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## Participate at Your Peril: The Need for Resolution of the Conflict Surrounding Employee Participation Programs by the TEAM Act of 1997

Michele L. Maryott

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**Participate at Your Peril:  
The Need for Resolution of the Conflict  
Surrounding Employee Participation Programs  
by the TEAM Act of 1997**

I. INTRODUCTION

The following scenario is not uncommon: a single parent who works the night shift in the manufacturing facility of a major American corporation is having difficulty because he cannot provide evening supervision for his teenage child. A strict seniority system controls shift assignments for the facility and any change in shift assignments would have an adverse impact on his co-workers. Management learns of the problem and forms a committee comprised of his co-workers and a management representative to address how to adjust work assignments to create more flexibility for this parent. While this activity seems reasonable, management at this company and management using similar techniques throughout the country are at risk of committing unfair labor practices under current labor laws.<sup>1</sup>

Recognizing that a significant advantage lies in a highly skilled and motivated workforce, many employers have implemented employee participation programs<sup>2</sup> which foster communication between employ-

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1. See *Selected Testimony Before Senate Labor and Human Resources Committee Hearing on TEAM Act (S. 295), February 12, 1997*, Daily Lab. Rep. (BNA) No. 30, at E-2 to E-3 (Feb. 13, 1997) [hereinafter *Selected Testimony*] (testimony of J. Thomas Bouchard, Senior Vice President, Human Resources, IBM, describing a similar scenario at an IBM manufacturing facility upon which this hypothetical scenario is based).

2. See H.R. REP. NO. 104-248, at 9 (1995), available in 1995 WL 560823. There is no single dominant form of employee participation program. The most common forms of programs are: (1) joint labor-management committees, which discuss a wide range of workplace issues; (2) quality circles, which focus on the production process and ways to improve efficiency, as well as the quality of the final product; and (3) quality of work-life groups, which focus less on the actual production process and more on the work environment and ways to improve it. *Id.*; see John R. McLain, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1738-41 (1985). For detailed examples of employee participation programs in both unionized and nonunionized settings, see Thomas C.

ers and employees on issues crucial to developing and maintaining competitive advantages.<sup>3</sup> The use of these programs highlights the importance of employee insight on issues relating to productivity, efficiency, and quality as well as improvement of employee morale through increased involvement in management decisions.<sup>4</sup>

Despite the apparent benefits that accompany programs designed to enhance the relationship between employers and employees, these programs are nonetheless threatened by sections 2(5) and 8(a)(2) of the National Labor Relations Act<sup>5</sup> (NLRA), which make it illegal for an employer to dominate a labor organization.<sup>6</sup> Under the broad interpretation of the term "labor organization," employee committees may constitute statutory labor organizations.<sup>7</sup> To the extent that an employer par-

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Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 510-14 (1986).

3. Steven I. Schlossberg & Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 LAB. LAW. 11, 17 (1987). Today's global economy mandates that employers capitalize on any tools available to them to improve productivity, quality, and efficiency. See Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993). As of 1982, at least one third of the Fortune 500 companies had implemented some form of employee participation program, ranging from one-way communication in the form of suggestion boxes to substantial bilateral communication and worker involvement in management. Schlossberg & Fetter, *supra*, at 14. Today, more than 80% of the largest employers in the United States, comprising an estimated 30,000 workplaces, have implemented employee involvement programs. H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997).

4. See Kohler, *supra* note 2, at 504. Supporters of employee participation programs cite efficiency, strengthened commitment, and increased productivity among employees as the prominent benefits of the programs. See Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 58 (1995). Opponents argue that these programs reduce managerial power and burden the decision-making process. *Id.* An overwhelming number of employees support programs that give them a greater voice and facilitate management cooperation. H.R. REP. NO. 104-248, at 5 (1995), available in 1995 WL 560823. Seventy-six percent of workers surveyed in 1994 believed that their involvement in decisions relating to production and operations would improve the competitiveness of their companies, and 79% reported having "personally benefitted" from the process. *Id.* (citing Richard B. Freeman & Joel Rogers, *Worker Representation and Participation Survey*, Conducted by Princeton Survey Research Associates, December 1994).

5. National Labor Relations Act, as amended, §§ 2(5), 8(a)(2), 29 U.S.C. §§ 152(5), 158(a)(2) (1994). Section 2(5) defines "labor organization" and section 8(a)(2) makes it unlawful for an employer to dominate or interfere with a statutory labor organization. *Id.* § 158(a)(2); see *infra* text accompanying note 42 for the text of § 2(5) and text accompanying note 69 for the full text of § 8(a)(2).

6. *Id.* §§ 152(5), 158(a)(2). See generally PATRICK HARDIN, *THE DEVELOPING LABOR LAW*, ch. 8 (3d ed. 1992) (providing an overview of the employer domination and assistance issue).

7. See, e.g., *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (establishing a broad

participates in the formation and operation of these organizations, they are vulnerable to attack as illegal employer-dominated organizations.<sup>8</sup> These broad statutory definitions create conflict for employers who desire to implement cooperative and participatory programs in the workplace.<sup>9</sup>

The *Electromation, Inc.*<sup>10</sup> decision of the National Labor Relations Board (NLRB or Board) in 1992 bolstered the current conflict surrounding employee participation programs in the nonunion workplace.<sup>11</sup> This decision created a chilling effect on employee participation programs,<sup>12</sup> offering only minimal guidance as to when such programs will be legal.<sup>13</sup> One proposed solution to alleviate the confusion surrounding these programs is a legislative amendment to the National Labor Rela-

definition of "labor organization" by holding that the language "dealing with" in section 2(5) encompassed more than bargaining with the employer; *infra* notes 46-48 and accompanying text (discussing the *Cabot Carbon* decision).

8. See 29 U.S.C. § 158(a)(2). The attack on such organizations generally comes in the form of unfair labor practice charges filed by a union that desires to represent employees. See HARDIN, *supra* note 6, at 295.

9. See HARDIN, *supra* note 6, at 295. "The very breadth of the definition of [labor organization] has called into question a variety of 'participatory management' arrangements, bringing the section 8(a)(2) prohibition into conflict with emerging managerial techniques for enhancing employee involvement." *Id.* The adversary nature of the workplace in the 1930s warranted these broad statutory definitions, but they "no longer make sense in today's [cooperative] workplace." H.R. REP. NO. 104-248, at 6 (1995), available in 1995 WL 560823.

10. *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), enforced 35 F.3d 1148 (7th Cir. 1994). In *Electromation*, the Board held that five employee "action committees" comprised of volunteer employees and members of management were labor organizations because they discussed matters involving employee dissatisfaction and that the employer unlawfully dominated these labor organizations because the employer created them and determined their structure and function. *Electromation*, 309 N.L.R.B. at 997; see *infra* notes 84-100 (discussing the *Electromation* decision).

11. H.R. REP. NO. 104-248, at 13, 15 (1995), available in 1995 WL 560823; 141 CONG. REC. H9523 (daily ed. Sept. 27, 1995).

12. See generally Elizabeth Walpole-Hofmeister, *Employee Participation: Need for Labor Law Change Debated Before Senate Panel*, Daily Lab. Rep. (BNA) No. 27, at D-14 (Feb. 9, 1996) (noting the dampened enthusiasm of employers for creating employee participation groups despite the relatively small number of domination cases before the NLRB).

13. *Electromation* contained four opinions, leaving employers to rely on nonspecific pieces of dicta in making decisions regarding employee involvement programs. See H.R. REP. NO. 104-248, at 13 (1995), available in 1995 WL 560823; see also *infra* notes 91-100 and accompanying text.

tions Act.<sup>14</sup> The Teamwork for Employees and Managers Act of 1997<sup>15</sup> (TEAM Act) proposes to amend section 8(a)(2) of the NLRA to provide that an employer's establishing, assisting, maintaining, or participating in any organization in which employees participate on matters regarding quality, productivity, and efficiency will not be an unfair labor practice.<sup>16</sup> While proponents of the legislation feel that this is an important step toward improving the ability of American companies to compete in the global marketplace,<sup>17</sup> opponents feel that this amendment would invite a return to the evils of "company unions" which minimize employees' rights by giving them a false sense of protection.<sup>18</sup>

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14. See Michael H. Cimini & Charles J. Muhl, *Dunlop Commission Reports*, MONTHLY LAB. REV., Apr. 1995, at 75. In its report, the Clinton-appointed Commission on the Future of Worker-Management Relations proposed that section 8(a)(2) of the NLRA be amended to permit employee participation programs to discuss terms and conditions of employment when they arise tangentially in relation to discussions concerning productivity and efficiency. *Id.*; see also *Remarks of John S. Irving to Chicago Meeting of Association of Labor Relations Agencies, July 25, 1995*, Daily Lab. Rep. (BNA) No. 142, at D-21 (July 25, 1995). For an analysis of proposed judicial resolutions, see Audrey Anne Smith, Comment, *The Future of Labor-Management Cooperation Following Electromation and E.I. du Pont*, 35 SANTA CLARA L. REV. 225, 257-63 (1995).

15. H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997). Identical legislation, known as the Teamwork for Employees and Managers Act of 1995, passed both houses of Congress in 1996 but was vetoed by President Clinton. 142 CONG. REC. H8816 (daily ed. July 30, 1996). Many of the arguments made during the 1995 Act's debates will be made again as the 1997 Act moves through the legislative process. The substance of the 1995 Act arguments will be used throughout this Comment to examine the anticipated arguments for and against the renewed legislation.

16. H.R. 634; S. 295. This legislation would make it less burdensome for employers to establish joint labor-management committees and employee participation programs for legitimate purposes by eliminating the fear of unfair labor practice charges. See *id.*; *infra* Part IV.

17. See 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (statement of Rep. Harris W. Fawell). In his remarks supporting the TEAM Act, Representative Fawell discussed the ability of foreign competitors to gain competitive advantages because of their extensive use of labor-management cooperation techniques and noted the competitive disadvantage of U.S. companies due to legal impediments to implementing such techniques. *Id.* Representative Fawell also characterized the statutory definition of labor organization as "a 60-year-old definition of labor organization [which is] colliding head-on with dynamic new concepts of doing business in today's fast evolving, information-centered economy and society." 141 CONG. REC. H9525 (daily ed. Sept. 27, 1995).

18. See William Tench, 'Worker Involvement' Means Union Busting, NAT'L L.J., Aug. 14, 1995, at A18. Opponents suggest that the Act will undermine employee protections by allowing nonunion employees to establish sham unions and by allowing other employees to establish company-dominated organizations while their co-employees are seeking legitimate unionization. 141 CONG. REC. H9526 (daily ed. Sept. 27, 1995) (remarks of Rep. Owens). Representative Owens argued that the TEAM Act would un-

This Comment explores the current conflict relating to employer-employee cooperative efforts and the need for the implementation of the TEAM Act. Part II discusses the legislative history of the National Labor Relations Act and examines the nature of the workplace at the time of its enactment.<sup>19</sup> Part III discusses the judicial and administrative interpretations of sections 2(5) and 8(a)(2) that led to *Electromation* and subsequent decisions.<sup>20</sup> Part IV focuses on the TEAM Act of 1997 and the conflicting views regarding its passage, including an explanation as to why the TEAM Act is crucial to the success of American companies in the global marketplace.<sup>21</sup> Part V concludes with the ramifications on the American workplace should the TEAM Act be defeated again.<sup>22</sup>

## II. THE LEGISLATIVE HISTORY OF SECTIONS 2(5) AND 8(A)(2) OF THE NATIONAL LABOR RELATIONS ACT

The current dispute surrounding employee involvement programs closely parallels the disputes surrounding "company unions" at the time of the enactment of the National Labor Relations Act.<sup>23</sup> Company-dominated unions, also known as "sham unions," were in-house labor organizations implemented and controlled by the employer.<sup>24</sup> These organizations purported to represent the employees, but were actually an impediment to legitimate unionization.<sup>25</sup> Company unions posed a serious

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determine the success that collective bargaining has brought to the American workplace. *Id.* Section 7 of the NLRA guarantees workers the right to seek independent union representation. National Labor Relations Act § 7, 29 U.S.C. § 157 (1994). The union engages with the employer in the collective bargaining process to determine terms and conditions of employment, wages and general protection of the employees. *Id.* For a detailed overview of the NLRA and the collective bargaining process, see generally HARDIN, *supra* note 6.

19. See *infra* Part II.

20. See *infra* Part III.

21. See *infra* Part IV.

22. See *infra* Part V.

23. See Tench, *supra* note 18, at A18. For a detailed history of the National Labor Relations Act as amended, see generally HARDIN, *supra* note 6, at 3-66; LEROY S. MERRIFIELD ET AL., LABOR RELATIONS LAW 43-61 (8th ed. 1989).

24. 78 CONG. REC. 3,443 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NLRA, 1935, at 15-16 (1949) [hereinafter 1 NLRB 1935]. These company unions arose under the National Industrial Recovery Act, which permitted the abuses that the NLRA later sought to prohibit. See HARDIN, *supra* note 6, at 25-26.

25. 78 CONG. REC. 3,443 (1934), reprinted in 1 NLRB 1935, *supra* note 24, at 15-

threat to the employees' rights to freely choose representation during a period when they needed significant protection from their employers.<sup>26</sup> In response to the concern regarding the prevalence of company unions, which undermined the NLRA's policy to promote industrial peace through the process of collective bargaining, Congress banned company unions by enacting sections 2(5) and 8(a)(2) of the National Labor Relations Act.<sup>27</sup>

A. *Prohibition of the Company Union: Protection of Employees' Rights Under Sections 2(5) and 8(a)(2)*

The specific purpose behind sections 2(5) and 8(a)(2) of the Act was to prohibit company unions that were formed and dominated by employers and limited employees' right to free choice guaranteed by section 7 of the NLRA.<sup>28</sup> At the time Congress enacted these provisions, the company union was a prevalent problem,<sup>29</sup> and employer-employee relations were highly adversarial.<sup>30</sup>

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26. *Id.* Although the discussion focused on the concerns regarding company unions, Senator Wagner recognized that employee participation renders important benefits and that the highest degree of cooperation arises when the employee can freely choose to participate or withdraw. *Id.* at 24; see also CONTEMPORARY ISSUES IN LABOR & EMPLOYMENT LAW, PROCEEDINGS OF NEW YORK UNIVERSITY'S 46TH ANNUAL NATIONAL CONFERENCE ON LABOR § 13.6, 346 (Bruno Stein ed. 1994) (noting that the proposition that important benefits arise from cooperative employment relationships is not a new one).

27. See 78 CONG. REC. 3,443 (1934), reprinted in 1 NLRB 1935, *supra* note 24, at 15-16 (remarks of Sen. Wagner). For an analysis of the origin of the prohibition on company unions, see Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 129-33 (1994). The preamble to the NLRA states that the policy of the United States is to facilitate the free flow of commerce by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representations of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." National Labor Relations Act § 1, 29 U.S.C. § 151 (1994); see also *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33-34 (1936) (discussing the history and purpose behind the Act).

28. See 78 CONG. REC. 3,443 (1934), reprinted in 1 NLRB 1935, *supra* note 24, at 15-16; HARDIN, *supra* note 6, at 289 (describing the purpose of section 8(a)(2)). Section 7 of the NLRA explicitly grants employees the right to free choice of bargaining representatives. 29 U.S.C. § 157 (1994). This right lies at the heart of the NLRA.

29. 78 CONG. REC. 4,229 (1934), reprinted in 1 NLRB 1935, *supra* note 24, at 23-24. In his remarks, Senator Wagner noted that a 1933 study of 25% of mining and manufacturing workers revealed that 45.7% of the employees were bargaining individually and 45% were enlisted in company unions, while only 9.3% of employees were dealing through traditional trade unions. *Id.* at 23.

30. *Id.* The two assumptions underlying section 8(a)(2) were that employees prefer

This adversarial nature of the employment relationship, which fueled the passage of NLRA, also led to a broad statutory definition of a "labor organization" as "any organization of any kind . . . in which employees participate and which exists for the purpose . . . of dealing with employers" about certain work-related issues.<sup>31</sup> Section 8(a)(2) makes it 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."<sup>32</sup> The evil that Congress sought to eliminate was the limitation that employer-dominated organizations placed on employees because they could not "cope with any issues that transcend[ed] the boundaries of a single business."<sup>33</sup> Congress viewed the inability of these employees to gain knowledge from outside unions as a major impediment to industrial peace.<sup>34</sup> Although Congress sought

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independent representation and that the nature of the top-down management systems in mass production industries does not require reliance on employee input. Estreicher, *supra* note 27, at 133. The absence of "brain work" by employees on the job, which was once part of the workplace culture, has long been outmoded by the view of employers that employee participation is vital to creating a competitive advantage. *See id.* at 126-27; 141 CONG. REC. H9526 (daily ed. Sept. 27, 1995). In the 1990s, the adversarial nature of the employment relationship has in many respects evolved into one of participation, and the dangers of limiting employee participation have become the focal point of the current controversy. *See* 141 CONG. REC. E228 (daily ed. Jan. 31, 1995) (remarks of Rep. Fawell).

31. 29 U.S.C. § 152(5). For the full text of section 2(5), see *infra* text accompanying note 42. In defining "labor organization," Congress sought to include any form of organization that could act as a bargaining representative for employees. *See* S. REP. NO. 74-573, at 7 (1935), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 2306 (1948) [hereinafter 2 NLRB 1947]. Congress included the explicit reference to employee representation committees, which were a common form of company union, in the final version of the Act to ensure that section 2(5) encompassed the entire spectrum of possibilities and to specifically ensure that these types of organizations would be prohibited. *See To Create a National Labor Board: Hearings on S. 2926 Before the Senate Committee on Education and Labor*, 73d Cong., 2d Sess. 241 (1934), *reprinted in* 1 NLRB 1935, *supra* note 24, at 272; Staff of Senate Committee on Education and Labor, 74th Cong., 1st Sess. (1935), *reprinted in* 1 NLRB 1935, *supra* note 24, at 1352.

32. 29 U.S.C. § 158(a)(2). For the full text of section 8(a)(2), see *infra* text accompanying note 69. As noted previously, the purpose of the NLRA was to protect employees' free choice. *See supra* note 27 and accompanying text. If the employer dominated the labor organization, then the representatives were really only the mouthpiece for the employer, thereby destroying section 7 rights.

33. 79 CONG. REC. 7,565 (1935), *reprinted in* 2 NLRB 1947, *supra* note 31, at 2333.

34. *Id.*; *see supra* note 27 (discussing the preamble to the NLRA).



to eliminate the company union, it stressed that it did not intend to eliminate employee groups that were formed independently of the employer by the employees.<sup>35</sup>

*B. An Early Attempt to Permit Employee Participation Under the NLRA*

The concern over company unions continued to exist well into the next decade as evidenced by the defeat of proposed amendments to the NLRA when Congress passed the Labor Management Relations Act in 1947.<sup>36</sup> One proposed amendment permitted an employer to form or maintain a committee of employees to discuss mutual matters of interest if no union had been recognized by the employer or certified by the NLRB.<sup>37</sup> Although this amendment passed in the House, its ultimate defeat remained consistent with the desire to keep company unions out

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35. 78 CONG. REC. 7,565, *reprinted in* 2 NLRB 1947, *supra* note 31, at 2333.

Nothing in the bill prohibits the formation of a company union, if by that term is meant an organization of workers confined by their own volition to the boundaries of a particular plant or employer. What is intended is to make such organization the free choice of the workers, and not a choice dictated by forms of interference which are weighty precisely because of the existence of the employer-employee relationship.

H.R. REP. NO. 74-972, (1935), *reprinted in* 2 NLRB 1947, *supra* note 31, at 2971-72.

36. 93 CONG. REC. 3,521 (1947), *reprinted in* LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1 NLRB 1947, at 601 (1948) [hereinafter 1 NLRB 1947]. Despite the defeat of an attempt to amend section 8(a)(2), enacted amendments expanded the scope of employer-employee communications by allowing employers to respond to their employees' grievance. *See* Smith, *supra* note 14, at 238.

37. H.R. 3020, 80th Cong. (1947), *reprinted in* 2 NLRB 1935, *supra* note 31, at 183. The amendment proposed the addition of section 8(d), which stated:

(d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act . . . [f]orming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9.

*Id.*

of the workplace.<sup>38</sup> These same arguments fuel the opposition to the Team Act of 1997.<sup>39</sup>

### III. JUDICIAL AND ADMINISTRATIVE INTERPRETATION OF SECTIONS 2(5) AND 8(A)(2)

The threshold determination that must be made before finding unlawful employer domination of an employee participation program is that the group constitutes a "labor organization" within the meaning of section 2(5) of the NLRA.<sup>40</sup> If a "labor organization" does exist, then a determination must be made as to whether the employer dominates, interferes with, or supports the organization.<sup>41</sup> Understanding the judicial and administrative interpretation of both sections is critical to an understanding of the current conflict surrounding employee participation programs.

#### A. *The Broad Interpretation of "Labor Organization"*

Section 2(5) of the National Labor Relations Act defines a labor organization as "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."<sup>42</sup>

In its first case, the National Labor Relations Board addressed whether an employee organization was a labor organization within the meaning of section 2(5).<sup>43</sup> The Board held that the employee association

38. 93 CONG. REC. 3,521 (1947), *reprinted in* 1 NLRB 1947, *supra* note 36, at 601. Representative Klein, in opposition to the amendment, remarked that it "revive[d] the right of an employer—long outlawed under existing law—to get him a company union for the purpose of bucking legitimate self-organization." *Id.* at 654. The arguments made against the early proposal to relax the ban created by sections 2(5) and 8(a)(2) are very similar to those made against the TEAM Act. *See infra* note 149 and accompanying text.

39. *See Selected Testimony, supra* note 1, at E-7 (testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO). Mr. Hiatt commented that the TEAM Act would "allow egregious forms of employer domination" and a resurgence of the company union. *Id.*

40. HARDIN, *supra* note 6, at 288; *see infra* text accompanying note 42.

41. *See* National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1994).

42. 29 U.S.C. § 152(5) (1994).

43. Pennsylvania Greyhound Lines, Inc., 1 N.L.R.B. 1, 2 (1935). In that case, the

constituted an employee representation plan under section 2(5) because it was "entirely the creature of the management."<sup>44</sup> Although the Board did not discuss the definition of "dealing with" in *Pennsylvania Greyhound Lines*, the meaning of that term is crucial to the analysis as to whether a labor organization exists.<sup>45</sup>

In *NLRB v. Cabot Carbon Co.*,<sup>46</sup> the Supreme Court interpreted the term "dealing with" to include more than mere bargaining.<sup>47</sup> Yet, aside from its broad determination that a group that does not bargain with the employer may nonetheless constitute a labor organization, the Court failed to define "dealing with," leaving that determination for subsequent cases.<sup>48</sup> Following *Cabot Carbon*, the Board and the courts continued to broadly interpret "dealing with," which in turn led to a broad interpretation of "labor organization."<sup>49</sup> Perhaps recognizing that this broad interpretation put section 8(a)(2) in conflict with employer programs designed to enhance employee involvement, the Board later nar-

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employer formed an employee association for the specific purpose of representing other employees in the discussion of controversial matters. *Id.* at 10. The employer then determined the procedures for electing employee representatives and determined the way in which matters would be resolved. *Id.* at 10-11.

44. *Id.* at 13. The employer created, planned, sponsored, and determined the organization's functions, and then "foisted [it] upon employees who had never requested" such an organization. *Id.* at 13-14. In addition, the Board noted that the employer had conducted the representative elections and written its by-laws. *Id.* at 14. Upon finding unlawful domination, the Board ordered the disestablishment of the organization, an order which became the traditional remedy upon a finding of unlawful domination. *Id.* at 50-51; see, e.g., *N.L.R.B. v. Metropolitan Alloys Corp.*, 233 N.L.R.B. 966, 970 (1977), enforced, 624 F.2d 743 (6th Cir. 1980).

45. See HARDIN, *supra* note 6, at 292.

46. 360 U.S. 203 (1959). *Cabot Carbon* involved an employee committee system in which employee-elected representatives met with management to discuss "employee's ideas and problems of mutual interest," including grievances and working conditions. *Id.* at 205 & n.1. The topics of discussion included "seniority, job classification, job bidding, working schedules, holidays . . . and improvement of working . . . conditions." *Id.* at 213.

47. *Id.* at 211. The Court relied upon the legislative history of section 2(5) to establish that "dealing with" and "bargaining with" were not synonymous. *Id.* Specifically, the Court construed the rejection of a proposal that would replace the broad term "dealing" with the more narrow term "bargaining collectively" as establishing Congress's intention that the term "dealing with" should not be limited to "bargaining with." *Id.* at 211-12.

48. See *id.*

49. See, e.g., *Thompson Ramo Woolridge, Inc.*, 132 N.L.R.B. 993, 994-95 (1961), enforced as modified, 305 F.2d 807 (7th Cir. 1962) (holding that an association that presented employee views to management was a labor organization despite the fact that it did not make any recommendations for management action); *Ampex Corp.*, 168 N.L.R.B. 742, 746-47 (1967) (holding that an employee committee with no formal structure and random membership was a labor organization).

rowed the scope of the term "labor organization" by creating several narrow exceptions in a series of cases.<sup>50</sup>

One narrow exception permits employee groups to resolve grievances provided that management has no involvement.<sup>51</sup> In two separate cases, the NLRB found that employee councils which heard employee grievances were not "labor organizations" because both councils had made independent decisions.<sup>52</sup> In this respect, the councils were performing a management function, rather than "dealing with" management.<sup>53</sup> In these cases, the Board affirmed the view that there is room for some employer-employee communication without the danger of creating a statutory labor organization.<sup>54</sup>

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50. See *Sparks Nugget, Inc.*, 230 N.L.R.B. 275, 276-77 (1977); *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108, 1121 (1977); *General Foods Corp.*, 231 N.L.R.B. 1232, 1234-35 (1977). These exceptions are relevant to the discussions surrounding employee participation programs because they provide competing arguments concerning whether or not certain types of programs are permissible.

51. *Sparks Nugget*, 230 N.L.R.B. at 276; *Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1108. This alleviates any "dealing with" management by the employees because the group acts independently. See *id.*

52. See *supra* note 51. In *Sparks Nugget*, the NLRB found that a joint employer-employee grievance council, structured almost entirely by management, did not "deal with" the employer. *Sparks Nugget*, 230 N.L.R.B. at 276. The committee met only to hear cases filed by individual employees and did not initiate grievances or recommend changes in terms or conditions of employment. *Id.* The Board based its finding on the fact that the council performed a "purely adjudicatory function," independently resolving grievances without any input from or interaction with management other than to report its decision. *Id.* In a vigorous dissent, Chairman Fanning stated that dealing with an employer regarding any one of the matters in section 2(5) is sufficient to support a finding that a labor organization exists, and he concluded that the committee involved clearly dealt with management with respect to grievances. *Id.* at 277 (Fanning, Chairman, dissenting).

Following *Sparks Nugget*, the Board departed again from the broad interpretation of "labor organization" with its decision in *Mercy-Memorial Hosp.* In *Mercy Memorial Hosp.*, the Board held that a joint employer-employee committee that decided grievances was not a labor organization despite the fact that the grievance determinations were subject to appeal by the complainant and the committee had the "right and obligation," according to the employer's policy, to recommend changes in rules, regulations, and working conditions. *Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1108-09, 1121.

53. *Sparks Nugget*, 230 N.L.R.B. at 276; *Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1121.

54. *Mercy-Memorial Hosp.*, 231 N.L.R.B. at 1121. The administrative law judge in *Mercy-Memorial Hosp.* stated that "the committee was created simply to give employees a voice in resolving the grievances of their fellow employees . . . not by present-

Another exception created by the NLRB hinges on the absence of a representative relationship between an employee group and the employer.<sup>55</sup> In finding that employee "teams"<sup>56</sup> were not labor organizations, the Board in *General Foods* noted that the "essence of a labor organization" involves a representative relationship between the organization and the employees involved.<sup>57</sup> In that case, the Board upheld the employer-created job enrichment program which included all members of the bargaining unit.<sup>58</sup> The Board found that the teams' authority to regulate themselves resulted not from "dealings" between the teams and the company, but from unilaterally delegated authority; thus, the powers constituted additional job duties.<sup>59</sup>

The Board's decisions in *Sparks Nugget*, *Mercy-Memorial*, and *General Foods* established exceptions to the definition of "labor organization," which extend to any organization whose purpose is limited to performing a managerial or adjudicative function.<sup>60</sup> The Sixth Circuit also

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ing to or discussing or negotiating with management but by itself deciding the validity of the employees' complaints and the appropriateness of the disciplinary action, if any, imposed." *Id.*

55. *General Foods*, 231 N.L.R.B. at 1234-35.

56. *Id.* The employer created four operating teams and other ad hoc committees, whose membership came from different teams, to carry out specific and limited functions including assigning jobs, job rotations, and scheduling overtime. *Id.* at 1235. One group of employees interviewed job applicants, another inspected the plant and reported safety infractions, and all teams were authorized to set their team's work schedules. *Id.*

57. *Id.* at 1234-35. The lack of agency status is important because it shows that employees retained their freedom of choice of representatives under section 7. See *Electromation, Inc.*, 309 N.L.R.B. 990, 998 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). The judge also found support for his decision in the fact that the employer's motive in organizing the teams had nothing to do with labor relations but rather involved efficiency. See *General Foods*, 231 N.L.R.B. at 1234. Opponents of the TEAM Act argue that the *General Foods* decision clearly permits employees to engage in "brain work" and to assist employers in making workplace decisions. *Selected Testimony*, *supra* note 1, at \*10.

58. *General Foods*, 231 N.L.R.B. at 1235. Some commentators view this case as an example of the fact that employers can lawfully use employee participation programs, while others note the narrowness of the exception and point out that the case leaves questions unanswered. See *Estreicher*, *supra* note 27, at 140-41.

59. *General Foods*, 231 N.L.R.B. at 1235. The Board found that these managerial functions were "flatly delegated" to the employees and therefore no employer involvement existed in the performance of these job duties. *Id.*

60. Aside from these few cases narrowly construing the definition of labor organization, the Board has generally found that when an employer creates an organization and determines its structure and agenda so that the organization has no existence independent of the employer, the organization constitutes a labor organization. See, e.g., *NLRB v. Ampex Corp.*, 168 N.L.R.B. 742, 746-47 (1967) (holding that an employee committee with no formal structure and random membership was a labor organiza-

addressed the distinction between "legitimate managerial initiatives and impermissible support for an organization" by creating its own exception, refusing to enforce the Board's decision on the issue.<sup>61</sup> Although the Board's decisions have been met with judicial approval in most jurisdictions, the Sixth Circuit, with its departure from Board interpretation, followed a different path.

In *NLRB v. Streamway*, the employer established an in-plant committee, provided representatives, and adjusted its vacation eligibility policy after a committee meeting.<sup>62</sup> Although the Board found that a labor organization existed, the Sixth Circuit determined that the committee was not a labor organization, but rather was merely a "communicative device."<sup>63</sup> The court based its finding on the fact that the employee groups spoke directly with management on an individual, rather than on a representative, basis and that neither the employees nor the committee members considered the committee a labor organization.<sup>64</sup>

Similarly, in *NLRB v. Airstream*, the Sixth Circuit declined to enforce the Board's order that an employee committee be disestablished because it was an employer-dominated labor organization.<sup>65</sup> In *Airstream*, the employer formed a "President's Advisory Council," told the employees to choose representatives, and discussed an attendance bo-

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tion); *Thompson Ramo Woolridge, Inc.*, 132 N.L.R.B. 993, 994-95 (1961) (holding that an association that presented employee views to management was a labor organization despite the fact that it did not make any recommendations for management action).

61. HARDIN, *supra* note 6, at 297; see *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989), *denying enforcement to* 288 N.L.R.B. 220 (1988); *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288 (6th Cir. 1982), *denying enforcement to* 249 N.L.R.B. 396 (1980).

62. *Streamway*, 691 F.2d at 290.

63. *Id.* at 295; see also *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993) (noting that employee groups that simply share information with an employer would not be deemed labor organizations); *Sears Roebuck & Co.*, 274 N.L.R.B. 230 (1985) (holding that an employer's "communications committee" was not a labor organization because the purpose of the committee was to be a management tool intended to increase company efficiency rather than to be a representative of the employees).

64. *Streamway*, 691 F.2d at 295-96. Although the Board held differently, this outcome seems consistent with the Board's view in *General Foods* that absence of a representative relationship precludes a finding of a labor organization. See *supra* notes 55-59 and accompanying text.

65. *Airstream*, 877 F.2d at 1300.

nus system with the representatives.<sup>66</sup> In determining that a labor organization did not exist, the Sixth Circuit followed its decision in *Streamway*, holding that even though the employer created the council at approximately the same time that an independent organizational drive was taking place, this council did not take any action during the pendency of the organizational drive and the action did not affect employees' rights.<sup>67</sup>

The Sixth Circuit's approach in these cases indicates that the adversarial relationship between employers and employees is diminishing and that where a program involves legitimate managerial functions, the cooperative relationship should not be disturbed by a finding that a labor organization exists.<sup>68</sup>

### B. *Approaches to Defining Employer Domination Under Section 8(a)(2)*

Section 8(a)(2) of the National Labor Relations Act makes it 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: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.<sup>69</sup>

Three approaches for determining whether employer domination exists under section 8(a)(2) have evolved: the objective approach, the subjective approach, and a hybrid approach.

Under the objective approach, domination of a labor organization is inferred if management sets up the committees and management approval is necessary for committee action to be effective.<sup>70</sup> In *Newport News*,

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66. *Id.* at 1294.

67. *Id.* at 1298-99.

68. See HARDIN, *supra* note 6, at 297. The Board's decisions in *Sparks Nugget*, *Mercy-Memorial Hospital*, and *General Foods*, as well as the Sixth Circuit's decisions in *Streamway* and *Airstream*, are significant to the current controversy surrounding employee participation programs. See *id.* See generally U.S. DEPARTMENT OF LABOR, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT COOPERATION: FINAL REPORT (1989).

69. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1994).

70. NLRB v. *Newport News*, Shipbuilding & Dry Dock Co., 308 U.S. 241, 249-50 (1939). In *Newport News*, the Court affirmed the Board's use of an "objective test" for determining if domination exists. *Id.* at 249. As the basis of its determination, the Court cited the effect of the employer's control over the form and structure of the organization in depriving employees of the complete freedom of action under section 7. *Id.* The Court noted that

an employer created an employee committee to "give employees a voice in respect of the conditions of their labor and to provide a procedure for the prevention and adjustment of future differences."<sup>71</sup> Several joint committees comprised of employees and management administered the plan, and the management representatives acted as a liaison between management and the representatives.<sup>72</sup> Affirming the decision of the Board, the United States Supreme Court found that because the employer had created the committee and continued to require management approval before any committee action would be effective, it was employer-dominated.<sup>73</sup>

In the 1950s, the Seventh Circuit departed from the Board's less flexible objective test in favor of a subjective or "actual domination" approach in *Chicago Rawhide Manufacturing Co. v. NLRB*.<sup>74</sup> Rejecting a per se approach, the court focused on whether the employee organization was employer-controlled from the standpoint of the employees.<sup>75</sup> In *Chicago Rawhide*, the court refused to enforce the Board's order for disestablishment,<sup>76</sup> holding that an employees' association that worked out employee grievances was not a labor organization because the idea origi-

[w]hile the men are free to adopt any form of organization and representation whether purely local or connected with a national body, their purpose so to do may be obstructed by the existence and recognition by the management of an old plan or organization the original structure or operation of which was not in accordance with the provisions of the law.

*Id.* at 250; cf. *Duquesne Univ.*, 198 N.L.R.B. 891, 892-93 (1972) (holding that only unlawful assistance, rather than domination, existed where the employees determined the structure and function of the employer-initiated committee). See generally HARDIN, *supra* note 6, at 298-305, for a detailed analysis of the domination approaches.

71. *Newport News*, 308 U.S. at 244.

72. *Id.* at 244-45.

73. *Id.* at 249.

74. 221 F.2d 165 (7th Cir. 1955).

75. *Id.* at 168. Although *Chicago Rawhide* appears to make it easier for employers to lawfully implement employee participation programs, the decision does not provide a sufficient basis to uphold these programs because the case did not involve the kind of employer involvement that is necessary to set up and maintain a successful program. McLain, *supra* note 2, at 1757-58.

76. The court noted that "[n]either mere cooperation, preference nor possibility of control constitute unfair labor practices; and the Board may not infer conduct violative of the Act from conduct that is not, unless there is a substantial basis, in fact or reason, for that inference." *Chicago Rawhide*, 221 F.2d at 168. In this case, the acts for which the employer was charged with domination constituted no more than cooperation with the employee association. *Id.*



nated with the employees and the employees did not believe that the employer controlled them.<sup>77</sup> The Seventh Circuit continued to follow this approach, which several other circuits later adopted.<sup>78</sup>

Just over a decade later, the hybrid approach emerged. The Sixth Circuit departed from the *Newport News* approach in *Modern Plastics Corp. v. NLRB*, where it applied an "objective test" and a "subjective test" to determine whether employer domination existed.<sup>79</sup> In *Modern Plastics*, the company's plant consisted of six groups, each of which were represented by an elected committee representative.<sup>80</sup> Under the hybrid approach, a finding of employer domination requires (1) an objective finding of actual domination, which may be established by evidence of anti-union bias, and (2) a subjective finding of active domination from the employees' point of view.<sup>81</sup> Despite the fact that the employer established the employee committee and the committee engaged in collective bargaining, the court found no domination.<sup>82</sup> The court based its decision on its findings that there was no anti-union animus shown by the employer and that the employees did not feel the employer dominated the committees.<sup>83</sup>

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77. *Id.* at 167-68.

78. *See, e.g., Modern Plastics v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Continental Distilling Sales Co.*, 348 F.2d 246 (7th Cir. 1965). In 1977, the Ninth Circuit also departed from the *Newport News* "objective test" and instead applied a relaxed "subjective test" to determine whether an employer dominated an employee committee. *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), *denying enforcement to* 206 N.L.R.B. 191 (1973). In *Hertzka & Knowles*, the court determined that a finding of domination requires actual domination, as determined from an employee's perspective, rather than inferred domination. *Id.* at 630. In this case, the court found no domination because employees still had retained freedom of choice. *Id.*

79. *Modern Plastics*, 379 F.2d at 204. Similar to the test used in *Modern Plastics*, the NLRB applied a more relaxed totality of the circumstances test in *Duquesne Univ.*, 198 N.L.R.B. 891, 893 (1972), where it found only unlawful assistance because the employees, rather than the employer, determined the structure and formation of the committee. *Id.*

80. *Modern Plastics*, 379 F.2d at 202. The employee committee served as the bargaining representative for the employees for over ten years, negotiating with the company on "a number of collective-bargaining agreements" when an outside union sought to organize the company's employees. *Id.*

81. *Id.* at 204 (citing *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955)).

82. *Id.* The court noted that the company and the committee worked well together for many years and that permitting the Board to disrupt that relationship simply because another union wanted to come into the company would be a disservice to the employees. *Id.* at 204-05.

83. *Id.*

C. *The New Era of Electromotion, Inc.*

*Electromotion*,<sup>84</sup> which represents the Board's reaffirmation of previously established interpretations of sections 2(5) and 8(a)(2), bolstered the current controversy surrounding employee participation plans.<sup>85</sup> In *Electromotion*, the management of the company involved employees in company decisions by creating five "action committees" for which management set the goals and responsibilities.<sup>86</sup> Both the employees and management representatives served on these committees.<sup>87</sup> The NLRB found that these committees constituted labor organizations because they were dealing with the employer concerning conditions of employment.<sup>88</sup> The NLRB further found that the employer dominated the organizations because management organized the committees and determined the nature, structure, and functions.<sup>89</sup> The majority opinion emphasized that the bilateral mechanism by which employees made proposals to management, which could then be accepted or rejected, was the crucial element in establishing the "dealing with" requirement under section 2(5).<sup>90</sup> While the four opinions in *Electromotion* provided little guidance

84. 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994). See generally Dennis M. Devaney, *Much Ado About Section 8(a)(2): The NLRB and Workplace Cooperation After Electromotion and du Pont*, 23 STETSON L. REV. 39 (1993) (examining the *Electromotion* and *E.I. du Pont* decisions).

85. See S.P. Dinnen, *House OKs NLRB Changes Prompted by Indiana Case*, INDIANAPOLIS STAR, Sept. 30, 1995, at E8.

86. *Electromotion*, 309 N.L.R.B. at 991.

87. *Id.* The five action committees were created to handle the following issues: (1) absenteeism and infractions; (2) a no-smoking policy; (3) a communication network; (4) pay progression for premium positions; and (4) an attendance bonus program. *Id.*

88. *Id.* at 997.

89. *Id.* These management controls were inconsistent with the structural independence required by *Newport News*. See *supra* notes 70-73 and accompanying text. Despite the Board's finding of an unlawfully dominated labor organization, the majority opinion suggested that where the purpose of the committee is limited to improving quality or efficiency, or to act as a communicative device to promote efficiency or quality, a violation would not be found. *Electromotion*, 309 N.L.R.B. at 997 n.28. This suggestion undermined the arguments made by proponents of the TEAM Act that the *Electromotion* decision prevents employers from implementing such programs. See *infra* notes 178-80 and accompanying text. When viewed in light of the chilling effect that *Electromotion* has had on employers and the reduction of employee participation programs in its wake, the TEAM Act would still serve an important purpose by removing that chilling effect. See Dinnen, *supra* note 85, at E8.

90. *Electromotion*, 309 N.L.R.B. at 997. The Board noted that the only purpose of the committees was to deal with the dissatisfaction of employees through the cre-

for employers as to the applicable criteria for determining whether an employee participation committee is a dominated labor organization, the concurring opinions shed some light on the types of committees that may be acceptable under the NLRA.<sup>91</sup>

In his concurring opinion, Member Devaney emphasized that section 8(a)(2) should not be a barrier to employee participation programs as long as the programs do not impair the right of employees to their free choice of a bargaining representative.<sup>92</sup> Member Devaney contrasted the type of action committee involved in *Electromation* with committees concerning "productivity, efficiency, materials conservation, safety and the like."<sup>93</sup> He noted that precedent suggests that an employee group may be lawful where it exists only for employee goal-setting and self-regulation, to perform managerial functions and grievance resolution, or to act as a management tool to increase efficiency in communications.<sup>94</sup>

Member Oviatt emphasized practical guidelines, and he stressed a wide range of lawful activities he viewed as untouched by the decision, such as quality circles, problem-solving structures, and committees to create better communications.<sup>95</sup> In his view, the critical question in cases involving violations of section 8(a)(2) for employee participation programs is whether the purpose is to "deal with" any of the enumerated subjects in section (2)(5).<sup>96</sup> Further, Member Oviatt specifically recognized that programs such as quality circles, quality of work-life programs, and employee-management cooperative programs do not implicate section 2(5).<sup>97</sup>

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ation of a bilateral process involving employees and management to reach solutions based on employee proposals. *Id.* The Board also determined that the committees were acting in a representational capacity, therefore constituting "employee representation committee[s] or plan[s]" as set forth in Section 2(5)." *Id.*

91. For a detailed analysis of the *Electromation* decision, see generally Steven I. Locke, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.*, 10 HOFSTRA LAB. L.J. 375 (1992) (discussing *Electromation*).

92. *Electromation*, 309 N.L.R.B. at 1003. This view follows the Sixth Circuit approach in *NLRB v. Streamway*, 691 F.2d 288 (6th Cir. 1982), *denying enforcement to* 249 N.L.R.B. 396 (1980).

93. *Electromation*, 309 N.L.R.B. at 1003.

94. *Id.* at 1001-02; *see supra* notes 51-68 and accompanying text.

95. *Electromation*, 309 N.L.R.B. at 1004.

96. *Id.* These matters include "grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." *Id.* (quoting § 2(5)).

97. *Id.* The employee committees that are established for the purpose of creating better communications between the employer and employee, although viewed as protected by Member Oviatt, are the exact type of committees that are in the most danger of being perceived as labor organizations under section 2(5).

Finally, Member Radabaugh, going beyond a mere analysis of existing law, suggested that section 8(a)(2) should be reinterpreted by the legislature in light of the growing importance of employee participation programs and cooperation between labor and management.<sup>98</sup> He also offered a four-part analysis for determining whether employee participation programs are lawful.<sup>99</sup> In Member Radabaugh's view, the four factors for consideration, none of which are dispositive, are (1) the extent of the employer's involvement in implementing the committees, (2) whether the employees reasonably perceive the participation program as a substitute for collective bargaining through an independent union, (3) whether employees have been assured of their Section 7 right to choose representation by an independent union, and (4) the employer's motives in establishing the employee participation program.<sup>100</sup>

One year after the Board decided *Electromation*, it faced a somewhat different situation in *E.I. du Pont de Nemours & Co.*,<sup>101</sup> where it had the opportunity to provide some concrete guidance regarding the definition of a labor organization and the employer domination analysis.<sup>102</sup> In that case, employees in a unionized company participated in safety committees, which made proposals to management for their approval or rejection.<sup>103</sup> Based primarily on the fact that management could reject the proposals, the Board found that the committees constituted labor organizations.<sup>104</sup> The Board emphasized the existence of a bilateral mechanism between two parties as the focal point in determining that the groups were "dealing with" the employer, and stated that a "bilateral mechanism" ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management

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98. *Id.* at 1013.

99. *Id.* In proposing this test, Member Radabaugh sought to accommodate labor-management participation while keeping employees' section 7 rights intact. *Id.*

100. *Id.* Opponents of the TEAM Act cite the lack of preservation of employees' section 7 rights as the major flaw in the Act. See *infra* notes 149-50 and accompanying text.

101. 311 N.L.R.B. 893 (1993).

102. *Id.* at 894, 895-97. This case provided the Board the opportunity to address issues raised by employee participation programs in the unionized workplace. *Id.* at 893-98.

103. *Id.* at 894-95.

104. *Id.* at 895.

responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."<sup>105</sup>

Expanding on this definition in an attempt to provide the guidance lacking in *Electromotion*, the Board articulated three employment situations that fail to meet the requirements of "dealing with." First, "brainstorming" is not akin to "dealing with" because the employees are not making proposals.<sup>106</sup> Second, a committee whose purpose is sharing information with the employer is not dealing with the employer.<sup>107</sup> Third, the Board noted that suggestion boxes are clearly not mechanisms for "dealing with" the employer, despite the fact that employees make proposals, because they are not making them as a group.<sup>108</sup> Based upon this analysis, the Board found quarterly all-day safety conferences held by the employer permissible because the conferences amounted to brainstorming sessions during which attempts were clearly made to prohibit discussion of bargaining issues.<sup>109</sup>

Even though *E.I. du Pont* took place in a unionized setting, this decision provided a small amount of guidance to employers regarding permissible forms of communication. Many believe that this guidance falls short, as evidenced by proposals to amend the NLRA to enable employers to involve employee groups in decision making without fear of committing unfair labor practices.<sup>110</sup> Opponents of the TEAM Act argue that *E.I. du Pont* shows that employers can implement employee participation structures under existing law without this fear.<sup>111</sup> This decision, however, only provides a narrow exception to the expansive reach of the *Electromotion* decision.<sup>112</sup>

#### D. Employee Participation in The Wake of Electromotion

Since the decision in *Electromotion*, the need for clarification of the legality of employee participation programs has become evident.<sup>113</sup> In

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105. *Id.* at 894.

106. *Id.* at 894-95.

107. *Id.*

108. *Id.* The Board noted that the "dealing" element is absent when, without evidence of a pattern, the employee group proposes ideas informally to management followed by management's response of acceptance or rejection. *Id.*

109. *Id.* at 896.

110. *See infra* Part IV.

111. *See infra* notes 182-83 and accompanying text.

112. *See supra* notes 103-09 and accompanying text.

113. The Commission on the Future of Worker-Management Relations suggested in its January 9, 1995, report that Congress clarify the NLRA and remove legal obstacles to enable employers to freely engage in participation programs. *See Cimini & Muhl, supra* note 14, at 78 (summarizing the Dunlop Report).

recent years the Board has considered charges involving the employee involvement efforts of some leading companies in the country and questioned the legality of these efforts.<sup>114</sup> Continuing its reliance on the *Electromation* decision, the Board found that employee participation programs constituted illegally dominated labor organizations in four of six recent rulings.<sup>115</sup>

In *Keeler Brass Automotive Group*,<sup>116</sup> the Board held that a grievance committee comprised of elected employees was an employer-dominated labor organization and ordered its disestablishment.<sup>117</sup> The Board, relying on its interpretation of "dealing with" in *Electromation*,<sup>118</sup> found a bilateral mechanism existed by which the committee engaged in a pattern or practice of submitting proposals to management for approval or rejection.<sup>119</sup> In further reliance on its decision in *Electromation*, the Board found that management dominated the organization because it initiated the committee and determined its structure, function, and continued existence.<sup>120</sup>

114. See H.R. REP. NO. 104-248, at 13-14 (1995), available in 1995 WL 560823 (noting the section 8(a)(2) charges against Donnelly Corporation and Polaroid Corporation, both of which the Department of Labor cited as one of the 100 best companies to work for in America, as well as against EFCO Corporation).

115. *Labor-Management Cooperation: Labor Board Issues Five Rulings on Employee Involvement Committees*, Daily Lab. Rep. (BNA) No. 26, at D6 (Feb. 8, 1996); see *Vons Grocery Co.*, 320 N.L.R.B. 53 (1995) (discussed *infra* notes 136-38 and accompanying text); *Stoody Co.*, 320 N.L.R.B. 18 (1995) (discussed *infra* notes 132-35 and accompanying text); *Dillon Stores*, 319 N.L.R.B. 1245 (1995) (discussed *infra* notes 124-26 and accompanying text); *Webcor Packaging, Inc.*, 319 N.L.R.B. 1203 (1995) (discussed *infra* notes 121-23 and accompanying text); *Reno Hilton Resorts Corp.*, 319 N.L.R.B. 1154 (1995) (discussed *infra* notes 127-30 and accompanying text); *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110 (1995) (discussed *infra* notes 116-20 and accompanying text). The cases in which the Board found an employer-dominated labor organization all contain aspects similar to the facts in *Electromation*.

116. 317 N.L.R.B. 1110 (1995).

117. *Keeler Brass*, 317 N.L.R.B. at 1114, 1116. It is interesting to note that the Board deciding *Keeler Brass* consisted of four Board members who were not on the Board at the time of the *Electromation* decision. See *id.* at 1110; *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), enforced, 335 F.3d 1148 (7th Cir. 1994).

118. See *supra* note 84-90 and accompanying text.

119. *Keeler Brass*, 317 N.L.R.B. at 1113.

120. *Id.* at 1115. The Board noted that the employer's involvement could not be "characterized as 'mere cooperation.'" *Id.* at 1115 n.21 (quoting *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1165-66 (7th Cir. 1994) (distinguishing *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955))); see *supra* notes 88-90 and accompanying text.

In *Webcor Packaging, Inc.*,<sup>121</sup> the Board upheld a finding that an employer-established plant council, which offered recommendations to management about proposed changes in working conditions, was not merely a communications mechanism but rather was engaged in the pattern or practice of making recommendations for management's consideration.<sup>122</sup> Again following *Electromation*, the Board found domination of the committee because the employer founded the committee and determined its structure and function.<sup>123</sup>

Similarly, in *Dillon Stores*,<sup>124</sup> the Board held that an employee-elected associates committee, which discussed and made regular proposals regarding a wide range of work issues including scheduling and sick leave reimbursement, constituted a labor organization because the employer could accept or reject its proposals.<sup>125</sup> Additionally, the Board found that management dominated the committee because the employer initiated the committee and determined its structure and function.<sup>126</sup>

Finally, in *Reno Hilton Resorts Corp.*,<sup>127</sup> the Board upheld a finding that quality action teams established by the employer were labor organizations.<sup>128</sup> Despite the fact that most of the meetings covered other topics, the team dealt with management "concerning wages, hours and other terms and conditions of work."<sup>129</sup> The Board also determined that management dominated the quality action teams because the company's general manager determined their size and structure, paid employees to attend the meetings, and developed the agendas for the meetings.<sup>130</sup>

While four of the six recent cases in which the Board found employer-dominated organizations contained very similar situations, the two cases in which the Board did not find labor organizations involved significantly different scenarios.<sup>131</sup> In *Stoody Co.*,<sup>132</sup> the Board found that an em-

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121. 319 N.L.R.B. 1203 (1995).

122. *Id.* at 1204. The Board noted that the council had no effective existence independent of the management's involvement and approval. *Id.* Employees will not be independently implementing most employee participation programs because the nature of the employment relationship will still require that employers be involved with the group's regular operations.

123. *Id.*

124. 319 N.L.R.B. 1245 (1995).

125. *Id.* at 1251-52.

126. *Id.* at 1252.

127. 319 N.L.R.B. 1154 (1995).

128. *Id.* at 1157.

129. *Id.* at 1156-57. Section 2(5) defines a labor organization as an organization that exists, even in part, for the purpose of dealing with the employer concerning "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 29 U.S.C. § 152(5) (1994).

130. *Reno Hilton*, 319 N.L.R.B. at 1157.

131. See *infra* notes 132-38 and accompanying text.

ployee handbook committee, created to review the company handbook for consistency with current work practices, was not a labor organization.<sup>133</sup> The Board emphasized the fact that management specifically instructed the committee not to discuss wages, benefits, or working conditions.<sup>134</sup> The Board also stated that it "support[s] an interpretation of the Act which would not discourage such programs," but the Board cautioned that recurring instances of employee participation committees making proposals to management on mandatory subjects would support a finding that a labor organization exists.<sup>135</sup>

In *Vons Grocery Co.*,<sup>136</sup> the Board held that a brief discussion on a mandatory topic by a quality circle group, which was established to discuss specific operational issues, did not render the group a labor organization.<sup>137</sup> The Board noted that the group did not have a pattern or practice of making proposals on mandatory subjects and that making one proposal on a condition of work did not constitute a pattern of dealing with the employer within the meaning of section 2(5).<sup>138</sup>

In light of the confusion created by *Electromation* and the indications that the Board will continue to adhere to that decision, the need for a legislative amendment to the NLRA has become increasingly clear. Enactment of the TEAM Act would remove the legal uncertainty surrounding these programs and enable employers to involve employee groups in decisions concerning areas of mutual interests, including product quality, productivity, and efficiency.<sup>139</sup>

#### IV. THE TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1997<sup>140</sup>

The introduction of the Teamwork for Employees and Managers Act of 1997 in the House and the Senate in February 1997<sup>141</sup> signaled the rec-

132. 320 N.L.R.B. 18 (1995).

133. *Id.* at 19-20.

134. *Id.* at 20-21. The Board did note that it is difficult to separate such issues as operations and efficiency from the matters of wages, benefits, or working conditions. *Id.* at 20.

135. *Id.* at 20-21.

136. 320 N.L.R.B. 53 (1995).

137. *Id.* at 53-54.

138. *Id.* at 54.

139. *See infra* Part IV.

140. H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997).

141. 143 CONG. REC. E187 (daily ed. Feb. 6, 1997) (statement of Rep. Fawell); 143



ognition of the continuing need to resolve the legality of employee participation programs. Identical legislation, known as the TEAM Act of 1995, passed both houses of Congress in 1996, only to be vetoed by President Clinton.<sup>142</sup> The 1997 Act once again proposes to amend section 8(a)(2) of the National Labor Relations Act to "allow labor management cooperative efforts [in the nonunion workplace] that improve economic competitiveness in the United States."<sup>143</sup> The stated purpose of the Act is to protect employers from governmental interference while not compromising employees' section 7 rights to be protected from coercive and deceptive employer practices.<sup>144</sup> Many oppose the Act, claiming that it amounts to union-busting and will open the door for the return of "company unions," which the NLRA sought to prevent in the 1930s.<sup>145</sup> The text of the Act would amend section 8(a)(2) to include the following:

*Provided further,* That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management 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 of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.<sup>146</sup>

The TEAM Act proponents recognize that a shift in employment relations from adversarial to cooperative efforts has taken place over the last six decades.<sup>147</sup> This Act removes the barriers employers previously

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CONG. REC. S1192 (daily ed. Feb. 10, 1997) (statement of Sen. Jeffords).

142. 142 CONG. REC. H8816 (daily ed. July 30, 1996) (recitation by the Speaker pro tempore McInnis of the Presidential veto).

143. H.R. 634 § 2; S. 295 § 2. In its findings, Congress presents compelling reasons for opening the door to expansive employee participation programs, including the demands of global competition, enhanced productivity and competitiveness, and a generally positive impact on workers. H.R. 634 § 2; S. 295 § 2. Changes in the workplace in response to "escalating demands" of the global economy necessarily involve enhanced role for employees. H.R. 634 § 2; S. 295 § 2.

144. H.R. 634; S. 295. The Act provides that employees will retain their right to choose an independent union and further provides that the Act is not applicable to unionized workplaces. *See id.*

145. *See* Tench, *supra* note 18, at A18. The force of the arguments against the Act rely on a backward-looking analysis of the events and conditions of the 1930s that led to company unions and the need to ban employer domination. *See* 141 CONG. REC. H9531 (daily ed. Sept. 27, 1995) (remarks of Rep. Gephardt).

146. H.R. 634 § 3; S. 295 § 3.

147. Congress enacted the NLRA based on the adversarial model of employment

faced to initiating cooperative efforts in the workplace, including joint problem-solving and productivity, and quality improvements.<sup>148</sup> On the other hand, the pro-union opponents of the Act fear that its passage only encourages employers to implement and dominate employee participation programs in an effort to impede legitimate union organizing efforts.<sup>149</sup>

If the TEAM Act fails, its demise will be attributed to both the perceived lack of specific protection against an employer's attempts to implement employee participation programs in the face of union organizational drives and to the use of broad language to describe the types of matters these groups could address.<sup>150</sup>

Despite the polarization of views regarding the TEAM Act, both sides recognize the importance of employer-employee participation and the need to find ways to improve efficiency, productivity and quality so that American companies may compete effectively as we enter the twenty-first century.<sup>151</sup> The main point of contention lies in the determination

relations. *See supra* notes 30-31 and accompanying text. More than six decades later, the time has come for a change from the labor era and top-down decision making to a workplace era where employee involvement in decision making is the norm. *See* H.R. REP. NO. 104-248, at 5-6 (1995), available in 1995 WL 560823.

148. *TEAM Act Would Remove Barriers to Workplace Cooperation*, PR NEWSWIRE, Sept. 28, 1995, available in LEXIS, Nexis Library, ALLNEWS Library [hereinafter *Barriers*].

149. David Warner, *Giving Employees a Voice on the Job*, NATION'S BUS., Sept. 1995, at 38; *see Administration: Reich Reaches Out to Labor Unions for Help in Combating GOP Proposals*, 189 Daily Lab. Rep. (BNA) No. 189, at A-2 (Sept. 29, 1995) [hereinafter *Reich Reaches Out*]. Opponents believe that the TEAM Act would undermine employee protections in two major ways. First, the Act would allow "nonunion employees to establish sham unions," and, second, the Act would allow "other employees to establish company-dominated alternative organizations while employees are in the process of [seeking independent union representation]." 141 CONG. REC. H9526 (daily ed. Sept. 27, 1995) (remarks of Rep. Owens). If the TEAM Act passes, many fear that employee participation programs will merely be used by "unscrupulous managers to bypass legitimate worker representative organizations." 141 CONG. REC. H9532 (daily ed. Sept. 27, 1995) (statements by Rep. Skaggs). These arguments are very similar to those made during the Taft-Hartley debates. *See supra* notes 36-38 and accompanying text. Employees today, however, are more aware of their rights to organize under the NLRA and could probably determine if a "company union" existed that was not working to their benefit. *See* Gillian Flynn, *Is Pro-Worker Good Business?*, 75 PERSONNEL J. 66, Oct. 1, 1996, at 66.

150. *See* H.R. 634; S. 295; *supra* text accompanying note 146.

151. 141 CONG. REC. H9527, H9529 (daily ed. Sept. 27, 1995) (remarks of Rep. Houghton and Rep. Sanders).

of how to achieve those goals in a way that minimizes the intrusion on employees' rights to free choice of representation.

#### A. *Analysis of the TEAM Act*

Three key provisions, when combined, will permit employers to lawfully implement employee participation programs. The first provision deals with the role of the employer in creating the programs. Whereas the current section 8(a)(2) prohibits an employer from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization,"<sup>152</sup> the proposed revision would permit employers to "establish, assist, maintain, or participate in any organization of any kind."<sup>153</sup> Although this language appears broad, the clauses following that language reduce its scope by limiting the permissible organizations to those in which employees participate in equal numbers as managers.<sup>154</sup>

The second major provision of the Act involves the matters upon which employee participation programs may make decisions. The Act provides that employee participation groups may "address matters of mutual interest."<sup>155</sup> Although the Act specifically mentions issues involving the overall productivity, efficiency, and safety in the workplace, the Act does not place a limit on the types of issues that may be discussed.<sup>156</sup> This lack of specificity will permit discussions pertaining to the mentioned topics to encompass discussions on issues involving the terms and conditions of work.<sup>157</sup> As noted by former Board member Charles I. Cohen, discussions of these previously off-limits subjects are inevitable in light of the fact that work conditions affect productivity and efficiency, and therefore, they should be permissible.<sup>158</sup> An employer's ability to discuss these issues with employees will enable the employer to realize the full potential of these programs.

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152. 29 U.S.C. § 158(a)(2) (1994).

153. H.R. 634; S. 295.

154. H.R. 634; S. 295. This limitation provides that managers will not outnumber the employees in any given group, thereby avoiding outright domination. *See* H.R. 634; S. 295. Although this clause alone does not guarantee that the managers on the committee will refrain from presenting the employer's view, to the extent that employees are not satisfied with outcomes, they will always be able to seek union representation. *See* H.R. 634; S. 295; *infra* note 159.

155. H.R. 634; S. 295.

156. *See* H.R. 634; S. 295.

157. *See* H.R. 634; S. 295. Even the NLRB acknowledges that discussions of this type will inevitably arise when addressing issues such as productivity and efficiency. *See* *Stoody Co.*, 320 N.L.R.B. 18, 19 (1995).

158. *Selected Testimony*, *supra* note 1, at E-4.

The third key provision, which requires that the employee participation organizations not "have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter . . . or amend collective bargaining agreements," addresses the concern that employers may attempt to use employee participation programs to destroy employees' rights to independent union representation.<sup>159</sup> Employee participation programs are not a substitute for independent representation. Further, the language of the Act indicates that the amendment to section 8(a)(2) will not apply in unionized companies.

Enactment of this Act will permit employers to lawfully engage in bilateral communications with their employees to further the goals of enhanced productivity, quality, and safety. To the extent that discussion of these issues requires discussions relating to the terms and conditions of work, such communication will be permitted under the Act, and justifiably so.<sup>160</sup>

Under the Act, several of the post-*Electromation* cases in which the Board found unlawful employer domination of employee participation programs would have had a different and better outcome. For example, where employee grievance committees do not fall within the narrow exceptions created by the Board because of the fact that they involve bilateral communications between the employer and employees,<sup>161</sup> such committees would now be permitted to lawfully engage in communications with the employer.<sup>162</sup> Similarly, employer-established councils that offer recommendations to management on terms and conditions of work for management consideration also would be lawful.<sup>163</sup> Clearly, the

159. See H.R. 634; S. 295. The fact that a lawful employee participation group cannot seek to be the exclusive bargaining representative should put to rest the stated fear of TEAM Act opponents that the Act would permit a return to the "sham unions" of the 1930s. See H.R. 634; S. 295. The continued opposition to the Act in light of this clause emphasizes the fact that its opponents fail to recognize the ability of employees to seek representation if they find it necessary.

160. See H.R. 634; S. 295.

161. See *supra* notes 51-60 and accompanying text.

162. See H.R. 634; S. 295. For example, the type of employee grievance committee involved in *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110 (1995), would now be permissible. See H.R. 634; S. 295; *supra* notes 116-20.

163. See H.R. 634; S. 295. The same situation was present in *Webcor Packaging, Inc.*, 319 N.L.R.B. 1203 (1995). In that case, the Board held that the employer-created council's pattern of making recommendations to management constituted an unfair labor practice. *Id.* at 1204; see *supra* notes 121-23 and accompanying text. *Dillon Stores*, 319 N.L.R.B. 1245 (1995), and *Reno Hilton Resorts Corp.*, 320 N.L.R.B. 1154

TEAM Act fosters the type of employer-employee communication that both proponents and opponents of the Act agree are needed.<sup>164</sup> Nonetheless, opponents of the TEAM Act ignore the realities of the workplace of the 1990s and blindly argue that this Act would destroy workers' rights.<sup>165</sup>

*B. The TEAM Act Will Enhance Employees' Voices in the Nonunion Workplace*

Under the TEAM Act, employers would be free to implement employee participation programs provided the employees participate to the same extent as managers and provided that these organizations do not attempt to perform the functions of a traditional bargaining representative.<sup>166</sup> Although almost 30,000 employers already have employee participation programs in place, the Act would protect these employers from unfair labor practice charges for illegal domination.<sup>167</sup> Giving employers and employees the freedom to work in this cooperative manner will have great advantages in terms of productivity, quality improvement, and employee morale.<sup>168</sup> The Act will permit employers and employees to realize these advantages by explicitly protecting employees' right to choose union representation while empowering them to become involved in decisions affecting their work.<sup>169</sup>

Employers are not the only parties who want the freedom to engage in employee participation programs. Indeed, an overwhelming number of employees favor employee participation programs that will give them the ability to communicate with management while allowing them to retain their section 7 rights.<sup>170</sup> Passage of the TEAM Act would send employ-

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(1995), involved similar situations. *See supra* notes 124-30 and accompanying text. All of these cases would likely be decided differently under the TEAM Act.

164. *See infra* note 172 and accompanying text.

165. H.R. REP. NO. 104-248, at 6-7 (1995), *available in* 1995 WL 560823.

166. H.R. 634; S. 295; *see* H.R. REP. NO. 104-248, at 5 (1995), *available in* 1995 WL 560823; U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, Commission on the Future of Worker-Management Relations: Report and Recommendations, (1994); Walpole-Hofmeister, *supra* note 12, at D-14. The passage of the TEAM Act would resolve the problem that currently exists due to the fact that employers in a nonunion workplace can legally implement unilateral changes regarding terms and conditions of work without consulting employees, while in a unionized workplace employees can legally control decisions through the union. 141 CONG. REC. H9530 (daily ed. Sept. 27, 1995) (remarks of Rep. Goodling). The TEAM Act will establish a compromise position by allowing employer-employee cooperative efforts in nonunion workplaces. *Id.*

167. H.R. 634; S. 295; Warner, *supra* note 149, at 38.

168. H.R. REP. NO. 104-248, at 6-7 (1995), *available in* 1995 WL 560823.

169. *See* Warner, *supra* note 149, at 38.

170. Seventy-six percent of workers surveyed in 1994 believed that their involvement

ees the positive message that their input is vital to the success of the companies for which they work.<sup>171</sup>

Parties on both sides of this debate agree that employees deserve to have a "voice" on the job.<sup>172</sup> The debate rages on, however, mainly because the two sides cannot agree from whom this voice should be heard. The proponents of the TEAM Act believe that the workers have the power and should have the ability to use their own voices through employee participation programs.<sup>173</sup> Opponents fail to acknowledge that this voice does in fact exist.<sup>174</sup> Representatives of organized labor believe that this voice will only be effectively heard if it comes from an independent source—namely the union.<sup>175</sup>

The reality under the TEAM Act is that employees can still seek that independent voice—if they need it.<sup>176</sup> Just as employees have sought union representation when they have felt that they have been treated unfairly in the past, employees in companies with employee participation programs can still seek an independent voice if the participation does not work.

in decisions relating to production and operations would improve the competitiveness of their companies, and 79% reported having "personally benefitted" from the process. H.R. REP. NO. 104-248, at 5 (1995), available in 1995 WL 560823 (citing Freeman & Rogers, *supra* note 4. Employee support for the Act also emanates from the fact that employees have a vested interest in improving the competitiveness of their companies and the stability of their futures. 141 CONG. REC. H9525 (daily ed. Sept. 27, 1995) (remarks of Rep. Stenholm).

171. 141 CONG. REC. H9533 (daily ed. Sept. 27, 1995) (remarks of Rep. Smith).

172. See *Selected Testimony*, *supra* note 1, at \*4, E-1 to E-2, E-7.

173. *Id.* at E-1 to E-2 (testimony of J. Thomas Bouchard, Senior Vice President, Human Resources, IBM). Mr. Bouchard noted that although IBM has been successful with the employee participation programs it has implemented, the employees could do much more to help management make IBM a better place to work. *Id.* at E-2. He noted that the TEAM Act would empower them to make these improvements. *Id.* at E-2 to E-3. IBM is also a member of the TEAM Coalition, an organization which represents more than 250 businesses that strongly support the TEAM Act. *Id.* at E-1, E-7.

174. *Id.* at E-5 (testimony of Jonathan P. Hiatt, General Counsel, AFL-CIO). Mr. Hiatt stated that "employee involvement is most effective, and most durable, when it is nurtured through collective bargaining, where workers speak with an independent voice." *Id.*

175. *Id.*

176. The TEAM Act in no way prohibits employees' freedom to exercise their Section 7 rights and seek union representation. See H.R. 634; S. 295.

C. *The TEAM Act Means Facilitated Communication for Employers and Employees*

Currently, the law involving employee participation programs significantly inhibits employees from effectively communicating with management.<sup>177</sup> Implementation of the TEAM Act would undoubtedly dissipate the adverse impact of *Electromation* on employers' efforts to implement employee participation programs.<sup>178</sup> In *Electromation* and cases following that decision, the existence of a labor organization basically turned on whether the employees engaged in a pattern or practice of making proposals to management that management could then accept or reject, and a finding of employer domination turned on whether the employer organized and determined the nature, structure, and function of the employee group.<sup>179</sup> The TEAM Act explicitly removes those considerations from the analysis of the lawfulness of employee participation groups that address issues of quality, productivity, efficiency, safety, and health.<sup>180</sup> A problem arises because two-way communications involving productivity, efficiency, safety, and health will inevitably cross the line into the "off limits" topic of terms and conditions of work.<sup>181</sup>

Opponents of the TEAM Act cite cases in which the NLRB has permitted employee participation as the basis for their argument that employees can effectively participate under current law.<sup>182</sup> Yet, in these so-called "safe haven" cases, the form of permissible communication was drastically limited. For example, opponents cite *E.I. du Pont de Nemours & Co.* as providing a safe haven under which employees can present ideas to management through suggestion boxes, brainstorming, and information-sharing committees.<sup>183</sup> Nevertheless, these methods do not ad-

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177. See *supra* Parts III.C-D.

178. See *Barriers*, *supra* note 148. Instead, employers will be attempting to implement programs that they feel are consistent with the TEAM Act and which would pass any scrutiny under that law.

179. *Electromation, Inc.*, 309 N.L.R.B. 163, 173 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994); see *Keeler Brass Automotive Group*, 317 N.L.R.B. 161 (1995); *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993); see also *supra* Parts III.C-D.

180. H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997); see *Barriers*, *supra* note 148.

181. See *Selected Testimony*, *supra* note 1, at E-4.

182. See *id.* at E-5 to E-6; see also *Simmons Indus., Inc.*, 321 N.L.R.B. No. 32 (1996) (upholding informational committees that addressed product quality and efficiency); *General Foods Corp.*, 231 N.L.R.B. 1232 (1977) (same). Although employee participation may be legal under the statutory framework of sections 2(5) and 8(a)(2), they are *not* legal under the interpretation of the NLRA, which proponents of the TEAM Act argue has been improperly interpreted. 141 CONG. REC. (daily ed. Sept. 27, 1995) (remarks of Rep. Goodling); see *infra* notes 204-10 and accompanying text (discussing guidelines for employers in the event the TEAM Act is not enacted).

183. See *Selected Testimony*, *supra* note 1, at E-4; *supra* notes 101-09 and accompa-

dress the heart of this issue—cooperation. Suggestion boxes preclude group meetings, and brainstorming and information-sharing sessions on issues such as productivity and efficiency will inevitably deviate into discussions of prohibited subjects because the productivity and efficiency of an operation depends on people—and the way people work depends on the structure of their jobs.<sup>184</sup> Thus, it would be impossible for employees to fully address issues involving efficiency and productivity without crossing over the line into the area of terms and conditions of work because increasing productivity may require changing the way the work is done.<sup>185</sup>

Opponents of the Act also cite the relatively low number of unlawful domination cases before the NLRB as proof of their contention that the participation programs which the TEAM Act purports to make lawful are already lawful.<sup>186</sup> The NLRB process is complaint-driven, however, and there is little incentive for employees to challenge workplace structures which meet their interest in having a greater involvement in the workplace.<sup>187</sup> Further, the *Electromation* decision has had a chilling effect on legitimate employee involvement programs and employers' plans to expand such programs, thereby reducing the number of potential complaints.<sup>188</sup>

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nying text (discussing the *E.I. du Pont* decision).

184. See *Selected Testimony*, *supra* note 1, at E-4.

185. *Id.* In *Stoody Co.*, 320 N.L.R.B. 18, 19-20 (1995), the NLRB found that an employer who disbanded a handbook committee after one meeting did not engage in an unfair labor practice. The employer disbanded the meeting because at the first meeting the employees and a manager discussed the company's vacation notification policy, a term and condition of work. *Id.* at 19. The Board found that the meeting was an "isolated" instance and therefore fell outside of the definition of "dealing with" management. *Id.* at 20. Nevertheless, as former Board Member Charles I. Cohen noted, "[N]o employer wants to set up a committee and then disband it every time a 'condition of work' is raised. . . . That kind of sterile, start-stop arrangement is wholly ineffective." *Selected Testimony*, *supra* note 1, at E-5. Mr. Cohen endorsed the TEAM Act as a "meaningful safe haven" that will permit companies to seek effective employee cooperation and ultimately increase their competitive advantages. *Id.* at E-5 (emphasis added).

186. 141 CONG. REC. H9527 (daily ed. Sept. 27, 1995) (remarks of Rep. Martinez).

187. H.R. REP. NO. 104-248, at 13 (1995), available in 1995 WL 560823.

188. *Id.*; see Dinnen, *supra* note 85, at E8.



#### D. *The TEAM Act Retains Protection of Employee Rights*

The authors of the Act recognized that an abusive employer may use the TEAM Act to compromise employees' section 7 rights and therefore devised language excepting from the permissible groups those that "have, claim or seek authority" to act as the employees' bargaining representative or desire to amend or negotiate collective bargaining agreements.<sup>189</sup> Through this language, the Act protects the existing rights of employees to seek formal union representation at any time.<sup>190</sup> Further, the Act does not apply to unionized workplaces.<sup>191</sup> Professor Charles Morris stated that the effect of the TEAM Act could, in some situations, allow workers to use the TEAM Act to their advantage, indicating that the TEAM Act "is really a bill of rights for employees."<sup>192</sup> Despite the protections in the Act, opponents insist that implementation of the TEAM Act will undermine employee protections by allowing employers to establish sham unions, thereby creating the illusion of employee protection, and by allowing employees to implement company unions while other employees are seeking outside union representation.<sup>193</sup> This perceived failure of the Act to explicitly protect against such occurrences poses a threat to its passage.<sup>194</sup>

#### E. *The TEAM Act Will Not Result in the Return of Sham Unions*

Perhaps the most insulting aspect of the TEAM Act opponents' argument that the TEAM Act will bring back sham unions is their failure to acknowledge that the sophistication and education levels of the employ-

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189. See H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997); 141 CONG. REC. H9516 (daily ed. Sept. 27, 1995) (statement of Rep. Waldholtz); see *supra* notes 147 and 170 and accompanying text (discussing the trend toward greater employee involvement in workplace decision making).

190. See 141 CONG. REC. H9531, H9537-38 (daily ed. Sept. 27, 1995) (statements of Reps. Goodling, Sawyer, Sanders, and Gunderson).

191. See *supra* notes 146 and 159 and accompanying text.

192. Louis C. LaBrecque, *Team Act Legislation Could Rebound in Labor's Favor*, *Panelist Says*, 15 Daily Lab. Rep. (BNA), No. 15, at A-2 to A-4 (Jan. 24, 1996) (quoting Charles J. Morris, Professor of Labor Law, Southern Methodist University Law School).

193. 141 CONG. REC. H9523, H9526 (daily ed. Sept. 27, 1995) (statements of Reps. Goodling, Gunderson, Miller, Knollenberg, Clay, and Owens).

194. See 141 CONG. REC. H9526 (daily ed. Sept. 27, 1995) (statement of Rep. Owens); *This Team Is a Loser*, ST. LOUIS POST-DISPATCH, Oct. 4, 1995, at 6B, available in WESTLAW, 1995 WL 3347 220; *Reich Reaches Out*, *supra* note 149, at A-2. The defeat of the TEAM Act of 1995 arose from the fear that the relaxation of § 8(a)(2) would lead to the resurgence of the company union. See *id.* However, this argument ignores the fact that employees today are significantly more sophisticated and educated than those in the 1930s. See Flynn, *supra* note 149, at 66.

ees of the 1990s are significantly greater than their counterparts of the 1930s.<sup>195</sup> Six decades later, employees now know they have rights and they know how to exercise them. Further, with the proliferation of the mass media over the last six decades, there is no longer the sense that employers can get away with egregious conduct. Clearly these external checks on an employer's conduct will remain intact should the TEAM Act become law.

*F. The TEAM Act Will Permit American Companies to Effectively Compete in the Global Economy*

Although involving employees in employment decisions that affect their life is a crucial benefit of the TEAM Act, this benefit in turn will create an advantage for American companies seeking to establish a strong position in increasingly competitive markets. Indeed, the key to global success in the future will be productivity and efficiency.<sup>196</sup> To the extent that employees are involved in making important decisions, they will continue to help their companies achieve success.

Major companies that now use employee participation programs laud the benefits these programs bring not only to the workforce within the company, but to the company as a whole.<sup>197</sup> In a recent statement to the Senate Labor and Human Resources Committee, J. Thomas Bouchard, Senior Vice President of Human Resources at IBM, described the company's success with teamwork and stressed the fact that IBM would like to implement and expand its employee participation programs.<sup>198</sup> Employees know what they need to make their lives better. If they can be involved with making those changes, then the work environment will be enhanced, and, as a result, productivity and efficiency will be increased.<sup>199</sup> This is just one example illustrating why senior management of major companies, recognizing the significant advantages of a highly skilled and motivated workforce that comes with employee participation, strongly support initiatives which remove legal barriers to participation programs.<sup>200</sup>

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195. See Flynn, *supra* note 149, at 66.

196. See O'Connor, *supra* note 3, at 901.

197. See *Selected Testimony*, *supra* note 1, at E-1 to E-2.

198. *Id.* Mr. Bouchard noted the restrictions that current law places on the ability of teams at IBM to maximize their potential in terms of making IBM a better place to work. *Id.*

199. See *id.*

200. H.R. REP. NO. 104-248, at 9 (1995), available in 1995 WL 560823. "Employee

G. *Life Without the TEAM Act—“A Legal Never-Never Land”*<sup>201</sup>

Without the TEAM Act, employers would be left to rely on the fragmented guidance offered by established case law interpreting sections 2(5) and 8(a)(2) of the NLRA.<sup>202</sup> Employers would be required to model their employee participation programs after the limited types of programs that have withstood scrutiny under sections 2(5) and 8(a)(2).<sup>203</sup> As discussed throughout this Comment, that would not be an easy task. Employee participation programs would have to be narrowly constructed and would never realize their full potential.

Based upon the existing interpretations, however, there are several precautionary measures that an employer may implement to ensure that its employee participation program will withstand challenge.<sup>204</sup> First, employers that create employee participation programs should make it clear to employees that they are not required to participate.<sup>205</sup> Second, to the extent managers participate in a program, they should not constitute a majority of the members of the program.<sup>206</sup> Third, management should establish open enrollment for employee participation rather than selecting the employees.<sup>207</sup> Fourth, the employees must not act as a representative of other employees and must not engage in any discussions involving mandatory bargaining subjects.<sup>208</sup> In addition, the employer should make it clear to the employees that their right to organize and bargain collectively is in no way impeded by the employee participation program.<sup>209</sup> Employers may also avoid challenge by creating specific ad hoc groups that relate to a particular production, efficiency, or quality issue and then disbanding them.<sup>210</sup>

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involvement is and must be a win-win strategy in all segments of our industrial policy.” *Id.* (citing testimony of Howard V. Knicely, Executive Vice President, TRW Vehicle Safety Systems, before the Committee on Economic and Educational Opportunities Subcommittee on Employer-Employee Relations).

201. H.R. REP. NO. 104-248, at 13 (1995), available in 1995 WL 560823.

202. See *supra* Parts III.C-D. (discussing *Electromation* and subsequent cases).

203. See *supra* Part III.

204. Steven H. Winterbauer, *When Things Aren't What They Seem: Labor Issues in the Nonunion Workplace*, 20 EMPLOYEE REL. L.J. 189 (1994).

205. *Id.* at 214.

206. *Id.*

207. *Id.*

208. *Id.* Mandatory bargaining subjects include grievances, wages, hours, and conditions of work. *Id.*

209. *Id.*

210. See *Stoody Co.*, 320 N.L.R.B. 18, 19-21 (1995). Employers may also try holding sporadic meetings and using staff meetings to discuss issues. See *id.* As noted by former NLRB member Charles I. Cohen, however, any program using the “start-stop” method of employee involvement would be inadequate. *Selected Testimony, supra*

## V. CONCLUSION

Employee participation programs are and will continue to be an effective way for companies to improve productivity, efficiency, and quality of their products, which will in turn help them compete in the global marketplace. Although certain characteristics of these programs currently render many of them unlawful under the National Labor Relations Act,<sup>211</sup> employers should continue to implement programs that are consistent with the purpose of the NLRA—the protection of employees' rights.<sup>212</sup>

Opponents of the TEAM Act should consider the people they claim to protect. Many of these workers desire a voice on the job, and many have successfully been heard by way of employee participation programs throughout the country. Although these programs do exist, their full potential is overshadowed by archaic laws that fail to recognize the reality of the new workplace.

The passage of the former TEAM Act by Congress signified the recognition that employee-employer relations have shifted from adversarial to cooperative. Under this Act, employers will be able to involve employees in many important facets of the company, without the fear of facing unfair labor practice charges, provided that they do not violate the specific protections in the Act. The time has come for employee empowerment and involvement in important aspects of production that will allow American companies to become a stronger, more competitive force in the global marketplace. The passage of the TEAM Act will be a crucial step in reaching that goal.

MICHELE L. MARYOTT

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note 1, at E-4.

211. See *supra* Part III (discussing case law prohibiting use of employee participation programs).

212. 29 U.S.C. §§ 151, 157 (1994).

