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Does the NLRA Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment

Bruce E. Kaufman†

I. INTRODUCTION

Employer-sponsored employee involvement and participation ("EIP") programs have been proliferating over the last two decades among American companies.¹ The impetus behind these programs is the desire of companies to improve productivity and lower cost in response to greater competitive pressure coupled with evidence from academic research and two decades of experimentation in industry demonstrating that these programs can indeed deliver higher performance and increased employee job satisfaction.²

Understandably, then, the management community reacted with shock and dismay in 1992 when the National Labor Relations Board ("NLRB" or "Board") issued its now-famous decision in the Electromation case.³ The company, nonunion at the time, had formed five employee “action committees” to obtain feedback and proposals for change on various company employment policies, such as those regarding attendance, pay progression, and smoking, that were a source of dissatisfaction to a number of the employees. From the company’s point of view, it was merely doing what academics, consultants, and policy experts constantly advise managers to do—giving the workers a chance to get involved and

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¹ See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, U.S. DEPARTMENT OF LABOR & U.S. DEPARTMENT OF COMMERCE, FACT FINDING REPORT 1 (1994); EDWARD LAWLER ET AL., EMPLOYEE INVOLVEMENT AND TOTAL QUALITY MANAGEMENT: PRACTICES AND RESULTS IN FORTUNE 500 COMPANIES 119 (1992) (reporting that over 80% of large companies used one or more forms of employee involvement).


participate in decisions that affected their work lives. Acting on a complaint by the Teamsters Union, however, the NLRB determined that the company's action teams constituted a labor organization, as defined in section 2(5) of the National Labor Relations Act ("NLRA" or "Act"), and were "dominated" by the employer, in violation of section 8(a)(2) of the Act. As a result, the Board found the company guilty of an unfair labor practice and ordered the employee committees disbanded.

A person unfamiliar with this area of labor law will likely find the NLRB's Electromation ruling baffling. After all, from most people's perspective, it would appear to promote the public interest, rather than harm it, to allow companies to solicit suggestions from groups of employees on improving the organization's employment practices. In addition, more participatory employment practices are widely touted in both the academic and practical literatures as an important source of competitive advantage in today's global economy. Nevertheless, the Board's ruling seems to stifle such practices.

What explains this apparent incongruity between the dictates of labor law and the canons of good business? Can a cogent argument still be made that the restrictions placed on the operation and structure of EIP programs by the NLRA ultimately serve the public interest? If such a case cannot be made, how should the nation's labor law be revised?

These are the major questions that I address in this Article. I shall proceed in three steps.

First, it is necessary to understand the purported public purpose served by the NLRA and, more specifically, the rationale for banning employer-dominated labor organizations through sections 2(5) and 8(a)(2). Based on congressional testimony, the writings and speeches of Senator Robert Wagner, the Act's principal author, and other evidence, I argue that the NLRA's major purpose was to promote greater unionization and collective bargaining. Increased unionization was advocated, first and foremost, as a means of promoting macroeconomic recovery from the Great Depression. Inclusion of section 8(a)(2), together with the broad definition of a "labor organization" in section 2(5), facilitated

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6. On the NLRA's goal of promoting greater unionization and collective bargaining, see generally Leon Keyserling, Why the Wagner Act?, in THE WAGNER ACT: AFTER TEN YEARS 5 (Louis Silverberg ed., 1945). Keyserling was Senator Wagner's legislative assistant.
accomplishment of this goal. Trade unions, unlike company-created employee organizations, have greater ability both to raise wages—increasing consumer buying power and aggregate demand in the economy—and to take wages out of competition through industry-wide trade agreements—ending deflationary wage and price cuts that suppress aggregate demand. Increased unionization was also advocated as a means of promoting greater democracy in industry, because trade unions are more independent of employer control than company-created employee organizations and are thus thought better able to provide effective representation of employee interests. Wagner and allies also concluded that most often employers create in-house employee organizations for purposes of union avoidance, so banning them via sections (5) and 8(a)(2) both protected workers’ freedom of association and encouraged the formation of independent employee organizations run by the workers themselves.

Having explained the rationales for banning nonunion employee organizations through sections (5) and 8(a)(2) of the NLRA, I next evaluate them critically. I conclude that neither the macroeconomic rationales nor the industrial democracy rationale for these sections was meritorious at the time of the passage of the NLRA and that neither is meritorious today. Instead, these provisions of the NLRA harm economic efficiency, retard the spread of more participatory and democratic forms of workplace organization, and unduly restrict employer and employee choice of methods of joint cooperation and decisionmaking in the workplace. I reach this conclusion based on three types of evidence: contemporary theory and empirical research pertaining to nonunion forms of employee representation and participation; field research in which I interview managers and employees concerning their experiences with nonunion employee participation and representation; and a cross-national comparison with nonunion forms of employee representation in Canada, where such organizations are legal and widespread.

Given my conclusion that sections 8(a)(2) and (5) do not promote the public good nor the separate interests of employers and employees, the third step in my analysis is to consider how these provisions of the NLRA should be modified. I argue that the NLRA should be revised so that nonunion employers may establish any form of employee representation and participation they desire, so long as the Act is also modified to protect more fully and effectively workers’ rights to join an independent


union. The reasoning behind this conclusion is twofold. First, the net result of company-created forms of employee participation and representation is the promotion of greater economic efficiency and employee well-being. Second, the appropriate way to ensure that employers only use such forms of employee representation for legitimate, “win-win” outcomes is to give employees a largely costless, unobstructed method to obtain representation by an outside labor organization if they are dissatisfied with the employer’s in-house council or committee.

Based on the above reasoning, I conclude that two recent proposals for reform of the NLRA—the recommendations of the Commission on the Future of Worker-Management Relations (the Dunlop Commission) and the proposed Teamwork for Employees and Managers (“TEAM”) Act—are one-sided and should be rejected. I propose instead that the NLRA be revised to mirror Canadian labor law. In particular, section 2(5) should be narrowed in scope so that nonunion forms of representation are no longer considered statutorily covered “labor organizations,” thereby permitting nonunion firms to establish and operate whatever type of nonunion employee representation program is desired. Section 8(a)(2), on the other hand, should remain as written to ensure that bona fide trade unions remain independent of employer influence. Finally, the Act should also be amended to expedite union representation elections and strengthen penalties against employers for antiunion acts of discrimination during organizing drives, such as the illegal discharge of union supporters. Such an amendment would better protect the ability of nonunion employees to obtain independent representation if they are dissatisfied with the performance of the employer’s plan.

Part II of this Article provides an historical overview of the origins and purpose of EIP programs in American industry, the development and growth of nonunion employee representation plans in the pre-
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NLRA period, and the purpose of the NLRA and the rationale for inclusion of section 8(a)(2). Turning from historical context to contemporary developments, Part III summarizes the different perspectives on the merits of the Electromation decision that have developed since the ruling was issued in 1992 and the evidence for and against these alternative positions from academic research, surveys of employers and workers, and government investigative reports.

Part IV provides an in-depth analysis of legal issues surrounding EIP programs in nonunion companies. This discussion is organized into three sections: examination of the structure or “anatomy” of various forms of EIP bodies; review of the relevant legal doctrine and NLRB rulings as they bear on section 8(a)(2) cases; and application of these legal criteria to consideration of which aspects of the anatomy of EIP programs will most likely be found to violate the NLRA.

To provide further insight on these matters, I present, in Part V, mini-case studies of EIP programs at six companies. The case studies provide—for the first time in the academic literature—a detailed, in-depth view of the extent to which companies at the cutting-edge of EIP practice are utilizing various types of employee representational committees. The findings from these case studies are quite different from those of previous research studies. In particular, I find evidence that a greater proportion of nonunion employee committees deal with prohibited subjects related to terms and conditions of employment and that company-union-like structures continue to exist in American industry despite their presumed demise after the passage of the NLRA.

In Part VI, I assess the degree to which the EIP programs in these six companies appear to step over the legal boundary set by the Electromation decision. Significant compliance questions exist, I conclude, for the majority of them. In this section I also summarize the opinions gathered from field interviews with more than a dozen managers, labor attorneys, and consultants regarding the impact of the Electromation decision on the viability of EIP programs and the extent to which these programs are used for union avoidance purposes.

Based on the evidence collected from the case studies and field interviews, as well as the findings of research on both historical and contemporary aspects of nonunion employee representation, I examine in Part VII the case for reform of the NLRA and the direction such reform should take. I conclude the NLRA’s provisions regarding nonunion representation are too restrictive and should be revised to resemble Canadian labor law.

Part VIII provides concluding remarks and observations. My recommended changes to the NLRA are, in effect, a melding of the provisions
of the TEAM Act and the proposals advanced by the Commission on the Future of Worker-Management Relations. The former favor the interests of employers, the latter the interests of unions. The compromise position described here provides the basis for a win-win outcome that promotes the interests of all parties to the employment relationship.

II. HISTORICAL BACKGROUND

Starting in the mid-1910s, hundreds of nonunion companies established various forms of shop committees, works councils, and employee representation plans. These employee bodies are today often called “company unions,” albeit somewhat inaccurately. The conventional wisdom today is that these employer-created representation plans were largely sham organizations that provided employees with little real power or benefit and existed largely to serve as union-avoidance devices. Unquestionably, union avoidance was a fundamental goal of nearly all nonunion companies during this period and a number of the works councils and shop committees accomplished relatively little of a substantive nature. But this is only one-half of the story, the half that is focused on most frequently. The other, less recognized half is the role these em-


15. The term “company union” is, strictly speaking, a misnomer when applied to many nonunion employee representation committees. A union is an independent association of workers representing employees of many different companies for purposes of collective bargaining over the terms and conditions of employment; a nonunion employee representation committee is created by the employer, often covers only a plant or subdivision thereof, frequently deals with a limited number of issues not directly related to the determination of wages (for example, health and the resolution of grievances), and eschews formal bargaining over terms and conditions of employment for informal negotiation, consensus-building, improved communication, and mutual problem-solving. In addition, unions have written constitutions, elected officers, and independent treasuries and utilize strikes and other adversarial weapons to win their demands. Some nonunion committees also have written charters or bylaws and elected delegates, but most are small-scale, informally structured organizations, and all stress cooperation and mutual gain over strikes and collective bargaining.

16. See HOWARD GITELMAN, LEGACY OF THE LUDLOW MASSACRE: A CHAPTER IN AMERICAN INDUSTRIAL RELATIONS 333 (1988) (discussing the view that employee representation “simply was a scheme for avoiding unions”); David Brody, Section 8(a)(2) and the Origins of the Wagner Act, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 29, 44 (Sheldon Friedman et al. eds., 1994) (“the works council was never conceived to be of any relevance to better plant operations”).

17. See, e.g., STUART BRANDES, AMERICAN WELFARE CAPITALISM, 1880-1940, at 119-34 (1976); LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939, at 190 (1990) (stating that employee representation was “little more than a facade”).
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Employee organizations played as vehicles for employee involvement and participation.

Starting in the World War I period, a number of leading American employers adopted an entirely new policy toward the management of labor. Unlike the old human resource management ("HRM") model, which treated employees like commodities to be bought as cheaply as possible, motivated through coercive "drive" methods, and disposed of when exhausted, this new model sought to promote the employer's profits by replacing adversarial employee relations with a cooperative approach of eliciting employees' hard work, attention to quality, and organizational loyalty through more humane and scientific methods. In addition to establishing high wages, employment security, written personnel policies, and supervisor training, these companies sought to promote employee participation and a sense of fair dealing by creating shop committees, works councils, and employee representation plans. Billed as a nonunion form of "industrial democracy," these representational structures were typically established, operated, and financed by the company and were limited in coverage to a particular department, plant, or company. They provided for periodic joint meetings between elected worker representatives and selected management representatives, and purportedly promoted improved communication, problem-solving, and dispute resolution with respect to both production and employment issues. The representational structures emphasized conciliation, cooperation, and mutual gain over adversarialism, distributive bargaining, and win-lose outcomes.

The heyday of this form of nonunion industrial democracy was the 1920s, an historical period now commonly referred to as the "welfare capitalism" era, when several hundred medium-large employers primarily in the progressive, liberal wing of the business community established


20. See NATIONAL INDUSTRIAL CONFERENCE BOARD, EXPERIENCE WITH WORKS COUNCILS IN THE UNITED STATES, Research Report No. 50, at 4-13 (1922); Kaufman, Prior to the Wagner Act, supra note 1411; Nelson, supra note 14.
representation plans covering a total of more than one million workers.\textsuperscript{21} In effect, these employers put in place an early forerunner of today's much-touted "high-performance workplace" and the employee representation plans of this period were the structure used by employers to promote a 1920s style of employee involvement and participation.\textsuperscript{22} Although often disparaged today as "shams,"\textsuperscript{23} the better-run representation plans, according to informed observers at the time, achieved notable advances in efficiency and productivity for companies and humane and generous employment practices and conditions for employees.\textsuperscript{24} These observers also noted that it was unlikely that trade unions would organize these progressive, leading-edge companies during this period, so that it was largely the prospect of mutual gain, rather than union avoidance, that was the most important motivating force behind the establishment and proliferation of the nonunion employee representation plans.\textsuperscript{25}

In mid-1929, shortly before the Great Depression, most expert observers believed that the welfare capitalism HRM model was both a firmly ensconced and a largely praiseworthy innovation in progressive employment relations. Nonunion employee representation plans were

\begin{itemize}
  \item \textsuperscript{21} See Brandes, supra note 17; David Brody, Workers in Industrial America 48-81 (1980); Sanford M. Jacoby, Modern Manors: Welfare Capitalism Since the New Deal 11-34 (1997); Nelson, supra note 14, at 338.
  \item \textsuperscript{22} On high performance workplaces, see Thomas Kochan & Paul Osterman, The Mutual Gains Enterprise (1994); Commission On the Future Of Worker-Management Relations, supra note 1, at 29-57. The role of company unions as a method of promoting cooperative, win-win outcomes is described by William Leiserson:

\begin{quote}
  The unskilled and semi-skilled working people of this country, in the last six years, have obtained more of the things... out of employee representation plans than they have out of the organized labor movement.... There is even evidence that these workers sometimes deliberately prefer company unions to the regular trade unions. The reason is that they think employee representation is doing what the unions have failed to do.
\end{quote}

  \item \textsuperscript{23} Gitelman, supra note 16, at 333; Paul Sultan, (A)(2) Brutus? The Perils and Promises of the TEAM Act, 47 Lab. L.J. 498, 499 (1996) (stating that even proponents of the TEAM Act agree that company unions "were admittedly bogus or sham structures").
  \item \textsuperscript{24} See Leiserson, Contributions of Personnel Management to Improved Labor Relations, in Wertheim Lectures on Industrial Relations 125-64 (1929); Sumner Slichter, The Current Labor Policies of American Industries, Q.J. Econ. 393 (1929); see also Ernest Burton, Employee Representation (1926); Bruce Kaufman, Nonunion Employee Representation in the United States, supra note 11. In a retrospective look at the company union established at the Thompson Products Company, Jacoby concludes, "[t]his study of company unionism calls into question the usual characterization of company unions as uniformly ineffect-ive and short-lived.... they evolved into organizations that effectively met their members needs." Sanford M. Jacoby, Reckoning with Company Unions: The Case of Thompson Products, 1934-1964, 43 Indus. & Lab. Rel. Rev. 19, 19 (1989); see also David Fairris, From Exit to Voice in Shopfloor Governance: The Case of Company Unions, 69 Bus. Hist. Rev. 493 (1995) (finding that company unions improved workplace safety and productivity).
  \item \textsuperscript{25} See Leiserson, supra note 24, at 156-58.
\end{itemize}
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often regarded as the crown jewel of this new HRM model and, despite their admitted shortcomings, were hailed as a notable advance over both the traditional nonunion model of industrial autocracy and the union model of collective bargaining.²⁶ It is paradoxical, therefore, that six short years later the welfare capitalism HRM model lay in tatters, with its promise of progressive win-win employment relations largely discredited and its crown jewel—the nonunion employee representation plans—outlawed by the newly enacted National Labor Relations Act. The explanation for this turnabout is found in the events of the Great Depression and, particularly, in the macroeconomic recovery program adopted by the newly elected administration of President Franklin D. Roosevelt in the summer of 1933.²⁷

Roosevelt believed that the Great Depression was caused by a growing imbalance between aggregate supply and demand.²⁸ Profits grew far faster than wages during the 1920s and the result was over-investment in both physical and financial capital and a concomitant shortfall in household income and purchasing power. In late 1929 the bubble burst, reflected in the crash of the stock market and a precipitous decline in spending and production. Although many firms quickly instituted wage cuts and layoffs, the welfare capitalist firms made great efforts to protect their costly investments in employee loyalty and goodwill by maintaining wages, avoiding layoffs through work-sharing, and cutting a host of non-

²⁶. See id.; Brody, supra note 16, at 55 (stating that employee representation was “the most celebrated experiment of the decade”); Kaufman, Prior to the Wagner Act, supra note 1411. Illustrative is the following statement of Robert Bruere, associate editor of the liberal magazine of public opinion, The Survey, and a card carrying trade-unionist, after an in-depth investigation of the employee representation plan at General Electric’s West Lynn, Massachusetts, plant. By contrast with the Amalgamated Clothing Workers of America [cited by Bruere as the trade union doing the most to promote labor-management cooperation and increased efficiency in production], the organization of the General Electric employees under the Plan of Representation in West Lynn—without dues, without a treasury, without its own technical staff, without the essentials of free initiative except in matters of recreation and grievances—makes the impression of a bottle-fed and company cradled organization. And yet, as I have said, the scope of the activities which have been developed under the Plan is so much wider than the scope of the activities ordinarily developed under trade union collective agreements that it is worth much not only to the employees at West Lynn but to the labor movement in general that this particular infant should be bottle-fed. The General Electric [sic] is maintaining at West Lynn a “service test station” which may make as a great contribution to the technique of industrial relations as its physical research laboratories have made and are making to the technique and development of the electrical industry. West Lynn, THE SURVEY, Apr. 1, 1926, at 27.

²⁷. The following account of the Great Depression and the origins of the Wagner Act comes from Kaufman, supra note 7. See also Kenneth Casebeer, Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act, 42 MIAMI L. REV. 285-363 (1987); Keyserling, supra note 6.

labor costs. In late 1931, however, the welfare capitalist firms were forced by a sea of red ink to initiate wage cuts, large-scale layoffs, production speed-ups, and more draconian supervision of labor in order to survive—a decision that precipitated yet further cuts and layoffs and a gradual demoralization and embitterment of labor. One consequence was a loss of faith among American workers in the integrity of employers and their ability to honor prior commitments of high wages, job security, and fair treatment. A second consequence of the downward spiral in the economy and employment conditions was a palpable sense of panic in the country and a conviction that some type of extraordinary emergency measure had to be adopted if complete collapse was to be avoided.

In that spirit, the Roosevelt Administration launched in June 1933 one of the most hastily conceived yet revolutionary economic programs ever promulgated in this nation’s history—the National Industrial Recovery Act (“NIRA”). The NIRA sought to stop the deflationary downward spiral of production, wages, and prices and to promote long-run economic recovery by stabilizing the wage/price structure and augmenting household income and purchasing power through a redistribution of income from profits to wages. Several methods were adopted to achieve these ends. One was the suspension of the antitrust laws so that companies, acting in concert through trade associations, could set prices and sales quotas in written “codes of fair competition.” A second was to require companies to specify, in those codes, minimum wage rates and maximum hours of work. A third was to encourage the formation of trade unions and the spread of collective bargaining, on the theory that the collective bargaining power of unions would be able to raise wages and improve labor conditions and thus contribute to the stabilization of wages and prices and the redistribution of income.

The NIRA sought to promote greater unionization through its now-famous section 7(a). The handiwork of Senator Robert Wagner and allies, section 7(a) stated:

Every code of fair competition ... shall contain the following conditions: (1) That employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the

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29. See BRODY, supra note 21, at 67-78.
30. See BRODY, supra note 21, at 75-78; COHEN, supra note 17, at 238-46.
32. See generally Kaufman, supra note 7, at 37-47.
34. See id. at 172-78.
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designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining.36

In response to the NIRA, over one million workers rushed to join unions. Workers joined unions partly out of a self-interested desire for improved wages and conditions and partly out of a sense of patriotic duty—to promote the President’s economic recovery plan—and desire to be represented in the ongoing code-making process in Washington, D.C., particularly with regard to the setting of industry wage rates and work hours.37

At the same time as union organizing spread across the land, hundreds of nonunion employers rushed to set up some form of employee representation plan. Part of their motive was to comply with what was widely perceived at the time, mistakenly, as the NIRA’s mandate that all firms adopt some form of collective bargaining.38 Also operating was the palpable fear among employers of being caught up in the sudden onrush of union organizing. To avoid unionization, employers fought back with a variety of weapons, such as firing union activists, preemptively increasing wages, and refusing to bargain.39 In addition, a widely used weapon was the hasty founding of a nonunion representation plan or “company union.”40 Indeed, within a twenty-four month period, over one thousand new representation plans were established, covering approximately 2.5 million workers.41 Unlike the representation plans established in the 1920s by the liberal/progressive employers, the great majority of these new representation plans were motivated first and foremost by anti-unionism animus, rather than the hope of mutual gain from a cooperative, high-involvement employment relations strategy. Accordingly, these plans were widely condemned by supporters of the New Deal not only as

36. NIRA, § 7(a), 48 Stat. 198 (1933). The role of Senator Wagner in the drafting of the NIRA, and section 7(a) in particular, is discussed in FARR, supra note 35, at 69-94; Kaufman, supra note 7, at 39-47.

37. See Kaufman, supra note 7, at 48-51. Writing in 1934, economist David McCabe stated in this regard that “the Recovery Act has to date given less impetus to organization for collective bargaining... than to organization for political action.” The Effects of the Recovery Act upon Labor Organization, 49 Q.J. Econ. 52, 77 (1934).

38. See DALE YODER, PERSONNEL AND LABOR RELATIONS 477 (1938) (“The Act was widely described as having made collective bargaining compulsory.”). In order to comply with this perceived mandate, many employers restructured their employee representation plans so they had features similar to bona fide trade unions, such as a written constitutions and elected officers, and began to refer to them as agencies for collective bargaining. See DIVISION OF INDUSTRIAL RELATIONS, supra note 14. This proved to be a major mistake, however, for it transformed the stated purpose of the plans from employee involvement to collective bargaining—a function they were never intended to perform and for which they were indeed subject to all the limitations cited by their critics (for example, lack of bargaining power and domination by the employer).


40. See id. at 39-40.

41. See COHEN, supra note 17, at 293-94; Nelson, supra note 14, at 338.

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a sham of collective bargaining and industrial democracy but also as a direct threat to the success of the President's economic recovery program—dependent as it was on raising wages and purchasing power.\textsuperscript{42}

In 1934 Senator Wagner began to draft new legislation that spelled out in greater detail labor's section 7(a) rights to organize and protections thereof. His first point of attack was to propose a legal ban on company-created employee representation plans. His rationale for doing so was clearly stated in a \textit{New York Times} article published on March 11, 1934. In it, Senator Wagner wrote:

The company union \ldots runs antithetical to the very core of the New Deal philosophy. Business men are being allowed to pool their information and experience in vast trade associations in order to make a concerted drive against the evil features of modern industrialism. They have been permitted to recognize values of unity and the destructive tendencies of discrete activities and to act accordingly. If employees are denied similar privileges, they not only are unable to uphold their end of the labor bargain; in addition they can not cope with any problems that transcend the boundaries of a single business. The company union has improved personal relations, group-welfare activities, discipline, and other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is a general one whose sweep embraces whole industries, or States, or even the Nation. Without wider areas of cooperation among employees there can be no protection against the nibbling tactics of the unfair employer or of the worker who is willing to degrade standards by serving for a pittance.\textsuperscript{43}

Thus, Wagner—one of the most ardent foes of company unions—admits that they help improve in-plant employment conditions and employer-employee relations but nonetheless defends banning them because the fact that they cover only a single plant or company prevents them from taking wages out of competition the way a trade union can if it organizes all firms in the relevant product market and bargains for a uniform wage scale. Put another way, Wagner justified a ban on nonunion employee representation plans because, in his view, they retarded the process of macroeconomic recovery from the Great Depression.

\textsuperscript{42} For example, in his congressional testimony, Senator Wagner stated: The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since enactment of the recovery law. Such a union makes a sham of equal bargaining power by restricting employee cooperation to a single employer unit at a time when business men are allowed to band together in large groups. It deprives workers of the wider cooperation which is necessary, not only to uphold their own end of the labor bargain but to stabilize and standardize wage levels, to cope with the sweatshop and the exploiter, and to exercise their proper voice in economic affairs.

\textsuperscript{43} Reprinted in id. at 22-26.
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Despite heated opposition from business groups, Wagner’s view prevailed and was incorporated into the NLRA, as enacted into law in 1935. The two key parts of the NLRA (as amended), as they pertain to company unions, are sections 8(a)(2) and 2(5). Section 8(a)(2) of the Act declares it an unfair labor practice, “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .”

Section 2(5) defines a labor organization very broadly 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, rate of pay, hours of employment, or conditions of work.

The effect of these two provisions is to outlaw any kind of employee representational body that is: (a) created, operated, and/or financed by the employer, and (b) engages in some kind of bilateral dealing with the employer over one or more aspects of the terms and conditions of employment.

By the end of World War II, the strictures against company unions contained in sections 2(5) and 8(a)(2), coupled with rulings of the Supreme Court that upheld both the overall constitutionality of the Act and a series of disestablishment orders issued by the National Labor Relations Board against individual employers who operated company unions, led to a virtual disappearance of nonunion employee representation plans in American industry. Many employers disbanded their nonunion representation committees, and others facilitated the transformation of their company unions into independent local unions, while other company unions were taken over or displaced by national and international unions in NLRB representation elections.

Over the next forty years, the NLRA’s ban on employer-sponsored employee representation committees generated a modest number of new cases before the NLRB and courts, some of which resulted in a revision or reinterpretation of certain aspects of section 2(5) and 8(a)(2) but none

of which affected fundamental change. Just as section 8(a)(2) occasioned relatively little litigation and debate in legal circles between 1950 and 1980 the subject of company unions passed from a central issue in academic industrial relations to a marginal area of interest explored largely by scholars in the field of labor history. Beginning in the 1980s, however, new developments in management thought, human resource practices, and the competitive position of American industry unexpectedly brought sections 2(5) and 8(a)(2) of the NLRA back to a place of prominence and contention.

Although the progressive wing of employers in the 1920s had already discovered the conceptual principles and practical advantages of employee involvement and participation, these insights largely lay fallow until rediscovered and popularized in the 1960s and 1970s by behavioral scientists in academia and leading-edge employers in industry. Writings by management theorists such as Douglas McGregor, Chris Argyris, and Frederick Herzberg extolled the productivity and performance payoffs from using forms of work motivation that appeal to positive human needs, such as the desire to have jobs that are interesting, provide opportunities for decisionmaking, and promote social interaction. Equally influential was the development of the sociotechnical theory of work systems by Eric Trist and colleagues. Trist argues that every work process is made up of a technical system and a social system and that peak productivity is achieved when the design of jobs takes into account human social needs. This is in stark contrast to the design of organizations in-


51. Studies on company unions in the 1920s and 1930s include BURTON, supra note 24; LABOR AND THE GOVERNMENT (Alfred Bernheim & Dorothy Van Doren eds., 1935); EARL MILLER, WORKMEN’S REPRESENTATION IN INDUSTRIAL GOVERNMENT (1922); Leiserson, supra note 22; and Leiserson, supra note 24. Contemporary historical works include BRANDES, supra note 17; COHEN, supra note 17; GITELMAN, supra note 16; and Nelson, supra note 14. In contrast, the only article on company unions featured in the scholarly industrial relations journal Industrial and Labor Relations Review over the period 1987-1997 was in a symposium on labor history.

52. See, e.g., COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, supra note 1.


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spired by Frederick Taylor's theory of scientific management, according to which jobs are designed solely to take advantage of economies of scale and division of labor and the psychological needs of workers are ignored. These theoretical insights were applied in industry, beginning with a small number of pioneering experiments in the late 1960s and early 1970s. Often referred to as a “high-performance work place” model, these new plants featured work teams, gain sharing, extensive information sharing, reduced management hierarchy and control, an egalitarian work culture, and—of most relevance for this article—high levels of employee involvement and participation in management decision-making.

Since the mid-1980s the high performance work place model has been adopted by a growing number of firms, spurred by the pressures of greater domestic and global competition, the desire of companies to achieve greater flexibility and economies in production, and this model’s demonstrable record of facilitating greater profitability and higher quality. Another complementary influence during this period was the introduction of “lean” production methods from Japan, such as just-in-time inventory and “kaizen” quality improvement methods. This model also makes heavy use of EIP techniques. Finally, while many American companies have not yet implemented the entire package of high-performance practices, they have nevertheless adopted parts of the model, including, in a number of cases, various types of EIP programs. As reviewed in more detail in Part III of this Article, one or more forms of high-involvement work practice are now found in the great majority of medium- and large-sized firms in this country.

III. OVERVIEW OF THE CURRENT CONTROVERSY

This Part examines the controversy surrounding the NLRB’s Electromation decision. The discussion is divided into two sections: first, a summary of the conflicting points of view concerning the legal merits and consequences of the Electromation decision and, second, an overview of

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57. See DESIGN OF JOBS: SELECTED READINGS (Louis Davis & James Taylor eds., 1972)
59. See Commission on the Future of Worker-Management Relations, supra note 1, at 45-47; see also Kaufman, supra note 2.
the evidence and conclusions from previously published academic research on this matter.

A. Contours of the Legal Debate

The Electromation case and its progeny have sparked national controversy and debate concerning their allegedly harmful impact on the ability of nonunion companies to establish and operate EIP programs. The different sides in this debate are briefly described below.

All sides of the Electromation debate agree that government policy should facilitate greater employee involvement and participation in managerial decisionmaking. All sides also recognize that employee involvement and participation cannot be done in an organizational vacuum; rather, successful EIP requires various organizational structures within the firm that allow employees to meet, discuss problems among themselves and with their managers, identify problem areas and brainstorm solutions, and exercise greater day-to-day influence in decision-making and plant operations. Particularly in firms of more than 200 employees, direct forms of employee involvement that would enable all employees to meet as a group and have an equal voice are too cumbersome and costly, which is why employers typically turn to some form of indirect or representational EIP structure. In such structures, a subset of employees represent their peers in meetings and discussions with management.

But it is at this point that nonunion employers run into the constraints of sections 2(5) and 8(a)(2) of the NLRA, as recently highlighted by the Electromation decision. The NLRA does not forbid all forms of employee representation committees and plans, only those that in some way deal with issues concerning the terms and conditions of employment. The complaint of employers, however, is that the operation of EIP programs, inevitably leads to discussions of terms and conditions of employment between employees and managers. How is it possible, they ask, to foster meaningful employee involvement and participation, or even discuss production and quality issues, when subjects such as safety, work schedules, pay incentives and bonuses, and grievances have to be avoided?

61. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, supra note 1, at 30.
62. See COTTON, supra note 2, at 114-40.
63. In recent Senate testimony on section 8(a)(2), for example, J. Thomas Bouchard, Senior Vice President of IBM, stated:
Yet for non-union companies [like] ours, under our National Labor Relations Act (NLRA), certain workplace subjects are “off limits” for teams of employees, such as those involving wages, hours, working conditions, dispute resolution and health and safety . . . .
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Proponents and critics of Electromation have coalesced into three different groups regarding the answer to this question.

The first position taken by the critics is that section 8(a)(2) of the NLRA poses a serious threat to cooperative employee relations and economic competitiveness and needs to be revised or deleted altogether. Critics note that nearly ninety percent of American workers in the private sector workplace are unorganized; that nonunion employers are increasingly utilizing EIP programs to foster higher productivity, quality, and job satisfaction; and that the Electromation decision calls into question the legality of many of these programs. Indicative of these sentiments is the following statement of William Buddinger, Chairman and CEO of Rodel, Inc., to the Senate Committee on Labor and Human Resources in testimony on the impact of section 8(a)(2) on employers:

A modification of the NLRA to allow teamwork and collaborative management is clearly needed. . . . The modern experiments in teamwork have generally produced the best of two worlds—more competitive enterprises and happier workers. . . . American enterprise must be free to change. . . . We cannot to that if we are shackled by laws that lock us into the past.

In response to concerns such as these, Representative Steve Gunderson and Senator Nancy Kassebaum introduced legislation in 1993 called the Teamwork for Employees and Managers Act, which sought to modify section 8(a)(2) by adding the following proviso:

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

Some argue that teams would typically not work on those subjects anyway, or shouldn't, and that the NLRA does not interfere with the team's ability to address subjects of product quality, efficiency and productivity.

But as a direct result of recent National Labor Relations Board decisions on teams and employee involvement plans, we have reviewed a number of IBM ideas on teamwork and have had to impose restrictions on teams in order not to run afoul of the law—even though those teams made good business and common sense.


or to amend existing collective bargaining agreements between the employer and any labor organization.

The Team Act died in committee in 1993, was re-submitted in 1995, and was passed by both houses of Congress in 1996, only to be vetoed by President Clinton. It was re-introduced in 1997 in significantly amended form but was not reported out of committee.

The second position regarding the alleged harmfulness of the Electromation decision is articulated by a subset of the decision’s critics. They express firm opposition to any relaxation of section 8(a)(2) on the grounds that doing so will once again open the door to sham company unions, thereby providing employers with another tool to subvert workers’ rights to join a union and engage in collective bargaining. Collective bargaining, they argue, provides an effective method for genuine power sharing and employee involvement in company operations. Thus, public policy should encourage rather than restrict the ability of workers to obtain union representation. In this vein, Jonathan Hiatt, general counsel of the AFL-CIO, stated in congressional testimony on the TEAM Act that “this bill has been devised to allow employers to establish and maintain employer-dominated systems of employee representation in the workplace—and to wield them to discourage or defeat the formation of truly independent workplace representatives: unions.”

The third position taken by the critics of Electromation (sometimes also in conjunction with the second position just described) is that the NLRA does not in fact significantly constrain the ability of nonunion companies to operate legitimate EIP programs and that the cries of alarm

68. See Maryott, supra note 64.
69. The TEAM Act bill introduced in 1997 was different in several respects from the initial bill of 1993. H.R. 634, introduced on February 6, 1997, reads as follows:

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

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over Electromation decision are vastly overblown.\(^2\) After a review of all section 8(a)(2) cases decided by the Board between 1972 and 1993, for example, James Rundle concluded that “[t]here is absolutely no evidence that the NLRB has ever in the past twenty-two years disestablished a committee of the type employers say they must have to be competitive.”\(^3\) This position rests on a combination of two arguments. One is that the NLRA does not restrict the ability of employers to set up teams and other forms of employee involvement structures for purposes of promoting increased efficiency and quality, since these employer-created bodies are in no way prohibited by section 8(a)(2) so long as they focus on production-related subjects and avoid issues relating to the terms and conditions of employment.\(^4\) The second is that, because over the last two decades there have been relatively few section 8(a)(2) cases brought against employers, the probability of an employer’s EIP program running afoul of the law is quite small.\(^5\)

**B. Evidence from Past Research**

Determining which of the three legal positions on section 8(a)(2) described above is correct is fundamentally an empirical issue and can only be resolved by examining current EIP practices of American employers and the effect of the NLRA on them. Accordingly, described below is a summary of the findings of relevant past research on the extent of EIP programs in industry and the potential constraint placed on the structure and operation of these programs by the NLRA.

A problem with considering past studies is that authors adopt different definitions of what practices constitute employee involvement and participation and the types of workplace employee groups that are included as EIP bodies. In evaluating the findings of this literature, therefore, it is important first to define EIP clearly and to stipulate the types of organizational structures that constitute EIP programs.

As discussed in more detail in Part IV of this Article, EIP programs vary considerably in terms of the workplace issues dealt with, the structure of the program, and the power given to employees. At its most general level, however, the essence of employee involvement and participa-


\(^{73}\) Rundle, supra note 72, at 173.

\(^{74}\) Dennis Devaney, Electromation and DuPont: The Next Generation, 4 CORNELL J.L. & PUB. POL'Y 3, 6 (1994).

\(^{75}\) See Rundle, supra note 72, at 166 (finding that between 1983 and 1993 the NLRB ordered fewer than two employee committees disestablished per year).
tion is a decision made by management to share with employees a greater amount of decisionmaking responsibility, information, and financial rewards.

This may take the form of a suggestion box, an annual town hall meeting with employees, self-managed work teams, a peer-review dispute-resolution panel, a plant-wide employee committee, or a variety of other devices. Further, an EIP program may be instituted as a relatively autonomous, stand-alone human resource management practice, or as part of a larger, more comprehensive high-performance work system. Although definitions of a “high-performance” workplace differ, one expert on the matter identifies eight key components: self-managed work teams; enlarged jobs that include a whole task; flexibility in work assignments; the delegation of motivating, coordinating and controlling tasks from supervisors to workers; wide dissemination of production and financial information; some form of gain-sharing reward system; substantial investment in training of employees in social and production skills; and reduction of status differentials and enhancement of trust between management and shopfloor workers.

Given this enumeration, it appears that EIP programs are relatively widespread among medium- to large-sized firms and that the proportion of firms with these programs is growing over time. A study in the late 1980s of 495 large firms by John Delaney, David Lewin, and Casey Ichniowski, for example, found that 43% of nonunion production workers in manufacturing were involved in some form of EIP program. According to a survey done in 1994, that statistic had increased substantially. The survey found that 75% of all employers used employee involvement programs and 96% of employers with 5000 or more employees did so. The breadth and depth of EIP activities apparently varies a great deal, however. For example, a study by Edward Lawler, Gerald Ledford and Susan Albers found that of 313 large companies with EIP programs, roughly one-third had what they classified as a “low” level of EIP, based on the extent of sharing of information, rewards, training opportunities, and power, while another one-third exhibited an “average” level and another

76. See Lawler, supra note 2, at 31.
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7% a "high" level. The EIP programs in 26% of these companies either could not be classified or relied principally on a sharing of financial rewards. A study by Paul Osterman concluded that, while over one-half of companies with fifty or more employees had some form of EIP program, only 37% were "transformed" in the sense that they had adopted two or more flexible work organization initiatives often associated with high-performance workplaces.

As indicated in Part II of this Article, only those EIP programs that are representative in nature and feature bilateral dealing with management on terms and conditions of employment fall under the restrictions of the NLRA. In gauging the constraints imposed by the NLRA, therefore, it is important to differentiate between alternative types of EIP programs and structures. No one source exists with the data to permit quantification of varying types of EIP programs and structures, but suggestive evidence can be pieced together from several studies.

It appears that the proportion of companies that use various types of nonrepresentational EIP structures focused on production and quality issues is larger than the proportion that relies on representational employee committees and councils. (An exception to this statement, as noted below, concerns joint safety committees.) The Lawler, Ledford, and Albers study cited above, for example, found that 66% of firms with EIP programs had a quality circle and 47% had self-managed work teams (both typically include all workers in the relevant work group and are thus not representational in nature). Similarly, the survey by Osterman found that 53% of companies used a form of employee teams and 41% of companies operated quality circles.

Employee representation committees are less frequently found. A nationwide survey of employees conducted in 1996 by Noah Meltz and Seymour Lipset found, for example, that, while 50% of nonunion employees said that they worked in companies with some type of EIP program, only 20% of them said that their companies also had a formal system of nonunion representation.

Another piece of evidence concerning the extent of formal employee committees comes from a survey of employees at 16 companies by the

80. See Lawler et al., supra note 1, at 32.
82. See Lawler et al., supra note 1, at 27-28.
83. See Osterman, supra note 81, at 177.
84. See Noah Meltz & Seymour Martin Lipset, Extent of Nonunion Employee Representation in Canada and the United States, in Nonunion Employee Representation, supra note 11.
consulting firm Industrial Relations Counselors, Inc. ("IRC"). Over one-half (53%) of employees reported that they were members of some type of departmental work group, but only 11% said that they participated in an employee committee, and only 15% said that they participated in a joint employer-employee committee.

Finally, in a 1994 survey by Richard Freeman and Joel Rogers, 52% of workers said that their company had an employee involvement program, and 47% said that the company had an annual town hall meeting, but only 37% reported the presence of a "committee of employees that discusses problems with management on a regular basis." Also of interest vis-à-vis the section 8(a)(2) debate is the finding in this study that 28% of the nonunion workers in EIP programs reported that the committees discussed wage and benefit issues as well as production issues. The one type of employee representation committee that seems to be quite common is a joint safety committee. The National Safety Council, for example, estimated that 56% of nonunion workplaces in 1993 had some form of employee safety committee.

The final piece of evidence on the prevalence of EIP programs, and the constraining effect of the NLRA, comes from two studies by Michael LeRoy. LeRoy's articles are noteworthy because, among the welter of law review articles on the Electromation decision (and subsequent NLRB cases, such as DuPont), they are the only ones to present new primary data on the representational structure and function of EIP teams and committees. For this reason, and because he was invited to present the findings of his research before the Senate Committee on Labor and Human Resources in hearings on the TEAM Act, LeRoy's work deserves particular attention.

In his first study, LeRoy collected data in early 1995 on twenty-three nonunion work teams. The evidence indicated that: (1) most work teams were small, with more than one-half comprising fewer than twenty workers; (2) almost half of the teams only made suggestions to management and thus did not "deal with" employers as required for a section 2(5)

86. RICHARD FREEMAN & JOEL ROGERS, WHAT WORKERS WANT (forthcoming, 1999).
87. See id. at 102.
88. See Devaney, supra note 74, at 16.
violation; (3) most teams handled work process or product quality issues and thus also remained within the legal ambit of section 2(5); and (4) two-thirds of the teams were created by management, indicating that the large majority would be considered “dominated” in the sense prohibited by section 8(a)(2) if they were also section 2(5) labor organizations. He concludes from these findings that, “the work teams surveyed here were very different from company unions of the 1930s,” and that “three-fourths of the teams appear to comply with Electromation and DuPont.”

The results of LeRoy’s first study support proponents of the third position espoused by some critics of Electromation, which is to say that the Electromation decision appears not to be a binding constraint on most smaller-scale EIP groups because they focus solely on production and quality issues. These conclusions are in some respects challenged by findings in his second, expanded study, however. In this study, completed in 1997, LeRoy surveyed six more Fortune 500 companies but examined a larger sample of nonunion teams—seventy-eight—and modestly revised his survey questionnaire in light of several post-Electromation section 8(a)(2) decisions by the NLRB. Analysis of the survey results indicated: (1) average team size continues to be small, with 89% of teams in this survey comprising twenty or fewer workers; (2) roughly one-half to two-thirds of the teams had bilateral “dealings with” management in the sense prohibited by section 8(a)(2); (3) the primary subject area of 82% of the teams consisted of production and work process issues; (4) over one-half of the teams also dealt with work scheduling, safety, and accident prevention, although only one-quarter or fewer dealt with other aspects of employment policy (such as pay and grievances); and (5) nearly all teams were created by management, and, for three-quarters of the teams, management plays at least some role in directing their activities.

Based on these results, LeRoy again concludes that “these findings reveal no evidence of company unions” and that “[e]mployer domination of teams has changed little, if at all, compared to the first survey.” LeRoy noted nevertheless that “[t]hese teams [in the second survey], compared to those in my first compliance survey, are much more likely to be found to be statutory labor organizations under the NLRA because they deal with employers over a wider variety of workplace issues, such

91. See LeRoy, Can TEAM Work?, supra note 89, at 244-51.
92. Id. at 218.
93. See LeRoy, Empirical Research Implications, supra note 89, at 74-78.
94. Id. at 42.
95. Id. at 41.
as the scheduling of work."96 The potentially constraining legal impact on employers is reduced in his opinion, however, by the fact that the degree of noncompliance with section 2(5) is typically modest and employers could bring these teams into compliance fairly easily by narrowing the range of their discussion. Based on these considerations, LeRoy again comes down largely in support of the third critical position above ("much ado about nothing"), stating: "Nothing in these findings supports some employers' claims that the NLRB's current enforcement of section 8(a)(2) is so draconian that nonunion teams must be disbanded to comply with the law."97 Somewhat paradoxically, however, he also concludes that the passage of the TEAM Act is desirable, because it will not open the door for the return of old-style company unions but will better protect legitimate communication and collaboration activities between managers and employees.

LeRoy's study, however, suffers from three methodological shortcomings that compromise the accuracy and generalizability of its results. The first problem is that the data were collected by a mail survey, which is apt to miss important qualitative evidence on the structure and operation of EIP programs that may be crucial to determining their legal status.98 The second is that the sample size is quite small, because the teams come from only six companies in each survey.99 The third shortcoming is that LeRoy fails to differentiate adequately between "teams" and other structures used for EIP purposes. Although his survey instrument asked respondents to distinguish among five kinds of employee groups (employee involvement program, work team, quality-of-work life program, employee committee, and other),100 he proceeds to lump all of these structures under the label "teams" and nowhere provides either a break-down of these "teams" by the five categories just described or a discussion of how the "teams" in each category vary by compliance status. This issue is important, because employee "teams," as that term is most often used in industry, are smaller in size, more informal in structure, less likely to perform a representational role, and more likely to be

96. Id.
97. Id.
98. See id. at 70.
99. See id. at 71.
100. See LeRoy, Can TEAM Work?, supra note 89, at 263. In a forthcoming study, LeRoy responds to this criticism by separating respondents' survey returns into the five aforementioned employee groups. Somewhat surprisingly, he finds that small-scale teams appear to have greater potential compliance problems with section 8(a)(2) than do larger EIP groups, largely because the teams more often deal with work scheduling. None of the large EIP groups covered pay issues, but 14% of teams did, another somewhat surprising result. See Michael H. LeRoy, Do Employee Participation Groups Violate Section 8(a)(2) of the National Labor Relations Act?: An Empirical Analysis, in NONUNION EMPLOYEE REPRESENTATION, supra note 11.
focused on production issues than most other forms of EIP. Thus, undue focus on employee teams may quite possibly explain why LeRoy found little evidence of more formal company union-like structures. Furthermore, there are a number of alternative, non-team forms of EIP that LeRoy does not inquire about, such as peer-review panels, plant-wide joint industrial councils, and employee representation on the board of directors.

A synthesis of LeRoy's work and the other studies and surveys described above suggests three generalizations. First, EIP programs are relatively widespread among medium-large employers and are proliferating over time. Second, whether due to legal constraints imposed by the NLRA or the voluntary decisions of employers made in the pursuit of greater profit, the majority of companies with EIP programs use forms of employee involvement, such as self-managed work teams, quality circles, and town hall meetings, that are not directly affected by section 8(a)(2). Third, the number of companies that use some form of employee representation committee as part of their EIP program is nonetheless sizable. If we assume for illustrative purposes that 15% to 35% of nonunion workers are employed in companies with some form of representational committee (other than a safety committee), the total number of private sector nonunion wage and salary workers covered by these representational EIP structures is in the range of 13.2 to 30.9 million. Even though a significant share of these employees are not covered by the NLRA (for example, public sector workers, managers and supervisors, and transportation employees), there remain many millions of nonunion workers who are potentially impacted by the restrictions of the Act on company unions. Moreover, the number of companies that would establish some form of representational committee were the ban on company unions to be dropped is unknowable but potentially large. The fact that very few section 8(a)(2) cases come before the NLRB, therefore, is likely to un-

101. Jon R. Katzenbach and Douglas K. Smith define a team as, "a small number of people with complementary skills who are committed to a common purpose, performance goals, and approach for which they hold themselves mutually accountable," and explain that "[v]irtually all the teams we have met, read, heard about, or been members of have ranged between two and twenty-five people. The majority of them ... have numbered less than ten." Jon R. Katzenbach & Douglas K. Smith, The Wisdom of Teams: Creating the High-Performance Organization 45 (1993).

102. See Estreicher, "Company Union" Prohibition, supra note 50, at 137-39 (distinguishing between “on-line” and “off-line” EIP programs). Leroy focused on teams that largely fall into the “on-line” category.

103. The lower bound of 15% is suggested by the study of Industrial Relations Counselors, Inc., supra note 85; the upper bound is suggested by Freeman & Rogers, supra note 86.

derstate substantially the universe of employers constrained by this provision of the labor law.

All of these conclusions, however, are necessarily broad-brush and subject to considerable uncertainty, given the diverse nature and purpose of the surveys available, the different definitions of EIP utilized in the studies, and the various types of employee groups included and excluded from the analyses. Informed policy analysis on section 8(a)(2) of the NLRA and the consequences of Electromation urgently needs, therefore, additional data on the nature of EIP programs in American industry and the impact of the NLRA on them. Toward this end, I next present new field-level data on the use of employee representation committees in EIP programs in select nonunion companies and then conduct a legal analysis of the extent to which these employee representation committees violate the prohibition on company unions contained in the NLRA.

IV. THE STRUCTURE AND LEGAL STATUS OF NONUNION EIP COMMITTEES

An analysis of nonunion EIP practices and their compliance with the NLRA requires a careful definition of EIP, delineation of different types of EIP groups and organizational structures, and knowledge of the legal prohibitions contained in the Act. This Part is devoted to all three of these matters. I begin by developing a conceptual anatomy of EIP programs in order to delineate alternative forms and methods of employee involvement.

A. Conceptual Anatomy of EIP Programs

John Cotton, drawing on earlier work by H. Peter Dachler and Bernhard Wilpert, suggests that EIP programs can be distinguished along five distinct dimensions. Modestly paraphrased, these are:

Formal-Informal. Some EIP programs are formal in the sense of having a written constitution, bylaws, or governing rules and regulations (such as those contained in an employee handbook or a company policy statement). Other EIP programs are informal with no written policy guidelines or defined structure. An example of the former might be a peer-review system of dispute resolution. An example of the latter might be a weekly breakfast meeting between the human resource director and a rotating group of employees.

105. See COTTON, supra note 2, at 27-29 (citing H. Peter Dachler & Bernhard Wilpert, Conceptual Dimensions and Boundaries of Participation in Organizations: A Critical Evaluation, 23 ADMIN. SCI. Q. 1 (1978)).
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**Direct-Indirect.** Some EIP programs provide direct or "face-to-face" involvement for organizational members; others are indirect in that a subgroup of employees represents the entire workforce through participation in some type of committee or team. An example of the former is a system of management by objectives in which the individual employee and manager jointly determine the employee's goals for the coming year. An example of the latter is a plant-level committee composed of one employee representative from each department.

**Influence in Decisionmaking.** A key attribute of EIP is the extent of influence given employees in decisionmaking. At one extreme, management provides no information to employees and makes all decisions beyond narrow task completion. In the middle range, management provides employees with information on a subject hitherto reserved for management, and solicits their opinion. At the other extreme, employees may be given veto power over a decision and may in some cases even be delegated complete authority to choose. An example of the former extreme is a unilaterally announced change in work hours; an example of the latter extreme is the complete delegation of inventory control to a self-managed work team.

**Range of Issues.** The range of issues considered in EIP programs can be distinguished by both breadth and depth. Breadth signifies the extent to which issues from different functional areas are considered, with production-related matters representing "narrow" EIP. Thus, a narrow EIP program might deal only with product quality, such as in a quality circle, while a "broad" EIP program might deal with not only production matters but also a wide array of other subjects, such as customer relations, management succession, and employment policy. An example of a broad EIP program might be a European-style works council. Range of issues also has a depth (or high-low) dimension, where depth signifies the level of impact in the organization. Thus, low-level EIP might pertain to issues affecting only the individual worker or work team, while high-level EIP programs affect strategic matters that influence the long-term direction of the organization. A German co-determination plan in which worker representatives serve on the board of directors would be an example of a high-level EIP program.

**Membership.** The fifth dimension of EIP is membership—which persons from the organization are included in the EIP group. This dimension also has axes for breadth and depth. Greater breadth signifies that the EIP group draws persons from a wider range of work units, occupations, or departments; greater depth signifies that the EIP group includes people from a successively wider range of positions in terms of organizational hierarchy and authority. A six-person team of production workers...
employed in one area of the trim department is "low" in terms of both the breadth and depth measures of membership, while a plant-wide council composed of shopfloor workers and the plant manager is "high" on both measures.

B. Restrictions in the NLRA

Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer to dominate or interfere with the formation or administration of a labor organization or support it financially or otherwise. Section 2(5) defines a labor organization very broadly as any organization, agency, or employee representation committee in which employees participate and that exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rate of pay, hours of employment, or conditions of work. The impact of the NLRA on EIP programs depends on the interpretation and application of these two sections of the law. This subject is complex, given the six decades of litigation and NLRB and court rulings on the subject, the diversity of interpretations offered by the Board and the federal courts, and the huge amount of commentary and analysis in the labor law literature. The key points, however, are these:

- The analysis of Electromation-type cases proceeds in two steps. The first is to determine whether the EIP program falls within the section 2(5) definition of a labor organization. If so, then the analysis considers

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109. See id. at 1400-02.
110. See, e.g., Mark Barenberg, Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production, 94 COLUM. L. REV. 753 (1994) (providing an in-depth historical review of the origins of company unions and the reasons for enactment of the section 8(a)(2) ban); Estreicher, "Company Union" Prohibition, supra note 50 (arguing that section 8(a)(2) is too restrictive with respect to employee involvement programs and should be revised); Rafael Gely, Where are We Now?: Life After Electromation, 15 HOFSTRA LAB. & EMP. L.J. 45 (1997) (reviewing NLRB section 8(a)(2) decisions since the Electromation case); William B. Gould IV, Employee Participation and Labor Policy: Why the TEAM Act Should Be Defeated and the National Labor Relations Act Amended, CREIGHTON L. REV. 3 (1996) (arguing that the TEAM Act is defective because it will permit employer domination of EIP committees and that the NLRA should be revised to permit wider employee choice on alternative forms of representation); Charles J. Morris, A Dialogue with the Chairman of the Labor Board: Challenging Conventional Wisdom on the Impact of Current Law on Alternative Forms of Employee Representation, 15 HOFSTRA LAB. & EMP. L.J. 319 (1998) (arguing that the current law does not restrict legitimate employee involvement committees).
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whether the program violates the section 8(a)(2) strictures regarding employer "domination."^{111}

• In *Electromation*, the NLRB applied a three-part test to determine whether the EIP committee was indeed a labor organization as defined in section 2(5). The three elements of the test are: (a) that the organization is one in which employees participate, (b) that it exists, at least in part, for purposes of "dealing with" the employer, and (c) that these dealings involve the prohibited subject areas of "grievances, labor disputes, wages, rates of pay, or working hours."^{112}

• Any EIP committee or group that is representational in nature clearly meets the criteria of "employees participate in." Whether a committee or group that is nonrepresentational (i.e., a committee of the whole) is also illegal has not yet been the subject of a definitive ruling, but some form of agency function seems to be crucial in drawing the line.^{113}

• An EIP committee need not be formally constituted to be considered a labor organization. The Board stated in *Electromation* that "[a]ny group, including an employee representation committee, may meet the statutory definition of 'labor organization' even it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues."^{114}

• EIP groups are illegal if they "deal with" the employer with respect to certain prohibited subjects. The phrase "deal with" has been interpreted broadly to cover not only bargaining and negotiation between employees and management but also a wide variety of bilateral interactions. The Board stated that it viewed

"dealing with" as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of these proposals by management. A unilateral mechanism, such as a "suggestion box," or "brainstorming" groups or meetings, or analogous information exchanges does not constitute "dealing with."^{115}

Thus, in the earlier *Thompson Ramo Woolridge* case,^{116} the Board found that an EIP committee that made presentations to management of employees' views but no recommendations fell within the meaning of "dealing with," but in *Spark's Nugget* the Board found that an employee...

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111. See Devaney, * supra* note 74, at 6.
115. *Id.* at 995 n.21.
group established for purposes of resolving grievances did not transgress the “dealing with” concept since this was a delegation of management authority rather than a bilateral interaction.117

- EIP committees may lawfully discuss matters related to production, quality, company business decisions, customer relations, and so on. Any issue, on the other hand, related broadly to terms and conditions of employment, such as work scheduling, safety, or grievances, is illegal.118 In practice, a rule of reason has been applied, which exempts EIP committees that discuss these matters from the strictures of section 2(5) where it is clear that the illegal activity was inadvertent and very infrequently done.119

- Once these issues are settled, and assuming the EIP group falls within the definition of a labor organization, the analysis then proceeds to the second step—whether section 8(a)(2) has been violated. The basic issue here is whether the employer “dominates,” “interferes with,” or “supports” a labor organization. In *Electromation*, the Board stated:

  [W]hen the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer’s active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment.

Following this logic, both the Board and the courts have in the past found evidence of domination, interference, and support when an employer financially or has otherwise assisted in the process of selecting employee representatives, drew up a charter for the group, provided any kind of ongoing financial support, provided meeting rooms, or paid employees for missed work time at council meetings. Although several federal circuit courts have attempted to relax the definition of “domination” by taking into account the employer’s motive in setting up the EIP program—by considering whether it was for the purpose of better communication and increased productivity or for union avoidance—the NLRB has so far ruled that section 8(a)(2) constitutes a *per se* ban and thus employer motive is irrelevant.120

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119. See, e.g., Vons Grocery Co., 320 N.L.R.B. 53 (1995). Evidence in *Vons Grocery* indicated that at one meeting of a company-created employee quality circle the discussion strayed from production and quality issues to accidents and the dress code. Although the quality circle was technically in violation of section 2(5), the NLRB viewed this as a *de minimus* violation and abjured from finding the employer guilty of an unfair labor practice. See *id.* at 54.
C. Which Types of EIP Programs Pass the Test?

We now come to the crucial question: Which types of EIP programs are legal under the NLRA and which types are not? I use two methods to find the likely answer.

The first is to return to the five dimensions of EIP programs previously discussed and examine whether any of them are determinative of legality.

**Formal-Informal.** The formal-informal dimension is not determinative on the issue of legality. Either type may be legal or illegal, depending on other criteria.122

**Direct-Indirect.** Subject to having violated at least one other prohibited criterion (such as the discussion of wages), an EIP program that provides some form of indirect representational or agency function will be ruled illegal. A group that provides "direct" participation, such as a committee of the whole or a production team, will typically not be found to violate the law, however.123

**Influence in Decisionmaking.** The amount of influence or power exercised by the EIP group is not determinative of its legal status. Instead, the crucial issue is the structure of its authority and the manner of interaction with management. As long as the authority to make decisions is clearly delegated to employees and they utilize it in an independent manner to reach decisions, like deciding grievance appeals, the EIP group is legal. Influence, no matter how small, exercised by an EIP group via bilateral interaction with management, such as discussing employee concerns, is likely to be ruled illegal.124

**Range of Issues.** EIP groups that discuss any topic related to terms and conditions of employment are illegal.125 Literally interpreted, this includes such issues as safety, work schedules, gain sharing, sexual harassment, and workplace violence.

**Range of Membership.** The membership composition of an EIP group is also not a determinative factor in determining its legality or illegality, so long as the group includes at least some employees below the rank of first-level management. The committee may be limited solely to non-managerial employees or may be jointly constituted with representatives from both employees and management. Likewise, the representatives

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122. See supra note 114 and accompanying text.
123. See supra note 113 and accompanying text.
124. See supra text accompanying note 115.
125. See supra note 118 and accompanying text.
may be elected or selected in some other way, such as on a rotating ba-

The crucial factors thus appear to be whether the group is representa-
tional in nature and whether the group deals in a bilateral manner with
the company management. These criteria should distinguish between the
legal and illegal nature of various types of EIP programs commonly
found in American workplaces. Consider, for example, the following:

_**Self-directed work teams.**_ These are legal, since the participation is
typically “direct” rather than representational in nature.\(^\text{127}\)

_**Quality Circles.**_ These are also legal, since the issues considered typi-
cally relate exclusively to production.\(^\text{128}\)

_**Safety Committees.**_ Although thirteen states have passed legislation
mandating that companies establish some form of joint employee-
management safety committee,\(^\text{129}\) these committees nonetheless are often
illegal.\(^\text{130}\) This conflict has manifested itself in recent proposed legislation,
the Comprehensive Occupational Safety and Health Reform Act, which
includes a provision specifically exempting safety committees from the
strictures of the NLRA.\(^\text{131}\)

_**Grievance Committees.**_ These groups typically contain several man-
agement and employee members who hear disputes and render decisions
on matters of discipline and discharge. If the grievance committee is
delegated final authority to make decisions, it will pass the legality test. If
its decisions are in some sense recommendations to management or are
reached only conditional on management approval, however, it runs the
risk of being found to be illegal.\(^\text{132}\)

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129. See Teamwork for Employees and Managers Act of 1997: Hearings on S. 295 Before the
Senate Comm. on Labor and Human Resources, 105th Congress (1997) (statement of J. Thomas
Bouchard, Sr. Vice President, Human Resources, IBM Corporation); see also Gregory Watch-
man, _Safe and Sound: The Case for Safety and Health Committees Under OSHA and the NLRA_,

130. In _EFCO Corp._, 327 N.L.R.B. 71, 76 (1998), the Board ruled that the joint safety
committee established by the company was a labor organization as defined by section 2(5) be-
cause the committee engaged in activities that constituted “dealing with” management, such as
reviewing safety rules and policies, developing safety incentive programs, and, most signifi-
cantly, making proposals to management about such policies and programs. In its ruling, the
Board stated that the safety committee would not be a labor organization if it had confined its
activities to things such as encouraging employees to submit safety ideas, reporting safety haz-
ards to management, communicating safety information to employees, or conducting safety
training. Dennis Devaney describes the case of a Tennessee company that was required by state
law to have a joint labor-management safety committee but was then charged by the NLRB
with a section 8(a)(2) violation. See Devaney, _supra_ note 74, at 20.


132. See Nunn, _supra_ note 108, at 1407-08.
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Ombudsperson. An ombudsperson is an individual designated by the employer to serve as a counselor, mediator, and problem solver with respect to workplace disputes. Although an ombudsperson is almost by definition not a collective entity, the person often serves in an agency capacity for an employee grievant vis-à-vis the employer. Thus, an ombudsperson will be an illegal, “dominated” labor organization if the ombudsperson represents an employee in a dispute over terms and conditions of employment.\(^\text{133}\)

Employee Councils. Another form of EIP is an employee committee or joint employer-employee council, formed either on a department- or plant-wide basis, that meets with management regularly to discuss matters of mutual interest. It is legal only so long as it avoids issues concerning terms and conditions of employment.\(^\text{134}\)

Focus or “Brainstorming” Groups. Some companies ask selected employees to meet with management as a focus or “brainstorming” group for purposes of eliciting suggestions and comments on some change in company policy or opinions on topics of concern to employees. These groups are legal as long as they are ad hoc, temporary, and for purposes of communication.\(^\text{135}\)

Scanlon Plans. A Scanlon Plan is a form of gain-sharing compensation system in which employees submit cost-saving suggestions to a joint employee-employer committee. The committee decides which ideas have merit and should be implemented. Employees then share in some portion of the savings. These committees appear to be illegal, at least if outside a collective bargaining relationship, since they are representational, “deal with” the employer, and handle an issue—pay—related to the terms and conditions of employment.\(^\text{136}\)

Employee Representatives on the Board of Directors. One or more employees are sometimes chosen either by management or fellow employees to serve as members, either voting or nonvoting, on the company’s board of directors. This arrangement is legal only if the employee representatives either take part exclusively in the deliberations and decisionmaking on issues unrelated to terms and conditions of employment or participate only to the extent of communicating employee views.

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133. See N.L.R.B. v. General Precision, Inc., 381 F.2d 61, 64-65 (3d Cir. 1967).
134. See Webcor Packaging, Inc., 319 N.L.R.B. 1203 (1995). In Webcor Packaging, the employer established a representative body called the Plant Council. Hourly employees elected five of their peers to serve as representatives. Its purpose was to assist the employer in developing company policy related to issues such as grievances, compensation, and revision of the employee handbook. The NLRB determined the council was in violation of section 8(a)(2). See id. at 1205.
135. See Electromation, 309 N.L.R.B. at 1003.
136. See Kent F. Murrmann, The Scanlon Plan Joint Committee and Section 8(a)(2), 31 LAB. L.J. 299 (1980).
opinions, or other relevant information to the board, when terms and conditions of employment are on the table.  

**Nonunion Professional Employee Association.** Professional employees such as nurses, engineers, and teachers sometimes form an association to promote their employment interests. These interests often include a mix of professional issues, such as accreditation standards and training requirements, and issues related to the terms and conditions of employment, such as salary levels and work scheduling. These associations may cover only employees in one company or they may represent employees across several companies or states. They are nonunion in that they have no formal certification from the NLRB as an agency of collective bargaining. These nonunion employee associations are legal as long as they are not employer-dominated, which is to say they are independently initiated by employees and do not rely on employee financial or administrative support for their continued existence.

The second method that sheds light on what types of EIP programs are legal under the NLRA is to examine guidelines given to companies on this matter by their legal counsel. Former Board member Dennis Devaney, co-author of the *Electromation* decision, cites the following example with apparent approval:

> [I]n order to remain within the legal ambit of section 8(a)(2), such plans should:

1) avoid structured groups in favor of ongoing employee involvement on an individual or unstructured group basis;

2) establish task-specific ad hoc groups that focus on a particular communications, efficiency, or productivity issue (as opposed to wages, hours ...) on a short term basis and then go out of existence;

3) use irregular groupings of employees, such as occur during retreats and the like, to address communications, efficiency, or productivity issues; and

4) use staff meetings to address communications, efficiency and productivity issues. Such meetings should be attended by all staff, rather than a representative number, in order to avoid the problem of employees representing other employees.

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137. *See Research Federal Credit Union*, 310 N.L.R.B. 56, 56 n.1 (1993). In this case, the employer created an employee representation committee that met with management to develop policy issues on employment-related matters, and the committee then presented the recommendations to the Board of Directors. *See id.* at 61-63. The NLRB ruled that the committee was a dominated labor organization. *See id.* at 65-66.


139. Devaney, *supra* note 74, at 23.
V. EIP PROGRAMS IN NONUNION COMPANIES: SIX CASE STUDIES

In this Part I shall present six brief case-studies of EIP programs currently in operation at six American companies. These companies, as indicated below, come from a variety of lines of business, are located in three different states, and range in size from approximately 300 employees to more than 100,000. They were selected largely because (a) the unit (plant, division, company) is mostly or completely nonunion (b) the plant or company has a well-developed EIP program or is moving in that direction, (c) the companies represent different industries, and (d) the senior management was willing to be interviewed and to allow me to publish a summary of what I found. I also interviewed high-level managers from three other companies with well-established EIP programs, but they requested that this Article not feature their companies.

In selecting the companies for this study, I relied largely on the advice of management consultants and attorneys about which companies in the southeastern United States have advanced EIP programs. No effort was made to pre-screen the companies in order to find a particular type of EIP structure or activity, and no companies were subsequently excluded from this Article for any substantive purpose. The companies reviewed their case studies for factual accuracy.

I noted in Part III of this Article that LeRoy's two studies provide the only other recent evidence obtained directly from nonunion companies on the representational structure and function of EIP teams and the NLRA's constraints thereon. The empirical evidence reported here also suffers from one of the methodological flaws found in LeRoy's studies—small sample size—but is largely free of the other two—reliance on a mail survey and narrow focus on teams. This study, like LeRoy's, is based on evidence collected from only six companies. Thus, extreme caution must be exercised in making generalizations from the patterns and characteristics of EIP programs reported here. At the same time, however, it is worth noting that these six case studies provide the first in-depth description in the academic literature of the full range of EIP structures utilized in a sample of nonunion companies as well as the use of employee representational committees therein.

Instead of being collected through a posted survey questionnaire, the data collected for this study were in each case obtained from an in-depth personal interview with a high-level company executive. This method is likely to gather more accurate and complete information, partly because a personal interview can elicit qualitative information or explore complex

140. This sample size excludes the three additional companies that requested that I not disclose their information in this Article.
subjects in ways that a mail survey cannot and partly because the individual interviewed is more likely to be forthcoming and truthful in a personal interview than in a mail survey returned to a person he or she does not know. I also broadened the scope of investigation beyond “teams,” which tend to be small-scale employee groups focused largely on production and quality issues, to include all facets of employee involvement. The result is likely to be a more accurate assessment of the extent to which employee representation committees are used in American industry and the degree to which the NLRA constrains employers’ use of these committees.

Company A

Unit: Individual Plant.
Line of Business: Manufacturing Soaps and Detergents.
Employment: 270.
Structure of EIP:

Self-managed work teams. The plant runs on two twelve-hour shifts, and each shift has two production teams, one in the process (manufacturing) area and the other in the packaging area. Duties of supervisors covering five functional areas have been delegated to the production teams: safety, production, training, administration, and counseling. Various team members (called “technicians”) assume responsibility for managing each of these functions as a “second hat.” This requires extensive, ongoing, and cross-functional training, that is roughly estimated to be between five and ten times the amount of training provided in a traditional plant. The most important of these areas is production coordinator, and this job is elevated to a full-time position. Team members select the production coordinator on an annual basis. Teams are responsible for all aspects of day-to-day operation, including ordering supplies, planning production runs, monitoring quality, machine repair, and counseling peers on performance or behavior problems. They also interview new job candidates. When additional technical or management expertise is needed, teams call on “resources” from a cadre of nine people in a “leadership group,” such as the plant manager (who splits his time between this plant and another one in a different state), the human re-

141. Anonymity for the companies interviewed was essential, given their fears of possible adverse legal action upon publication of these case studies. The Donnelly Corporation testified before the Dunlop Commission about its nonunion employer committees and was subsequently charged with a section 8(a)(2) violation. See John Merline, Halting Worker-Manager Teams, INVESTOR’S BUS. DAILY, Feb. 2, 1996, at A1. It is quite possible that, with these fears in mind, the executives I interviewed may have selectively failed to reveal the complete breadth and depth of their EIP activities—in any event, this problem that would most likely have been exacerbated had I used a mail survey.
source director, and the controller. The least integrated and self-managed of the groups is the twenty-person administrative support group, which is composed of clerical and administrative staff.

Packaging and Process Work Groups. The next level of EIP is the Packaging Work Group and Process Work Group. Each group meets once a week and has twelve technicians and leaders. The groups' missions are, in large part, to review operating results; address problems or needs in production, quality, and training; perform medium-to-long-range planning for their area; appoint special task forces to work on some specified issues or problems (for example, shift rotation or the late delivery of supplies), and so on. Technicians rotate on and off each group as part of the way they fulfill the "leadership" block in the pay-for-knowledge compensation system. All technicians thus have an incentive and intention to develop leadership and management skills.

Plant Review Board. Problems or disputes related to job performance, interpersonal relations, work assignment, and related issues are first dealt with at the team level by the employee and one of the several counselors. If not resolved at this level, the HR director is called in as a "resource," and, as a final step, the grievant can ask that the dispute be presented to a body known as the Plant Review Board, a peer-review group composed of both technicians and leaders. The Board can only make a recommendation; the plant manager makes the final determination. No employee can be discharged without the Plant Review Board first examining the case.

Special Project Teams/Committees. Ad hoc committees and teams of technicians and leaders are formed on an "as needed" basis to address a particular problem or issue. They develop recommendations that are forwarded on to the leadership group that makes the decision. The company would prefer to have greater joint decisionmaking at this step but has erected a "wall" in the process to avoid a potential charge of "dealing with" employees.

Compensation. The plant has a pay-for-knowledge system and an all-salaried workforce. The plant recently introduced a form of gain-sharing for all employees. Pay rates are pegged at the 95th percentile in the local labor market in order to attract and retain the best of the local labor supply.

Information. Extensive information on all aspects of production, quality, cost, and on-time-deliveries are provided to the technicians. "Nothing is hidden." Formal employee surveys are conducted, but this is relatively infrequent and largely in response to a perceived "need to know."
Company B

Unit: Individual Plant.
Line of Business: Automobile Assembly.
Employment: 2400.

Structure of EIP:

Work Zone Teams. The plant is organized into "work zones," and each work zone typically has a "team" of between ten and twenty employees. An "area manager" oversees each team in a supervisory capacity. The teams meet at the start of each shift to review production issues and determine job rotation. They are also responsible for quality inspection and repairs in their work zone. They do not interview job candidates or participate in peer counseling.

IMPACT Groups. These evolved out of quality circles, which proved to be ineffective. An employee may make a request to the area manager that an IMPACT group be formed to solve a problem or address an issue (for example, the need to redesign a work process to reduce heavy lifting). The manager forms a team of people with the relevant skills and knowledge that develops a proposed solution. The area manager has the discretion to approve or disapprove the proposed solution, but usually approval is given (sometimes subject to modification).

Safety Committees. These are joint employee-management committees that meet periodically, investigate reports of unsafe conditions, sponsor training sessions, and consider new safety practices and policies. The safety committees are the most formal type of employee representation in the plant. They necessarily deal with subjects related to terms and conditions of employment, such as job rotation, work hours, and line speed.

Peer-Review Panel. This is the most "empowered" committee in which employees participate. Employees who have reached the last step of the dispute-resolution process or who have been terminated for certain offenses can request a hearing before a peer-review panel. The panel is composed of five people, two from management and three from employees who have received additional training in dispute resolution. The panel's decision is binding and results in reversal of a disciplinary decision in about twenty percent of the cases—a number that is relatively low, it is said, because the process is so carefully managed before cases get to this point.

Focus Groups. Management regularly convenes focus groups of employees to solicit opinions and suggestions (for example, proposed changes in vacation scheduling). Thirty to forty employees are selected
from across the plant on a one-time basis and meet for approximately one hour.

**Breakfast and Lunch Meetings.** The plant's vice president of human resources and other executives schedule regular breakfast and lunch meetings with employees for purposes of informal discussion and "taking the pulse."

**Success Sharing Compensation.** Part of the compensation system is a "success sharing" bonus that pays employees based on plant-level performance on several business plan objectives (for example, defect rates).

**Information Sharing.** Periodic employee surveys are administered. Video monitors are stationed in each work zone and are used for communicating with employees about new policies and upcoming events. Weekly bulletins and monthly newsletters are also distributed.

**Company C**

Unit: Company.
Line of Business: Airline transportation.
Employment: 68,000.
Structure of EIP:

**Continuous Improvement Teams.** Approximately 3500 employees from across the company are organized into 300 continuous improvement teams ("CITs"). The teams are initiated by the management or employees of an individual work unit (for example, a group of mechanics at a repair facility), usually include six to ten people, and focus on work process improvements. Team members volunteer and rotate on and off on an informal basis.

**Personnel Meetings.** Once every one to two years employees in each work unit participate in a "personnel meeting." The divisional vice president or other officer of similar rank leads the meeting, accompanied by a representative of the personnel department. It is essentially a "town hall" event in which the executive first provides an overview of recent business developments, performance issues in the division or work unit, and other information, and then solicits questions and discussion from the audience on all relevant issues. Suggestions and complaints are recorded for later management review and action.

**InFlight Forum.** One of the divisions of the company is "Inflight Service." It has 18,000 employees, most of whom are flight attendants. The Senior Vice President in charge of the division organized an employee representational group called the "Inflight Forum" composed of one representative from each of the company's twenty-six bases. Each representative is elected. The Forum, which meets three to four times a
year at the company’s headquarters, promotes improved communication and exchange of ideas between employees and senior management. Each base has its own “mini-forum” of elected employee representatives meeting with base management. Issues are solicited from all of the bases, and the two that are both system-wide in nature and of highest priority are put on the agenda of the InFlight Forum. Any subject can be discussed, but guidelines established by management stipulate that certain things are “off the table”—mainly subjects that are of a company-wide nature, such as the number of vacation days. In addition to promoting dialogue, the Forum can form teams to investigate a particular topic, benchmark competitors’ practices, and then develop a proposal to be presented to senior management. Management may accept or reject the proposal or suggest the need for modifications or further deliberation by the InFlight Forum.

**Personnel Board Council.** Approximately two years ago a company-wide body called the Personnel Board Council (“PBC”) was established. In the last contract negotiations the company’s pilots, who are unionized, successfully negotiated to get one nonvoting seat on the company’s board of directors. The company decided also to provide the nonrepresented employees with nonvoting board seats. Toward that end, the PBC comprises one person from each of seven divisions. One division covers management employees up to the senior executive level. The purpose of the PBC, as stated in a written charter, is to provide a two-way communication channel between the board of directors and the employees. The employees in each division establish the procedure for choosing their representative to the PBC. None is elected. Rather, the representatives are chosen through a process of nomination and personal interviews conducted by employee peers. The PBC members serve for two-year terms. They solicit opinions, ideas, and complaints from fellow division employees and also travel as a group to various company facilities to conduct focus groups and personal interviews with employees. They then decide among themselves which is the most important company-wide issue and are given fifteen minutes at the next board of director’s meeting to discuss it and present recommendations and proposals. Senior management does not participate in choosing the topics to be presented to the board or in developing the proposals, other than to provide information or resources if requested. A summary of the topics presented at the board meeting and the discussion thereof is distributed to employees through several methods, such as newsletters and an intranet system.

**Profit-sharing.** The company recently established a profit-sharing program for all employees. No other form of gain-sharing or incentive pay is provided.
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Information-sharing. Periodic employee surveys are conducted. The results of the most recent one were made available to all employees. A once-a-month "phone-in" is held in which employees anywhere in the world can call in and ask a question of a designated senior executive.

Company D

Unit: Mill.
Employment: 700.
Structure of EIP:

Production Teams. Production employees are organized into teams built around distinct work processes, such as the operation of a paper machine. The teams are responsible for the day-to-day management of operations and administrative tasks. Team members rotate jobs, so there is extensive cross-functional training. Each employee has a matrix of required and elective "skill blocks" to complete as part of the skill-based pay system. Successful completion of each skill block is determined by a panel of employee peers.

Dispute Resolution. The first step in dispute resolution is counseling with peer team members. If the problem is not satisfactorily resolved, the grievant can ask that a peer-review panel be established. The panel's charge is to develop two to three possible courses of action, state as a recommendation which one the panel favors, and turn these over to the plant manager, who makes the decision. A discharged employee can also request arbitration if the person's team members disagree with the decision.

Department and Mill Core Teams. Every department has a "core team" composed of employee representatives and department management representatives that meets periodically to discuss department-level issues. These are generally related to production, quality, on-time delivery, and other such matters, but employment issues such as relief time and safety come up. There is also a "mill core team," composed of ten employees and six "leaders" (management) that meets regularly to discuss mill-wide issues. Both department and mill core teams have written charters. These charters explicitly state that the teams are not to consider personnel issues such as wages, vacations or hours. The person interviewed felt this requirement "chilled" the effectiveness of the EIP process. The mill core team meetings tend to be bland and the mill manager usually does not attend since employees tend to defer instinctively to his authority. The employee representatives on the mill core team select the employees to serve on the department core teams, thus making depart-
ment core teams a "feeder" channel for the mill core team. Service on these teams is required for successful completion of certain skill blocks.

**Listening Groups and Project Teams.** Once a year the mill's human resource director forms a "listening group" of employees and solicits their opinion on a set of issues. The mill also puts employees on special project teams to investigate specific issues and make recommendations. Each year, for example, several employees and the human resource director serve on a compensation committee that surveys pay rates at other mills. The human resources director then develops recommendations for senior mill management.

**Employee Surveys.** Employee surveys are done every two years.

**Company E**

Unit: State-level unit of the service division of a 110,000 employee company.

Line of Business: Service and repair of photocopiers.

Employees: 450.

Structure of EIP:

**Self-Managed Work Teams.** The employees in this unit of the company are primarily service technicians who repair and service the company's brand of photocopiers. Until the late 1980s, each manager would be assigned to coordinate and monitor approximately twelve technicians. It was the manager's job to act as a clearinghouse for customer calls, assign calls to individual technicians, take customer complaints, and monitor the work and performance of each technician. Technicians provided the manager with daily and weekly reports of their activities, the types of repairs done at each site, and the cost of parts used. The traditional organizational structure and underlying work processes were revamped in the late 1980s as part of a company-wide total quality management ("TQM") program. Technicians were formed into work groups of six to seven members, and each group was made responsible for many of the tasks formerly done by the manager. Thus, each work group is empowered to decide how calls will be handled, who will be assigned to each call, and how the work is to be done. Managers now have a span of control of thirty-to-one (approximately five work groups).

**Information.** Part of what allowed the large increase in span of control is new technology. Each technician has a laptop computer and, rather than give the manager a written report, transmits the data to corporate headquarters, where it can be immediately accessed by all work group members, the manager, and work groups in other states. Technicians also have electronic access to extensive data on all aspects of the company's
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business performance. Intra-team coordination has been facilitated by giving each technician a portable telephone so that they are in continual communication with each other and can hold field-level group brainstorming sessions.

Compensation. Individual performance evaluation now has a large component related to performance of the work group. A gain-sharing program also makes a part of individual pay depend on the team’s performance vis-à-vis their annual expense budget and surveys of customer satisfaction.

Company F

Unit: Plant.
Line of Business: Manufacturing missiles.
Employment: 1000.
Structure of EIP:

Self-Managed Work Teams. This plant converted to self-managed work teams over a twelve-month period in the late 1980s as part of a comprehensive transformation to a high-performance, TQM-based work system. Teams may be as large as twenty people, but memberships of eight to twelve are preferred. The teams are given monthly and annual production targets and expense budgets and are responsible for deciding how these are met. Thus, the teams determine the production schedule, the assignment of tasks, and extent of job rotation and perform their own quality inspections. The teams also schedule vacations and can elect to take a temporary “layoff” if production is slow.

Plant-wide Committees. Three plant-wide joint employee-management committees are in operation. The first is the “workplace action team,” which deals with issues such as work schedules and security (a large concern at this facility). The second is the “environment and safety team,” which deals with occupational safety and health issues. The third is the “gain-sharing team,” which is responsible for managing the gain-sharing program. Each committee has a “diagonal slice” of employees, including senior plant management, persons from the engineering and administrative staffs, and shopfloor employees. The gain-sharing team is the one that elicits the most employee interest and is viewed as being the most prestigious. The gain-sharing program provides employees with a bonus payment based on their ability to reduce production costs below a target figure. The committee thus monitors expenses (including management expenses on furniture and travel), periodically adds, deletes, or modifies performance targets, and issues regular reports to the plant employees on the status of that period’s gain-sharing pool.
People Council. This plant is one of five in its division. Three councils have been established that cover all five plants: a production council, a growth council and a people council (“PC”). The PC deals with all personnel-related processes and problems, including but not limited to traditional human-resource issues. Twelve people serve on the PC, drawn from the five plants and from the ranks of management, the professional staff (engineering), and production employees. The PC meets once a week, via teleconferencing, and has a very informal structure and operation. Its members have no tenure and are selected by management on a consultative basis with key stakeholders. The PC charters a variety of project teams that are charged with investigating specific issues. These teams are also joint employee-management groups. They periodically update the PC with a progress report and in turn receive “mid-course” feedback. Eventually they present a report or set of recommendations to the PC which, through a process of informal consensus-building, decides either to accept, modify, or send the proposal back for further work. An accepted proposal is then submitted by the PC to the division’s all-management “executive council,” which makes the final decision.

Town-Hall Meeting. Every year all employees attend a town-hall meeting off-site at which plant management and teams report on various aspects of plant performance, including profit and loss, followed by an open question-and-answer period.

Peer Review. A half-dozen channels exist for resolution of workplace problems, but one option is to bring the matter before a plant-level peer-review panel.

Employee Survey. A survey of employees is done regularly.

VI. COMPLIANCE ANALYSIS

A. The Six Case Studies

I believe that the breadth and depth of EIP activities undertaken by these six companies is quite striking. I also perceive, however, a significant incongruence between what a strict reading of the labor law says is permissible and what several of these companies are in fact doing in their EIP programs.

Most noteworthy in this regard are Company C (airline transportation) and Company F (missile manufacture). Both companies have employee representational bodies that are in a number of respects closely
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akin to the 1920s-era employee representation plans.\textsuperscript{142} In the former case, the InFlight Forum and the Personnel Board Council are division-wide or company-wide representational bodies that are financed by the employer. They have written charters, elected or selected employee delegates, regular meetings with management, and agendas that include issues related to the terms and conditions of employment. In the case of Company F, the People Council spans five plants, has selected employee representatives that meet with management, and considers various aspects of the terms and conditions of employment. It should be noted that executives at both companies are well aware of the law regarding non-union employee committees and have consulted labor attorneys on the matter, but have proceeded with their representation plans in the belief they conform to the relevant labor law (the Railway Labor Act ("RLA") in the case of Company C and the NLRA in the case of Company F).\textsuperscript{143} It can fairly be said that these parts of the EIP programs at these two companies appear to push against the boundary of what is permissible under the NLRA.

Three of the other companies, Company A (detergent manufacture), Company B (auto assembly), and Company D (paper manufacture), also have employee representational bodies that in some respect raise section 8(a)(2) compliance issues, but not to the same degree as Companies C and F.

In Company A, for example, the Packaging and Work Process groups are composed of employee representatives and selected managers, focus predominantly on production and quality issues but also on employment matters related to scheduling and safety, have authority to deliberate and make decisions, and are company-financed and controlled. In Company

\textsuperscript{142} This finding calls into question the assertion of Martin Moe that "the 1930s company union has little in common in terms of structure, purpose, or effect with most company EIPs." Martin 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, 1134 n.32 (1993).

\textsuperscript{143} The Railway Labor Act, 44 Stat. 577 (1926) (codified as amended in scattered sections of 15, 18, 28, 45 U.S.C. (1994)), also prohibits employer domination of a labor organization. It provides that, "representatives for both management and labor shall be designated by the respective parties and without interference, influence, or coercion by either party over the designation of representatives of the other," 45 U.S.C. § 152 para. 3 (1994), and that, "It shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency for collective bargaining." id. para. 4. The Railway Labor Act defines a "representative" broadly: "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." id. § 151 para. 6. Companies covered by the RLA nonetheless have greater latitude to operate nonunion employee committees because the National Mediation Board—the enforcement agency established by the Act—only has authority to disestablish such committees if they are found to illegitimately interfere with employee free choice once a union has successfully petitioned for a representation election. See U.S. Airways, Inc. v. National Mediation Bd., 158 L.R.R.M. 2984 (D.D.C. 1998).
B, the joint safety committees appear to be the part of the EIP program that comes closest to infringing on section 8(a)(2), given that the committees are composed of employee representatives and selected management personnel and are empowered to make joint decisions on safety matters. In Company D, the department and mill core teams appear to violate most significantly section 8(a)(2)'s prohibitions, for, even though the focus of the groups is on production issues, the employee and management representatives on each team must occasionally consider employment subjects such as work scheduling, job rotation, and safety in the course of their deliberations.

The only company of the six considered here that clearly appears to fall within the boundaries established by Electromation is Company E (photocopier service). The work groups are composed of all technicians assigned to that unit and thus are not representational in nature. These work groups correspond most closely to the small, production-oriented “teams” that LeRoy focuses on in his two studies\textsuperscript{144} and that are discussed in much of the contemporary management literature on high-performance workplaces.\textsuperscript{145}

Another indication of the gap between actual practice among these six companies and what is permissible under the NLRA is to compare their EIP programs with the practices cited by Electromation co-author Dennis Devaney as legally preferred.\textsuperscript{146} Briefly, these are: avoiding structured groups in favor of EIP conducted on an individual or unstructured group level; establishing task-specific ad hoc groups focused on productivity, efficiency, and communication; using irregular groupings of employees, such as at retreats; and using staff meetings at which all staff are present to address communication issues (thus avoiding representational issues). It is evident that only the EIP program at Company E, the photocopier service provider, comes reasonably close to meeting these criteria. The EIP programs at the other five companies would all have to be modified—modestly at Companies A, B, and D and substantially at Companies C and F.

\textbf{B. Comments of Managers and Attorneys}

To gain further insight on the constraining effect of the NLRA on employee involvement programs in nonunion companies, in each interview at these six companies I asked the management executive a series of open-ended questions about his or her opinion regarding the impact of

\textsuperscript{144} See sources cited \textit{supra} note 89.
\textsuperscript{145} See, e.g., KATZENBACH \& SMITH, \textit{supra} note 101.
\textsuperscript{146} See \textit{supra} text accompanying note 139.
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the law on the company’s EIP activities and whether the company would use more employee representational EIP structures if allowed. These matters were also explored in interviews with managers at the three other companies that declined to have their EIP activities featured in this article. I also interviewed four labor attorneys on the management side who are familiar with EIP programs and section 8(a)(2), and two management consultants who specialize in the design and implementation of high-performance workplace systems. Their comments and observations are summarized and synthesized below. Obviously, they are anecdotal, in some cases speculative, and based on a small number of cases, so caution is required in generalizing from them.

Responses from managers fell into three types. The first type of response was a lack of concern. Several managers, including the representative of Company E, whose EIP programs were clearly within the law believed that, while the restrictions imposed by the NLRA might be counterproductive and out-of-date, this was of little practical concern because they neither had nor desired to have the more formal systems of employee representation that might pose a legal problem.

The second response pattern was from managers whose EIP programs come closer to the legal boundary established by the NLRA but who have taken pains to ensure that the programs meet not only the spirit but also the letter of the law, such as those at Company A. Typically, these managers were more likely to follow the counsel of a management labor attorney in setting up the EIP program and to structure it in ways that would pass muster with the NLRB. These managers thus uniformly saw attorneys as a conservative and restraining influence on their initiatives in the EIP area.

The commitment of the latter group of managers to a strict “better safe than sorry” approach to EIP forces them to make certain compromises or changes in their programs that are typically viewed as awkward or counterproductive. To avoid a charge of “dealing with” employees in a manner that would violate the NLRA, for example, their companies resort to several stratagems. They may announce, for example, that all employment-related issues are “off-limits.” Doing so, however, is seen by the managers as counterproductive on two counts: first, because many aspects of efficiency enhancement and quality improvement inevitably require detailed and in-depth discussions with workers regarding various employment issues and, second, because many employees resent EIP programs devoted only to management’s interests in productivity and quality issues. Paradoxically, say these management executives, section 8(a)(2) actually works against employee interests in this regard, because it provides nonunion companies with a convenient excuse to avoid deal-
ing with issues that primarily affect the well-being and livelihoods of workers.

Alternatively, the companies may completely delegate authority to the employee committees so that there is no bilateral interaction between management and labor, such as making the decisions of a peer-review panel final and binding. From a management perspective, this approach both satisfies the law and increases the credibility and legitimacy of the decisions made by the employee representational committee, but it also opens up the possibility that a committee's decisions may substantially change company employment policy (an "unholy precedent") or contravene employment law.

Finally, to resolve the "dealing with" problem, the companies may limit the employee committee's role to communication and information exchange, reserving to management the process of deliberation and final decision. As an example, one manager said that the employee committee investigated the feasibility of alternative shift schedules, developed a list of pros and cons, and then "heaved the information over the wall" to management, who then made the final decision. This approach reportedly satisfied neither management nor the employees but was viewed as the price that had to be paid to stay within the law.

The third response pattern among the management was to be cognizant of sections 8(a)(2) and 2(5) but nonetheless to pursue more effective EIP programs at the risk of crossing the line and doing something that may be determined to violate the NLRA. Thus, the aim of these companies is to avoid clear violations but otherwise proceed with their EIP programs unless told to cease and desist. This attitude is the product of three convictions: first, that what they are doing produces a win-win outcome for the company and employees; second, that the restrictions imposed by sections 8(a)(2) and 2(5) are out-of-date and counterproductive; and, third, that the penalties in the NLRA for violating section 8(a)(2) are quite small, as are the chances of being charged with a violation.¹⁴⁷

As previously indicated, I also interviewed two management consultants who specialize in designing "high-performance" work systems and four management attorneys who specialize in EIP programs and section 8(a)(2) cases. Both groups were unanimous in their opinion that Electromation initially cast a significant chill on EIP programs but, over approximately the last four years, these fears have eased considerably if not completely.¹⁴⁸

¹⁴⁷. See supra note 75 and accompanying text.
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I was told that two factors contributed to the easing of concern over Electromation. One is a growing perception that the law still provides enough “wiggle room” to set up EIP programs and remain within the bounds of the law or not far beyond, albeit subject to some of the awkward or counterproductive constraints noted above. The second, and the more important according to the people interviewed, is that companies increasingly realize that the probability of being charged with a section 8(a)(2) violation is very small. According to the attorneys, usually the only time a nonunion company gets into legal trouble with its EIP programs is when a union begins an organizing campaign, discovers an in-house employee committee, and files a section 8(a)(2) charge. But most companies, I was told, view the probability of being a target of a union organizing campaign as quite small and, indeed, several managers in “high-performance” plants told me they had experienced no union activity in a decade or more. Furthermore, several attorneys ventured the opinion that the NLRB under Chairman Gould has deliberately backed away from prosecuting section 8(a)(2) cases in an attempt to forestall passage of the TEAM Act or similar legislation. Finally, even if a company is ultimately found guilty of a section 8(a)(2) unfair labor practice, the typical penalty is modest—the Board issues a cease and desist order and requires the company to display the order prominently in the workplace.

For these reasons, the managers, attorneys, and consultants interviewed for this study believed that the restrictions contained in the NLRA on “company unions” are having a less adverse impact on legitimate EIP programs than was initially feared after the Electromation decision came down in 1992. In effect, some companies have found ways, not always welcome or efficient but nonetheless serviceable, to live with the law, while others have chosen to quietly go beyond it, operating what one person described to me as “stealth” employee involvement committees.

It would be incorrect, however, to say that Electromation is having no effect on nonunion EIP programs. Both managers and attorneys stressed that, despite the small probability of being charged with a section 8(a)(2) violation and the small penalties assessed if found guilty, most companies want to stay within the boundaries of the law as a matter of business ethics. Furthermore, most companies understandably want to avoid both the large financial costs and public embarrassment associated with litigation.

149. See Rundle, supra note 72, at 166 (finding that of the 58 section 8(a)(2) cases between 1972 and 1993 in which the NLRB ordered a committee disestablished, only two involved an employee committee in which there was neither an organizing campaign underway nor commission of one or more other unfair labor practices by the employer).

150. See, e.g., Electromation, 309 N.L.R.B. at 998.
Section 8(a)(2) litigation can drag out for years on appeal and typically imposes significant costs of diverted management attention, organizational turmoil, and employee demoralization. Finally, some managers said they also did not want to provide unions with a pretext for filing an unfair labor practice charge or otherwise harassing the company, and thus they deliberately restrict the expansiveness and scope of their EIP efforts.

The majority of managers, consultants, and attorneys interviewed for this study believed that a substantial proportion of companies would modestly expand their EIP programs in terms of the breadth and depth of activities delegated to employee representation committees if it were legal to do so. One manager, for example, said that he would empower the employee and management representatives on the plant compensation committee to determine, subject to certain policy guidelines established by top management, the size of the quarterly gainsharing bonus for production employees. Another said she had formed a joint employee-management team to investigate employee complaints about the plant's vacation schedule, research the issues and alternatives, and then present the information to her for her final decision. Had the law allowed, she said, she would have chosen to interact with the team in the decision-making process so that there was a greater element of mutuality in the final product. Such chilling effects, my subjects indicated, are common.

While most nonunion companies would probably expand their EIP programs "on the margin," a smaller number would probably go further. Nonetheless, most subjects indicated that it was unlikely that most companies would go so far as to establish, as proponents of the TEAM Act fear, formal representational structures equivalent to the "company unions" of the 1920s and 1930s. The subjects cited four reasons for this. First, these types of formal plant- or company-wide structures are too cumbersome, costly, and time consuming—particularly with the increasing emphasis on operational flexibility and decentralization of decision-making. Second, many respondents doubted that modern "company-unions" would provide much additional benefit, either in improved efficiency and customer service or improved employee morale, over what

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151. The case of EFCO Manufacturing Company is illustrative. EFCO was found guilty of violating section 8(a)(2) by an administrative law judge in 1993 and appealed the decision to the NLRB in 1995, but the Board did not rule on the appeal until December 31, 1998. See EFCO Corp., 327 N.L.R.B. 71 (1998). Chris Fuldner, CEO of the company, stated: "These proceedings did not come without significant costs. Aside from the distaste of being treated as though we were criminals, we also spent in the neighborhood of about $150,000 in defending ourselves." He further reported that the company was hamstrung in its efforts to restructure its employee involvement activities and move forward with a new plan given the NLRB's long delay in issuing a decision on the case. Chris Fuldner, Employee Involvement and Section 8(a)(2) at EFCO Manufacturing, in NONUNION EMPLOYEE REPRESENTATION, supra note 11.
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can be attained from smaller scale, more focused EIP activities. Third, many companies like to foster an organizational culture that emphasizes individual treatment and respect and thus shy away from formal systems of employee representation, which tend to create a sense of collective identity among employees and a collective approach to problem-solving. Fourth, managers worry that in-house employee committees may become the launching pad for union organization of the company. One manager described in-house committees as “pet bears” and said that if not treated well they can quickly turn on the company and get out of control.152

These negative features notwithstanding, the interview subjects believed that a small minority of firms would nevertheless choose to operate formal, plant- or company-wide employee committees and councils if permitted by the law. Examples cited were the formal employee representation plans at the Polaroid and Donnelly corporations, both of which had recently been ordered disestablished by the NLRB.153 Partly, it was felt, companies such as these adopt formal systems of employee representation due to the overriding importance attached by their founders or top executives to fair dealing with employees or the fostering of a “family” corporate culture. Also important is that, in very large companies, and especially those experiencing organizational stress, a formal system of employee representation can be an effective method of promoting improved communication between top executives and shopfloor workers and fostering a win-win approach to resolving potentially divisive issues.

C. Union Avoidance

Since the issue of union avoidance is central to the controversy surrounding nonunion employee representation committees and section 8(a)(2), I devoted considerable time to this subject in my field interviews. Reported below is a synopsis of my findings.

As described in Part II of this Article, the view of supporters of section 8(a)(2) is that employers typically use nonunion employee committees to coerce and intimidate workers into avoiding bona fide trade unions or, alternatively, to create a climate of opinion in the plant that steers employees’ attitudes against outside representation.154

152. The “pet bear” metaphor is also reported in Daphne Taras & Jason Copping, When Pet Bears Go Wild: Triggering Union Certifications from Joint Industrial Councils (unpublished paper presented at the 1996 meeting of the Canadian Industrial Relations Association) (on file with the author).


154. See Barenberg, supra note 110, at 767 (“[T]he historical evidence shows that company unionism was widely coercive and manipulative . . . . [T]here is also undeniable evidence that
The management executives, consultants, and attorneys interviewed for this study provided a different perspective. It is true that no manager I interviewed expressed even a neutral attitude toward union organization and that most were explicitly committed to maintaining a union-free status. Thus, there is no pretense that EIP is not a part of a union avoidance strategy, as the companies' entire human resource program is, in part, crafted with this goal in mind. But, from the perspective of the people interviewed, in thinking about the social utility of nonunion employee committees it is crucial to distinguish between the types of employers that use them and the objectives they are intended to serve.

To illustrate this point, I will distinguish—for the sake of discussion—two types of companies: “high-road employers” and “low-road employers.” In reality, many companies fall somewhere in the middle. The high-road employers are run by well-trained, professional managers who earn profits for the company by emphasizing innovation, quality products, good customer service, efficiency in production and administration, and fair treatment of employees. These companies seek to remain union-free, but typically pursue this goal through a strategy of “union substitution.” In a union substitution strategy, the employer establishes human resource policies and practices—such as above-market wages, job security, a formal dispute-resolution process, and a culture of respect and fair dealing—intended not only to eliminate most of the sources of discontent that motivate employees to seek union representation but also to give employees more than they could hope to gain through collective bargaining.

John R. Commons, founder of the field of industrial relations, had these employers in mind when he commented seventy years ago, “[f]rom 10 percent to 25 percent of American employers may be said to be so far ahead of the game that trade unions can not reach them. Conditions are better, wages are better, security is better, than unions can actu...
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ally deliver to their members. In effect, these employers fend off unions with the velvet glove of good business practice and generous treatment of employees.

The other types of companies are the low-road employers. Whether due to unprofessional management, poor products, or depressed market conditions, these companies tend to be only marginally profitable. Either out of short-term greed, or the pressure to survive, the low-road employer takes a “win-lose” approach to human resource management, paying wages and benefits only as necessary to keep a workforce, practicing employment-at-will, skimping on safety and training, and adopting an “if you don’t like it here, you can leave” attitude toward employee relations. While workers at the high-road employer typically feel satisfied with and well treated by their employer, those who work for low-road employers are more likely to feel just the opposite. One response is to quit and seek work elsewhere, but another that many workers of low-road employers pursue is representation by an independent labor union.

Like the high-road company, the low-road employer also wants to remain union-free but typically adopts a different strategy to reach this goal. This strategy is called “union suppression.” The essence of the union suppression strategy is to use coercion and fear to dissuade or prevent workers from exercising their rights to join a union and engage in collective bargaining. In some cases the tools of coercion and fear are within the law, if not commonly accepted ethical principles, such as fostering racial divisions among the workers and spreading rumors of moral turpitude about union leaders. Often, however, tactics used are illegal, such as widespread firing of union sympathizers, spying on union meetings, and spreading rumors about possible plant closings.

Nonunion employee representation committees are found among both high- and low-road employers. But the objectives they serve, and

158. JOHN R. COMMONS, INDUSTRIAL GOVERNMENT 263 (1921).
160. See FREEMAN & ROGERS, supra note 86, at 43, 59 (reporting from a 1994 employee survey that one-third of American workers are discontented with their jobs and 32% of nonunion workers say they would vote for a union if given an opportunity); see also MILLS, supra note 155, at 197-98; Bruce E. Kaufman, The Future of the Labor Movement, LAB. L.J. 474 (1997); Hoyt Wheeler & John McClendon, The Individual Decision To Unionize, in THE STATE OF THE UNIONS 47 (George Strauss et al. eds., 1991).
161. KOCHAN & KATZ, supra note 156, at 190-94.
the manner in which they are formed and operated, are typically quite different.

Common to both kinds of employers is a desire to make profit and remain union-free. Like the progressive welfare capitalist firms of the 1920s, high-road employers seek to attain these goals through a cooperative, win-win human resource management strategy. The emphasis in this strategy is on treating workers as "human resources," building a mutuality of interests between employees and the firm, and fostering a sense of fair dealing and common enterprise—all of which is intended to unleash high levels of employee work effort, dedication to product quality and superior service, strong loyalty to the company, and a spirit of teamwork and self-sacrifice for the common good. Some of the high-road employers will look at nonunion forms of employee representation and decide against using them, either for philosophical or pragmatic business reasons—just as some prominent welfare capitalist firms did in the 1920s. Many others, however, will adopt some form of employee representation, often in a decentralized, small-scale manner but in other cases on a plant- or company-wide basis. Importantly, the high-road employer will generally not wait to implement nonunion committees until the last moment, when employee dissatisfaction is boiling over and a union organizing campaign has begun, but will inaugurate them early on as part of a forward-looking, progressive package of workplace practices aimed at preventing both employee dissatisfaction and a union campaign through fair treatment and greater empowerment. As another sign of these

163. Examples of high road employers with employee representation plans can be found in both the 1930s and 1990s. With respect to the former, Canby Balderston describes that, in 1931, Forbes magazine sponsored a competitive selection process to identify the company with "the soundest worker-management relations." CANBY BALDERSTON, EXECUTIVE GUIDANCE OF INDUSTRIAL RELATIONS, at v (1935). Twenty-five companies were selected for honorable mention, twenty of which were nonunion. Fourteen of these nonunion companies had an employee representation plan. The winner of the competition was Leeds & Northrup. In describing why the company was selected, Balderston stated: "It is natural to expect that a program honored in this signal fashion should have the usual arrangements that one expects to find in a firm with advanced personnel policies, that is employee representation, retirement annuities, group insurance, and systematic guidance of wage rates and promotion." Id. at 141 (emphasis added). In the 1990s, leading companies, such as Polaroid, Donnelly, and Herman Miller, have had broad-based employee representation groups—dating back to 1949 in the case of Polaroid. Similar to the accolades given to Leeds & Northrup, Polaroid, Donnelly, and Herman Miller were all selected as among the one hundred best companies to work for in America. See ROBERT LEVERING ET AL., THE 100 BEST COMPANIES TO WORK FOR IN AMERICA (1984).

164. See KOCHAN & OSTERMAN, supra note 22; Michael Beer & Bert Spector, Human Resource Management: The Integration of Industrial Relations and Organizational Development, in 2 RESEARCH IN PERSONNEL AND HUMAN RESOURCE MANAGEMENT 261-98 (Gerald Ferris ed., 1984); Kaufman, supra note 2, at 264-71.

companies' commitment to positive employee relations, they will main-
tain their representation plans even in periods of financial exigency and a
weak-to-nonexistent union threat.

Working for high-road employers is not necessarily Heaven on Earth,
and employees may well chafe at the companies' paternalism, feel dissat-
sisfaction with certain aspects of the job, or resent cut-backs made during
an economic downturn or as part of a corporate restructuring. Further,
it is certainly the case that the nonunion councils and committees oper-
ated by the high-road employers exist primarily to serve the employers' interests and will continue to survive and prosper only as long as they promote this end. The bottom line for most of the workers at high-road employers, however, is that no superior alternatives are readily attain-
able. Quitting is an option, but the chances of finding a better place of work are slim. Likewise, union representation is also an option, but it is not clear that a union can materially improve work conditions at the high-road employer. In addition, most employees at these companies are repelled by the adversarialism inherent in collective bargaining and the prospect of open warfare with the employer.168

166. Mark Harshaw, Acting Director of Human Resource at Dofasco, Ltd., describes the origin of the company's representation committees in Nonunion Employee Representation at Dofasco, in NONUNION EMPLOYEE REPRESENTATION, supra note 11. Dofasco is a nonunion Canadian steel maker and uses several types of nonunion employee representation committees. Harshaw explains that the company was founded in 1912 and the first representation committee was introduced in 1938 to administer the company's newly created savings and profit-sharing plans. He states:

Contrary to some opinions, union avoidance wasn't the driving force for a lot of our employee relations work. . . . Because the company was initially run by a family [the Shermans], it came to think of itself as a family and tried to establish that kind of relationship. . . . Over the years, a very strong culture developed on the cornerstone of the 'Golden Rule'. . . . In 1938 they introduced profit-sharing. All employees could share in the wealth of the company while at the same time providing them with an incentive to create that wealth through their collective efforts.

Id.

167. Corporate restructurings and downsizings often lead to employee anger and demoralization even at the best-managed companies. See PETER CAPPSELLI ET AL., CHANGE AT WORK 79-84 (1997). The Personnel Board Council of Company C described in the case studies that were reported in Part V of this Article was established after a three-year period of drastic cost cutting and consequent deterioration in employee morale and commitment.

168. Cathy Cone, an employee member of a representation council at Delta Air Lines, states:

The members of the council share the opinion that the entire purpose of employee representation is to shift the focus of the front-line and management away from an adversarial struggle over the terms and conditions of employment to cooperation and mutual gain. . . . Given that this is what we believe to be our purpose, it puts us in direct opposition to a union's purpose.

Cathy Cone, Nonunion Employee Representation at Delta Air Lines: An Employee Delegate's View, in NONUNION EMPLOYEE REPRESENTATION, supra note 11.
Nonetheless, critics of nonunion employee councils claim they are inherently undemocratic and subversive of employee rights and interests. But closer examination of this argument, according to the individuals I interviewed, calls it into question. They note, first, that in fairness it must be recognized that a number of labor unions are imperfectly democratic organizations and rank and file members are sometimes largely disenfranchised in terms of control over the leadership and the union’s affairs. Indeed, during the 1920s and 1930s, when critics of employer-created plans condemned them as shams, a number of the trade unions were highly autocratic and, in a number of cases, subject to significant corruption. Some unions today continue to suffer from these problems. Thus, employer-created plans have to be judged not against the ideal of industrial democracy touted by proponents of unions but against the actual governance practices of unions. Second, the defenders of company-created plans admit that nearly all nonunion councils and committees are “dominated” by management, in the sense of being created, financed, and operated by the company. But domination does not mean that they are necessarily objectionable on moral or ethical grounds, or are antithetical to employee interests. After all, it is equally true that all other aspects of a nonunion company’s human resource policy are similarly “dominated”—such as its compensation policy, training programs, and staffing decisions—but no one seriously argues that these policies should therefore be decided by majority vote of the employees or declared illegal because they conflict with basic democratic beliefs and institutions. Rather, precisely because the high-road employer seeks to gain competitive advantage through a cooperative, win-win strategy, the “dominated” employment practices put in place are deliberately designed to foster

169. See Hearings on S. 295 Before the Senate Comm. on Labor and Human Resources, 105th Congress (1997) (statement of Jonathan Hiatt) (“We urge the Committee to take it to heart that section 8(a)(2) stands for a very simple—and basic—proposition.... Employer dominated representation is inherently illegitimate and inimical to the exercise of full freedom of association.”); Morris, supra note 70, at 28.

170. See GORDON L. HOSTETTER & THOMAS QUINN BEESLEY, IT'S A RACKET! (1929). Thomas Eliot, a self-professed “New Dealer” who worked in the Roosevelt Administration as a deputy to Secretary of Labor Francis Perkins, recounts in his autobiography:

While I was all for upholding the workers’ rights under Section 7a, and highly critical of employers who denied them those rights, I was not automatically pro-union. Far from it. Frequently I wrote [to my family in 1933] scornfully about the leaders of some of the major A.F. of L. building trades, calling them “a bunch of racketeers in league with a lot of the building contractors.”


worker satisfaction and loyalty.\textsuperscript{172} Thus, one method through which this is accomplished is above-market wages; another is promises of job security; yet another is some form of nonunion employee representation committee that provides for some measure of joint decisionmaking, employee voice in company affairs, and a formal system for dispute resolution. These committees are thus not instruments of exploitation or coercion any more than high wages and good working conditions are. It is indeed true that all of these positive work conditions are provided by nonunion firms in order to make more profit but the end result is that employees, and society as a whole, are better off with these conditions than without them.\textsuperscript{173}

The picture is quite different if we look at low-road employers. As noted earlier, low-road employers treat workers as commodities to be hired for as little as possible, worked hard for as long as needed, and then let go with minimal fuss and expense.\textsuperscript{174} The cooperative, win-win strategy of high-road employers is unattractive to these companies, partly because they cannot afford it, partly because they do not have the management expertise or large organizational size to implement it, and partly because they can motivate employees to work hard with methods that are cheaper or more effective than high wages and fair treatment.\textsuperscript{175} Examples include fear of being fired in a depressed job market, tight supervision, a plethora of control mechanisms and punitive sanctions, and production technologies, including assembly lines, that allow management to control the pace of work.\textsuperscript{176} Nonunion employee councils thus hold little

\begin{footnotes}
\item[172] See Foulkes, \textit{supra} note 157; Mills, \textit{supra} note 155, at 194-96.
\item[173] David Boone, Manager of the Production Operations Division of Imperial Oil, Ltd., states, “Maintaining an effective nonunion form of representation consumes considerable management and employee effort and has tangible costs. . . . Even so, there is no doubt in my mind that the effort pays off in terms of better business results and a rewarding collaborative work environment.” David Boone, \textit{Operation of the Production District Joint Industrial Council at Imperial Oil}, in \textit{Nonunion Employee Representation}, \textit{supra} note 11.
\item[174] Whiting Williams described numerous examples of exploitative and onerous employment conditions at low road employers of the early 1920s. See \textit{Whiting Williams, What’s On the Worker’s Mind} (1920). For examples from recent times, see sources cited \textit{supra} note 159.
\item[175] See \textit{John R. Commons, Industrial Relations, in Trade Unionism and Labor Problems} 1, 7 (2d series 1921). Commons describes the motivational methods of low road employers by stating: \textit{We have been going on the theory that in order to get efficiency, in order to get output, in order to get laborers to work, there must be some kind of penalty held over the workingman—the penalty of unemployment, the penalty of being discharged if he does not work, if he does not do his duty, if he is not on the job. It is then that he suffers the penalty of being discharged from his job. Our method has been the rough method . . . .} Id.; see also Jacoby, \textit{supra} note 18, at 20.
\item[176] See, e.g., Mills, \textit{supra} note 155, at 192; Horwitz, \textit{supra} note 160; Milbank, \textit{supra} note 160.
\end{footnotes}
allure for low-road employers as a part of their long-term human re-
source strategy.\textsuperscript{177}

Just as the workplace at high-road employers is not Heaven on Earth, the workplace at low-road employers is not necessarily Hell on Earth. Low-road employers, after all, are constrained by market forces to pay a certain level of wages and benefits in order to recruit and retain a work-
force. They know that a certain amount of training and job security is
necessary for employee morale and productivity and are restrained from
undue arbitrariness and callousness toward labor by the threat of both
unions and lawsuits. Nonetheless, employees at low-road employers are
far more likely to be dissatisfied with the terms and conditions of work,
to perceive the employment relationship as win-lose, and to feel the need
for both outside protection and greater leverage in dealing with the man-
agement.\textsuperscript{178} Many of these employees, relative to their counterparts at
high-road employers, are thus likely to have a high level of interest in
union representation.\textsuperscript{179}

Because low-road employers typically invest little in positive em-
ployee relations practices, they are far more likely to experience a union
organizing campaign.\textsuperscript{180} One common response is to call in a labor attor-
ney or consultant to take command of the company's side of the cam-
paign.\textsuperscript{181} Given that the typical union representation election takes place
six to eight weeks after a petition is filed with the NLRB, the company
and its consultants have relatively little time to salve the employees' an-
ger and beat back the union. Toward this end, they try a number of tac-
tics—sometimes illegal ones.\textsuperscript{182} In a positive vein, the attorney or consult-
ant will often interview supervisors and foremen to determine the source
of employee discontent and make recommendations to top management
on what needs to be done to correct the situation. In a more negative
vein, low road companies often show anti-union videotapes in captive
audience sessions, make veiled threats about loss of jobs if the union wins
or promises about wage increases and other rewards if the union is voted
down, or fire or otherwise discriminate against union activists.\textsuperscript{183}

\begin{footnotesize}
\begin{enumerate}
\item[177.] See JACOBY, supra note 18, at 190-95.
\item[178.] See MILLS, supra note 155, at 192.
\item[179.] See Jack Fiorito et al., \textit{The Impact of Human Resource Policies on Union Organizing},
26 INDUS. REL. 113 (1987) (demonstrating that unions have a higher win rate in NLRB elec-
tions in firms that do not have progressive human resource practices).
\item[180.] See id. This fact is also revealed in an unpublished AFL-CIO report. DEPARTMENT OF
ORGANIZATION AND FIELD SERVICES, AFL-CIO, AFL-CIO ORGANIZING SURVEY:
1986-87 NLRB ELECTIONS, at 8 (1989) ("The presence of quality of work life programs are disastrous
for unions; only 17\% of elections were successful where such programs are present.").
\item[181.] See LAWLER, supra note 162, at 79-117; Kaufman & Stephan, supra note 162.
\item[182.] See Kaufman & Stephan, supra note 162, at 447.
\item[183.] See id.
\end{enumerate}
\end{footnotesize}
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One union avoidance tactic is to form a nonunion employee committee or council quickly. This accomplishes several purposes. On the positive side, the committee may quickly identify problem areas unknown to top management, such as a foreman with a record of sexual harassment or widespread employee dissatisfaction with vacation scheduling, and thus contribute to a win-win solution. But the negative consequences are likely to outweigh the positive. Since low-road employers typically establish nonunion employee committees only shortly before or during a union organizing drive, it is far more likely that the primary motive in doing so is short-term union avoidance.

Establishment of an employee committee may contribute to this end in several ways. It can, for example, buy the employer more time by deceptively convincing the employees that the company is seriously interested in resolving their complaints and promoting improved relations. As a result, the employees may call off the organizing campaign or the union may lose the support of a majority of the workers. Once the union is defeated, the employer may quickly lose interest in promoting improved conditions, renege on promises and commitments made during the campaign, ferret out union sympathizers and fire them, and disband the employee council or let it lapse into disuse. In this case, the net effect of the employee council is to help squash the union organizing drive with little real improvement in the conditions that precipitated the union drive in the first place. Then the employees and union must start over, often from a weakened position.

Nonunion employee councils can serve the union avoidance objectives of low-road employers in other ways. Employers use them, for example, to disseminate anti-union propaganda to workers. The worker representatives can communicate anti-union threats or promises that management is legally restrained from making, and the committees can be used to identify union sympathizers among the workers.

184. In Magan Medical Clinic, Inc., 314 N.L.R.B. 1083 (1994), for example, the employer set up a grievance committee shortly after a union-organizing drive began for the purpose of airing employee discontents with wages, hours, and treatment by supervisors.
185. In Garney Morris, Inc., 313 N.L.R.B. 105 (1993), the company formed an employee committee shortly after a union organizing drive began and strongly encouraged employees to participate in it. Garney Morris simultaneously committed numerous unfair labor practices, such as discharge of union supporters. In that case, the A.L.J. concluded, “[i]t is hard to imagine any conduct on the part of an employer which could more thoroughly decimate an organizing drive and more surely render a Board election meaningless.” Id. at 102.
187. See Barenberg, supra note 110, at 777-824. For an historical example of the use of company unions for this purpose, see Ozanne, supra note 156, at 146-52 (describing the manipulation of the company union by the International Harvester Company). In a modern-day
In the short run, nonunion employee committees are probably, on net, a deterrent to unionization. At high-road employers, they are one piece of a larger set of progressive human resource practices that keep unions out by creating employment conditions that are far above the local or industry average. At low-road employers, the committees are likely to appear only during or shortly before an organizing campaign and are one element of a larger set of anti-union practices that gain their effectiveness by creating conditions of fear, misinformation, and division.

Whether these nonunion committees impede unionization over the longer run, however, is uncertain. The conventional view is that they undermine union strength, a view widely and strongly held by people in the American labor movement. But the historical evidence from this country and contemporary evidence from others suggests that the long-run effect of nonunion committees is either neutral with respect to union growth or even positive. The key features of these committees are, first, they foster collective identity and collective action among nonunion workers and, second, they raise the expectations of employees about the way the firm is going to treat them. As long as these expectations are met, the employees are typically satisfied and tend to reciprocate with positive behaviors that make employee representation a good investment, such as lower turnover, better morale, greater loyalty, heightened dedication, and, importantly, substantially decreased interest in an outside union. If these heightened expectations are dashed, however—for example because of layoffs due to downsizing at a high-road employer or

example, Ryders Distribution, Inc., formed an employee committee shortly after a union organizing campaign commenced and instructed the employee representatives to poll other employees on their opinions about the company's employment practices and report the results to management. The company offered $500 to each employee as an inducement to participate in the representation program after employees initially expressed reservations. See Gely, supra note 110, at 61.

188. Rundle notes that two studies find "that union win rates are exceptionally low where an employee committee exists." Rundle, supra note 72, at 175.

189. See Herrnstadt, supra note 70, at 109 ("The creation of company-dominated unions is still one method that employers are using to demonstrate their opposition to independent labor organizations."); Rundle, supra note 72, at 166 (noting that of the 58 section 8(a)(2) cases that went before the NLRB between 1972 and 1993, only two did not involve other unfair labor practice charges and had not been established in the course of a union organizing drive).

190. See Taras, supra note 186. Concerning the traditional view that company unions hurt long-run union growth, Taras states that "[t]he outright banning of company unions does not necessarily offer advantages to unions. The Canadian experience shows that company unions can assist in organizing, but only in the context of a relatively healthy union movement.... There are few complaints in Canada [where company unions are legal] that nonunion representation has killed the vitality of union organizing in any way, and at least two unions in Canada have benefited greatly due to innovative organizing strategies which learned to harness company unions.

Id. at 287-88.
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broken promises of improved wages and conditions at a low-road employer—the positive feelings quickly evaporate and are replaced by intensely negative ones, such as betrayal, anger, and disillusionment. These negative emotions, in turn, create psychological conditions that propel workers toward unionization—a process the company has unintentionally facilitated by, in effect, setting up an in-house organizing committee for the union. As a union-avoidance device, therefore, employee representation is very much a double-edged sword that can just as easily hurt as help employers in their quest to stay union-free.

VII. POLICY IMPLICATIONS

I consider in this Part the implications of the foregoing analysis for the public policy debate over section 8(a)(2) of the National Labor Relations Act engendered by the Electromation decision. The appropriate place to begin this analysis is with an evaluation of the original rationale for the inclusion of section 8(a)(2) in the NLRA in 1935.

A. Historical Evaluation of Section 8(a)(2)

The historical context with regard to passage of the NLRA was reviewed in Part II. Based on the facts developed there, I conclude that the

191. An official of the UAW stated of the employee representation committee established at the Donnelly Company:

The Donnelly "Equity Committees" have not provided workers with any meaningful voice in resolving grievances or improving their wages, benefits and other conditions of employment. Instead, they have been a tool used by management to implement policies dictated by top company officials. When workers became disillusioned with the failure of the Equity Committees to address their grievances and to improve conditions at the plant, they tried to form an independent union....

Herrnstadt, supra note 70, at 111.

192. See RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE 50-56 (1992) (describing how the Steel Workers Organizing Committee successfully took over the company unions set up by the steel companies in 1936-1937 and the pivotal role the nonunion representation plans played in the eventual triumph of independent unionism); John N. Schacht, Toward Industrial Unionism: Bell Telephone Workers and Company Unions, 1919-1937, 16 LAB. HIST. 5 (1975) (explaining that company unions helped Bell Telephone maintain nonunion status for several decades, but in the late 1940s became a facilitating factor in the transition to independent unionism); see also Steve Jeffreys, "Matters of Mutual Interest": The Unionization Process at Dodge Main, 1933-1939, in ON THE LINE: ESSAYS IN THE HISTORY OF AUTO WORK 100 (Nelson Lichtenstein & Stephen Meyer eds., 1989). Jeffreys states:

The Joint Council helped to identify and then bring together a sizable element of the Dodge Main plant's more articulate workers. Meetings of the fifty-three elected workers' representatives gave the different areas of the highly concentrated plant a unity they might otherwise have had considerable difficulty establishing. And in what was to serve as a model for the rights of shop stewards, the scheme also gave the representatives time off their work.... [the company also] allowed them to meet independently.... At such a meeting the first major step to full union organization of the plant was taken.

Id. at 108-109.
NLRA’s ban on company unions, as accomplished through the combined provisions of sections 2(5) and 8(a)(2), was a policy mistake. This conclusion follow from the following four observations:

1) Until the passage of the National Industrial Recovery Act in the early months of the Roosevelt administration, nonunion employee representation plans, or “company unions,” had by and large received much more praise than criticism. Particularly before the Great Depression commenced in late 1929, even persons sympathetic to the cause of organized labor readily acknowledged that the nonunion representation plans of the welfare capitalist employers of the 1920s were, in general, a positive and praiseworthy innovation in employment practice. 193

2) The welfare capitalist firms of the 1920s desired to remain union-free and the representation plans were one element of their union avoidance strategy. The key fact, however, is that their union avoidance strategy was built on proactively establishing employment conditions that made employees so satisfied that they did not desire a union. Thus, these employers paid above-market wages, provided promises of job security, offered a plethora of employee benefits, and trained supervisors and foremen in the practice of human relations. 194

3) Much of the criticism of company unions stems from events and developments unleashed by the Great Depression and, in particular, passage of the National Industrial Recovery Act in June 1933. 195 If the Roosevelt administration had not decided to promote widespread collective bargaining as one of its principal means of accomplishing economic recovery, most nonunion employers would never have taken the time and expense to set up company unions, and hence the nonunion representation plans then in existence would have largely escaped condemnation as anti-union shams.

4) Senator Robert Wagner, author of the National Labor Relations Act, admitted that company unions promoted improved productivity and employee relations on the shop floor but nevertheless sought their banishment because, in his view, they were inherently undemocratic and were inimical to the New Deal economic recovery program. 196 In particular, Wagner and Roosevelt believed company unions were unable to stabilize wages, which they thought was essential to ending the economy’s deflationary downturn. They also believed that company unions

193. See Leiserson, supra note 24, at 154 (“Perhaps the most significant contribution of Personnel Management, however, has been its development of employee representation.”).

194. See Cohen, supra note 18, at 169-83; Jacoby, supra note 21, at 11-34; Bruce E. Kaufman, Prior to the Wagner Act, supra note 14.

195. See supra notes 36-42 and accompanying text.

196. See supra note 42 and accompanying text.
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did not have the bargaining power to raise wages and thus augment household purchasing power and aggregate demand.197

These observations betray the problematic nature of section 8(a)(2). First, Wagner and allies adopted a seriously flawed approach to economic recovery. Most modern economists believe that the quicker, surer way to end the Depression would have been to use expansionary fiscal and monetary policy.198 Monetary and fiscal policy not only can boost aggregate demand more quickly and sharply than increased collective bargaining but are also less harmful to the supply side of the economy.199 Wagner's most potent argument for banning company unions was thus predicated on an approach to economic recovery that, from today's perspective, was ill-considered and quite possibly counter-productive.

Second, Wagner and allies were probably correct to state that company unions were, at least in the short run and given the weak contemporary protection of the right to organize, a deterrent to greater unionization and collective bargaining.200 They were wrong, however, to conclude that this is necessarily against the public interest. The key consideration is how and why they discourage unionization. When nonunion employee committees and councils are used as part of a "high road," mutual-gains employment strategy, society benefits from and should quite possibly encourage their use.201 Society benefits because the employee committees, by promoting employee involvement in the workplace, promote greater productivity, increased competitiveness of American industry, better jobs and greater work satisfaction for employees, and a more participatory and humane workplace.202 If nonunion employee committees and councils are used primarily as an overt, reactive, and suppressive instrument of union avoidance, on the other hand, they can harm the public interest and should be banned.203

The harm done by nonunion employee committees, in this case, is both economic and noneconomic. With regard to the former, economic

197. See id.


199. Collective bargaining leads to strikes, restrictive work rules, and other inflexibilities that, ultimately, restrict the nation's ability to produce. Expansionary monetary policy, in contrast, stimulates aggregate demand by lowering interest rates and promoting more capital spending. More capital spending on plant and equipment, in turn, augments the nation's ability to produce.

200. As noted, the long-run effect of company unions may well be either neutral or positive with respect to union growth over the longer term. See supra notes 191-192 and accompanying text.

201. This argument is advanced in Kaufman & Levine, supra note 11.

202. See LAWLER, supra note 2, at 38; LEVINE, supra note 10, at 38-39.

203. See Kaufman & Levine, supra note 11.
efficiency and competitiveness are often promoted by unionization of low-road employers, because it ends exploitative wages and conditions, forces these employers to pay a fuller measure of the social cost of labor and motivates managers to run the firm in a more efficient manner. With regard to the latter, it is a basic constitutional and human right that workers should have full freedom of association in the workplace, and employer practices that infringe on this right contravene both national law and public ethics. In the drafting of the NLRA, therefore, Wagner should have sought to deter some types of company unions—but not all of them. He should have crafted language that allowed high-road employers to operate nonunion representation plans for win-win purposes but prevented their use as tools of union suppression.

Third, Wagner violated his own philosophical commitment to freedom of choice when he championed the ban on company unions. Wagner justified the section 8(a)(2) ban on grounds that employers used company unions to abridge workers' rights to join trade unions and engage in collective bargaining. In protecting workers' rights to join unions, however, he contemporaneously abridged the equally important right of workers to choose a nonunion form of employee representation. Moreover, events at the time clearly revealed that a significant proportion of workers preferred company unions over trade unions—a fact that Wagner must of have known first-hand.

204. Economic theory shows that when a firm has some degree of market power over wages, as in cases of monopsony and oligopsony, it can practice exploitation of workers by paying subcompetitive wage rates. Unionization of this employer will end the exploitation by raising wages closer to the competitive level, thereby promoting a more efficient allocation of resources. See BRUCE E. KAUFMAN, THE ECONOMICS OF LABOR MARKETS 270-73 (4th ed. 1994). Unions can also internalize social costs and spur management to operate the firm more efficiently. See DONALD R. STABLE, ACTIVIST UNIONISM: THE INSTITUTIONAL ECONOMICS OF SOLOMON BARKIN 50-57 (1993); Bruce E. Kaufman, Labor Markets and Employment Regulation: The View of the "Old" Institutionalists, in GOVERNMENT REGULATION OF THE EMPLOYMENT RELATIONSHIP 1, 34-35 (Bruce E. Kaufman ed., 1997).

205. See Barenberg, supra note 110, at 896 ("workers' right to participate in workplace governance is as compelling as their right to participate in political governance"); id. at 899 ("[W]orkplace participation rights are akin to inalienable aspects of personhood, like the right to vote or to be free of slavery."). The Findings and Policy statement of the National Labor Relations Act states in this regard: "It is hereby declared to be the policy of the United States [to encourage] the practice and procedure of collective bargaining and [to] protect[] the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing." 29 U.S.C. 151 (1998).

206. Wagner stated, in this regard, that "[w]hatever the men want to do ... within a plant, that is all right, only if it is the free choice of the men. Of course, we are all for that. That is all I am seeking to do, to make the worker a free man to make his choice...." 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, supra note 9, at 440.

207. See also Barenberg, supra note 110, at 776, 825-29.

208. The National Labor Board, created in mid-1933 by executive order, and its successor, the National Labor Relations Board (the "old" NLRB), created by executive order in mid-1934, were established to resolve disputes over section 7(a) of the NIRA. Both were chaired by Wagner. The boards held hundreds of secret ballot representation elections in the two years before
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Fourth, Wagner’s position on company unions versus trade unions suffered yet another logical inconsistency. In light of his position that company unions posed a threat to the New Deal economic recovery program because they could not take wages out of competition, he should also have favored including provisions in the NLRA that promoted industrial unions over craft unions and the extension of collective bargaining contracts to all nonunion firms in the industry (a policy that was implemented in certain European countries).

B. Implications for Current Policy

What, then, is the appropriate public policy with respect to company-created employee representation committees? In my opinion, labor economist Sumner Slichter of Harvard University gave the correct answer in his congressional testimony in 1934 on Senator Wagner’s proposed Labor Disputes Act (the forerunner of the NLRA).

He stated:

The problem which impresses me as overwhelmingly important is not the one of preventing the formation of the so-called “company union,” because as a practical matter I do not believe that can be done... even if it were desirable to do it.

But the problem is giving the independent labor organizations a fair opportunity to compete with the employee committees and to provide a method by which, in an impartial manner, the wishes, the preferences of the employees can be ascertained...

Slichter’s position is that both union and nonunion forms of employee representation should be allowed by law. I believe he is correct in this matter on two counts. First, on philosophical grounds, Slichter’s position is in accord with the principles of competition and free choice, which are

the NLRA. In these elections, workers were permitted to vote for no representation, trade union representation, or company union representation—unlike under the NLRA where the company union option is unavailable. In approximately 30% of these elections a majority of workers voted to keep the company union and, overall, one-third of the votes cast in NLRB elections between July 1934 and June 1935 were for company union representation. See LEO WOLMAN, EBB AND FLOW IN TRADE UNIONISM, 77-79 (1936). Since the NLRB only held elections where a union was actively contesting representation, one can reasonably conjecture that the proportion of the total workforce that would have voted for company union representation was higher than one-third.

See also Kaufman, supra note 7, at 57.

210. Industrial unions organize all production workers in a particular industry regardless of craft or skill, while craft unions organize only workers of a particular occupation. The market reach of the former is thus much broader, allowing it to be more effective in standardizing wages for all workers in an industry. See L. Hamburger, The Extension of Collective Bargaining Agreements To Cover Entire Trades and Industries, 40 INT’L LAB. REV. 153 (1939) (discussing the extension of collective bargaining agreements to nonunion firms in Europe).

211. Labor Disputes Act, S. 2926, 73d Cong. (1934).

212. 1 LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, supra note 9, at 92.

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fundamental values in American society. A policy with regard to employee representation based on this principle is therefore more likely to gain public support and political legitimacy. Second, Slichter's position is also in accord with abundant theoretical and empirical evidence that competition and free choice in both the economic and political spheres best serves the public interest. This is because competition prevents individuals or social institutions from taking advantage of the public by exploiting monopoly positions and motivates them to serve their clients in the most efficient manner. These considerations apply equally well to the performance of alternative forms of employee representation.

The policy goal is to ensure that all forms of employee representation, including union and nonunion varieties, generate as many win-win outcomes as possible, which is to say that they should promote firms' interests in higher productivity and product quality and employees' interests in improved conditions of work and equitable treatment. With regard to nonunion forms of employee representation, public policy needs to pursue a two-pronged approach to maximize these win-win outcomes.

The first prong is to ensure competition and free choice by pursuing economic policies that promote full employment and ease of access to jobs. As noted in Section VI.C, all aspects of company HRM policy and practice, including employee EIP committees, are management "dominated" in a nonunion company in the sense that they are unilaterally established, financed, and operated by management. But management domination does not necessarily give companies the power to use HRM policies and practices in ways that are inimical to worker interests. One key constraint on companies is employees' capacity to quit one firm and find alternative employment at another. A firm may desire to pay exploitatively low wages, require onerously long hours of work, or force employees to submit grievances to a sham EIP committee, but it will be prevented from doing so to the extent that its undesirable HRM

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214. See Kaufman & Levine, supra note 11.

215. The idea that management has leverage to use employee representation plans to illegitimately dominate workers is illustrated by Paul Weiler's remarks: "Once the employer has established an EIP for whatever reason, its employees must accept the program.... Unlike the decision about union representation, the only choice that workers have in this situation is to keep or leave their jobs." Paul Weiler, Governing the Workplace 213 (1990).
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practices make it difficult to recruit and maintain a productive work-force. Hence, economic policies are needed that promote competition and free choice in labor markets. The first place to start is to use macroeconomic fiscal and monetary policies to help achieve full employment. When the labor market is flooded with numerous job seekers desperate for work after an extended period of unemployment, firms find themselves in the superior bargaining position and can force upon employees exploitative and unjust terms and conditions of employment. In a full employment labor market, on the other hand, firms are forced by the scarcity of labor to practice all aspects of HRM, including the operation of EIP committees, in ways that are win-win. A second employment policy that promotes competition and free choice in labor markets is antidiscrimination law, so that workers of all racial groups and genders have unobstructed access to alternative employment. A third such policy is government-funded retraining programs, so that workers who are displaced by new technology or foreign trade can acquire new skills and hence more effectively compete for jobs in the labor market. The second prong of public policy should be to ensure effective competition and free choice in the “market” for employee representation. Nonunion employee committees may be management-dominated, but employers are nonetheless constrained to operate them in win-win ways to the extent employees can quickly and costlessly obtain an alternative form of representation. Stated another way, management is strongly motivated to operate nonunion employee representation committees in a responsible, above-board manner to the extent that there is a viable threat from a union. Not only does an unfettered ability to quit the job and obtain work elsewhere protect the workers' interests, so too does the unfettered ability to “quit” one form of representation at the company and obtain another.

Public policy can promote competition and free choice in the market for employee representation in several ways. Most fundamentally, employees need to be allowed to choose among as wide a range of alternative representational forms as possible, including the option of having no representational agent. Thus, as Slichter argued, labor law should im-

216. See also Kaufman & Levine, supra note 11.
218. See Kaufman & Levine, supra note 11.
219. As I argue elsewhere, a good case can be made on economic efficiency grounds that public policy should encourage various types of employee representation teams and councils in
pose minimal constraints on the ability of nonunion employers to operate employee representation committees. But, as Slichter also maintains, labor law must also ensure that employees have a free and relatively unconstrained ability to choose a different form of representation, such as an independent labor union. A second requirement, therefore, is that labor law provide employees with a readily accessible method to obtain independent representation if so desired. In keeping with American democratic values, the most obvious solution is some form of government-supervised, secret-ballot, union representation election. A third requirement for competitive elections between representational agents is that labor law must protect employees in their choice of a representational agent from undue forms of coercion and constraint. This can be accomplished by declaring illegal various suppressive practices by employers, such as discrimination against union activists and refusals to bargain. One specific practice that might be prohibited is establishment of a company-created and -financed employee representation committee after a union-organizing campaign has started, on the presumption that most often this action is an insubstantial, stopgap measure.

It is evident that, relative to conditions in the years prior to the passage of the NLRA in 1935, the United States has made considerable progress in fulfilling both the first and second prongs of the policy initiatives needed for effective competition and free choice in employee representation. With regard to the first, for example, labor markets have in the

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20. See generally KAUFMAN, supra note 204; Kaufman, supra note 204; Bruce Kaufman & David Lewin, Is the NLRA Still Relevant to Today's Economy and Workplace?, 49 LAB. L.J. 1113, 1116-17 (1998).
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last three decades been much closer to the full employment level than in the 1900-1935 era. Likewise, antidiscrimination laws, improved geographic and occupational labor mobility, and vastly higher levels of education and training among the workforce have all contributed to more open and competitive labor markets. All of these factors substantially reduce the ability of employers to exploit, coerce, or intimidate employees. Employer domination of labor markets has not been completely eliminated, however, for pockets of substantial unemployment—such as in low-income inner-city areas and communities struck by a large plant closure—continue to exist even in the most prosperous of years; the economy occasionally experiences substantial amounts of involuntary unemployment during business cycle recessions; and certain types of workers continue to face various constraints and barriers in the job market.

A similarly mixed assessment holds with respect to progress on the second prong of public policy. Here too the situation in the last three decades is substantially improved over the pre-NLRA years.

The passage of the NLRA in 1935 did much to level the playing field for independent labor unions, just as Slichter advocated. In particular, prior to the NLRA the only way unions could gain recognition and collective bargaining rights was through economic force, such as strikes and boycotts. This precipitated considerable violence and economic disruption, and often the unions were not strong enough to prevail against large, well-established employers. Further, the employers were largely unconstrained in their use of a plethora of union suppression tactics, such as spies, mass firings of union activists, and refusals to bargain. The net effect was that employee choice with respect to independent union representation was seriously constrained and often frustrated. Given this lack of competition and free choice, workers who felt dissatisfied with, or unjustly treated by, employer-created “company unions” were relatively powerless to obtain an alternative form of representation. Hence, em-

222. See generally Kaufman, supra note 204.

223. A review and assessment of the evidence on employer power in labor markets is provided in William Boul & Michael Ransom, Monopsony in the Labor Market, 35 J. Econ. LITERATURE 86 (1997).

224. See generally Kaufman, supra note 204; Kaufman & Lewin, supra note 222.

225. See IRVING BERNSTEIN, THE NEW DEAL COLLECTIVE BARGAINING POLICY 4-17 (1950) (describing union organizing before the Wagner Act as having a “long and bloody history”).


227. A good example is in the case of United States v. Weirton Steel Co., 10 F. Supp. 55 (D. Del. 1935), in which the employer unilaterally established an employee representation plan in 1933 and refused to permit a government-supervised secret ballot union certification election
ployers gained considerable power and discretion to operate these committees in ways that went against the interests of both employee and the public.

Enactment of the NLRA considerably ameliorated these forms of illegitimate employer domination. The union representation election established by the Act gives workers the opportunity to vote for independent union representation in a secret ballot election. Furthermore, the Act proscribes a wide range of employer unfair labor practices that had been used to coerce and intimidate employee votes. Finally, the Act created the NLRB to administer the Act's provisions and seek relief in the federal courts for infractions of its provisions. Formerly, employers once fired union activists with impunity and refused to negotiate with union representatives. These actions were made illegal by the NLRA, and their occurrence and severity were substantially reduced.

As with competition on the demand-side of the labor market, competition and free choice in the market for representational agents, while improved, is not yet unconstrained. Although considerable debate and conflicting evidence exists on the matter, I do not believe that the protections of the right to organize contained in the NLRA and the procedures used by the NLRB to administer the Act guarantee in all respects the conditions necessary for effective, unconstrained employee free choice with regard to union representation.

In particular, financial penalties against employers for unfair labor practices associated with an organizing campaign are too weak to deter the unprincipled or determined employer who wishes to keep out the union. Indeed, analysis of NLRB data reveals that the incidence of illegal firing has increased from one in twenty elections, adversely affecting one in 700 union supporters, to one in every four elections, victimizing one in fifty union supporters. Critics of the NLRA note, in this regard,

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231. Compare Henry S. Farber & Alan B. Krueger, Union Membership in the United States: The Decline Continues, in EMPLOYEE REPRESENTATION: ALTERNATIVES AND FUTURE DIRECTIONS 105, 130 (Bruce E. Kaufman & Morris M. Kleiner eds., 1993) (finding that the decline in worker demand for unionization is due largely to employees' greater satisfaction with their jobs), with Phil Comstock & Maier B. Fox, Employer Tactics and Labor Law Reform, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, supra note 16, at 90, 98 (concluding that employer coercion is an important reason for the decline in unionization).
233. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, supra note 12, at 70.
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that in cases of illegal discharge of an employee the usual remedy is reinstatement with back pay, minus earnings from other work. In 1990 the average back pay award was only $2749. By way of comparison, employers who illegally dismiss an employee for reasons related to gender or racial discrimination are liable for much larger penalties, including payments for financial and psychological harm to the victim as well as punitive damages for willful misconduct that can run into the millions of dollars. It is also worth noting that the monetary penalty for an employer's refusal to bargain is effectively zero, since the typical remedy is an NLRB order not to repeat this conduct.

A second problematic area is the NLRB's typical delay in holding a representation election. The median time between a union's petition for a representation election and the holding of the election is roughly fifty days (seven weeks), with twenty percent of cases taking more than sixty days. A frequent cause of delay in the holding of representation elections is that legal challenges by either a union or an employer on matters such as the appropriate bargaining unit must be resolved prior to the election. The optimal length of time between petition and election is a complicated matter; both employer and employee interests must be weighed. For example, holding an election after only one week may be undesirable on two counts: It does not give the employer sufficient time to determine the issues behind the union drive and present counter-arguments, and it does not provide employees enough time for cool reflection and deliberate choice. On the other hand, scheduling an election date two or more months after the petition unduly favors the employer, as the company gains sufficient time to chill the campaign through various union suppression tactics. It is noteworthy in this regard that empirical studies find that the probability of a union victory declines as the length of the campaign period increases. Given these considerations, I conclude that shortening the length of the election campaign to a median length of four weeks is desirable as a means of better protecting employee free choice.

234. See id. at 71.
235. See id. at 72-73.
236. See id. at 72.
237. See id., at 68.
239. Some proponents of labor law reform go further and recommend that elections be replaced altogether by card checks as a way to expedite the certification process. See Comstock & Fox, supra note 232, at 73-74. Such a procedure is unacceptable, however, if free and uncoerced employee choice is the objective, since one party (the union) learns up-front how each worker has “voted” and can potentially reward supporters and punish opponents.
A third problematic area concerns time delays in the adjudication of unfair labor practice charges. Before an employer is legally obligated to reinstate a discharged employee, for example, the case goes through a four-stage procedure.\textsuperscript{240} The employee's charge must first be judged meritorious by the Board's regional office, then by an administrative law judge following a full-scale trial, then by the Board itself, and then by a federal appeals court. This process takes, on average, three years to complete.\textsuperscript{241} Although only a minority of cases go through all four stages, the long delay an employee may face in obtaining reinstatement no doubt casts a chilling effect on workers' exercise of their right to choose union representation.

Given all the considerations discussed above, the appropriate stance labor law should take toward nonunion employee representation committees should include the following basic components:

- Nonunion employers should be permitted to establish and operate whatever kinds of employee representation committees are desired. These committees should be allowed to deal with any and all workplace issues. To accomplish this end, the definition of a "labor organization" in section 2(5) of the NLRA should be revised to include only independent associations of workers organized for purposes of collective bargaining.\textsuperscript{242}

- Employers should still be prohibited from "dominating" a labor organization in order to prevent employer subversion of labor unions and "sweetheart" contracts. The wording of section 8(a)(2) should remain as it is. Given the revised definition of a labor organization in section 2(5), the reach of section 8(a)(2) would be limited to independent worker organizations.

- Legal and administrative changes should be made to speed up NLRB certification elections. A reasonable target is a median of four weeks between petition and election. One reasonable method to accomplish this goal is to hold certification hearings after the election, rather than before it, as is now the case.

- Financial penalties of an employer for unfair labor practices, as enumerated in section 8(a)(3), should be increased in order to create greater deterrence against illegal anti-union practices. The NLRB should

\textsuperscript{240} See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, supra note 12, at 71.

\textsuperscript{241} See id.

\textsuperscript{242} As Charles Morris notes, a change in the definition of a "labor organization" in section 2(5) will have to be complemented by a similar change in the definition of a labor organization in other relevant parts of the labor law, such as section 3(i) of the Labor Management Reporting and Disclosure Act, in order to deregulate nonunion committees fully and consistently. See Charles Morris, Will There Be a New Direction for American Industrial Relations?—A Hard Look at the TEAM Bill, the Sawyer Substitute Bill, and the Employee Involvement Bill, 47 LAB. L.J. 89, 95 (1996).
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also be given expanded section 10(l) authority to seek injunctive relief in aid of employees harmed by employer acts of anti-union discrimination.\textsuperscript{243} Also, mandatory arbitration of the first contract should be required after impasses have extended more than one year.

\textbullet It should be declared an unfair labor practice for an employer to establish a new employee representation committee, or to modify an existing one, once a union has petitioned for an NLRB election. This provision will deter the use of such committees solely for purposes of short-run union avoidance.

These suggested reforms in the NLRA are entirely in the spirit of the position taken by Sumner Slichter at the time of the New Deal and, if adopted, would best promote the public interest with respect to the operation of nonunion employee representation plans. Section VII.C presents additional evidence. Before examining such evidence, however, it is useful to compare briefly these policy recommendations with two other sets of recommendations recently proposed for section 8(a)(2).

The first is the recommendations of the Dunlop Commission. The position laid out by the Commission in its \textit{Report and Recommendations}, issued in December 1994, is the following:\textsuperscript{244}

\textbullet The broad definition of a "labor organization" in section 2(5) should be maintained.

\textbullet The language of section 8(a)(2) should also be maintained in broad outline in order to prevent the re-emergence of management dominated "company unions."\textsuperscript{245}

\textbullet A qualifying statement should, however, be included in section 8(a)(2) that permits nonunion employee representation committees to deal with employers concerning terms and conditions of employment as long as these discussions are "incidental" to issues related to productivity, quality, and so on.\textsuperscript{246}

\textbullet A number of changes in other parts of the NLRA should be enacted to expedite the union certification process, strengthen the penalties against employers for unfair labor practices during an organizing campaign, and provide speedier injunctive relief to discharged employees.

\textsuperscript{243} Section 10(l), as currently written, gives the NLRB authority to provide injunctive relief only in the case of certain union-side violations, such as secondary boycotts. \textit{See Commission on the Future of Worker-Management Relations, supra note 12, at 21.}

\textsuperscript{244} \textit{See id. at 8-12, 18-24.}

\textsuperscript{245} The Commission's report states that nonunion employee representation committees, such as that of the Polaroid Corporation, should remain illegal. \textit{See id. at 8.}

\textsuperscript{246} \textit{Id.}
The second proposed reform in section 8(a)(2) and accompanying provisions of the NLRA is the TEAM Act legislation pending before Congress. The TEAM Act proposes to:

- maintain the definition of a labor organization as currently contained in section 2(5);
- modify section 8(a)(2) so that employers and employees can "address matters of mutual interest," including terms and conditions of employment;
- maintain the prohibition of employer domination of labor organizations that seek certification to serve as exclusive bargaining representatives or to enter into collective bargaining contracts; and
- maintain without change the union representation election process, penalties for employer unfair labor practices, and NLRB administrative processes.

Relative to the recommendations developed in this paper, it is apparent that both the Dunlop Commission proposals and the TEAM Act legislation are one-sided and unbalanced with respect to promoting competition and free choice in employee representation. The Dunlop Commission's proposals strengthen the protections given to workers to obtain independent union representation but then, having established the conditions for fair and effective competition between representational forms, fail to remove the tight constraints imposed by sections 2(5) and 8(a)(2) on nonunion employers. The net effect is to promote union representation while continuing to restrict nonunion representation, even when the Commission’s own recommendations on expedited elections and strengthened penalties against employers would, if adopted, largely remove the ability of employers to use these committees for anything but win-win outcomes. In this regard, the Commission never explains what appears to be a major paradox in its recommendations. That is, why should public policy ban nonunion representation committees if both parties to the employment relationship—the workers and the employer—express satisfaction with them, the workers' interests are safeguarded by a fully protected right to organize, and the committees are part of an ongoing EIP program?

The TEAM Act is also one-sided, but in the opposite direction. While the Dunlop Commission’s recommendations favor organized labor, the TEAM Act legislation favors employers. The TEAM Act allows employers much greater latitude to set up any and all forms of nonunion em-

248. The Commission's own report states that ongoing EIP programs are a boon for productivity, quality, and employee satisfaction. See COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, supra note 12, at 7.
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ployee representation plans and thus promotes greater competition between union and nonunion forms of representation. Greater competition, ceteris paribus, is a “plus” for the public interest. But for competition to serve the public interest it must take place on a level playing field, and the TEAM Act does not establish one. As argued above, the NLRA at present contains several shortcomings and weaknesses that allow employers to exercise undue influence and coercion on employees’ choice of a representational agent. But the TEAM Act contains no provisions to remedy these defects, such as expedited elections or stronger penalties for unfair labor practices. It is therefore unbalanced to the extent that it does not create the conditions necessary for employees to freely opt out of representational schemes if dissatisfied with their performance. Furthermore, the TEAM Act leaves unchanged the root cause of the problem with the NLRA—the overly expansive definition of a “labor organization” in section 2(5).

C. Evidence from Canada

The United States adopted the wrong approach to dealing with nonunion employee representation committees. Rather than ban the committees, as done in the NLRA (and RLA), the nation would have been better off to have allowed nonunion employers to operate employee committees while creating conditions that ensure the committees are not used for exploitative, illegitimate purposes. These conditions are full competition and free choice in both the labor market and the “market” for employee representation. These conditions lead to win-win, mutual-gain outcomes in nonunion firms. Trade unions would also be motivated by this competition to devise more innovative, effective programs and to curb nondemocratic or monopolistic practices in order to attract and keep members.

For clear evidence of the effectiveness of this proposal, one only need look north of the American border.

In a recent review of collective bargaining developments in Canada, Professor Daphne Taras notes that company unions were never outlawed in Canada as they were in the United States and that many continue to exist today.249 An exemplar is the Joint Industrial Council of the Imperial Oil Company, Ltd., a company-wide nonunion plan of employee representation in continuous operation since 1922 and the closest surviving descendant to the “Rockefeller Plan” established at the Colorado Fuel &

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Iron Co. in 1915—the employee representation plan that many historians consider to be the genesis of the company union movement in the United States.\textsuperscript{250} As Taras notes, company unions emerged at roughly the same time in both countries, rose and fell in popularity in lockstep through 1935, and then followed diametrically opposite paths thereafter—banned in the United States by the NLRA but permitted by Canadian law to the present day.

The divergent experience of nonunion employee representation in the two countries in the post-1935 period provides a unique natural experiment of sorts that can shed considerable light on issues that would otherwise remain topics of speculation. That is, the two countries are quite similar in terms of social, political, and economic institutions and approaches to labor policy, but one banned company unions after 1935, while the other permitted them to exist. Thus, the Canadian experience post-1935 provides what is probably the best evidence available of what would have happened in the United States had the NLRA taken a less restrictive approach to nonunion representation.

Several elements of the Canadian experience merit our attention.

• First, dozens of Canadian firms and public organizations have established and continue to operate company-union-like representational bodies.\textsuperscript{251} The clear implication is that, had the NLRA not banned these structures they would continue to exist today in a number of American firms.

• Second, only a small minority of nonunion firms in Canada choose to operate formal, company-wide representational bodies, such as the Joint Industrial Council at Imperial Oil.\textsuperscript{252} This result supports the conclusion of the managers, attorneys, and consultants interviewed for this study that formal, large-scale, representational committees and councils along the lines of the old-style company unions are not likely to re-appear en masse even if the NLRA's ban on company unions were dropped.

• Third, employers regularly use these employee representational bodies to deal with employees on matters related to the terms and conditions of employment, including wages, benefits, work scheduling, employee grievances, and safety. Had Canada adopted the provisions in sections 2(5) and 8(a)(2) of the NLRA, all of these bodies would have to be disbanded or substantially modified.\textsuperscript{253}

\textsuperscript{250} See Daniel Nelson, Employee Representation in Historical Perspective, in \textit{Employee Representation: Alternatives and Future Directions}, supra note 231, at 371, 373.

\textsuperscript{251} See generally Taras, supra note 157.

\textsuperscript{252} See Anil Verma, Employee Involvement and Representation in Nonunion Firms: What Canadian Employers Do and Why, in \textit{Nonunion Employee Representation}, supra note 11 (finding few examples of formal company-wide representational bodies).

\textsuperscript{253} See id.
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•Fourth, although only a minority of Canadian nonunion companies have set up formal, large-scale plans of employee representation, many others use smaller, less formal representational bodies as part of their EIP programs. Moreover, according to a recent study of Canadian EIP programs by Professor Anil Verma, it is commonplace for managers and employees to discuss in meetings of these bodies workplace issues that are related to the terms and conditions of employment. The implication of this finding is that sections 2(5) and 8(a)(2) of the NLRA do indeed constrain the operation of EIP programs in American nonunion companies.

•Fifth, the existence of company unions in Canada is, in the words of Professor Taras, a “nonissue” for Canadians. The ability of nonunion employers to discuss terms and conditions of employment with workers in EIP committees simply does not occasion criticism or debate. The final report of a government task force recently formed to review federal labor law in Canada, for example, cites no concerns and proposes no policy changes regarding company unions and employer “domination” of nonunion EIP committees. One can infer that the United States, should it adopt the Canadian approach to labor law, would also see the debate on section 8(a)(2) and dominated labor organizations fade into irrelevance.

•Sixth, part of the reason nonunion employers in Canada operate employee representation plans is, according to their own testimony, to remain union-free. But they are prevented by Canadian labor law, with its strong protections of the right to organize, from using employee committees as part of an illegal union suppression strategy. The implication for American labor law is that nonunion representation committees work well as long as employees have the ability to gain union representation if they desire it.

•Seventh, there appears to be little evidence that the ability of nonunion employers in Canada to operate company unions and other kinds of representational committees has adversely affected the organized labor movement in Canada. It is noteworthy, for example, that union density (the proportion of the workforce organized) in Canada is thirty-four

254. See id.
255. See Taras, Collective Bargaining, supra note 249, at 317.
257. See Boone, supra note 173 (“Our company prefers to deal with employee-related challenges and opportunities directly with employees to the greatest possible extent.... Imperial believes, and I believe, that the best relationships can exist without the use of an external third party, such as a union.”).
percent; that figure is only fifteen percent in the United States. Part of the reason why union density is so much higher in Canada is that the employer-created representation plans are often successfully co-opted by independent trade unions. For example, one-third of the new members organized by the Canadian-based Communications, Energy, and Paper Union came from raids on nonunion representation committees. The implication from the Canadian experience is, therefore, that American trade unions should not oppose relaxation of sections 2(5) and 8(a)(2), if this step is taken in conjunction with other revisions to the NLRA that strengthen the right to organize.

These findings suggest that Canada has found a way to enjoy the best of outcomes—nonunion employers are permitted to operate whatever kind of employee committees they want, with gains in productivity, quality, and employee relations, a larger proportion of Canadian than American employees have some formal mechanism for “voice” in the workplace, the Canadian labor movement is stronger and more vibrant than its American counterpart, and the existence of company unions and other forms of nonunion employee representation in Canada occasions very little public debate or criticism.

Canada has accomplished this by structuring its labor law to promote maximum competition and free choice in the “market” for employee representation. In particular, Canadian labor law differs from American law in these regards:

- Canadian labor law at both the federal and provincial level prohibits employer “domination” of a labor organization. For example, the Saskatchewan Trade Union Act states in section 11(1):

  It shall be an unfair labour practice for an employer, employer’s agent or any other person acting on behalf of the employer to... (b) discriminate or interfere with the formation or administration of any labour organization or contribute financial or other support to it;... (k) to bargain collectively with a company dominated organization... .

- A key difference between the American and Canadian approaches concerns the definition of a labor organization. Both federal and provincial laws define a labor organization narrowly to include only independent...
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ent worker associations constituted for purposes of collective bargaining. Thus, the Saskatchewan statute states in section 2(j): "'Labour organization' means an organization of employees, not necessarily employees of one employer, that has bargaining collectively among its purposes." 263

- Because nonunion employee committees are not independent worker associations for purposes of collective bargaining, they do not qualify as "labor organizations" and hence fall outside the purview of the Canadian federal and provincial regulations of collective bargaining. Thus, a Canadian nonunion employer can establish and operate such a committee without committing an unfair labor practice, as long as the committee is not established as an agency for collective bargaining and does not interfere in any respect with a union's campaign to organize the workers. 264

- Canada also differs from the United States in that it provides stronger protections of the right to organize. 265 The federal sector and several Canadian provinces, for example, allow union certification based on petitioning or a majority signing of union membership cards, while others (Ontario, for example) require that secret ballot elections be held within five days of petition. 266 Also, Canadian federal and provincial labor boards typically take a far more restrictive view of what constitutes permissible employer action during an organizing campaign, and several provinces give their labour boards relatively broad discretion in ordering certification of a union upon evidence of employer misconduct.

Collectively, these provisions for expedited union certification and stricter regulation of employer conduct during an organizing campaign may unduly tip the playing field toward the union side, while specific provisions (card check certification, for example) are fundamentally nondemocratic. These shortcomings do not, however, obviate the main lesson the Canadian example has for the American debate on section 8(a)(2). Canadian labor law illustrates the correct approach to nonunion employee representation, which is to permit employers to adopt nonunion employee committees but also to ensure, through strict legal protections of the right to organize, that employers cannot use the representation committees for purposes that are illegitimate or that run contrary to the social good. 267 The fact that company unions and other forms of non-

263. Id.
264. See id.
266. See id.
267. A number of American proponents of labor law reform have approvingly cited the Canadian example with regard to expedited elections and stronger penalties for unfair labor practices but have conspicuously ignored the other side of the Canadian model—the legalization of company unions. See, e.g., Weiler, supra note 215, at 254-61; Paul C. Weiler, Promises
union employee representation are widespread across Canada but occasion no public policy debate and little criticism suggests that the United States could also have the same outcome if the NLRA (and RLA) were reformed to follow more closely the Canadian model.

VIII. CONCLUSION

This article began with consideration of the Electromation ruling by the National Labor Relations Board. In that case, the Board ruled that the company committed an unfair labor practice by forming five employee action committees for purposes of working with management to devise changes in certain employment policies that were a source of employee dissatisfaction. From a purely legal perspective, the Board reached the correct decision, given the language of sections 2(5) and 8(a)(2) of the NLRA. Viewed from a public policy perspective, however, the Electromation decision is counterproductive because it impedes both the competitiveness of American industry and the opportunity for worker voice and participation in the workplace. The NLRA, therefore, should be revised.

Canadian labor law provides the best model for the proper direction for reform of the NLRA. Section 8(a)(2) of the NLRA should, therefore, remain unchanged, but the definition of a labor organization under section 2(5) should be narrowed to include only independent associations of workers formed for the purpose of collective bargaining. This narrowed definition would permit nonunion companies to establish and operate whatever type of employee representation committee they desire while protecting bona fide labor unions from employer domination. To prevent employers from using the employee committees to impose exploita-

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268. See supra note 3 and accompanying text.

269. Clyde Summers and Charles Morris, among others, advocate allowing nonunion employers to operate representational committees that discuss terms and conditions of employment but only under certain restrictive conditions—principally that employees be allowed to select representatives of their own choosing in a secret-ballot election and have the opportunity to accept or reject by majority vote the establishment of the employer's committee. See Morris, supra note 242, at 100; Clyde W. Summers, Employee Voice and Employer Choice: A Structural Exception to Section 8(a)(2), 69 Chi.-Kent L. Rev. 129, 139-40 (1993). I oppose such a stipulation because it: hinders employers from operating the types of EIP committees and teams that they view as most conducive to increased efficiency and productivity; introduces needless bureaucracy, inflexibility, and politics into the workplace; and does not substantively increase the protection of employee rights beyond what is accomplished by the proposals outlined in this Article. Voting is not a prerequisite for effective free choice regarding employer-created representation committees and carries with it a number of costs. The one restriction on the operation of employer committees that I believe has considerable merit is that, when the committees deal with the resolution of employment disputes, they be required to conform to minimum standards of procedural equity, such as recommended by the Commission on the Future of Worker-Management Relations, supra note 12, at 31-33.

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tive or unjust terms and conditions of employment, the NLRA should also follow in broad outline the Canadian approach by strengthening workers’ rights both to organize and engage in collective bargaining.

In effect, I advocate a melding of the reform proposals advanced by the Dunlop Commission and the TEAM Act. These revisions to the NLRA, combined with competitive, full employment conditions in labor markets, would ensure that nonunion employee representation committees lead to win-win outcomes for employers as well as employees.

Critics of reform of the NLRA argue that the Electromation decision is a nonissue because, first, it allows employers full freedom to form employee representation committees for purposes of improving productivity and quality, second, liberalization of the NLRA would allow employers to operate “sham” company unions, and, third, the probability of being charged with a section 8(a)(2) violation is so small, as are the penalties if found guilty, that the NLRA is not, from a practical point of view, a serious constraint on employers’ ability to run effective employee and involvement programs. The evidence and arguments advanced in this Article dispute all three contentions.

The six case studies of advanced EIP programs demonstrate that the majority of subject companies make use of employee representation committees and that these committees often deal with management over terms and conditions of employment. If scrutinized by the NLRB, many of these EIP programs would have to be revised, in some cases significantly. The evidence from Canada, as well as from interviews with American managers, labor attorneys, and consultants, suggests that liberalization of the NLRA would indeed result in the reappearance of some company-union-like representational bodies, although perhaps not in great numbers. These representational committees and councils, however, are not objectionable on their face, because they are nondemocratic in nature or necessarily toothless shams. Although nonunion employee committees are “dominated” (and thus nondemocratic organizations), every other aspect of a nonunion company’s human resource management program is unilaterally designed and operated, and no one seriously protests that arrangement. Further, although some employee committees in nonunion companies may be completely ineffectual or operated for no other reason than greater short-term profit, they cannot be tools of exploitation or inequitable treatment as long as workers have relatively easy and costless access to union representation. Finally, evidence from the field interviews suggests that while the constraining effect of the NLRA on EIP programs is, indeed, offset to some degree by the weak penalties and sporadic enforcement of section 8(a)(2), the majority of companies nonetheless try to adhere fairly closely to current law.
I believe the case for reform of sections 2(5) and 8(a)(2) of the NLRA is compelling. Two decades of experimentation and experience with EIP programs indicates that they are a valuable method of increasing the competitiveness and efficiency of American industry as well as the empowerment and job satisfaction of American employees. Further, the traditional organizational vehicle for employee voice at the workplace—the labor union—now represents only one in ten private sector workers, but nearly two-thirds of employees report that they want more opportunities for involvement and participation at work and that the preferred vehicle for more involvement is some form of cooperative joint employer-employee committee outside of the traditional collective bargaining mold. There is thus a large “representation gap” in the American workplace, and the majority of American workers say they prefer to see it filled by some form of nontraditional employee representation committee—exactly the kind of representational body that the NLRA undermines according to the Electromation decision.

Critics object to liberalizing the NLRA because nonunion EIP committees, in their view, exist only to serve management’s interests and provide employees with only a facade of empowerment and few if any tangible benefits. Rather than ban these committees outright, however, the better position, and the one more consonant with the American ethos of free choice, is to secure the right of employees to organize and then let the workers decide which representational form (if any) they desire. Just as was the case in the 1920s and 1930s, many workers will choose a nonunion form of representation.

In ending, I would like to quote the following statement by one of the employee representatives on the Personnel Board Council of Company C. No management personnel were in the room when the statement was made.

The key to a lot of what you’ve heard today is that the seven of us do not get paid any extra for all these extra hours we put into this job [serving on the Council], all the traveling we do, and all the time away from family. We are here because we want to improve the company, very unlike a union representative who is paid to represent people. We’re here to bridge a gap that I think the company had enough foresight to see. So we volunteered and we are doing this job without extra pay. When you look at the long term of why the seven people are here it is because we truly want to be the voice of the employees to the company.

I believe that most Americans would agree that this kind of attitude is one to be encouraged, as it is highly productive for the company and all of its stakeholders, including employees. Over time, of course, this em-

270. See FREEMAN & ROGERS, supra note 86.

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ployee and her fellow representatives and co-workers may discover that the council does not provide the effective voice they desire or proves disappointing in solving their workplace problems. This happened in dozens of cases in the 1930s, and it would no doubt happen again, if nonunion employee committees were deregulated. Rather than further retard union growth, legalization of the committees—coupled with stronger protections of the right to organize—would most likely bring into the ranks of organized labor many thousands of new members.