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THE LIMITS OF ORGANIZED EMPLOYER-EMPLOYEE RELATIONS IN NON-UNION FACILITIES: SOME NEW EVIDENCE OF FLEXIBILITY

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The National Labor Relations Board[1] recently has issued a number of decisions which suggest its uneasiness with the breadth historically attributed to the statutory definition of a "labor organization" under section 2(5) of the National Labor Relations Act.[2] While the Board continues to grant preference to a model of labor relations that presumes management and workers are adversaries,[3] these decisions reveal a groping for expanded avenues of lawful non-adversarial employer-employee interaction. In essence, the Board appears to have limited the scope of the statutory definition of a labor organization in order to render lawful conduct which would otherwise be proscribed under a strict application of section 8(a)(2).[4]

The provisions of the Act embody two basic goals for our labor relations system, goals which at times are in tension. A principal purpose of the Act is fostering the collective bargaining process as the means most likely to accomplish the goal of effective employee repre-

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1. Hereinafter referred to as the Board.

2. 29 U.S.C. § 152(5) (1976 & Supp. III 1979). *See* note 40 *infra* and accompanying text. The National Labor Relations Act is codified at 29 U.S.C. §§ 151-168 (1976 & Supp. III 1979) [hereinafter referred to as the Act].

3. This adversary model of labor relations centers upon the perceived ideological conflict between management and workers. *See* Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, 50 VA. L. REV. 1359 (1964) [hereinafter referred to as Ross]. One author has noted that the adversary model of labor relations includes the following presumptions:

> There exists an inherent conflict of interest between employers and employees; this conflict leads to hostility; employers wish to subvert the interests of their employees; no informed employee would align himself with his employer; any organization of employees in which management plays a part is thus necessarily a fraud and contrary to the employee's best interests.

Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 515 (1973) [hereinafter referred to as *New Standards*].

4. 29 U.S.C. § 158(a)(2). Section 8(a)(2) sets forth the code of conduct employers must observe when interacting with section 2(5) labor organizations. *See* note 109 *infra* and accompanying text. The text of section 8(a)(2) appears at text accompanying note 18 *infra*.

sentation in the establishment of wages, hours and conditions of employment. The Act guarantees that employees shall be safeguarded in their rights to organize labor unions and bargain collectively.[5] Often overlooked, yet equally important, is the Act's guarantee of employees' "right to refrain from any or all [of] such activities."[6] While infringements upon employee free choice which work to impair unionization are attacked vigorously,[7] the present administration of the Act realistically discourages employees from exercising their right not to be represented by a union while at the same time having some say in the governance of the work setting.[8] This is unfortunate not only because it unnecessarily limits the exercise of employee free choice, but also because it may restrain the efforts of industry to improve productivity.

Over the past decade the productivity of the average American worker has fallen behind the pace set by other industrial nations in the

5. Section 1 of the Act states:

> 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.

29 U.S.C. § 151 (1976 & Supp. III 1979). *See also* Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319 (1951).

6. 29 U.S.C. § 157 (1976 & Supp. III 1979).

7. Sections 8(a)(1), 8(a)(3) and 8(a)(5) are the primary provisions utilized to protect employees' rights to organize and bargain collectively. Section 8(a)(1) protects employees from employer interference or coercion in the exercise of their right to engage in concerted activity guaranteed under section 7 of the Act. Section 8(a)(3) prohibits employer discrimination in regard to hiring and tenure of employment based on union membership. Section 8(a)(5) coupled with section 8(d) creates a duty upon management to bargain in good faith with respect to wages, hours and other conditions of employment. 29 U.S.C. § 158 (1976 & Supp. III 1979).

8. In 1935 when the Act was originally enacted there was good reason for the Board to take a strict view toward such employer-employee interaction. At that time, over 2,500,000 workers were in company-dominated unions which acted as mere charades of representation and significantly hampered the efforts of organized labor. Today, however, organized labor plays a predominant role in the workplace and workers no longer require such paternalistic protection. C. SUMMERS & H. WELLINGTON, LABOR LAW 419-21 (1968); Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 809 (1977) [hereinafter referred to as Jackson]; *New Standards, supra* note 3, at 510-15. *See also* Summers, *Industrial Democracy: America's Unfulfilled Promise*, 28 CLEV. ST. L. REV. 29, 33, 40-41 (1979).

free world.[9] A recent report indicates that productivity of the total non-farm business sector in the United States declined as a whole by 1.1 percent in 1979.[10] A significant factor in this disturbing productivity problem is the growing alienation among workers in this country.[11] Through greater worker participation in the operation and management of the workplace, employers and employees can benefit from increased productivity, reduced alienation and improved working environments.[12]

The central thesis of the present examination is that some forms of employee-management interaction which allow non-unionized employees to affect their working conditions should be permitted under the Act.[13] Traditional interpretations of sections 2(5) and 8(a)(2) of the

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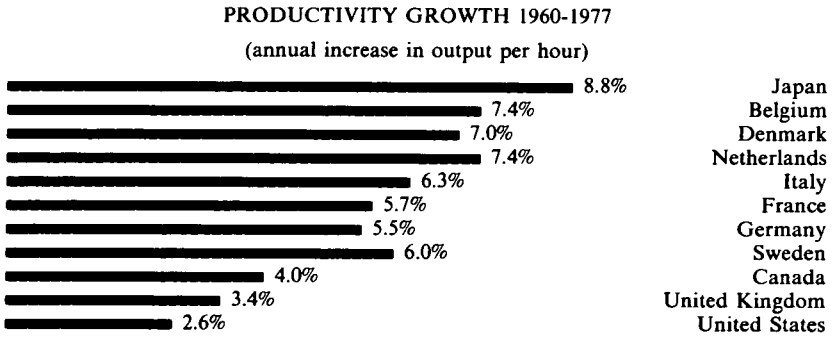

Developed from data in Daley & Neef, *Productivity and Unit Labor Costs in 11 Industrial Countries, 1977*, 101 MONTHLY LAB. REV. 11, 12 (Nov. 1978). Congress and the Executive Branch have also reacted to the growing need to improve worker productivity in the United States. *See, e.g.*, National Productivity and Quality of Working Life Act, 15 U.S.C. § 2401-2471 (1975); Exec. Order No. 12,089, 43 Fed. Reg. 49,773, *as amended by* Exec. Order No. 12,107, 44 Fed. Reg. 1055 (1978), *reprinted in* 15 U.S.C. § 2401 (1978).

10. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, BULL. No. 804, REPORTS ON INDUSTRIAL PRODUCTIVITY CHANGES FOR 1979 (1980).

11. *See, e.g.*, Cooper, Morgan, Foley & Kaplan, *Changing Employee Values: Deepening Discontent?* 57 HARV. BUS. REV. 117 (Jan.-Feb. 1979); Hackman, *Is Job Enrichment Just a Fad?* 53 HARV. BUS. REV. 129 (Jan.-Feb. 1975); Jenkins, *Democracy In The Factory*, ATLANTIC MONTHLY Apr. 1973 at 78; Walton, *How to Counter Alienation In The Plant*, 50 HARV. BUS. REV. 70 (Nov.-Dec. 1972).

12. The authorities supporting this view are legion. A recent bibliography and digest can be found in WORK IN AMERICAN INSTITUTE STUDIES IN PRODUCTIVITY, PRODUCTIVITY AND THE QUALITY OF WORKING LIFE (Vol. 2 1978).

13. Organized labor has also recognized the significance of employee participation in the functioning of the workplace. For example, a current Memorandum of Understanding between U.S. Steel Corporation and the United Steelworkers of America establishing "Labor-Management Participation Teams," provides, in part:

> The parties recognize that a cooperative approach between employees and supervision at the work site in a department or similar unit is essential to the solution of problems affecting them. Many problems at this level are not readily subject to resolution under existing contractual programs and practices, but affect the ongoing relationships between labor and management at that level. Joint participation in solving these

Act are the primary obstacles to such interaction.

CHARACTERISTICS OF A "LABOR ORGANIZATION" UNDER SECTION 2(5) OF THE NATIONAL LABOR RELATIONS ACT

Several sections of the Act work together to protect the right of employees to be free to choose their own representative and to bargain collectively.[14] The independent protection of section 8(a)(1)[15] of the Act accrues whether or not the employer-employee program in question is a labor organization within the meaning of section 2(5),[16] but the more stringent limitations of section 8(a)(2) apply only where an employer is accused of interfering with or dominating a "labor organization." Section 2(5) defines the term "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.[17]

Section 8(a)(2) provides that:

> [I]t shall be an unfair labor practice for an employer:
>
> . . . .
>
> (2) 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 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.[18]

The successful formulation of workable models of non-adversarial relations between employers and employees in non-union facilities may thus depend on whether such models are considered statutory labor organizations subject to the limitations of section 8(a)(2). Therefore, determining the characteristics of a labor organization under section 2(5) is essential.

problems at the departmental level is an essential ingredient in any effort to improve the effectiveness of the company's performance and to provide employees with a measure of involvement adding dignity and worth to their work life.

[1980] I COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS (BNA) § 29:71. *See also* Macy, *The Quality-of-Worklife Project at Bolivar: An Assessment*, 103 MONTHLY LAB. REV. 41, 43 n.5 (July 1980).

14. *See* notes 5-7 *supra*.

15. 29 U.S.C. § 158(a)(1) (1976 & Supp. III 1979).

16. *See* text accompanying notes 107-08 *infra*.

17. 29 U.S.C. § 152(5) (1976 & Supp. III 1979).

18. *Id.* § 158(a)(2) (1976 & Supp. III 1979).

NLRB v. Cabot Carbon Co.

NLRB v. Cabot Carbon Co.,[19] is the only case in which the Supreme Court has directly addressed the issue of what constitutes a labor organization under section 2(5) of the Act. During World War II, in response to encouragement by the War Production Board, Cabot Carbon Company established employee committees at a number of its unionized and non-unionized facilities. Each committee was comprised of representatives elected by the employees at a given facility and met monthly with management. The committees' by-laws, promulgated by the company and published in its policy manual, set forth the purposes, rights and obligations of the committees.[20] In essence, the committees' purpose as stated in the policy manual was to provide a procedure for considering employees' problems and ideas in areas of mutual interest to employees and management. Moreover, plant committees at non-union plants also were responsible for han-

19. 360 U.S. 203 (1959), *rev'g* Cabot Carbon Co. v. NLRB, 256 F.2d 281 (5th Cir. 1958), *denying enforcement to* International Chemical Workers v. Cabot Carbon Co., 117 N.L.R.B. 1633, (1957).

20. The company policy manual described the purposes, rights and obligations of the committees as follows:

1. To bring about a better understanding between employees in every branch and service of our Company to the end that each will have a better insight of the other's problems.
2. To provide a definite procedure for considering employees' ideas. As an example, the following problems are of mutual interest to employees and management:
   a. Safety.
   b. Increased efficiency in production.
   c. Conservation of supplies, materials, and equipment.
   d. Encouragement of ingenuity and initiative.
   e. Grievances (*non-union* plants or departments).

* * *

It is understood that the Employee Committees do not in any way detract from the authority and responsibility of the supervisory force but should serve to assist plant management in general in solving problems of mutual interest. It shall be the Committees' responsibility to:

1. Meet with plant management at regular monthly meetings called by management and to attend any special meetings called by management.
2. Work with management on those problems of mutual interest as set out under "Purposes."
3. Make recommendations on the suggestions from the employees in accordance with the Suggestion Plan.
4. Call meetings of the employees if in their judgment this is necessary, and the Committee may invite management to attend if they think advisable, but all such meetings will be optional as far as management is concerned and will be on the employees' time.
5. Handle grievances at nonunion plants and departments according to grievance procedure set up for these plants and departments. It shall be the duty of the Committee to call to the attention of management any troublemakers or acts of disturbance which would tend to lower morale, and it shall be the duty of the Committee to insist that gripes, grumbling, trouble-making among the employees either stop or be taken up under the regular grievance procedure at the plant.

117 N.L.R.B. at 1640-41.

dling grievances according to grievance procedures set up for those plants and departments.[21]

The trial examiner held that the employee committees at Cabot Carbon were labor organizations within the meaning of section 2(5).[22] Although noting the complete absence of any full-fledged negotiation by the committees on behalf of employees, the trial examiner concluded that the committees' stated purposes and duties, their undisputed discussion and recommendation of changes to management over mandatory subjects of bargaining and the advocacy role which they played on behalf of employees in the grievance structure fulfilled the statutory requirements of a labor organization under the Act. A three-member panel of the Board unanimously adopted the trial examiner's decision.[23]

The United States Court of Appeals for the Fifth Circuit reversed the Board's order,[24] reasoning that "Congress intended that employees, individually or in groups, and independently of labor's undiminished right to bargain collectively, should be able to discuss problems of mutual interest with their employers without violating the law."[25] After an extensive examination of the legislative history of the Act, the Fifth Circuit concluded that the requirement of "dealing with employers" under section 2(5) would only be satisfied where employees were "bargaining with employers" on behalf of employees.[26] This conclusion was drawn from the court's combined reading of sections 2(5), 8(a)(2) and 9(a) of the Act.[27]

21. The policy manual provided, in summary, that in the handling of employee grievances at non-union facilities, the Committee was under a duty to consult with the Foreman, the Assistant Plant Superintendent and the Plant Superintendent and to consider all the facts. If, after having done so, the Committee believed that the employee had a just grievance, it presented a formal written statement of its supporting reasons to the Plant Superintendent, who, thereafter, sent copies of it, plus his own report and recommendations, to the District Superintendent, the department head and Industrial Relations Department of the Company. Within five days, a meeting between the District Superintendent or the department head, or both, and the Committee and the Plant Superintendent took place in which the Committee and the Plant Manager each presented their positions. A decision was made at that time by the company, and the Committee could appeal to the General Manager if they so desired. NLRB v. Cabot Carbon Co., 360 U.S. 203, 206 n.3 (1959).

22. 117 N.L.R.B. at 1647.

23. *Id.* at 1633-34.

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

25. *Id.* at 290.

26. *Id.* at 285.

27. Section 9(a) of the Act provides:

Representatives 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 the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the

The Supreme Court perceived the legislative history of the Act differently and unanimously reversed the Fifth Circuit, reinstating the Board's order.[28] Emphasizing the broad nature of section 2(5), the Court rejected the Fifth Circuit's equation of "dealing with" and "bargaining with." The Court held that where committees "existed for the purpose, in part at least, 'of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work' " they would not be exempted from section 2(5) solely because they did not bargain with the employer.[29]

Two independent grounds were found by the Supreme Court to support its conclusion that the employee committees at Cabot Carbon were labor organizations. Initially, the Court concluded that the committees' function regarding the presentation of individual grievances to management "on behalf of employees" placed the committees within the purview of a statutory labor organization.[30] In essence, this role made the committees the grievant's advocate and representative before management, a duty traditionally carried out by a labor organization. The Court also found that the committees' extensive discussion and recommendation to management over matters covering nearly every mandatory subject of bargaining established independent grounds for finding that the employee committees at Cabot Carbon were indeed labor organizations within the meaning of section 2(5).[31]

The Court went on to reject the Fifth Circuit's interpretation of the impact of section 9(a) on the definition of a labor organization under the Act. Section 9, declared the Court, in no way affected the definition of a labor organization under section 2(5).[32]

> right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given the opportunity to be present at such adjustment.

29 U.S.C. § 259(a) (1976 & Supp. III 1979). The court interpreted section 9(a) as allowing groups of employees to discuss grievances with management in a committee setting when read in light of section 8(d)(3) of the proposed Taft-Hartley Amendment. Section 8(d)(3) as incorporated into the original House version of the Taft-Hartley Amendments would have allowed management to form and maintain employee committees to meet with it concerning issues of mutual interest. This section was not adopted by the conference committee. Still, the court stated that while section 8(d)(3) was not part of the final version of the Act as passed by Congress, it was implicitly accepted under section 9(a). 256 F.2d at 288-89.

28. NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).

29. *Id.* at 213.

30. *Id.*

31. *Id.* at 213-14.

32. The Supreme Court concluded that since proposed section 8(d)(3) was clearly rejected by Congress it could not, therefore, be read into section 9(a). 360 U.S. at 217-18. In Feldman & Steinberg, *Employee-Management Committees and the Labor Management Relations Act of 1947*,

The specific holding of *Cabot Carbon* is not surprising. The employee committees at issue therein functioned as true employee advocates and representatives over the same broad range of subjects that a traditional labor union would address in conventional bargaining. The ruling is significant, rather, for its broad interpretation of section 2(5) and the impact of this analysis on other programs less encompassing than that of Cabot Carbon Company. Through its expansive reading of the phrase "dealing with employers" in section 2(5), the Supreme Court arguably created a standard which places the vast majority of potential employee-employer communication programs in non-union facilities within the definition of a labor organization under the Act.

In the twenty years since the Supreme Court decided *Cabot Carbon*, its broad standard has been applied by both the Board and by the courts of appeals.[33] Generally, only those employer-employee programs formed solely for social or athletic purposes have escaped characterization as labor organizations.[34] Thus, employers and employees have been forced to interact almost exclusively within the traditional collective bargaining model of labor relations.

The principles elaborated in *Cabot Carbon* epitomize an unnecessarily paternalistic attitude that traditional interpretations of our labor relations laws display toward the conventional labor movement. By defining almost every form of employee-employer relations as a labor organization, the Board and the courts have unnecessarily implanted the adversary model of labor relations throughout the working environment.[35] While there was certainly good reason to take such a paternalistic approach to the labor movement during the 1930s and 1940s, it is questionable whether such a view is justified today.[36] In situations where the employees of a given facility have rejected or do not desire

35 TUL. L. REV. 365 (1961), the authors dispute the Supreme Court's interpretation of section 9(a), based upon the language of the House Conference Report and its reasons for not adopting section 8(d)(3). While these criticisms of the Supreme Court's reading of section 9(a) are not without merit, at this point in time, some twenty-two years after the decision in *Cabot Carbon*, a detailed reexamination of the Court's reasoning would serve no useful purpose.

33. *See, e.g.*, NLRB v. Erie Marine, Inc., 465 F.2d 104 (3d Cir. 1972); NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); NLRB v. General Precision, Inc., 381 F.2d 61 (3d Cir. 1966), *cert. denied*, 389 U.S. 974 (1967); NLRB v. Walton Mfg. Co., 289 F.2d 177 (5th Cir. 1961); South Nassau Communities Hosp., 247 N.L.R.B. No. 67 (1980); Alta Bates Hosp., 226 N.L.R.B. 485 (1976); Solmica, Inc., 199 N.L.R.B. 224 (1972); Roytype, Division of Litton, 199 N.L.R.B. 354 (1972). *See also* note 85 *infra*.

34. *E.g.*, Hudson Dispatch, 68 N.L.R.B. 115 (1946).

35. The adversary model of labor relations is described at note 3 *supra*.

36. *See* note 8 *supra*. *See also* Jackson, *supra* note 8, at 824-25. In reality, many workers today do not perceive themselves as adversaries of management and often identify with the company. *New Standards, supra* note 3, at 518. *See generally* Ross, *supra* note 3.

union representation,[37] it is arguable that some alternative non-adversarial employer-employee relationships can be tolerated without significant impairment of collective bargaining as a preferred statutory mechanism.[38]

RECENT EXCEPTIONS TO SECTION 2(5): A POTENTIAL SHIFT IN BOARD DOCTRINE

Perhaps in response to growing criticism of its strict paternalistic approach to sections 2(5) and 8(a)(2) questions, the Board recently has begun to recognize certain limitations upon the scope of section 2(5) labor organizations. This new group of cases suggests a shift in Board doctrine that could well open new avenues for non-adversarial labor relations in the non-union shop.[39] Generally, these cases may be classified as involving adjudicatory grievance committees, employee work teams and employee attendance at *ad hoc* meetings with management.

Adjudicatory Grievance Committees

Adjudicatory grievance committees actually decide the merits of the individual grievance before them, whereas section 2(5) labor organizations function to represent grievants before an outside arbitrator or management decisionmaker. The adjudicatory employee grievance committees in *Spark's Nugget, Inc.*[40] and *Mercy-Memorial Hospital Corp.*[41] illustrate the first recognized limitation by the Board upon the definition of a labor organization.[42] In each of these cases the employer created an adjudicatory grievance committee composed of rep-

37. The United States Bureau of Labor Statistics reports that only 19.7% of the total workforce and 23.6% of the nonagricultural workforce were unionized in 1978. LAB. REL. Y.B. 1979 at 237-38. This represents a 4.1% decline in the total unionized workforce and 7.9% decline in the nonagricultural workforce since 1960. Moreover, union membership among factory workers declined from 8.6 million in 1976 to 8.1 million in 1978. *Id.* at 238.

38. Statutory preference does not, however, automatically translate into popular preference. A Gallup Poll carried out between May 4-7 of 1979 indicates that public approval of unions has declined to a 45-year low of 55%, down 21% from 1957. *Id.* at 238-39.

39. From the outset, however, it must be emphasized that while these cases provide an excellent foundation for new models of non-adversarial employee-employer interaction, they are few in number.

40. 230 N.L.R.B. 275 (1977), *modified sub nom.* NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980).

41. 231 N.L.R.B. 1108 (1977).

42. In Northeastern Univ., 218 N.L.R.B. 247 (1975), the Board held that the faculty senate at Northeastern University did not constitute a statutory labor organization. While the Supreme Court's decision in NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), may render this portion of the *Northeastern University* case moot, its discussion of the limits of section 2(5) still bears analytic significance. *See* note 88 *infra* and accompanying text.

resentatives of both management and employees.[43] Relying on the committees' adjudicatory function to decide only the individual grievance before it, a majority of the Board held that neither committee constituted a labor organization under section 2(5), as they did not engage in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work.[44]

In *Spark's Nugget*, the company distributed a memo to all of its employees outlining the establishment of an "impartial employees' council" for "employees who are unable to resolve problems with their supervisors."[45] The memo explained the various stages of the grievance process which culminated in final and binding resolution of the grievance by the council.[46] A ballot also was provided for employees to select their departmental representatives to the council.

Each *ad hoc* council consisted of the company's director of employee relations, who sat as chairman, an employee member elected from the grievant's department and a third member selected by the first two. The third member had to be from the management of a department other than that of the grievant. The council convened on an *ad hoc* basis to consider individual grievances. In essence, it acted much like a panel of arbitrators, hearing both sides' testimony, receiving exhibits and thereafter rendering a binding decision based on a majority vote of its members.[47]

A majority of the three-member Board panel concluded that the grievance councils were not section 2(5) labor organizations but rather were purely adjudicatory grievance committees. After finding no evidence that the councils ever initiated grievances, recommended

43. A recent survey of 800 companies undertaken by the New York based Conference Board reports that two-thirds of those non-unionized employers surveyed have employee complaint programs which typically allow a grievance to be filed with a top company officer or a neutral third party. R. BERENBEIM, NONUNION COMPLAINT SYSTEMS: A CORPORATE APPRAISAL 2-6 (1980).

44. Mercy-Memorial Hosp. Corp., 231 N.L.R.B. 1108, 1118-19 (1977); Spark's Nugget, 230 N.L.R.B. 275, 275-76 (1977), *modified sub nom*. NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980). In *Spark's Nugget*, the Board did find the employer in violation of 8(a)(1), (3) and (5). These violations were based in part on the company's unilateral establishment of the council without consulting the certified exclusive bargaining representative of its employees, Union Local 86, Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO. Other violations included an unlawful solicitation rule, illegal employee interrogation and the unilateral implementation of a new insurance program. 230 N.L.R.B. at 288.

45. *Id*. at 275.

46. The first two stages of the grievance procedure involved discussions between the grievant and his supervisor and department head. The grievant could request a hearing before the Employee Grievance Council if dissatisfied with the result at either stage. *Id*. at 276.

47. The employees' current certified union, Local 86 of the Hotel & Restaurant Employees & Bartenders International Union, AFL-CIO, filed unfair labor practice charges against the employer after its unilateral establishment of the employee grievance committee. *See* text accompanying note 44 *supra*.

changes in terms or conditions of employment to management or acted in any manner as an advocate of employee interests, the Board held:

> In *Cabot Carbon*, and in the other cases cited by the Administrative Law Judge in support of his finding that the Employees' Council is a labor organization, the organizations in question "dealt with" the respective employers in some sense as the employees' advocates. Here, however, as noted above, the Employees' Council performs a purely adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance. Therefore, it cannot be said that the Employees' Council herein "deals with" management; *i.e.*, resolving employee grievances. Accordingly, we conclude that, inasmuch as the Employees' Council is not a labor organization, Respondent's conduct in instigating, dominating, and assisting said Council was not unlawful under Section 8(a)(2) of the Act.[48]

The majority's conclusion in *Spark's Nugget*, that the absence of any advocacy or representative role by the employee member of the council placed it outside of section 2(5), is factually consistent with *Cabot Carbon*.[49] In his dissent, Chairman Fanning, however, emphasized that individual grievances tend to encompass employee working conditions generally, and argued that the broad view of "dealing with employers" expressed in *Cabot Carbon* should extend to the employee council in question.[50] Unfortunately, the dissent failed to recognize the distinction between an employee committee which represents employees before management in the grievance process and one which actually decides the merits of the grievance before it on behalf of management.

In *Mercy-Memorial*,[51] after a series of general meetings between employees and management regarding employee dissatisfaction with the existing grievance mechanisms,[52] the hospital instituted an em-

48. 230 N.L.R.B. at 276 (footnotes omitted).

49. The employee committees at Cabot Carbon Company did not perform adjudicatory functions but, rather, advocated employee positions before management. 360 U.S. at 213.

50. Chairman Fanning's dissent parallels the general interpretation of a labor organization expressed by the courts and the Board since *Cabot Carbon*. *See* text accompanying note 33 *supra*.

51. Two separate hospital facilities, Mercy Hospital and Memorial Hospital, owned and operated by the same corporation, were involved in this case. The employee grievance committee was utilized at both facilities. 231 N.L.R.B. at 1118.

52. These meetings were called by the hospital in response to employee complaints about the way its existing grievance procedures operated and the refusal by employees to utilize them. A total of six meetings between hospital officials and concerned employees occurred between September and November of 1974. The meetings took place at both Mercy and Memorial Hospitals (which were located approximately one mile apart), with employees of one hospital being permitted to attend any meeting at the other. The meetings centered upon the creation of a viable grievance structure with employees and management submitting various ideas. As a result of these meetings the employee grievance committee at issue before the Board was jointly agreed upon. *Id.* at 1118-19.

ployee grievance committee. The major purpose of the committee was to allow more employee participation in the grievance procedure.[53] The committee was composed of a department head and four employees chosen by the grievant from a list of ten committee members.[54] When a grievance was heard, the hospital's personnel director presented a written synopsis of the issues and positions of each party to the committee. Then each party had an opportunity to present its case and a decision was rendered. All decisions were made in private by a majority vote. The decision was binding on the hospital; however, if the employee was still dissatisfied, he or she was permitted to appeal to the personnel committee of the board of directors.[55]

A majority of the Board[56] adopted the trial examiner's decision which held:

> I am not persuaded that the General Counsel has established by a preponderance of the evidence that the Grievance Committee here involved was formed for the purpose of dealing with the Respondent

53. The grievance procedure consisted of three stages. Stage I involved the presentation of the grievance to the employee's immediate supervisor, while stage II involved his department head. The procedure at stage III was described as follows:

Employee:

1. The employee must present his grievance to the Director of Personnel within three days following the completion of stage II.

Personnel Director:

2. The Personnel Director will arrange for a meeting of the Grievance Committee and inform employee and/or designee (if any) of the date.

Grievance Committee:

3. Investigate all aspects of the grievance including meeting (if necessary) with the employee and/or designee (if any).

Grievance Committee:

4. The Committee will render its decision within five days after its meeting. The Committee will inform the Personnel Director of its decision and the Director will inform the employee.

Employee:

5. If the employee is still not satisfied with the outcome of the grievance, he should proceed to stage IV.

Id. at 1119.

54. The grievance procedure defined the grievance committee as: "[C]omposed of four employees and one department head. Employees are elected for a one-year term by all employees and the employee may select a department head of his choice. Any member must have a minimum of three years of continuous employment with the hospital." Subsequently, this definition was modified to provide for a two-year staggered term for members of the committee. *Id.* at 1119 n.22.

55. The employee grievance committee at *Mercy-Memorial* was created in the midst of a three-year strike by Local 79, Service Employees International Union, AFL-CIO, which had been certified as the exclusive representative of certain Mercy Hospital employees by the Michigan Employment Relations Commission in 1970. Memorial Hospital was a completely non-union facility. *Id.* at 1109-11, 1118-19. After the strike ended, the union filed unfair labor practice charges against the hospital based, *inter alia*, upon its unilateral creation of the committee. *Id.* at 1118.

56. The majority consisted of Members Penello, Murphy and Walther. Chairman Fanning and Member Jenkins dissented in part.

> on behalf of employees concerning their grievances or that the committee functioned in that manner. Quite the contrary, the committee was created simply to give employees a voice in resolving the grievance of their fellow employees at the third level of the grievance procedure, not by presenting to, or discussing or negotiating with management but by itself deciding the validity of the employees' complaints and the appropriateness of the disciplinary action, if any, imposed.[57]

As in *Spark's Nugget*, emphasis was placed on the adjudicatory function of the committee and its managerial nature. The majority went somewhat further, however, by endorsing the stated purpose of the committee—to provide an employee voice in resolving grievances.[58] Such a view implicitly recognizes that the employee members of the committee would in fact *represent* employee interests in decision making, though not in grievance processing. Since the committee was strictly an adjudicatory body with unilateral powers, it did not "deal with" the employer. The Board majority thus did not find the potential internal advocacy among employee members of the committee and their interaction with management in arriving at a decision sufficient to bring the committee within the ambit of section 2(5).

Of further importance, the Board majority did not consider the additional right and obligation of the committee to recommend to management changes in rules, regulations and standards to bring the committee within the statutory definition of a labor organization. This portion of the holding was based on the fact that the committee exercised this power only once and it was, therefore, de minimus.[59] The dissent, on the other hand, found this stated purpose brought the committee within the definition of a labor organization.[60] The dissenters' view comports with the Board's traditional approach to section 2(5).[61] The majority's emphasis on the committee's primary or dominant function thus may mark an important positive shift in Board doctrine.

Several subsequent interpretations of *Mercy-Memorial* and *Spark's Nugget* evidence the Board's reluctance to extend the principles it re-

57. 231 N.L.R.B. at 1121.

58. While the Board did not specifically endorse the legitimacy of this purpose in its order, it stated that "[t]he Administrative Law Judge's Decision clearly articulates our reasons" for finding "that the Employees' Grievance Committee does not qualify as a labor organization under the language of section 2(5)." *Id.* at 1108. The Administrative Law Judge's endorsement is stated in the text accompanying note 57 *supra*.

59. 231 N.L.R.B. at 1121.

60. Chairman Fanning's dissent, in which Member Jenkins joined, emphasized that the declared purposes and actual functions of the committee with regard to making recommendations to management over mandatory subjects of bargaining brought it under the definition of a labor organization. *Id.* at 1109.

61. *See* text accompanying note 33 *supra*.

lied upon in those cases to situations involving traditional labor organization activities.[62] In *American Tara Corp.*,[63] for example, an employee discipline committee was established by the employer to review written warnings issued by supervisors dealing with employee conduct and to make recommendations to management on advisable discipline. The committee also participated with management in the formulation and enactment of new work rules and regulations governing the conduct and behavior of employees. A three-member Board panel adopted the decision of the trial examiner which held that the discipline committee constituted a labor organization within the meaning of section 2(5) and distinguished it from the committees in *Spark's Nugget* and *Mercy-Memorial* based on its function of "dealing with" management in regard to formulating new work rules.[64] Similarly, in *St. Vincent Hospital*,[65] a Board panel rejected an attempt by the employer to expand the principles of *Spark's Nugget* and *Mercy-Memorial* to a situation where employee committees engaged in discussion with management over mandatory subjects of bargaining on behalf of employees.

The decisions in *American Tara* and *St. Vincent* show that the principles enumerated in *Mercy-Memorial* and *Spark's Nugget* do not have unlimited reach. Nevertheless, the decisions in *Mercy-Memorial* and *Spark's Nugget* have remained intact and represent important limitations on the definition of a labor organization under the Act.[66]

Work Teams

Increased employee-employer interaction also has been permitted by the Board when employee work teams have been established by employers. In *General Foods Corp.*,[67] the employer instituted a job enrichment program to allow employees a larger and more meaningful role in

62. St. Vincent Hosp., 244 N.L.R.B. No. 20 (1979); American Tara Corp., 242 N.L.R.B. 1230 (1978); Mattiace Petrochemical Co., 239 N.L.R.B. 15 (1978). *See also* Streamway Div. of the Scott & Frazer Co., 249 N.L.R.B. 396 (1980); South Nassau Communities Hosp., 247 N.L.R.B. No. 67 (1980).

63. 242 N.L.R.B. 1230 (1978).

64. *Id.* at 2, 25. The more interesting question which the trial examiner did not reach, was whether the powers of the disciplinary committee in *American Tara* which were far more advisory and less adjudicatory than those possessed by the discipline committees in *Spark's Nugget* and *Mercy-Memorial*, placed it within the ambit of a labor organization under section 2(5).

65. 244 N.L.R.B. No. 20 (1979).

66. The principles of *Spark's Nugget* and *Mercy-Memorial* were adopted and distinguished by the trial examiner in *St. Vincent*. *See* note 85 *infra*.

67. 231 N.L.R.B. 1232 (1977). An excellent discussion of the concept of work teams is found in Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?*, 49 IND. L.J. 516 (1974) [hereinafter referred to as *Employer Implementation*]. *See* notes 77, 88 *infra*.

their day-to-day activities than was normally assigned in the manual unskilled operation. As a part of this program, the company instituted departmentally divided "work teams," which, acting by a consensus of their members, made job assignments to individual team members, assigned job rotations and scheduled overtime among members. Other functions of the work teams were carried out by *ad hoc* committees whose membership cut across team lines. The *ad hoc* committees were assembled by management for specific and limited task force functions, such as interviewing job applicants or inspecting and reporting on safety infractions within the plant.[68]

When management called team meetings which were held both on and off company property, members of the team were free to state complaints, but, in so doing, they were speaking only for themselves. The teams had no disciplinary power nor any formal spokesperson or leadership.[69] Moreover, they lacked all the conventional characteristics of a labor organization.[70]

A three-member Board panel adopted the trial examiner's opinion which concluded that the "work teams" did not constitute section 2(5) labor organizations.[71] The trial examiner's opinion emphasized that the purpose for establishing the work teams had nothing to do with labor relations as that term is generally understood. Rather, the teams functioned to facilitate the performance of work essential to operating the facility.[72] In essence, the trial examiner concluded that the work teams fulfilled a management function and, therefore, did not deal with management as a labor organization. If the work teams were committees at all, they were "committees of the whole" and thus lacked any "agency relationship to a larger body on whose behalf it is called to act," which the Board considered the essence of a labor organization.[73]

Similarly, the trial examiner stressed that the responsibilities of the management-created *ad hoc* committees were flat delegations of managerial functions not normally given unions and thus outside traditional notions of labor relations.[74] Moreover, while the company maintained

68. 231 N.L.R.B. at 1234.

69. If the teams had selected actual leaders or officers, a significant question would have arisen as to whether these leaders constituted supervisors under section 2 of the Act, and, if so, whether the employees dealing with these leaders satisfy the functional requirement for attaining labor organization status under the Act. *See Employer Implementation, supra* note 67, at 525.

70. The Board, however, requires only minimal structure to find the existence of a statutory labor organization. *See* note 103 *infra* and accompanying text.

71. 231 N.L.R.B. at 1232.

72. *Id.* at 1234.

73. *Id.*

74. *Id.* at 1235.

the ability to withdraw the authority granted the "work teams" and "*ad hoc*" committees at any time, such action would be wholly unilateral on its part without any dealings with employees over the matter.[75]

"Employee Representatives" Attending Ad Hoc Meetings With Management

The Board's decision in *Fiber Materials, Inc.*[76] provides one additional limitation to section 2(5) that requires brief analysis. In *Fiber Materials*, the company's non-supervisory training instructor selected employees to meet with management on an *ad hoc* basis to discuss questions regarding a newly promulgated fringe benefit policy. No grievances were presented; no negotiations occurred. The selected employees simply asked their own questions about the policy and did not act as representatives for other employees. Moreover, management selected different employees for each meeting and maintained no organizational structure whatsoever.

The trial examiner held, and the three-member Board panel affirmed, that the *ad hoc* meetings did not fall within the ambit of section 2(5). Since no formal organization existed, and since the informal groups which met with management did not raise grievances but merely asked individual questions about the company's fringe benefit policy, the trial examiner concluded that no labor organization existed.[77]

Moving Toward a Responsive Functional Standard

The decisions discussed in the preceding section of this article touch upon every strand of the definition of a labor organization under section 2(5). While these recent Board decisions are not of uniform significance, considered together they evidence a positive shift toward a more functional approach for determining the application of, and limitations upon, the scope of section 2(5) labor organizations.[78] In general, the recent cases appear to be less concerned with subject matter

75. *Id.* To date, the decision in *General Foods* has not been applied in any subsequent Board or court case. Assuming that it is a principled decision, however, its crucial elements may become the basis for a broad range of potential applications.

76. 228 N.L.R.B. 933 (1977).

77. *Id.* at 935.

78. In *Employer Implementation, supra* note 67, at 521, the student author maintained that functional subject matter and structural requirements each must be met in order to establish the existence of a statutory labor organization. In contrast, a purely functional approach disregards subject matter and structural requirements, except as they relate to function. Rather, primary emphasis is placed upon the predominant role and purpose of each given program.

and more concerned with the functions of the employee group involved.[79] In essence, this functional approach focuses on the primary purpose or function of the employee role in a given program as it relates to the textual requirements of section 2(5) and that section's interpretation by the Supreme Court in *Cabot Carbon*.[80]

To analyze the potential impact of these recent Board decisions, it is useful to isolate and discuss the various functional criteria identified in each decision. Review of these factors will provide a basis for determining their collective conceptual limits, and, in turn, the feasibility of creating innovative, non-adversarial employee-employer relations in the non-union shop.

DELEGATION OF MANAGERIAL AUTHORITY

Decision-Making

In determining whether a given program constitutes a labor organization, the Board appears to attribute substantial significance to delegations of managerial authority.[81] Thus, in *Spark's Nugget*[82] and *Mercy-Memorial*,[83] the adjudicatory function played by the joint employee-employer grievance committees in the disposition of individual grievances, authority which, in the absence of a collective bargaining agreement is vested exclusively in management, was considered determinative in finding that those committees did not constitute a labor organization under the Act.

This functional approach reflects a concern for the section 2(5) requirement that a given employee representational scheme exists, at least in part, for the purpose of "dealing with" employers. That requirement is met in situations where employees act to *represent* or *advocate* employee positions concerning wages, hours or working conditions and the decision-making power resides in management.[84] Where employees act as decision-makers, they do not "deal with employers."[85] Moreover, when the employee participation structures are

79. In other words, except as it relates to a given program's role and purpose, subject matter is not considered in determining whether a given program constitutes a statutory labor organization.

80. *See* text accompanying notes 19-38 *supra*.

81. *See* notes 39 40 & 71 *supra* and accompanying text.

82. 230 N.L.R.B. 275 (1977). *See* note 40 *supra* and accompanying text.

83. 231 N.L.R.B. 1108 (1977). *See* note 41 *supra* and accompanying text.

84. NLRB v. Cabot Carbon Co., 360 U.S. 203, 213-15 (1959).

85. A concise summary of this principle appears in the trial examiner's opinion in St. Vincent Hosp., 244 N.L.R.B. No. 20 (1979):

> The case relied upon by the Respondent for a contrary conclusion, Mercy-Memorial Hospital Corp., is inapposite; the Board in that case found Mercy-Memorial Hospital

vested with the power to *adjudicate* or *decide* such matters unilaterally, there is no dealing with employers even though employee representation or advocacy may occur within the internal workings of the program.[86]

Similarly, in *General Foods*,[87] the work teams' authority to schedule job assignments, overtime and job rotations for its members were found to be functions of management outside the ordinary role of labor unions. If, however, the teams had lacked decisional authority and had only made recommendations to management, under *Cabot Carbon* they would have constituted a labor organization.[88] Therefore, when reference is made to matters outside the scope of labor union activity, it appears that the Board is speaking of the *unilateral* authority to make decisions otherwise considered within the scope of mandatory subjects of bargaining, not the subject matter of the decisions.[89]

The holding in *General Foods* provides the single most expansive conceptual limitation to the broad definition of a labor organization recognized by the Board to date. That decision expanded upon the adjudicatory model of *Spark's Nugget* and *Mercy-Memorial* by creating a far broader concept of permissible delegations of managerial authority.[90] By declaring that such managerial delegation of function and authority generally falls outside the traditional role of section 2(5) labor

> Employees' Grievance Committee was not a "labor organization within the meaning of Section 2(5) of the Act" because it was not created to "deal with" hospital management as an employee *Representative or advocate* with respect to wages, hours or working conditions but rather was created to *adjudicate or decide* employee grievances over such matters.

Id. at 6 (citation omitted, emphasis added).

86. *See* notes 40-60 *supra* and accompanying text.

87. 231 N.L.R.B. 1232 (1977). *See* note 71 *supra* and accompanying text.

88. *But see* Northeastern Univ., 218 N.L.R.B. 247 (1974), where the Board stated with regard to the function of the faculty senate at issue therein:

> We find that the Faculty Senate functions as advisory committees and makes recommendations (which are totally different from bargaining demands that a union would make upon an employer during contract negotiations) to the president. Accordingly, we find that the Faculty Senate does not function as a labor organization within the meaning of the Act.

Id. at 248. *See* note 42 *supra* and accompanying text.

89. One student author has suggested that since management maintains its inherent power to reject or review any decision or finding made by a work team at all times, the teams actually recommend potential decisions to management on behalf of employees, and therefore, externally deal with the employer. *Employer Implementation, supra* note 67, at 526-28. Withdrawals of authority by management, however, are unilateral and, in essence, change the nature and function of the team. In the absence of employer withdrawal, the work teams act functionally as decision-makers and do not, therefore, deal with management. *See* General Foods, Inc., 231 N.L.R.B. 1232, 1235 (1977).

90. The employee grievance committees in *Mercy-Memorial* and *Spark's Nugget* decided only the individual grievance before them. In *General Foods*, however, the employer established an entirely new method of operating many of the day-to-day activities of the workplace.

organizations, the Board may have opened the door to a much more flexible approach to employee-employer relations in the non-union shop.[91]

The range of permissible delegation of managerial authority should not, however, be viewed as without limits. Each area in which such delegation occurs must be examined with regard to its scope and structure. To date, for example, no significance has been placed on whether management is represented on or comprises a majority of a given committee's membership. As the scope of the subject matter dealt with by such committees enlarges, the presence of management, especially in a majority position, should be carefully considered. In such situations, the impact of the committee's decisions on general working conditions increases and management control over committee voting may become more troublesome. As the employee participation is diluted, the nature of the employee's role may be less decisional and more representative in character.

Fact-Finding

Harder to draw expressly from the Board's decisions, yet implicitly recognized in *General Foods*[92] and a logical extension of the functional standard utilized in the area of managerial delegation of decision-making authority, fact-finding presents an attractive, non-adversarial method of employee-employer interaction. The concept of fact-finding rests on the notion that an employee council which merely investigates a given set of problems and reports its factual findings to the employer on matters of mutual concern—without discussion or recommendation—does not deal with the employer within the meaning of section 2(5).

A good example of a fact-finding group outside the ambit of section 2(5) is the safety committee formed by the employer in *General Foods*. The purpose of that committee was to "investigate and report" safety infractions at the facility. It was delegated no authority to act

91. It may be argued that as the workers involved in the programs examined in this section are engaged in managerial activity, they are not "employees" under the Act, but rather "managers" or "supervisors," and are not, therefore, subject to statutory constraint. *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974). The type of managerial function involved in the programs analyzed herein does not, however, mirror that which was at issue in *Yeshiva* or *Bell Aerospace*. The workers participating in the programs under analysis in this section continue to carry out their normal work activities, which are clearly viewed within the scope of the Act. Moreover, these normal activities dominate their employment. Thus, they should not be treated as "supervisors" or "managers." *See Employer Implementation, supra* note 67, at 521-24.

92. 231 N.L.R.B. 1232 (1977). *See* note 71 *supra* and accompanying text.

upon discovered violations. Rather, the committee served solely a fact-finding function. While such a function also might be labeled managerial in nature, if the committee had not only reported safety infractions to management but had also made recommendations, then section 2(5) might have been triggered. Therefore, it appears that the Board implicitly recognized that fact-finding is a managerial function outside the ambit of a labor organization's role under the Act.

In applying a functional standard to fact-finding committees, the degree of employee advocacy or representation is a crucial determination. Arguably, in the absence of any discussion or recommendations by such committees to management, functionally they serve a lesser advocacy or representative role than the employee grievance committees in *Spark's Nugget*[93] or *Mercy-Memorial*.[94]

Under a functional standard, the reporting of factual findings does not serve any representational or advocacy role. In essence, the subjective judgment involved in fact-finding is no different from the subjective viewpoint of any other decision-maker. Therefore, the Board's tolerance of employee members of an employee disciplinary committee implicitly representing the view of their fellow employees should apply to such implicit representation on employee fact-finding committees. This implicit representation is not sufficient to qualify fact-finding committees as statutory labor organizations.

Functional validity of fact-finding committees is not, however, without limits. Where such committees begin to actively solicit employee opinions and complaints in the course of their investigations, troublesome questions of their status arise. Their reports to management may thus become vehicles of direct advocacy of employee grievances.[95] Therefore, fact-finding committees must be strictly limited in both their methods of investigation and the nature of their reports.[96]

NON-REPRESENTATIONAL COMMITTEES OF THE WHOLE

In *General Foods*,[97] the Board did not accord labor organization status to a "committee of the whole" consisting of the entire bargaining

93. 230 N.L.R.B. 275 (1977). *See* note 40 *supra* and accompanying text.

94. 231 N.L.R.B. 1108 (1977). *See* note 41 *supra* and accompanying text.

95. An example of this sort of problem is a committee formed to find out whether the current vacation plan is appreciated by the employees at the company. Inherent in soliciting responses to relevant inquiries is a certain potential for representation that may be suspect under the Act.

96. It must be reemphasized that while fact-finding is a logical extension of the principle of delegation of managerial authority, it has never been specifically embraced by the Board.

97. 231 N.L.R.B. 1232 (1977). *See* note 71 *supra* and accompanying text.

unit.[98] The trial examiner's decision held that the essence of a "labor organization" is "a group or person which stands in an *agency* relationship to a larger body on whose behalf it is called upon to act."[99] In the absence of such an agency relationship, no labor organization exists.[100]

Under the functional standard, a group's or person's status as an agent of others would be fulfilled whenever actual or perceived representational conduct took place *on behalf of others*.[101] Thus, when employees elect representatives to advocate their positions, representational status is attained. Furthermore, where management chooses employees to make recommendations on behalf of their fellow employees, under a functional analysis they attain representational status. A harder case is presented where "ad hoc" discussions between management and selected employees occur and no recommendations are made.

NON-REPRESENTATIONAL AD HOC PROGRAMS

Consideration of the ad hoc nature of a given program was evidenced by the Board's decisions in both *Fiber Materials*[102] and *General Foods*.[103] Each decision noted the minimal impact of such ad hoc programs on the traditional functions of a conventional labor organization compared with the legitimate employer justification in gathering and disseminating information.

Viewed broadly, *Fiber Materials* stands for the proposition that management may legally select a cross-section of employees, on a strictly ad hoc basis, to attend a meeting or meetings regarding matters involving working conditions, wages or hours. Under a functional standard, ad hoc groups which discuss and raise questions regarding mandatory subjects of bargaining lack the minimal representational purpose and structure required to place them within the ambit of a statutory labor organization. Section 2(5) states that a labor organiza-

98. In Avildsen Tools & Mach., Inc., 112 N.L.R.B. 1021 (1955), a case pre-dating *Cabot Carbon*, the Board allowed a company to hold monthly meetings with all of its employees on company property. These meetings, labeled "Employee Assemblies," were open to any employee who wished to attend. *See* Sangermen, *Employee Committees: Can They Survive the Taft-Hartley Act?*, 24 LAB. L.J. 684 (1973).

99. 231 N.L.R.B. at 1234.

100. This analysis is particularly applicable to smaller plants and businesses where it is not unrealistic for an employer to utilize non-representational committees of the whole. Moreover, in *General Foods*, the Board recognized the validity of an employer establishing such committees by department. *See* notes 67-75 *supra* and accompanying text.

101. *See* note 29 *supra* and accompanying text.

102. 228 N.L.R.B. 933 (1977).

103. 231 N.L.R.B. 1232 (1977). *See* note 57 *supra* and accompanying text.

tion can be "any organization of any kind or any agency or employee representation committee or plan."[104] While the Board or courts have long held that a labor organization need not have the characteristics of a formal organization,[105] they did not find that the type of ad hoc groups evident in *Fiber Materials* had even the most minimal elements of a representative organization.

In *Fiber Materials*, the three-member Board panel affirmed the trial examiner's conclusion that the "informal discussion groups" created by the employer, because of their lack of any reasonable semblance of organizational structure, did not constitute a section 2(5) labor organization.[106] This factor also was mentioned in *General Foods Corp*. concerning the ad hoc committees therein.[107] Other factors affecting the functions of a given ad hoc group, however, also must be balanced carefully.

Once ad hoc committees attain a regularity in meetings and membership, they may acquire the representational characteristics of a labor organization required by section 2(5).[108] Moreover, as the scope of subject matter discussed increases or the discussion turns to recommendations, the role and purpose of the ad hoc meetings moves closer to that traditionally enjoyed by statutory labor organizations.[109] Minimal requirements of organizational form and representational character should, however, justify the exclusion of purely ad hoc meetings from labor organization status under section 2(5).

Appraisal

The cases and principles discussed above should not be viewed as definitive, well-established Board doctrine. They represent but four limitations to a general blanket approach to section 2(5) taken by the

104. 29 U.S.C. § 152(5) (1976 & Supp. III 1979). *See* text accompanying note 17 *supra* for the entire text of section 2(5).

105. *See, e.g.*, NLRB v. Clapper's Mfg., Inc., 458 F.2d 414 (3d Cir. 1972); Pacemaker Corp. v. NLRB, 260 F.2d 880 (7th Cir. 1958); American Mfg. Co., Inc., 196 N.L.R.B. 248 (1972). Elements disregarded by the Board and courts include a lack of any formal structure, by-laws, constitution, officers or dues.

106. 228 N.L.R.B. at 933.

107. 231 N.L.R.B. at 1232.

108. Such regularity in meetings and membership raises troublesome questions with respect to their continued ad hoc status. In essence, inherent within any scheme of regular ad hoc meetings is a potential representational function which moves closer to the type of traditional activities undertaken by statutory labor organizations. *See* Ampex Corp., 168 N.L.R.B. 742, *enforced*, 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

109. For example, where an employer discusses and takes recommendations from representative employees on potential wage increases, the impact of such meetings on general employee working conditions could trigger section 2(5).

Board and the courts since the decision in *Cabot Carbon*.[110] Still, the potential significance of these cases must not be underestimated since they may represent a substantial effort by the Board to narrow the scope of statutory labor organizations.

Of all the factors developed herein, the delegation of managerial authority allowed in *Spark's Nugget, Mercy-Memorial* and *General Foods* provides the most viable positive shift in Board policy. The reliance upon the principal function of the committees evident in those cases demonstrates a more flexible and realistic understanding of section 2(5). Delegations of managerial authority also appear to provide the greatest benefits to management in its efforts to increase productivity and to employees who struggle with alienation in the workplace.[111]

The utilization of a functional standard in analyzing the parameters of section 2(5) necessitates examining each program in totality.[112] Factors analyzed individually herein must, therefore, be viewed together in determining a given program's primary function. Invariably, some form of balancing occurs in any decision. Application of a functional standard does, however, provide a workable method for analyzing the parameters of a statutory labor organization. It also supplies a viable approach to the creation of innovative models of non-adversarial employee-employer relations in the non-union shop. While the analysis here suggested may not be the only way to appraise these cases, the functional approach advanced is a sensible way to define responsibly and effectively the nature of a labor organization under section 2(5). Through the application of this approach, more active employee participation in the operation of non-union facilities may be promoted outside the constraints of section 8(a)(2).

While it might be argued that the preceding analysis creates an incentive for potential employer abuse of employee rights under the guise of a program which does not constitute a statutory labor organization, such a view ignores the independent constraints of section 8(a)(1).[113] The purpose of section 8(a)(1) is to guarantee employees the

110. *See* note 33 *supra* and accompanying text.

111. *See* note 12 *supra* and accompanying text.

112. The functional approach to section 2(5) labor organizations is defined at text accompanying notes 77-79 *supra*.

113. Section 8(a)(1) provides that it 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 157.

29 U.S.C. § 158(a)(1) (1976 & Supp. III 1979). Section 7 rights are defined as follows:

> 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

right to free choice with respect to whether to engage in concerted activity under the Act. Any program which impairs the exercise of such rights violates section 8(a)(1) even though no statutory labor organization may be involved.[114]

Generally, one might suppose that the operational provision of a statute is likely to afford more flexibility in its application than an associated definition. This may not be the case, however, with respect to section 8(a)(2) when viewed in light of its language and purpose. The following brief analysis of section 8(a)(2) will explore the various efforts at adding flexibility to its application and their realistic utilization in the creation of effective non-adversarial employee participation structures in non-union facilities.

SECTION 8(A)(2): CONSTRUCTING A MORE FLEXIBLE STANDARD FOR EMPLOYER INTERFERENCE AND DOMINATION

Section 8(a)(2) was incorporated into the original provisions of the Wagner Act in 1935 and has remained intact since its enactment.[115] This operational section of the Act makes it unlawful for an employer to interfere with, dominate or support any labor organization. The major purpose of section 8(a)(2) was to assure that every labor organization remained completely free and independent from any employer influence or control.[116] Moreover, financial support of any labor organization by an employer was specifically deemed unlawful.[117] This purpose was originally based on notions of employee ignorance of the collective bargaining process and employee susceptibility to employer control.[118]

The Board has long taken the view that almost any form of employer support of a labor organization constitutes a violation of section 8(a)(2), even when the impact on union operation and representation might be viewed as minimal.[119] In reality, this approach has created a

> 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 as a condition of employment as authorized in section 158(a)(3).

29 U.S.C. § 157 (1976 & Supp. III 1979).

114. *See, e.g.*, Missouri Heel Co., 209 N.L.R.B. 481 (1974); Illinois Marble Co., 167 N.L.R.B. 1012 (1967).

115. 29 U.S.C. § 158(a)(2) (1970). *See* text accompanying note 18 *supra* for the text of section 8(a)(2).

116. *See* C. SUMMERS & H. WELLINGTON, LABOR LAW, 419-20 (1968); S. REP. NO. 573, 74th Cong., 1st Sess. 9-11 (1935). *See also New Standards, supra* note 3, at 514.

117. 29 U.S.C. § 158(a)(2). *See* S. REP. NO. 573, 74th Cong., 1st Sess. 9-11 (1935).

118. *See* Jackson, *supra* note 8, at 819.

119. *See, e.g.*, Gould Pumps, Inc., 196 N.L.R.B. 820, 824 (1977) (provided secretarial assist-

per se rule against any employer assistance to a labor organization.[120]

A line of circuit court of appeals decisions has, however, departed from the Board's *per se* approach to section 8(a)(2) and has allowed a certain degree of employer "cooperation" with employee labor organizations.[121] Where there is no evidence of unlawful motive in the organization's formation or operation, and where employee free choice has not been disturbed, these "cooperation" cases allow some employer support or assistance under section 8(a)(2).[122] This innovative, two-pronged standard is not, however, without problems. Initially, it is not at all clear whether employer motivation should be a legitimate concern under section 8(a)(2). Moreover, even assuming a role for motivation under that section, working with it is complicated by the difficulty in discerning motive and in defining what actually constitutes bad motive.[123] Finally, the second prong of the standard relating to employee free choice is limited by traditional interpretations of section 8(a)(2)'s prohibition against employer domination of, or interference with, any labor organization regardless of employee free choice.[124]

ance); M-W Educ. Corp., 223 N.L.R.B. 495, 497 (1976) (employer merely implanted ideas); Nutone, Inc., 112 N.L.R.B. 1153, 1170 (1955) (use of mimeograph machine); Standard Transformer Co., 97 N.L.R.B. 669, 671 (1951) (supplied refreshments and a place for meetings). A complete list of the various factors that the Board will find indicative of illegal domination, interference or support is found in *New Standards, supra* note 3, at 512.

120. *See* Jackson, *supra* note 8, at 814-18; *New Standards, supra* note 3, at 511.

121. NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); Coppus Eng'r Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955). *But see* NLRB v. Clapper's Mfg., 458 F.2d 414 (3d Cir. 1972); NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

122. The underlying concepts of the "cooperation" approach are discussed in Jackson, *supra* note 8, at 826-33.

123. *Id.* at 832.

124. NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 251 (1939). In *Newport News*, the employer had established, prior to passage of the Act, a plan known as "Representation Employees" to allow employees a voice concerning working conditions and a conduit for presenting grievances. Subsequent to the Act's passage, the plan was amended to bring it within the spirit and the letter of the Act. The significant changes included the elimination of compensation to employee representatives and removal of management's representatives from the plan. Nonetheless, the revised plan was objectionable to the Board for two reasons: any action agreed to by the committee was contingent upon agreement by the company, and the effectiveness of amendments to the committee's articles was dependent upon the company's failure to express its dissatisfaction with the amendment within 15 days. The Board found that the revised plan violated section 8(a)(2) despite findings that labor disputes repeatedly were settled under the plan, and that a majority of the employees, by secret ballot, had indicated their desire that the plan continue in its revised form. Furthermore, the employer had agreed to delete the objectionable elements of the revised plan. *Id.* at 248. The Supreme Court affirmed the Board's order, stating that where an organization existed for ten years and functioned under the joint control of management and employees, the plan must be totally disestablished in order to counteract years of practice and restore freedom of action to the employees. *Id.* at 250. *See also* NLRB v. Grand Foundries, 362 F.2d 702 (8th Cir. 1966) (Section 8(a)(2) was violated when employees requested

The Ninth Circuit's decision in *Hertzka & Knowles v. NLRB*,[125] can be described as the most significant departure from traditional section 8(a)(2) analysis in recent years. In *Hertzka*, the employer, shortly after the union had lost its representative status in a decertification election, solicited suggestions on how to accomplish meaningful management-employee dialogue. An employee proposed a system involving five committees comprised of management personnel and employees, with management being given voting power on some committees.[126] The Ninth Circuit reversed the Board's finding of an unfair labor practice and held that section 8(a)(2) does not outlaw employer cooperation which serves to facilitate employee free choice.[127] The court perceived that the committee structure was created primarily by employees and operated without undue employer influence.[128] Accepting this perception, *Hertzka* is not a radical departure from the section 8(a)(2) goal of maintaining free and independent labor organizations.

It has been suggested that the Ninth Circuit's view of section 8(a)(2) in *Hertzka* may move closer conceptually to the more flexible impact-justification approach utilized in section 8(a)(1) cases.[129] Under this approach, employee free choice becomes the central focus of section 8(a)(2).[130] Several commentators have gone so far as to interpret the section 8(a)(1) prohibition against interference with employee free choice as a blanket restriction on any of the practices particularized in section 8(a)(2).[131] Under this view, sections 8(a)(1) and 8(a)(2) are read synonymously. Traditional interpretations of section 8(a)(2), however, stress that section's additional paternalistic purpose of assuring that

establishment of a committee, even though the court found the committee served a laudatory and useful function.).

125. 503 F.2d at 625. *See* Jackson *supra* note 8, at 829-32.

126. Each committee had a particular zone of competence. The five committees were: (1) Professional Stature Within the Firm; (2) Remuneration for Professional Service; (3) Minimum Standards; (4) Efficiency; and (5) Physical Environment. 503 F.2d at 626 n.2.

127. *Id.* at 625.

128. The committees in *Hertzka* were each composed of five employee representatives and one management representative. The primary purpose of the management representative was to help reduce the long and tedious process of negotiation. *Id.* at 626, 629.

129. *See* Jackson, *supra* note 8, at 829-31.

130. The language of *Hertzka* to some extent supports such a view: "The sum of this is that a § 8(a)(2) finding must rest on a showing that the employee's free choice, either in type of organization or in the assertion of demands, is stifled by the degree of employer involvement at issue." 503 F.2d at 630. Still, the court also emphasized the complete independence of the labor organizations at Hertzka and Knowles from any employer support or influence. *Id.* at 631.

131. *New Standards, supra* note 3, at 510 n.3; Oberer, *The Scienter Factor in Section 8(a)(1) and (3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491, 493 (1967).

every labor organization remains completely free from any employer influence or control.[132]

Nonetheless, these "cooperation" cases reveal a growing concern by various courts of the shortcomings of traditional approaches to employer-employee interaction in non-union facilities. The significance of the various circuit court approaches is, however, limited by the fact that many employee programs in non-union shops are created, structured and funded by employers acting on their own initiative.[133] The presence of such significant employer participation may transcend the bounds of even the most liberal approach to section 8(a)(2). Still, these cases evidence growing judicial recognition of the need for more expanded lawful non-adversarial interaction under section 8(a)(2).

CONCLUSION

The Board's paternalistic view of the purpose and language of section 8(a)(2) inhibits attempts to build flexibility into the treatment of employee participation structures and non-union facilities. Especially where significant employer participation is involved, the approach to section 2(5) suggested here provides an important additional vehicle for the creation of expanded employee participation programs. By recognizing that certain employee activities or functions—such as participating in the management of the workplace—are different from those traditionally associated with labor organization activities, recent interpretations of section 2(5) permit the creation of employee programs that would otherwise be proscribed under the Board's strict view of section 8(a)(2). Thus, the courts' liberal approach to section 8(a)(2) questions, when combined with the Board's recent view of section 2(5), may provide the necessary flexibility for meaningful, non-adversarial interaction in the non-union shop.

132. *See* text accompanying note 111 *supra*.
133. *See* note 43 *supra* and accompanying text.