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IN DEFENSE OF UNION INVOLVEMENT IN WORKER OWNERSHIP

Toni Delmonte

I. INTRODUCTION

The current corporate strategy of buying and selling companies as a means of producing a profit has caused serious problems in the economy. Diversification is partially responsible for the evident neglect of individual firms and specific industries. Productivity in these unattended firms and industries continues to decline. Several American industries are no longer effectively competing with foreign imports. Lack of productivity and increased foreign competition in combination with the recession of the 1980s has resulted in increased unemployment, the flight of capital to areas where inexpensive labor is available, and the lack of economic development in America.

Faced with these predicaments, organized labor encounters serious challenges. Unionists are wrestling with a variety of strategies with which to meet these difficulties: retarding capital mobility and preventing shutdowns by acquiring control over pension funds, lobbying for plant closing prenotification, and advocating the use of eminent domain by communities. Some unions have lobbied for protectionist measures. Several are beginning to organize workers in other countries. And while some unions advocate converting plants in declining or unprofitable businesses to other product lines, a few unionists advocate subsidizing or nationalizing unprofitable businesses. None of these strategies have so far been more than occasionally successful.

As experience demonstrates the weakness of traditional economic strategies, labor has become far more conscious of the need to find new strategies. Unions are aware that collective bargaining is a troubled institution and understand that techniques traditionally used to bring collective bargaining to unwilling employers, including economic pressure and government regulation, have lost much of their potency.

Worker ownership is one strategy unions are exploring as a way to gain some control over capital and anchor it in communities. Worker ownership can be effective in assisting local communities to create, retain and improve jobs. Thus, unionists should include worker ownership as a tactic in the general struggle for economic reform.

However, labor's traditional skepticism of worker ownership has hindered employee ownership of business. Former President of the American Federation of Labor (AFL), Samuel Gompers' early endorsement of collective bargaining as the basis for the labor movement over the co-existent policy of cooperatively owned businesses has impeded active union involvement in this area. The past struggle between ideologies within the labor movement should not be repeated with the victor allowed to suppress employee ownership as an effective tactic.

In order for worker owned companies to survive as profitable businesses and worker ownership to be an effective tool in revitalizing the economy, the intimate assistance of labor organizations, the community, and government is required. The worker owned company will look to these entities for leadership, funding, and technical assistance.

This paper examines the role unions can play in economic development through worker ownership. Following a discussion of the internal ideological struggle within the labor movement, the paper describes in detail the transformation of a single company, Rath Packing Company, to an employee owned company. Although several unions have undertaken many worker ownership projects, the lessons learned from the union's participation in Rath, including both the mistakes made and successes achieved, are indicative of problems with past projects and can serve as a guide for future attempts. Unions are assisting workers to become owners and, at the same time, are creating new roles for themselves. Although the actual methods utilized to gain ownership of capital and secure control vary, three principal vehicles exist: employee stock ownership plans (ESOPs), worker cooperatives, and, what I term, creative collective bargaining.

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Although some unions are taking the offense in hostile takeover bids by becoming players in the highly technical and competitive world of corporate takeovers and reorganizations, I will not address this issue.

An equally important part of my discussion will focus on the necessity for substantial union involvement during negotiations and a solid, continuous union presence once employee ownership is established. It is imperative that worker representatives are present to ensure workers' rights and benefits during and after negotiations. Moreover, I believe

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the opportunity to democratize corporate institutions is not only ripe but the more significant goal.\textsuperscript{16}

The involvement of unions in employee ownership raises numerous legal questions involving a myriad of corporate law, finance, and labor law issues. The paper will address the following two complex legal questions. First is the potential conflict of interest when union officials sit on boards of companies which in turn raises several distinct issues, namely, the conflicting fiduciary responsibilities of corporate directors and union officials; the issue of union involvement and employer domination and the issue of union representatives' duty of fair representation under the National Labor Relations Act; union officers' access to and disclosure of information; and, the potential antitrust and competition problems that arise. Second is the question whether pension funds can be used to assist employee ownership. Unions have had to learn to arrange financing; they are often prevented from proceeding due to a shortage of capital. The use of pension funds to finance projects can be useful in strengthening employee ownership as a strategy for economic reform.

Although the law is inconclusive in these areas and there are obstacles, the law should not discourage employee ownership and control in a situation which makes financial sense to both the company and the employees. Moreover, these obstacles should not prevent labor organizations from forging the way to economic redevelopment and revitalization.

II. LABOR'S TRADITIONAL VIEW OF WORKER OWNERSHIP
The American labor movement has been shaped by the struggle between two diametric ideologies: the defense of the union's position in the capitalist system and the desire to change the system. The strong possibility for a reoccurrence of this ideological rift merits a reassessment of the events leading to the original division.

During the late 1860's, William Sylvis, an avid believer in trade unionism, pronounced his disillusionment with the trade union movement. He concluded that "there are a number of grievances . . . that cannot be reached or removed by trade unions . . . No permanent reform can ever be established through the agency of trade unions . . . ."\textsuperscript{17} His major complaint against trade unionism was with the ineffectiveness of the strike, evidenced by the defeat of the Iron Molders' International Union.\textsuperscript{18}

Sylvis espoused the philosophy of cooperation to correct basic flaws in the economy.\textsuperscript{19} He believed cooperation would eradicate class conflict by eliminating the wage system; he envisioned a better social order created by the laboring class.\textsuperscript{20} His efforts materialized into the establishment of several cooperative foundries during the post-Civil War depression. In the early part of 1868, eight shops were operating successfully, four were ready to open, and twenty were in various stages of organization.\textsuperscript{21} Moreover, Sylvis persuaded the International Union to assume control of a cooperative foundry in Pittsburgh.

The entire labor and social reform effort was affected by the cooperative movement and popular public interest was awakened. The National Labor Union endorsed the movement as "one of the most powerful agents for the elevation of labor and the equitable distribution of wealth.\textsuperscript{22} However, this favorable impression was blackened by the financial demise of the Pittsburgh foundry. Workers were either reluctant or unable to purchase stock, and creditors were unwilling to support the struggling foundry. Faced with severe financial difficulties and unable to secure sufficient capital, the local union turned to the International for support. Unfortunately, the International branded as illegal the transfer of strike pay to the cooperative.\textsuperscript{23} The culmination of these factors resulted in the closing of the Pittsburgh foundry and the beginning of the end of Sylvis' inspired cooperative movement.

By the 1880's, the various factions of the labor movement were polarized along ideological lines. The Knights of Labor, descendant of the National Labor Union, adopted the policy and historical legacy of reform unionism and maintained that only the basic transformation of the structure of society could solve the difficulties of the working class.\textsuperscript{24} Meanwhile, the renewed trade union movement contested social reconstruction. It looked instead toward immediate material improvements within the framework of the existing institutions and relied essentially on economic action.\textsuperscript{25}

While the Knights of Labor continued to perpetuate the reform tradition of American labor, the leaders of the trade unions began institutionalizing the collective bargaining process. Around the turn of the 20th century, trade unions, through the American Federation of Labor (AFL), prevailed over the Knights of Labor.\textsuperscript{26} Essentially, the productive power of the capitalist system was accepted by organized labor, and labor leaders sought to guarantee the rights of workers within the existing system rather than seek to change it. This strategy entailed a substantial narrowing of the aims of the labor movement. The division between labor and management was accepted; management defined unions as representatives of a particular interest within the firm. Self-management and worker ownership consequently disappeared from labor's agenda. President of the AFL, Samuel Gompers, drew the line conclusively while endorsing the doctrine of "pure and simple unionism":

Collective bargaining in industry does not imply that wage earners shall assume control of industry, or responsibility for financial management. It proposes that employees shall have the right to organize and to deal with the employer through selected representatives as to wages and working conditions . . . . [T]here is no belief held in the trade unions that its members shall control the plant or usurp the rights of the owners.\textsuperscript{27}
Although there have been important subsequent developments in the labor movement since 1920, the strategy constructed by the AFL has not been significantly modified. The "pure and simple unionism" doctrine underlies the current body of labor law, labor relations theory, and the interaction between employers, unions, and employees.

Under the National Labor Relations Act, employers and unions have a duty to "bargain collectively...subject to the provisions of section 9(a)." Section 9(a) declares that the union shall be the exclusive spokesperson "in respect to the provisions of section 9(a)." Section 9(a) declares that unions have a legitimate interest in managing their own affairs and the interaction between employers, unions, and employees.

Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business. It must also have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations labeling its conduct as unfair labor practice. Congress did not explicitly state what issues of mutual concern to union and management it intended to exclude from mandatory bargaining. Nonetheless, in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining process, outweighs the burden placed on the conduct of the business...

Thus, self-management and worker ownership have been legally removed from labor's agenda as well.

III. THE REEMERGENCE OF THE COOPERATIVE MOVEMENT

Since the early 1970s, issues of worker ownership and control have resurfaced. Organized labor has reacted with ambivalence, if not resistance, to the growth in worker ownership of businesses. According to a 1977 report, a substantial number of union officials expressed skepticism about employee ownership and its implications for labor. A frequent source of skepticism was the impact of employee ownership on collective bargaining. It was viewed as having a potentially negative impact by eliminating the necessary conflict of interest and aligning worker interests with managerial ones. One unionist anticipated that "under such circumstances, labor's traditional function(s) in this economy are changed dramatically if not eliminated."

Today while there is lingering skepticism, nine percent of the private sector workforce (nine million workers) now participate in employee stock ownership plans (ESOPs), with additional workers involved in other forms of ownership or management participation. Currently, substantial tax benefits exist for ESOPs. Some states have passed laws adopting the legal structure of the successful industrial cooperatives of Mondragon, Spain, facilitating the establishment of worker cooperatives. Many state governments now also have programs to support worker ownership.

Some unions have taken the initiative and are leading the way in the development of worker ownership as a strategy. Organized labor can ill afford to ignore the increase in number and complexity of worker ownership transactions, especially when coupled with decreasing union membership. With caution and a critical perspective, unions can use worker ownership positively as one ingredient in a mix of capital strategies.

IV. THE TRIALS AND TRIBULATIONS OF THE RATH PACKING COMPANY

A critical perspective is necessary in order for worker ownership to have a positive influence on workers, the labor movement and overall economic reform. The demise of Rath Packing Company ("Rath") is one example from which to learn. Rath was mismanaged to the brink of collapse and the city of Waterloo, Iowa was in danger of losing one of its major employers. The union local, facing the potential loss of its primary workplace, attempted to gain some degree of control over its future. As a result, Rath Packing Company was one of the first industrial plants to be worker owned and controlled.

In the 1940s Rath was considered one of the most modern meatpackers in the industry. During the 1950s and 1960s, management failed to make several strategic moves: they missed the opportunity to market pork products in the supermarkets, believing "mom & pop" stores would continue to dominate the market, and they decided not to reinvest in modern machinery and new processes. In addition, in the 1970s, the Nixon administration's price controls were applied to Rath's products, but not to livestock prices. Labor-management disputes were also common throughout this period. During the late 1970s, public loans and guarantees helped Rath remain viable. At the same time, United Food and Commercial Workers International Union ("UFCW") Local 46 was, in effect, granting the company loans by agreeing to defer company pension fund payments. In 1978, management asked Local 46, which represented most employees, to take a 50 percent wage...
cut, to give up one week of vacation and to delay a cost of living pay increase.\textsuperscript{46} The union rejected this proposal.

Rath was the second largest employer in Black Hawk County, Iowa, and the prospect of plant closure was an ominous prospect to the people in the county. In response, the community initiated action to channel short term funds to Rath, and to study the intermediate and longer term needs and potential for the firm. The Black Hawk County Economic Development Committee assembled a Rath Study Committee made up of representatives from the union, Rath, and local and regional public and private organizations.\textsuperscript{47} The committee received a U.S. Department of Commerce Economic Development Administration grant to commission a consultant's study of options for saving the company. The study recommended several major changes: the infusion of capital, the reorganization of the sales force, and the tightening up of labor practices and operational procedures.\textsuperscript{48} However, the competitive life expectancy of the Waterloo plant was estimated to be only three to five years, after which it would again be an unprofitable enterprise.\textsuperscript{49}

The next year, 1979, Rath Packing was saved from bankruptcy when Lyle Taylor, president of Meat Cutter Local 46, proposed, independently from International headquarters, that union employees purchase a controlling interest in the company. The employees took wage cuts and deferred benefits in return for 60 percent of the company's treasury stock.\textsuperscript{50} These actions provided the necessary new equity to leverage a HUD-UDAG loan; consequently, Black Hawk County and the City of Waterloo were able to lend Rath $4,500,000 for capital investment from this federal grant. Rath also received $3 million from the Economic Development Administration of the U.S. Department of Commerce.\textsuperscript{51} This infusion of capital prevented outside investors, interested in making substantial cuts in employee wages and fringe benefits, from gaining control of the firm.

Rath also agreed to a profit sharing plan, through which 50 percent of future pre-tax profits were to be used to restore funding to the pension plan and pay employees deferred wages and benefits.\textsuperscript{52} Furthermore, the acceptance of the above agreement was conditioned upon elections for a new Chief Executive Officer (CEO) and new directors to replace existing directors on the Board of Directors.\textsuperscript{53} The union chose ten new Board directors, three of whom were rank and file activists and seven of whom were chosen for their professional, business and political affiliations.\textsuperscript{54} The Local Agreement throughout maintained the basic features of the nationally negotiated labor-management Master Agreement.\textsuperscript{55}

To effectuate the transfer of 60 percent of the stock negotiated in exchange for the wage and benefit cuts, Rath attempted to develop a non-ESOP perpetual stock trust.\textsuperscript{56} The approval of the Department of Labor (DOL) is required before such a trust may be established. DOL, however, would not give a "prohibited transaction exemption"\textsuperscript{57} because the employees were buying more than 10 percent of the stock and holding it in trust.\textsuperscript{58} In June 1980, single employees elected to make individual stock purchases while awaiting the establishment of a trust.\textsuperscript{59} Unable to secure DOL's approval, Rath pursued the establishment of an Employee Stock Ownership Plan (ESOP).\textsuperscript{60} On January 1, 1981, the DOL accepted Rath's ESOP: Local 46, representing workers' interests, assisted in the drafting of the plan. Local 46 then presented the plan to the employees as a means of saving jobs, limiting concessions, gaining control of the company and management decisionmaking, protecting the pension plan, and preventing a proposed buy-out.\textsuperscript{61} Employees independently elected to put their stock into the Employee Stock Ownership Trust (ESOT).\textsuperscript{62} Since some employees who had purchased stock individually chose not to contribute that stock to the ESOT, the ESOT had only 49.5 percent of the total stock of the company rather than the anticipated 60 percent.\textsuperscript{63} The ESOT held 1.8 million shares of employee-owned stock; Rath's other 1.2 million shares remained publicly owned.

Rath established a "two-tiered" or "instructed trustee" model. Under this system, the ESOT Board of Trustees exercised the voting rights of all shares held in the ESOT rather than passing the votes through the trust directly to the employees. The employees\textsuperscript{64} voted democratically on all shareholder issues (the "first tier") and then required the trustees to vote (the "second tier") in accordance with the results of the employee voting.\textsuperscript{65} The ESOT Board of Trustees was elected democratically by all participants on a one vote per person basis, not a one vote per share basis. The members of the Board of Trustees were required to be plan participants, but could not be "officer[s], employee[s], agent[s] or representative[s] of the union [UFCW Local 46], or any other labor organization."\textsuperscript{66} However, the Union retained veto power over any possible changes in power, and any plan modifications or termination of its agreement that created the plan with Rath.\textsuperscript{68}

Since ESOPs are designed solely for providing ownership,\textsuperscript{69} additional mechanisms for participation and control need to be independently instituted. Local 46 fought for and established a system of worker participation from the shop floor to the boardroom, in exchange for concessions. A top level steering committee was also created, jointly chaired by union and management officials to meet monthly, to plan activities, and monitor developments with a strategic planning group to oversee the future of the company. On a volunteer basis employees joined Action Research Teams (ARTs) where discussion and problem solving was open to all topics related to the management of Rath.

In 1981 a new CEO was elected. Herbert Einstein declared an open house policy and promoted communication between management and workers. Lyle Taylor, the President of Local 46, also accepted a position on the Board of Directors in order to more accurately transmit union information and ideas to the Board.\textsuperscript{71}
With a workforce of 2200 employees and an annual payroll of $35,000,000, Rath was able to save $5 million in labor costs by 1983. This 20 percent reduction in labor costs per unit of production increased productivity. However, labor costs were only 15 percent of total costs. Rath Packing Company was subsequently unable to successfully counteract unfavorable externally imposed conditions: high interest rates, high inventory costs, high hog prices, declines in pork consumption, declines in prices, non-union competition, and outdated plant and marketing strategies.

Facing these unfavorable conditions, labor-management relations at Rath began to deteriorate. The last contract was negotiated in October, 1982. The pension plan was discontinued, with the approval of the union by a vote of 60 percent, due to these bad economic circumstances. No other retirement plan replaced it. Rath had been repeatedly requesting wage deferrals over the years. The final request for an additional deferral of $2.50 an hour per person in February, 1983 caused the UFCW International to file an unfair labor practice charge against Rath. The International charged that Rath did not have the authority to negotiate such a deferral under the existing contract. Local 46, however, agreed to the deferral on the basis that Herb Einstein would resign as CEO and union president Lyle Taylor would take his place.

In the spring of 1983, when Lyle Taylor became the company president and CEO, improved relations were anticipated. However, they worsened. In that year Rath was forced to file chapter 11 bankruptcy proceedings. In an effort to make Rath more attractive to an outside buyer, management asked and was granted relief from its union contract by the presiding bankruptcy judge. In 1984, management tried to decertify the union. However, they were barred from doing so because of the above mentioned pending unfair labor practice charge. The worker-owners then began picketing to get a contract. When a union steward was fired, 700 workers walked out of Rath for thirty days and struck against the plant they owned. The steward was reinstated and grievance proceedings were enacted.

These efforts and the reduction of the workforce, from approximately 2,000 employees right after the buy-out to approximately 300-400 employees, were unsuccessful. In early 1985, Rath ceased operation and sold its assets later that year.

V. THE NECESSARY ROLE UNIONS PLAY

Unions are better positioned than any other institution in America to ensure the effectiveness of worker ownership. They have the financial resources, the organizational knowledge, and the ideological commitment to workers' interests and collective action to play a major role in determining the character of worker ownership in this country. As evidenced by the role played by the UFCW Local in Rath, a union can render numerous services of great significance. Employee ownership can revitalize the labor movement by providing both a means of influencing the movement of capital and a framework for increased worker participation and control. Employee ownership can also serve as a foundation for new organizing drives through its ability to provide new jobs and financially significant ownership in start-up companies. The question then becomes: how do unions effectively assist in worker ownership and why are they needed once a company becomes worker owned?

Undoubtedly, unions will be required to develop new capacities and skills in order to effectively lead the takeover of industries. Since unions are not able to own companies themselves because of legal complications stemming from conflicts of interest, they will need to develop their own internal technical resources to provide support for their locals and members. Union locals and their members will need advice on how to conduct analyses of a company's financial worth, market trends, prospective business decisions, and so on. Unions involved in employee ownership can coordinate the efforts of experts, management, the community and their members. Organized labor will have to become proficient in developing effective leadership and management skills and in facilitating workplace democracy.

A precondition for the effective use of worker ownership is a detailed and full understanding of the company, its markets and its industry. It is imperative to establish that a company is viable prior to any efforts being made to acquire ownership and control of that company. Employee ownership and control will not counter deficiencies in the market. In the foregoing example, although a feasibility study was conducted at Rath, the union and the employees made the fatal mistake of ignoring the consultant's study. Rath's competitive life expectancy, even after the injection of substantial federal grants, was estimated to be only three to five years, after which time it would again be unprofitable. Although Rath continued to operate until 1985, worker ownership, perhaps, was not the appropriate option to pursue. To avoid the misguided pursuit of worker ownership, the AFL-CIO Industrial Union Department has recommended that, foremost, feasibility studies on the financial condition of the firm and its industry be conducted so workers will understand all potential options.

Furthermore, due to continuous financial strain, Rath was forced to reduce pension benefits and eventually discontinue the pension plan altogether as a means of increasing capital. Although the ESOP at Rath was never intended to replace the pension plan, the ESOP, in general, has been manipulated to achieve many objectives other than its original purpose of exclusively benefitting employees. Although a minimal number of ESOPs have replaced pension plans, the potential risk to employee investments is severe. As a result, the AFL-CIO is beginning to educate workers as to the distinction between ESOPs and tradi-
ESOPs can redefine the roles of managers, stockholders, workers and the union if the ESOP specifically establishes employee control. Most ESOPs, however, do not establish a mechanism for shaping company policy on wages or other equally important decisions which affect working conditions. In companies which have publicly traded stock, ESOPs grant employees the same limited voting rights as other shareholders, such as the right to vote on the sale of the firm or significant changes in company operations. In companies without publicly traded stock, the law does not require most voting rights to be passed through to employees. In general, voting must be passed through only on major corporate issues (e.g., mergers, dissolution, sale of all assets). Studies show that in 85 percent of all companies with ESOPs, worker-owners do not have full voting rights. Often employees are not even granted the right to vote for the Board of Directors. One ESOP promoter told owners: “Through the ESOP, you can sell the company and still keep it.” Essentially, it all depends on management’s willingness to actively involve its new worker-owners in decision making. A handful of companies have organized ESOPs such that employees elect directors, or have a voice regarding issues such as wages, hours, or working conditions.

It is essential that employee interests are ensured and protected during negotiations establishing an ESOP; organized labor can fill this role. The time to establish control mechanisms such as immediate allocation of voting stock, information exchange channels, and the right to elect board members is before the ESOP instrument is finalized and implemented. To that end, worker representatives should be sensitive to locating worker-sympathetic financial sources and legal advisors.

Although the law allows an ESOP to prevent employee voting on issues that require shareholder voting, the law will also allow the ESOP to stipulate to a wider array of issues that employees can vote on. Substantial employee voting rights can be provided for within the constraints of ESOP law. A democratic ESOP can be instituted: UFCW was instrumental in establishing a democratic ESOP at Rath.

One must keep in mind, however, that democratic ESOPs still only accord employees the right to vote on shareholder issues, which are granted and often quite limited by state corporate statutory law. Once a union has ensured the establishment of a democratic ESOP, they should also take the initiative in choosing new company management and educating management and workers about the concepts of democratic ownership. Education of the workforce has become paramount in the agenda of many of the existing private organizations providing technical assistance to worker-owned companies. As noted earlier, control is as important as ownership; this applies to ESOPs, worker cooperatives and situations where the collective bargaining agreement provides employee ownership rights. It is this author’s position that a worker-managed firm should place ultimate discretion over all matters lying within its field of choice in the hands of the firm’s personnel, with each member of the workforce having an equal voice regardless of what skills or managerial rank he or she may have. Where plans are primarily designed to improve productivity without offering effective control, the union is an essential advocate for the workers in a continuing struggle for control. Even the more democratic ESOPs and worker cooperatives require the perspective of the union. As in Rath, the union can be effective in instituting a system of worker participation from the shop floor to the board in order to obtain and maintain control.

Moreover, the union can monitor the daily operation of the company. Unions can help ensure that the firm is managed in the best interests of the workers. They can act as a “forum through which to balance the interests of workers” and the “interests of the company,” which are not always coterminous, even where the employees have workplace control. Unions can represent workers’ interests in decisions regarding the purchase of new equipment, retirement benefits, and plant expansions. As a leader of the USWA said: “A union in an employee owned firm must consider not just wages but also reinvestment.” Unions have already made advances towards filling this role. For instance, unions have been granted the right to internal company reports and sales information, which can be used to keep employees informed about the company’s financial condition.

Most importantly, the union is needed to act as a “legitimate opposition” between the individual and the majority position. This “legitimate opposition concept is rooted in the political community’s first amendment protection of dissenters’ rights to free speech. The union maintains its traditional role of protecting minority interests within the workplace community. The pro-employee representation is needed to act as a forum for member grievances. Surveys in unionized companies with ESOPs indicate that most workers believe they need unions even when they are “the owners.” Stewards still have grievances to handle. The UFCW played and maintained an active role in representing unsatisfied worker-owners and protecting their individual rights at Rath. The union supported the strike and represented the fired union steward during grievance procedures. Even in the well-known Mondragon network of cooperatives in Spain, where only one strike has occurred in over twenty years, the importance of the union in protecting individual rights is often overlooked. Although the strike led to changes in operations and was considered a beneficial learning experience, each of the strike leaders was summarily fired and not reinstated. Furthermore, collective bargaining agreements or formalized forums of some form are still needed to ensure fair arrangements for promotions, layoffs, discipline and safe and
healthy working conditions. In the Denver Cab Company, a worker cooperative, the organizational structure intentionally includes a negotiating committee composed of several board members and coop managers to represent members in bargaining with its six unions. Without formal and legitimate representation for employees interests, these interests are not considered in the daily operations of the business.

The union is necessary in the development of a worker-owned company and essential during its operations. The democratic organization requires an institutionalized opposition that is recognized as legitimate. It is imperative that the union be accepted as legitimate from the inception of the worker-owned company, as one of the first abuses of power is to raise the costs of opposition. In order for the union to assume this position, an outline of the union's oppositional role, the structure of the grievance procedure, and the funding of the union's local operations should be incorporated in the constitution of the new democratic firm.

VI. LEGAL ISSUES

As unions become more involved in worker ownership they are stepping beyond traditional labor-management relations and labor law. This paper will discuss two main issues, union representation on corporate boards of directors and the persuasive impact of pension funds, that give rise to several legal questions of which unions should be aware.

A. UNION REPRESENTATION ON CORPORATE BOARDS OF DIRECTORS

Union representation on corporate boards is consonant with the policies underlying American labor law as it has been interpreted and developed over the past forty years. Union board representation of employees is not a substitute for the collective bargaining process. Rather, it complements and extends an institutional process that has changed significantly since its origin. Although employers and the courts still strongly resist union intervention in managerial prerogatives, the scope of bargaining has nonetheless expanded to encompass matters formally considered managerial prerogatives and, as evidenced by the growing use of joint labor-management committees, cooperation has increasingly replaced confrontation.

Union board representation is a logical expansion of employee influence on the "running of the business." Board representation would provide the union with direct input into decisions presently beyond the scope of collective bargaining. Moreover, because the issues addressed on the directorate level are often not discussed during the bargaining process, the position on the board could be the only way for the workers' viewpoint to ever be considered in a timely manner. Thus utilized, union representation would effectively complement the collective bargaining process.

Union representation could reduce the inefficiency resulting from organizational complexity, board-of-director ineffectiveness, and capital market distortions. Union-provided information could supplement information provided by management. The union-provided information could illustrate the flaws in management's reasoning, thus assisting the shareholders and directors in making informed decisions. Union directors could also help to check management inefficiency; they could devote considerably more time to board matters than independent outside directors, and they would not have the same sympathy for management as members of the "closed club of elites." Finally, because of their independence, union directors could threaten to communicate managerial failings to management's two constituencies—the workers and the shareholders. Once again, the need for legitimate opposition is demonstrated.

Agreement between the union and the corporation to incorporate union-based board representation would provide a valid and economically beneficial exchange between the parties. Unless the parties explicitly indicate to the contrary, the union presumably receives from the exchange a board position to represent worker interests. The parties engage in arm's length bargaining, seeking out the best possible bargain they can attain given the legal constraints on their behavior. Therefore, when a corporation accedes to a union's demand for a position on the board of directors, it evidently is the best bargain the corporation's representatives could reach.

However, there are a series of legal impediments to union representation on corporate boards under current corporate and labor law. Questions have arisen concerning the fiduciary duties of those who serve as both directors and union representatives, employer domination and union interference and the union representative's duty of fair representation under the National Labor Relations Act, and the duty of information disclosure and antitrust and competition problems. Corporate and labor law is, however, changing to enable unions to represent employee interests on boards. The legal impediments outlined below should be eroded and the alternatives that have been suggested to facilitate representation without legal ramifications should be strengthened to allow employee ownership to expand and employees' interests to be considered in the daily operation of businesses.

a. The Fiduciary Responsibilities of Corporate Directors and Union Officials

Union representatives on corporate boards face a conflict of interest problem under current corporate and labor law. A corporate director has a fiduciary duty to the corporation's shareholders; a union official has a fiduciary duty to the union and its members. A union official on a corporate board thus has a duty to both union members and shareholders. Whenever these two groups' interests conflict, the union officer is faced with a possible breach of one of these duties.

The directors of a corporation are fiduciaries to the corporation's shareholders. The directors have a duty to serve...
the corporation's best interests and not to profit personally at the expense of the corporation. Traditionally, a board of directors could act only to make profits for stockholders. Thus, a union board representative would not be able to vote to further employee interests when they conflicted with shareholder interests. Approving the offer of the corporation with certain social obligations and have a responsibility to address the needs of employees, consumers, and the community in which they operate.

A radical shift from current law is not necessary; boards of directors are already making decisions benefiting employees. For example, directors have been allowed to exercise "in good faith, the infinite details of business, including wages which shall be paid to employees, the number of hours they shall work, the conditions under which labor shall be carried on, and the prices for which products shall be offered to the public." The courts are beginning to grant boards wider discretion in considering the needs of employees when developing corporate policy and are upholding the early stated principle that corporations have an implied power to perform acts wholly or in part to protect or aid employees. Corporations act as members of society with certain social obligations and have a responsibility to address the needs of employees, consumers, and the community in which they operate.

Furthermore, the courts can rely on the express vote of the shareholders or their representatives, the board, to indicate that effective union representation is in the shareholders' long-term interests. Approving the offer of the board seat is a further indication of compliance with shareholder interests. The legal structure has already provided for worker input into corporate affairs: collective bargaining focuses on wages, hours and conditions of employment.

However, voting to further shareholder interests when they conflict with worker interests could also violate another duty to which union officers are held by law. Section 501 of the Landrum-Griffin Act imposes a fiduciary responsibility on union officials "to refrain from dealing with [the union] as an adverse party or in behalf of an adverse party in any matter connected with his duties ..." As the Act fails to define the precise scope of an official's fiduciary obligations, the courts have turned to common law precedent and the specific language of section 501. Basically, the special problems and functions of a labor organization have been taken into account in evaluating the actions of union officials. To date, courts have rarely intervened to condemn a union official's conduct.

There are strong arguments that, in most circumstances, a union official on a corporate board would not violate section 501 of the Landrum-Griffin Act. Provided the employee representative does not act to undermine union democracy or engage in personal profiteering, an employee representative may take actions without fear of violating any fiduciary obligations to members of the union. As long as union democracy is maintained, employees have an effective vehicle for replacing the representatives and protecting their interests.

It could therefore be argued that the union board representative's principal fiduciary responsibility should be to the employees in the bargaining unit represented by the union. When employee interests are implicated, the union director's sole fiduciary duty should be to further those interests; however, when specific employee interests are not directly involved, the union director should have the usual corporate director's fiduciary duty to advance the corporation's interests, as defined by law.

An employee's welfare is closely, even if indirectly, linked to the corporation's financial health. Employees should be able to bring derivative suits on either of two causes of action: that the union director failed to attempt to advance employee interests or, if specific employee interests were not involved, that the director breached his fiduciary duty to further the corporation's welfare. To protect themselves, the shareholders should also have a right of action against union representatives on the board when an act in question is not part of a good faith effort to advance employee interests.

Corporations certainly have an impact beyond shareholders alone, yet shareholders are the sole group (other than management) with any evident representation on the board of directors. In seeking reform, requests by interested parties for outside directors and elections of public interest directors have been made and granted. Inadvertently, however, the workers, who have one of the strongest and clearest claims to representation, have been overlooked. Employees' interests should be represented to boards of directors as a serious consideration in the functioning of the company.

b. Employer Domination/Union Interference

Perhaps the most obvious potential legal barrier to union involvement in board representation lies in the National Labor Relations Act. Cooperation between management and the union could be considered interference or domination of the collective bargaining arrangement and either party could be accused of an unfair labor practice. Under the Act, employee suggestions committees, faculty governance boards, and junior boards of directors have been termed "labor organizations" and violations have been found. Activities as superficially innocuous as providing office space or supplies have constituted unfair labor practices. The creation of a codetermined board of directors in a worker owned company is at the least a potential violation of the Act.

However, there is a growing consensus that union direc-
Union representatives have a duty to treat their members in a "manner that is not arbitrary, capricious, discriminatory or in bad faith." Unions may unexpectedly violate their duty of fair representation while making decisions associated with the establishment and implementation of worker ownership. Two cases illustrate this potential problem. In Bodecker v. Local Union, No. P-46, the plaintiff claimed that the union coerced employees into accepting an ESOP by telling them it was necessary for the company's continued survival. The court held that, even if the union's statements were not true, they were not made arbitrarily or in bad faith. In Baker v. Amsted Industries, Inc., the plaintiff argued that the union had failed to pursue pension claims against the company following the employer's buy-out by an ESOP. The Court found no bad faith or egregious conduct, and ruled that the union had attempted to act in the best interest of the entire unit.

The union's official duty of fair representation, which prohibits arbitrary or discriminatory treatment of employees or groups of employees, is unlikely to be violated if the union takes precautions to ensure that all changes in negotiated benefits are collectively bargained for by the union and ratified by union members. Following the procedures specified in the union constitution and bylaws and explicitly established contracts, the goal should be to ensure that the interests of all members within the locals and locals within the international are taken into account and treated impartially in making decisions and providing assistance in employee ownership situations.

d. Access to and Disclosure of Information

Corporate directors commonly enjoy a broad right of inspection of corporate books and records. A union representative should have the same right of access to information. Expansive disclosure is necessary; knowledge of the financial condition of the corporation is crucial to achieve organizational and worker goals. Yet the duty to provide information under the NLRA to members or their representatives has been limited.

Another potential problem, which presents a slightly more complex situation, involves the confidentiality of information. If union representatives are allowed to release information obtained through their position on the board when such a release represents a good-faith effort to advance specific employee interests, this would conflict with the director's duty not to disclose information. Yet, disclosure is necessary in order to make the union representative's representation of employees' interests effective. Prohibiting disclosure of information would require the union representative to mislead other union officials intentionally whenever confidential information led them to support union positions or actions different from those that appeared best to other union officials and would inevitably conflict with the obligation to explain to employee constituents the reasons underlying various actions. Withholding such information would seem to contravene, explicitly, the command of section 501 of the Landrum-Griffin Act.

Because of the need for exchange of information in order to meaningfully include employees' interests in the operation of business, union representatives should have the same right of access to information as is common among other directors. Although the duty to provide information under the NLRA has been limited, a strong argument can be made for the necessity of the exchange of information in order to effectuate the union representative's representation of employee interests and to prevent a violation of section 501 of the Landrum-Griffin Act. Furthermore, support for this position, it is well recognized that employee shareholders are privy to information that shareholders at-large may not necessarily be entitled to receive.

e. Antitrust and Competition Problems

Union representatives on the boards of competing firms might possibly have reasons for and opportunities to engage in pricefixing, in violation of the Sherman and Clayton Acts. Essentially, no person can be a director in any two or more corporations at the same time under certain conditions. However, the Clayton Act does not prohibit many kinds of "indirect interlocks" between corporations as long as one individual is not a director of two competing corporations. While it is possible that labor unions are exempt from the prohibition against interlocking directorates, the issue has not been brought to court.

A union that appointed members to the boards of competing companies as a result of the collective bargaining process would be in a considerably weaker position than one in which union members at individual companies are elected by the worker-stockholders. A union representative elected by local members would be much more likely to have board status as an individual serving as an interested stockholder representing other interested stockholders than would a union board member appointed by an international. In that case, the representative of the international might be regarded chiefly as a legal "person" with a potential interest in collusion. Union members who serve on
corporate boards of competing firms should not be individuals who have an opportunity and reason to meet on a regular basis within the union.  

On the other hand, the NLRB does present problems when the analysis is of competition. In Bausch & Lomb, the NLRB held that an employer does not violate the Act by refusing to bargain with the certified union when the union has established a business enterprise in the same locality and industry as that of the employer and has thus become one of its direct competitors. Naturally, the ability of an employer to refuse to bargain in good faith in this situation poses a problem when an international union is involved in converting several companies within an industry into worker owned companies. However, the principles of Bausch & Lomb do not apply to situations in which the employees own stock in their employer since individual union members who own stock in their own employer are not in direct competition. Thus, unions that own a competing business are in a more vulnerable position. However, Bausch & Lomb has not been strictly followed. 

In sum, the interests of workers should be seriously considered in the development of corporate policy, even in the worker owned company. To that end, union spokespersons, representing the interests of not only their members but of the entire workforce, should not be precluded from boards of directors.

B. THE PERSUASIVE IMPACT OF PENSION FUNDS

Aside from the legal issues that surround the potential conflicts of interest when union officials sit on corporate boards of corporations, the legal issues that encompass the use of pension funds to assist employee ownership must also be explored. The innovative use of pension funds can be an important tool in facilitating and implementing employee ownership. Pension funds have acquired an important place in the national economy. In 1970 alone, pension fund purchases of common stock exceeded $4.6 billion. Presently, 870,000 private pension plans hold assets of $2 trillion, or about $8,000 for every man, woman and child in the United States. Pension funds are an extremely important benefit to individual employees and their unions.

Unfortunately, the pension assets of organized labor are often invested in enterprises that are philosophically antithetical to the goals of unions. However, unions have made only slight advancements in the realm of pension fund management. In the late 1960's, the AFL-CIO, UAW, and Ralph Nader, representing the Public Interest Research Group, called for flexibility in the law to enable trustees to invest in high social priority projects. The Amalgamated Clothing and Textile Workers Union's (ACTWU) corporate campaign against J.P. Stevens and Company, embarked upon after seventeen years of battle when the traditional tactics of gaining recognition failed, successfully utilized their influence over pension funds. The union was able to achieve victory by manipulating pension fund assets owned by other unions to force J.P. Stevens to come to the bargaining table.

In 1980, the AFL-CIO released its first study of union strategies for pension investment control. The AFL-CIO recommended using such strategies as capital investment to influence recognition by subjecting the fundholders to boycott campaigns. It also endorsed the use of share voting rights held by pension funds to pass union supported resolutions at corporate shareholder meetings. Further, it recommended that attempts be made to utilize pension assets to finance home mortgages or other loans for fund members and for the creation of jobs. Control by the union over the trustees was deemed imperative.

Some unions have been able to secure the right to influence pension investing within the collective bargaining agreement. So far, however, unions have not played a significant role in pension fund management. Their reluctance is primarily two-fold. First, unions fear the legal and economic implications of imprudent investments. A group of beneficiaries can bring a class action derivative suit against the union for breach of fiduciary duty. The result could be a liability of millions of dollars to the union simply for making a pro-labor investment. The extent to which unions can use pension funds to influence or control investment is further restricted by the legal framework established by the Employee Retirement Income Security Act of 1974 (ERISA). The federal act governing private pension funds. The legal framework is both comprehensive, in its coverage of the activities of pension plan fiduciaries, and complex, in its restrictions on the management or disposition of plan assets. ERISA is further complicated by the lack of clear judicial and legislative interpretations of the statute. Second, the unions have generally avoided involvement in the management of the economy.

Although both reasons for the unions' reluctance to become involved in pension fund management are valid, the first reason is more complex and flexible, and therefore more prone to interesting future opportunities. The development of law surrounding ERISA will either be a promising path for the future of the labor movement or a lost dream to the American population. This section will deal solely with ERISA and the case law and political statements made concerning it.

The potential power unions could acquire can easily be equated with the power now possessed by banks. When a bank purchases stock with the assets of a pension fund, it has the sole voting rights for that stock. Thus, the bank has substantial influence and, in some cases, control of the company's policy. The bank is consulted on each major decision of the company, thus allowing it to maintain a position of counselor in the economy. The bank can use pension assets to extend credit or deny credit to companies throughout the country. A bank decides which companies, which philosophies, and which social goals will be funded and able to thrive. As another condition of investment, a bank can insist that its chairman sit on the board.
of directors of the company to ensure the bank has a greater say in company policy.

It is important to understand how far a union can go in making socially beneficial investments, one of the major goals of which is to create jobs and stimulate the economy in the community where the pension funds originate. Pension funds could possibly be used as collateral for loans needed to establish worker owned companies, purchase existing companies, and consequently, create jobs for union members.

Judicial interpretations of ERISA, and the approval of investments under ERISA, have focused on three parts of the Act. First, there is a duty of loyalty that trustees must abide by: investments must be made solely in the interest of beneficiaries and exclusively for the purpose of their benefit. Second, investments must be made according to the prudent investment rule. Finally, certain transactions are prohibited.

However, decisions are not always made methodically in accordance with these three categories. Some uncertainty as to how to proceed with investments stems from the confusion in judicial decisions. In Brock v. Walton, Local 675 of the Operating Engineers International Union used its pension fund to purchase and develop ninety-five acres of land in conjunction with a Florida Real Estate Project. The fund also planned to finance the construction of several buildings on the site. Union members were to be used as the primary source of labor in land development and construction of the buildings. The fund also issued first mortgage loans on residential property. The District Court, in ruling on the question of the creation of jobs, held that ERISA U404(a)(1)(A), "for the exclusive benefit" provision, does not simply prohibit a party other than a plan’s participants and beneficiaries from benefiting in some measure from a prudent transaction. The Court of Appeals, on the other hand, focused on the prudent investment rule, and allowed the fund to issue first mortgage loans on residential property although the loans were to carry interest at a rate lower than the prevailing rates in the community. The court based its decision on the critical fact that the trustees had consulted with lawyers, accountants, actuaries and investment bankers over a six month period and therefore, did not violate the prudent investors rule. In commenting on prohibited transactions, the court distinguished this case from other cases involving self-dealing or preferential loans to plan officers where the trustees ran afoul of the rule prohibiting transactions with "parties in interests."

Certain factions of organized labor have mistakenly hailed the decision as setting a firm and favorable precedent for union pension investment. However, since the court did not decide the case under the duty of loyalty provision, the precedent set is neither as firm nor as favorable as believed, and leaves the most important question, of what "solely in the interest of the participants and beneficiaries, for the exclusive benefit of providing benefits to the participants and their beneficiaries" means, unanswered.

Under the exclusive benefit portion of this provision, questioning has centered primarily on the meaning of financial benefits to employees. The financial community has argued, and the Department of Labor has agreed, that this phrase refers only to the economic gain to be achieved from a certain investment. The term is generally used throughout the Act in reference to those cash benefits that a participant or his family would receive in accordance with the specifications of the plan. Advocates of socially responsible investing contend that the declaration of policy advanced does not refer to the objective of providing non-financial benefits to the employees through a socially responsible investment policy. Instead, the declaration and accompanying findings focus upon the need for fiduciary standards which ensure the financial "soundness" and "stability" of the plan. Thus, the union can argue that non-financial benefits are within the exclusive benefit rule; if the participants are not working because jobs have shifted elsewhere, contributions to the fund will cease. If contributions cease, the fund will not be able to meet its fundamental responsibilities.

In fact, the preamble to the Labor Department regulations points out that investment in securities issued by a small or new company, which may be riskier than those of a "blue chip" company, may be entirely proper under the Act. Furthermore, Congress has been considering the limitations of the exclusive benefit rule and is realizing the need to broaden the rule to allow consideration of broader constituency and longer term indirect benefits to the participants.

However, union officials may have difficulty proving, for example, that a policy investing only in unionized companies is intended to benefit the participants as workers rather than the union itself. Unions need to be leery of the collateral benefit to the union violating the "solely in the interest" portion of the duty of loyalty.

In Blankenship v. Boyle, the District Court held that manipulation of the United Mine Workers’ pension fund to coerce utility companies into purchasing coal supplies from UMW was a breach of fiduciary duty. While acknowledging that workers do benefit from investment practices that strengthen the union, the court found a clear case of self-dealing, in effect deciding under the prohibited transactions section of ERISA; the fact that the union had the funds in a no interest account was considered significant.

In Withers v. Teachers’ Retirement System of New York, defendant trustees invested in highly speculative city bonds in hopes of averting the bankruptcy of New York City. Plaintiffs brought a suit alleging breach of fiduciary duties. The court held that the city’s possible bankruptcy was sufficient cause for the investment decision. This collateral benefit sufficiently satisfied the primary interests of the participants. It must be noted that a possible flaw in the argument utilizing this case to support socially responsible investing is that the pension fund was a public retire-
ment plan and therefore not covered by ERISA.

As a result of these decisions, a case by case analysis has developed. In order for unions to proceed in gaining control of pension funds, they must adhere to a few guidelines. First, fiduciaries should analyze the needs and objectives of the participants and the plan and must determine whether the financial characteristics of the investment will satisfy the prudent investment requirements of the statute. Financial advisors with an interest in long term investment should be hired. A critical factor in defending an investment is the development of a rationale for the investment decision at the time it is made. While a fiduciary may be able to follow a socially sensitive investment policy by choosing to invest in worker owned companies and argue the nonfinancial benefits to employees, a socially dictated investment policy, in which financial comparability is sacrificed in order to achieve some social purpose, will probably not withstand scrutiny under the prudent investor rule. Second, assessments of investments have included a review of the fiduciary's conduct at the time the decision was made. Approval of investments has been granted when the plan's investors have been able to produce a complete analysis showing how the investments successfully further the plan's investment objectives. Empirical support is mandatory. If there is any element of self-interest in the choice of investments, whether that interest is financial or ideological, the statute may prohibit such conduct. It is essential that investment programs be designed primarily to further the interests of participants and beneficiaries. In designing a plan that permits only investments which aid the interests of the plan participants as participants and that simultaneously attempts to support worker ownership, the final result might be investment in that particular company, thus raising the common criticism of placing the investment at the mercy of a single enterprise. The collateral benefit doctrine is a seemingly uncompromising one. However, efforts should be made to circumvent it by arguing that employees do benefit by the creation of jobs, the reinvestment of funds within the communities, and the strengthening of their union. Thus, they remain the primary interest benefitting from the investment.

The possible benefits of controlling pension fund investment far outweigh the possible legal challenges. Unions should pursue the management of pension funds to promote the needs of their members. Worker ownership can be legitimately advanced as a socially responsible investment and such investment is legal within the framework of ERISA.

VII. CONCLUSION

The current problems in the economy warrant the labor movement's reassessment of strategies it uses to encounter new challenges. Although in the past unions have wrestled with a variety of strategies, none have so far been more than moderately successful. Employee ownership is a viable strategy unions can pursue as a way to gain control over capital and anchor capital within communities. Realizing the power worker ownership has to support local communities by creating, retaining and improving jobs, organized labor should include worker ownership as a tactic in the general struggle for economic reform.

In order for worker owned companies to survive as profitable businesses and worker ownership to be an effective tool in revitalizing the economy, unions will have to develop new skills to intimately assist workers in the development of worker owned businesses. Through development of worker ownership, unions are in a pivotal position to assist in economic development.

These attempts at worker ownership, although quite successful at times, need to be developed, improved and strengthened. The labor movement should take advantage of the growing private and public support for worker ownership and try to influence and develop this so it can meet organized labor's needs. Union policies regarding employee ownership need to reflect a commitment to worker ownership and guide future projects. Clearly, unions can assist workers in becoming owners and, at the same time, create new and vital roles for themselves. The necessity for substantial union involvement during negotiations and for a continued strong union presence once employee ownership is established is imperative to ensure workers' rights and benefits during and after negotiations. Most importantly, unions can expedite the democratization of corporate institutions.

Finally, the numerous legal questions raised by the involvement of unions in employee ownership should not discourage employee ownership and control in a situation which makes financial sense for both business and employees. The AFL-CIO should mount a nationwide campaign for worker control of pension funds through less stringent requirements on union investment. With proper legal precautions, these obstacles should not prevent labor organizations from forging the way to economic redevelopment and revitalization.
ENDNOTES


3. The federal government recently passed the Worker Adjustment and Retraining Notification Act (WARN), P.L. 104-379, 102 Stat. 890 (Aug. 4, 1990), requiring all employers with 100 or more employees to provide at least 60 days prior written notice of any covered plant closing or layoff. This notice must be given to unions, affected nonunion employees, state dislocated worker agencies, and local governments. See, The New Plant Closing Law, 35 The Pract. Law. 81 (January 1989). Currently, Wisconsin and Maine are the only states which have enacted plant closing pre-notification acts. See Dugent, Advantages and Limitations of Current Employee Ownership Assistance Acts to Workers Facing A Plant Closing, 36 Hastings L.J. 105 (Sept. 1984).

4. An organizational flyer of the Tri-State Conference on Steel reads "In early 1986, the Steel Valley Authority (SVA), made up of the City of Pittsburgh and eight nearby mill towns, was incorporated by the State of Pennsylvania as a legal body with the power of eminent domain." Flyer from the Tri-State Conference on Steel, (available from 300 Saline Street, Pittsburgh, PA 15207).

5. Rosen, supra note 2, at 3.


10. See infra notes 12-14.

11. I have chosen not to duplicate work which is available elsewhere in describing these basic methods of acquiring ownership and control. See infra notes 12-14 (noting articles adequately describing the technicalities of these three methods).

12. An Employee Stock Ownership Plan (ESOP) is defined in I.R.C. § 4975(e)(7) (1976 & Supp.IV 1980). It is an IRS-qualified stock bonus or stock purchase plan, pursuant to I.R.C. § 401(a) (1976 & Supp IV 1980), designed to encourage employers to give or sell stock to their employees through a trust (called an Employee Stock Ownership Trust (ESOT)). For a further explanation of ESOPs see Pitegoff, The Democratic ESOP, unpublicated manuscript available from the Industrial Cooperative Association (ICA) 58 Day Street, Suite 203, Somerville, MA 02144-2896 [1987] [hereinafter Democratic ESOP]; Ronan, Tax Incentives Encouraging Use of ESOPs as Corporate Finance and Anti-Takeover Devices, 58 Temp.L.Q. 115 (1985). The following are examples of ESOPs unions have been involved in:

- The United Food and Commercial Workers Union (UFCW) Local 46 saved Rath Packing Company in Waterloo, Iowa from bankruptcy by taking wage cuts in exchange for 60 percent of stock. Although considered a turning point in worker ownership, the union for the first time instituted the transaction and establishing a democratic ESOP, Rath Packing existed in a no-win market. C. Gunn, Workers' Self-Management in the U.S. (1980); Redmon, Mueller & Daniels, A Lost Dream: Worker Control at Rath Packing, 6 Lab.Res.Rev. 5 (Spring 1985) [hereinafter Redmon]; Rosen, supra note 2, at 10; see infra notes 40-82 and accompanying text.

- The Almagamated Clothing and Textile Workers Union (ACTWU) was able to transform the closed Levi Strauss Company into Colt Enterprises, a 100 percent employee owned company in Tyler, Texas in 1987, Gullet & Young, A Colt is Born: The Reopening of a Clothing Plant, 88 Employee Ownership Report 5 (Jan/Feb 1988).

- The United Automobile Workers (UAW) for Region 9A played a key role in establishing one of the largest employee owned democratic industrial companies in the country, Seymour Specialty Wire in Naugatuck Valley, Connecticut. Goldston, Naugatuck Valley Project, Working Paper #1, Worker Ownership, Midwest Center for Labor Research, 1985.

- The UAW Local 736 was also responsible for converting Hyatt Roller Bearing Plant in Clark, New Jersey to a worker-owned enterprise, Hyatt-Clark, when General Motors announced it was closing the plant. The ESOP was not fully democratic and the attempt by the union to negotiate such was the cause of continuing labor conflict at Hyatt-Clark. General Motor's cancellation of its contract with Hyatt-Clark in 1987 caused the plant to close later that year. The Hyatt-Clark ESOP: An Interview with Jim May, 6 Lab.Res.Rev. 27 (Spring 1985); Rosen, supra note 2, at 12; A Noble Experiment Goes Bankrupt, NY Times, May 3, 1987, sec. 3.

The United Steelworkers of America (USWA) is the only industrial union with an active program of support for employee ownership initiatives. As a result, USWA has been involved in several employee ownership projects:

- Republic Storage Company. In 1986, the 600 employees of Republic Storage Company in Canton, Ohio purchased their company from its former owner, LTV Corporation through an ESOP. A new seven member board of directors consists of two representatives of USWA, two from management and three outsiders. The company is the nation's largest manufacturer of lockers.

- Republic Container Company: The 60 employees of the plant in Nitro, West Virginia purchased their steel barrel manufacturing plant from LTV, establishing a democratic ESOP. The employees elect a six member board which is required to include one union member, one management representative and a representative of the lenders. The plant has been profitable for all twenty-eight years of its operation.

- Northern Copper Company: After being closed for three years and with significant help from the state of Michigan, the mine reopened as a 70 percent ESOP-owned company. Rosen, supra note 2, at 21-22, 35; Ball, United Steelworkers... Initiatives, The Entrepreneurial Economy, Nov. 1987, at 11-14. See infra note 96 and accompanying text.

- Independent Steel Union fostered the purchase of Weirton Steel from National Steel through the establishment of a nondemocratic ESOP and the creation of shop floor participation. Since the buy-out, Weirton has done very well. In fact, it has been the most profitable integrated steelmaker in the U.S., clearly showing that an employee owned company can prosper in this industry. Lynd, Why We Opposed the Buy-out at Weirton Steel, 6 Lab.Res.Rev. 41 (1985); Anderson, An Employee Stock Ownership Plan: The History of the Weirton Steel Buy-Out, 26 Duq.L.Rev. 657 (Spring 1988); Rosen, supra note 2, at 20.

13. A cooperative is a company that is wholly owned by the people who work in it. For a further explanation worker cooperatives see Elman & Pitegoff, The Democratic Corporation, XI N.Y.U. Rev. L. & Soc. Change 441 (1982-3). The following are examples of Worker Cooperatives unions have been involved in:

- UFCW was able to persuade A&P to grant the workers a right to first refusal on the Philadelphia division stores and endorse a capital loan fund for these buy-outs. As a result, five Owned & Operated (O&O) Supermarkets have been opened. Kreiner, Worker Ownership as the Basis for an Integrated, Proactive Development Model, XV N.Y.U. Rev. L. & Soc. Change 227 (1986-87); Eggerton, Workers Take Over the Store, The NY Times Magazine, Sept. 11, 1983.

- Bricklayers and Allied Crafts Union Local #1 of Birmingham, Alabama with the financial and technical assistance of their International Union brought forth a new cooperative corporation, Jefferson Masonry, Inc. The union has decided to discontinue the Birmingham project at least for the time being. MacKin, Jefferson Masonry, Inc., The Entrepreneurial Economy, Nov. 1987 at, 13-14; letter received from C. MacKin, Nov. 12, 1989.
Independent Drivers Association initiated the worker takeover of an ongoing and profitable firm. In 1979, Denver Yellow Cab Cooperative Association was opened as a worker cooperative and is currently the fourth largest taxi company. C. Gunn, supra note 12, at 152-161; 166-176.


15. The International Association of Machinists District 100 was able to rescue Eastern Airlines from bankruptcy. In exchange for 18 percent wage cuts, employees received 12.5 million common shares — about 25 percent of outstanding stock — and 3 million dividend paying preferred shares set at the value of the concessions. District 100 won the right to veto, on a one-time basis only, both Eastern's 1984 business plan and the financial restructuring program made possible by the union's wage concessions. On a continuing basis, the union also won the following management rights:

- the right to review the company's business plans, major capital expenditures and expansions and "to participate in the company's decision-making process" in these areas;
- the right to appeal any company plan or decision directly to the board of directors;
- unlimited access to all company financial information;
- a right to participate in the design of new facilities and in the redesign of existing facilities;
- four seats on the board of directors; and,
- a requirement that the company disclose a full list of all the consultants it hires. Id. at 84; see Rosen, supra note 2, at 25.

16. The UAW was able to secure a seat on Chrysler's board of directors, to be occupied by Douglas Fraser, UAW president in exchange for $203 million worth of concessions. See infra notes 125,126,134,147 and 162 and accompanying text.


18. The transference of economic ownership to workers ... is by itself irrelevant, and is at best a means to an end. That end is not ownership, but control: the extension of democracy to the production process and the elimination of artificial inequality," Kaufman, supra note 7, at 825 citing J. Rifkin & R. Barber, The North Will Rise Again: Pensions, Politics & Power in the 1980's 83 (1978).


20. Id. at 190 (The molders had spent a million and a half dollars on strikes with no permanent gain during the years 1859-1865).

21. However, William Sylvis was not at the forefront of the cooperative movement. Cooperatives had existed for several years prior to his advocacy: the Philadelphia House Carpenters of 1791; the cordwainers of 1806; and, the Rochdale Society's cooperative system, started in 1844.

22. Id. at 193-199.


25. Id. at 37.


27. Id. at 118.


29. [the elimination of the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection].

30. NLRA §8(a)(5); 29 U.S.C. §158(a)(5) (making it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) and §8(b)(3); 29 U.S.C. §158(b)(3) (making it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a)").

31. 452 U.S. 666, 669 (1981) (holding that an employer does not have a duty to bargain in good faith after its decision to close a part of its business).

32. R. Stern & R. O'Brien, National Unions and Employee Ownership (May 1977) (unpublished manuscript available from Cornell University) (summarizing the content of letters received from research directors and officers of forty-nine national unions in response to an inquiry on their policies toward worker ownership of firms).

33. Id. at 6; see Slott, supra note 8, at 93 ("[u]nion ownership diversify workers' activity into projects which will either fail economically or be coopted by the system, they don't strengthen labor. Worse, they can be an additional source of disunity for working class already hampered by sexual, racial and occupational divisions.").


35. See Ronan, supra note 12.


38. See supra notes 12-14 for examples.


40. Olson, Union Experiences with Worker Ownership, 5 Wis.L.Rev. 731, 759 (1982).

41. W. Whyte, supra note 1, at 96.

42. Redmon, supra note 12, at 5.

43. C. Gunn, supra note 12, at 82.

44. Id. at 81.

45. Id. at 87 (stating that the deferred 1975 payments were not met in 1978. The union agreed to postpone one more year. Payments on the 1978 and 1979 pension obligations, however, were never made either).

46. Redmon, supra note 12, at 5-6.

47. C. Gunn, supra note 12, at 88.

48. See id. at 89 (for the specifics of the consultant's recommendations).

49. Id. at 89-90.

50. Rosen, Kline, & Young, How Employee Ownership Plans Work in Employee Ownership in America: The Equity Solution (1986) [hereinafter EO in America].
51. Redmon, supra note 12, at 10.
52. C. Gunn, supra note 12, at 94; W. Whyte, supra note 1, at 97.
53. W. Whyte, supra note 1, at 98-99 (Since there was no candidate at the time, existing management continued until the election of Herbert Einstein in 1980).
54. Id. at 100.
55. C. Gunn, supra note 12, at 94. Although the specifics of the Local's Agreement and its incorporation of the Master Agreement are interesting, the import is the protection of industry-wide standards. A common criticism of employee buy-outs is that they have occurred as part of a concession deal. Concession bargaining undermines union standards and hurts other workers in the rest of the labor movement. See Slott, supra note 8, at 87.
56. Basically this trust would have avoided many of the ESOP regulations and would have held in trust employees' stock given in exchange for their wage deductions. See Olson, supra note 40, at 756, n.137 (detailing the specifics of the proposed trust plan).
57. ERISA §406(3); 29 U.S.C. §1106(e) (prohibits transactions between plan and party in interest if . . . acquisition on behalf of the plan, or any employer security or real property is in violation of §1107(a) of this section.). ERISA §407(a)(2); 29 U.S.C. §1107(a)(2) (A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair market value of the plan exceeds 10 percent of the fair market value of the assets of the plan.)
58. Olson, supra note 40, at 755-756.
60. ESOP structure is established in accordance with legislative restrictions in a written agreement negotiated between the selling management, union or nonunion representatives and financiers. See ERISA §§407-08; 29 U.S.C. §§1107-08 (1987). Furthermore, ESOPs are exempted from ERISA §§406; 29 U.S.C. §§1106 prohibited transactions. ERISA §408(b); 29 U.S.C. §1108(a).
61. Redmon, supra note 12, at 6.
62. The written plan validating the ESOP must provide for the establishment of an Employee Stock Ownership Trust (ESOT). The ESOT is formed to hold all the assets of the ESOP.
63. Redmon, supra note 12, at 8.
64. The ESOP plan details which employees participate in the ESOP, thus which employees can vote. ERISA §102(b); 29 U.S.C. §102(b). Olson, supra note 40, at 757 (Rath's ESOP agreement specified that all bargaining unit employees are to participate in the ESOP and nonbargaining unit employees may participate).
65. See Democratic ESOP, supra note 12.
66. Since shares of stock can be issued in accordance with levels of wages, managerial employees tend to have a greater number of shares. Thus, it is important to have a one vote per person basis rather than a one vote per share basis.
68. Id. at 758.
69. See Kaufman, supra note 7, at 829 (ERISA and IRC Regulations required that every employee benefits plan be established and maintained through a written instrument which provides 'for one or more named fiduciaries who . . . shall have authority to control and maintain the operation and administration of the plan.')
70. EO in America, supra note 50, at 105-106.
71. Id. at 104.
72. Olson, supra note 40, at 104.
73. EO in America, supra note 50, at 104.
74. Id. at 104.
75. Olson, supra note 40, at 760. But see Redmon, supra note 2, at 6 ("Late in 1982 Rath found itself $38 million behind in its payments to its employees' pension funds, and Rath management took extreme action: the pension plans were terminated, affecting over 6,000 people.")
76. Redmon, supra note 12, at 1132 (In 1979, deferrals amounted to $4,000 per person. These deferrals were continued from 1979 to 1983.)
77. Redmon, supra note 12, at 20.
78. Id. at 6.
79. Redmon, supra note 12, at 7, 14.
80. Id. at 13.
81. Id. at 17.
82. Rosen, supra note 2, at 11.
83. Id. at 60-61.
84. P. Pitegoff, supra note 34, at 12.
85. Swinney, supra note 8, at 104.
86. Id. at 104.
88. See Swinney, supra note 8, at 104 ("Worker ownership is not a good tactic when proposed by a company as an effort to get the workers to finance the closing of a plant which has been milked dry and would have no visible future under any owner; proposed by a company as an effort to liquidate or neutralize the union; the company is not capable of surviving in the marketplace, and, the workers are not capable of running the plant.")
90. ERISA §404(A); 29 U.S.C. §1104(A).
91. Rosen, supra note 2, at 42 (stating that according to a 1985 ESOP Association survey of its membership (236 companies responded), only 7 percent had converted a pension plan into an ESOP and 34 percent had a pension plan in addition to their ESOP).
92. P. Pitegoff, supra note 34, at 3 (noting several consequential uses that have arisen, which may incidentally hurt employees. Revelant among those noted are replacing pension plans or other employee benefit programs, so as to retain cash that otherwise would be permanently invested in the other programs and recouping cash in an existing benefit plan by converting it to an ESOP which uses its assets to buy stock from the company.)
93. Guidelines Help Unions Assess ESOPs, supra note 89; see Ball, supra note 12, at 11 (The United Steelworkers of America, one of the few unions with an active program of support for employee-ownership initiatives, strongly states in its resolution on ESOPs that: ESOPs must never be used as a substitute for an adequate, properly funded pension plan guaranteed by the Federal Benefit Guarantee Corporation (PBGC). The basic retirement incomes of our members must not depend on the solvency of any single business enterprise in a free market economy. (Emphasis added.).)
94. P. Pitegoff, supra note 34, at 6.
95. Hoer, ESOPs: Revolution or Ripoff?, Bus. Week, April 15, 1985 at 95.
99. Democratic ESOP, supra note 12, at 6-8 (discussing the two democratic voting structures that can be devised within an ESOP).
100. Kaufman, supra note 7, at 841-842.
101. Id. at 842.
104. Philadelphia Assoc. Cooperative Enterprises, Union Role In Employee Ownership (memo on file with author) (hereinafter PACE).
105. See infra text accompanying notes 110-116 (discussing unions' role as an institutionalized legitimate opposition).
106. See P. Pitegoff, supra note 34, at 9 (indicating that many worker owned companies supplement the ownership structure with other mechanisms for employee participation and influence in order to establish a more democratic company).
107. Kaufman, supra note 7, at 842 (citing J. Simmons & W.
110. Kaufman, supra note 7, at 942; Ellerman, The Legitimate Opposition at Work: The Union's Role in Large Democratic Firms, ICA (April 1986).
112. PACE, supra note 104 citing Sklar, An Experiment in Worker Ownership, Dissent 61-69 (Winter 1982) quoting Chuck Mueller, from UFCW Local 46 at Rain Paking Company.

My picture of the union in all of this is to watch out for the individual. Because there's always one guy that's got a grievance that everybody else couldn't care less about. So he's gotta have some protection; and the union is the only thing I see will do it... a personnel director could do it, but I haven't seen many [if any] men who will. They won't buck the corporation for one guy.

113. PACE, supra note 104.

114. See Smith, The Labor Movement and Worker Ownership, 2 Social Report (Boston College) (Smith, as assistant to the President of the United Steelworkers of America) sets forth six fairly conventional functions for unions in worker owned enterprises, the following two are the most relevant to this paper: 3) negotiating and enforcing equitable arrangements for promotion, demotion, layoff, recall, and termination of unfair discipline, the structure of wage relationships, and other working conditions problems and 5) establishing and enforcing safe and healthful working conditions, and informing workers on workplace hazards.

115. C. Gunn, supra note 12, at 158-160.


117. C. Gunn, supra note 12, at 74 (Positing eleven fundamentals that are essential to worker ownership. I have chosen the following fundamentals which must be recognized and committed to in order for unions to elevate their role in promoting worker ownership as a method of economic reform which serves the interests of workers:

1. Control and management of the enterprise is the right of all people who work at it, and this right is based on their work role, not on any stipulation of capital ownership. Management is based on direct and/or representative democracy and equality of voting power among all who work in the enterprise.
2. Income earned by the enterprise, after payment of all costs and taxes, belongs to those who work for it.
3. A participatory-democratic consciousness within the enterprise is essential, and educational emphasis on the philosophy and practice of workers' self-management should reinforce this set of attitudes and values.
4. All information must be available to all enterprise members, and managerial expertise must be shared and disseminated as fully as possible.
5. The enterprise must assure individual rights corresponding to basic political liberties to members within the firm.
6. An internal but independent judiciary must be capable of action to settle disputes over infractions of rules, enforce basic rights, and protect the by-laws of the enterprise).

118. Ellerman, supra note 110, at 7.

119. Id. at 15.

120. But see Klar, Judicial Neutralization of the Wagner Act and the Origins of Modern Legal Consciousness, 62 Minn.L.Rev. 265 (1975) (discussing the rejection of the collective bargaining model altogether as a barrier which keeps the workforce from marshalling its full strength to establish worker-controlled industries).

121. See supra notes 110-120 and accompanying text (arguing the necessity of a formalized and legitimized opposition in worker owned companies; the unions' traditional role naturally able to fulfill this requirement).

122. See supra text accompanying notes 28-31; United Technologies v. NLRC, 115 LL.R. (BNA) 1281, 1283 (further limiting mandatory subjects of bargaining).


124. Id. at 925.

125. UAW president Douglas Fraser made it very clear prior to his election to the Chrysler board that he would represent worker interests. See Hayes, Fraser Board Roles Riles Critics, Raises Questions, N.Y. Times, Nov. 26, 1979, at DI, col. 1.

126. New York Times, Oct. 26, 1979, at 81, col. 4 (in return for the board seat, the UAW agreed to $203 million worth of concessions to Chrysler in the collective bargaining agreement that it had negotiated with the three major domestic automakers.) In further support, six airlines have worker representatives on their boards as a result of the collective bargaining process. See e.g. Olson, supra note 40, at 778 (discussing Pan Am); IAM Debate, supra note 14 (discussing Eastern Airlines).

127. The basis of the following discussion on fiduciary duty is attributed to Economic and Legal, supra note 122.

128. Litvin v. Allen, 25 N.Y.S.2d 667, 674-78 (Sup. Ct. 1940) ("It is clear that a director owes loyalty and allegiance to the company—a loyalty that is undivided and an allegiance that is influenced... by no consideration other than the welfare of the corporation.")

129. The Supreme Court of Michigan accented this view in Dodge v. Ford Motor Company, 204 Mich. 459, 507 (1919) (stating that "it is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefits others...") See Hamer, Serving Two Masters: Union Representation on Corporate Board of Directors, 81 Col.L.Rev. 693 (1981).

130. See Hamer, supra note 129.


132. 6 Fletcher Cyclopedia of Corporations 276 (1950 rev.) citing People ex rel Metro. Life Ins. Co. v. Hutchkiss, 120 N.Y.S. 649 (App. Div. 1909) (upholding the decision to erect a hospital for its consumptive employees). See also Steinway v. Steinway & Sons, 40 N.Y.S. 715 (Sup. Ct. 1896) (allowing the corporation, following plant relocation, to construct new phones and contribute to church, school and free baths for their employees).

133. Hamer, supra note 129. See A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 590 (1953) (sustaining the validity of the donation by the corporation to a university, stating explicitly that 'individual shareholders whose private interests rest entirely upon the well-being of the plaintiff corporation, ought not be permitted to close their eyes to present day realities and thwart the long-visualized corporate action in recognizing and voluntarily discharging its high obligations as a constituent of our modern social structure'); Herald Co. v. Seawall, 472 F.2d 1081 (10th Cir. 1972) (sustaining the establishment of an employee stock ownership plan, finding the motivation of benefiting the public, the corporation and the employees as valid).

134. In 1979 Chrysler asked the President of the UAW, Douglas Fraser to sit on the Board. Moreover, Chrysler reserved the right to choose the Directors that would represent the union and employees.

135. Labor Management Report and Disclosure (Landrum-Griffin) Act Section 501(a), 29 U.S.C. section 501(a) (1976). The pertinent text of this provision is as follows:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization... to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization...


138. Economic and Legal, supra note 123.


140. One of the objectives of the NLRA was to combat the company union. According to Senator Wagner, who authored the Act, "The greatest obstacles to collective bargaining are employer dominated unions... [T]he very first step toward genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with the grievances, labor disputes, wages, rules, or hours of employment." 78 Cong. Record, p. 3442 (1932).

141. NLRA § 8(b)(2) (making it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it") and § 8(b)(1)(B) (making it an unfair labor practice for a union to interfere with the employer's right to select its representative for collective bargaining..."
or adjustment of grievances).


143. Id. at 190.

144. NLRB §8(a)(2). See e.g. Moberly, supra note 37, at 766 (stating that the NLRB did not find Fraser's position on the Chrysler Board an unlawful conflict of interest or employer domination).

145. The line of cases finding employer domination have arisen primarily at health care institutions connected to, or serving, a substantial number of patients under health and welfare plans. Olson, supra note 40, at 791, n.335 (St. Louis Labor Health Institute, 230 N.L.R.B. 180 (1977); Anchorage Community Hospital, Inc., 225 N.L.R.B. 575 (1976); Medical Foundation of New York, Inc., 185 N.L.R.B. 62 (1971); United Mine workers of America Welfare and Retirement Fund, 192 N.L.R.B. 1022 (1977); Centerville Clinics, Inc., 181 N.L.R.B. 155 (1970).


147. Douglas Fraser, UAW president and Chrysler director, indicated shortly before his election to the Chrysler board that "he would stay out of all board actions dealing directly with collective bargaining strategy but would take full part in discussion and votes on everything else, including basic policies on collective bargaining ..." Raskin, The Labor Leader as Company Director, New York Times, April 27, 1980, at F15, col. 1; Moberly, supra note 37, at 766 (indicating that Fraser, in order to resolve potential conflict questions also referred from discussion of a 1982 UAW strike against Chrysler that began in Canada).

148. Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (a case arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted arising under the Railway Labor Act). It was not until 1962 that the NLRB held that the union's duty rooted...
sion trustees not invest in up to five companies that conduct business with South Africa).

181. Siegal, supra note 172, at 689-90.
183. Siegal, supra note 172, at 696.
184. Significantly, no more than 10 percent of the assets of a defined-benefit pension fund may be invested in employer securities or real property. ERISA § 407(a)(2), 29 U.S.C. § 1107(a)(2) (1982). This is an absolute cap. Investments of 10 percent of the pensions funds are being approved. See Hyde & Livingston, supra note 6, at n.110 (At Dimco-Gray Company in Dayton, Ohio, the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers (IUE) invested 10 percent of its pension fund’s assets in the common stock of the company as part of a leveraged buy-out of that company).
185. ERISA §§404 and 404(A):
A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and — (A) for the exclusive benefit of:
(i) providing benefits to participants and their beneficiaries; and
(ii) defraying reasonable expenses of administering the plan; . . .
186. ERISA §404(B):
(b) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in alike capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .
187. ERISA §406(b):
(b) A fiduciary with respect to a plan shall not — (I) deal with the assets of the plan in his own interest or for his own account . . .
188. 609 F.Supp. 1221 (S.D.Fla. 1985), affd on other grounds, 794 F.2d 586 (11th Cir. 1986), stay denied, 802 F.2d 1399 (11th Cir. 1986).
190. 794 F.2d at 588.
191. 794 F.2d at 588 (referring to ERISA §406(b) prohibited transaction provision).
193. ERISA § 404(a).
194. Wessel, supra note 178, at 348.
195. ERISA §404(a)(1)(B).
196. Siegal, supra note 172, at 690.
197. E.g., ERISA §§ 2(a), 3(22), 3(34) and 3(35).
198. ERISA §2.
199. Social/Political Purpose, supra note 176, at 61-63.
202. Social/Political Purposes, supra note 176, at 66.
204. 329 F.Supp. at 1112.
206. Social/Political Purposes, supra note 176, at 85-87.
207. Id. at 88.