

A GATEWAY INTO THE SOUTH?: THE EFFECT OF THE
UAW’S PROPOSED INTRODUCTION OF EUROPEAN-STYLE
WORKS COUNCILS INTO COLLECTIVE BARGAINING IN THE
UNITED STATES

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I. INTRODUCTION

Union membership in the United States is declining, and if the current trend continues, unionization will no longer be relevant in the U.S. workplace.¹ In 2015, the number of unionized wage and salary workers in the United States remained at a record low of 11.1%, or 14.8 million workers.² A wide discrepancy between the public and private sector existed as only 6.7% of workers in the private sector were unionized.³ However, just over fifty years ago, in 1954, nearly 35% of wage and salary workers in the United States were members of a union.⁴

Over time, low union participation may cause dramatic changes in the social and economic composition of the United States, especially for its middle class. The growth of union membership in the mid-twentieth century is considered to be an important contributing factor in the development of the American middle class after the Second World War.⁵ The decline of union membership has likely contributed to the shrinking of the middle class in recent years.⁶ Additionally, scholars often describe the right to unionize as a “fundamental human and civil right,”⁷ and the freedom to unionize is considered to be “among the best means of ensuring the protections of a free society.”⁸ Supporters of unionization believe that when that freedom is taken for granted, “it is a civil right in peril.”⁹

Opponents of unionization argue that unions lead to higher prices for consumers, undermine American competitiveness with foreign industries, hinder the operation of a business with overly restrictive regulations, and, by compelling membership for certain positions, limit freedom in employment opportunities. There are currently twenty-eight states in the United States that are “Right to Work” states.¹⁰ In these states, a company that is

¹ César F. Rosado Marzán, *Organizing with International Framework Agreements: An Exploratory Study*, 4 U.C. IRVINE L. REV. 725, 731 (2014).

² News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Members — 2015, USDL-15-0158, Table 3, <http://www.bls.gov/news.release/pdf/union2.pdf>.

³ *Id.*

⁴ GERALD MAYER, CONG. RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES 23 (2004).

⁵ Marzán, *supra* note 1, at 731–33.

⁶ *Id.*

⁷ David L. Gregory, *The Right to Unionize as a Fundamental Human and Civil Right*, 9 MISS. C. L. REV. 135, 135 (1988).

⁸ *Id.* at 144.

⁹ *Id.* at 136.

¹⁰ NRTW, *National Right to Work Foundation Launches Missouri Task Force to Defend and Enforce New Right to Work Law, National Right to Work* (Feb. 13, 2017), <http://www.nrtw.org/news/missouritaskforce2122017/>.

unionized cannot compel employees to become members of the union or to pay union dues. These states protect employees from compulsory unionism by prohibiting union security agreements.¹¹ At present, every state in the Southeast, including Georgia, maintains a “Right to Work” statute.¹² As a result of these statutes, unions struggle to establish a significant presence in these states. In 2015, only 4% of employed workers in Georgia were members of unions, and only 5.1% of jobs were covered by a union or employee association contract.¹³

In 2014, the labor movement discovered a potential gateway into the Southeast through the foreign auto industry. In early 2014, the United Auto Workers Union (UAW) met with leadership at Volkswagen (VW) regarding the possibility of unionizing the workforce at its Chattanooga, Tennessee plant. The move would be unprecedented in the foreign auto industry in the United States. Although the “Big Three” U.S. automakers—General Motors, Ford, and Chrysler (FCA US)—are unionized, foreign automakers operating plants in the United States have thus far remained union-free.

If the UAW is successful in unionizing a major foreign auto company in a Southeast “Right to Work” state, it may be able to continue its success and increase the presence of unions in the Southeast.¹⁴ States that have a strong foreign industrial presence may see a surge in unionization rates among foreign-owned multinational companies. In recent years, Georgia has witnessed a sizeable growth of foreign investment in the state. Today, foreign investment by multinational corporations accounts for a substantial percentage of Georgia’s economy.¹⁵ Among these foreign investors,

¹¹ A union security agreement is an agreement between a labor union and employer that establishes whether the union may require employees, regardless of their union membership status, to pay union dues. See Kenneth G. Dau-Schmidt, *Union Security Agreements Under the National Labor Relations Act: The Statute, the Constitution, and the Court’s Opinion in Beck*, 27 HARV. J. ON LEGIS. 51, 57 (1990).

¹² *Right to Work States*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/right-to-work-laws-and-bills.aspx>.

¹³ News Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Union Affiliation of Employed Wage and Salary Workers by State, Table 5 <http://www.bls.gov/news.release/union2.t05.htm>. Among states in the Southeast, Georgia ranks third in lowest unionization rates behind North Carolina and South Carolina. *Id.*

¹⁴ One way to spread unionization throughout an industry is through pattern bargaining. Pattern bargaining is a technique in which a union uses the terms from previously successful union-company agreements in its negotiations with other similar companies. See Christopher L. Erickson, *A Re-Interpretation of Pattern Bargaining*, 49 INDUS. & LAB. REL. REV. 615 (1996) (discussing settlements between major automobile companies and the UAW and examining inter- and intra-industry patterns in bargaining).

¹⁵ In 2014, 217,500 workers in Georgia were employed by foreign-controlled companies, accounting for 6.2% of private-industry employment at the time. The four largest sources of foreign investment included Japan, the United Kingdom, Germany, and Canada. See Georgia

Germany has the most facilities in Georgia, with 424 locations across the state.¹⁶ In light of the significant presence of multinational corporations, the potential agreement with the UAW and Volkswagen in Tennessee may lead to a push in the labor movement in Georgia.

The UAW has experienced some success in its initial negotiations with Volkswagen by introducing a plan to establish a European-style works council in the Chattanooga plant.¹⁷ In Germany, works councils are a major aspect of labor relations.¹⁸ By introducing a works council model into its bargaining agreement, the UAW has gained the attention of Volkswagen. A series of setbacks in the UAW's efforts have occurred, many of which stem from Tennessee's status as a "Right to Work" state that has, to date, been largely opposed to the presence of unions. Furthermore, company unions have been found to be illegal under U.S. labor law.¹⁹ Nevertheless, if the UAW is able to overcome the hurdles and manage to unionize the Chattanooga plant with a works council model, it may attempt to capitalize on that success and expand to other foreign-owned companies in the South, including those in Georgia.

This Note analyzes the proposed works council models at the Volkswagen Chattanooga plant. It discusses whether the proposed models are legal under current U.S. labor law and considers the implications of the introduction of works councils on the future of U.S. labor relations in the largely anti-union Southeast. The analysis concludes by considering employee co-determination in the workplace as a product of works councils and the likelihood of the establishment of collectively bargained works councils that are used to expand union membership in the union-resistant climate of Georgia and the Southeastern United States.

Exports, Jobs, and Foreign Investment, U.S. Dep't of Commerce, Int'l Trade Admin., <http://www.trade.gov/mas/ian/statereports/states/ga.pdf>.

¹⁶ Michaela Schobert, *Georgia: The Nation's Champion for Doing Business*, GERMAN AMERICAN CHAMBERS OF COMMERCE, <http://www.gaccsouth.com/en/about-us/our-region/our-region/georgia>.

¹⁷ William Boston, *VW and UAW to Meet for Talks on Car Maker's Chattanooga Plant*, WALL ST. J. (May 1, 2016), <https://www.wsj.com/articles/vw-and-uaw-to-meet-for-talks-on-car-makers-chattanooga-plant-1462134557>.

¹⁸ See Dieter Sadowski, Joachim Junkes & Sabine Lindenthal, *The German Model of Corporate and Labor Governance*, 22 COMP. LAB. L. & POL'Y J. 3, 39–40 (2000).

¹⁹ See *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (1993).

II. BACKGROUND

A. *Workplace Democratization: Works Councils in Germany*

Unlike most law in Germany, which is codified into chapters by topic, German labor law is derived from several sources.²⁰ Despite efforts in recent years to codify German labor law, the task has not yet been successful.²¹ Instead, the law is a result of various national and international sources of labor law. On a national level, both the German Civil Code and German labor courts have developed provisions and established legal principles relating to German labor law.²² Internationally, Germany must follow directives of the European Union and its associated courts.²³ Germany is also a member of the Organisation for Economic Cooperation and Development (OECD) and the International Labour Organization (ILO).²⁴

Germany's Works Constitution Act of 1972 (WCA) provides for the creation of shop level employee groups known as works councils in individual workplaces.²⁵ German-style works councils may be defined as "institutionalized bodies for representative communication between a single employer . . . and the employees . . . of a single plant or enterprise."²⁶ Works councils are independent of a union and represent all workers of a plant regardless of union membership.²⁷ German works councils differ from unions in that they do not negotiate for wages and benefits, and they do not organize strikes when there is a dispute between employees and management.²⁸ German works councils are representative of the workforce at a specific company, not of an entire industry.²⁹ Today, works councils are mandatory and encompassing in Germany's private sector.³⁰ Because they are representative bodies involved in the determination of a company's

²⁰ Walter Ahrens & Mark S. Dichter, *Germany*, in *INTERNATIONAL LABOR AND EMPLOYMENT LAWS* 5-1 (William L. Keller & Timothy J. Darby eds., 4th ed. 2015).

²¹ *Id.* at 5-2.

²² *Id.*

²³ *Id.* at 5-3 (noting that Courts such as the European Court of Justice and the European Court of Human Rights may address issues involving labor).

²⁴ *Id.* at 5-4.

²⁵ See generally Thilo Ramm, *Co-determination and the German Works Constitution Act of 1972*, 3 *INDUS. L.J.* 20 (1974).

²⁶ JOEL ROGERS & WOLFGANG STREECK, *WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS* 6 (1995).

²⁷ *Id.*

²⁸ *Id.* at 7 (noting that works councils in other countries, such as Spain and Italy, do have the power to negotiate wages and call strikes).

²⁹ *Id.*

³⁰ *Id.* at 55.

direction, works councils serve to make employees stakeholders in their employers.³¹ Works councils coexist in Germany with industry-wide labor unions.³² These unions operate as centralized structures with headquarters that determine industry-wide strategies and policies that are implemented throughout Germany.³³

B. The Illegality of Works Councils Under U.S. Labor Law

The National Labor Relations Act (NLRA) was enacted in 1935 to protect the rights of both employees and employers.³⁴ Section 7 of the Act provides that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”³⁵ Section 8 of the Act addresses unfair labor practices. Specifically, Section 8(a)(2) provides that “[i]t shall be an unfair labor practice for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.”³⁶ In applying the law, the National Labor Relations Board (NLRB) and the United States Supreme Court have determined that a “company union” is a form of domination that is prohibited by Section 8(a)(2).³⁷

Today, the controlling case regarding the formation of works councils in the United States is *Electromation, Inc. v. N.L.R.B.*³⁸ In *Electromation*, the employer established “employee action committees” to provide a method for employees to initiate proposals to develop bilateral solutions for issues in the workplace.³⁹ The employer was responsible for establishing the committees, designing the committee structure, and providing employees with pay during committee activities.⁴⁰ The Seventh Circuit determined that the actions committees constituted labor organizations. The court pointed to the U.S. Supreme Court’s decision in *N.L.R.B. v. Cabot Carbon Co.*⁴¹ In *Cabot*

³¹ ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE: INTERNATIONAL AND COMPARATIVE EMPLOYMENT LAW, CASES AND MATERIALS* 396 (2007).

³² *See id.* at 404.

³³ *Id.* at 405.

³⁴ NLRB, *National Labor Relations Act*, <https://www.nlr.gov/resources/national-labor-relations-act> (last visited Jan. 27, 2017).

³⁵ 29 U.S.C. § 157 (2014).

³⁶ *Id.* § 158.

³⁷ *See generally* NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959).

³⁸ 35 F.3d 1148 (1994).

³⁹ *Id.* at 1151–52.

⁴⁰ *Id.* at 1152–53.

⁴¹ 360 U.S. 203.

Carbon, the Supreme Court held that in defining what constitutes a labor organization, the NLRA intended to include conduct much broader than collective bargaining in its use of the phrase “dealing with.”⁴² Thus, the *Electromation* committees were controlled by the Act and subject to its restrictions. As such, the court found that the creation of the committees violated Sections 8(a)(1) and 8(a)(2) of the Act.⁴³ The court looked to the legislative history of the NLRA to make its determination. The court held that the language in the legislation “[illustrated] the broad proscription on employer interference that Section 8(a)(2) was designed to provide.”⁴⁴ Because the employer in *Electromation* participated in the internal management of the committees, supervised the procedure of meetings, and actively participated in framing the purposes and goals of the organizations, its actions qualified as interfering with or dominating the labor organization.⁴⁵ The court concluded that “the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions.”⁴⁶ Thus, in *Electromation*, the court established a broad net limiting the ways employers may participate in the operation of a labor union. As a result, works councils and similarly structured labor organizations remain absent in the U.S. labor movement.

C. *The Attempt to Organize the Volkswagen Plant in Chattanooga*

In order to gain a foothold in the union-hostile Southeast, the UAW proposed establishing what union officials have described as a “totally new

⁴² See *id.* at 211–12. Section 2(5) of the NLRA states,

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.

29 U.S.C. § 152(5) (2012).

⁴³ Section 8(a)(1) of the NLRA provides that it shall be an unfair labor practice for an employer “to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1) (2012). Section 8(a)(2) of the NLRA states that it shall be an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(2) (2012).

⁴⁴ *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1164 (7th Cir. 1994).

⁴⁵ *Id.*

⁴⁶ *Id.* at 1170.

form of representation.”⁴⁷ By late 2013, the UAW claimed to have a “solid majority”⁴⁸ of workers at the Chattanooga plant signing union authorization cards favoring representation.⁴⁹ The collection of authorization cards is an alternative form of establishing union representation in the workplace.⁵⁰ The UAW, with its proposition of establishing a works council at the plant, gained the support of Volkswagen’s Global Works Council.⁵¹ This support was key because multinational transplant automakers had avoided unionization in their plants in the Southeast. Despite the support, the union had difficulty gathering the majority of the plant’s employees and lost the representation election in February 2014.

Although the UAW lost the election in February 2014, labor relations experts still believe that, in time, the Volkswagen plant will be unionized.⁵² After the February election, the UAW established a permanent presence in the area with the creation of Local 42.⁵³ At the same time, workers opposed to representation from the UAW established their own local labor organization called the American Council of Employees (ACE).⁵⁴ Each organization then submitted its own plan to establish a works council at the plant. The UAW plan involved a dual model where the UAW and Volkswagen would establish the works council in the collective bargaining agreement (CBA). The bargaining process would specify the role and power

⁴⁷ Associated Press, *Majority of Workers at Chattanooga VW Plant Have Signed Union Cards, UAW Says*, TIMES FREE PRESS (Sept. 11, 2013), <http://www.timesfreepress.com/news/local/story/2013/sep/11/majority-workers-chattanooga-vw-plant-have-signed-/118498>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ If the union, during its organization campaign, gains the support of over 50% of employees, it will collect and submit union authorization cards. At that point, an election is unnecessary to establish representation. If, however, the union has less than a majority, but has over 30% of workers sign authorization cards, there will be an election conducted by the NLRB. What We Do: Conduct Elections, NLRB (Nov. 10, 2016), <https://www.nlr.gov/what-we-do/conduct-elections>.

⁵¹ Letter from Berthold Huber, President, IndustriALL Global Union, to Volkswagen Employees in Chattanooga (Dec. 18, 2013); Letter from Berthold Huber, President, IndustriALL Global Union, to Members of UAW Local 42 (July 18, 2014), <http://uaw.org/app/uploads/2015/09/UAW-VW-Works-Council-Documents.pdf>.

⁵² Jake Holmes, *The Latest on the 2015 UAW Talks, From an Expert*, AUTOMOBILE (Oct. 2, 2015), <http://www.automobilemag.com/news/the-latest-on-2015-uaw-talks-from-an-expert/>.

⁵³ UAW Local 42 & International Union, UAW, *Vision Statement for a Collectively Bargained Works Council at Volkswagen Chattanooga* (May 7, 2015), <http://uaw.org/app/uploads/2015/09/UAW-VW-Works-Council-Documents.pdf>.

⁵⁴ American Council of Employees, *Constitution & Bylaws*, 1, http://www.americancouncilofemployees.com/uploads/2/2/0/0/22009070/ace_constitution_and_bylaws_10-20-14.pdf.

of the works council while reserving other responsibilities for the union.⁵⁵ The ACE, however, proposed the establishment of three separate committees which, taken as a whole, would establish what it considers to be the equivalent of a German-style works council.⁵⁶

In October 2015, the UAW petitioned the NLRB for a new election to organize the plant's 164 maintenance workers. Unlike the election in 2014, this time Volkswagen leadership at the plant expressed dissatisfaction at the new organization attempt. In a letter written by the plant's CEO and the plant's Executive Vice President of Human Resources, the company stated that it "finds the timing of this development unfortunate, given the challenges we are facing as a plant, Brand, and Group."⁵⁷ The letter also highlighted the differences between the requested election and the 2014 election.⁵⁸ Specifically, the letter stated that "[t]here is no clear path to a Works Council representing all employees from a bargaining unit representing only the maintenance team."⁵⁹ This new approach by the UAW would utilize "micro-bargaining" units in the factory.⁶⁰

Tennessee Governor Bill Haslam commented on the new election attempt by the UAW. Echoing the Volkswagen letter, Haslam stated that the "timing isn't great"⁶¹ for the pursuit of a new election. Haslam and other state political leaders had previously warned against unionization of the plant during the 2014 election.⁶²

⁵⁵ *Agreement for a Representation Election* between UAW & Volkswagen Group of America, Exhibit B, 2 (Jan. 27, 2014), <http://uaw.org/app/uploads/2015/09/UAW-VW-Works-Council-Documents.pdf>.

⁵⁶ American Council of Employees, *Works Council Concept Summary*, 1–2 (Apr. 2015), http://www.americancouncilofemployees.com/uploads/2/2/0/0/22009070/works_council_concept_apr2015.pdf.

⁵⁷ Letter from Christian Koch, CEO Chattanooga Operations & Sebastian Patta, Exec. Vice President, Human Resources, to Volkswagen Employees in Chattanooga (Oct. 23, 2015). The difficulties mentioned in the letter likely refer to the Volkswagen emissions scandal that came to light earlier in the year.

⁵⁸ *Id.*

⁵⁹ *Id.* The letter also highlights the fact that the petition for election was submitted by the UAW, not Volkswagen, that there was no Election agreement between the UAW and Volkswagen, and that the outcome would only affect the maintenance workers.

⁶⁰ The method of collective bargaining in U.S. labor law focuses on bargaining units. Thus, the entire workforce of an organization does not necessarily have to unionize. Instead, distinct bargaining units can be formed for specific positions. See *Specialty Healthcare*, 357 N.L.R.B. No. 83 (2011), *enforced sub. nom.* *Kindred Nursing Ctrs. E., LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013).

⁶¹ *Id.*

⁶² Mike Pare & Andy Sher, *Haslam: 'Timing isn't great' for UAW at VW Chattanooga*, TIMES FREE PRESS (Oct. 28, 2015), <http://www.timesfreepress.com/news/business/aroundregi-on/story/2015/oct/28/haslam-timing-isnt-great-uaw-vw-chattanooga/332867/>.

In mid-November 2015, the NLRB held a two-day hearing to determine whether the proposed maintenance worker bargaining unit qualified under U.S. labor law. The NLRB granted the petition to hold the vote.⁶³ The UAW also announced that it would be creating a partnership called the Transnational Partnership Initiative (TPI) with IG Metall, Germany's largest trade union.⁶⁴ The primary goals of the TPI would be to "explore new models of employee representation in the United States," to "collaborate to improve wages and working conditions for employees at German-owned auto manufacturers and suppliers in the U.S. South," and to "[e]xpand on the principle of 'co-determination' between management and employees by establishing German-style works councils or similar bodies to promote employee representation."⁶⁵

III. ANALYSIS

A. UAW's Proposed Dual Model

Presently, the Volkswagen Plant in Chattanooga is the only Volkswagen assembly plant that does not operate with a works council.⁶⁶ As such, in proposing to unionize the plant, the UAW proposed a works council model that was "in accordance with . . . the spirit of the Volkswagen Group culture as reflected in its Social Charter and Charter on Labor Relations."⁶⁷ In this statement, the UAW was referring to the Global Labour Charter signed by the VW Board of Management, the International Metalworkers' Federation, and the VW Global Group Works Council.⁶⁸ The Charter distinguishes three stages of participation for Volkswagen employees.⁶⁹ The first stage is the right to receive information, while the second stage establishes consultation

⁶³ Erik Schelzig, *UAW Taking 'Micro' Approach Toward Collective Bargaining at Volkswagen Plant in Tennessee*, U.S. NEWS AND WORLD REPORT (Nov. 19, 2015), <http://www.usnews.com/news/business/articles/2015/11/19/uaw-taking-micro-approach-to-unionizing-volkswagen-plant>.

⁶⁴ Press Release, United Automobile Workers of America (Nov. 19, 2015), <http://uaw.org/uaw-ig-metall-announce-u-s-partnership/>.

⁶⁵ *Id.*

⁶⁶ David Barkholz & Ryan Beene, *UAW Pushes to Form Works Council at VW Chattanooga Plant*, AUTOMOTIVE NEWS (May 7, 2015, 2:46 PM), <http://www.autonew.com/article/20150507/OEM01/150509882/uaw-pushes-to-form-works-council-at-vw-chattanooga-plant>.

⁶⁷ *Agreement for a Representation Election*, Exhibit B, *supra* note 55, at 4.

⁶⁸ See Press Release, IndustriALL Global Union, *Global Labour Charter Signed with VW* (Apr. 11, 2009), <http://www.industrialunion.org/archive/imf/global-labour-charter-signed-with-vw>.

⁶⁹ *Id.*

rights for employees, and the third stage includes rights of codetermination.⁷⁰ The Charter's language demonstrates Volkswagen's commitment to "sustainable corporate governance . . . founded on a performance-based and participatory culture . . . to secure and promote competitiveness and efficiency while also helping to secure and develop jobs and workforce employability."⁷¹ The UAW's proposed Dual Model incorporates several aspects of the Charter, including the three stages of employee participation.⁷² The UAW proposal states that the works council would be established during the collective bargaining negotiation between the union and Volkswagen.⁷³ Once the specifics are agreed upon, the works council would be included in the initial collective bargaining agreement.⁷⁴

The functioning of the works council would be "guided by" and "consistent with the terms of the CBA relative to represented employees."⁷⁵ The responsibilities of the works council would include making decisions by majority vote for the good of the employees and employer, representing the interests of employees in the day-to-day running of the plant, dealing with complaints and suggestions, serving as the contact for management for all intra-company issues concerning topics and tasks assigned to the works council under the CBA, communicating to the employees concerning the council's activities, discussing and negotiating ideas and other intra-company needs with management, acting in a respectful and non-discriminatory manner, conducting its activities in a manner that ensures compliance with regulations and adherence to applicable laws, and carrying out operational management regarding designated matters.⁷⁶ The UAW also noted that the implementation of the works council would be a gradual transition, with the employer retaining the responsibilities until the works council is in a position to assume them.⁷⁷ In a later proposal, the UAW included several specific examples of potential duties of the works council.⁷⁸

⁷⁰ *Id.*

⁷¹ *Charter on Labour Relations within the Volkswagen Group*, VOLKSWAGEN (2009) 1, <https://www.volkswagenag.com/presence/nachhaltigkeit/documents/policy-intern/2009%20Charta%20on%20Labour%20Relations%20EN.pdf>.

⁷² *Agreement for a Representation Election*, Exhibit B, *supra* note 55, at 4.

⁷³ *Id.*

⁷⁴ *Id.* at 2.

⁷⁵ *Id.* at 3, 5.

⁷⁶ *Id.* at 5, 6.

⁷⁷ *Id.* at 8.

⁷⁸ *Vision Statement for a Collectively Bargained Works Council*, *supra* note 53, at 10–20.

B. ACE's Proposed Committee Model

The American Council of Employees opposes the UAW as the representative for the workers at the Volkswagen plant but recognizes Volkswagen's interest in establishing a works council model at the plant to bring it more in line with its plants in Europe.⁷⁹ Members of the ACE believe that the UAW was "integrally involved" in the struggles of the Detroit automakers during the recession.⁸⁰ The ACE, however, recognizes the importance of establishing a method of employee representation at the plant.⁸¹ In its constitution, the ACE states that its objective is "to improve the general welfare of all employees, foster mutual understanding and cooperation, improve the workmanship, quality and grade of Volkswagen . . . products, and develop a higher degree of efficiency in their occupations."⁸² The ACE proposed its own works council concept in April 2015 as an alternative to the UAW's proposal.⁸³

The model in the proposal splits the traditional functions of a single works council into three distinct committees. The ACE suggests that the systems "may perform practically all of the traditional works council functions, fostering communication and efficiency and encouraging employee participation."⁸⁴ The three-committee system would include an Operational Committee, an Employee Input Committee, and a Management-Style Adjudicatory Committee.⁸⁵ The Operational Committee would focus on "flow and efficiency, quality, outreach, vendor selection, community involvement, teamwork, and customer relations."⁸⁶ The Employee Input Committee would provide communication within the plant and allow the sharing of ideas to Volkswagen.⁸⁷ The model recognizes that implementing any of the ideas shared by the Employee Input Committee would ultimately be at Volkswagen's discretion. The Management-Style Adjudicatory Committee would deal with terms and conditions of employment.⁸⁸ This committee would undertake certain managerial functions that would not be

⁷⁹ *Works Council Concept Summary*, *supra* note 56, at 1.

⁸⁰ Lydia DePillis, *The Strange Case of the Anti-Union Union at Volkswagen's Plant in Tennessee*, WASH. POST (Nov. 19, 2014), <http://www.washingtonpost.com/news/storyline/wp/2014/11/19/the-strange-case-of-the-anti-union-union-at-volkswagens-plant-in-tennessee/>.

⁸¹ American Council of Employees, *supra* note 54, at 1.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1–2.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

subject to review by Volkswagen other than for “budgetary, financial, or similar constraints.”⁸⁹

The ACE, in recognition of the restrictions placed on committees by *Electromation*, includes explanations as to why the committees would not be in violation of U.S. labor law in its proposal. The Operational Committee would not address terms and conditions of employment.⁹⁰ Furthermore, the Employee Input Committee would avoid the “dealing with” concern by not engaging in “back-and-forth proposals with management,” and it would not poll employees to determine majority positions on topics.⁹¹

C. *Legality of Proposed Models*

Even if the UAW is successful at organizing the workforce at the Volkswagen plant in Chattanooga, questions will still exist as to whether the proposed works council model would be legal under the *Electromation* framework. Critics suggest that the proposed model is not actually a new form of representation, but instead is a campaign tactic by the UAW to gain the support of foreign companies that use works councils.⁹² Critics additionally point to restrictions imposed on unions that the UAW did not address in its proposal.⁹³

Once a union is established as the exclusive representative for a bargaining unit, it then has a fiduciary responsibility of fair representation. This prevents the union from placing its own institutional interests ahead of the employees.⁹⁴ Those who oppose the UAW proposal’s legality suggest that establishing the works council would be an illegal transfer of responsibilities from the union to the employer.⁹⁵ Accordingly, “any attempt by a traditional labor union to delegate responsibility to a works council to negotiate over any terms and conditions of employment, process grievances, or any other duty of representation, is impermissible under the NLRA.”⁹⁶

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See WORKFORCE FREEDOM INITIATIVE, U.S. CHAMBER OF COMMERCE: A NEW ORGANIZING PARADIGM? WORKS COUNCILS AND THE NATIONAL LABOR RELATIONS ACT, https://www.uschamber.com/sites/default/files/documents/files/u.s._chamber_works_council_report_0.pdf.

⁹³ *Id.*

⁹⁴ *Id.* at 14–15.

⁹⁵ *Id.*

⁹⁶ *Id.* at 16.

Critics point to additional factors that they believe put the proposed model at odds with the NLRA.⁹⁷

The UAW believes that the critics are mistaken. In response to suggestions about the illegality of its proposal, the President of the UAW Local 42 stated that “the union and the company believed the concept was compatible with state and federal laws, aligned with the UAW’s policies, and is consistent with the company’s unique brand of co-determination between management and employees.”⁹⁸ The ACE also commented on the issue, stating that “the goal is to get as close as you can without violating U.S. labor law.”⁹⁹

D. Implications to the Auto Industry in the Southeast and Georgia

If the UAW is successful and the works council proposal is implemented into the CBA between the union and Volkswagen, there are various implications to the future of labor organization in the Southeast. While Georgia is not home to a German auto plant as Alabama, South Carolina, and Tennessee are, it has seen a recent increase in German foreign investment. Among recent developments was the construction of the U.S. headquarters of Porsche, a German automaker in Atlanta, which is now home to approximately 400 employees.¹⁰⁰

Georgia would not be insulated from the union’s attempts to expand into the Southeast. It is likely that the UAW would want to capitalize on its success by attempting to organize other German-owned auto manufacturing plants in the Southeast, including several plants in the Right to Work states, such as the Mercedes Benz plant in Alabama and the BMW plant in South Carolina. Like Volkswagen, BMW and Mercedes Benz have unions with

⁹⁷ *Id.* at 24 (“First, a works council would be at odds with exclusive representation; second, a union cannot delegate its duty of representation; third, a transfer of this duty would act as a “disclaimer of interest”; fourth, employer engagement with the works council would represent illegal “direct dealing”; fifth, a works council would likely violate union constitutions and bylaws; sixth, legal questions would be raised around the appropriate unit; seventh, professional employees may not automatically be included in a works council; eighth, supervisory employees could not participate in a works council, rendering the concept ineffective; and finally, the NLRA prohibits an employer from providing support to a works council, which would be considered improper domination or assistance.”).

⁹⁸ Mike Pare, *U.S. Chamber Says Works Council at VW Chattanooga Plant Would Be Unlawful*, TIMES FREE PRESS (Nov. 18, 2015), <http://www.timesfreepress.com/news/business/aroundregion/story/2015/nov/18/vw-chattanooga-works-council-doesnt-fit-us-law-report-says/336357/>.

⁹⁹ *Id.*

¹⁰⁰ Press Release, Porsche Cars North America, *Porsche to Build New U.S. Headquarters in Atlanta* (May 12, 2011), http://press.porsche.com/news/pdf/Porsche_Aerotropolis_release.pdf.

strong influence in Germany. Thus, the UAW would likely attempt to use the dual model works council as a form of pattern bargaining with the other Southeast plants. Moreover, if unionization begins to take hold at other foreign auto plants in the Southeast, it is possible that new investment by foreign automakers may suffer. For example, at one point Tennessee seemed likely to be the location of a new Audi plant in the United States. Audi, however, chose to locate the plant in Mexico, where it would have substantial labor cost savings.¹⁰¹

IV. CONCLUSION

The UAW has expressed its commitment to expansion into the American Southeast, and with its moves in recent years, there is no doubt that it will continue to fight to establish its presence in Right to Work states. The UAW has shown its creativity by incorporating a works council into future bargaining agreements with foreign owned companies in the United States. Achieving cooperation from Volkswagen in 2014, was a significant achievement for the UAW, but the union has since had difficulties gaining the support it needs to organize Volkswagen's plant in Chattanooga. Additionally, the recent emissions scandal has shifted Volkswagen's interest away from the UAW's organization attempts. Nevertheless, the UAW's recent partnership with IG Metall demonstrates its commitment to moving forward with its new approach. If, in time, the UAW is successful in establishing a works council in the United States, it may finally gain a foothold in the Southeast, which would allow it to pattern bargain with other foreign-owned companies in the region. Georgia, which leads the region in foreign investment, would certainly be a target for the UAW's expansion efforts. Before this can happen, however, the UAW will likely have to submit its model to the NLRB—and potentially to the federal court system—to scrutinize its legality. The current, labor-friendly Board may find that the dual model is consistent with U.S. labor law, but if the composition of the Board changes as a result of the 2016 presidential election and the UAW has not yet established itself as the representative of the Volkswagen plant, its model would likely be found to be illegal by an employer-friendly Board.

¹⁰¹ Additionally, Kia Motors America Inc., which has its headquarters in Atlanta and which built its first U.S. plant in Georgia, chose to build a second plant in Mexico in August of 2014. See James R. Healey, *Kia to Build \$1 Billion Mexico Small-Car Plant*, USA TODAY (Aug. 27, 2014, 5:23 PM), <http://www.usatoday.com/story/money/cars/2014/08/27/kia-billion-factory-mexico/14699535/>.