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The Legal and Economic Implications of Union-Management Cooperation: The Case of GM and the UAW

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Chapter 8

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SYNOPSIS

§ 8.01 Introduction

> 'Cooperation' sounds too much like 'cooption.' 'Collaboration' recalls the Nazis in occupied Europe. Words are important in labor relations. A word we like is 'jointness.' Another is 'involvement.'

With comments like those, a top United Automobile Workers official recently pinpointed one of the most significant and controversial developments in contemporary industrial life—the substitution of a new union-management attitude of conciliation and togetherness for the parties' traditional adversarial stance.

In this paper I shall briefly trace the rise of participative management, as the process is often called, using the experience of General Motors and the UAW as my prime example. The phenomenon will then be placed in historical perspective, and contrasting assessments of its desirability and future potential will be discussed. Finally, I shall try to evaluate some of the more important legal and economic implications of "jointness" and employee involvement in management decisionmaking.

§ 8.02 Participative Management

[1]—In General

During the late 1960s American management became alarmed by signs of growing alienation and militancy on the part of workers. Although this unrest was much exaggerated, it fueled efforts by many companies to enhance the quality of work life ("QWL") by increasing employee participation in job-centered decisionmaking. The interest

in such programs was intensified during the 1970s by glowing accounts of the capacity of Japanese industry to improve both the quantity and quality of production by fostering an almost filial relationship between employee and employer. By 1980 it was estimated that one-third of the companies in the *Fortune 500* had established programs in participative management.[1] Furthermore, in certain countries, such as Sweden and West Germany, worker participation was mandated by statute.[2]

Numerous studies attest that it is simply smart business to heed the voice of the individual employee and to give him or her a stake in the successful operation of the enterprise.[3] The worker on the production line will spot flaws that have escaped the eye of the keenest industrial engineer. The mere fact of involving employees in the design of production processes will contribute to heightened morale, better attendance, and greater dedication to the job.

Participative management or QWL programs have undoubtedly been used by some companies as a key ingredient in their union-avoidance campaigns.[4] Nevertheless,

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[1] Wallace & Driscoll, *Soical Issues in Collective Bargaining*, in U.S. Industrial Relations, 1950-1980: A Critical Assessment 199, 241 (J. Stieber, R. McKersie & D. Mills eds. 1981). The terms "participative management," "employee involvement" (EI) and "quality of work life" (QWL) have no fixed meanings. Some writers try to assign them different and more precise definitions. For my purposes I have tended to use them interchangeably.

[2] Berqvist, *Worker Participation in Decisions within Undertakings in Sweden*, 5 Comp. Lab. L. 63 (1982); Richardi, *Worker Participation in Decisions within Undertakings in the Federal Republic of Germany* 5 Comp. Lab. L. 23, 29-31 (1982).

[3] Wallace & Driscoll, *supra* n.1 at 238, 241. For varying appraisals see Goodman, *Quality of Work Life Projects in the 1980s*, 31 Lab. L. J. 487 (1980); Locke & Schweiger, *Participating in Decision-Making: One More Look*, in 1 Research in Organization Behavior 271 (B. Starr ed. 1979); Merrifield, *Worker Participation in Decisions within Undertakings*, 5 Comp. Lab. L. 1 (1982); Summers, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 Am. J. Comp. L. 367 (1980); T. Kochan, H. Katz & R. McKersie, The Transformation of American Industrial Relations 81-108, 146-77 (1986) [hereinafter *Transformation*].

[4] Wallace & Driscoll, *supra* n.1, at 242-51.

several major international unions have become engaged in such projects. In addition to UAW activity at GM and Ford, major programs have included the Communications Workers and AT&T, and the Steelworkers and various steel companies.[5] Rather ironically, some experts find that a strong union presence may be essential to ensure the long-term survival and continuing success of QWL undertakings.[6]

[2]—The GM-UAW Experience

[a]—Background

After the fierce organizing battles and sit-down strikes of the mid-1930s, labor relations between the UAW and GM "matured" to such an extent that some critics accused the two organizations of being "too cozy," to the detriment of the American consumer and sometimes union members as well.[7] Even the long ten week strike of 1970 has been described as a tactic to bring the membership into line. The intense global competition of the 1970s and 1980s, however, required GM to rethink its management philosophy and to strive aggressively for more efficient production techniques.

[b]—QWL Programs

Irving Bluestone, the thoughtful, innovative head of the UAW's GM Department during the 1970s, was a strong believer in greater employee involvement in management. He was thus receptive to the initiation of QWL programs at GM plants, but he and his company counterparts were canny enough not to press for them until local leaders and members were agreeable. The early plans focused rather narrowly on the "quality of work life." By the late 1970s

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[5] *Id.* at 246; *Transformation, supra* n.3, at 147-75.

[6] *Id.* at 176-77.

[7] W. Serrin, *The Company and the Union* 4, 24, 69, 298-306 (1973).

the programs in many plants had evolved into a second phase, where they were more closely linked to collective bargaining issues and procedures. In a few localities, such as the Pontiac Fiero auto plant, a third stage was reached in the 1980s, with the parties addressing larger "strategic" questions.[8] All together, GM and the UAW had plans operating in 50 plants by the end of the 1970s, and in 90 of 150 bargaining units a half decade or so later.[9]

Today the term "QWL," and perhaps the concept itself to some extent, has fallen into disfavor in certain UAW quarters. Some union officials feel GM has used the process improperly to bypass collective bargaining and communicate directly with employees about such matters as the company's vulnerable financial condition. GM representatives respond that occasional misunderstandings should not obscure the very substantial achievements of QWL programs. They have produced dramatic turnarounds in morale and productivity, for example, at such once notoriously troubled plants as Lordstown, Ohio and Tarrytown, New York.[10]

Both parties remain firmly committed to some form of ongoing union-management cooperation. Thus, the 1987 negotiations resulted in a supplementary agreement mandating a joint committee at every GM plant to meet regularly and deal with the dual problem of improving the company's "competitiveness" and reducing "outsourcing," or subcontracting, whenever feasible.

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[8] *Transformation, supra* n.3, at 147-52.

[9] Wallace & Driscoll, *supra* n.1, at 245; St. Antoine, *Dispute Resolution between the General Motors Corporation and the United Automobile Workers, 1970-82*, in Industrial Conflict Resolution in Market Economies 307 (T. Hanami & R. Blanpain eds. 1984).

[10] Wallace & Driscoll, *supra* n.1, at 239, 246; *Transformation, supra* n.3, at 151.

[c]—The Saturn Project

The most striking example of GM-UAW cooperation, the Saturn small-car project, was described in considerable detail in October 1985 by Eugene L. Hartwig, formerly GM's chief labor counsel and at that time a company vice president.[11] Prior to 1984, the company and the union had concluded that the American auto industry's failure to compete effectively in the small car market would eventually jeopardize its position in the midsize and large car markets as well. GM and the UAW agreed to pool their resources and launch a joint project to build a fuel-efficient, high quality, low cost small car.

During 1984 seven union-management committees were formed under the umbrella of the GM-UAW Study Center. Their functions paralleled the activities of Saturn's projected business units, which would be responsible for everything from product design and parts manufacturing to subassembly and final assembly. The 99 participants included 35 plant management officials, 42 union representatives and workers, and 22 members drawn from GM and UAW headquarters staff and negotiating teams. Studies of how best to integrate people and technology at all stages of design and production proceeded on a full-time basis. Joint teams logged an estimated two-million miles of travel, visiting plants in Sweden, West Germany, and Japan, as well as GM and non-GM plants in the United States. All committee decisions were by consensus, and ultimately the Study Center adopted a unanimous set of recommendations for the new Saturn Corporation.

The Memorandum of Understanding that emerged contemplated that the Saturn workforce would be drawn in large part from GM bargaining unit employees. Manage-

[11] Hartwig, *New Directions in Collective Bargaining*, in American Labor Policy: A Critical Appraisal of the National Labor Relations Act 240, 242-46 (C. Morris ed. 1987).

ment was assured of much greater flexibility in operations through a substantial reduction in the number of separate job classifications, especially among the skilled trades. Hartwig emphasized that the nonadversarial "team concept" would pervade Saturn's organizational structure, stating: "Most of the authority and decisionmaking is expected to be exercised at the work unit level, which is an integrated group of approximately 6-15 members."[12] He added: "Never before has a union been involved to this extent in designing work stations, business and people systems, and in selection of the site where its members will be asked to work and relocate their families."[13]

[d]—1987 Negotiations — Inverted Pattern Bargaining

Many outside observers predicted long, hard negotiations between GM and the UAW in 1987, with an extended strike not unlikely. Job security was the key union demand. Yet the company, its domestic market-share shrinking, was intent on greater operational flexibility and productivity. And GM seemed further hampered by its large percentage of inhouse parts manufacturing. While Ford already subcontracted out around fifty percent of its auto components, GM produced approximately seventy percent inhouse. That made any job guarantees much more difficult for GM.

Ford, currently the most profitable of the "Big Three" auto firms, was the UAW's "target" company in 1987. Agreement was quickly reached on a new three-year contract. Then, confounding the experts, the union settled with GM so easily that it did not even have to set a strike deadline. A *New York Times* writer ascribed much of the credit for the unexpectedly smooth bargaining to a 10-day trip to Japan that top GM and UAW negotiators took to-

[12] *Id.* at 245.
[13] *Id.* at 245-46.

gether earlier in the year.[14] Company and union representatives acknowledge that this joint undertaking enabled persons on both sides to get acquainted in a relaxed, leisurely fashion before sitting down across the table from one another.

With tens of thousands of jobs and untold millions of dollars at stake, however, one would suspect that there was also something more substantive involved than just a cordial, trusting relationship among the negotiators—regardless of how helpful the latter might be in paving the way for a settlement. What appears to have been the crucial factor was a deliberate decision by UAW president Owen F. Bieber and other union leaders not to obtain from Ford in the first round of bargaining any contract provisions that could not subsequently be matched in effect by the financially more troubled GM. Ford, for example, could probably have provided an unconditional guarantee of job security. But GM could not, and thus the provisions in both contracts assuring workers there will be no layoffs because of such changes as increased productivity (called "secure employment levels" or SELs at GM) contain an escape clause; layoffs are permissible if there is a decline in sales volume attributable to market conditions. The result was to preserve pattern bargaining in the auto industry, but with the new twist of what I would call an "inverse pattern." That is, the union did not drive the hardest bargain it could with the "target" company and then seek to impose that settlement on the rest of the industry. Instead, in the first round of negotiations, the UAW kept one eye cocked toward the future, trying to assess the capacity of the other firms to meet comparable demands.

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[14] Massing, *Detroit's Strange Bedfellows,* The New York Times Magazine, Feb. 7, 1988, § 6 at 20, col. 2.

As mentioned earlier, an attachment to the 1987 GM-UAW National Agreement established "operational effectiveness" committees at the national and local levels. These are joint union-management bodies that will constantly monitor work quality and efficiency at each location, and reexamine past outsourcing and subcontracting decisions in an effort to identify opportunities for "insourcing" and new work within a plant. A changed attitude evident among GM strategists is that insourcing may frequently constitute a positive advantage, permitting increased control over product quality, timing of deliveries, and so on. For the union, that attitude bodes well for preserving jobs. In addition, the 1987 contract strengthened GM's "jobs bank" program. Workers displaced by outsourcing or productivity will be retained at the same location at full pay and given training or a temporary job assignment.

The emphasis on job security at GM carries with it certain costs. There was grumbling among the rank-and-file when many Ford workers recently received profit-sharing bonuses of several thousand dollars each; GM employees got nothing despite a similar profit-sharing formula in their contract. GM's management explained that its employees could obtain such bonuses too, if the company adopted Ford's "lean and mean" philosophy. Laid-off Ford workers generally remain laid off, and the workforce stands at a steady 100,000. By contract, GM has recalled tens of thousands of employees, hiking its workforce to 360,000. "If we cut back to 240,000," says one high-ranking company official, "There could easily be profit-sharing. The unions and the workers have to make a choice. We think our approach is more humane." GM feels that systematic efforts to enlighten employees about the economic realities of such trade-offs have reduced resentment concerning the lack of bonuses. These efforts have in-

cluded a special paid educational leave (PEL) program, which so far has enabled 1,000 rank-and-file employees to spend four weeks in Ann Arbor, Cambridge, Washington, and GM headquarters, improving their knowledge of industrial relations, the economy, and the political process.

All these cooperative endeavors have not won universal acclaim. Retired UAW international director Victor Reuther (Walter's brother), brandishing the hallowed family name, tramped the country to denounce "jointness" as a sellout of union members' interests. He was backed by various insurgents and dissenters still active within the organization, some speaking out openly and others expressing reservations more discreetly. The union's failure to break away from pattern bargaining and secure the most favorable contract possible from Ford was also the subject of criticism.

Supporters of the incumbent UAW administration's policy pointed out that Walter Reuther himself had long sought enlarged employee involvement in management decisionmaking. "You bargain for what you can get at any given time," a prominent union official told me. "Walter couldn't get worker participation, and so he took more money instead. Today there's less money available, which is why we went for employee involvement." Union leaders are convinced employees can contribute to product quality. "Quality means sales," insisted one officer. "Sales mean jobs. It's as simple as that." Over 81 percent of the UAW's members at GM voted to ratify the 1987 agreement. By comparison, the 1982 contract prevailed with only a 52 percent approval. Learning of the membership's 1987 ratification vote, former UAW president Douglas Fraser declared, "The debate [on jointness] is over." But Fraser is an optimist by nature, and his may not have been the last word.

Within the next couple of years, before the current three-year contract is renegotiated, GM industrial relations vice president Alfred S. Warren, Jr. and UAW vice president Donald F. Ephlin, who heads the union's GM department, are both likely to retire. What will happen then? A unique chemistry has plainly operated between these two men, which has been highly conducive to mutual understanding and accommodation. Can the system survive the departure of one or both of its principal architects? Insiders are divided on the question. One view is that the cooperative bond is still fragile, and heavily dependent on the dominating personalities of Ephlin and Warren. Within weeks after the signing of the 1987 GM-UAW contract, the company laid off thousands of employees, invoking the sales-downturn escape clause. Many workers felt betrayed and resentful. Someone less committed than Ephlin might not be able, or wish, to hold the line. Other observers point out, however, that QWL programs and participative management did not begin at GM with Ephlin and Warren but with their predecessors. By now, according to this second analysis, the process has become sufficiently institutionalized to exist independently of any particular individuals.

[3]—Appraisals

Scholars have found precedents for today's QWL, participative management, and other cooperative programs in such diverse sources as the "scientific management" schemes of Frederick Winslow Turner,[15] the "Scanlon Plan"[16] for providing financial bonuses to all employees when productivity is increased through the efforts of joint worker-management committees, and even the shabby

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[15] Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 Harv. Civ. Rts.—Civ. Lib. L. Rev. 39, 57 (1988).

[16] Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. Rev. 499, 509-10 (1986).

"company unions"[17] of the 1920s and 1930s. Some critics have charged that the cooperative or "integrative" model "reflects its heritage,"[18] leaving management "in charge but with greater responsiveness to the needs of the lower participants in the enterprise."[19] Especially but not only in nonunion settings, the cooperative approach is seen as a snare and delusion for workers, beguiling them into a false sense of complacency about the commonality of their interests and the interests of their employers. Traditional collective bargaining is regarded as a far superior mechanism for dealing with the genuinely adversarial positions of employers and employees.

A leading advocate of increased union-management cooperation is Stephen I. Schlossberg, peppery former general counsel of the UAW whom William Brock had the good sense to select as his deputy under secretary of labor. Schlossberg and others like him believe that joint undertakings can both enhance the dignity of the individual worker and improve the competitiveness of American industry.[20] Schlossberg of course would not espouse employee involvement as an alternative to collective bargaining but rather as an integral part of it. Some others who embrace participatory programs undoubtedly have union avoidance as a prime motive.[21]

An unusually thoughtful and balanced treatment of the cooperation versus adversarialness issue is provided by critical legal theorist Karl Klare. He calls it a "falsely po-

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[17] Klare, *supra*, n.15, at 57.

[18] Kohler, *supra*, n.16, at 518.

[19] J. Barbash, *The Elements of Industrial Relations* 85 (1984).

[20] U.S. Dep't of Labor, Bureau of Labor-Management Relations and Cooperative Programs, U.S. Labor Law and the Future of Labor-Management Cooperation, No. BLMR 104 (1986). See also *Transformation*, *supra* n.3, at 226-50; Fetter & Reynolds, *Labor-Management Cooperation and the Law: Perspectives From Year Two of the Laws Project*, 23 Harv. Civ. Rts.—Civ. Lib. L. Rev. 3 (1988).

[21] Wallace & Driscoll, *supra* n.1, at 242-51.

larized debate."[22] Placing his customary emphasis on "workplace democracy" and "self-realization," Klare maintains that in the contemporary context of burgeoning democratic aspirations amidst grave power imbalances, "democratization requires the simultaneous elaboration of adversarial and participatory institutional forms."[23] He further recognizes today's need for shared employer-employee responsibility in "devising paths to economic prosperity," adding wryly: "Efficiency is simply too important to be left to management."[24] I would not put it quite that way but I agree with the sentiment. My major qualification is that labor and management cannot be expected to act over time against their perceived self-interest. Almost inevitably, there will be fluctuations in the proportion of cooperation and adversarialness in any relationship, depending on changes in the firm's competitive situation, employment levels, the health of the economy, and other circumstances. That should be neither surprising nor alarming. What is vital is that both sides negotiate with a realistic sense of each other's needs and bargaining flexibility.[25]

§ 8.03 III. Legal and Economic Implications

[1]—Duty to Bargain

A lesson I would draw from the GM-UAW experience and from the whole participative management movement is that we should seek to realize the full potential of creative bargaining by shedding as much as possible of the straitjacket imposed by *NLRB v. Wooster Div. of Borg-Warner*

[22] Klare, *supra* n. 15, at 82.
[23] *Id.* at 77, 79.
[24] *Id.* at 79.
[25] *Cf.* Fischer, *Labor's Dilemma: Adapting to Post-Recession Unionism*, 222:3 Industry Week 41, 42 (Aug. 6, 1984) ("whether [the parties] are friendly or feuding . . . is less important than whether they are addressing matters of genuine relatedness to the viability of the firm and its employees").

Co.[26] There the Supreme Court accepted a rigid and unrealistic dichotomy between mandatory and permissive subjects of bargaining. Mandatory subjects are the statutorily prescribed "wages, hours, and other terms and conditions of employment,"[27] about which either party must bargain at the behest of the other. Permissive subjects are all other lawful items, including a broad array of so-called managerial prerogatives or internal union affairs, which are often of intense interest to unions or management, respectively, but about which they cannot demand bargaining if the other party objects.[28] Governmental fiat should not control so basic and individualized a question as the contract issues a particular employer or union deems important enough to back up with a lockout or a strike.

Hypocrisy is encouraged and candor reduced by the *Borg-Warner* formula. A savvy party that urgently desires a permissive subject in a contract can usually bring negotiations to an artificial deadlock over a legally sanctioned mandatory topic. Experienced, sophisticated participants in a mature, durable bargaining relationship do not engage in such ploys to evade the law's strained distinctions.[29] If a union like the UAW, during a period of rapid inflation, wishes to discuss pension increases for retired workers, technically a nonmandatory subject,[30] the Big Three auto manufacturers discuss them.[31] A vast portion of the Saturn project undoubtedly involved nonmandatory topics. In those circumstances the law is superfluous.

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[26] 356 U.S. 342 (1958).

[27] NLRA § 8(d), 29 U.S.C. § 158(d).

[28] See generally R. Gorman, Basic Text on Labor Law: Unionization and Collective Bargaining 496-98 (1976); 1 C. Morris, The Developing Labor Law 761-64 (2d ed. 1983).

[29] See, e.g., Wollett, *The Borg-Warner Case and the Role of the NLRB in the Bargaining Process,* N.Y.U. Twelfth Annual Conference on Labor 39, 46-51 (1959).

[30] Allied Chemical & Alkali Workers Local 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

[31] Labor Relations Yearbook 1973 (BNA) at 27 (1974); Labor Relations Yearbook 1976 (BNA) at 7-9 (1977).

Where legal regulation is needed is for inexperienced or hostile parties and immature, fragile relationships. The time required for bargaining should not be a serious impediment to management's occasional need for swift action. A sampling I made of NLRB cases during the 1970s indicated that negotiations reached a deadlock or "impasse" in a median period of six and one-half weeks. After impasse, of course, an employer may institute its proposed terms unilaterally, without the union's consent.[32]

Borg-Warner's mandatory-permissive rubric probably reflects an American consensus that there is some "untouchable" core of entrepreneurial sovereignty (and an analogous area of union autonomy) that is beyond the reach of compulsory collective bargaining. An outright overruling of *Borg-Warner,* either judicially or legislatively, is therefore unlikely. But at least I think it would make for far healthier and more responsible labor relations if the duty to bargain encompassed, as the Kennedy-Johnson Board declared, any employer action that could effect a "significant impairment of job tenure, employment security, or reasonably anticipated work opportunities for those in the bargaining unit."[33] In my judgment that conclusion is adequately supported by the language, legislative history, and policy of the National Labor Relations Act.[34] The Warren Court gave qualified endorsement to the proposition,[35] and, de-

[32] NLRB v. Katz, 369 U.S. 736 (1962).

[33] Westinghouse Elec. Corp., 150 NLRB 1574, 1576 (1965). Subjects reclassified by the Kennedy-Johnson Board as mandatory bargaining topics included subcontracting, partial plant closings, and technological improvements.

[34] For a fuller statement of my views, see St. Antoine, *The Collective Bargaining Process,* in American Labor Policy: A Critical Appraisal of the National Labor Relations Act 215, 221-39 (C. Morris ed. 1987).

[35] Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (in-plant subcontracting of maintenance operations).

spite retrogression on the part of the Burger Court[36] and the Reagan Board,[37] sound personnel practices alone would argue that the broader scope of bargaining requirement should ultimately prevail.

[2]—Employer Domination or Support

At the time the Wagner Act, the original NLRA, was passed in 1935, a major barrier to effective unionization was the existence of employer-sponsored "company unions."[38] These consisted generally of joint employer-employee shop committees or all-employee representation plans, established by the employer and largely confined to an advisory or consultative role. Later embodiments took on more of the trappings of independent unions, with their own bylaws and elected officers. But most company unions received no dues, had no separate treasuries, and held no general membership meetings.[39] In any event the common denominator was that the employer, subtly or otherwise, pulled the strings. It was these company unions, and to a lesser extent the employer-favored union among competing organizations, that Section 8(a)(2) of the NLRA targeted in making it an unfair labor practice

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[36] First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) (majority opinion stated broadly that an employer need not bargain about an economically motivated decision to shut down part of a business, but the actual holding was narrower — dealing with the cancellation of a custodial contract because of a dispute over a management fee — and judgment was expressly reserved on "plant relocations, sales, other kinds of subcontracting, etc.").

[37] In Otis Elevator Co., 269 NLRB 891 (1984), the Board held an employer did not have to bargain about terminating one research facility because of antiquated equipment and consolidating research functions at another plant. The employer's decision "did not turn upon labor costs" but rather "turned upon a fundamental change in the nature and direction of the business." It was thus not "amenable to bargaining," regardless of its "effect on employees [or] a union's ability to offer alternatives." Cf. Hawthorn Mellody, Inc. 275 NLRB 339 (1985) (no violation when employer moved delivery operations to another facility, since decision "turned upon a change in the nature or direction of the business," even though labor costs were "a motivating factor").

[38] For a good recounting of the story, see Kohler, *supra* n.16, at 518-34.

[39] *Id.* at 529.

for an employer to "dominate" or "contribute financial or other support" to any "labor organization."[40]

Does Section 8(a)(2) prohibit or limit participative management schemes in either a union or nonunion setting? Professor Thomas Kohler argues powerfully that Section 8(a)(2) represents a carefully considered congressional choice of the adversarial over the cooperative model, and that, at least in the absence of an independent union's consent, the implementation of QWL and similar plans violates the statute.[41] The key in the nonunion situation is the meaning of "labor organization." The NLRA defines it as "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."[42]

In *NLRB v. Cabot Carbon Co.*[43] The Supreme Court adopted a broad interpretation of "labor organization" to strike down a joint employee-management committee arrangement under Section 8(a)(2). Committees at several plants met periodically to discuss production, working conditions, and employee grievances. Yet they had no formal structure and had never attempted to negotiate a contract with the employer. Nonetheless, the Court found the committees' recommendatory function enough to constitute "dealing with" the employer, and hence there was an

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[40] 29 U.S.C. § 158(a)(2).

[41] Kohler, *supra* n.16, at 518-45. A plausible case can be made that § 8(a)(2) applies even in the unionized setting. See Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 Indus. & Lab. Rel. Rev. 541 (1984). Minor employer assistance to a union may be acceptable under a de minimis principle. See, e.g., NLRB v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1984).

[42] NLRA § 2(5), 29 U.S.C. § 152(5).

[43] 360 U.S. 203 (1959). See also NLRB v. Newport News Shipbuilding and Drydock Co., 308 U.S. 241 (1939) ("immaterial" whether company involvement was "incidental rather than fundamental and with good motives").

employer-established "labor organization" within the meaning of Section 8(a)(2). Going still further, courts of appeals have concluded that employer committees were "dealing with" an employer even though they did no more than discuss[44] or exchange information about[45] covered topics.

More recently courts of appeals have departed from a strict reading of Section 8(a)(2) on such avowed policy grounds as rejection of a "purely adversarial model of labor relations" and acceptance of a "cooperative arrangement [where it] reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes."[46] In rationalizing their results, these courts have relied on such technical arguments as the lack of sufficient "interaction" or "active, ongoing association" between an employee committee and the employer to constitute "dealing," and the notion that frequent turnover in committee membership meant the employees were addressing management "on an individual rather than representative basis."[47]

I have considerable sympathy for Kohler's conclusion that "as time has passed, the meaning and basic purposes of the Act have been forgotten by the bodies charged with enforcing and applying its terms."[48] Nevertheless, the passage of time and the transformation of context will almost

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

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

[46] Hertzka & Knowles v. NLRB, 503 F.2d 625, 631 (9th Cir. 1974). See also NLRB v. Scott & Fetzer Co., 691 F.2d 288, 293 (6th Cir. 1982) ("the adversarial model of labor relations is an anachronism").

[47] NLRB v. Scott & Fetzer Co., 691 F.2d 288, 292-95 (6th Cir. 1982).

[48] Kohler, *supra* n.16, at 545. For excellent contrasting anaylses, compare Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 Yale L. J. 510 (1973), with Note, *Collective Bargaining as an Industrial Relations System: An Argument against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662 (1983).

invariably affect the sensible application of a statute that is now over half a century old. There was a paternalistic, protective attitude exhibited toward the blue-collar workers of our mass production industries in the 1930s[49] that may simply be inappropriate in dealing with the well-educated, often professional or semiprofessional employees in today's high-tech industries. Academic commentators like Klare, Kohler, and me may firmly believe that the employees of IBM, Texas Instruments, Cummins Engine Company, and myriad offices and department stores are misguided in failing to appreciate the psychological and financial benefits of organization. But if these workers perversely (and freely) persist in a contrary opinion, and even couple that with a desire for less formal mechanisms for input to or cooperation with their employers, I cannot say Section 8(a)(2) is so inflexible that it could not accomodate them. Naturally, the exact role of the employer in the establishment of an employee involvement plan, as well as its timing (just prior to a representation election?), could be crucial in any legal determination.

[3]—Managerial Employees

A potential final irony concerning participative management plans is provided by the Supreme Court's *Yeshiva*[50] decision. Faculty members who participated effectively in academic governance by jointly determining admissions standards and curricular matters and by making recommendations that were generally followed concerning appointments and promotions were held to be managerial employees and thus excluded from the protections of the NLRA. Without thinking the issue through, the Supreme Court has seemingly placed itself squarely in the camp of

[49] Initially, the NLRB insisted that employers remain neutral in union organizing campaigns lest their propaganda "poison the minds of workers." 1 NLRB Annual Report 73 (1936). Cf. NLRB v. Virginia Elec. & Power Co., 314 U.S. 469 (1941) (employer statements as free speech unless coercive).

[50] NLRB v. Yeshiva Univ., 444 U.S. 672 (1980).

the adversarialists: Keep the enemy at a distance or surrender your collective bargaining rights.

The inescapable logic is that the more any workers become involved in management decisionmaking, especially at the strategic level (as in Saturn), the more they risk their status as rank-and-file employees whose concerted activities are immune from employer reprisal. Fortunately, there are some early indications that the Labor Board will try not to extend *Yeshiva* so as to deter cooperative programs in blue-collar industries.[51] At their best, these programs can contribute significantly to industrial peace, one of the NLRA policy objectives most consistently espoused by the Supreme Court.[52] One would hope that common sense will ultimately prevail in this area, although *Yeshiva* itself must give a person pause.

[4]—Product Quality and Productivity

QWL and other participative management programs, according to one of the most intensive scholarly studies, have had a "problematic history."[53] Some have withered on the vine and others have failed completely, even after initial successes. Yet there have been stirring tales of accomplishment in both union and nonunion situations. GM's Tarrytown assembly plant went from a facility with low morale and low production to a prize specimen with reduced absenteeism and grievances and improved worker attitudes, selected as a site for one of the company's newest models.[54] A problem-solving group technique originally employed there in the layout redesign of two trim

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[51] See, e.g., Anamag, 284 NLRB No. 72, 125 LRRM 1287 (1987) ("team leader" heading a group of coworkers is not a "supervisor" excluded from the bargaining unit); see also Fetter, *supra* n.20, at 18.

[52] See, e.g. Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957); Boys Markets, Inc. v. Retail Clerks Local 770, 398 U.S. 235 (1970); Bonanno Linen Serv. v. NLRB, 454 U.S. 404 (1982).

[53] *Transformation, supra* n.3, at 148.

[54] *Id.* at 151; Wallace & Driscoll, *supra* n.1, at 246.

departments blossomed into a $1.6 million training program. At a Buick plant in Flint, Michigan, a joint union-management committee decided upon the use of semi-autonomous work teams to handle production following the conversion of a foundry to the manufacture of transmission parts.[55] Teams became largely responsible for job assignments, quality control, individual members' eligibility for pay increases, and even discipline. Sadly, what may have been one of the most ambitious projects of all, the involvement of employees in "strategic" decisionmaking at the Pontiac Fiero plant, with extensive access by them to performance and financial data,[56] has had a disappointing denounement. GM recently announced the discontinuance of the once-popular Fiero sportscar.

The semi-autonomous work team format has also been used in the nonunion plants of TRW, Inc. and Cummins Engine Company.[57] The nonunion system functions much like that at the Buick plant in Flint, except of course that the basic operating rules are promulgated unilaterally by management. Low employee turnover has been one of the positive characteristics of plants with such work teams. Significantly, a survey revealed that 72 percent of partially unionized firms encouraged the establishment of some form of employee participation plan in their new nonunion facilities.[58]

Whatever may be the union-avoidance motivation for promoting employee involvement, case studies indicate that properly developed QWL programs in both union and nonunion plants can enhance efficiency and product quality, can indeed produce "sizable improvements in organizational performance and the quality of working

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[55] Kohler, *supra* n.15, at 511-12.
[56] *Transformation*, *supra* n.3, at 161-62.
[57] *Id.* at 96-99; Kohler, *supra* n.15, at 512-13.
[58] *Transformation*, *supra* n.3, at 99.

life."[59] But the authors of one of the most comprehensive studies of contemporary industrial relations add these provocative comments:

> If linkage to strategic decisionmaking is essential for workplace participation to be successful in the long run, a strong union presence and active support for the process are also essential. Nonunion firms or those with weak unions are unlikely to develop or sustain this full form of worker participation.[60]

§ 8.04 Conclusion

The *Borg-Warner* mandatory-permissive dichotomy, especially as elaborated by the Burger Court and the Reagan Board, creates artificial distinctions regarding bargaining subjects which impair the fullest capacity of collective negotiations to resolve industrial disputes and heighten the quality of work life. Unions should at least be entitled to bargain about management decisions that adversely affect job security or employment opportunities. At the same time, the NLRA should be interpreted (or amended if necessary) to permit new modes of cooperative employer-employee relationships, in either union or nonunion settings, as long as workers choose them freely and without any kind of employer coercion.

The evidence of various case studies indicates that employee involvement in management decisionmaking, if properly structured, is beneficial for all concerned. It enhances workers' morale and sense of personal fulfillment, and it improves the quality of their working lives. Employers achieve increased productivity, higher quality output,

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[59] *Id.* at 162, 176. See also Foulkes, *Large Nonunionized Employers*, in U.S. Industrial Relations 1950-1980: A Critical Assessment 129, 134-36, 141-44, 155-56 (J. Stieber, R. McKersie & D. Mills eds. 1980); R. Pascale & A. Athos, The Art of Japanese Management 131-237 (1981); Special Task Force, U.S. Dep't of Health Education & Welfare, Work in America 93-110, 188-201 (1973).

[60] *Transformation, supra* n.3.

and hence greater competitiveness in the global market. Still another beneficiary of participative management is the American consumer. Our labor laws should facilitate and not impede such a salutary process.