


Spring 1976

# The West German Model of Codetermination Under Section 8(a) (2) of the NLRA

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## Recommended Citation

Wulff, Erik B. (1976) "The West German Model of Codetermination Under Section 8(a) (2) of the NLRA," *Indiana Law Journal*: Vol. 51 : Iss. 3 , Article 16.

Available at: <http://www.repository.law.indiana.edu/ilj/vol51/iss3/16>

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## The West German Model of Codetermination Under Section 8(a)(2) of the NLRA

Industries in the United States have been experimenting with innovative forms of labor relations in an effort to enhance peaceful industrial relations. Models have been designed to increase employee input into the decisionmaking process and to create more challenging and interesting jobs for workers.<sup>1</sup> Due to the apparent success of West Germany's *Mitbestimmung*, or codetermination, such a system may become attractive to business enterprises in the United States.

Codetermination is a type of corporate structure in which those who provide their services to the corporate entity determine and execute corporate policies equally with those who represent the financial resources.<sup>2</sup> Under this model, parity in the decisionmaking process is sought at the level of the board of directors. This note will discuss the West German model of codetermination, and suggest that the National Labor Relations Act (NLRA)<sup>3</sup> would not pose an impediment to the implementation of a codetermination model by an employer in a non-unionized, American business enterprise.

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<sup>1</sup> See, e.g., Whyte, *Organizations for the Future*, in *THE NEXT TWENTY-FIVE YEARS OF INDUSTRIAL RELATIONS* 129 (G. Somers ed. 1973); 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).

<sup>2</sup> The theoretical foundation of codetermination evolved in the post World War I era, and constitutes a reconciliation between Marxian socialism and capitalism in which equality between owners and workers in controlling the economic system was sought. Beal, *Origins of Codetermination*, 8 *IND. & LAB. REL. REV.* 483, 486-92 (1955); Hartman, *Codetermination in West Germany*, 9 *IND. REL.* 137, 140 (1970); Vagts, *Reforming the "Modern" Corporation: Perspectives from the German*, 80 *HARV. L. REV.* 23, 30 (1966) [hereinafter cited as Vagts]. When codetermination was implemented in the early 1950's an additional rationale for its adoption was that it would guard against the resurgence of Nazism. D. JENKINS, *INDUSTRIAL DEMOCRACY IN EUROPE: THE CHALLENGE AND MANAGEMENT RESPONSES* 31 (1974) [hereinafter cited as JENKINS]; McPherson, *Codetermination: Germany's Move Toward a New Economy*, 5 *IND. & LAB. REL. REV.* 20, 22 (1952). However, this argument has waned and it is no longer viewed as an objective of codetermination. JENKINS at 31; Hartman, *supra*, at 140. Current literature emphasizes the attainment of industrial democracy and corporate social responsibility as the goals of codetermination. See, JENKINS at 10; Blumberg, *Reflections on Proposals for Corporate Reform Through Change in the Composition of the Board of Directors: "Special Interest" or "Public" Directors*, 53 *BOSTON U.L. REV.* 547 (1973); Hartman, *supra* at 140-42; Simitis, *Workers' Participation in the Enterprise—Transcending Company Law?*, 38 *MODERN L. REV.* 1 (1975); Comment, *Codetermination in West Germany*, 51 *ORE. L. REV.* 214, 215, 221 (1971).

<sup>3</sup> The National Labor Relations Act (Wagner Act) is codified at 29 U.S.C. §§ 151-68 (1970).

THE WEST GERMAN MODEL OF CODETERMINATION  
CORPORATE STRUCTURE

As opposed to the American corporation with its single board of directors, German corporations have two boards: the supervisory board, *Aufsichtsrat*, and the managing board, *Vorstand*. At the top of the corporate hierarchy is the supervisory board which is designed to be an intermediary between management and stockholders.<sup>4</sup> It does not conduct the business of the corporation, but has the limited functions of appointing and overseeing the managing board. The actual determination and execution of corporate policy is left to the managing board<sup>5</sup> which consists of three directors, a sales director, a production director, and a labor director,<sup>6</sup> who operate independently in their areas of specialty, and collectively on matters of overall policy.<sup>7</sup>

*Codetermination*

The key to the German model of full codetermination is its provision for equal representation of stockholders and employees on the supervisory board.<sup>8</sup> Thus, of a normal supervisory board of 11 directors, five would be labor representatives.<sup>9</sup> The German Trade Union Federation (*Deutsche Gewerkschaftsbund*, or *DGB*) selects one director, and the industry *DGB*-affiliated union selects another. Another two directors are selected by the Works Council, which itself is directly

<sup>4</sup> Vagts at 50.

<sup>5</sup> *Id.* at 51. However, some major decisions must be approved by the supervisory board. JENKINS at 32.

<sup>6</sup> Beal, *supra* note 2, at 486; McPherson, *supra* note 2, at 22.

<sup>7</sup> Beal, *supra* note 2, at 486. See Vagts at 50. The supervisory board may decide to have more than three managing directors. See McPherson, *Codetermination in Practice*, 8 *IND. & LAB. REL. REV.* 499, 505 (1955).

<sup>8</sup> Full codetermination was enacted in 1951 as a supplement to collective bargaining for firms with more than 1,000 employees in the iron, steel, and coal industries.

The framework of labor relations in West Germany is still based on collective bargaining through unions. This is not necessarily in conflict with codetermination because collective bargaining is at a different level. There is single national union, the German Trade Union Federation (*Deutsche Gewerkschaftsbund* or *DGB*). Each industry has its own *DGB*-affiliated union, and collective bargaining is on an industry-wide basis. McPherson, *supra* note 2, at 23; Vagts at 69. Thus codetermination serves as a supplement to industry-wide collective bargaining since it permits modifications of industry-wide standards which more closely reflect the peculiar needs of a single corporation.

Partial codetermination was enacted in 1952 and exists in all other corporations with more than 500 employees. It merely provides for one-third labor representation on the supervisory board. The labor faction on the supervisory board does not have the right of concurrence in the selection of the labor director on the managing board.

<sup>9</sup> In larger corporations the supervisory board will consist of 15 or 21 directors. With these larger boards, labor constituency is proportionately increased. McPherson, *supra* note 2, at 21 n.2.

elected by the employees.<sup>10</sup> The fifth labor director is selected by the other four. He may not be an employee or union member, and usually is a labor expert or a public figure.<sup>11</sup> Five more directors are elected by the stockholders, and the eleventh director, who is to represent the public interest, is chosen by the two factions.<sup>12</sup> Although the purpose of this eleventh director is to provide a tie-breaking vote, in practice the eleventh director seldom casts the deciding vote, and his function is more aptly described as mediation.<sup>13</sup> In addition to equal representation on the supervisory board, the other key provision of the full codetermination model is that the labor director on the managing board must be approved by the majority of the labor faction on the supervisory board.<sup>14</sup> Thus, in addition to gaining equal participation on the supervisory board, employees have gained the ability to influence the decisions of the labor director of the managing board—the corporate official most closely connected with the corporation's day-to-day labor policies.

### *The Implications of Codetermination*

It is evident from Germany's use of the full codetermination model that the ideal of equal participation in management has not been achieved.<sup>15</sup> There has, however, been established a degree of labor influence over corporate policy. Although the managing board conducts the business of the corporation and has discretion in promoting the corporate interest, the supervisory board can influence corporate policy indirectly by its authority to select the managing board. Since there is parity on the supervisory board, labor theoretically has equal influence over corporate policy.<sup>16</sup>

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<sup>10</sup> One of these directors must be a white collar salaried employee, the other a blue collar worker. JENKINS at 32; McPherson, *supra* note 2, at 21. The works council is similar to a plant-level union and is becoming increasingly influential. JENKINS at 38-41.

<sup>11</sup> Beal, *supra* note 2, at 485.

<sup>12</sup> If the factions cannot agree upon the eleventh director, an elaborate procedure is followed to reconcile the opposing views. Ultimately, if a stalemate remains, the director is directly elected by the stockholders. McPherson, *supra* note 2, at 21-22. Thus, the eleventh director might reflect stockholders interests rather than labor interests.

<sup>13</sup> *Id.* at 68; JENKINS at 36; McPherson, *supra* note 6, at 502-03; Comment, *supra* note 2, at 216.

<sup>14</sup> McPherson, *supra* note 2, at 22; Comment, *supra* note 2, at 216.

<sup>15</sup> See Beal, *supra* note 2, at 497; Simitis, *supra* note 2, at 8.

<sup>16</sup> JENKINS at 33.

However, the ability of labor directors to influence corporate policy from a labor perspective has been questioned. The labor directors are subject to the corporate conflict of interest doctrine, which obligates them to further the corporate interest in the same manner as the stockholder directors. This is said to impede their role as labor representatives. Simitis, *supra* note 2, at 10-12, 14. *But see* Vagts at 38-48, where the corporate conflict of interest doctrine is described as being extremely flexible.

Although the results of full codetermination in West Germany are not conclusive,<sup>17</sup> it is generally conceded that it has had a beneficial impact.<sup>18</sup> Peaceful industrial relations, less manhours lost through strikes, increased industrial morale, better working conditions, better job security, more fringe benefits, and higher wages have all been attributed to full codetermination.<sup>19</sup>

Full codetermination has also established enhanced communications.<sup>20</sup> The stockholder directors receive continuous information on the conditions and concerns of the employees. The labor directors gain access to corporate information at more regular intervals and in greater detail than is obtainable through annual financial statements.<sup>21</sup> Through increased understanding of the operations of the firm, labor is capable of making more realistic demands during contract negotiations.

Problems which were anticipated in the operations of codetermination have not materialized. Constant confrontations between the labor and stockholder factions on the supervisory board have not appeared. Instead, compatibility of interest and a genuine effort to cooperate are frequently found.<sup>22</sup> Indeed, the success of the German experiment with codetermination has led other Western European countries to adopt similar worker participation models,<sup>23</sup> and in light of these developments,

<sup>17</sup> Vagts at 68-69; see JENKINS at 11; Hartman, *supra* note 2, at 142-43.

<sup>18</sup> JENKINS at 32-33, 44; Blumberg, *supra* note 2, at 560; Vagts at 78; Comment, *supra* note 2, at 222. *But see* JENKINS at 34-36.

It has been suggested, however, that the success of German industrial relations is attributable to the general prosperity of the economy rather than codetermination. Codetermination is said not to create greater harmony than a system based solely on collective bargaining during periods of economic instability. Note, *Worker Participation: An Emerging Concept in Europe*, 5 N.Y.U.J. OF INTL. LAW & POLITICS 555, 559 (1972).

<sup>19</sup> Vagts at 70-72.

<sup>20</sup> JENKINS at 32-33; Davis, *Works Councils in the EEC-II*, 124 New L.J. 150, 151 (1974); Vagts at 76. *See* Comment, *supra* note 2, at 218. However, the usefulness of labor directors as a vehicle of communications is questioned due to restrictions on directors in disclosure of non-public corporate information. Simitis, *supra* note 2, at 14.

<sup>21</sup> Comment, *supra* note 2, at 219.

<sup>22</sup> JENKINS at 33-34, 35; Simitis, *supra* note 2, at 9. *See* Vagts at 73. In fact, codetermination is premised on the assumption that owner and worker interests are not incompatible. *See* authorities cited in note 2 *supra*.

On the other hand, partial codetermination has not received the acclaim of full codetermination. Although it provides for a useful communications system as with full codetermination, labor influence is said not to be meaningful. JENKINS at 32. The fact that any unified stand taken by the labor faction can be overridden by the larger stockholder faction has resulted in less incentive to cooperate on the part of the stockholder faction. Sometimes, decisions are made in caucus before the board meeting, and they are merely formalized at the board meeting. Blumberg, *supra* note 2, at 560, 565, 567. The discontent with partial codetermination has led to proposed legislation to extend a modified form of full codetermination to all other industries. JENKINS at 36-38; *See* Comment, *supra* note 2, at 222.

<sup>23</sup> *See* JENKINS; Blumberg, *supra* note 2, at 560.

the desirability and practicality of adopting a codetermination model in the United States should be examined.

### *Codetermination in the United States*

The NLRA reflects two premises: the existence of an inherent conflict between employers and employees, and an inequality of bargaining power between a single employee and his employer. The Act attempts to alleviate this inequality by encouraging collective bargaining and protecting concerted activities directed at organizing workers. Employee independence in these activities has been ensured by prohibiting employer involvement, which has resulted in limiting industrial communications to collective bargaining with a recognized union.<sup>24</sup> In such a setting, codetermination as a substitute for collective bargaining could enhance industrial communication and combat worker alienation from the interests of the enterprise.<sup>25</sup>

However, implementation of codetermination in the United States would certainly be viewed with apprehension by American labor unions,<sup>26</sup> since collective bargaining has evolved into the institution for solving labor relations problems in the United States.<sup>27</sup> Implementing codetermination would diminish the role of collective bargaining, and therefore such proposals lack union support.<sup>28</sup> Thus, legislative endorsement of codetermination seems speculative. Realistically, codetermination could only be attained by voluntary implementation by a non-union employer.<sup>29</sup>

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<sup>24</sup> The underlying premise of the NLRA, the existence of an inherent conflict between employees and employers and an inequality of bargaining power between a single employee and an employer, has led to such close scrutiny of employer activities that industrial communications is limited to collective bargaining with a recognized union. See, e.g., *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954). However, more recently this has become a less significant problem. See, e.g., *Federal-Mogul v. NLRB*, 394 F.2d 915 (6th Cir. 1968).

<sup>25</sup> Blumberg, *supra* note 2, at 570. Codetermination may reverse the trend of employee hostility and apathy by providing the employees with an input to corporate decision-making. With the knowledge that their interests are continuously and directly voiced at the top of the corporate hierarchy, employees will have less reason to believe that management is unresponsive to their needs. See, *McPherson*, *supra* note 7, at 511-12.

<sup>26</sup> Vagts at 77-78.

<sup>27</sup> *Id.* Collective bargaining in West Germany is at an industry-wide level, rather than at the individual employer level as in the United States. See note 8 *supra*.

<sup>28</sup> Blumberg, *supra* note 2, at 570; Vagts, at 77-78.

<sup>29</sup> Vagts at 77. If codetermination were established in a non-union setting, subsequent union attempts to organize the employees could have difficulty in promoting union membership since the employees would already have a device within the corporate structure to influence corporate policy.

Voluntary implementation of codetermination by a unionized employer would create the same problems posed by legislative endorsement. Codetermination would compete with collective bargaining in conferring employee influence, and consequently would probably meet with hostility from the union. The union would not be opposed to

At first glance, it may appear unrealistic to expect a non-union employer to consider implementing codetermination. However, in a situation where unionization seems imminent, the employer could confer employee influence over corporate policy through codetermination as an alternative to unionization. Although unionization and codetermination involve similar concessions by the employer, the adversary stance of collective bargaining would be avoided. Employee influence would be achieved by a framework which would promote cooperation, enhance communications, and induce a better understanding between employers and employees. Thus, in light of the potential advantages of employer implementation of codetermination in a non-union setting, this note will examine whether the restrictions of the NLRA would be violated by such a course of action.<sup>30</sup>

#### CODETERMINATION AND THE NLRA

In examining whether the NLRA would pose barriers to the implementation of codetermination by an employer, the initial question is whether the codetermination framework would merit the same protection under the NLRA as other labor organizations. More specifically, the inquiry under the NLRA would be whether a codetermination board constitutes a labor organization under Section 2(5)<sup>31</sup> of the Act. If this inquiry is answered in the affirmative, the next question would be whether employer implementation of codetermination constitutes an unfair labor practice under Section 8(a)(2)<sup>32</sup> of the Act, which prohibits employer interference with the activities of a labor organization.

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codetermination if it could select the labor faction on the board, but obviously no employer would support such a proposal.

<sup>30</sup>Questions concerning the feasibility of codetermination under corporate law is beyond the scope of this note. Problems may arise concerning the permissibility of a dual-bond structure, the feasibility of full codetermination in light of board quorum requirements, or the necessity of issuing stock to employees. Yet codetermination has been suggested as a remedy to problems in the corporate field. Blumberg, *supra*, note 2.

<sup>31</sup> 29 U.S.C. § 152(5) (1970).

<sup>32</sup> 29 U.S.C. § 152(a)(2) (1970). If Section 8(a)(2) is violated, Section 8(a)(1) is also violated. See, e.g., *NLRB v. American Furnace Co.*, 158 F.2d 376, 378 (7th Cir., 1946).

Section 8(a)(1) of the Act is a blanket provision supplemented by the four succeeding unfair labor practices, which spell out with particularity some of the most prevalent abuses. See, *Hearings on H.R. 6288 Before the House Committee on Labor*, 74th Cong., 1st Sess. 13 (1935); S. REP. No. 573, 74th Cong., 1st Sess. 9 (1935).

For a discussion of the interrelationship between Section 8(a)(1) and the other unfair labor practices, see Oberer, *The Scierter Factor in Sections 8(a)(1) and 8(a)(3) of the Labor Act: Of Balancing, Hostile Motive, Dogs and Tails*, 52 CORNELL L.Q. 491 (1967); Getman, *Section 8(a)(3) of the NLRA and the Effort to Insulate Free Employee Choice*, 32 U. OF CHI. L. REV. 735, 736 (1965).

Regardless of whether a codetermination board constitutes a labor organization, employer implementation of codetermination may violate Section 8(a)(1) independently of Section 8(a)(2). This inquiry is beyond the scope of this note.

If the formation of a codetermination board by an employer constitutes a Section 8(a)(2) violation, the National Labor Relations Board (NLRB) may render a disestablishment order.<sup>33</sup>

### Section 2(5)

Section 2(5) provides that:

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

This provision, consistent with legislative intent,<sup>34</sup> has been interpreted broadly.<sup>35</sup> The courts have not been very articulate in making section 2(5) determinations, and the decisions have not developed extra-statutory guidelines to facilitate this determination.<sup>36</sup> For the sake of conceptual clarity, the definition of a "labor organization" can be divided into three requirements:

- (1) a structural requirement,
- (2) a subject-matter requirement, and
- (3) a functional requirement.<sup>37</sup>

If a codetermination board does not meet each of these, it would not constitute a "labor organization."

Finally, because of the unique structure of the codetermination board, a meaningful analysis under section 2(5) requires a two-tiered analysis. First, one must ask whether the entire codetermination board constitutes a labor organization, and second, whether the labor faction of the board as a separate entity constitutes a labor organization.

#### 1. Structural Requirement

The structural requirement is met by "an organization of any kind . . . in which employees participate . . ." Two inquiries are presented in determining whether codetermination would fulfill the structural requirement. The first inquiry is the degree of formality and regularity

<sup>33</sup> Disestablishment is the usual remedy where the Board finds an organization dominated by the employer. In contrast, where the Board finds that the employer's conduct only constitutes support, it will merely enjoin the prohibited conduct. As to what constitutes support or domination, see note 60, *infra*.

<sup>34</sup> See S. REP. No. 573, 74th Cong., 1st Sess. 7 (1935).

<sup>35</sup> *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

<sup>36</sup> See, e.g., *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971); *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958); *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir.), *cert. denied*, 348 U.S. 964 (1954); *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238 (1st Cir. 1953); *NLRB v. American Furnace Co.*, 158 F.2d 376 (7th Cir. 1946).

<sup>37</sup> This approach was taken in Note, *supra* note 1.



necessary for a group of employees to be considered a labor organization. Obviously an employee group which has a charter, by-laws, and officers is considered a labor organization.<sup>38</sup> Moreover, informal employee groups with no formal structure, constitution, by-laws, officers, or dues collections have also been considered labor organizations in the light of the policy of defining a "labor organization" broadly.<sup>39</sup>

The second inquiry is how much employee participation is necessary for an organization to meet the structural requirement.<sup>40</sup> In *Local 28, Masters, Mates, and Pilots v. NLRB*<sup>41</sup> the Court of Appeals for the District of Columbia determined that there must be "substantial and meaningful participation by employees." There, a 1½ percent constituency of the entire organization with full membership rights was considered "substantial and meaningful."

Focusing on the entire codetermination board, there is no doubt that the requisite degree of formality would be met, since a corporation's board derives its existence from a corporate charter, promulgates by-laws, and has officers. "Substantial and meaningful participation" would be fulfilled since labor constituency on the board would be ½ and labor directors would be subject to the same rights and duties as other board members.

The labor faction as a separate entity would also fulfill these requirements. Participation obviously would be "substantial and meaningful," and the formality of the organization would again be derived from the board rules. Even if the labor faction were not subject to the same formal constraints as the rest of the board, it would still be deemed a labor organization. Therefore, both the entire codetermination board and the labor faction of the board as a separate entity fulfill the structural requirement of the term "labor organization."

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<sup>38</sup> *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480 (7th Cir. 1946).

<sup>39</sup> "Such loosely-formed committees . . . constitute labor organizations within the meaning of the Act." *NLRB v. American Furnace Co.*, 158 F.2d 376, 378 (7th Cir. 1946). See also, e.g., *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971) (no formal organizational structure, random selection of employees); *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958) (no formal organization, no officers, no dues, no by-laws, rotation of employee participation on the committee); *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954) (lack of formal structure, monthly meetings of the president of the firm with all the employees, question and answer period); *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953) (no formal organization, by-laws, dues, or treasury).

<sup>40</sup> In deciding whether employee committees are labor organizations under Sections 2(5) and 8(a)(2) the courts have not made a distinction where there are also management representatives on the committee. See, e.g., *NLRB v. Standard Coil Prods. Co.*, 224 F.2d 465 (1st Cir. 1955).

<sup>41</sup> 52 CCH Lab. Cas. ¶ 16, 518 (D.C. Cir. 1965).

## 2. *Subject Matter Requirement*

The subject matter requirement of the definition of a "labor organization" is met if the organization deals with the employer "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The Supreme Court in *NLRA v. Cabot Carbon Co.*<sup>42</sup> indicated that an organization dealing with the employer on any one of these subjects would bring the organization within the statutory definition of a labor organization.

In the conventional single board structure, the extent of board involvement in the decisionmaking process is in part dependent upon the size of the corporation. In a small firm, especially one which is family owned, the board of directors tends to be concerned with the daily operations of the corporation, and would undoubtedly discuss matters contained in section 2(5). In a large corporation, the board tends to give a broad framework of policies to management, and is less likely to become involved in the decisionmaking process itself. Nevertheless, the board might give directives concerning labor disputes and other matters contained in section 2(5).

Whether codetermination would lead to the increasing involvement of the codetermination board in the daily operations of the corporation, and in particular in the matters contained in section 2(5), is a factual question which will have to be determined when such a case arises. With a dual board structure it is conceivable that the supervisory board will be so far removed from the daily operations of the corporation that labor matters will not be discussed. In West Germany, however, codetermination has had the contrary effect, and labor matters are dealt with on the supervisory board.<sup>43</sup> Therefore, it may be concluded that matters contained in section 2(5) would probably be discussed on a codetermination board, and thus both the entire codetermination board and the labor faction as a separate entity would fulfill the subject matter requirement of the definition of a "labor organization."

## 3. *Functional Requirement*

An organization "which exists for the purpose, in whole or in part of dealing with employers" fulfills the functional requirement of the definition of a "labor organization." In evaluating whether the entire codetermination board would meet the functional requirement of a labor organization, a conceptual difficulty arises in that a board of

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<sup>42</sup> 360 U.S. 203, 213 (1959).

<sup>43</sup> See Vagts at 77-78.

directors is generally considered the ultimate agent of the employer.<sup>44</sup> If the board is to be an employer and a labor organization simultaneously, the inquiry into the functional requirement would be in terms of whether the board is dealing with itself.<sup>45</sup> Furthermore, an analysis under the section of the NLRA which defines employer, section 2(2)<sup>46</sup> leads to the conclusion that if the entire codetermination board is deemed a labor organization, the board can no longer be considered an employer. Applying section 2(2) to codetermination in this manner creates the anomaly of having an organization which employs people, and yet is devoid of an employer for the purposes of the NLRA.<sup>47</sup>

These problems can be circumvented by examining whether the labor faction as a separate entity fulfills the functional requirement. Thus, the stockholder faction can be considered the employer, and section 2(2) no longer poses a conceptual barrier. The inquiry concerning the functional requirement would then be whether the labor faction is "dealing with" the stockholder faction.

In *NLRB v. Jas. H. Mathews & Co.*,<sup>48</sup> the Court of Appeals for the Third Circuit was confronted with delineating the scope of the term "dealing with." The employer had established a Junior Board, consisting of workers, which made recommendations to the employer concerning matters contained in the subject matter requirement. The employer argued that the Junior Board did not demand, or negotiate, but merely

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<sup>44</sup> See, e.g., IND. CODE § 23-1-2-11(a) (Burns 1971): "The business of every corporation shall be managed by a board of directors."; DEL. CODE ANN. tit. 8, § 141 (1975): "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

<sup>45</sup> One may define the employer by focusing on the stockholders or on management. However, stockholder power to affect corporation policy is extremely limited, and therefore cannot realistically be viewed as the employer. A focus on management as the employer encounters even worse conceptual problems, since management would be the employer dealing with the board of directors as the labor organization.

<sup>46</sup> 29 U.S.C. § 152(2) (1970):

The term employer includes any person acting as an agent of an employer, directly or indirectly, but shall not include . . . any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

<sup>47</sup> The exception when a labor organization acts in the capacity of an employer could arguably be used to fill the void. This provision is designed to permit union staffs to organize and bargain collectively with the union as their employer. See, e.g., *Office Employees Local 11 v. NLRB*, 353 U.S. 313 (1957). However, in the union staff situation, the employment relationship between the staff and the union is distinct from the employment relationship between the employees which the union represents and the company. In this instance, there is only one employment relationship, and therefore the exception would not seem to be applicable. Furthermore, it creates conceptual problems in that the employer and the labor organization are the same body. The inquiry into the functional requirement would be whether the codetermination board deals with itself.

<sup>48</sup> 156 F.2d 706 (3d Cir. 1946).

made recommendations, and therefore it was not "dealing with" the employer. The court responded:

Respondents say that this Junior Board did not deal, it only recommended and that final decision was with management. Final decision is always with management, although when a claim is made by a well-organized, good-sized union, management is doubtless more strongly influenced in its decision than it would be by a recommendation of a board which it, itself, has selected and which has been provided with no fighting arms.<sup>49</sup>

In *NLRB v. Cabot Carbon Co.*,<sup>50</sup> the Supreme Court was faced with the same argument. The employer had established a committee consisting of employees, which would discuss and make recommendations concerning working conditions and grievances. Again, the employer urged that discussions and recommendations did not fall within the parameters of "dealing with," because the final decision remained with the employer. The Supreme Court responded:

But this is true of all such "dealing," whether with an independent or company-dominated "labor organization." The principle distinction lies in the unfettered power of the former to insist upon its requests.<sup>51</sup>

The basic premise in each decision is that there is no functional difference between a recognized union bargaining for a contract and an employee committee making requests and recommendations. In both instances, the final decision rests with the employer and the power of the employee representative is limited to requesting, although there may be significant differences in the persuasiveness and enforceability of the requests.

Common usage of the term "dealing with" could lead one to conclude that under full codetermination the labor faction is dealing with the stockholder faction since they are equally represented. However, in delineating the scope of "dealing with," the courts premised the analysis on the fact that the final decision would always rest with the employer. On this basis the interaction between the labor faction and the stockholder faction can be distinguished. The labor faction does not recommend certain action and then await the decision of the stockholder faction; rather, it makes the decision together with the stockholder faction. With equal representation on the board, there will be no majority vote and therefore no decision, unless representa-

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<sup>49</sup> *Id.* at 708.

<sup>50</sup> 360 U.S. 203 (1959).

<sup>51</sup> *Id.* at 214.

tives of either faction are swayed to accept the other's point of view. Unless a decision is reached the status quo remains, and the stockholder faction cannot unilaterally implement its point of view. In the case of an additional board member elected by both factions, the situation in a deadlock would resemble arbitration. Neither faction can break the deadlock, and the decision is finally made by a person who has been mutually entrusted with the power to make an equitable decision.<sup>52</sup>

Applying this distinction, it is arguable that the labor faction on a full codetermination board does not fulfill the functional requirement.<sup>53</sup> The NLRA intended to bring within the parameters of the definition of a "labor organization" all organizations which have the purpose of promoting employee interests, so as to subject such organizations to the protection of section 8(a)(2). The protection against employer interference was deemed necessary due to the inherently coercive nature of the employment relationship.<sup>54</sup> In this light, it can be argued that a codetermination board has no need for special protection, since the employer no longer has unfettered discretion with respect to corporate policy, and more particularly subject matters contained in section 2(5). Policies cannot be developed unless the labor faction acquiesces in the proposals. Therefore, the inherently coercive nature of the employment relationship no longer exists, and a full codetermination board could be deemed not to be a labor organization.

This argument has merit where codetermination has been established irrevocably such as by governmental compulsion. However, where codetermination is voluntarily established by the employer, his discretion may be fettered in the particular decision at issue, but his discretion is essentially still unfettered due to the power to dissolve the codetermination board if the labor faction's views are repugnant to the stockholder interests. Thus, the inherently coercive nature of the em-

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<sup>52</sup> Under partial codetermination with minority employee representation on the board, the stockholder faction could always obtain a majority vote on issues. If a simple majority vote is required for a binding decision, the situation would resemble the conventional employer-employee relationship: the labor faction uses its power of persuasion to recommend action but the final decision will be made by the stockholder faction. Such a relationship would fall squarely within the *Cabot Carbon* concept of "dealing with."

However, corporate by-laws regarding voting requirements may provide for a 2/3 or 3/4 majority on matters which fall within the subject-matter requirement under Section 2(5). Where the stockholder faction cannot achieve a decision without swaying at least one labor board member, it cannot be said that the ultimate decision rests with the stockholder faction.

<sup>53</sup> This argument is also applicable to the partial codetermination with modified voting requirements alternative posed in note 51, *supra*.

<sup>54</sup> "Activities, innocuous and without significance, as between two individuals economically independent of each other or of equal economic strength, assume enormous significance and heighten to proportions of coercion when engaged in by the employer in his relationship with his employees." 3 N.L.R.B. ANN. REP. 125 (1939).

ployment relationship still exists due to the possible threat of dispossessing the employees of the privilege of board membership. Therefore, it would be difficult to argue persuasively that the interaction under full codetermination does not fall within the scope of "dealing with".<sup>55</sup>

In conclusion, the labor faction of the codetermination board fulfills the structural and subject matter requirements and probably also fulfills the functional requirement of the definition of "labor organization." In the event that the labor faction is found to be a labor organization, there must be a further inquiry to determine whether there has been a violation of section 8(a)(2).

### *Section 8(a)(2)*

Section 8(a)(2)<sup>56</sup> provides that it is an unfair labor practice for an employer:

To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

The specific evil which this section is designed to eliminate is the "company union," a device used by the employer to thwart genuine collective bargaining by dominating the union.<sup>57</sup>

Under this section the courts have strictly scrutinized employer involvement in activities of labor organizations on the basis of a subjective test from the perspective of the employee:

[T]he question is whether the organization exists as the result of a choice freely made by the employees, in their own interests, and without regard to the desires of their employer, or whether the employees formed and supported the organization, rather than some other, because they knew their employer desired it and feared the consequences if they did not.<sup>58</sup>

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<sup>55</sup> Moreover, the concurrent development of Section 2(5) and Section 8(a)(2) would diminish the persuasiveness of this argument. Although the courts more recently have permitted employers to become involved in employee activities where the motivation is friendly cooperation, the change in policy has been reflected in the analysis under Section 8(a)(2), and not in limiting the definition of "labor organization" under Section 2(5). All organizations which promote employee interests are still considered labor organizations, but are subject to less rigorous protection under Section 8(a)(2).

<sup>56</sup> 29 U.S.C. § 158(a)(2) (1970).

<sup>57</sup> S. REP. No. 573, 74th Cong., 1st Sess. 9-11 (1935); H.R. REP. No. 1147, 74th Cong., 1st Sess. 17-19 (1935).

<sup>58</sup> *NLRB v. Wemyss*, 212 F.2d 465, 471 (9th Cir. 1954). The subjective test was first explicitly acknowledged in *NLRB v. Thompson Prods., Inc.*, 130 F.2d 363 (6th Cir. 1942). The court derived this test from *NLRB v. Falk Corp.*, 308 U.S. 453 (1940), *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941), and *International Ass'n of Machinists v. NLRB*, 311 U.S. 72 (1940), and quoted *International Ass'n of Machinists*: "[W]here the employees would have just cause to believe that the solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding

Pursuant to this test, which was designed to insure the development of truly independent unions, any employer support, no matter how meager<sup>59</sup> and regardless of the employer's good faith,<sup>60</sup> was prohibited.<sup>61</sup> This test is based upon a belief in an irreconcilable conflict of interests between the employer and employee,<sup>62</sup> which leads to the conclusion that the only reason an employer would interfere with his employees' representative organization would be to further his own interests and thus defeat the best interests of his employees.<sup>63</sup>

However, this assumption of irreconcilable conflict is of questionable validity in the contemporary employment relationship. The working class—managerial class distinction has faded, and American workers perceive themselves as middle-class citizens with specialized occupational ideologies.<sup>64</sup> Consequently, the idea that the NLRA must have contemplated a permissible range of industrial cooperation has emerged.<sup>65</sup>

This change in attitude has resulted in a judicial approach which encourages cooperation between management and labor. The forerunner of this group of decisions, *Chicago Rawhide Manufacturing Co. v. NLRB*,<sup>66</sup> indicated that cooperation was the primary purpose of the

that they did not have the complete and unhampered freedom of choice which the Act contemplates." 311 U.S. at 80.

<sup>59</sup> See, e.g., *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480, 482 (7th Cir. 1946).

<sup>60</sup> See, e.g., *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251 (1939).

<sup>61</sup> Cf. 3 NLRB Ann. Rep. 125-26 (1939). The Board makes a distinction between dominating and supporting in formulating the appropriate remedy. See, e.g., *Carpenter Steel Co.*, 76 NLRB 670, 673 (1948). This distinction has been justified on the basis that "the free choice by employees of an agent capable of acting as their true representative, in the case of a dominated union, is improbable under any circumstances, while the free choice of an assisted but undominated union, capable of acting as their true representative, is a reasonable possibility after the effects of the employer's unfair labor practices have been dissipated," *NLRB v. UMW*, 355 U.S. 453, 458 (1958). Eventually the lengths to which the NLRB would go to find interference invoked criticism by the Courts of Appeals. See, e.g., *NLRB v. Brown Co.*, 160 F.2d 449 (1st Cir. 1947); *NLRB v. Brown-Brockmeyer Corp.*, 143 F.2d 537 (6th Cir. 1944); *NLRB v. Clinton Woolen Mfg. Co.*, 141 F.2d 753 (6th Cir. 1944); *NLRB v. Standard Oil Co.*, 138 F.2d 885 (2d Cir. 1943); *Wilson & Co. v. NLRB*, 126 F.2d 114 (7th Cir. 1942).

<sup>62</sup> Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 515 (1973).

<sup>63</sup> See Note, *New Standard for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973).

<sup>64</sup> Ross, *Labor Organizations and the Labor Movement in Advanced Industrial Society*, 50 VA. L. REV. 1359, 1379 (1964).

<sup>65</sup> *NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting). Feldman & Steinberg, *Employee-Management Committees and the Labor Management Relations Act of 1947*, 35 TUL. L. REV. 365 (1961). In addition, the philosophy behind the 1947 amendments to the NLRA was said to decrease the emphasis on encouraging collective bargaining. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274 (1948); Petro, *Labor Relations Law*, 35 N.Y.U.L. REV. 733, 765 (1960); See also, Note, *Section 8(a)(2): Employer Assistance to Plan Unions and Committees*, 9 STAN. L. REV. 351 (1957).

<sup>66</sup> 221 F.2d 165 (7th Cir. 1955).

NLRA. However, the decisions subsequent to *Chicago Rawhide* reflect a state of confusion in which it is difficult to discern a judicially-accepted conceptual framework.<sup>67</sup> There are two factors which contribute to this confusion. First, the courts have been unable to reconcile the overlap between the strict "hands off" approach and the new cooperation approach, resulting in uncertainty as to which policy is to be emphasized.<sup>68</sup> Second, every case is determined upon its own facts, and elements which are deemed to show illegal domination in one instance may, in another setting, be considered entirely proper.<sup>69</sup>

Out of this quagmire there have emerged three considerations which are important to the current section 8(a)(2) interpretation. First, did the employer's activities constitute actual or merely potential interference? In determining whether the employee committee was dominated and supported by the employer, the court in *Chicago Rawhide* stated:

Words and actions which might dominate the employees in their choice of a bargaining agent do not constitute domination proscribed by the Act unless the employees are actually dominated. The employer-employee relationship itself offers many possibilities for domination which is one of the reasons for the original enactment of the [NLRA], but *actual domination* must be shown before a violation is established.<sup>70</sup>

The Board found the following to be indicia of domination and support: the immediate acceptance of the committee by the employer without inquiry as to its representation status; the unrestricted, although unexercised, power to lay off or transfer the committee members; permitting elections on company time and premises; employer supervision of election notices on company bulletin boards; permitting the committee to transact business on company premises; and allowing the second step of the grievance process on company time without deduction of pay. The court reasoned that:

These acts do no more than evidence the presence of potential means for interference and support, a possibility that is always present to some degree in an employer-employee relationship. But, without evidence of the realization of that potential, they do not furnish a substantial factual basis for an unfair labor practice finding.<sup>71</sup>

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<sup>67</sup> Compare the Section 8(a)(2) analyses in Note, *supra* note 61, with Note, *supra* note 1.

<sup>68</sup> Cf. 47 VA. L. REV. 1092, 1097 (1961).

<sup>69</sup> Compare, e.g., NLRB v. Thompson-Ramo Woolridge, Inc., 305 F.2d 807 (7th Cir. 1962) with NLRB v. Post Publ. Co., 311 F.2d 565 (7th Cir. 1962) and *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

<sup>70</sup> 221 F.2d 165, 167-68 (7th Cir. 1955) (emphasis in original).

<sup>71</sup> *Id.* at 170.



Second, did the employer's involvement affect the employees' freedom of choice? This is essentially the remnant of the subjective test. In *Chicago Rawhide*, the court indicated that the subjective test was still to be applied.<sup>72</sup> However, the court never explained how the subjective test, which is the tool for enforcing the rigid "hands off" approach, fits into the new approach of encouraging cooperation. Yet it was clear that indicia of domination under the old subjective test would no longer be indicia of domination under an approach designed to foster cooperation. Eventually, the Court of Appeals for the Fifth Circuit in *NLRB v. Keller Ladder Southern, Inc.*,<sup>73</sup> discussed the extent of the continuing viability of the subjective test. The court indicated that the right to be protected is the guarantee of complete and unhampered freedom of choice by the employees in their selection of a bargaining representative.

This right, on the other hand, as valuable as it is, must be considered in context of the policy of the Act which fosters cooperation between employers, employees and labor organizations. This policy necessarily envisions a balance to the extent that the rights of all are recognized and safeguarded to the maximum degree possible. So long as the acts of cooperation do not interfere with the freedom of choice of the employees, there is no violation of the Act.<sup>74</sup>

The Court of Appeals for the Ninth Circuit further explained the subjective test in *Hertzka & Knowles v. NLRB*:<sup>75</sup>

We indicated that the employer must be shown to have interfered with the 'freedom of choice' of the employees . . . . The sum of this is that a Section 8(a)(2) finding must rest on a showing that the employees' free choice, either in type of organization or in assertion of demands, is stifled by the degree of employer involvement at issue . . . .<sup>76</sup>

Third, did the employer's involvement stem from an intent to coerce or improperly influence the employees' free choice? In *Chicago Rawhide*, the Board found that permitting the employee committees to meet on company property during working hours constituted a section 8(a)(2) violation. The court responded by stating:

The fact that the Company did not know that a few employees were attending meetings on company time, but did put a stop to the practice as soon as it was discovered, shows that the Company was not

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<sup>72</sup> *Id.* at 168.

<sup>73</sup> 405 F.2d 663 (5th Cir. 1968).

<sup>74</sup> *Id.* at 667.

<sup>75</sup> 503 F.2d 625 (9th Cir. 1974).

<sup>76</sup> *Id.* at 630.

intending, by permitting this practice, to coerce or influence the employees' choice of bargaining representative.<sup>77</sup>

In summary, the use of these three criteria signal a shift in labor policy by the courts. Under the old policy, which stressed the importance of independent employee organizational activity, the courts closely scrutinized any employer involvement in the organizational activity. Focusing on the impact that the employer involvement had on the employees was an effective means to this end. With the current emphasis on encouraging industrial cooperation, this narrow outlook is inadequate, and a broader view in which all the interests are considered is necessary. By broadening the inquiry into the three factors discussed above, employee interests are not the only considerations which dictate unlawful interference. An approach wherein employer interests are also considered is better suited to effectuate the new policy and results in a range of permissible employer involvement.<sup>78</sup>

#### CODETERMINATION UNDER SECTION 8(a)(2)

Determining whether the implementation of codetermination would violate section 8(a)(2) is difficult due to the lack of predictability in the current interpretation of section 8(a)(2). In addition, the question of codetermination in the United States is still embryonic,<sup>79</sup> and the section 8(a)(2) outcome is highly dependent on the total factual situation. Therefore the most probable scenario for the implementation of codetermination will be examined.

The strongest case for not finding an 8(a)(2) violation is one in which the employees initiate the idea of codetermination, and demand from the employer that employee representatives be allowed to attend and vote at board meetings. If the proposal is accepted by the employer and the employees maintain their independence in electing the representatives, and the representatives maintain their independence in their board dealings, there should be no section 8(a)(2) violation. Under similar circumstances, employee committees have been held not to contravene section 8(a)(2).<sup>80</sup> The formation and administration in this example are achieved by the employees' unfettered free choice and

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<sup>77</sup>221 F.2d 165, 170 (7th Cir. 1955). Subsequent cases have analyzed intent in terms of anti-union bias. See *Utrad Corp. v. NLRB*, 454 F.2d 520 (7th Cir. 1971); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *NLRB v. Post Publ. Co.*, 311 F.2d 565 (7th Cir. 1962).

<sup>78</sup>*Cf. NLRB v. Keller Ladder Southern, Inc.*, 405 F.2d 663 (5th Cir. 1968).

<sup>79</sup>Blumberg, *supra* note 2, at 563.

<sup>80</sup>*Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974); *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1st Cir. 1964). *Cf. NLRB v. Magic Slacks, Inc.*, 314 F.2d 844 (7th Cir. 1963); *Hotpoint Co. v. NLRB*, 289 F.2d 683 (7th Cir. 1961).

without any improper intent by the employer. There is implicit control in that the employer may veto the election of undesirable employees by their transfer or discharge, but unless the employer actually does so, this constitutes control which is inherent in the employment relationship and should be considered potential rather than actual control.

However, this is a highly unrealistic set of facts, since it is unlikely that employees would demand board representation rather than a union unless they knew beforehand that the employer would acquiesce in or actively support the proposal. A more probable set of facts is one in which the employer proposes to implement codetermination and the employees acquiesce in the proposal. The employer would execute the plan but would not attempt to coerce the employees' choice of representatives. In this situation it is clear that the formation of the organization would have been dominated by the employer, since the employer initiated the plan and implemented it.<sup>81</sup> The usual remedy for employer domination of the formation of a labor organization is the disestablishment of the organization.<sup>82</sup> However, if subsequent to the employer-dominated formation the labor organization functions independently, disestablishment may be considered improper.<sup>83</sup> In determining whether the employer in this instance is dominating the administration of the labor organization, the employer's motive and the employees' satisfaction with the labor organization become decisive factors.<sup>84</sup> If the employer has a history of anti-union bias and code-

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<sup>81</sup> See *International Union of United Brewery Workers v. NLRB*, 298 F.2d 297, 299 (D.C. Cir. 1961). The employer initiated the idea of an independent union, indicating that he would pay for attorney's fees for the formation of the union. He eventually had his attorney write a collective bargaining agreement, and submitted it to the employees to sign. This was considered domination of the formation of the labor organization. See also *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169, 173 (3d Cir. 1962).

<sup>82</sup> See, e.g., *Buitoni Foods Corp.*, 126 N.L.R.B. 767 (1960), *enforced*, 298 F.2d 169 (3d Cir. 1962). Even if the six month statute of limitations of Section 10(b) has expired on the charge of a dominated formation, employer domination of the formation sheds light on the lack of independent administration of the labor organization and may still lead to a disestablishment order. *Utrad Corp.*, 185 N.L.R.B. 434 (1970), *modified*, 454 F.2d 520 (7th Cir. 1972); *Ampex Corp.*, 168 N.L.R.B. 742 (1967), *modified*, 442 F.2d 82 (7th Cir. 1971).

If the NLRB finds that the employer's involvement only amounts to support or interference, a cease and desist order is given rather than a disestablishment order. See authorities cited in note 60 *supra*.

<sup>83</sup> *International Union of United Brewery Workers v. NLRB*, 298 F.2d 297 (D.C. Cir. 1961). However, if the formation and administration are both dominated, so that the labor organization does not function independently at the time of the NLRB inquiry, a disestablishment order is undoubtedly justified. See, e.g., *Schwarzenbach-Huber Co.*, 170 N.L.R.B. 1532 (1968), *modified*, 408 F.2d 236 (2d Cir. 1969); *Ampex Corp.*, 168 N.L.R.B. 742 (1967).

<sup>84</sup> See *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *NLRB v. Coca-Cola Bottling Co.*, 333 F.2d 181 (7th Cir. 1964). *But see* *NLRB v. Reed Rolled Thread Die Co.*, 432 F.2d 70 (1st Cir. 1970).

termination is implemented at a time of organizational activity by a union, the court might reasonably infer an improper motive in the establishment of codetermination.<sup>85</sup> On the other hand, if the employer has no record of anti-union bias, the courts should be less willing to find a violation.<sup>86</sup> If the employees' preference for representative organization was not affected,<sup>87</sup> and they are satisfied with a codetermination board,<sup>88</sup> this should also make the court less willing to find a violation.

### CONCLUSION

The West German model of codetermination results in increased labor influence in the corporate structure, but not to the extent of equal participation in management. It provides for enhanced communications and an element of employee control over the corporate policymakers, and as such may help solve some of the industrial woes in the United States. Since legislative implementation is unlikely at this time, codetermination would have to be achieved through voluntary implementation, which creates the problem of compliance with the labor laws.

In analyzing codetermination under the NLRA, it may be concluded that the labor faction on the codetermination board would constitute a labor organization. It remains unclear whether employer implementation of codetermination would violate section 8(a)(2) due to the current unsettled interpretation of that section. The trend is to permit cooperation between employers and employees, and implementation of codetermination for their mutual benefits should be permissible.

ERIK B. WULFF

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<sup>85</sup> See, e.g., *International Union of United Brewery Workers v. NLRB*, 298 F.2d 297, 299 (D.C. Cir. 1961); *Utrad Corp. v. NLRB*, 454 F.2d 520, 522 (7th Cir. 1971).

<sup>86</sup> Cf. *NLRB v. Newman-Green, Inc.*, 401 F.2d 1 (7th Cir. 1968); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967); *NLRB v. Post Publ. Co.*, 311 F.2d 565, 569 (7th Cir. 1962).

<sup>87</sup> *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974).

<sup>88</sup> *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967).