

January 1995

## Labor-Management Cooperation: Bath Iron Works's Bold New Approach

Jonathan B. Goldin University of Maine School of Law

Follow this and additional works at: <https://digitalcommons.minelaw.maine.edu/mlr>



Part of the [Labor and Employment Law Commons](#)

---

### Recommended Citation

Jonathan B. Goldin University of Maine School of Law, *Labor-Management Cooperation: Bath Iron Works's Bold New Approach*, 47 Me. L. Rev. 415 (1995).

Available at: <https://digitalcommons.minelaw.maine.edu/mlr/vol47/iss2/15>

This Comment is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

# LABOR-MANAGEMENT COOPERATION: BATH IRON WORKS'S BOLD NEW APPROACH

I.	INTRODUCTION .....	417
II.	THE NATIONAL LABOR RELATIONS ACT: AN ADVERSARIAL MODEL.....	425
III.	THE CHANGING AMERICAN LABOR MARKET AND THE MOVEMENT TOWARD COOPERATION: FINDINGS OF THE DUNLOP COMMISSION.....	429
	A. <i>Production and Quality Centered Initiatives</i> ....	434
	B. <i>Self-Managed Work Teams</i> .....	435
	C. <i>Workplace Committees and Partnerships</i> .....	436
IV.	LEGAL IMPEDIMENTS TO LABOR MANAGEMENT COOPERATION .....	438
	A. <i>NLRA Sections 8(a)(2) and 2(5): An Employer's Illegal Domination or Support of a Labor Organization</i> .....	439
	1. <i>Newport News and Cabot Carbon</i> .....	441
	2. <i>Reinterpretation: The Freedom of Choice Analysis</i> .....	443
	3. <i>Reinterpretation of a Section 2(5) Labor Organization</i> .....	445
	4. <i>Electromation, Inc.: Current Board Interpretation</i> .....	446
	5. <i>Recommendations of the Dunlop Commission</i> .....	450
	B. <i>The Supervisor and Managerial Exclusion</i> .....	451
	C. <i>Mandatory/Permissive Distinction</i> .....	455
V.	THE BIW EXPERIENCE .....	459
	A. <i>Changing Economy and Changing Attitudes</i> ....	460
	B. <i>The Concept of Teaming</i> .....	462
	C. <i>Bargaining and Drafting the New Agreement: Dissolution of the Adversarial Model</i> .....	463
	D. <i>The BIW Agreement</i> .....	465
	E. <i>Philosophical Underpinning</i> .....	465
	F. <i>The Significance of a Strong Union Voice</i> .....	468
	G. <i>AFL-CIO Principles for Labor-Management Partnership</i> .....	468
	H. <i>AFL-CIO Principles Applied to BIW</i> .....	469
	I. <i>The New American Workplace</i> .....	470
	J. <i>BIW—A New American Workplace</i> .....	474

K.	<i>Teaming and Joint Decision-Making: Disregarding the Mandatory/Permissive Distinction .....</i>	475
L.	<i>High Performance Workplace-Production Techniques .....</i>	478
M.	<i>The Alignment/Progression Model .....</i>	480
VI.	LEGALITY OF THE BIW AGREEMENT UNDER THE NLRA: THE NEED FOR LEGAL CHANGE .....	481
A.	<i>The Labor-Management Dichotomy: Exclusion of Supervisors and Managers.....</i>	481
B.	<i>The Ramifications of NLRA Sections 8(a)(2) &amp; 2(5): Domination of a Labor Organization .....</i>	484
	1. <i>Section 2(5): The Definition of a Labor Organization .....</i>	485
	2. <i>Section 8(a)(2): Domination .....</i>	487
	3. <i>Section 8(a)(5): Bargaining Issues.....</i>	488
	4. <i>The Need for Legal Change .....</i>	490
	5. <i>Pending Legislation.....</i>	493
VII.	CONCLUSION.....	498

## LABOR-MANAGEMENT COOPERATION: BATH IRON WORKS'S BOLD NEW APPROACH

### I. INTRODUCTION

An increasing number of employers and unions have found that the best way to compete in the marketplace and secure both profits for the firm and good jobs for workers is through cooperative worker-management relations. As Americans obtain more education, and with the changing nature of some work, employers increasingly find it appropriate to rearrange responsibilities and tasks to employees, who work sometimes as teams and other times as individuals. For their part, more highly educated employees express greater desire to participate in workplace decisions and have the knowledge and competence to undertake more tasks at the workplace. It is clearer now than in the past that creating value at the workplace is the joint responsibility of management and labor.<sup>1</sup>

To compete in the world market, Bath Iron Works must change. We must expand our vision to look at the big picture, instead of focusing on just a small piece of the world. In order to achieve the significant improvements necessary to better our performance on naval contracts, as well as enable us to enter into the commercial/industrial market, we must develop a rational plan that allows us to be the most efficient and competitive manufacturing organization in the world.<sup>2</sup>

On September 5, 1994, Labor Day, President Clinton addressed the nation from Bath Iron Works (BIW) in Bath, Maine.<sup>3</sup> The purpose of his visit was to hail, as a national model for workplace cooperation, the recently signed collective bargaining agreement<sup>4</sup> (the agreement) between BIW's management and workers represented by Local S/6 of the Industrial Union of Marine and Shipbuilding Workers of America (IUMSWA)/International Association of Ma-

---

1. COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP'T OF LAB., U.S. DEP'T OF COMMERCE, REPORT AND RECOMMENDATIONS 2-3 (1994) [hereinafter DUNLOP COMM'N FINAL RECOMMENDATIONS].

2. BATH IRON WORKS CORP. AND THE INDUS. UNION OF MARINE AND SHIPBUILDING WORKERS OF AMERICA/INT'L ASS'N OF MACHINISTS, 1994 LABOR NEGOTIATIONS THROUGH JOINT TEAMING 23 (1994) [hereinafter BIW AGREEMENT].

3. Remarks on Labor Day in Bath, Maine, 30 WEEKLY COMP. PRES. DOC. 1735 (Sept. 5, 1994). BIW is Maine's largest private employer. The 109-year-old shipyard provides 8800 jobs for Maine workers. BIW competes with other shipyards in the United States for contracts to build destroyers for the Navy.

4. Steve Campbell, *Clinton Praises BIW for Teamwork*, PORTLAND PRESS HERALD, Sept. 6, 1994, at 1A.

chinists (IAM) (Local S/6 or union).<sup>5</sup> President Clinton was joined on the podium by labor leaders from the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) and union representatives from the IUMSWA/IAM, and management from Bath Iron Works. Government, organized labor, and American business joined together to demonstrate to the nation the possibilities for creating a new American workplace. The separate interests represented on the stage symbolized both the history and the future direction of labor management relations at BIW and the potential that exists for unionized workplaces across America.

The economic necessities that led to the signing of this historic agreement are not limited to the shipbuilding industry. To meet mounting domestic and foreign competition, many American businesses are employing cooperative efforts and employee participation plans in their workplace. In an attempt to improve quality, productivity, and competitiveness, many American enterprises are realizing that employee input into management decision-making concerning quality and productivity is a beneficial step towards remaining competitive. Many American businesses understand that the dominant current system of work organization, where the interests of the employer and employee remain separate and employee initiative is stifled by hierarchical levels of authority and supervision, only serves to inhibit worker initiative and is detrimental to worker morale and self-esteem.

In his Labor Day speech, President Clinton declared that "[w]e cannot afford in a global economy to be divided again, Government and business and workers fighting each other all the time, people in this country finding ways to get in fights with each other instead of ways to pull together and make this country great again."<sup>6</sup> The division to which President Clinton referred has been a dominant characteristic of labor relations in the United States for the better part of the twentieth century. The National Labor Relations Act<sup>7</sup> (NLRA

---

5. Local S/6, BIW's largest union, represents about 5300 shipbuilders, including welders, pipe fitters and carpenters. Candace Lawson, *BIW 'Teaming' Replaces Conflict*, TIMES RECORD, July 20, 1994, at 14.

6. Remarks on Labor Day in Bath, Maine, 30 WEEKLY COMP. PRES. DOC. 1735 (Sept. 5, 1994).

7. The current version of the National Labor Relations Act is a result of three amendments to the original Act. In 1935 Congress passed the Wagner Act, the original National Labor Relations Act, which gave workers the right to organize unions and to bargain collectively with their employers. Ch. 372 § 1, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1982)). The NLRA was amended in 1947 by the Labor-Management Relations Act (Taft-Hartley Amendments). Ch. 120, § 101, 61 Stat. 136 (1947). In 1959 Congress further amended the NLRA when it passed the Labor-Management Reporting and Disclosure Act (Landrum-Griffin Amendments). Pub. L. No. 86-257, §§ 701 (b), 703, 73 Stat. 519 (1959). Attorney Thomas J. Schneider, in an address given at the Kennedy School of Government, traced the development of the NLRA as follows:

or Act), the nation's principal labor law, is the legal framework for collective bargaining that relies on the separation of labor and management to achieve a system of arm's length negotiation.

The Act's approach to labor relations often has been referred to as an adversarial model. This adversarial model views labor and management as separate entities with inherently antagonistic interests. Labor law experts suggest that federal laws may be perpetuating this adversarial relationship and stifling cooperative efforts between labor and management. The adversarial premise may have been justified in the socioeconomic circumstances of 1935, but critics claim that it is outdated for today's competitive global economy and is ill-suited to assist American businesses to compete. Whereas the concerns of labor and management were once seen as inherently in conflict, today, the argument runs, their concerns are coalescing. Both labor and management share an interest in the preservation of jobs through increased productivity and competitiveness.

The basic environment for American businesses and workers has changed dramatically since the time the NLRA was passed. Today the nation finds itself confronted with declining productivity, increased foreign and domestic competition, and reports of worker

---

The Wagner Act of 1935 [was] intended to foster industrial peace by promoting equality of bargaining power between employees and employers and by diminishing the causes of labor disputes, in particular union recognition disputes. The Act viewed employees' self organization and collective bargaining as essential conditions to industrial peace and considered employer interference with and obstruction of such activity to be the principal evils to be checked. The law did not at all restrict or regulate union activities. Thus, at this stage in time, in the 1930's, the government intended to encourage unionization and collective bargaining activities.

The Taft-Hartley Act of 1947 sought to promote industrial peace and restore an equilibrium in labor-management relations by abandoning the policy of affirmatively encouraging collective bargaining. Congress concluded that the rapid growth of the unions in the late 30s and early 40s and the spread of collective bargaining had destroyed the equality of economic power. Not only was a neutral stance toward collective bargaining adopted, but union activity was regulated and restricted much as employers' activities had been under the Wagner Act. For example, union discrimination against an employee regarding union membership, refusal to bargain collectively with an employer, secondary boycotts, and recognition picketing were made unfair labor practices. In addition, collective bargaining agreements become legally enforceable contracts.

Finally, the Landrum-Griffin Act of 1959 sought to further balance the power of the two sides. It also intended to protect the rights of individual union members by regulating internal union activities. Thus, labor peace was thought to be benefited by a free and fair struggle between labor and management at the bargaining table.

Thomas J. Schneider, *Quality of Working Life and the Law*, Address in the Harmen Lecture Series at the Kennedy School of Government and Public Policy (November 19, 1981), reprinted in Stephen I. Schlossberg and Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595, at 599-600 (1986).

dissatisfaction.<sup>8</sup> The American workplace, in addition, “has become the central institution in American society” and “the centerpiece of the nation’s economic performance.”<sup>9</sup> In today’s global economy “the quality of the workplace affects not only the individual enterprise and its employees, but also national economic growth and productivity performance.”<sup>10</sup> In response to these challenges, many American businesses have experimented with cooperative workplace governance and employee participation programs.<sup>11</sup> These programs are often geared toward increasing productivity and competitiveness by allowing workers to assist management in addressing workplace problems and involving the workers in management decision-making. Many of these cooperative plans, however, face legal challenges and can result in adverse consequences for workers under current American labor law.

The changing face of the U.S. economy and workforce has brought the issue of labor-management relations to the forefront of the public policy arena. On March 24, 1993, Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown announced the creation of The Commission on the Future of Worker-Management Relations (the Commission or Dunlop Commission).<sup>12</sup> With the goal of improving the nation’s productivity and living standards, the Commission was designed to study how workers and managers could work together more effectively by taking on new and often shared responsibilities.<sup>13</sup>

---

8. 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, 2021 (1987) [hereinafter *Rethinking the Adversarial Model*].

9. DUNLOP COMM’N FINAL RECOMMENDATIONS, *supra* note 1, at 1.

10. *Id.*

11. Workplace cooperative programs are not new to the U.S. economy. While they became very popular in the 1970s, one historian has dated their existence to the early 19th century. Henry P. Guzda, *Industrial Democracy: Made in the U.S.A.*, MONTHLY LAB. REV., May 1984, at 26. For a brief description of more recent history of employee participation efforts, see COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEP’T OF LAB., U.S. DEP’T OF COM., FACT FINDING REPORT 47-48 [hereinafter DUNLOP COMM’N FACT FINDING REP.]. One recent and celebrated cooperative effort was that of the Saturn-GM facility that entered into a cooperative agreement with the United Auto Workers. Stephen I. Schlossberg and Steven M. Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation*, 37 LAB. L.J. 595 (1986).

12. Notice of the establishment of the Commission as well as notice of the first meeting on May 24, 1993, was published in the *Federal Register* of May 7, 1993. The Commission is to serve solely as an advisory body in accordance with the Federal Advisory Committee Act. DUNLOP COMM’N FACT FINDING REP., *supra* note 11, at xi. The Commission is often referred to as the Dunlop Commission in honor of its Chairman, former Secretary of Labor, John T. Dunlop.

13. *Id.* The Mission Statement of the Commission states: “The future living standards of our nation’s people, as well as the competitiveness of the United States, depend largely on the one national resource uniquely rooted within our borders:

The Commission was to investigate and make recommendations concerning the current state of worker-management relations in the United States. In particular, the Commission was to address the existence and need for greater workplace cooperation and to identify the legal impediments to cooperation that exist under current U.S. labor law.<sup>14</sup> The Commission released its Fact Finding Report in May of 1994.<sup>15</sup> The final report with recommendations was issued on January 9, 1995.<sup>16</sup>

In its final report, the Commission urged American lawmakers, workers, and business leaders to find common ground, to develop an American workplace that is less adversarial, more cooperative, and more productive. The Commission declared:

It is time to turn down the decibel count, the adversarial and hostility quotient that all too often mars discussion of worker-management relations. . . . We must develop institutions and practices that will allow employees and firms to cooperate at the workplace in ways that will contribute optimally to economic growth and competitive performance and to the fulfillment of social norms.

---

our people—their education and skills, and their capabilities to work together productively.” *Id.* (quotations omitted).

14. The Commission was to report back to the Secretaries of Labor and Commerce regarding these specific questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?
3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?

*Id.* (quotations omitted).

15. Prior to release of the Fact Finding Report, the Commission held 11 national hearings in Washington, D.C., and working parties of three to five Commission members held hearings in six communities—Louisville, East Lansing, Boston, Atlanta, San Jose and Houston. A total of 134 persons testified before the Commission in its 11 hearings in Washington, D.C., and 220 persons testified in the six regional hearings (a total of 354 witnesses). The transcripts of the 11 national Commission hearings run to 2125 pages, and the transcripts of the six regional hearings run to 1733 pages (a total of 3858 pages). The Commission also received numerous exhibits, letters, papers, articles, and studies that have been included in its public record. *DUNLOP COMM’N FACT FINDING REP.*, *supra* note 11, at xii.

16. The Commission held four additional hearings in Washington, D.C., following the issuance of the Fact Finding Report, bringing the total number of hearings to 21. Fifty-seven persons testified before the Commission in these four additional hearings, bringing the total number of witnesses to 411 in the twenty-one public hearings. The transcripts of the four additional hearings totaled 823 pages, bringing the total number of pages for all the public hearings to 4681. *DUNLOP COMM’N FINAL RECOMMENDATIONS*, *supra* note 1, at x-xi.



The workplaces that we have inherited are far too adversarial in tone and substance for the good of the American economy. Changes must be made in the way firms, employees, and unions interact, and in workplace laws and regulations, to enable them to carry out successfully the vital tasks that society places on them.<sup>17</sup>

President Clinton traveled to Bath, Maine, on Labor Day to tell the nation of a success story in American labor relations. The BIW agreement represents a true departure from the adversarial model of labor relations and signifies a genuine partnership between labor and management towards mutual goals and shared concerns. The agreement proceeds upon the premise of cooperation, joint decision-making, and radical restructuring of production techniques. The agreement empowers workers to become part of the enterprise, to use their decision-making capabilities, and to do more than "check their brains at the door."

The BIW agreement was worthy of the national exposure it received that Labor Day. BIW's cooperative collective bargaining agreement represents a clear departure from the adversarial model of labor relations provided for in the NLRA. That national exposure, however, draws attention to a serious flaw in the way the National Labor Relations Act governs the employer-employee relationship. The NLRA, with its rigid separation of labor and management, did not envision BIW's type of cooperative relationship between management and unionized labor. As a result, legal uncertainties surround the BIW agreement's implementation. Beyond the NLRA's impediments to unionized cooperation lies a second problem as well. Unlike BIW, the majority of American workers has chosen not to be represented by a union.<sup>18</sup> The cooperative techniques adopted at BIW were the result of a collective bargaining agreement, the terms of which were negotiated by management and labor. In the great majority of American workplaces employing cooperative techniques, however, there is no union to represent the aggregate desires of the workers. In non-union workplaces, cooperative techniques such as those employed at BIW are often found to be in violation of the Act. As a result some cooperative workplace relationships have been ordered halted by court order, while others operate in a status of legal uncertainty.

The NLRA was drafted with a unionized workforce in mind. With the steady decline of unionism in America, the Act's rigid framework for collective bargaining maintains significant barriers to

---

17. *Id.* at 3-4.

18. The Dunlop Commission reported that in 1993, 11.2 percent of private sector nonagricultural workers were unionized. In the 1950s that number was approximately 35 percent. By contrast, the Commission reported that "over a third of public sector workers were union members in 1993, compared with 10 to 11 percent in the 1950s." DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 24.

cooperation in the non-union majority of American workplaces. Reevaluation of the NLRA to allow for greater workplace cooperation regardless of a union's presence is necessary.<sup>19</sup> American labor law must adapt to accommodate a better educated workforce, one that desires more input on the job. If management is willing to cooperate with workers and share their decision-making responsibilities, American labor law should encourage that undertaking. Congress must reexamine the adversarial premise of the NLRA in light of changing industrial realities.

This Comment examines the changing environment of the American workplace and the existing labor laws that impede cooperative efforts in both union and non-union workplaces. The BIW agreement serves as a framework to analyze the need for change in the law governing workplace cooperation.<sup>20</sup>

Part II of this Comment presents the legal and historical foundations of the National Labor Relations Act and discusses the framework for collective bargaining that led to the entrenchment of the adversarial model. Part III discusses the changing nature of the American economy and workforce that has led to the reevaluation of America's labor laws. Part III also discusses the general movement toward, and specific examples of, cooperative management and employee participation programs that have been employed in American workplaces throughout the country. The findings of the Dunlop Commission concerning these issues are discussed in detail.

---

19. This Comment examines a very limited portion of the NLRA. Reevaluation of the Act by Congress, on the other hand, should encompass examination of a much broader range of provisions contained in the NLRA. The Dunlop Commission, for example, examined the process of establishing the collective bargaining relationship in American workplaces. The Commission concluded that union "[r]epresentation elections as currently constituted are a highly conflictual activity for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial." *Id.* at 79. Accordingly, the Commission recommended "several revisions in the laws governing the representation process [that] will render employee decisions about whether to engage in collective bargaining simpler, more timely, and less conflictual, thus making this institution more accessible to those employees who want it." DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at 18. For examples of specific recommendations proposed by the Commission, see *infra* note 90. Discussion of these aspects of the Commission report are beyond the scope of this Comment. The Author would like, however, to emphasize his support for the right of workers to choose union representation, free from employer abuses and coercion, if that is what they desire. Analysis of the Commission's recommendations regarding collective bargaining and union representation elections would be a very interesting topic for further discussion.

20. When considering the BIW agreement it is important to keep in mind that BIW is a unionized plant. Some of the following discussion does not distinguish between unionized and non-unionized settings. When this distinction becomes significant to the discussion, however, effort has been made to point this distinction out, particularly as it relates to the BIW experience.

Part IV of this Comment identifies and analyzes specific provisions of the NLRA that obstruct workplace cooperative efforts. This part discusses the structural and judicially created impediments to cooperation that are found in sections 8(a)(2)<sup>21</sup> and 8(d)<sup>22</sup> of the NLRA, as well as the Act's exclusion of supervisors and managers from the ranks of organized labor. Discussion of these sections includes analysis of opinions by the National Labor Relations Board (NLRB or Board), United States Courts of Appeals, and the United States Supreme Court, with the recommendation of the Dunlop Commission provided where applicable.

Section V of this Comment discusses the particular experience at BIW and analyzes BIW's recently signed collective bargaining agreement between management and workers represented by Local S/6. Discussion of the agreement includes a description of the collective bargaining process, the teaming concept, the committee structure employed, and the alteration in production techniques provided for in the agreement. Again, the findings and recommendations of the Dunlop Commission and the recommendations of the AFL-CIO serve as guidelines for this discussion.

Section VI provides legal analysis of the BIW agreement in light of the relevant sections of the NLRA earlier identified as traditional impediments to labor-management cooperation. This Comment argues that the BIW agreement may be violating current labor laws and, therefore, that reformation of these laws is needed to allow for this sort of cooperation. In particular, the agreement reflects the pressing need to clarify the definitions of workers, supervisors, and managers, so that the Act's protections may be extended to these groups. The questions that exist as to the legality of the BIW agreement, although arising in a union setting, highlight the need to amend section 8(a)(2) of the NLRA to allow for greater employee participation in non-union firms as well. This must be done while protecting workers' rights to choose an outside labor organization if they desire. Employee participation committees cannot compete with unions for employee representation. This Comment argues that section 8(a)(2) is the proper provision in which to address this issue and this Comment presents an argument in favor of legislation currently pending in the U.S. Congress. Lastly, Section VI of this Comment concludes by encouraging labor and management to learn from the BIW agreement, to change their traditional confrontational mindsets, and to embrace cooperation as a mutually beneficial alternative.

---

21. National Labor Relations Act § 8(a)(2), 29 U.S.C. § 158(a)(2) (1982).

22. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1982).

## II. THE NATIONAL LABOR RELATIONS ACT: AN ADVERSARIAL MODEL

Congress passed the National Labor Relations Act, our nation's principal law dealing with labor-management relations, to prevent the industrial strife<sup>23</sup> and economic violence that threatened the American economy following the Depression. Congress perceived such "economic warfare"<sup>24</sup> to be the result of the "economic inequality between management and labor."<sup>25</sup> In order to address the violence and ameliorate this perceived inequality, the Act established an institutional framework for arm's-length bargaining in which representatives of labor would articulate employees' aggregate needs to management.<sup>26</sup> In particular, the Act guaranteed three specific rights to workers: 1) the right to organize; 2) the right to bargain collectively; and 3) the right to engage in concerted activity such as peaceful strikes and picketing.<sup>27</sup>

With the passage of the NLRA, it became the official policy of the United States Government to encourage collective bargaining and to protect workers' rights to be represented by a labor organization of their own choosing.<sup>28</sup> Collective bargaining refers to a process in

23. See S. REP. NO. 573, 74th Cong., 1st Sess. 1 (1935) ("The first objective of the bill is to promote industrial peace."), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2300 (1985) [hereinafter 2 NLRB, LEG. HIST.].

24. See 78 CONG. REC. 4229, 4230 (1934), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 22, 24 (1985) [hereinafter 1 NLRB, LEG. HIST.]. (Senator Wagner introduced the legislation as designed to address the "sharp outbreaks of economic warfare in various parts of the country . . .").

25. Thomas T. Crouch, Note, *The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace*, 41 VAND. L. REV. 577, 581 (1988) [hereinafter *In Search of Industrial Peace*] (citing *Hearings on S. 1958 Before the Senate Comm. on Education and Labor*, 74th Cong., 1st Sess. 34-43 (1935), reprinted in 1 NLRB LEG. HIST., supra note 24, at 1373, 1410-1419 (1985) (statement of Sen. Wagner)).

26. See Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1679 (1983) [hereinafter *Collective Bargaining*].

27. See 29 U.S.C. § 157 (1988). These rights are often referred to as "Section 7" rights. Section 7 of the NLRA provides, in pertinent part: "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 protection . . ." 29 U.S.C. § 157 (1988).

28. See 29 U.S.C. § 151 (1988). Section 1 of the NLRA provides, in pertinent part:

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-or-

which an employer meets and negotiates with an employee representative as to conditions of employment and workplace-related issues. The NLRA guarantees the rights of workers to organize and to choose an independent labor organization (or union) to represent their interests to the employer. The purpose of the Act was to provide unions with a "limited, statutorily defined role, large enough to encompass the bulk of labor unrest, and substitutes whenever possible the market mechanisms of arm's-length collective bargaining for physical force and direct coercion."<sup>29</sup>

The collective bargaining model treats management and labor as autonomous entities engaging in a quasi-contractual relationship.<sup>30</sup> The Act provides only for bargaining process, not outcomes. The parties, not the NLRA, determine the substance of any agreement they reach.<sup>31</sup> In order to maintain the freedom of private enterprise<sup>32</sup> and to respect the legal capacity of each autonomous party to contract,<sup>33</sup> the Act neither provides for substantive review of contractual terms nor mandates that any particular agreement be reached.<sup>34</sup>

The collective bargaining model relies on the strict separation of management and labor. The idea is that each side will represent its own interests at the bargaining table. Due to the inherently authoritarian nature of the employer-employee relationship, the concerns of the two sides are often in conflict. Management and labor, in effect, approach the bargaining table as "separate factions in warring camps."<sup>35</sup> The idea of management and labor as inherent adversaries is rooted in the turbulent history of the Wagner Act and is perpetuated by an enforced labor-management dichotomy.<sup>36</sup> The result, not surprisingly, has been "the development of an adversarial

---

ganization, 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.

*Id.*

29. COLLECTIVE BARGAINING, *supra* note 26, at 1674 (footnotes omitted).

30. *Id.* at 1674-75.

31. *Id.*

32. See *In Search of Industrial Peace*, *supra* note 25, at 581.

33. See *Collective Bargaining*, *supra* note 26, at 1675.

34. See NLRA § 8(d), 29 U.S.C. § 158(d) (1988). See also 79 CONG. REC. 7660 (1935), reprinted in 2 NLRB, LEG. HIST., *supra* note 23, at 2373. Senator Walsh, Chairman of the Senate Labor Committee stated:

When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, "Here they are, the legal representatives of your employees." What happens behind those doors is not inquired into, and the bill does not seek to second-guess labor-management agreements.

35. *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 494 (1947) (Douglas, J., dissenting).

36. See *Rethinking the Adversarial Model*, *supra* note 8, at 2042.

culture in American labor-management relations."<sup>37</sup> As one commentator has suggested:

The term "adversarial model" is used to describe a system in which management and labor maintain a strict separation, and approach collective bargaining as competing entities with opposing interests, involved in a struggle over limited resources. Because the basic premise of this system is that the parties' interests inherently conflict, the parties rarely consider the possibility that cooperation might benefit them both.<sup>38</sup>

This view was clearly espoused by the Supreme Court in *NLRB v. Insurance Agents, Int'l Union*.<sup>39</sup> Justice Brennan, writing for the majority of the Court, stated that labor and management "still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest. The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values."<sup>40</sup>

This difference in values is a basic assumption of the adversarial model and of the Act itself. The adversarial model is seen as a direct result of the industrial anarchy that led to enactment of the legislation<sup>41</sup> and as a natural consequence of the authoritarian nature of the employment relationship. Within this relationship, it is argued, conflict is inevitable and natural. As one commentator has argued:

[B]etween employer and employed inherent conflicts of interest exist which are a function of the authoritarian nature of the employment relationship itself. Further assumed is the idea that employees will be able to gain, protect and further recognition of their peculiar interests and goals only through formation of autonomous group that can act to check management's inherent power. Since a conflict of interests is regarded as inherent to the employment relationship, the use of economic pressure is seen as having a legitimate and appropriate role in the parties' ordering process. Thus, in the collective bargaining model, conflict is viewed as a natural rather than a morbid characteristic, and its expression through the strike, lockout and the like is regarded as integral to a system that permits the

---

37. *Id.*

38. *Id.* at 2022 n.7.

39. 361 U.S. 477 (1960).

40. *Id.* at 488-89.

41. See generally *Rethinking the Adversarial Model*, *supra* note 8, at 2042 (Clarke states that both management and labor bear equal responsibility for the adversarial nature of labor relations in the United States. In particular, Clarke points out that the history of labor in the U.S. has been marked by "a trade unionism that was militant in organizing industry and establishing an adversary position in that work setting.") (quoting Schrank, *Are Unions an Anachronism?*, *HARV. BUS. REV.*, Sept.-Oct. 1979, at 110.) Clarke contends this adversarial posture may have been necessary to solidify worker support in the climate of the 1930s.).

parties to seek their self-interest in establishing the order of their relationship. These features of collective bargaining have led to its characterization as an adversarial system.<sup>42</sup>

The Act as it is judicially construed reinforces the adversarial culture of labor relations. First, the Act has been written and interpreted to make a clear distinction between "employees," who are entitled to the Act's protections, and representatives of management, such as "supervisors" and "managers," who are not. This latter group has been interpreted to include any worker who uses his or her discretion or makes decisions in the interest of the employer or to further management policies. Supervisors and managers are not protected by the Act and therefore may not join unions, bargain collectively, or engage in concerted activity. Because supervisory and management personnel implement policy and make discretionary decisions on behalf of owners, they are excluded from the Act's protection. This assures that management functions, decisions, and interests remain outside the employees' role in the dichotomy.

Second, the Act, through section 8(a)(2), impedes cooperation between management and labor by assuring that employers can play no role in forming labor organizations or providing assistance to them. Section 8(a)(2) makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."<sup>43</sup> The consequence of this language, and a related provision that defines a "labor organization,"<sup>44</sup> has been to call into question the legality of cooperative management-labor committees that discuss and address issues concerning terms and conditions of employment and other workplace related issues.

Lastly, section 8(d) of the Act limits the issues that management and labor are required to bargain over to a short list of mandatory subjects. Section 8(d) defines the required subjects of collective bargaining as "hours, wages, and other terms and conditions of employment."<sup>45</sup> The result of this provision has been to create a distinction between mandatory and permissive subjects of collective bargaining.

---

42. Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 515 (1986) (citations omitted).

43. 29 U.S.C. § 158(a)(2) (1982). The statute also contains a proviso that reads: "[A]n employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." *Id.*

44. Section 2(5) of the Act, which is construed in unison with § 8(a)(2), defines a "labor organization" as follows:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

29 U.S.C. § 152(5) (1988).

45. 29 U.S.C. 158(d) (1988). The provision reads, in pertinent part:

While both an employer and union are obligated to bargain over mandatory terms,<sup>46</sup> no requirement exists relating to permissive subjects. Although this provision does not legally prohibit the two sides from discussing permissive subjects, "because of the adversarial nature of the interaction, the employer is unlikely to be willing to discuss other 'permissive' subjects that concern workers."<sup>47</sup> This mandatory-permissive distinction further serves to separate the domains of the two sides and has proven a significant impediment to cooperation.

The Act does not require that management and labor treat one another as adversaries in every aspect of the workplace. Cooperative workplaces and employee participation plans have become prevalent throughout the American economy. Many exist, however, in a state of legal uncertainty. While the adversarial bargaining model does not mandate that labor and management remain in perpetual conflict, however, neither does it encourage or tolerate meaningful cooperation. In a world of competitive global markets and a changing labor market and economy, the country can ill afford to allow labor laws to detract from America's efforts to adapt and compete. The specific provisions of the NLRA previously outlined are discussed in detail in Section IV of this Comment and an argument is presented in favor of legal change. The following Section describes how the changing nature of the American labor market has led to the reevaluation of existing labor laws. It details the increased popularity and success of cooperative workplaces that currently exist in the American economy.

### III. THE CHANGING AMERICAN LABOR MARKET AND THE MOVEMENT TOWARD COOPERATION: FINDINGS OF THE DUNLOP COMMISSION

Against this legal and historical backdrop of the NLRA, the Dunlop Commission investigated the existence and need for greater labor-management cooperation in the American workplace. In particular, the Commission was to answer the following question:

---

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

*Id.*

46. The Act imposes a duty of good faith bargaining upon both the employer and the representative of the employees. See 29 U.S.C. § 158(a)(5) (1988); 29 U.S.C. § 158(b)(3) (1988), respectively.

47. See *Rethinking the Adversarial Model*, *supra* note 8, at 2043.



“What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?”<sup>48</sup> The Commission found that “[t]he American economy, the workforce and jobs, the technology at workplaces, the competitive context of enterprises, and the regulations of employment have changed” significantly since the time our primary laws governing labor-management relations were passed.<sup>49</sup> These economic and social changes have posed significant problems and challenges to certain aspects of es-

---

48. See DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at xi.

49. *Id.* at 1. The Commission identified 25 critical factors in the American labor market that have affected American workers and posed challenges to the U.S. economy and traditional labor-management relations. These 25 factors are:

- 1) A long-term decline in the rate of productivity;
- 2) An increased globalization of economic life, reflected in trade and capital flows, and immigration;
- 3) Increased competitiveness of U.S. firms in the international marketplace in the late 1980s and early 1990s, due to changes in unit labor costs and exchange rates;
- 4) Changes in the work performed due to changing technology;
- 5) A shift in employment to service-producing sectors from goods-producing sectors;
- 6) A shift in the occupational structure of the workplace toward white collar jobs that require considerable education;
- 7) Millions of establishments and firms of different sizes, whose workplace practices and outcomes differ depending in part on the number of employees;
- 8) Turbulence in many product and financial markets due to deregulation and changes in government cutbacks in defense or other programs;
- 9) A higher proportion of Americans working than ever before, due in large part to the movement of women into the work force;
- 10) An increased minority share of the workforce;
- 11) Increased years of schooling by the workforce;
- 12) A changed age structure of the workforce as the “baby boom” generation ages;
- 13) An increased flow of immigrants from developing countries into the United States;
- 14) Substantial creation of jobs but high unemployment for the less skilled and considerable insecurity about jobs;
- 15) Stagnant real hour compensation, with falling real compensation for male workers;
- 16) A rising gap in earnings between higher paid and more educated or skilled workers and lower paid and less skilled workers;
- 17) A growing number of low wage fully employed workers whose living standards fall below those of low wage workers in other advanced countries;
- 18) Annual hours of work that exceed those in other advanced countries except for Japan;
- 19) A declining gap in earnings of men and women, but stagnation in the gap between non-white and white workers;
- 20) A growing number of jobs that diverge from full-time continuing positions with a single employer;
- 21) A large growing population for whom illegal activity is more attractive than legitimate work;
- 22) Stagnant rates of occupational injury and illness and increased workdays lost per full-time worker, with increased workers’ compensation costs;
- 23) A decline in the prevalence of collective bargaining;
- 24) Fewer strikes or lockouts; and
- 25) Increased government regulation of the workplace.

*Id.* at 26-27. The principal laws governing workplace organization are the Railway Labor Act (1926), the Wagner Act (1935), the Taft-Hartley Act (1947), and the Landrum-Griffin Act (1959). Other major laws from this period include the Social Security Act (1935), the federal-state system of unemployment insurance, and the Fair Labor Standards Act (1938). *Id.* at 1 n.1.

established worker-management relations and have resulted in certain adverse job-market outcomes for American workers.<sup>50</sup>

These changes, in turn, have forced many American workplaces to alter certain traditional methods of labor-management relations and to experiment with cooperative organizational principles.<sup>51</sup> Externalities in the American economy and workforce are “interacting with a growing recognition that achieving a high productivity/high wage economy requires changing traditional methods of labor-management relations and the organization of work in ways that more fully develop and utilize the skills, knowledge, and motivation of the workforce.”<sup>52</sup> Since the 1980s, there has been a dramatic increase in the number and variety of workplace cooperative efforts in both unionized and non-unionized worksites.<sup>53</sup> These cooperative arrangements take many different forms. Each, however, leads to greater worker input into management decision-making and requires more personal interaction between management and labor.<sup>54</sup>

The Dunlop Commission reported growing support for workplace cooperative efforts among U.S. workers, labor leaders, and business managers.<sup>55</sup> Based on survey data and direct testimony the Commission found that “a majority of American workers want to have opportunities to participate in decisions affecting their job, the organization of their work and their economic future.”<sup>56</sup> For example, the Commission reported an outside national survey documenting that “84% of employees working for organizations without an employee involvement or participation program would like to participate in one if given the opportunity and 90% of those working in enterprises with a plan responded that their company’s program was a ‘good idea.’”<sup>57</sup> The Commission reported that the changing characteristics of the American workforce suggest that workers’ desire

---

50. *Id.* at 1.

51. *Id.* at 29.

52. *Id.*

53. *Id.*

54. See *Rethinking the Adversarial Model*, *supra* note 8, at 2024.

55. See DUNLOP COMM’N FACT FINDING REP., *supra* note 11, at 30-34.

56. *Id.* at 30.

57. *Id.* (citing *Business Week* and Sirota and Alper Associates, *The 1985 National Survey of Employee Attitudes*, New York, Sirota and Alper, September 1985). The Commission also reported that “other surveys of blue and white collar groups conducted in the early 1980’s found similar results.” For example, one study found that over 80 percent of respondents expressed a “desire for a say about issues affecting how they did their work, and about the quality of their work, and a majority indicated an interest in having a say about the handling of grievances or complaints, the pace of work, and how technology is used on their jobs.” The survey found that white collar workers “expressed higher levels of interest in participation on all these issues than blue collar workers.” *Id.* citing THOMAS A. KOCHAN ET AL., *THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS* 212 (1986). The Commission also reported recent focus group interviews by the Princeton Survey Research Center found that:

for more involvement in the workplace has been "growing gradually over time"<sup>58</sup> and that a continued increase of interest should be expected in the future, "since interest in participation tends to rise with education."<sup>59</sup> The Commission also reported, however, that "[s]ome employees remain highly skeptical and fearful of cooperative programs developed by managers in the absence of an independent union to represent workers' interests."<sup>60</sup>

Representatives of organized labor echo this concern for independent representation as a necessary prerequisite for true and fair employee participation. Labor leaders, the Commission reported, believe that the long-run objectives of employee participation should be to "enhance both enterprise competitiveness"<sup>61</sup> and "industrial democracy by providing employees a voice at all levels of decision-making."<sup>62</sup> Union representatives believe, however, that these goals are unlikely to be achieved unless the employees have an independent source of representation in the form of a union to offset any imbalance of power created by a management-run cooperative plan.<sup>63</sup>

---

[H]ourly workers, professional and technical employees, and supervisors consistently stated that among the things they value most in a job are variety, freedom to decide how to do their work without close supervision, information and communication regarding things that affect their work and their firm, and evidence that their employers seek, value and act on their suggestions for improvement at their workplace.

*Id.* at 31 (citing "Worker Representation and Participation Survey Focus Group Report," Princeton Survey Research Associates, Princeton, New Jersey, April 1994).

58. See DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 31.

59. *Id.* To highlight this point, the Commission included the following commentator's observation: "[A] more educated work force—as ours has become—is simultaneously a more critical, questioning, and demanding work force, and a potentially more frustrated one if expectations are not met." See Rosabeth Moss Kanter, *Work in America*, 107 DAEDALUS 54 (1978).

60. See DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 31. The Commission included the following statement by *Labor Notes*, a publication of rank and file union activists:

We have deep skepticism toward the notion that workers and management have much in common in dealing with workplace problems. They compete with each other to divide the economic pie, much as companies compete for market share. The idea that they share interests has historically been used to defeat or preempt unions. . . .

Unions remain the only genuine independent employee organization capable of fighting for the interests of workers on the job.

See *id.* (citing *Labor Notes*, "The Independence of Labor," a paper submitted to the Commission, October 1, 1993).

61. See *id.* at 34.

62. *Id.* at 33.

63. *Id.* at 34. The AFL-CIO report states:

Left to its own devices, management is most likely to continue to adhere to the old ways of organizing work or to pursue work reorganizations which leave the underlying power relationships unchanged and which offer the appearance, but not the substance, of genuine worker involvement. It is

Lastly, the Commission reported that a large number of business managers support the idea of employee participation programs and worker-management partnerships as essential to maintaining competitiveness in their particular markets and industries.<sup>64</sup> For example, Bruce Carswell, Senior Vice President of GTE and Chairman of the Labor Policy Association, testified:

The message that we would like to leave with you today is that our nation can no longer afford to view the employment relationship as American workers and management competing with one another in a zero-sum game. Instead, we need to create a partnership among empowered employees, government, industry, and unions such that everyone is playing on the same team in pursuit of mutually beneficial objectives.<sup>65</sup>

Thus, there appears to be a consensus on both sides that more cooperation is needed in the American workplace.

The Commission estimated that between one-fifth and one-third of the American workforce is covered by some form of employee participation program.<sup>66</sup> This figure includes a substantial majority of larger American employers,<sup>67</sup> and it is expected that the number of participatory programs would be even greater if the surveys included as "employee participation" the more informal styles of communication found in many smaller American enterprises.<sup>68</sup> The permanence and longevity of these employee participation programs are varied.<sup>69</sup> However, the Commission reported that those most likely to be sustained over time "are ones in which the parties broaden the scope of issues addressed, and integrate them with human resource policies of the organization."<sup>70</sup> In particular, those arrangements combined with the presence of a union involved as a joint partner with management were found most likely to survive.<sup>71</sup>

There is no single dominant arrangement of participatory and cooperative schemes. Programs vary in form ranging from efforts originally designed to focus on productivity and quality improvement

---

unlikely in the extreme that such management-led programs of employee involvement or "empowerment" can sustain themselves over the long term. It is certain that such systems cannot meet the full range of needs of working men and women.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *THE NEW AMERICAN WORKPLACE: A LABOR PERSPECTIVE, A REPORT BY THE COMMITTEE ON THE EVOLUTION OF WORK 2 (1994)* [hereinafter *THE NEW AMERICAN WORKPLACE*].

64. See DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 32.

65. *Id.*

66. *Id.* at 36.

67. *Id.*

68. *Id.* at 55.

69. *Id.* at 36-37.

70. *Id.* at 37.

71. *Id.*

issues to broader participatory efforts including self-managed work teams, worker-management committees, partnerships, and employee ownership arrangements.<sup>72</sup> In addition, the Commission reported that these labels are somewhat tenuous and artificial, since programs often begin as one type or a combination of several and change over time.<sup>73</sup> The importance of these workplace schemes, however, is that they all represent efforts to involve workers in the overall operation of an enterprise for the simultaneous purposes of improving productivity, competitiveness, and job satisfaction. A brief description of the various organizational efforts documented by the Commission provides a helpful basis for general understanding and later discussion.

A. *Production and Quality Centered Initiatives*

Participation efforts that focus on quality and productivity improvements have become increasingly popular in United States industry. These organizations usually consist of teams comprised of workers, supervisors, and managers "in ways designed to overcome traditional status distinctions and job definitions."<sup>74</sup> In particular, many firms have employed Total Quality Management (TQM) processes that "encourage team members to explore root causes of problems and alternative solutions that involve human resource practices and policies."<sup>75</sup> Often these schemes begin with a focus on productivity or quality improvement but go on to address other workplace issues if they endure over time.<sup>76</sup> As a result, the Commission reported, "[I]t becomes increasingly difficult if not impossible to draw a line between production issues and employment

---

72. *Id.*

73. *Id.*

74. *Id.* at 39.

75. *Id.* To illustrate the TQM process, the Commission reported on the practices at the New United Motors Manufacturing operations (NUMMI) in California. There team members are trained to use a six step problem-solving process that requires team members to explore potential root causes associated with, among other things, "the way work is organized, how individuals perform their work, the staffing and scheduling of activities, and other personnel and employment practices." Toyota's manufacturing facilities in Kentucky have employed similar processes. *Id.* at 38.

76. *Id.* at 44. The Commission reported on the efforts in Atlanta of Bell South and representatives from the Communications Workers of America. There a quality of working life program that carried over from the early 1980s later "embraced TQM practices, and has evolved to the point where employees and workers meet with key customers to demonstrate their commitment to total customer satisfaction." This program, the Commission reported, resembled nearly all the others described to the Commission as entailing "a strong commitment to training in problem-solving, statistical methods, and related quality practices." *Id.* at 38.

practices, and among 'employees,' 'supervisors,' and 'managers' in the most successful productivity and quality improvement efforts."<sup>77</sup>

Some of these arrangements, for example, will eventually address a variety of terms and conditions of employment while others deal with issues traditionally reserved to management and supervisors.<sup>78</sup> The line between communication and shared decision-making is often difficult to draw in these various arrangements.<sup>79</sup> These organizational principles and outcomes are of legal significance. The breaking down of traditional roles between employees and supervisory personnel may result in the loss of NLRA rights and protections for participating workers. The Act does not cover individuals acting in a discretionary manner that aligns them with the interests of management. Likewise, American labor law "attempts to draw a distinction between processes that deal with production or quality issues, and those that involve wages, hours, or other terms and conditions of employment, and between processes in which employees communicate information to management versus those that involve consultation, shared decision-making, and/or representation."<sup>80</sup> The discussion of terms and conditions of employment is legally reserved for labor organizations that are independent from management. Arrangements such as TQM's often disregard the enforced labor-management dichotomy of the Act and are potentially illegal under the NLRA.

### B. *Self-Managed Work Teams*

"[S]elf-managed work teams take on duties and responsibilities traditionally performed by supervisors and managers."<sup>81</sup> To illus-

---

77. *Id.* at 39. The Commission reported on the quality improvement teams of Alliant Health Care Systems in Louisville. Alliant, the Commission reported, "relies heavily on use of temporary task force teams to solve specific problems that cut across traditional functional and/or hierarchical groups." *Id.* at 38. Mr. Rodney Wolford, former CEO of Alliant, described the personnel makeup and structure of the task force as follows:

When it comes to specific projects or specific improvement efforts, those are typically cross-functional teams made up of front-line workers, with some involvement by management, and certainly a responsibility of management to monitor the process and to be involved to some degree, but not necessarily to run the process.

Often-time those teams may even be chaired by front-line workers who have undergone specific training to be able to manage the team process. In terms of who goes on those teams, it's simply what makes sense representatives of all the various functions that may be involved or have some ownership accountability to any aspect of the process.

*Id.* at 38.

78. *Id.*

79. *Id.* at 39.

80. *Id.* at 37. For an explanation of the importance of these distinctions, see *infra* Section IV.

81. DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 40.

trate this concept, the Commission reported on the practices of D.D. Williamson and Company, a Louisville food processing manufacturer employing 105 persons. Ted Nixon, Chief Executive Officer of D.D. Williamson and Company, testified:

We have eliminated all supervisory positions and we have gone to self-managed work teams. Our Louisville plant runs 24 hours a day, five days per week. Shift leaders and teams were chosen by the associated themselves in something similar to a baseball draft. And team leaders rotate on a semi-annual basis. Along with the increase in responsibility, there's an extensive training. For the most, associates can now do several tasks . . . [sic] The work teams are also responsible for their own hiring and firing. We have some base education and personality screens that we use but after that the team does the interviewing and the team does the hiring.<sup>82</sup>

These types of arrangements, while giving the worker more discretion, input, and responsibility on the job, could result in the loss of the NLRA protections if those workers are found to be supervisors or managers under the Act.

### C. *Workplace Committees and Partnerships*

The Commission reported a "variety of firms and labor organizations [that] described their [workplace] efforts as full-fledged partnerships and committee structures."<sup>83</sup> The heart of these workplace schemes is that they require the input and cooperation of labor and management towards mutual goals and shared concerns. Some workplace committees and labor-management partnerships focus on very specific topics, such as workplace health and safety,<sup>84</sup> while others address a broad range of employment and managerial issues.<sup>85</sup> Of this latter type, the Commission reported on the efforts of several firms and organizations including Ford Motor and the United Auto Workers.<sup>86</sup> The Ford-UAW initiatives are imple-

---

82. *Id.* at 39.

83. *Id.* at 40.

84. The Commission reported that safety and health committees "[a]re among the most longstanding and widespread types of issue specific committees found in American workplaces." *Id.* The Commission reported a 1993 survey by the National Safety Council that found the existence of such workplace safety and health committees "in 75 percent of establishments with 50 or more employees and in 31 percent of establishments with less than 50 employees. This study also reported that safety and health committees exist in 89 percent of unionized establishments and 56 percent of nonunion establishments." DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 40 (citation omitted).

85. *Id.* at 43.

86. The Commission also reported on the National Steel Company and the United Steelworkers whose partnership has evolved to where union representatives now sit on the Board of Directors of several steel companies. *Id.* at 41. The Commission also reported on the efforts of AT&T and the Communications Workers of

mented on both a national and local scale and address matters of mutual concern in such areas as “product quality, education and development, employee involvement, team structures, work redesign, health and safety, ergonomics, employee assistance, apprenticeship, and labor-management studies.”<sup>87</sup> The Commission reported similar structural efforts in both union and non-union settings<sup>88</sup> but concluded that the “[e]stablishment of enterprise-wide committees that cover the full spectrum of work-place issues are more prevalent in unionized companies.”<sup>89</sup>

As discussed below in Section V the BIW collective bargaining agreement establishes a joint partnership between management and labor that employs a committee structure similar to that described by the Dunlop Commission. At BIW the union is a full partner in the enterprise. Committees have been formed consisting of both management and labor, and the subjects discussed cover a broad range of workplace issues. As this Comment contends, however,

---

America who described an integrated partnership they call the “Workplace of the Future.” This model is “built on extensive employee involvement and team systems at the workplace, consultation at the business unit level where long term competitive issues are discussed, and a corporate-wide human resource council that includes labor, management, and outside experts in discussion of long range plans.” *Id.*

87. *Id.* at 58.

88. *Id.* at 40-41. As an example of a non-union setting, the Commission reported on the efforts of the Donnelly Corporation as follows:

[The Scanlon Plan] was introduced in 1952 . . . in the late 1960s Donnelly had worked with the Scanlon Plan for a fair amount of time but we really introduced what we call the “Team Concept” in the late 1960s. . . . We also started at that time trying to provide an alternative forum for due process . . . the Equity Structure began in the late 1960s as basically an employees’ committee. . . . Now it’s developed over time to a representative structure to make sure that it satisfied two fundamental purposes. These representatives sit on committees, and we have sort of a hierarchy of committees. Eventually, the top committee in this structure is the Donnelly committee, which has 15 voting members, one of whom is president of the company. So again, it is a diagonal slice; there are representatives from all different section[s] of the company.

This structure has two fundamental purposes . . . it provides a safety net on issues of fairness, the whole issue of due process, grievance processing. We also call it the issue resolution process, so I think that’s a very interesting commonality there. . . .

Also, we ask our equity structure to guarantee that people have a voice in the development of policies that affect them and in fact, we ask our Donnelly committee to unanimously agree on all personnel policies that we put into place in the company.

*Id.* at 59. “Scanlon Plans,” a technique designed by a steelworker named Joseph Scanlon in the 1930s, involves the paying of bonuses to both managerial and non-supervisory employees when productivity is increased. The plan is administered through a joint worker-management committee that is made up of elected representatives from within a particular department. *See generally Rethinking the Adversarial Model*, *supra* note 8, at 2025-26.

89. DUNLOP COMM’N FACT FINDING REP., *supra* note 11, at 43.



even the most cooperative workplaces, such as BIW, have the potential to run afoul of the NLRA.

The findings of the Dunlop Commission make it clear that both management and labor support the idea of greater cooperation in the American workplace and are taking steps to implement these desires. These cooperative arrangements and employee participation plans are geared to making American businesses more competitive while providing greater job satisfaction and self-esteem for American workers. The testimony presented to the Commission supports the conclusion that these arrangements can be of benefit to all parties involved. One concern expressed by organized labor, however, is valid. Often such committees may be used by the employer as a union avoidance technique and can serve as puppet groups dominated by the employer for the benefit of the employer. American labor law must continue to protect against such abuses but in doing so must not deter laudable efforts by American business and workers to improve the overall quality of work life and economic competitiveness of their enterprise. The following section discusses the specific provisions of the NLRA that have called into question the legality of cooperative labor-management efforts and that serve as legal impediments to a more cooperative American workplace.

#### IV. LEGAL IMPEDIMENTS TO LABOR MANAGEMENT COOPERATION

It is against the backdrop of a changing economy and workforce and a growing interest in and a recognition of the success of cooperative labor-management enterprises that the Dunlop Commission sought to review and make recommendations concerning the nation's existing labor laws. In its final report the Commission refrained from proposing any explicit changes in existing statutory language. Rather, the Commission made broad recommendations aimed at promoting workplace cooperation. The Commission stated:

We take an integrated approach to modernizing American labor and employment law and administration for the future. Taken together, these recommendations give workers and managers the tools and flexibility to do what they say they want to do and are capable of doing to improve workplace performance. . . .

. . . .  
The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy. All parties want to encourage expansion and growth of these developments. To do so requires removing the legal uncertainties affecting some forms of employee participation while

safeguarding and strengthening employees' rights to choose whether or not they wish to be represented at the workplace by a union or professional organization.<sup>90</sup>

A. *NLRA Sections 8(a)(2) and 2(5): An Employer's Illegal Domination or Support of a Labor Organization*

Section 8(a)(2) of the NLRA has served as the most formidable legal impediment to workplace cooperation and employee participation at the workplace. The provision makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."<sup>91</sup> The interpretation and implementation of this provision has called into question the legality of many of the most innovative workplace cooperative and employee participation

---

90. See DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at xvi. In considering the recommendations of the Dunlop Commission that follow, it is important to note that they were made in conjunction with other recommendations not addressed in this Comment. The overall goal of the Commission's recommendations was to examine and suggest changes to current labor laws that impede cooperation and aid in creating an adversarial culture at the workplace. Many of the recommendations not discussed in this Comment deal with matters pertaining to the process and procedures of union representation elections and first-time contract negotiations. These recommendations aim at expediting representation elections and upgrading mediation and arbitration in difficult first contract negotiations. Because BIW is already unionized and the BIW agreement was not a first-time contract, many of the recommendations and areas of the law addressed by the Commission are beyond the scope of this Comment. However, if any of the Dunlop recommendations discussed in this Comment appear to be pro-management, they must be considered in light of the remainder of the Commission's study, which arguably is designed to enhance labor's ability to organize. The following examples should suffice to put the recommendations the Author later discusses into proper perspective. The Commission recommended:

1. Representation elections should be held before rather than after legal hearings about issues such as the scope of the bargaining unit. The elections should be conducted as promptly as administratively feasible, typically within two weeks.

2. The injunctions provided for in Section 10(l) of the Act should be used to remedy discriminatory actions against employees that occur in organizing campaigns and first contract negotiations.

3. Employers and newly certified unions should be assisted in achieving first contracts by a substantially upgraded dispute resolution program. The program should feature mediation and a tripartite advisory board empowered to implement options ranging from self-help (strikes or lockouts) to binding arbitration for the relatively few disputes that warrant it.

*Id.* at 18. For a discussion of the Commission's recommendations on Capitol Hill see *Prospects Uncertain for Implementing Dunlop Panel Report*, Daily Lab. Rep. (BNA), No. 19, at D-36 (Jan. 30, 1995). For a critical view of the Commission's findings and recommendations, see *The National Legal Center White Papers Reading Between the Lines of the Dunlop Commission Report*, Daily Lab. Rep. (BNA), No. 172, at D-20 (Sept. 8, 1994).

91. See 29 U.S.C. § 158(a)(2) (1988).

schemes. Section 2(5), in turn, defines a "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>92</sup>

Section 8(a)(2) is viewed as the backbone of the NLRA. As previously discussed, the NLRA was passed in an effort to dissipate the industrial strife that threatened the U.S. economy in the early 1930s. The Act set up a framework for collective bargaining in which employees could organize collectively and be represented by an independent union to deal with an employer on an equal level of bargaining strength. In this model the greatest threat to "the realization of this collective employee power"<sup>93</sup> was the establishment and formation of internal, company-dominated unions. Often taking the form of employee participation committees, these company or sham unions, it was argued, would be nothing more than puppet groups for management, essentially dominated by employers for the benefit of employers.<sup>94</sup> The primary goal of section 8(a)(2), by outlawing an employer's domination, interference, or assistance, was to ban such company-dominated labor organizations.<sup>95</sup> The effect of

92. See 29 U.S.C. § 152(5) (1988).

93. See *Rethinking the Adversarial Model*, *supra* note 8, at 2023 (footnote omitted).

94. Senator Wagner argued that "[c]ollective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing." See *Hearings on S. 1958 Before the Sen. Comm. on Educ. and Labor*, 74th Cong., 1st Sess. 40-41 (1935) (statement by Senator Wagner), *reprinted in* 1 NLRA LEG. HIST., *supra* note 24, at 1416-17.

95. In § 8(a)(2) Congress enacted a broad proscription of employer conduct. The Report of the Senate Committee on Education and Labor provided some guidance and examples on what would constitute unlawful conduct on the part of the employer:

The so-called "company-union" features of the bill are designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies. Such interference exists when employers actively participate in framing the constitution or bylaws of labor organizations; or when, by provisions in the constitution or by laws [sic], changes in the structure of the organization cannot be made without the consent of the employer. It exists when they participate in the internal management or elections of a labor organization or when they supervise the agenda or procedure of meetings. It is impossible to catalog all the practices that might constitute interference, which may rest upon subtle but conscious economic pressure exerted by virtue of the employment relationship. The question is one of fact in each case. And where several of these interferences exist in combination, the employer may be said to dominate the labor organization by overriding the will of the employees.

See SENATE COMM. ON EDUC. AND LABOR, S. REP. NO. 573, ON S. 1958, 74th Cong., 1st Sess. 10 (1935), *reprinted in* 2 NLRB, LEG. HIST., *supra* note 23, at 2309-10 (1985).

this provision, however, has been to assure “the separation of the parties that underlies the collective bargaining, or adversarial, model. Under section 8(a)(2), an employee must choose either an outside labor organization committed by law to the adversarial model, or no representation at all.”<sup>96</sup> Section 8(a)(2), thus, leaves little room for labor-management cooperation in the American workplace. This is particularly true in non-union settings where an employer’s formation of and assistance to participation plans is viewed as illegal domination or support.

### 1. Newport News and Cabot Carbon

The Supreme Court’s two major decisions interpreting the statutory policies of sections 8(a)(2) and 2(5) are *NLRB v. Newport News Shipbuilding & Dry Dock Co.*<sup>97</sup> and *NLRB v. Cabot Carbon Co.*<sup>98</sup> Taken together, these decisions exemplify how far-reaching the language of the statute is in striking down even the most noble of labor-management cooperative efforts. In *Newport News* the Supreme Court invalidated an employer-assisted representation plan in spite of evidence that the employees were satisfied and the employer’s motivations benign. In its prior proceedings the NLRB had found a violation of section 8(a)(2) and ordered that the plan be disestablished.<sup>99</sup> The Fourth Circuit, in reviewing the NLRB decision, refused to enforce the Board’s order and concluded that the Board should have focused on the apparent satisfaction of the participants and the benevolent intentions of the employer.<sup>100</sup> In reversing the Fourth Circuit, the Supreme Court held that the clear intention of section 8(a)(2) was to maintain a strict separation between management and labor and that employee satisfaction and employer’s motivations were irrelevant if this separation was not maintained in the workplace.<sup>101</sup>

---

96. See *Rethinking The Adversarial Model*, *supra* note 8, at 2022.

97. 308 U.S. 241 (1939).

98. 360 U.S. 203 (1959).

99. See *Newport News Shipbuilding & Dry Dock Co.*, 8 N.L.R.B. 866 (1938); *Rethinking the Adversarial Model*, *supra* note 8, at 2027. “There are two types of remedies for violations of section 8(a)(2). If the board finds that the employer has *dominated* the organization, it will order that it be permanently shut down or ‘disestablished.’ In some cases where the Board has found that the employer has merely *supported* or *interfered* with the organization, it has ordered the employer to cease and desist, while allowing the organization to affiliate with an outside union and continue functioning.” *Id.* at 2027 n.32.

100. See *Newport News Shipbuilding & Dry Dock Co. v. NLRB*, 101 F.2d 841, 846-47 (4th Cir. 1939).

101. See *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251. The Court stated:

The court below agreed with the respondent that, as the Committee had operated to the apparent satisfaction of the employees . . . it would be a proper medium and one which the employer might continue to recognize

In order to find that an employee committee has violated section 8(a)(2) of the Act, it is first necessary to determine whether the committee is in fact a "labor organization" as defined by section 2(5) of the NLRA. According to this provision, an organization falls within the definition if it exists for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>102</sup> When interpreted broadly, this provision has had the effect of including "employee representation plans bearing no resemblance to conventional labor unions, including arrangements lacking any formal, independent structure."<sup>103</sup> In *Cabot Carbon Co. v. NLRB*<sup>104</sup> the Fifth Circuit attempted to construe the provision narrowly, as requiring that to be a "labor organization" an employee committee must actually engage in "bargaining with" the employer.<sup>105</sup> The Supreme Court, however, reversed this decision and determined that section 2(5) implies only that the employee committee "deal with" an employer,<sup>106</sup> requiring "a considerably lower level of contact than does bargaining collectively."<sup>107</sup> The Court stated that "Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should be limited to and mean only 'bargaining with' as held by the

---

for the adjustment of labor disputes. The difficulty with the position is that the provisions of the statute preclude such a disposition of the case. The law provides that an employe [sic] organization shall be free from interference or dominance by the employer. . . . In applying the statutory test of independence it is immaterial . . . that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary purpose, and that the Board's conclusions are in accord with that purpose.

*Id.*; see also *Rethinking the Adversarial Model*, *supra* note 8, at 2027.

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

103. See *Collective Bargaining*, *supra* note 26, at 1669 (1983).

104. 256 F.2d 281 (5th Cir. 1958).

105. *Id.* at 285. In *Cabot Carbon*, the Fifth Circuit had refused to enforce a Board's disestablishment order. In the proceeding below, the Board had determined that the employee committee, which was set up to discuss grievances and working conditions with the employer, constituted a labor organization under the Act, and that the employer's support of it had therefore constituted violation of § 8(a)(2). See 117 N.L.R.B. 1633 (1957); see generally *Rethinking the Adversarial Model*, *supra* note 8, at 2030. The Fifth Circuit, even while recognizing that the organization was dominated by the employer, refused to enforce the Board's order, holding that since the committees had not actually engaged in "bargaining with" the employer, it did not constitute a labor organization under § 2(5) of the Act. See *Cabot Carbon Co. v. NLRB*, 256 F. 2d 281, 285; see generally *Rethinking the Adversarial Model*, *supra* note 8, at 2030.

106. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

107. See *Collective Bargaining*, *supra* note 26, at 1669.

Court of Appeals.”<sup>108</sup> As one commentator has suggested, “[U]nder the broad definition of ‘labor organization’ in section 2(5), strict enforcement of section 8(a)(2) would rule out employer support for almost every imaginable kind of employee organization short of an insurance plan, social club, or softball team.”<sup>109</sup> The definition of labor organization is critical to section 8(a)(2) analysis. A broad definition makes it more likely that cooperation will result in an 8(a)(2) violation.

## 2. *Reinterpretation: The Freedom of Choice Analysis*

There has been considerable debate among courts and scholars as to the original intent and contemporary relevance of sections 8(a)(2) and 2(5) of the NLRA.<sup>110</sup> This debate has centered around two critical and difficult issues: “(1) whether section 8(a)(2) prohibits cooperative labor-management representation plans with which employees are satisfied, and (2) how broadly the term ‘labor organization’ should be read.”<sup>111</sup> While the Supreme Court seemed to have provided answers to these questions in *Newport News* and *Cabot Carbon*, several circuit courts<sup>112</sup> have “chosen to ignore the Supreme Court opinions, and have refused to enforce section 8(a)(2) where there is evidence of employee satisfaction with the challenged organization.”<sup>113</sup> This approach has commonly been referred to as the “freedom of choice” analysis. Unlike the approach taken by the Supreme Court, which views the establishment of arm’s length collective bargaining as the goal of the Act and section 8(a)(2) as the protector of this system, freedom of choice proponents view the goal of the Act as ensuring employees the freedom to choose whether or not to be represented by an independent labor organization. As long as the employees are happy with their choice, no violation of section 8(a)(2) can exist. One commentator critical of the freedom of choice approach summarized the differences as follows:

---

108. *NLRB v. Cabot Carbon Co.*, 360 U.S. at 211-12.

109. *See Collective Bargaining*, *supra* note 26, at 1669. *See also* *Carborundum Co.*, 36 N.L.R.B. 710, 715 n.9 (1941).

110. *See* DUNLOP COMM’N FACT FINDING REP., *supra* note 11, at 53.

111. *See Rethinking the Adversarial Model*, *supra* note 8, at 2026.

112. Specifically, the First, Sixth, Seventh, and Ninth Circuits have adopted the freedom of choice analysis. *See, e.g., NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *NLRB v. Newman-Green, Inc.*, 401 F.2d 1 (7th Cir. 1968); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Coppus Eng’g Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

113. *Rethinking the Adversarial Model*, *supra* note 8, at 2026.

The National Labor Relations Board (Board) and many courts have traditionally treated section 8(a)(2) as a blanket proscription of any employer involvement in the formation or administration of an employee representation plan. Their primary consideration in applying the section has been whether the challenged organization is sufficiently autonomous to function as a bargaining representative. Thus, when the employer's support is critical in the establishment or administration of a representation plan, and when a plan cannot be altered by the employees without the employer's consent, the arrangements have been held to violate section 8(a)(2).

Since the mid-1950s, however, several federal courts have rejected this traditional interpretation. Treating section 8(a)(2) in isolation from the rest of the Act and neglecting the importance of arm's-length collective bargaining in the Act as a whole, these courts have seen the section as an obsolete restriction on management freedom. They have concluded that non-union representation plans should be permitted when the plans promote cooperative labor relations, and they have groped toward a test of the legality of such arrangements that relies on an undifferentiated assessment of "employee free choice."<sup>114</sup>

The Seventh Circuit in the 1955 case of *Chicago Rawhide Manufacturing Co. v. NLRB*<sup>115</sup> was the first court to apply freedom of choice analysis to an alleged section 8(a)(2) violation. The court, although acknowledging the employer's involvement in the employee organization, refused to enforce the Board's disestablishment order and held that the involvement constituted "cooperation," which is not prohibited by the Act, rather than "support," which the Act proscribes.<sup>116</sup> In distinguishing "cooperation" from "support," the court reasoned that support, like domination, involves "some degree of control or influence," whereas "[c]ooperation only assists the employees or their bargaining representative in carrying out their independent intention."<sup>117</sup> What was required to make out a violation, the court held, was a showing of "actual domination."<sup>118</sup> In so holding, "the court collapsed together the statutory terms 'domination' and 'support' in order to distinguish a third kind of employer involvement, 'cooperation,' not men-

---

114. *Collective Bargaining*, *supra* note 26, at 1663-64 (citations omitted).

115. 221 F.2d 165 (7th Cir. 1955). In *Chicago Rawhide* an employer and a group of employees set up an "Employee Committee" to handle grievances. The employer allowed the Committee to meet on company time. *Id.* at 166. After the employees overwhelmingly rejected an outside union in a Board supervised election, the company voluntarily recognized the Committee as the employees' exclusive bargaining representative. *Id.* at 167.

116. *Id.*

117. *Id.*

118. *Id.* at 168.

tioned in the Act.”<sup>119</sup> The court, in contrast to the Supreme Court’s rule in *Newport News*,<sup>120</sup> went on to consider the employees’ satisfaction with their decision to be represented by the Committee<sup>121</sup> and the employer’s laudable motives.<sup>122</sup> The court concluded, “We are not going to permit the destruction of a happy and cooperative employer-employee relationship when there is absolutely no evidence to support a finding of unfair labor practice.”<sup>123</sup> The court’s effort to construe the Act this way demonstrates the need for more flexibility in the rules that are used to evaluate cooperative relationships in the workplace.

### 3. *Reinterpretation of a Section 2(5) Labor Organization*

As an alternative to applying freedom of choice analysis, other courts have construed the Act’s definition of “labor organization” to allow greater workplace cooperation. In the 1982 decision of *NLRB v. Streamway Division of Scott & Fetzer Co.*,<sup>124</sup> the Sixth Circuit attempted to reinterpret the definition of a “labor organization” under section 2(5). In *Streamway* the employer established an in-house representation committee, with rotating membership, that was to address issues involving grievances and working conditions. The Committee was to be ongoing and would meet with company officials at regular intervals.<sup>125</sup> The Committee in question closely resembled the one struck down by the Supreme Court in *Cabot Carbon*. To validate the Committee, however, the court gave the term “labor organization” a very narrow construction and determined

---

119. *Collective Bargaining*, *supra* note 26, at 1665. The author further contends that the court never “fully articulate[d] what kinds of protections, if any, were intended by § 8(a)(2), nor did it explain how it had determined the employees’ ‘independent intention.’ ” *Id.* at 1665-66 (citing *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d at 167).

120. See *Rethinking the Adversarial Model*, *supra* note 8, in which the author points out that only one of the free choice cases attempts to distinguish *Newport News*. *Id.* at 2028 n.46. The other cases, see *supra* note 114, including *Chicago Rawhide*, ignore it altogether. *Id.* at 2029 n.46. The author also points out that a 1984 Sixth Circuit opinion, *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535, 547 n.12 (6th Cir. 1984), cited *Newport News* in a footnote and stated that the policy considerations that existed in 1939, the year *Newport News* was decided, had changed. *Id.* The author agrees that policy considerations have changed but argues that “in a question of statutory construction, the only issue which should concern the court is whether the statute has changed.” *Rethinking the Adversarial Model*, *supra* note 8, at 2029 n.46.

121. *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d at 169.

122. *Id.* at 170 (“The acts complained of show only laudable cooperation with the employees’ organization. . . . [T]he Company was not intending, by permitting this practice, to coerce or influence the employees’ choice of a bargaining representative.”).

123. *Id.*

124. 691 F.2d 288 (6th Cir. 1982).

125. *Id.* at 289-90.



that this Committee lacked the independent structure defined by section 2(5) for a "labor organization."<sup>126</sup> The court, conceding that the Committee was dominated by the employer,<sup>127</sup> determined that the organization did not fit the section 2(5) requirements and therefore no violation of section 8(a)(2) could be found. The court stated that "the adversarial model of labor relations is an anachronism"<sup>128</sup> and that "at some point a literal translation of section 2(5) will frustrate the very purposes of the Act itself."<sup>129</sup> Critics of the decision claim that "the court based its conclusion in large part on its stated policy of encouraging new, cooperative modes of labor relations"<sup>130</sup> while ignoring the express language and overall intent of the statute.

#### 4. Electromation, Inc.: *Current Board Interpretation*

In 1992 the NLRB handed down a major decision interpreting sections 8(a)(2) and 2(5) of the NLRA. The decision, *Electromation, Inc.*,<sup>131</sup> firmly rejects the freedom of choice analysis employed by several circuit courts. This case represents the Board's commitment to the original spirit and intent of the NLRA. In *Electromation* the Board reemphasized the interpretations provided by the Supreme Court in *Cabot Carbon* and *Newport News* and rejected the narrower interpretations provided by freedom of choice proponents.<sup>132</sup> This commitment to legislative intent and established precedent, however, had the immediate effect of disbanding a concrete attempt by an American enterprise to cooperate with workers to the mutual benefit of the parties involved. The broader implication of this decision calls into question the legality of employee participa-

---

126. *Id.* at 291.

127. *Id.* The court stated:

We think there is little question that if it is a "labor organization" under section 2(5) of the Act, the Committee was dominated by the Company. It was expressly mandated by the Company, and the Company controlled its composition and its meetings. Therefore, we think it follows that if the Committee was in fact a labor organization, the Company was guilty of a violation of section 8(a)(2).

128. *Id.* at 293.

129. *Id.* at 295.

130. *Collective Bargaining*, *supra* note 26, at 1670. The author goes on to state:

In its alacrity to uphold the legality of the committee, however, the court failed to consider the contradiction implicit in its reasoning: it relied on judicial reinterpretations of section 8(a)(2) to decide that no labor organization was present, but it also acknowledged "that if the Committee was in fact a labor organization, the Company was guilty of a violation of section 8(a)(2)." In effect, the *Streamway* court reinterpreted the definitional section of the statute in light of its policy preferences but simultaneously conceded that section 8(a)(2) indicated the opposite result.

*Id.* (citing *NLRB v. Streamway Div. of Scott & Fetzer Co.*, 691 F.2d at 291).

131. 309 N.L.R.B. 990 (1992).

132. *Id.* at 996.

tion plans and worker management cooperative programs throughout the nation's economy.

In *Electromation, Inc.* the Board found unlawful the employer's establishment of "action committees" designed for joint dealings with management over absenteeism, no-smoking policies, and pay progression plans.<sup>133</sup> The Board ruled that the employer unlawfully

---

133. Electromation, located in Elkhart, Indiana, is a non-union manufacturer of small electrical and electronic components for the automobile industry employing about 200 people. *Id.* at 1016. In late 1988 management at Electromation concluded that it was facing unacceptable financial losses and decided to reduce expenses by modifying its employee attendance bonus policy, and provide a year-end lump-sum payment to employees rather than give a wage increase. *Id.* at 990. Displeased with these changes, sixty-eight employees petitioned the company's management. *Id.* The company's president first met with the supervisors and decided that management would meet directly with the employees to discuss the problems. *Id.* Management then met with a selected group of eight employees and discussed with them issues including wages, bonuses, incentive pay, attendance programs, and leave policy. *Id.* at 990-91. After this meeting the president concluded that the company had a serious problem with its employees. The president testified that he concluded at that time that "it was very unlikely that further unilateral management action to resolve these problems was going to come anywhere near making everybody happy . . . and we thought that the best course of action would be to involve the employees in coming up with solutions to these issues." *Id.* at 991. The president testified that management came up with the idea of "action committees" as a way to involve employees. *Id.* Upon hearing about the action committees, the workers initially were "not positive." *Id.* Yet after the president explained that because "the business was in trouble financially . . . we couldn't just put things back the way they were . . . we don't have better ideas at this point other than to sit down and work with you on them," the workers agreed to the proposal. *Id.* The employer then posted a memorandum announcing the creation of the committees, which were to consist of six employees, one or two members of management, and the employer's Employees Benefits Manager. *Id.* Employee membership was determined by sign-up sheets. The Action Committees included: (1) Absenteeism/Infractions, (2) No Smoking Policy, (3) Communication Network, (4) Pay Progression for Premium Positions, and (5) Attendance Bonus Program. *Id.* Management expected that the employee committee members would talk with other employees in the plant, get their ideas, and communicate with any employees who were interested in the issues. *Id.*

Shortly after the Committees began to meet, Teamsters Local 1049 made a demand to the company for recognition and filed an election petition with the NLRB's Regional Director. *Id.* at 991, 1015. The union also filed an unfair labor practice charge with the Regional Director, alleging that Electromation's Action Committees violated § 8(a)(2) and § 8(a)(1) of the NLRA. *Id.* at 1015. There was no evidence that the employer was aware of the union's organizing effort until the union's demand for recognition. *Id.* at 991. At the next meeting of each action committee, Electromation's committee coordinator informed the members that management could no longer participate in the meetings but that the employees could continue to meet if they desired. *Id.* The Absenteeism/Infraction and Communication Network Committees decided to continue to meet; the Pay Progression Committee disbanded; and the Attendance Bonus Committee decided to write up a proposal that the controller had approved and then disband. *Id.* at 991-92. The Committee never submitted the proposal to the company's president because the union's election campaign intervened. *Id.* at 922. The Union lost the election 95 to 82. *Id.* at 1015. The administrative law judge found that Electromation had violated both § 8(a)(2)

dominated the committees by providing the idea to create the committees and by determining their structure and function.<sup>134</sup> In addition the Board ruled that the employer unlawfully contributed support to the committees by permitting the employees to carry out committee activities on paid time.<sup>135</sup> The Board, adhering to the broad interpretation laid down by the Supreme Court in *Cabot Carbon*, found the committees were in fact "labor organizations" under section 2(5) because they dealt with the employer on issues regarding conditions of employment.<sup>136</sup> Significantly, the Board rejected the idea that anti-union animus or motive should be required in order to find unlawful domination under section 8(a)(2)<sup>137</sup> and stressed that "a labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under section 8(a)(2)."<sup>138</sup>

The Board's decision prompted alarm in the business community. American business leaders argued that the *Electromation* decision would have the effect of finding most modern employee involvement or employee participation programs illegal.<sup>139</sup> On appeal to the Seventh Circuit, numerous amici filed briefs both in opposition to and in support of the Board's ruling. Briefs filed in opposition to the decision urged the court to apply a freedom of choice analysis, arguing that America's competitiveness in world markets depended heavily on management's ability to create and support employee participation programs. The Seventh Circuit, however, refused to address the broader question of section 8(a)(2)'s impact on modern day employee involvement programs. The Seventh Circuit, as had the Board, adhered to legislative intent and to Supreme Court precedent and affirmed the Board's ruling. The court stated:

---

and § 8(a)(1) of the Act, ordered that the committees disband, and recommended that the results of the recognition election be set aside. *Id.* at 1019.

134. *Id.* at 997-98.

135. *Id.* at 998.

136. *Id.* at 997. The Board rejected the idea that § 2(5) requires that the employees believe their organization to be a labor organization. *Id.* at 994. Instead, the Board used a three-part test in its § 2(5) analysis. In this analysis a committee is a labor organization under § 2(5) when: (1) the organization is one in which employees participate, (2) a purpose of the organization is to deal with employers, and (3) the organization concerns itself with conditions of employment or other statutory subjects contained in § 2(5). *Id.*

137. *Id.* at 996.

138. *Id.* at 995.

139. *But see Former NLRB Chairman Miller Calls Electromation Problem "Myth,"* Daily Lab. Rep. (BNA), No. 201, at D-7 (Oct. 20, 1993). Former NLRB chairman Miller argued that "[i]t is indeed possible to have effective [employee involvement] programs of this kind in both union and non-union companies without the necessity of any change in the current law . . . the 'so-called Electromation problem' is simply a 'myth.'"

In view of the wide variety of programs presented and described in the various amicus briefs filed before the Board and this Court, the Board reasonably and properly declined to attempt to issue an opinion addressing all possible employee involvement programs. Rather, exercising its discretion to construe the Act in light of the legislative history, applicable Supreme Court precedent, and the underlying policies of the Act, the Board found that the company's actions here fell within the statutory proscriptions and did not implicate changing industrial realities that might be relevant to construction of the statute in other circumstances. . . . Instead, it simply observed that it does not have latitude to change a particular construction of the statute based on changing industrial realities where congressional intent to the contrary is absolutely clear, or where the Supreme Court has decreed that a particular reading of the statute is required, or both. Nor was it necessary to do so in this case.<sup>140</sup>

The Board and Seventh Circuit decisions in *Electromation, Inc.* emphasize that modification of sections 8(a)(2) and 2(5) to meet today's economic challenges must come from the Congress and not from the courts. The *Electromation, Inc.* decision did attract Congressional attention,<sup>141</sup> and several bills were introduced in Congress to overrule essentially the Board's decision.<sup>142</sup>

Unfortunately, *Electromation* was a bad vehicle for the Board to use to make any real progress clarifying the law and promoting workplace cooperation. The facts of *Electromation, Inc.* made it a rather easy case in terms of Supreme Court precedent and statutory intent: the committees were the idea of the employer, management created and posted notice of the committees, and the employees in the committees dealt with the employer over statutory issues. The

---

140. *Electromation, Inc. v. NLRB*, 35 F.3d 1148, 1157 (7th Cir. 1994).

141. See 138 CONG. REC. H2205 (daily ed. Apr. 1, 1992) (statement of Rep. Gunderson) (noting that *Electromation* "will probably be one of the most important rulings ever" by the NLRB). See also 138 CONG. REC. H2206 (daily ed. Apr. 1, 1992) (statement of Rep. Ritter) (noting the second anniversary of the NLRB administrative law judge decision "that has put American competitiveness on ice."). See generally Michael L. Stokes, Note, *Quality Circles or Company Unions? A Look at Employee Involvement After Electromation and du Pont*, 55 OHIO ST. L.J. 897, 909 n.64 (1994) [hereinafter *Quality Circles or Company Unions?*].

142. See S. 669, 103rd Cong., 1st Sess. (1993) (The "Teamwork for Employees and Management Act of 1993" was introduced on March 30, 1993 by Sen. Nancy Kassebaum (R-KS) to permit labor management cooperative efforts that allow America's competitiveness to continue to thrive.); H.R. 1529, 103rd Cong., 1st Sess. (1993) (The "Teamwork for Employees and Management Act of 1993" was introduced in the House by Rep. Steven Gunderson (R-WI) on March 30 1993. The bill would amend the NLRA to allow employers to establish, assist, maintain, or participate in an organization or entity in which employees participate to discuss matters of mutual interest (including issues of quality, productivity, and efficiency) if such participation does not claim or seek authority to negotiate, enter into, or amend collective bargaining agreements.).

decision was easy for the Board, but NLRB members, in filing separate opinions, confused rather than clarified the law. For example, the Board gave some indications that legislative history and earlier Board decisions may require that an employee group act in a truly representational capacity to qualify as a labor organization, but the members expressly declined to reach this issue.<sup>143</sup> Allowing the higher standard would assure that committees created by management would not violate sections 8(a)(2) and 2(5) if they merely "dealt with" rather than "bargained with" the employer. This standard also would serve the purpose of ensuring the employees' autonomy when it comes to representation as to bargainable issues.

##### 5. *Recommendations of the Dunlop Commission*

The Dunlop Commission views workplace cooperation and employee participation innovations as a legitimate means to enhancing America's economic competitiveness. Accordingly, the Commission was very concerned about the ramifications of the *Electromation, Inc.* decision. Unfortunately, however, the Commission refused to recommend any express statutory amendments, thus declining to resolve many of the semantic problems associated with section 2(5) and section 8(a)(2) analysis. In its final report, the Commission did recommend:

Clarifying the National Labor Relations Act (NLRA) and its interpretation by the National Labor Relations Board (NLRB) to insure nonunion employee participation programs are not found to be unlawful simply because they involve discussion of "terms and conditions" of work or compensation as long as such discussion is incidental to the broad purposes of these programs. At the same time, the Commission reaffirms the basic principle that these programs are not a substitute for independent unions. The law should continue to make it illegal to set up or operate company dominated forms of employee representation.<sup>144</sup>

---

143. See *Quality Circles or Company Unions?*, *supra* note 141, at 911.

144. See DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at xvii. This recommendation, however, was not unanimously adopted by the Commission. One member, Douglas A. Fraser, former President of United Auto Workers and current Professor of Labor Studies at Wayne State University, filed a one page dissent. Mr. Fraser stated, in part:

Section 8(a)(2) stands as a bulwark against forms of representation which are inherently illegitimate because they deny workers the right to voice through the independent representatives of their own choosing and put the employer on "both sides of the table," . . . .

. . . . Given the legal and factual uncertainties that exist as to the scope of section 8(a)(2), and the danger that any statutorily-created exception would be an invitation to abuse, at the very least the prudent course would be to allow the administrative and judicial processes to address the issue of "incidental discussion" in the first instance. If problems were to develop—if, in fact, the law in practice were shown to substantially interfere with

This recommendation does not go far enough in ensuring that cooperative workplace efforts that work to the benefit of the parties involved are legal. The recommendation that the discussions be “merely incidental” provides little guidance for courts when dealing with the substantial fact-specific inquiry involved in the sections 8(a)(2) and 2(5) analysis. A better approach is that of the freedom of choice analysis. Under that standard cooperative programs may exist if they operate to the benefit and to the satisfaction of both sides involved. Employees must be given the choice whether to be represented by an outside labor organization. If they decline that choice, uncoerced by management, the employer and his workers should be allowed to enter into a mutually beneficial arrangement. Unfortunately, as has been discussed, such an approach violates Supreme Court precedent and violates the original intent of the statute.

### B. *The Supervisor and Managerial Exclusion*

The enforcement of a strict dichotomy between labor and management has proven central to the Act’s framework for collective bargaining.<sup>145</sup> “The Act’s definitions of employee, employer, and supervisor all assume a strict dichotomy between employees, who are entitled to the Act’s protections, and managers, who are not.”<sup>146</sup> Although the Act expressly excludes supervisors from the Act’s protections, the managerial exclusion was created by the Supreme

---

incidental discussions of terms of employment—Congress could then take up the subject against a far clearer legal and factual background.

In no event, should employer-dominated employee representation plans be permitted merely because they are limited to dealing with specified subjects such as safety and health or training. Employer-dominated representation is undemocratic regardless of the particular subjects with which the employer-controlled representative deals.

... I wish to make clear that I do not minimize the value of encouraging “employee participation” and “labor-management cooperation.” But to my mind, the kind of “participation” and “cooperation” that should be encouraged is *democratic* participation and cooperation *between equals*.

*Id.* at 14.

145. See *Collective Bargaining*, *supra* note 26, at 1677 (“It is critical to the industrial system embodied in the Act that there be a line between labor and management to serve as an axis for collective bargaining.”).

146. *Id.* (footnotes omitted). The Act, in its definition of employee, provides in pertinent part that “the term ‘employee’ shall include any employee . . . but shall not include any individual . . . employed as a supervisor . . .” 29 U.S.C. § 152(3) (1988). The Act defines a “supervisor” as

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.

*Id.* § 152(11).

Court in *NLRB v. Bell Aerospace*.<sup>147</sup> The Court defined "managerial" employees as "executives who formulate and effectuate management policies by expressing and making operative decisions of their employer. . . ." <sup>148</sup> This discretionary function, performed in furtherance of company policies, is viewed as beyond labor's role in the dichotomy.<sup>149</sup> The Court ruled that " 'managerial employees' are not covered by the Act,"<sup>150</sup> and therefore are excluded from its protections. In *Bell Aerospace* the Court created and applied this managerial exemption to buyers of parts and materials.

In *NLRB v. Yeshiva University*<sup>151</sup> the Court greatly expanded the scope of the managerial exclusion by holding that faculty members of Yeshiva University could not form a union or bargain collectively with their employer because professors were determined to be managerial. The Court ruled that professors, by voting on matters such as curriculum, class size, and academic standards, "exercise authority which in any other context unquestionably would be managerial."<sup>152</sup> The Court reasoned that to decide otherwise "would undermine the goal it purports to serve: To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."<sup>153</sup>

147. 416 U.S. 267 (1974). The Court reasoned that, in addition to supervisors who were explicitly excluded from the Act, "[t]he legislative history strongly suggests that there also were other employees, much higher in the managerial structure, who were likewise regarded as so clearly outside the Act that no specific exclusionary provision was thought necessary." *Id.* at 283.

148. *Id.* at 286 (quoting *Palace Laundry Dry Cleaning*, 75 N.L.R.B. 320, 323 n.4 (1947)).

149. See *Rethinking the Adversarial Model*, *supra* note 8, at 2042.

150. *NLRB v. Bell Aerospace*, 416 U.S. at 289.

151. 444 U.S. 672 (1980).

152. *Id.* at 686. The Court stated:

The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these. To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served.

*Id.*

153. *Id.* at 687-88. The Court stated, "The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy." *Id.* at 689 (footnote omitted).

In 1994 the Supreme Court again reaffirmed the vitality of the management-labor dichotomy in *NLRB v. Health Care & Retirement Corp.*<sup>154</sup> In ruling that certain nurses who performed supervisory functions were beyond the Act's protections, the Court held that the Board's test for determining whether nurses are supervisors under the Act was inconsistent with the statute. The Court ruled that the Board had created a false dichotomy between acts taken "in connection with patient care and acts taken in the interest of the employer." Since patient care is a nursing home's business, the Court reasoned, it follows that attending to the needs of patients, who are employer's customers, is in the employer's interest.<sup>155</sup> This decision is significant because the Board's "in the interest of the employer" test had been used to "separate out workers who direct others based on superior skill, experience and the like from true supervisors—those whose main function is to direct the work of others (or hire, fire, and so forth) for the employer."<sup>156</sup> In invalidating the Board's test, the Court stated that "acts within the scope of employment or on the authorized business of the employer are in the interest of the employer."<sup>157</sup>

The practical significance of these decisions may be far-reaching for those employees who direct co-workers even incidentally. Under *Yeshiva* these workers may be considered supervisors and denied protections of the Act.<sup>158</sup> These decisions may have far-reach-

---

154. 114 S.Ct. 1778 (1994).

155. *Id.* at 1782.

156. See DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at 10.

157. *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. at 1782 (citing *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 488-89 (1947)).

158. The Court stated that "[t]he National Labor Relations Act affords employees the rights to organize and to engage in collective bargaining free from employer interference. The Act does not grant those rights to supervisory employees, however, so the statutory definition of supervisor becomes essential in determining which employees are covered by the Act." *Id.* at 1780.

The Wagner Act of 1935 did not exempt supervisory employees from its coverage. As a result, supervisory employees could organize as part of bargaining units and negotiate with the employer. Employers had complained that this produced an imbalance between labor and management. The Court, however, refused to create such an exception in the 1947 decision of *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 490 (1947). The Court reasoned that any exceptions to the Act must be defined by Congress. Later in that year, with the passage of the Taft-Hartley Act, Congress did in fact create this statutory exception. See *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. at 1780. The *Packard* decision was a major factor in bringing about the Taft-Hartley Act. Both the House Report and the Senate Report expressed concern over the Board's broad reading of the term "employee" to include those clearly within the managerial hierarchy. The Senate Report specifically focused on the warnings expressed in Justice Douglas' dissent. See S.Rep.No. 105, 80th Cong., 1st Sess., 4 (1947), reprinted in 1 *NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947*, 407, 409-11 (1985).

It was Justice Douglas's dissent in the Court's 1947 decision in *Packard Motor Car Co. v. NLRB*, 330 U.S. 485 (1947), that became the intellectual underpinning for the



ing consequences for workers under many of the cooperative arrangements that exist in the U.S. economy. Many of these cooperative arrangements are designed purposefully to give employees more managerial and supervisory tasks and to share in managerial decision-making on the job. The Dunlop Commission reported that some workplace programs "blur the traditional distinction between supervisors or managers and workers, raising questions about the coverage of employees under the NLRA."<sup>159</sup> If cooperation transmutes employees into managers or supervisors, many workers will be ineligible for the underlying protections of the Act. This is too high a cost. Employees should not have to choose between section 7 rights and cooperation with management.

The Commission presented a possible solution. Recognizing that Supreme Court decisions do not take into account "the degree to which supervisory and managerial tasks have been diffused throughout the workforce in many American firms,"<sup>160</sup> the Commission recommended

updating the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing

---

Court's adherence to the management-labor dichotomy. In his famous dissent Justice Douglas lamented the breakdown of this dichotomy, warning that "management and labor will become more of a solid phalanx than separate factions in warring camps." *Id.* at 494. Justice Douglas warned that

The present decision . . . tends to obliterate the line between management and labor. It lends the sanctions of federal law to unionization at all levels of the industrial hierarchy. It tends to emphasize that the basic opposing forces in industry are not management and labor but the operating group on the one hand and the stockholder and bondholder group on the other. The industrial problem as so defined comes down to a contest over a fair division of the gross receipts of industry between these two groups. The struggle for control or power between management and labor becomes secondary to a growing unity in their common demands on ownership.

. . . [I]f foremen are "employees" within the meaning of the National Labor Relations Act, so are vice-presidents, managers, assistant managers, superintendents, assistant superintendents—indeed, all who are on the payroll of the company, including the president; all who are commonly referred to as the management . . . . If a union of vice-presidents applied for recognition as a collective bargaining agency, I do not see how we could deny it and yet allow the present application.

. . . [I]f Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose. But I find none.

*Id.* at 494-95.

159. See DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at 7.

160. *Id.* at 11.

work groups, or internal self-governance or dispute resolution processes.<sup>161</sup>

This recommendation is important in terms of employee participation programs. Employees reported greater job satisfaction and higher self-esteem when they felt their ideas were sought on the job. Higher workplace morale will undoubtedly lead to greater productivity and efficiency, which benefits both labor and management. Furthermore, employers should seek ideas from those on the front lines. America will be wasting a vital resource if it allows labor laws to stifle worker initiative and creativity. Employees should be encouraged to take initiative on the job and to contribute ideas to the betterment of the enterprise. The law should be clarified so that employees who use their discretion and take initiative on the job do not lose the protections afforded to them under the NLRA.

### C. *The Mandatory/Permissive Distinction*

If workers choose to be represented by an outside labor organization, that outside labor organization becomes the exclusive representative of the workers for collective bargaining. The NLRA, however, mandates only a limited number of subjects upon which management and labor have a duty to bargain. Section 8(d) of the Act imposes "the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."<sup>162</sup> With the statute providing little guidance as to what "terms and conditions of employment" are to be included in such discussions, the Supreme Court has distinguished between what it has labeled "mandatory" and "non-mandatory" (or permissive) subjects of collective bargaining.<sup>163</sup> If an issue is determined to be mandatory, the employer and union become obligated to bargain about the subject, and each side may utilize the economic weapons available to it under the NLRA to support its bargaining position. If, on the other hand, a term is labeled as non-mandatory, neither side is obligated to bargain about the issue. As to permissive subjects, "management may use its own discretion when acting within permissive areas, without having to give any consideration to employee interests."<sup>164</sup>

As the law has evolved, the Court has engaged in balancing the entrepreneurial ownership rights of the employer, "an employer's need for unencumbered decisionmaking,"<sup>165</sup> against the benefits to

161. *Id.* at xvii.

162. 29 U.S.C. 158(d) (1988).

163. *See* NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-50 (1958).

164. *In Search of Industrial Peace*, *supra* note 25, at 580.

165. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1980).

labor-management relations that may be expected from mandating a subject to the bargaining process. In *Fibreboard Paper Products Corp. v. NLRB*<sup>166</sup> the Court determined that management's decision to contract out work previously performed by employees in the bargaining unit, a decision that resulted in the loss of jobs, was a mandatory subject of collective bargaining. The Court determined that the contracting out of work was clearly a condition of employment<sup>167</sup> and that "issues relating to job security should be mandatory subjects of bargaining . . ." <sup>168</sup> The Court reasoned that the "inclusion of 'contracting out' within the statutory scope of collective bargaining" was "well designed to effectuate the purposes of the National Labor Relations Act . . . to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation."<sup>169</sup> Under the facts presented, the contracting out of similar work to be done under similar conditions, management's decision was viewed as particularly amenable to the collective bargaining process.

The majority was very careful to limit its holding to the exact facts presented,<sup>170</sup> but it was Justice Stewart's concurrence that truly sought to define and limit its scope. Obviously disturbed by the breadth of the decision, Justice Stewart emphatically declared that there were certain management decisions "which lie at the core of entrepreneurial control"<sup>171</sup> that should not be mandated to the pro-

166. 379 U.S. 203 (1964).

167. *Id.* at 210.

168. *In Search of Industrial Peace*, *supra* note 25, at 587.

169. 379 U.S. at 210-11.

170. The Court stated:

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8(d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.

*Id.* at 215.

171. *Id.* at 223. Justice Stewart stated:

Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative . . . . Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.

*Id.*

cess of collective bargaining.<sup>172</sup> According to Stewart, management decisions that are “fundamental to the basic direction of a corporate enterprise”<sup>173</sup> must be left to the sole discretion of the business owner. This was a matter of “traditional principles of a free enterprise economy.”<sup>174</sup>

In the 1980 decision of *First National Maintenance Corp. v. NLRB*<sup>175</sup> the Supreme Court announced the modern judicial interpretation of the mandatory/permissive distinction. The Court determined that an employer’s decision to shut down part of his business for purely economic reasons was not a term and condition of mandatory bargaining under the NLRA. Adopting the rationale of Justice Stewart’s concurrence in *Fibreboard*, the Court concluded that “[t]his decision, involving a change in the scope and direction of the enterprise, is akin to the decision whether to be in business at all, [and is] ‘not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.’”<sup>176</sup> The Court, while recognizing the union’s interest in protecting the jobs of its members, concluded that this decision would not be benefited by the collective bargaining process and was better suited to the entrepreneurial discretion of the business owner. The Court held:

We conclude that the harm likely to be done to an employer’s need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union’s participation in making the decision, and we hold that the decision itself is *not* part of section 8(d)’s “terms and conditions,” . . . over which Congress has mandated bargaining.<sup>177</sup>

The mandatory/permissive distinction perpetuates the adversarial nature of labor management relations. Although the judicially created distinction does not bar the two sides from discussing all subjects, the traditional adversarial nature of their relationship often leads to confrontation and an unwillingness to discuss all issues relevant to the workplace. In fact the balancing test proposed in *First*

---

172. Justice Stewart stated: “Viewed broadly, the question before us stirs large issues. The Court purports to limit its decision to the ‘facts of this case.’ But the Court’s opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.” *Id.* at 217-18. Justice Douglas and Justice Harlan joined Justice Stewart’s concurring opinion.

173. *Id.*

174. *Id.* at 226.

175. 452 U.S. 666 (1981).

176. *Id.* at 677 (citing *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. at 223) (Stewart, J., concurring). Cf. *Textile Workers v. Darlington Co.*, 380 U.S. 263, 268 (1965) (“an employer has the absolute right to terminate his entire business for any reason he pleases”).

177. *First National Maintenance Corp. v. NLRB*, 452 U.S. at 686 (citations omitted).

*National Maintenance* has been criticized, as Justice Brennan did in his dissent, "for balancing entrepreneurial freedom against a process, labor-management relations, rather than against a genuine employee interest in workplace management."<sup>178</sup> This entrepreneurial discretion enables management to shut labor out of certain decisions that affect the job security of the workers.

In a cooperative setting, however, the mandatory/permissive distinction becomes meaningless. The "distinctions drawn between mandatory and permissive bargaining subjects . . . have not only become hazy, but also, from a practical perspective, have become meaningless, because the demarcations between the goals of both labor and management purposefully have been removed."<sup>179</sup> In workplaces across America, management and labor are disregarding this distinction and rejecting the traditional adversarial framework of labor-management relations as envisioned in the NLRA. In this

---

178. *In Search of Industrial Peace*, *supra* note 25, at 592; James Friedman, *Keeping Big Issues Off The Table: The Supreme Court on Entrepreneurial Discretion and the Duty to Bargain*, 37 ME. L. REV. 223, 259 (1985). In the case of *Dubuque Packing Co. and United Food & Commercial Workers, Local 150-A*, the NLRB formulated a new test for determining whether an employer's decision to relocate unit work was a mandatory subject of collective bargaining. See 303 N.L.R.B. 386 (1991). The D.C. Circuit Court of Appeals approved the test. *United Food & Commercial Workers, Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993). The Board presented the test as follows:

Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel [is successful], he will have established *prima facie* that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the *prima facie* case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense by showing, by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.

303 N.L.R.B. at 391. The D.C. Circuit Court explained that the Board's test concerns three distinct layers. "First, the test recognizes a category of decisions lying 'at the core of entrepreneurial control' in which employers may unilaterally take action." 1 F.3d at 30 (citation omitted). This is an objective test that looks to the differences between the employer's old and new operations. Second, the test applies subjective scrutiny. The question here is whether labor costs played a role in the employer's decision. *Id.* Lastly, the test includes a futility provision that permits an employer to relocate without negotiating where its union either would not or could not offer sufficient concessions to change its decision. *Id.* The Supreme Court, after having granted certiorari, see 114 S. Ct. 1395 (1994), dismissed the request for review. See 114 S. Ct. 2157 (1994).

179. *In Search of Industrial Peace*, *supra* note 25, at 598.

regard section 8(d) only impedes cooperation to the extent the parties allow it. Once the mindset is geared towards cooperation rather than confrontation, a broader range of issues may be addressed at the bargaining table, issues that are considered of mutual rather than exclusive concern.

While section 8(d) may have its limitations, this provision of the NLRA must remain intact. The entrepreneurial discretion of business must be protected. As Justice Stewart argued, this is a matter of "traditional principles of a free enterprise economy."<sup>180</sup> In an adversarial climate of collective bargaining, section 8(d) may, in fact, serve to perpetuate confrontation. If the parties in collective bargaining wish to maintain separate interests and desire to treat the other as an adversary, the issues they discuss will be limited. This limitation, however, is a matter of choice. If, on the other hand, management and labor choose to relinquish their traditional roles as adversaries, a broader range of issues may be put on the table. If management desires to include workers and organized labor in decisions concerning the scope and nature of the enterprise, section 8(d) provides no barriers. This, however, must be a matter of choice, not of Congressional or judicial mandate.

## V. THE BIW EXPERIENCE

The experience at BIW is part of the national movement toward workplace cooperation described in the findings of the Dunlop Commission. The BIW agreement is significant because it represents both a structural change in workplace operations and decision-making and a basic change in the traditional attitudes held by labor and management. The BIW agreement received national attention on Labor Day for good reason. The agreement represents a comprehensive attempt to improve the productivity and competitiveness of the enterprise by involving the workers in the decisions that affect their job security and the overall well-being of the enterprise. The agreement exemplifies what is possible when the adversarial nature of the management-labor relationship is changed to a relationship of trust, cooperation, and mutual respect. This section discusses the details of the BIW agreement in light of both the findings of the Dunlop Commission and the recommendations of the AFL-CIO. This section analyzes the significance of the agreement in terms of the recommendations proposed for reformation of the American workplace.

---

180. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 226 (1964) (Stewart, J., concurring).

A. *Changing Economy and Changing Attitudes*

The Dunlop Commission reported that certain external forces in the economy and the workforce were combining with internal changes of attitude at the American workplace concerning the desire for more cooperation between labor and management. These findings closely mirror the experiences at BIW that led to the signing of its historic collective bargaining agreement. The 1980s were a bad time for labor management relations at the Maine shipyard.<sup>181</sup> Relations between management at BIW and its largest union had been adversarial and marked by a climate of distrust. In 1985 a bitter 100-day strike resulted at the yard when the two sides were unable to come to a contract agreement. In 1987 a comprehensive inspection by the United States Occupational Health and Safety Administration (OSHA) resulted in the issuance of approximately 2000 violation citations and in fines totaling \$2.4 million. The death of a worker in 1989 provided yet another opportunity for labor and management to square off against one another.<sup>182</sup>

To make matters worse, the government declared heavy reductions in defense spending. With the yard almost exclusively reliant on defense contracts, reductions in defense expenditures represented a threat to the mutual interests of both labor and management. It became evident to both management and labor that something needed to be done to save the company and the thousands of jobs it provides for the State of Maine. As David Libby, President of Local S/6, stated in a newspaper interview:

It didn't take too much to see the writing on the wall, to see that if we didn't do something and BIW didn't do something, then none of us would be working.

....

And the only way we're going to have those jobs is if BIW has a good backlog of ships to build. If we can do something to make that happen, I think it's as much our job as it is . . . management's job to make that happen.<sup>183</sup>

BIW decided to re-enter commercial shipbuilding, an industry dominated by state-subsidized foreign firms.<sup>184</sup> The highly competitive nature of this industry forced BIW to reconsider its production and decision-making techniques. An important opportunity for change in labor management relations occurred when BIW Presi-

---

181. Duane Fitzgerald, Remarks at the University of Maine School of Law (Nov. 1994) (Duane (Buzz) Fitzgerald and David Libby, President of Local S/6 IUMSWA, spoke to Prof. James Friedman's Labor Law class about the significance of the BIW agreement).

182. *Id.*

183. James M. McCarthy, *Working Together to Save Shipbuilding Jobs*, THE TIMES RECORD, March 2, 1994, at 15, 17.

184. *Id.* at 15.

dent Duane (Buzz) Fitzgerald asked George Kourpias, President of the International Association of Machinist and Aerospace Workers, to join an advisory panel that would seek a grant from the federal government to study the production techniques of foreign firms. This decision by BIW management represented the initial step in its attempt to involve labor in important decisions affecting the scope and nature of the enterprise.

With management and labor acting in cooperation, BIW successfully competed for a \$4.5 million grant to study foreign shipbuilding techniques in Japan and Finland.<sup>185</sup> The receipt of this grant was significant for two reasons. First, it represented an effort by the United States Government to assist firms committed to revitalizing American competitiveness by addressing and altering traditional norms of labor-management relations and the organizational and production techniques that flow from such relationships. Second, the cooperative processes involved in the joint labor-management advisory committee represented an important change in attitudes at the plant itself. This change was evident in the mindset of both parties.

With the aid of the federal grant, management at BIW invited labor leaders from the plant to join them abroad to study the foreign shipyards. The idea was to allow both sides to learn from their foreign competitors and to incorporate the knowledge and expertise of labor in the design of the product. Buzz Fitzgerald, in an interview with the *Times Record*, discussed foreign production and the new direction of BIW:

I think it starts all the way back in engineering. When they [foreign yards] design a ship, their initial design and engineering work is done with productibility very much in mind.

. . . .

I don't think we've done that in this country. Certainly not in the combatant business: We tend to design the world's most perfect ship and then hope like hell that someone can build it. And we don't take into account the kinds of difficulties we're imposing upon the workers . . . .

. . . .

As it turns out, if you include the workers or someone that is knowledgeable about how you actually have to do the work, there's a whole lot of things we would design differently to make things easier. We'd produce the same end product, but it would be easier to get there.<sup>186</sup>

---

185. *Id.*

186. James M. McCarthy, *Update: BIW's Five-Year Plan*, *THE TIMES RECORD*, January 26, 1994, at 17.



The Union's David Libby expressed similar sentiments and stressed the emerging changes in attitude between the once adversarial parties. In an interview with the *Times Record*, Libby stated:

I think, first, one of the important things to note is that the Machinists union was involved as part of the proposal to get the \$4.5 million grant from the government . . . .

. . . .

And I think that was one of the big factors in Bath Iron Works actually getting the grant to do this.

. . . .

I think it's also important to say that five years ago, or even three years ago, I don't believe BIW and this union would have been involved in this kind of venture.

. . . .

Some people think it's not a union's function to try to help the company out . . . [but] the most important issue to me is jobs for my people, the people I represent—that they have jobs five years from now, 10 years from now.

. . . .

I also think it is important to have the union involved from the beginning.

. . . .

We were involved in the strategic planning meetings. I don't think that anything was hidden from the union. And I think it's important that we're involved in seeing what's going on at the Finland shipyards, the Japanese shipyards. We're seeing first-hand the information and the technology the management people are looking at.<sup>187</sup>

As Fitzgerald and Libby indicate, both management and labor at BIW made a conscious decision to forge a relationship based on cooperation rather than on antagonism for the good of all concerned.

### B. *The Concept of Teaming*

Under the union's prerogative, the climate of cooperation was carried a step further when on July 22, 1993, the union received management approval of the teaming concept that would serve as the foundational underpinning in transforming the organizational and production techniques at BIW.<sup>188</sup> The joint union-management

---

187. James M. McCarthy, *Working Together to Save Shipbuilding Jobs*, THE TIMES RECORD, March 2, 1994, at 15.

188. The Joint Union, Management Teams/Committees Guidelines contained twelve specific points. They are as follows:

- 1) All mandatory subjects of bargaining are the exclusive right of Local S/6, and management cannot bypass the Union by unilaterally implementing changes in subjects of bargaining.
- 2) All Joint Teams/Committees that are formed must have the approval of Local S/6 prior to the participation of any Local S/6 members, which approval will not be unreasonably withheld.

team and committee guidelines, which were proposed by the union and approved by management, “[give] workers equal say with management on issues affecting the future of the company by giving them representation on committees ranging from safety and project bidding to the company’s efforts to re-enter commercial shipbuilding.”<sup>189</sup> The underlying principle of the teaming agreement, followed in the committee guidelines, is the idea of equal representation and consensus in decision-making. The joint teams/committees are to have an equal number of labor and management representatives, and decisions affecting joint team interaction are to be arrived at by consensus; all members of the team must agree to support a decision.

*C. Bargaining and Drafting the New Agreement: Dissolution of the Adversarial Model*

The teaming concept was added to the existing collective bargaining agreement with early success. The existing contract between management and labor, however, was due to expire in August, 1994, which could have meant failure for the burgeoning cooperative movement at BIW. The new collective bargaining agreement would require the approval of a majority of the workers represented by the union. The initial cooperative efforts of the union and management either would be embraced or rejected by the workers themselves.

- 
- 3) All Joint Teams/Committees that are approved will have at least 50% participation of bargaining unit employees, (Local S/6), to be selected by the President or his Designee.
  - 4) All Joint Teams will be registered with the Union/Company Oversight Committee.
  - 5) No Joint Teams will violate the Labor Agreement in any manner.
  - 6) Training—Joint Teams may receive training in team building, problem solving communications, conflict resolution, (P.S.D.M.), etc.
  - 7) Decisions affecting Joint Team interaction will be arrived at by consensus (consensus means all members of the Team must agree to support a decision).
  - 8) Quorum: To have a quorum and make decisions, there has to be at least 50% participation from both sides, (no quorum, you may still have a workshop but cannot make any decisions effecting [sic] the teams role and responsibility).
  - 9) Joint Teams must understand they cannot discuss mandatory subjects of bargaining unless approved by the Union/Company Oversight Committee.
  - 10) It is the intent of all Joint Teams to communicate final results to effected [sic] parties.
  - 11) Any additions, changes, or exceptions to this agreement can be made by the Union/Company Oversight Committee.
  - 12) Teams may select Facilitators by consensus, from within the team or may request a Facilitator from outside who will become a member of the team in accordance with the rest of this agreement.

BIW AGREEMENT, *supra* note 2, at 11-12.

189. Candace Lawson, *BIW 'Teaming' Replaces Conflict*, THE TIMES RECORD, July 20, 1994, at 1, 14.

While approval could lead to an historic change at BIW, rejection could lead to a strike and a retreat to the adversarial posturing that marked earlier collective bargaining sessions. The concern over potential rejection by the workers showed just how deep-seated the mistrust was (and in some cases is) that existed between management and labor at BIW and throughout American workplaces.

Recognizing that they stood at a crossroads, management and labor began a joint effort to draft the new collective bargaining agreement. According to Buzz Fitzgerald, "This was an entirely new process. . . . This was collaborative."<sup>190</sup> Beginning in April 1993 a group of forty employees representing the union and the company started an in-house program to train people to work cooperatively and make decisions by consensus. The group then "worked virtually full-time drafting the [new] contract."<sup>191</sup> A six-member "contract review team" composed of labor and management representatives evaluated and scrutinized the 1991 contract and made suggestions for change.<sup>192</sup> The contract review team was supported by an "issue support team" that would provide any additional research needed by the review team in formulating its recommendations.<sup>193</sup> The recommendations of the review team were reported to a fifteen-member negotiating team which, upon completion of a chapter of the contract, would forward it to the union shop stewards to explain it to the rank and file workers.<sup>194</sup> Consistent with the guidelines contained in their teaming agreement, each team or committee comprised equal representation from management and labor. All decisions were made by consensus.

Management even employed a more cooperative voting process. For the first time in BIW's history, company officials allowed union members to vote on company time and on company property.<sup>195</sup> On September 19, 1994, the historic vote took place. BIW workers approved the new collective bargaining agreement by a two-to-one margin. The vote, 3280 for and 1550 against, represented a true majority. "Almost 91 percent of the union's 5300 members voted that day, and those voting in favor of the contract represented almost 62 percent of the membership."<sup>196</sup>

---

190. L. Mercedes Wesel, *BIW Bosses, Labor About to Step into Era of Cooperation*, MAINE SUNDAY TELEGRAM, Aug. 21, 1994, at 1A, 9A.

191. *Id.* at 9A.

192. *Id.*

193. *Id.*

194. *Id.* The negotiating and review teams are also responsible for the implementation of the contract. "One of their first tasks [was] to appoint permanent area governing committees and a 10-member contract interpretation team. Six members of that group [came] from among the two original teams, two will come from management and two more from the union."

195. *Id.*

196. *Id.*

#### D. *The BIW Agreement*

The goal of the collective bargaining agreement between BIW and members of the IUMSWA/IAM, Local S/6 is clear: "A true commitment to teamwork to produce a labor agreement that promotes maximum efficiency and preservation of jobs."<sup>197</sup> This goal relies on the essential premise that the two sides have mutual and shared interests in the success of the enterprise. This premise has not been an underlying assumption of labor relations in American history. The agreement represents a departure from the adversarial approach to labor relations.

Teaming and cooperation have enabled BIW to employ extensive cooperative techniques to achieve its stated goal. BIW recognized the value and worth of workers, who, when given the opportunity to contribute in the thought-process and decision-making of the enterprise, become a valuable asset to the company rather than adversaries or simply commodities.

The BIW agreement integrates many of the cooperative techniques recommended by the Dunlop Commission and described in the previous section. Through its premise of teaming and cooperation, the agreement has attempted to create a workplace in which labor and management work together to improve the quality of the product, maximize efficiency at the workplace, and preserve jobs by remaining competitive. The following discussion describes the philosophical underpinning of the agreement, explains the actual committee structure employed, and analyzes the transformation in production techniques. It also addresses just how far the agreement actually goes in creating a real partnership between management and labor.

#### E. *Philosophical Underpinning*

The philosophical underpinning of the agreement was an intent to create an atmosphere at BIW of mutual respect and trust in order to achieve mutual goals. This required a transformation in the traditional roles of labor and management and a change in deeply rooted suspicions and perceptions. The philosophy of the agreement reads:

"We believe everyone wants to be part of an organization where people are empowered to be successful, are responsible for their actions and share in the rewards of being the best. By creating an atmosphere of trust and respect, through education and training, open communications, commitment, and problem solving, we will achieve our goal of maximum efficiency and job preservation to the benefit of all."<sup>198</sup>

---

197. BIW AGREEMENT, *supra* note 2, at 1.

198. *Id.* at 3.

The Dunlop Commission reported that a primary obstacle to cooperative efforts across the U.S. economy was a lack of trust between workers, management, and organized labor.<sup>199</sup> In particular, the Commission reported that many workers feel that employee participation and productivity plans are employed solely to benefit management in terms of profitability and efficiency. Success in these areas, workers reported, would result in loss of jobs.<sup>200</sup> Similarly, the Commission reported fears of high start-up costs as contributing to management's skepticism of participatory plans.<sup>201</sup> "Building a trusting relationship between workers and employers so that workers are highly motivated and contribute their ideas to the firm constitutes a long term investment. . . . Management surveys report layoffs and downsizing are the single biggest threat to the continuity of employee participation in industry today."<sup>202</sup>

The circumstances described in these findings were a very real problem for advocates of the cooperative plan at BIW. Management and labor, however, elected to address the issue of trust and commitment head-on. The idea of job security, once viewed as the sole prerogative of labor, became a mutual concern and a primary

---

199. DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 49.

200. *Id.* In order to highlight this point, the Commission reported the testimony of Mr. Romie Manan, an employee of National Semiconductor. Testifying at the San Jose hearings, he "told of how he and his fellow [workers] were bitter about being laid off after contributing ideas to improve productivity of his operations." *Id.* National Semiconductor planned to transfer this work to a new plant in another state. Mr. Manan testified:

The Company claims that these teams give us a voice in running the plant and a place where we can talk about our problems. In reality, however, in these groups, all the company ever wants to talk about are ways to make National (the company) more productive, more efficient, and more profitable.

Over the past seven or eight years, our company has shifted production from our plant to lower wage plants in Arlington, Texas and Portland, Maine. Thousands of my fellow workers on the fab lines have lost their jobs in the process. I will lose mine too, next week after working many years in that factory.

*Id.* at 49-50.

201. *Id.* at 51. The Commission reported that the Labor Policy Association found that conflicts between managers was a more significant obstacle to employee involvement efforts than were employees or unions. This intra-management conflict resulted from a combination of high start-up costs, which include resources spent on "training, consulting services, and management and employee time away from 'normal' activities," and a sense that benefits from the plans are difficult to measure or predict. The conflict arises "within management between advocates for these changes and those who want to measure their costs and benefits of these efforts before the benefits are realized." *Id.* The Labor Policy Association reported that, among managers who described "their cooperative efforts had been less successful than expected, 42 percent cited management resistance, 39 percent cited employee resistance, and 28 percent cited union resistance as a problem." *Id.*

202. *Id.* (citation omitted).

goal of the labor agreement. The BIW agreement declares job security as its purpose:

We believe job security to be the foundation for BIW to become globally competitive. Attributes of a secure work organization include employee stability, flexibility to effect change, maximum efficiency through teaming, and a sense of commitment by all. It also produces peace of mind that will create an environment of trust. This trust will be the foundation for cooperation that allows us to deal with all current and future challenges to our success.<sup>203</sup>

In order to gain the trust of the workers, and to prove its commitment to the "new" enterprise, management agreed to a no-layoff clause that was to last for the entirety of the three-year agreement.<sup>204</sup> In return for this promise the workers were to reciprocate by agreeing to alter their traditional production techniques and to learn new skills.<sup>205</sup> (The particulars of the new production techniques are discussed in detail in a later section.) It is important to note that the learning of new skills and the transformation of production techniques proved to be a major obstacle to gaining worker support. There was concern among the workers, similar to that reported by the Dunlop Commission, that the primary goal of management in this area was improved efficiency. In particular, the workers were concerned that the improved efficiency achieved during the three-year agreement would result in the loss of many jobs upon the expiration of the collective bargaining agreement and its no-layoff clause in 1997.<sup>206</sup> The process of collective bargaining is one of compromise, and time will tell the results of this particular compromise.

---

203. BIW AGREEMENT, *supra* note 2, at 22.

204. *Id.* The agreement reads: "There will be no involuntary layoffs for the duration of this agreement for those employees on the payroll as of the date of ratification. Employees laid off with recall rights as of the date of ratification who are recalled during the life of the contract will also be included." *Id.* The agreement also provides that any fluctuations in work, which would normally result in layoffs, would now be jointly reviewed by senior BIW and Local S/6 officials in order to identify and implement solutions. With the option of involuntary layoffs conspicuously absent, the list of possible responses to work fluctuations include: "pursue new work; employee reassignment flexibility; retraining; reduction of work hours; schedule acceleration; voluntary layoff; voluntary time off; job sharing; subcontract work—both in and out; overtime use; and early retirement." *Id.* The only exceptions to the no involuntary layoff commitment could result from the "cancellation of contract(s), natural disaster(s), or catastrophic event(s)."

205. The agreement expressly sanctions this tradeoff: "The company's commitment to the employees' future is continued employment through no layoffs, increased compensation, as well as increased post employment security through the IAM Pension Plan. The employees' commitment must be the willingness to learn, adapt, and safely apply additional skills to their crafts to maximize our competitiveness." *Id.* at 23.

206. See Fitzgerald remarks, *supra* note 181.

### F. *The Significance of a Strong Union Voice*

Among the most significant factors leading to success of cooperative plans in the U.S. workplace is the presence of a strong union voice to represent the concerns of the workers. As previously noted, the legality of cooperative plans is often called into question under section 8(a)(2) of the NLRA in the absence of an independent union voice. In addition, the Dunlop Commission reported deep skepticism among workers of cooperative plans employed under the sole prerogative of management and in the absence of an independent union.<sup>207</sup> Similarly, the Commission reported that union leaders distrust managers' motives for employing workplace cooperation in the absence of union representation. Union leaders often view employee participation initiatives as union avoidance techniques, a motivation that has been documented as one, but not the sole, motivation for some of the historical and current workplace innovations introduced by non-union employers.<sup>208</sup> Likewise, the Commission reported that management questions union leaders' "ability to support cooperation and employee participation, believe[s] unions will hold cooperation hostage to achieve other objectives, or [is] unwilling to share information and power with union leaders in the belief that the company will be 'contractually' bound to continue joint decision-making in the future."<sup>209</sup>

### G. *AFL-CIO Principles for Labor-Management Partnership*

The Commission reported that efforts in unionized settings are most likely to be successful when the union is involved as a joint partner with management. "A number of individual unions . . . [in turn] have recently publicly endorsed employee participation and labor-management partnerships as an explicit policy objective."<sup>210</sup> Most notably, the AFL-CIO recently released a report entitled *The New American Workplace: A Labor Perspective*.<sup>211</sup> The organization outlined its support for labor-management partnerships and for designing new models of work organizations that utilize independent unions as equal and joint partners in the evolving American workplace of cooperation. In stressing the importance of union representation in cooperative settings, the AFL-CIO concluded:

The new systems of work organization require, as a first requisite, that workers be represented by free and independent labor unions which they control. The very presence of such a

---

207. DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 31.

208. *Id.* at 50 (citing FRED FOULKES, PERSONNEL POLICIES IN LARGE NONUNION FIRMS (1980); DAVID W. EWING, JUSTICE ON THE JOB (1989)).

209. *Id.* at 51.

210. *Id.* Among the unions listed in this regard were the Steelworkers, CWA, the Amalgamated Clothing and Textile Workers, and the Grain Millers.

211. THE NEW AMERICAN WORKPLACE, *supra* note 62.

union fundamentally changes the nature of the workplace and the relationship between the individual worker and the employer. Trade union representation removes fear from the workplace and assures workers the protection that is essential if they are to feel free to express their views and to fully participate in workplace decisions. And such unions provide the vehicle through which workers can be represented with respect to decisions that affect their work lives.<sup>212</sup>

The fact that cooperation blurs the distinction between labor and management does not obviate the need for a strong union that is willing to compromise when necessary and hold firm when necessary.

In its report, the AFL-CIO outlined its principles for a true labor-management partnership in the new American workplace. These principles are summarized as follows:

First, we seek partnerships based on mutual recognition and respect. . . . A partnership requires management to accept and respect the union's right to represent the workers in unorganized units to join a union. . . .

Second, . . . the partnerships we seek must be based on the collective bargaining relationship. Changes in work organizations must be mutually agreed to—and not unilaterally imposed—and must be structured so as to assure the union's ability to bargain collectively on behalf of the workers it represents on an ongoing basis. . . .

Third, the partnerships must be founded on the principle of equality. In concrete terms, this means that unions and management must have an equal role in the development and implementation of new work systems . . . .

Fourth, the partnerships must be dedicated to advancing certain agreed-upon goals reflecting the parties' mutual interests. . . .<sup>213</sup>

#### *H. AFL-CIO Principles Applied to BIW*

The AFL-CIO has praised the BIW collective bargaining agreement as a national model for workplace cooperation. Thomas Donahue, Secretary of the AFL-CIO, stated that "Bath has something to be proud of . . . . It is, for certain, a development that will change the way American businesses make decisions."<sup>214</sup> George Kourpias, President of the International Association of Machinists, stated that "[h]ere [at BIW], union members share equal representation and

---

212. *Id.* at 11.

213. *Id.* at 11-12; see also DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 50.

214. Steven M. Pappas, *Labor Charts a New Course at BIW*, THE TIMES RECORD, Mar. 2, 1994, at 17. See generally Secretary-Treasurer Thomas R. Donahue, Remarks on Labor Day, Bath, Maine (Sept. 5, 1994).



equal power with the company at every level of every program . . . . This labor-management team will be a model for our country of real, authentic cooperation."<sup>215</sup> Kourpias made these remarks in a speech to union and non-union workers at BIW. In an unprecedented move, BIW halted its operations to allow Kourpias to give his address.<sup>216</sup>

The praise and accolades the BIW agreement has received are well deserved. The BIW agreement successfully incorporates the AFL-CIO principles for labor-management partnership into an agreement that represents a true commitment to workplace cooperation. BIW has recognized the value of its union as a partner in its enterprise and, through the mechanism of teaming and joint decision-making, has included the union and its workers as an equal voice in the decisions that affect the workers and the running of the business. The BIW agreement provides:

Local S/6 and BIW recognize the value of a labor organization and its role as a full partner in developing BIW into a high performance work organization. In recognition of the importance of union participation in the future of our organization, we will move forward as a team. Through mutual recognition and respect of each other's roles and responsibilities we will develop and achieve an environment of trust.<sup>217</sup>

The new approach at BIW, initiated in large part out of economic necessity, has the potential to yield significant efficiencies that many other businesses may also enjoy by implementing the cooperative model.

### *I. The New American Workplace*

The overriding theme of the AFL-CIO report is a call for the dissolution of the "dominant system of work organization" and the creation of a new American workplace that joins in a partnership with unionized workers to create "new work systems which alter in the most basic ways the manner in which work is organized, businesses are managed, and labor and management treat each other."<sup>218</sup> According to the AFL-CIO, the "dominant system of work organization" has been the prevalent form of work organization in the United States for the better part of this century.<sup>219</sup> This system of work organization has been organized around four core principles:

First, and most fundamentally, the basic premise of the dominant system of work organization is that the tasks of thinking,

---

215. James B. Parks, *Machinists Gain 'Equal Voice' in Shipyard Contract*, AFL-CIO NEWS, Sept. 5, 1994, at 3.

216. *Id.*

217. BIW AGREEMENT, *supra* note 2, at 5.

218. THE NEW AMERICAN WORKPLACE, *supra* note 62, at 1.

219. *Id.*

planning and decision-making are best done by an elite corps of thinkers, planners, and deciders. . . . [T]heir fundamental role is to centralize knowledge about, and control over, the workplace.

[S]econd, that the role of the individual worker is to perform assigned tasks in an assigned manner. This is accomplished in the archetypal work organization through a high degree of specialization and division of labor. Each worker is given a small, fixed task to be repetitively performed. The worker requires and develops great expertise in that task, rather than broader knowledge or more general skills.

Third, this work organization requires a hierarchical, regimented environment in which layers of management are created to assure that the decisions of the thinkers and planners are correctly executed. Through this chain of command decisions are communicated to workers who are instructed in what they are expected to do and then are closely monitored to make sure that the workers do as they are told. When problems or issues arise, those issues are carried up the chain of command to the appropriate level of supervision for a decision.

Fourth and finally, in this dominant method of work organization workers are seen by management and owners as merely another "input" into the production process—a disposable commodity like any other production input. The employer's aim is to get the maximum output from the worker at the lowest possible cost.<sup>220</sup>

According to the AFL-CIO, this method of work organization has had disastrous effects on American workers. The dominant system "does not respect basic worker rights, recognize worker potential, and in consequence does not satisfy basic worker needs."<sup>221</sup> The dominant model "does not allow workers the opportunity to make a full contribution because it denies workers the freedom to use their capacities and skills fully, let alone to further develop those capacities and skills."<sup>222</sup> In short, the dominant system of work organization, by suppressing worker discretion and input, has denied workers a sense of satisfaction and accomplishment in their work.<sup>223</sup>

The dominant system of work organization also has had negative economic effects on the American workplace. According to the AFL-CIO, the dominant model is plagued by inefficiencies that have substantially increased the costs of products and services.<sup>224</sup> These inefficiencies include "a large number of 'indirect workers'—consultants, planners, thinkers, decision makers, schedulers, super-

---

220. *Id.* at 3-4.

221. *Id.* at 1.

222. *Id.* at 5.

223. *See id.*

224. *See id.* at 7.

visors, managers, inspectors and the like . . . ."<sup>225</sup> In addition, the "hierarchical, bureaucratic structure of the traditional work system is, moreover, incapable of responding quickly to new needs or desires of the marketplace. And by setting rigid norms of standardized performance, the traditional work system has always had the perverse effect of stifling worker initiative and discretionary effort."<sup>226</sup>

As discussed, many American workplaces, faced with mounting economic pressures from competitors both home and abroad, are transforming their production and decision-making techniques to include more cooperative efforts. These efforts have included production and quality centered initiatives, self-managed work teams, workplace committees and partnerships, and employee ownership plans. According to the Dunlop Commission, however, few American workplaces have achieved what has popularly been referred to as a "high performance" workplace.<sup>227</sup> The Commission reported that, while there is no single standard to judge which, or what, combination of different workplace practices achieve this label, the experts agree that:

[T]he value of these practices is realized best when combined into a total organizational system that rests on a foundation of trust and combines employee participation, information sharing, and work organization flexibility with reinforcing human resource practices such as a commitment to training and development, gain sharing, employment security, and where a union is present, a full partnership between union leaders and management.<sup>228</sup>

When judged by this systemic standard, however, the Commission reported a low success rate across the American economy, perhaps as low as five percent.<sup>229</sup>

The AFL-CIO echoed this conclusion and determined that until recently, efforts to reform the traditional system of work organization "have not addressed the fundamentals of the problem and consequently have failed to take root."<sup>230</sup> The AFL-CIO points out, however, that several industrial giants, service industry enterprises, and public agencies have successfully transformed their workplaces. In particular the AFL-CIO points out how integrated work systems have "helped save parts of the automotive and steel industries, and have improved the performance of major manufacturers such as

225. *Id.*

226. *Id.*

227. See DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 36.

228. *Id.*

229. *Id.* The Commission referred to estimates made by the Commission on the Skills of the American Workforce and by Jerome Rosow, President of the Work in America Institute.

230. THE NEW AMERICAN WORKPLACE, *supra* note 62, at 8.

Xerox and Corning Glass.”<sup>231</sup> Summarizing such experiences and experiments throughout the American economy, the AFL-CIO discerned five basic principles which together define their model for the new system of work organization. They are, in part, as follows:

First, the model begins by rejecting the traditional dichotomy between thinking and doing, conception and execution. . . .<sup>232</sup>

Second, in the new model, jobs are redesigned to include a greater variety of skills and tasks and, more importantly, greater responsibility for the ultimate output of the organization. . . .<sup>233</sup>

Third, this new model of work organization substitutes for the traditional, multi-layered, hierarchy a flatter management structure. . . .<sup>234</sup>

Fourth, the new model goes beyond the workplace level to insist that workers, through their unions, are entitled to a decision-making role at all levels of the enterprise. . . .<sup>235</sup>

231. *Id.*

232. The principle goes on to read:

Workers—the individuals who actually do what it is the organization is doing—are in the best position to decide how their work can most efficiently and effectively be accomplished. Such decisions are never final but should be constantly revisited through an ongoing process in which change is the only constant. This process requires a fundamental redistribution of decision-making authority from management to teams of workers. These workers must not only be given such decision-making authority but also must be afforded the opportunity to develop and refine analytic and problem-solving skills so that they will be able to make the best possible work decisions.

*Id.*

233. This principle goes on to read:

Workers are organized into work groups (or teams); the workers learn not merely a particular task but an understanding of the overall process of producing a good or service and often they are trained to perform the various functions required for that process. Moreover, workers are given the authority, and the training, to exercise discretion, judgment and creativity on the job. Workers' ingenuity is viewed as a key to success; workers are free to do the right thing, rather than being compelled to do the prescribed thing.

*Id.* at 8-9.

234. This principle goes on to read:

At the same time, the role of the manager is transformed since the aim of the system is no longer to assure that workers do prescribed tasks, in prescribed manners, for prescribed intervals. In this less authoritarian work culture, the aim is to enable workers to be self-managers who are responsible for their own performance, and the work teams are often self-managed with responsibility for scheduling work, ordering materials, hiring workers and the like. The foreman is replaced by a team leader; the role is to lead rather than mandate.

*Id.* at 9.

235. This principle continues:

Just as workers understand best how the work should be organized, workers—through their representatives—have expertise to contribute to strate-

Fifth and finally, the new model of work organization calls for the rewards realized from organizing work on equitable terms agreed upon through negotiations between labor and management.<sup>236</sup>

These five principles form an integrated whole—a vision of a new system of work organization. They combine *individual participation* through restructured work processes and redesigned jobs, with *collective representation*, through restructured decision-making processes from the shop floor to corporate headquarters. The aim of this approach is to achieve work organizations which at one and the same time are more productive *and* more democratic. Therein lies the source of its legitimacy and its power.<sup>237</sup>

### J. BIW—A New American Workplace

The collective bargaining agreement that was signed on June 14, 1994, between BIW and the IUMSWA/IAM achieves the principles outlined by the AFL-CIO, implements systemic changes resulting in a “high performance” work organization, and creates a “new American workplace” based upon the premises of trust and respect, shared goals, and equality in decision-making. The efforts at BIW represent a genuine commitment to cooperative techniques that clearly depart from traditional workplace structures and dramatically alter the basic relationship between management and labor. The changes envisioned in the BIW collective bargaining agreement were the result of a joint effort between management and organized

---

gic decisions as well including, for example, about what new technologies should be acquired or about what changes to make in products or services. Moreover, as stakeholders in the enterprise, workers have a vital interest in the strategic decisions which ultimately determine how much work will be done, where and by whom. Because workers have long-term ties to their jobs, they bring a long-term perspective and can be counted on to promote policies designed to insure that businesses have long-term futures and can provide long-term employment at decent wages. Thus, in this new model such strategic decisions are to be jointly made by workers—acting through their unions—and other stakeholders.

*Id.*

236. *Id.* at 8-9. This last principle continues:

This means, in the first instance, a negotiated agreement to protect income and employment security to the maximum extent possible. Of equal importance it means a negotiated agreement to compensate workers fairly for their enhanced contribution to the success of the organization. This may be achieved through increases in base wages or, in other cases, through agreements providing for some form of supplementary contingent compensation (such as gain sharing, profit sharing, stock ownership or the like). What is most important is that the worker's share is not set as an act of grace by managers and owners but is the product of a negotiated agreement between the employer and the union representing the workers.

*Id.* at 9.

237. *Id.*

labor to save both jobs and the enterprise. The new American workplace at BIW empowers workers to use their discretion and judgment, and gives them a sense of value, achievement, and self-worth. The BIW agreement combines the best of the various workplace cooperative techniques outlined by the Dunlop Commission, and integrates them into a systemic whole. The agreement blurs the lines between management and labor and signifies the end of the adversarial culture of labor relations at BIW. The following section describes the details of the teaming structure, the changes it makes in decision-making apparatus, and the dramatic alteration of the production techniques for which it provides.

*K. Teaming and Joint Decision-Making: Disregarding the Mandatory/Permissive Distinction*

The concept of teaming is the foundation of the BIW collective bargaining agreement. This concept entails decision-making by consensus and equal representation on various committees. The agreement provides for the establishment of Joint Process Teams comprised of an equal number of union and management members. "These teams are established for the purpose of reviewing specific work processes, identifying areas of improved efficiency, and recommending process improvement suggestions to the Oversight Committee."<sup>238</sup> The Oversight Committee, which also comprises an equal number of management and union representatives, approves forms, and oversees the Joint Process teams. The agreement provides for the recognition of Local S/6 Committees that include an apprenticeship committee, benefits committee, grievance committee(s), human rights committee, and safety and health committee.

Most collective bargaining agreements include a management function clause that designates certain responsibilities as the sole prerogative of management. In addition the law, through section 8(d) of the NLRA, has determined that certain entrepreneurial decisions are left to the sole discretion of management. These decisions are viewed as non-mandatory subjects of collective bargaining and may be imposed unilaterally upon the work-force. They included basic changes in the scope and nature of the enterprise and decisions that entail major capital investment. Through the teaming agreement and consensus decision-making, however, management at BIW has given up much of its entrepreneurial discretion and has empowered the workers to share responsibility for these subjects.

What is truly remarkable about the BIW agreement is the scope of issues and subjects for which management has agreed to share its responsibility with labor. The agreement divides labor and management responsibilities into five separate categories: 1) those to be

---

238. BIW AGREEMENT, *supra* note 2, at 10.

jointly developed and implemented with joint approval;<sup>239</sup> 2) those to be developed by management and implemented with joint approval;<sup>240</sup> 3) those to be developed by management and implemented with information available to the union;<sup>241</sup> 4) shared responsibilities;<sup>242</sup> and 5) employees' responsibilities (management and Local S/6).<sup>243</sup> Under consensus decision-making, the agreement provides that "[w]here joint approval is required, implementation will not occur until consensus is reached. Reasonable options must be explored. You cannot just say no."<sup>244</sup>

Responsibilities to be jointly developed and implemented with joint approval include those involving "new technology" and "strategic business and marketing plan." Under the category of responsibilities to be developed by management but implemented with joint approval are "plan to scope/rescope work," "subcontract plan," and "new job classifications." These are the types of responsibility one traditionally would expect to find reserved to the sole prerogative of management under a management function clause. However, through the process of collective bargaining and the concept of teaming, union and management have created a workplace where consensus decision-making reaches nearly every department and as-

---

239. Under this category each party may present an idea or concept to the other. The idea is then jointly reviewed and, if accepted, the idea is developed with a plan for implementation. The topics for joint development/approval/implementation include: "Communications affecting the labor agreement; Corporate Training Plan; New technology; Administration of [the labor] agreement; Change of health insurance carrier; Recognition and reward program(s); [and] Strategic business and marketing plan." *Id.* at 7.

240. Under this category management is responsible to develop the idea but implementation must be by joint approval under consensus decision-making. These decisions include: "Plan to scope/rescope work; Plan for Classification Support Center staffing adjustments (i.e., hiring, recall, transfer plans); Subcontract plan; Manufacturing long-range overtime plan; New job classifications; [and] Reasonable rules and regulations." *Id.*

241. Responsibilities in this category include: "Merit raises; Discharge decisions; Assigning jobs; Providing company tools; Promotion decisions; Disciplinary decisions; Regulating equipment and property; Medical decisions; FMLA administration; Employee performance evaluations; Yard closure decisions; [and] Decrease the work force." *Id.* at 8.

242. Responsibilities in this category include: "Safety and health of employees; Investigations; Represent employees and their work; Payment of dues; Community involvement . . . ; Support teaming/teamwork; [R]equire employees to follow rules; Involve the right people in decisionmaking; [P]rotect the environment . . . ; Leadership for a successful company; High quality of work; Solve problems at the lowest level; Preservation of jobs; [and] Promote maximum efficiency." *Id.*

243. Responsibilities in this category include: "Work safely; Provide personal tools . . . ; Notice for family and medical leave; Do high quality work; Follow rules and regulations; Work efficiently; [O]ffer suggestions for improvement where you can; Resolve problems at the lowest level; Be responsible for your actions; Work within the labor agreement; [and] Change of address to Personnel Records." *Id.* at 9.

244. *Id.*

pect of the enterprise. The only notable exception to this is the area of discipline, which is reserved under the BIW agreement to the sole discretion of management.

To better illustrate the amount of entrepreneurial discretion that management at BIW has agreed to share with the union and its workers, an examination of the "Strategic Business Planning/Marketing" Team is helpful. The area of strategic business planning and marketing is clearly viewed as a non-mandatory subject of collective bargaining under section 8(d) of the NLRA. Alterations in the product, tapping new markets, and the amount of output have traditionally been viewed as subjects within the sole discretion of management. As a permissive or non-mandatory subject of collective bargaining, management is free to make these decisions unilaterally without consulting with or bargaining over the decision with the union.

Under the BIW agreement, however, management has invited labor to join as a partner in making decisions in this important area, one that goes directly to the scope and nature of the enterprise. The agreement provides:

Developing and implementing a joint long range strategic business and marketing plan is a vital ingredient in the future preservation of jobs. Through the effective utilization and improvement of all of our assets, we will develop new business lines and markets. We will work toward joint cooperation at the local, state, and national levels which will enhance our ability to compete globally. . . . Bath Iron Works and Local S/6 are committed to working together on the long range strategic business and marketing plan.<sup>245</sup>

The formation and existence of this team serves as a vivid example of the overall retreat from the adversarial model of labor relations at BIW. Rather than treat one another as foe, both parties at BIW have approached the collective bargaining table with mutual interests and shared concerns: the preservation of jobs through increased productivity, efficiency, and competitiveness. In this regard the agreement goes "beyond what traditionally has been perceived as appropriate bargaining procedure."<sup>246</sup> Agreements such as the one reached at BIW represent "private responses to the traditionally adversarial, autocratic labor-management relationship,"<sup>247</sup> and show the potential that exists when the parties look beyond the judicially-created demarcation lines of mandatory and permissive subjects of collective bargaining.

---

245. *See id.* at 80.

246. *In Search of Industrial Peace*, *supra* note 25, at 597. The author referred to the General Motors-UAW Saturn cooperative agreement.

247. *Id.* at 599.



The formation of these teams has served to propel the workers at BIW into the decision-making apparatus of the enterprise. The agreement has provided the workers with equal say in nearly every aspect of the enterprise. As David Libby, President of Local S/6 stated, "Now management knows they have to listen to the workers. And the workers know they will get listened to, because now the union has as much say as management."<sup>248</sup> In terms of the AFL-CIO principles, the workers have been given a decision-making role at all levels of the enterprise. The workers have gained the opportunity to contribute their expertise to strategic decisions including "about what new technologies should be acquired or about what changes to make in products or services."<sup>249</sup> This decision-making power, in turn, has helped to give workers a sense of worth and accomplishment in the enterprise. As David Libby stated, "It not only lets the people's ideas come across, it gives the people a sense of accomplishment when they know they've made a difference."<sup>250</sup>

#### L. High Performance Workplace—Production Techniques

Management and labor at BIW have taken their cooperative efforts a step further by rejecting the traditional dominant system of work organization and creating in its stead a "high performance work organization" that radically alters the production techniques employed at BIW. The basic outline for the organization provides for significant restructuring of jobs, training, and a pay system based upon multiple trades. The agreement summarizes the BIW High Performance Work Organization as follows:

Our High Performance Work Organization will empower employees to make decisions that will enable them to deliver superior value to our customers, shareholders, and employees. We will have shared responsibilities and gain shared benefits. Through training and communications, high performance skills will be provided to allow a work environment that will be flexible enough to reduce costs and be competitive in a world market. The compensation system will encourage employees to acquire additional skills and share in profits. And, most importantly, results will include employment security and a better quality of life for Bath Iron Works employees.<sup>251</sup>

In the past shipbuilding production at BIW had been plagued by idle stand-around time due to inefficiencies in the production process. Buzz Fitzgerald in an interview with the *Times Record* stated,

---

248. James B. Parks, *Machinists Gain 'Equal Voice' in Shipyard Contract*, AFL-CIO NEWS, Sept. 5, 1994, at 3.

249. THE NEW AMERICAN WORKPLACE, *supra* note 62, at 9.

250. James M. McCarthy, *Working Together to Save Shipbuilding Jobs*, THE TIMES RECORD, Mar. 2, 1994, at 17.

251. BIW AGREEMENT, *supra* note 2, at 33.

“[T]he way we have run our shipyards has generated a lot of inefficiencies in terms of idle time—of workers who want to work but can’t because the plans aren’t there, the materials aren’t there, the proper direction isn’t there.”<sup>252</sup> The High Performance Work Organization at BIW is designed to combat this problem by offering training and financial incentive to workers to become multi-crafted in the field of shipbuilding. Changing the workers’ traditional role of each performing a single function in the shipbuilding process, the High Performance Work Organization encourages the learning and implementation of many skills so that workers contribute more efficiently and with a better understanding of the entire operation. In addition, the new work system empowers workers to “develop ideas, plan the work, and make decisions on how the work is to be carried out.”<sup>253</sup> The new work organization creates a less authoritarian work environment and provides for greater worker autonomy and discretion at the job site. In effect, BIW’s High Performance Work Organization rejects the “traditional dichotomy between thinking and doing, conception and execution.”<sup>254</sup>

The High Performance Work Organization Issue Support Team at BIW drafted the following principles to serve as the foundation for the new work organization. They are reproduced here in their entirety because, taken together, they represent the most accurate description of the systemic and fundamental changes provided for in the collective bargaining agreement and currently underway at BIW’s new American workplace. The High Performance Work Organization principles describe BIW as follows:

- It is an organization where employees develop ideas, plan the work, and make decisions on how the work is to be carried out.
- It is an organization where superior performance and continuous process improvement will reduce costs, increase capacity, and result in job security.
- It is a process oriented organization that continually trains its employees to be multi-skilled.
- It is an organization with a work environment flexible enough to allow it to be competitive.
- It is an organization with a compensation system that encourages employees to acquire additional skills and rewards them for doing so.
- It is an organization with a communication network for the free flow of ideas and information for all to meet common goals.

---

252. James M. McCarthy, *Update: BIW’s Five-Year Plan*, THE TIMES RECORD, Jan. 26, 1994, at 17.

253. BIW Agreement, *supra* note 2, at 22a.

254. THE NEW AMERICAN WORKPLACE, *supra* note 62, at 8; *see also supra* pp. 80-81.

- It is an organization where all employees share in the profits and acquire ownership in the company.
- It is an organization that makes it possible for all employees to accept responsibility for completing high quality work on schedule and within budget.
- It is a motivated team which, through job satisfaction, is committed to the long-term success of all employees.
- It is an organization that will be globally competitive by achieving the lowest supervisor and support ratio in manufacturing.
- It is an organization that delivers superior value to the customer, the shareholders, and the employees.<sup>255</sup>

### M. *The Alignment/Progression Model*

The High Performance Work Organization at BIW will employ an alignment model in which workers can volunteer to learn additional skills that they will employ to become multi-crafted. "Pay increases now depend on the extent to which workers participate in the program . . . ."<sup>256</sup> Just as the AFL-CIO urged in its principles for a new American workplace, the BIW model provides workers the opportunity to learn and perform many skills and tasks and to become familiar with the overall process employed in producing the product. In particular, the model provides for core-skills, which "are those singular skills that are the basis of the shipbuilding process. Core skills can be stand alone steps or can be supporting in nature."<sup>257</sup> Next are associated skills and functions "which are supportive in nature to one's core skill and allow an employee to complete a process within his/her craft."<sup>258</sup> A craft is a "number of associated skills/functions, combined with a core skill, which allow an employee to complete a process. The associated skills/functions must support or complement the core skill."<sup>259</sup> A multi-crafted employee will have skills in more than one craft, and a "master mechanic," the ultimate achievement, will demonstrate competency in several crafts and will possess knowledge of the overall shipbuilding process.<sup>260</sup> The master mechanic will act much like his own supervisor, will possess knowledge of the material process, demonstrate leadership skills and an

---

255. See BIW AGREEMENT, *supra* note 2, at 22a.

256. L. Mercedes Wesel, *Team Players Mesh Under BIW Contract*, MAINE SUNDAY TELEGRAM, Feb. 26, 1995, at 5B. The *Maine Sunday Telegram* reported: More than 98 percent of the employees in the union have volunteered to be trained in an associated function, so they received a 40-cent hourly raise. They will earn another 20 cents an hour for each associated skill they learn, up to three skills. Multi-crafted worker [sic] earn another \$1 an hour.

*Id.*

257. BIW AGREEMENT, *supra* note 2, at 24.

258. *Id.*

259. *Id.*

260. *Id.*

aptitude for problem solving and decision making.<sup>261</sup> The entire High Performance Work Organization is managed by three key bodies: the Contract Interpretation Team (a joint team of labor and management), the Area Governing Committees (each made up of three members from management and three from the union), and Classification Support Centers (encompassing management and union stewards).

#### VI. LEGALITY OF THE BIW AGREEMENT UNDER THE NLRA: THE NEED FOR LEGAL CHANGE

The BIW agreement represents a true departure from the traditional adversarial model of labor-management relations. The agreement, by employing systemic cooperative techniques, is a radical attempt to save an American business. Its techniques serve the multiple goals of maximizing efficiency, productivity, and competitiveness, and at the same time provide greater job satisfaction and security for the workers involved. Efforts like the BIW agreement should be encouraged. Cooperative workplace programs are good for American businesses and workers alike. The legality of the agreement, however, is questionable under several of the provisions of the NLRA. This section analyzes the legality of the agreement and argues that change in the law is needed to ensure that creative efforts such as that employed at BIW are encouraged and can survive legal scrutiny.

##### *A. The Labor-Management Dichotomy: Exclusion of Supervisors and Managers*

Through the concepts of teaming, consensus decision-making, and the principles of the High Performance Organization, BIW and the shipbuilder's union have created a workplace that blurs traditional lines between the roles of labor and management. The new work organization enables workers to train and learn many skills, to become familiar with the overall production process, and to use judgment and creativity on the job. The new work organization has engaged in a fundamental redistribution of decision-making authority and has empowered workers with an equal voice at all levels of the enterprise and in every aspect of BIW pursuits. The BIW collective bargaining agreement has created a new American workplace.

The creation of this cooperative workplace, however, may have serious legal ramifications for BIW workers. The NLRA makes a

---

261. *Id.* The agreement provides that a master mechanic will demonstrate competency in all of the following: "[t]hree crafts/or highly skilled specialist who volunteers for three crafts; [k]nowledge of associated skills/functions; [a]bility to train in three crafts; [k]nowledge of planning tools; [k]nowledge of cost structure; [k]nowledge of material process; [d]emonstrated leadership skills; [and] [a]ptitude for problem solving and decision making." *Id.*

clear distinction between employees, who are covered by the Act's protections, and supervisors and managers, who are not. By blurring the lines between worker and manager and including the workers in the decision-making apparatus of the enterprise, the BIW agreement makes the status of these employees under the NLRA uncertain. If an employee is found to be a supervisor or a manager, that employee loses his right to bargain collectively or seek any rights or remedies provided for in the NLRA.

Both managerial and supervisory exemptions from labor representation grew out of a single concern: "That an employer is entitled to the undivided loyalty of its representatives."<sup>262</sup> The Act, however, did not consider the type of cooperative industrial workplace that is reflected in the BIW agreement. Rather, the "Act was intended to accommodate the type of management-employee relations that prevail in the pyramidal hierarchies of private industry."<sup>263</sup> By rejecting the dominant system of work organization and removing the lines between thinking and doing, the BIW agreement may result in the loss of NLRA protections for the very employees who succeed in this new structure.

The NLRB has found that even a small measure of discretionary authority qualifies employees as managers. In *Swift & Co.*<sup>264</sup> the Board ruled that procurement drivers who made purchases for employers were managerial. In *Firestone Tire & Rubber Co.*<sup>265</sup> the Board ruled production schedulers were managers. Similarly, the Board has ruled that lecturers who indoctrinate new employees,<sup>266</sup> personnel investigators who make hiring recommendations,<sup>267</sup> and buyers who make substantial purchases on an employer's behalf<sup>268</sup> all were managerial and therefore exempt from the Act's protections. In each of these decisions it was determined that these employees were involved in developing and enforcing employer policy.

The teaming structure, with its shared decision-making, requires even more discretion than does any of the employee activities reviewed in these Board decisions. Beyond that, the Supreme Court's decision in *Yeshiva* "means that rank and file employees who participate in work teams or joint committees can lose their right to form an independent union."<sup>269</sup> This is true even if the union bargained for the increased responsibility and discretion granted to the

---

262. NLRB v. Yeshiva University, 444 U.S. 672, 680 (1980).

263. *Id.* at 680 (citing *Adelphi University*, 195 N.L.R.B. 639, 648 (1972)).

264. 115 N.L.R.B. 752, 753 (1956).

265. 112 N.L.R.B. 571, 573 (1955).

266. *Peter Kiewit Sons' Co.*, 106 N.L.R.B. 194, 196 (1953).

267. *Western Elec. Co.*, 100 N.L.R.B. 420, 423 (1952).

268. *American Locomotive Co.*, 92 N.L.R.B. 115, 116-17 (1950).

269. DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at 10. "Indeed, the NLRB interpreted *Yeshiva* so as to strip union members of their collective bargaining rights—and their union—because they negotiated an employee participa-

workers. The union, in effect, can unintentionally bargain the workers out of the Act's protections.<sup>270</sup>

In making its recommendation to update the definitions of supervisors and managers, the Dunlop Commission recognized that the distinction between management and employee often is difficult to make in today's cooperative workplaces. The Commission reported:

If a more cooperative conception of the employer-employee relationship is embodied in labor law so that representation does not necessarily imply the existence of an adversarial relationship, it may be necessary to reconsider whether supervisors or middle managers should be denied the right to union representation or collective bargaining. . . . It would seem inconsistent with the intent of the NLRA if, in pursuit of more innovative and cooperative work relationships, employees were denied the right to independent union representation.<sup>271</sup>

As long as there is a possibility that cooperation will disqualify workers from the Act's protection, workers' representatives will be less likely to agree to new workplace arrangements.

A major aspect of the teaming structure at BIW is the diffusion of supervisory and managerial decision-making throughout the workforce. The work teams and committees at BIW are designed to address matters traditionally left to full-time supervisors and managers. A stated goal of the BIW agreement is to achieve the "lowest supervisor and support ratio in manufacturing."<sup>272</sup> The agreement presumes this only can be achieved by empowering rank and file workers with the discretion and decision-making capabilities that traditionally have been preserved for managers and supervisors.<sup>273</sup>

---

tion agreement with their employer." *Id.* (citing College of Osteopathic Medicine & Surgery, 265 N.L.R.B. 295 (1982)).

270. See College of Osteopathic Medicine & Surgery, 265 N.L.R.B. 295 (1982).

271. DUNLOP COMM'N FACT FINDING REP., *supra* note 11, at 55.

272. See BIW AGREEMENT, *supra* note 2, at 22a.

273. Already progress is being made toward this end. The *Maine Sunday Telegram* reported:

And under the teaming concept in the new contract, workers and supervisors now cooperate on planning schedules and overtime. "This makes my job much easier," said Mason, first-shift supervisor in the blast building, who used to be solely responsible for all scheduling.

Mason said he can now check on the progress of work in one of the blast buildings while blasters in the other buildings prepare for the shift by assigning certain people to certain tasks.

"They don't need me to do that," Mason said.

The workers plan soon to become the first in the yard without a supervisor in the overnight shift. They already work on their own during the first shift whenever the supervisor is out.

Mason said the increase in productivity comes from a combination of high morale and good ideas from the workers.

L. Mercedes Wesel, *Team Players Mesh under BIW Contract*, MAINE SUNDAY TELEGRAM, Feb. 26, 1995, at 5B.

The BIW scenario illustrates the need to revise this area of the law. The Dunlop Commission addresses the same need in its recommendations. The Commission recognized that individuals "whose primary function is to carry out the employer's labor relations policy by hiring, firing, and disciplining employees are clearly supervisors and should continue to be excluded from the Act."<sup>274</sup> Similarly, the Commission recognized that "[e]mployees near the top of the firm's managerial structure who have substantial, individual discretion to set major company policy and whose primary function is to develop such policy are clearly managerial employees and should also continue to be excluded."<sup>275</sup> The Commission recommended:

These two principles should be incorporated into a single, simplified "managerial employee" definition that includes statutory supervisors and managers but not (1) members of work teams and joint committees to whom managerial and/or personnel decision-making authority is delegated or (2) professionals and para-professionals who direct their less skilled co-workers.<sup>276</sup>

The Dunlop Commission's recommendation if enacted into law would protect team members at BIW from sanctions imposed under current law. Judges and lawmakers in Congress, however, in seeking to make new law accommodate cooperative employee-management relationships, must remember the foundational underpinnings of the managerial and supervisory exemptions. Current law determining employee-management status calls for a fact-specific inquiry regarding the employee's duties at work, the employee's self-perception of his role, his co-workers' perceptions, and the employer's idea of his status. This need not change with alteration of the law. Employers must continue to be guaranteed the undivided loyalties of their supervisors and managers, whether in the newly cooperative or the traditionally adversarial workplaces of America. At the same time, however, a change in the law is needed if experiments like BIW's are to survive and succeed. An employee must not be deterred from using discretion on the job for fear of losing his rights to join a union or to engage in concerted activity. The use of discretion should be encouraged by ensuring the employees' right to choose independent representation is preserved.

*B. The Ramifications of NLRA Sections 8(a)(2) and 2(5):  
Domination of a Labor Organization?*

In addition to the *Electromation, Inc.* decision, the Board in 1993 handed down another important opinion concerning the legality of employee participation plans under sections 8(a)(2) and 2(5). This

---

274. DUNLOP COMM'N FINAL RECOMMENDATIONS, *supra* note 1, at 9.

275. *Id.*

276. *Id.* at 9-10.

decision, *E. I. du Pont de Nemours & Co.*,<sup>277</sup> provides helpful guidance for evaluating the legality of the committee and teaming structure employed at BIW. As at BIW, the employee/employer committees established at the various du Pont plants existed in a unionized setting. The *du Pont* decision is enlightening because it gave the Board the "opportunity to address issues raised by employee participation committees which exist in the circumstances where employees have selected an exclusive collective bargaining representative."<sup>278</sup>

In *du Pont* the Board first determined whether six safety committees and one fitness committee were employer-dominated labor organizations within the meaning of sections 2(5) and 8(a)(2). Second, the Board considered an issue unique to employee participation committees in unionized settings: whether the employer bypassed the union in dealing with the committees and in dealing with unit employees, thus violating section 8(a)(5) of the Act.<sup>279</sup> Each of these two issues will be discussed below with specific reference to legal ramifications for BIW.

### 1. Section 2(5): The Definition of a Labor Organization

According to the Board's analysis in *du Pont*, there can be little doubt that the employer/employee committees at BIW are labor organizations under section 2(5). In *du Pont* the Board employed its traditional three-part test to determine the committees' status under section 2(5). Under this statutory test the Board concludes the entity is a labor organization if "(1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work,'

---

277. 311 N.L.R.B. 893 (1993).

278. *Id.* It is important to note that the BIW and *du Pont* scenarios are distinguishable. At BIW, the committee structure was the result of collective bargaining. The union and management agreed to the terms of the teaming structure. In *du Pont* the committees existed alongside the union but were not established as a result of collective bargaining. The fact that the terms of the committee structure were bargained for at BIW, however, does not take legal review of the committees out of the jurisdiction of the Board. If an unfair labor practice is occurring, regardless of the existence of an agreement, the Board has jurisdiction to review the charge. 29 U.S.C. § 160(a) (1988). Comparison to *du Pont* highlights the centrality of collective bargaining in the NLRA. As the analysis suggests, certain techniques employed at *du Pont* were found violative of the Act in the absence of a collective bargaining agreement defining the terms of the cooperative efforts. These same techniques would more than likely survive legal scrutiny at BIW because of the collective bargaining relationship there and because of the agreement itself. In an economy where only 11 percent of private employees join unions and enter a collective bargaining relationship with their employer, is it rational to disallow cooperative techniques simply because there is no union to negotiate the terms of these techniques?

279. Section 8(a)(5) provides, in pertinent part, that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ." 29 U.S.C. § 158(a)(5) (1988).



grievances, labor disputes, wages, rates of pay, or hours of employment."<sup>280</sup>

The *du Pont* Board had little trouble determining that the first and third criteria were satisfied and, as expected, the critical question in the Board's analysis became that of construing "dealing with" under section 2(5). Relying on the Supreme Court's interpretation in *Cabot Carbon*, the Board determined that "dealing with" under section 2(5) is broader than "collective bargaining."<sup>281</sup> The term "bargaining," the Board argued, "connotes a process by which two parties must seek to compromise their differences and arrive at an agreement."<sup>282</sup> The term, "dealing with," by contrast, does not require the two sides to seek compromise. Rather, "dealing with" involves a "bilateral mechanism between two parties"<sup>283</sup> as evidenced by "a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."<sup>284</sup>

In concluding that the committees in question were in fact "labor organizations" designed to "deal with" the employer, the Board relied on evidence that would dictate the identical conclusion for the teams and committees at BIW. Like BIW, the committees at *du Pont* were made up of both management and employee representatives who were full participating members. The committees discussed proposals with management representatives both inside and outside the committees. Further, and perhaps most importantly, "[t]hese representatives interact[ed] with employee committee-members under the rules of consensus decision-making . . . 'when all members of the group, including its leader, are willing to accept a decision.'"<sup>285</sup> This type of arrangement, the Board concluded, is decisive evidence of dealing. The Board determined that "[i]n circumstances where management members of the committee discuss proposals with employee members and have the power to reject any

---

280. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894.

281. *Id.*

282. *Id.*

283. *Id.* See also *Electromation, Inc.*, 309 N.L.R.B. at 995 n.21.

284. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 894. The Board added:

If the evidence establishes such a pattern or practice . . . the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

*Id.*

285. *Id.* at 895 (quoting from *du Pont's Personal Effectiveness Process handbook*).

proposal, we find that there is 'dealing' within the meaning of section 2(5)."<sup>286</sup>

This conclusion leaves little doubt that the committees at BIW would be held to be "labor organizations" established to "deal with" management under section 2(5) of the Act. The first and third criteria of the Board's three-part test are easily satisfied at BIW. There is no question that each committee or team at BIW is an organization in which employees participate. In addition, these committees discuss issues such as safety, training, recognition and reward programs, and changing health insurance carriers.<sup>287</sup> These subjects fall within the categories of subjects listed in section 2(5).<sup>288</sup> Furthermore, the process of consensus decision-making provided for by the BIW agreement mirrors that found to establish "dealing" in *du Pont*.

## 2. Section 8(a)(2): Domination

Once the committee in question is deemed a labor organization under section 2(5), the question then becomes whether that organization is dominated by the employer either in its formation or administration in violation of section 8(a)(2). At BIW the evidence appears convincing that management at BIW did not dominate the formation of the committees. The committee structure provided for in the agreement was introduced by the union and was accepted by management through the process of collective bargaining. In addition, the teaming agreement provides that the union, not management, will determine the participation of any Local S/6 members.<sup>289</sup> Unlike the situation in *du Pont*, there is little evidence that management made the plans for the structuring of the committees, called the organizational meetings to establish the committees, or made

---

286. *Id.* The Board, however, went on to state that the mechanism of majority decision-making, rather than consensus decision-making, would not necessarily constitute "dealing." The Board stated that "there would be 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." *Id.* Such structure is something BIW should seriously consider if reformation of the committee is required or desired.

287. BIW AGREEMENT, *supra* note 2, at 7.

288. *See, e.g.,* United States Postal Service, 302 N.L.R.B. 767, 776 (1991) (holding that the term "wages" does not merely refer to a sum of money given for actual hours worked but also refers to other forms of compensation and benefits). *See* E. I. du Pont de Nemours & Co., 311 N.L.R.B. at 894 n.8 (1993).

289. BIW AGREEMENT, *supra* note 2, at 11. *See* note 188 *infra* for full text of teaming agreement.

any determinations as to which unit employees would sit on the teams.<sup>290</sup>

The more serious problem confronting the legality of the BIW teams, however, is the possibility that BIW's management could be found to be dominating the administration of the committees. In *du Pont* the Board concluded that the process of consensus decision-making, whereby management ultimately retains veto power over any action the committee wishes to take, is strong evidence of an employer's domination of the administration of the committee.<sup>291</sup> The Board, however, did not conclude that this factor alone was sufficient to find domination. In *du Pont* the Board also found evidence that a member of management served as committee leader, that management could change or abolish any of the committees at will, and that union employees had no independent voice in determining any aspect of the composition, structure, or operation of these committees.<sup>292</sup> The Board concluded that these factors, in addition to the consensus decision-making, "taken together, establish that [du Pont] dominated the administration of the committees."<sup>293</sup> Aside from the mechanism of consensus decision-making, however, none of these additional factors are present at BIW. The BIW teaming agreement provides that the union must approve the formation of all joint committees and that decisions affecting the joint team interactions will be arrived at by consensus.<sup>294</sup> In this regard the *du Pont* decision provides some guidance for BIW but does not answer the question of domination definitively.

### 3. Section 8(a)(5): Bargaining Issues

An issue unique to employee participation committees at unionized firms is the question of whether the employer is bypassing the union and discussing mandatory subjects of collective bargaining with employee committee participants in violation of section 8(a)(5). As with the section 8(a)(2) analysis, the Board's decision in *du Pont* provides some helpful guidance but does not supply a definitive answer to BIW's concerns. In *du Pont* the Board was eager to point out that employees' participation in a safety conference was not an unlawful bypassing of the union over a mandatory term of bargaining in violation of section 8(a)(5).<sup>295</sup> The Board held that,

---

290. These were all factors that the Board used to determine that management at du Pont had dominated formation of the Freon Committee at the du Pont plant. E. I. du Pont de Nemours & Co., 311 N.L.R.B. at 896.

291. *Id.* at 895-96.

292. *Id.* at 896.

293. *Id.*

294. BIW AGREEMENT, *supra* note 2, at 11.

295. In *du Pont*, the Board affirmed the ruling of the Administrative Law Judge, but wrote a rather descriptive opinion in order to "add rationale to [the ALJ's] decision . . . to provide guidance for those seeking to implement lawful cooperative

regardless of the fact that safety, a mandatory term of bargaining, was discussed, the safety conferences amounted to no more than brainstorming sessions and did not constitute any type of dealing or bargaining with the employer about the issue.<sup>296</sup>

In addition the Board in *du Pont* placed heavy emphasis on the fact that the employer had a mechanism in place for keeping bargainable issues out of the discussion. The Board emphasized that the employer informed participants that the conference was not a union matter. The employer "made clear to the employees that it recognized the Union's role and that bargainable issues should be handled only by the Union."<sup>297</sup> Although the Board was not "wholly persuaded" that the employer was completely successful in actually keeping the issues separate, the Board determined that the employer's "good faith effort to separate out bargainable issues and the assurances that the Union had the exclusive role as to such issues are further indications that there was no undermining of the Union's status as the exclusive representative."<sup>298</sup>

Management and labor at BIW have been very careful to separate bargainable issues from discussion by the teams and committees. The teaming agreement specifically provides that "[a]ll mandatory subjects of bargaining are the exclusive right of Local S/6, and management cannot bypass the Union by unilaterally implementing changes in subjects of bargaining. . . . Joint Teams must understand they cannot discuss mandatory subjects of bargaining unless approved by the Union/Company Oversight Committee."<sup>299</sup> In addition, the BIW agreement initially provides that "Bath Iron Works recognizes the Union as the exclusive representative in respect to all rates of pay, wages, hours of employment, and all other conditions of employment for all employees in job classes in Local S/6."<sup>300</sup>

These mechanical and procedural safeguards would serve as helpful evidence in a section 8(a)(5) unfair labor practice proceeding. They may not, however, be enough. The court will consider both what is theoretically provided for in the agreement and what actually happens when the committees meet. In *du Pont* the Board did

---

programs between employees and management." *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 893. In determining that the safety conferences did not violate § 2(5), the Board observed that:

[T]he safety conferences are a good example of how an employer can involve employees in important matters such as plant safety, without running afoul of § 8(a)(2) or § 8(a)(5) of the Act. 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 897.

296. *Id.* at 896-97.

297. *Id.* at 896.

298. *Id.* at 897.

299. BIW AGREEMENT, *supra* note 2, at 11-12.

300. *Id.* at 5.

find that some of the committees had violated section 8(a)(5) by unlawfully bypassing the union as to mandatory terms of bargaining. The Board found that the safety and fitness committees dealt with issues that were identical to those addressed by the union and were actually successful in bringing about resolutions that the union had failed to achieve.<sup>301</sup> Unlike the safety conference that was held to violate the Act, these committees had the characteristics of bargaining sessions whereby proposals were offered, discussed, and decided. The *du Pont* committees more accurately reflect and resemble the structure and purpose of the BIW committees than does the safety conference at issue in *du Pont*. The BIW agreement has provided for procedural safeguards against a section 8(a)(5) violation, but practice may be far different from theory in this regard. Many of the topics of discussion delegated to the BIW teams are clearly mandatory subjects of bargaining. Management must be very careful to keep the employees informed of the union's status as exclusive representative of the employees for these matters. In addition, and perhaps more importantly, the employer must structure the discussions so they do not resemble actual bargaining sessions.<sup>302</sup>

#### 4. *The Need for Legal Change*

NLRA decisions by various courts provide some guidance for BIW but do not give clear answers to the legal questions surrounding BIW's cooperative effort. What does appear clear, however, is that the law of the Supreme Court and the Board provide little flexibility for management and labor to cooperate in the workplace. The First Circuit by contrast has been one court employing the freedom of choice analysis to accommodate more cooperation.<sup>303</sup> Any legal

---

301. For example, the Antiknocks Area Safety Committee was successful in obtaining a new welding shop for a welder who had complained of poor ventilation. The union's effort to resolve the problem had failed, and the welder instead took his complaint directly to the committee. Similarly, the Fitness Committee created a recreational area that included picnic tables, a volleyball area, a horseshoe pit, a jogging track, and sanitary facilities. The union had sought similar facilities in negotiations with *du Pont* but had failed. *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. at 897.

302. In addition, no violation of § 8(a)(5) will occur if the union grants employee team members the authority to discuss mandatory subjects of bargaining with management team members.

303. See *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979). In this case, the First Circuit (Coffin, C.J.) held that a labor organization was not dominated by the employer even though there was evidence that the employer had the unexercised power to appoint members to the organization, had printed and distributed ballots with paychecks, had paid for the organization's expenses, and that the organization had not negotiated a formal collective bargaining agreement. *Id.* at 1211-12. In finding no violation of § 8(a)(2), the court held that the legal standard to apply was a showing of *actual domination*. *Id.* at 1213. After reviewing the case law of the First Circuit (citing *NLRB v. Reed Rolled Thread Die Co.*, 432 F.2d 70 (1st Cir. 1970)); *NLRB v. Dennison Mfg. Co.*, 419 F.2d 1080 (1st Cir. 1969), *cert. denied*, 397

challenge to the cooperative techniques employed at BIW would be reviewable by the First Circuit. A traditional freedom of choice analysis may be inapplicable to the BIW agreement because the agreement was the result of collective bargaining where the will of the employees is manifested in the union itself. The First Circuit, nevertheless, may be willing to interpret the entire Act in light of changing industrial realities to accommodate labor-management cooperation. In *NLRB v. Northeastern University*<sup>304</sup> Judge Coffin declared that "changing conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model."<sup>305</sup> The First Circuit's willingness to reexamine the Act to accommodate cooperation reflects the need to reevaluate the adversarial model in labor relations. The Seventh Circuit's refusal to employ a freedom of choice analysis in the *Electromation, Inc.* decision, however, may reflect a growing reluctance on the part of the federal circuit courts to deviate from the standards employed by both the Supreme Court and the Board.<sup>306</sup> Inconsistencies and lack of uniformity among the circuit courts of appeal have left many employers and employees unsure of the permissibility of cooperation in the workplace. This uncertainty mandates that Congress amend the NLRA to provide guidance and promote cooperation in the workplace.

The Board's recent decisions in *Electromation, Inc.* and *du Pont* have left unresolved an important question in the section 8(a)(2) and section 2(5) analysis. In both decisions the Board refused to require that an employee committee act in a fully representational capacity to qualify as a labor organization under section 2(5). In *du Pont*, for example, the Board found that several of the committees

---

U.S. 1023 (1970); *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803 (1st Cir. 1970); *Coppus Eng. Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957)), the court declared its standard in conformity with other circuits that have applied a similar test. *Id.* at 1214 (citing *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *cert. denied*, 423 U.S. 875 (1975); *NLRB v. Keller Ladders S., Inc.*, 405 F.2d 663 (5th Cir. 1968); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *NLRB v. Post Publication Co.*, 311 F.2d 565 (7th Cir. 1962); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955); *NLRB v. Wemyss*, 212 F.2d 465 (9th Cir. 1954)). The court recognized "some room for management-employee cooperation short of domination, looking to the subjective realities of domination of employee will and not just the objective potentialities of organizational structure," and declared that "changing conditions in the labor-management field seem to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversary model." *NLRB v. Northeastern Univ.*, 601 F.2d at 1213-14.

304. 601 F.2d 1208 (1st Cir. 1979).

305. *Id.* at 1214.

306. As previously discussed, however, the *Electromation, Inc.* decision was not a difficult case from a § 8(a)(2) perspective. Unfortunately, it was not the ideal vehicle for the Board or the Seventh Circuit to clarify the law in favor of a more cooperative workplace or to employ a freedom of choice analysis.

had acted in a representational manner, and therefore the Board refused to address the question of whether section 2(5) requires the higher standard. In addition the Board rejected du Pont's contention that any section 2(5) analysis should be based upon a subjective standard. Du Pont argued that section 2(5) mandates direct affirmative evidence that the non-participating employees believed that participating employees were representing non-participating employees' interests.<sup>307</sup> The Board rejected this assertion but refused to summarily reject or accept the idea that section 2(5) mandates a representational aspect to an employee "labor organization."

Although the Board refused to decide the representation issue directly,<sup>308</sup> the Board did indicate that the legislative history of the Act<sup>309</sup> and earlier Board decisions<sup>310</sup> revealed a recognition of a representational capacity to section 2(5) labor organizations.<sup>311</sup> As one commentator has suggested, requiring a representational aspect to a "labor organization" under section 2(5) would accomplish both goals inherent in the ban on company unions in section 8(a)(2) and would comport with the economic theory behind the Act: "that the company unions that the NLRA sought to prohibit were all sham *representatives* or *agents* of their worker members"<sup>312</sup> and that "groups of employees that do not act in a representative capacity do not compete with unions for that right, and so do not pose a threat to the process of labor supply cartelization sanctioned by the NLRA."<sup>313</sup>

This argument is persuasive and would help to ensure the legality of many employee participation and involvement programs. A better approach, however, would be to address the representation issue directly in the language of section 8(a)(2). This is the approach currently under debate in the Congress. The following section discusses this proposal and argues in favor of the currently pending legislation.

---

307. E. I. du Pont de Nemours & Co., 311 N.L.R.B. at 894 n.7.

308. In *Electromation, Inc.* NLRB member Devaney, in his concurring opinion, concluded that § 2(5) does require a finding that a labor organization act in a representative capacity. *Electromation, Inc.*, 309 N.L.R.B. at 998-1003. The majority, however, found that the employee members of the committees in *Electromation, Inc.* had acted in a representative capacity, and therefore it was "unnecessary to the disposition of this case to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees." *Id.* at 994 n.20.

309. *Id.* at 992-97.

310. The Board pointed to the NLRB's first decision, *Pennsylvania Greyhound Lines*, 1 N.L.R.B. 1 (1935) and to *General Foods Corp.*, 231 N.L.R.B. 1232 (1977). See *Electromation, Inc.*, 309 N.L.R.B. at 995.

311. See generally *Quality Circles or Company Unions?*, *supra* note 141, at 911-15.

312. *Id.* at 912.

313. *Id.* at 925.

### 5. *Pending Legislation*

The legal uncertainties of the BIW agreement involve the procedures of its implementation rather than the actual formation of its committees. The committee structure and the teaming agreement were the result of negotiations between management and labor. In the BIW scenario there is absolutely no evidence that the employer unlawfully dominated in the formation of the committees in violation of section 8(a)(2). Unlike BIW, however, the majority of American workers are not represented by a union. In these non-union workplaces, cooperative programs and employee participation plans are often implemented unilaterally by management. In such circumstances there is great potential for a court to find unlawful employer domination in the formation and administration of the employee committees in violation of section 8(a)(2). Regardless of an employer's noble intentions and the employees' satisfaction with the participation plan, the Board and courts have ordered such plans disestablished.

Recognizing the ambiguities surrounding the legality of cooperative efforts under current labor law, the 104th Congress is actively reviewing the language and effect of section 8(a)(2). In particular, H.R. 743, the Teamwork for Employees and Managers Act of 1995, would modify section 8(a)(2) to make clear that companies can create labor-management teams to address issues such as productivity, quality control, safety, and other terms and conditions of employment.<sup>314</sup> Introduced by Representative Steve Gunderson (R-WI), the bill was approved on March 7, 1995, by the Employer-Employee Relations Subcommittee of the House Economic and Educational Opportunities Committee.<sup>315</sup> The bill is expected to be considered by the full committee in the near future. "Approval by the full committee and the House is almost certain, though the legislation's fate in the Senate is unclear."<sup>316</sup> Senator Nancy Landon Kassebaum (R-Kan.), Chairwoman of the Senate Human Resources Committee, has introduced a similar measure, S. 295, in the Senate. Labor Secretary Robert B. Reich has recommended that President Clinton veto the legislation.<sup>317</sup>

---

314. See H.R. 743, 104th Cong., 1st Sess. (1995); see generally Robert Marshall Wells, *Subcommittee Approves Bill on Workplace "Teams,"* 53 CONG. Q. WKLY. 759 (1995) [hereinafter *Subcommittee Approves Bill*].

315. *Subcommittee Approves Bill*, supra note 304, at 759 (The bill approved by the subcommittee was actually a substitute offered by Rep. Harris Fawell (R-III), Chairman of the House Subcommittee on Employer-Employee Relations.).

316. *Id.*

317. See Court Gifford, *House Panel Clears Team Act: Reich Threatens Veto by Clinton*, [1995] Mgmt. Briefing (BNA), Mar. 8, 1995. Labor Secretary Reich, in a letter to Rep. Harris Fawell (R-III), Chairman of the House Subcommittee on Employer-Employee Relations, wrote that the administration supports "flexibility and high-performance workplace practices that promote cooperative labor-management



H.R. 743 amends section 8(a)(2) of the NLRA to mandate that only employee committees that act in a representational capacity may be found invalid because of an employer's unlawful domination or support. The language of H.R. 743 provides:

Section 8(a)(2) of the National Labor Relations Act is amended by striking the semicolon and inserting 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 address matters of mutual interest, *including, but not limited to*, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization."<sup>318</sup>

---

relations." *Id.* Reich stated, however, that H.R. 743 would "undermine" the existing legal prohibitions against sham or company dominated unions. Under current law, Reich argued, nothing "prevents employers from setting up employee involvement groups that explore issues of quality, productivity, and efficiency." *Id.*

318. See H.R. 743, 104th Cong., 1st Sess (1995) (emphasis added to reflect language inserted by Falwell substitute). The official findings and purposes contained in the bill serve to illuminate the rationale behind the legislation. The findings state:

(a) Findings.—Congress finds that—

(1) the escalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships;

(2) such changes involve an enhanced role for the employee in workplace decisionmaking, often referred to as "Employee Involvement", which has taken many forms, including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;

(3) Employee Involvement programs, which operate successfully in both unionized and nonunionized settings, have been established by over 80 percent of the *largest* employers in the United States and exist in an estimated 30,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of businesses in the United States, Employee Involvement programs have had a positive impact on the lives of such employees, better enabling them to reach their potential in the work force;

(5) recognizing that foreign competitors have successfully utilized Employee Involvement techniques, the Congress has consistently joined business, labor and academic leaders in encouraging and recognizing successful Employee Involvement programs in the workplace through such incentives as the Malcolm Baldrige National Quality Award;

(6) employers who have instituted legitimate Employee Involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham "company unions" to avoid unionization; and

(7) Employee Involvement is currently threatened by legal interpretations of the prohibition against employer-dominated "company unions."

In requiring that an employee committee serve in a representational capacity, H.R. 743 is a pragmatic and fair clarification of the purpose of section 8(a)(2). Section 8(a)(2) was designed to ensure that employers could not establish sham unions that would compete with outside unions for the representation of the employees. The language of H.R. 743 addresses this concern by prohibiting an employer's support or domination of entities that seek to represent employees or that negotiate, enter into, or amend collective bargaining agreements. The bill recognizes three very important points: 1) that there are certain spheres of interest that are of mutual concern to both the employer and employee; 2) that employee participation plans serve the interests of both parties; and 3) that these committees cannot compete with outside unions for representation status. There should be no reason to prohibit management and labor from discussing issues of mutual concern, as long as the committee does not attempt to represent the workers as a bargaining agent for their collective interests. In short, the amendment preserves the employees' right to choose outside representation by ensuring that employer-employee committees do not compete for representative status.

Many who oppose the bill have argued that it would leave employees vulnerable to employer abuses. In particular they argue that the bill would "give employers the exclusive authority to select and appoint members of workplace teams, even if workers belonged to unions."<sup>319</sup> Representative Matthew G. Martinez (D-Calif.), ranking Democrat on the House Employer-Employee Relations Subcommittee, feared that the change in the law would "foment dictatorial practices in the workplace" and would severely undermine unions where they do exist in the workplace.<sup>320</sup> This complaint, however, fails to take into account the protections simultaneously afforded to employees under sections 8(a)(1) and 8(a)(5) of the NLRA. Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7."<sup>321</sup> H.R. 743 prohibits coercion and domination, but it encourages cooperation. Under the amended language of section 8(a)(2), "[L]abor and management

---

(b) Purposes.—The purpose of this Act is—

(1) to protect legitimate Employee Involvement programs against governmental interference;

(2) to preserve existing protections against deceptive, coercive employer practices; and

(3) to allow legitimate Employee Involvement programs, *in which workers may discuss issues involving terms and conditions of employment*, to continue to evolve and proliferate.

*Id.* (emphasis added to reflect language inserted by the Falwell substitute).

319. *Subcommittee Approves Bill*, *supra* note 304, at 759.

320. *Id.*

321. 29 U.S.C. § 158(a)(1) (1988).

will be free to cooperate, but oppressive employers will not be able to dominate."<sup>322</sup> Likewise, section 8(a)(5) still guarantees that the employer cannot bypass the union and bargain over issues that are traditionally left to the union.<sup>323</sup> The enforcement of this provision, combined with the safeguards provided for in H.R. 743, will ensure that employee committees will not compete with or usurp the authority granted to traditional labor unions.

Under H.R. 743 a labor organization would still be defined as one that "deals with" an employer over the statutory issues contained in section 2(5). Maintaining this lower level of contact between employer and employee will enable the NLRB and the courts greater authority and discretion when scrutinizing employee participation plans. Under the new approach of H.R. 743, it is legal for an employer to assist in the formation of a labor organization as long as that labor organization does not bargain with or seek to be the exclusive representative of the employees. In addition H.R. 743 will allow employees and employers to discuss issues of mutual concern such as productivity, efficiency, safety, and other terms and conditions of employment. There will be no violation of section 8(a)(2) where the element of bargaining or representation is missing. Maintaining the lower level "dealing with" definition contained in section 2(5), however, will allow the Board and courts more authority to scrutinize the plans. The judicial inquiry will be fact-specific and will guard against employer abuses. The judicial inquiry will resemble that employed by the freedom of choice analysts. The Board and the courts can guard against employer domination while ensuring the employees' freedom to choose outside representation. The judicial standard will be actual domination of an organization developed by an employer to usurp the role of a traditional union. This standard guards against employer abuses and at the same time achieves the goals inherent in the ban of company unions.

The need for greater labor-management cooperation is clear. Employers and employees have expressed their interest and desire for a more cooperative and less adversarial workplace. American labor law should not serve as an impediment to this mutually beneficial endeavor. As Representative Gunderson stated on the floor of the House:

[O]ne of the most important issues . . . is how we as a nation can develop and maintain a competitive, motivated, and involved workforce. This is particularly important today because we now live and compete in the global market. As the global market has expanded, successful American companies of all types have learned that cooperation between employees

---

322. *Rethinking the Adversarial Model*, *supra* note 8, at 2041 (arguing for either clarification of or repeal of § 8(a)(2)).

323. See, e.g., *E. I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

and managers is vital to staying competitive both domestically and internationally.

Unfortunately, the employee involvement programs across the country are legally threatened. Under the National Labor Relations Act, employee involvement programs have been disbanded because of inconsistencies between the purposes of the act when written, and the realities of the modern workplace . . . .

Through [employee] involvement programs, employees voice their opinions in the decisionmaking process and therefore have a greater stake in the success or failure of the company. Likewise, managers receive vital information from the people who have the most knowledge about detailed workplace operations—the employees. These programs often drive decisionmaking down to the lowest level possible and open up the flow of information in the workplace, creating much more cooperative atmosphere . . . .

America's greatest economic challenges will not be overcome in Washington. They will be met and overcome in American workplaces by the creativity of American workers and managers. Our task must be to nurture that creativity, not stifle it.<sup>324</sup>

Congress must ensure that our labor laws adapt to economic and industrial realities. Amendment of section 8(a)(2) is a good start, but more must be done. NLRA definitions of supervisors and managers must be amended so that workers feel free to participate in company decision-making without fears of losing the protections afforded by the NLRA. As a nation we must view our labor laws in terms of a more educated workforce that desires a more involved role in the operations of the enterprise. The paternalistic assumptions of the NLRA must give way to the realities of a changing American labor market. It is time to recognize that the battles of the past must yield to a more cooperative future.

Traditional labor unions must continue to play an important role in our society. Likewise, employees must continue to be guaranteed the right to choose an outside labor organization if that is what they desire. As the AFL-CIO principles outline, the role of a union in the workplace must also change. Unions must alter their mindset to embrace cooperation rather than conflict. Labor unions must act not only as an asset and friend of the employees but also as an asset to the company. In order to regain the competitive edge, the American workplace must change. This change must come from all the parties involved. Labor law should foster this cooperation rather than impede it.

---

324. See 141 CONG. REC. E220, E220-21, (daily ed. Jan. 30, 1995) (statement of Rep. Gunderson introducing the Teamwork for Employees and Managers Act).

## VII. CONCLUSION

Throughout the nation American businesses and workers are realizing that to remain competitive and to protect jobs requires a new era in labor-management cooperation. Cooperative programs and employee participation plans are being employed throughout the country in many different forms. Their legality, however, is uncertain under current labor law.<sup>325</sup> The framework for collective bargaining established by the NLRA does not require that the parties treat one another as adversaries, but the result of several provisions of the Act has been to maintain a strict separation between the parties. Under current labor law the parties may cooperate, but the law allows the parties to go only so far. In *E. I. du Pont* the Board determined several permissible techniques of cooperation. These included "brainstorming" groups, information sharing committees, and "suggestion box[es]."<sup>326</sup> These techniques may be helpful in the workplace, but they are limited in scope and effect. Where employees desire more input in the workplace and employers are willing to share their decision-making authority, the law should allow the parties to pursue these goals.

President Clinton traveled to Bath, Maine, last Labor Day to tell the nation of a success story in American labor relations. The BIW agreement represents a genuine effort between management and labor, once bitter rivals, to cooperate to the mutual benefit of each side. The BIW agreement extends the concept of cooperation to its maximum. The collective bargaining agreement makes management and labor joint partners in a single venture. The agreement, and the processes of collective bargaining employed, exemplify what is possible for businesses throughout America. The agreement,

---

325. The ambiguities in the law have actually restrained existing participation plans from pursuing more cooperative techniques. For example, a non-management employee who participated in a cooperative team at his workplace stated that the uncertainties in the law had a restraining effect upon members of his team. The worker stated, "We didn't have an opportunity to evolve as far as we could have." *Subcommittee Approves Bill, supra* note 304, at 759. The employee and his team members, who are not unionized, have worked with management on such issues as production and safety. But the employer "has not formed worker-management committees to discuss issues such as medical benefits or the design of company uniforms out of fear that it would be considered a violation of the NLRA." *Id.*

326. See 311 N.L.R.B. at 894. In each of these examples the Board determined that the element of "dealing" was not present and therefore the cooperative techniques did not qualify as "labor organizations" under § 2(5). For example, the Board stated that

a "brainstorming" group is not ordinarily engaged in dealing. The purpose of such a group is simply to develop a whole host of ideas. Management may glean some ideas from this process, and indeed may adopt some of them. If the group makes no proposals, the "brainstorming" session is not dealing and is therefore not a labor organization.

*Id.*

however, also exemplifies the need for statutory change to ensure that cooperative efforts are able to stand up to legal scrutiny. The law should foster labor-management cooperation, rather than impede or prohibit its undertaking.

The BIW collective bargaining agreement evidences the notion that the model of collective bargaining need not be an adversarial undertaking. The BIW experience exemplifies what is possible when the two sides extend their relationship beyond the traditional zero-sum game. American businesses with unionized workers should look to the BIW agreement and to the experiences of other businesses to learn what is possible when the union is made a partner and treated as an asset rather than an inherent adversary. For American businesses that have feared a union presence in their shop, the BIW experience should serve to ameliorate those insecurities. A change in attitude and mindset is required from each side. The labor-management relationship is only adversarial to the extent the two sides elect to treat one another in that way.

The BIW experience, however exemplary, unfortunately may be of limited use in analyzing workplace cooperation because, unlike BIW, the majority of the American workforce has chosen not to be represented by a traditional union. Currently only twenty percent of the workforce is represented by an outside union. The BIW agreement can serve as a national model for cooperation only in unionized workplaces. The law, however, should encourage cooperation regardless of a union's presence. American workers must be secure in their right to join a union and engage in concerted activities if that is what they desire. Likewise, employees should be able to choose between a traditional adversarial workplace or a more cooperative venture. If the latter is what they desire, American labor law should encourage its undertaking.

President Clinton hailed the BIW agreement as a national model for workplace cooperation. The irony of his visit, however, is that under current labor law legal uncertainties surround implementation of that agreement. These uncertainties may lead to adverse consequences for the workers involved. Furthermore, in the majority of workplaces across America, i.e., those without a union presence, the cooperative techniques employed at BIW would face even greater legal uncertainty. The BIW agreement, while representing a true achievement in labor relations, also exemplifies the need to reevaluate the basic premises of the NLRA. The adversarial model of labor relations is ill-suited to deal with today's changing American labor market and globally competitive economy. American labor law must adapt to economic realities. The well-being of our nation's workforce and economic competitiveness is at stake.

*Jonathan B. Goldin*

