Employee Involvement Programs and Electromation: Is the TEAM Act the Solution?

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NOTES

EMPLOYEE INVOLVEMENT PROGRAMS
AND ELECTROMATION: IS THE TEAM
ACT THE SOLUTION?

I. INTRODUCTION

Reacting to the declining position of the United States as the world's leading economic force, many employers have attempted to increase employee satisfaction and productivity by involving them in workplace management.\(^1\) Over the past two decades, many employers have tried to improve the quality of life for their employees by increasing employee participation in management decisions.\(^2\) Although late nineteenth and early twentieth century employers often used company unions\(^3\) as union busting devices,\(^4\) today many employers, commentators and scholars believe that giving employ-


3. See discussion infra, notes 25-28 and accompanying text.

4. See Lipsky, supra note 2, at 694. In the 1930's, employers conned their employees by using company unions to give employees the feeling they were actually represented by a union. See id.
ees a chance to voice their ideas through employee involvement programs (“EIP”) increases job satisfaction and productivity. Despite the increased use of these EIPs, their legality remains unclear under section 8(a)(2) of the National Labor Relations Act (“NLRA”). The failure of the National Labor Relations Board (“Board”) and the federal courts to give a consistent interpretation to section 8(a)(2) furthers the ambiguity regarding EIPs. Recent rulings by the NLRB and the federal courts raise even further doubt as to the legality of these EIPs. Given the success of an increasing number of companies using EIPs, this provision of the NLRA has met increasing opposition. In response to the ambiguity, a proposed bill is pending in Congress which if enacted, would legalize the use of EIPs by employers. The Teamwork for Employees and Management Act (“TEAM”) would amend section 8(a)(2) of the NLRA in order to legalize EIPs. TEAM is causing great debate among Republicans, Democrats, scholars, employers and unions. The debate centers around whether the TEAM Act will bring back the company union or give employees a
greater say in decision-making that is now unilaterally made by the employer. This note will argue that the TEAM Act’s amendment to section 8(a)(2) is needed in order to bring the NLRA in tune with today’s work force and work environment. With work environments continually evolving as a result of the accelerating level of sophistication of the workplace, the globalization of markets and advances in labor and cost saving technology, section 8(a)(2) is in desperate need of reform. It is an injustice that the labor act prohibits employee involvement, because employees can contribute tremendously in the management of the workplace. Companies that are already using EIPs generally see positive results, and so do their employees. Workers feel better about themselves, have a higher quality of work life and companies see increased productivity.

Part II of this note will examine the historical background for banning company unions. Part III focuses on recent rulings by the NLRB in federal courts that foster this unilateral style of management. Part IV will examine the proposed TEAM Act and the ensuing debate and illustrate why its passage is essential to the future of the American workplace.

II. LEGAL AND HISTORICAL BACKGROUND

In 1935, the drafters of the NLRA forbade employers from “dominating, or interfering, with the formation or administration of any labor organization, or contributing financial or other support to it.” Given the bitter strikes that occurred in the early part of this century, many employers were unsure as to whether they should crush or help the growth of organized labor. In response, many employers started company unions which gave their employees the feeling that they were represented by a union, when in truth, the union that represented them was controlled by the employer. The prototypical company union was established and funded by the

20. See Moe, supra note 1, at 1130-35.
21. See id.
22. See id. at 1135-37.
25. See id at 732-35.
employer with membership only extended to company employees.\textsuperscript{26} Employees would generally elect representatives from the workplace, who served with management on committees which tried to resolve worker grievances, operational problems, as well as discuss wages and benefits.\textsuperscript{27} While these committees served as a forum for discussion, final authority over all discussed material rested solely with the employer.\textsuperscript{28}

The rapidly increasing number of company unions deeply concerned Senator Robert Wagner, the primary drafter of the NLRA.\textsuperscript{29} According to Senator Wagner, the company union contained an inherent inequality of bargaining power.\textsuperscript{30} Additionally, Wagner felt that company unions were an ineffective means for advancing employees' rights.\textsuperscript{31} From Wagner's point of view, no legitimate collective bargaining could occur when the employer was on both sides of the table: "[c]ollective bargaining becomes a mockery when the spokesman of the employee is the marionette of the employer."\textsuperscript{32} With these concerns in mind, congress passed the NLRA in 1935.\textsuperscript{33} The purpose of the NLRA was in part, to promote the equality of bargaining power between the employer and the employee.\textsuperscript{34} Wagner believed that company unions, which had multiplied rapidly in recent years, were the greatest obstacle to the collective bargaining process.\textsuperscript{35} From the very outset it was clear that the NLRA's prohibition of company unions was aimed at terminating this form of sham union, "which gave employees the false

\begin{itemize}
\item\textsuperscript{26} See Thomas C. Kohler, \textit{Models of Worker Participation: The Uncertain Significance Of Section 8(a)(2)}, 27 B.C. L. REV. 499, 520-25 (1986).
\item\textsuperscript{27} See id. at 523.
\item\textsuperscript{28} See id. at 524-25.
\item\textsuperscript{29} See Mark Barenberg, \textit{The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation}, 106 HARV. L. REV. 1381, 1386 (1993) ("The role of the company union was the most important substantive issue in the political fight over the drafting and passage of the Wagner Act.").
\item\textsuperscript{30} See 78 CONG. REC. S3443 (1935) (statement of Sen. Wagner).
\item\textsuperscript{31} See Virk, supra note 24, at 736. In most company union arrangements the employer oversaw the election of employee representatives, provided financial support to the group, retained veto power over proposals and could extinguish the group at any time. See id.
\item\textsuperscript{32} 79 CONG. REC. 7565 (1935) (statement of Sen. Wagner).
\item\textsuperscript{34} See id.
\item\textsuperscript{35} See 78 Cong. Rec. 3443 (1935) (statement of Sen. Wagner).
\end{itemize}
impression that their chosen representatives would collectively bargain on their behalf.”

The NLRA’s prohibition of company unions involves two separate but distinct portions of the Act. Section 8(a)(2) makes it an unfair labor practice for an employer “to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” For a group to fall within the scope of section 8(a)(2), it must fall within the statutory definition of a “labor organization” under section 2(5) of the NLRA. A labor organization is

any organization of any kind, or any agent 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.

A. The Courts’ Interpretation of Section 2(5)

The last time the Supreme Court addressed the issue of what constitutes a labor organization was in 1959. In NLRB v. Cabot Carbon, a company established employee committees in its nonunion plants, after the War Production Board recommended that the company provide a means for resolving conflicts. Management collaborated with the employees to write the committees constitution and by-laws, in addition to defining goals and operating methods of the committee. Employees elected their representatives, who met monthly with management. After maintaining this format for over a decade, the Chemical Workers Union filed a section 8(a)(2) unfair labor practice charge against the employer, after the union’s organizing attempts failed at many of the company’s plants.

In finding a section 8(a)(2) unfair labor practice, the Supreme Court adhered to a broad definition of what constitutes a labor

36. See Moe, supra note 33, at 1138.
38. Id.
40. See Cabot Carbon Co., 360 U.S. at 203.
41. See id at 205.
42. See id at 206.
43. See id at 206-07.
The Court construed "dealing with" as encompassing more than simply bargaining. The Court held that committees can deal with management within the meaning of section 2(5) simply by making recommendations or requests, even if the committees never attempt to negotiate a formal contract with the employer. The Court dismissed the company's argument that no real dealing had occurred because the final word on all proposals rested with itself.

The NLRB has interpreted *Cabot Carbon* to bring almost all EIPs within the reach of section 2(5), unless the EIP includes all of the company's employees or the program constitutes a total delegation of traditional management functions to a group of employees. Recently, however, some appellate courts have shied away from the strict interpretation the Supreme Court gave labor organizations in *Cabot Carbon*.

In *NLRB v. Streamway Division of the Scott & Fetzer Co.*, the court rejected a strict interpretation of section 2(5) and concluded that EIPs are not labor organizations under the NLRA when employees outwardly express their desire not to be unionized. In *Scott & Fetzer*, the employer instituted an EIP consisting of both employees and management. The purpose of the EIP was to provide an informal process to pass along company plans as well as elicit suggestions to deal with improving plant operations. In holding that the EIP was not a labor organization within the meaning of section 2(5) and, therefore, not susceptible to a section 8(a)(2) challenge, the court distinguished *Cabot Carbon*. The Sixth Circuit noted that the facts of *Cabot Carbon* "involved a more active, ongo-

44. See id. at 210-14.
45. Id. at 211-12.
46. See id. at 213-15.
47. See id. at 214.
51. See id. at 295. In *Scott & Fetzer*, the court held that the committees were not representative because the members rotated regularly and none of the employees considered the committees to be labor organizations. See id. at 289-95.
52. See id. at 289. The committee was to consist of eight employee representatives with management personnel present. See id. at 289-90.
53. See id. at 289.
54. See id. at 291-94.
ing association between management and employees . . . .”

Due to the fact that the EIP had been set up by the employer “to determine employees attitudes regarding working conditions . . . for the Company’s self-enlightenment, rather than a method by which to pursue a course of dealings,” the court concluded that the EIP was merely a communication device. The court reached this conclusion by relying heavily on factors which the Supreme Court in *Cabot Carbon* glossed over.

**B. The Courts’ Interpretation of Section 8(a)(2)**

Once an EIP is found to be a labor organization, the Board or court must then decide if the EIP is unlawfully dominated, interfered with or supported by the employer within the meaning of section 8(a)(2). The section 8(a)(2) standard was first developed by the Supreme Court in *NLRB v. Newport News Shipbuilding & Dry Dock Co.* In *Newport News*, the Court affirmed a Board order disestablishing an employer assisted EIP that was operating to the apparent satisfaction of the employees. The Board found that the employer had unlawfully dominated, assisted and interfered with the administration of the labor organization. The Board based its conclusion on the fact that amendments to the EIP’s charter and the EIP’s proposals were subject to approval by the employer. The Fourth Circuit refused to enforce the Board’s order, because it believed that the Board failed to consider the evidence that the employer’s motives in forming the EIP were proper and that the EIP enjoyed overwhelming employee support.

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55. *Id.* at 294.
56. *Id.*
57. *See id.* at 295.
58. *See id.*
60. *308 U.S. 241 (1939).*
61. *See Newport News, 308 U.S. at 251. The preamble of the plan stated that its purpose was to give “employees a voice in respect of the conditions of their labor and to provide a procedure for the prevention and adjustment of future differences.” *Id.* at 244. The committee was to consist of five elected representatives and not more than five representatives chosen by management and management representatives. *See id.* at 244-45.
62. *See id.* at 247.
63. *See id.* at 245-47.
64. *See Newport News Shipbldg. & Dry Dock Co. v. NLRB, 101 F.2d 841, 846-48 (4th Cir. 1939).*
In reversing, the Supreme Court ruled that in order to comply with section 8(a)(2), the EIP must be structurally independent from management. Reasoning that the purpose of the NLRA was to provide a framework where employees could be free to organize without being controlled by management, the Court held that employees could not truly exercise their statutory rights in an organization controlled by management. The Court also stated that an EIP could violate section 8(a)(2) even though employees were satisfied with the plan and the employer established the EIP with the proper motives in mind. Equally irrelevant was the degree of employer involvement in the plan and the absence of coercion. Following Newport News, the Board generally treated section 8(a)(2) as an automatic prohibition of any employer involvement in an EIP. As the company union becomes more increasingly obsolete and newer forms of beneficial EIPs develop, the rigid application of the Newport News test becomes increasingly inappropriate, given the Board's mandate to interpret the NLRA in light of changing industrial conditions.

While the Board has strictly adhered to the traditional rule, a few appellate courts have developed more flexible standards to accommodate newer forms of EIPs. These courts have departed from the Newport News standard and have chosen instead to adopt a free choice analysis. Under this approach, courts do not consider EIPs to be dominated, assisted or interfered with if the employees freely choose to have such a program and are satisfied with it.

66. See id. at 249.
67. See id. at 251.
68. See id. at 248-51.
69. See, e.g., Duquesne Univ. of the Holy Ghost, 198 N.L.R.B. 891, 891-92 (1972) (finding a violation because management acted in an advisory position to the EIP and assisted it in finding legal representation); Merrill Transport Co., 141 N.L.R.B. 1089, 1098-99 (1963) (finding a violation because the EIP also had members of management in it, the employer paid employee representatives for their time and the employer furnished a place for the EIP to meet).
71. See generally Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974); Modern Plastics Corp. v. NLRB, 379 F.2d 201, 204-05 (6th Cir. 1967); Chicago Rawhide Mfg. Co., v. NLRB, 221 F.2d 165, 170 (7th Cir. 1955).
72. See cases cited supra note 71.
73. See cases cited supra note 71.
In 1955, the Seventh Circuit in *Chicago Rawhide Manufacturing Co., v. NLRB*\(^\text{74}\) stated that one of the Act's purposes is employer-employee cooperation.\(^\text{75}\) The court gave consideration to two factors the *Newport News* Court deemed irrelevant: employee satisfaction with the plan\(^\text{76}\) and the employer's proper motives.\(^\text{77}\) In *Chicago Rawhide*, the employees formed an independent shop committee.\(^\text{78}\) The employer permitted them to post notices of election on company bulletin boards and to meet on company time.\(^\text{79}\) The Board considered this to be unlawful support under section 8(a)(2) and issued a cease and desist order.\(^\text{80}\) The Seventh Circuit refused to enforce the order determining that this was not unlawful support but rather lawful cooperation.\(^\text{81}\) "Cooperation only assists the employees . . . in carrying out their independent intention."\(^\text{82}\) The court explained that employer motive in establishing an EIP is an important factor in determining whether unlawful domination exists.\(^\text{83}\) The court implicitly distinguished *Newport News* by explaining that actual domination differs from potential domination, which should not be illegal.\(^\text{84}\) Furthermore in *Hertzka & Knowles v. NLRB*,\(^\text{85}\) the Ninth Circuit upheld an EIP consisting of professional employees using the free choice rationale.\(^\text{86}\) The court explained that the employer did not dominate the EIP because the employees themselves chose to establish the committee.\(^\text{87}\) In fact, the idea was brought up by an employee and was later approved by the employees.\(^\text{88}\) So, under a free choice analysis, management involvement in EIPs is not per se illegal if the employees are satis-

\(^{74}\) 221 F.2d 165 (7th Cir. 1955).
\(^{75}\) See id at 167.
\(^{76}\) See id. at 169.
\(^{77}\) See id. at 170.
\(^{79}\) See id. at 730-31.
\(^{80}\) See id at 736-37.
\(^{81}\) See Chicago Rawhide, 221 F.2d at 167.
\(^{82}\) Id. at 167.
\(^{83}\) See id. at 170.
\(^{84}\) See id.
\(^{85}\) 503 F.2d 625 (9th Cir. 1974).
\(^{86}\) See id. at 631.
\(^{87}\) See id.
\(^{88}\) See id.
fled with this structure\textsuperscript{89} and there is no evidence that employee preferences are tainted by employer actions.\textsuperscript{90}

Another example of where a court noted the importance of cooperation and employee free choice in a section 8(a)(2) analysis occurred in \textit{Modern Plastics Corp. v. NLRB}\.\textsuperscript{91} In \textit{Modern Plastics}, the employer provided secretarial services, a conference room and pay for members of the EIP.\textsuperscript{92} The Sixth Circuit upheld the legality of the EIP, once again noting the lack of anti-union feelings on the part of the employer\textsuperscript{93} and employee satisfaction with the program.\textsuperscript{94} The court concluded that this did not constitute unlawful domination on the employers part.\textsuperscript{95}

\section*{III. The Re-emergence of EIPs and \textit{Electromation}}

During the last fifteen years the use of EIPs has reemerged and gained widespread popularity.\textsuperscript{96} These programs have been used in both union and nonunion companies.\textsuperscript{97} The use of EIPs has gained the support of many in the business and academic arenas.\textsuperscript{98} By allowing workers to get involved in defining the terms and conditions of their employment, these plans have resulted in substantial gains in productivity\textsuperscript{99} and increased employee job satisfaction.\textsuperscript{100} Because of changes in the economy and developments in the circuit courts, many commentators hoped that the Board and then the Seventh Circuit would use \textit{Electromation, Inc. v. NLRB}\textsuperscript{101} to clarify

\begin{flushleft}
89. See id. at 631.
90. See id.
91. 379 F.2d 201 (6th Cir. 1967).
92. See id. at 202-03.
93. See id. at 204.
94. See id.
95. See id.
97. See id.
100. See id.
\end{flushleft}
the standards for evaluating EIPs and would adopt a more flexible approach allowing the use of some EIPs. However, neither the Board nor the Seventh Circuit adopted more flexible approaches as expected. In fact, they complicated the matter further.

In Electromation, the Board ruled that labor management “action committees” designed to deal with the employer on such matters as employee absenteeism, pay progression and no smoking policies, were unlawfully dominated labor organizations. Electromation was a nonunionized manufacturer of electrical components who, due to heavy financial losses, announced in late 1988 that it would not be increasing wages in 1989 and would discontinue bonuses for good attendance. After the employees expressed displeasure, management met with eight selected employees and concluded that the company had serious morale problems and that a unilateral style of management would no longer work. At a subsequent meeting with the same eight employees, the company introduced its idea of creating five action committees. The committees consisted of six employees, one or two members of management and the Employee-Benefits manager. The committees met weekly in company conference rooms and were paid for their time. In February of 1989, the Teamsters Union demanded recognition from the employer. Up until that time, management had been unaware of any union organizational activity at the plant. Management then told the employee members of the committees that it could no longer participate with them in the groups, but that they could continue to meet on their own if they wished. After the Teamsters lost the representative election, they filed a section 8(a)(2) charge with the NLRB against the employer.

102. See Ryan, supra note 97, at 571.
103. See Electromation, 309 N.L.R.B. at 997.
104. See id at 990.
105. See id. at 990-91.
106. See id. at 991. The action committees pertained to the following areas: “(1) Absenteeism/Infractions, (2) No Smoking Policy, (3) Communication Network, (4) Pay Progression for Premium Positions, and (5) Attendance Bonus Program.” Id.
107. See id.
108. See id.
109. See id. at 990-91.
110. See id.
111. See id.
112. See id.
The Board held that the action committees were unlawfully dominated labor organizations in violation of section 8(a)(2).\textsuperscript{113} Furthermore, the Board found unlawful support because the committees operated on company time and in company facilities.\textsuperscript{114} With respect to section 2(5) of the Act, the Board reiterated support for the Supreme Court's broad interpretation in \textit{Cabot Carbon}.\textsuperscript{115} With respect to section 8(a)(2) the Board rejected the argument that anti-union motive should be required in order to find a section 8(a)(2) violation.\textsuperscript{116} Instead the Board emphasized that "a labor organization which is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management" is unlawfully dominated.\textsuperscript{117} The Board also stressed that the very creation of a EIP is a section 8(a)(2) violation unless the employees determine the form and substance of the committee.\textsuperscript{118}

In enforcing the Boards' order, the Seventh Circuit noted the fact that many companies in the United States have developed EIPs in order to improve the efficiency and effectiveness of the corporate organization.\textsuperscript{119} The court also took note that in light of today's changing industrial environment, section 8(a)(2) may require reconsideration in its application to certain EIPs.\textsuperscript{120} However, the Seventh Circuit felt that it was not the proper forum for such a re-analysis and that such re-analysis should be left to Congress.\textsuperscript{121} In coming to its decision, the court also reiterated its support for the Supreme Court's interpretation of section 2(5) in \textit{Cabot Carbon}.\textsuperscript{122}

With respect to section 8(a)(2) the court stated that "an interpretation . . . which would limit a court's focus to only the employees' subjective will, or which would require a finding of employee dissatisfaction with the organization, is at odds with the Supreme Court's holding in \textit{NLRB v. Newport News Shipbuilding & Dry Dock}
While the court confronted its previous decision in *Chicago Rawhide*, it went to great lengths to distinguish it from the present case. Although both the Board and the Seventh Circuit stated that this ruling was limited to the EIPs in the present case, the opinions nonetheless raise substantial doubt about the legality of any EIP.

The Board has applied the *Electromation* rule in several recent cases. In 1993 the Board applied *Electromation* in a case involving a unionized plant. In *E.I. du Pont de Nemours & Co.*, the Board held that joint labor management fitness and safety committees were unlawfully dominated labor organizations. Because the plant was unionized, the Board could have found these committees to be an attempt at directly dealing with employees over mandatory subjects of collective bargaining, in violation of the duty to bargain exclusively with the majority representative. However, the Board chose instead to rest its decision upon section 8(a)(2) of the Act.

In finding that these committees were unlawfully dominated, the Board emphasized that the employer had veto power over any proposal, the employer controlled how many employees served on the committees and each committee had a member of management who served as a leader or advisor. Interestingly, the Board also clarified what it meant by the term "bilateral mechanism" it used in *Electromation* when discussing section 2(5) of the Act.

[B]ilateral mechanism ordinarily entails a pattern or practice in which a group of employees, over time makes proposals to management, management responds to these proposals by acceptance

123. See *id.* at 1167.
124. See *id.* at 1168-69.
125. See *id.* at 1157.
126. See Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union*, 68 N.Y.U. L. Rev. 1127, 1172 (1993) (stating that *Electromation* effectively entrenched the traditional interpretation of sections 2(5) and 8(a)(2) and that the decision threatens many employer initiated EIPs).
128. See *E.I. du Pont*, 311 N.L.R.B. at 893.
129. See *id.* at 895-96.
132. See *id.*
133. See *id.* at 894.
or rejection by word or deed, and compromise is not required. If
the evidence establishes such a pattern or practice, or that the
group exists for a purpose of following such a pattern or practice,
the element of dealing is present. However, if there are only iso-
lated instances in which the group makes ad hoc proposals to
management followed by a management response of acceptance
or rejection by word or deed, the element of dealing is missing.134

In July of 1995, the Board applied Electromation to a grievance
committee in Keeler Brass Automotive Group.135 In Keeler Brass,
the employer started a grievance committee in 1983.136 About eight
years later, the employer decide to terminate the existing grievance
committee setup and start a new one.137 When the employer started
the new committee procedure, it implemented some changes.138 For
example the membership on the committee was reduced from nine
to five, the authority of the committee to call special meetings with-
out notifying the vice president was removed and a separate com-
plaint committee was eliminated.139 The Board, in concluding that
the committee was a labor organization within the meaning of sec-
section 2(5), relied heavily upon Cabot Carbon.140 The Board also
found that the committee was unlawfully dominated by the
employer in violation of section 8(a)(2) of the Act.141 "In this case
as in Electromation, actual domination is established by virtue of
the Respondent’s specific acts of recreating the organization, modi-
fying and amending it, and determining its structure and func-
tion."142 Furthermore, the Board also concluded that the employer
unlawfully supported the committee by paying members for their
time, holding meetings in company conference rooms and providing
secretarial and clerical assistance.143

134. Id. at 894.
136. See id.
137. See id.
138. See id.
139. Id. at 1110.
140. See id. at 1113. The Board concluded that the employee committees, like the
employee committees in Cabot Carbon, existed in part for the purpose of dealing with the
employer concerning grievances. See id. The Board then reversed the Administrative Law
Judge’s finding that the committee was not a labor organization within the realm of § 2(5) of
the Act. See id. at 1114.
141. See id. at 1114.
142. Id. at 1114-15.
143. See id. at 1115.
IV. THE PROPOSED SOLUTION (THE TEAM ACT)

In response to Electromation and other recent cases, many commentators have called for the reform of section 8(a)(2) of the Act. However, commentators are divided as to whether the reform would be best achieved through judicial revision or legislative revision. The wide variety of approaches taken by the Board and courts indicates that judicial revision would vary greatly among the jurisdictions. Instead of leaving the task to the judiciary, Congress should assume responsibility for revising the Act and ensure consistency in the national labor laws. In response to the outcry from commentators and employers, Senator Nancy Kassebaum, a member of the Senate Labor Committee, and Congressman Steve Gunderson, a member of the House Education and Labor Committee, each proposed legislation to reform section 8(a)(2) of the Act so as to exclude certain types of EIPs. Senate Bill 295 would amend section 8(a)(2) by adding to that provision the following clause:

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 issues of quality, productivity and efficiency] and which does not have, claim or seek author-

147. Compare Hertzka & Knowles v NLRB, 503 F.2d 625 (9th Cir. 1974), with Electromation, Inc. v. NLRB, 35 F.3d 1148 (7th Cir. 1994).
148. See Estreicher, supra note 145, at 125; Moe, supra note 145, at 1127.
ity to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.  

The TEAM Act was passed by Congress, but the bill was vetoed by President Clinton on July 30, 1996.

These bills, since being introduced, have continued to spark great debate on whether, if enacted into law, they would be beneficial in increasing employee satisfaction and production or bring back the company union. Republicans, lead by Representative Gunderson, believe the bills, if enacted into law, will encourage and legitimatize workplace organization. It is believed that this will lead to an increase in worker productivity and satisfaction. Democratic leaders oppose the bill and fear, if enacted, it would bring back the company union of old. Also opposing the bill is David Silberman, director of the AFL-CIO's task force on labor laws. He too believes that the bill, if enacted, would bring back the company union that organized labor has fought for so long to get rid of.

However, these fears are exaggerated and the passage of the TEAM Act into law is needed in order to bring the NLRA in tune with today's existing workplace practices that encourage teamwork and cooperation between management and labor. These criticisms misstate the purpose of EIPs which, while offering a vehicle for


153. The final version presented to President Clinton was the Senate version of the bill. See id. Senate bill S. 295 was reintroduced on February 10, 1997 in the identical form that was vetoed by President Clinton. See Employee Participation: Senate Panel Hearing on Labor, Business on Passage of TEAM Act, Daily Lab. Rep. (BNA) No. 30, at d-15 (Feb. 13, 1997).


156. See Employee Involvement: TEAM Act Likely to be Taken up This Year Despite Busy Schedule, Daily Lab. Rep. (BNA) No. 164, at D-13 (Aug. 24, 1995) (discussing Democrat's and organized labor's fear that the TEAM Act would turn back the clock to the days when nonunion employers were permitted to set up company or sham unions in an attempt to stave off a union organizing drive).

157. See AFL-CIO Official Calls TEAM Act "Solution in Search of a Problem", Daily Lab. Rep. (BNA) No. 27, at D-8 (Feb. 9, 1995) (discussing Silberman's objection to the TEAM Act because it would allow for employer dominated committees, such as the Electromation committee, to be legal).

158. See id.
employees to have a say in workplace decisions, are not intended as a substitute for unions but rather, as an aid to both employees and management. With the shift from a manufacturing based economy to a service based economy, employer-employee interests are no longer mutually exclusive. Service sector employees are more willing to participate in organizational policy, personnel decisions and the setting of professional standards. In addition, if TEAM is enacted, it would still be an unfair labor practice for the employer to dominate the labor organization. Moreover, if employees in a nonunion setting are dissatisfied with the EIP in place, they could always choose to be represented by an independent union. TEAM allows for cooperation between the employer and the employees but not domination. Even though the proposed amendment does not directly state that a proper motive is needed by the employer in order to implement an EIP, it is implied. A reading of the amendment as a whole with the already existing language of section 8(a)(2) and the Act in its entirety, indicates that a proper motive is needed. Motive could be determined by looking to circumstantial evidence as it is in other unfair labor practice hearings. For example, the Board or the courts could consider the previous history of the plant to see if there were anti-union feelings or activities or a prior record of unfair labor practices as presumptive evidence of an illicit motive. Most importantly, an illicit motive could be presumed where an EIP is established too close to an organizing campaign.

Revision of section 8(a)(2) is necessary in order to modernize American labor law and to empower companies to cope with the ever changing challenges of the twenty-first century. Currently, section 8(a)(2) fosters, if not requires, a unilateral style of management that is incompatible with today's complex workplace. Furthermore, more than 80% of the largest employers in the United States have implemented EIPs. Given the steadily declining rate of union membership to less than 15% of all employed

161. See H.R. 634 § 3; S. 295 § 3.
163. See H.R. 634 § 2(a)(3); S. 295 § 2(a)(3).
wage and salary workers in America as of 1995, the law continues to require employers to deprive workers of any say in management decisions. With *Electromation* decided as it was, most EIPs are in danger of being found illegal. Representative Gunderson recently referred to EIPs as "speeders on an interstate highway that have not yet been caught." The use of EIPs has had a positive impact on the lives of employees as well as increasing productivity. In order for the United States to maintain or even reclaim its position as the world's leading economic force, the use of EIPs is imperative.

V. CONCLUSION

Given the favorable impact EIPs have had throughout the country, it is time that the NLRA be revised so that their use is clearly legal. Due to the NLRB's unwillingness to accept the use of EIPs and the courts varying approaches to deal with them, legislation must be enacted to accommodate this workplace innovation. The use of EIPs has consistently led to increases in worker satisfaction, motivation and productivity. Currently, there is a bill in Congress, the TEAM Act, which would make the use of EIPs legal. With over 30,000 employers having implemented some sort of EIP, it is time that the national labor laws accept their use. Section 8(a)(2) of the Act fosters a unilateral style of management whereby employers cannot get their employees thoughts, feelings, or input in a manage-

165. See discussion supra notes 111-23.
167. See Fred K. Foulkes & E. Livernash, HUMAN RESOURCES MANAGEMENT, CASES AND TEXT 335-47 (2d ed. 1989) (tracing the history of participative management in the United States); see also Paul D. Staudohar, Labor-Management Cooperation at NUMMI, 42 LAB. LJ. 57 (1996). Giving an example of the GM-Toyota plant EIP which led to more motivated and productive employees and a more profitable plant. This particular plant had a history of labor-management conflict, which led to quality and productivity problems and an eventual shutdown by GM. See id. During negotiations over the site for the proposed joint venture, Toyota management proposed hiring new workers so it would not have to deal with adversarial relationship of the former employees of GM. See id. The UAW, who represented GM workers, found this plan unacceptable. See id. They succeeded in convincing management of both companies that the old employees could succeed if they implemented an EIP. See id. With the implementation of the EIP, the companies saw more motivated and productive employees and a more profitable plant. See id. In addition, the labor-management strife that plagued the old GM plant no longer existed. See id.
rial decision. This type of managerial style is no longer effective. With the complexities of today's workplace, management needs help from its employees in order to run a successful business. Many believe that their continued development and use is critical to the future competitiveness of the United States in the world market. Therefore, the passage of the TEAM Act is imperative.

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