

**A Divided Interest: The UAW's Current Contradiction of the
National Labor Relations Act's Adversarial Model**

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Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
Under the direction of
Professor Robert McCormick
Spring, 2010

I. INTRODUCTION

Labor relations in the United States have long been defined by a deliberate adversarial concept: “capital v. labor.” The phrase capital v. labor stands for the premise that management (capital) has separate interests from those of its employees (labor), and that both parties are best served by separately pursuing these interests. Since the passage of the Wagner Act during the Great Depression, Congress has solidified this relationship into law by embracing the adversarial model as the foundation of the National Labor Relations Act (“NLRA”).

The financial crisis of 2009 and the resulting corporate, labor, and governmental maneuverings have provided a new test for the adversarial model of the NLRA. Specifically, the financial meltdown in the U.S. auto sector has created an unusual bond between the Chrysler Group, LLC (“Chrysler”) and the United Automobile Workers of America (“UAW”) as well as between General Motors (“GM”) and the UAW. The UAW’s retiree health care trusts—Voluntary Employee Benefit Association trusts (“VEBA trusts”)—for Chrysler retirees and GM retirees now hold a majority equity interest in Chrysler and a substantial equity interest in GM. The UAW’s equity interests in both Chrysler and GM through these trusts align the union’s interests with both labor and management simultaneously. This creates a divided interest for the union because it operates as a bargaining agent for the employees while supporting management in its bid for maximum performance of the corporation. Therefore, with its divided interest, the UAW finds itself on both sides of the adversarial model, which results in a violation of the Act and a fundamental contradiction of the Act’s adversarial model.

This paper will first explore the origins and deliberate existence of the adversarial model in U.S. labor law and its prominence within the NLRA. Then, it will scrutinize the transactions between the UAW and Chrysler, and the UAW and GM to show the divided interest that the

labor organization is currently operating under. This will conclude with an assessment of precisely how and why this divided interest both violates the NLRA and contradicts some of its core provisions. Finally, the paper will end with a brief look at the consequences of allowing the UAW to continue operating with its divided interest, and how it may represent a transformation away from the adversarial model towards a model of cooperation between capital and labor.

II. THE ADVERSARIAL MODEL IN THE NLRA

The Wagner Act of 1935, named after the lead sponsor and advocate of the labor legislation, Senator Robert F. Wagner, is the foundation and main component of the National Labor Relations Act.¹ The Great Depression, and the economic collapse thereof, largely fueled the labor movement and the will to pass such legislation.² “It was designed to quell worker dissatisfaction and industrial strife by encouraging the development of independent labor organizations that, as representatives of a collective employee voice, could bargain on equal terms with employers.”³

Although the National Labor Relations Act has had a profound effect on labor relations in the U.S., the principal purpose of the NLRA, as set forth in the Wagner Act, was one of pragmatism. Simply put, the purpose of the Wagner Act was pragmatic and not a means of creating a tool for executing broad domestic economic policy. This position becomes apparent after examining the thoughts and intentions of the drafters of the legislation, instead of relying on varying interpretations set out by historians thereafter. Leon H. Keyserling was Senator

¹ See Theodore J. St. Antoine, *How the Wagner Act Came To Be: A Prospectus*, 96 MICH. L. REV. 2201, 2201-03 (1998).

² Michael D. Yates, *Should We Return to the Policy of the Wagner Act?*, 4 U. PA. J. LAB. & EMP. L. 559, 565 (2002).

³ Shaun G. Clarke, *Rethinking the Adversarial Model in Labor Relations: an Argument for Repeal of Section 8(A)(2)*, 96 YALE L.J. 2021, 2023 (1987).

Wagner’s legislative assistant who was the principal drafter of the Wagner Act.⁴ Despite idealized interpretations of the purpose behind the Wagner Act, Keyserling has made it very clear in interviews that the “Act did not have the ‘radical’ purpose of reshaping industrial relationships between employers and employees.”⁵ In fact, “One of the basic reasons for the Wagner Act was the effect it would have upon wage negotiations.”⁶ More specifically, according to Keyserling, the Wagner Act “dealt with the prohibition of unfair labor practices and the procedural requirements for enforcing the statute. So it really didn’t deal with economics.”⁷ The office of the Solicitor General, who represents the United States government in court actions, took this same position in defending the validity of the Wagner Act after it became law: “The arguments they prepared for the Supreme Court were ‘technical and pragmatic.’ At no point was there any discussion that the statute would revolutionize American employer-employee relations, beyond guaranteeing workers the right to organize and bargain collectively.”⁸

Even if one looks past pragmatism and identifies more with the broad policy goals of the Congress of encouraging industrial peace and stabilizing the economy, as set forth in the preamble to the Wagner Act, “Congress hoped to accomplish this by creating equality of bargaining power between capital and labor.”⁹ “[T]he denial of the right to organize and bargain collectively was the source of the most fractious and bloody types of industrial disputes.”¹⁰ Therefore, regardless of the broad implications on the labor relations in the United States, the

⁴ 96 MICH. L. REV. at 2203.

⁵ *Id.* at 2206.

⁶ Kenneth M. Casebeer, *Holder of the Pen: An interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 310 (1987).

⁷ *Id.* at 316.

⁸ 96 MICH. L. REV. at 2206.

⁹ Deborah A. Ballam, *The Law as a Constitutive Force for Change, Part II: The Impact of the National Labor Relations Act on the U.S. Labor Movement*, 32 AM. BUS. L.J. 447, 452 (1995).

¹⁰ 42 U. MIAMI L. REV. at 319 (quoting Leon Keyserling).

Wagner Act was drafted with a narrow focus, as supported by Keyserling himself, on collective bargaining and its effect on the adversarial relationship between capital and labor.

The relationship between capital and labor in the United States is adversarial and the Wagner Act left this conflict intact, as evidenced by its dedication to equalizing the bargaining power between these two sides. In fact, the Wagner Act, and NLRA thereafter, depend on this adversarial relationship to function because such a conflict is critical for the proper use of the employees' independent right to collectively bargain. It is clear from labor law scholars, the language of the NLRA, and court decisions interpreting the Act that the NLRA consists of a deliberate adversarial model that has long defined labor relations in the United States. Although there are some common interests, "Organized labor and management have long viewed each other as adversaries."¹¹

The adversarial relationship in labor relations, for the most part, is a naturally occurring, logical tension because management has separate goals from those of labor. "The purpose of unions was to maximize wages and better the terms and conditions of employment for their members . . . the goal of managers, on the other hand, was to minimize labor costs and secure a competent work force at the lowest wage the market permitted."¹² Consequently, labor and management compete against one another to fulfill their individual goals. This sense of competition in labor relations is especially fitting because it is consistent with the capitalistic economy of the United States. Moreover, the fundamental differences in the interests of capital and labor are further demonstrated by the modern trend of global economics. Capital's desire for maximum efficiency and larger profit margins has driven it towards cheap labor supplied by poor, underdeveloped workforces in remote areas around the world. This has undercut the

¹¹ Robert A. McCormick, *Union Representatives as Corporate Directors: the Challenge to the Adversarial Model of Labor Relations*, 15 U. MICH. J.L. REFORM 219, 220 (1982).

¹² *Id.* at 223.

domestic labor’s interests in lucrative wages and favorable conditions of employment. The point here is that capital and labor constantly compete against one another to advance their own interests, and it has always been that way in the United States. Samuel Gompers, the founder of the American Federation of Labor (AFL) and one of the most influential labor leaders in history, subscribed to this view: “Gompers believed that capital and labor were natural adversaries in a struggle to reap the profits of industry.”¹³

A brief analysis of some of the key components of the NLRA framework further support the Act’s embodiment of the long-held adversarial model. First, the NLRA creates adversarial conflict by only protecting employees and not management.¹⁴ Moreover, both the NLRA and interpretations from courts and the National Labor Relations Board (“NLRB”) have “distinguished between ‘employees’ . . . and various categories of persons whose interests have been considered more appropriately allied with management.”¹⁵ The NLRA itself creates such a line in its definition of “employee,” which now expressly excludes “supervisors.”¹⁶ The purpose of the express distinction within the “employee” classification under the NLRA and the judicial analysis applied to determine whether a person acts in a supervisor or managerial capacity is to distinguish between the interests of capital and labor, and the actors thereof, so as to maintain legal separation between these “antagonistic entities.”¹⁷ The deliberate separation between capital and labor is an absolute endorsement by the Act, and those who interpret and enforce it, that there is an adversarial model in which there must always be a constant tension of conflict between capital and labor over the pursuit of their different interests.

¹³ *Id.*

¹⁴ *Id.* at 233

¹⁵ *Id.*

¹⁶ 29 U.S.C. § 152(3) (2009).

¹⁷ 15 U. MICH. J.L. REFORM at 236.

Section 8(a)(2) of the NLRA is another example of the deliberate adversarial model within the Act. Section 8(a)(2) holds that it is 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”¹⁸ Much like the line drawn between capital and labor by the definition of “employee,” the unfair labor practice under 8(a)(2) sets a very clear, deliberate line. “By outlawing the formation of cooperative organizations through which employees can participate in management decision-making, section 8(a)(2) assures the separation of the parties that underlies the collective bargaining, or adversarial, model.”¹⁹ However, this line under 8(a)(2) goes even further to ensure that capital and labor, and their conflicting interests, remain distinct and separate. Specifically, the Supreme Court has taken a very strong position with its interpretation of 8(a)(2) violations: “Section 8(a)(2) prohibits employer participation in labor organizations regardless of employee satisfaction, or employer motive and degree of involvement.”²⁰ The NLRB holds a similar position with its finding that mere “potential” for employer domination is enough to trigger an 8(a)(2) violation.²¹ The overarching point is that judicial precedent “leave[s] no doubt that section 8(a)(2) should be applied broadly and interpreted to enforce a strict separation between management and labor.”²²

Now that the adversarial model of the NLRA is established, it becomes clear that the employees’ right to organize for purposes of collective bargaining is the cornerstone of the NLRA because it allows management and labor to engage in the adversarial framework. “Congress, therefore, designed the Wagner Act to increase employees’ collective strength so

¹⁸ 29 U.S.C. § 158(a)(2) (2009).

¹⁹ 96 YALE L.J. at 2021.

²⁰ *Id.* at 2028; *See NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939).

²¹ Anna S. Rominger, *The Mutual Interests Approach: Legislative Attempts to Legitimize Cooperative Labor and Management Relations*, 13 MIDWEST L. REV. 67, 77 (1995); *See also S.W. Motor Lines, Inc.*, 236 N.L.R.B. 938 (1978).

²² 96 YALE L.J. at 2031; *See also NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

they could bargain more effectively [with management] for higher wages and better working conditions.”²³ Collective bargaining is unquestionably the key adversarial principle of the NLRA as it is the only substantive right created under the Wagner Act: “The remainder of the Act’s provisions were procedural, establishing ground rules to monitor the process.”²⁴ This right was first developed in 1933 when Congress enacted the National Industrial Recovery Act (“NIRA”). The NIRA was unsuccessful largely because of a lack of enforcement, but its section 7(a), which “guaranteed employees the right to organize and bargain collectively through their chosen representative” was the focal point of the subsequent Wagner Act. Specifically, the right to organize and bargain collectively under 7(a) was mirrored by section 7 of the Wagner Act.²⁵ This right continues to be the foundation of the NLRA and reads in pertinent part: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining”²⁶

Lastly, the Preamble of the Wagner Act, which is the first section of the NLRA, solidifies collective bargaining as the fundamental adversarial principle of U.S. labor relations:

It is hereby declared to be *the policy of the United States* to eliminate 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.²⁷

²³ Anna S. Rominger, *Rethinking the Model: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 166 (1996).

²⁴ *Id.* at 167.

²⁵ *Id.* at 165.

²⁶ 29 U.S.C. § 157 (2009).

²⁷ 29 U.S.C. § 151 (2009) (emphasis added).

This language holds enormous significance. It is an express declaration of the policy of the United States, so the scope and intent of the Wagner Act, and the NLRA thereafter, for which this declaration supports in full effect, is very clear. Specifically, the Act does not modify the existing adversarial relationship between capital and labor. Rather, it provides labor with a tool to more effectively engage in this relationship for purposes of labor relations: “Experience has proved that protection by law of the right of employees to organize and bargain collectively . . . restor[es] equality of bargaining power between employers and employees.”²⁸

In sum, the purpose of the Wagner Act, which represents the original Congressional intent behind the NLRA, was pragmatic and not a means of creating a tool for executing broad domestic economic policy. Accordingly, the adversarial relationship between capital and labor in the United States was deliberately left intact. Therefore, the NLRA embodies an adversarial model, and collective bargaining is the cornerstone of the Act because it allows management and labor to engage in the adversarial framework.

III. THE UAW’S DIVIDED INTEREST

The UAW is one of the largest labor unions in the United States. “There are more than 800 local unions in the UAW. The UAW currently has 3,100 contracts with some 2,000 employers in the United States, Canada and Puerto Rico.”²⁹ With its size, presence, and influence, the UAW has been a force in labor relations in the United States. Accordingly, “UAW members have benefited from a number of collective bargaining breakthroughs.”³⁰ One such breakthrough is the UAW’s use of Voluntary Employee Beneficiary Association trusts

²⁸ *Id.*

²⁹ UAW, <http://www.uaw.org/about/uawmembership.cfm> (last visited Mar. 20, 2010).

³⁰ *Id.*

(“VEBA trusts”) to remove the responsibility of health care for retirees from major employers like Chrysler and GM.

VEBA trusts are tax-exempt organizations set up to provide for “the payment of life, sick, accident, or other benefits to the members of such association.”³¹ “Membership of a section 501(c)(9) organization must consist of individuals who are employees who have an employment-related common bond.”³² As a result of collective bargaining, the UAW began establishing individual VEBA trusts for the “Big Three.” This arrangement benefits both capital and labor: “In the long run, [VEBA trusts are] more secure than a promise of health care from a company Because the trusts are pre-funded, Chrysler, Ford and GM can remove projected retiree health care costs from their books, which will improve their financial positions.”³³ Therefore, “Retiree health care will be paid for by an independent VEBA trust, with funds that can only be used for that purpose.”³⁴

The VEBA trusts established by the UAW are independently managed and any funds contributed to the individual trusts belong exclusively to that trust and cannot be used for any other purpose. “The VEBA trusts will not be run by the UAW. They will be administered by an independent board The trustees will manage and pay benefits for UAW retirees from Ford, Chrysler and General Motors, and oversee the long term solvency of the VEBA.”³⁵ Although the VEBA trusts, and the assets within, are independently managed, contributions to them by employers are still subject to collective bargaining, meaning the UAW is in charge of negotiating with employers over the amount those employers have to pay into the VEBA trust accounts. In a

³¹ 26 U.S.C. § 501(c)(9) (2009).

³² IRS, <http://www.irs.gov/charities/nonprofits/article/0,,id=154610,00.html> (last visited Mar. 20, 2010).

³³ *Remarks by UAW President Ron Gettelfinger to the Bay City Rotary Club, Bay City Mich., Jan. 22, 2008*, UAW, Jan. 23, 2008. http://www.uaw.org/news/speeches/vw_fst2.cfm?fstId=32 (last visited Mar. 20, 2010).

³⁴ *Id.*

³⁵ *Id.*

speech to the Bay City Rotary Club in Michigan, UAW President Ron Gettelfinger said to the audience, “The independent VEBA trusts will be funded by tens of billions of dollars in cash, stock and other securities contributed by our employers. *It is the largest transfer of assets from capital to labor, ever, in the history of the United States.*³⁶

The UAW’s independent VEBA trusts created for Chrysler retirees and GM retirees demand substantial attention because they create a divided interest for the UAW. As discussed in the next section, these two VEBA trusts create a managerial interest for the UAW that effectively puts the labor organization on both sides of the adversarial model instead of being on the one side where it exclusively represents the interests of labor. These two VEBA trusts became controversial the moment the United States, and the rest of the world for that matter, experienced an economic crisis that still threatens the viability of the American auto industry.

In the summer of 2009, the era of dominance of the Big 3 came to a formal end when both Chrysler and GM filed for chapter 11 bankruptcy relief.³⁷ Considering the enormous impact of the simultaneous failure of two of the largest manufacturing companies in the United States and North America, the U.S. government, along with its Canadian counterpart, took strategic steps to preserve the functional components of Chrysler and GM in an effort to allow the companies to be revived and preserve the thousands of jobs at stake. Consequently, the North American governments partnered to participate in a § 363 asset sale in the bankruptcy process.³⁸ First, both governments provided Debtor-in-Possession (“DIP”) financing, which allowed both Chrysler and GM to continue operations while reorganizing under Chapter 11.³⁹ Then, the North American governments created and financed new entities to purchase all of the

³⁶ *Id.* (emphasis added).

³⁷ See *In re Chrysler LLC*, 405 B.R. 84 (Bankr. S.D.N.Y. 2009); *In re General Motors Corp.*, 407 B.R. 463 (Bankr. S.D.N.Y. 2009).

³⁸ Stephen J. Lubben, *No Big Deal: The GM and Chrysler Cases in Context*, 83 Am. Bankr. L.J. 531, 533-36 (2009).

³⁹ *Id.* at 536-37.

favorable assets from the two automakers, which puts the new entities in a fresh position to operate a new Chrysler and a new GM without many of the overwhelming liabilities that sank the organizations to begin with.⁴⁰ Since labor is a significant component of these operations, the government-created entities that purchased the assets made express agreements with the UAW in an attempt to ensure efficiency and competitiveness. “In exchange for wage cuts that brought the automakers in line with their foreign competitors, and the union’s promise not to strike for several years, the purchasers agreed to give equity stakes in the reorganized company to the UAW’s retiree health care trust, called the Voluntary Employee Beneficiary Association (VEBA).”⁴¹

The UAW VEBA trust for Chrysler retirees was issued a 55% equity interest in Chrysler Group.⁴² The UAW was also given a seat on Chrysler’s board of directors that was to be appointed and held by the VEBA trust.⁴³ In addition to owning a “significant amount of Chrysler stock and [being] allowed to appoint a representative to Chrysler’s board . . . the accord would provide the union with regular updates from the company on its long-term strategy and product plans.”⁴⁴ Specifically, “Chrysler will provide the UAW with quarterly updates and contributions by executives, CEOs, dealers, suppliers and other constituents”⁴⁵ Similarly, the UAW VEBA trust for GM retirees was issued a 17.5% equity interest in the new GM, along with warrants representing the possibility of another 2.5% share of equity.⁴⁶ “GM’s market

⁴⁰ *Id.*

⁴¹ *Id.* at 537.

⁴² Chrysler Blog, *Chrysler and Fiat Finalize Alliance*, June 10, 2009, <http://blog.chryslergroupllc.com/blog.do?p=entry&id=698> (last visited Mar. 21, 2010).

⁴³ *Id.*

⁴⁴ Alex P. Kellogg and Kris Maher, *UAW to get 55% Stake in Chrysler for Concessions*, *The Wall Street Journal*, April 28, 2009, <http://online.wsj.com/article/SB124087751929461535.html> (last visited Mar. 21, 2010).

⁴⁵ *Id.* (internal quotations omitted).

⁴⁶ Matthew Dolan, *UAW Defends its Share in GM Restructuring*, *The Wall Street Journal*, May 28, 2009, <http://online.wsj.com/article/SB124353536535963477.html> (last visited Mar. 21, 2010).

capitalization would need to reach \$75 billion in order for the union's trust to benefit from the warrants⁴⁷

Although the equity received by both VEBAs was in lieu of cash⁴⁸ owed by the automakers, it has created a divided interest for the UAW. Equity in a corporation, especially under these circumstances, is a tricky asset because its value is determined by the performance of the corporation. For instance, look at the 55% equity share that was transferred to the UAW VEBA trust for Chrysler retirees. A 55% stake is substantial in size because it is the controlling share of Chrysler; however, the present value of that share, when it was transferred to the VEBA, was effectively nothing because Chrysler's stock was trading for a nominal amount. In the words of Ron Gettelfinger, "We are trading debt for equity, and what is the value of the equity? Let's be honest, it's zero today."⁴⁹ Although the starting value of the equity was so small, it carried a far higher potential value on the premise that if Chrysler rebounded from Chapter 11 bankruptcy as a leaner, more efficient, high-performing automobile manufacturer, the value of the equity would increase dramatically. The main point here is to demonstrate how a better performance by Chrysler in the marketplace will positively affect the value of the UAW VEBA trust's 55% equity stake: the better Chrysler performs as a company—i.e. increased cash flow, reduction of debt to equity, lower margins, etc—the higher the stock market will value it, and this increased value will be reflected in a higher Chrysler stock price, which would increase the value of the VEBA trust's equity.

This cause-and-effect relationship between Chrysler's performance and the value of the VEBA trust's 55% equity stake is precisely what creates a divided interest for the UAW. The

⁴⁷ *Id.*

⁴⁸ Joseph R. Szczesny, *Why Detroit Retirees Have Health-Care Anxiety*, Time, May 31, 2009. <http://www.time.com/time/printout/0,8816,1902009,00.html> (last visited Mar. 21, 2010).

⁴⁹ Chris Isidore, *Union Reluctant to Grab Wheel in Detroit*, CNNMoney.com, May 21, 2009. http://money.cnn.com/2009/05/19/news/companies/uaw_ownership/index.htm (last visited Mar. 27, 2010).

UAW's first, and legal, interest is representing the employees of Chrysler for purposes of collective bargaining. Its new, divided interest is supporting Chrysler from a performance standpoint to aid the company in realizing a higher stock price. Remember, the UAW has a clear incentive to see both Chrysler and GM achieve maximum performance: "the VEBA could run out of money if these companies don't do well."⁵⁰ If Chrysler achieves maximum performance, the UAW's VEBA trust for Chrysler retirees will achieve maximum dollar value because of its 55% equity stake. If GM achieves maximum performance, the UAW's VEBA trust for GM retirees will achieve maximum dollar value because of its 17.5% equity stake. Additionally, there is even a stronger incentive for the UAW to support GM because if the automaker's market capitalization reaches \$75 billion, the VEBA trust will receive even more money through the exercise of its warrants.⁵¹ With a clear division in its interests, the UAW violates the National Labor Relations Act and contradicts its core adversarial model.

IV. CONTRADICTING THE ADVERSARIAL MODEL

The analysis set forth so far began by establishing the scope of the law under the NLRA. Its focus was on how the adversarial model so clearly exists within the Act. The Section 7 right to self-organize for purposes of collective bargaining, the Section 8(a)(2) unfair labor practice, and the pragmatic roots of the Wagner Act were all cited as evidence for a deliberate embodiment of the adversarial model in the NLRA and labor relations in the United States. The UAW's divided interest violates the NLRA on all three grounds by directly contradicting its adversarial foundation. In fact, the UAW, operating in its current capacity, is more representative of a cooperative model, and allowing this to continue represents a possible shift away from the adversarial model of the NLRA towards a model of cooperation.

⁵⁰ Szczesny, *supra* note 48.

⁵¹ Dolan, *supra* note 46.

The employees' right to organize for purposes of collective bargaining is the cornerstone of the NLRA and stands as the only substantive right provided under the Act.⁵² This right was meant to equalize the bargaining power between capital and labor to allow both parties to independently pursue their separate interests. Essentially, collective bargaining through independent representation gives labor a tool to more effectively engage in its adversarial relationship with management. The UAW's equity stakes in Chrysler and GM align the union's interests with both labor and management simultaneously, preventing it from fulfilling its primary, lawful function as bargaining representative for the employees. "A restructuring plan for General Motors sends stock to United Auto Workers' health care plan. The Wall Street Journal dubbed the company Gettelfinger Motors"⁵³ The UAW's position on both sides of the adversarial relationship between capital and labor violates the NLRA by infringing on the employees' Section 7 rights through an unlawful conflict of interest.

"The NLRA contains no specific prohibition against union activities in corporate governance or management, but the Board nonetheless possesses undisputed authority to disqualify persons from acting as employee representatives based upon conflict-of-interest considerations."⁵⁴ In making these considerations, the Board recognizes a presumption that union officials are loyal to the union, despite engaging in activities on behalf of management.⁵⁵ The presumption can be overcome by satisfying a two-part analysis: (1) the presumption remains unless the union officials hold a majority of the employer's governing body; (2) if this

⁵² Rominger, *supra* note 24.

⁵³ National Public Radio, *UAW's Gettelfinger on Chrysler's Future*, May 1, 2009. <http://www.npr.org/templates/story/story.php?storyId=103700673> (last visited Mar. 21, 2010).

⁵⁴ Robert A. McCormick, *Union Representatives as Corporate Directors: the Challenge to the Adversarial Model of Labor Relations*, 15 U. MICH. J.L. REFORM 219, 248-49 (1982).

⁵⁵ *Id.* at 249.

has not occurred, then the analysis looks at whether the union has a “direct, substantial pecuniary interest in the company whose employees it represents.”⁵⁶

Both pieces of the conflict-of-interest analysis are applicable to the UAW’s position with respect to Chrysler and GM. The first prong, though close with the UAW-Chrysler relationship, likely does not reflect a conflict of interest. The union will hold one seat on Chrysler’s new board, and that seat will be occupied by an appointee of the VEBA trust fund.⁵⁷ Since the board consists of nine directors, there is no union majority on Chrysler’s governing body: “Given that the UAW trust is only going to get one seat on the Chrysler board, the strategic direction of the company will come from a more diversified board.”⁵⁸

Although the UAW does not hold a majority on Chrysler or GM’s governing bodies, it has a conflict of interest under the second prong of the analysis because of its “direct, substantial pecuniary interest in the company whose employees it represents.”⁵⁹ First, the interest is direct. On its face, it appears that the VEBA trust, which may be viewed as an objective keeper / dispenser of funds, is distinct from the UAW and thus alleviates any contention of a conflict of interest. After all, the VEBA trusts set up for both companies’ retirees are the direct holders of the equity interests, and in the case of Chrysler, the VEBA trust also occupies the seat on the board of directors. This is merely a surface analysis that carries little weight. As discussed previously, although the VEBA trusts, and the assets within, are independently managed, contributions to the VEBA trusts by employers are subject to collective bargaining.⁶⁰ Therefore, the UAW determines the amount of money that is contributed to the VEBA trusts by employers

⁵⁶ *Id.* at 250; see also *Med.Found. of Bellaire*, 193 N.L.R.B. 62 (1971); *Centerville Clinics, Inc.*, 181 N.L.R.B. 135 (1970).

⁵⁷ Isidore, *supra* note 49.

⁵⁸ *Id.*

⁵⁹ 15 U. MICH. J.L. REFORM at 250.

⁶⁰ See *supra* p 10.

through its representative role in the collective bargaining process. Additionally, since the UAW negotiated for equity, it also has an interest and ability to maximize the value of that equity in the trusts by supporting the two companies in their pursuit of maximum performance. Clearly, the UAW holds a direct enough interest to be subject to a conflict of interest. Additionally, the UAW holds a substantial pecuniary interest in Chrysler and GM. Through its VEBA trusts, the UAW has the majority stake in Chrysler with a 55% interest in the company's equity. A union possessing majority control over one of the Big 3, and a substantial stake in another, is a concept that has never been conceived throughout the history of labor relations in the United States. "The United Auto Workers has never had the power of the General Motors Corporation in terms of funds. They didn't have the lasting financial resources."⁶¹ Taken together, the UAW contradicts the NLRA, and violates the section 7 right of the Act, through its conflict of interest that is both direct and financially driven through the equity interests of the VEBA trusts.

Perhaps equally as important as the application of the legal analysis, the conflict of interest is factually inherent in the UAW's relationship with both Chrysler and GM. With such substantial equity interests in the companies whose employees they represent, the UAW stands as an advocate for both management and labor. "I see it as a major problem for the UAW" said Gary Chaison, professor of industrial relations at Clark University in Worcester, Mass. "They didn't intend on owning a failing company. They want to remain the workers' bargaining agent, not their employers."⁶² Such a divided interest, meaning standing on both sides of the adversarial model, puts the UAW in a very uncomfortable position. "Experts say union leaders are worried about being . . . blamed by membership if management of the automakers needs to make additional plant closings or layoffs down the road to be competitive. Both GM and

⁶¹ 42 U. MIAMI L. REV. at 320.

⁶² Isidore, *supra* note 49.

Chrysler have already signaled plans to do [so].”⁶³ Under these circumstances, how can the UAW collectively bargain with itself? From the employees’ perspective, the UAW wants to maximize employee wages and benefits. From the management’s perspective, the UAW wants to maximize performance to increase the value of its equity interest. This is an inherent conflict of interest because maximizing performance often requires reducing employee wages and benefits.

In sum, the UAW has a divided interest that puts it on both sides of the adversarial model. This, in turn, creates a conflict of interest that violates the NLRA because of the UAW’s direct and substantial pecuniary interests in Chrysler and GM, and the inherent conflict of interest that exists under the circumstances. For many of these same reasons, the UAW also fundamentally contradicts the adversarial model of the NLRA and some of its core provisions.

The adversarial model of the NLRA allows for a logical tension between capital and labor because management has separate goals from those of its employees. “The purpose of unions was to maximize wages and better the terms and conditions of employment for their members . . . the goal of managers, on the other hand, was to minimize labor costs and secure a competent work force at the lowest wage the market permitted.”⁶⁴ With its divided interests, the UAW is simultaneously acting like a manager and an employee representative. The terms of the Chrysler collective bargaining agreement are a case in point: “the accord would provide the union with regular updates from the company on its long-term strategy and product plans . . . [including] quarterly updates and contributions by executives, CEOs, dealers, suppliers and other constituents”⁶⁵ Quarterly financial updates and long-term strategy planning are not information that is relevant for a party whose purpose is to collectively bargain on behalf of

⁶³ *Id.*

⁶⁴ 15 U. MICH. J.L. REFORM at 223.

⁶⁵ Kellogg and Maher, *supra* note 44-45.

employees for “rates of pay, wages, hours of employment, or other conditions of employment.”⁶⁶

The UAW’s access to this type of information, combined with its incentive to support the management of Chrysler and GM, completely undermine the adversarial model of the NLRA.

In addition to its conflict-of-interest violation of section 7, and the fundamental contradiction of the adversarial model that is embodied throughout the NLRA, the UAW also potentially violates section 8(a)(2) and places other provisions of the NLRA in question. Section 8(a)(2) states that it is 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”⁶⁷ Although this unfair labor practice was intended to apply to “company unions,” it may well apply to the UAW and its divided interest: “[judicial precedent] leave[s] no doubt that section 8(a)(2) should be applied broadly and interpreted to enforce a strict separation between management and labor.”⁶⁸ Also, it is a per se rule with a low threshold: according to the NLRB, the mere “potential” for employer domination is enough to trigger an 8(a)(2) violation.⁶⁹ Since the UAW has a financial incentive to support management—the more management succeeds, the more money will accrue in the VEBA trusts—its administration of the labor organization is interfered with, or at the very least, potentially interfered with.

The dual interests of the UAW put other provisions of the NLRA in question, and the ambiguities created are further evidence that the Act was not intended to allow for a labor organization to act in such a blended capacity between labor and management. The definitions section of the NLRA is good example of the confusing identity of the UAW. For instance,

⁶⁶ 29 U.S.C. § 159(a) (2009).

⁶⁷ 29 U.S.C. § 158(a)(2) (2009).

⁶⁸ 96 YALE L.J. at 2031; *See also* *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241 (1939); *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

⁶⁹ 13 MIDWEST L. REV. at 77; *See also* *S.W. Motor Lines, Inc.*, 236 N.L.R.B. 938 (1978).

“employer” is defined as “any person acting as an agent of an employer, directly or indirectly.”⁷⁰ Under this definition, there is no question that the UAW falls within the meaning of employer. However, the definition also excludes “anyone acting in the capacity of officer or agent of such labor organization” from the status of employer.⁷¹ Congress may have provided this exemption so that labor organizations could negotiate more freely and intimately with management without crossing over to management status. It is very doubtful, however, that Congress intended to expressly exclude a labor union that has the controlling equity interest in the employer company from the status of “employer” because such a situation was never conceived, as proven by the emphasis that labor and management are “antagonistic entities”⁷² in an adversarial model. In addition to arguably meeting the definition of “employer,” the UAW obviously satisfies the meaning of labor organization: “The term ‘labor organization’ means any organization . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Since the UAW may meet two opposing definitions, and those definitions represent the opposite ends of the adversarial model in labor relations, critical pieces / underpinnings of the NLRA are put into question.

“Fiduciary Responsibility of Officers of Labor Organizations”⁷³ is another important provision in the NLRA that needs to be addressed in light of the UAW’s divided interest. Congress values fiduciary responsibility in this context as evidenced by its negating of any exculpatory provisions in the bylaws or constitutions of labor organizations that attempt to shield

⁷⁰ 29 U.S.C. § 152 (2009).

⁷¹ *Id.*

⁷² 15 U. MICH. J.L. REFORM at 236.

⁷³ 29 U.S.C. § 501 (2009).

any person from liability stemming from a breach of fiduciary duty.⁷⁴ Subsection (a) describes the fiduciary duties as:

It is, therefore, the duty . . . to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and . . . 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 organization⁷⁵

With its VEBA trusts, the UAW properly holds its “money and property” solely for the benefit of the union. However, the investment equity holdings cause it to cross the line and deal “in behalf of an adverse party in any matter connected with [its] duties.”⁷⁶ By dealing and supporting managerial matters within Chrysler and GM, the UAW holds a pecuniary interest that directly conflicts with it as a labor organization. The actions of the UAW seem to systematically contravene the fiduciary responsibilities required under the NLRA, but the section specifically applies to “officers” of labor organizations.⁷⁷ An officer in a labor organization is defined as “any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.”⁷⁸ It appears that no officer from the UAW has breached his or her fiduciary duties with respect to the Chrysler and GM transactions. In fact, the UAW president is on record that he wants to sell the equity interest as soon as possible: “UAW president Ron Gettelfinger said the union hopes to sell its stake in both companies quickly because he is more interested in raising cash to cover retiree health care costs

⁷⁴ *Id.* at § 501(a).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ 29 U.S.C. § 402(n) (2009).

than having an ownership stake in GM . . . and Chrysler.”⁷⁹ The divided interest of the UAW puts the fiduciary responsibility component of the NLRA into question because while individual officers seem to comply with the section, the actions of the union as a whole directly violate it.

Even if the NLRA provisions are not put into question by the UAW’s divided interest between labor organization and managerial supporter, this dual status, at the very least, contradicts the pragmatic roots of the NLRA. The earlier analysis of the Wagner Act made it clear that the Act was narrow and deliberate with its focus on bargaining power as a means of addressing labor relations. Simply put, the Wagner Act, and NLRA thereafter, were not designed to be tools of broad domestic economic policy.⁸⁰ The UAW may well have had the employees’ best interests in mind when it took equity stakes, by way of its VEBA trusts, in Chrysler and GM in lieu of debt. “This isn’t about finance, it’s about people that expected health care benefits for life.”⁸¹ In fact, the auto industry may well have collapsed without this deal, and it goes without saying that this would have resulted in catastrophic economic shock by way of thousands of lost jobs in primary and secondary sectors of the economy. The actions taken by the UAW and North American governments are consistent with removing industrial “unrest” that would “obstruct[] commerce” at the grandest levels, much like that considered during the Great Depression, which led to the Wagner Act and this solemn declaration in its preamble.⁸² In fact, history may one day validate the involvement by the United States government as brilliant domestic economic policy. Regardless of the consequences on the auto sector in the United States, the strategic aim of the U.S. government, and the UAW’s willingness to accept direct equity interests in lieu of debt, these actions amount to a move of domestic economic policy that

⁷⁹ Isidore, *supra* note 49.

⁸⁰ 42 U. MIAMI L. REV. at 310.

⁸¹ Associated Press, *Chief Says UAW Will Sell Its Chrysler Stock*, May 4, 2009, <http://www.msnbc.msn.com/id/30568354/> (last visited Mar. 28, 2010).

⁸² *See* 29 U.S.C. § 151 (2009).

was cast upon the auto industry through the auspices of the NLRA. Again, the NLRA was not designed to be a tool of economic policy. Therefore, if Congress or the NLRB allow the UAW to continue with its divided interest, then they will effectively be endorsing a fundamental contradiction of the NLRA's adversarial model.

V. TRANSFORMATION TOWARDS COOPERATION

The UAW's divided interest that puts it in a position of supporting both capital and labor violates core principles of the NLRA because the union has a more cooperative relationship with Chrysler and GM than the traditional adversarial relationship that has long defined labor relations in the United States. Both the U.S. and the world have changed dramatically since the Wagner Act went into effect during the Great Depression. As of late, modern economic theory views the world as interconnected and "flat," which means the fate of the world's economies, in many respects, directly depend on one another. Consequently, labor is easier to come by in poorer nations at a far lower price with virtually no government regulation. This has led to the outsourcing of countless American manufacturing jobs, which has strained both employers and labor organizations in different ways. Considering the economic realities of the 21st Century, perhaps it is time for Congress to consider adopting a more cooperative model in place of the traditional adversarial model of the NLRA. "It is in this context that Congress must ask itself whether the adversarial model is still effectively serving the interests of America's workers and managers . . . [because] in an era of increased competition from abroad, the interests of American workers and managers are quite often compatible."⁸³

With these considerations in mind, there is one question that needs to be asked: does Congress wish to maintain an adversarial model or adopt a new cooperative model? This is the

⁸³ 96 YALE L.J. at 2039.

critical question that must be both asked and answered in order to comprehend what labor relations in the United States will look like in the 21st Century. Specifically, it will clarify whether the UAW can operate with such divided interests and be revered as the modern-day labor organization that transformed the adversarial model of the NLRA towards a more cooperative replacement, or whether it is operating under a clear conflict of interest that directly violates the NLRA's section 7 right of collective bargaining and contradicts the fundamental principles of its adversarial model.

If Congress wishes to maintain and support the current form of the UAW as both a labor organization and vested stockholder in Chrysler and GM, then it should make this position clear by amending the NLRA to reflect a legal shift towards a cooperative model away from the historic adversarial model. "Repeal of section 8(a)(2) would allow the creation of a two-pronged system in which American workers could choose between the adversarial and cooperative models, depending on the needs and desires of the particular group of workers."⁸⁴ I am not taking a position as to whether Congress should in fact adopt a more cooperative model in its approach to labor relations. Rather, I am arguing that Congress needs to take a definitive position, one that expressly endorses a cooperative model or one that supports the existing adversarial model. If Congress allows the UAW to continue with its divided interest and passively endorses a more cooperative approach, then Congress is putting labor relations in a state of legal disarray because this ambiguous position runs counter to the most fundamental concept behind the National Labor Relations Act: the adversarial model that requires constant conflict between capital and labor.

The essentials of the collective bargaining, or adversarial model are diametrically opposed to those of the cooperative, or 'integrative' model. The former posits an inherent conflict of interest between management and labor, while the latter sees

⁸⁴ 96 YALE L.J. at 2021.

their goals as compatible. The former requires to independent, autonomous entities while the latter requires integration of the parties . . . Given the diametrically opposite nature of these two models, *the Act cannot simultaneously encourage one while remaining neutral between the two.*⁸⁵

Clearly, this is a complex issue within the spectrum of labor law, and upon being addressed by Congress, the NLRB, or the courts, will prove to be very informative of the direction that labor relations in the United States will head in the upcoming years of the 21st Century.

VI. CONCLUSION

The adversarial model is clearly the defining characteristic of the NLRA. The relationship of capital v. labor was deliberately left intact by the NLRA, as demonstrated by the original intent behind the Wagner Act. This adversarial relationship is best demonstrated by the only substantive right provided in the NLRA—the employees’ right to collective bargaining. The UAW’s equity interest in Chrysler and GM, through its VEBA trusts, both violates the NLRA and fundamentally contradicts the adversarial model. The UAW’s position on both sides of the capital v. labor relationship as an employee bargaining agent on one side and a supporter of management on the other, violates the NLRA by infringing on the employees’ Section 7 rights through an unlawful conflict of interest. For these same reasons, the UAW fundamentally contradicts the adversarial model and puts some of the NLRA’s core provisions into question, leaving the ambiguities as further evidence that the Act was not intended to allow for a labor organization to act in such a blended capacity.

Ultimately, the UAW’s divided interest represents a more cooperative relationship with Chrysler and GM than the traditional adversarial relationship that has long been the foundation of the NLRA and labor relations in the United States. I take no position as to whether a cooperative model is a better system than the existing one; rather, I take a firm stance that

⁸⁵ 96 Yale L.J. at 2033 (emphasis added).

Congress must make a clear decision on the matter to avoid any more legal confusion that may surround the UAW and the NLRA. Upon such a decision, the fate of the UAW and its impact on the NLRA will be resolved, and the UAW's relationship with Chrysler and GM will be considered either as a clear violation and contradiction of the NLRA and its adversarial model, or the moment in time when the UAW transformed labor relations in the United States and paved the way for a more cooperative model for the 21st century.