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A DIALOGUE WITH THE CHAIRMAN OF THE LABOR BOARD: CHALLENGING CONVENTIONAL WISDOM ON THE IMPACT OF CURRENT LAW ON ALTERNATIVE FORMS OF EMPLOYEE REPRESENTATION

Charles J. Morris*

William B. Gould IV, Chairman of the National Labor Relations Board, has often expressed his concern about the problem of how the law can best provide for employee participation in the workplace. At a seminar sponsored by the Creighton University School

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of Law, he summarized his view that the TEAM Act¹ would compound rather than solve that problem and presented his own perception of related shortcomings under present law.² His comments provide a valuable frame of reference for critical questions posed by the prospect of establishing employee representation structures that might function as legal alternatives to traditional labor unions.

I am fully in agreement with Chairman Gould’s assessment of the TEAM Act, though I believe his restatement of existing law, notwithstanding that it reflects conventional wisdom on the subject, requires significant modification. I am indebted to him, however, for having raised the right questions about the law. The simulated dialogue that follows, consisting of verbatim excerpts from his Creighton presentation and my own responses, presents the legal parameters that I consider basic for the creation and operation of any form of alternative employee representation.

The dialogue begins.

**Gould:**

My view is that the dignity of work can best be realized through some form of representation or involvement by employees at the workplace.³

**Morris:**

Your emphasis on dignity of work is well placed, because pride in one’s work is indeed important to the human process as well as to the production process. If employees are to have an effective voice in the typical workplace, representation is essential, therefore this is an ideal concept with which to begin our discussion.

**Gould:**

The TEAM Act . . . should be called the Employee Domination Act since it would allow employers to impose representational arrangements . . . upon employees regardless of their wishes, appointing the workers’ representatives for them, determining what issues should be taken up, and what the structure of the system would be.

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2. See William B. Gould IV, Employee Participation and Labor Policy: Why the TEAM Act Should be Defeated and the National Labor Relations Act Amended, 30 Creighton L. Rev. 3 (1996) (The seminar was presented in Omaha, Nebraska, on June 7, 1996).
3. Id. at 6.
The TEAM Act is contrary to the democratic assumptions of America's society which presuppose our ability and basic right to select representatives of our own choosing—assumptions which ought to be applicable to the employment relationship. 4

Morris:

I could not agree with you more. From its inception as a hastily drafted response to the Labor Board's Electromation 5 decision, it was apparent that the TEAM Act would effectively repeal section 8(a)(2) 6 and provide a legal means for employers to give "employees the illusion of a bargaining representative without the reality of one." 7 Passage of the TEAM Act would effect a substantial change in the American system of labor law, dramatically altering the democratic principle contained in the NLRA that allows employees to decide for themselves whether they desire to join a union or some other form of labor organization, who their representatives will be, and whether they even wish to be represented. 8 The TEAM Act would permit substitution of an authoritarian model under which the employer can mandate employee representation and dictate the selection of the employees' representatives. 9

Gould:

Notwithstanding the flawed nature of the TEAM Act, the National Labor Relations Act is badly in need of revision . . . . [T]he need [is] to provide for a more level playing field between unions and employers as they compete in the marketplace of ideas for the allegiance of workers in organizational campaigns. The lawfulness of employee committees in a nonunion environment is important as well. Congress can and should do more to

4. Id. at 8. In a May 9, 1997 letter to Senator Dianne Feinstein, Chairman Gould said the NLRA should be amended to "allow employers to sponsor and financially assist employee organizations in nonunion establishments without any limitation . . . ." NLRB Chairman Gould Repeats His Opposition to TEAM Act, Daily Lab. Rep. (BNA) May 13, 1996, at A-6.


7. Electromation, 309 N.L.R.B. at 1003 (Devaney, concurring).

8. See Morris, supra note 6, at 92-93.

9. See Morris, supra note 6, at 92-93.
build the bridge of communication between such employees and employers.  

Morris:

Yes, the NLRA could and should be improved to make its processes more effective in order to achieve the level playing field to which you refer. I question, however whether there is a need to amend the Act to establish the lawfulness of employee committees in the nonunion workplace. The present Act already permits a wide range of lawful employee committees. The Labor Board's *General Foods Corp.* and *Sears, Roebuck & Co.* decisions affirmed that employee committees in which employees participate in day-to-day decision-making or in communications concerning their work are not labor organizations within the meaning of section 2(5). And as for employee committees that deal with the employer regarding compensation and other conditions of employment, the Act clearly allows such committees when they are genuinely representative of the employees and not controlled by the

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10. *Gould, supra* note 2, at 9. Chairman Gould has continued to press for an amendment to § 8(a)(2). In August 1997, he advocated the following as part of a package of recommended NLRA reforms:

Amend 8(a)(2) of the National Labor Relations Act to allow and encourage employee participation in nonunion workplaces so long as it is not designed to forestall or supplant collective bargaining and so long as it permits genuine employee participation free from domination by the employer. This will help assure U.S. industry’s competitiveness in the global economy and allow employees to contribute their ideas to the success of their enterprises without undermining collective bargaining.


11. 231 N.L.R.B. 1232 (1977) (holding that teamwork type programs involving employees in the production process are not prohibited by § 8(a)(2)).

12. 274 N.L.R.B. 230, 244 (1985) (holding that a communications committee that is not an advocate for employees, but a tool to increase efficiency, is not a labor organization within the meaning of § 2(5), 29 U.S.C. § 152(5)); *see also* Vons Grocery Co., 320 N.L.R.B. 53 (1995) (holding that an employee participation group that does not have a “pattern or practice” of making proposals to management cannot be transferred into a statutory labor organization).


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

employer—conditions that you agree ought to be deemed essential in a democratic system.\textsuperscript{14}

\textbf{Gould:}

\begin{quote}
[In a] bizarre way, the Act makes it unlawful to dominate or assist an organization that is concerned with employment conditions.\textsuperscript{15}
\end{quote}

\textbf{Morris:}

I suspect you are not really objecting to the prohibition of employer domination. It certainly is not bizarre to prohibit an employer from dominating, i.e., controlling, a labor organization that is supposed to be the free and voluntary voice of the employees. But whether it is bizarre to prohibit an employer’s assistance to such an organization is another matter. It depends on the nature of the assistance. Present statutory language and applicable case law recognize that there is a fine but perceptible line between assistance in the nature of cooperation and assistance that unduly interferes with employee freedom of action and decision-making.\textsuperscript{16} And, notwithstanding certain allegations that purported to express conventional wisdom during the TEAM Act debates,\textsuperscript{17} the tests which the Board and courts have developed to distinguish lawful cooperation from unlawful influence are now firmly established. Indeed, the law has been exceptionally clear on these issues for many years, as I shall spell out later in this dialogue.

\textbf{Gould:}

\begin{quote}
The principal deficiency of the current law lies in its ambiguity. First, while the Act prohibits “financial” assistance or other “support,” these terms are not self-defining. Literally, if an employer were to grant an employee committee the use of plant facilities, such as copying machines and meeting rooms, it would run afoul of the statute—although it is unusual to find a violation on this basis.\textsuperscript{18}
\end{quote}

\textsuperscript{15} Gould, supra, note 2, at 9.
\textsuperscript{18} Gould, supra note 2, at 9.
Morris:

I would go further and say that it would be impossible rather than unusual to find a violation on that basis, absent other critical factors. In situations where the labor organization belongs to the employees and is not controlled by the employer, the employer is free to cooperate in a variety of ways, such as providing "the use of plant facilities such as copying machines[,] and meeting rooms,"19 and much more, even compensation to union members and employee representatives for their time spent in representational activities. You presumably believe that there is nevertheless some danger that the statutory phrase "contribute financial or other support" might be applied in a manner which neither the Board nor the courts have ever contemplated, or which Congress, by its use of the limiting term "support" never intended.20 I say presumably, because in an earlier presentation about this issue you argued that "the NLRA's strict prohibitions against financial and other forms of assistance, as well as domination, makes repeal of section 8(a)(2) a desirable objective."21 That seems an odd assessment of the existing state of the law, for numerous Board decisions make it abundantly clear that there is no strict prohibition against an employer providing financial or other forms of assistance to employees' labor organizations, for the cases clearly hold that such contributions are not per se violative of the Act. The prohibition in section 8(a)(2) applies only to financial and other support, not to cooperation, as the Seventh Circuit explained in its Chicago Rawhide Manufacturing Co. v. NLRB22 decision:

"Support" is proscribed because, as a practical matter, it cannot be separated from influence. A line must be drawn, however, between support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination

22. 221 F.2d 165 (7th Cir. 1955), rev'd 105 N.L.R.B. 727 (1953).
may defeat the principal purpose of the Act, which is cooperation
between management and labor.23

As I shall demonstrate later, in response to your specific com-
ments about Chicago Rawhide, the Board has long understood and
regularly applied the distinction to which the Seventh Circuit
referred.24

I am still troubled, however, that you feel that the “principal defi-
ciency of the current law lies in its ambiguity.”25 The NLRA cer-
tainly has its deficiencies, but the least of them, in my opinion, is
ambiguity. Nevertheless, to the extent that any ambiguity may
exist, the advantage lies with the Board in its effort to interpret the
statute in accordance with Congressional policy. This conclusion
was reconfirmed by the Supreme Court in Holly Farms Corp. v.
NLRB26 when it invoked the two-step Chevron27 test to define the
role of the courts in reviewing the Board’s interpretation of the
NLRA:

If a statute’s meaning is plain, the Board and the reviewing courts
“must give effect to the unambiguously expressed intent of Con-
gress.” . . . When the legislative prescription is not free from
ambiguity, the administrator must choose between conflicting
reasonable interpretations. Courts, in turn, must respect the
judgment of the agency empowered to apply the law “to varying
fact patterns” . . . even if the issue “with nearly equal reason
[might] be resolved one way rather than another . . . .”28

And in NLRB v. Webcor Packaging, Inc.29 the Sixth Circuit, which
had previously been the least accommodating of all the Circuits in
reviewing the Board’s section 8(a)(2) decisions, acknowledged, on
the basis of Holly Farms, that it had been applying inconsistent
standards in its review of the Board’s interpretations of the Act,
and therefore any conflicting decisions were now "effectively overruled" by that case.\footnote{See id. at 1119. In Webcor, the Circuit affirmed the Board's finding that the employer had dominated the employees committee that it had created. See id. at 1124.}

Your charge of statutory ambiguity thus overlooks the Board's authority to exercise its expertise in clarifying any statutory phrase where the meaning is in question. Regarding the language to which you referred, in the cases that I shall shortly note, the Board has already accomplished the clarification you seek;\footnote{See infra notes 54-105 and accompanying text.} and in future cases, or possibly through rulemaking, it may further clarify this area of the law. However, before examining the case law that has evolved during several decades of statutory application, I want to pause upon the bare language of the provision, especially its proviso.\footnote{See 29 U.S.C. § 158(a)(2) (1994).} Regrettably, that proviso has been largely ignored by the Board, and as a consequence, also by the courts. Note the full text of section 8(a)(2), with the proviso, which both defines and limits the pertinent unfair labor practices:

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

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, that, subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.\footnote{29 U.S.C. § 158(a)(2) (1994) (emphasis added) (The reference to section 6 in the text refers to 29 U.S.C. § 156.).}

The opening phrase of the subsection, which contains the basic prohibitions against employer domination, interference, formation, administration, and support, is treated in the review of case law that follows.\footnote{See infra text accompanying notes 49-97 & 102-42.} It is the proviso, however, that now merits attention.

This proviso was inserted in the final draft of the Wagner Act for the reasons spelled out in the Senate Report.\footnote{See S. Rep. No. 573, on S. 1958 (1935).} That Report noted first that:

The committee feels justified, particularly in view of statutory precedents, in outlawing financial or other support as a form of unfair pressure. It seems clear that an organization or a repre-
sentative or agent paid by the employer for representing employees cannot command, even if deserving it, the full confidence of such employees. And friendly labor relations depend upon absolute confidence on the part of each side in those who represent it.\textsuperscript{36}

It then explained the limitation on the foregoing, which was that

\ldots the committee has been extremely careful not to work injustice by carrying these strictures too far. \textit{To deny absolutely by law the right of employees to confer with management during working hours without loss of time or pay would interrupt the very negotiations which it is the object of this bill to promote.} For these reasons, there is attached to the second unfair labor practice the \ldots proviso . . . .

This proviso is surrounded by adequate safeguards. \ldots [Its] entirety is made subject to the rules and regulations of the Board, thus enabling the Board to confine it to whatever extent may be necessary to effectuate the purposes of the bill.\textsuperscript{37}

Congress thus intended that where a labor organization is independent and free from unlawful employer influence, the employees would be permitted to engage in representational activities in their dealings with their employer while they received their regular pay, and such payments would not be treated as unlawful financial support of the labor organization by the employer.\textsuperscript{38} And to make doubly certain that this right would be administered rationally, Congress specifically provided the safeguard of administrative rulemaking.\textsuperscript{39} The Board, however, has never exercised that rulemaking authority,\textsuperscript{40} nor has it provided specific guideline rules through the adjudicatory process.

In an early case, \textit{Remington Arms Co., Inc.},\textsuperscript{41} the Board expressly noted the applicability of the proviso, and in 1979 it again referred to it in \textit{Janesville Products Division, Amtel, Inc.}\textsuperscript{42} But in most cases involving employee compensation for time engaged in labor rela-

\begin{itemize}
  \item \textsuperscript{36} \textit{Id.}
  \item \textsuperscript{37} \textit{Id.} (emphasis added).
  \item \textsuperscript{38} See \textit{id.}
  \item \textsuperscript{39} See \textit{id.}
  \item \textsuperscript{40} See generally American Hosp. Ass'n v. NLRB, 499 U.S. 606 (1991) (confirming the Board's authority to issue substantive rules pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, even without the specificity of authority contained in § 8(a)(2)).
  \item \textsuperscript{41} 62 N.L.R.B. 611, 614 (1945).
  \item \textsuperscript{42} 240 N.L.R.B. 854, 858 (1979).
\end{itemize}
tions activity, the Board has not explicitly referred to the provisio.\footnote{See infra text accompanying notes 57-105 (discussing the post-Chicago Rawhide cases).} That is unfortunate, for this is the only unfair labor practice provision in the entire Act that contains a specific direction for issuance of "rules and regulations pursuant to section 6." True, under the authority of \textit{NLRB v. Bell Aerospace Co.},\footnote{416 U.S. 267 (1974).} \"[t]he NLRB is not precluded from announcing new principles in an adjudicative proceeding, and the choice between rulemaking and adjudication initially lies within the NLRB's discretion.\"\footnote{Id. at 268.} Nevertheless, the Board could have used—and can still use—section 6 rulemaking to great advantage in this area, for it would thereby assure its constituents in the labor relations community that an employer can safely pay for all the time that employees invest in the labor-management process through their lawfully recognized independent labor organization. If that organization is not dominated or unlawfully supported by the employer, such payments constitute elements of lawful cooperation. As will be observed in the discussion that follows, the case law already permits such payments, but the Board, pursuant to explicit language in existing law, could do more to spell out the permissible extent of this type of cooperation.\footnote{See infra text accompanying notes 48-103 (discussing the post-Chicago Rawhide cases).} New legislation on the point would be superfluous.


gould:

In my \ldots Keeler Brass\footnote{Keeler Brass Automotive Group, 317 N.L.R.B. 1110 (1995).} \ldots concurring opinion \ldots I expressed my view that the \ldots Seventh Circuit in Chicago Rawhide \ldots was correct in its holding. In that case, the committee in question originated with the employees and met outside the presence of management. Management did not determine the subject matter to be considered and did not determine who would be on the committee or have veto power over any committee recommendations. These facts established the independence of the committees.\footnote{William B. Gould IV, \textit{Employee Participation and Labor Policy: Why the TEAM Act Should be Defeated and the National Labor Relations Act Amended}, 30 CREIGHTON L. REV. 3, 10 (1996); see Keeler Brass, 317 N.L.R.B. at 1116-19.}
Morris:

In your reference to *Chicago Rawhide* in the *Keeler Brass* concurring opinion, you carefully noted the Seventh Circuit’s error—later corrected by that court when it affirmed the Board’s Electromation decision—in holding that “[t]he test of whether an employee organization is employer controlled is not an objective one but rather subjective from the standpoint of the employees.” That feature of the court’s *Chicago Rawhide* opinion was therefore never embraced by you. But as to the other features in the opinion, I do not understand why you treat the case as if it does not represent established Board law, for the Circuit’s opinion in that case is clearly the settled and existing law. It is true that the Board is often reluctant to admit that it has made a mistake, at least without the Supreme Court’s prompting of such an admission. But as we both know, sometimes the Board chooses, consciously or otherwise, to correct a mistake without fully crediting the source of its shift in direction. In *Chicago Rawhide*, the Board did find a violation in the fact situation that you described, but immediately following its reversal by the Circuit it began to correct that error and continued to do so in almost all of the subsequent cases involving similar fact patterns. The contrary cases—of which I count only two—both occurred during the early years following the Seventh Circuit’s

49. *Chicago Rawhide Mfg. Co.* v. NLRB, 221 F.2d 165, 168 (7th Cir. 1955) (quoting from NLRB v. Sharples Chems., 209 F.2d 645, 652 (6th Cir. 1994)). In its *Electromation* decision, the Seventh Circuit recognized that

[A]n interpretation of section 8(a)(2) which would limit a court’s focus to only the employees’ subjective will, or which would require a finding of employee dissatisfaction with the organization, is at odds with the Supreme Court’s holding in *NLRB v. Newport News Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 249 (1939)

To focus exclusively on employee subjective reactions in order to demonstrate a section 8(a)(2) violation would... contravene the purpose of the Act. It is entirely possible that an extremely well constructed employer-dominated labor organization could be so “camouflaged” as to persuade employees that it represented their best interests and preserved their free choice when in fact it did not.

Electromation, Inc., 35 F.3d 1148, 1167-68 (7th Cir. 1994).

50. See, e.g., *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110, 1117 (1995) (Concurring in the *Keeler Brass* opinion, Chairman Gould asserted that the *Chicago Rawhide* standard was “different from that used by the Board for determining whether the employer’s conduct violated section 8(a)(2)” and that he was accordingly adopting “the court’s approach in this decision.”).

51. See infra text accompanying notes 57-105 (discussing the post-*Chicago Rawhide* cases).
decision (hereinafter referred to generically as Chicago Rawhide) and none occurred after 1966; but even during that early period, the Board decided five other cases consistent with Chicago Rawhide. Ultimately, and within a short period of time, it adopted the very test that the Seventh Circuit had enunciated, sometimes with specific attribution to the Circuit's decision but more often by merely citing its own post-Chicago Rawhide cases. Regardless, in at least fifteen cases involving employers that had provided financial and other forms of assistance to labor organizations, all of which cases are noted below, the Board applied the same Chicago Rawhide rationale that you enunciated in your Keeler Brass concurrence, treating such assistance as lawful cooperation rather than unlawful support, therefore finding no violation of section 8(a)(2) based on such conduct. And in no less than four of those cases, the Board specifically cited and credited the Seventh Circuit's decision.

Chicago Rawhide, consequently, provides no reason to amend statutory language, the meaning of which has been long understood. To emphasize, however, that such language and interpretative case law furnish clear and practicable guidelines that demonstrate positively how an employer can lawfully contribute financial and other support to an in-house labor organization, I shall review all of these post-Chicago Rawhide Board decisions. Note that these are decisions of the Board, not appellate court

52. See Modern Plastics Corp. v. NLRB, 379 F.2d 201, 202-03 (6th Cir. 1967), rev'g 155 N.L.R.B. 1126 (1966) (employer paid committee members their regular wages when attending meetings, prepared the committee's ballots, and paid for food and drinks when meetings were held at an outside cafe); NLRB v. Post Publ'g Co., 311 F.2d 565, 568-69 (7th Cir. 1962), rev'g 136 N.L.R.B. No. 23 (1962) (the Board indicated that standing alone, use of company property for union meetings and permitting use of the employer's machines for printing union notices would not constitute unlawful support, but coupled with the employer's allowing the union to receive the profits from the employees' cafeteria and coffee vending machine, it found a violation; the 7th Circuit reversed, deeming all such conduct to be permissible forms of friendly cooperation).

There are three additional cases where the Board was reversed: Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974); Federal-Mogul Corp. v. NLRB, 394 F.2d 915 (6th Cir. 1968); and Coppus Eng'g Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957). At first blush these cases might appear to be contra to Chicago Rawhide, but they are clearly not, for in addition to the employers' having provided a place for meetings, payment of wages to employees for their meeting time, and other friendly assistance, there was evidence in all three cases of unlawful employer intrusion into the labor organization's internal affairs—notwithstanding the appellate courts' contrary determinations. But compare NLRB v. Keller Ladders S., Inc., 405 F.2d 663 (5th Cir. 1968), and NLRB v. Summers Fertilizer Co., 251 F.2d 514 (1st Cir. 1958), where other Circuits enforced similar Board decisions.

53. See infra notes 57, 65, 69, 72 & 74 and accompanying text.
reversals of the Board, hence they unquestionably represent established Board law.

First, the pertinent facts of Chicago Rawhide. The “cooperation” which the Seventh Circuit approved consisted of (1) allowing the election of personnel and shop committeemen of the “Employees Committees” to be conducted on company time and premises, (2) allowing those committees to use company bulletin boards, (3) permitting the committees to transact their business on company premises, (4) allowing the processing of grievances on company time, and (5) allowing the company to contribute financial support to a recreational committee that was connected to the Employees Committees. In reversing the Board’s finding that the employer had violated section 8(a)(2) by “supporting, assisting and interfering” with the Employees Committees, the Circuit explained that the acts complained of showed only “laudable cooperation... rather than interference or support.”

The court’s decision was issued on March 24, 1955, and its impact on the Board was almost immediate, for one month later the Trial Examiner in Detroit Plastics issued his Intermediate Report in a case that involved an “Employees Representation Group” similar to the one in Chicago Rawhide. He described the Group as “a most informal organization, without any of the characteristics of formal labor organizations;... [but] regardless of its crudeness it did function as a labor organization” in its dealings with the employer regarding grievances, wages, and other working conditions. Notwithstanding that the employer had allowed the Group to operate on company time and property and provided Christmas parties where it presented the employees with gifts, the Trial Examiner found, on the sole authority of the just-issued Circuit decision in Chicago Rawhide, that the employer’s conduct was not violative of section 8(a)(2). Quoting at length from the court’s opinion,
he opined that "the language of the court . . . is apropos to the situation herein." The Board agreed. In numerous cases that followed, which I shall note in their chronological order, the Board repeatedly confirmed that Chicago Rawhide had become the applicable law defining lawful employer cooperation with an independent labor organization.

Thus, in Hannaford Bros. Co., the Board found no violation where the employer had permitted the employees' committees to conduct their business on company time and property. And in Remington Arms, previously noted, it found no violation where the employer had paid representatives of an independent union for time spent in negotiations with the employer. In Signal Oil and Gas Co., the employer permitted the labor organization to regularly use the company cafeteria for its meetings, allowed organizational elections to be held on company property, provided the organization with office supplies and equipment (including a desk and telephone), permitted the use of the company bulletin board, and paid employee representatives for working time lost due to bargaining sessions and grievance meetings. The Board held that "[n]either singly nor collectively are these acts or conduct violative of the Act."

In Manuela Manufacturing Co., Chicago Rawhide was expressly cited for the proposition that "[t]he use of company time and property does not per se support a finding of support or assistance." And in Coamo Knitting Mills, Inc., citing Manuela, the Board

61. Including portions quoted herein above.
62. Detroit Plastics, 114 N.L.R.B. at 1026 (referring in part to the excerpts included herein).
63. The Board's decision, issued on Nov. 16, 1955, affirmed without qualification the Trial Examiner intermediate report, adopting his "findings, conclusions, and recommendations." Id. at 1014.
64. See infra notes 65-97 & 102-104 and accompanying text.
65. 119 N.L.R.B. 1100 (1957).
66. See id. at 1101.
68. See id. at 614.
70. See id. at 1431.
71. Id. at 1432.
73. Id. at 385 & nn.22 & 23.
74. 150 N.L.R.B. 579 (1964).
75. See id. at 582 n.3.
found no violation even though the cooperation included allowing union organizational activity to occur on company time and property, for such conduct “all took place in a one-union context.”

The next case to recognize that an employer’s contributions of financial and other support to an in-house committee was not per se violative of section 8(a)(2) was *Heston Corp.*, where the Trial Examiner may have misread the significance of the Board’s tacit adoption of *Chicago Rawhide*, and was consequently reversed. The case involved an in-house association that had received company assistance even in excess of that which had been approved in *Chicago Rawhide*. This association conducted internal union business on company time, used company facilities without its members losing time or pay, conducted steward classes on company time and property, and some members of its board of directors received their regular wages for time spent attending meetings; additionally, the company interrupted production to allow the election of stewards on company time without employees losing pay, and it also permitted the storing of association records in a foreman’s office.

Promptly after *Heston*, the Board reaffirmed in *Coastal States Petrochemical Co.* that “the payment for meeting time, in the same manner as for working time, cannot alone be the basis for a finding of unlawful support . . .”

The authority of *Chicago Rawhide* therefore remained intact, although now the Board had several of its own decisions to cite for the “laudable cooperation” proposition. That is what occurred, first in *Ladish Co.*, then again in *Sunnen Products, Inc.* *Ladish* involved committee meetings on company time and property, wage payments for time spent on committee business, and company payment for the cost of printing the contract. *Sunnen* involved an in-house “Employees Advisory Board” as to which the Labor Board noted comparatively that the holding of closed meetings on com-

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76. *Id.* at 582. *Cf.* infra note 119 (citing cases).
78. *See id.* at 96.
79. *See id.* at 102.
81. *Id.* at 556.
82. *See supra* note 56 and accompanying text.
84. 189 N.L.R.B. 826 (1971).
85. *See Ladish Co.*, 180 N.L.R.B. at 583-34.
pany time and property was "not at all unusual where affiliated unions are involved and are not inherently coercive since they serve to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case." It is appropriate to remind ourselves that section 10(c) of the Act explicitly prohibits the Board from treating outside affiliated unions more favorably than independent inside labor organizations.

In 1979, the Board finally acknowledged, publicly, the impact of Chicago Rawhide, for in Janesville Products Division, Amtel, Inc., it noted that it had been "apparently influenced" by this and other appellate court decisions and now emphasized that "the Board has more broadly held that 'the use of company time and property does not per se support a finding of support and assistance.'"

Elias Mallouk Realty Corp. and BASF Wyandotte Corp. were the next cases in which the Board recognized that payment of regular wages to employee representatives of a labor organization for time spent in representational duties and providing company property to assist that organization in the performance of its functions are not unlawful, assuming that the organization, as in Chicago Rawhide, is an entity independent of the employer's control. In fact, as the Board noted in BASF Wyandotte, such payments by an employer to union representatives, and its provision of such items as office space and facilities, are mandatory subjects of bargain-

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86. Sunnen, 189 N.L.R.B. at 828.
87. 29 U.S.C. § 160(c).
89. See, e.g., Coppus Eng'g Corp. v. NLRB, 240 F.2d 564 (1st Cir. 1957), setting aside 115 N.L.R.B. 1387, and NLRB v. Magic Slacks, Inc., 314 F.2d 844 (7th Cir. 1963), denying enforcement of 136 N.L.R.B. 607. See also infra note 113.
91. 265 N.L.R.B. 1225 (1982).
92. 274 N.L.R.B. 978 (1985), enforced 798 F.2d 849 (5th Cir. 1986).
93. See id. at 980; Elias Mallouk, 265 N.L.R.B. at 1235-36.
Furthermore, the Board noted that the granting of such benefits does not violate section 302, the criminal provision of the Taft-Hartley Act that generally prohibits employers from making "payment of money or other thing of value" to representatives of their employees. The Board emphasized that permitting the use of company time and property in such circumstances "serve[s] to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case."

The section 302 issue was addressed by the Third Circuit in Caterpillar, Inc. v. United Automobile Workers. In an en banc decision, the court found no violation of that section when union officials, who were company employees, were granted paid leaves of absence pursuant to a collective bargaining contract that authorized them to serve as full-time grievance chairmen. Although that decision is now before the Supreme Court, what is not in issue is that union officials who are company employees that perform some work for the employer may unquestionably be paid by the employer for their time spent on union duties. The only issue before the Supreme Court is whether section 302(c)(1) permits an employer to pay or

95. 29 U.S.C. § 186, which provides in pertinent part:
   (a) It shall be unlawful for any employer . . . to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value—
   (1) to any representative of any of his employees . . .; or
   (2) to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer . . .
   . . .
   (c) The provisions of this section shall not be applicable (1) in respect to any money or thing of value payable by an employer . . . to any representative of his employees . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer . . .
97. BASF Wyandotte Corp., 274 N.L.R.B. at 980 (quoting from Sunnen Products).
99. See Caterpillar, 107 F.3d at 1057.
agree to pay the current wages of full-time union officials who are former employees of the employer and who no longer perform any work for the employer. The Circuit "perceive[d] no distinction between union officials who spend part of their time (which may be quite substantial) in adjusting grievances from the [former] employees who are involved here."\textsuperscript{100}

Regardless of how the Supreme Court rules, the Caterpillar case underscores the legality of employers paying their current employees for time spent in representational activities on behalf of an independent labor organization, especially when such payments result from a negotiated agreement with that organization.\textsuperscript{101}

Recent cases have reconfirmed the legality of such payments under section 8(a)(2). In Baker Mine Services, Inc.,\textsuperscript{102} the Board held that paying a labor organization’s negotiating committee members for time spent in collective bargaining negotiations, which were held on company property, does not per se establish unlawful assistance.\textsuperscript{103} In Electromation, the Board stated that “paying members of a committee for their meeting time and giving that committee space to meet and supplies is [not] per se a violation of sec. 8(a)(2).”\textsuperscript{104} This same principle was again reiterated by the Board’s majority opinion in Keeler Brass.\textsuperscript{105}

Clearly, Chicago Rawhide is a non-issue that provides no reason to amend the Act. However, Chicago Rawhide and its progeny do provide an important body of precedent that supports some of the features that would be essential to any alternative form of worker representation.

Now to your next concern.

Gould:

In Keeler Brass I stated my view that, inasmuch as most of the initiative for cooperative efforts in the workplace has come from employers, particularly in the non-union sector, we should not conclude that the committee is unlawful simply because the employer initiated it. I stated that the focus should be on

\textsuperscript{100} Id. (citing Trailways Lines, Inc. v. Trailways, Inc. Joint Council, Amalgamated Transit Union, 783 F.2d 101 (3d Cir. 1986)).

\textsuperscript{101} See id. at 1056-57.

\textsuperscript{102} 279 N.L.R.B. 609 (1986).

\textsuperscript{103} See id. at 610.

\textsuperscript{104} Electromation, Inc., 309 N.L.R.B. 990, 998 n.31 (1992).

whether the organization allows for employee action and choice

..., I would find no domination provided employees controlled
the structure and function of the committee and their participa-
tion was voluntary.\textsuperscript{106}

\textbf{Morris:}

I am pleased to respond that your view of what the law should be
actually expresses what the law already is. The Board cannot under
section 8(c)\textsuperscript{107} and the First Amendment\textsuperscript{108} deny the employer the
right to encourage its employees to organize into any lawful labor
organization, existing or proposed, affiliated or unaffiliated. The
leading case on the permissible extent of an employer’s message
that encourages support of a particular labor organization is the
First Circuit’s opinion enforcing the Board’s order in \textit{NLRB v. Corning Glass Works,}\textsuperscript{109} where the court stated that

If an employer keeps within the bounds fixed by the First
Amendment and by Congress by stopping short of direct or indi-
rect threats of reprisal or force, or promises of benefit, he cannot
be found guilty of an unfair labor practice.

..., The First Amendment and § 8(c) give an employer the right to
express his views and opinions both orally and in other ways, and
neither draws any distinction between the scope of an employer’s
right to express his views and opinions when his employees are
considering whether to unionize or not and when they are decid-
ing whether to join one union or another.\textsuperscript{110}

The cases have focused on whether the employees can exercise
genuine freedom of action and choice in the selection and operation

\textsuperscript{106} William B. Gould IV, \textit{Employee Participation and Labor Policy: Why the TEAM Act

The expressing of any views, argument, or opinion, or the dissemination thereof,
whether in written, printed, graphic, or visual form, shall not constitute or be
evidence of an unfair labor practice under any of the provisions of this Act, if such
expression contains no threat of reprisal or force or promise of benefit.

\textit{Id.}

\textsuperscript{108} U.S. CONST. amend. I. “Congress shall make no law ... abridging the freedom of
speech.” \textit{Id.}

\textsuperscript{109} 204 F.2d 422 (1st Cir. 1953).

\textsuperscript{110} \textit{Id.} at 428.
of their labor organization, not on whether the organization was initiated or encouraged by the employer.\textsuperscript{111} So long as the employer's message of support or encouragement "contains no threat of reprisal or force or promise of benefit,"\textsuperscript{112} the message is privileged.

The most prominent court decision involving employer advocacy of an in-house labor organization is the First Circuit's opinion in \textit{Coppus Engineering Corp. v. NLRB},\textsuperscript{113} where the president of the company had called a meeting of the employees and "suggested 'that they have a permanent grievance committee, if that is what they wanted to call it.'"\textsuperscript{114} The court held that absent non-privileged discrimination against a rival labor organization, which was not present in the case, the president's statement only meant that he preferred to deal with a permanent grievance committee rather than some other type of labor organization. Therefore, "[o]nly if 'such asserted preference, with all surrounding facts and circumstances, amounts to improper influence and approaches a coercive character' is it to be condemned."\textsuperscript{115} In the several Board cases decided subsequent to \textit{Coppus} that involved employer attempts to initiate a labor organization, the Board has never wavered from the application of this guarantee of free speech.\textsuperscript{116}

Thus, in \textit{Coamo Knitting Mills},\textsuperscript{117} the Board expressly found no violation in the employer's invitation to the union to organize the employees on company premises, nor in his speech to the employees in which he encouraged them to join the union and told them that "[t]he Company will negotiate a contract with the Union, which we believe will be mutually beneficial."\textsuperscript{118} Moreover, numerous cases stand for the proposition that if no other union is seeking or claiming representation, employers do not violate the Act when they grant a union representative broad access to employees on

\begin{footnotes}
\item[111] See \textit{Coppus Eng'g Corp. v. NLRB}, 240 F.2d 564 (1st Cir. 1957); \textit{Corning Glass Works}, 204 F.2d 422; \textit{Coamo Knitting Mills, Inc.}, 150 N.L.R.B. 579 (1964).
\item[112] 29 U.S.C. § 158(c) (1994).
\item[113] 240 F.2d 564 (1st Cir. 1957). Later, in \textit{Janesville Products}, 240 N.L.R.B. 854, 858 (1979), the Board credited \textit{Coppus} with being one of the court decisions that had influenced its post-\textit{Chicago Rawhide} cases, such as \textit{Manuela Mfg. Co.}, 143 N.L.R.B. 379 (1963).
\item[114] \textit{Coppus Eng'g Corp.}, 240 F.2d at 570.
\item[115] \textit{Id.} at 571 (citing \textit{Diamond T Motor Car Co. v. NLRB}, 119 F.2d 978, 982 (7th Cir. 1941)).
\item[116] See infra notes 119-25.
\item[117] 150 N.L.R.B. 579 (1964).
\item[118] \textit{Id.} at 595 app. A.
\end{footnotes}
company property for organizational purposes.\textsuperscript{119} In *Greyhound Airport Service, Inc.*,\textsuperscript{120} the Board held that an employer's suggestion to employees that they think about forming their own union to represent their interests was not a violation.\textsuperscript{121} Likewise, in *Walker's Midstream Fuel & Service Co.*,\textsuperscript{122} where the Board expressly noted that the employer's president had "initiated the idea of an employee committee which, if selected by the employees, 'could work out some kind of an agreement' with him,"\textsuperscript{123} it found no violation. And in *Missouri Heel Co.*,\textsuperscript{124} notwithstanding that an outside union was seeking to organize the employees, the Board found no violation when the employer told his employees: "If you would like to get a committee together like we have done in the past, come up with some proposals, we would be willing to listen to you."\textsuperscript{125}

Clearly, the law regarding employer initiation and encouragement of employees to join a particular labor organization—whether in-house or otherwise—requires no amendment.

Gould:

>[T]he fact is that a majority of the Board has not yet subscribed to the views that I have expressed on employer initiatives. This is one reason why a clarifying amendment to the statute which would allow for employer initiatives would be appropriate. . . .\textsuperscript{126}

\textsuperscript{119} See *New England Motor Freight, Inc.*, 297 N.L.R.B. 848 (1990) (holding that employer's encouraging employees to meet with union organizer on company premises with no supervisors present did not violate the Act); *Milton Kline et al, d/b/a Kleins' Golden Manor*, 214 N.L.R.B. 807 (1974) (holding that employees' meeting with union representative on company premises was not a violation of § 8(a)(2) where no other labor organization was seeking to organize); *Longchamps, Inc.*, 205 N.L.R.B. 1025 (1973) (stating that at a meeting with employees, employer introduced union representative, then turned the meeting over to them so that he could explain union benefits and distribute authorization cards after the employer and supervisors had left the room; the Board found no violation of § 8(a)(2)); *Jolog Sportswear, Inc.*, 128 N.L.R.B. 886 (1960) (allowing union representative to present an organizational speech to employees assembled on paid time in company cafeteria did not violate § 8(a)(2)).

\textsuperscript{120} 204 N.L.R.B. 900 (1973).

\textsuperscript{121} See id.

\textsuperscript{122} 208 N.L.R.B. 158 (1974).

\textsuperscript{123} Id. at 158.

\textsuperscript{124} 209 N.L.R.B. 481 (1974).

\textsuperscript{125} Id. at 484.

\textsuperscript{126} Gould, *supra* note 106, at 11.
Morris:
In defense of your Board colleagues whom you say have failed to subscribe to your views on employer initiatives, I would point out that no recent Board case has raised the issue; and your having raised it as dictum in your *Keeler Brass* concurring opinion is surely no basis for concluding that a majority of the Board would not join with you in an appropriate case, especially since your views are consistent with prior Board decisions. Because of the strong free speech language contained in section 8(c) and the presence of the foregoing cases, any employer so inclined already has a green light to suggest to its employees that they organize themselves into a committee or other entity to deal with matters affecting their employment. So long as such entity is the free choice of the employees and represents an uncoerced majority in an appropriate unit, the employer may lawfully recognize and deal with it. Why fix a provision if it ain't broke?

Gould:
I also said [in *Keeler Brass*] that if the employer created an employee participation organization in response to a union organizational campaign, I would “draw the inference that the organization was designed to thwart employee independence and free choice.”

New amendments should specifically incorporate such a provision so as to avoid any ambiguity. ¹²⁷

Morris:
Here again, there is no valid basis to amend the Act. There are many cases where employers have “created” an unlawfully dominated organization or influenced employees' committees under such circumstances, and the Board has properly found a violation of section 8(a)(2). ¹²⁸ But if an employer encourages employees to form or join a truly independent labor organization in preference to an outside union, the critical tests under current law will and should

be (1) whether the preferred organization is in fact independent of unlawful assistance or control by the employer, 129 (2) whether the employer has communicated to the employees any "threat of reprisal or force or promise of benefit" 130 to induce their support, 131 (3) whether the employer has committed any discriminatory acts with reference to either of the two organizations, 132 (4) whether the recognized organization represents an uncoerced majority of the employees 133 in an appropriate unit, 134 and (5) if the employer has extended recognition to a favored organization, whether it had knowledge of a valid petition for representation filed by the other organization if one was filed. 135 It would be helpful, however, if this last rule were changed to cover the time when the employer first has knowledge of an organizational campaign, rather than knowledge of the filing of a petition. Such a change could easily be achieved by the Board without additional legislation. But clearly, there is no need to change the applicable statutory language to cover this area of the law. What is required is for the General Counsel and the Board to provide swift and effective enforcement of existing law. 136

**Gould:**

*Employers ought to be able to promote the creation of and to subsidize employee groups.*

... [T]he final and most important aspect of any change should be an assurance that such employee organizations will be autonomous, that is to say, that they can select their own representatives

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131. See, e.g., Prince Macaroni Mfg. Co., 138 N.L.R.B. 979 (1962), enforced, 329 F.2d 803 (1st Cir. 1964) (threatening to discharge employee who was serving "two gods" by acting for an outside union while serving as a representative of an employees' committee violated 29 U.S.C. § 158(a)(1)).
132. See Schlabach Coal Co. v. NLRB, 611 F.2d 1161 (6th Cir. 1979).
or leadership and determine what it is that they want to discuss with management and how their organization should be structured.\textsuperscript{137}

Morris:

I fully agree, but as I have demonstrated, the law already provides for all of that. I appreciate, however, your having raised these important issues because our dialogue, and the research on which it is based, have revealed the nature of the problems that are involved in the establishment of any program of alternative employee representation. In the first place, the state of the law is such that employers who in good faith may wish to encourage their employees to create independent forms of representation should know that they may do so legally and that amendments to section 8(a)(2) are not required. Existing law adequately permits the creation of such non-traditional labor organizations. In the second place, so long as an employer understands a few simple legal requirements and acts accordingly, it may achieve the creation of an employee representational entity that is markedly different from a traditional labor union. Those basic requirements—to name only the ones that history teaches are the most likely to be violated—are that the employer (1) cannot coerce or require the employees to select an organization as their representative—that selection must be their own free choice,\textsuperscript{138} (2) cannot dictate the organization’s structure\textsuperscript{139} or how it functions,\textsuperscript{140} and (3) cannot control—directly or indirectly—the selection of the organization’s officers or representatives\textsuperscript{141} or otherwise actively participate in its internal affairs.\textsuperscript{142}


Engaging in such practices would compromise the independence of that labor organization and thus violate section 8(a)(2).

Our dialogue has accordingly revealed that viable alternative employee representational structures can be encouraged and developed under the NLRA as it now stands, but we must look to the General Counsel and the Board to ensure that this law is enforced in a manner that will encourage true employer cooperation, yet draw the line in those cases where an employer seeks to control the labor organization in question. The educational and enforcement process in this regard would be substantially enhanced if the Board were to promulgate clarifying rules pursuant to its general rulemaking authority and the specific proviso in section 8(a)(2).\textsuperscript{143}

We must not forget, however, that the legal principles to which we make reference are ultimately derived from the Congressional mandate that guarantees employees the "right to self-organization . . . and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."\textsuperscript{144} Thus, the right to organize at the workplace, whether in a traditional labor union or in an alternative representational structure, is a right that belongs only to employees,\textsuperscript{145} not to the employer. But whether a representational structure is initiated by the employer or the employees, if it conforms to the requirements of employee independence discussed herein, it will help fill an indisputable need in most American workplaces. That need is so great that even spokespersons for organized labor have recognized that nonunion solutions are possible and even suitable if they meet this independence requirement. As Jonathan Hiat\textsuperscript{146} told the Senate Committee when he expressed the AFL-CIO's opposition to the TEAM Act:

Employees in both unionized and non-unionized workplaces should have a voice in the workplace, and it should be their authentic voice, advanced by genuine and independent representatives selected by them, whether or not those representatives

\textsuperscript{143} See supra notes 35-46 and accompanying text.


\textsuperscript{146} Mr. Hiat is the General Counsel of the AFL-CIO.
formally go by the name “union,” “association,” or even “committee.” On that positive note, I bring this dialogue to a close.


what the . . . Seventh Circuit said in 1994 in upholding the NLRB’s decision in the Electromation case: representatives who enjoy the “unfettered power . . . to determine [their] own actions.” Independent representatives are selected by, and accountable to, the employees alone. Independent representatives are free to determine, on their own, their positions and their agenda. And, independent representatives do not exist at the sufferance of management.

Id.