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The Future of Labor-Management Cooperation Following Electromation and E.I. Du Pont

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I. INTRODUCTION

In an increasingly competitive and global marketplace, traditional adversaries are finding it advisable to realign their allegiances to achieve common goals. This is also true of labor-management relations. Employers and employees have increasingly recognized the need to work together to increase productivity and quality for the company, thus improving quality of life for the employees.¹ The usual, and most problematic, form of the resulting labor-management cooperation efforts are committees involving employees which provide management with their expertise and perspective on various workplace issues.² Currently, such committees are vulnerable to attack as unlawful labor organizations if they are found to be dominated by the employer.


² See Barry Bluestone & Irving Bluestone, Negotiating the Future 3 (1992). Bluestone notes several of the different types of these committees which have developed around different theories and in divers workplaces, all of which come under the aegis of "labor-management cooperation." Id. For the sake of consistency and in order to focus on legal rather than business management theory, these committees will be referred to generically throughout this Comment as labor-management cooperation efforts. For a more detailed analysis of some of the theory behind the different models of labor-management cooperation, see generally U.S. Dept. of Labor, Employment and Training Administration, Workforce Quality: Perspectives from the U.S. and Japan (1990); U.S. Dept. of Labor, Bureau of Labor-Management Relations and Cooperative Programs, Productivity and Employment: Challenges for the 1990s (1988); William B. Gould IV, Japan's Reshaping of American Labor Law (1984); Robert M. Marsh and Hiroshi Mannari, Modernization and the Japanese Factory (1976); Clyde W. Summers, An American Perspective of the German Model of Worker Participation, 8 Comp. Lab. L.J. 333 (1987).
One response to this cooperative exception to the traditional adversity between labor and management has been a more lenient judicial interpretation of the collective set of factors that constitute unlawful employer domination or interference with the formation or administration of a labor organization under the National Labor Relations Act\(^3\) [hereinafter NLRA]. However, two recent National Labor Relations Board [hereinafter NLRB] decisions appear to contradict this nascent trend by returning to the traditional definition of unlawful domination. These two cases, Electromation, Inc.\(^4\) and E.I. du Pont de Nemours & Co.,\(^5\) pose a challenge not only to a developing doctrine, but also to a now widely acknowledged business necessity.

Approximately 14% of all corporations, and 33% of all corporations with 500 or more employees, had instituted labor-management cooperation efforts by 1982.\(^6\) A 1991 survey indicated widespread recognition of the advantages of labor-management cooperation efforts in the workplace.\(^7\) In 1993, two bills presented to Congress revealed that 80% of the largest businesses in the United States, constituting 30,000 workplaces, had "employee involvement structures."\(^8\) Further, in June 1994, the Commission on the Future of Worker-Management Relations issued an interim report finding that labor-management cooperation efforts affect between one-fifth and one-third of the workforce today.\(^9\) In several well-publicized cases, significantly beneficial results for both the company and its employees have been attributed to these pro-

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7. See generally Brian S. Moskal, Is Industry Ready for Adult Relationships?, INDUSTRY WK., Jan. 21, 1991, at 18. The advantages accrue to employers through better quality, productivity and customer service as well as to employees through greater involvement in the management of the company and the concomitant increase in control over their own destiny. Id. at 22.
grams. The Department of Labor has acknowledged this trend and "taken a strong position in support of labor-management cooperation as an important prerequisite to America's return to preeminence in the world marketplace." Secretary of Labor, Robert Reich, is also an advocate of labor-management cooperation programs, despite the Clinton administration's general sympathy and support for the union perspective which has always been generally suspicious of the motives behind labor-management cooperation.

Electromation and E.I. du Pont are viewed by many management representatives as a major impediment to the labor-management cooperation now widely accepted as a requirement for successful competition in the global marketplace. Faced with the fact-dependent and ambiguous Electromation and E.I. du Pont standards, companies tend to either eliminate all labor-management committees to avoid litigation, de-


11. See Bureau of Labor-Management Relations and Cooperative Programs, U.S. Department of Labor, U.S. Labor Law and the Future of Labor-Management Cooperation 2 (1986). Unfortunately, the Bureau does not reach a conclusion regarding the means to resolve the conflict between labor-management cooperation and the traditionally adversarial employer-employee relationship under the NLRA. See also Joy K. Reynolds, A Perspective on the Electromation Case From the U.S. Department of Labor, 43 Lab. L.J. 397, 397 (1992) ("We believe that such joint efforts on the part of workers and employers offer the best hope for improving the competitiveness of U.S. companies.").


spite their beneficial value, or to flout these standards altogether and continue to encourage labor-management cooperation efforts despite the prospect of litigation.\textsuperscript{14} Obviously, a less equivocal standard is needed.

This comment examines the current standards and opposing perspectives on the problem of labor-management cooperation and supports a legislative amendment to section 8(a)(2) of the NLRA. Part II reviews the legislative background\textsuperscript{15} and judicial and agency interpretations of the provision,\textsuperscript{16} including the developments in \textit{Electromation} and \textit{E.I. du Pont}.\textsuperscript{17} Part III analyzes the competing theories regarding labor-management cooperation in the context of a variety of proposals that have been offered from various quarters, including judicial resolution\textsuperscript{18} and legislative resolution.\textsuperscript{19} Part IV analyzes a proposed legislative amendment that would encompass the concerns of the unions, as well as employees and employers.\textsuperscript{20}

\section*{II. BACKGROUND}

\subsection*{A. Overview}

Unions historically oppose the trend towards labor-management cooperation efforts because it appears not only to pose a threat to their role as the bargaining unit representative, but also seemingly contradicts traditional labor law principles. When the NLRA was enacted in 1935,\textsuperscript{21} there was a major concern with company-dominated unions which had begun to appear in the early twentieth century, and which proliferated after the enactment of the National Industrial Recovery Act of 1933.\textsuperscript{22} Many employers created "sham" company unions to avoid being compelled to bargain with an

\begin{itemize}
\item \textsuperscript{15} See infra part II.B.
\item \textsuperscript{16} See infra part II.C.
\item \textsuperscript{17} See infra part II.D.
\item \textsuperscript{18} See infra part III.B.
\item \textsuperscript{19} See infra part III.C.
\item \textsuperscript{20} See infra part IV.
\item \textsuperscript{22} 78 Cong. Rec. 3443 (1934) (statement of Sen. Wagner on the introduction of the NLRA bill in the Senate), \textit{reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 15-16 (1949) [hereinafter Legis. Hist.-NLRA]}. 
\end{itemize}
The company union was perceived as a threat to the NLRA goal of industrial peace because employer-dominated unions did not provide a meaningful opportunity for collective bargaining. Congress concluded that employees' best interests could only be impartially represented by an independent organization.

The passage of NLRA section 8(a)(2) made it an unfair labor practice to "dominate or interfere with the formation or administration of a labor organization." NLRA section 2(5) defined a labor organization as "any organization . . . which exists for the purpose, in whole or in part, of dealing with employers" concerning the usual bargaining issues. These provisions were included to ensure that employers would not circumvent the purpose of the newly validated labor organizations and upset the balance of bargaining power established by the NLRA. An employer was thus prevented from acting as a "sham bargaining agent," obstructing organization and bargaining efforts.

The first case decided by the NLRB addressed the issue of employer-dominated labor organizations. Since that time, the NLRB and the courts have broadly interpreted both the definition of a "labor organization" and the standard for employer "domination" to restrict employer evasions of the section 8(a)(2) prohibition against domination or interference.
with the formation or administration of a labor organization.\textsuperscript{30} In order to find that a "labor organization" exists, three elements must be met: (1) employees must participate; (2) the organization must exist for the purpose of "dealing with" the employer; and (3) the dealing must concern conditions of employment.\textsuperscript{31}

In \textit{NLRB v. Cabot Carbon Co.},\textsuperscript{32} the Court defined "dealing" as a more encompassing term than mere "bargaining."\textsuperscript{33} Accordingly, even if a labor-management cooperation committee does not literally \textit{bargain} with the employer, it may still be held to be a labor organization under section 2(5) if its actions fall under the broader definition of \textit{dealing} with the employer.\textsuperscript{34} Unfortunately, the Court did not elaborate on this definition and subsequent case law developed a number of different tests to identify a "labor organization," including the subject matter of discussion, the function and form of the group, employer intent and employee participation, and the authority of the group.\textsuperscript{35} In \textit{NLRB v. Newport News Shipbuilding & Drydock Co.},\textsuperscript{36} the Court indicated that a certain degree of structural dependence of a joint committee on an employer would constitute unlawful domination by the employer in violation of section 8(a)(2).\textsuperscript{37}

This broad definition of an employer-dominated labor organization thus limits recent labor-management cooperation efforts whenever these efforts have any structural link to the employer or include any sort of dealing with the employer. Given the goal of cooperation, such interactive contacts are

\textsuperscript{30.} Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978) (affirming that the NLRB is the body established by Congress to interpret the NLRA, subject to limited judicial review).
\textsuperscript{33.} \textit{Cabot Carbon}, 360 U.S. at 211.
\textsuperscript{34.} \textit{Id.} at 211-13.
\textsuperscript{35.} \textit{See generally} Michael S. Beaver, \textit{Are Worker Participation Plans "Labor Organizations" Within the Meaning of Section 2(5)?: A Proposed Framework of Analysis}, \textit{36 Lab. L.J.} 226 (1985).
\textsuperscript{36.} 308 U.S. 241 (1939); \textit{see supra} part II.C.1.
\textsuperscript{37.} \textit{Newport News}, 308 U.S. at 251. The Court established this standard despite evidence that the employees actively supported the joint committee and that the joint committee had been founded with a noncoercive purpose. \textit{Id.} at 244.
nearly impossible to avoid. In *Electromation, Inc.*,\(^{38}\) the NLRB determined that the presence of several action committees established by the employer to involve employees in problem-solving constituted a violation of section 8(a)(2) because they were employer-dominated and because they existed to "deal with" the employer.\(^ {39}\) NLRB Chairman James Stephens wrote the plurality opinion which was accompanied by three concurrences by the remaining members of the NLRB. Each concurrence presented a different perspective on the majority's enforcement of the traditional two-part test (domination/labor organization), and each emphasized the importance of labor-management cooperation efforts in the workplace and of allowing for greater latitude for their support.\(^ {40}\)

Despite this apparent diversity of perspective throughout the NLRB, the *Electromation* case was not an aberration. In *E.I. du Pont de Nemours & Co.*,\(^ {41}\) the NLRB again held that several action committees created by the employer were labor organizations because they were "dealing" with the employer in a way that did not fall into any of the narrow exceptions since they functioned to make group proposals to the employer rather than as individual communication devices.\(^ {42}\) In *E.I. du Pont*, the NLRB made no effort to limit the definition of the "dealing" which constitutes a labor organization, although it did provide a clearer explanation of the activities that constitute "dealing." Once again, NLRB Member Dennis M. Devaney concurred but wrote separately to emphasize that "the Board should focus enforcement of the provision on the specific evils" targeted by Congress, while otherwise leaving employers free to interact with their employees to effect labor-management cooperation.\(^ {43}\) The primary evil addressed by the NLRA is industrial strife, but the specific goal of section 8(a)(2) is ensuring impartial representation.

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40. *Id.* at 998-1015 (Devaney, M., Oviatt, M., and Raudabaugh, M., concurring).

41. 311 N.L.R.B. 893 (1993); see supra part II.D.2.


43. *Id.* at 899 (Devaney, M., concurring).
B. Legislative History of the NLRA

The NLRA was enacted in 1935 to eliminate industrial warfare occasioned by the unfair balance of power between employers and employees by establishing a framework within which conflicts could be resolved. To accomplish this purpose, the NLRA established the rights of employees to organize and bargain collectively with employers. The company union was recognized as one of several threats to the balance of power and concomitant employee rights.

Ironically, the concept of company unions was first introduced in the early part of the twentieth century by reformers seeking, for philosophical or religious reasons, to democratize the workplace and make it more productive. With the increasing strength and numbers of organized labor, some busi-

44. See S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935) ("The first objective of the bill is to promote industrial peace."); reprinted in 2 LEGIS. HIST.-NLRA, supra note 22, at 2300; see also S. 2926, 73d Cong., 2d Sess., title 1, § 2 (1934), reprinted in 1 LEGIS. HIST.-NLRA, supra note 22, at 1 (stating purpose of bill is to encourage "the equalization of bargaining power of employers and employees, [and provide] agencies for the peaceful settlement of disputes").

45. National Labor Relations (Wagner) Act, ch. 372, § 7, 49 Stat. 452 (1935) (amended by ch. 120, title I, § 101, 61 Stat. 140 (1947)) (current version at 29 U.S.C. § 157 (1988)). Section 7 provided that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or mutual aid or protection." Id.

46. Senator Wagner viewed the company union as the most significant threat to the goals of the NLRA. 78 CONG. REC. 3443 (1934) (introductory statement of Sen. Wagner), reprinted in 1 LEGIS. HIST.-NLRA, supra note 22, at 15-18 (1949).

47. See generally SAMUEL HABER, EFFICIENCY AND UPLIFT 124-25 (1964). As the title of this book suggests, there has been an ongoing American obsession with the twin goals of commercial efficiency and industrial democratization. The prime example of the former goal is Frederick W. Taylor's theory of "scientific" industrial management which envisioned the workplace (viz., the factory) as one great machine wherein maximum efficiency was achieved by scientific systemization of tasks, streamlining of tools and procedures, and the provision of incentives by management, id. at 21-26, resulting in a "radical separation of thinking from doing," id. at 24. Variations on the theory of scientific management, notably by Henry Ford, developed throughout the 1910's and 1920's. Id. at 160-67. However, the best recognized aspect of Taylorism today is its impact on industrial democratization. Id. at 167. Various theories of industrial democratization developed alongside Taylorism but posited that improving the condition of the individual employee would have the effect of greater commercial efficiency while Taylorism relied on the work ethic to improve the human condition. Id. at 20. Theories of industrial democracy were based on religious and social motives, as well as more practical motives such as fending off trade unions. Id. at 124-25.
nesses instituted company unions, ostensibly to appease their workforces while still maintaining control over the means of labor organization. During World War II, the War Labor Board encouraged the formation of employee committees to increase efficiency and productivity. These were established and operated under management control, and some continued to function after the War Labor Board authorization ceased.

The National Industrial Recovery Act of 1933 contained the prototype for section 7 of the NLRA. Employers refashioned their company unions to comply with the new law by eliminating the appearance of management presence on the committees, even though management still created these employee representation committees and thus continued to exercise considerable power. Further, there was a marked increase in the number of company unions, as many non-organized employers sought to avoid being forced to deal with an external organization. In 1933, 45% of employees were "represented" by company unions while only 9.3% of employees were dealing with employers through trade unions.

1. NLRA Section 8(a)(2)

Section 8(a)(2) was enacted specifically to counteract the evils associated with company unions and employee rep-

48. See generally Ernest R. Burton, Employee Representation (1926); Carroll E. French, The Shop Committee in the United States (1923).
54. The section provides that, It shall be an unlawful labor practice for an employer (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That
representation committees.\textsuperscript{55} Such employer constructs threatened the balance of power established through the collective bargaining framework by implementing spurious representation which was not in the employees' best interests.\textsuperscript{56} The original draft of this provision made it an unfair labor practice for an employer to “initiate, participate in, supervise, or influence the formation, constitution, bylaws, other governing rules, operations, policies or elections of any labor organization.”\textsuperscript{57} The provision was later modified to allow employees to “confer with [the employer] during working hours without loss of time or pay” based upon testimony at the Congressional hearings that certain unaffiliated employee organizations confined to representing employees on a single employer basis often operated in an amicable and cooperative atmosphere.\textsuperscript{58}

The phrase “to dominate or interfere with the formation or administration” was substituted for the more inclusive original language upon recognition that an employer might initiate a labor organization amongst its employees without posing a threat to its employees' freedom of choice of a bargaining representative.\textsuperscript{59} Although the formative stage of organization was viewed as most susceptible to interference by

\begin{itemize}
\item subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.
\end{itemize}


56. See 78 Cong. Rec. 3443 (1934) (introductory statement of Sen. Wagner), \textit{reprinted in} 1 LEGIS. Hist.-NLRA, \textit{supra} note 22, at 15; \textit{see also} Labor Disputes Act: Hearings on H.R. 6288 Before the House Comm. on Labor, 74th Cong., 1st Sess. 15 (1935)(statement of Sen. Wagner), \textit{reprinted in} 2 LEGIS. Hist.-NLRA, \textit{supra} note 22, at 2489. "Collective bargaining becomes a sham when the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing." \textit{Id.}

57. S. 2926, 73d Cong., 2d Sess. § 5(3) (1934), \textit{reprinted in} 1 LEGIS. Hist.-NLRA, \textit{supra} note 22, at 3.


59. See Labor Disputes Act: Hearings on H.R. 6288 Before the House Committee on Labor, 74th Cong., 1st Sess. 15 (1935) (statement of Sen. Wagner, explaining that the focus should be on whether or not the organization itself is “independent of the employee-employer relationship”), \textit{reprinted at} 2 LEGIS. Hist.-NLRA, \textit{supra} note 22, at 2489.
the employer, an employer's mere suggestion that its employees organize (thus "initiating" a labor organization) did not rise to the level of "domination" and "interference." Thus, section 8(a)(2) was narrowed somewhat from its original sweeping scope to acknowledge realistic communications between labor and management, without eliminating restrictions against sham bargaining and similar representative efforts.

2. NLRA Section 2(5)

An understanding of the term "labor organization" in section 8(a)(2) is essential to the analysis of employer domination. However, section 2(5) is not entirely enlightening on its face and reference to the legislative history of the provision is necessary. The term "labor organization" was broadly defined to generically incorporate any group which could conceivably serve as a bargaining representative for employees. The NLRB was given wide latitude to interpret the NLRA provisions, subject to judicial review, and thus to further refine the definition. Senator Wagner himself emphasized that "nothing in the measure discourages employees from uniting on an independent- or company-union basis, if by these terms we mean simply an organization confined to the limits of one plant or one employer. Nothing in the bill

60. "Such interferences exist when employers actively participate in framing the constitution or bylaws or labor organizations." S. Rep. No. 573, 74th Cong., 1st Sess. 10 (1935), reprinted in 2 Legis. Hist.-NLRA, supra note 22, at 2309.


62. This section provides that,

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


64. Beth Israel Hosp. v. NLRB, 437 U.S. 483, 500-01 (1978) (affirming that the NLRB is the body established by Congress to interpret the NLRA).
prevents employers from maintaining free and direct relations with their workers . . . .”

The term “labor organization” was originally defined as, “any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, or hours of employment.” However, the final Act was re-worded to include a specific reference to a common form of employer-dominated unions: the employee representation committee. The “employee representation committee” was a familiar form of company-dominated union in 1935, and was the specific type of organization which section 8(a)(2) was enacted to enjoin.

Thus, this definition requires three elements: (1) an organization, agency, or employee representation committee or plan; (2) employee participation; and (3) the purpose of dealing with employees concerning mandatory bargaining subjects. An organization existing for other purposes would not qualify as a labor organization under the NLRA. Thus, it was observed that certain types of employer-employee communication, not otherwise outlawed, were lawful, since the goal of the NLRA was to “remove from the industrial scene unfair pressure, not fair discussion.” Further, it was recognized that employees were under no obligation to exercise their section 7 rights to self-organization and collective bargaining, in which case any labor-management cooperation effort might

69. S. Rep. No. 1184, 73d Cong., 2d Sess. (1934), reprinted in 1 Legis. Hist.-NLRA, supra note 22, at 1104. “[T]heir abuses do not seem . . . so general that the Government should forbid employers to indulge in the normal relations and innocent communications which are part of all friendly relations between employer and employee.” Id.
be lawful, regardless of the amount of employer domination involved.70

3. The Taft-Hartley Amendments to the NLRA

In 1947, the NLRA was amended by the Taft-Hartley Act.71 The overriding concern of the Taft-Hartley amendments was the rapidly expanding power of the unions.72 Among the proposed provisions was one that would have allowed the formation of employee committees by an employer for discussion of the usual bargaining subjects even if the employees had no bargaining representative.73 Instead, the final version amended NLRA section 9(a).74 The initial proposal was rejected as redundant since the NLRA did not include the right to refrain from exercising employee rights under the NLRA. 29 U.S.C. § 157 (1935). See also To Create a National Labor Relations Board: Hearings on S. 2926 Before the Senate Committee on Education and Labor, 73d Cong., 2d Sess. 9 (1934) (statement of Sen. Wagner), reprinted in, 1 LEGIS.-NLRA, supra note 22, at 39:

Let me make it absolutely clear that the bill does not in any way impair the rights of employees to organize on the single employer or company union basis, if that is their desire. It simply forbids employers to force development along such lines alone, and prevents them from dominating their workers when the workers desire a company union.

Id.

70. Section 7 includes the right to refrain from exercising employee rights under the NLRA. 29 U.S.C. § 157 (1935). See also To Create a National Labor Relations Board: Hearings on S. 2926 Before the Senate Committee on Education and Labor, 73d Cong., 2d Sess. 9 (1934) (statement of Sen. Wagner), reprinted in, 1 LEGIS.-NLRA, supra note 22, at 39:


72. See Labor Management Relations (Taft-Hartley) Act, Ch. 120, title 1, § 101, 61 Stat. 136 (1947), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 2 (1947) [hereinafter LEGIS. HIST.-LMRA]. See also Cox, supra note 23, at 93-94. The introductory report for this legislation cataloged a number of abuses to which employees and employers had been subject since the passage of the NLRA in 1935 at the hands of unions and urged the passage of legislation to reestablish an equitable balance of power in the workplace. H.R. REP. No. 245, 80th Cong., 1st Sess. 3-4 (1947), reprinted in 1 LEGIS. HIST.-LMRA, at 295-96 (1947).

73. The relevant provision reads as follows:

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

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

H.R. 3020, 80th Cong., 1st Sess. § 8(d)(3) (1947), reprinted in 1 LEGIS. HIST.-LMRA, supra note 72, at 56.

74. Section 9(a) allows employers to adjust grievances presented to them by employees, "as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further,
explicitly prevent employees from meeting with their employer, and the revision to section 9(a) conceded to employers the capacity to answer employee grievances.\textsuperscript{75} Thus, even in 1947, twelve years after the passage of the NLRA, there was still a pronounced concern about company unions and preventing their resurgence.\textsuperscript{76} Although the Taft-Hartley amendment did not affect the definition of a labor organization,\textsuperscript{77} and attempts to specifically amend section 8(a)(2) were rejected,\textsuperscript{78} the scope of lawful employer-employee communications was slightly expanded by allowing employers to respond to their employees' grievances.

4. Summary

Although Congress enacted section 8(a)(2) to address the prevalent threat to industrial peace imminent in the continued existence of company unions, specifically employee representation committees, section 8(a)(2) still appeared to allow some limited room for employee-employer communications. This is suggested by both the modifications to the original Wagner Act and by the Taft-Hartley amendments.

C. Judicial and Agency Interpretation

1. \textit{NLRA Section 8(a)(2)—Newport News and Employer Domination}

The Supreme Court ruled early and only once, in \textit{NLRB v. Newport News, Shipbuilding & Drydock Co.},\textsuperscript{79} on whether employee committees violate section 8(a)(2) prohibitions against domination and interference. In \textit{Newport News}, the employer had established an employee committee in 1927 in cooperation with its employees in order to “give employees a voice in respect of the conditions of their labor and to provide a procedure for the prevention and adjustment of future dif-

\footnotesize{\textsuperscript{75} See H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 45 (1947), reprinted in 1 LEGIS. HIST.-LMRA, supra note 72, at 549.}

\footnotesize{\textsuperscript{76} H.R. Min. Rep. No. 245, 80th Cong., 1st Sess. 86 (1947), reprinted in 1 LEGIS. HIST.-LMRA, supra note 72, at 376.}

\footnotesize{\textsuperscript{77} See id. at 33, reprinted in 1 LEGIS. HIST.-LMRA, supra note 72, at 537.}

\footnotesize{\textsuperscript{78} See 93 CONG. REC. S6600 (daily ed. June 5, 1947), reprinted in 2 LEGIS. HIST.-LMRA, supra note 72, at 1539.}

\footnotesize{\textsuperscript{79} 308 U.S. 241 (1939).}
ferences." Several joint committees, composed of five representatives elected by the employees and five representatives selected by management (none of whom were supervisors), administered the plan. Management's representatives were "to keep the management in touch with the representatives and represent the management in negotiations with their officers and committees."

The plan was amended several times to consolidate the committees, but retained an equal number of representatives from both management and the employees. In 1937, after the validity of the NLRA had been sustained by the Supreme Court, the plan was revised, on approval of employees and management. The revised plan eliminated payment of compensation to the elected representatives, and established an "Employees' Representation Committee" composed solely of employees in place of the bipartisan committee, the actions of which were final on approval by the company. A poll of the employees revealed an overwhelming majority approval of the plan as revised.

The Court concurred with the findings of the NLRB that, despite the 1937 revisions, the organization had historically been dominated and controlled by the employer and that the purpose of section 8(a)(2) could only be achieved by the disestablishment of the committee. Having made this finding, the Court did not reach the issue of whether the committee, as revised, was in compliance with section 8(a)(2). The NLRB decision designated various contentions made by the employer regarding the revised committee as irrelevant. Instead, the NLRB concentrated on the fact that management approval was still necessary for committee action to be effective or to amend the plan, which led the NLRB to the conclusion that the employer still unlawfully dominated the com-

80. Id. at 244.
81. Id. at 244-45.
82. Id. at 245.
83. Id.
85. Id. at 246-47.
86. Id. at 248.
87. Id. at 251.
88. Id. at 250. The Court passed on the issue of whether the committee was a labor organization, not whether the committee had been dominated. Id. at 251 (1939).
mittee.\textsuperscript{89} The Court approved the NLRB's disestablishment order and failed to reach the issue of whether the revised committee was legal.\textsuperscript{90} The Court concluded that "it was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force."\textsuperscript{91}

2. Alternative Interpretations of Section 8(a)(2)

Domination

Not all the circuit courts have followed Newport News. One line of interpretation has relaxed the standard for finding domination to allow for the possibility of labor-management cooperation.\textsuperscript{92} This interpretation requires that actual (as opposed to inferred) domination be found to demonstrate an unfair labor practice under section 8(a)(2),\textsuperscript{93} and proposes a subjective test from the employees' standpoint to determine the existence of domination.\textsuperscript{94} One court stated, "[a] line must be drawn . . . between support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention."\textsuperscript{95}

This interpretation has been followed and expanded upon in other circuit courts.\textsuperscript{96} The subjective test continues

\begin{itemize}
\item \textsuperscript{89} NLRB v. Newport News, Shipbuilding & Drydock Co., 308 U.S. 241, 249 (1939).
\item \textsuperscript{90} Id. at 250.
\item \textsuperscript{91} Id. at 251.
\item \textsuperscript{92} Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165, 168 (7th Cir. 1955). The court noted that "[n]either mere cooperation, preference nor possibility of control constitute unfair labor practices; and the Board may not infer conduct that is violative of the Act from conduct that is not, unless there is a substantial basis, in fact or reason, for that inference." Id. at 168.
\item \textsuperscript{93} Id. at 168.
\item \textsuperscript{94} Id. The Chicago Rawhide court also laid a heavy emphasis on the motives of the employer. Id. at 167.
\item \textsuperscript{95} Id.
\item \textsuperscript{96} See NLRB v. Homemaker Shops, Inc., 724 F.2d 535 (6th Cir. 1984); NLRB v. Northeastern Univ., 601 F.2d 1208 (1st Cir. 1979); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974), cert. denied, 423 U.S. 875 (1975); Mod-
to require that the employer has *actually* interfered with and
dominated the employees' freedom of choice and the test for
this interference remains subjective, from the employees' point of view.97 Later cases have gone further, however, re-
quiring a more objective demonstration of actual domination
such as a showing of anti-union bias and *active* domination by
the employer in addition to the subjective test.98 Even the
NLRB allowed for the possibility of modern labor-manage-
ment cooperation by providing a slightly more relaxed test
under certain circumstances.99

3. *NLRA Section 2(5)—Cabot Carbon and the*
*Definition of a Labor Organization*

The Supreme Court's definition of a "labor organization,"
for the purpose of determining whether an employee commit-
tee is an unlawful "labor organization" violative of section
8(a)(2), is set out in *NLRB v. Cabot Carbon Co.*100 In *Cabot
Carbon*, the employer established an employee committee at
each of its plants pursuant to a suggestion of the War Produc-
tion Board in 1943.101 The stated purpose of the committees
was to provide a forum for employees' views and problems of
mutual interest to employees and management.102

Working with employee representatives, the employer
prepared bylaws, stating the duties and functions of the com-
mittees, subject to the approval of the employees establishing
those committees.103 The bylaws also determined the

97. *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974), cert.
98. *Modern Plastics Corp. v. NLRB*, 379 F.2d 201, 204 (6th Cir. 1967). The
court held that "[t]he Board must prove that the employer's assistance is actu-
ally creating Company control over the union before it has established a viola-
tion of Section 8(a)(2)." *Id.* The *Modern Plastics* court also maintained that the
purpose of the NLRA was to encourage cooperation and that industrial peace
was merely a "prime purpose" of the NLRA, fostered through collective bargain-
ing. *Id.*
99. The NLRB found no domination, only unlawful assistance, under a
slightly relaxed totality of circumstances test, where the employees determined
the structure and formation of the committee. *Duquesne Univ.*, 198 N.L.R.B.
891, 893 (1972).
100. 360 U.S. 203 (1959).
101. *Id.* at 205.
102. *Id.*
103. *Id.*
number of employees on each committee and their terms, the election procedure, the meeting times, and the grievance procedure, and established that employees would be paid for time served on the committees. The committees had no dues and the employer paid all the expenses. With the advent of NLRB certified labor organizations at many of the plants, the committees’ functions were effectively reduced to efficiency, production and grievance issues.

The Supreme Court rejected the court of appeals’ holding that the committees were not labor organizations because they did not bargain with the employers, but instead held that section 2(5) expanded the definition of “labor organization” by use of the word “dealing” to include more than mere bargaining. The Court concluded that the committees’ grievance procedure came within the ambit of “dealing” and that the proposals made by the committees to management related to conditions of work as well as several of the specific bargainable issues listed in section 2(5). The Court observed that a (lawful) independent labor organization would have the power to insist on its proposals, whereas an (unlawful) company-dominated labor organization would not. Therefore, if an employee committee exists “in part at least” to deal with the employer on grievances and bargaining subjects, it is an unlawful labor organization if the employer exercises direct control over it.

The NLRB has consistently followed this definition of “labor organizations” in finding various committees violative of section 8(a)(2). Each case demonstrates some combination of factors indicating a lack of structural independence from the employer. These factors include a lack of significant employee input into the function and formation of the committees, and employer control of the composition of the commit-

104. Id. at 205-06.
106. Id.
107. Id. at 211-13.
108. Id. at 213-14.
109. Id. at 214.
tees and the topics of discussion, as well as holding committee meetings on company time, on company premises, at the employer's convenience, with at least one member of management present. Furthermore, these committees discussed and presented proposals to management regarding terms and conditions of employment. Although each committee was formed for an ostensibly neutral purpose, and given names evoking a cooperative venture, in each case the committee's formation coincided with a union's recognition campaign. The NLRB's broad interpretation of "dealing" has generally been accepted in the circuit courts.

4. Alternative Interpretations of Section 2(5) Labor Organizations

Two Sixth Circuit Court cases departed abruptly from the NLRB/Cabot Carbon standards. In NLRB v. Streamway Division of Scott & Fetzer Co., the court held that a mixed employee-management committee designed to improve communications between management and employees, although dominated by the employer, was not a section 2(5) labor or-

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114. See Ona Corp., 285 N.L.R.B. at 402 (improving quality of work life); Clapper's Mfg., Inc., 186 N.L.R.B. at 334 (serving as an oral suggestion box); Grafton Boat Co., 173 N.L.R.B. at 1001-02 (advising management on working conditions and unjust practices).

115. See Ona Corp., 285 N.L.R.B. at 402 (employee action committee); Liberty Mkts., Inc., 236 N.L.R.B. at 1492 (management advisory committee); Clapper's Mfg., Inc., 186 N.L.R.B. at 332 (Employees' Committee); Grafton Boat Co., 173 N.L.R.B. at 1000 (Labor-Management Committee); Ambox, Inc., 146 N.L.R.B. at 1530 (Employee-Management Relations Council).


118. 691 F.2d 288 (6th Cir. 1982).
ganization and thus did not violate section 8(a)(2). The goal of the committee was to serve as a communication device between management and labor regarding the company's plans and programs, and to identify operational problem areas, and possible solutions. While observing that the term "dealing" was broadly defined by Congress and by the Court for the purpose of preventing not only company unions but also other sham mechanisms purporting to represent employees, the court determined that the amount of interaction which constituted "dealing" was still an open question.

The court also followed the view that the adversarial model of employer-employee relations is an "anachronism," and that management ought to be able to communicate with employees. Thus, the Sixth Circuit Court of Appeals has demonstrated its willingness to "reject a rigid interpretation of the statute and consider whether the employer's behavior fosters employee free expression and choice as the Act requires." One consideration in finding that the committee is not a labor organization is the continuous rotation of employee members to allow for maximum participation. Thus, the committee is less a representational body for the employee population than a forum for individual communication with management. Other considerations included the lack of anti-union animus or other evidence of employer's intent to stall an organizational drive or assume the union's du-

119. Id. at 294-95.
120. Id. at 289. The company clearly dominated the Committee by establishing it, and setting its agenda and structure, id., and the court acknowledged that "there is little question that if it is a 'labor organization' under section 2(5) of the Act, the Committee was dominated by the Company." Id. at 291.
121. Id. at 291-92. The court also tried to distinguish Cabot Carbon on its facts because it involved "a more active, ongoing association between management and employees, which the term dealing connotes, than is present here." Id. at 294.
122. Id. at 293.
123. NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 293 (6th Cir. 1982). "An overly broad construction of the statute would be as destructive of the objects as [sic] the Act as ignoring the provision entirely." Id. at 292. "It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor." Id. (quoting NLRB v. Walton Mfg. Co., 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting)).
124. Id. at 294-95.
ties, and the lack of general recognition that the committee was a labor organization.\textsuperscript{125}

In \textit{Airstream, Inc. v. NLRB},\textsuperscript{126} the employer formed the "President's Advisory Council," composed of elected representatives, as a forum for discussion of various problematic employment issues, at approximately the same time as an organizational drive was underway.\textsuperscript{127} Once again, the employer clearly dominated the labor-management council.\textsuperscript{128} However, following the \textit{Streamway} "communication device" theory, the court held that the Council was not a "labor organization," especially since the employer took no action regarding employee complaints during the course of the union campaign, and thus did not adversely affect the campaign.\textsuperscript{129} In summary, "not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act."\textsuperscript{130}

5. \textit{NLRB-Sanctioned Exceptions to the Section 2(5) Labor Organization}

The NLRB has also recognized two rare exceptions to the section 2(5) labor organization rule, where employee committees exist without dealing with the employer. In \textit{General Foods Corp.},\textsuperscript{131} the (then non-unionized) employer established job enrichment "teams" composed of the entire bargaining unit to discuss operational issues.\textsuperscript{132} The NLRB accepted that the "teams" were not established to head off organizational drives but rather in response to behavioral psychology studies so as to provide employees with greater involvement in the workplace.\textsuperscript{133} Although the teams discussed conditions of employment, the NLRB held they were not "labor organizations" for two reasons: first, the employer's

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} at 295.
  \item \textsuperscript{126} 877 F.2d 1291 (6th Cir. 1989).
  \item \textsuperscript{127} \textit{Id.} at 1294.
  \item \textsuperscript{128} \textit{Id.} Although employees elected their own representatives, Airstream formed the Council, set its agenda, and meetings took place on company time for which employees were paid. All this coincided with the organizational drive and addressed many of the same issues raised by the union. \textit{Id.}
  \item \textsuperscript{129} \textit{Id.} at 1297-98.
  \item \textsuperscript{130} NLRB v. Streamway Div. of Scott & Fetzer Co., 691 F.2d 288, 292 (6th Cir. 1982).
  \item \textsuperscript{131} 231 N.L.R.B. 1232 (1977).
  \item \textsuperscript{132} \textit{Id.} at 1233.
  \item \textsuperscript{133} \textit{Id.} at 1232, 1234.
\end{itemize}
motive for establishing the committees "had nothing to do with labor relations;" and second, there was no proper agency relationship of the organization to the employees on whose behalf it was called upon to act since the entire bargaining unit comprised the membership of the teams. Thus, where all of a company's employees are part of a labor-management cooperation effort, the group is not "dealing" with the employers.

The second exception developed by the NLRB to the broad definition of "dealing" concerns the delegation of managerial responsibilities. In Spark's Nugget, Inc., the Employees' Council performed a purely adjudicatory function, resolving employees' grievances, and did not interact with management for any purpose other than to render a final decision on the grievance. In Mercy-Memorial Hospital Corp., the Employees' Grievance Committee was created solely to give employees a voice in resolving the grievances of their fellow employees and thus did not "deal" with the employer. Thus, where a committee maintains some independent jurisdiction, separate from management, it is not held to be "dealing" with management.

6. Summary

The current standards for lawful labor-management committees are ambiguous at best. The Sixth Circuit Court challenged the objective Newport News domination standard on the theory that a distinction can feasibly be made between actual domination and lawful labor-management cooperation by use of a subjective test of employer motive and employee

134. The NLRB noted that "[i]n their essence, the teams, and each of them, are nothing more or less than work crews established by Respondent as administrative subdivisions of its entire employee complement." Id. at 1234.
135. Id. The NLRB remarked, "an entire bargaining unit, viewed as a 'committee of the whole,' has never been accorded de facto labor organization status." Id.
137. Id. at 276 (noting that the Council did not so much deal with management as it dealt for management in performing a management function).
139. Id. at 1121 (finding that the presence of a management representative of the grievant's choice on the Committee was not indicative of 'dealings' with management since the manager's vote would be bound by the decision of the majority).
approval. Cabot Carbon's broad definition of a "labor organization," which effectively could be manipulated to encompass almost any type of employee committee, has been revised by the NLRB. The revised definition allows exceptions for committees that do not act as agents of the employees, that is, in a representative capacity, and for committees which have authority independent from the employer. The objective Cabot Carbon standard has also been challenged by a subjective test in the Sixth Circuit which recognizes that while employer domination may be objectively ascertainable, the identification of a labor organization requires reference to subjective factors.

D. Electromation and E.I. du Pont: The NLRB Rules on the Legality of Cooperation Committees

1. Electromation

In Electromation, the company, a (then) non-unionized electronic components manufacturer employing approximately 200 persons, experienced financial losses and created five action committees as a means of involving employees in the attendant process of cutting labor expenses. Although the employees were not enthusiastic about the idea, they accepted it as the best possible solution under the circumstances. According to management, the role of the employee committee members was to act as a conduit between management and the other employees on the respective com-


141. An action committee was created for each of the following issues: (1) Absenteeism/Infractions; (2) No Smoking Policy; (3) Communication Network; (4) Pay Progression for Premium Positions; and, (5) Attendance Bonus Program. Id. at 991.

142. Id. The company cut expenses by distributing an annual lump payment based on seniority instead of wage increases as well as by changing its policy of awarding bonuses based on attendance. Id. at 990. Employees petitioned management to express their disappointment with the policy changes in response to which the company met with a group of eight employees, who were either randomly selected or had affirmatively requested permission to attend the meeting, to discuss the problems. Id. Following this meeting, the company's president again met with other members of management and concluded that unilateral management action would no longer satisfy the employees and that the best course was to involve employees in solving the problems whereupon the "action committees" were established. Id. at 991.

143. Id.
committee topics. Management determined the composition of each committee, its responsibilities and goals, the meeting dates, the topics of discussion, and also provided the materials and location for the meetings. Employees were paid for their participation, and a member of management was present at every meeting “to facilitate the discussions.” After the commencement of an organizational drive, the employer discontinued working with the committees.

The NLRB found first that the committees were labor organizations within the meaning of section 2(5) because: (1) employees participated on the committees; (2) the activities of the committees constituted “dealings” with the employer since proposals were submitted and would have been implemented but for the onset of the union campaign; (3) the subject matter of the committees generally consisted of conditions of employment; and (4) the committees acted in a representational capacity. The NLRB also found that the employer had dominated the committees since it had formed the committees despite employee ambivalence, defined the functions and topics of the committees, contributed support, and appointed management members to serve on the committees. In conclusion, the NLRB determined that the purpose of the committees was not to enable cooperation to improve quality or efficiency, but to create the false impression that employee demands were being met or at least considered. This sort of company unionism through unilateral bargaining or “dealing” was the very problem which section 8(a)(2) was enacted to address.

Three members of the NLRB concurred with Chairman Stephens’ opinion, but wrote separately to propose less restrictive interpretations of the NLRA in order to allow for greater latitude in labor-management cooperation. NLRB

145. Id.
146. Id.
147. Id. at 992.
148. Id. at 997.
150. Id.
151. Id.
Member Devaney's concurrence\(^{152}\) emphasized the representative nature of a labor organization, such that a joint labor-management committee would unlawfully impede the employees' free choice of a bargaining representative.\(^{153}\) NLRB Member Clifford R. Oviatt, Jr.'s concurrence\(^{154}\) recommended an exception to the rule for joint committees addressing "significant productivity and efficiency problems in the workplace" since these subjects are outside the usual topics of bargaining.\(^{155}\) NLRB Member John Neil Raudabaugh proposed a four-part test for determining the nature of a joint labor-management committee.\(^{156}\) The factors of the four-part test included the assessment of (1) the extent of the employer's involvement; (2) whether the employees objectively perceive the joint committee as a substitute for traditional collective bargaining; (3) whether the employees have been assured of their section 7 right to representation and collective bargaining; and (4) the employer's motive in establishing the committee.\(^{157}\) Electromation, Inc. appealed this decision but the Seventh Circuit Court of Appeals enforced the decision on September 15, 1994.\(^{158}\)

2. E.I. du Pont

In *E.I. du Pont de Nemours & Co.*,\(^{159}\) the company unilaterally instituted seven committees to address fitness and safety issues at the 3500-employee chemical plant without

\(^{152}\) *Id.* at 998-1003 (Devaney, M., concurring).

\(^{153}\) *Id.* at 990, 999 (Devaney, M., concurring).


\(^{155}\) *Id.*

\(^{156}\) *Id.* at 1005-15 (Raudabaugh, M., concurring).

\(^{157}\) *Id.* at 1013 (Raudabaugh, M., concurring).

\(^{158}\) Electromation v. NLRB, 1994 U.S. App. LEXIS 25612 (7th Cir. Sept. 15, 1994). Counsel for Electromation argued during the September 27, 1993, hearing that the subjective wishes of the employees who participate in the committees should factor into the analysis of the legality of the committees and that the NLRB's conclusion undermines employees' freedom of choice. *See* Randall Samborn, *Seventh Circuit Panel Hears Electromation Appeal*, NAT'L L.J., Oct. 11, 1993, at 17. The Seventh Circuit did not address the issue of whether modern labor-management cooperation groups were unlawful under the NLRA since it found that the NLRA's determination was supported by substantial evidence and its legal conclusions were reasonably based in the law. Electromation v. NLRB, 1994 U.S. App. LEXIS 25612, *68-*75 (7th Cir. Sept. 15, 1994).

\(^{159}\) 311 N.L.R.B. 893 (1993).
negotiating with the incumbent union. Once again, the main question, for the purpose of finding whether the committees were "labor organizations," was whether they were "dealing" with the employer under the Cabot Carbon test. E.I. du Pont broadly defined the term "dealing" to mean a "bilateral mechanism" which entails a pattern or practice of proposals to management, although no compromise on either side is required. The NLRB held that isolated instances of proposals to management did not count as "dealing," nor did "brainstorming" sessions, information sharing, or individual communications with management.

The employer's control over the committees assured a finding that it dominated the committees. This control was demonstrated by management's participation in committee decision-making, formation of one of the committees, determination of committee agendas and topics for discussion, determination of the number of employees on each committee and selection of employee participants on the committees if the number of volunteers exceeded the number of available spaces. Further, the management could "change or abolish any of the committees at will." The near complete lack of independent structure resulting in virtual employer control of the committee constituted a perfect illustration of the Newport News standard for employer domination of the formation and administration of a labor organization under NLRA section 8(a)(2).

Chairman Stephens, the author of the Electromation decision, was recused from participating in this decision, and only NLRB Member Devaney wrote separately in concurrence. NLRB Member Devaney diverged from his colleagues

160. Id. at 900 (Devaney, M., concurring).
161. Id. at 894.
162. Id.
163. Id.
165. Id. at 895-96.
166. Id. at 896.
167. Id. The NLRB held that E.I. du Pont did not violate NLRA § 8(a)(5) by holding safety conferences since these conferences were mere "brainstorming" sessions in which suggestions and ideas regarding safety were discussed. This did not constitute bilateral "dealing" with the employer since the conferences were not meant to establish proposals. Id. Further, the conferences did not address bargainable matters and it was made clear that such matters should be handled through the union. Id.
by subscribing to a narrower interpretation of "labor organization," allowing significant opportunity for labor-management cooperation efforts to serve as management tools so long as the committees did not usurp the role of a labor organization by purporting to represent employees in bargaining with the employer. Under this theory, the chief evil sought to be eradicated by section 8(a)(2) was employer manipulation of labor-management cooperation efforts "so that they appear to be agents and representatives of the employees when in fact they are not" which would undermine employee free choice in choosing a bargaining agent. Thus, a labor-management cooperation committee would not be unlawful, even if dominated by the employer, unless it acted in a representational capacity. The concurrence contended that the majority's definition of "dealing with" as a bilateral mechanism of proposal submission by committees and acceptance by management was tantamount to "bargaining with" and so the E.I. du Pont committees were thus unlawfully acting as employee representation committees.

E.I. du Pont did not appeal this decision and has abolished the offending committees. The company's managing counsel has stated that "it's not formalized committees that make us more competitive, but . . . self-managed work teams."

3. Summary

In Electromation and E.I. du Pont, the NLRB rigorously applied the traditional two-part test (domination/labor organization) to obliging facts and, not surprisingly, found 8(a)(2)

168. Id. at 898-900 (Devaney, M., concurring).
170. Id. at 902 n.10 (Devaney, M., concurring). NLRB Member Devaney differentiated "dealing with" and "bargaining with" by reference to the legislative history of the NLRA, showing that NLRA § 2(5) was worded so as to include false bargaining as well as bargaining. Id. See the testimony of William Green referenced by Member Devaney in Electromation: "[F]ew of the company union plans in themselves pretend to be an agency for collective bargaining. Show me a company union through which a wage agreement ... has ever been consummated. Never one." To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor, 73d Cong., 2nd Sess. 72 (1934) (statement of William Green, President of the American Federation of Labor), reprinted in 1 LEGIS. HIST.-NLRA, supra note 22, at 102.
171. See Samborn, supra note 13, at 1.
172. Id.
violations. In both cases, the committees were clearly labor organizations since they acted in a representational capacity regarding conditions of employment. The employer dominated the committees by controlling significant aspects concerning the formation of the committees and the conduct of meetings. Given these facts, evocative of company unionism, the NLRB must have felt little need to narrow the 8(a)(2) standards that had been observed, with few exceptions, since the NLRA was enacted. The concurring members in both cases suggested alternative tests which would recognize valid labor-management cooperation while continuing to restrict sham unions, in their modern guises, by refocusing the inquiry from the traditional employer domination/labor organization test to whether the role of the union had actually been threatened or usurped.

Despite this, the NLRB did provide further clarification of the Cabot Carbon "dealing with employers" standard for labor organizations by explaining it as a "bilateral mechanism" in which proposals are submitted by employees as a group and accepted by management. Unfortunately, this clarification provides no exception for legitimate labor-management cooperation efforts, many of which, because of their joint nature and the need for mutual communication and contribution, simply do not qualify as unilateral mechanisms.

III. ANALYSIS OF PROPOSALS

A. Opposing Perspectives on Labor-Management Cooperation

In general, the current theory supporting labor-management cooperation is that labor and management now, more than in times past, have common interests, namely countering the dual threats of foreign competition and a destabilized employment relationship.173 Beginning in the late 1970's, interest in labor-management cooperation grew exponentially as American businesses began experimenting with methods to increase productivity so as to remain globally competitive.174 During this same period of time, union mem-


174. See Bluestone & Bluestone, supra note 2, at 146.
bership had declined contemporaneously with the decline in manufacturing and industrial work, and the rise in the percentage of service sector jobs less amenable to unionization.\textsuperscript{175} One general result of these trends was a marked decrease in the stability of the employment relationship.\textsuperscript{176} In clarifying the standards for a lawful labor-management cooperative effort, it is necessary to remember that the Supreme Court has remarked that “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union members are employed.”\textsuperscript{177} Realistically then, current labor-management cooperation efforts are primarily an economic management tool with secondary ameliorative social and economic benefits for employees.\textsuperscript{178}

1. Overview of Theories of Labor-Management Cooperation

Labor-management cooperation efforts vary depending on the context of the workplace in which they are enacted, as well as on the different theories and models of labor-management cooperation in use.\textsuperscript{179} “Cooperation” can denote anything from unilateral methods, such as suggestion boxes and employee opinion surveys, to co-management of the business by employees.\textsuperscript{180} However, the very term “labor-management cooperation” presupposes some significant degree of mutual communication and contact between management and labor. Further, labor-management cooperation efforts are almost always initiated and supported to some degree by management

\begin{itemize}
\item \textsuperscript{175} See id., supra note 2, at 4-5; Gould, supra note 10, at 110.
\item \textsuperscript{176} See Gould, supra note 10, at 259-60.
\item \textsuperscript{177} First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666, 676 (1981).
\item \textsuperscript{178} One commentator has noted that the origins of labor-management cooperation are based on a “moral issue of equality” between labor and management rather than a means to achieve an economic end. E.g., Thomas C. Kohler, \textit{Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)}, 27 B.C. L. Rev. 499, 501 (1986). In the United States, however, labor-management cooperation has always been perceived as a management theory and has come to serve the purposes of management first whereas the European model of labor-management cooperation is based on socialist ideology which has permeated the law. See id. at 501 n.5.
\item \textsuperscript{179} See id. at 503-05.
\item \textsuperscript{180} See id. at 505-10.
\end{itemize}
since they are most often to the immediate benefit of management.\textsuperscript{181}

The context of the workplace plays a large part in determining the level and quality of cooperation. In addition to the unionization factor, the context of the workplace also includes the type of work done and the structure and size of the business. Several widely recognized "models" of labor-management cooperation have emerged based on a variety of theories which have been propounded over the course of the last two decades.\textsuperscript{182} Different "models" are associated with different types of workplaces and business enterprises.\textsuperscript{183} Each of these models provides employees some greater level of contribution to the success of the business, beyond the parameters of their individual job classifications.\textsuperscript{184} Such involvement would rarely be available through the traditional collective bargaining process.\textsuperscript{185}

2. Union, Employer, and Employee Perspectives

Despite the widely touted advantages of labor-management cooperation, well-warranted skepticism remains on the
part of unions, employers, and employees. The legal constructs developed to address the inherent adversity of the parties present a variety of impediments to labor-management cooperation, as do the entrenched historically opposed interests of the parties.\(^\text{186}\) It is important to understand the concerns of the three main players in this developing area of labor law in order to appreciate the impact of the proposed resolutions.

Historical union opposition to company unions, the main tools by which employers legally established dominion over their employees prior to 1935,\(^\text{187}\) has fueled modern union suspicions about the rationale behind many current labor-management cooperation efforts.\(^\text{188}\) The committees and teams established in the name of cooperation are viewed by unions, frequently with good reason, as attempts to usurp the union's role as the employees' representative.\(^\text{189}\) The committees in *Electromation* and *E.I. du Pont* are illustrative of the types of ill-conceived labor-management efforts that appear to be merely an end-run around the authority of the union.\(^\text{190}\) In the non-union sector, committees established ostensibly to promote labor-management cooperation are often no more than managerial attempts to maintain a union-free workplace.\(^\text{191}\) Although the *Electromation* committees were discontinued at the commencement of the organizational drive, while in existence, they were found to have been labor organizations dominated by the employer, thus usurping the proper role, and perhaps discouraging the existence, of a duly elected union.\(^\text{192}\) Union suspicions about labor-management cooperation are further fueled by the fact that these efforts are

\(^{186}\) See Schlossberg & Fetter, supra note 173, at 32-38 (discussing problems arising from labor-management cooperation efforts and the exclusivity doctrine, the duty to disclose information, the distinction between mandatory and permissive subjects of bargaining, and the duty of fair representation, among others). See generally Gould, supra note 10.

\(^{187}\) See supra part II.B.1.

\(^{188}\) See Schlossberg & Fetter, supra note 173, at 25.

\(^{189}\) See Gould, supra note 10, at 110.


\(^{191}\) See Gould, supra note 10, at 110.

\(^{192}\) Electromation, 309 N.L.R.B at 998.
nearly always initiated by the employer, the union's traditional adversary.\footnote{193}{See Kohler, supra note 178, at 550.}

In addition to concerns shared by all parties about whether labor-management cooperation is feasible or worth the effort in a particular workplace, employers are generally concerned about the usurpation of management prerogatives by employees.\footnote{194}{See BLUESTONE & BLUESTONE, supra note 2 at 167. Bluestone also notes a potential increase in costs associated with operating the committees, \textit{id.} at 166, and that “management is often skeptical of labor's ability to co-manager the workplace.” \textit{Id.} at 167.}

Not only do labor-management cooperation efforts require including employees in formulating traditional management decisions regarding personnel functions, product quality, and the work setting, but negotiating these efforts with unions may require concessions to the union by management.\footnote{195}{Under First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), certain decisions were found to be the prerogative of management and not subject to mandatory bargaining. \textit{Id.} at 670. Thus, employers would not be required to bargain about employee involvement in these areas.}

Furthermore, many management experts suspect that any legislative revision to allow for labor-management cooperation cannot be accomplished without concessionary revisions to other parts of the Act.\footnote{196}{Professor Gould advocates that “such reforms should not be undertaken independent of labor law amendments that give unions access to company property to engage in organizational campaigns and representative status even when the majority rule is not provided-as well as other far-reaching reforms.” See Gould, supra note 10, at 262.}

As with unions, the employer's willingness to compromise on some level is required for the success of labor-management cooperation.

Employees also have several concerns about labor-management cooperation. First, employee involvement in “managerial” decisions may pose the danger of changing the status of the individuals involved to the extent that they are no longer covered by the NLRA.\footnote{197}{NLRB v. Yeshiva Univ., 444 U.S. 672 (1980), established that university professors were not employees under the NLRA because of the “managerial” aspects of their jobs. \textit{Id.} at 682. Managerial employees are excluded from coverage under the NLRA in the wake of NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974), overruled in part by, NLRB v. Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981).}

Second, employee involvement may also threaten a violation of the exclusivity doctrine.\footnote{198}{Section 159(a) states that “[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit
management tool, and the secondary economic and social benefits for the employees may not materialize unless employee involvement is implemented fairly.\textsuperscript{199} Lastly, labor-management cooperation may be used for no better purpose than to mollify employees into believing that their concerns are actually being addressed.\textsuperscript{200}

3. \textit{Summary}

This brief survey of the general theories and competing concerns regarding labor-management cooperation should help to provide some context for the various proposals which address this problem. Although the theory of labor-management cooperation is still in its nascent stage, overwhelming support for the notion from employers and employees favors providing the parties with a viable legal choice. However, any revision to or reinterpretation of the current law will require compromise on all sides; the traditional adversaries, unions and employers, will need to yield aspects of their historical privileges, and employees will need to recognize that the benefits they derive from labor-management cooperation are secondary to the success of the business enterprise which makes such benefits possible.

B. \textit{Judicial Resolution}

The first set of proposals analyzed are judicial resolutions. The assumption of the free choice theory of judicial resolution is that labor-management cooperation is still possible under one or more alternative readings of the current law.\textsuperscript{201} None of the proposed alternative readings, however, have

\begin{footnotesize}
\begin{enumerate}
\item It has been noted that employees may simply be asked to work harder but not smarter, that the company may use the resulting efficiency gains to reduce the workforce, and that such programs may foster dissension among factions of employees supporting and opposing the programs. \textit{See Bluestone & Bluestone, supra note 2, at 167.}
\item In \textit{E.I. du Pont}, Member Devaney observed that this situation undermined the employee's free choice of a bargaining representative, \textit{E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 898 (1993)}, in that management was "on both sides of the bargaining table." \textit{Id. at 903.}
\item \textit{See generally Note, Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act, 83 Mich. L. Rev. 1736 (1985) [hereinafter Participatory Management].}
\end{enumerate}
\end{footnotesize}
been accepted by the NLRB or validated by the U.S. Supreme Court (as has the traditional two-part test), and probably will not be, absent some Congressional imprimatur to depart from the traditional adversarial system. This is especially true in the wake of Electromation and E.I. du Pont, and given the unresolved practical applications of the issue. The assumption under the traditional theory of judicial resolution is that the current law supports labor-management cooperation efforts to the extent they are useful, and that judicial reinterpretation is contrary to the legislative history of the NLRA.

1. The Cooperative Free Choice Interpretations of the NLRA

The traditional adversarial analysis leaves little opportunity for meaningful labor-management cooperation. Accordingly, alternative interpretations of the NLRA have developed in some of the circuit courts. The rationale behind these alternative interpretations is that employees should be able to freely choose, without government intervention via the NLRB, the method by which they will be represented. This theory is developed in alternative interpretations of both NLRA sections 8(a)(2) and 2(5).

202. See supra part III.A.
204. See generally Participatory Management, supra note 201. The free choice analysis assumes that the primary purpose of the NLRA was not the prevention of industrial strife but the protection of employee rights and that instead of adopting a purely adversarial system, the NLRA contemplated giving employees a choice between cooperation or adversarial relations. Id. at 1759-60. Although legitimate labor-management cooperation is distinguishable from company unions in their modern guises, such efforts are judged by the same set of standards. Free choice judicial interpretations distinguish legitimate labor-management cooperation efforts from modern day company unions by determining whether they serve a representative purpose as opposed to "those which merely offer workers more control over and participation in managerial functions." Id. at 1768.
a. The NLRA Section 8(a)(2) Subjective Test

The alternative interpretation of section 8(a)(2) allows for greater latitude for labor-management cooperation by adopting a subjective test, from the employees' perspective, to determine employer domination. This test requires a showing that the employer has interfered with the employees' freedom of choice in order to distinguish cooperation from domination. The subjective test is more narrow, in that actual domination, rather than the inference of domination, must be demonstrated, a requirement which could prove problematic in application. The subjective test further frustrates a finding of domination, even where justified, since, by the time litigation begins, the labor-management cooperation effort is already in place and employees may not recognize that it was not freely chosen. Lastly, this test is inconsistent with legislative history and has only the most tenuous link to established precedent.

b. The NLRA Section 2(5) Labor Organization Test

The Sixth Circuit has reinterpreted the term "labor organization" specifically to allow for labor-management cooperation if it resulted from the free choice of employees, even where there is objective evidence of employer domination. In doing so, the court essentially rejected the holding of Cabot Carbon. While Cabot Carbon established a broad interpre-

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205. See Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955). Note that the Electromation decision was enforced in the Seventh Circuit, the same court which originated this test in 1955. Electromation v. NLRB, 1994 U.S. App. LEXIS 25612 (7th Cir., Sept. 15, 1994). In Electromation v. NLRB the Seventh Circuit stated that, "an interpretation of Section 8(a)(2) which would limit a court's focus to only the employees' subjective will, or which would require a finding of employee dissatisfaction with the organization, is at odds with the Supreme Court's holding in Newport News." Id. at *61-*62. The court stated that Chicago Rawhide was distinguished from Electromation on its facts since the employees initiated the labor-management process and established its procedures, and their meetings were outside the presence of management. Id. at *66.

206. See supra part II.C.2.

207. The legislative history of section 8(a)(2) is clearly concerned with maintaining a balance between adversaries, see supra part II.B.1, and Newport News established clear precedent on the issue of domination. See supra part II.C.1.

208. See supra part II.C.4.

209. The Sixth Circuit attempted to distinguish Cabot Carbon by observing that the Court had not identified the specific limits of the term "dealing" other
tation of the "dealing with" clause of section 2(5) to promote union autonomy and the preservation of the balance of power between employees and employers, *Streamway* and *Airstream* attempt to narrow this interpretation to instances involving an "active, ongoing association between management and employees." 210 Other subjective and objective factors in identifying a labor organization are suggested, as well as evidence of the employer's attempt to undermine the employees' free choice. 211 For the same reasons as the subjective section 8(a)(2) test, the reinterpreted section 2(5) test is not well supported by legislative history. 212 The legislative history is preoccupied with the elimination of company unions to promote employee free choice, not with the promotion of employee free choice to eliminate company unions. 213 Further, in undercutting *Cabot Carbon*'s broad definition of "dealing," this test has only the most tenuous link to long-established precedent.

Generally, employers favor judicial resolution over the 8(a)(2) and 2(5) tests because it affords them greater freedom to implement labor-management cooperation programs. 214 However, judicial resolution efforts to allow for labor-management cooperation have been less than entirely successful. 215 There does not appear to be a united front on this issue at the NLRB. The concurring NLRB members in *Electromation* and *E.I. du Pont* sought to allow for greater labor-management cooperation by reinterpreting the term "labor organization." 216 Further, the new Chairman of the

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210. Id. at 294.
211. Airstream, Inc. v. NLRB, 877 F.2d 1291, 1295 (6th Cir. 1989); NLRB v. *Streamway Div. of Scott & Fetzer Co.*, 691 F.2d 288, 294 (6th Cir. 1982).
212. See supra part II.B.2.
213. See supra part II.B.2.
214. See Moskal, supra note 7, at 18.
215. Alternative tests have been developed in the First, Sixth, Seventh, and Ninth Circuits, none of which has proceeded to the U.S. Supreme Court and all of which rest on fairly shaky precedential ground and an unorthodox reading of the legislative history of the NLRA. See supra, parts II.C.2 and II.C.4.
216. See supra notes 152-58, 168-70 and accompanying text.
NLRB, William B. Gould IV, is strongly in favor of promoting labor-management cooperation through these alternative judicial resolutions or legislative revisions patterned after them.217

2. The Traditional Adversarial Interpretation of the NLRA

According to the traditional adversarial model, the primary goal underlying the passage of the NLRA was the prevention of industrial strife, not the promotion of employee free choice.218 This goal was accomplished by establishing a system in which the adversarial relations of the parties could be resolved relatively peaceably.219 Thus, promotion of employee associational rights was the means for reaching the primary goal of resolving industrial strife, rather than the end itself. Proponents of this view argue that the framework of collective bargaining provides the only viable opportunity for labor-management cooperation.220 This view rests on two assumptions. First, it assumes that labor and management are inherent adversaries.221 Second, it assumes that effective collective bargaining requires that each party maintain its autonomy so that the balance of power is not skewed so as to lead to industrial strife.222 Section 8(a)(2) assures this autonomy "by requiring that labor relations be conducted only by organizations capable of engaging in arm's-length bargaining."223 The argument follows that if this is no longer the case, then Congress should revise the statute and the NLRB

217. See Gould, supra note 10, at 262 ("The reforms can be undertaken both through Board and judicial interpretations of the statute as well as congressional amendments to it."); see also William B. Gould IV, Reflections on Workers' Participation, Influence and Powersharing: The Future of Industrial Relations, 58 U. Cinc. L. Rev. 381, 385 (1989).

218. See Collective Bargaining, supra note 203, at 1673.

219. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the NLRA is constitutional because of its purpose of promoting industrial peace to protect interstate commerce); S. Rep. No. 573, 74th Cong., 1st Sess. 1 (1935), reprinted in 2 Legis. Hist.-NLRA, supra note 22, at 2300 ("The first objective of the bill is to promote industrial peace.").

220. See Kohler, supra note 178. "What the term worker participation (and industrial democracy) meant to the framers of the Act . . . is clear: collective bargaining." Id. at 548.

221. See Collective Bargaining, supra note 203, at 1677-78. See also, Kohler, supra note 178, at 515.

222. See Collective Bargaining, supra note 203, at 1674-76.

223. Id. at 1678.
and the courts should not construe the statute in a way that is inconsistent with its stated purpose.\textsuperscript{224}

The need to maintain union independence and autonomy from the employer is crucial to the traditional adversary interpretation, because it allows employees to engage in arms-length bargaining with their employer.\textsuperscript{225} The rigorous application of the two-part test (employer domination/labor organization) ensures that employers will not usurp the role of the union by establishing a company union in its place. According to this theory, company unionism continues to thrive in the form of labor-management committees which are inconsistent with the basic purpose of the NLRA because they purport to serve the same purpose as a union, albeit under management control.\textsuperscript{226} Further, it is correctly noted that the rationale behind these new “company unions” originates with management, and, while not necessarily overtly hostile towards employee rights as in earlier times, is primarily for the economic benefit of the company with secondary benefits for the employees.\textsuperscript{227}

Certain limited types of labor-management cooperation have, however, been identified as being compatible with the collective bargaining model. The NLRB has narrowed its broad definition of a “labor organization” by finding two exceptions to the rule in circumstances that suggest some resolve to promote labor-management cooperation.\textsuperscript{228} Furthermore, as discussed in \textit{E.I. du Pont}, certain unilateral mechanisms, such as “brainstorming” groups, suggestion

\textsuperscript{224} See \textit{id.} at 1680-81. “Major revision of a social compact such as the Act is a job for Congress, not for the courts.” \textit{id.} at 1680.

\textsuperscript{225} See \textit{id.} at 1674-76.

\textsuperscript{226} See Kohler, supra note 178, at 548. Professor Kohler concludes that several popular forms of labor-management cooperation (joint worker-management bodies, semi-autonomous teams) constitute labor organizations due to their inevitable dealing with the employer and are dominated by the employer because of their lack of structural independence. \textit{id.} at 535-45.

\textsuperscript{227} See \textit{id.} at 547. “[P]articipative theories have been formulated on management’s behalf and are intended to secure worker cooperation and identity with the goals and directives of their employers.” \textit{id.} “As the experience of every industrialized nation reveals, management’s [sic] control of the order of the employment relationship has not been a regime acceptable to most workers . . . . Employer-sponsored alternatives to collective bargaining have not sufficed because under them, management retains ultimate control of the order of the relationship.” \textit{id.} at 550.

\textsuperscript{228} See supra part II.C.5 (discussing the NLRB-sanctioned agency and delegation exceptions).
boxes, information sharing, and other individual communications with management, are lawful forms of labor-management cooperation.\textsuperscript{229} Lastly, it is acknowledged that, "under the right conditions," if a union is present, labor-management cooperation efforts can be beneficial so long as management acknowledges the union's role as representative.\textsuperscript{230} Thus, some limited cooperative efforts may still be viable under the traditional interpretation of the NLRA.

The traditional adversarial view disapproves of the more "cooperative" forms of labor-management cooperation and of judicial attempts to resolve the issue. The \textit{Electromation} and \textit{E.I. du Pont} decisions are consistent with this view given the straightforward application of the two-part test. For obvious reasons, unions generally favor this view because of the support it lends their traditional role. But employers who wish to implement some form of labor-management cooperation are faced with a confusing variety of judicial interpretations of the NLRA that exist in addition to the traditional interpretation.\textsuperscript{231}

C. Legislative Resolution

Given the widespread support for, and success of, labor-management cooperation efforts and the unlikelihood of judicial resolution in the wake of \textit{Electromation} and \textit{E.I. du Pont}, the inevitable option is legislative resolution. Several alternatives exist. One alternative that has been suggested is the complete repeal of section 8(a)(2). Another alternative is the revision of either section 8(a)(2) or section 2(5), allowing for a more modern understanding of unlawful domination of labor organizations. These alternatives are explored below.

1. Repeal of NLRA Section 8(a)(2)

The argument for the repeal of section 8(a)(2) rests on the assumption that labor-management cooperation and the legislative principles that underlie section 8(a)(2) are entirely incompatible and cannot be synthesized within the pro-

\begin{verbatim}
230. See Kohler, supra note 178, at 527.
231. See Beaver, supra note 35, at 237.
\end{verbatim}
vision.\textsuperscript{232} The argument for repeal is supported by a traditional reading of the NLRA and a rejection of the free-choice judicial resolution analysis.\textsuperscript{233} Another assumption underlying the repeal argument is that the benefits of section 8(a)(2) are outweighed by the burdens imposed by obstructing labor-management cooperation.\textsuperscript{234} The repeal argument concludes that section 8(a)(2) could be eliminated from the NLRA altogether and that section 8(a)(1) would provide sufficient protection for employees from actual employer domination.\textsuperscript{235}

Section 8(a)(2) was enacted specifically to eliminate the prevalent problems associated with company unions.\textsuperscript{236} The primary threat posed by company unions was the appearance of impartial representation which threatened any meaningful opportunity for collective bargaining.\textsuperscript{237} Although many supporters of labor-management cooperation insist that the company union no longer exists,\textsuperscript{238} cases such as \textit{E.I. du Pont} and \textit{Electromation}, with their representational committees, prove otherwise. It is somewhat naive to believe that a grudgingly acknowledgment of the need for labor-management cooperation efforts will eliminate partisan impulses and automatically result in harmonious cooperation on all levels. Obviously, the adversarial nature of labor-management relations perseveres despite the recent realization of some common interests brought on by external forces. Labor-management efforts should be acknowledged as a management tool, which has the potential to be abused to the detriment of employees.

Section 8(a)(2) should remain substantially intact in order to continue to counteract the very abuse it was designed to prevent.\textsuperscript{239} Section 8(a)(1)\textsuperscript{240} cannot adequately address


\textsuperscript{233} See id. at 2034-38.

\textsuperscript{234} See Gould, supra note 10, at 153; Clarke, supra note 232, at 2044-49 (examining beneficial social and economic implications of repeal).

\textsuperscript{235} See Clarke, supra note 232, at 2040-41. "Employer domination or coercion would clearly 'interfere with' and 'restrain' employees, and would thus violate section 8(a)(1)." Id. at 2041.

\textsuperscript{236} See supra part II.B.1.

\textsuperscript{237} See supra part II.A.

\textsuperscript{238} See Gould, supra note 217, at 384 (1989); see also Participatory Management, supra note 201, at 1749.

\textsuperscript{239} See Schlossberg & Fetter, supra note 173, at 25 (arguing that there is an obvious need to preserve genuine prohibitions on company unions "and to proscribe the use by unscrupulous employers of spurious cooperative or partici-
the ongoing problem of company unions. Employer domination of a labor organization could easily be characterized as interfering with, restraining, or coercing employees in the exercise of their section 7 rights under section 8(a)(1); but so could the three other section 8(a) unlawful employer activities,\textsuperscript{241} for which reason section 8(a)(1) is a derivative claim under each of them.\textsuperscript{242} The other section 8(a) violations retain their primary status because of the essentially adversarial nature of the labor-management relations and because of the continuing categories of abuses which make specific reference to them necessary. Such is the case with section 8(a)(2). The acknowledgment of the mutual need for some cooperation in the workplace does not signal an end to the inherently adversarial relations between labor and management.

2. Legislative Revision of NLRA Section 8(a)(2)

The proponents of revising section 8(a)(2) argue that even if certain judicial resolutions are supportable, the rigorous enforcement of the traditional test by the NLRB and the majority of the circuit courts makes legislative revision the best option.\textsuperscript{243} Other proponents argue that the judicial resolutions are not supportable and that legislative revision of section 8(a)(2) is the only option.\textsuperscript{244} Either way, any proposal for revision should examine the judicial resolutions as the policy road maps to successful legislative resolution.
Judicial resolution of section 8(a)(2) calls for two things: a finding of actual domination by the employer based on a subjective test from the employees' point of view; and an assessment, based on the facts, of the employer's motives.\textsuperscript{245} The application of this theory to section 8(a)(2) would require a showing of actual domination, a subjective and fact-based standard.\textsuperscript{246} Accordingly, such a revision would excise most of the illustrative terms in section 8(a)(2) to eliminate objective standards for judging labor-management cooperation.\textsuperscript{247}

This revision allows for the worst of both worlds. By rendering the provision ineffective for application in actual domination cases, it also leaves the broad term "labor organization" which could continue to eliminate a number of labor-management cooperation efforts. Even worse, such a revision would surely require major employer concessions, such as the passage of legislation requiring that employers not replace striking employees,\textsuperscript{248} which would make the bill unpalatable to the business community and thus further impede its passage. Lastly, such a revision would require a case by case assessment of the subjective state of mind of the employer and the employees, placing a huge burden on the NLRB and the court system and leaving no clear standards for employers to follow.

3. Legislative Revision of NLRA Section 2(5)

As with proposals to revise section 8(a)(2), a proposal to revise the definition of a "labor organization" assumes that judicial resolution is not supportable. Furthermore, such a

\textsuperscript{245} See supra part II.C.2.

\textsuperscript{246} Under the subjective test, interference with the formation, NLRB v. Northeastern Univ., 601 F.2d 1208, 1211 (1st Cir. 1979), or administration, Hertzka & Knowles v. NLRB, 503 F.2d 625, 629 (9th Cir. 1974), of a labor organization need not be unlawful, any more than contributing financial or other support, NLRB v. Homemaker Shops, Inc., 724 F.2d 535, 546 (6th Cir. 1984).

\textsuperscript{247} Such a revision to section 8(a) could read as follows: It shall be an unfair labor practice for an employer—

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with his employer during working hours without loss of time or pay. Proof of such domination requires a subjective showing of both anti-union motive on the part of the employer and employee disfavor.

Labor-management cooperation proposal assumes that revision or repeal of section 8(a)(2) is unnecessarily drastic given that, as one commentator has observed, and as legislative history proves, this section is the "cornerstone" of the NLRA. Clearly, the sticking point in defining unlawful employer domination has been the definition of a labor organization, and not the identification of domination. Once again, an examination of the policies developed in the alternative judicial resolutions provides a road map for proposed revision.

Generally, the alternative judicial interpretations of section 2(5) have emphasized the representative qualities of a "labor organization" in an attempt to narrow the definition. Under Cabot Carbon, "dealing" means more than bargaining, but according to the alternative judicial resolutions which established the outer limits of this definition, it is no more than representation, and is not an unlimited proscription against communication between employers and employees. The NLRB has allowed limited exceptions to the broad definition of a labor organization for committees that do not act as agents of the employees, or where the committees act for management, rather than with management. Both of these exceptions constitute non-representative action. The Sixth Circuit interpretation further refines the term "dealing" in section 2(5) to allow for interaction between management and labor which is no more than a communication device, not active and ongoing, nor a vehicle for representation.

Thus, a revision to section 2(5) consistent with these interpretations would incorporate this narrower, but still obscure, definition of a "labor organization," possibly by specifically stating that the term shall not include labor-management committees which do act in a representational capacity. However, such a revision to section 2(5) would not

249. Kohler, supra note 178, at 518.
250. Domination is more readily objectively ascertainable, despite the proposition that it must be subjectively proven, whereas despite nearly 60 years of trying, the definition of a labor organization is still clouded by theory. Indeed, the Newport News Court had no trouble concluding that the committee had been dominated, but it passed on the issue of whether the committee itself was acceptable, leaving the issue to Congress. NLRB v. Newport News, Shipbuilding & Drydock Co., 308 U.S. 241, 251 (1939).
251. See supra part II.C.4.
252. See supra part II.C.5.
253. See supra part II.C.5.
necessarily be consistent with the application of the term in other sections of the NLRA. Accordingly, the better strategy is to concentrate on section 8(a)(2), the source of the challenges to labor-management cooperation.

IV. PROPOSAL—AMENDMENT OF NLRA SECTION 8(a)(2)

Some commentators have attempted to provide guidelines for lawful labor-management cooperation efforts in light of current judicial developments.254 Most recently, in the wake of the Electromation decision, an article proposed a list of common sense precautionary measures to ensure labor-management cooperation efforts the best opportunity to resist challenge.255 In 1990, the United Nations Association of the United States Economic Policy Council proposed thirteen "generic principles" for the lawful promotion of labor-management cooperation.256

254. Compare, e.g., Lee, supra note 185, at 219 with Zucker & Davis-Clarke, supra note 23, at 34. During the seven year period between the two articles, different issues and emphases have come to the fore, although several obvious themes remain the same. For instance, where a union is present, the employer would be well advised to negotiate labor-management cooperation efforts with the employees via their collective bargaining representative so as not to usurp the role of the union. And in the absence of an elected union, the establishment of labor-management cooperation committees is governed by the need to avoid creating labor organizations.

255. Steven H. Winterbauer, When Things Aren't What They Seem: Labor Issues in the Nonunion Workplace, 20 EMPLOYEE REL. L.J. 189 (1994). The article proposed the following measures:

- The employer [may propose] the EPP [Employee Participation Plan] but at the outset [should make] clear that employee participation [is] not mandatory;
- Managers do not participate in the EPP. Alternatively, if managers do participate, which standing alone does not violate the NLRA, the committee is governed by majority rule and managers do not constitute an majority;
- Employee participation is by way of open enrollment. The employer does not limit or select nonmanagerial membership;
- The EPP selects its own chair and determines its own agenda;
- The employer prohibits discussion of subjects of mandatory bargaining such as grievances, wages, hours, and conditions of work;
- The employer makes clear to employees that the EPPs are not intended to be a substitute for the employees right to organize and bargain collectively.

Id. at 214.

256. U.S. DEPT. OF LABOR, BUREAU OF LABOR-MANAGEMENT RELATIONS AND COOPERATIVE PROGRAMS (1990). These included employee involvement in the development of the program, a genuine long-term corporate commitment to the
Despite these clarifications and others, a great deal of confusion remains on the part of employees as well as employers about the legal requirements of labor-management cooperation. However, a joint bipartisan proposal, the Teamwork for Employees and Management Act [hereinafter TEAM], to amend section 8(a)(2) was introduced in the House and the Senate in 1993. The introduction of the bipartisan proposal explicitly recognized the need for labor-management cooperation. The proposal attempted to allow for labor-management cooperation efforts while placating the various concerns of unions, management and employees. The proposal was also substantively the same as the proposed amendment that was rejected during the Taft-Hartley amendments of 1947.

Instead of revising the existing language of either section 8(a)(2) or section 2(5), this proposal would amend section 8(a)(2) by adding a further provision recognizing labor-management cooperation efforts as lawful. It also understand-
ably would attempt to circumvent the fact-based subjective test carved out by the alternative judicial resolutions, by simply defining an acceptable labor-management cooperation organization as one which addresses matters of mutual interest to employers and employees, and distinguishing such an organization from a section 2(5) labor organization by emphasizing its absolute lack of representative capacity. The proposed amendment would leave the proscription against domination intact, while revising the definition of a labor organization consistent with the judicial resolutions, and confining the reach of the definition to the issue of domination. In practice, the domination test remains as a guarantee that the parties will continue to bargain at arms length. However, the amendment would acknowledge the existence of other issues of mutual interest, and recognize the legality of employer-employee groups that address issues of quality, productivity, efficiency, and the like.

The proposed amendment would address union concerns about continuing employer efforts to dominate labor organizations, and also management concerns about having to make concessionary revisions to other parts of the NLRA in exchange for union concessions on this issue. Employee concerns regarding the exclusivity doctrine would be addressed by leaving section 2(5) intact and providing an exception only regarding the issue of domination. Employee concerns about the improper use of labor-management cooperation efforts would be met by leaving section 8(a)(2) intact. Employee concerns about their protected status under the NLRA, as well as other legal inconsistencies arising from the limited implementation of cooperation in a traditionally adversarial relationship, would have to be addressed separately. In addition, a legislative amendment to section 8(a)(2) would demonstrate Congressional imprimatur of labor-management cooperation interest, including issues of quality, productivity and efficiency, and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.

efforts and ease the way for future interpretation of these issues.  

V. CONCLUSION

Given the increasingly competitive nature of the marketplace and a better educated workforce more capable of coming to its own decisions, employers and employees should be able to choose whether or not to implement a labor-management cooperation program. Legislative history, as well as the Electromation and E.I. du Pont cases, signal the dubious probability of successful judicial resolution. Additionally, practical exigencies militate against some of the proposed legislative revisions. This leaves a legislative amendment as the only viable recourse. The publicity surrounding Electromation and E.I. du Pont may expedite legislative amendment. The proposed legislative amendment maintains the protections already in place while supporting future labor-management cooperation efforts. The need for labor-management cooperation will only grow with the increase in both global competition and the non-unionized sector and the resultant unstable employment relationships. Amending legislation that was enacted in a different era, when the United States was industrially preeminent, is the appropriate response to these modern requirements.

Audrey Anne Smith

262. NLRB Member Raudabaugh has remarked, "[i]f you don't like the result, it's up to Congress to change it." Roger S. Kaplan & Margaret R. Bryant, Employer Participation Committees: "Sham Unions" or Wave of the Future?, LEG. TIMES, Dec. 13, 1993, at 25.
263. See Gould, supra note 10, at 262.