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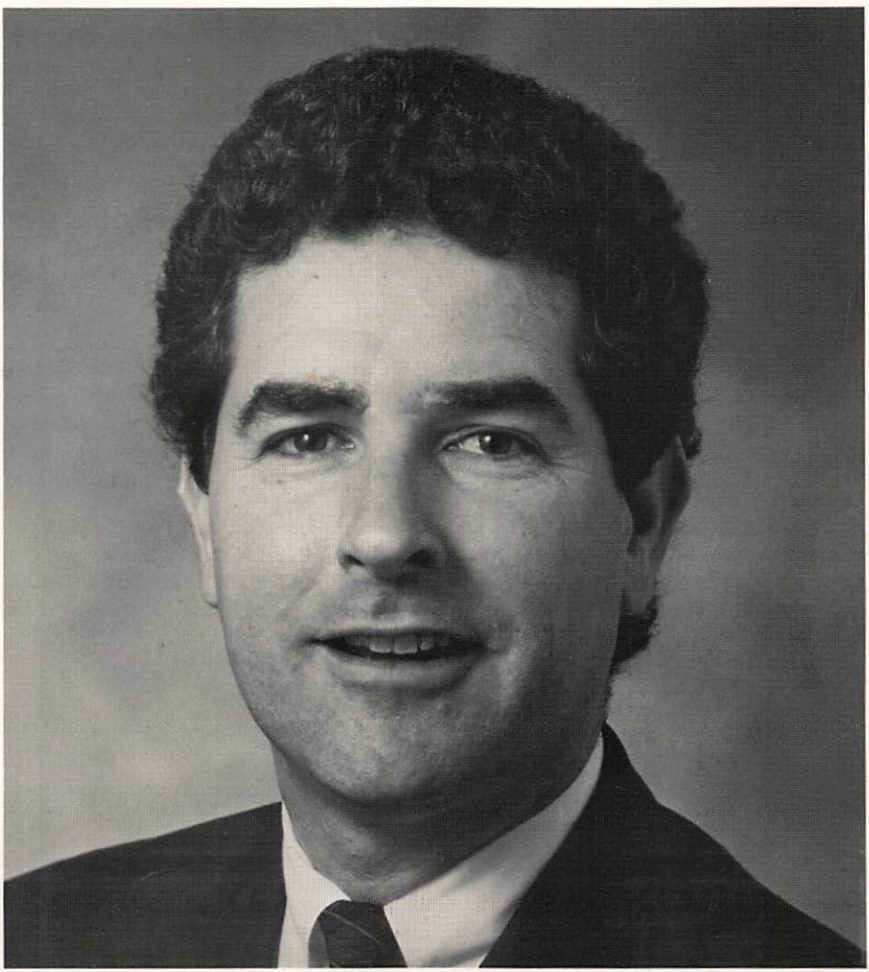

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The New Legal Challenge to Employee Participation

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Employee participation programs, an innovative modern day vehicle to improve the quality and efficiency of today's work environment, may be in danger of extinction in the wake of two recent decisions of the National Labor Relations Board (NLRB or the Board). Statistics show that over eighty percent of employers of Fortune 1000 companies nationwide have created some type of employee participation program. The legislators who passed the National Labor Relations Act (NLRA) in 1935, during an era of inherent labor-management confrontation, never envisioned that these committees would become part of the fabric of modern day society. While some have argued that the federal labor law is "antiquated" and must be flexible enough to adapt to accommodate employee involvement committees, it is clear that any such change in the law will not be an easy battle and will not occur overnight. As the NLRA reads today, Section 2(5) along with Section 8(a)(2) clearly limits the use of such committees by narrowing the range of topics that the committees can lawfully address. Employers cannot sit idle in anticipation that their committees will withstand Board scrutiny. Instead, they must seek a safe harbor to guard against violations of the NLRA.

Currently, Republican legislators have introduced legislation to amend the NLRA. Secretary of Labor Robert Reich has spoken out for change to ensure that the chilling effect of the two decisions will not weaken worker-management relations. Reich quickly set up a Commission on the Future of Worker-Management Relations to investigate worker-management relations and it is quickly working to propose a solution without having to wait for resolution through the courts or administrative agencies.

This article will provide a thorough overview of the statutes at issue, the application of the law as applied to the facts in the *Electromation* and *Du Pont* decisions and most importantly for employers, factors to consider in establishing any type of employee participation program. Finally, a brief update of the current developments in response to the two decisions will enable employers to keep an eye on the developments already at work. Although there are many unanswered questions, it is vitally important that employers ensure that their employee participation committees can withstand an attack by the NLRB.

Correct Law, Wrong Policy?

A surface reading of the Act would seem to indicate that employee participation committees violate Section 2(5) and Section 8(a)(2) of the Act. Section 2(5) defines a "labor organization" as follows: "*labor organization* means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate, and which exists for the purpose, in whole or in part, of "dealing with" employers con-

cerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." (Emphasis added).

Section 8(a)(2) provides that it shall be 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: Provided that, subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." (Emphasis added).

The legislative history indicates that the two provisions were enacted to prevent "sham" or "sweetheart" unions that employers set up as an artifice in the 1920s and 1930s to thwart legitimate labor groups from organizing. The National Labor Relations Act's main purpose was to eliminate industrial strife by encouraging collective bargaining. To eliminate an employer's ability to dominate unions, the drafters defined "labor organization" rather broadly.[1]

Initially, the original Senate bill (S. 2926) made it an unfair labor practice to "initiate, participate in, supervise, or influence the formation, rules, and other policies of a labor organization."[2] It is important to note that the final version of Section 8(a)(2) substituted the phrase "to dominate or interfere with the formation or administration" for the terms "initiate, participate in, supervise or influence." At the time, the drafters sought to ensure that groups were free to act independently of employers in representing employee interests while not prohibiting employers from merely suggesting to their employees that they organize.

The first time the Supreme Court was faced with interpreting the provisions of the Act in *Pennsylvania Greyhound Lines*,[3] it was faced with the type of employee representation plan that the drafters had envisioned. The plan was entirely employer dominated. The employer chose the employees to serve on its committee and required them to work for the interests of the company. Thus, management selected the "proper" men for the committee. Furthermore, the company chose the employees' bargaining representative so that the committee was not at all an agent of the employees or loyal to their interests.

The facts of both *Electromation* and *Du Pont*, which will be discussed below, indicate clear employer domination. However, the implications of these decisions reach out to any employee participation program that may fall into this broad definition. A number of the amicus briefs filed with the Board during the *Electromation* case urged the Board to ignore the language and legislative history of the provisions at issue and "freely adjust the breadth of the prohibition in light of changing economic realities." However, the Board indicated that they are not free to ignore the language unless Congressional intent to the contrary is absolutely clear or the Supreme Court has decreed that a particular reading of the statute is required to reflect such an intent.

The modern workplace has changed dramatically since the NLRA was passed in 1935. Today's workplace is less centralized and there are less manufacturing and more service jobs. In addition, the workforce is much more sophisticated. The committees at issue today are not controlled entirely by management but represent an interaction between both management and the employees to increase the efficiency and enhance the quality in the workplace.

National Labor Relations Board Member John Raudabaugh addressed the di-

[1] *Legislative History of the National Labor Relations Act of 1935*, 15-16 (GPO 1949).

[2] *Leg. Hist.* at 2309-2310.

[3] 1 NLRB 1 (1935), enf denied in part 91 F2d 178 (3d Cir 1937), 1 LC ¶ 17,027, rev 303 US 261 (1938), 1 LC ¶ 18,001.

lemma at a recent conference. He said: "How do we accommodate employee involvement committees within an antiquated federal labor law?" Many argue that, given the fact that three-quarters of what American industry does today as a standard practice is found to be illegal under the Act, and in light of the fact that these committees were unanticipated by the legislators who passed the Act in 1935, the only remedy may be new legislation.

The First Blow: *Electromation*

Electromation, Inc.,[4] affirmed an administrative law judge's decision holding that the company's worker-management "action committees" violated the Act by dealing with management on such issues as absenteeism, pay scales, and bonuses. The Board held that the action committees, made up of rank-and-file employees and members of management, were employer-dominated "labor organizations" within the meaning of Section 2(5) of the NLRA and not simply "communication devices." Secondly, the Board determined that the Company's conduct towards the action committees constituted domination and interference in violation of Section 8(a)(2) of the NLRA. Although the Board emphasized in its opinion that the decision was limited to the particular facts of the case and that it did not intend to outlaw employee participation committees entirely, the sting has been felt by employers throughout American industry.

The various action committees created by the company in *Electromation* included (1) absenteeism infractions, (2) no smoking policy, (3) communication network, (4) pay progression for premium positions, and (5) attendance bonus programs. Management created the committees expecting that the employees would "kind of talk back and forth." However, after the union made a demand to management for recognition, management disbanded the committees due to the union's campaign.

The Board held that an employer may not create an employee action committee during a union's organizing campaign and then proceed to dominate the committee. The evidence revealed that the employees did not ask that the company create the committee. Management dictated the form, nature and structure of the committee, called the meetings, determined the number of eligible employees, limited their participation and established the policy goals with no input by employees.

The Second Blow: *Du Pont*

Although the Board indicated that the *Electromation* decision was limited to its narrow facts, it was not a mere aberration in the law, as it only took the Board five months to hand down the *Du Pont*[5] decision. *Du Pont* sent a second dose of shock waves to employers throughout America. The Board intended to provide an opportunity to "clarify" the basis for its finding of unfair labor practices and to suggest ways for employers to avoid violating the Act. However, the guidance was anything but clear.

While *Electromation* involved a non-union setting, *Du Pont* dealt with issues raised where there was an incumbent union. *Dupont* held that the employer had circumvented the union and illegally dominated its joint worker-management safety and fitness committees because the company had the power to appoint its members, accept or reject recommendations, and disband the committees at will.

The Board easily found that the committees met the definition of "labor organization" set forth in Section 2(5) of the Act. The employees participated and the subjects discussed included safety, incentive awards for safety, and employee benefits such as picnic areas and jogging tracks. The Board focused most of its at-

[4] 309 NLRB No. 163 (12/16/92), 1992-93 CCH NLRB ¶ 17,069.

[5] *E.I. Du Pont de Nemours & Co.*, 311 NLRB No. 88, 1992-93 CCH NLRB ¶ 17,862. (5/28/93).

tention by giving guidance on what constituted "dealing with" in Section 2(5), which will be explained in more detail below. The Board held that the committees involved could not fall into any one of the safe havens.

The Board concluded that Du Pont dominated the administration of the committees. Management retained veto power over any action the committee wished to take. The committee essentially could do nothing if management opposed its proposals. In each committee, a management representative served as either a leader or "resource" (monitor or adviser), indicating that he had a clear role in establishing the agenda and controlling the workings of the meeting. Management also determined how many employees served on each committee and which employees would be selected if there were too many volunteers. Unit employees had no independent voice in determining the composition, structure, or operation of the committees. The employer had the power to dispose of all of the committees at will.

The Board held that management dominated the Freon Committee on safety. Management representatives again determined the number of employees who would serve on the committee and invited certain unit employees to attend. Management representatives chaired the meetings and determined its structure and purpose.

However, the Board indicated that safety conferences constitute permissible communication between management and its employees if the employer is careful to avoid dealing directly with union issues in violation of Section 8(a)(5) of the Act. In *Du Pont*, each conference began with supervisors and managers giving their opening remarks, followed by the group breaking up into smaller sections to discuss specific topics, such as communicating safety information. Employees would state their views, their experience on the topic, and what barriers must be overcome before their recommendation could be implemented. Employees were told that they could not discuss union issues and that these questions were placed on a "bucket list" to indicate that they would not be considered. The facilitator or "resource" for each group had the responsibility to ensure that these union issues were not discussed. Each small group submitted its comments to a central safety and occupational health committee for consideration.

The Board in *Du Pont* held that no dealing took place since these conferences on safety were mere brainstorming sessions. The Board based its decision on the fact that the conference was not deciding proposals to improve safety and the employer made perfectly clear that union issues were not to be discussed and a mechanism was provided to ensure compliance. However, the Board was not entirely persuaded that the employer succeeded in keeping all union issues out of the discussions. Nevertheless, its good faith effort was sufficient to convince the Board.

Although *Du Pont* still leaves many unanswered questions, the Board clearly indicated that an employer is free to encourage its employees to express their ideas and to become more aware of safety problems. An employer may initiate these conferences as long as they do not structure the conference as a bilateral mechanism where employees make specific proposals and management responds to each proposal.

The future of *Du Pont* is unclear in view of the fact that the composition of the NLRB is expected to change significantly. *Du Pont* was issued on Member Oviatt's last day on the Board and Member Raudabaugh is serving under a recess appointment (his term expired last December). Member Devaney is the only Democrat on the Board and wrote separately in both *Electromation* and *Du Pont*. If and when President Clinton appoints three new democrats to the Board, *Du Pont* will not be the final word.

Is the Committee a Labor Organization?

It is essential to determine if the committee falls within the confines of the definition of "labor organization" under Section 2(5) of the Act. Section 2(5) 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." (Emphasis added).

The organization will be deemed a "labor organization" if four elements are present: (1) employee participation, (2) a purpose to deal with employers, (3) concerning conditions of employment or other statutory subjects (i.e. grievances, labor disputes, wages, rates of pay, or hours of employment), and (4) if an "employee representation committee or plan" is involved, or other evidence is shown that the committee is in some way representing the employees." [6]

If the organization's purpose is to represent the employees, then it meets the definition of "employee representation committee or plan." It is insignificant that the organization has no formal structure, no elected officers, no bylaws, infrequent meetings, and no requirement for the payment of initiation fees or dues.

The Supreme Court, in *NLRB v. Cabot Carbon Co.*,[7] has interpreted the term "dealing with" in Section 2(5) as broader than the term "collective bargaining." The Board noted in *Du Pont* that "bargaining" connotes a process by which two parties seek to compromise, while dealing entails a pattern or practice in which a group of employees seeks over a period of time to make proposals which management accepts or rejects and no compromise is required. The Board directed that if there are only isolated instances in which a group makes ad hoc proposals and management accepts or rejects it, there is no dealing.

The Board in *Du Pont* offered three examples to give guidance as to what constitutes "dealing." First, a "brainstorming group," which simply discusses issues but does not make proposals to management is not dealing, even though management may adopt ideas it learns from the process. Second, there is no dealing when a committee exists solely to plan education programs to share information with the employer where the employer simply gathers information and does what it wants with it. Third, it is no violation of the Act to provide a suggestion box for the employees, since no specific proposals are at state and the proposals are made individually rather than by a group.

The Board also indicated that it makes no difference whether management representatives who have the power to reject employee proposals do so from inside the committee or outside it. The mere presence of management representatives on the committee is insignificant to the determination of whether the "dealing with" requirement is met. If the committee is governed by majority vote and management representatives are in the minority, then the committee makes the decisions rather than management. If management representatives act as observers or facilitators to the process and abstain from voting on proposals, there will also be no finding of dealing.

Has the Employer Dominated or Interfered?

Once it is determined that the committee is a "labor organization" within Section 2(5), it is necessary to determine if the employer's interaction with it violates Section 8(a)(2). Section 8(a)(2) provides that it shall be an unfair labor practice for an employer: "to *dominate* or interfere with the formation or administration of

[6] *Electromation* at 15.

[7] 360 US 203 (1959), 37 LC ¶ 65,515.

any labor organization or contribute financial or other support to it: Provided that, subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay." (Emphasis added).

Although the statute fails to define the specific acts that constitute "domination," the Board has held that "domination" occurs within the meaning of Section 8(a)(2) where "a labor organization is created by management, has its structure and function essentially determined by management, and whose continued existence depends on the fiat of management." [8] However, where the employees establish the organization, determine its structure, nature and function, even where the employer has the potential ability to influence the organization, there will be no finding of domination.

The Board noted in *Electromation* and the cases following *Cabot Carbon* "that when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment."

While most circuits agree with the Board's decision, the Sixth Circuit has deviated from the Board's rulings. Specifically, in *Airstream, Inc. v. NLRB*,[9] the employer formed a "President's Advisory Council" and directed its employees to choose representatives and discussed with the representatives an attendance bonus system. The Court held that a company organized committee was not a labor organization and therefore did not violate the National Labor Relations Act.

The judge, uncomfortable with the Board's previous rulings, commented: "To my mind an inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. The Act encourages collective bargaining, as it should, in accordance with national policy. The Act does not encourage compulsory membership in a labor organization. The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in the particular plant, if there is so much as an intention by an employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their "general welfare." [10]

In *NLRB v. Scott & Fetzer Co.*,[11] the employer created an "in-plant committee," chose its representatives, and adjusted its vacation eligibility policy after a committee meeting. Because the employer did not indicate any anti-union animus and there was no evidence that the committee was being used for more than a communication device, the Court held that there was no domination involved. However, the mere fact that there is no evidence of an anti-union motive does not excuse a Section 8(a)(2) violation where the elements of "dealing with" and a "labor organization" are present.

Establishing Employee Participation Programs

To ensure that the Board will not conclude that the committee is employer-dominated, it is essential for the employer to allow the employees to establish the committee and determine its structure, nature, and function. The following factors were expressly approved in the *Elec-*

[8] *Electromation* at 13.

[9] 877 F2d 1291 (6th Cir 1989).

[10] *Airstream* at 1292.

[11] 691 F2d 288 (6th Cir 1982), 95 LC ¶ 13,810.

tromation and *Du Pont* decisions to provide a safe haven for employee participation committees.

(1) Employees requested or demanded the establishment of the committee or were involved in its creation.

(2) Employees are involved in the committee and while employers can define the topic, it must grant a certain degree of autonomy to the committee.

(3) Employers do not select or limit the members who can participate.

(4) Managers, supervisors, and employees may participate on the committee as observers or facilitators without the right to vote on proposals.

(5) Committee action or decision-making must be decided by majority rule. Management representatives must be in the minority.

(6) Simple brainstorming sessions are acceptable.

(7) A suggestion box where employees make specific individual proposals to management does not violate the Act.

(8) Safety conferences are permissible if they avoid union issues, but the employer must provide a mechanism to ensure compliance.

(9) A committee must avoid discussion of wages, hours, and other terms and conditions of employment.

(10) A committee that is set up merely as a communication device is acceptable.

If an employee participation committee contains the following factors, however, a possible violation of the Act may result.

(1) The employer created the committee and employees have no say in the structure of the committee or issues to be discussed.

(2) An employee involvement committee is a bilateral arrangement. Management plans the agenda of the committee and maintains full authority and control of the meetings.

(3) Employers select the particular members to sit on the committee or limit an individual's participation in the committee.

(4) Managers on the committee are in the majority and proposals cannot be approved without the majority stamp of approval.

(5) No mechanism is provided to ensure that union issues will not be addressed at these meetings.

(6) Committee discussions include such topics as employee wages, hours, or other terms and conditions of employment.

(7) The committee is set up to filter management's agenda.

Implications and Current Developments

The employer in *Electromation*, unlike *Du Pont*, is appealing the decision to the Seventh Circuit Court of Appeals, while the Board seeks enforcement of its order. Oral argument was heard in *Electromation Inc. v. NLRB* (92-4129) on September 27, 1993. The Court has not yet rendered an opinion.

Congressional Rep. Steve Gunderson (R-Wis) and Sen. Nancy Kassebaum (R-Kan) simultaneously introduced in the House of Representatives and the Senate on March 30, 1993, the Teamwork for Employees and Management Act (H.R. 1529 and S. 669). The legislation proposes to amend Section 8(a)(2) of the Act and legalize labor-management programs that deal with such issues as quality, productivity, and efficiency. Since the introduction of the bill in the House in March, twenty co-sponsors have signed onto the bill.

The proposal seeks to add at the end of Section 8(a)(2) the following: "Provided further, that it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind in which employees participate to discuss

matters of mutual interest (including issues of quality, productivity, and efficiency) and which does not have, claim, or seek authority to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization."

Many observers believe that the legislation will be successful. Stanford Professor Steven Gould, who awaits confirmation by the Senate to head the NLRB, advocates such an amendment in his new book, *Agenda for Reform: The Future of Employment Relationships and the Law*, to be published soon.

Secretary of Labor Robert Reich is worried about the potential chilling effect the two cases may have on worker-management relations. Reich recently appointed a Commission on the Future of Worker-Management Relations which held its first session on May 24, 1993. The commission will explore new methods of enhancing productivity and efficiency by examining existing law and determining whether changes are necessary. Their recommendations will serve as a quicker method to hopefully resolve the problem rather than waiting for the courts or agencies to take action.

Critics are deeply disturbed with the National Labor Relations Board's ruling, which apparently allows employers to obtain worker input only through surveys, questionnaires, or suggestion boxes. In today's society, these methods are not productive and in fact are primitive at best. Arnold E. Perl, who argued *Electromation* on behalf of the U.S. Chamber of Commerce, insisted that "there is no turning back" from cooperative committees despite the Board's rulings.

On a brighter note, an August 9, 1993, a panel session sponsored by the American Bar Association's Section of Labor and Employment Law reported that only 37 complaints have been issued on employee committees as unfair labor practices since October 1, 1989, out of more than 10,000 charges. Since the *Electromation* decision was issued in December 1992, there have only been 17 instances of unfair labor practice violations out of a total of less than 2,000 charges. In a recent article, a panel member noted that questions regarding employee involvement programs account for less than one percent of the Board's workload.

The panel also indicated that in a recent case, charges were dismissed stemming from a series of luncheon meetings in a unionized workplace. Workers expressed their views while management listened. The Board concluded that the meetings were lawful brainstorming sessions and that the lunch meetings were not a surrogate for the union.

Unfortunately, there are still many unanswered questions. Even if companies set up their employee participation programs following the procedures outlined above, it is still unknown how the NLRB will rule. In the meantime, it is imperative that employers take note of these suggestions and incorporate them into their workplace until such time as the Seventh Circuit gives more definitive guidance to employers on employee participation.

[The End]