MUCH ADO ABOUT SECTION 8(a)(2): THE NLRB AND WORKPLACE COOPERATION AFTER ELECTROMATION AND DU PONT*

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A great deal of comment, much of it critical in nature, has been made with respect to the National Labor Relations Board's interpretation of section 8(a)(2) in the Electromation1 and du Pont2 cases. The Wall Street Journal, in a June 9, 1993, editorial, suggested that the Board was a “quality circle buster” which spent “its time patrolling the industrial landscape in search of anything that looks even vaguely like a `company union.’”3 A witness for the National Association of Manufacturers stated in testimony that the Board has “essentially said that any time a company works directly with its employees to discuss and address workplace issues without the involvement of a labor union, that company is likely to be in violation of the National Labor Relations Act.”4 Congressman Steve Gunderson, a Republican from Wisconsin, in a statement to the Senate Committee on Labor and Human Resources, said that the Board rulings have “called into question the legality of virtually every currently operating [employee participation] program in the nation.”5 The Cato Institute in a recent policy paper argued that the Board’s holdings may mean that all non-union employer-employee

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* With appropriate apologies to Shakespeare and Kenneth Branagh whose marvelous remake of Much Ado About Nothing I saw while working on this Article. This Article is based on an address delivered at the “Eighth Annual National Conference on Labor and Employment Law: Critical Issues for 1993,” held January 22-23, 1993 in Tampa, Florida. The Stetson University College of Law Center for Dispute Resolution presented the conference.


4. Mary Harrington, Director Corporate Labor Relations, Eastman Kodak Company, appearing on behalf of the National Association of Manufacturers before the Senate Labor and Human Resources Committee on July 1, 1993.
5. Steve Gunderson (R. Wisconsin), Testimony before the Senate Labor and Human Resources Committee on July 1, 1993.
cooperation is illegal.\(^6\)

The underlying premise of this Article is that the alarmist tone reflected in such statements, as well as the suggestion by some commentators that Electromation and du Pont signal the arrival of a legal Armageddon for employee participation programs, completely misreads the legal landscape with respect to the opinions. Such statements also have no relationship to the empirical reality of what is actually happening in the workplace. In fact, both Electromation and du Pont are mainstream Board decisions which were shaped by the factual evidence in each case. The decisions were directed by clear statutory language, prior Board and circuit court precedent, legislative history, and definitive guidance from the United States Supreme Court.

I. THE STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

Section 8(a)(2) of the National Labor Relations Act (NLRA) outlaws employer domination or interference with the formation or administration of any labor organization.\(^7\) The statute also forbids employers from contributing financial or other support to a labor organization.\(^8\) Section 2(5) of the statute 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.”\(^9\)

A proviso to section 8(a)(2) specifically states that employers are not prohibited from conferring with their employees during working hours without a loss of time or pay to the employee.\(^10\) More comprehensive language in section 9(a) of the statute authorizes

any individual employee or a group of employees . . . the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining

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8. Id.
representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect . . . . 11

Although nearly impossible for a person to discern from reading some of the recent commentary concerning section 8(a)(2), this provision was one of the centerpieces of the Wagner Act. As Senator Wagner remarked upon introduction of an early version of what eventually became the statute:

The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity . . . . Only 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 an agency for dealing with grievances, labor disputes, wages, rules or hours of employment.12

The policy underpinning this view flows from the very heart of the statute, section 7, which guarantees employees the freedom to select their own bargaining representative. The timeless evil that Congress attempted to make unlawful was interference with employee free choice. During the debates in 1947 over the Taft-Hartley Act amendments to the Wagner Act, the scope of section 8(a)(2) was again revisited.13 Congress rejected statutory changes which would have altered the treatment of employee representative committees. The House amendment provided that nothing in the Act should be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with the committee matters of mutual interest, if the employees did not have a bargaining representative.14 The Senate version, which was adopted in conference, instead amended section 9(a) to authorize individual employees and employers to deal directly with each other over grievances.15

The legislative history underscores that the revised language clearly stated “that the employee’s right to present grievances exists independently of the rights of the bargaining representative . . . .”\(^{16}\)

The conference report indicated that the House proposal was rejected because the Act permitted meetings of individual employees and groups of employees with the employer, while section 9(a) of the conference agreement permitted the answer of grievances by employers.\(^{17}\)

\section*{II. LEGAL PRECEDENT}

The framework for interpretation of section 2(5) and section 8(a)(2) was explicitly set out by the United States Supreme Court in a 1959 decision, \textit{NLRB v. Cabot Carbon Co.}\(^{18}\) After reviewing the statutory language and legislative history, the Court concluded that the term “dealing with” was meant to be more inclusive than the term “bargaining with.”\(^{19}\) Thus, the committee in \textit{Cabot Carbon}, which discussed with management various matters relating to working conditions and wages, was an illegally dominated labor organization.

Since \textit{Cabot Carbon}, the Board and the federal courts have applied a case-by-case evaluation of the factual evidence to assess the legality of various employee participation programs and employee involvement committees. This case-specific approach was followed by the Board in deciding both the \textit{Electromation} and \textit{du Pont} cases.

\section*{III. THE BACKGROUND FOR THE BOARD OPINIONS IN ELECTROMATION AND DU PONT}

Applying the two-step inquiry suggested by the Supreme Court in \textit{Cabot Carbon},\(^{20}\) the Board in both \textit{Electromation} and \textit{du Pont}
first determined whether the employee involvement committees were labor organizations within the meaning of section 2(5). Once this judgment was made, the Board applied the second prong of the test to decide if the employer illegally dominated or assisted the labor organization. Obviously, if the employee grouping is not a labor organization, there can be no violation of the statute. However, even if there is an employee committee that meets the definition of a labor organization, no violation of the statute occurs as long as the employer does not unlawfully dominate or influence the employee entity.

The Board's decisions in Electromation and du Pont included several concurring opinions. A number of commentators have lambasted the Board for not providing clear guidance or standards which would accommodate contemporary employee participation programs.21 Although there are multiple opinions in the cases, a fair reading of the decisions does provide considerable guidance to the baseline of acceptable activity subscribed to by the participating Board members. A fair reading also sheds light on what the Board members believe is required by the statutory language and gloss given section 8(a)(2) by the Supreme Court.

The concurring opinions emphasize that each of the Board members draws the outside boundaries of legality differently, but the collection of views clearly illustrates that there is significant latitude for lawful cooperative programs. The management bar's principal objection has been that no definitive black letter law exists in the area. The answer to the objection is that the statutory language, legislative history, and prior precedent limited the Board's ability to completely redefine the statute in the absence of Congressional action to change the law.

IV. ELECTROMATION

The majority opinion in Electromation found that the employee

21. See Arnold E. Perl, Employee Involvement Groups: The Outcry Over the NLRB's Electromation Decision, 44 Lab. L.J. 195 (1993). Perl commented that "[a]s a result of the Board's failure to provide new standards to accommodate contemporary employee participation programs, litigation and confrontation will reign supreme over common sense, ingenuity, and pragmatism." Id. at 207. See also Thomas J. Piskorski, Electromation: A Setback to Employer Participation Programs, 9 Lab. L.J. 218 (1993). Piskorski stated that "[n]otwithstanding the lip service that it was not striking down most employee participation programs, the Board offers little genuine guidance to employers on how to institute such a program without running afoul of section 8(a)(2)." Id. at 218.
committees were labor organizations under section 2(5) of the NLRA. It further found that the employer dominated and supported these committees in violation of section 8(a)(2). The majority found that Congress, through its passage of section 8(a)(2), sought to ensure that employee groups seeking to represent employee interests were free to act independently of employers. The majority also observed that *Cabot Carbon* provided guidelines for determining whether there exists an organization in which employees participate, at least in part, for the purpose of “dealing with” the employer concerning wages, hours, or conditions of work. The majority construed the Court's holding in the following way:

[W]e view “dealing with” as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in section 2(5), coupled with real or apparent consideration of those proposals by management. A unilateral mechanism, such as a “suggestion box,” or “brainstorming” groups or meetings, or analogous information exchanges, does not constitute “dealing with.”

The majority asserted that despite the broad definition of “dealing with” under *Cabot Carbon*, an organization whose purpose is limited to a managerial function would not be a labor organization under section 2(5). The majority noted that the *Cabot Carbon* Court held that the rejection of a proposed amendment to the 1947 Taft-Hartley Act that would have allowed employers to form committees of employees to discuss conditions of employment in the absence of a bargaining representative demonstrated that Congress had no intention of exempting employee representation committees from the definition of labor organization in section 2(5). Finally, with respect to whether a section 2(5) labor organization is unlawfully dominated, the majority stated 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 . . . .”

In my concurring opinion, I stressed my view that significant latitude exists under section 8(a)(2) for employers to implement

23. Id. at 5 n.21.
24. Id. at 5, 6.
25. Id. at 6.
programs involving employees in the workplace. My opinion noted that the legislative history of the Wagner Act showed no concern over employer-initiated programs relating to managerial issues such as quality, productivity, and efficiency. Instead, the focus was on employer-dominated “sham unions” which attempted to substitute the employer’s will for that of the employees. Similarly, with respect to Supreme Court precedent, my opinion emphasized that the Court had not dealt with employer programs limited to managerial issues. I noted that in Cabot Carbon, the Court relied on the grievance handling of the employee committee to find labor organization status. The Court did not reach the issue of whether the committee’s discussion of such matters as safety and increased efficiency warranted a finding of labor organization status. I also pointed out that prior Board precedent including General Foods, John Ascuaga’s Nugget, and Mercy Memorial Hospital allowed a broad range of lawful communications between employers and employees, such as permitting employees to set their own goals and regulate themselves, and delegating all matters concerning grievance resolution to employees.

Reaching an issue not addressed by the majority, I held that I would not be inclined to find labor organization status unless the group acted as a representative of other employees. In my view, evidence that a committee was an agent of the employer would be considered evidence that it lacked a representational purpose. Finally, agreeing with the Administrative Law Judge in Sears Roe-
I stated that I would not be inclined to find that the employer's solicitation of ideas from an employee group constituted "dealing with" that group.37

In Member Oviatt's concurring opinion, he stressed the wide range of lawful activities which were untouched by what he characterized as a "narrow and unremarkable" holding.38 These activities included quality circles, quality of work life programs, joint problem-solving structures that engage management and employees in finding ways to improve operations, and committees established to improve communications between management and employees.39 Member Raudabaugh concurred in the result but set out a separate test for determining a violation of section 8(a)(2).40 Under Member Raudabaugh's analysis, the inquiry turns 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 [employee participation program] as a substitute for full collective bargaining through a traditional union;

(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 [employee participation program].41

V. DU PONT

The majority opinion in du Pont affirmed an Administrative Law Judge's finding that six safety committees and one fitness committee were labor organizations within the ambit of section 2(5). The majority also found that du Pont dominated the formation of one of the committees, as well as the administration of all of the committees, in violation of section 8(a)(2). The majority indicated that it


37. Electromation, 309 N.L.R.B. No. 163, slip op. at 13 (Devaney, Member, concurring).

38. Electromation, 309 N.L.R.B. No. 163, slip op. at 14 n.2 (Oviatt, Member, concurring).

39. Id. at 14-15.

40. Id. at 15 (Raudabaugh, Member, concurring).

41. Id. at 23.
was adding rationale to the judge's decision in order to provide guidance for those seeking to implement lawful cooperative programs between employees and management.42

The majority noted that “dealing with” involves a bilateral mechanism and “ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”43 The majority further noted that “[i]f the evidence establishes such a pattern or practice, or shows that the group exists for a purpose of following such a pattern or practice, the element of dealing is present.”44 The majority noted several likely safe havens, such as brainstorming, sharing information with the employer, or a suggestion box procedure, because the proposals are made individually and not as a group.45 The majority also emphasized that:

The mere presence, however, of management members on a committee would not necessarily result in a finding that the committee deals with the employer within the meaning of Section 2(5). For example, there would be no “dealing with” management if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management. Similarly, there would be no “dealing” if management representatives participated on the committee as observers or facilitators without the right to vote on committee proposals.46

The majority further stated that the structural operations of the committees warranted a finding that the company had dominated the administration of the committees.47

In my concurring opinion, I focused on the fact that the company attempted to use the committees to freeze the union out of areas in which it had a vital and legally recognized interest: employee health and safety, bonuses, and employee grievances over safety.48

42. E.I. du Pont de Nemours & Co., 311 N.L.R.B. No. 88, slip op. at 1.
43. Id. at 2.
44. Id.
45. Id. at 2 n.11.
46. Du Pont, 311 N.L.R.B. No. 88, slip op. at 3.
47. Id. at 3 n.13.
48. Id. at 6 n.3 (Devaney, Member, concurring).
As my opinion states, the company's “conduct as to the safety and fitness committees comes close to a textbook example of an employer's manipulation of employee committees to weaken and undermine the employees' freely chosen exclusive bargaining agent.”49 I contrasted this behavior to that of the company with respect to the safety conferences, and, in agreement with my colleagues, found that the safety pause meetings did not violate the statute because employees were encouraged to raise their own issues and propose their own ideas while “bargainable” issues were tabled.50 The company's different conduct in the two employee participation settings provides a useful outline of the boundaries of lawful activity under section 8(a)(2).

Section 8(a)(2) should not create obstacles for employers wishing to implement such plans — as long as such programs do not impair employees' free choice of a bargaining representative. Section 8(a)(2) does not ban agenda-setting, establishing or dissolving committees, or mixing managers and statutory employees on a committee. It does, however, outlaw manipulating such committees so that they appear to be agents and representatives of employees when in fact they are not.51

VI. THE REAL WORLD WORKPLACE

In Negotiating the Future: A Labor Perspective on American Business, Barry and Irving Bluestone argue that “the present framework of labor-management relations in shops, offices, and factories throughout the nation remains largely antithetical to what Americans need most; much higher productivity, much better quality, more innovation, and far more employment security and job satisfaction.”52 Professor William Gould of Stanford University Law School, in his recently released treatise Agenda for Reform, states that “the principal legal obstacle to labor management cooperation is the anti-company-union unfair labor practice provision [section 8(a)(2)] of the NLRA.”53 The theoretical foundation of these argu-

49. Id. at 6.
50. Id.
51. Id. at 7.
53. WILLIAM B. GOULD IV, AGENDA FOR REFORM 7 (1993). President Clinton has recently nominated Professor Gould to be Chairman of the National Labor Relations Board.
ments is that section 8(a)(2), coupled with the Board's decisions in *Electromation* and *du Pont*, are significant impediments to employee participation programs.

This debate began in the wake of the 1986 United States Department of Labor study of the potential conflict of current federal labor laws and labor-management cooperative efforts.54 A considerable controversy flourished in the academic literature of that time. The foregoing proposition that the law needs to be changed is by no means a unanimous one. The 1988 Vanderbilt Special Project concluded that:

New legislation cannot balance all the interests that have become intricately woven into the working interpretation of 8(a)(2) over the past fifty years. Although labor and management relations have changed significantly since 1935, a flexible reading of the current legislation, within the framework of free choice, will be more productive than the development of new, untested legislation.55

The Board itself is faced with the reality that any Board analysis is circumscribed by Supreme Court precedent, the language of the statute, extensive legislative history, and prior Board opinions. The current Board also comes to the question infused with a healthy regard for the inherent limitations of administrative adjudication. As the majority opinion in *Electromotion* stated:

[W]hen the Board has the latitude to change a particular construction of the statute we may appropriately take into account changing industrial realities, [but] we do not agree that we are free so to act either when 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, or both.56

In my concurring opinions in *Electromotion* and *du Pont*, I highlighted an important reality that has been obscured by a good deal of the overheated rhetoric concerning 8(a)(2) and these cases. Basically, I believe that current law as further articulated in *Electromotion* and *du Pont*, “provide[s] significant latitude to em-

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56. *Electromation*, 309 N.L.R.B. No. 163, slip op. at 3 n.9 (citations omitted).
ployers seeking to involve employees in the workplace . . . . Section 8(a)(2) prohibits a specific form of employer conduct” and “is not a broad-based ban on employee/employer communications.”

Empirical evidence from the workplace amply demonstrates that section 8(a)(2) has not prevented broad scale implementation of employee participation programs throughout American industry. A 1992 *Forbes Magazine* piece indicates that more than 30,000 companies have some form of cooperative management programs in place. As I pointed out in my concurrence in *Du Pont*, between fiscal year 1990 and fiscal year 1992, complaints alleging violations of section 8(a)(2) amounted to only 20 out of over 9300 complaints issued during that three-year period. In a speech at Memphis State University, NLRB General Counsel Jerry Hunter emphasized that “[w]e do not go out looking for charges.” He further commented that he did not believe that employee participation programs are in great jeopardy and that many employee participation programs can peacefully exist with the law as it currently stands.

In reviewing existing cooperative programs, employers will be well served by comparing their existing programs to the base line guidance set forth in *Electromation* and *Du Pont*. A useful checklist appears in a recent article which lists the following alternatives if concerns are raised about the legality of current structures:

1. avoiding structured groups in favor of ongoing employee involvement on an individual or unstructured group basis;
2. establishing 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. using irregular groupings of employees, such as occur during retreats and the like, to address communications, efficiency, or productivity issues; and
4. using staff meetings to address communications, efficiency, and productivity issues. Such meetings should be attended by all staff, rather than a representative number, to avoid the problem of em-

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57. *Id.* at 9. The summary of the opinions previously set out at notes 22-51 and accompanying text outlines the legal arguments and analysis.
59. *Du Pont*, 311 N.L.R.B. No. 88, slip op. at 7 n.4.
61. *Id.*
ployees representing other employees.62

VII. CONCLUSION

The bottom line for both labor and management is that the Board's recent decisions have not sounded the death knell for employee participation programs. There is considerable room under existing law for carefully considered cooperative plans. As indicated, empirical data demonstrates that there is no massive litigation currently underway with respect to these issues. To the extent that elected policy makers believe more leeway for employee participation programs should be provided by law, the recently established Commission on the Future of Worker-Management Relations, and pending legislation introduced by Senator Nancy Kassebaum63 and Representative Steve Gunderson64 provide vehicles for discussion.

The House and Senate measures were introduced as companion pieces of legislation. The two bills parallel each other with only minor stylistic differences in the preambles and texts. Both legislative proposals would add a second proviso to section § 8(a)(2)65 permitting employers lawfully 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 to amend . . . collective bargaining agreements between the employer and any labor organization.66

If Yogi Berra were a labor law analyst reviewing the current legislative initiatives as compared to the amendments proposed during the Taft-Hartley debates, he would undoubtedly repeat his oft-cited observation “it's deja vu all over again.” The conceptual framework of the 1947 House Amendment and today's proposals are very similar. The Commission on Worker-Management Relations

65. See supra notes 10-11 and accompanying text for a discussion of § 8(a)(2)'s first proviso.
66. S. 669, 103d Cong., 1st Sess. § 3 (1993). See H.R. 1529, 103d Cong. 1st Sess. § 3 (1993) for a similar provision. Both bills were referred to the respective committees for study.
also is focusing on potential legal impediments to labor-management cooperation, including section 8(a)(2), and will report to the President by March, 1994.

Meanwhile, I recommend that practitioners, employees, corporations, and unions stay tuned. The Board will carry out its statutory duties by adjudicating cases which will continue to delineate and refine the boundaries of lawful activity under section 8(a)(2).