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Cato Institute Briefing Paper No. 18: Are Quality Circles Illegal? Global Competition Meets the New Deal

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Executive Summary

In an age of growing global competition, American business has just learned that its efforts over the past few years to improve efficiency by involving workers more closely in making decisions run afoul of the 1935 National Labor Relations Act. In December 1992 the National Labor Relations Board declared that, in nonunion firms, labor-management cooperation on a wide range of issues is illegal be cause the committees through which such cooperation takes place amount to "company unions." The full effects of the board's decision in the Electromation case are unknown, but companies are already abandoning their labor-management committees. Meanwhile, organized labor, which brought the Electromation complaint, is stepping up its efforts to capitalize on the decision, arguing that under the law the only way workers can cooperate with management is through unions.

Introduction

Believe it or not, federal labor law may make it illegal, in a private nonunion workplace, for labor and management to cooperate with each other. Since fewer than 12 percent of private-sector workers today belong to unions, labor-management cooperation involving 88 percent of America's private workforce may break the law.[1]

The Problem

Prodded by foreign competition--especially from the Japanese, whose system of labor-management relations is based on cooperation rather than confrontation--American companies in recent years have set up approximately 30,000 employee participation programs designed to improve communication between workers and managers; give employees a voice in decisionmaking; boost morale; lower costs; and improve productivity, product quality, and customer satisfaction.[2] Sometimes called "quality circles," "labor-management cooperation groups," or "employee involvement teams," those employee participation programs began in the late 1970s and have grown ever since. If American firms and their employees are to succeed and prosper in today's global marketplace, many believe that this new way of doing business must continue to take root and spread throughout the American economy.

But in a decision issued on December 16, 1992, involving a small Indiana electrical parts manufacturer named Electromation, Inc., the National Labor Relations Board (NLRB) ruled that labor unions may use the 1935 National Labor Relations Act (NLRA) to quash the development of employee participation programs in nonunion firms.[3] In an era of declining union membership, unions are seeking to use the law in this way because they are desperate to enroll new members. Whatever may have been the case in the 1930s, employers today recognize that good labor-management relations are necessary for survival. As a result, a nonunion worker is often just as well off today as a union worker--often better off, in fact, because labor unions, for their survival, frequently promote an expensive "us-

versus-them" adversarial mentality among workers. Where good labor-management relations prevail, unions have a hard time gaining a foothold. At bottom, then, the Electromation case involves an attempt by the labor union movement to frustrate nonunion labor-management cooperation. If the unions succeed, workers will have a voice in their workplaces only if they unionize.

Indeed, at the August 1991 annual meeting of the American Bar Association, the chairman of a session on labor and employment law observed that the International Association of Machinists and the Union of Electrical Workers seemed to "view employee involvement programs as little more than an attempt to increase employer control over the workplace, bind employees to the success of the enterprise, deflect them from interest in their own solidarity, and undermine existing union structures."[4] That view was reflected in a recent statement to the NLRB by Anton Hajjar, an attorney for the American Postal Workers Union: "A timeless evil lurks behind this new, fashionable trend called employee involvement."[5] The timeless evil, apparently, is the "company union."

Company Unions and the NLRA

Before the 1930s, many employers had organized their workers into unions in an effort to better deal with labor-management issues. Many of those so-called company unions-- for example, the Industrial Assembly of the Goodyear Tire & Rubber Company--were honest and successful attempts by employers to improve labor-management relations.[6] In 1933, however, Congress enacted the National Industrial Recovery Act (NIRA), Section 7(a) of which compelled employers to allow their employees to join unions if they so desired. Since the act did not specify that the unions had to be independent of employers, many employers formed in-house company unions, hoping thereby to comply with the law while avoiding having to deal with independent unions. Although those company unions were often called "employee representation committees," some did not represent the interests of employees at all. Instead, they were used by employers as smoke screens to prevent workers from affiliating with inde pendent unions. The NLRA put an end to all company unions, legitimate and illegitimate alike.

Section 8(a)2 of the NLRA states that it is 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. . . ." What is a labor organization? Section 2(5) of the NLRA says it is "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." The term "employee representation committee or plan" was intended specifically to include those company unions whose chief purpose was to frustrate employees who wanted to affiliate with independent unions.[7]

Electromation Background

What does that have to do with Electromation? Actually, nothing at all. Nevertheless, organized labor claims that it does. They seem to believe that any employee participation committee whose employee members are not union members is an illegal company union. To put the issue in an actual setting, let us examine briefly the facts of the Electromation case.[8]

At an employee Christmas party on December 23, 1988, John Howard, president of Electromation, which was then a nonunion firm, announced that since 1988 had been a year of substantial losses for the company, annual wage increases would be canceled for 1989 and the existing attendance bonus program would be altered to reduce costs. The party was not completely ruined because Howard then distributed unexpected Christmas bonuses to the employees.

After a holiday break during which the company was shut down, Howard received a petition signed by 68 of the 187 employees who were affected by the Christmas announcements. The petitioners objected to the changes in the attendance bonus program and requested that management consider alternative approaches to its financial problems. Eager to maintain the goodwill of his employees, and recognizing that engaging employees in dialogue was a more productive form of labor-management relations than authoritarian proclamations from the top, Howard set up a joint labor-management committee to discuss the issues.

The committee consisted of four management people, including Howard, and eight employees selected at random. It met twice, on January 11 and January 18, and discussed several topics of concern to both sides, including attendance,

tardiness, sick leave, incentive pay, overtime, wages, and bonuses. At the second meeting the committee members agreed to set up five joint labor-management "action committees," each of which would specialize in an area of concern: absenteeism and other infractions, a no-smoking policy, communications, pay scales for premium positions, and the attendance bonus program.

On January 19 all employees were asked to volunteer for specific committees, and the company selected employee members at random from each list of volunteers. No more than six employees could be on any one committee, and no employee could serve on more than one committee. Each committee was to have one or two management members, and the employee benefits manager was to serve on every committee. The composition of the committees and the eligibility rules were unilaterally set by management. The no-smoking committee was never organized and never met. The four other committees were organized and did meet.

Although employee committee members "talked back and forth" with, and sought advice from, other employees, they were not formal representatives of the other employees. They did not have to get the approval of all the other employees, or even a majority of the other employees, to take a particular stand at committee meetings. They were merely the means by which management sought to discover the concerns of employees.

The action committees' role was purely advisory. Howard agreed that if the committees came up with workable solutions he would implement them, but there was no unionlike collective bargaining in the sense that all sides had to agree before any policy could be implemented.

Electromation's management was serious about supporting the work of the committees. All committee meetings were held on company premises, the company paid the employee members for their attendance, and the company supplied the necessary materials, including telephones. Any disinterested observer would have had to conclude that here was a company that appreciated its employees, valued their good- will, and honestly sought their advice.

Shortly after the action committees were formed and got under way, however, the Teamsters Union undertook an organizing campaign at Electromation. Howard and the rest of the management team did not know about that effort to unionize the firm until February 13 when the Teamsters officially requested that Electromation recognize it as the exclusive bargaining agent for the company's nonmanagerial employees. On February 21 Howard pulled all management members off the four committees but told the employees they could continue to meet if they wished. The employee members of the Absentee/Infraction and the Communication Network committees continued to meet. The Pay Progression Committee disbanded. The Attendance Bonus Committee wrote up the proposal they had been working on and then disbanded.

Electromation's action committees were clearly not what the authors of the NLRA understood to be company unions. The company was not trying to thwart an attempt by its employees to become unionized. Indeed, after Howard became aware of the Teamsters' organizing drive, he did all he could to step out of the way. To any disinterested observer, Electromation was a nonunion firm that was trying to undertake cordial, effective labor-management cooperation and comply with the NLRA.

Electromation Legal Dispute

To begin organizing workers in a nonunion firm, a union must first collect supporting signatures from at least 30 percent of the workers. After it does so, the union re- quests recognition from the employer. If the employer balks, the next step is for the NLRB to conduct a certifi- cation election among the employees, by secret ballot, to determine whether a majority want the union to be their exclusive bargaining agent. Such an election was held at Electromation on March 31. The Teamsters lost by a vote of 95 to 82.[9] The Teamsters then filed an unfair labor practice charge against Electromation, alleging that the action committees had been illegal company unions used to prevent the workers from affiliating with a legitimate union.

If a complaint of an unfair labor practice is accepted by the general counsel of the NLRB, the case is first heard by an administrative law judge (ALJ). On April 5, 1990, the ALJ assigned to the Electromation case, George F. McInerny, announced his decision against the company. He set aside the results of the March 31 election and ordered the parties to hold another one. After several months, a second election was held, which the Teamsters won by convincing a

majority of workers that, thanks to the ALJ's decision, the only way they could cooperate with management was through a union. Electromation is today a unionized firm.

When the ALJ's decision was handed down, prior to the second election, Electromation appealed it to the NLRB. Notwithstanding the outcome of the second election, Electromation continued to press its appeal in order to get a ruling on the labor-management cooperation issues. Before ruling, the NLRB invited the Teamsters, Electromation, the NLRB general counsel, and other interested but not directly involved parties to give testimony on two questions: (1) At what point does an employee committee lose its protection as a communication device and become a labor organization? (2) What conduct of an employer constitutes domination or interference with an employee committee? The NLRB took oral testimony on September 5, 1991. In addition to the 3 main parties, 10 other parties, including the AFL-CIO and the U.S. Chamber of Commerce, gave testimony. The case had become the most hotly contested and widely discussed NLRB case in decades. On December 16, 1992, the NLRB issued its decision upholding the ALJ's opinion.

The board determined that the action committees were "labor organizations" under Section 2(5) of the NLRA because employees were involved in them and they were "dealing with" the employer on matters that unions usually bargain about in unionized companies. The board found that

the evidence . . . overwhelmingly demonstrates that the purpose of the Action Committees, indeed their only purpose, was to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of "dealing with" within the meaning of Section 2(5).(10)

In 1959, in NLRB v. Cabot Carbon Co., the U.S. Supreme Court declared that "dealing with" in Section 2(5) is not synonymous with "bargaining with."(11) Therefore, the board reasoned, the fact that Electromation did not engage in union-style bargaining with the committees did not mean that the committees were not labor organizations. In Cabot Carbon the committee in dispute dealt with "grievances," which are mentioned in the Section 2(5) definition of a labor organization. In Electromation the action committees dealt with attendance bonuses, pay scales, rule infractions, and labor-management communications. The first two issues obviously involve "rates of pay"; the latter two, according to the board, involve "conditions of work." In truth, it is hard to imagine that an employee participation plan would deal with anything but "conditions of work." Thus, accord ing to the NLRB, all such plans run up against the proscriptions of Section 8(a)2 since all are labor organizations.

Moreover, since Electromation initiated the committees and set the rules by which they would operate, it was guilty, according to the board, of "dominating" labor organizations in violation of Section 8(a)2. Finally, since Electromation provided the meeting places for the committees, supplied materials and telephones, and paid employee committee members for attendance, the board concluded that the firm was guilty of "supporting" the labor organizations, again contrary to Section 8(a)2.

The NLRB admitted that there was no evidence that Electromation was acting to counteract the Teamsters' unionization drive. It also acknowledged that there were no grounds for thinking that the company had any anti-union motives for any of its actions or that the employees regarded the committees as union substitutes. But, the board asserted, those points are irrelevant. Why?

Section 2(5) literally requires us to inquire into the "purpose" of the employee entity at issue. . . . But "purpose" is different from motive; and the "purpose" to which the statute directs inquiry does not necessarily entail subjective hostility towards unions. . . . If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union.(12)

Professor Charles J. Morris, who supported the union side in this case, asserts that "representation" is the key question in determining whether an employee participation plan is a Section 2(5) labor organization.(13) According to Morris, nonunion worker-management cooperation is all right if each employee speaks for himself, while if a nonunion employee represents other employees on any committee, the committee is automatically a labor organization, subject to the prohibitions of Section 8(a)2. Yet in all but very small firms any practical employee participation plan would have

to involve representation. Moreover, in nonunionized settings employers are likely to take the initiative in the formation and administration of such plans. The plans are motivated, after all, by the employers' concern with the bottom line. If accepted, Morris's view dooms virtually all employee participation plans in nonunion firms.

The NLRB tried to avoid condemning all nonunion employee participation plans in its Electromation decision. According to the board, those that focus on improving "quality" and "efficiency" are acceptable,(14) whereas those that deal with subjects about which unions usually bargain are not. Members Dennis Devaney and Clifford Oviatt wrote separate concurring opinions in which they tried to amplify that distinction.(15) Member John Raudabaugh, in his concurring opinion, correctly pointed out that the term "conditions of work" in Section 2(5) precludes any such distinction.(16)

Raudabaugh concurred in the decision because he thinks the law, as written, makes all employee participation plans Section 2(5) labor organizations. The only way around that result, he concluded, would be for Congress to change the law. He noted, however, that it might be possible to uphold an employee participation plan, even though it is a labor organization, by a liberal interpretation of the restrictions in Section 8(a)2. Such was not the case in Electromation, according to Raudabaugh, because among other things the company set up the action committees in response to employee complaints; thus, they had to be considered union substitutes. If Electromation had initiated the committees, without any employee prodding, "to accomplish its own entrepreneurial interests," Raudabaugh would have upheld them as permissible because they would not have been union substitutes.(17)

Polaroid, Too

Electromation is not the only nonunion firm to have faced this problem. On June 19, 1992, the Polaroid Corporation dissolved an employee participation committee that had been at the center of good labor-management relations in that nonunion firm for 40 years. Polaroid took that action in response to a declaration by the U.S. Department of Labor that the committee was a labor organization under the NLRA. Members of the committee were elected and acted as representatives of employees and, as in the Electromation case, the company supported the committee. Polaroid wanted to avoid the difficulties that Electromation was going through. As reported by the Bureau of National Affairs:

Bill Graney, chairman of the [Polaroid] committee for the past three years, said there was "a lot of anger" among employees that officials in Washington made a decision based "on some archaic laws." The committee could only remain in existence if it were completely independent of management, but "what made this work was that we were all in this together."(18)

Many at Polaroid--management and employees alike--are afraid that unions may see the dissolution of the committee as an opportunity to undertake an organizing campaign. Indeed, because of the Electromation decision, nonunion workers everywhere will now be faced with the Hobson's choice confronting Polaroid workers--union representation or no representation at all.

Congress, the Courts, and the Law

Congress could, of course, change the law that has led to the present situation. In fact, in June 1991, in response to Judge McInerny's decision, 33 congressmen introduced a bill called the American Competitiveness Act that would have amended Section 8(a)2 by adding a statement "that nothing [in the NLRA] shall prohibit the formation or operation of quality circles or joint production teams composed of labor and management, with or without the participation of representatives of labor organizations."(19) The bill got nowhere in the 102nd Congress. On January 31, 1992, nine congressmen, led by Rep. Steve Gunderson of Wisconsin, submitted a legal brief to the NLRB in which they asked the board to reverse the ALJ's decision in Electromation and uphold the legality of the company's action committees.(20) If the board did not do so, the congressmen said, they would lead a new effort in the House to amend the NLRA. On December 21, 1992, in response to the Electromation decision, Gunderson announced that he would introduce an amendment to Section 2(5) early in the 103rd Congress. His amendment would change "dealing with" to "collective bargaining with."(21)

Although the Gunderson amendment would probably settle the issue, most observers believe that there is little chance that any such amendment will make it through the 103rd Congress. Now that the NLRB has decided against

Electromation, the only hope left for nonunion labor-management cooperation would seem to rest with the federal courts. Thus, on December 28, 1992, Electromation announced that it would appeal the NLRB decision to the Seventh Circuit Court of Appeals.(22)

Electromation doubtless wishes it were in the jurisdiction of the Sixth Circuit Court of Appeals, which has overturned earlier NLRB decisions against employee participation committees. In 1982, for example, that court upheld the legality of a representation committee composed of employees elected by their peers; the committee had communicated employee concerns and suggestions to management on all manner of issues.(23) Similarly, in 1989 the same court upheld the legality of an elected "president's advisory committee," which was charged with communicating employee views to man- agement.(24) Unfortunately, other circuit courts, including the Seventh Circuit, have been less hospitable to such arrangements.

The Supreme Court has not taken up the issue since 1959. Today, however, the circumstances and issues in employee participation plan cases are different from those in the 1959 Cabot Carbon case. Moreover, the composition of the Court has changed. It is impossible to predict, therefore, just how the Court would decide Electromation if the case reached it.

At his confirmation hearings, Secretary of Labor Robert Reich was asked about the Electromation decision. He avoided any specifics but said that he thought the decision was narrow and should not impair labor-management cooperation. If it does have that effect, Reich said that he would "be seeking legislation" to remedy the situation.(25) We can only wait to see what kind of legislation the Clinton administration will seek.

For its part, Congress is not opposed to all employee participation arrangements. Sen. Edward M. Kennedy, for example, promoted the Occupational Safety and Health Reform Act of 1992, which would have forced companies, union and nonunion alike, with 11 or more employees to create joint labor-management health and safety committees.(26) Kennedy plans to reintroduce the bill in the 103rd Congress. And many unions support the bill even though such committees would be no different in principle than the Electromation action committees the unions so bitterly oppose. Indeed, Peggy Taylor, associate director of the AFL-CIO's Department of Legislation, said that such health and safety committees could be on the "cutting edge" of labor-management cooperation.(27) Apparently, unions do not want to be thought to be against health and safety, so they are willing to give up that turf, at least in nonunion settings, in exchange for monopoly representation privileges on all other matters. In union settings, however, they claim monopoly representation privileges even on matters of health and safety, as we shall next see.

The Problem Extends to Unionized Firms

The NLRA can be used to restrict labor-management cooperation even in unionized firms. On December 22, 1989, for example, an ALJ held that the DuPont Company violated the law at its Deepwater, New Jersey, plant because it instituted, dominated, and supported a "design team" consisting of management and employee members. On January 30, 1990, the NLRB upheld the ALJ.(28) The job of the team was to improve workplace safety, promote innovation, foster better communications, and make the plant more competitive. The union complained that all efforts with respect to those goals were being undertaken without going through the union. According to the NLRB, cooperation with the union is permitted, but cooperation with workers without union involvement is not.

That was not the end, however, to DuPont's labor-management cooperation troubles. On May 11, 1992, another ALJ declared that seven more committees at DuPont's Deepwater plant functioned as illegal company unions. Six of the committees dealt with safety issues while the seventh dealt with employee physical fitness programs.(29) The ALJ affirmed the finding in the earlier case: where there is a union, labor-management cooperation must be union-management cooperation, even in the operation of voluntary physical fitness programs.

The Electromation case, recall, concerned labor-management cooperation in a nonunion setting. Putting the unions' positions in the Electromation and DuPont cases together, we must conclude that, to them, labor-management cooperation in nonunion settings, except concerning health and safety, is always wrong; and labor-management cooperation in unionized settings must always be union-management cooperation. Quite simply, unions want to have a government-enforced monopoly on speaking for workers. In union settings they demand those monopoly privileges even in the areas of health and safety. In nonunion settings they are apparently willing to allow labor-management

cooperation on health and safety issues, but on nothing else.

A Common-Sense Approach

As the NLRB was weighing the Electromation case, Edward E. Potter, president of the Employment Policy Foundation, urged the board to take a "common sense" approach. Since the clear intent of the authors of Sections 2(5) and 8(a)2 was to prohibit employers from resisting independent unions by forming sham ones, those provisions should not be used to prohibit anything else, he argued, such as labor-management cooperation that is not based on animosity toward unions.(30) In cases like Electromation, Potter continued, the board should take into account the intent of the employer in forming employee participation committees. If there is no anti-union intent, no violation of the NLRA should be found. Potter further argued that the board should consider the perceptions of employees who participate in such plans. Employees are not stupid. They know when they are being conned for anti-union purposes. If employees do not feel they are being coerced or exploited for anti-union purposes, Potter concluded, they probably are not. The Electromation, Polaroid, and DuPont employees involved in such committees were not being victimized by their employers, and they knew it.

Whether the intentions of the authors of a statute ought to be binding on agencies and courts that interpret it is hotly debated in legal circles. Moreover, the intentions of the authors are not always clear. The author of the main Electromation decision wrote, for example, that "the legislative history reveals that the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife."(31) He then went on to quote Sen. Robert Wagner, the principal author of the act.

Genuine collective bargaining is the only way to attain equality of bargaining power. . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union 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. For these reasons the very first step toward genuine collective bargaining is the abolition of the employer dominated union as an agency for dealing with grievances, labor disputes, wages, rates, or hours of employment.(32)

That passage seems to substantiate Potter's view that Sections 2(5) and 8(a)2 were aimed at sham unions used to thwart the desires of employees to unionize, not at labor- management cooperation in nonunion settings. Yet the author of the main Electromation decision thought the passage justified the board's conclusion that the term "labor organization" should be interpreted broadly to include more than just sham unions. In his view, the statute was written broadly to include anything any employer could think of.(33) Ironically, in reading Wagner's intent to prohibit sham unions as entailing a prohibition of any nonunion labor-management cooperation, the board has ensured an adversarial relation between labor and management and so has undermined the larger aim of the act--the elimination of industrial strife.

In his opinion concurring in the judgment, Devaney took issue with the board's main decision on the question of legislative intent.

[T]he definition of "labor organization" [in Section 2(5)] is intended to bring under the purview of Section 8(a)2's strictures the phenomenon of the company-imposed sham bargaining agent, without reference to other types of employer-employee communication with purposes other than bargaining.(34)

Devaney concurred in the judgment against Electromation because, as he read the record, the company did, through the action committees, engage in bargaining on terms and conditions of employment.(35)

Despite the NLRB's sweeping prohibition of nonunion labor-management cooperation, other federal legislation implies that the federal government enthusiastically supports such cooperation in all firms, whether they are unionized or not. Indeed, a Bureau of Labor-Management Relations and Cooperation has been created in the U.S. Department of Labor. Its official purpose is "to promote cooperative labor-management efforts and enhance the quality of working life, while improving the productivity and competitiveness of American industry." Another example is the Malcolm Baldrige National Quality Improvement Act of 1987. Under that law the Department of Commerce gives Malcolm Baldrige National Quality Awards to companies that have devised and implemented outstanding quality management systems

based on employee involvement. It is not a little ironic that in its Electromation decision the NLRB has come out against non- union labor-management cooperation and, by implication, that it penalizes many of the very plans that the Malcolm Baldrige Award is designed to honor.

Free Choice?

After the Electromation decision came down, the AFL-CIO issued a statement praising the board for "guaranteeing employees the right to choose their own representatives."(36) That view was echoed by Charles J. Morris.

Employers who really believe in the right of workers to exercise a free and democratic choice in the selection or rejection of their representative will applaud the board's decision for it upholds the principle of free choice. The board in Electromation is simply saying as the Act requires, that employees ought not to be coerced in their choice of representation