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The National Labor Relations Act and Worker Participation Plans: Allies or Adversaries?

Susan Gardner*

I. INTRODUCTION

Faced with intensified international competition, decreased productivity and reported employee malaise, American business has embarked on the democratization of the workplace.¹ Cooperation is now the byword of labor and management as both groups seek to shed their entrenched tradition as adversaries. Several integrative plans have been developed to improve the quality of American work-life by enhancing employee participation in the decision-making process.²

The Department of Labor recently initiated a comprehensive study to determine whether the National Labor Relations Act³ (the Act) is consistent with this new spirit of cooperation between labor and management.⁴ Central to this study is an analysis of section

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1. See generally O. CROCKER, *QUALITY CIRCLES: A GUIDE TO PARTICIPATION AND PRODUCTIVITY* (1984); P. TOWNSEND, *COMMIT TO QUALITY* 51-77 (1986); Lawler & Mohrman, *Unions and the New Management*, 1 EXECUTIVE 293 (1987); Walton, *From Control to Commitment in the Workplace*, HARV. BUS. REV., Mar.-Apr. 1985, at 77; Walton, *Work Innovations in the United States*, HARV. BUS. REV., July-Aug. 1979, at 88 [hereinafter Walton, *Work Innovations*].

2. Walton, *Work Innovations*, *supra* note 1.

3. 29 U.S.C.A. § 151 (West 1973 & Supp. 1988).

4. The proposed study was distributed as *U.S. Labor Law and the Future of Labor-Management Cooperation*, 104 BUREAU LAB.-MGMT. REL. (1986). Two working documents from that study have been published to date: *U.S. Labor Law and the Future of Labor-Management Cooperation: First Interim Report—A Working Document*, 113 BUREAU LAB.-MGMT. REL. (Feb. 1987) [hereinafter *Laws Project I*] and *U.S. Labor Law and the Future of Labor-Management Cooperation: Second Interim Report—A Working Document*, 119 BUREAU LAB.-MGMT. REL. (Oct. 1987) [hereinafter *Laws Project II*].

8(a)(2).⁵ Through section 8(a)(2), the Act sanctions only one form of employee participation—collective bargaining—and prohibits an employer from dominating, interfering with, or contributing support to any labor organization.⁶ If employee participation plans are deemed labor organizations, a serious question arises as to whether such arrangements, if supported by management, would be considered in violation of the Act.⁷ Such a result would militate against such cooperative efforts, thereby necessitating revision of the National Labor Relations Act. While supporting the goal of cooperative working arrangements, some commentators, including Senator Orrin Hatch, question whether “such speculative concerns [over employee participation plans] warrant opening up federal labor law statutes . . .”⁸

This article joins in the current discussion surrounding worker participation plans and seeks to better understand the impact of section 8(a)(2) on these plans. First, the basic conflict between the Act and the efforts of the business world in seeking cooperative employee arrangements is discussed. Second, the historical interpretations of sections 2(5)⁹ and 8(a)(2), together with recent federal court decisions, are explored. Finally, the article recommends congressional hearings to ascertain whether the tension between the NLRA and these cooperative plans is rhetorical or substantive.

II. THE CONFLICT

A. *A Model for Adversaries*

Lacking economic power, American workers traditionally were at the mercy of employers who established workplace policies at will.¹⁰ In those few instances when employers approved the formation of labor organizations, thereby permitting limited employee participation in workplace decisions, the organizations quickly became employer-dominated.¹¹ Such unilateral or employer-dominated determinations

5. 29 U.S.C. § 158(a)(2) (1982).

6. *Id.*

7. See Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595 (1986).

8. Hatch, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 38 LAB. L.J. 3 (1987).

9. 29 U.S.C. § 152(5) (1982).

10. See A. COX, D. BOK & R. GORMAN, *LABOR LAW* 4-13 (10th ed. 1986).

11. For an excellent discussion of employer-dominated unions, see *id.* at 197-200. See also 78 CONG. REC. 3443 (1934), reprinted in 1 NLRB, *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935*, at 15 (1949); Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 514 (1972-1973) (citing C. SUMMERS & H. WELLINGTON, *LABOR LAW* 419, 420 (1968)). In 1935, over 2.5 million workers were represented by employer-dominated or so-called “company” unions. Note, *Employer-Dominated Unions—Illusory Self-Organization*, 40 COLUM. L. REV. 278, 281 (1940).

of labor policies engendered decades of confrontation and mistrust between labor and management.

In this atmosphere of "all out warfare" between labor and management,¹² the United States Congress¹³ adopted a model of labor relations characterized by collective bargaining and self-organization.¹⁴ Under the National Labor Relations Act of 1935, employers are required to bargain collectively with duly selected employee organizations.¹⁵ In an effort to further protect employees from management's co-optation of their labor organizations, Congress, under section 8(a)(2), made it unlawful¹⁶ for an employer "to dominate or interfere with . . . or contribute financial or other support to [any labor organization]"¹⁷ Thus, self-organization and collective bargaining formed the cornerstones of the Act, both viewed as necessary components of industrial peace.¹⁸

Section 8(a)(2) suggests that only through total insulation from employer influence can the interests of employees be truly represented.¹⁹ A presumption arises that any alignment by labor with

12. Hoerr, *America's Labor Laws Weren't Written for a Global Economy*, BUS. WK., Jan. 13, 1986, at 38.

13. The approach adopted by the United States was unique among its western counterparts. See Note, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARV. J. ON LEGIS. 947 (1977). Congress hoped to foster a "fair and free struggle" between labor and management rather than adopt the policies of its western counterparts which rigidly legislated and regulated the labor-management relationship. Schlossberg & Fetter, *supra* note 7, at 600 (citing address by T. Schneider, *Quality of Working Life and the Law*, Harmon Lecture Series at the Kennedy School of Government and Public Policy, Cambridge, Mass. (Nov. 19, 1981)). See also Glendon, *French Labor Law Reform 1981-1983: The Struggle for Collective Bargaining*, 32 AM. J. COMP. L. 449 (1984).

14. The National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935). This Act was later amended by the Labor-Management Relations (Taft-Hartley) Act, ch. 120, § 101, 61 Stat. 136 (1947) and further amended by The Labor Management Reporting and Disclosure (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified as amended at 29 U.S.C. §§ 151-169 (1982)).

15. 29 U.S.C. § 158(a)(5) (1982).

16. Depending on the seriousness of the violation, penalties for unlawful conduct range from a cease and desist order to disestablishment of the union. See, e.g., *Regency Elec., Inc.*, 169 N.L.R.B. 223 (1968); *Carpenter Steel Co.*, 76 N.L.R.B. 670 (1948).

17. 29 U.S.C. § 158(a)(2) (1982). The Act defines a labor organization 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." *Id.* at § 152(5). This definition includes not only the traditional union structure but also employee committees and representation plans. S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935).

18. See 79 CONG. REC. 7573 (1935). According to Senator Wagner, his bill was "designed to promote industrial peace."

19. 29 U.S.C.A. § 151 (West 1973 & Supp. 1988).

management is subversive to the interests of employees.²⁰ Furthermore, implicit within the law is the premise that inherent conflict exists between management and labor.²¹ This conflict is characterized by legally-sanctioned, concerted activities, such as strikes and lock-outs.²² The use of these economic weapons by either party to achieve its goals is considered a normal part of the collective bargaining process. It can be argued, however, that such an adversarial model of labor relations is not conducive to employee participation plans.²³

B. A Goal of Cooperation

In response to pressures caused by growing international challenges, dwindling domestic productivity, and a changing workforce, American business has developed an "obsession with productivity improvement."²⁴ According to former Secretary of Labor, William E. Brock, United States industry, in order to compete in a global economy, must develop a "solid atmosphere of cooperation . . . [which would] enable both unions and management to maintain individual integrity while working for the good of all."²⁵ Most industry analysts consider that corporate America's interests would be best served if management and workers were to cooperate by sharing in some form of decision-making rather than to continue using an outmoded adversarial labor relations model.²⁶

20. "[C]ollective bargaining becomes a mockery when the spokesman of the employees is the marionette of the employer." 79 CONG. REC. 7570 (1935). See also Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 514-15 (1973).

21. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488-89 (1960), wherein Justice Brennan concluded: "The parties [management and labor] . . . still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." See also Lawler & Mohrman, *supra* note 1.

22. See 29 U.S.C. § 157 (1982); see also *Insurance Agents*, 361 U.S. at 488-90; A. COX, D. BOK, & R. GORMAN, *supra* note 10, at 504-05; Cox, *The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951); Getman, *The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1212-13 (1967).

23. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980); M. DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1864-1964* (1970); Address by J. Dunlop, *Legal Framework of Industrial Relations in the United States*, Conference on the Labor Board at Mid-Century, Washington, D.C. (Oct. 2, 1985), reprinted in *Lab Rel. Rep. (BNA)*, No. 194, at E-1 (Oct. 7, 1985).

24. O'Conner, *Work Constraints: Barriers to Productivity*, *PERS. ADMIN.*, May 1984, at 90.

25. *Laws Project I*, *supra* note 4 at 2 (citing an address by W. Brock, Sixteenth Constitutional Convention, AFL-CIO, Anaheim, Cal. (Oct. 30, 1985)). See also Lawler & Mohrman, *Quality Circles After the Fad*, *HARV. BUS. REV.*, Jan.-Feb. 1985, at 65.

26. *Industrial Competitiveness Commission's Report*, 116 *Lab. Rel. Rep. (BNA)* 36 (1984); Strauss, *Workers' Participation in Management: An International Perspective*, 4 *RES. IN ORG. BEHAV.* 173, 179 (1982). The author states, "[Participation] is now at least superficially accepted by managers in most parts of the world." See also Lawler & Ozley, *Winning Union-Management Cooperation on Quality of Work Life Programs*, 68 *MGMT. REV.* 1924 (1979).

Over the past several years, management and workers have embraced a variety of organizational forms, all cited as examples of "worker participation" or, more generally, "quality of worklife" (QWL) programs.²⁷ The phrase, quality of worklife, often has a diverse meaning.²⁸ One accepted definition is: "A process by which an organization attempts to unlock the creative potential of its people by involving them in decisions affecting their worklives."²⁹ Direct channels of communication between workers and management are established to provide workers with an opportunity to advise management on those decisions affecting their work environment.³⁰ Frequently, QWL is perceived as a style of management that "invites participation or consultation from members of the workforce in matters that affect them"³¹ Under a QWL program, management and workers jointly determine what actions to take in order to increase satisfaction with the work environment. Some commentators believe that once the quality of worklife for members of the organization is improved, the effectiveness and productivity of management and the workers and, therefore, the company will improve.³²

The leading example of quality of worklife programs adopted by American firms is the quality circle (QC).³³ Usually initiated and administered by management, QC's are composed of small groups of

27. See R. BARRA, *A PRACTICAL STRATEGY FOR PUTTING QUALITY CIRCLES TO WORK* (1983); *Laws Project I*, *supra* note 4, at 3 (citing 1982 survey by Office of Economic Research which found that at least one-third of the Fortune 500 companies have adopted some form of quality of worklife programs).

28. Strauss, *supra* note 26, at 182. See also, R. SCHULER, *PERSONNEL AND HUMAN RESEARCH MANAGEMENT* 437 (1987).

29. Guest, *Quality of Worklife—Learning From Tarrytown*, *HARV. BUS. REV.*, July-Aug. 1979, at 76.

30. *The New Industrial Relations*, *BUS. WK.*, May 11, 1981, at 83.

31. Glaser, *State-of-the-Art Questions About Quality of Worklife*, *PERSONNEL J.*, May-June 1976, at 39-40; Schregle, *Forms of Participation in Management*, 9 *INDUS. REL.* 117 (1970).

32. Rosenberg & Rosenstein, *Participation and Productivity: An Empirical Study*, 33 *INDUS. & LAB. REL. REV.* 355, 367 (1980). The author concluded that "[t]he results of the statistical analysis performed strongly support the hypothesis that an increase in the level of the conduct and content of group participative activity is associated with an increase in group productivity." See also G. DESSLER, *PERSONNEL MANAGEMENT* 429-32 (3d ed. 1984); P. GIBSON, *QUALITY CIRCLES: AN APPROACH TO PRODUCTIVITY IMPROVEMENT* (1982).

33. See Cole, *A Japanese Management Import Comes Full Circle*, *Wall St. J.*, Feb. 22, 1983, at 1, col. 5. As of 1983, 6,200 American companies had adopted quality circles. See also Yeager, *Quality Circle: A Tool for the '80's*, 34 *TRAINING & DEV. J.* 60 (1980); Zemke, *Quality Circles—Can They Work in the United States?*, 56 *J. APPLIED MGMT.* 16 (1980). But see Pati, Salitore, & Prudy, *What Went Wrong with Quality Circles?*, 66 *PERSONNEL J.* 82 (1987).

workers (five to ten) who meet weekly to identify, analyze, and suggest solutions to work problems. These recommendations are presented to management for final consideration. Through QC's, employees become involved in the task design and performance decision-making process. Their reward is the satisfaction of having influenced that process. In the past, when management has genuinely committed to providing workers with some participatory role under a QC, albeit one of consultation, the firm has evidenced improved product quality and efficiency as well as reduced employee absenteeism and turnover.³⁴

III. THE HISTORY

Despite the popularity and merit of these new cooperative ventures, a potential conflict exists between worker participation plans and the National Labor Relations Act.³⁵ Management walks a fine line in seeking the cooperation of workers to increase productivity and improve quality without violating unfair labor practice guidelines. Management methods of achieving goals, therefore, must be carefully explored.

Worker participation plans may experience difficulty with two sections of the Act which are designed to maintain the full effectiveness of the collective bargaining process: section 2(5) which defines a labor organization as "any organization . . . in which employees participate . . . for the purpose of dealing with the employers concerning . . . conditions of work . . ." ³⁶ and section 8(a)(2) which prohibits employer domination of, interference with, or support for such labor organizations.³⁷ Therefore, a two-part analysis is necessary: first, a determination must be made as to whether the entity at issue (i.e., participation plan, employee team, worker committee) is a labor organization; second, a finding of whether that labor organization was unlawfully dominated, interfered with, or supported by the employer is necessary. The federal courts are split over whether employer sponsorship of such cooperative programs constitutes a violation of the Act.³⁸

34. Franecki, *Employee Committees: What Effect Are They Having?*, PERSONNEL J., July-Aug. 1984, at 67; Glaser, *Productivity Gains Through Worklife Improvement*, PERSONNEL J., Jan.-Feb. 1980, at 71; Zemke, *supra* note 33.

35. *See supra* note 3.

36. 29 U.S.C.A. § 152(5) (West 1973).

37. *Id.* at § 158(a)(2).

38. Compare *Lawson Co. v. NLRB*, 753 F.2d 471, 478-79 (6th Cir. 1985) (enforcing Board order to disestablish employer-sponsored worker committees) and *NLRB v. Clapper's Mfg.*, 458 F.2d 414, 415, 421 (3d Cir. 1972) (enforcing Board order to disestablish employer-sponsored "Employees' Committee") with *NLRB v. Streamway Div. Scott & Fetzer Co.*, 691 F.2d 288, 294, 396 (6th Cir. 1982) (refusing to find employer-sponsored employee committee to be a labor organization and thus denying enforce-

A. Section 2(5): What Constitutes a Labor Organization?

The statutory definition of labor organization under section 2(5) seeks to assure that employees will be protected from those employer activities which "masquerade" as labor organizations.³⁹ Specifically, section 2(5) defines a labor organization as: "Any organization of any kind . . . or *employee representation committee or plan*, in which employees participate . . . for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁴⁰ The legislative history supports a broad construction of section 2(5).⁴¹ Typically, the analysis of whether an entity is a labor organization has focused on three components derived from the above definition: a structural requirement, a subject matter requirement, and a functional requirement.

In the past, the structural requirement, "any organization of any kind . . . in which employees participate,"⁴² has been broadly construed.⁴³ This requirement is met if employees, as defined by section 2(3),⁴⁴ participate in the entity. Excluding purely social or athletic

ment of Board orders) and *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630-31 (9th Cir. 1974) (denying Board orders to disestablish employee-supported employee committee because employer did not interfere with employees' freedom of choice), *cert. denied*, 423 U.S. 875 (1975).

39. 79 CONG. REC. 6183 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2283 (1949). As Senator Wagner explained, the bill is aimed at protecting employees from those employers who "have set up a masquerade type of union which is really the creature of the employer rather than the representative of the employee . . ." *Id.* It is well-accepted that Senator Wagner considered "employer-dominated unions" as the "greatest obstacle" to genuine collective bargaining. 78 CONG. REC. 3443 (1934), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15 (1949).

40. 29 U.S.C.A. § 152(5) (West 1973) (emphasis added).

41. S. REP. NO. 573, 74th Cong., 1st Sess. 7 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2306 (1949). Specifically:

The term 'labor organization' is phrased very broadly in order that the independence of action guaranteed by section 7 of the bill and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to 'grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.' This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8.

42. 29 U.S.C.A. § 152(5) (West 1973).

43. *NLRB v. Ampex Corp.*, 442 F.2d 82, 84 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971).

44. 29 U.S.C. § 152(3) (1982) provides in part: "The term employee shall include any employee . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service . . . or . . . having the status of an independent contractor, or . . . employed as a supervisor . . ."

organizations⁴⁵ and those whose membership is not composed entirely of employees,⁴⁶ the NLRB, without requiring extraordinary formalities, has classified a variety of entities as labor organizations. Consequently, the lack of a formal, independent structure,⁴⁷ by-laws,⁴⁸ officers,⁴⁹ dues,⁵⁰ or continuity⁵¹ has not disqualified an entity from being designated a labor organization. This broad construction is reflected in *NLRB v. Ampex Corp.*,⁵² wherein both the Board and the circuit court found a labor organization existed even though the entity, an employee "communications committee," lacked a formal organizational structure and those employees who attended committee meetings were chosen randomly and rotated continuously.⁵³ The employer claimed this committee was an oral "suggestion box."⁵⁴ The court commented that although this "particular mechanism [may not be] a labor organization in the ordinary sense . . . [t]he statutory definition . . . is very broad."⁵⁵ It is thus apparent that section 2(5) has encompassed entities lacking any resemblance to traditional labor organizations.⁵⁶

The second requirement, subject matter, is reflected in the language of section 2(5) which delineates the issue of organizational participation as "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁵⁷ The Supreme Court's pivotal decision, *NLRB v. Cabot Carbon Co.*,⁵⁸ has governed analysis of this requirement since 1959. In *Cabot Carbon*, the company established

45. See, e.g., *Thompson Products, Inc.*, 57 N.L.R.B. 925 (1944).

46. See, e.g., *International Bhd. of Teamsters, Inc.*, 87 N.L.R.B. 720, 740 (1949) (farm workers not included in definition of employees so unions with farm workers not considered labor organizations).

47. See, e.g., *NLRB v. Erie Marine, Inc., Div. Litton Indus.*, 465 F.2d 104 (3d Cir. 1972); *NLRB v. Clapper's Mfg. Co.*, 458 F.2d 414, 418 (3d Cir. 1972); *Fire Alert Co.*, 182 N.L.R.B. 910, 917 (1970).

48. See, e.g., *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613, 620 (7th Cir. 1953); *American Tara Corp.*, 242 N.L.R.B. 1230, 1236-37 (1979).

49. See, e.g., *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 883 (7th Cir. 1958).

50. See, e.g., *Indiana Metal Prods. Corp. v. NLRB*, 202 F.2d 613, 620 (7th Cir. 1953); *Wyman-Gordon Co. v. NLRB*, 153 F.2d 480, 482 (7th Cir. 1946).

51. See, e.g., *NLRB v. American Furnace Co.*, 158 F.2d 376, 378 (7th Cir. 1946).

52. 442 F.2d 82 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); see also *Oval Wood Dish Corp.*, 62 N.L.R.B. 1129, 1139 (1945) (labor organization found to exist despite fact it never met with employer).

53. *Ampex Corp.*, 442 F.2d at 84.

54. *Id.*

55. *Id.*

56. A variety of employee groups traditionally have been deemed organizations under section 2(5). For example, several types of groups which bear little resemblance to conventional labor organizations were considered labor organizations in *Northeastern Eng'g, Inc.*, 112 N.L.R.B. 743, 751-52 (1955) (citing cases in which advisory councils, leadership councils, and junior boards were viewed as labor organizations).

57. 29 U.S.C.A. § 152(5) (West 1973).

58. 360 U.S. 203 (1959). Dealing with grievances alone would cause the employee committee to be a "labor organization." *Id.*

employee committees composed of elected employee representatives at its various plants.⁵⁹ These committees met regularly with management to facilitate the expression of problems which were of mutual interest to management and employees, including grievances.⁶⁰ They dealt with virtually every issue of subject matter⁶¹ enumerated under section 2(5)⁶² and, hence, normally subject to collective bargaining. The Supreme Court concluded that the subject matter requirement was met in *Cabot Carbon* and, significantly, indicated that the requirement is satisfied by an employee committee which concerns itself with *only one* of the designated issues under section 2(5).⁶³ As discussed previously, quality of worklife programs provide employees with the opportunity to participate in decisions concerning their work environment or "conditions of work;" this is one of the subjects enumerated under section 2(5).⁶⁴

The final analysis under section 2(5) is a determination of whether the organization is "for the purpose, in whole or in part, of *dealing with*" the employer.⁶⁵ In describing the degree of interaction needed to constitute "dealing with," the Supreme Court, in *Cabot Carbon*, held that such interaction need not reach the level of "bargaining."⁶⁶ Therefore, the mere making of recommendations by the Cabot Carbon employee committee was sufficient to constitute "dealing with." Subsequent decisions by the Board and circuit courts initially gave the term "dealing with" an even more liberal interpretation than

59. *Id.* at 205, 206.

60. *Id.* at 206.

61. *Id.* at 207. The committee discussed "seniority, job classifications, job bidding, make-up time, overtime records, time cards, wage corrections, working schedules, holidays, vacations, sick leave" and working conditions. *Id.*

62. Section 2(5) subject matter includes: "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C.A. § 152(5) (West 1973).

63. *Cabot Carbon*, 360 U.S. at 213.

64. See *supra* notes 26-33 and accompanying text. See also *Precision Castings Co.*, 30 N.L.R.B. 212, 215-17 (1941). A "welfare club" was deemed a labor organization because through the club, employees reported grievances and discussed conditions of employment to be communicated to the employer. Among its successes, the company installed drinking fountains and improved ventilation.

65. 29 U.S.C.A. § 152(5) (West 1973) (emphasis added).

66. *Cabot Carbon*, 360 U.S. at 212-13. The Court noted that Congress had explicitly rejected interpreting "dealing with" to mean "bargaining with." *Id.* at 211. The Court stated, "It is therefore quite clear that Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with'" *Id.* In essence, employers are unable to masquerade their activities with employee committees and thereby avoid collective bargaining by simply designating such committees as suggestion committees.

merely making recommendations.⁶⁷

The Supreme Court's expansive interpretation of "labor organization" under *Cabot Carbon* was grounded on its sense of congressional intent.⁶⁸ By specifically including the entity "employee committee" as an organizational form defined in section 2(5), Congress sought to promote complete freedom of organization by protecting employees from employer-dominated activities masquerading as employee committees.⁶⁹ As discussed by the *Cabot* Court, this congressional intent manifested itself again in 1947 when Congress, in effect, reaffirmed its earlier broad interpretation of labor organization under section 2(5).⁷⁰ During consideration of the Taft-Hartley amendments, the House of Representatives passed the Hartley Bill which included section 8(d)(3), a proposal to exempt most employee committees from the status of labor organization under section 2(5).⁷¹ The proposed section was intended to permit nonunion employers to establish employee committees for the purpose of discussing subjects of collective bargaining.⁷² However, the Taft Bill, as reported out of the Senate,

67. See, e.g., *NLRB v. Ampex Corp.*, 442 F.2d 82, 84 (7th Cir. 1971) (mere discussion held to be "dealing with"); *Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807, 810 (7th Cir. 1962) (finding association which presented employee views to management was a labor organization even though views not posed as recommendations for management action); *NLRB v. Standard Coil Prods. Co.*, 224 F.2d 465 (1st Cir.) (merely communicating held to constitute "dealing with"), *cert. denied*, 350 U.S. 902 (1955); *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 903 (2d Cir. 1954) (merely meeting in monthly dialogue with employer's president held to constitute "dealing with"), *cert. denied*, 348 U.S. 964 (1955); *North American Rockwell Corp.*, 191 N.L.R.B. 833, 837 (1971) (mere discussion held to constitute "dealing with").

68. *Cabot Carbon*, 360 U.S. at 217-18. The Court held that the definition of "labor organization" covers employee committees. *Id.* at 218. By including the phrase "dealing with" in the definition of labor organization, Congress intended the reach of section 2(5) to extend beyond the conventional labor union. *Id.*

69. Testimony at the hearings on Senate Bill 2926 by Edwin E. Witte, Professor of Economics at the University of Wisconsin, asserted that the employee representation committee was the most prevalent form of company union. *Creation of a National Labor Board, 1934: Hearings on S. 2926 Before the Committee on Education and Labor*, 73rd Cong., 2nd Sess. 242, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 272 (1949).

70. *Cabot Carbon*, 360 U.S. at 212.

71. H.R. 3020, 80th Cong., 1st Sess., § 8(d)(3) (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 31, 56 (1948). The proposed amendment read in part:

(d) *Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: . . . (3) [f]orming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9.*

72. H.R. REP. NO. 245, 80th Cong., 1st Sess. 33 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 292, 324 (1948). The section "permits employers whose employees have not designated a bargaining representative to set up similar committees and to discuss with them wages, hours,

lacked a comparable section 8(d)(3). The final conference version of the Taft-Hartley amendments reflected the body of the Taft Bill, explicitly rejecting language which would have exempted employer initiated or assisted committees from the status of labor organizations under section 2(5).⁷³

Recent interpretations of section 2(5) by the National Labor Relations Board and various circuit courts have, however, seemingly ignored the above congressional intent and decisional authority.⁷⁴ This revisionism is predicated upon a strong judicial policy preference of furthering management-labor cooperation and a self-professed "enlightened view of the Act."⁷⁵

This narrow construction of the definition of a labor organization began to take form in *Spark's Nugget, Inc.*,⁷⁶ where a split Board held that an employer-initiated joint grievance council, composed of two management representatives and one employee representative, was not a labor organization under section 2(5). The council, following rules and procedures developed by management, lacked any advocacy role; rather, it "performed . . . an adjudicatory function."⁷⁷ Since the council interacted with management only for the purpose of rendering final determinations in grievance disputes, the Board concluded that the council did not "deal with" management but, rather, "functioned for" management.⁷⁸ Again, the Board found no merit to the charge that the council masqueraded as a labor organization.

working conditions and other subjects of collective bargaining as well as other matters of mutual interest."

73. H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 31 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT RELATIONS ACT, 1947, at 505, 507 (1948).

74. *See infra* notes 79-93 and accompanying text.

75. *See, e.g.*, NLRB v. Streamway Div. Scott & Fetzer Co., 691 F.2d 288, (6th Cir. 1982). The Sixth Circuit, in choosing to reinterpret the statutory construction of section 2(5), quoted extensively from a dissenting opinion in NLRB v. Walton Mfg. Co., 289 F.2d 177, 182 (5th Cir. 1961), which condemned the "inflexible attitude of hostility toward employee committees." *Streamway*, 691 F.2d at 291. It also noted the opinion of Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967), wherein the "adversarial model of labor relations is considered an anachronism." *Streamway*, 691 F.2d at 292-93.

76. 230 N.L.R.B. 275 (1977), *enforced in part*, NLRB v. Silver Spur Casino, 623 F.2d 571 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); *see also* Mercy-Memorial Hosp. Corp., 231 N.L.R.B. 1108 (1977) (employee grievance committee found not to be a labor organization even though it was obliged to resolve grievances and to recommend to management changes in rules, regulations, and standards.)

77. *Sparks Nugget*, 230 N.L.R.B. at 276.

78. *Id.*

A 1977 decision, *General Foods Corp.*,⁷⁹ more closely reflects current interpretation of the Act. Here, the Board upheld the legality of an employer-initiated program of job enrichment. Recognizing that employees need a more meaningful role in their daily activities, the Board held that the employer-designated employee teams, which divided job assignments, scheduled overtime, assigned job rotations, and held periodic meetings with management, were not labor organizations under section 2(5).⁸⁰ Rather, these semi-autonomous groups were nothing more than work crews which were established by the employer in good faith to improve internal communication and to further employee participation.⁸¹ Since the company had delegated to these employee teams several managerial responsibilities, they were not acting in a representative capacity for the employees.⁸² As a result, "dealing" between management and the teams did not exist; thus, no finding of a labor organization was warranted.⁸³ The key element examined by the Board was whether the employee committee served a *representative* function.⁸⁴ If so, the committee must either be independent of the employer or not deal with matters traditionally within the realm of collective bargaining.

The most far-reaching decision to date, however, is the Sixth Circuit's opinion in *NLRB v. Streamway Division of the Scott & Fetzer Co.*⁸⁵ In that case, the employer sponsored a joint in-house representation committee which met regularly to discuss employee complaints, working conditions, and other issues of mutual concern. At the hearing, the Board concluded that the committee was a labor organization under section 2(5).⁸⁶ Distinguishing between "course of dealings" and the "communication of ideas," the circuit court disagreed, basing its conclusion primarily on policy considerations of encouraging cooperation between labor and management.⁸⁷ The court found that because of its rotating employee membership the committee was simply a collection of employees speaking individually to management; thus it was not acting as a representative agent or labor

79. 231 N.L.R.B. 1232 (1977). It should be noted that the Administrative Law Judge, in a departure from *NLRB v. Ampex* (see *supra* note 52 and accompanying text) focused on the lack of formal structure and other features common to labor organizations as further evidence that the committee was not a labor organization. 231 N.L.R.B. at 1234.

80. *Id.*

81. *Id.* at 1234-35.

82. Under the proviso to § 8(a)(2), "an employer shall not be prohibited from permitting employees to confer with him without loss of time or pay." 29 U.S.C. § 158(a)(2) (1982).

83. *General Foods*, 231 N.L.R.B. at 1234-35 (1977).

84. *Id.* at 1234.

85. 691 F.2d 288 (6th Cir. 1982).

86. 249 N.L.R.B. 396, 400-01 (1980).

87. *NLRB v. Streamway Div. Scott & Fetzer Co.*, 691 F.2d 291, 294-95 (6th Cir. 1982).

organization.⁸⁸ Rather, the committee was merely a part of an overall company plan to informally determine the employees' attitude toward working conditions.⁸⁹ Consequently, a method of "communication" existed between the committee and management, not a process of "dealing with" each other.⁹⁰ The lack of employer hostility toward unions was cited as another important factor.⁹¹ However, the court conceded that had the committee been deemed a labor organization, the employer would have been in clear violation of section 8(a)(2), having dominated and controlled the committee and its composition.⁹²

The court attempted to clarify *Streamway* in its 1985 decision of *Lawson Co. v. NLRB*.⁹³ After the initiation of two union organizing drives, the employer formed a Sales Assistant Committee, wherein committee members discussed complaints and views with management.⁹⁴ Several committee suggestions were implemented by the employer.⁹⁵ The employer contended that the representation committee was not a labor organization under the more "enlightened" approach enunciated by the court in *Streamway*.⁹⁶ However, the Sixth Circuit, comprised of a different panel, contended the company had misinterpreted *Streamway* since the Lawson representation committee fell squarely within the definition of a labor organization under section 2(5).⁹⁷ The court distinguished *Streamway* by contending the *Streamway* representation committee did not communicate with management on a representational basis, the employer did not exhibit an anti-union animus, and the committee was formed well before any organizing drive occurred.⁹⁸ Since Lawson had committed all of the above acts, the employer could "not take advantage of the narrow holding in *Streamway*."⁹⁹ Nowhere in the *Lawson* decision, however, was the argument made, as in *Streamway*, that cooperative

88. *Id.* at 294-95.

89. *Id.* at 294.

90. *Id.* at 295.

91. *Id.*

92. *Id.* at 291 (citing *NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678 (6th Cir. 1968)).

93. 753 F.2d 471 (6th Cir. 1985).

94. *Id.* at 473-74.

95. *Id.* at 474-75.

96. *Id.* at 477.

97. *Id.*

98. *Id.*

99. *Id.* (emphasis added).

employee committees should be encouraged as a matter of judicial policy. Therefore, the reach of *Streamway* remains unclear.

The unsettled interpretation of section 2(5) by the Board and the circuit courts, coupled with the failure of the Supreme Court to specifically define the boundaries by which management and employees are permitted to "deal with" each other, suggests that a management-sponsored cooperative committee, which is organized for the furtherance of quality of worklife, may be deemed a labor organization. As more QWL programs are adopted and union membership continues its decline, employers may face challenges from unions charging that worker participation plans have been created simply to chill unionism.¹⁰⁰

*B. Section 8(a)(2): What Constitutes Unlawful Domination, Interference With, or Support of a Labor Organization?*¹⁰¹

Traditional interpretation of section 8(a)(2) by the National Labor Relations Board and a majority of courts has led to the development of essentially a *per se* rule prohibiting domination, interference with, or support of a labor organization.¹⁰² Protecting the underlying purposes of section 8(a)(2), the Board's interpretation sought to ensure that a labor organization maintained structural independence from the employer.¹⁰³ When free from employer control, the organization would be able to concentrate all efforts toward the represented employees,¹⁰⁴ thus ensuring their freedom of choice.¹⁰⁵ However, the parameters of impermissible conduct under section 8(a)(2) remained unknown; the Board simply considered the totality of the circumstances, effectively precluding any degree of company assistance on behalf of a labor organization.¹⁰⁶

100. See Lawler & Mohrman, *supra* note 1; see also Barbash, *Thinking Ahead: Do We Really Want Labor on the Ropes?*, HARV. BUS. REV., July-Aug. 1985, at 10.

101. Although the distinction between unlawful "domination" and "interference" or "support" is simply a matter of degree, different remedies are available. If an employer *dominates* a labor organization, the Board may order that the entity be disestablished. If mere *unlawful interference* or *support* exists, the Board may simply order the employer to cease and desist such conduct. A. COX, D. BOK & R. GORMAN, *supra* note 10, at 197-202.

102. 29 U.S.C. § 158(a)(2) (1982); see also Note, *Employer-Dominated Unions—Ilusory Self-Organization*, 40 COLUM. L. REV. 278 (1940).

103. See, e.g., NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 265-67 (1938).

104. See, e.g., Holland Mfg. Co., 129 N.L.R.B. 766 (1960); Hotpoint Div. Gen. Elec. Co., 128 N.L.R.B. 788 (1960).

105. See, e.g., NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 250 (1939); NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 545 (6th Cir. 1984); Federal Mogul Corp. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968).

106. The following employer conduct has been found to be impermissible domination or support of a labor organization under section 8(a)(2): establishing committees in response to organizational drive, Lawson Co. v. NLRB, 753 F.2d 471 (6th Cir. 1985);

The seminal case addressing these initial policy considerations was the 1939 Supreme Court decision of *NLRB v. Newport News Shipbuilding & Dry Dock Co.*¹⁰⁷ Despite substantial employee support for the organization, the Court found that the employer's power to veto actions and amendments to the employee plan which governed its labor organization constituted unlawful domination under section 8(a)(2).¹⁰⁸ By retaining veto power, the employer was able to exert "[s]uch control . . . [over the] employee organization [so as to] deprive the employees of complete freedom of action"¹⁰⁹ In order to achieve its goals, a labor organization relies on its ability to exert economic pressure against employers.¹¹⁰ Consequently, a labor organization would be unable to exercise its economic weapons against an employer who controls the organization.¹¹¹

Due to employer control over its governance structure, the Board required the labor organization in *Newport News* to be disestablished. The Supreme Court considered the demonstrated employee support for the organization and the "good motives" of the employer in its as-

establishing committees with no formal structure or independence from the company, *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414 (3d Cir. 1972); participation in meetings, *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954), *cert. denied*, 348 U.S. 964 (1955); company Vice President ordering new election for employee committee members, *Texas Bus Lines, Inc.*, 277 N.L.R.B. 626 (1985); forcing employees to establish a committee, *Miller Materials Co.*, 244 N.L.R.B. 496 (1979); telling employees to form a committee to work directly with company president, *Spiegel Trucking Co.*, 225 N.L.R.B. 178 (1976), *aff'd mem.*, 559 F.2d 188 (D.C. Cir. 1977); providing employees with financial assistance and meeting place, *Duquesne Univ. of the Holy Ghost*, 198 N.L.R.B. 891 (1972); providing offices and other assistance to labor organization, including financial, *Dennison Mfg. Co.*, 168 N.L.R.B. 1012 (1967); company assistance in the union election, *Newman-Green, Inc.*, 161 N.L.R.B. 1062 (1966); employer arranging for an attorney, *Guard Services, Inc.*, 134 N.L.R.B. 1753 (1966); helping in drawing up charter and interfering with union organization, *Thompson Ramo Wooldridge, Inc.*, 132 N.L.R.B. 993 (1961), *modified on other grounds*, 305 F.2d 807 (7th Cir. 1962); providing use of mimeograph machine, *Nutone, Inc.*, 112 N.L.R.B. 1153 (1955); providing refreshments for meetings, *Kunst d/b/a Connor Foundry Co.*, 100 N.L.R.B. 146 (1952), *enforced*, 202 F.2d 846 (6th Cir. 1953); providing clerical support, *Stackpole Carbon Co.*, 6 N.L.R.B. 171 (1938), *enforced*, 105 F.2d 167 (3d Cir. 1939); providing meager financial support—50 cents per employee per year, *Wheeling Steel Corp.*, 1 N.L.R.B. 699 (1936).

107. 308 U.S. 241 (1939).

108. *Id.* at 249-51.

109. *Id.* at 249.

110. See generally *Cox, The Right to Engage in Concerted Activities*, 26 IND. L.J. 319, 322 (1951); *Getman, The Protection of Economic Pressure by Section 7 of the National Labor Relations Act*, 115 U. PA. L. REV. 1195, 1196, 1212-13 (1967).

111. See, e.g., *International Harvester Co.*, 2 N.L.R.B. 310, 347-51 (1936). The Board discussed fully the inability of employer-controlled labor organizations to exert economic pressure concluding: "[W]hen a deadlock is reached on any matter, the employees can do nothing. [The] existence [of the organization] is entirely subject to the will of the [company]. [Choices] rest with the [company] and not the employees." *Id.* at 351.

sociation with the labor organization as immaterial in a determination of conduct violating section 8(a)(2).¹¹²

Since the mid-fifties, several federal courts have relaxed the rigid application of section 8(a)(2), particularly when the establishment of worker participation plans is not in response to or during an organizational drive.¹¹³ The Seventh Circuit, in *Chicago Rawhide Manufacturing Co. v. NLRB*,¹¹⁴ for example, carved out a distinction between unlawful employer support and permissible employer cooperation. In *Chicago Rawhide*, the employer assisted in the establishment of an employee grievance committee, permitting it to meet during working hours.¹¹⁵ Following an overwhelming rejection of an outside union, the employer recognized the employee committee as the exclusive bargaining agent.¹¹⁶

During the process of recognition, the employer assisted the employee organization in several ways, including developing ballots and helping with the election of officers.¹¹⁷ These activities were clearly unlawful under the *Newport News* analysis of section 8(a)(2).¹¹⁸ The court concluded that the "acts complained of [assistance in the establishment and facilitation in the operations of an apparently employer-dominated committee] show only laudable cooperation with the employee's organization . . . rather than interference or support."¹¹⁹ In such cases, "[c]ooperation only assists the employees . . . in carrying out their independent intentions."¹²⁰ The method for determining the employee's independent intentions was not addressed. Nevertheless, the court rejected the Board's continuing hostility to any employer-sponsored employee committee (whether denoted as a grievance council or representation plan), placing instead great weight on the employer's lack of improper intent in assisting the employee organization.¹²¹ This decision was a departure from the earlier line of section 8(a)(2) cases.

In support of its ruling, the *Chicago Rawhide* court made no reference to the Supreme Court's decision in *Newport News* or to the leg-

112. *Newport News*, 308 U.S. at 251.

113. See, e.g., *Lawson Co.*, 267 N.L.R.B. 464, 472 (1983); *Stephens Inst.*, 241 N.L.R.B. 454, 469-70 (1979); *Utrad Corp.*, 185 N.L.R.B. 434, 440-41 (1970), *enforced*, 454 F.2d 520 (7th Cir. 1972). *But see* *Alta Bates Hosp.*, 26 N.L.R.B. 485, 491 (1976).

114. 221 F.2d 165 (7th Cir. 1955).

115. *Id.* at 166-67.

116. *Id.* at 167.

117. *Id.*

118. See *supra* notes 112-117 and accompanying text.

119. *Chicago Rawhide*, 221 F.2d at 170.

120. *Id.* at 167.

121. *Id.* at 170. The court found the record "shows that the company was not intending . . . to coerce or influence the employees' choice of a bargaining representative." See generally *Feldman & Steinberg, Employee-Management Committees and the Labor Management Relations Act of 1947*, 35 TUL. L. REV. 365 (1961).

islative history of the Act. Rather, the court simply asserted that "the principal purpose of the Act . . . is cooperation between management and labor."¹²² Based on this justification, the court made a substantial shift in the analysis of section 8(a)(2). Of particular interest is the court's insistence on a finding of "actual" employer domination of the *employees*, rather than of the labor organization, to warrant impermissible conduct.¹²³ This determination of domination is to be made from the subjective viewpoint of the employees rather than a finding of structural dependence of the employee organization. Further, the court emphasized a distinction between illegal support of an employee organization, which involves a degree of control, and permissible cooperation, which does not.¹²⁴ Such a distinction had not been previously recognized under section 8(a)(2). Not surprisingly, the argument has been made that here the court simply adopted an amendment which had been rejected during legislative consideration of section 8(a)(2).¹²⁵

Subsequent circuit court decisions have supported the *Chicago Rawhide* line of reasoning.¹²⁶ Several pivotal factors emerged in these decisions: the presence of anti-union animus,¹²⁷ the satisfaction of employees,¹²⁸ and the exercise of free choice on the part of the employees in selection of the organization.¹²⁹

The 1974 Ninth Circuit decision in *Hertzka & Knowles v. NLRB* reflects this trend, as the court sought to balance employer domination with employer cooperation.¹³⁰ Following unsuccessful negotiations with the employer, professional employees of Hertzka & Knowles, an architectural firm, narrowly decertified their union. At a meeting called by the employer shortly thereafter, the employees proposed

122. *Chicago Rawhide*, 221 F.2d at 167.

123. *Id.* at 167-68.

124. *Id.* at 167.

125. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L. REV. 499, 543-44 (1986). The author points out proposed language to modify section 8(a)(2) which would have made it an unfair labor practice for an employer "to contribute financial or other support except in such manner and such extent as may be requested by the employees"

126. See, e.g., *NLRB v. Northeastern Univ.*, 235 N.L.R.B. 858 (1978); *enforced in part*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957).

127. See *Coppus Eng'g*, 240 F.2d at 564.

128. See *Federal-Mogul Corp.*, 394 F.2d at 915; *Modern Plastics*, 379 F.2d at 201.

129. *NLRB v. Post Publishing Co.*, 311 F.2d 565 (7th Cir. 1962).

130. 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975).

and the employer created several joint in-house committees to “discuss and formulate proposals for changes in employment terms and conditions”¹³¹ These committees, which met on company time, included management representatives who participated fully in committee deliberations.¹³² The Board found the employer unlawfully dominated these committees in violation of section 8(a)(2).¹³³

Disagreeing, the Ninth Circuit commented:

Central to the [Act] is the facilitation of employee free choice and employee self-organization Section 8(a)(2) is . . . a means to that end. . . . Literally, however, almost any form of employer cooperation, however innocuous, could be deemed “support” or “interference.” Yet such a myopic view of section 8(a)(2) would undermine its very purpose. . . . Thus the literal prohibition of section 8(a)(2) must be tempered by recognition of the objectives of the NLRA.¹³⁴

The court concluded that the employees had freely chosen the in-house committees and presumed the employees were satisfied with the joint committees. Consequently, the court deemed the committees “capable of being a meaningful avenue for the expression of employee wishes.”¹³⁵

These decisions reflect the tendency of circuit courts to be more sympathetic than the Board to employer involvement in worker participation plans and thus are a retreat from the literal interpretation of section 8(a)(2) as expressed by the Supreme Court in *Newport News*.¹³⁶ As a result, many forms of employer support, previously deemed impermissible, have now been categorized as acceptable forms of employer cooperation.

CONCLUSION

Few question the need for American industry to become more productive in an increasingly competitive world. Many acknowledge that one vehicle to increased productivity, and thus improved global competitiveness, is the development of quality of worklife programs. Unresolved, however, is the question of whether some forms of QWL programs place the employer in violation of the National Labor Relations Act.

This article has demonstrated the continuing uncertainty employ-

131. *Id.* at 629.

132. *Id.*

133. *Hertzka & Knowles*, 207 N.L.R.B. 191 (1973).

134. *Hertzka & Knowles*, 503 F.2d at 629-30.

135. *Id.*

136. 308 U.S. 241 (1939). *But see* NLRB v. Clapper's Mfg., Inc., 458 F.2d 414 (3d Cir. 1972). The court upheld the Board's finding of domination, despite the employer's good intention, because the committee had no independent structure from the employer. However, the Board continues to be less sympathetic. *See, e.g.*, *Texas Bus Lines, Inc.*, 277 N.L.R.B. 626 (1985) (employer unlawfully interfered with employee committee because of vice president's involvement in establishment of the committee).

ers face as they develop QWL programs. Equally uncertain for employers is the question of whether a particular form of employee cooperation will be deemed a labor organization by the Board or the courts. Recently, the Board and several circuit courts have begun to chip away at the Supreme Court's broad interpretations of the NLRA in order to look more favorably upon labor-management cooperation. The courts openly admit that the basis of their reasoning is to provide a more enlightened interpretation of the Act in order to promote a policy of labor-management cooperation. However, since neither Congress nor the Supreme Court has addressed the issue further, employers must reluctantly rely on interpretations of the NLRA by the politically-appointed Board and the various circuit courts.

Intuitively, labor and management realize that the abolition of barriers to cooperation is essential to the future of American industry. Reliance on judicial interpretation of the Act to achieve this goal creates uncertainty. Congress should assure that there are no impediments toward this goal so that cooperation between labor and management will not be deterred by the NLRA. Employers need to be able to assess with greater certainty whether various forms of QWL will be deemed labor organizations and whether various degrees of cooperation will be deemed unlawful support.

Therefore, Congress should begin legislative hearings to determine the impact of the NLRA on the development of quality of worklife programs as well as the impact such programs have on the collective bargaining rights of employees. Perhaps these hearings will demonstrate that the uncertainty is more rhetorical than substantive. If the uncertainty is real, however, and these hearings demonstrate that such programs are initiated primarily to increase productivity and not to chill unionism, Congress should consider appropriate amendments to the Act so that various legitimate forms of labor-management cooperation will be assured. No longer should either management or labor be dependent on the uncertainty of judicial interpretation of the Act. In that way, American industry can continue to shift its policy toward employees—from a policy of adversaries to one of allies.

