

# ValpoScholar

## Valparaiso University Law Review

Volume 26  
Number 2 Spring 1992

pp.525-546

Spring 1992

### Section 8(a)(2) and Participative Management: An Argument for Judicial and Legislative Change in a Modern Workplace

John W. Bowers

Follow this and additional works at: <https://scholar.valpo.edu/vulr>

 Part of the [Law Commons](#)

#### Recommended Citation

John W. Bowers, *Section 8(a)(2) and Participative Management: An Argument for Judicial and Legislative Change in a Modern Workplace*, 26 Val. U. L. Rev. 525 (1992).

Available at: <https://scholar.valpo.edu/vulr/vol26/iss2/3>

This Article is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at [scholar@valpo.edu](mailto:scholar@valpo.edu).



Bowers: Section 8(a)(2) and Participative Management: An Argument for Ju

# SECTION 8(a)(2) AND PARTICIPATIVE MANAGEMENT: AN ARGUMENT FOR JUDICIAL AND LEGISLATIVE CHANGE IN A MODERN WORKPLACE

JOHN W. BOWERS\*

## I. INTRODUCTION

The stunning economic changes wrought by the emergence of the "global marketplace" and their concomitant effects on American business and labor have placed us at the crossroads of competition. Do we cling to anachronistic and inefficient workplace practices or forge ahead as motivated participants to overcome these workplace, as well as legal, obstacles which threaten to undermine America's economic future?

Abroad, many foreign corporate and government officials doubt America's ability to compete in the new economic world order. The recent comments by the Japanese Prime Minister as well as those by the Speaker of the House of Representatives about the American worker's education and ethic<sup>1</sup> should give America pause; these are powerful and potentially destructive stereotypes which must be countered not by "Japan bashing" or congressional retaliation, but by giving the forces of American capital and labor the tools, including legal ones, to test our mettle on the world economic stage.

This article's thesis is that the time for legal change, notably by amendment to Section 8(a)(2) of the National Labor Relations Act,<sup>2</sup> is now. By endorsing

---

\* Northwestern University, B.A. 1978; Mercer University J.D. 1983; Georgetown University Law Center, LL.M., with distinction, 1989. Adjunct Professor of Law, Valparaiso University School of Law and Partner in the law firm of Beers, Mallers, Backs & Salin in Fort Wayne, Indiana where he practices labor and employment law on behalf of management.

1. Frank J. Murray & Edward Neilan, *Japan's Leader Retreats from Bashing U.S.*, THE WASH. TIMES, Feb. 4, 1992, at A1.

2. 29 U.S.C. § 158(a)(2) reads:

It shall be an unfair labor practice for an employer . . .  
to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, that subject to rules and regulations made and published by the Board pursuant to Section 6, [section 156 of this title] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay; . . .

A labor organization is defined by 29 U.S.C. § 152(5) as "any organization of any kind, or

legitimate participative management programs<sup>3</sup> and removing the legal impediments to their creation and use, Congress and the National Labor Relations Board<sup>4</sup> can give the private sector a competitive boost.

In 1991, two unrelated events began which may have profound effects on the future of participative management programs in the United States. On June 4, 1991, the American Competitiveness Act<sup>5</sup> was introduced by members of the House of Representatives<sup>6</sup> in order to sharpen the United States' competitive edge.<sup>7</sup> This proposed legislation would amend Section 8(a)(2) so that the creation and use of quality circles or labor-management production teams in both union and nonunion workplaces are legally permissible.<sup>8</sup>

Second, late last summer, the National Labor Relations Board, in an unusual procedural development, heard oral argument in the case of

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." The National Labor Relations Act ("NLRA" or "Act") consists of the National Labor Relations Act of 1935 (29 U.S.C. §§ 151-68 (1990)), the Labor Management Relations Act of 1947 ("LMRA") (29 U.S.C. §§ 141-44, 151-67, 171-87 (1990)), and the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. §§ 152, 158-60, 164, 186-87 (1990)).

3. Participative management programs fall within several categories and use various names; however, all of the programs seek the goal of using employee knowledge to provide insights for personal and business growth. See *infra* notes 14-26 and accompanying text. Today, an estimated 35,000 companies and nine million American employees are involved with some form of a participative management program. Edward E. Potter, *Quality at Risk: Are Employee Participation Programs in Jeopardy?* (1991) (Policy paper, Employment Policy Foundation) [hereinafter Potter]. For a more detailed discussion of the particulars of such programs, see Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985).

4. The National Labor Relations Board ("NLRB" or "Board") is an agency of the United States empowered to develop a uniform, nationwide interpretation of the Act. WEST'S FEDERAL LABOR LAWS 42 (13th ed. 1991). Pursuant to 29 U.S.C. § 153(a), the NLRB is to consist of five members appointed by the President by and with the advice and consent of the Senate.

5. H.R. 2523, 102d Cong., 1st Sess. (1991).

6. Tom Campbell (R-Cal.) authored the bill and Minority Whip Newt Gingrich (R-Ga.) and G.O.P. Conference Chairman Lewis (R-Cal.) co-sponsored it. *Id.*

7. *Id.* at § 2. Specifically, the bill has provisions that would make the research and development tax credit permanent, provide additional capital gains tax support for long-term investments, encourage investments in new companies, eliminate the tax incentives for corporate takeovers, remove some restrictions on pension fund managers, afford greater protections to intellectual property rights, and establish a tax incentive so that companies will lend their employees to schools and colleges to teach and assist students in various fields of endeavor. *Id.* at §§ 1-401.

8. The proposed legislation would add the following language to the end of 29 U.S.C. § 158 (a)(2): "[p]rovided further, That nothing in this paragraph shall prohibit the formation or operation of quality circles or joint production teams composed of labor and management, with or without the participation of representatives of labor organizations." H.R. 2523, 102d Cong., 1st Sess. § 301 (1991).

*Electromation, Inc.*<sup>9</sup> The case has generated widespread interest among labor relations practitioners as well as officials of labor and management,<sup>10</sup> due to the fact that the Board will decide whether certain "Action Committees" established by management for the purpose of furthering employee discussion on matters of "mutual interest" are "labor organizations" which have been dominated or interfered with under the National Labor Relations Act.<sup>11</sup>

Undoubtedly, labor, management, and the courts will watch these developments very closely. Some experts predict the Board will re-examine existing case law in light of the trend in American business to afford employees a greater voice in the management of the workplace.<sup>12</sup> However, disagreement remains as to whether a traditional, adversarial model of American labor relations should continue.<sup>13</sup>

---

9. *Electromation, Inc. & International Brotherhood of Teamsters*, No. 25-CA-19818 (Apr. 5, 1990) (A.L.J. George F. McInerney). Oral argument took place before the Board in Washington, D.C. on Sept. 5, 1991. See *Union Spokesmen Ask NLRB to Endorse Traditional Test on Participation Committees*, Daily Labor Report (BNA) No. 173, at A-5 (Sept. 6, 1991).

10. See Harold J. Datz, Chief Counsel to NLRB Member John N. Raudebaugh, *Section of Labor and Employment Law American Bar Association Annual Meeting August 1991 Session on Legal Challenges to Employee Participation Programs*, Daily Labor Report (BNA) No. 157, at G-1 (Aug. 14, 1991).

11. *NLRB Set to Examine Employer Domination of Joint Labor-Management Committees*, Daily Labor Report (BNA) No. 160, at A-1 (Aug. 19, 1991). See also notes 84-102 and accompanying text.

12. *Attorneys Debate Whether Employee Participation Programs Undercut Unions*, Daily Labor Report (BNA) No. 157, at A-11 (Aug. 14, 1991).

13. See *infra* notes 40-58 and accompanying text for a discussion of the traditional adversarial model of labor relations.

At the May 30, 1991, press conference where a number of Republican Congressmen introduced the American Competitiveness Act, Congressman Campbell discussed the purpose behind the proposed Act's amendment of Section 8(a)(2): "[w]e are improving the United States labor laws today for a very important reason - to allow management and labor to work together in what the Japanese call 'quality circles'. Our outdated labor laws prohibit the involvement of management in any organization of employees. The purpose back in 1935 was to prevent the employer domination of labor unions. We've come many, many miles in many years since then, and it's important now to have management and labor working together constructively." Federal News Service, at 31 (May 30, 1991).

Edward E. Potter, President of the Washington D.C.-based Employment Policy Foundation maintains that participative management programs are part of the daily work regimen for thousands of U.S. businesses. Potter criticizes the Board's historical approach to Section 8(a)(2) as outdated and that it flies in the face of other federal agencies' views, particularly those of the Labor and Commerce Departments who encourage workplace cooperation. See generally Potter, *supra* note 3.

Malcolm Lovell, currently Director of the Institute for Labor Management Relations at Georgetown University and Under Secretary of Labor during the early years of the Reagan administration, favors a repeal of Section 8(a)(2) as does John Stepp, former Director of the Labor-Management Cooperative Program at the U.S. Department of Labor and now a consultant with Bill Usery & Associates in Washington, D.C. See *NLRB Set to Examine Employer Domination*

## II. PARTICIPATIVE MANAGEMENT PROGRAMS

While a relatively recent widespread phenomenon in the United States, participative-type management practices and programs have been in use in Europe and Asia for decades.<sup>14</sup> Among them are: labor-management committees, quality of work life programs, employee block or production teams, and quality control circles. These programs are designed to increase employee morale and reduce alienation and disaffection with work, increase productivity

---

of *Joint Labor-Management Committees*, Daily Labor Report (BNA) No. 160, at A 4-5 (Aug. 19, 1991).

Reactions from private sector management representatives have been predictably positive about the use of participative management programs, with many advocating a narrow reading of §§ 2(5) and 8(a)(2) to permit same (see *infra* notes 93-95 and accompanying text for more in-depth discussion of this viewpoint) while those from organized labor vary widely. The UAW and the Steelworkers have largely embraced participative management in the auto plants and steel mills. (See *infra* notes 16-26 and accompanying text). Robert Willis, President of the American Federation of Grain Millers, recently stated that participative management programs "[get] back to what unions were originally intended to do, empower[ing] workers on the shop floor by letting them make decisions that affect their work." See Dan Cordtz, *Listening to Labor*, FINANCIAL WORLD, Sept. 3, 1991, at 45. [hereinafter Cordtz].

The Teamsters, who are challenging Electromation's use of the "Action Committees," are more guarded. Teamster organizer, Lewis Richard, recently stated that while "there is a legitimate place for joint committees . . . they first must be negotiated." Richard is concerned that an NLRB affirmation of Electromation's policies will send an anti-union message to employers who may adopt such programs to fight organizing attempts by outside unions. See *NLRB Set to Examine Employer Domination of Joint Labor-Management Committees*, Daily Labor Report (BNA) No. 160, at A-3 (Aug. 19, 1991). The Machinists see participative management programs as potentially harmful to employees' interests. Owen E. Hernstadt, an in-house counsel with the union, believes that the collective bargaining-type functions of these committees - wages, hours and conditions of employment - impinge on the union's statutory function as exclusive bargaining representative. See Owen Hernstadt, Address Before the ABA Annual Meeting (Aug. 13, 1991), in *Section of Labor and Employment Law American Bar Association Annual Meeting August 1991 Session on Legal Challenges to Employee Participation Programs*, Daily Labor Report (BNA) No. 157, at A-11 (Aug. 14, 1991). See also Owen E. Hernstadt, *Why Some Unions Hesitate to Participate in Labor-Management Cooperative Programs*, 8 THE LAB. LAW. 71, 76-78 (1992), wherein the author raises similar issues as well as voicing concern that union involvement in participative management programs may present troubling duty of fair representation issues to individual union members. See also 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) (wherein the author posits "the regime of labor relations Congress established in passing the Act - an industrial system based on collective bargaining - cannot exist without a degree of separation of labor and management . . . the courts that have interpreted Section 8(a)(2) to permit employer-sponsored representation plans have erred by relying on ad hoc assessments of 'employee free choice' rather than focusing on the autonomy of the challenged organizations or the importance of arm's length bargaining.") *Id.* at 1663.

There is also some suspicion that poor economic conditions spur employer interests in these types of programs. See William B. Gould IV, *Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 394 (1989).

14. Cordtz, *supra* note 13, at 45.

and efficiency, reduce scrap and other waste, as well as heighten the quality of the goods produced or services delivered. All of these programs, or variations or hybrids of them, have been adopted by businesses in the United States.<sup>15</sup>

In Northwest Indiana and elsewhere throughout the Midwest, many such programs are in place in the steel mills.<sup>16</sup> At National Steel Company, the Company and the United Steelworkers of America employ one of the oldest programs currently in use in the American steel industry.<sup>17</sup> Entitled "Cooperative Partnership", and developed since 1981, the program's elements include a joint labor-management cooperative committee, consisting of a local union president, director of human resources, the vice president/general manager from each division, as well as other employees. This group meets semi-annually to "review capital investment plans and performance plans, short and long-range business plans, . . . and . . . marketing plans . . ."<sup>18</sup> Also, the program involves division and department-level labor-management groups as well as other working groups. At National Steel, the union cites several dimensions of the cooperative partnership that are beneficial to its involvement with management, including access to the financial and production statistics of the company on a regular basis. Furthermore, union members have a meaningful opportunity to change their work environment.<sup>19</sup>

In addition to the program at National Steel, Republic Steel implemented

15. See *supra* note 3 and accompanying text; see also Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499 (1986). Many unionized employers have formally adopted these programs by incorporating them into collective bargaining agreements. For example, Bethlehem Steel, National Steel Corporation's Midwest Division, Republic Steel, and United States Steel Corporation, have all adopted participative management or employee involvement programs. See Agreement between National Steel Corporation Midwest Division and United Steelworkers of America, Local Union 6103 Production and Maintenance Employees (June 1, 1989); Agreement between Republic Engineered Steels, Inc. and the United Steelworkers of America, Production and Maintenance Employees (Nov. 28, 1989).

16. Research for this Article was derived, in part, from interviews conducted with management and hourly employees of Republic Steel located in Massilon, Ohio, National Steel, Midwest Division, in Portage, Indiana, and Bethlehem Steel's mill in Portage, Indiana. See also Shawn G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 92 YALE L.J. 2021, 2024 (1987).

17. Interview with Paul F. Leckie, Supervisor, Internal Resources, and Jesse J. Nugent, Internal Resources, USWA/NSC, Midwest Division, National Steel Corporation, Portage, Indiana (Jan. 28, 1992).

18. Agreement between National Steel Corporation Midwest Division and the United Steelworkers of America, Local Union 6103, at 4 (June 1, 1989).

19. *Id.*

a nationally recognized participative management program.<sup>20</sup> Two years ago, Republic Steel employees bought the company.<sup>21</sup> Under an Employee Stock Option Plan (ESOP),<sup>22</sup> Republic Steel now manages its business through a series of plant, corporate, crew, and department meetings.<sup>23</sup> Because of their ownership, employees, through their union, have the same number of seats on the Board of Directors as management.<sup>24</sup>

The current state of the economy which clearly has had a negative effect on the steel industry,<sup>25</sup> initially led Republic to believe that it would have to layoff upwards of 500 employees.<sup>26</sup> However, due to joint efforts between the union and management to recycle scrap and conserve water consumption, the company is achieving \$25 million in annual savings and has averted massive layoffs.<sup>27</sup>

As can be seen from examples in northwest Indiana, participative management programs can have an extremely positive performance record financially as well as contributing to an enhanced sense of worker empowerment and decision making. Unfortunately, an evolving legal precedent, which proscribes the domination of union or the sponsorship of company or sham unions, has kept many employees and businesses from fully realizing the benefits of such workplace practices and programs. In addition, this precedent, as well as the NLRB's future decision in the *Electromation*<sup>28</sup> case, may place success stories, such as those in the steel industry, in jeopardy.

20. Recently, Republic Steel received a LIFT (Labor Investing For Tomorrow) award, along with International Business Machines, Inc., American Telephone & Telegraph Company, Inc. and Pepsico, Inc., from the U.S. Department of Labor for "designing and managing innovative programs to improve the skills of American workers." Peter T. Kilborn, *New Paths in Business When Workers Own*, N.Y. TIMES, Nov. 22, 1991, at A24.

21. *Id.*

22. Originally, 5,000 Republic employees contributed approximately \$4,000 each and also borrowed approximately \$190 million to finance the remaining purchase price. *From Confrontation to Cooperation*, ESOPROFILE (The ESOP Association, Washington, D.C.), Sept. 1, 1991, at 7-9.

23. *Id.* at 7. Additionally, in the Collective Bargaining Agreement, the management and the employees stated "[t]he parties desire to eliminate adversarial relationships where they now exist and to create an environment of trust in which the most appropriate management style is a non-autocratic, cooperative style of management." Agreement between Republic Engineered Steels, Inc. and United Steelworkers of America, Production and Maintenance Employees (Nov. 28, 1989).

24. Peter T. Kilborn, *New Paths in Business When Workers Own*, N.Y. TIMES, Nov. 22, 1991, at A24.

25. Since October 1990, 18,000 American Steel employees lost their jobs; Republic lost \$31 million from June 1990 through June of 1991 on sales of \$807 million. *Id.*

26. Kilborn, *supra* note 23, at 3.

27. *Id.*

28. No. 25-CA-19818 (Apr. 5, 1990) (A.L.J. George F. McInerney).

### III. THE TRADITIONAL, ADVERSARIAL MODEL OF LABOR RELATIONS AND SECTION 8(A)(2): YESTERDAY, TODAY, AND TOMORROW

Beginning in the early twentieth century, a few American businesses experimented with participative-type management programs.<sup>29</sup> Employer motivations ranged from altruistic notions of creating a more pleasant and enjoyable environment for workers, to a manipulative workplace organization or structure designed to ward off organization by large, independent labor unions.<sup>30</sup>

#### A. Section 8(a)(2): Yesterday

Employers were free to fashion workplace practices to fit their individual needs or fears.<sup>31</sup> Common law rules of employment allowed employers to hire and fire at will. Moreover, many employers established company unions,<sup>32</sup> associations and committees so as to regulate all facets of employee behavior, including attempts to organize facilities by outside labor unions.<sup>33</sup>

The Great Depression, beginning in October, 1929, and steadily worsening by the spring of 1933, led the new administration of Franklin Roosevelt to embark on an ambitious and activist role in stimulating the nation's ailing economy. No measure was more dramatic and sweeping than the National

---

29. See Daniel Nelson, *The Company Union Movement, 1900-1937: A Re-Examination*, 56 BUS. REV., 335, 339-43 (1982).

30. *Id.* See also Cordtz, *supra* note 13, at 45.

31. Prior to the Wagner Act, the formation or sponsorship of company unions by employers was lawful. See Nelson, *supra* note 29, at 356. See also MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW 2 (1988), for a brief overview of the "employment-at-will" doctrine.

32. By the depression era, company unions were a fixture in several industries:

The large corporations were strongholds of antiunionism, both through traditional weapons and newly developing benevolent personnel practices. "Welfare capitalism" brought profit-sharing plans (usually short-lived), bonus systems, more rational systems of hiring and discipline through more scientific personnel management, and employee welfare plans that attempted to substitute "company consciousness" for loyalty to craft. A most significant feature of this trend was the development of the "company union," or the employee representation plan or works council, typically instigated, financed and controlled by the employer. Already popular during World War I, company unions increased their membership from 403,000 to 1,500,000 between 1919 and 1928, a period in which the American Federation of Labor lost some 400,000 members. Lacking financial strength (apart from employer support) and dependent on employer approval for taking any significant actions, company unions nonetheless built up a company *esprit de corps* and often furnished a bulwark against penetration by an "outside union."

ARCHIBALD COX ET AL., LABOR LAW 41 (11th ed. 1991).

33. Nelson, *supra* note 29, at 343.



Industrial Recovery Act<sup>34</sup> which sailed through Congress in the early days of the new administration. The Act temporarily suspended the antitrust laws and permitted -- by the device of written codes for various industries, businesses to cooperate in fixing prices and controlling production. In addition, the rights of individual employees and labor organizations to organize and negotiate terms and conditions of employment with their employers were also guaranteed.<sup>35</sup>

When Section 7(a) of the National Industrial Recovery Act was declared unconstitutional,<sup>36</sup> Senator Wagner of New York railed, "[t]his breakdown of Section 7(a) has driven a dagger close to the heart of the recovery program."<sup>37</sup> Wagner's experience with big business, and in many circumstances its attendant company unionism, radicalized him. Distrustful of big business' motivations

34. The National Industrial Recovery Act, 15 U.S.C. § 707(a) (1933) provided:

(1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protections;

(2) That no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing.

35. PETER H. IRONS, *THE NEW DEAL LAWYERS* 204 (1982). Fearing that widespread strikes by unorganized workers might doom the recovery, the authors of the Act granted workers the right to organize and bargain collectively through representatives of their own choosing. Roosevelt named the famous World War I General, Hugh Johnson, to head the National Recovery Administration, a federal agency designed to implement and oversee the provisions of the NIRA. One of Johnson's first official acts was to announce that he would *not* compel union organization and would approve labor codes dealing with terms and conditions of employment to be enacted even if they were not the product of collective bargaining. In addition, Johnson stated that open shops were not contrary to the Act and that employers were "free to make individual bargains with those who chose to act individually." Labor remained restive. By August of 1933, a total of 2.4 million man days of work had been lost, roughly four times the level of the previous six months. IRVING BERNSTEIN, *THE TURBULENT YEARS: THE HISTORY OF THE AMERICAN WORKER 1933-1941*, at 172-73 (1970). It was clear that the economic fabric of the country was beginning to unravel with millions of workers unemployed and millions of others left with little or no voice at the workplace. Nonetheless, several large companies and many of America's dominant industries, were quick to react to the NIRA's favorable treatment of those who subscribed to its various codes. As a consequence, in the first year of the NIRA, employee representation plans, (company unions) increased by almost 200 percent. Some were outgrowths of legitimate employee preference for workplace decision-making, others were simply sponsored, ratified and completely controlled by the employer. IRONS at 204.

36. The NIRA's labor code provisions were declared unconstitutional in the case of *United States v. Weirton Steel Co.*, 10 F. Supp. 55 (Del. 1935). A few weeks later the U.S. Supreme Court declared the NIRA unconstitutional. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

37. 79 CONG. REC. S7565, 7568 (May 14, 1935) (statement of Senator Wagner).

and participation in the recovery program<sup>38</sup> when Wagner formulated the National Labor Relations Act, signed into law by the President in the summer of 1935, one of his stated purposes was to eradicate all vestiges of company dominated, assisted or sponsored unions or organizations.<sup>39</sup>

The National Labor Relations Act represents a comprehensive codification of private sector labor relations originally designed to allow industrial workers to gain greater wages and benefits.<sup>40</sup> In the midst of unprecedented economic strife, the Act sought to establish a uniform set of principles with employee free choice regarding unionization, which Congress believed was best effectuated by

38. In August of 1934, several prominent businessmen and politicians, including E.T. Weir (Weirton Steel), the Du Pont family, Alfred Sloan, and William Knudson of General Motors, Edward Hulton of General Foods, Sewell Avery of Montgomery Ward, J. Howard Pew of Sun Oil, and former Democratic presidential candidates Al Smith and John W. Davis (FDR was Davis' Vice-Presidential running mate in 1924) formed the American Liberty League. The League was designed to oppose "the quicksand of visionary experimentation" practiced on the economy by the New Deal. It condemned the Act's control of market forces and soon marshaled many of the country's top corporate lawyers into its ranks to defy recovery programs in court. E.T. Weir and Sloan each contributed \$10,000 to the League's coffers in aid of lawsuits challenging the constitutionality of the Wagner Act. On the eve of that Act's passage, the League formed the Lawyers Vigilance Committee comprised of some 2,000 lawyers throughout the country. In turn, a smaller, more elite unit of fifty-eight lawyers formed the National Lawyers Committee spearheaded by Raoul Desvernine, a prominent Wall Street attorney and Chairman of the Crucible Steel Company. Earl Reed, the outstanding corporate attorney from Pittsburgh and E.T. Weir's attorney, chaired the National Lawyers Committee which produced a detailed brief entitled "Report on the Constitutionality of the National Labor Relations Act" only weeks after the decision in the Weirton Steel Case. The form brief was quickly and widely disseminated to corporate attorneys in aid of their efforts to challenge the Wagner Act. See JAMES A. GROSS, *THE MAKING OF THE NLRB: 1933-1937*, at 172-73 (1974); see also DONALD R. BRAND, *CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION* 243 (1988) and IRONS, *supra* note 33, at 243-45.

39. 78 CONG. REC. S3443, reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 15-16 (1949) (remarks of Senator Wagner).

40. 29 U.S.C. § 151 (1990) states in part:

The denial by *some* employers of the right of employees to organize and the refusal by *some* employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by . . . causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce . . . (the italicized words were added to the Act by the Taft-Hartley Amendments of 1947 (emphasis added).

See also Calvert Magruder, *A Half Century of Collective Bargaining*, 50 HARV. L. REV. 1071 (1937); IRVING BERNSTEIN, *THE NEW DEAL COLLECTIVE BARGAINING POLICY* (1950); and Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6 (1959).

the process of collective bargaining, as the focal point.<sup>41</sup> The great disparity in bargaining power between individual employees and their employers was to be remedied by the promotion of collective bargaining through large, independent, and powerful labor unions.<sup>42</sup> The Act's various proponents, including its chief sponsor, Senator Wagner, believed that enforcement of the right of employees to organize and bargain collectively with employers would achieve industrial peace and stability.<sup>43</sup>

At the heart of the Act is Section 7. Patterned closely after Section 7(a) of the National Industrial Recovery Act, it provides:

Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization

---

41. 29 U.S.C. § 151 (1990) states further:

[e]xperience 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 by restoring equality of bargaining power between employers and employees . . .

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

See also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), where the Court in declaring the NLRA constitutional adopted an expansive view of Congress' role in regulating private sector industrial relations.

42. See 29 U.S.C. § 151 (1990) which states in part:

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

43. See Leon H. Keyserling, *The Wagner Act, Its Origin and Current Significance*, 29 GEO. WASH. L. REV. 199 (1960) and JAMES GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD, 1933-1937* (1974).

as a condition of employment as authorized in Section 8(a)(3).<sup>44</sup>

Employee choice is protected by various unfair labor practice provisions which make it unlawful for an employer to interfere with Section 7 rights,<sup>45</sup> discriminate against individuals based on their union support<sup>46</sup> or refuse to bargain with the employees' chosen representative.<sup>47</sup> In addition, Section 8(a)(2) prevents employer involvement in labor organizations generally, as well

44. 29 U.S.C. § 157 (1990).

45. 29 U.S.C. § 158(a)(1) states: "[i]t shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."

Section 8(a)(1) is the broadest of the Section 8(a) employer unfair labor practices. Violations of this section are often treated as derivative or independent. In the former situation, unfair labor practices are specifically prohibited by other provisions of Section 8(a). "[A] violation by an employer of any of the four subdivisions of Section 8, other than subdivision one is also a violation of subdivision one." CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 75 (quoting 1938 NLRB ANN. REP. 52 (1939)). With regard to independent violations, "acts constituting general interference with Section 7 rights, but not of Section 8(a), fall within this category . . ." CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 75-76 (1983). In Section 8(a)(1) matters, employer motive is not an element of the test for unlawful conduct. See *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 263 (1965); see also *Republica Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357 (1958).

46. 29 U.S.C. § 158 (a)(3) provides, in part: "[i]t shall be an unfair labor practice for an employer -- by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." Antionion "animus" or proof of discriminatory motive and discouragement of support for a labor organization by an employer, are required to establish a Section 8(a)(3) violation. See *NLRB v. Brown*, 380 U.S. 278 (1965); *Mueller Brass Co. v. NLRB*, 544 F.2d 815 (5th Cir. 1977); *Edward G. Budd Mfg. Co. v. NLRB*, 138 F.2d 86 (3d Cir. 1943).

47. 29 U.S.C. 158 (a)(5) states: "[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a)." The making of contracts with labor organizations is the central purpose of the parties bargaining obligations. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). The requirement of "good faith" conduct by the parties in an attempt to reach a contract is a critical element in the duty to bargain analysis. See, e.g., *Cook Bros. Enters.*, 288 N.L.R.B. 46 (1988). With regard to the subjects of bargaining, 29 U.S.C. § 158(d) provides, in pertinent part:

[f]or the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . . (This language was added by the Taft-Hartley Amendments of 1947).

See also *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342 (1958), for the Court's elucidation of the parameters of discussion at contract negotiations.

as the domination, interference, support or assistance to such labor organization.<sup>48</sup>

The "free choice" element of the Act manifests itself in the secret ballot election procedures of Section 9 wherein employees select or reject a labor organization as their representative<sup>49</sup> in matters concerning wages, hours and other terms and conditions of employment.<sup>50</sup> While the Act seeks to effectuate individual choice, selection of a representative affords such representative *exclusive* status with the result that individual employee rights are not paramount legally, but subordinate to the collective rights of all employees. In this fashion, the one voice, typically a union, speaks on behalf of all employees thereby maximizing their bargaining power in the attainment of greater pay benefits and working conditions. In addition, this exclusivity is to prevent the divisiveness and fragmentation of interests caused by many voices at the workplace.<sup>51</sup>

The basic instrument for protection of unionized employees is the negotiated, written collective bargaining agreement.<sup>52</sup> Typically, collective bargaining agreements cover union recognition and representation, establish a grievance procedure culminating in final and binding arbitration by a neutral of disputes between employees and the employer or the union and the employer. In addition, most collective bargaining agreements recognize the principle of seniority as a factor when employer economic decision making is exercised. Negotiation of such agreements is done by appointed officials of management and elected or appointed officials of unions. While individual union employees may express their desires to their union representatives, the law forbids any direct negotiations with their employer on matters of wages, hours and other terms and conditions of employment.<sup>53</sup>

The Act contemplates, indeed sanctions, resort to economic power through

---

48. See *supra* note 2, and *supra* Section III.

49. 29 U.S.C. § 159(a) provides in pertinent part:

[r]epresentatives designated or selected for the purposes 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 . . .

50. See *supra* note 47 and accompanying text.

51. *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50 (1975).

52. See *supra* note 47 for the text of section 158(d).

53. See *supra* note 47 and accompanying text.

the strike and lockout.<sup>54</sup> Conflict between labor and management, which Congress recognized as an inevitable and ongoing facet of American industrial life, was not proscribed.<sup>55</sup> Unlike the experience in Europe and elsewhere, the National Labor Relations Act did not mandate agreement between the parties but placed them, albeit at arms length, in a position where they could effect agreement if they so chose. The Act did not compel a party to agree or make a concession to the other.<sup>56</sup>

This statutory scheme was designed for administration by the National Labor Relations Board, comprised of individuals familiar with the peculiarities and nuances of the American workplace. Congress envisioned these individuals

54. 29 U.S.C. § 163 (1990) provides that: “[n]othing in this act, *except as specifically provided for herein*, shall be construed so as to either interfere with or impede or diminish in any way the right to strike, *or to affect the limitations or qualifications on that right.*” (italicized language added by Taft-Hartley Amendments). The lockout is seen as the employer corollary of the right to strike. *See, e.g.*, Challenge-Cook Bros. of Ohio, 282 N.L.R.B. 21 (1986), *aff’d*, 843 F.2d 230 (6th Cir. 1988); Harter Equipment, 280 N.L.R.B. 597 (1986), *enforced sub nom.* Operating Engineers Local 825 v. NLRB, 829 F.2d 458 (3d Cir. 1987).

55. In *NLRB v. Insurance Agents’ International Union*, 361 U.S. 477, 488-89 (1960), Justice Brennan spoke of the traditional, adversarial model of American labor relations:

[i]t must be realized that collective bargaining, under a system where the government does not attempt to control the results of negotiation, cannot be equated with an academic collective search for truth — or even with what might be thought to be the ideal of one. The parties — even granting the modification of views that may come from a realization of economic interdependence — still proceed from contrary and to an extent antagonistic view points and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect argument among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized.

*See also* *First Nat’l Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1981) where the Court stated “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”

56. For example:

Unlike labor laws in other nations, the Wagner Act did not seek to regulate the relationship of the parties once recognition was achieved and good faith bargaining begun. The focus of the statute was on eliminating barriers to organization and requiring collective bargaining once the employees had chosen to be represented. Neither union nor management desired governmental involvement in setting wages and working conditions.

JULIUS GETMAN & BERTRAN POGREBIN, *LABOR RELATIONS: THE BASIC PROCESSES, LAW AND PRACTICE* 2 (1988). *See also* text of Section 8(d) *supra* note 47. In 1947 and again in 1959, Congress amended portions of the National Labor Relations Act. The Taft-Hartley Amendments of 1947 notably added union unfair labor practices as unlawful behavior (*see* 29 U.S.C. § 158(b)) as well as the right of employees to refrain from participating in union activity as part of their broad Section 7 rights. The antidemocratic abuses of power by labor leaders was the primary motivation behind the Landrum-Griffin Amendments of 1959 which afforded individual members a greater voice in internal union affairs. (*See* Archibald Cox, *Internal Affairs of Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819 (1960)).

would use their knowledge to effectuate the purposes of the Act.<sup>57</sup> Leery of the roll of the federal courts, Congress limited their participation in national labor relations.<sup>58</sup>

Against this historical backdrop, Section 8(a)(2) and Section 2(5)<sup>59</sup> were interpreted. In a series of decisions beginning in the late 1930s, the National Labor Relations Board, the various federal circuit courts of appeals, as well as the United States Supreme Court, have effectuated the intent of the Wagner Act by enforcing these two provisions. The result has been the virtual elimination of company unions in America.<sup>60</sup> Yet more than fifty years after enactment into law, these two provisions have swept broadly when enforced by the Board and the courts striking down not only sham or dominated company unions, but, at times, legitimate attempts to foster direct and meaningful participation by employees in the daily management of the workplace. The adversarial model of labor relations adopted in the Wagner Act and formulated over the years by the NLRB and many courts,<sup>61</sup> championed the stark demarcation in autonomy between management and labor which Congress believed was necessary to ensure employee free choice.<sup>62</sup>

#### B. Section 8(a)(2): Today

Section 8(a)(2) extends to the domination, or interference with, or support to a labor organization as defined by Section 2(5).<sup>63</sup> Under the definition set

57. See *supra* note 4 and accompanying text.

58. 29 U.S.C. § 160(f) provides in pertinent part:

[a]ny person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. . . .

59. See *supra* note 2 and accompanying text.

60. See generally Nelson, *supra* note 29.

61. See, e.g., NLRB v. Borg-Warner Corp., 356 U.S. 342 (1958) (exclusion of classes of topics for bargaining); Detroit Edison Company v. NLRB, 440 U.S. 301 (1979) (duty to provide union with information relevant to contract negotiations not unlimited); First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (balancing test applied to bargaining duty regarding fundamental business decisions); Dubuque Packing Co., 303 N.L.R.B. 66 (1991) (NLRB's latest pronouncement on bargaining obligations when employer seeks to relocate during labor contract). See *supra* note 55 and accompanying text.

62. "The central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations." American Hospital Ass'n v. NLRB, 111 S. Ct. 1539 (1991).

63. See *supra* note 2 and accompanying text. When the Board finds an employer has dominated a labor organization, it utilizes the remedy of disestablishment. See, e.g., Ona Corp. Div., 285 N.L.R.B. 77 (1987). In cases of unlawful assistance or interference that do not constitute

forth in Section 2(5), arguably most participative management programs are labor organizations.<sup>64</sup> Typically, the Board inquires as to whether there is participation by “employees” who are “dealing with” employers. Historically, “dealing with” has been very broadly interpreted by the NLRB and most courts.<sup>65</sup>

In the seminal case of *NLRB v. Cabot Carbon Co.*,<sup>66</sup> the U.S. Supreme Court interpreted the “dealing with” phrase in Section 2(5) very broadly. The Court stated that “dealing with” encompasses activities and conduct beyond the parameters of collective bargaining.<sup>67</sup> In that case, the Court found that labor-management committees established by the employer during the Second World War and continued thereafter were labor organizations which had been “dealing with” the company on a number of issues normally left to the negotiations process. The Court rejected the analysis of the Fifth Circuit wherein that court had relied on Section 9(a) of the National Labor Relations Act<sup>68</sup> which allows, in part, “groups of employees to present to the employer grievances for adjustment, without intervention of the bargaining representative, as long as there is no conflict with the collective bargaining contract.”<sup>69</sup>

Following a factual finding of labor organization, the Board and the courts have inquired as to whether it has been “dominated,” “interfered with” or “supported” by an employer.<sup>70</sup> The Board and several courts have taken a

---

domination, the Board and the courts sanction the employer through the cease and desist order. *See, e.g., Interstate Material Corp.*, 290 N.L.R.B. 47 (1988).

64. “In participatory management programs, employees clearly participate in the groups or committees; increased worker participation is a major purpose of such programs.” Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1740 (1985).

65. *See, e.g., E.I. Du Pont de Nemours & Co.*, N.L.R.B. No. 4-C-18737 (Mar. 20, 1991) wherein the Board issued a complaint alleging, among other things, that eight participative management committees established in 1988 and 1989 at one of the employer’s New Jersey facilities illegally bypassed the union and dealt directly with the committees on subjects such as grievances, hours of work and other terms and conditions of employment. *E.I. Du Pont de Nemours & Co.*, Daily Labor Report (BNA) No. 57, at A-4 (Mar. 25, 1991). *See also Airstream, Inc.*, 288 N.L.R.B. No. 28 (1988), where the Board found a labor organization to exist from the fact that an advisory counsel presented grievances, proposals, and requests to their employer who chose to implement several of them.

66. 360 U.S. 203 (1959).

67. *Id.* at 214.

68. *Id.* at 217-18.

69. *Id.*

70. The problem has been explained as follows:

A narrow and often obscure line divides actual or attempted unlawful ‘interference’ or ‘assistance’ from what constitutes unlawful ‘domination’. Board and court decisions often create confusion by using the three terms indistinguishably to describe similar conduct. The difference between ‘domination’ and ‘interference’ or ‘assistance’ is a



traditional approach, couched in the adversarial mode, that Section 8(a)(2)'s prohibitions proscribe employer activity in a wide variety of circumstances.<sup>71</sup> However, both continue to struggle with distinctions between lawful cooperation and unlawful domination.<sup>72</sup> In addition, Section 8(a)(2) prohibits an employer from contributing "support" to a labor organization and, as such, requires employer neutrality in dealing with the representatives of its employees.<sup>73</sup> Finally, Section 8(a)(2) makes it unlawful for an employer to "contribute financial or other support to a labor organization," however, both the Board and the courts have recognized the distinction between unlawful support or assistance and lawful cooperation.<sup>74</sup>

A number of circuit courts of appeals have been disturbed by the Board's perceived intransigence when they have analyzed and enforced Sections 2(5) and 8(a)(2). The Sixth Circuit has taken the lead in advocating that an adversarial model of labor relations is not only anachronistic, but damaging to employees' full utilization of the principle of free choice. In *NLRB v. Streamway Division of Scott & Fetzer Company*,<sup>75</sup> the Court found that the NLRB offered insufficient evidence of continuous interaction between the employer and the committee, or that the committee was truly "representational in nature." Also deemed significant by the Court was the fact that no one viewed the employee committee as anything but a useful communication tool akin to a device whereby employees were able to speak directly with their employer.<sup>76</sup>

---

matter of degree. 'Domination' of a Union constitutes an irreversible subjugation of the Union to the employer's will; "interference" or 'assistance' is less severe misconduct, so that the Union is deemed capable of functioning as a Union once the 'interference' or 'assistance' is removed.

See CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 282 (1983). It is also unlawful for an employer to recognize a union at a time when it does not represent a majority of the employees. *Garment Workers v. NLRB*, 366 U.S. 732 (1961). See also *Human Dev. Ass'n v. NLRB*, 937 F.2d 657 (D.C. Cir. 1991) (NLRB found section 8(a)(2) and (3) violations for recognition of "minority union" who was assisted by contractual union security and dues check-off procedures) and *Texas World Serv. v. NLRB*, 928 F.2d 1426 (5th Cir. 1991) (recognition of minority union). In *NLRB v. General Steel Erectors, Inc.*, 933 F.2d 568 (7th Cir. 1991), the court enforced an NLRB order sanctioning the employer for "interfering with" union activities where a supervisor held the position of local union president.

71. See *Airstream, Inc., North American Van Lines, Inc.* 288 N.L.R.B. 11 (1988).

72. For an in depth discussion of this subject see CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 294-98 (1983).

73. *RCA del Caribe, Inc.* 262 N.L.R.B. 963 (1982); Abraham Grossman, 262 N.L.R.B. 955 (1982).

74. *Airstream, Inc.*, 288 N.L.R.B. 28 (1988) (unlawful support); *NLRB v. Homemaker Shops*, 724 F.2d 535 (6th Cir. 1984) (group was defined as "labor organization" but not dominated by the employer); *NLRB v. BASF Wyandotte Corp.*, 798 F.2d 849 (5th Cir. 1986) (lawful "friendly cooperation" with union).

75. 691 F.2d 288 (6th Cir. 1982).

76. *Id.* at 295.

The Sixth Circuit rejects a rigid interpretation of the statute and instead considers whether the employer's behavior fosters free expression and choice which it finds is the focal point of the Act.<sup>77</sup> In addition, the Court will inquire as to whether any antiunion animus is present as well as the employees' own view of the organization vis a vis their relationship with the employer. In *Streamway*, the employer's committee functioned in the same way many participative management programs do today. Interestingly, the Court in that case did not find that the committee was a labor organization and therefore did not reach the issue as to whether it was unlawfully dominated, interfered with or supported in violation of Section 8(a)(2).<sup>78</sup>

The Seventh Circuit Court of Appeals in the case of *Chicago Rawhide Manufacturing v. NLRB*,<sup>79</sup> rejected a "per se approach" to participative management-type programs and allowed employer involvement where a determination was made that employee free choice was not actually restricted by the company's actions or the structure of the organization.<sup>80</sup> The court was particularly impressed with the fact that the employees themselves came up with the idea for a committee, there was no antiunion animus on the part of the employer to ward off any outside union organizing attempts, and the employer's direct support for the committee was not significant.<sup>81</sup> Some circuit courts of appeals have followed the *Chicago Rawhide* rationale<sup>82</sup> while others continue to adhere to the Board's more rigid interpretation of the Act.<sup>83</sup>

Unfortunately, the Board and the various circuit courts of appeals have established no uniform test or criteria for analysis in these cases. As a result, the law is not applied evenhandedly and employers, employees, and unions are

---

77. *Id.* at 295-96; see also *NLRB v. Homemaker Shops*, 724 F.2d 535 (6th Cir. 1984).

78. The Board has established two exceptions to its traditional "per se" approach to employer activity. The situation where each and every one of the employer's employees participate in some kind of a program is not proscribed by the Act. Because of this total participation, the employees are not being "represented" therefore they are not a "labor organization" as defined by the Act. *General Foods Corp.*, 231 N.L.R.B. 1232 (1977); *Fiber Materials*, 228 N.L.R.B. 933 (1977). The second situation involves labor-management grievance committees that are totally free of management involvement. According to the Board's rationale, they are not "dealing with" the employer, but exercising independent authority. See *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108 (1977); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275 (1977), *denied in part sub nom.* *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

79. 221 F.2d 165 (7th Cir. 1955).

80. *Id.* at 167-68.

81. *Id.* at 168-70.

82. *Classic Ind. v. NLRB*, 667 F.2d 205 (1st Cir. 1981); *Modern Plastics v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974).

83. See *NLRB v. Fire Alert Co.*, F.2d (10th Cir. 1971); *Irving Air Chute Co. v. NLRB*, 357 F.2d 176 (2d Cir. 1965); *International Union of United Brewery, Flour, Cereals, Softdrink and Distillery Workers v. NLRB*, 298 F.2d 297 (D.C. Cir. 1961).

not afforded any certainty when these programs are established or implemented.

C. Section 8(a)(2): Tomorrow

The case of *Electromation, Inc.*<sup>84</sup> may result in the Board's formulation of a new test.<sup>85</sup> In that case, beginning in 1977 and continuing through 1988, ad hoc committees were established by the company in which employees participated along with members of management for the purpose of discussing subjects of "mutual interest."<sup>86</sup> When the company experienced a change in management, the committees were suspended. However, when adverse economic conditions forced the company to adopt cost reduction measures which were met with employee disaffection and concern, the ad hoc committees were resurrected. Among the issues discussed were overtime, tardiness, wages, bonuses, attendance, bereavement leave, sick leave and incentive pay.<sup>87</sup> The management reduced these matters of employee concern to five areas; each area of concern resulted in the establishment, by the company, of an "Action Committee" with membership composed of both employees and managers. Committee members met and considered the problems posed by each area and recommend ways for management to deal with them. When management could budget for the change, the recommendations were often accepted and implemented. Employees were paid for their time and attendance at the meetings. In addition, the company supplied them with writing materials and in some situations a calculator to be used when discussing cost issues.<sup>88</sup>

During this same period in early 1989, the Teamsters demanded recognition and a petition for election was filed in the Board's regional office in mid-February.<sup>89</sup> The Administrative Law Judge found that these meetings were not tied to the union organizing campaign. Nonetheless, he ruled that knowledge, or lack thereof, by the company of the employees' intentions or activities did not alter the legal effects of its actions.<sup>90</sup> He found that the Action Committees were labor organizations within the meaning of Section 2(5) and that they had

---

84. N.L.R.B. No. 25-CA-19818 (1990).

85. See *NLRB Set To Examine Employer Domination of Joint Labor-Management Committees*, Daily Labor Report (BNA) No. 160, at A-1 (Aug. 19, 1991) (soliciting the views of various labor and management representatives regarding the *Electromation* case as well as the future of Section 8(a)(2)).

86. *Id.* at 4.

87. *Id.*

88. *Id.* at 4-5.

89. *Id.* at 6.

90. In *Garment Workers v. NLRB*, 366 U.S. 731 (1961), the U.S. Supreme Court rejected the argument proffered by the parties (company extended recognition status to minority union) that an employer's good faith, and by implication lack of antiunion animus, is a defense to Section 8(a)(2) charges.

been dominated by the employer who organized the functions, nature and structure of the committees, allowed supervisory participation, supplied the materials used by committee participants, scheduled the meetings on company property and paid employees for their time spent when conducting company business. The Administrative Law Judge found the function, nature and structure of the committees purely a creature of management creation.<sup>91</sup> As a result, the judge found the structure and use of the committees violative of Sections 8(a)(2) and (1) of the Act and ordered them to be immediately disestablished.<sup>92</sup>

At the September 5, 1991, oral argument, the Board heard from several prominent labor and management representatives, including two former NLRB members, who presented a number of different approaches for consideration.<sup>93</sup> AFL-CIO General Counsel, Lawrence Gold, Teamster attorney James Wallington, Southern Methodist University law professor Charles Morris, as well as NLRB attorney Rick Lineback of Region Twenty-Five argued for a traditional application of Section 8(a)(2): committees established and sponsored by employers which discuss with employees subjects related to working conditions are labor organizations subject to unlawful domination, interference, and support.<sup>94</sup> Former members Hunter and Zimmerman<sup>95</sup> urged the Board to be more pragmatic by recognizing the realities of the 1990s workplace, as many of these programs can be reconciled with the Act.<sup>96</sup> Representatives of the United States' Chamber of Commerce, National Association of Manufacturers, the Coalition Of Management For Positive Employment,

91. *Electromation, Inc. & International Brotherhood of Teamsters*, No. 25-CA-19818 (Apr. 5, 1990).

92. *Id.* at 8.

93. *See Union Spokesmen Ask NLRB to Endorse Traditional Test on Participation Committees*, Daily Labor Report (BNA) No. 173, at A-5 (Sept. 6, 1991).

94. *Id.*

95. Robert H. Hunter appeared on behalf of the Council On Labor Law Equality while Donald Zimmerman spoke for the Manufacturers Alliance For Productivity and Innovation.

96. Hunter asked the NLRB to formulate a new test allowing employers to lawfully "create, support, and deal with an employee committee unless management's conduct would prevent workers from freely expressing their views." *See supra* note 92, at A-6. According to Hunter this new test "will permit employers to manage their business, without the government placing another legalistic barrier to competitiveness for American companies." *See supra* note 92, at A-6, 7. Zimmerman believes a strict reading of Section 8(a)(2) would leave employees without a voice in decision making. *Union Spokesman Ask NLRB to Endorse Traditional Test on Participation Committees*, Daily Labor Report (BNA) No. 173, at A-6, 7 (Sept. 6, 1991) [hereinafter *Union Spokesmen*]. Three weeks earlier, at the American Bar Association's Annual Meeting in Atlanta, Zimmerman said that while he did not advocate repeal of Section 8(a)(2), he did not believe an employer should be sanctioned when it attempts, in the absence of antiunion animus, to involve employees in workplace matters that are not tantamount to negotiations on mandatory subjects of bargaining. *See NLRB Set to Examine Employer Domination of Joint Labor-Management Committees*, Daily Labor Report (BNA) No. 160, at A-3 (Aug. 19, 1991).

Training and Education, the American Iron and Steel Institute and the Labor Policy Association, argued to the Board that a narrow reading of Section 8(a)(2) is needed to foster job security and competitiveness.<sup>97</sup> Questions from members Devaney and Oviatt hint that the Board may be moving toward adding a motive element to the analysis of Section 8(a)(2) cases.<sup>98</sup>

Sometime in 1992, the Board will render its decision, yet unlike previous decisions left for further elucidation and development by the Board and the courts of appeals, it should reject the archaic principles set forth in the Administrative Law Judge's decision in *Electromation* and formulate a new test whereby the intent of the employer in its interactions with employees in participative management programs is examined. If the employer sponsors and establishes them in an attempt to discourage union organizing, the Board should use traditional discrimination and antiunion animus analysis when enforcing the free choice element of the Act. But if, as the American Competitiveness Act's Amendment to Section 8(a)(2) seeks to effect, the programs are legitimately designed to increase productivity and/or the quality of the work environment, the NLRB should find no violation of the Act.<sup>99</sup>

In addition to the foregoing, relying on its own special expertise in workplace matters, the Board should expand the subjects of bargaining for discussion<sup>100</sup> and recognize the reality of the competitive workplace wherein

97. Management attorney Phillip A. Miscimarra representing the National Association of Manufacturers, the Coalition of Management for Positive Employment, Training and Education, and the American Iron and Steel Institute, urged the Board to find unlawful domination only if the employer's actions truly result in the coercion of employee free choice. *Union Spokesmen*, *supra* note 94, at A-6, 7. This position is similar to that advocated by the Fifth Circuit Court of Appeals, but ultimately rejected by the United States Supreme Court, in *Cabot Carbon*. See *supra* notes 66-69 and accompanying text. A U.S. Chamber of Commerce spokesman Arnold Perl assumed a similar position when he argued to the Board that the Supreme Court's *Cabot Carbon* holding should be limited to its peculiar facts wherein the committees in question truly were representational with regard to wages, hours and other terms and conditions of employment. Perl also argued that the NLRB "must find some middle road" that allows for participative management programs. See *Union Spokesmen*, *supra* note 96, at A-6.

98. Member Devaney wanted to know whether it made any difference if some of Electromation's employees had volunteered to serve on one or more of the "Action Committees." Member Oviatt solicited the parties as to whether the employees' attitude toward a committee as representational in nature was essential to a finding of illegal involvement. Member Radabaugh wanted to know whether an employer, whose motivation is to improve productivity and quality, still violates the Act when he establishes a committee similar to the one in *Electromation*. See *id.*

99. 29 U.S.C. § 158(a)(3) (1990) reads: "it shall be an unfair labor practice for an employer - by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." See also *NLRB v. Brown*, 380 U.S. 278 (1965) (the motive of the employer is the controlling factor in matters of employee discharge or discipline).

100. See *supra* note 41 and accompanying text.

the sharing of information, by definition, promotes efficiency and greater productivity. The litany of access to information cases clearly establishes that in the unionized environment, representatives of labor want to have as much information as they can for meaningful collective bargaining and contract administration.<sup>101</sup> It has been my experience, in dozens of contract negotiations with unions throughout the United States, that where the parties freely exchange information on market share, costs, competition, investment, marketing and other core entrepreneurial issues, that meaningful negotiations and competitive, practical labor contracts are the result. It is only in the very rarest of circumstances that brinkmanship, fear or ignorance lead to an agreement. It has also been my experience that any gains derived from such tactics are short lived, at best. What brings parties, in a unionized environment, to the bargaining table and to exchange information, in the first place is self interest. Workers desire greater wages and benefits, better working conditions as well as the opportunity to participate in the process of economic decision making. It is axiomatic that highly motivated, productive and efficient employees place businesses in a position to not only be competitive, but profitable.

Neither the Board nor Congress should ignore the realities of the workplace. Millions of working men and women daily discuss the particulars of work; to continue to inhibit this free flow of discussion is foolish and ultimately anticompetitive.

The Board is certainly equipped to deal with the possibility of company dominated labor organizations or any association or committee that inhibits the free choice of employees or their ability to discuss issues of concern with their employer.<sup>102</sup>

#### IV. CONCLUSION

The practical purpose of the Wagner Act was to prevent the unraveling of the economic fabric of our nation. During the early 1930s millions of working people were destitute and out of work. There was a philosophy that a voice at the workplace would stabilize the chaos which had resulted in nationwide strikes prompted by fear and economic dislocation. State sponsored collective bargaining was the answer wherein competing societal forces would not take to the streets, but resolve their economic differences with the advantage of structured rules and administrative and judicial means of enforcing such rules. It was believed that organized labor would provide the voice for those who could not or would not speak at the workplace, those upon whom our industrial future

---

101. See CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 606-29 (1983); CHARLES MORRIS, *THE DEVELOPING LABOR LAW* 1982-88, at 312-29 (Supp. 1989).

102. See 29 U.S.C. § 153 (1990).

was premised, those who produced. Today, many voices, including those of organized labor, must participate if American business is to prosper.<sup>103</sup> If the issue in 1935 was worker empowerment, then surely it flies in the face of the NLRA's focal point to disallow participation and economic decision making. Employers must compromise; the Board should modify and liberalize its rules and standards on subjects of bargaining, and disclosure of information as set forth above, in order to foster industrial democracy on the shop floor and afford American business the most advantageous position possible to compete in the global marketplace.

Employers who want to involve their union and nonunion employees in daily decision making should not be legally prohibited from doing so. Amendment to Section 8(a)(2), expansion of the subjects of bargaining, and greater disclosure of information, foster the central ethic of the National Labor Relations Act: employee free choice.

---

103. Former UAW President Fraser recently commented:

[t]he workplace will be less authoritarian and more democratic, and as a result it will be more efficient. There is no question that old habits are going to be hard to change; to some degree we're all creatures of habit but there's one thing that the leaders of America have to learn, including the labor unions and government; and that's that you have to develop the capacity and the courage to change with the times. If you don't, history will pass you by. Any labor leader who looks to the future should know that change is necessary and inevitable. If we learn to adapt to changing circumstances, we'll begin to solve the many problems facing our society.

See Douglas A. Fraser, *Workforce 2000 Report*, Address Before the A.B.A. Section of Labor and Employment Law at the 1990 Annual Meeting, reprinted in 7 LAB. LAW. 269 (1991).