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Statement

of

Rosemary M. Collyer
Crowell & Moring

on behalf of

The National Association of Manufacturers

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Commission on the Future of
Worker-Management Relations

"Issues of Employee Participation in the Workplace"

August 10, 1994
**Manufacturing: The Key to Economic Growth**

- U.S. manufacturing’s direct share of the Gross Domestic Product (GDP) has averaged more than 21 percent since World War II. And nearly half of economic activity depends indirectly on manufacturing.

- U.S. manufacturing productivity growth averaged 3 percent during the 1980s compared with almost zero growth in the rest of the U.S. economy.

- U.S. manufacturing exports have been the *single main source of strength* in the current economy — contributing 30 percent to 40 percent of the nation’s economic growth since 1987.

- Each $1 billion of exports creates 20,000 new jobs. Since 1985, exports have saved 4 million jobs in U.S. communities.

- Manufacturing jobs on average pay 15 percent more than jobs elsewhere in the economy.

- Manufacturing provides the bulk of technological advances and innovation for the economy.
Testimony of Rosemary M. Collyer  
Partner, Crowell & Moring  
August 10, 1994

Members of the Commission:

Thank you for this opportunity for dialogue as you consider what recommendations you might make to foster employee involvement in the workplace. My name is Rosemary M. Collyer and I am here on behalf of the National Association of Manufacturers as a member of NAM’s Labor and Employment Law Advisory Committee. While I am now a partner in the law firm of Crowell & Moring, here in D.C., I had the privilege of serving as General Counsel of the National Labor Relations Board from 1984 to 1989.

The NAM is a voluntary business association of more than 12,000 companies, large and small, located in every state. Members range in size from the very large to more than 8,000 smaller manufacturing firms, each with fewer than 500 employees. The NAM is affiliated with an additional 158,000 businesses through its Association Council and the National Industrial Council. NAM member companies employ 85 percent of all manufacturing workers and produce more than 80 percent of the nation’s manufactured goods. One of the nation’s oldest employer associations, the NAM will celebrate its centennial anniversary in 1995.

My experiences in government service and private practice have demonstrated that Employee Involvement programs are multi-faceted phenomena that have made material contributions to employee worklife and employer profitability. People working cooperatively
towards a common goal constitute a powerful force for job satisfaction, productivity gains, and competitive success. Employee Involvement programs are not a fad or temporary buzzwords. Rather, they represent multiple ways of engaging the human mind and spirit at the workplace. The kinds of programs are as variable as the types of companies for which employees work. No one "rule" can be applied to these myriad circumstances.

Therefore, the first recommendation we would make to you is that you proceed very cautiously in this area. Employee Involvement programs, of whatever type, are re-energizing American business and the last thing that is needed or appropriate is Government regulation that stifles their successes. Enhancing quality improvements and workplace productivity in the U.S. are central objectives of this Commission. Employee Involvement programs contribute to those goals, which we all share. The Commission should applaud and nurture these efforts.

We believe that Government's role in this process should be limited to information dissemination and facilitation at starting Employee Involvement programs upon request. The genius of America lies in its ability and willingness to experiment and develop new ideas and new practices. Employee Involvement programs are just one demonstration that this genius is alive and well. We do not mean to suggest that Employee Involvement is a panacea, nor that such programs, of whatever dimension, are successful in all environments. But when such efforts truly result in shared goals and common trust among workers and managers (and unions where they are present), they can re-make an entire workplace. However, trust cannot be mandated; it must develop on the plant floor, as have the varieties of Employee
Involvement programs your Fact Finding Report noted. You should recommend that the Departments of Labor and Commerce affirmatively support and encourage, but not regulate or mandate, Employee Involvement programs of all types.

NAM's members fear that the greatest risk to the diffusion of these positive developments lies in a hostile or unnecessarily-limited interpretation of Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2).\(^1\) It is unfortunate that the Members of the National Labor Relations Board, all friends and colleagues whom I respect immensely, failed to appreciate the legitimate dynamism in the Labor Act when they issued their decisions in Electromation\(^2\) and DuPont.\(^3\) The statute is one year shy of 60 years old; it has served its purposes well because each successive Board has adhered to the law's basic principles but has been willing to recognize and adjust to developments in labor-management

\(^1\) Section 8(a)(2) provides that it is an unfair labor practice for an employer:

>- to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; \textit{Provided}, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

A "labor organization" is defined in Section 2(5) of the Act, 29 U.S.C. § 152(5), 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.


\(^3\) E. I. DuPont de Nemours & Co., 311 NLRB No. 88 (1993).
relations. A more generous reading of the Act may not have affected the results in the recent cases but could properly interpret the statute to avoid wholesale repudiation of a major area of development which benefits employees, unions, employers, consumers, and the Government itself through increased self esteem, quality, productivity, and competitiveness.

No one more than a former General Counsel will defend the Board’s independence and praise its Members for calling it as they see it. I disagree with the analyses in Electromation with full respect and admiration for its authors. But the very confusion of the multiple decisions in that case has generated tremendous uncertainty that undermines successful and legitimate Employee Involvement programs. That confusion also offers an opportunity for this Commission (and the present and future Boards) to re-examine its theories and to reject those concepts which unnecessarily restrain the very positive developments which Employee Involvement programs represent.

For instance, the Board could give real meaning to the proviso in Section 8(a)(2) which specifically states that it is not a violation of the Act for an employer to “permit[] employees to confer with him during working hours without loss of time or pay.” The Labor Act authorizes the Board to publish rules and regulations governing such employer-employee conferences. If significant problems arise, the Board could consider such rules and regulations, adopted with the protections of the Administrative Procedures Act to ensure that all interests are heard and protected. With or without such regulations, the Board could move beyond the confines of Electromation without damaging the principles behind Section 8(a)(2).
In addition, the Board could give validity to the proviso in Section 9(a), 29 U.S.C. § 159(a), which gives individuals or groups of employees "the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect." If employees are represented by a union, the union is protected by the second proviso to Section 9(a) which guarantees it the right to have a representative present at any such adjustment.

Moreover, the Board could rely on its own precedent which has refused to find a violation of the Act when an employer deals with a representative of a small group of employees, on behalf of only that group, and in the absence of an exclusive majority-based representative for the larger workforce. These and other concepts offer a principled basis on which the Board could advance the purposes of Section 8(a)(2) without damaging the benefits of Employee Involvement programs.

Please do not misunderstand these comments. We believe in the principles that animate Section 8(a)(2) and agree that an employer should not lawfully be able to establish a "company union" to the detriment of organized labor. But the statute is a living scheme that should be interpreted and applied, with all its provisos intact, so that Employee Involvement

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4 See Don Mendenhall, Inc., 194 NLRB 1109 (1972); Max Factor & Co., 118 NLRB 808 (1957); Metal Mouldings Corp., 36 NLRB 107 (1942); Carborundum Co., 36 NLRB 710 (1941). These cases address "members only" contracts, which are unenforceable under the Labor Act but which do not necessarily violate the law when there is no exclusive bargaining representative.
programs which do not violate the principles of Section 8(a)(2) can flourish and continue to contribute to American working life.

To this end, the Commission could make a significant contribution. We urge you to fully consider the contours of the Labor Act and to develop a recommendation that supports appropriate Employee Involvement programs. Your voice might be persuasive to the present Members of the NLRB and could provide support for those parties engaged in post-Electromation litigation before the Agency. The final determinations lie, of course, in the Board's expertise and the courts' review, but this Commission could be an important factor in obtaining a re-evaluation of the entire set of issues. In the end, Employee Involvement programs represent an important and continuing effort by workers and managers to ensure productive, satisfying jobs that meet global competition. If the Board is unable to reach agreement on interpreting the Labor Act to permit such efforts, the law may have to be amended to match the realities and needs of the workplace.

We recognize that the labor movement distrusts Employee Involvement programs outside a collective bargaining relationship. The Labor Act declares the policy of the United States to be to encourage, but not require, the practice and procedure of collective bargaining. To require collective representation would be to deprive employees of the very rights to self-determination and workplace democracy which Congress sought to protect. The fundamental concept of the Labor Act is that unions are a force for the good when they are selected by employees in a free and fair election; nothing about an Employee Involvement program undermines that concept. Few labor leaders discount the values of trust, shared
goals, and a voice in decision-making which an Employee Involvement program can develop. Such programs have had notable successes in an organized workforce. We urge the Commission, however, not to discount the benefits of Employee Involvement programs for those in the majority who are not represented by a union. As unions’ own successes with such programs demonstrate, there is nothing inconsistent with formal representation and an Employee Involvement effort -- one look at the epitome of Employee Involvement programs, ownership of a company through an Employee Stock Ownership Plan, demonstrates this fact. Just so, there is nothing inconsistent with unorganized employee participation in an Employee Involvement program which does not violate the principles of Section 8(a)(2).

There may be some concern that a successful Employee Involvement program would reduce worker interest in representation by a labor union. American business faces increasing competitive demands from around the globe; whether employee participation in their own workplaces arises in a union or a non-union setting, Employee Involvement promotes good jobs, economic growth, and competitive success. This Commission should not be dissuaded from supporting Employee Involvement programs even if they were to lawfully influence the exercise of that free choice. Freedom to choose is the watchword, not representation per se. And, as a factual matter, there is no basis to conclude that Employee Involvement programs have impacted Labor’s ability to organize.

We also suggest that the Commission should not be distracted by nay-sayers who might raise the specter of a conflict with the Fair Labor Standards Act because employees participate in decision-making at their jobs. With regard to self-directed work teams,
managers continue to "manage" these efforts, but in a new way that recognizes the expertise which employees bring to their tasks.

Employee Involvement programs have the advantage of building on the knowledge and capabilities of employees themselves. One could say that employees have been an untapped resource for too long and that it's high time that American business recognized the worth of employee ideas and contributions. This Commission should issue a strong recommendation that the Federal Government look with favor on appropriate Employee Involvement programs and work, to the extent possible within the existing framework of laws, to encourage and nurture these valuable efforts.

Thank you for this opportunity to speak with you and I look forward to answering any questions you may have.