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EMPLOYEE VOICE AND EMPLOYER CHOICE: A STRUCTURED EXCEPTION TO SECTION 8(a)(2)

Clyde W. Summers*

INTRODUCTION

There is no need here to restate the reasons employees should have a voice in the decisions which affect their working lives. Nor is there need to revisit the voluminous literature detailing how employee participation increases productive efficiency and quality, and how it enhances democratic values and personal dignity. I leave that to my fellow contributors and their industrious footnoting.

There are few in politics, personnel management or academia who would openly argue that employees should have no voice in the terms and conditions of their work. The debate is largely over how much voice they should have, and in what decisions; though the underlying dispute is often whether the employees' right to voice is matched by management's duty to listen.

Participation is often limited to the one-way channel of the "suggestion box" through which employees may speak but seldom receive answers. Or participation may be through a two-way "communications" system in which messages are shuttled up and down the hierarchical chain with no dialogue or shared decisions. "Quality of work life" programs with "quality circles," "production teams," and "employee involvement programs" may provide some voice in performance of tasks, daily work assignments, production goals and minor shop floor problems. But these devices provide no voice in larger matters of job training and promotion rights, health and safety, wage payments and benefits, employment policies and job security.

The search for new forms of employee representation is driven by an assumption that these forms of participation which have such limited substance are not adequate; that workers should have a collective voice in all decisions, both small and large, which significantly affect their working lives. At present, the only channel for participation is through a majority union acting as exclusive representative in collective bargaining. But less than thirteen percent of all employees in the

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private sector are now represented by unions; eighty-seven percent have no voice in substantial matters affecting their working lives.

The search is primarily for some meaningful form of employee representation other than traditional collective bargaining which goes beyond what the NLRB described in Electromation, Inc. as a "'communication device' to promote generally the interests of quality or efficiency." The purpose here is to suggest one direction the search might take.2

I. THE USEFULNESS OF FOREIGN EXPERIENCE

Not surprisingly, some of those searching for new forms or representation have looked to the labor relations systems of other countries, particularly our chief international competitors, Germany and Japan. Professor Weiler, whose book Governing The Workplace has energized the current discussion, has proposed establishing, by statutory mandate, "Employee Participation Committees," (EPC) built on the model of the German works council. He has sketched out the elements of such a committee's structure, responsibilities, resources and finances following generally the outlines of the German Works Constitution Act,3 but with modifications to fit the American situation.4 Professors Freeman and Rogers would move in the same direction, but without a statutory mandate. They would encourage employers to create Employee Participation Committees by tax breaks and other government incentives, and allow less than a majority of employees to trigger their formation.5

Comparable efforts have not been made to build on the model of the Japanese enterprise unions which, in practice, bear many similari-

2. This is merely an elaboration of a suggestion floated in Clyde W. Summers, Industrial Democracy: America's Unfulfilled Promise, 28 CLEV. ST. L. REV. 29 (1979).
ties to the German works council, but which are built on a statutory base modeled on the Wagner Act.\textsuperscript{6} American employers, however, have borrowed heavily from the Japanese in creating quality circles and other work group structures. If not barred by section 8(a)(2),\textsuperscript{7} employers would likely copy the Japanese consultation committees and encourage the organization of enterprise unions to fend off or supplant traditional American unions.

No responsible person seriously suggests that German works councils or Japanese enterprise unions can be transplanted unchanged to American soil. Modifications, some major, would need to be made. Professor Weiler has flagged some of those necessary changes. Without detailing how it might be done, it is enough for my purposes here to state that I believe that a works council system modeled on the German system could be structurally superimposed on our collective bargaining system. It could be done in a way which would provide a form of representation to those not now represented by unions without undermining or weakening our present collective bargaining system, and perhaps substantially strengthening it. The obstacle is not structural, but political. It could work \textit{if} employers and unions were willing to let it work. That, however, in my view, is a forbidding, if not preclusive \textit{if}.

Although we can not, or will not, mandate works councils, we can learn from German and Japanese experience. The most important and illuminating question to ask is why they seem to work so well. That may give us some better understanding of what is required if we are to develop new forms of effective representation for ourselves and the difficulties we face if that is to be achieved.

German works councils and Japanese enterprise unions have several factors in common which underlie their effectiveness. First, they are rooted in the workplace, focused exclusively on problems of the enterprise.\textsuperscript{8} Membership in German works councils is, by law, limited to the establishment;\textsuperscript{9} council members are employees in the workplace, elected by other employees in the workplace and accountable only to those employees.\textsuperscript{10} Where an enterprise has several establishments, separate works councils may form a central works council, but

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\item \textsuperscript{6} Taishiro Shirai, \textit{A Theory of Enterprise Unionism, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN} 117, 120 (Taishiro Shirai ed., 1983).
\item \textsuperscript{8} See generally Clyde W. Summers, \textit{Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective}, 28 \textit{AM. J. COMP. L.} 367 (1980).
\item \textsuperscript{9} Works Constitution Act 1972, §§ 1, 5. (F.R.G.)
\item \textsuperscript{10} \textit{Id.} § 8.
\end{itemize}
the structure is confined to the enterprise. This focuses the works council on the welfare of the enterprise and focuses the employer on the welfare of its employees. This minimizes external influences; outsiders and outside influences do not intrude.

It is true that three-fourths of the works council members are union members, often elected on a union slate. But once elected they consider themselves responsible to their fellow employees and not to the union. Frequently they refuse to follow union policy, even to the extent of being disowned by the union and denied a place on the union slate in the next election. They may then win reelection on an independent slate. Even though the works council asserts its independence, the union provides it technical assistance and advice when asked, for the union, not the works council, is the suitor.

Japanese enterprise unions are similarly rooted in the workplace or enterprise, for there is no parent national union as we know it. The enterprise unions may be affiliated with a national confederation which provides some coordination, particularly in bargaining for general annual increases in the shinto or "spring offensive." But the enterprise union is essentially independent, and its officers and members consider it a part of the enterprise. Its purpose, in their view, is to serve the enterprise as well as its members.

Second, employers in Germany and Japan generally accept, indeed support, the system of plant level representation. German employers accept that employees are entitled to collective representation and a voice in decisions of the enterprise. They recognize that the works council can help solve problems and find mutually acceptable solutions. When such solutions are agreed upon, employers rely on the works council to persuade employees to accept them and carry them through. As a German employer said to me, "I could not run the plant without the help of the works council." But employers also recognize that works councils cannot serve these functions unless there is genuine sharing of information and decision making.

It is worth noting that although German employers accept collective bargaining with unions at the national or sectional level, they refuse to recognize or deal with unions at the plant level and have

11. Id. § 47.
12. Summers, supra note 8, at 373.
13. See generally Shirai, supra note 6, at 117-44.
resisted establishment of union steward systems in the workplace.\(^\text{15}\) They accept the works council because, "they are our people."

Japanese employers similarly accept enterprise unions and find them useful, although they predominate only in the large enterprises, and less than one-third of all workers are in enterprise unions.\(^\text{16}\) Where they exist, they are not viewed as adversaries of management, but as integral parts of the enterprise. This results, in part, from the fact that the practice of internal promotion results in many of those in management having once been officers of the unions in Japan.\(^\text{17}\) Japanese employers, unlike German employers, are not confronted with potential intrusion from "outside" unions, for there are no substantial "outside" unions in Japan. But there is reason to believe that they would be equally resistant to such unions at the plant level.

Underneath this acceptance of plant level representation is a third and more subtle factor—a recognition that employees are not just another factor in production, their labor to be purchased like supplies or energy. Instead, they are considered members of the enterprise and entitled to a voice in its decisions, with a share in the enterprise because of their contribution to its production and profitability. This is the articulate premise of the German Works Constitution Act\(^\text{18}\) and the Codetermination Acts\(^\text{19}\) providing for employee representation on corporate boards, but it is reflected in other legal rules and practices.

For example, German dismissal law proceeds from the premise that an employee has a right in his or her job and can not be dismissed without "social justification."\(^\text{20}\) Although employers are not required to retain unnecessary workers, an employee cannot be dismissed if there is another job available in the enterprise which the employee can perform; and the employer may be required to provide the employee training for that job.\(^\text{21}\) If a going enterprise is transferred, the

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17. Shirai, *supra* note 6, at 139.
employee's job rights are transferred with the enterprise and the successor assumes the obligation for continued employment with existing seniority rights. In cases of mass dismissal or plant closure, the employer has an obligation to work out with the works council a comprehensive plan for helping employees make the change. This may include staged timing of layoffs, transfers to other parts of the enterprise, job retraining, moving allowances, and severance pay. If full agreement is not reached, the dispute is submitted to arbitration, which may assess substantial severance pay.

Japanese recognition that employees, especially permanent as contrasted with so-called "temporary employees," are members of the enterprise is even more pronounced. The common expression is that permanent employees are "members of the family," and the employment relation takes on many family attitudes. "Lifetime employment" expresses the principle that employees are members of the enterprise and all measures possible should be taken to preserve that relationship. If cutbacks in employment become necessary, lifetime employees may be "dispatched" or "farmed out" to work for other employers at their existing salaries until they are again needed and returned to their regular jobs. The plant may be completely closed for a number of weeks, with the employees receiving eighty percent or more of their regular pay, half of which is reimbursed by the government to employers of more than 300 employees, and two-thirds to smaller employees.

Lifetime employment is limited almost entirely to large employers; small employers are unable to provide such assurance. However, the recognition that regular employees are members of the enterprise with a claim to continued employment is widely shared. For example, the practice of closing operations for a limited period and paying employees eighty percentage of their pay is more prevalent among small employers than large employers.

Although lifetime employment is an employment practice, not a legal concept, the Japanese courts have recognized the underlying principle and developed rules protecting employees from dismissal.

22. Id. at 92-93.
26. The courts have used the "abuse of rights" theory to void dismissals not based on "objectively reasonable grounds [which can] receive general social approval." SUGENO, supra note
They will review dismissals based on lack of work and inquire into whether the dismissals were compelled by economic necessity or whether the employer could have borne the burden of retaining the employees. These inquiries will be made even though the employees are not lifetime employees.

It is true that lifetime employment does not fully protect so-called temporary or part-time employees. They are used to provide much of the flexibility needed to protect the lifetime employees. They are not "members of the family." This, however, only reinforces the relation between the employer and the enterprise union, for the enterprise union does not include the temporary and part-time employees. The relation remains entirely within the "family."

When employees are treated as members of the enterprise, not hired hands providing labor, they come to think of themselves as belonging to and having a stake in the enterprise. They develop a loyalty to the enterprise and a concern for its welfare. When they are given full information about the financial condition of the enterprise and a voice in its decisions, they are more ready to promote its productivity and profitability. It is this shared view of the employees' place in the enterprise which reduces the adversarial character of plant relations in Germany and Japan and fosters a process of mutual problem solving and accommodation.

The fourth factor which makes the German work councils and Japanese enterprise unions work is that when disagreements arise between management and the employees' representative, devices are available to bring pressure on management. In Germany, a wide range of issues are subject to "codetermination." That means that if the works council and management are unable to agree, the dispute is submitted to arbitration—in effect, binding interest arbitration. This includes issues such as work schedules, overtime and short time, methods of wage payment, technical devices to monitor employees, prevention of accidents and occupational diseases, guidelines for hiring,

24. at 402. If a dismissal is not for "just" cause, it is an "abuse of right," and "just" cause is strictly applied with the courts voiding dismissals for misconduct, inefficiency, laziness, or even theft. See T.A. HANAMI, LABOUR LAW AND INDUSTRIAL RELATIONS IN JAPAN 89 (2d ed. 1985).


28. The doctrine of "abusive dismissal," requiring that there be reasonable and objective grounds for dismissal, has been applied to employees with contracts of indefinite duration, including "temporary workers" whose term contracts have been repeatedly renewed. SUGENO, supra note 24, at 155-56. It also has been applied to part-time employees. Id. at 162.

29. THE JAPAN INSTITUTE OF LABOUR, supra note 14, at 13-14.

transfers and dismissal, implementation of vocational training programs, and severance pay in cases of mass dismissals and plant closures. Although these may not reach the "core of entrepreneurial control," the threat to carry a codetermination issue to the slow, expensive and uncertain process of arbitration provides leverage to obtain agreement on issues not subject to codetermination. Indeed, works councils regularly negotiate for wages above the minimum prescribed by collective agreements. Although works councils are by law prohibited from striking, the danger of unauthorized strikes cannot be totally discounted.

Japanese enterprise unions have a variety of devices to use in disputes, designed more to embarrass than injure the employer. The strike is legally available but strikes are customarily very short or may often take the form of a protest demonstration of wearing badges or arm bands or posting hand bills to show their dissatisfaction. Such methods are often sufficient because employers take seriously such publicity of unhappiness within the family and give weight to the union's demands.

What conclusions might we draw from these characteristics of the German and Japanese systems that are relevant to our search for new forms of employee representation? The initial reaction is that the search is a futile quest; at least, these models provide no guide. We lack the fundamental attitudes which make these models work. American employers generally do not accept that employees are entitled, as a matter of right, to collective representation; quite the opposite, as our experience distressingly demonstrates. Many employers favor employee involvement programs, but these are largely limited to communications systems or quality circle type programs which give employees no voice in larger decisions that vitally affect their working lives. More substantial forms of nonunion participation have been barred by section 8(a)(2), but there is little reason to believe that its

31. Id. § 95.
32. Id. § 98.
33. Id. § 112.
35. HANAMI, supra note 26, at 133.
36. THE JAPAN INSTITUTE OF LABOUR, supra note 14, at 43-44. More than two-thirds of the strikes are less than four hours long. Yasuhiko Matsuda, Conflict Resolution in Japanese Industrial Relations, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 179, 194 (Taishiro Shirai ed., 1983).
37. SUGENO, supra note 24, at 563-68; HANAMI, supra note 26, at 137.
repeal would lead employers generally to accept much broader shared decision making.

Mandating works councils or employee representation committees, even if politically possible, would be accomplished over the determined opposition of employers. When defeated politically, many employers would wage guerilla warfare in the workplace or engage in sabotage. At the very least, they would bring to the process an adversarial attitude which would shrivel the possibilities for cooperation and mutual problem solving. All of this points toward a voluntary solution which would allow those employers who recognized the values of worker participation to construct a system implementing it where there was no union. The hope would be that other employers, seeing its values demonstrated, would come to accept it as a better way to conduct labor relations.

Acceptance of employee participation through works councils, however, would not of itself provide the undergirding recognition by employers that employees are members of the enterprise, the most important factor in leading both parties to focus on their mutual interest in the productivity and profitability of the enterprise. Employment at will and its radiations deny that workers share any rights in their jobs and make them subservient to the whims of the employer. And claims of management prerogatives deny that workers shall have a voice in decisions in the workplace. Work councils can have only limited effectiveness unless employers repudiate employment at will, disclaim areas of management prerogatives and take other steps to recognize employees as members of the enterprise.

Works councils are rooted in the workplace, but our unions are also rooted in the workplace. No one seriously suggests that a new form of representation should supplant or preclude unions; the two forms of participation must, therefore, be coordinated. This is a more difficult problem than in Germany where the union bargains at the national or sectional level but has no authority in the plant. The problem here is complicated by the fact that unions seldom represent all of the employees at the workplace, and often only a fraction in the enterprise. However, coordination, or at least coexistence, of the two systems of participation is, I believe, possible.

II. Toward a New Form of Representation

Creation by the employer of any form of employee representation, except perhaps narrowly confined "communication devices to
promote generally the interests of quality and efficiency," run headlong into section 8(a)(2) of the National Labor Relations Act which 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."  

Section 8(a)(2) effectively forecloses employee representation through any structure which is not wholly independent of employer support. For practical purposes, the alternatives are representation through a union or no representation at all, and this leads to collective bargaining through a majority union as the only available form of employee participation.

A common argument is that section 8(a)(2) limits employees' freedom of choice as to how they shall be represented. Many employees, it is said, want to have a voice in decisions in their workplace, but they do not want to be represented by a union and through collective bargaining. They perceive unions and collective bargaining as creating an adversarial relation leading to strikes. These employees, it is argued, should be free to choose other forms of representation; and employers who want employee participation should not be barred from providing it where employees do not want a union.

I pass over, for the present, certain misgivings about this argument, except to say that in my view rejection of unions and collective bargaining is less a result of employee choice than of employer choice. Although hard data is not at hand, I doubt that many representation elections would result in a "no-union" vote if the employer remained neutral in the election campaign. Those doubts are reinforced by experience in the public sector where employers seldom wage vigorous anti-union campaigns and the majority seldom votes "no-union." Certainly, employees will rarely refuse to organize where the employer openly prefers collective bargaining.

Undoubtedly, there are many cases in which the majority of the employees have rejected unions and collective bargaining, at least in part, because of the employer's open opposition. This opposition may take the form of a simple declaration, massive campaigning which goes to the brink of illegality, or coercive unfair labor practices. In any event, the end result is that both the employees and the employer have rejected representation through a union, but both want some form of employee representation for purposes of participation. It is to

38. Supra note 1.
this situation which the present search for new forms of representa-
tions is addressed.

One path, which is commonly suggested, is to repeal section 8(a)(2) and allow employee free choice. The result, however, would not be employee free choice, but employer free choice, for the only choice would be between the employer's proposed plan or no represen-
tation at all. Half a loaf might be better than no loaf at all, but experience warns that many employers' plans would be little more than crumbs.

Many, if not most, employers, are not prepared to give their em-
ployees a voice in substantial decisions of the enterprise, to give them adequate information enabling them to make useful judgments, and to discuss with them the potential alternatives. They may provide forms of participation, but only so long as the employee representatives' views do not depart from those of management and do not impede or cast doubt on management's decisions. Whether intended or not, the availability of such devices makes it easier for the employer to induce employees to reject unions and collective bargaining.

Repeal of section 8(a)(2) would reopen the doors to all of the evils it was intended to prevent. History warns that employee represen-
tation plans would be created for the very purpose of forestalling union organization, but they would provide only the shell of representa-
tion. Their structure and functions would be determined by the em-
ployer, they would be dependent on the employer for finances and administrative facilities, the representatives would be vulnerable to employer pressure, and the committee could be disbanded by the em-
ployer at any time. The employees' voice would be little more than an echo of management's.

It may be argued that employees will recognize a sham for what it is and reject it. History does not support this argument. Formal struc-
tures of representation can disguise the lack of substance, visible pro-
cedure can create an illusion of action. Representatives who are subservient to management, but who prize their prestige and other benefits, will help thicken that disguise and promote the illusion. If the employee representatives and management together control the

40. For an early, well-developed argument for this result, see Charles C. Jackson, An Alter-
native to Unionization and The Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice, 28 SYRACUSE L. REV. 809 (1977). The author would not, in form, repeal § 8(a)(2), but would limit the inquiry to em-
ployee free choice in such a way that, by his own admission, almost any violation of § 8(a)(2) would violate some other subsection of § 8. See id. at 838 n.119, 839 n.127.
channels of communication, the disguise becomes nearly impenetrable by ordinary employees. Moreover, if some employees penetrate the disguise or become dissatisfied with the employer's plan, their only alternative is unionization. But any movement in that direction will risk retaliation and be met by a massive anti-union campaign orchestrated by both the employer and those who purport to represent the employees. The choice presented will be between the union and the employer dominated plan. Many of the employees will not see through the disguise, and others will be persuaded that they will fare better under a representation system which the employer strongly supports than one which the employer bitterly opposes. The presence of the sham plan will thereby substantially reduce union support and employees will continue to have but the shell of representation.

The fact that some employers, out of anti-union motives, would create sham representation plans subservient to the employer, however, should not bar those employers who want to provide employees a meaningful voice. Employers should be able to create a representation system which has the independence, resources, information and scope of functions needed to speak for employees on matters of substantial concern to the employees. Our search should be for a way to permit the good while continuing to bar the bad.

In Electromation, Board Member Raudabaugh suggested that section 8(a)(2) be reinterpreted in the light of the present legal context and industrial condition to allow some forms of employee participation plans (EPP). He would look to four factors on a case by case basis:

1. The extent of the employer's involvement in the structure and operation of the committee;
2. whether the employees, from an objective standpoint, reasonably perceive the EPP as a substitute for full collective bargaining through a traditional union;
3. whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining; and
4. the employer's motives in establishing the EPP.

The four factors, on their face, are seedbeds of uncertainty; Member Raudabaugh's elaborations provide added fertility. When the four factors are intermixed on a case by case basis they are as likely to produce weeds as flowers, for they do not deal with the real evils of sham representation systems.

If employer-initiated representation plans are to be separated into those which are permitted and those which are barred, then the line between the two should be reasonably clear. Employers who seek to create the form of participation without the substance should be clearly warned that empty shells will not do. Employers who want to give employees a meaningful voice and create a structure for effective employee participation should know what is required to keep within the letter and purpose of the law.

Section 8(a)(2) was enacted to reach a real evil—sham employee representation plans which obstructed representation through unions and collective bargaining but provided no meaningful representation in its place.\(^4\) That evil is as potential today as it was real when the statute was enacted. Repeal of section 8(a)(2) or wholesale reinterpretation would open the door to the return of that evil.

The genesis of our present discussion is that section 8(a)(2) reaches beyond the evil to prohibit all forms of non-union representation. The solution should better take the form of carving out an exception to section 8(a)(2) which would allow employers and employees who have rejected collective bargaining to construct a system which will serve the employees' right to a voice and the employer's need for employee participation. The purpose of carving out an exception is to make available a system of participation where employees have rejected unionization. The exception, therefore, must be so defined as to be used only by those employers who are genuinely ready to share decision making with their employees.

III. The Outline of a Proposal

The core of my proposal, in simple terms, is to permit employers to establish employee representation plans free from the strictures of section 8(a)(2), if the plan met certain specified requirements. Those requirements would guarantee, so far as possible, that the employees' representatives had the independence necessary to speak freely on behalf of the employees, that they were the voice of the employees, not the echo of the employer. The suggested requirements, drawn largely from the German works councils, should be cast in general terms so as to provide flexibility. The central principles would be guaranteed independence from the employer and the guarantee of a meaningful voice.

This alternative should not be available to an employer which has interfered with its employee’s free choice; its purpose is to provide a form of employee representation only where employees have freely chosen not to have a union. Therefore, an employer should not be allowed to establish such a plan when there was an active organizing campaign under way or a representation proceeding was pending. Nor should an employer be allowed to establish such a plan where an unfair labor practice proceeding against the employer was pending or there had been a final determination of an unfair labor practice against the employer in the preceding three years. The availability of an alternative should not provide the employer an incentive to interfere with an employee’s freedom of choice.

The requirements which an employee representation plan should meet to be exempt from section 8(a)(2), I would suggest, include the following:

First, although the structure would be framed at the outset by the employer, the employees should be free to modify the structure by majority vote after consultation with the employer, so long as the structure is kept within the specified requirements. Once established, the plan could be abolished or disbanded only by the employees.

Second, supervisory and administrative employees should be represented separately from non-supervisory employees in order to insulate employee representatives from management influence or control. This should not preclude inclusion of first line foremen in the non-supervisory employee group where both agree, but the representatives of the non-supervisory groups must, themselves, be non-supervisory employees. The plan should call for joint meetings of representatives of all employee groups with representatives of management. But to assure continued independence, the representatives of the non-supervisory employees must retain the right to meet alone with representatives of management to deal with matters of their concern.

Third, the employee representatives should be elected by those they represent, free from outside influences. The elections should be at reasonable intervals and the nomination and election process should be subject to basic safeguards similar to those provided in Title IV of the Landrum-Griffin Act for election of union officers.

Most important, the choice must be that of the employees, uninfluenced by the employer. The employer should be barred from giving any support of any kind to any employee candidate, just as section

401(g) of Landrum-Griffin prohibits employers from promoting any candidate for union office.

*Fourth,* the employee representatives must be provided the resources needed for performing their functions. This would include paid time off for meetings with management, meetings with employees, handling of grievances, and internal discussions. The minimum amount could be fixed, as in Germany, by the number of employees covered. Employee representatives must also be provided office space and secretarial support, and have the right to hold employee meetings on company premises.

Most important, an employee representative plan must have guaranteed financial support for various organizational and educational purposes, and for hiring professional services and experts. This would include such costs as arbitration of grievances, enforcement of employees' legal rights, use of experts in health and safety matters and job evaluation programs. Again, the amount could be determined by some prescribed formula, to be paid by the employer. The employees should be free to supplement the amount with a check-off by majority vote.

*Fifth,* employee representatives should be protected from fear of retaliation for their activities. They should not be subject to dismissal or discipline, except upon employer proof of just cause, and they should not be subject to lay off so long as there was work available which they were qualified to perform. Prohibiting discrimination does not provide adequate protection because proving motive is too difficult. The representative should be able to enforce this right either by suit for dismissal contrary to public policy or by arbitration for dismissal without just cause, as well as by an unfair labor practice proceeding.

*Sixth,* the employer should have a duty to confer with the employee representatives on all matters which substantially affect the employees' working lives. Because the underlying principle of employee participation is to treat employees as members of the enterprise and give them a voice, there is no reason for drawing the troublesome and divisive line between bargainable subjects and management prerogatives. The only duty on management will be to confer; management will still retain the ultimate right to decide. The right of employees to strike would not be enlarged or reduced, for the only change in the National Labor Relations Act would be to provide an exemption from section 8(a)(2).
Employers would no doubt prefer to prescribe the subjects with which employee representatives could deal. This, however, would enable employers to limit the subjects and create a structure of elected representatives with no voice, a shell with no content. This is the kind of sham which section 8(a)(2) was designed to prevent. Any attempt to allow an employer to limit the subject matters to be discussed, but at the same time guarantee a substantial measure of participation would require line drawing which would generate uncertainty and controversy. The best test of whether a matter is of substantial interest to employees is their insistence on discussing it, and if it is of substantial interest to employees, the employer will undermine the purpose of participation if it insists that the subject is none of the employees' business.

The employer's duty should be to "confer" or "consult," not to "bargain," if for no other reason than to avoid the image of an adversarial process. But there would be a more fundamental difference; conferring or consulting would be a continuing process. Problems would be discussed and resolved as they arose, not bargained as a package and frozen for two or three year intervals. The duty on both sides would include, of course, the duty to meet, exchange views, and consider proposals and counter proposals for dealing with the problems in an effort to find a mutually acceptable solution. This solution would become the governing rule or principle to be followed by the parties until it was changed through the process of consultation.

Perhaps the most important aspect of the duty to confer would be the duty of the employer to provide the employee representatives all relevant information; they can not speak to a problem without all the relevant facts. This must include information which will enable them to make responsible judgments of the ability of the enterprise to bear the costs or burdens of potential solutions. The employees have as much concern as management with the continued viability of the enterprise. The scope of information required may be borrowed from the German Works Constitution Act. This includes giving information "in full and good time" of any plans concerning the construction, alteration or extension of the plant, works processes or jobs; matters relating to manpower planning such as manpower needs, staff movements and vocational training; and financial matters such as the economic and financial situation of the company, the production and investment programs, rationalization plans, introduction of new work methods, reduction of operations, and plan transfers or closures, or
any "other circumstances and projects that may materially effect the interests of employees of the company."  

Finally, the employee representatives should have the authority and ability to aid employees in enforcing any statutory or other legal rights, including those arising under individual contracts of employment. Where the employer and the employee representatives have agreed upon any rules or benefits, whether stated in the form of employer policies or written agreements, these should be enforceable by any employee for whose benefit they are made as a part of their contract of employment, and also by the employee representatives. The plan should include a provision that disputes over rights under individual contracts of employment and under agreements between the employer and the employee representatives should be submitted to binding neutral arbitration.

These are the broadly stated standards which I believe an employer-created representation plan should meet to be entitled to exemption from section 8(a)(2). There remains the question of how such a proposal would be administered and enforced. If an employer-created plan, on its face, did not fully meet these standards, its creation would be an unfair labor practice and the order should be for the employer either to disestablish the plan or, if it met most of the standards, to amend it to meet the standards. If the plan, on its face, met the standards, but the employer in practice violated any of them, those violations would be unfair labor practices, leading to the usual order to cease and desist. If those violations were extensive or persistent, evidencing an unwillingness of the employer to observe the standards, then the plan should be disestablished.

The existence of such employee representation plans would not structurally change unionization or collective bargaining. Where the union represented some, but not all, of the employees in the establishment, the employee representation plan would include only those not covered by the union. The two forms of employee participation would coexist. This might well create some tension because their scope and functions would be different, but each could operate independently. Unions would retain all of their rights under the statute to organize, petition for elections, and to become an exclusive bargaining representative. If the majority in an appropriate unit voted for the union, this would demonstrate those employees' choice to be represented by

44. Works Constitution Act 1972, § 106. See also, id. §§ 90, 92, 99, 100, 110, 111 (stating other requirements of information).
the union rather than the employer-created plan and the union would become the statutory representative. The employer would then be barred from dealing with the plan's representatives on issues involving employees in the bargaining unit and would be required to bargain with the union. This might require a new election of representatives by those outside the bargaining unit, but the plan could continue for those not represented by the union.

All employees would retain all of their rights under the National Labor Relations Act, including their section 7 right to engage in concerted activity for mutual aid and protection. Any two or more employees who were dissatisfied with any of their terms and conditions of employment could, like the employees in *Washington Aluminum*, 45 refuse to work until their demands were met. Certainly, the employee representatives should not be able limit or surrender that right of employees to strike as a union may do in agreeing to a no-strike clause.

A substantial question is whether employee representatives could be barred by agreement or otherwise from calling a strike. German works councils are, by law, prohibited from engaging in "acts of industrial warfare," but they have the leverage of being able to demand arbitration on a number of issues. Employee representatives would have no such leverage. Their practical ability to call a strike would be very limited because they would have little or no resources to support a strike. Moreover, the very nature of their establishment and operation would not look toward use of economic force as a method of resolving differences. It seems to me that they should have available at least this limited instrument to encourage the employer to make serious efforts to reach mutually agreeable solutions.

An employee representation plan under this proposal has obvious weaknesses; it is not the equivalent of representation by a majority union. At the outset, it may not be the fully free choice of the employees. In an NLRB election campaign the employer may bring its full weight to bear to defeat the union so long as it avoids being found guilty of an unfair labor practice. The employer's touting the availability of an alternative plan which it prefers will add to its anti-union arguments. The election outcome will reflect the employer's choice even more than it does now.

Policing the requirements would present substantial burdens. Every plan could raise questions as to whether it conformed in all respects to the requirements. These problems could be eased by rule-

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making and advisory opinions if the Board forced itself from the self-imposed blinders of case by case adjudication. In any case, it would, for at least a time, add substantially to the work load of the Board.

Most important, it would be difficult to legally prevent employers from making the process of consultation an empty shell. The danger is that the employer would establish the formal structures, provide the required information, meet with the employee representative, pretend to listen, but give the employees' representative's view no weight. Proving refusal to consult in good faith would be an even more ephemeral pursuit than proving refusal to bargain in good faith. There could, in reality, be no employee participation; the employee voice would be hollow. Even with the requirements, there is a danger that the plan would carry the seeds of company unionism.

The employees would have three potential responses to induce the employer to listen. First, the employer would largely lose the values of increased employee cooperation and efficiency. The plan would serve no purpose other than potentially forestalling unionization. Second, the employees could engage in concerted action. A traditional strike would have limited potential, but short term strikes, slow downs or even sabotage could exact a price. The employers failure to live up to the promises held out in establishing the plan could provide an incentive for such activities. Third, the employees, on finding that the plan was a shell, could readily convert it into a union and become the legal bargaining representative.

All of these responses provide only limited leverage to induce the employer to listen and consult in good faith. But the threat of these responses would exert some pressure on employers. The creation of a representation plan which met the stated requirements would create a level of employee expectations and provide an organizational structure which would substantially increase the likelihood and ability of the employees to make these responses effective. This would decrease the incentive of employers to create plans for sham purposes, but not discourage employers who had a genuine desire to provide for employee participation.

There may be relatively few employers who, when confronted with the possibility, will be willing to give their employees the voice which this proposal would provide. Most employers may prefer to limit employee involvement to suggestion boxes, communications systems or quality circles now allowed under section 8(a)(2). The propo-
sal is designed only to meet the needs of those who want to give their employees a meaningful voice, however few or many they may be.

**CONCLUSION**

This proposal is not presented as an ideal solution for providing employees meaningful participation in the decisions which affect their working life. In my view, collective bargaining between unions and management could potentially provide a much better instrument. If we had sixty or seventy percent unionization and employers fully accepted unions and collective bargaining, then Sweden, with its Codetermination Act of 1976,46 might provide a model. But we do not have a comprehensive system of collective bargaining; most American employers do not accept unions; and collective bargaining in this country has a predominate adversarial character. Providing participation through collective bargaining is at present impossible for the great majority of employees.

Mandated works councils built on the German model, with any three employers able to call for the election of a works council, would in my view, be the next best solution. Such a system could be structurally adapted to our present situation by the relatively simple device of providing for works councils where no majority union held representation rights. This would create less problems and tensions than now often exist when two or more unions have bargaining rights in the same enterprise.

The proposal here to provide a structured exception to section 8(a)(2) has only two claims to serious consideration. It will provide an alternative to the two present polar choices—representation by a majority union or no representation at all. The other virtue is that it appears to be within the range of present possibilities. It will provide an alternative for employers who recognize the values of employee participation, but whose employees reject unionization, without opening wide the doors to the evils barred by section 8(a)(2).47

46. Lag om Medbestammande i arbetslivet.
47. I doubt many employers will opt for this alternative. Their reaction may be, in Professor Finkin’s words, “With a works council like this, why not have a union and be done with it?” That reaction, however, will betray many wanting to talk of employee participation but not provide it. We might then ask just how much employee participation do employers generally want, and how much decision making are they willing to share? If employers do not want real participation, then § 8(a)(2) should remain with full vigor.