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Steven I. Locke

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KEEPING SECTIONS 2(5) AND 8(a)(2) OF THE NLRA INTACT: A FRESH LOOK AT WORKER PARTICIPATION COMMITTEES THROUGH ELECTROMATION, INC.

Increasing competition from abroad has sent many United States companies searching for innovative measures to restore themselves to a competitive level in the international marketplace. Specifically, American companies have been seeking to emulate some of the successful management techniques employed in Japan, as well as several other industrialized countries, such as Germany, the Netherlands, Austria, Denmark, Norway and Sweden. One such technique used is the "worker participation committee." Although the implementation of worker participation committees vary in form, their general purpose is to provide avenues of communication between employers and employees in order to create a more participatory management style and shed the industrial malaise that seems to be hindering firm productivity.

6. See e.g., Shaun G. Clarke, Note, Rethinking the Adversarial Model in Labor Relations: An Argument for the Repeal of Section 8(a)(2), 96 YALE L.J. 2021, 2024-26 (1987) (discussing several different types of worker participation committees such as the quality of work-life committees, the quality control circle, and the Scanlon plan).
While there are numerous forms of worker participation committees, two types generally predominate: (1) the quality control circle; and (2) the quality of work-life committee. Quality control circles tend to focus on improving both the quality of the final product and the production process itself. Each circle, typically consisting of a small number of workers from a given department and members of management, considers a limited scope of issues relevant to that department. Normally, a single plant will have several circles. The underlying premise is that giving the worker input into decisions regarding the production process will not only increase productivity directly, but also increase job satisfaction such that there will be a new dedication to producing a better final product.

Quality of work-life committees are set up in a fashion similar to that of the quality control circles, but focus specifically on the quality of the work environment as opposed to the end product. The ultimate goal of these committees is to increase employee job satisfaction by giving employees some measure of control over their environment, and consequently, have the employees become more committed to their jobs. This, in turn will lead to increased productivity. For the purposes of this paper, all types of worker participation committees ("WPC's"), including quality control circles and quality of

8. See supra note 5.
11. Id. at 262-63.
12. Id.
13. Andrew A. Lipsky, Comment, Participatory Management Schemes, the Law, and Workers' Rights: A Proposed Framework of Analysis, 39 Am. U. L. Rev. 667, 672-75 (1990)(discussing the notion that quality control circles will: (1) directly increase productivity because the person who is best able to decide the most efficient way to complete a task is the employee who does it for a livelihood, and (2) indirectly increase productivity because the more control the employees have over the final product, the more committed the employees will be to their jobs, and the more efficient they will be).
15. Id.
16. Id.
work-life committees, will be treated similarly, and are assumed to share the following characteristics: (1) they will meet regularly, during work time, without loss of pay to employees, (2) they will be composed of a small group of employees and a representative of management, who does not in any way preside over or control the meetings, and who does not set the agenda, and (3) participation in these groups by employees is strictly voluntary.

American firms who choose to implement WPC's face a serious legal obstacle in the provisions of the National Labor Relations Act ("NLRA"). Specifically, the WPC's may be in danger of violating sections 8(a)(2) and 2(5).

On December 16, 1992, the National Labor Relations Board ("NLRB") handed down Electromation, Inc., dealing with precisely this issue. The facts, which are not in dispute, as found by the administrative law judge, are set out briefly. Electromation, Inc. is a business in Elkhart, Indiana that manufactures small electric and electronic products. The company consists of approximately five departments with a total of two hundred employees. From late 1987 through 1988, several ad hoc committees were formed by management to discuss matters of mutual interest between management and employees.

By the end of 1988, Electromation, Inc., having financial diffi-
culties, made the decision to cut expenses wherever possible. One such cost cutting plan was aimed at controlling absenteeism by offering financial rewards for consistent attendance. Additionally, general wage increases for the following year were cut. These plans were announced to the employees on December 23, 1988, and then the plant was shut down until January 2, 1989.

When the plant reopened, employees began complaining about the new policies. Consequently, management held a meeting on January 11, 1989 during which it listened to the employees’ complaints. The employees that attended were selected by management from a pool of high and low seniority employees and were accompanied by two other employees who were allowed to participate at their own request. With the eight employees present, a number of topics were discussed. Among them were: overtime, tardiness, wages, bonus attendance, bereavement leave, sick leave, and incentive pay.

Upon the conclusion of this meeting, management realized that it may have made some errors with its previous cuts, and wanted to solve the problem by forming separate ad hoc committees to focus on specific problems. On January 11, 1989, management presented its new plan to the same people who attended the January 11 meeting. The plan broke down employee concerns into five areas. Each area would have its own “action committee,” composed of employees and representatives of management. Management would then analyze the recommendations of these action committees in light of budget constraints, and then implement the recommendations as it felt was appropriate. The subjects of the five action committees were: (1) absenteeism/infractions, (2) no smoking policy, (3) communication

25. Id.
26. Id. at 3-4.
27. Id. at 4.
28. Id.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id. at 3. It should be noted that this idea of using ad hoc committees was not new to Electromation, Inc. As previously mentioned, similar committees had been set up in 1987 with similar functions. Id.
36. Id. at 4-5.
37. Id. at 5.
38. Id.
39. Id.
network, (4) pay progression for premium positions, and (5) the attendance bonus program.\textsuperscript{40}

The plan was then presented to the employees.\textsuperscript{41} Each committee was to consist of as many as six hourly employees and one or two management level employees.\textsuperscript{42} Employees who wished to participate only had to volunteer by means of a sign up sheet.\textsuperscript{43} Selection of participants was to be made by management from the list of volunteers.\textsuperscript{44} Ultimately, there was no over-enrollment from which to choose.\textsuperscript{45} The committees were overseen by one person, Loretta Dickey, who was rarely active at any of the meetings.\textsuperscript{46}

The committees were scheduled to meet weekly, and employees were paid for their time at these meetings.\textsuperscript{47} The meetings were held in the company conference room and writing materials and a calculator were supplied by the company.\textsuperscript{48} At the meetings, the management representatives did not set the agenda, and everyone participated.\textsuperscript{49}

The committees continued to meet until the end of February, when Dickey was informed that a union was seeking to organize the plant.\textsuperscript{50} Under the advice of counsel, Dickey told each of the committees that management could no longer participate, but the employees could continue to meet without loss of pay if they so desired.\textsuperscript{51}

The union demand for recognition occurred on February 13, 1989.\textsuperscript{52} The parties executed a stipulation for election on March 3, and the election was held on March 31.\textsuperscript{53} The union lost the election and filed suit, claiming that the employer committed an unfair labor practice, violating section 8(a)(2) of the NLRA, by forming and maintaining the action committees. Although, no evidence presented showed either explicitly or implicitly, that the action committees were in any way a response to a union campaign, or that the employer

\begin{itemize}
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} Id.
\item \textsuperscript{43} Id.
\item \textsuperscript{44} Id.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 6.
\item \textsuperscript{47} Id.
\item \textsuperscript{48} Id.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Id.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\end{itemize}
even knew that such a campaign existed, the ALJ agreed with the union and held,

The fact of whether or not the Company knew of its employees' Union activities does not, however, alter the legal effects of the Company's actions. I have found that the Action Committees are labor organizations within the meaning of Section 2(5) of the Act. Section 8(a)(2) of the Act provides in pertinent part that it is 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."

The Board has found domination by an employer where the employer organized the functions, nature and structure of employee committees, supervisors conducted committee meetings, meetings took place on Company premises, supplies and materials used were donated by the Company, and committee members were paid for time spent conducting committee business.

The facts as set out above show that all but one of these factors were present in the formation and operations of the Action Committees. I do not think there is any question that, after the two informational sessions on January 11 and 18, the Company organized the Committees. Their functions, nature and structure were purely the creation of management. The meetings took place on Company property. Supplies and materials were supplied by management. Committee members were paid for their time spent at Committee meetings. The only missing factor is the supervisor domination of the discussions at the meetings. This criterion is not controlling, and I find that the Company dominated these (or this) labor organizations [sic] from their inception.

The respondents filed an appeal to the ALJ decision and oral arguments were held on September 5, 1991. On December 16, 1992, the NLRB affirmed the ALJ's decision noting that,

These findings rest on the totality of the record evidence, and they are not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed "labor organizations" or that employer actions like some of those at

54. Id. at 7.
55. Id.
issue here ould necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference or domination.\textsuperscript{57}

The Board then fails to offer any guidelines as to when a worker participation committee will definitely be considered an unfair labor practice.\textsuperscript{58} The two issues on the appeal that will serve as the focal point of this paper are:

(1) Whether the worker participation committees are “labor organizations” as defined by section 2(5) of the NLRA,\textsuperscript{59} and

(2) Whether the employer “dominated or interfered” with the “administration or formation of” or “contributed” support to these “labor organizations.”\textsuperscript{60}

\textbf{SECTION 2(5) AND THE CABOT CARBON DOCTRINE}

Section 8(a)(2) of the NLRA prohibits interference with a “labor organization.”\textsuperscript{61} The term “labor organization” is defined by Section 2(5) as,

any organization of any kind, or agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.\textsuperscript{62}

Section 2(5) basically requires that three conditions be satisfied in order for a group to qualify as a labor organization: (1) there must be some kind of representation of employees by agents, (2) the committee must have the purpose of “dealing with” the employer, and (3) the committee must deal with a subject regarding wages, hours, or

\textsuperscript{57} Id. at 2.


\textsuperscript{61} Id.

working conditions. The condition that has led to much litigation in the past, and a split in the circuits, is the definition of the term "dealing with."".

Originally, the term "dealing with" was broadly defined in 1959 when the Supreme Court reversed the United States Court of Appeals for the Fifth Circuit in NLRB v. Cabot Carbon Co. In Cabot Carbon, there was no issue over whether the WPC's involved were "dominated or interfered with" under section 8(a)(2); they clearly were. The determinative issue was whether or not the WPC's were "labor organizations" under section 2(5).

The employer in Cabot Carbon developed its version of worker participation committees in response to the War Production Board's policy of encouraging the development of such committees during the Second World War. The purpose of the policy was to increase productivity in order to support the war efforts. After the war ended, the committees remained intact, and more were added as new plants opened. According to the by-laws of the Cabot Carbon Committees, the purposes of these committees were:

1. To bring about a better understanding between employees in every branch and service of [the] Company to the end that each will have a better insight of the other's problems.

2. To provide a definite procedure for considering employees' ideas. As an example, the following problems are of mutual interest to employees and management:
   a. Safety.

63. See id.
64. See, e.g., NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); NLRB v. General Precision, Inc., 381 F.2d 61 (3d Cir. 1967); NLRB v. Newman-Green, Inc., 401 F.2d 1 (7th Cir. 1968); NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954); Wayside Press, Inc., v. NLRB, 206 F.2d 862 (9th Cir. 1953).
66. The circuit court, which ultimately found in favor of the employer, admitted that if the worker participation committees were labor organizations within the meaning of section 2(5), then there would have been a section 8(a)(2) violation. Cabot Carbon Co. v. NLRB, 256 F.2d 281, 282 (5th Cir. 1958), rev'd, 360 U.S. 203 (1959).
67. Id.
69. Id.
70. Id. at 1642.
b. Increased efficiency in production.
c. Conservation of supplies, materials and equipment.
d. Encouragement of ingenuity and initiative.
e. Grievances . . . . 71

Additionally, the “Functions of the Committee”:

do not in any way detract from the authority of management but should assist plant management in general to solve problems of mutual interest at regular monthly and special meetings called by management by (1) working with management on those problems of mutual interest as set out under “Purposes”; (2) making recommendations on [sic] the suggestions from employees in accordance with the suggestion plan set forth in the Cabot Guide; and (3) handling grievances at nonunion plants and departments according to established grievance procedure, reporting troublemakers and acts of disturbance, and insisting that gripes, grumbling, and troublemaking either stop or be taken up under the regular grievance procedure.72

About ten years after the war ended, the International Chemical Workers Union, who represented some of the employees at some of Cabot Carbon’s plants, accused Cabot Carbon of committing several unfair labor practices, including violating section 8(a)(2) of the NLRA by maintaining its employee committees.73

The Board, adopting the trial examiner’s recommendations, agreed with the union and held that the employee committees were “labor organizations” within the meaning of section 2(5) and their maintenance violated section 8(a)(2).74 While the Board noted that the employee committees did not engage in any outright collective bargaining, the committees’ stated purposes and functions were sufficient to make the employee committees “labor organizations.”75

The United States Court of Appeals for the Fifth Circuit denied enforcement of the Board order, holding that Congress intended to recognize employee rights to discuss areas of mutual interest with their employer without the intervention of the collective bargaining representative,76 provided there was no conflict with the collective

71. Id. at 1640.
72. Id. at 1642.
73. Id. at 1636-37.
74. Id. at 1653.
75. Id. at 1646.
76. Cabot Carbon Co. v. NLRB, 256 F.2d 281, 286 (5th Cir. 1958), rev’d, 360 U.S.
bargaining contract. In arriving at its decision, the court relied on section 9(a) of the NLRA, which provides,

Representatives . . . selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees . . . 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 the collective-bargaining contract or agreement then in effect . . . .

After examining the legislative history of section 2(5), the Fifth Circuit determined that the term "dealing with" was equivalent to the term "bargaining with." Therefore, in accordance with the rest of section 2(5), for the employee committees to be labor organizations, the employees involved had to be representing the other employees, and engaged in bargaining with the employer.

The Supreme Court reversed the decision of the Fifth Circuit reasoning that the term "dealing with" meant something broader than the term "bargaining with." Consequently, the court held that Cab-


77. Specifically, the court held,

We cannot come to any other conclusion than that the Senate and House conferees intended to recognize the right of groups of employees to discuss with their employer matter of mutual interest, including grievances, wages, hours of employment, and working conditions. Congress saw this right as existing independently of the right of bargaining representatives to speak for their labor organization. Further, Congress intended - contrary to the practice of the Board - that employees would have the right to have their grievances settled without the intervention of a bargaining representative, provided that there was no conflict with a collective bargaining contract. The conferees explained what they were doing and Congress approved it.

Id. at 288.


82. To define the term "dealing with" as something broader than the term "bargaining with," the Court looked to the legislative history of the statute:

When the original print of the 1935 Wagner bill (S. 1958) was being considered
ot Carbon’s employee committees were labor organizations within the meaning of section 2(5), in spite of the seemingly contradictory provisions of section 9(a).\textsuperscript{83}

In Electromation, the NLRB revitalized the Supreme Court’s broad interpretation of section 2(5),\textsuperscript{84} (which is implicitly coupled with its dismissal of the Fifth Circuit’s analysis of Section 9(a)) leaving virtually no room for the legal existence of any type of WPC outside the scope of the NLRA.\textsuperscript{85} However, in spite of the Supreme Court’s expansive reading of section 2(5), the Sixth Circuit, as well as the NLRB have developed some inroads into the Cabot Carbon Doctrine which are worth consideration.\textsuperscript{86}

\textbf{NEW TRENDS IN THE INTERPRETATION OF SECTION 2(5)}

In 1982, the Court of Appeals for the Sixth Circuit began to set limits on the scope of the Cabot Carbon Doctrine in \textit{NLRB v. Streamway Division of the Scott & Fetzer Co.}\textsuperscript{87} In Streamway, the employer established a worker participation committee whose goal “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.”\textsuperscript{88} The

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\textsuperscript{83} Id. at 211-12 (citations omitted).
\textsuperscript{84} Electromation, Inc., 309 N.L.R.B. No. 163, 18-26, appeal docketed, No. 92-4129 (7th Cir. Dec. 28, 1992).
\textsuperscript{87} 691 F.2d 288 (6th Cir. 1982).
\textsuperscript{88} The Court described the framework for the employee committees as follows:
employees involved would serve on a rotating schedule. The goal of forming the committees in this fashion was to "provide . . . as many employees as possible [with an] opportunity [for] direct input." The function of this employee committee was quite similar to that of a quality control circle.

After a suit was filed against the employer for committing an unfair labor practice, the NLRB found that the employee committee was a "labor organization" within the meaning of section 2(5), and that the employer violated section 8(a)(2) by dominating and interfering with the committee's formation. The United States Court of Appeals for the Sixth Circuit reversed. The court relied heavily on the reasoning Judge Wisdom's dissenting opinion in a similar case, NLRB v. Walton Mfg. Co..

To my mind an inflexible attitude of hostility toward employee committees defeats the act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. The act encourages collective bargaining, as it should, in

Initially, one general meeting and one departmental meeting in each of the four departments in the Company was to be held each month. The committee was to include eight employee representatives, and management personnel would be present at both general and departmental meetings.

[Four representatives] were to be elected from six categories of Assembly employees, with not more than one representative from each category; two were to be elected from the Machine Shop; one was to be elected from the "Polish and Buff" Department; and one was to be elected from the "P & I Control" Department.

[The management representatives for general meetings were to include the Vice President of Operations, the Manufacturing Manager, P & I Control Manager and the Personnel Manager. The various departmental meetings were to include either the Vice President of Operations and Manufacturing Manager or the Vice President of Operations and P & I Control Manager.]

Id. at 289-90.

90. The initial terms were to be six months with all terms thereafter lasting for three months each. Id. at 290.

91. Note, Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act, 83 U. Mich. L. Rev. 1736, 1751 (1985); See supra notes 6-13 and accompanying text.


94. 289 F.2d 177, 182 (5th Cir. 1961).
accordance with national policy. The Act does not encourage compulsory membership in a labor organization. The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in the particular plant, if there is so much as an intention by an employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their "general welfare". There is nothing in Cabot Carbon, or in ... any other law that makes it wrong for an employer "to work together" with employees for the welfare of all. There is nothing wrong — provided that the committee through which the employer and employees work is not in fact a labor organization within the meaning of Sections 2(5) ... and 8(a)(2) and is not used by the employer to infringe on labor's right of self-government and other rights in violation of Section 8(a)(1).95

The Sixth Circuit then cited several factors that influenced its decision. Among those factors were: (1) the rotation of the employee committee members to ensure many workers would get an opportunity to participate, and to make the committee less of a representative process, (2) the lack of anti-union animus on the part of the employer, and (3) the lack of effort to use the existence of the committee as a bar to the two organizational campaigns of the union.96

In a later case, Airstream, Inc., v. NLRB,97 the Sixth Circuit again limited the scope of the Cabot Carbon Doctrine. In Airstream, during a union organizational campaign, the president of the company set up an advisory committee, composed of employees and management, that would meet once a month and give the president questions and suggestions.98 At the first meeting, the president took suggestions but said that he could not act on any of them until after the union election was over.99 In response to an unfair labor practice charge under section 8(a)(2), the Sixth Circuit held the committee was not a labor organization,100 reasoning,

Airstream took no action during the course of the Union campaign either at an [advisory committee] meeting or as an announced consequence of such a meeting that could reasonably be construed to

95. Id.
96. Streamway, 691 F.2d at 294-95.
97. 877 F.2d 1291 (6th Cir. 1989).
98. Id. at 1294.
99. Id. at 1295.
100. Id. at 1295-96.
involve hours of employment, conditions of work, or the settling or handling of grievances or employee disputes. The basic function continued to be as a means of communication between management and employees. 101

The court then distinguished Cabot Carbon stating that in Airstream, the committee was set up in an advisory capacity, while in Cabot Carbon, the committees were formed to resolve grievances and “discuss matters covering nearly the whole scope of the employment relationship.” 102

In addition to the decisions of the United States Court of Appeals for the Sixth Circuit, there have also been several board decisions which have set limitations on the Cabot Carbon Doctrine. 103 These limitations can be broken down into two categories: 104 (1) cases where the employer delegates power, 105 and (2) cases where there is no actual representation involved. 106 In Sparks Nugget, Inc., 107 the employer formed a council of “impartial” employees to hear grievances concerning employees who had problems with their supervisors, and give resolutions to these problems. 108 The commit-

101. Id. at 1296.
102. Id. (quoting NLRB v. Cabot Carbon Co., 360 U.S. 203, 208 (1959)). Specifically, the court noted,

The basic function [of the Airstream committee] continued to be a means of communication between management and employees. In Cabot Carbon the employer prepared committee by-laws for adoption by the employees, which were adopted and published in a company manual. The “handling of grievances” was specifically included as a purpose of the by-laws, and there followed proposals on “seniority job classifications, job bidding, makeup time, overtime records, time cards, merit system, wage corrections, working schedules” and the like.

Airstream, 877 F.2d at 1296.
108. Id. at 275.
tee essentially acted as a panel of arbitrators. 109

The Board ultimately held that the grievance committee was not a "labor organization" within the meaning of section 2(5), and distinguished Sparks Nugget from Cabot Carbon,

In Cabot Carbon, . . . the organizations in question "dealt with" the . . . employers in some sense as the employer advocates. Here, however, . . . the [employee committee] performs a purely adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance. Therefore, it cannot be said that the [employee committee] herein "deals with" management; Rather it appears to perform a function for management; i.e. resolving employee grievances. Accordingly, we conclude that, inasmuch as the [employee committee] is not a labor organization, Respondent's conduct in instigating, dominating, and assisting said [committee] was not unlawful under Section 8(a)(2) of the Act. 110

In Mercy-Memorial Hospital Corp., 111 the facts were quite similar. An employee committee was formed to allow employees more participation in the grievance procedure. 112 The committee was basically an arbitration panel whose decision was binding on the hospital, but appealable by the employee. 113 The Board held that this grievance committee was not a "labor organization" using a reasoning similar to that applied in Sparks Nugget, Inc.,

[The committee was created simply to give employees a voice in resolving the grievances of their fellow employees, . . . not by presenting to or discussing or negotiating with management but by itself deciding the validity of the employees' complaints and the appropriateness of the disciplinary action, if any, imposed. 114

In General Foods Corp., 115 the employer divided all the employees into teams with each team acting on its own consensus to

110. Sparks Nugget, at 276. For a more detailed discussion of Sparks Nugget, see Schurgin at 623-25.
112. Id. at 1119.
113. Id. at 1118.
114. Id. at 1121. For a more detailed discussion of Mercy-Memorial Hosp., see Schurgin supra, at 625-28.
attack a variety of problems.\textsuperscript{116} The administrative law judge found that these teams were not "labor organizations" within the meaning of the Act, because there was no "representation" of the employees involved.\textsuperscript{117}

The Board affirmed the ALJ's decision noting that when an employee spoke directly to the employer, he did so on his own behalf, not as a representative of his co-workers.\textsuperscript{118} Therefore, when an employee went directly to the employer to discuss a matter of mutual concern, his actions were covered by the section 8(a)(2) proviso.\textsuperscript{119}

In the more recent case of \textit{Sears, Roebuck & Co.},\textsuperscript{120} the Board held that an employee participation committee designed to facilitate communication between the employees and employer was not a "labor organization."\textsuperscript{121} The Board relied on the fact that employees selected to serve on the committee did so on a rotational, rather than representational basis, and that the purpose of the committee was to give input to help solve problems with management.\textsuperscript{122}

\textbf{SECTION 8(a)(2)}

Now that the case law defining the term "labor organization" has been discussed, it is necessary to determine when employer interaction with a labor organization constitutes an unfair labor practice. Section 8(a)(2) of the NLRA provides,

\begin{quote}
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: \textit{Provided}, That subject to rules and regulations made and published by the Board pursuant to section 6, [29 U.S.C. § 156] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . . .\textsuperscript{123}
\end{quote}

In order to gain an accurate understanding of section 8(a)(2) of the NLRA, it is useful to understand the circumstances from which

\begin{itemize}
\item[116.] Id. at 1233-34.
\item[117.] Id. at 1234-35.
\item[118.] Id.
\item[119.] \textit{Id.} See infra, note 123 for the text of the section 8(a)(2) proviso.
\item[120.] 274 N.L.R.B. 230 (1985).
\item[121.] Id. at 244.
\item[122.] Id.
\end{itemize}
the statute evolved. The NLRA was enacted after the Supreme Court struck down the National Industrial Recovery Act,124 which was a Congressional attempt to protect employee rights to choose their own collective bargaining representative.125

Employers reacted to the enforcement of the NLRA by forming their own "company unions."126 Between the years 1932 and 1933 alone, "the number of employees covered by company unions rose from 432,000 to 1,164,000, an increase of 169 percent.127 By the fall of 1933, a study showed that only 9.3 percent of employees were represented by trade unions while 45 percent were enlisted in company unions.128 Given these statistics, it is logical that Congress reacted by passing section 8(a)(2).

Senator Wagner, "the key figure in the development of labor legislation,"129 for whom the Act was named, described the problem

126. Company unions are described by Cox et al. in LABOR LAW, eleventh edition: "Company unions" consisted essentially of two distinct types. Until the early 1930's the prevailing form involved the use of joint committees on which both employee and management unilaterally promulgated and implemented the plan, often in response to an "outside" organizational effort. Generally consisting of numbers of employee and management representatives with equal voting power, these committees functioned primarily as a forum for discussion and consultation; final decisional authority over the committees' recommendations usually remained in management . . . .

The prototype post-NIRA version of the company union—or employee committee, as they are also known—made provisions for separate meetings of employee representatives, reserving meetings with management only for presentation of proposals and discussion. (This supposedly made the plans less subject to challenge on grounds of interference or restraint; nevertheless, it was customary for management representatives to be present at all meetings to give information and advice) . . . . Management, however, instigated the committee's formation, and usually framed its constitution and by-laws, presenting them to employees for ratification. Although employees usually elected their representatives, candidates were restricted to current company employees, and often minimum age length-of-service requirements were imposed. Representatives' terms were normally of limited duration.

128. Id.
as follows,

At the present time genuine collective bargaining is being thwarted immeasurably by the proliferation of company unions. Let me state at the outset that by the term “company union” I do not refer to all independent labor organizations whose membership lists embrace only the employees of a single employer. I allude rather to the employer-dominated union, generally initiated by the employer, which arbitrarily restricts employee cooperation to a single employer unit, and which habitually allows workers to deal with their employer only through representatives chosen from among his employees.\(^{130}\)

Senator Wagner also noted that one purpose of the Act is to promote cooperation within labor, and then by cooperation, labor would have enough strength to deal with management on equal ground.\(^{131}\) It was the Senator Wagner’s opinion that only a position of equal strength could effectuate cooperation between labor and management.\(^{132}\) In describing section 8(a)(2), Senator Wagner explicitly stated that its purpose was not to invalidate all types of employee committees,

The new bill forbids any employer to influence any organization which deals with problems such as wages, grievances, and hours. They should be covered by a genuine labor union. At the same time, the bill does not prevent employers from forming or assisting associations which exist to promote the health and general welfare of workers or to provide group insurance, or for similar purposes. Employer-controlled organizations should be allowed to serve their proper functions of supplementing trade unionism, but they should not be allowed to supplant or destroy it.\(^{133}\)

Similar descriptions of the purpose of Section 8(a)(2) are echoed in


\(^{131}\) See infra, note 133.

\(^{132}\) See id.

the final Senate report on this part of the Act.¹³⁴

THE PER SE APPROACH TO SECTION 8(a)(2)

Like the term "dealing with" in section 2(5) of the NLRA, the terms of section 8(a)(2) have also given broad interpretations in several jurisdictions and by the NLRB.¹³⁵ The Supreme Court, in the Bernhard-Altmann case, similarly adopted a broad interpretation, thereby increasing the potential for employer violations.¹³⁶ In Bernhard-Altmann, a union organizational campaign was occurring simultaneously with an economic strike to protest a wage reduc-

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¹³⁴. The final Senate report states,
This bill does nothing to outlaw free and independent organizations of workers who by their own choice limit their cooperative activities to the limits of one company. Nor does anything in the bill interfere with the freedom of employers to establish pension benefits, outing clubs, recreational societies, and the like, so long as such organizations do not extend their functions to the field of collective bargaining, and so long as they are not used as a covert means of discriminating against or in favor of membership in any labor organization. Such agencies, confined to their proper sphere, have promoted amicable relationships between employers and employees and the committee earnestly hopes that they will continue to function . . . .

The so-called "company union" features of the bill are designed to prevent interference by employers with organizations of their workers that serve as collective bargaining agencies. Such interference exists when employers actively participate in framing the constitution or by laws of organizations; or when, by provisions in the constitution or by laws, changes in the structure of the organization cannot be made without the consent of the employer. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings. It is impossible to catalog all the practices that might constitute interference, 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. And where several of these interferences exist in combination, the employer be said to dominate the labor organization by overriding the will of employees.

S. Rep. No. 573, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2309 (1985). It should be noted that in his concurring opinion, Member Devaney acknowledged that the Congressional intent behind section 8(a)(2) was to regulate company unions rather than employer initiated worker participation committees. Electromation, Inc., 309 N.L.R.B. No. 163, 42, appeal docketed, No. 92-4129 (7th Cir. Dec. 28 1992) (Devaney, Member concurring).


tion.\textsuperscript{137} The two events were unrelated.\textsuperscript{138} Some of the strikers signed authorization cards and the union began to negotiate a settlement with the employer.\textsuperscript{139} During these negotiations, the employer recognized the union as the exclusive bargaining representative of the employees and agreed to make certain wage improvements and changes in conditions of employment in return for ending the strike.\textsuperscript{140} At this time, neither the employer, nor the union checked to insure that the union did indeed have a majority of authorization cards.\textsuperscript{141} It was later found by the Board, that during the negotiations, the union did not have the employees' majority support, although later, at the time a formal collective bargaining agreement was signed, the union did have the requisite majority support.\textsuperscript{142}

The Court held that under section 9(a)\textsuperscript{143} the NLRA “guarantees employees freedom of choice and majority rule,”\textsuperscript{144} and the opposite occurred in this case; the minority chose the representative.\textsuperscript{145} This was a clear “abridgement of section 7”\textsuperscript{146} and a violation of section 8(a)(2),\textsuperscript{147} because the employer “contribute[d] . . .

\begin{thebibliography}{99}
\bibitem{137} \textit{Id.} at 733.
\bibitem{138} \textit{Id.}
\bibitem{139} \textit{Id.} at 733-34.
\bibitem{140} \textit{Id.} at 734.
\bibitem{141} \textit{Id.}
\bibitem{142} \textit{Id.} at 734-35.
\bibitem{143} Section 9(a) of the NLRA provides,
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: \textit{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: \textit{Provided further,} That the bargaining representative has been given opportunity to be present at such adjustment.
\textit{29 U.S.C. \S\ 159(a)(1988).}
\bibitem{144} \textit{Bernhard-Altmann}, 366 U.S. at 737.
\bibitem{145} \textit{Id.}
\bibitem{146} Section 7 of the NLRA provides,
Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
\textit{29 U.S.C. \S\ 157 (1988).}
\bibitem{147} \textit{29 U.S.C. \S\ 158(a)(2)(1988).} For the text of section 8(a)(2), \textit{see supra} note 123 and
\end{thebibliography}
support" to a labor organization.\textsuperscript{148} The Court, responding to the employer's contention that his acting in good faith is a complete defense, continued,

We find nothing in the statutory language prescribing scienter as an element of the unfair labor practices here involved. The act made unlawful by section 8(a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.\textsuperscript{149}

The holding in \textit{Bernhard-Altmann} left behind the rule that it is interference \textit{per se} for an employer to grant recognition to any labor organization when that organization is not a reflection of the majority choice of the employees in the bargaining unit.\textsuperscript{150}

In addition to the \textit{per se} application of section 8(a)(2) in \textit{Bernhard-Altmann}, the Board has also shown itself willing to find section 8(a)(2) violations in an almost mechanical fashion.\textsuperscript{151} In \textit{Alta Bates Hosp.},\textsuperscript{152} the Board ordered an employee committee to be dissolved due to the ALJ's finding of "domination" in the "formation" accompanying text.

\textsuperscript{148} \textit{Bernhard-Altmann}, 366 U.S. at 737-38.

\textsuperscript{149} \textit{Id.} at 739 (citations omitted).


The holding of \textit{Bernhard-Altmann} was really a reiteration the earlier Supreme Court decision, NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939). In \textit{Newport News}, the employer had an employee participation committee and a reputation for peaceful dealings with that committee and no anti-union animus. After the NLRA had been sustained by the Supreme Court, the employer tried to maintain the committee in a form it felt would best comply with the Act. However, because the employer retained the right to veto any changes to the by-laws governing the committee, the Supreme Court found the committee "dominated" within the meaning of section 8(a)(2). This small degree of power retained by the employer was enough to deprive the employees of the rights guaranteed them by the NLRA. The employer's long history of peaceful relations with committee was inconsequential, as was the lack of anti-union animus. \textit{Id.} at 251. The NLRB relied heavily on \textit{Newport News} in its \textit{Electromation} analysis to find that the employee committees were 8(a)(2) violations. Electromation, Inc., 309 N.L.R.B. No. 163, 26-28, \textit{appeal docketed}, No. 92-4129 (7th Cir. Dec. 28, 1992).


\textsuperscript{152} 226 N.L.R.B. 485 (1976).
and "administration" of the worker participation committee.\textsuperscript{153} The Board found "domination" because the employer first introduced the idea of the committee, helped plan it, contributed a meeting place and office supplies, kept a veto power over amendments to the by-laws, and maintained management representatives comprising one-third of the committee.\textsuperscript{154} An 8(a)(2) violation was found in spite of the fact that the employees voted on who represented them and that their representatives made up two-thirds of the committee.\textsuperscript{155}

Similarly, in \textit{Wahlgreen Magnetics},\textsuperscript{156} the Board dissolved an employee committee pursuant to a finding of an 8(a)(2) violation.\textsuperscript{157} The Board relied on the employer first introducing the idea of the employee committee and developing the representation scheme of the employees.\textsuperscript{158} Also, while the employees chose their own representatives,\textsuperscript{159} the employer maintained a rule that any employee representative who was transferred, lost his representative status.\textsuperscript{160} Finally, the employer set up a meeting schedule, and provided a room, and paid the employees for the time spent at committee meetings.\textsuperscript{161}

In a more recent case, \textit{Ona Corp.},\textsuperscript{162} the Board adopted the ALJ's finding of domination of the employee committee based on the employer's first coming forward with the idea for the committee and helping to form it, the employer's choosing the topics of discussion, the employees being paid for their time, and the employer providing the room and supplies for the meeting.\textsuperscript{163} Once again, in \textit{Electromation, Inc.} the NLRB has applied this per se rule to the worker participation committee.\textsuperscript{164} However, in doing so, the Board has done so in spite of some recent developments in the law in several United States Circuit Courts.\textsuperscript{165}

\begin{itemize}
\item \textsuperscript{153} Id. at 490-91.
\item \textsuperscript{154} Id.
\item \textsuperscript{155} Id.
\item \textsuperscript{156} 132 N.L.R.B. 1613 (1961).
\item \textsuperscript{157} Id. at 1619-20.
\item \textsuperscript{158} Id.
\item \textsuperscript{159} Id.
\item \textsuperscript{160} Id.
\item \textsuperscript{161} Id.
\item \textsuperscript{162} 285 N.L.R.B. 400 (1987).
\item \textsuperscript{163} Id. at 406-07.
\item \textsuperscript{165} See infra, notes 166-208 and accompanying text.
\end{itemize}
A LESS RIGID INTERPRETATION OF SECTION 8(a)(2)\textsuperscript{166}

Although several United States Circuit Courts have adopted a \textit{per se} test for applying section 8(a)(2), other Circuit Courts have adopted a less rigid approach.\textsuperscript{167} In \textit{Chicago Rawhide Manufacturing Co. v. NLRB},\textsuperscript{168} the United States Court of Appeals for the Seventh Circuit avoided the \textit{per se} approach to section 8(a)(2), and adopted a test that focuses on whether or not the employer \textit{actually dominated} the labor organization.\textsuperscript{169} Although the NLRB explicitly declined to follow Seventh Circuit’s lead in \textit{Electromation}, it did so only by dropping a footnote which stated that the two cases were distinguishable giving little reason for this conclusion.\textsuperscript{170} Because the Seventh Circuit’s analysis has received so much support in other courts, it still merits

\begin{itemize}
\item \textsuperscript{166} Council on Labor Law Equality Brief at 28-29, \textit{Electromation, Inc.}, No. 25-CA-19818, points out that, "It is critical to delineate between conduct which is unlawful assistance or interference and that which is illegal domination" of a labor organization. This is because although both constitute violations of section 8(a)(2) of the NLRA, only conduct constituting "unlawful domination" requires "disestablishment of the organization." As the brief points out, these terms have been used interchangeably by the courts when they should not be, and this has served to confuse the law on the matter. See \textit{e.g.}, NLRB v. Demmlon Mfg. Co., 419 F.2d 1080, 1082 (1st Cir. 1969), \textit{cert. denied}, 397 U.S. 1023 (1970); NLRB v. Magic Slacks, Inc., 314 F.2d 844, 847 (7th Cir. 1963); Jafco, a Div. of Modern Merchandising, Inc., 284 N.L.R.B. 1377 (1987).
\item \textsuperscript{167} See, \textit{e.g.}, \textit{Chicago Rawhide Mfg. Co. v. NLRB}, 221 F.2d 165 (7th Cir. 1955)(adopting an “actual domination” test as opposed to applying a \textit{per se} approach to section 8(a)(2)). For other examples of application of the “actual domination” test, as well as other lower standards applied under section 8(a)(2); see also Coppus Eng’g v. NLRB, 240 F.2d 564 (1st Cir 1957); Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), \textit{cert. denied}, 423 U.S. 875 (1975); NLRB v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1984); NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Federal-Mogul Corp. v. NLRB, 394 F.2d 915 (6th Cir. 1968).
\item \textsuperscript{168} 221 F.2d 165 (7th Cir. 1955).
\item \textsuperscript{169} \textit{Id.} at 168 (emphasis in original).
\item \textsuperscript{170} The Board simply states that in \textit{Chicago Rawhide}, the employee committee was formed at the impetus of the employees and that while the case is distinguishable from \textit{Electromation}, no “passing on the merits” would be done here. \textit{Electromation}, Inc., 309 N.L.R.B. No. 163, 28, n.25, appeal docketed, No. 92-4219 (7th Cir. Dec. 28 1992). Member Raudabaugh, in his concurring opinion gives \textit{Chicago Rawhide}, more attention, arguing that \textit{per se} test, first handed down in \textit{Newport News}, and reiterated in \textit{Bernhard-Altmann} is still the applicable precedent, and without more, the Seventh Circuit’s analysis is inappropriate. \textit{Id.} at 87-89 (Raudabaugh, Member concurring).
\end{itemize}
serious consideration.\textsuperscript{171}

In \textit{Chicago Rawhide}, the employer operated several unorganized plants.\textsuperscript{172} In 1950, at a new plant, the employer set up a "system" for handling grievances.\textsuperscript{173} When the employees found this system unsatisfactory, they complained to the employer, and the two parties sat down and developed a new system.\textsuperscript{174} This new system called for the formation of two committees composed of employees and representatives of management, which later merged into a single committee.\textsuperscript{175} The employer let the committee meet during working time, and contributed money on several occasions to social activities organized by the committee to help defray the cost.\textsuperscript{176} In 1951, the International Fur and Leather Workers' Union tried to organize the plant without success.\textsuperscript{177} The union then filed suit against the employer for violation section 8(a)(2) of the NLRA.\textsuperscript{178}

The Board, using the \textit{per se} test, found an 8(a)(2) violation.\textsuperscript{179} However, the Court of Appeals for the Seventh Circuit reversed,\textsuperscript{180} holding,

Words and actions which might dominate the employees in their choice of a bargaining agent do not constitute domination proscribed by the Act unless the employees are \textit{actually dominated}. The employer-employee relationship itself offers many possibilities for domination, which is one of the reasons for the original enactment of the Wagner Act, but actual domination must be shown before a violation is established \ldots. The test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.\textsuperscript{181}

As the Seventh Circuit continued to employ the test adopted in

\begin{footnotes}
\textsuperscript{171} See \textit{e.g.}, Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974).
\textsuperscript{172} \textit{Id.} at 167.
\textsuperscript{173} \textit{Id.}
\textsuperscript{174} \textit{Id.}
\textsuperscript{175} \textit{Id.}
\textsuperscript{176} \textit{Id.} at 167-68.
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.} at 168.
\textsuperscript{179} \textit{Chicago Rawhide Mfg. Co.}, 105 N.L.R.B. 727 (1953), rev'd \textit{sub nom.}, Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955).
\textsuperscript{180} \textit{Chicago Rawhide Mfg. Co.} v. NLRB, 221 F.2d 165 (7th Cir. 1955).
\textsuperscript{181} \textit{Id.} at 167-68 (citations omitted, emphasis added).
\end{footnotes}
Chicago Rawhide,\textsuperscript{182} several other Circuit Courts began applying the same test.\textsuperscript{183} In Modern Plastics Corp. v. NLRB,\textsuperscript{184} the Court of Appeals for the Sixth Circuit held that just because a labor organization was “weak,” (had no formal constitution or by-laws by which to operate, no property, and no source of income, no dues, and meetings were held at the plant) did not mean that a violation of section 8(a)(2) had occurred.\textsuperscript{185} “Evidence of a weak labor organization . . . does not show that the Company exerted a subtle and insidious control over ignorant or protesting employees.”\textsuperscript{186} The Sixth Circuit then adopted the holding of Chicago Rawhide,\textsuperscript{187} “actual domination test,” and noted that the committee was the desire of the employees, and they were free to refuse any of the services of the committee without fear of reprisal.\textsuperscript{188} The court concluded by stating that the prime purpose of the NLRA “is to foster peace through collective bargaining” and that the employee committees in this case worked for many years to achieve that goal.\textsuperscript{189} In short, using the Chicago Rawhide “actual domination test” enabled the Court to facilitate the “prime purpose” of the NLRA, as opposed to the Board’s \textit{per se} test, which would have achieved a result contrary to that goal.\textsuperscript{190}

In NLRB v. Northeastern University,\textsuperscript{191} the employees, acting on their own, with the employer’s blessing, created an employee committee whose members were elected by the employees.\textsuperscript{192} The committee operated under its own by-laws and its purpose was to “promote harmonious working relationships between staff and university; provide for an exchange of information . . . relating to staff problems; sponsor social activities; [and] give . . . staff . . . input into . . . university policy affecting the staff.”\textsuperscript{193} The committee met in a university room, had no source of income, and general costs
were absorbed by the university. Although the committee never negotiated a formal collective bargaining agreement, it did influence the "terms and conditions of staff employment." 

In response to an unfair labor practice charge, the Court of Appeals for the First Circuit reiterated that the Chicago Rawhide test relying on actual domination, was more appropriate than the Board's per se test, relying on potential domination. The Court then held that just because the employer facilitated the committee's work by providing a room and absorbing some of the expenses does not mean that domination under section 8(a)(2) actually occurred.

In Hertzka & Knowles v. NLRB, the Organization of Architectural Employees ("the union") filed an unfair labor practice against the employer for violation of section 8(a)(2). After the union lost a decertification election, the employer requested suggestions on how to "accomplish a management-employee dialogue." An employee suggested a system of committees composed of employees and a representative of management. The suggestion was approved "overwhelmingly." The purpose of the committee was to "discuss and formulate proposals for changes in employment terms and conditions." Meetings were sometimes held on company time without loss of pay, and on some committees the management representative voted while not on others.

The Court of Appeals for the Ninth Circuit, in interpreting the purpose of section 8(a)(2) looked to Senator Wagner's comments regarding that section,

Nothing in the bill prevents employers from maintaining free and direct relations with their workers . . . . The only prohibition is

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194. Id. at 1212.
195. Id.
196. See Coppus Eng'g Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957)(adopting the Chicago Rawhide test); NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803 (1st Cir. 1964); NLRB v. Dennison Mfg. Co., 419 F.2d 1080 (1st Cir. 1969)(applying the Chicago Rawhide test and finding actual domination by the employer); NLRB v. Reed Rolled Thread Die Co., 432 F.2d 70 (1st Cir. 1970)(applying the Chicago Rawhide test).
198. 503 F.2d 625 (9th Cir. 1974).
199. Id. at 626.
200. Id. at 629.
201. Id.
202. Id.
203. Id.
204. Id.
against the sham or dummy union which is dominated by the employer, which is supported by the employer, which cannot change its rules and regulations without his consent, and which cannot live except by the grace of the employer's whims.205

The court then adopted the Chicago Rawhide "actual domination test"206 holding, that the "employer must be shown to have interfered with 'the freedom of choice' of the employees" and that the employer actually dominated the committee.207 Because there was no evidence of "actual domination" the Ninth Circuit reversed the NLRB's decision.208

AN ECONOMIC ANALYSIS

In the last decade, the use of economic analysis as a tool for analyzing legal matters has been propelled to prominence in the academic community by the law and economics school of thought.209 While the validity of applying economic models, based on arguably shaky assumptions to the law is widely debated,210 the application of the most basic model for developing a demand curve for labor makes a compelling argument in support of adopting the Chicago Rawhide test when applying section 8(a)(2) and 2(5) of the NLRA.

The easiest way to understand this basic model is to develop it step by step. An employer's demand for inputs (i.e. capital and labor) is a derived demand.211 It is derived from consumer's demand for the firm's product.212 For the purposes of this paper, only three of the most basic assumptions apply.213 The first two are: (1) that the

205. Id. at 630 (quoting STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATION 278-79 (R. Koretz, ed. 1970)(remarks of Feb. 21, 1935)).
207. Hertzka & Knowles, 503 F.2d at 670.
208. Id.
211. DON BALLANTE & MARK JACKSON, LABOR ECONOMICS, CHOICE IN LABOR MARKETS, 17 (1983).
212. Id.
employer seeks to maximize its profits, and the firm employs only two factors of production, labor and capital. Therefore, output ($Q$) is a function of ($f$) labor ($L$) and capital ($K$).

$$Q=f(L,K).$$

The final assumption is that the law of diminishing returns applies. The law of diminishing returns, in terms of the application of this model, states that while one input is fixed (i.e. capital), each additional unit of labor input added will yield ever shrinking quantities of additional output.

The easiest way to illustrate this notion is with an example. An employer owns a farm. His capital is one tractor (which is fixed). The employer can hire one farmer to operate the tractor. This will increase output substantially. Hiring a couple of other farmers might allow the tractor to be operated in shifts for longer periods of time, thereby increasing productivity. However, there is still a limited number of workable hours in a day, and if the first farmer was working more than half of them, this new increase in output will be less than the initial one. From this point on, additional farmers would have to work by hand since the tractor is already in constant use. Therefore, their pace of production would be slower. Theoretically, eventually so many farmers could be hired that they would crowd each other, increasing output by ever declining amounts.

Given that each employer is profit maximizing, it is clear that for a given budget constraint, he will try to choose his proportion of inputs such that maximum profit will be yielded. The budget constraint is represented in Graph A-1 by $k'$. 

214. In order to maximize profits, a firm must attain two related goals: (1) it must produce each quantity of output at the lowest attainable cost, cost-minimization, and (2) the output level chosen must be neither too large nor too small. BERTON M. FLEISHER & THOMAS J. KNEISNER, LABOR ECONOMICS: THEORY, EVIDENCE, AND POLICY, 45 (1984).


217. Id. at 63.

218. An employer's "budget constraint" is his fixed amount of funds set aside for the costs of inputs. The budget constraint is also referred to as an "isocost line," EHRENBERG & SMITH supra note 213 at 89, or an "isocost line," FLEISHER & KNEISNER supra note 214 at 61.

219. See FLEISHER & KNEISNER supra note 214 at 61 and accompanying text (discussing profit maximizing behavior of employers).

220. The budget constraint is straight, reflecting fixed labor and capital costs, which an
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employer in a competitive market has no ability to affect. FLEISHER & KNEISNER supra note 214 at 61-62. While this assumption is used as a starting point for this model, it is subsequently relaxed as the discussion progresses. Consequently, because discussing different market forms would be a complex endeavor which would not serve to further elucidate the issue at hand, these market forms are not addressed here.
The vertical axis represents the amount of capital employed while the horizontal axis represents the amount of labor. The locus of points denoted $k'l'$ represents the maximum expenditure possible, as allocated between varying proportions of capital and labor that can be employed, given a fixed budget.

To further develop the model, several "isoquant lines" ("isoquants") must be added. Isoquants are loci of points representing varying proportions of capital and labor that could produce given amounts of output. The three main characteristics of the isoquants that should be noted are their negative slopes, their convexity, and that they do not intersect. The isoquants are represented in Graph A-2 as $Q$, $Q'$ and $Q''$, and are superimposed on the budget constraint depicted in Graph A-1.

221. EHRENBERG & SMITH supra note 213 at 82-87.
222. Id.
223. The isoquants' negative slopes reflect the assumption that labor and capital are substitutes. So if an employer cut his use of labor, he could still produce the same amount of output as before by employing more capital. EHRENBERG & SMITH supra note 206 at 83.
224. The isoquants' convexity reflects the application of the law of diminishing returns. If an employer starts by using relatively more capital to produce his output, as he decreases his use of capital, he will need ever increasing amounts of labor to keep output constant. Id. at 83; FLEISHER & KNEISNER supra note 213 at 53.
225. See, e.g., Id. at 82-89; FLEISHER & KNEISNER supra note 214 at 53-56. The reasons for the isoquants not intersecting are beyond the scope of this paper.
226. Note that $Q''>Q'>Q$. Therefore, production at any point along $Q''$ will yield more output than production at any point along $Q'$. Similarly, production at any point along $Q'$ will yield more output at any point along $Q$. Additionally, there is an infinite number of isoquants, each of which complies with the assumptions discussed supra notes 223-225 and accompanying text. See id. at 82-89; FLEISHER & KNEISNER supra note 214 at 53-56. For the purpose of this simplified illustration, Graph A-2 depicts only the three isoquants, $Q$, $Q'$ and $Q''$. 
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Graph A-2
As long as we assume that the employer is a profit maximizer,\(^{227}\) the desired output is represented by point \(C.\)\(^{228}\) Given the budget constraint \(k'l',\)\(^{229}\) the employer could allocate his budget between capital and labor so as to wind up anywhere within triangle \(k'l'O.\)\(^{230}\) However, because profit maximization also implies cost minimization, the employer will seek to produce the most output at the least cost.\(^{231}\) To produce the maximum output, the employer will seek to operate along the budget constraint.\(^{232}\) Choosing points \(A\) or \(B\) would not be cost minimizing behavior. This is because operating at points \(A\) or \(B\) will have the employer engaged in maximum spending without obtaining maximum output.\(^{233}\) Specifically, production at points \(A\) or \(B\) would yield only \(Q\) output. However, by choosing to employ the combination of inputs \(k^* l^*,\) where \(Q'\) is tangent to \(k'l',\) the employer will be spending the same amount of money as he would if he chose inputs at \(k^{**} l^{**}\) but will be yielding extra output in the amount of \(Q'-Q.\)\(^{234}\) It is at this point that the employer accomplishes his goals of profit maximization and cost minimization.\(^{235}\)

It is this issue of choosing at which point along the budget constraint to operate that is most pertinent to the Electromation case and the use of WPC's. The model reveals that the employer wants to operate at the point where the highest possible isoquant is tangent to the budget constraint.\(^{236}\) However, the model does not explain how the employer gets to this point. To do so, the employer will first have to determine his costs. In the model, these costs are limited to expenses for labor and capital.\(^{237}\) Because we are only interested in labor costs, these expenses will be loosely referred to as the wage, and the costs of capital will not be discussed. The wage consists not

\(^{227.}\) See Fleisher & Kneisner supra note 214 and accompanying text.

\(^{228.}\) See Ehrenberg & Smith supra note 213 at 86-87 (discussing conditions of cost minimization using isoquants and isoexpenditure).

\(^{229.}\) See Fleisher & Kneisner supra note 220 and accompanying text.

\(^{230.}\) See id. at 60-62.

\(^{231.}\) Id. at 62-65.

\(^{232.}\) See Ehrenberg & Smith supra note 213 at 86-87.

\(^{233.}\) See Id.

\(^{234.}\) Id. Cost minimization will ultimately occur at the point where the slope of the isoquant, the marginal rate of substitution, is equal to the slope of the budget constraint/isoexpenditure line and the two are tangent. See id. at 86-87; Fleisher & Kneisner supra note 214 at 62-65 (giving a mathematical explanation for the occurrence).

\(^{235.}\) See supra note 214 and accompanying text.

\(^{236.}\) See supra notes 221-235 and accompanying text.

\(^{237.}\) See supra note 215 and accompanying text.
only of pure financial compensation, but also benefits ranging from contributions to pension plans and medical insurance to absorption of child care costs.

The key to determining the wage rate that an employer faces will be based on the employer getting an accurate understanding of employee desires. The issue at hand is to decide what mechanism best serves this end, as well as which mechanisms the law allows. Clearly from an economic perspective, the law should facilitate the employer's understanding of the costs it faces so that it may make the most efficient choices. If the employer does not have an accurate understanding of employee desires, inefficiencies may develop, ranging from unnecessary duplication of health benefits within dual income families to giving each employee salary increases when an employee child care arrangement may be sufficient and cheaper. Additionally, the job satisfaction that employees gain from having input into the employers' business decisions might give the employees a higher sense of dedication to their jobs, making them less likely to be selfish and perform more efficiently in the face of difficult financial times.

Given the potential for inefficiencies developing due to an employer making choices based on inaccurate information, section 8(a)(2) of the NLRA should not be construed to per se invalidate all WPC's, regardless of their effect. The result of such case law would be to hinder communication between employers and management, leading employers to make irrational choices. This will leave firms operating at a point such as point A on Graph A-2, when they should be operating at point C. This inefficiency, in the aggregate, will ultimately lead to higher costs and lower levels of production, which in


240. See Christine A. Clark, Comment, Corporate Employee Child Care: Encouraging Business to Respond to a Crisis, 15 FLA. ST. U. L. REV. 839 (1987)(discussing the possibility of private employers providing for employee child care costs in the state of Florida).

241. The inefficiency here lies in the notion that if both spouses work, and both receive incomplete coverage under their employers' respective health insurance plans, they will both want more complete coverage. However, if the avenues of communication are closed, the employers might wind up paying more to increase coverage, thereby increasing their labor costs, where changing to cafeteria plans might accomplish the same ends with no extra costs.

242. See supra notes 8-16 and accompanying text.
turn contribute to the lack of American competitiveness in the international marketplace. Given that the purpose of section 8(a)(2) was to avoid employers dominating labor organizations, it seems unreasonable for the courts to accommodate such an inefficient result. The Chicago Rawhide test is the only legal device that will allow the courts to avoid this consequence while remaining true to the policies underlying the NLRA.

It should also be noted that in the event that an employer does actually interfere with or dominate a WPC, under the Chicago Rawhide test, finding that WPC unlawful is consistent with the economic model. Inasmuch as employer domination or interference distorts the employees' true desires, the “advice” that grows out of these committees will be inaccurate, leading the employer to make inefficient choices. Theoretically, this distortion of once accurate information will have the same effect as if the WPC had never existed. The distorted information will lead to inaccurate decisions ultimately hurting the firms efficiency, and thereby productivity. The greater the degree of domination or interference by the employer is, the further point A on Graph A-2 will be from point C and the more efficiency and productivity will suffer.

ELECTROMATION, INC.

The facts of Electromation, Inc. are such that the Board's decision could have resolved the controversy that surrounds sections 2(5) and 8(a)(2) of the NLRA. Rather than do this, the Board simply revitalized the Cabot Carbon Doctrine keeping the definition of the term “dealing with” broad, declining to use the reasoning of the Sixth Circuit in Streamway and Airstream, Inc. The NLRB,

243. See supra notes 129-134 and accompanying text.
244. Id.
245. See supra notes 221-235 and accompanying text. The further point A is from point C, the greater the difference between Q and Q'. Therefore, the result is less output for the same amount of inputs.
247. See supra notes 61-86 and accompanying text.
248. NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); See supra notes 87-96 and accompanying text.
249. Airstream, Inc., v. NLRB, 877 F.2d 1291 (6th Cir. 1989); See supra notes 97-102 and accompanying text.
in similar fashion, employed the \textit{per se} approach\textsuperscript{250} to section 8(a)(2), rather than adopting the \textit{Chicago Rawhide} "actual domination test."\textsuperscript{251} However, in arriving at its decision, the Board specifically limited the decision to its facts without offering any guidelines.\textsuperscript{252}

The first decision that confronted the Board was whether or not Electromation's "action committees" are labor organizations within the meaning of section 2(5).\textsuperscript{253} To make this choice, the Board had to decide upon the appropriate definition of the term "dealing with," as it is used in section 2(5).\textsuperscript{254} In reaching its conclusion, the NLRB correctly recognize that the Supreme Court's interpretation of section 2(5) is the most logical one. While the two exceptions to the \textit{Cabot Carbon} Doctrine handed down in \textit{Mercy-Memorial Hosp.}\textsuperscript{255} and \textit{General Foods Corp.}\textsuperscript{256} are logical, they should remain isolated, and applicable only to cases with similar facts. The Sixth Circuit's approach to section 2(5) in \textit{Streamway}\textsuperscript{257} and \textit{Airstream, Inc.}\textsuperscript{258} while they yield the desired result, create bad law. By shrinking the definition of the term "labor organization" in order to allow for the existence of WPC's is an invitation to problems with respect to section 7 rights. The ultimate result will be that employers will be allowed to infiltrate, interfere and dominate the WPC's without a fear of retribution because the employee-members of these "non-labor organization" WPC's will be stripped of a major avenue for recourse under the NLRA. By excluding these WPC's from the status of "labor organizations" under section 2(5), the Board would be placing WPC's beyond the scope of section 8(a)(2), thereby depriving the employees serving on these committees of the right to bring unfair labor practice charges for domination of interference with the formation or administration of those committees. In short, the effect of confining the \textit{Cabot Carbon} Doctrine, in an effort to facilitate the use of WPC's, and thereby increase productivity in general, would be to

\textsuperscript{250} See supra notes 135-165 and accompanying text.

\textsuperscript{251} Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955); See supra notes 166-208 and accompanying text.

\textsuperscript{252} See supra, notes 56-58 and accompanying text.

\textsuperscript{253} 29 U.S.C. § 152(5)(1988). For the text of the statute see supra, note 60 and accompanying text.

\textsuperscript{254} Id.

\textsuperscript{255} 231 N.L.R.B. 1108 (1977).

\textsuperscript{256} 231 N.L.R.B. 1232 (1977).

\textsuperscript{257} NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); See supra notes 87-96 and accompanying text.

\textsuperscript{258} Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989); See supra 97-102 and accompanying text.
diminish employee rights under section 8(a) by emasculating section 8(a)(2). Not only is this idea contrary to the underlying policy of the act, it is completely unnecessary.

If the NLRB was looking to promote the use of WPC's in order to make U.S. firms more competitive, as it should be, but wants to remain consistent with the intentions of the Act, then the Board should readjust its approach to section 8(a)(2)(not section 2(5)) and abandon the per se approach in favor of the Chicago Rawhide "actual domination test." By applying this test, the Board can confront the WPC's and their surrounding circumstances either by creating guidelines, or deciding on a case by case basis if section 8(a)(2) has been violated. This test seems infinitely more logical than issuing a cease and desist order, in the mechanical fashion used by the Board in Electromation, to a WPC which has lived up to its purpose of keeping the channels of communication open and promoting a peaceful work environment, but which also meets once a month in the company conference room without the employees losing their pay. By using the Chicago Rawhide test, the Board would be able to weigh the functions of the committee against the employer exertion of influence over that committee, and determine whether or not the existence of the WPC is consistent with section 8(a)(2) of the Act.

Additionally, an economic analysis\(^2\) reveals that applying section 8(a)(2) in a per se fashion is inefficient where the WPC is being used to facilitate communication between management and workers, so that management may make more rational decisions based on accurate information. Inasmuch as an application of the NLRA forces employers to make choices based on inaccurate information, U.S. production in the aggregate suffers. The use of Chicago Rawhide test, however, allows employers to obtain necessary information to make business decisions and maintain a higher level of efficiency while at the same time preventing abuse of the WPC's by employers who dominate them, promoting inefficiency and causing production to suffer.\(^2\)

Although an adoption the Chicago Rawhide test might appear to be the beginning of the end for unions, nothing should be further from the truth. In fact, given the intention of the legislature when drafting section 8(a)(2),\(^2\) the only logical conclusion is that the

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259. See supra notes 209-245 and accompanying text.
260. See supra notes 236-245 and accompanying text.
261. See supra notes 129-134 and accompanying text.
most efficient way for the WPC to operate is against the backdrop of a union. If there is a union for the employees to turn to in the event that the employer begins taking advantage of the members of the WPC’s, as a practical matter employees rights are much more likely to be easily exercised and vigorously protected. The threat of the union intervening to make sure that the employees’ section 7 rights are enforced should also act as a countervailing power to that of the employer and should have a deterring effect on any employer ideas regarding domination or interference with the WPC’s.

This point, of course, begs the question, “What if the plant is unorganized?” To deal with this situation, the Board should set out specific guidelines. However, it is reasonable to conclude that if the employer begins to dominate the WPC, in the unorganized shop, the employees are free to seek out the help of a union. As soon as the employee seeks the union’s help, he is exerting his section 7 rights, and the employer will have to withdraw from the WPC. Otherwise, his participation would be considered assisting one labor organization over another under section 8(a)(2), and an unfair labor practice.\footnote{262} Although it is true that this course of events will cause employees to join a union against their original desires, it still leaves the employees an option to enforce their rights under section 8(a)(2). Additionally, the possibility of the employees seeking to organize the plant when they otherwise would not, should deter the employer from acting to dominate or interfere with the WPC.

Given the facts of Electromation, Inc.,\footnote{263} the Board correctly found that the “action committees” are labor organizations within the meaning of section 2(5). Whether or not the “action committees” were “dominated” or “interfered with” is not as clear a decision. However, the Board should not simply decide that just because the “action committees” were formed on the impetus of the employer, and meetings were held at the plant, using company office supplies, without loss of pay, that a violation of section 8(a)(2) has automatically occurred.\footnote{264} The Board, when making its decision, should have applied the Chicago Rawhide “actual domination test” and consider that these committees had been used in the past by the employer when no organizational campaign was being conducted, and that the employer stopped participating in the “action committees” as soon as

\footnote{263} For a summary of the facts, see supra notes 20-58 and accompanying text.
it heard of the union’s attempt to organize the plant. Any other decision will further develop a body of case law which promotes inefficiency within American firms by promoting business decisions based on inaccurate information. This in turn will serve, not only to hurt those firms faced with labor issues individually, but ultimately U.S. productivity in the aggregate, and American competitiveness in the international market place.

Steven I. Locke