practice charge against employer), *reh'g denied*, 405 U.S. 1033 (1972); *Grand Rapids Die*

Suppose, however, that instead of attempting to threaten or curry favor with its workers, an employer simply "advises" them. An employer could instruct its employees that they are not legally required to participate in the Board's investigatory interviews or to honor the subpoenas requiring them to testify.<sup>8</sup> Is that also an unfair labor practice or merely a legitimate (albeit self-interested) attempt to advise the work force of its legal rights?

To answer this question, the Board and courts must address three competing and often conflicting concerns: (1) the employer's desire to counsel employees regarding their legal rights, (2) the Board's need to obtain relevant information from those employees, and (3) the necessity of assuring that, regardless of the employer's motives, workers are not hindered in their freedom to participate in Board procedures. As the cases demonstrate, however, the Board and courts have failed to resolve these tensions in a clear and coherent manner.

This indeterminacy produces at least three pernicious consequences. First, employers are not given reliable guidance as to what freedom, if any, they possess to advise workers regarding their participation in Board investigations and hearings. Second, the opacity of the law breeds litigation because it encourages parties to appeal adverse decisions and urge tribunals to adopt whichever position suits their particular interests.<sup>9</sup> Third, and most disturbingly, employees are left vulnerable to em-

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Casting Corp. v. NLRB, 831 F.2d 112 (6th Cir. 1987) (per curiam) (upholding Board's determination that employer violated section 8(a)(1) by threatening to discharge employee if she filed charges with the Board), *enforcing*, 279 N.L.R.B. 662 (1986), *reh'g denied*, 833 F.2d 605 (6th Cir. 1987); Southern Foods, Inc., 289 N.L.R.B. No. 21 (June 15, 1988) (holding that employer violated sections 8(a)(1) and (a)(4) by discharging subpoenaed employees who left work to attend Board hearing); Morgan Servs., Inc., 284 N.L.R.B. 862 (1987) (ruling that employer violated section 8(a)(1) by threatening employees with reprisals if they cooperated with Board or union in investigation of unfair labor practice charges and objections to election); Middle Earth Graphics, Inc., 283 N.L.R.B. 1049 (1987) (finding section 8(a)(1) violation where employer offered employee \$25 to commit perjury).

8. The employer might, for example, base its assertion on the provision of 29 U.S.C. § 161(1) (1988) which states in part:

Within five days after the service of a subpoena on any person . . . such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

9. As Judge Posner explains:

Settlement out of court is cheaper than litigation. So only if each disputant expects to do better in the litigation than the other disputant expects him to do are the parties likely to fail to agree on settlement terms that make them both consider themselves better off compared with how they anticipate faring in litigation. Uncertainty is a necessary condition of such a divergence of estimates. It can be either factual or legal but only legal uncertainty is relevant here. If it is great, there will be much litigation, including much appellate litigation.

R. POSNER, *ECONOMIC ANALYSIS OF LAW* 511 (3d ed. 1986). Posner adds that "[b]ut since litigation, especially at the appellate level, generates precedents, the upsurge in litigation will lead to a reduction in legal uncertainty. Hence the amount of litigation will fall in the next period." *Id.*

ployers' attempts to dissuade them from exercising their right to cooperate with the Board in unfair labor practice proceedings.

For these reasons, it is essential for the Board and courts to agree upon a consistent approach to this problem. The approach I propose would forbid employers from advising employees that they do not have to speak with Board investigators or honor their subpoenas. This prophylactic rule is necessary because many employers have abused their self-appointed roles as counselors by giving advice that is erroneous, incomplete, or otherwise tends to interfere with Board procedures. Furthermore, even when the employer acts in good faith, employees reasonably may interpret such advice as a signal that the employer would prefer for them not to cooperate with the Board. By applying a *per se* prohibition to such advice, the Board and courts could clarify the law, reduce litigation, and assure that employers do not interfere with the ability of workers to vindicate their statutory rights.

## I

### ADVISING EMPLOYEES THAT THEY ARE NOT REQUIRED TO SPEAK WITH BOARD INVESTIGATORS

When Board investigators begin interviewing employees concerning possible unfair labor practices, there can be no question that their employer has an interest in what they say: employee statements may prompt the Board to file a formal complaint against the employer or, in the alternative, to dismiss the charges.<sup>10</sup> That does not necessarily mean, however, that the employer should be entitled to advise employees that they have the right to remain silent. Such counseling unduly interferes with the Board's investigatory efforts and may (regardless of the employer's motives) suggest to employees that they will incur the employer's wrath by cooperating with the Board. The employer's advice should therefore be proscribed by section 8(a)(1) because it hinders the vindication of workers' section 7 rights.

In response to this reasoning, employers may assert that they should be free to give such legal advice if it is not accompanied by any promises

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Unfortunately, this subsequent reduction in litigation cannot be achieved as long as the Board and courts continue, as shown below, to reach inconsistent and ambiguous conclusions.

10. 29 C.F.R. § 102.15 (1990) states:

After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all other parties a formal complaint in the name of the Board stating the unfair labor practices and containing a notice of hearing before an administrative law judge at a place therein fixed and at a time not less than 14 days after the service of the complaint.

However, 29 C.F.R. § 102.18 (1990) empowers the regional director to withdraw complaints before the hearing on her own motion. When the regional director withdraws or declines to issue a complaint, the person making the charge can file an appeal with the Board's general counsel pursuant to 29 C.F.R. § 102.19 (1990).

of benefit or threats of retaliation for what the workers do or do not say. Furthermore, employers may contend that workers frequently cannot obtain independent legal counsel and could feel intimidated by the prospect of being interrogated by government agents.

The Board and courts have not resolved these competing arguments in a consistent and rational manner. To the contrary, we are confronted with a confusing array of conflicting decisions by administrative law judges (formerly termed "trial examiners"), Board members, and federal appellate judges.

#### A. *The Board's Efforts to Prevent Employer Interference*

At times, the Board has taken strong prophylactic measures to prevent employer interference with the right of employees to cooperate in Board investigations. Such cases trace their lineage to the 1964 decision in *Certain-Teed Products Corp.*<sup>11</sup>

In *Certain-Teed*, the employer's personnel director advised roughly ninety percent of the work force that unfair labor practice charges had been filed and that employees would probably be contacted by Board representatives. He then informed the employees that they were free to speak with the Board's agents, but cautioned them to tell the truth because those who cooperated in the investigation would probably be required to testify at the hearing. Furthermore, he told the employees that they were not required to speak with Board agents unless they were subpoenaed to do so.<sup>12</sup>

The trial examiner found this last statement to be "poor, if not inaccurate, advice."<sup>13</sup> He observed, however, that there was no evidence of "any specific instances of interference [by the employer] with any alleged attempts by the General Counsel to interview employees or that it obstructed or hindered any investigation efforts by the General Counsel."<sup>14</sup> He therefore concluded that the personnel director's advice did "not constitute interference with the rights guaranteed employees in Section 7 of the Act, in violation of Section 8(a)(1) thereof."<sup>15</sup>

The Board reversed this determination, emphasizing that the personnel director's advice had contained intemperate language,<sup>16</sup> had not been solicited by the employees, and had indicated that workers who co-

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11. 147 N.L.R.B. 1517 (1964).

12. *Id.* at 1533-34.

13. *Id.* at 1534.

14. *Id.*

15. *Id.* at 1535.

16. For example, the personnel director informed employees that they could tell Board representatives to "go to the devil, or [go to] hell." *Id.* at 1520. The use of such strident language presumably could have led employees to believe that the personnel director was angered by the investigation and did not want them to participate in it.

operated with the investigation could be forced to testify.<sup>17</sup> Moreover, the employer had made other statements violative of section 8(a)(1) such as expressing displeasure toward employees who had testified at an earlier hearing.<sup>18</sup> Most importantly, the Board stressed:

The Board's ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals. . . . While it may be technically true that an individual may not be forced to give statements to a Board agent unless subpoenaed, . . . Respondent's advice was designed to and would in fact tend to discourage employees from supplying information to a Board agent and thus to hinder him in investigating the charges filed in this case against the Respondent.<sup>19</sup>

Indeed, the Board emphasized that it was irrelevant whether the employer's advice actually interfered with the investigation. The crucial concern was that such advice "tend[ed] to discourage employees" from cooperating with investigators and therefore violated the Act. As the Board explained, "[i]n determining whether particular conduct violates Section 8(a)(1) the Board looks to the *tendency* of such conduct rather than to its actual effect in the given case."<sup>20</sup>

The precise parameters of the Board's approach, however, were not delineated. The Board observed in a footnote that "[s]ection 12 of the Act . . . provides for criminal sanctions for any person impeding or interfering with a Board agent in the performance of his duties,"<sup>21</sup> which certainly implies that the Board would carefully scrutinize subsequent cases where employers told their workers that they were not obligated to cooperate with Board investigators. In the following footnote, however, the Board cautioned: "We need not decide whether under other circumstances, not present here, an employer could lawfully advise his employees that they had a right not to make statements to Board agents."<sup>22</sup> The *Certain-Teed* Board thus told employers to watch their step, but consciously refrained from deciding when, if ever, employers could legiti-

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17. The Board gave two reasons for condemning the statement regarding compelled testimony. First, the employer could have curbed the employees' willingness to speak with investigators by warning them that they would be dragged "more deeply in the litigation" if they did so. Furthermore, the statement "would also have made it clear to employees that [the employer] would know if they assisted in the Board investigation," which could have made them apprehensive that the employer would retaliate against them for such cooperation. *Id.* at 1521 & n.6.

18. *Id.* at 1520-21.

19. *Id.* at 1520.

20. *Id.* at 1521 n.7 (emphasis added) (citing *Joy Silk Mills v. NLRB*, 185 F.2d 732, 743-44 (D.C. Cir. 1950) (explaining that "it has been consistently held that the question is not whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights under the Act"), *enforcing as modified*, 85 N.L.R.B. 1263 (1949), *cert. denied*, 341 U.S. 914 (1951)).

21. *Certain-Teed*, 147 N.L.R.B. at 1520 n.4.

22. *Id.* at n.5.

mately advise workers of a right to remain silent vis-à-vis the Board. Unfortunately, the Board's failure to address this root issue created uncertainty regarding how to analyze and decide subsequent controversies.

The Board followed *Certain-Teed* when the issue of employer advice arose again two years later in *Bryant Chucking Grinder Co.*<sup>23</sup> Once Board agents began questioning employees, the employer's general manager placed the following statement upon a company bulletin board:

#### NOTICE

To All Employees:

As you all know, N.L.R.B. and union representatives are attempting to interview many of you in preparation for the Hearing to be held soon. We have heard that pressure is being put on some of you to assist these investigators.

We want you to know that it is your privilege to help the N.L.R.B. attorneys in building a case against the Company. This is your decision to make and the Company has no desire to interfere.

But you may not have been told, and you are entitled to know, that you are under no obligation to provide this assistance to the N.L.R.B. and the union. You do not have to talk with these people during this investigation. This is your choice as free citizens.

Consider what the N.L.R.B. and union are trying to do here. There has been a secret ballot election in which a large majority of you voted against the union. The N.L.R.B. is now joining with the union to force you to accept the union as your bargaining agent without a secret vote. In other words, the N.L.R.B. and the union are trying to say that when you signed the union card, that had the same effect as a secret ballot election.

Compare this with the political election we will all be voting in next November. You may have registered for this election as a Democrat or as a Republican. You know, however, that you don't have to make a final decision until all the issues have been debated and you cast your secret ballot for the man of your choice. No one will be able to say that, because you registered for one party, you have to forfeit your vote and automatically take that party's choice.

The issue in this case is whether people who have signed union cards are entitled to express their freedom as citizens in a free election. In deciding whether or not to assist in the investigation, think what [that] decision will mean to your own right and the right of your fellow employees to a secret ballot election.<sup>24</sup>

The Board's general counsel argued that this advice violated section 8(a)(1) because it was "calculated to interfere with statutorily protected

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23. 160 N.L.R.B. 1526 (1966), *enforced*, 389 F.2d 565 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968).

24. 160 N.L.R.B. at 1554.



employee rights by impeding the Board in its investigation processes.”<sup>25</sup> The trial examiner agreed, reasoning that such conduct “had the tendency to obstruct and impede the Board in its investigative and trial procedures and to deprive employees of vindication by the Board of their statutory rights.”<sup>26</sup>

The Board also followed *Certain-Teed* in its 1967 *R.G. Barry Corp.* decision,<sup>27</sup> where an employer posted a notice advising employees that they were not obligated to speak with government agents. In this case, the employer’s president posted a notice stating:

SPECIAL NOTICE

It has come to my attention that some of our Barry team members have been bothered at their homes by strangers who say that they want to interrogate our people. One employee was told to be at home at a certain time so the stranger could question her.

We have no idea who these people are. One said he was a “government man.” He said he did not want our team members to tell the company about the call.

The whole thing seems very strange and completely out of keeping with the normal American way of life. No government people have informed us about any such thing.

I immediately checked into this with our attorney. He said you do not have to see any of these mistery [sic] callers—whether they are union men, government men, or simply some salesman trying to get into your house.

Our attorney says we should advise you of one thing: **DO NOT SIGN ANYTHING THESE PEOPLE ASK YOU TO SIGN.**

You have a right to have your attorney or our company attorney present before you say or sign anything!

As far as we know, the NLRB has finished its investigation of the Union “charges” that were filed after you rejected the Union on December 2. We cooperated with the NLRB and will do so at any time they want any further information to which they are legally entitled.

Don’t let these strangers upset you or force you to say anything or sign anything against your will. You have a perfectly legal right to refuse to see or talk to them.

I am sorry this union trouble keeps causing you problems, and I hope that it will soon be a completely dead issue—as it should have been after you turned the Union down flat in your overwhelming vote on December 2. The important thing now is don’t be frightened by any mys-

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25. *Id.* at 1554-55.

26. *Id.* at 1564. The trial examiner’s ruling, which was adopted by the Board, was subsequently affirmed by the appellate court in *Bryant Chucking Grinder Co. v. NLRB*, 389 F.2d 565 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968).

27. 162 N.L.R.B. 1472 (1967), *enforced as modified*, 405 F.2d 1212 (6th Cir.), *cert. denied*, 396 U.S. 838 (1969).

tery callers. *You have a perfect legal right to refuse to talk with them or to sign anything.*

If anyone causes you any trouble about this, see your supervisor or call me, if you want to.<sup>28</sup>

The trial examiner found this statement unlawful in a ruling adopted by the Board. As he explained:

It appears to me that the notice posted by the Respondent is of the same import as the remarks found by the Board to have been in violation of Section 8(a)(1) of the Act in *Certain-Teed Products Corporation*, 147 NLRB 1517, 1519, 1520. Hence I find that the Respondent by posting the notice on February 8, 1966, during a period when unfair labor practice charges were pending against it with the Board, interfered with the rights of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act. It is clear that the notice tended to discourage employees from supplying information to a Board agent and to hinder the Board in investigating charges pending before it against the Respondent.<sup>29</sup>

The trial examiner's opinion was well founded, although he failed to discuss two aspects of the notice that made it particularly problematic. First, the employer actually *ordered* the employees not to sign any statements. That command plainly sought to infringe upon the employees' freedom to sign affidavits and obviously could have impeded the Board's effort to build its case. Second, as discussed below,<sup>30</sup> the employer's apparent offer to have the "company attorney" present at any interviews also had a tendency to diminish the employees' willingness to speak with the Board and raised serious questions of professional ethics. It is no surprise, therefore, that the Board upheld the trial examiner's conclusion.

Eleven years later, the Board still continued to maintain a careful eye on employer advice. In *Florida Power & Light Credit Union*,<sup>31</sup> the employer circulated the following memorandum to all nonsupervisory employees with the request that they initial it:

If any representative of the National Labor Relations Board, or any other agency or person contacts this office regarding [a complaining employee's discharge], it will, under all circumstances, be referred to the General Manager. This not only applies to telephone inquiries but also to any visits to this office.

All questions or requests for any information will be answered only by

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28. 162 N.L.R.B. at 1475-76 (emphasis in original).

29. *Id.* at 1476. The Board also followed *Certain-Teed* in *Milo Brooke Ford*, 158 N.L.R.B. 692, 704-05 (1966) (finding employer guilty of section 8(a)(1) violation for its unsolicited instruction to employee not to divulge information to Board investigator).

30. See *S.E. Nichols, Inc.*, 284 N.L.R.B. 556 (1987), *enforced in relevant part*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 3162 (1989), discussed *infra* notes 41-49 and accompanying text.

31. 238 N.L.R.B. 937 (1978).

me [the general manager] after consultation with our attorney.<sup>32</sup>

The employer argued that this memorandum was necessary to assure that employees did not "release confidential information to unauthorized persons" and that the general manager "would be the only person to submit the official position of [the employer] to the Board."<sup>33</sup> The Board, however, summarily rejected that defense on the grounds that the memorandum "tended to interfere with the rights of employees to obtain redress from the Board," and that the employer's alleged justification, even if true, did not outweigh those rights.<sup>34</sup>

An employer's efforts to forestall cooperation with an investigation were also condemned in the Board's 1982 *Morton Rosen* decision.<sup>35</sup> In *Morton Rosen*, the employer posted the following notice after it was charged with unlawfully terminating a worker:

I understand that some of you have been receiving phone calls from persons who say they are from the National Labor Relations Board. These people have been asking questions about your work here.

I want you to know that these calls are false, and that no one from the National Labor Relations Board has called you or will call you. We believe that these calls are the work of a former employee who is trying to cause trouble.

If you should receive a call like this, you are perfectly free to hang up on the caller.<sup>36</sup>

The administrative law judge held this notice unlawful in a recommended order adopted by the Board. Relying upon *Hedison Manufacturing Co.*,<sup>37</sup> he concluded that section 8(a)(1) had been violated even though there was no evidence of actual interference with the investigation.<sup>38</sup>

The result in *Morton Rosen* is predictable but the administrative law judge's reasoning is instructive. First, he did not probe into whether the employer actually believed in good faith that no bona fide Board agent would telephone the employees. Instead, he focused on the fact that the advice could have interfered with the Board's investigation regardless of the employer's motivation. Furthermore, as in *Certain-Teed*, the administrative law judge appeared to recognize that whether section 8(a)(1) has been violated does not depend on whether there has been actual interfer-

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32. *Id.* at 937.

33. *Id.*

34. *Id.* at 938. See also *John S. Barnes Corp.*, 180 N.L.R.B. 911 (1970) (finding violation where employer told workers not to cooperate with Board agents), *enforced per curiam*, 77 L.R.R.M. (BNA) 2372 (D.C. Cir. 1971).

35. 264 N.L.R.B. 1342 (1982).

36. *Id.* at 1343 n.1.

37. 260 N.L.R.B. 1037 (1982).

38. *Morton Rosen*, 264 N.L.R.B. at 1345.

ence with the rights of employees, but instead turns upon whether a forbidden tendency exists.

In this regard, the administrative law judge's reliance on *Hedison* was well placed. In *Hedison*, the employer asked employees to notify it if they were interviewed by or gave statements to Board agents investigating an alleged unfair labor practice. The administrative law judge ruled that section 8(a)(1) had not been violated because there was no showing that the employer's request actually coerced the employees.<sup>39</sup> The Board reversed, however, explaining that "[t]he correct inquiry is not whether an employee or employees were *actually, in fact*, coerced or restrained, but rather whether the employer's conduct can reasonably be said to have a *tendency* to interfere with, restrain or coerce employees in the exercise of their Section 7 rights."<sup>40</sup>

This approach is sensible, for in many cases an employer could make flagrant attempts to impede an investigation but it would be exceedingly difficult to prove that its wrongdoing actually prevented employees from cooperating with the Board. After all, an employee could refuse to speak with Board agents due to fear of the employer or a self-generated desire not to "get involved" in the proceedings or for a host of other reasons, all of which may prove difficult to ascertain. Moreover, employees too intimidated to cooperate with a Board investigation could, in many instances, be equally deterred from testifying about the cause of their trepidation at the Board's hearing. That, of course, would reward the employer who is completely successful at coercing employees into silence because the Board could not prove its case. Rather than leave employee rights in such a precarious position, cases such as *Certain-Teed*, *Morton Rosen*, and *Hedison* correctly focus on whether a "coercive tendency" exists.

The Board's recent decision in *S.E. Nichols, Inc.*<sup>41</sup> further exemplifies its willingness, at least in some cases, to guard against employer interference. In *S.E. Nichols*, a majority of the Board agreed with the administrative law judge that an employer's offer to provide legal counsel to its workers violated section 8(a)(1). According to testimony at the hearing, the employer's district supervisor warned employees that Board agents might interview them and that he would provide his lawyer to attend such interviews if the employees needed any "protection."<sup>42</sup> Administrative Law Judge Klein found this unlawful because it falsely implied that the employees needed to be protected from the Board and therefore would "tend to dissuade them from cooperating with the

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39. *Hedison*, 260 N.L.R.B. at 1042-43.

40. *Id.* at 1038 (footnote omitted; emphasis in original).

41. 284 N.L.R.B. 556 (1987), *enforced in relevant part*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 3162 (1989).

42. 284 N.L.R.B. at 580.

Board's investigation."<sup>43</sup>

Furthermore, the offer in this case was particularly problematic because the employer's district supervisor intended to provide his own counsel. As Klein reasoned, the employer "temptingly propos[ed] a serious conflict of interests" because an attorney could not "properly advise and represent both employees and the employer who has been accused of violating their rights."<sup>44</sup> Moreover, even "[t]he most fearless employee would find it difficult to provide the Board with information against his employer when he was accompanied and being 'advised' by the employer's counsel."<sup>45</sup>

Judge Klein's opinion has unquestionable power. First, the employer's advice that its employees may need a lawyer suggests that the Board is their adversary rather than a protector of their rights. Second, an obvious conflict of interest arises when an attorney for an employer charged with violating its employees' rights purports to advise those same employees when they are interviewed by the Board. Plainly, the attorney cannot serve two masters simultaneously when their interests may be diametrically opposed. This creates a hazard that the employer's attorney (intentionally or unintentionally) may advise the employee in a manner that would help protect the employer—who pays the fees—but prevents the employee from divulging information indicating that the employer had violated the Act. Furthermore, employees, realizing that the attorney's primary client is their employer, may be unduly susceptible to her instructions or be deterred from speaking frankly with the Board in her presence.<sup>46</sup> Not only would this interfere with the Board investigator's search for truth; it would also impede the ability of employees to protect their rights under the Act. As Klein recognizes, such interference must not be condoned.

Klein also emphasized that other federal agencies had taken steps to avoid analogous conflicts of interest<sup>47</sup> and that the Board itself recently had recognized the need to do so. As she explained, section 10056.2 of the Board's Casehandling Manual provides that non-party witnesses may be accompanied by counsel during interviews if this will not interfere with the questioning. The Manual cautions, however, that "[t]his policy will normally not prevail where counsel or other representative also rep-

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43. *Id.* at 581.

44. *Id.*

45. *Id.* at 582.

46. See *infra* note 123 for Trial Examiner Maller's discussion of an employee's vulnerability vis-à-vis her employer's attorney.

47. 284 N.L.R.B. at 582 (citing *United States v. Steel*, 238 F. Supp. 575 (S.D.N.Y. 1965) (sustaining the Securities and Exchange Commission's efforts to avoid conflicts of interest among counsel for subpoenaed witnesses); *United States v. Smith*, 87 F. Supp. 293 (D. Conn. 1949) (pertaining to conflicts of interest in the representation of witnesses in Bureau of Internal Revenue investigations)).

resents a party to the case."<sup>48</sup>

A majority of the Board adopted Klein's conclusion that the employer's offer to provide an attorney was unlawful, and its order was enforced by the Second Circuit.<sup>49</sup> *S.E. Nichols* is a praiseworthy opinion, for the Board realized that employers charged with unfair labor practices should not be permitted to offer the services of their attorneys to employees questioned by the Board. The possibilities for coercion and hindrance are simply too great. It is both ironic and unfortunate, however, that the Board fails to recognize that such risks are inherently present whenever management seeks to counsel employees with regard to a Board investigation of charges against the former. There is no convincing rationale for permitting such advice and good reasons exist to prohibit it on a per se basis. Unless the Board takes that step, however, its decisions concerning such advice will continue to be a source of confusion and litigation.

### *B. Trouble from Above: The Role of the Appellate Courts*

In several important cases, the Board's efforts to adhere to *Certain-Teed* have been rebuffed by a reviewing court. In *J.W. Mortell Co.*,<sup>50</sup> the general counsel forwarded subpoenas to many of the company's employees calling for their attendance at a Board hearing. These subpoenas were accompanied by a cover letter in which the general counsel explained that attendance at the hearing was mandatory unless excused by the general counsel and that employees would need to speak with him before it could be determined whether they would be required to testify. The letter then requested the employees to contact the general counsel's representative at a local motel before the hearing date.<sup>51</sup>

Soon thereafter, the employer posted a notice informing employees to see its personnel director if they had any questions concerning the subpoenas or the letter. Several employees did so, and the employer then posted the following notice on its bulletin board:

#### NOTICE TO EMPLOYEES

This notice is prompted for two reasons. First, many of our employees are confused as to the meaning and importance of communications which may have been received by them from the National Labor Relations Board, asking them to contact Mr. Eisenberg [the general counsel's representative]. Secondly, we wish to provide you with the truth about a meeting notice passed out by union organizers on April 13.

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48. 284 N.L.R.B. at 581 n.39.

49. *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952 (2d Cir. 1988) cert. denied, 490 U.S. 1108 (1989).

50. 168 N.L.R.B. 435 (1967), enforcement denied in relevant part, 440 F.2d 455 (7th Cir. 1971).

51. 168 N.L.R.B. at 448.

1. On August 3, 1965 our employees rejected a union in a secret ballot election. The U.A.W. asked the N.L.R.B. to throw out the election results and give them the bargaining rights without [a] second election. The N.L.R.B. has agreed to hold such a hearing to consider this possibility. This is the reason many of our employees have received a notification about a subpoena to appear at the hearing.

Preliminary to this hearing Mr. Eisenberg wishes to ask you certain questions about the union affair. Do not confuse the subpoena with Mr. Eisenberg's request. You are under no obligation to discuss the case with him prior to the hearing. If you wish to discuss the matter with him, you are encouraged to do so. However, we have received reports that union organizers, trying to supply witnesses for Mr. Eisenberg, have coerced and misrepresented Mr. Eisenberg's communication, causing some of our people to believe that they must contact Mr. Eisenberg at this time. This is typical of the union ethics we have all seen over the last sixteen months.

Do not be intimidated by the union organizers. Their "Notice of Meetings" handout is further intimidation to seek our cooperation with Mr. Eisenberg. They would have you believe a certified union exists and you had better play ball with them.

2. The "Notice of Meeting" handout is misleading. There is no certified Local 1387 at the J.W. Mortell Company. This is another instance of "union baloney." Whether our employees will eventually be represented by the U.A.W. will depend upon the outcome of the court hearing which will probably take several weeks. It will be months after the hearing before a decision is handed down.

Wonder if those attending the meeting will be obliged to pay union dues?  
J.W. Mortell Company<sup>52</sup>

One month later, the general counsel again sent letters to the subpoenaed employees urging them to meet him for interviews before the hearing. In these letters he explained that employees who simply showed up at the hearing without a prior interview might have to wait in the hearing room "for many hours, or even more than one day," before being called to testify.<sup>53</sup> These letters prompted yet another notice by the employer, which stated:

#### NOTICE TO EMPLOYEES

#### MEETING WITH NATIONAL LABOR RELATIONS BOARD ATTORNEYS

Once again employees have asked the Company if they must go to the motel of the government lawyers about the union case.

*Feel free to go to the motel or feel free to stay away.* No one can legally pressure you either way. Some of you have been told you will be held in

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52. *Id.* at 449.

53. *Id.*

court by the government lawyers for four or five days. This is only a union pressure tactic to force you to go to the motel. We honestly do not believe the government lawyers will hold you in court just to punish you for not going to the motel. You might be required to wait in court several hours but we are confident that an orderly arrangement will be worked out.

We sincerely regret these latest union pressure tactics, and we hope you will bear with us until this whole thing is concluded.

*Feel free to go to the motel or feel free to stay away.*<sup>54</sup>

The trial examiner held that these latter two notices ran afoul of the Act because they were posted "with the intent and purpose of instilling in the minds of employees, by innuendo it is true, the thought that Respondent would prefer that its employees not cooperate with Board counsel."<sup>55</sup>

This conclusion was adopted by the Board in a two-to-one vote. Members Fanning and Jenkins concurred with the trial examiner's reasoning and concluded:

We do not believe, with regard to both of these notices, that they somehow gather immunity for the Respondent simply because they advised employees that they may or may not cooperate with the General Counsel when in fact the substantive thrust of each notice is clearly directed to deter such cooperation. . . .

We find that such communications were designed to and would in fact tend to discourage employees from supplying legitimate information to a Board agent, thus hindering him in the investigation of the charges filed against Respondent. We find, therefore, that the above-described activities of Respondent interfered with the rights of employees to obtain redress from the Board and thereby violated Section 8(a)(1) of the Act. *Certain-Teed Products Corp.*, 147 NLRB 1517.<sup>56</sup>

In dissent, however, Member Zagoria argued that both notices were lawful. Zagoria emphasized that several employees had questioned the personnel director regarding this matter, that both notices affirmed that employees were free to go to the interviews, and that (unlike the employer's language in *Certain-Teed*) the notices were of a temperate tone. He also argued that the second notice's reference to "union pressure tactics" referred not to the general counsel's actions but rather to what the union supposedly had been telling employees. For those reasons, Zagoria found insufficient evidence "that the notices were 'calculated' or 'designed' to convince employees that Respondent did not want them to cooperate, or . . . would be 'displeased' if they did."<sup>57</sup>

Zagoria lost the battle but won the war as his arguments were vali-

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54. *Id.* at 449-50 (emphasis in original).

55. *Id.* at 451.

56. *Id.* at 437 (footnote omitted).

57. *Id.* at 437 n.4.



dated by the Seventh Circuit.<sup>58</sup> In his opinion for the majority, Judge Kroch simply concluded:

While it is possible to infer from the wording of the notices posted by Mortell an intent to discourage employees from appearing for interviews with a Board attorney, and the Board did construe the notices as conveying the impression that its own trial preparation was somehow subservient to the interest of the Union, we believe, in the light of all the circumstances as outlined in Judge Pell's concurring opinion, that this interpretation is an unduly strained one.<sup>59</sup>

As Kroch indicated, it was Judge Pell's concurrence that stated the essence of the court's disagreement with the Board. Pell explained that "the Board's construction of written documents and undisputed evidence is not binding on this court"<sup>60</sup> and concluded that there was no substantial evidence to support the Board's conclusion that the notices transgressed the Act.<sup>61</sup> Pell agreed with Zagoria that *Certain-Teed* was distinguishable because in this case the notices were of a temperate nature, and further argued that they were speech protected by section 8(c) of the Act,<sup>62</sup> which states:

The expressing of any views, argument, 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 subchapter, if such expression contains no threat of reprisal or force or promise of benefit.<sup>63</sup>

Pell then concluded:

It appears quite evident from the notices posted that the union was also communicating with the employees on the subject of the meetings with the General Counsel's representative in a manner which the company felt misrepresented the situation. The company was answering the union's assertions and making it clear that there was no legal obligation to discuss the case at the motel. The company also stated, however, that if the employees wished to discuss the matter with him they were "encouraged to do so." The employer candidly indicated the objectivity of the government in the matter by stating that they felt confident that an orderly arrangement would be worked out for the employee to testify.

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In the absence of any showing whatsoever that the General Counsel was in fact hampered in his presentation of this case, I find no basis in

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58. *NLRB v. J.W. Mortell Co.*, 440 F.2d 455 (7th Cir. 1971).

59. *Id.* at 457.

60. *Id.* at 461 (Pell, J., concurring) (citing *Celanese Corp. v. NLRB*, 291 F.2d 224, 226 (7th Cir. 1961), *cert. denied*, 368 U.S. 925 (1961)).

61. *Mortell*, 440 F.2d at 461 (Pell, J., concurring) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951), where the Supreme Court stated: "whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals").

62. 440 F.2d at 461 (Pell, J., concurring).

63. 29 U.S.C. § 158(c) (1988).

this particular matter for upholding the Board's decision.<sup>64</sup>

Judge Pell's reasoning is plausible on the surface but cannot bear scrutiny. First, he blundered (as did Zagoria) by attempting to distinguish *Certain-Teed* on the grounds that the notices in *Mortell* were of a temperate nature. That argument is specious for, although the *Certain-Teed* Board did mention that the employer's language was intemperate, the primary basis for its holding appeared to be that the employer had told ninety percent of its workers that they need not cooperate with the Board. This advice tended to hinder the Board's investigation.<sup>65</sup> Certainly the opinion did not hinge upon the employer's naughty language. Furthermore, the employer's language in *Mortell* was hardly cool and dispassionate. The employer's repeated insistence that employees did not have to meet with the general counsel's representative plainly revealed the employer's interest in the matter; no profanity was required. Employees reasonably could have interpreted the employer's constant reminders that they did not "have to" attend the prehearing interviews as a signal that the employer did not want them to do so and might retaliate against those who did.<sup>66</sup>

Judge Pell's purported reliance on section 8(c) is equally unconvincing. Although that provision protects an employer's right to present its views, it specifically excludes statements containing a "threat of reprisal or force or promise of benefit."<sup>67</sup> The Board had reasonably concluded that the employer's notices implied "its displeasure with those who would cooperate with the government lawyers,"<sup>68</sup> and the employees rationally could have concluded that they would be discharged or otherwise disciplined for speaking with the Board. Pell's application of section 8(c) therefore seems misguided in that it ignores the possibility of implied coercion.

Pell also erred by emphasizing that the general counsel apparently was not prevented from fully presenting his case. That fact is completely irrelevant in deciding whether an employer has violated the Act. As the Board clearly explained in *Certain-Teed*, "[i]n determining whether par-

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64. 440 F.2d at 462.

65. *Certain-Teed Prods. Corp.*, 147 N.L.R.B. 1517, 1520-21 (1964), discussed *supra* notes 11-22 and accompanying text.

66. In other words, the employer resembles the host who repeatedly tells an unwelcome guest that she does not "have to" stay for dinner. Although the statement superficially emphasizes the guest's freedom of choice, the obvious message is that it is time for the guest to leave. Unlike the social visitor, however, the employees were dependent upon the employer for their livelihoods, were aware of the employer's open hostility toward the union, and knew that the employer had been charged with violating their statutory rights. Even though the employer stated that employees were free to attend the interviews, the Board could expect such employees to be especially sensitive toward the employer's signals that it did not want them to do so. Employees may have feared that they might be discharged, demoted, or otherwise punished if they did.

67. 29 U.S.C. § 158(c) (1988).

68. *J.W. Mortell Co.*, 168 N.L.R.B. 435, 437 (1967).

ticular conduct violates Section 8(a)(1) the Board looks to the tendency of such conduct rather than to its actual effect in the given case."<sup>69</sup> In short, it is immaterial that the employer failed to cripple the Board's case; what matters is that its notices could reasonably tend to discourage employees from attending the prehearing interviews.

Pell's final argument, that the employer's notices were designed to counteract union misrepresentations, must also fail. First, it was never determined whether the union had in fact misrepresented the nature and purpose of the Board's proceedings; all we have is the employer's bare assertion that it had done so. Second, even if the union was guilty of such mischaracterization, the *Board* was the proper party to redress that problem, either by informing employees of the truth or by bringing charges against the union for interfering with its investigation. There still would be no excuse for the employer's apparent attacks on the Board's integrity and neutrality.

Indeed, Pell's assertion that the employer was not attacking the Board seems regrettably naive. The employer's notices repeatedly linked the Board's investigation and hearing with the union's organization efforts and clearly implied that the two were intertwined. Even if the notices were simply the result of poor draftsmanship, they easily could have led employees to believe that by participating in the Board's interviews they would be furthering the efforts of the union that their employer so obviously despised. The Seventh Circuit's opinion in *Mortell* thus constitutes an unjustified reversal of the Board's well-founded decision and a regrettable departure from the spirit of *Certain-Teed*.

*Mortell* thus exacerbated rather than resolved the uncertainties concerning how the Board and courts would judge employers who advised employees that they need not participate in the Board's investigatory interviews. Unfortunately, subsequent appellate decisions also have clouded this issue. Instead of a series of coherent opinions consistently delineating the law, we are left with an array of decisions in which administrative law judges (formerly trial examiners), Board members, and judges continue to apply disparate philosophies.

For example, in *Florida Steel Corp.*<sup>70</sup> the Board's efforts to protect the integrity of its investigatory process and the workers' freedom to participate therein were blunted by the Fifth Circuit. After a union filed objections to a recent representation election, the employer sent letters to its work force that stated in relevant part:

[I]f a National Labor Relations Board agent should drop in on you, you may ask for an opportunity to obtain legal counsel before you talk to him.

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69. 147 N.L.R.B. at 1521 n.7, discussed *supra* notes 11-22 and accompanying text.

70. 233 N.L.R.B. 491 (1977), *enforcement denied*, 587 F.2d 735 (5th Cir. 1979).

If you should want some legal counsel, or just help in handling any of the situations described above, all you need do is let your supervisor know. He will put you in touch with someone who can help you.<sup>71</sup>

The administrative law judge held that this violated section 8(a)(1), reasoning that "[i]n light of all the circumstances, including Respondent's pattern of unlawful conduct, as shown in this and previous cases, the letter seems a patent attempt to obstruct the investigations of the Board by discouraging employees from supplying information to Board agents."<sup>72</sup> The Board affirmed his conclusion and ordered the employer to cease and desist from "[i]nforming employees . . . that they can obtain legal counsel before talking to a Board agent, or that Respondent will assist them in obtaining such counsel, for the purpose of obstructing Board investigations."<sup>73</sup>

The Fifth Circuit refused to enforce the Board's order in an opinion<sup>74</sup> highly reminiscent of the Seventh Circuit's approach in *Mortell*. First, the court argued that the letters were free speech protected by the First Amendment and section 8(c).<sup>75</sup> Furthermore, the court emphasized that the employer had simply told the truth; as the Board conceded, employees are in fact entitled to obtain legal counsel before speaking with a Board agent.<sup>76</sup> The court then emphasized:

Our case involves the advising of employees of one of the most treasured and sacred rights possessed by citizens of this nation. Thus we need go no further than to say that we can conceive of no circumstances where accurately informing an employee of his right to counsel could amount to an interference, restraint, or act of coercion.<sup>77</sup>

The employer, of course, did more than advise its workers of their right to speak with an attorney; it also offered to help provide such counsel. As discussed earlier,<sup>78</sup> such an offer raises a serious conflict of interest and should be forbidden. Following the reasoning of the *Mortell* court, however, the Fifth Circuit ruled that the employer had acted law-

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71. 233 N.L.R.B. at 494.

72. *Id.* (footnote omitted) (citing *Certain-Teed Prods. Corp.*, 147 N.L.R.B. 1517 (1964) (discussed *supra* notes 11-22 and accompanying text) and *R.G. Barry Corp.*, 162 N.L.R.B. 1472 (1967), *enforced as modified*, 405 F.2d 1212 (6th Cir.), *cert. denied*, 396 U.S. 838 (1969) (discussed *supra* notes 27-30 and accompanying text)).

73. *Id.* at 491. *See also* *Air Express Int'l Corp.*, 245 N.L.R.B. 478, 496-97 (1979) (holding that employer violated section 8(a)(1) through its district manager's unsolicited statements to employees that Board investigators were harassing employees, that the employees did not have to answer the Board's questions without counsel, and that the company would provide legal advice for those who wanted it), *enforced in relevant part*, 659 F.2d 610 (5th Cir. 1981), *cert. denied*, 459 U.S. 835 (1982).

74. *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979).

75. *Id.* at 752.

76. *Id.*

77. *Id.*

78. *See* *S.E. Nichols, Inc.*, 284 N.L.R.B. 556 (1987), *enforced in relevant part*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 3162 (1989), discussed *supra* notes 41-49 and accompanying text.

fully because “[t]he letter on its face shows no tendency to interfere with, restrain, or coerce the employees, nor does the record show in any manner that the General Counsel’s investigation or presentation of his case was hampered nor [sic] made more difficult as a result of this letter.”<sup>79</sup> Moreover, the court argued that the employer’s letter did not discourage workers from speaking with Board agents, but merely informed them of an opportunity to consult with legal counsel before doing so.<sup>80</sup> The court then concluded:

[T]he Board entered its order . . . for the purpose of punishing the Company because of its opposition to the Union in this and other cases. This is not permissible, and we cannot approve it. The proper role of the Board is akin to that of an impartial and neutral referee. Its orders are required to be remedial, not punitive. Many cases have so held. It is fundamental that the Board has no authority to punish a company because it is against a union. Any company has a perfect right to be opposed to a union, and such opposition is not an unfair labor practice.<sup>81</sup>

Here the court seriously distorted the reasoning of the Board and administrative law judge. They did *not* seek to punish the employer for its mere opposition to the union. To the contrary, they interpreted the controversial letter in light of the employer’s numerous prior *unfair labor practices*.<sup>82</sup> Given that the employer repeatedly had violated the employees’ statutory rights (as opposed to lawfully resisting unionization), it was entirely reasonable for the administrative law judge and Board to conclude that the letter was part of yet another attempt to restrain employees in the exercise of their section 7 rights.

Furthermore, the court ignored the impact this sorry history of unfair labor practices could have had on the employees’ interpretation of the letter. Although the letter may have been facially neutral with regard to whether they spoke with the Board, employees knew they were dealing with an employer that had not hesitated to violate their rights before and conceivably would do so again. The employer’s letter (which demonstrated its awareness of the Board’s investigation) therefore could have led employees to believe that the employer did not want them to cooperate with the Board and would retaliate against those who did. The court

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79. 587 F.2d at 753.

80. *Id.*

81. *Id.*

82. The Florida Steel Corporation was no stranger to the Board; it had been found guilty of unfair labor practices on many prior occasions. *See, e.g.*, Florida Steel Corp., 231 N.L.R.B. 923 (1977); Florida Steel Corp., 231 N.L.R.B. 651 (1977); Florida Steel Corp., 224 N.L.R.B. 587 (1976), *enforced without opinion*, 552 F.2d 368 (5th Cir. 1977); Florida Steel Corp., 224 N.L.R.B. 45 (1976); Florida Steel Corp., 221 N.L.R.B. 371 (1975), *enforced without opinion*, 534 F.2d 1405 (5th Cir. 1976); Florida Steel Corp., 220 N.L.R.B. 225 (1975), *enforced in part*, 544 F.2d 896 (5th Cir. 1977). In these and other decisions the Board found that the Florida Steel Corporation had violated the Act, which helps explain why the Board viewed the employer’s “advice” in the present case with a rather skeptical eye.

failed to perceive that this crucial possibility could have converted the letter into an implied threat outside the safe harbor of section 8(c). Moreover, the court blundered (as did the Seventh Circuit in *Mortell*) by ignoring the message of *Certain-Teed* that “[i]n determining whether particular conduct violates Section 8(a)(1) the Board looks to the tendency of such conduct rather than to its actual effect in the given case.”<sup>83</sup> The Board’s cease and desist order was therefore a reasonable effort to protect the employees’ free access to the Board and not an attempt to “punish” the employer for exercising any legitimate prerogatives under section 8(c).

Despite its flawed analysis, *Florida Steel* was followed in 1980 by the Third Circuit in *NLRB v. Garry Manufacturing Co.*<sup>84</sup> In *Garry*, the union lost a representation election and the Board issued a complaint against the employer concerning its preelection activities. In response, the employer posted a notice at the workplace stating that a Board agent had been questioning employees in preparation for the upcoming hearing and was helping the union with its case. The notice then stated:

We want you to know that you are not obligated to talk to the agent or sign anything. If you do sign something, they may attempt to use this to bolster the union’s claim that they represent a majority of our employees on a given date, and that Garry should *now* be directed—without any election—to recognize District 65 as your bargaining agent.

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The N.L.R.B. agent is not interested in the results of the prior vote . . . or that you may not want District 65 to represent you now. He only wants your signature in order to force Garry to recognize District 65 as your bargaining agent. Again, you are not obligated to talk to the agent or sign anything.<sup>85</sup>

The Board held that this advice violated section 8(a)(1), concluding it “has the direct effect of obstructing this Agency’s performance of its proper legal function, denigrates its statutory purpose, and undermines employee confidence in this Agency’s [ability] to protect employees’ rights under the Act.”<sup>86</sup>

The Third Circuit reversed that conclusion, relying upon *Florida Steel*. The court first noted that two weeks after posting its notice the employer distributed a letter to employees stating that they were free to talk with the Board agent and that “technically” the agent was working for the Board rather than for the union.<sup>87</sup> The court then asserted:

[The posted notice] did not tend to coerce the employees. It informed

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83. 147 N.L.R.B. 1517, 1521 n.7 (1964), discussed *supra* notes 11-22 and accompanying text.

84. 630 F.2d 934 (3d Cir. 1980) (denying enforcement in relevant part of the Board’s decision at 242 N.L.R.B. 539 (1979)).

85. 630 F.2d at 944 (emphasis in original).

86. 242 N.L.R.B. at 540.

87. 630 F.2d at 944.

them of a right not to talk with the agent and made reasonably clear the agent's role. Moreover, to the extent that it might have been coercive, the letter cured that defect in sufficient time for any employee to talk with the agent or the Board if he or she so chose. There is no substantial evidence supporting the Board's finding that the letter violated section 8(a)(1) because there is no reasonable likelihood that it was coercive. We therefore reverse this finding of a violation.<sup>88</sup>

Such reasoning is fundamentally misguided. First, the initial notice did *not* "make reasonably clear" the Board agent's role. To the contrary, it strongly suggested that the agent was a mere pawn of the union, intent upon imposing that organization on the workers regardless of their desires. Furthermore, the letter may well have had a coercive tendency because the employer obviously opposed the union and had mischaracterized the Board as being in league with that organization. As a result, employees could infer that their employer did not want them to cooperate with the Board, and its pointed remark that they did not have to do so could only deepen that impression.

The court's conclusion that Garry's notice lacked a coercive tendency is all the more remarkable given its decision to enforce the Board's *Gissel* bargaining order in this case.<sup>89</sup> Based on the employer's "numerous statutory violations," the *Garry* court ordered the employer to recognize the union as its employees' collective bargaining representative.<sup>90</sup> However, these very violations added a coercive flavor to the employer's notice. Employees would have interpreted the notice in light of the employer's other actions, which entailed unlawful, repeated interference with their section 7 rights. It therefore seems inexplicable that the court failed to appreciate the coercive tendency of that notice.

The court's conclusion that the employer's subsequent letter "cured" any forbidden tendency of the notice is equally implausible. As the court itself observed, the employer distributed that second message "in response to an unfair labor practice charge" that had been filed after the posting of the notice two weeks earlier.<sup>91</sup> By that time, the damage had been done—employees had been apprised of the employer's perception of the Board as the handmaid of the odious union and rationally may have feared that cooperating with the Board would incur the employer's wrath. Moreover, the letter was hardly a ringing pronouncement of the Board agent's independence; the employer simply stated that

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88. *Id.*

89. In *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969), the Supreme Court upheld the Board's authority to order an employer to bargain with a union, even though that union had not won a representation election, where the employer had committed unfair labor practices "which have made the holding of a fair election unlikely or which have in fact undermined a union's majority and caused an election to be set aside."

90. 630 F.2d at 946.

91. *Id.* at 944.

the agent was not "technically" working for the union and that employees could talk with him if they so desired.<sup>92</sup> Such a grudging, tardy acknowledgment of the employees' freedom could hardly be expected to restore the confidence of those intimidated into silence by the initial notice. Thus, as in *Florida Steel*, the Board was reversed by a circuit court that construed every possible doubt in the employer's favor regardless of the coercion implicit in the circumstances.<sup>1</sup>

The conflicts between the Board and courts in *Mortell*, *Florida Steel*, and *Garry* are most unfortunate. First, as a substantive matter, the courts simply are incorrect. They have overruled Board decisions which wisely sought to protect employee access to the Board and prevent interference with Board investigations. Second, these conflicts dilute the Board's normative message that workers' freedom of access to the Board must not be circumscribed. As Charles Nesson has explained, "the projection and affirmation of norms embodied in substantive law are central functions of the judicial process . . . ."<sup>93</sup> Such a projection loses force, however, when appellate courts send a conflicting message that employer interference is permissible, at least if it is disguised as a form of advice. In addition to denigrating the Board's normative message, such opinions also encourage further litigation because employers realize that they may be able to overturn the Board's judgments upon appeal.

### C. *Trouble from Within: The Board's Internal Inconsistency*

The Board itself must bear partial responsibility for employer interference with its investigations. Although *Certain-Teed* and its progeny cast a prophylactic blanket over employee participation in the investigatory process, the Board also has issued decisions that take a far less critical stance toward an employer's proffering of advice. These decisions undermine the workers' ability to participate in investigations and sow confusion in the law by reaching results contrary to other precedents.

The Board has retreated from its protective stance, for example, when employers believe in good faith that the employees they advise are supervisors. In *Cato Show Printing Co.*,<sup>94</sup> an employer instructed its foremen and floorladies not to speak with a Board agent unless an attorney for the employer was present. The employer argued that this instruction was consistent with Board policy as set out in section 10056.5 of the Board's Field Manual and supplementary memoranda from the general counsel. As the administrative law judge acknowledged, it appeared that the employer "would be privileged to have [its] attorney pres-

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92. *Id.*

93. Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1390 (1985).

94. 219 N.L.R.B. 739 (1975).



ent during any interviews of its low level supervisors.”<sup>95</sup>

The employer later conceded that the foremen and floorladies were not actually supervisors. The administrative law judge found, however, that at the time the instructions were given the employer had believed in good faith that such workers were supervisors who fell within the scope of that privilege.<sup>96</sup> He also emphasized that in *Certain-Teed* the Board “was careful to point out that it was not saying that under other circumstances, not present in *Certain-Teed*, an employer could not lawfully advise his employees that they had a right not to make statements to Board agents.”<sup>97</sup> He then cited *Midwest Regional Joint Board*<sup>98</sup> and concluded that the employer had not violated the Act.<sup>99</sup>

The administrative law judge made no effort to explain *Midwest Regional*'s relevance, but its meaning and applicability were debated by the Board. In *Midwest Regional*, a union's business representative advised an employee that she should not speak with a Board agent investigating a charge against the employer without having an attorney present. The

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95. *Id.* at 747. The administrative law judge added, however, that the Board's policy “does not preclude the General Counsel from receiving information from intermediate or lower level supervisors who come forward voluntarily, or who indicate that they do not wish to be interviewed in the presence of the charged party's counsel or representative.” *Id.* at 747 n.11. Section 10056.6 of the NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART ONE) UNFAIR LABOR PRACTICE PROCEEDINGS (1989) now states in pertinent part:

Where the respondent is represented by counsel or other representative and cooperation is being extended to the Region in connection with its investigation of unfair labor practice charges, the charged party's counsel or representative is to be contacted and afforded an opportunity to be present during the interview of any supervisor or agent whose statements or actions would bind a respondent. This policy will normally apply in circumstances where: (a) the charged party or the latter's counsel or representative is cooperating in the Region's investigation; (b) counsel or representative makes the individual to be interviewed available with reasonable promptness so as not to delay the investigation; and (c) during the interview counsel or representative does not interfere with, hamper, or impede the Board agent's investigation. In cases involving individuals whose supervisory status is unknown, this policy would not be applicable.

This policy does not preclude the Board agent from receiving information from a supervisor or agent of the charged party where the individual comes forward voluntarily, and where it is specifically indicated that the individual does not wish to have the charged party's counsel or representative present. In those cases in which the witness does not object to the presence of counsel, the appointment for an interview should be made and counsel advised of the date, time, and place of the interview.

It is noted, however, that *former* supervisors, etc., are not agents of the respondent after the supervisory relationship has been severed. Thus, the respondent's counsel does not have the right to be present when a *former* supervisor is interviewed. In this regard, Rule 801(d)(2)(D) of the *Federal Rules of Evidence* states that an admission is “a statement by the party's agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship.” (Emphasis supplied.) See *Southern Maryland Hospital*, 288 NLRB No. 56 (Apr. 14, 1988). See also *S.E.C. v. Geon Industries*, 531 F.2d 39 (2d Cir. 1976). Further, section 10056.2 is applicable with respect to the handling of matters when the former supervisor is represented by counsel.

(emphasis in original).

96. 219 N.L.R.B. at 747.

97. *Id.*

98. 171 N.L.R.B. 641 (1968).

99. 219 N.L.R.B. at 747.

trial examiner found this unlawful, stating: "By its advising employees to refuse to give statements without an attorney present, the Union . . . has sought to impede free access of employees to the Board and thereby has engaged in unfair labor practices defined in Section 8(b)(1)(A) of the Act."<sup>100</sup> The Board, however, tersely concluded that "the evidence is insufficient to establish that by giving the advise [sic] in question [the union's business representative] sought to impede the free access of employees to the Board."<sup>101</sup> Neither the trial examiner nor the Board engaged in any further analysis or cited any authorities for their conflicting conclusions.

In *Cato*, a majority of the Board believed that the administrative law judge's reliance upon *Midwest Regional* was apropos and adopted his conclusion that the employer had not violated the Act. The majority stated that its decision in *Midwest Regional* "turned entirely on the purpose or motive of the union agent in advising employees not to give statements to a Board agent without an attorney present"<sup>102</sup> and that the same absence of improper motive existed in the present case. For the majority, it was critical that the employer had believed in good faith that its foremen and floorladies were supervisors. The majority also emphasized that the Supreme Court apparently had indicated that an employer's motive may be relevant in determining whether it has violated section 8(a)(1).<sup>103</sup>

In their partial dissent, Board Members Fanning and Jenkins rejected such analysis in its entirety. They emphasized the need to assure that employees are free to communicate with Board agents and explained that "unlike *Midwest*[,] where the discussion was between fellow-employee representatives, here the relationship of the parties was quite different—the Respondent was instructing its own employees."<sup>104</sup>

Fanning and Jenkins also rejected the argument that the employer's asserted good faith constituted a defense. As they explained:

This view is contrary to the teachings of the Supreme Court that "prohibited conduct cannot be excused by a showing of good faith." *International Ladies' Garment Workers' Union, AFL-CIO [Bernhard-Altmann Texas Corp.] v. N.L.R.B.*, 366 U.S. 731, 739 (1961). . . . Section 8(a)(1) is violated if an employee is restricted in protected activity, despite the employer's good faith view that he is a supervisor lacking such rights, when

100. 171 N.L.R.B. at 642. Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) (1988), forbids labor organizations and their agents from restraining or coercing employees in the exercise of their section 7 rights.

101. 171 N.L.R.B. at 641.

102. 219 N.L.R.B. at 739-40, 740 n.2.

103. *Id.* at 741 (citing *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965); *NLRB v. Brown*, 380 U.S. 278 (1965); *NLRB v. Exchange Parts Co.*, 375 U.S. 405 (1964); *NLRB v. Truck Drivers Local 449*, 353 U.S. 87 (1957)).

104. 219 N.L.R.B. at 743 & n.11.

it is shown that he is not a supervisor. Clearly, statutory rights are paramount in these circumstances, and once they have been invaded "[m]ore need not be shown." *ILGWU v. N.L.R.B.*, *supra*.<sup>105</sup>

*Cato* is not a simple case, for, as the majority emphasized, it may seem harsh to condemn an employer that honestly believed it was lawfully advising its supervisory personnel. For several reasons, however, the stance of Jenkins and Fanning appears preferable. First, whatever the Board's rationale in *Midwest Regional*, the case simply is inapposite to the *Cato* controversy for it did not involve the possible economic coercion and conflict of interest present when an employer seeks to limit its work force's ability to speak freely with Board investigators. Furthermore, although the relevance of employer motive in section 8(a)(1) cases remains unclear and controversial,<sup>106</sup> the employer's asserted good faith in *Cato* cannot obviate the fact that the foremen and floorladies were not "supervisors" and that the employer's instructions directly interfered with their free access to the Board. Rather than leave employees at the mercy of an employer's interpretation of the law, it would make more sense as a prophylactic matter to find such advice violative of section 8(a)(1) regardless of whether the employer was malicious or simply ignorant. Surely it is not asking too much to expect employers to learn and obey the law before attempting to interfere with their employees' right to speak privately with Board agents. Moreover, the "good faith" defense would be quite difficult to apply—how much effort, for example, must an employer expend to determine whether its employees enjoy supervisory status? For these reasons, one hopes that the Board will reconsider the *Cato* doctrine in subsequent cases.<sup>107</sup>

Unfortunately, other Board decisions also permit employers to advise workers that they do not have to cooperate with Board investigators. These decisions are difficult to reconcile with those cases finding violations of section 8(a)(1). In addition, they obfuscate the law in this area and reveal the Board's ambivalence in its commitment to protecting the rights of employees.

In the Board's 1966 *Hawthorne Aviation* decision,<sup>108</sup> for example,

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105. *Id.* at 743.

106. See, e.g., I C. MORRIS, *THE DEVELOPING LABOR LAW 76-78* (2d ed. 1983 & Supp. 1988); Christensen & Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 *YALE L.J.* 1269 (1968); Oberer, *The Scienier Factor in Sections 8(a)(1) and (3) of the Labor Act: Of Balancing Hostile Motive, Dogs and Tails*, 52 *CORNELL L.Q.* 491 (1967).

107. It bears emphasis that *Cato* does not shield the employer in situations where a supervisor has brought charges against it. In *Bechtel Power Corp.*, 248 N.L.R.B. 1257 (1980), for example, the Board found the employer guilty of a section 8(a)(1) violation when the employer insisted that a supervisor who had filed charges against it be accompanied by the employer's counsel when speaking with Board agents.

108. 161 N.L.R.B. 1326 (1966), *enforced in relevant part*, 406 F.2d 428 (10th Cir. 1969).

the Board upheld the trial examiner's ruling that an employer's attorney lawfully advised subpoenaed employees that they did not have to meet with the general counsel's attorney before the hearing. As the credited testimony revealed, the employer's attorney advised one employee simply to testify truthfully instead of speaking with the general counsel's attorney but "finally" told him that the employer could not prevent him from attending the meeting. The attorney also responded to a second employee's questions by advising him that he could speak with the general counsel's attorney if he wanted to but was not obligated to do so, advised a third employee that he did not have to confer with the general counsel's attorney in advance of the hearing, and told a fourth employee that he did not have to meet with the general counsel's attorney before the hearing and asked him not to do so.<sup>109</sup> In an opinion unsupported by any reasoning or authority, the Board accepted the trial examiner's bald conclusion that "[t]he evidence outlined above falls short of preponderating in favor of the conclusion that the Company instructed employees not to obey subpoenas or ordered them not to communicate with Board agents in advance of testifying."<sup>110</sup>

This conclusion is hardly adequate. Although the employer's attorney did not "order" employees to disregard their subpoenas or refrain from speaking with Board personnel, it seems obvious that he actively discouraged at least the fourth employee from cooperating with the general counsel's attorney. Such discouragement, coming from an employer's legal counsel, clearly could interfere with the Board's preparation of its case by making that employee reluctant to take part in a prehearing interview. *Certain-Teed* and its progeny held similar suggestions unlawful,<sup>111</sup> yet here the trial examiner gave no reasons whatsoever for departing from such precedents.<sup>112</sup> Even worse, the Board let this aspect of the trial examiner's opinion stand without any

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109. 161 N.L.R.B. at 1344.

110. *Id.*

111. *Certain-Teed Prods. Corp.*, 147 N.L.R.B. 1517 (1964), discussed *supra* notes 11-22 and accompanying text. Ironically, the trial examiner in *Hawthorne* did rely on *Certain-Teed* in holding that the employer's general manager violated the Act by referring to a Board field examiner as the "union lady" and advising workers that they could refuse to speak with her. *Hawthorne*, 161 N.L.R.B. at 1343-44. This exemplifies how the Board's inconsistent commitment to *Certain-Teed* can appear even within the context of a single decision.

112. The Board noted that the first employee advised by the employer's attorney was a supervisor and it is possible that the other employees also possessed supervisory status. 161 N.L.R.B. at 1330. If so, the employer may have been able to argue that it was not unlawful under the circumstances to insist that its attorney be present when they spoke with the general counsel's attorney. See, e.g., *Cato Show Printing Co.*, 219 N.L.R.B. 739 (1975), discussed *supra* notes 94-107 and accompanying text. Neither the trial examiner nor the Board relied upon that possibility, however, and in *Hawthorne* the employer's attorney did more than insist on being present at such prehearing interviews—he discouraged at least one of the employees from attending such an interview at all. The trial examiner's conclusion thus lacks any principled justification.

discussion.<sup>113</sup>

The Board has taken the same misguided approach as recently as 1986. In *Clark Equipment Co.*,<sup>114</sup> the Board let stand the administrative law judge's conclusion that the employer had not unlawfully attempted to dissuade employees from speaking with the Board. In *Clark*, the Board subpoenaed at least one employee and asked him to meet with Board attorneys to discuss the case at a local motel. When the employee asked the employer's employee relations director whether he had to talk with the Board's attorneys, he was told that he did not have to do so. Furthermore, the employer posted the following notice at the work place:

23 SEPTEMBER 1980

MANY OF YOU HAVE ASKED YOUR SUPERVISORS WHETHER YOU HAVE TO GO TO MEETINGS CALLED BY THE NATIONAL LABOR RELATIONS BOARD AND/OR UNION REPRESENTATIVES OVER AT THE REGAL INN THIS WEEK, AND ALSO WHETHER YOU HAVE TO SIGN PAPERS PREPARED BY THE NLRB REPRESENTATIVE OR THE UNION.

CLARK TAKES NO POSITION WHATSOEVER WITH RESPECT TO YOUR OWN PERSONAL DECISION TO GO ALONG WITH THIS REQUEST OF THE NLRB AND THE UNION[.] HOWEVER, YOU SHOULD KEEP IN MIND THAT YOU ARE UNDER NO LEGAL OBLIGATION TO GO TO ANY OF THESE MEETINGS OR TO SIGN ANY PAPERS IF YOU DON'T WANT TO.

THE CHOICES ARE YOURS ENTIRELY.

IF YOU HAVE ANY QUESTIONS DON'T HESITATE TO CONTACT EMPLOYMENT RELATIONS.<sup>115</sup>

The administrative law judge found such advice completely lawful. He distinguished prior decisions such as *Certain-Teed* on the grounds that the notice in *Clark* "was in response to employee inquiries, . . . did not mischaracterize the Board's role, . . . contained no remarks to suggest to employees that Respondent would look with disfavor on anyone who cooperated with the Board, and was not a false statement about the obligation imposed on employees receiving it."<sup>116</sup> Based on these distinctions, the Board accepted the administrative law judge's conclusion that there was no tendency to interfere with the employees' section 7 rights.<sup>117</sup>

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113. The Tenth Circuit also refrained from addressing this aspect of the decision because it was not appealed. *NLRB v. Hawthorne Aviation*, 406 F.2d 428 (10th Cir. 1969).

114. 278 N.L.R.B. 498 (1986).

115. *Id.* at 518.

116. *Id.* at 519.

117. The administrative law judge and the Board did find, however, that the employer had violated the Act by advising an employee that he was not legally required to honor Board subpoenas. *Id.* at 504, 518.

For better or worse, *Clark* will probably be an extremely influential precedent in the years ahead. Its reasoning was recently applied, for example, in *Microimage Display Div. of Xidex Corp.*, 297 N.L.R.B. No. 9, at 2 n.2 (Oct. 20, 1989), where the Board held that a similar notice was lawful

Cases such as *Clark* add fuel to employers' arguments that employers should be free to advise employees that they are not legally bound to cooperate with Board investigators (at least if the employee has not been subpoenaed) as long as the employers' advice is correct, impartial, and does not explicitly discourage such cooperation. This argument may seem particularly potent where, as in *Clark*, individual employees have sought the employer's counsel on whether they must speak with Board investigators. The employees' initiative in seeking advice may indicate that they trust their employer and are not being manipulated in order to hinder the Board's investigation. Furthermore, employers can argue that employees often are ignorant of their legal rights, cannot afford independent counsel, and are intimidated by the prospect of a bureaucratic interrogation.

Such an argument has undeniable force, but it cannot override the reasons for a prophylactic prohibition against such advice. First, where employees have *not* sought the employer's counsel, the mere fact that the employer has volunteered its opinion may indicate to employees that they would be wise to avoid cooperating with the Board. Because the employer stands accused of violating the Act, employees may readily interpret (or reasonably misinterpret) the employer's eagerness to inform employees that they need not supply information to the Board as a sign that the employer would prefer for its work force to remain silent.

Furthermore, when an employer proffers such advice, it effectively draws a line in the dust: any employees who proceed to cooperate in the Board's investigation obviously are doing so out of a sense of civic duty or personal desire rather than because of any perceived governmental compulsion. This enables the employer to identify those employees who want to assist the Board to the employer's potential detriment. Under such circumstances, employees may feel that their sentiments are exposed and that they risk retaliation for openly deciding to participate in the Board's investigation.

Employees may feel such coercion even when that is not the employer's subjective intent. In these cases, a section 8(a)(1) violation should still be found because the advice tends to interfere with the employees' vindication of their section 7 rights. Rather than analyze an employer's statements in the abstract, they must be evaluated according to how they may reasonably be perceived by the workforce. In this regard, it is ironic to note Epictetus' statement that "[i]t is not the things

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because it "indicated that it was in response to employee inquiries, did not misrepresent the role of the Board, contained no remarks indicating that the Respondent would look with disfavor on any employee who cooperated with the Board, and did not make any false statement about employees' witness obligations."

themselves that disturb men, but their judgements about these things."<sup>118</sup> Rather than hold American workers to the standard of a Greek Stoic, however, the Board should apply Epictetus' wisdom in a manner that recognizes the vulnerability of an employee whose employer is being investigated on a charge of unfair labor practices.

These problems do not disappear even where an employee actively seeks her employer's advice. First, it is naive to assume that such solicitation of counsel necessarily reflects the employee's confidence in and trust of her employer. To the contrary, the employee may discuss the investigation with her employer because she fears she will be punished if she fails to do so. She may be reluctant to miss work for a Board interview without the employer's prior knowledge, or she may seek her employer's assurances that she will not be disciplined for assisting the Board in its investigation. In short, the employee may broach the subject with her employer due to trepidation rather than trust.

Moreover, the fact that certain individual employees have sought advice cannot justify the employer's decision, as in *Clark*, to post a notice telling the entire work force that it need not cooperate with the Board. Those employees who did not request such advice will wonder why the employer has taken an interest in the matter and may conclude that the employer wants them to avoid speaking with the Board. It is therefore too simplistic to conclude that an employer's advice on such matters is noncoercive merely because at least one employee solicits it.

Opinions such as *Clark* also fail to consider the prophylactic reasons for discouraging employers from offering such advice. Although the employer's advice in those cases may have been sound, far too many cases confront us where the employer's statements were inaccurate, one-sided, or otherwise tended to diminish an employee's willingness to speak with the Board. This is no surprise, for an inherent conflict of interest contaminates such advice: bringing to light all evidence of unfair labor practices best serves the Board and the work force, while the employer has an undeniable stake in seeing that any transgressions remain undiscovered. Furthermore, even where the employer is scrupulously honest, it may give erroneous advice due to its ignorance of what the law entails.

#### *D. A Proposal: Removing the Peril of Employer Interference*

The problems discussed above demonstrate the need to forbid employers from advising employees that they do not have to cooperate with the Board. First, many employers have abused their self-appointed roles as counselors by giving advice that is erroneous, incomplete, or otherwise

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118. 2 EPICETUS, *Encheiridion*, in EPICETUS: THE DISCOURSES AS REPORTED BY ARRIAN, THE MANUAL, AND FRAGMENTS 487 (W.A. Oldfather trans., 1928).

tends to hinder the Board's investigation. Second, many workers may interpret an employer's advice as a not-so-subtle hint that the employees should not cooperate with the Board. Many employees experience profound alienation in the workplace<sup>119</sup> and will view their employer's advice with concern, especially considering that the same employer already has been accused of violating their rights. Furthermore, far too many employees have in fact been illegally discharged, demoted, or otherwise punished for participating in Board procedures.<sup>120</sup> More generally, unfair labor practices by employers have skyrocketed since the late 1950's,<sup>121</sup> and the remedies for unlawfully discharged employees are

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119. Much has been written concerning the problem of worker alienation. As Erich Fromm asserts:

The relationship between employer and employee is permeated by [a] spirit of indifference. The word "employer" contains the whole story: the owner of capital employs another human being as he "employs" a machine. They both use each other for the pursuit of their economic interests; their relationship is one in which both are means to an end, both are instrumental to each other. It is not a relationship of two human beings who have any interest in the other outside of this mutual usefulness.

E. FROMM, *ESCAPE FROM FREEDOM* 139 (1941). More recently, Roberto Unger has maintained: [I]n the contemporary industrial democracies the blend of technical hierarchy and voluntary contract takes different forms in sectors of the economy that either strengthen or soften the contrast between task-defining and task-executing activities. Widely recognized moral assumptions identify personal subjugation as the exemplary social evil. Neither individual and collective contract nor alleged technical necessity suffice to lift the experienced burden of subjugation from the experience of work in the areas of the economy that most starkly contrast task definers and task executors. Workers continue to suffer strongly felt experiences of powerlessness and humiliation.

R. UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* 274 (1987).

As Unger realizes, the sense of powerlessness a worker experiences may well depend upon her particular economic role in society. Robert Blauner has also warned that one must not draw undue conclusions about industrial alienation in general based upon a study of discrete industries. R. BLAUNER, *ALIENATION AND FREEDOM* 186-87 (1964). As Blauner reasons, "[w]hat is needed now is a more complete and comprehensive treatment of the entire range of industrial work milieux." *Id.* at 187. Even Blauner states, however, that "we must conclude that alienation remains a widespread phenomenon in the factory today." *Id.* at 183.

The extent and nature of alienation among American workers is beyond the scope of this article, but I find it self-evident that many employees experience a sense of vulnerability vis-à-vis their employers, and that this must be taken into account in determining whether an employer's advice concerning cooperation with the Board could tend to impede such employees' efforts to seek vindication of their section 7 rights.

120. See, e.g., cases cited *supra* note 7.

121. As Paul Weiler reports:

From 1957 to 1965, unfair labor practice charges against employers increased by 200%, while the number of certification elections increased by only 50%. By 1980, the annual number of certification elections had declined slightly, but unfair labor practice charges against employers were up another 200% from 1965, and fully 750% from 1957. Worse, employees entitled to reinstatement in 1980 numbered 10,033, a 1000% increase from the low point in 1957.

Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1779-80 (1983) (citing NLRB annual reports for the years indicated).

Furthermore, as Weiler explains, this alarming increase is not due simply to an increased propensity by employees to file charges since the percentage of such charges found to be meritorious by the Board increased from 21% in 1958 to 39% in 1980. *Id.* at 1780 n.34 (citing 29 NLRB ANN.



frequently far too little and come much too late.<sup>122</sup> It therefore is reasonable to assume that an employer's advice that employees do not have to speak with Board investigators may alarm employees who may then decide that it would be prudent to forgo the exercise of their section 7 rights.<sup>123</sup>

Finally, the Board's ad hoc approach in assessing the legitimacy of an employer's advice imposes substantial costs on the Board and the taxpayer. Currently, each case must be examined in minute detail to determine whether it is closer to *Certain-Teed* and its progeny or exceptional decisions such as *Clark*. This case-by-case approach is expensive, time consuming, and clouds rather than clarifies the law. We could have much more certainty—and far fewer cases to resolve<sup>124</sup>—if the Board applied a per se approach to prohibit employers from advising employees that they do not have to speak with Board investigators.

The one possible saving grace of the advice given in *Clark* is that it explicitly assured employees that the employer would not object if the workers chose to be interviewed by the Board. Such a benefit, however, may be obtained in a much more reliable manner than by permitting employers to offer counsel on this issue. Whenever the Board commences its investigation of an employer, that employer should be required to post a notice authored by the Board stating the nature of the investigation, the true role of the Board, and explaining that the employer must not punish or reward any employee for speaking with the Board regardless of whether the employee's statements are helpful or detrimental to the employer's legal position. The notice should also advise

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REP. 12 (1964) and 45 NLRB ANN. REP. 10 (1980)). The number of unfair labor practice charges brought against employers has tapered off in recent years, from 31,281 in 1980 to 22,266 in 1988. 45 NLRB ANN. REP. 243 (1980); 53 NLRB ANN. REP. 189 (1988). The 1988 figure, however, is still a remarkably disturbing increase from the 3,655 charges brought in 1957 or the 13,601 charges brought in 1970. 22 NLRB ANN. REP. 163 (1957); 35 NLRB ANN. REP. 157 (1970).

122. See Weiler, *supra* note 121, 1789-93 for a thoughtful discussion of the inadequacy of the Board's reinstatement and backpay awards for employees discharged in violation of the Act.

123. As Trial Examiner Abraham Maller once observed:

[I]n Board proceedings . . . the employer has the power to discharge, withhold promotion, or otherwise penalize potential or actual witnesses for the General Counsel, and employers have discharged employees both for filing charges and for giving testimony. Employee knowledge that such power exists and can be exercised is unavoidable. Consequently, the employee whose livelihood may depend on his pleasing his employer may be more amenable to the suggestions of his employer's counsel than an independent witness in private litigation would be.

Hamburg Shirt Corp., 156 N.L.R.B. 511, 527 (1965) (holding that employer violated section 8(a)(1) through its attorney's excessive prehearing questioning of employee), *enforced sub nom.* Amalgamated Clothing Workers of Am. v. NLRB, 371 F.2d 740 (D.C. Cir. 1966).

124. First, it seems logical that there would be fewer cases because fewer employers would offer such advice once they learned that it would be found unlawful on a per se basis. Furthermore, one can assume that greater certainty in the law would increase parties' willingness to settle cases because they could accurately predict how the legal issue would be resolved at the Board's hearing or on appeal to the circuit court. See *supra* note 9.

employees to contact the Board itself if they have any questions regarding the investigation or their duty to cooperate.

Such an approach would assure employees of their freedom to speak with the Board without the risk that employers will intentionally or unintentionally discourage employee cooperation or hinder the Board's investigation. Admittedly, this proposal is not foolproof, for as discussed below, the Board's advice is not always infallible.<sup>125</sup> On a comparative basis, however, it is far better to steer employees toward the Board—the agency trained and dedicated to vindicate their section 7 rights—rather than to the employer that has been accused of violating those same rights. The Board should make every effort to assure that it advises and questions employees in a respectful, correct, and noncoercive manner. This seems a more reasonable alternative than leaving employees at the mercy of an employer whose counsel may be colored by ill will, self-interest, or simple ignorance.

## II

### ADVISING EMPLOYEES TO DISREGARD BOARD SUBPOENAS

As shown above, there is substantial conflict concerning whether an employer may advise its workers that they do not have to cooperate with Board investigators. Such confusion and controversy also arise when an employer advises employees that they need not honor the Board's subpoenas to testify at a hearing. Such advice should be found unlawful because it frequently is erroneous and, even when accurate, has an inherent tendency to interfere with the vindication of employees' section 7 rights. As in the case of Board investigations, the Board itself should be the one to advise workers of their rights and obligations. The Board and courts, however, have wavered in their approaches to this problem. Although most decisions hold such advice unlawful, the Board and courts have failed to speak in a clear and united manner.

#### A. *The Board's Efforts to Prevent Employer Interference*

*Sanco Piece Dye Works*,<sup>126</sup> a 1942 Board decision, forbids such advising. In *Sanco*, the respondent<sup>127</sup> told an employee that he did not

125. See *infra* note 174 and accompanying text for a discussion of the problem that Board agents may give erroneous advice or have interests at odds with those of individual employees.

126. 38 N.L.R.B. 690 (1942).

127. The respondent in *Sanco* was not the immediate employer of the employee, but was an official and large shareholder of a holding company that rented premises to the employee's direct employer, exercised certain control over employment practices, and was perceived as the "big boss" by the employer's work force. *Id.* at 726. The Board therefore concluded that he was an "employer" within the meaning of section 152(2) of the Act which defined that term as including "any person acting in the interest of an employer, directly or indirectly." *Id.* at 726-27, 731. Section 152(2) was later amended to substitute "as an agent of an employer" for "in the interest of an employer."

have to appear as a witness at the Board's hearing if he did not wish to do so. When the employee explained that he had been served with a subpoena, the respondent reiterated that the employee did not have to appear and that the respondent would pay for an attorney to handle the matter. Even though the employee rejected this offer and proceeded to testify, the Board concluded that the respondent unlawfully had interfered with the employee's exercise of rights guaranteed under section 7.<sup>128</sup> The *Sanco* Board did not provide any detailed reasoning for its conclusion, perhaps sensing it was self-evident that employees must not be dissuaded from obeying subpoenas.<sup>129</sup>

In its 1960 *Winn-Dixie Stores* decision,<sup>130</sup> the Board belatedly offered at least limited reasoning to support its prophylactic approach. In *Winn-Dixie*, the employer's agents told subpoenaed employees that they did not necessarily have to honor their subpoenas and that if they chose to testify they would be "on their own."<sup>131</sup> The Board found this unlawful on the grounds that the employer had "used veil[ed] threats to intimidate [the workers] into ignoring the subpoenas" and conveyed the impression "that they might be penalized in some manner" if they appeared at the hearing.<sup>132</sup>

The Board also emphasized that the employer's advice was simply incorrect. The Board explained:

The Act and the Rules and Regulations of the Board provide clearly that a person served with a subpoena is *required* to appear and to give testimony pursuant to such subpoena. Section 11(1) of the Act empowers the Board or its agent to issue subpoenas "*requiring* the attendance and testimony of a witness." [Emphasis supplied.] . . . [A]t least until the person served with the subpoena petitions to have the subpoena revoked, he continues to be under an obligation to appear pursuant to the subpoena. Nor, contrary to the Respondent, do we consider relevant the fact that only a

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128. 38 N.L.R.B. at 725-26.

129. The Board took the same prophylactic approach in *Alterman Transp. Lines*, 127 N.L.R.B. 803, 804 (1960), where the Board reasoned that "the act of seeking to persuade an employee to forego participation in a Board proceeding constitutes interference, restraint, or coercion within the meaning of Section 8(a)(1) of the Act" (footnote omitted). See also *Sunshine Art Studios, Inc.*, 152 N.L.R.B. 565, 574-75 (1965) (finding section 8(a)(1) violation where manager told subpoenaed employee "[y]ou know you don't have to go [to the hearing] or you can be sick").

In *Textile Workers of Am.*, 108 N.L.R.B. 743 (1954), *enforced in relevant part*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956), the Board also emphasized that unions as well as employers must not be permitted to discourage employees from obeying its subpoenas. In this case union officials warned one employee that he "might get hurt" if he honored his subpoena and suggested to another that "people would make it pretty tough for her" if she did not "testify the right way." 108 N.L.R.B. at 748. The Board found the union guilty of violating section 8(b)(1)(A) and stressed that "participation in proceedings before the Board, whether in support of or in opposition to the position of a participating labor organization, is a right of employees to be exercised for mutual aid, without coercion or restraint." *Id.* at 749 & n.18 (footnote omitted).

130. 128 N.L.R.B. 574 (1960).

131. *Id.* at 577-78, 586.

132. *Id.* at 578.

United States district court may enforce a subpoena. The Respondent confuses a person's obligation to honor a subpoena with the procedure for enforcing this obligation. The obligation to honor the subpoena arises immediately when the subpoena is duly issued and served. It is only when the person served fails to fulfill this obligation that the necessity arises to seek enforcement of the obligation in the district court.<sup>133</sup>

The Board's opinion is laudable in that it perceives the coercion inherent in the employer's statement that the employees were "on their own" and clarifies the law concerning an individual's obligation to honor subpoenas. Unfortunately, however, the opinion is too fact-specific and fails to discuss whether under other circumstances an employer could legitimately advise employees that they need not honor their subpoenas. Because of this flaw, the true scope of *Winn-Dixie Stores* needs to be ascertained in subsequent cases.

Such ambiguity notwithstanding, in 1968 the Board also condemned an employer's interference in *Block-Southland Sportswear, Inc.*<sup>134</sup> In this case, the employer repeatedly advised employees that they did not have to testify at an unfair labor practice hearing against the employer even though the employees were under subpoena by the Board. Moreover, the employer unlawfully had penalized two employees (by transferring them to different positions) in retaliation for their testimony pursuant to subpoenas at an earlier representation hearing.<sup>135</sup> In a ruling adopted by the Board, the trial examiner stressed the employer's history of penalizing employees for testifying and the fact that its advice was both unsolicited and inaccurate. She then concluded that the employer had violated section 8(a)(1) because its advice "tended to create apprehension" among the subpoenaed workers and "also had the tendency to obstruct and impede the Board in its investigative and trial procedures and to deprive employees of vindication by the Board of their statutory rights."<sup>136</sup>

An equally stringent approach was taken in the 1974 *Richard T. Furtney* decision,<sup>137</sup> where the employer's attorney told employees that it was up to them whether or not to attend the Board's hearing if they received subpoenas. In an opinion affirmed by the Board, the administrative law judge found this unlawful for the following reasons:

[W]hen an employer informs an employee that he does not have to comply with a Board subpoena, or when it tells him that he is free to suit himself in deciding whether to go or not to go to a Board hearing in

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133. *Id.* at 579 (footnotes omitted; emphasis in original). In support of its reasoning, the Board relied upon 29 C.F.R. §§ 102.31(a)-102.31(b). *Id.* at 579 nn.4-6.

134. 170 N.L.R.B. 936 (1968), *enforced per curiam sub nom.* Amalgamated Clothing Workers of Am. v. NLRB, 420 F.2d 1296 (D.C. Cir. 1969).

135. 170 N.L.R.B. at 961-63.

136. *Id.* at 973-74.

137. 212 N.L.R.B. 462 (1974), *enforced without opinion*, 96 L.R.R.M. (BNA) 2107 (6th Cir. 1975).

response to the commands of a subpoena, such statements constitute unlawful interference with Section 7 rights and are a violation of Section 8(a)(1) of the Act. *Amalgamated Clothing Workers, AFL-CIO v. N.L.R.B. [Block-Southland Sportswear, Inc.]* 420 F.2d 1296 (C.A.D.C., 1969). When an attorney who practices before the Board makes such a statement to employees in the presence of and on behalf of an employer, such conduct constitutes a violation of Section 8(a)(1) and is also unprofessional conduct.<sup>138</sup>

The administrative law judge's approach sensibly sought to discourage employer interference with Board proceedings and recognized that an attorney's "advice" to the employees of a client/employer is inherently suspect and may be both unprofessional conduct and a violation of the Act. Furthermore, *Furtney* demonstrated how the Board frequently has been content to enforce an administrative law judge's finding of a section 8(a)(1) violation with little or no discussion.<sup>139</sup>

Most of the Board's recent decisions have reemphasized that ordinarily an employer may not advise employees that they are free to disregard their subpoenas.<sup>140</sup> In 1984, the Board extended this prohibition to cover advice given to former employees as well as the current work force. In *J. Coty Messenger Service*,<sup>141</sup> a majority of the Board adopted the administrative law judge's conclusion that the employer had violated section 8(a)(1) when its vice president told a former employee not to worry about a validly served Board subpoena and not to attend the hearing. The Second Circuit enforced the Board's order, reasoning that "[i]nfluencing a former employee to ignore such a subpoena unjustifiably obstructs the board's investigative process . . . and thereby directly infringes upon the right of current employees to have their rights vindicated by an effective enforcement process before the board."<sup>142</sup>

The court's logic is persuasive, for even former employees may per-

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138. 212 N.L.R.B. at 466.

139. See, e.g., *Delta Faucet Co.*, 251 N.L.R.B. 394, 399 (1980) (finding violation where employer suggested that employee could disregard subpoena); *Madison Kipp Co.*, 240 N.L.R.B. 879, 886-88 (1979) (employer violated Act by counseling employees on how to avoid service of subpoenas); *Mohican Mills, Inc.*, 238 N.L.R.B. 1242, 1251 (1978) (finding unfair labor practices where employer told employee that he did not have to honor subpoena and later harassed him for doing so); *Anthony L. Jordan Health Ctr.*, 235 N.L.R.B. 1113, 1119-20 (1978) (holding that employer violated Act by questioning the legitimacy of subpoenas and warning employees not to attend hearing, even though employer later told them they could attend).

140. See, e.g., *Quality Millwork Corp.*, 276 N.L.R.B. 591, 594-95 (1985); *L & J Equip. Co.*, 272 N.L.R.B. 652 (1984); *Travelways, Inc.*, 267 N.L.R.B. 1332, 1336-37 (1983); *Washington Beef Producers*, 264 N.L.R.B. 1163, 1170, 1185 (1982), *enforced without opinion*, 735 F.2d 1371 (9th Cir. 1984); *Amoco Fabrics Co.*, 260 N.L.R.B. 336, 374 (1982).

141. 272 N.L.R.B. 268, 269, 279 (1984), *enforced in relevant part*, 763 F.2d 92 (2d Cir. 1985).

142. *NLRB v. J. Coty Messenger Serv.*, 763 F.2d 92, 98 (2d Cir. 1985) (citation omitted). The court also noted that the former employee had a history of leaving and seeking reemployment with the same employer, so "any friendly encouragement to ignore the subpoena might very well have had the same coercive effect that such a statement would have had on a current employee." *Id.*

ceive the need to fulfill their ex-employer's bidding. Furthermore, even if the former employee has no intention of seeking reemployment, the advice not to testify interferes with the Board's ability to summon witnesses and attempt to vindicate the section 7 rights of current employees.

### *B. Inconsistency in the Board's Approach*

Although the Board commonly finds it unlawful for employers to suggest that subpoenas may be ignored, the law in this area is not as clear as some of the cases might suggest. To the contrary, in a number of instances the Board has held that such advice does not violate the Act.

In the 1966 case of *Bryant Chucking Grinder Co.*,<sup>143</sup> for example, the Board affirmed (without discussion) a trial examiner's conclusion that an employer's advice concerning subpoenas did not violate the Act. Shortly before an unfair labor practice hearing against the employer, its personnel director had issued the following notice to all foremen:

#### NOTICE

To All Foremen:

During the interviews last Friday in preparation for the N.L.R.B. Hearing, a number of employees asked about the legal effect of the N.L.R.B. subpoenas.

Because of the difficulty employees have in obtaining correct answers to such inquiries and because you may be asked similar questions, I have discussed with our counsel the meaning of subpoenas.

From this discussion it is my understanding that there is no penalty for refusing to comply with the N.L.R.B. subpoena.

The N.L.R.B. has authority to issue subpoenas requiring the attendance and testimony of witnesses at an N.L.R.B. Hearing. If the individual subpoenaed does not appear as directed, the N.L.R.B. has no power of its own to force an individual to comply with the subpoena. Instead it must apply to a District Court of the United States for an order requiring the person subpoenaed to appear. The District Court judge has power to issue such an order but he also has discretion as to whether or not he will do so.

In other words, the effect of the N.L.R.B. subpoena is that it is a formal direction of [sic, to] an individual to testify at a hearing but it does not have any binding legal effect until a Federal Judge sees fit to order the individual to comply. Therefore, no penalty can be imposed on the individual for failure to appear as ordered in the N.L.R.B. subpoena. A penalty can be applied only if a court grants the order referred to above and, after that order is served upon the individual, he continues his refusal to appear.

If you are questioned by any employee as to the meaning of the sub-

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143. 160 N.L.R.B. 1526 (1966), *enforced*, 389 F.2d 565 (2d Cir. 1967), *cert. denied*, 392 U.S. 908 (1968). *Bryant* is also discussed *supra* notes 23-26 and accompanying text.

poena, it is proper to give them the above information. In doing so, remember that you have no authority, and should not advise any employee as to whether he should submit to the N.L.R.B. subpoena.<sup>144</sup>

Although this notice was distributed only to the employer's foremen, they provided it to various subpoenaed employees who discussed it with some of their coworkers. The foremen did not actively persuade employees to disobey the subpoenas, but the general counsel argued that the memorandum was designed to impede and obstruct the Board's efforts to obtain their testimony. To bolster this argument, the general counsel emphasized that the employer also had issued notices stating that it was not responsible for subpoenas and that the employees had no legal obligation to cooperate with the Board's prehearing investigation.<sup>145</sup>

The trial examiner, however, disagreed. Although she ruled that the employer violated the Act by advising employees that they did not have to speak with Board investigators,<sup>146</sup> she concluded:

[T]he memorandum, while perhaps laying an unwarranted stress on the fact that no penalty can be imposed on an employee who fails to obey the subpoena unless and until a court orders the subpoena obeyed, does not, when read in its entirety, appear to have incorrectly stated the legal effect of such subpoenas; it purports on its face to be presented only for the benefit of those employees who might specifically seek advice on that subject; and it was not generally circulated or displayed to all the employees . . . . Under all the circumstances, I do not base any unfair labor practice finding on Respondent's use of this memorandum.<sup>147</sup>

This conclusion, although accepted by the Board and not discussed upon appeal, is questionable at best. The trial examiner correctly observed that the memorandum was circulated initially only to foremen and did not explicitly seek to dissuade employees from testifying at the hearing. It bears emphasis, however, that foremen circulated the memorandum to subpoenaed employees and that the employer previously had told them that they did not have to cooperate with Board investigators, that the Board was "building a case against the Company," and that "[t]he N.L.R.B. is now joining with the union to *force* you to accept the union as your bargaining agent without a secret vote."<sup>148</sup> When read against this background of mischaracterization of Board processes and hostility toward the union, the memorandum loses its facial semblance of benign neutrality. Employees reading the memorandum, well aware of the employer's opposition to the Board and union, could logically infer that the foremen channeled the memorandum to them because the em-

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144. 160 N.L.R.B. at 1556-57.

145. *Id.* at 1557-58.

146. This aspect of the decision is discussed *supra* notes 23-26 and accompanying text.

147. *Id.* at 1564 (footnote omitted).

148. *Id.* at 1554 (emphasis added).

ployer did not want the employees to testify. In light of that reasonable inference, employees understandably may have had second thoughts about obeying the Board's subpoenas.<sup>149</sup> Furthermore, neither the trial examiner nor the Board paused to consider whether it was simply inappropriate for the employer to advise employees on their obligation to testify against it. Such advice would seem inherently suspect, especially in light of the employer's other, unlawful statements.

Other Board opinions also have condoned employer advice regarding subpoenas in a most regrettable manner. In *Babcock & Wilcox Co.*,<sup>150</sup> for example, the Board turned a blind eye toward an employer's blatant assistance in helping an employee avoid testifying. In this case, a subpoenaed employee approached the employer's attorney and inquired whether he could "get out" of testifying.<sup>151</sup> The attorney responded that the Board's subpoena should not be enforced, but persuaded the employee to remain available in case the employer wanted him to testify. Furthermore, the employee was given a leave of absence because he was afraid the Board's general counsel would search for him at work. The employee never appeared for the hearing and was paid forty-five dollars by the attorney, ostensibly to compensate him for missing work and for keeping himself available in the event the employer decided to call him as a witness.<sup>152</sup>

Based on these facts, the trial examiner concluded that the employer had violated section 8(a)(1) by encouraging and assisting the employee to disobey the subpoena and by rewarding him for not testifying on behalf of the general counsel.<sup>153</sup> The Board, however, disagreed. First, the Board argued that the employee solicited the attorney's advice and it was "no more than a legal opinion given at the request of a client."<sup>154</sup> Second, the Board maintained that the employee already had decided not to testify before speaking with the attorney and therefore "could not have been induced or encouraged to do something he had already decided to do himself."<sup>155</sup> Third, the Board claimed there was no proof that the employee had received a leave of absence to help him avoid testifying.<sup>156</sup> Finally, the Board decided that the payment of forty-five dollars was "highly questionable" but was not demonstrably "intended as a device to keep the prospective witness from being available to" the general coun-

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149. One employee, in fact, later contacted a judge to inquire whether he should obey his subpoena. *Id.* at 1557.

150. 114 N.L.R.B. 1465 (1955).

151. *Id.* at 1466.

152. *Id.* at 1466-67.

153. *Id.* at 1478-80.

154. *Id.* at 1467.

155. *Id.* at 1467-68.

156. *Id.* at 1468-69.



sel.<sup>157</sup> For these reasons, the Board concluded that the employer's actions were "not above suspicion" but were not a proven violation of section 8(a)(1).<sup>158</sup>

None of this reasoning withstands scrutiny, and *Babcock & Wilcox* ranks among the most poorly reasoned decisions ever rendered by the Board.<sup>159</sup> First, the Board's rationale that the employer simply had given legal advice to a "client" is extremely misleading. The attorney represented the *employer*, not the subpoenaed employee, and the employer had been charged with violating the statutory rights of its workforce. This plainly gave rise to a conflict of interest.<sup>160</sup>

The Board's second line of argument—that the employer could not have induced or encouraged the employee to disobey the subpoena because he already had decided to do so—is simply counterintuitive. If the employee had developed a closed mind on the issue, then why did he solicit the attorney's advice? Surely the attorney's statement that he probably need not attend the hearing and the employer's grant of the leave of absence reinforced and facilitated the employee's inclination not to testify for the general counsel. Moreover, the employer's decision to grant the time off seems obviously designed to help the employee avoid testifying. Although the employer commonly granted requests for absences, it did so in this case while "fully cognizant" of the employee's motive and without even consulting the employee's foreman.<sup>161</sup> Under these circumstances, it seems clear that the employer unlawfully helped the employee shirk his obligation to testify.

That the employer unlawfully paid forty-five dollars to the subpoenaed employee is equally apparent. As the trial examiner reasoned, "the plain inference is, irrespective of any subjective motive, that this was nothing more than a reward for disobeying the subpoena."<sup>162</sup> The employer's argument that the payment was simply to compensate the employee for his time off and keeping himself available as possible defense witness is hardly convincing in light of its earlier actions and failure to demonstrate that it commonly gave similar rewards to non-subpoenaed employees under such circumstances.

Finally, the Board's opinion inexplicably and unjustifiably departed

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157. *Id.* at 1469-70.

158. *Id.* at 1470.

159. The only silver lining to the Board's discussion is that it is so severely misguided that it serves as a useful example of how *not* to analyze such cases. As Epictetus reasoned, "They call knowledge good, and error evil; so that even in regard to what is false there arises a good, that is, the knowledge that the false *is* false." 2 EPICETUS, *supra* note 118, at 117-19 (emphasis in original).

160. As the trial examiner observed, the employer's attorney "represent[ed] the interests of the opposing party" and therefore needed "to exercise extreme caution and prudence in conferring with" the subpoenaed employee. 114 N.L.R.B. at 1478.

161. *Id.* at 1468-69, 1479.

162. *Id.* at 1480.

from the precepts of *Sanco*,<sup>163</sup> the first significant Board decision concerning advice to subpoenaed employees. *Sanco* exemplified the Board's strict, prophylactic condemnation of activity designed to prevent an employee from honoring a subpoena.<sup>164</sup> The Board, however, made no effort to distinguish *Sanco* or reconcile its reasoning with the case at bar. *Babcock & Wilcox* therefore stands as a remarkably ill-considered decision and a radical departure from the Board's previous approach.

The scope of *Babcock & Wilcox* may be limited to cases where a subpoenaed employee already had decided not to testify before receiving her employer's advice.<sup>165</sup> The Board's 1971 decision in *Hilton Hotel Corp.*,<sup>166</sup> however, demonstrates that *Babcock & Wilcox*'s vitality is both lingering and pernicious. In *Hilton*, the union alleged that the employer unlawfully had laid off an employee, but the employee agreed with the rehabilitation manager not to pursue the claim in return for reinstatement to his job and backpay. When the Board moved forward with the complaint, the employee explained to the manager and the employer's attorney that he did not want to testify at the hearing but that he felt required to do so.<sup>167</sup> The attorney then stated that the subpoena served on the employee was invalid and offered to prepare a petition to revoke it.<sup>168</sup>

The general counsel asserted that the foregoing conduct by the employer's attorney constituted an unlawful effort to dissuade the employee from testifying. Indeed, the general counsel argued that the employer's attorney may well have violated Model Code of Professional Responsibility DR 7-104, which provides in relevant part:

(A) During the course of his representation of a client a lawyer shall not:

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(2) Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.<sup>169</sup>

The general counsel's argument seems potent—plainly a potential conflict of interest arises whenever management's attorney offers counsel to an employee concerning an unfair labor practice proceeding against the former. Instead of building upon DR 7-104, however, the trial exam-

163. *Sanco Piece Dye Works*, 38 N.L.R.B. 690 (1942), discussed *supra* notes 126-29 and accompanying text.

164. *Babcock & Wilcox*, 114 N.L.R.B. at 1480.

165. Indeed, the *Winn-Dixie Stores* decision distinguished *Babcock & Wilcox* on these grounds. 128 N.L.R.B. 574, 579 n.7 (1960), discussed *supra* notes 130-33 and accompanying text.

166. 193 N.L.R.B. 197 (1971), *enforced per curiam*, 69 Lab. Cas. (CCH) ¶ 13,207 (D.C. Cir. 1972).

167. 193 N.L.R.B. at 197-98, 201.

168. *Id.* at 201-02.

169. MODEL RULES OF PROFESSIONAL CONDUCT Rule DR 7-104 (1983).

iner simply remarked that “[c]ontravention of accepted standards of professional conduct is not necessarily violative of the National Labor Relations Act.”<sup>170</sup>

One can accept the trial examiner’s assertion that violations of attorneys’ professional disciplinary rules are not per se violations of the Act. That does not mean, however, that one should ignore or trivialize such violations in deciding whether an unfair labor practice has been committed.<sup>171</sup> If the employer’s counsel violated DR 7-104, that should at least raise serious questions concerning the lawfulness of the conduct under the Act. If anything, the evil sought to be prevented under DR 7-104 (the prospect of attorneys misleading or intimidating people with adverse interests under the guise of “advising” them) is most readily apparent when that adverse person is an employee under the economic control of the attorney’s true client, the employer.<sup>172</sup>

The trial examiner elided any serious discussion of this problem, however, and the Board made no effort to confront it. Instead, the trial examiner argued that the attorney’s conduct was permissible because the employee had no one else to advise him. In her eyes, the employee was “being used as a pawn by antagonists” and “[n]obody apparently was prepared to advise him in the light of his personal interests.”<sup>173</sup>

This point is undeniably troublesome. An employee’s self-interest may not coincide with the Board’s commitment to prosecuting a wayward employer and there is no guarantee that the Board’s advice to the public is always infallible.<sup>174</sup> Such potential problems, however, cannot justify a management attorney’s decision to advise subpoenaed employees that they do not have to appear at an unfair labor practice hearing against the employer. At least the general counsel and Board attorneys are charged with the statutory duty to protect employees’ section 7 rights; management attorneys are under no such obligation. To the contrary, management attorneys must zealously defend the employers who are their clients.<sup>175</sup> Obviously, that duty to serve the employer can come into conflict with an employee’s desire for sound legal advice. Even the

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170. 193 N.L.R.B. at 206 n.19.

171. The Board has never based a section 8(a)(1) violation on a transgression of DR 7-104, but in other contexts it has noted the persuasive power of the American Bar Association’s ethical guidelines. In *Mack Trucks*, 277 N.L.R.B. 711, 722 (1985), for example, the administrative law judge stated that the Model Rules of Professional Conduct “have no legal force” before the Board, but “should carry some persuasive thrust” on the issue of whether to disqualify a firm from a case.

172. See *supra* note 123 concerning the influence an employer’s attorney may wield over employee-witnesses.

173. 193 N.L.R.B. at 206.

174. The problem of inaccurate bureaucratic advice is by no means limited to the Board. See B. SCHWARTZ, *ADMINISTRATIVE LAW* §§ 3.18-3.21 (3d ed. 1991) for a discussion of the problems posed by unreliable administrative advice.

175. See, e.g., *MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7* (1980) (“A lawyer should represent a client zealously within the bounds of the law.”).

most honest management attorney would find it difficult to advise an employee objectively when he knows such counsel could result in legal detriment to the employer. As much as we may sympathize with the employee in *Hilton*, it appears seriously misguided to condone the efforts of the employer's attorney.

The trial examiner nevertheless concluded that the employer had not violated the Act.<sup>176</sup> The Board accepted this conclusion without any substantive discussion<sup>177</sup> and the D.C. Circuit enforced the Board's order in a terse, two-paragraph decision.<sup>178</sup> The failure of the Board and appellate court to correct (or at least clarify) the trial examiner's reasoning can only worsen the uncertainty encountered in this area of the law.

One wishes that *Babcock & Wilcox* and *Hilton* could be viewed as isolated departures from the Board's typically prophylactic approach. In truth, however, the Board repeatedly has approved of an employer's advice concerning subpoenas so long as the employee has solicited such advice and expressed some reluctance to testify.<sup>179</sup> These cases may carve out an important exception to the general rule that it violates section 8(a)(1) for an employer to tell its employees that they need not obey Board subpoenas.<sup>180</sup> The supposed justification for this lapse is that there is no tendency to coerce (and thus no interference with section 7 rights) when an employer gives subpoena-related advice to employees who do not wish to testify. Such an argument, however, has little force. First, the argument ignores the truism that people do not always mean what they say. Employees may "complain" about a subpoena not because they want to avoid testifying, but because they feel obliged to assure the employer of their loyalty. Given that numerous employees have been discharged after receiving subpoenas or testifying adversely to the employer,<sup>181</sup> an employee may find it prudent to express a reluctance to appear at the hearing. Under these circumstances, an employer's subse-

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176. *Hilton*, 193 N.L.R.B. at 206. It merits attention that Trial Examiner (now Administrative Law Judge) Klein has become more sensitive to potential conflicts of interest since she penned her opinion in *Hilton*. See, e.g., *S.E. Nichols, Inc.*, 284 N.L.R.B. 556 (1987), *enforced in relevant part*, 862 F.2d 952 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 3162 (1989), discussed *supra* notes 41-49 and accompanying text.

177. 193 N.L.R.B. at 197.

178. *NLRB v. Hilton Hotels Corp.*, 69 Lab. Cas. (CCH) ¶ 13,207 (D.C. Cir. 1972) (*per curiam*).

179. See, e.g., *Swift Textiles, Inc.*, 214 N.L.R.B. 36, 48 (1974); *Trend Mills, Inc.*, 154 N.L.R.B. 143, 165-67 (1965); *Franklin Lumber & Basket Co.*, 139 N.L.R.B. 1238, 1243-45 (1962).

180. The scope and vitality of this apparent exception, however, are far from clear. First, the Board has found an employer's advice concerning subpoenas unlawful even when that advice was repeatedly solicited by the employee. *Bobs Motors, Inc.*, 241 N.L.R.B. 1236 (1979). Furthermore, and even more directly on point, the Board found a violation where the subpoenaed employee's complaint that she did not want to attend the hearing prompted the employer's advice. *Amoco Fabrics Co.*, 260 N.L.R.B. 336, 374 (1982). The precedential value of *Babcock & Wilcox* and its progeny is therefore open to doubt even though they have not been expressly overruled.

181. See, e.g., cases cited *supra* note 7.

quent advice that the employee does not "have to" testify can reinforce the employee's fear to obey the subpoena.

Furthermore, even assuming that the employee subjectively does not want to testify, the argument ignores the Board's interest in obtaining voluntary compliance with its subpoenas. An employer's advice that employees may ignore the subpoenas can stiffen a worker's recalcitrance and increase the likelihood that the government will be burdened with the expense of pursuing an enforcement action in federal district court. Finally, the argument ignores the interest of other employees in securing vindication of their section 7 rights. Even if one employee would prefer not to testify, that employee's appearance may be essential to assure that any violations of co-workers' rights are brought to light at the hearing. The more encouragement an employer gives the employee not to testify, the more likely it becomes that potentially crucial testimony will not be heard unless the general counsel prevails in district court. That may satisfy the individual employee and the employer, but it is a disservice to every other worker whose rights hang in the balance at the hearing.

This does *not* mean that employees should be left in ignorance of their right to move for revocation of the subpoena pursuant to section 102.31(b).<sup>182</sup> As in the case of Board investigations, however, the Board itself should be the one to inform employees of their rights and obligations. The Board could easily accomplish this by stating on its subpoena forms both the mandatory nature of such subpoenas and the procedures for having them revoked. In this manner, employees could be apprised of their legal options without having to rely on advice by management that could prove erroneous and has an inherent tendency to interfere with the vindication of employees' section 7 rights. One therefore hopes that the Board will take this step and close the lacuna created by *Babcock & Wilcox*.<sup>183</sup>

The Board's 1981 *Rolligon Corp.* decision<sup>184</sup> reveals another gap in the Board's prophylactic approach, one concerning facially defective subpoenas. In *Rolligon*, the union subpoenaed twenty employees (approximately half the employer's work force) to appear at a hearing concerning a union's representation petition in an apparent effort to suggest that

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182. 29 C.F.R. § 102.31(b) (1990) provides in relevant part:

Any person, served with a subpoena, whether ad testificandum or duces tecum, if he does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena upon him, petition in writing to revoke the subpoena . . . . The administrative law judge or the Board, as the case may be, shall revoke the subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid.

183. 114 N.L.R.B. 1465 (1955), discussed *supra* notes 150-65 and accompanying text.

184. 254 N.L.R.B. 22 (1981).

many employees supported its cause.<sup>185</sup> These subpoenas were defective because they were not accompanied by witness and mileage fees as required by Board procedures.<sup>186</sup> When a number of employees showed these subpoenas to their employer, he explained that they were invalid and could be ignored. He also informed the employees, however, that they were free to attend the hearing and would not be disciplined for doing so.<sup>187</sup>

The administrative law judge held that this advice violated section 8(a)(1), emphasizing that "[t]he integrity of the subpoena process must be left unfettered and not interfered with" and that "[i]t was not within Respondent's realm of responsibility to make judgments about the subpoenas' validity or to suggest conduct inconsistent with their command."<sup>188</sup> The Board reversed that conclusion, however, on the following grounds:

[T]he subpoenas in issue here were defective on their face, and, therefore, Respondent's comments were an accurate description of the employees' privilege not to comply with them. In addition, Respondent clearly informed the employees that they were free to honor the subpoenas and that no action would be taken against any employee who chose to honor the subpoena. Accordingly, we find that Respondent's comments were accurate, noncoercive, and did not violate Section 8(a)(1) of the Act.<sup>189</sup>

*Rolligon* is a difficult decision, for its precise ruling is not too troublesome but its implications are disturbing. As the Board noted,<sup>190</sup> *Rolligon* may be distinguishable from *Winn-Dixie Stores*<sup>191</sup> and its progeny because in this case the employer's advice was entirely accurate and complete. Furthermore, the employer was not potentially interfering with the Board's efforts to call witnesses in an unfair labor practice proceeding. To the contrary, it was accurately advising employees of the invalidity of subpoenas served by the union in order to bolster the union's showing of employee support at a representation hearing. *Rolligon* therefore does not present the stark conflict of interest that arises when an employer seeks to advise employees subpoenaed by the Board to demonstrate that the employer has acted unlawfully.

Nonetheless, *Rolligon* should be viewed with disfavor. First, the employer's interests may still be bitterly at odds with those of the employees—they may prefer to have union representation whereas the em-

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185. *Id.* at 23-24, 27-31.

186. *Id.* at 22. See 29 C.F.R. § 102.32 (1990) and NATIONAL LABOR RELATIONS BOARD CASEHANDLING MANUAL (PART TWO) (REPRESENTATION PROCEEDINGS) § 11780 (concerning witness fees and travel expenses).

187. 254 N.L.R.B. at 23.

188. *Id.* at 30.

189. *Id.* at 23.

190. *Id.* at 23 n.5.

191. 128 N.L.R.B. 574 (1960), discussed *supra* notes 130-33, 165 and accompanying text.

ployer steadfastly opposes it.<sup>192</sup> Furthermore, even legally accurate advice can convey the impression to employees that the employer does not want them to testify and may conceivably retaliate against them if they do so. That risk is reduced where, as in *Rolligon*, the employer gives express assurances against reprisal, but employees concerned with keeping their employers satisfied may nonetheless find it prudent not to appear at the hearing. After all, the employer has made it clear that the employee does not "have to" appear at the hearing, and assurances against reprisals may appear to be weak comfort against the plain fact that the employee would be acting adversely to her employer. At the very least, therefore, one would have hoped that the Board would limit *Rolligon's* holding to its particular facts.

Unfortunately, later in 1981 the Board misapplied and extended *Rolligon* in *Litton Mellonics Systems Division*.<sup>193</sup> In *Litton*, three supervisory employees were subpoenaed by a union to appear at a representation hearing. The subpoenas did not include witness and mileage fees, so the employer's attorney advised the recipients that he believed the subpoenas were invalid and would move to quash them.<sup>194</sup> In an opinion affirmed by the Board, the administrative law judge ruled that this advice was lawful even though (in contrast to *Rolligon*), the attorney did not inform the employees that they could attend the hearing without fear of reprisal. In reaching this conclusion, the administrative law judge emphasized that the attorney also had told the employees to remain available to testify in case his motion was denied and the fact that management officials and supervisors planned to testify at the hearing.<sup>195</sup>

Such reasoning is weak, and *Litton* appears to be an unwarranted extension of *Rolligon*. What the administrative law judge considered exculpating factors do not obviate the problem that the attorney never informed the employees of their freedom to attend the hearing. Perhaps no harm was done in this particular case—the subpoenaed employees were supervisors, their interests in the hearing may have been identical to their employer's, and the hearing officer believed that their testimony was not necessary.<sup>196</sup> Nonetheless, it is a disturbing precedent for the Board to permit an employer's attorney to inform employees that their subpoenas may be invalid without also assuring them of their right to testify at Board hearings.<sup>197</sup>

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192. See Weiler, *supra* note 121, for an enlightening discussion of how many employers have resorted to unfair labor practices to cripple employees' unionization efforts.

193. 258 N.L.R.B. 623 (1981), *enforced without opinion*, 738 F.2d 447 (9th Cir. 1984).

194. 258 N.L.R.B. at 631, 636-37.

195. *Id.* at 637.

196. *Id.* at 631, 637.

197. *Rolligon* and *Litton* are technically beyond the scope of this article because they concern subpoenas to attend representation hearings rather than unfair labor practice hearings. There is always the danger, however, that their misguided logic will be applied in the latter situations.

*C. The Proposal Revisited: Foreclosing the Danger of Employer Interference*

Employers should be prohibited from offering advice regarding subpoenas for the same reasons they should be banned from advising employees concerning cooperation with Board investigators. There is simply no compelling reason why they should be permitted to offer such counsel and there is good cause to prohibit such advice on a per se basis. As the cases discussed above reveal, inaccuracy and the specter of employer coercion frequently plague such advice. Even when the employer offers such advice in good faith, it may inadvertently misstate the law or create the impression that it does not want employees to testify. Rather than invite such hazards—and the litigation they engender—the Board should prohibit employers from intervening with their advice in such matters. The Board itself should be the one to field any questions employees may have, and it should endeavor to provide answers in a frank and noncoercive manner.

#### CONCLUSION

The current doctrine governing employers' counseling of employees with regard to unfair labor practice proceedings is marred by substantial uncertainty and inconsistency. Although it is clear that employers may not explicitly forbid employees from speaking with Board investigators or honoring their subpoenas, the Board and courts have not consistently stated when an employer's "advice" to the same effect is unlawful. This opacity in the law is pernicious, for it fails to assure that employees may participate in Board investigations and hearings without fear of reprisal. Moreover, it breeds litigation as employers, aware of the conflicting precedents, have every incentive to appeal adverse decisions in the hope that the appellate tribunal will follow a contrary line of authority.

The root cause of this failure is that the Board and courts have not fully appreciated the inescapable conflict of interest that arises whenever an employer accused of violating its employees' rights purports to offer legal advice to its work force. Such advice is inherently suspect because the employees' statements—whether given to a Board investigator or at a hearing pursuant to subpoenas—may relate information demonstrating that the employer has violated the Act. Under these circumstances, it is unrealistic to expect employers to offer advice in an accurate and noncoercive manner.

My argument does not rest upon an assumption that all accused employers are in fact guilty of the alleged underlying unfair labor practices and will intentionally seek to limit their employees' access to the



Board.<sup>198</sup> Even where the employer is not guilty of the underlying charges and offers advice in good faith, however, it may give erroneous legal counsel or unintentionally convey the impression that it does not want its work force to testify or share information with Board investigators. This hazard, combined with the employees' economic vulnerability vis-à-vis their employers, leads me to conclude that such advice should be forbidden on a per se basis. Given that employees can protect and vindicate their section 7 rights only by participating in Board procedures, we should not entrust employers with the freedom to counsel employees concerning that participation.

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198. It bears emphasis, however, that in virtually every case where the Board or court condoned the employer's advice the Board in fact found the employer guilty of another violation of the Act. (Two prominent exceptions are the woefully misguided opinions in *Florida Steel Corp. v. NLRB*, 587 F.2d 735 (5th Cir. 1979), denying enforcement to 233 N.L.R.B. 491 (1977), discussed *supra* notes 70-83 and accompanying text, and *Babcock & Wilcox Co.*, 114 N.L.R.B. 1465 (1955), discussed *supra* notes 150-65 and accompanying text.) This obviously underscores the employer's potential conflict of interest when offering such advice.