

Spring 1974

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Recommended Citation

Macey, Barry A. (1974) "Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?," *Indiana Law Journal*: Vol. 49 : Iss. 3 , Article 9.

Available at: <http://www.repository.law.indiana.edu/ilj/vol49/iss3/9>

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DOES EMPLOYER IMPLEMENTATION OF EMPLOYEE PRODUCTION TEAMS VIOLATE SECTION 8 (a) (2) OF THE NATIONAL LABOR RELATIONS ACT?

Sections 2(5) and 8(a)(2) of the National Labor Relations Act (NLRA)¹ establish the ambits of permissible employer involvement

1. The National Labor Relations Act (Wagner Act) is codified at 29 U.S.C. §§ 151-68 (1970) [hereinafter referred to as NLRA or the Act]. Section 2(5) provides:

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.

Id. § 152(5).

Section 8(a)(2) provides:

(a) It 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

Id. § 158(a)(2).

It has been contended that § 9(a) of the NLRA, *id.* § 159(a), is also relevant to the question of employer involvement with certain types of labor organizations, but the Supreme Court rejected that contention in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). The relevant portion of § 9(a) provides:

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

29 U.S.C. § 159(a) (1970). In *Cabot Carbon* respondents argued that this section exempted employer-created grievance committees from the proscription of § 8(a)(2). In rejecting the argument the Supreme Court used the following language, which strongly suggests that the employer-employee contact permitted by § 9(a) is that initiated by the employees as individuals or informal groups, not the regular contact between a formal employee organization and the employer:

The amendment to § 9(a) does not say that an employer may form or maintain an employee committee for the purpose of "dealing with" the employer, on behalf of employees, concerning grievances. On the contrary the amendment to § 9(a) simply provides, in substance, that any individual employee or group of employees shall have the right personally to present their own grievances to their employer, and to have such grievances adjusted, without the intervention of any bargaining representative, as long as the adjustment is not inconsistent with the terms of any collective bargaining contract then in effect, provided that the bargaining representative, if there is one, has been given an opportunity to be present. It is thus evident that there is nothing in the amendment of § 9(a) that authorizes an employer to engage in "dealing with" an employer-dominated "labor organization" as the representative of his employees concerning their grievances.

360 U.S. at 217-18. For discussions of the § 9(a) argument, see Feldman & Steinberg,

with a labor organization. These sections were designed to maintain the independence of employee organizations in order to ensure the fair operation of the collective bargaining process, and they presuppose the existence of employers and employees as separate entities with conflicting interests.² In applying these sections, the National Labor Relations Board (NLRB) and the courts have traditionally focused upon the questions of what constitutes a labor organization, and what specific indicia of employer involvement amount to illegal support, domination and interference. Recent employer efforts to redesign the conventional workplace, by organizing employees into production teams and giving those teams the responsibility of making recommendations or decisions about certain aspects of production as well as certain terms and conditions of employment, have added a new dimension to analysis under these sections.

Although the efforts of Swedish manufacturers, particularly Volvo, to introduce team production have perhaps received the widest public attention, several American companies have also implemented the team form of production in recently built plants.³ A major difference between the Swedish and American organizational changes, however, is that the Swedish plans are the joint product of the employers and the unions, whereas in the United States the plans, for the most part, have been unilaterally implemented by the employer in a nonunion context.⁴

This note will describe a representative model of the team as an organizational form and will explore the issue whether an employer's implementation of such a plan in a nonunion context may constitute illegal domination of a labor organization under §§ 2(5) and 8(a)(2) of the NLRA.

Employee-Management Committees and the Labor Management Relations Act of 1947, 35 TUL. L. REV. 365 (1961); Sangerman, *Employee Committees: Can They Survive Under the Taft-Hartley Act?*, 24 LAB. L.J. 684 (1973).

2. See Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951) [hereinafter cited as Cox]; Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1212-13 (1967) [hereinafter cited as Getman].

3. The American companies leading this movement towards redesign of the workplace are Proctor & Gamble, General Foods and TRW Systems. See Jenkins, *Democracy in the Factory*, 231 ATLANTIC, April 1973, at 78 [hereinafter cited as Jenkins]; Walton, *How to Counter Alienation in the Plant*, 50 HARV. BUS. REV., Nov.-Dec. 1972, at 70 [hereinafter cited as Walton].

4. For discussions of the Swedish situation, see Carson, *Preparing Workers for Participation*, 28 INT'L MGT., Jan. 1973, at 44; Walton, *supra* note 3, at 80. For discussions of the particular suitability of the team and related theories of management for nonunion plants, see Myers, *Overcoming Union Opposition to Job Enrichment*, 49 HARV. BUS. REV., May-June 1971, at 37, 38 [hereinafter cited as Myers]; Walton, *supra* note 3, at 78-79.

THE TEAM CONCEPT

To combat the growing alienation among employees, manifested by industrial strife, high rates of personnel turnover, absenteeism, and low productivity,⁵ several employers have attempted to redesign the workplace in accordance with new theories of management. One such theory, participative decisionmaking, attempts to enhance the meaning of an employee's involvement in and sense of responsibility for his job.⁶ The fullest implementation of the theory of participative decisionmaking requires a major organizational redesign of traditional plant operations.⁷ The organizational model most widely discussed in the United States is that which assigns production employees into a number of teams which are delegated certain decisionmaking responsibility along with their productive tasks.⁸

Plants utilizing the team concept commonly assign all production employees into a number of teams with responsibility for an entire segment of plant operations delegated to each.⁹ Each team usually has a team

5. See Adams, *Living with Automation in Winnipeg*, in WORKERS' CONTROL 26 (G. Hunnius, G. Garson & J. Case eds. 1973) [hereinafter cited as WORKERS' CONTROL] worker's perspective); Hampden-Turner, *The Factory as an Oppressive and Non-Emanicipatory Environment*, in WORKER' CONTROL, *supra*, at 30 (social scientist's perspective); Herzberg, *Swapping Managerial Garbage*, 175 INDUS. WEEK, Oct. 2, 1972, at 40 (management theorist's perspective).

6. See Edel & van der Loeff, *Participation—Industrial Democracy: Constraints and Possibilities*, 11 MGT. INT'L REV., Apr.-May 1971, at 141; Powell & Schlacter, *Participative Management—A Panacea?*, 14 ACADEMY OF MGT. J. 165 (1971) [hereinafter cited as Powell & Schlacter]; Walton, *supra* note 3. For discussions of other closely related theories, i.e., job enlargement or enrichment and productivity bargaining, see THE SCANLON PLAN: A FRONTIER IN LABOR-MANAGEMENT COOPERATION (F. Lesieur ed. 1958); Hulin & Blood, *Job Enlargement, Individual Differences, and Worker Responses*, 69 PSYCHOLOGICAL BULL. 41 (1968) [hereinafter cited as Hulin & Blood]; Scott, *Job Enlargement—The Key to Increasing Job Satisfaction?*, 52 PERSONNEL J. 313 (1973); Sisman, *Job Enlargement: Effects of Culture on Worker Responses*, 12 INDUS. RELATIONS, Feb. 1973, at 1.

7. See Walton, *supra* note 3, at 72-74.

8. See, e.g., Walton, *supra* note 3.

The models also implement the theory of job enlargement on a major scale. This theory has been defined as

the process of allowing individual workers to determine their own pace (within limits), to serve as their own inspectors by giving them responsibility for quality control, to repair their own mistakes, to be responsible for their own machine setup and repair, and to attain choice of method.

Hulin & Blood, *supra* note 6, at 41-42. However, as it is the implementation of participative decisionmaking that raises the legal issues explored in this note, the discussion has been limited to that theory.

9. For example, in a pet food plant which has implemented the team concept, plant operations have been divided between two teams comprised of seven to fourteen employees and including a team leader. One team is assigned to processing the product which includes unloading and storing materials, drawing ingredients from storage and combining them to make the pet food product. The other team packages the product, stores it in the warehouse, and ships it. Walton, *supra* note 3, at 74.

leader, either appointed by management or elected by the team members.¹⁰ In addition to its productive tasks, each team is given the responsibility for making recommendations or decisions about some or all of the following matters:

- (1) individual job assignments;
- (2) interviewing job applicants and hiring;
- (3) establishing and changing work rules;
- (4) evaluation of individual job performance;
- (5) progression within the compensation system;
- (6) coping with manufacturing problems that occur within or between the team's areas of responsibility;
- (7) selecting team operators to serve on plant-wide committees or task forces.¹¹

Deliberation on problems falling within these areas occurs routinely in conjunction with the team members' performance of their productive tasks. The teams are purposely structured, both in terms of size and assigned functions, to facilitate a high degree of team member interaction which serves as the basis for recommendations or decisions.¹²

With some decisional authority delegated by the company to the team, this form of organization is designed to change the structure of the traditional employee-employer relationship by minimizing distinctions between employees and employers as separate identifiable groups with independent and conflicting interests. Instead, this plan attempts to substitute for the more conventional structure a cooperative relationship based on mutuality of interest and involvement in a common enterprise.¹³

10. *Id.* See also Volvo Press Information 1412-FS/ub-9600-EE/mm, 1973, at 4 (on file with the *Indiana Law Journal*).

11. Walton, *supra* note 3, at 74-76.

12. *Id.* at 74.

13. The mutuality is based on what management theorists perceive as a strong correlation between "enhanced . . . quality of work life for employees" and "improved productivity." *Id.* at 81. As one management official expresses it: "Humans will best respond (be productive) when there exists a high feeling of self-worth by employee, and employee identification with success of total organization." L. Ketchum, Paper Prepared for Presenting at "Humanizing of Work Symposium," American Association for the Advancement of Science Annual Meeting, Philadelphia, Pennsylvania, Dec. 27, 1971, at 1 (on file with the *Indiana Law Journal*) [hereinafter cited as Ketchum].

For an argument disputing the existence of this correlation, see Powell & Schlacter, *supra* note 6. The authors argue that studies attempting to establish the correlation have all been conducted in environments where increased productivity is rewarded by increased compensation. Thus, "it is quite impossible to divorce the effects of participation from the explicit or implicit economic incentive, which accompanies it." *Id.* at 166 (emphasis omitted). In conducting their own study, the authors attempted to eliminate economic incentive as a variable and concluded from the results that the correlation was not apparent.

Development of the employees' sense of identification with the company is crucial to the plan's success. At one plant, for example, the company, in addition to increasing the employees' participation in decision-making, has made a conscious effort to reduce the physical symbols of hierarchy, characteristic of conventional plants, on the premise that employee involvement with the company is promoted when an employee is treated as though his place within the organization is an important one.¹⁴

The fundamental conflict between the theory of labor relations underlying the team and the basic policies of the NLRA is apparent. The Act presupposes conflicts of interest and provides the neutral process of collective bargaining to resolve those conflicts. The theory on which the team is based, however, assumes that the employer can establish a mutuality of interest through the implementation of the team model. The resolution of this basic conflict must be made by reference to the specific provisions of the NLRA dealing with the permissible scope of employer involvement in employee affairs.

IS THE TEAM A "LABOR ORGANIZATION" UNDER § 2(5) OF THE NLRA?

One of the basic statutory prohibitions designed to assure the full effectiveness of the collective bargaining process is § 8(a)(2) of the NLRA¹⁵ which prohibits employer domination of, interference with, or support of a labor organization. This section is meant to ensure the independence of labor organizations,¹⁶ and it represents the most obvious legal obstacle to the implementation of the team concept.

Section 8(a)(2) is applicable only where the employer is allegedly dominating a "labor organization" as defined by § 2(5).¹⁷ Therefore, to determine whether § 8(a)(2) has any impact on the team concept, the question whether the team is a "labor organization" must first be explored.¹⁸

14. "There is an open parking lot, a single entrance for both the office and plant, and a common decor throughout the reception area, offices, locker rooms, and cafeteria." Walton, *supra* note 3, at 76.

15. 29 U.S.C. § 158(a)(2) (1970).

16. Employers may of course confer with the union; but they should not participate in its deliberations as an organic entity. The organization itself should be independent of the employer-employee relationship.

Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. 41 (1935) (statement of Senator Robert F. Wagner), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 1417 (1949) [hereinafter cited as LEGISLATIVE HISTORY]. See also NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 251 (1939).

17. See *NLRB v. Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954). Section 2(5) is codified at 29 U.S.C. § 152(5) (1970).

18. Traditionally, the NLRB and the courts have regularly rejected employer de-

The Structural Requirement of § 2(5)

For an organization to be a "labor organization" within the meaning of § 2(5), it must meet structural, subject matter, and functional requirements. The structural requirement is met by "any organization of any kind . . . in which employees participate. . . ."¹⁹ Courts have consistently refused to establish any extrastatutory formal requirements for a labor organization, thus indicating that the statutory provision be read as broadly as written.²⁰ Organizations in which employees participate have been found to qualify as labor organizations where they lacked a formal structure,²¹ a constitution or bylaws,²² officers,²³ the practice of collecting dues,²⁴ or even continuity of existence.²⁵ Accordingly, the team would seem to qualify.

It might be argued that although the team qualifies as an organization, it is not an organization in which employees participate. This argument would be based on the contention that team members, because they have more decisionmaking responsibility than employees in conventional plants, are not employees within the meaning of the NLRA. Section 2(3) of the NLRA,²⁶ however, defines "employee" very broadly; in order for team members to be excluded, they would have to qualify as one of the specifically enumerated exceptions to the definition. Section 2(3) provides in part:

The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual

fenses to domination charges when based on the contention that the organization in question was not a labor organization within the meaning of § 2(5). *See Note, Section 8(a)(2): Employer Assistance to Plant Unions and Committees*, 9 STAN. L. REV. 351, 353-54 (1957).

19. 29 U.S.C. § 152(5) (1970).

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

21. *See, e.g., NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955) (monthly meetings of all employees, where the president of the company spoke and then conducted a question and answer period, constituted a labor organization).

22. *See, e.g., Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953).

23. *See, e.g., Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958); *NLRB v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238 (1st Cir. 1953).

24. *See, e.g., Wyman-Gordon Co. v. NLRB*, 153 F.2d 480 (7th Cir. 1946).

25. *See, e.g., NLRB v. American Furnace Co.*, 158 F.2d 376 (7th Cir. 1946).

26. 29 U.S.C. § 152(3) (1970).

employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.²⁷

The only one of these exceptions which could possibly cover team members is the exception for supervisors. Section 2(11) of the NLRA²⁸ defines "supervisor" in the following terms:

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.²⁹

Team members collectively do have some responsibility for hiring new members of the work force, for assigning themselves to various tasks within their segment of production, and for disciplining individual team members in the sense of critically evaluating their job performance.³⁰ There are, however, two major problems with the position that the responsibilities of the team members make them supervisors rather than employees. The first is that although the team as a group has some of the authority delineated in § 2(11), no team member possesses such authority as an individual. The second, and related, problem is that although a supervisor need not possess all the enumerated responsibilities of § 2(11),³¹ the NLRB has acknowledged supervisory status only where the individual in question has subordinates to supervise.³² An individual's authority "responsibly to direct," then, seems to be a necessary prerequisite for supervisory status, and in the team context the team members as individuals do not have such authority since they are all equal in terms of status and therefore have no subordinates.

A major policy problem with the position that team members should

27. *Id.*

28. *Id.* § 152(11).

29. *Id.*

30. See text accompanying note 11 *supra*.

31. NLRB v. Gray Line Tours, Inc., 461 F.2d 763 (9th Cir. 1972); NLRB v. Little Rock Downtowner, Inc., 414 F.2d 1084 (8th Cir. 1969).

32. See, e.g., El Monte Hay Market, Inc., 173 N.L.R.B. 1140 (1968) (hay haulers not supervisors because the individuals they directed were not employees of the haulers' employer); Safeway Stores, Inc., 103 N.L.R.B. 758 (1953) (head meat cutter not a supervisor because he was the only employee in the meat section).

be classified as supervisors is that it would permit an employer to remove all his employees from the protection of the NLRA by delegating to them a very few of the types of authority delineated in § 2(11). If this position were adopted, team members who occupy the same socioeconomic position as conventional employees—they perform the same, basic productive tasks, receive approximately the same wages, work approximately the same number of hours, and have approximately the same opportunity for advancement³³—would be denied the protection of the NLRA because they have been given some voice in hiring new employees, in dividing work among themselves, and in evaluating the performance of their fellows.

For reasons both of statutory construction and sound policy, team members should not be classified as supervisors. If, then, they are not specifically excluded from the statutory definition of “employee,” they qualify as employees, and the team would satisfy the structural requirement of a labor organization, as it would be an “organization . . . in which employees participate.”³⁴

The Subject Matter Requirements of § 2(5)

The second requirement that an organization must meet to fall within § 2(5) is that its relationship with management concern “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”³⁵ In *NLRB v. Cabot Carbon Co.*,³⁶ a case in which the company was charged with dominating an assortment of employee committees, the Supreme Court of the United States established that an organization’s concern with only one of these matters satisfies this subject matter requirement.³⁷ At least two areas of responsibility often delegated to teams³⁸ appear to meet the requirements of § 2(5). Teams delegated the responsibility for establishing and changing work rules are concerned with items falling under the § 2(5) category of “conditions of work.” Similarly, teams making decisions about an individual’s progression within the compensation system are concerned with subject matter within the headings of “wages” or “rates of pay.” The purpose of participative decisionmaking which is to give employees a voice in decisions that shape the quality of life in the workplace,³⁹ naturally involves team concern with “conditions of work.” Since the subject matter requirement of § 2(5) is met by an

33. See Jenkins, *supra* note 3.

34. 29 U.S.C. § 152(5) (1970).

35. *Id.*

36. 360 U.S. 203 (1959).

37. *Id.* at 213.

38. See text accompanying note 11 *supra*.

39. See authorities cited note 6 *supra*.

organization dealing with any one of the enumerated subjects, most teams will meet this requirement.

The Functional Requirement of § 2(5)

The functional requirement of § 2(5) is met if a team exists "for the purpose, in whole or in part, of dealing with" the employer.⁴⁰ If a company has purposely involved a team in the determination of § 2(5) matters, the team, if it does in fact "deal" with the employer, necessarily exists, at least in part, for that purpose.⁴¹

The Court in *Cabot Carbon* unequivocally established that "dealing with" did not exclusively mean "bargaining with." Further, it specified that the term "dealing" encompassed employee recommendations to management.⁴² Although the facts of *Cabot Carbon* did not warrant a further elaboration on the meaning of "dealing," other courts have found "dealing" between the employer and a labor organization where the parties merely discussed § 2(5) subjects⁴³ and, also, where one of the parties merely asked questions,⁴⁴ or provided information.⁴⁵

A determination of whether a team "deals with" the employer concerning § 2(5) matters must address two major issues. The first is whether the participation of the team leader in the team's affairs constitutes "dealing" between employees and their employer. The second is whether

40. 29 U.S.C. § 152(5) (1970).

41. The NLRB and the courts seem generally to have ignored any subjective significance of the word "purpose" in § 2(5) by looking to the factual question whether "dealing" concerning § 2(5) subjects has occurred, rather than to the intent of either party. Thus, an organization which was created to work with the employer concerning management problems was found to be a labor organization because it had, in fact, dealt with the employer concerning § 2(5) matters. *Northeastern Eng'g, Inc.*, 112 N.L.R.B. 743 (1955). *See also* *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 213 (1959). This approach seems consistent with the legislative intent behind the provision as reflected in the following Senate report extracts which, at least implicitly, equates "for the purpose of dealing" with actual "dealing":

The term "labor organization" is phrased very broadly in order that the independence of action guaranteed by section 7 of the bill and protected by section 8 shall extend to all organizations of employees *that deal with* employers in regard to "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), *reprinted in* 2 LEGISLATIVE HISTORY, *supra* note 15, at 2306 (emphasis added).

42. 360 U.S. at 214.

43. *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); *NLRB v. General Shoe Corp.*, 192 F.2d 504 (6th Cir. 1951), *cert. denied*, 343 U.S. 904 (1952).

44. *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

45. *NLRB v. Standard Coil Prods. Co.*, 224 F.2d 465 (1st Cir.), *cert. denied*, 350 U.S. 902 (1955).

the relationship between the team and higher management involves "dealing" within the meaning of § 2(5).

The first issue has two components: (1) whether the team leader is an employer within the meaning of the Act; and (2) if he is, whether his contact with the team members, when that contact concerns § 2(5) subjects, amounts to "dealing." Section 2(2) of the Act includes within its definition of employer "any person acting as an agent if an employer, directly or indirectly . . ."⁴⁶ The legislative history of the Taft-Hartley amendments reflects the congressional intent to give supervisors, as defined in § 2(11),⁴⁷ the status of an agent of the employer.⁴⁸ Thus, if the team leader qualifies as a supervisor, it would appear that he participates in team affairs as an employer.

The determination of supervisory status is made on the basis of the individual's actual duties, not his or her job title.⁴⁹ As was indicated above, the individual, to be a supervisor, need not have all the responsibilities enumerated in § 2(11).⁵⁰ The normal functions of a team leader, particularly if appointed by the employer, would seem to indicate that he or she has the requisite degree of authority to be classified as a supervisor and thus an agent of the employer. Whereas the team members would not qualify as supervisors because they lack the authority "responsibly to direct,"⁵¹ the team leader, at least when appointed by the employer, would seem to possess this authority which has alone been deemed sufficient to establish supervisory status.⁵² One commentator has stated that the team leader is "largely responsible for team development and group decision making."⁵³ The team leader has been characterized as a "people manager"⁵⁴ which indicates an authority "responsibly to direct." And the team leader may also have the actual responsibility for granting individual team members raises, implying an employer-team leader agency relationship,

46. 29 U.S.C. § 152(2) (1970).

47. 29 U.S.C. § 152(11) (1970).

48. H.R. REP. No. 245, 80th Cong., 1st Sess. 16 (1947). The section of the House Report explaining the rationale for removing supervisors from the protection of the Act contains the following statements: "Management, like labor, must have faithful agents," and "[s]upervisors are management people." *Id.* (emphasis omitted). The Taft-Hartley Amendments, ch. 120, § 101, 61 Stat. 136 (1947), amending 29 U.S.C. §§ 151-68 (1946), are popularly known as the Labor-Management Relations Act.

49. *See* NLRB v. Cooke & Jones, Inc., 339 F.2d 580 (1st Cir. 1964); NLRB v. Quincy Steel Casting Co., 200 F.2d 293 (1st Cir. 1952).

50. Cases cited note 31 *supra*.

51. *See* text accompanying notes 29 & 32 *supra*.

52. Ohio Power Co. v. NLRB, 176 F.2d 385 (6th Cir. 1949); Clark O'Neill, Inc., 147 N.L.R.B. 370 (1964).

53. Walton, *supra* note 3, at 75.

54. *See* Ketchum, *supra* note 13, at 7.

even though the subject of the raise is open to discussion by the entire team.⁵⁵

If the team leader is an employer for purposes of § 2(5), then his contact with team members would clearly seem to constitute "dealing" given the broadness of that term as construed by the courts. The intrateam contact between the team leader and the other team members is similar to the employee-employer contact which a number of courts have found to be "dealing" within the meaning of the statute. Team discussion of work rules' for example, is not unlike the employee-management committee's discussion of smoking rules in *NLRB v. Standard Coil Products*⁵⁶ where the management committee was found to be a "labor organization" within the definition of § 2(5). Similarly, any discussion within the team, in which the team leader participates, would seem to constitute dealing in the same sense that the general discussion of § 2(5) matters by the communications committee qualified that committee as a labor organization in *NLRB v. Ampex Corp.*⁵⁷

The issue whether the external relationship between the team and higher management involves "dealing" in the § 2(5) sense is a more difficult one. It must be explored, however, in the event that the team leader, particularly one elected by the other employees, is not found to be participating in the team as an agent of the employer, or in the event that the role of the team leader is eliminated. To determine this issue, it is important to know exactly what powers the team has. The final product of team deliberations may be a decision or merely a recommendation. Therefore, it is necessary to discuss both as possibilities.

If the team makes recommendations to management relating to § 2(5) subjects, the conclusion is apparent. The team would fall squarely within the *Cabot Carbon* holding that an organization's act of making recommendations to the employer constitutes dealing within the meaning of the statute.⁵⁸ If, however, the team makes actual decisions relating to § 2(5) matters, the question whether it is "dealing" with the employer becomes more difficult. For there to be "dealing," there must be contact between the two parties. Here, it might be argued, no contact occurs. When the team operates within its delegated domain of responsibility, management provides no input into the team's decision. Management does not suggest what the decision should be; it does not even discuss with the team the issues to be decided. Since the team unilaterally makes

55. See Walton, *supra* note 3, at 76.

56. 224 F.2d 465 (1st Cir.), *cert. denied*, 350 U.S. 902 (1955).

57. 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

58. 360 U.S. at 214.

and implements its decision, it is not "dealing with" the employer.

The problem with this argument is that although the team makes a totally unilateral decision, that decision is not necessarily final.⁵⁹ Implicit in the company's delegation of decisionmaking responsibility to the team is management's ultimate power to review or even overrule the team's decision. If a team's decision is final in practice, its finality is attributable not to the team's authority, but to management's ultimate authority to let the decision stand. Conceptually, it is at least arguable that team decisions subject to review by management amount only to recommendations which become final when management decides not to exercise its veto. If this view is accepted, *Cabot Carbon* would again necessitate a finding that the team is "dealing" with the employer.⁶⁰

Another basis for a finding that the team is dealing with management, that of discussion with the employer about issues of employment, is implicit in the employer's ultimate power of review. Practically, the employer's power to review seems to imply that the team, at least occasionally, would have the burden of justifying its decisions to management personnel. Any discussions between the team and management in which the team is required to justify its action would thus constitute "dealing" in the broad sense of that term which the courts have adopted.⁶¹

Conceivably, an employer might avoid a finding that it was engaged in "dealing" with a team if it could persuade the NLRB and courts that it had not and would not exercise its formal power of review and that team decisions were thus final. In order to make this claim, however, the employer must have imposed carefully structured limits on the domain of team decisionmaking responsibility. Assuming that the employer requires a control mechanism of some type over team decisions, in order to protect itself against the possibility of decisions which undercut the company's economic position, the employer would have to argue that it had limited the domain of team decisionmaking so that management was

59. Management's willingness to accept team decisions could well depend on the decision's impact on plant productivity. The possible tension between productivity and participative decisionmaking as a method of improving the quality of work life has been recognized by some of the business commentators.

[M]anagers who concern themselves with [quality of work life for employees and productivity] will find points at which they must make trade-offs—i.e., that they can only enhance the quality of work life at the expense of productivity or vice versa. What concerns me is that it is easier to measure productivity than to measure the quality of work life, and that this fact will bias how trade-off situations are resolved.

Walton, *supra* note 3, at 81. See also Powell & Schlacter, *supra* note 6.

60. See text accompanying note 58 *supra*.

61. See notes 43-45 *supra* & text accompanying.

indifferent to any decision which the team might make within that domain. Thus review of any particular team decision would be unnecessary.

For example, an employer might design a basic wage ladder for its employees but give the team the power to decide which team members will be paid at the various levels. Since the employer has set the limit on total wage expenditures, it is indifferent to how the employees will divide the money among themselves. Arguably, the employer has not engaged in "dealing" with the team concerning wages because it has unilaterally determined the amount of money which the company will pay as wages, and it has delegated to the team the full power to make unilateral decisions about the wage levels of individual employees.

Conceptually, this argument is persuasive. An employer who has implemented such a plan, however, will face serious practical problems in realizing the positive features of team organization while maintaining this carefully structured division of decisionmaking responsibility. Such a careful division of authority undercuts a major purpose of implementing the team concept which is to improve employee morale by decreasing the hierarchal distance between employer and employees. In the situation described above, the employer, to avoid the deliberations which would constitute "dealing," would have to issue its unilateral decisions concerning § 2(5) subject in the form of directives not open to discussion. Thus communication between the employer and the team would be marked by an artificial formality inconsistent with the cooperative atmosphere which the team is designed to promote.

Moreover, confining all team decisions about § 2(5) subjects within employer imposed limits could prevent the employees from developing the sense of involvement with the company which is a prerequisite to improved productivity. It would seem that, to be truly effective, the team form of organization would permit employee involvement in more meaningful types of decisions.

The typical team, then, generally will meet the structural and functional requirements of a § 2(5) labor organization, since employees will be participants and the team will be involved in "dealing with" the employer regardless of whether a team leader participates in its affairs. In addition, the subject matter requirements of § 2(5) will be met, for team involvement in determining "conditions of work" is one of the primary goals of the concept itself.⁶² Thus, since virtually all teams will satisfy the structural, subject matter, and functional requirements of § 2(5), they will qualify as "labor organizations" and will therefore be

62. See authorities cited note 6 *supra*.

subject to the § 8(a) (2) prohibition of employer domination.

IS THE TEAM EMPLOYER DOMINATED UNDER § 8(A) (2) OF THE NLRA?

Section 8(a) (2) of the NLRA provides that it shall be an unfair labor practice for an employer to dominate, contribute financial or other support to, or interfere with the formation or administration of any "labor organization."⁶³ The policy emphasis underlying the application of this section has shifted somewhat in recent years. The policies initially deemed pertinent to its application were laid out by the United States Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. NLRB*.⁶⁴ There, even though the challenged labor organization had prevented serious labor disputes and had the support of the employees, the Supreme Court found it dominated because a provision of the plan establishing the organization gave the employer power to veto the organization's projected actions and amendments to the plan.⁶⁵ The Court held that the plan's provision constituted

[s]uch control of the form and structure of an employe organization [as] deprives the employes of the complete freedom of action guaranteed to them by the Act, and justifies an order [of disestablishment] as was here entered.⁶⁶

The policy underlying an interpretation of § 8(a) (2) as guaranteeing structural independence of labor organizations is implicit in this statement by the Court. A major purpose of the Act was to allow employees the freedom to exert economic pressure against the employer in order to force the employer to agree to terms it would not accept if not economically coerced.⁶⁷ The structurally dominated or supported labor organization is incapable of launching this kind of economic attack. An employer

63. 29 U.S.C. § 158(a) (2) (1970).

64. 308 U.S. 241 (1939). This case was decided well before the passage of the Taft-Hartley amendments to the NLRA in 1947, ch. 120, § 101, 61 Stat. 136 (1947). However, as the Supreme Court indicated in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), the conferees on the Taft-Hartley Amendments specifically rejected all attempts to "amend . . . the provisions in subsection 8(2) [of the original Wagner Act] relating to company-dominated unions" and had left its prohibitions "unchanged."

Id. at 217, quoting 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT 1947, 1539 (1948).

65. The difficulty with the position [that the organization was permissible because it had averted industrial strife and had the support of the employees] is that the provisions of the statute preclude such a disposition of the case. The law provides that an employe organization shall be free from interference or dominance by the employer.

308 U.S. at 251.

66. 308 U.S. at 249.

67. Getman, *supra* note 2, at 1195.

can cripple its effectiveness by disordering its internal operations or withdrawing its support.⁶⁸

Moreover, the problem of the structurally dominated labor organization goes even deeper than its basic vulnerability to employer sabotage. Not only is such an organization weak, but it also pre-empts the creation, by the employees, of an independent organization outside the employer's sphere of influence. Its very existence nurtures employee reliance on a dispute resolution system which clearly favors the employer because, unlike true collective bargaining, it does not permit the employees' full exertion of economic pressure.⁶⁹

To implement the policy of protecting a labor organization's structural independence, the NLRB and the courts have strictly scrutinized the relationship between the employer and the labor organization. They have found illegal support, for example, where the employer has provided office facilities⁷⁰ or clerical assistance,⁷¹ or where the employer has allowed the organization to meet on company time without deducting from the

68. Weakness of the organization, per se, is not proscribed by the Act.

It is only when the weak and ineffective structure can be traced to the employer, as by employer drafting of the by-laws or constitution, or when the by-laws incorporate instruments of employer control, as by veto power over amendments and decisions, that the functional weaknesses become persuasive evidence of domination.

Note, *Employer-Dominated Unions—Illusory Self-Organization*, 40 COLUM. L. REV. 278, 290 (1940) (footnotes omitted).

69. In this sense the team bears a striking resemblance to an industrial council found by the NLRB to be a dominated labor organization. Employee representatives on the Council had equal voting power with the management representatives, and the employees were participating not because of any employer coercion. The Board asked rhetorically:

But, in any real sense, can the Harvester Industrial Council Plan be considered as an effective method of employee representation and collective bargaining? Or, on the contrary, is it anything more than an elaborate structure designed to create in the minds of the employees the belief that they possess something of substance and value that enables them to deal with their employer on an equal footing, so that they will be sufficiently content to resist the appeal of an outside labor union?

The Board concluded that the Council was dominated for several reasons, among them:

[W]hen a deadlock [between the employees and employer] is reached on any matter, the employee representatives can do nothing. They possess no funds, no organization to fall back upon, no mass support.

And since the Council had no independent financial support

its existence [is] entirely subject to the will of the [company]. If it chooses to withdraw its support, the Plan collapses at once. If it chooses to continue its support, the Plan continues. The choice . . . is thus a choice that rests with the [company] and not with the employees.

International Harvester Co., 2 N.L.R.B. 310, 347-51 (1936).

70. See *Dennison Mfg. Co.*, 168 N.L.R.B. 1012 (1967).

71. See, e.g., *Stackpole Carbon Co.*, 6 N.L.R.B. 171 (1938), *enforced*, 105 F.2d 167 (3d Cir. 1939).

employees' pay for time spent at such meetings.⁷² Illegal domination or interference has also been found where the employer initiated or implemented the organization,⁷³ participated in the drafting of its rules or procedures,⁷⁴ participated in its meetings,⁷⁵ or selected or controlled its membership.⁷⁶

Assessed in terms of these specific prohibitions and viewed against the basic policy underlying § 8(a)(2), the team is clearly a dominated and supported labor organization. Employers conceive and implement it as an organizational form; the employer has the power to destroy it as the basic productive unit and to substitute some other form of productive organization; the employer dictates the § 2(5) subject matter with which the team is allowed to concern itself; the employer fully compensates team members for all deliberations relating to § 2(5) matters since they all occur on company time;⁷⁷ and where the team has an employer-appointed team leader, an agent of the employer participates in the team's daily activities and deliberations.

Because the team possesses these features, it cannot be used by the employees to exert economic pressure against the employer. The employer has the ultimate power to prevent the team from vigorously pursuing employee interests in conflict with those of management.⁷⁸ Where there is an employer-appointed team leader, he could

72. See *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480 (7th Cir. 1946); *Wahlgren Magnetics*, 132 N.L.R.B. 1613 (1961).

73. *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613 (7th Cir. 1953) (plan established by the company even though original suggestion had come from employees); *NLRB v. Jas. H. Matthews & Co.*, 156 F.2d 706 (3d Cir. 1946) ("Junior Board" conceived and implemented by management).

74. *NLRB v. Standard Coil Prods. Co.*, 224 F.2d 465 (1st Cir.), *cert. denied*, 350 U.S. 902 (1955) (management initiated procedures and then notified employees of their existence).

75. [C]ollective bargaining is an activity, presupposing that the employees shall have opportunity in the absence of the employer to canvass their grievances, formulate their demands in common, and instruct an advocate who they believe will best press their suit.

NLRB v. Stow Mfg. Co., 217 F.2d 900, 904 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955).

76. See *NLRB v. American Furnace Co.*, 158 F.2d 376 (7th Cir. 1946) (committee members appointed by employer's supervisors); *NLRB v. Jas. H. Matthews & Co.*, 156 F.2d 706 (3d Cir. 1946) (employees elected to "Junior Board," but nominees were subject to the approval of the company's directors).

77. Team deliberations on company time, if a team leader participates as an agent of the employer, might not constitute illegal support because of the proviso in § 8(a)(2): "[A]n employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay" 29 U.S.C. § 158(a)(2) (1970). Of course, the team leader's participation would constitute illegal domination in this case.

78. Could a new manager with more conventional ideas destroy the "Topeka [team] system"? Actually, clever as the technological designs are, there is

impede discussion critical of company policies. Regardless of whether there is a team leader, the employer could withdraw all § 2(5) matters from team consideration, or he could forbid the collective discussion of such matters on company time. More drastically, the employer could prevent, altogether, the association of team members during company time by introducing an alternative form of productive organization, such as the conventional assembly line.

Furthermore, the implementation of the team effectively inhibits the employees from attempting to construct their own labor organization. In fact, one of the intended effects of the team and related management theories is to prevent unionization.⁷⁹ The team provides resolution machinery capable of accommodating minor disputes or grievances and thereby pre-empts the creation of an independent labor organization. The incompatibility of unionism and the team concept is reflected in the management practice of implementing the team form of organization through the opening of a new plant rather than in a plant already in operation. The rationale for this practice, as explained by one management official, is that “[n]o power groups will exist within the organization that create an anti-management posture.”⁸⁰

Under the cases delineating the traditional meaning of employer domination, then, implementation of the team concept would be a clear violation of § 8(a)(2) whenever a team satisfied the § 2(5) definitional requirements of a “labor organization.” In recent years, however, the United States Courts of Appeals, by employing a three-pronged analysis, have given a new policy emphasis to § 8(a)(2) which may undercut the conclusiveness of this determination. The Seventh Circuit departed from the policy underlying the *Newport News* approach in its decision in *Chicago Rawhide Manufacturing Co. v. NLRB*.⁸¹ Emphasizing, instead, the policy of cooperation, *Chicago Rawhide* and its progeny reflect a willingness of the courts to be influenced in § 8(a)(2) cases by the existence of a harmonious relationship between employees and employers.⁸² In accordance with the new policy emphasis on cooperation, these courts have

nothing to preclude the use of orthodox autocratic techniques.

Jenkins, *supra* note 3, at 81.

79. [J]ob enrichment in the nonunion organization is harnessing talent in a manner that gives a competitive advantage to that organization, and also offers the only realistic strategy for preventing the unionization of its work force.

Myers, *supra* note 4, at 38.

80. Ketchum, *supra* note 13, at 4.

81. 221 F.2d 165 (7th Cir. 1955).

82. See 221 F.2d at 170. See also *Hotpoint Co. v. NLRB*, 289 F.2d 683, 685 (7th Cir. 1961); *Coppus Eng'r Corp. v. NLRB*, 240 F.2d 564, 573 (1st Cir. 1957).

developed an approach to § 8(a)(2) which permits employer involvement which is clearly illegal under the *Newport News* analysis. Since the team concept, if successfully implemented by the employer, promotes harmony and cooperation between employees and their employer, this harmony could be a major factor in the decision of a court assessing the team under § 8(a)(2). For this reason it is necessary to explore the limits of the circuit courts' approach to ascertain, first, whether the team would be permissible and, second, whether it should be.

As articulated in *Chicago Rawhide*, the new approach hinges on three elements: (1) a subjective standard for domination, from the point of view of the employees;⁸³ (2) a distinction between illegal "support," and cooperation or aid which does not involve "control;"⁸⁴ and (3) distinctions between actual domination or interference which is illegal, and potential domination or interference which the court stated was not a violation because it was always implicit in the employee-employer relationship.⁸⁵ Operating together, these three elements seem to change the traditional § 8(a)(2) analysis in two ways. First, use of a subjective standard for domination shifts the focus from the institution of the labor organization to the individual employees. Second, distinctions (2) and (3) shift from scrutiny of the structural relationship between the employer and the labor organization to scrutiny of the specific impact of employer conduct on the employees.

These shifts, although they are not absolute,⁸⁶ are reflected in some

83. 221 F.2d at 168. The evolution of the subjective standard for domination is marked by some peculiar leaps in logic. The standard was first announced in *NLRB v. Thompson Prods., Inc.*, 130 F.2d 362, 368 (6th Cir. 1942). There, the court used as its authority the following language from *International Ass'n of Machinists, Lodge 35 v. NLRB*, 311 U.S. 72 (1940), which, although it makes employee belief that the organization is dominated an important factor, does not make employee belief in general the standard for domination:

[W]here the employees would have just cause to believe that solicitors professedly for a labor organization were acting for and on behalf of the management, the Board would be justified in concluding that they did not have the complete and unhampered freedom of choice which the Act contemplates.

311 U.S. at 80.

The court in *Thompson Products* used the subjective standard to uphold Board findings of domination, but the possibility of using the standard to set aside Board findings of domination was raised in *NLRB v. Tappan Stove Co.*, 174 F.2d 1007 (6th Cir. 1949). Noting that "[t]he Supreme Court has repeatedly admonished the courts of appeal as to their limited power of review of fact findings of the labor board," the court, which was impressed with the "friendly labor relationship" between the employer and employees, reluctantly enforced a Board order calling for the disestablishment of a dominated labor organization. *Id.* at 1008-09. In so doing, however, it indicated that it would have preferred to find the organization not dominated under the subjective standard. *Id.* at 1014.

84. 221 F.2d at 167.

85. *Id.* at 167-68.

86. The court continued to speak, in places, of dominated "labor organizations." However, it seems to have equated the concept of a dominated labor organization with

of the court's statements in *Chicago Rawhide*. In establishing its landmark distinction between illegal support and permissible cooperation, the court stated:

Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the *employees* or their bargaining representative in carrying out their independent intention.⁸⁷

And where distinguishing actual from potential domination, it 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.⁸⁸

Other courts have used this approach expansively. Courts have found cooperation but not illegal support where the employer has provided the organization with office space and furniture, paper supplies, printing, duplicating and typing services;⁸⁹ where the employer has prepared for the organization its notices, election information and ballots;⁹⁰ and where the employer has allowed internal meetings of labor organizations on company time without deducting from employees' pay for time spent.⁹¹ Similarly, courts have found only potential rather than actual domination where the employer permitted meetings on company time but controlled their length;⁹² where the employer repeatedly ordered an employee representative not to concern himself with disputes arising in departments which he did not represent and, further, not to report on such matters to his own department;⁹³ where the employees' organization submitted proposed changes in its bylaws to management for approval;⁹⁴ where a provision of the organization's bylaws allowed the foreman to participate in

that of dominated employees and, in so doing, avoided the issue of structural independence of the organization. This mistaken equation is apparent from the court's statement that potential domination is not illegal because it is inherent in the employee-employer relationship. The fact that the employee-employer relationship does involve the potential for employer domination of an individual employee does not mean that the relationship also involves the potential for employer domination of a truly independent labor organization. The labor organization itself should be independent of the employer-employee relationship. See note 16 *supra*.

87. 221 F.2d at 167 (emphasis added).

88. *Id.* (emphasis added).

89. *Hotpoint Co. v. NLRB*, 289 F.2d 683 (7th Cir. 1961).

90. *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967).

91. *NLRB v. Magic Slacks, Inc.*, 314 F.2d 844 (7th Cir. 1963).

92. *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968).

93. *Id.*

94. *Hotpoint Co. v. NLRB*, 289 F.2d 683 (7th Cir. 1961).

calling departmental meetings of the organization and permitted him to submit reports of the meetings to his supervisor,⁹⁵ and where the employer had the power to change the organizational status of the employee representatives by transferring them to another department.⁹⁶ Through application of this expansion of the *Chicago Rawhide* analysis, arguments asserting the legality of the team form of organization may succeed by emphasizing the team's promotion of employer-employee cooperation.

However, a possible limit upon the persuasiveness of such arguments was established by the Seventh Circuit itself in *NLRB v. Ampex Corp.*⁹⁷ There, the court rejected the respondent's contention that the labor organization in question was permissible under *Chicago Rawhide* and its progeny with the following statement:

We have examined these cases and find that the organization involved in each had some reasonable claim to being an independent entity composed of employees and distinct from management. Not so here, and we deem the cases inapplicable.⁹⁸

Under this standard, the team would still be considered supported and dominated. As it meets only on company time, deliberates only on matters which are delegated by the management, and owes its very existence to a management experiment, it has no reasonable claim to being independent. Further, where the team leader participates as an agent of the employer, it is not an organization entirely distinct from management.

However, the *Ampex* qualification of the three-pronged approach enunciated in *Chicago Rawhide* is not logically required. A court strongly motivated by the concern for preserving a cooperative relationship between employers and employees might ignore *Ampex* and use these three elements of analysis to find the team permissible under § 8 (a) (2). If read literally, they might be interpreted as eliminating all concern for structural relationships and substituting concern only for the employees as individuals. Under this interpretation, § 8(a)(2) might be deemed violated only upon a showing that the employer has actually influenced employees to change their position on issues which are traditionally the subject of collective bargaining. If a showing of actual employer domination of particular employees is required, a § 8(a)(2) violation in the team context would be extremely difficult to establish. The employer has specifically designed the team to accommodate greater employee participa-

95. *Id.*

96. *Id.*

97. 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

98. *Id.* at 85.

tion and influence than is possible in the conventional workplace. Within the team each employee enjoys a greater freedom of involvement than his traditional counterpart.

Thus, if a court were to focus exclusively on the individual team members as opposed to the team as an entity, it could conceivably find that there is no illegal domination. However, to take this position, a court would be forced to abandon the literal meaning of § 8(a)(2) which is to protect and guarantee the independence of a labor organization, as well as to violate the policy behind that provision as framed by Congress and interpreted by the NLRB and the Supreme Court.⁹⁹ As written, § 8(a)(2) does not directly protect the individual employee; it protects, instead, the independent labor organization which, as the vehicle for collective employee action, enables the employees to protect themselves.¹⁰⁰

CONCLUSION

Although the team form of organization seems to accomplish very positive results in promoting employee satisfaction on the job, it is a clear violation of the Act. A possible solution to the domination problem which would preserve the positive features of the team would be to require the team to limit its concern to subjects not enumerated in § 2(5); if it is not a labor organization, there can be no illegal domination.¹⁰¹ Such a requirement would allow continued team involvement in problems relating to production which have traditionally been reserved for unilateral management decision,¹⁰² while prohibiting team consideration of the § 2(5) employee interests which the Act seeks to protect by providing for employee self-organization and collective bargaining.

Despite its positive features, a team which considers § 2(5) matters cannot be permitted because it is a dominated labor organization. National labor policy assumes that the interest of employees and employers conflict in many areas, and further, that the conflict is most satisfactorily resolved when the two deal together as independent entities, each advancing its interest to an extent determined by its economic strength. Subject

99. See notes 64-69 *supra* & text accompanying. See also note 16 *supra*.

100. "The Wagner Act became law on the floodtide of the belief that the conflicting interests of management and worker can be adjusted only by private negotiations, backed, if necessary, by economic weapons, without the intervention of law." Cox, *supra* note 2, at 322.

101. See *NLRB v. Cleveland Trust Co.*, 214 F.2d 95 (6th Cir. 1954). See also *Raybestos-Manhattan, Inc.*, 80 N.L.R.B. 1208 (1948) (Board disestablishment order does not prevent organization from continuing operations as something other than a labor organization).

102. The requirement would permit, for example, implementation of many features of the theory of job enlargement. See note 8 *supra*.

as it is to management's control, the team precludes the form of dispute resolution envisioned by the Act. It amounts, instead, to an interest resolution mechanism controlled by the employer. Employees are involved not because they have a right to participate or because they have the strength to demand recognition; instead, they are involved because the employer has invited them to participate. In short, the ultimate protection of their interests is traceable not to their own strength but to the benevolence of their employer. Before employee interests are entrusted for protection to the team form of organization, the legislature should have the opportunity to study once again the relationship between the fundamental interests of employees and employers and decide if those interests can be satisfactorily reconciled by a mechanism within the control of the employer.

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