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12

Nonunion Employee Involvement and Participation Programs: The Role of Employee Representation and the Impact of the NLRA

Bruce E. Kaufman, David Lewin, and John A. Fossum

Employer-sponsored employee involvement and participation (EIP) programs have proliferated over the past two decades among American companies (Lewin, Delaney, and Ichniowski 1989; Lawler, Albers, and Ledford 1992; Commission on the Future of Worker-Management Relations 1994a). The impetus behind these programs is the desire of companies to improve productivity and lower cost in response to greater competitive pressure, coupled with evidence from academic research and two decades of experimentation in industry that these programs can indeed deliver higher performance and increased employee job satisfaction (Cotton 1993; Kaufman 1997).

Given the widespread popularity of EIP programs, and their apparent success in boosting firm performance and employee job satisfaction, it is not surprising that recent rulings by the National Labor Relations Board (NLRB, or board)—most notably *Electromation, Inc.* (1992)—have set off considerable controversy and debate (Nunn 1995; Morris 1996; Gely 1997). The *Electromation* ruling involved Sections 8(a)(2) and 2(5) of the National Labor Relations Act (NLRA or Act). As described in earlier chapters of this volume (Kaufman, Estreicher), Section 8(a)(2) prohibits employer domination, interference, administration, or financial support of a labor organization; and Section 2(5) defines a labor organization very broadly to include any kind of employee group that exists at least in part for the purpose of dealing with employers over one or more terms and conditions of employment.

The purpose of Sections 8(a)(2) and 2(5) are to prevent employers from establishing and operating so-called company unions, which, at the time of the enactment of the NLRA, were widely seen as a sham form of employee organization largely established by employers as a union-avoidance device (Brody 1994; Kaufman 1996, 1997). A number of observers are concerned, however, that Sections 8(a)(2) and 2(5) substantially stifle and restrict legitimate employee involvement and participation programs. Many others, however, believe these provisions remain a necessary bulwark in the protection of workers' rights to organize free of employer interference. The *Electromation* case brought these conflicting viewpoints into stark relief.

The company, nonunion at the time, had es-

tablished five employee "action committees" to obtain feedback and proposals for change on various company employment policies, such as attendance, pay progression, and smoking, that were a source of dissatisfaction to many employees (Nunn 1995). The Teamster's Union believed, however, that these committees were erected by the employer to thwart its efforts to organize the company and petitioned the NLRB to declare the committees a prohibited unfair labor practice. After extensive hearings and deliberations, the board agreed with the union and ordered the committees disbanded.

As previously noted, many representatives of management, and a number of legislators in Congress, reacted with shock and cries of alarm to the board's decision. They contend the *Electromation* ruling has the potential to seriously crimp the ability of nonunion companies to operate EIP programs, as these programs make extensive use of employee teams, councils, and committees, and many of the issues they consider inevitably involve some aspect of company employment policy, such as work-scheduling, safety, and incentive pay rates. Illustrative is the comment of Congressman Steve Gunderson (quoted in Devaney 1993) that the board's ruling, "called into question the legality of virtually every currently operating [employee participation] program in the nation." Gunderson subsequently cosponsored legislation with Senator Nancy Kassebaum called the Teamwork for Employees and Managers Act (TEAM Act) that would allow EIP committees to discuss "matters of mutual interest" as long as the committees do not take on the role of bargaining agent for employees. President Clinton vetoed the TEAM Act in 1996 (Maryott 1997).

Representatives of organized labor and a number of policymakers in Congress and members of the academic community applauded the board's decision, however, and staunchly deny that the NLRA needs revision (Devaney 1993; Morris 1994). They maintain that the ban on company unions does not significantly impede the ability of nonunion companies to operate legitimate EIP programs for purposes of enhancing productivity and efficiency and that enactment of the TEAM Act would only give employers one more weapon in their drive to thwart unionization. Indicative of this sentiment is the statement of trade unionist Owen Herrnstadt (1997, p.108) that "although it is an understatement to say that the world has changed since passage of the NLRA, the need to ensure that workers' voices are heard through participation in legitimate unions and not muted by sham unions has not changed."

Given the sharp cleavage in opinion on the merits and impact of Sections 8(a)(2) and 2(5) on nonunion EIP programs, and the growing proliferation of such programs in American industry, it is surprising and disconcerting how little direct empirical evidence is available on this issue. The research literature on employee involvement and participation is extensive (see Cotton 1993; Levine 1995; McLagan and Nel 1995), but very little of it has explored the role of employee representational bodies as a delivery vehicle for EIP (see, however, LeRoy 1996, 1997), and no studies we are aware of have conducted field level, case study research to document the extent of representational bodies in American industry and the impact of the NLRA on their structure and operation.

To partially this gap, reported in this chapter are detailed case studies of EIP programs at eight American companies and the role of employee representational teams, councils, and committees therein. The object of these case studies is to provide factual evidence on the range and type of EIP programs extant in the American workplace

and the degree to which these programs are constrained (if at all) by the provisions of the NLRA. Before presenting the case studies, however, we first examine the nature and structure of EIP programs and the EIP representational bodies that are legal and illegal under current and past NLRB rulings. The chapter concludes with an analysis of the case study evidence—supplemented by material obtained from personal interviews with managers, labor attorneys, and consultants—and a discussion of the implications for both current EIP practice in industry and the public policy debate regarding revision of the NLRA.

Structure of EIP Programs

A legal compliance analysis of nonunion employee involvement and participation programs first requires a careful definition of EIP and delineation of different types of EIP groups and organizational structures.

Cotton (1993), drawing on earlier work by Dachler and Wilpert (1978), suggests that EIP programs can be distinguished along five distinct dimensions. Modestly paraphrased, these are as follows:

Formal-Informal. Some EIP programs are formal in the sense of having a written constitution, bylaws, or governing rules and regulations, such as contained in an employee handbook or a company policy statement. Other EIP programs are informal with no written policy guidelines or defined structure. An example of the former might be a peer-review system of dispute resolution. An example of the latter might be a weekly breakfast meeting between the human resource director and a rotating group of employees.

Direct-Indirect. Some EIP programs provide direct, or "face-to-face," involvement for organizational members; others are indirect in that a subgroup of employees represents the entire workforce through participation in some type of committee or team. An example of the former is a system of management by objectives in which the individual employee and manager jointly determine the employee's goals for the coming year. An example of the latter is a plant-level committee composed of one employee representative from each department.

Influence in Decision Making. A key attribute of EIP is the extent of influence given employees in decision making. At one extreme, management provides no information to employees and makes all decisions beyond narrow task completion. In the middle range, management provides employees with information on a subject hitherto reserved for management and solicits their opinion. At the other extreme, employees may be given veto power over a decision and may in some cases even be delegated complete authority to choose. An example of the former extreme is a unilaterally announced change in work hours; an example of the latter extreme is complete delegation of inventory control to a self-managed work team.

Range of Issues. The range of issues considered in EIP programs can be distinguished by both breadth and depth. Breadth signifies the extent to which issues from different functional areas are considered, with production-related matters representing "narrow" EIP. Thus, a narrowly construed EIP program might deal only with product quality, such as in a quality circle, while a "broad" EIP program might deal with not only production matters but also a wide array of other subjects, such as customer relations, management succession, and employment policy. An example of the latter might be a European-style works council. Range of issues also has a depth (or high-low) dimension, where depth signifies the level of impact in the organization. Thus, low-level EIP

subject areas of "grievances, labor disputes, wages," and the like.

- Any EIP committee or group that is representational in nature clearly meets the criteria of "employees participate in." Whether a committee or group that is nonrepresentational (e.g., a committee of the whole) is also illegal has not yet received a definitive ruling, but some form of agency function seems to be crucial in drawing the line.
- An EIP committee need not be formally constituted to be considered a labor organization. The board stated in Electromation, Inc. (309 NLRB 990, 1992): "Any group, including an employee representation committee, may meet the statutory definition of a '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."
- EIP groups are illegal if they "deal with" the employer with respect to certain prohibited subjects. The phrase "deal with" has been interpreted broadly to cover not only bargaining and negotiation between employees and management but a wide variety of bilateral interactions. In this vein, the board stated in *Electromation, Inc.*, "We view 'dealing with' as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of these proposals by management. A unilateral mechanism, such as a 'suggestion box,' or 'brainstorming' groups or meetings, or analogous information exchanges, does not constitute 'dealing with." Thus, in the earlier *Thompson Ramo Woolridge, Inc.* case (320 NLRB 993, 995, 1961) the board found that an EIP committee made presentations to management of employees' views but that no recommendations fell within the meaning of "dealing with," but in another case, *Spark's Nuggett, Inc.* (230 NLRB 275, 276, 1977), the board found that an employee group established for purposes of resolving grievances did not transgress the "dealing with" concept since this was a delegation of management authority, rather than a bilateral interaction.
- EIP committees may lawfully discuss matters related to production, quality, company business decisions, customer relations, and so on. Even so, the committees will be found illegal as an unfair labor practice if there is sufficient evidence to show that they are part of an employer's efforts to coerce or influence employees in choosing outside union representation (Devaney 1994). Any issue, on the other hand, related broadly to terms and conditions of employment, such as work scheduling, safety, or grievances, is illegal. In practice, a rule of reason has been applied that exempts from the strictures of Section 2(5) EIP committees that discuss these matters but where it is clear that the illegal activity was inadvertent and very infrequently done.
- Once these issues are settled, and assuming the EIP group falls within the definition of a labor organization, the analysis then proceeds to the second step—whether Section 8(a)(2) is violated . The basic issue here is whether the employer "dominates," "interferes with," or "supports" a labor organization. In the *Electromation, Inc.* decision, the board states on this issue," . . . when the impetus behind the formation of an organization of employees emanates from an employer and the organization has no effective existence

independent of the employer's active involvement, a finding of domination is appropriate if the purpose of the organization is to deal with the employer concerning conditions of employment." Following this logic, in the past both the board and the courts have found evidence of domination, interference, and/or support when an employer financially or otherwise assists in the process of selecting employee representatives, helps draw up a charter for the group, provides any kind of ongoing financial support, provides meeting rooms, or pays employees for missed work time at council meetings. Although several federal circuit courts have attempted to relax the definition of "domination" by taking into account the employer's motive in setting up the EIP program—whether it was for the purpose of better communication or increased productivity, or union avoidance—the NLRB has so far ruled that Section 8(a)(2) constitutes a per se ban and thus employer motive is irrelevant (Nunn 1995).

Legal and Illegal Forms of EIP

We now come to the crucial question: which types of employee involvement and participation programs are legal under the NLRA, and which types are not? Two methods are used to determine the answer. The first is to return to the five dimensions of EIP programs previously discussed and see which ones are likely to run afoul of the law.

Formal-Informal. The formal-informal dimension is not determinative on the issue of legality. Either type may be legal or illegal, depending on other criteria.

Direct-Indirect. Subject to having violated at least one other prohibited criterion (e.g., discussing wages), an EIP program that provides some form of indirect representational or agency function will be ruled illegal. A group that provides "direct" participation, such as a committee of the whole or a production team, will typically not be found to violate the law.

Influence in Decision Making. The amount of influence or power exercised by the EIP group is not determinative of its legal status. Instead, the crucial issue is the structure of its authority and manner of interaction with management. As long as the authority to make decisions is clearly delegated to employees and they utilize it in an independent manner to reach decisions (e.g., in deciding grievance appeals), the EIP group is legal. Influence, no matter how small, that is exercised by an EIP group via bilateral interaction with management (e.g., discussing employee concerns) is likely to be ruled illegal.

Range of Issues. EIP groups that discuss any topic related to terms and conditions of employment are illegal. Literally interpreted, this includes such things as safety, work schedules, gain sharing, sexual harassment, and workplace violence.

Range of Membership. The membership composition of an EIP group is also not a determinative factor in determining its legality or illegality, as long as it includes at least some employees below the rank of first-level management. The committee may be limited solely to nonmanagerial employees, or it may be jointly constituted with representatives from both employees and management. Likewise, the representatives may be elected or selected in some other way (e.g., on a rotating basis). The crucial factors lie elsewhere—is the group representational in nature and does it deal in a bilateral manner with the company management?

These criteria should be able to distinguish the legal versus illegal nature of various types of EIP programs commonly found in American work-

places. Consider, for example, the following (Kaufman 1999):

Self-directed Work Teams. These are legal, since the participation is typically "direct" rather than representational in nature.

Quality Circles. These are also legal, since the issues considered are typically production-related.

Safety Committees. Although thirteen states have passed legislation mandating that companies establish some form of joint employee-management safety committee, these committees nonetheless are often illegal. This conflict is evidenced by recent proposed legislation, the Comprehensive Occupational Safety and Health Reform Act, which included a provision specifically exempting safety committees from the strictures of the NLRA (Watchman 1994).

Grievance Committees. These groups typically contain several management and employee members who hear disputes and render decisions on matters of discipline, discharge, and so on. If the grievance committee is delegated final authority to make decisions, it will pass the legality test. If its decisions are in some sense recommendations to management, or are reached only conditional on management approval, it runs the risk of being found illegal.

Ombudsperson. An ombudsperson is an individual designated by the employer to serve as a combination counselor, mediator, and problem solver with respect to workplace disputes. Although an ombudsperson is almost by definition not a collective entity, the person nevertheless often serves in an agency capacity for an employee grievant vis-à-vis the employer. Thus, an ombuds plan will be an illegal "dominated" labor organization if the ombudsperson represents an employee in a dispute over terms and conditions of employment (Morris 1994).

Employee Councils. Another form of EIP is an employee committee or joint employer-employee council, formed either on a department or plantwide basis, that meets with management on an ongoing basis to discuss matters of mutual interest. It is legal only as long as it avoids issues concerning terms and conditions of employment.

Focus or "Brainstorming" Groups. Some companies ask selected employees to meet with management as a focus or "brainstorming" group for purposes of offering suggestions and comments on some change in company policy or opinions on topics of concern to employees. These groups are legal as long as they are ad hoc, temporary, and for purposes of communication.

Scanlon Plans. A Scanlon Plan is a form of gain-sharing compensation system in which employees submit cost-saving suggestions to a joint employee-employer committee. The committee decides which ideas have merit and should be implemented. Employees then share in some portion of the savings. These committees are legal as long as management determines the payout formula and timing and size of any bonuses; they are illegal, however, if employee members of the committee participate in the pay-determination process (Murrmann 1980).

Employee Representatives on the Board of Directors. One or more employees are sometimes chosen either by management or fellow employees to serve as members (voting or non-voting) on the company's board of directors. This arrangement is legal only if the employee representatives either take part in the deliberations and decision making on issues unrelated to terms and conditions of employment or, if terms and conditions of employment are on the table, they participate only to the extent of communicating employee views and opinions or passing on relevant information to the other board members.

Nonunion Professional Employee Association.

Professional employees, such as nurses, engineers, and teachers, sometimes form an association to promote their employment interests. These interests often include a mix of professional issues, such as accreditation standards and training requirements, and issues related to the terms and conditions of employment, such as salary levels and work scheduling. These associations may cover only employees in one company, or they may represent employees across several companies or states. They are nonunion in that they have no formal certification from the National Labor Relations Board as an agency of collective bargaining. These nonunion employee associations are legal as long as they are not employer dominated, which is to say they are independently initiated by employees and do not rely on employee financial or administrative support for their continued existence.

The second method that sheds light on what types of EIP programs are legal under the NLRA is to examine guidelines given to companies on this matter by their corporate legal counsel. An illustrative example, cited with apparent approval by former board member and *Electromation, Inc.* coauthor Dennis Devaney (1994), is the following. He states that in order to remain within the legal ambit of Section 8(a)(2), such plans should:

> 1. avoid structured groups in favor of ongoing employee involvement on an individual or unstructured group basis;
>
> 2. establish task-specific ad hoc groups that focus on a particular communications, efficiency, or productivity issue (as opposed to wages, hours. . . . .) on a short term basis and then go out of existence;
>
> 3. use irregular groupings of employees, such as occur during retreats and the like, to address communications, efficiency, or productivity issues; and
>
> 4. use staff meetings to address communications, efficiency and productivity issues. Such meetings should be attended by all staff, rather than a representative number, in order to avoid the problem of employees representing other employees.

EIP Programs in Nonunion Companies: Eight Case Studies

We next present minicase studies of EIP programs currently in operation at eight American companies. These companies, as indicated below, come from a variety of lines of business, are located in several areas of the country, and range in size from approximately 100 employees to over 100,000. They were selected largely on the basis that: (1) the unit (plant, division, company) is mostly or completely nonunion; (2) the plant or company has a well-developed EIP program, or is moving in that direction; (3) the companies represent different industries, including manufacturing, transportation, and services; and (4) the senior management was willing to be interviewed and allow us to publish a summary of what we found. High-level managers from three other companies with well-established EIP programs were also interviewed, but they requested that their companies not be featured in this study.

In selecting the companies, we relied largely on the advice of management consultants and attorneys as to which companies have advanced EIP programs. No effort was made to prescreen the companies in order to find ones having a particular type of EIP structure or activity, nor were any companies interviewed subsequently excluded from this article because they did not in some way provide support for the policy positions we advance later in this article. All case studies reported here were reviewed by the companies for factual accuracy.

Company A

Unit: Individual Plant
Line of Business: Manufactures Soaps and Detergents
Employment: 270

Structure of EIP

Self-managed Work Teams. The plant runs on two twelve-hour shifts, and each shift has two production teams, one in the process (manufacturing) area and the other in the packaging area. Duties of supervisors covering five functional areas have been delegated to the production teams: safety, production, training, administrative, and counseling. Various team members ("technicians") assume responsibility for managing each of these functions as a "second hat." This requires extensive, ongoing, cross-functional training, roughly estimated to be five to ten times the amount provided in a traditional plant. The most important of these areas is production coordinator, and this job is elevated to a full-time position. The production coordinator is a team member selected by his or her peers on an annual basis. Teams are responsible for all aspects of day-to-day operation, including ordering supplies, planning production runs, monitoring quality, machine repair, and counseling peers on performance or behavior problems. They also interview new job candidates. When additional technical or management expertise is needed, teams call on "resources" from a cadre of nine people in a "leadership group," such as the plant manager (who splits his time between this plant and another in a different state), the human resource director, controller, and so on. The least integrated and self-managed of the groups is the twenty-person administrative support group, composed of clerical and administrative staff.

Packaging and Process Work Groups. The next level of EIP in terms of organizational structure is the Packaging Work Group and Process Work Group. Each group meets once a week and has twelve technicians and leaders. The group's mission is to review operating results; to address problems or needs in production, quality, training, and the like; to perform medium- to long-range planning for their area; to appoint special task forces to work on some issue or problem (e.g., shift rotation, late delivery of supplies), and so on. Technicians rotate on and off each group as part of the way they fulfill the "leadership" block in the pay-for-knowledge compensation system. All technicians thus have an incentive and expectation to develop leadership/management skills.

Plant Review Board. Problems or disputes related to job performance, interpersonal relations, work assignment, and so forth are first dealt with at the team level by the employee and one of the several counselors. If not resolved at this level, the HR director is called in as a "resource," and as a final step the grievant can ask that the dispute be presented to a body known as the Plant Review Board, a peer-review group composed of both technicians and leaders. The board can only make a recommendation, the plant manager has final say-so. No employee can be discharged without the Plant Review Board first examining the case.

Special Project Teams/Committees. Ad hoc committees and teams of technicians and leaders are formed on an "as needed" basis to address a particular problem or issue. They develop recommendations that are forwarded to the leader-

ship group, who then make the decision. The company would prefer to have greater joint decision making at this step, but has built a "wall" in the process to avoid a potential unfair labor practice charge of "dealing with" employees.

Compensation. The plant has a pay-for-knowledge system and an all-salaried workforce. A form of gain-sharing was recently introduced for all employees. Pay rates are pegged at the 95th percentile in the local labor market in order to attract and retain the cream of the local labor supply.

Information. Extensive information on all aspects of production, quality, cost, on-time-delivery, and so forth are provided to the technicians. "Nothing is hidden." Formal employee surveys are done, but relatively infrequently and largely in response to a perceived "need to know."

Company B

Unit: Individual Plant
Line of Business: Automobile Assembly
Employment: 2,400

Structure of EIP

Work Zone Teams. The plant is organized into "work zones" and each work zone typically has a "team" of ten to twenty employees, but these teams are not self-managed (an "area manager" oversees each team in a supervisory capacity). The teams meet at the start of each shift to review production issues, determine job rotation, and the like. They are also responsible for quality inspection, repairs, and so forth in their work zone. They do not interview job candidates or get involved in peer counseling.

IMPACT Groups. These evolved out of Quality Circles, which proved to be ineffective. An employee may request to the area manager that an IMPACT group be formed to solve a problem or address an issue (e.g., a redesign of a work process to reduce heavy lifting). The manager forms a team of people with the relevant skills/knowledge (e.g., a safety engineer, an HR person) who develop a proposed solution. The area manager has the discretion to approve or disapprove the proposed solution, but usually approval is given (sometimes subject to modification).

Safety Committees. These are joint employee-management committees that meet periodically, investigate reports of unsafe conditions, sponsor training sessions, and consider new safety practices and policies. The safety committees are the most formal type of employee representation in the plant. They necessarily deal with subjects related to terms and conditions of employment, such as job rotation, work hours, and line speed.

Peer-review Panel. This is the most "empowered" committee in which employees participate. Employees who have reached the last step of the dispute resolution process, or who have been terminated for certain offenses, can request a hearing before a peer-review panel. The panel is composed of five people, two from management and three from the employees. Employees who have received additional training in dispute resolution are drawn from a pool. Their decision is binding and results in reversal of a disciplinary decision in about 20 percent of the cases (a number that is relatively low, it is said, because the process is so carefully managed before cases get to this point).

Focus Groups. Management regularly convenes focus groups of employees to solicit opinions and suggestions on certain topics (e.g., change in vacation scheduling). Thirty to forty employees are selected from across the plant on

a one-time basis and meet for an hour or so.

Breakfast and Lunch Meetings. The plant's vice president of human resources, as well as other executives, schedule regular breakfast and lunch meetings with employees for purposes of informal discussion and "taking the pulse."

Success Sharing Compensation. Part of the compensation system is a "success sharing" bonus, which makes payouts to employees based on plant-level performance on several business plan objectives (e.g., defect rates).

Information Sharing. Periodic employee surveys are done. Video monitors are stationed in each work zone and are used for communicating with employees about new policies, upcoming events, etc. Weekly bulletins and monthly newsletters are also distributed.

Company C

Unit: Company
Line of Business: Airline Transportation
Employment: 68,000

Structure of EIP

Continuous Improvement Teams. Approximately 3,500 employees from across the company are organized into 300 continuous improvement teams (CIT). The teams are initiated by the management or employees of an individual work unit (e.g., a group of mechanics at a repair facility), usually include six to ten people, and focus on work process improvements. Team members volunteer and rotate on and off on an informal basis.

Personnel Meetings. Once every one or two years employees in each work unit participate in a "personnel meeting." The divisional vice president, or similar person, leads the meeting, accompanied by a representative of the personnel department. It is essentially a "town hall" event in which the executive first provides an overview of recent business developments, performance issues in the division/work unit, and the like, and then solicits questions and discussion from the audience on any and all issues. Suggestions/complaints are recorded for later management review and action.

Inflight Forum. One of the divisions of the company is "Inflight Service." It has 18,000 employees, most of whom are flight attendants. The senior vice president in charge of the division organized an employee representational group called the "Inflight Forum" composed of one representative from each of the company's twenty-six bases. Each representative is elected. The Forum, which meets three or four times a year at the company's headquarters, promotes improved communication and exchange of ideas between employees and senior management. Each base has its own "miniforum" with elected employee representatives who meet with base management. Issues are solicited from all the bases, and the two that are both systemwide in nature and of highest priority are put on the agenda of the Forum. Any subject can be discussed, but guidelines established by management stipulate that certain things are "off the table"—mainly subjects that are of a companywide nature, such as number of vacation days. Besides promoting dialogue, the Forum can form teams to investigate a particular topic, benchmark competitors' practices, and then develop a proposal to be presented to senior management. Management may accept or reject the proposal, or suggest the need for modifications or further deliberation by the Forum.

Personnel Board Council. Approximately two years ago a companywide body called the Personnel Board Council was established. In the last contract negotiations the company's pilots, who

are unionized, successfully negotiated to get one nonvoting seat on the company's board of directors. The company decided also to provide the nonrepresented employees with nonvoting board seats. Toward that end, a representational group was formed, called the Personnel Board Council (PBC), which is composed of one person from each of seven divisions. One division covers management employees up to the senior executive level. The purpose of the PBC, as stated in a written charter, is to provide a two-way communication channel between the board of directors and the employees. The employees in each division establish the procedure for choosing their representative. None is elected; rather, the representatives are chosen through a process of nomination and personal interview conducted by employee peers. The PBC members serve for two-year terms. They solicit opinions, ideas, and complaints from fellow division employees, and also travel as a group to various company facilities to conduct focus groups and personal interviews with employees. They then decide among themselves which is the most important companywide issue and are given fifteen minutes at the next Board of Director's meeting to discuss it and present recommendations and proposals. Management does not participate in choosing the topics to be presented to the board or in developing the proposals, other than to provide information or resources if requested. A summary of the topics presented and the discussion thereof at the board meeting is distributed to employees through several methods, such as newsletters and electronic intranet system.

Profit-sharing. The company recently established a profit-sharing program for all employees. No other form of gain-sharing or incentive pay is provided.

Information Sharing. Periodic employee surveys are conducted. The results of the most recent one were made available to all employees. A once-a-month "phone-in" is held in which employees anywhere in the world can call in and ask a question of a designated senior executive.

Company D

Unit: Mill
Line of Business: Paper Manufacture
Employment: 700

Structure of EIP

Production Teams. Production employees are organized into teams built around distinct work processes (e.g., operation of a paper machine). The teams are responsible for day-to-day management of operations and administrative tasks (e.g., safety). Team members rotate jobs, so extensive cross-functional training is done. Each employee has a matrix of required and elective "skill blocks" to complete as part of the skill-based pay system. Successful completion of each skill block is determined by a panel of employee peers.

Dispute Resolution. The first step in dispute resolution is counseling with peer team members. If the problem is not satisfactorily resolved, the grievant can ask that a peer-review panel be established. The panel's charge is to develop two or three possible courses of action, state as a recommendation which one the panel favors, and turn these over to the plant manager, who makes the decision. A discharged employee can also request arbitration if the person's team members disagree with the decision.

Department and Mill Core Teams. Every department has a "core team" composed of employee representatives and department management

representatives that meets periodically to discuss department-level issues. These are generally related to production, quality, on-time delivery, and other such matters, but employment issues such as relief time and safety come up. There is also a "mill core team," composed of ten employees and six "leaders" (management), that meets regularly to discuss millwide issues. Both department and mill core teams have written charters. These charters explicitly state that the teams are not to consider personnel issues such as wages, vacations, and hours. The person interviewed felt this requirement "chilled" the effectiveness of the EIP process. The mill core team meetings tend to be bland, and the mill manager usually does not attend because employees tend instinctively to defer to his authority. The employee representatives on the mill core team select the employees to serve on the department core team, making it a "feeder" system for the former. Service on these teams is required for successful completion of certain skill blocks.

Listening Groups and Project Teams. Once a year the mill's human resource director forms a "listening group" of employees and solicits their opinion on a set of issues. The mill also puts employees on special project teams to investigate specific issues and make recommendations. Each year, for example, several employees and the human resource director serve on a compensation committee that surveys pay rates at other mills. The HR director then develops recommendations for senior mill management.

Employee Surveys. Done every two years.

Company E

Unit: State-level Unit of the Service Division of an 110,000 employee company

Line of Business: Service and Repair of Photocopiers ED: Can't get rid of bad break

Employees: 450

Structure of EIP

Self-managed Teams. The employees in this unit of the company are primarily service technicians who repair and service the company's brand of photocopiers. Up to the late 1980s, a manager would be assigned to coordinate and monitor approximately twelve technicians. It was the manager's job to act as a clearinghouse for customer calls, assign calls to individual technicians, take customer complaints, and monitor the work and performance of each technician. Technicians provided the manager with daily and weekly reports of their activities, the types of repairs done at each cite, and the cost of parts used. A significant redesign of the traditional organizational structure and underlying work processes was done in the late 1980s as part of a companywide TQM program. Technicians were formed into work groups (teams) of six to seven members, and the group was made responsible for many of the tasks formerly done by the manager (but only after very extensive training). Thus, the work group is empowered to decide how the calls will be handled, who will be assigned to each, and how the work is to be done. Managers now have a span of control of thirty-to-one (approximately five work groups).

Information. Part of what allowed the large increase in span of control is new technology. Each technician has a laptop computer and, instead of giving the manager a written report, downloads the data to corporate headquarters, which can, in turn, be immediately accessed by all work group members, the manager, and work groups in other states. Technicians also have elec-

sues (e.g., a new performance management system). These teams are also joint employee-management groups. They periodically update the PC with a progress report and in turn receive "mid-course" feedback. Eventually they present a report or set of recommendations to the PC, which through a process of informal consensus building decides to either accept, modify, or send back the proposal for further work. An accepted proposal is then submitted by the PC to the division's all-management "executive council," which makes the final decision.

Town Hall Meeting. Every year all employees attend a town hall meeting offsite where plant management and teams report on various aspects of plant performance, including profit and loss, then followed by an open question-and-answer period.

Peer Review. A half dozen channels exist for resolution of workplace problems, but one option is to bring the matter before a plant-level peer-review panel.

Employee Survey. A survey of employees is done regularly.

Company G

Unit: Plant
Line of Business: Powered Janitorial Maintenance Equipment
Employment: 100

Structure of EIP

Self-Managed Work Teams. The plant runs on two eight-hour shifts with six self-managed work teams (SMWTs), varying in size from two to twelve people. Each of the teams is responsible for final assembly of a particular product line. Five supervisors (reduced from twelve in the traditional system) perform roles of coaching, mentoring, problem solving, communicating goals and feedback from higher management, and assisting in disciplinary/performance problems. Teams work with industrial and product engineers to design work areas and assembly procedures as new product prototypes are developed. Each team is responsible for its production planning consistent with output goals of the firm. Teams interview employees or job applicants who are interested in becoming team members and discuss with them team expectations and performance criteria. The teams provide the HR manager with feedback and recommendations but do not have final authority to select among applicants. Teams do have the authority to allocate overtime hours among members and were at one time given authority to allocate vacation days. They did an ineffective job with the latter, and this task was transferred back to management.

Team Leader Council. Each self-managed workteam elects a leader who serves on the Team Leader Council. The position rotates among team members. The mission of the council is to discuss issues that are general across work groups. The council has fallen into disuse, primarily because of the team-specific nature of many production problems and the temporary nature of the groups' incumbents (due to the rotation of team leaders).

Plant Advisory Board. The Plant Advisory Board (PAB) is an elected group among assembly workers. It meets periodically with top management and receives information about future production plans and wage survey data. The PAB also provides top management with information about employee concerns in these and other areas.

CEO Meeting. The company's chief executive officer (CEO) holds semiannual meetings with

all employees to update them on sales, business developments, and other pertinent information.

Compensation. A pay-for-knowledge compensation system was installed when the company adopted self-managed work teams. The company has also had a profit-sharing plan for many years.

Company H

Unit: Company
Line of Business: Express Mail and Package Delivery Service
Employment: 121,000

Structure of EIP

Survey-Feedback-Action Process. A long-standing human resource practice of this company is its Survey-Feedback-Action (SFA) process. The SFA is a 29–item structured computerized survey that is administered on-line annually to a 10 percent sample of the company's U.S. and Canadian workforce. The human resource department analyzes the responses and distributes a summary report to all managers and supervisors, who, in turn, share the report with their employees (the feedback portion of the process), The HR department also uses the response to develop suggested action items for managers and supervisors. Upon mutual agreement that these action items are appropriate, the line managers are required to inform employees of the actions they plan to take and to monitor their effectiveness. To reinforce use of the SFA, superiors regularly rate the performance of managerial/supervisory personnel in providing SFA feedback to employees.

Supervisor-Management Board. A standing committee, the Supervisor-Management Board (SMB), was established to facilitate communication and exchange of information between senior management and supervisors and lower/middle managers in the various units/departments/facilities. The supervisory members of the SMB are appointed by senior management. The board considers a wide range of issues but gives particular emphasis to company-level matters. The board also serves as an "appeals" channel for supervisors and managers—for example, on issues such as promotion, relocation to other company facilities, and proposed areas of action based on SFA reports.

Employee Committees. The company often uses employee committees to deal with specific business and workplace issues. These are generally ad hoc committees of a "project" nature with the members recommended/appointed by management or solicited on a voluntary basis. Many of the issues examined are business related, such as tracking packages and the design of a new Web page, but some employment issues are also considered. Examples include revisions to the company's compensation plan, training and career development programs, job assignments, and an employee recognition and reward program. General managers of units/departments/facilities may establish their own ad hoc committees to deal with business and/or workplace issues, but must receive permission from the vice president for human resources before doing so. One such "local" ad hoc committee was formed to deal with the issue of relocating company facilities/depots from higher cost to lower cost locations; another was formed to deal with workplace safety issues for employees working the night shift in high-crime areas.

Employee Suggestion Program. A formal suggestion program is in place to encourage employees to submit ideas on how the company can reduce costs, improve quality, and so on. Em-

ployee suggestions are made at local facilities, and the most promising are forwarded to company headquarters for assessment and action. Over 3,000 suggestions are received annually. Monetary rewards of up to $25,000 re made, along with a variety of nonmonetary rewards and recognitions.

Guaranteed Fair Treatment Program. Grievances that cannot be settled informally between the employee and first-line supervisor can be appealed through three levels of review: management review, office review, and executive review. This procedure is known as the Guaranteed Fair Treatment (GFT) program and is available to all employees up to the level of middle manager. About 5 written grievances per 100 employees are filed annually. A maximum of seven days is allowed for settlement at the first two steps and twenty-one days at the final step.

Profit-Sharing. The company's compensation program calls for 75 percent of an employee's pay to be in the form of a base wage or salary, and 25 percent to be in the form of "pay at risk." The latter component takes the form of profit-sharing. In addition, certain employees receive bonus payments based on achievement of individual, team, or department goals.

Information-Sharing. In addition to information provided to employees through the SFA process, the company uses a printed newsletter and e-mail communications to inform employees about business developments. Also in place is a designated telephone "hot-line," which any employee in the company worldwide can use to pose a question or raise an issue with a senior executive.

Compliance Analysis: The Case Studies

We believe that the breadth and depth of employee involvement and participation activities undertaken by these eight companies is quite striking. We also perceive a significant incongruence or gap between what a strict reading of the labor law says is permissible and what several of these companies are doing in their EIP programs.

Most noteworthy in this regard are Company C (airline transportation) and Company F (missile manufacture). Both companies have employee representational bodies that are in a number of respects closely akin to the 1920s-era employee representation plans. In the former case, the In-Flight Forum and the Personnel Board Council are divisionwide or companywide representational bodies financed by the employer. They have written charters, elected or selected employee delegates, regular meetings with management, and agendas that include issues related to the terms and conditions of employment. In the case of Company F, the People Council spans five plants, has selected employee representatives that meet with management, and considers various aspects of the terms and conditions of employment. It should be noted that executives at both companies are well aware of the law regarding nonunion employee committees, have consulted labor attorneys on the matter, and have proceeded with their representation plans in the belief they meet all legal requirements of the relevant labor law (the Railway Labor Act in the case of Company C and the NLRA in the case of Company F). It can fairly be said, however, that parts of the EIP programs at these two companies appear to push against the boundary of what is permissible under the NLRA.

Five of the other companies—Company A (detergent manufacture), Company B (auto assembly), and Company D (paper manufacture), Company G (janitorial equipment) and Company H (package delivery)—also have employee representational bodies that in some respect raise Sec-

tion 8(a)(2) compliance issues, but not to the same degree as Companies C and F.

In Company A, for example, the Packaging and Work Process groups are composed of employee representatives and selected managers, focus predominantly on production and quality issues but also on employment matters related to scheduling and safety, have authority to deliberate and make decisions, and are company financed and controlled. In Company B, the joint safety committees appear to be the part of the EIP program that comes closest to infringing on Section 8(a)(2), given that the committees are composed of employee representatives and selected management personnel and are empowered to make decisions jointly on safety matters. In Company D, the department and mill core teams appear to most closely infringe on Section 8(a)(2)'s prohibitions, for even though the focus of the groups is on production issues, the employee and management representatives on each team must occasionally consider employment subjects, such as work scheduling, job rotation, and safety, in the course of their deliberations. The EIP body in Company G that appears most questionable from a legal point of view is the Plant Advisory Board, since it is an elected representative group and confers with management over some issues that are related to terms and conditions of employment. The employee committees at Company H also sometimes deal with management on issues related to terms and conditions of employment, although, unlike the PAB at Company G, these employee committees tend to be one-time, more informally constituted project teams and thus less likely subject to legal challenge.

The only company of the eight considered here that appears clearly to fall within the permissible boundaries established by the NLRA is Company E (photocopier service). The work groups are composed of all technicians assigned to that unit and thus are not representational in nature. These work groups correspond most closely to the small, production-oriented "teams" that Estreicher (1994) calls "on-line" systems (as opposed to "off-line" systems that are more often representational and deal with issues beyond production and quality) and that are focused on in much of the contemporary management literature on high-performance workplaces (Katzenbach and Smith 1993).

Another indication of the gap between actual practice among these eight companies and what is permissible under the NLRA is to compare their EIP programs with the practices cited by former NLRB member and *Electromation, Inc.* coauthor Dennis Devaney (1994) as legally permissible. Briefly, they are: to avoid structured groups in favor of EIP conducted on an individual or unstructured group level; establish task-specific ad hoc groups focused on productivity, efficiency, and communication; use irregular groupings of employees, such as at retreats; and use staff meetings to address communications issues, where all staff are present (to avoid representational issues). It is evident that only the EIP program at Company E, the photocopier service provider, comes reasonably close to meeting these criteria. The EIP programs at the other seven companies would all have to be modified, modestly at Companies A, B, D, G, and H and substantially at Companies C and F.

Comments of Managers, Attorneys, and Consultants

To gain further insight on the constraining effect of the NLRA on employee involvement programs in nonunion companies, in each interview at these eight companies we asked the management executive a series of open-ended questions about

his or her opinion regarding the impact of the law on the company's EIP activities and whether the company would use more employee representational EIP structures if allowed. These matters were also explored in interviews with managers at three other companies who chose not have their EIP activities featured in this article. We also interviewed four labor attorneys on the management side who are familiar with EIP programs and Section 8(a)(2), and two management consultants who specialize in the design and implementation of high-performance workplace systems. Their comments and observations are summarized and synthesized below. Obviously, they are anecdotal, in some cases speculative, and based on a small number of cases, so caution is required in generalizing from them.

We queried the managers regarding the extent to which they think their EIP programs are within the legal constraints of the NLRA (or RLA). Reactions tended to fall into three groups. The first consists of several managers whose EIP programs were clearly within the law, or close to it (e.g., the photocopier service unit). Their perspective is that while the restrictions imposed by the NLRA may be counterproductive and out-of-date, this is of little practical concern since they do not have, and do not desire to have, the more formal systems of employee representation that might pose a legal problem.

The second response pattern was from managers whose EIP programs come closer to the legal boundary established by the NLRA but who have taken pains to make sure the programs meet not only the spirit but also the letter of the law, such as those at Company A. Typically, they were more likely to follow the counsel of a management labor attorney in setting up the EIP program and to structure it in ways that would pass muster with the NLRB. In this regard, the managers uniformly saw attorneys as a conservative and restraining influence on their initiatives in the EIP area.

The commitment of these managers to a strict "better safe than sorry" approach to EIP forces them to make certain compromises or changes in the program that are typically viewed as awkward or counterproductive. To avoid a charge of "dealing with" employees in a manner that would violate the NLRA, for example, companies resort to several stratagems. They may announce, for example, that all employment-related issues are "off-limits." Doing so, however, is seen by the managers as counterproductive on two counts: first, because many aspects of efficiency enhancement and quality improvement inevitably require detailed, in-depth discussions with workers of various employment issues, such as work schedules, cross-functional training programs, and pay-for-knowledge incentive wage systems; and, second, because many employees see EIP programs devoted only to productivity and quality issues as serving largely management's interests and thus desire as a quid pro quo that issues central to them, such as pay, benefits, and vacation time, also be put on the table for discussion. Paradoxically, say these management executives, Section 8(a)(2) actually works *against* employee interests in this regard since it provides nonunion companies with a convenient excuse to avoid dealing with issues that primarily affect the well-being and livelihoods of workers.

Alternatively, the companies may completely delegate authority to the employee committees so that there is no bilateral interaction between management and labor, such as making the decisions of a peer-review panel final and binding. From a management perspective, this approach both satisfies the law and increases the credibility and legitimacy of the decisions made by the

legislation. And, finally, even if a company is ultimately found guilty of a Section 8(a)(2) unfair labor practice, the typical penalty, as previously noted, is quite modest.

For these reasons, the managers, attorneys, and consultants interviewed for this study believed that the restrictions contained in the NLRA on company unions are having a less adverse impact on legitimate EIP programs than was initially feared after the *Electromation, Inc.* decision in 1992. In effect, some companies have found ways, not always welcome or efficient but nonetheless serviceable, to live with the law, while others have chosen to go quietly beyond it, operating what one person described as "stealth" employee involvement committees.

It would, on the other hand, be incorrect to say that *Electromation, Inc.* is having *no* effect on nonunion EIP programs, based on the information gathered from our field work. Both managers and attorneys stressed that despite the small probability of being charged with a Section 8(a)(2) violation and the small penalties assessed if found guilty, most companies want to stay within the boundaries of the law as a matter of business ethics. Furthermore, most companies understandably want to avoid both the large financial costs and public embarrassment associated with litigation before the NLRB and courts. It was also noted that litigation of Section 8(a)(2) cases can drag out for years, should the company appeal an unfair labor practice charge, with significant costs of diverted management attention, organizational turmoil, and employee demoralization. Finally, some managers said they also did not want to provide unions with a pretext for filing an unfair labor practice charge, or for otherwise harassing the company, and thus they deliberately restrict the expansiveness and scope of their EIP efforts.

We then asked how the EIP practices in nonunion companies would change if unencumbered by legal considerations. The majority of managers, consultants, and attorneys interviewed for this study believed that a fairly large number of companies would modestly expand their EIP programs in terms of the breadth and depth of activities delegated to employee representation committees. One manager, for example, said if the law allowed he would empower the employee and management representatives on the plant compensation committee to determine, subject to certain policy guidelines established by top management, the size of the quarterly gain-sharing bonus for production employees. Another said she had formed a joint employee-management team to investigate employee complaints about the plant's vacation schedule, had the team research the issues and alternatives, and then present the information to her for her final decision. Had the law allowed, she said, she would have chosen to interact with the team in the decision-making process so there was a greater element of mutuality in the final product. These kinds of restrictions, it was felt by the people interviewed, are fairly common in advanced EIP programs and have a detrimental effect, albeit not overwhelmingly in most cases, on what can be accomplished.

While most nonunion companies would probably expand their EIP programs "on the margin," a smaller number, it was felt, would probably go further. Accordingly, we queried all the people interviewed whether in their opinion companies would, if unconstrained by the NLRA, desire to put in place some equivalent of the formal, company union-like representational structures found in the 1920s-1930s, per the fears of the opponents of the TEAM Act. The common response was that most companies would not go this far, for four reasons. One is that these types of formal plant- or companywide structures are too

cumbersome, costly, and time-consuming, particularly in today's environment where operational flexibility and decentralization of decision making is increasingly emphasized. Second, many respondents doubted that these company union-like bodies provide much additional benefit, either in improved efficiency and customer service or improved employee morale, over and above what can be attained from smaller-scale, more-focused EIP activities (e.g., special project teams, safety committees). Third, many companies like to foster an organizational culture that emphasizes individual treatment and respect and thus shy away from formal systems of employee representation, which tend to create a sense of collective identity among employees and a collective approach to problem solving. Fourth, managers worry that in-house employee committees may become the launching pad for union organization of the company. One manager described in-house committees as "pet bears" and said that if not treated well they can quickly turn on the company and get out of control (the "pet bear" analogy is also reported in Taras and Copping 1998).

These negative features notwithstanding, the people interviewed believed that a small minority of firms would nevertheless choose to operate formal plant- or companywide employee committees and councils if permitted by the law. Examples cited were the formal employee representation plans at the Polaroid Corporation and Donnelly Corporation, both recently ordered disestablished by the NLRB (Commission on the Future of Worker-Management Relations 1994a; Kaufman 1999). Partly, it was felt, companies such as these adopt formal systems of employee representation due to the overriding importance attached by their founders or top executives to fair dealing with employees or the fostering of a "family" corporate culture. Also important, we were told, is that in very large companies, and especially those experiencing organizational stress, a formal system of employee representation can be an effective method to promote improved communication between top executives and shopfloor workers, separated as they often are by many layers of corporate bureaucracy and thousands of miles of travel distance, and to foster a win-win approach to resolving potentially divisive issues, such as the structure of layoffs in a downsizing or a change in the work schedules of flight attendants.

A final issue discussed with the people interviewed was the role of employee committees and councils as a union-avoidance device (also see Taras 1998; Summers 1997). All managers interviewed stated a desire to avoid unionization of their facilities and said their human resource programs, including EIP activities, were operated with this goal (as well as numerous others) in mind. They did not see anything antisocial or illegal about this, as in their view their companies are avoiding unions by promoting win-win employment practices that yield additional productivity and quality for the company and more satisfying, highly compensated jobs for workers. Several noted, in this regard, that their facilities had not experienced a union organizing drive for many years, if ever, and were in general seen in the local community as highly desirable places to work.

A point made by a number of the people interviewed is that there are other cheaper and oftentimes equally effective ways, at least in the short-run, to avoid unions—such as targeting hiring and firing decisions to weed out people more likely to favor unions and use of "hardball" attorneys and consultants at the first sign of union activity—than employee representation commit-

tees and the other high-involvement practices utilized by companies, such as those interviewed for this study. They also noted that the companies most at risk of unionization are often also most likely to avoid establishing ongoing employee committees and councils, except perhaps as a stopgap device, because they do not wish to share power with employees nor give them an opportunity to develop a collective sense of grievance or forum for collective action. Even a number of progressive "high road" employers shy away from employee representation plans, it was stated, because the companies fear that the committees and councils can easily "backfire" and turn into an entry point for outside unions, in addition to the considerable management time and expense required to operate them successfully.

Conclusions and Policy Implications

This study provides what we believe to be the first case study evidence of the composition and structure of individual employee involvement and participation programs in a cross-section of advanced, "high-involvement" nonunion companies (also see Kaufman 1999). The specific components of these EIP programs differ markedly from one company to another, but common to all is an effort to share or delegate considerable information, decision making, and financial rewards to production-level employees that have heretofore been traditionally reserved to management. This process of sharing and delegating is achieved through a variety of means, but one important organizational vehicle is committees, councils, and panels composed of employee representatives who meet with selected management personnel to discuss and resolve a wide range of workplace issues. Often these issues pertain solely to production and quality matters, but inevitably subjects related to the terms and conditions of employment also arise—sometimes ancillary to a production or quality issue (e.g., a work-scheduling problem that has interfered with reaching a production target) but oftentimes because the employment issue is of direct importance to workers, management, or both.

As described in this chapter, the National Labor Relations Act, through Section 8(a)(2) and 2(5), places significant constraints on the structure and operation of employee representation committees in nonunion companies. In particular, the law makes it an unfair labor practice for a company to operate a dominated labor organization, where "dominated" means that the labor organization is in some way created, supported, or administered by management. The Act defines a "labor organization," in turn, quite broadly to include any kind of employee representation group that deals with the employer over a term or condition of employment. Considerable debate and controversy has ensued in recent years whether these strictures in the NLRA impede and constrain the operation of legitimate, productivity-enhancing EIP programs in nonunion companies. This concern was heightened by the NLRB's decision in the *Electromation, Inc.* case in 1992 in which it ruled the company had violated the NLRA when it established five employee action committees to work with management on identifying and resolving sources of employee dissatisfaction with various aspects of pay and working conditions.

Although a welter of articles in the academic literature and practitioner press have debated the degree to which the NLRA—and the *Electromation* decision—constrain EIP programs, surprisingly little direct empirical evidence has been presented on the matter. This chapter, and the following one by LeRoy, are among the first to

address this lacuna. The evidence obtained here from the minicase studies of advanced EIP programs in eight nonunion companies clearly suggests that the NLRA is a potentially significant constraint on what nonunion companies can legally do in this area. In particular, the large majority of the eight companies examined in this study use some type of employee representation committee, council, or board as part of their EIP programs that in some respect raises significant compliance issues with regard to Section 8(a)(2) of the NLRA (or similar provisions of the Railway Labor Act). A number of these potential violations arise from small-scale committees or panels that deal with issues such as safety, grievances, and production coordination, but in other cases companies have established plantwide or companywide representational bodies that explicitly investigate, discuss, and make recommendations to management on subjects related to the terms and conditions of employment.

The potential constraining effect of the NLRA on nonunion EIP programs is mitigated, in practice, by the small number of Section 8(a)(2) cases filed each year, the weak penalties for a Section 8(a)(2) violation, the uncertain legal boundary between legal and illegal practices, and the decision of some companies to move beyond what a strict reading of the law seems to permit with respect to employee committees. We find, as does LeRoy in the next chapter, that the initial alarm over the adverse impact of the *Electromation* decision has dissipated to some extent over time as companies have adjusted their EIP practices to conform with the law or chosen to practice "business as usual" on the expectation/hope that either their programs will escape legal scrutiny or, if challenged, pass such scrutiny. On the other hand, the evidence accumulated from the interviews with managers, attorneys, and consultants indicates that companies typically do not venture far outside the limits of the law for both ethical and practical reasons and, thus, the *Electromation* ruling and Section 8(a)(2) are meaningful constraints for companies that choose to have extensive, advanced EIP programs. A number are constrained only on the margin, but others would implement larger, more formal employee representation committees and councils if permitted and would choose to deal with employees on a wide range of issues related to terms and conditions of employment.

These findings and conclusions suggest the following position on policy regarding revisions to the NLRA (Kaufman 1999). We believe public policy should promote two goals. The first is to permit and even encourage companies to implement programs for employee involvement and participation and to allow them considerable discretion with respect to the role and operation of employee representation committees therein. We take this stance given the widespread evidence that EIP programs not only promote increased productivity and competitiveness in industry but also enhance employee job satisfaction and quality of worklife. The second goal we subscribe to is that public policy should fully protect the right of employees to join unions and collectively bargain and that employer practices of a coercive or punitive nature that infringe on this right should be prohibited. We hold this position given widespread evidence that some companies engage in exploitative, opportunistic, and/or inequitable practices vis-à-vis treatment of their employees (Friedman, Hurd, Oswald, and Seeber 1994) and that trade unions and collective bargaining are an important and socially beneficial means employees have to rectify these conditions. But without strong legal protections, workers are too often prevented by employer acts of antiunion discrimination from obtaining independent representation.

The challenge for public policy is thus to provide as much latitude as possible for nonunion companies to use employee representation committees as part of legitimate, win-win EIP programs but at the same time prevent companies from using them as illegitimate tools of union avoidance. We recognize that well-run, successful EIP programs tend to reduce employee interest in independent representation substantially, and are thus useful to employers as a union-avoidance device, but this practice seems largely benign and even beneficial to the extent the employer provides wages and conditions of work that meet or exceed what a union can deliver. The practices we wish to prevent are the use of "sham" employee committees that employers hastily put in place to short-circuit union organizing drives and that have no greater purpose than short-run union avoidance and protection of the employer's dominant position.

As one of the authors has argued elsewhere (Kaufman 1999; the Kaufman, Kaufman, and Levine chapters in this volume), both policy goals can be accomplished by a two-pronged change in the NLRA. The first is to narrow the definition of a labor organization in Section 2(5) so that it applies only to independent employee organizations established for purposes of collective bargaining. This change effectively exempts from the coverage of the NLRA all nonunion employee committees that are company created and operated for EIP purposes. At the same time, Section 8(a)(2) should remain unchanged so that bona fide agencies of collective bargaining remain free of employer interference and domination. The other prong of the legislative change effort should be to both strengthen the penalties against employers for acts of antiunion discrimination and streamline the representation election process. Thus, financial penalties for employee discharge and discrimination for union activity should be substantially increased, and the NLRB should be given expanded authority to seek immediate injunctive relief to remedy illegal employer acts. Likewise, NLRB administrative procedures should be streamlined in order to expedite the holding of representation elections so that elapsed time from petition to election is reduced from a median of six weeks to, say, four weeks. Finally, a new unfair labor practice provision should be written into the law that declares it illegal for an employer to create or establish any employee representation committee or plan once a union has filed for a representation election. All these revisions parallel in broad outline Canadian law, as summarized in the two chapters in this volume by Taras.

The animating idea behind this proposal is that if employees have a relatively unrestricted, low-cost means to obtain union representation, then nonunion companies are effectively constrained to form and operate employee representation committees only in ways that promote mutual gain. Should the programs promote only management's interests, or be operated in a manner that is unfair or otherwise unsatisfactory, employees can readily voice their unhappiness and replace the company's representation plan with an independent union. The existence of a credible union threat thus serves as an effective competitive check on the use and purpose of nonunion EIP employee committees. This check is then augmented, in our proposal, by an explicit ban on creation of employee committees during an organizing drive—the time "low road" employers are most likely to form an employee committee for illegitimate purposes of union avoidance. At the same time as law provides employees relatively free access to independent representation, our proposal also frees nonunion employers to

establish and operate whatever form of employee representation council or committee (if any) they desire and to discuss with these groups as wide or narrow a range of topics as deemed appropriate. Those employers that are interested in long-run, constructive "high-involvement" employment practices are thus given maximum opportunity to use employee representation groups as part of their EIP programs.

These revisions to the NLRA are superior, we believe, to those in two other recent proposals. The first is the recommendations contained in the *Final Report* of the Commission on the Future of Worker-Management Relations ("Dunlop Commission"). These recommendations include the following (Commission on the Future of Worker-Management Relations, 1994b):

- The broad definition of a "labor organization" in Section 2(5) should be maintained.
- The language of Section 8(a)(2) should also be maintained in order to prevent the re-emergence of management dominated "company unions," but a qualifying statement should be appended that permits nonunion employee representation groups to deal with employers over terms and conditions of employment as long as these discussions are incidental to issues related to productivity and quality.
- The financial penalties for employer unfair labor practices should be strengthened, the time between petition and conduct representation elections should be shortened, and the NLRB should be given greater authority to issue injunctive relief in cases of employer acts of antiunion discrimination.

The second reform proposal is the TEAM Act legislation approved by both houses of Congress in 1996 but vetoed by President Clinton (Maryott 1997). It proposes the following changes in the NLRA:

- The Section 2(5) definition of a labor organization should be maintained.
- Section 8(a)(2) should be modified so that employers and employees can "address matters of mutual interest," including terms and conditions of employment.
- The prohibition of employer domination of labor organizations should be maintained for employee groups that seek certification as exclusive bargaining agents or to enter into collective bargaining.
- The union representation election process, penalties for unfair labor practices, and NLRB administrative procedures should remain unchanged.

Relative to the recommendations advanced in this chapter, it is apparent that both the Dunlop Commission proposal and the TEAM Act legislation are one-sided and unbalanced with respect to promoting competition and free choice in employee representation. The Dunlop Commission's proposals are one-sided because they strengthen the protections given to workers to obtain independent union representation but then, having established conditions for fair and effective competition between union and nonunion representational forms, fail to go the next step and remove the tight constraints imposed by Sections 2(5) and 8(a)(2) on nonunion employers. The net effect is to promote union representation while continuing to restrict nonunion representation. The TEAM Act proposal is also one-sided but in the opposite direction. The legislation largely frees nonunion companies to form and operate whatever type of employee representation plan is desired, but it does nothing to strengthen the

NLRA's protection of the right to organize. The net effect is to allow employers to establish dominated labor organizations without at the same time creating the conditions (i.e., low cost, relatively unobstructed access to independent representation) necessary to ensure that companies operate these groups only for mutual gain. Furthermore, the TEAM Act legislation leaves untouched the root cause of the problem with the NLRA—the overly expansive definition of a labor organization in Section 2(5).

Our proposal combines in broad outline the recommendations of the Dunlop Commission and the provisions of the TEAM Act and, in so doing, achieves a compromise solution to reform of the NLRA that serves the interests of all parties to the employment relationship.

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