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WHERE ARE WE NOW?: LIFE AFTER ELECTROMATION

Rafael Gely*

I. INTRODUCTION

There probably has not been as much expectation concerning a recent NLRB decision, as that surrounding the two decisions that were supposed to settle the debate on the legality of workplace cooperative efforts: Electromation Inc.,1 and E.I du Pont.2 To a large extent, the Board itself was responsible for the degree of anxiety generated in anticipation of these decisions. In a rarely used process, the Board first announced it would hold oral arguments on the case, and would accept amici-briefs from various organizations interested in the outcome.3 Even more unusual, was the Board’s decision to reopen the record several days after the conclusion of oral arguments to accept additional post-argument briefs.4 The Board’s members also added to the expectation by making public statements in anticipation of the final decision that conveyed the impression that the section 8(a)(2) problem was approaching a crucial crossroads,5 and by taking over a year and four months to issue their final decision.

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1. 309 N.L.R.B. 990 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994).
5. See Member Raudabaugh Forecast NLRB Ruling in Electromation Case Before December 1992, Daily Lab. Rep. (BNA) No. 141, at A-4 (July 22, 1992). For example, Member Raudabaugh was reported as saying, “I've been studying [the Electromation case],
Not only were the expectations great, but in their aftermath, the decisions generated an avalanche of commentary in both academic and practitioner circles. On the one hand, employers and groups representing employers' interests, saw the Board's decision in Electromation as putting workplace cooperative efforts in danger of extinction. Proponents of this position viewed the Board's decision as making it virtually impossible for employers to continue experimentation with workplace cooperative efforts. These critics accused the Board of introducing "a fatal ambiguity and uncertainty" to the question of how employers could create workplace cooperative efforts that would withstand legal challenge. The decision, opponents feared, would have a "chilling effect" on employers' willingness to introduce participatory efforts in their workplaces.

Consistent with this apocalyptic view of Electromation, was the reaction by the Republican majority in Congress which, following the 1994 election where the Republican party regained control of both houses of Congress, introduced the Teamwork for Employees and Managers Act of 1995 ("TEAM Act"). When introducing the TEAM Act, Representative Gunderson followed the well established "competitive environment" argument by stating that the "escalating demands of global competition have compelled an increasing number of employers in the United States to make dra-

and studying it, and studying it because its been made into a major deal." Id. See also NLRB Decision in Electromation Inc. Imminent, Board Members Tell Conference, Daily Lab. Rep. (BNA) No. 240, at A-14 (Dec. 14, 1992) (quoting Member Devaney as saying, "[The decision in Electromation] is not out because it's a very difficult and complex issue, it will have tremendous impact").

8. See id.
9. See id. See also Kamer, supra note 6, at 41.
10. See H.R. 743, 104th Cong. (1995); S. 295, 104th Cong. (1995). The TEAM Act was approved by both houses, but was then vetoed by President Clinton. See Employee Participation: Clinton Vetoes TEAM Act Despite Pleas From Business For Passage, Daily Lab. Rep. (BNA) No. 147, at D-4 (July 31, 1996). Companion bills, similar to the bill vetoed by President Clinton, were introduced early this year in the House and Senate. See H.R. 634, 105th Cong. (1997); S. 295, 105th Cong. (1997). The Senate bill was approved by the Senate Labor and Human Resources Committee on March 6, 1997. See Legislation: GOP Workplace Proposals Awaiting Completion When Congress Returns, Daily Lab. Rep. (BNA) No. 166, at C-1 (Aug. 27, 1997).
mantic changes in workplace and employer-employee relationships" of the kind that involve an "enhanced role for the employee in workplace decision-making."11 He noted that employee involvement programs are widely used across the United States;12 that recent surveys indicate employees want more involvement in decisions affecting them in the workplace;13 and that the NLRB's current interpretation of section 8(a)(2) is constrained by a mind-frame more attune to the "very turbulent time in labor-management relations" than to the 1990's workplace.14 Gunderson concluded that an amendment to section 8(a)(2) was needed to nurture workplace creativity and confront "America's greatest economic challenges."15

In its Findings and Purposes section, the TEAM Act generally recites the "competitive environment" argument, as well as stating that the establishment of participatory programs has a positive impact on productivity, competitiveness and the lives of employees.16 Its "Finding" section concludes with the argument that recent attempts by employers to establish these participatory programs "have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham 'company unions' to avoid unionization,"17 but that nonetheless, employee involvement programs are currently threatened by the Board's prohibition against employer-dominated "company unions."18

The TEAM Act states as its purposes "(1) to protect legitimate Employee Involvement programs against governmental interference; (2) to preserve existing protections against deceptive, coercive employer practices; and (3) to allow legitimate Employee Involvement programs to continue to evolve and proliferate."19 To accom-

13. See id. (citing a survey by the Princeton Survey Research Associates on behalf of Professors Richard Freeman and Joel Rogers).
14. See id.
15. Id.
17. Id. at § 2(a)(6).
18. See id. at § 2(a)(7).
19. Id. at § 2(b)(1)-(3).
plish these three objectives, the bill asked Congress to amend section 8(a)(2), by adding the following proviso:

Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain or participate in any organization or entity of any kind, in which employees participate to address matters of mutual interest (including issues of quality, productivity and efficiency) and which does not have, claim or seek authority to negotiate or enter into collective bargaining agreements under this Act with the employer or to amend existing collective bargaining agreements between the employer and any labor organization.\(^2\)

This apocalyptic view of the Board’s holding in *Electromation* was confronted, interestingly enough, not with enthusiastic support for the Board’s decision, but with a somewhat dismissive and much guarded attitude. As discussed below,\(^2\)_ in both its *Electromation* and *E.I. du Pont* decisions, various members of the Board filed concurring opinions emphasizing the limited nature of the Board holdings, and their general support for the continuing experimentation with workplace cooperative efforts. In later writings, some of the members who wrote concurring opinions have continued to adhere to this view that the Board’s holdings did not represent a big shift in 8(a)(2) interpretation.\(^2\)_ Member Devaney, who had been quoted as saying before the *Electromation* decision was issued that the holding will have “tremendous impact,” has, both in his concurring opinion and in a later article, advanced the argument that the alarmist interpretation of *Electromation* has been essentially misguided.\(^2\)

Given the expectations that preceded the Board’s decisions, and the reactions that followed, it is somewhat surprising how little attention has been given to the decisions the NLRB has issued since *Electromation* and *E.I. du Pont*. While in general these recent decisions are consistent with the holdings in *Electromation* and *E.I. du Pont*, they provide us with the opportunity to analyze the manner in which the Board is currently dealing with the legality of workplace

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21. See infra notes 32 to 72 and accompanying text.
23. See id.
cooperative efforts. This article explores that issue. Part II of the article provides a brief overview of the workplace cooperative efforts problem. Part III reviews the Board’s decisions in *Electromation* and *E.I. du Pont*, and describes the various interpretations that were initially attributed to these two decisions. In Part IV, I analyze the cases decided since these two seminal decisions. The argument is advanced that while the Board generally continues to follow the contours of the test developed in *Electromation* and *E.I. du Pont*, the most recent decisions indicate a degree of uneasiness with the current approach to the workplace cooperative efforts problem. To the surprise of many, this, to some degree, was the extent of the law before the Board’s anti-climatic intervention. In that sense, not much has changed. Part V concludes the Article.

II. **THE WORKPLACE COOPERATIVE EFFORTS PROBLEM**

There are a large variety of workplace cooperative programs.⁴ These programs include different employment arrangements revolving around team or group activities, whose objectives are to involve employees in the decision-making process. They usually involve salaried and hourly employees coming together to share ideas concerning quality improvements, waste reduction, and other quality enhancing issues.⁵

Cooperative efforts have normally been classified along the following lines: Employee Participatory Programs (quality circles, quality of worklife, and strategic participation), Teams, Gain-sharing, Profit-sharing and Employee Stock Ownership Plans.⁶ The legality of the latter three types of programs has never been ques-

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⁶ See Eaton and Voos, supra note 24, at 176-77. See also Samuel Estreicher, *Employee Involvement and the “Company Union” Prohibition: The Case for Partial Repeal of Section 8(a)(2) of the NLRA*, 69 N.Y.U. L. Rev. 125, 127 (1994) (dividing cooperative efforts into those that are grounded in natural work groupings (“on-line” systems) and those that are not directly concerned with immediate productivity issues, and those concerned with issues of a more general nature, such as organization-wide procedures and developments).
tioned under section 8(a)(2). Thus, most of the cases dealing with section 8(a)(2) normally involve employee participatory programs and teams, or variations thereof.

The dispute as to the legality of workplace cooperative efforts, has centered around the interpretation of two statutory sections: section 8(a)(2) and section 2(5). Section 2(5) 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.]

Section 8(a)(2) of the NLRA makes it an unfair labor practice for an employer:

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

The NLRA thus establishes a two step analysis in reviewing the legality of an employer-employee cooperative effort. First, does the cooperative effort constitute a labor organization under section 2(5)? Second, if the cooperative effort is found to be a labor organization, has the employer dominated or interfered with the formation or administration of such an organization?

The case law interpreting these two sections can be classified as either restricting or limiting the ability of employers to establish

27. See Lori M. Beranek, Comment, The Saturnization of American Plants: Infringement or Expansion of Workers' Rights?, 72 MNN. L. REV. 173, 189-94 (1987) (discussing how the federal government has encouraged the creation of such programs).
31. See id. at 277.
32. See id.
workplace cooperative efforts, or on the contrary, as facilitating or permitting employers to establish these programs. The "restrictive" view tends to limit the kind of participatory programs that would be allowed under the NLRA, by giving an expansive reading to sections 2(5) and 8(a)(2). The "permissive" view, on the other hand, seeks to expand the kind of programs that would obtain judicial approval, by narrowly interpreting the definition of a labor organization, and the kind of conduct that would amount to domination or support.

III. ELECTROMATION AND E.I. DU PONT

A. Electromation

Electromation involved the question of the legality of five so-called "Action Committees," created by the employer in response to concerns previously raised by its employees. In an almost apologetic tone, the Board concluded that the "Action Committees" violated section 8(a)(2). The Board's decision was structured along the two separate inquiries suggested by the statutory regime. First, "at what point does an employee committee lose

33. See NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959) (holding that neither § 2(5) nor § 8(a)(2) eliminated employee committees from the term "labor organization," which resulted in a limitation on an employer's ability to create participatory programs).

34. See Airstream, Inc. v. NLRB, 877 F.2d 1291 (6th Cir. 1989) (holding that a "President's Advisory Council," created by the employer, and including employees' representatives, which met with the employer to voice complaints about work related issues such as leave policy and job bidding, was not "dealing with," but served merely as a "means of communication").


36. See Airstream, Inc., 877 F.2d at 1295-98, 1300.

37. See Electromation, Inc., 309 N.L.R.B. 990, 990-92 (1992), enforced, 35 F.2d 1148 (7th Cir. 1994). The "Action Committees" were formed as the result of a series of meetings that management had held with employees to discuss the employees' displeasure with a number of changes that had been made in an effort to reduce production costs. See id. at 990. "The Action Committees were designated as follows: Absenteeism/Infractions; No Smoking Policy; Communication Network; Pay Progressions for Premium Positions; and Attendance Bonus Program." Id. at 991.

38. See id. at 990. The Board explained:

These findings rest on the totality of the record evidence, and they are not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed "labor organizations" or that employer actions like some of those at issue here would necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference, or domination.

Id.

39. See id.
its protection as a communication device and become a labor organization?" 40 Second, what kind of conduct by the employer constitutes domination and interference with the labor organization? 41

In answering the first question, the Board applied a three-pronged test. 42 According to the Board, it will find a given group is a labor organization if "(1) employees participate, (2) the organization exists, at least in part, for the purpose of 'dealing with' employers, and (3) these dealings concern 'conditions of work' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment." 43 With respect to the issue of whether the organization must also have as a purpose the representation of employees, the Board noted if that were the case, such an organization will meet the statutory definition under section 2(5), if, in addition, it also meets the employee participation criteria and it deals with conditions of work or other statutory subjects. 44

The Board found all the elements satisfied, and specifically commented on the meaning of the "dealing with" element. 45 The Board began by pointing out that the term should, and had been, broadly construed to include situations other than bargaining. 46 The Board emphasized that the Action Committees were created in response to the employees' dissatisfaction with current employment conditions and with the hope that the employees would help management "to come up with ways to resolve these problems." 47 Thus, the Board concluded, it was clear that the Action Committees were created in order to solve employment problems through a bilateral process, which squarely fell under the "dealing with" element as interpreted in earlier cases by the Supreme Court. 48

40. Id.
41. See id.
42. See Electromation, Inc., 309 N.L.R.B. at 994.
43. Id.
44. See id. "Any group, including an employee representation committee, may meet the statutory definition of 'labor organization' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues." Id.
45. See id. at 997.
46. See id. at 995 (discussing Cabot Carbon to illustrate the broad nature of the term "dealing with").
47. See Electromation, Inc., 309 N.L.R.B. at 997.
48. See id.
Having found the Action Committees to be a labor organization, the Board then discussed the employer domination and interference issue. The Board’s focus was on whether the organization was the creation of management, whether the organization’s structure and function were determined by management, and whether the organization’s continued existence depended on the fiat of management. According to the Board, since “the Action Committees were the creation of the [employer] and [since] the impetus for their continued existence rested with the [employer] and not with the employees,” it was clear that the employer dominated their formation and administration and unlawfully supported them.

There were three concurring opinions filed in Electromation. The three concurring opinions set out to clarify various aspects of the majority opinion. Whether the concurring members achieved their objective has been the subject of substantial academic debate. Member Devaney’s concurrent opinion attempted to clarify the majority’s opinion by first indicating that under section 8(a)(2), there is significant latitude for employers to implement workplace cooperative efforts. Member Devaney noted that although the term “dealing with” is much broader than the term “bargaining,” it is not so encompassing as to include situations involving true communication devices, such as those participatory programs discussing managerial issues like quality, productivity and efficiency. Thus, according to Member Devaney, some forms of bilateral exchanges, such as “soliciting and/or accepting employee suggestions or ideas” will be permissible without running afoul of the “dealing with” element of section 2(5). Finally, Member Devaney attempted to answer a question left unanswered by the majority’s opinion: whether an employee participatory program can

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49. See id. at 995.
50. See id. at 997-98.
51. See id. at 998.
53. See id.
55. See Electromation, Inc., 309 N.L.R.B. at 999 (Devaney, M., concurring).
56. See id. at 1002 n.20.
57. Id. at 1003.
58. See id.
ever be found to be a labor organization in the absence of the "representation" element. In Devaney's view, a finding that an employee group acted as a representative of other employees is essential to the conclusion that such a group is a labor organization. According to Member Devaney,

[w]here an employee committee does not act as the agent or advocate of other employees, an employer's dealings with the committee will not cause the harm Section 8(a)(2) is intended to correct: the usurpation by the employer of the employees' right to choose their own bargaining representative and the concomitant frustration of their fundamental freedom of choice and action guaranteed by section 7.

A second concurring opinion was filed by Member Oviatt, again stressing the limited scope of the Board's decision. In a fairly apologetic tone, Member Oviatt recited the employers' cry for the need of improving efficiency and productivity in order to "remain competitive in the world economy," and the concern that present laws might serve as "roadblocks to companies' ability to perform more efficiently and to respond promptly to competitive conditions. . . ." According to Member Oviatt, the critical distinction between legal and illegal workplace cooperative efforts relates to the subject matter element. Member Oviatt described various kinds of employee-participation groups most likely to be outside the scope of sections 2(5) and 8(a)(2). Quality circles, quality of worklife programs, and employee-management committees are

59. See id. at 1002.
60. See Electromation, Inc., 309 N.L.R.B. at 1002.
61. Id.
62. See id at 1003 (Member Oviatt, concurring).
63. Id.
64. Id. at 1004.
66. See id.
67. See id. (defining quality circles as committees "whose purpose is to use employee expertise by having the group examine certain operational problems such as labor efficiency and material waste").
68. See id. (defining quality of worklife programs as programs involving "management's attempt to draw on the creativity of its employees by including them in decisions that affect their work lives," such as, "worker self-fulfillment and self-enhancement").
69. See id. (defining employee-management committees as programs "established by a company with the purpose of creating better communications between employer and employee by exploring employee attitudes, communicating certain information to employees, and making management more aware of employee problems").
not, according to Member Oviatt, within the reach of section 2(5) since they are not concerned with the subject matters proscribed under that section.\(^7\) Although Member Oviatt's decision appears to be the most circumscribed of all the concurrent opinions, since he arguably just intended to delineate the outer boundaries of the majority opinion, the tone of his opinion has certainly influenced later decisions by the Board.

In a third concurring opinion, Member Raudabaugh attempted to shift the focus of the inquiry from the "labor organization" question towards the "domination and interference" inquiry.\(^7\) According to Member Raudabaugh, most [participatory programs] are likely to satisfy the three requirements of section 2(5): employee participation, "dealing with" and "subject matter."\(^7\) In particular, argued Raudabaugh, "[m]ost participatory programs involve the presentation of proposals or ideas to management, and a management response to those proposals or ideas," and "it is uncommon for [participatory programs] to have managerial functions fully delegated. . . ."\(^7\) Therefore, concluded Raudabaugh, most participatory programs will involve employees "dealing with" the employer within the meaning of \textit{NLRB v. Cabot Carbon},\(^7\) and thus will qualify as a labor organization under section 2(5).\(^7\) Similarly, Member Raudabaugh argued that the "subject matter" requirement most likely will be met by every participatory program, since, even those programs that attempt to limit their discussions to issues of productivity and efficiency will be likely to have to consider one or more of the section 2(5) subjects in accomplishing the program's objectives.\(^7\)

\(^{70}\) See \textit{Electromation, Inc.}, 309 N.L.R.B. at 1004-05.

\(^{71}\) See \textit{id.} at 1005 (Member Raudabaugh, concurring).

\(^{72}\) See \textit{id.} at 1007.

\(^{73}\) \textit{Id.} at 1008.

\(^{74}\) 360 U.S. 203 (1959).

\(^{75}\) See \textit{Electromation, Inc.}, 309 N.L.R.B. at 1008-09.

\(^{76}\) See \textit{id.} at 1008.

A "discussion of work problems" may include almost anything, including, for example, poor lighting or inadequate ventilation in work areas. When employees present to management "specific solutions and improvement recommendations" regarding such matters, the "dealing with" standard of \textit{Cabot Carbon} will always be satisfied. Moreover, the subject matter of such "dealings" will usually include matters which clearly fit within the examples enumerated in Section 2(5), such as "grievances" or "conditions of work," if these terms are construed broadly.

\textit{Id.}
Thus, Raudabaugh instead directed his efforts toward the development of a set of guidelines to determine whether the “labor organization” in question was dominated or interfered with by the employer. Based on his reading of the NLRA’s legislative history, and on recent congressional developments which indicate a congressional policy in favor of employee involvement, Raudabaugh argued that the Board should be free to reinterpret section 8(a)(2) in a way that will “accommodate labor-management cooperation and the Section 7 rights of employees.” Raudabaugh proposed that the Board should look at the following factors when deciding the domination and interference issue:

1. the extent of the employer’s involvement in the structure and operation of the committees; 2. whether the employees, from an objective standpoint, reasonably perceive the [employee participatory program] as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining, and (4) the employer’s motives in establishing the [employee participatory program].

Member Raudabaugh’s interpretation of these four factors, illustrates a fairly expansive view of the types of workplace cooperative efforts that would be permitted to operate outside the reach of section 8(a)(2). For example, with respect to the first factor, the extent of the employer’s involvement in the structure and operation of the committee, Raudabaugh conceded that the fact that the employer initiates the idea of a participatory program, or that the employer suggests the rules and policies of the labor organization, is not sufficient to condemn it. Instead, Raudabaugh focuses on the decision-making process and on the extent of management participation within the group. Note that Raudabaugh makes no mention of the “continued existence” factor alluded to in the majority’s decision, focusing instead on the decision-making characteristics of the group, which in earlier cases has permitted the courts to find in favor of workplace cooperative efforts in situations in which the decision to continue the program rested entirely with the employer.

77. Id. at 1013.
78. Id.
79. See id.
The three concurrent opinions, although agreeing in principle with the rationale of the majority decision, appear to point to a much more permissive view of workplace cooperation than what the language in the majority decision would allow. The need “to insure that American firms successfully compete in a global economy” was apparently of enough importance to the three Board members who filed concurrent opinions, as to force them to leave the door open for future revisions of the Electromation test.

B. E.I. du Pont

The employer in E.I. du Pont had created six safety committees and one fitness committee in one of its unionized plants. In addressing the question of the legality of these committees, the Board first dealt with the labor organization question. In applying its Electromation three-part test, the Board concentrated on the “dealing with” requirement. The Board defined the term “dealing with” as entailing “a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.”

With respect to the “pattern or practice” element, the Board stated:

If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

In discussing the domination and interference issue, the Board, unlike in its Electromation discussion, shifted its focus away from the issue of whether the “continued existence” of the committees

81. Id. at 1014.
82. See E.I. du Pont de Nemours & Co., 311 N.L.R.B. 893, 906 (1993). The safety committees had operated for a number of years but had been limited as to managerial participation. See id.
83. The Board found that the first and third elements of the Electromation test were satisfied since there was no question that employees participated in the committees, or that the committees had discussed some of the proscribed subjects. See E.I. du Pont, 311 N.L.R.B. at 894.
84. Id.
85. Id.
depended on the fiat of management, and instead focused its dis-
cussion on the issue of the independence of the committees in terms
of their decision-making power. The Board placed particular
attention on the fact that management maintained an implicit veto
power over committee decisions, given the requirement that all
decisions be made by consensus. Although the Board noted the
employer had the power to “change or abolish any of the commit-
tees at will,” this factor does not appear to have been central to
the Board’s decision. The Board concluded that the operation of
the committees supported a finding that the employer dominated
the administration of all seven committees in violation of section
8(a)(2).

As he did in Electromation, Member Devaney filed a separate
concurrent opinion to point out that the conduct engaged in by the
employer in E.I. du Pont and which the majority found to be a vi-
olation of section 8(a)(2), would also be unlawful under Devaney’s
“narrower and more historically focused perspective.” For the
most part, Devaney’s opinion was similar to that in Electromation,
restating his “representation requirement” and his concern with
protecting the employee’s freedom of choice.

In discussing whether the employer in E.I. du Pont had domi-
nated the administration of the safety and fitness committees,
Devaney initially appeared to focus on the “continued existence”
issue. He states, “I find it difficult to conceive of a situation where
the very existence of an employee committee depends on the will of
the employer that would not merit a finding that the employer
‘dominated’ the committee.” However, in the next sentence of his
opinion, he takes the breath out of this argument by stating that “an
employer’s domination of the administration of an employee com-
mittee is not, taken alone, an unfair labor practice.” According to
Devaney, the fact that the employer forms the committees, assigns
management representative to the committees, provides the com-
mittees with funds, time, space and compensation, controls the

86. See id. at 895-96.
87. See id. at 896.
88. E.I. du Pont, 311 N.L.R.B. at 896.
89. Id.
90. See id. at 898.
91. See id. at 899.
92. Id. at 901.
agenda and could dissolve the committees at will, does not in itself amount to a violation of section 8(a)(2).\(^{94}\) Even if the committees are "dominated" in such a way by the employer, there is not necessarily any interference with the employees' exclusive right to choose a bargaining representative.\(^ {95}\)

Devaney's opinion has been interpreted as edging away from the \textit{Electromation} language, and instead advancing the permissive model.\(^ {96}\) While this might be subject to debate, it is clear that such language has reappeared as an underlying theme in later Board decisions.

**IV. RECENT DEVELOPMENTS**

**A. Overview**

Given all the attention that the \textit{Electromation} and the \textit{E.I du Pont} decisions have received in academic and practitioners circles, it is somewhat surprising that very little attention has been given to more recent NLRB decisions involving workplace cooperative efforts. Despite the lack of public attention, the issue of the legality of workplace cooperative efforts continues to be litigated at the NLRB. Since the \textit{Electromation} and \textit{E.I. du Pont} decisions, the Board has decided twelve cases applying the \textit{Electromation} test.\(^ {97}\) The decisions in these cases are interesting, in that they demonstrate that little has changed with respect to the interpretation of

\[^{94}\text{See id. at 902.}\]
\[^{95}\text{See id.}\]
\[^{96}\text{See A. B. Cochran, III, \textit{We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act}, 16 \textit{Berkeley J. Emp. & Lab. L.} 458, 499 (1995).}\]
section 8(a)(2). A review of these recent cases illustrates several points. When deciding 8(a)(2) complaints, the Board has adopted the *Electromation* language, and it is likely that the Board will find that a violation of section 8(a)(2) has occurred (ten out of the twelve cases resulted in violations). However, the Board appears to have adopted a narrow interpretation of the *Electromation* test, at times using language entirely consistent with the concurring opinions filed in that case. In particular, following the appointment of Chairman William Gould to the Board, the language of the cases appears to hedge towards a more flexible approach than that suggested in *Electromation*.

**B. The Initial Four**

The first four cases decided by the Board after the *Electromation* and *E.I. du Pont* decisions dealing with an 8(a)(2) complaint, were decided prior to Chairman Gould joining the Board. All four cases were decided against the employers, with the Board finding a violation of the Act in each situation. In general, these four cases represent a fairly straightforward application of *Electromation*. In *Research Federal Credit Union*, for example, the employer, following the commencement of an organizing campaign by an outside union, introduced the idea of employee involvement teams. The teams were composed of representatives from each department in the company, as well as some management representatives, and discussed topics such as smoking policies, part-time benefits, and annual performance reviews. The expressed purpose of the committees was to provide a means for employees to formally address matters of concern, and then to present these concerns together with recommendations for their solution to the Board of Direc-


100. 310 N.L.R.B. 56 (1993).

101. See id. at 61.

102. See id. at 61-62.
The Board affirmed the administrative law judge’s decision, finding that the committees were a labor organization, and that the employer had dominated and interfered with their formation and administration.

Very similar factual patterns were involved in Ryder Distribution Resources Inc., and Magan Medical Clinic, Inc. In Ryder Distribution Resources Inc., the employer, in response to a union organizing effort, created an employee participatory program called the “Quality Through People” (QTP) program. The program was described to the employees as a form of problem solving among the employees. The employees were initially unwilling to participate in the program, but changed their minds after the employer offered each employee $500 as a “good faith gesture.” Following a meeting in which the employees compiled a list of matters that concerned them, five “quality action” teams were created, which included as members several employees and one supervisor or manager. Employees in each team received training in problem solving techniques, and on how to convince management that it should implement the employees’ proposed solutions. As part of the problem solving training, the employees were told that it was important to poll other employees and to report the results of the polls to the employer.

The administrative law judge found that the employer had violated section 8(a)(2) by dominating and interfering with the formation of the five employee groups, based primarily on evidence introduced concerning the operation of the wages and benefits committee. The wages and benefits committee met with the employer with the purported objective of finding a solution to the problem of wages that was satisfactory to both the employer and a large majority of employees. After deadlocking on possible solu-

\[\text{\footnotesize 103. See id. at 62.}\]
\[\text{\footnotesize 104. See id. at 65-66.}\]
\[\text{\footnotesize 105. 311 N.L.R.B. 814 (1993).}\]
\[\text{\footnotesize 106. 314 N.L.R.B. 1083 (1994).}\]
\[\text{\footnotesize 107. See Ryder Distribution Resources, 311 N.L.R.B. at 815.}\]
\[\text{\footnotesize 108. See id.}\]
\[\text{\footnotesize 109. See id.}\]
\[\text{\footnotesize 110. See id.}\]
\[\text{\footnotesize 111. See id.}\]
\[\text{\footnotesize 112. See Ryder Distribution Resources, 311 N.L.R.B. at 815.}\]
\[\text{\footnotesize 113. See id. at 831, 32.}\]
\[\text{\footnotesize 114. See id at 818.}\]
tions, the employee-committee members were directed to poll the other employees concerning the employer's various proposals on wages and benefits.\textsuperscript{115}

The Board upheld the administrative law judge's findings with respect to the wages and benefits committee.\textsuperscript{116} The Board focused on the fact that the wages and benefits committee clearly was a labor organization under section 2(5), since its purpose was to deal with the employer.\textsuperscript{117} According to the Board, the central purpose of the committee was to address employees' dissatisfaction with their wages, by creating a "bilateral process" involving the employer and the employees.\textsuperscript{118} The Board also found, consistent with \textit{Electromation} and \textit{E.I. du Pont}, that the employer had dominated and interfered with the wages and benefits committee, since the whole idea was initiated by the employer, the employer used cash incentives to motivate employees to participate, and more importantly, the continued existence of the group rested with the employer.\textsuperscript{119}

\textit{Magan Medical Clinic}\textsuperscript{120} also involved a committee (the "Forum"), created by the employer following an effort by employees to start an organizing campaign.\textsuperscript{121} The Forum's stated purpose was to provide a "fair and orderly procedure for airing employee grievances involving wages, hours and terms and conditions of employment."\textsuperscript{122} At its first meeting, the employee members of the Forum were allowed to modify or change the set of rules initially adopted by the employer when establishing the group.\textsuperscript{123} In subsequent meetings, the employer told members of the "Forum" that "it was their committee and that he could have nothing to do with it."\textsuperscript{124} Following these organizational meetings, the "Forum" met to discuss grievances.\textsuperscript{125} Grievances were then presented to the employer, and according to the administrative law judge's decision,

\begin{itemize}
  \item \textsuperscript{115} See id.
  \item \textsuperscript{116} See id.
  \item \textsuperscript{117} See \textit{Ryder Distribution Resources}, 311 N.L.R.B. at 818.
  \item \textsuperscript{118} See id.
  \item \textsuperscript{119} See id.
  \item \textsuperscript{120} 314 N.L.R.B. 1083 (1994).
  \item \textsuperscript{121} See id. at 1084.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} See id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} See \textit{Magan Med. Clinic}, 314 N.L.R.B. at 1084–85.
\end{itemize}
the "Forum" "was able to obtain favorable action on grievances from [the employer]." The administrative law judge found that while the employer had interfered with the formation and administration of the "Forum," there was insufficient evidence to conclude that the employer dominated the group, since the group appeared to have had an effective existence independent from the employer. The Board affirmed the administrative law judge's decision finding that the "Forum" was a labor organization and that the employer had unlawfully interfered with its formation and administration.

In Peninsula General Hospital Medical Center, the participatory program at issue, the Nursing Service Organization ("NSO"), had been in existence for close to twenty years, primarily as a forum for the social and professional concerns of the employee members. A few months before the start of an organizing campaign by an outside union, the chairman of the NSO commenced efforts to "rejuvenate" the group. To accomplish this objective, the employer directed employees to elect a representative from each area "to attend NSO meetings and report back to the staff of the area represented." During the ensuing months, and while the organizing campaign was ongoing, the NSO met several times to discuss topics such as wages and working conditions. In one of these meetings, a survey was distributed and collected, which was intended to gather information regarding employee preferences on wages and benefits.

The Board again upheld the administrative law judge's decision, which in turn had applied the Electromation/E.I. du Pont analysis. The administrative law judge had no trouble finding that the NSO was a labor organization under section 2(5), again focusing on the "dealing with" requirement. With respect to the issue of

126. Id. at 1085.
127. See id. at 1086.
128. See id.
129. 312 N.L.R.B. 582 (1993).
130. See id. at 583.
131. See id.
132. Id.
133. See id. at 585-87.
135. See id. at 582, 588.
136. See id. at 587.
interference and domination, the administrative law judge’s focus was on the role played by the chairman of the NSO, who was a member of management. The judge characterized the role played by the NSO’s chairman as that of an active participant affecting fundamental changes in the group. Unlike the judge in Magan, the judge in Peninsula General Hospital made no distinction between dominance and interference, even though it can be argued that given its long standing existence, the NSO had as much of an independent existence from the employer as the Forum did in Magan.

C. The Turning Point

In short, in each of these first four cases, there was some form of workplace cooperative effort either created or significantly altered by management, which involved employees serving a representative role, and whose existence depended on management’s will. Each of the committees in these cases discussed subjects related to a statutory condition of employment. Given the facts of each of these cases, it is not surprising that the Board found a violation of section 8(a)(2). The Board appeared to have closely followed the Electromation and E.I. du Pont analysis.

The other eight cases involved somewhat more diverse situations. Also, these latter cases contain language that suggests a certain degree of uneasiness with the legal standard established in the two seminal cases, and a shift towards a limited reading of the Electromation and E.I. du Pont cases. In Keeler Brass Automotive Group, the Board confronted a grievance committee which, after eight years of operations, was being restructured by the employer. There, the committee procedures and composition

137. See id.
138. See id.
140. See, e.g., Magan Med., 314 N.L.R.B. at 1083; Peninsula Gen., 312 N.L.R.B. at 582; Research Fed. Credit, 310 N.L.R.B. at 56; Ryder Distribution, 311 N.L.R.B. at 814.
142. See Keeler Brass Automotive Group, 317 N.L.R.B. at 1110.
were decided by the employer. Committee members were then elected by employees to two year terms. Evidence was presented that the committee's decisions concerning grievances were not final, but instead were submitted to the employer, who then decided whether to approve or modify the committee's conclusions. In reversing the administrative law judge, the Board found that the committee was a labor organization, and that it was dominated by the employer.

Although the majority opinion breaks no new ground in terms of the Electromation type of analysis, the case's importance might lie in the concurrent decision of Chairman William Gould. In his concurrent opinion, Chairman Gould pays special attention to the question regarding the degree of independence enjoyed by the employee participation group. Chairman Gould cites with approval, two prior NLRB cases, and the Seventh Circuit decision enforcing the Board's Order in Electromation. According to Gould, the Seventh Circuit applied the correct standard in determining the legality of workplace cooperative efforts. In its decision reviewing the Board's holding in Electromation, the Seventh Circuit noted:

The Supreme Court has explained that domination of a labor organization exists where the employer controls the form and structure of a labor organization such that the employees are deprived of complete freedom and independence of action as guaranteed to them by Section 7 of the Act, and that the principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions.

143. See id. at 1110-12.
144. See id. at 1110.
145. See id. at 1111-12.
146. See id. at 1114.
148. See id. at 1116-19 (Chairman Gould, concurring).
149. See id.
151. Electromation, Inc., 35 F.3d at 1148.
152. See Keeler Brass Automotive Group, 317 N.L.R.B. at 1118.
According to Gould, the question of the independence enjoyed by the participatory program in question is a matter of degree.\textsuperscript{154} At one end of the spectrum, there might be situations involving a "minimal degree of employer involvement,"\textsuperscript{155} like the one encountered by the Seventh Circuit in the earlier Chicago Rawhide\textsuperscript{156} case. At the other end of the spectrum, there might be situations like the one in Electromation, involving a higher degree of employer involvement.\textsuperscript{157} Gould then proceeded to provide some guidelines to deal with those cases that fall under neither extreme.\textsuperscript{158} First, Gould suggested the Board should inquire about the creation of the group, that is, how the employee group came into being.\textsuperscript{159} According to Gould, however, this does not mean that in every case where the idea to form a participatory program originates with management there will be an 8(a)(2) violation.\textsuperscript{160}

\[\text{If, for example, the employer did nothing more than tell employees that it wanted their participation in decisions concerning working conditions and suggested that they set up a committee for such participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.}\textsuperscript{161}

This portion of Chairman Gould's opinion is interesting in that it echoes both the concurring opinion of Member Raudabaugh in Electromation (stating that the fact that the employer initiates the participatory program, or that the employer establishes the program's rules and policies, is not sufficient reason to condemn the program under the Act),\textsuperscript{162} and the concurring opinion of Member Devaney in E.I. du Pont, in which Devaney stated, "I see no unlawful behavior or threat to employees' Section 7 rights when employers form employee committees with management members, provide

\begin{footnotes}
\footnote{154. See Keeler Brass Automotive Group, 317 N.L.R.B. at 1118.}
\footnote{155. Id.}
\footnote{156. 221 F.2d 165 (7th Cir. 1955). In Chicago Rawhide, the committee originated with the employees and met outside the presence of management; management did not determine the subject matters to be considered, nor who should serve on the committee, nor did management have veto power over any committee recommendations. See id. at 166.}
\footnote{157. See Keeler Brass Automotive Group, 317 N.L.R.B. at 1118.}
\footnote{158. See id. at 1118-19.}
\footnote{159. See id. at 1118.}
\footnote{160. See id. at 1119.}
\footnote{161. Id.}
\footnote{162. See Electromation, Inc., 309 N.L.R.B. at 1013, 1014.}
\end{footnotes}
such committees with funds, time, space, and compensation, assign the committees agendas, and dissolve them at will.”

In addition to this first suggestion, Chairman Gould also pointed out that in deciding the “domination” question, the Board should also look at the circumstances surrounding the creation of the participatory program. In the case at hand, Gould argued that there were several factors pointing in the direction of a finding of no domination, which included: the fact that the employer had not created the committee in response to an organizing effort, the fact that participation in the committee was voluntary and that all voting committee members were freely elected by the rest of the employees, indicating that no domination was present. However, Chairman Gould maintained, the balance of factors pointed in the direction of domination. In particular, Gould was concerned with the fact that the employer set the membership guidelines for the committee, established the election procedure and conducted the election, and that the committee could not make a decision about when it would meet without the approval of the employer.

Although Chairman Gould’s decision cited with approval the Electromation test, it also appears to place much more attention on the domination issue than the Board did in Electromation’s early progeny. It is not clear, however, whether Chairman Gould’s guidelines to decide the question of domination tend to expand or limit the scope of the Electromation test.

D. Chairman Gould’s Era

On December 18, 1995, three years after its ruling in Electromation, the Board issued five decisions in cases raising 8(a)(2) complaints. These five decisions provide some instructive insights into the manner in which the Board appears to have settled in its interpretation of the meaning of the Electromation analysis. In particular, a review of these cases indicates that the Board appears to

164. See Keeler Brass Automotive Group, 317 N.L.R.B. at 1119.
165. See id.
166. See id.
167. See id.
168. See id.
be concerned with two critical factors. First, with respect to the section 2(5) question, the Board’s main focus has been the “dealing with” requirement. In answering this question, the critical element has been the showing that there is evidence of a “pattern or practice” of “dealing with” between the employer and employees. Second, in deciding the second prong of its Electromation analysis, i.e. whether there is evidence of domination or interference with the labor organization, the Board has paid close attention to whether the workplace cooperative effort’s “continued existence” rested entirely with the employer.

In Stoody Co. and Vons Grocery Co., the Board, for the first time since the Electromation decision, found in favor of the employer in an 8(a)(2) case. Stoody Co. involved the creation, by the employer, of a “handbook committee” which stated purpose was “[n]ot to discuss wages, benefits, or working conditions, but was to gather information about different areas in the handbook that were inconsistent with our current practices, that were obsolete, or that were misunderstood by employees so we could get them cleared up as soon as possible.” At the first meeting in Stoody, the committee engaged in some discussion concerning vacation time, as well as other non-proscribed subjects. Shortly after this first meeting, the committee was disbanded after the employer found out that a union which had been attempting to organize the workplace had filed 8(a)(2) “unfair labor practices” charges. Although the members of the “handbook” committees were to act as representatives of other employees, and although in their first and only meeting the committee discussed and made proposals concerning vacation time (clearly a statutory subject under section 2(5)), the Board found that the “dealing with” requirement was not


172. Electromation, 309 N.L.R.B. at 998.


175. Stoody Co., 320 N.L.R.B. at 18.

176. See id.

177. See id.
The Board relied on a passage from its *E.I. du Pont* decision stating that “dealing with” requires a showing of a “[p]attern or practice, or that the group exists for a purpose of following such a pattern or practice” of employees making proposals to management, and management responding to these proposals. According to the Board, since the “handbook committee” met only once, there was no evidence of a pattern or practice of “dealing with” and that, contrary to the Administrative Law Judge’s opinion, even if additional meetings of the Committee had been held, the meetings would not have resulted in proposals to management on working conditions.

A similar factual pattern was involved in the other decision in which the Board refused to find a violation of section 8(a)(2). In *Vons Grocery Co.*, the employer had created a group devoted to considering specific operational concerns and problems (the “Quality Circle Group”). Several years after its formation, the group, for the first time, strayed away from its consideration of purely operational matters and discussed issues related to a dress code and an accident point system. After a couple of meetings in which these two matters were further discussed, the group presented proposals to both the employer and the union representing employees at the plant addressing their discussions. Following complaints raised by the union, to the extent that the Quality Group had gone beyond the scope of its allowable activities, the employer reassured the union that no further discussion of topics other than operational matters would be made in the group, and invited a union representative to attend all group meetings.

Following a rationale similar to that utilized in *Stoody Co.*, the Board held that the Quality Group did not constitute a labor organization under section 2(5). According to the Board, there was no evidence of a “pattern or practice” of making proposals to management on statutory subjects, nor was there a substantial likelihood

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178. See id. at 20.
179. See id.; *E.I. du Pont*, 311 N.L.R.B. at 894.
180. See *Stoody Co.*, 320 N.L.R.B. at 21.
181. See *Vons Grocery Co.*, 320 N.L.R.B. at 53.
182. See id.
183. See id.
184. See id.
185. See id. at 54.
that the one incident in which such subjects were discussed would develop into a pattern.\textsuperscript{186}

The other three cases issued on the same day as \textit{Stoody Co.} and \textit{Vons Grocery Co.}, provide some insight into the Board's interpretation of the “domination and interference” element of its \textit{Electromation} analysis. In \textit{Reno Hilton Resorts},\textsuperscript{187} \textit{Webcor Packaging},\textsuperscript{188} and \textit{Dillon Stores},\textsuperscript{189} the Board confronted workplace cooperative efforts that clearly fit the “labor organization” definition of section 2(5) as interpreted in \textit{Electromation}. The main issue in these three cases was the question of “domination and interference.”\textsuperscript{190} In discussing this issue of domination, the Board focused on the fact that in both cases, the management could cancel the groups at any time without any input from the employees.\textsuperscript{191} Having found that the groups’ “continued existence” rested with the employers, the Board went on to find that there was evidence of “domination and interference” as prohibited under section 8(a)(2).\textsuperscript{192}

An interesting aspect of both \textit{Webcor} and \textit{Dillon Stores}, and of the last of the cases decided by the Board since \textit{Electromation},\textsuperscript{193} is a footnote by Chairman Gould which has appeared in each of these decisions. The footnote reads,

[Chairman Gould] notes that the control exercised by the [employer] over the [committee or group] is such that the freedom of choice and independence of action open to employees is

\textsuperscript{186} See \textit{Vons Grocery Co.}, 320 N.L.R.B. at 54.
\textsuperscript{188} 319 N.L.R.B. 1203 (1995). The Board's order in \textit{Webcor} was affirmed by the Sixth Circuit in NLRB v. \textit{Webcor Packaging}, Inc. 118 F.3d 1115 (1997). Where the Sixth Circuit endorsed the Board's approach in dealing with section 8(a)(2) disputes. In a short, yet interesting opinion concurring in the result only, Judge Ralph Guy, alludes to the highly political context surrounding the section 8(a)(2) dispute.

Because I believe that the result reached in this case no longer reflects congressional intent, it is with the greatest of reluctance that I concur. But for a presidential veto of amendatory legislation passed by the congress, what \textit{Webcor} attempted to do here would be viewed against the backdrop of legislation more hospitable to concepts like plant councils. \textit{Id.} at 1125.
\textsuperscript{190} See \textit{Reno Hilton Resorts}, 319 N.L.R.B. at 1157; \textit{Webcor Packaging}, 319 N.L.R.B. at 1211.
\textsuperscript{191} See \textit{Dillon Stores}, 319 N.L.R.B. at 1252.
\textsuperscript{192} See \textit{Dillon Stores}, 319 N.L.R.B. at 1252.
\textsuperscript{193} See \textit{Aero Detroit, Inc.}, 321 N.L.R.B. 1101, 1102 (1996).
too strictly confined within the parameters of the [employer's] making for the [committee] to be a genuine expression of democracy in the workplace.194

Chairman Gould’s footnotes are consistent with his concurring opinion in Keeler Brass, in which he indicated concern with the degree of independence that the members of the participatory programs enjoyed. The Chairman’s footnotes are also consistent with the Devaney and Raudabaugh concurrent opinions in Electromation, emphasizing the idea of free choice of employees in the selection of their bargaining representative.

V. CONCLUSION: WHERE ARE WE Now?

In looking at the Electromation progeny, one thing is clear, the Board continues to struggle with developing a standard to analyze the section 8(a)(2) problem. On the one hand, it appears, that the Board is following the Electromation test, at least in format. In determining whether the participatory program is a labor organization, the Board has consistently focused, as suggested by Electromation, on the “dealing with” element.195 However, the Board has been less consistent on the manner in which “dealing with” has been defined. While Electromation suggests a fairly broad interpretation of “dealing with,” the Board’s own dicta in that decision, the language used in E.I. du Pont concerning “patterns and practice,” and the way the “pattern and practice” language has been interpreted in later decisions, suggest a much narrower interpretation. For example, while the majority opinion in Electromation makes clear that “dealing with” should be broadly interpreted to include most bilateral processes,196 the concurring opinions suggested a much more limited definition. According to the concurring opinions, “true communication devices” in which the employer solicits and accepts employees’ ideas, should be permissible under section 2(5).197

The Board has defined “dealing with” as requiring a showing of “a pattern or practice, or that the group exists for a purpose of following such a pattern or practice,” of employees making proposals

194. Id. at n.6.
196. See id. at n.21.
197. See id. at 998.
to management and management responding to those proposals.\textsuperscript{198} A broad interpretation of this definition, consistent with \textit{E.I. du Pont}, will permit the Board to find a violation of section 8(a)(2) based on "pattern or practice" evidence by past behavior, or on the basis of evidence showing that such a "pattern or practice" is likely to develop, i.e., a prospective application. That is, it should suffice under this test, that the program under review has the potential for generating a "pattern or practice" even though it has not done so at the time of the Board's review. However, as evidenced by the \textit{Stoody Co.} and \textit{Vons Grocery} decisions, it is not clear the Board will be willing to consistently interpret the "pattern or practice" concept prospectively.

With respect to the domination and interference question, the Board's original position in \textit{Electromation}, focusing on the "continued existence" of the committee as a central factor in finding domination, has also been subject to some modifications. In \textit{Electromation}, the Board paid close attention to the question of whether the committee's continued existence depended entirely on the employer's fiat. By holding that a committee which can be terminated at the employer's will is clearly dominated by the employer,\textsuperscript{199} the Board arguably was imposing a new requirement for cooperative efforts: for a program to be legal under section 8(a)(2), it must be the case that it can be discontinued only with the consent or approval of employees. In later cases, however, the focus of the domination and interference question shifted from the continued existence of the committee itself towards a question on the decision-making characteristics of the committee.

Whether this particular aspect of \textit{Electromation} is likely to survive in the long run is unclear, especially in light of the language used in \textit{E.I. du Pont}, as well as in other recent NLRB decisions. In his concurring opinion in \textit{E.I. du Pont}, Member Devaney noted that the fact that the employer forms the committee and that the employer can dissolve the committee at will, does not in itself amount to a violation of section 8(a)(2).\textsuperscript{200} Somewhat troubling also are the concurring opinions of Member Raudabaugh in \textit{Electromation} and Chairman Gould in \textit{Keeler Brass Automotive}. In

\begin{itemize}
  \item 198. See \textit{E.I. du Pont}, 311 N.L.R.B. at 894.
  \item 199. See \textit{Electromation, Inc.}, 309 N.L.R.B. at 998.
  \item 200. See id.
\end{itemize}
addressing the question of domination and interference, both opinions discuss the independence issue by focusing on the issue of the origins of the workplace cooperative efforts. For example, in *Electromation*, Member Raudabaugh argues that the fact the employer initiates the idea of a participatory program is not sufficient to condemn it.\(^{201}\) Chairman Gould makes a similar argument in *Keeler Brass*. Chairman Gould noted that much of the initiative for cooperative efforts in the workplace has come from employers.\(^{202}\) Consequently, he added, these cooperative efforts are not unlawful simply because the employer initiates them.\(^{203}\) Missing from these two concurring opinions, however, is any mention of the "continued existence" element, a factor that was crucial to the Board’s majority in the *Electromation* decision.

Thus, it appears that little has changed since the “monumental” *Electromation* and *E.I. du Pont* decisions. The majority opinions in those two cases, arguably provided the foundation for a significant clarification of the legal standards surrounding the problem of workplace cooperative efforts. A review of the decisions that have followed the *Electromation* and *E.I. du Pont* cases, however, makes clear that a guarded and limited meaning, not much different than the predominant view before *Electromation*, has prevailed. In particular, the language in the concurring opinions reminding us that there was a substantial amount of room under the NLRA to experiment with workplace cooperative efforts, has resurfaced in later cases, championed by a somewhat unlikely ally, Chairman William Gould.

To the extent that not much has changed, certainly the concerns voiced primarily by employers has been unwarranted. There is no indication in the cases decided since *Electromation* and *E.I. du Pont* that suggests the Board is rushing to eliminate the ability of employers to establish workplace cooperative efforts. In that respect, the concerns on the extinction of participatory programs was “greatly exaggerated.” More importantly, however, is the implication that the argument raised in this Article has for the proposed legislation to amend section 8(a)(2). Given that the Board does not appear to have significantly altered the section 8(a)(2)

\(^{201}\) See id. at 1013.
\(^{202}\) See *Keeler Brass Automotive Group*, 317 N.L.R.B. at 1119.
\(^{203}\) See id.
analysis, any calls for radical legislative changes to the NLRA, along the lines of the TEAM Act, should not be uncritically adopted.