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Section 8(a)(2) of the NLRA and the Dunlop Commission's Report

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I. The Crisis of American Industrial Democracy

This paper sets out some of the author's impressions of the Dunlop Commission's Final Report (1994). The Dunlop Commission is, of course, the Commission on the Future of Worker-Management Relations established in 1993 by the U.S. secretaries of Labor and Commerce. The Dunlop Commission presented its Final Report to the two secretaries in December of 1994.

Five years have elapsed since the publication of the Final Report, during which time there have not been any major changes in U.S. labor legislation or industrial relations, except for continued union membership decline. Union density in the private sector has declined continuously since 1955, a trend which has held in recent years, the rate finally dropping below 10% to 9.6% in 1998. The author is concerned that the demise of the union in America may not be far off.

After its defeat in WWII, Japan was "remade" by the Occupation Army in the latter half of the 1940's. One of the most important reforms was labor reform, fashioned along New Deal lines and carried out by New Dealers. Many American institutions were transplanted to Japan from the U.S. and were welcomed enthusiastically by Japanese workers. Among these were unfair labor practices, the NLRB, the right to strike, joint production committees, and so on. The American collective bargaining system was very popular, even among leftist union leaders whose ideologies were strongly opposed to business unionism. Japan's Spring Wage Offensive was modeled on a UAW's bargaining tactic, and in many other instances as well, American labor unions were mentors for unions in post-war Japan. But with the union density decline, the American collective bargaining system itself has gradually deteriorated, causing concerns among Japanese union leaders about the pessimistic outlook for American labor unions.

The decline in union density in the private sector is expected to continue from the 9.6% level of 1998 to around 5.0% in the near future. If this happens, what will become of the "workplace democracy" that America once boasted of? Is industrial society in the U.S. retrograding to the manorial system? Or is there a possibility of union revival? Is it possible for the parties concerned to work out an alternative way of cooperating? What can the U.S. government do to prevent the death of industrial democracy? Will the government, along with employers, wink at the death of unions

in the U.S., or will it take bold measures to change U.S. labor law?

Soon after his inauguration, President Clinton appointed Robert Reich as secretary of the Department of Labor. It was Reich who, together with the Secretary of Commerce, set up the Dunlop Commission to explore solutions for the U.S. industrial relations crisis. This paper argues in support of the Final Report of the Dunlop Commission.

II. Section 8(a)(2) and Employee Participation

What was the focus of the Dunlop Commission's work? The Commission was required to report on the following three questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance workplace productivity through labor-management cooperation and employee participation?
2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
3. What (if anything) should be done to increase the extent to which workplace problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?

Although the Dunlop Commission tackled these various problems with a view to reconstructing American industries through further union-management cooperation, the Commission squarely addressed the issue of employee participation on the workplace level. A central question for the Dunlop Commission seemed to be how to spread employee participation plans to workplaces throughout American industry. It is this employee participation problem that I will deal with in this paper.

In the United States, employee representation plans (cited hereafter as ERPs) or employee participation plans (cited hereafter as EPPs) were historically a big issue for both labor practitioners and industrial relations professionals at least until the 1940s. ERPs or shop committees have flourished in such major corporations as AT&T, DuPont and GM. Militant unionists bitterly attacked ERPs as "company-dominated sham unions" aimed at precluding bona-fide unions. However national unions affiliated with the AFL could not organize the newly developed industries, and union density declined rapidly in the 1920s. In 1933 and 1935, under the National Industrial Recovery Administration, the organization and rapid spread of company unions was encouraged as a means to "cartelize" U.S. industries.

In 1935, the U.S. Congress enacted the NLRA under the sponsorship of Senator Wagner. Wagner regarded the ERPs as major obstacles to the growth of unions and of collective bargaining. Thus, ERPs and EPPs came to be forbidden under the NLRA, as company-dominated unions. Section 8(a)(2) of the Act provided as follows:

> Section 8(a)(2): It shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.

Together with Section 2(5) of the NLRA, Section 8(a)(2) is a crucially important provision for the protection of the workers' right to organize. Section 2(5)

defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Section 2(5) and Section 8(a)(2) can be called "company union" banning provisions.

With the enactment of the NLRA, most "company unions" disbanded and disappeared but a few were transformed into genuine labor unions or bona-fide employee participation groups. The problem of employee representation in the non-union sector did not emerge as an important issue in American labor legislation until the 1960's because of the social acceptance of Section 8(a)(2) and its enforcement by the NLRB.

But after the 1980-82 recession, the social climate in America greatly changed. Firstly, the traditional adversarial relations in the American industrial relations system came under sharp criticism, even by liberal scholars. American products were loosing their competitive edge over "Made in Germany" or "Made in Japan" products, and the major reason for this declining competitiveness was seen to lie in the lack of cooperative industrial relations in the American workplace. Secondly, industrial relations professionals in America drastically altered their appraisals of German work councils and Japanese enterprise unions. They began looking carefully at the German and Japanese models for clues in transforming the American industrial relations system into a more cooperative and participatory one. Thirdly, large corporations introduced new human resources management methods such as quality circles and employee involvement (EI) plan, so on. The intent of these new devices was to enhance productivity through employee participation in decision-making processes, and they have included various forms of workplace organizations for participation. According to workplace surveys conducted in the late 1980s and early 1990s, some 40% of American workplaces had such organizations.

The spread of employee participation plans (EPPs) in non-unionized companies was an intriguing but difficult subject for the NLRB. It formulated guiding principles to draw a distinction between lawful employee organizations and unlawful ones. Broadly speaking, the NLRB has regarded them as unlawful, as they involve "dealing with" employers on the issue of employment conditions, and yet are under the domination of employers. But the phrases "dealing with" and "domination" are both vague, and therefore the NLRB has had to treat these organizations on a case-by-case approach. In 1992, it issued an order on the Electromation case, and also on the DuPont case in 1993. In both cases the employee participatory organizations were regarded as unlawful under Section 2(5) or Section 8(a)(2). According to these rulings, the U.S. industrial relations system appeared to be facing a double crisis, that is, a representational crisis and a legal crisis. In the early 1990s the United States faced two puzzles in terms of industrial relations. The first was how to stop the weakening of collective bargaining, and the second how to enhance employee participation in workplaces. Both dealt with Section 8(a)(2), and moreover the solutions contradicted one another. On one hand, the NLRA needed to be amended in favor of unions. But on the other hand, there was a need to relax Section 8(a)(2) in order to promote employee participation in workplaces. The Dunlop Commission issued the following recommendations as solutions to this complex legislative problem.

Dunlop Commission's recommendation on Section 8(a)

(1) Facilitate the Growth of Employee Involvement

The Commission recommends that non-union employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs.

We believe that programs of the types referred to above, which are proliferating in the U.S. today, do not violate the basic purposes of Section 8(a)(2). Therefore we recommend that Congress clarify Section 8(a)(2) and the NLRB interpret it in such a way that employee participation programs operating in this fashion are legal.

(2) Continue to Ban Company Unions

The law should continue to prohibit companies from setting up company dominated labor organizations. It should be an unfair labor practice under NLRA Section 8(a)(1) for an employer to establish a new participation program or to use or manipulate an existing one with the purpose of frustrating employee efforts to obtain independent representation.

The recommendations of the Dunlop Commission are accommodational in nature. They point to the need for the law to "ease the creation of employee involvement programs without harming employee freedom to unionize" and conclude that "this balance is essential".

III. Comments on the Dunlop Commission's Report

The Dunlop Commission's Report recommended legalization of non-union employee participation programs, while retaining only essential contents of Section 8(a)(2) as before. This is because the Dunlop Commission evaluated highly both employee involvement program and collective bargaining. The Commission was never negative to collective bargaining system and labor union based upon "notorious" adversarialism. Therefore the Commission's Report supported labor unions and recommended several legal and/or institutional reforms to consolidate union rights. These contained important clauses on, for instance, prompt certification of elections, timely injunctive relief for discriminatory actions, resolution of first contract disputes and employee access to employer and union views on independent representation. These recommendations can help to slow down union decline by limiting employers' union busting activities. But employers can be expected to strongly resist such labor law reform.

In 1995 Congress tried to reform the existing U.S. labor laws according to the Dunlop Commission's recommendations. On September 18, 1995, it reported out the "Teamwork for Employees and Managers Act" H.R. 743 (104th Cong., 1st Sess.). "The Team Act" would have added the following proviso to Section 8(a)(2) to enhance" legitimate employee involvement programs."

> Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which

> employees participate to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in Section 9(a), this proviso shall not apply.

The "Team Act" passed in the House in 1995 and passed again in both Houses in 1996 to 1997. But President Clinton vetoed the Act in 1997. Although President Clinton's veto of the Team Act may hamper the diffusion of employee participation programs in the United States, it seems justifiable to the author because the Team Act adopted only the pro-employer arguments in the Dunlop Commission's Report and neglected the recommendations to strengthen union power.

In modern industrial society both collective bargaining and employee participation are necessary. Nowadays the United States of America faces a serious crisis in the industrial relations field. Unions are dying and the spread of employee participation programs is restricted by both labor law and conventional employment practices. How the U.S. will extract itself from this stalemate is a fascinating topic for the author, who has long studied U.S. industrial relations and labor history. It seems to the author that the Dunlop Commission's Report is fairly equitable, and offers solutions for the representation problem in America. The American people should heed the Commission's Report and try to reform the existing labor laws along the lines it has put forth.

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