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AFL-CIO Task Force on Labor Law

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Comments

Includes AIEG New Employee Handbook as appendix.

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STATEMENT OF DAVID M. SILBERMAN, DIRECTOR,
AFL-CIO TASK FORCE ON LABOR LAW

BEFORE THE

COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS

August 10, 1994

I thank the Commission for this opportunity to present the views of the AFL-CIO on the questions before you today.

The present challenge facing the Commission is to recommend steps for the federal government to take to encourage what the notice for this hearing terms "employee participation in the workplace." Our discussion of this issue proceeds in three parts. In Part I we argue that the highest priority of the government should be to encourage democratic forms of employee participation rather than those which are employer-controlled. Part II presents the AFL-CIO's suggestions for encouraging this type of employee participation. Finally, in Part III, we address what we quite frankly see as a "red herring," namely the issue of whether Section 8(a)(2) of the National Labor Relations Act and the Electromation case, is inhibiting any other forms of employee participation that ought to be encouraged.

I

"Employee participation," as the Commission's Fact Finding Report states (at p.29), can "take a wide variety of forms" and the phrase can mean a variety of things. It can refer to nothing more than a garden-variety suggestion box through which employees "participate" by submitting their ideas for management to accept, reject, or ignore. At the opposite end of the spectrum, "employee participation" can refer to a system of co-determination in which

employees and managers participate as equals in jointly making decisions on some or all workplace issues.

Given the range of practices encompassed within the phrase "employee participation," before this Commission can formulate recommendations in this area the Commission must first determine which forms of employee participation merit, and need, the affirmative encouragement of the government and which should be left to their own devices within the current legal system.

No one, for example, would seriously suggest that the government ought to act to encourage employee suggestion boxes: there is no evidence that such suggestion boxes significantly advance any public interest so as to warrant the solicitude of the government, nor is there any reason to believe that government action is needed to catalyze the diffusion of suggestion boxes. It is very much to the point, that, at the other end of the spectrum the federal government long ago made the judgment in favor of "encourag[ing] the practice and procedure of collective bargaining" -- to quote from the first section of the Wagner Act -- as a means through which employees can participate in determining the terms and conditions of their employment.

1. In deciding what forms of employee participation should be encouraged, we believe it essential to distinguish between the two qualitatively different approaches that have been posed to this Commission.

(a) The first approach is, perhaps, best labeled "participative management" -- a term that no longer is politically

correct in management circles but which nonetheless revealingly captures the essence of these forms of participation. Participative management is, as Richard Beaumont, the President of Organization Resources Counselors succinctly put it in his testimony to this Commission, "a way of getting work done."¹ This form of participation is "task driven," as Jerry Jasinowski, President of the National Association of Manufacturers testified; workers are "empower[ed] to solve problems and to do tasks."²

The witnesses who have come before this Commission to extol the virtues of participative management -- or what they prefer to call employee involvement -- have stressed the ways in which it departs from Taylorism in the responsibility that is delegated to the individual employee and the work team. But in the most fundamental respects, participative management reaffirms the traditional hierarchical relationship between management and workers since, as the Commission stated in its Report (at 52), management "retains control over whether to initiate, change or abandon employee participation."

On this approach it is management that creates the participatory structures -- the teams, committees, cells and the like. It is management that defines their jurisdiction and their mission -- i.e., that determines what "problems" or "tasks" to authorize the group to address. It is management that selects the employees to participate in these efforts (or, at a minimum,

¹Transcript of Commission Hearing of January 19, 1994 at 170.

²Tr. at 113 (Nov. 8, 1993) (emphasis added).

determines the rules for such selection). And it is management that establishes the scope of their authority -- that determines, for example, which bodies make recommendations and which make decisions. For all these reasons, participatory management might better be termed management-controlled participation.

Motorola is often thought of as the epitome of this type of system; indeed, in a written submission to the Commission, Motorola boasts of its "over 4,400 problem solving teams that have revolutionized the way we do business."³ Motorola's New Employee Handbook, excerpts of which are attached hereto, likewise talks about Motorola's commitment to "empowerment for all, in a participative, cooperative and creative workplace" as Motorola's "chosen method of managing." But Motorola's statement of the "Operating Principals [sic] for working in the empowerment process" makes clear the limits of management-controlled participation:

1. **Empowered teams exist to achieve Motorola's key initiatives.** The purpose of empowered teams is to achieve our key initiatives of Six Sigma quality, total cycle time reduction, production and manufacturing leadership and profit improvement. Activities undertaken by empowered teams should be to further one or more of these initiatives.

5. **Decision-making regarding employment issues remains with management.** Management will continue its role in making decisions regarding terms and conditions of employment for individual team members, such as pay, hours of work, benefits etc. Team members are encouraged to individually discuss concerns about their employment with management.

³Letter from James D. Burge, Corp. Vice President to Thomas Kochan, February 22, 1994, Docket No. 181.

Nor is Motorola unique in the limitations it places on participation and empowerment. Bruce Carswell, the Chairman of the Board of Directors of the Labor Policy Association, made this quite clear in his testimony, analogizing employee involvement to the "power in the pro football sense of bringing a play back in the huddle and have it thought of as being used, but the quarterback eventually has to make some decisions."⁴

(b) In contrast to the various forms of management-created and management-controlled participation is the second approach to employee participation which has been described to the Commission: what we call, for want of better terms, "joint labor-management decision-making systems" or "democratic participation." Whereas management-controlled participation begins from the premise of unilateral, management decision-making except to the extent that management delegates authority to bodies created by management, democratic participation starts from the premise of joint decision-making by management and workers, through representatives of their own choosing. In this country collective bargaining between the management of an individual establishment and a union representing the employees at that establishment generally provides the vehicle through which such participation takes place; in Europe collective bargaining takes place at the industry level and is supplemented at the establishment level by elected works councils.

On this approach, participatory structures may be jointly -- rather than unilaterally -- created through collective bargaining,

⁴Tr. at 164 (Nov. 8, 1993).

and their composition, jurisdiction, and authority jointly -- rather than unilaterally -- agreed to. In this way, employee participation may be extended down to the level of work processes on the shop floor and up to the level of strategic decisions in the corporate suites.

Democratic participation is thus more than merely a way of getting the work done, and it aims at more than "involvement" or task-driven empowerment. Rather, as explained in The New American Workplace: A Labor Perspective, a report by the AFL-CIO Committee on the Evolution of Work which was unanimously approved by the AFL-CIO Executive Council:

The aim of this approach is to achieve work organizations which at one and the same time are more productive and more democratic. Therein lies the source of its legitimacy and its power. [Emphasis in the original]

2. On any measure, it is the democratic form of employee participation which should command the government's attention and which is worthy of governmental impetus.

(a) Viewed first strictly from the standpoint of enterprise efficiency -- that is, based on the contribution that participation can make to improving productivity and quality and thus to enhancing firm performance -- there is strong reason to favor bilateral systems of participation over those that are management-controlled. To begin with, as the Commission Report notes (at 36), several studies have found "a higher survival rate" for participatory programs "in union than nonunion establishments"; that finding is especially significant given what the Commission terms (at 48) the "long history of temporary fads" in this area and

the difficulty of "sustain[ing]" labor-management cooperation "in the American environment."

Moreover, insofar as the economic advantage to be derived from employee participation lies in the level of commitment and discretionary effort that is elicited from the workforce, there is strong reason to believe that, over the long term, participatory systems rooted in workplace representation will outperform those that are not. Employees whose terms and conditions of employment are the product of an agreement between management and the employees' own representative have an institutional assurance that they will share fairly in -- and will not suffer adverse consequences from -- productivity gains produced through their efforts and they have mechanisms available to them to voice their grievances if they do not. Employees who are unrepresented must either place their faith in management's beneficence or, more likely, the employees must safeguard their interests against management opportunism.

Numerous studies have proven that, as Professors Freeman and Medoff put it, unionism "changes the employment relationship from a casual dating game, in which people look elsewhere at the first serious problem, to a more permanent 'marriage' in which they seek to resolve disputes through discussion and negotiation."⁵ This phenomenon, Professor Freeman has more recently written, "applies

⁵R. Freeman & J. Medoff, What Do Unions Do at 94 (1984).

universally to unionism in industrialized countries."⁶ Absent compelling evidence to the contrary -- and there is none -- it stands to reason that the same experience will be replicated in participatory systems and that, over time, represented employees will commit themselves more fully to their work.

That is the precise point that Jerome Rosow, President on the non-partisan Work in America Institute, made in his testimony to this Commission:

[W]orkers in unionized situations are more supportive of the system because they have the union to keep it honest and because they are more willing to learn and change as compared with those that do not have a contract. This has to do with their seniority or security, their pension, grievance, procedure, and so forth. So that that relationship, employees having a voice and having a protector in the form of a union, encourages the change process.⁷

And since the publication of the Commission's Report, a new study has been published which finds that "unionized firms, on average, provide a much better environment for tapping the benefits of employee participation programs than do nonunion firms."⁸

Even the analysis commissioned by the Employment Policy Foundation and prepared by the Center for Effective Organizations acknowledges that "a union which is favorable to employee involvement and works effectively to produce the conditions which

⁶Freeman, "Is Declining Unionization of the U.S. Good, Bad, or Irrelevant," in L. Mishel & P. Voos (eds), Unions and Economic Competitiveness at 149 (1992).

⁷Tr. at 192 (Sept. 15, 1993).

⁸Cooke, "Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison, 47 Ind. & Lab. Rel. Rev. 594 (July, 1994).

support employee involvement can indeed contribute to a successful employee involvement effort" and that the "key determinants of success are conditions which unions may help to create."⁹ On that basis alone, the case for focusing government efforts on encouraging democratic forms of participation would seem to be compelling.

(b) In our view, however, it would be mistake of the first order -- and a grave disservice to the kind of public debate that is needed in this country -- were the Commission to ground its recommendations solely in efficiency considerations. Public policy is not made, and can not be, on one dimension. Enhancing enterprise efficiency is, no doubt, an important end of public policy but it is not the only end. The Commission should make that clear and should explicitly base its recommendations on the full range of social values.

(i) Chapter One of the Commission's Report provides a useful starting point. The Commission there recognizes that this society seeks, and in the past has achieved, "economic progress for virtually all our citizens" (p.26). But the "changes in the economy, technology, workforce and competitive conditions ... have interacted within the U.S. labor relations systems to produce employment and wage outcomes that differ greatly from those in the past and fall short of meeting the needs of many Americans" (p.14). As the Commission warns (at 26), "a healthy society cannot long

⁹G. McMahan & E. Lawler, Effects on Union Status on Employee Involvement: Diffusion and Effectiveness (Employment Policy Foundation Policy Paper, February, 1994).

continue along the path the U.S. is moving, with rising bifurcation of the labor market."

Democratic forms of employee participation provide a means of addressing these distributive issues; management-controlled participation does not. Where workers enjoy the benefit of workplace representation, they can and do jointly decide with management the share of the firm's earnings that are paid to workers; that is, of course, the heart of what collective bargaining is all about. As the Commission observes (at 18), unions "bring the earnings of production workers closer to that of supervisory workers" and thereby "reduce earnings differentials within establishments." Thus -- as Congress recognized almost sixty years ago -- government ought to encourage employee participation through unions as a means of achieving more equitable economic outcomes.

The union role in protecting labor standards from continued erosion is now more important than ever. The Commission's Report recognizes (at 22) that employers increasingly have found it convenient to "reduce labor costs by retaining a smaller core of year round full-time workers who receive full benefits" and filling in with part-time workers who are "lower paid per hour than full-time workers" (p. 21), and with temporary workers who "tend to be in relatively low wage occupations" (*id.*).¹⁰

¹⁰A recent study of part-time workers -- who comprise the vast bulk of the contingent workforce -- finds that 81% of part-timers (compared to 22% of full-time workers) have earnings below \$10,000; 13.8% of part-time workers and 25.8% of involuntary part-time workers (compared to 5.2% of full-time workers) have family incomes

Left to their own devices, employers can be expected to continue down this path and allocate work between contingent and core employees based solely on an economic calculus as to the trade-off between reducing labor costs and reduced employee commitment; this trend as it unfolds is leading to less and less full-time employment for lower-skilled workers. Unions inject human values into that calculus, seeking to maximize the number of "core employees" receiving full benefits and at the same time to improve the situation of those workers outside of the core.

(ii) Chapter IV of the Commission's Report identifies another important end of public policy in this area. The question addressed in that Chapter is, as formulated by the Secretaries of Labor and Commerce in their charge to the Commission:

What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves rather than through recourse to state and federal courts and government regulatory bodies?

Implicit in that formulation is the entirely sensible judgment that, all other things being equal, private resolution of work-place problems is to be preferred over governmental solutions both because private resolutions are less costly to procure and better tailored to the needs of the individual workplace.

This end, too, is most likely to be realized through bilateral systems of employee participation. The scope of the issues that

below the poverty level; only 16.4% of part-time workers (compared to 61% of full-time workers) receive health insurance through their employment; and only 11.4% of part-time workers (compared to 48% of full-time workers) participate in a pension or retirement plan. Employee Benefit Research Institute, Characteristics of the Part-Time Work Force at 45, 48, 53, 64 (May, 1994).

can be addressed through these systems is defined neither by management alone nor by the employees alone, but by the two parties together. Thus the collective bargaining process enables employees, as a matter of right, to raise and jointly resolve all issues of concern to them involving terms and conditions of employment. Indeed, it is no coincidence that what the Commission terms (at 125) "an explosion in the breadth and depth of legal regulation of the American workplace" has occurred at the same time that, in the Commission's words (at 127), "the private institutions Americans have traditionally relied upon to resolve issues without resort to government regulation and court legislation, namely collective bargaining [and] grievance arbitration declined in coverage."

In addition, to the extent that federal (or state) law elect to remove certain matters from private decision-making and extend rights to employees whatever their market power, workers are far more likely to be able to enjoy those rights in practice if the workers are collectively represented. In the end, the enforcement of public-law norms which grant rights to individuals necessarily turns on individual enforcement actions. And, as the Commission observes (at 113), "[a]ccess to legal relief through the courts is limited for the majority of employees whose earnings are too low to cope with the high costs and contingency fee requirements of private lawyers." But as the Commission also notes (at 126), aside from the wealthy, those "best able to take advantage of the law are ... employees who have the kind of representation (usually a union

or some other advocacy group) that gets the attention of a short-staffed administrative agency."

(iii) Instrumental considerations aside, there are certain issues of principle that are implicated here as well. The right of all citizens to choose their own, freely-elected representatives is the bedrock of the American political system. Given the conditions of modern life, working men and women are as deeply and immediately affected, in many respects, by decisions made by their employers as by decisions made by their government. If the United States is to realize its highest ideals, public policy should seek to extend our commitment to democratic processes from the political sphere to the economic sphere by encouraging democratic forms of employee participation.

Indeed, as President Kirkland testified before this Commission:

Workplace democracy is not simply a good for working people; it is integral to the national interest in a healthy political democracy. Workers who participate in decision-making in the economic sphere can be counted on to participate actively in the political sphere as well; workers who are denied responsibility for their workplace conditions cannot. It is thus not surprising that vital labor movements nourish political democracy, as the recent experience in Central and Eastern Europe, Chile and South Africa all attest. And where workplace democracy is extinguished -- where workers are left unrepresented -- political democracy is in jeopardy as well.

(c) The short of the matter, then, is this. Bilateral, democratic forms of employee participation are at least as likely as -- and, over the long term, indeed more likely than -- management-controlled forms of participation to enhance the performance of American businesses and to that extent contribute to

our national economic health. These democratic forms of participation are far more likely than other forms of employee participation to contribute to the economic and social well-being of working men and women. And these democratic forms of employee participation are essential bulwarks to our democratic system of government. For all these reasons, the public policy priority should be to support and advance democratic forms of employee participation.

II.

The question thus becomes: what should the federal government do to encourage the development of democratic forms of employee participation.

In our view, the single most important change that could be made in this regard would be to reform the labor laws so as to make union representation accessible for the workers who desire it. That will, of course, be the subject of the Commission's September 8th hearing, and we look forward to the opportunity to present our specific recommendations at that time.

An effective labor law at a minimum would provide employees with a means of participating in workplace decisions whenever there is majority support among an "appropriate" employee group for doing so. But there are many workplaces in which the workers who desire to participate constitute less than a majority of the grouping deemed appropriate by the government. Under current law the desire of these workers to participate in decisions affecting their working lives is frustrated by a legal system which recognizes only

one type of employee representation.

In our view, the time has come to move beyond the all-or-nothing approach to representation embodied in our current law. More specifically, we believe that where there is significant support for representation within a workplace, the law should grant the workers desiring representation the right to designate their representative and should impose upon the employer an obligation to meet and confer with the representative to discuss all issues of concern (or at least all issues that must be negotiated with an exclusive representative).

The aim of this alternative form of representation, it should be emphasized, would not be to negotiate a formal agreement and no formal duty to bargain would attach; we do not believe it is practicable to mandate bargaining with multiple entities each representing a slice of the workforce. But it is possible -- and it would be the aim of this system -- to provide employees desiring representation with a voice in the various enterprise decision through representatives of their own choosing.

Executive Order 10988, which was signed by President Kennedy in 1962 to establish the first formal system of representation for federal employees, provides a possible model for such a regime. That Order provided for three levels of recognition and representation -- denominated as informal, formal, and exclusive -- based upon the degree of support for representation within the workplace.

Informal recognition simply entitled an organization to

present its views on matters of concern to its members; this recognition was extended to organizations which did not qualify for formal or exclusive recognition. Formal recognition was extended to organizations which were supported by at least 10% of the employees in an appropriate unit; it carried the right to meet and confer with the employer on issues of concern to the employees. Exclusive recognition was afforded only to majority representatives, and carried with it, of course, the right to bargain collectively on behalf of the entire group on defined subjects of bargaining.

The details of such a system for private sector employees would have to be developed with care to assure that the system does not paralyze employer decision-making by requiring continuous consultations with a large number of employee organizations each representing a small piece of the workforce. Care likewise must be taken to assure that such a system does not frustrate the employees' eventual ability to secure the right to bargain collectively on behalf of all members of an appropriate bargaining unit. In that regard, the system would have to assure effective protection for workers who choose to participate both to guard against retaliation and to enable those workers who serve in leadership positions to discharge their responsibilities to their constituents.

We would be pleased to supply the Commission with more detailed thoughts as to how a system of members-only representation could be structured so as to maximize the benefits for employers

and employees alike. For present purposes it suffices to note that permitting employees who wish to participate in the decisions that affect their working lives to initiate a system of consultation and representation even in the absence of majority support for collective bargaining would make an important contribution to promoting the kind of democratic participation that should be encouraged in this country.

Beyond that -- beyond creating the structural guarantees that are needed for democratic employee participation -- we believe there are steps the federal government can and should take to use its "bully pulpit" to promote the kind of employee participation that is good for businesses and workers alike. In this regard, we see much merit in Representative Gephardt's recent proposal for an American version of the Australian Best Practice programs, described in the Commission's Report (at 42).

There are many organized workplaces in this country in which employee participation begins and ends at the collective bargaining table. Too often that reflects the parties' inability to break out of the historic patterns of labor-management distrust or to overcome the fears of changing to a new work system expanding individual and collective employee participation. In some instances, the parties may not even be aware of -- or may not even have considered the possibility of -- enlarging the scope of employee participation.

For our part, the AFL-CIO has acknowledged that we have "been insufficiently attentive to the needs of trade union leaders who

are on the firing lines" and we have committed ourselves to "becom[ing] a resource to which unions can turn" and to "help[ing] unions identify paths to success so that the labor movement can become more and more active in pushing our vision of a new model of work organization."¹¹

In our view, a federal program of best practice awards could do a great deal more in helping labor and management learn from what others have accomplished and find ways to move forward. The prospect of competing for a national award itself would stimulate innovative approaches to employee participation. More importantly, by spotlighting what the best companies and unions have been able to accomplish, others would be encouraged to reexamine their own practices and to search for improvements.

Best practice awards might have the added benefit of addressing, at least in a small way, what this Commission has recognized as one of the principal impediments to the development of democratic forms of participation in non-union companies: the dominant management view in this country -- as opposed to virtually every other industrialized country -- that worker organization is detrimental to the interest of the firm and that the desire (or decision) of workers to organize represents a failure of management. Those attitudes lead management to resist organizing drives with all their strength, and produce the "highly conflictual" (p. 79) and "confrontational process" (p. 75) that disserves "the needs of workers, their unions, and their employers" (p. 141).

¹¹ The New American Workplace: A Labor Perspective at p.15.

That corporate culture needs to be changed if workers are to enjoy an effective right to representation. Just as the Baldrige Awards, from all reports, have significantly influenced the way management thinks about issues of quality, so, too, best employment practice awards have the potential for affecting management attitudes towards work organization and worker representation. Such awards can showcase companies in which labor and management have effectively worked together to achieve high levels of employee participation from the workplace to the corporate boardroom, teaching by example that labor and management need not be -- and are not necessarily -- antagonists but rather can and do work together in mutually beneficial ways.

III

In the current climate, no discussion of employee participation would be complete without a discussion of Section 8(a)(2) of the National Labor Relations Act. That section makes it unlawful for an employer to "dominate or interfere with the formation or administration of any labor organization" which is defined (in NLRA section 2(5)) to mean any "organization ... committee or plan in which employees participate and which exists for the purpose ... of dealing with employers concerning ... wages, rates of pay, hours of employment, or conditions of work." Some claim that the NLRB's interpretation of that section in the Electromation case is inhibiting forms of employee participation that ought to be encouraged. As I stated at the outset, we view the Electromation controversy as a red herring. We also believe

that section 8(a)(2) is integral to the structure of the NLRA and should not be weakened in any way.

1. The Electromation issue is a red herring because 8(a)(2) is not inhibiting the diffusion of the forms of employee participation extolled by management. The testimony of the management representatives who have appeared before this Commission makes this clear. For example, Bruce Carswell, Chairman of the Board of Directors of the Labor Policy Association, reported that "companies are now rapidly moving" to implement employee involvement systems; he described this as a "sea change" and a "workplace revolution."¹² Richard Beaumont, President of Organization Resource Counselors, concurred that "dramatic changes ... revolutionary in character" are "happening at a fairly rapid pace."¹³ John Ong, Chairman of the Business Roundtable, termed this the "transformation of the workplace."¹⁴

Their testimony is corroborated by the quantitative evidence reviewed by the Commission (at 34-35). Indeed, both the study by Paul Osterman and the survey by the Labor Policy Association find that approximately two-thirds of the companies with employee involvement programs adopted them within the past five years.

It is also very much to the point that in all of the hearings conducted by this Commission and in all of the written submissions

¹²Id. at 161, 136, 158.

¹³Tr. at 93, 98 (Jan. 19, 1994).

¹⁴Tr. at 184 (Dec. 15, 1993). See also Tr. at 86-87 (Nov. 8, 1993) (Jasinowski testimony about "extraordinary changes that are going on in the workplace").

the Commission has received, only one employer -- Polaroid -- has come forward to claim that its conduct in this area has been altered by legal constraints. Moreover, both I. MacAlister Booth, the President and CEO of Polaroid and Charla Scivally, the employee who challenged the Polaroid Employee Committee, made clear in their testimony that the only legal complaint that was made against the Committee was one filed under the Labor-Management Reporting and Disclosure Act, more commonly known as the Landrum-Griffin Act, and that complaint went to the absence of an election for the leadership of the Committee.

Nor is it surprising that section 8(a)(2) is not, in practice, inhibiting management from widely implementing its version of employee involvement. As we have stressed, because of the law's procedural and remedial deficiencies this Act does not -- indeed cannot -- do much to inhibit any employer activity. Section 8(a)(2) is especially unlikely to have much in the way of deterrent effect: its enforcement is triggered only by a complaint which, as the Commission has recognized (at 54), occurs rarely and generally only when an employer-dominated structure is used as a device to defeat a union organizing campaign; and the only risk an employer runs is an order to disestablish the unlawfully-created entity.

More fundamentally, 8(a)(2) is by and large an irrelevancy for management-controlled involvement systems. Those systems, Richard Beaumont explained, do not implicate "representational issues,"¹⁵

¹⁵Tr. at 170 (Jan. 19, 1994).

and as Daniel Yager, Assistant General Counsel of the Labor Policy Association testified they are "not necessarily focused on terms and conditions of employment" but rather are "focused on what will make the organization more efficient, what their customers want, what will make them more competitive."¹⁶ Section 8(a)(2), in contrast, is as Professor Joel Rogers put it in his testimony before this Commission, "centrally concerned about representation. It's not concerned about participation."¹⁷

Accordingly, as former NLRB Chairman and present management attorney Edward Miller stated to this Commission, "It is indeed possible to have effective programs of this kind in both union and nonunion companies without the necessity of any changes in current law. ... [A]n employer who really wants to ... can implement a very worthwhile employee involvement program and stay within the law."¹⁸

2. It is, of course, true that some management-controlled forms of participation do address terms and conditions of employment, at least insofar as such issues are connected to getting the work done more efficiently. It is at this point that section 8(a)(2) comes into play. Even here, however, the section is not necessarily the dominant player.

Thus, as presently understood 8(a)(2) does not prevent

¹⁶Id. at 31.

¹⁷Tr. at 171 (Jan. 19, 1994).

¹⁸Statement dated October 8, 1993, submitted to the Commission in connection with the East Lansing hearing.

employers from delegating to an employee committee or team "the power to decide matters [of employment conditions] for itself, rather than simply make proposals to management."¹⁹ Nor does that section prevent employers from discussing these issues with an individual employee or with a "brainstorming group" or with an employee group convened "for the purpose of sharing information with the employer."²⁰ Rather, what the section proscribes is an employer "dealing with" its employees on these issues through an employer-dominated entity.

In enacting this prohibition Congress intended, of course, to proscribe sham employee organizations -- entities created by management which employees were forced to join, which held no meetings, and which did nothing to represent employees before management. Such organizations were quite common in the 1930's, as Daniel Yager describes in his testimony. But contrary to Mr. Yager's suggestion, such entities were not the only employer-dominated entities that existed in 1935 and in no way define the limits of the concerns underlying 8(a)(2).

The reality is, as the Commission has observed (at 47), that a variety of "arrangements" -- "often called 'employee representation plans,' 'works councils,' or 'shop committees,'" -- predated the Wagner Act and "involved in varying degrees three themes: more efficient production and higher quality, workplace

¹⁹E.I. Dupont, 311 NLRB No. 88, at 3 (1993); see also Electromation, 309 NLRB at 995, discussing General Foods Corp., 231 NLRB 1232 (1977).

²⁰E.I. Dupont & Co., 311 NLRB No. 88, at 2 (May 28, 1993).

democratic values and participation, and discouragement of 'outside' labor organizations." Some of these arrangements had "quite respectable, well-founded roots in the advanced management thinking of the time," as the labor historian David Brody has reminded us.²¹

Against this background, the section 2(5) definition of "labor organization," which covers "any employee representation committee or plan," was crafted expansively for the specific purpose of reaching -- and thereby in section 8(a)(2) proscribing -- all of these forms of employee representation.²² To quote Professor Brody again, through sections 2(5) and 8(a)(2) Congress "left workplace representation to collective bargaining";²³ by "clearing the field of one kind of workplace representation, the law was opening the way for the construction of another through the processes of collective bargaining."²⁴

The judgment Congress made to proscribe all forms of employer-dominated employee organizations that deal with terms and conditions of employment and leave employee representation on such

²¹Brody, "Section 8(a)(2) and the Origins of the Wagner Act," in S. Friedman, R. Hurd, R. Oswald, & R. Seeber (eds), *RESTORING THE PROMISE OF AMERICAN LABOR LAW* AT 34 (1994). See also Nelson, "Employee Representation in Historical Perspective," in B. Kaufman & M. Kleiner (eds), *EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS* AT 371-89 (1993).

²²The legislative history leading to the definition of labor organization in section 2(5) is reviewed in *Electromation*, 309 NLRB at 993; additional detail is added in Brody, *supra* n. 10, at 39-41.

²³*Id.* at 43.

²⁴Tr. at 126 (Jan. 19, 1994) (testimony of David Brody).

matters entirely to collective bargaining rests on two principal considerations, each of which remains as valid today as it was in 1935.

First, 8(a)(2) embodies the fundamental principle that in bilateral relationships, each party should be free to select its own representatives and to decide for itself what issues (if any) the party wishes to discuss with the other party, what proposals (if any) the party wishes to make to the other party, and what accommodations (if any) the party wishes to reach with the other party. In any other context it would be unthinkable to allow A to select B's representative for purposes of dealing with A; the employment relationship -- in which workers are dependent upon their employers for their very livelihood -- is the last one in which such conflict of interest should be countenanced.

That is precisely the point Senator Robert Wagner made in championing the enactment of 8(a)(2):

I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other. Collective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing. ... [T]o argue that freedom of organization for the worker must embrace the right to select a form of organization that is not free is a contradiction in terms.²⁵

Second, section 8(a)(2) recognizes that allowing employer-dominated employee organizations even as one form of employee representation distorts the process of employee free choice and

²⁵1 Legislative History of the National Labor Relations Act at 1416-17.

thus that such organizations are, in Senator Wagner's words, "one of the great obstacles to genuine freedom of self organization."²⁶ This point warrants brief elaboration.

Generally speaking, unrepresented employees are unlikely to be in a position to evaluate accurately either the long term value of employer-dominated labor organizations or the extent and effect of employer control. That difficulty, and the added difficulty of dislodging an employer-dominated labor organization once established, would in the absence of 8(a)(2) lead employers to create such organizations at the first sign of need and would pose a structural obstacle to employees creating a new, appropriate and independent representative at a later time.

This structural obstacle is of particular importance given the overall American labor relations system. As the Commission has recognized (at 74-75), in our system employees who desire independent representation must go through a "highly confrontational" and "conflictual" struggle which creates "considerable tension" and exacts high "human cost." Given these realities even employees who understand well the limits of an employer-controlled organization and who, all things being equal, would prefer independent representation may nonetheless resign themselves to an employer-controlled organization to pretermit the struggle required to establish an independent representative.

Thus a legal system allowing employers to offer a readily available, safe and cost-free employer-dominated representative as

²⁶1 1935 Leg. Hist. at 1373, 1416.

an alternative to an inaccessible, risky and expensive independent representative would not further genuine employee free choice but rather create a dynamic that overwhelms it. Indeed, by allowing the fallback of an employer-controlled representative such a system would encourage even those employers who recognize the value to the enterprise of some form of employee representation to redouble their resistance to independent representation.

Thus, as Professor Brody argued in his testimony before the Commission:

abhorrence of company domination is a corollary to the principle of freedom of association central in our labor law. We would have to expunge the law itself before we could evade the test of company domination in our consideration of alternative forms of workplace representation.²⁷

This is, of course, far more than theory or conviction alone; it is a central teaching of history as well as of contemporary experience. As the Commission observes (at 47), employer-dominated representation plans grew during and immediately after World War I when the National War Labor Board was requiring some form of employee representation; few of those plans survived for very long. But a second wave of these plans was started in 1933 by the enactment of the National Industrial Recovery Act; for two years -- until they were banned by section 8(a)(2) -- these plans largely succeeded in preempting the growth of independent employee organizations.

Santana warns that those who do not learn the lessons of history are doomed to repeat it. Contemporary experience in this

²⁷Tr. at 120 (Jan. 19, 1994).

context underscores that warning. We know that American management continues to resist independent employee organization with all its strength and continues to preach the gospel of a "union-free environment." We know, too, that in this crusade American management is more than willing to use employer-dominated organizations as a tool to subvert independent labor organizations.

Electromation itself illustrates the point. That case, as Professor Charles Morris observed in the statement he submitted to the Commission, is a "garden variety Section 8(a)(2) case"²⁸ in which the employer, confronting a workforce restive over changes unilaterally made by the employer to the employees' terms and conditions of employment, sought to diffuse that tension by creating ad hoc "Action Committees" to deal with these issues. When the employees sought to form a labor union to address their concerns, the employer quite explicitly pitted the Action Committees against the union, suspending the committees' operation during the pendency of the organizing drive and telling the employees that the employer "could not continue to work with the committees until after the election."²⁹

The recent decision of an Administrative Law Judge in NCR is likewise instructive. In that case, shortly after employees at two

²⁸ Statement of Charles Morris, Dec. 1, 1993, at 20, Docket No. 158. In a separate paper that Professor Morris prepared for a Symposium and which he submitted to this Commission, he notes that "the fame of the case relates more to its hype than to its type -- for the case was not a bona fide worker participation case." Morris, Deja Vu and 8(a)(2) -- What's Really Being Chilled by Electromation at 2 (April 30, 1994), Docket No. 158.

²⁹Electromation, 309 NLRB at 992.

of NCR's locations sought to organize unions, NCR created a system of "satisfaction councils" for the stated purpose of providing "a means whereby the complaints of the employees could be moved from them to management."³⁰ But when a group of NCR employees formed their own National Association of NCR Employees and requested a meeting between their elected steering committee and NCR's CEO Jerre Stead, they were told that, absent an NLRB election, "it would not be appropriate for Jerre to meet with, or recognize the Committee"; at the same time they were advised that "juice with Jerre, the Jerre Line, Ask Jerre, and the Open Door Policy are all available for any Associate" and that "the Satisfaction Councils are an excellent way to encourage communication between Coaches and Associates."³¹

The lesson of cases like these should not be ignored. Edward Miller, the management attorney and former NLRB Chairman, states it well: "While I represent management, I do not kid myself. If Section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur."³²

3. In sum, section 8(a)(2) embodies the fundamental principle that effective worker representation requires that workers have a full measure of independent power and cannot succeed in the absence

³⁰NCR Corp., 9-CA-30467, p.4 (May 26, 1994).

³¹The facts concerning the National Association of NCR Employees were presented to the Commission by Andrew Rivers, an NCR employee, at the Commission's East Lansing Hearing (Tr. at 242-49) and Mr. Rivers submitted to the Commission the exchange of correspondence between his organization and NCR.

³²Statement of Edward Miller, supra, at 7.

of such independence. Employers remain free to involve employees as much as they wish in the work of the enterprise; section 8(a)(2) says only, and quite simply, that employers may not deal with employees on their terms of employment through employer-dominated entities. That rule remains as valid and vital today as it was sixty years ago when first enacted, and this Commission should so recognize.

Appendix

AIEG NEW EMPLOYEE HANDBOOK



MOTOROLA

*Automotive and Industrial
Electronics Group*

AIEG NEW EMPLOYEE HANDBOOK

A Publication of AIEG Personnel

AIEG NEW EMPLOYEE HANDBOOK

Our Five Key Initiatives

Our Five Key Initiatives are described below so you may understand their importance as our organization works to implement them successfully. We believe that if we do these five things well, we will achieve our key goals and provide Total Customer Satisfaction. The specific identification of each initiative sharpens our focus on these exceptionally important issues, all of which tie together and reinforce each other.

1. Six Sigma Quality

This is our key quality goal to be achieved everywhere in Motorola. We will achieve Six Sigma and Beyond results in everything we do, and strive for a 10-times reduction in defects every two years. "Six Sigma" means approximately 99.9998% perfect product or service. This attainable next-level of quality is a major step toward achieving 100% perfect quality -- our ultimate goal.

2. Total Cycle Time Reduction

We will apply cycle time reduction techniques to all elements of our business, with a goal of 10-times improvement in cycle time in the next 5 years.

3. Product, Manufacturing and Environmental Leadership

Product and technical leadership have always been a major thrust. Manufacturing excellence must become our standard of operation and include all support activities necessary to produce the product. Environmental leadership is an area in which Motorola leads other corporations as we all strive to save our environment.

4. Profit Improvement

This program must be successful in order to achieve the superior financial results that will enable us to fund our continued growth. Through everyone's efforts to improve profitability, we can secure our future by investing in new businesses and technologies.

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6. **Management facilitators ensure consistency with Operating Principles.** Since guidelines cannot anticipate every potential action, management facilitators provide guidance and direction, as necessary, to ensure consistency of empowered teams to these Operating Principles. Facilitators must seek appropriate counsel and interface with subject matter experts -- such as environment, safety, government procurement, the Personnel Department, the Law Department and Corporate Audit -- when their teams pursue activities in these legally sensitive areas. The team's management facilitator is responsible for the team's output as well as being responsible for team compliance to the Operating Principles.
7. **Training occurs prior to performing any legally sensitive activity.** Teams and their respective facilitators must receive approved training before assuming responsibility for legally sensitive activities -- such as safety, security, selection and performance feedback. This will ensure the safety and well-being of every individual and compliance with applicable legal requirements and Motorola policies and procedures.

As an employee in an empowered environment, we must believe that our contribution to the organization can and will make a difference. We must be willing to participate actively in our job area by continuously striving to improve our performance and that of our team. We must be sensitive to our fellow team members' roles and our customer needs, acknowledge the efforts and contributions of our associates, maintain personal job skills, and be open to skill upgrading as required by technology.

THE "MOTOROLA CULTURE"

"The Motorola Culture" is an expression to illustrate how we view our corporate community where each citizen is entitled to certain fundamental rights and privileges. Each citizen of the Motorola community has certain responsibilities as well.

Motorola stands fully behind your right to contribute your suggestions on how we all might more effectively reach our goals. We welcome opinions, recommendations, new ideas and constructive criticisms from everyone through open lines of communication.

Through involvement and providing people with greater responsibility, we maintain an environment where each individual feels a personal level of satisfaction in reaching a goal. At Motorola, you are to contribute the full strength of your skills and talent, and to share in the success your contribution brings.

AIEG NEW EMPLOYEE HANDBOOK

SECTION III - WHAT YOU CAN EXPECT FROM MOTOROLA

OUR EMPLOYEE RELATIONS PHILOSOPHY

With the exception of a recent business acquisition, Motorola has maintained a non-union environment in all our domestic operations throughout more than a 60-year history. This simply means that the company and its employees are free to deal directly with each other, participate in open and candid dialogue and conduct business without the intervention of any third parties. It is Motorola's intent to continue this direct relationship with its employees, and we believe that it is also the preference of our employees to continue to think, speak and act for themselves.

- Our relationship is built on open and candid dialogue directly between the company and employees. Therefore, the need for any third-party involvement is eliminated from our business.
- We treat employees as individuals with dignity and respect.
- We provide competitive wages and benefits and safe, comfortable working conditions.
- We apply only job-related standards to measure work.
- We encourage an employee to discuss problems with immediate supervision and use the Open Door Policy if the problem cannot be resolved.

RESOLVING PROBLEMS: OUR OPEN DOOR POLICY

It is our policy that all employees be treated with respect. Anyone who has a job-related problem, question or complaint, or who has been disciplined or discharged, may use the "Open Door Policy" procedures. It is important that you feel free to use this procedure; therefore, Motorola will not tolerate any recrimination against people who make use of this policy.

Step One: Most job-related problems or concerns can and should be resolved directly between you and your immediate supervisor. You are encouraged to discuss such issues with your supervisor, who should be constructive and objective in working with you to resolve the matter. In those cases where the immediate supervisor is the subject of the complaint, you are permitted to begin the procedure at Step 2.