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UNION REPRESENTATIVES AS CORPORATE DIRECTORS: THE CHALLENGE TO THE ADVERSARIAL MODEL OF LABOR RELATIONS

Robert A. McCormick*

Maybe the adversary relationship is precisely what is wrong with the American labor movement.

—Douglas Fraser

I'm afraid it's a sellout.

—Maye L. Amos, Chrysler employee

In 1979, during the collective bargaining negotiations between the United Auto Workers Union ("UAW") and the Chrysler Corporation, the parties agreed upon a union proposal of a revolutionary nature in American labor-management relations. Chrysler Chairman Lee A. Iacocca would recommend that Douglas Fraser, President of the UAW, be elected to the board of directors of the corporation; in return, the union granted wage and benefit concessions, and agreed to work for the company's loan guarantee plan. In May 1980, Chrysler shareholders accepted the recommendation of the nominating committee, and Fraser, in his words, "became the first trade unionist to serve on the board of a major private corporation in this country."
Whether this event constitutes a temporary aberration in industrial relations, born of the particular circumstances of the employer and the innovative leadership of the union, or whether it represents a trend toward the European experience of employee representation in management affairs, is the subject of some debate and conjecture. Nevertheless, it is difficult to overstate the magnitude of this departure from the role played by unions during the past century in their relations with management. Organized labor and management have long viewed each other as adversaries. At the same time, unions have traditionally considered their interests to be served best by a limited role and have thus spurned broader managerial activities within enterprises employing their members. The acceptance of a role in corporate governance by a union official represents a major departure from labor's traditional approach and constitutes an experiment with nonadversarial employment relations at the policy-making level of the enterprise. In this venture, the UAW and Chrysler have ushered in an entirely new vision of American union representative on the company's governing board, see Wall St. J., Sept. 17, 1980, at 4, col. 1, with the major condition being that approval of the undertaking be obtained from the Department of Justice and the Labor Department, see Wall St. J., Mar. 2, 1981, at 3, col. 3. The Justice Department, however, was "unable to state a present intention to institute or not to institute antitrust enforcement proceedings challenging contemporaneous service by members of the UAW on the boards of AMC and Chrysler." Interlocking Directorates—Union Representation, 5 TRADE REG. REP. (CCH) ¶ 50,425, at 55,968 (Feb. 26, 1981). The Labor Department, on the other hand, did approve the arrangement. See Labor Department on UAW AMC Board Seat, 2 LAB. REL. REP. (BNA) No. 106, at 147 (Feb. 23, 1981) (finding that the UAW-AMC agreement would not violate the Taft-Hartley or Landrum-Griffin Acts).

A few initiatives similar to these recent developments in the automobile industry have occurred in other settings as well. See N.Y. Times, Mar. 5, 1982, at 32, col. 4 (midw. ed.) (Pan American World Airways nominated an employee who was also a union official to its board of directors); cf. Wall St. J., Apr. 28, 1972, at 34, col. 1 (employees of United Air Lines defeated in an attempt at stockholders' meeting to gain representation on the company's board).


6. See Senser, Industrial Democracy, Ltd., 107 COMMONWEAL 489 (1980); Note, Serving Two Masters: Union Representation on Corporate Boards of Directors, 81 COLUM. L. REV. 639, 640 (1981) ("Should this first example of employee representation in a major corporation prove successful, it is likely that the practice will become increasingly common."); More Unions Knocking at Boardroom Doors?, INDUS. WK., Nov. 12, 1979, at 19.

7. At the same time, the UAW and the automobile manufacturers are at the forefront of innovations aimed at increasing worker involvement in production decisions. See The New Industrial Relations, Bus. Wk., May 11, 1981, at 84; infra note 114.
labor-management relations, the legal ramifications of which remain largely unexplored. The question must be asked, therefore, whether and to what degree the National Labor Relations Act ("NLRA") will accommodate deviations from the conventional model of labor-management relations.

Moreover, further questions arise concerning whether this departure from a limited, adversarial union role will be beneficial for labor. A substantial majority of union officials remain skeptical about this new arrangement; some reject the approach outright while others are more ambivalent, but all must certainly

8. Some recent commentary, however, has explored certain aspects of the question. See Note, supra note 6; Comment, Broadening the Board: Labor Participation in Corporate Governance, 34 SW. L.J. 963 (1980); Note, Employee Representative on the Corporate Board of Directors: Implications Under Labor, Antitrust, and Corporate Law, 27 WAYNE L. REV. 367 (1980).


10. Following his election to the Chrysler board, Fraser said: "This development naturally has stirred a vigorous debate in management and labor circles. Some view it as a breakthrough, others as an abomination." Fraser, supra note 4, at 13. This is not the first time, however, that the UAW and the automobile manufacturers have negotiated arrangements perceived as revolutionary at the time but now considered standard practice. For example, in 1948 the union and the manufacturers negotiated the first cost-of-living escalator provisions, and in 1955 the UAW's supplemental unemployment benefit program was first agreed upon as part of a collective bargaining contract. Today, such programs are commonplace. See id.

11. See, e.g., Letter from Ted Reed, Dir. of Research, Int'l Union of Operating Eng'rs, to author (Mar. 19, 1981) (union opposes concept of labor representatives on corporate governing boards); Letter from Robert L. Wartinger, Vice Pres., Int'l Typographical Union, to author (Mar. 13, 1981) (rejecting notion of placing union officials on corporate boards, because to do so would create an undesirable "one with management" impression); Letter from Walter L. Davis, Dir. of Info., United Food & Commercial Workers Int'l Union, to author (Mar. 5, 1981) (stating that Union President William H. Wynn has publicly opposed participation on corporate boards); Letter from Victor W. Fuentealba, Pres., Am. Fed. of Musicians, to author (Feb. 19, 1981) ("there is a definite conflict of interest when a union representative serves on the governing board of an employer"); Letter from Reginald Newell, Dir. of Research, Int'l Ass'n of Machinists & Aerospace Workers, to author (Feb. 9, 1981) ("If anything, the attacks on organized labor in recent years by Corporate America and the the New Right have reinforced our negative views . . . .") (all letters on file with the Journal of Law Reform).

12. See, e.g., Letter from Wilbur Daniels, Vice Pres., Int'l Ladies Garment Workers Union, to author (Feb. 18, 1981) (no position taken on the question of union representatives serving as corporate directors); Letter from William Casamo, Exec. Ass't to the Pres., United Paperworkers Int'l Union, to author (Feb. 11, 1981) (noting that the subject has never been "seriously addressed or entertained," and concluding that "there is no genuine interest or concern" with the question); Letter from Charles R. Armstrong, Gen. Counsel, United Rubber, Cork, Linoleum & Plastic Workers of Am., to author (Feb. 6, 1981) (no firm union position, either pro or con, on question of union representation)
recognize the possible ramifications of the Chrysler-UAW experiment for the future of labor policy in this country.13

This Article addresses these questions first by discussing the predominant philosophical approach adopted by unions in their dealings with management, and then describing several ways in which the labor laws reflect this traditional model of employment relations by showing, first, that the influence of unions has been limited to circumscribed categories of business decisions. The Article next examines decisions made by the National Labor Relations Board ("NLRB") and the courts that have carefully sought to separate employer from employee, assuming their interests to be inherently antagonistic. Then follows an evaluation of the NLRB's treatment of deviations from the traditional model of labor-management relations, with special emphasis given those circumstances under which union officials will be permitted to assume an active, participatory function in the entire spectrum of business decisions. Finally, the Article concludes by considering the implications, particularly for the individual member-employee, of a broader role for labor in corporate governance.

I. THE ADVERSARIAL TRADITION IN LABOR-MANAGEMENT RELATIONS

At the outset, it is clear that the involvement of employee representatives in the whole range of management decisions represents a fundamental departure from the theory and practice of trade unionism as followed, in the main, during the past century in this country. Despite periodic departures from the predominant approach, the prevailing spirit of the American trade-union movement has been that of "business unionism"; unions have primarily, though not exclusively, endeavored to improve wages, hours, and working conditions for their members, and have been

(13. See The $203 Million Seat on the Board, Newsweek, Nov. 5, 1979, at 82 (Lane Kirkland, then Secretary-Treasurer and now President of the AFL-CIO, stated he would "wait to see how the whole thing works out"); Letter from Anne C. Green, Dir. of Research and Educ., Int'l Chemical Workers Union, to author (Feb. 18, 1981) ("Certainly the idea is exciting and a great deal of discussion has taken place both within the Executive Board and [among] members of this union.") (on file with the Journal of Law Reform). But cf. N.Y. Times, Nov. 16, 1981, at A1, col. 4 (while not rejecting the possibility for union representation on corporate boards, AFL-CIO President Kirkland argued that control over pension funds and other corporate assets has far greater potential as a source of union strength).
only secondarily concerned with broader issues of social and corporate policy.\(^\text{14}\) This orientation emerged as the central force behind the Federation of Organized Trades and Labor Unions formed a century ago\(^\text{15}\) and reorganized in 1886 as the American Federation of Labor.\(^\text{16}\) The theory rejected utopian and radical approaches to relations between workers and owners and adopted a "philosophy of pure wage consciousness,"\(^\text{17}\) which viewed the interests of management and labor to be inherently in conflict. The purpose of unions was to maximize wages and better the terms and conditions of employment for their members, because the goal of managers, on the other hand, was to minimize labor costs and to secure a competent work force at the lowest wage the market permitted.

Unions considered their interests to be served best by a limited focus, and, as a result, repudiated more expansive managerial roles within corporate enterprises. Samuel Gompers, the Federation's first leader and influential early thinker, accepted, if not embraced, capitalism and sought to enlarge the bargaining power of the industrial worker.\(^\text{18}\) Gompers believed that capital and labor were natural adversaries in a struggle to reap the profits of industry. He did not believe workers and management shared common interests; rather, each sought distinct and different ends.\(^\text{19}\) In his view, therefore, labor's role was solely to nego-

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14. See A. Rees, The Economics of Trade Unions 2 (1962). Regarding the theory and practice of trade unionism in the United States, see generally I. Bernstein, The Lean Years (1960); A. Blum, A History of the American Labor Movement (1972); H. Pelling, American Labor (1960); M. Perlman, Labor Union Theories in America (1958); S. Perlman, A Theory of the Labor Movement (1928).

The program of the Industrial Workers of the World ("I.W.W."), which began in 1905, probably represented the most radical departure from the traditional trade union approach. Its aim was the immediate abolition of the wage system and the elimination of capitalism. Like other challenges to conventional trade unionism, it faltered.

The overwhelming bulk of American workingmen remained as fundamentally opposed to the I.W.W. philosophy as were their employers or the middle class generally. The American Federation of Labor, which lost no opportunity to discredit and attack its radical rival, continued to dominate the labor movement and revolutionary unionism made no real headway against business unionism.


15. See F. Dulles, supra note 14, at 157-61.


17. See S. Perlman, supra note 14, at 197-207.


19. Gompers observed that "[t]here has never yet existed identity of interests between buyer and seller of an article. If you have anything to sell and I want to buy it your interest and mine are not identical." 7 U.S. Industrial Comm'n, Report, testimony
tiate on behalf of workers.

By and large, the pragmatic posture espoused by Gompers still inheres in the approach of most unions toward their relations with management. Indeed, while most unions have not adopted an official position on the propriety of union officers' taking positions in corporate governance, many question the wisdom of the broader role secured by Fraser. This new venture is seen by numerous union officials as impractical, illogical, or not feasible, while others see the arrangement as useful only when the employer is in severe financial difficulty. Among the concerns articulated is the fear that by obtaining positions on governing boards, unions will become "one with management" — with the result that unions' ability to improve working conditions and redress grievances for employees will be diminished.

at 655 (1901) (statement of Samuel Gompers); see also M. PERLMAN, supra note 14, at 271 (Gompers felt "that those who thought that labor management would come to recognize one another's rights and share identical interests were talking of something 'very remote and very far removed'") (quoting id.). The Preamble to the American Federation of Labor's first constitution embodied Gompers' view of this inherent conflict: "Whereas . . . a struggle is going on in all the civilized world between the Capitalists and the Laborers which grows in intensity from year to year . . . . " P. JACOBS, OLD BEFORE ITS TIME: COLLECTIVE BARGAINING 28 (1963).


24. See letter from Walter L. Davis, supra note 11. Thus, for example, members of the United Food & Commercial Workers International Union who were employees of the Rath Packing Company — which had suffered through five consecutive years of losses — purchased 60% of the company's stock and thereafter appointed 10 of the 16 members of the corporate board. Woodworth, Workers Take Over, N.Y. Times, June 25, 1980, at A27, col. 1.


26. See id; see also Address by William W. Winpisinger, Gen. Vice Pres., Int'l Ass'n
Although some union officials appear receptive to arrangements that would allow labor to divide the number of seats on corporate boards equally with management, they view a single union voice as "token" representation with "diluted" effect. 27 The very strong perception continues that relations between labor and management are intrinsically antagonistic, so that collaborative efforts will not ultimately benefit employees; 28 as well, there remains a general preference for a limited approach to labor-management relations that eschews roles traditionally assigned to management. 29 The comments of one labor official embody this prevailing union sentiment:

Despite all the institutional advertising that industry does about its social responsibilities, the purpose of business is to make a profit. If profits can be increased by holding down wages, speeding up production or replacing workers with machines, this is the way it will be done.

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of Machinists & Aerospace Workers, at the University of Michigan-Dearborn (Dec. 2, 1976) ("workers can receive a better share of the fruits of free enterprise at bargaining tables than in board rooms") (Mr. Winpisinger is now president of the Association) (on file with the Journal of Law Reform).


28. See, e.g., 1980 UE REP., supra note 22, at 16 ("There are irreconcilable differences between labor and management on the company level because profit is produced from the labor power of workers."); More Unions Knocking at Boardroom Doors?, supra note 6, at 20 (Teamsters President Frank Fitzsimmons observed: "Labor and management have always been in an adversary position, and I do not think putting a union official on the board of directors . . . will change that position."); Telephone interview with Arthur F. Kane, supra note 20.

29. See, e.g., Letter from William J. Donlon, supra note 21 ("Historically, . . . our organization has preferred to have management personnel assume those responsibilities of management."); Letter from Francis X. Burkhardt, Dir. of Research, Int'l Bhd. of Painters and Allied Trades, to author (Feb. 10, 1981) ("With regard to the management of operating costs, sales, marketing, etc. an advisory position for union representatives is as far as I would urge our Local Union officers to push for . . ."). (on file with the Journal of Law Reform). Chrysler Chairman Iacocca, however, espouses a different perspective:

I have to co-operate with the union because I got the guy on my board. I'm forced into dialogue. How can I lose? You say, "Oh yeah, but ideologically, they got their nose in the tent, the union will find out your decision to close a plant." Well, hell, they're gonna find out one way or another. I don't look at it like a purist who says, "Oh my God, my management prerogatives are going up in smoke." I think the world is a-changin'.

Some Sayings from Chairman Lee, Detroit Free Press, Sept. 14, 1980, at E9, col. 1; see also Simison, Chrysler Lauds Strong Performance of UAW's Fraser as Board Member, Wall St. J., Mar. 12, 1981, at 33, col. 4.
As long as these are the hard, cold realities of the basic relationship between management and labor, the union’s place is not at the director’s table, making management decisions, but at the bargaining table, protecting and pressing the rights of the work force.\textsuperscript{50}

\section*{II. The Limited Role of Unions Under the Law}

The NLRA institutionalized the concept of the limited union role, assigning to labor and management respective areas of sovereignty. The traditional union emphasis upon wages, hours, and working conditions\textsuperscript{81} is embodied in the distinction between mandatory and permissive subjects of bargaining.\textsuperscript{82} One effect of this dichotomy is that although a union may insist that the employer bargain with it regarding subjects deemed mandatory, the right is reserved to the employer to implement unilaterally decisions concerning those subjects deemed permissive.\textsuperscript{83} While the union might have the statutory right to bargain about the effects of a decision,\textsuperscript{84} its right to involvement in the initial deliberations of an employer exists only in circumscribed areas. As Fraser made clear when he took the directorship, this limited sphere of influence motivated the UAW leadership to seek a broader role in directing the Chrysler Corporation: “Workers need and deserve a voice in determining their own destiny. To be effective, that voice must be heard before decisions are made, rather than afterward. We need to play a role in the decision-making process instead of reacting once the corporation has set its

\begin{itemize}
\item \textsuperscript{50} Address by William W. Winpisinger, \textit{supra} note 26, at 5-6 (emphasis in original).
\item \textsuperscript{31} See S. Gompers, \textit{Labor and the Employer} 286 (1920) (“Among the matters that properly come within the scope of collective bargaining are wages, hours of labor, conditions and relations of employment . . . . But there is no belief held in the trade unions that its members shall control the plant or usurp the rights of the owners.”); J. Getman, \textit{Labor Relations} 40 (1978) (“The unions have rarely sought to become involved in decisions concerning production, except to the extent such decisions have direct impact on the continuation of existing jobs. Nor have they become involved in questions of management personnel. They have been content to leave such decisions to management.”).
\item \textsuperscript{33} See Allied Chemical & Alkali Workers Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).
\end{itemize}
A. The Mandatory-Permissive Dichotomy

In the absence of a duty to bargain with a union, an employer has always possessed complete discretion, except as otherwise limited by law, to order the terms and conditions of employment and to determine all other business matters that could affect employees. Because a great many decisions bear upon conditions of employment, the degree to which employees' selection of a union curtails this freedom is a question that goes to the heart of labor policy which has long proven difficult to resolve.  

The NLRA originally contained no definition of collective bargaining. Thus, at one time, it could be argued forcefully that — although the Act gave legal status to the representative selected by a majority of employees and directed the employer to "bargain collectively" with that representative — the subjects to be negotiated were to be left solely to the parties. It has now long been recognized, though, that the NLRB has the authority to determine the scope of subjects about which bargaining may be compelled. As early as 1940, the Board assumed this authority, and Congress soon endorsed the Board's approach to delimiting mandatory subjects of bargaining. Section 8(d) of the

35. Fraser, supra note 4, at 13.
37. See Cox & Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 HARV. L. REV. 389, 401 (1950) ("There are few more troublesome problems in industrial relations than those of determining the respective responsibilities of management and union for decisions which are of practical concern to both the employer and the employee.").
38. Section 8(a)(5) of the NLRA makes it unlawful for an employer to "refuse to bargain collectively" with the employee representative, subject to § 9(a). 29 U.S.C. § 158(a)(5) (1976). Section 9(a) establishes that the employee representative is the exclusive representative for the purposes of collective bargaining regarding rates of pay, wages, hours of employment, or other conditions of employment. 29 U.S.C. § 159(a) (1976).
39. See, e.g., 79 Cong. Rec. 7659 (1935) ("The bill does not go beyond the office door. It leaves the discussion between the employer and the employee, and the agreements which they may or may not make, voluntary.") (remarks of Sen. Walsh).
40. See Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 219 n.2 (1964) (Stewart, J., concurring); Cox & Dunlop, supra note 37, at 397.
41. See Singer Mfg. Co., 24 N.L.R.B. 444 (1940), enforced, 119 F.2d 131 (7th Cir. 1941); Wilson & Co., 19 N.L.R.B. 990, 999, enforced, 115 F.2d 759 (8th Cir. 1940).
42. During consideration of the Taft-Hartley amendments, the House bill contained an actual list of mandatory subjects excluding all others. See H.R. 3020 § 2(11), 80th Cong., 1st Sess. (1947), reprinted in 1 N.L.R.B., LEGISLATIVE HISTORY OF THE LABOR
NLRA, as enacted in 1947, defined collective bargaining as "[t]he performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

Notwithstanding the open-endedness of the statute, however, "wages, hours, and other terms and conditions of employment" were undeniably words of limitation, for "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which union members are employed." Though the further elucidation of "wages" and "hours" has caused relatively little difficulty, the nature of "conditions of employment" has been hotly debated and vigorously litigated for many years. A wide variety of business decisions greatly affect the job security and working conditions of employees. Decisions regarding product choice and design, the substitution of labor-saving devices, plant relocation or closure, and subcontracting, although traditionally considered to be appropriately within the sole discretion of management, clearly have grave implications for employees. Indeed, often-times the very existence of jobs may be at stake. Nevertheless, numerous interpretations of the Act have excluded the influence of organized labor in these critical areas.

For many years, the Board espoused the view that an employer had no duty under NLRA section 8(a)(5) to consult with the bargaining representative before deciding matters such as subcontracting and plant closure, so long as the decision was not


motivated by anti-union animus.⁴⁷ Board rulings required only that the employer bargain with the union concerning the effects of such decisions, as distinct from the decisions themselves.⁴⁸ Similarly, the Supreme Court early, and consistently thereafter, interpreted the law as embracing the customary, limited approach toward the union role,⁴⁹ and relied upon existing contracts to determine the subjects that the parties themselves considered appropriate for collective bargaining.⁵⁰ Thus, the circumscribed sphere of influence traditionally embraced by organized labor became a significant element of the legal framework governing labor-management relations.

This approach, however, has not been followed uniformly by the Board, which in 1962 adopted a much more expansive view of the term “conditions of employment.” In essence, the Board began to look at the effect of employer decisions upon the bargaining unit in determining whether a mandatory bargaining subject was involved. As a result, the Board held that an employer violated its duty to bargain by unilaterally subcontracting, for economic reasons only, work formerly performed by unit employees.⁵¹

This constituted a major expansion of the role traditionally sought by and assigned to labor. If unions had the right, and employers the correlative duty, to bargain about all decisions even tangentially affecting conditions of employment, there would be an enormously broad range of business decisions subject to mandatory bargaining. This approach by the Board, then, constituted a fundamental challenge to the limited model of industrial relations, and came before the Supreme Court in the controversial case of Fibreboard Paper Products v. NLRB.⁵²

⁴⁷. See Mahoning Mining Co., 61 N.L.R.B. 792, 803 (1945) (“the Board has never held that . . . an employer may not in good faith . . . change his business structure, sell or contract out a portion of his operations, or make any like change . . . without first consulting the bargaining representative”); see also Walter Holm & Co., 87 N.L.R.B. 1169 (1949) (“Section 8(a)(5) does not require an employer to consult with its employees’ representative as a prerequisite to going out of business for nondiscriminatory reasons”).
⁴⁸. See cases cited supra note 34.
⁴⁹. See NLRB v. American Nat’l Ins. Co., 343 U.S. 395, 408 (1952) (collective bargaining “has been considered to absorb and give statutory approval to the philosophy of bargaining as worked out in the labor movement in the United States”) (quoting Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944)).
⁵¹. See Town & Country Mfg. Co., 136 N.L.R.B. 1022, 1027 (1962) (“the elimination of unit jobs albeit for economic reasons, is a matter within the statutory phrase ‘other terms and conditions of employment’ and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act”), enforced, 316 F.2d 846 (5th Cir. 1963).
B. Fibreboard and Its Progeny

Fibreboard presented the narrow issue whether an employer's decision to subcontract work would be considered a mandatory subject of bargaining when, as a result, employees in the bargaining unit were replaced by employees of an independent contractor to perform the same work under similar working conditions. The Court concluded that bargaining over this subcontracting decision could be compelled,\(^{53}\) though it expressly restricted its holding to the particular facts of the case. Justice Stewart authored an influential concurrence, setting forth his view of the appropriate role of unions in business decisionmaking:

Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions [as liquidation of assets or investment in labor-saving devices], which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.\(^{54}\)

The Supreme Court's ruling, however, only defined the contours of the debate. Cases decided after Fibreboard evinced a marked disagreement between the Board and the courts regarding the right of unions to bargain about decisions arguably

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53. The Court marshalled several factors to support its conclusion that the decision to subcontract should be considered a mandatory bargaining subject. First, the decision had the effect of terminating employment, thus falling within the literal scope of the statutory "terms and conditions of employment" phraseology. Id. at 210. Second, compelled bargaining in the situation at hand effectuated the purposes of the Act by "bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace." Finally, the Court found that subcontracting decisions frequently were part of collective bargaining contracts, indicating that labor and management considered the subject to be one appropriate for negotiation. Id.

54. Id. at 223 (Stewart, J., concurring).
within the “core of entrepreneurial control.” The Board — despite substantial opposition from the courts of appeals — continued to hold that economically motivated decisions to discontinue operations and relocate,\(^{55}\) to reorganize marketing operations,\(^{56}\) or to close part of a business\(^ {57}\) were issues about which labor could insist upon collective bargaining.\(^ {58}\)

C. First National Maintenance Corp. and the Limited Scope of Collective Bargaining

The Supreme Court, in *First National Maintenance Corp. v. NLRB*,\(^ {59}\) recently addressed this fundamental disagreement over the scope of an employer’s obligation to negotiate with the union. The employer had elected to terminate an unprofitable maintenance and service contract, which prompted a union demand to bargain with the employer over the decision.\(^ {60}\) The employer refused, answering that the decision was purely economic and thus beyond the scope of the union’s functions. The NLRB ruled, however, that the employer could be compelled to bargain on this subject,\(^ {61}\) and the Court of Appeals for the Second Circuit enforced the Board’s order.\(^ {62}\)

The Supreme Court disagreed. It characterized the employer’s


56. See International Harvester Co., 236 N.L.R.B. 712 (1978), enforced on other grounds, 618 F.2d 85 (9th Cir. 1980).


58. See generally Ozark Trailers, Inc., 161 N.L.R.B. 561, 566 (1966) (“whether a particular management decision must be bargained about should [not] turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving ‘major’ or ‘basic’ change in the nature of the employer’s business”). In fact, however, the Board’s approach has not been wholly consistent on this question. See First Nat’l Maintenance Corp. v. NLRB, 101 S. Ct. 2573, 2578 & n.10 (1981).


60. The union demanded as well that the employer engage in collective bargaining over the effects of the decision to terminate this part of the business. *Id.* at 2576; see supra text accompanying notes 34-35.


decision as involving a change in the scope and direction of the enterprise, akin to a decision about whether to be in business at all. Quoting Justice Stewart's Fibreboard concurrence, the Court found this subject to be "'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'"63 Significantly, the Court again endorsed reliance upon industrial custom for determining whether labor and management themselves considered the matter to be properly a part of collective bargaining, and found it to be "relatively rare" that contract provisions would give a union the right to participate in decisions concerning "alteration of the scope of the enterprise."64 The Court set forth an amorphous standard for determining the nature of compulsory bargaining subjects: "bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business."65 Under this calculus, the Court concluded that the potential harm from requiring negotiations over the contract termination decision outweighed any benefit to be gained from union participation. Further, the Court found that compelled bargaining regarding an employer's decision to cancel a portion of its business could hamper desired flexibility in management judgments, without significantly augmenting the flow of constructive ideas into the decisionmaking process.66

While application of the balancing test to particular business decisions remains to be developed, there is little question that the range of subjects about which bargaining may be compelled by labor organizations will, in part, be circumscribed by the range of subjects about which labor and management have bargained in the past. Thus, the Court has shaped the future of collective bargaining according to the historically limited pattern. The burden of attempting to expand the traditional areas

63. 101 S. Ct. at 2580 (quoting Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 223 (Stewart, J., concurring)).
64. 101 S. Ct. at 2583.
65. Id. at 2581.
66. Id. at 2586. Justice Brennan, joined by Justice Marshall, dissented. Citing the 1979 negotiations between the UAW and Chrysler as a factor contributing to the company's ability to stay afloat financially, he argued that union involvement in managerial activities might contribute greatly to mutually satisfactory decisionmaking. In his view, therefore, the majority had taken account only of management interests, and had failed "to consider the legitimate employment interests of the workers and their Union." Id. (Brennan, J., dissenting).
to include "management decisions that have a substantial impact on the continued availability of employment." After First National Maintenance Corp., rests with the unions.

In seeking the Chrysler appointment, Fraser made it apparent that the union had been motivated, to a substantial degree, by frustration over its inability to affect those management decisions having a profound impact on member-employees. "Plant closings and relocations have hit Chrysler hard. Some may be inevitable, others shortsighted. The Chrysler Board needs to be sensitized to the suffering certain decisions inflict on workers." Bargaining about severance pay and other "effects" of those decisions was deemed wholly inadequate for addressing the issues involved — yet they were bound both by tradition and by law to this limited role.

III. THE ENTERPRISE DIVIDED: LABOR AND MANAGEMENT AS SEPARATE AND DISTINCT

In serving simultaneously as corporate director and president of the union, Fraser crosses a demarcation line that Congress, the NLRB, and the courts have painstakingly sought to define and preserve. Judicial and NLRB interpretations of the NLRA, in keeping with the intent of the 1947 congressional amendments, have distinguished between "employees," who alone enjoy the protections afforded by the Act, and various categories of persons whose interests have been considered more appropriately allied with management. The purpose and effect of this distinction has been to separate employer from employee, whose separate interests have been viewed as being, by their very nature, antagonistic.

67. Id. at 2581.
68. Fraser, supra note 4, at 13.
69. See, e.g., NLRB v. Mt. Clemens Metal Products Co., 287 F.2d 790, 791 (6th Cir. 1961) ("The employer is under a duty to refrain from any action which will place him on both sides of the bargaining table."); Nassau & Suffolk Contractors' Assoc., Inc., 118 N.L.R.B. 174, 187 (1957) ("Employees have the right to be represented in collective bargaining negotiations by individuals who have a single-minded loyalty to their interests.") (emphasis deleted); Bausch & Lomb Optical Co., 108 N.L.R.B. 1555-1557 (1954) ("one purpose of the Act was to draw a clear line of demarcation between supervisory representatives of management and employees because of the possible conflicts in allegiance"). This does not mean, however, that Fraser has violated the labor laws by pursuing dual roles as union president and corporate director. See infra pt. IV.
70. See cases cited infra notes 90-91.
71. See infra notes 77-86 and accompanying text.
A. The Supervisor as Employer

The original provisions of the NLRA included all workers within the term "employee," and contained no disqualifying language for those exercising supervisory authority. The Board, except for a brief hiatus, ordered employers to bargain even with organizations made up entirely of foremen and other supervisory employees. In Packard Motor Car v. NLRB, the Supreme Court approved such a bargaining order over the company's arguments that management was entitled to its supervisors' loyalty. The Court held that Congress alone had the authority either to place limitations upon the right of supervisors to organize or to exclude them from the Act's coverage. Justice Douglas, in dissent, placed the implications of the majority decision for the traditional model of labor relations in broad perspective:

The present decision . . . tends to obliterate the line between management and labor . . . . It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.

. . . [I]f Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmis-

73. During the period spanning from 1942 to 1945, Board decisions took several different approaches to deciding the proper application of the Act to supervisory employees. In 1942, supervisors were excluded from rank-and-file units, Mueller Brass Co., 39 N.L.R.B. 167 (1942), though their certification in separate units was permitted, Union Collieries Coal Co., 41 N.L.R.B. 961, supplemental decision, 44 N.L.R.B. 165 (1942), even if the union were affiliated with the local representing rank-and-file employees, Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942). In a space of two years, from 1943-1945, the Board held that no union could be certified to represent groups of supervisors, except in those industries where supervisors had previously been organized. Yale & Towne Mfg. Co., 60 N.L.R.B. 626 (1945); Maryland Drydock Co., 49 N.L.R.B. 733 (1943).
takable trace of that purpose. But I find none. 76

The following year, Congress passed the Taft-Hartley Amendments to the Act. 77 Clearly motivated by the Packard decision, 78 Congress took up the Court's invitation by excluding from the definition of employee "any individual employed as a supervisor." 79 While section 14(a) of the NLRA permitted supervisors to become or remain members of a union, 80 after Taft-Hartley, foremen and other supervisors were no longer "employees" of the employer and therefore were no longer extended the protections of the Act for their concerted activities. 81 This change reflected Congress' conclusion that management was entitled to complete fidelity from its supervisors — and that union membership put supervisors' interests in conflict with those of management.

During congressional deliberations over the appropriate breadth of the exclusion of supervisors from the collective bargaining process, considerable support arose for removing supervisors from protected status only when they were affiliated, either directly or indirectly, with unions of production employees. 82 In this way, it was proposed, the problem of divided loyalty among supervisors could be met without removing their right to organize and bargain collectively. This approach, in fact, had been taken by the same Congress to obviate potential conflicts of interest among plant guards. 83 Its application to supervisors, however, was rejected on the basis that "no one, whether employer or employee, need have as his agent one who is obligated to those on the other side." 84 Therefore, the demarcation

76. 330 U.S. at 494-95 (Douglas, J., dissenting).
80. Id. § 164(a).
83. Section 9(b)(3), added by Taft-Hartley, prevented the Board from including in a rank-and-file unit "any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises." Neither could a union affiliated with a union that admitted such persons be certified to represent guards. 29 U.S.C. § 199(b)(3) (1976). But guards retained the right to organize and bargain collectively.
line between employer and employee was based not upon concerns that supervisors would have ties to particular unions, but rather upon the sentiment that supervisors protected under the NLRA might have allegiances to employees generally. Employees were on the “other side”; providing supervisors with the opportunity to organize under the Act was viewed as allying them with employees and, thus, against the interests of employers.

In amending the Act to exclude supervisors, Congress was addressing, of course, a situation different from that posed by Fraser’s election to the Chrysler Board. Nonetheless, that election contrasts vividly with the model of labor-management relations Congress envisioned, in which unions and employers had distinct and conflicting interests. Congress did not perceive unions and employers as sharing mutual and interdependent concerns, as have Chrysler and the UAW. Rather, labor and management were seen as antagonistic entities requiring legal separation and protection from one another.

B. The Manager as Employer

The adversarial model of employment relations under the Act is further illustrated by the exclusion of those persons possessing “managerial” authority from the ambit of the Act. Neither the NLRA nor any of its amendments identified and excluded this category of persons from the protections of the statute. Yet the Board, very early, developed a policy of refusing to certify, as

also S. Rep. No. 105, supra note 78, at 5 (“It is natural to expect that unless this Congress takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file.”).

85. The NLRB, in furtherance of this philosophy, has excluded persons as supervisors solely upon a finding that they had authority to act as supervisors, even if that authority is rarely if ever exercised. See, e.g., Hirsch Broadcasting Co., 116 N.L.R.B. 1780 (1956); Yamada Transfer, 115 N.L.R.B. 1330 (1956); United States Gypsum Co., 93 N.L.R.B. 91 (1951). See generally R. Gorman, Basic Text on Labor Law 36-37 (1976).

86. As to this development, Professor Cox said:

The growth of foremen’s unions unquestionably threatened a revolution in management, for to perform its responsibilities effectively the employer requires the foreman’s undivided loyalty as its principal point of contact with the workers and such loyalty cannot be secured if the foremen are psychologically allied with, or subject to the pressures of their union on behalf of, the rank and file. Cox, supra note 9, at 5. As to the legal treatment of foremen’s unions generally, see Larrowe, A Meteor on the Industrial Relations Horizon: The Foremen’s Association of America, 2 Lab. Hist. 259 (1961); Levinson, Foremen’s Unions and the Law, 1950 Wis. L. Rev. 79.

inappropriate, bargaining units that included "managerial" employees together with rank-and-file employees. This policy received endorsement during consideration of the Taft-Hartley amendments; the legislative history suggests strongly that Congress agreed with the Board's policy of distinguishing between "management" and employees. Indeed, the distinction remained intact for over twenty years, as the Board, with unanimous approval from reviewing courts, continued to find all managerial employees outside the purview of the Act.

In 1970, however, the Board modified its position, and in 1972, in Bell Aerospace Co., Division of Textron, Inc., included buyers who were considered "management" in a bargaining unit with other employees. The employer refused to bargain, contending that the unit was inappropriate because it contained managerial employees. The Board rejected this objection and sought enforcement of its order to bargain, reasoning that only those managerial employees whose duties encompassed labor relations would be susceptible to conflicts of interest.

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94. Thus, the "fundamental touchstone" was "whether the duties and responsibilities of any managerial employee . . . include determinations which should be made free of any conflict of interest which could arise if the person involved was a participating member of a labor organization." 196 N.L.R.B. at 828.
The Board’s approach, then, signaled an easing of the strict division between management and labor. By permitting certain managers to organize, the Board no longer envisioned employee organization as, by itself, antagonistic to employer interests. Though the Board’s decision recognized circumstances under which a manager who was also a union member might face a conflict between goals of management and the union, those interests were not necessarily presumed to be broadly and inherently at odds.

The NLRB’s easing of the division between labor and management, however, did not withstand judicial scrutiny. The Court of Appeals for the Second Circuit denied enforcement of the Board’s order,95 and the Supreme Court sustained that reversal, concluding “that Congress intended to exclude from the protections of the Act all employees properly classified as ‘managerial’ ”96 regardless of whether their duties include labor relations matters.

This broad exclusion of managers upon policy considerations highlights the adversarial foundation of the NLRA in two important ways. First, it embodies the consistent and universal view of the Board, the courts, and Congress that a division between management and labor inheres in national labor policy. Second, though the Board would have excluded only those managerial employees susceptible to conflicts of interest — specifically, those employees exercising labor relations functions for the employer — the Court required exclusion of those persons deemed “closely aligned with management,” irrespective of any potential for actual conflict of interest. This approach separates management from labor along status lines, and leads to the ineluctable inference that protected concerted activity and employee organization are, by their very nature, seen as antithetical to the interests of management. As one result, the rules of the contest have been drawn to place labor and management on separate, distinct, and opposing sides. In agreeing that Fraser should play a role in directing the company, this is a vision which the UAW and Chrysler have challenged.

96. NLRB v. Bell Aerospace Co., Div. of Textron, Inc., 416 U.S. 267, 275 (1974) (emphasis added). Managerial employees were subsequently defined as “those who formulate and effectuate management policies by expressing and making operative the decisions of their employer, and those who have discretion in the performance of their jobs independent of their employer’s established policy.” General Dynamics Corp., Convair Aerospace Div., 213 N.L.R.B. 851, 857 (1974).
C. Management as Labor's Adversary

Perhaps the most germane example of the strict division between the parties wrought by the Act has been the NLRB's persistent hostility toward activities of management in, or on behalf of, labor organizations.97 Section 8(a)(2) of the NLRA makes it 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,"98 thereby ensuring representation of employees' interests undiluted by subtle or overt influence from the employer.99 It was aimed initially at the employers who had established "company unions" to avoid "true" or adversarial collective bargaining with employee-selected representatives — a phenomenon arising during the 1920's and 1930's as a response of employers to the emerging influence of independent unions.100 Congress, persuaded that

100. See R. GORMAN, supra note 85, at 195; Crager, Company Unions Under the National Labor Relations Act, 40 Mich. L. Rev. 831, 831-32 (1942). Passage of the National Industrial Recovery Act, 48 Stat. 195 (1933) (held unconstitutional 1935), and particularly § 7(a) of the Act, was later seen by Congress as having given impetus to employer-sponsored labor organizations. Congress perceived this as reflecting attempts to avoid unionization — rather than as indicative of sincere attempts to foster employee self-organization. Thus, Senator Wagner remarked that "[t]he company unions that have come to my attention are dominated by the employer, and most of them were created as soon as Section 7(a) [of the National Industrial Recovery Act] became a law, and in order to circumvent the law." National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Education & Labor, 74th Cong., 1st Sess., pt. 3, at 283, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1617, 1649 (1935). In 1935, employer-sponsored labor organizations accounted for more than 2.5 million workers. C. SUMMERS & H. WELLINGTON, LABOR LAW 419-20 (1968). This figure amounted to approximately one-fourth of all industrial employees. T. BROOKS, TOIL AND TROUBLE 170 (1965). Of this development, a Senate Committee declared: "Practically 70 percent of the employer-promoted unions have sprung up since the passage of section 7 (a) of the National Industrial Recovery Act. The testimony before the committee has indicated that the active entry of some employers into a vigorous competitive race for the organization of workers is not conducive to peace in industry." S. REP. No. 573, 74th Cong., 1st Sess. 11, reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 2300, 2310 (1935).
company unions had great potential for undermining the labor movement, invested the Board with broad powers under section 8(a)(2) to eradicate employer-supported organizations. Thus, from its inception, the Board developed and vigorously enforced a rule that maintained "a strict dichotomy between labor and management." In essence, the NLRB adopted a per se approach to allegations of unlawful interference or domination.

101. Note, New Standards, supra note 97, at 510-11; see, e.g., Ansin Shoe Mfg. Co., 1 N.L.R.B. 929, 935 (1936) (the statutory prohibition against management domination and interference with labor organizations "must be broadly interpreted to cover any conduct upon the part of an employer which is intended to bring into being, even indirectly, some organization which he considers favorable to his interests").

The labor-management dichotomy has been made sweeping by the broad statutory interpretation and a definition given the term "labor organization," defined in § 2(5) as "any organization, of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." 29 U.S.C. § 152(5) (1976). In interpreting this broad definition, the Supreme Court held in NLRB v. Cabot Carbon, 360 U.S. 203 (1959), that a committee organized by the employer to provide "a procedure for considering employees' ideas and problems of mutual interest to the employees and management" was a labor organization within the meaning of § 2(5). The Court concluded that the statutory phrase "dealing with" went beyond mere "bargaining," and thus, because the committee discussed such matters as job classification, holidays, vacations, and similar matters, the organization existed at least in part for the purpose of "dealing with" the employer regarding terms and conditions of employment. Id. at 210-13.

In keeping with this broad approach, the nature and degree of group activity required to meet the statutory definition of a labor organization has not been substantial. Pursuant to the Cabot Carbon holding, the NLRB has found employee groupings to be labor organizations where the group has no constitution or officers, General Dynamics Corp., 213 N.L.R.B. 851 (1974); East Dayton Tool & Dye Co., 194 N.L.R.B. 266 (1971), bylaws, Sweetwater Hospital Ass'n, 219 N.L.R.B. 803 (1975), or other formal structure, NLRB v. Clapper's Mfg. Inc., 458 F.2d 414 (3d Cir. 1972); NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), cert. denied, 414 U.S. 939 (1971). A group has been found to be a labor organization though it has not entered into a collective bargaining contract, Peggs Run Coal Co. v. UMW Dist. 5, 475 F.2d 1396 (3d Cir. 1973); Arkay Packaging Corp., 221 N.L.R.B. 99 (1975), or ever bargained previously, Sweetwater Hospital Ass'n, 219 N.L.R.B. 803 (1975). Employee groups have been found to rise to the level of labor organizations even though characterized by the employer as a "communications committee," NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), cert. denied, 414 U.S. 939 (1971), an "employees' committee or association," Eastern Indus., 217 N.L.R.B. 834 (1975); Thompson Ramo Woolridge, Inc., 132 N.L.R.B. 993 (1961), enforced as modified, 305 F.2d 807 (7th Cir. 1962), an "oral suggestion box," NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), cert. denied, 414 U.S. 939 (1971), or a committee designed to open channels of communication and bring the "monolithic corporation into relevant contact with its people," Arkay Packaging Corp., 221 N.L.R.B. 99 (1975). So long as the employee group has dealt with management regarding working hours, overtime, lateness, absenteeism, see id., sanitary conditions, inadequate ventilation, desirability of additional fringe benefits, see NLRB v. Clapper's Mfg., Inc., 458 F.2d 414 (3d Cir. 1972), aisle safety, or additional coffee, see Rupp Indus., 217 N.L.R.B. 385 (1975), it has been found to fall within the statutory meaning even if discussions range widely beyond traditional subjects of collective bargaining, see NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), cert. denied, 414 U.S. 939 (1971).
whereby any employer involvement beyond a certain critical level would be found violative of the Act.102

This approach has been eroded to some extent, however, by various appellate court rulings refusing enforcement of Board orders to dissolve employer-supported organizations.103 More than the Board, these courts have attempted to distinguish employer domination or interference from cooperative efforts designed to enhance labor-management relations.104 Under this view, establishment of a section 8(a)(2) violation requires a showing of actual domination or interference, not merely hypothetical employer overreaching.105 The courts will consider fac-

102. See Note, New Standards, supra note 97, at 511-14. Thus, in its first published decision, the Board found that a “union” formed during an organizing drive to handle employee grievances violated § 8(a)(2). Pennsylvania Greyhound Lines, 1 N.L.R.B. 1 (1935), enforced, 303 U.S. 261 (1938). Under the Board’s traditional interpretation of § 8(a)(2), for instance, employer-supported organizations could not be salvaged by a showing that the employer had beneficent motives, see NLRB v. Newport News Shipbuilding & Drydock Co., 308 U.S. 241 (1939), or that the employees were satisfied with the organization, see St. Joseph Lead Co., 171 N.L.R.B. 541, 544-45 (1968); see also Feldman & Steinberg, Employee-Management Committees and the Labor Management Relations Act of 1947, 35 Tul. L. Rev. 365, 366 (1961) (“A long line of court [and Board] decisions . . . has stricken down, with apparent mechanical regularity, a succession of plans whereby employers have sought to establish employee-management committees to adjust the multitude of day-to-day shop grievances.”). For an early account of the treatment of company-sponsored employee groups, see Crager, supra note 100.

103. See generally Note, New Standards, supra note 97, at 519-25.

104. This departure from the Board’s per se rule likely reflected a growing awareness that § 8(a)(2), in its extreme form, addressed a problem — the company union — which no longer existed. As early as 1947, then-Board Chairman Herzog observed that “[w]hatever reasons may once have existed for directing disestablishment in every case in which a violation of section 8 (2) was found, [he doubted] whether that remedy [was] invariably necessary . . . [because between 1935 and 1947] employees ha[d] learned much about protecting their own rights and making their own choices with the full facts before them.” Detroit Edison Co., 74 N.L.R.B. 267, 279 (1947). In 1953, he declared the company union problem to be “almost dead.” Labor-Management Relations, 1953: Hearings on H. Res. 115 Before the House Comm. on Education and Labor, 83d Cong., 1st Sess., pt. 1, at 266 (1953) (remarks of NLRB Chairman Herzog). Furthermore, in 1972, one commentator excoriated the Board’s approach as the reflection of outdated assumptions:

Only in light of labor’s struggle against the early company unions is the per se rule intelligible. Standing alone, it is not entirely logical; outright employer assistance by itself need be neither detrimental nor improper . . . . The per se prohibition on such assistance is understandable only when coupled with the assumption that employer assistance to labor organizations is necessarily subversive to the interests of the employees.

Note, New Standards, supra note 97, at 515; see also id. at 515-25 (calling for a limited redefinition of the approach to § 8(a)(2), not only because the threat of company unionism has declined, but also because employees themselves have disavowed class struggle politics and adversarial relationships with management).

105. See, e.g., NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Federal-Mogul Corp. v. NLRB, 394 F.2d 915 (1st Cir. 1968); Modern Plastics Corp. v. NLRB, 379 F.2d 201 (6th Cir. 1967); NLRB v. Prince Macaroni Mfg. Co., 329 F.2d 803 (1st Cir.
tors such as whether improper employer intent was involved in the providing of assistance to the employee group,\textsuperscript{106} whether other coercive activities accompanied the employer support,\textsuperscript{107} and whether employees were precluded from selecting a different, independent representative.\textsuperscript{108} In \textit{Hertzka} \& \textit{Knowles v. NLRB},\textsuperscript{109} a case exemplifying the disagreement with the Board's per se approach, the court distilled these factors into a requirement that a section 8(a)(2) violation "rest on a showing that the employees' free choice . . . is stifled by the degree of employer involvement at issue."\textsuperscript{110} Finding no evidence of anti-union animus or employee dissatisfaction, the court denied enforcement of the Board's order to dissolve employee committees that included management representatives. Expressing sentiments clearly applicable to the collaborative efforts undertaken by Chrysler and the UAW, the court observed that "[f]or us to condemn this organization would mark approval of a purely adversarial model of labor relations. Where a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act."\textsuperscript{111}

Despite these judicial initiatives, the NLRB has largely persisted in its more inflexible interpretation of the scope of section 8(a)(2).\textsuperscript{112} Thus, the Board, through its unyielding condemnation

\begin{itemize}
  \item \textsuperscript{106} See, e.g., NLRB v. Ampex Corp., 442 F.2d 82 (7th Cir.), \textit{cert. denied}, 414 U.S. 939 (1971); NLRB v. Newman-Green, Inc., 401 F.2d 1 (7th Cir. 1968); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955).
  \item \textsuperscript{107} See, e.g., NLRB v. Keller Ladders Southern, Inc., 405 F.2d 663 (5th Cir. 1968); Coppus Eng'g Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957).
  \item \textsuperscript{108} See, e.g., NLRB v. Clegg, 304 F.2d 168 (8th Cir. 1962); Coppus Eng'g Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957); \textit{cf.} Hotpoint Co. v. NLRB, 289 F.2d 683 (7th Cir. 1961) (employee council had a right independent of employer to make and amend putatively restrictive union bylaws).
  \item \textsuperscript{109} 603 F.2d 625 (9th Cir. 1974).
  \item \textsuperscript{110} Id. at 630.
  \item \textsuperscript{111} Id. at 631.
  \item More recent Board decisions have found impermissible interference or domination where employees voted for an employer-assisted committee as an alternative to representation by an international union, e.g., Victor M. Sprys, 217 N.L.R.B. 712 (1975), and where representatives to an employer-assisted group had been freely elected by employees in the employer's various departments, e.g., Arkay Packaging Corp., 221 N.L.R.B. 99 (1975); Rupp Indus., 217 N.L.R.B. 385 (1975). Violations of § 8(a)(2) have been declared as well when groups were formed or assisted by the employer during an organizing campaign, e.g., Utrad Corp., 185 N.L.R.B. 434 (1970), \textit{enforced as modified}, 454 F.2d 520 (7th Cir. 1971); Victor M. Sprys, 217 N.L.R.B. 712 (1975), even in the total absence of concurrent organizing activities, e.g., Renselaer Polytechnic Inst., 219 N.L.R.B. 712 (1975); Versatube Corp., 203 N.L.R.B. 456 (1973), \textit{enforced}, 492 F.2d 795 (6th Cir. 1974). Board decisions have found employer's actions violative of the Act when they involved conducting meetings on the employer's premises, e.g., Utrad Corp., 185
of employer assistance to employee groups, has viewed the Act as embodying a “purely adversarial model of labor relations.” In contrast, many courts concur with Chrysler and the UAW that, under certain circumstances, cooperation and mutual assistance can be salutary rather than necessarily injurious to employee interests.

N.L.R.B. 434 (1970), enforced as modified, 454 F.2d 520 (7th Cir. 1971), controlling the composition of the representative body, e.g., Rensselaer Polytechnic Inst., 219 N.L.R.B. 712 (1975), participating through supervisors or other agents attending employee meetings, e.g., id.; Utrad Corp., 185 N.L.R.B. 434 (1970), enforced as modified, 454 F.2d 520 (7th Cir. 1971), providing compensated time during working hours for employee meetings, e.g., id., supplying clerical services or stationery, e.g., Thompson Ramo Wooldridge, Inc., 132 N.L.R.B. 993 (1961), enforced as modified, 305 F.2d 807 (1962), or assisting with legal services, e.g., Versatube Corp., 203 N.L.R.B. 456 (1973), enforced, 492 F.2d 795 (6th Cir. 1974).

113. See supra notes 103-111 and accompanying text; see also NLRB v. Magic Slacks, Inc., 314 F.2d 844 (7th Cir. 1963); NLRB v. Post Publishing, 311 F.2d 565 (7th Cir. 1962); NLRB v. Valentine Sugars, Inc., 211 F.2d 317 (5th Cir. 1954).

114. Other experiments with cooperative labor relations have met with mixed judicial treatment as a result of the adversarial assumptions implicit in the NLRA. Nevertheless, employers and unions have recently engaged in a great deal of experimentation with employee groupings working on a cooperative basis. Inspired by the success of Japanese manufacturers in using a consensus approach to labor-management relations, see generally R. Cole, WORK, MOBILITY, AND PARTICIPATION (1979); W. Ouchi, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE (1981); E. Vogel, JAPAN AS NUMBER ONE (1979); How Japan Does It, TIME, Mar. 30, 1981, at 54, these experiments — termed quality circles or quality-of-work-life programs — are occurring across a range of domestic industries. It has been estimated that some 750 employers — including Lockheed, Polaroid, Dana, TRW, Procter & Gamble, Herman Miller, and Northrop — are introducing such programs. Burck, What Happens When Workers Manage Themselves, FORTUNE, July 27, 1981, at 62. Moreover, major unions — including the UAW, the United Steelworkers of America, the Communication Workers of America, and the International Brotherhood of Electrical & Telecommunications International Union — have signed national labor agreements containing commitments to quality-of-work-life programs. Burck, What’s In It For The Unions, FORTUNE, Aug. 24, 1981, at 88; At G.M.’s Buick Unit, Workers and Bosses Get Ahead by Getting Along, N.Y. Times, July 5, 1981, § 3, at 4, col. 3; A Search for Quality: Detroit Tries It All, Wash. Post, Aug. 23, 1981, at G1, col. 1. While the election of Fraser constitutes an experiment with nonadversarial labor-management relations at the highest level of corporate governance, these innovations may be viewed as cooperative efforts at the opposite end of the enterprise.

Comprehensive treatment of the quality-of-work-life experiments must await another day; nonetheless, some preliminary observations can be made. It has generally been assumed, in keeping with the broad definition of a “labor organization” enunciated in NLRB v. Cabot Carbon, 360 U.S. 203 (1959); see supra note 77, that employer involvement in such programs would be violative of the NLRA. “Assessed in terms of [the] specific prohibitions [against employer assistance] . . . , the [production] team is clearly a dominated and supported labor organization.” Note, Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?, 49 Ind. L.J. 516, 531 (1974); see Murmann, The Scanlon Plan Joint Committee and Section 8(a)(2), 31 LAB. L.J. 299 (1980). Despite this well-established doctrine, the Board has revealed some greater degree of tolerance for nonadversarial employee groupings. See General Foods Corp., 231 N.L.R.B. 1232 (1977); Mercy-Memorial Hospital Corp., 231 N.L.R.B. 1108 (1977); Sparks-Nugget, Inc., 230 N.L.R.B. 275 (1977). Significantly, however, these decisions have been based not upon a distinction between em-
IV. VARIATIONS ON THE THEME: THE BOARD’S TREATMENT OF DEVIATIONS FROM TRADITIONAL ROLES OF LABOR AND MANAGEMENT

In light of the adversarial model of labor-management relations envisioned by the NLRA, it might well be asked whether and to what extent the law will accommodate deviations — such as Fraser’s recent elevation to the Chrysler Board — from the traditional roles taken by labor and management. Specifically, under what circumstances will a representative of an employer or employees be permitted to adopt a dual role, engaging in activities on behalf of both labor and management?

Examination of NLRB decisions reveals several touchstones for evaluating such conflict-of-interest questions. First, Board conflict-of-interest doctrine has centered upon the potential harm inflicted upon employee interests by conflicts arising from abuses of position; essentially, the Board seeks to protect employee interests rather than those of the employer or competitors. \(^{115}\) Second, the Board maintains a behavioral assumption that representatives do not alter their allegiances when performing functions for the other side. \(^{116}\) Management representatives in unions, then, are presumed to remain loyal to management, and union representatives involved in management affairs likewise are presumed to remain loyal to the union. With these perspectives in mind, a consistent approach can be derived from the cases reviewing the legality of dual roles for union or management representatives.

A. Employers Involved in Union Affairs

On its face, the NLRA gives employees complete freedom in

\(^{115}\) Thus, in Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954), where the union owned a company that competed directly with the employer, the Board disqualified the union not because of a threat to the employer, but rather because of the potential that the union might protect its investment by less vigorously representing the employees. See id. at 1559-60; see also Nassau & Suffolk Contractors’ Ass’n, 118 N.L.R.B. 174, 185 (1957) (“Congress has not seen fit to make it an unfair labor practice for a labor organization to dominate or interfere with the administration of an employer’s business”).

\(^{116}\) See infra text accompanying notes 122-29.
their choice of representatives. Section 7 gives employees the right "to bargain collectively through representatives of their own choosing."\textsuperscript{117} Section 9(c)(1)(A) provides for the filing of a representation petition by "any individual" acting on behalf of employees,\textsuperscript{118} and section 2(4) defines the term "representative" as including "any individual."\textsuperscript{119} Nevertheless, as a matter of policy, the Board has held, for example, that a supervisor may not represent the employees of his employer for collective bargaining purposes, notwithstanding that the employees freely selected him as their representative.\textsuperscript{120} Indeed, the NLRB has not wavered in its condemnation of any substantial involvement by employer representatives in internal union affairs.\textsuperscript{121} Thus, in \textit{Columbia Pictures Corp.},\textsuperscript{122} the Board refused to process a representation petition where supervisors had participated in the formation of the union. Similarly, in \textit{Nassau & Suffolk Contractors' Association, Inc.},\textsuperscript{123} where two of the twelve members of the union's negotiating team were supervisors, the Board found a violation of section 8(a)(2), observing that it was "improper for supervisors, even those with predominantly union loyalty, to serve as negotiating representatives of employees."\textsuperscript{124}

Consistent with this reasoning, where a supervisor of the employer served also as union steward, the Board found an impermissible intermingling of supervisory and employee-representative functions which deprived the employees of their right to be represented in collective bargaining matters by individuals having "single-minded loyalty to their interest."\textsuperscript{125} More significantly, in \textit{Employing Bricklayers' Association},\textsuperscript{126} the Board

\textsuperscript{118.} \textit{Id.} § 159(c)(1)(A).
\textsuperscript{119.} \textit{Id.} § 152(4).
\textsuperscript{120.} Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954). The authority to disqualify bargaining representatives was established in \textit{NLRB v. Jones & Laughlin Steel Corp.}, 331 U.S. 416, 422 (1937), where the Supreme Court made clear the Board's "discretion to place appropriate limitations on the choice of bargaining representatives should it find that public or statutory policies so dictate."
\textsuperscript{121.} \textit{See generally supra} pt. III C.
\textsuperscript{122.} 94 N.L.R.B. 466 (1951).
\textsuperscript{123.} 118 N.L.R.B. 174 (1957).
\textsuperscript{124.} \textit{Id.} at 187. The Board reasoned:

Employees have the right to be represented in collective-bargaining negotiations by individuals who have a single-minded loyalty to their interests. Conversely, an employer is under duty to refrain from any action which will interfere with that employee right and place him in slight degree on both sides of the bargaining table.

\textsuperscript{126.} 134 N.L.R.B. 1535 (1961).
found a section 8(a)(2) violation where the employer’s executive secretary merely voted for delegates to the union’s international convention. The employer contended that its involvement was related only tangentially to the representation process, but the Board dismissed this argument by asserting that very few matters within the concern of unions are unrelated to the representation process. That the management official was a union member and may well have been acting in the perceived best interest of the union was deemed irrelevant because, in the Board’s view, participation in such union affairs should be reserved for “union members who have no divided loyalties.”

Here, the manager’s vote represented “the judgment of a person with dual loyalties, which are not always easily reconcilable.”

Therefore, where a representative of management also undertakes duties on behalf of the union, thus assuming a dual role, such action will be condemned though the duties be far removed from collective bargaining and though no actual wrongdoing be established. The manager is presumed loyal to management, and the Board position guards against the mere potential for undermining employees’ interests. As a result, were Fraser considered a management representative — a tenable position, given the important role he plays in the governance of Chrysler — his continued active involvement in the union would be proscribed. In fact, however, the view that a labor representative such as Fraser could become one with management has not prevailed in NLRB decisions addressing the elevation of union officials to corporate governing boards.

**B. Union Representation on Corporate Boards Under the NLRA**

While Fraser sits as one of twenty members of Chrysler’s board of directors, he serves also as the union’s chief spokesman during contract negotiations with Chrysler and the other major

127. *Id.* at 1537.


129. Under certain circumstances, the Board has permitted some erosion of this principle. In the construction industry, for example, where skilled supervisors might move from a unit position into supervision and back again, the Board has allowed low-level supervisors to be included in the bargaining unit. *See, e.g.*, *Nassau & Suffolk Contractors’ Ass’n*, Inc., 118 N.L.R.B. 174 (1957).
automobile manufacturers. He remains actively involved in developing and defining the UAW's collective bargaining stance, in modifying positions taken during negotiations, and in determining whether contract proposals should be accepted. Although not a daily participant in negotiations, he does, on occasion, attend such sessions on behalf of the union.

In addition to these UAW duties, Fraser as a member of the Chrysler Board votes upon a wide range of issues confronting the corporation. His involvement on the Board does not extend to corporate debates regarding bargaining strategy with the UAW, but otherwise he "participate[s] fully in deliberations on all other matters, . . . including . . . collective bargaining policies and other worker concerns, such as health and safety, plant closings and transfers, new technology, product planning, major investments and equal employment opportunities and practices." 131

Such activities of an employee representative acting as corporate decisionmaker likely will be scrutinized for a variety of potential conflicts of interest. Perhaps the best example is the employee representative who participates, as does Fraser, in decisions regarding plant relocation or closure, subcontracting of unit work, adoption of labor-saving devices, or other matters which have immediate effects upon jobs or job benefits. If the director accepts such policy changes in these matters, claims from adversely affected employees are likely to follow; if the director resists such developments, questions regarding the director's duty to shareholders become apparent. 132


132. Questions about Fraser's fiduciary duties to shareholders, as distinct from his obligations to UAW members, while beyond the scope of this Article, are far from settled. There is a division of authority regarding whether a corporate officer's fiduciary duty runs to the corporation as an entity, or to the shareholders themselves. Compare 15 PA. Cons. Stat. Ann. § 1408 (Purdon Supp. 1981-1982) (director's duty runs to the corporation), with N.C. Gen. Stat. § 55-35 (1975) (duty runs both to corporation and to shareholders). The weight of authority, however, holds that a director's duty runs to the corporation. See A. Berle & G. Means, The Modern Corporation and Private Property 221-26 (1939); H. Henn, Handbook of the Law of Corporations and Other Business Enterprises § 238 (2d ed. 1971). As a result, a majority of courts will not void a board decision that is fair and reasonable to the corporation, merely because a director with an outside interest participated in making the decision. See Pepper v. Litton, 308 U.S. 295, 306 (1939); Remillard Brick Co. v. Remillard-Dandini Co., 109 Cal. App. 405, 241 P.2d 66 (1952); Fill Bldgs., Inc. v. Alexander Hamilton Life Ins. Co., 396 Mich. 453, 241 N.W.2d 466 (1976); see also MODEL BUSINESS CORP. ACT § 41 (1979). See generally Note, supra note 6, at 652-60.
Based upon the limited, adversarial model of labor-management relations embodied in Board law, a wide range of activities by management representatives in union affairs is proscribed. Because the Act seeks to protect the interests of employees, the parallel question arises whether a participatory role for labor representatives in business decisionmaking, by itself, tends to undermine the interests of employees. Put another way, does the law require that union officials, like Caesar's wife, be above suspicion?

In light of the traditional model of labor-management relations, the instances in which union representation on corporate governing boards have been challenged are understandably few. This has led some to presume mistakenly that such actions would be assessed under the same standards as are applied to determining the propriety of management activities on behalf of unions. Though the Board has passed upon the question only a few times, and by its own admission has yet to articulate a test broadly applicable to such questions, case law does reveal that union officials such as Fraser will be liberally permitted to serve upon the governing boards of enterprises employing their members; while simultaneously retaining their representative status — unless union representatives comprise a majority of the corporate board, or unless the union has a direct financial interest in the company.

The NLRA contains no specific prohibition against union activities in corporate governance or management, but the Board nonetheless possesses undisputed authority to disqualify persons from acting as employee representatives based upon

133. See infra note 115 and accompanying text.
134. See supra note 115 and accompanying text.
135. See supra note 8, at 969-70. The argument runs that a union officer serving as corporate director could be viewed as a supervisor engaging in important union affairs, thus violating § 8(a)(2). A variant on this approach would find union representation on a corporate board violative of § 8(a)(2) whenever an employer initiated and implemented the plan. See Note, The West German Model of Codetermination Under Section 8(a)(2) of the NLRA, 51 Ind. L.J. 795, 812 (1976). These analyses, though, seemingly give short shrift to NLRB decisions approaching the question as one of conflict of interest, where the union representative is presumed to remain loyal to member-employees despite involvement with the corporate board; see infra notes 141-45 and accompanying text.
138. See supra note 115 and accompanying text.
conflict-of-interest considerations. The NLRB has seldom exercised this discretion, however, in the face of the cardinal policy of freedom of selection of representatives. This reflects the Board's apparent conclusion that union participation in corporate governance does not, by itself, work to the detriment of employees; union officials engaged in activities on behalf of management are assumed to remain loyal to the union, thus posing no threat to employees' interests.

In Anchorage Community Hospital, Inc., for example, union representatives sat both on the employer's board of trustees and on the executive management committee that reviewed and approved the governing labor contract. Indeed, of the fifteen trustees who comprised the board, seven were also union representatives. Emphasizing that the union representatives still constituted a minority of the board, the NLRB held that in the absence of evidence that the union had, in fact, sacrificed the employee's interests to advance those of the employer, the presence of union representatives on the employer's governing board would not be violative of the Act. Similarly, in Child Day Care Center, a union whose local represented the employees of a child day-care center also appointed half of the members of the board of trustees that administered funds for the day-care center. Moreover, the chairman of the board of trustees was himself a union official. Nevertheless, the NLRB found that these intertwined relationships among labor and management did not preclude the union's representation of the day-care center employees, because union officials did not represent a majority on the board of trustees, and no other factors suggested that the union could not "approach negotiations with the single-minded purpose of protecting and advocating the interests of

139. See supra note 120.
140. See NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968) ("There is a strong public policy favoring the free choice of a bargaining agent by employees. The choice is not lightly to be frustrated.").
141. Fraser has repeatedly emphasized that he intends to represent the interests of employees while serving as a corporate director. See, e.g., The Risk in Putting a Union Chief on the Board, Bus. Wk., May 19, 1980, at 149; Lett, Fraser to Quit at Chrysler, Detroit News, Apr. 13, 1982, at 1, col. 6 (Responding to speculation that he might stay on as a corporate director after retiring from the presidency of the UAW, Fraser observed, "I think that sort of runs counter to why I'm there in the first place — as a representative of the workers."); Simison, UAW's Fraser to Speak Out for Labor, Public in Role as Director at Chrysler, Wall St. J., Oct. 29, 1979, at 6, col. 2.
143. Id. at 575.
144. 242 N.L.R.B. 1177 (1980).
employees."^{145}

Once union representatives constitute a majority of the employer's governing body, however, a different perspective prevails. At this point, the Board seemingly considers the presumption of continuing loyalty to be inapplicable. In the rare event where union officials have garnered a majority on the employer's board of directors, the NLRB has concluded that the union no longer can advocate effectively the interests of employees.^{146} In *Centerville Clinics, Inc.*,^{147} for instance, the Board found a section 8(a)(2) violation where 112 members of the employer's 114-member board of directors were union officials.

Aside from union domination of the employer's governing body, the other factor that triggers reversal of the presumption of continuing loyalty is a union's direct, substantial pecuniary interest in the company whose employees it represents.^{148} Such a financial interest, especially when combined with union involve-

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145. *Id.*, *Id.*, UMW Welfare & Retirement Fund, 192 N.L.R.B. 1022 (1971) (violation of § 8(a)(2) found where supervisors actually participated in the daily activities of the local union).

146. Questions regarding the lawfulness of a union's continuing representation likely will arise in situations where employees purchase a plant from the employer pursuant to an employee stock option plan or other similar arrangement. *See generally* Granados, *Employee Stock Option Plans: An Analysis of Current Reform Proposals*, 14 U. Mich. J.L. Rev. 15 (1980); *Note, Employee Stock Ownership Plans: A Step Toward Democratic Capitalism*, 55 B.U.L. Rev. 196 (1975). If, under these circumstances, union representatives take a majority of positions on the corporate board, the union's continued representation of the employees likely would be voidable; in this event, the Board apparently considers that the employees have effectively become the employer. *See, e.g.*, *supra* note 24 (describing employees' decision to purchase a majority share in the Rath Packing Company, which in turn led to a union majority on the 16-member corporate board).

Such sales to employees have occurred in the automobile industry. In November 1981, for instance, General Motors sold its Clark, New Jersey, Hyatt roller-bearing plant to employees. *The Disaster in Detroit*, Newsweek, Nov. 9, 1981, at 66. Proposals to sell Ford Motor Company plants in Sheffield, Alabama, and Northville, Michigan, were unsuccessful when sale terms could not be reached. Detroit Free Press, Mar. 18, 1981, at 1A, col. 2; Detroit Free Press, Nov. 24, 1981, at 1A, col. 2. Such developments may well be on the increase. *See* Woodworth, *supra* note 24, at A27, col. 1 ("With an alarming increase in the incidence of plant closings . . . conversion to worker ownership may become an important strategy for economic survival for the decades ahead.").


148. A few cases have recognized that a disqualifying conflict of interest can arise as well where a union has a financial stake in a competitor of the employer. *See, e.g.*, NLRB v. H.P. Hood, Inc., 496 F.2d 515 (1st Cir. 1974) (loan made from the union's pension fund to a competitor of the employer); NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968) (same); Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954) (union owned a direct competitor of the employer). Such an interest could cause the union to pursue policies in derogation of the interests of both the employer and employees. *See generally* Note, *Conflict of Interest Problems Arising From Union Pension Fund Loans*, 67 Colum. L. Rev. 162 (1967); *Note, Union Investment in Business: A Source of Union Conflicts of Interest*, 46 Minn. L. Rev. 573 (1962).
ment in managing the employer's operations, may place the union in the untenable position of deciding between the interests of its constituents and the furtherance of its investments — thereby creating a disqualifying conflict of interest under the Act. Thus, in both Centerville Clinics and Medical Foundation of Bellaire,\(^\text{149}\) an important factor contributing to the finding of violations was the financial dependency of the employer upon the union, in addition to the substantial union representation on the employer's governing board.\(^\text{150}\)

The twin elements that could cause union involvement in corporate management to be considered violative of the NLRA manifestly are not presented by Fraser's election to the Chrysler Board. Fraser is distinctly a minority voice on the Board; in contrast to Anchorage Community Hospital, Inc.,\(^\text{151}\) where a fifteen-member board having seven union representatives did not violate the Act, labor occupies only one position on Chrysler's twenty-member Board.\(^\text{152}\) Furthermore, the union does not have a financial interest in Chrysler that could create a disqualifying conflict of interest. Although the UAW clearly has an interest in Chrysler's prosperity, this is no more a financial stake than any employees have in the success of their employer, and does not pose the threat that the union would subjugate the interests of the workers to advance its own concerns.\(^\text{153}\)


\(^{150}\) In these decisions, the Board has identified the pecuniary ties between union and employer that support its finding of a conflict of interest, without delving into the question whether certain levels of financial involvement alone would be sufficient to establish a disqualifying conflict. In Anchorage Community Hospital, 225 N.L.R.B. 575 (1976), the Board suggested that a conflict of interest would be engendered only if the employer had a substantial financial dependency upon the union. Although the union had made construction loans to the employer, this financial involvement was "not sufficiently large to present a danger that Respondent Union would subvert the bargaining rights of the unit employees," id. at 575; cf. NLRB v. David Buttrick Co., 399 F.2d 505 (1st Cir. 1968) (a disqualifying conflict was not established where the union made a substantial loan to a competitor of the employer, because the union did not have an "equity-like interest" in the competitor and therefore had no incentive to manipulate the interests of the employer and employees).

\(^{151}\) 225 N.L.R.B. 575 (1976); see supra text accompanying note 142.

\(^{152}\) See NLRB Advice Memorandum, Case No. 7-CB-4815, 1980-81 NLRB Dec. (CCH) ¶ 20,269, at 33,478 (Oct. 22, 1980) ("the Union, in the person of Fraser, holds only one position on the Board of Directors out of 20, clearly not such a significant number as would present a conflict of interest.").

\(^{153}\) The UAW does not "wish to see Chrysler [sic] flourish at the expense of the employees"; rather, "the Union's only interest in the financial state of Chrysler is to insure maximum jobs and benefits for the employees." See id.
The conflict of interest questions raised by Fraser's election to the Chrysler Board are made more complex by the UAW's representation of the employees of Chrysler's domestic competitors. Regardless of the position adopted by the UAW in negotiations with any one automobile manufacturer, doubts may arise concerning the propriety of the union's approach. Thus, should the UAW grant concessions to Chrysler, employees of General Motors, Ford, and American Motors may well perceive their long-term interests being sacrificed for those of Chrysler and its employees. Indeed, this conflict already is more than conjectural. A recent study indicates that Chrysler, by virtue of wage and benefit compromises made by the UAW, will save several hundred dollars on every car produced. Though Chrysler might argue that these concessions merely redress its economy of scale disadvantages, employees at competing auto manufacturers could legitimately view these cost savings as a threat to their job security and the profitability of their employers — and ultimately to their future wages and fringe benefits. In turn, solicitude for the interests of the employees of other domestic manufacturers conceivably could cause Fraser to alter his approach in representing the Chrysler workers.

In decisions addressing conflicts of interest arising from third-party considerations, however, the Board has been even less willing than with cases involving dual roles for union representatives to find a disqualifying conflict of interest. Again, this reluctance

154. This combination of relationships is not likely to be limited to the UAW and the automobile manufacturers. If, as some believe, a precondition to union participation on employers’ governing boards is the financial debility of the employer, see supra note 24 and accompanying text, such ventures can be expected in the large, manufacturing sectors of the economy, such as steel and rubber, which have suffered declining market shares over the past decade. Cf. supra note 4 (discussing ventures in the airline industry). Because these sectors are characterized by large, industry-wide unions, it is probable that placement of a union representative on any one corporate board will create potential conflict of interest problems with competitors, see supra note 4 (discussing the unwillingness of the Justice Department to approve appointment of a UAW representative to the American Motors Board following the Chrysler-UAW undertaking).

155. See, e.g., NLRB Advice Memorandum, Case No. 7-CB-4815, 1980-81 NLRB Dec. (CCH) ¶ 20,269, at 33,478 n.1 (in return for Fraser's election to the Chrysler Board, the UAW collective bargaining agreement with Chrysler called for wage increases $203 million less than provided for in earlier packages negotiated with General Motors and Ford).


157. Cf. Wall St. J., Nov. 11, 1979, at 4, col. 1 (allegations by the Chairman of General Motors that Fraser's directorship would create fundamental conflicts of interest which could upset future labor negotiations).
is grounded in the overriding desire to avoid intrusions into employees' freedom to select their bargaining representatives.\(^{158}\)

In the leading case of *Sierra Vista Hospital, Inc.*,\(^{159}\) the Board set forth its approach to situations presenting potential conflicts of interest resulting from union allegiances to third parties. Where a supervisor of a third-party employer participated actively in internal union affairs, the Board recognized the possibility that this could "impinge" upon the employees' right to a bargaining representative whose undivided concern is for their interests."\(^{160}\) Nonetheless, the Board concluded, mere involvement of third-party employers in the union would not itself be sufficient to disqualify a bargaining representative; in the absence of "a showing that danger of a conflict of interest interfering with the collective bargaining process is clear and present," there would be no impermissible conflict.\(^{161}\)

Under this approach, Fraser's allegiances with Chrysler would not be considered sufficient to create a conflict of interest disqualifying him from representing the employees of competing domestic auto manufacturers. The NLRB does not consider it significant that Fraser's objective of ensuring the solvency of Chrysler, when serving as a member of the corporate board or when representing the Chrysler workers, might make it more difficult for him to approach negotiations with Chrysler's competitors with a single-minded desire to advance the interests of their employees. The Board would require hard evidence, not merely conjecture, before finding that Fraser's third-party ties created a "clear and present danger" of an impermissible conflict.\(^{162}\) Thus, the NLRA, although conceived and ad-

158. *See supra* note 106.
160. *Id.* at 633.
161. *Id.* (quoting NLRB v. David Buttrick Co., 399 F.2d 505, 507 (1st Cir. 1968)). In cases subsequent to *Sierra Vista*, the Board has rejected allegations of disqualifying conflicts of interest arising from third-party entanglements where supervisors of competitors were involved in union affairs, including high executive positions, but did not engage in the actual collective-bargaining process. *See, e.g.*, Lodi Memorial Hospital Ass'n, Inc., 249 N.L.R.B. 786 (1980); Baptist Hospitals, Inc., 246 N.L.R.B. 170 (1979).

Only intimate alliances between the union and third-party interests have been held sufficient to create a disqualifying conflict. *See, e.g.*, Welfare & Pension Funds, 178 N.L.R.B. 14 (1969) (local bargaining unit had "direct and immediate allegiances" to a parent union); General Teamsters, Local 249, 139 N.L.R.B. 605 (1962) (both the employer and the local unit were members of the same federation of local unions); Oregon Teamsters' Security Plan Office, 119 N.L.R.B. 207 (1957) (union attempted to represent its own employees); *see also* Bausch & Lomb Optical Co., 108 N.L.R.B. 1555 (1954) (union owned a direct competitor of the employer, and thus was in the position of choosing between furthering its investment and representing the unit employees).

162. *See NLRB Advice Memorandum, Case No. 7-CB-4815, 1980-81 NLRB Dec.*
ministered on the assumptions that comprise a limited, adversarial model of labor-management relations, will not prevent the Chrysler-UAW departure from that model.

V. IMPLICATIONS OF THE DEPARTURE

Whether this new-found marriage between labor and management will become a key to Chrysler's financial recovery remains to be seen. Furthermore, only time will tell whether such a cooperative venture, like other innovations born in the automobile industry, will become a widely accepted union practice. Whatever the benefits of this venture, however, the Board's liberal acceptance of union involvement in management activities poses serious implications, particularly for disaffected individual member-employees.

A. The Presumption of Loyalty

The Board's conflict of interest decisions reveal a presumption that union representatives engaged in corporate decisionmaking remain faithful to the interests of employees. In fact, though, considerable evidence from the social sciences suggests that this presumption may be seriously misplaced. Furthermore, at

(CCH) ¶ 20,269, at 33,477 (Oct. 22, 1980) ("Although it is conceivable that the Union would take 'harsh' positions in bargaining with other auto manufacturers for the purpose of injuring them and benefiting Chrysler, there is no evidence to indicate that the Union or Fraser has done that or plans to do that.").

163. See supra note 141.

164. "[T]he members of any enduring group are likely to display a striking homogeneity of beliefs, attitudes, values, and behavior." Group Dynamics 139 (D. Cartwright & A. Zander 3d ed. 1968). While the strength and effectiveness of forces toward uniformity depend upon many variables, there is no longer any question that groups exert influences which can and do result in conforming opinions and behavior patterns. See L. Festinger, S. Schacter & K. Back, Social Pressures in Informal Groups 151-76 (1950).

Although the forces inducing uniformity among group members are not fully understood, voluminous empirical research conducted over the past three decades suggests they fall into two general categories. First, there are forces arising from conflicts within a person who observes that his opinion or actions differ from those of the group. See Festinger & Aronson, The Arousal and Reduction of Dissonance in Social Contexts, in Group Dynamics, supra, at 125. Second, there are forces brought to bear by other group members seeking to influence the person's beliefs. Thus, group pressures may cause individual group members to alter their opinions, even as to matters of observable fact, to conform to the opinions of the group. See Group Dynamics, supra, at 130-40; Asch, Effects of Group Pressure Upon the Modification and Distortion of Judgments, in Groups, Leadership & Men 177 (H. Guetzkow ed. 1951 & photo. reprint 1962). Indeed, where a single individual is a minority of one against an otherwise-unanimous majority, as may well be the case with Fraser, the pressure toward conformity could be even
least one NLRB member has observed that intimate involvement in management and the operations of the employer might alter the union's commitment to the bargaining unit — not because of corruption of interests in the traditional sense, but because involvement in management affairs may make the union representative more attuned to management objectives and less sensitive to employee goals.168

If this danger is present even in normal business settings, it is manifestly greater dramatically where an employer such as Chrysler is engaged in a struggle for its very existence.166 While it may be true that the goals of management and employees are the same in many ways, it is just as true that many times they conflict. After wrestling with managerial problems in his capacity as corporate director, could Fraser, or anyone, represent as vigorously the employees in a dispute with Chrysler over, for example, a proposed speedup of the production line? As an officer of the corporation, Fraser would have full appreciation of, and indeed, great responsibility for Chrysler's financial solvency. Under these circumstances, could he, with the same detachment as before his election, protest an increased workload or select the next strike target? The possibility arises then, that employees will be deprived of single-minded union representation, in derogation of their rights under the NLRA.

B. Redress for Inadequate Representation

If employees whose union has secured a seat on their employer's governing board become dissatisfied with the quality of union representation, their avenues of recourse are limited. An
greater. See Asch, supra, at 185-88.

At the same time, by being a member of two groups, the Union and the Board, Fraser will be influenced by frequently contradictory norms. Though the effect of conflicting pressure from different reference groups has been studied in various contexts, see, e.g., T.M. Newcomb, Social Psychology 528-71 (1950); Killian, The Significance of Multi-Group Membership in Disaster, 57 Am. J. Soc. 309 (1952); Singer, Reference Groups and Social Evaluations, in Social Psychology 66, 76 (M. Rosenberg & R. Turner eds. 1981), there are few conclusions concerning the conditions that may cause one group norm to override others. See Siegel & Siegel, Reference Groups, Membership Groups, and Attitude Change, 55 J. Abnormal & Soc. Psychology 360 (1957).


employee can claim, either before the Board or the courts, that the union is failing fairly to represent the members. Or, employees able to garner the necessary support can petition the NLRB for an election to decertify the union as the bargaining representative. In many cases, however, these options are more illusory than real.

The power of union officials to exercise wide discretion in contract negotiations was emphasized in *Ford Motor Co. v. Huffman*, where the Supreme Court observed that effective collective bargaining necessitated a broad delegation of authority to negotiators to make concessions and accept proposals if in their view the interests of the parties would thereby best be served. As a result, courts have accorded a "wide range of reasonableness" to unions negotiating agreements with employees.

The NLRB position likewise is broadly accepting of union actions under duty-of-fair-representation standards; the Board envisions a circumscribed set of situations in which it will entertain charges of inadequate union representation. According to the NLRB General Counsel, "if there is no independent evidence of bad motive, complaint will not issue where the union gives some reasonable, judgemental explanation for its decision. If the union action passes these tests, . . . [the] proper recourse is the ballot box, not before the General Counsel or the Board."

Under these formulae, absent evidence of overt wrongdoing, should a union begin to place greater emphasis upon management's objectives as a result of its involvement in governing the enterprise, it will undoubtedly have a "reasonable, judgmental" rationale for a less aggressive bargaining posture. Certainly, a

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167. 345 U.S. 330 (1953). The Ford Motor Company and the UAW had agreed to give seniority credit for World War II veterans who had not worked for the company before the war. This agreement was challenged by several employees, who claimed that the UAW had breached its duty of fair representation by making a distinction on the basis of a factor not related to wages and working conditions.

168. Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

*Id.* at 337-38.

bargaining position arguably based upon the long-term health of the enterprise would fall within the "wide range of reasonableness" entrusted to unions engaged in negotiations. As a result, disgruntled union members would find little hope under a duty-of-fair-representation theory for a successful challenge to a "softer" position adopted by their bargaining representative.

Simultaneously, the General Counsel's invitation for dissatisfied employees to use the ballot box may be a hollow one, particularly where, as here, the employer's facilities are geographically dispersed and employees are covered by national agreements. By way of illustration, the UAW represents in excess of one-hundred units of Chrysler employees, of which forty-nine are production and maintenance units. The employees in these units are located throughout the United States as well as Canada and Mexico, and are covered by uniform contracts negotiated on a national level. The UAW, like many other international unions, frequently petitions for individual units in the name of the International and the Local. If the local union succeeds in an election, the unit then is merged into the nationwide unit covering the relevant classifications of employees. These individual units cannot thereafter avoid application of a contract approved by the nationwide constituency. Further, once the local union is certified or contractually recognized as part of a national unit, it cannot be decertified on an individual basis even if initially it would have been an appropriate bargaining unit on its own; the merger effectively destroys the separate identity of the individual unit. Therefore, no single plant could avoid being bound by a UAW contract, considering the existence of a nationwide unit, a history of centralized bargaining, and coverage under a single contract, even if that plant voted as a unit against the contract. Moreover, gathering the thirty percent showing-of-interest necessary to bring about an election would itself be a Herculean task beyond the reach even of most large organizations. Such structural barriers thus require

173. Cf. Univac Div. of Remington Rand Div. of Sperry Rand Corp., 137 N.L.R.B. 1232 (1962) (employee sought decertification of one plant out of a multiplant bargaining unit, but was denied because the Board said that the individual certified units had been merged into one overall unit and so could not later be decertified on an individual basis).
174. NLRB Statements of Procedure, Series 8, 29 C.F.R. § 101.18(a) (1981); cf. id. §§ 101.26, .27(a)(3) (initiation of rescission-of-authority cases also apply 30% rule).
that tremendous organization and economic resources be marshaled to mount a campaign capable of decertifying a nationwide unit, and serve to make the ballot box a false hope in many instances. 175

CONCLUSION

Douglas Fraser's election to a position on the governing board of the Chrysler Corporation constitutes a singular event in the history of relations between organized labor and management in this country. The union's assumption of a broader capacity in the enterprise represents a marked departure from the limited, adversarial role adopted nearly universally by unions in their dealings with management over the past century. In this undertaking, union and management have embarked upon an experiment with nonadversarial relations at the policy-making level of corporate governance.

The NLRA, for nearly a half-century the cornerstone of national labor policy, has institutionalized the limited pattern of American labor-management relations. Despite the NLRA's adherence to this conventional model, however, decisions by the courts and the NLRB indicate clearly that Fraser's participation in corporate governance does not run afoul of the Act. The premise that union officials serving as corporate directors will remain loyal to employee interests dictates that, without more, Fraser's new duties will not be considered inherently injurious to employee interests.

By their agreement, the UAW and Chrysler are venturing into uncharted waters of employment relations. In so doing, they have set aside antagonistic positions and recognized their mutual interdependence, in developments that seem wholly salubrious. At the same time, Fraser appears fully capable of addressing the problems confronting the corporation while continuing to advance the best interests of auto industry employees.

In other instances, though, the liberal acceptance of unions in

175. These difficulties, however, may be largely hypothetical when applied specifically to the issues of Fraser's election to the Chrysler board, due to the general satisfaction with the arrangement among UAW members. Accounts from union members and negotiators as well as from fellow directors and management officials indicate that Fraser has continued to represent his constituents vigorously and responsibly. See Wall St. J., Mar. 12, 1981, at 33, col. 4. Moreover, the UAW has a long record and tradition of integrity and fidelity to the desires of the membership. See James, Union Democracy and the L.M.R.D.A., 13 Harv. C.R.-C.L. L. Rev. 247, 353 (1978).
corporate governance may present grave dangers; many unions may be less responsive than the UAW to the needs of their memberships. As one prominent union president has cautioned, an inherent risk increasing the scope of union functions "is that the union will eventually end up negotiating with itself. A corollary risk is that . . . [a]s worker representatives on directing boards become more and more involved in management’s problems, they are likely to become less and less responsive to the needs of those they represent." Where the Board’s presumption of continuing union loyalty proves misguided, disaffected employees may have little opportunity to remedy the union’s subsequent inadequate representation of their interests. If employees cannot fully redress their grievances either through the legal system or through collective bargaining, they might well turn to other, less peaceful means. It would be tragically ironic if accommodation of nonadversarial employment relations, as embodied in the Chrysler-UAW agreement, engendered frustration and strife of the sort the NLRA was designed to abate.
