

*Hot Topic
"Future Worker Management"*

LAW OFFICES
McGUINNESS & WILLIAMS
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
SUITE 1200
1015 FIFTEENTH STREET, N. W.
WASHINGTON, D. C. 20005

202 789-8600
FAX: 202 789-1708

Property of
MARTIN P. CATHERWOOD LIBRARY
NEW YORK STATE SCHOOL
INDUSTRIAL AND LABOR RELATIONS
Cornell University

STATEMENT OF
DANIEL V. YAGER
ASSISTANT GENERAL COUNSEL FOR
LABOR POLICY ASSOCIATION
APPEARING ON BEHALF OF
"THE WORKING GROUP"
BEFORE THE
COMMISSION FOR THE FUTURE OF
WORKER-MANAGEMENT RELATIONS

January 19, 1994

MR. CHAIRMAN AND MEMBERS OF THE COMMISSION: My name is Daniel V. Yager. I am a partner in the law firm of McGuinness & Williams and serve as the Assistant General Counsel for the Labor Policy Association, an organization of the senior human resource executives of more than 200 major U.S. companies. I appear before you today on behalf of a group of management attorneys calling itself "The Working Group."

The attorneys in our group include: Vincent J. Apruzzese of Apruzzese, McDermott, Mastro & Murphy; Charles G. Bakaly, Jr. of O'Melvaney & Myers; Robert S. Carabell, Senior Counsel, TRW, Inc.; William J. Curtin of Morgan, Lewis and Bockius;

William Kilberg of Gibson, Dunn & Crutcher; Charles A. Powell III of Powell, Tally & Frederick; and Ezra Singer, Assistant General Counsel — Human Resources, GTE Corporation.

We were assembled last fall by your Commission's counsel, Prof. Paul C. Weiler, to discuss with him the views of management attorneys on the various issues being considered by the Commission. At Professor Weiler's invitation, we appear before you today to discuss our views on the legal issues surrounding employee involvement (EI).

Employee involvement is a topic about which the President, Secretary Reich, Chairman Dunlop, NLRB Chairman-designate Gould, and human resources experts agree. It is a vital policy matter and one of great concern to all Americans committed to enhancing our competitiveness in a global economy. A strong and clear recommendation by this Commission would be of immeasurable value in supporting and guiding our national policy.

Our Group has developed a consensus position on this issue, which we urge this Commission to consider and adopt. I quote:

Electromation and its progeny have had a chilling effect on employers' willingness to initiate and/or continue employee participation committees, at the very time these committees have become widely recognized as a major means of improving productivity and enhancing product quality. *Electromation* must be clarified or changed to assure continued employee participation.

To understand how the law has reached its current state, I will first attempt to put the issue in its historical context, then discuss where the former NLRB went badly awry. Finally, I will suggest why the Working Group believes it imperative that this Commission issue a strong statement endorsing a policy by the Administration which supports employee involvement without legal impediment.

Before discussing the law itself, however, we want you to be aware that management attorneys today face a serious dilemma when it comes to employee involvement. We watch as our clients continue to move towards what are called "horizontal" or "lateral organizations" where employees at all levels of the enterprise are given a greater voice in all aspects of the operations. Our clients are doing this for one primary reason — to make themselves more competitive in the global marketplace — indeed, in many cases, to ensure their survival. Meanwhile, employees enjoy a greater sense of fulfillment in their work and identify themselves more with the well-being of the enterprise. The end result is a "win-win" situation for both the company and its employees.

To say that those clients who have moved towards horizontal organizations are happy with them would be a serious understatement. Their feelings go beyond happiness to a deep commitment to what began as an organizational restructuring and is now a whole new way of life.

Yet, we, as their attorneys, have to be the bearer of bad news. We have to tell them that their "way of life" is in serious legal jeopardy under our labor laws. We have to tell them that, even though they are empowering their employees, they may not be doing it in a manner sanctioned by the law — *i.e.*, through collective bargaining with a labor union acting as the exclusive representative of their employees.

As their legal advisors, we face a predicament. Generally, we caution our clients to stay on the "safe side" of the law, but in this case that may mean telling them to dismantle quality, efficiency, productivity, and success in a global marketplace. I want to assure you that we cannot and do not advise our clients to support or assist company-dominated unions to meet this need.

Allow me to address how we got into this quandary in the first place.

Employer-Dominated Company Unions. As you know, the predominant method of human resource management in the early part of this century was "Taylorism." Named after Frederick Taylor, this management approach was characterized by top-down decisionmaking, beginning with the CEO or President and flowing down through middle management to the shop foreman. By the time you got to the shop floor, most of the decisions were made and the line employee was simply supposed to do as he was told. In the early 20th Century, this made for a very efficient system and helped the United States achieve industrial and commercial supremacy throughout the world.

Obviously, this left the employee at the bottom of this hierarchy with little or no power over workplace decisionmaking. The only way he or she could achieve any influence was by banding together with all other employees and forming a labor union to go to management and say: "Bargain with us or you will have no workers to run your plant."

Just as this concept had great appeal to the powerless line employee, it had little or no appeal to management in companies steeped in the Taylorist approach where only management called the shots. Thus, these companies resisted the union movement.

This resistance came in a variety of forms. One of the most effective was to establish an alternative "company union" that had all of the superficial trappings of a union, but which, in fact, was under the complete control of management.

A 1935 study of 126 of these "company unions" by the Bureau of Labor Statistics¹ identified a number of their common characteristics:

¹ Bureau of Labor Statistics, *Characteristics of Company Unions* (1937).

- formed in response to a strike or strong trade union support in the plant or locality;
- no secret ballot election of the union or its officers;
- coercive tactics used by management to get employees to join the union;
- absence of any written collective bargaining agreement;
- few or no meetings of employee members;
- absence of the use of strikes or other economic weapons;² and,
- the absence of any meaningful negotiations, or even discussions, between unions and management.

This last characteristic is perhaps the most significant, demonstrating that the typical "company union" was little more than a ruse to try to divert support for a labor union to something posing no threat to management's Tayloristic approach to doing business. Thus, the employees were left with no genuine voice in workplace matters.

Section 8(a)(2). The threat posed by employer-dominated company unions to legitimate collective bargaining was a key focus of the Congress in enacting the Wagner Act of 1935. Experience under the Railway Labor Act had shown that the absence of a specific prohibition against company unions could result in their further proliferation.

² In one of the two instances of strikes, the strike was called as a one-day protest over a regional Labor Board (*i.e.*, under the National Industrial Relations Act) order of reinstatement of dismissed trade union members. One of the strikers noted: "The superintendent told the workers it would be a good time to show their strength."

Thus, it was decided specifically to prohibit the formation and operation of such unions as a separate unfair labor practice.³ More significantly, the Congress, in prohibiting the domination of a "labor organization," defined the latter term broadly to include:

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.⁴

At the time, the breadth of this definition caused little concern since only two forms of employee organizations "dealing with" employment conditions were envisioned: legitimate trade unions and employer-dominated company unions. Any attempt by the Congress to draft narrower language would only have served as an invitation to employers at the time to craft alternatives that didn't "look like a duck" but could still swim, fly and quack.

Interpretation of Section 8(a)(2). An examination of the early NLRB case law demonstrates that the Board took very seriously its mission to eradicate sham company unions. The very first case reported by the NLRB involved an employer-dominated

³ Section 8(a)(2) of the National Labor Relations Act provides:

[It shall be an unfair labor practice for an employer] to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; *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.

29 U.S.C. § 158(a)(2).

⁴ Section 2(5) of the National Labor Relations Act; 29 U.S.C. § 152(5).

"company union"⁵ and about one out of every five cases in the early years involved enforcement of a complaint against such a practice.

This aggressive pursuit by the Board — and the increased sophistication of employees as to their rights under the labor laws⁶ — resulted in the virtual elimination of "sham" company unions. Section 8(a)(2) cases have dwindled in recent years to fewer than one in twenty, with those cases often involving an employer favoring one independent union over another.

While the law achieved its purpose in exterminating sham company unions, its language permitted an unfortunate side effect — a broad, mechanistic interpretation of Section 8(a)(2) which now extends well beyond the sham company unions 8(a)(2) was designed to prevent.

This "mechanistic" approach has evolved as a result of two strains of interpretation:

- 1) a broad reading of the term "labor organization" to encompass almost any structure where employees and management discuss⁷ and try to resolve issues directly related to or affecting working conditions; and,

⁵ *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935).

⁶ As early as 1947, NLRB Chairman Herzog observed:

This is 1947, not 1935; in the interim employees have learned much about protecting their own rights and making their own choices with the full facts before them.

Detroit Edison, 74 N.L.R.B. 267, 279 (1947).

⁷ A critical issue in this determination is the scope of the phrase "dealing with." The Supreme Court held, in *NLRB v. Cabot Carbon*, 360 U.S. 203 (1959), that the phrase was broader than negotiating a collective bargaining agreement but failed to provide further guidance other than to state it did not include mere communication between employers and employees in a non-representative manner.

- 2) a total disregard for the employer's motives or the employees' desires in determining whether unlawful "domination" has occurred.

While the Board has contended that it has applied the law based on the "totality of the circumstances,"⁸ its approach has been more accurately described by some observers as a "per se" approach,⁹ and there is ample case law to illustrate this characterization.¹⁰

The federal courts generally have deferred to the Board in these determinations, but there have been noteworthy exceptions.¹¹ The Sixth Circuit, in particular, has led the way in adopting an approach that focuses on whether "employee choice" as to union representation has been inhibited, rather than using a "checklist" approach.¹²

Electromation. The collision between EI and Section 8(a)(2) was a long-anticipated one. For several years prior to the 1992 *Electromation* decision, law review articles and speeches by labor law experts (including NLRB members) questioned whether the committees typically used in EI settings were in fact employer-dominated labor organizations. These committees exhibited a number of the critical elements,

⁸ *Coamo Knitting*, 150 N.L.R.B. 579, 582 (1964).

⁹ Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 Yale L.J. 510, 516 (1973).

¹⁰ See, e.g., *Newman-Green, Inc.*, 161 N.L.R.B. 1062 (1966); *Dennison Mfg. Co.*, 168 N.L.R.B. 1012 (1967); *Merrill Transp. Co.*, 141 N.L.R.B. 1089 (1963); *Kunst*, 100 N.L.R.B. 146 (1952), *enforced*, 202 F.2d 846 (6th Cir. 1953); *Standard Transformer Co.*, 97 N.L.R.B. 669 (1951); *Crowley Milk Co., Inc.*, 88 N.L.R.B. 1049 (1950), *modified*, 208 F.2d 444 (3d Cir. 1953); *Duquesne Univ. of the Holy Ghost*, 198 N.L.R.B. 891 (1972).

¹¹ See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974), *denying enforcement to* 206 N.L.R.B. 191 (1973), *cert. denied*, 423 U.S. 875 (1975); *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

¹² See *Modern Plastics v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *NLRB v. Homemaker Shops, Inc.*, 724 F.2d 535 (6th Cir. 1984); *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968).

including discussions between employees and management representatives about "conditions of employment," which the Board had found unlawful in its 8(a)(2) decisions. In fact, most attorneys familiar with Section 8(a)(2) recognized that, if employee involvement structures were going to have a "safe harbor," the Board's "mechanistic" approach to Section 8(a)(2) must be modified.

Thus, when the Board announced in 1991 that it was going to confront the issue squarely,¹³ there was a mixture of relief and anxiety among management attorneys. We were relieved that the issue was finally going to be addressed by the Board, but anxious because, unless the Board adopted a new approach, it would only invite a stream of unfair labor practice charges against a critical element of our clients' urgent need for competitiveness. Meanwhile, there was also some concern that the facts in *Electromation* did not appear to represent a typical EI situation,¹⁴ and thus its value as a test case seemed minimal.

¹³ On May 14, 1991, the Board announced it would conduct a hearing in the *Electromation* case and invited participants to address two questions: 1) At what point does an employee communication lose its protection as a communication device and become a labor organization? 2) What conduct of an employer constitutes domination or interference with the employee committee?

¹⁴ In response to human resource tensions, *Electromation* formed five Action Committees to consider certain specifically defined issues (Absenteeism/Infractions, No Smoking Policy, Communication Network, Pay Progression for Premium Positions, and Attendance Bonus Program). The committees were formed without knowledge on the part of the Company that the Union had begun an organizing effort among its employees. Each of the committees was made up of six hourly employees and one or two management personnel, plus one management person who would sit on each to ensure coordination among them. Employees interested in serving on a committee were invited to sign up on volunteer sheets, with selection being made by management from the volunteers. Each of the volunteers was placed on at least one committee but, in order to give everyone a chance, some were not able to serve on all of the committees for which they volunteered. The employee members of the committee were active participants, and there was no evidence of any complaints or that the discussions were dominated by management representatives. When the company later learned that a union was seeking recognition, it withdrew from participation in the committees, but informed the employee members that they could continue to meet if they so wished, which some did. When the union lost the election, it filed a charge alleging that the Action Committees violated Section 8(a)(2).

There was some reason for hope. Indeed, the Board previously had given its blessings to certain types of EI by excluding them from the definition of "labor organization": 1) employer-employee grievance committees performing a purely adjudicatory function;¹⁵ 2) autonomous teams of employees to whom management delegated its authority, instead of "dealing with" them;¹⁶ and 3) committees which discussed productivity issues without delving into terms and conditions of employment.¹⁷

These cases protected some EI structures, but we knew that they didn't go nearly far enough to provide the necessary protection. Our hope was that the Board would follow the 6th Circuit line of cases and interpret Section 8(a)(2) according to its intent — to guarantee employees' freedom of choice as to whether to be represented by a union for purposes of collective bargaining.¹⁸ Where the EI structure in question does not inhibit that free choice there should be no violation. Indeed, we hoped that the Board would recognize that legitimate EI structures actually *achieve* the underlying purposes of the statute by empowering employees (although perhaps not in a form recognizable to Senator Wagner).

Unfortunately, our hopes were in vain. Instead of adapting the 1930's law to the needs of the 1990's and beyond, the Board reasserted its traditional mechanistic approach. Meanwhile, it only added further confusion by including three separate

¹⁵ *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977); *Mercy Memorial Hospital*, 231 N.L.R.B. 1108 (1977).

¹⁶ *General Foods Corp.*, 231 N.L.R.B. 1232 (1977).

¹⁷ *Sears Roebuck & Co.*, 274 N.L.R.B. 230 (1985).

¹⁸ Several briefs *amicus curiae* were filed with the Board urging such an approach, including briefs filed by ten members of Congress, the Labor Policy Association, the National Association of Manufacturers, the American Iron and Steel Institute, The Coalition of Management for Positive Employment, Training and Education, and the Council on Labor Law Equality.

concurring opinions, each of which articulated an interpretation that would protect a great number of EI structures. Unfortunately, these three interpretations were inconsistent with one another. The effect was to leave the current law in place, but demonstrate that the Board itself was confused as to how the law should be interpreted.

Although the Board itself had raised expectations of a definitive ruling, ultimately it declined to rule upon the legality of EI structures generally.¹⁹ While providing some comfort, this produced even more confusion.

Notably, the facts in *Electromation* do not appear typical of most EI structures. Its Action Committees were established in response to employee dissatisfaction with changes in human resources policies. Moreover, each Committee was formed to address a specific issue that was clearly or (at least arguably) a "condition of employment": 1) Absenteeism/Infractions; 2) No Smoking Policy; 3) Communication Network; 4) Pay Progression for Premium Positions; and 5) Attendance Bonus Program.

Most EI structures are established to address broader issues of efficiency, quality, or health and safety. Their involvement in employment issues is incidental to those larger concerns.

However, there are other facts in *Electromation* which are shared by many, if not most, EI structures. These structures are often unilaterally designed and established by management. In addition, while conditions of employment may not be the primary focus, EI structures frequently find discussion of them unavoidable.

¹⁹ "We find no basis in this record to conclude that the purpose of the Action Committees was limited to achieving 'quality' or 'efficiency' or that they were designed to be a 'communication device' to promote generally the interests of quality or efficiency. We, therefore, do not reach the question of whether any employer initiated programs that may exist for such purposes, as described by amici in this proceeding, may constitute labor organizations under section 2(5)." *Electromation, Inc.*, 309 N.L.R.B. No. 163, at 17 n.28 (1992).

Moreover, *Electromation* made it clear that management's motives in establishing the EI structure are irrelevant, as long as the elements of Sections 2(5) and 8(a)(2) are present.

DuPont. The Board quickly followed the *Electromation* decision with its decision in *E.I. du Pont de Nemours & Co.*²⁰ Again, the facts were atypical in that they involved the establishment of EI structures — in this case health and safety committees — in a unionized setting without the union's blessing.²¹ In its decision, the Board attempted to clarify its *Electromation* ruling but, again, added to the confusion. One thing the case did seem to clarify was that a union has "veto power" over any EI structure involving workers it represents, if terms and conditions of employment are involved.²²

Pending Cases. Some have attempted to downplay the significance of *Electromation* and *DuPont*, highlighting their atypical facts and pointing to the few other cases that have emerged in the 13 months since *Electromation* was decided. We would

²⁰ 311 N.L.R.B. No. 88 (1993).

²¹ The *DuPont* case involved six safety committees and one fitness committee established by the company at its Chambers Works facility in Deepwater, New Jersey. The committees had been preceded by safety and health committees run entirely by management personnel. The Administrative Law Judge found that the non-challenged safety and fitness committees had been established over a period from 1984 to 1988 "in the same pattern" as the company's quality of work life committees. Employee members of the committees were selected by the company from among volunteers. The company felt that this would ensure the presence of "highly motivated and individually committed" individuals. It was not until 1989 that the union (Chemical Workers Association, Inc., International Brotherhood of DuPont Workers) made its own proposal for a site-wide joint health and safety committee, asserting that health and safety issues are mandatory subjects of bargaining. The union also demanded the abolition of the existing committees and urged its members to refuse to participate in them any longer. DuPont did not accede to the unions' demands, and the union filed a complaint with the National Labor Relations Board.

²² Unfortunately, the Board did not state in the case that, had the same structures been established through the collective bargaining process, they would have been legal even though certain elements of employer "domination" existed (e.g., joint control of the committee and veto power over the committee's decisions). While most labor lawyers believe that the *DuPont* committees would have been safe had they been bargained, the Board's silence appears to invite further litigation to resolve that question.

like to think that this is indeed the case. Some might conclude that the "saving grace" in all of this is that the NLRA is a complaint-driven law and, as long as no one files a charge against an EI structure, it is safe. However, this provides little comfort to employers who conscientiously strive to maintain their operations in strict accordance with the law.

Meanwhile, there are cases pending. This Commission heard testimony on January 5 about a case involving Polaroid. Also, a case is pending against NCR involving its Satisfaction Councils and Quality Information Councils.²³

In addition, a case recently decided by an administrative law judge concerns us because it does appear to represent a more typical set of facts.

In *Webcor Packaging Inc.*,²⁴ a strong disciple of employee involvement attempted to introduce EI in a plant after becoming vice-president for operations at the company in Burton, Michigan. His experience at one of Webcor's competitors had convinced him of the value of employee involvement. Thus, the company established an Employee Involvement Steering Committee, with employee representatives chosen by lot from volunteers.

The Committee was told that it could only focus on quality, waste reduction, housekeeping, safety, and productivity. It was specifically ordered *not* to involve itself in "policy" issues, *i.e.*, wages, work rules, hours of employment, etc. However, at the first two or three meetings, the employees repeatedly raised "policy issues" but were told they could not be discussed. The company realized that, with this restriction, the EI Steering

²³ Daily Lab. Rep. (BNA), No. 97, A-4 (May 21, 1993).

²⁴ 7-CA-31809 *et al.*, Oct. 28, 1993.

Committee was going nowhere, so it set up a Plant Council to deal only with "policy issues."

An 8(a)(2) charge was filed by a union that had lost an organizing campaign among the workers and, adhering to *Electromation* and *Dupont*, the Administrative Law Judge ordered the Plant Council disbanded. The ALJ went to great lengths to explain that Webcor was not motivated by defeating the union, but was instead committed to "involving all of the people in our operation in thinking . . . [n]ot checking their brains at the door."

We understand the company is appealing the case. This could provide the new Board, once it is confirmed, with an opportunity to take the law in a more flexible direction.

Current State of the Law. In the meantime, the law remains inhibiting, even threatening, to employee involvement. For counsel to provide clients with a definitive delineation of what employers can and cannot do in this area is simply not possible. *Electromation* and *Dupont* have provided minimal guidance to employers and, if anything, have created more confusion.

We do know, however, that there are certain pitfalls that, alone or in conjunction with other factors, can spell doom for an employer's EI efforts. A brief discussion of these follows:

1) TERMS AND CONDITIONS OF EMPLOYMENT: If an employer can purge his EI structures of consideration of any "terms and conditions of employment," those structures will be completely safe since they cannot be deemed "labor organizations."

Unfortunately, the Board has defined "terms and conditions of employment" very broadly to include a great deal more than wages and hours. Thus, even though they may

play a crucial role in efficiency, productivity and quality, the following subjects could be argued to be forbidden:

- workplace health and safety;
- rewards for efficiency and productivity;
- work schedules;
- work assignments;
- work rules;
- job descriptions and classifications;
- production quotas;
- use of bulletin boards;
- work loads;
- changes in machinery;
- discipline;
- hiring & firing; and
- promotions and demotions.

This means that, while management can decide such matters unilaterally, it may be unlawful to seek the input of employees in making the best decisions for the enterprise. As our clients know, it is virtually impossible to avoid touching these topics in the pursuit of efficiency and productivity. Meanwhile, as the *Webcor* case illustrates, it is often the employees themselves who want to focus on these issues.

2) "BILATERAL" MECHANISM: The Board states that, for the critical component of "dealing with" under the definition of "labor organization" to exist, there must be a "bilateral mechanism." This is defined in *DuPont* as "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."²⁵

Consider what this means. If management merely listens to the employees but does absolutely nothing in response, there is no "bilateral mechanism" and there can be no violation. It is only when management seeks to address the employees' concerns — truly empowering them — that "bilateralism" exists and there can be a violation. We ask you, is this what Section 8(a)(2) was enacted to prevent?

3) REPRESENTATION: The Board has failed to address whether employees in the EI structure must represent others for a "labor organization" to exist.

"Representation" existed in both *Electromation* and *Dupont* so the Board found it unnecessary to address the question directly. Frankly, we were disappointed by the Board's unwillingness to address this issue. Moreover, we question how a group of individuals who do not "represent" other employees could be considered to meet anyone's definition of a "labor organization."

Much of the confusion around this issue is based on a misunderstanding of the fundamental differences between collective bargaining and employee involvement.

Collective bargaining had its origins in an adversarial relationship between management and the employees. In collective bargaining, the employees agree amongst themselves *before* communicating with management and present a single, unified voice to management on working conditions specifically. Individuals who may or may not even be employees are selected to present these views on behalf of the group.

²⁵ *E.I. du Pont de Nemours & Co.* 311 N.L.R.B. No. 88, at 2 (1993).

Employee involvement, on the other hand, is premised upon a cooperative relationship where it is recognized that the interests of the employees and management in the success of the enterprise are mutual. Thus, the focus of EI generally goes beyond terms and conditions of employment and is directed towards the broader issues of quality, efficiency, and productivity which are key components of competitiveness. Meanwhile, unlike collective bargaining, employees speak as individuals, since it is their own intellectual resources which are being tapped by the employer. In speaking as individuals, they may also reflect views they have gathered from discussions with other employees but, unlike collective bargaining, they are not presenting a single, unified "worker" voice.

Thus, employee involvement and collective bargaining are two different phenomena. As this Commission has seen, in some settings they coexist and in others they don't. Significantly, experience has demonstrated that either can be very successful without the other. Thus, to those who would suggest that the presence of a union is essential for effective employee involvement, we simply would respond: employee involvement structures have functioned and do function effectively in thousands of workplaces without union participation.

Hence, it would be a serious mistake to conclude that EI should *only* exist where there is also collective bargaining. If, in fact, employees in an EI setting believe they also need collective bargaining, the law is already structured to provide them with that choice.

4) ESTABLISHMENT OF THE STRUCTURE: In both *Electromation* and *Dupont*, the fact that the structures involved were unilaterally established and configured by management was critical to the Board's finding of domination.

The underlying assumption appears to be that, when initiated by management, "employee involvement" is devoid of any employee choice — as distinguished from "collective bargaining" where employees elect a union to be their collective bargaining representative. However, EI is distinguishable from collective bargaining, not by the lack of employee choice, but by the existence of *mutual choice*.

Any human resources manager who is an EI advocate will tell you that successful EI depends ultimately upon employee choice. If the employees do not believe in it, EI fails no matter how it is structured. Employees initially may resist new ways of operation that require them to take more responsibility for their work product. Case histories of EI successes often reflect such early resistance. If that resistance remains, EI doesn't work and the employer will likely abandon it.

EI that is not chosen by management, however, also is subject to failure. Indeed, it is management who loses its decision-making power and once that power is given up, it is very difficult to take it back. Hence, management employees are often the most resistant to employee involvement.

Because of this natural reluctance by both employees and management to abandon established ways of doing things, the impetus for EI frequently comes from the higher levels of the corporation—the CEO or a senior human resources vice president or manager. Unfortunately, this "top-down" genesis runs afoul of the *Electromation* principle that "labor organizations" (as defined by the Act and the Board) cannot be established by management, even if their success ultimately depends upon employee choice.

Thus, our advice to our clients must be that, to be safe, the EI structures must be initiated by the employees themselves. That sounds very appealing on paper, but, unfortunately, it seldom comes about that way.

5) SAFE HARBORS: In *Dupont*, the Board attempted to provide some comfort to employers by listing certain "safe harbors." Unfortunately, these tend to be of a very primitive nature:

- "brainstorming" sessions to develop, but not propose, ideas;
- information sharing;
- suggestion boxes; and,
- conferences, where employees are encouraged to talk about their experiences.

Again, it appears that employers may listen to their employees, but if they empower them, they are in trouble.

As these "safe harbors" illustrate, there may be little our clients can do other than hope that a disgruntled employee or a union interested in organizing them does not file an NLRB charge. Even if what they are doing *seems* to be legal under the recent Board decisions — as with *General Foods*-type autonomous teams — the area is so confused that litigation is likely to result from any charge that is filed.

Outlook. Certainly, the legal battle on this issue is far from over. *Electromation* is currently on appeal before the Seventh Circuit, which conducted oral argument last September. Meanwhile, *Webcor* and ensuing cases will continue to move forward.

Indeed, the next Board to address the issue will be a completely new Board with most members appointed by President Clinton. Thus there may be reason to anticipate change, as several nominees/candidates for nomination have expressed the belief that the

law should provide greater latitude to employers in this area. Reform may be forthcoming, therefore, through Board and judicial reinterpretations of the existing statute.

While lawyers continue to debate this issue before the NLRB and the courts, companies will continue to seek ways to enhance their competitiveness. Right now, some believe the legalities are ambiguous enough, and the chances of an NLRB order remote enough, that they are continuing their commitment toward employee involvement. However, as they hear more about the experiences of companies like Polaroid, NCR and Webcor, the chill may become more severe. Meanwhile, there are already internal conflicts in many companies between labor counsel and human resources managers as to how to respond.

The recommended "cure" for these uncertainties takes varying forms, from change in the law through Board action to legislative reform. My own client, the Labor Policy Association (LPA), has testified before this Commission in support of legislation introduced by Senator Nancy Kassebaum (R-KS) and Rep. Steve Gunderson (R-WI) — S. 669/H.R. 1259 — which would overturn *Electromation*. LPA strongly supports the goals of this legislation.

The Working Group consensus, however, is that this Commission need not become embroiled in the legislative issue. Instead, we would urge the Commission to adopt the position reflected in the Group's consensus — that "*Electromation* should be clarified or changed to assure continued employee participation" — and to encourage the Administration to adopt policies which support this position. If an Administration policy is articulated with clarity, it should guide Congress and the Board in addressing the realities of the 1990's. Employee involvement is for the good of America. It should not

be undermined by a myriad of legal technicalities — whether through mandated approaches or the imposition of burdensome preconditions. Such "one size fits all" approaches contradict the flexibility and creativity essential to successful employee involvement.

Employee involvement represents a consensus in our society which extends from the President to the shop floor. Government officials (including those in the current Administration), academics, business leaders and, most importantly, workers themselves have demonstrated their commitment to this new approach to work. We sincerely hope that your Commission will further the realization of this consensus by issuing a strong statement in its support.