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SPECIAL PROJECT: LABOR-MANAGEMENT COOPERATION

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The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act*

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I. INTRODUCTION

Much of the current debate concerning labor-management cooperative efforts centers on section 8(a)(2) of the National Labor Relations Act (the Act), which makes dominating, interfering with, or contributing to the formation or administration of any labor organization an unfair labor practice.¹ On its face, this section may inhibit cooperative efforts through a prohibition of management support for employee or-

* Throughout the Special Project, this piece is cited as Special Project Note, *Future Cooperative Efforts*.

1. 29 U.S.C. § 158(a)(2) (1982).

ganizations. The effect of section 8(a)(2), however, need not be so restrictive because of the Act's underlying concern for the effectuation of employee freedom of choice.² A concern for employee free choice provides a means for permitting positive cooperative efforts,³ consistent with trends in labor-management relations, while preventing the abuses feared by the drafters of the Act.

An examination of the legislative history surrounding the passage of the Act in 1935⁴ is crucial to understanding section 8(a)(2) because much of the debate on the original Act⁵ centered on what eventually became section 8(a)(2).⁶ Although the stated purpose of the 1935 Act was "[t]o promote equality of bargaining power between employers and employees [and] to diminish the causes of labor disputes,"⁷ the discussion surrounding the formation of this Act reveals that the controlling intent of the Act's drafters was to eliminate the company-dominated union.⁸ To effectuate their goals, the drafters structured the Act in a

2. See *infra* notes 83-86 and accompanying text; see also Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 YALE L.J. 510 (1973) [hereinafter Note, *New Standards*]. This Note suggests redefining the terms "domination" and "support" to allow for a class of assisted labor organizations if the employer is acting in good faith and the employees choose not to have a traditional union. The author of the Yale Note contends that such a redefinition would expand the freedom of choice guaranteed by the Act. *Contra* Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662, 1663 (1983) (contending that "courts which have interpreted section 8(a)(2) to permit employer-sponsored representation plans have erred by relying on ad hoc assessments of 'employee free choice' rather than focusing on the autonomy of the challenged organizations and the importance of arm's-length bargaining").

3. See Rosenberg & Rosenstein, *Participation and Productivity: An Empirical Study*, 33 INDUS. & LAB. REL. REV. 355 (1980). This piece empirically evaluated employer-employee cooperative efforts and concludes that an increase in productivity accompanied the increase in cooperative activity.

4. S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3270 (1959) [hereinafter NLRA HIST.].

5. The original National Labor Relations Act, known as the Wagner Act, passed Congress in 1935. In 1947 Congress amended the Act with the Labor Management Relations Act of 1947, popularly called the Taft-Hartley Act. The Act received further change in the Labor-Management Reporting and Disclosure Act of 1959. These later changes in the National Labor Relations Act left the language of § 8(a)(2) unaltered.

6. The original draft proposed by Senator Wagner used comparable language in §§ 5(3) and 5(4). When the Act was enacted in 1935, the language, which Congress relabeled § 8(a)(2) in 1947, was in § 8(2).

7. S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 3238 (preamble). The Senate Bill included this preamble through most of the debate, yet when signed by the President on July 5, 1935, the preamble read "[t]o diminish the cause of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes." *Id.* at 3270.

8. The company-dominated union is an organization formed and controlled by management to represent employees. The company-dominated union, however, not only failed to represent employee interests, but also blocked any other organization from representing the employees. The drafters of the Act distinguished the company-dominated union from the company union. The term "company union" referred to an independent employee organization in a single company. See

way that forces labor and management into adversarial positions.⁹ Contrary to the contentions of later cases, the Act's drafters did not intend to promote cooperation between labor and management. The legislative history indicates that the drafters were more concerned with cooperation among labor itself,¹⁰ with the belief that if employees could increase their power through cooperation with each other, then labor could bargain as an equal with management.

To facilitate an analysis of cooperative efforts under section 8(a)(2), this Special Project Note focuses on a form of labor-management interrelation, the employee committee, which plays a prominent role in both the legislative and judicial history of section 8(a)(2).¹¹ This Note does not discuss other forms of employee-employer interrelations such as quality of work life programs,¹² quality control circles,¹³ productivity sharing plans,¹⁴ worker teams,¹⁵ or employee participation on boards of directors.¹⁶ An analysis of employee committees under section 8(a)(2) naturally entails examining the theory behind other cooperative structures. Consequently, judicial attitude toward employee committees usually is indicative of judicial attitude toward cooperative efforts in

infra notes 67-74 and accompanying text.

9. See *infra* notes 75-76 and accompanying text.

10. See *infra* notes 77-82 and accompanying text.

11. See Murrmann, *The Scanlon Plan Joint Committee and Section 8(a)(2)*, 31 *LAB. L.J.* 299 (1980). Murrmann explains the benefits of employee committees and notes that these committees clearly violate § 8(a)(2). The author recommends new legislation to insure the existence of these collaborative efforts. The Scanlon Committee is a form of productivity sharing plan. See *infra* note 14.

12. See Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 *MICH. L. REV.* 1736 (1985). "QWL (quality of work life) projects focus on interpersonal relationships among workers and the general 'humanization' of labor conditions." *Id.* at 1739. Generally, the projects try to improve the overall quality, satisfaction, and significance of workers' roles in the production process.

13. *Id.* at 1740. Quality control circles are small groups of workers that meet regularly to discuss potential improvements and problems. These circles emphasize improvements in productivity and product quality. *Id.*

14. See Gold, *Labor-Management Committees: Confrontation, Cooptation, or Cooperation?*, 29 *KEY ISSUES SERIES* 16 (1986) (stating that "[p]roductivity sharing plans generally combine worker participation in decision making with a group incentive plan that rewards workers for productivity gains").

15. See Note, *Does Employer Implementation of Employee Production Teams Violate Section 8(a)(2) of the National Labor Relations Act?*, 49 *IND. L.J.* 516 (1973). This article explains the various elements of the production team, noting that while such team efforts have produced positive results, they still clearly violate § 8(a)(2). A production team, as opposed to a quality control circle or a quality of work life program, is a group assigned to run a particular section of plant operations and is virtually autonomous in that section. *Id.* at 518-19.

16. See Moberly, *Worker Participation and Labor-Management Cooperation Through Collective Bargaining*, 15 *STETSON L. REV.* 99 (1985). Professor Moberly "focus[es] on collective bargaining developments that have enhanced worker participation and labor-management cooperation." *Id.* at 99.

general.

The employee committee represents a form of employee representation that falls somewhere between a valid employee union and an invalid company-dominated union. Courts traditionally determine whether an employee committee is closer to an invalid organization by applying a set of judicially developed criteria.¹⁷ Although application of those criteria to employee committees has a strong judicial tradition, several courts have begun to depart from a strict criteria analysis and to focus on whether such committees represent an organization freely chosen by employees.¹⁸ This free choice approach provides a means of allowing beneficial employer-employee cooperative efforts which may satisfy established criteria for a section 8(a)(2) violation.¹⁹ Although some commentators contend that Congress should strike or rewrite section 8(a)(2) to allow cooperative efforts,²⁰ this Note concludes that legislation affecting section 8(a)(2) is unnecessary and possibly harmful. Over the past fifty years courts have developed an interpretation of section 8(a)(2) that engenders an awareness of the drafters' intent and a realization of current needs of American industry.

II. LEGISLATIVE HISTORY OF SECTION 8(a)(2)

The history of the National Labor Relations Act begins on February 28, 1934, when Senator Wagner of New York, former chairman of the National Labor Board, introduced Senate Bill 2926, popularly known as the Labor Disputes Act.²¹ The Senate referred the Bill to the

17. See *infra* notes 114-52 and accompanying text.

18. See *infra* notes 152-214 and accompanying text.

19. By examining whether an employer infringed an employee's freedom, the court allows its investigation to step beyond the technical limits of the Act in order to support a positive, cooperative arrangement, which may partially offend the language of § 8(a)(2).

20. See, e.g., Murrmann, *supra* note 11; Note, *New Standards*, *supra* note 2.

21. S. 2926, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRA Hist., *supra* note 4, at 1.

The Labor Disputes Act was not the first piece of labor legislation in the United States. The proposed Act paralleled, in some respects, the Railway Labor Act of 1926, 44 Stat. 577 (codified as amended at 45 U.S.C. §§ 151-163 (1982)), which introduced the concept that neither bargaining party could interfere, influence, or coerce the other party in the choice of bargaining representative. See *infra* note 88 and accompanying text. Aside from having indirect ties with The Railway Labor Act, the Labor Disputes Act was a direct outgrowth of § 7(a) of the National Industrial Recovery Act of 1933, 48 Stat. 195, 15 U.S.C. § 707(a)(2) (repealed 1935), see *infra* note 70 and accompanying text, whose language had ties to the 1932 Norris-Laguardia Act, 47 Stat. 70 (current version at 29 U.S.C. § 101 (1982)).

The National Industrial Recovery Act, through Presidential Executive Order, created a National Labor Board which consisted of Senator Wagner as chairman, two representatives each from labor and industry, and the heads of the National Recovery Administration's Labor Advisory Board and Industrial Advisory Board. The initial functions of the National Labor Board were to mediate disputes between labor and management and to report violations of § 7(a). Although the Board was geared toward investigation and reporting of § 7(a) violations, it possessed no enforcement powers. As the expiration of the National Industrial Recovery Act approached in 1934, Sena-

Committee on Education and Labor for hearings and evaluation.²² These hearings contributed significantly to the development of the Act. Neither the original Senate Bill,²³ nor its companion House Bill,²⁴ contained the key term "domination" until Senator Walsh, chairman of the Committee, introduced the second draft of the bill.²⁵ This second draft served as a model for Senator Wagner's 1935 version of the bill,²⁶ which, after additional hearings,²⁷ eventually passed Congress²⁸ with section 8(a)(2) unaltered.

A. Development of Section 8(a)(2) Terminology

Section 8(a)(2) explicitly states that an employer commits an unfair labor practice by taking any action "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."²⁹ An examination of the Act's key terminology highlights the salient points of the debate surrounding the drafting of the final form of section 8(a)(2). The terms "initiate" and "influence" appeared in the description of unfair labor practices in Senator Wagner's original draft, but were omitted in the second and final

tor Wagner introduced the Labor Disputes Act with the intention of creating a permanent Labor Board with facilities to prevent problems originally targeted by § 7(a). See M. FORKOSCH, A TREATISE ON LABOR LAW § 286 (2d ed. 1965).

22. The Committee held hearings on March 14-22 and March 26-April 3, 1934. See 1 NLRA HIST., *supra* note 4, at 31-1127.

23. The original Senate Bill contained §§ 5(3) and 5(4), which evolved into § 8(a)(2). Section 5(3) classified an employer's attempts "[t]o initiate, participate in, supervise, or influence the formation, constitution, bylaws, other governing rules, operations, policies, or elections of any labor organization" as unfair trade practices. Similarly, § 5(4) made it an unfair labor practice for an employer "[t]o contribute financial or other material support to any labor organization, by compensating anyone for services performed in behalf of any labor organization, or by any other means whatsoever." S. 2926, *supra* note 21, reprinted in 1 NLRA HIST., *supra* note 4, at 3.

24. H.R. 8423, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1128 (introduced by Rep. Connery). The House version contained language identical to Senate Bill 2926.

25. S. REP. NO. 1184, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1070. Section 3(3) of the re-draft categorized an employer's interference with, domination of the administration of, or contribution of financial support to any labor organization as unfair trade practices. *Id.* at 1087.

26. S. 1958, 74th Cong., 1st Sess. (1935), reprinted in 1 NLRA HIST., *supra* note 4, at 1295. Section 8(2) of S. 1958 made it an unfair labor practice for an employer "[t]o dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it." *Id.* at 1299.

27. The Committee on Education and Labor held a second set of hearings on Senate Bill 1958 on March 11-15, 18, and 19, 1935, reprinted in 1 NLRA HIST., *supra* note 4, at 1373-1616, and from March 21 to April 2, 1935, reprinted in, 2 NLRA HIST., *supra* note 4, at 1617-2276.

28. H.R. 6288, 74th Cong., 1st Sess. (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2459 (introduced by Rep. Connery).

29. 29 U.S.C. § 158(a)(2) (1982).

drafts of the bill.³⁰ Criticism of the term "initiate" reflected a concern that the term would prohibit the initiation of communications, suggestions, or proposals.³¹ On the other hand, support for the term "initiate" came from those who restricted its use to preventing employers from initiating a labor organization.³² The drafters' decision to eliminate the term demonstrated a desire to limit the Act's prohibitions.

The Committee also omitted the term "influence" from the final draft of the Act,³³ noting that the very essence of collective bargaining involves employer and employee striving to influence each other.³⁴ According to Senator Walsh, the Committee believed that labor and management should be able to exercise "the right of peaceful persuasion."³⁵ Although intentionally omitted from the Act, the terms "initiate" and "influence" frequently surface in evaluations of employee committees under section 8(a)(2).³⁶

While the Committee deleted these two terms, other controversial language survived the debate and remained in the final version of the Act. Most importantly, the Act contains the extensively debated terms "dominate" and "interfere."³⁷ When an employer creates an organization that restricts employee cooperation solely to the individual employer unit,³⁸ the employer, by exercising a "compelling force over the

30. S. 2926, *supra* note 21, reprinted in 1 NLRA HIST., *supra* note 4, at 1; see *supra* note 23 for the text of the Bill.

31. *To Create a National Labor Board: Hearings on S. 2926 Before the Senate Comm. on Education and Labor*, 73d Cong., 2d Sess. (1934) [hereinafter *Hearings S. 2926*], reprinted in 1 NLRA HIST., *supra* note 4, at 389 (testimony of James A. Emery, General Counsel, National Association of Manufacturers).

32. *Hearings S. 2926*, *supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 257 (testimony of Otto Beyer, Federal Coordinator of Transportation).

33. S. 1958, *supra* note 4, reprinted in 2 NLRA HIST., *supra* note 4, at 3273.

34. *Hearings S. 2926*, *supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 423 (testimony of James A. Emery); *id.* at 564 (testimony of Ralph F. Foster, Factory Manager, American Laundry Machinery Co.).

35. 78 CONG. REC. 10,559, 10,560 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1125 (radio address by Sen. Walsh on June 5, 1934).

36. See, e.g., *NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 186 (5th Cir. 1961) (Wisdom, J., dissenting) (permitting employer-employee cooperation "as long as it does not take the form of a labor organization dominated or improperly influenced by the employer"); see also *Classic Indus., Inc. v. NLRB*, 667 F.2d 205, 206 (1st Cir. 1981) (holding that the employer violated § 8(a)(2) when he "initiated" actual distribution of ballots for creation of an employee committee).

37. Senator Wagner's second and final draft of the Act included the terms "dominate" and "interfere" in § 3(3). S. 2926, 73d Cong., 2d Sess. (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1087.

38. *Hearings S. 2926*, *supra* note 31, reprinted in 78 CONG. REC. 4229, 4230 (1934) and in 1 NLRA HIST., *supra* note 4, at 23 (Sen. Wagner noting in an article from the *New York Times*, dated March 11, 1934, that "I do not refer to all independent labor organizations. . . . I allude rather to the employer dominated union, generally initiated by the employer, which arbitrarily restricts employee cooperation to a single employer unit."); 79 CONG. REC. 7565, 7570 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2333 (Sen. Wagner commenting that "[t]he primary

collective activities” of the employees,³⁹ dominates the employee organization.⁴⁰ Senators Wagner and Walsh contended that an employer dominated a labor organization by dictating the organization’s constitution and by-laws,⁴¹ by influencing its formation, policies, and elections, by financially subsidizing it, or by discriminating either in favor of or against its members through wage or hour differentials.⁴² The drafters felt that no realistic collective bargaining could take place when the employer, by dominating the union, controlled both sides of the bargaining table.⁴³

evil of the organization which is dominated or interfered with by the employer is that, sometimes because of express prohibitions, more often because of its intrinsic composition, it is not well suited to extend its cooperative activities beyond the bounds of a single employer unit”); *Labor Disputes Act: Hearings Before the House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess. (1935)* [hereinafter *Hearings H.R. 6288*], reprinted in 2 NLRA HIST., *supra* note 4, at 2488 (Sen. Wagner further asserting that “the most common characteristic of the company-dominated union is that the employer. . .does not permit his workers to band together with others who are not serving the same company”).

39. *Hearings S. 2926, supra* note 31, reprinted in 79 CONG. REC. 4229, 4230 (1934) and in 1 NLRA HIST., *supra* note 4, at 24 (article by Sen. Wagner printed in the *New York Times*, March 11, 1934).

40. S. REP. No. 1184, *supra* note 25, reprinted in 1 NLRA HIST., *supra* note 4, at 1104 (stating that “[t]here was presented to the committee much testimony . . . to the effect that a few employers had dominated labor organizations of their own employees by dictating the terms of their constitutions and bylaws, by refusing to let these labor organizations amend their constitutions without the consent of the employer, by dictating to the organization officials the procedure or agenda for meetings, by indulging in unusual favors prior to or contemporaneously with an election of representatives by the workers, and by making financial contributions to one of several rival labor organizations with the intent of inducing the workers to join the subsidized organization”); 78 CONG. REC. 10,559, 10,560 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1125 (radio address by Sen. Walsh on June 5, 1934) (commenting that “[w]e found . . . many company unions, because of the financial contributions by employers, were subsidized organizations [and] that in many instances the employer dictated the text of the constitution and bylaws to these organizations, paid the expense of holding meetings and elections of the organizations, [and] extended special benefits that attracted their employees to membership in the company unions. . .”); 79 CONG. REC. 7648, 7660 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2374-75 (Sen. Walsh noting that “[i]n some company unions the employer hires the hall where the union meets, pays for the ballots, employs clerical help for the union, [and] pays salaries to the representatives of the workers”).

41. 78 CONG. REC. 10,559, 10,560 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1125 (radio address of Sen. Walsh on June 5, 1934); 79 CONG. REC. 7648, 7660 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2373 (address by Sen. Walsh).

42. *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 39 (statement of Sen. Wagner).

43. *Id.* at 213 (testimony of Mrs. Elinore Morehouse Herrick, Acting Chairman, Regional Labor Board); *Hearings H.R. 6288, supra* note 38, reprinted in 2 NLRA HIST., *supra* note 4, at 2489 (statement of Sen. Wagner) (stating that “I cannot comprehend how people can rise to the defense of a practice so contrary to American principles as one which permits the advocates of one party to be paid by the other whereby [c]ollective bargaining becomes a sham [because] the employer sits on both sides of the table or pulls the strings behind the spokesman of those with whom he is dealing”); 79 CONG. REC. 7565, 7570 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2333 (statement by Sen. Wagner) (asserting that “[c]ollective bargaining becomes a mockery when the

The term "interference" goes beyond the term "domination" and expands the scope of activities that violate the Act. For Senator Wagner, interference occurred if the employer participated in the management or formation of the constitution or by-laws of a labor organization,⁴⁴ or if the employees' association was subject in some way to the employer's will.⁴⁵ Senator Wagner indicated that generally nonoffensive actions could rise to the level of interference because of the "unique dependency"⁴⁶ of the employee on the employer. Thus, the term "interference" was intended to include any acts by management that impair the freedom of action of the labor organization.⁴⁷

The term "labor organization" is another controversial item included in the final version of section 8(a)(2).⁴⁸ The Act itself provides some insight into the meaning of this phrase in section 2(5).⁴⁹ The original draft of the Act defined the term "labor organization" as "any organization . . . of any kind in which employees participate to any degree whatsoever."⁵⁰ Even though the early language was broad, several experts still feared that employee committees, which they equated with company-dominated unions, might be outside the purview of the Act.⁵¹ To quell this fear, the second draft of the Act directly addressed

spokesman of the employee is the marionette of the employer").

44. *Hearings H.R. 6288, supra note 38, reprinted in 2 NLRA Hist., supra note 4, at 2489* (statement of Sen. Wagner).

45. 79 CONG. REC. 7565, 7570 (1935), *reprinted in 2 NLRA Hist., supra note 4, at 2334* (statement of Sen. Wagner).

46. *Hearings H.R. 6288, supra note 38, reprinted in 2 NLRA Hist., supra note 4, at 2489* (statement of Sen. Wagner).

47. Senator Boland asked,

Is it "interference" for an employer to initiate a company union, to participate in its administration, to restrict changes in its constitution, to exercise a veto power over its decisions, to influence its policies, or to contribute financial support to the organization or its representatives? . . . In my opinion, these, along with any other acts impairing the freedom of action of labor organizations, should be deemed prohibited by the statute.

79 CONG. REC. 2332, 2337 (1935), *reprinted in 2 NLRA Hist., supra note 4, at 2443*.

48. S. 1958, *supra note 4, reprinted in 2 NLRA Hist., supra note 4, at 3273*.

49. *Id.* at 3271. Section 2(5) currently provides:

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

29 U.S.C. § 152(5) (1982).

50. The original draft provided: "The term 'labor organization' means any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment." S. 2926, *supra note 21, reprinted in 1 NLRA Hist., supra note 4, at 2*.

51. *Hearings S. 2926, supra note 31, reprinted in 1 NLRA Hist., supra note 4, at 272* (testimony of Edwin E. Witte, Professor of Economics, University of Wisconsin) (noting that "in subsection (2) of section 5, you speak only of representatives of the employees, and I submit that there

the employee committee issue and further expanded the general definition of labor organization.⁵² Senator Walsh, in the Committee report submitted to the Senate, explained that the term "labor organization" had a broad meaning to guarantee that the independence of action protected by section 8 of the Act would extend to all organizations that dealt with employers on "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁵³ The final change made to section 2(5) of the Act, found in Senator Walsh's redraft, was the addition of the phrase "conditions of work" in order to cover other dealings between labor and management.⁵⁴

The last relevant term in section 8(a)(2), which added another prohibited employer activity, prevented an employer from contributing "financial or other support"⁵⁵ to a labor organization. This provision attracted much criticism because a consistent characteristic of company unions and employee committees was direct or indirect employer financial support.⁵⁶ Various groups argued that financial support, provided at a level agreed to by both employer and employees⁵⁷ and given to the employees annually for their allocation,⁵⁸ did not make an organization subservient to the employer.⁵⁹ Others added that the clause was too expansive in the sense that "other support" might be extended to include moral support, advice, or counsel.⁶⁰ Some commentators even con-

is danger that your language does not include this most prevalent form of company unionism that we now know, the employee representation committee").

52. The re-draft of Senate Bill 2926 stated that "[t]he term 'labor organization' means any organization or any agency or employee representation committee, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning hours of labor, wages or working conditions." S. REP. NO. 1184, *supra* note 25, *reprinted in* 1 NLRA HIST., at 1086.

53. S. REP. NO. 573, 74th Cong., 1st Sess. (1935), *reprinted in* 2 NLRA HIST., *supra* note 4, at 2300.

54. S. 1958, *supra* note 4, *reprinted in* 2 NLRA HIST., *supra* note 4, at 3271.

55. *Id.* at 3273.

56. *Labor Disputes Act: Hearings Before the Senate Comm. on Education and Labor on S. 1958*, 74th Cong., 1st Sess. (1935) [hereinafter *Hearings S. 1958*], *reprinted in* 2 NLRA HIST., *supra* note 4, at 1876 (testimony of Harvey G. Ellard, The Institute of American Meat Packers).

57. *Hearings S. 1958*, *supra* note 56, *reprinted in* 2 NLRA HIST., *supra* note 4, at 1936 (testimony of A.B. Trembley, Chairman, Goodyear Industrial Assembly of the Goodyear Tire & Rubber Co.).

58. *Id.* at 1797 (testimony of Jack Larkin, General Chairman, Employees' Representatives); *id.* at 2120 (testimony of G.O. Bailey, Chairman, Association of Employees, American Telephone & Telegraph Co.).

59. *Id.* at 1935 (testimony of A.B. Trembley, Chairman, Goodyear Industrial Assembly of the Goodyear Tire & Rubber Co.); *Hearings S. 2926*, *supra* note 31, *reprinted in* 1 NLRA HIST., *supra* note 4, at 715 (testimony of G.L. Fullmer, Association of Employees, American Telephone & Telegraph Co.).

60. *Hearings S. 1958*, *supra* note 56, *reprinted in* 2 NLRA HIST., *supra* note 4, at 1829 (testimony of Robert T. Caldwell, Attorney for the American Rolling Mill Co.); *id.* at 1896 (testimony of James L. Donnelly, Executive Vice President, Illinois Manufacturers' Association).

tended that the clause was unnecessary because the Act already prohibited support that rose to the level of domination or interference.⁶¹ The drafters' concern was that if an employer could provide financial support to a labor organization, then that labor organization would become a subsidized group under the employer's control⁶² and could not function freely.⁶³ In response to the pressure against the clause, Senator Walsh, in the second draft of the bill,⁶⁴ deleted Senator Wagner's original clause, "or other material support."⁶⁵ The clause did not remain absent and in the final draft of the Act the drafters reinserted the original clause with a meaning expanded by the deletion of the restrictive term "material."⁶⁶

B. Central Themes of the 1935 Debate over Section 8(a)(2)

Aside from the technical aspects of the Act, the legislative history indicates that several important issues permeated congressional discussion. One of these issues related to the strengths and weaknesses of the company union and various other forms of employee organizations. Senator Wagner believed that the company-dominated union was the greatest obstacle to collective bargaining⁶⁷ and genuine freedom of self-organization.⁶⁸ A company-dominated union is an employee representation organization that lacks independence and owes a dual obligation to employers and employees.⁶⁹ The company-dominated union blossomed as a result of the passage of section 7(a)⁷⁰ of the National Industrial

61. *Id.* at 1712 (testimony of Walter Gordon Merritt, League for Industrial Rights).

62. 78 CONG. REC. 10,559, 10,560 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 1125 (radio address of Sen. Walsh on June 5, 1934).

63. 79 CONG. REC. 7648, 7660 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2375 (statement by Sen. Walsh); *Hearings S. 2926*, *supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 131 (statement of William Green, President, American Federation of Labor).

64. S. REP. NO. 1184, *supra* note 25, reprinted in 1 NLRA HIST., *supra* note 4, at 1087.

65. S. 2926, *supra* note 21, reprinted in 1 NLRA HIST., *supra* note 4, at 3.

66. S. 1958, *supra* note 4, reprinted in 2 NLRA HIST., *supra* note 4, at 3273.

67. 78 CONG. REC. 3443, 3443 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 15-16 (comments by Sen. Waguer); see *supra* note 8 and accompanying text.

68. *Hearings H.R. 6288*, *supra* note 38, reprinted in 2 NLRA HIST., *supra* note 4, at 2488 (testimony of Sen. Waguer).

69. Senator Boland described the company-dominated union as an organization initiated and created by the employer, in which the employer participates in its administration and operations, in which he is represented on all the committees, and either supervises, initiates, or participates in the decisions or exercises a veto power over them, in which the employer can veto all proposals for amendments in the original charter of the organization, and in which he provides the organization with financial aid and comfort.
79 CONG. REC. 2332, 2336 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2439.

70. That statute provided:

Employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in

Recovery Act. Many persons testifying before the Committee supported the company union and believed that the Act would destroy and eliminate these organizations,⁷¹ even though they had proved to be a beneficial means of improving communications between management and labor.⁷² Although the drafters of the Act contended that they were trying to eliminate only the company-dominated union,⁷³ the Act, as a practical matter, ended the company union⁷⁴ and substantially ham-

other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

National Industrial Recovery Act of 1933, 48 Stat. 195, 15 U.S.C. § 707(a)(1) (repealed 1935), *reprinted in* 1 NLRA HIST., *supra* note 4, at 68. Senator Wagner viewed his original Bill as a clarification and fortification of the provisions of this earlier statute. Although Congress had "attempted to open the avenues to collective bargaining," the statute "did not outlaw the specific practices by which some employers set up insuperable obstacles to genuine collective bargaining." *Hearings S. 2926, supra* note 31, *reprinted in* 78 CONG. REC. 3443 (1934) *and in* 1 NLRA HIST., *supra* note 4, at 15 (comments by Sen. Wagner when introducing S. 2926); *see* M. FORKOSCH, *supra* note 21, § 286.

71. *Hearings S. 2926, supra* note 31, *reprinted in* 1 NLRA HIST., *supra* note 4, at 700 (testimony of James T. Young, Teacher, University of Pennsylvania); *id.* at 104 (brief of William Whitfield Woods, President, The Institute of American Meat Packers); *id.* at 564 (testimony of Ralph F. Foster, Factory Manager, American Laundry Machinery Co.); *id.* at 691 (testimony of L.L. Balleisen, Secretary, Industrial Division, Brooklyn Chamber of Commerce); *Hearings S. 1958, supra* note 56, *reprinted in* 2 NLRA HIST., *supra* note 4, at 2148 (brief of James J. Cantwell, Employee Representative, John A. Roeblings Sons Co.); *id.* at 1896 (testimony of James L. Donnelly, Executive Vice President, Illinois Manufacturers' Association); *id.* at 2056 (testimony of E.R. Lederer, Chairman of Labor Subcommittee of the Planning and Coordinating Committee for the Petroleum Industry).

72. *Hearings S. 1958, supra* note 56, *reprinted in* 2 NLRA HIST., *supra* note 4, at 2057 (testimony of E.R. Lederer, Chairman, Labor Subcommittee of the Planning and Coordinating Committee for the Petroleum Industry); *Hearings S. 2926, supra* note 31, *reprinted in* 1 NLRA HIST., *supra* note 4, at 691 (testimony of L.L. Balleisen, Secretary, Industrial Division, Brooklyn Chamber of Commerce); *id.* at 564 (testimony of Ralph F. Foster, Factory Manager, American Laundry Machinery Co.).

73. 79 CONG. REC. 7565, 7570 (1935), *reprinted in* 2 NLRA HIST., *supra* note 4, at 2333 (statement by Sen. Wagner) (commenting that "[a]nyone familiar with these laws will recognize at once that there is nothing in the pending bill . . . which outlaws the so called 'company union', if by that term is meant simply an entirely free and independent organization of workers who through their own volition confine their cooperative activities to the limits of one company"); *Hearings H.R. 6288, supra* note 38, *reprinted in* 2 NLRA HIST., *supra* note 4, at 2488 (statement of Sen. Wagner); *Hearings S. 2926, supra* note 31, *reprinted in* 1 NLRA HIST., *supra* note 4, at 39 (statement of Sen. Wagner); 78 CONG. REC. 4229, 4230 (1934), *reprinted in* 1 NLRA HIST., *supra* note 4, at 23 (statement from *New York Times* article written by Sen. Wagner).

74. *Hearings S. 2926, supra* note 31, *reprinted in* 1 NLRA HIST., *supra* note 4, at 700 (testimony of James T. Young, Teacher, University of Pennsylvania) (noting that "Senator Wagner has repeatedly said . . . that he does not want to abolish all company unions . . . Well, as they stand there, they are so broad, so sweeping and drastic, that they would have the effect of destroying the company unions even where the employees heartily desired them. . ."). Representative Counery commented that the Act "will mean the elimination of company unions, not by force, but because the workers when they have the opportunity to pick their own union without coercion will not pick a company union." In response, Representative Marcontonio expressed his view that "[a] company union incidentally is synonymous with an employer-dominated union. Once you remove employer control your company union becomes an honest union or ceases to exist." 79 CONG. REC. 9668, 9699

pered the growth of all employee representational organizations.

The debate over the strengths and weaknesses of the company union reflected two major underlying beliefs of the drafters. The first theme concerned the conflict between an amicable model and an adversarial model of labor relations. Those opposing the Act argued that the Act's goal was the promulgation of adversity through the destruction of amicable and mutually beneficial relationships and that the result of the Act would be industrial strife and turmoil.⁷⁵ In their view, the proper model for industrial relations was one of mutual cooperation and benefit.⁷⁶

The Committee responded to this criticism by claiming that its intent was not to prevent the normal relations and innocent communications that are part of friendly employment relations,⁷⁷ but rather to

(1935), reprinted in 2 NLRA HIST., *supra* note 4, at 3152 (statements of Reps. Connery and Marcontonio).

75. *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 104 (brief of William Whitfield Woods, President, The Institute of American Meat Packers); *Hearings S. 1958, supra* note 56, reprinted in 2 NLRA HIST., *supra* note 4, at 1691 (testimony of Arno P. Mowitz, representing the Full Fashioned Hosiery Association) (stating that "our main objection to the practical phase of this bill is that you tie the employers' hands in an attempt to arrive at amicable relation and working terms with his employees"); *Hearings S. 1958, supra* note 56, reprinted in 1 NLRA HIST., *supra* note 4, at 1881-85 (testimony of Harvey G. Ellard, Institute of American Meat Packers) (asserting that "the whole plan of this proposed legislation is opposed to the basic philosophy of partnership and cooperation between employers and employees [and is based] on the theory that dealings between employers and employees are necessarily hostile and adverse"); *Hearings S. 1958, supra* note 56, reprinted in 2 NLRA HIST., *supra* note 4, at 1896-97 (testimony of James L. Donnelly, Executive Vice President, Illinois Manufacturers' Association) (noting that "[t]he whole spirit of this bill is to make enemies of employers and employees"); *id.* at 2148 (brief of James J. Cantwell, Employee Representative, John A. Roeblings Sons Co.); *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 437 (testimony of Henry S. Dennison, Industrial Advisory Board of the N.R.A. and a member of the National Labor Board) (commenting that "[y]ou are acting here not for the short but for the long pull, and in your eagerness to cure immediate ills cannot take too much risk of building up our industrial system into two armed camps—labor and management. . .").

76. *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 533 (testimony of Henry I. Harrinan, President, United States Chamber of Commerce); *id.* at 462 (testimony of A.P. Mowitz, representing the Full Fashioned Hosiery Association) (stating that "I think the average employer, when he becomes educated will realize that the old order has passed and a new order is before us, and that an amicable approach from both ends to that new order is the best solution of this problem"); *Hearings S. 1958, supra* note 56, reprinted in 2 NLRA HIST., *supra* note 4, at 1991 (testimony of John Thomas Smith, Vice President, General Motors Corporation) (noting that "[t]he bill runs counter to the common-sense theory of mutual interest, which should exist between employers and employees in manufacturing operations"); *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 565 (testimony of Ralph F. Foster, Factory Manager, American Laundry Machinery Co.).

77. *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 763 (testimony of Arthur H. Young, Vice President, United States Steel Corporation); *id.* at 718 (testimony of Leslie Vickers, Economist, American Transit Association); *id.* at 533 (testimony of Henry I. Harriman, President, United States Chamber of Commerce) (commenting that "[t]his Act . . . in my judgment . . . will tend to increase rather than decrease the trouble . . .").

further democratic collective bargaining.⁷⁸ The Act's supporters contended that industrial strife arose as a result of company-dominated unions.⁷⁹ Senator Wagner claimed that the Act promoted the concept of cooperation within labor itself.⁸⁰ He believed that only through wide cooperation could labor gain the strength necessary to bargain with management on an equal level,⁸¹ and that only when employees had this strength could they cooperate with management.⁸² The drafters did not want to force management and labor into adversarial positions, but, to achieve their goal of eventual equality, they were willing to draw some clear lines.

The second essential theme that surfaced in the early debate on section 8(a)(2) was the issue of freedom of choice.⁸³ The drafters of the Act stressed that the employee was free to choose any representation plan as long as it did not violate the confines of the Act.⁸⁴ This restriction on the amount of freedom granted by Senator Wagner attracted criticism from some,⁸⁵ while others praised the Act for freeing the em-

78. S. REP. NO. 1184, *supra* note 25, reprinted in 1 NLRA HIST., *supra* note 4, at 1104.

79. 79 CONG. REC. 9668, 9716 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 3192 (statement of Sen. Truax) (observing that "[t]he various and sundry forms of interference within referred to by employers, promote unrest, dissatisfaction, strife, and resentment, and revolt against the existing order of things"); *Hearings S. 2926, supra* note 31, reprinted in 1 NLRA HIST., *supra* note 4, at 131 (statement of William Green, President, American Federation of Labor); 79 CONG. REC. 7565, 7570 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2334 (statement by Sen. Wagner) (asserting that "[c]ontrary to the argument that the company union has the virtue of insuring industrial peace, we know that this open entry of employers into the field of active organization of workers promotes strife and discord").

80. 78 CONG. REC. 4229, 4230 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 23 (statement from *New York Times* article written by Sen. Wagner); 79 CONG. REC. 7565, 7570 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2321 (statement by Sen. Wagner) (noting that because "the isolated worker is . . . [c]aught in the labyrinth of modern industrialism and dwarfed by the size of corporate enterprise, he can attain freedom and dignity only by cooperation with others of his group").

81. "[W]ithout wider areas of cooperation among employees there can be no protection against nibbling tactics of the unfair employer. . . ." 78 CONG. REC. 4229, 4230 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 23; 78 CONG. REC. 3443, 3443 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 15 (comments by Sen. Wagner).

82. 78 CONG. REC. 4229, 4230 (1934), reprinted in 1 NLRA HIST., *supra* note 4, at 24 (statement from *New York Times* article written by Sen. Wagner) (commenting that "[m]ost impartial students of industrial problems agree that the highest degree of cooperation between industry and labor is possible only when either side is free to act or to withdraw . . .").

83. 79 CONG. REC. 9668, 9716 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 3192 (statement of Sen. Truax) (observing that "[t]his bill merely gives them an opportunity to choose for themselves [and] [l]et there be no interference by the employer in respect to that free choice"); 79 CONG. REC. 7648, 7650 (1935), reprinted in 2 NLRA HIST., *supra* note 4, at 2350 (comments by Sen. Borah) (stating that "I want to see the workingman free to join a union or to remain out of a union [and] free to form any kind of a union if it is freely formed").

84. *Hearings H.R. 6288, supra* note 38, reprinted in 2 NLRA HIST., *supra* note 4, at 2489 (statement of Sen. Wagner).

85. Ralph F. Foster, Factory Manager, American Laundry Machinery Co., believed that "any

ployee from the restrictions imposed by a company-dominated union.⁸⁶

III. JUDICIAL HISTORY

An examination of the legislative history of section 8(a)(2) lays only part of the foundation upon which to base an evaluation of the current limits of this section. The other component necessary to analyze the historical basis of section 8(a)(2) encompasses several Supreme Court decisions, both preceding and following the passage of the Act. In particular, these cases emphasize the early judicial attachment to the concept of employee freedom of choice.

A. Pre-1935 Judicial Perspective

An analysis of the judicial perspective on section 8(a)(2) begins before the passage of the Act with *Texas & New Orleans Railway Co. v. Brotherhood of Railway & Steamship Clerks*.⁸⁷ The Court decided the *Steamship Clerks* case under the Railway Labor Act of 1926,⁸⁸ a statute that provided much of the inspiration for the National Labor Relations Act.⁸⁹ In this case, the Brotherhood of Railway and Steamship Clerks sought to enjoin the Railway Company from recognizing and bargaining

type of labor organization should be permitted." While he opposed the company-dominated association "because it cannot accomplish any good," he feared that the Bill's effect on the company union would be unnecessarily restrictive. *Hearings S. 2926, supra note 31, reprinted in 1 NLRA HIST., supra note 4, at 565.* Similarly, Harvey G. Ellard of the Institute of American Meat Packers stated that his industry "has no desire to register a protest against the principle which seeks to guarantee the free choice of employees in the selection of their representatives for collective bargaining. It feels, however, that the choice should be wholly free, without coercion from any source." *Hearings S. 1958, supra note 56, reprinted in 2 NLRA HIST., supra note 4, at 1879.*

86. *Hearings S. 2926, supra note 31, reprinted in 1 NLRA HIST., supra note 4, at 149* (testimony of Dr. Francis J. Haas, National Labor Board) (asserting that "[t]he need of freedom from employer domination is patent and this freedom the bill before you seeks to guarantee"); H.R. REP. NO. 969, 74th Cong., 1st Sess. (1935), *reprinted in 2 NLRA HIST., supra note 4, at 2925* (noting that "[w]hat is intended is to make such organization the free choice of the workers, and not a choice dictated by forms of interference which are weighty precisely because of the existence of the employer-employee relationship").

87. 281 U.S. 548 (1930).

88. 44 Stat. 577 (1926) (codified as amended at 45 U.S.C. §§ 151-63 (1982)). The *Steamship Clerks* case concerned construction of the following language: "Representatives . . . shall be designated by the respective parties in such manner as may be provided in their corporate organization . . . or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." 45 U.S.C. § 152, ¶ 3 (1982). The Court interpreted the third paragraph of § 152 as outlawing company-dominated unions in the railroad industry. See J. COMMONS & J. ANDREWS, PRINCIPLES OF LABOR LEGISLATION 420-21 (4th ed. 1936).

89. In enacting the National Labor Relations Act, Congress had in mind the experience in the administration of the Railway Labor Act, and declared that the "bill is merely an amplification and further clarification of the principles enacted into the Law by the Railway Labor Act." H.R. REP. NO. 1147, 74th Cong., 1st Sess. 3 (1935), *reprinted in 2 NLRA HIST., supra note 4, at 3048.*

with a company union.⁹⁰ The Court concluded that the purpose of the legislation was not to forbid normal, friendly relations, but rather to prohibit the use of influence or coercion in derogation of a party's right to "self-organization."⁹¹ In the Court's view, the statutory scheme was based on the concept of freedom of choice.⁹² The Court held that "collective action would be a mockery" if one party could interfere with the other's freedom of choice.⁹³

B. Early Supreme Court Construction of Section 8(a)(2)

Despite passage of the Act, the *Steamship Clerks* case retained its precedential value. In two early opinions interpreting the Act, the Supreme Court cited to the *Steamship Clerks* case when analyzing potential violations of the National Labor Relations Act. In *NLRB v. Jones & Laughlin Steel Corp.*⁹⁴ the Court reaffirmed the *Steamship Clerks* holding that collective bargaining would be made a mockery if the Court allowed interference with freedom of choice.⁹⁵ In *NLRB v. Pennsylvania Greyhound Lines, Inc.*⁹⁶ the Court examined whether an order of the National Labor Relations Board (the Board) to withdraw recognition from a labor organization, and post notices to this effect, was an appropriate remedy for a section 8(a)(2) violation.⁹⁷ Although the case was not directly on point, the Court stated that based on congressional intent to clarify the principles of the Railway Labor Act in the National Labor Relations Act, the *Steamship Clerks* case stood as viable precedent for freedom of choice.⁹⁸

90. *Steamship Clerks*, 281 U.S. at 554-55. While in the midst of a controversy before the Railway Labor Board, the Texas & New Orleans Railway Co. formed a company union to prevent an outside union from organizing its employees. *Id.* at 555.

91. The Court noted that "[t]he intent of Congress is clear with respect to the sort of conduct that is prohibited. 'Interference' with freedom of action and 'coercion' refer to well understood concepts of the law." *Id.* at 568. Likewise, in this context, the word "influence" would not be interpreted "as interdicting the normal relations and innocent communications which are part of all friendly intercourse," but rather as "cover[ing] the abuse of relation or opportunity so as to corrupt or override the will." *Id.*

92. *Id.* at 569 (stating that "the entire policy of the Act" depends on "uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained").

93. *Id.* at 570.

94. 301 U.S. 1 (1936). In this case the Court found congressional power for the NLRA in the protection of interstate commerce.

95. *Id.* at 34.

96. 303 U.S. 261 (1938).

97. *Id.* at 262-63.

98. *Id.* at 266 (quoting REPORT OF THE HOUSE COMM. ON LABOR, H.R. REP. NO. 1147, *supra* note 89, reprinted in 2 NLRA HIST., *supra* note 4, at 3048); see *supra* note 88 & 89 and accompanying text.

In two other important Supreme Court opinions, which arose contemporaneously with *Greyhound Lines*, the Court strengthened the concept of employee free choice. In *NLRB v. Newport News Shipbuilding & Dry Dock Co.*⁹⁹ the Court reviewed an order of the Board that disestablished an employee committee because of employer domination. The Board found that control of the organization's form and structure vested in both labor and management.¹⁰⁰ The Court upheld the Board's determination and concluded that such control of an employee organization violates the complete freedom of action guaranteed by the Act.¹⁰¹

In *NLRB v. Link-Belt Co.*¹⁰² the defendant corporation's employees formed an organization in response to the Act prohibiting their company union.¹⁰³ The Board concluded that the organization was not the result of the employees' free choice¹⁰⁴ because of certain benefits and employer assistance provided to the organization during its formation.¹⁰⁵ The Court agreed with the Board's holding and stated that the employer's failure to announce formally that the employees had a free choice following the dissolution of the company union was a violation of the Act.¹⁰⁶

99. 308 U.S. 241 (1939). The facts found by the Board indicated that the employer, in cooperation with his employees, put into effect an employee representation plan with employer financial support. *Id.* at 244. The committee contained an equal number of employee representatives and management representatives, employee elections were arranged by management, and the plan controlling the organization could not be altered without employer consent. *Id.* at 245-46. After the passage of the Act, the employer revised the plan to eliminate all financial support. *Id.* at 246.

100. The Court noted:

[W]here an organization has existed for ten years and has functioned in the way that the Committee has functioned, with a joint control vested in management and men, the effects of the long practice cannot be eliminated and the employees rendered entirely free to act upon their own initiative without the complete disestablishment of the plan.

Id. at 250.

101. *Id.* at 249.

102. 311 U.S. 584 (1941).

103. *Id.* at 586-87. From 1933 until 1937 Link-Belt Co. maintained a company union. On April 12 and 13, 1937, several employees who were disappointed with the Supreme Court's acceptance of the Act organized the Independent Union of Craftsmen. On April 19, 1937, the employer and the employees reached an agreement which dissolved the old company union and recognized the new Independent. *Id.*

104. *Id.* at 587. The Court recognized that "[a]n 'inside' union, as well as an 'outside' union, may be the product of the right of the employees to self-organization and to collective bargaining 'through representatives of their own choosing,' guaranteed by § 7 of the Act." *Id.* The real issue, then, was not the insider status of the union but rather the employees' free choice.

105. The Board found evidence that representatives of Independent solicited employees to join Independent on company premises and company time, while representatives of an outside union were fired for similar activity. Furthermore the Board found that company foremen actively solicited for Independent and that leaders of the old company union actively supported the new Independent. *Id.* at 589-92.

106. *Id.* at 597-98 (finding that "[c]ircumstantial evidence makes credible the finding that complete freedom of choice on the part of the employees was effectively forestalled by maintenance of the company union").

The last important Supreme Court opinion in the judicial history of section 8(a)(2) is *NLRB v. Cabot Carbon Co.*¹⁰⁷ *Cabot Carbon* is crucial to understanding section 8(a)(2) because of the Court's examination of the definition of "labor organization" found within section 2(5) of the Act.¹⁰⁸ The Court examined an employee committee that met with management to discuss various topics traditionally negotiated during collective bargaining.¹⁰⁹ The question was whether this organization, which the employer had formed and financially supported, qualified as a labor organization under section 2(5).¹¹⁰ The Board held that the committee was a labor organization under section 2(5), but the Court of Appeals reversed,¹¹¹ finding that the term "dealing with" as used in this section to define an organization's activities meant "bargaining with."¹¹² After reviewing the legislative history of section 2(5) and noting its re-enactment without change in 1947, the Court concluded that Congress intended the phrase "dealing with" to cover more than simple bargaining.¹¹³ This ruling reflected the Court's assumption that the drafters of the Act intended to include employee committees within the definition of section 2(5) and thereby ensure their independence through section 8(a)(2).

IV. JUDICIAL APPLICATION OF SECTION 8(a)(2)

Building on these early cases, judicial interpretation of potential violations of section 8(a)(2) traditionally centered on several crucial questions. The first subsection shall examine how courts that found employee committees in violation of section 8(a)(2) answered these questions, while the following subsection examines factually similar cases in which the court found no violation. The criteria addressed herein are all factors in a balancing test by which the court decides if section 8(a)(2) prohibits a particular organization.

107. 360 U.S. 203 (1959).

108. See *supra* notes 48-54 and accompanying text.

109. *Cabot Carbon*, 360 U.S. at 207 (noting that the committee "made and discussed proposals and requests respecting many other aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions").

110. *Id.* at 204-05.

111. *Id.* at 210 (citing *Cabot Carbon Co. v. NLRB*, 256 F.2d 281 (5th Cir. 1958)).

112. *Id.*

113. *Id.* at 211-18. The Court first noted that in the congressional discussion the Secretary of Labor proposed an amendment to § 2(5), which the Senate rejected, that would have replaced the term "dealing" with "bargaining collectively." *Id.* at 211. The Court went on to note that "[w]ith full knowledge of the terms of § 2(5) of the original Wagner Act, and of its legislative history and judicial interpretation, Congress in the Taft-Hartley Act re-enacted the section without change." *Id.* at 212 (footnotes omitted).

A. Traditional Criteria of a Section 8(a)(2) Violation

Frequently, the first question in an analysis of an employee committee is whether the committee qualifies as a labor organization under section 2(5) of the Act. Threatened committees often unsuccessfully attempt to avoid section 8(a)(2) by denying labor organization status.¹¹⁴ Since *Cabot Carbon*¹¹⁵ courts have expanded the meaning of labor organization within section 2(5)¹¹⁶ to include any plan¹¹⁷ or loosely formed¹¹⁸ or "amorphous"¹¹⁹ organization that discusses any of a variety of topics with the employer.¹²⁰ Based on judicial interpretation of section 2(5), it would be ineffective to claim that a group is not a labor organization because it was chosen at random from the employees,¹²¹ lacked formal organization, constitution, or bylaws,¹²² did not make express recommendations,¹²³ or served merely as a channel of communications¹²⁴ with the employer.

114. See *Lawson Co. v. NLRB*, 753 F.2d 471 (6th Cir. 1985); *NLRB v. Clapper's Mfg., Inc.*, 458 F.2d 414 (3d Cir. 1972); *NLRB v. Ampex Corp.*, 442 F.2d 82 (7th Cir. 1971); *NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678 (6th Cir. 1968); *NLRB v. Thompson Ramo Wooldridge, Inc.*, 305 F.2d 807 (7th Cir. 1962).

115. See *supra* notes 107-13 and accompanying text.

116. See *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958). In *Pacemaker* the court found a "loosely formed" employee organization in violation of the Act. The court concluded that the committee had no formal organization, bylaws, officers, or dues, but such findings were immaterial when evaluating § 2(5) labor organization status. *Id.* at 883.

117. *Ampex*, 442 F.2d at 84. In *Ampex* management emphasized

that the committee had no formal organization structure, that employees who were to attend a meeting were chosen at random from among groups of employees, that participation was rotated, . . . that there was a separate grievance procedure in which the committee was not involved, and that the matters discussed at committee meetings ranged widely beyond the subjects concerning which employees and labor ordinarily deal.

Id.

118. *Pacemaker*, 260 F.2d at 883.

119. *Clapper's Mfg.*, 458 F.2d at 419. In this case, the committee was inaugurated by the employer as an "oral suggestion box," and it held meetings at the company's convenience, collected no dues, and had no "semblance of formal structure." *Id.* at 418. The court held that, despite the organization's "amorphous quality," "the committee was established in part to discuss employee grievances and problems with management and did actually 'deal' with [management] in regard to a number of such issues." *Id.* at 419.

120. See *Lawson Co. v. NLRB*, 753 F.2d 471, 477 (6th Cir. 1985); *NLRB v. General Shoe Corp.*, 192 F.2d 504 (6th Cir. 1951). In *General Shoe*, the court found that the employee committee, which was selected in an election organized and executed by management, received clerical services from management, had no authority to make final decisions, and discussed a variety of topics with management, qualified as a labor organization. *Id.* at 507.

121. *Ampex*, 442 F.2d at 84; see *supra* note 117.

122. See *supra* notes 116 & 119.

123. *Thompson Ramo*, 305 F.2d at 810 (stating that "express recommendation is not essential to 'dealing,' if discussion between respondent and the Association Board was designed to remedy grievances").

124. *Ampex*, 442 F.2d at 84 (committee formed to act as "suggestion box"); see *Clapper's Mfg.*, 458 F.2d at 418 (committee was "to serve, ostensibly, as an 'oral suggestion box'").

Another important question in applying section 8(a)(2) is whether an employee committee was formed during an outside union's organizing campaign. Legislative history indicates that a major concern of the Act's drafters was the use of the employee committee as a weapon against the outside union.¹²⁵ Consequently, courts consistently view the formation of such committees for the purpose of crippling an outside union's campaign as a violation of the Act.¹²⁶ Although in many situations the formation of a committee may have had no relation to the outside union's efforts,¹²⁷ an employee committee formed in the midst of an outside union campaign may indicate an anti-union animus, which in turn may trigger an investigation of the committee's underlying purpose.¹²⁸

A third important issue is the extent of the employer's involvement in the election of employee committee members. This inquiry may reveal the extent of the employer's control over the employee committee. Even though the Senate removed the term "initiate" from the language of the Act,¹²⁹ the courts' investigation of the election issue reflects a continuing concern over who initiates the organization. Employers can violate section 8(a)(2) by telling employees to pick representatives,¹³⁰ by preparing, circulating, and distributing ballots¹³¹ produced with company supplies,¹³² and by posting the results of the election.¹³³ Because the Act specifically refers to domination or interference with the "formation . . . of a labor organization,"¹³⁴ the employer's activity regarding the election process may constitute a section 8(a)(2) violation in itself, though courts often view such activity as simply one factor in their

125. See *supra* notes 80-82 and accompanying text.

126. See, e.g., *Classic Indus., Inc. v. NLRB*, 667 F.2d 205 (1st Cir. 1981); *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889 (8th Cir. 1977); *NLRB v. Grand Foundries, Inc.*, 362 F.2d 702 (8th Cir. 1966); *NLRB v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954).

127. See, e.g., *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (7th Cir. 1958); *NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678, 679 (6th Cir. 1968) (employee committee formed in June 1964 while union campaign did not begin until April 1965).

128. See, e.g., *NLRB v. H & H Plastics Mfg. Co.*, 389 F.2d 678 (6th Cir. 1968) (finding anti-union bias indicative of violation); *Modern Plastics Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967) (finding no violation because no anti-union bias).

129. See *supra* notes 30-35 and accompanying text.

130. *Lawson Co.*, 753 F.2d at 474. Lawson met with 35 to 50 sales assistants and told them to pick representatives to serve on the committee that would discuss complaints.

131. *Classic Indus., Inc. v. NLRB*, 667 F.2d 205, 206 (1st Cir. 1981). When the outside union began to try to unionize the plant, the employer decided he preferred to work with employees. The manager had his foreman distribute ballots to workers to pick two workers to be representatives on a new employee committee. *Id.*; *NLRB v. Prince Macaroni Mfg. Co.*, 329 F.2d 803, 810 (1st Cir. 1964) (finding the plant manager "responsible to cause ballots to be prepared, circulated, counted, and to have results posted").

132. *NLRB v. Sharples Chems.*, 209 F.2d 645, 648 (6th Cir. 1954).

133. *Prince Macaroni*, 329 F.2d at 810; see *supra* note 131.

134. See S. 1958, *supra* note 4, reprinted in 2 NLRA Hist., *supra* note 4, at 3273.

overall analysis.¹³⁵

A fourth factor involves the circumstances surrounding the employee committee's meetings with the employer. A court may ask whether management called or scheduled the meeting,¹³⁶ whether management representatives conducted the meeting,¹³⁷ whether high-level management personnel attended the meeting,¹³⁸ whether management took and posted the minutes of the meeting,¹³⁹ and whether the employee committee had an opportunity to meet outside the employer's presence.¹⁴⁰ A court also may inquire into whether the material discussed¹⁴¹ at the meeting placed the employee committee within the confines of section 2(5).¹⁴² Furthermore, courts generally consider whether an employee, in meeting with the employer and discussing issues deter-

135. In *NLRB v. H & H Plastics Manufacturing*, the court listed the following factors as relevant to the question of management domination:

lack of any written governing instrument and lack of any independent means of financial support. . . , meetings . . . on company property, the attendance at these meetings of high management representatives, the taking and distribution of minutes by a management official, the fact that meetings could be called by a management official, the fact that employees were paid for the time spent at meetings, management participation in elections, management preparation and distribution of ballots, management determination of employee electoral units, management determination of time of election, . . . absence of independent legal advice. . . .

389 F.2d at 680.

136. See, e.g., *Pacemaker*, 260 F.2d at 883 (finding that "the [c]ompany determined the number of employees to serve on committee, and the manner of their selection . . . the time, date and place of meetings and paid the employees for attending").

137. See, e.g., *Grand Foundries*, 362 F.2d at 709 (holding that the "[shop] Committee was put into effect and promulgated by management, under the aegis of management, [and] utiliz[ed] company space and time, with a management representative actively moderating the meetings"); *Prince Macaroni*, 329 F.2d at 810 (finding that the employer "conduct[ed], at its own expense, the election of members of the Committee").

138. See, e.g., *Clapper's Mfg.*, 458 F.2d at 418 (finding that "[m]eetings were held at the company's convenience, on its premises, and never in the absence of management"); see also *Classic Indus.*, 667 F.2d at 207 (finding that the "[v]ice-president was present at every meeting, and [that] he opened, closed and guided the discussion at most, if not all of them").

139. See, e.g., *Prince Macaroni*, 329 F.2d at 810 (finding that "[m]inutes of the Committee meetings [were] made by the personnel director, . . . typed at [the employer's] expense and posted on [the employer's] door"); *Sharples Chems.*, 209 F.2d at 647.

140. See, e.g., *NLRB v. Reed Rolled Thread Die Co.*, 432 F.2d 70 (1st Cir. 1970) (stating that the "record reveals evidence of a bland unilateralism in accomplishing management objectives").

141. *Thompson Ramo*, 305 F.2d at 810 (focusing on "discussion between respondent and the Association [that] was designed to remedy grievances"); *Pacemaker*, 260 F.2d at 883 (looking into "dealing[s] with company concerning grievances, wages and conditions of work"); *Sharples Chems.*, 209 F.2d at 647-48 (finding that a "wide variety of subjects were discussed . . . includ[ing] . . . pay, work schedules, overtime, pension plans and hospitalization insurance"); *General Shoe*, 192 F.2d at 504 (observing that "committees deal with the [r]espondent concerning grievances, wages, hours of work, and conditions of employment").

142. Section 2(5) defines a labor organization as one that deals with employers "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or condition of work." S. 1958, *supra* note 4, reprinted in 2 *NLRA Hist.*, *supra* note 4, at 3271.

minative of the employment relationship, can exhibit the same degree of independence necessary for arm's length negotiation.¹⁴³

A fifth question in assessing a potential violation of section 8(a)(2) is whether the employer provides financial support to the organization.¹⁴⁴ Financial support of an employee committee ranges from direct financial subsidies to paying employees regular wages, or a special salary, for the time spent in meetings with the employer.¹⁴⁵ Courts question the ability of an employee to bargain as an equal with the party who pays his salary.¹⁴⁶ A majority of employee committees violate the language of the Act, at least technically, because most employee committees function without independent financial resources.¹⁴⁷ Although an employee may feel no compulsion to yield to an employer because the employer is paying the employee for time spent at a meeting, several courts, by broadly reading the Act, show distrust of any form of financial support.¹⁴⁸

The final element in assessing whether a section 8(a)(2) violation exists is an evaluation of the actual structure of the employee committee. The Act itself does not demand any certain structure, but courts often believe that an unstructured organization is easily subject to management control.¹⁴⁹ Most employee committees that violate the Act lack

143. See *Lawson*, 753 F.2d at 477 (asserting that "[t]he ultimate question with respect to unlawful domination or interference is whether the employer has been able to 'induce adherence of employees to the [labor organization] in the mistaken belief it was truly representative and afforded an agency for collective bargaining'"); *Reed Rolled*, 432 F.2d at 70 (holding that the "Board could properly conclude that such a picture was one of subtle domination rather than of arm's length, vigorous give-and-take bargaining between two self-reliant groups").

144. Financial support prohibition comes directly from § 8(a)(2) language. See *supra* note 29 and accompanying text.

145. See *Pacemaker*, 260 F.2d at 883; *Sharples Chems.*, 209 F.2d at 648; *General Shoe*, 192 F.2d at 506.

146. As one court has noted:

Collective bargaining becomes a delusion and a snare if the employer, either directly or indirectly, is to sit on both sides of the bargaining table; and, with the great advantage that he holds as the master of pay and promotions, he will be on both sides of the table if he is allowed to take any part whatever in the choice of bargaining representatives by the employees.

NLRB v. Stow Mfg. Co., 217 F.2d 900, 904 (2d Cir. 1954) (citing *American Enka Corp. v. NLRB*, 119 F.2d 60, 62-63 (4th Cir. 1941)).

147. See, e.g., *Pacemaker*, 260 F.2d at 883; *General Shoe*, 192 F.2d at 506; see also *Clapper's Mfg.*, 458 F.2d at 418; *Reed Rolled*, 432 F.2d at 71.

148. See Annotation, *What Constitutes "Financial or Other Support" Within § 8(a)(2) Making Such Support of a Union an Unfair Labor Practice*, 10 A.L.R.3d 853, 861 (1966).

149. See *Grand Foundries*, 362 F.2d at 709 (observing that "[t]he employees had no meetings discussing the advisability or the desire for such an organization, and they actually played no part as a group in originating and organizing this Committee as a representative bargaining unit for employees . . . [this Committee] certainly was not set up to and was not so constituted as to further free and unfettered discussion and consideration of employees' rights as envisioned by the Act"); see also *Classic Indus.*, 667 F.2d at 207; *Reed Rolled*, 432 F.2d at 71.

a formal written constitution or bylaws.¹⁵⁰ Besides examining what structure exists, courts generally examine who devised or created this structure.¹⁵¹ An employee committee that has a formal structure may be more susceptible to employer control than an unstructured group because the structure may be provided by or for the employer.¹⁵²

The criteria explained in this subsection compose the primary elements of a balancing equation. A court, using this traditional approach, may assign any value to the various criteria to determine whether an employee committee violates that court's interpretation of section 8(a)(2). No single element in the analysis is generally considered the most crucial. In most cases brought under section 8(a)(2), an individual criterion does not establish a violation. Instead, the combination of factors in the context of the particular industry and employment relationship may indicate a problem. The elements that compose this general analysis represent recurring elements examined by numerous courts that have attempted to define the difficult terms "support" and "domination." This analysis, however, does not provide the answer to whether a committee should be dissolved. Rather, it merely presents questions that should be asked in the overall balancing. Indeed, mechanical application of this criteria analysis has invalidated various beneficial programs that violate section 8(a)(2) only in a technical sense.¹⁵³

B. *Employee Free Choice Supplanting Section 8(a)(2) Criteria*

Although courts frequently find an employee committee in violation of section 8(a)(2), judicial condemnation has not been universal. Aside from the cases that fail simply for lack of a factual basis or lack of section 2(5) organization status,¹⁵⁴ several courts have found no viola-

150. See, e.g., *Ampex*, 442 F.2d at 84; *Pacemaker*, 260 F.2d at 883; see also *Clapper's Mfg.*, 458 F.2d at 418.

151. See *NLRB v. Fremont Mfg. Co.*, 558 F.2d 889, 891 (8th Cir. 1977) (finding that the employer created a "Progress Team, which consisted of two employees, elected in a company-conducted election, who were to bring employee complaints to the employer"); *Grand Foundries*, 362 F.2d at 709; see also *Classic Indus.*, 667 F.2d at 206.

152. See *Fremont*, 558 F.2d at 891.

153. See *supra* notes 72-73 and accompanying text.

154. See *Hotpoint Co. v. NLRB*, 289 F.2d 683 (7th Cir. 1961). The Board reviewed an employee committee and found the committee in violation of the Act because of employer domination. The Board contended that the "Council is 'fettered' in its powers to 'follow through' on its recommendations", that the company could eliminate councilmen by reorganizing, and that amendments to council by-laws required company approval. *Id.* at 685-86. The court found no merit in the Board's contentions; see also *NLRB v. Newman-Green, Inc.*, 401 F.2d 1 (7th Cir. 1968); *NLRB v. Magic Slacks, Inc.*, 314 F.2d 844 (7th Cir. 1963) (overturning the Board's finding that an employee committee which met on employee time without management's presence, and which was overwhelmingly supported by employees, violated the Act). "There is nothing of substance to show invidious motivation on Newman-Green's part, or a result which affected the self-organization right of the employee . . . employees supervised the election, counted the ballots, and

tion based on the concept of employee freedom of choice. Courts have expanded the theory of employee freedom of choice¹⁵⁵ beyond the drafters' conception¹⁵⁶ to allow employees to choose a labor organization that may or may not satisfy some of the traditional criteria applied to section 8(a)(2). Along with an expansion of the concept of freedom of choice, several courts have realized that cooperation is not necessarily equivalent to domination or interference.¹⁵⁷ Acceptance of freedom of choice and the concept of the distinct nature of cooperation has not been universal, but acceptance by several influential circuits indicates a promising future for cooperative efforts under section 8(a)(2).

1. Early Recognition of the Acceptability of Freely Chosen Cooperative Efforts

Some of the early cases that recognized the acceptability of cooperation concentrated on the distinction between the terms "domination," or "interference," and "cooperation."¹⁵⁸ One of the most frequently noted cases drawing this distinction was *Chicago Rawhide Manufacturing Co. v. NLRB*.¹⁵⁹ In *Chicago Rawhide* the Seventh Circuit found that an employee committee did not violate the Act because the evidence showed no actual domination, only potential domination.¹⁶⁰ To the court, the term "support," which the court equated with domination and interference, implied some degree of control, while "cooperation" implied assistance given to the employees in carrying out their independent goals.¹⁶¹ In reaching a conclusion that promoted cooperation, the court partially misconstrued the purpose of the Act as the promotion of cooperation between management and labor¹⁶² rather than the drafters'

determined the winners without any interference from management." *Newman-Green, Inc.*, 401 F.2d at 5. The court concluded that the evidence did not support an inference that Newman-Green interfered with employee free choice. *Id.* at 5-6.

155. See *supra* notes 84-86 and accompanying text.

156. See *supra* note 80 and accompanying text.

157. See *infra* notes 158-63 and accompanying text.

158. See, e.g., *Coppus Eng'g Corp. v. NLRB*, 240 F.2d 564, 573 (1st Cir. 1957) (holding that the use of company property and time for committee meetings "shows no more than cooperation by petitioner and a possibility of company control [which] does not constitute substantial evidence of support or domination").

159. 221 F.2d 165 (7th Cir. 1955). The court noted that "[a]llowing the use of Company property, and even time, for employee meetings is not in itself an unfair labor practice . . . We are not going to permit the destruction of a happy and cooperative employer-employee relationship when there is absolutely no evidence to support a finding of unfair labor practice." *Id.* at 170.

160. *Id.* at 167-68 (asserting that the employment relationship "itself offers many possibilities for domination . . . but *actual domination* must be shown before a violation is established" (emphasis in original)).

161. *Id.* at 167.

162. The court reasoned that "[i]f this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the

conception of cooperation among labor itself.¹⁶³

General judicial acceptance of employee committees has come slowly. The first associations to rebut successfully section 8(a)(2) challenges were independent unions that had very little employer contact.¹⁶⁴ In addition, these early cases emphasized the concept of employee freedom of choice. For example, in *NLRB v. Wemyss*¹⁶⁵ the court asked whether the independent union was freely chosen by the employees.¹⁶⁶ The court reasoned that the issue of domination depended on the subjective state of mind of the employee.¹⁶⁷ The court allowed this independent union to continue because the employees were free to choose the union and the employer's assistance in its formation was minimal.¹⁶⁸ Another early case rejecting a section 8(a)(2) challenge to an independent union was *NLRB v. Valentine Sugars, Inc.*¹⁶⁹ Examining the historical setting surrounding the drafting of the Act in 1935, the court stated that, although the Act evolved during a period of virtual class war between employer and employee,¹⁷⁰ the Act did not prohibit the employer from making courteous or friendly gestures.¹⁷¹ The court concluded that because the employees chose the independent union to re-

Act, which is cooperation between management and labor." *Id.* See *NLRB v. Post Publishing Co.*, 311 F.2d 565, 569 (7th Cir. 1962) (supporting the "pattern of friendly and courteous cooperation, or even generous action, of the sort [that] brings about the end result in labor-management relations sought by the underlying philosophy motivating the National Labor Relations Act").

163. See *supra* note 80 and accompanying text.

164. See, e.g., *Post Publishing*, 311 F.2d at 569; *Wayside Press, Inc. v. NLRB*, 206 F.2d 862 (9th Cir. 1953). In *Wayside Press*, employees used a company printing press to prepare ballots for a vote on whether to reactivate an independent company union, at a meeting held on company time. The court found no violation of the Act in "the employer's affirmative urging of the employees to exercise their rights under the Act to organize an independent union," noting that "[a]cquiescence or approval are not what the Act contemplates when it uses strong words such as 'interfere,' 'restrain,' 'coerce,' and 'dominate' . . ." *Id.* at 866.

165. 212 F.2d 465 (9th Cir. 1954).

166. *Id.* at 471.

167. *Id.* (stating that the question is whether the organization was the result of employees' free choice, "in their own interests, and without regard to the desires of their employer, or whether the employees formed and supported the organization, rather than some other, because they knew their employer desired it and feared the consequences if they did not").

168. *Id.* The employer provided the independent union with facilities and opportunities to contact the employees that he did not provide to the outside union.

169. 211 F.2d 317 (5th Cir. 1954).

170. *Id.* at 320 (contrasting the view "prevalent in some quarters . . . that a class war, with employees on one side and employers on the other, was not only irrepressible but desirable, and that the proper, . . . normal relation and attitude of each to the other should be . . . one of suspicion, distrust and even hatred" with the idea that the Act was designed "to assuage such feelings and change such relations").

171. *Id.* at 320-21 (commenting that the purpose of § 8(a)(2) is to prevent employers from "pretending to permit their employees to join or form an organization to represent them in collective bargaining, while . . . actually forming the organization or taking it over themselves, with the result that they would have representation on both sides of the table, indeed would be dealing with themselves").

present them, generous actions would not trigger a violation of section 8(a)(2).¹⁷²

2. Expansion of the Free Choice Analysis to Employee Committees

The early Supreme Court cases involving section 8(a)(2), which showed a degree of deference to the broad concepts of freedom and cooperation,¹⁷³ opened the door to an expansive application of the concept of employee freedom of choice to employee committees. In *Hertzka & Knowles v. NLRB*¹⁷⁴ the Ninth Circuit reviewed a Board decision which found an employee committee that met on employer time and property with employer representatives to be a violation of the Act.¹⁷⁵ The court stated that the facilitation of employee free choice was central to the Act¹⁷⁶ but acknowledged that under a literal reading of section 8(a)(2), any manner of cooperation would violate the Act.¹⁷⁷ The court, relying in part on the *Wemyss* decision, stated that such a "myopic view" of the section would inhibit the Act's objective of establishing the employees' chosen system.¹⁷⁸ The court concluded that to condemn the employee committee would signify acceptance of a purely adversarial model and disestablish a freely chosen cooperative arrangement.¹⁷⁹

The First Circuit in *NLRB v. Northeastern University*¹⁸⁰ applied a similar approach to the Ninth Circuit's in *Hertzka & Knowles*. In *Northeastern University* the court examined a challenge to an employee committee that had no formal membership, no dues, no mass meetings, and whose members needed management's approval to participate.¹⁸¹ Concentrating on the "subjective realities" and not the "objective potentialities" of domination of employee will, the court stated that judicial precedent indicated some room for labor-management co-

172. *Id.* at 323.

173. *See supra* notes 94-113 and accompanying text.

174. 503 F.2d 625 (9th Cir. 1974).

175. *Id.* at 627. The employee committee was formed as a result of an outside union's failure to reach an agreement with the employer. Both employer and employees participated at the meeting in which the committee plan evolved. *Id.* at 626.

176. *Id.* at 629.

177. *Id.* at 630.

178. *Id.* The court quoted the *Wemyss* case in which the court had earlier asked "whether the organization exists as a result of a choice freely made by the employees, in their own interests, and without regard to the desires of their employer." *Id.* at 630 (citing *Wemyss*, 212 F.2d at 471).

179. *Id.* at 631 (stating that "[w]here a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act").

180. 601 F.2d 1208 (1st Cir. 1979).

181. *Id.* at 1212. The employee committee was composed of 15 employees, selected by category of staff worker, whose purpose was to exchange information with management relating to staff problems. The committee met with management during lunch breaks, in a room provided by management, to discuss terms and conditions of employment. *Id.* at 1211-12.

operation short of domination.¹⁸² According to the court, changing conditions in labor and management relations supported the argument for "cooperative employer-employee arrangements as alternatives to the traditional adversary model."¹⁸³ Thus, minor participation by management in employee committees was acceptable as long as the committee represented the employees' free choice.¹⁸⁴

3. The Sixth Circuit Approach

While several jurisdictions slowly have accepted labor-management cooperation by relaxing the strict criteria applied to section 8(a)(2), the Sixth Circuit has established itself as a leader in adopting cooperative efforts. The Sixth Circuit cases, which include *Modern Plastics Corp. v. NLRB*,¹⁸⁵ *Federal-Mogul Corp. v. NLRB*,¹⁸⁶ *NLRB v. Streamway Division of the Scott & Fetzer Co.*,¹⁸⁷ and *NLRB v. Homemaker Shops, Inc.*,¹⁸⁸ are some of the most influential cases in the field of labor-management relations. These cases expound a forward, modern view that is consistent with current trends in employee-employer relations.

In 1967 the Sixth Circuit showed signs of accepting employee-employer cooperation in *Modern Plastics Corp. v. NLRB*¹⁸⁹ in which the court reviewed a finding of the Board that an employee committee with no constitution, bylaws, or dues, whose members received their regular salary for meetings with the employer, and who met to discuss grievances with the employer was in violation of the Act.¹⁹⁰ Evaluating the traditional criteria applied to potential section 8(a)(2) violations from the subjective standpoint of the employee,¹⁹¹ the court found that the committee was the choice of the employees and that to suppress such an organization when the employees were not complaining would be a mistake.¹⁹² The court concluded that the Act's purpose of encouraging

182. *Id.* at 1213-14.

183. *Id.* at 1214.

184. *Id.* at 1215 (observing that "even formal management minority participation on a shop committee" is not necessarily illegal "so long as such representation reflects the employees' free choice").

185. 379 F.2d 201 (6th Cir. 1967).

186. 394 F.2d 915 (6th Cir. 1968).

187. 691 F.2d 288 (6th Cir. 1982).

188. 724 F.2d 535 (6th Cir. 1984).

189. 379 F.2d 201 (6th Cir. 1967).

190. *Id.* at 202-03.

191. *Id.* at 204.

192. *Id.* at 203-04. The court noted that the "[t]he Board is not made either guardian or ruler over the employees, but is only empowered to deliver them from restraint at the hands of the employer when it exists." *Id.* (quoting *Humble Oil & Ref. Co. v. NLRB*, 113 F.2d 85 (5th Cir. 1940)).

cooperation supported the continuation of this committee.¹⁹³ While noting the primary purpose of the Act was the promotion of industrial peace through collective bargaining,¹⁹⁴ the court permitted an organization to exist that satisfied the traditional criteria for a dominated organization—an organization the drafters might see as a major obstacle to unfettered collective bargaining.

The Sixth Circuit closely followed the *Modern Plastics* analysis in *Federal-Mogul Corp. v. NLRB*.¹⁹⁵ An employee committee appealed a Board order finding the committee in violation of section 8(a)(2) because the committee, which had no formal constitution, bylaws, or dues, negotiated a contract with the employer.¹⁹⁶ The court's analysis acknowledged that the potential for managerial interference and domination always existed within the employment relationship. The court, however, noted that the Act only proscribed domination that interfered with the employees' free will.¹⁹⁷ The court stated that to draw the line at anything less than actual domination would seriously limit "the very cooperative efforts the Act was designed to encourage."¹⁹⁸ The court would find a violation only if management's actions actually undermined employee independence and freedom of choice.¹⁹⁹ In conclusion, the court not only reversed the Board's finding, but also praised the committee as an excellent example of labor-management cooperative efforts.²⁰⁰

Two more recent cases reaffirmed this general approach. *NLRB v. Homemaker Shops, Inc.*²⁰¹ conformed directly with the approach adopted in the previous decisions, while *NLRB v. Streamway Division of the Scott & Fetzer Co.*²⁰² found a different means to achieve similar

193. *Id.* at 204 (asserting that "[t]here is a line between cooperation and domination, and the purpose of the Act is to encourage cooperation and discourage domination").

194. *Id.*

195. 394 F.2d 915 (6th Cir. 1968).

196. *Id.* at 917. The committee met monthly with the employer, except when it was negotiating a collective bargaining agreement. Members of the committee lost no pay while at meetings and were responsible for reporting back to other employees. The stated purpose of the committee was to develop and maintain good communications between employer and management. *Id.*

197. *Id.* at 918.

198. *Id.*

199. *Id.*

200. *Id.* at 921.

201. 724 F.2d 535 (6th Cir. 1984).

202. 691 F.2d 288 (6th Cir. 1982); see Annotation, *Employee Committee or Similar Group as "Labor Organization" Under the National Labor Relations Act*, 75 A.L.R. Fed. 262 (1985); see also Hogler, *Employee Involvement Programs and NLRB v. Scott & Fetzer Co.: The Developing Interpretation of Section 8(a)(2)*, 35 LAB. L.J. 21 (1984). This piece examines *NLRB v. Scott & Fetzer Co.* as an attempt by the Sixth Circuit to articulate coherent principles under § 8(a)(2) that are flexible enough to permit employee-employer cooperation consistent with the court's "nonadversarial" view of labor relations. *Id.* at 22. The author describes the Sixth Circuit approach

objectives. In *Homemaker* the court applied the subjective test, first accepted in *Modern Plastics*, focusing on the employee's impression of the employer's action on the employee's freedom of choice.²⁰³ The employer provided considerable assistance that enabled the committee, which had no outside financial or administrative structure, to function.²⁰⁴ Noting the traditional fear that an unorganized committee might be far more susceptible to management interference, the court emphasized that potential control did not violate the Act.²⁰⁵ The court concluded that as long as the committee effectively represented employee interests, "peaceful cooperation between the Company and the Committee should be encouraged, not chastised."²⁰⁶

Another approach applied by the Sixth Circuit focused on interpretation of section 2(5)²⁰⁷ and built on the Supreme Court's expansive definition of a labor organization in *Cabot Carbon*.²⁰⁸ In *NLRB v. Streamway Division of the Scott & Fetzer Co.*²⁰⁹ the court refused to extend the holding of *Cabot Carbon* to an employee committee.²¹⁰ The court noted that the Supreme Court in *Cabot Carbon* had not placed any limitation on the term "dealing with" in section 2(5).²¹¹ The court emphasized that not all forms of communication on personnel policy violate the Act.²¹² The court also found support for a flexible approach

as indicative of "a flexible, enlightened view of labor relations." *Id.* at 27; cf. Schmidman & Keller, *Employee Participation Plans as Section 8(a)(2) Violations*, 35 LAB. L.J. 772 (1984) (interpreting *Scott & Fetzer* and concluding that courts are lessening the protection provided under § 8(a)(2) by narrowing the definition of labor organization under § 2(5), thereby encouraging the use of employee participation plans as a substitute union or union weakening devices).

203. *Homemaker*, 724 F.2d at 545.

204. Among other services, the employer sent notices of committee meetings, provided coffee and space for the meetings, printed ballots for committee elections, and reimbursed travel expenses. *Id.* at 547.

205. *Id.* at 545.

206. *Id.* at 547.

207. See *supra* notes 49-55 and accompanying text.

208. See *supra* notes 107-13 and accompanying text.

209. 691 F.2d 288 (6th Cir. 1982).

210. *Id.* at 294 (commenting that "we cannot accept the Board's suggestion that *Cabot Carbon* should be read so broadly as to call any group discussing issues related to employment a labor organization").

211. *Id.* at 292 (reasoning that because Justice Whittaker "did not indicate the limitations . . . upon the meaning of 'dealing' under the statute, the Supreme Court has not yet spoken on the issue").

212. *Id.* The court supported the reasoning of Judge Wisdom's dissent in *NLRB v. Walton Manufacturing Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting), that "the Board's policy against all employee committees (in practice, if not in theory) is a dangerous departure from the law and one that may have unfortunate, far-reaching social and economic effects." *Id.* at 182. In Judge Wisdom's view, §§ 2(5) and 8(a)(2) should be read "as contemplating employer-employee cooperation, as long as it does not take the form of a labor organization dominated or improperly influenced by the employer. One of the purposes of the Act was to soften the dog-eat-dog attitude of management and labor in some industries." *Id.* at 186.

to interpretation of the Act in *Modern Plastics* and *Federal-Mogul*.²¹³ Although the decision reaffirmed the circuit's approach in the area of employee freedom of choice, the court believed it could settle the case by limiting *Cabot Carbon* and denying labor organization status to the committee. The court concluded by stating that a literal interpretation of section 2(5) would at some point frustrate the purpose of the Act.²¹⁴

These Sixth Circuit opinions exemplify a positive change in the judicial approach to employee committees under section 8(a)(2). Overly zealous application of the traditional criteria would have struck down these cooperative efforts, which the Sixth Circuit shielded with the free choice analysis. A free choice analysis enables a court to protect an arrangement that it feels is beneficial, based on the subjective evaluation of the individual court. Although the test is subjective, this approach would eliminate a dominated labor organization in accordance with the intent of the Act. The free choice concept is a response to the current needs of industry in order to protect cooperation that would not survive a mechanical application of the traditional criteria. Since 1935 labor's status in the employment relationship has changed. Consequently, employees are now able to make certain choices regarding their conditions of employment. If employees wish to join management in cooperative efforts, the free choice analysis ensures that such arrangements can survive.

IV. CONCLUSION

The drafters of section 8(a)(2) intended to foster the growth of employee organizations by insulating them from employer influence. The drafters wrote section 8(a)(2) broadly to prevent any subtle influence by the employer over employee representation organizations. The only cooperation envisioned by the drafters of the Act was cooperation among labor itself. Cooperation between management and labor would be acceptable only at a later stage of employee organization development when employee organizations would be independent and strong enough to choose freely between cooperation and contention. Since the drafting of section 8(a)(2), labor organizations have matured sufficiently so that they are in a strong enough position to negotiate with management. With the fruition of many of the drafters' goals comes the realization that labor-management cooperation no longer should be stifled by a rigid application of section 8(a)(2).

213. *Scott & Fetzer*, 691 F.2d at 293. The court stated that its previous decisions "indicate, however, that our circuit is willing to reject a rigid interpretation of the statute and instead consider whether the employer's behavior fosters employee free expression and choice. . . ." *Id.*

214. *Id.* at 295.

Courts are beginning to realize that the goals of the 1935 Act are being achieved. The early court decisions following the original protective attitude of the drafters of the Act struck any arrangement that had any sign of employer support or domination. These decisions now attract less favorable attention. The use of the traditional criteria to invalidate any arrangement that conflicts with a strict reading of section 8(a)(2) now seems outdated. As employee representation organizations grow in size and strength, courts have begun to sense that strict protection is no longer necessary. These courts believe that freely chosen cooperation should be permitted, but they acknowledge that courts are bound to apply the criteria consistently used in cases concerning section 8(a)(2). Consequently, these courts continue to apply the traditional criteria, but add the employee free choice element to their balancing test.

While some authors have argued that section 8(a)(2) should be repealed or amended to facilitate cooperative efforts,²¹⁵ this Note contends that new legislation should not be enacted. The gradual acceptance of the free choice concept method means the growth of a practical method of evaluating the beneficial nature of a cooperative effort. This free choice approach allows courts to evaluate a program individually, supporting those that are beneficial and striking those that are harmful. One element new legislation might properly address is the acceptability of programs that do not represent an uncoerced decision by the employee.

The freedom of choice approach applied to the traditional 8(a)(2) analysis provides the flexibility necessary to promote economic growth. New legislation cannot balance all the interests that have become intricately woven into the working interpretation of 8(a)(2) over the past fifty years. Although labor and management relations have changed significantly since 1935, a flexible reading of the current legislation, within the framework of free choice, will be more productive than the development of new, untested legislation. The concept of furthering employees' free choice has its roots in early cases and the legislative debate. Although free choice appeared early in the discussion of section 8(a)(2), the concept sat dormant until various courts revived it in order to overcome the section's mechanical application. The willingness of some

215. See Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, 96 YALE L.J. 2021 (1987). The author supports the decisions by several courts of appeals not to find a violation of § 8(a)(2), yet contends such decisions violate congressional intent in passing the Wagner Act. The Note concludes that Congress is the proper agent of change and should repeal § 8(a)(2).

courts to use the concept of freedom of choice in the area of employee committees to support a cooperative effort may indicate a willingness to support other forms of freely chosen cooperative arrangements.

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