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ELECTROMATION V. INTERNATIONAL BROTHERHOOD OF TEAMSTERS: ANALYTIC FRAMEWORK FOR NLRB INTERPRETATION OF UNLAWFUL EMPLOYER DOMINATION OF NONUNION EMPLOYEE PARTICIPATION PROGRAMS

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ABSTRACT

In a recent decision, the NLRB has created a framework for legal analysis of unlawful employer domination allegations which threatens many employee participation or empowerment programs in nonunion places of employment. A marked incompatibility in the application of the 58 year old National Labor Relations Act and current accepted management practices has been noted. The most likely solution to this apparent dilemma in labor-management relations appears to be statutory reform of the labor code.

On December 16, 1992, the National Labor Relations Board (NLRB) issued a decision likely to have profound consequences for many employee participation programs (EPP) nationwide. In its *Electromation, Inc. v. International Brotherhood of Teamsters* ruling [1], the NLRB upheld the decision of Administrative Law Judge George F. McInerny that the company's employee "action committees" were "labor organizations" within the meaning of the National Labor Relations Act (NLRA) [2]. The administrative law judge had further held that these "labor organizations" (the aforementioned action committees) were unlawfully dominated by the employer in violation of § 8(a)(2) of the NLRA. In affirming the decision of the administrative law judge, the NLRB was scrupulous

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in stating that this particular ruling applies specifically to the circumstances that occurred at Electromation and does not make all EPPs unlawful [1, at 2, 17 n. 28]. However, the analytic framework used in the *Electromation* decision will be the same by which all other EPPs must be tested when allegations of employer domination arise. The crucible developed in this decision, therefore, will have a dramatic impact in determining the legitimacy of many existing employee participation programs.

The purpose of this article is to present the analytic framework by which the NLRB will make determinations of unlawful employer domination in cases of nonunion organizations' employee participation programs. It further assesses the ruling's probable impact on many contemporary participation programs that focus on issues involving quality, efficiency, and productivity. It should be noted that employee involvement in such programs as quality circles, work teams, productivity committees, quality-of-work-life programs, and other forms of employee participation are handled as bargaining issues within the framework of collective bargaining in organized shops [3]. Therefore, this article focuses strictly on the effects confronting nonunion work environments. In so doing, it includes brief discussions of what constitutes a "labor organization" under the NLRA. Additionally, an examination of how a common form of employee involvement/quality circles programs would be analyzed under this framework is conducted. Finally, the NLRB's limitations in reinterpreting the fifty-eight-year-old NLRA and the consequences this may have on achieving congruence between the act and the industrial/economic environment of the 1990s are examined.

EMPLOYEE PARTICIPATION PROGRAMS AT ELECTROMATION

As stated previously, the NLRB emphasized that the *Electromation* decision was based strictly on the "totality of the evidence" of a particular employer's EPP and circumstances peculiar to that employer [1, at 2]. To understand the application of the unlawful employer domination tests, the facts of the *Electromation* decision can be instructive. The employer, in this instance, had initiated an employee participation program, which it called "action committees," in response to employee dissatisfaction over alterations in bonus and wage increases necessitated by diminishing company financial performance. The company created five of the action committees for the purpose of resolving what it perceived as several workplace problems and eliciting employee involvement in developing solutions to these problems [4]. At the time the employer organized these committees, there was no recognized or certified bargaining agent for its workforce, nor was there any knowledge of a union organizing drive in progress.

Within Electromation, each committee was composed of up to six hourly employees and one or two management personnel, in addition to the company's personnel manager [5]. The committee members, hourly employees, were selected

from voluntary sign-up sheets provided by the company. All meetings were conducted on Electromation property, the company provided any needed supplies, and all company employees were compensated for the time they spent in committee meetings. Shortly after the action committees were formed, the International Brotherhood of Teamsters (IBT) (hereafter, the union) communicated its demand for recognition to the company. The company then voluntarily suspended its participation in the committees pending the outcome of the union's campaign.

The union filed an unfair labor practice complaint against the employer alleging that the action committees established by Electromation were designed to interfere with the employees' organizing activities. Although the administrative law judge held that the committees were not motivated by an intent to thwart the union's organizing efforts, he did hold that the action committees were, none-theless, an unlawful management practice by being employer-dominated labor organizations. In its decision, the NLRB affirmed the administrative law judge's ruling on this matter. What follows is a description of the analytic framework the NLRB used in reaching this conclusion.

WHAT CONSTITUTES A LABOR ORGANIZATION?

In assessing unlawful employer domination cases, the NLRB follows a two-part inquiry. Before a finding of unlawful domination can be made, a finding of the "labor organization" status of the employee involvement group is first required [1, at 10]. Section 2(5) of the NLRA defines the term "labor organization" as meaning:

> 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 by authors[2, §152(5)].

For an EPP to qualify as a labor organization, it must satisfy three elements contained in the statutory definition: 1) employees must participate in the program; 2) the program exists for the purpose of "dealing with" employees; and 3) these "dealings" are concerned with grievances, labor disputes, compensation, or working conditions [1, at 10]. In the *Electromation* case, it was concluded that the action committees handily met all of these conditions. Employees were members and participants of the committees. The committees were created for the purpose of addressing the employees' dissatisfaction. Finally, the dissatisfaction had resulted from concern over working conditions and changes in compensation programs [1, at 17].

It is difficult to imagine any EPP that would *not* meet these three elements. Board member John N. Raudabaugh, in his concurring opinion, acknowledged

that due to the broad nature of the concept of "dealing with" and the terms "conditions of work" and "labor disputes," most EPPs will possess the three elements necessary to establish themselves as "labor organizations" under § 2(5) [1, at 40-43]. In the instance of the action committees, this determination was made.

DETERMINING UNLAWFUL DOMINATION

Having established an Employee Participation Program as a "labor organization" covered under the NLRA, the inquiry now moves into its second stage, determining whether that organization is in violation of § 8(a)(2). Under the NLRA it is an unfair labor practice for an employer:

> to dominate or interfere with the formation or administration of any *labor organization* [emphasis added by the authors] or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay [2, § 158(a)(2)].

As with the determination of "labor organization" under § 2(5), assessing undue employer domination or interference is based on an employer engaging in one of three forms of conduct prohibited by § 8(a)(2) [1, at 15]. In essence, the employer violates this section when it can be shown that it: 1) interferes with the "labor organization's" formation; 2) interferes or intervenes with the labor organization's administration; or 3) provides the organization with financial or other support. Placing this in the perspective of the *Electromation* case, the employer was found to have dominated the action committees for several reasons. It must be remembered that since the committees were constituted by the company to achieve company goals, each separate committee's formal mission statement and objectives had been drafted by the employer. Under an exact interpretation of § 8(a)(2), this would be sufficient to establish unlawful domination. By unilaterally prescribing the scope of the issues that each committee could address, the employer demonstrated control over the committee and its members.

However, there was further evidence to establish unlawful interference. For example, committee membership and size was also determined by the employer. Additionally, the employer ensured that each committee had a minimum of two management representatives on each committee. Furthermore, the employer unlawfully supported the labor organizations (action committees) by providing them with supplies, permitting them to carry out their activities on paid time, and by allowing the committees to meet on company property [1, at 18].

At this juncture, it is important to note that, in any unlawful domination investigation, an employer's motives for establishing a given EPP are not at issue once the employee involvement program has been elevated to "labor

organization" status. There is nothing in § 8(a)(2) that requires a finding of anti-union animus or a specific impetus to deny employees their right to organize [6]. Consequently, even the best economic motives or business necessities will not afford an employer any insulation from an unfair labor practice finding once the determination of domination has been established. This situation occurs not because the NLRB has a particular anti-EPP bias, but because the law from which their direction is drawn was drafted for a work environment existing in an economy that was national, and for a model of labor-management relations that was decidedly adversarial. As the NLRA is currently structured, the NLRB is required to apply a 1935 statute to the 1993 American employee/employer environment.

THE HISTORICAL LEGACY

The *Electromation* decision is replete with historical analysis of the NLRA as the NLRB attempted to establish Congress' intent in §§ 2(5) and 8(a)(2). This is essential, as the NLRB reminds us, because the board's latitude for interpreting the labor code is very restrictive. If any NLRB interpretation is clearly contrary to congressional intent or the Supreme Court's interpretation, the decision can be reversed on appeal [7]. Within this narrow range of action available to it, the board's decision in *Electromation* and many future EPP cases will be influenced by the same constraints. The board itself is placed in a quandary, as the decisions it is empowered to make will be only as good as the laws from which they were derived.

Since quality circles, work teams, and truly cooperative employee/employer programs were neither in existence nor envisioned at the time of the NLRA's enactment, it is hardly surprising that consideration of them is absent in the act's congressional intent. The pressing concern for the seventy-fourth Congress was the removal of the many barriers to effective collective bargaining. In 1935, one of those barriers was the "sham" or captive union, often disguised as employee participation groups, which employers had created in order to avoid compliance with the previously enacted National Industrial Recovery Act [1, at 9]. It was Congress's intent, *in 1935*, to remove, once and for all, employer attempts to subvert the legitimate organizing process through "company unions," "employee representation plans," and similar employee organizations whose real purpose was to block employees' § 7 rights to self-organization. The NLRB's majority agreed that the analysis of any EPP must center on the group's purpose and function in light of the NLRA's goal of protecting the right of self-organization from the specific abuse of employee organizations created and dominated by employers [1, at 9 n. 18]. In 1935, Congress was *clearly* more concerned with the right of self-organization than any contrary employer concerns.

In 1993, American business concerns are focusing on international competition and increased pressure on these companies to operate more efficiently. The quest

for improved efficiency and productivity has become so ingrained in American business that it is now part of the very principles of management taught in virtually every school of business in the nation [8]. The quandary that now arises from *Electromation* is that in order to conform with standards that are consistent with the intent of a 1935 Congress, employers may be compelled to eliminate EPPs that are at the heart of modern business competition. To illustrate this point, a representative quality circle program will be analyzed under the criteria that the NLRB has provided in *Electromation.*

EVALUATING QUALITY CIRCLE PROGRAMS UNDER THE FRAMEWORK

One method by which the impact of the *Electromation* ruling can be assessed is by applying its analytic framework to a common form of employee participation. The form selected for this purpose is the quality circle. These EPPs have been in existence in the United States, in one form or another, since 1974 [9].

The authors acknowledge that EPPs constitute a broad range of employee involvement activities and are tailored to meet individual employer needs, and as a result EPPs vary greatly from company to company. However, a substantial number of these EPPs have been developed around the quality circle model even though they may be known by other names. Because of the widespread use and acceptance of such programs throughout the business community, a representative quality circle is evaluated.

A quality circle is broadly defined as a group of employees who meet on a regular basis to discuss ways of improving their company's product or processes [10, p. 511]. The specific objectives a circle can pursue will cover a myriad of workplace activities but will invariably address such issues as error reduction, job involvement, enhanced communications, development of control mechanisms, modification of work methods and procedures, alterations of working conditions, and improvement of job structure [11, p. 552]. As to a quality circle's organization, the ideal size of the group is considered to be seven or eight members, though such committees can range from three to fifteen [12, p. 11]. These members are volunteers drawn from the same department or work area and do similar work. "Experience demonstrates that member activities will have a greater chance of success" when the worker's supervisor is initially assigned as the team leader, though this is not a necessity [12, pp. 15-16]. The majority of quality circles will also have a management or staff individual as a member.

Once the circle structure has been determined, all members will receive training in decision-making and problem-solving techniques. This training is conducted by either in-house management personnel or company-selected consultants. After initial training is completed, the circles are given a great deal of latitude in recommending solutions to quality and efficiency problems, including suggestions on modifying the way work is organized.

In operation, the quality circle identifies a problem and proposes a solution. Management reviews the proposal and decides whether or not to implement the recommendation. Implementation of quality circle recommendations remains the sole prerogative of management. If the proposal is approved for implementation, both management and the quality circle evaluate the effectiveness of the solution [13, p. 211].

The question that must now be answered is, would a quality circle, such as that described above, violate the NLRA? Following the *Electromation* framework, it would first be necessary to determine whether the quality circle was a labor organization under § 2(5). Obviously, the employee participation element is satisfied because the majority of members on each quality circle team are workers/employees. Additionally, the quality circle exists for the purpose of "dealing with" the employer. In the context of § 2(5) the term "dealing" has a far broader connotation than in collective bargaining. In *Electromation*, the NLRB viewed this term as a "bilateral mechanism involving proposals from the employee committee . . . coupled with real or apparent consideration of those proposals by management" [14]. In essence, making recommendations to management would satisfy this definition [15]. Since it is the quality circles' purpose to generate such recommendations, this criterion has been met.

The third and final criterion of the EPP's dealings concerning "conditions of work" is also easily fulfilled by the quality circle. Any recommendation that addressed the aforementioned issues (e.g., modification of work methods or procedures) would be encompassed by this broad term "conditions of work." Even more mundane, specific proposals such as improving poor lighting or inadequate ventilation at work sites would clearly fit the "conditions of work" standard [16]. The quality circle has, thus far, qualified as a labor organization under the NLRA.

The inquiry now moves to the unlawful domination phase. Without delving too far, an argument can be made, as it was in *Electromation*, that the quality circle is dominated by management. Its very formation is at the whim of management. Quality circles are created by employers to satisfy a business need.

As for interference or domination in the labor organization's administration, the employer again appears to be in violation. The overall objectives and goals of the quality circle have been established by the employer. Even the training of the individual members is conducted or directed by the employer. Additionally, the employer has determined, hence controlled, the composition of the circle. If, for example, sixteen employees volunteer for a seven-member circle, the employer must decide who is selected and who is not. The employer also ensures that its management representatives participate in this "labor organization." The final decision on implementation of the labor organization's recommendations is controlled by the employer. With a company exerting so much control over the labor organization/quality circle, this should be sufficient to support a finding of unlawful domination. Even the employer's financial support for the circles, along with meeting facilities, could further sustain a finding of unlawful contribution of

support. The NLRB did not hold that compensating members for their time was per se a § 8(a)(2) violation. However, when viewed within the context of other unlawful domination, these actions would further substantiate that finding [1, at 18 n. 31]. Under the circumstances previously described, it is highly likely that quality circles, as a form of employee involvement, would violate the NLRA.

SITUATIONS UNDER WHICH EMPLOYEE PARTICIPATION IS LAWFUL

Not all employee participation is proscribed by the NLRA. Since § 8(a)(2) does not prohibit all employee communications, there have been instances in which EPPs were not judged to violate the act. In *Mercy-Memorial Hospital*, a committee was created to ascertain the validity of employee complaints, but since it did not discuss these complaints with, nor resolve them through the employer, it was judged to comply with the act [17]. In another instance, an employee organization that dealt with employees' grievances was held to be lawful because it did not interact with management [18]. In this particular circumstance the NLRB held that the committee members were not advocates who "dealt" with management, but rather the committee performed a function of management [19]. Finally, a job-enrichment program was judged not to have violated the NLRA because it was composed of the work crews of the entire employee complement [20]. In applying the standard under § 2(5), the case law strongly suggests that the more formal the group's organization, the more a representative purpose is inferred, and the greater the likelihood that it will be declared a "labor organization" [21].

The message for most employers, however, is apparent. To avoid unfair labor practice complaints regarding unlawful domination, all employees must be involved and/or the employers must completely absent themselves from the employee participation process. This may appear to be a paradox to many modern managers, as the underlying motive behind the employee participation movement is *involving* employees in the management and decision processes of the company. This aim would be difficult to attain if *management were removed from the process.*

CONCLUSIONS

The *Electromation* ruling apparently poses a very real dilemma for employee/employer relations. Though not intended to universally outlaw EPPs, it is unlikely that most employee involvement programs could withstand the current broad interpretation of § 8(a)(2). The NLRB majority contends that there is little they can do to alleviate the situation because any interpretation of the NLRA must be in accord with the clear intent of Congress at the time of the statute's enactment

[1, at 7 n. 9]. Consequently, well-established and successful employee participation practices are now likely to fall victim to an anachronism.

It has been nearly thirty-four years since the NLRA experienced its last major amendment. Perhaps it is time that the act was revised to reflect more nearly the realities of the contemporary work environment.

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ENDNOTES

1. 309 N.L.R.B. No. 163 (Dec. 16, 1992).
2. 29 U.S.C. § 151 *et. seq.*
3. J. A. Fossum, *Labor Relations: Development, Structure, Process*, (5th Edition), Irwin, Homewood, Illinois (1992).
4. The issues to be addressed by separate committees were: 1) absenteeism, 2) no smoking policy, 3) communications network, 4) pay progression for premium positions, and 5) attendance bonuses. The no-smoking action committee was never fully organized and, therefore, never met.
5. *Electromation v. Local 1049, International Brotherhood of Teamsters*, 25-CA-19818, 5 (Apr. 5, 1990).
6. *NLRB v. Newport News Shipbuilding Co.*, 308 U.S. 241 (1939).
7. *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992).
8. See T. S. Bateman and C. P. Zeithal, *Management Function and Strategy*, Irwin, Homewood, Illinois (1993), 629-631; R. W. Griffin, *Management*, (4th Edition), Houghton Mifflin Co., Boston (1993), 499-521; J. H. Donnelly, Jr., J. L. Gibson, and J. M. Ivancevich, *Fundamentals of Management*, (8th Edition), Homewood, IL: Irwin, (1992), 352-353; D. Hellriegel and J. W. Slocum, Jr., *Management*, (6th Edition), Addison-Wesley Pub. Co., Reading, Massachusetts (1992), 24, 553; S. P. Robbins, *Management*, (3rd Edition), Prentice Hall, Englewood Cliffs, New Jersey (1991), 322-323, 485-487.

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14. [1, at 12 n. 21], citing *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).
15. [1, at 40], member Raudabaugh, concurring.
16. *Participating Management Under § 2 (5) and § 8(a)(2) of the National Labor Relations Act*, 83 Mich. L. Rev. 1736, 1747 (1985).
17. 231 N.L.R.B. 1108 (1977).
18. *John Ascuaga's Nugget*, 230 NLRB No. 275 (1977).
19. W. E. Fulmer and J. J. Coleman, Jr. (1984). Do Quality-of-Work-Life Programs Violate Section 8(a)(2)? *Labor Law Journal, 35*:675-684.
20. *General Foods Corporation.*, 231 NLRB No. 122 (1977).
21. M. S. Beaver, (1985), "Are Worker Participation Plans 'Labor Organizations' Within the Meaning of Section 2(5)?: A Proposed Framework for Analysis," *Labor Law Journal, 36*:229-237.

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