WE DIDN'T MEAN IT: RETHINKING *ELECTROMATION* AND THE PRESUMPTION OF ANTI-UNION ANIMUS IN NLRA SECTION 8(A)(2) VIOLATIONS

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INTRODUCTION

ABC Corporation, a hypothetical private sector employer, has been in business for several years. Employees of ABC Corporation have generally been happy, receiving pay above industry average and health insurance that covers more than their basic needs. Union organization failed on one occasion due to the employees' satisfaction with their work environment, which pleased the employer and frustrated the labor union.

A new facility recently opened and advertised higher rates and better insurance on a local radio show. Suddenly, ABC Corporation begins hearing from management that employees have started to voice complaints about pay and health insurance offered by ABC Corporation. The employer, concerned that employees will leave for the neighboring facility, creates an employee committee called "The Voice." ABC Corporation selected two employees as the initial members and leaders of the committee. These particular individuals were selected because they are good employees, have been with the company for a long time, and are respected by their peers. Other employees were encouraged to join the committee via flyers in the breakroom and company email. ABC Corporation capped the total number of committee members at twenty in an effort to increase the efficiency of the committee.

The Voice met a week later during working hours. The employer paid the committee members for their time and provided lunch during the meeting. The committee discussed concerns with pay and health insurance and ultimately created a proposal requesting a two percent pay increase and an insurance plan with a lower deductible. After reviewing the proposal, ABC Corporation granted the employees' requests by increasing their pay and providing an insurance option with a lower deductible amount. From a market perspective, the wage and health insurance changes were competitive and, in fact, better than most unionized facilities in the area.

Employees were thrilled with the change and the employer was happy to see an increase in morale and a decrease in employee turnover. ABC Corporation did

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not create the committee, nor grant the requests, to avoid unionization. Rather, ABC Corporation created the committee to improve the workplace for all employees. Regardless of ABC Corporation's motivation in forming the committee, a union, who had previously attempted unionization at the facility, filed a claim for section 8(a)(2) of the NLRA violation.

To determine if the hypothetical company, ABC Corporation, violated section 8(a)(2) of the NLRA by creating the employee committee, The Voice, a court would apply the *Electromation* test, asking if: (1) the committee constitutes a labor organization; and if (2) the employer's involvement in the committee constituted domination and support.[1] The committee is considered a labor organization if it: (1) involves employee participation; (2) "deals with" the employer; and (3) concerns wages, hours, or work conditions.[2]

Under this test, a court would likely find that The Voice constitutes a labor organization because the committee involves employee participation by having employees on the committee, it "deals with" the employer because the employer had to approve any of the committee's proposals, and the committee addresses concerns with wages, hours, and work conditions because The Voice created proposals regarding pay and health benefits.

Next a court would determine that the employer dominated and supported the committee by appointing members, implementing employee recommendations, and providing financial support to the committee and its members.[3] Based on this analysis, ABC Corporation would likely be found in violation of section 8(a)(2) of the NLRA, and The Voice would be dismantled despite the employer creating the committee with pure intentions, and employees being pleased with both the committee and the results generated from the committee. This hypothetical illustrates the way employers and employees are harmed by the *Electromation* test and why anti-union animus on the part of the employer should be considered as an element when analyzing section 8(a)(2) cases.

This article considers the pros and cons of the *Electromation* test and, ultimately, recommends a new test be applied to future section 8(a)(2) cases. Part I examines the history of section 8(a)(2) of the NLRA, related case law, and legislative attempts to change the general test, as well as the development of employee participation programs within the workplace. Part II discusses the pros and cons of the *Electromation* test and how it is applied to cases today. Part III describes alternatives to the *Electromation* test. Part IV goes on to demonstrate that anti-union animus should be added to the general test in determining a section 8(a)(2) violation. Under this new test, the anti-union animus should be presumed, unless the employer can successfully rebut the presumption.

1. *See* Electromation, Inc. v. NLRB, 35 F.3d 1148, 1157–58 (7th Cir. 1994).
2. *Id.* at 1158 (citing 29 U.S.C. § 152(5)).
3. *Id.*

I. BACKGROUND LAW

A. *Employee Participation Programs*

Employees are a valuable source of ideas for improving a workplace.[4] In recognizing their value, employers are often interested in creating employee participation programs (EPPs), sometimes known as employee committees or action committees, where employees have a space to identify and develop workplace improvements and share their ideas with management.[5] Private-sector union density is very low, so EPPs have been considered a "positive and important" development in labor-management relations, and many believe reforms should allow opportunity for more worker voice.[6] Ultimately, proponents of EPPs argue that banning these committees harm employees by not allowing autonomy in planning work schedules, addressing health and safety concerns, and other important items within a workplace.[7]

While arguably valuable, employers have historically created EPPs in an attempt to avoid unionization.[8] In 1935, for instance, 2.5 million workers were represented by nonunion employee representation programs with representatives handpicked by management.[9] This created "sham" representation, causing employees to believe that they were represented by unions acting in good faith to negotiate a fair contract on their behalf when, in reality, their "representatives" were pawns of the employer.[10] Employers went so far as to place company "spies" in the organizations to monitor discussions.[11] These concerns were manifested in section 8(a)(2) of the NLRA, which bans company unions.[12] Opponents of EPPs question the inequality of power within nonunion groups that pose as "union" organizations.[13] While EPPs sometimes feel empowered, they are generally merely

4. Tara Mahoney & Allison Drutchas, *Could Your Employee Participation Program Be Illegal?*, SHRM (June 9, 2016), https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/could-your-employee-participation-program-be-illegal.aspx.

5. Jessica Miller-Merrell, *Creating an Employee Action Committee to Improve Talent Retention*, RANDSTAD RISESMART (Sept. 20, 2018), https://www.randstadrisesmart.com/blog/creating-employee-action-committee-improve-talent-retention.

6. K. Bruce Stickler & Patricia L. Mehler, *Employee Participation Programs After* Electromation; *They're Worth the Risk!*, 2 ANNALS HEALTH L. 55, 55 (1993).

7. *Reinventing the Workplace: Improving Quality, or Creating Company (Sham) Unions?*, L. LIBR. – AM. L. & LEGAL INFO., https://law.jrank.org/pages/8034/Labor-Law-REINVENTING-WORKPLACE-IMPROVING-QUALITY-OR-CREATING-COMPANY-SHAM-UNIONS.html (last visited Sept. 2, 2021) [hereinafter *Reinventing the Workplace*].

8. James Sherk, *How to Give Workers a Voice Without Making Them Join a Union,* THE ATL. (Mar. 11, 2014), https://www.theatlantic.com/politics/archive/2014/03/how-to-give-workers-a-voice-without-making-them-join-a-union/284328/.

9. Mahoney & Drutchas, *supra* note 4.

10. *Id.*

11. *Reinventing the Workplace*, *supra* note 7.

12. National Labor Relations Act (NLRA) § 8(a)(2), 29 U.S.C. § 158(a)(2) (1935).

13. *Reinventing the Workplace*, *supra* note 7.

advisory and the employer retains all control in decision making.[14] Additionally, employers can dissolve EPPs at any time, unlike a union.[15]

B. *The* Electromation *Decision*

Electromation, an electrical contractor, created five EPPs after a number of employees complained about changes to employee benefits.[16] These committees, which were comprised of employees and management, intended to resolve concerns raised by employees.[17] The National Labor Relations Board (NLRB) found that in creating the EPPs, Electromation violated section 8(a)(2) of the NLRA, which makes it unlawful for an employer to control a labor organization,[18] including establishing or controlling a "company union."[19] In *Electromation,* the NLRB determined an employer violated section 8(a)(2) when: (1) the employer-created EPP constitutes a labor organization; and (2) the employer's involvement in the EPP constituted domination and support.[20] An EPP qualifies as a labor organization if it: (1) involves employee participation; (2) "deals with" the employer; and (3) concerns wages, hours, or work conditions.[21]

The NLRB determined that the EPPs in *Electromation* constituted a labor organization because the EPPs involved employee participation, "dealt with" the employer because the EPPs were created to resolve employee complaints, and concerned employee benefits, including wages, hours, and working conditions.[22] Having found that the EPPs were labor organizations under the NLRA, the NLRB went on to determine whether Electromation unlawfully dominated or supported the EPPs.[23]

The NLRB enumerated several factors indicating domination or support of its EPPs: (1) the employer's role in suggesting the EPP; (2) the employer's role in defining the EPP's purpose and rules; (3) the employer's role in selecting the number of members; (4) whether the employer included management in the EPP membership; and (5) the employer's financial support of the EPP.[24] When considering these factors, the NLRB determined that Electromation's involvement in the EPPs constituted domination and support because Electromation created the EPPs, determined the EPP's purpose and goals, determined the number of members in each EPP, selected the management representation in each EPP, and

14. *Id.*
15. *Id.*
16. *Electromation, Inc.*, 35 F.3d at 1152.
17. *Id.* at 1152–53.
18. 29 U.S.C. § 158(a)(2).
19. *Interfering With or Dominating a Union (Section 8(a)(2)),* NLRB, https://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-or-dominating-union-section-8a2 (last visited Sept. 2, 2021).
20. *Electromation, Inc.*, 35 F.3d at 1154.
21. *Id.* at 1154–55.
22. *Id.* at 1154.
23. *Id.*
24. *Id.* at 1155.

provided financial support to the EPP.[25] Ultimately, the NLRB found that Electromation violated section 8(a)(2) of the NLRA, and the decision was upheld on appeal.[26]

Notably, the NLRB in *Electromation* did not require a finding of anti-union animus to find a violation of the NLRA, finding that the "purpose" of the EPPs is not the same as motive and that a violation may occur regardless of whether the employer created it to avoid unionization.[27] The court explained that focusing on anti-union animus and employee satisfaction with the EPP would contradict the Act itself, explaining that employers could disguise an EPP as one that represents the best interest of employees when it was actually created in bad faith.[28] Further, the court determined that "any substantial changes should . . . be considered by Congress."[29] Federal courts that have considered the issue have adopted the NLRB's test and analysis used in *Electromation*.[30]

C. *A Failed Legislative Fix*

In early 1994 the Dunlop Commission on the Future of Worker-Management Relations released what is now referred to as the "Dunlop Report," which conducted a major review of labor law and provided recommendations for labor law reform.[31] The Commission found: economic performance improves when there is employee participation; employee participation programs were likely to increase overtime; and, 40 to 50 million workers would take part in EPPs if available.[32] Ultimately, the Commission recommended section 8(a)(2) of the NLRA be clarified to allow EPPs so long as "they do not allow for a rebirth of the company unions the section was designed to outlaw."[33] The Commission believed that their recommendation was consistent with current law and provided merely a clarification.[34]

In 1995, the Teamwork for Employees and Managers (TEAM) Act was introduced in an effort to amend the National Labor Relations Act based on the recommendations of the Dunlop Report.[35] The Act would have exempted EPPs

25. *Id.*

26. *Id.* at 1171.

27. *Id.* at 1167.

28. *Id.* at 1168.

29. *Id.* at 1157.

30. *See, e.g.*, NLRB v. Fremont Mfg. Co., 558 F.2d 889 (8th Cir. 1977*);* NLRB v. Walton Mfg. Co., 289 F.2d 177 (5th Cir. 1961); NLRB v. Stow Mfg. Co., 217 F.2d 900 (2d Cir. 1954). *See also* NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 894 (1993).

31. *The Dunlop Commission on the Future of Worker-Management Relations - Final Report,* CORNELL UNIV. LIBR. (Aug. 1994), https://ecommons.cornell.edu/handle/1813/79039 [hereinafter *The Dunlop Report*].

32. *Id.* at 24–25.

33. *Id.* at 25.

34. *Id.* at 26.

35. *Disincentives of Work*, WASH. POST (Sep. 11, 1995), https://www.washingtonpost.com/archive/opinions/1995/09/11/disincentives-of-work/524bc028-445e-44ea-8137-7037d5500c8b/.

from section 8(a)(2) of the NLRA, allowing employees and management to "address matters of mutual interest" through the committees.[36] Unions opposed the Act, worrying that it would allow employers to create phony employee organizations, handpick the leaders of the organization, and mislead employees into thinking that they are being represented and heard by the company.[37] The Act passed the House and Senate but was ultimately vetoed by President Clinton.[38]

D. Electromation *Today*

Despite legislative attempts to overturn *Electromation*, its doctrine is still applied regularly today.[39] In 2018, for instance, the NLRB affirmed that a large hospital system's EPP amounted to an employer-dominated labor organization and violated the NLRA.[40] The EPP presented employee proposals to management regarding employee awards and lunch breaks. The NLRB determined that the hospital unlawfully dominated and supported the EPP because the hospital created the EPP, placed managers in the EPP, established the EPP's purpose, and financially supported the EPP's activities.[41]

Similarly, the NLRB found that T-Mobile had created an unlawful labor organization that was designed to solicit complaints from call center workers regarding worker schedules and benefits.[42] Despite the EPP resulting in positive change for employees, including better benefits and a pay increase, the EPP was judicially dismantled.[43]

II. LEGAL ANALYSIS

A. *Why* Electromation *Makes Sense*

As indicated by the failed attempts to legislatively alter *Electromation*, there are reasons why *Electromation* makes sense. Even under *Electromation*, not all company-created EPPs amount to an employer-dominated labor organization. Hiring and operating committees, for instance, are lawful, as well as committees that deal with productivity or quality. Arguably, the benefits of EPPs may still be realized by an organization through these lawful EPPs. Unfortunately, the area

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36. Teamwork for Employees and Managers Act, H.R.743, 104th Cong. (1995).

37. *Company Unions,* AFL-CIO (Feb. 22, 1995), https://aflcio.org/about/leadership/statements/company-unions.

38. *Employee Participation Programs Put Employers at Risk*, FINDLAW, https://corporate.findlaw.com/litigation-disputes/employee-participation-programs-put-employers-at-risk.html (last updated July12, 2016).

39. Rafael Gely, *Where Are We Now?: Life After Electromation*, 15 HOFSTRA LAB. & EMP. L.J. 45, 71 (1997).

40. UPMC, 366 N.L.R.B. No. 185 (2018), *recons. denied*, 2018 WL6524011, at *1 (Dec. 11, 2018).

41. *Id.*

42. T-Mobile USA, Inc., No. 14-CA170229, 2017 WL 1230099, at *34 (N.L.R.B. Apr. 3, 2017), *rev'd in part on other grounds*, 2019 WL 4855522 (N.L.R.B. Sept. 30, 2019).

43. *Id.*

between lawful and unlawful EPPs is gray. The result is that employers may avoid EPPs altogether and the employees lose out on its benefits. Alternatively, employers may decide that the area is so gray that they push the limits and create EPPs that are ultimately unlawful. Neither of these outcomes benefit the employee.

Assuming that unionization is beneficial to employees, *Electromation* may protect employees from employers who create EPPs in order to avoid unionization. "Sham" unions have historically harmed employees, creating a false sense of representation.[44]

Similarly, *Electromation* is pro-union, keeping discussions of wages, hours, and working conditions between employees and an employer within the sole purview of unions. Under *Electromation*, employees who are dissatisfied with aspects of their employment and want to force their employer to negotiate with them on solutions must work through a union to do so.[45] This maintains the union's significance and purpose in the workplace.

B. *Reasons to Reconsider* Electromation

Employee Participation Programs are not inherently corrupt or harmful to employees.[46] Many EPPs are created by well-meaning employers interested in improving the work environment for their employees.[47] Even the most involved business owners and leaders are often removed from the day-to-day work of their employees and receiving employee feedback before implementing changes is in the best interest of both the employer, who is spending money on the changes, and the employees, who live with the changes once implemented.[48] Employers attempting to improve the working conditions of their employees, with or without a union, is good public policy and should be encouraged.

III. ALTERNATIVES TO NO-ANIMUS-REQUIRED POLICIES

A. *Anti-Union Animus Required*

A pro-employer alternative to the current policy on section 8(a)(2) violations, which does not require a showing of anti-union animus, is to require proof that an employer harbored anti-union animus when creating an EPP. Requiring anti-union animus would encourage employers to create EPPs within their workplaces for good, non-discriminatory reasons. Employers and employees would benefit from the back-and-forth discussion on workplace improvements.

Conversely, an employer's anti-union animus mindset would be difficult to prove. Some sort of "smoking gun," like an email declaring the secret purpose of the EPP, would be required to prove anti-union animus. Employees and unions

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44. Carol Brooke, *Nonmajority Unions, Employee Participation Programs, and Worker Organizing: Irreconcilable Differences?*, 76 CHI.-KENT L. REV. 1237, 1238 (2000).

45. Mahoney & Drutchas, *supra* note 4.

46. *Id.*

47. *Id.*

48. Miller-Merrell, *supra* note 5.

would be unlikely to discover this proof; therefore, a policy like this one would essentially give the employer free rein to create EPPs as they please, for any purpose, without consequence.

To illustrate this test, look to the ABC Corporation hypothetical at the beginning of this article. There is no evidence that ABC Corporation created The Voice committee to impede unionization of their facility. ABC Corporation would not be found in violation of section 8(a)(2) because all indications point to the company acting in good faith. Consider, however, if ABC Corporation created the committee immediately following the failed organization attempt and selected employees to lead the committee who did not vote in favor of the union. What if the employees selected to lead the committee not only voted against the union, but were vocal during the election of their dislike of unions? Is this enough to demonstrate anti-union animus, or would evidence need to be produced showing that the employer stated that the creation of the group was to avoid further efforts of unionization? If the latter is required, how would that information be discovered? Would ABC Corporation use email to communicate its anti-union animus for later discovery? These questions demonstrate the genuine concerns with an anti-union animus requirement in section 8(a)(2) cases.

B. *Anti-Union Animus: A Rebuttable Presumption*

A different approach to the anti-union animus debate is a compromise between these opposing sides: a rebuttable presumption of anti-union animus. Under a rebuttable presumption analysis, to establish an NLRA violation for the creation of EPPs, the employee or union must show that: (1) the EPP constitutes a labor organization; (2) the employer's involvement in the EPP constitutes domination and support; and (3) the employer had anti-union animus, which is presumed under the new test. The burden would then shift to the employer to disprove the anti-union animus presumption.

On its face, this appears to be a fair compromise between employees, employers, and unions. Employers that create EPPs for the true purpose of benefiting their employees and without any anti-union animus may continue to do so without fear of a NLRA violation. Employees would have the protection of the NLRA and the benefit of EPPs created with the intention of improving the work environment.

Even so, employers may have concerns over the presumption of animus component, regardless of their ability to rebut it. Proving the absence of animus may be difficult. While establishing animus would require a "smoking gun," its absence would require an employer to demonstrate goodwill and eliminate ulterior motives. If the presumption is strong, employers may find themselves in the same situation they are in today, where their animus, or lack thereof, is irrelevant to the analysis because proving that animus does not exist is difficult.

To demonstrate the rebuttable presumption of anti-union animus test, apply the standards to the ABC Corporation hypothetical. After determining that a prima facie case for a section 8(a)(2) violation exists by applying the *Electromation* test, it would be presumed that ABC Corporation had anti-union animus. Next, the burden would shift to ABC Corporation to disprove the anti-union animus. ABC

Corporation would submit records created during the creation of the committee that indicate the concern of turnover as the motivating factor for creating the committee and other related material to rebut the presumption and, ultimately, would likely prevail under this test.

IV. RECOMMENDED SOLUTION: ANTI-UNION ANIMUS AS A REBUTTABLE PRESUMPTION

Anti-union animus should be added to the general test in determining a violation, but the animus should be presumed unless the employer can successfully rebut the presumption. While no perfect test exists, this addition to the current analysis gives the employer a chance to protect themselves from NLRA violations by proving a good reason for creating the EPP.

A. *Rebuttable Presumption Test Objections*

This analysis is not overtly employer or union friendly, giving way to objections from both sides of the argument. Unions will argue that employers may have the ability to create documentation outlining "good reasons" for creating EPPs, while the unstated purpose may still be to avoid unionization of their facilities. For example, in the ABC Corporation hypothetical, the employer could have created the committee as described but with the actual intention of avoiding unionization now that employees were dissatisfied. Unions may worry that this proposed rule would result in unlawful company unions being allowed by masking themselves as pro-employee committees.

Employers will argue that proving a *lack* of animus is difficult, if not impossible, depending on the strength of the presumption. For employers, this new rule may not result in significantly different outcomes than outcomes resulting from the previous test. In the ABC Corporation hypothetical, the court would presume that ABC Corporation was motivated by an anti-union animus when creating the employee committee. To rebut that presumption, the corporation would need to prove that they created the committee in good faith. Evidence of good faith may be difficult for ABC Corporation to present; emails outlining the initial idea of the committee, meeting minutes detailing the committee plan, and affidavits from management and employees explaining the mentality of the organization when creating the committee may help, but would it be enough?

B. *Rebuttable Presumption: Still Standing*

From a union perspective, concerns of sham employer-sponsored labor organizations are not unreasonable. The banning of company unions altogether resulted from these frauds harming employees.[49] Employers, on the other hand, are reasonable when asking how to prove a negative in court. Defining a rebuttable presumption in this instance may help alleviate union and employer concerns. A strong presumption of anti-union animus may be rebutted with factual evidence

49. *Reinventing the Workplace, supra* note 7.

showing a lack of animus. Factors like timing of the committee's creation in comparison to organization efforts, employees' beliefs regarding the purpose of the committee formation, meeting minutes and communications created during the planning and formation of the committee, along with the outcome of the committee's suggestions could assist in overcoming the presumption.

In the ABC Corporation hypothetical, the committee was formed long after a failed attempt at unionization, which would favor the employer. If the committee had been created during the attempted organization of the facility, this factor would favor the union. Here, the employees were pleased with the formation of the committee, favoring the employer. The meeting minutes and planning communication indicated a pro-employee view and not anti-union animus, favoring the employer. Additionally, the employer implemented the employees' proposals, showing power in the committee, also favoring the employer. If the employer had created the committee and ultimately never even considered the proposals, the committee would look more like a sham and the factor would favor the union. In this hypothetical, under the new test, ABC Corporation would be presumed to have an anti-union animus but would successfully rebut the presumption, leaving the committee intact and avoiding an NLRA violation.

C. *Is There Sufficient Discretion to Implement This Test?*

If the proposed test is adopted, there are questions about who has the authority to implement such a test. The court in *Electromation* ruled that adding a test considering the anti-union animus of an employer in the creation of an EPP is the job of Congress.[50] The likelihood of the NLRA ever being amended by Congress, however, is slim. The last significant legislative change to the NLRA was in 1959[51] and the last amendment was in 1974,[52] despite multiple attempts to amend the Act over the years.[53] That's not to say that the NLRA has not been clarified or that tests have not been subsequently created.

The NLRB is the agency responsible for enforcing the NLRA[54] and, therefore, may create rules and interpret the Act to meet this objective, including implementing a test.[55] When an agency has the authority to make rules that carry the force of law,[56] such a test's validity is determined by applying a two-step review.[57] First, if the statute's meaning is clear, the text controls and the agency

50. Electromation, Inc. v. NLRB, 35 F.3d 1148, 1154, 1157 (7th Cir. 1994).

51. *1959 Landrum-Griffin Act*, NLRB, https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1959-landrum-griffin-act (last visited Sept. 3, 2021).

52. *1974 Health Care Amendments*, NLRB, NAT'L LAB. REL. BD., https://www.nlrb.gov/about-nlrb/who-we-are/our-history/1974-health-care-amendments (last visited Sept. 3, 2021).

53. Robert P. Hunter, *The National Labor Relations Act and the Growth of Organized Labor*, MACKINAC CTR. FOR PUB. POL'Y (Aug. 24, 1999), https://www.mackinac.org/2306.

54. *Frequently Asked Questions – NLRB: What is the National Labor Relations Board's Role?*, NLRB, https://www.nlrb.gov/resources/faq/nlrb (last visited Sept. 3, 2021).

55. *Id.*

56. United States v. Mead Corp., 533 U.S. 218, 237 (2001).

57. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

may not implement its own interpretation.[58] If, instead, the meaning is ambiguous, the agency's interpretation is valid so long as it is reasonable.[59] In deciding whether the statute is ambiguous, canons of statutory construction are used in its interpretation.[60]

Section 6 of the NLRA authorizes the NLRB to make rules and regulation "as may be necessary to carry out the provisions of the Act."[61] This language grants the NLRB authority to create substantive policies unless expressly prohibited by the statute. Section 8(a)(2) of the NLRA does not expressly prohibit the NLRB from creating substantive policies; therefore, the test should be analyzed under the two-step review.

First, the statute's meaning is unclear and ambiguous. Section 8(a)(2) of the NLRA states that employers may not:

> dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, [t]hat subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

Many questions remain after a plain reading of the statute: what is meant by "labor organization," "other support," and "confer with"? Because the meaning is unclear and susceptible to several meanings, the agency may implement its own interpretation so long as it is reasonable. Further, an interpretation is reasonable so long as it is "rationally related to the goals of the statute,"[62] even if the agency changes their interpretation over time.[63]

The validity of the test proposed turns on the reasonableness of the test. Those who oppose the test will argue it is unreasonable, whereas those who support it will argue it is reasonable. Generally, the reasonableness standard is a low standard, and when a review gets to the second step of the analysis, it is typically determined to be valid.[64] Here, as described throughout, the proposed test takes a middle-ground approach to the question of EPPs, considering both employer and union arguments. Having reached the second level of the analysis and being rationally related to the NRLA's goals, it should be found reasonable.

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58. *Id.*

59. *Id.*

60. VALERIE C. BRANNON & JARED P. COLE, U.S. CONGRESSIONAL RESEARCH SERVICE, CHEVRON DEFERENCE: A PRIMER 13 (R44954 2017).

61. 29 U.S.C. § 156.

62. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 388 (1999); Pharm. Rsch. & Mfrs. of Am. v. FTC, 790 F.3d 198, 208 (D.C. Cir. 2015) (quoting Vill. of Barrington v. Surface Transp. Bd., 636 F.3d 650, 667 (D.C. Cir. 2011)).

63. *See* Rust v. Sullivan, 500 U.S. 173, 186–87 (1991). *See generally* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 514 (2009).

64. Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals,* 15 YALE J. ON REG. 2, 32 (1998) (determining that in 1995 and 1996, courts that reached step two of the Chevron test "upheld the agency view in 89% of the applications.").

CONCLUSION

Anti-union animus on the part of the employer should be considered when analyzing company union cases. The current test punishes employers even when they are motivated by making their workplaces better for their employees and, ultimately, harms employees. Utilizing a rebuttable presumption of anti-union animus test is a compromise for employers, employees, and unions, ensuring the best possible work environment for employees.