

The impact of labour-management cooperation schemes on New Zealand unions

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This important study examines the impact which moves towards increasing industrial democracy are likely to have on trade unions. The analogous area of collective bargaining and its impact on unions is discussed first. There follow sections on the direct impact of cooperative schemes, the negative effects of union participation, the impact on union structure, and the special area of worker-directors.

I INTRODUCTION

During the past two decades New Zealand has been an active participant in what has been an international discussion concerning the implementation of labour-management cooperative schemes, known also as industrial democracy, quality circles or participative management. Most of what has been written on this subject has suggested that employers as well as workers can, to some extent, gain from such programmes. However, there has been virtually no consideration of their impact on unions. This is a serious oversight since unions undeniably are important participants in labour relations.

This oversight may be rooted in a vision of unions as antagonists only, because of the role they play in collective bargaining. There is certainly some truth in this. Management and labour have many areas of conflict, including the level at which wages should properly be set, the "mission of the workplace", and "the proper expectations of workers".¹ Some have denied any possible relationship between collective bargaining and labour-management cooperation.² They see collective bargaining as responsible in and of itself for the conflict and turn to cooperation as a means of preventing such conflict, rejecting a role for unions, which they see as linked to collective bargaining.

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1 See O Kahn-Freund *Labour and the Law* (1977) 48.

2 See M Vranken "Workers' Participation at the Workplace: Some European Experiences with Reference to the New Zealand Case" (1986) 16 VUWLR 337, 337; B Brooks "Works Committees and Industrial Relations" [1976] NZLJ 89, 89; compare I McAndrew "Bargaining Structure and Bargaining Scope in New Zealand: The Climate of Employer Opinion" (1989) 14 NZJ Ind Rel 133, 133.

However, if collective bargaining and labour-management cooperation are not independent systems, our greater experience with collective bargaining can provide important insights into the operation of labour-management cooperation and its impact upon unions.

II THE COOPERATIVE POTENTIAL OF COLLECTIVE BARGAINING

Collective bargaining does have many characteristics analogous to participatory management.³ The New Zealand Federation of Labour and the New Zealand Employers Federation have often found common ground. A notable instance was their joint recommendations as to legislative reform.⁴ This was not an anomaly, for the bulk of workplace disputes have historically been settled more or less amicably, and without the need for the intervention of outside parties.⁵

The very nature of collective bargaining is the process of finding common ground. The change in industrial law in New Zealand from one which greatly circumscribed the subjects for negotiation⁶ could enlarge the scope of collective bargaining in New Zealand to that of countries such as the United States, in which unions and employers jointly set terms on issues as varied as wages, hours, joint apprentice and training programmes, superannuation schemes, benefits programmes, vacations, holidays, redundancy, schools, safety rules, and other services and programmes within and throughout the workplace. Indeed, within the United States, joint determination has even extended into areas considered classical domains

3 This concept has been embodied in the primary statutory scheme supporting collective bargaining in the United States, the National Labour Relations Act. Its goal is stated to be "the friendly adjustment of industrial disputes arising out of differences as to wages, hours or other working conditions" and the restoration of "equality of bargaining power between employers and employees" 29 USC Sec 151. The effect of the NLRA was to create "a search for contractual order": see C Tomlin *The State and the Unions: Labor Relations, Law and the Organized Labor Movement in America, 1880-1960* (1985) 247; O Kahn-Freund, above n1, 225; see also L Ulman "Introduction: The Problems in Historic Context" in *Challenges to Collective Bargaining* (L Ulman ed 1967) 1.

4 B Brooks, above n2, 90, 90 n6; see also New Zealand Employers Federation, *The Employer 5* (Oct 1989); Victoria University of Wellington Industrial Relations Centre, *NZ System of Industrial Relations* (1989) 16.

5 See R Miller *The Resolution of Disputes and Grievances in New Zealand* (1983) 19. Smith and Turkington surveyed employer and union attitudes before and after engaging in negotiations. Their survey, although providing evidence of differences of opinion, found a reservoir of respect for the other side and its positions: see D Smith & D Turkington *A Profile of Voluntary Collective Bargaining in New Zealand* (1981) 10-11. In *Feltex Industries Ltd v NZ Amalgamated Engineering Etc IUOW Anor* [1987] NZILR 892, 895, the union and management set up a consultative committee to deal with bonuses. While we know of this because it led to conflict and a court decision, nonetheless that conflict provides a window on the practice.

6 But see N Woods "Law and Industrial Relations: The Influence of Parliament" (1971) 2 Otago LR 262, 267.

of managerial sovereignty, such as finance through profit sharing plans and employee ownership plans, personnel matters such as qualifications of and size of the workforce, employee advancement, seniority, productivity by means such as setting rates and job content, and location of plants.⁷

Collective bargaining has the salutary effect of causing unions and employers to determine and assess their priorities, thus mediating each group's conflicting interests.⁸ It is not surprising then that the collective agreement has been characterized as an industrial peace treaty⁹ or the original quality of worklife document¹⁰ with, let it not be forgotten, its origin in a philosophy of adversarial relations rather than cooperation.¹¹ The bargained document arrived at by the parties provides a basis by which they have agreed to conduct themselves.¹² This is

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- 7 See N Chamberlain *The Union Challenge to Management Control* (1967) 6, 53 (noting that union officials are usually part-time managers of the corporate enterprise); M Poole *Workers' Participation in Industry* (1975) 85; P Selznick *Law, Society and Industrial Justice* (1969) 87-88; J Barbash "Rationalization in the American Union" in *Essays in Industrial Relations Theory* (G Somers ed 1969) 147, 148; J Joyce "Codetermination, Collective Bargaining and Worker Participation in the Construction Industry" in *Challenges and Choices Facing American Labor* (T Kochan ed 1985) 257, 257, 261 [hereinafter *Challenges*]; P Wallace and J Driscoll "Social Issues in Collective Bargaining" in *US Industrial Relations, 1950-1980: A Critical Assessment* (J Stieber, R McKersie & D Mills ed 1981) 199, 232-33 [hereinafter *Critical Assessment*]; C Summers "Worker Participation in the US and West Germany: A Comparative Study from an American Perspective" (1980) 28 Am J Comp L 367, 380-82. It is estimated that there may be as high as a 50% overlap between quality of worklife issues and issues which can be characterized as terms and conditions of employment. See M Parker *Inside the Circle: A Union Guide to QWL* (1985) 47-48. See generally *NZ Meat Processors etc IUOW v Fortex Group Inc* [1987] NZILR 787, 800.
- 8 See J Dunlop "The Social Utility of Collective Bargaining" in *Challenges to Collective Bargaining*, above n3, 168, 173-75.
- 9 See O Kahn-Freund, above n1, 122.
- 10 See O Kahn-Freund, above n1, 122.
- 11 See K Hopt "New Ways in Corporate Governance: European Experiments with Labour Representation on Corporate Boards" (1984) 82 Mich LR 1338, 1348; Note "Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States" (1977) 14 Harv J Legis 947, 988. Blumrosen notes that the need of unions to protect individual rights as an aspect of the duty of fair representation owed by unions in the United States to their members acts to stifle cooperation: see A Blumrosen "The Worker and Three Phases of Unionism: Administrative and Judicial Control of Worker-Union Relationship" (1963) 61 Mich LR 1435, 1516. See also D Bok "Reflections on the Distinctive Character of American Labor Laws" (1971) 84 Harv LR 1394, 1435 (adversarial history has resulted in unions coming to preempt the functions of a works council). It would be a mistake, however, to bypass Martin Vranken's point that German works councils themselves were born as a consequence of employer antagonism to unions. See M Vranken, above n2, 350.
- 12 Compare M Vranken & K Hince "The Labour Court and Private Sector Industrial Relations" (1988) 18 VUWLR 105, 119.

the sort of relationship inherent in the democratic process which allows groups with differing views nonetheless to discuss and compose their differences.

Joint determination already exists in another arena. It is easy to lose sight of the extent to which joint determination of workplace conditions is achieved through informal methods of control. These are an inextricable part of the system, by which workers retain latent discretion in the performance of their tasks.¹³ This latent power is what employers seek to harness though eliciting workers' cooperation in the performance of their jobs, providing a route for them to become reconciled to the system under which they labour.¹⁴

The similarities between traditional collective bargaining and cooperative systems result in mutual influence where both exist. In some instances, bargainers have concluded that negotiations were simplified by the existence of cooperative mechanisms.¹⁵ Cooperative programmes frequently return to adversarial relations as a consequence of management's persisting concern with a loss of authority and prerogative or unions' concern about loss of function.¹⁶

The role unions play in participatory management is that of a coordinator or facilitator between this process and traditional bargaining.¹⁷ This role within cooperative systems is not far removed from traditional roles played by unions within collective bargaining systems. Unions act as fiduciaries of industrial peace, serving both managerial and disciplinary functions with regard to the workforce.¹⁸

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- 13 See B Garson *All the Livelong Day* (1975); M Poole, above n7, at 35, 99; P Selznick, above n7, 97, 101; C Sobel *Work and Politics: The Division of Labor in Industry* (1982) 61-62, 104-05; see also R Howard *Brave New Workplace* (1985) 38-39, 107, 114. In its least socially acceptable form, this method of control can even extend to sabotage. See C Zabala "Sabotage at General Motors' Van Nuys Assembly Plant, 1975-1983" (1989) 20 *Ind Rel J* 16, 29. Indeed, worker perception that established custom and practice are as good as award language for the creation of workplace rights has been an important cause of rights disputes. See R Miller, above n5, 5.
- 14 See G Feller "A General Theory of the Collective Bargaining Agreement" (1973) 61 *Cal LR* 663, 722.
- 15 See J Simmons & W Mares, *Working Together* (1985) 78.
- 16 See J Craft "Post-Recession Bargaining: Mutualism or Adversarial Relations?" (1983) 34 *Lab LJ* 431, 438; A Chelte, P Hess, R Fanelli & W Ferris "Corporate Culture as an Impediment to Employee Involvement: When You Can't Get There From Here" (1989) 16 *Work & Occ* 153; C Elliger & B Nissen "A Case Study of a Failed QWL Program: Implications for Labour Education" (1987) 11 *Lab Stud J* 195, 200, 201, 203.
- 17 See T Kochan, H Katz & N Mower "Worker Participation and American Unions" in *Challenges*, above n3, 271, 289.
- 18 See K Klare "Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law" (1981) 4 *Indust Lab Rel J* 450, 452. In fact, unions have a role to play even at worker-owned companies. See P Blumberg *Industrial Democracy: The Sociology of Participation* (1968) 144-45; D Zwerdling *Democracy at Work* (1978) 61. This results from the ongoing need for institutionalized, constructive criticism.

Generative intent and practical experience support the conclusion that collective bargaining and participative or cooperative management are analogous. Thus, it is possible to draw upon our lengthier and greater experience with collective bargaining to forecast the manner in which issues between unions and their membership will or could be affected with the institution of participative management in a workplace.

III THE IMPACT OF THE DECISION TO ENGAGE IN COOPERATIVE SCHEMES

The following examination of the impact of labour-management cooperation on unions is rooted first in general experience in that process but also draws on the manner in which employers, employees and unions have conducted themselves in collective bargaining systems. Once we have that generalised understanding of the parameters in which the system is likely to operate, it will be applied in the specific context of contemporary New Zealand industrial relations. We must begin by looking at the contexts in which employee involvement is instituted. Each of these will have their unique characteristics; however, it is clear that the most significant factor sparking the recent interest in cooperative management is the context of worldwide recession and economic reorganisation.

Many of these programmes have drawn their first breaths directly as a consequence of companies' needs to deal with economic exigency. They frequently appear in a climate of concessionary bargaining. New Zealand experienced aspects of this during the 1988 award negotiations with employer proposals for pay simplification, work rule flexibility and low or no increases in wages.¹⁹ This has been the case in the United States, where these programmes are either an element of a plan to improve productivity or as a quid pro quo for employees' agreeing to concessions.²⁰ In the United States, this included as many as 11% of firms seeking concessions who did not actually need them; the number of such requests fell by two-thirds when unions asked to see financial documents in support of the need for concessions.²¹ At the same time in the United States, there was a general breakdown in the bargaining structure developed over decades so that bargaining

Unions provide a logical vehicle to perform this role, protecting dissenters. See J Simmons & W Mares, above n15, 256.

19 See R Harbridge & M Dreaver "Changing Patterns of Working Time Arrangements in Registered Collective Agreements in New Zealand" (1989) 14 NZJ Ind Rel 251; I McAndrew, above n2, 136.

20 See H Katz "Collective Bargaining in the 1982 Bargaining Round" in *Challenges*, above n3, 213, 222-23; B Simon & S Stewart "Employee Buyouts to Prevent Plant Closings" in *Labour Relations Law in Corporate Retrenchment* (J Waks ed 1984) 473, 478; see also J Barbash "Reflections on Positive Collective Bargaining" (1981) 6 Lab & Soc 81, 83. Concessionary bargaining was a phenomenon with widespread impact. In 1982, in eight major industries, 30-50% of contracts negotiated involved concessions. See P Cappelli & R McKersie "Labour and the Crisis in Collective Bargaining" in *Challenges*, above n3, 227, 228-29.

21 See P Cappelli & R McKersie, above n20, 228.

took place at the local plant level to a greater extent than it had in the past,²² a trend sought currently in New Zealand by employer groups. Thus one important aspect of the context in which these programmes are evolving involves economic hardship and procedural disarray.

The second component of the setting for participatory programmes has been the recent radical changes in the nature of work and workers. Technological changes have and will entail shifts in occupational job ladders.²³ The rate of net employment will alter drastically from earlier periods²⁴ and will be accompanied by shifts of millions of workers to different occupations, industries, and regions²⁵ or even to long-term unemployment. At the same time, particularly as we enter a global economy, labour costs have become a relatively more important competitive factor as the costs of transportation and communication have declined.²⁶ Finally, the entry of groups not well represented in the workforce affects the manner in which participative plans are implemented and accepted.²⁷

"[O]ne cannot usefully examine any aspects of labour law apart from its institutional and social context."²⁸ When this context is acknowledged, it becomes obvious that labour-management cooperative programmes will arise in a troubled environment. Some will have been initiated as acts of desperation by an insolvent organisation. Solutions to problems developed in a crisis atmosphere are likely to include an element of coercion. If programmes are set up as a result of false claims, then mistrust will taint a relationship predicated on openness.

It is a delusion to believe that cooperation is a sanctuary from the evils of a world where disappointment, suspicion, and frustration exist. Labour relations are haunted by the ghosts of past suffering, elements of overreaching, intense adversarial activity, and the uncertainty caused by radical changes in workplace demographics, the nature of work, and the creation of a world economy. These will counteract what should exist once cooperation has entered the scene.

22 See H Katz, above n20, 219, 220.

23 See R Belous "Technological Change and Its Effects on Labor Markets" (1986) 37 Lab LJ 494, 496; see generally B Bluestone & B Harrison *The Deindustrialization of America: Plant Closings, Community Abandonment and the Dismantling of Basic Industry* (1982); R Howard, above n13; O Kahn-Freund *Labour Relations: Heritage and Adjustment* (1979) 4.

24 See R Belous, above n23, 495.

25 Above n24, 497. Changes in occupation will include changes in the proportion of blue collar to white collar jobs. See M Nowak "Worker Participation and Its Potential Application in the United States" (1984) 35 Lab LJ 148, 148.

26 See T Kochan & M Piore "US Industrial Relations in Transition" in *Challenges*, above n7, 1, 10.

27 See K Herkelmann "Women in Positions of Leadership: Problems They Face" in *Participative Management* (J Cangemi, C Kowalski & J Claypool eds 1985) 166, 167-68.

28 C Summers, above n7, 367.

Given this more realistic scenario, it is obvious that union representatives will not have a simple choice in determining whether or not to engage in labour-management cooperation. On the one hand, union representatives may feel they have no alternative and thus have no choice but to embrace participative work strategies advanced by management.²⁹

Unions may experience pressure from members who are aware that entrepreneurial decisions, such as purchasing, expanding or selling a plant, employing new technology, starting a new product line, or making investment decisions, affect employment security and, consequently, union security.³⁰ While awareness of the link between business policy and industrial relations has been strengthened by recent economic crises,³¹ it would be a mistake to think that such a link is new:³²

Workers are interested in the health of the industry that they serve and in the stability of their jobs and their community for a very fundamental reason: they have heavily invested, not money, but themselves in all three. Workers therefore have a vital stake in strategic decisions, and that interest - as the workers determine it - has a fundamental right to be represented.

29 See eg M Parker, above n7, 63; J Simmons & W Mares, above n15, 251 (noting that some unions see workplace democracy as an outgrowth of the basic union struggle); D Zwerdling, above n18, 173 (quoting from former UAW president Douglas Fraser, as saying that such schemes are vital to provide adequate union representation, to protect workers' interests and jobs, while on the other hand noting that many unions participate in quality of worklife programmes because they feel if they shrink from doing so management will take the initiative and the employees would then lose faith in their union representatives). Unions may have organizational pressures which are essential to their nature and which impel them to embrace new goals from time to time, such as participative management, in order to retain their vitality as a living, growing organisation. As Chamberlain states, unions require that new goals always replace old ones once one is achieved: see N Chamberlain, above n7, 103.

30 See T Kochan & M Piore, above n26, 11-12; R McKersie "Union Involvement in Entrepreneurial Decisions of Business" in *Challenges*, above n7, 149, 149-50. Samuel Camens of the United Steelworkers of America stated that unions not only have a right to participate in grave social decisions, such as shutdowns, but they have no choice not to participate, since this is what their members expect of them. See *Challenges*, above n7, 168. See also J Bamber "New Technology - The Challenges to Unions: A Comparative View" (1986) 37 Lab LJ 502, 502, 506.

31 See T Kochan & M Piore, above n26, 5.

32 See J Joyce, above n7, 260: "[T]he proposition that the suppliers of capital should control the enterprise because of the risk they bear ignores the reality that workers bear a substantial part of the risk of enterprise failure." Not only do they bear a substantial portion of the risk, but they are less well able to protect themselves from it; work cannot be diversified in the same manner as one can diversify a stock portfolio. See Comment "An Economic and Legal Analysis of Union Representaton on Corporate Boards of Directors" (1982) 130 U Pa LR 919, 928-29.

In addition to workers' "sweat equity", many as well have become the financial backers of their companies. This has been made possible in New Zealand during the past several years through various financial strategies such as profit sharing, employee shareholding, and joint employer-employee cooperatives.³³ In the United States there are approximately 5000 to 6000 employee stock option plans in effect and in nearly 500 of these employees own the majority interest.³⁴ Such workers may want their unions to place themselves in positions to influence and safeguard members' investments most effectively, particularly if workers have, in the past, experienced the impact of management decisions not in the workers' interests.³⁵ Not to do so would be an abnegation of self-interest at odds with the way business affairs are generally conducted. "[I]t is a rare investor/lender indeed who would both increase the amount at risk and reduce the degree of protection for its existing investment. Yet that is precisely what labour has been expected to do (and often does) in the concession bargaining context."³⁶

The need to protect both workers' jobs and investments is particularly acute within systems from which employers are easily able to disinvest. An important reason a union might want to become involved at the strategic level is to blunt loss of representation when a legal system permits employers to keep new plants non-union while gradually shifting production to them from older, usually unionized plants.³⁷ It would be virtually impossible for a union to protect its members' interests without the ability to monitor closely company activities for signs of potential disinvestment and to have influence over those decisions.³⁸ To do this, a union must have access to information and the existence of an ear willing to listen to union concerns. Although it is possible to achieve both these through traditional bargaining structures, unions may have superior influence and ability to

33 B Brooks, above n2, 91.

34 See B Townley *Labor Law Reform in US Industrial Relations* (1986) 100-101; B Simon & S Stewart, above n20, 488-89. In the United States, a major source of employee investment is workers' pension funds. It is estimated that these may well control a majority of the financial market.

35 R Stephens "A Framework for Analysing Worker Participation in Management" (1982) 7 NZJ Ind Rel 23, 26.

36 B Simon & S Stewart, above n20, 480. A government report found that managers of ESOPs used the assets to accumulate personal wealth while employees fared financially no better than under traditional operations. Furthermore, stock had been sold to employees at questionable prices with inadequate provisions made for stock repurchase. See J Barbash, above n20, 88.

37 See R McKersie, above n30, 155-56; see also T Kochan "Discussion" in *Challenges*, above n7, 120-21. Kochan states (at 120) that unless unions are involved at the strategic level of multi-plant firms which operate both union and non-union plants, "they will not be able to take wages out of competition. That is, if this is to be dealt with, the employer policies that create these differentials have to be dealt with at their source".

38 B Simon & S Stewart, above n20, 478.

represent their members at the formulative stage of corporate policies than when limited only to post hoc reactions to decisions.³⁹

Arguments such as these present compelling reasons for unions to seek involvement in participative structures. Indeed, in certain circumstances these arguments may be so compelling that it might be said that a union has failed in its representative capacity if it does not take advantage of them.

IV UNION PARTICIPATION MAY HAVE NEGATIVE EFFECTS

Just as a union may feel it is in its best interests to engage in labour-management cooperation, equally strong arguments can be made that involvement not only betrays a union's role as worker representative but actually impairs its effectiveness as the workers' representative.

Such plans often are implemented and shaped by the employer. A union may be uncertain that the arrangement truly represents employee interests. Little is known of worker desires in general on this point. Studies have indicated that, when polled, workers regard the implementation of such programmes with suspicion, feeling that they have been set up only because employers feel they will reduce costs and improve profits rather than out of concern for employee welfare.⁴⁰ It is doubtful that cooperative plans are the sort of issue for which workers will

³⁹ B Simon & S Stewart, above n20, 500.

⁴⁰ See J Craft, above n16, 436-37; see also National Center for Productivity and Quality of Working Life *Recent Initiatives in Labour-Management Cooperation* (1976) 9-10 [hereinafter *Recent Initiatives*]. If little is known of the desires of employees, even less is known of the characteristics of those workers who believe in them. See J Witte *Democracy, Authority and Alienation in Work* (1985) 41-42. It would be a mistake to regard workers as monolithic in their approaches to participatory management. Poole discusses five categories of worker attitudes towards appropriate functions of unions and legitimate union activity: the ideological, revolutionary, conservative, instrumental, and political. Ideological workers are committed to unionism and see it as playing a major part in a member's life. According to Poole, this view is more widely held than is commonly supposed. The revolutionary worker sees the union as a vehicle to overthrow the capitalist system. The conservative view, particularly prevalent among craft employees, regards the union's role as seeking job security and controlling job opportunities. Instrumentalists see the union as a means to an end. Poole states that this type is not as prevalent as is supposed. The political view desires unions to give workers greater control of the decision-making process at work, to ensure greater equity and justice, and to protect workers from arbitrary and capricious acts by management. These varying views workers hold of unions result in different approaches to participation and the forms it can take. See M Poole, above n7, at 87-89; see also C Sobel, above n13, 142-144. It would also be a mistake to see union members as more docile than their leaders and to fail to see unions as reflecting a coalition or compromise position in their dealings with management. See B James "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections" (1978) 13 Harv CR-CL LR 247, 260.

strike.⁴¹ On the other hand, several polls have concluded that workers, if not specifically interested in quality circles, board representation, or the like, do desire more influence over the scope of their jobs, the way work is done, and the quality of the work produced, precisely the sort of issues dealt with through cooperative mechanisms.⁴² Some have suggested that actual involvement in such programmes alters worker perceptions, leading to an increased desire for participation and a transformed view of the nature of industrial authority.⁴³

However, transforming workers' views raises fears that it is inimical to union-worker interests, in that the union's agenda will be replaced by the employer's.

Productivity, which is indirectly an important issue for workers, is of primary importance to an employer.⁴⁴ Beyond simple bread and butter issues, workers are more concerned with problems of "how to 'liberate' work so that it will flow freely, happily, creatively, with a minimum of hindrance and frustration".⁴⁵ This is not to say management interest in participation may not be a consequence of genuine concern for employee wellbeing; however, that concern is often inextricably tied in with concern for the bottomline: profits.⁴⁶

41 See J Simmons & W Mares, above n15, 32. One study showed workers wanted "more say in running the plant" fourteenth out of fifteen goals for bargaining. See J Witte, above n40, 25-26; G Bohlander "How the Rank and File Views Local Union Administration - A Survey" (1982) 8 Empl Rel LJ 217, 228; but see P Blumberg, above n18, 161, 163. He states that in the 1950s German steel and coal workers did vote to strike over codetermination and won.

42 See NZ Employers Federation *Employee Involvement in the New Zealand Workplace: An Introduction and Guide to Worker Participation* (1977) 2; P Blumberg, above n18, 120-21; *Recent Initiatives*, above n40, 39; T Kochan, H Katz & N Mower, above n17, 275-77. Witte states that in one study, three-fourths of employees supported the presence of an employee on the board of directors: see J Witte, above n40, 33.

43 See P Blumberg, above n18, 24-25; M Poole, above n7, 29, 92-93.

44 See Report of the Committee of Enquiry into Industrial Democracy (1989) 3; J Bamber, above n30, 503; J Craft, above n16, 436-37. In Japan, the inspiration for much of today's interest in cooperative management, quality circles concern themselves only with productivity and product quality. See Note "Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labour Relations Act" 83 Mich LR 1736, 1736 (1985). E F Schumacher noted: "To introduce labour-saving devices, to reduce the hours of work, to promote job elimination and automation - all this is 'progress'. It is the ideal of the employer to have output without workers ...": see E F Schumacher *The Liberation of Work: The Elimination of Strikes and Strife in Industry Through Associative Organization of Enterprise* (1969) v-vi.

45 E F Schumacher, above n44, vi.

46 See J Cangemi "A Pragmatist's View of Participative Management" in *Participative Management*, above n27, 739-40. This fear is exacerbated by the use of participative managerial schemes as an element of union avoidance, as touted at union avoidance seminars. See D Zwerdling, above n18, 169-70. When such programmes are initiated by management and in its control, the power to end the programmes is also vested within management; but compare *Recent Initiatives*, above n40, 112-13 (suggesting that although a final decision may be management's, management within the steel

Unions and employees cannot, then, lose sight of the fact that frequently these workplace reforms are aimed almost exclusively at boosting productivity. While unions and workers are not opposed to productivity, they do not want to see it gained at the workers' expense with increases in productivity leading to worker redundancy for those directly participating or for others.⁴⁷ To the extent that such programmes are instituted without attention to the differences in objectives, loyalties, legal responsibilities, codes of conduct, and philosophies of management and workers they are likely to lead to dissension and failure.⁴⁸

QWL programs that put their entire stress on productivity, rather than work life quality, or that fail to share the gains with the workers who make them possible or that try to institute speedups under the guise of productivity improvements or that do not bring in Union leadership as full partners are going to have a brief life, as, indeed, most of them do.⁴⁹

Seeds of dissatisfaction may also find fertile soil when the benefits of cooperative arrangements are not shared with the workers. If management overlooks the workers' contribution and sees profits as being generated solely by the efforts of management, it creates a conflict between its stated goals of democracy and concern for workplace conditions and management's "ethics-in-use" which dictate "short-term, quick-fix solutions to productivity problems so as to maximize the 'bottomline'".⁵⁰

Unions need to be aware that management may have entered into a participative scheme without a full realization that it entails undercutting traditional management roles. Once this is realised, management may react by undercutting the programme.⁵¹ This reaction is potentially very destructive of the union in its role as worker representative, since the union and workers may have given up informal employee initiative and control over the manner in which work is performed or

industry was expected to explain its reasons for acting contrary to the committee's suggestions).

47 See J Simmons & W Mares, above n15, 234. Suspicions are exacerbated by factors such as top-down implementation which simply "plugs" the employees in, a past history of animosity, reduction of protective work rules, closing plants, and accompanying failures to bargain with the workers' representative. See J Craft, above n16, 433; D Zwerdling, above n18, 36-39 (discussing the Rushton mine situation).

48 Compare N Chamberlain, above n7, 43-44.

49 Compare H Samuel "Coping With the New Realities in Industrial Relations" (1986) 37 Lab LJ 534, 535.

50 C Ellison, J Craig & C Ray "Ethics, Values and Productivity" in *Participative Management*, above n27, 143-45.

51 See J Simmons & W Mares, above n15, 73. An interesting example of such a situation can be found in *Condon v Local 2944, United Steelworkers of America, AFL-CIO, CLC* 683 F 2d 590 (1st Cir 1982), in which the employer and union established a safety committee to which management then refused to surrender any authority.

even undercut the collective bargaining system,⁵² without receiving any benefit in return.

When cooperative schemes harm employees by, for example, creating job loss, then workers suffer a detriment from the programme.⁵³ To the extent that the union is seen as the cause, it may be perceived as having failed its role as representative and as liable for a decision jointly entered into with management.⁵⁴

Union representatives may fear their own unemployment through a conscious attempt to replace the union's structure with that of a competing representational structure favoured by the employer.⁵⁵ Unions do need to be concerned with this, particularly if they face an anti-union management. Anti-union feeling within management is not unknown, and there has been a growth in their numbers and the depth of their feeling in recent years.⁵⁶

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- 52 See M Parker, above n7, 50-53, 142-43 (quoting IAM Research Report, Winter-Spring 1982).
- 53 Jobs lost as a consequence of such programmes endanger their prospects of survival. See J Simmons & W Mares, above n15, 89-90. The problems of job loss and speed-ups have been explicitly recognised as serious deficits of such programmes. Attempts have been made to avoid this through guidelines requiring that there be no loss of jobs or increase in quotas as a consequence. See P Wallace & J Driscoll, above n7, 245-46.
- 54 See M Parker, above n7, 142-43 (quoting an IAM Research Report, Winter-Spring 1982); compare J Simmons & W Mares, above n15, 101-02.
- 55 See M Parker, above n7, 50-53, 98; J Simmons & W Mares, above n15, 234; *Challenges*, above n7, 307 (Rudy Oswald of the AFL-CIO stating that many employers see QWL as a way to keep unions out). Simmons and Mares recounting that the president of the National Association of Manufacturers had recommended the use of QWL as a tactic for creating a union-free environment stated that, under the circumstances, offers of management cooperation seem like buying a boutonniere for a funeral. See J Simmons & W Mares, above n15, 235. Even the most law-abiding management may yet prefer to deal with a more conciliatory organisation and may thus act in ways which undercut the union's power and policies. See P Blumberg, above n18, 159. Guillermo Grenier provides a particularly interesting account of a company based in the eastern United States which set up a production plant in the West with the design that it should remain non-union. As part of this plan, it hired a Quality Circle developer to bring quality circles to their "full potential" as a "union-busting" tool. See G Grenier "Quality Circles in a Corporate Antiunion Strategy: A Case Study" (1988) 13 Lab Stud J 5.
- 56 See J Craft, above n16, 436 (Craft states management attitudes are generally anti-union, seeing a need to be non-union to be competitive and further notes a record number of de-certification seminars held and the flourishing state of the management consultant business in the United States); T Kochan & M Piore, above n26, 10-11 (many companies "are now following a very aggressive and sophisticated strategy for union avoidance"), and 3 ("American employers have historically been philosophically opposed to unionism"). This includes diluting union job control, weakening union job control, weakening unions' adversarial thrust by participation as a means of making managerial decisions more palatable, and strengthening employer-employee communication. Grenier relates the manner in which one company consciously used QWL as an anti-union strategy: see G Grenier, above n55, 5.

Even when there is no conscious effort to replace the union, experience has demonstrated the difficulty of preventing collective bargaining issues from being dealt with through such an alternative mechanism.⁵⁷ When grievable issues are resolved through cooperative mechanisms, particularly when this either results in altering existing terms of employment or, worse, comes about despite the issue's having been raised within but not resolved through the grievance procedure, there may be detrimental consequences to the union.⁵⁸

Participative management structures also have the potential to fracture the workforce, as a consequence of varying views held by workers on the role unions should play in them. Thus, the issue of participation may create additional minority viewpoints, each then requiring representation and reintegration by the union. Reconciling these groups within the union's structure may damage its collective strength. However, failing to do so may lead to crippling dissension. In such a case, the union acts at its peril if it does not adequately consider and act upon the needs and desires of the minority, even if it does so in good faith.⁵⁹

V THE IMPACT OF PARTICIPATION ON UNION STRUCTURE

Participative management may not only have an impact upon the workforce, as just discussed, but upon the union as an institution. It would be a misconception to separate union existence from the interests of the members, for changes in union structure inevitably have an impact upon its ability to represent its members adequately.

A *Positive Effects on Union Structure*

One by-product of participation, particularly at the shopfloor level, may be the creation of QWL-trained leaders as a pool for future union leaders.⁶⁰ Some studies have shown that cooperative arrangements provide a channel for activism for those members who have temperaments more comfortable with accommodation, rather than confrontation.⁶¹ In Germany, which has had far longer experience with codetermination and works councils, it was found that these programmes

57 See *Recent Initiatives*, above n40, 15; M Parker, above n7, 50-53; D Pincus "Employee Involvement Programs as Alternative Dispute Resolution Strategies" (1986) 37 Lab LJ 520, 523; B Spector "Blurring the 'Proper Separation': Quality of Work Life and Contractual Agreements" (1986) 37 Lab LJ 857, 857; compare G Summers "Individual Rights in Collective Agreements and Arbitration" (1962) 37 NYULR 362, 377.

58 See T Kochan, H Katz & N Mower, above n17, 296-97; T Kochan & M Piore, above n26, 8; compare M Parker, above n7, 71.

59 See B Spector, above n57, 860-61 (implementing change in job classifications through QWL resulted in filing of grievances, which the union was then required to process).

60 See T Kochan, H Katz & N Mower, above n17, 298-99.

61 See T Kocahn, H Katz & N Mower, above n17, 298-99.

strengthened unions which were devastated during the Nazi period⁶² after unions actively embraced the systems and decided to use them as outposts in the plant.⁶³

Such arrangements are less widespread and of more recent vintage elsewhere, offering less opportunity to assess them. Nonetheless, there is evidence of improvement in a number of areas of concern to employees and unions, including some which have an impact upon union function, such as higher attendance at union meetings and greater activism.⁶⁴ Positive developments may be dependent upon the approach taken by unions faced with the institution of these systems. Where unions are a visible, equal partner, participation leads to perceptible enhancement of job security and company performance; where union leaders link support for the programmes to larger collective bargaining and representational strategies; and where there has been adequate time to become comfortable with the programme, there may well be more positive results for unions.⁶⁵

In some instances, cooperative systems have aided unions' representation of employees by contributing to industrial peace, improving the function of employer and union in problem-solving by providing them with greater experience in more efficient, constructive conflict resolution techniques, and cutting the number of grievances filed.⁶⁶ The advantages flowing to the union as a consequence include conservation of personnel, time, and financial resources, permitting the union to concentrate on more creative solutions, tackle more difficult issues, and seek ways to provide greater services to the membership.⁶⁷

62 See Note, above n11, 963-64. In fact, it was the experience of German unions that organization of previously unorganized plants occurred as a consequence of codetermination. See D Garson "Recent Developments in Workers' Participation in Europe" in J Vanek *Self Management: Economic Liberation of Man* (1975) 161, 165-166.

63 See K Hopt, above n11, 1350.

64 See J Simmons & W Mares, above n15, 267; D Zwerdling, above n18, 173; but see T Kochan, H Katz & N Mower, above n17, 289, noting that in at least one study, union representatives found no strong evidence of an increase in union activism resulting from QWL.

65 Compare T Kochan, H Katz & N Mower, above n17, 282-87, 288. To avoid intra-union suspicions, one union took the issue of participative management to the membership for approval, prior to its initiation, then went to the table and bargained concerning its details. When it had achieved an agreement it wrote it into the collective agreement, with the committee members being partly elected. See J Simmons & W Mares, above n15, at 244. The programmes are also most successful from management's point of view when there is greater union participation. See W Cooke "Improving Quality and Productivity Through Collaboration" (1989) 28 *Ind Rel* 299, 309.

66 See *Recent Initiatives*, above n40, 27, 62.

67 See generally D Zwerdling, above n18. Zwerdling recounts throughout his book examples of such opportunities, including the institution of worker education programmes. Education programmes in particular may have synergistic effects by improving workers' ability to ameliorate job conditions further.

Unions may be further able to make wise use of their resources as a consequence of greater information sharing by management, a feature of some participative programmes. Where such a programme provides the representatives with timely information concerning capital, budgets, customer contacts, profit margins, and the like,⁶⁸ it removes a great deal of unnecessary apprehension created by uncertainty. It provides an opportunity to target bargaining and representational initiatives to areas of real concern. Information may provide greater real security for workers than the application of traditional rules designed to provide it.⁶⁹ Providing information to the union may transform adversarial relations into "win/win" strategies, with both parties able to concentrate on problem-solving, rather than enmity.⁷⁰

One final structural advantage to unions may be the use of a vehicle other than collective bargaining to represent production and other interests where a cooperative mode is required, while retaining the collective bargaining structure to represent those matters as to which the union must remain adversarial.⁷¹

B Negative Effects on Union Structure

While union functioning can be enhanced through participative management, consequences of such systems which are detrimental to collective bargaining representatives cannot be ignored.

For example, there is another side to the coin with regard to the provision of information to unions. First, unions, and particularly smaller unions, may lack the expertise necessary to take advantage of it or may be overwhelmed by the amount and detail of technical information. Some commentators have argued that for this reason, unions should not share in any managerial functions. Certainly, to the extent unions operate at a disadvantage with regard to making use of such information, they may have traded the job protections of work rules and seniority for an illusory advantage.⁷²

68 This is part of the arrangement at American Can Corporations. See N Adler "Mutual Interest Bargaining at Mid-Decade: Strategies, Tactics and Trends - A Management Perspective" in J Waks, above n20, 24; D Smith & D Turkington, above n5, 13. See generally K Hopt, above n11, 1349; see also C Summers, above n7, 382; compare O Kahn-Freund, above n1, 87-88.

69 H Katz, above n20, 224. One commentator regards access to such information as necessary because without it "officials' representation of worker interests would be rendered ineffective" to check management excesses and inefficiencies: see Comment, above n32, 951-52.

70 See N Adler, above n69, 24; Note, above n11, 951-52.

71 See P Blumberg, above n18, 161, 163.

72 See P Blumberg, above n18, 141-42 (discussing the views of Hugh Clegg); J Witte, above n40, 75; R McKersie, above n30, 151; J Craft, above n16, 432-33; compare R Howard, above n13, 195; see also *NZ Public Service Association v Board of Electricity Corp of NZ Ltd* [1987] NZILR 706.

Access to information may increase its prominence within the bargaining context and may thus distort the process. First, the information will have been gathered for management's purposes and will reflect its viewpoints. The availability of information may cause bargaining to become a hyper-technical affair,⁷³ divorced from practical experience, union representatives' traditional base of knowledge. In order to meet the avalanche of data, unions may be required to develop expertise in these areas, including by retaining independent technical specialists.⁷⁴

While there may be positive aspects to both of these developments, unions may prefer not to concentrate upon managerial issues for fear this will remove their focus from matters of greater concern to the workers. In addition, unions may be less than enthusiastic about relying upon advice, even that provided by their own experts who may not understand or appreciate union views and values.

Information may create numerous conflicts for union representatives. First, not all information received will be positive, and union representatives may find themselves the bearers of bad tidings to their membership.⁷⁵ They might prefer to receive such information in another format which would provide more room to manoeuvre or would allow them to distinguish themselves more clearly from association with management.⁷⁶

Representatives may find that being provided inside information carries with it certain seductions which may cause them to lose sight of its impact and consequences upon the rank and file and thus to lose credibility with the membership.⁷⁷ If only certain representatives have access to information, this may divide the union, resulting in a decrease of union democracy and cohesion.⁷⁸ Finally, unions may find they have an obligation to provide information that is accurate and can be relied upon,⁷⁹ even if they otherwise do not wish to provide the information for strategic reasons.

73 Compare P Cappelli & R McKersie, above n21, 244, who expect all bargaining inevitably to become an "increasingly technical operation where the role of information becomes especially important".

74 See J Bamber, above n30, 503; P Cappelli & R McKersie, above n21, 244. Witte found that over time there was a decline in the advantages held by management representatives over work representatives in quality circles, yet at all times management continued to dominate. See J Witte, above n40.

75 See J Simmons & W Mares, above n15, 128-32. The special problems of worker representatives on boards of directors with respect to information will be discussed below: see below notes 104-109 and accompanying text.

76 See R McKersie, above n30, 159.

77 See R McKersie, above n30, 151, 152.

78 See Comment, above n32, 952-53. This is a situation most likely to be encountered with worker-directors.

79 See R McKersie, above n30, 152.

One other hidden problem created by access to information, as it concerns workers' interests, is that the flow may in reality be one-way, as, for example, workers' providing management important insights into rank and file sentiments that permit management to push forward with its agenda.⁸⁰ Workers may give management their secret shortcuts, which may then be studied and amalgamated to arrive at the "right" way to perform the job,⁸¹ removing an area of worker autonomy.

Cooptation, another major concern of unions, is inherent in these ventures. The problem has many roots and may occur at several levels. One of the most basic causes is the employer's training of workers to engage in these programmes, through workshops and curricula it designs. When the employer provides the training, it has an opportunity to promote management viewpoints, while ignoring issues of particular interest to unions, or even alternate views.⁸² The absence of the union at the outset of a participative system may make it less likely that employees will be aware of any union involvement in the programme. If there are positive results from participating, the union will not be seen as having any involvement in them.⁸³

A degree of cooptation is inherent in the process. It is its nature to build employee commitment to the employer. A resulting degradation of the union representative's status may be all but inevitable.⁸⁴ This degradation can be exacerbated by management's favouring participation programmes, undercutting the union and demoralizing its activists,⁸⁵ as well as through a silent erosion or loss of role-identity within the enterprise flowing from the implementation of a cooperative system.⁸⁶

Unions not only face the structural dangers from an erosion of worker support but may actually lose leaders through cooptation. Cooptation is a danger, in part, as a consequence of activists' positive belief in the democratic process. This may cause them to compromise too much when the situation requires a confrontational approach in order to represent employee interests properly. When cooperation is in vogue, it may be difficult for unions to remain as an agency of worker protest. Conflict need not mean that the organization is in a process of destroying itself but

80 See R McKersie, above n30, 152.

81 See M Parker, above n7, 50-53; see above text accompanying notes 13-14.

82 See M Parker, above n7, 15-21; see also *Recent Initiatives*, above n40, 14; J Simmons & W Mares, above n15, 68; C Elliger & B Nissen, above n16, 206.

83 Compare above n 66 and accompanying text.

84 Compare above n66 and accompanying text. Such a problem may be inherent in the system, as Thomas Donahue, secretary-treasurer of the AFL-CIO, noted, saying that unions do not want to be the junior partner in success and the senior partner in failure. See J Simmons & W Mares, above n15, 260.

85 See M Parker, above n7, 50-53.

86 See H Kehrl "Employee Relations Innovations for the 1980s" in *Employee Relations and Regulations in the '80s* (H Northrup & R Rowan ed 1982) 12, 12 [hereinafter *Employee Relations*]; B Spector, above n57, 857.

that there is a heterogeneity of preferences and value systems within the organization. Heterogeneity is necessary for an organization to adapt effectively to a complex and changing environment. The loss of that element within the workplace would consequently be a detriment to the survival of the workplace and the workers' long-term interests. It would also mean a loss of protection for the dissenting voice, a state of affairs inimical to democracy.⁸⁷

Related to cooptation are processes of optation and isolation, in which representatives may fail to represent their constituents' preferences because they no longer concur in them or cannot represent them because they have remained unaware of them through isolation.⁸⁸ Forces which act to produce these results include the employer's training and paying individuals who are supposed to represent worker or union interests,⁸⁹ providing special status to them, including perquisites such as improved working conditions and the seductions of being admitted to the inner circle,⁹⁰ the need for them to elicit management cooperation to perform their roles and the concomitant need to cooperate with management, little union support or resources being made available to them, and the temptation and availability of movement into managerial, higher paying jobs.⁹¹

One study showed that chief among factors which motivate workers to participate in cooperative arrangements is the desire to take part in management decisions. Supervisory ambitions were frequently found in the same individuals.⁹² Union officials may themselves face a double danger, for they are management officials, who fulfill their managerial roles within the union framework.⁹³ In other words, there may be temperamental factors which create a predisposition towards cooptation among the very individuals taking part in cooperation endeavours.

To the extent that a union's role is endangered or its representatives are silenced or coopted into silence, the union will have lost credibility with the membership and failed in its representational duties. There may well be a point where engaging in the setting up of another quasi-representational mechanism is the organizational equivalent of suicide. To unions concerned with their survival as vehicles of employee representation, these dangers of participatory management may overcome any of their advantages.

87 J Brett & T Hammer "Organizational Behaviour and Industrial Relations" in *Industrial Relations Research in the 1970s: Review and Appraisal* (T Kochan, D Mitchell & L Dyer ed 1982) 221, 254-55 [hereinafter *Industrial Relations*]; see J Simmons & W Mares, above n15, 256; J Witte, above n40, 57; A Blumrosen, above n11, 1465; J Craft, above n16, 432.

88 See J Witte, above n40, 60-61, for a fuller definition of these terms.

89 See R McKersie, above n30, 151.

90 See M Parker, above n7, 37-40.

91 See M Parker, above n7, 37-40.

92 See J Witte, above n40, 57.

93 See N Chamberlain, above n7, 53.

VI SPECIAL ISSUES IN PARTICIPATING ON BOARDS OF DIRECTORS

Participatory management can take many forms. Although much of what has been said above can apply to all situations, special issues are created by worker representation on corporate boards of directors. Unions have sought for many years to influence corporate actions through the enterprise's directors. One recent example in the United States was the corporate campaign involving J P Stevens, a company whose violations of labour law extended through two decades.⁹⁴

A *Positive Effects*

The main reason for supporting worker representation on boards of directors is the opportunity to improve the quality of decisions made by the board as they affect worklife. The board can be provided with information it might otherwise have overlooked, which is vital to understanding worker needs. Just as management representatives can draw on technical expertise generally foreign to worker representatives, so too can workers provide management with specialized knowledge of the plant. Management may be more open to hearing the other side's views through the medium of representation on the board of directors, particularly as to issues not directly related to working conditions but which may affect them. The injection of a new viewpoint may aid directors to consider their social obligations.⁹⁵

Such input is particularly important when there is a decision which is likely to have very negative consequences for the rank and file. In those circumstances, it has been the experience in Germany that codetermination has played an important role in softening the blow:⁹⁶

Co-determination had led to greater consideration of the societal impact of enterprise decisions. Decisions concerning new investments, cutbacks or shutdowns of works, geographical transfers of work, and other changes in the organization are acceptable for the labour representatives only if the social impact of these changes is taken into account labour's concern with the societal impact of enterprise decisions should not be construed as a rejection of the profit motive, however.

⁹⁴ See B Townley, above n20, 100.

⁹⁵ See Comment, above n32, 944-45; Note, above n11, 993-95 (representation on the board may be particularly appropriate since the workers may increasingly be the shareholders of the company).

⁹⁶ K Hopt, above n11, 1354-55; see Note, above n11, 947. Former UAW President Fraser evidently played such a role on the Chrysler board. Another director recounted that Fraser described the impact of board decisions in terms of flesh and blood, creating a shock felt throughout the room, confronting the other directors for the first time with such considerations. See J Simmons & W Mares, above n15, 250. Some have noted that simple presence on the board is more important as a goal than parity of numbers. See R McKersie, above n30, 161.

While participative management can provide workers with the right to information, protest, suggest, and consult, codetermination can add the right to veto - either temporarily or permanently - to decide, or to co-decide.⁹⁷ Thus, it is a mechanism which can offer great protection for workers. Where there has been any consideration of the matter, it is generally contemplated that the worker-director act in a role which complements that of other directors. Whereas the latter are to serve only the interests of the beneficial owner of the company, the shareholders, the former is to serve primarily the interests of the workers. Such special interest directors have been a recent addition to some boards.⁹⁸ Thus, while the principal fiduciary duty of a worker-director would be to the employees, when employee interests are implicated, the sole fiduciary duty of a worker-director would be to the employees.⁹⁹

Certain aspects of the controversy as to the role of a worker-director may be rooted in a failure to consider the reality of the nature of the modern corporation. The trend toward participatory management systems may be a tacit recognition that the law which provides for the existence of corporations rests on a legal fiction which disconnects work from ownership interests¹⁰⁰ and has in the past limited the question of the best interests of the corporation to that of maximization of profits,

97 See M Poole, above n7, 26. Where it is not possible to have an actual worker representative on the board, it may be that some of the same benefits may be gained through seeking the appointment of directors more sympathetic to the concerns of the workforce. See K Hopt, above n11, 1355.

98 This is a break from past debate whether the director owed its representational duty to the shareholders of the corporation. See generally R McCormick "Union Representatives as Corporate Directors: The Challenge to the Adversarial Model of Labor Relations" (1982) 15 U Mich J L Ref 219, 247 n132. Such special interest directors include those who represent either corporate creditors or shareholders blocs. Employees would thus be defined as among the broad corporate interests deserving protection. See Note, above n11, 1004-06. "Each views the 'best interests' of the company from a particular perspective If the 'best interests of the corporation' are given an appropriately expansive legal definition, the labour representative should be able to bring the employee viewpoint to bear in a manner consistent with his duties as a director" (at 1002-03).

99 See Comment, above n32, 948-49. "The board of directors studies ... show that the union strengthens its position vis-a-vis management where it takes control over the representative function, where the union elects, trains, and monitors the labour representatives to supervisory boards and manages the communication flow between representatives and the rank and file, worker representatives have a better chance of being effective worker advocates on the board because they are perceived by management as being interest group representatives with union power." See J Brett & T Hammer, above n87, 240-41.

100 See R Russell *Sharing Ownership in the Workplace* (1985) 7; P Selznick, above n7, 67. There are two opposing concepts of corporations and their roles concerning work: (1) private institutions are the only way in which to shape work and (2) work is a public activity too important to leave solely to corporate discretion. See R Howard, above n13, 11.

usually short-term profits, to the exclusion of other goals and interests.¹⁰¹ A more accurate view seeks to comprehend corporate function as an integral part of its gestalt.

B Negative Effects

Even with a realignment which would permit worker-directors to represent worker interests on the board of directors, there still remain a number of problems for unions. Worker-directors may wear at least three hats: union member, employee and board member.¹⁰² Conflicts of interest are most likely encountered in disclosure of information, the role to be performed in the formulation of collective bargaining strategy and in decision-making which has a negative impact upon the interests of the workers, the union's position when it has members employed at competitors of the employer, and the dangers of blurring roles of management and union.

An important reason for creating the position of worker-director is to improve the flow of information, to report to the unions and workforce current problems facing the enterprise.¹⁰³ The dissemination of information, however, may conflict with certain duties as a director.¹⁰⁴ On the other hand, if the worker-director does not disclose to the union, this may create severe problems. Non-disclosure may create a false impression among the workers and their representatives as to whether difficulties exist which require attention. It may give worker-directors undue power, should others assume they must blindly follow their advice, since they are in a position to know. Such deference is anti-democratic and creates a conflict with the union representatives' duty to act as worker representatives.¹⁰⁵ Disclosures of information which other directors do not consider disclosable may lead to the circumvention of the worker-director, thus weakening the position's effectiveness.¹⁰⁶

Commentators who have considered the problem have suggested that defining what is disclosable, either through collective bargaining or otherwise, would resolve the problem. Yet even they recognize that this will not prevent all such difficulties.¹⁰⁷ Furthermore, it is not probable that any definition will be easily

101 K Hopt, above n11, 1360.

102 In the case of employee ownership of the company, the director may also sport the additional headgear of owner. See J Simmons & W Mares, above n15, 120.

103 See K Hopt, above n11, 1349, 1361; see also J Simmons & W Mares, above n15, 72. In at least one instance, nondisclosure by the representative led to a strike. See J Simmons & W Mares, above n15, 128-132.

104 See Comment, above n32, 952-53.

105 See Comment, above n32. At Vermont Asbestos Group, a worker-owned company, the worker-directors from time to time shared information they thought important. What and when to disclose and related problems created an uncomfortable position for them. See J Simmons & W Mares, above n15, 120.

106 Compare K Hopt, above n11, 1361-62.

107 See K Hopt, above n11. Comment, above n32, 952-53.

agreed to. Information is a very sensitive issue,¹⁰⁸ and labour is likely to have a more expansive view as to what should be disclosed than management.

The formulation of management's position in collective bargaining and other decisions, particularly those which are inimical to workers' interests, present clear conflicts for worker-directors. The worker-director may absent him or herself from those discussions, to permit management to make the necessary decisions free from concern for placing the worker-director in conflict.¹⁰⁹ If this is done, has this not meant an abdication of the duty to represent worker interests to the best of his or her ability by being present when those decisions are made?

On the other hand, the participation of a worker-director in co-determining unpleasant decisions such as the closing of a plant, layoffs, relocations, subcontracting, or the adoption of labour-saving devices to replace workers, presents an uncomfortable state of affairs. First, a probable response to such participation may be claims of non-representation.¹¹⁰ Second, if those decisions have a disparate impact upon one group of employees, there may again arise disgruntled voices claiming a failure to represent the minority.¹¹¹ Should that disgruntlement lead to organised oppositions with differing programmes, this would present a mortal threat to the existence of the union.¹¹² Finally, full participation may be used as a basis for arguing that the union representatives have become managers, with all the repercussions inherent in that status.

Participation in board decisions of one employer creates a conflict of interest for the union in its representation of members employed by competitors. Such a conflict may be present if more favourable terms are granted one employer, thus affecting the competitiveness of the other.¹¹³ When the union has power to control an employer and the temptation, likelihood, or incentive to control the employer in order to protect union business interests, then it may have lost the ability to represent its members with complete singleness of purpose.¹¹⁴

108 Compare M Dube "New Rules for Collective Bargaining: An Improved Climate for Management Negotiators" (1986) 37 Lab LJ 432, 433-34.

109 See Note, above n11, 1003 (can absent self from board deliberations on collective bargaining issues to avoid conflict); Comment, above n32, at 954 (access only to discussion of collective bargaining philosophy).

110 See R McCormick, above n98, 247; see *Filippini v Austin* 650 FRD 425, 429-430 (CD Cal 1985).

111 But see *Johnson v Air Line Pilots in the Service of Northwest Airlines Inc* 650 F 2d 133 (8th Cir 1981), cert den 454 US 1063 (1981).

112 See O Kahn-Freund, above n1, 212.

113 See R McCormick, above n98, 156.

114 See, for example, *Plumbers Local 533 (Plumbing Contractors)* 271 NLRB 1361 (1984) (one-quarter ownership interest in competitor). This problem reflects that experienced when employees identify with their firm's interests, taking on a competitive view towards other firms and workers, replacing cooperation in union activities and goals with competition. Thus, cooperation within the firm may be accompanied by competition without. See M Poole, above n7, 36; T Kochan, H Katz

Finally, the existence of a worker-director may exacerbate the problems of blurred roles. The worker-director who becomes privy to inside information and encounters the seductions of luxury through intimate involvement at the board level may find this alters his or her commitment to the unit. This could affect decisions such as choosing strike targets, improperly preferring one group of employees over another when there is a conflict of interest, or even a failure to comprehend worker goals.¹¹⁵

VII CONCLUSIONS

The implications of the factors discussed cannot lead to any single result applicable to all workplaces. The mix of industry, personalities, bargaining histories, and economic exigencies will not be the same. It is the interplay of these which affects the course participative management schemes take. Some predictions can, however, be made, based on studies of attitudes relevant to the functioning of such programmes.

By and large, they do not inspire optimism in the future of participatory programmes. The studies dealt with factors such as employer attitudes towards the uses and methods by which cooperative programmes are implemented, underlying attitudes towards the proper spheres of management and labour, and expectations. An American labour lawyer noted:¹¹⁶

If the QWL program was suggested by the company rather than the union, if the union got little or nothing in exchange for it, if there is confusion on what the committee in practice may discuss, if there is confusion as to whether the committee is the company's agent, the union's agent, or a separate entity, if the company controls the committee membership and agenda, if the committee starts to look like management's pointman in implementing decisions, if the committee is being used to undercut the union, if the union surrenders to the committee its obligation to represent members on

& N Mower, above n17, 296-97. Leslie Nulty of the United Food and Commercial Workers Union stated that in the garment industry if a union promotes the welfare of one firm, it risks putting all the others - where the union also has members - out of business. See *Challenges*, above n7, 167.

115 See D Zwerdling, above n18, 170, 171; R McCormick, above n99, 255; Note, "Serving Two Masters: Union Representation on Corporate Boards of Directors" (1981) 81 Colum LR 639, 650-51. "Unlike political elites, workers' representatives are supposedly very similar to their constituents in status and concerns [E]mployees who seek participation differ from the rank and file in a number of characteristics, and these characteristics have a significant effect on the likelihood of achieving adequate representation of workers' interests in systems of joint worker-management decision making." It was a desire of Chrysler management that codetermination would cause the union to learn about the company's needs and problems and especially its need for profits. See J Barbash, above n20, 86. In other words, management intended that at least limited cooptation take place as a consequence of the arrangement.

116 E Boal "Legal Challenges to QWL" in M Parker, above n7, 95, 98; see also D Zwerdling, above n18, 46.

working conditions, or if there is organized opposition to the QWL program among employees....

then the fruits of participation will be disruption in the workplace rather than harmony. This appears likely to be a good description of the situation in New Zealand.

For example, as discussed above, there must be a willingness on the part of management to take honest steps towards participation to ensure success. Yet, a poll of managers' willingness to negotiate decisions ranging from those with clear applicability to working conditions to those more closely related to classic managerial decisions disclosed a desire to maintain tight control in all areas. Well over 50% of those polled believed that all the issues should be determined by management alone, except for those relating to work scheduling (48.6%), rules of conduct (39.2%) and safety (21.6%). Indeed, so strong was the bias towards unilateral decision-making on the part of management officials that most areas were felt to be in management's sole control by 70-90%.¹¹⁷

In its handbook discussing employee involvement, the NZ Employers Federation states that "the effect of consultation should be to achieve the co-operation of employees in ... the implementation of management decisions". It does not envision the possibility that programmes could be a salutary means of providing employees with influence over workplace decisions.¹¹⁸ More recently, the Employers Federation stated "that in New Zealand employee involvement [should] be seen as a matter that is the direct concern of employees and employers, without formal union involvement". It recommended that the Labour Relations Act be amended to "reflect a general movement towards the decentralisation of industrial relations"; that it concern workplace issues and not "critical areas of finance, investment or other risk decisions".¹¹⁹ These attitudes conflict with employee desires for more control over their worklife.¹²⁰

The inability to share control is not the only characteristic of management inimical to cooperative arrangements. Information sharing is supposed to be an element essential to participation. A survey disclosed, however, that 69% of New Zealand companies never inform employees of relevant company information such as change in plans, objectives, or contemplated profits.¹²¹

Again, as discussed above, the manner in which these programmes are introduced is a key element of success. Yet a Department of Labour poll showed that 36% of

117 I McAndrew, above n2, 142-43; see also Report of the Committee of Enquiry Into Industrial Democracy (1989) 4.

118 See NZ Employers Federation, above n42, 35; see also New Zealand Employers Federation, *The Employer 2* (Oct 1989).

119 New Zealand Employers Federation, *The Employer 2* (Oct 1989).

120 See above n42 and accompanying text.

121 B Brooks, above n2, 92.

employers had introduced participative schemes without either consulting or negotiating with their workforces, 41% introduced them without notice to the union, and, although 29% informed the union, they did not allow it to consult or negotiate.¹²²

Successful cooperation can only be achieved by genuine involvement and respect for employee participation. Nevertheless, a government poll found that twenty-three of sixty-five schemes which management claimed to be examples of participative management were really only profit-sharing schemes designed to give employees the feeling of involvement without the reality. In some cases they were actually set up to prevent any true employee involvement.¹²³

These studies strongly suggest that in New Zealand participation is used by management to allow employers to retain control yet persuade employees to produce at higher levels.¹²⁴ Indeed, the fact that employees naturally turn to unions to influence management, and yet that management seeks to implement worker participation in the absence of the union,¹²⁵ lends support to suspicions that management implements these programmes with no concern for employee wellbeing.

It is not the system of collective bargaining which necessarily entails conflict. It flows from the attitudes of the parties engaging in collective bargaining. A mere change of form will not rid the workplace of conflict. It is all too easy to focus on strikes with their drama and fail to see that worker disgruntlement can be expressed through absenteeism, turnover, and accidents, which are just as detrimental to productivity.¹²⁶ Participative mechanisms introduced in the climate existing in many New Zealand workplaces is likely to result in increased levels of frustration and latent conflict. At General Motors' Van Nuys plant, introduction of the team concept into the workforce actually exacerbated conflict.¹²⁷

122 D Smith "A Critique of Worker Participation in New Zealand" (1978) 3 NZJ Ind Rel 71; see also NZ Employers Federation, above n42, which virtually omits any mention of unions as having an interest in the subject.

123 See D Smith, above n122, 78; see also R Stephens, above n35, 23 (1982).

124 See D Smith, above n122, 78; see also R Stephens, above n35, 23 (1982).

125 See D Smith, above n122, 74.

126 See B Brooks "Some Reflections on Industrial Conflict in New Zealand" in *Labour and Industrial Relations in New Zealand* (J Howells, N Woods & F Young ed 1974) 204, 205; D McDonald "Cooperation and Conflict: A Trade Union Point of View" in id, 221; compare F Schmidt "Industrial Action: The Role of Trade Unions and Employer's Associations" in *Industrial Conflict: A Comparative Legal Survey* (B Aaron & K Wedderburn ed 1972) 2, 26 (noting the greater strife in American labour relations resulting from employer attitudes towards unions).

127 See C Zabala, above n13, 30; compare B Brooks, above n2, 92, noting that 93% of New Zealand managers believed they alone were responsible for company policy.

Worker participation is an idea which has surfaced on occasions earlier in this century only to sink into relative obscurity.¹²⁸ Although management and labour can jointly determine many aspects of their workplace life, it does not follow that they have no opposing interests. As Sir Otto Kahn-Freund warned, to believe so is to follow a chimera.¹²⁹ Under the current state of affairs, all parties may well be better off dealing with the reality of conflict through mechanisms which recognise its existence rather than participative management schemes ill adapted to the realities of the present day.

¹²⁸ See D Smith, above n122, 71.

¹²⁹ See O Kahn-Freund, above n1, 16-17.