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Statement of Arnold E. Perl Before the Commission on the Future of Worker-Management Relations

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The Working Group

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STATEMENT OF

ARNOLD E. PERL

APPEARING ON BEHALF OF "THE WORKING GROUP"

BEFORE THE

COMMISSION FOR THE FUTURE OF WORKER-MANAGEMENT RELATIONS

August 10, 1994

MR. CHAIRMAN AND MEMBERS OF THE COMMISSION: My name is Arnold E. Perl. I am a principal in the law firm of Young & Perl, P.C. and serve as its President. I appear before you today on behalf of a group of management attorneys calling itself "The Working Group." A previous presentation by The Working Group was made on January 19, 1994, and will not be restated here, other than The Working Group's consensus position developed on this issue of employee involvement:

> *Electromation* and its progeny have had a chilling effect on employers' willingness to initiate and/or continue employee participation committees, at the very time these committees have become widely recognized as a major means of improving productivity and enhancing product quality. *Electromation* must be clarified or changed to assure continued employee participation.

When the Commission on the Future of Worker-Management Relations issued its fact finding report in May 1994, it concluded that "With respect to future legal policy, the major question is whether, and if so, how, the National Labor Relations Act should be revised or interpreted to permit nonunion firms to develop one or more of the array of employee participation plans that have been challenged under Section 8(a)(2) of the Act. . . ."[1/] The Commission stated that in the second stage of its proceedings, it would like to hear from interested parties on the best possible future direction which should be embarked upon by the Commission.

We submit on behalf of "The Working Group," that the National Labor Relations Board must make a thorough reexamination of the legal standards surrounding Sections 2(5) and 8(a)(2) of the National Labor Relations Act (NLRA) to resolve the current legal uncertainty regarding employee involvement and participation programs ("EPP"). Unless and until such a reexamination is made and the results known, it is premature to conclude that legislative reform is an appropriate or even a desirable approach to protect bona fide EPPs.

To assist the Commission, we have developed three propositions that should be considered in the reexamination of this critical area of the law. First, those individuals serving on an EPP must act as representatives of a larger group of employees for the EPP to be a labor organization. Second, employee groups whose essential purpose is

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1/ Fact Finding Report, Commission On The Future of Worker-Management Relations (May 1994), pp. 56-57.

to address quality, efficiency or productivity do not constitute labor organizations under the Act even if they "touch" on terms and conditions of employment. Third, the NLRB should reexamine its test for "actual domination" within the meaning of Section 8(a)(2) of the Act.

These three propositions address the two cornerstones of any relevant inquiry into the subject: the Section 2(5) definition of labor organization and the provisions of Section 8(a)(2) of the NLRA. Significantly, they reflect concepts over which the Board is either substantially divided or markedly silent. As such, each is appropriate for consideration by the Board at this important juncture.

We begin with the Section 2(5) definition of labor organization, because unless an EPP is deemed to be a labor organization, the provisions of Section 8(a)(2) do not apply.

PROPOSITION 1: Actual and explicit "representation" must exist in order for any employee group to be deemed a "labor organization" under Section 2(5).

A crucial issue left unresolved by *Electromation*,[2/] is whether members of an employee participation program must serve in a "representational" capacity for the EPP to constitute "labor organization" status under Section 2(5) of the NLRA. Had the Board adopted the view espoused by Member Devaney in his concurring opinion in *Electromation*, thousands of EPPs would not be in legal jeopardy today. As Harold Datz, Chief Counsel to then Board Member John Raudabaugh, wrote, following the

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2/ *Electromation, Inc.*, 309 NLRB 990 (1992).

Board's *Electromation* decision:

> If representation is a necessary element for labor organization status, it may be that many EPPs are not labor organizations. The term "representative" can be used in a democratic sense *or* in an agency sense. With respect to the former usage, if the employer appoints the members of the EPP (rather than having them selected by the employees), the EPP would not be the representative of the employees. With respect to the agency usage of the term "representative," the EPP may be a vehicle for the attainment of employer objectives, rather than an agent or advocate for employee interests. If so, it does not function as the representative of employees. Finally, a committee of all employees, i.e., a committee of the whole, is not a representative group. Rather, it is the whole group. Thus, it does not "represent" employees.
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> In sum, if "representation" is a necessary element for labor organization status, the aforementioned EPPs would fall outside the statutory definition.[3/]

Mr. Datz, like Board Member Raudabaugh, concluded that he does not consider "representation" to constitute a necessary element for "labor organization" status.[4/] However, Board Member Devaney stressed in his concurring opinion in *Electromation* that he, contrary to his colleagues, "would not be inclined to find that an employee group constituted a statutory labor organization unless the group acted as a representative of other employees."[5/] Clearly, Board Member Devaney is correct in his view, and he is supported by the Board's own decision in *General Foods Corp.*[6/]

3/ *Daily Lab. Rep.* (BNA) E-2 (Feb. 17, 1993) (emphasis in original).

4/ Id.

5/ *Electromation*, 309 NLRB at 1002 (Devaney, M., concurring).

6/ 231 NLRB 1232 (1977).

Indeed, former NLRB General Counsel Jerry Hunter's own Guideline Memorandum concerning *Electromation*, issued in April 1993, focused on *General Foods:*

> In *General Foods*, . . . the employer established teams of all employees in the bargaining unit, divided according to job assignments, assigned job rotations and scheduled overtime. Each team had meetings to discuss such topics as implementation of the compensation system and the objectives of each team or group of employees. The teams operated under the control of a supervisor. A psychologist was hired to improve internal communications among team group members and to build trust among the team members, and members discussed conditions of work, such as compensation, at their meetings. The Board adopted the Administrative Law Judge's findings and conclusions that the teams were not labor organizations, since the entire bargaining unit, viewed as a "committee as a whole," has never been accorded *de facto* labor organization status. [It does not] stand . . . in an agency relationship to a larger body on whose behalf it is called upon to act. When this relationship does not exist, all that can come into being is a staff meeting or the factory equivalent thereof.[7/]

Significantly, prior to *Electromation*, it widely was believed that representation status was the *sine qua non* for labor organization status. For example, in *Sears, Roebuck and Co.*,[8/] the Administrative Law Judge held that an employee committee that discussed matters related to work performance with the employer was not a statutory labor organization because the participants "did not represent their fellow employees."[9/] Thus, in *Sears*, the company created a "communications committee," consisting of one employee from ten different departments, for the purpose of resolving problems between different departments and discussing matters such as uniforms, tools,

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7/ General Counsel's Guideline Memorandum Concerning *Electromation, Inc.* at 7, 309 NLRB No. 163 (GC 93-4).

8/ 274 NLRB 230 (1985).

9/ Id. at 244.

and equipment. A rotating system was used so that each employee in each department would have an opportunity to participate in the meetings, and the employee members of the committee were paid by the company for the time they spent at the meetings.

Although the committee discussed matters related to work performance that could have had a direct impact on working conditions, the Administrative Law Judge found that the committee was not a labor organization within the meaning of the NLRA since:

> [T]he communications committee was used as a management tool that was intended to increase company efficiency. *The communications committee was not an employee representative or advocate.* The committee did not deal with the Company on behalf of the employees. *The employees on the committee were not selected by their fellow employees and they did not represent their fellow employees.* All the employees, on a rotation basis, were to participate in meetings with management to give input in order to help solve management problems. I therefore find that the communications committee was not a labor organization within the meaning of the [NLRA] . . . .[10/]

Since, as the Commission previously reported,[11/] the Board in *Electromation* authored four different opinions explaining their respective views about the relevant legal principles, it is appropriate for the new Board appointed since *Electromation* to reexamine these views and seek to arrive at a consensus opinion. This is a task which this Board is uniquely situated to undertake. Indeed, as evidenced by the foregoing decisions predating *Electromation*, the NLRA heretofore has been interpreted to exclude

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10/ Id. (emphasis supplied).

11/ Fact Finding Report, Commission On The Future of Worker-Management Relations, p. 54.

EPPs where no finding of "representative status" exists. Were the Board to return to this earlier interpretation, much of the legal uncertainty and concern relating to these programs would disappear.

> **Proposition 2: EPPs do not constitute a "labor organization" merely because they may "touch" on terms and conditions of employment where their essential purpose is product quality, workplace efficiency, or productivity.**

In *Electromation*, the Board underscored that its decision was limited to the facts before it and that its findings "[were] not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed "labor organizations."[12/] As if to distance itself from EPPs that had their roots in quality, efficiency, etc., the Board in *Electromation* emphasized that there was:

> "no sound basis in this record to conclude that the purpose of the Action Committees was limited to achieving 'quality' or 'efficiency' or that they were designed to be a 'communication device' to promote generally the interests of quality or efficiency. We, therefore, do not reach the question of whether any employer initiated programs that may exist for such purposes . . . may constitute labor organizations under Sec. 2(5)."[13/]

Similarly, in his separate concurrence, Member Oviatt added that "[n]ot in this case . . . is the question of how to treat a situation where a legitimately established committee, whose purpose is to improve productivity, recommends changes whose implementation results in job loss."[14/]

12/ 309 NLRB at 990.

13/ 309 NLRB at 997, n. 28.

14/ 309 NLRB at 1004, n. 2.

As a result of *Electromation* and its progeny, The Working Group previously has advised this Commission that management attorneys face a predicament. As we watch our clients continue to move toward greater employee involvement activities, they continue to be exposed to legal jeopardy by virtue of the considerable uncertainty that exists as a result of the lack of clear definition under the NLRA. The notion that EPPs which deal essentially with issues relating to quality, efficiency, and productivity somehow could be deemed a labor organization needs to be dismissed by the Board sooner rather than later. The Board needs to reaffirm the holdings of *General Foods*[15/] and *Sears*.[16/]

Thus, in *General Foods*, the Board adopted the holding of its ALJ that to prove a violation of Section 8(a)(2), the General Counsel must first establish Section 2(5) labor organization status by a preponderance of evidence that the employee involvement groups were "in their intendment or operation entities which existed to deal with management concerning *labor relations* on behalf of employees." *General Foods Corp.*, 231 NLRB at 1235 (emphasis supplied). Although there existed evidence that General Foods dealt with its employees concerning conditions of employment, the Administrative Law Judge found that such actions were "de minimis" and found the teams not to constitute labor organizations under Section 2(5). Id.

Similarly, in *Sears, Roebuck & Co.*, 274 NLRB 230, an Administrative Law

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15/ 231 NLRB 1232 (1971).

16/ 274 NLRB 230 (1985).

Judge found that the communications committee discussed matters related to work performance which could have a direct impact on working conditions, but found the group not to be a "labor organization" since, inter alia, the evidence on the record "establishe[d] that the communication committee was used as a management tool that was intended to increase company efficiency."

In his concurring opinion in *Electromation*, Member Oviatt stated that:

> I find nothing in today's decision that should be read as a condemnation of cooperative programs and committees of the type I have outlined above. The statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace.[17/]

The time has come for the entire Board itself to provide such assurance. As noted by Charles B. Craver, Professor of Law and former Secretary of the Labor and Employment Law Section of the American Bar Association:

> . . . . NLRA provisions should be interpreted and applied in a flexible manner that will permit the development of innovative forms of worker participation, while simultaneously protecting the fundamental statutory right of employees to control their representational destiny.[18/]

Such an appropriate balance *can* be attained when employee participation programs revolve around quality, efficiency, communications, and/or productivity. Surely they can and do coexist in the workplace without jeopardizing the employees' right to choose representation under the NLRA. Indeed, "genuine" employee

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17/ 309 NLRB at 1004.

18/ Craver, "The NLRA at 50: From Youthful Exuberance to Middle-Aged Complacency," Lab. L.J. 615 (August 1985).

participation programs must be allowed to flourish free from legal challenge. This Administration's emphasis and reliance on employee involvement in the workplace requires nothing less.

Proposition 3: The National Labor Relations Board should reexamine its test for "actual domination" under Section 8(a)(2) of the NLRA.

The Board has acknowledged that "[the NLRA] does not define the specific acts that may constitute domination . . . ."[19] In *Electromation*, however, the Board, for the first time, applied a definition that will cover most *any* employer conduct *vis-a-vis* a "labor organization":

> [A] labor organization that is the creation of management, whose structure and function are essentially determined by management, . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.[20]

The view taken by the Board in *Electromation* would require that management essentially take a "hands-off" approach to EPPs in order to avoid a finding of "domination." Yet this is directly contrary to that which is required for the successful implementation of EPPs, according to a study reported recently in the Harvard Business

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19/ 309 NLRB at 995.

20/ Id. (emphasis in original).

Review.[21] The study, conducted by researchers at the University of Southern California's Center for Effective Organizations, found that a hands-off approach by managers "turns teamwork into a little more than a waste of everyone's time." Indeed, the key problem where teamwork failed, according to the study, "was the lack of management's involvement in creating a context where work could go forward."[22] Yet, when management becomes "involved" under the Board's view, such involvement automatically will be construed as "domination."

The Board's domination test, as articulated in *Electromation,* essentially is an objective test for "the potential to dominate" rather than a determination of "actual domination," especially since the subjective standpoint of the employees is not even considered. Such an approach appears to be contrary to the mainstream of authority developed by the circuits, which requires evidence of "actual domination" rather than merely a potential to dominate in order to establish a violation of Section 8(a)(2) of the Act.

As the First Circuit observed in *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979):

> This collection of precedents, recognizing some room for management-employee cooperation short of domination, looking to the subjective realities of domination of employee will and not just the objective potentialities of organizational structure seems also in harmony with the approach in other circuits (citations omitted). . . . If anything, changing

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21/ Harvard Business Review, May - June 1993, at 13.

22/ Id.

> conditions in the labor management field seemed to have strengthened the case for providing room for cooperative employer-employee arrangements as alternatives to the traditional adversarial model."[23/]

The Board's test for domination not only appears to be contrary to the mainstream of authority developed by the circuits, it does not take into account or give effect to the National Productivity and Quality of Working Life Act which Congress passed in 1975, which underscores the importance of such cooperative efforts to improving the productivity of U.S. industry. The Act provides that the "laws, rules, regulations, and policies of the U.S. shall be interpreted as to give full force and effect to this policy."[24/]

Significantly, a reexamination of the test for evaluating EPPs under Section 8(a)(2) was advocated by Member Raudabaugh in his concurring opinion in *Electromation*. In his view, the test for evaluating EPPs under Section 8(a)(2) should turn on the following factors:

(1) The extent of the employer's involvement in the structure and operation of the committees;

(2) Whether the employees, from an objective standpoint, reasonably perceive the EPP as a substitute for full collective bargaining through a traditional union;

23/ Id. at 1213-14 (citations omitted).

24/ National Productivity and Quality of Work Like Act of 1975, 15 U.S.C. §2401 et seq.

(3) Whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining; and

(4) The employer's motives in establishing the EPP.[25/]

Similarly, in yet another test for evaluating EPPs under Section 8(a)(2), it has been proposed that an 8(a)(2) violation could be established only where a labor organization existed, some assistance was provided by the employer, and there existed either employer intent to coerce or a showing of employee dissatisfaction.[26/]

It is noted that the test advocated by Member Raudabaugh as well as the test espoused by the Note in the Yale Law Journal would afford greater flexibility for bona fide EPPs and serve as "a scalpel for excising occasional malignancies," rather than "a meat cleaver once appropriate for hacking through the mass of company unions."[27/]

CONCLUSION

Exactly one year ago, while addressing the American Bar Association's Section of Labor and Employment Law at its 1993 Annual Meeting in New York, N.Y., I urged the new Board to expand on what the previous Board already had said in

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25/ 309 NLRB at 1013.

26/ Note, New Standards for Domination and Support Under Section 8(a)(2), 82 Yale L.J. 510, 516 (quoted with approval in *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979)).

27/ 82 Yale L.J. at 528.

Electromation and *DuPont*.[28] I noted that Secretary of Labor, Robert Reich, told a Senate committee on July 1, 1993, referring to the Board's decisions in *Electromation* and *DuPont*, that "more clarification of the issue is needed."[29] In fact, Secretary Reich stated that *Electromation* and *DuPont* may be "chilling very constructive worker-management relations."[30] Secretary Reich further expressed concern that these decisions "have had a broader affect" on cooperative worker-management efforts than the "relatively narrow" specific facts involved.[31]

Consistent with the Secretary's view, this Commission can play a vital role. When the Commission issues its recommendations, it should identify the propositions discussed herein and urge the Board to select key cases in which these propositions can be addressed. Only by the adoption of these principles, can the Board return to its own precedent and conform to the mainstream of judicial authority. The result will be to eliminate the legal uncertainties now afflicting the adoption and implementation of these important mechanisms of competitiveness.

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28/ *E. I. DuPont de Nemours & Co.*, 311 NLRB 893 (1993).

29/ *Daily Lab. Rep.* (BNA) A-6 (July 2, 1993).

30/ Id.

31/ Id.