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OLD WINE IN NEW BOTTLES?**

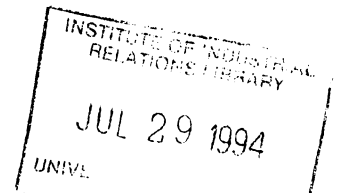
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PROSPECTS FOR EMPLOYEE REPRESENTATION IN THE UNITED STATES:
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Since the 1970s, the United States has experienced two major changes in its industrial relations system. The first is a large contraction in private-sector unionism. Currently only 11 percent of private-sector workers are represented by a union, well less than half the level of twenty-five years ago. While unionism has declined elsewhere, its shrinkage has been greater in the United States than any other advanced industrial nation, with the possible exception of France. (Visser 1989; Farber and Krueger 1993) But even France still has works councils as well as mechanisms for extending union contracts to nonunion workers. Thus U.S. unions have lost more economic and political influence than their French counterparts; quite possibly they have become the weakest labor movement in the advanced world.

The second major change in the United States has been the rapid expansion of team-based production and other mechanisms for employee participation in the workplace. These employee involvement programs (EIPs) have made significant inroads in American companies since 1970. Employers tout EIPs as integrative approaches to employee relations that offer workers new channels for participation in decision-making and that encourage cooperation with management in raising productivity. Over ten years ago, about half of the large firms surveyed by the New York Stock Exchange (1982) said that they had "taken a shift in their basic approach to management" by introducing EIPs that run the gamut from quality circles to teams to more complex representational schemes. A more recent survey of all firms (Osterman 1994) finds that teams are being used by 54 percent of the companies surveyed, followed by job rotation (43 percent), quality circles (41 percent), and total quality management (34 percent). Emphasizing the linkage of these practices to productivity-enhancement, EIPs are often referred to as "high performance work practices." Data from various studies strongly suggest that employee involvement, especially at the workgroup level, is linked to favorable economic outcomes for the firm. (U.S. Department

of Labor 1993; Pfeffer 1994)

EIPs initially took hold in the nonunion sector and are now spreading to unionized firms as well. Their basic premise, however, runs counter to that of the traditional adversarial model of collective bargaining. As a result, making EIPs fit into unionized workplaces has not been easy. Critics -- such as those associated with the "New Directions" faction in the UAW -- contend that EIPs sap worker interest in unionism and, indeed, are partly responsible for the large drop in U.S. union representation. (Parker and Slaughter 1988) Although EIPs can be found throughout the union sector, the most elaborate and far-reaching EIPs today are found at nonunion companies.

The new EIPs in the nonunion sector are a formidable achievement but they are not without problems. That this is the case should not be surprising. As Knoke (1990: 223) points out in his general study of organizations, "the inclusiveness and openness of democratic governance is fundamentally at odds with the hierarchy and exclusiveness of bureaucratic management." In the case of nonunion EIPs, employee participation occurs chiefly at the job level; influence at higher levels in the organization are, with very few exceptions, limited to voice mechanisms that leave hierarchical power relations unchanged. Moreover, employees in nonunion EIP firms lack independent channels for articulating their concerns and must rely on those provided by management. Although managers often try to be fair, employees are unaccustomed to or fearful of expressing their concerns and dissatisfactions. Decisions that are supposed to be made with employee involvement are still made unilaterally. Complaint systems--even in the most advanced nonunion companies--fail to protect against stigmatization and retaliation. (Heckscher 1988; Lewin and Peterson 1988) This may be the reason that EIPs seem to result in higher productivity levels when introduced in unionized settings (Kelley and Harrison 1992).

Solving these problems requires some kind of autonomous structure to handle employee complaints, coordinate EIPs, focus and articulate group concerns, and bring these to management's attention. Obviously, one form that this could take is representation by a national union, such as those affiliated with the AFL-CIO. So far, however, national unions have failed to gain significant support from employees in advanced nonunion firms. Some argue that this is due to coercion by employers, who pressure and threaten employees not to join unions. Undoubtedly such employer behavior occurs during union organizing campaigns. (Weiler 1990; Meltzer and LaLonde 1991) It is also likely, however, that neither industrial solidarity nor the conflictual ethos of national unionism meshes with the communitarian culture and decentralized EIPs found in advanced nonunion firms. Indeed, in a provocative study Farber (1990) finds that the decline in demand for union representation in the United States can be accounted for almost entirely by an increase in nonunion workers' job satisfaction. While I am skeptical of Farber's results, I am also skeptical that national unions will soon, if ever, successfully establish themselves as complements to the EIPs that currently exist in nonunion firms.

The CIO's industrial unions can be thought of in Darwinian terms as a successful adaptation to the economic environment of the 1930s. The environment, however, has changed over the last sixty years. Today's markets are global, so industrial unions cannot take wages out of competition; neither do high union wages guarantee Keynesian prosperity as envisioned by the Wagner Act. (Any stimulative impact from union wage premiums is lost when union members spend their incomes on imported goods.) And unions face a multitude of organizing barriers, including hostile employers and, at least in advanced nonunion firms, an indifferent workforce. With nearly 90 percent of the private-sector workforce unorganized, it is time to consider some new ways of closing the so-called "representation gap." There are two main alternatives currently being

debated: what I term the "mandatory" and "experimental" approaches (Eisenscher et al. 1993 call these the "works-council-centered system" and the "regulated 'free form' system.")

The mandatory strand would require employers to adopt institutional forms intended to remedy defects in the new nonunion model. Most of these involve some kind of works council or employee committee system that could be grafted onto workplaces that make either extensive or limited use of EIPs. The mandatory works council idea, modeled after European practices (Wever and Allen 1992), currently has captured the policy spotlight. In 1989, several proposals were made to the AFL-CIO's Committee on the Evolution of Work calling for state or federal legislation that would require employees in almost all companies to elect members of "Worker Representation Committees," which would function like works councils. Paul Weiler (1990), an influential scholar of labor law and counsel to the Dunlop Commission, recommends legislation that would require every firm above a certain size to establish Employee Participation Committees (EPCs), elected through a proportional representation scheme to reflect the different constituencies in the firm. The EPCs would address the "spectrum of resource policies of the firm," with an initial concentration on the administration of public laws.

On a related front, Oregon, Washington, and Minnesota presently have -- and Congress recently has considered for OSHA--legislation requiring joint labor-management health and safety committees in all workplaces. Freeman and Rogers (1993) have combined the EPC and OSHA ideas with a proposal whereby employers would be given positive incentives to establish works councils, such as by allowing the councils to supervise the enforcement of OSHA regulations or to implement federal on-the-job worker training programs. Some employers would welcome this decentralized regulatory approach; works councils would devise

safety and training policies tailored to idiosyncratic employer needs rather than the "plain vanilla" variety emanating from Washington. It has also been suggested that the government's administrative savings on decentralization be refunded to employers in the form of tax breaks.

Those advocating an experimental approach see statutory works councils -- or the use of incentives to promote them -- as a bad idea. Estreicher (1993), for one, feels that steps should first be taken to develop wider experience with collaborative representation in the nonunion sector (and to strengthen existing unions, which is almost always also a part of mandatory proposals). Expanding experimentation with nonunion EIPs would be accomplished chiefly by amending section 8(a)(2) of the National Labor Relations Act, which makes it an unfair labor practice for an employer to dominate, interfere with, or provide financial assistance to a labor organization. This proposal -- to amend 8(a)(2) and hope that this legal change would solve some of the problems associated with the progressive nonunion model -- is, in a nutshell, the experimental approach to reform.

There is no doubt that the law is a barrier to expansive kinds of employee involvement; whether such a barrier is desirable, and how strict it ought to be, are what much of the present debate is all about. The issues in the debate were framed by the Electromation decision of the National Labor Relations Board. (309 NLRB 163 (1992)). The case involved an Indiana manufacturer of electronic components that had set up joint employee-management action committees for solving employee problems in five areas, including pay progression, attendance bonuses, and absenteeism. Shortly after the committees were established, the Teamsters attempted to organize the plant and filed 8(a)(2) charges with the NLRB. Various employers' groups, notably from "high-tech" industries, filed briefs contending that a decision against the company would stifle the formation of EIPs at advanced nonunion firms. Nevertheless, in a major ruling (now

on appeal to the Seventh Circuit), the NLRB held that the committees were illegal because: a) the company was involved in the formation of the committees and b) the committees represented employees in dealings with the employer over terms and conditions of employment. Yet Electromation left it unclear precisely when employers could or could not set up committees, teams, and other EIPs in the workplace. (244 DLR AA-1, Dec. 18, 1992).

Some of the questions raised by Electromation were clarified in a second major NLRB ruling in this area: the DuPont case. (311 NLRB 88 (1993)) At one of its unionized plants, DuPont had established joint labor-management committees to deal with safety issues. Because the committees bypassed the existing union (the International Brotherhood of DuPont Workers, which, ironically, initially was established in the 1930s as a "company" union), and because management had the right to veto employee suggestions, the NLRB held the committees unlawful. DuPont, said one board member, "tried to have it both ways. It tried to simultaneously maintain control, discretion, and flexibility in the use of the committees and also to create the illusion of an employee representative that undercut and weakened the chosen representative." For its part, management contended that the committees were merely a management vehicle to facilitate communications and were consistent with guidelines from the Occupational Safety and Health Administration. (108 DLR AA-1, June 8, 1993)

In itself, the DuPont decision did little to clarify Electromation. However, attached to the decision were five pages of guidelines in which the NLRB told employers how to set up EIPs that would comply with the National Labor Relations Act. Briefly, the NLRB held that an EIP might be lawful if: 1) it dealt exclusively with management functions, such as an entirely self-managing team 2) if the EIP were a rotating group or an assembly of all employees that had no leaders or spokespersons 3) if the EIP involved sharing information or "brainstorming" with employees without making proposals 4) if the EIP was a

one-way body, such as a suggestion box. Left unclear, however, was the question of whether EIPs could discuss with management so-called "permissive" issues (those not mandated to be subjects for collective bargaining) and whether OSHA safety committees would be lawful in nonunion plants. (Block 1993; 153 DLR C-1, August 11, 1993)

In keeping with these guidelines, an administrative law judge of the NLRB recently held in National Cash Register that NCR must disband its worker-management "satisfaction councils." NCR, a nonunion company, established the councils in response to a 1991 union organizing drive. After NCR was purchased by AT&T in 1993, the Communications Workers union filed charges against the satisfaction councils. The judge found that the councils were designed as a vehicle for employees to deal with management on a number of problems that were, in essence, grievances, and hence were in violation of the law. (Parks 1994; 195 DLR A-1, June 3, 1994)

What has been the response of labor and management to the NLRB? The AFL-CIO, which underwrote the publication of a recent study of workplace reform (Applebaum and Batt 1994), generally supports the NLRB approach and the 8(a)(2) ban on company unions, contending that "it is unlikely in the extreme that...management-led programs of employee involvement can sustain themselves over the long term [and] cannot meet the full range of needs of working men and women." The management community, however, is not happy with the NLRB decisions, although few companies are changing their current practices to conform to the new guidelines. The NLRB is a reactive agency; a nonunion employer with an unlawful EIP is likely to be charged only if a union organizing campaign is underway, an unusual occurrence these days.

There are, however, a few companies that have changed their current practices in anticipation of an NLRB hearing, such as Polaroid. In 1949, Polaroid created a system of elected employee committees that met regularly with manage-

ment for two-year terms and represented employees in their work groups. After the Electromation ruling, a Polaroid employee filed a complaint with the NLRB about the committees. Before the NLRB held an investigation, Polaroid decided to junk its old committees in favor of something called the Polaroid Employee-Owners Influence Council, which is comprised of 30 employees who reflect a range of views on issues but do not represent any individual employee's view. In keeping with the NLRB's DuPont guidelines, the group does not negotiate, has no leaders, and is forbidden from discussing topics raised by employees outside the committee. Meanwhile, another employee has filed NLRB charges contending that Polaroid's new EIOC is also unlawful. (96 DLR A-2, May 20, 1994; Monks 1994)

With support from the business community, several bills are being considered in Congress that would allow employers to set up EIPs that go beyond the Du Pont strictures. The "Teamwork for Employees and Management Act" (TEMA) would permit EIPs to deal with "matters of mutual interest (including issues of quality, productivity, and efficiency)" so long as these EIPs do not negotiate or modify an existing labor contract. Sponsored by Representative Steve Gunderson and Senator Nancy Kassebaum, both Republicans, the bills would even allow nonunion employers to organize employees into full-fledged company unions if these unions do not "bargain collectively" with the employer. (Moody 1993; Le Roy 1993) Another bill, The American Competitiveness Act, introduced by Republicans Newt Gingrich and Tom Campbell, adds a proviso to section 8(a)(2) stating that "nothing in this paragraph shall prohibit the formation of quality circles or joint production teams...with or without the participation of representatives of labor organizations." (Reynolds 1992)

The administration finds itself in a difficult position in the debate over EIPs. Last year Labor Secretary Robert Reich told the Senate that the NLRB's DuPont guidelines were insufficient and that he thought more clarification of

the issue was needed. (126 DLR A-5, July 2, 1993) Reich also voiced his support for a bill written by Harris Wofford and Edward Kennedy, both Democrats--the "Workers Technology Skill Development Act." The bill would encourage worker involvement in the development and use of advanced workplace technology. Reich spoke favorably of the need for "high performance work practices" and shortly after his testimony, the Department of Labor issued a report summarizing recent academic research on the subject. (reprinted in 143 DLR F-1-12, July 28, 1993) But Reich did not give a definitive statement on the course labor law ought to follow; instead he deferred on this to the so-called Dunlop Commission.

The Dunlop Commission (formally the Commission on the Future of Worker-Management Relations) is chaired by former Labor Secretary John T. Dunlop and comprised largely of academics with an interest in industrial relations and labor policy (seven out of the ten commissioners fit this description). Formed in 1993 by the Commerce and Labor Departments, the Commission recently issued its initial report. The initial report does not attempt to resolve the mandatory-versus-experimental debate nor does it offer a clear statement of how the law might be changed to facilitate either approach or even a more conservative proposal such as TEMA. Rather, it simply states that "the major question is whether, and if so, how, the National Labor Relations Act should be revised or interpreted to permit nonunion firms to develop one or more of the array of employee participation plans that have been challenged under section 8(a)(2) of the Act." The report lays out four very different policy options: 1) retaining 8(a)(2) in its present form 2) the TEMA approach 3) a quasi-experimental approach (permitting employers to establish EIPs but only "if these procedures meet certain standards about employee selection, access to information, protection against reprisals, and the like") and 4) the mandatory approach (requiring employers to offer EIPs that meet minimum quality standards). Those wishing a definitive statement on these issues will need to wait for the Commission's

second report, which is expected sometime late this year or early next year.

(105 DLR S1-159, June 3, 1994)

Some, including myself, are deeply concerned that none of these proposals addresses the needs of employees who are not in stable career-type employment relationships. The Commission's proposals focus on enterprise representation, a form of representation that is inadequate for a growing number of employees. The past fifteen years have seen not only economic globalization but also the disintegration of the stable employment relationships that are a prerequisite to enterprise representation. (Jacoby and Mitchell 1990) Large nonunion companies like IBM and Eastman Kodak no longer guarantee quasi-lifetime jobs. A rapidly increasing share of the workforce is comprised of contingent employees (part-time, temporary, and contract workers) whose ties to the employer -- and whose employers' ties to them -- are weak. Some visionaries, such as Heckscher (1988) and Cobble (1991), have proposed non-workplace-based employee organizations--including associational and occupational unionism--as a way of providing representation for workers who lack the cohesion of a stable employment relationship. Other scholars have begun to outline the kind of legal regime needed to reach workers who will not be affected either by traditional unionism or by nonunion EIPs. (e.g., Gottesman 1993)

Another concern -- expressed particularly by those in and around the labor movement -- is that the the Dunlop Commission proposals will weaken unions and undermine hard-won rights achieved under the National Labor Relations Act. In a recent article, David Bacon (1994), a union organizer, says that section 8(a)(2) remains "an essential element in protecting the right of workers to control their own independent organizations." Without 8(a)(2), employers will be completely free to set up EIPs which, says Bacon, "in every case" are intended "to undermine the idea that workers and bosses have distinct, and fun-

damentally antagonistic, interests and to get the two sides together to work for a common corporate goal." Similar views have appeared in Labor Notes, a newsletter associated with the New Directions group of the UAW: "Giving up 8a2 would allow the return of such fake organizations [company unions] that historically have proven to be a potent anti-union device." If the prohibition against company unions is weakened, said one labor educator quoted in Labor Notes, "a future generation of organizers may scorn us for it." (Parker and Slaughter 1993)

Supporters of 8(a)(2) revision -- including both the experimental and mandatory camps -- argue that unions can expect the Dunlop Commission to give them something worthwhile in exchange for letting go of section 8(a)(2), namely, "labor law reform" (expedited union election procedures and stricter controls on employer conduct during union organizing campaigns.) Unions have been seeking these reforms ever since the Democratically-controlled Senate refused to pass omnibus labor law reform legislation in 1977. But only if unions are willing to give something up can they expect to win such reforms, according to one commissioner, MIT professor Thomas Kochan. "If we bring the Administration a traditional package [of labor law reforms] it'll die on the vine," says Kochan. (quoted in Bacon 1994)

Opponents of 8(a)(2) reform counter that such a tradeoff -- 8(a)(2) for labor law reform -- is undesirable, for three reasons. First, it's not a trade worth making because, if unions go along it, they will have "bought the idea that unions need to help companies compete, and that therefore management needs a free hand to reorganize the shop floor." (Parker and Slaughter 1993) That is, EIPs--or anything resembling them, such as company unions--are to be avoided at all costs. Second, 8(a)(2) currently protects employees from opportunistic EIPs set up with the sole intention of thwarting a union organizing campaign, such as the "satisfaction councils" created by NCR. Because most of the 8(a)(2)

charges filed with the NLRB arise from a union organizing drive, getting rid of 8(a)(2) will remove a major safeguard for unions while doing nothing to promote the spread of EIPs. After all, it is argued, most nonunion employers currently do what they please in this area, pace Electromation. How else explain the 50-percent EIP level observed in the aforementioned employer survey, coupled with the fact that the NLRB has received only 37 complaints on employee committees between 1989 and 1993, out of more than 10,000 NLRB complaints filed during that period? (153 DLR C-1, August 11, 1993; Eisenscher 1994)

Finally, opponents of changing 8(a)(2) say that even if the Dunlop Commission recommends the tradeoff, there is a great risk that Congress will water the Commission's recommendations down to the point where unions get little or nothing in return for giving up 8(a)(2). With strong opposition to labor law reform in the business community and with labor in a weak position, a trade will be politically difficult to effect. Harvard professor Richard Freeman, another commissioner, recently said, "There is some fear that in the business community no one is willing to give up anything, that there's no trade." (quoted in Bacon 1994)

In reverse order, the counterarguments that supporters of 8(a)(2) reform, including myself, have made are these: First, while there is no guarantee of anything in this world, there is a strong possibility that some kind of trade can be made if 8(a)(2) reform is introduced as part of package sanctioned by a blue-riband body such as the Dunlop Commission. And if labor activists sandbag the changes likely to be proposed by the Commission, they run the risk of opening the way up to even less desirable reforms, such as TEMA or the Campbell-Gingrich bill. Second, it is possible to revamp 8(a)(2) without removing the protections the law currently affords against unfair employer behavior during organizing campaigns. As Weiler (1990:214) points out, an EIP is usually the

result of the same mixed-motive impulse that gives rise to such policies as generous fringe benefits, seniority provisions, and employee assistance plans. It is not obvious why 8(a)(2) should single out EIPs for what Weiler calls a "blanket legal ban, on the theory that this kind of program is peculiarly likely to divert workers from the collective bargaining alternative." Nor is it obvious that 8(a)(2) is needed to protect employees during organizing campaigns. Just as it is unlawful for employers to raise wages during an organizing campaign with the intent of influencing its outcome, so would it be illegal for employers to institute an EIP for the same reason, even without section 8(a)(2).

This brings me to the third issue --the fact that 8(a)(2) is considered sacrosanct by many in the labor movement -- which has to do with the distinctive history of industrial relations in the United States. In most other countries, neither works councils nor team systems are freighted with the same negative historical connotations that they bear in the United States. With the exception of Britain, all members of the European Community have legislation mandating works councils, while enterprise unions and joint employee-management committees are widespread in Japan and other countries. (Freeman and Rogers 1993; Jacoby 1994; Morishima 1992) True, the most aggressive works councils tend to be found in countries, such as Germany, where national unions also are strong; in France and Japan, where national unions are relatively weak, plant representation is not as robust. (Thelen 1991; Howell 1992) This is not to say, however, that French workplace committees or Japanese enterprise unions are ineffectual and toothless; the evidence strongly suggests otherwise. (Koike 1988; Brunello 1992; EIRR 1993; Jacoby 1993)

Here is not the place to recount the history of employee representation plans ("company unions") in the United States; excellent summaries can be found elsewhere. (Nelson 1982, 1993; Gitelman 1988; Schacht 1985; Zahavi 1988) Sev-

eral points relevant to the debate over section 8(a)(2) may be extracted from that history, however. First, a distinction needs to be drawn between employee representation plans existing prior to the 1933 National Industrial Recovery Act and those adopted after it. Most of the latter had one and only one purpose: to deter the formation of unions affiliated with the AFL or CIO. But company unions from the pre-NIRA period were, like the rest of what was called "welfare capitalism," motivated by a variety of concerns. Avoiding unionism was one of these, to be sure (although it is worth pointing out that the industries in which unionism was weakest prior to 1933 were the same industries in which employee representation plans were most common). Other reasons for adopting representation plans included: "tapping the worker's brain" so as to improve workplace efficiency; reducing labor turnover; controlling egregious foremen; getting employees to identify with the firm as a way of strengthening the work ethic; and, finally, a sense--shared by employers and reformers--that employee representation was the "right" thing to do. (Jacoby 1985a)

That company unions were perceived as morally desirable had much to do with liberal ideology of the early twentieth century, particularly the notion, promoted by John Dewey and others, that participation in one's natural group would foster social interdependence and democratic solidarity. (Kloppenbergh 1986; Lustig 1982) In the United States, these ideas were appropriated both by employers and by trade unionists to justify company and affiliated unions, respectively; liberal intellectuals thought that these ideas were consistent with either kind of representation. Meanwhile in Europe, these same ideas --blended with ingredients from syndicalism, Marxism, and even Catholic reform -- gave rise to a workers' council movement in the years after the First World War. (Jacoby 1985b)

Come the 1930s, the dislocations of the Great Depression caused an enormous loss of trust in American employers and in welfare capitalism. (Cohen 1990) Nevertheless, some liberal intellectuals, including Donald Richberg and Leo Wolman, continued to believe that company unions might have a role to play under the national labor-relations system designed by Congress in the fateful years between 1933 and 1935. Even Senator Wagner, who moved in the same circles as Richberg and Wolman, had an understanding of collective bargaining that was "profoundly integrationist and cooperationist, not conflictual and adversarial, as is conventionally supposed" (Barenberg 1993:1427). Why, then, if Wagner still was moved by liberal corporatist ideas did he put the eradication of company unions at the center of the National Labor Relations Act? Part of the answer lies with the company unions hastily created in the mid-1930s; these convinced Wagner (but not Wolman or Richberg) of the need to forcefully create a space for national unions. But a more fundamental reason had to do with Wagner's belief that only national unions were capable of boosting purchasing power to permanently prevent a recurrence of depression. As Wagner (1934) wrote in the The New York Times, the company union "has improved personal relations, group welfare activities, discipline, and other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is a general one whose sweep embraces whole industries, or States, or even the nation."

Wagner's criticism had found the Achilles heel of 1920s-style employee representation. But the argument has little meaning today. Wage standardization no longer serves the macroeconomic function once envisioned by underconsumptionists like Wagner. Also, in contrast to the situation in 1934, national unions today are entrenched in those sectors of the economy still prone to oligopoly.

Another point to bear in mind is this: as early as 1936 (and actually already in the 1920s -- see Leiserson 1929), company unions--including those created under the NIRA--were evolving in wholly unforeseen directions. Under intense scrutiny from the NLRB and pressure from affiliated unions, company unions became financially and otherwise independent of employers. According to David Saposs (1936), company unions increasingly were "modeled after trade union organization and procedure." As I have shown elsewhere (Jacoby 1989), there were myriad forces pushing company unions in this direction, including situational incentives arising from the transformation of a mass of individual employees into a group; in one stroke, company unions solved the collective action problem. From the employer's perspective, the solution of this problem had two unfortunate consequences: First, it gave company unions (what were now called "independent labor unions") considerable bargaining power, which they used. Troy (1960) and Jacoby and Verma (1992) present evidence showing relatively high wages being paid to company unions, as high or higher than those going to affiliated union locals. Second, company-union members made tempting organizing targets for national unions because, unlike nonunion workers, they already were a collectivity familiar with the arcana of contracts and grievance procedures. Ten percent of all company unions experienced an organizing raid each year in the 1950s, surely an annoyance to managements. Even without raids, bargaining and contract administration were time-consuming procedures that limited management's ability to make prompt and unquestioned decisions. (Shostak 1962)

One result of all this was a gradual loss of interest in company unions at several firms--most of them large-- that had managed to preserve their company unions through the Second World War. Take, for example, the experience of DuPont, a giant multi-plant employer. Throughout the 1930s and the war, DuPont established company unions at its U.S. facilities; by 1946, 85 percent of its

employees were represented by company unions. After the war, however, DuPont made a strategic shift: Over the course of the next decade it opened 25 new plants, many in the South and all of them without company unions. By 1960, company unions represented only 59 percent of the company's employees. (Rezler 1963)

How did DuPont manage employee relations in its new plants? It operated along the lines of what we today call the "new" nonunion model: limiting employee involvement to workgroup issues, while relying heavily on behavioral science techniques to replicate the "voice" features of company unionism. The same change occurred at TRW, where the new nonunion model replaced the contractual rigidity and labor-cost pressures associated with TRW's company unions. (Kochan et al., 1994) Some managers emphasized the continuity of the new model with the company-union approach, such as a TRW vice president who said, "Openness, leveling, listening therapy, conflict resolution --all this talk by behavioral scientists. Hell, we've been doing these things for 30 years. They're just elegant terms for principles we practiced years ago --old wine in new bottles." (Business Week 1966) Nevertheless, while there was continuity, there also was change: companies like DuPont and TRW were trying to create new institutions that preserved the communicative features of company unions without an excess of democracy or bargaining power.

That is, the rise of the "new" nonunion model was not a case of history repeating itself; something had been lost between the 1920s and the 1960s. Company unions, however imperfect, at least had used formally democratic processes and had been able to influence management at the workplace and strategic levels; that's precisely why managers came to see them as potentially subversive. The "new" nonunion model, on the other hand, avoided democracy, focused attention solely on the workgroup, and encouraged passivity by turning over to trained professionals the task of probing, interpreting, and changing the

worker's mind. As one prescient manager said, "To restore the highest possible level of participation in solving problems does not imply the necessity for management-worker councils, shop committees, or any other formal devices. All that is necessary is ... to give [workers] a chance to express their own ideas and let them know that their thinking is needed and valued." (Worthy 1948)

Mind you, the shift away from company unions was occurring even as the NLRB began to take a more lenient approach. The NLRB's milder policies started during the Second World War and accelerated after passage of the Taft-Hartley Act, which stipulated that the NLRB was not to discriminate against unaffiliated unions when deciding section 8(a)(2) cases. Now, in section 8(a)(2) cases, the NLRB no longer paid attention to affiliation status. Instead, the distinction applied was that between employer domination--the remedy for which continued to be disestablishment--and lesser forms of illegal employer interference and support, which, if withdrawn by the employer, permitted a union, including a company union, to appear on the ballot. (Millis and Brown 1950) NLRB chairman Paul Herzog supported this approach, contending that "This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them." (Note, 1957:356)

What can we conclude from this short review of company union history?

- First, whatever one's position on the Law and Reality debate (Getman et al., 1976), modern employees are, if anything, even more sophisticated than after the Second World War; radical reform of 8(a)(2) is not likely to cause employees to become confused in choosing between an EIP and a national union.

- Second, not all company unions deserve a demonic reputation. Those company unions that survived the Wagner Act often evolved into independent and effective organizations. Hence the shift in the 1960s from company unionism to the "new" nonunion model entailed a significant loss of democratic possibilities in the workplace.

- Third, one can not make the case--as do some opponents of reform--that the historical evolution of company unions into more independent bodies required an aggressive policing stance by government. Initially this was true; during and after the war, however, it was not. Hence if section 8(a)(2) is loosened to allow employers to experiment freely with EIPs, it is possible that we will in the future see the same evolution that occurred in the 1920s and again in the 1940s and 1950s: toward more independent and democratic forms of employee involvement; this is what advocates of the experimental approach are counting on. Of course, history never repeats itself, in this case because modern managers have memories of what happened in the past. Hence there is no guarantee that a loosening of 8(a)(2) will expand the scope and depth of employee participation in nonunion workplaces. Precisely for that reason, advocates of a mandatory approach, including me, are skeptical of simply excising section 8(a)(2) and hoping for the best.

Where do we go from here? If the past is a guide, employers will be leery of EIP proposals that may lead, directly or indirectly, to an increase in their labor costs. On the other hand, unions will be wary of any proposal that might cause a blurring of the line between nonunion EIPs and unions. This suggests the following addition to the menu of policy options laid out by the Dunlop Commission: Prohibit EIPs--either mandated works councils or whatever evolves out of an experimental loosening of 8(a)(2)--from pursuing wage bargains. Such a ban would keep the cost of EIPs down, while differentiating national unions from nonunion EIPs. National unions would still have the unique role of representing workers wishing to bargain over pay; employers would be reassured that the integrative benefits of an expansive EIP can be obtained without a major increase in wage costs. The same approach can be taken to strikes; works councils and nonunion EIPs would not have the right to strike; national unions--and

those attempting to form them--would have a monopoly on concerted action.

Each of these ideas has been tested abroad. For example, German works councils have a "peace obligation" that prohibits them from striking, while centralized wage bargaining allows German councils to focus on integrative issues such as working conditions and plant efficiency. The same is true of Japanese enterprise unions, who rely on shunto (national wage bargaining) to set wage norms at the plant level. Thus because they deal with "win-win" topics, works councils and enterprise unions are viewed favorably by employers and employees in Germany and Japan. (Note however, that some large Japanese companies are beginning to rely on joint consultation committees for firm-level adjustment of shunto wage norms, in part because the JCCs have a tradition of not striking. Similar behavior has been observed in Germany, where peace-obligated works councils have been adjusting industrial wage norms --usually downwards--to take account of a firm's ability pay. Thus a ban on strikes by nonunion EIPs is probably more important and more enforceable than a ban on wage bargaining. See Koike 1988; Morishima 1992; Wever 1990; and Katz 1993.)

The big unknown in all of this is political feasibility. Labor law is an issue that arouses the passions of the employer community and on which it speaks with a united voice, in contrast to health care. One might wish to stake out the democratic high ground, a place where, as Carole Pateman (1970) once said, "the aim of organizational democracy is democracy. It is not primarily increased productivity...rather it is to further justice, equality, freedom, the rights of citizens, and the protection of interests of citizens, all familiar democratic aims." But moral high grounds are not the place where realpolitik dwells. The reality is that the business community is likely to exercise considerable influence, if not veto power, over proposals emanating from the Dunlop Commission. Few employers are likely to tolerate mandatory EIPs. On the other hand, business will probably go along with the experimental approach

while trading as little as possible for getting rid of 8(a)(2).

As if to coax employers along, the Dunlop report waxes rhapsodic about the economic benefits of employee participation. But there is a problem here, as the report recognizes. Under our current system, employee participation has not diffused as widely or as deeply as in other countries. One reason for this undoubtedly has to do capital-market barriers that systematically bias American firms against the participatory approach, in spite of its economic virtues. (Levine and Tyson 1990) Merely preaching the economic benefits of participation, therefore, will not cause employers who lack EIPs to embrace them; getting rid of section 8(a)(2) will not solve this problem either. Only a mandatory approach --requiring all firms to adopt EIPs -- will rescue us from the social suboptimum we seem to be stuck in.

Much as I hate to admit it, however, the mandatory approach is probably not going to fly in Congress, even if employers are assured that mandatory EIPs will have neither strike nor wage-bargaining rights. That leave us with the experimental approach. If it passes, it will undoubtedly cause a change in the nature of participation -- existing nonunion EIPs will become more innovative and less problematic --but it probably will do little to change the density of participation in American workplaces. In short, if the experimental approach is enacted (which, by the way, is no sure thing), we can expect to see neither the horrors envisioned by labor-movement critics nor the benefits that would come from having participation --and representation--spread far beyond their current borders.

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