4-1-1994

The Worker Participation Conundrum: Does Prohibiting Employer-Assisted Labor Organizations Prevent Labor-Management Cooperation?

Robert B. Moberly

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Labor and Employment Law Commons

Recommended Citation
Available at: https://digitalcommons.law.uw.edu/wlr/vol69/iss2/4
THE WORKER PARTICIPATION CONUNDRUM: DOES PROHIBITING EMPLOYER-ASSISTED LABOR ORGANIZATIONS PREVENT LABOR-MANAGEMENT COOPERATION?

Robert B. Moberly *

Abstract: Worker participation and labor-management cooperation have been important concepts in labor relations for more than a decade. Recently, some proponents of labor management cooperation have argued that the statutory prohibition against employer assistance to labor organizations contained in section 8(a)(2) of the National Labor Relations Act has hampered the development of worker participation programs and ought to be repealed or modified. Others are opposed both to repealing the prohibition and to labor-management cooperation in general. This Article argues that worker participation and labor-management cooperation are beneficial and ought to be encouraged; nonetheless, the prohibition against employer-assisted labor organizations is important to protect against employer interference with union organization, and ought to remain in place. The Article reviews the early cases arising under section 8(a)(2), as well as two important recent decisions, Electromation and Du Pont, and concludes that neither the statute nor these cases prevent the development of worker participation programs aimed at improving productivity, quality and efficiency. The Article concludes that proposals to amend or repeal section 8(a)(2) would lead to schemes that would threaten employee rights, evade unionization, and seriously damage the credibility of legitimate worker participation programs.

I. INTRODUCTION

For more than a decade, employers, unions, governments, and others have paid considerable attention to the development of worker participation and labor-management cooperation programs. These participation programs have taken a variety of forms, including workers on company boards of directors, worker ownership, quality of worklife programs, quality circles, productivity gain sharing and profit sharing.¹ The purpose of worker participation programs is to increase the contributions and morale of employees, thereby leading to greater worker productivity and satisfaction. Management sometimes introduces such

* Professor of Law, University of Florida College of Law. B.A., University of Wisconsin; J.D., University of Wisconsin Law School. The author is grateful for the research assistance of Scott Atwood.

programs unilaterally; in other instances the programs are established through collective bargaining.

Observers and critics have reacted both positively and negatively to worker participation programs. Some proponents of such programs argue that Congress should amend or repeal section 8(a)(2) of the National Labor Relations Act (NLRA), which prohibits employer assistance to, or domination of, labor organizations, in order to encourage the development of employee participation programs. Most such advocates contend that section 8(a)(2) is outdated legislation that advocates an adversarial relationship between labor and management. They maintain that the modern global economy necessitates labor-management cooperation and, therefore, cooperative programs should not be stymied in any way. These advocates reject the notion that employers would use such programs for reasons other than simply increasing employee satisfaction and, ultimately, productivity.

Conversely, those who oppose amending section 8(a)(2) of the NLRA also frequently are critical or skeptical of employer-employee cooperation and participation efforts. They do not deny the contention that section 8(a)(2) created an adversarial relationship between labor and management. These observers advocate such a relationship. They reject any type of cooperative program, regardless of how restricted it is, because they view the programs as simply a form of management usurpation of the employees' collective bargaining power.

This Article takes a different tack, arguing that employer-employee cooperation and worker participation are beneficial and ought to be encouraged; yet section 8(a)(2) remains a vital part of our efforts to protect against employer interference with union organization. Tracing

section 8(a)(2) from its inception under the Wagner Act\(^5\) in 1935, this Article disputes the contention that the legislative intent underlying section 8(a)(2) was to promote adversarialism. Rather, Congress sought to promote cooperation through collective bargaining. Misinterpretation of this intent has led some circuits to improperly permit employee programs that were employer dominated.

Proponents of modification or elimination of section 8(a)(2) especially criticize two recent NLRB cases, \textit{Electromation, Inc. v. Teamsters Local 1049} and \textit{E.I. Du Pont de Nemours & Co. v. Chemical Workers Ass'n.}\(^7\) The critics of section 8(a)(2) contend that these cases illustrate the shortcomings of section 8(a)(2) in the modern economy. This Article argues that \textit{Electromation} and \textit{Du Pont} do not unduly restrict efforts at employee participation. Rather, the cases restrict employers' ability to threaten employees' legitimate right to organize.

The Article then examines the movement to amend or repeal section 8(a)(2) in light of \textit{Electromation} and \textit{Du Pont}. Eliminating or modifying section 8(a)(2) as suggested by some proponents of worker participation would allow employers to use employee participation programs as union-busting mechanisms. At the very least, the suggested changes would allow management to control such programs and impede employees' right to organize, a result section 8(a)(2) was expressly designed to prevent. This Article ultimately concludes that an unaltered section 8(a)(2) is a viable and necessary portion of the NLRA, and that Congress should retain this section in full.\(^8\) The Article also discusses proposals for labor reform that would encourage cooperative programs without losing the protection that section 8(a)(2) now affords.

II. SECTION 8(A)(2) OF THE NATIONAL LABOR RELATIONS ACT

A major purpose of the 1935 Wagner Act was to curtail company unions, commonly known as sham unions.\(^9\) Company unions were

\footnotesize{\begin{itemize}
  \item 5. 49 Stat. 449 (1935). The Wagner Act was the NLRA as originally enacted. Section 8(a)(2) has remained unchanged despite subsequent amendments to the Act.
  \item 8. At least absent wholesale reform of the NLRA to encourage and protect greater employee involvement and representation rights. \textit{See infra} notes 189 to 191 and accompanying text.
\end{itemize}}

333
employee groups that employers created and dominated, with the intention of giving employees the outward appearance that the employer was collectively bargaining in good faith with its employees.

The initial draft of the Wagner Act contained only a ban on company unions and the issue was "the most important substantive issue in the political fight over the drafting and passage of the Wagner Act." Senator Wagner thought that employer-dominated unions constituted the greatest obstacle to true collective bargaining. Such a union, he noted, "makes a sham of equal bargaining power. . . . [O]nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees." Thus, the first and most important step toward genuine collective bargaining was to abolish company-dominated unions as an agency for dealing with grievances and other conditions of employment.

Senator Wagner's efforts were memorialized in section 8(a)(2) of the NLRA, which makes it an unfair labor practice for employers to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it."

Early NLRB decisions defining employer domination or interference under section 8(a)(2) involved blatant examples of employer misconduct. Nonetheless, these decisions established the basic parameters of employee groups that would be accepted under the Wagner Act. Three years after the adoption of the Wagner Act, the Supreme Court decided *NLRB v. Pennsylvania Greyhound Lines, Inc.*, in which management established an employee representation plan that was stacked with employees it could control. Employees paid no dues to the organization. Management established the union bylaws, which gave the company direct control over the selection of union representatives and over union meetings, and strongly urged employees to join the union. Moreover, management essentially eliminated the employees' ability to alter the


12. *Id.*


15. 303 U.S. 261 (1938).

16. *Id.* at 269.
Section 8(a)(2) and Worker Participation

bylaws unilaterally, since a provision in the bylaws prescribed that all amendments receive a two-thirds vote from the Joint Reviewing Committee. Under the bylaws, management determined one half of the members of that committee.17

Controversy arose when a few employees attempted to align the other workers with an American Federation of Labor (AFL) affiliate. The company actively resisted the union’s organization attempts, threatening to fire any employee that joined the union.18 As a consequence, the AFL affiliate filed a complaint with the NLRB against Greyhound. In the complaint, the union maintained that Greyhound had violated section 8(a)(2) of the NLRA by dominating the employee association and by interfering with the employees’ right to organize under section 7 of the NLRA.19

Greyhound did not dispute the facts of the case, but maintained that the NLRB improperly ordered the disestablishment of the representative plan. Management contended that a finding of an unfair labor practice and an order for the cessation of the practice were the only possible remedies if the company was found to have violated the NLRA.20 Greyhound disputed the board’s ability to order any measures more drastic than a cessation of the unfair labor practice.

The Court initially determined that the company Employees Association was plainly a sham union.21 It found that management had committed unfair labor practices when it improperly dominated and interfered with the association.22 Such actions stymied employee attempts to “bargain collectively through representatives of their own choosing.”23 Consequently, the only issue was the appropriate remedy.

The Court then considered whether the board could properly disestablish a company union. Examining the legislative history, the

17. Id.
18. Id. at 270.
19. Id. at 263. 29 U.S.C. § 157 (1988) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

20. Greyhound, 303 U.S. at 264.
21. Id. at 270.
22. Id.
23. Id.
Court noted that the Railway Labor Act of 1926, which permitted the dissolution of improper labor organizations, was the basis for the NLRA. Yet, the NLRA expanded the Railway Labor Act and had as a stated purpose the promotion of equalized collective bargaining. The Court thus concluded that Congress clearly intended to promote disestablishment of labor organizations that management had improperly influenced.

The Court conceded that disestablishment may not be appropriate in every instance of employer domination. In this case, however, the Greyhound employee association clearly warranted a disestablishment order. Alluding to the blanket control that Greyhound wielded over the association, the Court held that the company "by unfair labor practices, ha[s] succeeded in establishing a company union so organized that it is incapable of functioning as a bargaining representative of employees." In such instances, stated the Court, the only proper alternative was to dissolve the labor organization and begin the process anew. Employees could then independently establish an organization that would represent only their interests, not those of management as well.

The next year, the Supreme Court solidified its blanket prohibition of company unions in *NLRB v. Newport News Shipbuilding and Dry Dock Co.* In *Newport News*, management, with the aid of employees, implemented an employee representation plan. The stated purpose of the plan was to give employees an avenue for the discussion of working conditions to ameliorate future labor-management antagonism. This representation took the form of joint committees. Employees elected representatives, whom the company paid for their efforts. Management personnel were not eligible for such positions, but management reserved the right to select one half of the employee members of the joint committees. Further, the joint committees could not call for arbitration of disputes until the company president acceded to such a request.

---

24. *Id.* at 266.
25. *Id.* at 266–68.
26. *Id.* at 270.
27. *Id.* at 271.
29. *Id.* at 244.
30. *Id.*
31. *Id.*
32. *Id.* at 244–45.
33. *Id.* at 245.
The original plan underwent a number of revisions during its twelve years in existence. For example, in 1931, management replaced the multiple joint committees with a single general joint committee. Management then gave the general joint committee the responsibility of dealing with grievances. Yet management retained the right to appoint one half of the committee's members. Management also retained the right to assert final approval of the committee's grievance decisions.

Management made a final revision of the plan in 1937, after the Supreme Court had upheld the legality of the NLRA. It discontinued compensation of representatives and replaced the general joint committee with a committee composed only of employee-elected representatives. Yet committee proposals could only become effective upon agreement of the company. Moreover, the committee could alter its bylaws, but only if not "disapproved by the company within fifteen days after their passage."

Newport News claimed that its motives in forming the union were completely benign and that the committee was intended solely to benefit its employees. The company argued that the organization had the support of its employees. The company further noted that there had not been a single work stoppage since the representative plan had been first implemented. The Court, however, indicated that employer motive and employee satisfaction are not pertinent factors in determining whether a company union is prohibited. The Court rejected management's claim that the plan was proper because it obviated the need for work stoppages. The Court stated that such a consideration would only be proper if it were part of the congressional policy underlying the NLRA. Examining the NLRA, the Court concluded that "the statute plainly evinces a contrary purpose, and that the board's conclusions are in accord with that purpose."
The Court termed the true question as whether there is employer domination or interference. The Court found such dominance and interference in *Newport News*. Alluding to management's retention of the right to reject amendments to committee bylaws, the Court determined that on that basis alone the plan failed.\(^{46}\) The Court rejected management's contention that this practice was commonly followed in collective bargaining and therefore was appropriate in the instant situation.\(^{47}\) Instead, the Court concluded that management's effective control over the committee bylaws predetermined that the employees would not have complete control over the committee. Therefore, the plan violated the "complete freedom of action guaranteed to them by the [NLRA]."\(^{48}\)

The Court further held that where an employee representation plan previously violated the NLRA, simple revision of the plan would not suffice. The Court supported the board's decision that plans previously tainted by employer domination or interference should be disestablished.\(^{49}\) Only with an entirely new plan, the Court concluded, could a proper employee representation plan shed the specter of impropriety that covered the prior plan. The Court thus found that regardless of how innocuous the company's actions or unions appeared, company-dominated organizations could not be allowed if the Wagner Act's goal of promoting collective bargaining was to have a chance for success.\(^{50}\)

Section 8(a)(2) remained intact despite employee efforts to legalize company unions and their progeny, World War II's employee groups,\(^{51}\) in the Taft-Hartley Act of 1947.\(^{52}\) Significant questions arose, however, concerning the precise definition of a labor organization. Section 2(5) of

---

\(^{46}\) Id. at 249.
\(^{47}\) Id.
\(^{48}\) Id.
\(^{49}\) Id. at 250.
\(^{50}\) Id. at 250–51.

\(^{51}\) During World War II, Congress created the War Production Board. The board urged cooperation between labor and management in industries critical to the war effort. Board-supported "employee groups" and "labor management committees" worked closely with management to deal with grievances and other employment issues. Most of these groups violated the Wagner Act, but wartime regulations exempted them from litigation. Following the war, some of these employee groups remained despite the dissolution of the War Production Board.

the Wagner Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The primary point of contention was the point at which an employee group was transformed into a labor organization that represented the interests of all the employees. The term "dealing with employers" was at the core of the confusion. It was unclear whether such dealing could only occur in bilateral discussions, or if it was even further confined to official collective bargaining activities. The import of the distinction between employee groups that were and were not labor organizations was that only labor organizations were subject to the strictures of section 8(a)(2). Management preferred a narrow interpretation of "dealing with" because employer-assisted or -dominated employee representation plans would be more likely to gain judicial sanction.

The Supreme Court finally addressed the issue of labor organizations in NLRB v. Cabot Carbon Co. The employee representative committee at issue in Cabot Carbon was a remnant World War II employee group. Membership on the committee was restricted solely to employees, who were paid for time spent performing committee work. Management, with employee input, established the committee's bylaws, paid all of the committee's expenses, and provided clerical support.

The committee never represented employees as their collective bargaining agent with management. Rather, the committee's purpose was to facilitate discussion of employee concerns. Grievances and most other areas mentioned in section 2(5) were frequent topics of discussion. The committee then made recommendations to management suggesting appropriate remedies for these concerns. Management was not required to accept the group's recommendations.

55. Id. at 205.
56. Id. at 206. Such committees existed at each of Cabot Carbon's several plants. Id. at 204.
57. Id. at 205.
58. Id. at 209.
59. Id. at 207. Discussions included "seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions." Id.
although it frequently adopted the committee’s proposals.\textsuperscript{60} Cabot Carbon also provided support and assistance to the committee.\textsuperscript{61} A union coexisted with the employee group at approximately one third of Cabot Carbon’s plants.\textsuperscript{62} The union eventually filed a complaint, maintaining that the employee committee was a section 2(5) labor organization and consequently accusing the employer of section 8(a)(2) violations.\textsuperscript{63}

The Court held that the committee was a labor organization under the provisions of section 2(5). The Court rejected management’s contention that the Taft-Hartley Act of 1947 had exempted such groups from section 2(5) analysis, noting that the provisions to that effect had not survived the joint houses of Congress.\textsuperscript{64} Instead, the Court based its holding on the fact that the committee and management discussed topics specifically mentioned in section 2(5).\textsuperscript{65} As such the committee was “dealing with” management.

Management contended that because no collective bargaining was taking place, the committee could not be statutorily “dealing with” the employer.\textsuperscript{66} The Court, however, rejected this narrow interpretation, and concluded that the committee need not have been bargaining with Cabot Carbon in the “usual concept of collective bargaining,\textsuperscript{67} in order to establish a section 2(5) labor organization. The committee could not unilaterally implement any of the recommendations it made on the section 2(5) enumerated topics. Management maintained control over the discussions and impeded the independence of the employee committee. Thus, the Court concluded that the committee was a labor organization even if it only discussed and then made proposals and requests concerning “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”\textsuperscript{68} In fact, noted the Court, only one of the section 2(5) enumerated topics need be shown to have been addressed to constitute a labor organization. The Court, therefore, expanded the purview of section 2(5), holding that actual bilateral negotiation was not a prerequisite for an employee committee to be

\begin{footnotesize}
\textsuperscript{60} Id. at 207–08.
\textsuperscript{61} Id. at 209.
\textsuperscript{62} Id.
\textsuperscript{63} Id. at 206–07.
\textsuperscript{64} Id. at 215–17.
\textsuperscript{65} Id. at 213.
\textsuperscript{66} Id. at 214.
\textsuperscript{67} Meaning bilateral negotiation. Id.
\textsuperscript{68} Id. at 212–13.
\end{footnotesize}
deemed a labor organization. Rather, the Court concluded that it would suffice for section 2(5) purposes if an employee committee merely discussed and made recommendations on any of the topics specifically mentioned in section 2(5).69

A majority of the circuits have followed the *Cabot Carbon* view that any employee committee that offers requests or recommendations to management on any issue enumerated in section 2(5) is deemed a labor organization. A minority of circuits, however, have narrowly interpreted the *Cabot Carbon* analysis and effectively have used employer motive and employee satisfaction as determining factors on the question of whether section 8(a)(2) was violated.70 Some courts have also concluded that actual rather than potential domination needs to be shown.71

The Seventh Circuit's decision in *Chicago Rawhide Manufacturing Co. v. NLRB*72 was the first to proffer a version of this alternative view. In Rawhide, the court disregarded the specific language of the Supreme Court in *Newport News* by using employer motive and employee satisfaction as determining factors on the question of whether section 8(a)(2) was violated.73 The court also concluded that actual rather than potential domination needed to be shown.74 This reasoning did have some allure to it, especially considering the perceived harshness of *Cabot Carbon*. Other courts therefore followed Rawhide's lead.

The Sixth Circuit's 1982 decision in *NLRB v. Streamway Division of the Scott & Fetzer Company*75 acknowledged *Cabot Carbon* and then limited its holding. The court concluded that *Cabot Carbon's* broad view of the term "dealing with" management "did not indicate the limitations, if any, upon the meaning of 'dealing' under the statute."76 The court therefore held that the issue of the amount of interaction required for dealing was unsettled, and thus sought to answer the question in the context of the facts of the instant case.

---

69. Id. at 213–14.
70. NLRB v. Streamway Div. of the Scott & Fetzer Co., 691 F.2d 288 (6th Cir. 1982); Hertzka & Knowles v. NLRB, 503 F.2d 625 (9th Cir. 1974); Chicago Rawhide Mfg. Co. v. NLRB, 221 F.2d 165 (7th Cir. 1955).
71. See Streamway, 691 F.2d at 295.
72. 221 F.2d 165 (7th Cir. 1955).
73. Id. at 170.
74. Id. at 167–68.
75. 691 F.2d 288 (6th Cir. 1982).
76. Id. at 292.
Streamway organized and established an In-plant Representation Committee. The purpose of the committee was to promote labor-management relations by “communicating Company plans and programs; defining and identifying problem areas and eliciting suggestions and ideas for improving operations.” The committee was composed solely of employees, but management was present at all of the meetings. Moreover, membership on the committees was fluid, with members continuously rotated so that all employees had the opportunity to serve. The court observed that the company clearly dominated the committee, but noted that the threshold question for a section 8(a)(2) analysis was whether the committee was a labor organization.

The Sixth Circuit found that the committee was not the type of group that Congress envisioned when it defined labor organizations in section 2(5). The court stated that the continuous rotation of members indicated that the employees were acting more on an individual basis than on a company wide representational basis. Moreover, the court concluded that the lack of anti-union animus was a factor. The primary basis for the court’s decision, though, was that there was “no evidence that anyone viewed the committee as more than a communicative device.”

The court observed that section 2(5) did not prohibit communication between employees and management. Rather, the court concluded that such communication was appropriate if the existence of the committee did not inhibit the collective bargaining ability of the employees. According to the court, the employees had simply chosen a less formalistic and adversarial approach of communicating with management. The employees had voluntarily chosen to dispense with formal collective bargaining. Consequently, the court found Streamway’s employee committee not a section 2(5) labor organization and never reached the section 8(a)(2) question.

77. Id. at 289.
78. Id. at 289–90.
79. Id. at 290.
80. Id. at 291.
81. Id. at 295.
82. Id. at 294–95.
83. Id. at 295.
84. Id.
85. Id.
86. Id.
Section 8(a)(2) and Worker Participation

The Ninth Circuit's decision in *Hertzka & Knowles v. NLRB*\(^{87}\) completely ignored the *Cabot Carbon* section 2(5) distinction and focused instead on employer domination or interference under section 8(a)(2). The employees in *Hertzka* voted to decertify their union.\(^{88}\) Prior to the decertification election, management allegedly made threats of reprisal against employees supporting the union. Thereafter, management called a meeting and, at the suggestion of one of the employees, developed employee committees.\(^{89}\) At the request of the employees, the committees included a management representative, whose purpose was to reduce the "tedious process" of negotiation.\(^{90}\) The management representatives had a vote on some, but not all, of the committees. The committees sometimes held their meetings on company premises during work hours.\(^{91}\) The committees then formulated proposals for management to review.

The union consequently accused management of section 8(a)(1)\(^{92}\) and section 8(a)(2) violations. The Ninth Circuit quickly upheld the section 8(a)(1) violation based on the threats of reprisal against employees.\(^{93}\) The court then turned to the 8(a)(2) question and first examined the legislative history of the NLRA. Citing Senator Wagner, the court concluded that the NLRA permitted direct relations with the employer provided that management did not control the relations to such an extent that the group was essentially a sham.\(^{94}\) The court observed that under a strict reading of section 8(a)(2), virtually all employer-employee relations could be deemed improper.\(^{95}\) The court found such a conclusion unacceptable.

The Ninth Circuit castigated those who adopted the "myopic" view that only adversarial relations were acceptable.\(^{96}\) The court held that the section 8(a)(2) impropriety hinged on whether the employees exercised

\(^{87}\) 503 F.2d 625 (9th Cir. 1974).
\(^{88}\) Id. at 626.
\(^{89}\) Id.
\(^{90}\) Id. at 629.
\(^{91}\) Id.
\(^{93}\) Hertzka, 503 F.2d at 628–29.
\(^{94}\) Id. at 630.
\(^{95}\) Id.
\(^{96}\) Id.
their "free choice" in creating and accepting the employee committee. Consequently, the court concluded that "[w]here a cooperative arrangement reflects a choice freely arrived at and where the organization is capable of being a meaningful avenue for the expression of employee wishes, we find it unobjectionable under the Act."

Referring to the instant case, the court found the employee committee to constitute allowable employer-employee relations. The court determined that the employees had exercised their "freedom of choice" in selecting the type of bargaining unit they desired. Management was active in the group, but the court found this acceptable because the idea came from employees rather than management. The court also did not deem it dispositive that the committee met on firm premises during firm time. Moreover, even though management representatives could vote and express their opinions, the court decided that the company did not exercise any control over the organization's bylaws or functions. Thus, the Ninth Circuit is one of a minority of circuits that have narrowly interpreted Cabot Carbon and have used employer motive, employee satisfaction, or actual versus potential domination as determining factors on the question of whether section 8(a)(2) was violated.

The NLRB has not accepted the analyses of the minority circuits. Rather, like the majority of circuits, it has applied a fairly strict test to employee representation plans and has been unwilling to read Cabot Carbon's holding narrowly. This approach has been criticized as nostalgia and as an impediment to change in the modern workplace. But the board has upheld a number of worker participation programs and has indicated it is not adverse to the recent proliferation of quality of worklife and other employee participation programs.

Perhaps the most far-reaching board decision was Sparks Nugget, Inc. In Sparks Nugget, the board determined that an employee committee established by management to resolve grievances was not a

97. Id.
98. Id. at 631.
99. Id.
100. Id.
101. Id.
102. Id. The Ninth Circuit based this conclusion on the fact that there was no evidence of "actual interference" with employee rights and that the management representative could easily be out voted by the employees on the committee. Id.
103. See Quality Circle Busters, Wall St. J., June 9, 1993, at A12 (referring to the NLRB as "an antique New Deal agency that can't seem to get its mind around the modern economy").
labor organization because it was actually adjudicatory in nature. Management unilaterally proposed and created an "impartial" Employee Council, which had three members: one employee representative elected by the employees and two management members. Management's director of employee relations chaired the council. Its purpose was to resolve grievances, rather than proposing solutions for management's review, and all decisions of the committee were final. The union filed charges against Sparks Nugget, maintaining, among other things, that the Employee Council was a section 2(5) labor organization that was violative of section 8(a)(2).

The board first addressed the threshold question of whether the Employee Council was a labor organization. Referring to Cabot Carbon, the board conceded that "dealing with" encompassed more than pure collective bargaining. Yet the board concluded that a labor organization must act in some sense as an employee advocate. Otherwise, the organization could not "deal with" management in a bilateral process.

Turning to the facts, the board rejected the contention that the Employee Council acted in a representational capacity for employees. Rather, the council performed a solely adjudicatory function for management. Noting that the council had never initiated grievances, recommended changes in terms or conditions of work, or acted in any manner as an employee advocate, the board held that the Employee Council was not within the statutory meaning of a labor organization. As such, the board never reached the section 8(a)(2) question and deemed the Employee Council a legitimate entity.

Section 8(a)(2) has effectively achieved its goal of eliminating traditional company unions. The courts and NLRB now rarely hear cases where the employer has established a company union of the sort addressed in Greyhound and Newport News. Yet the concern over company unions is not a moot point. While usually less overt, employee participation programs foster the same concerns of employer domination or interference that section 8(a)(2) was intended to counter. These programs frequently straddle or even clearly cross the line into

105. Id. at 1300.
106. Id.
107. Id.
108. Id. at 1300–01.
109. Id. at 1300.
mandatory subjects of bargaining. Moreover, these same programs are almost exclusively management initiated.

The changing economic environment presents both the courts and the NLRB with a conundrum. Certainly they do not want to unnecessarily disadvantage American industry. On the other hand, neither do they want employers to be able to exploit the use of employee participation programs and circumvent section 8(a)(2) simply by proclaiming the need for American competitiveness. This background sets the stage for the NLRB’s recent decision to hear two cases, one union and one non-union, in which the NLRB attempted to clarify the tests for the validity of employee participation programs.

III. CURRENT STATUS OF SECTION 8(A)(2):

ELECTROMATION AND DU PONT EXAMINED

The National Labor Relations Board recently decided two cases that directly addressed section 8(a)(2) and worker participation issues. Electromation, Inc. v. Teamsters Local 1049,110 arose in a non-union setting while E. I. Du Pont de Nemours & Co. v. Chemical Workers Ass’n111 arose in a unionized workplace. The cases were highly publicized in advance as landmark cases.

A. Electromation, Inc. v. Teamsters Local 1049

Electromation manufactured electrical components with about 200 employees. The company was not unionized at the time in question.112 In 1988, Electromation decided to cut expenses by altering the employee attendance bonus policy and, in lieu of a wage increase for 1989, distributing a lump-sum payment based on length of service. Employees were displeased with this reduction in benefits and, in January 1989, 68 employees signed a petition expressing dissatisfaction with the new attendance policy. The company president then met with a group of eight management-selected employees. The group discussed a number of issues, including wages, bonuses, incentive pay, attendance pay programs, and leave policy (all of which are conditions of employment). Management then proposed establishing “action committees” as a

112. Electromation, 142 L.R.R.M. (BNA) at 1003.
method of involving employees.\textsuperscript{113} After the management met again with the same eight employees, the company announced five action committees in the areas of 1) absenteeism-infractions, 2) no smoking policy, 3) communication network, 4) pay progression for premium positions, and 5) attendance bonus program.\textsuperscript{114} The company posted sign-up sheets for the action committees, each of which consisted of six employees and one or two members of management, as well as the benefits manager who coordinated all the action committees. No employees were involved in drafting the policy goals expressed in the sign-up sheets, and the company determined the number of employees on each of the action committees. After the committees were organized, the company posted a notice to all employees announcing the members of each committee. The management coordinator testified that the posting was to ensure that anyone who wanted to know what was happening should contact the people on the action committees.\textsuperscript{115}

The action committees began meeting in late January and early February of 1989, and scheduled weekly meetings in conference rooms on the company premises. Management representatives participated in these meetings, and a manager facilitated the discussions. The company paid employees for their time spent participating in committee meetings and also supplied necessary materials.\textsuperscript{116}

Contemporaneous with the establishment of the employee committees, a local affiliate of the Teamsters launched an organizing drive. The record was unclear as to whether the union’s efforts actually predated the creation of the employee committees. In any event, there was no evidence that the company was aware of the union’s organizing efforts until February 13, when the union sought recognition.\textsuperscript{117} The company immediately informed employees that it would be unable to participate in subsequent committee meetings, and that the company could not work with the committees until after the union election.\textsuperscript{118}

Prior to representation, the union charged that the employee committees violated section 8(a)(2) and requested their disestablishment.

\textsuperscript{113} Id.
\textsuperscript{114} Id.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 1004.
\textsuperscript{118} Id. The union lost the election and immediately filed a complaint alleging that the employee committees unfairly affected the election. Electromation, Inc. v. Teamsters Local 1049, No. 25-CA-19818, 1992 WL 386692, at *34 (N.L.R.B. Dec. 16, 1992). The ALJ agreed and ordered new elections. Id. at *55-*56.
The NLRB thereafter issued a complaint to that effect. An administrative trial judge found that the action committees constituted a labor organization within the meaning of section 2(5) because employees, supervisors, and managers served as committee members and their discussions concerned conditions of employment. The judge also found that the company dominated and interfered with the committees because it organized the committees, created their nature and structure, and determined their functions. Therefore, the administrative judge concluded that the action committees violated section 8(a)(2).

On appeal, the board scheduled oral argument, usually reserved for significant cases, and framed the pertinent issues as: 1) at what point does an employee committee lose its protection as a communication device and become a labor organization, and 2) what conduct of an employer constitutes domination or interference with the employer-employee committee? In the majority opinion, however, the board restricted its holding to the specific facts of this case. As an introduction to its analysis, the board pointed out that the statutory language standing alone was insufficient to determine whether the statute should apply to particular facts. Therefore, it sought guidance from legislative history to determine what kind of activity Congress intended to prohibit. In the board’s view, the legislative history revealed that the prohibition against company-dominated labor organizations was a critical part of Senator Wagner’s goal of eliminating industrial strife through encouraging collective bargaining. Senator Wagner wanted to include not only those groups that were highly organized, such as labor unions, but also those groups that were only loosely organized representation committees. Because he intended to eliminate employer-dominated unions, and to avoid creating a loophole that could

119. Id. at *34.
120. Electromation, 142 L.R.R.M. (BNA) at 1004.
121. Id. The judge also noted that the meetings took place on company property, supplies and materials were provided by management, and members were paid for time spent on committee work.
122. Id. at 1002.
123. Id.
124. Id. at 1004.
125. Id.
126. Id.; see supra notes 11–14 and accompanying text.
127. Electromation, 142 L.R.R.M. (BNA) at 1005. The latter group was a prevalent form of company union at the time the Wagner Act was passed. Id.
conceivably emasculate the entire act, Senator Wagner defined the term "labor organization" broadly.\(^\text{128}\)

The NLRB further explored the legislative history with respect to the type of employer conduct that Congress intended section 8(a)(2) to prohibit. Of particular import were the revisions to the Wagner bill as it made its way through the legislative process. The original proposal prohibited any employer involvement at all. A later version substituted the words "dominate or interfere with the formation or administration" for "initiate, participate in, supervise, or influence."\(^\text{129}\) The board noted that the change emanated from Congress's acceptance that some employer-employee interaction was positive because such interaction frequently worked toward industrial peace.\(^\text{130}\) Yet it also observed that Congress maintained a fairly strict restriction on employer involvement because there was a consensus that most employer involvement, especially at the formation stage, was fatal to the employee group's independence.\(^\text{131}\) The board concluded that by prohibiting domination, interference, or assistance, Congress intended to provide a broad assurance that employee groups would be protected in their freedom to act independently of employers when representing employee interests.\(^\text{132}\)

Going on to the merits, the NLRB first considered whether the action committees were labor organizations under section 2(5).\(^\text{133}\) The organization is a labor organization, said the board, if 1) employees participate, 2) the organization exists, at least in part, for the purpose of "dealing" with employers, and 3) those dealings concerned "conditions of work" or other statutory subjects.\(^\text{134}\) Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of "employee representation committee plan" under section 2(5).\(^\text{135}\)

\(^{128}\) Id. Additionally, the board noted that Professor Edwin Witte of the University of Wisconsin, a prominent labor economist, was also influential in securing a broad definition of "labor organization." He wanted to include the most prevalent form of company-dominated union, the employee representation committee, including those committees that merely "deal" or "adjust." Id. See generally Barinberg, supra note 9 (establishing the intention of the framers to create a broad definition of "labor organization").

\(^{129}\) Electromation, 142 L.R.R.M. (BNA) at 1005.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id. at 1005–06.

\(^{133}\) Electromation, 142 L.R.R.M. (BNA) at 1006.

\(^{134}\) Id.

\(^{135}\) Id. The majority opinion, because it found that the employee members of the action committees acted in a representational capacity, expressly declined to determine whether an
The board noted that the Supreme Court broadly defined “dealing with” in *Cabot Carbon.* Nonetheless, some unilateral mechanisms, such as suggestion boxes or brainstorming groups or other information exchanges, do not constitute “dealing with.” Rather, “dealing with” contemplates a bilateral mechanism involving proposals from the employee committee concerning statutory subjects, coupled with real or apparent consideration of those proposals by management. The organization could escape the “dealing with” label if it is limited to performing essentially a managerial or adjudicative function, such as deciding employees’ complaints without dealing or interacting with the employer.

Applying these principles to the facts of this case, the board first found that Electromation’s action committees were labor organizations. This conclusion was based on four findings. First, there was no dispute that employees participated in the group. Second, the committees were actively “dealing with” management by sending proposals to management for consideration. Third, the subject matter of the dealing, which included treatment of employee absenteeism and bonuses and other monetary incentives, clearly concerned conditions of employment. Fourth, the employees acted in a representational capacity, since they were to talk back and forth with other employees and get ideas from other employees regarding solutions that would satisfy the employees as a whole.

The board concluded that a purpose of the action committees, in fact their only purpose, was to address employee dissatisfaction by creating a bilateral process to reach bilateral solutions on the basis of employee group could ever be found to constitute a labor organization without a finding that it acted as a representative of other employees. *Id.* at 1006 n.20. The majority noted that member Devaney, who separately concurred, would have reached that issue. *Id.* Devaney concluded that such a finding is necessary to find that a group is a labor organization within the meaning of section 2(5). *Id.* Thus it appears that this remains an open issue.

136. *Id.* at 1006–07.
137. *Id.* at 1006 n.21.
138. *Id.* at 1007.
139. *Id.* at 1008.
140. *Id.*
141. *Id.* at 1009.
142. *Id.* at 1008.
143. *Id.* at 1008–09.
proposals. The company did not limit the purpose of the action committees to achieving "quality" or "efficiency," and did not design the committees to be solely a "communication device" to promote efficiency or quality. Thus the board did not reach the question of whether an employer-initiated committee existing for quality, efficiency, or communication purposes may constitute a labor organization under section 2(5).

After concluding that the action committees were labor organizations, the board determined that the employer's conduct constituted domination in the formation and organization of the labor organization, in violation of section 8(a)(2). It was the company's idea to create the action committees. The company drafted the purposes and goals of the committees, which defined and limited the subject matter to be covered by each committee. The company determined how many members would comprise a committee and that an employee can serve on only one committee, it appointed management representatives to the committees to facilitate discussions, and it contributed financial and other support, such as time to serve on the committees. On this record, the board concluded that the company dominated the action committees in their formation and administration, and unlawfully supported them. The purpose of the action committees was not to enable management and employees to cooperate to improve quality or efficiency, but rather to create an impression that disagreements were being resolved bilaterally, when in fact the company imposed on employees its own unilateral form of bargaining or dealing.

Members Devaney and Oviatt made it clear in their concurring opinions that quality of worklife programs would be permissible, so long as they do not impair the right of the employees to free choice of a bargaining representative. Member Oviatt noted that the conduct in Electromation was "garden variety 8(a)(2) conduct," but nonetheless expressed approval for a broad spectrum of worker participation

---

144. Id. at 1009.
145. Id. at n.28.
146. Id. However, the concurring opinions of members Devaney and Oviatt clearly did not view such committees as labor organizations. Id. at 1010, 1015. Member Oviatt unequivocally noted "[i]the statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace." Id. at 1015.
147. Id. at 1010.
148. Id.
149. Id. at 1010, 1015.
150. Id. at 1015 n.2.
programs such as quality circles and quality of work programs that draw on the creativity of employees. Oviatt observed that the board has upheld self-regulating employee teams that are given unilateral power over their job duties. Member Devaney further stated that neither Congress nor the Supreme Court had ever indicated that employee participation programs geared solely toward safety and productivity were impermissible.

In summary, the board unanimously agreed that employee participation groups that deal with management on conditions of employment are unlawful when set up and dominated by management. The NLRB’s decision in Electromation should not be surprising. Contrary to critical editorial opinion from the Wall Street Journal, the ruling does not outlaw most existing employee participation programs that are aimed at productivity and efficiency. The case does not prohibit productivity teams, quality circles, quality of worklife programs, or other legitimate worker participation efforts. Quality circles and work teams may address the production process and efficiency concerns, but must not be used for employee representation concerning conditions of employment. These plans must not usurp the rights of employees to pick their own representatives by giving employees the illusion of a bargaining representative without the reality of one. Worker participation programs are likely to continue unharmed to the extent that they deal with improving quality, productivity, or matters such as customer relations, rather than working conditions. The case reaffirms the protections of labor organizations and employees, without impairing legitimate worker participation efforts.

B. E. I. Du Pont de Nemours & Co. v. Chemical Workers Ass’n

The NLRB issued its decision in E.I. Du Pont de Nemours & Co. v. Chemical Workers Ass’n in May 1993, just six months after Electromation. Du Pont is a diverse corporation that specializes in chemicals. Its Deep Water, New Jersey plant employs more than 3,500

---

151. Id. at 1015. A third concurring opinion by member Raudabaugh completely disregarded the Supreme Court’s opinion in Cabot Carbon, id. at 1023–25, and seemed to have very little credibility with any of the other board members. See id. at 1007, nn. 23–24; 1016 n.5.
152. Id. at 1015.
153. Id. at 1012.
persons. Unlike Electromation, Du Pont was unionized, and the Chemical Workers Association ("union") had been active at Deep Water for about 50 years representing the plant's clerical, production and maintenance employees.

In 1984, Du Pont began experimenting with cooperative programs. The company established a number of committees, which included management as well as bargaining unit employees. Employees and management representatives discussed "conditions of work" such as safety and incentive awards, and benefits such as employee picnic areas and jogging tracks. Decisions were made by consensus.

A major question was whether the committees existed, at least in part, for the purpose of "dealing with" the employer. The board made it clear that there is room for lawful cooperation under the act, specifically listing brainstorming groups, information sharing groups, and suggestion boxes as legitimate activities not involving the bilateral mechanism of "dealing with" the employer. The board noted that committees could exist for the purpose of planning educational programs without there being dealing. The Du Pont committees, however, went much further. Because management representatives interacted with employee committee members under rules of consensus decision-making, the management could reject employee proposals. Therefore, the board found that there was dealing within the meaning of Section 2(5).

Moreover, the board found that management dominated the administration of these committees. Management retained veto power over any committee action because decisions were by consensus. In

---

156. Id. at 1128.
157. Id. at 1123.
158. Id. at 1128.
159. Id.
160. Bargaining unit employees are those employees that are represented by the union.
162. Id. at 1124.
163. Id. at 1123.
164. Id. at 1124.
165. Id.
166. Id. The board also concluded that there would be no "dealing with" management if the committee were governed by majority decision making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management. There also would be no "dealing" if management representatives participated on the committee as observers or facilitators without the right to vote on the committee proposals. Id.
167. Id. at 1125.
addition, a management member served as either the leader or the resource person in each committee, and therefore had a key role in establishing the agenda for each meeting and in conducting the meeting. Management also controlled how many employees could serve on the committee, and which employee volunteer would be selected if there were an excess number of volunteers. The employees had no voice in determining any aspect of the composition, structure, or operation of the committees. Moreover, management could change or abolish any of the committees at will. This established that the company dominated the administration of the committees in violation of section 8(a)(2).168

Unlike Electromation, Du Pont involved the additional question of whether management violated its duty to bargain under section 8(a)(5) of the NLRA169 by holding safety conferences,170 as well as by establishing safety and fitness committees. The board held that the safety conferences amounted to brainstorming and information sharing, and noted that nothing in the NLRA prevents an employer from encouraging its employees to express their ideas or to become more aware of safety problems in their work.171 Management did not establish the conferences to act as a bilateral mechanism to make specific proposals and to respond to them.172 Thus the board set forth the safety conferences as a labor-management cooperation technique that would be permissible under the NLRA.

In contrast, the safety and fitness committees did not separate their activities from those properly within the union’s authority.173 Some committees dealt with issues identical to those with which the union dealt, and in fact brought about resolutions that the union had attempted and failed to achieve, such as a new welding shop, a recreation area with picnic tables and other amenities, and, as previously noted, incentive awards.174 Thus, in addition to violating section 8(a)(2), the company bypassed the recognized labor union in violation of section 8(a)(5).

168. Id.
170. The stated purpose of the conferences was to “increase personal commitment, responsibility and acceptance of safety as our #1 concern.” Du Pont, 143 L.R.R.M. (BNA) at 1125.
171. Id.
172. Id.
173. Id. at 1126.
174. Id.
Following *Du Pont*, the Wall Street Journal proclaimed the NLRB the "quality circle busters," while the New York Times reported that "employers, lawyers, and business trade associations expressed dismay" about the decision. Such commentators would have one believe that Du Pont was merely attempting to improve worker productivity and company efficiency. If this were true, the committees probably would have withstood scrutiny. Nothing in the opinion indicates that quality of working life programs that concern themselves solely with production and efficiency are unacceptable. The committees involved in *Du Pont* were far more wide-ranging. These committees were used, as is common in company union situations, to place mandatory subjects of bargaining before company-dominated groups. Supposed employee committees supplanted the union and were actually controlled to some degree by management, while the authorized representatives of the employees, the recognized union, was made even weaker. In this way, the company avoided dealing with the lawfully recognized independent union on the subjects. These were precisely the evils that Senator Wagner was aiming at in section 8(a)(2), and this case demonstrated that these evils still exist.

Relaxation of protection against company unions would only result in further diminution of the bargaining power and effectiveness of lawfully-recognized unions. Without section 8(a)(2), some employers doubtless would attempt to retain as much control as possible over so-called cooperative programs. Labor-management cooperation programs (or jointness programs) often serve an important function even in unionized workplaces, but they should be negotiated with the union when they involve conditions of employment. Certainly there is no lack of examples of successful cooperative programs that major employers and unions in the United States have negotiated. Such agreements


177. See Barinberg, supra note 9 and accompanying text.


normally contain certain negotiated principles, including a joint
determination of the goals of the program, the sharing of information, a
clear indication that the program serves as a supplement to, rather than
substitute for, collective bargaining, certain expressed indicia of mutual
respect and trust, and further statements of support and leadership from
both top management and union representatives.180

The board recognizes the importance of cooperative efforts, such as
quality of worklife programs. Productivity and efficiency issues clearly
are legitimate subjects for employee committees. At Du Pont, however,
management used the committees to undermine the union's
representational capacity, rather than to truly cooperate. The Wall Street
Journal scoffed at this idea, sarcastically remarking that the committees
obtained a picnic area and "the union had promised picnic tables too, but
never delivered."181 The implication was that the union was
lackadaisical. In reality, the union had repeatedly been turned down on
the picnic tables.182 By granting the committees benefits that the
company denied through collective bargaining, management used the
committees to undermine collective bargaining. The effect of such
conduct, if allowed to continue, would be to diminish union power even
further and clearly establish management as the dominant party in labor
relations.

IV. PROPOSALS TO AMEND OR REPEAL SECTION 8(A)(2)

There are numerous proposals to amend or repeal section 8(a)(2). These
include recent congressional proposals reacting to Electromation
and Du Pont, and potential proposals by the recently established
Commission on the Future of Worker-Management Relations.183

In March 1993, Representative Gunderson184 and Senator
Kassenbaum185 introduced legislation amending section 8(a)(2). Under
this amendment an employer could establish or assist an organization of

Directions in Worker Participation and Collective Bargaining, supra note 1; Moberly, Toward
Labor-Management Cooperation in Government, supra, note 1.

180. See generally Moberly, New Directions in Worker Participation and Collective Bargaining,
supra note 1; Moberly, Toward Labor-Management Cooperation in Government, supra, note 1.


182. Du Pont, 143 L.R.R.M. (BNA) at 1126.


employees, and discuss matters of mutual interest with it, so long as the organization does not have authority for a collective bargaining agreement. This amendment apparently would allow the employer-dominated committees in both Electromation and Du Pont. Some have justified this proposal by arguing that the Wagner Act was established for, and only contemplates, an adversarial model of labor management relations; accordingly, the section must be altered to reflect the changing times. This is, however, clearly inaccurate. Recent work shows conclusively that Senator Wagner in fact had as his primary goal creating a system in which employers and independent unions would be able to cooperate through collective bargaining to create a more stable and productive work environment.

Of course, collective bargaining will not always be a cooperative enterprise; as in any form of negotiation or bargaining, there will be adversarial or positional examples as well as examples of cooperation. Indeed, there is likely to be a continuum of behavior from a cooperative to a competitive or adversarial stance, depending on the bargaining relationship and many other factors. In many cases, deep-seated employer resistance has prevented the system from becoming as cooperative as intended. Nonetheless, nothing in the legislative history or experience of section 8(a)(2) requires an interpretation that prohibits cooperative efforts.

Nor do Electromation and Du Pont prohibit worker participation programs. To the contrary, the majority and concurring opinions support such programs when limited to productivity, quality and efficiency, or when negotiated through collective bargaining. Thus, no NLRB or court decision has struck down a properly limited employee participation program. On the other hand, eliminating section 8(a)(2), or drastically amending it, would seriously threaten employees’ right to organize and engage in collective bargaining, as recognized by Senator Wagner in 1935. Such removal or amendment would lead to the creation of participation schemes designed, at least in part, to avoid, break, or evade

186. See supra note 3 and accompanying text.
187. See Barinberg, supra note 9 and accompanying text. This has also been noted by Professor Cox and his co-authors, who state: "[T]he Wagner Act . . . embodied a conscious, carefully articulated program for minimizing labor disputes. Its sponsors urged that enforcement of the guarantees of the rights to organize and bargain collectively would be the best method of achieving industrial peace . . . ." Archibald Cox et al., Labor Law Cases and Materials 86–87 (11th ed. 1990).
unionization. This would seriously damage the credibility of any kind of employee participation program, including those properly limited to productivity, efficiency, and quality, as well as broader programs created through collective bargaining. Consequently, repeal or amendment could have the opposite effect of that intended—participation groups would become discredited and employees would avoid them wherever possible.

Repeal or amendment of section 8(a)(2) could only be justified if such action were part of a comprehensive overhaul of our labor laws to encourage genuine employee participation that is not employer controlled. For example, one proposal is that every American workplace above a certain size have an “employee participation committee” that voices the interests of employees in dealing with management about a wide range of employment issues.\textsuperscript{189} Even here, many serious technical questions would have to be resolved. At a minimum, however, this would require nonunion employers who want to experiment with employee participation to comply with minimum standards of employee representation, such as holding secret ballot elections, providing information and financial resources, and protecting representatives from reprisal.

Another possibility is to provide for worker councils, workers on boards of directors, or minority representation, as is found in many European countries.\textsuperscript{190} Employee committees might also be established by statute, with appropriate representation procedures and protection from reprisal, to consider certain statutory rights such as job safety.\textsuperscript{191} If any such plans to create truly independent employee participation are adopted by Congress, it would be a simple matter to exclude such plans from section 8(a)(2). It is not necessary to repeal or otherwise amend the statute.

\begin{footnotes}
\item[191] For example, proposed legislation would require employers with more than ten employees to establish safety and health committees involving both management and labor representatives. H.R. 3160, 102d Cong., 1st Sess. § 201 (1991).
\end{footnotes}
V. CONCLUSION

Worker participation programs are a vital part of American industry today, in both the unionized and non-unionized sectors. NLRA section 8(a)(2) does not hamper the development of such programs when they are legitimately directed toward improvements in productivity, efficiency, and quality. This section does, however, prohibit employers from creating employee groups that deal with employers on conditions of employment. The employer inevitably controls such groups and uses them to undermine the rights of workers and unions.

Electromation and Du Pont do not inhibit the proper use of employee committees to improve productivity, quality, and efficiency. No court or board decision has struck down an employee participation plan aimed at those goals, provided they do not also establish employer-controlled groups that deal with conditions of work. Therefore, these decisions do not require repealing or amending section 8(a)(2).

Amendments to section 8(a)(2) should be considered only as necessary to accommodate comprehensive labor law reform that would broadly increase employee representation rights. While there is much to be considered in the creation of such additional forms of representation, other industrial countries have achieved broader employee representation through the use of worker councils, workers on boards of directors, minority representation, and related schemes. Moreover, the notion of employee participation committees is worthy of further consideration. We must, however, approach these changes with great caution, and only as part of broad labor law reform that would not decrease the right and ability of employees to obtain adequate representation through labor organizations that are truly independent.