The legality of employee participation programs after the NLRB's Electromation Inc. decision

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Published in *Business Law Review*, vol. 26, pp. 85-91, Spring 1993

THE LEGALITY OF EMPLOYEE PARTICIPATION PROGRAMS AFTER THE NLRB'S *ELECTROMATION, INC.* DECISION

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I. INTRODUCTION

American businesses, faced with diverse competitive forces, have adopted an array of different quality improvement efforts to enhance their competitive standing in our world economy. "Total quality management" is team centered.[1] "Quality circles" are employee participation groups whose purpose is to utilize employee expertise in examining operational problems such as work quality, labor efficiency, and material waste. Other teams or committees utilized by business are sometimes called "quality of work-life programs," whereby management draws on the creativity of its employees by including them in decisions that affect their work life.[2]

In its *Electromation, Inc.*[3] decision, the National Labor Relations Board considered whether an employer was free to establish certain

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[1] While much debate exists as to how to implement and administer "total quality management" (TQM) programs, the very center of TQM is team development, including teams where employees participate with management personnel and form the hub around which all other elements of TQM, such as customer satisfaction and supplier performance most revolve. *See* DENNIS C. KINLAW, CONTINUOUS IMPROVEMENT AND MEASUREMENT FOR TOTAL QUALITY: A TEAM-BASED APPROACH, (1992).

[2] *See* Donna Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality?*, 30 B.C.L. REV. 987 (1989); see also, Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?* 7 HOFSTRA LAB. L. J. 219 (1989).

[3] 309 N.L.R.B. No. 163, 142 L.R.R.M. 1001 (1992).

"action committees" which the employer characterized as committees established to communicate with its employees in order to improve quality and efficiency, or whether these committees constituted labor organizations which the company dominated and assisted in violation of the National Labor Relations Act (NLRA).[4] The Board determined, in a very narrow decision, that the action committees did violate the NLRA.[5] And, while this decision did not provide a broad scoped pronouncement on the legality of all employee participation programs, it set forth the applicable law and provided some guidance to employers which will allow for the continued functioning of many employee participation programs. This article will set forth the applicable law used to determine whether an employee participation program is in violation of the NLRA in the context of the *Electromation* decision, and it will assess the significance of this decision.

II. EMPLOYER DOMINATION OF UNIONS AND EMPLOYEE REPRESENTATION

Section 8(a)(2) of the National Labor Relations Act makes it an unfair labor practice for an employer to "dominate or interfere with the formation or administration of any labor organization" or to contribute support to it.[6] Prior to the enactment of the Wagner Act in 1935, employers tried to avoid collective bargaining obligations under the predecessor law, the National Industrial Recovery Act, by forming employer-dominated unions.[7] Senator Wagner addressed the issue of company dominated labor organizations in his opening remarks in support of the National Labor Relations Act, stating:

> Genuine collective bargaining is the only way to attain equality of bargaining power.... The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power.... (O)nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer dominated union as the agency

[4] *Id.* at 1010.

[5] *Id.*

[6] 29 U.S.C. § 158 (a)(2).

[7] The National Industrial Recovery Act was passed in 1933 and was invalidated by the U. S. Supreme Court in Schechter Poultry Co. v. United States, 295 U.S. 495 (1935) some two years later. Congress responded immediately by passing the National Labor Relations Act of 1935, 29 U.S.C. § 151 *et seq.*, which is frequently referred to as the Wagner Act.

> for dealing with grievances, labor disputes, wages, rates, or hours of employment.[8]

Because the Wagner Act's purpose was to eliminate employer dominated unions the term "labor organization" was defined broadly in Section 2(5) of the NLRA, as follows:

> The term "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 concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Congress thus brought within the coverage of the Act a broad range of employee groups; and it sought to ensure that such groups were free to act independently of their employer in representing employee interests.

Before a finding of unlawful employer domination can be made under Section 8(a)(2) a finding that the employee group or committee is a "labor organization" under Section 2(5) is required. The most common issue facing the NLRB and the courts in such determinations is the question of whether or not the group or organization exists at least in part for the purpose "of dealing with employers" concerning conditions of work or other statutory subjects, as required by the Section 2(5) definition. Guidance for the Board and the courts concerning so-called "dealing with" cases was provided by the Supreme Court in *NLRB v. Cabot Carbon Co.*[9] In *Cabot Carbon* the Court held that the term "dealing with" in Section 2(5) is broader than the term "collective bargaining" and applies to situations that do not contemplate the negotiation of a collective bargaining agreement.[10]

Notwithstanding that "dealing with" employers is broadly defined, the Board has found no "dealing with" status and thus no Section 8(a)(2) violations when the employee group or committee's purpose is limited to performing essentially adjudicative or managerial functions. Thus a grievance committee involving employees and managers was found not to be a Section 2(5) labor organization where the committee was created to give employees a voice in resolving grievances of their fellow employees, not by negotiating with management, but by itself deciding the validity of each employee's complaint.[11] And, an employer created "communications committee" made up of one em-

[8] LEGISLATIVE HISTORY OF THE NLRA OF 1935, 15-16 (1949).
[9] 360 U.S. 203 (1959).
[10] *Id.* at 211.
[11] Mercy-Memorial Hospital, 231 N.L.R.B. 1108, 1121 (1977).

ployee from each department was found not to be a Section 2(5) labor organization because the purpose of the committee was to be a management tool intended to increase company efficiency rather than an advocate for or representative of employees.[12]

Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of the employer whose structure and functions are determined by the employer and whose continued existence depends on the fiat of management, is one whose formation and administration has been dominated under Section 8(a)(2). In such a case, actual domination is established by virtue of the employer's specific acts.[13]

III. THE *ELECTROMATION* CASE

Electromation, Inc., a manufacturer of electrical components employing some 200 individuals, altered its existing employee attendance bonus policy and in lieu of its annual wage increase, distributed lesser benefits in order to cut its operating expenses.[14] Shortly after these changes the company received a petition signed by 69 employees expressing displeasure with the new attendance policy.[15] Thereafter, on January 11, 1989 the company's president met with a selected group of eight employees and discussed with them a number of issues, including wages, bonuses, incentive pay, attendance programs, and leave policy. The company's president testified that, "it was very unlikely that further unilateral management action to resolve these problems was going to come anywhere near making everybody happy ... and we thought that the best course of action would be to involve the employees in coming up with solutions to these issues."[16] Thereafter, the company announced the formation of five "action commit-

[12] Sears, Roebuck & Co., 274 N.L.R.B. 230, 244 (1985).

[13] In *Pennsylvania Greyhound Lines* 1 N.L.R.B. 1 (1935) *enfd. denied* in part 91 F.2d 178 (3rd Cir. 1937), *revd.* 303 U.S. 261 (1938), the NLRB's very first decision, the Board found and the Supreme Court affirmed, that the organization at issue was an employee representation plan under Section 2(5), that the organization was entirely the creation of management, which planned it, sponsored it, and foisted it on employees who never requested it, and the organization's functions were described and given to it by management, all of which supported the Board finding of a Section 8(a)(2) violation. 1 N.L.R.B. at 13-14. *But see,* Airstream Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989) where the employer had formed a "President's Advisory Council," told employees to choose representatives, and discussed with their representatives an attendance bonus plan. The Sixth Circuit found that this was not a labor organization under Section 2(5) and that there was an absence of evidence showing domination within the meaning of Section 8(a)(2).

[14] *Electromation, Inc.* 142 L.R.R.M. 1001, 1003 (1992).

[15] *Id.*

[16] *Id.*

tees" to deal with five areas of employees' complaints including absenteeism infractions, the company's no smoking policy, communications, pay progression for premium positions, and the attendance bonus program.[17] The company drafted policy statements for each committee, determined the number of employees permitted to sign up for the committees, limited participation to no more than one employee per committee, paid employees for time spent on committee work and supplied necessary materials.[18] The committee members were to serve on a representational basis, getting ideas from fellow employees and informing them of what was going on in each committee.[19] A month after the action committees were formed, the Teamsters union made a demand for recognition and subsequently filed unfair labor practice charges, contending that the action committees were in violation of Section 8(a)(2).[20] The administrative law judge found that the company had violated the Act, and, the Board affirmed this decision with three of the four Board members agreeing on a majority opinion, the fourth member concurring in the result, and two of those signing the majority decision writing concurring statements.[21]

Electromation's majority made it clear at the start of their opinion that their findings were narrow indeed and applicable to the totality of the record evidence.[22] Moreover, the majority made it explicitly clear that the findings were not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed "labor organizations" or that employer actions like some of those at issue in this case would necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference, or domination.[23]

The Board majority then followed the two pronged Section 2(5)-Section 8(a)(2) analysis followed by previous Board decisions and the courts. First, the Board determined that the Electromation, Inc. action committees constituted a labor organization within the meaning of Section 2(5) of the Act. Applying the statutory language of Section 2(5), the Board determined that "employees participated" in the action

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 1004.

[21] Chairman James M. Stephens, and Members Dennis M. Devaney and Clifford R. Oviatt, Jr. signed the majority opinion. Members Devaney and Oviatt also authored concurring opinions. The fifth position on the Board was vacant at the time of this decision.

[22] 142 L.R.R.M. at 1002.

[23] *Id.*

committees and the activities of the committees constituted "dealing with the employer"; the subject matter of that dealing concerned "conditions of work"; and the employees acted in a "representational capacity."[24] Thus, the Board concluded that the action committees were created for, and actually served the purpose of dealing with the employer about conditions of employment.[25]

Second, the Board found that Electromation's conduct *vis a vis* the action committees constituted "domination" in the formation and administration of the committees in violation of Section 8(a)(2). In support of this finding the Board referred to the fact the employer drafted the goals statement of each committee, determined the subject matter for each committee and determined how many members would serve on each committee.[26] Moreover, the Board concluded that the evidence supporting domination also supported a finding of unlawful contribution of support in violation of Section 8(a)(2), including the fact that the committees carried out their missions on paid time.[27] The Board majority concluded:

> ... The purpose of the Action Committees was, as the record demonstrates, not to enable management and employees to cooperate to improve "quality" or "efficiency," but to create in employees the impression that their disagreements with management had been resolved *bilaterally*. By creating the Action Committees the Respondent imposed on employees its own *unilateral* form of bargaining or dealing and thereby violated Section 8(a)(2) and (1) as alleged.[28]

IV. CONCLUSION

In *Electromation, Inc.*, the Board decided that certain "action committees" set up by the employer were illegal labor organizations in violation of Section 8(a)(2) of the Act. The decision was a narrow one, however, and was not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed in violation of Section 8(a)(2).

The Board majority would not find a Section 8(a)(2) violation where the employee group or committee is limited to performing essentially managerial functions rather than representational functions;[29] and it would also not find a Section (8)(2) violation where the employee participation committee served as a grievance committee with au-

[24] *Id* at 1008, 1009.
[25] *Id.* at 1009.
[26] *Id.*
[27] *Id.*
[28] *Id.* at 1010 (emphasis in original).
[29] *See supra* note 12.

thority to decide disputes rather than negotiate with management about the resolution of the dispute.[30]

It is common for businesses today to utilize employee involvement techniques such as joint employee-management committees that meet and look into safety issues and product quality issues. Such committees have proven to be very successful in helping employers make workplaces safer, and have increased product quality, employee morale, and productivity. In unionized companies these committees are often sanctioned by the unions, with union officers participating on the committees.[31] So long as these employee-management cooperative programs or committees do not usurp the traditional role of a union concerning collective bargaining about wages, hours, working conditions, and grievances, these committees may continue to be utilized by employers.[32]

[30]*See supra* note 11.

[31]Union cooperation is usually readily available to work with management to resolve safety issues through bilaterally established joint employee-management committees. Unions are also generally willing to participate in bilaterally established committees to consider quality issues. However, where employers attempt to radically change the way businesses are operated by implementing "total quality management" programs with the cooperation of the union certified to represent the employees, the employer will ordinarily have to pay a heavy price for such cooperation. When General Motors' Pontiac Division implemented a TQM program under the principles of W. Edwards Deming, Pontiac instituted a job security policy providing for no layoffs of employees due to gains in quality and productivity under the TQM plan. Pontiac's division manager believed that the key to the process was to get the union on board; and the union participated in the planning process and agreed to collective bargaining agreement changes such as the election of team leaders, rather than selection based on seniority. ANDREA GABOR, THE MAN WHO DISCOVERED QUALITY, 226-229 (1990).

[32] Where an employer seeks to avoid bargaining with a union, the employer cannot use a "safety and progress committee" to discuss and resolve an unlimited range of employee problems. And, an employer may not support and use employee committees as a means to supplant or substitute for a union as the exclusive bargaining representative on wages, hours, working conditions, and grievances. Szabo v. U. S. Marine Corporation, 819 F.2d 714 (7th Cir. 1987).