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104TH CONGRESS, 1st Session | HOUSE OF REPRESENTATIVES | REPORT 104–248

TEAMWORK FOR EMPLOYEES AND MANAGERS ACT OF 1995

SEPTEMBER 18, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. GOODLING, from the Committee on Economic and Educational Opportunities, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany H.R. 743]

[Including cost estimate of the Congressional Budget Office]

The Committee on Economic and Educational Opportunities, to whom was referred the bill (H.R. 743) to amend the National Labor Relations Act to allow labor management cooperative efforts that improve economic competitiveness in the United States to continue to thrive, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Teamwork for Employees and Managers Act of 1995".

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) the escalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships;

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(2) such changes involve an enhanced role for the employee in workplace decisionmaking, often referred to as "Employee Involvement", which has taken many forms, including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;

(3) Employee Involvement programs, which operate successfully in both unionized and nonunionized settings, have been established by over 80 percent of the largest employers in the United States and exist in an estimated 30,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of businesses in the United States, Employee Involvement programs have had a positive impact on the lives of such employees, better enabling them to reach their potential in the workforce;

(5) recognizing that foreign competitors have successfully utilized Employee Involvement techniques, the Congress has consistently joined business, labor and academic leaders in encouraging and recognizing successful Employee Involvement programs in the workplace through such incentives as the Malcolm Baldrige National Quality Award;

(6) employers who have instituted legitimate Employee Involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham "company unions" to avoid unionization; and

(7) Employee Involvement is currently threatened by legal interpretations of the prohibition against employer-dominated "company unions".

(b) PURPOSES.—The purpose of this Act is—

(1) to protect legitimate Employee Involvement programs against governmental interference;

(2) to preserve existing protections against deceptive, coercive employer practices; and

(3) to allow legitimate Employee Involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

SEC. 3. EMPLOYER EXCEPTION.

Section 8(a)(2) of the National Labor Relations Act is amended by striking the semicolon and inserting the following: ": *Provided further*, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply;".

SEC. 4. LIMITATION ON EFFECT OF ACT.

Nothing in this Act shall affect employee rights and responsibilities contained in provisions other than section 8(a)(2) of the National Labor Relations Act, as amended.

EXPLANATION OF AMENDMENTS

The provisions of the substitute are explained in this report.

PURPOSE

The purpose of H.R. 743, the Teamwork for Employees and Managers (TEAM) Act of 1995, is to amend the National Labor Relations Act (NLRA) to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against deceptive and coercive employer practices, and to allow legitimate employee involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

COMMITTEE ACTION

H.R. 743 was introduced by Representative Steve Gunderson on January 30, 1995, and its cosponsors include every Republican Member of the Committee on Economic and Educational Opportunities.

The Subcommittee on Employer-Employee Relations held a hearing on removing impediments to employee participation in the workplace on February 8, 1995. During this hearing, both the general issue of the uses and benefits of employee involvement structures and the specific legislative approach to clarifying the legality of such techniques provided in H.R. 743 were discussed. Testimony was received from the Honorable Steve Gunderson, Member of Congress, 3rd District of Wisconsin; Elaine Jensen, Sylvia Williams, Paul Bohling, and William O'Brien of the FMC Corporation of Chicago, Illinois; Mr. Charles F. Nielson, Vice President, Human Resources, accompanied by Mike Patterson, Shane Jackson, Robert Brooks and Ricky Fulks—Process Operators, David Wiggins and Chris Karry—Technicians, and Ms. Carolyn Manuel—Manufacturing Superintendent, of Texas Instruments of Dallas, Texas; Rosemary M. Collyer, Esquire, Crowell & Moring, Washington, DC; and Judith A. Scott, General Counsel, International Brotherhood of Teamsters, testifying on behalf of the AFL–CIO, accompanied by Berna Price and Diane Verrette.

The Committee on Economic and Educational Opportunities held a hearing on H.R. 743 on May 11, 1995. At that hearing, testimony was received from Mr. Michael P. Morley, Senior Vice-President and Director of Human Resources, Eastman Kodak Company, Rochester, New York (*testifying on behalf of the TEAM Coalition, Washington, DC*); Ms. Julie Smith, Team Advisor, TRW Vehicle Safety Systems Inc., Cookeville, Tennessee; Ms. Vicki J. McCormick, Human Resource Manager, EFCO Corporation, Monett, Missouri—accompanied by Ransom A. Ellis, Jr., Attorney at Law, Ellis & Black, Springfield, Missouri, and several EFCO employees including J. Mark Hardwick-Senior Buyer, David Szydloski-Foreman, David Burton-Project Engineer and Kevin W. Brown-Material Coordinator; Mr. David M. Silberman, Director of the AFL–CIO Task Force on Labor Law Reform, Washington, DC; and Mr. David Brody, Professor Emeritus of History, University of California—Davis, Davis, California.

The Subcommittee on Employer-Employee Relations favorably reported H.R. 743, as amended, to the Full Committee on March 7, 1995, by a vote of 8–4 (1 voting present). On June 22, 1995, the Committee on Economic and Educational Opportunities approved H.R. 743, as amended, on a voice vote, and, by a vote of 22–19, ordered the bill favorably reported.

STATEMENT

INTRODUCTION

H.R. 743, the Teamwork for Employees and Managers (TEAM) Act will promote greater employee involvement in the workplace by removing impediments under the National Labor Relations Act (NLRA). These impediments, largely contained in section 8(a)(2) of

the Act, were originally targeted at "company" unions, but actually sweep much broader to ban many cooperative labor-management efforts. This legislation signals a new era in employee relations and recognizes that the best workplaces for employees and the most productive workplaces for employers are ones where labor and management work together hand in glove. The Committee has focused several of its legislative efforts on decentralizing decision-making in a variety of areas within its jurisdiction, and, in the employment arena, employee involvement increases local decisionmaking by giving employees a voice in how their workplace is structured. In workplaces where employee involvement programs have been implemented, employees are empowered and can play a role in reaching decisions on many aspects of their employment and production processes.

As this nation enters the twenty-first century, the Committee believes it important that U.S. workplace policies reflect a new era of labor-management relations—one that fosters cooperation, not confrontation. Employees want to work with their employers to make their workplaces both more productive and a better place to work. A recent study of employees' views in this area indicates that a majority of workers want a voice in their workplace and feel that having a say in their workplace would be effective only if management cooperates. When asked to choose between two types of organizations to represent them, workers chose, by a 3-to-1 margin, one that would have no power but would have management cooperation, over one with power but without management cooperation.[1] Employee involvement gives workers the best of both worlds by offering both empowerment and cooperation.

The TEAM Act would clarify the legality of employee involvement structures by amending the NLRA to add a proviso to section 8(a)(2) clarifying that it is not impermissible for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest—including, among others, issues of quality, productivity, efficiency, and safety and health. The bill also specifies that such organizations may not have, claim or seek authority to enter into or negotiate collective bargaining agreements or to amend existing collective bargaining agreements, nor may they claim or seek authority to act as the exclusive bargaining agent of employees. H.R. 743 specifies that the proviso does not apply to unionized workplaces, thereby ensuring that employee involvement cannot be used as a means to avoid collective bargaining obligations. The amendment to section 8(a)(2) contained in the bill is designed to provide a safe harbor for cooperative labor-management efforts without weakening the ability of workers to organize and elect union representation.

The legality of employee involvement and labor-management cooperative efforts must be clarified, as these are the kinds of management techniques that move U.S. businesses toward the high performance workplaces necessary to enable them to compete in the increasingly competitive global economy. The broad definitions

[1] "Worker Representation and Participation Survey," Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

in the NLRA were written for a different era of employer-employee relations and no longer make sense in today's workplace. The hierarchical model of the workforce of the early twentieth century, where each employee's and supervisor's job tasks were compartmentalized and performed in isolation, is not effective in the current globally competitive marketplace. The labor law must evolve to adjust to the modern reality where job responsibilities overlap and each employee must have a sense of, and a voice in, the whole production process. The TEAM Act accomplishes this evolution and the Committee fully supports its enactment.

THE IMPORTANCE OF EMPLOYEE INVOLVEMENT

In the wake of the Industrial Revolution, American business operated under the time-honored principle of the division of labor. This theory was based on the belief that "when a workman spends every day on the same detail, the finished article is produced more easily, quickly, and economically."[2] Indeed, for most of this century, the accepted American method of human resource management—named "Taylorism" after Frederick Taylor, a turn-of-the-century engineer and inventor—has been top-down decision-making aimed at minimizing "brain work" at the shop-floor level. Employees simply did as they were told by their supervisors, who also operated within confined parameters set by their superiors.

Decades ago, when market forces were relatively static with the United States in the dominant position, Taylorism ensured the continuity and conformity necessary for American companies to maintain their economic supremacy. The past twenty years, however, have witnessed a dramatic transformation in the fundamental nature of labor-management relations. This transformation is due primarily to foreign competition, rapid technological change, and other factors which have provided strong incentives for altering workplace relationships.

By the late 1970s, managers began to view employees as a source of ideas for "developing and applying new technology" and "improving existing methods and approaches to remain competitive."[3] Rather than utilizing the majority of employees to perform a single task, as had been the practice under division of labor, companies began instituting a variety of programs designed to more broadly involve employees in solving problems and making decisions which once were exclusively within the realm of management.[4] These programs, implemented in both union and nonunion workplaces, included quality circles, quality of work life projects, and total quality management programs. By involving workers to varying degrees in most aspects of production, these programs have frequently resulted in substantial productivity gains, as well as increased employee satisfaction.

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[2] Alexis De Tocqueville, "Democracy in America" 555 (George Lawrence trans., Harper & Row 1988) (1848) (quoted in Michael L. Stokes, Note, "Quality Circles or Company Unions? A Look at Employee Involvement After Electromation and Dupont," 55 Ohio St. L.J. 897, 901 (1994)).

[3] Neil DeKoker, "Labor-Management Relations for Survival," in "Industrial Rel. Res. Ass'n Proc. of the 1985 Spring Meeting 576," 576 (Barbara D. Dennis ed., 1985) (quoted in Stokes, supra note 2, at 902).

[4] Stokes, supra note 2, at 903.

Current forms of employee involvement

Employee involvement is not a set "program" that is easily defined. Rather, it is a means by which work is organized within a company and, as such, a way for employees and employers to relate to one another regarding that organization. Because of this, there is no single dominant form of employee involvement. It usually includes some structured method for addressing workplace issues through discussions between employees and employer representatives. Indeed, two out of every three employee involvement structures do not even have a manual of procedure, thereby allowing the participants to design their structure to meet their changing needs.[5]

Although employee involvement programs come in infinite varieties, for discussion purposes they can be classified in general terms into several categories. Five of the most common forms of employee involvement include:

Joint labor management committees

In union settings, joint labor-management committees provide union and management leaders with a forum for ongoing discussion and cooperation outside the collective bargaining context. In nonunion settings, the committees are composed of employees (elected or volunteered) in addition to management officials.[6] While some of these committees have a special focus, most are designed to address multiple issues at the department or plant level and often serve as an umbrella under which smaller employee involvement efforts operate.[7]

Quality circles

Quality circles are small groups of employees which meet regularly on company time with the goal of improving quality and productivity within their own work areas. They typically are comprised of hourly employees and supervisors who receive special training in problem-solving techniques. Although quality circles usually lack authority to implement solutions without management approval, they provide workers with an invaluable opportunity to influence the manner in which their products are manufactured and designed.[8]

Quality of Work-Life Programs

Quality of Work-Life (QWL) programs are also designed to improve productivity, but focus primarily on improving worker satisfaction. Unlike quality circles, which focus directly on product improvement, QWL programs are premised on the belief that making workers' jobs more meaningful will lead to gains in productivity.

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[5] See Edward E. Lawler III, Gerald E. Ledford, & Susan A. Morhman, "Employee Involvement in America": A Study of Contemporary Practice (American Productivity & Quality Center: Houston, TX), at 33 (1989).

[6] Edward E. Potter, "Quality at Risk: Are Employee Participation Programs in Jeopardy?" (Employment Policy Foundation: Washington, D.C.), at 19 (1991).

[7] Congress has established a grant program, currently funded at $1.5 million, to help selected labor-management committees carry out joint programs; this program is administered by the Federal Mediation and Conciliation Service.

[8] Potter, supra, note 6, at 21. Martin T. Moe, Note, Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union, 68 N.Y.U. L.Rev. 1127, 1158 (1993).

Techniques employed by QWL programs are intended to bring about fundamental changes in the relations between workers and managers and can include changing the decision-making, communication and training dimensions within an organization. Joint labor-management committees are frequently used to coordinate and monitor QWL programs.[9]

Self-Directed Work Teams

Self-directed work teams are groups of employees who are given control of some well-defined segment of production. Such teams are often responsible for their own support services and personnel decisions in addition to determining task assignments and production methods.[10]

Gainsharing

Gainsharing is the generic term used for a variety of programs intended to address the problem of loss of sales and jobs caused by declining productivity. A common feature of these programs is the payment of bonuses to employees when productivity is increased. Gainsharing programs are often developed and administered by joint labor-management committees, which also serve as clearinghouses for employee suggestions for improving productivity.[11]

Again, it is important to note that the examples discussed above are intended to provide illustrations of the various ways in which employee involvement is utilized in today's modern workplace. Many other forms are successfully utilized by both small and large employers. More important to this discussion, however, is the fact that employee involvement, regardless of its form, seeks as its fundamental goal to unlock the productive capabilities of American workers. And, while it may be argued that some similarities exist between modern employee involvement and the employer-dominated company unions of the 1930s, today's programs differ dramatically in intention, form and effect from the offensive organizations the National Labor Relations Act sought to abolish. Indeed, today's employee involvement programs "seek to engender labor-management cooperation and improve worker productivity and morale by granting employees greater involvement in the issues that most affect their work lives."[12]

Employee involvement enjoys broad support

Notwithstanding the contentions of opponents of the TEAM Act, employee involvement enjoys wide-spread and ever-increasing support among employees, employers, academics and policy-makers.

In testimony before the Committee on Economic and Educational Opportunities, Ms. Julie Smith, a Team Advisor and hourly employee at TRW Vehicle Safety Systems described her company's use of employee involvement:

> Our teams are involved in all aspects of the plant. We are instrumental in redesigning work space and manufacturing equipment when a new product line is opened. We

[9] Moe, supra note 8, at 1158-59.
[10] Id.
[11] Moe, supra note 8, at 1160.
[12] Id.

> address health and safety issues, and ergonomics. We develop methods of reducing scrap and improving our effectiveness. We decide what changes need to be made, we participate in driving the change and making sure it happens in a timely manner. Our ideas are listened to and we make a difference.[13]

But, perhaps more important than Ms. Smith's description of the ways in which her company uses employee involvement is her description of the ways she and her fellow employees have responded to its use:

> At Cookeville, we don't have time clocks. People come to work to use their minds as well as their heads. We look forward to starting our day, and when we go home, we feel good about what we've done because we know that we've had a direct influence on the decisions that affect our work environment.[14]

Senior management has voiced similarly enthusiastic support for employee involvement. This sentiment is perhaps best reflected in the testimony of Howard V. Knicely, Executive Vice President, TRW Vehicle Safety Systems before the Committee on Economic and Educational Opportunities Subcommittee on Employer-Employee Relations:

> In my company, as in most others, technology is being acquired in numerous ways—capital can be raised wherever the financial market is most attractive. However, the single most competitive advantage we have that cannot be acquired or copied is a well-trained, highly motivated, and involved work force. This is our hope for the 90s. Employee involvement is and must be a win-win strategy in all segments of our industrial policy.[15]

While some in academia have voiced concern about the potential impact of H.R. 743, others have acknowledged the fundamental changes in labor-management relations that brought about its introduction and are extremely supportive of the specific goals it seeks to achieve. As noted by Professor Samuel Estreicher:

> Competitive pressures on U.S. firms from a variety of sources—the emergence of international product markets, deregulation of air and truck transport and telecommunications, technological advances that reduce the advantages of local firms, and capital market forces that require enhancement of shareholder values—are undermining Taylorist conceptions of how best to utilize front-line workers.[16]

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[13] Hearing on H.R. 743, "The Teamwork for Employees and Managers (TEAM) Act" Before the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. at 24 (May 11, 1995) (statement of Julie Smith, Team Advisor, TRW Vehicle Safety Systems, Inc.).

[14] Id. at 22.

[15] Hearing on "Removing Impediments to Employee Participation/Electromation" Before the Subcommittee on Employer-Employee Relations of the House Committee on Economic and Educational Opportunities, 104th Cong., 1st Sess. at 44 (Feb. 8, 1995) (statement of Howard V. Knicely, Executive Vice President, TRW Vehicle Safety Systems, Inc.).

[16] Samuel Estreicher, "Employee Involvement and the 'Company Union' Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA," 6 N.Y.U. L.Rev. 125, 135 (1994).

With regard to employee involvement and its relationship to the modern workplace, Professor Estreicher notes:

> Worker participation is a desirable goal whether or not it increases the demand for independent representation, as long [as] it does not prevent workers from effectively choosing for themselves how best to advance their interests in the workplace. *Because employee involvement programs can enhance opportunities for worker participation and improve firm performance without foreclosing other options, legal restrictions should be lifted.* (emphasis added) [17]

Similar recognition of the important role played by employee involvement programs has also been voiced by any number of prominent public policy-makers. In its final Report and Recommendations, President Clinton's Commission on the Future of Worker-Management Relations acknowledged that "[e]mployee involvement programs have diverse forms, ranging from teams that deal with specific problems for short periods to groups that meet for more extended periods." [18] Perhaps more importantly, the President's Commission concluded,

> On the basis of the evidence, the Commission believes that it is in the national interest to promote expansion of employee participation in a variety of forms provided it does not impede employee choice of whether or not to be represented by an independent labor organization. *At its best, employee involvement makes industry more productive and improves the working lives of employees.* (emphasis added) [19]

Similarly, Secretary of Labor, Robert B. Reich, has also noted the fundamental changes taking place in today's modern workplace:

> High-performance workplaces are gradually replacing the factories and offices where Americans used to work, where decisions were made at the top and most employees merely followed instruction. The old top-down workplace doesn't work any more.[20]

In response to these changes, the Department of Labor has recently issued a publication to American businesses which underscores the benefits derived from employee involvement:

> Highly successful companies avoid program failure by assembling employees into teams that perform entire processes—like product assembly—rather than having a worker repeat one task over and over. In many cases, teams of workers have authority usually reserved for managers: They hire and fire; they plan work flows and design or

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[17] Id. at 158.

[18] Commission on the Future of Worker-Management Relations: Report and Recommendations, Dep't of Labour and Dep't of Commerce, December 1994.

[19] *Id.*

[20] Robert B. Reich, The "Pronoun Test" for Success, The Washington Post, July 28, 1993, at A19.

adopt more efficient production methods; and they ensure high levels of safety and health.[21]

Employee involvement works

Employee involvement as a means of promoting the competitiveness of American business is a central concept in contemporary U.S. labor-management relations. Indeed, during the past twenty years, employee involvement has emerged as the most dramatic development in human resources management.

Evidence of the success—and, corresponding proliferation—of employee involvement can be found in a 1994 survey of employers performed at the request of the Commission on the Future of Worker-Management Relations. The survey found that 75 percent of responding employers—large and small—had incorporated some means of employee involvement in their operations. Among larger employers—those with 5,000 or more employees—the percentage was even higher, at 96 percent.[22] It is estimated that as many as 30,000 employers currently employ some form of employee involvement or participation.

The success of employee involvement can also be found in the views of American workers. As noted previously, a survey conducted by the Princeton Survey Research Associates found overwhelming support for employee involvement programs among workers, with 79 percent of those who had participated in such programs reporting having "personally benefitted" from the process. Indeed, 76 percent of all workers surveyed believed that their companies would be more competitive if more decisions about production and operations were made by employees rather than managers.[23]

Clearly, employee involvement is more than just another passing trend in human resources management. Over the last twenty years, it has evolved—along with the global economy—into a basic component of the modern workplace and a key to successful labor-management relations. As such, American business must be allowed to use employee involvement in order to more effectively utilize its most valuable resource—the American worker.

Electromation and aftermath signal need for clarification

On December 16, 1992, the National Labor Relations Board (NLRB) issued a decision in Electromation, Inc.,[24] a case which many thought would provide the Board an opportunity to clarify the legality[25] of employee involvement structures which are in-

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[21] See "Road to High-Performance Workplaces: A Guide to Better Jobs and Better Business Results," U.S. Department of Labor, September 1994.

[22] The "Nature and Extent of Employee Involvement in the American Workplace," Survey conducted by Aerospace Industries Associates, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors, Inc., August 10, 1994.

[23] "Worker Representation and Participation Survey," Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

[24] 309 NLRB No. 163 (1992).

[25] The two provisions of the National Labor Relations Act most directly at issue in the debate over the legality of employee involvement structures are section 2(5) and section 8(a)(2). Section 2(5) defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Section 8(a)(2) makes it an

creasingly a part of modern work life. Electromation involved several employee participation committees, which were organized around various workplace issues, established within a small, non-union company. The committees were established, unrelated to any organizing effort,[26] in response to employees' objections to several changes in attendance and wage policies proposed by the company. The so-called "action committees" were formed to address several workplace issues: (1) absenteeism, (2) no-smoking policy, (3) communication network, (4) pay progression for premium positions, and (5) attendance bonus program. The Board found that the company played the primary role in establishing the size, responsibilities and goals of the committees and in setting the final membership and initial dates for meetings.

In order to determine if the company had committed an unfair labor practice under the NLRA, the Board had to first consider whether the action committees were "labor organizations" under the Act. The Act's definition of "labor organization" is quite broad and encompasses "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."[27] The interpretation of this definition by the courts has added to its breadth as the Supreme Court has held that the term "dealing with employers" is not limited to collective bargaining situations, but is a much broader concept.[28] Working with this wide-ranging definition, the NLRB determined that the committees were "labor organizations" within the meaning of the National Labor Relations Act.

The Board next turned to the question of the company's role in the establishment and operation of the action committees and considered whether the company had "dominated" or "interfered with" the committees. Under section 8(a)(2) of the Act, it is an unfair labor practice by an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." In this context, the NLRB found the company had dominated the committees in violation of section 8(a)(2) because of its primacy in setting the size, responsibilities and goals of the committees, and in selecting the final makeup and initial dates for meetings. The Electromation decision was later affirmed by the Seventh Circuit Court of Appeals.[29]

The need for clarification of the legality of employee involvement structures has since moved far beyond the specific facts of the Electromation decision. The breadth of the relevant provisions of the NLRA combined with the confusion created by the four opinions in the decision have left the myriad employers and employees attempting to establish cooperative arrangements in the workplace in a legal never-never land. Furthermore, since the Electromation

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unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

[26] Although the Teamsters Union began an organizing drive shortly after the formation of the action committees, the NLRB determined that the company did not establish them to interfere with the employees' right to choose a union. In fact, the company disbanded the committees once it learned of the organizing efforts to avoid charges that it was tainting the election.

[27] Section 2(5) of the NLRA.

[28] See *National Labor Relations Board* v. *Cabot Carbon Co.,* 360 U.S. 203 (1959).

[29] *Electromation, Inc.* v. *National Labor Relations Board,* 35 F.3d 1148 (7th Cir. 1994).

decision, the NLRB has considered charges involving the employee involvement efforts of some of the leading companies in the country and has consistently questioned the legality of these efforts:[30]

Donnelly Corporation:[31] Named One of the 100 Best Companies to Work for in America and recognized by the U.S. Department of Labor (DOL) for its innovative work system, the NLRB has nonetheless issued a complaint against Donnelly charging that its employee involvement structure violates section 8(a)(2). The irony is that the genesis of the complaint was testimony that Donnelly presented to DOL's Commission on the Future of Worker-Management Relations (Dunlop Commission) on "Innovations in Worker Management Relations." Dr. Charles J. Morris, former editor of The Developing Labor Law, heard the testimony, felt the Donnelly system was a violation of section 8(a)(2), and thus filed the initial charge.[32]

Polaroid Corporation:[33] Also cited as One of the Best 100 Companies to Work for In America, the Polaroid Corporation has long had an institutional commitment to employee involvement and has been a model for other companies establishing cooperative efforts. Despite the company's attempt in the early 1990's to reconstitute its successful committees to comply with section 8(a)(2), a complaint was issued by the Board's General Counsel challenging even the new structure which removed all decisionmaking authority from the employees. A hearing was scheduled on the complaint this summer and Polaroid is awaiting the decision from the Administrative Law Judge.

EFCO Corporation:[34] The EFCO Corporation first became involved in employee involvement programs in the late 1970's with the establishment of an employee stock ownership plan (ESOP). The company then moved to utilize Total Quality Control techniques and an extensive employee committee system. Four of the committees—employer policy review, safety, employee suggestion, and employee benefits—were challenged as violating section 8(a)(2) by the Carpenters' Union after an unsuccessful organizing effort.[35] Although acknowledging EFCO's commitment to employee empowerment, the Administrative Law Judge nonetheless found that the committees were "labor organizations" and that the company had illegally dominated them because of its role in establishing the committees, choosing initial members, participating in meetings, and setting top-

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[30] Much has been made by opponents of H.R. 743 of the relatively small number of charges filed with the Board alleging a violation of section 8(a)(2). First and foremost, the NLRB process is wholly complaint driven and there is obviously a diminished incentive for employees to challenge workplace structures which effectively meet their interest in having greater involvement in workplace decisionmaking. Furthermore, the relative absence of litigation should not be the criteria by which the need for clarifying the legality of employee involvement programs is judged. An obvious and primary problem is the chilling effect that the Electromation decision has had on legitimate employee involvement programs and on employers' plans to expand such programs.

[31] GR–7–CA–36843.

[32] Although this charge was eventually dismissed, a Donnelly employee then amended an unrelated unfair labor practice charge she had filed to include the alleged section 8(a)(2) violation. A complaint was issued on this second charge and a hearing is scheduled for October 26, 1995.

[33] 1–CA–29966.

[34] 17–CA–16911 (March 7, 1995).

[35] The Carpenters' Union attempted to organize EFCO employees in the summer of 1993, however, the union never filed a petition for an election with the NLRB.

ics for discussion. EFCO plans to appeal the ALJ decision to the full Board.

Keeler Brass Automotive Group:[36] In the most recent ruling on the legality of employee involvement structures, a unanimous NLRB has ordered Keeler Brass Automotive Group to disband a grievance committee established for several of its plants. The Board, reversing the decision by the Administrative Law Judge, found that Keeler Brass had unlawfully dominated the formation of the committee and had interfered with its administration. In a concurring opinion, Chairman Gould concluded that the committee was not capable of independent action, despite the fact that the committee was not created in response to union organizing efforts or as a means to undercut independent action by employees, participation on the committee was voluntary and determined by election, and employees were the only voting members of the committee.

Suffice to say that the Board's interpretation of the interrelationship between the broad definition of "labor organization," which sweeps in many employee participation programs, and the strict limits on the role of employers in such organizations, makes it a very treacherous road to navigate for companies who want to institutionalize some form of labor-management cooperation.

THE CURRENT PROHIBITIONS IN THE NLRA ARE TOO BROAD

A brief examination of the history of the prohibition in section 8(a)(2) demonstrates both why the stricture was originally crafted so broadly and why such breadth interferes with the preferred method of labor-management organization in many U.S. businesses today. In 1935, when Congress passed the National Labor Relations Act (NLRA), the so-called Wagner Act,[37] employer-dominated (company) unions had become a focal point in the national debate over how to improve labor-management relations. The precursor to the NLRA, the National Industrial Recovery Act, passed in 1933, had temporarily given employees "the right to organize and bargain collectively through representatives of their own choosing."[38] However, the Recovery Act proved to be of little value in ensuring those rights, in part because it left the subject of employer-dominated unions largely unaddressed.

Under the Recovery Act, employers could use company unions as tools to avoid recognition of, and collective bargaining with, independently organized unions. Employers often refused to recognize independently formed unions on the ground that employees were already represented, albeit by a company union. As a result, employers could establish and bargain exclusively with unions that were formed and operated largely at their direction. The Recovery Act permitted such abuses of company unions for various reasons. Primarily, the Act contained inadequate enforcement mecha-

[36] 317 NLRB No. 161 (June 14, 1995).

[37] Senator Robert Wagner was the prime sponsor of the bill which became the National Labor Relations Act (NLRA).

[38] National Industrial Recovery Act, 48 Stat. 195, 198 (1933) (the rights established by the Recovery Act had only temporary effect, because section 2(c) of the act contained a sunset provision).

nisms.[39] Further, the Act did not specifically prohibit company unions, although it prohibited employers from requiring employees to join a company union as a condition of employment.[40] Lastly, the Act granted employees the right to organize, but did not specify "the kind of organization, if any, with which employees should affiliate."[41] Thus, consistent with the Recovery Act, an employer could appear to be "recognizing and cooperating with organized labor" while avoiding the dangers inherent in dealing with a union not subservient to the employer's interests.[42]

Recognizing the inadequacies of the Recovery Act, section 8(a)(2) of the NLRA was specifically drafted to prevent employers from using company unions to avoid recognizing and collective bargaining with independently organized unions. Senator Robert Wagner, sponsor of the bill which became the NLRA, stated that "[t]he greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since enactment of the recovery law."[43] According to an article printed in the New York Times during debate over the NLRA, the number of employees in company unions had increased from 432,000 in 1932, before passage of the Recovery Act, to 1,164,000 just one year later.[44] Over 69 percent of the company unions in existence at that time had been formed in the brief period following passage of the Recovery Act.[45] The magnitude of this problem following passage of the Recovery Act is evidenced by the fact that more than 70 percent of the disputes coming before the National Labor Board (precursor to the NLRB) before enactment of the NLRA concerned employers' refusal to deal with properly elected union representatives.[46]

Prior to passage of the NLRA then, employers did use company unions as a tool to avoid collective bargaining with independently organized unions and to control what collective bargaining did take place. Section 8(a)(2) of the NLRA was an important measure for ensuring that employers did not use company unions as an obstacle to genuine collective bargaining. However, the legislative history of the NLRA suggests that while Congress strongly desired to eliminate barriers to genuine collective bargaining, it did not desire to ban all employer-employee organizations.

Senator Wagner stated in a discussion regarding the advantages and disadvantages of company unions that "[t]he company union has improved personal relations, group-welfare activities, and other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is one whose sweep embraces whole industries, or States, or even the Nation."[47] He further stated, regarding a bill containing provisions virtually identical to section 8(a)(2) of the NLRA, that it did "not prevent employers from setting up societies or organiza-

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[39] Hardin, Patrick, "The Developing Labor Law" (3d ed. 1992), vol. 1 at 25–26.
[40] National Industrial Recovery Act, 48 Stat. 195, 198–99 (1933).
[41] I. Bernstein, "Turbulent Years" 38 (1970).
[42] Hardin, supra note 39, at 26.
[43] 78 Cong. Rec. 3443 (1934) reprinted in 1 NLRB, "Legislative History of the National Labor Relations Act," 1935, at 15 (1949).
[44] Wagner, Robert. "Company Unions: A Vast Industrial Issue," The New York Times, Mar. 11, 1934.
[45] Id.
[46] Wagner, Robert. "Company Unions: A Vast Industrial Issue," The New York Times, Mar. 11, 1934.
[47] *Id.*

tions to deal with problems of group welfare, health, charity, recreation, insurance or benefits. All of these functions can and should be fulfilled by employer-employee organizations. But employers should not dominate organizations which exist for the purposes of collective bargaining in regard to wages, hours, and other conditions of employment."[48] Thus, at the outset of debate over the NLRA Congress indicated its disapproval of employer-dominated organizations which existed for purposes of collective bargaining, but did not signal its disapproval of employer-employee organizations in general.

Further debate over the proposed scope of section 8(a)(2) confirms that Congress did not desire to ban all employer-employee organizations. Senator Wagner stated several times that "[e]mployer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism . . ."[49] The Senate Report on S. 2926, an earlier version of the NLRA containing provisions virtually identical to 8(a)(2), confirms this view. Regarding employers' use of company unions as an obstacle to collective bargaining, the report on the bill states that "these abuses do not seem to the committee 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. . . . The object of [prohibiting employer-dominated unions] is to remove from the industrial scene unfair pressure, not fair discussion."[50]

Senator Walsh, then Chairman of the Senate Committee on Education and Labor, concurred in this view. Commenting on S. 2926, he stated that "this . . . unfair labor practice seeks to remove from the industrial scene unfair pressure by the employer upon any labor organization that his workers may choose, yet leaves fair discussion unhampered."[51] Thus, analysis of the legislative history of the NLRA suggests that Congress strongly desired to prevent employers from using company unions as an obstacle to collective bargaining, again while leaving intact organizations intended to promote employer-employee communication and cooperation.

The broad language of section 8(a)(2) does not seem consistent with a Congressional desire to prohibit only employer-employee organizations which would inhibit recognition of, and collective bargaining with, independent unions. However, the Congress' experience with narrow interpretations by the courts of labor relations legislation prior to enactment of the NLRA may explain why Congress drafted section 8(a)(2) broadly. Specifically, in the decades preceding enactment of the NLRA, Congress had enacted various measures designed to allow the development of organized labor and to ensure the right to bargain collectively. These measures included the Erdman Act, enacted in 1898; sections of the Clayton Act; the

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[48] Hearings on S. 2926 Before the Senate Committee on Education and Labor, 73rd Cong., 2d Sess. 9 (1934) (statement of Senator Wagner) reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 39–40 (1949) (emphasis added).

[49] 78 Cong. Rec. 3443 (1934) reprinted in 1 NLRB, "Legislative History of the National Labor Relations Act," 1935, at 16 (1949); Wagner, Robert. "Company Unions: A Vast Industrial Issue," The New York Times, Mar. 11, 1934.

[50] S. Rep. No. 1184, 73rd Cong., 2d Sess. (1934) reprinted in 1 NLRB, "Legislative History of the National Labor Relations Act," 1935, at 1104 (1949).

[51] 78 Cong. Rec. 10,559 (1934) reprinted in 1 NLRB, "Legislative History of the National Labor Relations Act," 1935, at 1125 (1949).

Railway Labor Act; and the Norris-LaGuardia Act.[52] Of these, the Clayton Act and the Norris-LaGuardia Act were broadest in their scope of coverage.[53]

Congress designed sections 6 and 20 of the Clayton Act to prevent courts and employers from using the Sherman Act as a barrier to union activity and development. Under the Sherman Act, federal courts were able to assert federal question jurisdiction over labor disputes and frequently held that organized labor activities, by obstructing the flow of goods in interstate commerce, were in violation of the Act.[54] Section 6 of the Clayton Act was designed to prevent application of the Sherman Act to organized labor "by providing that labor itself is not 'an article of commerce.'"[55] The section also specified that labor organizations do not violate antitrust laws by "lawfully carrying out" their "legitimate objectives."[56] Section 20 of the Clayton Act was designed to greatly restrict the ability of courts to issue injunctions against organized labor activity. The first paragraph of section 20 was intended to reduce the use of injunctions by requiring that there be no adequate remedy at law and actual or threatened injury before issuance of an injunction.[57] The second paragraph of section 20 lists and describes several labor activities and provides that "none of these activities shall 'be considered or held to be violations of any law of the United States,'" and prohibits enjoining those activities even if the requirements of the first paragraph are met.[58] Thus, Congress attempted to allow the development of organized labor through language in the Clayton Act which specifically prohibited various types of interference with organized labor.

Despite the seemingly broad scope of sections 6 and 20 of the Clayton Act, however, the Supreme Court interpreted both sections very narrowly in *Duplex Printing Press Co.* v. *Deering*. The Court interpreted the first paragraph of section 20 as approving of existing labor-injunction practice rather than as imposing more stringent requirements for the issuance of injunctions against organized labor.[59] Further, the Court interpreted the phrase "between an employer and employees" contained in the first paragraph as limiting application of both paragraphs to cases between an employer and its own employees.[60] Thus, the Court interpreted the Clayton Act as having minimal impact on barriers to union development and activity, despite statutory language which would suggest otherwise.

Given the Court's narrow interpretation of the Clayton Act, and the failure of the Recovery Act to ensure the rights to organize and bargain collectively, it is not surprising that Congress drafted sec-

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[52] Hardin, supra note 39, at 12–24 (providing a historical background to the National Labor Relations Act).

[53] The Erdman Act and the Railway Labor Act were limited in scope to employees engaged in the operation of interstate trains. Hardin, supra note 39, at 14, 20.

[54] Hardin, supra note 39, at 9–10, 16.

[55] Hardin, supra, at 16.

[56] Id.

[57] Although both of these requirements were historically present in equity, courts had largely disregarded them in labor-injunction practice prior to passage of the Clayton Act. Hardin, supra note 39, at 16–17.

[58] Hardin, supra note 39, at 17.

[59] *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921) (construed in Hardin, supra note 39, at 18).

[60] Id.

tion 8(a)(2) of the NLRA broadly.[61] Prior to the period in which the NLRA was enacted, courts greatly resisted any efforts designed to allow the growth of organized labor and collective bargaining.[62] Thus, in order to ensure employees the rights to organize and bargain collectively, Congress was compelled to expansively craft the prohibition in section 8(a)(2) of the NLRA.

As the previous discussion of the expansive use of various forms of employee involvement and labor-management cooperation indicates, a broad-sweeping prohibition of all employer-employee organizations no longer serves the interests of giving employees an effective voice in their workplace. While the right to independent representation will always remain one of the bedrock principles of the NLRA, as this nation approaches the twenty-first century, nothing about modern employee involvement interferes with that right. Like all aspects of society, the workplace of today is very different than it was sixty years ago. In 1935, organized labor was still in its formational stages and much more at the mercy of employers intent on derailing its development. The myriad labor protections that are on the books today—from the Fair Labor Standards Act to the Occupational Safety and Health Act to the Worker Adjustment and Retraining Notification (WARN) Act to the Family and Medical Leave Act—are testimony to the tremendous influence and power of independent labor unions to protect working men and women.

Likewise, working men and women have changed, and so consequently have their needs in the workplace. The demands on, and skills required of, workers in today's information-based economy are very different than those prevalent in the manufacturing-driven economy of the early twentieth century. The workforce of today mirrors the demographic changes of the United States as a whole and thus the interests and values of workers are increasingly more diverse. The nature of work, for both employees and managers, has also evolved tremendously in sixty years from the perspective of both technological and organizational developments. Workplace structures that have the flexibility to meet the situational and differing needs of employees, while also addressing the productivity demands of employers, are at a premium in the modern working environment. While formal representation through an independent labor organization will remain the preferred form of organization in many workplaces, clearly, there must be a place in this nation's labor laws for cooperative arrangements between employees and employers to address the challenges and demands of working in a globally competitive marketplace.

The Team Act legalizes employee involvement: Company unions are still prohibited

The TEAM Act clarifies that it shall not constitute or be evidence of a violation of section 8(a)(2) of the NLRA for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters

[61] The definitional provisions in section 13 of the Norris-LaGuardia Act were also drafted broadly, again demonstrating Congress' tendency towards drafting pro-labor acts broadly in this period. Hardin, supra note 39, at 23–24.

[62] Hardin, supra note 39, at ch. 1.

of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health. This language creates a safe harbor in the NLRA for a wide range of employee involvement structures where managers and workers can discuss the myriad issues that affect both the productive capacity of a company and the quality of work life.

Some of the matters of mutual interest which employee involvement structures address will unavoidably include discussions of conditions of work. The processes by which a company "produces" its product are inextricably linked to the terms and conditions of individuals' employment in those processes. Lawrence Gold, General Counsel of the AFL–CIO, perhaps described this reality best when he argued before the Board:

> What is productivity? It's who does what, its whether "A" works certain hours, whether "B" gets relief, whether a particular way of moving materials is sound or unsound. People are affected by that, their jobs and prerogatives, their seniority, their vacations. All of that is the stuff of working life. And to say that you can abstract productivity from working conditions is something that I have a great deal of difficulty with.[63]

Indeed, the truth of the matter is that if employee involvement structures were prohibited from discussing issues related to conditions of work, their effectiveness would be severely hampered. The phrase "terms and conditions of employment" includes issues ranging from grievance procedures, layoffs and recalls, discharge, workloads, vacations, holidays, sick leave, work rules, use of bulletin boards, change of payment from a weekly salary to an hourly rate, and employee physical examinations.[64] If it is even possible, requiring employee involvement structures to narrowly focus on issues unrelated to conditions of work limits their ability to be a forum for employees and managers to develop comprehensive strategies that contribute both to the economic well-being of the company and to the pecuniary and non-pecuniary satisfaction of the workforce.

Despite the breadth of the language creating the safe harbor, the TEAM Act retains several important protections in section 8(a)(2). Importantly, the bill provides that employee involvement structures may not have, claim, or seek authority to be the exclusive bargaining representative of employees or to negotiate, enter into, or amend collective bargaining agreements. This is a very significant protection that distinguishes employee involvement structures from the company unions of yesteryear that section 8(a)(2) was designed to prohibit. Even after enactment of H.R. 743, such company unions would continue to be unlawful under section 8(a)(2).

For example, in *National Labor Relations Board* v. *Lane Cotton Mills*,[65] a violation of 8(a)(2) was found where the employer established an in-house welfare association and refused to bargain with a Textile Workers Organizing Committee that had been elected by the employees. The employer's action in this case would not fall

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[63] Transcript of Proceedings Before the National Labor Relations Board in *Electromation, Inc.* (Case No. 25–CA–19818) 61–62 (Sept. 5, 1991).

[64] See Hardin, supra note 39, at 885–86.

[65] 111 F.2d 814 (5th Cir. 1940).

within the safe harbor created by the TEAM Act because management treated the welfare association as the exclusive bargaining representative, conduct specifically prohibited by H.R. 743.[66] Similarly, in *Solmica*,[67] a company president suggested to his employees that they could resolve their differences themselves, without a union. The employees agreed and eventually signed a collective bargaining agreement with the president. Again, this conduct would continue to be a violation of section 8(a)(2) as the TEAM Act would not permit employee involvement structures, no matter how formal or informal, to negotiate collective bargaining agreements.

While opponents of the TEAM Act have argued that many of the 1930s "company unions" which prompted the enactment of Section 8(a)(2) shared the beneficent characteristics of today's employee involvement structures, a 1937 Bureau of Labor Statistics study, entitled "Characteristics of Company Unions," 1935 [hereinafter BLS Survey] paints a substantially different picture. The study of 126 company unions found that 64 percent of them had been formed in response to a strike or local union activity. The remainder had either been intended to improve plant morale (11.2 percent) or to appease public opinion or respond to governmental encouragement of collective bargaining (24.8 percent).[68]

Even if some of the characteristics of company unions are shared by today's employee involvement structures, there is a critical distinction. Unlike company unions, legitimate employee involvement structures do not pretend to serve the same purpose as an independent labor union, which acts as the exclusive representative of the employees for collective bargaining and handling of grievances. Unlike the employee involvement structures of today, company unions in the first half of this century were being advanced as exclusive alternatives to labor unions. However, as discussed previously, they rarely possessed the essential characteristics of a genuine collective bargaining representative.

Under H.R. 743, the decision to choose formal organization and to secure independent representation remains in the hands of the employees. Nothing in the TEAM Act interferes with that choice. The safe harbor created in H.R. 743, while arguably broad in terms of the types of employee involvement structures to which it applies, is quite narrow in terms of the scope of conduct related to such structures which is legitimized. The bill states that "it shall not constitute or be evidence of a violation under *this paragraph* for an employer" to establish and participate in an employee involvement structure. [Emphasis added.] H.R. 743 also specifically provides in section four that "Nothing in this Act shall affect employee rights and responsibilities contained in provisions other than section 8(a)(2) of the National Labor Relations Act, as amended."

Thus, the other protections in section 8(a) of the NLRA which prohibit employer conduct that interferes with the right of employees to freely choose independent representation remain in full force. If employee involvement structures do not prove to be an effective means for employees to have input into the production and

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[66] See also, *National Labor Relations Board* v. *Link-Belt Co.*, 61 S. Ct. 358 (1941), *American Tara Corp.*, 242 NLRB 1230 (1979).

[67] 199 NLRB 224 (1972).

[68] "BLS Survey" at 84.

management policies that impact them, those employees have every right, and every reason, to formally organize. Section 8(a)(1)—which makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights, guaranteed by section 7 of the NLRA, to organize and bargain collectively through representatives of their own choosing—remains untouched by the TEAM Act.[69] Employee involvement structures cannot be used to interfere with employees' ability to freely exercise section 7 rights.[70]

H.R. 743 was amended in Committee to clarify that the amendment to section 8(a)(2) contained in the TEAM Act does not apply in cases in which a labor organization is the representative of such employees as provided in section 9(a) of the NLRA. This amendment was intended to mollify concerns that H.R. 743 would permit employers to use employee involvement structures as a means to avoid their obligation to bargain collectively with a labor organization. As an initial matter, the bill, as introduced, was not intended to alter in any way an employer's obligation under section 8(a)(5) to bargain with the duly elected representatives of employees.[71] However, the amendment adopted in Committee makes it absolutely clear that the safe harbor created in the TEAM Act for certain employee involvement structures does not immunize an employer from the prohibition against directly dealing with employees who are represented by a labor union. In fact, as a practical matter, if employers and employees in a unionized workplace want to initiate some type of employee involvement structure, the union essentially has a veto power over the very establishment of such a structure.

In sum, H.R. 743 creates a safe harbor in the NLRA for a broad range of employee involvement structures which have an infinite variety of organizational characteristics and which deal with a broad spectrum of workplace issues. However, this safe harbor exists only to the extent that an employer's dominance or interference with respect to such structures is being judged in the context of section 8(a)(2). The legality of the establishment or use of such structures in the context of any other potential violation of the Act remains unaffected.

CONCLUSION

The Committee has placed the highest priority on the enactment of H.R. 743. The workplace of today is simply not the same as the workplace that was prevalent in the America of the 1930's when the National Labor Relations Act was enacted. This nation must prosper in an increasingly competitive and information-driven economy where, at every level of a company, employees must have an understanding of, and a role in, the entire business operation.

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[69] Similarly, the TEAM Act does not alter the prohibition in section 8(a)(3) making it an unfair labor practice for an employer to discriminate against any employee on the basis of his or her membership in a labor organization.

[70] In *Stone Forest Industries, Inc.,* 36–CA–6938 (March 17, 1995), it was found that an employer's promise, the day before a union election, to establish a Communications Committee to deal with employee grievances was a violation of section 8(a)(1) because it was used as an inducement to persuade employees to vote against the union.

[71] H.R. 743, either as it was introduced or as it was reported by the Committee, is not intended to overrule or alter the NLRB's decision in *E.I. du Pont de Nemours & Co.,* 311 NLRB No. 88 (1993).

Employee involvement in the modern workplace has proven to be an effective strategy at increasing both the value-added each employee brings to the production process and the job satisfaction that each employee derives from the workplace.

This nation's labor law must be relevant to the employer-employee relationships of the twenty-first century. The Committee feels strongly that the amendments to the NLRA contemplated by the TEAM Act are crucial and that the bill poses no threat to the well-protected right of employees to select representatives of their *own* choosing to act as their exclusive bargaining agent. Even with the changes to the NLRA proposed in H.R. 743, an employee involvement structure may not engage in collective bargaining nor may it act as the exclusive representative of employees. The prohibitions in the NLRA outlawing interference with employees' attempts to form a union and preventing employers from avoiding bargaining obligations by directly dealing with employees remain unaffected by the TEAM Act.

The bill makes it clear that employers can work together with their employees to confront and solve the myriad problems and issues that arise in a workplace. To allow otherwise would stand in the way of cutting edge human resource management that offers business the opportunity to make an investment in the human potential of the American workforce that will yield untold dividends for this nation.

SUMMARY

H.R. 743 would amend the National Labor Relations Act (NLRA) to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against deceptive and coercive employer practices, and to allow legitimate employee involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

SECTION-BY-SECTION ANALYSIS

SECTION ONE

Provides that the short title of the bill is the "Teamwork for Employees and Managers Act of 1995."

SECTION TWO

Establishes the findings by the Congress related to the escalating demands of global competition, the resulting need for an enhanced role for employees in workplace decisionmaking, the extensive use by employers of employee involvement techniques, the positive impact of and support for employee involvement, and the legal jeopardy for employers engaging in employee involvement.

Also provides that the purposes of the Act are to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against deceptive and coercive employer practices, and to allow legitimate employee involvement programs, in which workers may discuss issues involving

terms and conditions of employment, to continue to evolve and proliferate.

SECTION THREE

Amends section 8(a)(2) of the National Labor Relations Act (NLRA) to provide that it shall not constitute or be evidence of an unfair labor practice for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health. Provides that such organizations or entities may not have, claim, or seek authority to be the exclusive bargaining representative of employees or to negotiate, enter into, or amend collective bargaining agreements. Also provides that the amendment to section 8(a)(2) does not apply in cases in which a labor organization is the representative of such employees as provided in section 9(a) of the NLRA.

SECTION FOUR

Provides that nothing in the Act shall affect employee rights and responsibilities contained in provisions other than section 8(a)(2) of the NLRA.

OVERSIGHT FINDINGS OF THE COMMITTEE

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the body of this report.

INFLATIONARY IMPACT STATEMENT

In compliance with clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that the enactment into law of H.R. 743 will have no significant inflationary impact on prices and costs in the operation of the national economy. It is the judgment of the Committee that the inflationary impact of this legislation as a component of the federal budget is negligible.

GOVERNMENT REFORM AND OVERSIGHT

With respect to the requirement of clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives, the Committee has received no report of oversight findings and recommendations from the Committee on Government Reform and Oversight on the subject of H.R. 743.

COMMITTEE ESTIMATE

Clause 7 of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs which would be incurred in carrying out H.R. 743. However, clause 7(d) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Con-

gressional Budget Office under section 403 of the Congressional Budget Act of 1974.

APPLICATION OF LAW TO LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch. This bill would clarify the legality of employee involvement programs in workplaces covered by the National Labor Relations Act and as such has no application to the legislative branch.

UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act requires a statement of whether the provisions of the reported bill include unfunded mandates. This bill would clarify the legality of employee involvement programs in workplaces covered by the National Labor Relations Act and as such does not contain any unfunded mandates.

BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirement of clause 2(l)(3)(B) of rule XI of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 2(l)(3)(C) of rule XI of the House of Representatives and section 403 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 743 from the Director of the Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 28, 1995.

Hon. WILLIAM F. GOODLING,
Chairman, Committee on Economic and Educational Opportunities, House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 743, the Teamwork for Employees and Mangers Act of 1995, as ordered reported by the Committee on Economic and Educational Opportunities on June 22, 1995. CBO estimates that enactment of H.R. 743 would have no significant effects on the federal budget and no impact on the budgets of state and local governments. Because enactment of H.R. 743 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

H.R. 743 would amend the National Labor Relations Act to allow employers to establish or participate in organizations in which employees participate, to address matters of mutual interest, so long as these organizations do not seek authority to negotiate or enter into collective bargaining agreements with the employer. The bill could affect the workload and costs of the National Labor Relations Board by increasing or decreasing its investigations of employers' involvement in employee organizations. We anticipate that such effects, if any, would not be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Christina Hawley.

Sincerely,

JAMES L. BLUM
(For June E. O'Neill).

ROLL CALL VOTES

Roll Call No. 1 (by Mr. Sawyer): An amendment in the nature of a substitute attempting to establish specific conditions under which employee involvement structures would be permissible and delineating specific situations where it would be impermissible. Defeated by a vote of 16–24, with 1 Member voting Present.

Member	Aye	No	Present
Chairman Goodling		X	
Mr. Petri		X	
Mrs. Roukema			
Mr. Gunderson		X	
Mr. Fawell		X	
Mr. Ballenger		X	
Mr. Barrett		X	
Mr. Cunningham		X	
Mr. Hoekstra		X	
Mr. McKeon		X	
Mr. Castle		X	
Mrs Meyers		X	
Mr. Johnson		X	
Mr. Talent		X	
Mr. Greenwood		X	
Mr. Hutchinson		X	
Mr. Knollenberg		X	
Mr. Riggs		X	
Mr. Graham		X	
Mr. Weldon		X	
Mr. Funderburk		X	
Mr. Souder		X	
Mr. McIntosh		X	
Mr. Norwood		X	
Mr. Clay	X		
Mr. Miller	X		
Mr. Kildee	X		
Mr. Williams	X		
Mr. Martinez	X		
Mr. Owens	X		
Mr. Sawyer	X		
Mr. Payne	X		
Mrs. Mink	X		
Mr. Andrews	X		
Mr. Reed	X		
Mr. Roemer	X		
Mr. Engel		X	
Mr. Becerra			X
Mr. Scott	X		
Mr. Green	X		
Ms. Woolsey	X		
Mr. Romero-Barceló	X		
Mr. Reynolds			
Totals	16	24	1

Roll Call No. 2 (by Mr. Miller): An amendment relating to expedited relief in cases where discrimination on the basis of union membership is alleged. Defeated by a vote of 16–23.

Member	Aye	No	Present
Chairman Goodling		X	
Mr. Petri		X	
Mrs. Roukema			
Mr. Gunderson		X	
Mr. Fawell		X	
Mr. Ballenger		X	
Mr. Barrett		X	
Mr. Cunningham		X	
Mr. Hoekstra		X	
Mr. McKeon		X	
Mr. Castle		X	
Mrs. Meyers		X	
Mr. Johnson		X	
Mr. Talent		X	
Mr. Greenwood		X	
Mr. Hutchinson		X	
Mr. Knollenberg		X	
Mr. Riggs		X	
Mr. Graham		X	
Mr. Weldon		X	
Mr. Funderburk		X	
Mr. Souder		X	
Mr. McIntosh		X	
Mr. Norwood		X	
Mr. Clay	X		
Mr. Miller	X		
Mr. Kildee	X		
Mr. Williams	X		
Mr. Martinez	X		
Mr. Owens	X		
Mr. Sawyer	X		
Mr. Payne	X		
Mrs. Mink	X		
Mr. Andrews	X		
Mr. Reed	X		
Mr. Roemer			
Mr. Engel	X		
Mr. Becerra	X		
Mr. Scott	X		
Mr. Green	X		
Ms. Woolsey	X		
Mr. Romero-Barceló			
Mr. Reynolds			
Totals	16	23	

Roll Call No. 3 (offered by Mrs. Mink): An amendment relating to application of the Act in the context of union organizing campaigns. Defeated by a vote of 18–20.

Member	Aye	No	Present
Chairman Goodling		X	
Mr. Petri		X	
Mrs. Roukema			
Mr. Gunderson		X	
Mr. Fawell		X	
Mr. Ballenger		X	
Mr. Barrett		X	
Mr. Cunningham		X	
Mr. Hoekstra		X	
Mr. McKeon		X	
Mr. Castle		X	
Mrs. Meyers		X	
Mr. Johnson			

Member	Aye	No	Present
Mr. Talent		X	
Mr. Greenwood			
Mr. Hutchinson		X	
Mr. Knollenberg		X	
Mr. Riggs			
Mr. Graham		X	
Mr. Weldon		X	
Mr. Funderburk		X	
Mr. Souder		X	
Mr. McIntosh		X	
Mr. Norwood		X	
Mr. Clay	X		
Mr. Miller	X		
Mr. Kildee	X		
Mr. Williams	X		
Mr. Martinez	X		
Mr. Owens	X		
Mr. Sawyer	X		
Mr. Payne	X		
Mrs. Mink	X		
Mr. Andrews	X		
Mr. Reed	X		
Mr. Roemer	X		
Mr. Engel	X		
Mr. Becerra	X		
Mr. Scott	X		
Mr. Green	X		
Ms. Woolsey	X		
Mr. Romero-Barceló	X		
Mr. Reynolds			
Totals	18	20	

Roll Call No. 4 (by Mr. Green): An amendment relating to access of labor organizations and cease and desist orders where violations occur. Defeated by a vote of 18–20.

Member	Aye	No	Present
Chairman Goodling		X	
Mr. Petri		X	
Mrs. Roukema			
Mr. Gunderson		X	
Mr. Fawell		X	
Mr. Ballenger		X	
Mr. Barrett		X	
Mr. Cunningham		X	
Mr. Hoekstra		X	
Mr. McKeon		X	
Mr. Castle		X	
Mrs. Meyers		X	
Mr. Johnson			
Mr. Talent		X	
Mr. Greenwood			
Mr. Hutchinson		X	
Mr. Knollenberg		X	
Mr. Riggs			
Mr. Graham		X	
Mr. Weldon		X	
Mr. Funderburk		X	
Mr. Souder		X	
Mr. McIntosh		X	
Mr. Norwood		X	
Mr. Clay	X		
Mr. Miller	X		

Member	Aye	No	Present
Mr. Kildee	X		
Mr. Williams	X		
Mr. Martinez	X		
Mr. Owens	X		
Mr. Sawyer	X		
Mr. Payne	X		
Mrs. Mink	X		
Mr. Andrews	X		
Mr. Reed	X		
Mr. Roemer	X		
Mr. Engel	X		
Mr. Becerra	X		
Mr. Scott	X		
Mr. Green	X		
Ms. Woolsey	X		
Mr. Romero-Barceló	X		
Mr. Reynolds			
Totals	18	20	

Roll Call No. 5 (by Mr. Petri): Motion to favorably report the bill to the House with an amendment in the nature of a substitute and with the recommendation that the amendment be agreed to and that the bill as amended do pass. Passed by a vote of 22–19.

MEMBER	Aye	No	Present
Chairman Goodling	X		
Mr. Petri	X		
Mr. Roukema			
Mr. Gunderson	X		
Mr. Fawell	X		
Mr. Ballenger	X		
Mr. Barrett	X		
Mr. Cunningham	X		
Mr. Hoekstra	X		
Mr. McKeon	X		
Mr. Castle	X		
Mrs. Meyers	X		
Mr. Johnson			
Mr. Talent	X		
Mr. Greenwood	X		
Mr. Hutchinson	X		
Mr. Knollenberg	X		
Mr. Riggs	X		
Mr. Graham	X		
Mr. Weldon	X		
Mr. Funderburk	X		
Mr. Souder	X		
Mr. McIntosh	X		
Mr. Norwood	X		
Mr. Clay		X	
Mr. Miller		X	
Mr. Kildee		X	
Mr. Williams		X	
Mr. Martinez		X	
Mr. Owens		X	
Mr. Sawyer		X	
Mr. Payne		X	
Mrs. Mink		X	
Mr. Andrews		X	
Mr. Reed		X	
Mr. Roemer		X	
Mr. Engel		X	
Mr. Becerra		X	

MEMBER	Aye	No	Present
Mr. Scott		X	
Mr. Green		X	
Ms. Woolsey		X	
Mr. Romero-Barceló		X	
Mr. Reynolds		X	
Totals	22	19	

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 8 OF THE NATIONAL LABOR RELATIONS ACT

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(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 him during working hours without loss of time or pay**[**;**]***: Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply;*

* * * * * * *

MINORITY VIEWS

INTRODUCTION

The Committee majority has reported out a bill which represents a giant step backward in an old, tried and discredited direction.

Despite the majority's claim to the contrary, the so-called TEAM Act has nothing to do with teamwork, with workplace cooperation, or with empowering employees. There is nothing in the National Labor Relations Act (NLRA) or in any decision of the National Labor Relations Board (NLRB) which prohibits teams or workplace cooperation and the entire point of the NLRA is to encourage employee empowerment. Moreover, as the majority itself states, the types of work systems the majority heralds are in fact proliferating at a rapid pace.

In the name of "teamwork", H.R. 743 actually would legalize employer domination of employee organizations and of systems of employee representation. In other words, this bill would legalize virtually all of the insidious practices of the 1920's and 1930's—practices which section 8(a)(2) of the NLRA [hereinafter section 8(a)(2)] was specifically enacted to proscribe.

Employer-controlled employee organizations are every bit as illegitimate—and every bit as inimical to freedom of association—as the government-controlled and party-controlled labor organizations which only recently were overthrown in Eastern Europe. Such employer domination is, and ought to remain, an unfair labor practice.

THE TEAM ACT HAS NOTHING TO DO WITH TEAMWORK

We wish to make clear at the outset that we fully agree with the majority that the "workplace of today is simply not the same as the workplace that was prevalent in the America of the 1930's." We also agree that "this nation must prosper in an increasingly competitive and information-driven economy where, at every level of a company, employees must have an understanding of, and a role in the entire business operation." And we could not agree more that to deal with the globally-competitive economy of "the twenty-first century . . . it is important that U.S. workplace policies reflect a new era of labor-management relations—one that fosters cooperation, not confrontation." None of this, however, in any way justifies the bill the majority has reported.

In the 1930's, and for many years thereafter, workplaces were organized on the principle that workers are interchangeable parts who perform best when they check their brains at the door of the workplace and carry out rote tasks in a manner desired by management. As Henry Ford put it, "the work of an individual must be repetitive"; "our tasks are exceedingly monotonous . . . but

then, also, many minds are monotonous . . . many men want to earn a living without thinking."[1]

In the past few years, management in many firms has belatedly discovered that working men—and women—do not want to "earn a living without thinking", but rather want to use their capacities fully to contribute to the success of their employer. Management has also belatedly discovered that those who actually do the productive work of an organization are in the best position to decide how their work can be most efficiently and effectively accomplished. Where management has come to accept these truths—as in non-union companies like Texas Instruments and unionized companies such as Xerox, Saturn, or Corning Glass—the workplaces operate very differently than the mass production factories of the 1930's, to the benefit of employees and employers alike.

The TEAM Act, however, has nothing to do with these changes in work systems, because section 8(a)(2) has nothing to say about them. Section 8(a)(2) does not mandate command-and-control management or any other form of management. Nor does section 8(a)(2) in any way restrict the adoption of Deming's system or any other system of management.

The NLRB made that clear in *General Foods*,[2] decided in 1977. In *General Foods* the Board squarely held that work teams which are "administrative subdivisions," of an employer, reflecting management's judgment as to "the best way to organize the work force to get the work done,"[3] do not violate section 8(a)(2). That is true, the Board went on the hold, even if the teams hold meetings (or "staff conferences") at which individual employees raise grievances which "involve conditions of employment" and even if certain "managerial functions" are "delegated" to the teams.[4] So long as a team does not act as "a bargaining agent"—or so long as any such actions on the part of the team are "de minimis and isolated"—section 8(a)(2) is not implicated.[5]

Significantly, since *General Foods*, there has not been even a single case to reach the Board which so much as questioned the lawfulness of teams or any other system that "moves as much brain work as possible to front-line employees."[6]

It is thus hardly surprising that employee involvement has proliferated and is now practiced by as many as 30,000 employers according to the majority's estimate, including 96 percent of large firms. Indeed, within the confines of the current law, employee involvement, in the majority's own words, has become "a basic component of the modern workplace". This is hardly evidence that suggests a need to change the law.

Equally important, employee involvement systems are virtually never the subject of legal challenge. Indeed, according to a study by Professor James Rundle of Cornell University, from 1983 to

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[1] Henry Ford, "Today and Tomorrow," p. 160 (1926).
[2] 231 NLRB 1232.
[3] Id. at 1234.
[4] Id. at 1235.
[5] Id.
[6] Statement of Howard Knicely, Chairman of the Labor Policy Association (LPA) and Executive Vice President of TRW, Inc., "Hearings on Removing Impediments to Employee Participation/Electromation," before the Subcommittee on Employer-Employee Relations of the House Economic and Educational Opportunities Committee, 104th Congress, 1st Sess., at p. 28, (February 8, 1995).

1993 the NLRB issued a total of just 17 orders requiring an employer to disband an employer-created employee organization under section 8(a)(2); in all but two of these cases the organization was created either to thwart a union organizing drive or to bypass an existing union.[7]

As David Silberman, Director of the AFL–CIO Task Force on Labor Law, testified before the Commission, this legislation is truly a "solution in search of a problem."[8]

THE REAL FACTS ABOUT ELECTROMATION

The majority contends that the NLRB's decision in *Electromation Inc.*[9] interferes with the adoption of these forms of employee involvement. That is simply not true: as Professor Charles Morris has written, *Electromation* is a case "more significant for its hype than its type."[10]

Electromation involved a traditionally-run, command and control manufacturer of electrical components. The case arose when new management of the company decided to cut expenses by altering attendance bonuses and denying the employees a general wage increase. These changes were announced at an employee Christmas party. Within two weeks, a group of employees submitted a petition to management protesting the loss of benefits. At approximately the same time, some employees began circulating union authorization cards.

Faced with a restive workforce, the comapny—in an effort to preserve control—formed five "Action Committees." The company decided the scope of each committee's jurisdiction and selected the employee members of the committee. The company instructed those individuals to represent their fellow employees with respect to those issues management chose to address. When a majority of the employees signed written authorization designating a union to serve as the employees' representative, the company commenced an anti-union campaign.

As part of that campaign, the company pitted its Action Committees against the union by suspending the operations of committees—not "disbanding" them as the majority claims—and informing the employees that "due to the Union's campaign the Company would be unable to participate in the committee meetings and could not continue to work with the committees *until after the election*." (Emphasis added.)[11]

The National Labor Relations Board, composed at the time of five Members appointed by Presidents Reagan and Bush, unanimously

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[7] Rundle, "The Debate Over the Ban on Employer-Dominated Labor Organizations", in Restoring the Promise of American Labor Law, p. 161, (1994).

[8] Testimony of David M. Silberman, Director, AFL–CIO Task Force on Labor Law, Hearings on S. 295. The TEAM Act: The Employee Involvement and Worker-Management Cooperation Act, before the Senate Committee on Labor and Human Resources, 104th Congress, 1st Sess., (February 9, 1995).

[9] 309 NLRB No. 163 (1992), *enf'd*. 35 F.3d 1138 (7th Cir. 1994).

[10] Morris, "*Deja Vu and 8(a)(2)—What's Really Being Chilled*," (April 30, 1994).

[11] On the same day at which the company so notified the employees, the company held a meeting, which all employees were required to attend, to hear a speech by the company president, John Howard. As part of the speech, Mr. Howard held up a placard with a drawing of a graveyard and a series of tombstones bearing the names of "deceased employers" in the area in which Electromation was located. An Administrative Law Judge found that "it is easy to understand how employees ... could think that they heard Howard make ... threats," but that Howard was not, in fact, guilty of violating the law.

ruled that the employer had violated section 8(a)(2). The Board found that the "only purpose" of the Action Committees was "to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management" and that the employer had dominated that process by controlling the jurisdiction, composition and processes of the Committees. The Board stated that the "employees essentially were presented with the Hobson's choice of accepting the status quo, which they disliked, or undertaking a bilateral 'exchange of ideas' within the framework of the Action Committees, as presented by the [employer]."

The NLRB summarized its conclusion as follows:

> In sum, this case presents a situation in which an employer alters conditions of employment and, as a result, is confronted with a workforce that is discontented with its new employment environment. The employer responds that discontent by devising and imposing on the employees an organized committee mechanism composed of managers and employees instructed to "represent" fellow employees. The purpose of the Action Committees was, as the record demonstrates, *not to enable management and employees to cooperate to improve "quality" or "efficiency"* but to create in employees the impression that their disagreements with management had been resolved bilaterally. (Emphasis added.)

Electromation chose to appeal to the United States Court of Appeals for the Seventh Circuit. A panel of that court unanimously affirmed the NLRB's decision. The court explained that under the NLRA, "the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions." And the court had little difficulty sustaining the NLRB's conclusion that the Action Committees:

> which were wholly created by the Employer, whose continued existence depended upon the employers, and whose functions are essentially determined by the employer, lacked the independence of action and free choice guaranteed by Section 7 [of the NLRA].

The court stressed that its ruling "*does not foreclose the lawful use of legitimate employee participation organization*, especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity efficiency, and quality control." (Emphasis added.)

Electromation chose not to seek review of the Court of Appeals' decision either before the full Seventh Circuit or the United States Supreme Court.

In sum, the *Electromation* ruling is a narrow one which addresses only the issue of employer-created and controlled employee committees that consider wages and working conditions. *Electromation* does not address any other form of employee involvement. As Edward Miller, a life-long management attorney and former Chairman of the NLRB under President Nixon has stated, the claim that

Electromation invalidated employee involvement is a "myth"; it "is indeed possible to have effective programs . . . without the necessity of any changes in current law."[12]

Moreover, the facts of the case illustrate the abuses that would be possible without section 8(a)(2). While the motivation of the employer in *Electromation* in creating the "Action Committees" is unclear, there is every reason to believe that the employer did so to fend off the workers' desire for independent representation. Certainly the company used the committees as pawns in its anti-union campaign. And in all events, the Action Committees were tools of the employer to deal with employee discontent and were not an independent voice of the employees.

THE MYTH OF UNCERTAINTY AND THE SAWYER AMENDMENT

Because the NLRB in *Electromation* took pains to confine its decision to the question before it and not to utter broad pronouncements, in dictum, on questions that might be raised in other cases, the decision necessarily, and appropriately, is a careful and limited one. But the issues left open by *Electromation* in no way call into question the fundamental principle that section 8(a)(2) speaks only to employer-dominated representation and not to methods of work organization.

The majority, nonetheless, claim that *Electromation* has had a "chilling effect . . . on legitimate employee involvement programming and on employers' plans to expand such programs." But no empirical evidence—or even anecdotal evidence—is cited by the majority to support these claims. To the contrary, the data indicate that in the two and one-half years since *Electromation* was decided, employee involvement has continued to grow at a healthy pace, especially in small firms. For example, studies conducted by Professor Paul Osterman of M.I.T. and by the Labor Policy Association (LPA) done in 1994 both found that two-thirds of the companies with employee involvement programs had adopted them in the preceding five years. In the LPA study 60 percent of the small businesses with employee involvement programs had adopted them in the preceding three years.[13]

The business community's professed fear about the "chilling effect" of *Electromation* is a recent invention—one that post-dates the November 1994 elections. Two months before those elections, the Labor Policy Association and National Association of Manufacturers testified before the Dunlop Commission on the employee involvement issue. Each organization stated that it did not see the need for—and did not propose or support—legislative change at that time; rather, they advocated "a wait and see approach."[14] Just two months later, lobbyists from these organizations and their

[12] Edward Miller, "Myths and Reality About U.S. Labor Relations," at p. 6 (testimony submitted to the Commission on the Future of Worker-Management Relations, October 8, 1993).

[13] "The Nature and Extent of Employee Involvement in the American Workplace," Survey conducted by Aerospace Industries Associates, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors, Inc., August 10, 1994; Osterman, "How Common Is Workplace Transformation and Who Adopts It?", 47 Industrial and Labor Rel. Rev. 173 (1994).

[14] Hearing Before the Commission on the Future of Worker-Management Relations, September 8, 1994, Tr. at 105–07.

member companies were swarming Capitol Hill claiming that the sky was falling and that the TEAM Act was urgently needed.

In a good-faith effort to meet the professed concerns about *Electromation's* supposed chilling effect, at the Committee markup many in the minority supported a substitute offered by Representative Sawyer (D–OH). That substitute was designed to create safe harbors for employers genuinely concerned about their ability to create team systems for work organization. The Sawyer substitute would have amended section 8(a)(2) by adding a proviso permitting three specific types of practices: self-managed work teams, supervisor-managed work teams, and productivity/quality teams. In each case, these teams would have been lawful, even if they held ancillary discussion of conditions of work directly related to the work issues before the team.

The majority's unanimous vote against the Sawyer substitute belies any claim that H.R. 743 is truly concerned with teamwork or employee involvement. Rather, the teamwork rubric is simply a convenient and innocent-sounding means for obscuring the real purpose and real effect of this legislation.

THE REAL PURPOSE OF THE TEAM ACT

If, then, the TEAM Act has nothing to do with teamwork, and is not necessary to dispel any uncertainty about the legality of employee involvement, why is it being pushed so aggressively? The answer is plain: the TEAM Act's real agenda is to permit management to "involve" employees in ways that do not threaten management prerogatives.

When all is said and done, there is only one form of so-called "employee involvement" that section 8(a)(2) currently prohibits. Under the law, employers may not "involve" their employees in dealing with the employer on the terms and conditions of their employment through employee organizations or employee representation plans which are dominated by the employer. That prohibition has proven to be an inconvenience for some employers who wish to create the form—but not the substance—of joint decisionmaking by employers and employees.

Remarkably, the proponents of the TEAM Act are not claiming that it is designed to "empower" workers. In testimony before the full Committee, the LPA stated that the legislation "enables employers to give power directly to employees." But there is nothing in the current law which in any manner, shape, or form prohibits employers from transferring "power" to employees. To the contrary, in *E.I. Dupont & Co.*,[15] the NLRB expressly ruled that the Act permits employers to grant a committee or team "the power to decide matters for itself rather than simply make proposals to management."

Moreover, the very last thing that the LPA or other backers of the TEAM Act seek is a workforce with real power—a workforce able to deal with employers on a more-or-less equal footing in determining the terms and conditions of their employment. And the ultimate point of the TEAM Act is to legalize involvement schemes that will enable management to preserve existing hierarchies and

[15] 311 NLRB 893, 895 (1993).

existing power arrangements—that is, to preserve management's unilateral control over determining terms and conditions of employment.

THE TEAM ACT MEANS THE RETURN OF COMPANY UNIONS

Despite the majority's claims to the contrary, there is nothing new about the TEAM Act. It represents a return to the discredited practice of company unionism.

Under the TEAM Act, management would be entirely free to create, mold, and terminate employee organizations, at will, to deal with wages, benefits and working conditions. For each such employee organization or plan it chooses to create, management would have *carte blanche* to select the employees' representatives, write the organization's bylaws, determine the organization's governing structure and operating procedures, and establish the organization's mission and jurisdiction. The legislation contains no conditions to assure that such organizations are either legitimate or democratic. Rather, the legislation gives employers unfettered power to fashion employee organizations to the employer's own liking and to disband such organizations if and when doing so suits the employers' pleasure.

The only limitations that H.R. 743 would place on an employer-dominated employee organization would be to require such an organization to function as a non-exclusive—rather than as an exclusive—representative and to foreclose such an organization from negotiating binding agreements. These conditions serve to further advance the interest of employers by assuring that any understanding arrived at with an employer-created organization will never be legally binding on the employer but rather may be repudiated at the whim of the employer.

In sum, H.R. 743 returns to employers everything that they had prior to 1935 that enabled them to create and dominate employee organizations. The inexorable effects will be to encourage the return of employer-dominated employee organizations and employee representation plans—that is, of company unions.

The majority contends that its bill will not have such an effect, but in order to make that claim, the majority is forced to redefine "company unions" into something quite different from what they were in fact. The majority pretends that the company unions of the 1930's were "sham organizations" which entered into sham collective bargaining agreements. That pretense is convenient for the majority because it enables the majority to claim that it has safeguarded against the return of these practices by prohibiting employer-created organizations from signing contracts.

In point of fact, however, as the noted labor historian Dr. David Brody testified before the Committee, this is not what company unions were all about.[16] Indeed, a study by the Bureau of Labor Statistics in 1935 found that the overwhelming majority of company unions did not enter into any collective bargaining agreements, at all. Rather, company unions, as Dr. Brody explained,

[16] Statement of David Brody, Professor Emeritus of History, University of California at Davis "Hearing on H.R. 743, the Teamwork for Employees and Managers [TEAM] Act," Before the Committee on Economic and Educational Opportunities, 104th Congress, 1st Sess., at p. 42, (May 11, 1995).

were employer-controlled systems of in-plant representation. And that is precisely what H.R. 743 would allow once again.

The majority could not be more wrong in suggesting that Senator Wagner had intended to ban all employer-dominated employee organizations, and that the language of the current statute was drafted more broadly than needed to achieve Senator Wagner's ends. Senator Wagner specifically considered a proposal to prohibit employer-dominated, employee organizations which "bargain" with an employer and specifically rejected that proposal as too limited. Leon Keyserling, Senator Wagner's chief aid, explained that if that proposal had been adopted, "then most of the activity of employers in connection with the company unions we are seeking to outlaw would fall outside the scope of the Act." The very point of the Act, Keyserling explained, is to cover employer-dominated employee organizations "whether they merely 'adjust' or exist as a 'method of contact' or 'engage in genuine collective bargaining.'"[17]

Thus despite the majority's pious claims to the contrary, this legislation is an open invitation to employers to recreate the company unions as they existed in the 1920's and 1930's. Former NLRB Chairman Miller puts it well: "While I represent management I do no kid myself. If Section 8(a)(2) were to be repealed I have no doubt that in not too many months or years sham company unions would again recur."[18]

COMPANY UNIONS ARE ILLEGITIMATE AND ANTITHETICAL TO FREEDOM OF ASSOCIATION

There are two fundamental reasons why Congress decided to prohibit employer-domination of employee organizations when it enacted the National Labor Relations Act in 1935 and when it reenacted that law, as part of the Taft-Hartley Act in 1947. Those reasons remain just as true and powerful today.

First, employer-dominated employee organizations are inherently illegitimate. Although employers and employees have many interests in common, in the nature of things they have differing interests when it comes to determining how much they will be paid, what benefits they will receive, and what their other terms of employment will be. Against that background, elementary notions of representational fairness demand that the individuals who speak for the employees should be "independent" of the employer in the sense that they are accountable to, and only to, the employees they represent. Section 8(a)(2) of the NLRA guarantees employees the right to such an independent voice. And the NLRA contains another provision which parallels that section and assures that employers can pick their own representatives without union interference.

As Senator Wagner said in 1935:

> I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other. Collective bargaining becomes a sham when the em-

[17] Memorandum of Leon Keyserling, quoted in David Brody, Section 8(a)(2) and the Origins of the Wagner Act in "Restoring the Promise of American Labor Law," p. 41 (1994).

[18] Miller, supra n. 12, at 7.

> ployer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing. . . . [T]o argue that freedom of organization for the worker must embrace the right to select a form of organization that is not free is a contradiction in terms.

Second, as Senator Wagner also noted, employer-dominated employee organizations are "one of the great obstacles to genuine freedom of self-organization." It is difficult enough under our labor laws for employees who want an independent voice on the job to organize a union of their own, given the depth of management opposition they face. Organizing would become next to impossible, however, if on top of everything else employers were permitted to offer a safe and cost-free company union as an alternative to the risks and costs involved in creating an independent representative.

That is why employers chose to create employer-dominated representation systems in the 1920's and 1930's. As John Common wrote in his seminal "History of Labor in the United States," "every investigator, whether pro-employer, pro-labor, or neutral seems to agree that the company unions have interested a majority of the employers because of their potentialities in combating unionism."[19] And that is why Congress enacted section 8(a)(2) of the NLRA in 1935. As Dr. Brody has written, "abhorrence of company domination is a corollary to the principle of freedom of association central in our labor law."[20]

While much has changed in the ensuing sixty years, the fundamental judgments that Congress made in enacting section 8(a)(2) of the NLRA remain as valid today as they were in the 1930s. The TEAM Act ignores the lessons of history by allowing for a return to systems of employer-dominated representation which are illegitimate and inimical to freedom of association.

WORKING MEN AND WOMEN DO NOT DESIRE EMPLOYER-DOMINATED REPRESENTATION

The majority claims that the TEAM Act would further the desire of working men and women. The evidence on which the majority purports to rely proves precisely the opposite.

The majority cites the Worker Representation and Participation Survey directed by Professors Richard Freeman and Joel Rogers and administered by Princeton Survey Research Associates. But as Professors Freeman and Rogers have stated, their Survey found "that virtually all employees wanted both cooperative relations with management and, within those relations, a significant measure of independence and control over how their interests are represented." In other words, "American workers want *both* cooperation and independence in workplace relations, and they see no necessary conflict between the two."[21]

Specifically, in the Survey, only a small minority of workers (11%) believe that management should be free to pick the employee members of labor-management committees or to select the leaders

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[19] Commons, 3 "History of Labor in the United States" at 354 (1935).

[20] Testimony of David Brody before the Commission on the Future of Worker-Management Relations, January 19, 1994, Tr. at 120.

[21] R. Freeman and J. Rogers, "Worker Representation and Participation Survey: Second Report of Findings" at 4, 11 (June 1, 1995).

of employee organizations (12%). Yet that is precisely what the TEAM Act would let management do.

Similarly, in the Survey only 17 percent of respondents favor a system of "involvement" in which management makes the final decisions; 81 percent of respondents favor a system in which decisions are made jointly through the agreement of employees and management. And 56 percent of workers favor the use of outside arbitrators to resolve disagreements. Yet the TEAM Act would institutionalize a system of management control.

SCHOLARS OVERWHELMINGLY OPPOSE THE TEAM ACT

Shortly before the mark-up, the Committee received a letter from Dr. Hoyt Wheeler, the president-elect of the Industrial Relations Research Association. That letter was signed by more than 400 professors of labor law and industrial relations and other neutral parties in the labor-management community. The letter states:

> The stated purposes of this bill—promotion of legitimate employee involvement and genuine worker-management co-operation—are vital to the national interest. However, enactment of the TEAM Act would frustrate the realization of these goals by encouraging illegitimate forms of employee involvement and discourage the legitimate expression of worker voice.
>
> For the past sixty years, it has been the policy of our labor law to encourage collective bargaining by protecting the right of workers to freely associate and select representatives of their own choosing. A cornerstone of that policy has been the prohibition, contained in section 8(a)(2) of the National Labor Relations Act, on employer domination of employee organizations and employee representation plans. That section was central to the NLRA and was enacted because prior to the NLRA's enactment, employer control of employee organizations and representation plans had been used widely and effectively to impede workers from organizing independent labor unions.
>
> The proposed TEAM Act would negate the original purpose of section 8(a)(2) by permitting without limitation a revival of the very practices against which section 8(a)(2) was aimed. The legislation contains no safeguards to guarantee that employer-created representation plans function democratically and independently of the employer. Nor is there anything in the bill which would prevent employers from manipulating the employer-controlled organizations in order to thwart genuine employee voice. As a result, we are persuaded that passage of the TEAM Act would quickly lead to the return of the kind of employer-dominated employee organization and employee representation plans which existed in the 1920's and 1930's.
>
> Employee involvement and worker-management cooperation can and should be fostered by means which do not further limit employees' freedom of association. The proposed TEAM Act represents a step backwards towards the discredited approaches of the 1920's and 1930's and away

> from true employee involvement and genuine worker-management co-operation. H.R. 743 and S. 295 should not be enacted into law.

In addition, Dr. John Dunlop, former Secretary of Labor in the Ford Administration and chairman of the Commission on the Future of Worker-Management Relations (Dunlop Commission), has publicly stated that the members of that Commission—including three former Secretaries of Labor, several scholars of labor relations, the chief executive officer of Xerox and a representative of the small business community—unanimously oppose enactment of H.R. 743.

Given the polarization within the labor-management community between business and labor, the opinion of these scholars and Commission members, who have no ax to grind, is particularly impressive.

THE TEAM ACT IS ONE-SIDED

In addition to being unnecessary and ill-conceived, the TEAM Act is entirely one-sided. The bill addresses the one complaint that employers have about the National Labor Relations Act. But this bill—like the rest of the majority's legislative agenda—does nothing to address the concerns or advance the interests of employees.

The failure of the NLRA to protect workers' rights to organize and bargain collectively is, by now, well-documented, but that failure is of no moment to the majority. The only issues that make it onto the majority's legislative radar screen are those raised by the already powerful.

At the Committee mark-up, the minority offered an amendment which simply sought to assure that workers who are illegally discharged for attempting to organize an independent labor organization in lieu of an employer-dominated organization created under the TEAM Act would receive the same kind of expedited hearing that the NLRA already provides in cases involving secondary boycotts. Notwithstanding the majority's claim that the right to organize is the ultimate safeguard against employers abusing the privileges being granted to them by the TEAM Act, the majority voted down this simple amendment which would have effectuated that right.

The majority also voted down a modest amendment designed to assure that employers who violate the expansive limits of the TEAM Act—an act not easily accomplished—would be subject to stronger remedies than merely the current law's slap on the wrist.

CONCLUSION

The National Labor Relations Act is a complex law. It seeks to foster and protect a system of labor-management relations whereby employees, through collective activity, are able to balance the inherently disproportionate economic power otherwise vested in management and thereby achieve binding contracts covering terms of employment reflecting the mutual needs of both labor and management.

Section 8(a)(2), however, stands for a simpler, more fundamental principle—representatives should be exclusively responsible to

those they represent. Stripped of all the rhetoric, H.R. 743 stands for the proposition that employers should be able to choose and control who shall speak for employees on matters in which the interests of employers and employees are inherently divergent and sometimes at odds.

The principle that representatives should be exclusively responsible to those they represent is essential to the system of labor-management relations envisioned by the National Labor Relations. Act. More importantly, it is the bedrock principle of republicanism, our system of government, and basic fairness. That a party that calls itself the Republican Party should proffer legislation that would grant to employers the right to choose both who will represent the interests of workers and how they will do so is not simply ironic, but tragic. To use an analogy from American history, it is akin to saying that allowing the British Parliament to choose which Americans would represent the interests of American colonists (and on what issues they would be able to speak) would have provided adequate and sufficient representation for Americans. That such a gross contradiction of core concepts of fairness is likely to produce cooperation, or anything other than animosity, is no more likely today than it was in 1776.

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