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NON-REPRESENTATIVE GROUPS: FOSTERING EMPLOYEE PARTICIPATION IN WORKPLACE DECISION-MAKING

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INTRODUCTION

The evolution of cooperative models of industrial relations in the American workplace currently engenders great interest among political, legal, and academic communities. Much of the ongoing debate focuses on the ability of American employers to construct mechanisms for "aligning individual and organizational goals," "sharing information," and "seeking employee input," without facing accusations of illegally sponsoring a "labor organization" in violation of section 8(a)(2) of the National Labor Relations Act.[1] Several recent developments give substance to this debate. First, the Fact Finding Report issued by the Commission on the Future of Worker-Management Relations concluded that worker participation programs "improve the quality of work life and in some cases raise productivity and product quality."[2] Second, the *Electromation*[3] and *du Pont*[4] decisions, which set forth certain criteria to be used in deter-

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[1] 29 U.S.C. §§ 151-69 (1988). In July 1993 the Department of Labor issued a report extolling the virtues of worker participation by recognizing that "[s]ystems of mutually reinforcing practices create multiple ways to develop workers' skills, to align individual and organizational goals, and to share information crucial to solving problems." U.S. DEP'T OF LABOR, REPORT ON HIGH PERFORMANCE WORK PRACTICES AND FIRM PERFORMANCE (1993), *reprinted in* DAILY LAB. REP. (BNA) No. 143, at F-1 (July 28, 1993).

[2] COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, FACT FINDING REPORT 45 (1994) [hereinafter FACT FINDING REPORT].

[3] Electromation, Inc., 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).

[4] E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993).

mining the lawfulness of worker participation programs under the National Labor Relations Act, have created debate concerning the application of the Act to the myriad possibilities for employer/employee cooperative groups in the workplace. Finally, recent changes in the composition of the National Labor Relations Board enhance further speculation as to the Board's current stance regarding such employee participation groups.

This essay argues that the Act should be construed to allow greater employer support of employee participation groups in order to develop further cooperation in industrial relations. These groups offer valuable insights on issues directly affecting employees' working lives and provide a forum for the expression of the views of today's diverse labor force. Ultimately, these groups may facilitate employee satisfaction in the workplace by improving the quality of management decisions. While the adversarial collective bargaining model originally contemplated by the Act is an important component of industrial democracy, it should not be enshrined as the only legally permissible model for formal employee participation in workplace decision-making. The existing legislation leaves room for a more flexible approach.

Part I of this essay provides historical information on collective bargaining in the United States and describes changes in the workforce that militate in favor of alternative schemes for interaction between employers and employees. Part II traces the emphasis on representation in labor organizations espoused by Congress, the courts, and the National Labor Relations Board. Finally, Part III of this essay discusses permissible non-representational employee participation groups.

I. THE CHANGING FACE OF AMERICAN LABOR

Following the Great Depression and the initiatives of the New Deal, the view that fundamental conflicts of interest between workers and managers should be regulated superseded the normative premise that market forces should have free rein in the labor area.[5] Although this view did not enjoy universal support, New Deal legislation endorsed collective bargaining as a part of our national policy and as the preferred mechanism to

[5] THOMAS KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 22 (1986).

accommodate "the goals of the parties to the employment relationship."[6]

Collective bargaining has played a vital role in providing employees with a strong voice in the workplace. Many positive attributes of modern industrial relations, including basic worker rights, owe their development to the collective bargaining process. Furthermore, the right to bargain collectively through representatives who are accountable exclusively to workers is an essential check on potential coercion, manipulation, or indifference by employers. Accordingly, the fundamental right of employees to bargain collectively must be protected and preserved.

However, even if one accepts that "conflict of interest" was the normative principle at the time the National Labor Relations Act was passed, why would one assume today that collective bargaining must be protected as the *exclusive* lawful method of employer/employee group interaction?[7] No normative principle supports the proposition that collective bargaining must be the sole method through which employees' groups and employers are lawfully permitted to interact in today's workplace.

Despite the truism that some employers and employees have an incongruence of interests amounting to a conflict, the fundamental problem with positing "conflict of interest" as the overarching principle governing labor relations is that this principle oversimplifies the spectrum of relations between employees and employers. Almost all employers and employees share some mutuality of interests. This mutuality justifies a more cooperative approach to employer/employee relations. Eliminating employer-sponsored cooperative groups by declaring them per se unlawful deprives employees of the choice to participate in such groups. Restricting the parties to the collective

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[6] *Id.* at 24. Although the collective bargaining model was adopted, it was recognized that workers and management shared common goals, such as a "common interest in building and maintaining a successful enterprise." *Id.* at 23. However, the cornerstone of the National Labor Relations Act was the right of the workers to bargain collectively. *Id.* at 25-27. This right is most clearly set forth in § 701 of the Act, which guarantees employees the right to self-organization, to join labor organizations, and to bargain collectively. 29 U.S.C. § 157 (1988).

[7] This exclusivity is maintained through the applications of the provisions of § 8 of the Act, which set forth certain prohibited activities. 29 U.S.C. § 158 (1988).

bargaining model is unnecessarily paternalistic and cannot be justified in light of major, ongoing changes that are taking place in the American workplace.

First, the modern work environment is no longer epitomized by the large-scale manufacturing operations that employed principally white, male workers and dominated the American economy from 1934 until 1955.[8] Today's workforce is much more diverse by gender[9] and race.[10] With the increasingly varied circumstances, backgrounds, and expectations of this more diverse workforce, there is a greater need to accommodate and to address employees' different perspectives on a cross-sectional basis. The collective bargaining model does not easily accommodate the presentation of diverse perspectives because the majority has the power to select the exclusive bargaining representative.[11] Once the majority selects a representative, minority points of view may be silenced.

Moreover, today's employees generally are educated better and are informed better than are those of the past.[12] Thus, they are more capable of determining where their self-interest lies and acting accordingly, either through collective bargaining or by an alternative method. Today's employees generally are less trusting of authority, whether it is the government, unions, or employers that claim they know what is best. These workers have the ability and should be given the opportunity to assess and to participate in alternatives to collective bargaining.[13]

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[8] FACT FINDING REPORT, *supra* note 2, at 6, 10, 12. There has been a steady decline over the last 40 years in the number of nonagricultural, private sector workers who are members of unions. Whereas approximately 35% of the nonagricultural, private sector labor force were union members in the 1950s, only 11.2% were union members in 1993. *Id.* According to this report, the decline in collective bargaining in the private sector "has created an arena for employee-management relations in which most employees have no independent organization to discuss issues with management." *Id.* at 24.

[9] In 1950, 33.9% of women of working age were in the labor force; in 1993, 57.9% were in the labor force. *Id.* at 10. By contrast, in the same period, the percentage of males in the labor force dropped from 86.4% to 75.4%, due in part to declines in the age of retirement. *Id.*

[10] In 1954, approximately 10% of the workforce was non-white, contrasted with 15.2% in early 1994. *Id.* at 12.

[11] 29 U.S.C. § 159(a) (1988).

[12] In 1970, 25.9% of the labor force aged 25-64 years had more than 12 years schooling, contrasted with 52% in 1992. FACT FINDING REPORT, *supra* note 2, at 12.

[13] A 1985 survey reported that 84% of employees working for organizations

Of great significance are dramatic changes that have occurred in the United States economy since the passage of the National Labor Relations Act. The United States now faces continuous and significant competition worldwide and is the nation with the greatest debt.[14] To compete successfully, employers must improve productivity in a global environment in which competitors benefit by having cooperative relations with their employees.[15] In addition, the U.S. economy has shifted "from blue to white-collar occupations, from the North to the South, and from the manufacturing to the service sector."[16] These shifts have created diverse expectations and perspectives in both the workforce as a whole and in the employee makeup of individual companies. One last change worth noting is that beginning perhaps with the Civil Rights Act of 1964, our legal system increasingly has recognized individual, as distinguished from collective, employment rights.

These various factors emphasize the need for the flexible development of alternatives to collective bargaining. Through cooperative ventures between employers and employees who identify with the goals of the firm (as opposed to viewing the firm as inimical to their interests), solutions to workplace problems shaped by input from employees as well as from employers can lead to a mutually beneficial, higher level of productivity.[17] Employers need the flexibility to offer employees a structure to carry on a dialogue regarding terms and conditions of employment without being required to implement the adversarial collective bargaining model. Ultimately, the collective bargaining model should be required to compete with alternative, cooperative models for employee support. The law should allow workers the latitude to make their own choices without any presumption about which model, adversarial or cooperative,

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without an employee involvement or participation program would like to participate in one if given the opportunity. *Id.* at 30 (citing BUSINESS WEEK and SIROTA AND ALPER ASSOCIATES, *The 1985 National Survey of Employee Attitudes*, (Sept. 1985)). Ninety percent of employees in organizations with a plan responded that the plan was a "good idea!" *Id.*

[14] *Id.* at 3.

[15] *Id.* at 41.

[16] Henry S. Farber, *The Extent of Unionization in the United States in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 53-54 (Thomas A. Kochan ed., 1985).

[17] *See* FACT FINDING REPORT, *supra* note 2, at 34, 37-39, 43-44.

is in employees' best interest, and it should protect their right to do so.

II. CURRENT INTERPRETATIONS OF THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Board's broad construction of National Labor Relations Act sections 8(a)(2)[18] and 2(5)[19] has to date posed serious obstacles to cooperative programs welcomed by workers. The Board should require that *representation* of non-participating employees be a necessary precondition to categorizing any employee group or plan as a "labor organization." Express adoption of this requirement, which already is implicit in the National Labor Relations Act and in many cases decided by the Board, would permit employers to communicate directly with groups of employees that could speak for themselves concerning terms and conditions of employment. The legislative history of the Act and the court opinions and Board decisions interpreting it, offer substantial support for the express adoption of this requirement. Indeed, no reported case decided to date by the Board or by the courts appears to express a contrary view.

In *Electromation*,[20] the Board singled out certain passages from the Senate hearings on the adoption of section (8)(a)(2). These passages indicate that Congress understood sections 2(5) and 8(a)(2) to be concerned fundamentally with the issue of

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[18] Section 8(a)(2) provides:

> 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 any financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to 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; . . .

29 U.S.C. § 158(a)(2) (1988).

[19] Section 2(5) defines "labor organization" as:

> [A]ny 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.

29 U.S.C. § 152(5) (1988).

[20] Electromation, Inc., 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).

"representation."[21] Moreover, the Supreme Court, in virtually every case construing section 8(a)(2) and its earlier analogue, the Railway Labor Act of 1926,[22] acknowledged that congressional concern was focused on protecting employees' freedom to select their own representatives to deal with employers. In the seminal case in this area, *Texas & New Orleans Railroad Company v. Brotherhood of Railway and Steamship Clerks*,[23] the Court upheld the validity of a judicially enforceable obligation created by section 2(3) of the Railway Labor Act. The Court noted that the provision forbade "interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other,"[24] and stated:

> Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. . . . Such collective action [by employees] would be a mockery if representation were made futile by interference with freedom of choice. Thus the prohibition by Congress of interference with the selection of representatives for the purpose of negotiation and conference between employers and employees, instead of being an invasion of the constitutional right of either, was based on the recognition of the rights of both.[25]

NLRB v. Pennsylvania Greyhound Lines, Inc.,[26] was the first case to uphold the Board's authority to order the disestablishment of an employer-dominated labor organization. In that case the Court noted that failure to disestablish the dominated "Association" might "enabl[e] the employer to induce adherence of employees to the Association in the mistaken belief that it

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[21] *See Id.* at 992-94.

[22] Railway Labor Act, ch. 347, § 2(3), 44 Stat. 577, 578 (1926) (current version at 45 U.S.C. § 152 (1988)).

[23] 281 U.S. 548 (1930).

[24] *Id.*

[25] *Id.* at 569-70.

[26] 303 U.S. 261 (1938).

was truly representative and afforded an agency for collective bargaining."[27]

In *NLRB v. Cabot Carbon Co.*,[28] the Court distinguished an employer's right to confer directly with its employees under the provisions of section 9(a) of the National Labor Relations Act from prohibited "dealing" under section 8(a)(2) of the Act by emphasizing the unique representative function of a labor organization.[29] The point, as the *Cabot Carbon* Court noted, is that section 8(a)(2) addresses impermissible interference with the representational role or agency function of a "labor organization," whereas section 9(a) simply permits personal or group airing of grievances.

The Supreme Court consistently has found that section 8(a)(2) is directed at the evil of corruption through domination, interference, or support of the agency relationship or representational status of a labor organization. In the context of employer-initiated programs, the principle is that the employer violates the law if it foists on its employees a body that employees have not freely chosen but that purports to represent them. Finally, the National Labor Relations Board has never, in a section 8(a)(2) context, found a "labor organization" to exist if it did not purport in some capacity to "represent" the interests of absent or non-participatory employees.[30] Moreover, the few decisions in which the Board did not find employer-initiated committees, teams, or panels to be "labor organizations" did not

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[27] *Id.* at 271.

[28] 360 U.S. 203 (1959).

[29] The court observed that:

> The amendment to § 9(a) does not say that an employer may form or maintain an employee committee for the purpose of 'dealing with' the employer, on behalf of employees, concerning grievances. On the contrary the amendment to § 9(a) simply provides, in substance, that any individual employee or group of employees shall have the right personally to present their own grievances to the employer . . . . It is thus evident that there is nothing in the amendment of § 9(a) that authorizes an employer to engage in 'dealing with' an employer-dominated 'labor organization' as the *representative* of his employees concerning their grievances.

Id. at 217-18 (emphasis added).

[30] In *Electromation*, the Board expressly declined to adopt a "representation" requirement, as was advocated in Member Devaney's concurrence. 309 N.L.R.B. 990, 995 n.20 (1992). Only Member Raudabaugh, however, rejected outright such a requirement. *Id.* at 1007 n.13 (Raudabaugh, Member, concurring).

so find precisely because the entity under consideration did not represent employees.[31]

Two well-known NLRB cases in which adjudicatory bodies were found not to be labor organizations clearly illustrate that "dealing" necessarily connotes a representational function that is lacking when the body in question simply decides matters rather than acts as an advocate, representative, or agent for other employees. In *Sparks Nugget Inc.*,[32] the Board found that an employees' council was not a labor organization because it did not act "in any manner as an advocate of employee interests."[33] The Board distinguished *Cabot Carbon* and other cases relied on by the Administrative Law Judge, observing that in those cases "the organizations in question 'dealt with' the respective employers in the same sense as the employees' advocates."[34] Similarly, in *Mercy-Memorial Hospital Corp.*,[35] the Board adopted the Administrative Law Judge's conclusion that an employer's grievance committee was not a labor organization because it was not "formed for the purpose of dealing with the [employer] on behalf of employees concerning their grievances."[36]

Most recently, in the *Electromation*[37] and *du Pont*[38] decisions, the Board focused on the "dealing with" requirement of section 2(5) without recognizing that in order to determine whether a group "deals with" an employer, it must first be determined whether the group "represents" non-participating employees. Nevertheless, *Electromation* and *du Pont* present the Board's current interpretation of the outer reach of the "dealing with" criterion. The Board distinguished "dealing," a

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[31] The clearest statement of this position is found in the decision of the Administrative Law Judge, which was affirmed by the Board in General Foods Corp., 231 N.L.R.B. 1232, 1234 (1977) (finding that the essence of a labor organization, as this term has been construed by the Board and the courts, is a group or a person who stands in an agency relationship to a larger body on whose behalf it is called upon to act).

[32] 230 N.L.R.B. 275 (1977).

[33] *Id.* at 276.

[34] *Id.*

[35] 231 N.L.R.B. 1108 (1977).

[36] *Id.* at 1121.

[37] Electromation, Inc., 309 N.L.R.B. 990 (1992), *enf'd*, 35 F.3d 1148 (7th Cir. 1994).

[38] E.I. du Pont de Nemours & Co, 311 N.L.R.B. 893 (1993).

bilateral mechanism involving employee proposals and employer consideration of such proposals, from permissible mechanisms such as brainstorming groups, suggestion boxes or meetings, and analogous information exchanges.[39]

In both *Electromation* and *du Pont*, the employees' committees involved were found to be acting in a representative capacity for employees who were not present for the discussions with members of management. However, *du Pont*'s all-day "safety conferences" were found to be lawful. Thus, although only discussing the "dealing with" requirement, *Electromation* and *du Pont* suggest that input from employees is permissible in a group setting if it amounts only to learning about employees' thoughts, perceptions, and reactions. Accordingly, although these cases do not expressly adopt a representational requirement, they support its logical corollary: It is permissible for employers and individual employees to discuss employees' thoughts on terms and conditions of employment in a group setting without running afoul of section 8(a)(2).

III. PERMISSIBLE NON-REPRESENTATIONAL GROUPS

A major purpose behind non-representational groups is to permit employees in a group setting to inform management of their views concerning particular issues. From the outset, however, it is important to articulate what these "non-representational" groups would and would not do. By definition, neither the group as a whole nor its participants would "represent" any other employees. Thus, employee elections to these groups would be problematic lest participating employees be perceived as agents for the whole or for a segment of the employee population. Participating employees would not speak for other employees or bind other employees to conditions or agreements. These parameters must be clear because they distinguish non-representational groups from representational bodies that "deal with" management on behalf of non-participating employees, as that concept has developed through the legislative history, case law, and Board decisions discussed above.

Group participants could, however, express and present individual views in a group setting on issues that impact directly on employees' working lives, both to members of management

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[39] *Id.* at 894; *Electromation*, 309 N.L.R.B. at 995 n.21.

and to each other.[40] By listening to each others' perspectives on a particular issue under discussion, each participant, whether employee or manager, could hear and could be influenced by views other than his or her own. Indeed, communication within such a group would be the principal advantage of a group forum (as opposed, for example, to employee surveys or suggestion boxes), because the perspectives presented by the participants likely would vary according to their respective needs, backgrounds, and desires. Additionally, because such a group would not be a labor organization, there would be no need to limit the type of issues it could consider.

On the other hand, participants could not present group proposals to management lest the group be seen as "dealing" in a manner prohibited by law. Any decision following group discussion clearly and unilaterally would be made by management. It would be important from a functional and from a legal standpoint that all employees understand this outcome.

Although the analogy may be imperfect in some respects, a non-representative employee group might function similarly to the way a focus group functions in market research. Employees can be been as "customers" of terms and conditions of employment such as wages, benefits, and perquisites in the same way that in commerce consumers are "customers" for products and services. Management would present to the non-representative employee group a proposal for addressing a particular employment issue. In turn, management would receive feedback through the dynamic of group and individual interaction and through discussion from those most affected by the issue, just as a focus group of consumers provides customer feedback to sellers on likes and dislikes, needs and wants, and strengths and weaknesses of a proposed commercial product or service. In this way, employees could influence management decision-making in an effective, constructive, and cooperative way, even though they would not represent or in any way speak on behalf of other employees.

One distinct advantage of such a construct is that the group participants could be selected to reflect the demographics of the workplace with respect to gender, race, nationality, age, and job

[40] These groups could be comprised, for example, of 20 to 30 participants; large enough to create a group dynamic but sufficiently small to allow each of the participants to speak. The administrative costs of the group legally would be paid by management, and employees would not be penalized for time away from their jobs while participating in such a group.

type — a diversity atypical of elected bodies in general. Accordingly, such a group could reflect the range of opinions in a company's work force on whatever particular issue were being discussed. It thus would provide management with an opportunity prior to decision-making for consultation with a spectrum of the employees affected by the decision.

If employees conclude that participation in such a group fails to meet their needs or expectations, they would be free to refuse to continue participating in it. They would be protected by law if they choose instead to organize into traditional collective bargaining units. However, management and employees should be permitted legally to pursue alternatives such as non-representational groups, and the law should allow employees to decide for themselves if such groups are effective.

Effectiveness, like beauty, is often in the eye of the beholder. One recently published study indicates that employees, as well as management, recognize and appreciate the virtues of cooperative arrangements. Professors Richard Freeman of Harvard University and Joel Rogers of the University of Wisconsin recently conducted a survey of twenty-four thousand workers representing fifty-six million people in companies with at least twenty-five employees.[41] By a margin of three to one, workers preferred a "powerless" but influential form of employee participation in workplace decision-making over a "powerful" one that did not enjoy a cooperative relationship with management.[42] Paternalistic arguments outlawing employee participation groups as "inherently coercive," especially in the absence of any other evidence of employer coercion, should not be used to curtail employee choice in these matters.

CONCLUSION

Depicting the modern work environment as a "conflict of interest" between an overbearing employer and comparatively powerless workers is an unwarranted oversimplification. In today's workplace, it is unjustifiable to maintain a regulatory scheme that makes adversarial collective bargaining the sole means of employer engagement with groups of employees over terms and conditions of employment. The National Labor

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[41] Richard Freeman & Joel Rogers, *Worker Representation and Participation Survey: First Report of Findings*, N.Y. TIMES, Dec. 5, 1994, at D1.

[42] *Id.*

Relations Act should be construed to permit management interaction with non-representational groups regarding these issues. Such groups are not "labor organizations" within the scope of the Act's regulation.

Permitting non-representational employee groups to engage lawfully with employers improves employee satisfaction because it allows employees the opportunity to influence decisions that affect employees' working lives. It improves the quality of management decision-making because it gives management the benefit of employee input. In this way, employers and employees can, as long as the parties are amenable, collaborate to effectuate their mutual best interests. If employees became dissatisfied with their circumstances, they could choose to organize independently for purposes of traditional collective bargaining under the National Labor Relations Act. The legal machinery of the National Labor Relations Board should be dedicated to guarding that choice, free from actual employer interference or restraint. However, it should not presume coercion solely based on the existence of a non-representational employee participation structure.