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NOTES

Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act

The employees must have the opportunity of participating in the decisions as to what shall be their condition and how the business shall be run. They must learn also in sharing that responsibility that they must bear the suffering arising from grave mistakes, just as the employer must. But the right to assist in making the decisions, the right of making their own mistakes, if mistakes there must be, is a privilege which should not be denied to labor. We must insist upon labor sharing the responsibilities for the result of the business.

— Louis D. Brandeis

The widely reported Japanese economic "miracle" has prompted both management theorists and social commentators to urge American enterprises to adopt Japanese management techniques. Often


4. See, e.g., D. Jenkins, JOB Power (1973); WORKPLACE DEMOCRACY AND SOCIAL CHANGE (F. Lindenfeld & J. Rothschild-Whitt eds. 1982). These authors focus on participatory management as a means of increasing worker control over the factors of production, while the management theorists concentrate on the potential for increased labor productivity under Japanese-style management systems.

5. Although often viewed by the popular press as a creation of Japanese culture, participatory management's origins cannot be traced to any one source. Various forms of worker participation in management are widespread in the European Economic Community. See, e.g., Gevers, Worker Participation in Health and Safety in the EEC: The Role of Representative Institutions, 122 INT'L LAB. REV. 411 (1983). In some EEC countries, most notably West Germany, worker participation in the form of employee representation on corporate boards of directors is required by statute. See, e.g., Mitbestimmungsgesetz § 15(2), 1976 BGBl, pt. 1, at 1153, 1157 (West Germany's 1976 Codetermination Act). See also J. Furlong, LABOR IN THE BOARDROOM (1977) (containing extensive discussion and English translation of the Codetermination Act); HoP, NEW WAYS IN CORPORATE GOVERNANCE: EUROPEAN EXPERIMENTS WITH LABOR REPRESENTATION ON CORPORATE BOARDS, 82 MICH. L. REV. 1338, 1350-51 (1984).

Ironically, perhaps the largest experiment with participatory management occurred in the United States during World War II, with the encouragement of the federal government's War Production Board. This experiment, which involved some 2.5 million workers in labor-management committees, led some commentators to advocate increased labor-management cooperation in the postwar period. See, e.g., E. LeVer & F. Goodell, LABOR-MANAGEMENT COOPERATION (1948).
drawn together under the rubric of "participatory management," these methods of workplace control emphasize employee participation in enterprise decisionmaking. While such participation can take many forms, ranging from mere suggestion boxes to employee ownership, the most common American adaptations of participatory management involve the formation of groups, or committees, composed of representatives of labor and management. Often these committees focus on a specific problem area, such as quality control, but some vary widely in function and scope.

Managers of nonunion plants who wish to implement participatory management often must initiate the machinery of employee participation themselves. In so doing, however, managers risk run-

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6. Some social commentators have attempted to distance themselves from the management theorists by distinguishing the different types of participatory management. See, e.g., Rothschild-Whitt & Lindenfeld, *Reshaping Work: Prospects and Problems of Workplace Democracy*, in *WORKPLACE DEMOCRACY AND SOCIAL CHANGE*, supra note 4, at 4: "Participation," "participative management," and the like have become such popular terms in United States industry today that it is important to distinguish their usage from what we mean by economic democracy. . . . [W]orker participation can be treated as a continuum from the most modest levels of participation, employee consultation in decision-making, to the wider levels of employee influence to joint management or codetermination, and finally to full worker's control over the process and product of labor. (emphasis in original) (citation omitted). This Note is concerned with some of the more "modest" levels of participation, such as employee consultation and influence. See Section I infra.

7. See Section I infra; see also Prizinsky, *Companies Express Optimism for Labor-Management Teams*, Am. Metal Market, Mar. 12, 1982, at 3, col. 1; Main, *The Trouble With Managing Japanese-style*, FORTUNE, Apr. 2, 1984, at 50 (quality circles "probably the most popular import").

8. The quality control (QC) circle is one of the specific aspects of Japanese management considered most adaptable to American settings. See notes 24-29 infra and accompanying text; see also W. Ouchi, supra note 3, at 261-68; but cf. Middleman & Rosenbloom, *Can Quality Circle Concept Work in U.S.?,* J. Com., July 29, 1982, at 4A, col. 2; Main, supra note 7 (describing the failure of quality circle programs at several United States companies).


10. Participatory management techniques have flourished in many heavily unionized industries, particularly automobile manufacturing. See, e.g., Job, *Saturn Gives Management Role to Workers*, Det. News, Jan. 11, 1985 (describing the role of the United Auto Workers in designing a participatory management system for General Motors' Saturn division). In a unionized setting, management usually must seek worker approval through the collective bargaining representative before implementing the changes in work rules and job classifications that participatory management techniques typically require. If the workers, through their bargaining representative, approve the changes, then there is no question regarding their legality. However, some collectively bargained contracts do not prevent employers from installing participatory management programs without the union's cooperation. For a discussion of the legality of that technique under the National Labor Relations Act (NLRA), see Sockell, *The Legality of Employee-Participation Programs in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541 (1984).

This Note's analysis is restricted to nonunion employees because the issues presented when a union already represents the employees involve the "exclusivity doctrine" of § 9(a) of the National Labor Relations Act, codified as amended at 29 U.S.C. § 159(a) (1982) (hereinafter referred to as "NLRA" or "Act"), rather than § 8(a)(2)'s prohibition of employer-dominated labor organizations, 29 U.S.C. § 158(a)(2) (1982). See Sockell, supra, at 543-46.

11. Although nonunion employees may, and sometimes do, suggest participatory management programs, the lack of organization among nonunion employees makes it more likely that management will first suggest changes in workplace organization.
ning afoul of section 8(a)(2) of the National Labor Relations Act (NLRA or Act), which makes it an unfair labor practice for employers to interfere with, dominate, or assist employee labor organizations.

This Note argues that participatory management programs initiated by the employer in nonunion settings should be permissible under the NLRA when they do not restrict the freedom of employees to choose their own bargaining representative. Section I describes the major currents of participatory management theory. Section II explores the restrictive interpretation the National Labor Relations Board (Board) and the courts have traditionally given those sections of the NLRA applicable to participatory management programs. Section III describes the increasingly permissive approach taken by some courts, and to a lesser extent by the Board, in applying the NLRA to participatory management settings. Section IV examines the legislative histories of the NLRA and subsequent federal labor legislation, and concludes that participatory management furthers federal labor relations policy.

I. TYPES OF PARTICIPATORY MANAGEMENT

The term “participatory management” encompasses several overlapping approaches to increased employee involvement in workplace decisionmaking. Labor-management committees, quality of work life projects, quality control circles, and employee production teams are four common labels applied to participatory management efforts in American enterprises. In the interest of clarity, each type of program will be discussed separately, although in practice an enterprise may utilize a combination of these participatory techniques.

Labor-management committees first became widespread during World War II as a method of improving productivity, solving production-related problems, and preventing labor strife by boosting em-

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13. Section 8(a)(2) states “It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .” 29 U.S.C. § 158(a)(2) (1982). See notes 66-82 & 101-22 infra and accompanying text. Section 2(5) 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.” 29 U.S.C. § 152(5) (1982). See notes 44-65 & 86-100 infra and accompanying text.
14. See note 6 supra.
15. The terminology used here is not intended to suggest that participatory management is limited to these four types. Other forms of worker participation, such as employee representation on corporate boards of directors, are excluded from the analysis because they have already received adequate discussion in the literature. See, e.g., Note, Worker Ownership and Section 8(a)(2) of the National Labor Relations Act, 91 YALE L.J. 615 (1982).
employee morale. Considering the successful track record of such committees in many unionized plants, it is not surprising that they have begun to appear in nonunion settings as well. In both contexts, many labor-management committees have various combinations of the following characteristics: (1) they consist of a roughly equal number of representatives of labor and management; (2) two co-chairpersons — one from each side — are appointed by mutual consent, and serve either on a rotating basis or concurrently; (3) meetings are held on a regular basis, or sometimes on an as-needed basis; (4) committees set their own priorities, generally concentrating on matters on which both parties can agree; and (5) employee members and foremen are rotated so that a large number of people are involved in the joint consultative process.

Quality of work life (QWL) projects are specifically designed to improve the quality of work life. Although sometimes considered a special type of labor-management committee, they have distinct characteristics which merit special treatment. QWL projects focus on interpersonal relationships among workers and the general “humanization” of labor conditions. They are designed to make workers' tasks more meaningful and satisfying, which in turn should lead to gains in productivity. QWL projects differ from other participatory manage-
ment techniques in that their initial focus is on worker satisfaction rather than productivity; thus, employees are more likely to suggest that a QWL project be undertaken.\(^{23}\)

The quality control (QC) circle is perhaps the most widely advocated “Japanese” participatory management technique.\(^{24}\) QC circles are small groups of workers (usually no more than ten per group) that meet weekly for one or two hours to discuss work problems and potential improvements in the production process.\(^{25}\) A successful program will usually involve a plantwide system of circles, but each circle includes workers from only one department, with discussions limited to issues affecting that department.\(^{26}\) These work discussions, run by the workers but with supervisory personnel present and involved, typically generate recommendations for specific improvements, which are then passed on to management for consideration. Approval is routine, although management retains the power to refuse any recommendation made by the circle.\(^{27}\)

QC circles differ from QWL projects because of their emphasis on productivity and product quality. Although QC circles are considered more effective if approached with an attitude of humanity toward the worker,\(^{28}\) the immediate objective of the QC circle is still an improved

to improve the work environment. It includes rather specific programs of work restructuring, which involves redesigning job content and responsibilities, in order to permit greater discretion at lower organizational levels.\(^{\text{1}}\). The Center's report proceeds to recount an example of a QWL project at a Tennessee plant which was "so successful in terms of both work satisfaction and productivity that more than 80 percent of the union members voted to enlarge the program." Id. at 30-31.

23. A statement made by a vice president of the United Auto Workers Union illustrates the distinction:

Traditionally, management has called upon labor to cooperate in increasing productivity and improving the quality of the product. My view is that the other side of the coin is more appropriate; namely, that management should cooperate with the workers to find ways to enhance the human dignity of labor and to tap the creative resources of each human being in developing a more satisfying worklife, with emphasis on worker participation in the decisionmaking process.

NATIONAL CENTER, supra note 16, at 30. The source of a project's inception can be the crucial factor when the "actual domination" test is applied under § 8(a)(2). When employees initially suggest that a labor-management committee or QWL program be formed, the Board and the courts are much less likely to find the employer guilty of unfairly "dominating" the resulting employee organization. See note 107 infra and accompanying text.


25. See W. Ouchi, supra note 3, at 262-63.

26. See id. at 262.

27. See id. at 263.

28. See id. at 266-67 ("Unfortunately, many American companies seem to insist on the use of Q-C Circles simply by managerial fiat. The Japanese stress the impossibility of this approach. Instead, management must create positive conditions, and then the patience to allow effort and morale to grow naturally.").
QWL projects, by contrast, propose to improve the quality of workers' roles in the production process under the theory that satisfied workers produce higher quality products at lower cost.29

The employee production team is one participatory management technique already enjoying some success in the United States. Borrowing from the managerial successes of Swedish automakers,30 several major American corporations began using employee production teams on an experimental basis in the early 1970s.31

Typically, management initiates employee production teams by assigning a plant's production workers into groups. Each group, or team, is responsible for some defined segment of plant operations. Within that segment, the team is given considerable autonomy in deciding how subtasks are divided and performed.32 For example, managers in a General Foods plant in Topeka, Kansas, allowed team members to manage the day-to-day production process, participate in personnel decisions which would affect team composition, and resolve grievances of other team members.33 Team members were compensated according to the number of different jobs they mastered, which created an incentive for members to learn each other's jobs, thus discouraging the development of repetitive, assembly-line tasks.34

Like QWL projects, employee production teams are designed to reduce worker alienation. However, management may find it more palatable to install production teams, whose purpose is more directly linked to productivity gains, than QWL projects, which are designed primarily to improve worker satisfaction.35 Thus, employee production teams may develop more rapidly in nonunion settings, where management usually chooses which methods of participatory management to employ.

29. Because the central objective of QC circles — an improved product — appears to benefit employers more directly than employees, management is far more likely than the workers to propose organization of employees into QC circles. Therefore, if QC circles are considered "labor organizations" under the NLRA, it is difficult to escape the conclusion that the employer has "dominated" the formation of the circles in violation of § 8(a)(2). See Section III. A. infra.


31. See Walton, supra note 30 (discussing managerial innovations by General Foods, Procter & Gamble, and TRW). See generally D. JENKINS, supra note 4, at 225-35.

32. See Walton, supra note 30, at 74-75.

33. See D. JENKINS, supra note 4, at 227-28.

34. Id.

35. Because they are more likely to be formed or at least initially suggested by management, employee production teams, like QC circles, may be subject to attack as company-dominated "labor organizations" prohibited by § 8(a)(2). But see General Foods Corp., 231 N.L.R.B. 1232 (1977), discussed at notes 95-96 infra. See generally Note, Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?, 49 IND. L.J. 516 (1974).
II. TRADITIONAL APPROACHES TO PARTICIPATORY MANAGEMENT UNDER THE NLRA

The success of participatory management in Japan depends heavily on that nation's modern tradition of labor-management cooperation. Although Japanese labor and management do not view their interests as entirely consonant, they tend to view one another with less suspicion and hostility than do their American counterparts. Labor and management in America have a history of more confrontational, adversarial relations. American labor law, particularly the NLRA, reflects that history by codifying an adversarial model of relations between labor and management.

Faced with organized labor's strong desire to outlaw "company

36. See, e.g., E. VOGEL, JAPAN AS NUMBER ONE: LESSONS FOR AMERICA 131-57 (1979). Vogel attributes labor-management cooperation in Japan to both cultural and historical sources: The success of Japanese companies in avoiding disruptive labor unrest must be understood in the context of long-run individual identification with the company, but it has been reinforced by company handling of labor unions. After World War II, when the Allied Occupation ordered a rapid expansion of labor unions, Japanese company executives moved quickly to make employees members of labor unions. Labor unions were thus born not from virulent leaders led by bitter union leaders but from the initiative of company leaders. Nonetheless, unions do energetically represent the interests of the workers in pushing for benefits. Though very worried about the danger of unions in the late 1940s, management has come to regard their unions as friends in helping stabilize the company. To avoid an excessive adversary relationship and create a proper climate, management finds time to socialize with union leaders without waiting for disputes that engender an atmosphere of controversy.

Id. at 153-54. But see Levine & Taira, Interpreting Industrial Conflict: The Case of Japan, in LABOR RELATIONS IN ADVANCED INDUSTRIAL SOCIETIES 61, 84 (B. Martin & E. Kassalow, eds. 1980) ("[I]ndustrial conflict has become as much a part of the Japanese ethos as it has in other industrialized market economies."). See generally W. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW (1984).

37. Both the original NLRA (Wagner Act) and the Taft-Hartley Act were at least ostensibly directed at the adverse economic effects of acrimonious relations between management and labor. The NLRA states its purposes as follows: "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or necessary effect of burdening or obstructing commerce . . . ." 29 U.S.C. § 151 (1982). The Taft-Hartley Act, passed in 1947 to supplement and amend the Wagner Act, states as its policy that "[I]ndustrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other . . . ." 29 U.S.C. § 141(b) (1982). Thus, the prevention of industrial strife, and not necessarily the promotion of an adversary system of labor relations, is the primary purpose of federal labor legislation. See notes 132-45 infra and accompanying text (arguing that the Wagner Act was intended to permit labor-management cooperation as a means of encouraging the peaceful settlement of labor disputes).

38. Some commentators have argued that the central policy of federal labor legislation is the preservation of an adversarial model of employer-employee relations. See, e.g., 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 (1983). A more accurate statement would be that the prevention of industrial strife through the preservation of both employers' and employees' rights is the one overriding concern of federal labor policy. See note 37 supra. While Congress envisioned that an adversary model might help achieve those ends, it did not preclude cooperation between workers and management, provided that the rights of all parties are preserved.
unions," Congress developed a framework in the NLRA to prohibit management from interfering with the formation and development of labor organizations. This framework places substantial barriers between labor and management to ensure that the right of employees to choose their own independent bargaining agent is not impeded. These barriers have accomplished their original purpose; the "company union" practices of the 1930s have been eradicated. In the process of eliminating company unions, however, the NLRB and many courts have construed the language of the NLRA so broadly that many employer practices far removed from union creation have been struck down.

A. Section 2(5): Defining "Labor Organization"

Section 8(a)(2) of the NLRA proscribes employer interference with

39. In the 1920s, many employers attempted to prevent employees from joining more antagonistic national and international labor unions by forming their own unions and presenting them to the employees as independent mechanisms for collective bargaining. See R. Dunn, Company Unions (1927) (presenting the "progressive trade union slant on company unions"); cf. Nelson, The Company Union Movement, 1900-1937: A Reexamination, 56 Bus. Hist. Rev. 335 (1982) (arguing that some company unions made important contributions to the development of a professional approach to labor relations). Senator Wagner, the author of the original NLRA, was a leading proponent of the elimination of employer-dominated company unions. See Wagner, Company Unions: A Vast Industrial Issue, N.Y. Times, Mar. 11, 1934, § 9, at 1, col. 1, reprinted in 78 Cong. Rec. 4229-31 (1934), and in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 22-26 (1949) (hereinafter cited as Leg. Hist. NLRA).


41. The formal division in the NLRA between labor and management contains two layers. First, § 2(5) defines labor organization to include far more than traditional union structures. See 29 U.S.C. § 152(5). Second, § 8(a)(2) prohibits employers from dominating, interfering with, or assisting labor organizations as defined in § 2(5). Thus, a manager who wishes to implement a participatory management program must either refrain from forming her employees into groups which qualify as § 2(5) labor organizations, or she must refrain from dominating, interfering with, or even assisting in the formation or administration of such organizations. In practice, some courts have created precedents that allow management to circumvent either barrier, depending upon the makeup of the participatory organization and the role the company performs in the organization's operation. See notes 83-122 infra and accompanying text.

42. The demise of company unions is well documented. See, e.g., Nelson, supra note 39, at 335 (Company unions were "obliterated by the Congress and the courts during the 1930s.").

43. See, e.g., NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.) (informal employee committee that met with employer to make suggestions and discuss conditions of employment was a labor organization under the NLRA), cert. denied, 404 U.S. 939 (1971); NLRB v. General Shoe Corp., 192 F.2d 504 (6th Cir. 1951) (evidence that employer met, advised, and dealt with five employee committees sufficient to show that committees were labor organizations), cert. denied, 343 U.S. 904 (1952); Predicasts, Inc., 270 N.L.R.B. No. 170, at 10, 1984-85 NLRB Dec. (CCH) § 16,451, at 28,125-26 (1984) ("Personnel Committee" designed to serve as an "information exchange between employees and management" ruled a labor organization because it informally mediated employee grievances and made nonbinding recommendations to management); Sunnen Prods., Inc., 189 N.L.R.B. 826 (1971) (employee advisory board composed of and freely elected by employees ruled a labor organization). In all of these cases, employer involvement in the organization's formation was considered pervasive enough to support an 8(a)(2) violation. Cf. Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955), discussed in text at notes 105-16 infra.
employee "labor organizations." Thus, for a participatory management program to be struck down under section 8(a)(2), the employee group must be considered a "labor organization" under the Act. At first glance, participatory management groups do not appear to be labor organizations in the usual sense of the term. This is particularly true for employee production teams and QC circles, which are designed solely to increase productivity. However, the NLRA's definition of labor organization encompasses much more than the traditional union structure. Under section 2(5):

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Thus, for a group of employees to be considered a labor organization, three requirements must be met: (1) the employees must participate in the group; (2) the group must have as one of its purposes "dealing with" the employer; and (3) the subject matter of those dealings must include grievances, labor disputes, wage rates, employment hours, or working conditions.

In participatory management programs, employees clearly participate in the groups or committees; increased worker participation is a major purpose of such programs. It is less clear whether employee participation groups exist for the purpose of "dealing with" the employer regarding matters traditionally reserved for collective bargaining. Although to some extent this determination should be handled on a case-by-case basis, in NLRB v. Cabot Carbon Co. the Supreme Court interpreted the "dealing with" language of section 2(5) in a way that appears to leave only a small area open for argument.

Cabot Carbon arose out of the War Production Board's (WPB) encouragement of labor-management committees during World War II. With the WPB's encouragement and approval, the Cabot Carbon
Company set up employee committees at several of its plants, both union and nonunion.\(^51\) After the war, the company simply continued to hold meetings of the existing committees, and new committees were formed as new plants were acquired.\(^52\) In the mid-1950s, a union representing some of the company's employees\(^53\) filed several unfair labor practices against the company, alleging among other things that the employee committees were labor organizations under section 2(5), and that the company had impermissibly interfered with the formation and operation of the committees in violation of section 8(a)(2).

The trial examiner agreed, finding that the committees were labor organizations under section 2(5).\(^54\) But the Fifth Circuit reversed the Board's enforcement order,\(^55\) holding that employees, whether individually or in groups, "should be able to discuss problems of mutual interest with their employers — without violating the law."\(^56\) The court equated "dealing with" employers under section 2(5) and "bargaining with" employers. Thus, under the Fifth Circuit's approach, employees could form groups, or be assigned to groups by their employer, so long as the groups did not undertake collective bargaining with the employer. In attempting to establish the right of employees to discuss problems and grievances outside the channels of collective bargaining, the court relied heavily on section 9(a) of the NLRA.\(^57\) It

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\(^51\) Cabot Carbon Co., 117 N.L.R.B. 1633, 1640 (1957), enforcement denied, 256 F.2d 281 (5th Cir. 1958), revd., 360 U.S. 203 (1959). Thus, although the company provided the direct impetus for the committees' formation, the original idea to create the committees came from the federal government, through the War Production Board.

\(^52\) 117 N.L.R.B. at 1640-42. The committee bylaws referred to slight differences in the jurisdiction of individual committees, depending upon whether the committee's plant had been organized. The only real differences related to the handling of grievances, which in organized plants were presumably handled directly by the union.

\(^53\) The International Chemical Workers Union represented some of Cabot Carbon's employees but had been unsuccessful in its efforts to organize several plants in which labor-management committees operated.

\(^54\) The trial examiner noted that the committees provided a mechanism for resolving grievances in nonunion plants, and that the recorded minutes of committee meetings revealed that "subjects pertaining to labor relations and working conditions were discussed and otherwise dealt with." 117 N.L.R.B. at 1643. These subjects included sick leave plans, holiday work schedules, job classifications, and even a "[r]equest that gloves for employees be furnished at cost through [the company's] supply room." 117 N.L.R.B. at 1643.


\(^56\) 256 F.2d at 290.

\(^57\) Section 9(a) reads:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in...
reviewed the legislative history of section 9(a) and concluded that Congress intended to allow "groups of employees to present to the employer grievances for adjustment, without the intervention of the bargaining representative, as long as there is no conflict with a collective bargaining contract."®

The Supreme Court unanimously rejected the Fifth Circuit's ruling and reinstated the Board's order.® The Court emphasized that "dealing with" meant something much more expansive than "bargaining with," and decided that the Cabot Carbon Company's "employee committees" had been dealing with the company regarding a number of matters usually reserved for the collective bargaining process.®

Thus, the Court found that the committees were "labor organizations" under section 2(5), despite the seemingly contrary provisions in section 9(a) relied upon by the lower court.©

The Supreme Court's construction of sections 2(5) and 9(a) leaves little room for employee organizations to qualify as something other than labor organizations under the NLRA.® While it is certainly possible for employers to meet with employees without forming "labor

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

29 U.S.C. § 159(a) (1982) (emphasis in original). The language in § 9(a) that specifically allows employees to have grievances adjusted "without the intervention of the bargaining representative" was added as part of the Labor Management Relations (Taft-Hartley) Act of 1947.

58. 256 F.2d at 286.
60. The Court clearly indicated its dissatisfaction with the Fifth Circuit's construction of "dealing with":

Consideration of the declared purposes and actual functions of these Committees shows that they existed for the purpose, in part at least, "of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." It cannot be, and is not, disputed that, by the terms of the bylaws, . . . the Employee Committees . . . [h]and[e]d grievances . . . at nonunion plants and departments . . . . It is therefore as plain as words can express that these Committees existed, at least in part, for the purpose "of dealing with employers concerning grievances . . . ." This alone brings these Committees squarely within the statutory definition of "labor organizations." 360 U.S. at 213 (emphasis in original). The Court also noted that the Committees discussed with management "such matters as seniority, job classification, job bidding, working schedules, holidays, vacations, sick leave, a merit system, wage corrections, and improvement of working facilities and conditions." 360 U.S. at 213. The Court concluded: "[W]e think that those activities establish that the Committees were 'dealing with' [the company], with respect to those subjects, within the meaning of § 2(5)." 360 U.S. at 214.
61. The Supreme Court took a narrow view of § 9(a)'s scope and rejected the Fifth Circuit's argument because a congressional joint conference committee had refused to adopt a House version of the Taft-Hartley Bill which would have specifically allowed labor-management committees in nonunion settings. For criticism of the Court's analysis, see Feldman & Steinberg, Employee-Management Committees and the Labor Management Relations Act of 1947, 35 Tul. L. Rev. 365, 376-86 (1961). See also notes 174-78 infra and accompanying text.
62. See notes 83-85 infra and accompanying text.
organizations," after *Cabot Carbon* the permitted scope of such meetings is severely circumscribed. The Court's construction of the "dealing with" language of section 2(5), combined with its dismissal of the Fifth Circuit's section 9(a) analysis, may leave little of substance for employee groups to accomplish. While the Court's approach effectively prevents the operation of company unions in any guise, it may also inhibit the formation of legitimate mechanisms for the enhancement of employee participation in management.

B. *The Traditional Approach to "Employer Domination" Under Section 8(a)(2)*

In *Cabot Carbon*, it was clear that the employer had dominated the employee committees; the dispositive issue was whether those committees were labor organizations under the Act. Some cases, however, have held that employee organizations, although labor organizations under section 2(5), were nevertheless not "dominated" by the employer under section 8(a)(2) and were therefore permissible. But under the traditional approach to section 8(a)(2) cases, virtually all

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64. Some commentators have detected a trend in Board decisions toward expanding the area of employee-management relations which lie outside the restrictions of § 2(5). See, e.g., Schurgin, *The Limits of Organized Employer-Employee Relations in Non-Union Facilities: Some New Evidence of Flexibility*, 57 CHI.-KENT L. REV. 615, 623-38 (1981). Cases reflecting this trend, however, are "few in number." Id. at 623 n.39. See notes 95-100 infra and accompanying text.

65. For example, under the *Cabot Carbon* analysis, employee groups that discuss "grievances" or "conditions of work" are automatically considered labor organizations. In reality, however, any group of employees assembled for the purpose of communicating with management is likely to mention "grievances," usually as a way of indicating to management how "conditions of work," and therefore productivity, can be improved. For example, QC circles usually operate according to the following format:

The technique itself [QC Circles] involves small groups of workers . . . in weekly meetings. These meetings . . . center on the discussion of work problems and possible work improvements. Specific solutions and improvement recommendations are submitted to management for approval; approval is typically granted. Workers run the discussions, although supervisors are usually present and involved, and the discussions must be conducted on company time.

M. SASHKIN, supra note 24, at 58. A "discussion of work problems" may include almost anything, including, for example, poor lighting or inadequate ventilation in work areas. When employees present to management "specific solutions and improvement recommendations" regarding such matters, the "dealing with" standard of *Cabot Carbon* will always be satisfied. Moreover, the subject matter of such "dealings" will usually include matters which clearly fit within the examples enumerated in § 2(5), such as "grievances" or "conditions of work," if these terms are construed broadly.

66. Even the Fifth Circuit, which decided the case in favor of the company, admitted that "there is not much doubt [that], if the committees are labor organizations, . . . Cabot interfered with the administration of the committees, and assisted and supported the committees unlawfully." 256 F.2d at 284 (emphasis in original).

67. See, e.g., NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979). For a discussion of the less restrictive approach to § 8(a)(2) cases followed by some circuits, see notes 101-22 infra and accompanying text.
forms of employer support for section 2(5) labor organizations have been treated as unfair labor practices.

The language of section 8(a)(2) contains broad restrictions on employer activity. Employer "domination" of and "interference" with labor organizations is prohibited, as is employer contribution of "financial or other support" to such groups.68 From the start, the Board and some courts have interpreted section 8(a)(2) as a comprehensive ban on employer involvement in the activities of section 2(5) labor organizations.69 While the Board insists that it considers the "totality" of the circumstances in each case,70 some jurisdictions have in effect adopted a per se rule prohibiting employer cooperation with employee labor organizations.71 As a result, many seemingly innocuous employer actions have been ruled unfair labor practices.72

The rationale for the per se approach to section 8(a)(2) cases may have been sound in 1935, but its continued vitality has become highly questionable. When the NLRA was enacted, the practice of company unionism was widespread.73 Section 8(a)(2)'s abolition of this practice was considered a major victory for organized labor.74 Stringent enforcement of section 8(a)(2) by both the Board and the courts was necessary to accomplish the NLRA's objective of preserving employ-


69. See, e.g., NLRB v. Jas. H. Matthews & Co., 156 F.2d 706 (3d Cir. 1946), where a "multiple management" program comprised of several labor-management committees was deemed a labor organization despite the company's contention that the program was "but a committee of the workers designed to discuss and make recommendations to management about production problems." 156 F.2d at 707. The court suggested in dicta that a per se approach might be unwise: "the case perturbed us considerably at the argument for we were reluctant to reach a conclusion that labor and management cannot confer about production problems without violating the Act." 156 F.2d at 707. However, in part because grievances were discussed by the committees, the court held that the employer's formation and operation of the "multiple management" program constituted an unfair labor practice because the committees were impermissibly dominated labor organizations. For a description of the "multiple management" system struck down in Matthews, see C. McCormick, Multiple Management (1938). See generally Note, New Standards for Domination and Support Under Section 8(a)(2), 82 Yale L.J. 510, 511-14 (1973).

70. See 2 NLRB Ann. Rep. 95 (1937):
The activities of an employer which are intended to produce, or have the necessary effect of producing the result prescribed as an unfair labor practice are multifarious. The cases do not single out any one activity or circumstance as determinative of the existence of a violation under [§ 8(a)(2)]. In each of the cases so far determined a series of acts have been revealed which in their totality constitute domination or interference with a labor organization.

71. See Note, supra note 69, at 511. Despite the Third Circuit's professed reluctance to follow a per se approach, see note 69 supra, no case in the twenty years following the Act's passage permitted any level of employer cooperation with employee "labor organizations."

72. See, e.g., Wheeling Steel Corp., 1 N.L.R.B. 699, 708-09 (1936), enforced in part, 94 F.2d 1021 (6th Cir. 1938) (fifty-cent annual donation per employee held to be unfair labor practice); see also cases cited in Note, supra note 69, at 512.

73. See Wagner, supra note 39, at 1.

74. See generally R. Dunn, supra note 39.
ees' freedom to select their own bargaining representatives.\textsuperscript{75} However, the acceptance of independent labor unions as bargaining representatives,\textsuperscript{76} as well as the changing nature and declining number of 8(a)(2) cases,\textsuperscript{77} significantly weaken the rationale for the per se approach. Modern employer practices challenged under 8(a)(2) rarely resemble company unionism as it existed before the NLRA. Instead, recent cases typically involve employer recognition of minority unions,\textsuperscript{78} or employer assistance favoring one outside union over another during competing organizational drives.\textsuperscript{79} While these practices require the continued application of section 8(a)(2) to preserve employee free choice, they do not require a per se rule prohibiting all forms of employer cooperation with employee labor organizations.

Moreover, the per se rule effectively excludes alternatives to the adversary model of labor relations. While the NLRA favors the adversary approach as one way to ensure that employees' interests are vigorously advanced in collective bargaining, Congress did not intend to force that model on employees who do not desire outside representation by an independent union.\textsuperscript{80} Rules preserving employee "free choice" should not be enforced more strictly when employees choose

\begin{itemize}
\item \textsuperscript{75} The Board's restrictive approach has been described as an attempt to further three interrelated policies of the NLRA: (1) protection of employee free choice; (2) protection of the then-fledgling labor movement; and (3) insuring vigorous representation for employees (if they wish representation at all). See Jackson, \textit{An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice}, 28 SYRACUSE L. REV. 809, 818-22 (1977). Jackson argues that changed conditions, including increased employee sophistication and the greater strength of the American labor movement generally, render the per se rule unnecessary in today's labor relations climate. See \textit{id.} at 822-26.

\item \textsuperscript{76} While it is true that many employers remain firmly dedicated to keeping their workers unorganized, the number of organized workers attests to the acceptance of independent labor unions as a legitimate participant in the American industrial relations system. A recent Bureau of Labor Statistics study (1980) recorded union membership at more than 22 million workers. Adams, \textit{Changing Employment Patterns of Organized Workers}, MONTHLY LAB. REV., Feb. 1985, at 25, 25. While union membership as a percentage of the total workforce has declined in recent years, much of the decrease can be attributed to the general shift of jobs to service-related industries, which are traditionally nonunion. See R. BERENBEIM, THE DECLINING MARKET FOR UNIONIZATION 5 (1978).

\item \textsuperscript{77} Since the NLRA was passed in 1935, § 8(a)(2) cases have gradually become a less significant component of unfair labor practice charges as a whole. In 1938, 19.5% of all unfair labor practice complaints were based on § 8(a)(2). In the 1940s, that percentage declined to below 10% and by 1981 stood below 3%. See Note, \textit{infra} note 69, at 515 n.46; 46 NLRB ANN. REP. 176 (1981). During this period, the subject matter of typical 8(a)(2) complaints has changed as well. Originally, most 8(a)(2) cases involved the classic company union structures for which the legislation was designed. See, e.g., 2 NLRB ANN. REP., \textit{supra} note 70, at 95-104. More recent cases tend to involve competing unions, or employer recognition of minority unions. See cases cited in notes 78-79 \textit{infra}; see also Midwest Piping Co., 63 N.L.R.B. 1060 (1945).

\item \textsuperscript{78} See, e.g., \textit{Ford Bros., Inc.}, 263 N.L.R.B. 92 (1982).

\item \textsuperscript{79} See, e.g., \textit{Farmers Energy Corp.}, 266 N.L.R.B. 722 (1983), enforced, 730 F.2d 1098 (7th Cir. 1984). Under the doctrine established by the Board in Midwest Piping Co., 63 N.L.R.B. 1060 (1945), it is an unfair labor practice for an employer to recognize one of two or more competing unions after one of the unions has submitted a representation petition to the Board.

\item \textsuperscript{80} See notes 136-43 \textit{infra} and accompanying text.
\end{itemize}
to be represented by organized labor than when employees choose to work with management in a more cooperative setting.\textsuperscript{81} If employees feel more comfortable in a setting of labor-management cooperation, or if they have philosophical objections to union organization but still wish to discuss employment-related matters with their employers, the Act does not prohibit them from doing so. By refusing to distinguish management efforts to "cooperate" with employees from management "support" and "domination" of employee organizations, the Board and some courts have, perhaps unintentionally, inhibited employees' exercise of free choice. Thus, the per se rule can work to contradict the policy of the NLRA by denying employees the right to choose cooperative modes of contact with their employers.\textsuperscript{82}

III. \textbf{NEW APPROACHES TO SECTIONS 2(5) AND 8(a)(2):
IMPLICATIONS FOR PARTICIPATORY MANAGEMENT}

Traditional analysis under sections 2(5) and 8(a)(2) leaves little, if any, opportunity for employers to initiate participatory management techniques in nonunion settings.\textsuperscript{83} Labor-management committees, QWL projects, QC circles, and employee production teams all involve groups of employees meeting with management to discuss specific

\textsuperscript{81} In \textit{Cabot Carbon}, the Supreme Court indicated that in nonunion settings some employer-employee cooperation regarding grievances is permissible:

[\textsection 9(a) of the NLRA provides that] any individual employee or group of employees shall have the right personally to present their own grievances to their employer, and to have such grievances adjusted, without the intervention of any bargaining representative, as long as the adjustment is not inconsistent with the terms of any collective bargaining contract then in effect, provided that the bargaining representative, if there is one, has been given an opportunity to be present.

360 U.S. at 218 (emphasis added). Thus the Court suggested that the Act should not be read to prohibit employees, simply because they lack formal representation, from communicating with their employer to resolve problems of mutual concern.

82. Some commentators have argued that employer-controlled participatory management systems should be prohibited even if they increase worker satisfaction, because they force employees to depend upon the good will of management:

Employees [who belong to employer-implemented production teams] are involved not because they have a right to participate or because they have the strength to demand recognition; instead, they are involved because the employer has invited them to participate. In short, the ultimate protection of their interests is traceable not to their own strength but to the benevolence of their employer.

Note, \textit{supra} note 35, at 537. In other words, because management retains ultimate control over the teams, employees should not be allowed to avail themselves of the added satisfaction offered by increased participation in management decisionmaking. This argument fails for several reasons. First, employers retain "ultimate control" over all nonunion employees under the employment-at-will doctrine. Employees formed into teams are no more subject to employer control than ordinary employees. If anything, team members are less subject to employer control, since management may hesitate to intervene in team operations for fear of hampering team effectiveness. Second, this argument erroneously assumes that employees are unable to decide for themselves when a particular organizational form poses a threat to them. Moreover, the argument implies that employees are powerless pawns at the mercy of employer "benevolence." Employees in employer-implemented production teams are hardly powerless; at all times they retain the right to seek outside representation if they become dissatisfied with team operation.

83. \textit{See} notes 63-65 \textit{supra} and accompanying text.
workplace issues. It is both difficult and potentially counterproductive to confine the discussions of these groups, particularly labor-management committees, to matters which lie outside the scope of section 2(5). A labor-management committee which cannot discuss general employee "grievances" or specific "conditions of work" may be left with very little to discuss. QWL projects face similar barriers under the traditional approach: to "improve" the quality of working life, the "conditions of work" must somehow change. But under Cabot Carbon, employees who participate in a QWL project could be considered a "labor organization" if they discuss "conditions of work" with management. Thus, if an employer helps in the formation of or provides assistance to a QWL project, he is guilty of an unfair labor practice under the traditional approach.

A. New Standards Under Section 2(5)

The harshness of the traditional approach has motivated the Sixth Circuit and the NLRB to loosen the restrictions of section 2(5) when applied to certain participatory management techniques. This departure from the Cabot Carbon doctrine, although limited thus far, may provide an important theoretical basis in future litigation involving participatory management.

In NLRB v. Streamway Division of the Scott & Fetzer Co., the Sixth Circuit read the Supreme Court's decision in Cabot Carbon narrowly, concluding that some participatory management organizations can be distinguished from section 2(5) labor organizations. In Scott & Fetzer, the company established an "in-plant representation committee" for its employees. The company's avowed purpose in establishing the committee was "to provide an informal yet orderly process for communicating Company plans and programs; defining and identifying problem areas and eliciting suggestions and ideas for improving operations." In other words, the committee functioned much like a QC circle, providing a mechanism for employees to participate in management's efforts to improve quality control and productivity.

The Board found that the committee was a labor organization under section 2(5), and that the company had dominated and interfered with the formation of the committee in violation of section 8(a)(2). The Sixth Circuit reversed, holding that the committee was

84. See text at notes 19-20 supra.
85. 360 U.S. at 213-14.
86. 691 F.2d 288 (6th Cir. 1982), denying enforcement to 249 N.L.R.B. 396 (1980).
87. 691 F.2d at 289.
88. See notes 24-29 supra and accompanying text (describing typical QC circle functions).
89. 249 N.L.R.B. 396 (1980), enforcement denied, 691 F.2d 288 (6th Cir. 1982). The Board had little difficulty concluding that the committee was a "labor organization": [The employer's] testimony clearly indicates that working conditions were something the representatives were supposed to talk about in the meetings. . . . It is further clear that [the
not a labor organization as defined in section 2(5), and thus the company could not even be charged with an unfair labor practice under section 8(a)(2). In distinguishing Cabot Carbon, the court observed that the limits of section 2(5)'s "dealing with" language had never been completely defined. That is, although Cabot Carbon dictated that "dealing with" can be more extensive than "bargaining with," it did not discuss whether some employee committee activities might not even be considered "dealing[s] with" at all. The court then felt free to define the lower boundaries of "dealing with."

The most important facet of the Sixth Circuit's clarification of "dealing with" was the court's examination of the employee group's operational practices. When an "active, ongoing association between management and employees" is involved, it is likely that the employee group will be considered a labor organization. Factors that suggest a lack of dealings include the parties' own view of the employee organization, and whether there is any evidence of anti-union animus on the employer's part. In Scott & Fetzer, the court found that all of these

employer] intended the members of the committee to act in a "representative" capacity. It matters not that only one grievance, vacations, was actually adjusted at the meetings. The [committee] was established by [the employer] for the ostensible purpose of securing adjustments in terms and conditions of employment, and the inhibiting effect upon employees, and therefore the violation is clear.

249 N.L.R.B. at 400-01.

90. 691 F.2d at 291.

91. In arguing that Cabot Carbon did not completely define the boundaries of § 2(5), the Sixth Circuit said:

Although Justice Whitaker [in Cabot Carbon] stressed the continuous course of contacts between the committee and both local and central management, and stated that "dealing" often involves making recommendations, he did not indicate the limitations, if any, upon the meaning of "dealing" under the statute. Because the Supreme Court has not spoken further on this issue, the question of how much interaction is necessary before dealing is found is unresolved.

Scott & Fetzer, 691 F.2d at 292.

92. Scott & Fetzer, 691 F.2d at 294. The court has been criticized for the failure to distinguish Cabot Carbon on any "principled basis." Hogler, Employee Involvement Programs and NLRB v. Scott & Fetzer Co.: The Developing Interpretation of Section 8(a)(2), 35 LAB. L.J. 21, 27 (1984). But Hogler fails to give sufficient weight to the court's efforts to distinguish the employee committees at issue in Scott & Fetzer from committees designed to represent employees in relations with their employer:

[U]nless employees are encouraged "in the mistaken belief that [a committee is] truly representative and afford[s] an agency for collective bargaining," no interference with employee choice, essential to a finding that the Act has been violated, occurs. The Board offers no evidence that anyone viewed the committee as anything more than a communicative device.

Scott & Fetzer, 691 F.2d at 295 (quoting Federal-Mogul Corp. v. NLRB, 394 F.2d 915, 918 (6th Cir. 1968)) (citation omitted).

93. Scott & Fetzer, 691 F.2d at 294-95. The court also implied that a standard using language similar to that in § 9(a), see notes 57-64 supra and accompanying text, should be employed: "[T]he continuous rotation of committee members to ensure that many employees participate makes the Committee resemble more closely the employee groups speaking directly to management on an individual, rather than a representative, basis . . . ." 691 F.2d at 294-95. The court did not specifically mention § 9(a), perhaps because Cabot Carbon appears to render that section irrelevant to § 2(5) determinations. See NLRB v. Cabot Carbon Co., 360 U.S. 203, 215-18 (1959); see also note 61 supra and accompanying text.
factors suggested that the “in-plant representation committee” was no more than a “communicative device” through which employees and management could discuss matters of mutual concern.94

Dissatisfaction with the traditional approach to section 2(5) cases is not confined to the Sixth Circuit. In the past decade, the Board has itself created two limited exceptions to traditional section 2(5) analysis. The first exception excludes from the statutory definition of “labor organization” programs that include all of a plant’s employees.95 When all of a plant’s employees participate in a program, they are not being represented; thus, the Board argues, the employee group falls outside the boundaries of a labor organization.96 This approach, if generally accepted, would allow employee production teams and QWL programs to operate outside the constraints of the NLRA, since these types of programs typically involve all of a plant’s employees. But other participatory techniques, such as some labor-management committees, do not come under this exception because they involve the selection of employee representatives, not the direct participation of every employee.

The Board’s second exception to traditional section 2(5) analysis involves the extent to which the employer delegates managerial authority to the employee group. For example, some employers have set up committees that resolve grievances presented by individual employees. When these committees are allowed to exercise their function unfettered by management supervision, the Board has held that they do not “deal with” management under section 2(5).97 Instead, the Board considers such a committee to be exercising its authority independently from management. This independence theoretically precludes

94. 691 F.2d at 295.
96. The General Foods case involved management’s organization of its employees in a pet food plant into employee production teams. For a description of a similar organization structure at another General Foods plant, see note 33 supra and accompanying text. The administrative law judge’s opinion, later enforced by the Board, clearly distinguished the structure of employee production teams from that of § 2(5) labor organizations:

In their essence, the teams, and each of them, are nothing more or less than work crews established by [the company] as administrative subdivisions of its entire employee complement at the Gaines Nutrition Center. It is virtually uncontested that [the company’s] original purpose in establishing these crews had nothing to do with labor relations, as that term is generally understood. . . .

A team could not be a bargaining agent because it lacked the structure and capacity to be an organization or an agent of any kind. No team had a team spokesman. At every team meeting, those who spoke did so on their own behalf and in their own individual capacities. If such a set of circumstances should give rise to the existence of a labor organization, no employer could ever have a staff conference without bringing forth a labor organization in its midst.

the notion that the committee could "deal with" management.98

Labor-management committees99 that confine themselves largely to the resolution of individual employee grievances may be permissible under this theory. However, most labor-management committees given the power to set their own agendas100 would find it difficult to limit the scope of their discussions to come under this exception.

B. Developing a Less Restrictive Doctrine in 8(a)(2) Cases: The Chicago Rawhide Approach

While attempts to limit the application of section 2(5) to participatory management programs have only recently met with success, a more flexible interpretation of section 8(a)(2) has been developing for almost three decades.101 Faced with the changing nature of section

98. But see Note, supra note 38, at 1671-72:

The Board's conclusion, that an employee committee that is on its face an organ of management cannot be a labor organization within the meaning of the Act, seems logical. In practice, however, it is difficult to distinguish between deciding matters of managerial perogative and dealing with management. For example, in [Spark's Nugget], the Board found that an "Employees' Council" that was composed of two representatives of management and one designated employee that handled all workers' grievances was not a labor organization. In this sort of structure, however, the lone employee on the committee probably functioned more as an advocate for aggrieved employees than as a managerial decisionmaker; and such advocacy seems to fall well within the meaning of "dealing with" management. (emphasis in original) (citations omitted). In a more recent case, the Board displayed no difficulty drawing the distinction between managerial delegation of authority and managerial negotiation with employees. In Lawson Co., 267 N.L.R.B. 463 (1983), enforced, 753 F.2d 471 (6th Cir. 1985), an employer contended that employee groups it had established in response to an outside union's organizational drive were in fact not representative, but rather were merely "quality circles" or "communications vehicles." The administrative law judge quickly dismissed the company's contention:

The [employer's] witnesses referred to the direct dealing with the employee committee it created as a "quality circle," an advisory council, a quality council, a communication vehicle, a sales assistant council, a contract relationship, etc., etc., page after page of technical synonyms that in no sense change the plain facts. Were I now to respond to all these fanciful wordings of the witnesses, this Decision, too, would go on and on and the true objective of the Respondent — to kill off the union movement permanently — would be furthered, rather than arrested, as the statute commands.

267 N.L.R.B. at 472. The Board upheld the judge's opinion, but in doing so suggested that it might permit employers to operate genuine QC circles:

We shall . . . [require] . . . that Respondent withdraw recognition from and disestablish the employee committee. We note that the purpose of this requirement is to remove the taint of Respondent's unlawful formation and domination of the sales assistants committee . . . ; it is not based on the operation of any "quality circle" program Respondent may currently be conducting.

267 N.L.R.B. at 463 n.5. Although not controlling, this language suggests that, in future cases involving participatory management, the Board will concentrate on the employer's motivations, and the effect of the organization's formation on the employees' desire to unionize, rather than on the form of the employee group itself. If this occurs, genuine, good-faith efforts by employers to share managerial power with employees will be more likely to survive § 8(a)(2) challenges.

99. See notes 16-20 supra and accompanying text.

100. See text at note 19 supra (item 4).

101. For a discussion of the early development of § 8(a)(2) doctrine, see Note, supra note 69, at 519-25; Note, Section 8(a)(2): Employer Assistance to Plant Unions and Committees, 9 STAN. L. REV. 351 (1957).
8(a)(2) cases in the 1950s, the Seventh Circuit developed a new test for determining permissible levels of employer involvement in employee labor organizations. The court rejected the per se approach, concentrating instead on the issue of whether employee free choice had actually been restricted by management's actions. Several courts have followed the Seventh Circuit's lead. While this development has led to the successful defense of several participatory schemes against 8(a)(2) attacks, the disagreement among the courts has produced uncertainty as to how the law will be applied to any given participatory technique.

The court first employed the actual domination test in Chicago Rawhide Manufacturing Co. v. NLRB. That case involved several employees' committees, one of which later became the workers' recognized bargaining agent. The NLRB, responding to a complaint from a union which had unsuccessfully tried to organize the plant, found that the company had violated section 8(a)(2) "by assisting, contributing support to, and interfering with the administration of" several employee committees which had existed at the plant during the union's organizational drive. The Seventh Circuit reversed, noting that the idea for the committee had originated with the employees, the employer's support had been minimal, and the employer's limited involvement had not been a response to the outside union's organizing efforts.

As the Seventh Circuit continued to follow its permissive approach to 8(a)(2) cases, a few other circuits also began to question the

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102. For a discussion of the per se approach, see notes 71-82 supra and accompanying text.
103. See notes 10S-16 infra and accompanying text.
104. To date, four circuits have adopted some form of the "actual domination" test. See, e.g., Classic Indus. v. NLRB, 667 F.2d 205 (1st Cir. 1981); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975); Modern Plastics v. NLRB, 379 F.2d 201 (6th Cir. 1967); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955); cf. NLRB v. Keller Ladders S., Inc., 405 F.2d 663 (5th Cir. 1968) (acknowledging validity of Chicago Rawhide in dictum); NLRB v. Grand Foundries, Inc., 362 F.2d 702 (8th Cir. 1966) (same). Other circuits and the Board, by contrast, have consistently held that any employer assistance to or cooperation with an employee labor organization violates § 8(a)(2). See, e.g., Fire Alert Co., 182 N.L.R.B. 910 (1970), enforced, NLRB v. Fire Alert Co., 65 Lab. Cas. (CCH) ¶ 11,874 (10th Cir. 1971); NLRB v. General Precision, Inc., 381 F.2d 61, 66 (3d Cir.) (employer support of employee "administration committee," set up to determine pension plan eligibility, leaves "no substantial factual questions in dispute" regarding § 8(a)(2) violation) cert. denied, 389 U.S. 974 (1974); Irving Air Chute Co. v. NLRB, 350 F.2d 176, 180 (2d Cir. 1965) (employer support of employee labor organizations violates § 8(a)(2) "even absent company domination"); International Union of United Brewery, Flour, Cereal, Soft Drink & Distillery Workers v. NLRB, 298 F.2d 297 (D.C. Cir. 1961) (employer required to withdraw recognition from unlawfully assisted "Employee Association" pending Board certification), cert. denied, 369 U.S. 843 (1962); cf. NLRB v. Link-Belt Co., 311 U.S. 584, 596-97 (1941) (Courts of Appeals may not substitute their judgment for that of the Board on factual questions regarding the level of employer domination).
105. 221 F.2d 165 (7th Cir. 1955).
107. 221 F.2d at 167-70.
108. See Continental Distilling Sales Co. v. NLRB, 348 F.2d 246 (7th Cir. 1965); NLRB v.
Board's continued inflexibility in employer domination cases. The First, Sixth, and Ninth Circuits have all permitted some forms of employer cooperation with employee labor organizations, often citing *Chicago Rawhide* with approval. The other circuits, however, continue to follow the Board's less flexible approach.

Two factors dominate the *Chicago Rawhide* analysis. First, the inquiry focuses on whether "employee free choice" has been restricted by management's actions. Employer domination or support is defined by the degree to which it interferes with the employees' freedom to choose an independent bargaining representative. The second factor is derived from the view that increased cooperation between employees and management is an important policy behind the NLRA. Under the cooperative model of labor relations, courts distinguish "mere cooperation" from "support." Section 8(a)(2) prohibits "support," but cooperation is encouraged by the Act's stated purpose and underlying policies.

*Chicago Rawhide*'s concentration on employee free choice and enhanced labor-management cooperation in practice allowed only minimal employer support of employee labor organizations. Recent cases have gone further, permitting employers to allow meetings on
company time and property,\textsuperscript{118} provide printing and secretarial services,\textsuperscript{119} and even oversee election procedures\textsuperscript{120} for employee labor organizations. Such levels of employer assistance would have been clear violations of the Act under its traditional interpretation.\textsuperscript{121} However, since the \textit{Chicago Rawhide} approach has not become generally accepted doctrine,\textsuperscript{122} some jurisdictions continue to forbid all forms of employer assistance to employee labor organizations, and new forms of labor-management cooperation are still subject to challenge in all jurisdictions.

\section*{C. Implications for Participatory Management}

The \textit{Chicago Rawhide} approach, by allowing minimal levels of employer-employee cooperation, thus permits the legal operation of some aspects of participatory management systems. For example, meetings on company time are permissible under \textit{Chicago Rawhide} absent actual employer domination of employee freedom to choose an independent bargaining representative.\textsuperscript{123} The operation of labor-management committees, QC circles, and the like always involves meetings, and management usually cannot convince employees to participate unless that participation takes place on company time and property. Thus, if employer involvement is limited enough to preclude a finding of actual domination, courts that follow \textit{Chicago Rawhide} would likely allow a participatory management system to survive a challenge under section 8(a)(2).\textsuperscript{124}

Most types of participatory management, however, require a great deal of employer involvement at the outset.\textsuperscript{125} Employers often suggest participatory management to employees in hopes that productivity will increase.\textsuperscript{126} Employees may agree to participate for an entirely different reason: a desire to make their jobs more meaningful and enjoyable.\textsuperscript{127} For participatory management to be successful, the employer must often convince the employees of the need for greater participation.\textsuperscript{128} Thus, in many cases it is difficult to argue that the employer has not "interfered with" the "formation" of an employee

\begin{itemize}
  \item \textsuperscript{118} See NLRB v. Magic Slacks, Inc., 314 F.2d 844 (7th Cir. 1963).
  \item \textsuperscript{119} See Hotpoint Co. v. NLRB, 289 F.2d 683 (7th Cir. 1961).
  \item \textsuperscript{120} See Modern Plastics v. NLRB, 379 F.2d 201 (6th Cir. 1967).
  \item \textsuperscript{121} See notes 69-72 supra and accompanying text.
  \item \textsuperscript{122} See note 104 supra.
  \item \textsuperscript{123} See notes 113-18 supra and accompanying text.
  \item \textsuperscript{124} See, e.g., NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979).
  \item \textsuperscript{125} See W. OUCHI, supra note 3, at 97-129.
  \item \textsuperscript{126} See note 29 supra; see also note 35 supra and accompanying text.
  \item \textsuperscript{127} See notes 22-23 supra and accompanying text.
  \item \textsuperscript{128} See W. OUCHI, supra note 3, at 97-129 and passim.
\end{itemize}
participatory "labor organization." Therefore, the Chicago Rawhide interpretation of section 8(a)(2), though desirable as a means of encouraging labor-management cooperation, does not offer a legal basis for courts consistently to allow participatory management programs. By contrast, allowing participatory groups to remain outside the realm of section 2(5) altogether, as in Scott & Fetzer, offers a more consistent and defensible legal framework for the operation of participatory management systems. A mechanism for increasing the power of employees over their work environment through increased participation in management simply does not resemble a labor organization, whether it be a traditional labor union or a company union. Unions exist in large part because of a perceived lack of employee power; it makes little sense to prevent employees from gaining power just because that increased power might obviate their desire for traditional union representation.

IV. PARTICIPATORY MANAGEMENT AS AN INSTRUMENT OF FEDERAL LABOR POLICY

Despite evidence that workers derive more enjoyment and satisfaction from their employment when they participate in management, the Board and many courts remain reluctant to allow participatory innovations in the workplace. The courts often express no hostility toward participatory management itself, but insist that the policies underlying the NLRA demand limitations on such programs. Such conclusions ignore an important goal of federal labor legislation: to promote cooperation between management and labor. Although the

129. Indeed, in many cases it is so obvious that employer domination has occurred that the dispositive issue is whether or not a § 2(5) labor organization has been created. See note 66 supra and accompanying text.


131. Many union leaders oppose participatory management programs, even those (such as QWL programs) designed to promote employee satisfaction. See, e.g., Delamotte, Union Attitudes Toward Quality of Working Life, in THE QUALITY OF WORKING LIFE 405 (L. Davis & A. Chems eds. 1975). Union opposition to participatory management can be explained by the general atmosphere of distrust which exists between the leaders of American labor and management. See notes 36-38 supra and accompanying text. Union leaders may also be acting to forestall the threat participatory management poses for the preservation of organized labor's power over employees, or out of a genuine concern that employees are being coerced by management to reject unions and accept instead a limited managerial role. Of course, the requirement of actual domination under Chicago Rawhide is designed to prohibit coercion by management; only benign cooperation is permitted.

132. See, e.g., D. JENKINS, supra note 4, at 171-72 (discussing R. LIKERT, NEW PATTERNS OF MANAGEMENT (1961)); W. OUCHI, supra note 3, at 43. This is one aspect of participatory management about which both management theorists, supra note 3, and those who advocate economic democracy for its own sake, supra note 4, tend to agree.

NLRA guarantees employees the right to choose an adversarial model of relations with their employer, it does not require them to do so. As long as the right of employees to self-organization is preserved, nothing in the NLRA or any other federal law mandates that employees and management may not cooperate with one another when both parties agree that such an arrangement would be mutually beneficial.

An examination of the legislative history of the NLRA and other federal labor legislation further suggests that Congress never intended to bar labor-management cooperation outside the scope of collective bargaining. Even during the deliberations that led to the passage of the Wagner Act in 1935, the primary concern was the protection of individual employee rights, not the preservation at any cost of "collective bargaining as an industrial system." 135

**A. The Wagner Act**

The purpose of the Wagner Act is clearly stated in the Act's first section — "encouraging the practice and procedure of collective bargaining." 136 In a general sense, much of the disagreement over the Act's purpose 137 stems from the intended scope of "encourage." If the use of "encourage" was intended to discourage nonadversarial modes of industrial relations, then participatory management would seem to contradict the Act's policy.

However, the Act's legislative history indicates that the adversary model of labor relations was not intended to be the exclusive avenue for employer-employee communications. First of all, Senator Wagner, the architect of the Act, introduced the original version of the bill with a speech describing several subject areas in which employer-employee cooperation might be permissible. 138 Furthermore, at the hearings on

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134. The prohibition of employer unfair labor practices in § 8(a) of the NLRA, 29 U.S.C. § 158(a)(1)-(5) (1982), is designed to protect employees in their exercise of their rights as enumerated in § 7, 29 U.S.C. § 157 (1982). The employees' § 7 rights include "the right to self-organization . . . and the right to refrain from [self-organization]" (emphasis added).


137. Compare Note, supra note 38, at 1673-80, with Jackson, supra note 75, at 834-38.

138. See 1 LEG. Hlsr. NLRA, supra note 39, at 16:

The bill which I am introducing today forbids any employer to foster or participate in or influence any organization which deals with problems that should be covered by a genuine labor union. At the same time it does not prevent employers from forming or assisting associations which exist to promote the health or general welfare of workers, to provide group insurance, or for other similar purposes. Employer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism, but they should not be allowed to supplant or destroy it.

Although there is a difference between health insurance and a plan which seeks directly to discuss working conditions, this passage does suggest that the Wagner Act's proponents did not envision a per se prohibition of employer-employee cooperation. But see NLRB v. General Precision, Inc., 381 F.2d 61, 66 (3d Cir.) (employer domination of employee committee set up to determine pension plan eligibility violated § 8(a)(2)), cert. denied, 389 U.S. 974 (1967). It is significant that consideration of the bill began with a statement that the Act should not prohibit
the proposed bill, a parade of employers and employees testified that while some employer-dominated employee organizations were abusive restrictions of employee freedom to organize, others served the useful purpose of promoting cooperative and harmonious relations between the parties. As a result, the Senate attempted to strike a balance between the cooperative and adversarial approaches.

While the original version of the Wagner Act, first introduced in 1934, was substantially altered before its eventual passage in 1935, the Senate Report on the final version of the bill indicates that Congress specifically intended to allow some forms of employer-employee cooperation during working hours. Moreover, during consideration

all employer-assisted organizations which involve employees. Arguably, some forms of participatory management, particularly those that emphasize employee satisfaction, should be interpreted as organizations designed “to promote . . . the general welfare” of employees, and not as attempts to “supplant or destroy” trade unionism.


140. S. 2926 (the Labor Disputes Act), the 1934 version of the Wagner Act, originally contained the following precursor to § 8(a)(2):

Sec. 3: It shall be an unfair labor practice —

(3) For an employer to interfere with or dominate the administration of any labor organization or contribute financial support to it: Provided, That . . . an employer shall not be prohibited from permitting an employee, individually, or local representatives of employees, from conferring among themselves or with management during working hours without loss of time while engaged in the business of a labor organization.

S. 2926, as reported, 2d Senate Print, 73d Cong., 2d Sess. 26-27 (1934), reprinted in 1 Leg. Hist. NLRA at 1070, 1087. The Senate Report described the compromise the language was intended to strike:

[Section 3(3)] is one that the committee has considered with great care. There was presented to the committee much testimony . . . that a few employers had dominated labor organizations of their own employees by dictating the terms of their constitutions and by-laws [etc. . . .] These practices and others of the same character are clearly abusive and should not be allowed to continue in the few instances where they have existed.

Yet these abuses do not seem to the committee so general that the Government should forbid employees to indulge in the normal relations and innocent communications which are part of the friendly relations between employer and employee. The policy of the government is founded upon the theory of democratic collective bargaining, not upon the theory of class war . . . . And democratic collective bargaining means the exchange of ideas no less than the exchange of services, goods, or money. The object [of § 3(3)] is to remove from the industrial scene unfair pressure, not fair discussion.


141. However, only minor alterations were made in § 3(3) of S. 2926, which in the final version became § 8(2), codified as amended at 29 U.S.C. § 158(a)(2). See note 13 supra.

142. S. REP. No. 573, 74th Cong., 1st Sess. 10, reprinted in 2 Leg. Hist. NLRA, supra note 39, at 2300, 2309-10:

It is impossible to catalog all the practices that might constitute interference [under § 8(2)], which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. . . . [T]he committee has been extremely careful not to work injustice by carrying these strictures too far. To deny absolutely by law the right of employees to confer with management during working hours without loss of time or pay would interrupt the very negotiations which it is the object of this bill to promote.
of the bill on the Senate floor, further emphasis was given to employee freedom of choice as to whether and how to be represented, not to collective bargaining as an exclusive system for the resolution of industrial conflict.143

Congressional intent to emphasize employee freedom of choice as the reason for prohibiting employer domination of employee labor organizations144 fully supports the Chicago Rawhide approach to section 8(a)(2) cases.145 Indeed, several members of Congress expressed concern during consideration of the Wagner Act that a mechanical application of section 8(a)(2) would frustrate the Act's purpose of encouraging employers and employees to resolve their differences without resort to the economic weaponry of strikes and lockouts. In response, the bill's proponents referred to the proviso in section 8(a)(2) which specifically permits joint employer-employee conferences during working time. The per se approach inhibits efforts at even noncoercive employer-employee communication. It also prevents the type of cooperation, exemplified by participatory management, which can play an important role in furthering the Act's purpose of preventing industrial strife.

Analyzing the history of section 2(5) of the Wagner Act leads to the same conclusion. The original version of section 2(5) differed in two important respects from the section as enacted. The proposed bill, like the final version, attempted to define "labor organization"

Clearly, then, Congress did not intend to establish a per se prohibition of employer-employee cooperation outside of union contexts. That such an approach arose indicates that the Board and the courts declined to follow Congress's instructions to treat the question as "one of fact in each case."

143. See, e.g., 79 CONG. REC. 7650, reprinted in 2 LEG. HIST. NLRA, supra note 39, at 2321, 2350 (statement of Sen. Borah): "It has been stated over and over again by the critics of the bill that the bill prohibits the company union. There is nothing in the bill which prohibits a group of men coming together and organizing a company union if they themselves, the workers, desire a company union ... I want to see the workingmen free to join a union or to remain out of a union. I want workingmen free to form any kind of a union if it is freely formed; that is, formed of the free will of the employees. This bill does not do what so many seem to think. (Emphasis added)."

144. See, e.g., the following interchange between Senator Wagner and Arthur Torrey, an employer advocate:

Senator WAGNER: [I]s there anything in this bill which interferes with that relationship of the workers in a particular plant, if they do not care to bargain collectively, but want to bargain individually? There is nothing in the legislation to prevent them. All I can see is that if they do, as workers, want to organize and bargain collectively, they may do so.

Mr. TORREY: The practical effect of the legislation would, I feel certain be an interference with that preference on the part of employees to bargain individually. . . .

Senator WAGNER: [A]ll that we are attempting to do is to make the worker a free man, so that he may be permitted to bargain collectively, even though he may encounter an employer . . . who does not believe in labor organizations and won't deal with any labor organizations, or any organization of workers, call it what you will. There isn't anything here at all that does any more than give the worker freedom.

Hearings on S. 2926, (testimony of Arthur Morris Torrey), reprinted in 1 LEG. HIST. NLRA, supra note 39, at 27, 516.

145. See text at notes 105-16 supra.
broadly, so as to include more than traditional labor unions. The enacted version contained additional language which specifically defined "employee representation plans" as labor organizations. Similarly, the subject-matter restrictions in section 2(5) of the final bill were more inclusive than those appearing in the proposed bill.

As proposed, section 2(5) defined "labor organization" to include "any organization, labor union, association, corporation, or society of any kind" through which employees discussed certain matters with their employers. In apparent response to concerns, expressed during hearings on the bill, that this language would not encompass some employer-dominated company unions, an amended version of the bill introduced in early 1935 specifically included "any agency or employee representation committee or plan" in the definition. Senator Wagner explained the change as necessary to prevent nullification of the Act's attempt to eliminate employer-dominated company unions, which were often labeled "employee representation committees." Congress apparently agreed, including the amended language in the

146. Labor organizations were defined in § 3(5) of the Labor Disputes Act as follows:
      The term "labor organization" means any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment.
      S. 2926, 73d Cong., 2d Sess. § 3(5) (1934), reprinted in 1 LEG. HIST. NLRA, supra note 39, at 1, 2.


148. See notes 156-58 infra and accompanying text.

149. See note 146 supra.

150. The Act sought to eliminate company unions only if they were dominated by the employer. As Senator Wagner and others emphasized, company unions formed by the employees free from management pressure were viewed as a valid exercise of the employees' § 7 rights. See Wagner, supra note 39, § 9, at 1, col. 7; see also note 143 supra.


153. See COMPARISON OF S. 2926 (73d Congress) and S. 1958 (74th Congress) 22 (Comm. Print 1935), reprinted in 1 LEG. HIST. NLRA, supra note 39, at 1319, 1347:

      It has been argued frequently by employers as well as by protagonists of the bill last year that an employee representation plan or committee arrangement is not a labor organization or a union but simply a method of contact between employers and employees. But the act is entitled to prescribe its own definitions of labor organizations, for its own purposes, and it is clear that unless these plans, etc., are included in the definition, whether they merely "deal" or "adjust", or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act. The act would thus be entirely nullified. If, as employers insist, such "plans", etc., are lawful representatives of employees, then employer activity relative to them should clearly be included.

      This language indicates that § 2(5) was intended only to regulate those employee organizations which are representational in nature. Because participatory management systems do not generally seek to provide representation for employees, it can be argued that it is inappropriate to include participatory techniques under the coverage of § 2(5). See text at notes 181-83 infra.
Despite the specific inclusion of representation committees in the Act's definition of "labor organization," participatory management committees do not necessarily fall within section 2(5). The purpose of participatory management committees is clearly distinguishable from that of employee representation committees. Participatory committees seek to increase employee power over matters which traditionally fall within managerial prerogatives. Representation committees, as their name implies, serve as representatives of employees before management. The purpose of representation committees is not to increase employee decisionmaking authority, but rather to affect decisions which are still made by the employer. Thus the Act need not be construed as necessarily precluding the operation of labor-management committees outside the scope of section 2(5).

In addition to adding the language pertaining to representation committees, Congress expanded the subject-matter language of the "labor organization" definition. The 1934 proposals listed "grievances, labor disputes, wages, or hours of employment" as subjects that employee "labor organizations" discuss in their "dealings with" employers. After extensive hearings on the 1934 bill, Senator Wagner offered in 1935 a section 2(5) whose subject-matter requirements were substantially identical to the 1934 version. Congress then further expanded the subject-matter language by adding "conditions of work" to the list, apparently to prevent a narrow construction of the definitional requirements from undermining the purpose of section 2(5).
Aside from expressing its general desire for a broad construction of section 2(5), Congress did not define "conditions of work." Yet it is precisely that language that causes the Board and most courts to treat participatory management organizations as labor organizations under the Act. Most participatory management programs are not concerned with the other subjects listed in section 2(5). For example, QC circles and employee production teams, which are usually confined to specific areas of production, are ill-equipped to discuss wages, rates of pay, or hours of employment. Individual employee grievances, or labor disputes generally, may arise tangentially in team meetings, but employee groups designed to improve product quality or worker efficiency usually avoid becoming mired in the discussion of such potentially divisive matters.

160. See S. REP. No. 573, 74th Cong., 1st Sess. 7 (1935), reprinted in 2 LEG. HIST. NLRA, supra note 39, at 2300-06:

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. Thus, the Senate clearly expressed that § 2(5) should be construed broadly so that employee "independence of action" under § 7 is preserved. That is, employee freedom of choice is the policy objective which underlies an expansive reading of § 2(5). This gives added force to the Sixth Circuit's novel use of employee free choice cases in the § 8(a)(2) area as support for limitations on the scope of § 2(5). But see Hogler, supra note 92, at 26-27 (arguing that in Scott & Fetzer, the Sixth Circuit's citation to several § 8(a)(2) cases was logically unsound).

161. Senator Wagner maintained that the 1934 version of his bill would not "prevent employers from forming or assisting associations which exist to promote the health or general welfare of workers, to provide group insurance, or for other similar purposes." 78 Cong. Rec. 3443 (1934), reprinted in 1 LEG. HIST. NLRA, supra note 39, at 16. Other legislators suggested that company-sponsored unemployment insurance and employee stock ownership plans would not be included in the § 2(5) definition. See S. REP. No. 1184, 73d Cong., 2d Sess. 4 (1934), reprinted in 1 LEG. HIST. NLRA, supra note 39, at 1099, 1103. These exceptions have been described as "vague and perhaps trivial." See Sockell, supra note 10, at 550-51.

162. See note 26 supra and accompanying text.

163. For example, a successful participatory program at General Motors, involving a plantwide QWL program and departmental QC circles, has recently lost the support of some UAW leaders. See Main, supra note 7, at 51:

Even if the birth [of participatory management] is without complications, sustaining employee involvement can be tricky, especially in light of union officials' often tender sensitivity that circles will assume some of their role as the workers' representatives. . . . [T]o keep the employee participation groups going, both management and workers have had to tread a very fine — some might say imaginary — line. "The cardinal rule here is that you don't discuss contractual matters in the quality-of-worklife groups," says Norman Meyer, president of UAW Local 699 . . . . Meyer added that "District committeemen, like supervisors, are deathly afraid of quality of worklife as a threat to their jobs." Id. Presumably, union officials fear that QWL programs will make it unnecessary for employees to rely on outside unions to bargain with employers, even over traditionally contractual matters. That fear alone, however, does not justify declaring participatory management a per se violation of employees' § 7 rights. Since, as Meyer states, it is a "cardinal rule" that QWL groups do not discuss "contractual" matters, any QWL project which remains within its own boundaries will not satisfy the subject-matter requirements of § 2(5) and thus should not be treated as a "labor organization" under the Act. If, however, a QWL project
However, if “conditions of work” is construed broadly, the term includes nearly everything a group of employees might discuss in meetings with supervisors. For example, if a QC circle participant suggests a change in the flow of components through an assembly line, implementing the suggestion necessarily involves change in the nature and allocation of employee responsibilities. That is, in a broad sense, conditions of work have changed for the employees. Or to take another example, an employee may suggest a change in plant temperature to prevent the breakdown of sensitive electronic machinery. Changing the temperature may also make the workers more (or less) comfortable. Again, “conditions of work” have clearly changed as the direct result of a meeting between the employer and its employees. The purpose of the employee participatory organization, however, is not representational, and thus the employee group should not be treated as a labor organization.164

B. The Labor Management Relations (Taft-Hartley) Act

Congress retained the language of both sections 8(a)(2) and 2(5) when it passed the Labor Management Relations Act (LMRA or Taft-Hartley Act)165 in 1947. However, during consideration of the bills166 which formed the basis of Taft-Hartley as enacted, the House and Senate each directly confronted the issue of labor-management committees under the Wagner Act.

The House version (the Hartley bill)167 explicitly permitted the formation and operation of labor-management committees to discuss any

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164. The distinction between representation and participation can become blurred because of the similar terminology used to describe both types of employee organizations. For example, in both instances, the word “committee” describes the organization involved. In fact, the Scott & Fetzer case involved what the company had dubbed a “representation committee.” Yet the Scott & Fetzer Company’s committees were arguably not representational at all, because the employees used the committee form for an almost exclusively nonrepresentational purpose: to communicate individually with their employer. See NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288, 294-95 (6th Cir. 1982) (“The continuous rotation of Committee members to ensure that many employees participate makes the Committee resemble more closely the employee groups speaking directly to management on an individual, rather than a representative, basis as in General Foods.”). See also Lawson Co. v. NLRB, 753 F.2d 471, 477 (6th Cir. 1985) (“The employees in [Scott & Fetzer] communicated with management on an individual rather than representational basis.”). Therefore, the Board and the courts must look beyond labels, and focus on the substance and purpose of each employee organization challenged under the Act.


166. The Taft-Hartley Act represents a compromise between two bills: the Hartley bill (passed by the House) and the Taft bill (passed by the Senate).

subject, provided that the Board had not already recognized a different representative for those employees. The House Report explaining this provision clearly indicated that the labor-management committees encouraged by the federal government during World War II would be permitted under the proposed section.

The Senate, however, substantially revised the Hartley bill in substituting its own version, the Taft bill. The Taft bill did not include specific approval for World War II-style committees; instead, it amended section 9(a) of the Wagner Act to expand the scope of permissible employer-employee communication in contexts other than collective bargaining. The Senate Report explaining the provision called these changes "important," particularly because they expanded employee choice in presenting grievances to the employer outside collective bargaining channels.

168. H.R. 3020, 80th Cong., 1st Sess. § 8(d)(3) (1947), reprinted in 1 LEG. HIST. LMRA, supra note 167, at 56:

[8](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) 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.

(Emphasis omitted.)

169. See H.R. REP. No. 245, 80th Cong., 1st Sess. 33 (1947), reprinted in 1 LEG. HIST. LMRA, supra note 167, at 292, 324:

During World War II, many employers, with the help of the Government, set up labor-management committees, with which they discussed matters of mutual interest. This exception to section 8(a)(2) permits employers whose employees have not designated a bargaining representative to set up similar committees and to discuss with them wages, hours, working conditions and other subjects of collective bargaining as well as other matters of mutual interest; but an employer may discuss subjects of collective bargaining only if the employees do not have a certified representative or one that the employer currently recognizes as the exclusive representative of the employees. This clause does not permit "company unions". The employees generally may elect members of the committee, but section 8(a)(1) and (2) forbid the employer to create a formal organization having members among employees generally or other common characteristics of a labor union.

(Emphasis in original.)


171. S. 1126, 80th Cong., 1st Sess. § 9(a) (1947), reprinted in 1 LEG. HIST. LMRA, supra note 167, at 116-17:

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(Emphasis in original.)

172. The Senate Report states:

The revisions of section 9 relating to representation cases make a number of important
The Taft and Hartley bills were then submitted to a conference committee, where the conferees adopted the Senate version of section 9(a) and omitted the House language permitting employee committees. The House version was not rejected in principle, however; instead, the conferees suggested that it was rejected only because the rest of the Act, and particularly section 9(a), was designed to permit employer-employee communication in cooperative settings.

The Fifth Circuit relied upon this language in holding that the Cabot Carbon Company's "employee-management committees" were not section 2(5) labor organizations. In reversing, the Supreme Court criticized the Fifth Circuit for "treat[ing] the amendment to § 9(a) as though Congress had adopted, rather than rejected as it did, the proposed [section] advocated by the House." Many commentators, particularly those who criticized the Supreme Court's decision, assumed that after Cabot Carbon no formal labor-management cooperation could take place outside the scope of section 2(5). The Sixth Circuit's Scott & Fetzer decision, as well as a handful of Board decisions, have suggested that the scope of Cabot Carbon is not as great as some observers feared.

The language of the conference report indicates that Congress clearly intended to expand opportunities for labor-management cooperation when it enacted the LMRA. With equal force, Congress changes in existing law. An amendment contained in the revised proviso for section 9(a) clarifies the right of individual employees or groups of employees to present grievances. . . . The revised language would make it clear that the employee's right to present grievances exists independently of the rights of the bargaining representative . . . .


173. See note 166 supra.


175. The Conference Report states:

Section 8(d)(3) of the [Hartley bill] provided that nothing in the act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest, if the employees did not have a bargaining representative. This provision is omitted from the conference agreement since the act by its terms permits individual employees and groups of employees to meet with the employer and section 9(a) of the conference agreement permits employers to answer their grievances.


177. See note 175 supra.

178. See, e.g., Feldman & Steinberg, supra note 61, at 375-76; cf. Note, supra note 69, at 527 ('A number of distinguishing factors render Cabot Carbon inapplicable to participatory management techniques.').


180. See notes 95-100 supra and accompanying text.

181. See note 175 supra.
wanted to continue the strong policy against employer-dominated company unions.\textsuperscript{182} To further both of these policies, courts should use section 2(5) as a mechanism to distinguish employee organizations which are \textit{representational} in nature from those which merely offer workers more control over and participation in managerial functions.\textsuperscript{183}

Conceptually, it makes more sense to draw this distinction at the threshold level of section 2(5) than at the employer-involvement stage of section 8(a)(2) because the difference between participatory management systems and conventional company unions involves the function of the organization(s) created, not the level of employer influence. If courts use section 8(a)(2) in their efforts to allow good-faith employer efforts to increase employee power over workplace decision-making, the result may be a severely weakened 8(a)(2) doctrine which might not operate to prevent the employer-dominated representational activity the Act was designed to eliminate. Applying the representational/participatory distinction at the section 2(5) level, by contrast, leaves intact a strong prohibition of traditional company unionism while at the same time allowing employers to experiment with more humane and cooperative modes of industrial relations so long as the employees raise no objections.

Under this analysis, participatory organizations such as QC circles and employee production teams, because they are often confined to one area of a plant and are usually not representational in nature, would not be subjected to section 8(a)(2) scrutiny. Plantwide participatory programs, such as some labor-management committees and most QWL projects, would be examined under section 2(5) to determine whether or not their functions were representational. If the evidence suggested that the organization was representational, then the \textit{Chicago Rawhide} test could be applied under section 8(a)(2) to help the court decide if employer involvement was extensive enough to compromise the employees' freedom to choose an independent bargaining representative. An unfair labor practice charge would be sustained only when the requirements of both tests were met.

\textbf{Conclusion}

While new approaches by the Board and by courts lend hope to those who favor participatory management, current law makes the legality of these techniques less than certain. However, a close reading of the cases, as well as an understanding of the policies underlying

\textsuperscript{182} Even the proposal in § 8(d)(3) of the Hartley bill to permit representational labor-management committees was not intended to allow employers to dominate "company unions" as they had before passage of the Wagner Act. \textit{See} note 169 \textit{supra}.

\textsuperscript{183} \textit{Compare} NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982), \textit{with} Lawson Co. v. NLRB, 753 F.2d 471 (6th Cir. 1985).
federal labor law, suggest that a legislative cure for this inconsistency may not be necessary. Rather, participatory management, when not intended to represent employees and when not restrictive of employee free choice, can and should be distinguished from employer domination of employee groups which fit more closely within the traditional concept of labor organizations. This distinction would not undermine employee freedom to organize, and would make possible a more efficient, competitive, and humane system of management.