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Introduction: Special Project - Labor Management Cooperation

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SPECIAL PROJECT:

LABOR—MANAGEMENT COOPERATION

Introduction

In the midst of the industrial strife and upheaval of the 1930s, the United States Congress, with the passage of the National Labor Relations Act (NLRA),[1] established the legal framework that regulates the rights and interests of both labor and management through an adversarial collective bargaining process.[2] As domestic businesses have expanded to serve a worldwide market, however, the modern labor-management relationship is experiencing intense pressure from foreign competition that is rattling the adversarial process' foundations. In an attempt to raise productivity and quality, many American businesses have participated in cooperative efforts with employees, focusing on employee participation in the traditionally management oriented decisionmaking process.[3] Labor unions, in order to attract additional employees and increase diminishing memberships, also have become more receptive to cooperative proposals.[4] Many of these innovative labor-management cooperative ventures, designed to bolster the marketability of United States companies, have created labor-management relationships that were not envisioned by the drafters of the NLRA, and, indeed, some of which do not fit within the current labor law scheme at all. This potential confiict between cooperative efforts and modern labor policy has provoked a study by the United States Department of Labor to assess whether the current legal framework is adequate to meet the needs of our evolving domestic enterprises.[5]

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1. Ch. 372, § 1, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-187 (1982) (as amended)) (also referred to as the Wagner Act).

2. In the context of the NLRA, and in its usage throughout this Special Project, the term "labor" refers to both union and nonunion employees. In 1935 Congress passed the original NLRA in order to ensure legislatively that employees possess the right to organize unions and to bargain collectively with their employers. These rights are aimed at union representation, but are granted to all employees as a matter of individual choice.

3. As Deputy Under Secretary of the United States Department of Labor Stephen Schlossberg and his executive assistant, Steven Fetter, note in a recent report:

> A 1982 survey found that at least one-third of the Fortune 500 companies, with both organized and unorganized work forces, have some form of participative management or quality of work life program in operation. . . . This one-third figure reflects the whole gamut of participative programs from a mere suggestion box to state-of-the-art experiments in worker and union involvement in traditionally exclusive management areas.

Schlossberg & Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595, 596 (1986) (footnote omitted).

4. Comment, *The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?*, 72 MINN. L. REV. 173, 178 (1987).

5. Schlossberg & Fetter, *supra* note 3, at 595. The preface to the initial study reads in perti-

A current example of the juxtaposition of the new labor-management cooperative approach to industrial relations[6] and the established federal labor laws is the labor agreement entered into by General Motors Corporation and the United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) setting forth certain terms and conditions of employment[7] for the Saturn facility, General Motors' new subsidiary located in Spring Hill, Tennessee.[8] Among the provisions of the Saturn Agreement is a recognition clause in which General Motors acknowledges that the UAW will be the labor representative at the Saturn plant prior to the hiring of the start-up employees.[9] Relying on sections 7 and 8(a)(1), (2), and (3) of the NLRA,[10] the National

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> Potential conflict between current Federal labor laws and labor-management cooperative efforts has led the U.S. Department of Labor to embark on a study, using its own resources and inviting the assistance of outside experts, to review the nation's labor laws and collective bargaining traditions and practices that may inhibit improved labor-management relations. The study is designed to assess whether the existing framework impedes, or, indeed, totally bars, many of the cooperative efforts the Department is encouraging and publicizing; and, if so, whether, through interpretation or modification, the laws can be made to support both the ingredients and the goals of labor-management cooperation rather than conflict with them.

U.S. DEP'T OF LABOR, BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, *U.S. Labor Law and the Future of Labor-Management Cooperation* preface (1986).

6. Labor-management cooperation is not a new phenomenon in the United States. In the 1920s some private railway carriers maintained employer-employee committees that had been established during World War I. *See* Guzda, *Industrial Democracy: Made in the U.S.A.*, 107 MONTHLY LAB. REV., May 1984, at 26.

7. Memorandum of Agreement Between Saturn Corp. and the United Auto Workers, June 28, 1985, *reprinted in* Daily Lab. Rep. (BNA) No. 107 (June 4, 1986) (LEXIS, Labor library, DLABRT file) [hereinafter Saturn Agreement]. The Saturn Agreement goes on to detail the various structure and responsibilities of the work units at the plant.

8. General Motors and the UAW committed to the Saturn Project with the expectation that their extraordinary partnership would enable General Motors to compete in the subcompact car market. *See* Saturn Agreement, *supra* note 7, at 1.

9. *See id.* at 2. The full text of the recognition clause reads:

> The success of Saturn is fully dependent on its people. Hiring and retention of experienced, dedicated personnel is essential. It is recognized that the best source of such trained automotive workers is found in the existing GM-UAW workforce. Therefore, to insure a fully qualified workforce, a majority of the full initial complement of operating and skilled technicians in Saturn will come from GM-UAW units throughout the United States.
>
> During the period of organization and start-up, certain particular skilled personnel will be required, including operating technicians and skilled technicians, virtually all of whom will come from UAW-represented units; therefore, the UAW is recognized as the bargaining agent for the operating and skilled technicians in the Saturn manufacturing complex.

Id.

10. Section 7 of the NLRA protects employee organizational rights, including their freedom "to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities," as well as their right "to refrain from any or all such activities." 29 U.S.C. § 157 (1982). Section 8(a)(1) makes employer interference with these rights an unfair labor practice. *Id.* § 158(a)(1). The Foundation claimed that General Motors' recognition of the UAW as the exclusive bargaining agent before any employees were actually hired interfered with rights of future employees to choose their own form of representation. *See* Letter

Right to Work Legal Defense Foundation, Inc. (the Foundation)[11] filed unfair labor charges with the National Labor Relations Board (the NLRB) challenging the Agreement's premature recognition of the UAW as the bargaining agent for Saturn employees and the implementation of a discriminatory hiring policy giving UAW members preferential status. In dismissing the Foundation's charges, the General Counsel for the NLRB concluded that General Motors' recognition of the UAW was not premature.[12] The General Counsel maintained that the Agreement's pre-employment agreement simply conditioned recognition on the UAW's attainment of a majority status at the Saturn facility.[13]

The UAW-General Motors Saturn Agreement represents an alternate managerial philosophy under which management embraces labor as a partner in the actual decisionmaking hierarchy of the enterprise. The bedrock principle motivating this cooperative effort is one of

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from Rossie D. Alston, Attorney for the National Right to Work Legal Defense Foundation, to Rosemary Collyer, General Counsel, Division of Advice of the NLRA 5, 7 (July 16, 1986) [hereinafter Alston Letter] (copy on file with the *Vanderbilt Law Review*).

The Foundation also claimed that the recognition of the UAW constituted unlawful employer support of a labor organization, in violation of § 8(a)(2). *Id.* at 5. For a discussion of § 8(a)(2), see generally *infra* Special Project Note, *Future Cooperative Efforts* 545.

Section 8(a)(3) prohibits discrimination in hiring practices, although it does allow the use of a union security clause if the union meets certain criteria. *See* 29 U.S.C. § 158(a)(3) (1982). Under a union security clause, an employee may be required to join a union as a condition of employment. A union receiving unlawful employer support under § 8(a)(2) cannot meet the § 8(a)(3) requirements, and thus cannot use a union security clause in its collective bargaining contract. The Foundation argued that because the UAW had received unlawful support, it could not qualify for this exception and was thus bound by the general prohibition of discrimination. *See* Alston Letter, *supra*, at 6.

11. The National Right to Work Legal Defense Foundation describes itself as an organization dedicated to "[d]efending America's working men and women against the injustices of compulsory unionism." Notation from Foundation's letterhead (on file with the *Vanderbilt Law Review*).

12. *NLRB General Counsel Orders Dismissal of Charges Regarding UAW-GM Saturn Pact*, Daily Lab. Rep. (BNA) No. 107 (June 4, 1986) (LEXIS, Labor library, DLABRT file) [hereinafter Daily Lab. Rep. No. 107]; *see* Comment, *supra* note 4, at 175 n.8 (discussing the general format for dealing with an unfair labor practice charge is dealt).

13. *See* Daily Lab. Rep. No. 107, *supra* note 12. The General Counsel's decision appears to be tbe result of a two-part analysis. First, recognizing "the validity of the agreement to vie preferential hiring rights to current General Motors employees who are represented by the UAW," the General Counsel determined that the Agreement was consistent with prior NLRB and United States Supreme Court cases that required employers to bargain with unions about the effects of a managerial decision which might have adverse consequences for union workers. *Id.* Then, by reading into the Saturn Agreement a clause that conditions recognition upon the UAW's attainment of a majority status at Saturn, the General Counsel found that General Motors did not prematurely recognize the UAW. As the General Counsel explained, "[T]he legal effect of the agreement is only that General Motors will recognize the UAW in the future, if and when a majority of employees working at Saturn freely choose to be represented by the UAW at that facility." *Id.* To further support its position, the General Counsel noted that the Saturn Agreement, having no fixed term, was not a contract bar. Thus, the employees to be hired at Saturn, through petition to decertify the UAW or to select another union, could freely exercise their right to be unrepresented or to be represented by another union. *Id.*

human relations: the more that workers participate in the operations of the business, the more workers feel their individual contributions add to the quality and success of the product. The desired results are a more congenial collective bargaining relationship and a more competitive product. As the Foundation's challenge of the Saturn Agreement and, consequently, the General Counsel's liberal interpretation of the Agreement[14] demonstrate, however, current labor policies may impede rather than encourage this new cooperative approach to labor-management relations.[15]

This apparent ambiguity concerning the legality of labor-management cooperation raises several questions about the state of our labor policy and the future of our business community. For example, what are the various interests at stake in the modern labor-management relationship and how have these interests changed or evolved since the passage of the original NLRA? What has been the response of the courts and Congress to these changes? Are the underlying reasons that prompted the passage of the original NLRA still viable today, or have they been replaced by more immediate concerns? If cooperative efforts are designed to ameliorate the adversarial nature of the labor-management relationship, to what extent do such efforts affect, supplement, or replace the institution of collective bargaining and the protections it affords to employers and employees alike? Finally, is current labor law actually an impediment to certain types of cooperative efforts; or can the present legal framework be interpreted to accommodate these new situations and avoid such impediments?

This Special Project addresses these and other related questions by exploring gaps in current labor law, as well as potential areas of overlap and conflict between various sections of the NLRA and judicially-created doctrines. Initially, the Special Project confronts a potential hurdle faced by most cooperative efforts by analyzing the legislative history and judicial development of section 8(a)(2) of the NLRA. The Special Project then examines the current judicial doctrine dividing the subjects of collective bargaining into "mandatory" and "permissive" categories, and applies that doctrine's adversarial scheme to a cooperative environment. Third, the Special Project explores the problem of employees who fall outside of the traditional collective bargaining process to discern whether they will be omitted by future cooperative efforts as well, and, if so, what other protections are available to them. Finally, the Special Project provides a comparative perspective by examining labor-management relations in other industrialized democracies and ex-

14. *See id.*

15. Comment, *supra* note 4, at 179.

amines how these governments implement more extensive cooperative structures than those presently found in the United States.