September 2006

Worker Centers: Emerging Labor Organizations - Until They Confront the National Labor Relations Act

David Rosenfeld

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https://doi.org/10.15779/Z38XP7T

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REVIEW ESSAY

Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act

David Rosenfeld†

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† Partner, Weinberg, Roger & Rosenfeld, a union-side law firm, in Alameda, California. B.A. 1966, Brown University. J.D. 1973, University of California, Berkeley School of Law (Boalt Hall). Lecturer, Boalt Hall. The author appreciates the assistance of Eli Naduris-Weissman, Jesse Jacobsen and Puneet K. Sandhu. The views expressed here are his own.
There is no crisis for working Americans and the labor movement. By any measure, the strength of organized labor and the vitality of the working class have been declining steadily for thirty to forty years. Such a continuing erosion of strength is hardly precipitous enough to be considered an immediate crisis. Two new books dramatically illustrate the long-term failures of workers and their traditional institutions and effectively describe the efforts of the worker center movement to fill the void in advocacy for low-income workers.

Worker Centers: Organizing Communities at the Edge of the Dream (Economic Policy Institute, 2006) by Janice Fine and Suburban Sweatshops: The Fight for Immigrant Rights (Belknap Press, 2005) by Jennifer Gordon offer two different but complementary views of the worker center movement. Jennifer Gordon offers an insider’s view of the worker center, known as the Workplace Project, she established and guided on Long Island known as the Workplace Project. Janice Fine provides us with a broad and comprehensive survey of the nationwide movement and a keen outsider’s view. Both tender the same conclusion: The worker center movement is too small to have any significant impact on working people generally. They each argue, nonetheless, that worker centers have achieved positive results, in limited respects, often reaching beyond those whom they immediately serve.

This review examines worker centers as a vehicle for advancing the rights and enhancing the economic strength of low-wage workers. It concludes that the law presently offers little remedy for workers and the National Labor Relations Act is an impediment to significant advances by worker centers. The worker center movement has yet to come to grips with this problem, which will limit its growth and effectiveness. This review

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WORKER CENTERS calls this, with some irony, the "labor organization problem." As they grow in number and scope, worker centers will have their development and effectiveness arrested by the very problem they were designed to avoid: the regulation of and restrictions on labor organizations under the National Labor Relations Act (NLRA).

Janice Fine’s book analyzes the worker center movement recognizing its very limited impact but also highlighting its strengths. Fine identified 137 worker centers in operation as of May 2005. She defines worker centers as “community-based mediating institutions that provide support to and organize among communities of low-wage workers.” They have diverse organizational structures, goals, and community bases. They focus on the immigrant workforce population. In doing so, they assist workers in making legal claims, organize direct action campaigns against employers, train and educate leaders in immigrant communities, advance legislative goals, and pursue other activities.

Jennifer Gordon’s book describes the activities of the Workplace Project on behalf or workers and trumpets the enactment of the Unpaid Wages Prohibition Act in New York State, which provides for penalties on employers who do not pay employees wages that are owed. Nevertheless, the reader is left with the same sense of frustration that American workers experience: There is little low-wage workers can do about their plight without significant legislative changes or a dramatic resurgence of the labor movement.

Both books converge on a concept described by Janice Fine as a “pre-union” and by Jennifer Gordon as “strategic alliances.” The important question raised by these books, and considered by this review, is the extent to which the worker centers can serve as “pre-unions” and can create a permanent structure for low-wage workers separate from, but in coordination with, the labor movement. Fine is more sympathetic to the establishment of a permanent structure coordinated with the traditional labor movement. Gordon is less willing to find a close relationship with the traditional labor movement.

No statute explicitly recognizes the worker center. Worker centers run the risk, however, of ultimately becoming a “labor organization” within the meaning of federal law, particularly the National Labor Relations Act and the Labor Management Reporting and Disclosure Act. If a worker center becomes a “labor organization” and creates a permanent structure for

3. NEW YORK LAB. LAW §198-a (2005).
6. Id. § 401 et seq.
workers either within an industry or of a particular employer, it immediately suffers from the restrictions imposed by federal law. The potentially counterproductive impact of federal law on worker centers demonstrates the need for realistic change in federal laws to allow workers to find alternative expressions to enforce their rights.

This review considers the strange outcomes that would result from the regulation of worker centers under traditional federal labor laws, which were designed for another era. As a preliminary, I briefly describe the worker center movement. After discussing both Janice Fine's and Jennifer Gordon's books, I turn to the definition of "labor organization" under the National Labor Relations Act. The definition is so broad as to sweep most worker centers into the ambit of the NLRA. Worker centers do not want to be unions or compete with unions. Yet as they become more effective they act like and may be determined to be labor organizations regulated by the very laws that are designed to regulate unions. They will see that this transition, which may occur sooner than the worker center movement understands, will become a natural impediment, if not a complete barrier, to the development of the worker center cause.

II.
WORKER CENTERS: FROM NINETEENTH CENTURY MUTUAL AID SOCIETIES TO A MODERN MOVEMENT

A. Worker Centers as an Alternative to Unions Long Before the NLRA Encouraged the Development of Unions

In the absence of unions, workers traditionally have developed other forms of collective entities.7 In this country of immigrants, worker centers long have been a central institution in integrating immigrant workers into the workforce and society. The activities undertaken by modern worker centers are nothing new. The modern worker center movement is a revival in somewhat different form of working class organization.

In the late nineteenth century, mutual benefit societies developed throughout the country. These associations provided the only means for workers to secure insurance in case of sickness, job loss, or accident.8

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7. Neither Fine nor Gordon recounts the venerable history of worker centers that is indispensable to a full understanding of the modern worker center movement. Gordon does not refer to the kinds of worker centers that flourished in the nineteenth and twentieth centuries; she traces the movement to only the last two decades. GORDON, supra note 4, at 26-32. Fine acknowledges the forms workers centers took, particularly during the past waves of immigration. FINE, supra note 2, 27-41.

Mutual aid societies have specific protection under the law that continues to this date. They are one form of alternative organization to provide benefits that are now commonly provided by employers either through workers' compensation insurance or employer-paid health insurance.

In the first half of the nineteenth century, the common laborers building the canals in the eastern part of the country formed secret societies, often short lived, to respond to grievances. Some of these engaged in factional fights to preserve jobs for their members. Similarly, various organizations developed in the second half of the nineteenth century to fight for the eight-hour day, not unlike the efforts today to establish a living wage. These associations encompassed not only a group of workers in a particular trade but often were regionally based and sought the same legislative goal.

Some unions arose out of such workingmen's associations. For example, the militant United Mine Workers had its precursors in the Workingmen's Benevolent Association, which existed alongside the Ancient Order of Hibernians and the Molly Maguires: These early worker organizations focused on many of the tasks undertaken today by workers centers.

Unions in New York City developed their own health care delivery system before the rise of employer-provided health insurance, thus serving a function many worker centers serve today. Health care is just one of the services that worker centers can and do provide.

Since the passage of the National Labor Relations Act and the growth of unions in the 1930s and thereafter, the need for these kinds of alternative organizations for workers declined. In the period between the wars, the rise of unions displaced many of the community organizations that had previously supported workers. Lizabeth Cohen brilliantly describes this

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9. For example, California law recognizes a corporate entity known as a Nonprofit Mutual Benefit Corporation. CAL. CORP. CODE §§ 7110-8817 (2006). Moreover, because of the Employee Retirement and Income Security Act of 1974 (ERISA), the benefits provided by these mutual benefit societies are now far more regulated. ERISA regulates pensions, health plans and other forms of benefit plans provided by employers. 29 U.S.C. § 1001 et seq. (2000).


12. Ultimately, these efforts led to the infamous decision of Lochner v. New York, 198 U.S. 45 (1905), in which the Court applied a substantive due process rationale to invalidate a New York statute prohibiting employees from working more than sixty hours per week or ten hours per day in a bakeshop. See PAUL KENS, LOCHNER V. NEW YORK: ECONOMIC REGULATION ON TRIAL (1998); DAVID MONTGOMERY, BEYOND EQUALITY: LABOR AND THE RADICAL REPUBLICANS, 1862-1872 (1987).


history in her book about the rise of the CIO and the influence of the New Deal in Chicago.\textsuperscript{16}

I point out these examples only to lay the foundation for the role that worker centers can play in modern employment relationships. The resurgence of such alternative organizations today reflects the void created by the decline of unions. There is one remarkable difference, however. The institutions that workers relied upon to supplement unions—or in some cases substitute for unions where they did not exist—did not rely on the law: They were not legal clinics. Only the modern worker center relies on the law as a remedy. Therein lies its weakness.

\textbf{B. Jennifer Gordon's Insider's View of Worker Centers}

Jennifer Gordon arrived on Long Island in 1992 armed with knowledge of Spanish and a grant to explore the possibility of setting up an immigrant worker center among Central American immigrants. Recently graduated from Harvard Law School, she came ready to seek a solution for the problems facing this growing immigrant work force in a community that ignored them as part of the underground economy.\textsuperscript{17} Out of this was born the Workplace Project. Gordon's book tracks the progress of this worker center during the six years she directed the project until her departure in 1998. The book therefore reflects a broad overview of the issues facing low wage immigrant labor and the efforts to assist them.

The book is organized around three phases of organizing used at the Workplace Project, each centering on different uses of the law. First, there was the effort to enforce the law. Second, there was the effort to educate and organize around legal and "rights" education. Third, there was the effort to enact stronger wage protection. The Workplace Project coordinated each of these phases with worker organizing efforts, although the goal of such organizing was not necessarily to create unions. Rather the primary aim was the empowerment of workers and the improvement of working conditions. One theme of the book is that legal efforts divert from organizing and sometimes undermine the development of long-term organization.

Gordon describes the social context of the Workplace Project: a Long Island that had attracted a considerable population of immigrant workers almost exclusively from Central America. They live amidst the suburban Long Island communities and accept the lowest paying jobs: gardening, food service, building cleaning, construction, childcare and the like. Virtually all of these immigrants are undocumented.

\textsuperscript{16} LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1938 (1990).

\textsuperscript{17} E.g., Scott Cummings & Ingrid Eagly, Lawyers, Unite, \textit{LEGAL AFFAIRS} (March/April 2005), available at http://www.legalaffairs.org/issues/March-April-2005/review_cummings_marapr05.msp.
Gordon notes the repeated failure of enforcement of New York’s relatively advanced wage and hour laws. Most of the legal battles undertaken by the Workplace Project arose in unpaid wage situations. Sometimes the threat of legal action paid off; however, often when legal action was successful, collection of the judgment was impossible. Thus, this tactic was not particularly useful. Gordon relates, for example, how in some cases direct collective action by way of picketing an employer was more successful than the threat of legal action. These observations are reflective of the overall problems encountered by worker centers and worker advocates. Although sometimes successful, this legal clinic approach seems to be less successful in the long run because of the lack of effective laws and the absence of effective enforcement of those laws that exist. After all, employers have an incentive to try to get away with underpaying or not paying at all. The worst that can happen is that the employer has to pay all of the money it owed the worker anyway, except in those rare situations where the law imposes an effective remedy.\footnote{The liquidated damages remedy of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (2000), provides double damages but does not seem to do much to ensure compliance. Fine, supra note 2, at 197-200.}

Under this regime there is a strong incentive to cheat.

The second approach to worker organizing Gordon discusses is worker education. The Workplace Project initiated a program to educate workers about their workplace rights. The ultimate goal was to build and sustain “a participatory membership organization of immigrant workers.”\footnote{Gordon, supra note 4, at 147.} Ultimately, only those who went through the workers’ rights training were allowed to pay dues and join. Consider the different position of workers in unions under the NLRA. Under the Act an employee can keep his job and demand union representation by either meeting the financial core obligation where there is a union security obligation or by free-riding—not paying anything—where there is no union security obligation.

Like all worker centers, an enduring problem at the Workplace Project was developing incentives for workers to maintain active involvement. Most workers who come to the Workplace Project have been terminated by their employer and are seeking unpaid wages. They have no continuing interest in the worker center services beyond receiving legal assistance to recover those wages. This is like union members who lose their employment and have no continuing membership interest in the union, unless the union operates on the hiring hall model where the member continues in the industry.

Gordon relates the Workplace Project’s approach to this problem of worker commitment. She calls it “Rights Talk.” This means mobilizing the immigrants around rights, both legal and moral, which they must enforce or
create. She recounts the use of Rights Talk in other reform movements; most notably the civil rights movement. By creating rights to which the members of the Workplace Project believe themselves entitled, they learn to assert those rights. Members become organized and mobilized to create and assure rights for themselves and for members of their community. The discussion, supported with appropriate academic and political references, reminds us that no organization can endure without a "consciousness and identity."\textsuperscript{20}

Gordon then poses the fundamental contradiction affecting every such organization. The enforcement function of any clinic encourages and satisfies the individual goals of redressing individual wrongs and discourages collective action. How then can this effort be "shaped to work in tandem with an organizing effort, to serve collective goals even as it vindicates individual rights"?\textsuperscript{21} Gordon found that "it was increasingly evident that the successful provision of legal services in the employment context often co-opted potential leaders."\textsuperscript{22} Does Gordon solve this problem? No, but she points out a number of strategies to respond. For example, legal services were only offered to those who chose to join and support the organization, including committing to various levels of participation, creating a problem I address below.\textsuperscript{23}

After Gordon left the Project, a new format was developed. Labeled "La Alianza Para La Justicia," workplace problems were presented to committees that created group strategies to resolve the problem instead of through individual action. Although the law remained one of the strategies utilized by these committees, legal enforcement actions were de-emphasized.\textsuperscript{24}

Towards the end of her relationship with the Project, the debate between the legal clinic model versus the organizing model arose again:

On one side were those who believed that the reconfigured clinic still failed to attract workers who would stay to organize, and that it sent the wrong message about the group's purpose and method. Other members and staff argued that the legal clinic built the organization's good reputation in the

\textsuperscript{20} Id. at 184.
\textsuperscript{21} Id. at 185.
\textsuperscript{22} Id. at 193.
\textsuperscript{23} Under the NLRA, unions must fairly represent all members of a bargaining unit, not just union members. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).
\textsuperscript{24} See Saru Jayaraman, Letting the Canary Lead: Power and Participation Among Latina/o Immigrant Workers, 27 N.Y.U. REV. L. & SOC. CHANGE 103 (2001-02). Ms. Jayaraman succeeded Ms. Gordon at the Workplace Project after a short period of other leadership. This article mentions "a campaign to remove the abusive supervisor [of a janitorial company] and democratize the Long Island district of their union." Such efforts, which unions may see as interference with their interests, have caused some tension between worker centers and unions. GORDON, supra note 4, at 289-90; FINE, supra note 2, at 120-56.
community and provided a critically necessary service, one available nowhere else.\textsuperscript{25} This is the continual struggle in an effort to achieve grassroots goals in a clinical setting and to maintain and grow a worker center. When Saru Jayaraman took over the Workplace Project, she guided the center towards an approach that prioritized organizing over the pursuit of legal relief. She implemented a new system known as "the committees." Each worker with a problem participates first in a workshop without the involvement of attorneys. The worker then meets with a committee, either an industry committee or unpaid wages committee. Referrals to lawyers are the last resort. Instead, committees use direct action with worker involvement to resolve workplace issues. Gordon has her doubts: "[T]he clinic's determination to put lawyers at a greater remove sharpens my questions about how much organizing is served by denying legal support or delaying it considerably."\textsuperscript{26}

The Workplace Project illustrates the formidable challenges in resolving the problems of the workplace. A legal clinic alone can only help so many.\textsuperscript{27} Gordon's book is effective: It is not an exposé but a reflection of the very difficult task of improving the lives of low-wage workers. She teaches us that it is difficult to organize and maintain a project to assist low-wage immigrant workers while showing us the various structures, approaches, and goals that an organization can apply to these intractable problems. Her project tried various combinations of these approaches and none was demonstrated to be the best approach; each was only a partial solution. Once we accept the proposition that a worker center can have only a very limited sphere of influence, we can appreciate its success for those workers whose lives it improves directly and indirectly.

Janice Fine begins where Jennifer Gordon ends her story. She shows us the broader impact of the worker center movement across the country. Just as one individual local union can only affect a few workers, only the larger labor movement or worker center movement can have a regional or national impact.

\section*{C. Janice Fine's Outsider's View}

Janice Fine has put together a wonderful and thorough survey of the worker center movement. It is an encyclopedia of the various forms of worker centers and their efforts to assist immigrant workers. Her book

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{25} Gordon, \textit{supra} note 4, at 212-13.
\item \textsuperscript{26} \textit{Id.} at 217.
\item \textsuperscript{27} Gordon makes only brief reference to laws lawyers can use to resolve any workplace wage issue. \textit{Id.} at 249. Although this is likely because Gordon wishes to emphasize that Workplace Project's approach was not legal, it nonetheless demonstrates an important point: the available law to support any claim is minimal.
\end{enumerate}
\end{footnotesize}
categorizes and analyzes the various forms and strategies used by these centers. She examines virtually all aspects of the movement: internal organization, reform efforts, relationships with unions, coalitions with other groups, finances, immigrant rights issues, and relations with other worker centers. Her book complements Gordon’s book. There appears to be no disagreement between them about these institutions and what they serve or accomplish. Fine’s book, however, is intended as a survey and therefore methodically covers aspects of worker centers not touched upon in Gordon’s book because her book is an autobiographical story about the Workplace Project with a few references to other worker centers.

There is, however, a difference in tone that is important. When the reader is done with Gordon’s book, he understands well the difficulties and contradictions of establishing, operating and making a successful worker center. Fine’s book leaves the reader with the more optimistic view of the worker center movement’s potential for effectiveness and success. This difference in tone is probably deliberate. Gordon describes the view from the worker center trenches, relating the continual struggle for identity and success. Fine observes from her extensive studies of worker centers. Although she reaches similar conclusions and recognizes the problems that Gordon relates, Fine’s book leaves the reader with a sense of purpose and accomplishment. Gordon’s book leaves the reader with a feeling of frustration because it reflects, in sharp relief, the difficulties of the work of low wage immigrant worker advocates.

Fine defines worker centers as “community-based mediating institutions that provide support to low-wage workers.” The book describes the external and internal variations of these institutions. She describes the immigration patterns that have led to the need for worker centers and argues that they are replacing institutions that formerly existed to assist immigrants. She points out the various services that they provide that in many cases go well beyond resolving workplace problems.

Fine writes about the variety of clinic approaches employed by worker centers. For example, she describes one clinic that can boast of two hundred volunteer lawyers, although most worker centers operate with few and in some cases no lawyers.

Fine concludes with an assessment of the strengths and weaknesses of worker centers: “The greatest strengths of worker centers include their successful leadership development programs and their success in winning improvements in the employment situations of low-wage workers.” She asserts that worker centers “provide a collective voice for low wage

28. Fine, supra note 2, at xii.
29. Id. at 2.
30. Id. at 78. Some worker centers offer legal assistance in other types of matters such as family law issues, consumer issues, taxes, etc.
31. Id. at 248.
WORKER CENTERS

workers to express themselves and an openness to organizational change and experimentation.\textsuperscript{32}

What Fine gives to worker centers she appropriately takes away with her assessment of their weaknesses: "The major weakness of immigrant worker centers are their relatively small memberships, the limited capacity they have for deep industry based research, and problems with their financial stability."\textsuperscript{33}

Consider the Workplace Project. In approximately two years, the project "accepted 234 wage cases for representation and resolved 71 percent of them winning over $215,000 for 166 workers during that time."\textsuperscript{34} Over the period, 900 Latino workers had sought help from the project’s legal clinic.\textsuperscript{35} This sounds like a very small impact: a little over $100,000 collected in claims per year. There were 7,000 private employers on Long Island within the reach of the Workplace Project.\textsuperscript{36} Another statistic gleaned from Gordon’s book is membership. There were approximately 500 members of the project although only ten to twenty percent were active at any one time.\textsuperscript{37} This is a small number, assuming a population of approximately 280,000 Latinos on Long Island.\textsuperscript{38}

Both Gordon and Fine argue that the impact of worker centers is broader than the numbers suggest. Workers who move through the centers become organizers and leaders. The centers have a moral impact by exposing the problems of low-wage workers. In some cases, worker centers have effectively mobilized and lobbied to pass beneficial legislation. Some employers probably correct abuses fearing that workers will end up obtaining the assistance of the worker center. It is difficult to measure worker centers’ impact as there are few comprehensive studies of the effectiveness of worker centers.\textsuperscript{39}

First, the law does not assist immigrants who are undocumented. \textit{Hoffman Plastic Compounds}\textsuperscript{40} is nothing new. It has never been legal to

\textsuperscript{32} Id.
\textsuperscript{33} Id. at 252. Fine and Gordon each recognize this critical funding problem. Worker centers are not financed by collecting dues from those whom they serve. Unions, by contrast, depend on member dues. This funding problem is a particular vulnerability of worker centers. The Workplace Project depended substantially on foundation support. \textit{GORDON, supra} note 4, at 108.
\textsuperscript{34} \textit{GORDON, supra} note 4, at 243.
\textsuperscript{35} Id. at 242.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 70.
\textsuperscript{38} Id. at 18.
\textsuperscript{40} \textit{Hoffman Plastic Compounds}, Inc. v. NLRB, 535 U.S. 137 (2002). In \textit{Hoffman Plastic Compounds}, the Court held that undocumented workers, although "employees" within the meaning of
hire undocumented workers, which forces such workers into the underground economy. As a result, undocumented workers have been prevented from seeking redress through the courts for most legal problems.\textsuperscript{41} This inability of undocumented workers to obtain a remedy for labor law violations is part of our legal fabric.

The second lesson is that while undocumented workers are “employees” within the meaning of the National Labor Relations Act,\textsuperscript{42} their protections under the law are virtually meaningless. Undocumented workers can vote in NLRB elections, yet they have no real protection from employer retaliation. It is not clear that unions have an enforceable duty of fair representation toward undocumented workers. They have questionable protection from discharge under the terms of a collective bargaining agreement. In some circumstances, they can collect unpaid wages or overtime if they avoid deportation or are willing to remain in this country long enough to allow the legal proceedings to be completed. If undocumented workers engage in collective action, they can be fired and the employer only need post a notice to other employees that it has successfully fired one or more employees in violation of the Act without other remedy or consequences.\textsuperscript{43} Rather than serving as a remedy or consequence for illegal firing, such a notice demonstrates the employer’s success in illegal firing and may intimidate remaining workers.

In summary, Fine’s survey of worker centers focusing on the immigrant worker community is best read for what it is: a catalogue of opportunities, ideas and programs for low wage workers immigrants and non-immigrants. She has got the worker center movement right and anyone who is interested in understanding what can be accomplished should read the book. She is able to fit the worker center movement into the labor movement—and that is where we meet the “labor organization” problem.

\section*{D. Worker Centers as Collective Action}

Both Jennifer Gordon and Janice Fine suggest that collective action by workers is sometimes the most successful approach to workplace problems.


In the case of the Be-Bop Bagel shop, described in Gordon’s book, two workers were owed overtime and minimum wages. The Project contacted the owners who conceded that money was owed but refused to pay anything. The Project began bringing pressure on the shop with two protests in May of 1997. Court action was followed by more protests, using leaflets. The owners finally settled.44 This campaign sounds like traditional labor union activity.

The Be-Bop Bagel Shop campaign is an example of one type of worker center campaign. In many cases the Project would pursue an employer and engage in a campaign of contacts, letter writing and, if necessary, seek redress in court or via administrative action. In essence, the Workplace Project would attempt to deal with an employer until the dispute over wages or other conditions of work was resolved. These phrases, “deal” and “wages” and “other conditions of work,” track legally significant language from the National Labor Relations Act.45 I explore these phrases and their special significance in Part III.

Janice Fine calls this type of activity “Economic Action Organizing.” She describes the campaign of the Korean Immigrant Worker Advocates (KIWA).46 KIWA launched a campaign to improve wages and working conditions in the Korean restaurants where it had previously handled claims and protests for Korean workers on an ad hoc basis. The campaign targeted the Korean Restaurant Owners Association and certain members, including the largest restaurant in the organization. Fine reports that the sustained campaign resulted in measurable improvement, including forcing restaurants to pay the minimum wage. She notes, “[T]he idea is that RWAK [Restaurant Workers Association of Koreatown] will grow and will get powerful enough so that the association can meet with the owners association and create a policy and try to get rid of all the negative aspects of working in restaurants.”47 What she describes is precisely the function of a union or labor organization.48

The experience of KIWA, the Be-Bop Bagel campaign, and similar struggles demonstrate that worker centers, even if they do not embark on formal organizing drives to establish unions, act like unions, with the exception that worker centers generally do not seek recognition as the exclusive representative of a group of workers.49 This review explores

44. GORDON, supra note 4, at 200-02.
46. FINE, supra note 2, at 109-12.
47. Id. at 112. RWAK was a group of restaurant workers who sought to improve working conditions in Los Angeles. Fine notes, “[I]ts efforts to establish itself as a worker association that would operate as a quasi-union of restaurant workers.” id.
48. KIWA launched an organizing drive in the Korean markets that Fine describes as an effort to establish an independent union among grocery workers. That effort was unsuccessful. Id. at 139-43.
49. Part of this is certainly based on the implicit truce between worker centers and labor unions, which sometimes have seen themselves as competitors.
closely the possibility of labor organization status of worker centers. Neither Fine nor Gordon recognizes the potential barrier and threat the issue poses to the worker center movement. Both find terms to describe the collective action of worker centers that distance them from labor union direct action, although both recognize that worker centers do encourage pickets, organizing, boycotts, strikes, and other forms of concerted activity.

Employers will likely respond to the union-like tactics that worker centers employ to achieve their goals. One potentially successful employer response is to assert that the worker center is a "labor organization" within the meaning of the National Labor Relations Act. Such a designation would impose certain crippling restrictions on worker center activities. Worker centers currently run perilously close, if not crossing into, the regime of NLRA regulation. This barrier—potential regulation under the NLRA—ultimately may serve as a real limit on their effectiveness and growth.

III.
The Labor Organization Problem

A. The Extremely Broad Definition of Labor Organization

Worker centers may encounter the labor organization problem as they become more effective and engage in more collective action. This problem arises from the purposefully broad definition of labor organization found in the National Labor Relations Act. A "labor organization" is

any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.51

In this Part, I explore this definitional problem. I conclude that many worker centers may be "labor organizations" and subject to the restrictions of the National Labor Relations Act and the Labor Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act).52

The breadth of the definition of "labor organization" serves two important purposes that were intended to assist unions. First, Congress intended the broad definition to give a broad sweep to the prohibition in the NLRA against all forms of company unions—one of the prevalent anti-union tactics of employers in the 1930s. The second broad purpose is to

50. 29 U.S.C. § 152(5).
51. Id. (emphasis added).
52. Id. § 401 et seq.
allow nascent and informal groups to qualify as “labor organizations” for organizing purposes. In the first case, the employer wants the group to act in the place of a labor organization without being classified as one so as to supplant any employee-controlled union, a tactic Congress aimed to block via the broad definition of “labor organization.” In the second case, the broad definition promotes organizing by assisting a group that wants to act like a union so that it can have the sanction of an NLRB conducted election or other NLRA protections.

The definition arose because unions fought for a broad definition to defeat employer-dominated or -assisted labor organizations. On the other hand, in a few cases, formative groups have sought labor organization status to gain NLRA protection or procedures.

Worker centers are different. They do not want to be labor organizations, but they do want to act like them. Employers do not want them to be labor organizations and have the right to represent employees. It could become a useful tactic for employers to impose the restrictions of the NLRA and other federal laws on worker centers to set limits on their activity. There is no hint in the enactment of the NLRA that Congress contemplated this situation where a group did not want to be a labor organization. Only as the NLRA has become more restrictive have organizations attempted to avoid the reach of the law.

1. The Definition

A reading of the definition of “labor organization” demonstrates its extreme sweep. First, it is extremely broad because it encompasses “any organization of any kind, or any agency or employee representation committee or plan.” This definition imposes no structural requirement; in fact, “[a]ny group . . . may meet the statutory definition of ‘labor organization’ even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.”54 Worker centers that are incorporated or enjoy non-profit status have governing documents. Some worker centers may not have governing documents, but that is not necessary to acquire labor organization status. Even a committee that consists of a group of workers who meet on an irregular basis with no other structure falls within this definition.55 All worker centers described by Fine and mentioned by Gordon likely have more than enough structure to meet this aspect of the definition.

54. Electromation, Inc., 309 N.L.R.B. 990, 994 (1992), enforced, 3 F.3d 1148 (7th Cir. 1994). The Board’s decision references the legislative history to establish Congressional intent to cover all forms of employee representation groups that existed at the time of passage of the NLRA. Id. at 992-94.
55. Id.
The definition further requires that "employees" within the meaning of the statutory definition participate. Some groups would thus be excluded where, for example, all the members are not employees. In a few cases groups consist of independent contractors and are therefore not labor organizations. For example, Fine describes the New York Taxi Workers Alliance as a group of independent contractors excluded from the NLRA. So long as at least some of the employees are not independent contractors or not supervisors, however, the entity has employee participation. A committee composed entirely of farmworkers who are excluded from the definition of employee as agricultural laborers would not be a labor organization. If a few non-agricultural laborers joined the committee, however, it would become a labor organization.

Nor is there any requirement that the employees be employed by a single employer or in the same industry. The definition of employee "include[s] any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." The worker centers described by Fine and Gordon meet this criterion with the possible exception of certain groups of agricultural employees or domestic workers.

The definition also requires "participation" by employees. Since all worker centers are formulated based on some requirement of worker participation, they will probably always meet this part of the definition.

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56. 29 U.S.C. § 152(3).
58. Int'l Org. of Masters, Mates & Pilots of Am. v. NLRB, 351 F.2d 771 (D.C. Cir. 1965), enforcing 146 N.L.R.B. 116 (1964), supplementing 144 N.L.R.B. 1172 (1963), and supplementing 125 N.L.R.B. 113 (1959) (concluding that while supervisors comprised vast majority of union, it was a labor organization); Sierra Vista Hosp., 241 N.L.R.B. 631 (1979).
59. A labor organization consisting exclusively of Railway Labor Act employees would be excluded. Ass'n. of Prof'l. Flight Attendants, Advice Memorandum, 16-CC-694, 695, (1987), 1987 WL 103406 (N.L.R.B. C.C.). But see Air Line Pilots Ass'n, 345 N.L.R.B. No. 51, slip opinion n. 4 (2005) (holding that while overwhelming majority of members are governed by Railway Labor Act, ALPA is a labor organization where a small number of pilots are governed by NLRA).
60. For example, domestic workers generally are excluded from coverage by the NLRA. Fine, supra note 2, at 175. If a domestic worker is not employed directly by a family or homeowner but instead by a company which provides in-home domestic services, the worker would be subject to NLRB jurisdiction. Ankh Servs., Inc., 243 N.L.R.B. 478 (1979); 30 Sutton Place Corp., 240 N.L.R.B. 752, n. 6 (1979). See also Alan Hyde, New Institutions for Worker Representation in the United States: Theoretical Issues, 50 N.Y.U. L. REV. 385, 402-03, 404 n. 77 (2005-06).
61. Even a pure legal services program may include "participation." Involvement as "clients" is not functionally different than the relationship of worker to union representatives or worker center advocates. Lawyers acting on behalf of unions either as inside counsel or outside counsel have the same status for federal law purposes of union business agents. See Dahl v. Rosenfeld, 316 F.3d 1074 (9th Cir.
Indeed, both Gordon and Fine insist that worker participation is a central premise to the success of any worker center. Many have membership criteria for workers.\textsuperscript{62} The definition further requires that the group exist for the purpose of “dealing with employers.” The word “employer” excludes only “the United States or any wholly owned government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or, any person subject to the Railway Labor Act . . .”\textsuperscript{63} No worker center seems to be excluded because it deals exclusively with any such excluded employer. Indeed, even if it seeks to deal primarily with an employer subject to the exclusion, it is covered if it seeks to deal with at least one employer who is not excluded.\textsuperscript{64}

The critical part of the definition is the requirement that the group exist for the purpose of “dealing with employers.” The Supreme Court addressed the phrase “dealing with employers” in the definition of labor organization in \textit{NLRB v. Cabot Carbon Co.}\textsuperscript{65} The question in \textit{Cabot} was whether employee committees that met with the employer to “consider and discuss problems of mutual interest, including grievances, and the handling of ‘grievances at nonunion plants and departments,’”\textsuperscript{66} were labor organizations. The employer asserted that it did not bargain with the committees but merely received input from the committees. Noting particularly that the definition of “labor organization” used the word “dealing” instead of “bargaining,” the Court held that dealing meant something considerably broader than bargaining. As the employer conceded that it dominated these committees, the only issue was whether it engaged in any form of “dealing.” The Court found that the employee committees’ activities consisted of dealing; therefore, the employer committed an unfair labor practice within the meaning of section 8(a)(2).
The case then establishes that such a committee need not formally bargain but need only "deal" with the employer to be a "labor organization" subject to a section 8(a)(2) charge.

2. The NLRB Confronts the Issue of a Group That Does Not Want Labor Organization Status and Fumbles It: Center for United Labor Action

So far in this analysis, many worker centers fit comfortably into the definition of labor organization, so long as the "dealing with" phrase is satisfied. The Board faced this question in Center for United Labor Action.\(^6\) Like too many NRB decisions, the majority consists of two members, disagreeing to some extent with the Administrative Law Judge (ALJ), with a strong dissent from the third Board member. The Center for United Labor Action (CULA) supported the Amalgamated Clothing Workers' (ACW) boycott of Farah Manufacturing Company, which manufactured men's and boys' pants in Texas.

This boycott grew into a national effort. The union engaged in a lawful consumer picketing campaign at a retail store in Rochester, New York. CULA went a step further and engaged in picketing, asking customers not to trade at the retail establishment to pressure the store to stop selling Farah pants. That picketing would be unlawful if engaged in by a labor organization since it called for a total boycott of the retailer, a neutral, rather than a boycott of Farah Pants only.\(^6\) Predictably, the employer filed a charge with the NLRB asserting that CULA was acting as a "labor organization" within the meaning of the NLRA and was engaged in illegal picketing.

The respondent CULA was the local Rochester, New York, branch of a national organization. The national organization defined itself as "an association for working men and women devoted to the improvement of working conditions and the advancement of all workers of all races.... It helps to organize the unorganized and aims to make existing labor organizations more effective."\(^6\) This pronouncement indicates that CULA shared at least some of the goals of unions, but it was not so clear that its goals and activities satisfied the NLRA definition of "labor organization." Although the Center for United Labor Action disclaimed being a labor

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\(^6\) 219 N.L.R.B. 879 (1975) ("CULA").

\(^6\) A consumer picketing campaign asks customers not to buy a product sold by a third party. In this case the ACW asked customers not to purchase Farah Pants sold at the retail establishment. See NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58 (1964) (Tree Fruits Labor Relations Committee). A request to customers to not purchase a product that results in a complete or nearly complete boycott is, however, proscribed. NLRB v. Retail Clerks Local 1001, 447 U.S. 607 (1980).

\(^{69}\) CULA, 219 N.L.R.B. at 877.
organization, its history reflected efforts to assist organizing drives, strikes, legislative and adjudicative functions.  

The ALJ held that CULA was not a labor organization because it lacked the "purpose of adjusting or resolving disputes in which they become involved." This seems questionable: the Center's involvement in the boycott was intended to resolve "the dispute" by forcing Farah to succumb to the union's demands. There was no evidence of direct contact with Farah or the retailer. Nonetheless there is no doubt that CULA's goal or purpose was to force, or at least assist in, a resolution of the dispute between ACW and Farah.

The Board agreed with the ALJ that CULA was not a labor organization within the meaning of the NLRA, stating that "to qualify as a labor organization under our Act the organization must be selected and designated by employees for the purpose of resolving their conflicts with employers . . . ." The Board's creation of a "selected and designated" requirement, however, is not supported nor required by the text of the statute. The only requirement in the text of the statute is employee participation. The Board, despite its pronouncement, did not really rest its decision on whether the employees "selected and designated" CULA, but rather on the "dealing" concept.

The majority regarded the Center for United Labor Action as a "social cause" and found it did not exist for the purpose of "deal[ing] with the employer over matters affecting the employees." The critical issue was not whether employees selected CULA, which appeared to be a supportive intermeddler, but whether CULA sought to "deal" with Farah:

Support for a cause, no matter how active it may become, does not rise to the level of representation unless it can be demonstrated that the organization in question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.

The reasoning seems flawed because CULA likely would have met with Farah to convince it to change its position towards the ACW if Farah had been willing. The only apparent reason that CULA did not deal with Farah over the disputed issues of wages, hours and working conditions was that Farah refused. Under this interpretation of the NLRB's reasoning, CULA's status depends not on its intent of forcing a change in Farah's policy but

70. Id. at 873, 877.
71. Id. at 880.
72. There was considerable evidence of the Center's involvement in other labor disputes. Apparently no party argued that the Center's involvement in those disputes was sufficient to give it labor organization status. If such an argument prevailed, the Center's involvement in those disputes would give it labor organization status for all other circumstances. Id.
73. CULA, 219 N.L.R.B. at 873 (emphasis added).
74. Id.
75. Id.
whether Farah met with CULA to resolve the dispute. Thus, the retailer involved could have established the Center's status as a labor organization by inviting it in the store to discuss the reason for its picketing.

This leaves CULA's status in the control of the employer unless CULA forcefully disclaimed any interest in meeting with Farah. CULA could have forcefully told Farah it had no interest in meeting or dealing with it, but only intended to support the efforts of the workers as a "social cause." Most worker centers, however, do not refuse to deal directly with employers.

The Board did little to explain its "social cause" comment, which seems contrary to the historical role of the labor movement. Unions, to varying degrees, get involved in social and political issues beyond the immediate interests of the workplaces of their members. Unions would fit the role of "social cause" even under a narrow construction of the phrase. I do not think a line can effectively be drawn between "social causes" which are not labor organizations and those that are labor organizations, so long as both causes exist in whole or in part to deal with employers. The "social cause" notion seems to be little more than an attractive rhetorical phrase.

The logic of the dissenting opinion is persuasive. The dissent concluded that CULA did exist at least in part for the purpose of dealing with employers. Its purpose as pointed out in the dissent was to obtain "reinstatement of discharged employees, for a boycott of a manufacturer with whose labor policies it disagrees, or to aid and indeed finance employee organizing activities."76 The statute does not require that the organization exist solely for the purpose of "dealing." It need only exist "in whole or in part" for such a purpose. And there is no reason to believe there is any "de minimis" exclusion for the "in part" test. The Board's effort to carve out an exception for all social causes makes little sense where this "social cause" had at least some expressed purpose of dealing with Farah and other employers.

CULA has never been tested, limited or accepted for these propositions in any subsequent NLRB decision.77 There were a series of Advice Memoranda in the 1970s following CULA in which the Division of Advice determined that several organizations were not labor organizations.78

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76. Id. at 875. Nothing in the Board's opinion suggests that the Center promised never to talk with or meet with Farah.


78. Central Arizona Minority Employment Plan, Advice Memorandum, Case 28-CC-623 (1977); Michael E. Drobney, an Agent of Laborers Local 498, Cases 8-CC-835; 8-CB-3229 (1976); Casa Aztlán Ass'n. Prodercheros Obreros, Case 13-CG-5 (1976); Metro Atlantic/DeKalb SCLC, Cases 10-CP-123, 10-CC-866; United Black Workers Association, Case 14-CB-2206. The Division of Advice found the Blue Bird Workers Committee a labor organization and authorized complaint. Blue Bird Workers Comm., Advice Memorandum, Case 4-CC-1458 (1982), 1982 WL 30224 (N.L.R.B G. C.). In two cases predating the Blue Bird Workers Committee, Advice Memorandum found two committees to be labor
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may still serve to exempt some worker centers which avoid the “dealing”; nevertheless many worker centers will likely fall with this critical part of the definition, because their “dealing” is more explicit.

3. The Breadth of the Definition for Section 8(a)(2) Purposes

The question of labor organization status most commonly arises when an employer is charged with unlawful domination or assistance of a labor organization. Since Cabot Carbon, the definition has been expanded to include employee committees that “deal” with employers even if they do not engage in bargaining. In recent cases, the breadth of the definition of “labor organization” has been reaffirmed.

The Board considered the “labor organization” issue in two related cases decided in 1992 and 1993. In Electromation, Inc., the employer formed action committees to consider internal plant issues. Each committee was composed of six employees, the benefits manager and one or two management representatives. The Board reaffirmed that the definition of “labor organization” is especially broad and covers this scenario: “Any group, including an employee representation committee, may meet the statutory definition of ‘labor organization’ even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.” Like most section 8(a)(2) cases, Electromation arose from a situation where the employer supported or assisted the putative labor organization. It was not disputed that the purpose of the action committees was to “address employees’ dissatisfaction concerning conditions of employment through creation of a bilateral process involving employees and management in order to reach bilateral solutions.” Thus, the action committees engaged in “dealing” with the employer since the employer encouraged the formation and existence of the process. This was enough to establish that the committees were labor organizations within the meaning of the NLRA. Since no one disputed that the employer established the committees and ran them, the element of domination was clear and the violation of section 8(a)(2) was established.

organizations. Acme/Alltrans Strike Committee, Case 21-CB-6318 (1978) and “Protesting Citizens” and Its Agent Elvin Winn, Case 15-CC-681 (1977). In Eastern Farmworkers Ass’n, Case 29-CP-287 (1975), the Advice Memorandum found this community service organization to be a labor organization. It held authorization cards designating it as the representative of certain employees. These older Advice Memoranda are available from the Division of Advice under the Freedom of Information Act and are also on file with the author.

80. See supra note 66 and accompanying text.
81. 309 N.L.R.B. 990 (1992), enforced, 35 F.3d 1148 (7th Cir. 1994).
82. 309 N.L.R.B. at 994; Sahara Datsun, Inc. v. NLRB, 811 F.2d 1317 (9th Cir. 1987).
83. 309 N.L.R.B. at 997.
In section 8(a)(2) cases like this, the element of domination or assistance is a critical element, because "dealing" is usually self-evident, since the employer encourages and allows the conduct and thus proves the dealing. To escape the "domination/assistance" label in these cases, the employer seeks to continue the activity without violating section 8(a)(2) by characterizing the conduct as "communication." In Electromation, the concurring members of the Board emphasized that employer communication with employees could exist without creating a labor organization. Board Member Clifford Oviatt discussed "quality circles" and other forms of employee participation that do not rise to the level of "dealing," but these would likely be inapplicable to worker centers.

The problem posed by worker centers is that even when no "dealing" ever occurred, because the employer had no role in the group, the organization can be a labor organization because its purpose is to deal. Or, in limited circumstances, the employer may "deal" with the worker center after some degree of pressure. This situation—dealing under pressure—raises another legal problem, namely that it is unlawful assistance for an employer to "deal" with a non-majority union.84

The Board took up the same section 8(a)(2) question a year later, this time in the union workforce setting, in E.I. DuPont Co.85 There, the Board described "dealing with" as a "bilateral mechanism" (a phrase borrowed from Electromation) that does not require the back-and-forth compromise that is the product of bargaining in an effort to reach an agreement.86 The Board noted that isolated instances of such a bilateral mechanism did not constitute dealing.87 Where the employer, in response to worker center demands, meets with the worker center or worker representative, it is possible that a "bilateral mechanism" has been established. So long as the employer refuses to meet with the worker center, however, there can no "dealing," only a purpose or intention on the part of the worker center to "deal." It seems contradictory to hold that a worker center which seeks to "deal" but never accomplishes the "dealing" becomes a "labor organization" because of its purpose to "deal," but where it "deals" with an

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84. It is fundamental principle of labor law that an employer may not lawfully recognize a union that does not enjoy majority support. Int'l Ladies' Garment Workers v. NLRB, 366 U.S. 731 (1961). I consider this problem, infra Part IV.A.
86. "That "bilateral mechanism" ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or ejection by word or deed, and compromise is not required." Id. at 894.
employer over one issue, it does not become a “labor organization” because no “dealing” occurs in the sense of a “bilateral mechanism.”

This problem of whether purpose or “bilateral mechanism” is the *sine qua non* of the “dealing” requirement can be refined somewhat from cases that have focused on the reference to two phrases used in DuPont: “isolated instances” and “pattern or practice.” In *Peninsula General Hospital Medical Center*, the Fourth Circuit refused to enforce a Decision and Order of the NLRB that found a committee was a labor organization for section 8(a)(2) purposes because the there was no “pattern or practice” of dealing. That case seems to hinge on the court’s view that certain conduct the Board found to be dealing was not in fact dealing, but rather a form of permitted communication. Nevertheless, that case has reinforced the “pattern or practice” gloss on what it means to “deal with” the employer.

The “pattern and practice” issue may apply to in-house committees that potentially deal with only one employer. There, the employer controls the opportunity for a “pattern or practice” of meetings which would become “dealing.” As illustrated in *Peninsula General Hospital*, and other cases involving in-plant committees, the employer controls the amount of dealing so that it can be isolated, thus avoiding a “pattern or practice.” The employer thus controls whether a committee is a “labor organization.”

The opposite is true with outside groups not established by employers, such as unions or worker centers. Unions seek to deal with employers by gaining recognition and bargaining; everyone agrees that they are labor organizations. Although the employer may defeat an organizing drive, and thereby preclude any opportunity to bargain, the statute does not require actual bargaining for an entity to be considered a labor organization. All the statute requires is the organization exist “for the purpose, in whole or in part, of dealing with employers.” There need not be an effort to organize. This is significant: A group of workers may seek to organize an employer for years and thus constitute a labor organization even though they never succeed in dealing with the employer. What determines the outcome is the organization’s purpose, not its success in achieving the purpose.

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88. Where employees participate on committees that have management functions, however, they are not “dealing” but “managing.” *Crown Cork & Seal*, 334 N.L.R.B. 699 (2001). There is little danger that employers will invite worker centers into their business to participate in any fashion to co-manage.


91. *Stoody Co. Div. of Termadyne*, 320 N.L.R.B. 18, 20-21 (1995) (finding there was no dealing where committee held only one meeting).

92. *E.I. DuPont Co.*, 311 N.L.R.B. at 994 n. 20 (1993). See also *Polaroid Corporation*, 329 N.L.R.B. 424, 432-34 (1999) (finding representational function). Some worker centers approach the non-representation concept by attempting to get aggrieved workers to function as a “committee of the whole,” thus avoiding a role where they either represent others or are “represented” by others. They meet as a group and function as a group. This is similar to the committee model Saru Jaramayan created
4. The Breadth of the Definition for Section 9 and other Statutory Purposes

In another other area of labor law, the Board has adopted an extremely loose standard for establishing the existence of a labor organization consistent with the broad definition. To allow fullest access to NLRA Section 9 representation procedures, the broadest definition to labor organization has been recognized by the NLRB. So long as the organization exists for the statutory purpose, the fact that it has never acquired representation rights does not limit its ability to qualify as a labor organization and it may seek formal representation status in the very initial stages of formation.

This doctrine applies also in cases of so-called defunct unions. These occur where an employer withdraws recognition asserting that a union is "defunct" or, as in a section 9 representation case, where a rival union asserts the incumbent is defunct. The standard sets a very low bar and it takes little to prove the labor organization continues to exist.

Groups of workers sometimes independently seek to form their own union. There remains today a tradition of Directly Affiliated Local Unions, of DALUs, within the AFL-CIO. Under this concept, a group of workers may petition for an election under NLRB procedures that require a preliminary finding that a "labor organization" within the meaning of the NLRA. They become directly affiliated with the AFL-CIO without having to participate in an international union. This illustrates how loosely organized labor organizations can become more formalized. It also

at the Workplace Project. See Gordon, supra note 4, at 214-18. This model has one significant drawback: if the group deliberately avoids representing anyone who is not a "member" of the committee, it will have to avoid seeking any remedy for them.


95. Butler Mfg. Co., 167 N.L.R.B. 308 (1967); Early Cal. Indus., 195 N.L.R.B. 671, 674 (1972). In these contexts the organization claiming "labor organization" status takes the position that it seeks bargaining status and the employer or rival union resists. Yale Univ., 184 N.L.R.B. 860 (1970). This is in contrast to the section 8(a)(2) situation where the employer asserts the alleged "labor organization" does not seek bargaining status.


97. Prior to the merger of the AFL and CIO in 1955, the CIO and the AFL competed with each other by affiliating local unions that were willing to secede from the competing international. The AFL called them federal labor unions and the CIO called them local industrial unions. Robert Zieger, The CIO: 1935-1955 68-69 (1995). These kinds of disputes led to the especially broad treatment of formative unions as labor organizations for section 9(a) and section 8(a)(2) purposes.

98. The AFL-CIO stopped chartering DALUs in 1995. The split with the Change To Win coalition led to the creation of "direct local affiliates" or DLAs. This shows the creativity of encouraging groups of workers to form very informal unions. AFL-CIO, Direct Affiliation with the AFL-CIO for Independent Local Unions 9 (Oct. 6, 2005), http://www.aflcio.org/aboutus/thistheaflcio/ecouncil/ec10062005.cfm.
demonstrates the efforts of the labor movement to broaden the reach of the definition of "labor organization."

In another context, there is tension between the purposes of the Act and the broad definition. Section 8(g) requires written notification before any labor organization engages "in any strike, picketing, or other concerted refusal to work at any health care institution . . ."\textsuperscript{99} In a few cases where informal groups of workers have engaged in a strike or picketing activity, employers have sought to establish that the groups acted as a labor organization, leaving the employees unprotected because the labor organization has not complied with the notification procedure. This is an effort by the employer to broaden the definition.\textsuperscript{100} The NLRA can lead to some unusual results when its provisions are applied broadly.

This analysis of the definition demonstrates how minimal a threshold exists within the structure of the Act for demonstrating labor organization status in various labor law contexts.

\textbf{B. Worker Centers as "Labor Organizations" Within the Meaning of the NLRA}

Worker centers do not always fit the "labor organization" paradigm. Some exist to handle individual complaints, functioning under the service model of a legal clinic: one or more workers come into the center with a specific workplace-related problem that the center attempts to resolve. This may not be "dealing" since it is related to a specific problem such as unpaid wages and as soon as the problem is resolved the dealing ends. On the other hand, as illustrated by the Be-Bop Bagel campaign, the actions taken by the worker center may include an ongoing campaign over a period of time utilizing various tools to pressure the employer into "dealing with" the worker center on the problem. Does such an effort turn the worker center into a labor organization since it exists, in part, for the purpose of "dealing"?

The more commonplace problem, as exemplified by the Workplace Project, is a worker center that deals with many employers over isolated problems for each employee or groups of employees. The organization may

\textsuperscript{99}. 29 U.S.C. § 158(g). The notification procedures of section 8(d), 29 U.S.C. § 158(d), are not likely to trigger this problem because it applies only in the bargaining context, at which point the question of labor organization status has been settled.

\textsuperscript{100}. Long Beach Youth Center, Inc., 230 N.L.R.B. 648 (1977), enforced, 591 F.2d 1276 (9th Cir. 1979) and East Chicago Rehabilitation Center, Inc., 259 N.L.R.B. 996 (1982), enforced, 710 F.2d 397 (7th Cir. 1983). For example, one possible strange result from this application would occur where a group of workers engages in a strike, the employer fires them and defends on the ground that the group constituted a labor organization even though the employer dominated or assisted the labor organization within the meaning of section 8(a)(2). Although the employer dominated the group, it was nevertheless a labor organization and required to give the section 8(g) notice. Lydia Hall Hospital, Advice Memorandum, Case 29-CA-11506 (1985). This now leaves the employer free to fire them for engaging in unprotected activity.
pursue multiple problems but not always as part of an ongoing pattern or practice with any employer. It does not seem that this would disqualify the organization from being a labor organization because the definition of labor organization speaks in terms of "dealing with employers." Thus, efforts by a worker center that are aimed at numerous employers, albeit not on a repeated basis, would likely be sufficient to bring the center within the definition of "labor organization."

Moreover, it would not seem likely that a worker center could easily shed the attachment of labor organization status without taking decisive steps to eliminate activity which reflected "dealing with employers." The definition of employee "shall include any employee, and shall not be limited to the employees of a particular employer." Where a group of workers assists employees of another employer they are engaged in "concerted" activity. "Dealing" extends effectively from "any" employer to "every" employer except those statutorily excluded. Thus, the worker center would have to cease dealing with every employer to stop acting as a labor organization.

Whether the worker center ever deals with any employer may be irrelevant; the definition on its face extends to any organization "which exists for the purpose, in whole or in part, of dealing with employers." Therefore, even an organization that exists for the unachieved purpose of dealing with employers would qualify as a labor organization. Under this "purpose" definition, the employer has no control over the dealing element so long as the center attempts to deal. If the employer invites the dealing, then the organization becomes a labor organization.

The "bilateral mechanism" formulation of DuPont does not really fit in the context of the "purpose"-oriented definition. It was formulated in the context of the employer that fosters and encourages the "bilateral mechanism," ignoring the situations where the organization seeks to deal but the employer resists. In this latter scenario, the employer may successfully resist dealing with the group thus precluding any "bilateral mechanism." Yet the group seeks such a bilateral mechanism over working conditions. It thus exists for the purpose of engaging in such a bilateral mechanism although it may never achieve it. For example, in CULA, the Center for Labor Action's picketing was, in part, for the purpose of forcing Farah to accede to demands of at least the union. If the Center had expressed the same goals as the Union, it would most likely have been a labor organization.

An organization like the one I have described is not seeking to obtain exclusive representation. Rather, it is seeking to deal with the employer on

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103. 29 U.S.C. § 152(2).
issues of concern that affect the workplace. Ironically, in *Electromation* the Board described how certain unilateral mechanisms such as suggestion boxes, brainstorming conferences, and other information exchanges do not constitute dealing\(^{104}\) precisely because that process is unilateral or one-way. The employer does not consider the suggestions unless it chooses to do so. Here, where the worker center attempts to resolve workplace issues by various forms of activity, the action is unilateral: the worker center acts and the employer often ignores the worker center unless the worker center commences some form of legal process.

There is one remaining element to the "labor organization" analysis. The phrase "in whole or in part" means that an organization can have as its purpose functions wholly unrelated to dealing with employers so long as it exists, in some part, for that purpose. In sweeping language, one court stated: "If [the organization] existed, even in small part, for the purpose of dealing with employers concerning grievances or disputes, or conditions of work it was a 'labor organization' with [the statute]."\(^{105}\)

Applied literally, this extremely broad definition can create unintended consequences and lead to unpredictable mischief. Consider a church that sets up a committee to pursue workplace justice issues. Several workers (both employees within the meaning of section 2(3) of offending employers within the meaning of section 2(2)) are members of the church and participate in the committee. This activity sounds perilously close to a group existing "in part . . . for the purpose of dealing." As part of its efforts, the church supports an organizing drive by a union, including making written demands on the employer to meet with the church group. Is the church now a labor organization?

The NAACP has long interjected itself into labor disputes.\(^ {106}\) The broad language of the Supreme Court in *New Negro Alliance v. Sanitary Grocery Co.*, reflects this:

> The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association . . . . There is no justification in the apparent purposes or the express terms of the Act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise

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with respect to discrimination in terms and conditions of employment based upon differences of race or color.\textsuperscript{107}

The Court held that the particular dispute with the grocery over hiring and discrimination was a labor dispute within the meaning of the Norris-LaGuardia Act.\textsuperscript{108} This holding preceded the passage of the Taft-Hartley Act, with its restrictions on unions.\textsuperscript{109} Had the issue arisen after the passage of Taft-Hartley, Sanitary Grocery Company might well have claimed the picketing of its store was unlawful recognition picketing.\textsuperscript{110} In that case, the NLRB would have been obligated to seek an injunction to prohibit the activity.\textsuperscript{111}

The National Rifle Association has also interjected itself into labor disputes.\textsuperscript{112} Even organizations that oppose workplace rights would be “dealing” with employers and subject to the same definition since section 7 protects the rights of employees to “refrain from” participation in union activities.\textsuperscript{113} What the preceding examples prove is that some worker centers described by Janice Fine will fit into the definition of labor organization.\textsuperscript{114} Likely the Workplace Project, as reported by Jennifer Gordon with such passion, was a “labor organization.”

Consider Janice Fine’s description of the Chicago Interfaith Workers Rights Center.\textsuperscript{115} The Center has “three strategies for dealing with the time-consuming, resources-intensive nature of operating a legal clinic.” These strategies involved filing and pursuing claims against employers with administrative agencies that enforce worker rights. Presumably, the center acting in support of or on behalf of workers “deals” with employers on a regular and on-going basis in the making of demands, settlement, and in litigation. The Board in CULA flatly rejected the suggestion that representation of employees before state agencies was “dealing” with employers and related to its labor organization status.\textsuperscript{116} This may have

\begin{thebibliography}{99}
\bibitem{107} 303 U.S. 552, 562 (1938).
\bibitem{108} 29 U.S.C. § 101 \textit{et seq}.
\bibitem{110} \textit{Id.} § 158(b)(7)(C).
\bibitem{111} \textit{Id.} § 160(l).
\bibitem{114} Some employers will not meet the NLRB’s commerce jurisdictional standards. NLRB, AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, § 1-200 (2005), available at http://www.nrlb.gov/nlrb/legal/manuals/outline.asp (lasted visited October 29, 2006). There is no comparable standard, however, imposed on labor organizations so long as the employer meets the Board’s standards, the labor organization falls within the statutory definition even if has no assets or income.
\bibitem{115} FINE, \textit{supra} note 2, at 82-84.
\bibitem{116} 219 N.L.R.B. at 873-74.
\end{thebibliography}
been an ill-considered thought. Plainly, filing the claims and pursuing those claims, when done in concert, is activity protected by section 7 as “concerted activity for mutual aid or protection.” It is also clear a union would have standing under many circumstances to represent its members in an action against an employer. If a union were representing a group of workers in an organizing drive, it would be doing so for the purpose of dealing with that employer. So too, if one of the worker centers were to represent workers as part of an effort to improve working conditions, would it not be dealing with the employer? This issue is not as easy as the simplistic response the two member majority made it out to be in CULA.

Volunteers at the Chicago Interfaith Workers Rights Center were “also encouraged to call the employer, notify them that a complaint is about to be filed, and see whether they can work out a settlement.” Although working out a settlement for one employee on a single claim may be “isolated” and thus not “dealing,” what if there are multiple claims? As noted above the Center probably did this routinely to many employers, thereby creating an established “pattern and practice” of dealing.

Finally the Center deals with group claims. Where there is a union involved, the Center would first contact the union to see if it could get resolution through the union. Where no union is involved the Center makes a determination whether there “is a good prospect for a union organizing drive.” At that point they assist the workers in contacting that union and work together to support the organizing. Assuming for our analysis that the Center abandons any attempt to deal with the employer because the chosen union is doing it, there may be no “dealing” implicated.

Where, however, “there is no possibility of an organizing drive” the center tries to organize direct-action pickets and demonstrations at the company.” This is exactly the same as the Be-Bop Bagel example described by Jennifer Gordon: direct action by worker centers adopting traditional labor activity against employers—pickets, boycotts, and demonstrations to force the employer to deal with the Center to improve and correct wages, hours or other terms and conditions of employment.

Another prominent example is those worker centers that act as hiring halls. In the unionized construction industry, for example, an employer


\[119.\] FINE, supra note 2, at 84.

\[120.\] Under the approach if a worker center were founded to assist rodeo cowboys and cowgirls, would it be a labor organization? Probably. So long as some of the members are employees and not all excluded from the Act, labor organization status is imposed. Major League Rodeo, 246 N.L.R.B. 743 (1979).

\[121.\] FINE, supra note 2

\[122.\] Id.
may call the union to dispatch qualified employees. This is the traditional hiring hall approach. It is not limited to construction, for many unions utilize such hiring halls or referral lists. Fine describes how the day labor movement has developed a form of worker center with a hiring hall as the central attraction for workers. As Fine puts it, "[A] number of worker centers [have been] pressed for the formation of day laborer hiring halls."\(^2\)

The workers who use the halls set their wages through some kind of democratic process in which the workers "participate." In these cases, the center then deals with the employers in dispatching employees on the conditions established by the hiring hall. This appears to be dealing; the maintenance of a hiring hall most likely turns the center into a labor organization.\(^3\) This illustrates the reach of the definition and the extent of the problem.\(^4\)

Undeniably many worker centers seek to deal with employers on behalf of employees. In the case of the Workplace Project, each time a worker came in with a problem, the Project sought to adjust that issue for that employee. Although the contact with that employer might be only for that one employee, the purpose was to deal with that employer and other employers. Although in a few cases the Board has found that the conduct of the group was so isolated as not to constitute dealing, the analysis I have explained above suggests that if the organization exists for dealing with many employers on behalf of various employees, this is sufficient to constitute dealing.\(^5\) In other words, dealing is not limited to one particular employer but extends to many employers.

\(^{123}\) Id. at 113.

\(^{124}\) The NLRB may assert jurisdiction over such a labor organization without regard to whether it would assert jurisdiction over any individual employer making use of the hiring hall. So long as one of the employers meets the jurisdictional standards, the Board will assert jurisdiction over the entire hiring hall operation. See Laborers Local 220, Advice Memorandum, Case 31-CB-9799 (1996) (on file with author).

\(^{125}\) The problem is exacerbated in the construction industry. There an employer can execute a pre-hire agreement under section 8(f); section 8(a)(2) does not apply. John Deklewa & Sons, 282 N.L.R.B. 1375, enforced sub nom. Int'l Ass'n Bridge, Structural and Ornamental Iron Workers, Local 3 v. NLRB, 843 F.2d 770 (3d Cir. 1988). A worker center could establish a hiring hall, supply cheap labor and undercut union hiring halls. E.g. FINE, supra note 2, at 130-33. The temporary agency industry, of which Labor Ready is an example, performs this service of providing labor to construction job sites. See Labor Ready website, http://www.laborready.com/default.aspx (last visited October 29, 2006). But an employer could enter an agreement with a worker center to supply labor even though it was not an exclusive arrangement, agree to a minimum wage and have an enforceable agreement insulating itself to some degree from organizing by a legitimate union. However, such pre-hire agreements do not serve as contract bars preventing decertification elections the way a collective bargaining contract would do outside the construction industry.

C. The Potentially Significant Impact of NLRA Restrictions on Worker Centers

The application of the National Labor Relations Act would limit the activity of worker centers in several ways. I note some of the many severe restrictions that apply to labor organizations below:

- The secondary boycott provisions of section 8(b)(4) prohibit all but limited types of boycotts. Boycotts by publicity such as leafleting that does not involve picketing are permitted. Effectively all picketing of neutral employers, i.e., employers who are not party to the labor dispute, is unlawful. Coercion through mass rallies and other coercive conduct of neutrals is also prohibited.

- Picketing for organizational or recognitional purposes would be illegal at least after 30 days under section 8(b)(7)(C).

- Picketing where there is a recognized exclusive representative or certified bargaining representative would be a violation of section 8(b)(7)(A) or (B).

- Picketing to force an employer to fire a supervisor would be prohibited under NLRA section 8(b)(1).

- Discrimination on account of race, sex or national origin by the worker center against members would be an unfair labor practice.

129. 29 U.S.C. § 158(b)(7)(c) (2000). Professor Alan Hyde argues that picketing for members-only recognition would be lawful. Alan Hyde, After Smyrna: Rights and Powers of Unions that Represent Less Than a Majority, 45 Rutgers L. Rev. 637, 655 (1993) (discussing Douds v. Local 1250, Retail Wholesale Dep't Store Union, 173 F.2d 764 (2d Cir. 1949)). See also Julie Yates Rivchin, Building Power Among Low-Wage Immigrant Workers: Some Considerations for Organizing Structures and Strategies, 28 N.Y.U. Rev. L. & Soc. Change 397, 414 (2004). She states “a workers’ center as currently organized will likely be able to escape restrictions because they are not intended to pressure the employer or workers to recognize the organization as a bargaining representative.” Id. Professor Charles Morris makes the same argument in his book, which I discuss in discussed infra, Part IV.A. I think they are ultimately wrong. If worker centers are labor organizations, then they are picketing at least for organizing purposes: to obtain members and employee support. See B. Meltzer, Organizational Picketing and the NLRB: Five on a Seesaw, 30 U. Chi. L. Rev. 78 (1962). Moreover, whatever demands a worker center makes will have an impact on all employees. Thus, they will seek changes affecting all employees and in this sense could be interpreted as representing more than just “members.”
131. Id. § 158(b)(1)(B).
Agreements reached with employers to cease doing business with unfair employers or sweatshops may be prohibited.\textsuperscript{133}

- Referral procedures would have to be non-discriminatory if exclusive referral procedures were sought or obtained.\textsuperscript{134}

- Worker centers would be subject to unfair labor practice charges if lawsuits or agency actions brought by the worker center were later deemed baseless or retaliatory.\textsuperscript{135}

If a worker center engages in some of the conduct described by Gordon and Fine, it would be to any employer's advantage to seek cover under the NLRA by seeking a determination that such a center is acting like a labor organization.

It is only fair to note that there may be advantages of labor organization status:

- Federal preemption may protect some of the worker center activity from state regulation.\textsuperscript{136}

- Agreements reached with employers may be enforceable under federal law.\textsuperscript{137}


\textsuperscript{133} 29 U.S.C. § 158(e) prohibits "hot cargo" agreements. Picketing to obtain or to enforce such agreements is prohibited by 29 U.S.C. § 158(b)(4)(A) and can subject a labor organization to damages under 29 U.S.C. § 187.

\textsuperscript{134} Fine describes several hiring hall situations, none of which appears to be exclusive—meaning that the employer must seek referrals from the hiring agency. Fine, p. 112-116. If it were exclusive, it would be unlawful to "discriminate" and the operation of the hiring hall would become much more complicated. PATRICK HARDIN & JOHN E HIGGINS, JR. DEVELOPING LABOR LAW 368-76, 2014-31 (4th ed. BNA 2001).

\textsuperscript{135} Lawsuits deemed baseless or retaliatory can be unfair labor practices within the meaning of the NLRA. Although such unfair labor practice charges are not likely to succeed, they do pose an additional risk. See Petrochem Insulation, Inc. v. NLRB, 240 F. 3d 26 (D.C. Cir 2001); BE&K Const. Co. v. NLRB, 534 U.S. 516 (2002); Bill Johnson's Rest., Inc. v. NLRB, 461 U.S. 731 (1983). The remedy in such a case would be payment of the employer's attorneys' fees.

\textsuperscript{136} San Diego Bldg. Trades v. Garmon, 359 U.S. 236 (1959); Teamsters Local 20 v. Morton Trucking Co., 377 U.S. 252 (1964). It is also possible that some favorable local or state regulation or assistance would be preempted. For example, local ordinances confining employers to obtaining day laborers from licensed and approved day labor centers operating as labor organizations would raise problems.

\textsuperscript{137} 29 U.S.C. § 185 (2000); Textile Workers Union v. Lincoln Mills of Ala., 353 U.S. 448 (1965) (holding federal common law applies to enforcing agreements subject to section 185). It is not clear that agreements on a members-only basis are enforceable. See Alan Hyde, supra note 129, at 650-51; Retail Clerks Local 128 v. Lion Dry Goods, Inc., 369 U.S. 17 (1962). See infra Part IV.A.
• Protection from anti-trust regulation.\textsuperscript{138}

The NLRA is not the only problem. The NLRA's definition of "labor organization" also appears in the Landrum-Griffin Act\textsuperscript{139} with slight modifications:

"Labor Organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency or employee representation committee, group, association or plan so engaged 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, any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.\textsuperscript{140}

The definition appears broader than the NLRA definition since it adds the two words "group [or] association," to those organizations that can constitute a labor organization.\textsuperscript{141} The definition is, however, limited by the subsection (j)(2):

A labor organization shall be deemed to be engaged in an industry affecting commerce if it . . . (2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce.\textsuperscript{142}

Subsection (j)(2) most likely reaches worker centers to the extent they are "acting as the representative of employees of an employer or employers engaged in an industry affecting commerce."

The Landrum-Griffin Act has the following requirements:

\textsuperscript{138} Anti-trust problems arise from agreements between labor organizations and non-labor organizations. There are so-called statutory and non-statutory exemptions. See H. A. Artists & Assos. v. Actors Equity Ass'n., 451 U.S. 704 (1981). In one case, the Court, relying on the statutory exemption, dismissed an anti-trust claim against a boycotting entity without finding that the entity was a labor organization entitled to the statutory exemption. Adolph Coors Co. v. Wallace, 115 L.R.R.M. 3100 (N.D. Ca. 1984). Thus agreements between worker centers and employers would have anti-trust immunity. For example, if a day labor group became the exclusive referral agency for employers, that arrangement would not be subject to anti-trust attack under federal or state law by a competing private company.

\textsuperscript{139} 29 U.S.C. § 401 et seq.

\textsuperscript{140} Id. § 402(i).

\textsuperscript{141} The last phase ("any conference . . . local central body") also suggests that Congress intended to broaden the definition but this phrase has probably no impact on worker centers. One could stretch this a little bit. Day labor centers as reported by Fine have a national organization (national union) so a regional organization might fall with the definition just as the national organization would. Fine, supra note 2, at 224-27. See Ala. Educ. Ass'n v. Chao, 455 F.3d 386 (D.C. Cir 2006).

\textsuperscript{142} 29 U.S.C. § 402(j).
• Elections will be required of officers at least every three years. 143

• Labor organizations must file annual financial reports, commonly referred to as the LM-2, although different versions may apply to worker centers depending on their income. 144

• Labor organizations must adopt a constitution and bylaws and file them with the Secretary of Labor. 145

• Labor organizations must make financial records available to their members for review. 146

• Officers and agents are subject to fiduciary duties. 147

• Bonds are required of officers and employees who handle money. 148

There are many additional requirements imposed on labor organizations and their officers. 149

If the Landrum-Griffin Act applies to all labor organizations and this includes worker centers, their ability to operate will be greatly restricted. 150 Many worker centers operate on a principle of worker participation and democracy but they have never envisioned elections run according to Department of Labor rules and subject to scrutiny by the Secretary of

143. Id. §§ 481-83. Given the transient nature of worker center participation, determining eligibility to serve as an officer and voting eligibility would be extremely difficult. Unions in seasonal industries must hold their elections during the "season" to allow seasonal workers to vote.

144. Id. § 431(b). For the complexity of the LM-2 form, see the Department of Labor's website: http://www.dol.gov/esa/regs/compliance/olms/revisedlm2.htm (last visited October 29, 2006).

145. Id. § 431(a).

146. Id. § 431(c).

147. Id. § 501.

148. Id. § 502.


150. The same definition with other modifications appears in Title VII. 42 U.S.C. § 2000e(e). The Employee Retirement and Income Security Act of 1974 (ERISA) uses a similar but not identical definition of employee organization. 29 U.S.C. § 1002(4). Various state laws use the same definition for many purposes. This will add many additional layers of regulation with sometimes conflicting definitions.

It does not appear that the Department of Labor has yet faced this issue. There is no reported case on the issue. The Department has an LMRDA Interpretative Manual not updated since the mid-1980s—which it uses internally and makes available to the public directly from the Office of Labor-Management Standards. The manual (on file with the author) applies a very broad interpretation although there is no reference to anything resembling a worker center.
Labor. Worker center advocates, who so value democracy and a worker-controlled center, would have to contend with Landrum-Griffin democracy, which varies significantly from the models they have worked so hard to develop.

As a collateral note, but important to this debate, states have adopted the NLRA definition of labor organization for various purposes—but have often broadened the definition. For example, Alaska has adopted the following definition of labor organization:

For the purpose of AD 23-40.020-23-40.040 ‘labor organization’ includes an organization constituted wholly or partly to bargain collectively or deal with employers, including the state and its political subdivisions, concerning grievances, terms, or conditions of employment or other mutual aid or protection in connection with employees.\(^{151}\)

It should be immediately apparent that this definition is extremely broad. No employee participation is required. This definition would sweep in any advocacy group concerned with conditions of employment or legislation that affects workplace conditions.\(^{152}\) Those states that have expanded the definition, and Alaska is just one of many, have created another entanglement for worker centers.\(^{153}\)

If the NLRB, the Department of Labor, or other agencies that enforce workplace laws determine that worker centers meet the test of “labor organization,” this would create a substantial impediment, if not an insurmountable barrier, to the growth of the worker center movement. So far, however, no agency has addressed the issue of worker centers as “labor organizations.” But that will not prevent employers and others from doing so where private rights of action exist.\(^{154}\) As worker centers grow in prominence and in the ambition of their activities, they will increasingly become targets of employers.\(^{155}\)

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153. CAL. GOV. CODE § 12926(a) uses a similarly broad definition. California Proposition 226, which would have regulated labor organizations in 1998, was defeated in part because it used this broad definition and some organizations which were not the intended “labor organizations” entered the political battle and opposed the proposition to avoid any concerns that it would apply to them. E.g., California Secretary of State 1998 California Primary Voter Guide, http://primary98.ss.ca.gov/VoterGuide/Propositions/226.htm (last visited Nov. 18, 2006).
154. It is much harder for employers to enforce the Landrum-Griffin Act because some provisions, such as Title IV, 29 U.S. C. §§ 481-83 are primarily enforceable only by the Secretary of Labor and because § 411(a)(4) provides that no “interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.” A rival union is not subject to this limitation.
155. There is an additional consequence to this broad definition. Groups organized against union representation can be considered labor organizations. Porto Mills, Inc., 149 N.L.R.B. 1454 (1964) (finding anti-union group was labor organization).
IV. WORKER CENTERS AS AN ALTERNATIVE WORKER ORGANIZATION TO FILL THE VOID

A. Worker Centers, the NLRA, and Professor Morris' The Blue Eagle at Work

Worker center advocates can turn to the protections of the NLRA to shield some activity of employees in some cases. The NLRA protects "protected concerted activity" which takes many forms. For low-wage immigrant workers, the activity may encompass walkouts, picketing, confronting the employer, demanding higher pay, and many other activities all without the involvement of any labor organization. Putting aside the problems of immigration status under Hoffman Plastic Compounds, the question of whether many employers would meet the NLRB’s jurisdictional standards, and even whether the worker might be an independent contractor, advocates recognize that worker centers can occasionally take advantage of the protections provided by section 7 of the Act. This reliance invokes the jurisdiction of the NLRB and worker centers would probably not want to provoke a counter-response from the employer.

This invites the questions recently addressed in The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace by Charles Morris. The book, as well as the review in this Journal by Judge John True and the response by Charles Morris, demonstrates the need to reshape the law to allow different forms of employee organization and representation. Worker centers must address this debate. Professor Morris argues that an employer has an obligation to bargain with a non-majority union, a union that represents only its members and does not seek exclusive representation. That never happened.

157. Id.
160. CHARLES J. MORRIS, THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE (2005). The author of this Review was partially involved in the Hi-Tech Honeycomb case referred to in the book. The International Association of Machinists filed a charge in which the author of this Review represented the Union. Professor Morris pursued his theories with the concurrence of the Union. The Union’s involvement, of course, was somewhat contradictory to the thesis of the book since the Union saw this as an organizing target and sought to become the exclusive representative. That never happened.
argues that it is not a violation of the section 8(a)(2)\textsuperscript{163} prohibition on employer assistance to unions for an employer to bargain with or even deal with a non-majority union, so long as it does not seek exclusive representation.\textsuperscript{164} He must establish this because normally recognition of a labor organization without a showing that it is the majority representative violates section 8(a)(2).\textsuperscript{165} This is an important point for worker centers. So long as they avoid seeking exclusive representation, under Morris' argument, they avoid the problem of unlawful recognition by an employer. This would mean carefully limiting demands to a limited group of employees. Furthermore, under this theory, worker centers could only avoid a section 8(a)(2) charge by restricting their representation to members only. This is not always possible since worker centers tend not to have formal membership structures. On the other hand, the demands could be on behalf of represented employees who are non-members and who have authorized the worker center to represent them.

Let's assume, however, that section 8(a)(2) does not prohibit recognition of non-majority unions and that employers will not dominate worker centers. Assistance as prohibited by section 8(a)(2) should not be much of an issue since the recognition of the worker center will not be exclusive—any other worker center could get equal recognition albeit for a different group of "members."\textsuperscript{166} What happens when the worker center demands "justice" or overtime for all workers in the shop or a particular department? Or the worker center demands the termination of an abusive supervisor? Or the worker center demands an increase in health coverage instead of a wage increase? It is likely that not all employees will participate. Although it is not likely that any one employee will object unless encouraged to do so by the employer, nevertheless a single dissenting employee could file an unfair labor practice charge that he objects to the non-majority union and to the unlawful assistance to a non-majority union. Since the NLRB will investigate a charge filed by anyone irrespective of her interest in the employment relationship, one employee could upset the whole scheme.

\textsuperscript{163} 29 U.S.C. § 158(a)(2) (making it unlawful for employer to give assistance to a union, which includes recognizing or dealing with a union as the exclusive representative unless the union actually represents a majority of the employees).

\textsuperscript{164} MORRIS, supra note 160, at 94-97.

\textsuperscript{165} ILGWU v. NLRB (Bernhard-Altmann Texas Corp.), 366 U.S. 731 (1961).

\textsuperscript{166} Where a union has its eye on organizing, the union may see the worker center's involvement as a threat to the goal of exclusive recognition. Alternatively, a rival union may want to block organizing efforts. Many cases where the NLRB has had occasion to create the rules regarding section 8(a)(2) have occurred in rival union situations.
These demands sound like the demands of an exclusive representative that would trigger the prohibition of section 8(a)(2). The employer could properly respond that it cannot deal with the worker center precisely because to do so would be illegal. And it could seek to avoid any future demand by filing charges against the worker center under section 8(b)(1)(A) if the worker center invoked any coercion such as a threat to picket. Morris thus highlights a real problem here for worker centers.

Professor Morris does not fine-tune this problem. He makes it clear that the non-majority unions may only demand bargaining on behalf of its members. In fact, this becomes a powerful tool to attract members: Only members enjoy the benefits of representation. In the exclusive representation setting, such a limit would violate the duty of fair representation.

In the non-majority union context, a demand that the employer bargain over any of the traditional subjects of bargaining as it affects the members only, and Professor Morris lists many of them, would invariably affect non-members. For example, Morris argues that non-majority unions should demand to bargain over any changes affecting members as to such issues as workplace rules, safety and health, profit sharing plans, ERISA governed benefits and the like. Bargaining over wages for members only or a grievance procedure for members only may be possible. Many subjects will have an effect upon non-members and potentially all other non-represented employees. Such issues may adversely impact non-members who do not want representation. For example, if any employee-member is moved from one position to another and his position is filled by a non-member, can the employer bargain with the non-exclusive representative to move the member back to his original job and displace the non-member? Can the employer bargain over seniority that would govern layoffs, job assignment, or anything else potentially affecting other unrepresented employees? What about work rules? Many, if not most changes by the employer are going to affect more than just members.

167. Majestic Weaving Co., 147 N.L.R.B. 859 (1964), enforcement denied on other grounds, 352 F.2d 854 (2d Cir. 1966) (unlawful for employer and union to engage in preliminary bargaining or agree on terms of future contract until majority status demonstrated).

168. The employer could file an RM petition, which is the process by which the Board resolves the question whether a union represents the employees in a bargaining unit by conducting an election.


170. MORRIS, supra note 160, at 194-95.

171. Professor Morris would apply the unilateral change doctrine of NLRB v. Katz, 369 U.S. 736 (1962), which would require the employer to bargain with the nonmajority union before change conditions affecting the members of the nonmajority union.
Even if the employer did not object to the involvement of a non-majority union, non-member employees who did object could easily derail this system with an appropriate charge asserting that the employer dealt with a union as the exclusive representative on a subject affecting him even though the non-majority union only sought to protect only the member. Take seniority as an example: By asserting seniority rights, the non-majority union invariably affects other employees, some of who may not be members and who may oppose such involvement. Morris does not consider this problem.

Professor Morris does concede that minority unions are labor organizations within the meaning of section 2(5). In fact, he muddles this issue. He asserts:

The statutory words “self-organization” and “labor organizations” are complementary to the phrase “to bargain collectively” in section 7. It is thus self-evident from the statutory text that the contemplated collective bargaining process requires the existence of an identifiable organization that engages in or seeks to engage in collective bargaining, not merely an ad hoc amorphous group or any other “employee representation committee or plan in which employees participate” that does not seek to engage in collective bargaining.\footnote{\textsuperscript{172}}

This statement does not recognize that labor organization status adheres even if collective bargaining status is eschewed. Any such committee or plan is a labor organization for all purposes under the National Labor Relations Act whether or not it seeks to bargain collectively.

Professor Morris is partially correct that an “ad hoc” committee can avoid section 2(5) labor organization status under limited circumstances where it is formed for a very limited purpose. That is irrelevant to his argument: Every committee or plan he advocates will be a labor organization. Each will seek to deal with employers whether or not it seeks to bargain collectively. Thus his analysis of “group dealing” is faulty to the extent that, if he is correct that the statute compels bargaining with a non-majority union, he does not explain why it does not compel “dealing with” an employer.\footnote{\textsuperscript{173}} Thus the non-majority union may under Morris’s theory compel bargaining under the NLRA but not something less.

Morris fails to address adequately this problem for two reasons. First, he sees his non-majority union as an organizing device for unions. Since non-majority unions are already part of a labor organization and governed by labor organization rules, he ignores the problem. Worker centers cannot do so. Thus he ignores the Landrum-Griffin Act implications. He acknowledges, however, that section 8(b)(7)(C) may apply to any union

\footnote{\textsuperscript{172} MORRIS, \textit{supra} note 160, at 155-56 (emphasis in original).} \footnote{\textsuperscript{173} \textit{Id.} at 158-59.}
picketing for recognition. But he argues that it will not apply since the non-majority union does not seek exclusive recognition. Morris has no choice but to accept full labor organization status since he is arguing for NLRA sanction for bargaining. Nonetheless, Morris does not analyze the impact of labor organization status in any detail since all unions which will seek non-majority status already have accepted that labor organization status.

Throughout Morris’ argument, he assumes that the non-majority or minority union is a “labor organization”; he calls them unions. Thus Morris seems to ultimately acknowledge that he is describing a regime where a non-majority union, a labor organization within the meaning of section 2(5), can have legally enforceable rights of representation for members only. He does not deal with the potential adverse consequences of such status.

Morris effectively argues that such non-majority unions can directly assist unions in organizing for he describes them as “the stepping-stone role of the minority-union members-only bargaining that usually leads to mature section 9(a) majority/exclusivity bargaining.” This is the same point made about worker centers by Janice Fine when she describes them as “pre-unions.” In this role they serve an important purpose and Fine, Morris, and Gordon as well have others have emphasized this point. As I have shown, for NLRA purposes it may not be true that worker centers are only pre-unions. They may in fact be labor organizations.

Professor’s Morris analysis may not reach the NLRB in the foreseeable future. The General Counsel has now expressly rejected this theory in a

174. Id. at 179-181. Professor Morris’ authority for the proposition that section 8(b)(7) may apply to picketing for recognition by non-majority unions is somewhat thin. Even if Professor Morris is literally correct, this is not practical. As many cases illustrate, a stray comment by a member of the labor organization going beyond the limited demand for non-majority representation will convert the picketing into representation picketing or organization picketing. For example, a lone picket or worker center member could say that the purpose of the picketing was to get the employer to talk to the worker center. This would easily be construed as a demand for recognition.

175. Professor Morris suggests that a group of workers could test his theory by picketing for recognition for their non-majority union, thus triggering a charge under section 8(b)(7). The union could defend on the ground that the picketing was lawful because the union did not seek exclusive recognition thus presenting the issue to the Board. He is correct except it will be difficult to find a test situation where there isn’t some evidence of either an organizational object or a recognitional object on an exclusive basis, that is for all employees. See True, supra note 161, at 201.

176. Morris, supra note 162, at 187-207.

177. Professor Morris does argue that non-majority status does not impose a duty of fair representation on the organization for non-members or force the employer to violate section 8(a)(3) by discriminating against non-members. Id. at 194-207.

178. Id. at 197

179. FINE, supra note 2, at 247.

180. GORDON, supra note 4, at 289-290.

181. Another risk is that the worker center will be treated as an agent of a union. See NLRB v. Int’l Longshoremen’s & Warehousemen’s Union, 238 F.2d 558 (9th Cir. 1960).
Like Morris, the Advice Memorandum assumes the organization involved was a "union," which it was under the circumstances. When dealing with worker centers, the demand for "dealing" creates the "labor organization" problem that is the subject of this review.

Let's return to worker center issues. First, no worker center wants to be labeled a labor organization under the NLRA, considering all the restrictions and obligations that would apply. Thus, a worker center does not want the status of non-majority union. Yet this is precisely what may happen in many cases. Whether minority unions are permitted under the NLRA is an important debate, but the important part of the debate for worker centers is whether they are unions and subject to the restrictions of labor unions. Here emerges the essential contradiction: Although worker centers can serve as valuable stepping-stones to true collective organization, they do not want to be considered labor organizations.

**B. Can the NLRA Be Amended or Interpreted to Fix the Problem?**

Legislative change of the National Labor Relations Act is unlikely absent a substantial political shift, although there have been efforts to amend section 8(a)(2). Seeking relief from Electromation, employers have sought a relaxation of section 8(a)(2) in Congress. Known as the TEAM Act (Teamwork for Employees and Managers Act), it has been the subject of extensive academic comment. Unions have vigorously opposed the proposed change in the law.

The proposed act does raise an interesting possibility. One version of the TEAM Act would allow an employer without sanction to "assist . . . any . . . organization or entity of any kind, in which employees participate . . . to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative." It does not take much imagination to recognize that the

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183. In addition there are potential conflicts between unions and worker centers that have led both to approach each other with reservation. *Fine*, supra note 2, at 150-156. Recently, AFL-CIO has openly embraced the worker center movement and created a partnership with the day labor worker center movement. AFL-CIO, *A National Worker Center-AFL-CIO Partnership*, http://www.aflcio.org/mediacenter/prsptm/pr08092006.cfm (last visited October 29, 2006).


TEAM Act allows an "entity of any kind" that is not a labor organization within the meaning of section 2(5). It does not take much to imagine worker centers using this as a shield and sword. Worker centers would have as a shield the protection of the TEAM Act to engage in dealing with employers and have the sanction of the Act for so doing. At the same time, the TEAM Act would provide worker centers a weapon: It arguably would allow worker centers to picket to force employers to deal with it without triggering the limits of section 8(b)(7).\footnote{187}

It is not likely that unions within the AFL-CIO or the Change to Win Coalition would support any effort by the worker center movement to amend the Act. But there may be some use to such changes as part of an overall package of labor law reform. Professor William B. Gould has long argued for a relaxation of section 8(a)(2) to accommodate union-management cooperation.\footnote{188} However, like others I have referred to, his forceful argument that 8(a)(2) needs modification does not deal with the labor organization problem I have described here. Those who view worker centers as "pre-unions" and part of the effort to organize may welcome them, labor organizations or not.

This could play out in various circumstances with surprising results. The employer who establishes a labor organization and unlawfully recognizes it might find the organization co-opted by an independent and more powerful labor organization. Even though the initial recognition was unlawful, it must be challenged within six months—otherwise the lack of majority status cannot be questioned.\footnote{189} That organization might even affiliate or merge with another organization. Its leadership would be the core of an organizing drive.

In Organizing Immigrant Communities: UNITE's Workers Center Strategy,\footnote{190} Professor Immanuel Ness provides an example of how established unions may use worker centers for "pre-union" purposes. Ness tells the story of how UNITE (now UNITE HERE) formed a series of Garment Workers Centers in various metropolitan areas in the 1990s. As Ness describes it, the "short-term objective of establishing workers centers is to provide political and ideological support for unionization among disenfranchised low-wage workers . . . ."\footnote{191} This is not an overstatement: the garment centers were part and parcel of an effort to organize and certainly in this situation a labor organization. They were, quite intentionally, a pre-union.
The possibility that pre-unions and union-assisted worker centers may be “labor organizations” suggests two solutions. First, CULA suggests that social causes are not labor organizations. Thus, if worker centers were “social causes,” they could avoid designation as a “labor organization.” The problem with this potential solution is that the phrase “social cause” is probably not capable of adequate definition and certainly suggests issues of content-based regulation that may raise First Amendment concerns. Moreover, most worker centers are not so broadly organized to be treated as a “social cause” because some focus on employment issues. Finally, if the statute is interpreted literally to apply to a “social cause,” which in any part attempts to deal with an employer, its “social cause” aspect will not save it from designation as a “labor organization.”

A second possible, and perhaps more viable, solution is suggested by the holding of the Fourth Circuit in Peninsula General Hospital. The Fourth Circuit stated that a “pattern or practice” of dealing is required before labor organization status attaches. Certainly most worker centers do not engage in ongoing dealings with any one employer although many will do so with numerous unrelated employers. This “pattern or practice” concept may well be properly applicable to some worker centers. Similarly, the “isolated” instances of contact described in DuPont would seem to apply, but the “pattern or practice” language from Peninsula General Hospital would exempt more worker centers from labor organization status. Thus worker centers which engage in campaigns against employers to enforce the minimum wage, hire back workers, or pay unpaid wages would not be engaged in anything other than “isolated” activities against that employer. Once the worker’s problem is resolved, the worker center focuses on another employer. This however does not fully solve the labor organization problem because the definition of employee is not limited to “the employees of a particular employer.” Therefore, even though the worker center does not deal with multiple employees over multiple problems of the same employer at one time, taken as a whole, it establishes a pattern and practice of dealing with multiple employers.

Labor has something to gain and something to lose from an expansive application of this gloss. On one hand, has traditionally fought to avoid allowing employers to establish employee committees and the like, for fear

195. 311 N.L.R.B. 893, 894 (“if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.”).
they might prevent or displace union representation. On the other, labor may have to accept this narrowing of the definition of labor organization in order to preserve the effectiveness of pre-unions. Yet the “pattern or practice” or “isolated” instances definitions make some sense. For example, in *DuPont* the employer established committees to deal with narrow problems just as the employer did in *Electromation*. If only one committee had been set up to deal with one problem at a time, there would not have been the same appearance of a labor organization—because a narrowly-tailored committee meeting for a limited time does not appear to be dealing.

The problem of the status of worker centers under the NLRA presents an opportunity to align the Act to changes in the workplace in a way that recognizes the competing interests of employers, employees, and organized labor. With some careful narrowing of the definition of labor organization, worker centers could avoid the problem of labor organization status. Employers, who generally seek the same result, would probably support such an interpretation. The question is whether organized labor would be on board, caught as it is between the competing concerns of avoiding company unions and eagerness to preserve the effectiveness of worker centers as pre-unions. A narrower definition of labor organization likely would employers to set up their own form of “pre-unions.” This would reflect some of the changes in the workplace the National Labor Relations Act heretofore has not accommodated.

IV.
CONCLUSION

Jennifer Gordon arrived on Long Island in 1992 and developed the Workplace Project, which since has become the model for the current worker movement. Her book demonstrates the hardships borne by low-wage immigrant laborers throughout the country. More importantly, it demonstrates the difficulties in creating organizations that can adequately, effectively, and on an ongoing basis serve these workers. She proves, nonetheless, the necessity of doing so.

Janice Fine has provided an incomparable survey of the worker center movement. She identifies its strengths and accomplishments. Her book recognizes the daunting task facing worker centers as they attempt to achieve substantial gains for low-wage workers.

Both books demonstrate a real tension: Are worker centers pre-unions or are they labor organizations? Do they really want to be labor organizations? This is a conflict that may never be resolved, particularly under the present regime of the National Labor Relations Act.

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Fine and Gordon, as well as most worker center advocates, realize the limited accomplishments of worker centers. As I have shown above, the number of workers for whom the centers solve workplace problems is relatively small. The amount of money collected, for example, in unpaid wages is miniscule in the big picture. The number of employers who are directly affected is similarly limited. Thus, the impact of acting like a union—organizing and improving working conditions at any one employer, or a group of employers or even an industry—is probably minimal. Acting like a pre-union does not accomplish a lot, at least on the present scale of the worker center movement. It's like having 150 local unions with membership of perhaps 100 people each.

There is, however, something else that Gordon and Fine advocate that is more enduring and more important. Worker centers can create leadership and direction. Generally, undocumented immigrant workers remain in the underground economy and cannot fully participate. Worker centers, like the Workplace Project, have become the catalyst for change for all low-wage workers. Minimum wage and living wage campaigns have been successfully moved by worker centers.\footnote{E.g. Fine, supra note 2, at 177-78.} Increasingly, states are enacting legislation that protects workers.\footnote{The Bureau of Labor Statistics publishes an annual survey of enacted state legislation in the \textit{Monthly Labor Review}. The last version for 2005 is available at http://www.bls.gov/opub/mlr/2006/01/art1full.pdf (last visited October 29, 2006).} Much of this is the result of the efforts of worker centers and their advocates. As is apparent from the Workplace Project’s achievements, it is the leadership, more than the members, which catalyzed the movement for the Unpaid Wages Act in New York. No matter how much Jennifer Gordon tries to convince us that only democratic worker centers can succeed, they depend to a large measure on the leadership of brilliant advocates like Jennifer Gordon. No doubt she could have run for office as the elected official of the Workplace Project and served the labor organization well!

We need to preserve the worker center movement. It serves a large group of workers who cannot be served effectively by the traditional labor movement. These books compellingly demonstrate the need for this movement. When considered against the labor organization problem these books prove the need for change in the National Labor Relations Act. The worker center movement presents a great opportunity: to create and encourage new organizations, reform the National Labor Relations Act, and to satisfy employer concerns to meet changes in the workplace.