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## ENHANCING EMPLOYEE PRODUCTIVITY AFTER *ELECTROMATION AND DU PONT*

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American businesses face increased competition in the global market and actively seek new ways to boost productivity.<sup>1</sup> Over the past few decades, trends in academic research and literature have shifted from emphasizing employee control to promoting employee cooperation as the primary means of enhancing productivity.<sup>2</sup> Firms continue to experiment with work organization, compensation sys-

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1. See, e.g., Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation*, in UNIONS AND ECONOMIC COMPETITIVENESS 173, 191 (Lawrence Mishel & Paula B. Voos eds., 1992).

2. "Over the past decade, there has been a major shift in management philosophy and practice in many firms and other organizations from the old 'Theory X' military, chain of command model to 'Theory Y,' involving participative management and the use of employee involvement (EI) systems." John W. Kendrick, *Policy Implications of the Slowdown in U.S. Productivity Growth*, in PRODUCTIVITY GROWTH AND THE COMPETITIVENESS OF THE AMERICAN ECONOMY 75, 102 (Stanley W. Black ed., 1989). Cf. WILLIAM G. OUCHI, *THEORY Z: HOW AMERICAN BUSINESS CAN MEET THE JAPANESE CHALLENGE* (1981) (advocating adoption of Japanese participative management practices as a means to rejuvenate American business).

McAdams and Hawk summarized the shift:

In a traditional, hierarchical organization, the primary role of employees is to comply with direction. The newer approach realizes that we expect and, in fact, need our employees to be active participants in improving business performance. . . . These two mind-sets have very different implications for the way we think about people. The traditional mind-set stresses control issues, particularly cost control. It regards people as a cost of doing business — and costs are to be minimized. The emerging mind-set suggests that we view people as assets — and assets should be developed. Thus encouraging our employees' creativity and capabilities can be a strategic method for improving our competitive position.

tems, and labor relations in order to increase productivity and profitability.<sup>3</sup> Two devices have emerged and now proliferate: employee-participation plans (EPPs)<sup>4</sup> and performance-reward plans (PRPs).<sup>5</sup>

Businesses design EPPs primarily to promote employee-management communication, tap worker creativity, and enhance productivity and morale, most commonly through the establishment of committees consisting of managers and employees to assist in workplace decision-making.<sup>6</sup> PRPs, on the other hand, encourage the same behavior through a reward mechanism that links awards with

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JERRY L. McADAMS & ELIZABETH J. HAWK, CAPITALIZING ON HUMAN ASSETS 9 (1992).

3. Eaton & Voos, *supra* note 1, at 191; Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation*, in UNIONS AND ECONOMIC COMPETITIVENESS, *supra* note 1, at 247, 247-48.

4. EPPs include such plans denoted as employee involvement plans, work teams, quality control circles (QCs), joint labor-management cooperative committees, joint production teams, team systems, autonomous work groups, voluntary cooperative efforts, strategic participation, job enrichment, and quality of work life (QWL) programs. Eaton & Voos, *supra* note 1, at 176.

In general, EPPs involve superiors who share decision-making with their subordinates. John A. Wagner III & Richard S. Gooding, *Effects of Societal Trends on Participation Research*, 32 ADMIN. SCI. Q. 241, 241 (1987).

Approximately 80% of the Fortune 1000 firms use some sort of EPP. *NLRB Ruling Could Ultimately Force Corporations to Restructure Employee Involvement and Quality Circle Programs*, PR NEWswire, Dec. 21, 1992. EPPs are considered to be a solution to the cost, quality, and productivity problems plaguing American industry, and help companies compete in the global market. *Id.*

5. PRPs represent one of the most promising and popular compensation innovations in recent decades. See Randolph M. Hale, *The New Industrial Relations in a Global Economy*, 37 LAB. L.J. 539, 542 (1986). Gainsharing, profitsharing, and other productivity gainsharing techniques are popular academic topics. *Id.* Compensation theorists widely advocate PRPs. See, e.g., EDWARD E. LAWLER III, STRATEGIC PAY: ALIGNING ORGANIZATIONAL STRATEGIES AND PAY SYSTEMS (1990); JAY R. SCHUSTER, THE NEW PAY: LINKING EMPLOYEE AND ORGANIZATIONAL PERFORMANCE (1992).

PRPs have no standard definition, but they generally include: performance assessment at any particular level of the firm; inclusion of non-management employees; non-competitive, non-deferred rewards; and the use of clear, pre-announced performance-payout links, as opposed to managerial discretion. McADAMS & HAWK, *supra* note 2, at 15.

The most prominent PRP forms are gainsharing and non-deferred profitsharing plans. PRPs may also link compensation to measures other than productivity or financial performance, such as quality, safety, output/volume, cost reduction, attendance, sales/referrals, or project milestones. McADAMS & HAWK, *supra* note 2, at 50.

6. See, e.g., Eaton & Voos, *supra* note 1, at 173 (stating "many managers, labor

individual or work group performance.<sup>7</sup>

Many EPPs and PRPs, despite their diversity and lack of standard design, successfully boost employee productivity.<sup>8</sup> In a series of recent cases, however, the National Labor Relations Board (NLRB) renewed the controversy over the legality of EPPs and PRPs.<sup>9</sup> In *E.I. du Pont de Nemours & Co.*,<sup>10</sup> the Board held that PRPs designed and implemented by an employee committee at a union plant constitute an unfair labor practice.<sup>11</sup> In *Electromation, Inc.*,<sup>12</sup>

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leaders, and government officials have come to believe that tapping worker knowledge and energy is the key to overcoming our problems of competitiveness.”)

Employers may have darker motivations for installing EPPs as well, such as pre-empting union organizing campaigns. See Stephen I. Schlossberg & Miriam B. Reinhart, *Electromation and the Future of Labor-Management Cooperation in the U.S.*, 43 LAB. L.J. 608, 619-20 (1992) (observing “employers . . . speak the language of labor-management cooperation but concentrate real energy and commitment on the ugly principle of union-busting”); Bennet D. Zurofsky, *Everything Old Is New Again: Company Unions in the Era of Employee Involvement Programs*, 8 LAB. LAW. 381, 386 (1992) (stating “employee participation programs are nothing more than unilaterally created management vehicles for dealing with the issue of collective bargaining”). See also Eaton & Voos, *supra* note 1, at 181; John Schmidman & Kimberlee Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772, 772 (1984).

7. See generally McADAMS & HAWK, *supra* note 2. Gainsharing plans, for instance, specify a formula for splitting gains resulting from employee efforts. Dale Belman, *Unions, The Quality of Labor Relations, and Firm Performance*, in UNIONS AND ECONOMIC COMPETITIVENESS, *supra* note 1, at 41, 75 n.27.

8. See *infra* notes 43-51 (discussing the effectiveness of EPPs and PRPs). See also McADAMS & HAWK, *supra* note 2, at 10 (finding PRPs that used operational payout measures, such as productivity, provided a typical 200% return on payout to employers).

But see Wagner III & Gooding, *supra* note 4, at 241, 258 (citing studies yielding differing conclusions on EPP participation-productivity link, and concluding that results depend on methodology employed).

9. The business and legal media anxiously awaited the *Electromation* decision. See, e.g., John P. Furfaro & Maury B. Josephson, *Quality Circles*, N.Y. L.J., Dec. 6, 1991, at 3; Gene Koretz, *Worker Involvement: It Sounds Like a Good Idea, But . . .*, BUS. WK., Apr. 1, 1991, at 18; John S. McClenahan & William H. Miller, *NLRB Takes Measure of Quality Circles*, INDUS. WK., Nov. 4, 1991, at 84; Jeffrey C. McGuinness, *Blunting America's Competitive Edge; Will Labor-Management Cooperation be Ruled Illegal?*, INDUS. WK., Oct. 21, 1991, at 63; Randall Samborn, *Case Holds Key to U.S. Competitiveness; NLRB to Rule on Legality of Labor-Management Committees*, NAT'L L.J., Apr. 6, 1992, at 1; Kirk Victor, *Labor v. Management in 'Son of Sham'*, NAT'L L.J., Apr. 18, 1992, at 965.

10. 311 N.L.R.B. No. 88, 1993 N.L.R.B. LEXIS 637 (May 28, 1993) [hereinafter *du Pont*].

11. See *infra* notes 195-210 and accompanying text for a discussion of the *du Pont* case.

the NLRB ruled that under certain circumstances EPPs constitute labor organizations unfairly dominated by non-union employers.<sup>13</sup>

The *Electromation* and *du Pont* rulings have important implications for EPPs and PRPs.<sup>14</sup> While joint union-employer established EPPs and PRPs are legal,<sup>15</sup> traditionally non-unionized industries,

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12. 309 N.L.R.B. 990 (1992), *appeal docketed*, No. 92-4129 (7th Cir. Dec. 28, 1992) [hereinafter *Electromation*].

13. See *infra* notes 173-86 and accompanying text for a discussion of the *Electromation* case. The National Labor Relations Act governs employee-employer relationships. See 28 U.S.C. §§ 141-187 (1988).

14. PRPs are often designed and implemented similarly to EPPs via joint employee-management design teams. McADAMS & HAWK, *supra* note 2, at 38.

15. See Donna Sockell, *The Legality of Employee Participation Programs in Unionized Firms*, 37 INDUS. & LAB. REL. REV. 541, 542 (1984) (stating that “despite union objections, these programs seem to be thriving”).

While a supportive union is unlikely to bring an NLRA challenge against an EPP, a nonsupportive union may well contest the plan. Sockell argued that unionized employers may violate § 8(a)(5) if they bypass the bargaining agent or abrogate their duty to bargain collectively. *Id.* at 543. Section 8(a)(5) prohibits employers from bypassing recognized bargaining representatives in the discussion of topics subject to mandatory bargaining. 29 U.S.C. § 158(a)(5) (1988).

In *E.I. du Pont de Nemours & Co.*, 1989 N.L.R.B. LEXIS 736 (Dec. 22, 1989), the Administrative Law Judge (ALJ) found precisely this violation. *Id.* at \*73. Despite union objections, *du Pont* formed a “Design Team” to address and correct working conditions. The team proposed, *inter alia*, a PRP (“Accomplishment Awards Suggestion System”). *Id.* “By exhorting the Team to propose solutions to workplace problems, and by adopting them on the bargaining table, [du Pont] created and fostered [a labor organization] whose purpose and functions competed with those of the Union.” *Id.* The ALJ also indicated in dictum that Team consideration of a proposed “participative management” program (a hybrid EPP/PRP) would violate § 8(a)(5). *du Pont*, 1989 N.L.R.B. LEXIS at \*73. See also *Jafco*, a Div. of Modern Merchandising, Inc., 284 N.L.R.B. 1377, 1379 (1987) (holding employer’s unilateral implementation of “suggestion committees” illegally bypassed exclusive bargaining representative).

Unions can similarly block PRPs. In *Camvac Int’l Inc.*, 388 N.L.R.B. 816, 818 (1988), the NLRB found that the employer’s implementation of a profitsharing PRP shortly after a union’s demand for recognition violated § 8(a)(1) because it conferred a benefit without a persuasive business reason, and “failed to show that it would have announced implementation of the plan when it did had there been no union activity.” *Id.*

Unions, however, are often the initial proponents of EPPs. *Eaton & Voos*, *supra* note 1, at 173-74. Evidence also indicates that EPPs can flourish in union environments. Stephen I. Schlossberg & Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 3 LAB. LAW. 11, 11-12, 14-17 (1987) (recounting positive GM-UAW and Ford-UAW experiences); see also William E. Fulmer & John J. Coleman, Jr., *Do Quality-of-Work-Life Programs Violate Section 8(a)(2)?*, 35 LAB. L.J. 675, 682 (1984) (finding unions working successfully with management in QWL programs).

such as those in the service sector, now risk violating the NLRA when implementing EPPs and PRPs.<sup>16</sup> Many managers may erroneously assume the NLRA does not apply to non-union environments.<sup>17</sup> Thus, devices designed to boost productivity require a fresh evaluation. As one commentator noted, “[m]anagement and workers need clearly delineated standards within which to function in worker participation groups if this technique is to be effectively implemented and utilized.”<sup>18</sup>

This Note examines labor policy in its historical and contemporary context to discern the interests of management and employees, and to determine whether EPPs and PRPs require governmental protection. In the interest of productivity, this Note asserts that federal labor law should not view EPPs and PRPs as employer-dominated labor organizations under the NLRA. Part I examines the productivity crisis and the evolution of EPPs and PRPs. Part II discusses the purpose and history of the NLRA. Part III considers the interpretations of the NLRA and its impact on participation plans. Part IV analyzes policy options, and Part V concludes that EPPs and PRPs should not be subject to the restrictions imposed by the NLRA.

## I. THE PRODUCTIVITY CRISIS AND THE EVOLUTION OF THE PLANS

### A. *The Productivity Crisis*

Productivity growth is essential to the national economy.<sup>19</sup> On a

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It is unlikely, however, that unorganized employees will have the impetus to propose EPPs or PRPs. Particularly in non-unionized service sector firms, management takes the initiative. See Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1738 n.11 (1985) [hereinafter *Participatory Management*].

16. The post-*Electromation* decision in *Research Federal Credit Union*, 310 N.L.R.B. No. 13, 1993 N.L.R.B. LEXIS 15 (Jan. 8, 1993), which invalidated an employer's EPP, augers poorly for the non-unionized service sector. See *infra* notes 187-94 and accompanying text for a discussion of the *Research Federal Credit Union* case.

17. The NLRA does not distinguish between manufacturing and service employers. See NLRA § 2(2), 29 U.S.C. § 152(2) (1988). Non-union service firms are as vulnerable to charges of unfair labor practices as unionized manufacturing firms.

18. Michael S. Beaver, *Are Worker Participation Plans "Labor Organizations" Within the Meaning of Section 2(5)?: A Proposed Framework for Analysis*, 36 LAB. L.J. 226, 237 (1985).

19. PAUL KRUGMAN, *THE AGE OF DIMINISHED EXPECTATIONS: U.S. ECONOMIC*

macroeconomic level, national productivity growth raises living standards<sup>20</sup> and maintains national economic power.<sup>21</sup> During the 1950s and 1960s, productivity grew an average of 2.8% annually; since the 1970s, however, it has slowed to 1.2%.<sup>22</sup> The “productivity crisis”<sup>23</sup> is most apparent in the service sector.<sup>24</sup> Economists remain

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POLICY IN THE 1990s 17 (1990). “Productivity growth is the single most important factor affecting [the United States] economic well-being.” *Id.*

20. *Id.* at 10. Raising productivity is the only means by which to sustain long-term growth in living standards. *Id.* Krugman noted that this causal relationship is illustrated by comparing real consumption per capita with productivity growth in the United States: both are currently four times greater than in 1900. KRUGMAN, *supra* note 19, at 10.

Other economists agree. “Perhaps the most fundamental implication of the decline in productivity growth relates to our own standard of living. Increased productivity makes possible national economic growth and an improved individual standard of living.” Howard M. Leichter, *National Productivity: A Comparative Perspective*, in PRODUCTIVITY AND PUBLIC POLICY 49 (Marc Holzer & Stuart S. Nagel eds., 1984). See also WILLIAM J. BAUMOL ET AL., PRODUCTIVITY AND AMERICAN LEADERSHIP: THE LONG VIEW 24 (1989) (“[I]n the long run, productivity growth can make an enormous contribution to living standards, and [ ] there is no substitute for productivity growth in this respect”); see generally MARTIN M. BAILY & ALOK K. CHAKRABARTI, INNOVATION AND THE PRODUCTIVITY CRISIS 1-12 (1988).

21. KRUGMAN, *supra* note 19, at 12. Krugman stated:

Shifts in national power are, in the end, dominated by productivity. Since World War II, productivity growth in Britain has averaged about 1.5 percent a year; in Japan it has averaged 7 percent. Britain won the war, and Japan lost; yet Britain has become a third-rank power, while Japan is on the verge of becoming a first-rank one.

*Id.* See also Leichter, *supra* note 20, at 64-65 (comparing contemporary U.S. productivity problems with those of Britain in the early 20th century); Lester Thurow, *The Moral Equivalent of Defeat*, 42 FOREIGN POL’Y 114, 124 (1981) (inferring that U.S. economic problems, including slowed productivity growth, are the “moral equivalent of defeat. The United States has been defeated economically.”).

22. KRUGMAN, *supra* note 19, at 12. See also BAILY & CHAKRABARTI, *supra* note 20, at 1-2 (using output per hour of labor as a productivity measure, found productivity to grow 3.3% annually in 1948-65, but only 1.4% in 1965-85).

Since the publication of Krugman’s book, productivity growth for 1992 rose to a 2.7% annual rate, the largest growth in 20 years. See, e.g., *America the Super-Fit*, THE ECONOMIST, Feb. 13, 1993, at 69 (stating productivity grew 3% in the service sector). Accord Michael Prowse, *Productivity in U.S. Increased 2.7% Last Year*, FIN. TIMES, Feb. 5, 1993, at 5.

23. See generally BAILY & CHAKRABARTI, *supra* note 20. Cf. BAUMOL ET AL., *supra* note 20, at 81-82. Baumol stated:

The available data leave us with no clear and uniform productivity growth trends for the U.S. economy. . . . [but] [e]ven if the United States is suffering no slowdown relative to its past, other economies may be doing even better than that, and the competitiveness of [the U.S.] economy may thereby indeed be threatened.

undecided on the cause of the slowed growth,<sup>25</sup> but generally agree that the solution requires increasing worker capital, improving education, and reducing consumption.<sup>26</sup> The solution will require the attention of three actors: the federal government, labor, and management.<sup>27</sup>

The first actor, the federal government, benefits from higher productivity via increased tax revenues and lower trade deficits. While the government recognizes that the crisis exists, its principal response to date has been to form committees and issue reports.<sup>28</sup> No

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*Id.*

The financial press routinely refers to U.S. productivity woes as a "crisis." *See, e.g., Crashes Big and Small*, FIN. TIMES, Oct. 19, 1992, at 18; Karen DeWitt, *Education Lobby Getting Crowded*, N.Y. TIMES, Jan. 6, 1991, at 38; Gene Koretz, *No Service Sector Pain, No Productivity Gain*, BUS. WK., Jan. 21, 1991, at 20; *The Rewards of Failure*, FIN. TIMES, Feb. 19, 1992, at 18.

24. Koretz, *supra* note 23, at 20 (stating that the "U.S. productivity crisis is centered in the service sector;" manufacturing sector productivity rose 44% during the 1980s, while service sector productivity rose only 1.4%).

25. *See generally* BAILY & CHAKRABARTI, *supra* note 20, at 13-45 (reviewing various explanations; the authors conclude that as to labor, neither deterioration in work effort nor labor quality explains "weak productivity performance").

One scholar summarized that:

These . . . are the major explanations for the productivity slump: (1) excessive, counterproductive government regulations; (2) changes in the work force; (3) *increased service orientation of the U.S. economy*; (4) *decline in the work ethic*; (5) *worker resistance to innovative equipment and practices*; (6) poor management; (7) inadequate investment; (8) inadequate resources devoted to R&D; (9) government subsidization of "sunset" industries and lack of encouragement of "sunrise" industries; and (10) economic cycles. Although there are a few economists who are willing to cite one factor as the villain, most contend that a combination of these have contributed to our productivity problem.

Leichter, *supra* note 20, at 53-54 (emphasis added).

26. BAILY & CHAKRABARTI, *supra* note 20, at 15. *See generally id.* at 13-45; BAUMOL ET AL., *supra* note 20, at 251-82.

27. *See* JOHN T. DUNLOP, INDUSTRIAL RELATIONS SYSTEMS 17, 94 (1958). In this classic treatise, Dunlop identifies these actors and infers they share an underlying consensus that delineates and legitimizes their roles; this shared ideology stabilizes the system. *Id.* at 383. Conversely, any lack of shared consensus leads to change:

An industrial-relations system implies an inner unity and consistency, and a significant change in one facet of the context or the ideology may be expected to displace an old equilibrium . . . and to create new positions within the system and new rules.

*Id.* at 388.

28. Congress created the National Commission on Productivity in 1971. Pub. L. No. 92-210, § 4, 85 Stat. 753 (1971) (repealed 1975). This led to the establishment of



cohesive productivity policy has yet emerged.<sup>29</sup>

The second actor, labor, stands to benefit from higher productiv-

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the National Center for Productivity and Quality of Working Life (National Center) in 1975. 15 U.S.C. §§ 2401-2471 (1988). "Despite chronic inadequacy of funds, the National Center through its various incarnations managed to develop and disseminate information on labor-management cooperation as part of its broader program to improve private sector productivity." Ronald J. St. Cyr, *Worker Participation and Quality of Working Life at the Plant Level: American Experience and the Federal Role*, 35 LAB. L.J. 539, 542 (1984). President Carter established the National Productivity Council in 1978 to supersede the National Center. Exec. Order No. 12,089, 3 C.F.R. 246 (1978).

President Reagan established the National Productivity Advisory Committee in 1981 to provide advice on increasing national productivity. Exec. Order No. 12,332, 3 C.F.R. 198 (1982). Reagan also created the White House Conference on Productivity in 1982. Pub. L. No. 97-367, 96 Stat. 1761 (1982). See PRESIDENT'S COMM'N ON INDUS. COMPETITIVENESS, 2 GLOBAL COMPETITION: THE NEW REALITY 12-16, 139-60 (1985); REPORT OF THE WHITE HOUSE CONFERENCE ON PRODUCTIVITY (1984). In summary:

New forms of labor-management cooperation must be created . . . . If the National Labor Relations Board and the courts agree that such changes are prohibited by the Act, some changes in the basic labor laws may well be necessary that these innovations are not in violation of the [NLRA] . . . . Employee incentives must be strengthened so as to reward the efforts of individual employees and to highlight the linkages between pay and performance . . . . Work skills must be improved . . . .

*Id.*

Congress instituted the Malcolm Baldrige National Quality Award in 1987 to award companies that increased employee-employer communications in the pursuit of quality. 15 U.S.C. § 3711a (1988).

A more proactive approach surfaced when Congress passed the Labor-Management Cooperation Act of 1978, which directed the Federal Mediation & Conciliation Service to grant funds to support joint labor-management initiatives. 29 U.S.C. § 173 (1988). Joy K. Reynolds, *A Perspective on the Electromation Case from the U.S. Department of Labor*, 43 LAB. L.J. 397, 399 (1992).

The Department of Labor (DOL), which has long advocated joint efforts on the part of workers and employers, also commissioned studies. See Schlossberg & Fetter, *supra* note 15, at 13 (describing DOL efforts). DOL eschews taking an activist strategy because "a consensus on legislation or a change in statutory interpretation [can] not be dictated by the government, but need[s] to grow out of agreement by the parties." Reynolds, *supra* at 397.

Robert Reich, the new Secretary of Labor under the Clinton Administration, outlined a four-point agenda to address improving the quality of U.S. jobs. *Labor Department, Reich Outlines Four-Point Plan to Improve Quality of U.S. Jobs*, DAILY REP. EXEC., Jan. 8, 1993, at 5. The fourth point is to encourage "high performance," "family-friendly" work organizations. *Id.* "Reich also stressed the importance of worker participation in a joint effort to improve productivity and competitiveness and to make workplaces safer . . . . [N]o group is better able to spot efficiency and quality improvement than workers who are right there on the front line." *Id.*

29. Leichter, *supra* note 20, at 63. "[D]espite all the reports, media attention,

ity through higher wages and living standards. The extent to which it does so remains contingent upon its ability to bargain with management. The collective bargaining provisions of the NLRA provide organized employees with a potent weapon.<sup>30</sup> Non-organized employees must bargain with management on an individual basis.

For the third actor, management, improving productivity is one means of increasing profits. Even with technological innovation, employers aim to make workers more productive.<sup>31</sup> An employer can accomplish this through involving employees and communicating with them, either through union or non-union conduits. For a non-union firm, however, encouraging union activity runs counter to traditional American managerial philosophy; unions substantially reduce profits.<sup>32</sup> Without a union, however, the employer may be

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and national agonizing, no administration has yet proposed a productivity policy.”  
*Id.*

30. NLRA § 7(a), 29 U.S.C. § 157(a) (1988) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protections, and shall also have the right to refrain from any or all such activities to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

NLRA § 9(a), 29 U.S.C. § 159(a) (1988) provides:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive* representatives of all the employees in such unit for the purposes of collective bargaining in respect to pay, wages, hours of employment, or other conditions of employment . . .

(emphasis added). Thus, the NLRA provides a right to collectively bargain and requires employers to deal exclusively with the bargaining representative. For an analysis of the resulting “Exclusivity Doctrine,” see Sockell, *supra* note 15, at 551.

31. See St. Cyr, *supra* note 28.

The persistent slowdown in the rate of productivity growth starting in the mid-1960s, management’s uncertainty about new technology and how to handle it, the rising demands from consumers for better product quality to offset inflationary price rises, and international competition also impelled management to look at how it produced and where it could improve.

*Id.* at 541.

32. Studies show that unionized firms within certain industrial sectors earn lower rates of profit than non-unionized firms. See John T. Addison & Barry T. Hirsch, *Union Effects on Productivity, Profits & Growth: Has the Long Run Arrived?*, 7 J. LAB. ECON. 72, 95 (1989) (finding that “evidence points unambiguously to lower profitability under unionism;” the authors conclude that “reductions in profitability seem likely to result from a combination of union wage increases and rather small (and possibly negative) union effects of productivity”); Belman, *supra* note 7, at 62;

left without a known mechanism with which to interact with its most important asset: its employees.<sup>33</sup> The need for both a communication device and productivity gains led to the adoption of EPPs and PRPs.<sup>34</sup>

### B. *Conceptual Foundations of EPPs and PRPs*

Employers implement EPPs and PRPs to increase profitability through improved worker productivity.<sup>35</sup> For instance, employees

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Richard Freeman, *Is Declining Unionization of the U.S. Good, Bad, or Irrelevant?*, in UNIONS AND ECONOMIC COMPETITIVENESS, *supra* note 1, at 161. See generally BARRY T. HIRSCH & JOHN T. ADDISON, *ECONOMIC ANALYSIS OF UNIONS* 208-15 (1986).

Management is also concerned with maximizing stockholder wealth in conjunction with profitability. Analysis of unanticipated changes in stock prices can also be viewed as measuring unionization effects on profitability. One study shows that unionization depresses stock prices. Richard S. Ruback & Martin B. Zimmerman, *Unionization and Profitability: Evidence from the Capital Market*, 92 J. POL. ECON. 1134, 1155-56 (1984) (showing, *inter alia*, that during union organizing campaigns, stock prices drop an average of almost 4%).

For a summary and criticism of traditional economic analysis of labor unions, see Kenneth G. Dau-Schmidt, *A Bargaining Analysis of American Labor Law and the Search for Bargaining Equity and Industrial Peace*, 91 MICH. L. REV. 419 (1992).

33. In anticipation of the *Electromation* decision, Prof. Morris wrote:

[S]omething important is now needed to create and sustain a feeling of mutual trust and respect between employees and their company. A company needs a believable mechanism with which to conduct a meaningful dialog with its employees. But because it became fashionable in recent years for employers to operate in a union-free environment, many formerly unionized companies in America are now discovering . . . that they threw out the baby with the bath. . . .

The business community's agonized plea to the Labor Board in *Electromation* [to condone EPP committees] may in reality be a Freudian cry for help.

Charles J. Morris, *National Labor Policy: Worker Participation and the Role of the NLRB*, DAILY LAB. REP., Mar. 4, 1992, at E2. Zurofsky argues that EPPs are a means by which management can enjoy all the benefits of collective bargaining without having a powerful bargaining partner. Zurofsky, *supra* note 6, at 387.

Eaton and Voos found that EPPs were more successful in union environments because of the institutionalized communication devices that unions offer. Eaton & Voos, *supra* note 1, at 175. Union workers have greater job security, and are thus more likely to speak up without fear of management retaliation. A union's "collective voice" also allows workers to directly influence the design and implementation of EPPs. *Id.* at 175. Further, "[u]nion workplaces possess — and nonunion workplaces lack — institutions for serious productivity bargaining." *Id.* at 191.

34. For a brief history of EPPs and PRPs, see Eaton & Voos, *supra* note 1, at 180-81. See also George Strauss & Eliezer Rosenstein, *Worker Participation: A Critical View*, 9 INDUS. REL. 197, 200-04 (1970) (tracing historical roots of EPPs).

35. McAdams and Hawk found that of 15 potential reasons for implementing PRPs, "improving business performance" was the most prevalent. McADAMS &

assigned to repetitive tasks become alienated and particularly difficult to motivate.<sup>36</sup> The conceptual foundation of EPPs is that increasing employee motivation heightens productivity. This model assumes that the primary motivation to work is self-gratification, not merely compensation,<sup>37</sup> and that employees become motivated if they participate, are involved, or have "ownership" in their tasks. Thus, involving employees strengthens morale, makes them more productive, increases job satisfaction, and generates profit for the firm.<sup>38</sup>

The PRP model is conceptually similar to the EPP, but differs because it assumes reward substantially motivates employees.<sup>39</sup> If employees have a direct financial stake in company performance, they will be more motivated to be productive on the company's behalf.<sup>40</sup> Thus, PRPs typically link compensation to either a productivity or financial-performance measure.<sup>41</sup> PRPs, unlike EPPs, provide direct monetary rewards to employees for their contributions toward improving productivity.<sup>42</sup>

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HAWK, *supra* note 2, at 30. "Apparently, PRPs are valued as business strategies with the expectation that they will contribute to business results." *Id.*

36. BARBARA GARSON, *ALL THE LIVELONG DAY* at x-xi (1975). Garson observed:

Many assembly-line workers deliberately slow their pace from time to time and watch the pieces pile up. Sometimes this is for revenge against the company that "treats us like machines," "uses us like tools." More often it's just for a break, a chance to talk, kid around, take a drink of water. But the most common motive is one that I hadn't expected. . . . [T]he most dramatic thing I found was quite the opposite of nonco-operation [sic]. *People passionately want to work.*

*Id.*

37. For an overview of employee motivation theories, see GREGORY B. NORTHCRAFT & MARGARET A. NEALE, *ORGANIZATIONAL BEHAVIOR: A MANAGEMENT CHALLENGE* 132-75 (1990).

38. See Fulmer & Coleman, *supra* note 15, at 675-76 (citing QWL definitions and goals). See generally H. Peter Dachler & Bernhard Wilpert, *Conceptual Dimensions and Boundaries of Participation in Organizations: A Critical Evaluation*, 23 *ADMIN. SCI. Q.* 1, 8-9 (1978) (reviewing literature studying linkage between morale and productivity); Richard E. Walton, *Work Innovations in the U.S.*, *HARV. BUS. REV.*, July-Aug. 1979, at 88.

39. See generally NORTHCRAFT & NEALE, *supra* note 37.

40. See, e.g., NORTHCRAFT & NEALE, *supra* note 37 (couching this concept in language such as "aligning the incentives of employees with the company.").

41. McADAMS & HAWK, *supra* note 2, at 55.

42. See generally BRIAN GRAHAM-MOORE & TIMOTHY L. ROSS, *GAINSHARING: PLANS FOR IMPROVING PERFORMANCE* (1990).

### C. Effectiveness of EPPs and PRPs

Studies show that EPPs generally boost productivity.<sup>43</sup> Specific results depend on the organizational culture of the firm.<sup>44</sup> When studies find no EPP productivity gains, methodological problems in the study may exist.<sup>45</sup> PRPs are also effective. The recent Consortium for Alternative Reward Strategies study<sup>46</sup> indicates that PRPs positively impact business performance.<sup>47</sup> The study found that a task force or design team, often a joint employee-management committee, develops the PRP.<sup>48</sup> Plans designed by a task force yield better results than those mandated by management.<sup>49</sup> In other words, the EPP-style task force component of PRPs enhances productivity under PRPs. Other studies indicate that among PRPs, gainsharing plans positively impact productivity more than profit-sharing plans.<sup>50</sup> Thus, the studies indicate that to improve produc-

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43. See, e.g., Harry C. Katz et al., *Industrial Relations Performance, Economic Performance, and QWL Programs: An Interplant Analysis*, 37 *INDUS. & LAB. REL. REV.* 3, 3-17 (1983) (finding that EPPs and PRPs improve economic performance of unionized firms); Richard D. Rosenberg & Eliezer Rosenstein, *Participation and Productivity: An Empirical Study*, 33 *INDUS. & LAB. REL. REV.* 355, 367 (1980) (finding one EPP to successfully improve productivity); Schlossberg & Fetter, *supra* note 15, at 14 n.7 (1986) (citing study by Office of Economic Research, New York Stock Exchange, *People and Productivity: A Challenge to Corporate America*, Nov. 1982, at 24, 40).

44. GARY J. MILLER, *MANAGERIAL DILEMMAS: THE POLITICAL ECONOMY OF HIERARCHY* 228 (1992) (asserting theory that work group strategies that flounder do so because management fails to make credible commitments to group autonomy).

45. Wagner III & Gooding, *supra* note 4, at 241, 258 (citing studies yielding differing conclusions on participation-productivity link, and concluding that results depend on methodology employed).

46. The Consortium for Alternative Reward Strategies Research (CARS) study is reported in McADAMS & HAWK, *supra* note 2. The CARS database includes extensive information on 432 PRPs. *Id.* at 17.

47. McADAMS & HAWK, *supra* note 2, at 80. The most pronounced effect of a PRP on an organization is increased communication. *Id.* Of all plans, 59% of the survey participants reported that management is either very satisfied or satisfied with their PRP. *Id.* at 78. The survey did not measure employee satisfaction. *Id.*

48. McADAMS & HAWK, *supra* note 2, at 38. Eighty percent of the plans surveyed used task force/design teams, while twenty percent were management mandated. One-third of the plans that used joint employee-management task forces had their members chosen by management. *Id.*

49. McADAMS & HAWK, *supra* note 2, at 38. There is no statistically significant difference in plan results, however, between joint employee-management committees and management-only committees. *Id.*

50. Eaton & Voos, *supra* note 1, at 176-79. In analyzing General Accounting Office data, Eaton and Voos found that profitsharing is more prevalent in nonunion-

tivity, PRPs should tie compensation to a productivity measure, and involve employees and management in designing plans and setting baselines. This course of action, however, by a non-unionized firm constitutes an unfair labor practice under *Electromation* and *du Pont*.<sup>51</sup> These NLRB decisions stand as barriers to employee productivity improvement.

## II. HISTORY AND PURPOSE OF THE NLRA

Productivity did not concern NLRA sponsor Senator Robert F. Wagner in 1935. Instead, minimizing "industrial strife"<sup>52</sup> and "economic warfare"<sup>53</sup> were paramount. The industrial relations landscape of the 1930s resembled a battleground.<sup>54</sup> The Wagner Act sought to promote bargaining equity between employees and employers and reduce union recognition disputes.<sup>55</sup> Increasing the bargaining power of workers through collective bargaining provided the means to accomplish these goals.<sup>56</sup>

Senator Wagner's bill targeted businesses that created employer-

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ized settings, while gainsharing is equally prevalent in both unionized and nonunionized firms. *Id.* at 180. Eaton and Voos stated:

Gainsharing tends to be preferred by unions over profitsharing partially because it allows more worker control over the costs included in the bonus formulae and the resulting payout when productivity rises. Profits in contrast are often viewed as subject to too much manipulation by management accounting practices.

*Id.* at 184. Further, "[t]here is little evidence that profit-sharing . . . is particularly effective in motivating employees to greater performance." *Id.* at 189.

E.I. du Pont de Nemours instituted a widely-publicized "incentive pay" (profit-sharing) program in 1987, and rescinded it because it failed in 1992. See MILLER, *supra* note 44, at 126-27 (discussing the history and analysis of the du Pont plan).

51. See *infra* notes 173-210 and accompanying text for a discussion of cases holding that management-implemented plans constitute an unfair labor practice.

52. See S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300, 2300 (1959) [hereinafter 2 NLRB] (stating primary objective is to promote industrial peace).

53. See 78 CONG. REC. 4229 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 22, 24 (1959) (article by Sen. Wagner) [hereinafter 1 NLRB].

54. See generally JOHN A. FOSSUM, LABOR RELATIONS 29-59 (1979).

55. See 2 NLRB, *supra* note 52, at 2300-03.

56. Section 1(b) of the NLRA provides:

The denial of some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or

dominated “company unions” to circumvent the earlier National Industrial Recovery Act’s collective bargaining provisions.<sup>57</sup> When an employer organized its employees, it created a “company union”<sup>58</sup> which it could effectively control if allowed to “sit on both sides of the bargaining table.”<sup>59</sup> Prior to the passage of the NLRA, company unions proliferated.<sup>60</sup> In the NLRA, Congress outlawed com-

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the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce . . .

The inequality of bargaining power . . . tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. . . .

NLRA § 1(b), 29 U.S.C. § 151(b) (1988).

57. See 2 NLRB, *supra* note 52, at 2321, 2333-35 (statement of Sen. Wagner); 79 CONG. REC. 7565, 7570 (1935) (statement of Sen. Wagner), *id.* at 2321, 2324 (stating that “contrary to the argument that the company union has the virtue of insuring industrial peace, we know that this open entry of employers into the field of active organization of workers promotes strife and discord.”).

But see Senator Wagner’s earlier comments, 1 NLRB, *supra* note 53, at 23 (“The company union has improved personal relations, group welfare activities, discipline, and other matters . . . But . . . [w]ithout wider areas of cooperation among employees, there can be no protection against the nibbling tactics of the unfair employer”).

58. Sen. Wagner defined “company union” as an employer-dominated union, generally initiated by the employer, which arbitrarily restricts employee cooperation to a single employer unit and which habitually allows workers to deal with their employer only through representatives chosen from among his employees.

1 NLRB, *supra* note 53, at 22-23. Sen. Wagner referred to a 1933 study of mining and manufacturing firms showing that 9.3% of workers were unionized, 45% were company unionized, and 45.7% were nonunionized. *Id.*

Rep. Boland described “company-dominated unions” as:

. . . one which is lacking in independence, and which owes a dual obligation to employers and employees. It is an agent which possesses two masters. It attempts to sell the labor of its employee members to the employer member, and at the same time it receives compensation from the employer. It acts through representatives who are in the employ of the company, who are subject to discharge and discipline by the management at any time, who purport to represent employees and receive at the same time compensation from the employer for their activities presumably in the employee’s behalf. To require an employee or one seeking employment to join such a union is to nullify the rights of self-organization and to make a mockery of collective bargaining.

2 NLRB, *supra* note 52, at 2430, 2439.

59. See *NLRB v. Stow Mfg. Co.*, 217 F.2d 900, 904 (2d Cir. 1954) (citing *American Enka Corp. v. NLRB*, 119 F.2d 60, 63 (4th Cir. 1941)).

60. *Labor Pains in Indiana*, DETROIT NEWS, Aug. 30, 1992, at D1. “Company unions were a fact of industrial life in the New Deal 1930s; employers resisting independent trade unions created internal groups that, at their peak, accounted for an estimated 40-60% of all union membership.” *Id.*

pany unions by passing sections 2(5)<sup>61</sup> and 8(a)(2),<sup>62</sup> which prohibit employer influence over broadly defined “labor organizations.”<sup>63</sup> Employee free choice was the ultimate goal of the NLRA.<sup>64</sup>

The NLRA encouraged unionization and collective bargaining activities through adversarial communications as a means to empower employees.<sup>65</sup> While the NLRA did not intend to outlaw all interaction between employees and employers,<sup>66</sup> it nonetheless forces employees to choose between an outside labor organization and no representation at all because it forbids employees to participate in management decision-making through cooperative entities.<sup>67</sup>

After passage of the NLRA, company unions disappeared and independent unions thrived.<sup>68</sup> By 1947, however, Congress thought unions had grown too strong and collective bargaining provided too much economic power over employers.<sup>69</sup> The Taft-Hartley Act

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61. NLRA § 2(5), 29 U.S.C. § 152(5) (1988); see *infra* note 81 and accompanying text for the NLRA definition of a “labor organization.”

62. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988); see *infra* note 128 and accompanying text for the full text of § 158(a)(2).

63. See *infra* notes 80-217 and accompanying text for a discussion of the NLRA and employee participation plans.

64. Schmidman & Keller, *supra* note 6, at 778 (citing 29 U.S.C. §§ 151, 157 (1970)).

65. See NLRA § 1, 29 U.S.C. § 151 (1988).

66. Section 8(a)(2) also provides that “an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.” See *infra* note 128 and accompanying text for the full text of § 8(a)(2). The bill which I am introducing today forbids any employer to foster or participate in or influence any organization which deals with problems that should be covered by a genuine labor union. At the same time it does not prevent employers from forming or assisting associations which exist to promote the health or general welfare of workers, to provide group insurance, or for other similar purposes. *Employer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism, but they should not be allowed to supplant or destroy it.*

1 NLRB, *supra* note 53, at 16 (statement of Sen. Wagner) (emphasis added).

See *infra* notes 80-217 and accompanying text for an analysis of major Supreme Court cases revealing that the Court applies § 8(a)(2) broadly and enforces a strict separation between management and labor.

67. See Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021, 2022 (1987).

68. See FOSSUM, *supra* note 54.

69. The findings and policy section of the Taft-Hartley Act amended § 1 of the NLRA to include:

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or necessary effect of bur-



sought to restore equilibrium by regulating union activity.<sup>70</sup> The 1959 Landrum-Griffin Act sought to protect rights of individuals by regulating internal union activities.<sup>71</sup>

In interpreting the NLRA, the Supreme Court explicitly recognizes the adversarial model.<sup>72</sup> Several federal courts of appeal challenged the adversarial model in cases such as *NLRB v. Streamway*

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dening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

NLRA § 1, 29 U.S.C. § 151 (Supp. 1992).

70. Labor Management Relations Act (Taft-Hartley), ch. 120, 61 Stat. 136 (1947). The House version of the Hartley Bill contained a new § 8(d)(3) which eliminated as an unfair labor practice:

(3) Forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under § 9.

H.R. 3020, 80th Cong., 1st. Sess. 26 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 158, 183 (1948). The section failed to become part of the final bill.

71. Labor-Management Reporting and Disclosure Act (Landrum-Griffin) 73 Stat. 519 (1959). Title I of the Landrum-Griffin Act provides union members with a Bill of Rights. *Id.* at secs. 101-05. Title V imposes a fiduciary duty on union officials to employee members. *Id.* at sec. 501.

72. *See, e.g., NLRB v. Yeshiva Univ.*, 444 U.S. 672, 680 (1980) (stating NLRA was “intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry”); *NLRB v. Insurance Agents Int’l Union*, 361 U.S. 477, 488 (1960) (“[t]he parties . . . proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest”); *Emporium Capwell v. Western Addition Community Org.*, 420 U.S. 50, 62 (1957) (noting that national labor policy was designed to “minimiz[e] industrial strife” by encouraging collective bargaining); *Packard Motor Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting) (criticizing decision of Court finding foremen were employees under NLRA because it would unite management and labor against shareholders, rather than keep management and workers “separate factions in warring camps”).

*Division of Scott & Fetzer*,<sup>73</sup> which adopted what one commentator refers to as the “enlightened” approach to modern industrial relations.<sup>74</sup> The *Electromation* decision, however, indicates that the NLRB is still reluctant to use a cooperative interpretation of the NLRA because it is inconsistent with the Act’s legislative intent.<sup>75</sup>

Given the combative nature of management and labor in the 1930s, it is understandable that an adversarial model of labor relations evolved.<sup>76</sup> Most did not foresee a future of employee-management cooperation in a global economy and the resulting benefit to both sides.<sup>77</sup> Commentators question whether an adversarial model still applies, and assert that a cooperative model is more appropriate.<sup>78</sup> Thus, commentators criticize the literal interpretation of sec-

73. 691 F.2d 288 (6th Cir. 1982); see *infra* notes 101-04, 122-25 and accompanying text for a discussion of *Streamway*.

74. Martin J. Klaper, *An ‘Enlightened View’ of the Employee Committees Under the Taft-Hartley Act*, 9 EMPLOYEE REL. L.J. 474, 475 (1983).

75. *Electromation, Inc.*, 309 N.L.R.B. 990, 996 n.24 (1992). See *infra* notes 211-17 and accompanying text for a discussion of the practical implications of *Electromation*.

76. The adversarial model assumes:

There exists an inherent conflict of interest between employers and employees; that this conflict leads to hostility; that employers wish to subvert the interest of their employees; that no informed employee would align himself with his employer; and that any organization of employees in which management plays a part is thus necessarily a fraud and contrary to the employees’ best interests.

Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510, 515 (1973) [hereinafter *New Standards*].

77. *Labor Pains in Indiana*, *supra* note 60. See also David H. Brody, Special Project, *The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act*, 41 VAND. L. REV. 545, 566 (1988). Brody stated:

The only cooperation envisioned by the drafters of the NLRA was cooperation among labor itself. Cooperation between management and labor would be acceptable only at a later stage of employee organization development when employee organizations would be independent and strong enough to choose freely between cooperation and contention.

*Id.* at 573. See also Schlossberg & Fetter, *supra* note 15, at 17 (stating “[t]hus, after years of adversarial relations, many employers and unions . . . have decided to abandon traditional confrontational attitudes to try working together to increase productivity and quality for the company and improve the quality of work life for the employees.”).

78. See, e.g., Clarke, *supra* note 67, at 2038-49. But see Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 550 (1986) (arguing that cooperative models undermine NLRA ideals of self-association and private ordering); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National*

tions 2(5) and 8(a)(2) as too inflexible for current economic realities and a less hostile industrial relations climate.<sup>79</sup>

### III. THE NLRA AND EMPLOYEE PARTICIPATION PLANS

The operation of an EPP or PRP may constitute an unfair labor practice if the plan falls within the NLRA's definition of a "labor organization" and the employer dominates or assists the plan. Where the employer merely assists or supports an employee group, courts will issue a cease and desist order against management. When domination occurs, however, an order disestablishing the organization is appropriate.<sup>80</sup>

#### A. Labor Organizations

The NLRA defines a "labor organization" as:

[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.<sup>81</sup>

Congress' language including "any organization of any kind" necessarily anticipates broad coverage.<sup>82</sup> Thus, labor organizations include more than just "unions." Determining whether a plan falls within the statutory definition of a labor organization requires completion of three analytical tests: subject matter (i.e., is the commit-

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*Labor Relations Act*, 96 HARV. L. REV. 1662, 1673-80 (1983) (same) [hereinafter *Collective Bargaining*].

79. E.g., Clarke, *supra* note 67, at 2022; Charles B. Craver, *The NLRA at Fifty: From Youthful Exuberance to Middle-Aged Complacency*, 36 LAB. L.J. 604, 605 (1985); Schlossberg & Fetter, *supra* note 15, at 38-39. "[I]t is difficult to justify restricting representation to a form that was designed for industrial workers, in an economy where three of four jobs are nonindustrial." Clarke, *supra* note 67, at 2045.

80. *NLRB v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 270-71 (1944); *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 250 (1939) (stating "[D]isestablishment of a bargaining unit previously dominated by the employer may be the only effective way of wiping the slate clean and affording the employees an opportunity to start afresh in organizing for the adjustments of their relations with the employer"); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 542-43 n.5 (6th Cir. 1984).

81. NLRA § 2(5), 29 U.S.C. § 152(5) (1988).

82. See 2 *NLRB*, *supra* note 52, at 2300, 2306 (using intentionally broad language to ensure protection under § 8).

tee discussing section 2(5) topics?); structure (i.e., are employees participating in a representative capacity?); and function (i.e., are employees "dealing with" the employer? Does the committee make only recommendations to management, or has management delegated authority to make decisions?).<sup>83</sup> If all three tests are met, then the committee is a labor organization, although the decisions do not always reflect a thorough consideration of the structure test.

### 1. Subject Matter Test

Under the subject matter test, the inquiry is whether the plan exists to address "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>84</sup> Discussion of any one of these individual topics, typical of collective bargaining negotiations, satisfies this threshold test.<sup>85</sup> "Grievances"<sup>86</sup> and "conditions of work"<sup>87</sup> are the broadest categories.

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83. Commentators generally agree that these three tests, or slight variations therein, are applicable in determining whether a committee constitutes a "labor organization" under § 2(5). See Beaver, *supra* note 18, at 228 n.6; Raymond L. Hogler, *Employee Involvement Programs and NLRB v. Scott & Fetzer Co.: The Developing Interpretation of Section 8(a)(2)*, 35 LAB. L.J. 21, 24 (1984); Charles C. Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 SYRACUSE L. REV. 809, 813-14 (1977); Barbara A. Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the NLRA*, 38 LAB. L.J. 206, 211 (1987); Barry A. Macey, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?*, 49 IND. L.J. 516, 521 (1974); Kent F. Murrmann, *The Scanlon Plan Joint Committee and Section 8(a)(2)*, 31 LABOR L.J. 299, 301-03 (1980); *Participatory Management*, *supra* note 15, at 1744; Sockell, *supra* note 15, at 547.

See generally W.J. Dunn, Annotation, *What is a "Labor Organization" Within the Provisions of Federal Labor Relations Act § 8(a)(2) Making it Unfair Labor Practice for Employer to Interfere with Labor Organization*, 51 A.L.R.2d 1276 (1957).

84. NLRA § 2(5), 29 U.S.C. § 152(5) (1988).

85. UARCO, Inc., 286 N.L.R.B. 55, 75 (1987) (stating "it is well settled that the phrasing of the statutory definition is in the disjunctive. Accordingly, 'dealing with' an employer concerning one (or more) of the matters enumerated" satisfies the test).

86. See *NLRB v. Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807, 810 (3d Cir. 1967) (holding that a committee which discussed only grievances met subject matter test); *NLRB v. Jas. H. Matthews & Co.*, 156 F.2d 706, 707-08 (3d Cir. 1946) (holding that a committee designed to discuss and make recommendations on production problems became a labor organization when it also discussed pay, hours, profitsharing, scheduling, and benefits).

87. See, e.g., *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414, 419 (3d Cir. 1972) (citing evidence that employee committee discussed sanitary conditions, ventilation,

EPPs routinely discuss “conditions of work” when considering means of improving productivity.<sup>88</sup> PRP design or reassessment teams necessarily discuss similar “conditions of work” as well as wages, compensation, or “benefits.”<sup>89</sup> Thus, EPPs and PRPs fall squarely within the subject matter test for labor organizations under section 2(5).

## 2. Structure Test

Labor organization status also requires that employees participate in a representative, rather than an individual, capacity.<sup>90</sup> In determining the representational character of employee involvement,

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and fringe benefits as factors considered in determining labor organization status); UARCO, Inc., 286 N.L.R.B. 55, 60, 74-76 (1987) (finding discussion of, *inter alia*, seniority policy and parking lot were “conditions of employment”); Ona Corp., 285 N.L.R.B. 400, 402, 405-06 (1987) (holding that discussion of breaktimes, vacation time, telephone usage, shift preferences, and safety apparel related to conditions of work).

88. See *supra* note 4 and accompanying text for a discussion of EPPs.

89. See *supra* note 5 and accompanying text for a discussion of PRPs. The NLRB construes § 2(5) “wages” to encompass not only hourly remuneration but other compensation and benefits as well. See, e.g., Postal Service, 302 N.L.R.B. 767, 776 (1991).

90. Section 2(5) requires that “employees” participate. Section 2(3) states: The term “employee” shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . or by any other person who is not an employer as herein defined. NLRA § 2(3), 29 U.S.C. § 152(3)(1988). Supervisors and confidential or managerial personnel are not statutory employees. Section 152(11) states:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. NLRA § 2(11), 29 U.S.C. § 152(11) (1988).

Managerial employees present definitional problems. See, e.g., NLRB v. Yeshiva Univ., 444 U.S. 672, 686 (1980) (finding faculty members to be managerial employees not covered by Act); NLRB v. Bell Aerospace, 416 U.S. 267, 289 (1974) (same). See generally David M. Rabban, *Can American Labor Law Accommodate Collective Bargaining by Professional Employees?*, 99 YALE L.J. 689 (1990); David M. Rabban, *Distinguishing Excluded Managers from Covered Professionals Under the NLRA*, 89 COLUM. L. REV. 1775 (1989).

By emphasizing participative decision-making, “[m]any of the most promising experiments in labor-management cooperation deliberately set out to blur distinctions between manager and worker.” Schlossberg & Fetter, *supra* note 15, at 21. See also Lee, *supra* note 83, at 206; Walton, *supra* note 38, at 88.

four factors are considered: "the function of the group; the form of the plan under which the group exists; the employer's intent in forming the group; and the employees' perception of the group."<sup>91</sup> In general, courts consider these factors in context, outside the prescriptions of *per se* applications.<sup>92</sup>

Under the group function prong of the structure test, the function of the group may indicate its representational capacity. Representational capacity has been found when the group presents employee views and makes recommendations to management,<sup>93</sup> presents other employees' grievances,<sup>94</sup> or even decides what issues should be submitted to all employees for a vote.<sup>95</sup> Nonrepresentational functions have been found when a group merely provides employee feedback to management or disseminates management information to employees.<sup>96</sup>

The group form prong of the structure test examines the composition, selection, and organization of the group.<sup>97</sup> For instance, the absence of formal components such as a constitution, bylaws, or elected officers has been held to be immaterial to finding organizational status.<sup>98</sup>

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91. Beaver, *supra* note 18, at 230.

92. *Id.* at 233.

93. E.I. du Pont de Nemours & Co., 1989 N.L.R.B. LEXIS 736, at \*44-45 (1989) (finding by ALJ that Design Team whose members identified workplace problems and devised solutions in form of proposals to management inferred representational capacity); Ferguson-Lander Box Co., 151 N.L.R.B. 1615, 1620 (1965) (holding committee recommendations regarding vacation policy infers representation).

94. NLRB v. Thompson Ramo Wooldridge, Inc., 305 F.2d 807, 810 (7th Cir. 1962) (finding employee committee whose members presented grievances as representatives of other employees was labor organization); Hammond Organ Co., 149 N.L.R.B. 997, 1004 (1964) (holding consideration of other grievances constitutes representation).

95. Geauga Plastics Co., 166 N.L.R.B. 486, 491 (holding employee plant committee that decided which issues should be submitted to employees was unlawfully dominated), *enforced*, 404 F.2d 1382 (6th Cir. 1968), *cert. denied*, 395 U.S. 944 (1969).

96. Fiber Materials, Inc., 228 N.L.R.B. 933, 941 (1977) (finding employer's discussion and explanation of fringe benefit policy with selected employees, not involving negotiation or airing of grievances, was not "representational"). *But see* Ace Mfg. Co., 235 N.L.R.B. 1023, 1030 (1978) (holding that employee feedback concerning working conditions lead to reasonable inference that such communications would be conducive to a representative discussion that constitutes "dealing").

97. Beaver, *supra* note 18, at 231.

98. NLRB v. Clapper's Mfg., Inc., 458 F.2d 414, 418 (3d Cir. 1972); NLRB v.

Under the employer intent prong of the structure test, the inquiry is whether the employer attempted to establish an employee committee as a means to thwart a union organizing drive. If so, the NLRB and the courts routinely and summarily conclude that the committee is representational in nature.<sup>99</sup> An employer's knowledge regarding union organizational activities is thus relevant in determining the representational capacity of the committee supposedly formed to deter union activity.<sup>100</sup>

The final factor considered as part of the structure test is employee perception. In *NLRB v. Streamway Division of Scott & Fetzer*,<sup>101</sup> the Sixth Circuit found that the employees did not consider the committee in question to represent anyone.<sup>102</sup> This lack of employee perception of representational capacity was a substantial factor in reversing the NLRB's finding of labor organization status.<sup>103</sup> Few courts include this factor in analysis of a committee's

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Ampex Corp., 442 F.2d 82, 84 (7th Cir.), *cert. denied*, 404 U.S. 939 (1971); Pace-maker Corp. v. NLRB, 260 F.2d 880, 883 (7th Cir. 1958).

99. Lawson Co., 267 N.L.R.B. 463, 472 (1983) (finding that employer's "sales assistant committee" formed in response to unionization drive was a labor organization), *enforced*, 753 F.2d 471, 477 (6th Cir. 1985); Classic Indus., Inc. v. NLRB, 667 F.2d 205, 208 (1st Cir. 1981) (foregoing labor organization analysis entirely in light of representational nature of "shop committee" and ample evidence of anti-union animus).

100. *E.g.*, Hasa Chem., Inc., 235 N.L.R.B. 903, 909 (1978). *Cf.* NLRB v. Streamway Div. of Scott & Fetzer, 691 F.2d 288, 295 (6th Cir. 1982) (considering as a factor that the employee committee was established after one unsuccessful unionization attempt and many months prior to a second attempt as evidence of lack of anti-union animus in finding no labor organization status); Fiber Materials, Inc., 228 N.L.R.B. 933, 941 (1977) (same).

101. 691 F.2d 288 (6th Cir. 1982).

102. *Streamway*, 691 F.2d at 295 (indicating that there was "no evidence that anyone viewed the committee as anything more than a communicative device").

103. *Id.* at 295. The other factors followed the traditional group function, group form, and employer intent analysis. The court cited a continuous rotation system of committee members, inhibiting representation capacity, and lack of anti-union animus in addition to employee perception in determining that the structure test was not met. *Id.* at 295-96. The court, however, ignored the subject matter test. It skirted the functional test's "dealing with" requirement by noting that the *Cabot Carbon* decision "did not indicate the limitation, if any, upon the meaning of 'dealing' under the statute. Because the Supreme Court has not spoken further on the issue, the question of how much interaction is necessary before dealing is found is unresolved." *Id.* at 292. Instead, the court thought it more appropriate to "consider whether the employer's behavior fosters employee free expression and choice as the Act requires." *Id.* at 293. In so doing, it applied criteria pertinent to the domination

structure.<sup>104</sup>

In general, the function of the EPP or PRP committee is for participating employees to make recommendations to management.<sup>105</sup> Committee members are usually either selected by management or they volunteer.<sup>106</sup> Employees arguably participate not for their own self-aggrandizement, but to represent other employees' views. Thus, regardless of any employer intent to foil union activity or employee perception considerations, the functional and representational factors of most EPPs and PRPs would pass "structural" muster.

### 3. Function Test

The function test considers (1) whether employees have in fact been "dealing with" the employer over matters which are normally subject to collective bargaining and (2) the amount of power that group wields. In the seminal case of *NLRB v. Cabot Carbon Co.*,<sup>107</sup> the Supreme Court held that employee committees existing, at least in part, to deal with employers concerning grievances were labor organizations within the meaning of section 2(5).<sup>108</sup> *Cabot Carbon* held that Congress did not intend the "dealing with" language of section 2(5) to be synonymous with "bargaining with," and thus the former included a broader scope of topics than those typically addressed under formal collective bargaining.<sup>109</sup> However, this does not prevent employers and employees from discussing "matters of mutual interest concerning the employment relationship" in the absence of a labor organization.<sup>110</sup>

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issue directly to the determination of the committee's labor organization status. See also *infra* notes 123, 170 and accompanying text for a discussion of *Streamway*.

104. Beaver, *supra* note 18, at 233. The NLRB explicitly rejected the employee perception test in *E.I. du Pont de Nemours & Co.*, 1993 N.L.R.B. LEXIS 637, at \*3 n.7 (citing *Electra Food Mach.*, 279 N.L.R.B. 279, 280 (1986)).

105. See discussion *supra* part I.B.

106. McADAMS & HAWK, *supra* note 2, at 38-39.

107. 360 U.S. 203 (1959).

108. *Id.* at 212-14. During World War II, the Cabot Carbon Company was encouraged by the federal government's War Labor Board to establish an employee committee at its manufacturing plants to discuss, among other topics, grievances. After the war ended, the employee committees continued. The International Chemical Workers filed unfair labor practice charges when they were unable to organize Cabot Carbon's employees. *Id.* at 205-07.

109. *Id.* at 211-12.

110. *Id.* at 218.



If the group exercises power by making recommendations to management, it is considered a labor organization because such action resembles the function of a labor union, even absent negotiation with the employer.<sup>111</sup> Employee group recommendations as to disciplinary policy,<sup>112</sup> employee benefits,<sup>113</sup> working conditions,<sup>114</sup> or employee grievances<sup>115</sup> confer section 2(5) labor organization status. Whether management acts on the recommendations may also be relevant to the distinction between employee authority to make changes and mere employee feedback.<sup>116</sup>

The NLRB created two exceptions to the literal reading of section 2(5). Even if the subject matter and representational structure criteria are met, the post-*Cabot Carbon* cases hold that the group does not constitute a labor organization if it functionally makes decisions based on management-delegated authority.<sup>117</sup> Thus, a labor organization does not exist when an employee-management committee adjudicates, but does not initiate, employee grievances,<sup>118</sup> or when the

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111. *Id.* at 214.

112. *American Tara Corp.*, 242 N.L.R.B. 1230, 1231 (1979).

113. *Sea Life, Inc.*, 175 N.L.R.B. 982, 984-85 (1969).

114. *E.I. du Pont de Nemours & Co.*, 1989 N.L.R.B. LEXIS at \*49 (citing *Alta Bates Hosp.*, 226 N.L.R.B. 485 (1976) (holding by ALJ that discussion of the "quality of cafeteria food, inequitable treatment of clerical employees, a restroom for non-smokers; a revised identification system for entering parking area; and the distribution of chemical pamphlets to all laboratory technicians" fell within the ambit of § 2(5) topics)); *Ferguson-Lander Box Co.*, 151 N.L.R.B. 1615, 1620 (1985).

115. *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414, 419 (3d Cir. 1972) (holding that committee discussing grievances with management constituted labor organization); *Hasa Chem., Inc.*, 235 N.L.R.B. 903, 909 (1978) (holding that employee committee acted as employees' advocate for grievances); *but see NLRB v. Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807, 810 (7th Cir. 1962) (holding that employee committee that presented employee grievances "dealt with" management despite no evidence of making recommendations; "express recommendation is not essential to 'dealing', if discussion between [employer] and [committee] was designed to remedy grievances.").

116. *Lawson Co. v. NLRB*, 753 F.2d 471, 477 (6th Cir. 1985) (holding that employee committee "instrumental in obtaining improvements for all employees" satisfies functional test); *NLRB v. Ampex Corp.*, 442 F.2d 82, 84 (7th Cir.) (reasoning that since management acted upon committee's recommendations, the "dealing with" requirement was satisfied), *cert. denied*, 404 U.S. 939 (1971). *See also Sunnen Products, Inc.*, 189 N.L.R.B. 826, 827 (1971) (same); *Hammond Organ Co.*, 149 N.L.R.B. 997, 1004 (1964) (same). *But see supra* note 96.

117. *Beaver*, *supra* note 18, at 234.

118. *Mercy Medical Hosp. Corp.*, 231 N.L.R.B. 1108 (1977) (holding that a grievance committee was not a labor organization; fact that the committee made a em-

group assumes "management functions and responsibilities."<sup>119</sup> In addition, meetings in which management merely explains a new policy are not considered labor organizations.<sup>120</sup> Further, committees that do not represent employees as a group do not constitute labor organizations.<sup>121</sup>

As employee participation plans proliferated, some appellate courts attempted to re-interpret section 2(5) to accommodate the plans. The Sixth Circuit, for instance, ruled in *NLRB v. Streamway Division of Scott & Fetzer*,<sup>122</sup> that in-plant representation committees designed to assess employee attitudes regarding working conditions for the company's "self-enlightenment" did not "deal with" management.<sup>123</sup> In its controversial decision, the court held that not

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ployment policy recommendation on at least one occasion was de minimis); *Spark's Nugget, Inc.*, 230 N.L.R.B. 275 (1977), enforced in relevant part sub nom. *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980) (holding that a joint employee-management committee of two managers and one employee having power to resolve (but not initiate) employee grievances was not a "labor organization" because it acted in an adjudicative, rather than a representative, capacity), cert. denied, 451 U.S. 906 (1981). Cf. *American Tara Corp.*, 242 N.L.R.B. 1230, 1241-42 (1978) (holding that, but for other activity "dealing with" the employer in recommending new disciplinary policy, an adjudicatory disciplinary body would not be a § 2(5) labor organization).

119. *General Foods Corp.*, 231 N.L.R.B. 1232, 1234-35 (1977). The management at a General Foods plant organized all employees into production teams. Since all employees participated in the program, there was no representational characteristic making it a labor organization. *Id.*

120. *Fiber Materials, Inc.*, 228 N.L.R.B. 933, 941 (1976) (holding that a meeting called by management to explain a new fringe benefit plan was not a "labor organization;" a "discussion" did not constitute "dealing with" in this instance).

121. *General Foods Corp.*, 231 N.L.R.B. 1232, 1234 (1977) (finding that a semi-autonomous work team delegated with extensive managerial tasks that did not "deal with" the employer as representatives on a group basis was not a "labor organization"). The Board noted that "[i]f such a set of circumstances should give rise to the existence of a labor organization, no employer could ever have a staff conference without bringing forth a labor organization in its midst." *Id.* at 1234.

122. 691 F.2d 288 (6th Cir. 1982).

123. *Id.* at 294. An absence of anti-union animus, lack of employee perception that the committee represented employee interests, and a rotation of committee members (indicating that recommendations were made on behalf of individual committee members rather than on behalf of all employees) led the court to its determination. *Id.* at 294-95.

Several commentators find the *Streamway* decision irreconcilable with *Cabot Carbon*. See *Beaver*, supra note 18, at 236 (stating that the *Streamway* court relies on employer noninterference and employee satisfaction in determining § 2(5) status, rather than as factors in the § 8(a)(2) inquiry); *Hogler*, supra note 83, at 27; *Klaper*, supra note 74, at 481.

all communication between management and employees concerning employment policy violates the NLRA.<sup>124</sup> Communication alone between a committee and management does not accord labor organization status.<sup>125</sup>

Most EPPs make recommendations regarding work conditions to management, and management intends to act upon them. PRP design teams make recommendations regarding award formulas and performance baselines for management's approval. As such, they "deal with" management. Thus, most EPPs and PRPs satisfy the function test.

In sum, most EPPs and PRPs meet the requirements of the subject matter, structure, and function tests.<sup>126</sup> Therefore, EPPs and PRPs fall within the broad, literal definition of "labor organization" under section 2(5).<sup>127</sup>

### B. *Employer Domination*

If a court finds that the committee in question constitutes a "labor organization," the issue becomes whether the employer dominates, interferes with, assists, or supports the committee. The NLRA states:

It shall be an unfair labor practice for an employer . . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6 [29 U.S.C. § 156], an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay . . .<sup>128</sup>

Section 8(a)(2) thus prohibits both employer domination of a labor organization and the less invasive interference or assistance of such a labor organization by an employer. Ostensibly, section 8(a)(2)

124. *Streamway*, 691 F.2d at 292.

125. *Id.* at 294.

126. *E.g.*, *Memphis Truck & Trailer, Inc.*, 284 N.L.R.B. 900, 911-12 (1987) (finding "Employer Action Committee," similar to a quality circle, a labor organization).

127. Murrmann, *supra* note 83, at 301-02 (stating that "[t]he courts have refused to further specify the intent of [§ 2(5)], and so the statutory language applies as broadly as it is written."); Sockell, *supra* note 15, at 549. *See also Electromation*, 309 N.L.R.B. at 1008 (Raudabaugh, concurring) (stating that the judicial construction of the statute is broad).

128. NLRA § 8(a)(2), 29 U.S.C. § 158(a)(2) (1988).

protects, among other things, employees' collective bargaining rights.<sup>129</sup>

### 1. Objective Factor Tests

The NLRB and some courts have developed three objective tests to determine whether an employer dominates a labor organization.<sup>130</sup> The first test examines a series of objective factors. The employer "dominates" the labor organization if a sufficient number of objective factors are found.<sup>131</sup> Potential domination, not actual domination, is the threshold.<sup>132</sup> This body of per se indicia<sup>133</sup> includes the following actions by an employer: creating a labor organization,<sup>134</sup> aiding its formation,<sup>135</sup> providing financial assistance,<sup>136</sup>

129. Zurofsky, *supra* note 6, at 384. Collective bargaining rights are delineated in NLRA § 7, 29 U.S.C. § 157 (1988).

130. *See* Lee, *supra* note 83, at 216.

131. NLRB v. Thompson Ramo Wooldridge, Inc., 305 F.2d 807, 810 (7th Cir. 1962) (stating that "the question is not whether each individual fact is a violation, but whether the facts taken together" infer domination); Brody, *supra* note 77, at 566; Lee, *supra* note 83, at 216.

132. Early on, the Supreme Court stated:

In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives.

NLRB v. Newport News Shipbuilding & Dry Dock Co., 308 U.S. 241, 251 (1939).

133. *See* NLRB v. Link-Belt, 311 U.S. 584 (1941) (holding that § 8(a)(2) violations are actually determined under a per se rule rather than from looking at the "totality of the circumstances"). *See also New Standards, supra* note 76, at 511-12. In *New Standards*, the author noted:

Any employer support of a labor organization is illegal beyond a certain critical level, regardless of the character of the challenged organization, the intent of the employer, or the will of the employees. Under this per se rule, virtually the only question ever litigated is whether the challenged actions are sufficient to constitute the illegal quantum of support.

*Id.*

134. NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261, 270 (1938) (holding that creation of a company union violated § 8(a)(2)).

135. *In re* Horne, 61 N.L.R.B. 742, 752 (1945) (holding that the drafting of a charter and bylaws that started a union constituted an unfair labor practice).

136. *See, e.g.,* Camvac Int'l, Inc., 288 N.L.R.B. 816, 847 (1988) (citing facts that (1) employees were paid for attendance at meetings, and (2) personnel director recorded committee minutes and produced photocopies at no cost, as support for finding employer domination); Comet Corp., 261 N.L.R.B. 1414, 1447 (1982) (holding that paying employees for meeting on company property and time, along with company's provision of clerical assistance, were factors indicating domination). *See gen-*

allowing the use of company facilities,<sup>137</sup> and aiding a particular union.<sup>138</sup>

The second test examines management's paternal relationship with the labor organization.<sup>139</sup> Creation of an organization by management does not constitute domination;<sup>140</sup> the employer dominates the organization only when other factors are present, such as management control in areas of structure and membership.<sup>141</sup>

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erally P.A. Agabin, Annotation, *What Constitutes "Financial or Other Support" Within § 8(a)(2) [29 U.S.C. § 158(a)(2)] Making Such Support of a Union an Unfair Labor Practice*, 10 A.L.R.3d 861, 867-71, 876-913 (1966) (discussing which forms of support to labor unions constitute an unfair labor practice under § 8(a)(2)).

137. Several cases held that allowing the use of company facilities or services, including legal counsel, office space, secretarial services, and equipment, to one union but not to another constitutes unlawful support. *See, e.g.,* Dennison Mfg. Co., 168 N.L.R.B. 1012, 1015-16 (1967) (providing office facilities constitutes unlawful support); Newman-Green, Inc., 161 N.L.R.B. 1062, 1073-79 (1966) (holding employer provision of secretarial help is illegal support); Watkins Furniture Co., 160 N.L.R.B. 188, 193 (1966) (holding mere promise to provide meeting place was illegal support); Nutone, Inc., 112 N.L.R.B. 1153, 1170-71 (1955) (finding employer provision of copying machine illegal support); Shell Oil Co., 2 N.L.R.B. 835, 847, 853 (1937) (holding employer provision of telephone usage illegal support).

138. *NLRB v. Daylight Grocery Co.*, 345 F.2d 239 (5th Cir. 1965) (holding that an employer's anti-union campaign against one union, resulting in the formation of a company union, was an unfair labor practice).

139. *Lee, supra* note 83, at 216.

140. *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165, 168 (7th Cir. 1955) (finding that no labor organization existed where two committees formed by management used input from employees regarding structure and function).

141. *See, e.g.,* *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414, 418 (3d Cir. 1972) (holding that an employer dominated a committee by meeting only at management convenience, on its premises, and with management present, as well as by controlling composition of committee); *NLRB v. Ampex Corp.*, 442 F.2d 82, 84-85 (7th Cir.) (holding that employer dominated committee in which management performed everything necessary for it to function except for the attendance of employees), *cert. denied*, 404 U.S. 939 (1971); *Utrad Corp. v. NLRB*, 454 F.2d 520, 523 (7th Cir. 1971) (relying on, *inter alia*, employer formation, financial assistance, and supervisor participation in finding domination); *Pacemaker Corp. v. NLRB*, 260 F.2d 880, 883 (7th Cir. 1958) (finding domination when employer presided over meetings and determined the number of employee representatives, their manner of selection, and meeting times); *NLRB v. Sharples Chem., Inc.*, 209 F.2d 645, 652 (6th Cir. 1954) (considering employer's ability to remove an employee representative from the committee by transferring him to a different department as one factor indicating domination); *Camvac*, 288 N.L.R.B. at 847 (citing fact that management controlled a number of employee representatives as one factor indicating employer domination); *UARCO, Inc.*, 286 N.L.R.B. 55, 75 (1987) (listing evidence that employer controlled and participated in election of employee committee members and committee meetings, and had "no operative existence save for the sufferance" of employer as facts

The third test involves timing. This test scrutinizes the time lapse between committee formation and a union campaign.<sup>142</sup> The test's use remains most appropriate when evidence suggests that the company is attempting to thwart union organization.<sup>143</sup>

Under a traditional objective factor analysis, EPPs rarely escape dominated status. While employees may propose EPPs, management must participate for the EPP to function. Similarly, PRPs require management's agreement to share gains with employees based on some formula. EPP and PRP design often requires hiring professional consultants because it is beyond the expertise of most employees and management.<sup>144</sup> Extensive management involvement remains essential. Because few EPPs or PRPs would survive absent tacit support of the employer, they are necessarily "dominated" under the objective factor tests.

## 2. Subjective Factor Tests

In a separate line of cases, various federal courts of appeal favor using subjective tests to accommodate cooperative labor-manage-

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supporting domination); *Homemaker Shops, Inc.*, 261 N.L.R.B. 441, 442 (1982) (finding employer domination when factors indicate labor organization "exists essentially at will of the employer"); *American Tara Corp.*, 242 N.L.R.B. 1230, 1242 (1979) (holding that employer dominated the employee committee by dictating powers and responsibilities and providing financial support); *G.Q. Sec. Parachutes, Inc.*, 242 N.L.R.B. 508, 513 (1979) (finding that employer dominated a committee, formed six weeks before a union election, by specifying the committee's function and paying members).

*Cf. NLRB v. Northeastern Univ.*, 601 F.2d 1208, 1214-16 (1st Cir. 1979) (finding that no employer domination existed when committee prepared own bylaws and elected own members, and management representatives attended only at committee's invitation); *Duquesne Univ.*, 198 N.L.R.B. 891, 892-93 (1972) (failing to find domination when employees formed and structured organization, even though employer had potential to influence).

142. *Lee*, *supra* note 83, at 211.

143. *See, e.g., Utrad Corp.*, 454 F.2d at 523 (relying on, *inter alia*, employer's anti-union history and resurrection of employee committee contemporaneously with organizing campaign in finding domination); *Jet Spray Corp.*, 271 N.L.R.B. 127, 140 (1984) (finding employer domination where employee committee was created by president, who determined the committee composition, selection process, and meeting dates, and who threatened reprisals if an outside union was selected); *MGR Equip. Corp.*, 272 N.L.R.B. 353, 359 (1984) (finding that employer actions to encourage employees to form own union on company time, while being paid and during a union organizing campaign, constituted employer domination).

144. *McADAMS & HAWK*, *supra* note 2, at 38 (finding consultants were used in designing 46% of the PRPs studied).

ment relations.<sup>145</sup> The tests require the NLRB to show actual domination, rather than potential domination, to establish a violation.<sup>146</sup> Cooperation, but not necessarily support, remains lawful.<sup>147</sup> Mere facilitation of the operations of a labor organization fails to establish domination.<sup>148</sup> Furthermore, an employer's support must actually create company control over the organization in order to be an unfair labor practice.<sup>149</sup> Contextual factors taken into account include

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145. See, e.g., *Homemaker Shops*, 724 F.2d at 545 (describing test for domination as a "subjective one"); *Streamway*, 691 F.2d at 293 (stating that "the adversarial model of labor relations is an anachronism" and rejecting a "rigid interpretation of the statute"); *Northeastern Univ.*, 601 F.2d at 1213-14 (finding subjective test appropriate); *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974) (stating that "almost any form of employer cooperation, however innocuous, could be deemed 'support' or 'interference.' Yet such a myopic view of § 8(a)(2) would undermine its very purpose and the purpose of the Act as a whole . . ."), cert. denied, 423 U.S. 875 (1975).

See also *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663, 667 (5th Cir. 1968) (holding that a joining of hands between employers and union to exclude employees violated § 8(a)(1) and (2)); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967) (holding cooperation between and assistance to the employee committee by the employer insufficient for domination); *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564, 571 (1st Cir. 1957) (holding company president's suggestions that employees form committee insufficient for domination).

146. *Modern Plastics*, 379 F.2d at 204.

147. *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968). See also *Chicago Rawhide*, 221 F.2d at 167-70 (relying on employee satisfaction and employer's "laudable" motives which indicated that employer "cooperated" with, rather than "supported," the committee). In *Chicago Rawhide*, the Seventh Circuit also relied on the facts that employees originated the committee idea, the employer minimally supported the committee, and the employer's limited involvement was not in response to an outside union's organizing efforts. *Id.* at 167-68. The court stated:

A line must be drawn . . . between support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor.

*Id.* at 167.

148. *Northeastern Univ.*, 601 F.2d at 1214.

149. *Classic Indus., Inc. v. NLRB*, 667 F.2d 205, 208 (1st Cir. 1981) (holding that employer dominated an employee committee which was set up by employer after learning of worker interest in establishing a union; employer also actively campaigned against the union); *Modern Plastics*, 379 F.2d at 204 (stating "evidence of a weak labor organization alone, does not support an inference of company domination," and finding no exertion of "subtle and insidious control over ignorant or pro-

evidence of anti-union bias,<sup>150</sup> extensive employer influence,<sup>151</sup> and employee dissatisfaction<sup>152</sup> with the committee.<sup>153</sup> Evidence of employer intent<sup>154</sup> and employee free choice<sup>155</sup> are also relevant. If

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testing employees"). See also *Coppus Eng'g*, 240 F.2d at 571-72 (printing shop committee's rules in employer's booklet of plant rules and policies insufficient for domination); *Chicago Rawhide*, 221 F.2d at 168 (holding employer's cooperation and assistance insufficient for domination).

150. *Lawson Co. v. NLRB*, 753 F.2d 471, 477 (6th Cir. 1985) (holding that "formation of committee in direct response to union campaign" is a factor in determining domination); *Modern Plastics*, 379 F.2d at 204 (holding that evidentiary lack of anti-union animus pertinent to finding of no domination, despite employer assistance to in-house representation plan).

151. *Homemaker Shops*, 724 F.2d at 546 (considering management absence at employee committee meetings indicative of lack of domination).

152. *Homemaker Shops*, 724 F.2d at 547 (holding employee satisfaction is one factor in determining employer assistance); *Hertzka & Knowles*, 503 F.2d at 631 (considering fact that committee plan was suggested by employee offered proof of employee satisfaction with cooperative efforts); *Modern Plastics*, 379 F.2d at 204 (holding that evidentiary lack of employee dissatisfaction pertinent to no finding of domination, despite employer control of in-house representation plan, and coupled with fact that outside union seeking to represent employees brought the charges). Cf. *Lawson Co.*, 753 F.2d at 478 (holding that employee dissatisfaction is not the only factor in determining domination).

153. *Modern Plastics*, 379 F.2d at 204. See also *Lawson Co. v. NLRB*, 753 F.2d 471 (6th Cir. 1985) (holding that the employer's anti-union animus was sufficient to find employer domination).

154. See *Northeastern Univ.*, 601 F.2d at 1215 (finding employee's suggestion of implementing committee persuasive factor in not finding employer domination).

155. See *Homemaker Shops*, 724 F.2d at 546 (holding that employer assistance with union balloting process did not subvert employees' free choice, thus no domination); *Northeastern Univ.*, 601 F.2d at 1215 (finding that employer's potential power to appoint committee members did not infer domination when power never exercised); *Hertzka & Knowles*, 503 F.2d at 634 (stating that "where cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act."); *NLRB v. Wemyss*, 212 F.2d 465, 471-74 (9th Cir. 1954) (holding employer preference for one union over another was not domination as it did not impact employee free choice).

But see *Newport News*, 308 U.S. at 251 (holding that even though employees were satisfied with joint employer-employee committee for twelve years, the NLRA requires strict separation of management and labor; employee satisfaction is irrelevant). Several circuits have strictly followed *Newport News*. See, e.g., *Local 1814, Int'l Longshoremen's Ass'n v. NLRB*, 735 F.2d 1384, 1402 (D.C. Cir. 1984) (holding that free choice analysis is irrelevant).

Many commentators advocate emphasizing employee free choice in evaluating domination. See, e.g., Brody, *supra* note 77, at 546; Jackson, *supra* note 83, at 833-39; *New Standards*, *supra* note 76, at 525 (stating "[s]ince employee freedom of choice is an underlying goal of the Act, the satisfaction or dissatisfaction of employ-



the employer induces the employees to perceive that the committee represents its interests, the practice is unfair.<sup>156</sup>

The Supreme Court has not yet sanctioned the use of subjective factors to evaluate domination. Early on, in fact, the Court disavowed use of the employee satisfaction test in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*<sup>157</sup> The NLRB follows the Supreme Court's objective factor approach.<sup>158</sup>

A recent appellate case illustrates the subjective approach. In *Airstream, Inc. v. NLRB*,<sup>159</sup> the Sixth Circuit relied heavily upon the nature and impact of the employer's conduct to determine that an employee committee was not an unfairly dominated labor organization. For four years prior to the allegedly unlawful conduct, Airstream's management conducted "rap sessions" in which employees asked questions and made suggestions.<sup>160</sup> A month after the union filed its petition for certification, Airstream's president announced the formation of a President's Advisory Council (PAC), with members elected by fellow employees. This move formally institutionalized the rap sessions.<sup>161</sup> The PAC held its first meeting only three days prior to the union election.<sup>162</sup> The PAC met on company time, during which the president distributed a written agenda explaining the role of the committee and the discussion topics: the Attendance Bonus Program, absentee policy, and work rules.<sup>163</sup> The union subsequently lost the election and charged, *inter alia*, that Airstream unfairly dominated the PAC.<sup>164</sup>

The NLRB Administrative Law Judge agreed with the union, but

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ees should be a controlling factor"); *Participatory Management*, *supra* note 15, at 1749-58; William P. Schurgin, *The Limits of Organized Employer-Employee Relations in Non-Union Facilities: Some New Evidence of Flexibility*, 57 CHI.-KENT L. REV. 615, 636-41 (1981).

156. *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915, 918 (6th Cir. 1968).

157. 308 U.S. 241, 251 (1939) (holding that employer satisfaction is irrelevant); *accord* *NLRB v. Southern Bell Tel. & Tel. Co.*, 319 U.S. 50, 59-60 (1943).

158. *See, e.g., Memphis Truck & Trailer*, 284 N.L.R.B. at 912 (1987) (finding a QC-type EPP initiated by the president, financially supported by company, and requiring company approval to be unfairly dominated); *see supra* notes 130-43.

159. 877 F.2d 1291 (6th Cir. 1989).

160. *Id.* at 1295.

161. *Id.* at 1293.

162. *Id.* at 1294.

163. *Id.* at 1295.

164. *Airstream*, 877 F.2d at 1292.

the Sixth Circuit reversed. The court reasoned that the discussion of the absentee policy at the PAC meeting did not constitute "dealing with" employees regarding hours of employment or conditions of work, let alone grievances, wages, or rates of pay.<sup>165</sup> The court held that the PAC functioned as a means of communication between management and employees.<sup>166</sup> As such, the committee fell within *Cabot Carbon's* "matters of mutual interest" exception.<sup>167</sup> Further, no substantial evidence of anti-union animus existed.<sup>168</sup> Absent an express finding that the committee constituted a labor organization,<sup>169</sup> the court held that the employer did not dominate the PAC because the PAC's formation did not influence the election.<sup>170</sup>

Most EPPs would survive a subjective factor analysis in the First, Sixth, and Ninth Circuits.<sup>171</sup> Employee dissatisfaction is rarely reported, and it is doubtful that employees' free choice to unionize is curtailed. Only when the employer blatantly attempts to thwart union organization would a plan run afoul of the NLRA under a subjective factor analysis.<sup>172</sup>

### C. Recent NLRB Decisions Regarding Participation Plans

The NLRB continues to interpret the NLRA strictly. In *Electro-*

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165. *Id.* at 1296-97.

166. *Id.* at 1296.

167. *Id.*

168. *Id.* at 1297-98.

169. The court glossed over the subject matter test by stating that the absentee policy did not fall under the "conditions of work" category. *Airstream*, 877 F.2d at 1297. The court completely ignored the structure test even though the employees unequivocally elected representatives. Instead, it strenuously found that the committee constituted only a communications device rather than one that 'dealt with' management under the functional test. *Id.*

170. *Id.* at 1297-98. The Board in *Electromation* criticized both the *Airstream* and *Streamway* § 2(5) labor organization analyses as relying on indicia of employer control, which is relevant only to the § 8(a)(2) domination issue. *Electromation*, 309 N.L.R.B. at 996. *Airstream* indeed appears to avoid the traditional labor organization tests, and considers the employer's conduct and negligible impact on the union election the most persuasive arguments for resolving the entire issue. *Airstream*, 877 F.2d at 1297-98.

171. *See, e.g., Streamway*, 691 F.2d 288 (6th Cir. 1982); *Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles*, 503 F.2d 625 (9th Cir. 1974).

172. The NLRB in *Research Federal Credit Union*, *infra* notes 187-94, even if it had adopted subjective factor analysis, would nonetheless have found the EPP an unfairly dominated labor organization due to the questionable motives of management.

*mation, Inc.*,<sup>173</sup> the NLRB found that five joint employee-management “action committees” were labor organizations. Management formed the committees in a non-union plant to deal with deteriorating employee morale with respect to several issues, as reflected in the committee names: Absenteeism/ Infractions, No-Smoking Policy, Communications Network, Pay Progression for Premium Positions, and Attendance Bonus Program.<sup>174</sup> Each committee consisted of six volunteer employees, one or two members of management, and the company’s Employee Benefits Manager.<sup>175</sup> The Board found that all of the committees discussed subject matters included within section 2(5), that employees participated in a representational capacity, and that they “dealt with” management by making recommendations.<sup>176</sup> Management, however, was unaware of a union organizing campaign when it formed the committees and ceased attending them once the union demanded recognition.<sup>177</sup> The NLRB nonetheless concluded that the employer unfairly dominated the committee by creating it, determining its structure and discussion subject matter, and supporting it such that the committee’s existence “rested with the [employer] and not with the employees.”<sup>178</sup> Further, the employer did not effectively disestablish the committee, as evidenced by the meetings that continued after management withdrew.<sup>179</sup>

Member Raudabaugh’s concurrence in *Electromation* recommended an alternative test for domination. The analysis examined four factors:

- (1) the extent of the employer’s involvement in the structure and operation of the committees;
- (2) whether the employees, from an objective standpoint, reasonably perceive the EPP as a substitute for full collective bargaining through a traditional union;
- (3) whether employees have been assured of their Section 7 right to be represented by a traditional union under a system of full collective bargaining, and
- (4) the employer’s motives in establishing the EPP.<sup>180</sup>

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173. 309 N.L.R.B. 990 (1992).

174. *Id.* at 991.

175. *Id.*

176. *Id.* at 997.

177. *Id.* at 991.

178. *Electromation*, 309 N.L.R.B. at 998.

179. *Id.*

180. *Id.* at 1013 (Raudabaugh, concurring).

No single factor under Raudabaugh's proposal would be dispositive.<sup>181</sup> As applied to the facts in *Electromation*, Raudabaugh considered the first factor to weigh heavily in favor of domination, as management exercised complete control over the committee.<sup>182</sup> The second factor, employee perception, also indicated employer domination because the committee members were viewed as representatives, and thus a substitute for collective bargaining.<sup>183</sup> The employer did not notify the employees of their section 7 rights, and thus the third factor also weighed heavily toward domination.<sup>184</sup> There was insufficient evidence to find domination based solely on the fourth factor.<sup>185</sup>

In Raudabaugh's opinion, the first, second, and third factors weighed heavily in favor of domination and more than offset the employer's good motives.<sup>186</sup> Under this analysis, the *Electromation* management might have tipped the balance in its favor if only it had reminded the employees of their right to unionize prior to the committees' formation; subsequent events proved, however, that the employees did not require such prompting.

In *Research Federal Credit Union*,<sup>187</sup> the employer contacted a management consultant for advice on how to handle mounting employee discontent two months before a union demanded recognition, and hired the consultant one day after the demand.<sup>188</sup> The consultant interviewed employees and recommended an EPP to improve morale.<sup>189</sup> The "Employee Involvement Committee," consisting of three elected employees and three managers, met three times prior to the unsuccessful union election and twice thereafter.<sup>190</sup> The committee discussed various topics including the smoking policy, performance evaluations, ventilation, pay raises, and sick time.<sup>191</sup> It made recommendations, some of which the credit

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181. *Id.*

182. *Id.* at 1014-15.

183. *Electromation*, 309 N.L.R.B. at 1015.

184. *Id.*

185. *Id.*

186. *Id.*

187. 1993 N.L.R.B. LEXIS 15 (Jan. 8, 1993).

188. *Id.* at \*8-9.

189. *Id.* at \*13-23.

190. *Id.* at \*28-29.

191. *Id.* at \*30-35.

union's board of directors adopted.<sup>192</sup>

The NLRB held the committee was a labor organization, relying on the facts that the employer created and structured the committee; employees elected representatives to discuss wages, hours of employment, and working conditions; the committee made recommendations to management; and both the employer and consultant displayed anti-union animus.<sup>193</sup> The Board also found the employer dominated the committee, basing its decision on management's creation and sustenance of the committee, and the suspicious proximity of the union demand and the EPP introduction.<sup>194</sup>

Shortly after considering EPPs in the non-union environments of *Electromation* and *Research Federal Credit Union*, the NLRB considered EPPs in the unionized setting of *E.I. du Pont de Nemours & Co.*<sup>195</sup> Over union objections, du Pont unilaterally established six safety committees and one fitness committee.<sup>196</sup> The committees consisted of both volunteer employee and management members,

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192. *Research Federal Credit Union*, 1993 N.L.R.B. LEXIS 15, at \*30-35.

193. *Id.* at \*35-36.

194. *Id.* at \*36. Shortly after *Research Federal Credit Union*, the NLRB confronted another § 2(5)-§ 8(a)(2) case containing evidence of anti-union animus. In Salt Lake Div., A Div. of Waste Management of Utah, Inc., 310 N.L.R.B. No. 149, 1993 NLRB LEXIS 306 (Mar. 29, 1993), a new divisional manager reduced the employees' vacation pay and replaced their sick-leave with an attendance bonus program. *Id.* at \*18. Employee morale, already low, sunk further. *Id.* Four months later, two employees contacted a union representative and commenced organizing. *Id.* Two months after the union requested an election, the manager formed the Benefits, Safety, and Productivity & Routing Committees and asked employees to participate. *Id.* at \*36-37. The manager selected committee members from among the employees that volunteered. *Id.* at \*37. In the month preceding the election, the manager met several times with each committee and announced a "proposed" safety bonus program along with "proposed" revisions to the attendance bonus program and vacation plan. *Id.* at \*38-41. The manager informed the employees that the latter two were scheduled for approval at the next committee meeting, coincidentally the same day as the union election. *Id.* at \*41-42. As the manager determined the committee size and membership, set the meeting times and agenda, led the meetings, and selected which employee proposals were meritorious, the ALJ had little difficulty finding that the committees constituted labor organizations dominated "as part of a transparent attempt to undermine employee support of the union." *Id.* at \*44-45. The Board adopted the decision and order of the ALJ outright. *Id.* at \*1-2.

195. 311 N.L.R.B. No. 88, 1993 N.L.R.B. LEXIS 637 (May 28, 1993).

196. *Id.* at \*1. The committees met the § 2(5) subject matter test because they discussed safety, incentive awards, and facility improvements. *Id.* at \*3. At least two of the committees agreed to award incentives in recognition of safe work practices. *Id.* at \*8-9.

and conducted business by consensus decision-making.<sup>197</sup> The management members had veto power over any employee proposal.<sup>198</sup> Management members also set the agenda and conducted the meetings.<sup>199</sup> Employees had no influence over committee composition or operation.<sup>200</sup> Management responded positively to committee proposals,<sup>201</sup> some of which were similar to earlier union proposals rejected by management.<sup>202</sup> Based on these facts, the NLRB concluded that the committees constituted dominated labor organizations.<sup>203</sup>

Perhaps in response to criticism over its *Electromation* decision, the NLRB took great pains in *du Pont* to emphasize the types of employee participation which would not run afoul of the NLRA. Brainstorming sessions in which ideas are developed or information shared are safe havens as long as the session as a whole does not operate as a bilateral mechanism to make recommendations or proposals to management.<sup>204</sup> Employee suggestion boxes also remain

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197. *Id.* at \*7.

198. *Id.* at \*10.

199. *du Pont*, 1993 N.L.R.B. LEXIS 637, at \*10.

200. *Id.* at \*11.

201. *Id.* at \*6.

202. *Id.* at \*16.

203. *Id.* at \*10-12. The Board counseled:

As a practical matter, if management representatives can reject employee proposals, it makes no real difference whether they do so from inside or outside the committee. In circumstances where management members of the committee discuss proposals with employee members and have the power to reject any proposal, we find that there is "dealing" within the meaning of Section 2(5). . . . The mere presence, however, of management members on a committee would not necessarily result in a finding that the committee deals with the employer within the meaning of Section 2(5). For example, there would no "dealing with" management if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management. Similarly, there would be no "dealing" if management representatives participated on the committee as observers or facilitators without the right to vote on committee proposals.

*Id.* at \*7-8.

The Board rejected a subjective standard based on employee perception to evaluate the functional test for a labor organization. *Id.* at \*3 n.7.

204. *du Pont*, 1993 N.L.R.B. LEXIS 637, at \*15. The Board specifically found that quarterly all-day safety conferences did not violate the NLRA. The Board did hold that the conferences constituted "brainstorming" sessions, and violated § 8(a)(5) by bypassing the union in discussing the mandatory bargaining subject of

immune from attack because individuals, not groups, use such methods to make proposals.<sup>205</sup>

The NLRB also articulated its position on PRPs in *du Pont*. All of *du Pont*'s safety committees discussed, proposed, and implemented incentive awards for safety improvements.<sup>206</sup> Earlier, the union made similar proposals, but management rebuffed them.<sup>207</sup> The Board ruled that *du Pont* bypassed the union, violating the mandatory bargaining provisions of section 8(a)(5),<sup>208</sup> in addition to dominating the committees in violation of section 8(a)(2).<sup>209</sup> The Board ordered *du Pont* to cease and desist from operating its PRPs, disestablish the committees, and rescind the awards.<sup>210</sup>

#### D. *Practical Implications of the NLRB Decisions*

In all three cases, the NLRB designated EPPs as unfairly dominated labor organizations. The *du Pont* decision similarly branded PRP committees. While *du Pont* provides management with practical guidance as to how to set up and maintain lawful communication devices, these applications are severely limited and are unlikely to provide the long-term productivity gains available under EPPs and PRPs.

Further, *Research Federal Credit Union* clearly shows that the typically non-unionized service sector is not immune from the NLRA. EPPs will not survive scrutiny under the NLRB's gauntlet of objective tests. As a practical matter, the employer can safely avoid dominating a labor organization only if it avoids discussing work conditions, involving employees, and having employees make recommendations. This is a problem for employers because these are the crucial elements that make EPPs effective.

Pursuing productivity through PRPs is less problematic than EPPs

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safety. *Id.* at \*14-15. "Nothing in the Act prevents an employer from encouraging its employees to express their ideas and to become more aware of safety problems in their work." *Id.* at \*15.

205. *Id.* at \*5-6.

206. *Id.* at \*31 (Devaney, concurring).

207. *Id.* at \*16.

208. NLRA § 8(a)(5), 29 U.S.C. § 158(a)(5) (1988). *See also* Sockell, *supra* note 15, at 543 (arguing that unionized employers may violate § 8(a)(5) by negotiating with representatives other than those certified to represent employees).

209. *du Pont*, 1993 N.L.R.B. LEXIS 637, at \*16-17.

210. *Id.* at \*17-20.

because committees are not necessary. Although task force designed PRPs produce better results,<sup>211</sup> there is no statistical inference that task force committees must include employees to succeed.<sup>212</sup> The prescription is clear: Employers wishing to implement a PRP avoid potential unfair labor charges only if there are no employees placed on the design task force or involved in reassessment.

The NLRA allows anyone to file an unfair labor charge against an employer on behalf of an employee.<sup>213</sup> Thus, any agitated employee could charge a non-unionized employer with dominating a labor organization should the employer institute an EPP or PRP with employees serving on committees.<sup>214</sup> The lack of a standing requirement also means that foreign competitors not subject to the NLRA could file unfair labor charges whenever their American rivals establish employee committees. Otherwise legitimate and beneficial EPPs and PRPs may fall by the wayside merely because of the perceived threat of NLRA compliance.

Management, however, may not be overly concerned with charges of dominating labor organizations because the remedies available to successful challengers have a minimal impact on management.<sup>215</sup> The NLRB does not assess financial penalties.<sup>216</sup> Management may

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211. See *supra* note 49 and accompanying text for a discussion of PRP plans designed by a task force.

212. See *McADAMS & HAWK, supra* note 2, at 38.

213. No section of the NLRA imposes a standing requirement in order to file an unfair labor practice charge. The courts have never required standing. See, e.g., *NLRB v. Indiana & Michigan Elec. Co.*, 318 U.S. 9, 17-18 (1943) (stating “[d]ubious character, evil or unlawful motives, or bad faith of the informer cannot deprive the Board of its jurisdiction to conduct the inquiry”). *Accord Hercules Powder Co. v. NLRB*, 297 F.2d 424, 433 (5th Cir. 1961); *NLRB v. Chauffeurs, Teamsters & Helpers Local No. 364*, 274 F.2d 19, 24 (7th Cir. 1960); *NLRB v. General Shoe Corp.*, 192 F.2d 504, 505-07 (6th Cir. 1951); Steve Gunderson, *NLRB Muddies Regulatory Waters*, WALL ST. J., Feb. 1, 1993, at A10 (stating “[a]nyone, whether a disgruntled employee, an outside union, or a pesky competitor, may file a charge against [a] committee with the NLRB.”).

214. While this scenario is possible, there is little evidence that it in fact occurs. Since 1990, § 8(a)(2) complaints averaged only 0.21% of the General Counsel’s caseload. *du Pont*, 1993 N.L.R.B. LEXIS 637, at \*24 n.4 (Devaney, concurring).

215. See *supra* note 80 and accompanying text for a discussion of the impact of remedies on management.

216. *Pennsylvania Greyhound*, 303 U.S. at 267-68. See also *Dau-Schmidt, supra* note 32, at 506-09 (recommending financial penalties to better deter employer intransigence); *supra* note 80 and accompanying text (discussing nonfinancial penalties against employers who assist or dominate an employee group).



decide that the benefits of increased productivity outweigh the costs of compliance with the NLRA. Although the effects of a remedial order may have few financial ramifications for the employer, negative public relations effects may loom.<sup>217</sup>

#### IV. POLICY AND CHANGE

The evidence shows that EPPs and PRPs, depending on their design and the firm's organizational culture, enhance employee productivity.<sup>218</sup> Increased productivity benefits employees, management, and the federal government.<sup>219</sup> But the legal framework designed to empower industrial employees under the NLRA poses problems for service sector employers pursuing such plans in non-union environments.<sup>220</sup> Unless the framework is changed, the actors may be forced to forego the opportunities for improvement that EPPs and PRPs offer.

The overriding policy question is thus whether the interests of employees, management, and the government can be collectively aligned and individually protected to promote increased productivity.<sup>221</sup> In other words, "[s]hould we allow a legal framework tailored to exigencies of the past rather than the necessities of the future to obstruct the development of full commitment and cooperation, which are necessary ingredients for America to regain its competitive edge in the global economy?"<sup>222</sup>

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217. Gunderson, *supra* note 213, at A10 (noting unfair labor practice charges "may raise difficult public relations problems, likely tarnishing your company's image with labor groups, suppliers, the surrounding community and others").

218. See *supra* notes 43-51 and accompanying text for a discussion of the effectiveness of EPPs and PRPs.

219. See *supra* notes 19-34 and accompanying text for a discussion of the productivity crisis.

220. See *supra* notes 211-17 and accompanying text for a discussion of the practical implications of the recent NLRB holdings.

221. Freeman stated:

Research has not yet adequately addressed or answered the \$64,000 question: how can firms and unions develop the good employer-worker relations that maximize productivity and thus benefit workers, employers, and the public? Even partial answers to this question would have a tremendous practical payoff.

Freeman, *supra* note 32, at 157.

222. Schlossberg & Fetter, *supra* note 15, at 22.

### A. Policy Considerations

The inherent problem in solving this dilemma is that neither the adversarial model, as embodied in the NLRA, nor cooperative models, such as EPPs and PRPs, easily accommodate each other. These bipolar extremes fail to recognize that employers' and employees' interests both conflict and coalesce.<sup>223</sup>

A primary concern among employees is fair treatment on the job. Job security is another employee concern.<sup>224</sup> Unions exist to assure democracy in the workplace; this includes protecting economic interests of employees, providing due process, and improving morale and the physical work environment.<sup>225</sup>

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223. Clarke noted that “[g]iven the diametrically opposite nature of these two models, the Act cannot simultaneously encourage one while remaining neutral between the two. Because it explicitly endorses collective bargaining, the Act cannot support a neutral section 8(a)(2) analysis that turns on a determination of ‘employee free choice.’” Clarke, *supra* note 67, at 2033 (emphasis omitted).

Another commentator argued:

[I]t is the handling of conflict, not unions, which affects productivity. Managers and employees have shared interests, but also legitimate differences in interests. It is these differences which underlie conflict in the workplace. The institutions and procedures for managing conflict that govern employee and managerial behavior thereby regulate firm performance. Low trust/high conflict environments, environments with elevated levels of grievance activity, work stoppages, and dissatisfaction are not conducive to employees doing more than is required to earn a paycheck and avoid dismissal. Employers, lacking the support of their labor force, cannot avail themselves of employee loyalty and intelligence to improve the product or production methods. Conversely, high trust/low strife environments provide a foundation for improving efficiency. By developing trust, emphasizing problem-solving, and respecting the divergent and conflicting interests of the parties, these joint programs make it possible to implement new technologies, job practices, employment relations, and management structures in a manner consistent with the concerns of both labor and management.

Belman, *supra* note 7, at 70-71.

224. In comparing the U.S. and German labor systems, Schlossberg and Reinhart noted:

Nobody will argue the fact that U.S. employers have a unique proclivity to respond to bad business news through the technique of employee layoffs — a proclivity which is not only costly and self-defeating but which also aggravates and hinders the whole economy.

Schlossberg & Reinhart, *supra* note 6, at 619. See also KATHARINE G. ABRAHAM & SUSAN N. HOUSEMAN, *JOB SECURITY IN AMERICA: LESSONS FROM GERMANY* (1993) (describing the German industrial relations model and recommending more stringent job security provisions in American labor law).

225. Belman, *supra* note 7, at 72.

Labor, however, initially eschewed EPPs despite the potential for job enrichment and higher wages. Labor viewed “employee involvement initiatives as veiled at-

Employers want to enhance productivity to increase profitability, and perceive unions as an obstacle to this goal. Scholars disagree as to whether unions positively effect productivity,<sup>226</sup> but there is virtually unanimous scholarly consensus that unions negatively affect

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tempts by management to increase control, link jobs to profitability and undermine their existence.” Samborn, *supra* note 9, at 1. Eaton and Voos found that:

This association of innovation, particularly employee participation with non-union companies and facilities, initially created a climate of hostility and suspicion within the labor movement. While opposition continues in some cases today, in general union leaders have become much more diversified in their views and less oppositional in the 1980s.

Eaton & Voos, *supra* note 1, at 181 (citation omitted).

Alternatively, EPPs might constitute a ruse to undermine collective bargaining and increase production speeds. See Adrienne E. Eaton & Paula B. Voos, *The Ability of Unions to Adapt to Innovate Workplace Arrangements*, 79 AM. ECON. REV. 172-76 (1989). Furthermore, EPPs could potentially restrict employees' freedom of association by forcing them to participate on committees. Furfaro & Josephson, *supra* note 9, at 3. See generally GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY* (1988) (detailing the QC experience at a Johnson & Johnson plant as an anti-union tactic).

226. See HIRSCH & ADDISON, *supra* note 32, at 100-01. Hirsch and Addison found no “compelling evidence” that unions effect productivity positively or negatively, but suggested that there are positive effects in industries with large wage differentials between union and non-union workers, and when competitive pressures are present. Further, Hirsch and Addison noted that unions extract wage increases from management to the detriment of physical capital and research and development budgets, thereby suppressing productivity gains. Hirsch and Addison also argued:

As a consequence, productivity growth tends to be slower in unionized firms and industries. Increased management opposition to unions, and declining union coverage and employment within most sectors of the U.S. economy, appear to be predictable responses to the relatively poor performance of highly unionized companies during the 1970s.

*Id.*

But see Charles Brown & James L. Medoff, *Trade Unions in the Production Process*, 86 J. POL. ECON. 355, 377 (1978) (arguing union productivity is higher than non-union establishments); Kim B. Clark, *The Impact of Unionization on Productivity: A Case Study*, 33 INDUS. & LAB. REL. REV. 451, 467-68 (1980) (examining cement plants prior to and after unionization, and finding a positive union effect on productivity of 6-8%). Brown and Medoff found positive union-productivity effects, and while plausible that unionization possibly makes workers more productive, they dismissed the alternate theory that the causal linkage may be obscured in that unions tend to target organizational efforts toward the most productive firms within an industry. *Id.* at 373-74. Brown and Medoff concluded that for U.S. manufacturing firms, “[u]nion and nonunion establishments . . . can compete in the same product market despite the fact that the former pay their workers more because unionized workers . . . are more productive by a roughly offsetting amount.” *Id.* at 377.

firm profits.<sup>227</sup>

Taken together, the interests of employees and employers can be viewed as converging more than conflicting. The interests are dependent: each requires the other in order to pursue their economic interests. Employee concerns are not merely economic. Indeed, the underlying theory of EPPs and PRPs is that alleviating employees' concerns about job security, due process, and quality of work life make them more productive. The flood of EPP introductions may be positive proof that management now realizes it is self-serving to address employee concerns.

Conflicts still remain, however, over economic concerns, particularly compensation. Management, holding the purse strings, stands to benefit more economically from productivity gains than employees. The distribution of productivity gains between the employer and employee invites confrontation.<sup>228</sup> PRPs potentially redress this inequality. If employees participate in designing PRP gainsharing and in setting baselines, and if management agrees to an equitable split of productivity gains, both parties win.<sup>229</sup>

Government interests include encouraging productivity and

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227. See *supra* note 32. Others argue that an employer may well want to encourage unionism despite studies showing a negative impact on profitability. The MIT Commission on Industrial Productivity concluded that business leaders should: support diffusion of cooperative industrial relations systems by accepting labor representatives as legitimate and valued partners in the innovative process. American managers must recognize that unions are a valued institution in any democratic society. Resources traditionally devoted to avoiding unionization need to be reallocated toward promoting and sustaining union-management cooperation.

MICHAEL C. DERTOUZOS ET AL., *MADE IN AMERICA: REGAINING THE PRODUCTIVE EDGE* 150 (1989).

228. Zurofsky, *supra* note 6, at 385-86. Zurofsky argued:

An employer-imposed committee is inherently unequal. What the boss giveth, the boss can taketh away. There is no vehicle for effectively demanding or securing any supposed employee gains. Without real equality and real bargaining, employer-imposed employee participation committees are a sham in terms of advancing employee interests. . . . The only thing lacking from this collectively bargained ideal is representation of the employee's interest. Where is the right of the employee to demand increased compensation for becoming "his or her own best manager"? Is the virtue of service to the corporate ideal to be its own reward?

*Id.*

229. See generally BRIAN GRAHAM-MOORE & TIMOTHY L. ROSS, *GAINSHARING: PLANS FOR IMPROVING PERFORMANCE* (1990) (discussing the benefits of joint employee-management participation in PRP gainsharing design).

resolving conflict efficiently. But various government entities send mixed messages. The Department of Labor and the administrative commissions speak glowingly of employee-employer cooperation,<sup>230</sup> while the NLRB virtually forbids it.<sup>231</sup> Such a schizophrenic approach to labor policy serves no party's best interests.<sup>232</sup>

The optimal solution requires, first and foremost, a consistent governmental policy. If we assume cooperation is preferred to confrontation, policy should encourage cooperation whenever possible. EPPs and PRPs should be legal. Only when cooperation fails and adversarial conditions arise should an adversarial model, held in reserve, come into play.

In this vein, employees should have the right to union representation, but also the right to decline representation.<sup>233</sup> Similarly, employees should have the right not to participate in EPPs.<sup>234</sup> Conversely, when employees freely and deliberately choose to be non-union, management should be able to form EPPs and PRPs without running afoul of the NLRA.

Unfortunately, the only clear indication that employees have exercised their free choice to be non-union is a negative vote by the

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230. See *supra* note 28 and accompanying text for a discussion of various commissions and recommendations regarding labor-management cooperation.

231. See *supra* notes 80-217 and accompanying text for discussion of case law which prohibits labor-management cooperation.

232. See *supra* notes 107-10 and accompanying text for a discussion of *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959), in which the federal government encouraged the employer to form the committees in question, well after Congress enacted the NLRA. The Supreme Court, of course, found the committees to be unfairly dominated labor organizations. *Cabot Carbon*, 360 U.S. at 214-15.

233. Section 7 of the NLRA guarantees individuals the right "to refrain from any or all [labor organization] activities." NLRA § 7, 29 U.S.C. § 157 (1988). Section 7 does not, however, guarantee individuals the right to bargain individually. For instance, if the majority of the employees in the bargaining unit vote for union representation, the minority will be represented by the union and bound by the union's collective bargaining agreement even if they do not join.

One commentator stated:

Workers should be given the choice between adversarial and cooperative representation. Specifically, section 8(a)(2) should either be repealed, or amended to clarify that it prohibits management *coercion* or *domination*, but that it does not prohibit truly *cooperative* representation or worker participation plans. Enforcement of the prohibition on coercive or employer-dominated plans should be handled by the courts on a case-by-case basis.

Clarke, *supra* note 67, at 2040.

234. See Zurofsky, *supra* note 6, at 385 (arguing that employees must retain the choice of not participating in EPPs).

majority in a union election. What is not clear is whether employees have exercised free choice by refusing to sign authorization cards, thus preventing the election which would definitively signal their choice. This scenario typifies the service sector, where unionization attempts are relatively unsuccessful. How is non-unionized, service-sector management to know when its employees have decided against union representation, thus allowing it to introduce an EPP or PRP which will benefit employees and the employer?

### B. *Alternatives for Change*

The simplest solution would be for the NLRB and the courts to apply a subjective factor analysis to the domination inquiry.<sup>235</sup> This is unlikely, as the Supreme Court and NLRB repeatedly resist fashioning contemporary interpretations of the NLRA.<sup>236</sup> Since courts cite congressional intent as the obstacle, the agent for change becomes Congress.<sup>237</sup>

The NLRB decisions to date regarding EPPs indicate that the problem lies with section 2(5)'s overly broad inclusion of EPPs and PRPs as labor organizations. Congress could alter the NLRA to accommodate EPPs without eviscerating employee protections of section 8(a)(2). Every EPP becomes a "labor organization" when employee committees discuss the "conditions of work" pertinent to improving productivity with the employer. Simply removing "issues of quality, productivity and efficiency"<sup>238</sup> from the ambit of "conditions of work" would rectify the immediate problem.<sup>239</sup> Most EPPs and PRPs would escape "labor organization" status entirely because

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235. Brody suggested that Congress not revise the NLRA because courts can easily accommodate legitimate EPPs by adopting employee free-choice criteria and new legislative provisions may cause more confusion than those presently in force. Brody, *supra* note 77, at 573-75. Absent a definitive Supreme Court ruling incorporating employee free-choice analysis, however, the NLRB and appellate cases would unlikely converge.

236. *du Pont*, 1993 N.L.R.B. LEXIS 637, at \*2 n.6 ("The Board does not have the power to rewrite the 1935 National Labor Relations Act."); *Electromation*, 309 N.L.R.B. at 992.

237. Clarke, *supra* note 67, at 2039-41.

238. *Id.* at 2040-41.

239. A revised § 2(5) might define a "labor organization" as:  
[A]ny organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or any conditions of work

they would not pass the subject matter test.<sup>240</sup> Unfortunately, other NLRA provisions rely on section 2(5)'s definition of "labor organization" to preclude unfair labor union practices.<sup>241</sup> Fixing one problem would create others.

Congress could alternatively modify section 8(a)(2) to prohibit domination, but not prohibit assistance or support. This would eliminate the most egregious effects of management influence on employees. One author argued that if Congress repealed section 8(a)(2), section 8(a)(1) would continue to prohibit employer domination.<sup>242</sup> This author further suggested that enforcement of the prohibition would necessarily require courts to deal with domination on a case-by-case basis.<sup>243</sup> Employers and the courts, however, need more definitive guidance to avoid overloading judicial dockets.

Other solutions have been proffered. House legislators introduced, but did not pass, the American Competitiveness Act<sup>244</sup> in 1991, partially in anticipation of a pro-union *Electromation* decision. The Act's sponsors intended to send a clear message to the NLRB that not all EPPs are labor organizations unfairly dominated by employers. This bill simply carved out an exception to section 8(a)(2) for two types of EPPs: quality circles and joint production teams. Unfortunately, this bill failed to define exactly what constitutes a quality circle or joint production team. Furthermore, it excluded

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other than issues of product or service quality, workplace productivity and efficiency.

240. See *supra* notes 84-89 and accompanying text for a discussion of the subject matter test.

241. See, e.g., NLRA § 8(b), 29 U.S.C. § 158(b) (1988) (specifying unfair labor practices on the part of unions).

242. Clarke, *supra* note 67, at 2040-41. "Labor and management will be free to cooperate, but oppressive employers will not be able to dominate." *Id.* at 2041.

243. *Id.* at 2040.

244. H.R. 2523, 102d Cong., 1st Sess. (1991). The Act provided:

Title III — Labor Provisions Sec. 301. Formation and Use of Quality Circles and Joint Production Teams.

(a) In General.— Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. 158(a)(2)) is amended by inserting before the semicolon at the end the following: "Provided further, That nothing in this paragraph shall prohibit the formation or operation of quality circles or joint production teams composed of labor and management, with or without the participation of representatives of labor organizations" . . .

*Id.*

other types of EPPs and PRPs, particularly gainsharing, which have the greatest potential for increasing productivity.

Congress' most recent proposal to amend the NLRA, the Teamwork for Employees and Management Act of 1993 (TEAM),<sup>245</sup> is laudable. It appends a proviso to section 8(a)(2) allowing employees to participate in organizations which discuss "matters of mutual interest" and which clearly do not "have, claim or seek" the authority to enter into collective bargaining agreements.<sup>246</sup> TEAM generically approves EPPs and PRPs by removing them from domination status, and forthrightly relies on employees to be self-informed of their section 7 collective bargaining rights.

Admittedly, this solution does not guarantee immunity for PRP design teams. Compensation issues would still remain mandatory bargaining topics. However, employee involvement in PRP design derives no compelling productivity benefits.<sup>247</sup> Thus, firms would not risk violating the NLRA as long as employees do not sit on committees as employee representatives.

## V. CONCLUSION

Managers have limited options in enhancing employee productivity after *Electromation* and *du Pont*. For the non-union manager, *Electromation* and *Research Federal Credit Union* teach that EPPs should only be pursued if employee morale is sufficiently high so as not to invite union activity. Although there is no guarantee that unfair labor practice charges will not be filed, absence of union activity renders such charges less likely. The simple solution for managers implementing PRPs is to mandate them without employee

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245. S. 669, 103d Cong., 1st Sess. (1993). The House bill, H.R. 1529, 103d Cong., 1st Sess. (1993), is identical.

246. Section 3 of the bill provides:

Section 8(a)(2) of the National Labor Relations Act (29 U.S.C. 158(a)(2)) is amended by adding at the end thereof the following: "Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain or participate in any organization or entity of any kind, in which employees participate to discuss 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 under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization."

S. 669, 103d Cong., 1st Sess. § 3 (1993).

247. McADAMS & HAWK, *supra* note 2, at 38.



discussion and hope that employees will be duly motivated and appreciative of the potential rewards. Under no circumstances should employees be allowed to believe that they are gaining the benefits of collective bargaining from an EPP or PRP committee. For the manager of a unionized business, *du Pont* makes bargaining with the union over the EPP and PRP imperative. Brainstorming sessions and suggestions boxes, however, fall into the "safe haven" category.<sup>248</sup>

As the twenty-first century approaches, the NLRA represents an antiquated approach to labor relations. Mitigating industrial strife was the reason for passing the Wagner Act in 1935; enhancing employee productivity in a service-based economy in order to compete globally is now required. The NLRA should be revised in order to address contemporary labor conditions. TEAM represents a sensible step in this direction. In the interest of productivity gains which benefit all parties, the NLRA should be revised to shield EPPs and PRPs from dominated labor organization status.

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248. See *supra* notes 204-05 and accompanying text for a discussion of brainstorming sessions and suggestion boxes.

\* J.D./M.B.A. 1994, Washington University.