

Quality Circles or Company Unions? A Look at Employee Involvement After *Electromation and DuPont*

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I. INTRODUCTION

The past fifteen years have witnessed a dramatic transformation in the fundamental nature of labor-management relations. Under traditional management philosophy, workers were expected to “check their brains at the door” when they arrived at work in the morning. The ineluctable logic of the division of labor demanded that workers would use their backs, while managers would use their brains—to think of ways to get the work accomplished more efficiently. By the late 1970s, however, many corporate executives began to discover that the traditional way of organizing work was wasting one of their greatest assets: the creative minds of their workers. Throughout the next decade, therefore, increasing numbers of corporate managers adopted “employee involvement” or “participatory management” programs such as quality circles¹ in an effort to harness this heretofore wasted resource. In the process, they expected to enhance their firms’ productivity, improve the quality of the products or services they produced, and increase the job satisfaction of their workers.

These innovative efforts are in jeopardy because of the anticcompany union provision of the National Labor Relations Act (NLRA or the Act). Intended to eliminate a particularly egregious source of labor strife—the sham worker representation organizations known as “company unions”—this provision was broadly drafted in order to prohibit all the devices employers had used to give their employees the illusion of representation and thereby forestall union organizing drives. Unfortunately, the language of the provision is also broad enough to capture many bona fide employee involvement organizations.

Since the late 1970s, the National Labor Relations Board (NLRB or the Board) has incrementally attempted to construe the Act’s provisions to separate the participatory management sheep from the company union goats. In its decision in *Electromation, Inc.*² the Board was expected to set the matter straight. Its success in that effort is the focus of this Note.

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¹ See *infra* part II.B.1.

² 309 N.L.R.B. 990 (1992). The Board’s decision was upheld in *Electromation, Inc. v. NLRB*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994).

Part II will discuss the historical background of the NLRA's anticompany union provision and the evolution of participatory management, give a brief description of the types of employee involvement programs, and examine their status under the Act before *Electromation*. Part III will look at the Board's decision in *Electromation*, focus on that decision's effects on the statutory definition of a labor organization, and address the Board's subsequent effort to refine its definition of a labor organization in *DuPont*.³ Part IV will examine the state of the law after *DuPont*, analyze the shortcomings of the Board's current interpretation, and discuss two areas in which a new interpretation of the statute's language could benefit participatory management. Finally, Part V will conclude that the statutory definition of a labor organization should be interpreted to require a finding that an employee group acted in a representative capacity before an employer can be found to have committed an unfair labor practice by assisting it.

II. EMPLOYEE INVOLVEMENT UNDER THE NATIONAL LABOR RELATIONS ACT

A. *The Historical Background*

At the time the 1935 National Labor Relations Act⁴ was written, workplace "cooperation" between management and labor most often took the form of company unions.⁵ Employers offered these in-house, employer-created organizations to their workers "as an alternative either to dealing with management individually or through a trade union."⁶ Although purported to represent the workers' interests,⁷ company unions rarely reached bilateral agreements with their sponsoring employers.⁸ They did, however, retard the self-organization of workers into autonomous trade and industrial unions, in large measure by providing the appearance of collective action without the

³ E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893 (1993).

⁴ 29 U.S.C. §§ 151-69 (1988).

⁵ BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, BULLETIN NO. 634, CHARACTERISTICS OF COMPANY UNIONS 3 (1935); see generally Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 518-30 (1986) (discussing the history of the company union movement).

⁶ BUREAU OF LABOR STATISTICS, *supra* note 5, at 4.

⁷ See *id.*

⁸ See *id.* at 155. Only about 5% of the company unions studied by the Bureau of Labor Statistics in 1935 had obtained collective agreements containing provisions regarding wages, hours, or working conditions. *Id.* at 154-55.

substance.⁹

Enacted as a key element of the Roosevelt Administration's New Deal response to the economic depression of the 1930s,¹⁰ the NLRA sought to encourage collective bargaining as a means of preventing strikes and other forms of industrial unrest, thereby removing the burdens to commerce they cause.¹¹ At the heart of the Act were three rights guaranteed to workers: the right to organize, the right to bargain collectively, and the right to engage in peaceful strikes and picketing.¹² These rights were to be implemented and enforced by a number of provisions, of which the most important—at least in the eyes of Senator Wagner, the NLRA's sponsor—was the one that prevented employers from dominating or interfering with labor organizations.¹³

⁹ See Kohler, *supra* note 5, at 530.

¹⁰ See ARCHIBALD COX, ET AL., *LABOR LAW* 84–86 (1991); see also 29 U.S.C. § 151 (1988).

¹¹ See 29 U.S.C. § 151 (1988). Section 1 of the original National Labor Relations Act of 1935 (the Wagner Act) laid the blame for strikes and industrial unrest squarely upon the doorstep of employers: "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which . . . burden[] or obstruct[] commerce" National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151 (1988)). The 1947 Taft-Hartley Amendments to the Act recognized that "certain practices by some labor organizations" also burdened the free flow of commerce "through strikes or other forms of industrial unrest." 29 U.S.C. § 151 (1988).

Some commentators have argued that the NLRA's encouragement of collective bargaining implies that Congress adopted an adversarial model of labor relations as federal policy. See, e.g., Kohler, *supra* note 5; Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1663 (1983) [hereinafter Harvard Note]. A better view is that the central concern of the NLRA—and of federal labor policy in general—is to protect the free flow of commerce by reducing incitements to industrial unrest. As one writer noted, "[w]hile Congress envisioned that an adversary model might help achieve those ends, it did not preclude *cooperation* between workers and management, provided that the rights of all parties are preserved." Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 MICH. L. REV. 1736, 1742 n.38 (1985) [hereinafter Michigan Note]. Had Congress intended to adopt a purely adversarial model of labor relations, it would not have crafted the language of § 2(5) to permit employee organizations to deal with their employers over subjects other than those it enumerated in the section: it would simply have prohibited such dealings altogether. See *infra* note 14.

¹² See COX, *supra* note 10, at 85.

¹³ See William B. Gould IV, *Reflections on Workers' Participation, Influence, and Powersharing: The Future of Industrial Relations*, 58 U. CIN. L. REV. 381, 384 (1989). At the time, Senator Wagner believed that

Within a few years, it was apparent that this key provision—section 8(a)(2)¹⁴—had achieved its purpose. In 1935 approximately 2.5 million workers were members of company unions—about three-fifths as many as belonged to worker-organized trade and industrial unions.¹⁵ During the following years, through vigorous enforcement of the law by the NLRB and the Supreme Court,¹⁶ company unions were “obliterated.”¹⁷ Meanwhile, with

[t]he greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power

[O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. . . .

For these reasons *the very first step toward genuine collective bargaining is the abolition of the employer dominated union*

78 CONG. REC. 3443, *reprinted in* 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15–16 (1985) [hereinafter 1 NLRB] (emphasis added).

¹⁴ In pertinent part, § 8(a)(2) provides that:

It shall be an unfair labor practice for an employer—

. . . .

. . . to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . [but] an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay

29 U.S.C. § 158(a)(2) (1988).

The term “labor organization,” in turn, was broadly defined to include “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, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5) (1988).

Section 8 of the NLRA deals with unfair labor practices. In the original Wagner Act, the subsection prohibiting company unions was numbered 8(2). The subsequent Taft-Hartley Amendments added union unfair labor practices to the list, in § 8(b), and assigned employer unfair labor practices to § 8(a). For the sake of clarity, I have used the Taft-Hartley numbering scheme throughout this Note.

¹⁵ See Kohler, *supra* note 5, at 530.

¹⁶ See *Electromation, Inc.*, 309 N.L.R.B. 990, 994 (1992), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994). “After Congress passed the Act in 1935, a first order of business for the Board, backed by the Supreme Court, was to weed out employer-dominated organizations.” *Id.*

¹⁷ See Michigan Note, *supra* note 11, at 1743 n.42 (quoting Daniel Nelson, *The Company Union Movement, 1900–1937: A Reexamination*, 56 BUS. HIST. REV. 335, 335 (1982)).

the aid and encouragement of the federal government, membership in trade and industrial unions increased rapidly, so that by 1947 nearly 15 million workers were union members.¹⁸

Under the protection of the NLRA, and riding on the swell of the surging post-World War II American economy, labor unions were able to negotiate significant benefits for their members.¹⁹ These gains came at a cost, however: an average of 370 major strikes, involving more than 1.5 million workers, took place each year from 1947 to 1957.²⁰ As authors Barry and Irving Bluestone observed, "the fundamental nature of the relationship between management and labor was notably adversarial."²¹ For the first four decades of the NLRA's existence this fact posed no significant problems to the economy as a whole, for it was strong enough to absorb the cost of strikes and overcome the inefficiencies inherent in a system of adversarial labor-management relations. By the 1970s, however, as it became apparent that the traditional adversarial system was hurting American economic competitiveness, managers began to experiment with other approaches.

B. *The Evolution of Cooperative Relations*

Historically, American business had operated under the time-honored principle of the division of labor. This theory was based on the truism—long known, but first applied systematically during the Industrial Revolution—that "when a workman spends every day on the same detail, the finished article is produced more easily, quickly, and economically."²² But by the late 1970s,

¹⁸ See COX, *supra* note 10, at 92.

¹⁹ See BARRY BLUESTONE & IRVING BLUESTONE, *NEGOTIATING THE FUTURE* 33–59 (1992). In addition to wage increases, what the authors call the "traditional workplace contract" came to include such standard features as a productivity-based Annual Improvement Factor; cost-of-living adjustments to offset the effects of inflation; job-related benefits such as pensions, paid holidays, vacations, and medical insurance; seniority-based layoffs, recalls, and transfers; negotiated conditions of work and work rules; and grievance procedures (culminating in arbitration) to resolve contract disputes. *Id.* at 43–50.

²⁰ *Id.* at 41. This amount of labor unrest is all the more significant when one considers that the 1947 Taft-Hartley Amendments to the NLRA prohibited unions from using some economic weapons—most notably the secondary boycott—that they had previously employed to great effect. See COX, *supra* note 10, at 92–97.

²¹ BLUESTONE, *supra* note 19, at 41.

²² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 555 (George Lawrence trans., Harper & Row 1988) (1848). De Tocqueville further observed that

[w]hen a workman is constantly and exclusively engaged in making one object, he ends by performing this work with singular dexterity. But at the same time, he loses the

foreign competition,²³ rapid technological change,²⁴ and other factors provided a strong impetus to change the workplace relationship. Managers began to recognize that their workers could also be thinkers; that “[i]nstead of only a few people being paid to think and the rest being paid for their bodies from the neck down, everyone’s ideas [were] needed to work on developing and applying new technology and on improving existing methods and approaches to remain competitive.”²⁵ To tap this resource, companies began to institute a wide array of employee involvement programs²⁶ such as quality circles, quality of work life projects, and total quality management programs. These programs gave groups of hourly workers the opportunity to solve problems and make

general faculty of applying his mind to the way he is working. Every day he becomes more adroit and less industrious, and one may say that in his case the man is degraded as the workman improves.

Id.

The principle found its fullest and most influential expression in Frederick Winslow Taylor’s 1911 book *Scientific Management*. Taylor, who believed that the use of scientific methods to break down every craft into simple, easily learned tasks would result in work that was easier for the workers—and more efficient and profitable for the employer—outlined in his book a series of principles by which enterprises should be managed. One of these principles involved the use of a centralized planning department. This department would unquestionably decrease “the cost of production . . . by separating the planning and the brain work as much as possible from the manual labor.” See FREDERICK WINSLOW TAYLOR, *SCIENTIFIC MANAGEMENT* 121 (Harper & Brothers 1947) (1911). Taylor realized that “there [were] many people who [would] disapprove of the whole scheme of a planning department to do the thinking for the men . . . on the ground that this does not tend to promote independence, self-reliance, and originality in the individual.” *Id.* at 146. Such people, Taylor believed, “must take exception to the whole trend of modern industrial development.” *Id.*

²³ Michael Schuster, *Problems and Opportunities in Implementing Cooperative Union-Management Programs*, in *INDUSTRIAL REL. RES. ASS’N SERIES PROC. OF THE THIRTY-FIFTH ANN. MEETING* 189, 189 (Barbara D. Dennis ed., 1983).

²⁴ Neil DeKoker, *Labor-Management Relations for Survival*, in *INDUSTRIAL REL. RES. ASS’N PROC. OF THE 1985 SPRING MEETING* 576, 576 (Barbara D. Dennis ed., 1985).

²⁵ *Id.*

²⁶ I use this generic term to encompass such diverse programs as quality circles (QCs), quality of work life projects (QWL), and total quality management (TQM). Though they differ in their approach to the subject, they all have a common basis: they are changes in management structure designed to (among other things) elicit greater worker interest and involvement in their jobs, to provide a means for using their creativity, and thereby to improve productivity and product or service quality. See, e.g., HARRY KATZAN, JR., *QUALITY CIRCLE MANAGEMENT* 28–29 (1989); Schuster, *supra* note 23, at 189.

decisions that once were exclusively within the realm of management.²⁷

1. *How Employee Involvement Programs Function*

The simplest program—and the first to be adopted on a widespread basis—was the “quality circle.”²⁸ An individual quality circle typically consists of six to twelve members, usually from the same work unit, who meet regularly on a voluntary basis to identify product quality problems, develop solutions to those problems, and make recommendations to management.²⁹ The circle operates under the general guidance of a circle leader—frequently the group’s supervisor—who is responsible for the circle’s operation and sets its agenda.³⁰ Decisions within the circle as to the cause of a problem and the solution the group will recommend may be made by vote or by consensus.³¹

Quality of work life (QWL) projects focus primarily on worker satisfaction, rather than productivity or product quality.³² The QWL

²⁷ Employee involvement programs like these and others have been adopted by many U.S. companies. According to one recent estimate, approximately 35,000 companies have adopted some form of employee involvement, in which about nine million employees are believed to participate. See John W. Bowers, *Section 8(a)(2) and Participative Management: An Argument for Judicial and Legislative Change in a Modern Workplace*, 26 VAL. U. L. REV. 525, 526 n.3 (1992). In another recent study—a random survey of nearly 200 unionized companies—19% had begun QWL-type plans. See BLUESTONE, *supra* note 19, at 163. A 1983 survey of approximately 400 large companies revealed that 56% of their unionized operations had established some type of quality circle program. *Id.*

²⁸ Schuster, *supra* note 23, at 189. Though once used almost exclusively in Japan, quality circles are now a commonly used management technique in the United States as well. As many will hasten to add, the principles underlying quality circles and total quality management programs were developed by American researchers, most notably the late Dr. W. Edwards Deming, during the 1940s. See, e.g., Scott McIntyre, *Living with TQM*, A.B.A. J., Jan. 1994, at 8 (letter to the editor); Michigan Note, *supra* note 11, at 1740 n.24.

Deming’s principles were relatively unknown (and untried) in the United States until the late 1970s; they were commonly used in Japanese industry by the 1950s. See THOMAS H. BERRY, *MANAGING THE TOTAL QUALITY TRANSFORMATION* 41 (1991).

²⁹ See KATZAN, *supra* note 26, at 21–23. Both the leader and the circle members receive training in specialized problem-identification and problem-solving techniques. *Id.* at 46. Apart from the addition of a quality circle facilitator, who is responsible for the operation of the circle program throughout the plant, no changes need be made to the existing organizational structure for the program to be successful. *Id.* at 24–25.

³⁰ *Id.* at 43–45.

³¹ *Id.* at 83–84, 129–30.

³² See Michigan Note, *supra* note 11, at 1739–40. “Quality of work life” refers to a variety of approaches intended to make workers’ jobs more meaningful and satisfying. See

approaches range from cafeteria improvements and work-rule changes to more fundamental changes such as flexible work hours, self-directed work teams,³³ and job redesigning and restructuring.³⁴

Total quality management (TQM) programs represent a complete top-down transformation of a corporation's structure and culture.³⁵ In a sense, a TQM program is like a quality circle program writ large:³⁶ a quality improvement (QI) team will identify a quality problem that is measurable, and for which data are available;³⁷ analyze the problem to determine its root cause(s);³⁸ agree

Schuster, *supra* note 23, at 191; Michigan Note, *supra* note 11, at 1739. Worker satisfaction, in turn, is expected to lead to a higher quality product at a lower cost. *See* Michigan Note, *supra* note 11, at 1739.

³³ Self-directed work teams are an innovation with particular significance for labor-management relations. In plants where they are used, each team is assigned the responsibility for performing a major operational function, such as the assembly and testing of diesel engines. The teams are given considerable autonomy to determine how the function is to be completed. For example, a team may manage the day-to-day production process, interview and hire job applicants drawn from a pool chosen by management, resolve grievances, impose discipline on other team members, set production and material flow schedules, prepare budgets and monitor costs, and even order parts from vendors. To implement this fundamental change in the way work is structured—particularly when it takes place in a union setting—employers often rely on a joint worker-management committee to coordinate the operation of the program and to provide a forum for workers and managers to discuss and resolve any problems that may arise. *See* Kohler, *supra* note 5, at 507-09; Michigan Note, *supra* note 11, at 1739-41.

³⁴ Schuster, *supra* note 23, at 191.

³⁵ Successful implementation of TQM is predicated upon a corporate culture that rewards quality (as distinct from quantity) and upon a workforce that is satisfied with its working conditions, pay, benefits, supervision, performance appraisal system, and communications within the company. *See* BERRY, *supra* note 28, at 22. As one writer observed, “[i]f . . . the employee population has a sour attitude toward management and the company, then gaining their active and enthusiastic participation in TQM will be extremely difficult, if not impossible, without first improving the areas of principal concern.” *Id.*

³⁶ TQM differs from quality circles in several important respects, however. While quality circles generally consist of several volunteering hourly employees who perform related job tasks, QI team members are selected by management, may come from any level in the organization, and often represent a variety of departments and functions. Membership on the team is mandatory, and the team leader is assigned by management. Furthermore, the problem or project upon which the team will work is often selected by management, is always approved by management, and must relate to a business priority. *Id.* at 4. “Unit-level quality” groups, which resemble traditional quality circles, still exist at the lowest rung of the TQM organizational ladder. *Id.* at 93-94.

³⁷ *Id.* at 58-59.

³⁸ *Id.* at 65-66.

upon a solution and draft an implementation plan for management approval;³⁹ and then monitor the effects of the change, meanwhile recommending further changes as necessary.⁴⁰

2. *Employee Involvement Programs Run the Risk of Violating Section 8(a)(2)*

Most employee involvement programs appear to fit within the NLRA's definition of a "labor organization."⁴¹ They are organizations in which employees participate; they interact with the management structure of their sponsoring corporations in a variety of ways; and their activities may have a direct or indirect effect upon grievances, hours of employment, and especially "conditions of work."⁴² If an employee involvement group is a labor organization, then an employer that "dominates" it, "interferes" with its formation or administration, or contributes financial or other support to it, may be found to have violated section 8(a)(2) of the Act.⁴³ In fact, because employee involvement programs are created by management as management tools to solve management problems, it is difficult to escape the conclusion that employers dominate them.⁴⁴

Although few such programs have been the target of unfair labor practice

³⁹ *Id.* at 67-68.

⁴⁰ *Id.* at 68-70. Statistical process control techniques are used to monitor the change's effects.

⁴¹ *See supra* note 14 and accompanying text.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See* E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 901 (1993) (Devaney, concurring) (observing that committees formed as management tools to solve management problems will almost invariably be "dominated" by the employer). An employer commits an unfair labor practice by dominating or interfering with a labor organization, or by contributing financial or other support to it. *See supra* note 14; *see infra* part III.B.1. The NLRB and most courts interpret section 8(a)(2) to forbid any employer involvement in the activities of labor organizations. *See* Michigan Note, *supra* note 11, at 1748. This interpretation of employer domination plainly includes management formation and financing of labor organizations. Thus, if a quality circle is found to be a statutory labor organization, many aspects of the relationship between it and management described in Part II.B.1 could result in unfair labor practice charges.

Other courts use an "actual domination" test to see whether an employer's involvement has restricted employees' "free choice" of an independent bargaining representative, distinguishing employer "cooperation" from prohibited "support." *See* Chicago Rawhide Mfg. v. NLRB, 221 F.2d 165, 167 (7th Cir. 1955).

complaints,⁴⁵ the possibility that they may be prohibited by the NLRA⁴⁶ has prompted congressional interest in amending the Act to permit their use.⁴⁷ A tremendous amount of attention was generated, therefore, when the NLRB announced that it would take the unusual step of hearing oral arguments⁴⁸ in *Electromation, Inc.*,⁴⁹ a case involving committees of workers organized by

⁴⁵ Out of over 9300 complaints issued by the NLRB's Office of General Counsel over the three year period between fiscal year 1990 and fiscal year 1992, only 20 (0.21%) involved allegations of employer violations of § 8(a)(2). See E.I. du Pont de Nemours & Co., 311 N.L.R.B. at 899 n.4 (Devaney, concurring).

⁴⁶ See, e.g., Bowers, *supra* note 27, at 538-39; Kohler, *supra* note 5, at 536.

⁴⁷ S. 699, 103d Cong., 1st Sess. § 3 (1993) would have amended § 8(a)(2) to exclude from its coverage employee groups established to "discuss matters of mutual interest" when those groups do not "have, claim, or seek authority to enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization." 139 CONG. REC. S4014 (daily ed. Mar. 30, 1993) (statement of Sen. Kassebaum).

Similar legislation, proposed in 1991 (prior to *Electromation*), would have specifically exempted quality circles and joint worker-management production teams from the reach of § 8(a)(2). See Bowers, *supra* note 27, at 526 n.8.

⁴⁸ Board Member Clifford Oviatt explained that "the [NLRB's] first mistake was the agreement among the members to slate the case for oral argument, thereby signaling the press and the public that a major change in the law was in the offing." *Labor Lawyers Say Electromation Less Important than Once Predicted*, 31 GOV'T EMPLOYEE REL. REP. 167, 168 (1993). Furthermore,

Oviatt explained that other members were keen to schedule argument on a "hot topic," and he relented as a courtesy to his colleagues even though he would have preferred to affirm the administrative law judge's holding with a short-form ruling. "I just think it was a bad vehicle" to discuss employee involvement committees and to "get everybody stirred up" . . .

Id.

⁴⁹ 309 N.L.R.B. 990 (1992), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994). See *supra* note 48 regarding the way in which *Electromation* first gained its exceptional status. Even before the decision was released, NLRB Chairman James Stephens was

known to have argued that the decision should be as narrow as possible because the circumstances in the . . . case were not strong enough to use to break new legal ground. Sources said the other board members agreed. But even with a narrow ruling, the . . . decision [would] serve as the lead case for several other complaints working their way through the NLRB legal process.

Frank Swoboda, *Worker Programs Face NLRB Challenge*, WASH. POST, Dec. 15, 1992, at

their employer—in response to employee complaints—to develop alternatives to the company's previously announced changes to its attendance bonus policy.⁵⁰

III. *ELECTROMATION, INC.*: A RELUCTANT LANDMARK

Electromation, Inc., an Elkhart, Indiana nonunion manufacturer of small electrical and electronic components for the automobile industry,⁵¹ found itself in financial trouble in late 1988.⁵² In order to cut expenses, Electromation's management decided to alter its employee attendance bonus policy, and to provide a year-end lump-sum payment to employees instead of giving them a wage increase.⁵³ Displeased by these changes, sixty-eight employees petitioned the company's management to change the altered attendance policy.⁵⁴ In response, the company president met twice with a group of randomly chosen employees,⁵⁵ first to discuss the problem issues (including wages, bonuses, incentive pay, attendance programs, and leave policy) and then to propose the creation of joint worker-management "action committees" to "meet and try to come up with ways to resolve these problems."⁵⁶

C1, C2.

⁵⁰ *Electromation*, 309 N.L.R.B. at 990-91.

⁵¹ *Id.* at 1016.

⁵² *Id.* at 990.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ During 1988, the company had held several similar meetings with other groups of employees. Like the "action committees," these groups were randomly selected from the top and bottom halves of the company seniority list. *See id.* at 1016.

⁵⁶ *Id.* at 991. As Electromation's president testified, if the committees "came up with solutions that . . . [management] believed were within budget concerns and they generally felt would be acceptable to the employees, [then the company] would implement [those] suggestions or proposals." *Id.* (emphasis added). Although the workers were initially not receptive to the idea, the president explained that financial problems prevented them from "put[ting] things back the way they were." *Id.* Eventually the employees agreed that the action committee concept was preferable to simply acquiescing in the changes Electromation had already made. On the day after the second meeting, the company posted a memorandum directed to all its employees that announced the formation of five action committees (designated as Absenteeism/Infractions, No Smoking Policy, Communication Network, Pay Progression for Premium Positions, and Attendance Bonus Program) and posted sign-up sheets for each. *Id.*

The company expected that the employee members of all the committees would talk with other employees in the plant, get their ideas, and be available so that "anyone [who] wanted to know what was going on . . . could go to [them]." *Id.* At the first meeting of the Attendance Bonus committee, the members were informed that they "were supposed to go out amongst the other employees and find out what kind of ideas they had concerning a

Shortly after the committees began to meet, Teamsters Local 1049 made a demand to the company for recognition,⁵⁷ and subsequently filed an election petition with the NLRB's Regional Director.⁵⁸ Later, during the election campaign, the union filed an unfair labor practice charge with the Regional Director, alleging that Electromation's action committees violated sections 8(a)(2) and 8(a)(1) of the NLRA.⁵⁹ Seven months later, an administrative law judge found merit in the union's unfair labor practice charge, decided that Electromation had dominated and assisted the action committees in violation of sections 8(a)(2) and 8(a)(1) of the Act, and issued a recommended order directing Electromation to disband the committees.⁶⁰ In response to the company's exceptions, the NLRB scheduled the case for oral argument.⁶¹

A. *The Board's Decision*

Given the facts of the case,⁶² the NLRB had little trouble deciding that Electromation had violated sections 8(a)(2) and 8(a)(1) of the NLRA when it

good attendance program'" *Id.* at 991 n.7. The Attendance Bonus committee developed a proposal that was rejected by the company's controller, himself a member of the committee, because it was too expensive. The employees subsequently developed a second proposal which the controller deemed to be fiscally sound. *Id.* at 991-92.

⁵⁷ *Id.* at 991. The administrative law judge found no evidence to indicate that the company was aware of the union's organizing effort until the union demanded recognition. *Id.* at 1018. At the next scheduled meeting of each action committee, Electromation's committee coordinator informed the members that management could no longer participate in the committee meetings, but that the employee members could continue to meet if they wished. The Absenteeism/Infraction and Communication Network committees decided to continue to meet; the Pay Progression committee disbanded; and the Attendance Bonus committee decided to first write up the proposal the controller had approved and then to disband. *Id.* at 991. The committee never submitted the proposal to the company's president because the union's election campaign had intervened. *Id.* at 922.

⁵⁸ *Id.* at 1015.

⁵⁹ *Id.* On March 31, 1989, the representation election was held. The union lost, 95 to 82. *Id.*

⁶⁰ *See id.* at 1019. The judge also found the company's unfair labor practice had interfered with the election and recommended that the result be set aside. *Id.*

⁶¹ *Id.* at 990.

⁶² As Board Chairman James Stephens, the opinion's author, later told a congressional panel, the case involved "a 'fairly garden-variety' violation" of the NLRA. *NLRB Chairman Calls Electromation a 'Fairly Garden-Variety' Violation*, 31 GOV'T EMPLOYEE REL. REP. 388, 388 (1993). Because the testimony made it clear that Electromation had established the committees specifically to *represent* its employees in discussions about working conditions, the General Counsel was readily able to establish all the elements of the unfair labor practice charge. *See infra* notes 69-72 and accompanying text.

responded to its employees' complaints by "devising and imposing on the employees an organized Committee mechanism composed of managers and employees instructed to 'represent' fellow employees."⁶³ Although the "garden variety" nature of the case did not require a detailed opinion, the Board nonetheless discussed at length the statutory definition of a labor organization, the legislative history of the Act's prohibition of company unions, and the elements of the section 8(a)(2) unfair labor practice charge. This discussion—although mostly dicta⁶⁴—does indicate how the NLRB may rule in future, closer cases.⁶⁵

⁶³ *Electromotion*, 309 N.L.R.B. at 998. The Board's opinion went on to state that "[t]he purpose of the Action Committees was . . . not to enable management and employees to cooperate to improve 'quality' or 'efficiency,' but to create in employees the impression that their disagreements with management had been resolved *bilaterally*." *Id.*

⁶⁴ The NLRB realized—belatedly, it seems—that the facts in *Electromotion* made the case a bad vehicle for establishing new policy. See *supra* notes 48–49. At times the Board attempted to downplay the significance of the case, see *supra* notes 48 and 62, but it had already attracted congressional attention. See 138 CONG. REC. H2205 (daily ed. Apr. 1, 1992) (statement of Rep. Gunderson) (noting that *Electromotion* "will probably be one of the most important rulings ever" by the NLRB, and observing that the case had been pending before the Board for two years); see also 138 CONG. REC. H2206 (daily ed. Apr. 1, 1992) (statement of Rep. Ritter) (noting the second anniversary of the administrative law judge's decision in *Electromotion* "that has put American competitiveness on ice"). Because so much was expected from the case, the NLRB had to make the most of it—hence the detailed treatment of legislative history and prior Board decisions in what should have been a "garden variety" case.

⁶⁵ Chairman Stephens's Board opinion and Member Devaney's concurring opinion form the basis for my discussion in the following sections. Both of these members will remain on the Board well into the Clinton Administration; therefore, their opinions are likely to be influential upon the three new members President Clinton is entitled to appoint. Chairman Stephens will be replaced as Chairman but is entitled to remain as a Member until August 27, 1995. Member Devaney's appointment expires December 16, 1994.

When the NLRB exercises the authority given to it by the NLRA to make rules to implement the Act's provisions, it almost invariably makes them in the context of individual adjudications. See 29 U.S.C. § 156 (1988); see generally COX, *supra* note 10, at 140–42 (discussing the NLRB's use of adjudication to formulate new doctrine); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571, 573–74 (1970) (same). In approaching the decision in *Electromotion* it is worth noting that, as one commentator observed:

The advantages of adjudicatory lawmaking for an agency concerned with congressional review are substantial. Adjudicatory lawmaking permits the agency to adopt rules without clearly articulating its policies and their implications. . . . In leaving its doctrine ambiguous, often seemingly restricted to the facts of a certain case, the Board can legislate in controversial areas without giving critics a clear and final rule to attack.

B. *The Developing Definition of "Labor Organization"*

1. *"Dealing" as a Bilateral Mechanism*

In order to establish a violation of section 8(a)(2), the General Counsel⁶⁶ must first show that the entity that the employer allegedly dominated or interfered with was a statutory labor organization.⁶⁷ Within section 2(5), the *Electromation* majority agreed, were three elements: that the organization was one in which employees participated; that it existed, at least in part, for the purpose of "dealing with" an employer; and that those dealings concerned "conditions of work" or one of the other subjects listed in section 2(5).⁶⁸

"Dealing," as the Supreme Court had held, meant more than "bargaining collectively,"⁶⁹ but the lower limits of the term were left undefined.⁷⁰ In *Electromation*, the NLRB attempted to establish these lower limits. Bearing in mind that Congress intended to proscribe "employer interference in setting up or running employee 'representation' groups [which] actually robbed employees of the freedom to choose their own representatives,"⁷¹ the Board advised that it viewed "dealing with" as "a bilateral mechanism involving proposals from the employee committee . . . coupled with real or apparent

Adjudication also gives the agency the opportunity to avoid clarifying the many issues underlying the rule Indeed, it is a common criticism of the Board that it often will announce such changes in an apparently innocuous manner, frequently limiting its analytical discussion to one or two paragraphs

Perhaps the greatest advantage of adjudication in avoiding congressional scrutiny is that it presents no firm and final resolution of a policy issue, but only an incremental and ambiguous step in the gradual evolution of a general doctrine.

Robert L. Willmore, Note, *NLRB Rulemaking: Political Reality Versus Procedural Fairness*, 89 YALE L.J. 982, 995-96 (1980).

⁶⁶ The Taft-Hartley Amendments to the NLRA established the office of the General Counsel within the NLRB. The General Counsel (or the director of the NLRB region, where such authority is delegated) has final authority to investigate unfair labor practice charges, to decide whether a complaint should be issued, and to prosecute the complaint (the party that filed the unfair labor practice charge may intervene and take part in the proceedings). See generally COX, *supra* note 10, at 107-11 (discussing the office of the General Counsel).

⁶⁷ *Electromation*, 309 N.L.R.B. at 994.

⁶⁸ *Id.*

⁶⁹ *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211 (1959).

⁷⁰ The Court of Appeals for the Sixth Circuit made this observation in *NLRB v. Streamway Div. of the Scott & Fetzer Co.*, 691 F.2d 288, 292 (6th Cir. 1982).

⁷¹ *Electromation*, 309 N.L.R.B. at 993.

consideration of those proposals by management.”⁷² The decision then singled out some “unilateral” employee involvement practices, such as suggestion boxes, “‘brainstorming’ groups or meetings, [and] analogous information exchanges,” which it did not consider to be “dealing.”⁷³

2. Does the Act Require a Labor Organization to be Representative?

If employee groups must act in a representational capacity in order to be considered labor organizations, legitimate employee involvement programs are not likely to violate section 8(a)(2).⁷⁴ Though it expressly declined to reach this issue,⁷⁵ the Board’s opinion nonetheless gave some indications that the Act’s legislative history and the NLRB’s decisions might require it.

First, the Board’s review of the legislative history of the Act⁷⁶ revealed

⁷² *Id.* at 995 n.21. The Board did not reach the issue of whether such an employee group must actually act as a representative of other employees in order to run afoul of the Act. *Id.* at 994 n.20. Because the Board found that the action committees in question did act in a representational capacity, the majority did not need to decide whether an employee group that did not act as a representative of other employees could ever be a labor organization. *Id.*

Because the primary purpose of most employee involvement groups is to generate proposals, as discussed in Part II, if those proposals concerned any of the subjects listed in § 2(5), a Board decision following the *Electromation* holding would still find that the groups deal with their employers, and therefore constitute labor organizations.

⁷³ *Id.* at 995 n.21.

⁷⁴ See *infra* part IV.C for a discussion of this point. Prior to *Electromation*, the NLRB had already determined that the NLRA permitted some participatory management practices. See *infra* notes 84–90 and accompanying text.

⁷⁵ See *Electromation*, 309 N.L.R.B. at 994 n.20.

⁷⁶ The Board reviewed the NLRA’s history in order to determine just what activity Congress intended to prohibit when it enacted § 8(a)(2). *Id.* at 992–94. Specifically, the Board attempted to determine what Congress meant by “representation” as it appears in the phrase “employee representation committee or plan.” This phrase appears in § 2(5) as part of the description of types of organizations in which employees might participate. *Id.* at 992.

In essence, the Board concluded that although the section already reached “any organization of any kind,” employee representation committees—the most prevalent form of company unions—might not be included within that language because they were only “‘loose organization[s] if you [could] call [them] organization[s]’” *Id.* at 993 (quoting *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73d Cong., 2d Sess. 241 (1934) (statement of Edwin E. Witte, Professor of Economics), reprinted in 1 NLRB, *supra* note 13, at 271). For this reason Congress mentioned the committees specifically.

one predominant theme: that the company unions that the NLRA sought to prohibit were all sham *representatives* or *agents* of their worker members.⁷⁷ This theme of labor-organization-as-representative continued into the Board's conclusions. Having examined the Act's pertinent legislative history, the Board majority agreed that "Congress' goal was to preserve for employees the right to choose their bargaining *representative* free from employer interference . . ." ⁷⁸

Second, in a continuation of its historical analysis, the Board emphasized the representative character of a labor organization when it addressed its 1935 *Pennsylvania Greyhound Lines, Inc.*⁷⁹ decision—the Board's very first unfair labor practice case, and one that the present-day Board considered to be "entirely typical of the 'employee representation plans or committees'

⁷⁷ For example, after noting that the elimination of employer-dominated labor organizations was a vital goal of the Act, the Board quoted Senator Wagner's description of this goal: "the abolition of the employer dominated union as an *agency* for dealing with grievances, labor disputes, wages, rates, or hours of employment." *Id.* at 993 (quoting 78 CONG. REC. 3443, 3443 (statement of Sen. Wagner), *reprinted in* 1 NLRB, *supra* note 13, at 15–16) (emphasis added). Later, when it addressed Professor Edwin Witte's successful attempt to expand the definition of labor organizations to include unorganized (but very prevalent) "employee representation committees," the Board quoted Witte as describing the committees as being "merely a method of electing representatives." *Id.* (quoting *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Educ. and Labor*, 73d Cong., 2d Sess. 241 (1934) (statement of Edwin E. Witte, Professor of Economics), *reprinted in* 1 NLRB, *supra* note 13, at 271). Senator Wagner's explanation of the expanded definition was then cited: "If, as employers insist, such 'plans' . . . are lawful representatives of employees, then employer activity relative to them should clearly be included [in the Act's prohibition]." *Id.* (quoting STAFF OF SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., 1ST SESS., MEMORANDUM COMPARING S. 1958 WITH S. 2926, at 22 (Comm. Print 1935), *reprinted in* 1 NLRB, *supra* note 13, at 1347). Finally, in addressing the distinction between true employer interference with a labor organization and conduct that would be considered "minimal," the Board noted Senator Wagner's test: "[t]he question is entirely one of fact and turns upon whether or not the employee organization is entirely the *agency* of the workers . . ." *Id.* at 994 (quoting *Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 15 (1935) (statement of Sen. Wagner), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2489 (1985)).

⁷⁸ *Electromation*, 309 N.L.R.B. at 994 n.18 (emphasis added). Moreover, this legislative history showed that Congress had found "that employer interference in setting up or running employee 'representation' groups actually robbed employees of the freedom to choose their own representatives." *Id.* at 993. Based on this finding, "Congress concluded that ridding collective bargaining of employer-dominated organizations . . . would advance the . . . Act's goal of eliminating industrial strife." *Id.*

⁷⁹ 1 N.L.R.B. 1, 51 (1935) (prohibiting Greyhound from interfering with its employees' rights to "self-organization, to form, join or assist labor organizations, [or] to bargain collectively through representatives of their own choosing").

perceived as so pernicious by Senator Wagner and . . . Congress.”⁸⁰ As the *Electromation* Board described the case, Greyhound management “usurped from the employees their protected right to a bargaining representative of their own choosing when it set up and accorded recognition to a ‘committee’ that was in no way an agent of the employees or loyal to their interests”⁸¹

Finally, by noting with approval its 1977 *General Foods Corp.*⁸² decision, the Board signaled its agreement with that case’s reasoning on the representational aspect of section 2(5).⁸³ For the purposes of the Board’s discussion, the key feature of *General Foods* was the fact that the self-directed employee work groups in question performed essentially managerial functions⁸⁴ such as job assignment, job rotation, and overtime scheduling, and so were not labor organizations.⁸⁵ But the administrative law judge’s conclusions in that case, which the Board adopted, also contained this important observation:

The essence of a labor organization, as this term has been construed by the Board and the courts, is a group or a person which stands *in an agency relationship* to a larger body on whose behalf it is called to act. When this relationship does not exist, all that can come into being is a staff meeting or the factory equivalent thereof.⁸⁶

Although it is unclear whether the Board had this aspect of *General Foods* in mind when it discussed the case, the NLRB’s General Counsel, giving a subsequent briefing on *Electromation*, emphasized that *General Foods* was still good law and “stressed that an element of the definition of [a] labor organization [was] that the employees on the committee act in a representational capacity on behalf of other employees.”⁸⁷

Taken together, *Electromation* and *General Foods* stand for the proposition that employers may unilaterally delegate authority over traditionally “managerial” functions to groups of employees.⁸⁸ In addition to reaffirming the

⁸⁰ *Electromation*, 309 N.L.R.B. at 994 (discussing *Greyhound Lines*, 1 N.L.R.B. at 1).

⁸¹ *Id.*

⁸² 231 N.L.R.B. 1232, 1234–35 (1977) (finding that worker teams were not labor organizations because, in large part, they were organized to promote workplace efficiency and did not act as agents for the employees).

⁸³ *Electromation*, 309 N.L.R.B. at 995 (discussing *General Foods*, 231 N.L.R.B. at 1232).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1001 (Devaney, concurring).

⁸⁶ *General Foods*, 231 N.L.R.B. at 1234 (emphasis added).

⁸⁷ *Employee Involvement Little Changed by Electromation Ruling, Hunter Says*, 31 GOV’T EMPLOYEE REL. REP. 623, 623 (1993).

⁸⁸ See *General Foods*, 231 N.L.R.B. at 1235 (noting the groups were performing

important "managerial function" exception to section 2(5) set forth in *General Foods*,⁸⁹ the Board also observed that section 2(5) was not implicated when management delegated the adjudication of grievances to groups of employees.⁹⁰ Finally, as Member Devaney observed in his concurring opinion, the Board's 1985 *Sears, Roebuck and Co.*⁹¹ decision upheld the finding that an employee "communications committee" was not a labor organization, even though some of the matters it discussed could have had a direct effect on working conditions, because "the purpose of the committee was to be a management tool intended to increase company efficiency, rather than [to act as] an employee representative or advocate."⁹²

"managerial functions . . . flatly delegated to employees."); see also *Electromation*, 309 N.L.R.B. at 1002 (Devaney, concurring).

⁸⁹ *General Foods* noted three ways in which the employee involvement groups in question were not labor organizations. First, the entire bargaining unit was involved in the employee involvement process, so there was no separate entity "set apart from the totality of the bargaining unit which it has been called upon to represent." *General Foods*, 231 N.L.R.B. at 1234. Second, the groups did not stand "in an agency relationship to a larger body on whose behalf it is called to act." *Id.* Third, the groups were performing "managerial functions . . . flatly delegated to employees." *Id.* at 1235.

⁹⁰ See *Electromation*, 309 N.L.R.B. at 995.

⁹¹ 274 N.L.R.B. 230, 244 (1985) (finding that a communications committee was not a labor organization because it was organized to promote workplace efficiency and did not act as an employee representative).

⁹² *Electromation*, 309 N.L.R.B. at 1002 (Devaney, concurring) (citing *Sears*, 274 N.L.R.B. at 230). Member Devaney continued: "I am in wholehearted agreement with the thrust of these cases, and I find in them guidelines for consideration of future cases involving alleged violations of Section 8(a)(2)." *Id.* In pertinent part, the administrative law judge deciding *Sears* held that:

In the instant case the communications committee discussed matters related to work performance. Many of those matters could have a direct impact on working conditions. The ease with which a technician could obtain parts could affect his working condition However, the evidence in the record establishes that the communications committee was used as a management tool that was intended to increase company efficiency. The communications committee was not an employee representative or advocate. The committee did not deal with the Company on behalf of the employees. The employees on the committee were not selected by their fellow employees and they did not represent their fellow employees. All of the employees, on a rotation basis, were to participate in meetings with management to give input in order to help solve management problems.

Sears, 274 N.L.R.B. at 244.

Although the employee committees were unmistakably intended to serve as agents of the company, because they were "created by the Company for company purposes," the

In citing these decisions, the Board majority and concurring opinions confirmed that the principles they enunciated are still good law. The effects of these decisions on the body of law that has been developed to define the characteristics of statutory labor organizations, and the effect of *Electromation* itself, were once again addressed by the Board in its May, 1993 *DuPont* decision.⁹³

C. DuPont: *A Look at Employee Involvement in a Union Setting*

At issue in *DuPont* was the legality under sections 2(5) and 8(a)(2) of worker-management safety committees at six DuPont facilities. Also at issue were the questions of whether the company had illegitimately bypassed the union when it interacted with the committees—which would violate section 8(a)(5)⁹⁴ of the Act—and whether the company violated section 8(a)(5) of the Act when it held safety conferences with its employees.⁹⁵ The administrative law judge found that DuPont had violated sections 8(a)(2) and 8(a)(5) in its dealings with the committees, but had not violated the Act when it conducted the safety conferences. The Board agreed, but “add[ed] rationale to his decision . . . to provide guidance for those seeking to implement lawful cooperative

judge also considered management’s refusal to discuss matters raised by employees that related to wages and benefits to be significant. *Id.* at 243. If the committees had been permitted to act on behalf of employees in this manner (i.e., to discuss wages and benefits), they no longer would have been management tools performing delegated management functions—unless the committees were also given the power to make the final decision upon those matters. *Cf. Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108, 1119–21 (1977) (finding that a joint employee-management grievance committee, composed of four employees and one manager, in which decisions on grievances were made by majority vote, was not a statutory labor organization); *General Foods*, 231 N.L.R.B. at 1235 (permitting the “flat delegation” of managerial functions to groups of employees). In essence, these decisions permit employee groups to discuss subjects listed in § 2(5) (i.e., grievances, as in *Mercy-Memorial Hospital*) with management provided that the employee groups have the final say. If the groups are not delegated the authority to make decisions—if they are mere communications devices—they must refrain from dealing with management over § 2(5) subjects. The mere existence of an agency relationship between the employee group and the employer is not enough to exempt the group from the reach of § 2(5): where statutory subjects are involved, the agent must also be delegated final decisionmaking authority.

⁹³ *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

⁹⁴ Section 8(a)(5) provides, in pertinent part, that “[i]t shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees” 29 U.S.C. § 158(a)(5) (1988).

⁹⁵ *See DuPont*, 311 N.L.R.B. at 893.

programs between employees and management."⁹⁶

First, the Board clarified the position it articulated in *Electromation* on employee committees dealing with an employer. Dealing, the Board determined, "ordinarily entails a pattern or practice" in which a group of employees makes proposals to management to which management would respond, accepting or rejecting them "by word or deed."⁹⁷ If the group existed for the purpose of making proposals to management, the element of dealing would be present, even if no proposals had actually been made.⁹⁸ Conversely, if the group existed for some other purpose—such as developing a variety of ideas for solving a particular problem ("brainstorming") or sharing information with the employer—but did upon "isolated instances" make "ad hoc proposals to management" that were followed by a management response, no element of dealing would be found.⁹⁹

Second, the Board explicitly approved of DuPont's practice, at its safety conferences, of informing the employees involved that "bargainable issues" could not be dealt with in the conference's discussion groups.¹⁰⁰ By making this "good-faith effort to separate out bargainable issues," and by making it clear that such issues were within the scope of the union's duties, DuPont prevented the conference group discussions from becoming unlawful bargaining sessions.¹⁰¹ Furthermore, the company used the discussion groups as a means of soliciting suggestions and ideas from its employees on the topic of workplace safety, but it did not require the groups to decide on proposals to improve safety conditions.¹⁰²

Finally, because the Board found that the worker-management safety committees had acted in a representative capacity, it did not need to reach the issue of whether labor organization status under section 2(5) would exist in the

⁹⁶ *Id.*

⁹⁷ *Id.* at 894.

⁹⁸ *Id.*

⁹⁹ *Id.* at 894 n.7. Though the Board does not specify this in its opinion, § 2(5) also requires that the proposals concern "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." See 29 U.S.C. § 2(5) (1988).

¹⁰⁰ See *DuPont*, 311 N.L.R.B. at 896-97.

¹⁰¹ *Id.* at 897. By law, workplace safety is a mandatory subject of collective bargaining. Generally speaking, in the absence of a contractual provision or past practice that dictated otherwise, DuPont would have had to bargain with the union before making any changes affecting workplace safety. In this case, DuPont did not violate § 8(a)(5) because it was not "directly dealing with its employees" over this mandatory subject of bargaining. *Id.*

¹⁰² *Id.* By structuring the goals of the conference in this manner, DuPont did not end up dealing with its workers. *Id.*

absence of such a finding.¹⁰³

IV. THE STATE OF THE LAW AFTER *DUPONT*

In both *Electromation* and *DuPont*, the Board attempted to carve out an area in which employee involvement groups could operate without running afoul of the Act's company union prohibition. Some employee involvement practices are clearly included within the "safe havens" the Board described; others appear to be protected by earlier decisions that the Board reaffirmed. But by refusing to reach a decision on whether groups would have to be representative of workers before they could be considered labor organizations, the Board has left the status of most employee involvement practices in limbo.

A. "Safe Havens" and Others that Might Be Safe

As *DuPont* makes clear, when employers use brainstorming groups to generate a number of problem-solving ideas or use communication groups to obtain information from employees, the element of dealing required by statute is missing because the process is purely unilateral.¹⁰⁴ Ideas and information flow upward from workers to management, but the workers have not developed a specific proposal and do not expect a specific response. Such activity is clearly permitted by the Board.¹⁰⁵ So, too, is an employer's use of a suggestion box to solicit proposals from individual employees—but not from groups.¹⁰⁶

¹⁰³ *Id.* at 894 n.7. DuPont believed that the committees had not acted in a representational capacity. It urged the Board to adopt a subjective standard, arguing that the committees could not be found to be labor organizations in the absence of testimony by nonparticipating employees showing that "the composition and functioning of the committee[s] led [them] to believe that the employee members were there to represent [their] interests." *Id.*

The Board might have used this opportunity to summarily reject the idea that an employee group must be representative in order to be a labor organization, but it did not. Instead, it rejected the proffered subjective standard, finding the documentary and testimonial evidence on the record supported the judge's finding that the committees had in fact acted in a representational capacity. In his concurring opinion, however, Member Devaney reiterated that he "would require that an employee committee act in a representative capacity in order to be found a statutory labor organization." *Id.* at 903 n.11 (Devaney, concurring).

¹⁰⁴ *Id.* at 894.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The suggestion box procedure was exempted from the reach of § 2(5) by both *Electromation* and *DuPont*, but the Board's reasons for doing so, as a matter of statutory

Employee groups that occasionally make ad hoc proposals to management also seem to be on safe ground, provided that the proposals are not made so often as to become a “pattern or practice.”¹⁰⁷ But on their face, the *DuPont* limits—“isolated instances” of groups making “ad hoc proposals”—do not protect quality circles or quality improvement teams. Groups such as these exist not only to discuss problems and to develop a number of possible solutions, but also to apply the knowledge and expertise of their individual members to arrive at the *best* solution, one which the group will then propose to management.¹⁰⁸ Because the groups are created specifically to make proposals to management, they still seem to be prohibited by the law as it presently stands.¹⁰⁹

Section 2(5) does allow employee groups to make some proposals to management, but the exception is very limited. A quality circle that exists for the purpose of making proposals to management—and thus deals with the employer, according to the NLRB’s *DuPont* definition—would not be considered a labor organization if its proposals do not concern subjects listed in the section: grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. But if those terms are construed to have any breadth at all, virtually any quality circle proposal could “concern” one of them.¹¹⁰ The quality circle that proposed the solution would then be a labor

construction, are unclear. *Electromation* described the procedure as being unilateral, and thus not a type of dealing. *Electromation, Inc.*, 309 N.L.R.B. 990, 995 n.21 (1992), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994). However, it is quite possible to imagine a manager discussing a suggestion box proposal (one that involves a statutory subject such as “conditions of work,” as discussed in note 99) with an employee, sending it back to her for revision, or offering suggestions to improve the proposal, all of which would be “bilateral” exchanges.

DuPont says that the element of dealing is missing because the suggestion box proposal is made by an individual, not a group. *DuPont*, 311 N.L.R.B. at 894. This analysis seems faulty for the same reason. Nothing in the Board’s definition necessarily restricts bilateral exchanges to those between an employer and a group of employees.

In fact, the decisions should have exempted the suggestion box procedure because it does not meet the first element of the statutory definition: no “organization” is involved.

¹⁰⁷ *DuPont*, 311 N.L.R.B. at 894. No case law has yet been developed to define the outer limits of permissible action in this area.

¹⁰⁸ See generally BERRY, *supra* note 28, at 55-74; KATZAN, *supra* note 26, at 21-87.

¹⁰⁹ See *supra* note 98 and accompanying text.

¹¹⁰ For example, crowded conditions in a work area may be the root cause of a quality problem (perhaps by making it difficult for forklift drivers to deliver materials without bumping into bins of finished parts and damaging them, thereby increasing scrap or rework/repair costs). But if open space around one’s work station is a condition of work, a proposal that was intended to solve a quality problem (perhaps by rearranging the shop layout, or by changing material handling methods) would also run afoul of the words of

organization.

Moreover, even if management unilaterally delegates authority to a quality circle to decide on and implement solutions to a limited range of problems (solutions, perhaps, that would be relatively inexpensive to implement), the circle's method of operation might get it into trouble. Although unilateral delegations of authority over conditions of work to groups of employees are permissible under the Act,¹¹¹ most quality circles, at least initially, include at least one supervisor or manager. If the group makes its decisions by majority vote—and workers make up the majority of the group—there is no dealing in violation of the Act.¹¹² But quality circles often make decisions by consensus,¹¹³ so any member—including the supervisor—has the power to effectively veto the circle's decision by preventing a consensus from emerging. Once again, the worker members are put in the position of dealing with a manager who has the power to accept or reject their proposals—and the circle thus becomes a statutory labor organization.¹¹⁴

§ 2(5). See Michigan Note, *supra* note 11, at 1747 n.65 for a discussion of this point.

¹¹¹ See *supra* notes 88–89 and accompanying text.

¹¹² See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 895 (1993).

¹¹³ See BLUESTONE, *supra* note 19, at 242; KATZAN, *supra* note 26, at 111–30. The committees at issue in *DuPont* operated according to rules of consensus decisionmaking, which specified that “consensus is reached when all members of the group, including its leader, are willing to accept a decision.” *DuPont*, 311 N.L.R.B. at 895.

¹¹⁴ See *DuPont*, 311 N.L.R.B. at 895 (noting that if a manager outside the circle had the power to reject a proposal, then the circle's act of making a proposal to the manager would constitute dealing).

Self-directed work groups raise a similar problem. In *Electromation*, the Board observed that “an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5).” *Electromation, Inc.*, 309 N.L.R.B. 990, 995 (1992), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994). Thus, a self-directed work group might be given the authority to determine its own starting and quitting time, or to resolve grievances within the group. In *General Foods*, the employee groups had been given authority to interview job applicants, inspect the plant and report on safety infractions, and set their own starting and quitting times. See *General Foods Corp.*, 231 N.L.R.B. 1232, 1235 (1977). In *Mercy-Memorial Hospital*, a grievance committee composed of four workers and one manager was empowered to rule upon employee grievances by majority vote. See *Mercy-Memorial Hosp. Corp.*, 231 N.L.R.B. 1108, 1119–20 (1977). Provided the group had the power to decide these matters for itself, there would be no dealing, and no conflict with the NLRA. See *DuPont*, 311 N.L.R.B. at 895.

But if the group must meet with management as part of its decisionmaking process, its discussions might rise to the level of dealing. See *DuPont*, 311 N.L.R.B. at 895. For example, in *General Foods*, there was one instance in which the self-directed work groups, as groups, had discussions with management. This event occurred when the groups

B. *The Statutory Subjects of Dealing*

Most of the statutory subjects of dealing¹¹⁵ are more or less self-explanatory,¹¹⁶ but the term “conditions of work”¹¹⁷ requires further definition. Although the Board has not attempted to provide a single definition of “conditions of work,” recent decisions suggest that the Board may equate the entire list in section 2(5) with “mandatory subjects of collective bargaining,”¹¹⁸ a concept developed by the Supreme Court in its interpretation

recommended a holiday schedule change to management. The administrative law judge thought this was “[t]he closest evidence to [group] dealing,” but considered it to be a “*de minimis* and isolated” matter. *General Foods*, 231 N.L.R.B. at 1235. Had the groups met with management more often, the judge’s findings may have been different.

¹¹⁵ These subjects are grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. See 29 U.S.C. § 152(5) (1988).

¹¹⁶ As one commentator observed, almost any work problem could be considered a “grievance.” See Michigan Note, *supra* note 11, at 1747 n.65. Looking to practice as a guide to interpretation, one finds that most union contracts will define a grievance as a dispute that relates in some manner to the proper interpretation or application of the collective bargaining agreement. See COX, *supra* note 10, at 742. Translating this definition into a nonunion setting, a grievance might arise when a worker and manager have a disagreement over the existence or application of a work rule or shop practice—over some element of the “common law of the shop.”

¹¹⁷ The original version of the NLRA contained no reference to “conditions of work.” It defined a labor organization as one that dealt “with employers concerning grievances, labor disputes, wages or hours of employment.” S. 2926, 73d Cong., 2d Sess. § 3 (1934), *reprinted in* 1 NLRB, *supra* note 13, at 2. Introducing this version of the Act, Senator Wagner characterized the company unions he sought to ban as “agenc[ies] for dealing” with precisely these subjects. 78 CONG. REC. 3443, *reprinted in* 1 NLRB, *supra* note 13, at 16. But in the version of the Act adopted the next year, Congress, following the suggestion of the Secretary of Labor, included the phrase “conditions of work.” See STAFF OF SENATE COMM. ON EDUC. AND LABOR, 74TH CONG., 1ST SESS., MEMORANDUM COMPARING S. 1958 WITH S. 2926, at 9 (Comm. Print 1935), *reprinted in* 1 NLRB, *supra* note 13, at 1331. The list of subjects in the final version of the Act had apparently been made as broad as possible in order to reach all company unions. See Kohler, *supra* note 5, at 534 n.202.

¹¹⁸ The Supreme Court recognized the distinction between mandatory and permissive subjects of bargaining in *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342, 349–50 (1958).

The distinction is based on the Court’s reading of §§ 8(a)(5) and 8(b)(3) of the NLRA, which require employers and unions to bargain collectively, and of § 8(d), which defines collective bargaining as a “mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment” See 29 U.S.C. §§ 158(a)(5), 158(b)(3), 158(d) (1988). Those subjects—wages, hours, and other terms and conditions of employment—are mandatory bargaining subjects, which either party may insist upon as a condition of agreement. All other subjects (except

of the NLRA.¹¹⁹ Though equating the two may seem to merely trade one list for another, using the well-established concept of “mandatory subjects” to define “conditions of work” would give some form to an otherwise amorphous category. If the Board does interpret section 2(5) in this way, then an employer could confidently deal with an employee involvement committee over permissive bargaining subjects without running the risk of committing an unfair labor practice.¹²⁰

those that are illegal) are considered permissive subjects. Permissive subjects may be discussed by the parties, and may be incorporated in a collective bargaining agreement, but neither party can insist on a permissive subject or use economic weapons to compel agreement upon it.

¹¹⁹ The opinions of some individual Board members suggest that the Board is moving toward this definition of § 2(5) subjects. In his *Electromation* concurrence, Member Oviatt drew a distinction between “subject matters about which labor organizations traditionally bargain,” which fall within the § 2(5) definition, and “operational problems such as labor efficiency and material waste,” which do not. *Electromation, Inc.*, 309 N.L.R.B. 990, 1004 (1992) (Oviatt, concurring), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994).

Five months later, in *Ryder Distribution Resources, Inc.*, the Board characterized the last element of § 2(5) as requiring the dealings between the employee group and the employer to “concern ‘conditions of work’ or . . . other statutory subjects of bargaining” *Ryder Distribution Resources, Inc.*, 311 N.L.R.B. 814, 817-18 (1993) (emphasis added). The reference to “statutory subjects of bargaining” might simply seem to refer to § 2(5) of the NLRA, but § 2(5) does not address bargaining. The statutory subjects of bargaining are covered in § 8(d) (i.e., mandatory bargaining subjects). *See supra* note 118 and accompanying text.

Again, in *DuPont*, the Board’s analysis of the unfair labor practice charge hinged in part upon the finding that the subjects of committee discussion—incentive awards—were “mandatory subjects of bargaining” that fell within the § 2(5) definition. *See E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 895 (1993) (emphasis added).

Finally, Member Devaney addressed the distinction directly in his concurring opinion to *DuPont*, in which he explicitly analyzed the factual situation to determine whether the employer had dealt with the employee committees over mandatory subjects of bargaining. *Id.* at 902 (Devaney, concurring). He returned to this factor in *Peninsula General Hospital Medical Center*, noting that the dominated labor organization in that case had largely concerned itself with mandatory subjects of bargaining. *See Peninsula Gen. Hosp. Medical Ctr.*, 312 N.L.R.B. 582, 582 n.4 (1993).

¹²⁰ In an April 15, 1993, memorandum to the NLRB’s field offices, the Board’s General Counsel “claimed that it is at least arguable that if the employer deals with a committee only over permissive subjects of bargaining, the committee may fall outside the definition of labor organization and, therefore, may be lawful under the Act.” *NLRB Official’s Memo Warns of Traps in Setting up Involvement Committees*, 31 GOV’T EMPLOYEE REL. REP. 588, 588 (1993).

As in most other areas of labor law, the law distinguishing mandatory from permissive

As the expert agency in charge of administering the NLRA, the Board is free to change particular constructions of the Act, and may "take into account changing industrial realities" when it does.¹²¹ Construing the list of subjects in section 2(5) as "mandatory subjects of bargaining" would not be inconsistent with the legislative history of the Act,¹²² and it would benefit the practice of employee involvement by drawing a brighter—or at least better established—line between subjects that employee involvement groups may freely handle and those over which they must be sure to avoid dealing with management.¹²³

Moreover, such an interpretation would be consistent with the economic

subjects is quite complex. In very general terms, mandatory subjects of bargaining include wages, hours, and other "issues that settle an aspect of the relationship between the employer and employees." *Allied Chem. and Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 178 (1971). Another verbal formulation of this classification is that mandatory subjects are those that are "germane to the working environment." *See Ford Motor Co. v. NLRB*, 441 U.S. 488, 498 (1988) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222 (1964) (Stewart, J., concurring)). At the opposite pole, permissive subjects are those involving managerial decisions "which lie at the core of entrepreneurial control." *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 223 (1964) (Stewart, J., concurring).

¹²¹ *Electromation*, 309 N.L.R.B. at 992 n.9.

¹²² The distinction between mandatory and permissive subjects did not exist at the time the Act was drafted. My point is that the significance of "conditions of work" to the drafters of § 2(5) is questionable. The original 1934 draft of the NLRA contained no reference to "conditions of work." *See supra* note 114. Neither did the first draft of the 1935 version of the bill. *See S. 1958*, 74th Cong., 1st Sess. § 2(5) (1935), *reprinted in* 1 NLRB, *supra* note 13, at 1296. Its inclusion in the final draft of the 1935 bill almost seems to have been an afterthought. (In this regard, it is significant to note that the version of § 2(5) proposed by Mr. Charlton Ogburn on behalf of the American Federation of Labor contained no reference to "conditions of work." *See STAFF OF SENATE COMM. ON EDUC. AND LABOR*, 74TH CONG., 1ST SESS., MEMORANDUM COMPARING S. 1958 WITH S. 2926, at 10 (Comm. Print 1935), *reprinted in* 1 NLRB, *supra* note 13, at 1332).

Given the phrase's uncertain importance, limiting its construction to include only mandatory bargaining subjects does not seem to substantially conflict with the intent of the Act's drafters, especially when one considers that all the other § 2(5) subjects came to be considered mandatory subjects after *Borg-Warner*.

¹²³ This distinction would be beneficial to the practice of employee involvement even if the Board retains its general prohibition of group proposals to management. Because all elements of the statutory definition must be satisfied for a group to be a labor organization, a group could safely make proposals (and thereby deal with management, according to *DuPont*) concerning permissive subjects of bargaining. In this connection, it is important to note that a properly constituted employee involvement group will be tasked with handling *managerial* problems, which typically would be considered permissive subjects (that is, subjects that lie near to "the core of entrepreneurial control"). *Cf. Fibreboard*, 379 U.S. at 223 (Stewart, J., concurring).

theory underlying the Act. Most economists treat unions as labor cartels.¹²⁴ Following this explanation of the function of unions, Judge Richard Posner has postulated that the NLRA is a “device for facilitating . . . the cartelization of the labor supply by unions.”¹²⁵ From this thesis, one can infer that employer actions that do not interfere with the ability of unions to organize (“cartelize”) workers will not contravene the Act. By pretending to offer some of the benefits of unionization to workers¹²⁶ without the costs,¹²⁷ company unions clearly interfere with the unions’ organization of the labor force.¹²⁸ That is not the case when employee groups deal with their employer concerning permissive bargaining subjects. Although unions are free to discuss such subjects with willing employers, they cannot use their cartel powers to force agreement.¹²⁹ Therefore, when participatory management groups deal with their employers over permissive subjects, they do not offer competition to the NLRA-sanctioned labor cartel, since the NLRA has not given the cartel any unique powers in this area. Because the groups’ activities do not conflict with the underlying purposes of the Act, the Act should not be read to prohibit them.¹³⁰

¹²⁴ See Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 999 (1984).

¹²⁵ *Id.* at 990.

¹²⁶ Company unions appear to offer representation, and organized discussions with the employer, if not bargaining.

¹²⁷ Being employer sponsored, company unions need charge no dues, and they avoid the real risk of alienating the employer.

¹²⁸ See *supra* part II.A; see generally Posner, *supra* note 124.

¹²⁹ See *supra* note 118 and accompanying text.

¹³⁰ This discussion of cartel theory and its implications for interpretation of the NLRA is necessarily quite terse. For a more complete explanation, see Posner, *supra* note 124.

A more difficult question would arise if an employer offered to deal with its employees over permissive bargaining subjects as an explicit alternative to unionization. (Employee involvement has been used by employers as an anti-union tactic. See BLUESTONE, *supra* note 19, at 168). In theory, such an offer could be considered a *de facto* recognition by the employer of the nascent employee involvement group as a *bargaining* representative of the workers (since the proposal is but a thinly veiled offer to reach a compromise with its employees, and there is nothing in the law to prevent willing parties from bargaining over permissive subjects). Cf. *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 903 n.12 (1993) (Devaney, concurring) (observing that “tacit recognition of a bargaining agent” could occur in this way). Although the group may still not meet the statutory definition of a labor organization, an employer that bargained with a group it established—no matter what the subject—would surely interfere with the right of its employees to bargain collectively through representatives of their own choosing, and thereby commit an unfair labor practice in violation of § 8(a)(1) of the Act. See 29 U.S.C. §§ 157, 158(a)(1) (1988).

C. *The Representation Question*

Whether employee involvement groups must be found to act in a representative capacity before they can be considered labor organizations is a question of vital importance to the future of the participatory management movement and perhaps to the future competitiveness of the American economy.¹³¹ As we have seen, many common forms of participatory management are designed to harness the creativity and specialized knowledge of hourly workers and to apply those abilities not just to scattergun problem solving but to the formation of carefully considered proposals for corporate action.¹³² Under the present interpretation of section 2(5), employee groups that submit proposals to management deal with their employer and will be considered statutory labor organizations if their proposals concern "conditions of work" or other subjects listed in the section.¹³³ Even if the subject list in section 2(5) is interpreted to cover only mandatory subjects of collective bargaining, any proposal meant to address a permissive subject may well have enough of an effect on a mandatory subject to bring the proposal across that ill-defined line, transforming the group that made the proposal into a statutory labor organization.¹³⁴ Finally, self-directed work groups might also end up dealing with their employer if their necessary interactions with the employer rise to the level of "proposals" that occur more frequently than "isolated instances."¹³⁵

Interpreting section 2(5) to require an employee group to act in a representative capacity before finding it to be a statutory labor organization would largely solve these problems. Employee groups could be used to research managerial problems—ones that pertain to matters such as productivity and product quality—and submit proposed solutions. They could consider subjects that have effects on their working conditions—the very matters upon which their expertise will be most valuable. Self-directed work groups could freely discuss matters with their managers without running the risk of establishing a "pattern or practice" of making proposals to management.

At least one commentator has suggested that section 8(a)(2) should be repealed, believing that the general prohibition of employer interference with the right of workers to organize themselves and select a bargaining representative of their own choosing is sufficiently protective of workers'

¹³¹ See generally BLUESTONE, *supra* note 19, at 3-30 (discussing the importance of employee involvement to the competitiveness of American business).

¹³² See *supra* part II.B.

¹³³ See *supra* part III.C.

¹³⁴ See *supra* part IV.B.

¹³⁵ See *supra* part IV.A.

rights.¹³⁶ Whether this contention is true or not, the fact remains that employers *do* interfere with attempts by their workers to organize themselves and *have* set up in-house labor organizations dressed up as participatory management programs as a means of forestalling union organizing campaigns.¹³⁷ Because this type of unfair labor practice persists, the section of the NLRA meant to address it should not be eviscerated. Neither should it be interpreted so broadly as to chill the development of genuine worker-management cooperation.

Requiring a showing that the group acted as a representative of other workers before finding it to be a labor organization would accomplish both goals. It would be consistent with the original aims of the NLRA as they are seen both in the legislative history of the Act¹³⁸ and in a contemporaneous study of the phenomenon of company unionism.¹³⁹ It would also comport with the economic theory underlying the Act: groups of employees that do not act in a representative capacity do not compete with unions for that right, and so do not pose a threat to the process of labor supply cartelization sanctioned by the NLRA.¹⁴⁰

The representative nature of employee groups could be objectively tested by three indicia.¹⁴¹ First, if an employer bargains with an employee group, the

¹³⁶ See Shaun G. Clarke, Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987). The author refers to § 8(a)(1), which makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of" their statutory rights, including the right to self-organization. See 29 U.S.C. § 157, 158(a)(1) (1988).

¹³⁷ See, e.g., *Ryder Distribution Resources, Inc.*, 311 N.L.R.B. 814, 818 (1993); *Salt Lake Div., a Div. of Waste Mgmt. of Utah, Inc.*, 310 N.L.R.B. 883, 910 (1993); *Research Fed. Credit Union*, 310 N.L.R.B. 56, 65 (1993).

¹³⁸ See *supra* part III.B.

¹³⁹ See BUREAU OF LABOR STATISTICS, *supra* note 5, at 3-4.

¹⁴⁰ The analysis in Part IV.B pertaining to subjects of bargaining applies with equal force to the issue of representation.

¹⁴¹ In following the NLRB's doctrinal development in *Electromation* and *DuPont*, this Note has focused upon the dealings between employee groups and management. Furthermore, this Note presupposes that employee groups are formed by management in accordance with the management theorists' models discussed in Part II.B.1.

Questions germane to the representative status of a labor organization could also arise in the context of the organization's formation. If an organization was formed by the employees themselves, or staffed with employees elected to their positions, it would be difficult to find that it "was established . . . as an agent of the employer"—and thus was not a representative of the employees—even if it never discussed subjects such as wages and benefits with the employer. See *infra* note 143 and accompanying text. Conversely, an organization formed by management and staffed with employees selected by management would objectively be seen as an agent of the employer provided it did not bargain with the

employer gives it de facto recognition as the bargaining representative of at least the employees within the group.¹⁴² While the relationship between employees and their employer is both adversarial and cooperative, adversarial matters are properly ones for labor unions to handle. If management bargains with one of its employee groups—regardless of the subject matter of the bargaining—the relationship becomes adversarial, and warrants an inference that the group has begun to act in a representative capacity. Second, discussion by the employer and the group of matters directly affecting the allocation of scarce resources (such as hourly wages or benefits) would justify a finding of representation. These subjects are least likely to concern former management functions that have been legitimately delegated to a quality circle or quality improvement team. Moreover, they are subjects upon which workers are most likely to want union representation because discussion of them would necessarily be adversarial—resources devoted to wages cannot be used to pay managers' salaries. Third, as Member Devaney suggested in his *Electromation* concurrence, "evidence that a committee was established and unambiguously served as an agent of the employer [would] be evidence that the committee lacked a representational purpose."¹⁴³

V. CONCLUSION

The last fifteen years have witnessed developments in worker-management cooperation unforeseen by the drafters of the NLRA. Because some employers do attempt to cloak the dominated labor organizations they use to ward off union organizing efforts in the garb of employee involvement or participatory management, some company union problems do remain. Fortunately, these situations are rare. In contrast, large numbers of American businesses—and a significant number of unions—have experimented with employee involvement, with positive results in productivity and product or service quality.

Some commentators have concluded that the NLRA will have to be amended to prevent its anticcompany union provisions from crippling this vital development in cooperative relations. Such action seems premature. The NLRB has made appreciable progress toward delineating an area under the Act in which employee involvement groups will be free to operate. In addition, the

employer or discuss matters directly affecting allocation of scarce resources (such as compensation). In any event, like most questions in labor law, the significance of the various indicia regarding a group's formation and its interactions with an employer would have to be weighed on a case-by-case basis.

¹⁴² See *supra* note 130.

¹⁴³ *Electromation, Inc.*, 309 N.L.R.B. 990, 1002 n.20 (1992) (Devaney, concurring), *enforced*, Nos. 92-4129 and 93-1169, 1994 WL 502513 (7th Cir. Sept. 15, 1994).

Board's recent opinions suggest that when an appropriate case arrives, the pertinent statutory definition will be interpreted to require that an employee involvement group act in a representative capacity before it will be found to be a company-dominated labor organization instead of a legitimate management tool. This interpretation will permit the NLRA to accommodate today's economic reality, in which both cooperative and adversarial labor relations exist.

