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### Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?

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# NONMAJORITY UNIONS, EMPLOYEE PARTICIPATION PROGRAMS, AND WORKER ORGANIZING: IRRECONCILABLE DIFFERENCES?

CAROL BROOKE\*

## INTRODUCTION

The National Labor Relations Board's 1992 decision in *Electromotion, Inc. v. Teamsters Local 1049*,<sup>1</sup> upheld by the Seventh Circuit in 1994,<sup>2</sup> provoked a political and academic debate about the value of employer-initiated employee participation programs ("EPPs") and the effect of these programs on unions and on the rights of employees to organize. In that case, the Board held that Electromotion, a non-union manufacturing plant, violated section 8(a)(2)<sup>3</sup> of the National Labor Relations Act ("the Act")<sup>4</sup> when it formed employee "action committees" to consider issues such as absenteeism and attendance bonuses.<sup>5</sup> Section 8(a)(2) of the Act states that it is an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."<sup>6</sup>

The business community reacted swiftly to the decision, calling for repeal, or at least serious modification, of section 8(a)(2) to allow for EPPs such as quality circles, quality of work life programs, and other similar groups.<sup>7</sup> Congress weighed in with a bill called the

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1. 309 N.L.R.B. 990 (1992).

2. *Electromotion, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994).

3. 29 U.S.C. § 158(a)(2) (1994).

4. 29 U.S.C. §§ 151-69 (1994).

5. See *Electromotion*, 309 N.L.R.B. at 997.

6. 29 U.S.C. § 158(a)(2).

7. See, e.g., Steve Gunderson, *Manager's Journal: NLRB Muddied Regulatory Waters*, WALL ST. J., Feb. 1, 1993, A10. Rafael Gely outlines the distinctions between the various forms of employee participation programs in his article, *Whose Team Are You On? My Team or My Team?: The NLRA's Section 8(a)(2) and the TEAM Act*, 49 RUTGERS L. REV. 323 (1997). Quality circles are small groups of employees, with or without managerial members, who

Teamwork for Employees and Managers Act ("TEAM Act"), which sought to rewrite section 8(a)(2) to allow employers to create EPPs in non-union workplaces as long as the programs represented the employees to the same extent as management.<sup>8</sup> The argument was that companies need the improved efficiency and output that results from employee involvement in order to be competitive in the global marketplace.<sup>9</sup> Many labor advocates responded with dire predictions of the revival of company unions. They characterized EPPs as sham organizations, designed to indoctrinate workers into a pro-management mentality and to stamp out incipient union organizing.<sup>10</sup> Although President Clinton vetoed the bill on July 30, 1996,<sup>11</sup> the debate continues.

Since *Electromation*, labor supporters have found themselves divided. Some assert that the actual effect of *Electromation* on employers' ability to establish effective EPPs has been minimal.<sup>12</sup> There are writers who find it paternalistic to assume EPPs foster false consciousness in workers,<sup>13</sup> while others sympathize with organized

identify problems and solutions and have responsibilities to the circle that extend beyond the time of the meeting. Work teams are groups of workers who define a common purpose and set performance standards for members. Work teams create work structures in which workers' jobs are interrelated and teams take joint responsibility for decisionmaking. See *id.* at 335-37. Charles Heckscher describes quality of worklife ("QWL") programs as employee problem-solving sessions that take place on work time, in which employees identify problems and suggest solutions. QWLs discuss policy as well as production issues. See CHARLES HECKSCHER, *THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION* 128 (1996).

8. The Teamwork for Employers and Managers Act, S. 295, 104th Cong. (1995) [*hereinafter* TEAM Act]. The TEAM Act would have amended § 8(a)(2) to allow an exception for employers who set up, assist, and/or participate in EPPs "to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer. *Id.* § 3.

9. See, e.g., 142 CONG. REC. S7614, at S7615 (daily ed. July 10, 1996) (statement of Sen. Hatfield) ("To be competitive in today's international . . . market, employees must act in partnership with management.").

10. See *id.* at S7617 (statement of Sen. Feingold) ("Management-dominated teams are antidemocratic mechanisms for companies to fight real worker-selected representative labor systems. They are anti-union tools.").

11. See Joseph L. Manson et al., *The Developing Law of Employee Committees*, SD50 A.L.I.-A.B.A. 127, 133 (1999).

12. See, e.g., Bruce E. Kaufman, *Does the NLR Act Constrain Employee Involvement and Participation Programs in Nonunion Companies?: A Reassessment*, 17 YALE L. & POL'Y REV. 729 (1999) (showing through interviews with management that *Electromation* has not caused many constraints on the ability to establish EPPs); Michael H. LeRoy, "Dealing With" *Employee Involvement in Nonunion Workplaces: Empirical Research Implications for the TEAM Act and Electromation*, 73 NOTRE DAME L. REV. 31 (1997) (surveying human resource managers at six Fortune 500 companies and concluding that *Electromation* did not have a chilling effect of companies' ability to establish EPPs).

13. See, e.g., Samuel Estreicher, *Employee Involvement and the "Company Union"*

labor's stance,<sup>14</sup> and argue for a strict construction of section 8(a)(2). Finally, some labor advocates focus primarily on other mechanisms for enhancing employee voice in the workplace, including the elimination of the doctrine of exclusive representation, which requires that the designated representative be the only representative. This would also encourage the formation of a relatively new form of employee organization: identity groups centered on issues of race and/or gender.<sup>15</sup> A subset of those who promote identity groups also support the abolition or modification of section 8(a)(2) as another means of promoting employee participation.<sup>16</sup>

The recent attention to identity groups reflects a growing interest in the topic of nonmajority unions ("NMUs"). An NMU is an independent organization formed by a group of workers to foster activism around issues of concern to workers, provide mutual support, hold job training or other skills-building sessions, or form coalitions with other labor or community organizations.<sup>17</sup> Some NMUs closely resemble unions and engage in activities typical to a union, including assisting members with grievances, educating workers about their rights, and communicating with management about health and safety concerns. However, an NMU does not represent a majority of workers and cannot engage in collective

*Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. REV. 125, 128 (1994).

14. See, e.g., Robert B. Moberly, *Worker Participation After Electromation and DuPont*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW 147, 159 (Sheldon Friedman et al. eds., 1994) (arguing that § 8(a)(2) reforms would hurt organizing and collective bargaining); Rick Fantasia et al., *A Critical View of Worker Participation in American Industry*, 15 WORK & OCCUPATIONS 468, 469 (1988) ("Worker participation programs . . . are one component of a larger management offensive to increase capital's power in the workplace and to weaken or replace an important basis for workers' power, the union.").

15. See, e.g., Marion Crain & Ken Matheny, *Labor's Divided Ranks: Privilege and the United Front Ideology*, 84 CORNELL L. REV. 1542, 1616-17 (1999) (arguing that elimination of majority rule and exclusive representation will allow workers whose interests have not traditionally been represented by organized labor to gain power in the workplace).

16. See, e.g., Rachel Geman, *Safeguarding Employee Rights in a Post-Union World: A New Conception of Employee Communities*, 30 COLUM. J.L. & SOC. PROBS. 369, 388 (proposing the amendment of section 8(a)(2) to allow employer support for labor organizations "comprised of members of protected categories (as defined by Title VII of the Civil Rights Act) and which exist to protect and serve the needs of members of that protected class.").

17. See, e.g., Alan Hyde, *After Smyrna: Rights and Powers of Unions That Represent Less Than a Majority*, 45 RUTGERS L. REV. 637 (1993) [hereinafter Hyde, *After Smyrna*] (arguing that union supporters should continue organizing after election loss); Alan Hyde, *Employee Caucuses: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149 (1993) [hereinafter Hyde, *Employee Caucuses*] (arguing that caucuses can be forceful advocates for workers); Clyde Summers, *Unions Without Majority: A Black Hole?*, 66 CHI.-KENT L. REV. 531 (1990) (arguing that nonmajority unions have many opportunities for activism).

bargaining, although some have argued persuasively that it should be allowed to do so.<sup>18</sup>

In this Note, I argue that those who support an expanded role and status for NMUs in the American workplace need to become active participants in the debate surrounding EPPs. Much of the analysis and writing in the area of section 8(a)(2) has focused on the effects of EPPs on existing unions.<sup>19</sup> In an era in which union power is steadily declining,<sup>20</sup> workers are showing increased interest in aligning themselves based on gender, race, or immigrant status,<sup>21</sup> and employers are touting EPPs.<sup>22</sup> It is important to look at the impact these employer-sponsored programs have on NMUs and the ability of workers to organize in other nontraditional ways.

This Note analyzes the interactions between EPPs and NMUs, and the impact of these very different employee organizations on worker organizing. In Part I, I describe the work of the Workers Unity Committee (“the Committee”), an NMU at Consolidated Diesel Company (“CDC”), a manufacturing plant in Whitakers, North Carolina, and outline the employer’s use of EPPs. Part II considers the ways in which employer-sponsored EPPs may foster or hinder worker organization and looks at the current status of section 8(a)(2), under recent decisions of both the National Labor Relations Board and the courts. I discuss the role, legal standing, and influence

18. See Matthew W. Finkin, *The Road Not Taken: Some Thoughts on Nonmajority Employee Representation*, 69 CHI.-KENT L. REV. 105 (1993) (arguing that members-only bargaining may be more responsive to workers’ concerns than bargaining via an exclusive representative).

19. See, e.g., Yonatan Reshef et al., *Employee Involvement Programs: Should Unions Get Involved?*, 20 J. LAB. RES. 557 (1999); Rick Fantasia et al., *supra* note 14, at 468 (analyzing two case studies of quality of work life programs in union settings); Tove H. Hammer & Robert N. Stern, *A Yo-Yo Model of Cooperation: Union Participation in Management at the Rath Packing Company*, 39 INDUS. & LAB. REL. REV. 337 (1986).

20. See HECKSCHER, *supra* note 7, at xv (“The futility of organized labor has become even more apparent as membership has dropped to below 11 percent in the private sector, and has largely stopped growing even in the public sector.”).

21. The growing worker center movement is responding to this trend. See, e.g., Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995) (describing worker center whose members are Latin American immigrants working on Long Island); Benjamin Marquez, *Organizing Mexican-American Women in the Garment Industry: La Mujer Obrera*, 15 WOMEN & POL. 65 (1995) (analyzing the experience of a worker center that focuses on the particular concerns of Mexican American women).

22. Numerous employers spoke in favor of the TEAM Act. See, e.g., *Employee Involvement: Hearings on S. 295 Before the Senate Small Bus. Comm.*, 104th Cong. (1996) (statement of Donna Gooch, Human Resource Director, Sunsoft Corp.) (stating that employee involvement has helped her company reduce turnover, improve performance, reduce the injury rate, and motivate employees, and that EPPs are necessary to keep Sunsoft competitive in the global marketplace).

on organizing of nonmajority unions in Part III. Finally, in Part IV, I consider how reform of section 8(a)(2) might impact NMUs and make recommendations to enhance the viability of these worker-run organizations. I use the Committee throughout this Note as an example of an NMU that is currently grappling with the challenge of organizing workers in a workplace that stresses employee participation. I conclude that worker organization and worker voice are best served by requiring employers who sponsor EPPs to offer equal support and assistance to NMUs.

## I. CASE STUDY: CDC WORKERS' UNITY COMMITTEE

### A. Background

Workers at CDC have been building engines for the company, a joint venture between Cummins Engine Company and J.I. Case Company, since 1983.<sup>23</sup> There is no union at CDC; indeed, North Carolina businesses have one of the lowest unionization rates in the country.<sup>24</sup> For a number of years, however, a group of CDC employees have been actively involved in the Committee, an NMU "committed to building a strong membership organization and movement for workers [sic] rights and empowerment on the job and in the community."<sup>25</sup>

The Committee defines its role as follows: "to identify the pressing issues effecting [sic] CDC workers in the plant and community; to engage CDC workers in discussions and education about what needs to be done to improve working conditions; [and] to involve CDC workers in organized activities that encourage management to address issues that we face as employees."<sup>26</sup> The Committee's activism has focused on shopfloor issues such as variable pay<sup>27</sup> and scheduling,<sup>28</sup> and has extended beyond the plant to include

23. See Kyle Marshall, *New Way of Working Slowly Catching On*, NEWS & OBSERVER, Sept. 5, 1993; see also Curtis Sittenfeld, *The Factory Powered by People: There's Something Revolutionary Going on Inside a Facility in North Carolina. By Granting Workers an Extraordinary Level of Responsibility, They Are Achieving Extraordinary Levels of Performance*, NAT'L POST, July 10, 1999.

24. See North Carolina Department of Commerce, *The Ten Best Reasons for Locating in North Carolina* (visited Nov. 10, 1999) <<http://www.commerce.cnidr.org:80/commerce/business/best.html>>.

25. CDC Workers Unity Committee, *CDC Workers Unity Committee Purpose and Program* (on file with author).

26. *Id.*

27. See, e.g., CDC Workers Unity Committee ("Committee"), *Why an Equal Share*, UNITY NEWS, Aug. 1992, at 1 [hereinafter Committee, *Why an Equal Share*]; Committee, *An Equal*

support for the struggles of workers at other companies<sup>29</sup> and involvement in local political issues.<sup>30</sup> The Committee's membership is predominantly African American (CDC's workforce is estimated to be seventy percent African American),<sup>31</sup> and some of its efforts have been directed toward issues of racial discrimination.<sup>32</sup>

The Committee is a good example of what an NMU is able to accomplish and what its limitations are under the current labor laws. The Committee's persistence at a company with a strong tradition of work teams and other types of employee participation is also illustrative of the ways in which EPPs affect worker organization. Finally, the example of the Committee is useful because it shows how labor law reform in the area of EPPs might impact worker-initiated organizations.

## *B. Organizing Techniques and Accomplishments*

### *1. Within the Plant*

#### *a) Wages, Hours, and Conditions of Employment*

The Committee has advocated for a number of policy changes at the plant level. Safety issues have been a focus; for example, after a worker nearly bled to death on a Sunday at work, the Committee initiated a campaign to keep the medical department open on the weekends.<sup>33</sup> The Committee has also been active on a number of wage issues, pushing management to pay each worker an equal amount of variable, or bonus, pay,<sup>34</sup> and advocating a two dollar an hour raise for all employees.<sup>35</sup> It succeeded in having overtime

*Share Is Only Fair*, UNITY NEWS, May 1992, at 4.

28. See, e.g., Committee, *B-Rodline Workers Return to 8 Hr Day*, UNITY NEWS, Jan. 1993, at 2.

29. See, e.g., Committee, *Guatemalan Workers: Morganton, NC*, UNITY NEWS, June 1995, at 4 (discussing poultry workers' fight for union recognition).

30. See, e.g., Committee, *Whitakers Voters Elect "Voices for the People,"* UNITY NEWS, Dec. 1993, at 2.

31. Telephone Interview with Jim Wrenn, Organizer of the Committee (Aug. 4, 2000).

32. See, e.g., Committee, *Discrimination Charges Filed by Manpower Worker*, UNITY NEWS, Dec. 1993, at 1 (supporting a temporary worker who filed racial discrimination charges after being refused permanent employment).

33. See Committee, *Weekend Medical Coverage a Hot Issue; Management Misses the Point*, UNITY NEWS, Dec. 1993, at 3 [hereinafter Committee, *Weekend Medical Coverage a Hot Issue*]; Committee, *Worker Suffers Near Fatal Accident: Workers Call for Weekend Medical Coverage*, UNITY NEWS, Sept. 1993, at 1.

34. See Committee, *Why an Equal Share*, *supra* note 27, at 1.

35. See Committee, *What CDC Workers Want for Christmas: \$2 per Hour Across the Board Raise*, UNITY NEWS, Dec. 1994, at 1.

included in variable pay calculations,<sup>36</sup> and has advocated for, and won, a paid Martin Luther King Day holiday.<sup>37</sup> The Committee employs a variety of techniques to organize workers and influence management, including petitions,<sup>38</sup> plant surveys on the Committee's focus issues,<sup>39</sup> and meetings with management.<sup>40</sup>

*b) Enforcement of Rights of Individual Workers*

The Committee champions the causes of individual workers who experience unjust treatment on the job.<sup>41</sup> The Committee has used its strong community ties to build community-labor alliances to support these efforts. For example, after a young couple was fired for leaving work before their overtime shift had ended in order to pick up their children during a snowstorm, the Committee organized a letter-writing campaign to the company CEO,<sup>42</sup> mobilized community-based organizations, and appealed to the city council.<sup>43</sup> The Committee won and the couple was reinstated with back pay.<sup>44</sup>

## 2. In the Community

The Committee does not simply request support from the local community; it also is actively involved in promoting activities that benefit the community.<sup>45</sup> The Committee is highly conscious of the inter-connectedness of worker and community struggles. It was instrumental in setting up a Community Empowerment Alliance, a group designed to work on issues of common concern to the mostly African American residents of a predominantly unincorporated rural

36. See Committee, *2.5% Raise an Insult After Record Year*, UNITY NEWS, Mar. 1995, at 1.

37. See Committee, *CDC Workers Celebrate King Day*, UNITY NEWS, May 1992, at 2.

38. See Committee, *Petition Tradition at CDC*, UNITY NEWS, Aug. 1992, at 3.

39. See Committee, *Zero in on Safety Shoes*, UNITY NEWS, July 1994, at 1; Committee, *Variable Pay Movement Picking Up Steam*, UNITY NEWS, Jan. 1993, at 1.

40. See Committee, *Weekend Medical Coverage a Hot Issue*, *supra* note 33, at 3.

41. See, e.g., Committee, *supra* note 32, at 1.

42. See Committee, *Rehire Cullen and Yolanda Parker*, UNITY NEWS, Apr. 1996, at 1.

43. Telephone Interview with Saladin Muhammad, organizer with United Electrical, Radio, and Machine Workers of America (Nov. 9, 1999).

44. *Id.*

45. For example, Committee members helped raise funds for a highly successful local, community-run health clinic in Bloomer Hill. *Id.* The Committee also sponsors a free bi-weekly workers' legal clinic at the Workers' Center in nearby Rocky Mount. See, e.g., Committee, *Workplace and Community Updates*, UNITY NEWS, May 1993, at 4. The Committee's newsletter, *Unity News*, includes regular updates of union and NMU organizing efforts at plants in the nearby area, and encourages CDC workers to support these campaigns. See, e.g., Committee, *Workplace Updates*, UNITY NEWS, Aug. 1992, at 4.



area.<sup>46</sup> The Alliance's commitment to a community labor agenda has helped prevent retaliatory firings of Committee activists.<sup>47</sup>

The Committee involves itself in local politics, often focusing on issues of particular importance to African Americans.<sup>48</sup> In Whitakers, a town in which no African American had served on the city council in 100 years,<sup>49</sup> the Committee became actively involved in the election campaign of a slate of three African American candidates (including one CDC employee).<sup>50</sup> Two of the three Committee-endorsed candidates won. The Committee also supported a boycott of white-owned businesses in nearby Battleboro during an annexation battle.<sup>51</sup>

### 3. Union Campaign

In 1994, the Committee initiated attempts to organize a local office of the United Electrical, Radio and Machine Workers of America ("UE"). Throughout the years, the Committee has consistently recognized the limitations of an NMU and lauded the greater achievements possible in an organized environment.<sup>52</sup>

For its part, UE does not use a traditional union-organizing model in its interactions with CDC workers. Though theoretically building toward a majority presence in the plant, the main UE organizer working with the Committee recognizes the inherent value of NMUs as providing an institutionalized presence of organized workers within a plant in a region of the country with historically low rates of organization. His work with the Committee includes educating workers about the connections between CDC and the global economy, providing training for shop stewards and other activists, and maintaining a supportive union presence, so workers will come to understand the importance of unions and also raise their expectations about working conditions.<sup>53</sup> Meanwhile, the Committee/UE continues as a strong nonmajority presence at CDC.

46. See Telephone Interview with Muhammad, *supra* note 43.

47. See *id.*

48. See Committee, *supra* note 30, at 2.

49. See Telephone Interview with Muhammad, *supra* note 43.

50. See *id.*

51. See Committee, *Justice for Battleboro*, UNITY NEWS, July 1994, at 2.

52. See, e.g., Committee, *All Workers at CDC Deserve King Holiday*, UNITY NEWS, Mar. 1994, at 3 (pointing out that contract workers at CDC do not receive a paid MLK holiday, but contract workers at a nearby unionized facility do).

53. Telephone Interview with Muhammad, *supra* note 43.

### C. Employee Participation Programs at CDC

#### 1. Teams

CDC is an enthusiastic proponent of the team-based approach. Teams rotate as a group between a day and night work schedule on a biweekly basis, and bonuses are awarded to everyone on the team or to no one on the team.<sup>54</sup> CDC emphasizes team responsibility and team problem solving. The teams address issues such as absenteeism;<sup>55</sup> one worker describes calling fellow team members each morning to wake them up for work.<sup>56</sup> The company's philosophy towards the teams is expressed during quarterly in-plant meetings held by the general manager with small groups of employees, in the company's weekly newsletter, or over the plant's closed circuit television network.<sup>57</sup>

The Committee views the team approach with a cynical eye. In the Committee's outline of its purpose and policies, it characterizes the company's team approach as a management tool that does not allow workers a true voice:

The team concept systems do not give workers real power to address problems related to production, like speed-ups, forced over-time, multiple job assignments and health and safety . . . . The teams don't provide CDC workers with an independent means of challenging unfair treatment and discrimination. CDC management defines the guidelines for the decisions of the teams and can reverse them at will.<sup>58</sup>

#### 2. Employee Reflective Groups

In addition to the teams, CDC also convenes periodic "Employee Reflective Groups" to consider specific workplace policies and to make recommendations. The Reflective Groups have dealt with a variety of issues, including wage increases,<sup>59</sup> child care,<sup>60</sup> and health benefits.<sup>61</sup> The Committee is quick to use its newsletter, *Unity News*, to point out the problems with management's employee

54. *See id.*

55. *See* THE EMPLOYEE HANDBOOK FOR CONSOLIDATED DIESEL COMPANY 43 (1992) (on file with author).

56. *See* Marshall, *supra* note 23.

57. *See* Sittenfeld, *supra* note 23.

58. *CDC Workers Unity Committee, supra* note 25.

59. *See* Committee, *supra* note 35, at 1; Committee, *CDC Wages Still Falling Behind*, UNITY NEWS, Mar. 1994, at 1 [hereinafter Committee, *CDC Wages*].

60. *See* Committee, *CDC Workers Need Day Care*, UNITY NEWS, July 1994, at 3.

61. *See* Committee, *New Medical Charge Is a Pay Cut*, UNITY NEWS, Jan. 1993, at 3.

involvement system. For example, the Health Care Reflective Group, established by management after worker outcry over proposed charges for health insurance, recommended against charging employees and instead suggested increased company support for the wellness program and fitness center; however, these ideas were ignored by company officials.<sup>62</sup>

The Committee also emphasizes the problem that management-selected representatives compose the reflective groups.<sup>63</sup> The company's frequent refusal to follow the recommendations of its committees is also a problem.<sup>64</sup> The committees have no decision-making power; all suggestions are forwarded to management.<sup>65</sup>

## II. EMPLOYEE PARTICIPATION PROGRAMS AND WORKER ORGANIZING

### A. *Purposes of Employee Participation Plans*

#### 1. Employee Performance

EPPs take many different forms, and management asserts a wide variety of reasons for creating these programs. One rationale is that EPPs increase productivity and performance by encouraging workers to make suggestions to improve production. This provides incentives for workers to perform at a higher level and creates a greater sense of trust towards management, making the employees more flexible and responsive.<sup>66</sup> Decreasing employees' resistance to changes in the workplace and improving morale are often cited as important primary goals of EPPs.<sup>67</sup>

At CDC, credit is given to the team system for the company's low turnover and injury rates, as well as for enhancing "morale,

62. *See id.*

63. *See* Committee, *CDC Wages*, *supra* note 59, at 1 (stating that decisions of the reflective group are not representative of the workers' desires because reflective group members are chosen by management).

64. *See* Committee, *supra* note 60, at 3 (discussing problem that a CDC task force appointed to look into child care issues was disbanded because management did not want to fund the projects it proposed).

65. *See* Committee, *Equal Share Update*, UNITY NEWS, Feb. 1993, at 1 (noting that the Payscale Reflective Group can only make recommendations to management).

66. *See* William N. Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 INDUS. & LAB. REL. REV. 594, 595 (1994).

67. *See* Susan Schwochau et al., *Employee Participation and Assessments of Support for Organizational Policy Changes*, 18 J. LAB. RES. 379, 380, 382 (1997).

learning, trust, and personal growth.”<sup>68</sup> CDC has only one supervisor for every 100 employees; most plants have a ratio of one to twenty-five.<sup>69</sup>

## 2. Deterrence of Worker Organizing

Some assert a more insidious antiworker, antiunion purpose to EPPs. Guillermo Grenier conducted a seven-month long study of quality circles and their impact on workers at Ethicon-Albuquerque in the early 1980s.<sup>70</sup> He concluded that the underlying goal of the worksite innovations instituted at the plant was to control workers: “This control is exerted not only over their behavior while on the job but also when the design works well, over their attitudes about their work and how they feel all day and their inability to change it.”<sup>71</sup> Grenier identifies a number of quality circle characteristics that enhance management control over workers. These include peer pressure, sometimes through confrontation, to encourage or discourage particular behaviors, screening of new hires to assess their union sentiments, division of the workforce into fragmented work teams, creation of a humanized face for management power, and the use of managerial language.<sup>72</sup> Thus, workers are manipulated by the creation of a sense of control coupled with a decrease in actual control. The divisive effect of EPPs on worker unity and cohesion may become more pronounced when some workers assume positions of responsibility with the program.<sup>73</sup>

Suggesting that the benefits workers perceive from EPPs are illusory, other analysts agree with Grenier’s conclusion that EPPs promote the development of a false sense of worker control over the workplace. These analysts point out that companies with strong commitments to EPPs are often antiunion, one stated that “[t]here is strong evidence that participation programs are carefully controlled by management precisely to prevent workers from expanding the scope of their participation, and thus the promise of power is likely to be an empty one.”<sup>74</sup> GMC’s quality of worklife literature states

68. See Sittenfeld, *supra* note 23.

69. See *id.*

70. See GUILLERMO J. GRENIER, *INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY*, at xvi (1988).

71. See *id.* at xvii-xviii.

72. See *id.* at 17.

73. See Fantasia et al., *supra* note 14, at 476-77.

74. *Id.* at 471-72.

outright that the program is not intended to foster workplace democracy.<sup>75</sup>

In some cases, companies promote EPPs as an integral part of an antiunion strategy. Ethicon-Albuquerque management was able to use its quality circle structure very effectively to counter an emerging union campaign. They accomplished this by encouraging discussions about the union during team meetings,<sup>76</sup> identifying union supporters as antiteam<sup>77</sup> and punishing them for poor attitudes,<sup>78</sup> keeping prounion workers separated from others through the team system,<sup>79</sup> and using team meetings as a means for management to inform workers about its anti-union philosophy.<sup>80</sup> Another researcher has found a correlation between a corporate anti-union philosophy and the presence of EPPs, a grievance system, teams, and other innovations.<sup>81</sup>

Even in workplaces where management institutes EPPs at some point considerably after the plant has become unionized, the two do not always coexist comfortably. Rick Fantasia points out that a grievance procedure arrived at through collective bargaining may be undermined by a quality of worklife program in which management responds more favorably to grievances raised through the quality of worklife procedure.<sup>82</sup> A study of telephone company employees found that workers who felt positive about employee involvement were more likely to want their unions to be more involved in the program.<sup>83</sup> This could suggest either genuine enthusiasm for an empowering EPP, or the sentiments of coopted union members taken in by management rhetoric.

At CDC, management has made many attempts to deter the Committee in its organizing efforts. The company has resisted the Committee's attempts to exercise its members' right to engage in concerted activity. In August of 1994, the Committee filed an unfair

75. *See id.* at 474.

76. *See* Louise Lamphere & Guillermo J. Grenier, *Women, Unions, and "Participative Management": Organizing in the Sunbelt*, in *WOMEN AND THE POLITICS OF EMPOWERMENT* 227, 241 (Ann Bookman & Sandra Morgen eds., 1988).

77. *See id.* at 243-44.

78. *See* GRENIER, *supra* note 70, at 83.

79. *See* Lamphere & Grenier, *supra* note 76, at 254.

80. *See* GRENIER, *supra* note 70, at 60.

81. *See* Thomas A. Kochan et al., *The Effects of Corporate Strategy and Workplace Innovations on Union Representation*, 39 *INDUS. & LAB. REL. REV.* 487, 494 (1986).

82. *See* Fantasia et al., *supra* note 14, at 478.

83. *See* Yonaton Reshef et al., *supra* note 19, at 566.

labor practices (“ULP”) charge<sup>84</sup> based on CDC’s policy prohibiting solicitation or distribution of literature by employees during nonworking time.<sup>85</sup> The Board ruled in the workers’ favor, leading to a settlement agreement with CDC.<sup>86</sup>

After the Committee affiliated with UE, the company renewed its efforts to restrict worker organizing. Committee members who were also union supporters were charged with harassment under the company’s antiharassment policy for distributing literature.<sup>87</sup> Again, the Committee and UE filed a ULP charge. Because the new charge was evidence that the company was not following the settlement agreement reached earlier, the Board revoked the agreement<sup>88</sup> and combined the old charges with new ones brought by the Committee.<sup>89</sup> The Committee eventually prevailed on both charges.

CDC has been able to use its EPPs to undermine the Committee’s organization efforts. A team manager prohibited workers who attempted to sign a Committee petition during a team meeting from doing so.<sup>90</sup> CDC stepped up its employee participation activities after the Committee affiliated with UE. The company paid consultants to survey employees about pay scales and variable pay,<sup>91</sup> issues the Committee had already attempted to address with management on numerous occasions. The consultants’ work, however, resulted in a record variable pay bonus for workers.<sup>92</sup>

Apart from the company’s efforts to crack down on union organizing, CDC’s team structure has hampered the Committee’s work. In response to a Committee survey showing that workers supported changes to the variable pay policy,<sup>93</sup> management

84. See Committee, *Labor Board Victory For UC/UE*, UNITY NEWS, Dec. 1994, at 2.

85. See THE EMPLOYEE HANDBOOK FOR CONSOLIDATED DIESEL COMPANY, *supra* note 55.

86. See Notice from Director of Human Resources at CDC to the Employees of CDC (Oct. 31, 1994) (on file with author); Committee, *supra* note 84, at 2.

87. See THE EMPLOYEE HANDBOOK FOR CONSOLIDATED DIESEL COMPANY, *supra* note 55, at 43; Committee, *HR Must Stop False Harassment Charges*, UNITY NEWS, Dec. 1994, at 2.

88. See Letter from Curtis A. Wells, Acting Regional Director, National Labor Relations Board, to Bruce Petesch, Esquire, Haynesworth, Baldwin, Johnson and Greaves, and Phil White, Field Organizer, United Electrical, Radio and Machine Workers of America (Feb. 10, 1995) (on file with author).

89. See Committee, *Labor Board Issues Complaint Against CDC*, UNITY NEWS, Mar. 1995, at 3.

90. See Committee, *No Empowerment Here*, UNITY NEWS, Oct. 1994, at 4.

91. See Committee, *CDC Hires Outsiders to Bust Union*, UNITY NEWS, Mar. 1995, at 3.

92. See Committee, *First Qtr Variable Pay: It’s About Time!*, UNITY NEWS, June 1995, at 3.

93. See Committee, *supra* note 65, at 1.

established a Payscale Reflective Group,<sup>94</sup> thereby deflecting the Committee's efforts on this issue. By developing the concept of the "team player" to describe workers who do not cause trouble, do not become injured on the job, and are not absent from work, the company succeeds in creating an atmosphere of peer pressure and in fracturing worker unity.<sup>95</sup>

*B. Do Employee Participation Programs Lead to Worker Organizing?*

In light of the fact that many companies with overt or disguised anti-union philosophies also institute EPPs, it would be reasonable to assume that EPPs only suppress, rather than encourage, worker organizing. There are indications, however, that the institutional structures established by EPPs may at times positively affect organizing efforts. At Ethicon, for example, the initial organizing committee for the union campaign was comprised of six people from a single work team.<sup>96</sup> Some teams stood their ground successfully when management began to fight the union,<sup>97</sup> but it was difficult to spread pro-union resistance to other teams because of the isolation imposed by the team system. Ultimately, management showed its hand by disestablishing one of the pro-union teams<sup>98</sup> and setting up a pro-company committee.<sup>99</sup> Nevertheless, election results indicated that the teams may have facilitated pockets of union support—the union won majority support in those quality circles where at least two members openly supported the campaign.<sup>100</sup>

A study of EPPs at large U.S. corporations shows that EPPs do not promote company objectives if they are truly empowering. Schwochau and others<sup>101</sup> found that an important goal for employers instituting EPPs was to decrease employee resistance to change. The theory is that "if employees perceive that they are involved in decisions, this may be sufficient to enhance morale and satisfaction

94. *See id.*

95. An example is that of a pregnant worker who missed work due to back problems. She was pressured to return to work by her team members, who did not want to forego the team bonus. *See Telephone Interview with Muhammad, supra note 43.*

96. *See GRENIER, supra note 70, at 62.*

97. *See id.* at 142-43.

98. *See id.* at 86-87.

99. *See id.* at 88-89.

100. *See id.* at 195.

101. *See Schwochau et al., supra note 67, at 380.*

and reduce resistance to change.”<sup>102</sup> The study’s results suggest that employees are not so easily deceived. The employer’s desired outcome was more likely to occur when employees had input on a wide range of issues, not simply performance and quality, and when the employees themselves were given the authority to implement recommended changes.<sup>103</sup> Less research has addressed the question of whether the less empowering forms of EPPs can lead to formation of a union. Still, Grenier’s work suggests that ultimately the company’s ability to manipulate the EPPs to its own advantage will probably tilt the balance in management’s favor in an organizing campaign.

Committee members have attempted to make use of CDC’s team structure and professed commitment to employee participation, by encouraging members to run for elected team positions and pushing teams to discuss issues of concern with the Committee.<sup>104</sup> The Committee’s attorney credits the CDC’s responsiveness to some of the Committee’s concerns to the company’s need to act consistently with its participatory philosophy.<sup>105</sup> Overall, however, organizers perceive the teams as a greater hindrance than a help to their organizing efforts.<sup>106</sup>

### C. *Current State of Section 8(a)(2)*

#### 1. Labor Organization

Section 8(a)(2) of the NLRA prohibits employer domination or support of a labor organization.<sup>107</sup> The NLRB and the courts have wrestled with the interpretation of a labor organization under section 8(a)(2), and what actions by the employer establish domination. The Act defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>108</sup>

102. *Id.* at 382.

103. *See id.* at 397.

104. *See* Telephone Interview with Muhammad, *supra* note 43.

105. *See* Telephone Interview with Travis Payne, attorney for the Committee (Dec. 9, 1999). The company responded favorably to Committee’s demand for a raise when the Committee compared CDC worker salaries to those at the company’s unionized facilities.

106. *Id.*

107. *See* 29 U.S.C. § 158(a)(2) (1998).

108. 29 U.S.C. § 152(5) (1998).



a) “Dealing with” the Employer

The “deal with” prong of the definition of a labor organization has been the subject of considerable litigation. In the only Supreme Court decision to squarely address section 8(a)(2),<sup>109</sup> the Court reversed the Fifth Circuit court’s opinion that an organization did not “deal with” the employer when it did not engage in collective bargaining. The Court defined the “deal with” requirement broadly: an organization that concerned itself with grievance resolution or working conditions and which made proposals or attempted to reach solutions was considered to deal with the employer.<sup>110</sup> The Third Circuit expanded upon this distinction between collective bargaining and employer/employee dealings in *Slaughter v. NLRB*.<sup>111</sup> In that case, the Board held that forcing an employer to deal with a coworker (nonunion) representative violated the principle of exclusive representation because the coworker in effect functioned as a labor organization.<sup>112</sup> The Court of Appeals reversed on the grounds that only the existence of a collective bargaining relationship implicates exclusivity, and held that collective bargaining is distinct from a labor organization’s dealings with an employer.<sup>113</sup>

Having established that “dealing with” and collective bargaining are two separate things, the courts began to define the types of activities that constitute a “dealing with” relationship between employer and organization. Two recent cases present the Board’s current thinking on this issue. In *E.I. duPont de Nemours*,<sup>114</sup> the Board considered unfair labor practice (“ULP”) charges against a company that set up six safety committees and a fitness committee. The Board again endeavored to distinguish between bargaining and “dealing with,” characterizing bargaining as a process typically requiring compromise,<sup>115</sup> whereas “dealing with” is a “bilateral mechanism” in which employers regularly make proposals to management which are either accepted or rejected.<sup>116</sup> The Board emphasized the give and take nature of dealing, distinguishing

109. See *NLRB v. Cabot Carbon*, 360 U.S. 203 (1959).

110. See *id.* at 213.

111. 794 F.2d 120 (3d Cir. 1986).

112. See *id.* at 127-28.

113. See *id.*

114. 311 N.L.R.B. 893 (1993).

115. See *id.* at 894.

116. *Id.*

activities such as employee suggestion boxes or brainstorming sessions, which do not involve feedback from management.<sup>117</sup>

The safety and fitness committees established by DuPont dealt with management in one of two ways: management either considered and passed judgment on proposals developed by the committee, or management members of the committee had the power to determine the fate of such proposals via consensus decisionmaking.<sup>118</sup> The Board emphasized that participation, including voting, by management in the proposal decisions did not create a “dealing with” relationship. Rather, management’s ultimate ability to determine the outcome was the essential consideration.<sup>119</sup>

In *Electromation, Inc. v. NLRB*, the Seventh Circuit emphasized that the literal language of section 2(5)<sup>120</sup> defines “labor organization” very broadly and stated that a broad construction should also be applied to the requirement of “dealing with.”<sup>121</sup> After workers approached management to express dissatisfaction with new employee attendance and bonus policies,<sup>122</sup> Electromation established five action committees on different topics.<sup>123</sup> At least one committee developed a policy proposal that management rejected.<sup>124</sup> Management, at all times, retained the right to veto any such proposal developed by one of the committees.<sup>125</sup> On these facts, the Court upheld the Board’s finding that the committees dealt with the company.

In *Vons Grocery Co.*, the Board applied a narrowing construction to the definition of “deal with.”<sup>126</sup> There, the Board held that a quality circle that made proposals to management regarding statutory subjects, on just two occasions over a three year period, was not a labor organization because the group did not regularly make proposals for management’s adoption or rejection.<sup>127</sup> This interpretation of “dealing with” was consistent with the Board’s holding in

117. *See id.*

118. *See id.* at 895.

119. *See id.*

120. 29 U.S.C. § 152(5) (1994).

121. 35 F.3d 1148, 1161 (1994).

122. *See id.* at 1151.

123. *See id.* at 1152.

124. *See id.* at 1153.

125. *See id.* at 1152 (The company president said an action committee’s proposal would be implemented “if they came up with solutions that . . . we believed were within budget concerns and they generally felt would be acceptable to the employees.”).

126. 320 N.L.R.B. 53, 54 (1995).

127. *See id.*

*DuPont*, in which the Board required a “pattern or practice” of submitting proposals to management for approval or rejection.<sup>128</sup> The Seventh Circuit in *Electromation*, however, did not distinguish between a regular practice of presenting proposals and an ad hoc occurrence,<sup>129</sup> nor did the Board.<sup>130</sup>

### b) *Statutory Subjects*

The second, relatively straightforward, requirement for a group to be considered a labor organization is that it deals with the employer on the “statutory subjects” outlined in section 2(5): “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>131</sup> The *Electromation* Court found that the work of the action committees related to conditions of employment, including absenteeism and bonuses.<sup>132</sup> Safety and employee benefits also fell under the category of statutory subjects in *DuPont*.<sup>133</sup>

In *Electromation*, the Seventh Circuit enforced the Board’s finding that five action committees established by the company to consider policy issues constituted labor organizations because they were representative bodies set up to use “a bilateral mechanism involving proposals from the employee organization concerning the subjects listed in section 2(5), coupled with real or apparent consideration of those proposals by management.”<sup>134</sup>

## 2. Employer Domination or Support

The second, highly fact-driven, determination under section 8(a)(2) is whether the employer dominates or supports the labor organization. The Court cited the following facts to support its finding of employer domination in *Electromation*: the committees were created by management in the face of employee opposition; several of the committees disintegrated when management ceased to participate; management established the makeup, purpose, and procedure of the committees; the committees did not address an area of identified employee concern; and management ultimately

128. 311 N.L.R.B. at 894.

129. 35 F.3d at 1160.

130. 309 N.L.R.B. 990, 997 (1992).

131. 29 U.S.C. § 152(a)(5) (2000).

132. 35 F.3d at 1161.

133. 311 N.L.R.B. at 894.

134. 35 F.3d at 1161.

controlled the membership of the committees.<sup>135</sup> The Court held that employer support for the committees in the form of paid time to do committee work, meeting space, and supplies did not alone violate section 8(a)(2) but violated it under the conditions of employer domination described above.<sup>136</sup>

Similar facts were cited to support a finding of employer domination in *DuPont*: management's ability to veto committee proposals via the requirement of consensus, to control membership, procedure, and the agenda of meetings, and to unilaterally change or dissolve the committees.<sup>137</sup>

The Court in *Electromation* rejected the employer's contention that a purely subjective test of employee satisfaction is appropriate to determine whether employer domination has occurred, stating, "It is entirely possible that an extremely well-constructed employer-dominated labor organization could be so 'camouflaged' as to persuade employees that it represented their best interests and preserved their free choice when in fact it did not."<sup>138</sup> *Electromation* strongly suggests a willingness to allow some level of employer support for employee committees, even bilateral plans, when the committee has some recognized degree of independence from management.<sup>139</sup> Post-*Electromation* cases, however, have not raised this precise issue. In these later cases, the employee committees in question were established either in opposition to employees' wishes or in the context of an antiunion campaign by the employer.<sup>140</sup> The

135. *See id.* at 1169-70.

136. *See id.* at 1170.

137. 311 N.L.R.B. at 896.

138. 35 F.3d at 1168.

139. 35 F.3d at 1168. The Court distinguished *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955), in which the Board's finding of employer domination was denied enforcement on the basis of several factors: (1) the employees in that case initiated talks with the employer that led to the creation of an employee association; (2) management did not participate in the meetings of the association; and (3) management did not control the membership, agenda, or proposals developed by the committee. *See Electromation*, 35 F.3d at 1165. Finally, the Court recognized that a finding of employer cooperation, rather than support, was justified in the latter case because "the labor organization involved has some 'reasonable claim to being an independent entity composed of employees and distinct from management.'" *See id.* at 1168 (quoting *NLRB v. Ampex Corp.*, 442 F.2d 82, 85 (7th Cir. 1971)).

140. *See NLRB v. Webcor Packaging, Inc.*, 118 F.3d 1115, 1117-18 (1997), *cert. denied*, *Webcor Packaging, Inc. v. NLRB*, 118 S.Ct. 1035 (1998) (employer established Plant Council at the same time union organizing campaign was taking place); *V&S ProGALV, Inc. v. NLRB*, 168 F.3d 270, 274 (1999) (committee was established as an in-house union); *NLRB v. Autodie Intern., Inc.*, 169 F.3d 378, 383 (1999) (employer's recognition of in-house committee as collective bargaining representative violated section 8(a)(2) when that committee did not have majority support; later recognition of what was essentially the same committee also violated section 8(a)(2) despite its apparent majority support from employees).

court in *NLRB v. Webcor Packaging, Inc.* enforced the Board's order to disestablish the committee,<sup>141</sup> holding that "[i]f the company itself creates the labor organization . . . a showing of actual control is unnecessary" to demonstrate employer domination.<sup>142</sup>

The Board is clearly following a broad construction of sections 8(a)(2) and 2(5). *DuPont* and *Electromation* stand for the principle that a prohibited employer/employee relationship exists if management responds to proposals of the committee on statutory subjects and retains the ultimate authority to adopt or veto them. Subsequent Board decisions have upheld this general rule,<sup>143</sup> adding the narrower interpretation of "dealing with" expressed only in *Vons Grocery Co.*<sup>144</sup>

The Board's current approach to the issue of employer domination and support, however, could leave an opening for employers to provide some assistance to or recognition of NMUs without violating section 8(a)(2). The courts, at least in the Sixth Circuit, are holding firm on rejecting employer-created committees that can demonstrate a measure of employee support. However, the Seventh Circuit's reasoning in *Electromation* suggests it will be much less concerned with the false consciousness aspect of employee committees when the committees are shown to be independent of the employer in creation, membership, and activities.<sup>145</sup>

The CDC teams probably do not violate section 8(a)(2), as they are organized around production areas.<sup>146</sup> In addition, the team's work is mainly to discuss issues of production and quality,<sup>147</sup> subjects the court in *Electromation* found acceptable.<sup>148</sup> They are involved with the hiring of new team members and with employee discipline at some level, and management retains final decision-making authority

141. 118 F.3d at 1118.

142. *Id.* at 1124.

143. See *Polaroid Corp.*, 329 N.L.R.B. No. 47 (1999) (finding that an employee committee dealt with the employer when management polled committee members and responded later with its decision); *Efco Corp.*, 327 N.L.R.B. No. 71 (1998) (holding that committees presenting proposals to management for approval or rejection were labor organizations under section 8(a)(2), but a committee which merely screened employee suggestions and forwarded them to management was not).

144. 320 N.L.R.B. at 54.

145. *Electromation*, 35 F.3d at 1168.

146. See *Payne*, *supra* note 31.

147. See *id.*

148. 35 F.3d at 1157 (stating that this decision does not rule out other types of EPPs, "especially those which are independent, which do not function in a representational capacity, and which focus solely on increasing company productivity, efficiency, and quality control, in appropriate settings.").

on these issues.<sup>149</sup> Employee grievances are statutory subjects,<sup>150</sup> and the hiring of new employees may be considered part of working conditions. To the extent that these activities are a regular part of the teams' work, the activities may violate section 8(a)(2) because they represent dealing with the employer on statutory subjects. In addition, management dominates the teams by setting up criteria for making recommendations, establishing the goals of the teams, and facilitating meetings. The everyday work of assessing production and quality issues without making proposals to management, however, should not violate section 8(a)(2).

The Employee Reflective Groups, on the other hand, almost certainly violate section 8(a)(2). They deal with the employer by making proposals on workplace policy which management either adopts or vetoes. Furthermore, the issues considered by the Employee Reflective Groups clearly fall into the category of statutory subjects. Finally, the employer dominates the Reflective Groups. The company creates the committees, controls the membership, determines the topics for discussion, and at all times controls their continued existence.

### III. NONMAJORITY UNIONS AND WORKER ORGANIZING

#### A. *Role of Nonmajority Unions*

As the percentage of American workers who are union members declines, there has been increasing attention to the issue of NMUs. These independent, worker-run organizations can play a number of different roles in the lives of workers.

Clyde Summers argues that section 9(a)'s exclusive representation doctrine should not detract from the section 7 rights of an NMU where there is no majority union acting as an exclusive representative.<sup>151</sup> Distributing literature,<sup>152</sup> soliciting members,<sup>153</sup> striking,<sup>154</sup> and picketing are all protected activities by which an NMU may engage. Summers suggests that NMUs may assume many of the traditional roles of a union by establishing an in-plant committee,

149. See Payne, *supra* note 105.

150. 29 U.S.C. § 152(5) (1994).

151. See Summers, *supra* note 17, at 531-32.

152. See *id.* at 534.

153. See *id.*

154. See *id.* at 535.

electing shop stewards,<sup>155</sup> and engaging in collective activity that forces employer action.<sup>156</sup> Summers also contends that NMUs are protected in their attempts to bargain with the employer on behalf of their members. However, given the “relatively weak economic and legal position” of the NMU that seeks to act under the aegis of protected concerted activity,<sup>157</sup> Summers advocates for greater attention to worker education and enforcement of individual rights instead,<sup>158</sup> including health and safety, benefits, and implied contracts. Alan Hyde also encourages unions that lose an election to demand immediate recognition from the employer as the representative of employees who have signed cards.<sup>159</sup> The NMU will then be well placed to assert its right to whatever benefits the employer grants to any EPP teams or groups.<sup>160</sup>

### B. *Legal Status of Nonmajority Unions*

The rights which Summers, Hyde, and others argue apply to NMUs are often contested. The activities which have led to Board action most frequently in recent years are assertions of the right to have a co-worker present during an investigatory interview (commonly referred to as *Weingarten* rights), issues of what constitutes protected concerted activity, the ability to bargain and act as a representative of its members, and the status of NMUs when EPPs are also present.

#### 1. *Weingarten* Rights

The 1975 Supreme Court decision that established *Weingarten* rights, *NLRB v. Weingarten*,<sup>161</sup> involved a unionized worksite. The Court upheld the Board’s interpretation that a worker’s request that a union representative be present during an investigatory interview implicates the employee’s section 7<sup>162</sup> right to engage in concerted activity for mutual aid and protection<sup>163</sup> where the employee has a

155. *See id.* at 541.

156. *See id.*

157. *See id.* at 542.

158. *See id.* at 542-43.

159. *See Hyde, After Smyrna, supra* note 17, at 648.

160. *See id.* at 659. Hyde discusses using *Black Grievance Workers v. NLRB*, 749 F.2d 1072, 1073 (3d Cir. 1984) to enforce this right (*see text* accompanying note 234).

161. 420 U.S. 251 (1975).

162. 29 U.S.C. § 157 (1994).

163. *See Weingarten*, 420 U.S. at 256.

reasonable belief that discipline will follow.<sup>164</sup> The Court reasoned that “[t]he union representative whose participation [the employee] seeks is, however, safeguarding not only the participating employee’s interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.”<sup>165</sup>

The few cases that have considered the issue of whether *Weingarten* rights apply in nonunion workplaces have focused on the fact that the Court rooted the right in section 7. *Johnson v. Express One International, Inc.*,<sup>166</sup> a case arising under the Railway Labor Act (“RLA”),<sup>167</sup> considered whether a pilot had a right to have a member of his pilot’s committee, an elected body that was not recognized as a representative for collective bargaining purposes, present during an investigatory meeting with management. In denying the pilot’s petition, the Fifth Circuit considered it significant that the RLA’s equivalent to section 7 does not explicitly protect activities conducted for mutual aid or protection.<sup>168</sup> The Court held that the rights to organize and to collectively bargain in and of themselves did not encompass *Weingarten* rights,<sup>169</sup> suggesting that it might be receptive to a case filed under the NLRA on similar facts.

The Third Circuit, in an NLRA case, held that the Act did not compel a finding that unorganized workers cannot assert *Weingarten* rights.<sup>170</sup> The Board’s contrary holding had been based upon the finding that *Weingarten* rights stemmed from the section 8(a)(5)<sup>171</sup> right to bargain collectively.<sup>172</sup> The Third Circuit reasoned that an investigatory interview only has the *potential* to implicate terms and conditions of employment; therefore, the collective bargaining right is not involved.<sup>173</sup> Furthermore, the Court held, the section 9(a) right to exclusive representation is only operative in a union setting.<sup>174</sup>

In a recent decision, the Board agreed with the Third Circuit’s logic. Reasoning that *Weingarten* rights are grounded in section 7 and

164. *See id.* at 257.

165. *See id.* at 260-61.

166. 944 F.2d 247 (5th Cir. 1991).

167. *See* 45 U.S.C. §§ 151-88 (1994).

168. *See Express One*, 944 F.2d. at 251.

169. *See id.* at 252.

170. *See Slaughter v. NLRB*, 794 F.2d 120, 125 (3d Cir. 1986).

171. 29 U.S.C. § 158(a)(5) (1994).

172. *See Slaughter*, 794 F.2d at 126.

173. *See id.* at 126.

174. *See id.* at 127.



that section 7 rights are afforded to nonunion employees to the same extent as union employees, the Board held that nonunion employees may exercise *Weingarten* rights.<sup>175</sup>

The *Weingarten* cases are significant for NMUs for two reasons. First, the Board's decision in *Epilepsy Foundation* allows employees to enforce their right to have a fellow member of an NMU present during an investigative interview. This provides NMUs an important role in resolving the problems of their members and increasing their power in the workplace. Second, the *Epilepsy Foundation* and *Slaughter* holdings that section 9(a)'s influence on section 7 rights is only implicated when a collective bargaining relationship is established<sup>176</sup> supports Summers' contention that NMUs (at least in worksites where no majority union is present) can exercise the full range of section 7 rights.<sup>177</sup>

## 2. Concerted Activity

Section 7 of the Act guarantees an employee's right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in *other concerted acts for the purpose of collective bargaining or other mutual aid or protection.*"<sup>178</sup> The latter provision has given rise to significant litigation over the years. The courts have struggled to define what employee actions constitute concerted activity in nonunion workplaces.

The principal case dealing with concerted activity in a union environment raises important questions of the protections afforded unorganized workers. In *NLRB v. City Disposal Systems, Inc.*, the Supreme Court considered the rights of a truck driver working under a collective bargaining agreement that prohibited the employer from requiring employees to drive unsafe vehicles.<sup>179</sup> The Supreme Court upheld the Board's ruling that section 7 protection applies to an individual worker's assertion of a right found in a collective bargaining agreement.<sup>180</sup>

In a case with remarkably similar facts to *City Disposal*, but with the critical difference that the employee in question was not a union

175. See *Epilepsy Found. of N.E. Ohio*, 331 N.L.R.B. 92 (2000).

176. *Id.*; *Slaughter*, 794 F.2d at 127.

177. See Summers, *supra* note 17, at 534.

178. 29 U.S.C. § 157 (2000) (emphasis added).

179. 465 U.S. 822, 824-25 (1984).

180. See *id.* at 829.

member, the Board strictly construed the definition of concerted activities as it applies to unorganized employees.<sup>181</sup> In *Meyers Industries*, the Board held that the Act mandated that a lone employee from an unorganized workplace could only engage in concerted activity if he or she acted on the authority of other employees and if the employer was aware that the employee's actions were concerted.<sup>182</sup> The DC Circuit overruled the Board's finding that the Act required this narrow construction of section 7.<sup>183</sup>

Since its decision in *Meyers Industries*, the Board has shown a greater willingness to find the link between an individual employee's actions and those of other unrepresented employees, which is necessary for activity to be concerted.<sup>184</sup> In *McEver Engineering, Inc.*, the Board held that a quick strike by employees protesting dangerous working conditions was a protected concerted activity despite the workers' failure to specifically demand relief from the employer.<sup>185</sup> The Board similarly gave a broad reading to concerted activity in *Compuware Corp.*, holding that an employee who discussed concerns with other workers and told them he would represent them in a meeting with management engaged in protected concerted activity despite the fact that the other employees did not authorize him to speak on their behalf.<sup>186</sup>

It is hard to identify a trend from such a limited number of cases, but after *Prill*, the Board seems to be taking a more expansive approach toward the rights of unorganized employees acting in concert for mutual aid and protection. The circuit courts have upheld findings of concerted activity, even where the connection between the acts of individual employees and their coworkers is not immediately obvious.

### 3. Employer Recognition and Bargaining

NMUs enjoy far greater rights in the workplace when there is no union present. Section 9(a) states that a collective bargaining representative selected by a majority of the employees in a bargaining unit has the exclusive right to represent that unit in bargaining over

181. See *Meyers Indus. Inc.*, 268 N.L.R.B. 493 (1985).

182. See *id.*

183. See *Prill v. NLRB*, 755 F.2d 941, 951-52 (D.C. Cir. 1985).

184. See *City Disposal*, 465 U.S. at 831.

185. 275 N.L.R.B. 921, 925 (1985), *aff'd*, 784 F.2d 634 (5th Cir. 1986).

186. 320 N.L.R.B. 101 (1995), *aff'd*, 134 F.3d 1285, 1289-90 (6th Cir. 1998), *cert. denied*, 118 S.Ct. 1805 (1998).

statutory subjects.<sup>187</sup> The Supreme Court strictly construed this section in *Emporium Capwell Co. v. Western Addition Committee Organization*, holding that a picket and other actions held by a small group of unionized employees to protest allegedly race-discriminatory practices constituted an attempt to collectively bargain in violation of the principle of exclusive representation.<sup>188</sup> In an earlier case in which the company granted recognition to an NMU in the mistaken belief that it represented a majority of the employees,<sup>189</sup> the majority found a violation of both sections 8(a)(1) and 8(a)(2). The court held that recognizing an NMU as the exclusive representative is a form of employer support to a labor organization prohibited under section 8(a)(2), and it interferes with employees' section 7 rights to choose their own representatives.<sup>190</sup>

Matthew Finkin has made a strong argument that members-only bargaining should be available to nonmajority unions.<sup>191</sup> At this point, however, there is no mechanism to force employers to bargain with groups that do not represent a majority of workers. The Supreme Court has held that federal courts have jurisdiction to enforce agreements between employers and nonmajority unions under section 301(a) of the Labor Management Relations Act, but the Court issued a caveat, stating that its opinion did not cover the issue of "whether minority unions may demand that employers enter into particular kinds of contracts."<sup>192</sup> The Court later upheld a Board decision asserting that an NMU did not have the right to picket in an attempt to force the employer to bargain.<sup>193</sup> There is, however, no *prohibition* on employer bargaining with NMUs in the absence of a majority union.<sup>194</sup>

In addition to petitioning for employer recognition and bargaining, an NMU may be able to assert a right to equal treatment when the employer is affording favorable treatment to another group. In *Black Grievance Committee v. NLRB*, the court reversed the Board's dismissal of a section 8(a)(1) complaint filed by the Black Grievance Committee.<sup>195</sup> The Committee was an independent

187. 29 U.S.C. § 159(a) (2000).

188. 420 U.S. 50 (1975).

189. *See Int'l Ladies Garment Workers' Union v. NLRB*, 266 U.S. 731 (1961).

190. *See id.* at 738.

191. *See Finkin, supra* note 18, at 199.

192. *See Retail Clerks Int'l. Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962).

193. *See NLRB v. Local Union No. 103*, 434 U.S. 335, 340 (1978).

194. *See Summers, supra* note 17, at 536.

195. 749 F.2d 1072, 1073 (3d Cir. 1984).

organization of workers at Philadelphia Electric Company who were dissatisfied with representation provided by the Independent Group Association (“IGA”),<sup>196</sup> which was not an exclusive representative but was afforded many union privileges.<sup>197</sup>

The complaint concerned an enhanced grievance procedure afforded to IGA members, which included opportunities for written comments, investigation, and mediation, unlike the normal company grievance procedure.<sup>198</sup> The court rejected the Administrative Law Judge’s reasoning, adopted by the Board, that employer assistance to a labor organization was irrelevant to employees’ exercise of section 7 rights in the absence of an exclusive representation campaign:

When an employer accords one non-majority employee group privileged status over another non-majority group, and thus encourages membership in the former while discouraging it in the latter, he unlawfully interferes with the section 7 rights of employees to band together in the group of their choice, even though neither organization seeks section 9(a) exclusive representation status.<sup>199</sup>

The court’s holding that preferential treatment of one NMU over another is impermissible would seem also to apply to the situation of NMUs in nonunion workplaces where the employer has established EPPs. However, the other circuit courts have not ruled on this question, and the Board’s own decision (albeit in the 1980s) not to find a ULP in *Black Grievance Workers* may indicate limited staying power for this doctrine of equality between nonmajority organizations.

### C. *Do Nonmajority Unions Lead to Worker Organizing?*

Why do NMUs sometimes foster union organizing when EPPs more typically discourage it? The most fundamental reason may be that worker activism is a prerequisite for the establishment of an NMU, unlike an EPP. There are many other characteristics of NMUs that may tend to make these organizations catalysts for union organizing, as illustrated by the Committee. First, the Committee recognizes the importance of working with worker centers and other community groups and running effective public relations campaigns

196. *See id.*

197. *See id.*

198. *See id.* at 1074.

199. *Id.* at 1077.

to support their demands.<sup>200</sup> This helps them build the broad base of community support necessary to win a union election.<sup>201</sup> Second, the Committee exists without management interference and influence, allowing it to work on issues that are priorities to workers. Third, members of the Committee have developed leadership skills that would be useful in a union organizing campaign, including the ability to speak and write persuasively. Fourth, the Committee acknowledges the specific issues facing African Americans in the workplace and responds to these issues. Fifth, the Committee has demonstrated it has the staying power necessary to build momentum and commitment.<sup>202</sup> Finally, workers who participate in the Committee can gain confidence in the power of collective action through the concrete victories of the Committee.

There is not much quantitative research on the issue of whether NMUs actually lead to the formation of unions, but the little research that exists tends to confirm this hypothesis. A study by Ichniowski and Zax looks at workers who are members of union-affiliated “associations,” defined as worker organizations that do not engage in collective bargaining but provide a variety of benefits to their members.<sup>203</sup> In a survey of non-union employees, they found that 36.5% of the respondents who considered themselves anti-union were interested in the services an association might provide,<sup>204</sup> and more than 70% of those who were pro-union also favored associations.<sup>205</sup> Ichniowski and Zax conclude that “the availability of associations would initially slow the growth of collective bargaining because some

200. The Committee derives significant support from its relationship with Black Workers for Justice and has drawn on its relationship with community members in at least one highly publicized campaign. See Telephone Interview with Muhammad, *supra* note 43; see also Cullen & Parker, *supra* note 42, at 1.

201. Many unions recognize the importance of community support during campaigns. See, e.g., Janice Fine & Richard Locke, *Unions Get Smart: New Tactics for a New Labor Movement*, 207 DOLLARS & SENSE (1996) (describing the relationship between AFSCME and BUILD, an organization of black churches, during Baltimore’s living wage campaign); Simon Greer, *Community-Labor Alliance Sparks South Carolina*, 24 LAB. RES. REV. 87 (1996) (describing partnership between the International Union of Operating Engineers and the Carolina Alliance for Fair Employment that led to an election victory for hotel workers at Melrose Resort).

202. See James Green & Chris Tilly, *Service Unionism: Directions for Organizing*, 38 LAB. L.J. 486, 489 (1987) (advocating that unions develop a “long-term, patient, person-to-person organizing style” to reach service and clerical workers).

203. See Casey Ichniowski & Jeffrey S. Zax, *Today’s Associations, Tomorrow’s Unions*, 43 INDUS. & LAB. REL. REV. 191, 192 (1990).

204. See *id.* at 197.

205. See *id.* at 195.

nonunion workers who would vote for a bargaining agent also support the association form of organizing.”<sup>206</sup>

However, an analysis of census data by the same researchers found a strong connection between association membership among public employees and union membership five years later,<sup>207</sup> suggesting that workers’ actual, rather than hypothetical, experiences in associations are more determinative of attitudes toward unions. If this is the case, the formation of an NMU in a workplace could serve as an important preliminary step toward union organizing.

Other research supports this interpretation of Ischniowski and Zax’s findings. Jack Fiorito and others interviewed 275 union officials and studied NLRB election and decertification data and ULP files. The results demonstrated that “decentralized control contributes to organizing effectiveness . . . shifting decisions downward in the union to the locals and to the members results in greater organizing effectiveness.”<sup>208</sup> Fiorito and others conclude that the organizing model of unionism, which focuses on worker empowerment and self-help, is more effective than a model in which the union appears primarily as a provider of services to its members.<sup>209</sup>

Certainly NMUs can fill an important need for employees without leading to the formation of unions. Charles Heckscher advocates for the formation of what he terms associational unions. These may include groups affiliated with unions, identity groups, and professional organizations.<sup>210</sup> Heckscher envisions that associational unions would engage in membership services and campaigns to influence public opinion, as well as collective bargaining.<sup>211</sup> Multiple associations could be present in a single workplace, allowing “coordinated diversity” in which all workers would have a voice.<sup>212</sup> A number of writers point out that identity caucuses and other forms of NMUs can both meet needs that traditional unions do not.<sup>213</sup> These

206. *Id.* at 197.

207. *See id.* at 200.

208. Jack Fiorito et al., *National Union Effectiveness in Organizing: Measures and Influences*, 48 *INDUS. & LAB. REL. REV.* 613, 631 (1995).

209. *See id.*

210. *See* HECKSCHER, *supra* note 7, at 185-87.

211. *See id.* at 187.

212. *See id.* at 177.

213. *See* Crain & Matheny, *supra* note 15, at 1596-1600 (discussing how women’s voices are ignored and suppressed in unions).

could pressure unions to become more responsive to the particular concerns of different groups that make up their membership.<sup>214</sup>

The Committee's organizing has not resulted in a union election to date, but the Committee does not focus on that goal.<sup>215</sup> Without a majority presence in the plant, the Committee has won a number of important battles: a pay increase,<sup>216</sup> a recalculation of variable pay,<sup>217</sup> and a paid Martin Luther King Day holiday.<sup>218</sup> Outside the plant, the Committee has established itself as an active member of the community and has built key alliances with other labor and political struggles throughout the region.<sup>219</sup> These are significant victories for a worker organization in a right-to-work state.

#### IV. PROPOSALS FOR REFORM

Since *Electromation*, many commentators have called for changes to section 8(a)(2). These writers, and others concerned with workers' power and representation in the workplace, do not confine their recommendations to this section of the Act, however. Most also concern themselves to some degree with expanding unorganized employees' protection to engage in concerted activity.<sup>220</sup> Many argue for the expansion of coverage to managerial employees.<sup>221</sup> Others advocate changes in section 9(a)'s principle of exclusive representation to increase opportunities for NMUs, particularly identity caucuses.<sup>222</sup> I join these writers in their suggestions.

A few writers argue that some NMUs would benefit from employer assistance.<sup>223</sup> Alan Hyde advocates allowing employer

214. See Hyde, *Employee Caucuses*, *supra* note 17, at 160 ("I see the continued existence of caucuses within labor unions as a potential antidote to some of the problems of unions: their bureaucracy, weak internal democracy, and low rates of participation.").

215. See Payne, *supra* note 105; Telephone Interview with Muhammad, *supra* note 43.

216. See Payne, *supra* note 105.

217. See *2.5% Raise an Insult After Record Year*, *supra* note 36, at 1.

218. See *CDC Workers Celebrate King Day*, *supra* note 37, at 2.

219. Muhammad, *supra* note 43; see also Committee, *supra* note 30, at 2.

220. See Hyde, *Employee Caucuses*, *supra* note 17, at 170 (arguing for a broad interpretation of unorganized workers' section 7 rights); Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 535 (1992) (Section 7 is "an attempt to codify the experience of solidarity, and should be construed as broadly as possible.").

221. See Crain, *supra* note 220, at 505 ("This division of the work force siphons off some of the most educated and powerful members of the work force, factionalizing the work force and hampering effective collective resistance to employer power."); Hyde, *Employee Caucuses*, *supra* note 17, at 167 (arguing that the statutory exemption for managerial employees should be eliminated).

222. See Crain, *supra* note 220, at 509-10; Crain & Matheny, *supra* note 15, at 1617.

223. See Hyde, *Employee Caucuses*, *supra* note 17, at 187; Gemen, *supra* note 16, at 387.

support for employee-initiated groups, “if employees know of the support and freely choose that form of representation.”<sup>224</sup> He proposes a system in which employees could vote to authorize the employer assistance to such a group.<sup>225</sup> Hyde’s system would also cover EPPs created by the employer. Employers who institute their own EPPs following this formal authorization procedure would have a defense to any section 8(a)(2) charges.<sup>226</sup>

In this Note, I discuss a number of studies supporting the conclusion that EPPs generally do not facilitate meaningful employee participation in the workplace, and that employers frequently structure and orient EPPs in such a way as to discourage worker organizing and employee influence over workplace policies.<sup>227</sup> While employees who are attempting to organize, or who belong to NMUs, may be able to take advantage in some limited instances of the structure of employer-sponsored participation plans to advance their own causes, overall, the presence of EPPs harms rather than helps workers’ efforts to establish their own form of representation.<sup>228</sup> This is true even when the EPP does not appear to violate section 8(a)(2), as in the teams at Ethicon and at CDC. Unlike EPPs, NMUs have the potential to develop into traditional unions.<sup>229</sup> Even when they do not, however, the Committee’s experience demonstrates that they provide a vehicle for worker activism, voice, and empowerment.

These findings dictate the course of reform. Those who want to encourage employer voice and participation in the workplace must focus their efforts on bolstering NMUs. This entails recognition of the fact that EPPs may displace worker organizing efforts or drain them of vitality. How then can we maximize the potential of worker-centered organizations and minimize the harm posed by EPPs?

224. Hyde, *Employee Caucuses*, *supra* note 17, at 187.

225. *See id.* at 188.

226. *See id.*

227. *See, e.g.*, GRENIER, *supra* note 70, at xvi-ii; Fantasia et al., *supra* note 14, at 471, 476-77.

228. *See* GRENIER, *supra* note 70, at 86-89; *see also* Daphne Taras & Jason Copping, *The Transition from Formal Nonunion Representation to Unionization: A Contemporary Case*, 52 *INDUS. & LAB. REL. REV.* 22, 37 (1998).

229. Some unions that recognize the importance of community support in labor campaigns and the ability of worker centers to meet the needs of groups of workers identified by gender, race, and/or immigrant status are working closely with worker centers and, in some cases, even sponsoring them. Unions like UE also recognize the value of NMUs. *See* Abby Scher, *Immigrants Fight Back: Workers Centers Lead Where Others Don’t*, 207 *DOLLARS & SENSE* 35 (1996) (ILGWU has opened worker centers in five cities since 1991); José De Paz, *Organizing Ourselves: Drywallers’ Strike Holds Lessons for the Future of Labor Organizing*, 20 *LAB. RES. REV.* 26 (1993) (describing the work of the California Immigrant Workers Association, an associational union established by the AFL-CIO Organizing Department).



Alan Hyde's proposal is significant because it provides a formal mechanism for employees to reject EPPs through a majority vote of employees.<sup>230</sup> I support this aspect of his proposal. I am, however, wary of his suggestion that NMUs seek employer assistance via an election process. This has the potential to enmesh NMUs, with their extremely limited resources, into a morass of campaigning and divert their energy from more pressing issues.<sup>231</sup> I would instead propose codifying the decision of *Black Grievance Committee v. NLRB*<sup>232</sup> to require that an employer who establishes an EPP provide equal resources to any independent worker organization of more than a certain number of workers, perhaps just two (to be consistent with the concerted activity requirement). Equality of resources could be defined to include employer financial support, use of company facilities, and access to management. Worker centers and associational unions could take advantage of this provision by establishing subcommittees specific to a particular workplace.

Hyde encourages NMUs to assert their right to equal treatment under the Third Circuit's decision.<sup>233</sup> However, the Board has failed to expressly ratify that opinion, and later Board decisions enforcing the rights of NMUs to equal assistance have typically done so in the context of union campaigns.<sup>234</sup> In order for NMUs to have a fighting chance at enforcing this right, the Act should explicitly include it. Section 8(a)(2) would read simply that an employer that supports or assists a labor organization must offer equal assistance and/or resources to any independent worker organization of a certain size at that worksite.

There are disadvantages to this proposal. Most significantly, NMUs that receive employer support could find this undermines their independence and fosters loyalty to the company. Fledgling groups

230. See Hyde, *Employee Caucuses*, *supra* note 17, at 188.

231. I am less concerned that NMUs would devote significant resources to the fight to reject employer-sponsored initiatives.

232. 749 F.2d 1072 (3d Cir. 1984).

233. See Hyde, *After Smyrna*, *supra* note 17, at 659.

234. See, e.g., *NLRB v. Conn. Color, Inc.*, 288 N.L.R.B. 699 (1988) (employer violated section 8(a)(1) by forbidding union members to post literature on company bulletin board where employees posted personal notices and solicitations); *NLRB v. Raytheon Missile Sys. Div.*, 277 N.L.R.B. 1528 (1986) (upholding the decision that employer's denial of in-plant union organizing committee's request to post notices for a violation of section 8(a)(1) where employees and outside organizations were allowed to do so). *But see* *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979) (finding a violation of section 8(a)(1) when the university denied a meeting space to an employee chapter from 9 A.M. to 5 P.M., when this space was available to other employee organizations).

may be tempted to seek resources from their employers; because they are new, they may also be most vulnerable to being coopted. NMUs that accept employer assistance are also still faced with the problem of EPPs that undermine organizing.

These are real issues for NMUs. However, some employee groups truly do not want an adversarial relationship with their employer;<sup>235</sup> the voice of these members would be strengthened by this proposal. NMUs that fear being compromised by accepting employer assistance are not required to seek it. These groups would still have the ability to challenge an employer's participation plan through the periodic election process that Hyde proposes. Alternatively, these groups could try the equal access option and decide for themselves whether it was worth the risk.

As to the problem of the continued existence of EPPs, most employers would probably forego EPPs rather than comply with this revised section 8(a)(2). Employers that accept an NMU's challenge and provide assistance while maintaining their own program of EPPs face the continued risk that a majority vote of the employees could dismantle the EPP. Those employers who are truly committed to worker participation would not be precluded from establishing EPPs as long as they are equally amenable to the presence of NMUs. EPPs established by such employers are less likely to present the barriers to worker organizing than EPPs that are set up for the purpose of containing and channeling employee voice.

### CONCLUSION

In this Note, I argue that EPPs frequently do not lead to enhanced employee voice in the workplace, nor do they encourage union organizing. The presence of an NMU in the workplace, in contrast, may create conditions under which union organizing is more likely to occur. Even where this does not happen, NMUs help workers to develop a sense of collective power and the skills to achieve change in the workplace.

Reforms to section 8(a)(2) must be carefully crafted if worker organizing is to be furthered and worker voice enhanced. I would require employers who sponsor their own participation programs to offer similar resources to any NMU that has been organized in that

235. See, e.g., Hyde, *Employee Caucuses*, *supra* note 17, at 156 (describing Employees for One TekCo, an employee group that does not seek to become a union and whose members are generally happy with their employer).

workplace. This proposal would achieve several purposes: the elimination of EPPs in workplaces where employers do not want enhanced employee voice; the provision of employer assistance to worker-sponsored organizations where the organizations might benefit from such assistance; and the encouragement of NMUs as an alternative place where workers can express their voices and create change through that expression.