
WORKER CENTERS AND THE “SOCIAL CAUSE EXCEPTION”

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*“When the day is over the doors are locked on us / ‘Cause money buys the access
/ And we can’t pay the cost / How can we expect anyone to listen / If we’re
using the same old voice? / We need new noise”***

I. INTRODUCTION

In 1954, thirty-nine percent of private sector laborers were unionized; by 1999 that number dropped to ten percent.¹ Labor unions provide vital services for workers and the decline of unions has also meant that workers go without those services. At one time, union representatives and organizers were hired by the labor unions to recruit workers to organize.² In the postwar era the unions stopped reaching out and recruiting new members and focused instead on only protecting current workers.³ This is no help to those workers who wish to organize and do not understand the legal issues associated with doing so.

In the absence of labor unions, so called “worker centers” have formed to provide legal aid and representation for employees who wish to organize.⁴ In the absence of union representation, these clinics also help workers settle grievances and negotiate for better wages and conditions.⁵

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** REFUSED, *New Noise, on THE SHAPE OF PUNK TO COME: A CHIMERICAL BOMBINATION IN 12 BURSTS* (Burning Heart Records 1998).

¹ Dan Clawson & Mary Ann Clawson, *What Has Happened to the US Labor Movement? Union Decline and Renewal*, 25 ANN. REV. SOC. 95, 97 (1999).

² *Id.* at 106-07.

³ *Id.* at 98.

⁴ JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM 1-2* (2006).

⁵ *Id.* at 2.

Along with a brief explanation of the operation of worker centers, this paper will explore the various issues, legal and otherwise, associated with these centers. The paper will focus on the unique legal question of whether these worker centers constitute labor organizations under the meaning of the National Labor Relations Act (“NLRA”). After careful study and analysis it is clear that at least some worker centers are not legal organizations because they fall within what I have termed the “social cause exception.”

II. WHAT ARE WORKER CENTERS AND WHAT DO THEY DO?

Before considering whether worker centers are legal organizations, one must first determine what worker centers are and how they operate. In her comprehensive survey on the subject, Janice Fine identified at least 137 worker centers operating in the United States as of May 2005.⁶ Often these worker centers focus on immigrant workers.⁷ For the purposes of her study, Fine defined “worker center” broadly, as providing support to low-wage workers.⁸ To supplement her definition, Fine identified three “approaches,” some combinations of which are utilized by the organizations she classifies as “worker centers.”⁹

The first of Fine’s approaches is “service delivery.”¹⁰ This approach centers on providing services to individual workers.¹¹ This approach is perhaps best illustrated by the legal battles of car wash workers in Los Angeles to collect unpaid wages in the early 1990s.¹² During that time period, legal aid attorneys became inundated with claims from car wash workers.¹³ Recognizing the widespread and similar methods of wage theft that the car wash workers experienced, the attorneys handling these claims began collaborating and eventually

⁶ *Id.* at 3.

⁷ *Id.* (122 worker centers are immigrant worker centers).

⁸ *Id.* at 2 (“Worker centers are community-based mediating institutions that provide support to low-wage workers.”).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* (“providing legal representation to recover unpaid wages; English classes; worker rights education; access to health clinics, bank accounts, and loans”).

¹² Susan Garea & Sasha Alexandra Stern, *From Legal Advocacy to Organizing: Progressive Lawyering and the Los Angeles Car Wash Campaign*, in *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* 126 (Ruth Milkman, Joshua Bloom & Victor Narro eds., 2010).

¹³ *Id.* (Illustrating the treatment of workers with Messrs. Thomas and Lopez. Thomas worked ten-hour days for which he was paid \$35; Lopez worked sixty-hour weeks but was regularly paid for only seventeen hours.).

formed the Coalition of Low-Wage and Immigrant Worker Advocates (“CLIWA”).¹⁴ By litigating wage claims on behalf of mistreated workers, the service delivery approach of organizations like CLIWA are able to provide for workers at the individual level.

The second of Fine’s approaches is “advocacy.”¹⁵ This approach centers on providing the needs of workers at the industrial level.¹⁶ Rather than focusing on remedies for individual injustices, the goal of the advocacy approach is to remedy widespread injustice throughout a given industry or population. Here again, the experience of CLIWA is illustrative. In addition to providing legal representation for individual claims, the organization’s other goal was legislative reform.¹⁷ CLIWA pursued this goal by drafting legislation to regulate the car wash industry and then lobbying for the bill’s eventual passage.¹⁸ By pursuing an enforced regulatory scheme for the entire industry CLIWA was able to prevent injustices from ever occurring rather than simply remedying them when they did occur. Thus, it is the pursuit of change that is the crux of the advocacy approach.

The third approach recognized by Fine is “organizing.”¹⁹ The goal of the organizing approach is to provide for the community as a whole.²⁰ While the other two approaches are law- and lawyer-centric, the organizing approach centers on the development of strong worker leaders and organizations. To state it proverbially, service delivery and advocacy “give a man a fish” but the organizing approach “teaches a man to fish.” Unfortunately, CLIWA did not embrace this approach and after it finally achieved its legislative goals, it fell back on the litigation-based service delivery approach.²¹ Luckily, through its advocacy CLIWA caught the eye of the American Federation of Labor and Congress of Industrial Organizations- (“AFL-CIO”) affiliated United Steelworkers Union (“USW”).²² Inspired by the success of CLIWA, the USW launched the Car Wash Workers Committee (“CWWC”) as the first

¹⁴ *Id.* at 129-30.

¹⁵ FINE, *supra* note 4, at 2.

¹⁶ *Id.* (“researching and releasing of exposés about conditions in low-wage industries, lobbying for new laws and changes in existing ones, working with government agencies to improve monitoring and grievance processes, and bringing suits against employers”).

¹⁷ Garea & Stern, *supra* note 12, at 130.

¹⁸ *Id.* at 130-32.

¹⁹ FINE, *supra* note 4, at 2.

²⁰ *Id.* (“building ongoing organizations and engaging in leadership development among workers to take action on their own for economic and political change”).

²¹ Garea & Stern, *supra* note 12, at 137-40.

²² *Id.* at 138.

step in an ongoing campaign to unionize the industry.²³ Thus, the USW was able to inject the organizing approach into the car wash workers campaign where CLIWA had failed to recognize the need. By widening the involvement of the workers, the organizing approach is able to build an enduring and strong grassroots labor movement.

Thus, service delivery, advocacy, and organizing are the three approaches commonly utilized by worker centers. Each approach plays a distinct and effective role in building a strong labor movement. These approaches will return in Part V, where they will be applied to the relevant law.

III. WORKER CENTERS AND THE “LABOR ORGANIZATION” PROBLEM

In the era immediately preceding the rise of unionism, workers joined mutual benefit and fraternal societies.²⁴ These organizations performed many functions now performed by unions, from securing insurance for workers to responding to grievances to building industrial solidarity.²⁵ As unions grew, the need for these organizations shrank.²⁶ However, with the growth of unions came the regulatory restrictions of the NLRA and the Taft-Hartley amendments. These restrictions have been successful in limiting the efficacy of unions and, as a result, union membership and activity has sharply declined.²⁷ In this respect, the modern labor landscape more resembles that pre-union era and worker centers represent the resurgence of those early pre-union organizations. Thus, if worker centers are to be successful in supplementing union activity, they must be free from the restrictions of the NLRA by avoiding the “labor organization” label. The two limitations of the NLRA that would be most detrimental to worker centers are liability for unfair labor practices and the restrictions on secondary activity.

²³ *Id.*

²⁴ David Rosenfeld, *Worker Centers: Emerging Labor Organizations—Until They Confront the National Labor Relations Act*, 27 BERKELEY J. EMP. & LAB. L. 469, 472-73 (2006).

²⁵ *Id.*

²⁶ *Id.* at 473.

²⁷ Clawson & Clawson, *supra* note 1, at 100; *see also* FINE, *supra* note 4, at 1-2 (“In the past, large numbers of American workers . . . were able to join together through unions to wage a common struggle for dignity, better wages, and better working conditions, but now unfavorable labor law and employer opposition have made this much more difficult.”).

The clearest reason why worker centers should avoid the “labor organization” label is that it creates liability for unfair labor practices. The NLRA classifies unfair labor practices into two categories; those committed by employers and those committed by labor organizations.²⁸ A group not falling into one of those two categories is not liable for unfair labor practices and is not restricted by the regulations of the NLRA. Thus, worker centers can avoid an entire field of regulation and liability by not acting as a labor organization. By avoiding the “labor organization” label, worker centers can avoid the costs and stresses of an entire area of litigation.

Other than the costs of litigation generally, the specific restrictions that the NLRA imposes on labor organizations would be detrimental to worker centers, but none is more troubling than the restriction on secondary activity. Labor organizations are restricted from applying economic pressure on people or entities with which they do not have a dispute regarding employment.²⁹ For example, a labor organization cannot discourage consumers from shopping at a certain retailer because that retailer sells the products produced by the targeted employer.³⁰ However, labor organizations can engage in so-called “product picketing,” where they encourage customers not to buy the targeted employer’s product from the secondary retailer.³¹ Labor organizations must be careful not to cross this fine line. Worker centers are largely managed and operated by inexperienced volunteers, thus making them more vulnerable than traditional unions to inadvertently creating secondary activity liability.³²

Furthermore, violating the prohibition against secondary activity explicitly and specifically creates a cause of action for the secondary target to collect monetary damages.³³ The National Labor Relations Board (the “Board”) usually imposes equitable remedies such as in-

²⁸ 29 U.S.C. § 158 (2012) (The NLRA also holds agents of labor organizations liable, but that technical point is of no consequence here.).

²⁹ *Id.* § 158(b)(4).

³⁰ This is, in fact, the issue in *Center for United Labor Action (CULA)*, 219 N.L.R.B. 873 (1975) (“CULA”), in which an organization encouraged customers not to shop at clothing retailer Sibley because the retailer carried clothing produced by Farrah, the targeted employer. This case is discussed in great detail below. For another example of secondary activity, see *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964).

³¹ *NLRB v. Retail Store Emps., Local 1001*, 447 U.S. 607, 614-15 (1980).

³² FINE, *supra* note 4, at 216.

³³ 29 U.S.C. § 187.

junctions and cease-and-desist orders for unfair labor practices.³⁴ Monetary damages are most often awarded as back pay when the Board reinstates a wrongfully terminated employee.³⁵ However, the Taft-Hartley Act specifically carves out pecuniary damages as the remedy to a charge of unlawful secondary activity.³⁶ Furthermore, that provision creates liability in the district courts independent of, and irrespective of, any of the Board's findings to the contrary.³⁷ Meaning, even if the Board does not award monetary damages, a secondary target can file suit against a labor organization and the court is not bound by the Board's findings.

Thus, it is in the best interest of worker centers that they steer clear of activities that would cause the Board to classify them as "labor organizations" under the NLRA. In doing so, worker centers can limit exposure to litigation. Furthermore, worker centers would be free to operate without the restrictions imposed by the NLRA. The restriction on secondary activity creates a special vulnerability for worker centers as its technical distinctions pose a hazard to the unsophisticated and inexperienced volunteers that staff worker centers. This risk is heightened by the provisions of the Taft-Hartley Act, which specifically creates pecuniary liability for organizations that violate the restriction on secondary activity.

IV. THE "SOCIAL CAUSE EXCEPTION"

As discussed above, one of the major obstacles facing any worker center is the NLRA's broad definition of "labor organizations" and the steps that must be taken for a worker center to remain outside of that definition. Commentators agree that the restrictions that come with the label of "labor organization" under the NLRA would be detrimental to worker centers.³⁸ Attorney David Rosenfeld takes a pessimistic view, reasoning that workers centers are, most likely, labor organiza-

³⁴ *Id.* § 160(c), (j); see also 51B C.J.S. *Labor Relations* § 1148 (2013).

³⁵ 29 U.S.C. § 160(c).

³⁶ *Id.* § 187(b).

³⁷ *Id.*; see also George P. Parker, Jr., *Monetary Recovery Under the Federal Labor Statutes*, 45 TEX. L. REV. 881, 907-08 (1967).

³⁸ Rosenfeld, *supra* note 24, at 471-72 ("If a worker center becomes a 'labor organization' and creates a permanent structure for workers either within an industry or of a particular employer, it immediately suffers from the restrictions imposed by federal law."); accord Eli Naduris-Weissman, *The Worker Center Movement and Traditional Labor Law: A Contextual Analysis*, 30 BERKELEY J. EMP. & LAB. L. 232, 263-71 (2009).

tions under the NLRA.³⁹ Though Rosenfeld invokes the critical *Center for United Labor Action* (“*CULA*”)⁴⁰ decision, he treats the decision as an outlier in the Board’s current decisions.⁴¹ *CULA* introduces what I will refer to as the “social cause exception,”⁴² and worker centers can avoid the “labor organization” label by operating within that exception.

CULA introduced an important limitation on the NLRA that carved out an exception for worker centers from being recognized as “labor organizations.” This limitation is the distinction between “labor organizations” and what the Board calls “social causes.”⁴³ This raises the second issue of what exactly constitutes a social cause. Though the Board does not explicitly address this issue, there is ample authority in the decision to attempt to construct some factors common among social causes. One of those factors, that a social cause is not “selected or designated by employees for the purpose of resolving their conflicts with employers,”⁴⁴ is a vital distinction that has been misunderstood by other commentators.⁴⁵

In *CULA*, the Board rested its decision not to classify the Center for United Labor Action (“*CULA*”) as a labor organization by distinguishing it as a “social cause.”⁴⁶ Social causes, the Board reasoned, do not “exist[] for the purpose of dealing with employers over employee problems.”⁴⁷ Elsewhere in the decision, the Board states that “[*CULA* never] sought to *deal directly* with employers concerning employee la-

³⁹ See Rosenfeld, *supra* note 24, at 472.

⁴⁰ *CULA*, 219 N.L.R.B. 873, 879 (1975).

⁴¹ Rosenfeld, *supra* note 24, at 487-89.

⁴² The analysis to follow raises the question of whether the “social cause exception” is really a “true exception” to labor organization status or whether social causes are merely classes of organizations which by their very nature exist outside of the “labor organization” definition. Most likely social causes fall in the latter category, but for the sake of readability I have chosen to use the phrase “social cause exception” to describe the issue at hand.

⁴³ *CULA*, 219 N.L.R.B. at 873 (“The difficulty we find in the Administrative Law Judge’s reasoning is that it equates support for what is considered to be a social cause with the desire to represent the individuals in the furtherance of their cause.”).

⁴⁴ *Id.*

⁴⁵ See, e.g., Michael C. Duff, *Days Without Immigrants: Analysis and Implications of the Treatment of Immigration Rallies Under the National Labor Relations Act*, 85 DENV. U. L. REV. 93, 133-36 (2007); Alan Hyde, *New Institutions for Worker Representation in the United States: Theoretical Issues*, 50 N.Y.L. SCH. L. REV. 385, 408 (2005-2006); Rosenfeld, *supra* note 24, at 487-89.

⁴⁶ *CULA*, 219 N.L.R.B. at 873-74.

⁴⁷ *Id.* at 873.

bor relations matters.”⁴⁸ It is the non-dealing nature of social causes that exempts them from recognition as a labor organization under Section 2(5) of the NLRA.⁴⁹

The “dealing” provision is purposefully broad, with the intention of prohibiting company unions.⁵⁰ The Board has returned again and again to what exactly constitutes “dealing,” most notably in the *Electromation* and *E.I. du Pont* cases.⁵¹ In those cases, as in most “dealing” cases, the Board is being asked to consider whether the employer has created a labor organization by forming some group of employees, a decision that turns on whether or not the activities of the group constitute “dealing.”⁵² If the Board finds that these groups are labor organizations then the employer has committed an unfair labor practice by forming a company union.⁵³

However, the “dealing” concept is not so easily applied outside of the realm of employer-dominated company unions. The Board ruled that CULA’s actions did not constitute dealing.⁵⁴ This conclusion is consistent with the Board’s recent “bilateral mechanism” doctrine. In *E.I. du Pont*, the Board explained,

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 rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.⁵⁵

The Board mentions a suggestion box as an example of a unilateral mechanism and as such it would not constitute dealing.⁵⁶ CULA pick-

⁴⁸ *Id.* (emphasis added).

⁴⁹ 29 U.S.C. § 152(5) (2012) (“The term ‘labor organization’ means 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.” (emphasis added)).

⁵⁰ Naduris-Weissman, *supra* note 38, at 282.

⁵¹ *Electromation, Inc.*, 309 N.L.R.B. 990 (1992); *E.I. du Pont de Nemours & Co.* (“*E.I. du Pont*”), 311 N.L.R.B. 893 (1993).

⁵² *Electromation, Inc.*, 309 N.L.R.B. at 992; *E.I. du Pont*, 311 N.L.R.B. at 893.

⁵³ 29 U.S.C. § 158(a)(2).

⁵⁴ CULA, 219 N.L.R.B. 873 (1975) (“[CULA has] supported strikes by joining in the picketing and leafleting of employers and, in certain instances, engaged in fund-raising activities on behalf of strikers; however, [it has never] sought to deal directly with employers concerning employee labor relations matters.”).

⁵⁵ *E.I. du Pont*, 311 N.L.R.B. at 894.

⁵⁶ *Id.*

eted and fundraised, which the Board ruled was not the “direct dealing” of a labor organization.⁵⁷ Similarly, the purpose of CULA’s actions was to voice concerns and raise awareness but not to engage in the sort of back-and-forth bilateral mechanism that constitutes “dealing” under *E.I. du Pont*. Mindful of the Board’s difficulty in defining what exactly constitutes “dealing,” it is clear that the “direct dealing” of CULA is simply the “bilateral mechanism” of *E.I. du Pont*, couched in different terms. In the language of *E.I. du Pont*, CULA’s actions are more like a suggestion box than an employee action committee.

Thus, the Board’s observation, that CULA was not a labor organization because it did not seek to “deal directly” with the employer, finds support in the current bilateral mechanism doctrine. By synthesizing the decision in *CULA* and the bilateral mechanism doctrine it becomes clear that social causes are not labor organizations because they do not seek to deal with employers as required by the NLRA. The logical chain presented above is reduced thusly: a social cause does not engage in “direct dealing”; “direct dealing” is merely an outdated term for what the Board now calls a “bilateral mechanism”; a “bilateral mechanism” is required for “dealing”; “dealing” is a requirement of labor organizations under the NLRA; therefore, since social causes do not seek to implement a bilateral mechanism they do not deal and thus are not labor organizations.

Critics of the *CULA* decision, such as attorney David Rosenfeld, argue that the decision has never been applied in another Board decision, an indication that the “social cause” language has been replaced with the “bilateral mechanism” language of *Electromation*.⁵⁸ Rosenfeld defines “dealing” broadly, as does the Board, but Rosenfeld goes immediately to the extreme. Citing the dissent in *CULA*, Rosenfeld argues that any organization that exists, at least in part, to deal with employers is a labor organization and there are no “de minimis” exceptions.⁵⁹ His examples of social causes that could be labeled labor organizations include churches and the National Rifle Association.⁶⁰ Rosenfeld’s prime example is a case in which the Supreme Court found that the NAACP had become a “labor organization” by injecting itself in a labor dispute.⁶¹

⁵⁷ *CULA*, 219 N.L.R.B. at 873.

⁵⁸ Rosenfeld, *supra* note 24, at 488-89.

⁵⁹ *Id.* at 488.

⁶⁰ *Id.* at 495-96.

⁶¹ *Id.* (citing *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938)).

Rosenfeld ignores the year of that decision, 1938, which suggests that the decision may have had more to do with the color of the agitators' skin than the merit of their claims. But even more notable is that this case pre-dates *Electromotion*, so if *Electromotion* has replaced the language in *CULA*, surely it has replaced the language of this case as well. His argument makes no room for the possibility that the NAACP case supplements *Electromotion* because his argument dismissing *CULA* relies on *Electromotion* overturning existing doctrine for the new "bilateral mechanism."

It is clear that Rosenfeld finds this broad definition of "dealing" troubling, but he nevertheless argues that such rulings would not be incongruous with the *Electromotion* case. As discussed above, *CULA* is not inconsistent with the *Electromotion* "bilateral mechanism" doctrine. Rosenfeld pleads for a limitation on the definition of "dealing" but in his rush to dismiss *CULA* as nothing more than a curiosity, he overlooked the very limitation he so desires. The Administrative Law Judge's ("ALJ") opinion in *CULA* invokes a Supreme Court decision in which the Court chided the Board for ruling within the letter of the law even when doing so was not within the spirit or the intention of the law.⁶² The dissent's argument, adopted by Rosenfeld, is thus untenable. To apply the NLRA to any organization that does any dealing, however small, with employers would include labor and employment law firms. That would make such law firms subject to the Labor-Management Reporting and Disclosure Act ("LMRDA") and its restrictions as well. Rosenfeld's argument would, for example, require labor and employment law firms to elect their officers through secret ballot at least every three years.⁶³ Such an application of the law would be completely absurd and would do nothing to achieve the NLRA's objective.

Yes, "dealing" is construed broadly, but that does not mean that it is construed irrationally. The scope of "dealing" is limited and the limit lies where attributing dealing to a "social cause" so completely contravenes the spirit of the law. The purpose of the NLRA is to foster industrial peace and imposing its restrictions on churches, activist groups and lobbying organizations does not advance that goal. Thus, the fact that the Board broadly interprets "dealing" does not alter the holding in *CULA*; in fact, *CULA* serves as the limitation on that broad interpretation.

⁶² *CULA*, 219 N.L.R.B. at 879 (citing *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 72 (1964)).

⁶³ 29 U.S.C. § 481(b) (2012).

Having recognized that the Board would most likely recognize the social cause exception under its current framework, the issue then becomes defining what exactly constitutes a social cause. In *CULA* the Board did not expressly address this issue, but some factors can be extricated by analyzing the Board’s reasoning as to what set *CULA* apart from true labor organizations. Those factors are: whether the organization was chosen by employees to represent them;⁶⁴ whether the organization seeks to implicitly or explicitly deal with the employer over issues affecting employment;⁶⁵ and whether the organization seeks to marshal public support.⁶⁶ The Board explicitly stated that whether employees were members of the organization was not a factor for considering social cause status.⁶⁷

The first factor is whether the organization was selected and designated by employees for the purpose of resolving their conflicts with employers. This is an important limitation on the NLRA’s broad “labor organization” definition.⁶⁸ On this issue, the Board adopted the holding of the ALJ, who admitted that the “selected and designated” characteristic of labor organizations was not textually-based.⁶⁹ However, the ALJ reasons, and the Board agrees, that such a technical application of the law is at odds with its underlying policy.⁷⁰

However, in the context of employee action committees, like those in *Electromation* and *E.I. du Pont*, the Board held that those organizations, which were not chosen by employees, were nonetheless la-

⁶⁴ *CULA*, 219 N.L.R.B. at 873 (“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 . . .”).

⁶⁵ *Id.* (“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.”).

⁶⁶ *Id.* (“[I]t is not unusual for social activist groups, newspapers, and clergy to actively support the employees’ cause and to seek to marshal public opinion in support of it.”).

⁶⁷ *Id.*

⁶⁸ 29 U.S.C. § 152(5) (“The term ‘labor organization’ means 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.”).

⁶⁹ *CULA*, 219 N.L.R.B. at 879.

⁷⁰ *Id.* (“As the Supreme Court has frequently had occasion to remind us, ‘it is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.’” (quoting *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. at 72)).

bor organizations.⁷¹ In *Electromotion*, for example, the employer selected and assigned the employees to the various committees.⁷² This contradicts the holding in *CULA* that to qualify as a labor organization the group in question must have been chosen by the employees. Thus, the Board's current analytical framework would not seem to support the *CULA* requirement that labor organizations must be employee-chosen.

However, the underlying logic to the "selected and designated" characteristic can still be a workable feature of the social cause exception. Rather than using "selected and designated" as a necessary element of a labor organization, the distinction can be reclassified as a factor showing social cause status. The inquiry into whether the organization was selected and designated by employees remains, but instead of being determinative of labor organization status it becomes indicative of social cause status. This is best understood by contrasting the organization in *Electromotion* with the one in *CULA*. In *Electromotion*, though the organization was not chosen by the employees, it does not have any other characteristics (or any of the other factors addressed below) of what would normally be considered a "social cause." *CULA* is clearly very different from the organization in *Electromotion*. In the framework that follows it will be clear that this factor is the only one that those two organizations share. *CULA* is closer to the colloquial understanding of "social cause" and so for that reason the determination of social cause status cannot turn on whether the organization was selected and designated by employees.

Thus, the "selected and designated" inquiry remains the same, but its application can easily be altered to fit within the Board's current definition of labor organization. By recognizing that a common feature of social causes is that they are not selected or designated by employees, but having that as only part of the analysis, the Board would avoid creating an exception that was too broad to achieve the policy interests of the NLRA.

The next factor is whether the organization seeks to deal with employers. In *CULA* the Board held that "[s]upport 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

⁷¹ See *Electromotion, Inc.*, 309 N.L.R.B. 990 (1992); *E.I. du Pont*, 311 N.L.R.B. 893 (1993).

⁷² *Electromotion, Inc.*, 309 N.L.R.B. at 990-92.

question is expressly or implicitly seeking to deal with the employer over matters affecting the employees.”⁷³ The analysis becomes a bit circular at this point: a social cause is not a labor organization because it does not seek to deal and social causes are organizations that do not seek to deal. Furthermore, as addressed above, the Board’s definition of “dealing” is not easy to apply. However, both of these concerns are addressed by making this inquiry indicative, but not dispositive, of whether an organization constitutes a social cause.

First, framing the inquiry as a factor rather than an element of social causes alleviates some of this inquiry’s admittedly circular logic. It is important that the Board make such an inquiry so as to apply the exception in a manner befitting its underlying policy. As was done in *CULA*, this inquiry is largely fact-based. In *CULA*, the Board looked to the activities the organization engaged in, picketing and fundraising, to determine that these activities did not demonstrate what it would now term a “bilateral mechanism.”⁷⁴ The use of the term “demonstrate” makes it clear that the evidence must exhibit some objective purpose on behalf of the organization to represent employees in order to constitute “dealing.”

This fact-based analysis to determine dealing is not inconsistent with other precedent. *N.L.R.B. v. Fruit and Vegetable Packers, Local 760*, asked whether a union had violated the prohibition against secondary picketing.⁷⁵ In that case, Local 760 picketed outside of grocery stores to ask customers not to purchase Washington Apples because of a labor dispute between the apple pickers and the fruit company.⁷⁶ The Board found that the Local had violated the NLRA by picketing a secondary employer.⁷⁷ The Supreme Court reversed the Board’s decision, reasoning that the Local was only asking customers not to buy a certain product as opposed to asking customers not to patronize the secondary employer.⁷⁸ The Court held that even though the activity did constitute a secondary picket under the broad definition in the NLRA, such a strict application led the Board afoul of the NLRA’s underlying policy.⁷⁹ Thus, to determine whether an activity constitutes a secondary picket, the Court ruled that inquiry must be made into the de-

⁷³ *CULA*, 219 N.L.R.B. at 873.

⁷⁴ *See id.*

⁷⁵ 377 U.S. 58, 59 (1964).

⁷⁶ *Id.* at 59-60.

⁷⁷ *Id.* at 62.

⁷⁸ *Id.* at 72-73.

⁷⁹ *Id.* at 71-72.

monstrable purpose of the activity. If that purpose does not comport with the policy concerns underlying the NLRA, then the activity is not a secondary picket. In the same way, the Board must look to the factually demonstrable purpose of the activities to determine whether those activities exhibit a desire to “deal” in accordance with NLRA policy.

Second, framing the inquiry as a factor rather than an element of a social cause alleviates the concern over the difficulty the Board and the courts have in determining “dealing.” For example, in *CULA* the Board and the ALJ disagreed over the issue of dealing. The ALJ admitted that though he found the outcome of the analysis unfavorable (and thus found *CULA* was not a labor organization on policy grounds), *CULA* was nonetheless “dealing” within the meaning of the NLRA.⁸⁰ Furthermore, the Board has continued to complicate this issue with “bilateral mechanisms” and “pattern or practice” requirements, resulting in unpredictable outcomes. If the determinative inquiry were whether or not the organization sought to deal, the Board would put too much weight on an imprecise and unpredictable legal concept. Defining this inquiry as a factor allows the Board more latitude in close cases like *CULA* than if “dealing” were the sole determinative inquiry.

The next inquiry is whether the organization seeks to marshal public support. This factor may be thought of as an alternative to the last factor (whether the organization seeks to deal with the employer). While the main purpose of a labor organization is to “deal with employers,” the main purpose of a social cause is to marshal public support for that cause.⁸¹ Here again, defining this inquiry as a factor limits the breadth of its application. Surely the traditional union also seeks to marshal public support for its cause, but to define a union as anything other than a labor organization would be a clear violation of the NLRA’s underlying policy. So again, this inquiry must only be one piece of the larger inquiry as to what constitutes a social cause.

There may be other factors that would aid in distinguishing between labor organizations and social causes, but those three are at least implied by the Board in *CULA*. In addition to those things that the Board considered, it also made clear those factors that fell outside of its consideration. The Board was clear that the presence of employees within an organization did not bear on whether it was a social cause or

⁸⁰ *CULA*, 219 N.L.R.B. 873, 879 (1975).

⁸¹ *Id.* at 873.

a labor organization.⁸² Even though such organizations may fall within the literal meaning of the NLRA, the Board finds such a result “ridiculous on its face,” thus echoing the Supreme Court’s concern in *Fruit and Vegetable Packers* that the Act should not be applied so as to contravene its underlying policies.⁸³ It is easy to imagine that to hold otherwise would label any number of legitimate social causes as labor organizations. For example, if the Democratic Party engaged in the activities of CULA it would be unreasonable to label them a “labor organization” just because some employees were also Democratic Party members.

Furthermore, whether members of the organization had represented employees “before various state agencies and commissions . . . has no bearing on [CULA’s] status as a labor organization within the meaning of our Act.”⁸⁴ Here, the Board carves out another exception to the representation factor by excluding legal work as a form of employee-selected representation. Though the Board does not explain the reasoning for this exception to the representation factor, its logic is easily deduced. Aiding or representing a worker in the context of a legal or administrative proceeding clearly falls outside of the NLRA’s scope. When the matter goes to the courts there is no longer the concern that one party will dominate the other because of the legal safeguards already in place in those contexts that protect each party. Practically, this exception helps to exclude law firms and clinics from being labeled as labor organizations.

In addition to the three factors and two “non-factors,” the Board mentions three examples of social causes that are helpful in illuminating the type of organization they had in mind when constructing the social cause exception.⁸⁵ The Board mentions “social activist groups, newspapers and clergy” as the types of organizations that regularly lend support to striking workers but are not labor organizations.⁸⁶ The

⁸² *Id.* (“It would also be uncommon if, among those who belong to such organizations, there were not some individuals who would meet the definition of employees under our Act. But are we then to conclude that any organization that engages in strike-supporting activities exists, at least in part, for the purpose of dealing with employers over employee labor relations matters? We believe that such a conclusion would be ridiculous on its face.”).

⁸³ *Id.*; *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 71-72 (1964).

⁸⁴ *CULA*, 219 N.L.R.B. at 873-74.

⁸⁵ *Id.* at 873.

⁸⁶ *Id.*

selection of these three groups is interesting because they reveal the possibility that the Board was concerned with restricting the First Amendment rights of these “social causes.” The examples chosen all illustrate particularly protected rights under the First Amendment. The clergy operate under the freedom of religion, the newspapers operate under the freedom of press and the social activist groups operate under the freedoms of speech and petition. The missing First Amendment freedom is the freedom of assembly.⁸⁷

Thus, it is possible that the types of “social causes” that the Board sought to protect in *CULA* were the types of associations the Framers sought to protect in the freedom of assembly. The difficulty that the Board has in describing the “social causes” that fall outside of the NLRA is telling. The notion of joining others in pursuit of a cause is inherently American. As Alexis de Tocqueville observed,

I have since travelled over England, whence the Americans have taken some of their laws and many of their customs; and it seemed to me that the principle of association was by no means so constantly or so adroitly used in that country. The English often perform great things singly; whereas the Americans form associations for the smallest undertakings. It is evident that the former people consider association as a powerful means of action, but the latter seem to regard it as the only means they have of acting.⁸⁸

Though Americans fetishize individuality, they recognize that individual action is limiting. Again, Tocqueville described the problem best,

Amongst democratic nations, on the contrary, all the citizens are independent and feeble; they can do hardly anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, fall into a state of incapacity, if they do not learn voluntarily to help one another. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy⁸⁹

Thus, perhaps the Board was concerned that labeling social causes as labor organizations (and imposing the associated duties and limitations thereof) would be a disastrous limitation on the freedom of association. As Tocqueville observed, it is that very freedom which allows Americans to maintain their independence.

⁸⁷ An in-depth analysis of these Constitutional concerns falls outside of the scope of this article. For a more thorough analysis see Naduris-Weissman, *supra* note 38, at 316-23.

⁸⁸ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 629 (Henry Reeve trans., Bantam Dell 2004) (1835).

⁸⁹ *Id.*

Therefore a social cause is characterized by the three factors: it is not selected and chosen, does not deal, and marshals public support; the two non-factors: employee membership and legal representation; the three examples: clergy, newspapers and social activist groups; and the related First Amendment implications.⁹⁰

V. DO WORKER CENTERS FALL WITHIN THE SOCIAL CAUSE EXCEPTION?

Having established the existence of the social cause exception and the defining factors of a social cause, the issue next presented is whether worker centers fall within the social cause exception. However, this question is unanswerable. Due to the variety and diversity of worker centers it is impossible to apply this framework in a way that would account for those countless variations. However, it is clear that some, if not many, worker centers would be covered by the social cause exception so long as they fall within the framework. It is possible for a worker center to implement all three of Fine’s approaches, service delivery, advocacy and organizing, while remaining under the social cause exception.

First, worker centers may surely implement the service delivery approach. The only activity in this approach that comes close to labor-organization-like representation is aiding workers in pursuing legal claims against an employer. However, the Board in *CULA* clearly excised such representation as lying outside of the scope of the NLRA.⁹¹ However, it is important to note that representing the employees’ interests to an employer directly would likely constitute dealing as a “bilateral mechanism” and would not exempt the worker center from labor organization status. It is for this reason that this type of representation has been excluded from the examples of service delivery activity.

Second, worker centers may implement the advocacy approach. This approach centers on lobbying for legislation and raising public awareness. This approach goes to the “marshal public support” factor within the social cause analysis and favors workers centers. Additionally, this approach may also demonstrate a lack of purpose to deal with the employer. Here again, the worker center and its agents must be careful not to engage in the sort of “bilateral mechanism” that would constitute dealing. It is easy to imagine a scenario in which the worker

⁹⁰ *CULA*, 219 N.L.R.B. at 873-74; see also Naduris-Weissman, *supra* note 38, at 316-23.

⁹¹ *CULA*, 219 N.L.R.B. at 873-74.

center, in drafting proposed legislation, meets with an employer to solicit input. Depending on the factual situation, the Board may find that such a meeting constituted “dealing” if it can be demonstrated that the purpose of the meeting was to pressure the employer to change its policies.

Third, worker centers may implement the organization approach. The focus of this approach is on developing a strong labor movement within the community. It is hard to imagine an instance where a worker center would involve an employer with these types of activities and so finding the “dealing” or representation factors seems highly unlikely. Furthermore, this type of activity seems to be the type the Board sought to protect under the freedom of association analysis.

Thus, worker centers can implement all of Fine’s approaches while remaining within the social cause exception. In order to do so, worker centers should act “behind the scenes” by providing support and aid to workers but never intervening on their behalf outside of the legal representation context. So, for example, a worker center employee may train a worker on how to effectively confront an employer or the worker center employee may represent the worker in a legal proceeding, but to remain inside the exception, the worker center employee cannot confront the employer on behalf of the worker.

Therefore, it is clear that an effective worker center can operate while staying within the social cause exception. To avoid being labeled as a labor organization, worker centers must be careful not to engage in the kind of bilateral mechanism that the Board might find constitutes “dealing” for purposes of the act. By playing a logistical and support role, worker centers can avoid engaging in “dealing” and running afoul of the NLRA.

VI. INTERNAL THREATS

In closing, it is important to note that while this paper has highlighted the external activities and threats to worker centers, it has not addressed internal threats. By far the biggest internal threat to worker centers is non-involvement. Much of the literature on worker centers notes how crippling this issue can be.⁹² A worker center that fails to build a strong and active membership base will not be an effective ally in the labor movement.

⁹² Rosenfeld, *supra* note 24, at 475 (commenting on the various authors that have raised the issue of non-involvement).

One possible remedy for this particular weakness is a clinic-center hybrid. A partnership between a worker center and a law school could provide the kind of active and engaged volunteers needed to staff the worker center. Law students could easily be trained to handle the service delivery activities of worker centers like filing unpaid wage claims and health and safety violations. This aspect of the partnership would be invaluable to the worker center, as the law student volunteers would mitigate the early difficulty of building a strong membership base. These types of clinics also benefit the law schools because they provide students with practical experience that sets their students apart.

The idea of a center-clinic hybrid could be an effective way to fight the internal threat of non-involvement and is definitely a topic worthy of further study, but as noted above, falls outside of the scope of this paper.

VII. CONCLUSION

The legal landscape is promising for worker centers. These centers, if operated correctly, will be able to provide vital services and support to workers while remaining shielded from potential unfair labor charges. This shield is the social cause exception formulated in *CULA*, which while often forgotten, would nonetheless find footing on the Board's current bilateral mechanism doctrine.

