

REALITY OR MYTH: PARTICIPATORY PROGRAMS AND WORKPLACE DEMOCRACY — A PROPOSAL FOR A DIFFERENT ROLE FOR UNIONS*

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Are employer-created employee participative committees fact or fiction in providing workplace democracy? If in fact such committees provide workplace democracy, what type of legal relief is needed to release employers from the strictures of National Labor Relations Act sections 2(5) and 8(a)(2)? Are proposals for such legal relief feasible? If fiction, does organized labor under the traditional model of representation continue to be better suited to ensure workplace democracy for a changing work force? If not, what new model of representation might prove more effective in ensuring workplace democracy for a changing work force? This Article addresses the above questions in addition to offering historical and legal perspectives on employer-created employee committees and examining the basic structures of the more popular committees.

I. HISTORICAL PERSPECTIVES ON EMPLOYER-CREATED PARTICIPATORY PROGRAMS

Workplace participatory programs¹ are proclaimed for heralding in a new age of industrial relations.² The purpose of these pro

* This Article is based on an address delivered at the "Eighth Annual National Conference on Labor and Employment Law: Critical Issues for 1993" held January 22-23, 1993 in Tampa, Florida. The Stetson University College of Law Center for Dispute Resolution presented the conference.

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1. Participatory programs have been referred to by various titles such as employee involvement committees, cooperative plans or programs, integrative models (or schemes, or methods) of industrial relations, and representation plans. This Article uses these names interchangeably. Participatory programs have been integrated in the union and nonunion workplace. This Article focuses on participatory programs in the nonunion work setting.

2. See, e.g., U.S. DEPT OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: FINAL REPORT 141 (1989), describing the framework of America's labor law "as tending to produce collective bargaining relationships that are legalistic, rule-driven, and confrontational." The report advises that "it seems increasingly

grams is to infuse democracy into the governance of the workplace by permitting employees to have a voice on issues that affect their work life.³ Participatory programs emphasize cooperation in place of the adversarial model of collective bargaining under the National Labor Relations Act (NLRA).⁴ An important structural element of the programs is the inclusion of some type of employer-created em-

clear that the competitive demands of today's world economy can be met most successfully by those enterprises that call forth the best efforts of their employees through participative mechanisms, whether employee involvement or labor-management cooperation." *Id.*

3. Sydney and Beatrice Webb, British economists, are credited with initiating the idea of industrial democracy in their work by that name. SYDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* (1897). The Webbs' theory of workplace democracy was to be implemented through trade unionism and collective bargaining as a strategy to deal with the problem of unequal bargaining power between workers and employers. Union representatives elected by employees were to provide a voice on employment conditions which would raise the standard of living of workers. Paul D. Staudohar, *The Elements of Industrial Democracy*, 1 J. INDIV. EMP'T RTS. 7, 9 (1992-93); THOMAS A. KOCHAN & HARRY C. KATZ, *COLLECTIVE BARGAINING AND INDUSTRIAL RELATIONS* 22-25 (2d ed. 1988).

4. 29 U.S.C. §§ 151-69 (1988). Enactment of the 1935 NLRA was a congressional effort to achieve industrial peace between labor unions and management through what some commentators describe as a shotgun wedding. CHARLES O. GREGORY & HAROLD A. KATZ, *LABOR AND THE LAW* 225 (3d ed. 1979). The NLRA protected the rights of employees to organize and bargain collectively through their representatives with a correlative duty placed on employers to recognize and bargain with the employees' representatives. Prior to the NLRA, employee activities in support of unionization and collective bargaining were met with resistance from employers, and courts treated employees' concerted actions (e.g., strikes, picketing and boycotts) as a "conspiracy." See discussion *infra* notes 5-17 and accompanying text. See also Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment-At-Will Rule*, 51 U. PITT. L. REV. 641, 643-49 (1990), for a discussion of the pre-NLRA labor environment in America.

Congressional policy underlying the NLRA was set forth in 29 U.S.C. § 151 (Supp. I 1935):

The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized . . . substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depression Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and restoring equality of bargaining power between employers and employees.

ployee committee that recommends solutions or advises management on workplace issues.

A review of labor history reveals, however, that employer-created employee committees or representation plans are not novel concepts in industrial relations. Employee committees and representation plans existed prior to the enactment of the NLRA and were known as “company unions.”⁵ Membership in company unions was limited to employees of one plant or of one employer,⁶ much like the more recent employee participatory models. Employee representation plans differed only in form, not substance, from the employee committee. In most instances, the structure of these plans made them creatures of the employer, and the plans were in fact company dominated.⁷

An employee representation plan in its standard pattern was composed of an equal number of representatives chosen by employees and management. At joint meetings they usually discussed grievances.⁸ The equal representation of plan membership assured that no decision would be adopted unless management favored it. In case of a deadlock, members submitted the matter to higher officials of the company for a decision.⁹ Also, the fail-safe veto provision in the plan provided management with veto power over any decision, including changes in the constitution and bylaws of the plan.¹⁰

5. JOSEPH ROSENFARB, *THE NATIONAL LABOR POLICY AND HOW IT WORKS* 107 (1940). Rosenfarb states the first company union (called the Filene Cooperative Association at Wm. Filene & Sons Co., a Boston department store) came into existence in 1898. *Id.* at 104 (citing TWENTIETH CENTURY FUND, *LABOR AND THE GOVERNMENT* 75 (1935)). However, in 1914, the Colorado Fuel and Iron Company made an early move to institute company unions as an employer controlled substitute for outside unions. Colorado Fuel and Iron adopted a company union plan after a horribly violent strike called the Ludlow massacre, where soldiers and mine guards with machine guns killed the strikers and their wives and children. The company union became known as the “Rockefeller Plan,” after John D. Rockefeller, Jr. who owned the controlling interest of Colorado Fuel and Iron. Investigation of the plan by the U.S. Commission on Industrial Relations revealed it was a company tool and, “embodied none of the principles of effectual collective bargaining . . . a plan devised . . . for the purpose of ameliorating or removing the unfavorable criticism of Mr. Rockefeller” after the massacre. 5 PHILIP S. FONER, *THE AFL IN THE PROGRESSIVE ERA, 1910-1915*, at 197-212 (1980) (citing REPORT ON THE COLORADO STRIKE INVESTIGATION, H.R. DOC. NO. 136, 63d Cong., 3d Sess. 35 (1915)); see also FOSTER R. DULLES & MELVYN DUBOFSKY, *LABOR IN AMERICA* 242 (4th ed. 1984).

6. ROSENFARB, *supra* note 5, at 107.

7. *Id.* at 106.

8. *Id.* at 105.

9. *Id.*

10. *Id.* at 105-06.

Company unions structured on the employee committee model were similar in form to that of a genuine labor organization.¹¹ No provisions in the committee's constitutions or bylaws allowed for management representation.¹² This appearance of independence was deceptive, however, because the employee committee's financial life-line was virtually dependent on the employer's support.¹³

Company unions' growth and fixture in labor history came during World War I (1914-1918), when the federal government supported their creation as a means to settle labor disputes that threatened wartime production.¹⁴ During the post-war period, employers' fierce and continued resistance to union organizational efforts intensified and led to a proliferation of company unions as an avoidance tactic. In addition, companies devised a strategy of *welfare capitalism* that established employee benefit programs¹⁵ to demonstrate to employees that unions were unnecessary.¹⁶ Union

11. ROSENFARB, *supra* note 5, at 106.

12. *Id.*

13. *Id.* at 107.

14. See FONER, *supra* note 5, at 174-76, 340-45. Workers' wages did not increase with the rise in prices of commodities stimulated by the war. This condition caused some 1,227,000 workers in 1917 to engage in strikes with the number rising to 1,240,000 in 1918. As a result, in January 1918, President Wilson established the War Labor Conference Board which recommended the creation of a National War Labor Board (NWLB). Once instituted, the NWLB sponsored representation schemes in nonunion plants. Initially, employers were reluctant to cooperate but "soon recognized [the representation plan's] usefulness as a substitute for unionism, amenable to their control." *Id.* at 341 (citing SELIG PERLMAN & PHILIP TAFT, HISTORY OF LABOR IN THE UNITED STATES, 1896-1923, at 409 (1935)). Of great import to labor during this period was the NWLB's adoption of the policy that "[t]he right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." *Id.* at 175.

Although the NWLB was in existence for only sixteen months, its creation marked the first flicker of protection in the form of a national policy that accorded employees the right to organize and engage in collective bargaining. Moreover, it recognized that employees should select a representative of their own free choice. *Id.*

15. See ARTHUR A. SLOANE & FRED WITNEY, LABOR RELATIONS 64-65 (7th ed. 1991). These programs were varied and could extend from offering elaborate profit-sharing plans, insurance plans, or recreational facilities and cafeterias to health and welfare systems. *Id.*

16. *Id.* Foster Rhea Dulles' & Melvyn Dubofsky's discussion in LABOR IN AMERICA, on welfare capitalism as one of the barriers to unionization, remarked that "[t]he labor movement was . . . being killed by kindness." DULLES & DUBOFSKY, *supra* note 5, at 242. Companies sought to make working conditions so favorable workers would no longer consider unions of any value. Employees benefitted considerably in the improvement of their working conditions and wages but did not understand how dependent they had become upon their employers for the favors they were receiving in lieu of genuine collective

membership plummeted from 5.1 million in 1920 to 3.8 million three years later and by the close of the 1920s was at a twelve year low of 3.4 million.¹⁷

The greatest growth of company unions occurred after the passage of the 1933 National Industrial Recovery Act¹⁸ (NIRA). America was in the worst year of the Great Depression with one-quarter of the civilian labor force jobless.¹⁹ An elixir was desperately needed for the nation's economic ills, and the NIRA was to be the cure.²⁰ Section 7(a) of the NIRA was to have been an instrumental provision for labor, according a statutory right to employees to organize and bargain collectively through their choice of representatives, and to be

bargaining. "[T]he entire welfare program remained subject to the control of the corporation sponsor How quickly welfare capitalism might collapse — and especially its stock-distribution program — should prosperity give way to depression was hardly realized at the time." *Id.* at 243.

Employers adopted other strategies such as the "yellow dog" contract that extracted a promise from workers as a condition of employment that they would not join or remain in a union. *Id.* Court injunctions were also a barrier to unionization by restraining the activities of labor organizations. *Id.* See also *supra* note 4 and accompanying text.

17. SLOANE & WITNEY, *supra* note 15, at 64.

18. 15 U.S.C. §§ 701-12 (1934). Company unions became the principal weapon in circumventing section 7(a) of the NIRA. Membership in company unions ballooned from 432,000 in 1932 to 1,164,000 in 1933, a gain of 169 percent. Over 69 percent of the employer-dominated unions then in existence had been inaugurated within the 1934-35 period. 78 CONG. REC. 3678 (1934) (statement of Sen. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT OF 1935, at 21 (1949) [hereinafter LEG. HIST. NLRA]. Some company unions bought the loyalty of employee plan representatives, as the Goodrich Company's Cooperative Plan did, by providing extra financial compensation to employees serving as plan representatives. See *A Bill to Equalize the Bargaining Power of Employers and Employees, to Encourage the Amicable Settlement of Disputes Between Employers and Employees, to Create a National Labor Board, and for Other Purposes: Hearings on S. 2926 Before the Committee on Education and Labor*, 73d Cong., 2d Sess. 101 (1934) [hereinafter *Hearings*] (statement of William Green, President of the American Federation of Labor), in LEG. HIST. NLRA at 131.

19. Irving Bernstein, *Americans in Depression and War*, in U.S. DEP'T OF LABOR, BICENTENNIAL HISTORY OF THE AMERICAN WORKER 201 (Richard B. Morris ed., 1976) [hereinafter Bernstein, THE AMERICAN WORKER]. The United States did not start to systematically collect statistics on joblessness until 1940. Therefore, the 1933 estimate of jobless persons in March, the record high, was 15,500,000 in a civilian work force of over 51,000,000. *Id.*

20. Franklin D. Roosevelt was sworn in as President during the worst period of the Depression, March 1933. Between 1933 and 1940, programs and policies for economic relief and recovery were introduced under the Roosevelt administration. This period is referred to as the New Deal era. The NIRA was the first of the New Deal laws to address the labor situation in America. Bernstein, THE AMERICAN WORKER, *supra* note 19, at 201-04, 214-17.

free of employers' interference, restraint, or coercion.²¹ However, the absence of language that expressly secured recognition rights to employees' representatives was a serious defect in the NIRA.²² The lifespan of the NIRA was short because two 1935 Supreme Court decisions found basic provisions of the Act unconstitutional.²³

On March 1, 1934, Senator Wagner introduced Bill S. 2926,²⁴ entitled the "Labor Disputes Act."²⁵ The bill, "designed to clarify and fortify" section 7(a) of the NIRA²⁶ through provisions that created an administering agency, the National Labor Relations Board, gave the Board enforcement powers.²⁷ Senator Wagner described the repressive effect company unions had on employees as the "greatest obstacles to collective bargaining . . . Such a union," Wagner asserted, "makes a sham of equal bargaining power [and] deprives workers of the wider cooperation which is necessary . . . to exercise their proper

21. Section 7(a) was actually a rekindling of the labor policy adopted by the NWLB. See *supra* note 14. This policy also was expressed in the Railway Labor Act of 1926, ch. 347, 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. § 151 (1988)), and the declaration of policy in the Norris-La Guardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101 (1988)). See Edwin E. Witte, *The Background of the Labor Provisions of the N.L.R.A.*, 1 U. CHI. L. REV. 572 (1934).

22. Section 7(a) caused great consternation for unions due to the radically different interpretations of that section by labor and management. Employers relied upon language in the NIRA to boldly assert they had the right to continue to deal only with company unions even though a national union had enrolled a majority of workers in a plant. See DULLES & DUBOFSKY, *supra* note 5, at 261; Witte, *supra* note 21, at 572.

23. The Supreme Court held NIRA's statutory provisions unconstitutional in two cases, *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Scholars have written that the NIRA died under its own weight attempting to be the panacea for America's Depression ills. The Act addressed diverse areas ranging from prohibiting the interstate shipment of hot oil that was an issue in *Panama Refining Co.*, to drafting codes of fair competition for various industries, as was the case in *Schechter*. Somewhere between the hot oil and fair competition codes, the § 7(a) labor provision was sandwiched.

24. S. 2926, 73d Cong., 2d Sess. (1934).

25. *Id.* at Tit. I, § 1. A great increase in strikes occurred during the summer of 1933 over the recognition issue. The year 1934 brought an eruption with 1,856 stoppages, the largest number of strikes since World War I. This situation aided in convincing Senator Wagner that new labor legislation was needed to close the loopholes of the NIRA. Bernstein, *THE AMERICAN WORKER*, *supra* note 19, at 206-08.

26. 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 15. Section 7(a) of the NIRA was written into S. 2926 as Tit. I, § 4 as, "[e]mployees shall have the right to organize and join labor organizations, and to engage in concerted activities, either in labor organizations or otherwise, for the purposes of organizing and bargaining collectively through representatives of their own choosing or for other purposes of mutual aid or protection." *Id.* at 3.

27. S. 2926, 73d Cong., 2d Sess., Tit. II, § 201 (1934); 78 CONG. REC. 3443 (1934), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 4, 17.

voice in economic affairs."²⁸

Senator Wagner's bill legislated workplace democracy by establishing a statutory mechanism that accorded employees a "voice" through a freely selected outside representative that would meet and bargain with management.²⁹ Outside representation was the key element for two reasons. First, employees' lack of adequate knowledge of the labor market, or general business conditions, made their attempts to acquire legitimate opportunities ineffective. Second, only in the absence of a subservient relationship with an employer could a representative act freely in the interest of employees.³⁰ Emphasizing the second point, Senator Wagner bluntly stated, "[s]imple common sense tells us that a man does not possess this freedom when he bargains with those who control his source of livelihood."³¹

Enactment of Bill S. 2926 did not provide that all employer-created employee plans and committees would immediately become unlawful. As Senator Wagner explained, Bill S. 2926:

does not prevent employers from forming or assisting associations which exist to promote the health or general welfare of workers, to provide group insurance, or other similar purposes. Employer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism, but they should not be allowed to supplant or destroy it.³²

In spite of protracted hearings, Congress approved the final bill,³³ and President Roosevelt signed it on July 5, 1935.³⁴ The final bill revised the original Bill S. 2926 and was titled the "National Labor Relations Act."³⁵ The National Labor Relations Act (NLRA)

28. *Id.* (emphasis added).

29. S. 2926, 73d Cong., 2d Sess., Tit. I, §§ 4, 5, & Tit. II, § 207 (1934), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 3-4, 11.

30. 78 CONG. REC. 3443 (1934), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 15-16.

31. *Id.* at 16.

32. *Id.*

33. S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, LEG. HIST. NLRA, *supra* note 18, at 3270.

34. See 79 CONG. REC. 10,719-20 (statement of the President upon signing S. 1958 on July 5, 1935), reprinted in 2 NLRB, LEG. HIST. NLRA, *supra* note 18, at 3268-69.

35. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. § 151 (1988)). Bill S. 2926 was temporarily withdrawn at the urging of President Roosevelt for a further trial period of the NIRA. Then, in early 1935, Wagner reintroduced the measure as S. 1958, eleven days before the NIRA was declared unconstitu-

included three instrumental provisions to achieve what Senator Wagner called "genuine collective bargaining."³⁶

First, section 7 secured the employees' right to self organization and to bargain collectively through a representative of their own choosing.³⁷ Sections 2(5) and 8(a)(2)³⁸ jointly outlawed sham company unions. Section 2(5)'s broad definition of the term labor organization spread a wide net to ensure that the various types of employee representation plans, committees, or company unions fell within the scope of the NLRA:

The term labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.³⁹

tional. DULLES & DUBOFSKY, *supra* note 5, at 265.

36. 78 CONG. REC. 3443 (1934) (statement of Sen. Wagner), *reprinted in* 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 15.

37. Section 7 of the NLRA reads, "[e]mployees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"

The 1947 Labor Management Relations Act (Taft-Hartley Act) extended the rights of employees to also "refrain from any or all of such activities" stated in section 7. See discussion *infra* notes 43-55 and accompanying text.

If the employer refused to recognize and bargain with employees' legitimate representative, the enforcement powers of the NLRB would be triggered through a section 8(5) violation: "[i]t shall be an unfair labor practice for an employer- (5) To refuse to bargain collectively with the representatives of his employees subject to the provisions of section 9(a)." Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (1988)). Section 8 was amended by the 1947 Taft-Hartley Act and that provision became 8(a)(5). The 1947 Act added section 8(b) which set forth violations stemming from unions' conduct. See *infra* notes 51-52 and accompanying text for language and discussion on section 9(a).

38. Section 8 became § 8(a)(2) under the 1947 Taft-Hartley Act.

39. Employers had argued that because language in S. 2926 did not specifically mention employee representation committees or plans, those arrangements were not, by the statute's definition, a labor organization or a union but simply a communication device between employers and employees. To permit such pinched interpretation would have nullified the Act. As a result, the final bill (S. 1958) expanded the types of organizations included within the scope of section 2(5).

In addition, the final bill extended section 2(5) subject matters to include grievances, rates of pay, and conditions of work. The original bill included "grievances," but a Senate Report of the bill deleted it. S. REP. No. 1184, 73d Cong., 2d Sess., pt. 3, at 4 (1934), *reprinted in* 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 1072. Excluding grievances meant excluding a vast field of employer interference with self organization. Most employee com-

Section 8(a)(2) provided a microscope to examine employee associations found to be labor organizations within the meaning of section 2(5). Structure, function, and control of employee associations were analyzed, using section 8(a)(2) language, to determine whether the employer “dominate[d] or interfere[d] with the formation or administration of [a] labor organization or contribute[d] financial or other support to it.”⁴⁰

Some members of the committee evinced concerns at the Committee Hearings on Bill S. 2926 that language prohibiting employer financial contribution could, under a strict interpretation of section 8(a)(2), prevent employers from compensating employees their regular wages during working hours when an employer discussed terms of an agreement with an employee representative of a legitimate organization. Moreover, such language would preclude an employer from participating in a legitimate employee representation plan.⁴¹ As a result, a proviso was added to section 8(a)(2). It states, “an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.”⁴²

As unions savored the sweet taste of organizing success under

mittees and plans were nothing more than “agencies for presenting and discussing grievances or other minor matters [anyway], and [did] not address . . . fundamental issues of collective bargaining agreements as to hours, wages, and basic working conditions.” COMPARISON OF S. 2926, 73D CONG., AND S. 1958, 74TH CONG., 22-23 (Comm. Print 1935), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 1319, 1347.

40. Tit. I, §§ 5(3), (4) of the original bill (S. 2926) addressed employer control but did not include the term “domination.” Section 5(3) prohibited financial support and a § 5(4) violation occurred where the employer, “initiate[d], participate[d] in, supervise[d], or influence[d] the formation, constitution, bylaws, other governing rules, operation, policies, or elections of any labor organization.” When the bill was referred to the Committee on Education and Labor, the two subsections were combined and revised with the term “domination” appearing for the first time. Senator Walsh, in the Committee report accompanying the revisions, stated that the “object of [this section] . . . is to remove from the industrial scene unfair pressure, not fair discussion.” S. REP. No. 1184, 73d Cong., 2d Sess. at 5 (1934), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 1104.

41. *Hearings*, *supra* note 18, at 500, 801, 914 (statements of Henry I. Harriman, President United States Chamber of Commerce; Ellwood H. Smith, employee representative of Bethlehem Steel Co.; William S. Elliott, Vice President and General Counsel of the International Harvester Co.), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 534, 839, 952.

42. Integrating the *proviso* with the prohibiting language of 8(a)(2), Senator Walsh explained the section sought “to remove from the industrial scene unfair pressure by the employer upon any labor organization that his workers may choose, yet leaves fair discussion unhampered.” 78 CONG. REC. 10,560 (1934), reprinted in 1 NLRB, LEG. HIST. NLRA, *supra* note 18, at 1125.

the Wagner Act,⁴³ antiunion forces were solidifying their position. Organized labor's political fortunes began to ebb in the 1940s with charges of improper and coercive behavior leveled against it. New Deal labor legislation, critics contended, had granted unions too much power.⁴⁴ New legislation was needed to balance the legal scales of labor-management relations that were thought to tilt too far toward labor.

In the spring of 1947, the House⁴⁵ and Senate⁴⁶ considered legislation to "balance off the Wagner Act."⁴⁷ Controversial provisions such as section 8(d)(3), which would allow employer-created committees to engage in discussions on NLRA section 2(5) subjects,⁴⁸ were included in the House Bill (referred to as the Hartley bill). An impassioned minority regarded 8(d)(3) as attempting to "resurrect and legitimize . . . representation plans [that were] so familiar prior to passage of the [NLRA and] . . . incapable of functioning as bargaining representatives of employees."⁴⁹ The minority's apprehension was not alleviated by language offered to amend section 8(a)(2) that would prohibit an employer from "preventing [a labor] . . . organization from determining independently or out of the employer's

43. Union membership increased five-fold from 3.9 million in 1935 to 15.5 million in 1947. A. Norman Somers, *The National Labor Relations Board From Wagner to Taft-Hartley: A Study in Transition and Adaption*, 9 FED. B.J. 315, 318 n.8 (1948) (citing DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 405 (1941); Bureau of Labor Statistics release of Dec. 1947)).

44. See DULLES & DUBOFSKY, *supra* note 5, at 343-44. Another New Deal statute beneficial to labor was the 1932 Norris-La Guardia Act (Anti-Injunction Act), 29 U.S.C. § 101 (1988), that prohibited courts from issuing "any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute," except as provided under the Act.

45. Representative Fred Hartley of New Jersey introduced H.R. 3020 in the House. H.R. No. 245, 80th Cong., 1st Sess. 1 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT ACT, 1947, at 31 (1948) [hereinafter LEG. HIST. LMRA].

46. Senator Robert Taft of Ohio introduced S. 1126 in the Senate. S. REP. No. 105, 80th Cong., 1st Sess. 1 (1947), *reprinted in* 1 NLRB, LEG. HIST. LMRA, *supra* note 45, at 407.

47. Jack Barbash, *Unions and Rights in the Space Age*, in U.S. DEP'T OF LABOR, BICENTENNIAL HISTORY OF THE AMERICAN WORKER 250 (Richard B. Morris ed., 1976).

48. In accordance with § 8(d)(3), an employer would not violate the Act for "forming or maintaining . . . a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative under section 9."

49. H.R. MINORITY REP. No. 245, 80th Cong., 1st Sess. 85 (1947), *reprinted in* 1 NLRB, LEG. HIST. LMRA, *supra* note 45, at 355, 376.

presence its own policies or . . . objects and course of action.”⁵⁰

Section 8(d)(3) was deleted from the final bill and, instead, language from the Senate bill (the Taft Bill) that amended section 9(a) of the Wagner Act was included. Language added to the section 9(a) proviso allowed employee-employer communication independent of a bargaining representative.⁵¹ Interestingly, the Senate report chastises the NLRB for “not giv[ing] full effect to this right” that was “defined in the present statute,”⁵² i.e., the Wagner Act.

The Labor Management Relations Act (LMRA) of 1947⁵³, popularly known as the Taft-Hartley Act, had a stormy journey through Congress.⁵⁴ Commenting on the new restrictive provisions that applied to labor, one author wrote that the LMRA, “depending upon where you sit, [was] either the ‘Magna Charta of Management’ or the ‘Valhalla of Organized Labor.’”⁵⁵

II. SOME STRUCTURAL MODELS OF EMPLOYER-CREATED PARTICIPATORY PROGRAMS

Employer-created employee plans and committees have been a part of the industrial relations landscape for almost one hundred

50. *Id.* at 77, 368.

51. The Taft-Hartley Act added the emphasized language to the § 9(a) proviso: Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer *and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.*

Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (1988)).

52. S. REP. No. 105, 80th Cong., 1st Sess. 24 (1947), *reprinted in* 1 NLRB, LEG. HIST., LMRA, *supra* note 45, at 430.

53. Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. § 141 (1988)).

54. *See* DULLES & DUBOFSKY, *supra* note 5, at 344.

55. Thomas R. Mulroy, *The Taft-Hartley Act in Action*, 15 U. CHI. L. REV. 595, 595 (1948). Section 8(b), which set forth prohibitions on labor organizations, was one of the largest changes wrought by the LMRA. Another loss for labor that employers had waged fierce battles against was the close shop agreement which obligated employers to hire and retain in employment only union members.

years.⁵⁶ In recent years, however, these employee plans and committees have changed their character, not only because of the enactment of the NLRA, but also as a result of the 1970s global market integration acceleration.⁵⁷ American corporations, challenged by global competition, had to confront the inadequacies of an outdated management system known as "Taylorism."⁵⁸ This system introduced scientific management into industry and operated by segmenting the production process into repetitive, elementary tasks that minimized workers' judgments on how their jobs should be performed.⁵⁹ Taylorism was effective for mass standardized production but proved inadequate to meet new global market demands.⁶⁰ Foreign competition and a decline in productivity levels, mainly attributable to workers' attitudes,⁶¹ provided motivation for American corporations to adopt a participatory style of management. Eighty percent of the Fortune 1000 companies have now instituted some type of participative program that allows employees' input on workplace issues.⁶² Modern day participatory programs differ as to the degree of employee input permitted into workplace decisionmaking. Although a garden variety of programs exist, the designs employers most frequently adopt are quality control circles, workplace teams, the Scanlon Plan, and quality of work life programs.⁶³

56. See *supra* note 5.

57. See William B. Gould IV, *Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 CIN. L. REV. 381, 382, 384 (1989).

58. The name is derived from its originator, Frederick W. Taylor, an advocate of scientific management. Scientific management was viewed as a weapon to eliminate unionism. 5 PHILLIP S. FONER, *THE AFL IN THE PROGRESSIVE ERA, 1910-1915*, at 114 (1980). In fact, Taylor regarded labor leaders as demagogues and wrote to an associate that "Gompers and his allies have to be destroyed." 3 PHILLIP S. FONER, *THE POLICIES AND PRACTICES OF THE AMERICAN FEDERATION OF LABOR, 1900-1909*, at 44 (1981).

59. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899 (1993). See also DULLES & DUBOFSKY, *supra* note 5, at 242.

60. See O'Connor, *supra* note 59.

61. See, e.g., *First Pennsylvania Bank Study*, PR Newswire, June 9, 1983, available in LEXIS, Nexis Library, OMNI File. A survey of Mid-Atlantic business leaders found that 68% attributed their companies' declining productivity to a change in workers' attitudes and habits, not to a lack of capital investment, slowdown in technology discovery, or government regulation.

62. *Attorneys File Appeal in Electromation Case*, PR Newswire, Jan. 5, 1993, available in LEXIS, Nexis Library, OMNI File.

63. A brief description of the four program models follows. For a more informational discussion on workplace participatory programs see Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 500-13 (1986).

Quality control circles were originally developed in Japan and imported to the United States about the mid-1970s.⁶⁴ The objective of quality control circles is the improvement of the production process and quality of the product.⁶⁵ Structure of the program is based on a plant wide system of circles comprised of workers from a single department. Circle meetings are held usually for an hour a week and employees receive training in quality improvement techniques, then begin to identify, analyze and solve work-related problems.⁶⁶

A truly amorphous scheme is offered through the workplace team program, which attempts to shift traditional managerial and supervisory responsibilities for controlling and solving performance problems to employees.⁶⁷ Workers' input can range from the limited work-unit team to the more inclusive self-managed team. In a work-unit team, members develop a small set of key performance measures that are related to the company's objectives and, with management, establish goals for performance on those measures.⁶⁸ The self-managed team (in its more radical form), however, operates in an organizational structure where traditional divisions, departments, and sections established on functional lines cease to exist.⁶⁹ Teams, comprised of five to thirty employees, replace the traditional structure based on an organizational chart. Each self-managed team is structured to operate as a small, independent business unit having the responsibility to produce an entire product, deliver a service, or produce and deliver a major part of a product or service.⁷⁰ A significant difference between a self-managed team and a work-unit team is the absence of managers or supervisors on the self-managed team; instead, an employee elected as team leader assumes the role of facilitator.⁷¹

A more limited cooperative model than the work-unit team or

64. See William B. Gould, JAPAN'S RESHAPING OF AMERICAN LABOR LAW 95 (1984); *IAQC: Bay Area Quality Circle Conference at Stanford*, Business Wire, Mar. 19, 1984, available in LEXIS, Nexis Library, WIRES File.

65. *Id.*

66. *IAQC: Bay Area Quality Circle Conference at Stanford*, Business Wire, Mar. 19, 1984, available in LEXIS, Nexis Library, WIRES File.

67. JOSEPH H. BOYETT & HENRY P. CONN, *WORKPLACE 2000: THE REVOLUTION RESHAPING AMERICAN BUSINESS* 238 (1991).

68. *Id.*

69. *Id.* at 239. Traditionally, the organizational structure of a plant or division is represented by the pyramid organizational chart.

70. *Id.*

71. *Id.*

quality control circle is the Scanlon Plan, which allows indirect input from employees. Under this plan, workers and managers contribute ideas or suggestions to employee-management committees for improving cost reduction and productivity. The key to the Scanlon Plan is that economic gains derived from increased efficiency in performance and productivity are shared by the company with the work force.⁷²

Although quality control circles, workplace teams, and the Scanlon Plan differ as to structure, the goals are identical: the increase of production efficiency and product quality. In contrast, quality of work life programs attempt to emphasize workers' satisfaction rather than focusing on improving production and the product.⁷³ When workers' tasks are satisfying and meaningful, the organization benefits from an increase in performance or productivity. Workers come to perceive that their aspirations and the organization's ends are the same. Quality of work life programs have no structural specifics. The term is a metaphor for organizational attempts to "humanize" the workplace through joint employee-management committees that connect with the total work force and allow participation in organizational problem solving.⁷⁴

III. LEGAL PERSPECTIVES ON EMPLOYER-CREATED PARTICIPATORY PROGRAMS

The National Labor Relations Board⁷⁵ (NLRB or Board), as well as the court system, has had occasion to examine the operation of some participatory programs, although not for the purpose of determining whether they in fact allowed for a more democratic workplace. Agency and judicial review were accorded to decide whether a participatory program, whose structure included an employee committee, was subject to sections 2(5) and 8(a)(2) of the NLRA.⁷⁶ Issues central to these cases are (1) whether the employ

72. SLOANE & WITNEY, *supra* note 15, at 36.

73. *See, e.g.*, KOCHAN & KATZ, *supra* note 3, at 404-05. The quality-of-work-life movement of the 1970s did not receive a very enthusiastic response from management or unions in spite of the program's initial support from the government. *Id.* at 430-31. *See also* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 31 (1990).

74. *See* TED MILLS, THE AMERICAN CENTER FOR THE QUALITY OF WORK LIFE, QUALITY OF WORK LIFE: WHAT'S IN A NAME?, *excerpted from* THE NAME THAT ISN'T THERE (1978).

75. 29 U.S.C. § 153 (1988). *See* discussion *supra* note 27 and accompanying text.

76. The first case to come before the newly established NLRB, *Pennsylvania Grey-*

ee committee was a labor organization as defined by section 2(5) and, if so, (2) whether the employer dominated, interfered with the formation or administration, or contributed to support of the labor organization (i.e., the employee committee) in violation of section 8(a)(2).

The first issue can become a problem for employers instituting an employee committee. The Board and the courts have drawn nebulous lines of distinction in these cases, with the pivotal points being (1) whether the employee committee is engaged in “dealing with” the employer and (2) whether the subject matter the employer and committee deal with falls within section 2(5)'s scope of grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Supreme Court's construction of the term “dealing with” in section 2(5) is crucial to assessing the function of the employee committee.⁷⁷

A seminal case, *NLRB v. Cabot Carbon Co.*,⁷⁸ provided opportunity for the Court to shed judicial insight on the phrase “dealing with.” Cabot Carbon not only established an employee committee at each plant, but prepared committee bylaws in collaboration with employee representatives.⁷⁹ The purpose of the committee was stated in the bylaws: to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management.⁸⁰ The bylaws cited grievances⁸¹ as a problem of mutual

hound Lines, Inc., 1 N.L.R.B. 1 (1936), involved sections 2(5) and 8(a)(2). Facts showed Greyhound created a sham union exemplar: officers of Greyhound were active in preparation of the organization's bylaws that could not be changed without management consent. Management representatives even presided over meetings and selected employee organization representatives. Organization membership was automatic and management bore all expenses because there were no dues. Even though the organization was created as a bargaining agency, its only function was to settle grievances, with final review lodged in a joint committee. Voting by management committee members could and did prevent other issues from being considered. After reviewing the record, the Supreme Court opined that the structure of the employee organization made it incapable of functioning as a bargaining representative. The Court upheld the Board's order that Greyhound withdraw recognition from its employees association. 303 U.S. 261, 268-70 (1938).

77. The Court construed that term in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

78. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959).

79. *Id.* at 205.

80. *Id.*

81. *Id.* at 204, 206. A grievance procedure was established for the nonunion plants. Steps in the procedure required committee consultation with plant officials at various levels with the general manager responsible for the final decision. *Id.* at 206 n.3.

interest.⁸² Each plant committee was to meet once a month with plant management. When the joint meeting was held, the problem areas broadened to include a panoply of workplace issues.⁸³ The employee committee required no membership or dues, and Cabot Carbon paid its expenses.⁸⁴

Although not provided for in the bylaws, a central committee composed of the chair of each plant committee and officials of Cabot Carbon was also created. Annual meetings were held, with the scope of the central committee's discussions covering nearly the whole employment relationship. Proposed committee solutions were approved in some instances, and rejected in others, with management offering a reason for rejection.⁸⁵

The NLRB found that neither committee had ever attempted to negotiate a collective bargaining contract with Cabot Carbon.⁸⁶ Nevertheless, the Board held that the employee committee organized by the employer to discuss such matters as grievances, seniority, job classification, job bidding, working schedules, holidays, vacations, sick leave, and improvement of working facilities was a labor organization within the meaning of section 2(5) and that the employer had violated section 8(a)(2). The Board ordered that all recognition be withdrawn and the committees disestablished.⁸⁷

Even though the Fifth Circuit agreed with the Board's finding of a section 8(a)(2) domination by Cabot Carbon, it refused to enforce the Board's order for two reasons. First, the court thought the section 2(5) term "dealing with" was synonymous to "bargaining with," and the court found that the committee was never actually engaged in collective bargaining with the employer.⁸⁸ Second, the 1947

82. *Cabot Carbon*, 360 U.S. at 206. Other areas of mutual interest included safety; increased efficiency and production; conservation of supplies, materials, and equipment; encouragement of ingenuity and initiative. *Id.* at 206 n.2.

83. *Id.* at 207. Discussions of the committee considered proposals on such issues as seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions. Plant officials participated in the discussions and in some instances granted the proposed request, e.g., change from a company to a plant seniority system. *Id.* at 207, 208 n.5.

84. *Id.* at 209.

85. *Id.* at 207-08.

86. *Cabot Carbon*, 360 U.S. at 209.

87. *Id.* at 209-10.

88. The Fifth Circuit rationalized that even though § 2(5) language is broad: [i]t does not necessarily include employee committees that "avoid the usual concept of collective bargaining" and have no bargaining powers, but "provide a

amendment of section 9(a)⁸⁹ excluded such employee committees from the section 2(5) definition of labor organization.⁹⁰

The Supreme Court reversed the Fifth Circuit. The Court interpreted “dealing with” as being broader than the term “bargaining with,” and, as such, its sweep as to employee committees included within section 2(5) is wider.⁹¹ Cabot Carbon's contention that the committees' function was solely to make recommendations and that the final decision always remained with the employer did not influence the Court. The Court observed that this point was “true of all such `dealings,' whether with an independent or a company-dominated `labor organization.' The principal distinction lies in the unfettered power of the former to insist upon its requests,”⁹² while the latter, a creation of the employer, “has been provided with no fighting arms.”⁹³

The Court's attention then focused on whether the 1947 amendment to section 9(a) rescued employee committees, as created by Cabot Carbon, from the reach of section 2(5). After reviewing the legislative history of section 9(a), the Court concluded that no change was made in the definition of “labor organization,” and all attempts to amend section 8(a)(2) were rejected, leaving its prohibitions “unchanged.”⁹⁴

forum for the discussion of mutual problems.” The term “dealing with” includes “discussion with.” But the terms cannot be equated. In ordinary language a deal or act of dealing is “the act of buying and selling; a bargain, a reciprocal arrangement.”

Cabot Carbon Co. v. NLRB, 256 F.2d 281, 285 (5th Cir. 1958).

89. Language specifically at issue was the addition made to the first *proviso* and the second added *proviso* in § 9(a). See *supra* note 51 for § 9(a) language.

90. *Cabot Carbon*, 360 U.S. at 210.

91. The Court cited the Senate Report in the legislative history of the section, which supports a more inclusive interpretation of § 2(5):

The term “labor organization” is phrased very broadly in order that the independence of action guaranteed by section 7 . . . and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8.”

Id. at 211 n.7 (quoting S. REP. No. 573, 74th Cong., 1st Sess. 7 (1935), *reprinted in* 2 NLRB, LEG. HIST. NLRA, at 2306).

92. *Id.* at 214 (quoting NLRB v. Jas. H. Matthews & Co., 156 F.2d 706, 708 (3d Cir. 1946)).

93. *Id.* at 214 n.15.

94. *Id.* at 217. The Court's discussion of § 9(a) reviewed H.R. 3020's proposed new section designated as § 8(d)(3), the Senate's substitute bill, S. 1126, which proposed an

A peculiar phenomenon has developed in circuit courts presented with the issue of whether an employee committee is a labor organization within section 2(5) and therefore is dominated or supported by the employer in violation of section 8(a)(2). These courts have ignored the broad interpretation the *Cabot Carbon* Court accorded to section 2(5). The Sixth Circuit's *NLRB v. Streamway Division of Scott & Fetzer Co.*⁹⁵ is one of the first and most noted departures. Management in *Scott & Fetzer* expressly established an "In-Plant Representation Committee" to provide workers with a communication vehicle to complain about conditions of employment⁹⁶ and offer suggestion for improving operations.⁹⁷ *Scott & Fetzer* established the committee in the midst of two certification elections.⁹⁸ In each election, the United Auto Workers failed to obtain majority representation and bargaining status.⁹⁹ The Board found the employee committee was a section 2(5) labor organization and thus a violation of section 8(a)(2).¹⁰⁰

The Sixth Circuit denied enforcement of the Board's order with its early statement that the employee "[c]ommittee was not, under any enlightened view of the Act," a section 2(5) labor organization.¹⁰¹ This assertion should have alerted the labor-management community that the court was about to alter old or enter new legal terrain as to employer-established participatory programs. *Cabot Carbon*, the court averred, did not indicate the limitations, if any, on the meaning of "dealing" under the statute. Therefore, the question of how much interaction was necessary before dealing could be found was yet unresolved.¹⁰²

With this declaration, the court was now in a posture to reel in the far-reaching line of section 2(5) that had been cast in *Cabot Carbon*. Rationale for a more restricted reading of section 2(5) was based on policy. The Sixth Circuit revealed its new policy by an-

amendment to 9(a), and the House Conference Report, H.R. CONF. REP. No. 510, 80th Cong., 1st Sess. 505, 549 (1947), accepting the Senate's § 9(a) language. See discussion *supra* notes 43-55 and accompanying text.

95. 691 F.2d 288 (6th Cir. 1982).

96. *Id.* at 295. One complaint voiced by the committee was over a change in *Scott & Fetzer's* vacation policy; as a result, *Scott & Fetzer* altered the policy. *Id.* at 295 n.11.

97. *Id.* at 289, 294.

98. *Id.* at 289.

99. *Id.*

100. *Streamway Div. of Scott & Fetzer Co.*, 249 N.L.R.B. 396 (1980).

101. *Scott & Fetzer*, 691 F.2d at 291.

102. *Id.* at 292.

nouncing that “our court [has] joined a minority of circuits indicating that the adversarial model of labor relations is an anachronism.”¹⁰³ As an illustration of that circuit's more recent attitude in the industrial relations area, the court cited cases that considered the question of domination within the meaning of section 8(a)(2).¹⁰⁴ Such cases, the court opined, indicate the circuit's willingness to reject a rigid interpretation of the statute and focus instead on whether the employer's behavior fosters employees' free expression and choice as required by the Act.¹⁰⁵

Although the Sixth Circuit did acknowledge the language of *Cabot Carbon* that cautioned against a restrictive reading of the term “dealing,” nevertheless, the court proceeded to read the term — restrictively. *Cabot Carbon's* reach was shortened by the *Scott v. Fetzer* court's limitation of that case to its facts, by stating that “dealing” there “involved a more active, ongoing association between management and employees, which the term dealing connotes, than is present here[,]” where the employee committee was more of a communicative device.¹⁰⁶ A curious fact is that *Scott & Fetzer's*

103. *Id.* at 293.

104. The court cited two cases: *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967) (rejecting the Board's finding of domination based merely on the weakness of the employee organization; the real question was whether the company dominated the decisions of the committee) and *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968) (denying enforcement to the Board's order and holding that it was not the potential for control that the Act declared unlawful but management's activities that actually undermine the integrity of the employees' freedom of choice and independence in dealing with the employer).

105. *Scott & Fetzer*, 691 F.2d at 293. When the Sixth Circuit's reasoning is compared with one of the earliest leading Supreme Court opinions on this issue, the court's independent shift in policy becomes more evident. See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939), where the Court upheld the Board's order abolishing an employee representation plan that was implemented through the cooperative efforts of the employer and employees. The plan could not be amended if the employer disapproved the amendment. It was irrelevant that the employees expressed satisfaction with the representation plan and desired that it should continue. *Id.* at 247-48. Further, the employer's good motive in creating the plan and argument that no labor disputes had occurred since the plan's existence was of no consequence in the disposition of the case. *Id.* at 247-48, 251.

106. *Scott & Fetzer*, 691 F.2d at 294. The change in *Scott & Fetzer's* vacation policy was viewed as an isolated incident that did not alter the court's analysis of the committee's function. *Id.* at 295 n.11. Factors the Sixth Circuit cited in ruling the *Scott & Fetzer* employee committee was not a § 2(5) labor organization were: (1) the continuous rotation of committee members, (2) the absence of hostility or antiunion animus on the part of the employer, (3) the absence of evidence connecting the committee's creation to the organizational drive, and (4) no consideration by employees, committee, or union that the Representation Committee even remotely resembled a labor organization. *Id.* at 294-

representation committee was structured to allow continuous interaction between workers and management through scheduled monthly meetings. *Scott & Fetzer's* rationale has facilitated participatory programs' surmounting the language found in *Cabot Carbon*, section 2(5), and the legislative history of that section.¹⁰⁷

What is the position of the National Labor Relations Board in view of this "enlightened" approach to labor relations as to section 2(5) and participatory programs? Generally, the Board has followed *Cabot Carbon's* guidance and accorded section 2(5) a broad interpretation.¹⁰⁸ Nevertheless, the Board has had occasion to refuse to find a section 2(5) "labor organization" where the employee committee was functioning in a purely adjudicatory capacity,¹⁰⁹ exercising responsibilities that were managerial in character,¹¹⁰ or operating as a "committee of the whole" comprised of all employees without desig-

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It is interesting to note that the Court, in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. at 248, thought lack of union animus was irrelevant in upholding the Board's order to disestablish the employer-created employee representation plan. See *supra* note 105 and accompanying text.

107. See *supra* note 39 and accompanying text.

108. Cases cited by the NLRB in a recent decision (*Electromation, Inc.*, 309 N.L.R.B. No. 163 (1992), see discussion *infra* notes 112-30 and accompanying text) illustrating the Board's continued homage to *Cabot Carbon* were: *Ona Corp.*, 285 N.L.R.B. 400 (1987); *Liberty Market*, 236 N.L.R.B. 1486 (1978); *Clapper's Mfg.*, 186 N.L.R.B. 324, *enforced*, 458 F.2d 4414 (3d Cir. 1972); *Ambox, Inc.*, 146 N.L.R.B. 1520 (1964). In each case, the § 8(a)(2) violation was flagrant in the employer's structuring of and dealing with the employer-created employee committee on § 2(5) subjects. Unlike *Scott & Fetzer*, facts in the four cited cases supported a finding that the employer was hostile or held antiunion animus towards the union, the employees considered that the employer-created committee represented them before management, and there was evidence of continuous interaction between the company and the committee. See *supra* notes 95-107 and accompanying text.

109. The employer in *Spark's Nugget, Inc.*, 230 N.L.R.B. 275 (1977), *enforced in part sub nom.* *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981), established an impartial "Employee Council" to hear employees' grievances against their supervisors and to render binding decisions. The court found that *Cabot Carbon's* broad interpretation of "dealing with" did not encompass the function of the Employee Council. The responsibility of the Council, the Board opined, was purely adjudicatory and was actually a prerogative of management. 230 N.L.R.B. 276.

See also *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108 (1977) (involving an employee committee established to hear workers' grievances and render final decisions). The hospital's grievance committee, however, had the added function of recommending changes in the employer's rules and regulations. Nonetheless, that function did not place the committee within § 2(5). The Board adopted the finding of the administrative law judge that the committee was "created simply to give employees a voice in resolving the grievances of their fellow employees . . ." *Id.* at 1121.

110. *Spark's Nugget*, 230 N.L.R.B. 275. See *supra* note 109 for discussion.

nated leaders or spokespersons.¹¹¹

IV. ELECTROMATION'S GUIDANCE ON EMPLOYER-CREATED PARTICIPATORY PROGRAMS

National Labor Relations Board cases have not delineated a bright line ruling on when functions of employee committees will intrude within section 2(5)'s domain. In the last twenty years, employee involvement programs have become the model of choice in industrial relations.¹¹² Therefore, the labor management community anxiously awaited the Board's recently issued decision in *Electromation, Inc.*,¹¹³ which was supposed to provide that defining line. Two issues of the case became a cause célèbre: (1) at what point does an employee committee lose its protection as a communication device and become a labor organization, and (2) what conduct of an employer constitutes domination or interference with the employee committee?¹¹⁴ Some members of the labor management community viewed the *Electromation* decision as holding the future of employee involvement programs.¹¹⁵ Some even questioned whether *Electromation* would sound the death knell for this new age of coop-

111. Another noted case where the Board refused to find a § 2(5) labor organization was *General Foods Corp.*, 231 N.L.R.B. 1232 (1977). *General Foods* had instituted a job enrichment program organized around four work teams. Acting by a consensus of its members, each team made individual job assignments, decided job rotation, scheduled overtime, and, at times, conducted hiring interviews. The structure of the teams was the deciding factor in the administrative law judge's recommended order adopted by the Board. Judge Walter Maloney wrote:

To my knowledge an entire bargaining unit, viewed as a "committee of the whole," has never been accorded *de facto* labor organization status. The essence of a labor organization, as this term has been construed by the Board and the courts, is a group or a person which stands in an agency relationship to a larger body on whose behalf it is called upon to act. When this relationship does not exist, all that can come into being is a staff meeting or factory equivalent thereof.

Id. at 1234.

112. See *Gould*, *supra* note 57, at 384. Many reasons have been offered for the modern day proliferation, extending from the necessity of a cooperative workplace for American business to compete in a global market to an attempt by some employers at avoiding unions. *Id.* at 382, 384.

113. 309 N.L.R.B. No. 163 (Dec. 16, 1992). Board Members Stephens, Devaney, and Oviatt joined in the majority opinion, with Board Members Devaney, Oviatt, and Raudabaugh writing separate concurring opinions.

114. *Id.*, slip op. at 1.

115. See, e.g., *Attorneys File Appeal in Electromation Case*, *supra* note 62; *Rep. Gunderson Plans to Introduce Bill to Address Effects of Electromation Ruling*, Daily Lab. Rep. (BNA) No. 245, at A-16 (Dec. 21, 1992).

eration in the workplace or, from another stance, mean the erosion of workers' statutory rights.¹¹⁶ Now that the dust has settled, there may be agreement that more was expected from *Electromation* than the facts could deliver.

Electromation created five action committees upon finding that employees were displeased with management's unilateral alteration of the attendance bonus policy: (1) absenteeism/infractions, (2) no smoking policy, (3) communication network, (4) pay progression for premium positions, and (5) attendance bonus program.¹¹⁷ Employees' first reaction to the concept of action committees was not positive, but when presented with a Hobson's choice (maintain the status quo, which they disliked, or find bilateral solutions to problems concerning working conditions), employees accepted the committees.¹¹⁸ The plan allowed a designated number of employees to sign up for and serve on each committee and provided that representatives from management would participate in scheduled weekly committee meetings.¹¹⁹ A few weeks after the committees began functioning, a union demanded recognition from the employer.¹²⁰

The employer informed employees that management representatives would not participate on the committees until after the union campaign but that employees could, if they so desired, continue to meet. Two committees did continue to meet.¹²¹

The Board found the action committees were not simply "communicative devices" but constituted a labor organization within the meaning of section 2(5) and that Electromation's conduct constituted domination and interference in violation of sections (8)(a)(1) and (2) of the Act.¹²² The Board's decision was based on a two-step analysis. First, the action committee had to satisfy the definitional elements of section 2(5) as to "(1) employee participation, (2) a purpose to deal with employers,¹²³ (3) concerning itself with condi

116. *Labor and Management Assess Impact of NLRB Ruling on Employee Participation Plans*, Daily Lab. Rep. (BNA) No. 245, at A-15 (Dec. 21, 1992).

117. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 2.

118. *Id.*

119. *Id.*

120. The Board found no evidence that Electromation was aware of the union's efforts to organize until presented with the demand. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 3.

121. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 3.

122. *Id.* at 8.

123. The Board distinguished "purpose" from "motive" and explained that "the 'purpose' to which the statute directs inquiry does not necessarily entail subjective hostil-

tions of employment or other statutory subjects, and (4) if an `employee representation committee or plan' is involved, evidence that the committee is in some way representing the employees."¹²⁴ Once the action committees were deemed a section 2(5) labor organization, the second step of the analysis was applied: whether the employer has engaged in any of the three forms of conduct prohibited by section 8(a)(2).¹²⁵

The first step's second and third elements are important to the debate over whether employer-created participatory programs in the unorganized setting really provide an avenue for democratizing the workplace. Two statements of the Board in *Electromation* that focus on these elements help to fuel old doubts about whether democratization can be achieved through these programs. In addressing proof of these elements, the Board stated, "if a purpose [of the employee committee] is to deal with an employer concerning conditions of employment, the section 2(5) definition has been met regardless of whether the employer has created it, or fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union."¹²⁶ Guided by *Cabot Carbon*, the Board "view[ed] `dealing with' as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in section 2(5), coupled with real or apparent consideration of these proposals by management."¹²⁷

What *Electromation* makes clear, despite its narrow ruling, is that the statutory subject areas that lend definition to section 2(5) remain sacrosanct and cannot be trespassed upon by an employee committee that seeks legitimacy as purely an involvement program or communication device. Indeed, the Board concluded in *Electromation* that "[t]he purpose of the Action Committees was, as the record demonstrates, not to enable management and employees to cooperate to improve `quality' or `efficiency,' but to create in employees the impression that their disagreements with management

ity towards unions. Purpose is a matter of what the organization is set up to do, and may be shown by what the organization actually does." *Id.* at 7.

124. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 7.

125. *Id.*

126. *Id.*

127. *Id.* at 5, n.21. The Board was of the opinion, however, that "[a] unilateral mechanism, such as a `suggestion box,' or `brainstorming' groups or meetings, or analogous information exchanges, does not constitute `dealing with.'" *Id.*

had been resolved bilaterally.”¹²⁸ Had committees at Electromation been established to deal with questions of quality and efficiency, instead of section 2(5) subjects,¹²⁹ the committee would not have run into problems.¹³⁰

V. WORKPLACE DEMOCRACY AND EMPLOYER-CREATED PARTICIPATORY PROGRAMS

The area of concern is not with the issue that the *Cabot Carbon Court* or the Sixth Circuit *Scott & Fetzer* case or the Board's *Electromation* decision were grappling to resolve, which is whether the employee involvement committee is actually a section 2(5) labor organization. The concern should be with the realization of the limited or restricted participatory role these programs allow employees

128. *Id.* at 9.

129. Electromation's president began contemplating the five-committee model after a Jan. 11th meeting with employees. At that meeting, he became aware of serious problems on a number of issues, including overtime, tardiness, wages, bonuses, attendance, bereavement leave, sick leave, and incentive pay, and decided employees should be involved in the process of finding solutions. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 2.

130. *Electromation* is on appeal. Two cases worth noting that were decided after *Electromation* are Salt Lake Div., 310 N.L.R.B. No. 149 (Mar. 29, 1993) and E.I. du Pont de Nemours & Co., 311 N.L.R.B. No. 88 (May 28, 1993). In both cases, the NLRB remained true to *Cabot Carbon* instructions.

Salt Lake involved a nonunion circumstance similar to *Electromation*. The administrative law judge found the employer-created committees were a labor organization within § 2(5) and facts presented a “classic case” of a § 8(a)(2) violation. After a union filed an NLRB election petition the employer established three employee committees (benefits, safety, and productivity and routing committees). Although the subject areas of two committees appeared to be safety and productivity, in actuality the committees dealt with subject matters in the § 2(5) domain, such as attendance bonuses, safety bonus programs and vacations. The employer composed committee membership from a sign-up list it previously requested. The employer unilaterally dissolved or changed the size and membership of the committees, set meeting times, presided over the meetings, decided which ideas had merit to include in meeting summaries, and which policy changes to make. The Board affirmed the judge's findings. 310 N.L.R.B. No. 149, slip op. at 1.

Du Pont provided the Board with the opportunity to address § 2(5) and § 8(a)(2) issues raised by employee participative committees where employees have selected an exclusive bargaining representative. The employer established six safety committees and one fitness committee. The record showed each committee had management representatives, discussed § 2(5) subjects, and that the management representatives established the agenda for the meetings, conducted the meetings, controlled committee membership composition, and had authority to reject any proposal presented. (Moreover, a discussion of § 8(a)(5) issues revealed some committees dealt with issues identical to those dealt with by the union, and reached a resolution on issues the union failed to resolve.) The Board found committee functions to be within the first three factors of *Electromation*'s two step analysis. See *supra* notes 123-27 and accompanying text. Therefore, the Board found a § 8(a)(2) violation. 311 N.L.R.B. No. 88, slip op. at 5.

to have in decisions that affect their work life. Employees' voices are silenced on the very subjects such as decent wages or salary, health care, and job security that are important to the dignity of personhood. The job or occupation has a significant bearing on an employee's life or the "wholeness" of the individual. In fact, one study found that most, if not all, employees tend to describe themselves by their work.¹³¹

Truly, the most valuable asset to the modern day worker is his or her job or occupation. Frank Tannenbaum's 1951 commentary on the status of American workers has more truth today than when he wrote it over four decades ago:

We have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for the relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all their income is something new in the world. *For our generation, the substance of life is in another man's hands.*¹³²

The American work ethic regards gainful employment as a badge of respectability, while loss of employment is regarded with embarrassment and affects the worker's feeling of self-worth. Similarly, persons who believe they lack control over, or have no voice on, issues in the workplace that determine their ability to flourish (or acquire the sustenance of life) will also suffer from feelings of low self-esteem and injury to the dignity of personhood.¹³³ Professor Charles Fried's poignant depiction of when an affront to human dignity occurs in the workplace illuminates even more the implications Tannenbaum's comment has to workplace democracy:

[A]n offense to human dignity . . . occur[s] when some persons exercise what is thought to be a demeaning measure of control over significant portions of the lives of others. [Such] . . . offense . . . [is present] when workers are subject to arbitrary measures of discipline, discharge, promotion, allocation of tasks, working conditions,

131. Theodore J. St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 646 (1985) (citing SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE, *WORK IN AMERICA* 6 (1973)).

132. FRANK TANNENBAUM, *A PHILOSOPHY OF LABOR* 9 (1951).

133. See generally Diana T. Meyers, *Work and Self-Respect*, in *MORAL RIGHTS IN THE WORKPLACE* 18 (Gertrude Ezorsky ed., 1987).

and the like. But even where the control is not exercised in an arbitrary way, the offense is thought to exist where the worker has little opportunity to participate in the processes that determine the rules that govern his activities, whether in the formulation of general industrial policy or in the design and execution of the particular tasks that the worker performs.¹³⁴

Old common law notions of the employer as an absolute sovereign of the job have been somewhat dispelled with passage of protective legislation¹³⁵ for workers and modification of the common law employment at will rule.¹³⁶ Where no legal conflict arises, the pre-New Deal status of employer as sole decision maker and authority continues to prevail, as it always has, based upon property rights. But as Paul Staudohar notes:

[T]he property right basis of management carries no corresponding duty on the part of employees to be managed. In a free society people can be managed and directed only if they provide consent. Because property rights do not confer complete authority over employees, management may find it necessary to relinquish a share of its authority in order to induce the cooperation of employees.¹³⁷

While integrative models¹³⁸ of industrial relations do permit participation from employees in decisions that generally involve operational efficiency and productivity, such models do not and cannot provide a forum for the panoply of section 2(5) subjects that affect a "significant portion" of employees' work life. Consequently, democratization in the workplace cannot be achieved through the participatory models.

134. Charles Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1022 (1984).

135. See, e.g., 1938 Fair Labor Standards Act, 29 U.S.C. §§ 201-19 (1988 & Supp. 1992); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34 (1988); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (1988); 1989 Worker Adjustment and Retraining Modification Act (WARN), 29 U.S.C. §§ 2101-09 (Supp. 1989); Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988 and Supp. III 1992); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988 and Supp. III 1992); 1990 Americans with Disabilities Act, 42 U.S.C. § 12101 (Supp. III 1992).

136. See Squire, *supra* note 4, for a discussion on common law approach to restricting an employer's unfettered right (where there is no protective statute at issue) to terminate employees. See also Jay M. Feinman, *The Development of the Employment-at-Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

137. Staudohar, *supra* note 3, at 10 (citing NEIL W. CHAMBERLAIN & JAMES W. KUHN, COLLECTIVE BARGAINING 114-15 (1986)).

138. See *supra* note 1.

Sections 2(5) and 8(a)(2) accord an unabridged voice to employees through their legitimate representatives, which infuses democracy in the workplace through collective bargaining. The collective bargaining model structured under the NLRA, however, is also problematic. Statistics support the proposition that, for whatever reason, a vast number of employees in the private sector do not prefer exclusive representation by a labor organization.¹³⁹ Should these employees, who receive at best only "half a loaf of industrial democracy"¹⁴⁰ through involvement plans, be denied a voice on issues that affect a significant portion of their worklife and give meaning and definition to their personhood?

VI. SOLUTIONS TO LEGITIMIZE EMPLOYER-CREATED
PARTICIPATORY PROGRAMS TO ADDRESS
SECTION 2(5) SUBJECTS

Several solutions to this dilemma have been proposed. One is the *Chicago Rawhide*¹⁴¹ approach, which incorporates a more flexible interpretation of section 8(a)(2). In that case, employees were dissatisfied with the company's procedures to hear grievances. The company, with a group of employees, worked out a new plan which created an employee committee and a grievance committee. Eventually the two committees were merged.¹⁴² Committee meetings were held during working hours.¹⁴³ Later, the company recognized the employee committee as the employees' exclusive bargaining representative after a union tried to organize the employees and was overwhelmingly defeated.¹⁴⁴ The court denied enforcement of the Board's finding of a violation, and cautioned that if the line between cooperation and support were not discerned, the principal purpose of the Act, i.e., cooperation between management and labor, would be

139. The dramatic downward slide in private sector union membership has reached a hemorrhaging stage and predictions are that a low of seven percent membership is possible by the year 2000 if the decline continues. *Labor Movement Urged to Take Huge Risks*, 141 Lab. Rel. Rep. (BNA) 193, at D-25 (Oct. 19, 1992).

140. Clyde Summers, *Unions Without Majority — A Black Hole?*, 66 CHI-KENT L. REV. 531, 548 (1990). See *infra* notes 156-69 and accompanying text for discussion.

141. *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

142. *Id.* at 166.

143. *Id.*

144. *Id.* at 167. During the union's organization drive, 80% of all plant employees signed a petition asking that its employee committee be recognized as the bargaining agent. After the union's defeat, the petitions were presented to the employer. *Id.*

defeated.¹⁴⁵ Facts upon which the violation rested went only to show a potential for control, and the court opined that was not sufficient.¹⁴⁶ For a violation of section 8(a)(2), the *Chicago Rawhide* court adopted a subjective standard of “actual control,” i.e., whether the employee organization is controlled by the employer from employee's standpoint.¹⁴⁷ Other circuits have followed *Chicago Rawhide* in applying what has been called “the employee free choice standard” for section 8(a)(2).¹⁴⁸ The liberal reading of section 8(a)(2), however, does not resolve the issue of democratization of the workplace where employee involvement plans have been established. A subjective boundary still remains that the employee involvement committee may not traverse.¹⁴⁹

Some supporters of participatory programs advance a more drastic position by calling for the repeal of section 8(a)(2), allowing employees choice between the adversarial and cooperative models of industrial relations.¹⁵⁰ Employers establishing involvement com

145. *Chicago Rawhide*, 221 F.2d at 167.

146. *Id.* at 168, 170. The Board concluded that the employer's indicia of domination included the employer's unrestricted, although unexercised, power to lay off or transfer the committee member, assistance with the administration of the employee committee's election (election held on company premises, on company time, supervising and posting notices of the election), permitting committee business to be transacted on company premises, not deducting compensation while processing grievances from committee members, and contributing financial support to a recreation committee established by the employees. *Id.* at 170.

147. *Chicago Rawhide*, 221 F.2d at 168. The “subjective standard” was applied by other circuits prior to *Chicago Rawhide*. See, e.g., *NLRB v. Wemyss*, 212 F.2d 465, 471-72 (9th Cir. 1954), stating that:

[T]he question whether the organization is employer dominated depends upon the state of mind of the employees . . . [and] whether the organization exists as the result of a choice freely made by the employees, in their own interests, and without regard to the desires of their employer, or whether the employees formed and supported the organization, rather than some other, because they knew their employer desired it and feared the consequences if they did not.

Id. at 471.

148. See *supra* note 104 and accompanying text. See also Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985) (supporting employees' free choice). But see Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983).

149. The *Chicago Rawhide* court specifically mentioned that in the initial negotiations with the employer, the committee did not constitute a labor organization, and the discussions did come within the § 8(a)(2) proviso. However, during the course of the negotiations over grievance procedure, the employee committee became a labor union within the meaning of § 2(5). 221 F.2d at 169.

150. See, e.g., Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor*

mittees could then include section 2(5) subjects without fear of violating the Act and having to disestablish the committees. The danger in this approach is in history repeating itself. The reason for section 8(a)(2) was to allow employees a voice in their work life through a legitimate labor organization.¹⁵¹ Historically, employers established employee associations or “the company union” to avoid collective bargaining with legitimate labor organizations.¹⁵² Even with repeal of section 8(a)(2), it is doubtful that the employee committee and employer would deal with section 2(5) subject matters. A real possibility of employees' being intimidated and not being able to raise or “meaningfully discuss” such issues with management exists. Lack of job security and promotion protection, as offered in a bargaining agreement, can even cause the hardihood of the workplace to retreat from issues not condoned by management. Moreover, employee committees function in a purely *advisory* capacity and management retains ultimate authority on all issues. Furthermore, management, as the creator of the committees, dictates their life span.

Some within the labor-management community perceive that truly dire measures are required to bring industrial relations into the new global age. They advocate nothing less than the repeal of the National Labor Relations Act.¹⁵³ Some labor leaders espouse the position that no rules are better than inadequate rules and prefer a return to the “law of the jungle,”¹⁵⁴ while other advocates describe the situation in more civilized terms and propose to substitute the common law for our present statutory labor scheme.¹⁵⁵ A return to the pre-NLRA era would ensure a back-to-the-future trip for industrial relations.

Professor Clyde Summers proposes a most intriguing theory that could be of assistance to workers' achieving democracy in the workplace in a nonunion setting where an employee involvement

Relations: An Argument for Repeal of Section 8(a)(2), 96 YALE L.J. 2021 (1987). But see Kohler, *supra* note 63, at 499 (positing that § 8(a)(2) is key to the Act's scheme).

151. See discussion *supra* notes 1-55 and accompanying text.

152. *Id.*

153. See, e.g., Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983).

154. Abner J. Mikva, *The Changing Role of the Wagner Act in the American Labor Movement*, 38 STAN. L. REV. 1123, 1123 (1986) (citing Bill Keller, *Unionists See Labor Day '84 as a Time to Weigh Setbacks*, N.Y. TIMES, Sept. 3, 1984, at A1).

155. See Epstein, *supra* note 153.

committee has been established.¹⁵⁶ Summers posits that section 9(a)¹⁵⁷ does not derogate the section 7¹⁵⁸ rights of employees and the rights of a minority union to represent its members when no majority union is present.¹⁵⁹ In other words, section 9(a) qualifies the exercise of section 7 rights only when a majority union with exclusive representation rights exists.¹⁶⁰ The purpose of section 9(a) does no more than give special status (i.e., as exclusive representative) to a majority union.¹⁶¹ Section 7 makes no distinction between a union with a majority and a union without a majority.¹⁶² Moreover, the rights guaranteed by section 7 may be exercised with or without a union.¹⁶³

Summers suggests significant functions in the workplace that a nonmajority union can perform,¹⁶⁴ and conceives in-plant committees established by the nonmajority union as the structure through which the nonmajority union would operate and maintain a visible presence in the workplace.¹⁶⁵ Summers' proposal would appear to be a viable approach to infuse democracy in workplaces that implement an employee involvement plan. Employees under the plan who desire input on section 2(5) subjects could allow a nonmajority union to represent them on issues in these subject areas. Summers' approach allows choice for a minority of employees who might desire representation by a union.

Professor Summers does note that a statutory amendment probably would be needed to achieve representational rights for a nonmajority union, as courts and the NLRB have long interpreted section 9 and section 7 as according representation rights exclusively to majority unions.¹⁶⁶ A major drawback in Professor Summers' approach, which he recognizes, is that the nonmajority union's bar-

156. Summers, *supra* note 140.

157. See *supra* note 51 for language in § 9(a) of the NLRA.

158. Summers, *supra* note 140, at 531, 534. See *supra* note 37 for language in § 7 of the NLRA.

159. *Id.*

160. *Id.* at 534.

161. *Id.* at 531.

162. *Id.* at 534.

163. Summers, *supra* note 140, at 534.

164. *Id.* at 541-45. For example, (1) members could distribute, in nonwork areas of the plant during nonwork time, literature publicizing and protesting working conditions, and (2) through a union in-plant committee, present grievances to management and enforce the Occupational Safety and Health Act (OSHA). *Id.*

165. Summers, *supra* note 140, at 541.

166. *Id.* at 540.

gaining position would probably be weak when attempting to deal with the employer on section 2(5) subjects.¹⁶⁷ A question is raised: What effective pressure could a nonmajority union exert on the employer?¹⁶⁸ Summers proffers that if an employer refuses to meet and negotiate or responds unsatisfactorily to a grievance, the nonmajority union may picket or engage in a stoppage or walkout.¹⁶⁹ Professor Summers' proposal certainly offers another avenue to protect employees' section 7 rights, but the old adage "strength in numbers" would apply in any attempts to achieve democracy in the workplace.

VII. ORGANIZED LABOR'S CHALLENGE TO
CHANGE IN ORDER TO
PRESERVE WORKPLACE DEMOCRACY

Chronic decline in union membership raises concern for the future of workplace democracy. Paradoxically, the decline has occurred in the midst of worker dislocations caused by takeovers, shutdowns, and downsizing that heightened employees' mistrust of corporations and disgruntled employees filing a record number of wrongful discharge suits and job discrimination and unfair labor practice complaints.¹⁷⁰ In the past, management activities such as these would have precipitated unionization.¹⁷¹ Union membership in the private sector presently stands at less than it was before enactment of the NLRA.¹⁷² Bureau of Labor Statistics data show the downward trend for private sector union membership has not ended, reporting a drop from 11.9% in 1991 to 11.5% in 1992.¹⁷³

167. *Id.* at 540. Professor Summers likens the nonmajority union's position to that of a union with a majority in a bargaining unit encompassing only a minority of the employer's work force. *Id.*

168. Summers, *supra* note 140, at 541-42.

169. *Id.* at 541. Differentiation is made between picketing to induce the employer to meet and negotiate concerning a particular grievance and "recognition" picketing within § 8(b)(7). The former would be governed by a rationale applied to "area standards" picketing. A more difficult question Summers raises is picketing to obtain a members-only agreement; but he concludes that such agreement lacks the underlying reason for § 8(b)(7). *Id.* at n.42.

170. John Hoerr, *What Should Unions Do?*, HARV. BUS. REV., May-June 1991, at 30.

171. *Id.*

172. Richard B. Freeman & Joel Roger, *A New New Deal for Labor*, CHI. DAILY L. BULL., Mar. 11, 1993, at 6.

173. Union membership for all wage and salary workers slipped in 1992 to 15.8% after hovering at 16.1% in 1990 and 1991. *New Administration Seen Giving Labor Chance to Check Declining Unionization*, Daily Lab. Rep. (BNA) No. 38, at C-1 (Mar. 1, 1993)

There is no lack of reasons or blame (depending on the angle from which the situation is viewed) for the downward spiral in union membership.¹⁷⁴ Even if obstacles to unionization were removed, one challenge would still remain — organized labor, itself. Technology, global competition, demography and other forces have drastically altered America's business environment, but labor appears to be functioning in a mid-1900s time warp.¹⁷⁵ A study by the Hudson Institute reports that by the end of the 1990s, "changes [or forces] under way will produce an America that is in some ways unrecognizable from the one that existed a few years ago."¹⁷⁶

American workers have changed.¹⁷⁷ Beginning in 1956, the number of white collar workers¹⁷⁸ exceeded that of blue-collar workers.¹⁷⁹ Further, educational attainment of workers has steadily increased, resulting in the work force of the future being more highly educated.¹⁸⁰ Indeed, a majority of all new jobs by the year 2000 will require postsecondary education, and almost a third will be filled by

(citing data released by the Bureau of Labor Statistics).

174. Predominant reasons cited have included aggressive employer resistance, shift from a manufacturing to a service economy, insufficient organizing efforts, public attitude towards unions, NLRB labor election decisions of the Reagan Board, and NLRB election procedures. See generally St. Antoine, *supra* note 131; Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983). See also PAUL C. WEILER, *The Declining Fortunes of Collective Bargaining*, in GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 105 (1990).

175. The high point of union penetration into the non-farm labor work force was 1945 with about 35.5% organized. Union membership increased during the early 1960s through 1979, but at a slower pace than overall employment. Union membership started its steady decline from 1979 to the 1990s. *Proportion of Union Members Declines to Low of 15.8 Percent*, Daily Lab. Rep. (BNA) No. 25, at B-3 (Feb. 9, 1993).

176. HUDSON INSTITUTE, *WORKFORCE 2000: WORK AND WORKERS FOR THE TWENTY-FIRST CENTURY* xiii (1987) [hereinafter *WORKFORCE 2000*].

177. The Hudson Institute reports that women will comprise about three fifths of the new entrants into the work force by the year 2000. Minorities also will make up a large share of new entrants but immigrants will represent the largest share of the increase in the population and the work force since the first World War. *WORKFORCE 2000*, *id.* at xx, 85, 89, 91-93.

178. White collar workers can be found in such dissimilar occupational categories as professional salespersons, architects, clerical and office employees, government workers, computer programmers, and health workers.

179. SLOANE & WITNEY, *supra* note 15, at 7.

180. See KOCHAN & KATZ, *supra* note 3, at 84. It was reported that for the first time employees performing executive, professional or technical jobs (which include such jobs as financial managers, accountants, lawyers, architects, engineers, computer programmers, scientists, teachers, doctors and dental hygienists) out numbered those making or transporting goods. *White-Collar Jobs Outpace Blue Collars*, CHI. TRIB., Jan. 29, 1993, at 3.

college graduates.¹⁸¹ Evidence of this trend appears with the 1990 census reporting that the white collar work force expanded by more than a third from ten years earlier, while blue collar jobs declined.¹⁸² Traditional union organizing and collective bargaining agreements may not adequately address the needs of white collar workers. As the level of education rises so does the expectation and desire to exercise responsibility, self-direction, and skill in work life.¹⁸³ Workers have also become concerned with such issues as flexible schedules, computer technology and career development.¹⁸⁴ They are “more interested in their individual circumstances,” so that a sole appeal to “loyalty of labor as a class” is not effective in organizing.¹⁸⁵ In addition, many young white collar workers have been highly mobile in past years, having job tenure of only one or two years. They did not perceive it worthwhile to support a six-month long unionization drive.¹⁸⁶ White collar workers attempting to satisfy what Abraham Maslow designates as esteem and self-actualization needs,¹⁸⁷ may question whether the traditional representation structure of unions is relevant to their circumstances.¹⁸⁸

Further, white collar workers belong to the baby-boom generation that now dominates the labor force. One writer has described this new generation of workers:

181. WORKFORCE 2000, *supra* note 176, at 97.

182. *White-Collar Jobs Outpace Blue Collars*, *supra* note 180.

183. Gerald Doppelt, *Technology and the Humanization of Work*, in MORAL RIGHTS IN THE WORKPLACE *supra* note 133, at 11; *see also* WEILER, *supra* note 73, at 31.

184. *See* Steven Greenhouse, *Reshaping Labor to Woo the Young*, N.Y. TIMES, Sept. 1, 1985, at C-1.

185. *Blue Collars in the Sunset — And Haze on the Horizon*, THE ECONOMIST, Mar. 2, 1985, at 31. *See, e.g.*, Greenhouse, *supra* note 184, at C1, where communication workers have expressed difficulty of organizing high-tech companies because employees are individualist.

186. Greenhouse, *supra* note 184, at C1.

187. Maslow's theory of hierarchy of needs postulates that humans move through stages of needs and progress to a higher stage only when the lower needs are sufficiently satisfied. Translating Maslow's pyramid into the modern day workplace, at the base are the physiological needs (food, shelter, clothing or in the work force, satisfactory compensation). Proceeding up the hierarchy of needs are security needs (job safety, benefit package, e.g., health care), social needs (workplace friendships), and esteem needs (status and prestige). At this latter stage, the employee might ignore money motivators (since need one has been met) for an all important job title, and at the top, self actualization needs (competence and personal achievements and accomplishments). Here, mastery of occupation skills becomes important. *See* DAYLE M. SMITH, MOTIVATING PEOPLE 1-11 (1991).

188. White collar workers under age 35 in fields as diverse as insurance and electronics have goals and desires different from those of labor's traditional blue collar stalwarts. Greenhouse, *supra* note 184, at C6.

As a group it has more education and is more socially activist than previous generations. Baby-boomers are less awed by authority and do not readily submit to it. Some of them do not believe in the industrial system at all. They are as a group more assertive and critical of inequity. To elicit the support of these people often requires giving them a greater share in decisionmaking.¹⁸⁹

Labor has generally failed to penetrate the white collar frontier of potential membership.¹⁹⁰ A few reasons are offered for this failure.¹⁹¹ First, lingering unreceptive attitudes are held by the public towards unions.¹⁹² Unions have suffered from the poor image conveyed by the mass media, not only as to some union leaders' criminality,¹⁹³ but also to "seemingly irresponsible union strikes."¹⁹⁴ The Professional Air Traffic Controllers Organization (PATCO) strike in 1981 is indelibly etched in the public's memory. President Ronald Reagan received an outpouring of support when he fired the 11,500 air-traffic-controllers. PATCO's illegal strike generated strong anti-union sentiments from the public.¹⁹⁵ Indeed, there was no public outcry when the Federal Labor Relations Authority

189. Staudohar, *supra* note 3, at 16.

190. SLOANE & WITNEY, *supra* note 15, at 8.

191. SLOANE & WITNEY, *supra* note 15, at 8-12, offer the following three "probable explanations" as to "why . . . the white collar world . . . [was] so relatively unreceptive to the union organizer."

192. SLOANE & WITNEY, *supra* note 15, at 9.

193. This perception appears to have subsided to some extent. *Blue Collars in the Sunset — And Haze on the Horizon*, *supra* note 185, at 31, citing the results of a Harris Business Week Poll reporting the percentage who believe that union leaders:

194. SLOANE & WITNEY, *supra* note 15, at 9. White collar workers under age 35 have not been favorably disposed to unions. Some have the notion that unions and conflict are synonymous; one young computer programmer expressed the perception that unions "create some type of unrest" when they "interfer[e] somewhere," and "a lot of times they're involved in illegal activities." Greenhouse, *supra* note 184. Workers ages 35 to 64 actually have the highest unionization rate. *Proportion of Union Members Decline to Low of 15.8 Percent*, *supra* note 175.

195. John S. DeMott, *Labor's Unhappy Birthday: Union Ranks Are Thinning and Organized Workers Are Losing Their Clout*, *TIME*, Nov. 16, 1981, at 124.

(FLRA) stripped PATCO of its bargaining authority and ordered the disbandment of the union.¹⁹⁶

A large segment of the population, including an incalculable number of white collar workers, allow their opinions of unionism to be molded by those labor activities receiving mass media coverage.¹⁹⁷ To underscore the implication, a recent poll reported results of a survey on the public's confidence in fifteen major American institutions. Organized labor was included and ranked fourth from the bottom with only twenty-six percent of Americans expressing confidence in organized labor.¹⁹⁸ Big business was third from the bottom with only twenty-three percent expressing confidence. However, the survey was good news in some ways. Compared with results from a similar poll taken a decade ago, organized labor had not lost ground but ranked about the same.

Second, the labor movement has been distinguished by uninspiring, rather bureaucratic leadership that seems only dimly aware of the white collar problem and unimaginative in discovering solu-

196. *Controllers*, Reuters, Oct. 23, 1981, available in LEXIS, Nexis Library, OMNI File. Even though legislation is needed to address the replacement of striker issue (i.e., employers permanently replacing employees who strike over economic items — as were PATCO's members), one commentator causes serious thought with the statement that "strikes have generally gone out of style for the American worker [S]trikes are a . . . part of a 'scorched earth' economic policy that most workers in the United States do not subscribed to." Statistics from the Government Accounting Office show that in the last 20 years, strikes have fallen by over 90% (from a high of 494 in 1974 to less than 40 in 1991). Julian M. Kien, *America's Changing Unions*, PULP & PAPER, June 1992, at 132. The decrease may be attributable to the threat, although it may not manifest, of striker replacement that is sanctioned by law.

197. SLOANE & WITNEY, *supra* note 15, at 10. Blue collar workers have generally been in a better position, by virtue of their membership, to perceive the strengths as well as the weaknesses of unionism. *Id.* Organized labor did attempt to counter such perceptions by engaging in a two year, image building, "Union Yes," mass media blitz that proved successful. As a result, a 1988 Gallup Poll indicated a rise in pro-labor feeling with 61% of those polled said to approve of unions. *More Back Unions, Poll Shows*, CHI. TRIB., Aug. 24, 1988, at C4. This did not, however, increase membership which stood at 17% as of September 1988 and continued to decline. See Harry Bernstein, *Unions Trying New Sales Tactics to Stimulate Growth*, L.A. TIMES, Sept. 27, 1988, at D1.

198. The fifteen major institutions in the survey with the highest ranking cited first were: military (67% express confidence), church (53% — ironically, the church is ranked after the military, and was first with 62% in a 1983 poll), police (52%), television news (46%), presidency and U.S. Supreme Court (43% each), public schools (39%), banks (38% — Banks scored 51% in the 1983 poll), medical profession (34%), newspapers (31%), organized labor (26%), big business (23%), Congress (19%) and the criminal justice system (17%). George H. Gallup, Jr. & Robert Bezilla, *Are People Losing Faith in Religion?*, WASH. POST, May 29, 1993, at F7.

tions.¹⁹⁹ Despite plummeting membership numbers of the 1980s, unions conducted only half the organizing campaigns they had in the previous two decades.²⁰⁰ Organized labor has been portrayed as complacent, having become “fat and happy [from] the economic growth years of the 1960s and 1970s, and [having] ignored signs of the decline.”²⁰¹ Even in the 1990s, labor has failed to adequately address the situation. Organized labor has no sense of urgency in developing a strategic plan aimed specifically at organizing white collar workers. This has led observers to question whether strong leadership exists within the labor movement.²⁰²

Third, white collar workers possess certain unique general properties that may tend to work against unionization in any event:

- (a) White collar employees tend to believe that joining a union (an institution traditionally associated with manual workers) would decrease their occupational prestige.
- (b) However tenuous, the white collar worker can at least perceive some opportunity to advance into managerial ranks and is reluctant to join a union, and thus support what is potentially a major constraint on employer freedom of action. Whereas the blue collar employee's educational deficiencies limit promotional avenues within the industrial world, and is destined to be apart from and directed by the managerial class.
- (c) The considerable higher proportion of women in white collar work than in blue collar work has served as a challenging force for organization.
- (d) Many professional white collar workers (e.g., engineers, college professors, institutionally employed doctors) believe more can be gained from individual bargaining with their employer than from collective bargaining.²⁰³

199. SLOANE & WITNEY, *supra* note 15, at 10.

200. Peter Perl, *The Lifeline for Unions: Recruiting; Today's Issues Are Markedly Different*, WASH. POST, Sept. 13, 1987, at H1. Calculations are that unions will have to spend \$300 million over what they now spend just to maintain the present union density level. An additional \$800,000 to \$1 million per year is required to increase the proportion of unionized workers by just one percent. *New Administration Seen Giving Labor Chance to Check Declining Unionization*, *supra* note 173.

201. Perl, *supra* note 200.

202. *See New Administration Seen Giving Labor Chance to Check Declining Unionization*, *supra* note 173.

203. SLOANE & WITNEY, *supra* note 15, at 11-12. The four “general properties” cited by Sloane and Witney are also applicable to the generation of baby boomer white collar workers. *Id.*

*VIII. A NEW MODEL OF REPRESENTATION
FOR ORGANIZED LABOR*

The labor movement has been compared to an “alcoholic `in denial,’ who blames the decline in membership on recession, unsympathetic politicians, or the shift from a manufacturing to a service economy.”²⁰⁴ To reverse the trend, labor movement leaders must first admit that past practices have failed;²⁰⁵ then unions must start to reinvent themselves.²⁰⁶

Organized labor must develop models of representation that appeal to a more individualistic and educated work force that prefers to be in control of its own destiny. A more educated, white collar work force may be unreceptive to allowing an outside union to make “lump” decisions that impact on their individual career goals. Moreover, traditional bargaining contracts are not well-suited for the white collar workplace. As an illustration, seniority and performance skills are the usual basis for promotion in the traditional bargaining contract but are not appropriate to a white collar setting where promotion evaluation might be based upon intangible factors, such as critical reasoning.

Upon reflection, the labor movement might discover that a new course must be charted if membership is to include the largest growing occupational segment of the work force, the white collar workers. Organized labor's role as a very visible and directing presence in the work life of blue collar workers may not be well-adapted for the individualistic, more educated, white collar worker. Consequently, a more limited model of representation should be considered for white collar workers.

The writer offers such an approach and proposes amending section 9 of the NLRA, if necessary, to structure a new role for labor organizations.²⁰⁷ Exclusive representation under the NLRA would continue, but a more limited role that accords representation rights

204. *Labor Movement Urged to Take Huge Risks*, 141 Lab. Rel. Rep. (BNA) 193 (Oct. 19, 1992) (statement of Stephen Lerner, builder services organizing director of the Services Employees International Union at an October 9, 1992 labor conference). This statement should *not* be interpreted that such factors are an illusion or have not gravely impacted on the labor movement. *See also supra* note 174.

205. *Labor Movement Urged to Take Huge Risks*, *supra* note 204.

206. This suggestion was made by Hoerr, *supra* note 170, at 30.

207. Amending the NLRA should be unnecessary because the writer's model is in conformity with the § 9 exclusivity representation model.

to a labor organization to perform specific services would be included. This approach could be designated as "service representation" or "consultation rights representation." The NLRB's petition for election forms might include an additional category, perhaps "CC" or "CR" for "Consultation Rights" representation.²⁰⁸

Whether a unit is appropriate in service or consultation rights representation would be based upon traditional Board and statutory guidelines but could also find appropriate units structured on employees' involvement or work team committees.²⁰⁹ The labor organization could achieve such limited status (the doctrine of majority rule would apply) through, for example, authorization cards or an NLRB election. This approach differs from Professor Summers' approach,²¹⁰ because it maintains section 9 majority rule and provides not only for employees' choice, but also for employees' retaining control over the extent of the union's role in their work life. This recognizes the fact that employees are different today than when the NLRA was promulgated in 1935.²¹¹

Employees would pay a retainer fee to the union based on the services to be performed and the number of employees to be represented. The retainer would purchase a service, not a membership. In instances where representation involves time consuming complex matters, additional charges would be warranted and fee schedules set forth in the agreement of representation. Employees under the service contract who desire membership may purchase something on the basis of an associate membership.²¹² Further, the service or con-

208. An NLRB election petition currently includes the following categories from which the petitioner designates the purpose for filing: RC-Certification of Representative, RM-Representation (Employer Petition), RD-Decertification, UD-Withdrawal of Union Shop Authority, UC-Unit Clarification, and AC-Amendment of Certification.

209. The appropriateness of a unit structured on an employee committee must be determined by the NLRB. Unquestionable acceptance of an employer-created committee as an appropriate unit might raise questions under § 9(c)(5)(b), which states that the "extent to which the employees have organized shall not be controlling" in determining whether a unit is appropriate. 29 U.S.C. § 159(c)(5)(b) (1988).

210. See *supra* notes 156-69 and accompanying text.

211. For instance, educational level has increased, occupational categories include jobs unheard of in 1935, such as computer programmer, and career goals (white collar generation versus traditional blue collar worker) are different.

212. The model offered by the writer differs from the usual associate membership which purchases benefits. Labor leaders have been critical of this concept, suggesting that the associate membership "might merely evolve into a labor version of a mail-order catalog house — people buying products with nothing but a financial responsibility." James Warren, *Union Maps Own Route to Texas' Remotest Areas*, CHI. TRIB., Aug. 3, 1986, at 1. The writer's model permits an associate membership only after employees and a labor

sultation union could offer selected benefits packages or plans (e.g., health care plans, legal counseling on nonunion matters in the civil area, and pension plans) to retainer- or fee-paid units. Benefits packages could act as a selling point for employees to enter into such service-based relationships with the union. If cost is a concern in offering benefits to service-paid units, the union could charge an additional fee for the benefits.

One function the service or consultation union might contract to perform is to represent employees at grievance hearings where provided for under a handbook or to negotiate a procedure that includes arbitration. The union would then have service rights to also represent employees at arbitration procedures. Workers might want the union to raise issues of work condition on specific items (perhaps only two or three, such as requirements for sabbatical leave qualification and standards for bonus pay). When service or consultation unions engage in negotiations with management on a limited number of specific issues, such discussions could result in a memorandum of understanding in lieu of a collective bargaining agreement. If a question on the implementation of the memorandum of understanding arises, the retainer relationship could allow the service or consultation union to represent employees in resolving the problem with management.

The limited model of representation would offer white collar workers an initial contact with a labor organization that might evolve into an expanded representation role for the union. This model would allow the vast number of employees who are not represented by a labor organization to have a voice on issues that significantly affect the well-being of their lives and afford workers participating in an employer-established employee committee some protection. Moreover, workers would have choice as to the extent they desire a third party to enter their worklife. Finally, the limited model would be a step toward modernizing the NLRA to meet the needs of industrial relations in the twenty-first century.

organization have entered into an exclusive (for example, by cards or NLRB election) consultation or representation agreement.