



6-1-1999

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Recommended Citation

Michael H. LeRoy, *Dealing with Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the Team Act and Electromotion*, 73 Notre Dame L. Rev. 31 (1997).

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“DEALING WITH” EMPLOYEE INVOLVEMENT IN
NONUNION WORKPLACES: EMPIRICAL RESEARCH
IMPLICATIONS FOR THE TEAM
ACT AND *ELECTROMATION*

*Michael H. LeRoy**

No one can question the rightness of a policy intended to preserve the integrity of collective bargaining by labor representatives free of interference from management But this policy becomes too much of a good thing when it is pushed so far as to leave no place for a bona fide, socially desirable employee committee or joint employer-employee committee that is something less than a labor organization and something more than a Great Books Study Group.

—Judge John Minor Wisdom
*NLRB v. Walton Mfg. Co.*¹

Cabot Carbon’s rejection of the notion that “dealing with” is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if “dealing with” is less than bargaining, what is more than?

—NLRB Member Dennis Devaney
*Electromation, Inc.*²

I. INTRODUCTION

A. Overview

More than sixty years have passed since the National Labor Relations Act (NLRA) was enacted with the purpose of redistributing eco-

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1 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting).

2 309 N.L.R.B. 990, 1002 (1990) (Devaney, concurring).

conomic power to ordinary workers.³ At the time of its passage, three distinct methods of employer-employee dealing existed.⁴ Employers dealt with individual employees,⁵ or a union of employees,⁶ or a company union.⁷ Senator Robert Wagner, sponsor of the NLRA (Act),

3 See Sen. Robert Wagner's insight when he introduced the bill that eventually became the NLRA:

The law has long refused to recognize contracts secured through physical compulsion or duress. The actualities of present-day life impel us to recognize economic duress as well. We are forced to recognize the futility of pretending that there is equality of freedom when a single workman, with only his job between his family and ruin, sits down to draw a contract of employment with a representative of a tremendous organization having thousands of workers at its call. Thus the right to bargain collectively, guaranteed to labor by section 7(a) of the Recovery Act, is a veritable charter of freedom of contract; without it there would be slavery by contract.

NATIONAL LABOR RELATIONS BOARD, 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 20 (1985).

4 U.S. DEPT. OF LABOR, CHARACTERISTICS OF COMPANY UNIONS 2-3 (Bull. 634, 1937).

5 The Department of Labor's exhaustive study of 14,725 workplaces in 1935 summarized this form of dealing:

[T]he employer personally, or through his foreman or personnel director, negotiates with his employees individually. The employer may occasionally call a meeting of his employees to make an announcement or for purposes of general discussion. A temporary workers' committee may sometimes be appointed to act upon a particular matter. Essentially, however, relations between the employer and the employee remain on an individual basis, and there is no permanent or formal organization of workers with duly constituted representatives to carry on negotiations.

Id. at 2.

6 This form of dealing consisted of negotiations with a trade union. Individual grievances and the detailed interpretation and application of agreements are sometimes handled through shop committees, but broad questions of wages, hours, and working conditions usually are negotiated through representatives or agents of the trade union who need not necessarily be employed by the establishment or company.

Id. at 2-3.

7 The Department defined a company union as:

an organization confined to workers of a particular company or plant, which has for its purpose the consideration of conditions of employment. When this method of handling labor matters was carried on by informal committees, the whole arrangement was commonly referred to as an "employee-representation plan." The term plan is hardly suitable, however, in cases where more formal procedure has developed, such as written constitutions, elections, membership meetings, provisions for arbitration, written agreements, and dues.

Id. at 3.

viewed company unions as shams designed to frustrate genuine union organizing.⁸ Consequently, section 8(a)(2) of the Act prohibited employer domination or interference with a "labor organization"⁹; and section 2(5) broadly defined a "labor organization" to include company unions and numerous alternatives to employee representation.¹⁰

The first two methods of employer-employee dealing are clearly in evidence today. Among the almost 90% of private-sector employees who have no union representation,¹¹ individual employment contracts are common.¹² Unions, although suffering declining membership, are still a force in many work settings.¹³

8 He justified introduction of the National Labor Relations Act by observing: The greatest barrier to [employee] freedom is the employer-dominated union, which has grown with amazing rapidity since the passage of the Recovery Act. The employer-dominated union generally is initiated by the employer. He takes part in the determination of its rules, its procedures, its policies. He can terminate it at will and he exercises absolute veto power over its suggestions. Certainly there is no real cooperation on an equal footing between employers and employees under such circumstances.

Id. at 38-39.

9 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 . . ." 29 U.S.C. § 158(a)(2) (1996).

10 This provision did not name company unions as such, but rather defined them in functional terms 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." 29 U.S.C. § 152(5) (1996). This definition is widely understood to encompass employee representation groups that cannot properly be called company unions. *See NLRB v. Cabot Carbon*, 360 U.S. 203, 210-14 (1959).

11 *Union Membership Declines by 100,000 to 16.3 Million, or 14.5 % of Workforce*, Daily Lab. Rep. (BNA) No. 19, D-14 (Jan. 29, 1997) [hereinafter *Union Membership*], reports on a U.S. Department of Labor survey showing that in 1996, there were 9.4 million union members in private, nonagricultural industries. Union density was 10.2% of private-sector wage and salary jobs, down from 10.4% in 1995. *Id.*

12 The securities industry has pioneered a relatively new form of individual-dealing by requiring employees to arbitrate employment disputes. *See, e.g.,* Patrick McGeehan, *Bias Panel Is Formed by NASD*, WALL ST. J., May 29, 1997, at C1. In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court validated this form of dealing by holding that employee agreements to arbitrate employment disputes are not precluded by employment discrimination laws.

13 *See Union Membership*, *supra* note 11, at D-14 (showing that concentrated pockets of union membership remain in transportation and utilities (26.5% unionization), precision production, craft, and repair employees (23% unionization), and construction (18.5% unionization)).

The existence of the third method of dealing is now hotly disputed. The TEAM Act,¹⁴ a bill to amend section 8(a)(2) of the NLRA by permitting more dealing between employers and employees without a union intermediary, is the focus of this heated debate. Since the bill was introduced, numerous law review articles have examined employer dealings with nonunion employee groups.¹⁵ Empirical re-

14 S. 295, 105th Cong. (1997) and H.R. 634, 105th Cong. (1997), would amend section 8(a)(2) of the NLRA by striking the semi-colon 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 at least the same extent practicable as representatives of management participate, to address matters of . . . quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements . . . between the employer and labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.

Id.

15 See generally Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm*, 21 J. CORP. L. 657 (1996) (advocating participatory management within a theory of corporate governance); Jon Blumenthal, *Remedying Electromation, Inc. v. NLRB and its Progeny: The Future of Employee Participation Programs*, 5 KAN. J.L. & PUB. POL'Y 193 (1996) (arguing that section 8(a)(2) of the NLRA is outdated); Rafael Gely, *Whose Team Are You On? My Team or My Team?*, 49 RUTGERS L. REV. 323 (1997) (taking a skeptical view of participatory programs from an internal labor market perspective); William B. Gould IV, *Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended*, 30 CREIGHTON L. REV. 3 (1996) (arguing that his theory of employee participation, as set forth in *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110 (1995), should be the basis for amending section 8(a)(2)); Nancy K. Kubasek et al., *Putting Worker-Management Relations in Context: Why Employee Representational Choice Needs Greater Protection in Reform of Section 8(a)(2) of the NLRA*, 34 HARV. J. ON LEGIS. 53 (1997) (viewing the TEAM Act as a needed response to protect employee involvement groups); Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331 (1994) (concluding that although section 8(a)(2) has largely eliminated company unions, it remains a relevant safeguard for union organizing); Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159 (1996) (arguing that an adversarial model of labor-management relations is no longer appropriate); Madelyn C. Squire, *Electromation: A Metaphor for the Ills of the NLRA—Is a Representation Standard a Cure?*, 73 U. DET. MERCY L. REV. 209 (1996) (arguing for a "reasonable belief" standard to justify an employer's imposition of an employee representation committee); Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 U. CIN. L. REV. 1379 (1995) (examining the general characteristics of QWL, Quality Circle, survey feedback, and other employee representation plans); Note, *Labor-Management Co-*

search has considered related matters, such as employee interest in alternative forms of workplace representation¹⁶ and the effect of employee involvement programs on worker preferences for traditional unions.¹⁷

This academic research has not occurred in a vacuum. The AFL-CIO, organized labor's main federation, has challenged the TEAM Act, contending that it would return employer-employee dealings to the stilted form of company unions.¹⁸ Interestingly, occasional advice

operation after Electromation: Implications for Workplace Diversity, 107 HARV. L. REV. 678, 685 (1994).

16 See Richard Freeman & Joel Rogers, *What Do Workers Want? Voice, Representation and Power in the American Workplace*, 50 PROC. OF NEW YORK UNIVERSITY FIFTIETH ANNUAL CONFERENCE ON LABOR (Samuel Estreicher, ed., forthcoming December 1997). Based on the second wave of their survey, which sampled 800 employees, Freeman and Rogers concluded: "In general, Wave Two showed that employees see current company efforts to involve them in company decision-making and open door policies as real and desirable. But they want more and greater involvement in decisions, for their own sake and for the sake of the firm." *Id.*

17 See Jim Rundle, *Winning Hearts and Minds: Union Organizing in the Era of Employee Involvement Programs*, Cornell University and AFL-CIO Conference Paper (Washington, D.C. 1996) (copy on file with author). This study of 165 NLRB representation elections showed that unions encountered an employee involvement program in 38% of their campaigns, up from 7% since 1988. It found that unions won 48% of the elections where no employee involvement program existed, but only 32% where such a program was in place. Rundle concluded:

In less than ten years, employee involvement programs have grown from a blip on the radar screen to a significant new phenomenon facing union organizers. They are now encountered by organizers in one third of all organizing campaigns. For all the hope that some academics have bestowed on them as vehicles for improving employee 'voice' in an increasingly non-union work world, the ones the organizers encounter are far from benign. They are accompanied by aggressive anti-union campaigns, and as employee organizations, are utterly undemocratic.

Id.

18 See Jonathan Hiatt's (General Counsel for the AFL-CIO) 1997 testimony before the Senate Labor and Human Resources Committee, stating that

while some employers backing this legislation may want to "empower" employees to make decisions on the job, the very last thing these employers desire is a work force that is genuinely empowered in its dealings with management—that is, a workforce that can deal with the employer on an equal footing in determining the terms and conditions of their employment. Instead, the thrust of this legislation is to further empower management's unilateral control over those terms and conditions.

The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1997), available in 1997 WL 8218929 (testimony of Jonathan Hiatt, General Counsel for the AFL-CIO); see also Robert Muehlenkamp (Director of Organizing for the Teamsters), contending that "this change in the law would deny employees the right to be represented by someone

articles in human resource (HR) management publications lend some support to their view.¹⁹

Employers sharply counter that progressive HR management entails legitimate employer-employee dealings, such as jointly solving workplace problems that affect everyone.²⁰ Since this kind of interaction is common and is linked to higher growth rates for firms,²¹ this organizational form has important implications for the American economy. Their point is strengthened by the fact that employee ownership of firms is rising and the linkage between this kind of ownership and employee involvement improves firm performance.²²

independent from the employer, as currently guaranteed by section 8(a)(2).” *The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources*, 105th Cong. (1997), available in 1997 WL 60522 (testimony of Robert Muehlenkamp Director of Organizing for the Teamsters).

19 For example, Jonathan A. Segal advises that

employee involvement teams can be formed to give employees a feeling of empowerment. However, these teams may run afoul of the NLRA’s *Electromotion* ruling. Although there are some risks inherent in any meaningful employee involvement program, these programs should not be avoided altogether. The risks can be minimized with the help of experienced counsel.

Jonathan A. Segal, *Keeping Norma Rae at Bay: Discouraging Unionization through Better Personnel Management*, HR Mag., Aug. 1, 1996, at 111, available in 1996 WL 9969489, advises that

20 See William Budinger’s testimony concerning his small nonunion firm, where health insurance costs were rising more than 20% per year in the early 1990s. His testimony is relevant to the TEAM Act because his firm solved its health insurance problem by using an ostensibly unlawful form of employer-employee dealing:

Several production people, a researcher, a scheduler, and a human resources professional formed a team and began interviewing their families, other employees, health care professionals, and other companies. After nine months of work, they came up with a new idea—replace our traditional health-care program with a wellness program that invested in preventing illness rather than just curing it. We installed the wellness program and discovered that it measurably improved the well-being of our people. At our annual health fair, we’ve found that we’re thinner, fitter, healthier, and smoke less on average than we did five years ago.

The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1997) (testimony of William Budinger), available in 1997 WL 60501.

21 See *Employee Participation Programs Spur Fast Growth Companies*, Coopers and Lybrand L.L.P., “Trendsetter Barometer” Survey Shows (visited Aug. 24, 1997) <<http://www.colybrand.com/eas/trendset/106.html>>. The Coopers & Lybrand survey found that 8 in 10 of the fastest growing firms in the U.S. have employee participation programs, and also found a correlation between those firms that most highly value these organizational structures and those firms’ growth rate.

22 See *A Statistical Profile of Employee Ownership* (visited Aug. 24, 1997) <http://www.nceo.org/library/eo_stat.html>. This survey showed that 8.7 million employees,

As this public policy debate occurs, the character and functions of employee teams are steadily evolving. The most notable change is that teams are redistributing power in the workplace. Team-based management is increasingly used as a substitute for traditional management of work by supervisors.²³ While cost-cutting appears to motivate some of this change,²⁴ creation of a shared decision-making culture appears to be a more common purpose in giving workers more authority. The changing definition of a front-line supervisor's role in managing work is evidence of this change.²⁵ The transition

as of 1996, participate in ESOPs and stock bonus plans, and reported that a 1987 NCEO study based on a survey of 45 ESOP and 225 non-ESOP firms showed that employee ownership combined with a participative management style had 8% to 11% more growth compared to conventionally owned and managed firms.

23 A forceful presentation of this link appears in Jeffrey E. Myers, *Downsizing Blues: How to Keep Up Morale*, MGMT. REV., April 1, 1993, at 28, available in 1993 WL 2942783 ("When team building is already in place, use of this practice can have the benefits of involving more workers in downsizing decisions, facilitating communications regarding downsizing and the rationale for such moves . . . Special attention must be given to employees who fall in the 'middle-manager' classification. These individuals suffer particularly heavily in a downsizing.").

24 See, e.g., *Robertshaw, USWA & IAMAW: Tennessee's 1995 Labor-Management Partnership Award Winner*, TENN. TRIB., Oct. 12, 1995, at 10, available in 1995 WL 15505588 (reporting an agreement by an employer and union to respond to global competition by replacing salaried supervisors with hourly working coordinators).

25 General Electric's reorganization of its Financial Services Organization (FSO), provides a good example:

For the most part, the major Work-Out themes that were repeated throughout the town meetings—participation, empowerment, and teamwork—were received enthusiastically by FSO's rank-and-file workers. In local "sensing" sessions, in which senior managers met with small groups of people for roundtable talks, employees seemed eager to become more involved and willing to take on more decision-making responsibility.

Middle managers and supervisors were more reluctant to embrace these new organizational values. Besides feeling threatened by what they perceived as the loss of power and authority, many found it impossible to imagine working in an organization where they didn't have to spend their time checking and correcting what other people did, intervening to solve problems, and running day-to-day operations.

To win these people over—and to neutralize any potential resistance to the change effort—FSO implemented a series of training workshops specifically designed for supervisory personnel. Called the Leadership Challenge, these sessions helped raise awareness by modeling the new roles that managers would play in a more participative environment and by outlining the attributes that characterize the successful modern manager.

Robert Frigo & Robert Janson, *GE's Financial Services Operation Achieves Quality Results Through "Work-Out" Process*, NAT'L PRODUCTIVITY REV., Dec. 22, 1993, at 53, available in 1993 WL 2946165.

from a traditional system of work-management to one that provides employees more autonomy is hard for some people to accept.²⁶

Employers embrace this change, notwithstanding its unsettling effects, because it holds out untapped gains for them and their employees. Teams provide flexibility in responding to fast-changing markets.²⁷ They also provide a limited antidote to some of the harmful outgrowths of rapid change, such as high rates of employee and customer turnover, and are therefore viewed as a good business practice.²⁸ Teams sometimes benefit employees by aligning their compensation with an employer's growth. Gainsharing, one method for aligning these interests, is often applied in teams.²⁹ By making teams accountable to customers or "end-users" of an organization's goods or services,³⁰ alignment of employer and employee interests is also strengthened.

In an interesting turn of events, employers, perhaps emboldened by team successes, are giving teams more functions. Shifting the management of diversity from HR professionals to teams is a daunting example. Still in an experimental phase, this appears to result from HR managers' twin identification of employee involvement and diversity management as today's defining workplace issues.³¹ Only a few large employers have given teams a broad mandate to manage diversity.

26 See, e.g., Evelyn F. Rogers et al., *Self-Managing Work Teams: Do They Really Work?*, 18 HUM. RESOURCE PLAN. 53 (1995), available in 1995 WL 14336389 (concluding its case study of a restructured restaurant business and stating that "[t]he organization learned that it was much harder to convert a traditionally managed group to a self-managed group than one expected").

27 See JEFFREY GOLDSTEIN, *THE UNSHACKLED ORGANIZATION: FACING THE CHALLENGE OF UNPREDICTABILITY* (1996), (providing recent examples of these uses). See also Bernard Portis & Neil Hill, *Making Employee Participation a Way of Life: Four Experiences*, 33 NAT'L PRODUCTIVITY REV. 481 (1991), available in 1991 WL 2818447.

28 This thesis is set forth in FREDERICK REICHEL, *THE LOYALTY EFFECT: THE HIDDEN FORCE BEHIND GROWTH, PROFITS, AND LASTING VALUE* (1996).

29 For an accessible and informative explanation of gainsharing, see *Understanding Gainsharing* (visited Aug. 24, 1997) <<http://wmjackson.com/Understanding.html>> (copy on file with author) (explaining that this system requires employee involvement, communication, rewards for meeting goals, and dollar-based formulas; and distinguishing gainsharing from profit sharing and piecework).

30 This appears to be true even in the public sector. See Dawn Anfuso, *City of Hampton: A Public Deployment of Corporate Tactics*, PERSONNEL J., Jan. 1995, at 70. The article describes Hampton, Virginia's successful adoption of team-based organization and subsequent requirement that teams survey customers to determine their satisfaction with city services.

31 See, e.g., Kathleen Menda, *Policy Flaws Show Need for Reform*, HR MAG., June 1995, at 133, available in 1995 WL 12309856 (reviewing EDWARD E. POTTER & JUDITH A. YOUNGMAN, *KEEPING AMERICA COMPETITIVE: EMPLOYMENT POLICY FOR THE TWENTY-FIRST CENTURY* (1995)).

Xerox's program has been highly successful,³² but R.R. Donnelley's, though well-intentioned, may have aggravated existing racial and gender tensions.³³ United Airlines reports a more typical experience. There, teams are handling a limited diversity issue that has everyday import: flexible scheduling, particularly for employees who have child-rearing or elder-care responsibilities.³⁴

B. Organization of this Article

This Article adds new evidence about employer-employee dealings in nonunion work settings to this public policy debate. It builds on my 1996 *Notre Dame Law Review* article³⁵ that the Senate Labor and Human Resources Committee later examined in its deliberations over the TEAM Act.³⁶ That article surveyed 23 nonunion work teams scattered throughout the United States, and found that (1) most teams were small; (2) almost half the teams only made suggestions to management, and therefore, did not even meet the threshold requirement of "dealing with" an employer so as to constitute a section 2(5) labor organization; (3) most teams handled work process or product quality issues, in apparent conformity to guidelines set forth in *Electromation* and *DuPont*; (4) two-thirds of the teams were created by management; (5) recruitment of non-supervisory employees to be team

32 See Matti F. Dobbs, *Managing Diversity: Lessons from the Private Sector*, 25 PUB. PERSONNEL MGMT. 351 (1996), available in 1996 WL 10845155; *Xerox Wins Award for Making Diversity Work*, WORK & FAM. NEWSBRIEF, Dec. 1, 1995, available in 1995 WL 10431843.

33 See Alex Markels, *A Diversity Program Can Prove Divisive*, WALL ST. J., Jan. 30, 1997, at B1, available in 1997 WL-WSJ 2407638, which reports on a discrimination lawsuit seeking millions of dollars in damages that stems from a team-based diversity program:

At the various diversity-training sessions, the company encouraged participants to speak freely. Recalling a 1995 session, Hellen Harris, a 42-year-old black production expeditor in the financial-printing division, says she told the 13-member group, including managers, "how hard it was to work in a place that was so abusive to women and minorities."

But the managers disputed her observations, she says, adding: "It was really draining and stressful." And she recalls that the division's director "said he had a problem with blacks supervising whites."

Id.

34 See Elizabeth Sheley, *Flexible Work Options: Beyond 9 to 5*, HR MAG., Feb. 1996, at 56, available in 1996 WL 9969423.

35 Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215 (1996).

36 *The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources*, 105th Cong. (1997), available in 1997 WL 8218929.

members was equally divided between volunteer placement and employer selection; (6) most teams acted on the basis of employee-management consensus; and (7) the most common form of team evaluation was jointly performed by employees and managers.³⁷

The research I present here is an extension of my first survey. I revised my *Electromation* and *DuPont* compliance survey in light of the growing (but still small) number of NLRB cases that made section 8(a)(2) rulings.³⁸ These cases are reviewed in Parts II(B)–II(D) of this Article. Part II(B) examines those decisions in which the Board found that an employer unlawfully established a labor organization and dominated it.³⁹ The next part discusses cases where an employer was charged with unlawful domination of an employee team or group, but no violation was found.⁴⁰ This is followed by a part in which two federal appeals court decisions are discussed and analyzed.⁴¹

My continuing research is also informed by the debate over the TEAM Act. In Part III, I review the pertinent history of this bill in the 104th Congress,⁴² and briefly examine the 105th Congress' treatment of this proposed legislation.⁴³

Based on these emerging developments, I revised my initial team survey. These changes are discussed in Part IV(A).⁴⁴ I then administered these surveys to seventy-eight teams in scattered locations throughout the United States. My sampling method is described in Part IV(B),⁴⁵ which is followed by an examination of the main flaws in this study's research methodology. Part IV(D) presents my research findings.⁴⁶ By way of overview, these numerous findings can be condensed to three main conclusions:

37 See LeRoy, *supra* note 35, at 244–51.

38 See Vic Koenig Chevrolet, 321 N.L.R.B. 1255 (1996); Aero Detroit, Inc., 321 N.L.R.B. 1101 (1996); Autodie Int'l, Inc., 321 N.L.R.B. 688 (1996); Simmons Industries, Inc., 321 N.L.R.B. 228 (1996); Vons Grocery Co., 320 N.L.R.B. 53 (1995); Stoodly Co., 320 N.L.R.B. 18 (1995); Dillon Stores, 319 N.L.R.B. 1245 (1995); Webcor Packaging, Inc., 319 N.L.R.B. 1203 (1995); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995); Keeler Brass Automotive Group, 317 N.L.R.B. 1110 (1995); Magan Med. Clinic, Inc., 314 N.L.R.B. 1083 (1994); Garney Morris, Inc., 313 N.L.R.B. 101 (1993); Peninsula Gen. Hosp. Med. Ctr., 312 N.L.R.B. 582 (1993); Ryder Distribution Resources, Inc., 311 N.L.R.B. 814 (1993); Waste Management of Utah, Inc., 310 N.L.R.B. 883 (1993); Research Fed. Credit Union, 310 N.L.R.B. 56 (1993).

39 See *infra* notes 63–197 and accompanying text.

40 See *infra* notes 198–224 and accompanying text.

41 See *infra* notes 225–38 and accompanying text.

42 See *infra* notes 239–54 and accompanying text.

43 See *infra* notes 255–61 and accompanying text.

44 See *infra* notes 262–69 and accompanying text.

45 See *infra* notes 270–71 and accompanying text.

46 See *infra* notes 272–77 and accompanying text.

1. These teams, compared to those in my first compliance survey, are much more likely to be found to be statutory labor organizations under the NLRA because they deal with employers over a wider variety of workplace issues, such as the scheduling of employees' work.⁴⁷ The significance of this finding is that, compared to teams in my first survey, a much greater percentage of these teams now appears to be subject to section 8(a)(2)'s prohibition against employer domination or interference.

2. Employer domination of teams has changed little, if at all, compared to the first survey.⁴⁸ However, since a greater number of nonunion teams now appear to meet the definitional requirements of a statutory labor organization under the NLRA, this means that a greater number of teams, compared to the first survey, appear to have section 8(a)(2) compliance problems.⁴⁹ Although a general survey such as this cannot make case specific fact-findings, like those in unfair labor practice (ULP) proceedings involving section 8(a)(2), this second wave survey suggests that about half of these nonunion teams do not comply with this provision.

Although these findings are discussed in greater detail, it must be noted here that many could be brought into compliance fairly easily. For example, some forms of employer-employee dealing in teams, such as handling employees' scheduling or management selection of employees to participate on teams, could be eliminated or modified. Nothing in these findings supports some employers' claims that the NLRB's current enforcement of section 8(a)(2) is so draconian that nonunion teams must be disbanded to comply with the law.⁵⁰

47 See Findings 3 and 5 *infra* Part IV(D).

48 Compare Finding 5 in LeRoy, *supra* note 35, at 249 (finding that employers appointed employees in 39.1% of surveyed teams; that employees volunteered to participate in the same percentage of teams; and peers selected employees in 21.7% of teams) with Finding 7, *infra* Part IV(D) (showing that employers selected team members in 50% of the surveyed teams; employees volunteered to participate in 41.0% of teams; and employees were selected by peers in 35.9% of teams).

49 When a team does not meet the NLRA's definition of a labor organization, employer domination is a moot issue. section 8(a)(2), the provision prohibiting such conduct, expressly prohibits employer domination or interference with a labor organization. To illustrate, a team that handles only product quality matters is not a labor organization, as interpreted by the NLRB in *Electromation*, 309 N.L.R.B. 990 (1992). Therefore, an employer may lawfully dominate it.

50 Some employers make this exaggerated argument apparently to whip up concern about the harmful effects of section 8(a)(2):

Although there are a small number of court cases, the ripple effect from those cases is pervasive in corporate America. Many, many corporate executives are confused about how to interpret the current law. They are aban-

3. This Article also finds that current teams are not like company unions, because they are small-cell groups and exhibit a significant degree of power-sharing between employers and employees.⁵¹ Thus, it finds merit in the TEAM Act's policy prescription of permitting legitimate employee involvement groups to operate outside the strictures of section 8(a)(2), while continuing to subject sham employee representation groups or company unions to this law.

This Article concludes by discussing the public policy implications of these findings. These findings reveal no evidence of company unions, because the surveyed teams were very small, had governance structures in which employees and management shared decision-making in varying degrees, and therefore were quite different from the large-scale forms of earlier company unions. Considering, however, that recent Board cases show that some employers do establish illegitimate teams that are essentially company unions, this Article concludes that section 8(a)(2)'s prohibition against this sham organization should remain in place. However, it also concludes that the TEAM Act is a desirable amendment to this prohibition because it proposes to shelter employer efforts to communicate and collaborate with employees in nonunion settings without diminishing the NLRA's protections against sham unions.

II. EMERGING TRENDS IN SECTION 8(A)(2) CASE LAW FOLLOWING *ELECTROMATION*

A. Overview

The NLRB rarely adjudicates section 8(a)(2) cases.⁵² Nevertheless, employers view this law's enforcement as a threat to their competitiveness in a global economy.⁵³ From December 1992, when the

doing employee involvement altogether or are crippling initiatives by placing severe limitations on them.

The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1996), available in 1996 WL 7135535 (testimony of Richard Wellins).

51 See discussion *infra* Part V (Conclusions and Policy Implications), Point 2.

52 Sen. Edward Kennedy's research disclosed that "[s]ince the National Labor Relations Board decided the *Electromotion* case in 1992, the Board has resolved only 16 cases—out of 54,919 cases considered—in which part of the remedy required dissolution of employee teams." *The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources*, 105th Cong., (1997), available in 1997 WL 70683 (testimony of Sen. Edward M. Kennedy).

53 A prominent management attorney and former NLRB Member, Charles Cohen, summarized this concern:

NLRB issued *Electromation*, to June 1997, the Board ruled on a handful of cases involving participatory programs.⁵⁴

Although the NLRB ruled against employers in most of these cases, it is important to note that these employers did not appear to have legitimate participatory teams. Instead, their "teams" were started directly in response to union organizing drives to offer employees an alternative to a union⁵⁵ or during election campaigns to decertify a union.⁵⁶ This is not to suggest that all adverse actions against employers under section 8(a) (2) involve spurious forms of employee representation. Polaroid's long-standing and progressive form of nonunion representation was disbanded after an administrative law judge (A.L.J.) ruled against it.⁵⁷ The point is that most NLRB rulings

The TEAM Act is necessary because the law written in 1935 is too restrictive for today's economy. In the past 60 years, we have moved from a domestic economy to a global economy. This has put immense pressure on America's companies and their employees to improve quality, productivity, and efficiency in order to compete with companies in other countries. These improvements have been achieved in many instances through employee participation committees—which facilitates employer-employee communication and allows managers to tap into their most valuable resource: their employees.

Unfortunately, the NLRA severely restricts those committees in the United States. In our zealous effort to prohibit company unions, we have created obstacles to common sense dealings between employees and management.

The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1997), available in 1997 WL 60517 (testimony of Charles Cohen).

54 *The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources, 105th Cong. (1997), available in 1997 WL 63032.*

55 These are Peninsula Gen. Hosp. Med. Ctr., 312 N.L.R.B. 582 (1993) (discussed *infra* notes 63–79); Aero Detroit, Inc., 321 N.L.R.B. 1101 (1996) (discussed *infra* notes 80–89); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995) (discussed *infra* notes 90–95); Magan Med. Clinic, Inc., 314 N.L.R.B. 1083 (1994) (discussed *infra* notes 96–102); Garney Morris, Inc., 313 N.L.R.B. 101 (1993) (discussed *infra* notes 103–10); Ryder Distribution Resources, Inc., 311 N.L.R.B. 814 (1993) (discussed *infra* notes 111–21); Research Fed. Credit Union, 310 N.L.R.B. 56 (1993) (discussed *infra* notes 122–33); and Waste Management of Utah, Inc., 310 N.L.R.B. 883 (1993) (discussed *infra* notes 134–42).

56 These are Vic Koenig Chevrolet, Inc., 321 N.L.R.B. 1255 (1996) (discussed *infra* notes 143–51) and Autodie Int'l, 321 N.L.R.B. 688 (1996) (discussed *infra* notes 152–65).

57 See Ann G. Liebowitz, *The Non-Union Union?*, 50 PROC. OF NEW YORK UNIVERSITY FIFTIETH ANNUAL CONFERENCE ON LABOR (Samuel Estreicher, ed., forthcoming December 1997) (describing in detail Polaroid's Employees' Committee). Non-supervisory employees and managers elected employees to a committee that, in addition to

following *Electromation* have been set in high-pitched union-avoidance campaigns and have not involved high-performance teams.

In two cases, however, the NLRB has upheld an employee participation program in the face of section 8(a)(2) charges.⁵⁸ These cases matter because they signal the Board's increasing toleration of employer experimentation with teams, particularly if those teams involve legitimate efforts to improve workplace democracy.⁵⁹ A related case involved a challenge of employer communication to team members represented by a union.⁶⁰ The issue was whether an employer's efforts to challenge a union's claim that team-member participation would eventually lead to job cuts violated employees' section 8(a)(1) right to be free from employer interference, restraint, or coercion of employees' exercise of their collective bargaining rights.⁶¹ The Board

its considerable autonomy, had wide-ranging powers to deal with management on issues such as overtime, scheduling, and discipline.

58 These are *Vons Grocery Co.*, 320 N.L.R.B. 53 (1995) (discussed *infra* notes 198-203) and *Stoody Co.*, 320 N.L.R.B. 18 (1995) (discussed *infra* notes 204-17).

59 Shortly after participating in these decisions, NLRB Chairman William Gould IV said in a 1996 speech:

In a nonunion situation, the sensible response . . . is to allow employee groups, with or without a management representative component, to discuss anything they want. The more workers know about the enterprise and the better they are able to participate in decision making, the more likely that democratic values and competitiveness are enhanced. And if the law is simplified, ordinary workers and small business people will be able to adapt to their own circumstances and avoid reliance upon wasteful, expensive litigation.

Remarks of NLRB Chairman Gould on Workplace Cooperation, Daily Lab. Rep. (BNA), No. 208, at E-3 (Oct. 25, 1996).

60 *Hamilton Standard Div. of United Technologies Corp.*, 313 N.L.R.B. 1303 (1994), also available in 1994 WL 228596.

61 In 1990, employees were reorganized into Continuous Improvement Teams (CITs), and for the next two years, the union, which had a long bargaining relationship with the employer, challenged the existence of these teams. In January 1992, the company president communicated a letter to all bargaining unit employees in which he mentioned the union's earlier ULP complaint alleging that the company was promoting CITs as an alternative to union representation. He stated:

Many employees have expressed concern about the future of continuous improvement and team work at Hamilton Standard because of the union's stance. Many of you feel the latest charge is an attempt to block your efforts to help improve our business. If it is, I am confident the attempt will not work.

. . . .

We will go forward with continuous improvement at Hamilton Standard. I have seen the success of our core work teams and process improvement teams, which are legal within the definition of the National Labor Relations Act. . . .

ruled that the employer's answer to union claims did not chill this right and was therefore lawful.⁶² Although this is a section 8(a)(1) case, it has obvious and direct implications for the administration of teams under section 8(a)(2).

B. Post-Electromotion Cases Finding Section 8(a)(2) Violations

In the wake of *Electromotion*, several NLRB cases presenting section 8(a)(2) violations stand out because they involved the establishment of committees to thwart union organizing. *Peninsula General Hospital Medical Center*⁶³ is the most important of these cases because the NLRB's finding of a section 8(a)(2) violation was reversed on appeal.⁶⁴

A hospital employer established the Nurses Service Organization (NSO) as early as 1968 to promote professional and social concerns.⁶⁵ Until 1988, the NSO did not handle employment matters.⁶⁶ Employees funded the organization until 1988, when the hospital took over this responsibility.⁶⁷ In 1989, the NSO's executive committee recommended changes to increase employee participation and organizational effectiveness, such as designating a representative from each department to attend meetings.⁶⁸

Implementation of these suggestions was put off until early 1990. However, before this occurred, the Maryland Nurses Association began an organizing drive.⁶⁹ At this time, some nurses staged a job ac-

We will continue to promote values that empower people and encourage the success and survival of our company. But this charge could slow our progress. It could delay needed improvements and end up costing us business and jobs I assure you that, while we will abide by the decision of the Board on this issue, we will, with your help, pursue our case and defend our right to improve our business aggressively

Id. at 1304, 1994 WL 228596, at *3.

62 *Id.* at 1306, 1994 WL 228596, at *6. After noting that the letter was sent in a context totally devoid of antiunion animus and other alleged ULPs, the Board found that the company intended "to persuade its employees of the importance of the use of continuous improvement teams." *Id.* at 1305, 1994 WL 228596 at *4. Moreover, the Board found that the letter was devoid of any threats, express or implied. *Id.* at 1305, 1994 WL 228596, at *5.

63 312 N.L.R.B. 582 (1993), available in 1993 WL 391258.

64 See *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262 (4th Cir. 1994), discussed *infra* notes 226, 229-38 and accompanying text.

65 *Peninsula Gen. Hosp. Med. Ctr.*, 312 N.L.R.B. at 583, 1993 WL 391258, at *2.

66 *Id.*

67 *Id.*

68 *Id.* at 583, 1993 WL 391258, at *3.

69 *Id.* at 584, 1993 WL 391258, at *3.

tion to protest wages, working conditions, and staffing.⁷⁰ One week later, the NSO held a meeting to discuss these and other issues.⁷¹ As employee frustration became more apparent to the NSO's lead officer, Karen Poisker, she distributed a letter on February 26 stating her sympathy for nurses' concerns and relating how the NSO would respond.⁷² Her letter also informed nurses that the hospital administration would soon conduct a benefits survey.⁷³ Less than two months later, the Association failed to receive a majority of votes in a representation election.⁷⁴

The Association appealed this loss,⁷⁵ and in the resulting A.L.J. decision, the NSO was found to be a section 2(5) labor organization that dealt with employees.⁷⁶ The A.L.J. also ruled that the hospital unlawfully dominated the group.⁷⁷

In affirming these rulings, the Board concluded that the NSO was changed in 1989 to take on a representational character, and there-

70 *Id.*

71 *Id.*

72 *Id.* at 584, 1993 WL 391258, at *4. In her letter, Poisker stated that NSO would do more "decision making," meaning that NSO would be utilized more "as a means for active problem solving and decision making regarding nursing department policies, practice issues and projects (for example career paths, shared governance, clinical ladder, budget process)." *Id.* The letter also assured nurses that with "the support of all and participation of dedicated representatives from each area, we will have a means to affect change and involve staff in decision making." *Id.*

73 *Id.* (stating that consultants had been hired to examine "our entire compensation package including benefits" and also informing the nurses that "[p]ersonnel is also planning a benefits survey so that they will be sure to know what the priorities should be for consideration in this next budget year").

74 *Id.*

75 *Id.* at *1-2.

76 *Id.* at 587, 1993 WL 391258, at *9 ("[T]here can be little doubt that the NSO, whatever its origins may have been, clearly became an organization dealing with the Employer concerning working conditions within the meaning of section 2(5) of the Act.").

77 *Id.* His analysis focused on Poisker's central role in restructuring and administering the NSO. He noted that she was Vice-President for Nursing and a member of the Hospital Executive Staff which was responsible for funding the hospital; that at the same time she was active in the reorganization of the NSO; that she was an active participant in effecting changes in the NSO, that she was also a member of the NSO's Executive Committee and took part in establishing its meeting agendas, that she also helped to rewrite the NSO's bylaws, which were later approved by the hospital's board of trustees; and that she was also involved in discussing, responding to, and resolving a whole array of work-related issues, including overtime scheduling, vacation, wages, shift differential and sick leave. *Id.* He therefore concluded "Poisker was not only a compelling active vocal force within the NSO, but was in fact the dominant force in restructuring the NSO as a labor organization. Such activity constitutes domination and interference in the affairs of the NSO." *Id.* at 587, 1993 WL 391258, at *10.

fore engaged in bilateral dealings with employees that subjected it to section 2(5).⁷⁸ The Board also reasoned that since the hospital "dictated the structure of the committee and controlled its operations, the employees could reasonably view the committee as a substitute for collective bargaining through traditional union representation, and the employees were never given assurances of their right to choose collective bargaining through traditional union representation."⁷⁹

In *Aero Detroit, Inc.*,⁸⁰ the employer appeared to implement a company union. It innocuously named this employee organization the Continuous Improvement Team (CIT),⁸¹ but unlike many teams, the CIT was established during a union organizing drive.⁸² When the plant manager formed the CIT, he told employees that this team was better than a union for communicating their concerns to management.⁸³

The NLRB found that the company's "unlawful establishment of the CIT, and its use of that entity as a vehicle for unlawfully soliciting [employee] grievances and promising benefits to employees, in particular, struck at the very heart of the employees' organizational efforts."⁸⁴ It therefore concluded that the CIT was a section 2(5) labor organization that dealt with employees over conditions of employment and served a representational function.⁸⁵

One interesting aspect is that employees initially showed interest in participating, but later backed away.⁸⁶ The representation election was inconclusive, with 79 votes for the organizing union, 75 votes against this representative, and 14 votes challenged.⁸⁷ A second election was not ordered because the A.L.J. and Board believed that the employer committed so many serious unfair labor practices that a fair election could not be held.⁸⁸ The Board therefore affirmed the A.L.J.'s bargaining order.⁸⁹

The Board also found a section 8(a)(2) violation in *Reno Hilton Resorts Corp.*⁹⁰ The hotel established Quality Action Teams (QATs) in

78 *Id.* at 582 n.4, 1993 WL 391258, at *1 n.4.

79 *Id.*

80 321 N.L.R.B. 1101 (1996), *available in* 1996 WL 506084.

81 *Id.* at 1105, 1996 WL 506084, at *6.

82 *Id.* at 1109, 1996 WL 506084, at *9.

83 *Id.*

84 *Id.* at 1105, 1996 WL 506084, at *6.

85 *Id.* at 1101, 1996 WL 506084, at *1.

86 *Id.* at 1109, 1996 WL 506084, at *9.

87 *Id.* at 1101 n.4, 1996 WL 506084, at *1 n.4.

88 *Id.* at 1105-06, 1996 WL 506084, at *6.

89 *Id.*

90 319 N.L.R.B. 1154 (1995), *available in* 1995 WL 788577.

which employees dealt with the hotel over wages, hours, conditions of work, safety, employee job rotations, starting times, and tip-sharing.⁹¹ Employer domination of this organization occurred, according to the Board, when the hotel's general manager set the agendas for each meeting, paid employees to attend, and also, when he set the size and structure of the QATs.⁹²

As in *Aero Detroit, Inc.*, the employer set up a participatory committee in the midst of a union organizing campaign.⁹³ The union lost the first election and later lost a rerun election; but the Board ruled that the second election was "free and fair" and therefore declined to order another election.⁹⁴ Nevertheless, the Board ordered the hotel to disestablish the QATs.⁹⁵

In *Magan Medical Clinic, Inc.*,⁹⁶ the employer set up a grievance committee in which employees participated by voting for committee members.⁹⁷ The committee's purpose was to provide a procedure for airing employee grievances over wages, hours, and terms and conditions of employment.⁹⁸ The A.L.J. determined that management established the committee immediately after learning that employees were attempting to organize a union because they wanted a means to adjust grievances against their supervisors.⁹⁹

The A.L.J. concluded that the committee was a section 2(5) labor organization that dealt with employees over statutory subjects, but also found insufficient evidence that the employer dominated the committee.¹⁰⁰ Nevertheless, the A.L.J. ordered the employer to stop recognizing the committee.¹⁰¹ The Board affirmed this order.¹⁰²

In *Garney Morris, Inc.*,¹⁰³ the company president formed an employee committee in response to a union organizing drive.¹⁰⁴ He also repeatedly prodded employees to select representatives to participate on the committee.¹⁰⁵ The A.L.J. concluded that "[i]t is hard to imag-

91 *Id.* at 1156-57, 1995 WL 788577, at *4.

92 *Id.* at 1157, 1995 WL 788577, at *4.

93 *Id.* at 1165, 1995 WL 788577, at *15-18.

94 *Id.* at 1157, 1995 WL 788577, at *5.

95 *Id.* at 1159, 1995 WL 788577, at *6.

96 314 N.L.R.B. 1083 (1994).

97 *Id.* at 1084.

98 *Id.*

99 *Id.* at 1086.

100 *Id.*

101 *Id.* at 1087.

102 *Id.* at 1083.

103 313 N.L.R.B. 101 (1993), available in 1993 WL 491808.

104 *Id.* at 101-02, 1993 WL 491808, at *1.

105 *Id.* at 116, 1993 WL 491808, at *27.

ine any conduct on the part of an employer which could more thoroughly decimate an organizing drive and more surely render a Board election meaningless."¹⁰⁶ He then imposed a bargaining order, which the Board upheld on appeal.¹⁰⁷

In reaching this decision, the Board noted that in direct response to a union organizing campaign, the company systematically embarked on a widespread campaign designed to discourage union support.¹⁰⁸ It ruled that the company committed "a large number and variety of unfair labor practices affecting a large number of employees, including repeated 'hallmark' violations such as widespread threats of plant closure and job loss, and actual, unlawful layoffs and discharges of union supporters."¹⁰⁹ It also ordered the company to disband and withdraw recognition from the representational committee.¹¹⁰

As in the preceding cases, management in *Ryder Distribution Resources, Inc.*¹¹¹ formed an employee committee soon after a union organizing drive began.¹¹² In this case, the company retained a consultant, who advised the company to encourage employees to drop their representation election petition in favor of participating in the Quality Through People program (QTP).¹¹³ A representation election was scheduled to be held on May 18, 1990, but following a May 6 request by employees, the Union withdrew its representation petition.¹¹⁴

Soon thereafter, the company tried to implement its QTP program, but employees balked at participating.¹¹⁵ After the company offered \$500 as a "good-faith gesture" to induce employees to participate, they agreed to do so.¹¹⁶ It used the QTP program as a feeder to five separate quality action committees, which dealt with the company over safety, maintenance and repairs, communication, training, and wages and benefits.¹¹⁷

106 *Id.* at 102, 1993 WL 491808, at *3.

107 *Id.*

108 *Id.* at 103, 1993 WL 491808, at *3.

109 *Id.*

110 *Id.* at 103, 1993 WL 491808, at *4.

111 311 N.L.R.B. 814 (1993), *available in* 1993 WL 196063.

112 *Id.* at 814-15, 1993 WL 196063, at *1-2. The campaign began in February 1990, and the committee was formed in June.

113 *Id.* at 814, 1993 WL 196063, at *2.

114 *Id.* at 814-15, 1993 WL 196063, at *1.

115 *Id.* at 815, 1993 WL 196063, at *1.

116 *Id.*

117 *Id.*

A conflict arose, however, when employees sought pay and benefit increases through these committees, because management desired that they merely suggest new ways to divide existing wages and benefits.¹¹⁸ The QTP program was then terminated and some employees resumed a union organizing drive.¹¹⁹ The Board agreed with the A.L.J. that the wages and benefits sub-committee was a section 2(5) labor organization and was unlawfully dominated,¹²⁰ and ordered the company to stop using this committee to deal with employees.¹²¹

In *Research Federal Credit Union*,¹²² dissatisfied employees contacted a union in early March 1990 to express their interest in organizing.¹²³ According to the A.L.J., the company engaged a consultant "to help [the company] wage an antiunion campaign and win the election."¹²⁴ After soliciting employee grievances through a series of interviews,¹²⁵ the consultant helped form employee involvement teams to discuss changes in sick leave, promotion, performance review, and staffing policies.¹²⁶

In finding that the committee structure constituted a section 2(5) labor organization which was unlawfully dominated, the A.L.J. reasoned that "it was created to undermine and supplant the Union as the representative of Respondent's employees Its swift action in soliciting grievances, then remedying or promising to remedy them definitely got the attention of the employees and took the wind from the sails of the union campaign."¹²⁷ Believing that the employer's unlawful conduct "struck at the very heart of the employees' organizational efforts"¹²⁸ and was "unlawfully established . . . to facilitate direct dealing with employees on working conditions, thus supplanting the Union's role for the future,"¹²⁹ the A.L.J. recommended a bargaining order. He also ordered the employer to stop dealing with these committees and to disestablish them.¹³⁰

118 *Id.*

119 *Id.*

120 *Id.* at 818, 1993 WL 196063, at *6.

121 *Id.* at 819, 1993 WL 196063, at *8.

122 310 N.L.R.B. 56 (1993), *available in* 1993 WL 7637.

123 *Id.* at 57, 1993 WL 7637, at *3.

124 *Id.* at 58, 1993 WL 7637, at *4.

125 *Id.* at 58-59, 1993 WL 7637, at *7.

126 *Id.* at 60-63, 1993 WL 7637, at *8-13.

127 *Id.* at 62, 1993 WL 7637, at *13.

128 *Id.* at 65, 1993 WL 7637, at *18.

129 *Id.*

130 *Id.* at 66-67, 1993 WL 7637, at *20.

The Board affirmed these orders.¹³¹ In agreeing to this, Member Raudabaugh restated the four factors he set forth in *Electromation* to determine unlawful domination:

(1) the extent of the employer's involvement in the structure and operation of the committee; (2) whether the employees, from an objective standpoint, reasonably perceive the employee participation program as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Sec. 7 right to choose to be represented by a traditional union under a system of full collective bargaining; and (4) the employer's motives in establishing the employee participation program.¹³²

Applying these criteria, he found that the company completely dictated the structure of the Employee Involvement Committee and controlled its operations; that employees could reasonably view the committee as a substitute for a union; that employees were not assured of their right to choose collective bargaining through traditional union representation; and that the employer had antiunion motives.¹³³

*Waste Management of Utah, Inc.*¹³⁴ involved a union organizing drive that was spurred by management's reduction in benefits to improve the firm's profitability.¹³⁵ Within two months of the union's filing for a representation election, the company instituted an employee involvement program that consisted of routing and productivity, safety, and benefits committees.¹³⁶ Management presided over committee meetings, solicited employee participation, decided the makeup of the committees, and chose meeting times and places.¹³⁷ Shortly before the representation election occurred, management provided employees two documents of proposed policy changes in the safety bonus program and accident/injury review program, and attributed these proposals to employee involvement committees.¹³⁸ Furthermore, it promised to implement these proposals within a month.¹³⁹

131 *Id.* at 56, 1993 WL 7637, at *1.

132 *Id.* at 56 n.1, 1993 WL 7637, at *1 n.1.

133 *Id.*

134 310 N.L.R.B. 883, *available in* 1992 WL 465255.

135 *Id.* at 886, 1992 WL 465255, at *7.

136 *Id.* at 890, 1992 WL 465255, at *14.

137 *Id.*

138 *Id.* at 890-91, 1992 WL 465255, at *15.

139 *Id.*

Based on this evidence, the A.L.J. found that the employer created a section 2(5) labor organization and unlawfully dominated it.¹⁴⁰ He then ordered that the committees be disestablished and that the employer bargain with the union.¹⁴¹ The Board affirmed these orders, noting that

While the subject matter of some of the committees, i.e., routing and productivity, and safety, might under other circumstances indicate that the avowed purposes of these committees might place them outside the ambit of Section 8(a)(2), it is plain that under our recent decision in *Electromation* . . . these committees were dominated labor organizations tacitly held out to employees as an employer-approved alternative to representation by an organization of the employees' own choice.¹⁴²

Two section 8(a)(2) cases have coincided with employer efforts to de-unionize by using the NLRA's de-certification process. In *Vic Koenig Chevrolet, Inc.*,¹⁴³ the company president circulated a petition for employees to express interest in decertifying their union. This occurred after some bargaining unit employees expressed an interest in taking this action.¹⁴⁴ Eventually, the president learned the identity of employees who supported this petition and those who did not. Shortly thereafter, he created a four-employee group which, he said, would give him "a fair spread" of opinions because the group included two employees who had signed the petition and two who did not.¹⁴⁵ After convening this "Executive Committee," the president and these employees discussed a variety of issues, including changes in employee pay and the attendance policy.¹⁴⁶

The A.L.J. found that the relationship between the committee and company entailed a bilateral process which constitutes "dealing with" under section 2(5).¹⁴⁷ She also concluded that a pattern or practice of dealing had been established, even though only three meetings occurred, because the committee had been in existence for only four months before she heard the case (and therefore was meeting with regularity in a short time), and because the company president asked employees to develop more ideas about section 2(5)

140 *Id.* at 892, 1992 WL 465255, at *16.

141 *Id.* at 912, 1992 WL 465255, at *49-50.

142 *Id.* at 883, 1992 WL 465255, at *1.

143 321 N.L.R.B. 1255 (1996), *available in* 1996 WL 496374.

144 *Id.* at 1255, 1996 WL 496374, at *2.

145 *Id.* at 1282, 1996 WL 496374, at *42.

146 *Id.* at 1282-83, 1996 WL 496374, at *43.

147 *Id.* at 1284, 1996 WL 496374, at *45.

subjects for future meetings.¹⁴⁸ In addition, she concluded that the committee acted in a representational capacity because its proposals covered all employees and because the president asked the group to consult with other employees about pay policy.¹⁴⁹ Without specific comment on the section 8(a) (2) issue, the Board affirmed the A.L.J.'s ruling¹⁵⁰ and ordered the company not to "dominate, assist, or otherwise support the executive committee."¹⁵¹

Employees in *Autodie International, Inc.*,¹⁵² were represented for a number of years by a labor organization called the Autodie Employees Labor Organization (AELO). In December 1991, a majority of employees represented by the AELO voted to have their labor organization affiliate with the United Auto Workers.¹⁵³ When this independent local affiliated with the UAW, Autodie Corporation recognized the new union.¹⁵⁴ A year later, the business sought bankruptcy protection and was sold to a successor-employer, Autodie International, Inc. (ADI).¹⁵⁵ After this transaction, more than 200 of ADI's 348 employees petitioned the company to negotiate with their in-house committee instead of the UAW.¹⁵⁶

The company then withdrew recognition from the UAW local union.¹⁵⁷ Elections were held off company property for representatives of the newly constituted Autodie International In-House Shop Committee.¹⁵⁸ The company bargained collectively with elected representatives of this group until the NLRB issued a ULP complaint.¹⁵⁹ Responding to this, the company withdrew recognition from the employee group and stopped bargaining.¹⁶⁰ Soon thereafter, however, a group of employees formed the Autodie International Employees Labor Organization, whereupon the company recognized it, bargained with it, and negotiated an agreement with it.¹⁶¹

148 *Id.*

149 *Id.*

150 *Id.* at 1255, 1996 WL 496374, at *1.

151 *Id.* at 1264, 1996 WL 496374, at *15.

152 321 N.L.R.B. 688 (1996), *available in* 1996 WL 392655.

153 *Id.* at 690, 1996 WL 392655, at *4.

154 *Id.*

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 691, 1996 WL 392655, at *7.

159 *Id.*

160 *Id.* at 691-92, 1996 WL 392655, at *8.

161 *Id.*

The A.L.J. concluded that the company violated section 8(a)(2) by recognizing and bargaining with this employee group.¹⁶² In addition, he concluded that the company engaged in related unfair labor practices when it switched work assignments based on employee support for the UAW, when it acted against employees who wore UAW pins and hats, and when it denied the UAW access to company bulletin boards.¹⁶³ He then ordered the company to stop recognizing and dealing with this group.¹⁶⁴ The Board adopted his findings and affirmed his order with slight modifications.¹⁶⁵

The few remaining Board cases finding employer violations of section 8(a)(2) are trendless. For example, the employer in *Simmons Industries, Inc.*¹⁶⁶ established safety committees at two nonunion plants. Their purpose was to communicate the company's safety program to employees and to have employees identify safety risks.¹⁶⁷ The Board adopted the A.L.J.'s finding that the committees constituted section 2(5) labor organizations because safety is included in the statutory definition of working conditions.¹⁶⁸ In particular, the A.L.J. found that the "[s]afety [c]ommittee . . . [a]cted as representational presenters of safety complaints and recommendation makers whose proposals were considered and accepted or rejected by management either at an interactive committee level or upon report from the committee."¹⁶⁹

In addition to these committees, the company formed a Total Quality Management committee at both plants.¹⁷⁰ The Board found that these groups dealt with the employer over section 2(5) subjects when they discussed bonus pay, length of work shift, absentee policy, and break time.¹⁷¹ Since management selected employees to participate on the team, the Board also held that this arrangement violated section 8(a)(2)'s prohibition against employer domination and interference with a labor organization.¹⁷²

The Board nevertheless found that one of Simmons' teams, the Corrective Action Committee, did not violate the NLRA.¹⁷³ Team

162 *Id.*

163 *Id.* at 692-94, 1996 WL 392655, at *9-11.

164 *Id.* at 696, 1996 WL 392655, at *16.

165 *Id.* at 688, 1996 WL 392655, at *1.

166 321 N.L.R.B. 228 (1996), *available in* 1996 WL 270959.

167 *Id.* at 249, 1996 WL 270959, at *41.

168 *Id.* at 228 n.3, 1996 WL 270959, at *3 n.3.

169 *Id.* at 254, 1996 WL 270959, at *50.

170 *Id.* at 231, 1996 WL 270959, at *6.

171 *Id.* at 253, 1996 WL 270959, at *50.

172 *Id.* at 228 n.3, 1996 WL 270959, at *3 n.3.

173 *Id.* at 254, 1996 WL 270959, at *50.

members discussed various ways to process chicken for the company's main customer, Kentucky Fried Chicken.¹⁷⁴ The A.L.J. found that the subjects discussed by the group were consistent with the guidance principles set forth in *Electromation* and hence were not section 2(5) subjects.¹⁷⁵ In particular, the judge concluded that the committee "came within that area of informational mechanism which is limited to questions of quality of product and efficiency of operation"¹⁷⁶ By adopting the A.L.J.'s conclusions of law,¹⁷⁷ the Board agreed to leave this committee alone.

The employer in *Webcor Packaging, Inc.*¹⁷⁸ was found to have established a labor organization through a representative body named the Plant Council.¹⁷⁹ The Board concluded that the Council was a statutory labor organization because it involved a "bilateral mechanism . . . [that] entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to these proposals by acceptance or rejection by word or deed."¹⁸⁰ It also concluded that this organization was unlawfully dominated because it was the "creation of management, whose struc-

174 *Id.* at 231, 1996 WL 270959, at *6.

175 *Id.* at 254, 1996 WL 270959, at *51.

176 *Id.*

177 *Id.* at 229, 1996 WL 270959, at *1.

178 319 N.L.R.B. 1203 (1995), *available in* 1995 WL 789965. The decision was affirmed while this Article was being edited. See *NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115 (6th Cir. 1997). The court enforced the Board's order to disestablish the Plant Council and held that it was without jurisdiction to overturn the Board's order requiring that a new union representation election be held. *Id.* at 1125. Judge Guy's concurrence is notable in light of this Article's view that Section 8(a)(2) requires some modification:

Because I believe that the result reached in this case no longer reflects congressional intent, it is with the greatest of reluctance that I concur. But for a presidential veto of amendatory legislation passed by Congress, what Webcor attempted to do here would be viewed against the backdrop of legislation more hospitable to concepts like plant councils.

Id. (concurring opinion).

179 The company's vice president testified that he ordered establishment of the council. He said that it was designed to recommend and propose changes in working conditions. Management would consider whether to accept or reject these recommendations:

What you're looking for out of those bodies and specifically out of the Plant Council, is a consensus building type of recommendation that would come—that would be a recommendation from that entire committee to Management about a proposed change . . . and if there was a recommendation to be made, it was to be considered by Management.

Webcor Packaging, 319 N.L.R.B. at 1203, 1995 WL 789965, at *1. .

180 *Id.*

ture and function are essentially determined by management, and whose continued existence depends on the fiat of management"¹⁸¹

The company in *Keeler Brass Automotive Group*¹⁸² established an employee grievance committee in 1983, and revised its structure in 1991 so that no meeting could be called without management's approval. In this case, organizational changes were made in the absence of any union organizing or presence.¹⁸³ Soon after it was reconstituted, the employee committee recommended that management's decision to discharge an employee be reduced to reinstatement with a new seniority date. Management communicated its opposition to this recommendation, and after more consideration, the committee reversed itself to let the discharge stand.¹⁸⁴ Soon thereafter, the committee took up another termination grievance and "tentatively" decided that the grievant should be reinstated; but then reversed itself after management submitted more evidence.¹⁸⁵

The A.L.J. ruled that the employee committee was not a section 2(5) labor organization, because the section's "dealing with" requirements were not met.¹⁸⁶ In reversing this decision, the Board distinguished this case from two earlier cases involving disciplinary committees that the Board ruled lawful because those employers fully delegated adjudicatory functions to them.¹⁸⁷

181 *Id.* at 1204, 1995 WL 789965, at *5. In summarizing this unlawful conduct the Board quoted from a company memo that:

The Plant Council will consist of five hourly employees who will be elected by the hourly work force,' and that 'the Plant Council will function as a policy development body . . . involved with the development of plant policies, the employee handbooks, the creation of a grievance procedure that will involve council member representation, and with the process of hourly compensation and benefits.

Id. at 1204, 1995 WL 789965, at *5-6. The Board also noted that the company determined the number of management officials who would serve on the Council and then selected management representatives. The Board also determined the council's function, subjects to be addressed, and the total number of employees and management representatives to serve on the council. *Id.*

182 317 N.L.R.B. 1110 (1995), *available in* 1995 WL 421143.

183 *Id.* at 1112, 1995 WL 421143, at *3.

184 *Id.* at 1111, 1995 WL 421143, at *2.

185 *Id.* at 1111-12, 1995 WL 421143, at *3.

186 *Id.* at 1124, 1995 WL 421143, at *22.

187 See *Mercy-Memorial Hospital*, 231 N.L.R.B. 1108 (1977), and *John Ascuaga's Nugget*, 230 N.L.R.B. 275 (1977) (involving lawful grievance committees). In distinguishing *Keeler Brass'* committee, the Board noted:

Those employee committees could definitively resolve grievances without further recourse to the employer. The *Keeler Brass Grievance Committee*,

The Board also ruled that the employer unlawfully dominated this committee. In reaching this judgment, the Board noted that the grievance committee was formed in 1983 at the request of employees, but when the committee was reconstituted in 1991, management wrote its policies, defined its purpose, and determined its composition.¹⁸⁸

In a concurring opinion that was noteworthy for endorsing genuinely empowered, nonunion disciplinary committees, Chairman Gould said that "when employees freely participate in a committee which, in itself, has the authority to resolve grievances and make final decisions, . . . the Committee is not a labor organization [under section 2(5)]."¹⁸⁹

In *Dillon Stores*,¹⁹⁰ management established Associates' Committees in several stores. The company set forth the committees' governance structure in annual memos to full-time and part-time employees.¹⁹¹ While they took up some matters unrelated to employment (for example, whether to provide service to customers who do not wear a shirt or shoes), the committees also discussed matters such

in contrast, does not have full grievance handling authority without dealing with management. This is reflected by Clinton's case. The Committee recommended conditional reinstatement. The recommendation was considered by HRD, but received a negative reaction followed by outright rejection. The Committee then considered additional evidence from HRD and reached a result that yielded to HRD. Similarly, in Podpolucki's case, the Committee decided that reinstatement and backpay were warranted but then changed course after ex parte discussion with management.

Keeler Brass Automotive Group, 317 N.L.R.B. at 1114, 1995 WL 421143, at *6.

188 *Id.* at 1114-15, 1995 WL 421143, at *7.

189 *Id.* at 1117, 1995 WL 421143, at *11.

190 319 N.L.R.B. 1245 (1995), available in 1995 WL 788570.

191 The memo stated:

TO ALL DILLON STORE RETAIL ASSOCIATES:

It is time to elect the Associates' Committee members for the 1993-94 year. As in the past, people serving on the committees will serve voluntarily. Each store's committee will be comprised of one full-time associate and one part-time associate. In towns where we have only one store, the committee will be made up of two full-time associates and one part-time associate. We encourage all departments to participate. The committee will meet once each quarter, or as needed, to be determined by the committee and the District Manager.

After the meeting with management personnel, a followup report of items discussed and answers to questions covered by the committees will be posted on each store's bulletin board. This report will also be discussed at the next scheduled weekly store meeting.

Id. at 1246, 1995 WL 788570, at *3.

as the company's dress-code for employees, criteria for promotion, and employer plans to offer health benefits.¹⁹²

The A.L.J. found that "most, if not all, of the employee representatives' proposals and grievances concerned the employees' terms and conditions of employment; those proposals and grievances had been advanced collectively on a representational basis; and [the company] did entertain those proposals and grievances."¹⁹³ He therefore concluded that the company "engaged in 'dealing' with the Associates' Committee. The Associates' Committee was, therefore, a labor organization under section 2(5)."¹⁹⁴ He also found that the company unlawfully dominated each committee because:

[I]t initiated all meetings . . . ; it determined the committee's structure and functions; . . . it determined which employees would serve as representatives [and] determined the terms of office of the representative; it determined election dates and times; it provided election notices, ballots, ballot boxes, and tally facilities [and] procedures; and it paid employee representatives for their time spent at meetings and preparing for meetings.¹⁹⁵

The Board affirmed these findings,¹⁹⁶ and Chairman Gould specially noted that the employer exerted too much control over the committee's governance structure and process.¹⁹⁷

C. *Post-Electromation Cases Finding No Section 8(a)(2) Violations*

Following *Electromation*, most section 8(a)(2) cases involving teams have found that employers broke the law. Two cases, however, found no employer violations.

*Vons Grocery*¹⁹⁸ involved a unionized employer who had formed and met with a Quality Circle Group (QCG) in roundtable discussions since 1983. Over time, nearly all the delivery drivers participated in these discussions with management.¹⁹⁹ The Board found that its activities were consistent with guidance principles set forth in *DuPont* be-

192 *Id.* at 1246-47, 1995 WL 788570, at *4.

193 *Id.* at 1252, 1995 WL 788570, at *13.

194 *Id.*

195 *Id.*

196 *Id.* at 1245 nn.1-2, 1995 WL 788570, at *1 nn.1-2.

197 *Id.* at 1245 n.2, 1995 WL 788570, at *1 n.2 ("the control exercised by the [company] over the committee is such that the freedom of choice and independence of action open to employees is too strictly confined within parameters of the [company's] making for the committee to be a genuine expression of democracy in the workplace").

198 320 N.L.R.B. 53 (1995), *available in* 1995 WL 789954.

199 *Id.*

cause discussions focused narrowly and consistently on operational matters.²⁰⁰ On one occasion, however, the QCG strayed into new territory by discussing a dress code and point system for accidents.²⁰¹ The Board viewed this as a *de minimis* violation that posed no threat to the Union's traditional role in collective bargaining.²⁰² It therefore concluded that "[o]ne incident of making proposals on conditions of work does not constitute a pattern or practice of dealing with the employer within the meaning of section 2(5)."²⁰³

*Stoody Co.*²⁰⁴ presents an interesting contrast to *Research Federal Credit Union* and *Ryder Distribution Center*. Those cases involved section 8(a)(2) violations resulting from employers acting on consultants' advice.²⁰⁵ In contrast, *Stoody Co.* had no consultant; it relied on the advice of its plant manager, who appeared to be cognizant of sections 2(5) and 8(a)(2) when he created an Employee Handbook Committee.²⁰⁶ While forming the committee in 1993, he clearly instructed it not to make proposals with management concerning wages, benefits and other working conditions.²⁰⁷ Instead, he said, its purpose was to find out from employees what employment practices were inconsistent with formal existing policies.²⁰⁸ He also allowed the committee to communicate to management its sense of policies that were obsolete or misunderstood by employees so that the company could respond appropriately.²⁰⁹

Consistent with its guidance in *DuPont*, the Board found that these communications did not constitute bilateral interaction between employees and management, but instead were informational in nature.²¹⁰ In short, there was no "dealing with" between workers and

200 The Board reasoned that for "nearly 3 years, the QCG existed lawfully in the Respondent's unionized work force as a group devoted to operational matters. Then, on one and only one occasion, the QCG developed proposals on matters involving conditions of work such as a dress code and an accident point policy." *Id.* at 54, 1995 WL 789954, at *2.

201 *Id.*

202 The Board noted that during this isolated instance "the Union was informed of the proposals and brought into the consideration of them before any decision was made. Indeed, the Union pursued the proposals in negotiating sessions with the Respondent and the QCG gave up any further role with regard to the proposals." *Id.*

203 *Id.*

204 320 N.L.R.B. 18 (1995), available in 1995 WL 789953.

205 See *Research Fed. Credit Union*, 310 N.L.R.B. 56 (1993); *Ryder Distribution Center Resources, Inc.*, 311 N.L.R.B. 814 (1993).

206 *Stoody Co.*, 320 N.L.R.B. at 19, 1995 WL 789953, at *2.

207 *Id.*

208 *Id.*

209 *Id.*

210 *Id.* at 20, 1995 WL 789953, at *3.

supervisors, and consequently, these discussions did not bring the group within the statutory definition of a labor organization.²¹¹ Thus, the Board reversed the A.L.J.'s finding that the company violated section 8(a)(2).²¹²

The case also featured an isolated deviation by an employee group from its standard practice. When an operations manager appeared at one meeting, he led employees in a discussion about their concerns over vacation time.²¹³ This was a section 2(5) subject.²¹⁴ The evidence showed, however, that the plant manager admonished the operations manager for going beyond the well-defined scope of the committee's charge, and the group never again discussed this subject.²¹⁵

The Board, recognizing on the one hand that Congress intended that section 2(5) be broadly construed,²¹⁶ nevertheless took a positive view of employees and managers engaging in dialogue:

Drawing the line between a lawful employee participation program and a statutory labor organization may not be a simple matter because it may be difficult to separate such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of a labor organization. If parties are burdened with the prospect that any deviation, however temporary, isolated, or unintended, from the discussion of a certain subject, will change a lawful employee participation committee into an unlawfully dominated labor organization, they may reasonably be reluctant to engage in employee participation programs.²¹⁷

Although neither case introduced a new legal doctrine, *Vons Grocery* and *Stooddy Co.* have several significant implications for teams. First, enactment of the TEAM bill is far from certain during the 105th Congress, particularly because during the first session, the Republican majority is far too small to override a likely presidential veto.²¹⁸ Even

211 *Id.* at 20-21, 1995 WL 789953, at *4-5. The Board observed that the plant manager "carefully limited the purpose of the Committee to information gathering. He stated that the Committee was not to discuss wages, benefits, or working conditions, but was to gather information about inconsistencies between the employee handbook and actual practices." *Id.* at 21, 1995 WL 789953, at *5.

212 *Id.* at 19, 1995 WL 789953, at *2.

213 *Id.* at 19, 1995 WL 789953, at *3.

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 20, 1995 WL 789953, at *4.

218 Republican efforts in June 1997 to attach a rider to a disaster relief bill to flood-ravaged North Dakota provides a possible scenario for the TEAM Act, because President Clinton threatened to veto both bills. Lack of enough members to override

assuming that the political scene changes in the next few years, enactment of this legislation will continue to be difficult because Democrats may filibuster the bill in the Senate.²¹⁹ This is exactly the tactic that Republicans successfully used to block striker-replacement legislation when they were a minority party in the early 1990s.²²⁰

Consequently, in the foreseeable future the NLRB's interpretation of section 8(a)(2) is likely to determine the permissible limits of employer dealings with nonunion teams under the NLRA. That being so, in *Vons Grocery* the Board signaled unions and NLRB Regional Directors not to fuss over hyper-technical violations of section 8(a)(2). In effect, this case created a doctrine permitting *de minimis* violations of section 8(a)(2). One would predict, if the TEAM Act does not become law, that employers will test this doctrine and attempt to expand it. If, as in *Vons Grocery*, one mistaken use of teams is pardoned under the law, what about two slips? What exactly constitutes a pattern or practice of "dealing with" under section 2(5)?

Also, employers might test *Stoody Co.*'s implicit principle of agency. In effect, the Board implied that employer domination of a labor organization cannot be attributed to any or all managers who interact with a team when it examined the interplay between the operations manager and the plant manager.²²¹ A test case might involve a low-level manager who violates a carefully conceived and limited team plan over a period of weeks, who is then stopped by senior management from leading a team in this unlawful conduct after they learn about this departure from the team's blueprint. Would the NLRB order disbandment of a team under these circumstances? This is another possible scenario for expanding *Vons Grocery's de minimis* violation doctrine.

Stoody Co.'s most important implication draws from the fact that management carefully considered *Electromation* compliance issues in setting up a sophisticated nonunion employee committee. Although employers predicted that *Electromation* would terribly restrict their use

a veto forced congressional Republicans to withdraw their rider. See Sharon Schmickle & Tom Hamburger, *Clinton Returns Relief Bill to Congress With a Veto*, STAR TRIB., June 10, 1997, at 1A, also available in 1997 WL 7569650.

219 When the Senate committee approved the TEAM Act in March, Sen. Kennedy and other Democrats threatened to mount a filibuster to block a vote on the bill. See Court Gifford, *Senate Panel Approves TEAM Act; Democrats Warn of Floor Fight, Filibuster*, Daily Lab. Rep. (BNA) No. 44, at AA-1 (March 6, 1997).

220 See *Senate Vote to End Filibuster on Striker Replacement Fails 53-47*, Daily Lab. Rep. (BNA) No. 133, at AA-1 (July 13, 1994).

221 See *Stoody Co.*, 320 N.L.R.B. at 21, 1995 WL 789953, at *5.

of teams,²²² *Stoody Co.* leaves considerable latitude in organizing work teams without violating the NLRA.²²³ One tactic is to limit subjects that a team handles to quality, work process, and efficiency. Even if the employer dominates this team, it is unlikely to be found in violation of the law because the NLRA has excluded these subjects from the section 2(5) definition of a labor organization. On careful reflection, these safe havens are potentially expansive. A team working on efficiency might consider, for example, whether a factory is too hot to permit maximum work-flow. That is an efficiency issue, but it also relates to work conditions. Or a team might establish a reward for measurable improvements in efficiency, such as a raffle ticket for a nice vacation. Has the team confined itself to efficiency, or has it crossed the line into unlawful compensation? Prizes are both a reward and an inducement, but they are not compensation, especially when they are awarded on a lottery basis. Moreover, it is hard to see *DuPont's* "bilateral interaction" implicated in such a plan. The point is that *Electromation* leaves a fairly open field to employers who carefully direct teams toward efficiency and work process objectives and apply this guidance decision creatively.

222 See, e.g., Arnold E. Perl, *Employee Involvement Groups: The Outcry over the NLRB's Electromation Decision*, 44 LAB. L.J. 195 (1993); Michael Verespej, *New Rules on Employee Involvement*, BUS. WK., Feb. 1, 1993, at 55-58; Steven Weinstein, *Teams In Trouble?* PROGRESSIVE GROCER, Feb. 1, 1993, at 93-95.

223 A web-page posting of advice by John E. Lynchski, a Pittsburgh management attorney with the law firm of Cohen & Grigsby, offers advice along these lines:

Minimize Support: An employer should limit the financial and other support provided to the committee. Participants should not receive any extra pay or benefit for being on the committee.

Let the Committee Run the Committee: Employers should allow the committee to establish its own policies, procedures and guidelines. Employers should also let the committee pick new members once original members no longer take part.

Avoid Having Employees Act in a Representational Capacity: Debating or bargaining over workplace issues with employees who act as representatives for the workforce moves the dialog from communications and more toward negotiations, and will likely result in an NLRB finding of illegality.

Break the Committee into Subcommittees: If separate subcommittees discuss different issues, employers won't have to drop the whole process just because some aspect steps across the NLRB's line.

Stress the Group's Communication Role: An employer should emphasize the communications aspects of the group.

John E. Lynchski, *Will the Rewards of Employee Participation Committees Outweigh the Risk That The NLRB Finds Some Illegal?* (visited Aug. 24, 1997) <<http://www.stellar.org/global/e-hr3.html>>.

Finally, these two cases are significant because, without them, it would be hard to see where the Board's post-*Electromotion* rulings have drawn any line. Arguably, no line exists unless some decisions find employer violations and others do not. These two cases indicate that in the absence of legislation, the Board is incrementally expanding earlier precedents that permit employers to deal with nonunion teams.²²⁴

D. Post-*Electromotion* Appellate Cases Involving Section 8(a)(2) Violations

Two appeals courts have reviewed the section 8(a)(2) cases since the Board decided *Electromotion*. One reviewed the Board's *Electromotion* decision;²²⁵ the other reviewed *Peninsula General Hospital Medical Center*.²²⁶ Both decisions carefully reviewed the legislative history of section 8(a)(2) and its judicial interpretation.²²⁷ They also wrestled with the fact that a 1935 law intended to outlaw rampant sham-unionism is now applied in a different economic and organizational-management context.²²⁸ In both cases, a union organizing drive coincided with an employer's attempt to implement new participatory programs, and the Board ruled that the resulting employee organizations were unlawfully dominated section 2(5) labor organizations.

Why, then, did these courts reach conflicting rulings? The factual differences were not great enough to warrant this. If anything, one would reason that the *Electromotion* court would reverse the Board's ruling, because that employer disbanded its employee committees immediately after learning that a union campaign was underway. Similarly, one would expect that the *Peninsula* court would affirm the

224 Important precedents include *John Ascuaga's Nugget*, 230 N.L.R.B. 275 (1977), available in 1977 WL 8927, and *Mercy Memorial Hosp.*, 231 N.L.R.B. 1108 (1977), available in 1977 WL 9502, which involved total employer delegation of authority to employee groups to adjudicate disciplinary grievances and *General Foods Corp.*, 231 N.L.R.B. 1232 (1977), available in 1977 WL 9495, where the Board upheld employer creation of a job enrichment program in which management delegated the functions of investigating plant safety, job evaluation, and drafting of job descriptions.

225 *Electromotion, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

226 *NLRB v. Peninsula Gen. Hosp. Med. Ctr.*, 36 F.3d 1262 (4th Cir. 1994).

227 The *Electromotion* court reviewed this. See *Electromotion*, 35 F.3d at 1163-68. The *Peninsula* court reviewed this as well. See *Peninsula*, 36 F.3d at 1264-65, 1270-72.

228 The *Electromotion* court acknowledged that "in an effort to succeed in an increasingly competitive global marketplace, many United States companies have developed employee involvement structures which encourage employee participation . . ." *Electromotion*, 35 F.3d at 1156. In a similar vein, the *Peninsula* court stated "employee participation programs have become a vital part of American industry . . ." *Peninsula*, 36 F.3d at 1265 (citation omitted).

Board's ruling because the hospital intensified its reorganizational efforts after learning that the same kind of drive was occurring in its workplace. What accounts for the difference is judicial temperament: the *Electromation* court properly carried out a narrow review, while the *Peninsula* court substituted its fact-finding for the Board's.

The *Peninsula* court said all the right things about its scope of review for NLRB decisions. It noted that the "determination of whether an employee organization is a 'labor organization' is a matter within the Board's expertise, and therefore, lies in the first instance with the Board."²²⁹ In a related vein, the NLRA requires federal courts "to uphold the Board's factual findings if they are supported by substantial evidence on the record."²³⁰

The court lost sight of these limitations when it failed to defer to the Board's fact-findings. The Board thought it relevant that the NSO, which had existed since 1976, changed its purpose in 1989, within months of a union organizing campaign;²³¹ but the court saw no connection in this timing when it concluded that "unrelated to the NSO, the operating room nurses conducted their job action and, at roughly the same time, the Association began an organizing campaign at the hospital."²³² When a management liaison for the NSO stated that she saw a need for the NSO to "communicate" with nurses concerning matters such as differential pay, the court seized on this verb to conclude this interaction fell outside the bounds of bilateral interaction.²³³ In contrast, the Board viewed this "communication" as part of a change in the NSO's purpose, moving it away from a professional service organization to a representational form that was intended to function as a union substitute.²³⁴ The Board also viewed a survey that was administered after the NSO was reorganized as evidence of bilateral interaction, because many of the survey responses dealt with employment matters and because management intended to act on them.²³⁵ The court, although lacking power to be a fact-finder, nevertheless negated the Board's reasonable inference when it stated, "We

229 *Peninsula*, 36 F.3d at 1269 (quoting *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 178-82 (1962)).

230 *Id.* (citing 29 U.S.C. §§ 160(e) and (f), and also citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938) (holding that substantial evidence is more than a scintilla but less than a preponderance)).

231 *Id.* at 1272.

232 *Id.* at 1272 n.13.

233 *Id.* at 1272.

234 *Id.* at 1273.

235 *Id.*

find this [inference] to be purely speculative and directly contrary to the undisputed evidence in the record."²³⁶

At the core of its rejection of the Board's fact-findings, the court viewed management's change in the structure of the NSO, beginning with a statement of intent to make such a change in late October 1989, as disconnected from the job-action and formal beginning of an organizing drive that occurred less than three months later.²³⁷ The Board, by contrast, was impressed by the fact that these organizational changes and the association's organizing drive virtually overlapped; it therefore concluded that hospital management overhauled the NSO to stave off the possibility of bargaining with a union. The court trivialized this change "as part of the budget process."²³⁸

III. THE REVISED TEAM ACT

A. *The TEAM Act in the 104th Congress*

As I noted in my 1996 Article, the 104th Congress first considered a version of the TEAM Act that merely proposed to codify *Electromotion's* guidance precepts.²³⁹ The initial bill was ironic because it proposed to codify an NLRB decision which employers and Republicans vehemently protested.²⁴⁰ I therefore concluded that this bill was partly an exercise in "demonstrating Republican prowess in legislating against labor's will."²⁴¹

Representative Steve Gunderson (R., Wis.) was the chief sponsor of the first version of the TEAM Act.²⁴² In all likelihood, he did not offer this mild version out of philosophical preference, but rather, in

236 *Id.*

237 *Id.* (noting that "[b]ecause Peninsula had, as of October 23, implemented several measures which were seemingly responsive to the nurses' concerns, the Board argues that this shows that Peninsula responded to the NSO's proposals and, therefore, 'dealt with' the NSO," but disputing that any evidence in the record supported this inference).

238 *Id.* at 1274.

239 See LeRoy, *supra* note 35, at 240 (concluding that "[o]n its face, then, the TEAM Act is a very limited proposal to codify much of *Electromotion's* and *DuPont's* guidance language.").

240 See *id.* (observing that employers "responded with alarm to these principles" when the Board first set them forth).

241 *Id.* at 262.

242 See *Statement by Rep. Gunderson and Text of Teamwork for Employees and Managers Act*, Daily Lab. Rep. (BNA) No. 20, at D-25 (Jan. 31, 1995) (reporting on Rep. Gunderson's introduction of the TEAM Act and reprinting the bill).

anticipation of President Clinton's threatened veto of his bill.²⁴³ In effect, he dared the President to reject a bill that codified an NLRB decision that *unions* found desirable only a few years earlier. During committee hearings, however, Gunderson's Republican colleagues expressed unease and sought more protections for nonunion teams.²⁴⁴ Shortly thereafter, the bill was amended along these lines.²⁴⁵

The House narrowly passed H.R. 743 on September 27, 1995.²⁴⁶ When the Senate version was on the floor for a vote, moderate Democrats such as Senator Jeff Bingaman (D., N.M.) unsuccessfully tried to find a legislative compromise that would make the bill veto-proof.²⁴⁷ These efforts failed and H.R. 743 passed by an even slimmer margin on July 10, 1996.²⁴⁸ As he promised, President Clinton vetoed the bill,²⁴⁹ and subsequent efforts to override his veto were fruitless.²⁵⁰ In

243 The President threatened to veto this legislation in the early days of the 104th Congress. See *White House Offers Protection to Unions*, CHARLESTON DAILY MAIL, Feb. 21, 1995, at 1D, available in 1995 WL 11623583.

244 See Michelle Amber, *AFL-CIO: Gore Says Clinton Would Veto Repeal of Davis-Bacon, Service Contract Acts*, Daily Lab. Rep. (BNA) No. 35, D-6 (Feb. 22, 1995) (reporting that the House Chairman of the Committee on Economic and Educational Opportunities suggested that Rep. Gunderson meet with business leaders to hear their concerns about this legislation).

245 See Court Gifford, *Employee Involvement: House Panel Clears TEAM Act; Reich Threatens Veto by Clinton*, Daily Lab. Rep. (BNA) No. 45, at D-4 (March 8, 1995) (reporting that a House subcommittee voted 8-4 to approve a substitute version of the bill).

246 See *Business Praises House TEAM Act Passage; Labor Notes Close Margin*, Daily Lab. Rep. (BNA) No. 189, D-7 (Sept. 29, 1995) (reporting passage of the bill on a 221-202 vote).

247 Summarizing the futility of this task, Sen. Bingaman spoke before the full Senate just prior to that chamber's vote on the TEAM Act:

[A]fter several weeks of trying to find this common ground to propose a substitute for the bill that we are considering, I have concluded that it is not possible at this time. The organization of employers that has been formed to support the TEAM Act has determined to resist amendments and to drive toward passage of S. 295 even though this legislation faces a sure veto by the President. The labor unions, on the other hand, have organized to oppose the TEAM Act. Relying on the President's promised veto, they have determined that the TEAM Act or any substitute for it which amends Section 8(a)(2) should be opposed.

142 CONG. REC. S7508-02 (daily ed. July 10, 1996) (statement of Sen. Bingaman), available in 1996 WL 385048.

248 See *TEAM Act Clears Senate, Clinton Veto Expected*, Daily Lab. Rep. (BNA) No. 133, at D-2 (July 11, 1996) (reporting passage of the bill on a 53-46 vote).

249 See White House Office of Communications, *Veto of Employees and Managers TEAMWORK Act*, July 30, 1996, available in 1996 WL 425665. The President explained:

all likelihood, he vetoed the bill because unions strongly opposed it²⁵¹

I am returning herewith without my approval, H.R. 743, the "Teamwork for Employees and Managers Act of 1995." This act would undermine crucial employee protections.

I strongly support workplace practices that promote cooperative labor-management relations. In order for the United States to remain globally competitive into the next century, employees must recognize their stake in their employer's business, employers must value their employees' labor, and each must work in partnership with each other. Cooperative efforts, by promoting mutual trust and respect, can encourage innovation, improve productivity, and enhance the efficiency and performance of American workplaces.

Current law provides for a wide variety of cooperative workplace efforts. It permits employers to work with employees in quality circles to improve quality, efficiency, and productivity. Current law also allows employers to delegate significant managerial responsibilities to employee work teams, sponsor brainstorming sessions, and solicit employee suggestions and criticisms. Today, 30,000 workplaces across the country have employee involvement plans. According to one recent survey, 96% of large employers already have established such programs.

I strongly support further labor-management cooperation within the broad parameters allowed under current law. To the extent that recent National Labor Relations Board (NLRB) decisions have created uncertainty as to the scope of permissible cooperation, the NLRB, in the exercise of its independent authority, should provide guidance to clarify the broad legal boundaries of labor-management teamwork. The Congress rejected a more narrowly defined proposal designed to accomplish that objective.

Instead, this legislation, rather than promoting genuine teamwork, would undermine the system of collective bargaining that has served this country so well for many decades. It would do this by allowing employers to establish company unions where no union currently exists and permitting company-dominated unions where employees are in the process of determining whether to be represented by a union. Rather than encouraging true workplace cooperation, this bill would abolish protections that ensure democratic representation in the workplace.

True cooperative efforts must be based on true partnerships. A context of mutual trust and respect encourages the prospect for achieving workplace innovation, improved productivity, and enhanced efficiency and workplace performance. Any ambiguities in this situation should be resolved, but without weakening or eliminating fundamental rights of employees to collective bargaining.

Id.

250 See *Kassebaum Hits Clinton's TEAM Act Veto as Election-Year Move to Placate Labor*, Daily Lab. Rep. (BNA) No. 148, at D-8 (Aug. 1, 1996) (reporting Senate Majority Leader Trent Lott's view that an override vote would be unlikely to occur).

251 An undated memorandum prepared by the national AFL-CIO explained the labor federation's opposition to the bill. In sum, the memo argued that (1) "[t]he TEAM Act will allow employers to resurrect company unions of the past," (2) "[t]he TEAM Act will take away fundamental democratic rights that workers currently en-

and contributed large sums of money to his re-election campaign.²⁵² Moreover, in stump speeches leading up to the 1996 elections, the administration stated its alliance with the AFL-CIO in opposing the TEAM Act²⁵³ and thought the bill was important enough to include in the Democratic Party platform.²⁵⁴

B. *The TEAM Act in the 105th Congress*

Having retained control of the Congress in the 1996 elections, Republicans identified the TEAM Act as an important legislative priority.²⁵⁵ The bill was reintroduced early in the 105th Congress in the form that the 104th Congress passed.²⁵⁶ Reflecting the priority that Republicans assigned it, the bill moved swiftly through the Senate Committee on Labor and Human Resources. Before a key committee vote, a leading opponent, Senator Edward Kennedy (D., Mass.), offered four amendments during the bill's mark-up.²⁵⁷ These would have (1) prohibited employers from implementing employee involve-

joy," (3) "[c]arving out union-represented employers does not cure the fatal flaws of S. 295," (4) "[t]he TEAM Act will tilt the careful balance of labor relations heavily in favor of management," (5) "[t]he TEAM Act is unnecessary—current law does not prohibit legitimate labor management cooperation." Undated and untitled legislative memorandum prepared by Maria C. Fiordellisi, Legislative Representative, AFL-CIO (copy on file with author).

252 Shortly before he vetoed the TEAM Act, the President received donations totaling \$230,000 from the Laborers International Union, \$100,000 from the American Federation of Teachers, and \$250,000 from the Communications Workers Union. See Ruth Marcus & Charles R. Babcock, *Parties' National Committees Set Record for 'Soft Money'*, WASH. POST, July 18, 1996, at A8.

253 See, e.g., Vice President Al Gore's Remarks to United Auto Workers Convention, Washington, D.C. (Feb. 7, 1995) (copy on file with author). In his remarks, the Vice President stated that "[w]hen we see the Republicans urging modification of section 8(a)(2) of the National Labor Relations Act, we draw the line. We oppose tampering with the prohibition against company dominated unions!"; Pamela M. Prah, *Clinton Seeks USW Delegates' Support in Getting Democrats Elected at All Levels*, Daily Lab. Rep. (BNA) No. 155, at D-5 (Aug. 12, 1996) (reporting that the President addressed the Steelworkers' convention via satellite, in part, to state his shared opposition to the TEAM Act).

254 See Pamela M. Prah, *Union Rights, Job Training, Immigration Spotlights in Draft Democratic Platform*, Daily Lab. Rep. (BNA) No. 148, at D-10 (Aug. 1, 1996) (reporting that a draft of the platform stated that "[w]e vigorously oppose the Republican efforts . . . to undermine collective bargaining through the TEAM Act.>").

255 See *Comp Time, TEAM Act Rank Among Goodling's Top Priorities*, Daily Lab. Rep. (BNA) No. 227, at D-2 (Nov. 25, 1996).

256 See *Fawell Introduces TEAM Act in House; Hearing Set on Companion Bill in Senate*, Daily Lab. Rep. (BNA) No. 27, at D-11 (Feb. 10, 1997).

257 See Court Gifford, *Senate Panel Rejects Kennedy Amendments, Will Resume Markup of TEAM Act March 5*, Daily Lab. Rep. (BNA) No. 41, at D-7 (March 3, 1997).

ment committees during union organizing campaigns, (2) provided employees triple back pay if they were fired during union organizing campaigns, (3) required an employer to provide a union access to the workplace if an employer conducted a captive audience meeting, and (4) authorized the NLRB to seek injunctions to reinstate employees who are discharged during union organizing campaigns. Senator James Jeffords (R., Vt.), chair of the Senate Labor and Human Resources Committee, urged his committee to defeat all four amendments, and subsequently, these amendments were defeated on a 10-8 vote along party lines.²⁵⁸

A virtual repeat of the bill's previous experience is quite possible, but there are indications that it may be enacted. One difference from past experience is that a Democratic senator with a solid record for voting in favor of AFL-CIO policy positions, Senator Bingaman (D., N.M.) has already voted with Republicans during a key committee vote.²⁵⁹ The significance of his vote is two-fold. It increases the possibility that moderate and conservative Democrats may cross party lines to support this legislation. In addition, Senator Bingaman, who tried unsuccessfully to broker a compromise in 1996, is now in a stronger position to negotiate such a compromise with his Republican counterparts, because TEAM Act supporters are likely to see him as bridge for winning more Democrats.

Another difference from past experience is that some Democrats are threatening to filibuster the bill.²⁶⁰ This extreme measure, a tactic that empowers a minority of senators, implies that the bill has a stronger prospect of enactment. A bill that had less chance of compromise and eventual passage probably would not elicit this extreme response.

The National Association of Manufacturers' moderate tone adds another difference. This influential lobby group for employers expressed optimism that a legislative compromise would be worked out to avert a presidential veto.²⁶¹

258 See *id.*

259 See Court Gifford, *Senate Panel Approves TEAM Act, Democrats Warn of Floor Fight, Filibuster*, Daily Lab. Rep. (BNA) No. 44, at D-7 (March 6, 1997).

260 See *id.* (indicating that Sen. Kennedy and other Democrats on the labor committee are prepared to filibuster the bill and otherwise mount a floor fight once it reaches the floor for a vote).

261 See *NAM Offers Agenda for Helping Workers that Stresses Worker Involvement of TEAM*, Daily Lab. Rep. (BNA) No. 39, at A-5 (Feb. 27, 1997) (reporting NAM president Jerry Jasinski's view that a compromise could be brokered and a repeat veto of the TEAM Act avoided).

Table 1

Comparison of TEAM Act Language, 104th and 105th Congress
(Differences in *Italics*)

104TH CONGRESS

INITIAL VERSION OF H.R. 743

[INTRODUCED JAN. 30, 1995]

SECTION 8(A)(2) SHALL BE AMENDED
TO ADD:

Provided further, That it shall not constitute or be evidence of an unfair labor practice for any employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim or seek authority to enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.

[AMENDED AS STATED IN ADJOINING
COLUMN AND PASSED BY HOUSE
SUBCOMMITTEE ON MARCH 7, 1997]

105TH CONGRESS

REVISED VERSION OF H.R. 743

[INTRODUCED FEB. 3, 1997]

SECTION 8(A)(2) SHALL BE AMENDED
TO ADD:

Provided further, That it shall not constitute or be evidence of an unfair labor practice for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate *to at least the same extent practicable as representatives of management participate*, to address matters of mutual interest, including, *but not limited to*, issues of quality, productivity, efficiency, and *safety and health*, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to enter into collective bargaining agreements between the employer and any labor organization, *except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.*

IV. FINDINGS OF EMPLOYER "DEALING WITH" AND DOMINATION OF EMPLOYEE TEAMS

A. *Revised Research Questions in Wave 2 of the Team Survey*

Wave 2 of this survey mostly replicated my first *Electromation* compliance survey.²⁶² I made some changes, however, to reflect new NLRB case law. I expanded the list of workplace subjects teams handle to include four additional subjects. Management of diversity was added because more teams are being asked to perform this function.²⁶³ Team handling of employee handbooks was added in light of the experience disclosed in *Stoody Co.*²⁶⁴ Grievances were added be-

262 See LeRoy, *supra* note 35, at 262-66.

263 See *supra* notes 29-32 and accompanying text.

264 See *supra* notes 204-09 and accompanying text.

cause the team in *Keeler Brass Automotive Group* dealt with this subject.²⁶⁵ Scheduling was added because this seemingly mundane issue triggered recent labor disputes,²⁶⁶ was raised in the form of a proposed legislative amendment to the Fair Labor Standards Act,²⁶⁷ and was included in the section 2(5) listing of subjects handled by a labor organization.²⁶⁸

I also tried to measure more clearly the degree to which employees and managers directed team activities. Thus, I expanded Item III(4) in my first survey, which simply asked respondents to answer whether the group's work was determined by management directive, management-employee consensus, or employee initiative. In the second wave, Item III(4) asked, "Who directs the team's or group's activities? Check more than one if applicable." I then created separate sections for respondents to assess the extent to which management, employees, and management and employees jointly direct these activities. I made this revision because my original question forced respondents to choose among three categorical responses without weighing relative degrees of control within these responses. I also probed more deeply into whether teams experienced disagreements and, if so, how these were resolved. *Keeler Brass Automotive Group*, involving an employer who disagreed with its grievance committee's decisions, prompted this new line of questioning.²⁶⁹

B. Sampling Method

Senior HR managers who attended a Labor Policy Association (LPA) conference were asked to participate in this survey. As a result, teams at six Fortune 500 companies were surveyed between April and July 1997. Neither the LPA nor any participating employer revised, restated, deleted, or otherwise modified any survey item that was

265 See *supra* notes 182-87 and accompanying text.

266 Two large employers, Staley and Dial Corp., locked out employees after their workers refused to agree to concessions to eliminate eight-hour work shifts that were consistently scheduled during the day or night. See *57% of Staley Union Workers Reject Contract*, PEORIA J. STAR, July 11, 1995, at C7, available in 1995 WL 3247702; and Donald E. Franklin, *Dial Locks Out 386 Workers at Local Plant*, ST. LOUIS POST-DISPATCH, July 2, 1993, at 7A, available in 1993 WL 8028006.

267 See Court Gifford, *White House Draws Line on Comp Time; Won't Negotiate with GOP over Flextime*, Daily Lab. Rep. (BNA) No. 110, at D-18 (June 9, 1997) (reporting on the Family Friendly Workplace Act, S. 4, 105th Cong. (1997), a Republican bill to amend the FLSA by substituting compensatory time off for mandatory time-and-a-half overtime pay).

268 The definition of subjects handled by a section 2(5) labor organization includes "hours of employment." See *supra* note 10.

269 See *supra* notes 183-84.

presented at its March meeting. In addition, neither the LPA nor any employer funded this research.

These senior-level officers were asked to identify one or more nonunion locations with employee teams. Surveys were then provided for each specific team at a given location.²⁷⁰ Respondents could be either a manager or a non-supervisory employee. A survey item asked about their supervisory status.²⁷¹ The first page of the survey was on University of Illinois stationery, with my phone number and address clearly printed. Respondents were instructed to answer the survey truthfully and completely, and to mail the survey directly to me or to place the survey in a sealed envelope and return it to a central collection point for the participating firm. All participating firms were expressly told that a survey delivered to me with a broken seal would not be counted.

C. Methodology Flaws

The survey used in this study provides a starting point for a study that would produce generalizable results. A better survey, however, would sample many hundreds of nonunion teams among large and small employers over more diverse industries. It would also improve on the questions in this survey by asking for more specific information. For example, it would probe more deeply into the answers revealing that team participation improved employer-employee communication and also improved employee pay. Specifically, it would ask whether improved employer-employee communication lessened the appeal of a union for team members, and whether improved pay resulted from a gainsharing policy that the employer implemented outside of the team's decision-making framework. An improved survey would also be longitudinal; that is, it would track the same teams over time and would periodically survey them to determine whether and how they evolve. A sophisticated analysis of many teams would also contemplate that some would be affected by union organizing campaigns, and would analyze campaign outcomes in light of team characteristics.

270 The sample drew from worksites in six states: Oklahoma, Utah, Illinois, Colorado, Ohio, and Pennsylvania.

271 Managers completed 67% of surveys; non-supervisory employees completed 33%.

Figure 1A
Are Teams Section 2(5) Labor Organizations?
Characteristics of 78 Nonunion Work Teams

<i>Inquiry</i>	<i>Compliance</i>	<i>Fuzzy Compliance</i>	<i>Non-Compliance</i>
<i>"Dealing with" employees: How does team interact with management?</i>	1 (1.3%) Discuss without deciding/ suggesting 24 (30.8%) Offer suggestions 35 (44.9%) Interact with customers	37 (47.4%)* Make proposal that mgmt. considers 16 (20.5%)* Team reaches decisions by voting 37 (47.4%)* Team reaches decisions by informal consensus	
<i>What subjects does the team handle?</i>	64 (82.1%) Work process 62 (79.5%) Product quality	12 (15.4%) Other	13 (16.7%) Discipline 13 (16.7%) Diversity 12 (15.4%) Grievance 8 (10.3%) Handbook 9 (11.5%) Health/Fitness 5 (6.4%) Insurance 6 (7.7%) Leave 9 (11.5%) Pay 39 (50.0%) Safety 54 (69.2%) Schedule 13 (16.7%) Tardy/Absence 21 (26.9%) Vacation

* Note: 85% of the teams had managers participate with employees in these interactions.

Figure 1B Section 8(a) (2): Do Employers Dominate Teams?			
<i>Inquiry</i>	<i>Compliance</i>	<i>Fuzzy Compliance</i>	<i>Non-Compliance</i>
<i>Who created the team?</i>	2 (2.6%) Employees	38 (47.7%) Mgmt. and employees	38 (47.7%) Management
<i>Who selects Non-supervisory employees to teams?</i>	32 (41.0%) Volunteer 28 (35.9%) Peers		39 (50.0%) Managers 30 (39.0%) Part of job
<i>Who directs team?</i>	12 (15.8%) Mgmt. rarely directs 5 (6.6%) Mgmt. never directs 6 (7.8%) Employees always direct 29 (37.7%) Employees usually direct 2 (2.6%) Employees veto actions	25 (32.9%) Mgmt. occasionally directs 36 (46.8%) Employees occasionally direct	6 (7.9%) Mgmt. always directs 28 (36.8%) Mgmt. usually directs 5 (6.6%) Mgmt. vetoes actions 4 (5.2%) Employees rarely direct 3 (3.9%) Employees never direct

D. Research Findings

Figures 1A and 1B summarize my data analysis. It is important to understand that survey items permitted respondents to check more than one answer, where applicable. To illustrate, some teams interact in several different ways by discussing some matters without making a proposal to management, by reaching decisions on other issues, and by presenting formal proposals to management. Thus, percentage totals in Figures 1A and 1B do not sum to 100%.

Finding 1: Most of the surveyed teams are small.

The average team had nine members.²⁷² Almost two-thirds (62.8%) of the surveyed teams had ten or fewer members. An additional 25.7% of the surveyed teams had eleven to twenty members. Thus, 88.5% of the surveyed teams have twenty or fewer members.

²⁷² The median is used here.

Compared to teams in my first survey, a much greater percentage of teams in this survey are smaller.²⁷³

Finding 2: Most of the teams came into existence in the past four years, after the Board rendered its *Electromation* decision.

Fifty-three of the teams (67.9%) have been in existence four years or less. Seventeen teams (21.8%) have been in existence one year or less, and nineteen teams (24.4%) have been in existence two years.

Finding 3: Roughly half the teams appear to have bilateral interactions with management that are in a fuzzy compliance zone regarding the section 2(5) "dealing with" test.

My analysis for this finding began by examining how many teams are composed of managers and non-supervisory employees. Eighty-five percent of the teams have this composition. The Board considered this matter as an important factor in determining whether the employer in *DuPont* was "dealing with" employee teams:

All the committees discussed proposals with management representatives inside the committees. Each committee has management representatives who are full participating members. These representatives interact with employee committee-members under the rules of consensus decision-making as defined in the Respondent's Personal Effectiveness Process handbook. The handbook states: "consensus is reached when all members of the group, including its leader, are willing to accept a decision." Under this style of operation, the management members of the committees discuss proposals with unit employee members and have the power to reject any proposal. Clearly, if management members outside the committee had that power, there would be "dealing" between the employee committee and management.²⁷⁴

However, the Board did not believe that a team's composition necessarily indicated section 2(5) "dealing with":

In our view, the fact that the management persons are on the committee is only a difference of form; it is not a difference of substance. As a practical matter, if management representatives can reject employee proposals, it makes no real difference whether they do so from inside or outside the committee. In circumstances where management members of the committee discuss proposals

²⁷³ Compare LeRoy, *supra* note 35, at 244, Finding 1 (reporting that only six of twenty-two (27.8%) teams had fewer than ten members, and an additional five teams (22.7%) had ten to nineteen members).

²⁷⁴ E.I. DuPont & Co., 311 N.L.R.B. 893, 895 (1993), *available in* 1993 WL 191471.

with employee members and have the power to reject any proposal, we find that there is "dealing" within the meaning of Section 2(5).²⁷⁵

On the other hand, the Board noted:

The mere presence, however, of management members on a committee would not necessarily result in a finding that the committee deals with the employer within the meaning of Section 2(5). For example, there would 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. Similarly, there would be no "dealing" if management representatives participated on the committee as observers or facilitators without the right to vote on committee proposals.²⁷⁶

In view of this doctrinal vagueness, I categorized responses indicating that teams make proposals or make decisions by taking votes or reaching consensus in the fuzzy compliance category. As the foregoing discussion indicates, however, there are circumstances where intra-team actions such as voting, forming consensus, and making proposals can constitute statutory "dealing with" (that is, where dealing with occurs as a function of non-supervisory employees and management representatives engaged in bilateral exchanges *within* a team setting).

In light of the foregoing discussion, and after observing that so many teams in this survey have a manager present on a team, I moved responses for "[team] makes proposals" item out of the compliance cell in my earlier analysis,²⁷⁷ and placed it in the fuzzy compliance cell. Almost half the teams have this interactional method (thirty-seven, or 47.4%). The same number also interact by reaching an informal consensus.

A smaller percentage of teams engage in unambiguously safe forms of interactions. Only one team (1.3%) limited itself to discussing matters without reaching decisions or even making suggestions. Twenty-four teams (30.8%) offered suggestions. To the best of my knowledge, no prior study has attempted to quantify the extent to which teams interact with customers. Almost half the surveyed teams (thirty-five, or 44.9%) do this.

275 *Id.*

276 *Id.*

277 LeRoy, *supra* note 35, Fig. 2 at 246.

Finding 4: Most teams are involved in "safe-harbor" functions such as improving work processes and product or service quality.

Four out of five teams are involved in attempting to improve work processes (sixty-four, or 82.1%) and product or service quality (sixty-two, or 79.5%).

Finding 5: In addition to their involvement with "safe-harbor" functions such as improving work processes and product or service quality, most teams are involved in a variety of functions that relate to aspects of the employment relationship.

Team handling of employee scheduling is the most common of these activities (fifty-four, or 69.2%), followed by safety and accident prevention (thirty-nine, or 50%). Apart from these functions, teams are much less likely to be involved with other functions. Team handling of employee vacations is the next most frequent activity (twenty-one, or 26.9%). A persistent minority of teams appear to be involved with many functions. These include formulating and administering policies for tardiness and absences (thirteen, or 16.7%) and more general disciplinary matters (thirteen, or 16.7%), employee grievance systems (twelve, or 15.4%), pay (nine, or 11.5%), health and fitness (nine, or 11.5%), employee handbook (eight, or 10.3%), leave (six, or 7.7%), and insurance benefits (five, or 6.4%).

Finding 6: Almost all teams are created either by management, or by management and employees; virtually no teams are created exclusively by employees.

Only two teams (2.6%) were created by employees. Management had a hand in creating all other teams (thirty-eight, or 47.7% were created by management and employees acting together, and the same number were unilaterally created by management).

Finding 7: Teams are staffed by a variety of methods, with no single method predominating; these include self-selection, peer-selection, management-selection, and definition of job duties.

Management selection of team members is the most common recruitment method, but only half the surveyed teams (thirty-nine) use this method. Moreover, other selection methods are used almost as frequently: employees volunteer in thirty-two teams (41%), participate

as part of their formal job duties in thirty teams (39%), or are selected by peers in twenty-eight teams (35.9%).

Finding 8: Roughly 90% of teams are equally divided among those that are essentially directed by management and those that are essentially directed by employees; but within these spheres of influence, the less dominant group rarely is disenfranchised or marginalized in directing team activities.

Respondents were asked to consider separately the extent to which managers and employees direct team activities. The purpose in framing their assessment in this fashion was to encourage the respondents to concentrate their thinking on these separate groups of people. Overall, these dual assessments were consistent.

Roughly 90% of the teams divide equally into two spheres of influence, one controlled by management and one controlled by employees. Nearly half of the teams are perceived to be always directed (six, or 7.9%) or usually directed (twenty-eight, or 36.8%) by management; but nearly half of the teams are also perceived to be always directed (six, or 7.9%) or usually directed (twenty-nine, or 37.7%) by employees.

Although one group appears to be in control in teams, the less dominant group rarely seems to be disenfranchised or marginalized in directing teams. Employees occasionally direct almost half of the teams (thirty-six, or 46.8%), and management occasionally directs almost one-third of the teams (twenty-five, or 32.9%). Further reinforcing this conclusion, relatively few teams have one group controlling team activities to the exclusion of the other group. In only seventeen (22.4%) teams, management never or rarely directs activities. Even fewer teams (seven, or 9.2%) have employees who never or rarely direct activities.

V. CONCLUSIONS AND PUBLIC POLICY IMPLICATIONS

1. This survey discloses no evidence that teams are like company unions from the 1930s. The small size of the surveyed teams found here is similar to the findings of other studies.²⁷⁸ Company unions, by contrast, were typically engaged in large-scale settings. A 1935 Department of Labor study surveyed 14,725 employers and found that company unions were single agencies that tended to concentrate in

278 See Thomas Li-Ping Tang & Amy Beth Crofford, *Self-Managing Work Teams*, EMPLOYMENT REL. TODAY, Dec. 1, 1995, at 29, 33 (studying teams at numerous corporations and reporting that team cells had an average of six members).

establishments that employed 200–499 people.²⁷⁹ Other evidence in this study tends to refute the notion that teams are reincarnations of company unions. Finding 7, showing that employees control the activities of roughly half of the nonunion teams surveyed, and that employees exert little control in only one in ten teams, supports this conclusion.

This finding has some import for the current debate on the TEAM Act because unions claim that many nonunion teams are simply throw-backs to company unions.²⁸⁰ By lumping all or most teams into this category, unions miss an opportunity to show that *some* teams are used just as company unions were to interfere with organizing efforts.²⁸¹

Thus, their insistence that teams equate to company unions appears to be disengaged from the particulars of the bill they so fervently oppose. One of the TEAM Act's key findings reflects labor's concern that nonunion teams not be used for illegitimate purposes.²⁸² Moreover, unions fail to recognize that the main protection against company unions was written into the NLRA's statutory definition of a labor organization, and the TEAM Act proposes no amendment of section 2(5).²⁸³ Concerning this feature of the bill, I testified that:

Whereas Section 2(5) prohibits an employer from "*dealing with*" employees concerning subjects such as pay, work conditions and grievances, the TEAM Act creates a safe harbor only for an employee involvement organization where management representatives and employees "*address matters of mutual interest.*" This is a meaningful semantic difference. The term "*dealing with*" clearly connotes bargaining and negotiating—that is, the process of making a proposal

279 U.S. Department of Labor, *supra* note 4, at 46 tbl. 4, data—cols. 7, 8 (showing that only 11.5% of establishments with company unions had fewer than fifty employees, but 16.5% had 100–99 employees, 27.0% had 200–499 employees, and 14.7% had 500–999 employees).

280 See testimony of Hiatt and Muehlenkamp, *supra* note 18.

281 See *supra* notes 63–141, and cases in accompanying text.

282 In its proposed findings, section 6 of the TEAM Act states that "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." S. 295 and H.R. 634, 105th Cong. §6 (1997).

283 See *The Teamwork For Employees and Managers (TEAM) Act of 1997: Hearings Before the Senate Comm. on Labor and Human Resources*, 105th Cong. (1997), available in 1997 WL 63032 (testimony of Michael H. LeRoy) ("An objective and careful analysis of this bill shows . . . that the Section 2(5) definition of a labor organization remains absolutely unchanged. This is a vital point. Thus, the legislative history behind this very essential definition of a company union remains as pertinent in 1997 as it did in 1935.").

and receiving a counter-proposal. *Webster's New Collegiate Dictionary* offers this definition of the verb form of deal: "to engage in bargaining."

The verb phrase in the TEAM Act, "to address," has two alternative definitions in *Webster's Dictionary* that fit this context, "to deal with," or "to communicate directly." The first definition does not fit for the simple reason that these words have special significance under Section 2(5), and as I stated, that section remains intact under the TEAM Act. To adopt this interpretation would nullify Section 2(5), which, of course, cannot happen under this proposed law. So, that leaves "to communicate directly," and that, in fact, is what legitimate Employee Involvement programs purport to do²⁸⁴

I concluded that "[t]o discuss is synonymous with 'to communicate directly'; it is not consistent with the phrase 'deal with.'"²⁸⁵

These facts lead to the conclusion that the TEAM Act is a limited effort to legalize communication and collaboration between employees and managements in nonunion settings without diminishing the NLRA's protections against sham or company unions.

2. Although this study finds no evidence that current teams are like company unions, teams in this second survey differ markedly from the teams I surveyed only two years ago. Remarkably, 46.2% of the teams in this survey were created in this very short time. At a minimum, this suggests that employers are creating new teams notwithstanding *Electromation's* supposed chilling effect.²⁸⁶ The findings presented here therefore lend some support to Senator Kennedy's argument that NLRB disposition of section 8(a)(2) cases is not as much of a problem as TEAM Act supporters suggest.²⁸⁷

Another aspect of the findings undermine, however, the argument that this legislation is merely an issue in search of a real problem.²⁸⁸ Many more teams in this survey appear to be subject to

284 *Id.*

285 *Id.*

286 For a classic and overblown version of this argument, see Wellins' Senate testimony, *supra* note 50.

287 LeRoy, *supra* note 35, at 244-51.

288 See S. REP. NO. 105-12, at 30 (1997), where the minority Report, in a section titled "The Chilling Effect is a Myth," argued:

Proponents have resorted to claiming that these few cases exert a "chilling effect" on employers who want to establish employee involvement plans, but supposedly do not because of concerns about section 8(a)(2). However, employee involvement programs are thriving under the current law. As the majority has admitted for over three years, more than 30,000 exist today, and 75% of employers use them—including over 96% of large employers. This alone demonstrates that there is no chilling effect.

section 8(a)(2) because they seem to be section 2(5) labor organizations. The problem is that more teams are being asked to handle a wider range of subjects compared to teams in my first survey. Some of these subjects, scheduling, for example, are expressly enumerated under section 2(5)'s coverage of "hours of employment." The growing popularity of departures from the eight-hour workday—particularly twelve-hour shifts²⁸⁹—suggests that the finding reported here is not a fluke. In a related vein, the finding that one in four teams determines employee vacations also corresponds to other evidence showing that teams are taking on this employment-related function.²⁹⁰

In addition to taking on more section 2(5) subjects, this study presents more evidence that teams are meeting that provision's requirements for "dealing with." Only a minute fraction of teams appear to limit themselves to the safest form of interaction, that is, offering only suggestions. The Board in *DuPont* explicitly treated employee suggestions as a permissible form of interaction,²⁹¹ but this survey shows that fewer than one-third of teams engage in this interaction. Thus, numerous teams—perhaps 50% or more—appear to meet all the definitional requirements of a section 2(5) labor organization.

As a complicating feature, however, even these teams continue to handle work process and quality issues. Thus, they appear to comply

Id.

289 See Herbert R. Northrup, *The Twelve-Hour Shift in the Petroleum and Chemical Industries Revisited: An Assessment by Human Resource Management Executives*, 42 INDUS. & LAB. REL. REV. 640 (1989).

290 See Sandra N. Phillips, *Team Training Puts Fizz in Coke Plant's Future*, PERSONNEL J., Jan. 1996, at 87, available in 1996 WL 9819978 (relating one team's experience in formulating and communicating a company's new vacation policy).

291 In this vein, the Board explained:

For example, 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.

Similarly, if the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

Likewise, under a "suggestion box" procedure where employees make specific proposals to management, there is no dealing because the proposals are made individually and not as a group.

E.I. DuPont & Co., 311 N.L.R.B. 893, 894 (1993), available in 1993 WL 191471, at *1-2.

with *Electromotion*. This leaves the impression, therefore, that many teams operate in a zone of fuzzy compliance, where some characteristics make them appear to be in compliance and others do not. Since the post-*Electromotion* Board has found, on at least one occasion, that a partial lapse does not constitute a section 8(a)(2) violation,²⁹² it appears that some employers may be trying to expand the law by challenging the NLRB to accept inoffensive, mixed-compliance teams.

In addition, there is considerable evidence that many teams, in addition to being section 2(5) labor organizations, also meet the NLRB's test of unlawful domination under section 8(a)(2), because in about half the teams managers appoint employees to teams and also direct team activities. Compared to company unions, however, current teams lack stultifying control by employers. Instead, many appear to consensus-seeking, small-scale groups where there is a genuine degree of power sharing between management and non-supervisory employees.

Section 8(a)(2)'s prohibition against company unions is still needed because recent NLRB cases show that this employer abuse still exists; but the argument that it requires no modification ignores important changes that have taken place in the formation and administration of nonunion employee groups that interact with employers. Ironically, this argument also ignores a signal that the NLRB is sending for more permissive uses of nonunion teams.²⁹³ The Board, however, is without power to make significant new policy in this arena without direction from Congress. Unless there is wider acceptance of the TEAM Act's finding that "Employee Involvement is currently threatened by legal interpretations of the prohibition against employer-dominated 'company unions,'"²⁹⁴ the research findings presented here suggest that a growing number of legitimate teams will be subjected to a law that was not intended for them.

292 See *Stoody Co.*, 320 N.L.R.B. 18 (1995), available in 1995 WL 789953.

293 Board Chairman William Gould recently stated:

In a nonunion situation, the sensible response . . . is to allow employee groups, with or without a management representative component, to discuss anything they want. The more workers know about the enterprise and the better they are able to participate in decision making, the more likely that democratic values and competitiveness are enhanced. And if the law is simplified, ordinary workers and small business people will be able to adapt to their own circumstances and avoid reliance upon wasteful, expensive litigation.

Remarks of NLRB Chairman Gould on Workplace Cooperation, Daily Lab. Rep. (BNA) No. 208, at E-1, E-3 (Oct. 25, 1996).

294 S. 295, 104th Cong., § 2(a)(7) (1996).