

## Calendar No. 389

104TH CONGRESS }  
2d Session }

SENATE

{ REPORT  
104-259

### TEAMWORK FOR EMPLOYEES AND MANAGEMENT ACT OF 1995

MAY 1, 1996.—Ordered to be printed

Mrs. KASSEBAUM, from the Committee on Labor and Human  
Resources, submitted the following

### REPORT

together with

### MINORITY VIEWS

[To accompany S. 295]

The Committee on Labor and Human Resources to which was referred the bill (S. 295) to permit labor management cooperative efforts that improve America's economic competitiveness to continue to thrive, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

### CONTENTS

	Page
I. Introduction .....	1
II. Purpose and summary .....	3
III. Background and need for legislation .....	3
IV. Legislative history and committee action .....	16
V. Explanation of bill and committee views .....	19
VI. Cost estimate .....	23
VII. Regulatory impact statement .....	23
VIII. Section-by-section analysis .....	23
IX. Minority views .....	25
X. Changes in existing law .....	41

### I. INTRODUCTION

In his State of the Union address in 1996, President Clinton told the country: "When companies and workers work as a team, they

do better. And so does America.” Unfortunately, our Federal labor law actually prohibits many forms of worker-management teamwork.

The Teamwork for Employees and Management (TEAM) Act, S. 295, will promote greater employee involvement by removing the barriers created by Federal labor law. These barriers, largely found in section 8(a)(2) of the National Labor Relations Act (NLRA), were originally targeted at “company” unions but actually sweep much broader to ban many cooperative labor-management efforts.

This legislation, S. 295, signals a new era in employee relations. The bill recognizes, as President Clinton did in his national address, that the best workplaces for employees and the most productive workplaces for employers are ones where labor and management work together.

The Senate has focused several of its legislative efforts on decentralizing decision making. In the employment arena, employee involvement increases local decision making and provides employees with a voice in how to structure the workplace. In workplaces where employee involvement programs have been implemented, employees are empowered to play a role in reaching decisions on many aspects of their employment.

As this nation enters the 21st century, the committee believes it important that U.S. workplace policies reflect a new era of labor-management relations—one that fosters cooperation, not confrontation. Employees want to work with their employers to make their workplaces both more productive and more enjoyable.

A recent study of employees’ views in this area indicates that a majority of workers want a voice in their workplace. They also believe that their contribution would be effective only if management cooperates. When asked to choose between two types of organizations to represent them, workers chose, by a 3-to-1 margin, one that would have no power but would have management cooperation over one with power but without management cooperation.<sup>1</sup> Employee involvement gives workers the best of both worlds by offering both empowerment *and* cooperation.

The legality of employee involvement and labor-management cooperative efforts must be clarified. These human resource programs move domestic industry toward the high performance workplaces necessary to compete in the increasingly competitive global economy. The broad definitions in the NLRA were written for a different era of employer-employee relations and no longer make sense in today’s workplace.

The hierarchical model of the work force of the early 20th century, where each employee’s and supervisor’s job tasks were compartmentalized and performed in isolation, is not effective in the current globally competitive marketplace. Federal labor law must evolve to adjust to the modern reality of overlapping responsibilities and each employee having a sense of the whole production process. The TEAM Act accomplishes this evolution. For these reasons, the committee fully supports its enactment.

---

<sup>1</sup>“Worker Representation and Participation Survey,” Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

## II. PURPOSE AND SUMMARY

The purpose of S. 295, the Teamwork for Employees and Management (TEAM) Act of 1995, is to amend the National Labor Relations Act (NLRA) to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against coercive employer practices, and to allow legitimate employee involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

The TEAM Act would clarify the legality of employee involvement programs by adding a proviso to section 8(a)(2) of the NLRA clarifying that an employer may establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest—including, among others, issues of quality, productivity, and efficiency.

The bill also specifies that such organizations may not have, claim, or seek authority to enter into or negotiate collective bargaining agreements or to amend existing collective bargaining agreements, nor may they claim or seek authority to act as the exclusive bargaining agent of employees. Senate bill 295 specifies that the proviso does not affect other protections within the NLRA, thereby ensuring that employee involvement cannot be used as a means to avoid collective bargaining obligations. The amendment to section 8(a)(2) contained in the bill is designed to provide a safe harbor for cooperative labor-management efforts without weakening workers' ability to select independent union representation.

## III. BACKGROUND AND NEED FOR LEGISLATION

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

Decades ago, when market forces were relatively static with the United States in the dominant position, Taylorism ensured the continuity and conformity necessary for American companies to maintain their economic supremacy. The past 20 years, however, have witnessed a dramatic transformation in the fundamental nature of labor-management relations. This transformation is due primarily to foreign competition, rapid technological change, and other factors which have provided strong incentives for altering workplace relationships.

By the late 1970s, manager began to view employees as a source of ideas for “developing and applying new technology” and “improv-

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

ing existing methods and approaches to remain competitive.”<sup>3</sup> Rather than organizing workers to perform a single task, as had been the practice under division of labor, companies began instituting programs to involve employees more broadly in solving problems and making decisions which once were exclusively within the realm of management.<sup>4</sup>

These programs, implemented in both union and nonunion workplaces, included quality circles, quality of work-life projects, and total quality management programs. By involving workers to varying degrees in most aspects of production, these programs frequently resulted in substantial productivity gains, as well as increased employee satisfaction

#### FORMS OF EMPLOYEE INVOLVEMENT

Employee involvement comes in many forms. It is not a set “program,” and therefore, it defies easy definition. Rather, employee involvement is a means by which work is organized within a company and, as such, a way for employees and employers to relate to one another within an organization.

Because of this, there is no single dominant form of employee involvement. It usually includes some structure method for addressing workplace issues through discussions between employees and employer representatives. Indeed, two out of every three employee involvement structure do not even have a manual of procedure, thereby allowing the participants to design their structure to meet their changing needs.<sup>5</sup>

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

##### *Joint labor-management committees*

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

<sup>3</sup> Neil DeKoker, “Labor Management Relations for Survival,” in “Industrial Rel. Res. Ass’n Proc. of the 1985 Spring Meeting” 576, 576 (Barbara D. Dennis ed., 1985) (quoted in Stokes, *supra* note 2, at 902).

<sup>4</sup> Stokes, *supra* note 2, at 903.

<sup>5</sup> See Edward E. Lawler III, Gerald E. Ledford, and Susan A. Morhman, “Employee Involvement in America: A Study of Contemporary Practice” (American Productivity & Quality Center: Houston, TX), at 33 (1989).

<sup>6</sup> Edward E. Potter, “Quality at Risk: Are Employee Participation Programs in Jeopardy?” (Employment Policy Foundation: Washington, D.C.), at 19 (1991).

<sup>7</sup> Congress has established a grant program, currently funded at \$1.5 million, to help selected labor-management committees carry out joint programs. This program is administered by the Federal Mediation and Conciliation Service.

### *Quality circles*

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

### *Quality of work-life programs*

Quality of Work-Life (QWL) programs are also designed to improve productivity but focus primarily on improving worker satisfaction. Unlike quality circles, which focus directly on product improvement, QWL programs are intended to bring about fundamental changes in the relations between workers and managers and can include changing the decision-making, communication, and training dimensions within an organization. Joint labor-management committees are frequently used to coordinate and monitor QWL programs.<sup>9</sup>

### *Self-directed work teams*

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

### *Gainsharing*

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

Again, the examples discussed above are intended to provide illustrations of the various ways in which employee involvement has been utilized in today's modern workplace. Many other forms are successfully utilized by both small and large employers.

More important to this discussion, however, is the fact that employee involvement, regardless of its form, seeks as its fundamental goal to unlock the productive capabilities of American workers. And, while it may be argued that some similarities exist between modern employee involvement and the employer-dominated company unions of the 1930s, today's programs differ dramatically in intention, form, and effect from the organizations the National

<sup>8</sup>Potter, *supra*, note 6, at 21. Martin T. Moe, Note, "Participatory Workplace Decision making and the NLRA: Section 8(a)(2), Electromation, and the Specter of the Company Union," 68 N.Y.U. L.Rev. 1127, 1158 (1993).

<sup>9</sup>Moe, *supra* note 8, at 1158-59.

<sup>10</sup>*Id.*

<sup>11</sup>Moe, *supra* note 8, at 1160.

Labor Relations Act sought to abolish. Indeed, today's employee involvement programs "seek to engender labor-management cooperation and improve worker productivity and morale by granting employees greater involvement in the issues that most affect their work lives."<sup>12</sup>

#### EMPLOYEE INVOLVEMENT ENJOYS BROAD SUPPORT

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

In testimony before the Senate Committee on Labor and Human Resources, Ms. Angie Cowan, an employee and team member at TRW in Cookeville, TN, described her company's use of employee involvement:

The biggest difference between TRW, Cookeville and other businesses and plants is our employee involvement and communication. \* \* \* We have team meetings whenever needed to discuss team issues such as line rotation schedules, changes of lunches and/or breaks, changes of our delivery schedule, and safety or housekeeping films. \* \* \*

The communication at TRW absolutely cannot be beat. We know at any time, we can call anybody in the plant without having to have a middle person. That is the very best thing. \* \* \*

How many of you can say that you have got the best boss in the world? I can. I really love my job.<sup>13</sup>

Ms. Cowan's colleague described to the committee the way in which she and her fellow employees responded to the use of employee involvement:

What employee involvement means to me is that we come to work looking forward to starting our day and when we go home, we feel good about what we've done because we know we've had a direct influence on the decisions that affect our work environment.<sup>14</sup>

Another witness before the committee, Ms. Molly Dalman, a team member from the Donnelly Corp. in Holland, MI, described a similar experience of increased job satisfaction as well as improved productivity:

Our goal is to keep each other informed, to produce a high-quality product in the most efficient manner. This helps us to be competitive in the market.

Teams have their biggest impact in their work areas. I know my job, what I need to do and how to do it better than my team leader or any engineer. Therefore, I need to

<sup>12</sup>Id.

<sup>13</sup>Hearing on S. 295, the Teamwork for Employees and Management (TEAM) Act before the Senate Committee on Labor and Human Resources, 104th Cong., 1st Sess. at 11-12 (Feb. 9, 1995) (statement of Angie Cowan, rework coordinator at TRW).

<sup>14</sup>Id. at 51.

feel as if I have some control in my work area, and by working in teams, I have that control.<sup>15</sup>

Senior management has voiced similarly enthusiastic support for employee involvement. This sentiment was perhaps best reflected in the testimony of Richard Wellins, senior vice president for Development Dimensions International, Pittsburgh, PA, before the Senate Committee on Labor and Human Resources:

[T]eams and other forms of employee involvement have had a tremendous impact on American competitiveness. On manufacturing plant floors and in corporate offices across the country, work teams are making employees and their companies more productive than at any time in the history of this country. Witness GE's cross-train teams which increased productivity by 115 percent; teams at Miller Brewing's new plant start-up improved productivity by 30 percent; the 1,000 plus teams at Texas Instruments, a Baldrige winner, who helped cut product return rates from 3 to .03 percent; and Fisher Rosemont, an Emerson Electric company, whose cycle time was cut by 62 percent. These are just three of literally hundreds of examples of teams in action.<sup>16</sup>

Academics have also acknowledged the fundamental changes in labor-management relations over the last 20 years and are extremely supportive of the specific goals employee involvement seeks to achieve. As noted by Professor Samuel Estreicher:

Competitive pressures on U.S. firms from a variety of sources—the emergence of international product markets, deregulation of air and truck transport and telecommunications, technological advances that reduce the advantages of local firms, and capital market forces that require enhancement of shareholder values—are undermining Taylorist conceptions of how best to utilize front-line workers.<sup>17</sup>

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

Worker participation is a desirable goal whether or not it increases the demand for independent representation, as long [as] it does not prevent workers from effectively choosing for themselves how best to advance their interests in the workplace. *Because employee involvement programs can enhance opportunities for worker participation and improve firm performance without foreclosing other op-*

<sup>15</sup> Hearing on S. 295, The Teamwork for Employees and Management (TEAM) Act Before the Senate Committee on Labor and Human Resources, 104th Cong., 2d Sess. at 9 (Feb. 8, 1996) (statement of Molly Dalman, team member at Donnelly Corp., Holland, MI).

<sup>16</sup> Hearing on S. 295, The Teamwork for Employees and Management (TEAM) Act Before the Senate Committee on Labor and Human Resources, 104th Cong., 2d sess. at 22 (Feb. 8, 1996) (statement of Richard Wellins, DDI Inc., Pittsburgh, PA).

<sup>17</sup> Samuel Estreicher, "Employee Involvement and the Company Union" Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA, 6 N.Y.U. L.Rev. 125, 135 (1994).

*tions, legal restrictions should be lifted.* (Emphasis added.)<sup>18</sup>

Similar recognition of the important role played by employee involvement programs has also been voiced by any number of prominent public policy-makers. In its final report and recommendations, President Clinton's Commission on the Future of Worker-Management Relations acknowledged that "[e]mployee involvement programs have diverse forms, ranging from teams that deal with specific problems for short periods to groups that meet for more extended periods."<sup>19</sup> Perhaps more importantly, the President's Commission concluded:

On the basis of the evidence, the Commission believes that it is in the national interest to promote expansion of employee participation in a variety of forms provided it does not impede employee choice of whether or not to be represented by an independent labor organization. *At its best, employee involvement makes industry more productive and improves the working lives of employees.* (Emphasis added.)<sup>20</sup>

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

High-performance workplaces are gradually replacing the factories and offices where Americans used to work, where decisions were made at the top and most employees merely followed instruction. The old top-down workplace doesn't work any more.<sup>21</sup>

In response to these changes, the Department of Labor issued a publication to American businesses that underscored the benefits of employee involvement:

Highly successful companies avoid program failure by assembling employees into teams that perform entire processes—like product assembly—rather than having a worker repeat one task over and over. In many cases, teams of workers have authority usually reserved for managers: They hire and fire; they plan work flows and design or adopt more efficient production methods; and they ensure high levels of safety and health.<sup>22</sup>

#### EMPLOYEE INVOLVEMENT WORKS

During the past 20 years, employee involvement has emerged as the most dramatic development in human resources management. One reason is that worker involvement has become a key method of improving American competitiveness.

Evidence of the success—and corresponding proliferation—of employee involvement can be found in a 1994 survey of employers per-

<sup>18</sup>Id. at 158.

<sup>19</sup>"Commission on the Future of Worker-Management Relations: Report and Recommendations," Dep't. of Labor and Dep't. of Commerce, December 1994.

<sup>20</sup>Id.

<sup>21</sup>Robert B. Reich, "The 'Pronoun Test' for Success," The Washington Post, July 28, 1993, at A19.

<sup>22</sup>See "Road to High-Performance Workplaces: A Guide to Better Jobs and Better Business Results," U.S. Department of Labor, September 1994.



formed at the request of the Commission on the Future of Worker-Management Relations. The survey found that 75 percent of responding employers—large and small—had incorporated some means of employee involvement in their operations. Among larger employers—those with 5,000 or more employees—the percentage was even higher, at 96 percent.<sup>23</sup> It is estimated that as many as 30,000 employers currently employ some form of employee involvement or participation.

The success of employee involvement can also be found in the views of American workers. A survey conducted by the Princeton Survey Research Associates found overwhelming support for employee involvement programs among workers, with 79 percent of those who had participated in such programs reporting having “personally benefitted” from the process. Indeed, 76 percent of all workers surveyed believed that their companies would be more competitive if more decisions about production and operations were made by employees rather than managers.<sup>24</sup>

Clearly, employee involvement is more than just another passing fad in human resources management. Over the last 20 years, it has evolved—along with the global economy—into a basic component of the modern workplace and a key to successful labor-management relations. As such, American industry must be allowed to use employee involvement in order to utilize more effectively its most valuable resource—the American worker.

#### ELECTROMATION AND OTHER CASES SIGNAL NEED FOR CLARIFICATION

On December 16, 1992, the National Labor Relations Board (NLRB or Board) issued a decision in *Electromation, Inc.*,<sup>25</sup> a case which many thought would clarify the legality<sup>26</sup> of employee involvement programs. *Electromation* involved several employee participation committees within a small, nonunion company. Unrelated to any organizing effort,<sup>27</sup> management created the employee teams in response to employee objections over several proposed changes in attendance and wage policies. The so-called “action committees” addressed the following workplace issues: (1) absenteeism, (2) no-smoking policy, (3) communication network, (4) pay progression for premium positions, and (5) attendance bonus program. The Board found that the company played the primary role in establish-

<sup>23</sup>“The Nature and Extent of Employee Involvement in the American Workplace,” survey conducted by Aerospace Industries Associates, Electronic Industries Association, Labor Policy Association, National Association of Manufacturers, and Organization Resources Counselors, Inc., Aug. 10, 1994.

<sup>24</sup>“Worker Representation and Participation Survey,” Richard B. Freeman and Joel Rogers, Conducted by Princeton Survey Research Associates, December 1994.

<sup>25</sup>309 N.L.R.B. No. 163 (1992).

<sup>26</sup>The two provisions of the NLRA most directly at issues in the debate over the legality of employee involvement programs were sections 2(5) and 8(a)(2). Section 2(5) defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Section 8(a)(2) makes it an 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.”

<sup>27</sup>Although the Teamsters Union began an organizing drive shortly after the formation of the action committees, the NLRB determined that the company did not establish them to interfere with the employees’ right to choose a union. In fact, the company disbanded the committees once it learned of the organizing efforts to avoid charges that it was tainting the election.

ing the size, responsibilities, and goals of the committees and in setting the final membership and initial dates for meetings.

In order to determine whether the company committed an unfair labor practice, the Board first found that the action committees were “labor organizations” under the NLRA. The term “labor organization” was quite broad and encompassed “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.”<sup>28</sup> (Emphasis added.)

Courts have added to the breadth of what constitutes a “labor organization” by finding that the term “dealing with employers” was not limited to collective bargaining situations, but was a much broader concept.<sup>29</sup> The Board found that “dealing” included bilateral communication between workers and supervisors within the employee involvement program. Working with this wide-ranging definition, the NLRB held that the action committees were “labor organizations” under the NLRA.

The Board then turned to the company’s role in establishing and operating the action committees. Under section 8(a)(2) of the NLRA, it was 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.”

In this context, the NLRB found the company had dominated the committees by establishing the size, responsibilities, and goals of the committees, and by selecting the final makeup and initial meeting dates for the committees. Accordingly, the Board held that the company had committed an unfair labor practice under Federal labor law. The decision was later affirmed by the Seventh Circuit Court of Appeals.<sup>30</sup>

The need for clarification of the legality of employee involvement programs has since moved far beyond the specific facts of the *Electromation* decision. The breadth of the relevant provisions of the NLRA left employers and employees in a legal never-never land. Furthermore, since the *Electromation* decision, the NLRB has considered charges involving the employee involvement efforts of some of the leading companies in the country and has consistently questioned the legality of these efforts:<sup>31</sup>

Donnelly Corp.:<sup>32</sup> Named “One of the 100 Best Companies to Work for in America” and recognized by the U.S. Department of Labor (DOL) for its innovative work system, the NLRB nevertheless issued a complaint against Donnelly charging that its employee involvement program violated section 8(a)(2). The irony was that the genesis of

<sup>28</sup> Section 2(5) of the NLRA.

<sup>29</sup> See *National Labor Relations Board v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

<sup>30</sup> *Electromation, Inc. v. National Labor Relations Board*, 33 F.3d 1148 (7th Cir. 1994).

<sup>31</sup> Much has been made by opponents of S. 295 of the relatively small number of charges filed with the Board alleging a violation of section 8(a)(2). First, the NLRB process is wholly complaint-driven, and employees have a diminished incentive to challenge workplace structures which effectively meet their interest in having greater involvement in workplace decision making. In addition, the *Electromation* decision has had a chilling effect on legitimate employee involvement programs and on employers’ plans to expand such programs.

<sup>32</sup> GR-7-CA-36843.

the complaint was testimony that Donnelly presented to DOL's Commission on the Future of Worker-Management Relations (Dunlop Commission) on "Innovations in Worker-Management Relations." Dr. Charles J. Morris, former editor of "The Developing Labor Law," heard the testimony, believed the Donnelly system was a violation of section 8(a)(2), and filed the initial charge.<sup>33</sup>

Polaroid Corp.:<sup>34</sup> Also cited as "One of the Best 100 Companies to Work for In America," the Polaroid Corp. has long had an institutional commitment to employee involvement and has been a model for other companies establishing cooperative efforts. Despite the company's attempt in the early 1990's to reconstitute its successful committees to comply with section 8(a)(2), the Board's general counsel issued a complaint challenging the new program even though it removed all decisionmaking authority from the employees.

EFCO Corp.:<sup>35</sup> The EFCO Corp. first became involved in employee involvement programs in the late 1970's with the establishment of an employee stock ownership plan (ESOP). The company then moved to utilize total quality control techniques and an extensive employee committee system. Four of the committees—employer policy review, safety, employee suggestion, and employee benefits—were challenged as violating section 8(a)(2) by the Carpenters' Union after an unsuccessful organizing effort.<sup>36</sup> Although acknowledging EFCO's commitment to employee empowerment, the Administrative Law Judge nevertheless found that the committees were "labor organizations" and that the company had illegally dominated them by forming the committees, choosing initial members, participating in meetings, and selecting topics for discussion.

Keeler Brass Automotive Group:<sup>37</sup> A unanimous NLRB ordered Keeler Brass Automotive Group to disband a grievance committee established for several of its plants. The Board, reversing the decision by the Administrative Law Judge, found that Keeler Brass unlawfully dominated the formation of the committee and interfered with its administration. In a concurring opinion, Chairman Gould concluded that the Committee was not capable of independent action, despite the fact that the committee was not created in response to union organizing efforts or as a means to undercut independent action by employees, participation on the committee was voluntary and determined by election, and employees were the only voting members of the committee.

<sup>33</sup> Although this charge was eventually dismissed, a Donnelly employee then amended and unrelated unfair labor practice charge she had filed to include the alleged section 8(a)(2) violation. A complaint was issued on this second charge and a hearing was scheduled.

<sup>34</sup> 1-CA-29966.

<sup>35</sup> 17-CA-16911 (Mar. 7, 1995).

<sup>36</sup> The Carpenters' Union attempted to organize EFCO employees in the summer of 1993. However, the union never filed a petition for an election with the NLRB.

<sup>37</sup> 317 NLRB No. 161 (June 14, 1995).

The Board's broad interpretation of the term "labor organization," which includes many employee participation programs, and the strict limits on the role employers may play in such organizations make it very difficult for employee involvement programs to proceed successfully. Clearly, a legislative change must be made.

#### CURRENT NLRA PROHIBITIONS ARE TOO BROAD

A brief look at the history of section 8(a)(2) demonstrates why the provision was originally crafted so broadly and why such breadth interferes with the preferred method of labor-management organization in many U.S. firms today. In 1935, when Congress passed the NLRA, the so-called Wagner Act,<sup>38</sup> employer-dominated (company) unions had become a focal point in the national debate over how to improve labor-management relations. The precursor to the NLRA, the National Industrial Recovery Act, passed in 1933, had temporarily given employees "the right to organize and bargain collectively through representatives of their own choosing."<sup>39</sup> However, the Recovery Act proved to be of little value in ensuring those rights, in part because it left the subject of employer-dominated unions largely unaddressed.

Under the Recovery Act, employers could use company unions as tools to avoid recognition of, and collective bargaining with, independently organized unions. Employers often refused to recognize independently formed unions on the grounds that employees were already represented, albeit by a company union. As a result, employers could establish and bargain exclusively with unions that were formed and operated largely at their direction.

The Recovery Act permitted such abuses of company unions for various reasons. Primarily, the act contained inadequate enforcement mechanisms.<sup>40</sup> Further, it did not specifically prohibit company unions, although the law prohibited employers from requiring employees to join a company union as a condition of employment.<sup>41</sup> Lastly, the act granted employees the right to organize but did not specify "the kind of organization, if any, with which employees should affiliate."<sup>42</sup> Thus, consistent with the Recovery Act, an employer could appear to be "recognizing and cooperating with organized labor" while avoiding the dangers inherent in dealing with a union not subservient to the employer's interests.<sup>43</sup>

Recognizing the inadequacies of the Recovery Act, section 8(a)(2) of the NLRA was specifically drafted to prevent employers from using company unions to avoid recognizing and collective bargaining with inadequately organized unions. Senator Robert Wagner, sponsor of the bill which became the NLRA, stated that "[t]he greatest obstacles to collective bargaining are employer-dominated

<sup>38</sup> Senator Robert Wagner was the prime sponsor of the bill which became the National Labor Relations Act (NLRA).

<sup>39</sup> National Industrial Recovery Act, 48 Stat. 195, 198 (1933) (the rights established by the Recovery Act had only temporary effect, because section 2 of the act contained a sunset provision).

<sup>40</sup> Hardin, Patrick, "The Developing Labor Law" (3d ed. 1992), vol. 1 at 25-26.

<sup>41</sup> National Industrial Recovery Act, 48 Stat. 195, 198-99 (1933).

<sup>42</sup> I. Bernstein, "Turbulent Years," at 38 (1970).

<sup>43</sup> Hardin, *supra* note 39, at 26.

unions, which have multiplied with amazing rapidity since enactment of the recovery law.”<sup>44</sup>

According to an article printed in the New York Times during debate over the NLRA, the number of employees in company unions had increased from 432,000 in 1932, before passage of the Recovery Act, to 1,164,000 just 1 year later.<sup>45</sup> Over 69 percent of the company unions in existence at that time had been formed in the brief period following passage of the Recovery Act.<sup>46</sup> The magnitude of this problem following passage of the Recovery Act was evidenced by the fact that more than 70 percent of the disputes coming before the National Labor Board (precursor to the NLRB) before enactment of the NLRA concerned employers’ refusal to deal with properly elected union representatives.<sup>47</sup>

Prior to passage of the NLRA then, employers used company unions as a tool to avoid collective bargaining with independently organized unions and to control the collective bargaining the did take place. Section 8(a)(2) of the NLRA was an important measure for ensuring that employers did not use company unions as an obstacle to genuine collective bargaining.

However, the legislative history of the NLRA suggests that, while Congress strongly desired to eliminate barriers to genuine collective bargaining, it did not desire to ban all employer-employee organizations. Senator Wagner stated in a discussion regarding the advantages and disadvantages of company unions that:

[t]he company union has improved personal relations, group-welfare activities, and other matters which may be handled on a local basis. But it has failed dismally to standardize or improve wage levels, for the wage question is one whose sweep embraces whole industries, or States, or even the Nation.<sup>48</sup>

Senator Wagner further stated, regarding a bill containing provisions virtually identical to section 8(a)(2) of the NLRA, that it:

[did] not prevent employers from setting up societies or organizations to deal with problems of group welfare, health, charity, recreation, insurance or benefits. All of these functions can and should be fulfilled by employer-employee organizations. But employers should not dominate organizations which exist for the purposes of collective bargaining in regard to wages, hours, and other conditions of employment.<sup>49</sup>

Thus, at the outset of debate over the NLRA, Congress indicated its disapproval of employer-dominated organizations which existed for purposes of collective bargaining but did not signal its disapproval of all employer-employee organizations.

<sup>44</sup> 78 Cong. Rec. 3443 (1934) reprinted in 1 NLRB, “Legislative History of the National Labor Relations Act,” 1935, at 15 (1949).

<sup>45</sup> Wagner, Robert. “Company Unions: A Vast Industrial Issue,” the New York Times, Mar. 11, 1934.

<sup>46</sup> *Id.*

<sup>47</sup> Wagner, Robert. “Company Unions: A Vast Industrial Issue,” the New York Times, Mar. 11, 1934.

<sup>48</sup> *Id.*

<sup>49</sup> *Hearings on S. 2926* before the Senate Committee on Education and Labor, 73d Cong., 2d sess. 9 (1934) (statement of Senator Wagner) reprinted in 1 NLRB, *Legislative History of the National Labor Relations Act*, 1935, at 39–40 (1949) (Emphasis added).

Further debate over the proposed scope of section 8(a)(2) confirms that Congress did not desire to ban all employer-employee organizations. Senator Wagner stated several times that “[e]mployer-controlled organizations should be allowed to serve their proper function of supplementing trade unionism. \* \* \*”<sup>50</sup>

The Senate report on S. 2926, an earlier version of the NLRA containing provisions virtually identical to 8(a)(2), confirms this view. Regarding employers’ use of company unions as an obstacle to collective bargaining, the report on the bill stated:

[t]hese abuses do not seem to the committee so general that the Government should forbid employers to indulge in the normal relations and innocent communications which are part of all friendly relations between employer and employee. \* \* \* The object of [prohibiting employer-dominated unions] is to remove from the industrial scene unfair pressure, not fair discussion.<sup>51</sup>

Senator Walsh, then Chairman of the Senate Committee on Education and Labor, concurred in this view. Commenting on S. 2926, he stated that “this \* \* \* unfair labor practice seeks to remove from the industrial scene unfair pressure by the employer upon any labor organization that his workers may choose, yet leaves fair discussion unhampered.”<sup>52</sup>

Thus, the NLRA’s legislative history strongly suggests that Congress desired to prevent employers from using company unions as an obstacle to collective bargaining. At the same time, however, the act’s sponsors sought to leave intact organizations intended to promote employer-employee communication and cooperation.

The broad language of section 8(a)(2) does not seem consistent with a congressional intent to prohibit only employer-employee organizations which would inhibit recognition of, and collective bargaining with, independent unions. However, the Congress’ experience with narrow interpretations by the courts of labor relations legislation prior to enactment of the NLRA may explain why the NLRA’s sponsors drafted section 8(a)(2) so broadly.

Specifically, in the decades preceding enactment of the NLRA, Congress had passed various measures to allow the development of organized labor and to ensure the right to bargain collectively. These measures included the Erdman Act, enacted in 1898; sections of the Clayton Act; the Railway Labor Act; and the Norris-LaGuardia Act.<sup>53</sup> Of these, the Clayton Act and the Norris-LaGuardia Act were broadest in their scope of coverage.<sup>54</sup>

Congress designed sections 6 and 20 of the Clayton Act to prevent courts and employers from using the Sherman Act as a barrier to union activity and development. Under the Sherman Act,

<sup>50</sup> 78 Cong. Rec. 3443 (1934) reprinted in 1 NLRB, “Legislative History of the National Labor Relations Act,” 1935, at 16 (1949); Wagner, Robert. “Company Unions: A Vast Industrial Issue,” *The New York Times*, Mar. 11, 1934.

<sup>51</sup> S. Rep. No. 1184, 73d Cong., 2d sess. (1934) reprinted in 1 NLRB, “Legislative History of the National Labor Relations Act,” 1935, at 1104 (1949).

<sup>52</sup> 78 Cong. Rec. 10,559 (1934) reprinted in 1 NLRB, “Legislative History of the National Labor Relations Act,” 1935, at 1125 (1949).

<sup>53</sup> Hardin, *supra* note 39, at 12–24 (providing a historical background to the National Labor Relations Act).

<sup>54</sup> The Erdman Act and the Railway Labor Act were limited in scope to employees engaged in the operation of interstate trains. Hardin, *supra* note 39, at 14, 20.

Federal courts were able to assert Federal question jurisdiction over labor disputes and frequently held that organized labor activities, by obstructing the flow of goods in interstate commerce, violated the act.<sup>55</sup> Section 6 of the Clayton Act prevented the application of the Sherman Act to organized labor “by providing that labor itself is not ‘an article of commerce.’”<sup>56</sup> The section also specified that labor organizations did not violate antitrust laws by “lawfully carrying out” their “legitimate objectives.”<sup>57</sup>

Section 20 of the Clayton Act was designed to greatly restrict the ability of courts to issue injunctions against organized labor activity. The first paragraph of section 20 was intended to reduce the use of injunctions by requiring that there be no adequate remedy at law and actual or threatened injury before issuance of an injunction.<sup>58</sup> The second paragraph of section 20 listed several labor activities and provided that “none of [those] activities shall ‘be considered or held to be violations of any law of the United States,’” and prohibited enjoining those activities even if the requirements of the first paragraph were met.<sup>59</sup>

Thus, Congress attempted to permit organized labor to develop through language in the Clayton Act which specifically prohibited various types of interference with organized labor. Some of these attempts were thwarted, however.

Despite the seemingly broad scope of sections 6 and 29 of the Clayton Act, the Supreme Court interpreted both sections very narrowly in *Duplex Printing Press Co. v. Deering*. The Court interpreted the first paragraph of section 20 as approving of existing labor-injunction practice rather than as imposing more stringent requirements for the issuance of injunctions against organized labor.<sup>60</sup> Further, the Court interpreted the phrase “between an employer and employees” contained in the first paragraph as limiting application of both paragraphs to cases between an employer and its own employees.<sup>61</sup> The Court interpreted the Clayton Act as having minimal impact on barriers to union development and activity, despite statutory language which would suggest otherwise.

Given the Court’s narrow interpretation of the Clayton Act, and the failure of the Recovery Act to ensure the right to organize the bargain collectively it was not surprising that Congress drafted section 8(a)(2) of the NLRA broadly.<sup>62</sup> Prior to the period in which the NLRA was enacted, courts often resisted efforts designed to permit the growth of organized labor and collective bargaining.<sup>63</sup> Thus, to ensure employees the rights to organize and bargain collectively, Congress expansively crafted the prohibition in section 8(a)(2) of the NLRA.

<sup>55</sup> Hardin, *supra* note 39, at 9–10, 16.

<sup>56</sup> Hardin, *supra*, at 16.

<sup>57</sup> *Id.*

<sup>58</sup> Although both of these requirements were historically present in equity, courts had largely disregarded them in labor-injunction practice prior to passage of the Clayton Act. Hardin, *supra* note 39, at 16–17.

<sup>59</sup> Hardin, *supra* note 39, at 17.

<sup>60</sup> *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921) (construed in Hardin, *Supra* note 39, at 18).

<sup>61</sup> *Id.*

<sup>62</sup> The definitional provisions in section 13 of the Norris-LaGuardia Act were also drafted broadly, again demonstrating Congress’s tendency toward drafting pro-labor acts broadly in this period. Hardin, *supra* note 39, at 23–24.

<sup>63</sup> Hardin, *supra* note 39, at ch. 1.

As the previous discussion on employee involvement indicates, a broad-sweeping prohibition of all employer-employee organizations no longer serves the interests of giving workers an effective voice in their workplace. Although the right to independent representation remains a fundamental principle of Federal labor law, nothing about modern employee involvement interferes with that right.

Like all aspects of society, today's workplace is very different than it was 60 years ago. In 1935, organized labor was in its formational stages and was at the mercy of employers intent on derailing its development. They myriad labor protections on the books today—the Fair Labor Standards Act, the Occupational Safety and Health Act, the Worker Adjustment and Retraining Notification (WARN) Act and the Family and Medical Leave Act—are testimony to the tremendous influence and power of independent labor unions to protect working men and women.

Likewise, working men and women have changed and so, consequently, have their needs in the workplace. The demands on, and skills required of, workers in today's information-based economy are very different than those prevalent in the manufacturing-driven economy of the early 20th century. The work force of today mirrors the demographic changes of the United States as a whole, and thus, the interests and values of workers are increasingly more diverse.

The nature of work, for both employees and managers, has also evolved tremendously in 60 years from the perspective of both technological and organizational developments. Workplace structures that have the flexibility to meet the situational and differing needs of employees, while also addressing the productivity demands of employees, are at a premium in the modern working environment. While formal representation through an independent labor organization will remain the preferred form of organization in many workplaces, clearly, there must be a place in this Nation's labor laws for cooperative arrangements between employees and employers to address the challenges and demands of working in a globally competitive marketplace.

#### IV. LEGISLATIVE HISTORY AND COMMITTEE ACTION

On January 30, 1995, Senator Kassebaum, along with Senators Jeffords, Gregg, and Gorton, introduced the Teamwork for Employees and Management (TEAM) Act, S. 295.

On February 9, 1995, the Senate Committee on Labor and Human Resources held a hearing (S. Hrg. 104–20) on the TEAM Act. The following individuals provided testimony:

Don Skiba, Julie Smith, Johnny Albertson and Angie Cowan of TRW Corporation, Cookeville, TN.

Kevin King and Lori Garrett of Eastman Chemical, Kingsport, TN.

Chester McCammon of Universal Dynamics, Woodbridge, VA.

Harold Coxson of Coleman, Coxson, Panello, Fogleman & Cowan, Washington, DC.

David Silberman, Director of AFL–CIO Task Force on Labor Law, Washington, DC.

Berna Price, Electromation, Elkhart, IN.



Additional statements or letters regarding S. 295 were also received and placed in the record.

On February 8, 1996, the Senate Committee on Labor and Human Resources held a second hearing (S. Hrg. 104-386) on the TEAM Act. The following individuals provided testimony:

Molly Dalman, Michael Klein, Anne Nagy and Bonny Topp of Donnelly Corp., Holland, MI.

Christopher Fuldner, president of EFCO Corp., Monett, MO.

Richard Wellins, senior vice president, Development Dimensions International, Pittsburgh, PA.

David Khorey, counsel to Donnelly Corp., Holland, MI.

Jonathan Hiatt, general counsel to AFL-CIO, Washington, DC.

Alan Reuther, legislative director, United Auto Workers, Washington, DC.

Additional statements and letters on S. 295 were also received and placed in the record.

On April 17, 1996, the Senate Committee on Labor and Human Resources met in executive session to consider S. 295. A quorum being present, the committee voted on the following amendments:

Senator Kennedy offered an amendment requiring the NLRB to seek an injunction to reinstate workers discharged during organizing drives. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Kennedy offered an amendment to permit treble damages for unfair labor practices. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Kennedy offered an amendment requiring management to bargain over core management decisions. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Kennedy offered an amendment to change the definition of “supervisor” under the NLRA. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Kennedy offered an amendment to provide union organizers with access to the work site. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Simon offered an amendment to debar federal contractors that commit unfair labor practices. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

Senator Simon offered an amendment to require arbitration when the parties cannot agree to a first contract. The amendment was defeated.

Yeas	Nays
Kennedy	Kassebaum
Pell	Jeffords
Dodd	Coats
Simon	Gregg
Harkin	Frist
Mikulski	DeWine
Wellstone	Ashcroft
	Gorton
	Faircloth

The committee then voted to report S. 295 favorably.

Yeas	Nays
Kassebaum	Kennedy
Jeffords	Pell
Coats	Dodd
Gregg	Simon
Frist	Harkin
DeWine	Mikulski
Ashcroft	Wellstone
Gorton	
Faircloth	

#### V. EXPLANATION OF BILL AND COMMITTEE VIEWS

The TEAM Act clarifies that it *shall* not constitute or be evidence of a violation of section 8(a)(2) of the NLRA for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, and efficiency. This language creates a safe harbor in Federal labor law for a wide range of employee involvement initiatives. Supervisors and workers can discuss a myriad of issues that affect both the productive capacity of a company and the quality of work-life.

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

What is productivity? It’s who does what, it’s whether “A” works certain hours, whether “B” gets relief, whether a particular way of moving materials is sound or unsound. People are affected by that, their jobs and prerogatives, their seniority, their vacations. All of that is the stuff of working life. And to say that you can abstract productivity

from working conditions is something that I have a great deal of difficulty with.<sup>64</sup>

Indeed, if employee involvement programs were prohibited from discussing issues related to conditions of work, their effectiveness would be severely hampered. The phrase “terms and conditions of employment” includes issues ranging from grievance procedures, layoffs and recalls, discharge, workloads, vacations, holidays, sick leave, work rules, use of bulletin boards, change of payment from a weekly salary to an hourly rate, and employee physical examinations.<sup>65</sup> Even if it were possible to limit employee involvement to issues unrelated to working conditions, doing so would limit their ability to be a forum for employees and managers to develop comprehensive strategies that contribute both to the economic well-being of the company and to the pecuniary and non-pecuniary satisfaction of the workforce.

Despite the breadth of the language creating the safe harbor, the TEAM Act retains several important protections in section 8(a)(2). Importantly, the bill provides that employee involvement initiatives may not have, claim, or seek authority to be the exclusive bargaining representative of employees or to negotiate, enter into, or amend collective bargaining agreements. This is a very significant protection that distinguishes employee involvement programs from the company unions of yesteryear that section 8(a)(2) was designed to prohibit. Even after enactment of S. 295, such company unions would continue to be unlawful under section 8(a)(2).

For example, in *National Labor Relations Board v. Lane Cotton Mills*,<sup>66</sup> a violation of section 8(a)(2) was found where the employer established an in-house welfare association and refused to bargain with a Textile Workers Organizing Committee that had been elected by the employees. The employer’s action in this case would not fall within the safe harbor created by the TEAM Act because management treated the welfare association as the exclusive bargaining representative, conduct specifically prohibited by S. 295.<sup>67</sup> Similarly, in *Solmica*,<sup>68</sup> a company president suggested to his employees that they could resolve their differences themselves, without a union. The employees agreed and eventually signed a collective bargaining agreement with the president. Again, this conduct would continue to be a violation of section 8(a)(2), as the TEAM Act would not permit employee involvement structures, no matter how formal or informal, to negotiate collective bargaining agreements.

While opponents of the TEAM Act have argued that many of the 1930’s “company unions” which prompted the enactment of section 8(a)(2) shared the beneficent characteristics of today’s employee involvement structures, a 1937 Bureau of Labor Statistics study, entitled “Characteristics of Company Unions, 1935” [hereinafter “BLS Survey”] paints a substantially different picture. The study of 126 company unions found that 64 percent of them had been formed in response to a strike or local union activity. The remainder had ei-

<sup>64</sup> Transcript of Proceedings Before the National Labor Relations Board in *Electromation, Inc.* (Case No. 25–CA–19818) 61–62 (Sept. 5, 1991).

<sup>65</sup> See Hardin, *supra* note 39, at 885–86.

<sup>66</sup> 111 F.2d 814 (5th Cir. 1940).

<sup>67</sup> See also, *National Labor Relations Board v. Link-Belt Co.*, 61 S. Ct. 358 (1941), *American Tara Corp.*, 242 NLRB 1230 (1979).

<sup>68</sup> 199 NLRB 224 (1972).

ther been intended to improve plant morale (11.2 percent or to appease public opinion or respond to governmental encouragement of collective bargaining (24.8 percent)).<sup>69</sup>

Even if some of the characteristics of company unions were shared by today's employee involvement structures, there is a critical distinction. Unlike company unions, legitimate employee involvement programs do not pretend to serve the same purpose as an independent labor union, which acts as the exclusive representative of the employees for collective bargaining and handling of grievances.

Unlike the employee involvement structures of today, company unions in the first half of this century were being advanced as exclusive alternatives to labor unions. And companies were refusing to bargain with duly chosen, independent labor unions in favor of company unions. However, as discussed previously, these company unions rarely possessed the essential characteristics of a genuine collective bargaining representative.

Under S. 295, the decision to choose formal organization and to secure independent representation remains in the hands of the employees. Nothing in the TEAM Act interferes with that choice. The safe harbor created in S. 295, while arguably broad in terms of the types of employee involvement structures to which it applies, is quite narrow in terms of the scope of conduct related to such structures which is legitimized. The bill states that "it shall not constitute or be evidence of an unfair labor practice under *this paragraph* for an employer" to establish and participate in an employee involvement program. (Emphasis added.) Senate bill 295 also specifically provides in section 4 that "nothing in this amendment made by section 3 shall be construed as affecting employee rights and responsibilities under the National Labor Relations Act other than those contained in section 8(a)(2) of such Act."

Thus, the other protections in section 8(a) of the NLRA which prohibit employer conduct that interferes with the right of employees to choose independent representation freely remain in full force. If employee involvement programs do not prove to be an effective means for employees to have input into the production and management policies that affect them, those employees retain the right at all times to organize formally and seek union representation. Section 8(a)(1)—which makes it an unfair labor practice for employers to interfere with, restrain, or coerce employees in the exercise of their rights, guaranteed by section 7 of the NLRA, to organize and bargain collectively through representatives of their own choosing—remains untouched by the TEAM Act.<sup>70</sup> Employee involvement programs cannot be used to interfere with employees' ability to exercise freely section 7 rights.<sup>71</sup>

In addition, S. 295 was not intended to alter an employer's obligation under section 8(a)(5) to bargain with the duly elected rep-

<sup>69</sup> BLS Survey at 84.

<sup>70</sup> Similarly, the TEAM Act does not alter the prohibition in section 8(a)(3) making it an unfair labor practice for an employer to discriminate against any employee on the basis of his or her membership in a labor organization.

<sup>71</sup> In *Stone Forest Industries, Inc.*, 36-CA-6938 (Mar. 17, 1995), it was held that an employer's promise, the day before a union election, to establish a communications committee to deal with employee grievances was a violation of section 8(a)(1) because it was used as an inducement to persuade employees to vote against the union.

representatives of employees.<sup>72</sup> Thus, it is absolutely clear that the safe harbor created in the TEAM Act for legitimate employee involvement programs does not immunize an employer from the prohibition against directly dealing with employees who are represented by a labor union. In fact, as a practical matter, if employers and employees in a unionized workplace want to initiate some type of employee involvement structure, the union essentially has veto power over the very establishment of such a structure.

In sum, S. 295 creates a safe harbor in the NLRA for a broad range of employee involvement programs. These legitimate initiatives come in an infinite variety of organizational forms and deal with a broad spectrum of workplace issues.

However, this safe harbor exists only for the purposes of section 8(a)(2) and protects the workers' right to choose independent representation at any time.

The committee places a high priority on the enactment of S. 295. The workplace of today is simply not the same as the workplace that was prevalent in the America of the 1930s when the National Labor Relations Act became law. This Nation must prosper in an increasingly competitive and information-driven economy where, at every level of a company, employees must have an understanding of, and a role in, the entire business operation.

Employee involvement in the modern workplace has proven to be an effective strategy at increasing both the value that each employee brings to the production process and the job satisfaction that each employee derives from the workplace. For these reasons, the committee recommends that the Senate promptly pass S. 295.

This Nation's labor law must be relevant to the employer-employee relationships of the 21st century. The committee believes strongly that the TEAM Act is crucial to our Nation's competitiveness as well as our workers' sense of job satisfaction.

Significantly, the committee believes that the bill poses no threat to the well-protected right of employees to select representatives of their own choosing to act as their exclusive bargaining agent. Even with the changes to the NLRA proposed in S. 295, an employee involvement program may not engage in collective bargaining nor may it act as the exclusive employee representative. The prohibitions in the NLRA outlawing interference with employees' attempts to form a union and preventing employers from avoiding bargaining obligations by directly dealing with employees remain unaffected by the TEAM Act.

In sum, the TEAM Act permits supervisors and managers to confront and solve the myriad problems and issues that arise in a workplace. Without this important legislation, the committee believes the Nation would be idling a vast human resource that can yield untold dividends for the country.

---

<sup>72</sup> Senate bill 295 is not intended to overrule or alter the NLRB's decision in *E.I. du Pont de Nemours & Co.*, 311 NLRB No. 88 (1993).

## VI. COST ESTIMATE

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, April 29, 1996.*

Hon. NANCY LANDON KASSEBAUM,  
*Chairman, Committee on Labor and Human Resources, U.S. Senate, Washington, DC.*

DEAR MADAM CHAIRMAN: The Congressional Budget Office has reviewed S. 295, the Teamwork for Employees and Managers Act of 1995, as ordered reported by the Committee on Labor and Human Resources on April 17, 1996. CBO estimates that enactment of S. 295 would have no significant effect on the federal budget. Because S. 295 would not affect direct spending or receipts, pay-as-you-go procedures would not apply.

S. 295 contains no mandates as defined by Public Law 104-4, and would impose no direct costs on state, local, or tribal governments.

S. 295 would amend the National Labor Relations Act to permit an employer to participate in employee organizations for the purpose of addressing matters of mutual interest, so long as these organizations do not seek to negotiate collective bargaining agreements with the employer. The bill could affect the workload and costs of the National Labor Relations Board by increasing or decreasing investigations of employers' involvement in employee relations. We anticipate that such effects, if any, would not be significant.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact for federal cost implications is Christi Hawley. For state and local costs, the staff contact is John Patterson, and for private sector costs, the staff contact is Daniel Mont.

Sincerely,

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

## VII. REGULATORY IMPACT STATEMENT

The committee has determined that there will be no increase in the regulatory burden imposed by this bill.

## VIII. SECTION-BY-SECTION ANALYSIS

Section 1 provides that the short title of the bill is the "Teamwork for Employees and Management Act of 1995."

Section 2 provides the findings and purposes of the legislation. Specifically, the findings by the Congress recognize the escalating demands of global competition, the resulting need for an enhanced role for employees in workplace decision making, the extensive use by firms of employee involvement techniques, the positive impact of and support for employee involvement, and the legal jeopardy for employers engaging in employee involvement.

The purposes of the act are to protect legitimate employee involvement programs against governmental interference, to preserve existing protections against deceptive and coercive employer prac-

tices, and to allow legitimate employee involvement programs in which workers may discuss issues involving terms and conditions of employment to continue to evolve and proliferate.

Section 3 amends section 8(a)(2) of the National Labor Relations Act (NLRA) to provide that it shall not constitute or be evidence of an unfair labor practice for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity and efficiency. The legislation also provides that such organizations or entities may not have, claim, or seek authority to negotiate or enter into collective bargaining agreements between an employer and any labor organizations.

Section 4 provides that nothing in section 3 of the legislation shall affect employee rights and responsibilities under the NLRA other than those contained in section 8(a)(2) of the NLRA.



## IX. MINORITY VIEWS

Labor-management cooperation and employee involvement are critical to the future success of our economy. Any bill that promises to encourage them appears at first blush to be a good idea. But what S. 295 promises and what it delivers are two very different things.

In 1993 and 1994, the Commission on the Future of Worker-Management Relations (the Dunlop Commission), a bi-partisan group of labor relations experts from business, academia, and unions, conducted an intensive study of labor-management cooperation and employee participation. The Commission held 21 public hearings and heard testimony from 411 witnesses, received and reviewed numerous reports and studies, and held further meetings and working parties in smaller groups. The Commission made one recommendation that is of particular relevance to S. 295:

The law should continue to make it illegal to set up or operate company-dominated forms of employee representation.<sup>1</sup>

Yet now, after only two hearings, the Labor and Human Resources Committee has voted along party lines to report this bill, whose sole purpose is to make company-dominated forms of employee representation lawful. The committee's action is ill-considered and unwise. It is destructive of rights fundamental to a democratic society and is inherently anti-union.

The administration has pledged to veto S. 295, and we applaud that decision.

1. *The National Labor Relations Act prohibits company-dominated labor organizations because they are inherently destructive of workplace democracy and true employee empowerment*

Section 8(a)(2) of the National Labor Relations Act is one of the core provisions of American labor law. By making employer domination of labor organizations illegal, section 8(a)(2) ensures that all labor organizations will genuinely represent the employees they purport to represent, rather than the owners and managers with whom they deal over issues relating to the terms and conditions of employment, including wages and hours of work.

The law has recognized for more than 60 years that it is profoundly anti-democratic to allow an employer to select the representative of his employees. It is also profoundly arrogant for this Committee or any employer to think that the employer should make that choice for the employees.

If a labor organization, employee representation plan or committee is to be the genuine voice of the employees, its members must

---

<sup>1</sup>Commission on the Future of Worker-Management Relations, "Report and Recommendations," p. xvii (December 1994).

be selected by the employees and allowed to operate without outside interference. This principle of independence is so important that it is separately protected by the Landrum-Griffin Act, which makes employer financial assistance to a labor organization a violation of criminal law.

Senator Robert Wagner, the author of the National Labor Relations Act (the Wagner Act), considered the prohibition of company-dominated labor organizations to be essential to the goals of the act, which include “encouraging the practice and procedure of collective bargaining” and “protecting the exercise by workers of full freedom of association.” When he introduced the bill that became the Wagner Act, Senator Wagner declared:

Genuine collective bargaining is the only way to attain equality of bargaining power. \* \* \* The greatest obstacles to collective bargaining are company-dominated unions, which have multiplied with amazing rapidity. \* \* \* [only] 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 company-dominated union as an agency for dealing with grievances, labor disputes, wages, rules or hours of employment.<sup>2</sup>

The majority goes to great lengths to argue that Senator Wagner and Congress did not have in mind employee representation plans that do not negotiate labor agreements or committees like those at the Donnelly Corporation or EFCO when they condemned “company unions” in 1935 and prohibited the domination of “labor organizations.” But in fact, they did have such plans in mind, since the overwhelming majority of company unions in 1935 never entered into any collective bargaining agreement. The evil that Senator Wagner addressed in 1935 is the same one S. 295 would legalize today.

In *NLRB v. Cabot Carbon*, 360 U.S. 203 (1959), the Supreme Court examined the legislative history of the Act’s definition of “labor organization” and concluded definitively that Congress had not meant to limit it to organizations that engaged in collective bargaining. First, Congress explicitly considered and rejected in 1935 a proposal by the Secretary of Labor to limit the Wagner Act’s definition of “labor organization” to organizations that bargain collectively.

Second, during consideration of the Taft-Hartley Act in 1947, Congress rejected a proposal very much like S. 295, which would have permitted an employer to form or maintain “a committee of employees and discuss with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or if the employer has not recognized, a representative as their representative under section 9.”<sup>3</sup> Congress has consistently rejected the notion that company-domi-

<sup>2</sup> 78 Cong. Rec. 3443 (1935).

<sup>3</sup> H.R. 3020, 80th Cong., 1st Sess., 26, reprinted in 1 LMRA Leg. Hist. at 537.

nated labor organizations are acceptable as long as they do not attempt to negotiate a contract.

No good purpose is served by allowing the employer to choose and dominate the employees' representative. Cooperation is not truly furthered, because the employer is not really dealing with the employees if he is dealing with his own hand-picked "representative." An employer does not need the pretense of a team or committee if he only wants to cooperate with himself.

2. *Employer-formed teams, committees, and employee involvement plans that do not deal with the subjects of collective bargaining have always been legal. S. 295 is not needed to make them legal and serves no legitimate purpose*

Under section 8(a)(2) of the NLRA, employers are free to communicate with their employees about the terms and conditions of employment. Section 8(c) specifically guarantees employers the right of free speech, and section 9(a) protects the right of employees to present their grievances individually or in groups and the right of the employer to respond and resolve those grievances. The NLRB has upheld the right of employers to establish suggestion boxes and to establish groups of employees for brainstorming and for sharing information. *E.I. Dupont*, 311 NLRB No. 88 (1993).

The NLRB's 1977 *General Foods* decision, 231 NLRB 1232, made clear that employers have the right under section 8(a)(2) to set up production processes in which significant managerial responsibilities are delegated to employee work teams. In that case, employee teams, acting by consensus of their members, made job assignments to individual team members, assigned job rotations, and scheduled overtime among team members. As the NLRB took pains to emphasize in *Electromation*, 309 NLRB 990 (1992), section 8(a)(2) does not proscribe employee involvement programs that deal with issues of productivity, efficiency and quality control. Where teams do not purport to represent other employees, they will not be considered labor organizations and will not run afoul of section 8(a)(2) even when they stray from issues of quality and productivity and enter a grey area on issues relating to wages, hours, and working conditions. *NLRB v. Streamway Division of Scott & Fetzer Co.*, 111 LRRM 2673 (6th Cir. 1982).

Finally, the NLRB and the courts have taken a common sense approach to section 8(a)(2) that ensures that companies will not violate the law if their employee involvement programs include isolated, occasional, or unintended instances of dealing with the subjects of collective bargaining. See *Vons Grocery Co.*, 320 NLRB No. 5 (1995), *Stoody Co.*, 320 NLRB No. 1 (1995), and *NLRB v. Peninsula General Hospital*, 36 F. 3d 1262 (4th Cir. 1994).

The flexibility of the law is reflected in the fact that employee involvement plans are widespread in American industry and are gaining in popularity. As the Majority admits, 75 percent of all employers surveyed by the Princeton Survey Research Associates in 1994, and 96 percent of large employers, already had employee involvement plans. By the Majority's own estimate, 30,000 employee involvement plans are already in operation. Section 8(a)(2) has not been an obstacle to this proliferation, and S. 295 is obviously unnecessary.

3. *S. 295 would legitimize employer conduct that should remain unlawful*

The only decided cases the Majority has cited in support of its argument that section 8(a)(2) should be amended (*Electromation*, *EFCO Corporation*, and *Keeler Brass*) are cases that have nothing to do with quality circles, self-managed work teams, front-line efficiency, the introduction of new technology or work practices, or expanding employee decision-making.

As the NLRB wrote in *Electromation*:

[T]his case presents a situation in which an employer alters conditions of employment and, as a result, is confronted with a workforce that is discontented with its new employment environment. The employer responds to that discontent by devising and imposing on the employees an organized committee mechanism composed of managers and employees instructed to “represent” fellow employees. The purpose of the Action Committee was, as the record demonstrates, *not to enable management and employees to cooperate to improve “quality” or “efficiency”*, but to create in employees the impression that their disagreements with management had been resolved bilaterally. 309 NLRB at 182 (emphasis added).

Far from being a legitimate cooperative effort on the part of management, the action committees at *Electromation* were nothing but a technique to manipulate the employees. As the Court of Appeals noted:

[T]he company proposed and essentially imposed the action committees upon its employees as the only acceptable mechanism for resolution of their acknowledged grievances. \* \* \* *Electromation* unilaterally selected the size, structure, and procedural functioning of the committees; it decided the number of committees and the topics to be addressed by each \* \* \* Also, as was pointed out during oral argument, despite the fact that the employees were seriously concerned about the lack of a wage increase, no action committee was designated to consider this specific issue. In this way, *Electromation* actually controlled which issues received attention by the committees and which did not.

In *EFCO*, 17–CA–16911 (1995), the Administrative Law Judge (ALJ) found that the employee committees in question, which dealt with benefit issues relating to employee stock option plans and profit sharing, were different from those in *Electromation* only “in form, not substance.” (17–CA–16911 at 28.) He found that *EFCO*’s committees were established unilaterally by management, which chose the initial membership, participated in almost all of the meetings of the various committees, and selected some of the issues the committees dealt with.

Furthermore, *EFCO* engaged in numerous activities that were destructive of the employees’ right to form and join a union. The ALJ found that *EFCO* violated section 8(a)(1) of the NLRA by

maintaining an invalid no-solicitation rule, creating the impression of surveillance, and soliciting grievances from employees.

EFCO's employee committees did not empower workers. They were created or revived in the context of an organization drive by the United Brotherhood of Carpenters, which began organizing EFCO in 1991 and had assigned two additional organizers to the campaign as employees in 1992.

EFCO's committees were delegated no real power, and EFCO reserved for itself the authority to decide which recommendations, suggestions, policies, safety rules, and employee benefits would be adopted. In particular, the safety committee had "lapsed into inactivity" for some three years until its reactivation during the organizing drive. The ALJ found that the safety committee was not taken seriously by the employees, that there was "widespread disregard, even ridicule, of the safety committee's efforts to improve plant safety."

In *Keeler Brass*, 317 NLRB No. 161 (1995), the employee committee in question was established to handle employee grievances. The Board found that, rather than empowering employees to handle grievances free of company influence, the company dominated the committee by determining the committee's membership eligibility rules, approving candidates, conducting the election, counting the ballots, and soliciting employees to vote for particular committee members.

Since the activities found violative of section 8(a)(2) in *Electromation*, *EFCO* and *Keeler Brass* had nothing to do with quality circles, self-managed work teams, increasing efficiency on the front-lines, improving the quality of a product or service, introducing new technology or work practices, or expanding employee decision-making, these cases do not support the majority's contention that section 8(a)(2) needs to be amended.

The other two cases cited by the majority, *Polaroid*<sup>4</sup> and *Donnelly*,<sup>5</sup> have not yet been tried by an ALJ. Moreover, the Donnelly Equity Committee, by claiming to be the exclusive collective bargaining representative of workers at one of its plants, would still be illegal under S. 295. The bill expressly excludes committees which "claim or seek authority to negotiate or enter into collective bargaining agreements."

Testimony provided to the committee by Alan Reuther, Legislative Director of the United Automobile, Aerospace, and Agricultural Implements Workers Union (UAW), recounted efforts by Donnelly to use its company-created Equity Committees to thwart organizing efforts by the UAW. In particular, Mr. Reuther testified that Donnelly had actively resisted the UAW's organizing drive, distributing anti-union literature to workers while trying to bolster the credibility of this Equity Committee by expanding worker representation and referring to the committee's work as a "grievance resolution process."

According to Reuther, 70 percent of the employees signed authorization cards that designated the UAW as their representative and asked for a representation election. Donnelly then derailed the se-

<sup>4</sup> 1-CA-29966.

<sup>5</sup> GR-7-CA-36843.

cret ballot union representation vote by prompting the “Equity Committee” to seek resolution of pending unfair labor practices prior to the vote.

In short, the Equity Committees so vigorously defended by Donnelly are neither democratic nor independent. Members are not elected by employees in a secret ballot, but appointed by supervisors or a public show of hands. Donnelly finances the activities of its committees and sets their agendas, and members have no authority to investigate grievances independently.

The case law cited by the majority in support of the TEAM Act does not justify the sweeping changes to § 8(a)(2) the majority has proposed. As Professor Charles Morris has written, *Electromotion* is a case “more significant for its hype than its type.”<sup>6</sup> The same might also be said of *Electromotion*’s successor cases.

#### 4. *The real purpose of S. 295 is to impede union organizing*

As Senator Wagner recognized, company-dominated labor organizations are a major obstacle to the development of real unions that represent employers vis a vis their employers and that can help them achieve improvements in their wages and working conditions.

James Rundle, a researcher at Cornell University, has shown that employers that institute employee involvement plans after a union organizing campaign has begun are much likelier to defeat the union than employers who do not institute such plans. Other researchers, including Fiorito, Grenier, Bronfenbrenner, and Juravich, have also found profound negative effects on union organizing where employers institute such plans, especially where the plan or committee deals with the employer on pay or discusses the union organizing campaign.

Not surprisingly, employers know about the effect of employee representation plans on union organizing, and union avoidance is an explicit purpose of many such plans. As Charles Morris reports in his law article, “Deja Vu and (a)(2), What’s Really being Chilled by *Electromotion*,” a study of employee representation plans published by the Harvard Business School Press in 1989 found that in every company studied, managers cited the plans as “a valuable and proven defense against unionization.”

*Electromotion* is a perfect illustration of how company-dominated employee committees impede union organizing, and how their disestablishment pursuant to section 8(a)(2) promotes employee empowerment by protecting the right of employees to form independent labor organizations. The International Brotherhood of Teamsters petitioned for an election in 1989, while the “action committees” were in operation. The company mounted a vigorous anti-union campaign and suspended the committees until after the election. The union lost the election. A second election was held after a National Labor Relations Board Administrative Law Judge found the action committees to be in violation of section 8(a)(2) and ordered them disbanded. The union won the election. Subsequently, after a decertification petition was filed, a third election was held, and the union won that vote, too.

<sup>6</sup>Morris, “Deja Vu and 8(a)(2)—What’s Really Being Chilled by *Electromotion*?” (Apr. 30, 1994).

If the proponents of S. 295 had their way, the employees at Electromation would never have voted for a union. Today, the workers have a 3-year collective bargaining agreement that their union negotiated on their behalf.

*5. S. 295 ignores the real impediments to employee involvement and empowerment*

According to the majority report, the *Electromation* decision marked the beginning of the end of employee involvement, leaving employers in a “legal never-never land.”

There were only 87 cases in 1994 in which employers were required to disestablish employee participation committees. By contrast, there were 7,947 orders in 1994 requiring employers to reinstate employees they had unlawfully discharged, and 8,559 orders for backpay.

In fact, it is employees who are seeking empowerment through a union who are in a legal never-never land. Their right to free association and free choice about representation has not been protected, and tens of thousands of them have suffered at the hands of anti-union employers. If the committee were truly concerned about employee involvement it would strengthen the remedies for unlawful discharge and seek ways to deter employer violations—particularly during union organizing campaigns. The right to form a union is not effectively protected by remedies that may take 3 or more years to obtain, long after the representation election they were meant to affect has been lost.

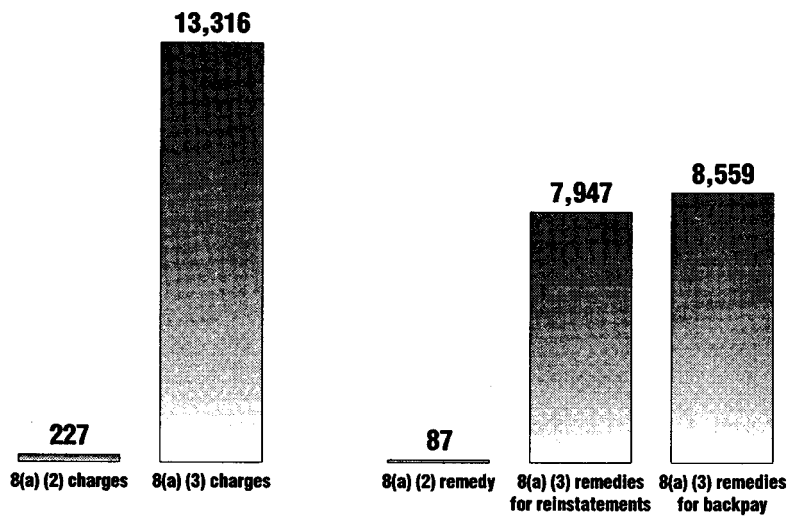
Employer violations of the rights of their employees to form and join a union have escalated dramatically over the years.

The proportion of NLRB elections in which union supporters are discharged is five times greater now than in the late 1950's. Union supporters are illegally fired in one out of four elections, according to the Dunlop Commission.

The effect of this widespread, unlawful employer activity extends far beyond the individuals who lose their jobs and the means to support themselves and their families. Employees all across the Nation are afraid to seek union representation. The Dunlop Commission found that 79 percent of workers say it is likely that employees who seek union representation will lose their jobs.

## Comparison of Charges Filed and Remedial Actions Taken in 8 (a) (2) and 8 (a) (3) Cases

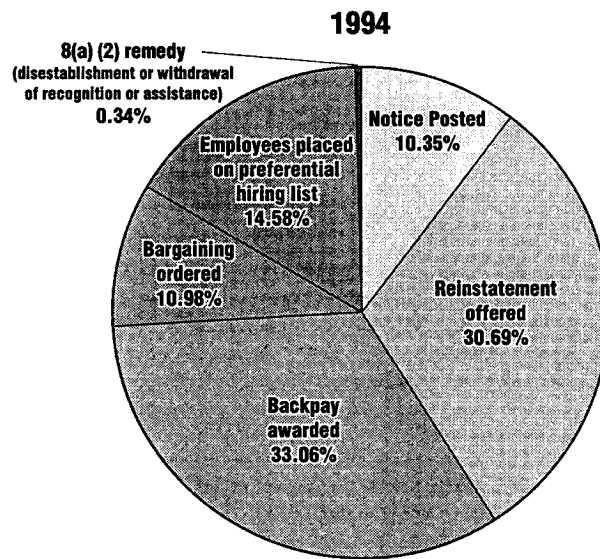
1994



Source: NLRB Annual Report for FY 1994



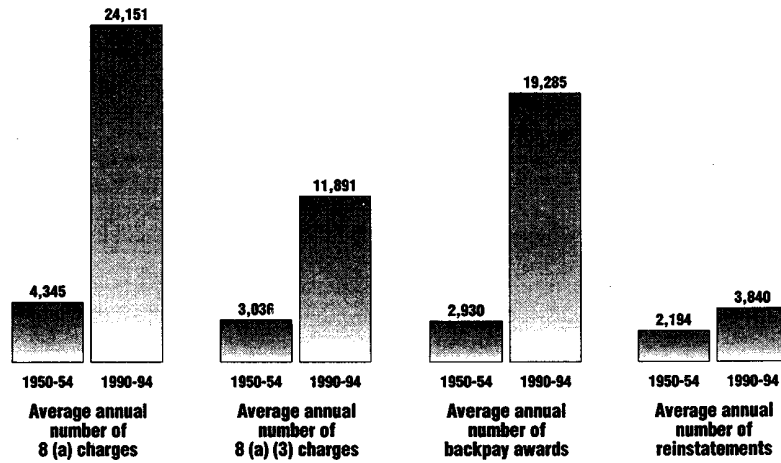
## Remedial Actions Taken by Employers in Unfair Labor Practice Cases



**Total Actions = 25,900**

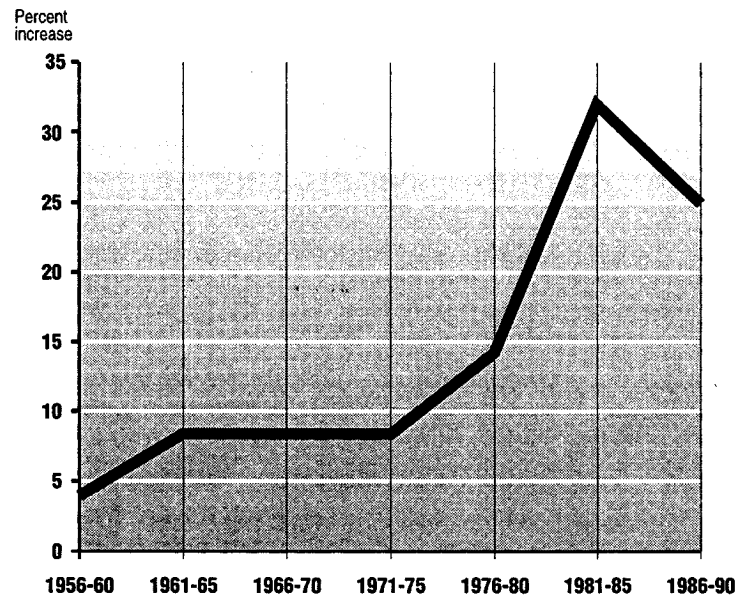
Source: NLRB Annual Report for FY 1994

### Explosion in the Number of Employer Unfair Labor Practices



Source: Commission on the Future of Worker-Management Relations; NLRB Annual Reports 1990-94

## Proportion of NLRB Elections in Which A Union Supporter is Illegally Discharged



Source: Commission on the Future of Worker-Management Relations

*6. Scholars overwhelmingly oppose the TEAM Act*

Dr. Hoyt Wheeler, the President of the Industrial Relations Research Association, recently wrote a letter that was signed by more than 400 professors of labor law and industrial relations and other neutral parties in the labor-management community. The letter states:

The stated purposes of [S. 295]—promotion of legitimate employee involvement and genuine worker-management co-operation—are vital to the national interest. However, enactment of the TEAM Act would frustrate the realization of these goals by encouraging illegitimate forms of employee involvement and discourage the legitimate expression of worker voice.

For the past 60 years, it has been the policy of our labor law to encourage collective bargaining by protecting the right of workers to freely associate and select representatives of their own choosing. A cornerstone of that policy has been the prohibition, contained in section 8(a)(2) of the National Labor Relations Act, on employer domination of employee organizations and employee representation plans. That section was central to the NLRA and was enacted because prior to the NLRA's enactment, employer control of employee organizations and representation plans had been used widely and effectively to impede workers from organizing independent labor unions. The proposed TEAM Act would negate the original purpose of section 8(a)(2) by permitting without limitation a revival of the very practices against which section 8(a)(2) was aimed. The legislation contains no safeguards to guarantee that employer-created representation plans function democratically and independently of the employer. Nor is there anything in the bill which would prevent employers from manipulating the employer-controlled organizations in order to thwart genuine employee voice. As a result, we are persuaded that passage of the TEAM Act would quickly lead to the return of the kind of employer-dominated employee organization and employee representation plans which existed in the 1920's and 1930's. Employee involvement and worker-management cooperation can and should be fostered by means which do not further limit employees' freedom of association. The proposed TEAM Act represents a step backwards towards the discredited approaches of the 1920's and 1930's and away from true employee involvement and genuine worker-management co-operation. H.R. 743 and S. 295 should not be enacted into law.

In addition, Dr. John Dunlop, Chairman of the Commission on the Future of Worker-Management Relations and Secretary of Labor in the Ford administration, has said that the members of the Dunlop Commission—including three former Secretaries of Labor, a former Secretary of Commerce, the CEO of Xerox Corp., several prominent labor relations scholars, and a representative of the small business community—unanimously oppose enactment of the TEAM Act.

## DEMOCRATIC AMENDMENTS

The majority claims that its primary objective in eliminating the protections of § 9(a)(2) is to give more authority and autonomy to employees. However, the TEAM Act bolsters employer prerogatives without a commensurate enhancement of employee rights under the NLRA.

At the TEAM Act Executive Session, Democrats offered a number of amendments designed to remedy some of the inequalities that presently inhere in the NLRA. These amendments would have provided employees with enhanced legal remedies for NLRA violations by an employer, debarred firms with a pattern and practice of NLRA violations from receiving Federal contracts, and preserved the NLRA protections of employees who accept decision-making authority. The committee rejected all of these amendments on party-line votes.

## KENNEDY AMENDMENTS

Senator Kennedy offered two amendments to strengthen the remedies provided under the NLRA for unlawful discharges of employees during union organizing campaigns. The first would have amended section 10(1) of the NLRA to require the NLRB to give top priority to the investigation of charges that an employer has illegally discharged an employee during a union organizing campaign or during the negotiation of a first collective bargaining agreement. If the NLRB found reasonable cause to believe the charge was valid, it would be required to seek an injunction in federal court pending final adjudication of the charge. The second amendment would have amended section 10(c) to provide for triple backpay and the award of attorney fees as the remedy for illegal discharges during union organizing drives or during the negotiation of a first collective bargaining agreement.

Senator Kennedy offered an amendment to expand the range of issues subject to collective bargaining. One way to increase employee empowerment and equalize bargaining power is to ensure that critical subjects, such as the decision to close or relocate a plant or to subcontract bargaining unit work are not excluded from collective bargaining. No issue is more important to employees than the fundamental issue of whether they will have a job at all. The amendment would have amended section 9 of the NLRA to make clear that employees can negotiate over all issues that significantly affect wages, hours, and terms and conditions of employment.

Senator Kennedy offered an amendment to provide employees with as much access to union organizers and information about unions as they have to the employer's anti-union campaign. The amendment would have amended section 8 of the NLRA to make it an unfair labor practice for an employer to deny a non-employee union organizer access to the non-work areas of the employer's facility for the purpose of conferring with employees, if the union had filed a petition for representation with the NLRB. The amendment would also make it unlawful for an employer to deny a union the right to attend a meeting of employees called by the employer to discuss representation by a labor organization.

Senator Kennedy also filed an amendment to preserve the status as employees protected by the NLRA of employees who collectively, as part of a work team or committee, take on some of the decision-making authority of managers. The amendment would also have amended the definition of “supervisor” in section 2 of the NLRA to exclude individuals whose only supervisory role is to direct the work of another employee, without having the power to hire, fire, discipline or discharge the employee.

#### SIMON NLRA DEBARMENT AMENDMENT

Senator Simon’s NLRA debarment amendment would have allowed the Secretary of Labor to debar from Federal contracts firms that showed a clear pattern or practice of NLRA violations. The Federal government already enforces a number of statutes and executive orders that hold Federal contractors to high standards. For example, the Davis-Bacon Act requires Federal construction contractors to pay their workers the “prevailing wage” in their locality, and Executive Order 11246 requires Federal contractors to establish affirmative action policies in their workplaces. Yet there is no statute or executive order in place to require that Federal contractors abide by the NLRA.

A recent GAO Report commissioned by Senator Simon showed that the Federal government is currently paying millions of contract dollars per year to companies that have demonstrated a clear pattern and practice of violating labor laws. The Report, entitled “Worker Protection: Federal Contractors and Violations of Labor Law,” showed that approximately 13 percent (or more than \$23 billion) of FY 1993 Federal contracts went to 80 firms that were found to have violated the NLRA in FY 1993–94.

Of the 80 cases decided by the NLRB involving Federal contractors, 44 firms interfered with their workers’ right to organize, 45 firms refused to bargain collectively with their employees’ representatives, and 33 firms discriminated against union supporters in hiring or conditions of employment.

The GAO also identified 15 firms that were more serious violators, in that they had either been ordered by the NLRB to comply with a comprehensive remedy, taken actions affecting the job status of more than 20 workers, or had a history of labor law violations in the period preceding the time covered by the study. Among the third group, 3 of the 15 (Beverly Enterprises, Monfort of Colorado, and Overnite Transportation Co.) had received several adverse Board judgments.

Senator Simon’s amendment, the Federal Contractor Labor Relations Enforcement Act of 1995, would have addressed this problem by giving the Secretary of Labor the discretion to debar firms that show a “clear pattern and practice” of NLRA violations from receiving Federal contracts or extensions or modifications of Federal contracts for three years.

The Simon amendment would also have given the Secretary discretion to reduce or remove a debarment order for a firm that demonstrates that it has complied with the rules that it had been found to have violated, that there has been a bona fide change of ownership, or that there has been fraud or misrepresentation by a charging party.

Under the Simon amendment, the Secretary would have been allowed to define “pattern and practice” through the administrative rulemaking process. The Amendment would also have left to the Secretary rulemaking authority regarding the debarment of a parent company because of the actions of a subsidiary.

The Simon amendment would have helped to ensure that employers who repeatedly disregard the rights of their workers under the NLRA would face serious economic consequences for their failure to abide by the law. It also would have promoted efficient and economical Federal procurement by removing Federal support for firms that unfairly underbid their competitors by ignoring the requirements of the NLRA.

#### SIMON FIRST CONTRACT ARBITRATION AMENDMENT

Senator Simon’s Labor Relations First Contract Negotiations Act of 1996 would have required mediation of first contract negotiation disputes lasting longer than 60 days. Under the Amendment, If an employer and a new representative have not reached a collective bargaining agreement within 60 days of the representative’s certification, both sides would be required to jointly select a mediator to help them reach an agreement (or have one appointed by the Federal Mediation and Conciliation Service). Either side would be entitled to request binding arbitration of any matter still in controversy 30 days after selecting the mediator.

Approximately one-third of unions never get a first collective bargaining agreement following certification. Estimates of the union failure rate in the 1980s range from 20 percent to 3 percent. Furthermore, many employers engage in bad faith “surface” bargaining with a newly-elected union representative. This illegal tactic significantly reduces the odds of employees securing an initial agreement from their employer.

On the other hand, mediation of first contract terms leads to a first contract in approximately two-thirds of certifications. Of the 10,783 certification notices the Federal Mediation Conciliation Service (FMCS) received between 1986 and 1993, 6,009 (56 percent) resulted in an initial agreement. An additional 4 percent did not need mediation. Submitting first contract disputes to mediation could significantly decrease the overall union failure rates.

Arbitration could prevent many first contract strikes, which tend to last longer than contract renewal strikes handled by mediators (FMCS). First contract strikes last an average of 45 days, and produce agreements only 54 percent of the time. Contract renewal strikes last an average of only 30 days and produce successful agreements 82 percent of the time.

The Simon Labor Relations First Contract Negotiations Act would have assisted employees who have voted for union representation to obtain the benefits of a collective bargaining agreement with unnecessary and wasteful delay.

#### CONCLUSION

S. 295 proposes to undermine workplace democracy in a profound way. Employers would be free to create and control employee committees, even those designed to represent employees regarding the

most basic, pocketbook issues of wages, retirements, and health benefits.

The TEAM Act would allow employers to create a “labor organization,” while controlling virtually every aspect of its activity. The employer could select committee members, limit its agenda or discussions, stack the committee with management or company favorites, and even unilaterally terminate the committee for any reason.

While the National Labor Relations Act currently promotes and protects the creation of democratically elected, equal bargaining partners, S. 295 would authorize phony employee organizations that would sour good labor-management relations.

Over the years, section 8(a)2 has endured for the same reason democratic governments endure: the precious right of self-representation allows each American to seek a prosperous and safe future. We dissent from this bill’s gratuitous attack on the right of working men and women.

TED KENNEDY.  
BARBARA A. MIKULSKI.  
CLAIBORNE PELL.  
CHRIS DODD.  
TOM HARKIN.  
PAUL WELLSTONE.  
PAUL SIMON.



## X. CHANGES IN EXISTING LAW

In compliance with rule XXVI paragraph 12 of the Standing Rules of the Senate, the following provides a print of the statute or the part or section thereof to be amended or replaced (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

### TEAMWORK FOR EMPLOYEES AND MANAGEMENT ACT OF 1995

## TITLE 29—UNITED STATES CODE

\* \* \* \* \*

#### SEC. 158. UNFAIR LABOR PRACTICES.

##### (a) UNFAIR LABOR PRACTICES BY 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 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[;]: *Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain or participate in any organization or entity of any kind, in which employees participate to address matters of mutual interest (including issues of quality, productivity and efficiency) and which does not have, claim or seek authority to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization;*

\* \* \* \* \*

