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Employee Involvement Committees and Federal Regulations

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CORPORATE COUNSEL'S GUIDE TO WORKER PARTICIPATION COMMITTEES AFTER *ELECTROMATION*

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A. WHAT IS AN EMPLOYEE PARTICIPATION COMMITTEE?

An employee participation committee is essentially any kind of workplace employer-employee committee that functions to deal with workplace issues. These types of committees, long employed by some of America's foreign competitors such as German and Japanese companies, became something of a "rage" in corporate America beginning in the 1980's. Surveys indicate that at least 80% of Fortune 1000 companies have installed employee participation committees of one type or another. These include so-called "quality circles", "quality of work life" committees, productivity gainsharing programs, self-directed work teams, safety committees and diversity committees.

B. THE *ELECTROMATION* PROBLEM

1. Background to the *Electromation* Problem: Section 8(a)(2) of the NLRA.

When the National Labor Relations Act ("NLRA") was enacted in 1935, one of the primary concerns of the Act's architect, Senator Robert Wagner, was the proliferation of company dominated unions. Company dominated unions had begun to appear in the early twentieth century and had multiplied after the enactment of the National Industrial Recovery Act of 1933. By 1935, company union membership was growing far faster than worker membership in autonomous unions. The first of Senator Wagner's many drafts of the bill that was to become the NLRA contained only one substantive provision: a provision banning company unions.

Senator Wagner's concern about company unions culminated in Section 8(a)(2) of the NLRA.[1] Instead of an outright ban on company participation in labor unions, after

[1] This section was enacted as section 8(2) of the 1935 Wagner Act. When the Act was amended in 1947 by the Taft-Hartley Act, the section was renumbered as Section 8(a)(2).

political compromise, Senator Wagner settled for the following language:

> (a) It shall be an unfair labor practice for an employer –
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> (2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . .[2]

Section 2(5) of the NLRA defines "labor organization" as:

> . . . any organization of any kind, or any agency or employer representation committee or plan, in which employees participated 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.

It is that extremely broad language of Section 2(5) that sets the stage for the *Electromation* problem.

2. The *Electromation* Case.

In *Electromation, Inc.*, 309 N.L.R.B. 990, 142 LRRM 1001 (1992), the National Labor Relations Board ("NLRB") ruled that a non-union employer which had established employee "action committees" had violated the Section 8(a)(2) prohibition on domination of labor organizations, and the Board ordered the employer to disband the committees. The Board's decision was later enforced by the Seventh Circuit, *Electromation, Inc. v. National Labor Relations Board*, 35 F.3d 1148 (7th Cir. 1994).

a. Case Facts

Electromation was a non-union electronic components manufacturer which employed approximately 200 workers in its Elkhart, Indiana facility. After experiencing financial losses, management instituted a series of cost-cutting measures in 1988. The measures were unpopular with employees, and sixty-eight workers signed a petition asking management to reconsider the measures. In response to the petition, management met with a group of eight employees to discuss the problems. Following the meeting, the company's president met with other members of management and concluded that the best course would be to involve employees in the company's budget problems and other concerns. Company management then met again with the same group of eight employees and proposed the creation of employee-management "action committees" to address the company's problems. The employees at the meeting initially

[2] The additional language of the clause reads: "*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[.]"

reacted negatively to the concept of these committees, but eventually decided to go along with it.

In January, 1989, the company set up five action committees.[3] Each committee consisted of up to six employees (who were permitted to volunteer for the committee) and one or two members of management, as well as the company's Employee Benefits Manager, who was in charge of the coordination of all the committees. Management determined the final composition of each committee, its responsibilities and goals, the meeting dates, the topics of discussion, and also provided the materials and location for the meetings. Employee were paid for their participation, and a member of management was present at every meeting to facilitate the discussions.

Within a month of the formation of the committees, Teamsters Local 1049 demanded recognition from the company. On the advice of counsel, management advised the employees that because of the union's demand, the company could no longer participate in the committees, but that the employee members could continue to meet if they desired. Two of the five committees continued to meet without company participation. The Teamsters filed an unfair labor practice charge with the NLRB, alleging that the committees constituted a labor organization under Section 2(5) of the NLRA and that the company had violated Section 8(a)(2) of the NLRA by dominating the committees. An administrative law judge found in favor of the union.

b. Board Holding in *Electromation*.

In a 4-0 decision by Chairman Stephens,[4] the Board first found that the action committees were labor organizations within the definition of Section 2(5) of the NLRA because employees participated in the committees and acted as representatives of other employees and the committees existed for the purpose of "dealing with" the employer regarding conditions of employment.

Having found the committees to be "labor organizations," the Board then found that the company had dominated the formation and administration of the committees in violation of section 8(a)(2) of the Act because the company had initiated the idea to create the committees, had defined the membership, functions and goals of the committees, contributed support to the committees, and appointed management members to serve on the committees. The Board also found that the purpose of the action committees was not to enable management and employees to cooperate to improve quality or efficiency, but rather to create in employees the impression that their disagreements with management had been resolved bilaterally, where in fact the employer had imposed on its employees a unilateral form of bargaining.

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[3] The five committees were denominated as (1) Absenteeism/Infractions; (2) No Smoking Policy; (3) Communication Network; (4) Pay Progression for Premium Positions; and (5) Attendance Bonus Program.

[4] Board members Devaney, Oviatt and Raudabaugh each wrote separate concurrences.

Having found a violation of the NLRA, the Board ordered Electromation to dismantle the action committees and to post a notice informing employees of the Board's findings and order.

C. THE POST-*ELECTROMATION* CASES

In the years since the *Electromation* decision, the Board has resolved a relatively small number of cases involving the legality of employee participation committees.[5] However, in the vast majority of those cases considered, the Board has found a Section 8(a)(2) violation. There appear to be only three post-*Electromation* cases where the Board has approved any kind of employee participation committee (*see* below). In addition, in one case discussed below, *NLRB v. Peninsula General Hospital Medical Center,* 36 F.3d 1262 (4th Cir. 1994), the Fourth Circuit denied enforcement of a Board order finding a Section 8(a)(2) violation.

1. Cases Finding a Section 8(a)(2) Violation.[6]

a. *Waste Management of Utah, Inc.,* 310 N.L.R.B. (1993).

In this case, management instituted employee-management routing and productivity, safety and benefits committees within two months of a union filing a petition for an election. Management decided the makeup of the committees, selected meeting times and places and presided over committee meetings. Shortly before the union election, management provided employees with proposed changes in the safety bonus program and in the accident/injury review program and attributed the proposals to the employee committees. Management promised to implement the proposals within a month. Under these facts, the Board upheld an administrative law judge's

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[5] In connection with Senate hearings in 1997 on the proposed TEAM Act of 1997 (*see* below for further discussion of the Team Act), Senator Edward Kennedy cited a February 10, 1997 letter from the General Counsel of the NLRB to the effect that "[S]ince the National Labor Relations Board decided the Electromation case in 1992, the Board has resolved only 16 cases – out of 54,919 cases considered – in which part of the remedy required dissolution of employee teams." Statement of Senator Edward M. Kennedy of the Teamwork for Employees and Managers Act of 1997: Hearing Before the U.S. Senate Committee on Labor and Human Resources, February 12, 1997, available at 1997 WL 70683.

[6] In addition to the cited Board decisions, there are at least four decisions from NLRB administrative law judges finding post-*Electromation* violations of Section 8(a)(2). *See Polaroid Corp. & Charla Scivally* (June 14, 1996), available at 1996 NLRB LEXIS 377 (employer unlawfully dominated employee participation group established by the employer to address issues of pay, policy and benefits); *Grouse Mountain Associates II* (July 16, 1998), available at 1998 NLRB LEXIS 486 (although hotel did not devise the structure of or participate in the formation of an employee "Quality Assurance" ("QA") committee, the hotel violated Section 8(a)(2) by rendering support and assistance to the committee in that a manager designated the dates, times and locations of the QA committee, acted as the chairperson of each meeting, and recorded the committee's minutes); *Summa Health System, Inc.* (March 29, 1999), available at 1999 NLRB LEXIS 196 (hospital ordered to dismantle two "Process Enhancement Teams ("PET") that had been set up to address issues of efficiency and cost reduction in operations); *Addicts Rehabilitation Center Fund, Inc.* (July 20, 1999), available at 1999 NLRB LEXIS 512 (residential treatment center for drug addicts violated Section 8(a)(2) by establishing employee "Pro-Action" committee to deal with staff grievances).

finding of unlawful employer domination. The Board ordered the employer to dismantle the committees and to bargain with the union.

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

This case involved a unionized plant where the employer had established six safety committees and one fitness committee. The NLRB found these joint labor management committees to be unlawfully dominated labor organizations. In its decision, the Board emphasized that the employer had veto power over any proposal, the employer controlled how many employees served on the committees, the employer could change or abolish the committees at will and each committee had a member of management who served as a leader or advisor.

c. *Research Federal Credit Union*, 310 N.L.R.B. 56 (1993), *remanded without opinion*, 25 F.3d 1115 (D.C. Cir. 1994).

This case involved an employer who had introduced employee involvement teams following the commencement of a union organizing campaign. The teams were composed of employees from each department in the company, as well as management representatives, and addressed various topics, such as annual performance reviews, benefits for part-time employees and smoking policies. The Board found that the teams constituted labor organizations and that the employer had unlawfully dominated the teams.

d. *Ryder Distribution Resources, Inc.*, 311 N.L.R.B. 814 (1993).

In this case, the employer established an employee participatory program called the "Quality Through People" program in response to a union organizing effort. Company employees were initially reluctant to participate in the program, but changed their minds after the employer offered each employee $500 as a "good faith gesture." Following a meeting with employees where they enumerated their concerns, the employer created five "quality action" teams. Each team had several employees as members and one manager. Employees on each team received training on how to convince management to implement employee proposals and were instructed that it was important to poll other employees and to report the results of the poll to the employer. Based primarily on evidence introduced regarding the wage and benefits committee, the administrative law judge found that the employer had violated Section 8(a)(2) of the NLRA. The Board upheld the administrative law judge's findings, emphasizing that the "Quality Through People" program had been initiated by the employer, the employer used cash incentives to motivate employees to participate and the continued existence of each team rested with the employer.

e. *Garney Morris, Inc.*, 313 N.L.R.B. 101 (1993).

In this case, a company president formed an employee committee in response to a union organizing campaign and repeatedly urged employees to select representatives to participate on the committee. The administrative law judge found that the establishment of the employee committee violated Section 8(a)(2) of the NLRA, and that the employer had committed other unfair labor practices as well. The judge imposed a

bargaining order and also ordered the company to disband the employee committee. The NLRB upheld the administrative law judge's decision.

f. *Magan Medical Clinic, Inc.*, 314 N.L.R.B. 1083 (1994).

This case involved a committee called the "Forum," which was created by the employer following an effort by employees to start an organizing campaign. At its first meeting, the employee members of the Forum were permitted to change the operating rules initially set up by the employer and were subsequently told by management that the committee was theirs and management could have nothing to do with it. Following the organizational meetings, the Forum met to discuss employees grievances, which the committee then presented to management. The Forum was successful in persuading management to act on the grievances. Under these facts, an administrative law judge found that the employer had violated Section 8(a)(2) by interfering with the formation and administration of the Forum, but that there was insufficient evidence to show that the employer had unlawfully dominated the group, since the group appeared to have had an effective existence independent from the employer. The Board affirmed the administrative law judge's decision.

g. *Keeler Brass Automotive Group*, 317 N.L.R.B. 1110 (1995).

In this case, the employer had started a grievance committee in 1983. Some eight years later, the employer terminated the existing grievance committee setup and started a new one. Membership on the committee was reduced from nine to five, the authority to call special meetings without notifying the vice president was removed and a separate complaint committee was eliminated. The Board found that the grievance committee was a labor organization and that the employer had unlawfully dominated it by creating it, modifying it and determining its structure and function. The Board also found that the employer had unlawfully supported the committee by paying members for their time, holding meetings in company conference rooms and providing secretarial and clerical assistance.

h. *Reno Hilton Resorts Corp.*, 319 N.L.R.B. 1154 (1995).

This case involved "Quality Action Teams" that a hotel employer had established during a union organizing campaign. The teams dealt with the employer regarding wages, hours and working conditions, including safety, employee job rotations, starting times and tip-sharing. The Board found unlawful employer domination because the hotel's general manager set the size and structure of the teams, set the agendas for each meeting and paid employees to attend.

i. *Webcor Packaging, Inc.*, 319 N.L.R.B. 1203 (1995), *enforced, NLRB v. Webcor Packaging*, 118 F.3d 1115 (6th Cir. 1997) .

In this case, the employer established an employee-management group called the Plant Council and decreed that the Council would consist of five employees elected by the hourly workforce and management representatives selected by the company. The group's designated function was to develop and recommend changes regarding plant policies, employee handbooks, the creation of a grievance procedure and wages and

benefits. The Board found that the employer violated Section 8(a)(2) because management created the Plant Council, determined its structure and function and could dismantle the group at any time.

j. *Dillon Stores*, 319 N.L.R.B. 1245 (1995).

This case involved a department store chain that established "Associates' Committees" in several stores. Committee members were elected by employees, but the company set forth eligibility criteria and the structure of the committees in annual memoranda to employees. The committees discussed some issues unrelated to wages, hours, benefits and working conditions, such as whether service should be provided to customers who were not wearing shirts or shoes, but the committees also discussed the company's dress code for employees, promotion criteria and health benefits. The Board found that the company unlawfully dominated the committees because it initiated the committee meetings, determined the structure and functions of the committees, determined which employees were eligible to serve as representatives and the terms of office of the representative, determined election dates and times, provided election notices, ballots, ballot boxes and tally facilities and procedures and paid employee representatives for their time spent at meetings and preparing for meetings.

k. *Simmons Industries, Inc.* 321 N.L.R.B. 228 (1996).

In this case, the employer, a chicken processor, established safety committees, "Total Quality Management" committees and "Corrective Action" committees at two non-union plants. The Board found that the safety committees, which dealt with safety complaints and made safety proposals, and the Total Quality Management committees, which discussed bonus pay, length of work shift, absentee policy and break time, were labor organizations within the meaning of Section 2(5) of the NLRA. Since management selected the committee members, the Board also found unlawful domination. The Board found, however, that the Corrective Action committees, which discussed ways to process chicken for Kentucky Fried Chicken, the company's main customer, were <u>not</u> labor organizations within the meaning of Section 2(5) because these committees only dealt with issues of product quality and operational efficiency.

l. *Aero Detroit, Inc.*, 321 N.L.R.B. 1101 (1996).

This case involved an employee organization called the "Continuous Improvement Team" ("CIT") that an employer had started during a union organizing drive. When the plant manager formed the CIT, he told employees that the team would be better than a union for communicating employee concerns to management. The administrative law judge found that the company unlawfully established the CIT and then used it as a vehicle for unlawfully soliciting employee grievances and promising benefits to employees. Although the union representation election at the plant had been inconclusive, the judge issued a bargaining order rather than an order for another election on the ground that the employer had committed so many unfair labor practices that a fair election could not be held. The NLRB upheld both the finding of a violation of Section 8(a)(2) and the bargaining order.

m. *Autodie International, Inc.*, 321 N.L.R.B. 688 (1996).

In this case, employees at the company were represented for many years by a labor organization called the Autodie Employees Labor Organization ("AELO"). The AELO eventually affiliated with the United Auto Workers ("UAW"). A year after the affiliation with the UAW, the company sought bankruptcy protection and was sold to a successor employer. Following the sale, a majority of the employees petitioned the company to negotiate with their in-house committee instead of the UAW. The company then withdrew recognition from the UAW and bargained with the in-house committee. After the NLRB issued an unfair labor practices complaint, however, the company withdrew recognition from the in-house committee and ceased bargaining with it. Thereafter, a group of employees formed the Autodie International Employees Labor Organization and the company recognized this group, bargained with it and negotiated an agreement with it. Upon these facts, the administrative law judge found that the employer had violated Section 8(a)(2) by recognizing and bargaining with the in-house Labor Organization, and ordered the company to stop recognizing and dealing with the Organization. The Board affirmed this ruling.

n. *Vic Koenig Chrevolet, Inc.*, 321 N.L.R.B. 1255 (1996).

In this case, a group of employees expressed interest in decertifying their union. The company president then circulated a petition for employees to express interest in decertification. Shortly thereafter, the company president created a four-employee "Executive Committee", including two employees who supported decertification and two who did not. According to the president, this group would give him "a fair spread" of employee opinions. After assembling the "Executive Committee", the president and the employees discussed a variety of issues, including changes in employee pay and the attendance policy, and the president asked the committee members to consult with other employees about pay issues. Although only three meetings of the Executive Committee had occurred, the administrative law judge found that the committee had a pattern and practice of "dealing with" the employer and, therefore, was a labor organization within the meaning of Section 2(5). This finding was based on the facts that the committee had been in existence for only four months at the time of hearing and therefore was meeting with regularity in a short time and the company president had asked the committee to develop more ideas regarding pay issues. After finding that the Executive Committee was a labor organization, the administrative law judge also found that the company had unlawfully dominated the committee. The Board affirmed the findings of the administrative law judge.

o. *EFCO Corp.*, 327 N.L.R.B. 71 (1998).

As part of a "Manufacturing Resources Planning" program designed to improve efficiency and quality, a manufacturer of aluminum windows, door systems, curtain wall and storefronts established four employee committees: an Employee Benefit Committee, an Employee Policy Review Committee, a Safety Committee and an Employee Suggestion Screening Committee. The employer selected the initial members of the committees. The committees met on the employer's premises during working time and employees were paid for time spent on committee activities. The administrative law judge had found that all four committees were labor organizations

within the definition of Section 2(5) of the NLRA and that the employer had violated Section 8(a)(2) by unlawfully dominating the committees. The Board affirmed the findings of the administrative law judge, except as to the Employee Suggestion Screening Committee, which the Board found was not a labor organization within the meaning of Section 2(5). This part of the Board's decision is discussed below in the section of this outline summarizing cases where the Board found no violation of Section 8(a)(2).

p. *Naomi Knitting Plant*, 328 N.L.R.B. 180 (1999).

In this case, a union had mounted an unsuccessful organizing campaign at a knitting plant. Following the union's loss of a representative election, a management consultant advised the company to establish an employee "Design Team." The consultant met with plant employees and described the Design Team concept to them as a device to facilitate communication between management and hourly workers. The consultant determined the structure and number of members of the Design Team and the members were elected by hourly workers in an election supervised by the consultant. The elected Design Team initially met twice a month, and then monthly. Minutes of the meetings were taken by a company clerical, and posted for all employees to read. The Design Team discussed a variety of topics, from "Family Day" at the plant and keeping the picnic area clean to job bidding and drug testing. Under these facts, the Board found that the employer had unlawfully dominated the formation and operation of the Design Team and issued a cease-and-desist order.

2. Cases Finding No Section 8(a)(2) Violation.[7]

a. *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262 (4th Cir. 1994), *denying enforcement of* 312 N.L.R.B. 582 (1993).

This case involved an employee participatory program called the Nursing Service Organization ("NSO"). The NSO had been in existence for almost twenty years as a forum for the professional and social concerns of the employee participants.

[7] In addition to the cited Court of Appeal and Board decisions, a NLRB administrative law judge has issued a decision finding no violation of Section 8(a)(2). *Crown Cork & Seal Company, Inc.* (February 27, 1998), available at 1998 NLRB LEXIS 114. In this case, the NLRB had issued a complaint against a manufacturer of aluminum cans, alleging that the employer had unlawfully dominated eight employee teams and committees, including various Production teams, an Organizational Review Board, an Advanced Certification Board and a Safety Committee. The non-union employer had started the teams as part of its "Socio-Tech" system of employee management of the plant. Although the various teams dealt with issues of working conditions, such as attendance and discipline, in addition to production and quality issues, the administrative law judge found that the teams were not labor organizations within the definition of Section 2(5) of the NLRA. In reaching his conclusion that the teams were not labor organizations, the administrative law judge relied on the fact that the teams had no decision-making authority and functioned merely to recommend actions to management. Thus, the ALJ found that the teams were "acting just as a first-line supervisor does . . . in a traditional plant setting" by making recommendations "to a higher management level" and that there was nothing impermissible in the employer having "delegated traditional management functions to the entire workforce, divided into groups at different levels."

Several months before the start of a union organizing campaign, the chairman of the NSO, who was a member of management, announced efforts to "rejuvenate" the group. Management directed employees to elect a representative from each area to attend NSO meetings and to report back to the staff of the area represented. In the following months, and while the union organizing campaign was ongoing, the NSO met several times to discuss topics such as wages and working conditions. At one of these meetings, a survey was distributed that was intended to gather information regarding employee preferences on wages and benefits. Under these facts, the administrative law judge found that the employer had unlawfully interfered and dominated a labor organization, and the Board affirmed the decision.

The Fourth Circuit, however, refused to enforce the Board's order on the ground that the Board had not proved that the NSO was a labor organization within the meaning of Section 2(5) of the NLRA. Section 2(5) requires that in order to constitute a labor organization a group or committee must exist for the purpose of "dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work." The Fourth Circuit found that the "dealing with" requirement had not been established where there were only isolated instances of employee proposals concerning working conditions rather than a "pattern or practice" of such activity.

b. *Stoody Co., Div. Of Thermadyne, Inc.*, 320 N.L.R.B. 18 (1995)

This case involved the creation by the employer of a "handbook committee." The stated purpose of the committee was "not to discuss wages, benefits, or working conditions, but to gather information about different areas in the handbook that were inconsistent with our current practices, that were obsolete, or that were misunderstood by employees so we could get them cleared up as soon as possible." At its first and only meeting, the committee discussed and made proposals regarding vacation time, as well as other subjects not included in the committee's mandate. After a union that had been attempting to organize the company filed a Section 8(a)(2) unfair labor practices charge, the employer disbanded the handbook committee. Under these facts, the Board found that the handbook committee was not a labor organization, stating that the "dealing with" language of Section 2(5) of the NLRA requires a showing of a "pattern or practice, or that the group exists for a purpose of following such a pattern or practice" of employees making proposals to management on proscribed subjects and management responding to those proposals. Because the handbook committee had met only once, the Board found that there had been no pattern or practice of "dealing with" proscribed subjects. The Board also found, contrary to the opinion of the administrative law judge, that even if additional meetings of the handbook committee had been held, the meetings would not have resulted in proposals to management on working conditions.

c. Vons Grocery Co., 320 N.L.R.B. 53 (1995).

In this case, a unionized employer had created an employee-management "Quality Circle Group" for the purpose of considering operational issues. Several years after its formation, the Quality Circle Group for the first time veered from its attention to purely operational issues and discussed matters concerning a dress code and an accident point system. After several meetings where these two issues were discussed,

the Quality Circle Group presented proposals to the employer and the union on these subjects. Following complaints by the union that the Quality Circle Group had gone beyond its allowable mandate, the employer told the union that there would be no further discussion of topics other than operational matters, and invited a union representative to attend all group meetings. Under these facts, the Board held that the Quality Circle Group did not constitute a labor organization under Section 2(5) of the NLRA because there was no evidence of a "pattern or practice" of making proposals to management on verboten subjects, nor was there a substantial likelihood that the one instance where this had happened would be repeated.

d. *EFCO Corp.*, 327 N.L.R.B. 71 (1998).

In this case, the Board found that while three other employees committees were unlawful (*see* discussion above), a fourth committee – an Employee Suggestion Screening Committee – was not a labor organization within the meaning of Section 2(5) of the NLRA. The administrative law judge had found that all four committees were labor organizations and that the employer had violated Section 8(a)(2) by unlawfully dominating the committees. In reversing the administrative law judge's ruling as to the Employee Suggestion Screening Committee, the Board noted that although the company's memorandum announcing the formation of the committee had stated that the committee's duties would include recommending the best suggestions to management, the committee in practice had not done this. Rather, the Board stated that, in practice, the committee did not formulate proposals or present them to management, but merely reviewed and forwarded suggestions made by individual employees to the appropriate management committee. Thus, the Board found that the committee served an essentially clerical or ministerial function since it did not "recommend" or provide an opinion about the adoption or modification of a suggestion. The Board was untroubled that the Employee Suggestion Screening Committee did, in fact, deem a few suggestions unreasonable and did not pass those suggestions on to management since "the vast majority of suggestions" were sent on. Finally, the Board notes that the company had used the screening committee program primarily as a mechanism for employees to express their ideas about ways in which production might be improved, rather than to address issues of wages, hours, benefits and working conditions.

D. THE CONGRESSIONAL REACTION TO *ELECTROMATION*: THE FAILED TEAM ACT

After the Republicans gained control of the Senate and House of Representatives following the 1994 election, Senator Nancy Kassebaum (R-Kan.), then a member of the Senate Labor and Human Resources Committee, and Congressman Steve Gunderson (R-Wis.), a member of the House Education and Labor Committee, responded to the Board's *Electromation* decision by proposing legislation to amend Section 8(a)(2) of the NLRA so as to exclude certain types of employee participation committees.

Known as the Teamwork for Employees and Managers Act of 1995 ("TEAM Act"), the legislation was passed by the House on September 27, 1995 and by the Senate

on July 10, 1996. President Clinton vetoed the TEAM Act on July 30, 1996. The Act – Senate Bill 295 – would have amended Section 8(a)(2) by adding the following language:

> 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 address 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 between the employer and any labor organization.

In February 1997, Representative Harris Rawell (R-Ill.) and Senator James Jeffords (R-Vt.) reintroduced the TEAM Act as the Teamwork for Employees and Managers Act of 1997. The TEAM Act of 1997 was approved in March 1997 by the Senate Labor and Human Resources Committee. However, Republicans never sent the bill for a floor vote after Senate Democrats threatened to mount a filibuster to block a vote and President Clinton said he would again veto the bill.

E. WHAT'S A CORPORATE COUNSEL TO DO: PRACTICAL ADVICE ABOUT EMPLOYEE PARTICIPATION PROGRAMS

The NLRB cannot initiate a cause of action on its own: an individual, a union or an employer must initiate an unfair labor practices claim. What this means is that in the non-union environment where there is no incipient union organizing effort, joint employee-management committees are extremely unlikely to come to the attention of the NLRB because individual employees are unlikely to challenge them. Moreover, in the unlikely event that a participation committee did come to the attention of the NLRB, the employer's downside risk is not great – *i.e.*, if the Board were to find a Section 8(a)(2) violation, the remedy would merely be a cease-and-desist order and a requirement that the employer post a notice informing employees of the NLRA violation. Accordingly, in the non-union environment joint employee-management participation committees are likely to continue their proliferation.

For employers concerned about the possibility of unfair labor practices charges being filed with the NLRB in connection with the establishment or operation of employee-management participation committees, the preceding synopsis of relevant Board authority illustrates just how difficult it is for such committees to pass muster with the Board. Although it is extraordinarily hard, if not virtually impossible, to design a lawful employee-management participation committee in the face of existing law, employers concerned about running afoul of the law should keep the following in mind:

- Creating an employee committee in the face of a union organizing drive is almost guaranteed to be a foolhardy venture; in such cases, it may be impossible to overcome the presumption that the committee was designed to thwart union organizing efforts.

- The employer should not dictate the structure of the committee – *e.g.*, how many employee members, how they are chosen, etc. – or the committee's goals or objectives. In no case should management hand-pick the employee members of a committee.

- The committee should not act in a "representational" capacity on behalf of employees. When seeking input from employees regarding wages, hours, benefits or working conditions, the employer should directly solicit all employees to provide their views and opinions. If only committee members are solicited, the Board is likely to find that the committee members serve in a representational capacity. Moreover, to militate against a finding that the committee is serving in a representational capacity, the committee should not have any designated officers or spokespersons. If possible, participation on the committee should be rotated on a frequent basis.

- The "communications" role of the committee should be stressed. Debating or bargaining with committee members, who act as proxies for the entire workforce, is likely to lead the Board to find that the committee is a Section 2(5) labor organization if the committee touches at all on any issues of wages, hours, benefits or working conditions (a very broad category).

- The more a committee deals solely with operational issues, such as improving product quality or marketing issues, the less likely there is to be a finding that the committee is a Section 2(5) labor organization.

DISCUSSION HYPOTHETICAL[8]

Consider the following situation: a group of minority journalists at a non-unionized newspaper believe that the newspaper's editors have discriminated against them in connection with story assignments. The minority journalists believe that the editors tend to assign Black reporters exclusively to "Black stories," such as stories about Black neighborhoods, Black newsmakers, or civil rights issues; Hispanic reporters to "Hispanic stories," such as stories about Latino neighborhoods, illegal aliens, or bilingual education. As a result, the minority reporters rarely get to cover more prestigious beats such as the Supreme Court, Congress, or the White House. These reporters meet with management and discuss their grievances.

The management suggests setting up a committee to address the assignment procedure and to look for ways to increase the overall diversity of the editors and staff. Management proposes that the committee be comprised of the newspaper's owners and current editorial board, all of the minority journalists who wish to participate, a rotation of other interested journalists, and the personnel director. Management further proposes that the committee examine the assignment process; improved procedures for recruiting minorities (including possible "outreach" strategies); ways that the newspaper can retain minority employees (including the use of certain benefit packages); and, methods of ensuring minority success and promotion (including mentoring programs, revisions in the evaluation process, and implementation of an affirmative action plan). The committee will meet as often as necessary for six months, at which time a plan of action will be announced. The establishment of this committee is put to the entire workforce for a simple yes or no vote. A majority of the employees vote for the diversity committee, and the committee is formed.

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[8] Taken from *Notes Labor-Management Cooperation After Electromation: Implications for Workplace Diversity*, 107 Harv. L.Rev. 678 (1994), © 1994 The Harvard Law Review Association and reprinted with permission from the Harvard Law Review Association.