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Whose Team Are You On? My Team or My TEAM?: The NLRA's Section 8(a)(2) and the TEAM Act

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WHOSE TEAM ARE YOU ON? MY TEAM OR MY TEAM?: THE NLRA'S SECTION 8(A)(2) AND THE TEAM ACT

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I. INTRODUCTION

Management has rediscovered workplace cooperative efforts.[1] The National Labor Relations Board ("Board" or

1. Although no reliable census of the number of workplace cooperative efforts exists, several recent surveys estimate the current levels of activity. For example, a 1991 survey of 694 firms with fifty or more employees found that sixty-four percent of the surveyed establishments have one or more employee involvement activities in place. *See* Paul Osterman, *How Common Is Workplace Transformation and Who Adopts It?*, 47 INDUS. & LAB. REL. REV. 173, 177 (1994). The Commission on the Future of Worker-Management Relations, created by President Clinton, found that a substantial majority of the larger American employers reported using some form of workplace cooperative efforts. *See Fact Finding Report: Commission on the Future of Worker-Management Relations*, XI U.S. DEP'T OF LABOR, at 36 (May 1994) [hereinafter *Fact Finding Re-*

"NLRB"),[2] Congress,[3] and President Clinton[4] and his Republican challenger, Senator Dole,[5] have also rediscovered this phenomenon. Workplace cooperative efforts, however, are hardly new to the American workplace or the American legal system.

For almost a century, management has experimented with various forms of cooperative approaches to work organization. These programs, typically involving a small group of employees who meet on a fairly regular basis to identify workplace problems and opportunities for improvement, have been imple-

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port].

In this Article, the terms "participatory programs" and "workplace cooperative efforts" are used to refer to any program in which employer and employees participate outside the traditional collective bargaining structure. Several such efforts are discussed below.

2. *See, e.g.*, Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.2d 1148 (7th Cir. 1994) (discussing whether an "action committee" consisting of six employees and one or two managers qualifies as a labor organization); E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993) (discussing examples of lawful and unlawful workplace cooperative efforts).

3. Both houses of congress approved legislation addressing workplace cooperative efforts last year. The Employees and Managers Act, H.R. 743, 104th Cong. (1995) [hereinafter TEAM Act] passed by a margin of 221 to 202.

4. As he had promised the year before, President Clinton vetoed the TEAM Act, arguing that the current law poses no threat to workplace cooperative efforts. *See Employee Participation: Clinton Vetoes TEAM Act Despite Pleas From Business For Passage*, 1996 Daily Lab. Rep. (BNA) 147, at d4 (July 31, 1996); *see also Labor-Management Cooperation: GOP Bid To Expand Employee Involvement Brings Protests From Organized Labor*, 1995 Daily Lab. Rep. (BNA) 72, at d29 (Apr. 14, 1995) (noting that Vice President Gore told union leaders in February, 1995 that President Clinton was prepared to veto the bill). Several Republican legislators and management groups have vowed to pursue similar legislation in 1997. *See Employee Participation: Kassebaum Hits Clinton's TEAM Act Veto As Election-Year Move To Placate Labor*, 1996 Daily Lab. Rep. (BNA) 148, at d8 (Aug. 1, 1996).

5. In his last days as Senate majority leader, Senator Dole attached the TEAM proposal to a legislative package that included a minimum wage increase and the elimination of a recently enacted federal gasoline tax. He was obliged to rescind the package, however, after failing to gain the necessary votes. *See Employee Participation: Issue of Representation Is Addressed in Possible Amendment to TEAM Act*, 1996 Daily Lab. Rep. (BNA) 100, at d6 (May 23, 1996).

mented in a variety of forms. They have been referred to as, inter alia, "Quality Circles," "Teams," and "Employee Involvement Groups."[6]

Since their inception, the legality, efficiency and even morality of such programs have been the subject of ongoing debate.[7] Following the enactment of the National Labor Relations Act ("NLRA" or "Act")[8] in 1937, the debate has centered on the question of whether section 8(a)(2) of the NLRA prohibits employers from implementing cooperative efforts in the workplace.[9] Section 8(a)(2) prohibits an employer from dominating or interfering with the formation or administration of a labor organization.[10] Employers have traditionally argued that any restrictions on their ability to establish workplace cooperative efforts reduce managerial flexibility and firm productivity thus leaving American firms at an economic disadvantage in an increasingly competitive global economy.[11] Conversely, labor organizations and employees have been concerned that employers "misuse" such cooperative approaches as anti-union and control mechanisms.[12]

This decades-long debate has reached a crucial juncture. Employers have been outraged by the National Labor Relations Board's recent decisions striking down the validity of participatory programs and have turned to Congress for relief.[13] In response, Congress approved legislation seeking to

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6. *See infra* note 19 and accompanying text.

7. *See generally* GUILLERMO J. GRENIER, INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY 16-22, 176-84 (1988) (discussing various aspects of implementing workplace cooperative efforts).

8. 29 U.S.C. § 152(5) (1994).

9. *See infra* notes 86-143 and accompanying text.

10. *See* 29 U.S.C. § 152(5).

11. *See Statements on the TEAM Act Before the House Economic and Educational Opportunities Committee*, May 11, 1995 Daily Lab. Rep. (BNA) 92, at d31 (May 12, 1995). Bill Gooding (R-PA), Chairman of the Committee on Economic and Educational Opportunities, argued that for a company to compete in an increasingly competitive and information-driven economy, employees must understand and participate in the entire business organization.

12. *See Factfinding Report*, *supra* note 1, at 32-34.

13. *See Employee Participation: TEAM Act Supporters Launch Campaign to Push for Passage*, 1996 Daily Lab. Rep. (BNA) 26, at d15 (Feb.

amend the NLRA to facilitate the use of such programs.[14] Organized labor, however, successfully lobbied the Clinton administration to veto the legislation.[15]

This Article analyzes employee participatory programs from the internal labor markets perspective.[16] Internal Labor Markets ("ILM") refer to the explicit or implicit agreements between employer and employees incorporating rules governing wages, working hours, promotion opportunities and grievance procedures. In order to function properly, ILMs require employees to learn skills that are valuable to the contracting firm, but are of much lesser value elsewhere. Employees agree to acquire such "firm-specific" skills and employers agree to subsidize the training needed to obtain these new skills. It is a mutually beneficial arrangement: employers expect to observe increases in productivity and efficiency and employees expect increases in pay and employment security as their tenure with the firm increases. These implicit or explicit agreements, however, may not be realized. A countervailing characteristic of ILMs is that once established, both parties might have strong incentives to refuse to perform, that is, to engage in opportunistic behavior. Examining ways to prevent such behavior is the central theme of this Article.

Application of the ILM analysis to participatory programs provides us with some useful insights.[17] First, implementing workplace cooperative programs requires employees to learn new skills which, although very valuable to the current employer, may have little value outside the current firm. Second, like most ILM arrangements, the idiosyncratic nature of firm-

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8 1996) (describing the kickoff of an information campaign by several major U.S. corporations and headed by two former congressmen to gain public support for the bill); *Employee Participation: Business Leaders Urge Clinton to Sign Teamwork Legislation*, 1996 Daily Lab. Rep. (BNA) 122, at d6 (June 25, 1996) (noting that over 600 top corporate executives signed a letter to President Clinton urging him to sign the bill should it reach his desk).

14. *See infra* notes 224-37 and accompanying text.

15. *See Employee Participation: Clinton Vetoes TEAM Act Despite Pleas From Business for Passage, supra* note 4, at d4 (reporting that President Clinton vetoed the TEAM Act on July 30, 1996).

16. *See infra* notes 268-92 and accompanying text.

17. *See infra* notes 293-336 and accompanying text.

specific skills creates incentives for opportunistic behavior. Employees can reduce their job effort and employers can implement policies making it difficult for employees to recover the benefit of their human capital investments. Controlling such opportunistic behavior at later stages of the employment relationship should be the guiding concern when the Board and reviewing courts apply section 8(a)(2) to determine the legality of cooperative efforts.

The NLRB's interpretation of section 8(a)(2), however, has been inconsistent at times and demonstrates a tendency to focus on tangential issues rather than the problems identified by the ILM analysis.[18] For example, the Board has largely focused on the issue of freedom of choice, asking whether employees have been tricked into believing that a new cooperative effort is in fact an independent bargaining representative which will protect their interests against the employer. Although freedom of choice problems are certainly significant, they are not an ILM problem. When judging the legality of cooperative efforts, the Board and the courts should not focus on the participatory program's immediate impact on the organizing drive, but rather on the effect the participatory program could have on the long-term employment relationship. The central inquiry should be whether the employer's program will increase the likelihood of opportunistic behavior at later stages of the employment process. The Board, when interpreting section 8(a)(2), should shift its focus to incorporate an ILM. By dispensing with peripheral considerations, a more coherent and stronger section 8(a)(2) test may be formulated, which can potentially resolve the debate over workplace cooperative efforts.

Part I of this Article describes the various forms of workplace cooperative efforts. Part II introduces some of the programs currently used by employers which are subject to section 8(a)(2) scrutiny. Additionally, Part II identifies the skills learned by employees involved in participatory programs which suggest the ILM characteristics of these programs. Part III discusses the existing views on the legality of workplace cooperative efforts and then analyzes those policies proposed to

18. *See infra* notes 144-223 and accompanying text.

resolve the workplace cooperative efforts dispute. Part IV introduces the internal labor market framework, while Parts V and VI apply this framework to the workplace cooperative efforts problem. Finally, Part VII presents some concluding remarks.

II. WORKPLACE COOPERATIVE EFFORTS

Workplace cooperative efforts have received extensive treatment in both legal and management literature.[19] Although the

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19. The management and human resources literature have addressed a range of topics. *See generally* Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, *in* UNIONS AND ECONOMIC COMPETITIVENESS 173, 180-93 (Lawrence Nishel & Paula B. Voos eds., 1992) (describing the role of unions in the development and performance of workplace cooperative efforts); Walter J. Gershenfeld, *Employee Participation in Firm Decisions*, *in* HUMAN RESOURCES AND THE PERFORMANCE OF THE FIRM 123 (Morris M. Kleiner et al. eds., 1978) (reviewing recent empirical studies analyzing the effect of workplace cooperative efforts on firm performance); Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, *in* UNIONS AND ECONOMIC COMPETITIVENESS *supra*, at 247-86 (analyzing the effects of the implementation of workplace cooperative efforts in the performance of the firm).

Similarly, the legal literature in this area has been comprehensive. *See generally* A.B. Cochran III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458 (1995) (arguing against legislative amendment of Section 8(a)(2)); Dennis M. Devaney, *Much Ado About Section 8(a)(2): The NLRB and Workplace Cooperation After Electromation and du Pont*, 23 STETSON L. REV. 39 (1993) (arguing that contrary to conventional wisdom, the NLRB decisions in *Electromation* and *E.I. du Pont* do not signal the end of employee participation programs); Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988) (providing a third alternative to the adversarial and cooperation models); Michael H. LeRoy, *Can TEAM Work? Implication of an* [Electromation] *and* [du] [Pont] *Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215 (1996) (providing an empirical analysis of private sector compliance with the NLRB's guidelines concerning workplace cooperative efforts); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983) [hereinafter Harvard Note] (arguing that the central concern of section 8(a)(2) is to ensure that labor relations are conducted through institutions that are sufficiently autonomous as bargaining repre-

analysis conduced thus far has been otherwise comprehensive, little attention has been paid to the internal labor markets characteristics of these programs. This section begins by tracing the historical development of workplace cooperative efforts in the United States and then considers two predominant types of cooperative efforts and attempts to identify their ILM characteristics.

A. A Brief History of Workplace Cooperative Efforts

Cooperative efforts, both in concept and practice, date back as far as the end of the last century. "Company unions,"[20] as they were known, were attractive to employers for a variety of reasons. Some progressive employers were concerned about the dehumanizing effects which the large corporation, the mass production system and managerial control techniques were having on the workforce.[21] Other employers, however, saw company unions as a means of thwarting the formation of independent unions.[22] Due to the range of motives behind their formation, no single type of company union emerged as the rule. Several employers adopted a broad approach. They introduced extensive employee welfare programs, including various forms of insurance and social services (such as banks and libraries), and gave employees some control over major working conditions subject to the employer's veto right.[23] Oth-

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sentative); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736 (1985) [hereinafter Michigan Note] (arguing that workplace cooperative programs initiated by the employer in nonunion settings should be permissible under the NLRA when they do not restrict the freedom of employees to choose their own bargaining representatives); Note, *Rethinking the Adversarial Model In Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987) [hereinafter Yale Note] (contrasting the adversarial and cooperative models).

20. *See* Daniel Nelson, *Employee Representation in Historical Perspective*, *in* EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 371, 372 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (discussing the origins of company unions); *see also* LeRoy, *supra* note 19, at 222 (discussing The Filene Cooperative and other U.S. Corporations that gave workers the right to govern their working conditions).

21. *See* Nelson, *supra* note 20, at 372.

22. *See id.*

23. *See id.*; *see also* LeRoy, *supra* note 19, at 222 (noting that the

er employers embraced a more guarded form of company union.[24] These were mainly used as a representative and bargaining entity of fairly modest scope.[25] During the 1920s and early 1930s, companies in the railroad, textile, and garment industries began to expand from the company union type of participatory program to programs similar in form to contemporary quality circles and top-level planning committees.[26] The 1920s also saw the development of the Hawthorne experiments, emphasizing the use of democratic leadership and improved communication.[27] It should be stressed, therefore, that company unions, as well as the other participatory experiments of the early 1900s, were motivated by a wide variety of concerns. These included improving efficiency, reducing labor turnover, controlling abusive supervisory behavior, increasing employees' loyalty and commitment to the firm and yes—avoiding unionism.[28] It was such a mixture of objectives and policies that generated within organized labor a tradition of suspicion and hostility toward the implementation and use of workplace cooperative efforts.[29]

Labor's fears did not take long to materialize. During the following decade, with the passage of the 1933 National Industrial Recovery Act,[30] the focus of participatory programs turned from employee involvement to union-avoidance.[31] The shift from a welfare-oriented to an anti-union focus is historically significant as the latter prompted the NLRA.[32] Thus, the

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Filene Cooperative allowed workers to govern their working conditions subject to the owner's right to veto).

24. *See* Nelson, *supra* note 20, at 373.

25. *See id.*

26. *See* Gershenfeld, *supra* note 19, at 126.

27. *See id.* The findings of the Hawthorne experiments, conducted at Western Electric, suggested that employees who were consulted about their work were more interested in what they were doing and were also more effective. *See id.*

28. *See* Sanford M. Jacoby, *Current Prospects for Employee Representation in the U.S.: Old Wine in New Bottles?*, 16 J. LAB. RES. 387, 393-94 (1995).

29. *See* Gershenfeld, *supra* note 19, at 126.

30. 15 U.S.C. § 707(a) (1933), *repealed by* A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

31. *See* Jacoby, *supra* note 28, at 393.

32. *See* Cochran, *supra* note 19, at 473-75 (asserting that section

major concern of section 8(a)(2) was the elimination of the inside union option as a means of structuring labor-management relationships.[33]

The Second World War, however, brought another round of employee involvement experimentation.[34] During the following three decades an explosion of research in the behavioral sciences expanded the contours of cooperative efforts.[35] Common research topics included goal setting, team-building, and the characteristics that differentiated successful organizations from their less successful counterparts.[36] This renewed academic interest in participatory programs generated some experimentation with new programs, especially in the unionized sector of the economy.[37] For example, the soon notorious "area labor-management committees," were instituted in the early 1970s with the support of the National Commission on Productivity.[38] The committees brought together labor and management in geographical areas facing economic difficulties.[39] They attempted to improve through cooperative efforts both the economic state of their communities and the state of labor-management relationships.[40]

Despite the intellectual interest sparked by the concept of employee involvement and the success of various workplace experiments, it was not until the 1980s that participatory programs had a real impact at the industry level.[41] By the mid-1980s surveys indicated that experimentation with partici-

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8(a)(2) prohibited interfering with labor organizations).

33. *See id.*

34. *See* Gershenfeld, *supra* note 19, at 126 (discussing formation of labor-management committees to aid work effort and the lasting effects in some industries).

35. *See id.* at 127.

36. *See id.*

37. *See id.*

38. *See id.*

39. *See id.*

40. *See id.*

41. *See* Ted Mills, *Europe's Industrial Democracy: An American Response,* 56 HARV. BUS. REV., Nov.-Dec. 1978, at 143, 147-48 (observing that the United States, unlike most European countries during the 1970s, experienced no trend toward "industrial democracy," despite its strong labor organizations).

patory programs was widespread among U.S. firms.[42] Judging from the intensity of the debate over recent NLRB decisions concerning the legality of such programs, interest remains strong in the 1990s.

B. What are Workplace Cooperative Efforts?

Workplace cooperative programs come in many forms.[43] Aimed at involving employees in decision-making activities, such programs generally organize those employees into a team or group.[44] Typically, both salaried and hourly employees come together to share ideas concerning quality improvements, waste reduction, and to identify and solve problems.[45]

Cooperative efforts have normally been classified along the following lines: employee participatory programs (quality circles, quality of work life, and strategic participation), teams, and gainsharing, profit-sharing or employee stock ownership plans.[46] The legality of the latter three programs has not been challenged under section 8(a)(2).[47] Thus, this Article's analysis

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42. *See* Gershenfeld, *supra* note 19, at 129-32 (asserting that employee involvement programs and quality of life programs were in effect at 53% of the firms listed on the New York Stock Exchange in a 1982 survey).

43. *See* Eaton & Voos, *supra* note 19, at 176-78 (providing a description of selected programs, their characteristics and their effectiveness).

44. *See id.*

45. *See* WILLIAM N. COOKE, LABOR-MANAGEMENT COOPERATION: NEW PARTNERSHIPS OR GOING IN CIRCLES? 3 (1990) (describing the structure and purpose of most labor and management joint committees).

46. *See* Eaton & Voos, *supra* note 19, at 176; *see also,* 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, 127 (1994) (dividing cooperative efforts into those that are concerned with immediate supervisory and management issues ("online" systems) and those concerned with issues of a more general nature, such as plant-wide procedures, policies and developments). As this Article seeks to identify the ILMs aspects of cooperative efforts and because both on-line and off-line systems involve ILM type issues, I use the more conventional classification. Even the conventional classification is somewhat artificial, because most workplace cooperative efforts tend to evolve and change over time in ways that defy any sort of classification scheme. *See Fact Finding Report*, *supra* note 1, at 37 (investigating the different and evolving cooperative approaches used by large and small companies in various industries).

47. *See* Comment, *The Saturnization of American Plants: Infringement*

focuses on the former two—those that have caused the most controversy.

1. Employee Participatory and Involvement Programs

Employee Participatory and Involvement Programs ("EPIPs") is the general term applied to programs designed to involve employees in firm decisionmaking.[48] EPIPs will most likely involve small group meetings engineered toward motivating employees to share suggestions for improving productivity.[49] EPIPs include quality circles, quality of worklife efforts and strategic participation programs.[50] These variants differ mainly in the nature of the issues that fall under the group's jurisdiction.[51] They are similar in terms of structure and the process involved in their formation and implementation.[52] This Article's focus is on the internal labor market dimensions of these programs, thus discussion will concentrate on the structure and process of quality circles.

Quality circles are best defined as a "formal, institutionalized mechanism for productive and participative problem-solving interaction among employees."[53] Typically, quality circles involve small groups of employees from the same depart-

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or Expansion of Workers' Rights?, 72 MINN. L. REV. 173, 189-94 (1987) (discussing how the federal government has encouraged the creation of such programs).

48. *See* Eaton & Voos, *supra* note 19, at 176.

49. *See id.*

50. *See, e.g.*, WILLIAM G. OUCHI, THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE 261-68 (1981) (describing Japanese companies' success with Quality Control Circles); *see also* Michigan Note, *supra* note 19, at 1738-41.

51. Quality Circles usually focus on productivity and efficiency issues. OUCHI, *supra* note 50, at 261, while Quality of Worklife programs tend to address the more general aspects of employees' well being. Michigan Note, *supra* note 19, at 1738. Strategic Participation Programs concentrate on higher level decisions on questions of company policy and future guiding strategic principles, e.g., decisions concerning capital involvement, technology and product design. *See* Eaton & Voos, *supra* note 19, at 176.

52. *See* COOKE, *supra* note 45, at 4 (emphasizing that the "structural similarities do not imply that there are no differences among team-based programs").

53. OLGA L. CROCKER ET AL., QUALITY CIRCLES: A GUIDE TO PARTICIPATION AND PRODUCTIVITY 6 (1984).

ment.[54] The groups convene periodically for purposes of examining productivity and quality issues, engaging in a continuing effort to uncover and solve work-related problems, monitoring and assessing new opportunities, and suggesting ways to capitalize on those developments.[55] Members of quality circles may also meet to learn both interpersonal and technical problem-solving skills.

Quality circles may or may not be structured to include managerial employees.[56] The average quality circle involves about eight to ten employees.[57] Meetings can be scheduled both during scheduled work hours with managerial approval, or after working hours on the employees' own initiative.[58] Meetings are chaired by a leader, who acts as a facilitator to encourage participation and keep the participants focused on the predetermined agenda. The group leader may be either a front-line supervisor or a paid facilitator.[59] An essential element of quality circles is the involvement of employees in group objectives beyond the span of each meeting. Thus, members frequently receive assignments, such as observing the day-to-day activities at the plant or collecting and analyzing data, and report their findings at the following meeting.[60] Typically, employee-members of quality circles do not receive additional compensation for participation and there are no immediate rewards for making good suggestions.[61]

The internal workings of a typical quality circle are a fairly complex process. The implementation of a quality circle involves multiple stages which include brainstorming sessions, selecting a problem, identifying causes and subcauses, consul-

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54. *See id.* at 7.

55. *See id.*; *see also* Michigan Note, *supra* note 19, at 1740 (explaining how the Japanese Quality Control Circle differs from quality of worklife projects).

56. *See* CROCKER ET AL., *supra* note 53, at 7.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See* GREGORY B. NORTHCRAFT & MARGARET A. NEALE, ORGANIZATIONAL BEHAVIOR: A MANAGEMENT CHALLENGE 506 (1990) (examining Quality Circles as a management technique for improving employee performance).

tation with other groups or departments affected by the problem, and training in technical and statistical analysis to solve the problem.[62] These stages are expected to take place during a time span of eight to twelve weeks, with most stages requiring activities of varying complexity.[63]

2. Teams

"Teams," like EPIPs, are participatory programs characterized by intense involvement in a potentially large number of issues.[64] A "team" has been defined as "a small number of people with complementary skills who are committed to a common purpose, performance goals, and approach for which they hold themselves mutually accountable."[65] This definition includes two elements which highlight the internal labor market aspects of cooperative efforts.

First, being committed to a "common purpose and performance goal" requires members of the team to spend a substantial amount of time and effort exploring, shaping and agreeing on a purpose that is both collective and individual.[66] They must also define the standards against which their perfor-

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62. *See* CROCKER ET AL., *supra* note 53, at 87-92 (identifying the following five stages in the Quality Circle process: 1) preliminary activities: initial meeting; circle goals and objectives established; brainstorming for problems to be solved; and discussion of problem suggestions; 2) selection of a critical problem; 3) identification of subcauses perceived to be most crucial to problem elimination; assignment of activities to individual members for purpose of verifying subcauses; presentation to circle of verification; and selection of subcauses shown to be most crucial to problem elimination; 4) brainstorming for solutions: development of action plans to assist in analyses of solution; assignment of activities to individual members for purposes of investigating and verifying solutions; selection of best solutions; decide on adequate solution; and communicate findings to members of technical and managerial staff; 5) implementation Process: prepare report; oral presentation; and implement solution).

63. *See id.* at 87-96.

64. *See* Eaton & Voos, *supra* note 19, at 177; *see also* Michigan Note, *supra* note 19, at 1741 (providing insight into the use of employee production teams as a participating management technique).

65. *See* JON R. KATZENBACH & DOUGLAS K. SMITH, THE WISDOM OF TEAMS 45 (1993) (developing this definition of teams from other goal-oriented groups).

66. *See id.* at 50.

mance as a group will be measured.[67] Finding a common set of standards requires team members to engage in activities particular to their firms. The activities or skills are associated with internal labor markets: getting to know other employees; learning jobs of other team members; and assuming team responsibility for decisions that were formerly the responsibility of particular individuals.[68]

Second, the operation of a team requires that there be a commitment to a "common approach." This part of the definition relates directly to the skill development and acquisition aspect of teams. The common approach addresses the issue of how the team will work together.[69] Team members must agree on their division of labor, their agenda, the skills they must develop, and other administrative issues.[70] The development of new skills necessary to the team is essential to this aspect of team development. Once the team is formed, its members must learn whatever skills are necessary to team performance. These new skills are the foundation for a common approach—the "team approach."[71]

Unlike EPIPs, teams incorporate new and more flexible forms of work organization.[72] Consider for example, the so-called "autonomous groups," a common type of team. Autonomous groups are given near-total responsibility for producing a product or service.[73] Their decision-making authority and scope are broader than those of the quality circles and the quality of worklife efforts.[74] Autonomous groups are given au-

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67. *See id.* at 53-55.

68. *See* Eaton & Voos, *supra* note 19, at 177 (asserting that the creation of a team requires "cross training" of team members and increased responsibility for previously separated functions).

69. *See* KATZENBACH & SMITH, *supra* note 65, at 56-59 (emphasizing the importance of establishing methods and skills and dividing the work appropriately among members).

70. *See id.*

71. *See id.*

72. *See* Eaton & Voos, *supra* note 19, at 177.

73. *See* CYNTHIA D. FISHER ET AL., HUMAN RESOURCE MANAGEMENT, 439-40 (2d ed. 1993) (the group makes the most of production decisions, such as scheduling, assigning work, deciding on methods, and over selecting new members and allocating pay raises).

74. *See id.*

thority to make significant logistic decisions concerning scheduling, work assignment, hiring, and compensation practices.[75] They have the ability to alter production methods and make major logistic decisions concerning their work process.[76] As in the case of quality circles, there is no additional direct compensation.[77]

3. Summary

As the above discussion illustrates, a common thrust of the many types of cooperative efforts is that employees undertake tasks of a *fairly specific* nature that are unique to the particular product or service of their employer.[78] In fact, to employers, an attractive characteristic of cooperative efforts is that they provide a competitive advantage that is difficult for industry competitors to replicate.[79] Such a program is deemed a sustainable comparative advantage.[80] A program is unique, and thus difficult to imitate, when it involves an attribute specific to that particular firm.[81] The unique character of workplace cooperative efforts is determined by the idiosyncratic knowledge that employees provide to the firm.

Employees participating in cooperative efforts are expected to acquire knowledge that is specific to the particular employer. Such specific knowledge would be of little value outside the firm. In other words, employees participating in cooperative efforts must invest heavily in "firm-specific" capital, while employers "invest" in employees by providing the training associated with establishing participatory programs. As dis-

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75. *See id.*

76. *See id.*

77. *See* NORTHCRAFT & NEALE, *supra* note 61, at 506.

78. *See* Michael H. Gottesman, *In Despair, Starting Over: Imagining A Labor Law for Unorganized Workers*, 69 CHI.-KENT L. REV. 59, 65 (1993) (describing how union members frequently agree to firm-specific contracts to help ensure their employer's survival).

79. *See* Patrick M. Wright et al., *Matches Between Human Resources and Strategy Among NCAA Basketball Teams*, 38 ACAD. OF MGMT. J. 1052, 1053-57 (1995) (describing how strategic human resource management helps organizations achieve a sustained competitive advantage).

80. *See id.*

81. *See id.*

cussed in Part IV below, once these investments have been made, both employers and employees may have incentives to engage in what the ILM model calls "opportunistic behavior."[82] How such behavior may be prevented is central to understanding the legal issues surrounding workplace cooperative efforts.

Another important characteristic of workplace cooperative efforts is that employees are not immediately compensated for participating in the program. Generally, employees participating in such programs do so on a "voluntary" basis.[83] They undertake new responsibilities, which may include working additional hours, without a corresponding increase in pay.[84] Employees engaging in such participatory efforts, however, may expect some benefit in exchange for their present uncompensated additional efforts. These benefits may take the form of additional compensation in the future, increased job security, or increased "voice" and participation in the firm's decision-making process.[85]

III. EXISTING VIEWS ON THE LEGALITY OF WORKPLACE COOPERATIVE EFFORTS

The dispute over the legality of workplace cooperative efforts has turned on the interpretation of NLRA sections 8(a)(2) and 2(5).[86] Section 8(a)(2) of the NLRA makes it an unfair labor

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82. *See* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1359 n.42 (1988) (defining opportunistic behavior as "the inefficient bread of an implicit contract").

83. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause and Employment at Will*, 92 MICH. L. REV. 8, 12-19 (1993) (explaining that in internal labor markets the employees expect to be compensated in the future for effort they put forth in the present).

84. *See id.*

85. *See infra* notes 304-13 and accompanying text.

86. The academic analysis of these two sections is extensive. *See, e.g.*, Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1456-61 (1993) (arguing that the National Labor Relations Act was based on a cooperative scheme akin to current theories that advocate trusting collaboration); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System*

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.[87]

A "labor organization" is defined in section 2(5) as:

> Any organization of any kind, or 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.[88]

This statutory background has remained unchanged since the 1935 enactment of the NLRA. The Act establishes a two-step analysis for reviewing the legality of an employer-employee cooperative effort.[89] First, does the cooperative effort con-

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of Employment Law, 69 CHI.-KENT L. REV. 149, 171-90 (1993) (discussing how the forms of representing employees that are present in the American workplace may become the basis for new labor law policies); Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 233, 277 (1990) (arguing that advocates of workers' interests should focus their efforts on blocking management-oriented cooperative programs because present political conditions favor labor-management cooperation that is oriented toward management objectives); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571, 589 (1992) (recommending legislative revisions to the National Labor Relations Act aimed at eliminating the obstacles to labor-management cooperation that have impinged American industrial productivity); Clyde W. Summers, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, 69 CHI.-KENT L. REV. 129, 138-48 (1993) (proposing an exception to section 8(a)(2) permitting employers to establish employee representation plans where employees have freely chosen not to unionize). *See generally* Thomas Kohler, *Models of Worker Participation: The Uncertain Insignificance of Section 8(a)(2)*, 27 B.C. L. REV. 499 (1986).

87. 29 U.S.C. § 158(a)(2) (1994).

88. 29 U.S.C. § 152(5) (1994).

89. *See* McLeod, *supra* note 86, at 277 (stating that cooperation theo-

stitute a labor organization under section 2(5)?[90] Second, if the cooperative effort is found to be a labor organization, has the employer dominated or interfered with its formation or administration?[91]

The case law interpreting the two sections can be categorized as either limiting the employers' ability to establish workplace cooperative efforts, or conversely as permitting employers to establish such programs. The "restrictive" view tends to limit the kind of participatory programs allowed under the NLRA, by giving an expansive reading to sections 2(5) and 8(a)(2).[92] At the other end of the spectrum, the "permissive" view expands the types of programs that would obtain judicial approval by narrowly interpreting the definition of a labor organization and the conduct that constitutes domination or support.[93] The two views articulate the major concerns expressed in the workplace cooperative programs debate, and help scholars to understand the objectives that the Board, the courts and Congress have pursued when delineating public policy on this issue. The two views are discussed in this section. In addition, this section analyzes the various policy positions determining the legality of workplace cooperative efforts, including those taken by the Board, by Congress, and those originating in academia.

This Article argues in Parts V and VI that these approaches do not directly address the critical problem with workplace cooperative efforts: the incentives that they create for employers to behave opportunistically.

A. The "Restrictive" View

The line of cases under this heading involve decisions that permitted limiting the types of participatory programs under sections 2(5) and 8(a)(2).[94] Decisionmakers who follow this

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rists fear this analysis may bar alternatives to collective bargaining).

90. *See id.*

91. *See id.*

92. *See* NLRB v. Cabot Carbon Co., 360 U.S. 203, 218 (1959) (holding that neither section 2(5) nor section 8(a)(2) eliminated employee committees from the term "labor organization," which resulted in a limitation on an employer's ability to create participatory programs).

93. *See infra* notes 124-43 and accompanying text.

94. *See Cabot Carbon*, 360 U.S. at 209-11; NLRB v. Newport News

approach tend first to adopt an expansive reading of what constitutes a "labor organization" under the Act,[95] and second, expand the categories of employer behavior that would amount to domination or interference under section 8(a)(2).[96]

Section 2(5) defines a labor organization as a group in which employees "participate"[97] 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."[98]

Of these statutory elements, the "dealing with" requirement has generated the most controversy.[99] Unlike some of the oth-

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Shipbuilding & Dry Dock Co., 308 U.S. 241 (1939).

95. Employer "assistance" or "domination" under section 8(a)(2) is legally problematic only if directed toward a "labor organization" as defined in section 2(5). *See* Ryan, *supra* note 86, at 589.

96. *See, e.g., Cabot Carbon,* 360 U.S. at 218 (holding that employee committees were included in the definition of "labor organization" and that employers were therefore not permitted to dominate them under section 8(a)(2)).

97. Since by definition every employer-employee cooperative effort involves employees, the first of the three elements would appear to be relatively straightforward. Still, even this first element has generated some controversy. Opponents of the "restrictive view" have argued for a more narrow definition of a labor organization by requiring that the structure of employee participation be representational in nature (i.e., that the employees directly involved in the participatory program serve as the representatives of other employees in the workplace). *See* Cochran, *supra* note 19, at 477. Although this argument has been floating around for quite a while, *see, e.g.*, General Foods Corp., 231 N.L.R.B. 1232, 1234-35 (1977), it has acquired new life as a result of the NLRB's decisions in Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994), and E.I. du Pont, 311 N.L.R.B. 893 (1993). *See infra* notes 144-90 and accompanying text. While both cases held that the participatory programs involved amounted to a violation of the Act, some of the concurring opinions in those cases cited with approval the representational argument. The requirement that the employee participatory program be representational in nature implies that in programs where employees speak only for themselves and do not purport to represent the views and concerns of others, they do not participate, and thus, the program is not a labor organization. *See* Cochran, *supra* note 19, at 478.

98. 29 U.S.C. § 152(5) (1994).

99. This second element is commonly referred to as the functional requirement. For a discussion of the level of power necessary for a labor organization to be "dealing with" an employer, see Cochran, *supra* note

er demands of the workplace cooperative efforts debate, the Supreme Court has spoken directly to this subject. In the 1959 case of *NLRB v. Cabot Carbon Co.*,[100] the Supreme Court addressed the definition of "dealing with." In *Cabot Carbon* the employer had established, pursuant to a suggestion by the War Production Board, "employee committees" at each of its plants.[101] The stated purpose of these committees, established at both union and non-union plants, was "to provide a procedure for considering employees, ideas and problems of mutual interest to employees and management."[102] The Employee Committees' bylaws set forth membership requirements, election procedures, and assigned them responsibility for handling grievances at the non-union plants.[103] The NLRB found that the employee committees were labor organizations, the formation and administration of which had been dominated and interfered with by the employer.[104] The NLRB commented

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19, at 480. Although it would appear that the subject matters incorporated in section 2(5) are so broad as to likely include nearly anything that an employer would want to discuss with its employees, the Board and some courts of appeal have interpreted the subject matter requirement more narrowly. For example, in *General Foods*, the Board confronted the legality of a participatory program involving "autonomous groups." *See General Foods*, 231 N.L.R.B. at 1235. The groups were part of a job enrichment program initiated by the employer. The program was based on the assumption that "employees desire to have a larger and more meaningful role in their day-to-day work activities than is normally assigned to them in a mechanical production line operation." *Id.* Accordingly, the groups were designed to enlarge the powers and responsibilities of all plant employees and to give them more power and control over their job situations. Despite evidence that the teams made recommendations about holiday schedules, a subject matter clearly governed by section 2(5), the Board found the program's purpose to be managerial and thus outside of the scope of the NLRA. *See id.* at 1235. A similar rationale was advanced in Sears, Roebuck, 274 N.L.R.B. 230, 244 (1985) (holding that programs that focused on matters of work performance would not constitute labor organizations); *see also* Estreicher, *supra* note 46, at 127 (distinguishing between off-line and on-line systems in terms of the subject matter requirement).

100. 360 U.S. 203 (1959).

101. *See id.* at 205.

102. *See id.*

103. *See id.*

104. *See id.* at 209.

that the committees, in addition to discussing problems addressed by their bylaws with the employer, also "[m]ade and discussed proposals and requests respecting many other aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions."[105]

The Court of Appeals for the Fifth Circuit reversed the Board,[106] finding that, although the "Employee Committees" were clearly dominated by the employer, they were not labor organizations under section 2(5) because they did not bargain with the employer.[107] The court held that "dealing with," in section 2(5), meant "bargaining with."[108]

On appeal, the Supreme Court rejected the appellate court's narrow interpretation and held that the NLRA's legislative history did not support the argument that "dealing with" was limited to situations involving traditional bargaining between employers and employees.[109] The Court also rejected the employer's contention that, because the employer had retained final authority over the committees' proposals, the employer was not "dealing with" the committees within the meaning of section 2(5).[110] In rejecting the employer's argument, the Court noted that, even in traditional collective bargaining relationships, the employer has the ability to reject proposals made at the bargaining table.[111] The Court reasoned that what is distinguishable about independent labor organizations is that the employees have the "unfettered power" to insist upon their request.[112] By expanding the definition of the term "dealing with," the Supreme Court in *Cabot Carbon* gave an

105. *Id.* at 207.

106. *See* Cabot Carbon Co. v. NLRB, 256 F.2d 281 (5th Cir. 1958), *rev'd*, 360 U.S. 203 (1959).

107. *See id.* at 286 (holding that employee committees must bargain with employers to be considered labor organizations).

108. *See id.* at 285.

109. *See* NLRB v. Cabot Carbon Co., 360 U.S. 203, 211 (1959).

110. *See id.* at 214.

111. *See id.*

112. *See id.*

expansive reading to the definition of what constitutes a "labor organization." It thus limited an employer's ability to establish workplace cooperative efforts that would not run afoul of section 2(5).

Proponents of the "restrictive" view have also sought to limit the kind of participatory programs permissible under the Act through an expansive reading of section 8(a)(2). Specifically, decisions following this view have developed the "form and structure" paradigm.[113] This approach centers the inquiry around the question of whether the form and structure of the participatory program is controlled by the employer.[114] In *NLRB v. Newport News Shipbuilding & Dry Dock Co.*,[115] the Supreme Court, again in an early NLRA decision, invalidated an employee representation plan created by the employer for the stated purpose of giving employees a voice in establishing working conditions and to provide a procedure to prevent and adjust future differences.[116] Although there were several problems with the structure of the plan,[117] the Supreme Court's main concern was that it required that any amendment to the plan be approved by the company.[118] The Court stated that "such control of the form and structure of an employe [sic] organization deprives the employees of the complete freedom of action guaranteed to them by the Act . . . ."[119]

An interesting aspect of the form and structure paradigm is the emphasis placed on relatively trivial matters, when, at least until recently,[120] little attention has been paid to a much more fundamental problem. The primary emphasis has been on whether the employer was dominating or interfering with the decision-making process of the particular group or program. For example, programs where the employer may veto

113. *See* NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 249 (1939) (holding that employee committees must bargain with employers to be considered labor organizations).

114. *See id.*

115. 308 U.S. 241 (1939).

116. *See id.* at 244.

117. For example, employees served as representatives, and they were paid for their services. *See id.*

118. *See id.* at 208.

119. *Id.*

120. *See infra* notes 144-72 and accompanying text.

committee decisions tend to fare poorly before the Board.[121] The dangers of interference with the decision-making process, whether via veto power or otherwise, are not without importance. Focusing on the extent of the employer's interference with the decision-making process of a participatory program, however, is arguably a poor means of distinguishing between legal and illegal workplace cooperative efforts. After all, the employer may effectively exercise a veto in traditional collective bargaining.[122]

Traditional collective bargaining relationships involve an independent union, but a veto power alone does not make such unions the instrument of the employer.[123] A better approach to this problem would incorporate an unfortunately sometimes overlooked factor. Namely, whether the participatory program has a "life of its own" independent from the employer. This theory raises some additional questions. For example, can the employer disband the group without employee input or without compensating employees for whatever loss the committee's dissolution may have caused them? More generally, can the employer engage in opportunistic behavior? This Article explores these issues in the context of the discussion of opportunistic behavior under the NLRA and the recently vetoed TEAM Act.

B. The "Permissive" View

Decisions falling under this approach respond in kind to the two main arguments made by the restrictive view. When defining the term "labor organization," these cases tend to construe the term "dealing with" much more narrowly.[124] This avoids

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121. *See* E.I. Du Pont de Nemours & Co., 311 N.L.R.B. 893, 903 (1993) (finding that management committee members exercised an implicit management veto when process required a consensus for decisionmaking); Rideout Memorial Hosp., 227 N.L.R.B. 1338, 1342 (1977) (finding domination where employer retained and exercised power to veto changes to the by-laws of the employee organization).

122. *See* ROBERT J. FLANAGAN ET AL., ECONOMICS OF THE EMPLOYMENT RELATIONSHIP 396 (1989) (describing the bilateral monopoly characteristics of the collective bargaining process).

123. *See id.*

124. *See* Cochran, *supra* note 19, at 478-79.

having a participatory program fall under the definitional reach of Section 2(5).[125] For example, in *NLRB v. Streamway Division of Scott & Fetzer Co.*,[126] the Court of Appeals for the Sixth Circuit considered the legality of "in-plant representation committees" initiated by the employer after an unsuccessful organizing drive by an outside union.[127] Similar to the committees at issue in *Cabot Carbon*, the representation committees' stated objective was "to provide an informal yet orderly process for communicating Company plans and programs; defining and identifying problem areas and eliciting suggestions and ideas for improving operations."[128] In addition, the employer had established membership guidelines and election procedures.[129] Unlike *Cabot Carbon*, the "Representation Committees" were not designed to process grievances.[130] The Sixth Circuit, however, did not rely on this factual difference when distinguishing *Streamway* from *Cabot Carbon*. Instead, the court attempted to distinguish the two cases on a much broader principle. The court noted that "dealing with" involved "a more active, ongoing association between management and employees" than that engaged in by the "Representation Committees."[131] The court went on to characterize the committees as "part of a company plan to determine employee attitudes regarding working conditions and other problems . . . for the Company's self-enlightenment."[132] Thus, the *Scott Fetzer* decision and subsequent Sixth Circuit caselaw[133] can be read as standing for the proposition that participatory programs which serve merely as communicative devices do not "deal with" the

125. *See id.*
126. 691 F.2d 288 (6th Cir. 1982).
127. *See id.*
128. *Id.* at 289.
129. *See id.*
130. *See id.*
131. *Id.* at 294.
132. *Id.*
133. *See, e.g.*, Airstream, Inc. v. NLRB, 877 F.2d 1291, 1293 (6th Cir. 1989) (holding that a "President's Advisory Council," created by the employer, and including employee representatives, which met with the employer to voice complaints about work-related issues such as leave policy and job bidding, was not dealing with, but served merely as a "means of communication").

employer and thus are outside the reach of section 2(5).[134]

With respect to section 8(a)(2), cases adhering to the "permissive" view have rejected the form and structure paradigm in favor of a new paradigm. The Free Choice paradigm rests on an underlying premise that the primary concern of labor law should be to protect the employee's free choice of representational forms—even if the form chosen is one created by the employer.[135] In fact, Free Choice proponents, argue that the NLRA can be understood as primarily concerned, not with the prevention of industrial strife, but with the protection of individual employee rights.[136]

From this premise, the Free Choice paradigm suggests two important conclusions that serve as guidelines in assessing the legality of workplace cooperative efforts. First, "actual" and not "potential" domination must be shown to establish a violation of section 8(a)(2).[137] Courts following this paradigm reason that there is always the potential for interference and support in the employee-employer relationship. Therefore, the potential for domination must have been realized.[138] Cases turning on the element of actual, as opposed to potential domination, involve workplace cooperative efforts that amount to what the courts have described as weak labor organizations.[139] Those challenging the legality of cooperative efforts in these cases have unsuccessfully argued that the "weakness" of the labor organizations involved is enough evidence to show domination.[140] Second, domination must be assessed from the subjec-

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134. The flawed logic of this proposition has not gone unnoticed by labor law scholars. *See, e.g.*, Hyde, *supra* note 86, at 178 (arguing that since most of what takes place in participatory programs amounts to making proposals, there is not much left for a "communicative" group to do other than make proposals).

135. *See* Kenneth O. Alexander, *Worker Participation and the Law Once Again: Overview and Evaluation*, 39 LAB. L.J. 696, 700-02 (1988); *see also* Klare, *supra* note 19, at 50-56.

136. *See* Yale Note, *supra* note 19, at 2033-34.

137. *See* Cochran, *supra* note 19, at 483.

138. *See* Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 167 (7th Cir. 1955).

139. *See id.* at 170; Federal-Mogul Co., Coldwater Distrib. Ctr. Div. v. NLRB, 394 F.2d 915, 918-19 (6th Cir. 1968); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204 (6th Cir. 1967).

140. *See, e.g.*, *Federal-Mogul Co.*, 394 F.2d at 918-19 ("[I]n the instant

tive point of view of employees.[141] At first, it would appear that a subjective test would favor employees and limit the range of legally permissible cooperative efforts. In fact, this language was first used in cases finding various forms of cooperative efforts to be in violation of section 8(a)(2).[142] When the subjective element is appended to the actual domination requirement, however, the likelihood of finding a section 8(a)(2) violation is reduced. Even if the employer intended to dominate the group, no violation will be found if the employees involved thought they were free to operate independently of management.[143]

C. *The Board's Current Position: Electromation, E.I. du Pont and Beyond*

Probably no recent NLRB decision has been as closely watched as the two decisions that were supposed to settle the debate on the legality of workplace cooperative efforts. Next, this Article discusses the *Electromation* and *E.I du Pont* decisions and also considers subsequent NLRB decisions applying the test laid out in these two seminal decisions. An analysis of these decisions suggests that the Board remains ambivalent as

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case we are obviously dealing with a weak labor organization having no constitution, by-laws or possessed of any means of independent financial support. These factors may create an unstable organization susceptible to managerial control, but no inference of actual domination can be drawn from these facts alone.").

141. *See Chicago Rawhide*, 221 F.2d at 168 ("[T]he test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.").

142. *See, e.g.*, NLRB v. Sharples Chems. Inc., 209 F.2d 645, 652 (6th Cir. 1954).

143. Such was the situation in *Federal-Mogul Co.*, where the court noted that although management had attempted to control an employee participating in the committee, no violation lay as the employee always thought that "[h]e was free to report back anything he felt important, including management's attempts to limit his discussions." *Federal-Mogul*, 394 F.2d at 918. Professor Barenberg has recently explained the flaw in this reasoning. He argues that the main drawback of employer-sponsored representation plans lies in "[t]heir systematic coercive and distorting effect on workers' choice over modes of workplace governance rather than in their systematic deflection of worker representatives' conduct as honest agents." Barenberg, *supra* note 86, at 1458.

to whether to follow the "restrictive" or the "permissive" views.

1. *Electromation*

In *Electromation,* the employer created several "Action Committees" in a non-unionized facility.[144] When announcing the creation of the committees, the company president stated their purpose was to "meet and try to come up with ways to resolve [several problems recently identified by employees in a series of meetings with management]."[145] The employer drafted the membership guidelines and policy objective for each committee.[146] Each committee consisted of six employees, one or two managers and the Employee Benefits Manager.[147] Employees volunteered through sign-up sheets, and participation was limited to one committee at a time.[148] The committees met for about three months, at which time further meetings were suspended as the result of an organizing campaign sponsored by the Teamsters.[149]

In an almost apologetic tone, the Board concluded that Electromation's Action Committees violated section 8(a)(2).[150]

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144. The "Action Committees" were formed as the result of a series of meetings between management and employees. *See* Electromation, Inc. 309 N.L.R.B. 990, 990 (1992). The meetings were held to discuss the employees' displeasure with a number of changes that had been made in an effort to reduce production costs. *See id.* at 990-92. The Action Committees were designated as follows: Absenteeism/Infractions; Non Smoking Policy; Communication Network; Pay Progressions for Premium Positions; and Attendance Bonus Program. *See id.*

145. *Id.* at 991.

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.* at 990. The Board explained:

> [T]hese findings rest on the totality of the record evidence, and they are not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed "labor organizations" or that employer actions like some of those at issue here would necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference, or domination.

Id. Similarly, in his concurring opinion, Member Devaney indicated that under section 8(a)(2) there is significant latitude for employers to imple-

The Board began its analysis with the legislative history of sections 2(5) and 8(a)(2).[151] This search for legislative guidance led the Board to two important conclusions. First, the definition of a "labor organization" under section 2(5) was intended to be broad enough to include the "employee representation committee" type of organization.[152] Second, although the dangers of employer domination and interference at the formation stage were significant because the employer's act of setting up and running employee "representation" groups robbed employees of the freedom to choose their own representatives, it was equally clear that there was room for programs which did not rob employees of their right to select their own representatives.[153] These findings, based on legislative history, are significant because they illustrate the Board's ambivalence to choosing between the "restrictive" or "permissive" views. While the Board, at least in this decision, appears to have been ready to accept the Free Choice paradigm, it was unwilling to risk allowing employers to establish cooperative efforts that could eviscerate the collective bargaining process with impunity.[154]

The Board then proceeded to answer the two following questions. First, at what point does an employee committee cease to be a protected communication device and become a labor organization?[155] Second, what kind of employer conduct constitutes domination and interference with a labor organiza-

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ment workplace cooperative efforts. *See id.* at 999-1003. He would not include as labor organizations programs relating to managerial issues such as quality, productivity, and efficiency. *See id.* Member Oviatt echoed the same theme in his opinion. He recited the employers' cry of the need to improve efficiency and productivity in order to remain competitive in the world economy and the concern that present laws might serve as roadblocks to "[c]ompanies' ability to perform more efficiently and to respond promptly to competitive conditions." *See id.* at 1003.

151. *See id.* at 992-94 (finding that a "critical part" of the Wagner Act was to end company dominated labor organizations).

152. *See id.* at 994.

153. *See id.* at 993.

154. *See* McLeod, *supra* note 86, at 289-90 (arguing that the possibility exists for corporations to use the "rhetoric of participation and mutuality" to derail collective bargaining).

155. *See Electromation, Inc.*, 309 N.L.R.B. at 990.

tion?[156] The Board applied a three pronged test to these questions. According to the Board, a given group is a labor organization if "(1) employees participate, (2) the organization exists, at least in part, for the purpose of dealing with employers, and (3) these dealings concern, conditions of work or other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment."[157] As to the issue of whether the organization's purpose must be employee representation, the Board noted that such an organization meets the statutory definition under section 2(5) if it also meets the employee participation criteria and deals with conditions of work or other statutory subjects.[158]

The Board found all the elements satisfied, and specifically commented on the meaning of the "dealing with" and the "representation" elements of the test. With respect to the "dealing with" element, the Board began its analysis by noting that the term should, as it had been in the past, be broadly construed to include situations other than bargaining.[159] The Board emphasized that the Action Committees were created in response to employees' dissatisfaction with employment conditions and with the hope that the employees would help management "come up with ways to resolve these problems."[160] Thus, the Board concluded, the Action Committees were created in order to solve employment problems through a bilateral process, a matter which fell squarely under the "dealing with" element as interpreted by *Cabot Carbon*.[161] After this bold restatement of a broad interpretation of the term "dealing with," the Board retreated to a more guarded position and observed that an orga-

156. *See id.*

157. *Id.* at 994.

158. *See id.* ("Any group, including an employee representation committee, may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.").

159. *See id.* at 995 (discussing *Cabot Carbon* to illustrate the broad nature of the term "dealing with").

160. *See id.* at 997. The employer had testified as to the magnitude of the problems between management and labor and that further unilateral management action would not likely resolve them. *See id.*

161. *See id.*

nization whose purpose is limited to performing "essentially a managerial or adjudicative" function would not be considered a "labor organization" subject to section 2(5).[162]

The Board further determined whether those employees involved in the Action Committees were acting in a representative capacity.[163] According to the Board, it was clear that the employer in *Electromation* contemplated that the Action Committees would serve a representative function.[164] The Board noted that the employee members of the committees were expected to talk "back and forth" with other employees in order to generate solutions to problems identified by the employer before the creation of the committees.[165] Having found that the employees served a representative function, the Board did not have to decide whether a program that lacks a representative element could be considered a labor organization.[166]

Having found the Action Committees to be labor organizations, the Board then discussed the employer domination and interference issue. The Board focused on whether management created the organization, whether management determined the organization's structure and function and whether the

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162. *See id.* at 995. This "de minimis" argument was developed in prior cases cited with approval in *Electromation*. *See* General Foods Corp., 231 N.L.R.B. 1232, 1235 (1977) (holding that the employer-created job enrichment program composed of employee work crews did not exist "to deal with management concerning labor relations on behalf of employers," and consequently was not a labor organization under section 2(5) of the Act); Mercy-Memorial Hosp., 231 N.L.R.B. 1108, 1121 (1977) (stating that the Grievance Committee was not created to deal with the employer on behalf of employees to address their grievances); John Ascuaga's Nugget, 230 N.L.R.B. 275, 275-76 (1977) (finding that an employees' organization which resolved employees' grievances but did not interact with management was not a labor organization within the meaning of section 2(5)).

163. *See Electromation*, 309 N.L.R.B. at 995.

164. *See id.*

165. *See id.*

166. Member Devaney's concurring opinion elaborated on this theme. *See id.* at 999-1003. Member Devaney would require that the representational element be established before a given cooperative effort could be found to be a labor organization. *See id.* at 1002. In Devaney's view, a finding that an employee group acted in a representative capacity is a prerequisite to the conclusion that the group is a labor organization. *See id.*

organization's continued existence was contingent on management.[167] According to the Board, because "the Action Committees were the creation of the [employer] and since the impetus for their continued existence rested with the [employer] and not with the employees," it was clear that the employer dominated their formation and administration and unlawfully supported them.[168]

The Board's focus on whether the Action Committees' "continued existence" rested with the employer is noteworthy for three reasons. First, by focusing on the "continued existence" factor, the Board shifted the inquiry under section 8(a)(2) away from such issues as the employer's motive or whether the employees believed the committees to be a labor organization.[169] These inquiries were likely to result in ambiguous applications, and the change leads to a much more straightforward test. Second, although the Board and some courts had previously discussed whether a cooperative program was dependent on the employer, they had mainly addressed the independence of the decision-making process, not the independence of the committees themselves.[170] Finally, this shift is consistent

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167. *See id.* at 997-98.

168. *See id.* at 998.

169. The Board recognized its shift in focus:

> [A]s noted previously (fn. 24), Board precedent and decisions of the Supreme Court indicate that the presence of anti-union motive is not critical to finding an 8(a)(2) violation. We also see no basis in the statutory language, the legislative history, or decisions apart from Scott & Fetzer to require a finding that the employees believe their organizations to be a labor union.

Id. at 996.

170. Some of the concurring opinions reiterated this concern for the independence of the decision-making process. For example, in his concurring opinion, Member Raudabaugh proposed an altogether different test to determine whether there had been domination and interference by the employer. *See id.* at 1013. In discussing the first factor of his proposed test, the extent of the employer's involvement in the structure and operation of the committee, Raudabaugh conceded that the fact that the employer initiates the idea of a participatory program, or that the employer suggests the rules and policies of the labor organization is not sufficient to condemn it. *See id.* Instead, Raudabaugh focused on the decision-making process and on the extent of management participation within the group. Raudabaugh therefore never mentioned the "continued existence"

with this Article's thesis. The problem with cooperative efforts is the incentive they create for employers to behave opportunistically.[171] As long as the employer can unilaterally alter the internal labor market arrangement, whether by terminating a workplace cooperative effort or the employees that have been involved in the implementation and operation of the program, these employees risk losing their human capital investments. By requiring that the "organization" have an existence independent of the employer, the Board creates mechanisms that prevent or at least minimize the likelihood of opportunistic behavior. Unfortunately, although the language in *Electromation* could be interpreted to require complete independence between the employer and the labor organization, recent decisions call into question how far the Board is willing to go with respect to this issue.[172]

2. *E.I. du Pont*

In *E.I. du Pont*, the employer created six safety committees and one fitness committee at one of its unionized plants.[173] Management decided which working groups or areas would participate and which employees to invite.[174] Where the number of volunteers exceeded the desired number of members, management selected those who would serve on the committee. Employees served on the committees for indefinite periods of time, without regular rotation, and received their regular pay for the time spent attending meetings and performing committee duties.[175] The company provided the committees with meeting places, equipment and supplies, and also retained the authority to modify or terminate them.[176] The committees, which included both employees and managerial staff, operated

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factor alluded to in the majority's decision, focusing instead on the decision-making characteristics of the group.

171. *See infra* Part V.D.

172. *See infra* Parts III.C.3, III.D-E.

173. E.I. du Pont, 311 N.L.R.B. 893, 906 (1993). The safety committees had operated for a number of years but were limited to managerial participation. *See id.* at 905.

174. *See id.* at 910.

175. *See id.*

176. *See id.*

on a consensus approach to decisionmaking, and in management's view served as representatives for all other employees in the plant.[177] The committees were created over union objections and a request by the union to form a joint labor-management committee to deal with health and safety.[178] The administrative law judge dissolved the committees, finding that they constituted labor organizations under section 2(5), and further that the employer had dominated their formation and administration.[179]

In *E.I. du Pont*, the Board majority, while applying the principles established in *Electromation*, expressed its intent "to provide guidance for those seeking to implement lawful cooperative programs between employees and management," and "to address issues raised by employee participation committees which exist in circumstances where employees have selected an exclusive collective-bargaining representative."[180] The Board turned first to the labor organization question. In applying the three-part *Electromation* test, the Board concentrated on the "dealing with" requirement.[181] The Board defined the term "dealing with" as entailing "a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."[182] The Board emphasized two elements of this definition: the "pattern or practice" and "proposals" elements.[183]

With respect to "pattern or practice," the Board stated:

> [I]f the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pat-

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177. *See id.* at 895. The Personal Effectiveness Process handbook, which governed the committees' operation, gave the following definition of consensus: "consensus is reached when all members of the group, including its leader, are willing to accept a decision." *Id.*

178. *See id.* at 906-07.

179. *See id.* at 910-18.

180. *Id.* at 893.

181. The Board found that the first and third elements of the *Electromation* test were satisfied as there was no question that employees participated in the committees, or that the committees had discussed some of the proscribed subjects. *See id.* at 894.

182. *Id.*

183. *See id.*

> tern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.[184]

Concerning the "proposals" element, the Board described three situations where they would not have been presented and where consequently "no dealing with" would be found.[185] The Board stated that situations involving a "brainstorming" group, a committee that exists for the purpose of exchanging information, or a "suggestion box" do not constitute "dealing with," as no collective proposals are being made.[186] The committees involved in this case, however, were found not to fall under any of the three safe havens.[187]

Having found the committees to be labor organizations, the Board, in an approach similar to *Electromation*, briefly discussed the issues of domination and interference. Unlike the discussion in *Electromation*, however, the Board shifted its focus from whether the "continued existence" of the committees depended on a fiat by management and instead focused on the issue of the committees' independence in their decision-making power. The Board paid particular attention to the fact that management, by requiring a consensus on all decisions, maintained an implicit veto power over the committees.[188] Although the Board noted that the employer had the power to "change or abolish any committees at will,"[189] this factor does not appear to have been central to the decision. The Board concluded that the committees' structure supported a finding that the employer dominated the administration of all seven committees in violation of section 8(a)(2).[190]

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184. *Id.*
185. *See id.* at 894-95.
186. *See id.*
187. *See id.*
188. *See id.* at 896.
189. *Id.*
190. As in *Electromation*, Member Devaney filed a separate concurrence and noted that the employer's conduct would also be unlawful under his "narrower and more historically focused perspective." *See id.* at 898 (Devaney, Member, concurring). A portion of Devaney's reasoning is of

3. Recent Developments

Given all the attention the *Electromation* and *E.I du Pont* decisions have received in academic and professional circles, it is somewhat surprising how little attention has been given to more recent NLRB decisions involving workplace cooperative efforts.[191] This section reviews the salient themes in some of these decisions. In particular, I will discuss how the Board is currently applying the *Electromation* standard.

The issue of the legality of workplace cooperative efforts continues to be litigated before the NLRB. The decisions in the more recent cases are interesting because they demonstrate that, although the Board will most likely find a violation of section 8(a)(2), it continues to struggle with the *Electromation* test.[192] In particular, following Chairman William Gould's ap-

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particular interest to this Article's thesis. When discussing whether the employer in *E.I. du Pont* dominated the administration of the safety and fitness committees, Devaney initially appeared to focus on the "continued existence" issue. *See id.* at 901. He stated, "I find it difficult to conceive of a situation where the very existence of an employee committee depends on the will of the employer that would not merit a finding that the employer "dominated" the committee." *Id.* However, in the next sentence of his opinion he takes the breath out of this argument by stating that "an employer's domination of the administration of an employee committee is not, taken alone, an unfair labor practice." *Id.*

191. The only discussion of these more recent decisions that I have found is in a speech delivered by Chairman Gould. *See* William B. Gould, Beyond "Them and Us" Litigation: The Clinton Board's Administrative Reforms and Decisions Promoting Labor-Management Cooperation, Address Before the National Labor Relations Board Region Twenty-Five and Indiana School of Law, Indianapolis Seventieth Annual Seminar on Labor-Management Relations (Feb. 29, 1996), *in* 1996 Daily Lab. Rep. (BNA) 42, at d27 (Mar. 4, 1996) [hereinafter Gould's Address] (discussing several recent NLRB decisions and noting that the Board has increased its support for employee cooperative programs).

192. The pace of litigation of section 8(a)(2) complaints appears to have remained at the same level as before the *Electromation* decision. It has been reported that prior to 1993, section 8(a)(2) complaints generated an average of about three NLRB decisions per year. *See Fact Finding Report, supra* note 1, at 54. Following the *Electromation* (decided December 1992) and *E.I. du Pont* (decided May 1993) decisions, the Board has issued an average of about three section 8(a)(2) decisions per year. From May 1993 until August 1996, the Board decided eleven section 8(a)(2) cases: Research Federal Credit Union, 310 N.L.R.B. 56 (1993); Ryder

pointment to the Board,[193] the language in the cases appears to hedge towards a more flexible approach than that suggested in *Electromation*.

The first four cases decided by the Board after the *Electromation* and *E.I. du Pont* decisions dealing with a section 8(a)(2) complaint were decided prior to Chairman Gould's appointment.[194] All four cases were decided against the employers and, in general, they represent a fairly straightforward application of *Electromation*.[195]

The appointment of Chairman Gould, however, marked a

Distribution Resources, Inc., 311 N.L.R.B. 814 (1993); Peninsula Gen. Hosp. Med. Ctr., 312 N.L.R.B. 582 (1993); Magan Med. Clinic, Inc., 314 N.L.R.B. 1083 (1994); Keeler Brass Automotive Group, 317 N.L.R.B. 1110 (1995); Stoody Co., 320 N.L.R.B. 18 (1995); Vons Grocery Co., 320 N.L.R.B. 53 (1995); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995); Dillon Stores, 319 N.L.R.B. 1245 (1995); Webcor Packaging, Inc., 319 N.L.R.B. 1203 (1995); Simmons Indus., Inc., 321 N.L.R.B. No. 32, 152 L.R.R.M. (BNA) 1155 (May 20, 1996). There is also an administrative law judge's decision awaiting review before the Board: Polaroid Corp., 1996 NLRB LEXIS 377, at *24 (June 14, 1996) (finding that an employee participation group established by the employer to address issues of pay, policy, benefit, and practice was a labor organization, and that by dominating the group the employer had violated section 8(a)(2)).

The Board has found section 8(a)(2) violations in nine of the eleven cases decided since *Electromation* and *E.I. du Pont*.

193. Professor Gould was confirmed as NLRB Chairman on March 2, 1994. *See Senate Confirms Gould Nomination to NLRB; Feinstein, Cohen And Browning Also Approved*, 1996 Daily Lab. Rep. (BNA), 41 at AA-1 (Mar. 3, 1994).

194. *See supra* note 192.

195. In *Research Federal Credit Union*, for example, the employer, following the commencement of an organizing campaign by an outside union, introduced so called employee involvement teams. The teams were composed of representatives from each department of the company including some management representatives, and discussed topics such as smoking policies, part-time benefits, and annual performance reviews. *See Research Federal Credit Union*, 310 N.L.R.B. at 61-62. The expressed purpose of the committees was to provide a means for employees to formally address matters of concern, and then to present these concerns, together with recommendations for their solution, to the Board of Directors. *See id.* at 62. The Board affirmed the administrative law judge decision, finding that the committees were a labor organization and that the employer had dominated and interfered with their formation and administration. *See id.* at 65-66.

slight change in the tone of the Board's treatment of workplace cooperative efforts. Consider, for example, the first section 8(a)(2) case decided by the Board following his confirmation: *Keeler Brass Automotive Group*.[196] While the majority analysis is similar to that found in *Electromation*, Chairman Gould's concurrence raises some interesting issues. Gould paid special attention to the degree of independence that should be enjoyed by the employee participation group which, he concludes, is a matter of degree.[197] The spectrum ranges from situations involving a "minimal degree of employer involvement,"[198] as previously encountered by the Seventh Circuit in *Chicago Rawhide Manufacturing Company v. NLRB*.[199] to situations involving a higher degree of employer involvement, as in *Electromation*.[200] Gould then suggested guidelines for those

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196. 317 N.L.R.B. 1110. In *Keeler Brass Automotive Group*, the Board confronted a grievance committee which, after eight years of operations, was being re-structured by the employer. *See id.* at 1110. The committee procedures and composition were decided by the employer. *See id.* Committee members were elected by employees to two-year terms. *See id.* Evidence was presented that the committee's decisions concerning grievances were not final, but were instead subject to review or modification by the employer. *See id.* at 1115. In reversing the administrative law judge, the Board found that the committee was a labor organization, and that it was dominated by the employer. *See id.* at 1113-16.

197. *See id.* at 1116-19 (Gould, Chairman, concurring). Chairman Gould's opinion cites with approval the Seventh Circuit decision enforcing the Board's Order in *Electromation*. *See id.*

> The Supreme Court has explained that domination of a labor organization exists where the employer controls the form and structure of a labor organization such that the employees are deprived of complete freedom and independence of action as guaranteed to them by Section 7 of the Act, and that the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions.

Electromation, Inc. v. NLRB, 35 F.3d 1148, 1170 (7th Cir. 1994).

198. *Keeler Brass*, 317 N.L.R.B. at 1118.

199. 221 F.2d 165 (7th Cir. 1955). In *Chicago Rawhide*, the committee originated with the employees and met outside the presence of management. Management did not determine which subjects would be considered, nor membership; and it did not have veto power over committee recommendations.

200. *See Keeler Brass*, 317 N.L.R.B. at 1118-19.

cases falling between the two extremes. First, the Board should inquire how the employee group came into being.[201] According to Gould, however, it does not follow that because the idea to form a participatory program originated with management, there will necessarily be an 8(a)(2) violation:

> [I]f, for example, the employer did nothing more than tell employees that it wanted their participation in decisions concerning working conditions and suggested that they set up a committee for such participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.[202]

Second, when deciding whether there was unlawful "domination," the Board should look at the circumstances surrounding the creation of the participatory program.[203] Thus, in *Keeler Brass,* Gould argued that there were several factors which could lead to a finding of no domination.[204] For example, the employer had not created the committee in response to an organizing effort, participation in the committee was voluntary, and all voting committee members were freely elected by the rest of the employees.[205] However, continued Chairman Gould, the balance of factors pointed to unlawful domination. In particular, Gould was concerned that the employer had established membership guidelines and the election procedure, conducted the election, and that the committee could not even decide when it would meet without the employer's approv-

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201. *See id.* at 1119.

202. *Id.* This portion of Chairman Gould's opinion echoes both the concurring opinion of Member Raudabaugh in *Electromation*, 309 N.L.R.B. at 1013 (stating that the fact that the employer initiates the participatory program, or that the employer establishes the program's rules and policies, is not sufficient reason to condemn the program under the Act), and the concurrence of Member Devaney in *E.I. du Pont*, 311 N.L.R.B. at 902 ("I see no unlawful behavior or threat to employees' Section 7 rights when employers form employee committees with management members, provide such committees with funds, time, space and compensation, assign the committees agendas, and dissolve them at will.")

203. *See Keeler Brass*, 317 N.L.R.B. at 1119.

204. *See id.*

205. *See id.*

al.[206]

Although Chairman Gould cited with approval the *Electromation* test, he also placed greater emphasis on the domination issue than had earlier post-*Electromation* Board decisions. It is not clear, however, whether Chairman Gould's guidelines to decide the question of domination will expand or limit the scope of the *Electromation* test.

Two other post *Electromation* and *E.I. du Pont* decisions are worth mentioning, as they suggest how the Board appears to have interpreted the *Electromation* analysis with respect to selecting between the "restrictive" and "permissive" views. In the cases of *Stoody Co. Division of Thermadyne, Inc.*,[207] and *Vons Grocery Co.*,[208] the Board, for the first time since the *Electromation* decision, found in favor of the employer in an 8(a)(2) case. *Stoody Company* arose after the employer's creation of a "handbook committee" whose stated purpose was "[n]ot to discuss wages, benefits, or working conditions, but was to gather information about different areas in the handbook that were inconsistent with our current practices, that were obsolete, or that were misunderstood by employees, so we could get them cleared up as soon as possible."[209] At its first meeting, the committee discussed vacation time, as well as other non-proscribed subjects.[210] Shortly after this first meeting, the employer discovered that a union attempting to organize the workplace had filed 8(a)(2) unfair labor practices charges, and disbanded the committee.[211] While the "handbook" committees were intended to act as representatives of other employees,[212] and although at their first and only meeting the committee discussed and made proposals regarding vacation time (clearly a statutory subject under section 2(5)),[213] the Board found that the "dealing with" requirement

206. *See id.*
207. 320 N.L.R.B. 18 (1995).
208. 320 N.L.R.B. 53 (1995).
209. *Stoody*, 320 N.L.R.B. at 25.
210. *See id.* at 19.
211. *See id.*
212. *See id.* at 25.
213. *See id.*

had not been satisfied.[214] The Board, relying on a passage of its *E.I. Du Pont* decision, stated that "dealing with" requires a showing of a "pattern or practice, or that the group exists for a purpose of following such a pattern or practice," of employees making proposals to management and management responding to such proposals.[215] The Board reasoned that since the "handbook committee" met only once, there was no evidence of a pattern or practice of "dealing with" and, contrary to the administrative law judge's opinion, even if the committee had held additional meetings, they would not have resulted in proposals to management regarding working conditions.[216]

A similar fact pattern arose in another decision in which the Board refused to find a violation of section 8(a)(2). In *Vons Grocery Co.*,[217] the employer created a "Quality Circle Group" to discuss and address specific operational concerns and problems.[218] Several years after its formation, the group, for the first time, strayed from its consideration of purely operational matters and discussed issues related to a dress code and an accident point system.[219] After a couple of meetings during which these matters were further developed, the group presented proposals to both the employer and the union which represented employees at the plant.[220]

Following union complaints that the Quality Group had exceeded the scope of allowable activities, the employer first reassured the union that there would be no further discussion of topics other than operational matters, and then invited a union representative to attend all group meetings.[221] Following a rationale similar to that utilized in *Stoody Co.*, the Board held that the Quality Group did not constitute a labor organization under section 2(5).[222] The Board found no evidence of a "pattern or practice" of making proposals to management on

214. *See id.* at 20.
215. *See id.* (citing *E.I. du Pont*, 311 N.L.R.B. at 894).
216. *See id.* at 20.
217. 320 N.L.R.B. 53 (1995).
218. *See id.*
219. *See id.*
220. *See id.*
221. *See id.*
222. *See id.* at 54.

statutory subjects, and that there was little likelihood that the one incident in which such subjects were discussed would develop into a pattern.[223]

These recent cases suggest that the Board is somewhat ambivalent with respect to adopting the "permissive" or "restrictive" views of workplace cooperative efforts. While some of the language in *Electromation* and *E.I. Du Pont* is consistent with the "restrictive" view, the *Keeler Brass Automotive Group*, *Stoody Co.*, and *Vons Grocery* decisions contain language more consistent with the "permissive" view, at least regarding the definition of the term "dealing with" and the question of what kind of employer conduct amounts to domination and interference.

D. The TEAM Act

Following the landmark 1994 election in which the Republican party regained control of both houses of Congress, Representative Gunderson (R-WI) introduced the "Teamwork for Employees and Managers Act of 1995 ("TEAM Act")."[224] The TEAM Act was subsequently vetoed by President Clinton.[225] It remains, however, illustrative of the current debate. It was designed to amend section 8(a)(2) of the NLRA in order to facilitate the development of cooperative efforts in the workplace.[226] When introducing the TEAM Act, Representative Gunderson, followed the well established "competitive environment" argument,[227] stating that "the escalating demands of global competition have compelled an increasing

223. *See id.* As to what constitutes a "proposal," see Dillon Stores, 319 N.L.R.B. 1245, 1251 (1995) (holding that a program involving employee meetings where employees asked "can we?" "could we?" "will the employer," or "will there be?" constituted proposals and thus amounted to "dealing with" under section 2(5)).

224. H.R. 743, 104th Cong. (1995); S. 295, 104th Cong. (1995).

225. *See* 1996 Daily Lab. Rep. (BNA), *supra* note 4, at d4.

226. *See Statement by Rep. Gunderson and Text of Teamwork for Employees and Managers Act*, 1995 Daily Lab. Rep. (BNA) 20, at d25 (Jan. 31, 1995) [hereinafter *Gunderson's Statement*]. Similar legislation was also introduced in 1993. *See* H.R. 1529, 103d Cong. (1993); S. 669, 103d Cong. (1993).

227. *See Gunderson's Statement*, *supra* note 226.

number of employers in the United States to make dramatic changes in workplace and employer-employee relationships" of the kind that involve an "enhanced role for the employee in workplace decision-making."[228] Representative Gunderson concluded that an amendment to section 8(a)(2) was needed to nurture workplace creativity and confront "America's greatest economic challenges."[229] He noted that the NLRB's current interpretation of section 8(a)(2) is constrained by a mind-set more attuned to "a very turbulent time in labor-management relations" than the 1990s workplace.[230] He further argued that employee involvement programs are widely used in the United States[231] and that recent surveys indicate that employees want more involvement in decisions affecting them in the workplace.[232]

In its Findings and Purposes section, the TEAM Act stated both the "competitive environment" argument and that the establishment of participatory programs has a positive impact on both productivity and competitiveness, and the lives of employees.[233] The section also stated that recent attempts by employers to establish participatory programs "[h]ave not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930s when employers established deceptive sham 'company unions' to avoid unionization."[234] Nonetheless, it concluded, employee involvement programs are currently threatened by the Board's prohibition against employer-dominated company unions.[235]

The TEAM Act stated its purpose to be "to protect legitimate employee involvement programs against governmental interference; to preserve existing protections against deceptive, coercive employer practices; and to allow legitimate employee in-

228. *See* H.R. 743 § 2; *Gunderson's Statement*, *supra* note 226.
229. *Gunderson's Statement*, *supra* note 226.
230. *See id.*
231. *See id.*
232. *See id.* (citing a survey by the Princeton Survey Research Associates on behalf of Professors Richard Freeman and Joel Rogers).
233. *See* H.R. 743 § 2(a)(4).
234. *Id.* § 2(a)(6).
235. *See id.* § 2(a)(7).

volvement programs to continue to evolve and proliferate."[236]

To accomplish these three objectives, the bill asked Congress to amend section 8(a)(2) as follows:

> 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 participate, to address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority 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.[237]

E. The Dunlop Commission

At the same time that these legislative efforts to amend section 8(a)(2) were taking place,[238] President Clinton's Commission on the Future of Worker-Management Relations, the so-called Dunlop Commission, was reviewing the current state of worker-management relations in the United States.[239] In December 1994, the Commission issued its final report on the future of worker-management relations.[240] Although the final report did not specifically address the TEAM Act, it dealt with the issue of employee involvement and raised some interesting points related to the themes discussed in this Article.

The Commission identified what it believed to be the main obstacle to the diffusion of workplace cooperative efforts: a general skepticism on the part of workers. The Commission stated that, although there is no clear consensus on what has prevented the further spread of workplace cooperative efforts, a commonly cited factor is workers' lack of faith that management will use the "[f]ruits of workers participation to benefit

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236. *Id.* § 2(b)(1)-(3).

237. *Id.* § 3.

238. These efforts originated in 1993 with the introduction of a similar bill by Representative Gunderson. *See* H.R. 1529, 103d Cong. (1993).

239. *See generally Fact Finding Report, supra* note 1.

240. *See* REPORT AND RECOMMENDATIONS, COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (1994) [hereinafter *Final Report*].

employees as well as shareholders."[241] The Fact Finding Report went on to note that workers' biggest fear is that improvements in productivity and efficiency obtained from cooperative efforts will result in the loss of their jobs.[242]

In the Commission's view, this "lack of trust" is neither irrational, nor the result of class animosity between workers and managers, but can be understood as a rational response by employees to the economic realities that workplace cooperative efforts bring into the employment relationship.[243] The Commission recognized that participation in workplace cooperative efforts requires employees to make human capital investments, and that recovering the "returns" on their investments requires a long-term employment relationship. According to the Commission:

> Building a trusting relationship between workers and employers so that workers are highly motivated and contribute their ideas to the firm constitutes a *long term investment* . . . . Employee participation and related workplace changes entail *high start-up costs for training*, consulting services and management and employee time away from "normal" activities. Yet the *benefits are not likely to be realized until some time in the future* and often are difficult to predict or measure.[244]

In its Final Report, the Commission offered a solution to the competing concerns surrounding workplace cooperative efforts.[245] "[T]he Commission believes that it is in the national interest to promote expansion of employee participation, provided [that such a goal] does not impede employee choice of whether or not to be represented by an independent labor organization."[246] The Commission noted, however, that as presently implemented, some participatory programs may

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241. *See Fact Finding Report*, *supra* note 1, at 49 (reviewing testimony and survey data gathered at public hearings).

242. The Fact Finding Report further notes that the lack of trust is not endemic to workers, but is also widespread among union leaders and middle level managers. *See id.* at 50.

243. *See id.*

244. *Id.* at 51 (emphasis added).

245. *See Final Report*, *supra* note 240, at 7.

246. *Id.*

violate section 8(a)(2) because, although designed to improve productivity and quality, such programs also tend to involve discussions concerning working conditions and compensation issues.[247]

As a remedial measure, the Commission recommended congressional clarification of section 8(a)(2), "so that employee involvement programs—such as those relating to production, quality, safety and health, training or voluntary dispute resolution—are legal as long as they do not allow for a rebirth of the company unions the section was designed to outlaw."[248] More specifically, the Commission recommended that the legality of nonunion employee participation programs depends not on whether they involve discussion of terms and conditions of work or compensation which are incidental to the broad purposes of these programs.[249]

The Commission, however, emphasized the continued need to prohibit "company dominated labor organizations" and to ensure that encouraging employee participation in nonunion settings would not adversely affect employees' ability to select independent union representation.[250] Achieving these two goals will require that employees involved in these participatory experiments be assured the same protections from retaliation for expressing their views on workplace issues as is currently accorded unionized employees.[251] The Final Report noted that such protection is currently available under the NLRA, since such expressions constitute concerted activities for the purpose of mutual aid or protection.[252]

The Commission's recommendations are surprising when viewed in light of its discussion concerning the "lack of trust" factor. The Commission, to the extent that it indicated that a possible solution to the problem of workplace cooperative efforts would be to limit the scope of section 8(a)(2) by excluding from its reach programs where wages and working conditions are discussed incidentally, apparently took an approach similar

247. *See id.*
248. *Id.*
249. *See id.* at 8.
250. *See id.*
251. *See id.*
252. *See id.*

to that advanced under the TEAM Act.[253] Although the Commission's recommendations clearly differ from the proposal advanced in the TEAM Act, both by recognizing the continued need to prevent the creation of "company unions" and the need to protect nonunionized employees' ability to express their views on workplace issues, the Commission failed to provide any protection against the opportunistic behavior that may result from the impact that workplace cooperative efforts have on the employment relationship.

F. So, What's Wrong With What We Have?

The debate concerning workplace cooperative efforts has been framed thus far in terms of the restrictive/permissive distinction. The focus of the debate has been on whether section 8(a)(2) is intended to protect employees' free choice in selecting a bargaining representative or to protect the integrity of the bargaining process by assuring complete independence between employers and the employees' representative. The Board's current position, as illustrated by *Electromation* and its progeny, appears to waver between the restrictive and permissive views. The TEAM Act, although purportedly protecting the independence of the collective bargaining process, clearly favored the adoption of the "permissive" view. The Dunlop Commission, recognizing that neither extreme adequately addressed the problem, instead adopted a hybrid approach which had some of the free choice elements of the "permissive" view, while also considering the need for some continued degree of independence between the employer and the employees' representative.

This Article will argue that both the permissive and restric-

253. Professor Thomas Kochan, a member of the Dunlop Commission, distinguished the Commission's proposal from the TEAM Act by noting that the Commission's recommendation would not have drawn new lines between permissible and nonpermissible subjects of discussion for participatory programs. Instead, Kochan argued, the Commission's recommendation only sought to clarify that "[e]mployee participation would not be judged illegal solely because participants discussed terms and conditions of employment as an incidental part of the process." *Labor Law Reform: Clarification, Not Elimination of Section 8(a)(2) Needed, Kochan Says*, 1995 Daily Lab. Rep. (BNA) at d18 (Jan. 9, 1995).

tive views are misguided because they fail to address what appears to be a more serious consequence of the formation of workplace cooperative efforts—the incentives they create for employers to behave opportunistically. The following two sections develop this argument.

IV. A BIT OF THEORY: EXTERNAL AND INTERNAL LABOR MARKETS

The employment relationship has a variety of forms.[254] Employers and employees may enter into discrete contracts of fairly short duration with no expectation of continued employment.[255] Such arrangements encompass what some economists term the external labor market ("ELM").[256] The ELM posits that workers seek new jobs by searching across an industry for the best conditions of employment. In general, ELMs are considered relatively competitive due to worker mobility and the competition between firms for these workers.[257]

The ELM theory makes two basic assumptions. First, that employees' tasks are of a general nature, such that there is very little in the task specific to the particular organization.[258] "General skills," learned by the employee at his or her

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254. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 57-81 (1975).

255. *See id.*

256. *See* Michael L. Wachter, *Labor Law Reform: One Step Forward and Two Steps Back*, 34 INDUS. REL. J. OF ECON. & SOC'Y 382, 385 (1995); *see also* Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349, 1357 (1988).

257. *See id.* This "ideal" view of the external labor market is realized only under a very specific set of assumptions (e.g., perfect information, worker mobility, profit maximization). Where these conditions are not met market distortions can arise. *See* DOUGLAS L. LESLIE, CASES AND MATERIALS ON LABOR LAW: PROCESS AND POLICY 25-28 (1992).

258. *See* Wachter & Cohen, *supra* note 256, at 1358-64 (distinguishing between firm-specific skills, not easily transferable to other firms, and general skills that are easily transferable across firms within the same industry). *See also* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS - WITH SPECIAL REFERENCE TO EDUCATION 29-31 (1964) (arguing that different skills require different types of training, including schooling and job-specific training).

expense and thus requiring training from the particular firm, are equally valuable to any other firm searching the same type of knowledge.[259] Second, that there is no expectation of long-term employment.[260] That is, ELM assumes that both parties to employment contracts within the ELM can terminate the contractual relationship without incurring any substantial loss.[261]

Not all employment transactions, however, assume this form. Some jobs require the employee to learn skills specific to the particular contracting firm.[262] Firm specific tasks may arise due to the following circumstances:

> (1) equipment idiosyncrasies, due to incompletely standardized, albeit common, equipment, the unique characteristics of which become known through experience; (2) process idiosyncrasies, which are fashioned or "adopted" by the worker and his associated in specific operating contexts; (3) informal team accommodations, attributable to mutual adaptation among parties engaged in recurrent contact but which are upset, to the possible detriment of group performance, when the membership is altered; and (4) communication idiosyncrasies with respect to information channels and codes that are of value only within the firm.[263]

Such "specific skills" are valuable only to the particular firm, and thus, there are no incentives to acquire them within the ELM context.[264] Employees will be reluctant to invest in skills valuable only to a particular employer in the absence of some expectation of long term employment.[265] Employers will

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259. *See id.*

260. *See* Wachter, *supra* note 256, at 385.

261. *See id.*

262. *See* Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353, 366-67 (1984). When describing the relationship between internal labor markets and specific jobs skills, Leslie writes that "the key premise of the relational contract model of labor markets is that many job skills are learned on the job and are specific to the firm. *Employees work in teams, and tasks are complex.*" *Id.* (emphasis added).

263. Oliver E. Williamson, Michael L. Wachter & Jeffrey E. Harris, *Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange*, 6 BELL J. ECON. 250, 256-57 (1975) (emphasis added).

264. *See* Wachter & Cohen, *supra* note 256, at 1358.

265. *See id.*

be equally reluctant to provide specialized training, since there is no guarantee that employees will stay with the firm or will perform in a manner allowing the employer to recover the costs associated with the training.[266] The need arises, therefore, to devise a mechanism to create the right kind of incentives for the acquisition of firm specific skills.[267]

Internal Labor Markets ("ILM") provide such a mechanism and thus constitute an alternative to exclusive reliance on ELMs.[268] ILMs arise due to the ELMs' inability to deal with employment transactions when there is a need for firm specific skills.[269] A "perfect" or "ideal" ILM arrangement involves a detailed and complex employment contract establishing, inter alia, long term wages and conditions, including employee duties during the contractual period, and the conditions for termination of the employment relationship.[270] Such a "perfect" arrangement is, however, an unattainable ideal.

More likely the parties will act in accordance with an "implicit relational contract," wherein hiring occurs mainly for entry-level positions, there are promotion ladders, wages attach to particular jobs, and seniority rules may control promotion.[271] In short, the employment relationship is internalized.

Firms potentially can encourage workers to make long-term investments in the firm, in turn producing technological and cost efficiencies, by internalizing parts of the employment relationship.[272] Internalization requires certain types of investment of human capital.[273] Employees invest early in their careers, by agreeing to a below market wage rate while learning

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266. *See id.*

267. *See* Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 HOUS. L. REV. 1517, 1521-24 (1995) (discussing the development of internal labor markets and their application to employment discrimination problems).

268. *See* Wachter & Cohen, *supra* note 256, at 1358 (asserting that ILMs arise because of the costs of job or company specific skills); *see also* Wachter, *supra* note 256, at 385-86.

269. *See* Wachter & Cohen, *supra* note 256, at 1358-64.

270. *See* LESLIE, *supra* note 257, at 32.

271. *See id.* at 33.

272. *See* Wachter & Cohen, *supra* note 256, at 1360-61.

273. *See* Wachter, *supra* note 256, at 385.

the skills required to perform a job—the employee's opportunity wage.[274] Employees recover a return on their investment at a later point in their careers—when their actual or inside wage is higher than their opportunity or outside wage.[275] Similarly, employers invest at the earlier stages of the employee's career by paying a wage that is higher than that employee's marginal productivity.[276] The employer recovers her investment during the employee's midcareer years.[277] At that stage the employee's marginal productivity is believed to exceed the wage paid by the employer.[278]

The expectation that employees will be attached to the firm for a long period of time or that they will be adequately compensated for their investments in the case of a breach is central to the ILM.[279] The employer arguably would not want to

274. *See* Stewart J. Schwab, *Life-Cycle Justice: Accommodating Just Cause And Employment At Will*, 92 MICH. L. REV. 8, 12-19 (1993). Professor Schwab provides an excellent analysis of the Internal Labor Markets concept from two different perspectives: the "specific human capital" story and the "efficiency wage" story. The "specific human capital" story assumes that investments in firm specific skills occur under an incentive system where both parties share the cost and benefits over the employee's work life. *See id.* at 13-14. Schwab notes that a critical aspect of the "specific human capital" story is the self-enforcing nature of the employment relationship. *See id.* at 15. The "specific human capital" story assumes that at later stages in the employment relationship both the employee's productivity is higher than the employee's inside wage, and the employee's inside wage is higher than the employee's opportunity wage. *See id.* Consequently, there is no incentive by either party to terminate the employment relationship. *See id.* Employees have no incentive to leave the firm, since they are being paid above what they could make in the outside market, and employers have no incentive to fire the employees, since their productivity exceeds their wages. *See id.* Under the "efficiency-wage" story, while employees' productivity later in their careers is higher than their outside or opportunity wage, their inside wage, is even higher. *See id.* at 16. Consequently, the employer has an incentive to terminate late-career employees, since their wages exceed their productivity. *See id.* This Article's description of the development of Internal Labor Markets is consistent with Professor Schwab's "efficiency-wage" story.

275. *See id.* at 18; *see also* Wachter & Cohen, *supra* note 256, at 1363.

276. *See* Wachter & Cohen, *supra* note 256, at 1361.

277. *See id.*

278. *See id.*

279. *See* Paetzold & Gely, *supra* note 267, at 1522.

lose an employee with specialized training because that would require the training of a substitute and result in a corresponding loss in productivity during the training period.[280] The employee, on the other hand, will possess skills that are not readily transferable and will therefore be reluctant to leave the employment until she has recovered on her investment.[281] Thus, to the extent that the parties to an ILM arrangement continue their relationship, their agreement will be fully realized.[282]

ILMs thus appear to suggest a solution to the problem of the acquisition of specific skills caused by the discrete nature of transactions in the ELM. The ILMs' saving grace, however, is also a flaw: ILMs may themselves be inefficient due to the investments' highly specific nature.[283] Specific skills are in a sense sunk investments.[284] Once these investments have been made, a bilateral-monopoly bargaining arrangement is created and is ripe for strategic or opportunistic behavior.[285] "Opportunistic" behavior occurs when one party attempts to breach the ILM arrangement by trying to "expropriate" the returns the other party expects from its investments.[286] The employer's incentive to comply with an implicit contract are significantly reduced once the employer has recouped her investment.[287] Thus, if the employer terminates the employment relationship after the employees have learned the firm-specific skill and the employer has recovered its investment, but before the employees are able to recover their investments, the employees' investments are lost.[288] Similarly, an

280. *See* Wachter & Cohen, *supra* note 256, at 1361.

281. *See id.* at 1363.

282. *See* Paetzold & Gely, *supra* note 267, at 1523.

283. *See* Wachter, *supra* note 256, at 385; *see also* George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, *in* PROCEEDINGS OF NEW YORK UNIVERSITY 43D ANNUAL NATIONAL CONFERENCE ON LABOR 109 (Bruno Stein ed., 1990) (applying the internal labor model to the issue of replacement workers under the NLRA).

284. *See* Wachter, *supra* note 256, at 385-86.

285. *See id.*

286. *See id.*

287. *See* Wachter & Cohen, *supra* note 256, at 1361-64.

288. *See id.*

employer's investment may be lost if, during the midcareer years, employees make it more difficult to recover the investment, by engaging in behavior such as shirking, withholding information or otherwise increasing monitoring costs.[289]

Collective bargaining agreements provide a solution to the ILM enforcement problem.[290] Collective bargaining agreements attempt to control opportunistic behavior by explicitly incorporating various aspects of the employment relationship (i.e., rules governing working hours, promotion opportunities and grievance procedures) with enforcement mechanisms and provisions making the agreement contingent on such future events as changes in the firm's product market or the economy at large.[291]

Labor law should help create a structure that reduces the incentives to the parties subject to ILM arrangements to behave opportunistically.[292] This Article asks whether the current interpretation of section 8(a)(2), the TEAM Act, or perhaps an alternative legal structure, is a better policy instrument to limit the occurrence of the type of opportunistic behav-

289. *See id.*

290. *See* Cohen & Wachter, *supra* note 283, at 115-16; *see also* Michael L. Wachter & Randall D. Wright, *The Economics of Internal Labor Markets*, *in* THE ECONOMICS OF HUMAN RESOURCE MANAGEMENT 86-102 (Daniel J.B. Mitchell & Mahmood A. Zaidi eds., 1990) (discussing how seniority and other sorts of tenure provisions protect workers from the potential opportunistic behavior of firms that have recouped their investments and who would be willing to fire older workers).

291. *See* Wachter & Wright, *supra* note 290, at 100-02. Human resource management policies serve the same purpose in nonunion firms. *See* Wachter, *supra* note 256, at 386. For example, seniority provisions are not unique to the unionized workplace. In academia, where the vast majority of faculty lack union representation, tenure provisions are commonly used. The use of tenure in academia nicely fits the ILMs' model. Younger professors may invest time serving on idiosyncratic university committees and engage in other firm-specific endeavors with the assurance that once tenured, the university cannot fire them at a later stage when they are less professionally active. *See generally* RICHARD P. CHAIT & ANDREW T. FORD, BEYOND TRADITIONAL TENURE (1982) (examining the changes taking place in the traditional concept of tenure); BARDWELL L. SMITH, THE TENURE DEBATE (1973) (explaining the different perspectives of the tenure debate).

292. *See* Wachter & Cohen, *supra* note 256, at 1364-67.

ior described above.

V. ILMS AND WORKPLACE COOPERATIVE EFFORTS

A. Overview

The ILM theory provides a powerful tool for understanding the economic dynamics of workplace cooperative efforts as well as some guidance as to the appropriate legal standard applicable to cooperative programs under the NLRA. In this section, the ILM model is used to analyze workplace cooperative efforts. This process requires us to answer three questions: (1) How do the parties invest within the context of workplace cooperative efforts? (2) What benefits do the employer and the employee expect to obtain from the investments made through participation in the cooperative programs? and (3) What is likely to go wrong? How can opportunistic behavior occur within the context of workplace cooperative efforts? The next three sections address these issues.

B. Investments Made . . .

ILMs are closely related to the acquisition of firm-specific skills. Their acquisition requires that investments be made by both employer and employee. Workplace cooperative efforts are a clear example of an employment arrangement designed to motivate employees to acquire and develop new skills. Both employers and employees must invest to establish participatory programs.

As explained in Section II of this Article,[293] a central characteristic of all participatory programs is that they require employees to learn skills, that is make human capital investments not likely to be transferable to other organizations.[294]

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293. *See supra* notes 19-85 and accompanying text.

294. Consider, for example, Member Devaney's concurring opinion in *E.I. du Pont*, recognizing the ILM characteristics of workplace cooperative efforts:

> Further, the success of many types of employee involvement programs depends on persuading employees—or freeing them—to turn their full attention and intelligence to the solution of management problems; *to forget, in a sense, for the duration of the committee's work that they have their own separate interests in the workplace*

The two types of cooperative efforts discussed above clearly illustrate the intense investment required of employees after the program is created.[295] Employees involved in Quality Circles must learn new skills (both interpersonal and technical), work in assignments outside their groups, and, in general, immerse themselves in problem-solving techniques unique to their particular employment. Similarly, the "teams" concept requires individuals to commit themselves to the goals, objectives, and decision-making processes of the particular group. This process, though performance-enhancing to a particular firm, is unlikely to be of great value to the outside market. Even the less formal programs such as grievance committees,[296] committees structured around specific workplace problems such as absenteeism or smoking policies,[297] and discussion groups[298] require employees to establish a network, make decisions, and invest personal capital in issues that may very well be idiosyncratic to their workplace.

The nature of the investments made by employees is probably best illustrated by the fact that the establishment of workplace cooperative efforts is not accompanied by additional immediate compensation. The programs are normally framed in terms of voluntary participation and employees receive no extra pay for participation.

Employers also invest when establishing participatory programs. There are, for example, administrative costs associated with creating and running such programs.[299] In addition, there are costs in the form of initial productivity losses. These losses result from the time spent by employees learning new

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and to do the employer's work.

E.I. du Pont & Co., 311 N.L.R.B. 893, 902 (1993) (Devaney, Member, concurring) (emphasis added).

295. *See supra* notes 19-85 and accompanying text.

296. *See, e.g.*, Keeler Brass Automotive Group, 317 N.L.R.B. 1110 (1995); General Foods Corp., 231 N.L.R.B. 1232, 1233 (1977).

297. *See, e.g.*, Electromation, Inc., 309 N.L.R.B. 990 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

298. *See, e.g.*, Research Fed. Credit Union, 310 N.L.R.B. 56 (1993).

299. For example, consultants are frequently hired, supervisors' responsibilities are shifted to accommodate the new time commitments, and administrative support may be required. *See* CROCKER ET AL., *supra* note 53, at 67-84.

tasks, and from the time required for changes in employment practices to be understood and properly implemented.[300]

C. Benefits Expected . . .

Having identified the investments made by employers and employees in the context of workplace cooperative efforts, the next question is why the parties make these substantial investments. What benefits do both parties expect in return for their willingness to enter into these implicit contracts?

Generally, employers have strong incentives to invest in the creation of internal labor markets in the form of workplace cooperative efforts.[301] The expected benefits or "returns" from such investments consist of direct economic benefits and nonpecuniary or indirect economic benefits.[302] The former, direct economic benefits, are easily described. Employers implementing workplace cooperative efforts expect to observe improvements in plant efficiency and productivity. Typically, these improvements are the result of improved job attitudes and performance, reduced waste, and increased flexibility in utilizing the workforce.[303]

In addition to direct economic benefits, employers can also derive nonpecuniary benefits from workplace cooperative efforts. Internal labor markets, in general, and workplace cooperative efforts, in particular, have been described as mechanisms for limiting and controlling the interclass conflict between labor and management.[304] Participatory programs are believed to help management maintain control over employees by creating the impression that a democratic workplace exists without the "assistance" of outside organizations, such as inde-

300. *See id.*

301. *See* LAWRENCE T. PINFIELD, THE OPERATION OF INTERNAL LABOR MARKETS: STAFFING PRACTICES AND VACANCY CHAINS 13-16 (1995) (describing the origins and functions of ILMs).

302. *See* RANDALL HANSON ET AL., *Employee Empowerment at Risk: Effects of Recent NLRB Rulings*, 9 THE ACAD. OF MGMT. EXECUTIVE 45, 47 (1995) (describing the benefits of implementing workplace cooperative efforts). *But see* GRENIER, *supra* note 7, at 6-13 (questioning whether quality circles have achieved their expected results).

303. *See* FISHER ET AL., *supra* note 73, at 438.

304. *See* PINFIELD, *supra* note 301, at 16.

pendent labor unions.[305] Control can be achieved through cooptation (making workers adopt management's viewpoint) or through limiting employee participation to trivial and meaningless aspects of the job.[306] Workplace cooperative efforts are particularly suited to these nonpecuniary objectives because of the intrinsic characteristics of participatory programs.[307] For example, most participatory programs are couched in a "humanizing" tone, which contrast sharply with typical work bureaucracy. Work rules promulgated by such a source are perceived to be less formal and are created by the employees themselves rather than imposed by management.

Conversely, as suggested by the ILM rationale, employees are also willing to make the type of investments required by workplace cooperative efforts. Employees, like employers, can expect both pecuniary and nonpecuniary future benefits. Employees investing in firm-specific skills expect to be monetarily compensated for their investment; typically ILMs involve higher post-training wages where wages are a function of the employee's tenure.[308] Employees therefore will likely expect their pay to increase in the post-training period as they acquire increased knowledge about different aspects of the production process and as their decision-making responsibilities increase.[309]

In addition, and particularly true given the kind of investments expected from employees in this context, employees participating in cooperative programs expect a return in the form of increased "voice" in their employment relationship. "Voice" refers to the use of direct communication to bring actual and desired conditions closer together.[310] In the employment setting, voice is exercised by discussing work conditions and the need for change rather than quitting the job.[311]

The most recent survey data indicates that a substantial

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305. *See* GRENIER, *supra* note 7, at 13-20.

306. *See id.*

307. *See id.*

308. *See* Schwab, *supra* note 274, at 15.

309. *See* NORTHCRAFT & NEALE, *supra* note 61, at 507-08.

310. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 7-11 (1984).

311. *See id.* at 8.

majority of U.S. workers want the opportunity to participate in decisions affecting their jobs, the organization of their jobs and their economic future.[312] These same surveys also indicate that employees value highly the freedom to decide how to do their work and evidence that their employers appreciate and act on their suggestions to improve the workplace.[313] Employees involved in workplace cooperative efforts probably have the expectation that, by participating in these programs, a new form of work organization providing a continuing voice in the workplace will be developed. To the extent that knowledge about the workplace increases with tenure, employees expect that, like wage rates, "voice" will also become a function of tenure.

D. What Can Go Wrong . . .

Finally, the application of the ILM model to the workplace cooperative effort problem requires a discussion of opportunistic or strategic behavior. What prevents the full realization of the implicit contracts entered into by employers and employees within internal labor markets?

ILM arrangements, as discussed above,[314] while addressing some of the inefficiencies of the external labor market, also create several problems of their own. In particular, ILMs are likely to result in "opportunistic" behavior.[315] Opportunistic behavior appears when one party attempts to breach the ILM arrangement by trying to "expropriate" the other party's expected return on its investments.[316] Parties to an ILM contract cannot easily leave the relationship without substantially losing the value of their investment.[317] Once the employer has recovered her investment, her incentives to comply with the implicit contract are significantly reduced.[318] Similarly, the employer's investment could be lost if, during the mid-

312. *See Fact Finding Report*, *supra* note 1, at 30-31 (discussing survey results on employees' attitudes toward participation).
313. *See id.*
314. *See supra* notes 268-313 and accompanying text.
315. *See id.*
316. *See id.*
317. *See id.*
318. *See id.*

career years, employees make it more difficult for their employer to recover her investments by engaging in behavior such as shirking, withholding information or increasing monitoring costs.[319]

As in the case of other ILM arrangements, opportunistic behavior within the workplace cooperative effort context appears at post-training stages in the employment relationship. The opportunity to "cheat" arises only after the parties have invested in training or other firm-specific acquisitions. In most ILM arrangements, both parties have similar opportunities to engage in strategic behavior. What distinguishes the workplace cooperative efforts context is that, while the employer retains the ability to behave opportunistically, the structure of participatory programs leaves the employees in a rather vulnerable position.

1. "Cheating" Later On

The ILM predicts that once the long-term investments have been made, in theory, both employers and employees have the ability to engage in opportunistic or strategic behavior.[320] Employees can reduce their job efforts, while employers can terminate the employment contract or make unilateral changes in employment conditions. This section examines how the opportunities to engage in opportunistic behavior arise within the context of workplace cooperative efforts.

Employer opportunistic behavior in the workplace cooperative efforts context can occur in either or both of the following ways: 1) terminating the employees that have participated in the program; 2) terminating the program itself. Consider first the employer's option to terminate the employees that have been involved in a program. Since, under current law,[321] most nonunionized employees can be terminated at will, there are few constraints on the employer not to terminate employees

319. *See id.*

320. *See supra* notes 268-318 and accompanying text.

321. *See* Schwab, *supra* note 274, at 28-30. To the extent that courts, as Schwab argues, recognize and apply the ILM principle to employment-at-will decisions, the constraint described in the text will be much more burdensome. *See id.* at 32-51.

after their peak productivity years. An employer that has established a workplace cooperative effort with the expectation of increased productivity will probably wait to see if the program is successful. If the program is successful, that is, if there are observable increases in productivity, the employer will, at that time, recover whatever investments she has made in the program. The employer can continue the program for as long as productivity of those employees involved in the program exceeds their inside wage. As suggested by the ILM model, however, at some point, the inside wage will exceed the employees' productivity. At that time, the employer can terminate the employees. If the cooperative effort proves unsuccessful, there would be an even greater incentive for the employer to immediately terminate the employees involved in the program. Similar incentives exist in situations where the participatory program may have been used as an anti-union device.

The employer's decision to terminate the employees involved in the participatory program might arguably be constrained by reputational considerations. When an employer "opportunistically" terminates a group of employees, the employer is abrogating an implied contract with these employees. The repeated breach of such implied contracts will result in the employer acquiring a negative reputation. Future employees will be reluctant to enter into similar contracts, or will only do so at a substantial premium - thus defeating the purpose of the internal labor market's arrangement. Reputation, then, is supposed to serve as a check or "monitor" on employer behavior.

Some ILM scholars have argued that reputation costs are, on average, large enough to deter opportunistic behavior on the part of the employer.[322] The extent to which reputation serves as a constraint on opportunistic behavior, however, is highly questionable.[323] The inter-firm transfer of reputational information between generations of workers (i.e., employees who have been fired telling new employees about the

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322. *See* Cohen & Wachter, *supra* note 283, at 118.

323. *See* Schwab, *supra* note 274, at 26-28; *see also* Leonard Bierman & Rafael Gely, *Striker Replacements: A Law, Economics, and Negotiations Approach*, 68 S. CAL. L. REV. 363, 374-78 (1995) (rejecting the argument that reputation is an absolute constraint on opportunistic behavior).

employer's reputation), is most often incomplete and consequently unlikely to be a substantial constraint on opportunistic firings.[324] In addition, reputation will not constrain an employer who does not expect to use participatory programs in the future. For example, suppose an employer seeks information from the employees concerning an aspect of the production process that needs improvement. The employer introduces a participatory program and obtains the information. The employer's goal has been achieved and the program is a success. Having obtained the information, however, the employer may very well disband the program and continue operations in a traditional, less participatory manner.

In addition to terminating employees, the employer may, at any time, terminate the participatory program without consulting the employees involved in the effort. Unlike situations involving board-certified bargaining representatives, the employer is not required to consult with the employees involved in the workplace cooperative effort before terminating the program.[325] Thus, the employer could potentially implement the program, recover her investment and then terminate the program.

As when an employer opportunistically terminates employees, the employer's decision to terminate a participatory program arguably may be constrained by reputational considerations. The case for a reputational constraint is somewhat stronger in the case of intra-firm reputation transfers, employees discussing their experiences and the employer's reputation with other employees of the same firm, than with inter-firm transfers. Still, reputation does not constitute a significant constraint within the context of workplace cooperative efforts. The reason is twofold. First, employees do not usually have a real choice about whether or not to establish a participatory program. Although participation in these programs is usually described by employers as voluntary, there are strong pressures, both formal and informal, on employees to "join" the

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324. *See* Schwab, *supra* note 274, at 27.

325. Sections 8(a)(5) and 8(b)(3) of the NLRA impose on both the employer and the union a duty to bargain in good faith with respect to wages, hours and other terms and conditions of employment. 29 U.S.C. §§ 158(a)(5), (b)(3) (1994).

group effort. Thus, while employees may be well aware of the likelihood of the employer "cheating" by opportunistically terminating the program, they may perceive no alternative but to participate in the cooperative effort. Second, even in cases of intra-firm reputation transfers, the employer has an extraordinary opportunity to misinform employees and reconstruct past events in a light favorable to the organization. Employees newly involved in the program may be convinced that the new effort will be more successful than the previous attempt to establish a participatory program and that the problem lay not with the employer, but was instead caused by a "disgruntled" group of employees.[326]

There are several reasons why an employer may choose to terminate a participatory program. There are straightforward cases where the benefits currently derived from the participatory program are smaller than the costs associated with its continuation. There are, however, less obvious reasons for an employer to terminate these programs. The program may have been established to divert attention from more significant or underlying problems. The goal having been achieved, the employer may then terminate the participatory program.[327] Alternatively, the employer may have sought specific information from employees that would otherwise be difficult, if not impossible, to obtain. For example, information on the reasons for high absenteeism, high employee turnover or problematic supervisors is easily accessible to employees but may not normally be shared with management. An employer may establish a participatory program to obtain such information, without any real commitment to allowing employees to recover the benefits associated with participation in cooperative efforts.

Theoretically, employers can engage in opportunistic behavior within the workplace cooperative effort context, whether by

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326. *See generally* GRENIER, *supra* note 7, at 116-25 (describing how a social psychologist at a plant which was undergoing an organization drive manipulated employees into changing positions they had taken publicly in support of the union).

327. An extreme example and an unfortunately common occurrence is the case where an employer seeks to dilute union support during an organizing campaign. For an excellent case study describing how a company implemented this strategy, see GRENIER, *supra* note 7.

terminating the program or terminating the employees involved in the program. There appears to be very little incentive within the ILM context to prevent such behavior.

In theory, employees possess a similar ability to behave opportunistically within the ILM context. Workplace cooperative efforts, however, present an unusual set of circumstances which in practice prevent opportunistic behavior by employees. As in all ILM arrangements, employees can behave opportunistically by reducing their work effort - an activity known as "shirking." Shirking can take various forms. Employees can, for example, "dally" or engage in pranks while at work.[328] Shirking can also take the form of not thinking creatively, thereby failing to actively contribute to the firm's efficiency and productivity.[329]

Employees, however, face a constraint on opportunistic behavior that substantially reduces their ability to shirk: the nature and structure of the workplace cooperative effort itself.[330] As discussed in Section II, a key feature of workplace cooperative efforts is that they require employees to work in groups.[331] Two aspects of group dynamics serve as significant constraints on employee opportunistic behavior: the way performance is measured and peer pressure.

Teams and other workplace cooperative efforts are normally evaluated on the basis of group rather than individual performance. The goals and objectives are group-driven, not individually developed. In order for any individual in the group to do well, the "whole" must do well. By the same token, improper performance by a group member affects not only the individual, but the group as well. In this sense, shirking by the individual results in externalities for other group members.[332] This incentive structure, emphasizing group performance, creates

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328. *See* Schwab, *supra* note 274, at 21-24.

329. *See id.*

330. In addition to the constraint imposed by the structure of participatory programs themselves, employees also face a reputation constraint. As in the case of employers, however, reputation is unlikely to substantially control opportunistic behavior. *See id.* at 23.

331. *See supra* notes 19-85 and accompanying text.

332. *See* NORTHCRAFT & NEALE, *supra* note 61, at 278-307 (discussing the characteristics of group influences on individual behavior).

incentives for employees to monitor themselves.[333] Peer pressure becomes a control mechanism that the employer can use to monitor and control employee shirking.[334] Workplace cooperative efforts, as a managerial ethic, are therefore no more than a refined bureaucracy.[335] Their intent is simply to direct employees into more efficient modes of operation by means of employee self-monitoring through peer pressure.[336]

Finally, even if employees were able to shirk, it is not clear that such behavior is costly to the employer. Employee shirking is of little consequence to an employer who instituted the cooperative program as a means of distracting employees from more urgent and substantive employee concerns. Such would be the case where the employer established the participatory program in response to an independent union's organizing drive.

In conclusion, employers risk little by engaging in workplace cooperative efforts. Such enterprises require employee investment in firm-specific skills. Once the skills have been acquired, the likelihood of employees engaging in opportunistic behavior is reduced by the nature of the cooperative effort itself. In addition, employers are unfettered in their ability to behave opportunistically once the investments have been made by employees. Given that the cooperative effort can be discontinued at any time, and given that employees have little, and

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333. *See* GRENIER, *supra* note 7, at 17-20, 129-30 (describing peer pressure as the simplest and most effective method of controlling the attitudes and behavior of employees).

334. *See id.*

335. Grenier concludes that participatory programs involve a "de-bureaucratizing" control mechanism of greater sophistication, efficiency and subtlety than traditional bureaucratic techniques. *See id.* at 131. Grenier notes that participatory programs, as a "de-bureaucratizing" mechanism, possess the following characteristics: an increased personalization of authority; decreased dependence on "rules" imposed by management; the separation of decisionmaking from the power to implement decisions; the institutionalization of peer pressure as a control mechanism; and an increased use of managerial rhetoric to de-emphasize power differences and emphasize a common purpose. *See id.*; *see also* Thomas C. Kohler, *The Overlooked Middle*, 69 CHI.-KENT L. REV. 229, 245 (1993) (arguing that under workplace cooperative schemes, individuals exist only through the group, with no separate identity of their own).

336. *See* GRENIER, *supra* note 7, at 131.

most likely, no opportunity to refuse to participate, employers can establish the program, reap the benefits and then discontinue the program.

2. "Cheating" Early On

The application of the ILM analysis to the workplace cooperative efforts context indicates a disturbing conclusion. They facilitate employer opportunistic behavior, and such behavior is more likely to occur at later stages in the employment relationship. From an ILM perspective, the real problem with cooperative efforts is that they provide the employer with additional opportunities to behave opportunistically by expropriating rents due to employees who have made idiosyncratic investments with the particular employer. The focus of section 8(a)(2), therefore, should be to prevent such opportunistic behavior.

As demonstrated by the cases reviewed in Section III(C) of this Article,[337] the Board and reviewing courts have not considered the important insights available through the ILM analysis. Although at times the Board and several courts of appeal have alluded to elements consistent with the ILM analysis,[338] the determination of the legal status of workplace cooperative efforts has commonly focused on other issues, specifically, the effect the participatory program could have on the ability of employees to freely choose their bargaining representative.

For example, the Sixth and Ninth Circuits and certain Board decisions[339] developing the Free Choice paradigm articulate the view that the central inquiry when evaluating a workplace cooperative effort pursuant to section 8(a)(2) is whether employees' freedom to choose their preferred form of representation has been detrimentally affected.[340] Thus, when decid-

337. *See supra* notes 144-223 and accompanying text.

338. *See, e.g.*, Electromation, Inc., 309 N.L.R.B. 990, 997-98 (1992) (inquiring whether program's existence depended on employer fiat), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

339. *See supra* notes 124-143 and accompanying text.

340. Labor unions have expressed similar concerns. *See Fact Finding Report*, *supra* note 1, at 32-34. For example, opponents of the proposed changes to § 8(a)(2) have expressed their concern that interference with participatory programs may impede the ability of unions to organize new

ing charges brought under section 8(a)(2), courts applying the Free Choice paradigm have focused on the issue of "actual" as opposed to "potential" domination, and have analyzed the domination issue from the "subjective" view of employees.[341] The Board, when finding various forms of cooperative efforts to be illegal, has adopted a similar rationale. For example, in his *Electromation* concurrence, Member Devaney discussed at length his view that a workplace cooperative effort cannot be a labor organization in the absence of the "representation" element.[342] Absent this factor, argued Devaney, there is no harm to the employees' right to choose their own bargaining representative.[343] A similar argument was advanced by Chairman Gould in *Keeler Brass*.[344] The Board, citing with approval the Seventh Circuit's decision in *Chicago Rawhide*,[345] required the employees' subjective view to be considered when determining domination.[346]

The focus on freedom of choice, as opposed to the opportunistic behavior, may in part be due to the timing of events in cases raising section 8(a)(2) complaints. A review of the cases discussed above indicates that challenges to participatory programs tend to be raised in conjunction with a union organizing drive.[347] This is to be expected since, without the involvement

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workers. *See id.* Labor organizations long have been concerned by employers' use of cooperative efforts as a union avoidance technique. *See id.* There is ample evidence that union avoidance has been one of the motivating factors, although not the only one, behind management efforts to implement workplace cooperative efforts. *See id.* By providing employees with a sense of "ownership" over the workplace, the satisfaction of being able to influence their work product, and an apparent voice in workplace issues, employers expect employees' perception of the need for collective outside representation to be diminished. *See id.*

341. *See id.*

342. *See Electromation*, 309 N.L.R.B. at 1002-03.

343. *See id.*

344. 317 N.L.R.B. 1110, 1116-19 (1995).

345. 221 F.2d 165 (7th Cir. 1955).

346. Chairman Gould has, in later writings, qualified this statement by adding that, although employees' subjective views are important, "[t]o rely completely upon employee satisfaction would undermine extant Supreme Court precedent." (footnotes omitted). *See* Gould's Address, *supra* note 191.

347. Ten of the twelve cases decided by the Board since the

of an independent union, employees may be hesitant or even unaware of their right to challenge the legality of the cooperative effort. The consequence of when the claims are raised on section 8(a)(2) analysis is a distortion of both legal analysis and issues. Because of the immediate impact a participatory program may have on employees' ability to organize collectively, an issue that is in itself worthy of section 8(a)(2) analysis has been permeated with representational rights rhetoric. While laudable, the focus on representational and free choice issues has led the Board and reviewing courts to overlook more significant problems raised by workplace cooperative efforts.

Preventing opportunistic behavior at later stages of the employment relationship should be the guiding principle when evaluating the legality of cooperative efforts. The Board and the courts should focus, not on their immediate impact on the organizing drive, but on the effect the participatory program could have on the long-term employment relationship. The central inquiry should be whether the employer's program increases the likelihood of opportunistic behavior at later stages of the employment process. Issues of freedom of choice caused by employers using participatory programs as anti-union mechanisms are better addressed by other provisions of the Act,[348] specifically section 8(a)(1). By relying on section 8(a)(1) to protect employees' representational and free choice rights, the Board can free section 8(a)(2) for the opportunistic behavior problem—a problem so far largely ignored in section 8(a)(2) jurisprudence.

An issue commonly litigated under the NLRA concerns the legality of the employer's granting or withholding of economic benefits in order to interfere with a union's organizing effort.[349] The Supreme Court has held that such an action by

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Electromation decision involved a complaint raised by a union which had recently began an organizing drive. The only two cases not involving union organizing drives are *E.I. du Pont* and *Vons Grocery Co.* *See supra* notes 144-223 and accompanying text.

348. *See infra* notes 349-59 and accompanying text. The NLRA is well equipped to deal with the type of illegality that can occur at the organizing stage via cooperative efforts.

349. *See generally* ROBERT A. GORMAN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 163-68 (1976).

the employer amounts to a violation of sections 8(a)(1) and 8(a)(3).[350] The Court reasoned that "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."[351] Whether the benefits granted are permanent and unconditional is of no import because a grant of benefits under such conditions will be held to be an unfair labor practice under section 8(a)(1).[352]

A benefit subject to this standard of review is the solicitation of employee complaints during a union organizing campaign.[353] The Board has long held that the solicitation of employee grievances during an organizational campaign interferes with an election.[354] The Board has found such behavior to violate section 8(a)(1), even absent an express promise of unconditional future benefits or an explicit "no-promise" pledge.[355] The Board has also been willing to find a section 8(a)(1) violation without any showing of employer anti-union motive.[356] Although these cases are not directly on point, the

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350. *See* NLRB v. Exchange Parts, Co., 375 U.S. 405 (1964). Section 8(a)(1) provides that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. § 158(a)(1) (1994). Section 8(a)(3) makes it an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." § 158(a)(3).

351. *Exchange Parts, Co.*, 375 U.S. at 409.

352. *See id.* at 410.

353. *See generally* GORMAN, *supra* note 349, at 166.

354. *See id.*

355. *See* Raley's, Inc., 236 N.L.R.B. 971, 972 (1978), *enforced*, 608 F.2d 1374 (9th Cir. 1979) (holding that the employer violated § 8(a)(1) by conducting a series of meetings preceding a representation election in which employees voiced their grievances on a variety of subjects). *Cf.* Clare Community Hosp., 273 N.L.R.B. 1755, 1755 (1985) (determining that there is no violation of § 8(a)(1) when the employer creates, preceding a representation election, a Communications Task Force, the purpose of which was to improve communication between employees and management).

356. Although motive is normally not a factor in § 8(a)(1) cases, the Supreme Court, in the leading decision in this area, *Exchange Parts Co.*, relied on the showing of illegal motive in finding that the employer had committed an unfair labor practice. *See* GORMAN, *supra* note 349, at 165.

rationale arguably extends to situations where the employer dismantles a workplace cooperative effort upon learning of the union's organizing drive.[357]

The Board's current interpretation of section 8(a)(1) is well suited to the concerns raised by unions with respect to employers using workplace cooperative efforts as anti-organizing weapons. Violations of section 8(a)(2) also raise, by definition, a derivative 8(a)(1) violation.[358] Claims arising from interference with the employees' freedom of choice and undue interference with the selection of a bargaining representative by the creation of a workplace cooperative effort can properly be addressed under current section 8(a)(1) jurisprudence.[359]

VI. HOW CAN WE FIX IT?

A. The Current Approach

Section 8(a)(2) can be understood as an enforcement mechanism to prevent opportunistic behavior within ILMs.[360] Regardless of whether one favors an expansive reading of section 8(a)(2), it is generally understood that for a labor organization to genuinely represent employees' concerns, the labor organization must be as independent as possible.[361] A high level of independence is crucial to minimizing the kind of opportunistic behavior that can arise within the ILM context.[362] In the past, the Board and reviewing courts have chosen to focus on arguably less important matters, instead of the issue of the independent existence of the labor organization. Recent NLRB decisions, however, are consistent with the concerns raised in

357. Professors Harper and Estreicher raise this question rhetorically in their labor law casebook, but without any specific discussion or explanation. *See* MICHAEL C. HARPER & SAMUEL ESTREICHER, LABOR LAW: CASES, MATERIALS, AND PROBLEMS 395 (1996).

358. *See* GORMAN, *supra* note 349, at 132.

359. *See* Estreicher, *supra* note 46, at 131 (noting that employer-coercion does not explain the full breadth of § 8(a)(2) because other sections of the Act directly address the coercive behavior commonly associated with the installation of employee representation programs).

360. *See* Wachter, *supra* note 256, at 385.

361. *See* Summers, *supra* note 86, at 141.

362. *See id.*

this Article.[363]

The Board's current approach under *Electromation* and its progeny entails a two step analysis. First, when determining whether a cooperative effort is a labor organization, most cases appear to turn on the "dealing with" requirement.[364] This element involves a search for evidence of a "pattern or practice" of employees making proposals to management and management responding to those proposals.[365] Second, the recent cases indicate that the question of domination turns on whether the "continued existence" of the cooperative effort was by employer fiat.[366]

The focus on "the pattern or practice" and "continued existence" elements are, in general, consistent with the ILM analysis discussed in this Article. The requirement that, for there to be a section 8(a)(2) violation, it must be established that the cooperative effort existed for the purpose of implementing a pattern or practice of employees making proposals and management responding to those proposals suggests that the Board is cognizant of the skill investment aspect of workplace cooperative efforts. Thus, the NLRA should be interpreted to protect such investments from opportunistic behavior. Although the Board has focused on a showing of a past "pattern or practice,"[367] the language of *E.I. du Pont*,[368] cited with approval by the Board in later cases allows for a prospective application of the test.[369] Under this test, it is sufficient that the program under review has the potential for generating a "pattern or practice" even if it has not done so at the time of the Board's review.[370]

Similarly, the Board's current focus on the issue of "continued existence" addresses the key concern of the ILM analysis:

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363. *See supra* notes 191-223 and accompanying text.

364. *See, e.g.*, Stoody Co., Div. of Thermadyne, 320 N.L.R.B. 18 (1995); Vons Grocery Co., 320 N.L.R.B. 53 (1995).

365. *See id.*

366. *See, e.g.*, Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995); Webcor Packing, Inc., 319 N.L.R.B. 1203 (1995).

367. *See Stoody Co.*, 320 N.L.R.B. at 20-21; *Vons Grocery Co.*, 320 N.L.R.B. at 54.

368. 311 N.L.R.B. 893 (1993).

369. *See id.* at 894.

370. *See* cases cited *supra* note 364.

the employer's ability to discontinue a program after recovering her investment before employees have had an opportunity to do so. The holding that a committee that can be terminated at will is clearly dominated by the employer arguably imposes a new requirement that cooperative efforts may be discontinued only with employee consent or approval. Such a requirement would ensure that ILM agreements are not breached with impunity and would require employers to either fulfill their implicit ILM commitments or compensate employees for their breach.[371]

The latter element might require further development by the Board and reviewing courts, especially in light of language used in *E.I. du Pont*, and other recent NLRB decisions.[372] In his concurring opinion in *E.I. du Pont*, Member Devaney noted that the fact the employer forms the committee and can dissolve the committee at will does not in itself amount to a violation of section 8(a)(2).[373] Also troubling are the concurring opinions of Member Raudabaugh in *Electromation*[374] and Chairman Gould in *Keeler Brass Automotive*.[375] Both opinions discuss the independence issue in their analysis of domination and interference by focusing on the origins of the workplace cooperative effort. For example, in *Electromation*, Member Raudabaugh argues that the fact that the idea for a participatory program began with the employer is not sufficient to condemn it.[376] Chairman Gould makes a similar argument in *Keeler Brass*.[377] He notes that cooperative efforts in the workplace have generally been initiated by employers.[378] Consequently, cooperative efforts are not unlawful simply because the employer initiated them.[379] Missing from these two concurring opinions, however, is any mention of the "continued

371. For a discussion of the enforceability of implicit contracts in this context, see *infra* notes 372-79 and accompanying text.

372. *See* cases cited *supra* note 364.

373. E.I. du Pont, 311 N.L.R.B. 893, 902 (1993).

374. 309 N.L.R.B. 990, 1013 (1992), *enforced*, 35 F.3d 1148 (7th Cir. 1994).

375. 317 N.L.R.B. 1110, 1119 (1995).

376. *Electromation, Inc.*, 309 N.L.R.B. at 1013.

377. *Keeler Brass*, 317 N.L.R.B. at 1119.

378. *See id.*

379. *See id.*

existence" element, a factor crucial to the Board's majority in the *Electromation* decision.

The extent to which the language in these three concurring opinions may become the prevailing interpretation of the "continued existence" element is unclear. Arguably, the statements are consistent with the Board's *Electromation* decision. That is, in addition to considering whether the "continued existence" of the program is within the employer's discretion, the Board can also consider how the committee was created and how independent the committee's decisionmaking process really is. So long as the Board requires the committee's "continued existence" to be independent of the employer, the additional two factors do not affect the ILM analysis. The two factors might even serve as evidence of the "continued existence" element. The ILM analysis suggests that no factor is more important to discovering the possibility of opportunistic behavior than the "continued existence" element.

In short, the current approach is potentially well suited to addressing the problem of opportunistic behavior. *Electromation*, *E.I. du Pont*, and their progeny suggest an analysis applicable to the problems identified in the ILM analysis. There is, however, language in these same decisions suggesting the Board may not have the resolve to deal squarely with the opportunistic behavior problem.

B. Would the TEAM Act deter opportunistic behavior?

Under the current Board interpretation of sections 2(5) and 8(a)(2), it is arguably possible with some minor clarifications to deter the opportunistic behavior that can follow the introduction of workplace cooperative efforts. Conversely, it is clear that legislation such as that proposed in the TEAM Act would not prevent such strategic behavior, and may in fact motivate such behavior.

The TEAM Act was ultimately vetoed.[380] An analysis of the potential ramifications of such legislation, however, remains relevant as the issue is very much alive. The proposed bill

380. *See Employee Participation: Clinton Vetoes TEAM Act Despite Pleas from Business for Passage*, *supra* note 4, at d4 (reporting President Clinton's veto of TEAM Act).

would have allowed workplace cooperative efforts to address "[m]atters of mutual interest, including issues of quality, productivity and efficiency . . . ."[381] Discussion of a broad range of issues would likely have required employees to acquire skills particular to the contracting organization. The sanction of discussion of a wide range of topics would have encouraged employers to experiment with cooperative efforts and led to a corresponding employee investment in the required skills.

Such an outcome is, arguably, desirable. To the extent that employer experimentation leads to greater employee involvement, workplace democracy, increases in productivity and the acquisition of new skills by employees; it benefits workers, management and society at large. The problem lay, however, in an aspect the drafters of the TEAM Act overlooked completely.

The legislation would have made tremendous concessions to employers by excluding workplace cooperative efforts as evidence of an unfair labor practice. There was, however, no mention of a corresponding obligation on employers to satisfy the expectations inherent in a ILM implied contract after the cooperative effort was implemented. Employers, under the proposed TEAM Act could have established cooperative efforts, locked employees into long term investments in firm-specific skills, collected any resulting benefits, and then terminated the program without permitting employees to recover on their investments. In fact, as drafted, the proposed bill would have encouraged such behavior. As discussed in Section III.D above,[382] the TEAM Act would have specifically foreclosed employers from negotiating or entering into a collective bargaining agreement with the employees participating in a cooperative program.[383] This last section was justified by the bills' proponents as a means of ensuring that workplace cooperative efforts would not become a substitute for collective bargaining.[384] The effect of such language, however, would have been cooperative efforts precluding employees from entering legally enforceable contracts and any ability to protect themselves

381. *See* H.R. 743, 104th Cong. § 3 (1995).
382. *See supra* notes 224-37 and accompanying text.
383. *See* H.R. 743 § 3.
384. *See* Gunderson's Statement, *supra* note 226.

against opportunistic behavior by the employer.[385]

C. A Modest Proposal

This Article has sketched the contours of a potential solution suggested by the ILM model to the problems raised by the current interpretations of sections 2(5) and 8(a)(2). This section will briefly summarize my proposed solution.

1. The Section 2(5) Question

The definition of a "labor organization" under section 2(5) turns on the Board's language in *E.I. du Pont,* requiring the demonstration of either a "pattern or practice" of employee proposals and management response to such proposals, or "that the group exists for a purpose of such a pattern of practice."[386] In order to provide the protection needed against employer opportunistic behavior, the language must be interpreted broadly enough to allow the Board to determine whether the cooperative effort would likely result in employees merging themselves into the new procedures enough to make firm specific investments.

This interpretation of the section 2(5) problem may result in a finding that cooperative efforts are in fact labor organizations. To the extent this is true, the proposal is consistent with Member Raudabaugh's view in *Electromation*, noting that most participatory programs will probably satisfy the requirements of section 2(5),[387] and that a more profitable line of inquiry would be to focus on the question of domination and interference.[388]

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385. *See* Charles J. Morris, *Will There be a New Direction for American Industrial Relations? - A Hard Look at the TEAM Bill, the Sawyer Substitute Bill and the Employee Involvement Bill*, 47 LAB L.J. 89, 90-91 (1996).

386. E.I. Du Pont, 311 N.L.R.B. 893, 894 (1993).

387. *See* Electromation, Inc., 309 N.L.R.B. 990, 1008-09 (1992), *enforced*, 35 F.2d 1148 (7th Cir. 1994).

388. *See id.* at 1008.

2. The Section 8(a)(2) Question

The Board and reviewing courts must continue to focus their attention on the independence of the cooperative effort, and specifically whether the committee's continued existence depends entirely on employer fiat. To the extent that the employer has the power to disband cooperative programs at will, the program is likely to violate section 8(a)(2). Conversely, if the employees involved in the cooperative effort have the ability to oppose or otherwise counter the employer's decision, the independence of the labor organizations has been satisfactorily established under section 8(a)(2). An employer willing to establish a cooperative program without running afoul of section 8(a)(2) would have only to grant the group the right to oppose its termination and a means of exercising such right.[389]

3. The Enforcement Mechanism

Requiring employee approval before program termination raises the related issue of how such an obligation should be enforced. It has been suggested that the employer be allowed to show, as a defense to a section 8(a)(2) unfair labor practice charge, that the workplace cooperative effort satisfies the "continued existence" requirement.[390]

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389. Professor Rogers has advanced a similar proposal, albeit from a different perspective. He would provide as a defense to section 8(a)(2) an employer's demonstration that:

> (a) the system was authorized by a majority of employees in a secret ballot; (b) that before the ballot, employees were specially advised of their right to oppose the creation of such a plan without reprisal; (c) that such authorization expires in some uniform period of time, perhaps three years, unless reauthorized . . . ; (d) that the system may be abolished by a majority of employees in a secret ballot at any time; and, (e) that the system cannot at any time be unilaterally abolished by the employer.

Joel Rogers, *Reforming U.S. Labor Relations*, 69 CHI.-KENT L. REV. 97, 114 (1993) (citing the proposals made by Hyde, *supra* note 86, at 188, and adding two of his own). Professor Summers would further require the employer under section 8(a)(2) to show that once established, the program could be abolished only by the employees. *See* Summers, *supra* note 86, at 142.

390. *See* Rogers, *supra* note 389, at 114.

An alternative approach would make the "implicit agreements" underlying workplace cooperative efforts legally enforceable.[391] The agreed employment practices, such as rules and promised benefits form the basis for the workplace cooperative effort and can be understood by reviewing courts as implied contracts worthy of legal enforcement. Where employees participating in cooperative efforts have made substantial firm-specific investments, the courts must be willing to carefully scrutinize employers' decisions to discontinue programs or terminate employees. If the employees have made firm-specific investments, such as to substantially perform their side of the "contract," the appropriate remedy for an employer's breach may be damages or specific performance perhaps by awarding the employee reinstatement and back pay.[392]

Although this proposal appears rather radical, there is plenty of case law supporting the enforceability of explicit or implicit individual and group contracts.[393] Professor Schwab's analysis of leading case law in the employment-at-will area can be understood to support such "implicit arrangements" and recognizes the need to guard against opportunistic behavior.[394] Furthermore, individual "implicit contracts" are enforceable even when there is a recognized labor organization.[395] For example, employees may enforce individual agreements created when they were not represented by a union, and even promises made in the presence of a recognized bargaining agent, so long as such promises were not part of the collective bargaining agreement.[396]

This proposal requires the Board to recognize that workplace

391. *See* Paetzold & Gely, *supra* note 267, at 1551; *see also* Summers, *supra* note 86, at 145.

392. *See* Paetzold & Gely, *supra* note 267, at 1551.

393. Fortune v. National Cash Register Co., 364 N.E.2d 1251 (Mass. 1977) (recognizing a cause of action for breach of implied covenant of good faith in employment contracts); Grouse v. Group Health Plan, Inc., 306 N.W.2d. 114 (Minn. 1981) (allowing employee, who had resigned his prior job in reliance of job offer and who was told before beginning new job that position had been filled, to recover under doctrine of promissory estoppel).

394. *See* Schwab, *supra* note 274, at 32-61.

395. *See* Hyde, *supra* note 86, at 161.

396. *See id.*

cooperative efforts must be viewed from the ILM perspective. The analysis suggests that the prevention of opportunistic behavior must be the central focus of section 8(a)(2). Such issues as freedom of choice and representational matters are better addressed by other provisions of the Act, specifically section 8(a)(1).[397]

This proposal may arguably be a disincentive to employer experimentation with workplace cooperative efforts. Similar criticisms have been levelled at other proposals that sought to resolve the section 8(a)(2) debate.[398] To the extent that employers establish participatory programs in order to engage in opportunistic behavior, the statement is probably correct. The proposal, however, in no way limits employers' ability to establish such programs, nor reduces their ability to terminate the programs, provided that the employees involved have been consulted or compensated for their participation. Employees claiming a breach of the implicit agreement will have to show that they have made firm-specific investments and that they have not been allowed to recover the anticipated returns. As noted by Professor Schwab courts are capable of such determinations at common law and have done so in other areas of the employment relationship.[399]

VII. CONCLUSION

Professor Kohler has suggested in his commentary on the section 8(a)(2) debate that, despite the large volume of research conducted on the legality of workplace cooperative efforts, some "pretty big things" remain unaddressed.[400] One

397. The idea that a change in the Board's interpretation of section 8(a)(2) must be accompanied by changes in other provisions of the Act has some currency. Professor Samuel Estreicher, for example, argues in favor of narrowing the definition of a "labor organization" under section 2(5). *See* Samuel Estreicher, *Labor Law Reform in a World of Competitive Markets*, 69 CHI.-KENT L. REV. 3, 35-46 (1993). Such change, however, must occur within the context of changes to other sections of the Act's provisions to ensure that employees' representational rights are not infringed. *See id.*

398. *See* Summers, *supra* note 86, at 148.

399. *See* Schwab, *supra* note 274, at 57.

400. "Humans can ignore anything, G.K. Chesterton observed, as long

such thing has been the Internal Labor Market characteristics of workplace cooperative efforts and the insight the characteristics can bring to our understanding of the problem. This Article begins to explore some implications of the ILM approach to workplace cooperative efforts.

The ILM analysis suggests three conclusions. First, the implementation of workplace cooperative efforts requires the employees involved to acquire firm-specific skills—skills that are not easily transferable to other employers. In this regard, workplace cooperative efforts represent a form of internal labor markets. Workplace cooperative efforts can be understood as a series of implicit or explicit agreements between employer and employee over the acquisition of some skills in exchange for a deferred benefit.

Once an ILM is established, both parties are in a position to engage in strategic or opportunistic behavior. Employers can terminate the employment relationship, while employees can engage in unproductive behavior that is difficult for the employer to detect. Workplace cooperative efforts are, however, a variant of implicit agreements that permits opportunistic employer behavior, but structurally reduces the opportunity for employee opportunistic behavior. The workplace cooperative effort framework prevents employee shirking, as the group itself becomes an enforcing mechanism. No countervailing pressure, however, exists for the employer. Under existing law, employers can terminate participatory programs without consideration for their employees' firm-specific investments. This scenario leads us to a second implication.

Workplace cooperative efforts are particularly problematic, not because they can assume representational forms that "fool" employees into believing that their interests have been adequately protected, but because of the incentives they create for employers to behave opportunistically. Any test devised to deal with the legality of cooperative efforts under sections 2(5) and 8(a)(2) of the NLRA must recognize these dynamics.

Finally, the analysis of sections 2(5) and 8(a)(2) from an ILM perspective suggests the following conclusions. The definition

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as the thing being ignored is big enough." Kohler, *supra* note 335, at 229.

of a labor organization under section 2(5) should be focused on the "dealing with" element. In particular, in the language of Board's *E.I. du Pont* decision, the inquiry should be on whether there has been a pattern or practice of employee proposals and management acceptance or rejection of such proposals, or a showing that the group existed for the purpose of such a pattern or practice. Properly interpreted, this standard allows the Board to bring within the scope of section 2(5) any cooperative effort in which firm-specific investments have or will be made. With respect to the question of domination and interference under section 8(a)(2), the ILM perspective suggests that the focus should be on the "continued existence" element. So long as the workplace cooperative effort's existence depends entirely on employer fiat, there will be a violation of the Act. Employers wishing to establish participatory programs conforming with section 8(a)(2) must provide employees with the power to oppose the termination of the programs, and the courts must be willing to enforce the "implicit" contracts resulting from these employment arrangements and provide relief for employees confronted by an employer's opportunistic behavior.