



6-1-1999

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Michael H. LeRoy

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## Recommended Citation

Michael H. LeRoy, *Can TEAM Work - Implications of an Electromotion and DuPont Compliance Analysis for the TEAM Act*, 71 Notre Dame L. Rev. 215 (2014).

Available at: <http://scholarship.law.nd.edu/ndlr/vol71/iss2/7>

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# Can TEAM Work? Implications of an *Electromotion* and DuPont Compliance Analysis for the TEAM Act

Michael H. LeRoy\*

## I. INTRODUCTION

### A. Overview

Congress is now considering a controversial bill (the "TEAM Act"<sup>1</sup>) to loosen the National Labor Relations Act's<sup>2</sup> ("NLRA") restrictions on work teams, commonly called employee involvement groups. Employers believe a 1992 National Labor Relations Board (the "Board") decision, *Electromotion*,<sup>3</sup> seriously undermines the legality of these teams.<sup>4</sup> The ruling has widespread significance since these teams exist in more than 30,000 workplaces.<sup>5</sup>

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\* Associate Professor, University of Illinois, Institute of Labor and Industrial Relations and College of Law.

I am grateful for support provided by the UIUC Center for Human Resource Management and its Director, Prof. Gerald R. Ferris, and the encouragement of my family, Janet LeRoy, Sarah LeRoy, Benjamin LeRoy, Robert LeRoy, and Carol LeRoy. In memory of my uncle Paul Lefkovits, a victim of the Holocaust who died as a human shield for retreating Nazi troops.

1 S. 295, 104th Cong., 1st Sess. (1995); H.R. 743, 104th Cong., 1st Sess. (1995) (both bills are commonly referred to as "The Teamwork for Employees and Managers Act of 1995"). For an overview of the TEAM Act, see *infra* notes 117-41.

2 29 U.S.C. §§ 151-187 (1988).

3 309 N.L.R.B. 990 (1992).

4 The president of the Whirlpool Corporation's testimony before the Commission on the Future of Worker-Management Relations (also called the "Dunlop Commission"), summarized the employer's perspective as follows:

I see excellent employee-management relations at Whirlpool *because* of our cooperation and participation. But a threat does exist to the continued improvement and success at Whirlpool and throughout the United States. The threat is found in the NLRB's recent rulings in the cases of *Electromotion* and *DuPont* under section 8(a)(2) of the Labor Act.

I have no intentions of debating the fine points of what constitutes a 'labor organization' or 'domination' under the law; however, as a business leader operating in a challenging global environment, I know that any ruling that compromises our ability to involve our people . . . to empower our workers . . . to commit to our employees . . . puts every American job in peril.

*Selected Statements before Senate Labor and Human Resources Committee on Teamwork for Employees and Managers Act (S. 295)*, Daily Lab. Rep. (BNA) No. 28, at E-1 to E-2 (Feb. 10, 1995).

5 See *Rep. Gunderson Plans to Introduce Bill to Address Effects of Electromotion Ruling*, Daily Lab. Rep. (BNA) No. 245, at A-16 (Dec. 21, 1992) (citing this general figure). Employer reaction is reported in Albert R. Karr, *Labor Letter*, WALL ST. J., Dec. 29, 1992, at A1 (citing employer alarm over the decision and a dire prediction that the decision would unleash a flood of union-inspired lawsuits against employee involvement programs). A leading employer group, the Labor Policy Association, said "workplace cooperation was pushed on thin ice today as a result of (*Electromotion*)," and derided the Board's ruling as "totally unresponsive to modern workplace realities." *Id.*; see also Arnold E. Perl, *Employee Involvement Groups: The Outcry over the NLRB's Electromotion Decision*, 44 LAB. L.J. 195 (1993).

Further, employers view these teams as an essential ingredient to their success because they remove layers of costly and unnecessary managers,<sup>6</sup> motivate employees by giving them more control over work,<sup>7</sup> and improve their competitiveness.<sup>8</sup> Moreover, these teams appear to be part of a long-term employer strategy to reduce core, permanent employment by assigning more project-driven work to specially created teams.<sup>9</sup>

But unions see something sinister in these work teams and the TEAM Act: a return to 1930s company unions, sham organizations mounted by employers to frustrate union organizing.<sup>10</sup>

6 Robert M. Tomasko, *Restructuring: Getting It Right*, MGMT. REV., Apr. 1992, at 10 (reporting management guru Peter Drucker's reflections that "[m]iddle managers have become insecure, and they feel unbelievably hurt. They feel like slaves on the auction block.").

7 Innumerable articles and books document this phenomenon. For informative and recent accounts, see Barbara Ettore, *GE Brings A New Washer To Life*, MGMT. REV., Sept. 1995, at 33 (describing how a union representing 8,000 employees and a hard-nosed employer used worker empowerment principles to recreate a work culture, from the engineers to production workers, and saved a large business in Louisville, Kentucky); Susan Harte, *UPS To Let Rank-and-File Workers Buy Stock; Move Part of Firm's Effort To Increase Employee Involvement*, ATL. CONST., Aug. 29, 1995, at F1 (reporting on a new pay plan to complement a change in work culture permitting UPS drivers to manage their work).

A detailed examination of a typical employee involvement effort appears in Raju Narisetti, *Manufacturers Decry A Shortage of Workers While Rejecting Many*, WALL ST. J., Sept. 8, 1995, at A1. The article describes that Scott Paper Co. recently built a new plant in Owensboro, Kentucky, staffing it with half the usual number of employees. Every employee is assigned multiple production responsibilities within teams. The account relates that:

Along with operating the tissue-making equipment, the Owensboro workers do tasks previously handled by managers. They develop their own five week production schedules, enter data in computer spreadsheets, buy supplies and load onto 18-wheelers cases of two-ply bathroom tissue rolls coming off packing machines. They deal with customers and production staff at other Scott mills. They even take attendance, interview job seekers, and vote on merit raises for one another.

*Id.* at A4.

8 See, e.g., *Northern Telecom Employees Say Team Style Aids Plant, Workers*, Daily Lab. Rep. (BNA) No. 106, at C-1 (June 1, 1990) (describing a now common type practice of re-engineering workplaces into "cells" that monitor and improve manufacturing efficiency, conduct performance reviews, adopt flexible work schedules, and interview team applicants). The article explains how managers and employees perceive this organizational change as essential to competing with Japanese counterparts. This perception was summarized by operations manager Anna Versteeg:

In the 1980s, American business went to robotics, automation, and all of the hard, technological improvement. One of the things I think we forgot was what made us important, and that was the people and the innovation and the gains that you can get from turning on the people. That is what made us great in the Fifties and Sixties and led us when we were ahead of the Japanese.

*Id.*

9 See Michael Verespej, *A Workforce Revolution?*, INDUSTRY WK., Aug. 21, 1995, at 21 (predicting that core jobs will continue to shrink in numbers, supplanted by teams of contingent workers coming together for particular projects).

10 As Congress began hearings on the TEAM Act, the president of the United Steelworkers of America, George Becker, stated that the bill "turns back the labor law clock 60 years, suggesting that the boss can decide who speaks for workers on workplace committees." Philip Dine, *Neither Labor Nor Management Raves Over New Workplace Report*, ST. LOUIS POST-DISPATCH, Jan. 13, 1995, at 1C. Shortly thereafter, the president of the Teamsters union blasted the TEAM Act as:

undemocratic and un-American. All Americans should have the right to choose their own representatives. No one would call it democracy if people from another country chose America's leaders. In the same way, it is undemocratic to let management choose employee representatives, dictate what issues they can discuss, and disband a committee if it takes the wrong positions.

*GOP Lawmakers Propose Lifting Ban on Company-Sponsored Labor Committees*, Daily Lab. Rep. (BNA) No. 20, at A-1 (Jan. 31, 1995).

Recent law review articles on employee involvement teams debate whether the NLRA should be amended to remove legal impediments affecting these teams.<sup>11</sup> Meanwhile, numerous social science studies have examined work teams to discover their organizational and business effects,<sup>12</sup> as well as effects on workers.<sup>13</sup> In addition, there have been many U.S. government reports on these teams.<sup>14</sup>

As hearings on the TEAM Act were occurring, the main federation of U.S. labor unions, the AFL-CIO, issued a statement asserting that the "TEAM Act has nothing to do with teamwork. . . . Indeed, even in workplaces in which employees have democratically elected a union to be their exclusive representative, the so-called TEAM Act would allow employers to create, fund, and deal with a rival, company-controlled union." *Federation Announces Campaign on Worker Concerns About Jobs, Wages*, Daily Lab. Rep. (BNA) No. 36, at A-3 (Feb. 23, 1995).

11 For books and articles sympathetic to this reform, see WILLIAM B. GOULD, IV, *AGENDA FOR LABOR LAW REFORM: THE FUTURE OF EMPLOYMENT RELATIONS & THE LAW* 121 (1993); Michael S. Albright, *The Legality of Employee Participation Programs Following the NLRB's Electromation, Inc. Decision*, 1993 DET. C.L. REV. 1035; Samuel Estreicher, *Employee Involvement and the "Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125 (1994) (contending that section 8 (a) (2) currently reduces the ability of employers to expand employee roles and capabilities); Michael H. LeRoy, *Employer Domination of Labor Organizations and the Electromation Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812 (1993) (reporting that about 70% of 282 surveyed unions rated as satisfactory their participation in cooperative or employee involvement programs); Robert B. Moberly, *The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?*, 69 WASH. L. REV. 331 (1994); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127 (1993); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571 (1992); Paul Weiler & Guy Mundlak, *New Directions for the Law of the Workplace*, 102 YALE L.J. 1907 (1993) (maintaining that employers should be permitted more latitude to experiment with employee participation if they meet certain standards); Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987).

For the case against loosening sections 2(5) and 8(a) (2), see A.B. Cochran, III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. ON EMPLOYMENT & LAB. L. 458 (1995); Steven I. Locke, Note, *Keeping Sections 2(5) and 8(a)(2) of the NLRA Intact: A Fresh Look at Worker Participation Committees Through Electromation, Inc.*, 10 HOFSTRA LAB. L.J. 375 (1992); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983).

12 See, e.g., William Cooke, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration*, 46 INDUS. & LAB. REL. REV. 119 (1992); Harry C. Katz et al., *Industrial Relations and Productivity in the U.S. Automobile Industry*, in 3 BROOKINGS PAPERS ON ECONOMIC ACTIVITY 685 (1987); Harry C. Katz et al., *Assessing the Effects of Industrial Relations and Quality of Working Life on Organizational Effectiveness*, 28 ACAD. MGMT. J. 509 (1985); Harry C. Katz et al., *Industrial Relations Performance, Economic Performance, and QWL Programs: An Interplant Analysis*, 37 INDUS. & LAB. REL. REV. 3 (1983).

13 See, e.g., Carrie R. Leana & Edward Locke, *Participation in Decision Making: One More Look, in 1 RESEARCH & ORGANIZATIONAL BEHAVIOR* 265 (B. Staw ed., 1979); John A. Wagner, III & Richard Z. Gooding, *Shared Influence and Organizational Behavior: A Meta-Analysis of Situational Variables Expected to Moderate Participation-Outcome Relationships*, 30 ACAD. OF MGMT. J. 524 (1987); John A. Wagner, III & Richard Z. Gooding, *Effects of Societal Trends on Participation Research*, 32 ADMIN. SCI. Q. 241 (1987).

14 See, e.g., U.S. DEP'T OF LABOR, *HIGH PERFORMANCE WORK PRACTICES AND FIRM PERFORMANCE* (1993); BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, *THE NEW WORK SYSTEM NETWORK: A COMPENDIUM OF WORK INNOVATION CASES* (1990); BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, *COOPERATIVE PARTNERSHIP: A NEW BEGINNING FOR NATIONAL STEEL AND THE UNITED STEELWORKERS OF AMERICA* (1989); BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, *THE CHANGING ROLE OF FIRST-LINE SUPERVISORS AND MIDDLE MANAGERS* (1988); BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS, U.S. DEP'T OF LABOR, *FORGING PARTNERSHIP THROUGH EMPLOYEE INVOLVEMENT: THE CASE OF THE GM-HYDRA-*

This Article examines the TEAM Act from a perspective that is familiar to lawyers and social scientists, and also employers and unions. It grows from a detailed survey that was based on employer compliance guidelines discussed in *Electromotion* and a closely related decision in a union-represented workplace, *DuPont*.<sup>15</sup> Twenty-three of these surveys were completed in late 1994 and early 1995 for teams in non-union workplaces located across the nation.

As a result, this Article appears to report the first survey of employer compliance with *Electromotion* and *DuPont* precepts.<sup>16</sup> Although the survey here is very small, it suggests preliminary conclusions about some of the public policy arguments Congress is considering. One of this Article's most important conclusions is that the work teams surveyed here were very different from company unions in the 1930s. Those organizations tended to be large monoliths with a centralized management structure that pretended to negotiate better pay and working conditions for workers; in contrast, most of the surveyed teams here were small, semi-autonomous or autonomous units that dealt more narrowly with work efficiency or product quality issues. A second key finding is that three-fourths of the teams appear to comply with *Electromotion* and *DuPont*. The others, in varying degrees, seemed to have one or more features that conflicted with the guidance principles stated in *Electromotion* or *DuPont*. Even in these cases, however, there was no evidence to suggest that these teams were anything like company unions in the 1930s.

### B. Organization of this Article

Section II examines how changes in industrial production prior to enactment of the NLRA were organized around a hierarchical and authority-centered management structure. It recounts how this control structure led employers in the 1930s to respond to intensive union organizing by creating illusory representational organizations called company unions. This discussion also attempts to explain why unions perceive current work teams as reappearing forms of company unions. This explanation focuses on the declining nature of the American labor movement, and unions' understandable perception that a philosophy embraced by so many employers cannot be trusted.

Section III examines the origins of the NLRA's prohibition against these sham unions. The NLRA was premised on a fundamental assumption that workers and employers had conflicting interests in the workplace; Congress identified company unions as a prime manifestation of employer attempts to subvert workers' free choice of a union to represent their employment interests. Passage of the National Industrial Recovery Act in 1933

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MATIC WILLOW RUN PLANT AND UAW 735 JOINT ACTIVITIES (1988); U.S. DEP'T OF LABOR, QUALITY OF WORK LIFE: AT&T AND CWA EXAMINE PROCESS AFTER THREE YEARS (1985).

15 *DuPont*, 311 N.L.R.B. 893 (1993).

16 Sandra L. Nunn, Comment, *Are American Businesses Operating Within the Law? The Legality of Employee Action Committees and Other Employee Participation Plans*, 63 U. CIN. L. REV. 1379, 1431-32 (1995) (engaging in the kind of analysis presented here, but rather than surveying actual workplaces with these programs, answers the compliance question by examining the general characteristics of QWL, Quality Circle, survey feedback, and other employee representation plans).

fostered company unions by encouraging collective bargaining between employers and unions. Many employers correctly anticipated that this law presaged a stronger obligation to recognize independent unions, and consequently, engaged in preemptive organizing of their own workforce to keep real unions out. Thus, Congress enacted a sweeping ban against company unions, first by defining in section 2(5) a labor organization broadly to include all forms of employee groups that deal with employers over a wide range of employment matters, and second, by prohibiting employers in section 8(a) (2) from dominating or interfering with such organizations. As evidence in this Article shows, employers do not use work teams today as company unions, because teams concern themselves with much more limited matters, principally work process or efficiency, and product or service quality.

Section IV examines the Board's *Electromation* and *DuPont* decisions in detail. Specifically, this discussion focuses on guidance principles that the Board announced to help employers and unions discern when workplace teams, now commonplace, run afoul of the NLRA. This discussion is important because the survey used in this study incorporated these compliance principles.

Many employers reacted to *Electromation* with vehement opposition or great concern. Although Republicans did not control the 103rd Congress, the first version of the TEAM Act was introduced in 1993 shortly after the Board decided *Electromation*. This Act is discussed in Section V, as is the current version of the TEAM Act. The main conclusion of this section is that the TEAM Act does not portend a return to company unions, as most unions and some scholars suggest. To the contrary, a close reading of the bill shows that it codifies the essential guidance principles that the Board stated in *Electromation* and *DuPont*. Therefore, to the extent that employer compliance with these decisions can be measured, one can reasonably predict how employers would behave if the bill were enacted. This Article concludes that nothing in the TEAM Act would induce employers to fundamentally change their current use of work teams.

Section VI describes how survey questions were developed, how the sample was drawn, and flaws in these research methods. It also reports seven main findings: (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 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 team members was equally divided between volunteer and employer selection; (6) most teams acted on the basis of employee-management consensus; and (7) the most common form of team evaluation was performed by employees and managers.

Based on these findings, Section VII discusses what these characteristics of work teams imply for such organizations if the TEAM Act becomes law. The main implication is that the TEAM Act will change little or nothing about the administration of these work teams. Since unions viewed *Elec-*

tromation and DuPont favorably, and never suggested that these decisions portend a return to company unions, and since the Act does nothing more than codify the main guidance principles in these cases, most of the team activity observed here—which appeared to be legal—should be expected to continue without change.

Beyond these immediate implications are some broader issues posed by the TEAM Act: will employers stay the course with work teams, or is this a passing fad? Also, will the TEAM Act frustrate union organizing? Section VIII notes that employers' present infatuation with teams is nothing new. Some employers used similar organizations in the 1920s, but for some inexplicable reason, withdrew from this social experimentation. This historical fact is relevant to the TEAM Act, because in the long-term, no one can be sure that the organizational form that employers are seeking to protect will be used.

The rest of the section presents several empirical arguments that tend to refute critics of the TEAM Act, who claim that its provisions would depress union organizing activity. Although progressive in concept, work teams are occasionally accompanied by restructuring that includes layoffs, and therefore, are sometimes perceived by employees as a new way for employers to get more work for the same pay. Even in the absence of layoffs, some evidence shows that the Japanese concept of *Kaizen* (continuous improvement) is at the heart of work teams; but in reality, unrelenting attempts to improve productivity can lead to employee burnout. In sum, team work has some virtues, but also some distinct problems; and these problems have the potential to feed union organizing in the future. Thus, the doom-and-gloom picture painted by the TEAM Act's critics is probably overstated, as is the uncritically positive account of work teams offered by TEAM Act supporters.

## II. THE WORKER-EMPLOYER CONFLICT MODEL EMBODIED IN THE NLRA

### A. *The National Labor Relations Act and the Industrial Revolution*

Enacted in 1935, the NLRA stands at the midpoint of two very different periods of workplace organization. By the end of the Nineteenth century, automated production overtook manual work, and this profoundly changed the organization of work in factories. A contemporaneous account by Sidney and Beatrice Webb explains this transformation in the bootmaking industry:

[N]ew machines have introduced a new organisation of the factory, the workman steadily becoming less and less of an individual producer, working at his own speed, and more and more a member of a 'team,' or a small part of the operatives each performing a small part of the process, and thus obliged to keep up with each other.<sup>17</sup>

Furthermore, there existed an employer ideology that owners of capital were intrinsically superior to common laborers. The Reverend Henry Ward Beecher boiled this view down to, "God intended the great to be

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17 SIDNEY WEBB & BEATRICE WEBB, *INDUSTRIAL DEMOCRACY* 399 (14th ed. 1920).

great and the little to be little,"<sup>18</sup> while Abram Hewitt intoned: "It is for the master [employer] to do the thinking."<sup>19</sup> A Chicago bank pamphlet from the 1860s translated this philosophy into a social contract for the workplace: "When workmen accept such employment . . . they must be understood as surrendering their individual freedom to the extent which is necessary for enabling him to fulfill the responsibility of his position."<sup>20</sup>

In short, innovations in manufacturing technology in the second-half of the Nineteenth century, combined with a Darwinistic employer ideology, offered an ideal culture for the development of a hierarchical, authority-centered personnel management structure.

By the 1890s, employers began to recognize that scientific management of human resources was no less vital to their success than technological improvements in their factories, and they developed bureaucracies "to subdivide, as well as to coordinate, the tasks of administration and production . . . to maximize the efficiency of each operation."<sup>21</sup> Human beings were viewed as machines whose performance could be improved with sound engineering.<sup>22</sup> Their performance was to be orchestrated in a hierarchical system in which all jobs were carefully analyzed, and then coordinated by management.<sup>23</sup> Contrary to current themes of worker involvement and empowerment, this workplace ideology was often explicitly premised on managerial elitism:

[T]he number of people of relatively low intelligence is vastly greater than is generally appreciated and . . . this mass of low-level intelligence is an enormous menace to democracy unless it is recognized and properly treated. . . . [T]he intelligent group must do the planning and organizing for the mass, . . . our whole attitude toward lower grades of intelligence must be based upon an intelligent understanding of the mental capacity of each individual.<sup>24</sup>

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18 DAVID MONTGOMERY, *BEYOND EQUALITY* 230-31 (1967).

19 *Id.* at 231.

20 *Id.*

21 Reinhard Bendix, *Bureaucratization in Industry*, in *INDUSTRIAL CONFLICT* 164, 170 (Arthur Kornhauser et al. eds., 1954).

22 The preeminent labor economist of this period summarized this conception as follows:

Now comes the scientific engineer. . . . [H]e is hired by the employer to advise him how to get the greatest output at the least cost. The engineer studies how to economize the forces of . . . human nature embodied in men. . . . The stop-watch, the special slide rule, the speedometer, the time-testing laboratory, have the same use applied to both. The "fatigue curve" is unfeelingly figured out so as to show the speed at which each human machine should run in order to insure its longest life and greatest efficiency.

JOHN R. COMMONS, *LABOR AND ADMINISTRATION* 141-42 (1913).

23 For a summary of this conception, see P.J. Nilsen, *Job Analysis*, Proceedings of the Employment Managers' Conference (May 9-11, 1918), in *BUREAU OF LABOR STATISTICS*, 1919, at 132:

Whenever I think of job analysis I am reminded of the expression 'square pegs in round holes.' . . . Of course, the holes referred to are the different positions that go to make an organization. If the organization is represented by a chart, these holes might be represented by circles or rectangles of various dimensions depending on the importance of the position. The pegs, then, are the incumbents of these positions, or the persons all the way down the line from president to messenger boy, who fill, or try to fill, these holes. Now the number and kind of positions, or holes if you please, are authorized and provided by the management in a more or less formal and definite way.

24 Henry H. Goddard, *The Levels of Intelligence*, in *PRACTICAL PSYCHOLOGY FOR BUSINESS EXECUTIVES* 48 (Lionel Edie ed., 1922).

This marriage of machine production and hierarchical management created not only extreme specialization of jobs, but engendered such "standardized procedures . . . that the incumbent has little chance to do [the work] his own way. He has been left with a minimum of decisions about the work itself."<sup>25</sup> One woman's experience as a coil winder at a large Westinghouse factory in East Pittsburgh typified this experience: "It was such a monotonous job! Oh, just repetitive! You would do it all automatically. You didn't have to use your head at all. It gave us a lot of time to think about other things."<sup>26</sup>

Although more employers were guided in their management of workers by this control philosophy, there were notable exceptions to this trend. The Filene Cooperative, founded in 1898 by a progressive management, gave workers the right to govern their working conditions, subject to the owners' right to veto.<sup>27</sup> Owner Edward Filene believed that:

industrial democracy, under which employees will have an adequate voice in the policies of the industry and an adequate stake in the profits of an industry, is inevitable. . . . because we have given to the masses of employees a political vote with which they can get anything and everything they find themselves unable to get by industrial methods.<sup>28</sup>

By 1901, Filene's Association had an arbitration board, consisting of employee representatives, who settled grievances over wages, discharge, and working conditions.<sup>29</sup>

This example was far from unique. A leading industrial consultant, John Leitch, adapted the U.S. Constitution to provide a labor-management governance structure at Packard Piano Co.<sup>30</sup> Also, the Philadelphia Rapid Transit Co. and the Milwaukee Electric Railway were run under a joint committee system of elected workers and superintendents.<sup>31</sup>

In addition, even among some of the intellectual founders of scientific personnel management, there was a sense that workplace applications were untrue to their principles. Ironically, the leading light of this philosophy, Frederick W. Taylor, bristled at employers' misuse of his ideas.<sup>32</sup> In doing

25 Daniel Katz, *Satisfactions and Deprivations in Industrial Life*, in *INDUSTRIAL CONFLICT* 86, 90 (Arthur Kornhauser et al. eds., 1954).

26 RONALD W. SCHATZ, *THE ELECTRICAL WORKERS* 32 (1983) (reported comments of Margaret Darin Stasik).

27 MARY LADAME, *THE FILENE STORE: A STUDY OF EMPLOYEES' RELATION TO MANAGEMENT IN A RETAIL STORE* (1930).

28 EDWARD A. FILENE, *THE WAY OUT* 170 (1925).

29 *Id.* at 142.

30 JOHN LEITCH, *MAN TO MAN, THE STORY OF INDUSTRIAL DEMOCRACY* 30-62 (1919). His plan created a workers' "House of Representatives" and a managers' "Senate," with the "presidency" occupied by a team of senior executives. A rule became law when it passed both legislative assemblies and was approved by the executives. *Id.* at 139-49.

31 U.S. COMMISSION ON INDUSTRIAL RELATIONS, 3 *FINAL REPORT AND TESTIMONY* 2734-35 (1916).

32 Scientific management is not any efficiency device . . . not a system of figuring costs . . . not a piecework system . . . not a bonus system . . . not a premium system . . . it is not a stop watch on a man . . . and writing things down about him . . . it is not time-study, it is not motion study . . . it is not any of the devices which the average man calls to mind when scientific management is spoken of.

FREDERICK W. TAYLOR, *SCIENTIFIC MANAGEMENT* 26 (1947).

so, he stated a conception that sounds quite similar to the cooperation themes espoused by employers today:

[I]n its essence scientific management involves a complete mental revolution on the part of the workingman . . . . And it involves an equally complete mental revolution on the part of those on the management side.

. . . .

. . . The great mental revolution that takes place in the mental attitude of the two parties under scientific management is that both sides take their eyes off of the division of the surplus as the all-important matter, and together turn their attention toward increasing the size of the surplus until this surplus becomes so large . . . that there is ample room for a large increase in wages for the workmen and an equally great increase in profits for the manufacturer.<sup>33</sup>

Elton Mayo, another personnel management luminary, also departed from an orthodox view of control management. His industrial experiments led to the conclusion that teamwork boosted worker productivity more than scientific factors, such as timing and duration of rest periods and increasing piece rates.<sup>34</sup> This research is more consistent with current employee involvement principles. In sum, although control-style management predominated from the turn of the century until after the NLRA was enacted, there were numerous precursors to current conceptions of participative management that had nothing to do with company unions.

### *B. The National Labor Relations Act in the Post-Industrial Age*

Sixty years after passage of the NLRA, control models have been replaced by empowerment models.<sup>35</sup> These models emphasize different values. Generally, they assume that organizational performance improves

<sup>33</sup> *Id.* at 27, 29-30.

<sup>34</sup> See ELTON MAYO, *THE SOCIAL PROBLEMS OF INDUSTRIAL CIVILIZATION* 72-73 (1945), reporting on research involving six women who made telephone assemblies:

[T]he major experimental change was introduced when those in charge sought to hold the situation humanly steady by getting the cooperation of the workers. What actually happened was that six individuals became a team and the team gave itself wholeheartedly and spontaneously to cooperation in the experiment. The consequence was that they felt themselves to be participating, freely and without afterthought, and were happy in the knowledge that they were working without coercion from above or limitation below.

<sup>35</sup> For an excellent summary of this new organizational paradigm, see Richard Seaman, *How Self-Directed Work Teams Support Strategic Alignment*, COMPENSATION AND BENEFITS REV., July 17, 1995, at 23:

More and more companies are realizing that a new organizational structure, within the command-and-control paradigm, delivers no organizational benefit because it does not strike to the heart of the problem. Self directed work teams and management delayering often come into play because of the time dimension of competition and the aforementioned decision-making process. Strategic alignment frequently demands a more responsive organizational structure, one that permits people closer to the product or service to make the decisions that keep the customer happy.

*Id.* at 27; see also Rahul Jacob, *The Struggle To Create An Organization for the 21st Century*, FORTUNE, Apr. 3, 1995, at 90, offering this insightful report of how firms are reengineering work:

The horizontal corporation includes these potent elements: Teams will provide the foundation of organizational design. They will not be set up inside departments, like

when hierarchy is reduced and layering disperses power to workers;<sup>36</sup> that workers add value to the work process as a result of accumulated job experience and self-improvement;<sup>37</sup> that workers need less direct managerial supervision,<sup>38</sup> while technology disperses information and thereby narrows the knowledge-gap between workers and managers;<sup>39</sup> that worker interests are aligned more closely with customer satisfaction and team performance;<sup>40</sup> and that employee evaluation is most effective when done by a combination of co-workers and supervisors.<sup>41</sup>

A product of the control-management period, the NLRA stands at the threshold of a new century, but has been largely unchanged since 1947.<sup>42</sup> Moreover, the Act's most basic element—conferring the right upon employees to form their own organizations to negotiate terms and conditions of employment with employers, without interference by employers<sup>43</sup>—has remained constant since 1935. In consequence, a heated debate in the 104th Congress has pitted employers who have forsaken their control models for worker empowerment against labor unions, who increasingly per-

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marketing, but around core processes, such as new-product development. Process owners, not department heads, will be the top managers . . . .

*Id.*

36 For current examples, see Perry Flint, *The Buck Stops Lower*, AIR TRANSPORT WORLD, Sept. 1, 1995, at 28 (reporting on United Air Lines efforts to restructure work by replacing vertical hierarchies with more horizontal work-structures); David Nissan, *The Great HQ Breakup*, FIN. POST, Aug. 15, 1995, at 49 (reporting on organizational decentralization at Monsanto, Hoechst AG, and Royal Bank of Canada).

37 See Raymond E. Miles & Charles C. Snow, *The New Network Firm: A Spherical Structure Built On A Human Investment Philosophy*, 23 ORGANIZATIONAL DYNAMICS 4, 13 (1995) (stating that the "human investment philosophy focuses on current abilities but places special emphasis on the potential of organization members to develop a potential package of technical, business, and self-management skills to possess the capability to grow new competencies to meet tomorrow's needs").

38 See *id.* at 4, 11 (reporting that Asea Brown Boveri (ABB), an electronics manufacturer that uses employee teams "has minimized the amount of rule-guided behavior among its internal units, substituting instead a series of market-oriented processes and rewards that encourage cooperative and mutually beneficial actions").

39 See Gerald E. Ledford, Jr., *Designing Nimble Reward Systems*, COMPENSATION & BENEFITS REV., July 17, 1995, at 46-47 (noting that "[i]nformation technology allows companies to respond to change in market demand almost instantly. It also permits the use of new organizational forms, such as flattened hierarchy, which becomes possible as technology replaces middle management").

40 See John A. Byrne, *The Horizontal Corporation*, BUS. WEEK, Dec. 20, 1993, at 76, reporting an ideal that more employers are approaching:

Self-managing teams would become the building blocks of the new organization. Performance objectives would be linked to customer satisfaction rather than profitability or shareholder values. And staffers would be rewarded not just for individual performance but also for the development of their skills and for team performance.

*Id.* at 77.

41 See Manuel London & Richard W. Beatty, *360-Degree Feedback as a Competitive Advantage*, 32 HUM. RESOURCE MGMT. 353 (1993).

42 In 1947, The Taft-Hartley Act substantially amended the NLRA. These reforms favored employers, *inter alia*, by creating unfair labor practices for unions, including broad prohibitions on secondary strikes, requiring that a notice period precede a strike, and recognizing employer speech rights. For specific provisions, see the H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S.S.C.A.N. 1135, that eventually became law over President Truman's veto.

43 "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." 29 U.S.C. § 157 (1994).

ceive this as a superficial transformation aimed at installing the very kind of company union that the NLRA prohibited.

### C. *The Decline and Insecurity of American Labor Unions in the 1990s*

For unions, the parallels between 1935 and 1995 are alarming. This perspective is important to understand because it helps to explain why unions are so vigorously opposed to the TEAM Act. Contrary to the view expressed by some labor law and industrial relations experts, this Article sees few similarities between current participative programs and sham unions from the 1930s. But the TEAM Act arises in a context of long-term union decline, and this context is important in explaining why labor's reaction to the TEAM Act is overblown and unfounded.

In the private sector, union representation of workers has been in such long-term decline that membership gains made over the past four decades have been erased.<sup>44</sup> Labor's declining political influence<sup>45</sup> reached a modern-day low point when Republicans were restored to power in both the House and Senate in the 1994 national elections. This election underscored labor's political impotence, and this alone helps to explain why the AFL-CIO opposes the TEAM Act. Even if benign, the legislation symbolizes that unions no longer have a hand on the labor-policy rudder.

Unions' dreadful experiences since 1980 in organizing new members, and in bargaining new contracts, also factor in labor's attack on the TEAM Act. Unions' ability to strike has been crippled,<sup>46</sup> and because more employers appear to be hiring permanent replacements when unions strike, unions have lost their former ability to mount credible threats to strike.<sup>47</sup>

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44 In 1994, the Bureau of Labor Statistics (the "BLS") found that 16.7 million workers, or 15.5% of the workforce, belong to unions. *Union Membership: Data For 1994 Shows Membership Held Steady At 16.7 Million*, Daily Lab. Rep. (BNA) No. 27, at D-23 (Feb. 9, 1995). The BLS survey found a continuation in declining union membership totals in the private sector, dating back to the 1950s. In 1994, 9.6 million of these workers, or 10.9% of the private sector workforce, were union members. For historical perspective on this decline, see Lisa Williamson, *Union Mergers: 1985-94 Update*, MONTHLY LAB. REV., Feb. 1, 1995, at 18, reprinted in Daily Lab. Rep. (BNA) No. 53, at D-26 (Feb. 1995) (offering this summary: "Union membership declined by nearly 4.4 million between 1979 (when union membership reached its peak) and 1994. The decrease was widespread in the private sector, particularly in the primary metals, automobile and aerospace equipment manufacturing, transportation, and communications industries. . .").

45 See generally John T. Delaney & Marick F. Masters, *Unions in Political Action*, in THE STATE OF THE UNIONS 313 (George Strauss et al. eds., 1991); John T. Delaney & Susan Schwochau, *Employee Representation Through the Political Process*, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 265, 302 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (predicting that "movement away from organized labor as workers' political representatives will lead to the creation of another interest group to take the place of the AFL-CIO in political arenas.").

46 See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, VOL. 45, NO. 12, COMPENSATION & WORKING CONDITIONS 66 (1993) (Table D-1, Work Stoppages Involving 1,000 Workers or More, 1947-1993) (showing that there were 187 major strikes (involving 1,000 or more workers) in 1980, 145 in 1981, 96 in 1982, 81 in 1983, 62 in 1984, 54 in 1985, 69 in 1986, 46 in 1987, 40 in 1988, 51 in 1989, 44 in 1990, 40 in 1991, 35 in 1992, and 34 in 1993).

47 See generally Matthew W. Finkin, *Labor Policy and the Evisceration of the Economic Strike*, 1990 U. ILL. L. REV. 547; Michael H. LeRoy, *Regulating Employer Use of Permanent Striker Replacements: Empirical Analysis of NLRA and RLA Strikes, 1935-1991*, 16 BERKELEY J. OF EMPL. & LAB. L. 169 (1995); Daniel Pollitt, *Mackay Radio: Turn It Off, Tune It Out*, 25 U.S.F. L. REV. 295 (1991); Note, *One Strike and You're Out? Creating An Efficient Permanent Replacement Doctrine*, 106 HARV. L. REV. 669 (1993).

During this period, unions have found themselves with little choice but to agree to contract concessions.<sup>48</sup>

Compounding matters, labor came tantalizingly close in 1992,<sup>49</sup> and then in 1994,<sup>50</sup> in passing legislation it dearly wanted as a palliative to its long, uninterrupted slide when Congress failed to enact striker replacement legislation. Furthermore, unions suffered a humiliating defeat when the presidential candidate they endorsed in 1992 deserted them in a crucial trade agreement, NAFTA.<sup>51</sup> Having passed only two minor employment laws in recent years—the Worker Adjustment and Retraining Notification Act<sup>52</sup> and the Family and Medical Leave Act<sup>53</sup>—and having failed to influence Congress to enact labor law reforms, labor's declining ability to elect congressional candidates sympathetic to their movement has been translated into legislative outcomes.

This Article offers no explanation for the fact that certain labor law and industrial relations experts have erroneously concluded that passage of the TEAM Act will return company unions to the workplace. Unions have made the same assertion, and although their view is just as erroneous, it is explainable in terms of the foregoing context. The rout of unions by employers in the organizing field, at the bargaining table, and at the general election ballot box has been so thorough that unions cannot be blamed for exaggerating the threat they imagine the TEAM Act presents.

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48 See, e.g., *Prohibiting Discrimination Against Economic Strikers: Hearing on S. 55 Before the Subcomm. on Labor of the Senate Comm. on Labor & Human Resources*, 102d Cong., 1st Sess. 67 (1991) (statement of Karen Behnke, a replaced striker) ("During the negotiations Curtis Industries repeatedly threatened that if the UAW did not accept these concessions the company would permanently replace all of the workers. To back up this threat the company ran newspaper advertisements and began taking job applications for replacement workers prior to the expiration of the contract.").

49 The Workplace Fairness Act, a bill strongly backed by labor that would treat employer hiring of permanent striker replacements as a new unfair labor practice, was defeated by a 57-42 cloture vote. See *Senate Vote Kills Bill to Restrict Use of Permanent Striker Replacements*, Daily Lab. Rep. (BNA) No. 117, at A-9 (June 17, 1992).

50 This same legislation failed again in July 1994. See *Senate Vote to End Filibuster on Striker Replacement Fails 53-47*, Daily Lab. Rep. (BNA) No. 132, at AA-1 (July 13, 1994); *Defeat of Striker Replacement Bill A Victory for Business Coalition*, Daily Lab. Rep. (BNA) No. 133, at AA-1 (July 14, 1994).

51 James Gerstenzang, *NAFTA Takes Toll in Anger, Split Allies Politics*, L.A. TIMES, Nov. 19, 1993, at 16 (reporting on labor's resounding defeat in trying to stop passage of NAFTA, and President Clinton's aggressive support for the trade agreement).

52 See *Plant Closing Bill Passes in House by Overwhelming Margin*, Daily Lab. Rep. (BNA) No. 135, at A-9 (July 14, 1988) (reporting on passage of the plant closing bill in the House by a veto-proof margin, with union lobbyists looking on).

53 See *Clinton Signs Family Leave Bill Into Law, Proclaims End of Gridlock*, Daily Lab. Rep. (BNA) No. 24, at AA-1 to AA-2 (Feb. 8, 1993) (reporting on passage of the leave bill and the AFL-CIO's strong support for it).

### III. ORIGINS OF NLRA'S PROHIBITION OF COMPANY UNIONS

#### A. *Labor Unrest and the Mood of Congress Leading Up to Enactment of the NLRA*

Extreme labor market conditions fed worker concerns, and even violence, in the early-and mid-1930s. Unemployment was extremely high;<sup>54</sup> but even though this condition created a large supply of potential striker replacements, and would therefore in theory suppress strike activity, strikes occurred frequently in the early 1930s.<sup>55</sup> Senator Robert Wagner, who also served as the Chairman of the National Labor Board before the NLRA was enacted, had an explanation for this anomaly. He blamed most of 70% of these strikes on defects in the National Industrial Recovery Act (NIRA), which he thought promoted sham or company unions.<sup>56</sup>

Looking for ways to minimize worker unrest, Congress might simply have outlawed all strikes. But this option was partly foreclosed by nearly a century of common law precedent recognizing the legality of peaceful strikes conducted for lawful purposes.<sup>57</sup> Furthermore, by the 1930s Congress had begun to side with the ordinary worker in his struggle against large and powerful employers. In 1926 Congress enacted the Railway Labor Act, thereby creating collective bargaining rights for rail and air transport workers.<sup>58</sup> In 1932, it enacted the Norris-Laguardia Act, which greatly lim-

54 Unemployment was 20% in 1935, the year the NLRA was enacted, and 18.0% and 14.3% in 1936 and 1937, respectively. See U.S. DEP'T OF LABOR, BULLETIN NO. 916, HANDBOOK OF LABOR STATISTICS 36 (1947) (Table A-12).

55 For example, in 1933 there were 599 strikes nationwide. *To Create a National Labor Board, 1934: Hearings on S. 2926 Before the Senate Comm. on Labor and Education*, 73d Cong., 2d Sess. 40, 43 (1934) (Statistics of Work of National Labor Board), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 70, 73 (1985) [hereinafter LEGISLATIVE HISTORY].

56 The following testimony summarizes Senator Wagner's expert view:

[E]mployees are becoming impatient at the denial of their rights, and strikes and violence are appearing in various parts of the country. I am in a position to know this. . . . The first defect of [the National Industrial Recovery Act] is that it restated the right of employees to bargain collectively, but did not impose on employers the duty to recognize such representatives. Failure to acknowledge this correlative duty has caused more than 70 percent of the disputes coming before the National Labor Board.

. . . 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 8-9, reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 38-39 (1985) (statement of Senator Wagner).

57 *Commonwealth v. Hunt*, 45 Mass. (4 Met.) 111 (1842), was the first significant common-law decision to recognize the legality of worker combination, or in modern terms, formation of a labor union. There, seven bootmakers agreed that they would quit their employment if their employer hired a new bootmaker in their shop who was willing to work for less money. *Id.* at 112-14. The court opined that if the employees had threatened physical force or fraud to achieve their economic goal of maintaining the wage-rate in the shop, "it would have been a very different case." *Id.* at 132.

58 Railway Labor Act of 1926, Pub. L. No. 69-257, 44 Stat. 577 (codified as amended in scattered sections of 15, 18, 28, 45 U.S.C (1994)).

ited federal court jurisdiction in labor disputes.<sup>59</sup> This legislation grew from a perception that courts were biased in favor of employers during labor disputes.<sup>60</sup>

### B. *The National Industrial Recovery Act and Proliferation of Company Unions*

Congress passed the National Industrial Recovery Act (the "NIRA") in 1933 "[t]o encourage national industrial recovery, to foster fair competition, and to provide for the construction of certain useful public works."<sup>61</sup> Passed during the depths of the Great Depression, this law depended on employer and union compliance with a set of legally unenforceable work codes.

The law's use of the term "fair competition" drew from a labor market context. Labor unions recognized their economic self-interest in organizing as many workers in their industry as possible, in order to create uniform wages and working conditions.<sup>62</sup> They believed that "yellow dog" contracts, in which individual workers signed employment agreements promising never to join a union, created unfair competition.<sup>63</sup>

This background helps to explain section 7(a) of the Act, which established these general criteria for codes of "fair competition":

- (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing . . . ;
- (2) That no employee, and no one seeking employment, shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing; and
- (3) that employers shall comply with the maximum hours of labor, minimum rates of pay, and other conditions of employment, approved or prescribed by the President.<sup>64</sup>

Point 1, on its face, was intended to permit employees to freely choose their own union and to engage in collective bargaining with their employ-

59 Norris-Laguardia Act of 1932, Pub. L. No. 72-65, 47 Stat. 70 (codified as amended at 29 U.S.C. §§ 101-115 (1994)).

60 Representative LaGuardia stated Congress' intent in passing this law:

Gentlemen, there is one reason why this legislation is before Congress, and that one reason is disobedience of the law on the part of whom? On the part of organized labor? No. Disobedience of the law on the part of a few Federal judges. . . . If the courts had administered even justice to both employers and employees, there would be no need for considering a bill of this kind now.

75 Cong. Rec. 5,478 (1932) (statement of Rep. LaGuardia).

61 National Industrial Recovery Act, ch. 90, 48 Stat. 195, 195 (1933) (Act held unconstitutional in *A.L.A. Schechter Poultry v. United States*, 295 U.S. 495 (1935)).

62 See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 U.S. 37, 43 (1927) (when a large manufacturer terminated its labor agreement with the stone cutters union, the union responded by encouraging all of its members throughout the nation to boycott any work involving use of "unfair" Bedford stone); see also *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 244-46 (1917) (involving a massive effort by the United Mine Workers union to secretly sign up coal miners in West Virginia, and then to launch a strike). Part of the union's motivation in *Hitchman* was to stabilize wage rates in neighboring states, which were forced down by less expensive coal from nonunion producers in West Virginia. *Id.* at 240-41.

63 See, e.g., *Adair v. United States*, 208 U.S. 161, 174 (1908) (ruling that the Erdman Act, a law forbidding yellow dog contracts, violated the due process rights of an employee "to sell his labor upon such terms as he deems proper").

64 LEGISLATIVE HISTORY, *supra* note 55, at 46.

ers through this representative. Point 2 reinforced this idea of free choice by prohibiting an employer from interposing a sham union, and by stating the principles for outlawing yellow dog contracts. Point 3 sought to stabilize a vicious cycle of declining wage rates, which in turn might depress economic demand and thus overall economic activity, by removing wages from competition between employers.<sup>65</sup>

But the NIRA was a failure in Senator Wagner's view because employers used company unions to subvert its principles.<sup>66</sup> Abundant evidence in the NLRA's hearings supported this view:

1. Employers' primary motive in establishing these organizations was to preempt union organizing; and paradoxically, the NIRA accelerated this process. For example, shortly after the NIRA was enacted:

Mr. T.H.A. Tiedeman, of the Standard Oil Co. of New Jersey, [was] quoted in Personnel, the magazine of the American Management Association, for November 1933, as saying that one company, presumably his own company, had sent out almost 2,000 copies of an outline of preparation and installation of an employee representation plan—

For the confidential use of many executives, who because of the Industrial Recovery Act, are making inquiry as to the best method for inaugurating a plan of collective bargaining between elected representatives of employees and management.<sup>67</sup>

Presenting statistical evidence of this highly organized management response to the NIRA, Senator Wagner noted:

[T]hese unions have multiplied most rapidly since the enactment of the law which was intended to guarantee to the worker the fullest freedom of organization. The number of employees covered by company unions rose from 432,000 in 1932 to 1,164,000 in 1933, representing a gain of 169 percent. More than 69 percent of the company-union schemes now in existence have been inaugurated in the brief period since passage of the Recovery Act.<sup>68</sup>

2. Employers promised that these organizations would treat employees fairly. This letter from C.W. Nash to persuade employees to join an employee representation committee offers a good example:

I would not be fair to you if I did not see to it that you got the real facts, and therefore, I am now proposing a plan which I believe will serve to do that thing and give you and the company a chance to sit down together and discuss and decide matters of mutual interest to all of us. I always

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65 For an insightful interpretation of the centrality of this aim, as it was incorporated into the NLRA, see Bruce E. Kaufman, *Why the Wagner Act? Reestablishing Contact with Its Original Purposes*, in *ADVANCES IN INDUSTRIAL & LABOR RELATIONS* (David Lewin et al. eds., forthcoming 1996).

66 Yesterday we had a hearing in the automobile industry and it came out very clearly that the company union was formed by sending to each worker a constitution and by-laws telling him, "This is now your organization." As the result of that an election was held, and the workers testified that they voted because they knew very well if they did not vote their jobs were gone.

LEGISLATIVE HISTORY, *supra* note 55, at 110 (statement of Sen. Wagner).

67 *Id.* at 113.

68 *Id.* at 123.

have believed that if we could do this in a spirit of friendly understanding and confidence in each other, we would accomplish a great step forward in promoting and maintaining the kind of relationship we all want in this industry.

It seems to me that this company has now reached a degree of understanding and mutual respect between employees and management that we can consider together practical means of giving effect to a plan which I believe will assure lasting cooperation, goodwill, and prompt, fair settlement of any questions that may arise.

I have sufficient confidence in the fairness of men to believe that when they know the facts and have an equal voice in deciding matters concerning them that they will come to decisions that are fair and reasonable.<sup>69</sup>

3. Company unions were nominally controlled by employees, but actually controlled by employers. General Motors' Pontiac plan provides a good illustration of this illusory workplace democracy:

This provides for voluntary membership of all employees of the manufacturing department; that is, voluntary for all employees 21 years or more, with at least 90 days of service and at least first papers. These employees choose their representatives from among the members of their own division with at least 1 year's service. They meet alone, but the factory manager must be notified of all meetings. Management is present only when requested. The meeting place is established by the works council subject to the approval of the plant manager. The company pays the representatives their regular earned rate, prints the ballots for elections, and elections are held on company time. In addition, the company will furnish a stenographer for any meeting on request.

The plan emphasizes that membership is voluntary, but it provides that only members of the employees association have the right to make a complaint to the works council with reference to wages, hours of labor, working conditions, or other appropriate subjects. Only members have a right to take out insurance and to participate in the company savings and investment plans.

. . . In other words, they offer an inducement to the workers to come into their company union, and say that he cannot be a beneficiary under these plans otherwise. . . . In cases of disagreement, appeal is possible all the way up to the general management of the company, who, it is said, "will take up the subject for consideration."<sup>70</sup>

4. Company unions had broad mandates to deal with employers concerning working conditions and pay. Carnegie Steel had a plan that served as model for others in the industry:

[A]t such conferences, negotiations may be carried on between representatives of the employees and the representatives of management on: Rules, ways and means, safety and prevention of accidents, economy and

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69 *Id.* at 126-27.

70 *Id.* at 128.

waste prevention, wages, piecework, and tonnage rates, hours of employment and working conditions, housing and living conditions, health and works sanitation, education and publications, athletics and recreation, continuity of employment and conditions of industry.<sup>71</sup>

### C. *Elements of Sections 2(5) and 8(a)(2) of the NLRA*

All this evidence convinced a majority in Congress that company unions were indeed a problem. The dilemma, then, was how to regulate them without also interfering with an employer's inherent right to manage and direct its workforce. Congress decided on a solution that was simple in principle: return to the original purpose in section 7(a) of NIRA, permitting employees to freely choose to have their own workplace representative. However, Congress wanted the law to have teeth this time, and therefore wanted to ensure it defined unlawful conduct. It embodied this principle in a thorough but also somewhat complicated format.

First, Congress directed its attention to nonunion workplaces where numerous company unions already existed. It brought these sham unions within the definition of a labor organization in section 2(5) by describing the gamut of functions that these organizations performed, as well as the names these organizations were called.<sup>72</sup> Congress then made it unlawful for an employer to dominate or interfere with such an organization.<sup>73</sup>

Congress had in mind two specific concerns in prohibiting domination or interference. First, assuming as Congress did that disputes between workers and employers should be adjusted by negotiations, an arms-length relationship should exist between the workers' representative and the employer.<sup>74</sup> Second, Congress intended to ensure that this kind of relation-

<sup>71</sup> *Id.* at 121-22.

<sup>72</sup> Section 2(5) defines a labor organization as:

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

29 U.S.C. § 152(5) (1988).

A University of Wisconsin economics professor, Edwin E. Witte, played a critical role in helping to fashion this definition. In Senator Wagner's first draft of the NLRA, a labor organization was defined as "any organization, labor union, association, corporation or society of any kind, in which the employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment." LEGISLATIVE HISTORY, *supra* note 55, at 271-72. But Professor Witte testified, "I am not certain that this includes what is known as the 'employee representation' committee, which is the most prevalent form of company union." *Id.* at 272. This led Congress to broaden the definition of a labor organization to include "any organization of any kind, or any agency or employee representation committee or plan." 29 U.S.C. § 152(5) (1994).

<sup>73</sup> This was accomplished by defining the following employer unfair labor practice in what is now § 8(a)(2):

It shall be an unfair labor practice for an employer . . . ; (2) 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) (1994).

<sup>74</sup> Sen. Wagner observed that critics of this conception "claimed that the bill would prevent friendly relations between employers and employees because [sic] it prevents employers from influencing the rules or policies of labor organizations." LEGISLATIVE HISTORY, *supra* note 55, at 41. He then explained: "Such an interpretation strains beyond all reason the provisions of this

ship existed by essentially prohibiting employers from contributing money or other financial support to a labor organization.<sup>75</sup>

#### IV. REGULATORY AMBIGUITY: NLRB GUIDANCE IN *ELECTROMATION AND DUPONT*

##### A. Electromation

For all the controversy surrounding this case, it is remarkable for its mundane facts. Electromation employed almost 200 people to make varied electrical products, and encountered financial problems in late 1988.<sup>76</sup> Management decided to trim costs by substituting a lump sum payment for next year's pay increase, and by revising its attendance policy.<sup>77</sup> At least 68 employees were unhappy about these changes, and in January 1989, wrote a letter to the company president protesting these changes.<sup>78</sup> He responded by arranging a meeting between management and randomly selected employees to discuss wages, bonuses, incentive pay, tardiness and attendance, and sick leave; and concluding that management's unilateral action might have been a mistake, he distilled the numerous complaints made by these employees into five general subjects that "action committees" would address.<sup>79</sup>

When he discussed this at a meeting with employees on January 18, his plan was opposed, but he convinced doubting employees that "we don't have better ideas at this point than to sit down and work with you on them"; as a result, action committees were formed to deal with (1) absenteeism/infractions, (2) the no smoking policy, (3) a communication network, (4) pay progression for premium positions, and (5) an attendance bonus program.<sup>80</sup> Envisioning that each committee would have six employees and a management facilitator, the company asked for volunteers by posting committee sign-up sheets; but when too few people signed up for some committees, and some employees signed up for multiple committees, an employee benefits manager made the final employee assignments.<sup>81</sup>

Although the smoking policy committee never met, the others did in February, and the company paid employees for their time spent on committee work.<sup>82</sup> Later, the benefits manager, acting as facilitator for the committees, explained that the "Committees would 'kind of talk back and forth' with the other employees in the plant" to ensure wider representation of employee views.<sup>83</sup> The attendance bonus committee made the most

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bill. Frank and friendly negotiations depend upon the absence of influence exerted by one party over another." *Id.*

<sup>75</sup> See 1 *id.* at 1125. Congress made an exception for instances where an employer paid a worker his wages while, during working hours, he put aside his job to represent fellow employees involved in a dispute.

<sup>76</sup> *Electromation*, 309 N.L.R.B. 990 (1992).

<sup>77</sup> *Id.* at 990-91.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 991.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 991-92 & n.6.

<sup>83</sup> *Id.* at 991.

headway by proposing a plan, but the company comptroller rejected it as too costly.<sup>84</sup>

To this point, the company was unaware that the Teamsters Union was working with some employees on an organizing campaign; however, when the union demanded recognition on February 13, the company withdrew itself from participation in the action committees, telling employees that they could continue their participation if they desired.<sup>85</sup> Two committees continued to meet but were disbanded on March 15 because of the union campaign.<sup>86</sup> A representation election occurred on March 31 where employees voted against representation 95 to 82; this precipitated a formal complaint that the action committees violated section 8(a)(2) of the NLRA.<sup>87</sup>

The NLRB took up this case after Electromation appealed the administrative law judge's finding of a section 8(a)(2) violation, and affirmed this finding.<sup>88</sup> It reasoned that the committees were section 2(5) labor organizations because they were employee representation groups that dealt with the company over matters such as pay and work conditions.<sup>89</sup> It then found that Electromation dominated these committees because the company, and not the employees, first had the idea to form these committees and then determined the committee purposes and goals, size, and composition.<sup>90</sup>

In considering the ambit of section 2(5), the majority opinion<sup>91</sup> stated that even though "dealing with" is broadly defined . . . it is also true that an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under section 2(5)."<sup>92</sup> This reasoning led the Board at various points to suggest that efficiency, work process improvement, and product quality are managerial subjects that fall outside the bounds of section 2(5).

Unfortunately, the Board did not develop this distinction fully and in one place; rather, this conception dribbled out in piecemeal fashion. Toward the end of the majority opinion, the Board cryptically observed that the "purpose of the Action Committees was . . . not to enable management

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84 *Id.*

85 *Id.*

86 *Id.* at 991-92.

87 *Id.* at 1015 (noted in the appendix).

88 *Id.* at 990.

89 The evidence thus overwhelmingly demonstrates that a purpose of the Action Committees, indeed their *only* purpose, was to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of "dealing with" within the meaning of section 2(5).

*Id.* at 997.

90 *Id.* at 997-98.

91 Chairman Stephens and Members Devaney and Oviatt joined the majority opinion, but Members Devaney, Oviatt, and Raudabaugh wrote lengthy concurrences which are not discussed in this Article.

92 *Electromation*, 309 N.L.R.B. at 995. To illustrate this distinction, the Board then cited a decision where an employer created a job enrichment program by composing work crews made up entirely of nonsupervisory employees, and another where a group of nonsupervisory employees resolved employee grievances without interacting with management.

and employees to cooperate to improve 'quality' or 'efficiency.'"<sup>93</sup> This statement did nothing, however, to define terms such as efficiency or quality. Consequently, three concurring opinions elaborated on these terms, but in very different ways. Devaney's concurrence noted that "the legislative history of the Wagner Act, although replete with expressions of outright alarm over the development of employer-dominated sham 'unions,' shows virtually no concern over employer-initiated programs concerned with efficiency, quality, productivity, or other essentially managerial issues."<sup>94</sup> Taking a different approach, Oviatt wrote a separate concurrence "to stress the wide range of lawful activities which I view as untouched by this decision";<sup>95</sup> and he included "'quality circles' whose purpose is to use employee expertise by having the group examine certain operational problems such as labor efficiency and material waste"<sup>96</sup> and more far-reaching employee participation programs "involving worker self-fulfillment and self-enhancement."<sup>97</sup> Member Raudabaugh appeared to take a more restrictive view when he said:

the list of subjects in Section 2(5) is a lengthy one. It includes such broad terms as "conditions of work" and "labor disputes." It is hard to imagine an employee committee that would be able to avoid these matters completely. Even if the committee's stated purpose is to deal only with such entrepreneurial concerns as product quality or workplace efficiency, it seems clear that the committee, in order to achieve its purpose, would have to consider one or more of the subjects listed in Section 2(5).<sup>98</sup>

## B. DuPont

One reason *Electromation* became so controversial is that nine influential congressmen took the highly unusual step of filing an amicus brief in the decision.<sup>99</sup> This is noteworthy because, less than two years later, many of these congressmen, including Newt Gingrich, helped Republicans recapture the Congress after a forty-year hiatus. Nothing about their brief was

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<sup>93</sup> *Id.* at 998.

<sup>94</sup> *Id.* at 999.

<sup>95</sup> *Id.* at 1004.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1008. The Board also concluded that the "purpose of the Action Committees was, as the record demonstrates, not to enable management and employees to cooperate to improve 'quality' or 'efficiency,' but to create in employees the impression that their disagreements with management had been resolved bilaterally." *Id.* at 998.

<sup>99</sup> *Id.* at 990 n.2. Representatives Steve Gunderson and Newt Gingrich headed this group, followed by William Goodling, who became Chair of the House committee in the 104th Congress where the TEAM Act was reintroduced. They were joined by Representatives Don Ritter, Paul B. Henry, Richard K. Armey, John Boehner, Mickey Edwards, Scott Klug, and Cass Ballenger. See *Congressional Group Urges Preservation of Participation Programs in Brief to NLRB*, Daily Lab. Rep. (BNA) No. 22, at A-9 (Feb. 3, 1992) (reporting that the brief argued that employee involvement programs are "an essential element in restoring the United States' preeminent position in the world economy"). One gets some sense, however, of this group's predisposition to overreact to anything less than a completely agreeable decision when the brief stated that an adverse ruling could spell an end to employee-management cooperative programs. In addition, the political nature of this filing was made evident when the brief stated that "if the Board's interpretation of the law effectively prevents employers from maintaining and establishing employee involvement programs, amici will be compelled to seek a legislative remedy."

improper or out of place; the point simply is that leaders of a then-minority political party understood *Electromotion* well from an employer perspective, and were prepared to make an issue of it. And they did this with some early fanfare when they made the mere filing of their amicus brief a news event.<sup>100</sup> In sum, opposition to *Electromotion* was organized and ready to act almost a year before the Board decided the case.

Thus, *Electromotion* overshadowed the later decided *DuPont*.<sup>101</sup> *DuPont* reads more as a continuation of unfinished thoughts leftover from *Electromotion* than a new lead case on how section 8(a)(2) applies in a union-represented workplace. Sensing that the labor-management community was carefully watching, the Board stated that it sought to "clarify" this body of law and to "emphasize" those cooperative employer efforts "because they show that there is some room for lawful cooperation under the Act."<sup>102</sup>

So the Board began with a careful discussion of "safe havens"<sup>103</sup> under the "dealing with" provision of section 2(5), observing that this condition is only met when there is a "'bilateral mechanism' . . . [that] entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required."<sup>104</sup> Emphasizing that "dealing with" does not preclude all forms of cooperative communication between employees and management, the Board then offered this guidance: "[A] 'brainstorming' group is not ordinarily engaged in dealing. The purpose of the group is simply to develop a host of ideas. Management may glean some ideas from this process, and indeed adopt some of them. If the group makes no proposals, the 'brainstorming' session is not dealing and is therefore not a labor organization."<sup>105</sup> The Board also suggested that "if the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization."<sup>106</sup> In addition, the decision stated that "a 'suggestion box' procedure where employees make specific proposals to management" does not create "dealing because the proposals are made individually and not as a group."<sup>107</sup>

The Board then examined the decision-making apparatus of the employee committees involved in this case. Stating that although "[t]he mere presence . . . of management members on a committee would not necessar-

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100 *Congressional Group Urges Preservation of Participation Programs in Brief to NLRB*, Daily Lab. Rep. (BNA) No. 22, at A-9 to A-10 (Feb. 3, 1992).

101 311 N.L.R.B. 893 (1993). The case involved the Chemical Workers' challenge to seven labor-management committees that the union claimed DuPont was using to bypass ordinary collective bargaining. The Board found that two of the committees violated section 8(a)(2) and section 8(a)(5), prohibiting bad faith bargaining, because "some committees dealt with issues which were identical to those dealt with by the Union, and they brought about resolutions that the Union had attempted and failed to achieve." *Id.* at 897.

102 *Id.* at 893.

103 *Id.* at 894.

104 *Id.*

105 *Id.*

106 *Id.* The Board reasoned "if the committee make 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." *Id.*

107 *Id.*

ily result in a finding that the committee deals with the employer in terms of Section 2(5),"<sup>108</sup> in this case it found that the "dealing with" condition existed.<sup>109</sup>

Turning to that part of section 2(5) defining dealt-with subjects that establish the existence of a labor organization, the Board concluded that two committees at DuPont "did not limit their activities to imparting information or planning educational programs. Both committees also decided on incentive awards to be given to unit employees . . . . Such awards are benefits and compensation . . . and fall within the subjects set forth in Section 2(5)."<sup>110</sup>

Finding that some of DuPont's labor-management committees satisfied all the criteria of section 2(5), the Board turned to the section 8(a) (2) issue: whether the employer dominated or interfered with these groups. It readily found such a violation:

[T]he [company] ultimately retains veto power over any action the committee may wish to take. This power exists by virtue of the management members' participation in consensus decision-making. The committee can do nothing in the face of management members' opposition . . . .

The [company] also controls such matters as how many employees may serve on each committee . . . . Unit employees had no independent voice in determining any aspect of the composition, structure, or operation of the committees.<sup>111</sup>

Neither *Electromation* nor *DuPont* broke new doctrinal ground in construing section 2(5). Forty years earlier, the Board found that the "dealing with" condition of a labor organization existed where a company president held a monthly question-and-answer session with employees, and as a result, altered some working conditions.<sup>112</sup> More recently, in *General Foods Corp.*,<sup>113</sup> the Board found that an employer's job enrichment program, dividing employees into small work teams, was not a section 2(5) labor organization

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108 *Id.* at 895.

109 *Id.* The Board found that:

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 [employer'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. . . . In our view, the fact that the management persons are on the committee is only a difference in 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. . . . [W]e find that there is 'dealing with' within the meaning of Section 2(5).

*Id.*

110 *Id.*

111 *Id.* at 895-96.

112 *Stow Mfg.*, 103 N.L.R.B. 1280 (1953); see also *Thompson Ramo Wooldridge, Inc.*, 132 N.L.R.B. 993 (1961) (holding that a section 2(5) labor organization existed where an employee communicated views to the employer, and later, the employer, at its discretion and without negotiations, rejected or implemented suggestions made by the employee committee).

113 231 N.L.R.B. 1232 (1977).

even though it used a consensus style decision-making process for scheduling work, making job assignments, and occasionally interviewing job applicants. The administrative law judge in that case found that these activities involved "managerial functions [that were] being flatly delegated to employees and do not involve any dealing with the employer on a group basis or . . . within the meaning of Section 2(5)."<sup>114</sup>

Nor did the Board break any new ground in interpreting employer domination under section 8(a)(2). Soon after the NLRA was enacted, the Board found unlawful domination where an employer retained a veto power over an employee committee.<sup>115</sup> The Supreme Court upheld this view in *Newport News Shipbuilding & Drydock Co. v. NLRB*.<sup>116</sup>

## V. THE TEAM ACT

### A. Background to the TEAM Act

Early in the 104th Congress, Representative Steve Gunderson (R-Wisconsin) and Senator Nancy Kassebaum (R-Kansas) introduced a bill to amend the NLRA, called the TEAM Act.<sup>117</sup> Gunderson explained that their bill was needed because the NLRB used *Electromation* as a precedent to disband five employee involvement programs in 1993.<sup>118</sup> Although factually correct, Gunderson probably overstated the importance of these post-*Electromation* decisions when he said that this decision called into question "virtually every current employee involvement program in the nation."<sup>119</sup>

Before the TEAM Act was introduced, Congress had not seriously considered amending either section 2(5) or section 8(a)(2) since 1947. In 1947, a Republican Congress enacted sweeping legislative changes to the NLRA. The Hartley bill, H.R. 3020, proposed a new section 8(d)(3):

(d) Notwithstanding any other provision of this section, the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act:

. . . .

(3) Forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as their representative under section 9.<sup>120</sup>

The Taft bill contained no such provision, but proposed to amend Section 9(a) of the Hartley bill, which at that time stated: "any individual employee or a group of employees shall have the right at any time to pres-

<sup>114</sup> *Id.* at 1235.

<sup>115</sup> *Newport News Shipbuilding & Drydock Co.*, 8 N.L.R.B. 866 (1938).

<sup>116</sup> 308 U.S. 241, 249 (1939).

<sup>117</sup> See *supra* note 1.

<sup>118</sup> *GOP Lawmakers Propose Lifting Ban on Company-Sponsored Labor Committees*, Daily Lab. Rep. (BNA) No. 20, A-1 (Jan. 31, 1995).

<sup>119</sup> *Id.*

<sup>120</sup> H.R. 3020, 80th Cong., 1st Sess. 26 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 56 (1985).

ent grievances to, and settle grievances with, their employer."<sup>121</sup> The Taft bill differed as follows:

And to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with other terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.<sup>122</sup>

Later, a conference committee agreed to delete all of the House language, and agreed to amend the NLRA with the Senate's proposal.<sup>123</sup>

This background is relevant to the TEAM Act for two reasons. First, when the Supreme Court was presented with an important section 8(a)(2) case in 1959, *Cabot Carbon, Inc.*,<sup>124</sup> it cited this history to reject the employer's argument that its employee representation committees were not labor organizations under section 2(5).<sup>125</sup> Second, the 1947 Hartley provision that the Conference Committee rejected would have legalized company unions, because it would have applied to employee representation committees in nonunion workplaces and would have permitted those committees to discuss the very matters Congress identified in 1935 as part of a company union's sham work.<sup>126</sup> In contrast, the TEAM Act touches on none of these controversial issues, but rather legitimizes only committee handling of work process, efficiency, and product or service quality matters.

### B. *The TEAM Act's Proposed Amendment to Section 8(a)(2)*

Although this history is relevant in considering whether the TEAM Act would result in the return of company unions, it was far from employers'

121 H.R. 3020, 80th Cong., 1st Sess. 28 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 58 (1985).

122 H.R. 3020, 80th Cong., 1st Sess. 86 (1947) (as passed by the Senate) (codified at 29 U.S.C. § 159(a) (1947)), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 244 (1985).

123 H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. 45 (1947), *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 549 (1985).

124 NLRB v. Cabot Carbon, Inc., 360 U.S. 203 (1959).

125 The Court said:

Notwithstanding the fact that Congress rejected the House proposal of a new section, to be designated § 8(d)(3), which, if adopted, would have permitted an employer to form or maintain a committee of employees and to discuss with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if there was no employee representative, [the company] contended that Congress intended to accomplish the same purpose by its amendment to § 9(a), and that, in consequence, an employer, whose employees have no bargaining representative, may now legally form or maintain a committee of employees and discuss with it the matters referred to in the proposed § 8(d)(3). We . . . conclude that there is nothing in the amendment of § 9(a), or in its legislative history, to indicate that Congress thereby eliminated or intended to eliminate such employee committees from the term 'labor organization' as defined in § 2(5) and used in § 8(a)(2).

*Id.* at 217.

126 Compare language in 8(d)(3) with section 2(5). For a discussion of section 2(5), see *supra* note 72.

minds when they reacted angrily to *Electromotion*.<sup>127</sup> Representative Gunderson responded to employer concerns shortly after *Electromotion* was decided by considering a bill far more radical than the TEAM Act.<sup>128</sup> Given employer opposition to *Electromotion* from the day it was decided, it is not surprising that once Republicans regained control of the Congress, they proposed a legislative response to *Electromotion*.

The TEAM Act is intriguing and surprising, however, for its moderation. In 1993, Gunderson was initially undecided whether to respond to *Electromotion* with a broad or a narrow amendment, and he turned to employers for advice in this matter.<sup>129</sup> At first, he was leaning toward the more sweeping approach, which would have entailed amending section 2(5) by deleting "dealing with" and inserting "collective bargaining with" the employer over subjects such as wages, hours, or working conditions.<sup>130</sup> This would have greatly narrowed the definition of a labor organization to include only employee groups where unions are present. Considering that section 2(5) covers most, but not all, private sector workplaces,<sup>131</sup> and that only 11% of private sector employees have union representation,<sup>132</sup> Gunderson's first idea would have nullified the protective reach of section 2(5) in most private sector workplaces. Such a proposal would have been a radical change in course for the NLRA.

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127 See Randolph Heaster, *Case Won't Hurt True Employee Panels*, KAN. CITY STAR, Feb. 7, 1993, at F11 (reporting Phillip Scaglia's view that "if the ruling is misinterpreted, it could have serious consequences for American industry's competitiveness"); Frank Swoboda, *NLRB Ruling Tests How Much Companies Trust Their Workers*, WASH. POST, Dec. 27, 1992, at H2 (reporting the Labor Policy Association's characterization of *Electromotion* as "totally unresponsive to workplace realities"); Michael A. Verespej, *New Rules on Employee Involvement*, INDUSTRY WEEK, Feb. 1, 1993, at 55 (reporting management attorney Martin Payson's view that *Electromotion* "puts into question every participation group that employers have put into place the past 20 years," and management attorney John Tysse's view that "the bottom line is that [Electromotion] clearly crimps employee-involvement efforts"); Steve Weinstein, *Teams In Trouble?*, PROGRESSIVE GROCER, Feb. 1, 1993, at 93 (reporting a leading management lawyer's view that the NLRB "chickened out" by not expanding employer rights in participative teams).

128 *Rep. Gunderson Plans to Introduce Bill to Address Effects of Electromotion Ruling*, Daily Lab. Rep. (BNA) No. 245, at A-16 (December 21, 1992). To appreciate the radical import of this proposal, compare it to the Supreme Court's holding in *Cabot Carbon, Inc.*, that section 2(5) is broader than the term "collective bargaining" and applies to situations where no collective bargaining agreement is being considered or negotiated. *Cabot Carbon, Inc.*, 360 U.S. at 211. The Court also recounted that when a Republican Congress enacted numerous changes in the NLRA that were favorable to employers by passing the Taft-Hartley Act of 1947, it nevertheless rejected a proposed new section 8(d)(3) that would have allowed "forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions." *Id.* at 215.

129 *Gunderson Seeks Management Consensus on Legislation to Overrule Electromotion*, Daily Lab. Rep. (BNA) No. 17, at A-4 to A-5 (Jan. 28, 1993) (reporting that Rep. Gunderson used a Jan. 27 breakfast meeting with the National Association of Manufacturers to seek an employer consensus on responding to *Electromotion*). The article reports that some employers favored amending section 8(a)(2), while others felt that section 2(5) should be amended.

130 *Rep. Gunderson Plans to Introduce Bill to Address Effects of Electromotion Ruling*, Daily Lab. Rep. (BNA) No. 245, at A-16 (Dec. 21, 1992).

131 The Railway Labor Act covers employees in rail and air transportation, and does not contain a section 2(5) labor organization definition. Section 2(3) expressly excludes the U.S. government and "any State or political subdivision thereof" from the NLRA's definition of an employer, and section 2(3) of the NLRA expressly excludes "agricultural laborer(s)" from the definition of an employee covered under the act. Thus, sections 2(5) and 8(a)(2) offer no protection to rail and air transport employees, agricultural laborers, and all government employees.

132 See *supra* note 44.

But once Senator Gunderson actually proposed legislation in 1993, he offered a much more moderate, narrow amendment of the NLRA. Instead of narrowing the broad definition of a labor organization, his bill left section 2(5) intact and proposed only to amend section 8(a)(2) by adding a proviso that would exempt employee participation groups or plans that handle matters of efficiency, productivity, or product quality.<sup>133</sup> Although this bill was unsuccessful, it was reintroduced once Republicans gained control of the Congress in early 1995. The bill is intriguing because it appears to codify the guidance language in *Electromotion* and *DuPont*, even though employers responded with alarm to these principles.

Notably, the TEAM Act leaves the broad wording of section 2(5) completely intact. It only proposes to amend section 8(a)(2), using language from *Electromotion* and *DuPont*. The amendment would change nothing in the wording of section 8(a)(2), but would 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 address matters of mutual interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.<sup>134</sup>

Thus, the amendment does two things: it codifies the existing guidance language in *Electromotion* that says a section 8(a)(2) violation does not occur, notwithstanding employer control over an employee group, when subjects handled by the group are limited to quality, productivity, and efficiency,<sup>135</sup> and it also implements the Board's guidance in *DuPont*.<sup>136</sup> The TEAM Act also proposes to amend the purpose statement of the NLRA, but not in a way that would permit employers to use participative work teams or employee groups of any kind to undermine collective bargaining.<sup>137</sup>

On its face, then, the TEAM Act is a very limited proposal to codify much of *Electromotion's* and *DuPont's* guidance language; but debate over the bill, just like debate over *Electromotion*,<sup>138</sup> has been distorted. This debate has featured employers characterizing *Electromotion* as a grave threat to

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133 H.R. 1529, 103d Cong., 1st Sess. (1993); S. 669, 103d Cong., 1st Sess. (1993); *Gunderson Bill Would Amend NLRA to Allow for Participation Programs*, Daily Lab. Rep. (BNA) No. 60, at A-14 to A-15 (Mar. 31, 1993).

134 *Statement by Rep. Gunderson and Text of Teamwork for Employees and Managers Act*, Daily Lab. Rep. (BNA) No. 20, at E-33 (Jan. 31, 1995).

135 Compare *supra* text accompanying note 134 (line 4 of the TEAM Act) with *supra* notes 92-93.

136 Compare *supra* text accompanying note 134 (lines 5-7 of the TEAM Act) with *supra* note 110.

137 See *Statement of Rep. Gunderson and Text of Teamwork for Employees and Managers Act*, *supra* note 136 (proposing to amend the purposes of the NLRA at section 2(b)). This amendment states that the purpose of the act is: "(1) to protect legitimate Employee Involvement programs against government interference; (2) to preserve existing protections against deceptive, coercive employer practices; and (3) to allow legitimate Employee Involvement programs to continue to evolve and proliferate." *Id.*

138 See *Former NLRB Chairman Miller Calls Electromotion Problem "Myth,"* Daily Lab. Rep. (BNA) No. 201, at A-5 (Oct. 20, 1993). This view has added cogency because the speaker was President Nixon's appointee who after leaving office, served as a leading management lawyer.

their interests,<sup>139</sup> and unions and academics characterizing the TEAM Act as a prelude to restoration of 1930s-style company unions.<sup>140</sup>

## VI. FINDINGS OF EMPLOYER COMPLIANCE WITH *ELECTROMATION AND DUPONT*

### A. *Development of Survey Questions*

The survey was developed by analyzing *Electromation* and *DuPont* language setting forth section 8(a)(2) compliance guidance.<sup>141</sup> For example, *DuPont* discussed employers "dealing with" employee groups under section 2(5).<sup>142</sup> A question was then formulated from this discussion, asking respondents to indicate how group decisions were made. Choices came directly from this discussion, and respondents were instructed to answer more than one if applicable. The following were the choices: the group only discusses and makes no decisions, the group makes suggestions, the group makes proposals that management considers, the group makes decisions based on voting by group members, the group makes decisions by informal consensus building, employees and managers negotiate, managers make decisions, managers modify decisions, and managers veto decisions.<sup>143</sup>

Some questions did not come directly from either *Electromation* or *DuPont*, but were asked because of their potential relevance to the broader issue of whether these teams resemble company unions of the 1930s. For example, the survey asked how many employees were part of the team or group.<sup>144</sup> Many company unions were organized on a plant-wide basis, and tended to be large organizations;<sup>145</sup> but as the results from this study show, the teams in this study tended to be quite small, often with less than 20 people. This information suggests, but does not prove, that employee

139 Kodak Vice President Michael P. Morley testified before Congress that *Electromation* "sounded an alarm to the 30,000 workplaces in the United States that have adopted employee involvement . . . . *Electromation* . . . came as a shock to those familiar with employment policy. . . . *Electromation* made it abundantly clear that section 8(a)(2) constitutes a serious threat to workplace cooperation." *Statements on the TEAM Act before the House Economic and Educational Opportunities Committee, May 11*, Daily Lab. Rep. (BNA) No. 92, at E-1 (May 12, 1995).

140 See *TEAM Act Gets Low Marks from Scholars of Labor Law Who Warn of Sham Unions*, Daily Lab. Rep. (BNA) No. 76, at C-1 (Apr. 20, 1995) (reporting that Professor Paula Voos, a member of the Dunlop Commission, warned that the TEAM Act "failed to 'guard sufficiently against the return of company unionism. . . .'" and reporting a public letter from Professors Harry Katz, Hoyt Wheeler, and Clyde Summers, who believe "that passage of the TEAM Act would quickly lead to the return of the kind of employer-dominated employee organizations and employee representation plans that existed in the 1920s and 1930s").

Without explaining their reasoning or offering supporting evidence, Katz, Wheeler, and Summers continued: "Indeed, because the proposed legislation applies even to workplaces where the employees have selected a union as their exclusive representative, enactment of this bill would free unionized employers to destabilize bargaining relationships and undermine support for the elected representative." This logic seems oblivious to the TEAM Act's expressly stated purpose of protecting only "legitimate Employee Involvement programs" while "preserv[ing] existing protections against deceptive, coercive practices." Cf. *supra* note 137.

141 Questions were drawn from the majority opinion and concurrences.

142 See *supra* text accompanying notes 103-07.

143 See *infra* app. at 264 (survey Item IV(1)).

144 See *infra* app. at 263 (survey Item I(3)).

145 See *supra* text accompanying notes 70-71.

teams or groups in the 1990s are not the monolithic and manipulative organizations of the 1930s; rather, they tend to be organized by specific tasks and functions.

### *B. Sampling Method*

The sample consisted of twenty-three nonunion employee teams located in Texas, Illinois, California, Ohio, Kentucky, Kansas, South Dakota and Vermont.<sup>146</sup> All teams were located at manufacturing sites or servicing centers, but nevertheless, performed highly varied functions. Sixteen teams were directly involved in manufacturing, four were involved in design and engineering, and three performed accounting functions.

The teams worked for six Fortune 500 employers who are partners in the Center for Human Resources Management at the University of Illinois (the "CHRM"). The Center funded this research,<sup>147</sup> and nineteen partner firms were invited to participate. Surveys were sent to the offices of senior vice presidents for human resources, or similar offices, and were then distributed to human resource managers at various plants. Surveys were completed from December 1994 through May 1995.

The surveys were completed by employees with a variety of responsibilities. One survey from a Defense Department supplier was completed by the plant superintendent who explained that fifty-six employees worked in wholly autonomous teams with this superintendent as the only manager on site. Three surveys were completed by engineers who were team members, and eight surveys were completed by human resource managers at the plant. In ten surveys, no inference could be made as to whether the respondent was a manager or non-supervisory employee.

### *C. Flaws in the Sampling Method and Survey*

The results and conclusions reported in this Article are limited by serious flaws in the sampling method and survey. The sample's small size is an obvious limitation, and means that the results and conclusions may not be generalized.

The sample is drawn from Fortune 500 firms that, in addition, are members of an academic research consortium. This suggests that these employers may, to an unrepresentative degree, devote attention to human resource management and strategy. The teams that were surveyed are likely the product of this planning. While there are advantages in surveying Fortune 500 employers, because of their large impact on the national economy, their likely dissimilarity to smaller and more common firms is also a disadvantage.

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<sup>146</sup> A parallel survey was created for union-represented workplaces, but only three completed surveys were received. This response was too small to provide meaningful statistical analysis. Furthermore, because the survey questions were different from the nonunion surveys, these surveys could not be analyzed with the nonunion surveys, in order to reflect the different interactions that might occur in the context of collective bargaining.

<sup>147</sup> A committee of partner representatives, consisting of senior vice presidents for human resources and University of Illinois faculty, selected this research project through a competitive proposal process.

The method for distributing the survey also raises some questions. Some CHRM employers provided a list of names and addresses, and the survey was sent directly from the University of Illinois to the workplace. Other employers requested that surveys be given to their office. These surveys were distributed under a cover letter from headquarters. In all cases, I received a copy of the cover letter. Each was brief and gave no overt indication of how the respondent was to answer questions. The advantage of this distribution method is that it resulted in a higher response rate, but it is also fair to question whether a memo from a superior resulted in some biased answers.<sup>148</sup>

Whether or not the respondent was a manager or a non-supervisory employee might also have biased the answer. Conceivably, a manager and a non-supervisory employee participating on the same team would have different perceptions about how the group operates. This is a relevant concern because a key aspect of this study is to determine the degree to which these teams were controlled or dominated by management.

Finally, the survey's questions were flawed to some degree. For example, an apparently simple question asked respondents to classify their team or group as an Employee Involvement Program, Employee Committee, Quality-of-Worklife Program, Work Team, or other employee group. Although these are common names for such groups, and even though these classifications have distinct meanings,<sup>149</sup> it is not clear that the respondents understand these terms as they are commonly used or that the respondents apply these meanings consistently. One person's Employee Involvement Program might be functionally identical to another's Work Team. Thus, statistical variation over these categories might simply be an artifact of the survey.

All of these amount to serious limitations but are offset by several considerations. Although the sample is quite small, it has great geographic diversity. It is also diverse in terms of products or services, consisting of plants that make nuclear weapons components, food additives, sophisticated electronics, packaging commodities, and mass-marketed paper products.

The problem of response bias was addressed by stating in the opening paragraph of the survey that answers would be treated anonymously and by providing respondents a self-addressed envelope for return directly to the University of Illinois.<sup>150</sup> In this respect, it must be noted that no CHRM representative asked how many surveys I received from his or her firm's workplace. Over 50% of the respondents chose to identify themselves by returning their survey in company stationery, but at no time did I report specific surveys to CHRM representatives.

Finally, the potential for bias was addressed by asking a large number of questions requiring descriptive rather than evaluative answers. For example, the survey asked: What is the length of employee participation? Two choices were provided: a fixed, definite term, or indefinite participa-

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148 The concern here is that managers completing the survey would realize they were being evaluated in some sense, and would therefore bias answers to make themselves look good in the eyes of their superiors.

149 For an overview of these differences, see Nunn, *supra* note 16.

150 See *infra* app. at 263 (introductory paragraph).

tion.<sup>151</sup> Another question asked respondents to check any of the following subjects as those handled by the team: pay, insurance, safety, discipline, fitness/health, tardy/absence policy, work process improvements, vacation, leave, product or service quality, or other.<sup>152</sup>

The factual nature of these answers is important, because the compliance analysis provided here was based on this information, and not subjective judgments about employer domination or control of the team.

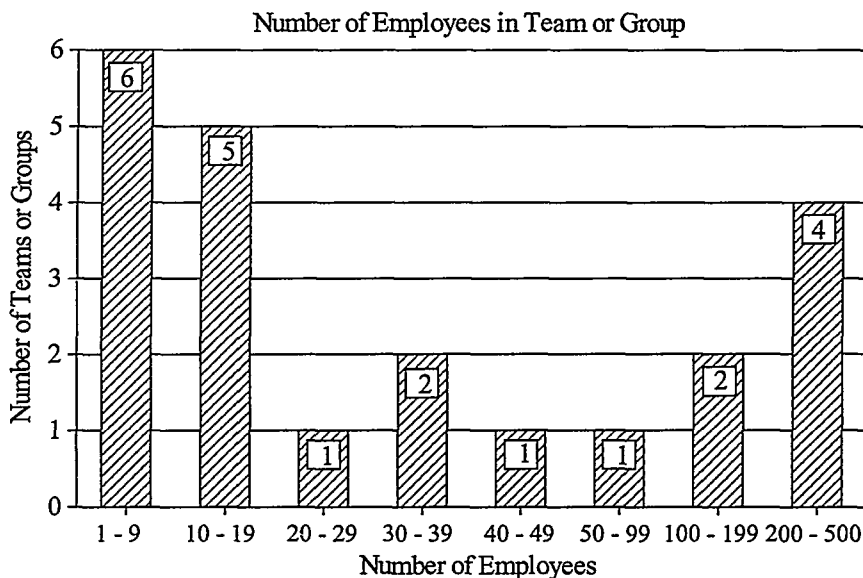
#### D. Findings

##### 1. Finding 1

Most of the teams were small. Figure 1 shows that six of the twenty-two respondents had fewer than ten members, and five had between ten and nineteen members.<sup>153</sup> Thus, half of the teams were small. The possible significance of this finding is that small group size facilitates individual participation. Teams of this size lend credence to employer claims that this organizational form is being used to empower employees. Five teams fell into a rough mid-size category, with three having between twenty and thirty-nine members, one with forty-five members, and one with fifty-six members.

Six teams were relatively large. These teams had 120, 134, 140, 276 (two separate teams), and 500 members. The one respondent with a team

FIGURE 1: SIZE OF TEAM OR GROUP



<sup>151</sup> See *infra* app. at 264 (survey Item III(3)).

<sup>152</sup> See *infra* app. at 265 (survey Item V(1)).

<sup>153</sup> One respondent left this part of the survey blank, and therefore, is not counted in this total.

of 500 is superficially reminiscent of an old company union; that is, a plant-wide organization to deal with employees. The two teams with 276 members also appear to fit this description. For teams ranging from 120 to 140, not even a preliminary assessment about group dynamics can be made. More information about the work context is needed to make this assessment.

Findings 2-7 are taken from Figure 2, which should be treated like a flowchart. It considers seven different elements that *Electromation* and *DuPont* identify as being part of sections 2(5) and 8(a)(2). No single element determines employer compliance under the NLRA, but certain patterns may suggest where compliance problems exist with teams.

To illustrate: The third element under section 2(5) presents data about subjects that teams handle. Three respondents stated that pay is one of these subjects. Since pay is contained in the section 2(5) definition of a labor organization,<sup>154</sup> these three teams have potential compliance problems.

The survey was not detailed enough to determine whether an actual violation was present. For example, if the team handled a pay issue only once, but routinely handles efficiency matters, it is conceivable that the Board would rule that the team does not constitute a labor organization, because it does not exist to handle matters of compensation.

The usefulness of this flowchart, however, is its presentation of data tendencies. We can see, for instance, that twenty-one of the twenty-three surveyed groups handled work process issues. While this datum does not yield a legal conclusion, nor even a public policy conclusion, it fills an informational void in which commentators are guessing about the extent to which teams treat work process issues. In short, it gives a limited empirical picture of how the structure, governance, and activities of these teams roughly correspond to *Electromation* and *DuPont's* compliance guidelines.

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154 See *supra* note 72.

FIGURE 2: *ELECTROMATION* AND *DUPONT* COMPLIANCE ANALYSIS OF 23 PARTICIPATIVE WORK GROUP TEAMS WITH NO UNION

NLRA SECTION 2(5)

Inquiry	Indicative of Compliance	Fuzzy Zone	Indicative of Violation
<i>"Dealing with" employees: How does team interact with management?</i>	Discusses (1) Suggests (11) Proposes (15)	Consensus (17) Vote (10)	Manager Decides (6) <sup>155</sup>
<i>What subjects does the team or group handle?</i>	Work Process (21) Quality (15)		Safety (8) Discipline (6) Vacation (5) Health (4) Tardy/Absent (4) Pay (3) Leave (2) Insurance (0)

NLRA SECTION 8(a)(2)

Inquiry	Indicative of Compliance	Fuzzy Zone	Indicative of Violation
<i>Who created the team?</i>	Employees (6)	Management & Employees (1)	Management (16)
<i>Who selects team members?</i>	Voluntary (9) Peers (5)		Management (9)
<i>Who directs team activities?</i>	Employees (10)	Management & Employees (17)	Management (5)
<i>Who evaluates the team or group?</i>	Employees (2) External Party (6)	Management & Employees (9)	Management (2)

## 2. Finding 2

A question was asked to determine the extent to which employees "deal with" employees through teams.<sup>156</sup> Since "dealing with" and group decision-making can be joined as a single process, Item IV(1) on the survey

<sup>155</sup> Responses indicating that management decides, changes or vetoes overlap Sections 2(5) and 8(a)(2).

<sup>156</sup> See *infra* app. at 264 (survey item Part IV(1), under heading Group's Decision Making Powers, asking respondents to "[d]escribe how the group makes decisions. Check more than one if applicable."). Possible responses were "the group only discusses and makes no decisions," "the group makes suggestions," "the group makes proposals that management considers," "the group makes decisions by informal consensus building," "managers make decisions," "managers modify decisions," and "managers veto decisions."

arrayed these responses together. It should be noted, however, that in *DuPont* the Board treated employer vetoes not as a section 2(5) issue—even though a veto is a form of “dealing with” employees—but rather, as a domination and interference issue under section 8(a)(2).<sup>157</sup>

Just one respondent stated that the team only discussed matters with the employer, while eleven stated they only made suggestions. These twelve groups would seem to lack the kind of bilateral interaction that the Board in *DuPont* stated was necessary to satisfy the “dealing with” provision in section 2(5).<sup>158</sup> Nevertheless, the survey does not permit the conclusion that roughly half the teams had no bilateral interaction with employers, because respondents were permitted to check multiple responses. Not all of the eleven teams answering that they made suggestions checked only that response.

Fifteen groups made proposals to management. This finding is in the fuzzy compliance zone because there is too little information as to how the employer responded to this communication. *DuPont* states that if a team makes a proposal unilaterally, and the employer does not communicate a response, the “dealing with” provision is not satisfied.<sup>159</sup> On the other hand, if an employer responds to a team’s proposal with a counter-proposal, then bilateral interaction clearly is occurring. This is evidence of the existence of a labor organization, but is not alone dispositive of the issue. If this bilateral interaction concerns work process or product quality, *Electromotion* suggests that no labor organization exists.<sup>160</sup>

Seventeen respondents stated they made decisions by informal consensus. This is interesting because it suggests the prevalence of informal decision making processes in these groups. Unfortunately, this finding alone does not have legal relevance, and therefore is put in the fuzzy zone of compliance. On the other hand, these data suggest that current teams differ from company unions, because company unions were governed by formal bylaws and charters,<sup>161</sup> while current teams operate much more informally.

The survey also provided information on the extent to which management changed or altered team decisions. Managers made decisions in six teams, changed decisions in eight teams, and vetoed decisions in four teams. Since making, changing, and vetoing team decisions connote control, and therefore, domination, these are listed as indicated violations; but again, stress must be laid on the fact that the survey does not permit a legal conclusion. If this employer domination occurred in a team that dealt only with work efficiency matters, *Electromotion*<sup>162</sup> and *DuPont*<sup>163</sup> suggest that no section 8(a)(2) violation would occur.

Even though these responses lead to no legal conclusions, they may indicate the extent to which employers keep their hands off team deci-

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157 See *supra* note 109.

158 See *supra* text accompanying note 104.

159 See *supra* note 106 and accompanying text.

160 *Electromotion*, 309 N.L.R.B. 990, 1001-02 (1992).

161 LEGISLATIVE HISTORY, *supra* note 55, at 121-22.

162 See *supra* notes 76-98 and accompanying text.

163 See *supra* notes 99-111 and accompanying text.

sions. In this survey, managerial alteration of decisions occurred in eight of twenty-three, or about one third, of the teams.

### 3. Finding 3

This finding resulted from answers to Survey Item V(1).<sup>164</sup> This Item was derived from *Electromation's*<sup>165</sup> and *DuPont's*<sup>166</sup> guidance creating "safe harbors" of subjects that fall outside of section 2(5).

Twenty-one respondents (roughly 90%) answered that their team handled work process matters. Consistent with this finding, fifteen teams reported handling product or service quality matters. The Board in *Electromation* appeared to approve of these activities,<sup>167</sup> and in *DuPont* implied that these activities are lawful because they do not touch on compensation or benefits.<sup>168</sup> But the data also show that some groups handled more than work process matters: eight handled safety, six handled discipline, five handled vacations, four handled fitness and health matters, four handled tardy and absence policies, three handled pay, and two handled employee leaves. All of these fall under section 2(5)'s broad definition of subjects handled by a labor organization.<sup>169</sup>

One of this survey's major limitations, no weighing of a team's time or resources spent on these subjects, is evident here. The fact that 90% of the teams are involved with work process issues, and roughly 65% are involved with quality issues, suggests but does not prove that these activities are teams' primary concerns. While the survey shows that one third of the teams handle section 2(5) subjects, it does not reveal how much time is spent on these activities. Consequently, no definite conclusion can be made about team compliance with *Electromation* and *DuPont*. What the data show is that one third of these teams are risking compliance problems under the NLRA by handling section 2(5) subjects.

Even though this percentage appears to be somewhat high, it must be remembered that a team's handling of these subjects is not alone dispositive in a section 8(a)(2) case. If a team is free from employer domination or interference, either because there is no bilateral interaction on these matters, or because the employer removes itself entirely from the process of making decisions about what the team is doing in this matter, there would appear to be no violation of the NLRA.

### 4. Finding 4

Two thirds of the teams were created by management. This finding resulted from Item II(2), asking "[w]ho created the group?"<sup>170</sup> Six teams,

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164 This item states: "Describe the subjects handled by the group. Check more than one if applicable." Responses included "pay, insurance, safety, discipline, fitness/health, tardy/absence policy, work process improvement, vacation, leave, and product/service quality."

165 See *supra* text accompanying notes 93-98.

166 See *supra* text accompanying note 110.

167 See *supra* text accompanying note 93.

168 See *supra* text accompanying note 110.

169 See *supra* note 72 (defining a labor organization).

170 See *supra* text accompanying note 90.

or about one fourth, were created only by employees, and one was jointly created by employees and management.

The data show that in nonunion workplaces, employers are primarily responsible for creating participative teams. The significance of this finding is that a team's creation by management may be an important factor indicating employer domination or interference under section 8(a)(2). But this question alone is not dispositive of the section 8(a)(2) issue. If an employer creates a team, but empowers it to act on its own, employer domination or interference might not exist. Finding 2, showing that seventeen teams operate by informal consensus building, and showing that management changes only one third of the teams' decisions, tends to demonstrate that these teams enjoy considerable autonomy. In short, evidence here suggests that while management creates many teams, it may empower them to the point of mooted the claim of employer domination or interference.

## 5. Finding 5

Item III(1) in the survey asked respondents to "describe how employee participation occurs. Check more than one if applicable."<sup>171</sup> The Item was derived from portions of *Electromotion*<sup>172</sup> and *DuPont*<sup>173</sup> focusing on how employees were selected for the team.

The results show a diverse recruitment pattern for teams, with an equal number of teams composed of volunteer members (nine), or employees selected by management (nine). Peer selection occurred in five (or about one fifth) of the teams. The results for peer and volunteer selection are not indicative of employer domination or interference, because employers do not control these selections.

But while this is true in a general sense, *Electromotion* shows that these results should not be overinterpreted. There, after the company president asked for volunteers but found that too few signed up to compose various action committees, his employee benefits administrator was given the task of selecting action committee members.<sup>174</sup> In short, although the employer in *Electromotion* was found to have dominated a labor organization partly because it selected team members, the Board ignored the fact that management really wanted voluntary employee participation.<sup>175</sup>

Thus, it would seem that whenever management selects team members, it adds a risk factor under *Electromotion*. Selection of team members would therefore be problematic for a considerable number of teams in the general population (since nine teams, or about 30%, had this selection procedure). But again, this factor alone is not dispositive, especially where a team confines itself to work process or quality issues, and thereby removes the team from the labor organization category.

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<sup>171</sup> Respondents were able to select from "employees are selected," "employees volunteer," "employees participate as part of their job," "employees are elected by peers," and "employees are appointed by management."

<sup>172</sup> See *supra* text accompanying note 90.

<sup>173</sup> See *supra* text accompanying note 111.

<sup>174</sup> See *supra* text accompanying note 81.

<sup>175</sup> See *supra* text accompanying notes 81, 90.

## 6. Finding 6

The Board in *Electromation*<sup>176</sup> and *DuPont*<sup>177</sup> analyzed the extent of employer control of team activities when it considered the section 8(a)(2) issue. The survey approached this issue in two ways: (i) by having respondents describe how their teams make decisions,<sup>178</sup> and (ii) by asking in Item III(4), "[h]ow is the group's work determined? Check more than one if applicable."<sup>179</sup>

Direction by employee initiative occurred in twice as many teams (ten, or about 40%) as management directive (five, or about 20%). Here the survey's specific use of the terminology "employee *initiative*" merits emphasis because this behavior indicates team autonomy. Because respondents were told to check more than one answer where applicable, this finding about team autonomy has limited significance. There were seventeen responses indicating that the team was at least sometimes directed by an employee-management consensus.<sup>180</sup> It appears that some teams occasionally act autonomously, and at other times act on an ambiguous consensus. Since the survey did not provide for weighted responses to indicate the degree of autonomous action, and also did not have a question to ascertain whether a team's autonomy was linked to deciding subjects such as pay and conditions of work,<sup>181</sup> no legal conclusions about these groups can be made.

## 7. Finding 7

Item VII(2) asked respondents, "If the group is evaluated, who evaluates? Check more than one, if applicable."<sup>182</sup> Neither *Electromation* nor *DuPont* examined this issue, but this question was asked because evaluation implies control and accountability, and therefore appears to be relevant to the section 8(a)(2) issue of employer domination or interference. Employees rarely evaluated team performance without management participation in this process (it occurred with only two teams, or about 10%); but this was also the case for evaluations performed only by managers. The more common methods of evaluation were by employees and management (nine teams, or 30%), and by an external party (six teams, or 20%). While this Finding has no great significance, it is consistent with evidence showing

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<sup>176</sup> See *supra* text accompanying note 90.

<sup>177</sup> See *supra* text accompanying notes 108-10.

<sup>178</sup> See *supra* note 154.

<sup>179</sup> See *infra* app. at 264. Responses included "Management Directive," "Management-Employee Consensus," and "Employee Initiative."

<sup>180</sup> Compare Finding 6 with Finding 1, *supra* notes 153-54 and accompanying text. Consensus would seem to be a workable decision-making process in small groups.

<sup>181</sup> Hypothetically, in a mixed control situation where an employer dominated work process issues, but was completely laissez-faire in safety issues, it is conceivable that the Board would find no employer violation. Since section 2(5) does not include work process matters, it would seem that employers are free to dominate teams that handle these matters, because when these teams act in this capacity, they are not labor organizations. If that team then handled a section 2(5) issue such as pay or safety, the Board might then look for evidence of employer domination or interference; but if the employer permitted the team to act autonomously on these matters, the Board might find that there was no domination of the labor organization.

<sup>182</sup> See *infra* app. at 266.

that most teams use consensus decision making, because the primary mode of evaluation is also collaborative.

## VII. WHAT THE FINDINGS IMPLY FOR THE TEAM ACT

### A. *Critics of the TEAM Act Cite Insufficient Evidence to Support Their Conclusions*

Critics of the TEAM Act have warned that this legislation promotes the return of 1930s company unionism.<sup>183</sup> Their assertions are remarkable, however, for failing to cite any supporting studies or empirical evidence. This is troubling for several reasons. These critics are prominent and respected members of the labor law and industrial relations academics, and so their views should be taken seriously.<sup>184</sup> In addition, the potential danger they point to is very serious; in effect, they equate the TEAM Act to an evisceration of the NLRA.<sup>185</sup> Moreover, they make blanket indictments of the TEAM Act, failing, in the process, to account for many employee participation programs that unions rate as positive experiences.<sup>186</sup> Finally, their public pronouncements are conclusory statements that fail to mention that the bill proposes to codify the guidance language of *Electromotion*. At the least, these critics should explain how specific provisions of the bill enlarge employer safe havens spelled out by *Electromotion* and *DuPont* to the point of returning company unions.

These criticisms are all the more ironic because they come from several members of the Commission for the Future of Worker-Management Relations (the "Dunlop Commission"). Empaneled by President Clinton to

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183 See Chris Murphy, *Teamwork on Trial*, GRAND RAPIDS PRESS, June 11, 1995, at F1 (statement of Professor Hoyt Wheeler) ("If you're in favor of this legislation, you favor establishing the kind of company unions that dominated before 1935. . . . As a management lawyer I could create an illegitimate company union in a half hour under the TEAM Act."). Professor Wheeler was joined by Professors Clyde Summers and Harry Katz in leading a controversial petition drive to portray the TEAM Act as a return to company unionism. Bob Bouyea, *Three Professors Are Targets of Cat Letter*, PEORIA J. STAR, July 18, 1995, at C1.

184 Three professors have led a petition drive to defeat the TEAM Act: Professors Harry C. Katz, New York State School of Industrial and Labor Relations; Clyde W. Summers, University of Pennsylvania School of Law; and Hoyt N. Wheeler, College of Business Administration, University of South Carolina. *Labor Law Professors Urge Congress to Reject TEAM Act Before House Panel*, Daily Lab. Rep. (BNA) No. 120, at A-10 (June 22, 1995) (reporting that 340 academics and 75 arbitrators signed their letter petitioning Congress to reject the TEAM Act).

185 The letter charged that the TEAM Act would:

[n]egate the original purpose of section 8(a)(2) by permitting without limitation a revival of the very practices against which section 8(a)(2) was aimed. The legislation contains no safeguards to guarantee that employer-created representation plans function democratically and independently of the employer. Nor is there anything in the bill which would prevent employers from manipulating employer-controlled organizations in order to thwart genuine employee voice.

As a result, we are persuaded that passage of the TEAM Act would quickly lead to the return of the kind of employer-dominated employee organizations and employee representation plans which existed in the 1920s and 1930s.

*Id.*

186 See U.S. DEP'T OF LABOR, COOPERATIVE PARTNERSHIP: A NEW BEGINNING FOR NATIONAL STEEL CORPORATION AND THE UNITED STEELWORKERS OF AMERICA (1989); U.S. DEP'T OF LABOR, QUALITY OF WORK LIFE: AT&T AND CWA EXAMINE PROCESS AFTER THREE YEARS (1985); LeRoy, *supra* note 11, at 1839-43.

suggest labor law reforms,<sup>187</sup> and promising in its mission statement to investigate "new methods or institutions . . . to enhance work-place productivity through labor-management cooperation and employee participation,"<sup>188</sup> this Commission's final report described employee participation programs in positive terms.<sup>189</sup> In a press conference with Secretary of Labor Reich, Chairman Dunlop strongly suggested that workplace teams are essentially good, and that the NLRA puts undesirable barriers in their way.<sup>190</sup> But a few months later, his public pronouncements about these workplace organizations contradicted this view. The Commission's report was considered a dead letter, however, after the November 1994 elections that brought Republicans to power.<sup>191</sup> This history gives the critics' attack something of a sour-grapes quality.

### B. Survey Implications for the TEAM Act

The compliance survey used here asked questions from *Electromation* and *DuPont's* guidance language, and because that guidance tended to be general, the questions were not made to be more specific. To make these questions more specific—for example, by asking respondents to assign

187 Reich, *Brown Announce New Panel To Examine Workplace Cooperation, Employee Participation*, Daily Lab. Rep. (BNA) No. 56, at AA-1 (Mar. 25, 1993).

188 *Commission on the Future of Worker-Management Relations: Mission Statement*, Daily Lab. Rep. (BNA) No. 56, at F-1 (Mar. 25, 1993).

189 See REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS (JAN. 9, 1995), reprinted in Daily Lab. Rep. (BNA) No. 6, at Special Supplement (Jan. 10, 1995). The very first goal listed by the Commission for the 21st Century American workplace is to "[e]xpand coverage of employee participation and labor-management partnerships to more workers, more workplaces, and to more issues and decisions." *Id.* at 4.

The Commission's first recommendation is to "[f]acilitate the growth of employee involvement. The Commission recommends that nonunion employee participation programs should not be unlawful simply because they involve discussion of terms and conditions of work or compensation where such discussion is incidental to the broad purposes of these programs." *Id.* at 8. This is a remarkable statement because it essentially ignores the distinction *Electromation* made between groups that handle only work process, efficiency, or product quality matters, and section 2(5) subjects, such as pay and conditions of work.

The Report continues: "We believe that [employee involvement programs] . . . , which are proliferating in the U.S. today, do not violate the basic purposes of Section 8(a)(2). Therefore, we recommend that Congress clarify Section 8(a)(2) and that the NLRB interpret it in such a way that employee participation programs operating in this fashion are legal." *Id.*

While agreeing with the Report's recommendation and reasoning, Commissioners Dunlop and Voos, several weeks later, forcefully criticized the TEAM Act, even though the Act leaves section 2(5) intact and appears to agree with the Commission's Report that employee involvement needs to be encouraged.

190 Press Conference Subject: *Dunlop Commission Report on the Future of Worker/Management Relations*, FED. NEWS SERV. WASH. PACKAGE (June 2, 1994), available in WESTLAW, 1994 WL 8372529 (statement of Chairman Dunlop) ("employee participation, which has grown and is designed to enhance efficiency, performance, quality, and the high performance workplace, . . . may well be constrained, in the view of many employers, by our existing statutory arrangements. . . . [P]art of that is the classic legal division of workers, supervisors, and managers which in that division tends to inhibit the sort of workplace cooperation and organization of work . . .") (emphasis added).

Eleven months later, he declared that the Commission he chaired "would not countenance [for] a minute for lots of reasons" the TEAM Act, even though the Act uses very similar language to his press conference statement. *Dunlop Urges Cooperation Between Labor and Management Inside Beltway*, Daily Lab. Rep. (BNA) No. 91, at A-10 to A-11 (May 11, 1995).

191 See *Dead on Arrival*, INDUSTRY WEEK, Feb. 6, 1995, at 56 (reporting management lawyer John Tysse's observation that "[t]he Report almost borders on the trivial," and that it did little more than "identify a problem, pose the options, and then walk away.").

weights to subjects their teams handled—would have the effect of substituting my interpretation of sections 2(5) and 8(a)(2) for the Board's, and would therefore give an inaccurate sense of how teams comply with these seminal decisions. In short, given the generality and ambiguity of the guidance provided in these decisions, a compliance analysis cannot provide a definite picture of team compliance.

Nevertheless, these two decisions offer a consistent interpretation of the NLRA in light of current employee participation programs. Moreover, these interpretations go farther than previous decisions in setting forth general guidelines for determining team compliance with sections 2(5) and 8(a)(2). Even though this survey does not result in legal conclusions about team compliance with these provisions, it paints a broad-brush empirical picture of how twenty-three participative teams scattered throughout the nation comply with these advisory principles. This picture can be used now to assess the arguments for and against the TEAM Act; while this assessment has considerable limitations, it is based on more detailed and relevant information than the theoretical or hypothetical or single-case arguments offered in congressional testimony<sup>192</sup> or news accounts.<sup>193</sup>

Here, then, is what this study's findings imply for the TEAM Act:

Current teams appear to lack the basic organizational characteristics of company unions. Finding 1 showed that half the teams had fewer than twenty members, and another quarter had between twenty and fifty-six members. This suggests that current teams are organized in small functional cells. This organizational form stands in sharp contrast to the typical company union, which was a large scale, plant-wide organization.<sup>194</sup>

Other findings are consistent with this conclusion. Numerous small teams in a workplace appear to be inefficient organizations for the kind of manipulation and domination of employee representation that company unions perpetrated. But small teams appear to be well suited to achieve task-specific goals. Finding 3, discovering that 90% of the teams handled work process matters and 60% handled product or service quality matters, indicates that most participative teams in the 1990s focus legitimately on matters of intrinsic managerial interest.

Not only do most teams have an organizational form better suited to legitimate employer interests in improving work process and product or service quality, but this form appears to carry over into legitimate empowerment of employees. Findings 2 and 6, showing respectively that 70% of teams operate on the basis of informal consensus, and that twice as many teams are directed by employee initiatives compared to those directed by management initiatives, suggest that teams are empowered to a considerable degree. To be sure, these findings do not indicate how much employees were empowered, and it is also true that a team with a single manager and several nonsupervisory employees built around informal consensus can

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192 See, e.g., *supra* note 4.

193 See *supra* notes 139-40 and accompanying text.

194 See *supra* text accompanying notes 69-70.

be a coercive management instrument where employees conform their views to agree with the manager.<sup>195</sup>

But these data suggest that this is not often the case. Since the typical team is small, individual employees are more likely to be more assertive than they would in a large-scale organizations. In contrast, plant-wide company unions tended to mold individual participation to fit employer objectives that were more directed to frustrating union organization than improving work process or product quality.<sup>196</sup> In short, although size of work teams is not alone determinative, it seems related to the employer domination issue.

In theory, employers can still dominate a large workplace with numerous small teams by vetoing each team's decisions, but this would appear to be a cumbersome process from an employer's perspective. Here it is interesting to note that the Board in *DuPont* found that only two of seven teams in a large chemical plant had violated section 8(a)(2).<sup>197</sup> This case, then, appears to illustrate the point that division of the workplace into numerous teams creates structural barriers for imposition of the kind of monolithic employer control that the 1935 Congress found so troubling in company unions.

Consistent with this emerging picture of small, task-directed, and participative organizations, the finding that employees volunteered for teams as frequently as management made team assignments indicates that more employers are pushing power down to the "shop floor." This stands in contrast to evidence from the 1930s indicating that employers tied representative workplace organizations to a much more hierarchical control structure where employee participation was often coerced or manipulated.<sup>198</sup>

Also, Finding 7, showing that teams are more often evaluated by external parties rather than managers acting alone or employees acting alone, gives more credence to employer characterizations that these programs are unlike company unions. Unfortunately, this study did not pinpoint what external review meant in particular settings. An outside consultant may have done the review, or it may have been done by another team in the firm. The general significance of an external review, however, should not be lost in this discussion. This kind of process connotes an openness, honesty, and willingness to expose problems and difficulties that company unions lacked.

These findings are also consistent with a growing body of anecdotal and case-study evidence showing that teams in the 1990s differ markedly from company unions that grew out of NIRA. Instead, the employer vision reflected in current teams appear to be more consistent with views held by corporate liberals in the 1920s,<sup>199</sup> or the highly influential industrial psychologist, Elton Mayo, who derided his generation's mechanistic view of how workers produce:

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195 See *supra* text accompanying note 108.

196 See *supra* text accompanying note 68.

197 See *supra* note 109.

198 See *supra* text accompanying note 70.

199 See *supra* notes 27-31 and accompanying text.

We have failed to train students in the study of social situations; we have thought that first-class technical training was sufficient in a modern and mechanical age. As a consequence, we are technically competent as no other age in history has been; and we combine this with utter social incompetence.<sup>200</sup>

### VIII. CONCLUSIONS

It appears that an employer's purpose in forming teams often has little or nothing to do with avoiding unions. This is not to suggest that employers are no longer interested in thwarting union organization; to the contrary, much evidence suggests that employers wish to keep unions out of their workplaces.<sup>201</sup> Employers today threaten to arrest union organizers for the most trivial kinds of trespass to property;<sup>202</sup> they fire employees who are behind organizing efforts;<sup>203</sup> they use thinly veiled threats of unemployment<sup>204</sup> or plant-closure<sup>205</sup> or disinvestment<sup>206</sup> to sway employees to vote against a union; they bribe susceptible organizers to keep out unions;<sup>207</sup> and they tie up bargaining for a first contract so long that they sometimes succeed in decertifying a union.<sup>208</sup>

200 See MAYO, *supra* note 34, at 120.

201 See CHARLES B. CRAVER, CAN UNIONS SURVIVE 47-51 (1994) (discussing virulent employer opposition to unions); BENNETT HARRISON & BARRY BLUESTONE, THE GREAT U-TURN: CORPORATE RESTRUCTURING AND THE POLARIZATION OF AMERICA 48-50 (1988) (discussing union avoidance strategies); JOHN LAWLER, UNIONIZATION AND DEUNIONIZATION 72-75, 102-08 (1990) (discussing union avoidance as an investment decision, personnel practices to frustrate unionization, and employer use of labor relations consultants to defeat unions); Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections*, in CHALLENGES AND CHOICES FACING AMERICAN LABOR 45, 54-61 (Thomas Kochan ed., 1985).

202 See, e.g., Johnson & Hardin Co. v. NLRB, 49 F.3d 237 (6th Cir. 1995); NLRB v. Great Scot, Inc., 39 F.3d 678 (6th Cir. 1994); Oakwood Hosp. v. NLRB, 983 F.2d 698, 700 (6th Cir. 1993); Leslie Homes, Inc., 316 N.L.R.B. 123 (1995).

203 See Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953, 993-95 (1991) (estimating that from 1985-1989, discriminatory discharges occurred in 32% of union-representation elections).

204 Guardian Industries Corp. v. NLRB, 49 F.3d 317, 322 (7th Cir. 1995) (upholding an NLRB cease-and-desist order to prohibit the employer from threatening employees with unemployment if the union was approved).

205 See, e.g., DTR Indus., Inc. v. NLRB, 39 F.3d 106 (6th Cir. 1994) (denying enforcement of an NLRB bargaining order, where the company president predicted one week before an NLRB representation election that the firm would lose 50% of its business if employees voted for the UAW); Crown Cork & Seal Co. v. NLRB, 36 F.3d 1130, 1139 (D.C. Cir. 1994) (denying enforcement of an NLRB bargaining order, where an employer predicted that can-making contracts would be lost if employees voted for the United Steelworkers and noted that a large number of plants represented by that union had already closed).

206 See, e.g., Adair Standish Corp. v. NLRB, 912 F.2d 854, 859-60 (6th Cir. 1990) (upholding the Board's ruling that an employer violated the NLRA by making statements before a union representation election linking delivery of a new printing press to remaining nonunion).

207 See, e.g., Robert Frank, *Bottle Battle: Allegations of Bribery To Block Union Haunt Coca-Cola*, WALL ST. J., Oct. 6, 1995, at A1 (reporting on the U.S. Attorney's office investigation into charges that an executive bribed a union organizer \$10,000 one week before a representation election in exchange for getting the names of employees who were supporting the organizing drive). In the 1980s, another organizing drive failed, after which many employees were fired. *Id.*

208 See, e.g., NLRB v. Thill, Inc., 980 F.2d 1137 (7th Cir. 1992). After two thirds of its workers voted for union representation in 1981, the employer bargained but did not reach an agreement; and two years later, after finally winning a remedial order from an administrative law judge, the employer appealed. In 1990, the Board ruled on the appeal in favor of the union, but the employer appealed again. *Id.* at 1138. In 1992, the Seventh Circuit denied enforcement to the

But frustrating union organizing appears to be beside the point when employers change organizational form and work culture. The imperative to use this organizational mode appears to be the same in union<sup>209</sup> as well as in nonunion settings. It is part of a management philosophy that transcends the matter of union representation. Instead, its purpose is to reduce layers of management,<sup>210</sup> to appropriate employees' knowledge of how work is actually performed and how it can be improved,<sup>211</sup> and to improve product or service quality by making employees more accountable for their own performance.<sup>212</sup> Consistent with this philosophy, teams are not organized on a mass-scale, but are deliberately kept small to encourage employee participation.<sup>213</sup>

Moreover, just as with most teams surveyed here, teams usually do not have general charters permitting them to set compensation,<sup>214</sup> or other

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Board's bargaining order because by this time, eleven years after election occurred, "[t]here is no reason to believe that the union retains the support of a majority of Thill's production and maintenance workers. Out of the 70 to 80 members of the bargaining unit, only 10 remain from 1981." *Id.* at 1142.

209 There are too many examples of companies turning to unions for cooperative solutions through employee empowerment plans to give much credence to the idea that employee involvement is used only in nonunion settings. For example, see George W. Bohlander & Marshall H. Campbell, *Problem-Solving Bargaining and Work Redesign: Magma Copper's Labor-Management Partnership*, NAT'L PRODUCTIVITY REV., Sept. 22, 1993, at 519 (reporting in detail on the radical remaking of a confrontational union-management culture around the concept of employee empowerment); Richard Greer, *U.S. Companies, Unions Reinventing Workplace*, ATL. CONST., Sept. 6, 1993, at A1 (describing how AT&T's phone repair plant in Atlanta, which employed 485 union-represented workers in 1993, decided that it could compete with low-wage competitors in Mexico by improving product quality and cutting waste); Tim Shorrock, *Business Groups Want Curbs Lifted on Nonunion Committees*, DES MOINES REG., Jan. 23, 1995, at 16 (reporting on the Amalgamated Clothing and Textile Workers relationship with Xerox Corp. that resulted in ideas that significantly reduced production costs); Guy Webster, *Mining: A Giant Bore*, ARIZ. REPUBLIC, Oct. 25, 1993, at 1 (reporting that the team concept was at the heart of a labor agreement that saved 1,300 mining jobs).

210 See Homa Bahrami, *The Emerging Flexible Organization*, 34 CAL. MGMT. REV. 33 (1992); Elliott Jaques, *We Don't Need Flat Organizations*, 68 HARV. BUS. REV. 127 (1990).

211 See Howard Gleckman et al., *The Technology Payoff: A Sweeping Reorganization of Work Itself Is Boosting Productivity*, BUS. WEEK, June 14, 1993, at 57, 57 (statement of Gary Reiner, GE vice president for business development) (identifying work redesign as his company's solution to productivity problems, and particularly credited the practice of giving workers more flexibility and authority to accomplish their work: "All the good ideas—all of them—come from the hourly workers."). He credited their input with cutting inventory costs at GE Power Systems from \$90-\$100 million a year. *Id.*

212 See, e.g., Tim McLaughlin, *Total Quality Management: The Wind Beneath McDonnell F/A-18's Wings*, ST. LOUIS BUS. J., Oct. 2, 1995, available in WESTLAW, 1995 WL 10490343 (describing how employee teams working on the Navy's F/A-18 Super Hornet have reduced the plane's weight by 1,000 pounds, reduced parts by 33%, improved wing function and engine thrust, and weeded out unreliable suppliers); Robert L. Rose, *Hard Driving: A Productivity Push at Wabash Puts Firm on a Roll*, WALL ST. J., Sept. 8, 1995, at A1 (describing a nonunion firm with a hierarchical management system that nevertheless uses employee participation to identify improvements in manufacturing efficiency).

213 See Miles & Snow, *supra* note 37, at 11 (reporting that "[p]erhaps the most well-developed large-company spherical network is that operated by electrical equipment manufacturer ABB (Asea Brown Boveri). Although ABB has over 200,000 employees, all work in small organizational units. The average plant employs fewer than 200 workers, and most of the company's 5,000 profit centers contain only 40 to 50 people.").

214 Peter V. LeBlanc, *Pay For Work: Reviving An Old Idea For the New Customer Focus*, COMPENSATION & BENEFITS REV., July 1, 1994 at 5, 12 (concluding that "organizations apparently believe that they can give employees more responsibilities, reduce management levels and numbers, and raise expectations for teamwork and demands for quality and speed without adjusting the reward system.").

conditions of employment. Instead, they usually have a narrowly defined function and often exclusive domain, such as workplace safety. Often, their focus is directed at saving production or service costs,<sup>215</sup> or improving customer satisfaction.<sup>216</sup>

This is not to suggest that increased employee participation in nonunion settings poses no problems for unions. Teamwork's greatest threat to unions is the promise of employee empowerment, because effecting that promise might undercut the paradigm of employee-employer conflict that is at the heart of every union's appeal.

But even though the findings presented here show that employee teams today are nothing like company unions in the 1930s, and although this Article finds that the TEAM Act does nothing more than codify *Electromotion* and *DuPont's* guidance language, these findings and conclusions do not imply that empowerment will succeed. Nor do they imply the kind of threat to unions that critics suggest.

First, history is not on the employers' side. Reading the vast literature on current employee participation plans, one gets the sense that employers believe they have found a New Age method for managing human resources. Perhaps the best scholarship in this whole field is historical, showing that numerous employers a century ago experimented with the very organizational forms and methods reported here.<sup>217</sup> We do not know why this early experimentation lapsed into dormancy for sixty years; but these programs did not fail for lack of scientific ingenuity, or employer commitment.

Second, just as a union eventually was certified to represent employees at Electromotion,<sup>218</sup> union organizing is taking place notwithstanding the

215 See William G. Clemens, *Strike Threat Helped Forge Successful Labor Policy*, TUCSON CITIZEN, Aug. 7, 1995, available in WESTLAW, 1995 WL 8972024; William G. Clemens, *Magma A Shining Example*, TUCSON CITIZEN, Aug. 7, 1995, available in WESTLAW, 1995 WL 8972023 (describing in detail how employee involvement teams helped to sharply reduce copper production costs in a highly competitive industry from 78 cents a pound in 1988 to 58 cents a pound in 1994); Emily Nelson, *Gas Company's Gain-Sharing Plan Turns Employees Into Cost-Cutting Vigilantes*, WALL ST. J., Sept. 29, 1995, at B1 (describing how a struggling gas utility has regained a competitive edge by empowering workers to make business decisions that reduce operating expenses).

216 For a general observation, see Rahul Jacob, *The Struggle To Create An Organization for the 21st Century*, FORTUNE, Apr. 3, 1995, at 90 (stating that "[r]ather than focusing single-mindedly on financial objectives or functional goals, the horizontal organization emphasizes customer satisfaction."). See also Peter V. LeBlanc, *Pay For Work: Reviving An Old Idea For the New Customer Focus*, COMPENSATION & BENEFITS REV., July 1, 1994 at 5, 8 (reporting this particular example of organizations being more customer-focused: "In April 1994, Boeing unveiled its first new commercial aircraft in more than a decade to compete with Europe's Airbus and other jumbo passenger airplanes. Unlike in the past, Boeing invited customers to help company teams design the plane. This critical customer input resulted in a more easily maintained plane (flight attendants can change bulbs in overhead reading lights, for example) with wider aisles, bigger storage bins, and higher ceilings for greater comfort.").

217 For an especially incisive history, see Sanford M. Jacoby, *Union-Management Cooperation in the United States: Lessons from the 1920s*, 37 INDUS. & LAB. REL. REV. 18 (1983). After making an exhaustive comparison of employee involvement efforts in the 1920s and 1980s, Jacoby concluded: "Today, ideas about union-management cooperation that have long been dormant again are in the air. It is risky to draw lessons from the past as a guide to future developments; nevertheless, there are striking similarities between earlier and current experiments in union-management cooperation." *Id.* at 31.

218 Albert R. Karr, *Labor Letter*, WALL ST. J., Feb. 1, 1994, at A1.

introduction of empowerment work settings.<sup>219</sup> Empowerment may create expectations that cannot be fulfilled, or it may challenge employees too much. It is also possible that unions have been successful in organizing for reasons unrelated to empowerment in specific work settings.

Third, there are gathering storm clouds on the nation's economic horizon, centering on income distribution; and these developments have implications for union organizing regardless of worker empowerment. Throughout the 1980s and 1990s, American workers improved their productivity,<sup>220</sup> while declines in unit costs in this period greatly improved their employers' global competitiveness.<sup>221</sup> By 1994, productivity gains and slow wage growth put American employers in a commanding lead against top-rivals, Germany and Japan;<sup>222</sup> and this combination contributed to record profits posted by American corporations.<sup>223</sup>

Workers have not shared, however, in these gains. Inflation-adjusted wages in the U.S. have actually fallen since 1973.<sup>224</sup> This has resulted in a growing disparity between poor and wealthy Americans; and the growing gap has become so alarming that an unusual array of economists,<sup>225</sup> business leaders,<sup>226</sup> Federal Reserve Chairman Alan Greenspan,<sup>227</sup> and other

219 See Bill Bowen, *Public Workers' Union Makes Dallas Inroads*, DALLAS BUS. J., Oct. 1, 1993, available in WESTLAW, 1993 WL 9418712 (reporting that "[S]purred by such practices as team management and employee involvement, there are signs that labor organizing among public sector employees may be coming to life—even in Texas."). The article noted that the American Federation of State, County, and Municipal Employees union succeeded in organizing 2,500 employees in the two preceding years. *Id.*

220 For a recent study on manufacturing productivity, see Mary Grenier et al., *Comparative Manufacturing Productivity and Unit Labor Costs*, 118 MONTHLY LAB. REV. 26 (1995). U.S. productivity growth from 1979-1993 averaged 2.5% a year, placing the nation behind Japan, Belgium, Italy, and the U.K. American productivity was better during 1985-1990 (2.8% growth per year), and grew to 3.2% in 1993. *Id.* at 29.

221 Alfred L. Malabre, Jr., *Protectionist Calls Belie Competitiveness*, WALL ST. J., Jan. 27, 1992, at A1 (showing that unit labor costs in the U.S. fell 0.1% from 1985-1990, but rose 7.9% in Canada, 10.3% in Japan, 10.8% in Britain, 11.0% in France, 11.3% in South Korea, 14.3% in Italy, and 15.6% in Germany).

222 See David Wessel, *The U.S. Economy May Dominate for Years*, WALL ST. J., Jan. 10, 1994, at A1, observing:

Like a once-flabby athlete, the U.S. has been working out at the health club for the past couple of years. And it has paid off. Germany and Japan have just finished a big lunch and are only now signing up at the local gym. . . .

Morgan Stanley figures U.S. workers cost \$16.70 an hour at current exchange rates; Japanese labor costs \$19.30, and Germany \$25.50. The gap will narrow, but the U.S. advantage is likely to persist.

223 Roger Lowenstein, *The '20% Club' No Longer Is Exclusive*, WALL ST. J., May 4, 1995, at C1 (reporting that first quarter 1995 return-on-equity for Standard & Poor's 500 companies averaged 20.12%). Lowenstein reported that "[t]his figure . . . represents the highest level of corporate profitability in the postwar era. . . ." *Id.*

224 See Melvin M. Brodsky, *Labor Market Flexibility: A Changing International Perspective*, MONTHLY LAB. REV., Nov. 1994, at 53, 58 (reporting that "[r]eal hourly earnings of production or nonsupervisory workers on private nonfarm payrolls, which peaked in 1973 at \$8.55 per hour and have been headed downward since, were \$7.64 in 1989 and \$7.39 in 1993.").

225 See Keith Bradsher, *Rich Getting Richer in U.S.*, STUDIES FIND, S.F. CHRON., Apr. 17, 1995, at A1 (reporting Prof. Edward N. Wolff's comparative study on income distributions in industrialized nations and the economist's conclusion that "[w]e are the most unequal industrialized country in terms of income and wealth, and we're growing more unequal faster than the other industrialized nations.").

226 See Steven Rattner, *U.S. Income Is Getting Riskier*, CLEV. PLAIN DEALER, Sept. 2, 1995, at 11B (statement of Steven Rattner, managing partner of Lazard Freres & Co.) (observing that "since 1973, annual earnings of the bottom 10 percent of workers have dropped by 24 percent—after

policy-makers<sup>228</sup> have expressed deep concern about it. In sum, unless employers share more productivity gains from teamwork with employees in the form of improved pay and job security, they appear to increase the risk that employees will withdraw from, or withhold themselves from, participative programs. Moreover, since worker perceptions of inadequate pay often spur union organizing,<sup>229</sup> nonunion employers should be concerned about inequitable team programs.

Fourth, it may be too early to discern the effects of large-scale reductions among managerial employees that often attend empowerment programs. To date, teamwork's biggest loser has not been production workers, but managers,<sup>230</sup> as firms have slashed their jobs while pushing decision-making down the organization to more self-directed work teams. This has resulted in increased insecurity among a class of employees who never before felt this threatened. Moreover, it is conceivable that the beneficial effects of disemploying managers show up early, while harmful effects, such as loss of valuable experience, are delayed.<sup>231</sup>

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adjustment for inflation—while those of the top 20 percent have increased by 10 percent. As a result, the United States . . . has the widest income disparity of any modern democratic nation.”).

227 David Wessel, *Greenspan Predicts Revival of Growth Without Any Acceleration in Inflation*, WALL ST. J., July 20, 1995, at A2 (reporting that Greenspan testified that the increasingly unequal distribution in the U.S. posed “a major threat to our society.”). On Jan. 25, 1995, in testimony before the Senate Finance committee, Greenspan testified that “most all analysts of income distributions have been acutely aware that since the late 1970s, that there’s been a fairly pronounced increasing dispersion of incomes, and that . . . the rich get richer and the poor get poorer.” *Hearing of the Senate Finance Committee Subject: Economic Outlook*, FED. NEWS SERV. WASH. PACKAGE (Jan. 25, 1995), available in WESTLAW, 1995 WL 6623933.

228 See *Prepared Testimony of Robert E. Rubin Secretary of the Treasury Before the House Appropriations Committee*, FED. NEWS SERV. WASH. PACKAGE (Feb. 14, 1995), available in WESTLAW, 1995 WL 6621829 (statement of Secretary of Treasury, Robert Rubin):

This slow growth in average wages has been accompanied by an unequal distribution of income gains. . . . [I]n the past fifteen years, those with incomes in the lowest fifth of American households have seen their real incomes fall below the levels attained by their counterparts in 1980; those in the top fifth have seen their incomes rise by 21 percent; and the middle has stood still.

The unequal distribution of income gains over the past fifteen years has put very real pressure on middle-class families. Their standards of living have failed to match their legitimate expectations.

See also *Remarks by Labor Secretary Robert Reich At Labor Department Low-Wage Workers Conference Labor Department*, FED. NEWS SERV. WASH. PACKAGE (Feb. 16, 1995), available in WESTLAW, 1995 WL 6621937 (statement of Secretary of Labor, Robert Reich) (“[i]n the late 1970s, about 7 1/2 percent of working families . . . were below the poverty line. . . . Right now, 1995, 11.5 percent of working American families are under the poverty line. . . . [T]he problem is not that some people are getting rich. . . . It’s good news that some people are getting rich. The problem is that most of us are getting nowhere. We’re hurtling toward a two-tiered society composed of a minority who are profiting from economic growth and a majority who are not.”).

229 See, e.g., David Debo, *Union Starts Organizing Drive at Fisher-Price’s Medina Plant*, BUS. FIRST-BUFFALO, Jan. 9, 1995, at 3 (reporting on a union organizing drive sparked at a long-time nonunion toy factory after the employer eliminated extra weekend pay); Peter L. DeCoursey, *Support Employees at Boone Go Union*, READING EAGLE, Sept. 29, 1995, at B2 (reporting that a school district’s support and clerical staff voted for union representation over unhappiness with a 2% annual raise); Linda Tucci, *McDonnell Douglas Machinists See Union For Engineers*, ST. LOUIS BUS. J., July 4, 1994, at 1 (reporting on a union organizing drive involving 10,000 professional employees after the employer’s over-perceived, arbitrary pay cuts).

230 See Tomasko, *supra* note 6, at 10 (reporting Drucker’s observation).

231 *Id.* (reporting Harry Levinson’s insights on corporate reengineering: “Early retirements have left many [employers] bereft of organizational memory.”).

Finally, just as there is some evidence that increased empowerment has threatened the managerial class, it also appears that aspects of teamwork have occasionally alienated or angered nonsupervisory employees.<sup>232</sup> The team concept has not existed in a strategic vacuum, but rather, has been part of employers' plan to respond to global competition,<sup>233</sup> and as part of this strategy, employers have been laying off employees even when the firm has been profitable.<sup>234</sup> Workers have reacted to this strategy with anxiety, fear and a sense of betrayal.<sup>235</sup> Disemploying people through layoffs and coerced retirements has created a grim survivors' syndrome in some workplaces.<sup>236</sup> A senior industrial psychologist at AT&T recently offered this evaluation on the effects of corporate delayering, and consequent job-cutting, to senior executives: "Open hostility is surfacing as never before. Its focus is toward the company rather than toward the competition or the marketplace where such energies can be productively channeled. The amount of suppressed, covert hostility lurking just below the surface in many people is truly frightening."<sup>237</sup>

Against this backdrop of constant restructuring, some empowerment programs have cut muscle, and not just fat, out of organizations.<sup>238</sup> Some teams have been constantly pushed to improve efficiency to the point

232 For an excellent article on "mavericks," employees who fail to be won-over by teams, and who often work to undermine team effectiveness, see Lynn Summers & Ben Rosen, *Mavericks Ride Again (Troublesome Work Team Members)*, TRAINING & DEVELOPMENT, May 1, 1994, at 119. According to one team member "Mavericks are team members who aren't 'with the program.' . . . They do what they think are their jobs, but they don't crosstrain or help anyone. They care only about themselves, not about the team. And they aggravate other team members." *Id.*

233 See *supra* notes 4 and 8.

234 Matt Murray, *Thanks, Goodbye: Amid Record Profits, Companies Continue to Lay Off Employees*, WALL ST. J., May 4, 1995, at A1. Murray reports that as corporate profits increased 13% in 1993 and 11% in 1994, companies laid off 516,069 employees. This figure exceeded by 200,000 the number of jobs that were cut during 1990, when the last recession occurred. *Id.* Proctor & Gamble Chairman Edwin Artzt explained why his company slashed 13,000 of its 106,000 jobs recently: "We must slim down to stay competitive . . . . The public has come to think of corporate restructuring as a sign of trouble, but this is definitely not our situation." *Id.*

235 Xerox, which was represented by its CEO on the Dunlop Commission and has a successful team approach, eliminated 9,500 of its 97,000 jobs since the beginning of 1994. *Id.* A company spokesman related that "Xerox has had a very paternalistic reputation for its sort-of contract with employees for years. . . . I know it can sound very heartless when you're making these decisions when individuals' careers are affected, especially when the company's making money. But I think it is a new reality." *Id.* Employee Bennie Dillon commented: "Three to five years ago, I felt pretty close to being comfortable, but now I think I'm part of a big wheel that's just rolling. Whatever that wheel wants to do, it's going to do it." *Id.* AT&T, another company using employee involvement teams, cut 9,800 jobs in 1994, when it also posted its best financial results in a decade. *Id.* at A6. An AT&T technician, Joe Froman, reacted:

I always get a chuckle when they go on TV and say we're doing so well. Here at the bottom ranks, where the grunts are, you're always feeling the pinch, the tightening of the belt, take this away, take that away. You always wonder why they couldn't make things better for us when they're doing so well.

*Id.*

236 See ANTHONY DOWNS, CORPORATE EXECUTIONS (1995).

237 Peter Larson, *Layoff Survivors Require Care*, CALGARY HERALD, Mar. 11, 1995, at E16.

238 For an intriguing view of this, see Carol Howes, *Cult of "Corporate Anorexia" Could Tip Companies Over Edge*, OTTAWA CITIZEN, May 20, 1995, at D9. Bob Evans, founder of a Canadian outplacement firm, compares delayered and empowered firms to anorexics who lack muscle and fat to handle emergencies and other shocks. He opines that empowerment is sometimes a euphemism that means "employees take on more and more and more." *Id.* Eventually, he says, workers can be pushed to the point where they think, "Screw you, screw this customer, screw this company." *Id.*

where some employees have felt that the pace of work has gotten out of hand.<sup>239</sup> Team-workers have felt betrayed when their employer has outsourced their jobs to low-wage workers in developing countries.<sup>240</sup> Other team-workers have felt that labor-management cooperation is simply a one-way street benefitting their employer.<sup>241</sup> In union-represented workplaces, this perception has destabilized union leadership supporting cooperative labor relations, and spawned dissident organization within unions.<sup>242</sup>

239 See Erik Gunn, *Union at Briggs Moves to Recast Acrimonious Debate over Job Losses*, MILWAUKEE J., June 6, 1994, at 8C (reflecting this concern in a labor dispute involving thousands of workers for engine-maker Briggs-Stratton, where a local union leader was fearful about self-directed work teams being used in a speedup, thereby creating more stress for production workers); see also Robert L. Rose, *Hard Driving: A Productivity Push at Wabash National Puts Firm on a Roll*, WALL ST. J., Sept. 7, 1995, at A1 (reporting on disgruntled manufacturing employees working in an empowered environment, who are interested in forming a union to address onerous working conditions, such as assembly speed-ups and working in extremely hot factories).

240 See Sean Griffin, *Job Insecurity: Angry, Anxious Boeing Machinists Know That If a New Contract Isn't To Their Liking, They Can Walk Off the Job*, TACOMA NEWS TRIB., Sept. 24, 1995, at G1. Job outsourcing was at the heart of a major machinist strike against Boeing in October 1995. Griffin reports that the purpose of union cooperation over the past three years was "to make the company leaner, smarter, more productive and less divided by bureaucratic barriers." *Id.* Nevertheless, Boeing decided to "off-load" some jobs to Mexican employees, whose earnings are only one-fourth of similar Boeing employees. The article reports that "Boeing officials were surprised at the angry reaction to their announcement three months ago that another 4 percent of Boeing work would be exported. Workers shouted down bosses. They stomped out of meetings. They felt a bitter sense of betrayal." *Id.*

241 Two bitter strikes at Caterpillar in the 1990s provide an illustration, because these strikes occurred in the context of a strong labor-management cooperation program. Frank Swoboda, *The Bitter Harvest of a Global Shift: Improving Productivity Doesn't Help Caterpillar Workers in an Internationalized Economy*, WASH. POST, Apr. 19, 1992, at H1, insightfully reports:

In the new world order of global competition, the bitter five-month strike at Caterpillar Inc. above all raises questions about how the fruits of labor-management cooperation should be divided up.

What share of the rewards should go to the company's shareholders, who provided the cash to modernize and automate, and what share belongs to the workers, whose cooperation on the factory floor helped raise productivity to a worldwide standard?

See also Robert L. Rose & Alex Kotlowitz, *Back to Bickering: Strife Between UAW and Caterpillar Blights Promising Labor Idea*, WALL ST. J., Nov. 23, 1992, at A1 (reporting on particular aspects of Caterpillar's employee-involvement program that were greatly damaged by the UAW strike: "Employee involvement became a near-religion in industrial America during the 1980s as Rust Belt companies sought to become competitive in world markets. But with so many workers now worried about losing their jobs, 'these programs are under siege,' says Tom Raleigh, a consultant who helped initiate Caterpillar's [program].").

242 See Robert R. Rehder, *Japanese Transplants: After the Honeymoon*, BUS. HORIZONS, Jan.-Feb. 1990, at 87 (reporting on the New Directions dissident movement in the United Auto Workers). This group "is calling for less cooperation with companies that they allege are forcing workers to compete with each other under a primarily Japanese management system." *Id.* at 88; see also James Risen, *Dissidents' Win at Mazda Plant Stuns UAW, Firm*, L.A. TIMES, May 11, 1989, at 1. Risen reports on the surprising election of a more confrontational union leadership representing thousands of auto workers in a plant where employee involvement was built around the concept of kaizen (a Japanese term for continuous improvement through increased productivity and quality). The article reports that workers began to identify kaizen with production line speed-ups, heavier workloads, and improvements that made their jobs obsolete. The defeated local union president observed that:

People don't feel they have had the input in decision-making that they were told they would have. Management thinks that employee involvement means that managers listen to what the workers say, and then go ahead and make the decisions themselves. The people were told in orientation that it meant they would be involved in the actual decision-making.

*Id.*

The debate so far about the TEAM Act has been steeped in well-rehearsed arguments by familiar employer and union representatives, with some disgruntled professors joining in from the sidelines. This Article improves on this debate by surveying twenty-three participative teams to see how well they comply with *Electromation* and *DuPont*. It also makes two unremarkable, and yet little remarked, observations: that the TEAM Act does not portend the return of company unions, nor does it change *Electromation* and *DuPont*. Essentially, the act offers to codify the common-sense guidance that these decisions provided, while demonstrating Republican prowess in legislating against labor's will.

As important as this legislation is, it does not address a more fundamental matter. A century ago, some employers experimented with organizational models for sharing power between themselves and small groups of employees, but that experiment failed for reasons having nothing to do with NLRB decisions. By the 1930s, virtually all employers returned to organizational models based on adversarial conceptions of workers and management, including company unions. In light of this history, even if the TEAM Act becomes law, the long-term future of work teams remains uncertain.

## APPENDIX

### SURVEY OF EMPLOYEE INVOLVEMENT GROUPS & WORK TEAMS

Please use a **SEPARATE FORM** to answer questions about **EACH** employee involvement or team-based group you know. Some questions ask how a group operates. Please consider your answers carefully. Your answers are anonymous. By using the enclosed self-addressed envelope, your survey will go to the University of Illinois Mail Center. **The mail clerk will open and discard envelopes before forwarding surveys to me to ensure that I don't use a postmark to identify you.**

#### I. BACKGROUND

**I(1) Name of Group:** \_\_\_\_\_

**I(2) Type of Group:**

Employee Involvement Program	( )
Work Team	( )
Quality-of-Work Life	( )
Employee Committee	( )
Other	( )

**I(3) Number of Employees Covered:** \_\_\_\_\_

**I(4) Brief Description of Work Performed by Employees:**

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#### II. CREATION OF GROUP

**II(1) How many years has the group been in existence?** \_\_\_\_\_

**II(2) Who created the group?**

Management	( )
Employees	( )
Management and employees	( )

**II(3) Were written goals for the group issued at the time it was created?**

Yes ( ) No ( ) Cannot Determine ( )

**II(4) Briefly summarize these goals:**

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**II(5) Have these formal goals ever been changed since the group began?**

Yes ( ) No ( ) Cannot Determine ( )

### III. STRUCTURE AND ORGANIZATION OF GROUP

#### III(1) Describe how employee participation occurs. Check more than one if applicable:

- Employees are selected ( )
- Employees volunteer ( )
- Employees participate as part of their job ( )
- Employees are elected by peers ( )
- Employees are appointed by management ( )

#### III(2) Describe how management participation occurs. Check more than one if applicable:

- Managers volunteer ( )
- Managers are specifically assigned ( )
- Managers participate as part of their job ( )
- Managers are appointed ( )
- Managers are selected by employees ( )
- There are no managers ( )

#### III(3) Length of Employee Participation

- Employees participate for a fixed, definite term ( )
- Employees participate indefinitely ( )

#### III(4) How is the group's work determined? Check more than one if applicable:

- Management directive ( )
- Management-employee consensus ( )
- Employee initiative ( )
- Other (List) \_\_\_\_\_ ( )

### IV. GROUP'S DECISION MAKING POWERS

#### IV(1) Describe how the group makes decisions. Check more than one if applicable:

- The group only discusses and makes no decisions ( )
- The group makes suggestions ( )
- The group makes proposals that management considers ( )
- The group makes decisions based on voting by group members ( )
- The group makes decisions by informal consensus-building ( )
- Managers make decisions ( )
- Managers modify decisions ( )
- Managers veto decisions ( )

**IV(2) For groups having decision making powers, describe how agreement is reached:**

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**IV(3) For groups having decision-making powers, describe how disagreements are handled:**

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## V. SUBJECTS HANDLED BY GROUPS

**V(1) Describe the subjects handled by the group. Check more than one if applicable:**

Pay	( )
Work Process Improvements	( )
Insurance	( )
Vacation	( )
Safety	( )
Leave	( )
Discipline	( )
Product/Service Quality	( )
Fitness/Health	( )
Tardy/Absence Policy	( )
Other _____	( )
Other _____	( )

## VI. EFFECTS OF GROUP ACTIVITY

**VI(1) Describe effects of the group's activity. Check more than one where applicable:**

	Diminished	No Change	Improved
Communication between employees	( )	( )	( )
Communication between employees and managers	( )	( )	( )
Employee productivity	( )	( )	( )
Service or product quality	( )	( )	( )
Employee pay	( )	( )	( )
Employee benefits	( )	( )	( )
Work flow	( )	( )	( )
Use of technology	( )	( )	( )

## VII. EVALUATION OF GROUP ACTIVITY

### VII(1) How often is the group formally evaluated?

- |                       |     |
|-----------------------|-----|
| Never                 | ( ) |
| Irregular times       | ( ) |
| Once a year           | ( ) |
| More than once a year | ( ) |

### VII(2) If the group is evaluated, who evaluates? Check more than one, if applicable.

- |                           |     |
|---------------------------|-----|
| Only managers             | ( ) |
| Only employees            | ( ) |
| Managers and employees    | ( ) |
| External reviewers        |     |
| (Nonmembers of the group) | ( ) |

### VII(3) If the group is evaluated, what is evaluated? Check more than one, if applicable.

- |   |     |
|---|-----|
| Effect of group activity on business objectives | ( ) |
| Scope of group's activity                       | ( ) |
| Group's communication dynamics                  | ( ) |
| Group's decision making dynamics                | ( ) |
| Relationship of group to other business units   | ( ) |
| Attitudes of group members                      | ( ) |
| End-user (e.g., customer) perception of group   | ( ) |

## VIII. INTER-GROUP ACTIVITY AND COORDINATION

### VIII(1) Does the group formally interact with other groups?

Yes ( ) No ( )

### VIII(2) If yes, what are these groups? Check more than one, if applicable.

- |                           |     |
|---------------------------|-----|
| Other employee group      | ( ) |
| (Name) _____              |     |
| End-user (customer) group | ( ) |
| (Name) _____              |     |
| Other _____               | ( ) |

Thank you for your time and effort in completing this survey. Copies of aggregate results are available from Professor Michael H. LeRoy, Institute of Labor & Industrial Relations, 504 E. Armory, Champaign, IL 61820 ((217) 333-1482).

11/04/94