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Dennis M. Devaney

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ELECTROMATION AND DU PONT: THE NEXT GENERATION[†]

Dennis M. Devaney^{††}

INTRODUCTION

Spurred by the perception that fundamental changes in the global economy are reducing American competitiveness and that the standard of living in the United States may be declining, American business leaders, labor leaders, government officials, and academics have begun to re-evaluate traditional methods of management.¹ Since the 1970s, an increasing number of businesses have explored the use of employee involvement organizations as a means of retaining or regaining a competitive edge. Experimentation with employee involvement has led to an explosion of employee organizations, including, but certainly not limited to, quality circles, work improvement programs, quality of worklife improvement groups, participative management groups, cost study teams, competitive action teams, autonomous or semi-autonomous work groups, parallel organization structures, special task forces, business teams, and personal effectiveness programs.

The National Labor Relations Act² has received increased attention recently due to the Act's proscription of company-dominated labor unions under section 8(a)(2). The question of whether the Act precludes employer implementation of employee involvement groups was, and continues to be, widely debated. This attention has focused especially on two of the National Labor Relations Board's recent decisions: *Electromation, Inc.*³

[†] This essay reflects the opinion of its author and does not necessarily represent the view of the National Labor Relations Board.

^{††} Member, National Labor Relations Board, Washington, D.C.; B.A., M.A., University of Maryland, 1968, 1970; J.D., Georgetown University, 1975.

¹ See e.g., EILEEN APPELBAUM & ROSEMARY BATT, *THE NEW AMERICAN WORKPLACE* (1994). Appelbaum and Batt argue that "business as usual" is not working for at least two reasons: 1) Firms in the newly industrialized countries are able to compete in price-conscious markets by paying wages that are much lower than those paid in the U.S.; and 2) the cost advantages of American-style mass production were lost because of the diversity and customization made possible by computer-based technology. *Id.* at 3.

² 29 U.S.C. §§ 151-69 (1988).

³ 309 N.L.R.B. 990 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

and *E.I. du Pont de Nemours Co.*⁴ *Electromation* was characterized as the Board's most closely watched decision in years.⁵ The impact of both decisions has been hotly argued; one amicus curiae brief in *du Pont* suggested that finding such employee committees unlawful "thwart[s] the myriad efforts being undertaken by labor unions, employee groups, and employers to develop human resource policies to meet the challenges of the 21st Century."⁶

Unhappily, unnecessary confusion persists as to whether employee involvement organizations violate the National Labor Relations Act. According to a 1993 survey conducted by the Labor Policy Association in cooperation with other industry groups, over forty percent of 532 responding companies stated that the federal government was "seriously questioning" employee involvement.⁷ In another forum, one management spokesman expressed the concern that the law should not require "employees to check their brains at the front door when they come to work."⁸

My purpose is not to explore each of the various types of employee involvement programs but to discuss the National Labor Relations Act and the nature and extent of its prohibition of company-dominated employee groups. I hope to show that the area of permissible conduct between the Scylla of violating the Act and the Charybdis of maintaining outdated or uncompetitive styles of management is wider than many believe. The Act has definite restrictions that nevertheless allow for a wide range of lawful employee involvement organizations. Accordingly, I discuss in Part I Congressional intent as expressed in the Act itself and in deliberations leading to its passage. In Part II, I provide an overview of the Board's test for determining the lawfulness of employee groups and discuss *Electromation* and *du Pont* in Part III. I suggest in Part IV employee involvement methods that do not violate the National Labor Relations Act,

⁴ 311 N.L.R.B. 893 (1993).

⁵ Martin Salwen, *NLRB says Labor-Management Teams at Firm Violated Company-Union Rule*, WALL ST. J., Dec. 18, 1992, at A12.

⁶ 311 N.L.R.B. at 899.

⁷ Labor Policy Association, *The Nature and Extent of Employee Involvement in the American Workplace* (presented to the Commission on the Future of Worker-Management Relations, 1994).

⁸ Paul Weiler & Guy Mundlak, *New Directions for The Law of the Workplace*, 102 YALE L.J. 1907, 1992 (1993).

and in Part V, I outline proposed changes in the law. I conclude by providing a short checklist to guide employers in bringing their employee involvement organizations into compliance with section 8(a)(2) of the Act.

I. THE NATIONAL LABOR RELATIONS ACT

Section 8(a)(2) of the National Labor Relations Act provides 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."⁹ Section 2(5) of 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."¹⁰ A proviso to section 8(a)(2) states that employers are not prohibited from conferring with employees during working hours without a loss of time or pay for the employee.¹¹

The purpose of section 8(a)(2) is deeply rooted in the Act's legislative history and is intertwined with other fundamental statutory protections and principles. One commentator noted that the "role of the company union was, in fact, the most important substantive issue in the political fight over the drafting and passage" of the Act in 1935.¹² Sponsors of the National Labor Relations Act considered section 8(a)(2) to be a direct corollary to the guarantee under the National Industrial Recovery Act's section 7 of employees' right to select their own bargaining representatives.¹³

⁹ 29 U.S.C. § 158(a)(2) (1988).

¹⁰ *Id.* § 152(5).

¹¹ *Id.* § 158(a)(2).

¹² Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1386 (1993).

¹³ Section 7(a) of the precursor to the National Labor Relations Act provided in pertinent part that:

Every code of fair competition . . . shall contain the following conditions: 1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from interference, restraint, or coercion of employers or labor, or their agents, in the designating of such representative or in self-organization or in other activities . . .; and 2)

Although congressional intent to outlaw "sham" unions is unmistakable, it is equally clear that Congress did not intend to outlaw all communications between employers and employees. In its report to the full Senate, the Senate Labor Committee noted that "[t]hese abuses do not seem . . . so general that the Government should forbid employers to indulge in the normal relations and innocent communications which are part of all friendly relations between employer and employee."¹⁴ The report concluded that the object of this section was "to remove from the industrial scene unfair pressure, not fair discussion."¹⁵ It is within this framework that the Board and the courts have applied section 8(a)(2).

II. THE TEST FOR EMPLOYEE INVOLVEMENT GROUPS — AN OVERVIEW

To decide whether an employee involvement committee violates section 8(a)(2), the Board engages in the two-step inquiry set forth by the Supreme Court in *NLRB v. Cabot Carbon Co.*¹⁶ Under that test, the Board addresses two basic questions: 1) Is the committee a "labor organization" for purposes of the National Labor Relations Act?, and 2) did the employer dominate the formation or operation of the committee? The Board must find both labor organization status and domination by the employer to find a violation of section 8(a)(2).

A. IS THE GROUP A LABOR ORGANIZATION?

Under the National Labor Relations Act, a group is a labor organization if: 1) Employees participate in the organization; 2) the organization exists, at least in part, for the purpose of

that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing"

National Industrial Recovery Act, § 7(a), ch. 90, 48 Stat. 195, 198 (1933), *decl'd unconst.*, A.L.A. Schechter Poultry Corp. v. United States, 195 U.S. 495 (1935). Section 7(a) was the quid pro quo for the National Industrial Recovery Act's provisions permitting employers to join together and set industry "codes" fixing prices and production in violation of the antitrust laws.

¹⁴ S. REP. NO. 1184, 73d Cong., 2d Sess. 1104 (1949).

¹⁵ *Id.*

¹⁶ 360 U.S. 203 (1959).

"dealing with" employers; and 3) these dealings concern conditions of work or other statutory subjects such as grievances, labor disputes, wages, rates of pay, or working hours.¹⁷

Since the premise of employee participation programs is employee participation, this first requirement of the three-part test is rarely at issue. The second requirement, however, which focuses on the "purpose" of the organization and whether it "deals with" the employer, requires some clarification. Although the Board inquires into the "purpose" of employee involvement committees, the Act does not require a finding of anti-union animus to find an 8(a)(2) violation. As the majority stated in *Electromation*, "[p]urpose is a matter of what the organization is set up to do, and that that may be shown by what the organization actually does."¹⁸ Furthermore, in *Cabot Carbon* the Supreme Court held that "dealing with" covers a broader range of activity than "collective bargaining" and does not necessarily involve negotiations of a collective bargaining agreement or even employer agreement to employee proposals.¹⁹ Moreover, the structure of a statutory labor organization need not be formal; it may lack a constitution, bylaws, elected officials, formal or regular meetings, or dues. Because the statute lists only mandatory subjects of bargaining, there is a strong argument that if the committee addresses only permissive subjects of bargaining it is not a statutory labor organization.

In *Electromation, Inc.*, a majority of the Board concluded that Congress intended the definition of "labor organization" to include a broad range of employee groups but reserved judgment on the question of whether it is necessary to find that an organization acts in a *representational* capacity for it to be a statutory labor organization.²⁰ In my concurrence, I concluded that such a finding is necessary.²¹ In my view, an employee committee avoids the proscription of section 8(a)(2) when it does not act as the agent or advocate of other employees, because the employer is not usurping the employees' right to choose their own bargaining representative. This distinction, I think, follows Congressional intent in proscribing "sham" unions while permit-

¹⁷ 29 U.S.C. § 152(5) (1988).

¹⁸ 309 N.L.R.B. at 996.

¹⁹ 360 U.S. 203, 204-18 (1959).

²⁰ See 309 N.L.R.B. 990, 994-97 (1992), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

²¹ *Id.* at 998-1005 (Devaney, Member, concurring).

ting "fair discussion" between employers and employees.²²

B. HAS THE EMPLOYER ENGAGED IN UNLAWFUL DOMINATION?

In assessing section 8(a)(2) violations, the second basic inquiry is whether the employer has dominated the labor organization. Illegal domination may occur in the formation or in the administration of the organization. An employer may dominate the formation of an organization by formulating the idea for the organization, creating the organization, forming its structure, writing the bylaws or other governing principles, appointing the members, or determining the method by which the members of the organization are to be selected. An employer also may dominate the administration of an organization through actions such as determining the subject matter addressed in meetings, having management members on the committee, having veto power over issues, and controlling the operation of the committee.

Although most federal courts of appeals have accepted the Board's test and analysis of Section 8(a)(2) and 2(5),²³ some have denied enforcement of Board decisions because they disagreed with particular aspects of the Board's analysis. For instance, the Sixth Circuit ruled that a group is a labor organization only if the General Counsel demonstrates that the employees subjectively believe their group to be a labor organization and if the employer had anti-union animus.²⁴ The Board in *Electromation* found no support for this view in the Act, its legislative history, or Supreme Court precedent, and thus did not adopt the Sixth Circuit's approach.²⁵ Similarly, the First, Ninth, and Seventh Circuits also denied enforcement to Board findings of section 8(a)(2) violations if the impetus for forming the employee group came from the employees themselves.²⁶

²² *Id.*

²³ *See, e.g.,* *Electromation, Inc. v. N.L.R.B.*, 35 F.2d 1148 (7th Cir. 1994); *N.L.R.B. v. Fremont Mfg. Co.*, 558 F.2d 889 (8th Cir. 1977); *N.L.R.B. v. Walton Mfg. Co.*, 289 F.2d 177 (5th Cir. 1981); *N.L.R.B. v. Stow Mfg. Co.*, 217 F.2d 900 (2d Cir. 1954); *see also* *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203 (1959) (supporting Board's interpretation of 42 U.S.C. §§ 152(5) & 158(a)(2) (1988)).

²⁴ *Airstream, Inc., v. N.L.R.B.*, 877 F.2d 1291 (6th Cir. 1989); *N.L.R.B. v. Scott & Fetzer*, 691 F.2d 288 (6th Cir. 1982).

²⁵ 309 N.L.R.B. at 996.

²⁶ *NLRB v. Northeastern Univ.*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka &*

The Fourth Circuit recently denied enforcement of a Board decision in *Peninsula General Hospital Medical Center*.²⁷ The court stated it had no quarrel with the Board's test but disagreed with the application of the test in the case.²⁸ It found that the employer's "Nursing Service Organization" was a lawful "communications device" in spite of the Board's finding that the employer presented the organization to employees as a representative body designed to address matters such as wage rates.²⁹ Although the court stated it found nothing in its decision inconsistent with the Seventh Circuit's opinion enforcing *Electromation*,³⁰ its application of the Board's test in *Peninsula* leaves room for doubt.

III. THE STATUS OF SECTION 8(A)(2) ORGANIZATIONS

Although the Board and the courts have used the *Cabot Carbon* test for several decades, the Board's applications of the test in *Electromation*³¹ and *du Pont*³² received unprecedented attention, in large part because of employers' expanded use of employee involvement committees. I will first address the employer conduct the Board found unlawful in *Electromation* and *du Pont*. I will then discuss the types of employee organizations we found to be unlawful.

A. ELECTROMATION

In *Electromation* the Board determined that the employer unlawfully set up and operated "Action Committees" comprised of employees and management representatives. The Board held that the committees constituted a "labor organization" within the meaning of section 2(5) of the National Labor Relations Act³³ and that management dominated and interfered with

Knowles v. N.L.R.B., 503 F.2d 625 (9th Cir. 1974); Chicago Rawhide Mfg. Co. v. N.L.R.B., 221 F.2d 165 (7th Cir. 1955).

²⁷ NLRB v. Peninsula General Hosp. Medical Ctr., 36 F.3d 1262 (4th Cir. 1994).

²⁸ *Id.* at 1272-74.

²⁹ *Id.*

³⁰ *Id.* at 1271 n.10.

³¹ *Electromation, Inc.*, 309 N.L.R.B. 990 (1992), *enfd* 35 F.2d 1148 (1994).

³² *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893 (1993).

³³ 29 U.S.C. § 152(5) (1988).

this labor organization in violation of section 8(a)(2) of the Act.³⁴ However, many observers drew the unwarranted conclusion that employee involvement organizations in general were at risk of being declared unlawful.³⁵ To the contrary, as discussed below, the Board set forth in the majority and concurring opinions examples of employee involvement efforts that remain lawful under the Act.

In late 1988 Electromation management reduced employee benefits in an effort to curb financial losses.³⁶ Aroused by this action, sixty-eight employees presented the employer with a petition expressing disapproval of the new attendance/bonus wage policy.³⁷ In response, management representatives met with eight employees, most of whom were selected at random, and discussed with them such matters as wages, bonuses, incentive pay, attendance programs, and leave.³⁸ The president concluded Electromation had serious employee problems and decided to form five "Action Committees" to involve employees in the decision-making process.³⁹ The president met with the same group of employees and gained their reluctant assent to form the committees.⁴⁰

The employer formed several committees, which addressed absenteeism, communications, pay progression for premium positions, and the attendance/bonus program.⁴¹ Each committee consisted of five employee members, at least one management representative, and the employer's employee benefits manager.⁴² The employer paid the employees for committee activity and provided meeting space and necessary supplies.⁴³ The Attendance Bonus Committee developed a proposal that the

³⁴ *Id.* § 158(a)(2).

³⁵ See e.g., Thomas J. Piskorski, *Electromation: A Setback to Employee Participation Programs*, 9 LAB. LAW. 209, 218 (1993) (commenting that no employee participation program is safe from challenge under *Electromation's* holding).

³⁶ 309 N.L.R.B. at 990.

³⁷ *Id.*

³⁸ *Id.* at 990-91.

³⁹ *Id.* at 991.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

company controller, who was a committee member, rejected as too costly.⁴⁴ Shortly after the committees began to meet the union demanded that Electromation recognize it.⁴⁵ The union lost the election.⁴⁶

The majority held that the Action Committees were "labor organizations" the employer was "dealing with" under the National Labor Relations Act.⁴⁷ It found the committees' purpose was to address employees' disaffection concerning conditions of employment through a *bilateral* process in which the aim was to reach solutions through a dialogue based on employee initiated proposals.⁴⁸ The majority also found that the employee members had acted in a representative capacity and noted that management told them to obtain ideas from their fellow employees with the aim of providing solutions that would satisfy employees as a whole.⁴⁹ However, the majority did not address whether such a purpose was essential to finding labor organization status.⁵⁰

The Board also found that the employer dominated and assisted the Action Committees in violation of section 8(a)(2) of the Act.⁵¹ It observed that the employer developed the idea of the committees and created them in spite of initial employee reluctance, drafted the written purposes of the committees, and permitted employees to carry out committee activities during work hours.⁵² The majority explained that "employees essentially were presented with the Hobson's choice of accepting the status quo, which they disliked, or undertaking a bilateral 'exchange of ideas' within the framework of the Action Committees."⁵³

In my concurrence, I agreed that the Action Committees were labor organizations dominated by the employer but wrote separately to respond to concerns raised by both parties regard-

⁴⁴ *Id.* at 992.

⁴⁵ *Id.* at 991.

⁴⁶ *Id.* at 992.

⁴⁷ *Id.* at 997 (citing 29 U.S.C. § 152(5) (1988)).

⁴⁸ *Id.* at 997-98.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 998.

ing the lawfulness of contemporary employee participation plans.⁵⁴ In my view, section 8(a)(2) proscribes only company-imposed sham bargaining agents; it is not a broad-based ban on employer-employee communications.⁵⁵ Electromation management substituted its will for the employees' and usurped their right to choose their own representative when it formed the Action Committees to bargain over terms and conditions of employment, with employer-selected participants, in spite of employee reluctance, and without evidence of majority support.⁵⁶ The employer placed itself on both sides of the table by excluding certain issues from discussion and "pre-screening" employee proposals, thus giving employees the illusion of a bargaining representative without the reality of one.⁵⁷

The Seventh Circuit Court of Appeals enforced the Board's decision in *Electromation* when it held the Board properly concluded the Action Committees were statutory labor organizations and that the employer illegally dominated them.⁵⁸ The court found it unnecessary to address the "much broader" question concerning the general legality of employee involvement organizations.⁵⁹ The court also concluded it need not decide whether labor organization status necessarily entails representation of non-member employees,⁶⁰ or whether mechanisms such as suggestion boxes, brainstorming meetings, and other information exchanges constitute "dealing" within the meaning of section 2(5).⁶¹

In holding the Action Committees constituted labor organizations, the court rejected the employer's assertion that each committee should be considered separately; it noted the committees were created as part of the same program, were interrelat-

⁵⁴ *Id.* at 988-1005 (Devaney, Member, concurring). Members Oviatt and Raudabaugh also found the Action Committees were unlawful. *See id.* at 1003-05 (Oviatt, Member, concurring); *id.* at 1005-15 (Raudabaugh, Member, concurring).

⁵⁵ *Id.* at 1003.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Electromation, Inc. v. N.L.R.B.*, 35 F.2d 1148 (7th Cir. 1994) (referring to violations of the National Labor Relations Act, 29 U.S.C. §§ 151-69 (1988)).

⁵⁹ *Id.* at 1151.

⁶⁰ *Id.* at 1158.

⁶¹ *Id.* at 1161.

ed, and had identical relationships with the employer.⁶² Upholding the Board's finding that the employer unlawfully dominated the committees, the court also rejected the argument that the Board improperly failed to focus on the *subjective will* of the employees rather than the conduct of the employer.⁶³ The court observed that "the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions," a characteristic lacking in Electromation's Action Committees.⁶⁴

B. *DU PONT*

In *du Pont* the Board found that six safety committees and one fitness committee were employer-dominated labor organizations within the meaning of sections 2(5) and 8(a)(2) of the National Labor Relations Act.⁶⁵ In considering whether the committees were "labor organizations," the Board focused on whether the committees were "dealing with" the employer.⁶⁶ Finding that the committees were "dealing with" the employees, the majority noted that the committees contained members of management as well as employees and that it reached decisions only by consensus.⁶⁷ Thus, management members could reject any proposals advanced by employee members within the committees and thereby prevent their "presentation" to manage-

⁶² *Id.* at 1158-59.

⁶³ *Id.* at 1167-68 (citing in support *N.L.R.B. v. Newport News, Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 249 (1939) (holding that the Board properly ordered the disestablishment of a company labor organization, in spite of its successful operation to the apparent satisfaction of the employees)). The court distinguished *Chicago Rawhide Mfg. Co. v. N.L.R.B.*, 221 F.2d 165 (7th Cir. 1955), on which the employer relied. In *Chicago Rawhide*, unlike in *Electromation*, the employees initiated the first meeting with the employer, the committees met outside the presence of management, and employer representatives did not determine the subject matters to be considered, select the members of the committees, or exercise a veto over committee recommendations. Thus, the court found the employer engaged in mere "cooperation," as opposed to unlawful "support."

⁶⁴ *Id.* at 1170 (citing *Newport News*, 308 U.S. at 249).

⁶⁵ *E.I. du Pont de Nemours & Co. v. N.L.R.B.*, 311 N.L.R.B. 893, 895-96 (1993) (citing 29 U.S.C. §§ 152(5), 158(a)(2)).

⁶⁶ *Id.* at 894.

⁶⁷ *Id.* at 895.

ment.⁶⁸ The majority noted that the mere presence of management members on an employee involvement committee does not require a finding that the committee is "dealing with" the employer.⁶⁹

In my concurrence I observed that employers may not establish and manipulate employee committees to appear to be *employee* tools when such committees actually are a *management* tool.⁷⁰ The employer in *du Pont* attempted to use the committees to freeze the union out of areas in which the union had a vital and legally recognized interest: employee health and safety and related bonuses and grievances.⁷¹ However, this decision should not be viewed as a broad ban on employer discussions with employees on safety-related issues.⁷² Rather, *du Pont* presented key facts that supported finding a section 8(a)(2) violation; for example, the union took an active role in safety and proposed a joint labor-management safety committee, but the employer rejected it and set up a rival committee that it controlled.⁷³ Unlike the majority, I concluded that it was unnecessary to consider whether *du Pont* "dealt with" the committees, because the record amply demonstrated the employer *bargained* with those committees.⁷⁴

C. SUBSEQUENT CASES

In *Magan Medical Clinic, Inc.*,⁷⁵ the Board found the employer violated section 8(a)(2) by dominating the formation of an employee grievance committee.⁷⁶ The Board noted that the employer formulated the committee with the purpose of frustrating employees' attempts to determine whether they wanted a bargaining representative, and the employer bargained with

⁶⁸ *Id.*

⁶⁹ *Id.* (noting that management representatives who do not have the ability to reject proposals developed by employees, or who participate simply as observers or facilitators without the right to vote, are not "dealing").

⁷⁰ *Id.* at 899 (Devaney, Member, concurring).

⁷¹ *Id.* at 903.

⁷² *Id.*

⁷³ *Id.* at 900-01.

⁷⁴ *Id.* at 902.

⁷⁵ 314 N.L.R.B. 1083 (1994).

⁷⁶ *Id.* However, a majority found it had not dominated the administration of the committee.

the committee over grievances.⁷⁷

In *Ryder Distribution Resources, Inc.*,⁷⁸ a majority of the Board found that an employer-established wage and benefit committee was a labor organization, because the committee's purpose was to address dissatisfaction with wages through a bilateral process in order to reach solutions based on employee proposals.⁷⁹ Because committee members were informed that they should poll employees and then agree about wage and benefit preferences, the majority also found that the committee acted in a representative capacity.⁸⁰

In my concurrence in *Ryder*, I agreed that the wage and benefit committee was a labor organization.⁸¹ I noted that the employer interfered with the exercise of the employees' right to a representative of their choice in order to induce them to abandon their petition for a union election.⁸² The employer did this by giving the employees the impression that dealing with the employer through an employer-dominated employee involvement program would yield more favorable and faster results than would union representation.⁸³ Importantly, I noted that certain activities of the committee, such as employee training in problem solving and consensus building, and in opening lines of communication between management and employees might in other circumstances distinguish it from statutory labor organizations.⁸⁴ However, I concluded that these activities were so overwhelmed by the committee's clear purpose of substituting itself for union representation that they could not rehabilitate the employer's conduct.⁸⁵

In two other cases, *Waste Management of Utah, Inc.*,⁸⁶ and *Research Federal Credit Union*,⁸⁷ the Board found to be unlawful committees that were used by the employers to supplant the

⁷⁷ *Id.*

⁷⁸ 311 N.L.R.B. 814 (1993).

⁷⁹ *Id.*

⁸⁰ *Id.* at 818.

⁸¹ *Id.* at 819-21 (Devaney, Member, concurring).

⁸² *Id.* at 820.

⁸³ *Id.*

⁸⁴ *Id.* at 820 n.6.

⁸⁵ *Id.*

⁸⁶ 310 N.L.R.B. 883 (1993).

⁸⁷ 310 N.L.R.B. 56 (1993).

union or to act as an alternative to union representation. As the Board noted in *Waste Management*, the committees' involvement with routing, productivity and safety might have put them outside the ambit of section 8(a)(2) had the employer not tacitly held out the committees as alternatives to employee representation by an organization of their choice.⁸⁸

IV. EMPLOYEE INVOLVEMENT COMMITTEES THAT DO NOT CONFLICT WITH THE NATIONAL LABOR RELATIONS ACT

Employee participation may exist lawfully in a wide variety of ways. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") concluded in its May 1994 Fact Finding Report that among the most longstanding and widespread employee participation committees are those that focus on health and safety issues.⁸⁹ According to the 1993 survey of the National Safety Council, eighty-nine percent of unionized establishments and fifty-six percent of non-union establishments have such committees.⁹⁰ The Commission also recognized the growing popularity of task force teams that are problem-specific and cut across traditional hierarchical groups by including a "vertical slice" of managers and employees.⁹¹ It further noted that many production or quality-focused problem solving groups evolve over time into self-managed work teams to which many managerial functions are delegated.⁹² The Board has addressed employee involvement organizations with such characteristics and found that, under the proper circumstances, they do not violate section 8(a)(2).

For example, the majority in *du Pont* explained that brainstorming groups ordinarily are not engaged in dealing and

⁸⁸ 310 N.L.R.B. at 883.

⁸⁹ U.S. DEPT OF LABOR & U.S. DEPT OF COMMERCE, COMM'N ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT FINDING REPORT 40 (1994) [hereinafter FACT FINDING REPORT].

⁹⁰ *Id.* (citing THOMAS W. PLANEK AND KENNETH P. KOLOSH, NATIONAL SAFETY COUNCIL, SURVEY OF EMPLOYEE PARTICIPATION IN SAFETY AND HEALTH (1993)).

⁹¹ *Id.* at 37-39.

⁹² *Id.* at 39-40.

therefore usually are not labor organizations.⁹³ These groups usually develop ideas to present to management rather than make specific proposals to it. An employer legally may glean some ideas from the process and, if it wishes, adopt some of them. In *du Pont* we found that, although the employer maintained some unlawful employee involvement committees, its safety conferences did not violate section 8(a)(2).⁹⁴ The stated objective of the safety conferences was to increase personal commitment, responsibility, and acceptance of safety as "the number one concern."⁹⁵ The employees shared their experiences about certain safety issues and developed ideas and suggestions in small groups.⁹⁶ The employer informed employees that bargainable matters could not be addressed and that such issues should be handled only by the union.⁹⁷ Despite uncertainty as to whether the employer fully succeeded in keeping bargainable issues out of discussions, the majority found that these safety conferences were lawful brainstorming groups.⁹⁸ The majority noted that the employer's good faith effort to separate out bargainable issues and its assurances that the union had the exclusive role as to such issues supported the conclusion that the conferences did not undermine the union's status as the exclusive representative.⁹⁹

I agreed in my concurrence that the safety conferences were lawful.¹⁰⁰ I articulated my position that the legislative history of section 8(a)(2) leaves employers with significant freedom through interaction with groups of more than one and fewer than all employees to involve rank-and-file workers in matters formerly seen as management concerns, to call on employees' full ability and know-how, and to increase their enthusiasm for and commitment to quality and productivity through implementing recent developments in worker effectiveness training and empowerment.¹⁰¹ I noted that it is immaterial whether

⁹³ 311 N.L.R.B. 893, 894 (1993).

⁹⁴ *Id.* at 897.

⁹⁵ *Id.* at 896.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.* at 897.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 898 (Devaney, Member, concurring).

¹⁰¹ *Id.* at 899.

these developments occur through hierarchical employer-structured entities or through workplace 'democratization' whereby employees become, in a sense, their own supervisors and managers.¹⁰²

Other Board cases, as well as legislative history, support the conclusion that a wide range of employee involvement methods are not proscribed by section 8(a)(2). For instance, in *General Foods Corporation*,¹⁰³ the Board found that employer-created "teams" in which employees made job assignments, assigned job rotations, and scheduled overtime among team members by consensus were not statutory labor organizations.¹⁰⁴

Employers may also use employee involvement organizations to communicate with their employees. As I stated in my concurrence in *du Pont*, if the committees there limited themselves to establishing and disseminating safety programs, they would not have violated section 8(a)(2).¹⁰⁵ In *Sears, Roebuck & Co.*,¹⁰⁶ the Board upheld the finding that a "communications committee," composed of one employee from each department who served on a rotation system and discussed matters relating to compensation, was not a labor organization that represented or advocated for employees but a management tool used to increase efficiency.¹⁰⁷ It may also be true that employer's assurances to employees that the committee is not intended as a substitute for a bargaining representative, and that they are free to select such a representative may affect the nature of a committee's "purpose."¹⁰⁸ I would not be inclined to find that an employer's mere solicitation of ideas or suggestions from an employee group constitutes "dealing with" that group.¹⁰⁹

Board precedent indicates that an employer lawfully may delegate managerial functions, such as grievance resolution, if

¹⁰² *Id.*

¹⁰³ 231 N.L.R.B. 1232 (1977). In my view, *General Foods* supports the requirement that committees must act in a representative capacity for employees in order to qualify as a statutory labor organization.

¹⁰⁴ *Id.* at 1236.

¹⁰⁵ 311 N.L.R.B. at 903 (Devaney, Member, concurring).

¹⁰⁶ 274 N.L.R.B. 230 (1985).

¹⁰⁷ *Id.* at 233.

¹⁰⁸ See *Electromation, Inc.*, 309 N.L.R.B. 990, 1003 (1992) (Devaney, Member, concurring), *enfd.*, 35 F.3d 1148 (7th Cir. 1994).

¹⁰⁹ See *id.*

it does so with awareness of section 8(a)(2). For instance, in *Mercy-Memorial Hosp. Corp.*¹¹⁰ the Board found that a grievance committee was not a labor organization, because the committee decided the validity of the employees' complaints but did not give employees a role in presenting complaints to management or in discussing or negotiating with management over those complaints.¹¹¹

V. SECTION 8(A)(2) UNDER THE NEW BOARD MEMBERS

Member Stephens and I expressed our views on section 8(a)(2), but Chairman Gould, and Members Browning and Cohen have not had a full opportunity to express their positions in Board opinions. Member Cohen joined the majority in the *Magan Medical Clinic, Inc.* decision of September 12, 1994,¹¹² and agreed with Member Stephens and me that the employer's involvement in the formation of employee committees violated the Act. However, Member Cohen did not detail his position in that case. In his 1993 book, *Agenda for Reform*, Chairman Gould expresses the view that conduct designed to thwart legitimate trade unions or to deprive employees of free choice in the selection of representatives is necessary to find a violation of section 8(a)(2).¹¹³ He favors the "subjective will" approach taken by several courts of appeals in such cases as *Chicago Rawhide*¹¹⁴ and therefore would consider the employer's subjective intent in forming employee involvement committees.¹¹⁵

A few cases currently before the Board may provide an avenue for the new Board to express its view on section 8(a)(2). In *Keeler Brass*,¹¹⁶ the Board will face the question of whether a grievance committee established by the employer to hear and resolve employee grievances is a statutory labor organiza-

¹¹⁰ 231 N.L.R.B. 1108 (1977).

¹¹¹ *Id.* at 1112.

¹¹² 314 N.L.R.B. 1083 (1994).

¹¹³ WILLIAM GOULD, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 140 (1993).

¹¹⁴ *Chicago Rawhide Mfg. Co. v. N.L.R.B.*, 221 F.2d 165 (7th Cir. 1955). See *supra* note 63 and accompanying text.

¹¹⁵ GOULD, *supra* note 113, at 140.

¹¹⁶ *Keeler Brass Automotive Group*, N.L.R.B. Case No. 07-CA-32185 (Oct. 29, 1992).

tion.¹¹⁷ A central issue is whether the committee's purpose is to "deal with" the employer.¹¹⁸ In another pending case, *Webcor Packaging Inc.*,¹¹⁹ the Board is considering the legality of a "Plant Committee" created by the employer that has a majority of employee members elected by fellow employees.¹²⁰ In *Vons Grocery Co.*,¹²¹ also currently before the Board, the administrative law judge found that the employer's "Quality Circle Group" was not a labor organization.¹²² This judge found that the group had not attempted to represent employees in section 2(5) matters but was simply a "study group" that "brainstormed" on issues involving operational and capital improvements.¹²³

Contrary to the dire predictions of some observers, the *Electromation* and *du Pont* decisions have not opened the floodgates of litigation or initiated a full scale assault on employee involvement plans. Currently, only six cases involving section 8(a)(2) and employee involvement organizations are pending before the Board.¹²⁴

One issue that may reach the Board is whether state laws mandating certain employee involvement committees are preempted by the National Labor Relations Act. In a recent memo to the Region 10 Director, the Board's Division of Advice stated that a complaint should be issued against an employer that formed an employee safety committee required by Tennessee state law.¹²⁵ The Division of Advice concluded that this provision of Tennessee state law is in conflict with section 8(a)(2) and is preempted by the Act.¹²⁶

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ N.L.R.B. Case No. 07-CA-31809 (Dec. 20, 1993).

¹²⁰ *Id.*

¹²¹ N.L.R.B. Case No. 21-CA-28816 (Aug. 22, 1994).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See *id.*; *Asarco, Inc.*, N.L.R.B. No. 16-CA-15721 (Oct. 17, 1994); *Dillon Stores*, N.L.R.B. No. 17-CA-16811 (May 26, 1994); *Webcor Packaging, Inc.*, N.L.R.B. No. 07-CA-31809 (Dec. 20, 1993); *Stoody Company*, N.L.R.B. No. 26-CA-15425 (Nov. 23, 1993); *Keeler Brass Automotive Group*, N.L.R.B. No. 07-CA-32185 (Oct. 29, 1992).

¹²⁵ *Goody's Family Clothing, Inc.*, Op. Gen'l Counsel, NLRB *4 (Sept. 21, 1993) (LEXIS, LABOR library, NLRBGC file).

¹²⁶ *Id.*

VI. PROPOSED CHANGES IN THE LAW

The growth of employee involvement mechanisms and the Board's *Electromation* and *du Pont* decisions fueled an intense debate about whether section 8(a)(2) should be left untouched, amended, modified, or simply repealed. In its Fact Finding Report, the Dunlop Commission outlined four options:

- 1) Retain section 8(a)(2) in its present form; or change that section by:
- 2) allowing non-union employers to establish procedures by which its employees will "deal with" conditions of employment;
- 3) permitting employers to establish such employee participation procedures dealing with conditions of work, if certain standards are met, including protection against reprisals; or
- 4) requiring employers to offer their employees participation procedures meeting minimum quality standards.¹²⁷

Consistent with the Commission's third option, some academics suggest modifying the law to allow employers to expand the use of employee involvement committees without entirely denying certain protections for employees. For instance, Professor Paul Weiler suggested that section 8(a)(2) be amended to allow non-union employers who want to experiment with employee participation to do so only if they comply with minimum standards of employee representation.¹²⁸ According to Weiler, such standards would include the use of secret ballot elections, provision of information and financial resources, and protection of representatives from reprisal.¹²⁹ In a similar vein, Chairman Gould, prior to his appointment as Chairman, suggested that section 8(a)(2) be modified to allow employee committees to address a wide variety of subjects and to receive financial assistance unless an inference of anti-union intent could be inferred from the formation or administration of these committees.¹³⁰

¹²⁷ FACT FINDING REPORT, *supra* note 89, at 57.

¹²⁸ Weiler & Mundlak, *supra* note 8, at 1924.

¹²⁹ *Id.*

¹³⁰ GOULD, *supra* note 113, at 139.

Proposals to amend section 8(a)(2) have waxed and waned since the passage of the National Labor Relations Act, most notably during the debate over the Taft-Hartley Amendments, passed in 1947.¹³¹ Recently, the push for amending section 8(a)(2) has gained some force. In the past session, Republicans in Congress advanced bills that would revise section 8(a)(2).¹³²

Unions leaders generally have not favored any change in section 8(a)(2). In a statement given before the Dunlop Commission on August 10, 1994, David Silberman, Director of the AFL-CIO Task Force on Labor Law, addressed proposed changes in section 8(a)(2).¹³³ He expressed the AFL-CIO's support for bilateral, democratic forms of employee participation and asserted that the debate over whether section 8(a)(2) should be amended is simply a "red herring."¹³⁴ According to Silberman, section 8(a)(2) properly prevents conduct that strikes at the heart of employee representation rights and does not prevent a vast range of employee participation efforts.¹³⁵

Management representatives, on the other hand, generally express support for amending section 8(a)(2) to allow a greater range of employee involvement organizations. The Labor Policy Association, for example, expressed its support for legislative change that would provide "an exemption from section 8(a)(2)'s ban on collaborative workplace efforts that are not being adopted as a union avoidance technique."¹³⁶ The Manufacturers Alliance for Productivity and Innovation, Inc., also expressed its support for such changes and asserted that there is a general

¹³¹ Labor Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (codified as amended at 141-87 (1988)).

¹³² S. 669, 103d Cong., 1st Sess. (1993); H.R. 1529, 103d Cong., 1st Sess. (1993).

¹³³ *Hearings Before the Comm'n on the Future of Worker-Management Relations* (Aug. 10, 1994) [hereinafter *Hearings*] (statement of David Silberman, Director of the AFL-CIO Task Force on Labor Law).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*, (statement of Steven M. Darien, Vice President of Human Resources, Merck & Company, Inc., on behalf of the Labor Policy Association). However, management does not universally hold this view. Jack West, Chairman of the American Society for Quality Control, asserted that although ASQC favored changing section 8(a)(2), many organizations have concluded that the prohibitions of section 8(a)(2) are not a significant issue for them, because their quality and participation approaches are not adversely affected. *Id.*, (statement of Jack West).

consensus among U.S. manufacturers that the National Labor Relations Act should not restrict management's ability to introduce new approaches to work organization involving employee participation.¹³⁷

CONCLUSION

A wide range of employee involvement organizations currently are lawful and remain unthreatened by *Electromation*, *du Pont*, and their progeny. Understandably, employers desire guidance for their efforts to involve employees lawfully at the workplace. The two basic questions the Board asks to determine whether an employee involvement group violates section 8(a)(2) are: 1) Whether the group constitutes a "labor organization," and 2) whether the employer dominated the group in its formation or administration. A useful checklist that provides a touchstone for employers, unions, and employees who are concerned about the legality of their employee involvement organizations appears in a recent article. The article suggests that in order to remain within the legal ambit of section 8(a)(2), such plans should:

- 1) Avoid structured groups in favor of ongoing employee involvement on an individual or unstructured group basis;
- 2) establish task-specific ad hoc groups that focus on a particular communications, efficiency, or productivity issue (as opposed to wages, hours, other conditions of work grievances, or labor dispute issues) on a short term basis and then go out of existence;
- 3) use irregular groupings of employees, such as occur during retreats and the like, to address communications, efficiency, or productivity issues; and
- 4) use staff meetings to address communications, efficiency and productivity issues. Such meetings should be attended by all staff, rather than a representative number, in order to avoid the problem of employees representing other employees.¹³⁸

¹³⁷ *Id.*, (statement of Kenneth McLennan, President, Manufacturers Alliance for Productivity and Innovation, Inc.).

¹³⁸ G. Roger King, *Employee Participation Committees: Implications of Electromation*, SOC'Y FOR HUM. RESOURCE MGMT. LEGAL REP. 8 (Spring 1993).

Constructive debate was and will continue to be an important crucible for policy evolution on the reach of section 8(a)(2). The essays that follow provide a solid overview of arguments on both sides of this issue. Whatever may be said of the ongoing debate, it is clear that sham unions are still unlawful and that some employee involvement plans are permissible. Gray areas remain, but the new Board undoubtedly will have its chance to speak on the policy arguments outlined in the following essays.