

1985 — 1986 ANNUAL SURVEY OF LABOR RELATIONS AND EMPLOYMENT DISCRIMINATION LAW

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INTERNATIONAL ECONOMICS AND AMERICAN EMPLOYMENT RELATIONS†

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INTRODUCTION

The United States Supreme Court's 1985-86 term was a pathbreaking one in terms of employment relations decisions. The Court issued highly significant decisions in cases involving affirmative action,¹ sexual harassment,² religious accommodation,³ and the ability of state and local governments to regulate labor relations.⁴ Of all the noteworthy labor cases decided by the Supreme Court in its most recent term, however, the most significant may well be *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America v. Brock* (*UAW v. Brock*),⁵ in which the Court addressed international trade and competition issues.

In *UAW v. Brock*, decided June 25, 1986, the UAW challenged the Secretary of Labor's interpretation of eligibility requirements for participation in the Labor Department's trade adjustment assistance program established pursuant to the Trade Act of 1974 (the Act).⁶ Under this program, workers whose employment is adversely affected⁷ by competition from foreign imports are entitled to a wide range of benefits.⁸ In a five to four decision, the United States Supreme Court held that the UAW had standing to challenge the Secretary of Labor's interpretation of the eligibility provisions of the Act.⁹

Most importantly, *UAW v. Brock* addressed directly the problem of foreign competition, an issue of foremost significance to the future of American employment relations. The United States is no longer an insular economy, but rather an economy which must adjust to foreign products entering its markets and, indeed, to foreign companies doing business on its shores.¹⁰ The impact of foreign competition upon American employment relations has, and will continue to be, enormous.

A second interesting and important facet of *UAW v. Brock* is that it united a wide range of groups frequently at odds with each other in support of the UAW's position

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¹ See *Local 28 of the Sheet Metal Workers' Int'l Ass'n v. E.E.O.C.*, 106 S. Ct. 3019 (1986); *Local Number 93, Int'l Ass'n of Firefighters v. Cleveland*, 106 S. Ct. 3063 (1986); *Wygant v. Jackson Bd. of Educ.*, 106 S. Ct. 1842 (1986).

² See *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986).

³ See *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986).

⁴ See *Golden State Transit Corp. v. City of Los Angeles*, 106 S. Ct. 1395 (1986).

⁵ 106 S. Ct. 2523 (1986).

⁶ See 19 U.S.C. § 2101 (1982).

⁷ See *id.* § 2272 (setting forth the determining standards).

⁸ These benefits can include, in addition to unemployment compensation, money for job training, job search, and job relocation. See DEP'T OF LABOR, FACT SHEET NO. 86-12, TRADE ADJUSTMENT ASSISTANCE FOR WORKERS (1986).

⁹ *UAW v. Brock*, 106 S. Ct. at 2533.

¹⁰ See generally M. WEIDENBAUM, BUSINESS, GOVERNMENT AND THE PUBLIC 277-311 (1986).

that it had legal standing to challenge the Secretary of Labor's Trade Act interpretation. Indeed, the Chamber of Commerce of the United States, AFL-CIO, the NAACP, National Association of Manufacturers, Alliance for Justice, and Chemical Manufacturers Association all joined to file an amicus brief in support of the UAW's position.¹¹ The importance of this consensus is clear. Cooperation among labor, management, and other groups is vital in effectively addressing the challenges which foreign competition poses to American industry and labor. It is promising to see groups of ostensibly varied interests, historically adversarial to each other, coalesce on the issue of standing.

The Court's decision in *UAW v. Brock* and other labor relations developments during the 1985-86 term are important because they focus upon issues relating to international trade and competition. These developments signal that the courts are paying greater attention toward the impact of international business arrangements upon American employment relations. Additionally, these developments appear to indicate an increased cooperative spirit between labor and management, a cooperation vital in addressing the challenges foreign trade poses to American labor.

This survey addresses some of the broad issues involving the impact of foreign competition on American employment relations, with special emphasis on developments during the 1985-86 Survey year. Part I presents a brief description of some of the economic forces at work in the modern international economy. Part II discusses the promise of, and challenges to, the pathbreaking General Motors-United Autoworkers Saturn Labor Agreement which represents a positive labor-management alliance prompted, in part, by increased foreign automaker competition. The article then presents in section III a brief survey of the Court's interpretations of section 8(a)(2) of the National Labor Relations Act, which prohibits undue management-union cooperation. Next, part IV discusses the recommendations and conclusions of the Schlossberg Report regarding the necessity of increased cooperation between labor and management. Finally, the article discusses recent decisions applying United States civil rights laws to foreign companies operating in America, a subject of considerable scholarly and judicial debate.

I. SOME ELEMENTARY ECONOMICS

Today we live in a "world economy." Increased technology has lowered what economists call "transaction costs,"¹² or the costs of completing transactions, to the point where business interactions are feasible between the United States and virtually all parts of the world. Individuals can pick up the telephone and call Japan or France without operator assistance. Goods can easily be shipped between nations. For approximately \$800 apiece, Japanese automakers can ship cars to the United States.¹³

Coincidental with these declining transaction costs, increasing numbers of countries have developed and are currently developing the productive capacity to manufacture goods for which there is a demand in the United States. Often foreign producers can staff their facilities with workers whose compensation is but a fraction of the comparative

¹¹ See Amicus Brief of Chamber of Commerce et al., *UAW v. Brock*, 106 S. Ct. 2523 (1986).

¹² Professor Ronald Coase wrote the classic article in this area in 1960. See Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

¹³ See Reynolds, *Unions and Jobs: The U.S. Auto Industry*, 7 J. LAB. RES. 103, 116 (1986). This figure, of course, is somewhat higher for cars going to the East Coast and lower for cars going to the West Coast, which may help to explain why more Japanese imports are sold on the West Coast. *Id.*

cost of the payroll of competing American producers. For example, newly industrialized countries such as Korea and Taiwan recently have become major highly cost-efficient producers of steel.¹⁴ Indeed, Korea has perhaps the most modern steel producing facilities in the world and pays its production workers only about \$2.00 per hour.¹⁵

These factors have put enormous competitive pressures on a number of U.S. industries. For years, various U.S. industries, such as automobiles and steel, faced relatively little foreign competition.¹⁶ At the same time, U.S. production was concentrated in a handful of companies.¹⁷ As a result, these industries functioned on almost a cartel-like basis, with companies reaping significant profits and workers earning arguably above-market salaries.¹⁸

In some industries, such cartel-like behavior may be able to continue. For example, in the cigarette industry, an industry also marked by heavy concentration,¹⁹ foreign produced products have not been able, it seems, to meet American tastes. Consequently, these foreign imports have not become meaningful economic "substitutes" for American-produced goods.²⁰ In the end, these firms are able to earn solid profits, and cigarette industry production workers are able to earn average annual salaries of approximately \$41,000, salaries which one economist has estimated to be almost \$20,000 a year higher than the "market" rate of pay for production workers with comparable skill mixes.²¹ Other industries, such as those of automobiles, rubber, textiles, and steel, have not been so fortunate. In particular, foreign imports in these industries have often been extremely acceptable to American tastes (and finances).

In response to this new highly competitive environment, the leading American automakers, for one, have taken several measures. General Motors and the other auto companies, together with the UAW, have sought protectionist legislation seeking to limit the number of Japanese automobile imports, which by 1981 represented nearly 22 percent of all U.S. auto sales.²² The pressure for such legislation led the Japanese in 1981 to impose a "voluntary" limit on automobile exports to the United States.²³ The UAW and auto part suppliers also have been advocating "domestic content legislation" which would require automakers selling large numbers of cars in the United States to

¹⁴ See Shilling, *Steel Industry Must Scrap Cartel Mentality*, Wall St. J., July 29, 1986, at 24, col.3.

¹⁵ *Id.*

¹⁶ See generally R. CRANDALL, *THE U.S. STEEL INDUSTRY IN RECURRENT CRISIS: POLICY OPTIONS IN A COMPETITIVE WORLD* (1981); FEDERAL TRADE COMM'N, *REPORT ON THE U.S. STEEL INDUSTRIES AND ITS INTERNATIONAL RIVALS: TRENDS AND FACTORS DETERMINING INTERNATIONAL COMPETITIVENESS* (1977); *THE AMERICAN AND JAPANESE AUTO INDUSTRIES IN TRANSITION* (R. Cole & T. Yakushiji ed. 1984); B. YATES, *THE DECLINE AND FALL OF THE AMERICAN AUTOMOBILE INDUSTRY* (1985).

¹⁷ See generally A. COCKERILL, *THE STEEL INDUSTRY* 56-60 (1974); W. HOGAN, *STEEL IN THE UNITED STATES: RESTRUCTURING TO COMPETE* (1984); H. KATZ, *THE DECLINE OF COMPETITION IN THE AUTOMOBILE INDUSTRY: 1920-1940* (1970); L. WHITE, *THE AUTOMOBILE INDUSTRY SINCE 1945* (1971).

¹⁸ See Reynolds, *supra* note 13 at 112-17; Shilling, *supra* note 14, at 24, col. 3.

¹⁹ See Overton, *Diversification and International Expansion: The Future of the American Tobacco Manufacturing Industry* in W. FINGER, *THE TOBACCO INDUSTRY IN TRANSITION* 15, 161 (chart) (1981). See generally P. JOHNSON, *THE ECONOMICS OF THE TOBACCO INDUSTRY* (1984); R. MILES, *COFFIN NAILS AND CORPORATE STRATEGIES* (1982).

²⁰ See generally A. ALCHIAN & W. ALLEN, *EXCHANGE & PRODUCTION: COMPETITION, COORDINATION & CONTROL* 173-78 (1983).

²¹ See Shilling, *supra* note 14, at 24, col. 3.

²² See M. WEIDENBAUM, *supra* note 10, at 279.

²³ *Id.*

have up to ninety percent domestic parts and labor in their cars.²⁴ In response to these and other protectionist pressures, various Japanese auto companies have begun U.S. operations. Nissan, for example, has opened a major plant in Smyrna, Tennessee, and Toyota has entered into a joint venture with General Motors to manufacture cars in Fremont, California.²⁵

General Motors also has responded to this newly competitive environment by building seventeen new factories in Mexican towns just across the U.S. border.²⁶ It is there, in locations easily accessible to U.S. markets, that much of General Motors' labor intensive operations, such as cutting and sewing car seats, take place.²⁷ General Motors pays workers in the Mexican plants approximately \$22 a week, and they maintain, by Mexican standards, a middle-class existence.²⁸

All these developments have had dramatic impacts, of course, on the American public and on General Motors' relationship with its employees. The auto industry's "voluntary" import quotas obviously have hurt consumers to the extent that such protectionism has limited the supply of foreign cars and boosted prices.²⁹ Indeed, estimates reveal that higher prices for goods caused by all U.S. restrictions on imports, tariffs, and other protectionist measures represent a hidden annual tax on American consumers of over \$58 billion, or over \$255 per year per American consumer.³⁰

On the other hand, the "voluntary" auto import quotas also have had the salutary effect of protecting, albeit at a cost,³¹ the jobs of numerous General Motors and other autoworkers. Nevertheless, large numbers of autoworkers have still lost their jobs or taken pay cuts.³² Moreover, with American autoworkers continuing to earn an average salary of \$36,418 per year, or about \$16.50 per hour,³³ it is understandable why General Motors has set up various operations in Mexico, and why the Japanese, who pay their autoworkers about \$10.00 per hour,³⁴ have been able to successfully penetrate the United States market.

One particularly beneficial aspect of increased foreign competition, however, is that it has prompted the forging of new cooperative relationships between American labor and management.³⁵ This is especially true in the auto industry, where the recent GM-UAW Saturn labor agreement is a pathbreaking paradigm.

II. THE GENERAL MOTORS-UNITED AUTOWORKERS SATURN LABOR AGREEMENT

In July of 1985, General Motors and the United Autoworkers Union entered into a landmark labor agreement involving General Motors' new soon-to-be-opened Spring

²⁴ See H.R. 1234, 98th Cong., 1st Sess. § 4, 129 CONG. REC. H290 (Feb. 2, 1983).

²⁵ See Reynolds, *supra* note 13, at 119-21.

²⁶ See O'Reilly, *Business Makes A Run For The Border*, FORTUNE, Aug. 18, 1986, at 72.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See generally A. ALCHIAN & W. ALLEN, *supra* note 20, at 156.

³⁰ See M. WEIDENBAUM, *supra* note 10, at 285.

³¹ One observer has estimated that the restraints cost American consumers \$160,000 per autoworker's job saved. See Reynolds, *supra* note 13, at 117.

³² See generally M. WEIDENBAUM, *supra* note 10, at 341 (outlining the massive layoffs at Chrysler).

³³ See Shilling, *supra* note 14, at 24, col. 3.

³⁴ See *id.*

³⁵ See generally *supra* note 11 and accompanying text.

Hill, Tennessee, Saturn subsidiary.³⁶ Under this labor agreement, workers will receive eighty percent of the base pay that other unionized GM autoworkers receive, but also will have the opportunity to increase substantially their base wages depending on productivity.³⁷ Moreover, in contrast to typical UAW organized plants which often have over 135 different job classifications,³⁸ Saturn will have only one job classification for non-skilled workers and three to five additional job classifications for skilled workers.³⁹ The agreement also contains various provisions for union/employee-management consensus decision-making⁴⁰ and explicitly seeks "a cooperative problem-solving relationship between management and the Union."⁴¹

One of the most controversial sections of the Saturn agreement is section two, which gives existing GM-UAW workers hiring preferences at the Saturn operation and recognizes the UAW as the bargaining agent for Saturn employees.⁴² On August 6, 1985, the National Right to Work Legal Defense Foundation filed unfair labor practice charges against the UAW with the National Labor Relations Board (NLRB) charging that this section of the Saturn agreement, in particular, violates the right of employees under the National Labor Relations Act (NLRA) to choose freely their own representatives.⁴³

On June 2, 1986, however, the NLRB's Division of Advice released a lengthy memorandum setting forth the legal bases for a decision by the NLRB's General Counsel dismissing the charge.⁴⁴ The Advice Division memorandum in essence held that the Saturn labor agreement was simply an extension of existing GM-UAW agreements and thus was not unlawful.⁴⁵

The National Right to Work Foundation responded quickly to the NLRB's actions, calling for General Counsel Rosemary Collyer's resignation in a June 4, 1986 letter to President Reagan.⁴⁶ Additionally, the Foundation proposed legislation to make the NLRB General Counsel's prosecutorial discretion to dismiss or issue a complaint in response to a party's unfair labor practice charge partially reviewable on appeal by the full NLRB.⁴⁷ The Right to Work Foundation also attacked Collyer's decision on legal grounds, specifically citing NLRA section 8(a)(2)'s⁴⁸ prohibition against undue employer support for or collaboration with a labor organization and the impact of such undue collaboration/support on individual employee rights.⁴⁹

³⁶ The text of the agreement is reprinted in DAILY LAB. REP. (BNA) No. 107, at E-1 (June 4, 1986) [hereinafter Saturn Contract].

³⁷ See *id.* at E-3-4 (contract section 22).

³⁸ See Reynolds, *supra* note 13, at 114.

³⁹ See Saturn Contract, *supra* note 36, at E-3 (contract section 19).

⁴⁰ *Id.* at E-1-2 (contract section 10).

⁴¹ *Id.* at E-1 (contract section 1).

⁴² *Id.* (contract section 2).

⁴³ See Unfair Labor Practice Charge Against UAW brought by Rex H. Reed, August 6, 1985.

⁴⁴ See DAILY LAB. REP. (BNA) No. 110, at E-1 (June 9, 1986).

⁴⁵ *Id.* at E-3. The Division of Advice memorandum relied upon the decision of the NLRB in Kroger Co., 219 NLRB 388, 389, 90 L.R.R.M. 1192, 1192 (1975) (upholding union recognition based on a contractual "recognition clause" where new units became subject to the contract).

⁴⁶ See DAILY LAB. REP. (BNA) No. 108, at E-1 (June 5, 1986).

⁴⁷ The proposed legislation would afford an appeal only when the General Counsel decided to dismiss a charge. See *id.* at E-2. See generally Rosenblum, *A New Look at the General Counsel's Unreviewable Discretion Not To Issue a Complaint under the NLRA*, 86 YALE L.J. 1349 (1977).

⁴⁸ 29 U.S.C. § 158(a)(2) (1982).

⁴⁹ See DAILY LAB. REP. (BNA) No. 108, at E-2.

Interestingly, dissident rank-and-file UAW members at a June 6, 1986 gathering of the UAW constitutional convention echoed similar themes. These members objected that the Saturn agreement had been negotiated in advance without a chance for rank-and-file approval, and received a pledge from UAW President Owen Bieber that the union would not accept a Saturn-type agreement "in any other situation."⁵⁰ Various convention delegates attacked the Saturn agreement as "company unionism"⁵¹ and suggested that talk of union/management cooperation was phony. As one UAW delegate put it, "[w]e are supposed to go hand-in-hand down the yellow brick road with General Motors while they are busy outsourcing work overseas."⁵² UAW President Bieber, however, emphasized the importance to the union of gaining a toe-hold at Saturn because the union could potentially organize the non-union Nissan operation twenty-three miles down the Tennessee road.⁵³

With various sides attacking Saturn-type labor/management cooperation as unlawful "company unionism," it is worthwhile to examine briefly the specific mandates of section 8(a)(2) of the NLRA,⁵⁴ the provision which prohibits such conduct. In examining section 8(a)(2), a critical question emerges as to whether the mandates of section 8(a)(2) continue to make sense in today's labor-management relations environment, or whether the time is now ripe to consider possible statutory changes.

III. SECTION 8(a)(2)

Section 8(a)(2) of the National Labor Relations Act states, in relevant part, that it shall be an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."⁵⁵ The purpose of this section was, as Senator Robert Wagner (the author of the original NLRA) enunciated, to outlaw company-dominated unions.⁵⁶

Throughout most of the history of the NLRA, the NLRB has applied the mandates of section 8(a)(2) quite literally, by basically adopting a "per se" rule proscribing any management support of a labor organization which goes beyond a bare minimal level. Thus, the NLRB has found that employers have violated section 8(a)(2) for allowing labor organizations to use their copy machines⁵⁷ or telephones,⁵⁸ or for providing a labor organization with a place or refreshments for its meetings.⁵⁹

In recent years, however, various courts, in particular the federal courts of appeals,⁶⁰ have been looking at section 8(a)(2) from a new perspective. The thrust of this new view

⁵⁰ See DAILY LAB. REP. (BNA) No. 110, at A-10 (June 9, 1986).

⁵¹ *Id.* at A-10-11.

⁵² *Id.* at A-11.

⁵³ *Id.* Union organization of the Nissan operation also would potentially work to General Motor's advantage by leveling the costs of production which General Motors and its competitors face. See Reynolds, *supra* note 13, at 121, 124 & n.2.

⁵⁴ 29 U.S.C. § 158(a)(2) (1982).

⁵⁵ *Id.*

⁵⁶ See 79 CONG. REC. 2368, 2371 (1935) (statement of Sen. Wagner). See generally R. GORMAN, LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 197-200 (1976).

⁵⁷ See Kaiser Foundation Hosps., Inc., 223 N.L.R.B. 322, 91 L.R.R.M. 1523 (1976).

⁵⁸ See Shell Oil Co. of California, 2 N.L.R.B. 835, 845-48, 1 L.R.R.M. 548, 555-57 (1937).

⁵⁹ See Kunst d/b/a Connor Foundry Co., 100 N.L.R.B. 146, 151-52, 30 L.R.R.M. 2767, 2768-71 (1952).

⁶⁰ See, e.g., Hertzka & Knowles v. NLRB, 503 F.2d 625, 627-30, 87 L.R.R.M. 2503, 2504-07

is to sanction what is seen as positive labor/management "cooperation" even when such "cooperation" might well otherwise be seen as constituting unlawful employer "support" under section 8(a)(2).⁶¹ Thus, the Ninth Circuit in the 1974 case of *Hertzka & Knowles v. NLRB*⁶² noted that literally "almost any form of employer cooperation, however innocuous, could be deemed 'support' or 'interference,'" but that such a view of section 8(a)(2) was "myopic" and cut against broader objectives of the NLRA.⁶³ Similarly, the Sixth Circuit in a recent section 8(a)(2) case asserted that "the adversarial model of labor relations is an anachronism."⁶⁴

Numerous commentators have hailed this new view of section 8(a)(2),⁶⁵ and a highly important Department of Labor report, known as the "Schlossberg Report," discussed at greater length below, recently embraced this new view.⁶⁶ Indeed, the Department of Labor is currently engaged in a major effort to promote labor-management cooperation,⁶⁷ and the National Right to Work Legal Defense Foundation has charged that NLRB General Counsel Rosemary Collyer, in denying issuance of an unfair labor practice complaint against the GM-Saturn pact, acted in concert with the Labor Department.⁶⁸

Yet while the tide for a reformed view of section 8(a)(2) grows stronger, a note of caution is worthwhile. Solicitor General Charles Fried recently correctly asserted that today's interpretations of section 8(a)(2) will affect the development of American industrial relations in future generations.⁶⁹ Moreover, while the highly adversarial model of United States' labor-management relations of past eras indeed may be anachronistic in today's world economy, some degree of labor-management separation and institutional autonomy may be useful for the effective conduct of collective bargaining.⁷⁰ Further, if changes to section 8(a)(2) are to be made, they probably should be made by Congress, rather than by federal judges on an ad hoc basis.⁷¹ The issue seems extremely ripe for careful congressional consideration.

(9th Cir. 1974) (taking a liberal view of what constitutes permissible cooperation under section 8(a)(2)).

⁶¹ See generally R. GORMAN, *supra* note 56, at 201-03.

⁶² 503 F.2d 625, 630, 87 L.R.R.M. 2503, 2506 (9th Cir. 1974).

⁶³ *Id.*

⁶⁴ *NLRB v. Streamway Div. of the Scott & Fetzer Co.*, 691 F.2d 288, 293, 111 L.R.R.M. 2673, 2677 (6th Cir. 1982).

⁶⁵ See, e.g., Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1763 (1985).

⁶⁶ See "Analysis of U.S. Labor Law and Future of Labor-Management Cooperation," DAILY LAB. REP. (BNA) No. 116 at D-1, D-8-9 (June 17, 1986) [hereinafter Schlossberg Report].

⁶⁷ See *id.* at D-2-3.

⁶⁸ See National Right To Work Legal Defense Foundation Letter to President Reagan, DAILY LAB. REP. (BNA) No. 108, at E-1 (June 5, 1986). The National Right to Work Legal Defense Foundation is concerned with promoting the rights of individual employees within the union-management structure.

⁶⁹ See Fried, *Individual and Collective Rights in Work Relations: Reflections on the Current State of Labor Law and Its Prospects*, 51 U. CHI. L. REV. 1012, 1026 (1984).

⁷⁰ For an excellent discussion of this point of view see Note, *Collective Bargaining As An Industrial System: An Argument Against Judicial Revision of Section 8 (a) (2) Of The National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983).

⁷¹ Cf. Bierman, *Judge Posner and the NLRB: Implications For Labor Law Reform*, 69 MINN. L. REV. 881 (1985) (attacking one prominent federal judge for his cavalier interpretation of the NLRA and urging that Congress make necessary reforms rather than federal courts on an ad hoc basis).

IV. THE SCHLOSSBERG REPORT

In June of 1986 the Department of Labor issued a major report dealing with United States labor laws and the future of American labor-management cooperation.⁷² The report's principal author was Stephen I. Schlossberg, the Labor Department's controversial⁷³ Deputy Under Secretary for Labor-Management Relations. The thrust of the report is that strong support for labor-management cooperation is necessary if the United States is going to be able to compete effectively in the world marketplace.⁷⁴

To this end, the report engages in an extensive review of existing labor laws and the extent to which they hinder labor-management cooperative efforts. In addition, it analyzes existing and developing cooperative programs. The report voices direct support for the GM-UAW Saturn project,⁷⁵ and advocates a liberal view of the strictures of NLRA section 8(a)(2).⁷⁶

One of the most striking aspects of the report is the stridency of its anti-management/pro-union language. Thus, for example, the report states that various observers do not view the struggle between American labor unions and management as a fair one.⁷⁷ The report then goes on to observe that:

[p]erceived abuses of power on the part of labor — crippling strikes, picket line violence, corruption, secondary boycotts, discrimination, and jurisdictional disputes — have, for the most part, been dealt with by Congress through legislative changes. But the fact remains that, over time, many employers and their agents have become adroit at manipulating the labor laws to delay and obstruct unionization.⁷⁸

The report then continues to advocate a program of essentially pro-union labor law reform.⁷⁹

Regardless of the substantive merits of these assertions, which are certainly open to debate,⁸⁰ what is most remarkable is that they were made in a document issued by the Reagan Administration. The Reagan Administration frequently has been accused of

⁷² See Schlossberg Report, *supra* note 66.

⁷³ Schlossberg was formerly General Counsel of the United Autoworkers Union. See Federal Staff Directory 1041 (1986). His appointment and conduct in office have raised the ire of various conservative groups. See, e.g., DAILY LAB. REP. (BNA) No. 108 at E-1 (June 5, 1986) (letter to President Reagan from National Right To Work Foundation implicating Schlossberg in the denial of worker rights).

⁷⁴ See Schlossberg Report, *supra* note 66, at D-2.

⁷⁵ *Id.* at D-5.

⁷⁶ See *id.* at D-6-D-9, See also *supra* note 66 and accompanying text.

⁷⁷ Schlossberg Report, *supra* note 66, at D-4.

⁷⁸ *Id.*

⁷⁹ *Id.* at D-4-5. Congress rejected a recent attempt at such reform in 1978. See 124 Cong. Rec. 18398 (June 22, 1978) (failure to invoke cloture). See generally Comment, *Labor Law Reform: The Regulation of Free Speech and Equal Access in NLRB Representation Elections*, 127 U. PA. L. REV. 755 (1979).

⁸⁰ There is a voluminous literature debating the pros and cons of pro-union labor law reform. See, e.g., Bredhoff, *Labor Law Reform: A Labor Perspective*, 20 B.C.L. REV. 27 (1978); Nash, *The Labor Reform Act of 1977: A Detailed Analysis*, 4 EMPLOYEE REL. L.J. 59 (1978).

being extraordinarily "anti-union,"⁸¹ particularly since the Professional Air Traffic Controllers Organization ("PATCO") strike of 1981.⁸²

The great significance of the Schlossberg Report is that it analyzes and makes recommendations regarding a number of issues from a labor-management cooperation perspective. For example, the report criticizes the Supreme Court's decision in *NLRB v. Yeshiva University*,⁸³ which held that the University's faculty members were managerial employees not covered by the NLRA.⁸⁴ The report also lambasts a decision of the NLRB which held that physicians and dentists who have a voice in the management of their facility cannot belong to a union.⁸⁵ The report concludes that as a result of these decisions, "those individuals best suited to helping labor-management cooperation along are lost to the cause."⁸⁶

The Schlossberg Report also attacks the Supreme Court's decisions in *NLRB v. Borg Warner*⁸⁷ and *Truitt Manufacturing v. NLRB*,⁸⁸ which deal with the scope of bargaining under the National Labor Relations Act and the duty of employers to disclose information to unions. The report advocates broader duties of employer information disclosure and a broadened scope of collective bargaining.⁸⁹ The report also discusses, in a positive vein, the issue of having union representatives on company boards of directors.⁹⁰

Thus, international competition, perhaps for the first time ever, meaningfully has brought the issue of American labor-management cooperation to the fore of public discussion.⁹¹ The 1986 Schlossberg/Department of Labor Report, with its extensive analysis and controversial conclusions regarding the need for increased labor-management cooperation, represents a landmark study of an increasingly important subject.

V. FOREIGN COMPANIES AND AMERICAN CIVIL RIGHTS LAWS

With increasing numbers of foreign companies, particularly Japanese businesses, opening operations in the United States, in part in an effort to overcome protectionist barriers,⁹² the question has arisen as to what extent these companies fall under the ambit of American civil rights laws. More specifically, the question arises whether, and to what extent, these foreign companies must comply with the ban against employment discrimination which Title VII of the Civil Rights Act of 1964 imposes.⁹³ For example, can a

⁸¹ The Reagan NLRB has come under particular criticism. See Bierman, *supra* note 71, at 906 & nn.136-39.

⁸² See generally Meltzer & Sunstein, *Public Employee Strikes, Executive Discretion, and the Air Traffic Controllers*, 50 U. CHI. L. REV. 731 (1983).

⁸³ 444 U.S. 672, 687-90 (1980).

⁸⁴ See Schlossberg Report, *supra* note 66, at D-6.

⁸⁵ See Schlossberg Report, *supra* note 66, at D-6 (criticism of the Board's decision in *FHP, Inc.*, 274 N.L.R.B. No. 168, 118 L.R.R.M. 1525 (1985)).

⁸⁶ Schlossberg Report, *supra* note 66, at D-6.

⁸⁷ 356 U.S. 342, 42 L.R.R.M. 2034 (1958).

⁸⁸ 351 U.S. 149, 38 L.R.R.M. 2042 (1955).

⁸⁹ See Schlossberg Report, *supra* note 66, at D-9.

⁹⁰ *Id.* at D-10-11.

⁹¹ See generally *Conference Focuses On Competition As A Means To Make American Industry More Competitive*, DAILY LAB. REP. (BNA) No. 229, at A-10-13 (Feb. 12, 1986).

⁹² See *supra* note 25 and accompanying text.

⁹³ 42 U.S.C. secs. 2000e to 2000e-17 (1982).

Japanese company doing business in the United States give hiring preference to Japanese nationals?

The issue is one which in recent years has been the subject of considerable scholarly debate.⁹⁴ There also have been a number of federal court cases dealing with the question in various factual contexts.⁹⁵ These cases generally have involved prominent Japanese companies, such as Sumitomo, Canon, and Itoh.

The United States incorporated subsidiary of Canon Corporation, Canon, U.S.A., for example, has been involved in two reported 1981 federal cases dealing with this subject. In the first of these cases, *Porto v. Canon, U.S.A., Inc.*,⁹⁶ a male employee of the company brought a suit alleging that the company had a hiring, promotional, and employment system which discriminated against and limited the opportunities of employees that were of non-Japanese national origin.

In defense, the company raised an argument which has been the basic defense asserted by defendant companies involved in litigation of this kind. The company argued that the Treaty of Friendship, Commerce, and Navigation (or "FCN" treaty) between Japan and the United States⁹⁷ in essence exempts the company from the application of Title VII of the Civil Rights Act. More specifically, the company asserted that Article VIII (1) of the FCN treaty, which permits companies of one party to hire "accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice"⁹⁸ when doing business within the territory of the other party, supercedes any obligations the company might have under Title VII.⁹⁹

The federal district court, however, rejected this argument. The court reasoned that because Canon, U.S.A. was incorporated in the United States, it was not a "company of Japan" for purposes of coverage by the treaty.¹⁰⁰ The court pointed out that by doing business in the United States as an independently incorporated subsidiary, as opposed to a mere branch operation of an existing Japanese company, Canon, U.S.A. derived a variety of legal and other benefits.¹⁰¹ Thus, the court held, "[i]f a corporation decides to organize under American law in order to invoke these benefits, it does not seem unfair to require it to accept the burdens of American law."¹⁰² The court stated that the company might be able to justify employing Japanese nationals in positions where such employment is "reasonably necessary to the successful operation of its business."¹⁰³

⁹⁴ See, e.g., Note, *Commercial Treaties and the American Civil Rights Laws: The Case of Japanese Employers*, 31 STAN. L. REV. 947 (1979); Sethi & Swanson, *Are Foreign Multinationals Violating U.S. Civil Rights Laws?*, 4 EMPLOYEE REL. L.J. 485 (1979); Note, *The Rights Of A Foreign Corporation And Its Subsidiary Under Title VII of the Civil Rights Act of 1964, and Treaties of Friendship, Commerce, and Navigation*, 17 GEO. WASH. J. INT'L L. & ECON. 607 (1983) [hereinafter GEO. WASH. Note]; Edwards, *International Law and Employment Discrimination*, 8 OKLAHOMA CITY L. REV. 1 (1983).

⁹⁵ See, e.g., *Avigliano v. Sumitomo Shoji Am., Inc.*, 473 F. Supp. 506 (S.D.N.Y. 1979), *aff'd*, 638 F.2d 552 (2d Cir. 1981), *vacated* and remanded 457 U.S. 176 (1982); *Speiss v. C. Itoh & Co. (America)*, 469 F.Supp. 1 (S.D. Tex. 1979), *rev'd* 643 F.2d 353 (5th Cir. 1981), *vacated* and remanded 457 U.S. 1128 (1982). See also GEO. WASH. NOTE, *supra* note 94, at 607 n.1.

⁹⁶ 28 F.E.P. 1679 (N.D. Ill. 1981).

⁹⁷ Treaty of Friendship, Commerce and Navigation, April 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No. 2863.

⁹⁸ *Id.* at art. VIII, para. 1.

⁹⁹ *Porto v. Canon, U.S.A., Inc.*, 28 F.E.P. at 1680.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1682.

¹⁰² *Id.*

¹⁰³ *Id.* at 1684.

The second case involving Canon, U.S.A., *Mattison v. Canon, U.S.A., Inc.*,¹⁰⁴ involved facts very similar to the earlier case. In *Mattison*, a male manager alleged he was fired because he was non-Japanese.¹⁰⁵ A federal district court, however, rejected the company's defense that it was exempted from Title VII by the FCN treaty. The court ruled that a company that decided to incorporate in the United States came under this country's laws.¹⁰⁶

A federal district court in Texas took an almost identical approach to the issue during roughly the same time period in a case involving the American subsidiary of the C. Itoh company. The 1979 case of *Speiss v. C. Itoh & Co. (America), Inc.*¹⁰⁷ involved a suit by three white male middle-management employees of the company's Houston office. These employees asserted that the company had violated Title VII by discriminating against them in favor of employees of Japanese national origin. The company defended by arguing that the Japan-United States FCN treaty exempted it from Title VII. The court, however, rejected this defense out of hand, ruling that because Itoh America was incorporated in the United States, it must come under United States law.¹⁰⁸

The company appealed the decision to the U.S. Court of Appeals for the Fifth Circuit, where it received a much friendlier reception. In *Speiss v. C. Itoh & Co. (America), Inc.*,¹⁰⁹ the Fifth Circuit held, first, that Itoh America, as an American incorporated subsidiary of Itoh Japan, had standing to invoke the coverage of the Japan-United States FCN Treaty.¹¹⁰ The court then went a step further by ruling that Article VIII (1) of the FCN treaty did in large measure exempt the company from the mandates of Title VII.¹¹¹ Thus, the authority of the company under the treaty to "engage executive personnel" of its "choice" superseded any possible obligations under Title VII to treat white male middle managers in a non-discriminatory manner.¹¹²

Before the United States Supreme Court had an opportunity to review the Fifth Circuit's 1981 decision in the *Itoh* case, however, the Court handed down its famous 1982 opinion in the case of *Sumitomo Shoji American, Inc. v. Avigliano*.¹¹³ The *Sumitomo* Court overruled the Fifth Circuit's holding in *Itoh*.

The *Sumitomo* facts, however, were slightly different from those in the cases involving Canon and Itoh. While these other cases involved white American males alleging national origin discrimination, the *Sumitomo* case involved white American female employees alleging both sex discrimination and national citizenship/national origin discrimination.¹¹⁴ More specifically, the female employees asserted that their employer had restricted them to clerical jobs and reserved executive and sales jobs within the company for male Japanese citizens.¹¹⁵

¹⁰⁴ 28 F.E.P. 1685 (N.D. Ill. 1981).

¹⁰⁵ *Id.* at 1685.

¹⁰⁶ *Id.* at 1686.

¹⁰⁷ 469 F. Supp. 1 (S.D. Tex. 1979), *rev'd*, 643 F.2d 353 (5th Cir. 1981), *vacated* and remanded 457 U.S. 1128 (1982).

¹⁰⁸ *Id.* at 9.

¹⁰⁹ 643 F.2d 353 (5th Cir. 1981).

¹¹⁰ *Id.* at 358-59.

¹¹¹ *Id.* at 359.

¹¹² *Id.* at 360-62.

¹¹³ 457 U.S. 176 (1982).

¹¹⁴ *Id.* at 178.

¹¹⁵ *Id.*

The basic construct of the *Sumitomo* case, however, was the same as that in the cases involving Canon and Itoh. Sumitomo America, like the other companies, was incorporated in the United States. This turned out to be the critical factor in the Supreme Court's analysis. For when Sumitomo asserted that it was essentially exempt from the mandates of Title VII because of the Japan-United States FCN treaty, the Supreme Court responded as had the federal district courts in the cases involving Itoh and Canon. The Supreme Court emphasized that because Sumitomo America was incorporated in New York, it was a company of the United States and not of Japan.¹¹⁶ Consequently, the company was not entitled to protection under the Japan-United States FCN treaty.¹¹⁷ The Supreme Court clearly rejected the company's assertion that the FCN treaty was meant to cover Japanese company subsidiaries regardless of where they were incorporated.¹¹⁸ In the Supreme Court's opinion, if a subsidiary of a Japanese company is incorporated in the United States, it is an American company covered by American laws, and not by the treaty.

Thus, under the Supreme Court's holding in *Sumitomo*, if a Japanese company decides to do business in the United States by way of a subsidiary incorporated in the United States, that subsidiary clearly will be subject to Title VII and other United States civil rights laws.¹¹⁹ Thus, the *Sumitomo* Court overruled the Fifth Circuit's holding to the contrary in *Itoh*.

In *Sumitomo*, however, the Supreme Court left unanswered as many questions as it resolved. For one, the high court expressly avoided the issue of whether discrimination suits based on national citizenship, as opposed to national origin, are cognizable under Title VII.¹²⁰ Even more significantly, the Court failed to address the issue of to what extent, if at all, the Japan-United States FCN treaty would limit the applicability of Title VII in cases where the company clearly had the right to invoke the treaty's protection. Such an issue might arise, for example, if a Japanese company set up a branch office, as opposed to an independently incorporated subsidiary, in Los Angeles. If this Los Angeles branch office then decided to hire only Japanese citizens for its executive positions, the question of whether the Japan-United States FCN treaty permits it to do so would need to be determined. There is some language in the Supreme Court's *Sumitomo* opinion which suggests that the Japan-United States FCN treaty should *not* be interpreted so broadly and that the opinion simply means that Japanese companies in this country should be treated on a "comparable basis" with United States companies.¹²¹ Nevertheless, the high court did not address directly and clearly did not resolve this issue.

Thus, all that is certain in the wake of *Sumitomo* is that if a Japanese company or a company of another country where a similar treaty relationship exists desires the protection and privileges of operating in the United States by way of a United States incorporated subsidiary, then that subsidiary must bear the burdens imposed by the laws of this country. Beyond that, the waters are still relatively murky and likely to be tested increasingly in the years to come.

¹¹⁶ *Id.* at 182.

¹¹⁷ *Id.* at 183.

¹¹⁸ *Id.* at 185.

¹¹⁹ *Id.* at 189.

¹²⁰ *Id.* at 180 n.4.

¹²¹ *Id.* at 186.

CONCLUSION

The modern economy is aptly described as a world economy. Foreign competition and interchange is beginning to have a profound impact on the nature and conduct of American employment relations. This impact was evident to a perhaps unprecedented degree during the 1985-1986 survey year.

During this past year, American unions and managements coupled continued calls for protectionism with unprecedented cooperative efforts. A re-thinking of the adversarial posture set forth in parts of the National Labor Relations Act, such as section 8(a)(2), also began. This re-thinking was markedly evident in the United States Department of Labor's landmark June, 1986 "Schlossberg Report," which called for greater labor-management cooperation as a way of dealing with increased foreign competition.

These, and related issues, such as the employment relations implications of foreign (especially Japanese) companies doing business in the United States, have clearly moved to the fore of public concern. Indeed, in future Survey years, they can be expected to be of greater and greater importance, as international economic forces increasingly impact on American employment relations.