Japanese-Style Worker Participation and United States Labor Law

William S. Rutchow

University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mjil

Recommended Citation

Available at: https://repository.law.umich.edu/mjil/vol8/iss1/8
Japanese-Style Worker Participation and United States Labor Law

William S. Rutchow*

I. INTRODUCTION

Foreign corporations, particularly Japanese, investing directly in the United States1 have imported a style of labor-management relations which emphasizes worker participation in the management of the organization.2 American corporations faced with competition from more efficient foreign enterprises have also adopted worker-participation programs to increase efficiency and productivity.3

In the past, employer attempts to initiate employee participation programs in the U.S. have run afoul of § 8(a)(2) of the National Labor Relations Act (NLRA).4 Section 8(a)(2) of the NLRA makes employer domination of or interference with an employee labor organization an unfair labor practice,5 and the courts and the National Labor Relations Board (Board) have generally viewed employee participation plans as labor organizations improperly dominated by employers.6 The recent corporate enthusiasm for worker participation programs has, however, led the Board and some courts to reexamine their criteria for finding a violation of § 8(a)(2).7

This note will evaluate the current legal status of Japanese-style worker participation programs under the NLRA. First, it analyzes relevant sections of the NLRA and their interpretation by the Board and the courts. Second, the note describes various types of Japanese worker participation programs, and suggests

* Member of the class of 1988, University of Michigan Law School.
2. Consider, for example, the 1987 slogan of Honda of America Mfg., Inc.: “With increased associate involvement, we improve quality, reduce cost and secure our future.” (workers are called “associates” at Honda). Publication of Corporate Communications Department of Honda of America Mfg., Inc., 24000 U.S. Route 33, Marysville, OH 43040.
3. See generally Guest, Quality of Work Life—Learning From Tarrytown, HARV. BUS. REV. July-Aug. 1979, at 76.
7. See, e.g., Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967).
how these programs can be legally implemented under current American labor law. Third, the note considers standards the Supreme Court may adopt to test the legality of worker participation programs in the future. Finally, this note recommends that the Supreme Court uphold those participation programs which are freely chosen by employees.

II. UNITED STATES LABOR LAW

A. The National Labor Relations Act

Any discussion of the constraints imposed by U.S. law on Japanese-style management practices should begin with the National Labor Relations Act. Sections 1, 2(5), 7, and 8(a)(2) of the NLRA\(^8\) dictate the opportunities for, and the restrictions on, the establishment of any novel labor-management programs.

The NLRA’s statement of purpose declares that U.S. policy encourages collective bargaining and protects “the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”\(^9\)

Congress regarded the infamous “company union” as a major obstacle to this goal of full freedom of association.\(^10\) In response to the massive union movement that occurred in the United States in the first third of the twentieth century, employers in the 1930’s formed company-sponsored unions. These company unions, or employee committees, allowed employers to avoid forced bargaining with the rapidly expanding independent unions.\(^11\) In passing a law which guaranteed the right of employees to organize freely and to bargain collectively,\(^12\) it

---

10. An indication of Congressional intent can be found in the statements of the NLRA’s sponsor, Senator Wagner: “The greatest obstacles to collective bargaining are employer-dominated unions…. [T]he very first step toward genuine collective bargaining is the abolition of the employer-dominated union as an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.” 78 Cong. Rec. 3443 (1934) (statement of Sen. Wagner).
11. See generally Kohler, Models of Worker Participation: The Uncertain Significance of Section 8(a)(2), 27 B.C.L. Rev. 499, 518–532 (1986); A. CoX, D. Bok, & R. Gorman, Labor Law: Cases and Materials 197–200 (10th ed. 1986). These company unions were often a sincere attempt to give workers their first opportunity to be involved in the structuring of their working conditions. Nevertheless, management control of these “unions” was almost total. The employer initiated the committee, wrote the by-laws, drafted the constitution, called the meetings, provided all facilities and funds, ran the meetings, and sometimes even appointed the employee members of the committees. Even if the committee had a secret election of employee representatives, it was relatively easy for an employer to control the selection process through criteria for eligibility such as age and length of service restrictions.
hardly seemed consistent to allow company unions to remain in existence.\textsuperscript{13} Section 8(a)(2) therefore makes it an unfair labor practice for an employer to:

\begin{quote}
dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.\textsuperscript{14}
\end{quote}

Section 8(a)(2) outlaws employer domination of a "labor organization." Section 2(5) defines a labor organization as:

\begin{quote}
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.\textsuperscript{15}
\end{quote}

Thus, a legally acceptable worker participation plan must not constitute a labor organization, as defined by § 2(5), or, if the plan does constitute a labor organization, then it must not be dominated by an employer, as forbidden by § 8(a)(2).

\section*{B. Judicial Application of NLRA to Employee Organizations}

The sections of the NLRA addressing employee organizations have a checkered interpretive history in U.S. courts.\textsuperscript{16} The NLRA, as previously described, encourages collective bargaining,\textsuperscript{17} but it also protects the "exercise by workers of full freedom of association."\textsuperscript{18} These dual purposes have contributed to tension among the cases construing §§ 2(5) and 8(a)(2). Some courts have encouraged collective bargaining by interpreting these sections strictly to find that almost any employee organization formed outside of the formal collective bargaining arena violates the NLRA.\textsuperscript{19} Courts upholding some types of employee organizations have, conversely, stressed employee free choice and free associa-

\begin{footnotes}
\item 13. For an example of the attitude of some members of Congress toward company unions at the time of the passage of the NLRA, see \textit{S. REP. No. 573, 74th Cong., 1st Sess. 9} (1935).
\item 15. 29 U.S.C. § 152(5) (1982); An employee's full freedom of association was further clarified in a 1947 amendment of § 7 of the NLRA. Employees were given the explicit right to refrain from joining a labor organization (such as an outside union). "Employees shall have the right . . . to form, join, or assist labor organizations . . . and shall also have the right to refrain from any or all of such activities." \textit{Labor Management Relations Act, ch. 120, 61 Stat. 140} (1947) (codified as amended at 29 U.S.C. § 157 (1982)) (emphasis added).
\item 17. 29 U.S.C. § 151 (1982).
\item 18. \textit{Id.}
\item 19. \textit{See, e.g., NLRB v. Link-Belt Co., 311 U.S. 584} (1941); \textit{NLRB v. Reed Rolled Thread Die Co., 432 F.2d 70} (1st Cir. 1970); \textit{NLRB v. Grand Foundries Inc., 362 F.2d 702, 709} (8th Cir. 1966).
\end{footnotes}
tion and have de-emphasized the promotion of collective bargaining. In fact, this goal of employee free choice underlies virtually every judicial decision allowing employee organizations to withstand scrutiny under either § 2(5) or § 8(a)(2).

1. Interpretation of § 2(5)

The Supreme Court made its only major statement concerning employee participation plans nearly thirty years ago in NLRB v. Cabot Carbon Co. In Cabot Carbon, the employer had organized several "employee committees" to meet on a regular basis with management to discuss problems of mutual interest, including the handling of grievances at the company's nonunion plants. The outcome of the case depended on whether these employee committees were labor organizations, as defined by § 2(5), and were therefore subject to the restrictions imposed by § 8(a)(2). In deciding that the committees were indeed labor organizations under § 2(5), the Court interpreted the phrase "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" to mean more than to bargain collectively. The Court found that the stated purpose and actual practice of the committees in handling grievances made it "as plain as words can express" that these committees dealt with management concerning grievances and that this alone brought the committees "squarely within the statutory definition of 'labor organizations'."

20. See, e.g., Scott & Fetzer, 691 F.2d 288; Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955).

21. See, e.g., Scott & Fetzer, 691 F.2d at 293.

22. See, e.g., Chicago Rawhide, 221 F.2d 165.


24. Id. at 205.


26. The Court, interpreting the legislative history of the NLRA as authorizing a broad meaning of the term "dealing," stated:

The legislative history of § 2(5) strongly confirms that Congress did not understand or intend [dealing with and bargaining with] to be synonymous. When the original print of the 1935 Wagner bill . . . was being considered in the Senate, the then Secretary of Labor proposed an amendment to § 2(5). . . . The proposal was that the term "bargaining collectively" be substituted for the term "dealing." But the proposal was not adopted. 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" as held by the Court of Appeals.

27. Proposals by the committees respecting such matters as seniority, sick leave and wage corrections also supported the Court's finding that the committees were labor organizations. Cabot Carbon, 360 U.S. at 213.
Supreme Court, in this case, encouraged the collective bargaining goal of the NLRA by construing § 2(5) to find that any employee committee in contact with the employer outside of the formal collective bargaining process was a "labor organization" and therefore subject to the restrictions of § 8(a)(2).

The lower courts and the Board have generally followed the Supreme Court's decision in Cabot Carbon by interpreting the phrase "dealing with," in § 2(5), very broadly. The term "dealing" has usually been defined by the courts as including almost every type of employer/employee communication. Recently, however, the Sixth Circuit Court of Appeals has adopted a more narrow definition of "dealing." In NLRB v. Streamway Div. of Scott & Fetzer Co., the Sixth Circuit, while agreeing with Cabot Carbon that "dealing" did mean more than collective bargaining, concluded that the term had not been clearly defined by the Cabot Carbon court. The Court of Appeals decided that "dealing" could not be defined so as to include all attempts at employer/employee communication. The court differentiated between a labor organization dealing with the employer and an employee representation committee communicating with the employer. Since the disputed employee representation committee in Scott & Fetzer merely communicated with the employer, the court concluded that it was not a labor organization under § 2(5).

The Sixth Circuit in Scott & Fetzer, calling the adversarial model of labor relations an anachronism, purported to adopt an interpretation of the NLRA that would encourage cooperative labor/management relations. Although the Court of Appeals considered several factors before concluding that the employee committees in Scott & Fetzer only communicated with the employer, the court appar-


29. 691 F.2d 288 (6th Cir. 1982).

30. "Whatever the reach of Cabot Carbon beyond the facts of that case, we do not think it applies here. We cannot accept the Board's suggestion that Cabot Carbon should be read so broadly as to call any group discussing issues related to employment a labor organization." Scott & Fetzer, 691 F.2d at 294.

31. "Although we acknowledge that the difference between communication of ideas and a course of dealings at times is seemingly indistinct, we believe, nevertheless, that it is vital here." Scott & Fetzer, 691 F.2d at 294.

32. Scott & Fetzer, 691 F.2d at 293. The Sixth Circuit first indicated that the adversarial model was an anachronism in Modern Plastics, 379 F.2d 201. The U.S. Supreme Court viewed the NLRA as promoting this adversarial model of labor relations at the time Cabot Carbon was decided. See NLRB v. Insurance Agents' Int'l Union, AFL-CIO, 361 U.S. 477, 488-89 (1959).

33. The factors the court looked to included: (1) the continuous rotation of committee members to insure that most employees participated and were thereby speaking directly and individually to management; (2) a finding by the Administrative Law Judge (ALJ) that there was no employer hostility or anti-union animus; and (3) neither the employees nor an outside union involved in two certification elections ever regarded the committees as anything even remotely resembling a labor organization dealing with management. Scott & Fetzer, 691 F.2d 294–95.
ently upheld the representation committees because they promoted cooperative labor/management relations\textsuperscript{34} and employee free choice.\textsuperscript{35} Protection of freedom of choice for employees replaced the promotion of collective bargaining as the overriding consideration of the Sixth Circuit in \textit{Scott & Fetzer}.\textsuperscript{36} The Sixth Circuit concluded that if employee free choice in organizational matters is not impaired, then a particular employee representation committee will not be found to have "dealt with" the employer and will not constitute a § 2(5) labor organization.\textsuperscript{37}

The Board has also found that certain employee organizations do not constitute "labor organizations" under § 2(5). In \textit{General Foods Corp.},\textsuperscript{38} the Board, in adopting the decision of the Administrative Law Judge (ALJ), dismissed an unfair labor charge against an employee production team system at a General Foods plant. The decision avoided a direct conflict with \textit{Cabot Carbon} by focusing on the participatory or representational nature of the production teams instead of the definition of "dealing." The ALJ concluded that in no Board case had a team program been found to constitute a labor organization when the teams included the entire labor force, a "committee of the whole." In \textit{General Foods}, the entire work force was divided into four teams. There was no representative spokesman at team meetings, and all employees could participate as fully or as little as they desired. These qualities showed that the teams were participatory, not representational.\textsuperscript{39} The ALJ and the Board also concluded that the employee production teams were not § 2(5) labor organizations because the teams lacked

\textsuperscript{34} As evidence of this policy, consider that, in overruling the Board, the Court of Appeals concluded that to permit the Board to disrupt the employee committee without substantial evidence of domination would frustrate the purpose of the NLRA. See \textit{Scott & Fetzer}, 691 F.2d at 292–293.

\textsuperscript{35} The Sixth Circuit had moved toward a test of actual infringement of employee free choice in two cases in which committees that were found to be labor organizations were found not to be illegally dominated under § 8(a)(2). See \textit{Federal-Mogul Corp., Coldwater Distrib. Center Div. v. NLRB}, 394 F.2d 915, 918 (6th Cir. 1968); \textit{Modern Plastics v. NLRB}, 379 F.2d 201, 204 (6th Cir. 1967). The court in \textit{Scott & Fetzer} stated that \textit{Modern Plastics} and \textit{Federal-Mogul} "indicate . . . that [the Sixth] circuit is willing to reject a rigid interpretation of the [NLRA] and instead consider whether the employer's behavior fosters employee free expression and choice as the Act requires." \textit{Scott & Fetzer}, 691 F.2d at 293. For a detailed discussion of the domination issue, see infra text accompanying notes 42–56.

\textsuperscript{36} The court held that:

There has been no evidence of Company hostility toward the union and no evidence that the Company itself interfered with any exercise of employee rights to bargain collectively, unless it might be said that an enlightened personnel policy led them to be content with the status quo. \textit{This was their choice}. We see no reason under the Act to disturb that choice or to tip the scales against it and in favor of [an outside union] which the employees themselves have twice rejected.

\textit{Scott & Fetzer}, 691 F.2d at 295 (emphasis added).

\textsuperscript{37} \textit{See Scott & Fetzer}, 691 F.2d at 295.

\textsuperscript{38} 231 N.L.R.B. 1232, 1232 (1977).

\textsuperscript{39} \textit{See id.} at 1234–35.
the normal features of a labor organization, such as a constitution, bylaws, and officers, and because the teams had not been created to forestall the organization of an independent union but were established to organize the work load within the facility.\footnote{In \textit{General Foods}, dealing is mentioned, but the ALJ decided that what management functions the employees were responsible for were completely delegated from management to the workers and, therefore, the teams were not dealing with management. \textit{Id.} at 1234–35. Recently, the Sixth Circuit adopted a representational/participatory distinction in 2(5) cases by upholding an unfair labor practice charge where an employee committee formed by the employer was representational in nature and anti-union animus was present. \textit{Lawson Co. v. NLRB}, 118 L.R.R.M. (BNA) 2505, 2509 (6th Cir. 1985).}

Under the theories described in this section, the courts and the Board have found certain worker participation programs to be outside the definition of a labor organization given in \$ 2(5) and, therefore, beyond the coverage of \$ 8(a)(2) of the NLRA. The majority of courts approving worker participation programs have not, however, relied on \$ 2(5); instead, these courts have accepted that the challenged worker participation programs were labor organizations but have held that the organizations did not violate \$ 8(a)(2) because they were not dominated by the employer.

2. Interpretation of \$ 8(a)(2)

The first major case allowing a worker participation program to survive scrutiny under \$ 8(a)(2) was \textit{Chicago Rawhide Manufacturing Company v NLRB}.\footnote{221 F.2d 165 (7th Cir. 1955).} Nearly all cases permitting worker participation programs since \textit{Chicago Rawhide} have followed its basic reasoning. The case involved a Grievance Committee and an Employees Shop Committee established under a plan created by the employer and the employees.\footnote{There was no disagreement among the parties that these committees were indeed \$ 2(5) labor organizations. The committees handled grievances, discussed wages and generally acted as the bargaining agent for the employees; in fact, the employees eventually petitioned the NLRB to recognize the committees as the exclusive bargaining representative of the employees. \textit{Chicago Rawhide}, 221 F.2d at 166–67.} An outside union, which had lost a representation election, brought an unfair labor practice charge complaining that the company had unlawfully supported the employee committees in violation of \$ 8(a)(2). The Seventh Circuit held that the company’s cooperation in permitting employees to meet during working hours to explain the grievance plan, in allowing election of committee representatives on company premises, and in providing other minor forms of assistance did not support an unfair labor charge.\footnote{\textit{Id.} at 170.} The court drew a distinction between illegal support of a labor organization and cooperation with such an organization. Illegal support included “at least some degree of control or influence,”\footnote{\textit{Id.} at 167.} while employer cooperation only “assists the
employees . . . in carrying out their independent intention[s].”\(^{45}\) Without this distinction between support and cooperation, employers would face accusations of unlawful domination for any attempt to cooperate with their employees, and such accusations would frustrate the NLRA’s principal purpose of encouraging "cooperation between management and labor."\(^ {46}\)

In permitting limited employer involvement with employee organizations, the Seventh Circuit in *Chicago Rawhide* adopted a flexible interpretation of employee free will and association. Evidence of actual control of the employee organization by the employer, not just the potential for employer control or domination, became necessary, after *Chicago Rawhide*, to prove a violation of § 8(a)(2). Employer cooperation aiding an employee organization, but not interfering with the free choice of workers, is allowed.\(^ {47}\)

Several factors that courts since *Chicago Rawhide* have examined when considering alleged violations of § 8(a)(2) include: (1) anti-union animus of the employer; (2) whether the employee organization was formed during an organizational drive by an outside union; (3) whether the employer or employees initiated the organization; (4) employee satisfaction with the organization; (5) employee support for the formation of the organization; (6) employer involvement in the organization’s election process; (7) employer financial support for the organization, such as clerical staff, office space, equipment, or paid time-off to attend meetings; and (8) management control of the organization’s meetings.\(^ {48}\) Courts approving employee participation programs analyze these factors and all surrounding circumstances to determine, on a case by case basis, whether the choice of employees, in establishing a particular employee organization, was free from actual employer interference or coercion.\(^ {49}\)

The approach taken by the Seventh Circuit in *Chicago Rawhide*, though adopted by several other circuits,\(^ {50}\) has not been endorsed by the Board, which continues to apply a strict standard toward employer cooperation with employee

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) “Assistance or cooperation does not always mean domination . . . and the Board must prove that employer assistance is actually creating company control over the union before it has established a violation of Section 8(a)(2). ‘The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees’. ” *Id.* at 168 (quoting NLRB v. Sharples Chemicals, Inc., 209 F.2d 645, 652 (6th Cir. 1954)).

\(^{48}\) See Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 293 (6th Cir. 1982); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975) (stating that employee suggestion of committee was a material consideration); Schmidman & Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772, 775–76 (1984).

\(^{49}\) See generally, e.g., NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962); *Chicago Rawhide*, 221 F.2d 165.

\(^{50}\) See, e.g., NLRB v. Northeastern Univ., 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); NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663, (5th Cir. 1968); Federal-Mogul Corp. v. NLRB, 394 F.2d 915 (6th Cir. 1968); NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962).
organizations. While the Board examines factors similar to those scrutinized by courts following the *Chicago Rawhide* approach, the Board considers not only actual control, but also the potential for employer control of the employees' freedom of choice. Even if no actual domination of or interference with the employee organization by the employer can be shown, the Board, and courts following its strict approach, will find a violation of § 8(a)(2) if the potential for such interference exists.

When worker participation programs have been upheld, the courts and the Board have used two methods of statutory construction. In a minority of cases, the courts and the Board have defined the parameters of a "labor organization" under § 2(5) to limit the types of participation programs subject to attack under § 8(a)(2). By narrowing the broad interpretation of "dealing" from *Cabot Carbon* and by drawing a distinction between representational and participatory organizations, the Sixth Circuit and the Board have placed employee participation programs that do not impair the free choice of employees outside the reach of the NLRA. The majority of cases upholding worker participation plans, however, accept that the plans fall within the statutory definition of a labor organization, but find that labor organizations characterized by employee free choice and association are not dominated by the employer in violation of § 8(a)(2). Thus, whether the Board or the courts have utilized § 2(5) or 8(a)(2) in their analyses, they have approved only those employee organizations freely chosen by the employees.

### III. Japanese-Style Worker Participation Programs

The Japanese have become prime exponents of the cooperation model of labor relations. The major difference between Japanese and U.S. labor relations is the degree of cooperation between labor and management. Japanese companies investing in the United States face the challenge of inspiring cooperation and employee loyalty, which are seen as cornerstones of Japanese productivity, in a labor market with a long adversarial history between labor and management.

---

51. i.e. employer financial support of the organization, management control of the meetings, etc.
55. See supra notes 49–50.
57. The Japanese must prove that they can put an American face on their vaunted consensus-management style. Powell, *supra* note 1, at 44.
This section discusses which management strategies could be used by a Japanese corporation investing in the U.S. to inspire worker cooperation and loyalty.

In Japan the company union is the basis of the cooperative relationship between labor and management. Today, company unions comprise over 90 percent of the labor unions in Japan, and many top corporate executives are former union members. There are differences between the U.S. company unions of the 1930's and the company unions of present-day Japan. Japanese company unions were not designed to avoid unionization; they were the form that unionization initially took in Japan. Company unions in Japan, unlike U.S. company unions, do retain a small measure of independence from the companies whose workers they represent through their affiliation with loosely organized national federations. Nevertheless, the significant similarities between contemporary Japanese company unions and their early 20th century American counterparts make implementation of Japanese-style unions in the United States legally doubtful.

Japanese company unions owe their success to the paternalistic culture in which they exist. In Japanese culture, the company has an obligation to protect the interests of its workers. This paternalistic approach of the typical Japanese corporation conflicts with the American ideal of the individual and makes the Japanese company union an unlikely vehicle for fostering employee loyalty in the U.S. assuming it could survive the legal hurdles of § 8(a)(2).

Other worker participation programs utilized by the Japanese to further cooperative labor/management relations may, however, be adaptable to a U.S. operation. The type of "Japanese" program most adaptable to a U.S. company is the Quality Control Circle (QCC). QCC's consist of small groups of employees

61. See W.B. Gould, supra note 56, at 17-18. These government mandated, company unions were part of the basic reforms of the Japanese social order dictated by General MacArthur to help develop democracy at the end of World War II.
63. Japanese company unions, though technically independent, are influenced to a large extent by the employer, and the form of such unions (i.e., limited to one company as opposed to American trade or industry-wide unions) appears to bring them within the prohibitions of § 8(a)(2). See generally W.B. Gould, supra note 56.
64. For example, the largest companies guarantee lifetime employment. W.B. Gould, supra note 56, at 10-11.
65. The president of the Building and Construction Trades Department of the AFL-CIO, Robert Georgine, mocks this paternalistic style: "'We'll tell you what's good for you, and you do everything you can to make us successful.' That doesn't wash here." Powell, supra note 1, at 44.
66. Japanese company unions possess many of the characteristics, such as employer financial support and management control of meetings, which even the most flexible courts have found to be violations of § 8(a)(2). See supra text accompanying note 49.
formed from existing departments. The employees meet regularly to suggest improvements in product quality and production efficiency. Members of management often attend circle meetings, but the meetings are run by the employees. The recommendations made to management by these circles involve specific production improvements. Bonuses are frequently awarded for employee suggestions that result in significant quality gains. The groups usually operate through voluntary input by each employee in the group. The groups rarely consider topics not related to their own specific work product. Although QCC's do not give workers a voice in management decisions, members of such circles have the opportunity to contribute to the structuring of the manufacturing process, a rarity for American workers.

The Japanese are not alone in developing innovative worker participation programs. Swedish corporations, among others, have implemented Japanese-style worker participation programs. Specifically, Swedish automakers use "employee production teams." Employers initiate production teams by placing plant workers into relatively small teams that become responsible for an entire operation within the plant. Acting by consensus, the team makes job assignments to team members, assigns job rotations, resolves quality control problems, schedules overtime, and interviews prospective employees. Usually the teams have no disciplinary powers, although some teams do hear and resolve grievances.

The team concept, because it involves the rotation of job functions, relieves the tedium associated with manufacturing jobs, improving worker morale and productivity. This job rotation is facilitated by the flexible structuring of job classifications often found in Japanese plants, which differs from the highly rigid and departmentalized job classifications characteristic of American unionized facilities.

68. Honda of America utilizes QCC's known as NH (for "New Honda") circles. An NH circle consists of five to ten members who voluntarily work together on an area of common concern to suggest improvements in such areas as quality, safety, communications, working environment, and efficiency. Honda of America Mfg., Inc., The Honda Way: An Innovative Approach to Management and Production (available from the Corporate Communications Department of Honda of America Mfg., Inc., 24000 U.S. Route 33, Marysville, OH 43040).

69. A week's expenses-paid trip to Japan was awarded to a circle at Honda of America.

70. See Kohler, supra note 11, at 506; Note, supra note 67, at 1740; see also Krause, Americans Can Build Good Cars, 18 WASH. MONTHLY, July-Aug. 1986, at 41, 43.

71. See Kohler, supra note 11, at 506.

72. See Note, supra note 67, at 1741.

73. See General Foods Corp., 231 N.L.R.B. 1232, 1233 (1977); Kohler, supra note 11, at 508.

74. Note, supra note 67, at 1741. Honda of America has a separate Associate Review Panel, made up of employees, which reviews discharges at the plant and makes decisions as to whether an employee is entitled to reinstatement. Telephone interview with Roger F. Lambert, Manager—Corporate Communications, Honda of America Mfg., Inc. (March 10, 1987).

75. The Honda of America facility at Marysville, Ohio, for example, has only two job classifications, compared with as many as 100 classifications in some American unionized plants, allowing Honda associates the freedom to perform many different job functions. Koepp, Honda in a Hurry, TIME, Sept. 8, 1986, at 49.
Worker participation may also take the form of Quality of Work-life (QWL) (or job enrichment) programs. QWL programs have been defined as:

A process for work organization which enables its members at all levels to actively participate in shaping the organization's environment, methods, and outcomes. This value-based process is aimed toward meeting the twin goals of enhanced effectiveness of the [firm] and improved quality of life at work for employees.76

This type of program involves a process of attitude reinforcement for individual workers and is more flexible than either QCC's or production teams. A company's QWL program generally includes physical fitness programs, personal enrichment seminars on topics such as stress management and interpersonal communications,77 joint labor/management safety or quality committees, QCC's, and production teams.78 QWL programs emphasize worker satisfaction and enrichment with the expectation that, as employee satisfaction with the working environment increases, the quality and quantity of production will increase.79 The emphasis on employee satisfaction directs the communication between management and employees toward the conditions of the working environment rather than toward wages and hours or production and product quality.

The Japanese have experience with all of the worker participation programs described above.80 Japanese corporations investing in the United States will likely use one or more of these programs to improve the loyalty and productivity of their U.S. labor force.81 U.S. individualism, while at odds with the paternalistic Japanese labor/management philosophy,82 does not preclude the successful implementation of these programs in the United States. The individual worker may not be as important as the team or the circle, but the additional responsibilities given to workers through QCC's and production teams can improve an individual's self-esteem and job satisfaction. This corporate emphasis on the worth of the individual can, in turn, increase worker loyalty to the organization that fosters these feelings of satisfaction and self-worth.83

77. Cf. General Foods, 231 N.L.R.B. at 1235 (outside professional brought in to increase team communication and trust levels).
78. See generally, e.g., Fulmer, supra note 76.
79. See Note, supra note 67, at 1741.
80. See generally Krause, supra note 70.
81. For example, Honda of America uses a form of the QCC called the NH circle. Honda of America Mfg., Inc., supra note 68.
82. Asa Jonishi, senior director of Kyocera Corp., a Japanese high-tech company with facilities in California, concedes that "[m]ost Americans are very, very individualistic—you could almost say egotistic; they are quite different from the way we would like our people to be." Powell, supra note 1, at 44.
83. Consider the remarks of Shoichiro Irimajiri, President of Honda of America Mfg., Inc.:
IV. WORKER PARTICIPATION PROGRAMS UNDER U.S. LABOR LAW

The major legal consideration confronting a corporation interested in implementing Japanese-style worker participation techniques involves the types of programs the corporation can institute in the United States without violating the NLRA.84

What, specifically, constitutes a legal worker participation program under the NLRA? One comprehensive statement can be made. If the only discernible motive for implementing a QCC, employee-production team or other type of worker participation program is to short-circuit an organizing drive by an independent labor union, the Board and the courts will define the program as a § 2(5) labor organization improperly dominated by an employer in violation of § 8(a)(2). The anti-union animus shown by impeding an organizing drive constitutes the type of interference with employee free choice found impermissible by even the most liberal judicial interpreters of §§ 2(5) and 8(a)(2).85 In other situations, however, the legality of a worker participation program will often depend upon jurisdiction.

Determining the legality of an employee production team, QCC, or QWL program in any jurisdiction involves establishing whether the program constitutes a § 2(5) labor organization and, if so, whether the employer dominates that organization in violation of § 8(a)(2). The Board and the Sixth Circuit have both parted from the Supreme Court's broad construction of § 2(5) in Cabot Carbon to uphold the legality of worker participation programs.86 According to the Board, employee production teams that embrace the entire labor force lack a crucial element of a § 2(5) labor organization, namely representation. When all employees can participate and talk directly to management without the intervention of a

[T]he Honda approach is to start with the individual Associate, with respect for that individual's intelligence, hard work and commitment.

Our whole approach to quality is based upon our respect for what the individual Associate can achieve. We do not mandate quality by having quality inspectors at each step on the manufacturing process. Instead we teach quality as a satisfying way of life and ask each Associate to take responsibility for the quality of our products.


84. A violation of § 8(a)(2) of the NLRA by an employer would usually result in the filing of an unfair labor practice against the employer. If the charge is sustained by the Board, the employer will probably be ordered to disband the participation organization or withdraw the illegal support.


87. See General Foods, 231 N.L.R.B. at 1234. Because the Board has allowed employee production teams to remain outside the scope of § 2(5) in General Foods, and since the Board is the first body to consider an unfair labor practice charge, employers should know the characteristics that employee production teams must possess to avoid classification by the Board as labor organizations.
team leader or spokesperson, the organization is participatory and does not constitute a § 2(5) (representational) labor organization.88 If the General Foods decision is followed by the Board in the future, the Board's position should withstand review by the Courts of Appeals. Though many of the Courts of Appeals simply assume that worker participation programs are labor organizations under § 2(5),89 because the courts are obligated to defer to decisions of the Board,90 approval of participatory employee organizations by the Board may make the courts reluctant to label worker participation programs as § 2(5) labor organizations.

Employee production teams are generally concerned with the delegation of production responsibility and do not usually communicate with management.91 Normally, therefore, production teams will not be identified as labor organizations because, if there is no communication with management, there can be no "dealing" with management, as required of a § 2(5) labor organization.92

QCC's and QWL programs must be participatory and not representational as well as possess other characteristics to avoid classification as labor organizations under § 2(5). QCC's must be concerned with production quality and must not consistently discuss grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of employment. Controlling the subject areas open to recommendation by these circles is crucial. Dangers emerge when QCC's make broad policy recommendations to management rather than product quality suggestions. When the subject matter of any employee participation program encompasses the traditional areas of employee representation such as grievances, wages, and hours, it is likely that the program will be identified as a labor organization.93 Even occasional communication on these traditional matters constitutes "dealing" in all but one circuit,94 and only a labor organization can permissibly deal with management on such issues.

A QWL program risks classification as a labor organization when the program includes a structured plan of feedback and communication between management and employees on subjects related to traditional labor organization issues such as grievances and wages. QWL programs, however, do not invariably involve broad

88. See General Foods, 231 N.L.R.B. at 1235.
89. See generally Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955) (the court's analysis focused on § 8(a)(2) and simply accepted that the challenged committees were § 2(5) labor organizations).
90. The Board is "one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertise which courts do not possess and therefore must respect." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).
91. See General Foods, 231 N.L.R.B. at 1235.
92. See Scott & Fetzer, 691 F.2d at 293.
94. That circuit being the Sixth Circuit. See Scott & Fetzer, 691 F.2d at 294.
programs of labor/management communication; for example, a QWL program may simply involve health committees or worker exercise programs.95

The effectiveness of worker participation programs largely depends upon management seriously considering the recommendations generated by the employee organizations. But when the recommendations concern broad non-production issues, implementation of the recommendations by management shows that the organization effectively deals with management and therefore constitutes a § 2(5) labor organization.96 Ironically then, the more effectively a program fosters communication between labor and management, the more probable its identification as a labor organization and the more vulnerable it becomes to accusations of employer domination.97 Because of the types of recommendations a company wants generated by QWL and QCC programs, these participation plans will often be classified as § 2(5) labor organizations, and thus the analysis must proceed to the question of whether the employer dominates the worker participation program in violation of § 8(a)(2).

For QCC's, employer domination problems result from management initiation of the circles, management selection of meeting times, management attendance at meetings, and management's furnishing of facilities for the meetings. These factors would probably establish a § 8(a)(2) violation for the Board or a circuit court following the Board's strict standard toward employer assistance to employee organizations.98 Circuit courts following Chicago Rawhide and using an actual-domination-of-employee-free-choice standard would not be likely to invalidate a QCC if the employees were satisfied with the circle, if management did not control the meetings, and if management did not allow these circles to substitute for a labor organization.99 Courts employing the actual-domination standard will consider whether the QCC is voluntary. When employees are not pressured to join a QCC, but are free to participate if they wish, employee choice is not controlled by the employer.

A QWL plan that includes suggestion committees and feedback to employees

95. Cf. Fulmer, supra note 76, at 675–76.
96. See&F1 NLRB v. Clapper's Mfg., Inc., 458 F.2d 414, 419 (3d Cir. 1972) (employee committee whose recommendations on sanitary conditions and inadequate ventilation were implemented by management held to be a labor organization); But see Fulmer, supra note 76, at 682 (arguing that recommendations funneled through QWL programs do not represent "dealing").
97. Cf Scott & Fetzer, 691 F.2d at 291 (stating that because the committee was expressly mandated by the company and because the company controlled its meetings, if the employee committee was a labor organization, there was "little question that...[it] was dominated by the Company").
99. See, e.g., Federal-Mogul Corp., Coldwater Distrib. Center Div. v. NLRB, 394 F.2d 915, 921 (6th Cir. 1968) (employee committee upheld due to lack of actual employer control even though committee members compensated for time spent at meetings and employer financially supported the committee). Disestablishment is the usual Board remedy for a labor organization illegally dominated under § 8(a)(2).
by management can face charges of employer control similar to those directed at QCC programs. A finding of illegal support or control will generally depend upon the jurisdiction.\textsuperscript{100} The potential for employer control in QWL programs can be great, but actual control may vary widely on a case by case basis, depending on the characteristics of the particular QWL program.\textsuperscript{101}

Though an employee production team is less likely than a QCC or QWL plan to be regarded as a labor organization, if so classified it will probably be controlled by the employer in violation of 8(a)(2). The ability of management to disband these teams may be an important consideration in showing employer control over such teams.\textsuperscript{102} For production teams, however, the major defense to an 8(a)(2) charge remains an assertion that the team is not a 2(5) labor organization but merely a work crew to which management delegates responsibility but with which it does not “deal.”

Under current judicial interpretations of the NLRA, any type of employee participation program that communicates worker input to management is likely to constitute a labor organization dominated by the employer. But in jurisdictions following the \textit{Chicago Rawhide} actual-domination standard, a successful worker participation program receiving cooperation and input from management will not be disestablished under § 8(a)(2) merely because employer/employee communication has resulted in concrete cooperation between management and labor. The legality of worker participation programs therefore continues to depend on the jurisdiction in which the program is challenged.

\textbf{V. POTENTIAL SUPREME COURT RESOLUTION}

The rising number of Japanese-style worker participation programs in the United States increases the pressure on the Supreme Court to resolve the conflict among the circuit courts on the question of worker participation.\textsuperscript{103} There are several possible alternatives available to the Supreme Court. First, the Court could reaffirm its holding in \textit{Cabot Carbon} and uphold the Board’s strict reading of § 8(a)(2) to forbid employer cooperation with and assistance to employee organizations and virtually eliminate opportunities for labor/management relations outside the traditional collective bargaining arena. Second, the Court could

\textsuperscript{100} This jurisdictional distinction results from the split among circuits applying the actual domination standard and those circuits applying the potential domination standard. See supra notes 50, 52.

\textsuperscript{101} See supra text accompanying notes 77–80.


\textsuperscript{103} See W.B. Gould, supra note 56, at 99 (commenting on U.S. decisions which view contact between labor and management through participation programs as unlawful: “This view is anachronistic and should be disregarded by the Supreme Court when it next has the opportunity to consider the matter.”). But see Note, Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act, 96 Harv. L. Rev. 1662, 1682 (1983) (“Ad hoc judgments by courts about whether employee free choice has been preserved—made without any legislative delineation of what this choice would mean—do not promote the current legally established industrial relations system.”).
narrow the broad *Cabot Carbon* construction of § 2(5) by adopting the representational/participatory distinction of *General Foods* or the communication/dealing distinction of *Scott & Fetzer*. A narrow interpretation of § 2(5) would place many worker participation programs outside the definition of a labor organization and would thus limit the programs subject to the restrictions of § 8(a)(2). Finally, the Court could adopt the employee free choice/actual domination standard first elaborated in *Chicago Rawhide* to allow, under § 8(a)(2), a case by case determination of employer interference with employee freedom of association and actual employer domination of employee organizations.

When applying the NLRA to worker participation plans, the Supreme Court should use a different analysis for employee production teams than for QCC's or QWL plans. To establish the legality of employee production teams, the Court should adopt, under § 2(5), a distinction between "dealing" with the employer and something less than "dealing." A distinction between a § 2(5) labor organization that "deals" with the employer and a worker participation organization that either communicates with the employer or has its responsibilities delegated to it by the employer has substantial support in the language of § 2(5). In practice, production teams have virtually all responsibility delegated to them by management, and while the teams are usually controlled by the employer, they seldom deal with management concerning "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Because production teams are concerned primarily with the delegation of production responsibility, and not "dealing" with management, the Supreme Court could find, without distorting the plain language of § 2(5), that these teams generally are not labor organizations and therefore are not subject to the restrictions of § 8(a)(2).

104. See Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 294 (6th Cir. 1982). The distinction in *Scott & Fetzer* is sound, though the reasoning is somewhat inconsistent. The court in *Scott & Fetzer* transplanted a theory formulated to address the issue of domination of an employee's freedom of association (in violation of § 8(a)(2)), and applied it to § 2(5). Section 2(5) merely defines a labor organization with no mention of employer interference or domination. Employer domination or interference is simply not a part of the definition of a labor organization. For example, an employee organization dominated by the employer need not "deal" with the employer (i.e. a production team in which all responsibility is delegated), while an employee organization that "deals" with the employer may not be dominated by that employer (i.e. an independent union).


106. Section 2(5) defines a labor organization, in part, as "any organization . . . in which employees participate and which exists for the purpose . . . of dealing with employers." 29 U.S.C. § 152(5) (1982).

107. *Id.*

108. The Supreme Court could also adopt the distinction made by the Board in *General Foods* between a representative employee organization and a participatory employee organization to uphold participatory employee production teams. Nevertheless, the Supreme Court could find this distinction untenable under the language of the NLRA. Section 2(5) defines a labor organization as "any organization of any kind . . . in which employees participate," and makes no distinction between participatory organizations and representative organizations. *Id.*
When the Court examines the legality of QCC and QWL programs, it should adopt a different analysis. An effective QCC or QWL program must involve considerable communication between labor and management. These programs will, therefore, often be regarded as labor organizations "dealing" with the employer under § 2(5).\textsuperscript{109} Nevertheless, if a QCC or QWL program allows unrestricted employee freedom of choice and association, then the \textit{Chicago Rawhide} actual domination test, developed by the Seventh Circuit under § 8(a)(2), can provide the Supreme Court with a workable standard to permit the program to survive. If the Court is willing to consider all the circumstances surrounding the implementation and operation of a challenged QCC or QWL program on a case by case basis, then the \textit{Chicago Rawhide} test should enable the Court to determine, in each particular case, whether the employee organization has actually been dominated by the employer in violation of § 8(a)(2).\textsuperscript{110} Such an analysis will enable the Supreme Court to reach equitable decisions in individual cases by upholding freely chosen programs and invalidating those programs actually dominated by the employer. By adopting the standards developed by the circuit courts in \textit{Scott & Fetzer} and \textit{Chicago Rawhide},\textsuperscript{111} the Supreme Court could interpret §§ 2(5) and 8(a)(2) of the NLRA to uphold the validity of all types of worker participation programs in a principled, yet practicable and flexible manner.

Additional support for a less rigid judicial approach to worker participation plans can be found in the legislative history of the NLRA. During the consideration of the 1947 Taft-Hartley Amendments to the NLRA,\textsuperscript{112} the House of Representatives passed an amendment allowing employers to form employee committees.\textsuperscript{113} The Conference Committee rejected this amendment as unneces-

\textsuperscript{109} A QCC or QWL program will undoubtedly be regarded as a § 2(5) labor organization if it discusses with the employer such issues as grievances, wages, hours, and working conditions. See Lawson Co. v. NLRB, 118 L.R.R.M. (BNA) 2505, 2509 (6th Cir. 1985); NLRB v. Sharples Chemicals, 209 F.2d 645 (6th Cir. 1954) (employee committees afforded employees a means to secure satisfaction for their grievances and improvement of their working conditions and therefore were labor organizations).

\textsuperscript{110} See, e.g., NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663, 667 (5th Cir. 1968) (citing \textit{Chicago Rawhide} in finding that cooperation that does not interfere with employee free choice is not illegal).

\textsuperscript{111} The Supreme Court should also consider the standard developed by the Board. See General Foods Corp., 231 N.L.R.B. 1232 (1977).

\textsuperscript{112} Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947).

\textsuperscript{113} The amendment, § 8(d)(3), reads as follows:

\begin{quote}
8(d). \textit{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) Forming 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.
\end{quote}

necessary because the Committee interpreted the NLRA to permit employees to meet with their employers outside of the collective bargaining arena. Thus, the legislative history surrounding the Taft-Hartley Amendments supports a more flexible interpretation of the NLRA by the courts.

Several policy considerations may persuade the Supreme Court to reject its holding in *Cabot Carbon* and allow worker participation programs in the future. A strict interpretation of the NLRA could discourage Japanese direct investment in the United States. Such investment, if encouraged, could effectively reduce the U.S. trade deficit with Japan. Hundreds of thousands of jobs have been and will continue to be created by increased Japanese investment, mostly in small rural communities which the Japanese prefer and where the recent farm crisis has left many Americans unemployed. In addition, these programs often represent a sincere effort by the employer to decrease the hostility and mistrust that has long characterized American labor relations.

The potential for management abuse of worker participation programs is a very real concern. Nevertheless, adopting a standard that synthesizes the *Scott & Fetzer, General Foods*, and *Chicago Rawhide* approaches will allow the Court to promote truly cooperative labor/management relations while continuing to invalidate those programs not freely chosen by employees and those controlling the right of employees to organize.

VI. Conclusion

Unless the Supreme Court provides the lower federal courts and the Board with clear guidelines to evaluate the legality of Japanese-style worker participation plans, the resolution of § 8(a)(2) unfair labor practice charges will continue...
to depend on jurisdiction. In several strict standard circuits, the possibility of successfully defending a § 8(a)(2) charge brought against a worker participation program is slim. Even in the more liberal circuits that emphasize employee free choice, employers do not enjoy carte blanche to initiate any program they desire. Without legislative revision, the NLRA does impose, in every circuit, certain restrictions upon Japanese-style worker participation techniques.

Until the legal status of worker participation programs is clarified, employers in the United States will be hesitant to initiate such programs. The Supreme Court should adopt a combination of the dealing/communicating distinction and the actual domination standard. This hybrid approach will allow the Court to support freely chosen participation programs that contribute to cooperation between labor and management without resulting in a judicial revision of the NLRA.