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DEJA VU AND 8(A)(2): WHAT'S REALLY BEING CHILLED BY ELECTROMATION?

Charles J. Morris†

INTRODUCTION

The fame of Electromation relates more to its hype than to its type. The case was not a bona fide worker participation case, and it established no new legal principles. In deciding Electromation, a unanimous National Labor Relations Board ("NLRB") held that joint employee/management committees (dubbed "Action Committees") that addressed certain statutory bargaining subjects were "labor organizations" within the meaning of the National Labor Relations Act (the "Act"). Hence, management's creation and domination of those committees was an unfair labor practice. This holding was based on unambiguous language in the Act and on an unbroken chain of long-established precedent.

Why has this case aroused such furor? Although the committees in Electromation did not constitute labor unions in the conventional sense, they were not unique. As one knowledgeable observer noted, "[a] considerable number of organizations in the U.S. have employee committees not so dissimilar to Electromation's." This is déjà vu, because such joint commit-

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1 Electromation, Inc. 309 N.L.R.B. 990 (1992), enfd, 35 F.3d 1148 (7th Cir. 1994). This essay focuses on the National Labor Relations Board's decision in Electromation and does not discuss the Seventh Circuit's recent enforcement of the case.


3 Id. §§ 152(5), 158(a)(2).


5 Barbara P. Noble, Teamwork Concept Faces Challenge, N.Y. TIMES, Jan. 2, 1993, at A38 (quoting Arnold Perl, the attorney representing the United States Chamber of Commerce, an amicus in Electromation).
tees were common when the Act was passed in 1935.6 *Electromation* was an extraordinary decision only because the Board serendipitously decided to use the occasion to explore the legal ramifications of employee participation plans ("EPPs"), even though the Action Committees in the case did not remotely resemble such plans.

As generally understood, EPPs embrace active employee involvement in decision-making in the work or production process, but the committees in *Electromation* were not so involved. However, when the NLRB targeted the case for oral argument, some observers in the management community worried that the Board's decision might impinge adversely on legitimate employer efforts to involve employees in work-process decisions.7 Other management observers apparently were concerned more that the case might affect a broader area of employee participation; they feared the Board's decision would implicate current practices in many nonunion workplaces in which employees deal with their employers in setting conditions of employment and settling grievances in ways that could qualify those practices as labor organizations within the meaning of section 2(5).8

By the time the Board issued its decision, *"Electromation"!* was the new battle cry of the nonunion management community. The main message was that *Electromation* had a "chilling effect" on worker participation and something should be done about it.9 Their solution pointed toward congressional repeal of the Act's sections 2(5) and 8(a)(2).10

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6 E. E. CUMMINS, THE LABOR PROBLEM IN THE UNITED STATES 562-63, 565-66 (1932); CARROLL R. DAUGHERTY, LABOR PROBLEMS IN AMERICAN INDUSTRY 637, 640 (2d ed. 1948); HARRY A. MILLIS & ROYAL E. MONTGOMERY, ORGANIZED LABOR 841, 857-59 (1945).


8 A "labor organization" is "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." 42 U.S.C. § 152(5).

9 Hearings, supra note 7, at 2 (statement of Daniel J. Yager).

10 See S. 669, 103d Cong., 1st Sess. (1993); H.R. 1529, 103d Cong., 1st Sess. (1993). The only employer-dominated labor organizations that hence-
Electromation exposed the Achilles' heel of nonunion management's approach to the Nation Labor Relations Act: section 8(a)(2). Until Electromation, section 8(a)(2) was the best kept secret in American labor law. This case thus highlighted a heretofore apparently innocuous provision of the Act. In recent years section 8(a)(2) was enforced only rarely, because enforcement was attempted only when a conventional labor union tried to organize.\footnote{See Charles J. Morris, A Blueprint for Reform of the National Labor Relations Act, 8 ADMIN. L.J. AM. U. 517, 537 n.83 (1994) (showing that all published NLRB cases prior to Electromation charging § 8(a)(2) violations were filed ancillary to union organizing campaigns).} If this provision becomes widely and effectively enforced, which seems likely, it will have a substantial impact on the way many nonunion companies organize and arrange employee-involvement in determining working conditions and handling grievances. Although legitimate worker participation plans will not be affected, many plans and committees currently operating in violation of section 8(a)(2) will be affected — plans that previously operated in a relatively safe haven. This is where Electromation will have its chilling effect.

I. TWO CATEGORIES OF EMPLOYEE COMMITTEES

Opponents of the NLRB's decision in Electromation fail to distinguish between two distinct categories of employee committees. This distinction is critical. In the first category are EPPs in which employees engage in day-to-day decision-making or communications concerning the work with which they are involved. The Board's General Foods\footnote{General Foods Corp., 231 N.L.R.B. 1232 (1977) (holding that team-type programs involving employees in the productions process are not prohibited by § 8(a)(2)).} and Sears, Roebuck\footnote{Sears, Roebuck & Co., 274 N.L.R.B. 230 (1985) (holding that a communications committee that is not an advocate for employees, but a tool to increase efficiency is not a "labor organization" prohibited by § 8(a)(2)).} decisions established that such committees in a nonunion setting are not labor organizations under section 2(5). Hence, employee involvement in the work or production process whereby managerial functions regarding work methods are delegated forth would be outlawed under these substantially identical bills would be those that identify the product of their discussions or dealings with the employer as a "collective bargaining agreement."
to employees, such as in employee production teams, and communication committees that confine their discussions to matters related to work performance are clearly lawful.

In the second category are committees through which employees deal with their employer on issues "concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." Because committees of this latter type in a nonunion setting clearly are unlawful, their chilling should not be deemed objectionable in a law-abiding society. The only way such committees might affect productivity is by their palliative effect on employees who might otherwise prefer an independent collective voice to represent them in negotiating their working conditions. This second category of committee is the epitome of the sham labor organizations section 8(a)(2) was intended to prohibit.

With respect to Electromation's influence on participatory employee committees of the first category, I have seen no evidence of a chilling effect, and available reports point in the opposite direction. For example, former NLRB chairman and distinguished management attorney Edward B. Miller noted that the "so-called 'Electromation problem'" simply is a "myth." He said that it is indeed possible to have "effective" employee participation programs "in both union and non-union companies without the necessity of any change in current law." Miller foresaw the danger inherent in tampering with the present law when he candidly asserted, "While I represent management, I do not kid myself. If section 8(a)(2) were to be repealed, I have no doubt that in not too many months or years sham company unions would again recur."

Companies certainly are not scuttling their legitimate EPPs. Jerome Rosow, president of the Work in America Institute, a non-profit group that promotes employee participation, observed that although "[s]ome companies are going to have to clean up their act . . . most will find ways to work within the labor

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14 See, e.g., General Foods, supra note 12.
15 See, e.g., Sears, Roebuck, supra note 13.
18 Id.
19 Id.
"Clean up their act," however, is what many nonunion advocates apparently do not want to hear.

The chilling effect of Electromation is thus to be found on the illegal programs of the second category, not on the legitimate nonunion EPPs of the second category. However, because many affected nonunion companies will resist giving up their tainted worker-involvement programs, Electromation has become a convenient whipping boy that masks the true concern about section 8(a)(2) — that it might finally be enforced as Congress intended.

II. THE POST-ELECTROMATION CLEAN-UP PROCESS & THE POLAROID EXPERIENCE

The clean-up process, nevertheless, is beginning. Sometimes it is discharged in good faith; sometimes not. As an illustration of the good faith approach, one prominent management attorney confirmed to me that as a direct result of Electromation he now advises his clients, including some billion-dollar companies, that many of their existing employee-involvement programs are illegal. Although he did not wish to be the bearer of bad news, he felt his only ethical option was to so advise his clients.

However, some human resources managers, apparently unconstrained by a code of professional responsibility, might advise their companies to continue their tainted employee-involvement programs, even though such programs are known now to be illegal, on the theory that nothing need be changed before it is formally challenged. Unfortunately, this approach may well represent the conventional wisdom that prevails among industrial relations management in many United States companies. That attitude eventually may change, however, because the signs are increasing that section 8(a)(2) will be enforced more vigorously and with greater frequency.

Some of those signs are coming from the rumblings that followed Polaroid Corporation's well-publicized cancellation of its long-established Employees' Committee ("EC"). Polaroid

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20 Bill Montague, Labor Board: Du Pont Must Kill Committees, USA TODAY, June 8, 1993, at 6B.

21 This conversation took place at the 1994 Spring Meeting of the Industrial Relations Research Association in Philadelphia with reference to programs falling in the second category.

22 See Polaroid Dissolves Employee Committee in Response to Labor
promptly filled that void by creating several successor entities, also of questioned legality. The publicly known facts about the EC and other employee structures at Polaroid suggest that this company may have violated the law for many years.

The events at Polaroid are especially significant for two reasons. First, they illustrate an apparent bad faith clean-up process. The corporation's new employee structures, consisting of an "Employee-Owners' Influence Council" and a group of "employee advocates," appear to be mere subterfuges that, as the NLRB complaint alleges, are but further examples of employer-dominated labor organizations within the meaning of sections 2(5) and 8(a)(2). Second, the resulting exposure of Polaroid's "employer advocates" will provide the first legal test in recent years of an "ombudsman" plan. Such grievance plans are increasingly popular among many nonunion companies.

I shall not dwell on the specifics of Polaroid's defunct Employees' Committee, for it was an unexceptionable example of a very ordinary company union, distinguished only by its longevity. Nor shall I discuss all of the general features of its replacement plan, the "Employee-Owners' Influence Council," because that entity appears to replicate the employee representation of the old Employees' Committee; only with the addition of a mantra-like disavowal of representational intent.

Department Ruling, DAILY LAB. REP. (BNA) No. 121, at A-3 (June 23, 1992) [hereinafter Polaroid Dissolves] (discussing the dissolution of Polaroid's EC); see also DAVID W. EWING, JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE 299 (1988).

See Testimony on Employee Committees Highlights Dunlop Commission Hearing, DAILY LAB. REP. (BNA) No. 4, at A-11 (Jan. 6, 1994) [hereinafter Employee Committees] (noting that the legality of Polaroid's successor entities has also been challenged).

See Polaroid Dissolves, supra note 22, at A-3, in which Ann Leibowitz, Polaroid's labor counsel, explained that the corporation's EC was created around 1949 and "evolved as a Polaroid institution quite without regard to the laws that regulate labor organizations."


See Employee Committees, supra note 23, at A-4 (noting that Polaroid's Employees' Committee was created in 1949).

Even the name "Influence Council" conveys the concept of representation in that it was intended to provide a means for employees to influence top management regarding "matters of pay, benefits, policy and practices," each clearly a mandatory bargaining subject. Amended Consolidated Complaint,
ly worth noting, however, is Polaroid's ombudsman\textsuperscript{28} plan, called "employee advocates."\textsuperscript{29} Such a plan has not been the subject of any recent NLRB case prior to Polaroid. This ombudsman plan was long a feature of Polaroid's grievance procedure\textsuperscript{30} and is fairly typical of the questionable ombudsman systems found in many United States companies.\textsuperscript{31}

Nonunion ombudsman plans generally provide employees with a counselor to represent them as they move through the company's grievance procedure. Various names are applied to the person assuming this representational role including "ombudsman," "ombudsperson," "employee representative," "employee counselor," and "employee specialist." Whatever the nomenclature, this person serves as the grievant's agent, representing and dealing with management on the employee's behalf. This assistance may be provided regardless of whether the company has a defined grievance procedure.\textsuperscript{32}

Given the role played by the ombudsman, such a person is "an agency" within the meaning of the Act's section 2(5).\textsuperscript{33} Contrary to popular belief, under section 2(5) a "labor organization" is not necessarily a collective entity; a single person may constitute a labor organization.\textsuperscript{34} In \textit{N.L.R.B. v. General Preci-
sion, Inc., the Third Circuit upheld the Board's finding that an employee counselor plan through which employees were offered the assistance of counselors hired by the employer violated section 8(a)(2). The court found this ombudsman plan to be a successor to the previously disestablished employees' committee and held it immaterial that the counselors were "acting as clearly identified management personnel." The scheme of the Act requires that an employee's representative be independent of the employer. The typical ombudsman is not.

CONCLUSION

The foregoing are the primary reasons the nonunion management community worries about the prospects for section 8(a)(2) enforcement in the post-Electromation era. Regarding the desire of most United States companies to remain nonunion, 1995 is not significantly different from 1935. It certainly is not different with regard to one of the principal means many employers utilize to maintain a union-free workplace: employee participation plans that violate the Act. It indeed is evident what's really being chilled by Electromation.

35 381 F.2d 61 (3d Cir. 1967).

36 The court noted that the employee counselors assisted, counseled, and represented large numbers of employees in the processing and presentation of grievances. Id. at 62.

37 Id. at 64. According to the court, the labeling of the counselors as "management personnel" did not offset their avowed purpose of dealing with management on behalf of the employees. Id. The court noted that the employer dominated the sole organization available to its employees with respect to their entire relationship to their employer, including the handling of their grievances. In so doing, the employer "is affirmatively going against the letter and spirit of the [National Labor Relations] Act." Id. at 149.

38 Id. at 149. As Senator Wagner noted with reference to the portion of the Wagner Act here in issue, "Nor can a man whose very livelihood depends upon maintaining the favor of his employer, be outspoken and independent in representing the interest of employees." Hearings on S. 1958 Before the Senate Comm. on Education and Labor, 74th Cong., 1st Sess. (1949), reprinted in 1 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 1416 (1949).