CHEE & LEAPHORN

Attorneys at Law

Memorandum

Re: TEAM

To: Alex Associate

From: Kay Scarpetta

Our client, the United Association of Pipefitters, wants me to draft a position paper respecting proposed legislation called TEAM. The idea is that local and state Pipefitters Unions could use the position paper in lobbying efforts with members of Congress from their states.

Give me some guidance on this.

Memorandum

Re: TEAM

To: Alex Associate

From: Perry Paralegal

In 1992, the Labor Board decided a case called *Electromation*. It has caused the hub-bub (hubbeb? hubub?) I put it in just after the TEAM Act.

In response to *Electromation*, Representative Steve Gunderson (R-Wis.) proposed an original draft of the Teamwork for Employees and Managers Act, known as the TEAM Act, which would amend section 8(a)(2) of the NLRA to provide greater employer opportunities to create and participate in employee involvement committees

The bill passed both houses in 1996, but was vetoed by the President on July 30, 1996. The AFL-CIO is considering having the legislation reintroduced and this occasions the United Association's request.

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TEAM

S. 295, 105th Cong. (1997) and H.R. 634, 105th Cong. (1997)

Amend § 8(a)(2) of the NLRA by striking the semi-colon and inserting the following:

> Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of. . .quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements. . . between the employer and labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.

ELECTROMATION, INC.

309 NLRB 990
National Labor Relations Board, 1992, *enforced*, 35 F.3d 1148 (7th Cir. 1994)

BEFORE STEPHENS, CHAIR, DEVANEY, MEMBER, OVIATT, MEMBER, AND RAUDABAUGH, MEMBER.

I.

The Respondent is engaged in the manufacture of electrical components and related products. It employs approximately 200 employees. These employees were not represented by any labor organization at the time of the events described herein.

In late 1988 the Respondent concluded that it was experiencing unacceptable financial losses. It decided to cut expenses by altering the existing employee attendance bonus policy and, in lieu of a wage increase for 1989, distributed year-end lump-sum payments based on length of service. Shortly after these changes were announced, the Respondent became aware that employees were displeased with the reduction in benefits. In early January 1989, the Respondent received a petition signed by 68 employees expressing displeasure with the new attendance policy. Upon receipt of this petition, the Respondent's president, John Howard, met with the Respondent's supervisors to discuss the petition and the employees' complaints. At this meeting, the Respondent decided to meet directly with employees to discuss their problems. Thereafter, on January 11, the Respondent met with a selected group of eight employees and discussed with them a number of issues, including wages, bonuses, incentive pay, attendance programs, and leave policy.

After the January 11 meeting, President Howard again met with his supervisors and concluded that the Respondent had serious problems with its employees. Howard testified that it was decided at that time that "it was very unlikely that further unilateral management action to resolve these problems was going to come anywhere near making everybody happy . . . and we thought that the best course of action would be to involve the employees in coming up with solutions to these issues." Howard testified further that management came up with the idea of "action committees" as a method to involve employees.

The Respondent next met with the same group of eight employees on January 18. Howard explained to the assembled group that management had distilled the employees' complaints into five categories. Howard testified that he proposed the creation of Action Committees that "would meet and try to come up with ways to resolve these problems; and that if they came up with solutions that . . . we believed were within budget concerns and they generally felt would be acceptable to the employees, that we would implement these suggestions or proposals." Howard testified further that the reaction of the assembled employees to the concept of action committees was "not positive." Howard explained to the employees that because "the business was in trouble financially . . . we couldn't just put things back the way they were . . . we don't have better ideas at this point other than to sit down and work with you on them." According to Howard, as the meeting went on, the employees "began to understand that that was far better than leaving things as they were, and that we weren't going to just unilaterally make changes. And so they accepted it." Howard agreed that employees would not be selected at random for the committees based on seniority and that, instead, sign-up sheets would be posted.

On January 19, the Respondent posted a memorandum directed to all employees announcing the formation of five Action Committees and posted sign-up sheets for each Action Committee. The memorandum explained that each Action Committee would consist of six employees and one or two members of management, as well as the Respondent's Employees Benefits Manager, Loretta Dickey, who would coordinate all the Action Committees. The sign-up sheets explained the responsibilities and goals of each Committee. No employees were involved in the drafting of the policy goals expressed in the sign-up sheets. The Respondent determined the number of employees permitted to sign-up for the Action Committees. The Respondent informed two employees who had signed up for more than one committee that each would be limited to participation on one committee. After the Action Committees were organized, the Respondent posted a notice to all employees announcing the members of each Committee and the dates of the initial Committee meetings. The Action Committees were designated as (1) Absenteeism/Infractions, (2) No Smoking Policy, (3) Communication Network, (4) Pay Progression for Premium Positions, and (5) Attendance Bonus Program.

The Action Committees began meeting in late January and early February. The Respondent's coordinator of the Action Committees, Dickey, testified that management expected that employee members on the Committees would "kind of talk back and forth" with the other employees in the plant, get their ideas, and that, indeed, the purpose of the Respondent's postings was to ensure that "anyone [who] wanted to know what was going on, they could go to these people" on the Action Committees. Other management representatives, as well as Dickey, participated in the Action Committees' meetings, which were scheduled to meet on a weekly basis in a conference room on the Respondent's premises. The Respondent paid employees for their time spent participating and supplied necessary materials. Dickey's role in the meetings was to facilitate the discussions.

On February 13, the Union made a demand to the Respondent for recognition. There is no evidence that the Respondent was aware of organizing efforts by the Union until this time. On about February 21, Howard informed Dickey of the recognition demand and, at the next scheduled meeting of each Action Committee, Dickey informed the members that the Respondent could no longer participate but that the employees could continue to meet if they so desired. The Absenteeism/Infraction and the Communication Network Committees each decided to continue their meetings on company premises; the Pay Progression Committee disbanded; and the Attendance Bonus Committee decided to write up a proposal they had discussed previously and not to meet again. The Attendance Bonus Committee's proposal was one of two proposals that the employees had developed concerning attendance bonuses. The first one, developed at the committee's second or third meeting, was pronounced unacceptable by the Respondent's controller, a member of that

committee, because it was too costly. Thereafter the employees devised a second proposal, which the controller deemed fiscally sound. The proposal was not presented to President Howard because the Union's campaign to secure recognition had intervened.

On March 15, Howard informed employees that "due to the Union's campaign, the Company would be unable to participate in the committee meetings and could not continue to work with the committees until after the election," which was to be held on March 31.

On the foregoing evidence, the judge found that the Action Committees constituted a labor organization within the meaning of Section 2(5). He noted that employees, supervisors, and managerial personnel served as committee members and that their discussions concerned conditions of employment. The judge found that the Respondent dominated and assisted the committees on the basis of evidence that the Respondent organized the committees, created their nature and structure, and determined their functions. The judge also noted that, although management did not dominate meeting discussions, meetings took place on company property, supplies and materials were provided by management, and members were paid for time spent on committee work.

In its exceptions and brief, the Respondent contends that the Action Committees were not statutory labor organizations and did not interfere with employee free choice. It notes that no proposals from any committee were ever implemented, that the committees were formed in the absence of knowledge of any union activity, and that they followed a tradition of similar employer-employee meetings.

II.

Section 2(5) of the Act defines a "labor organization" as follows:

> 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.

Section 8(a)(2) provides that it shall be an unfair labor practice for an employer

> to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: 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.

Whenever we are attempting to determine the application of the statute to particular facts, we must first determine whether the statutory language standing alone answers the question. Here, we cannot properly limit our analysis to the statutory language because the terms are not all self-defining. For example, although the "Action Committees" are committees in which "employees participate," the parties have raised questions about the meaning of "representation" in the phrase "employee representation committee." We therefore seek guidance from the legislative history to discern what kind of activity Congress intended to prohibit when it made it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization" or to contribute support to it.

The legislative history reveals that the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife through the encouragement of collective bargaining. Early in his opening remarks Senator Wagner stated:

> Genuine collective bargaining is the only way to attain equality of bargaining power. . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power. . . . (O)nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labor disputes, wages, rates, or hours of employment.

. . . Congress concluded that ridding collective bargaining of employer- dominated organizations, the formation and administration of which had been fatally tainted by employer "domination" or "interference," would advance the Wagner Act’s goal of eliminating industrial strife. That conclusion was based on the nation’s experience under the NIRA, recounted by witnesses at the Senate hearings, that employer interference in setting up or running employee "representation" groups actually robbed employees of the freedom to choose their own representatives. Senator Wagner here made a distinction, important for this inquiry, between *interference* and *minimal conduct*—"merely suggesting to his employees that they organize a union or committee"—that the nation’s experience had shown did not rob employees of their right to a representative of their own choosing. As Senator Wagner stated:

> The question is entirely one of fact and turns upon whether or not the employee organization is entirely the agency of the workers. . . . The organization itself should be independent of the employer-employee relationship.

In sum, Congress brought within its definition of "labor organization" a broad range of employee groups, and it sought to ensure that such groups were free to act independently of employers in representing employee interests.

III.

Before a finding of unlawful domination can be made under Section 8(a)(2) a finding of "labor organization" status under Section 2(5) is required. Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of "dealing with" employers, and (3) these dealings concern "conditions of work" or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of "employee representation committee or plan" under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects. Any group, including an employee representation committee, may meet the statutory definition of "labor organization" even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues. Fire Alert Co., 182 NLRB 910, 912 fn. 12 (1970), enfd. 77 LRRM 2895 (10th Cir. 1971); Armco, Inc., 271 NLRB 350 (1984). Thus, a group may be an "employee representation committee" within the meaning of Section 2(5) even if there is no formal framework for conducting meetings among the represented employees (i.e. those employees whose conditions of employment are the subject of committee dealings) or for otherwise eliciting the employees’ views. . . .

In considering the interplay between Section 2(5) and Section 8(a)(2), we are guided by the Supreme Court’s opinion in NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959). In *Cabot Carbon* the Court held that the term "dealing with" in Section 2(5) is broader than the term "collective bargaining" and applies to situations that do not contemplate the negotiation of a collective bargaining agreement.. . .

As the *Cabot Carbon* Court explained in detail, Taft-Hartley House and Senate conferees rejected a proposed new Section 8(d)(3) passed by the House that would have expressly permitted "forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions" in the absence of a certified or recognized bargaining representative. The conference report as finally approved by the House and Senate did not contain the House's proposed new Section 8(d)(3) or any similar language. Instead, Section 9(a) was amended. Examining this legislative history, the *Cabot Carbon* Court noted that Section 8(a)(2) remained wholly unchanged and, with respect to Section 9(a), the Court found that there was nothing in the amendment of Section 9(a) that authorized an employer to engage in "dealing with" an employer-dominated "labor organization."

Notwithstanding that "dealing with" is broadly defined under *Cabot Carbon*, it is also true that an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5). In those circumstances, it is irrelevant if the impetus behind the organization's creation emanates from the employer. See General Foods Corp., 231 NLRB 1232 (1977) (employer created job enrichment program composed of work crews of entire employee complement); Mercy-Memorial Hospital, 231 NLRB 1108 (1977) (committee decided validity of employees' complaints and did not discuss or deal with employer concerning the complaints); John Ascuaga's Nuggett, 230 NLRB 275, 276 (1977) (employees' organization resolved employees' grievances and did not interact with management).

Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that 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 one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function. However, when the formulation and structure of the organization is determined by employees, domination is not established, even if the employer has the potential ability to influence the structure or effectiveness of the organization. Thus, the Board's cases following *Cabot Carbon* reflect the view that when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment. . . .

Of course, Section 2(5) literally requires us to inquire into the "purpose" of the employee entity at issue because we must determine whether it exists "for the purpose of dealing" with conditions of employment. But "purpose" is different from motive; and the "purpose" to which the statute directs inquiry does not necessarily entail subjective hostility towards unions. Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union.

IV.

Applying these principles to the facts of this case, we find, in agreement with the judge, that the Action Committees constitute a labor organization within the meaning of Section 2(5) of the Act; and that the Respondent dominated it, and assisted it, i.e., contributed support, within the meaning

of Section 8(a)(2).

First, there is no dispute that employees participated in the Action Committees. Second, we find that the activities of the committees constituted dealing with an employer. Third, we find that the subject matter of that dealing—which included the treatment of employee absenteeism and employee remuneration in the form of bonuses and other monetary incentives—concerned conditions of employment. Fourth, we find that the employees acted in a representational capacity within the meaning of Section 2(5). Taken as a whole, the evidence underlying these findings shows that the Action Committees were created for, and actually served, the purpose of dealing with the Respondent about conditions of employment. . . .

The evidence thus overwhelmingly demonstrates that a purpose of the Action Committees, indeed their *only* purpose, was to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of "dealing with" within the meaning of Section 2(5).

It is also clear that the Respondent contemplated that employee-members of the Action Committees would act on behalf of other employees. Thus, after talking "back and forth" with their fellow employees, members were to get ideas from other employees regarding the subjects of their committees for the purpose of reaching solutions that would satisfy the employees as a whole. This could occur only if the proposals presented by the employee-members were in line with the desires of other employees. In these circumstances, we find that employee- members of the Action Committees acted in a representational capacity and that the Action Committees were an "employee representation committee or plan" as set forth in Section 2(5).

There can also be no doubt that the Respondent's conduct vis a vis the Action Committees constituted "domination" in their formation and administration. It was the Respondent's idea to create the Action Committees. When it presented the idea to employees on January 18, the reaction, as the Respondent's President Howard admitted, was "not positive." Howard then informed employees that management would not "just unilaterally make changes" to satisfy employees' complaints. As a result, employees essentially were presented with the Hobson's choice of accepting the status quo, which they disliked, or undertaking a bilateral "exchange of ideas" within the framework of the Action Committees, as presented by the Respondent. The Respondent drafted the written purposes and goals of the Action Committees which defined and limited the subject matter to be covered by each Committee, determined how many members would compose a committee and that an employee could serve on only one committee, and appointed management representatives to the Committees to facilitate discussions. Finally, much of the evidence supporting the domination finding also supports a finding of unlawful contribution of support. In particular, the Respondent permitted the employees to carry out the committee activities on paid time within a structure that the Respondent itself created.

On these facts, we find that the Action Committees were the creation of the Respondent and that the impetus for their continued existence rested with the Respondent and not with the employees. Accordingly, the Respondent dominated the Action Committees in their formation and administration and unlawfully supported them. . . .

DEVANEY, M., (concurring)

Like my colleagues, I acknowledge that a genuine "employee participation program" is not before the Board today, and, in agreeing that the Respondent violated Section 8(a)(2), I do not pass on the status of any other arrangement. It is my position, however, notwithstanding the concerns of

some amici, that legislative history, binding judicial precedent, and Board precedent provide significant latitude to employers seeking to involve employees in the workplace. In my view, Section 8(a)(2) prohibits a specific form of employer conduct. It is not a broad-based ban on employee/employer communications. Thus, adjudication of the dealings between an employer and an employee organization must begin with an understanding of exactly what harms to Section 7 rights Section 8(a)(2) was intended to prevent and a targeting of Section 8(a)(2) enforcement at exactly those harms.

I base these conclusions on the following observations. First a "pure" employee participation plan was not before Congress in 1935 and has never been before the Supreme Court. Second, the legislative history of the Wagner Act, although replete with expressions of outright alarm over the development of employer-dominated sham "unions," shows virtually no concern over employer-initiated programs concerned with efficiency, quality, productivity, or other essentially managerial issues. Third, Board law itself has also recognized that employer-supported "committees" may take forms that are lawful under Section 8(a)(2). Based on the above, I would answer the question, posed by one amicus, thus: Section 8(a)(2) should not create obstacles for employers wishing to implement employee involvement programs—as long as those programs do not impair the right of employees to *free choice of a bargaining representative*. . . .

The record here indicates overwhelmingly that the Action Committees are not "normal relations and innocent communications" between employer and employee that Congress intended to leave undisturbed. Instead, the facts demonstrate why Congress couched the prohibition of company unions in broad terms. The Action Committees do not correspond to the historical "employee representation plans." Yet the Action Committees' effect on Section 7 rights is precisely the harm Congress sought to avert in Section 8(a)(2). In this regard, the Respondent, in spite of the expressed reluctance of employees and with no assurance of majority support, established the Action Committees for the purpose of "bargaining" with them over terms and conditions of employment. The Respondent itself chose the Action Committee members and charged them with representing their fellows, overriding employee preferences as to how the representatives would be chosen. By these acts, the Respondent substituted its will for that of a majority of employees and usurped their right to choose their own representative. In addition, the Action Committees effectively put the Respondent on both sides of the bargaining table; the company excluded the subject of wages from the committees' agenda, in spite of employee preference that it be discussed, and the controller "pre-screened" employee proposals so that the Respondent would have only palatable proposals to consider. Thus, the Action Committees gave employees the illusion of a bargaining representative without the reality of one. Further, the subject matter of the Action Committees, as set out by the Respondent, did not consist of concerns about productivity, efficiency, materials conservation, safety, and the like: instead, the Committees were set up to bargain over terms and conditions of employment. Nor did they constitute employee participation or empowerment committees: they were intended to give the impression that decisions resulting from their activities were "bilateral," yet the Respondent was in control of their subject matter and of the content of their proposals. By establishing committees that purported to act as the agent of employees in the bilateral consideration of problems, but in reality acted as its own agent, the Respondent unlawfully "dominated and supported" a labor organization in violation of Section 8(a)(2). . . .

OVIATT, M. (concurring)

I join in the majority opinion, but I do so as much for what the opinion does *not* condemn as an unfair labor practice as for what it *does* find to be a violation of Section 8(a)(2) and (1). Thus, I write separately to stress the wide range of lawful activities which I view as untouched by this decision.

In my view, the critical question in most cases of alleged violations of Section 8(a)(2) through domination or support of an entity that includes employees among its membership is whether the entity is created with any purpose to deal with "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" as set forth in the Section 2(5) definition of "labor organization." In this case, I have no doubt that the subject matter of the Action Committees falls comfortably within the definition. The Committee's purpose was to address and find solutions for issues related to absenteeism, pay progression, attendance bonuses, and no- smoking policies. These are plainly among the subject matters about which labor organizations traditionally bargain since they involve "wages" or "conditions of work."

There is, however, an important area of industrial relations where committees and groups of employees and managerial personnel act together with the purpose of communicating, addressing and solving problems in the workplace that do not implicate the matters identified in Section 2(5). Among the employee- participation groups that may be established by management are so-called "quality circles" whose purpose is to use employee expertise by having the group examine certain operational problems such as labor efficiency and material waste. See, Beaver, Are Worker Participation Plans "Labor Organizations" Within the Meaning of Section 2(5)? A Proposed Framework of Analysis, Lab.L.J. 226 (1985). Other such committees have been dubbed "quality-of work-life programs." These involve management's attempt to draw on the creativity of its employees by including them in decisions that affect their work lives. These decisions may go beyond improvements in productivity and efficiency to include issues involving worker self-fulfillment and self-enhancement. See, Fulmer and Coleman, Do Quality-of Work-Life Programs Violate Section 8(a)(2)?, 35 Lab.L.J. 675 (1984). Others of these programs stress joint problem-solving structures that engage management and employees in finding ways of improving operating functions. See, Lee, Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act, 38 Lab.L.J. 206, 207 (1987). And then there are employee-management committees that are established by a company with the purpose of creating better communications between employer and employee by exploring employee attitudes, communicating certain information to employees, and making management more aware of employee problems. See, Beaver, supra.

Where there is a labor union on the scene, these employee-management cooperative programs may act as a complement to the union. They can not, however, lawfully usurp the traditional role of the Union in representing the employees in collective bargaining about grievances, wages, hours, and terms and conditions of work. Where no labor union represents the employees, these programs are often established to open lines of communication so that the operation may take advantage of employee technical knowledge and expertise. See, Note, New Standards For Domination and Support Under 8(a)(2), 82 Yale Law Journal 510, 511 (1973).

Certainly, I find nothing in today's decision that should be read as a condemnation of cooperative programs and committees of the type I have outlined above. The statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace. In my view, committees and groups dealing with these subjects alone plainly fall outside the Section 2(5) definition of "labor organization" since they are not concerned with grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Indeed, in this age of increased global competition I consider it of critical importance that management and employees be able, indeed, are encouraged, to engage in cooperative endeavors to improve production methods and product quality.

Johanna Oreskovic
CAPTURING VOLITION ITSELF: EMPLOYEE INVOLVEMENT AND THE TEAM ACT

19 Berkeley J. Employment & Lab. L. 229 (1998)

. . . In the minds of the Act's framers, a bargaining equation heavily weighted in management's favor rendered the classical contract model of negotiation between two individuals inapplicable to labor contracts, because the bargaining power of employers greatly exceeded that of the individual worker. Inequality of bargaining power tainted the employment contract with duress and coercion, and rendered meaningless the concept of mutual assent. Collective bargaining, however, could strike a balance between equality and inequality of bargaining power and help to legitimate the employer-employee authority relationship. Specifically, the threat of collective action would act as an inducement for management to negotiate in good faith; therefore, collective empowerment in the labor market was necessary to enable the parties to forge agreements based on genuine consent. In this way, collective bargaining would facilitate the "development of a partnership between labor and management in the solution of national problems." The increased bargaining power of organized labor would also result in more equitable division of the fruits of production, thereby enabling workers to participate meaningfully in the economic life of the society as well. Thus, the adoption of collective bargaining as the national policy of the United States would serve as an indispensable complement to political democracy.

Charles J. Morris
A [SIMULATED] DIALOGUE WITH THE CHAIRMAN OF THE LABOR BOARD

15 Hofstra Lab. & Employment L.J. 319, 1998

[William] Gould [Then Chairman, National Labor Relations Board]:

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

[Charles] Morris [Professor of Law, emeritus]:

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. 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.

Morris:

I could not agree with you more. From its inception as a hastily drafted response to the Labor Board's *Electromation* decision, it was apparent that the TEAM Act would effectively repeal section 8(a)(2) and provide a legal means for employers to give "employees the illusion of a bargaining representative without the reality of one." 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. 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.

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 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 employer— conditions that you agree ought to be deemed essential in a democratic system.

Gould:

[In a] bizarre way, the Act makes it unlawful to dominate or assist an organization that is concerned with employment conditions.

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. And, notwithstanding certain allegations that purported to express conventional wisdom during the TEAM Act debates, 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.

Gould:

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.

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," 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. 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." 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. NLRB 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 as-

sists 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 may defeat the principal purpose of the Act, which is cooperation between management and labor. . . .