**Electromation, Inc. *and* International Brotherhood of Teamsters, Local Union No. 1049, AFL–CIO[1] and ''Action Committees,'' Party of Interest.** Case 25–CA–19818

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 5, 1990, Administrative Law Judge George F. McInerny issued the attached decision. The Respondent filed exceptions and a supporting brief.

On May 14, 1991, the Board scheduled oral argument in this case because it raised important 8(a)(2) and (1) issues. On September 5, 1991, the Respondent, the General Counsel, and the Union, and as amici curiae, the American Federation of Labor and Congress of Industrial Associations, the Chamber of Commerce of the United States of America, the Council on Labor Law Equality, the Coalition of Management for Positive Employment, Training, and Education, Labor Policy Association, Manufacturers' Alliance for Productivity and Innovation, and Charles J. Morris, Professor Emeritus of Law, Southern Methodist University, presented oral argument before the Board. The parties and the amici curiae have filed statements of position and briefs.[2]

The Board has considered the decision and the record in light of the exceptions, briefs, and oral arguments and has decided to affirm the judge's rulings, findings, and conclusions as modified below.[3]

This case presents the issue of whether ''Action Committees'' composed, in part, of the Respondent's employees constitute a labor organization within the meaning of Section 2(5) of the Act and whether the Respondent's conduct vis a vis the ''Action Committees'' violated Section 8(a)(2) and (1) of the Act. In the notice of hearing of May 14, 1991, the Board framed the pertinent issues as follows:

(1) At what point does an employee committee lose its protection as a communication device and become a labor organization?
(2) What conduct of an employer constitutes domination or interference with the employee committee?

For the reasons below, we find that the Action Committees were not simply ''communication devices'' but instead constituted a labor organization within the meaning of Section 2(5) of the Act and that the Respondent's conduct towards the Action Committees constituted domination and interference in violation of Section 8(a)(2) and (1). These findings rest on the totality of the record evidence, and they are not intended to suggest that employee committees formed under other circumstances for other purposes would necessarily be deemed ''labor organizations'' or that employer actions like some of those at issue here would necessarily be found, in isolation or in other contexts, to constitute unlawful support, interference, or domination.

I.

The Respondent is engaged in the manufacture of electrical components and related products. It employs approximately 200 employees. These employees were not represented by any labor organization at the time of the events described herein.

In late 1988 the Respondent concluded that it was experiencing unacceptable financial losses. It decided to cut expenses by altering the existing employee attendance bonus policy and, in lieu of a wage increase for 1989, distributed year-end lump-sum payments based on length of service. Shortly after these changes were announced, the Respondent became aware that employees were displeased with the reduction in benefits. In early January 1989,[4] the Respondent received a petition signed by 68 employees expressing displeasure with the new attendance policy. Upon receipt of this petition, the Respondent's president, John Howard, met with the Respondent's supervisors to discuss the petition and the employees' complaints. At this meeting, the Respondent decided to meet directly with employees to discuss their problems. Thereafter, on January 11, the Respondent met with a selected group of eight employees[5] and discussed with them a number of

[1] On November 1, 1987, the Teamsters International Union was readmitted to the AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] The American Federation of Labor and Congress of Industrial Organizations did not file a brief. The American Postal Union, AFL–CIO, filed an amicus brief but did not participate in the oral argument. An amicus brief was filed by U.S. Representatives Steve Gunderson, Newt Gingrich, William Goodling, Don Ritter, Paul B. Henry, Richard K. Armey, John A. Boehner, Mickey Edwards, Scott L. Klug, and Cass Ballenger. Additional amicus briefs and submissions were filed after oral argument by Labor Education and Research Project, Labor Policy Association, The Coalition of Management for Positive Employment, Training, and Education, the National Association of Manufacturers, and The American Iron and Steel Institute, Professor Morris, and the Charging Party.

[3] On August 1, 1990, the Board granted the Charging Party's Motion to Sever Cases and to Withdraw Objections to the Election in Case 25–RC–8676, which had been consolidated for hearing with this unfair labor practice case. Because the judge's recommended Order contains a disposition of the representation case, now severed, we shall issue a new Order.

[4] All dates are in 1989 unless noted otherwise.

[5] The January 11 meeting was similar in structure to meetings the Respondent had held with employees the previous year. Three employees were chosen at random by the Respondent from each of two groups: one consisted of employees with high seniority and the other consisted of employees with low seniority. Two additional employees who had asked to attend the January 11 meeting were permitted

issues, including wages, bonuses, incentive pay, attendance programs, and leave policy.

After the January 11 meeting, President Howard again met with his supervisors and concluded that the Respondent had serious problems with its employees. Howard testified that it was decided at that time that ''it was very unlikely that further unilateral management action to resolve these problems was going to come anywhere near making everybody happy . . . and we thought that the best course of action would be to involve the employees in coming up with solutions to these issues.'' Howard testified further that management came up with the idea of ''action committees'' as a method to involve employees.

The Respondent next met with the same group of eight employees on January 18. Howard explained to the assembled group that management had distilled the employees' complaints into five categories. Howard testified that he proposed the creation of Action Committees that ''would meet and try to come up with ways to resolve these problems; and that if they came up with solutions that . . . we believed were within budget concerns and they generally felt would be acceptable to the employees, that we would implement these suggestions or proposals.'' Howard testified further that the reaction of the assembled employees to the concept of action committees was ''not positive.'' Howard explained to the employees that because ''the business was in trouble financially . . . we couldn't just put things back the way they were . . . we don't have better ideas at this point other than to sit down and work with you on them.'' According to Howard, as the meeting went on, the employees ''began to understand that that was far better than leaving things as they were, and that we weren't going to just unilaterally make changes. And so they accepted it.'' Howard agreed that employees would not be selected at random for the committees based on seniority and that, instead, sign-up sheets would be posted.

On January 19, the Respondent posted a memorandum directed to all employees announcing the formation of five Action Committees and posted sign-up sheets for each Action Committee. The memorandum explained that each Action Committee would consist of six employees and one or two members of management, as well as the Respondent's Employees Benefits Manager, Loretta Dickey, who would coordinate all the Action Committees. The sign-up sheets explained the responsibilities and goals of each Committee. No employees were involved in the drafting of the policy goals expressed in the sign-up sheets. The Respondent determined the number of employees permitted to sign-up for the Action Committees. The Respondent informed two employees who had signed up for more than one committee that each would be limited to participation on one committee. After the Action Committees were organized, the Respondent posted a notice to all employees announcing the members of each Committee and the dates of the initial Committee meetings. The Action Committees were designated as (1) Absenteeism/Infractions, (2) No Smoking Policy, (3) Communication Network, (4) Pay Progression for Premium Positions, and (5) Attendance Bonus Program.

The Action Committees began meeting in late January and early February.[6] The Respondent's coordinator of the Action Committees, Dickey, testified that management expected that employee members on the Committees would ''kind of talk back and forth'' with the other employees in the plant, get their ideas, and that, indeed, the purpose of the Respondent's postings was to ensure that ''anyone [who] wanted to know what was going on, they could go to these people'' on the Action Committees.[7] Other management representatives, as well as Dickey, participated in the Action Committees' meetings, which were scheduled to meet on a weekly basis in a conference room on the Respondent's premises. The Respondent paid employees for their time spent participating and supplied necessary materials. Dickey's role in the meetings was to facilitate the discussions.

On February 13, the Union made a demand to the Respondent for recognition. There is no evidence that the Respondent was aware of organizing efforts by the Union until this time. On about February 21, Howard informed Dickey of the recognition demand and, at the next scheduled meeting of each Action Committee, Dickey informed the members that the Respondent could no longer participate but that the employees could continue to meet if they so desired. The Absenteeism/Infraction and the Communication Network Committees each decided to continue their meetings on company premises; the Pay Progression Committee disbanded; and the Attendance Bonus Committee decided to write up a proposal they had discussed previously and not to meet again. The Attendance Bonus Committee's proposal was one of two proposals that the employees had developed concerning attendance bonuses. The first one, developed at the committee's second or third meeting, was pronounced unacceptable by the Respondent's controller, a member of that committee, because it was too costly. Thereafter the employees devised a second proposal, which the

to do so. There is no contention that either the January 11 meeting, or the January 18 meeting, described below, violated the Act.

[6] The no-smoking committee was never organized and held no meetings.

[7] Dickey's testimony in this regard is confirmed by the testimony of employee Gayle Bango, a member of the Attendance Bonus Committee. Bango testified that at the first meeting of the committee, employees were informed that ''we were supposed to go out amongst the other employees and find out what kind of ideas they had concerning a good attendance program because they [the employees] weren't happy with the one we got.''

controller deemed fiscally sound. The proposal was not presented to President Howard because the Union's campaign to secure recognition had intervened.

On March 15, Howard informed employees that ''due to the Union's campaign, the Company would be unable to participate in the committee meetings and could not continue to work with the committees until after the election,'' which was to be held on March 31.

On the foregoing evidence, the judge found that the Action Committees constituted a labor organization within the meaning of Section 2(5). He noted that employees, supervisors, and managerial personnel served as committee members and that their discussions concerned conditions of employment. The judge found that the Respondent dominated and assisted the committees on the basis of evidence that the Respondent organized the committees, created their nature and structure, and determined their functions. The judge also noted that, although management did not dominate meeting discussions, meetings took place on company property, supplies and materials were provided by management, and members were paid for time spent on committee work.[8]

In its exceptions and brief, the Respondent contends that the Action Committees were not statutory labor organizations and did not interfere with employee free choice. It notes that no proposals from any committee were ever implemented, that the committees were formed in the absence of knowledge of any union activity, and that they followed a tradition of similar employer-employee meetings.

## II.

Section 2(5) of the Act defines a ''labor organization'' as follows:

> The term ''labor organization'' means any organization of any kind, or any agency or employee representation committee or plan, inwhich employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Section 8(a)(2) provides that it shall be an unfair labor practice for an employer

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

Whenever we are attempting to determine the application of the statute to particular facts, we must first determine whether the statutory language standing alone answers the question. Here, we cannot properly limit our analysis to the statutory language because the terms are not all self-defining. For example, although the ''Action Committees'' are committees in which ''employees participate,'' the parties have raised questions about the meaning of ''representation'' in the phrase ''employee representation committee.'' We therefore seek guidance from the legislative history to discern what kind of activity Congress intended to prohibit when it made it an unfair labor practice for an employer to ''dominate or interfere with the formation or administration of any labor organization'' or to contribute support to it.[9]

The legislative history reveals that the provisions outlawing company dominated labor organizations were a critical part of the Wagner Act's purpose of eliminating industrial strife through the encouragement of collective bargaining. Early in his opening remarks Senator Wagner stated:

> Genuine collective bargaining is the only way to attain equality of bargaining power . . . . The greatest obstacles to collective bargaining are employer-dominated unions, which have multiplied with amazing rapidity since the enactment of [the National Industrial Recovery Act]. Such a union makes a sham of equal bargaining power . . . . (O)nly representatives who are not subservient to the employer with whom they deal can act freely in the interest of employees. For these reasons the very first step toward genuine collective bargain-

[8] The judge found no merit to allegations that the Respondent had threatened and interrogated employees in violation of Sec. 8(a)(1). No exceptions were filed to these findings.

[9] A number of the amici have suggested that, even if the language and legislative history of the provisions at issue show a clear congressional intent to impose a broad prohibition extending to activities like those of the Respondent and the employee committees at issue in this case, and even if that understanding of congressional intent was expressed in an opinion of the Supreme Court, the Board is free to adjust the breadth of the prohibition in light of changing economic realities. In particular, the amici argue that, for the sake of American competitiveness in world markets, it is desirable to allow employers to create and support employee/management committees in the manner that the Respondent did with respect to the Action Committees here. While we agree that when the Board has the latitude to change a particular construction of the statute we may appropriately take into account changing industrial realities, we do not agree that we are free so to act either when congressional intent to the contrary is absolutely clear or the Supreme Court has decreed that a particular reading of the statute is required to reflect such an intent, or both. See, e.g., *Lechmere, Inc. v. NLRB*, 139 LRRM 2225 (1992); *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 675–676 (1981) (holding that, in requiring bargaining over an economically motivated decision to close down part of a business, the Board transgressed absolute congressional limits in construing broad language that Board is empowered to define ''in light of specific industrial practices'' (footnote omitted)).

> ing is the abolition of the employer dominated union as an agency for dealing with grievances, labor disputes, wages, rates, or hours of employment.[10]

Because of the Wagner Act's purpose to eliminate employer dominated unions, the term ''labor organization'' was defined broadly. Indeed, even though the original Senate Bill (S. 2976) broadly defined ''labor organization'' as ''*any organization, labor union, association, corporation, or society of any kind in which employees participate to any degree whatsoever* and which exists for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, or hours of employment, or conditions of work'' [emphasis added],[11] the Wagner Act, as finally enacted, expanded the initial part of the definition in order to encompass common forms of company dominated unions that had arisen following passage of the National Industrial Recovery Act. Professor Edwin E. Witte was influential in securing the enacted broader definition of ''labor organization.'' Professor Witte expressed concern whether the legislation as introduced would include the most prevalent form of company-dominated union, the employee representation committee, which Professor Witte described as ''the loose organization if you can call it an organization, that has no members, no dues, that is merely a method of electing representatives.''[12] Senator Wagner's explanation of the revised definition reveals that the revision's purpose was to include this form of dominated labor organization within the statutory definition:[13]

> It has been argued frequently by employers as well as by protagonists of the bill last year that an employee representation plan or committee arrangement is not a labor organization or a union but simply a method of contact between employers and employees. But the act is entitled to prescribe its own definitions of labor organizations, for its own purposes, and it is clear that unless these plans, etc., are included in the definition, whether they merely ''deal'' or ''adjust,'' or exist for the purpose of collective bargaining, most of the activity of employers in connection therewith which we are seeking to outlaw would fall outside the scope of the act. The act would thus be entirely nullified. If, as employers insist, such ''plans,'' etc., are lawful representatives of employees, then employer activity relative to them should clearly be included.

With respect to employer conduct that was to come within the ambit of Section 8(a)(2) itself, it is noteworthy that the original Senate bill (S. 2926) made it an unfair labor practice for an employer to ''initiate, participate in, supervise, or influence the formation, rules, and other policies of a labor organization.''[14] After considering testimony that certain unaffiliated employee organizations confined to representing employees on a single employer basis often operated in an amicable and cooperative atmosphere, the Senate sponsors modified Section 8(a)(2) specifically to permit employees to confer with their employer during working hours without loss of time or pay.[15] In this regard it is also noteworthy that the modified version contained in S. 1958 substituted the term ''to dominate or interfere with the formation or administration'' for the terms ''initiate, participate in, supervise, or influence.'' As Senator Wagner explained:[16]

> The provision in S. 1958 makes express that it is an unfair practice to dominate or interfere with the formation of a labor organization or to contribute support in some manner, equally destructive of self-organization, but other than ''financial.'' While possibly an employer should not be penalized for merely suggesting to his employees that they organize a union or a committee, i.e., for ''initiating'' a labor organization, it cannot be argued that an employer should be free to help form the labor organization by engaging actively in its sponsorship, and in the drafting of its bylaws, etc. As the testimony before the committee last year and this year amply demonstrates, it is at the stage of ''formation'' that employer activity is most effective and harmful.

Thus, Congress concluded that ridding collective bargaining of employer-dominated organizations, the formation and administration of which had been fatally tainted by employer ''domination'' or ''interference,'' would advance the Wagner Act's goal of eliminating industrial strife. That conclusion was based on the nation's experience under the NIRA, recounted by witnesses at the Senate hearings, that employer interference in setting up or running employee ''representation'' groups actually robbed employees of the freedom to choose their own representatives. Senator Wagner here made a distinction, important for this inquiry, between *interference* and *minimal conduct*—''merely suggesting to his employees that they organize a union or committee''—that the nation's experience had shown did not rob employees of their right to a rep-

[10] I *Legislative History of the National Labor Relations Act of 1935*, 15–16 (GPO 1949) (hereafter cited Leg. Hist.).

[11] I Leg. Hist. 32.

[12] I Leg. Hist. 271.

[13] Comparison of S. 2926 (1934) and S. 1958 (1935), I Leg. Hist. 1347.

[14] I Leg. Hist. 3.

[15] See II Leg. Hist. at 2309–2310.

[16] I Leg. Hist. 1352.

resentative of their own choosing. As Senator Wagner stated:[17]

> The question is entirely one of fact and turns upon whether or not the employee organization is entirely the agency of the workers . . . .The organization itself should be independent of the employer-employee relationship.

In sum, Congress brought within its definition of ''labor organization'' a broad range of employee groups, and it sought to ensure that such groups were free to act independently of employers in representing employee interests.[18]

III.

Before a finding of unlawful domination can be made under Section 8(a)(2) a finding of ''labor organization'' status under Section 2(5) is required.[19] Under the statutory definition set forth in Section 2(5), the organization at issue is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purpose of ''dealing with'' employers, and (3) these dealings concern ''conditions of work'' or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment. Further, if the organization has as a purpose the representation of employees, it meets the statutory definition of ''employee representation committee or plan'' under Section 2(5) and will constitute a labor organization if it also meets the criteria of employee participation and dealing with conditions of work or other statutory subjects.[20] Any group, including an employee representation committee, may meet the statutory definition of ''labor organization'' even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues. *Fire Alert Co*., 182 NLRB 910, 912 fn. 12 (1970), enfd. 77 LRRM 2895 (10th Cir. 1971); *Armco, Inc*., 271 NLRB 350 (1984). Thus, a group may be an ''employee representation committee'' within the meaning of Section 2(5) even if there is no formal framework for conducting meetings among the represented employees (i.e. those employees whose conditions of employment are the subject of committee dealings) or for otherwise eliciting the employees' views.

As noted in our discussion of the Wagner Act's legislative history, Congress viewed the abolition of employer-dominated organizations as essential to the Act's purpose. After Congress passed the Act in 1935, a first order of business for the Board, backed by the Supreme Court, was to weed out employer-dominated organizations. Indeed, the very first unfair labor practice case decided by the Board raised the issues of whether an organization was a labor organization under Section 2(5) and whether the employer had dominated that organization in violation of Section 8(a)(2) and (1). *Pennsylvania Greyhound Lines*, 1 NLRB 1 (l935), enfd. denied in part 91 F.2d 178 (3d Cir. 1937), revd. 303 U.S. 261 (1938). In that case, the Board, as affirmed by the Supreme Court, found that the organization at issue was an employee representation plan under Section 2(5), that the organization was entirely the creation of management, which planned it, sponsored it, and foisted it on employees who had never requested it, and that the organization's functions were described and given to it by management. 1 NLRB at 13–14.

The Greyhound plan was entirely typical of the ''employee representation plans or committees'' perceived as so pernicious by Senator Wagner and ultimately by Congress. Greyhound management founded the association in 1933. The manager charged with establishing the association wrote that

> it is to our interest to pick out employees to serve on the committee who will work for the interest of the company and will not be radical. This plan of representation should work out very well providing the proper men are selected, and considerable thought should be given to the men placed on this responsible Committee.

Thus, Greyhound usurped from the employees their protected right to a bargaining representative of their own choosing when it set up and accorded recognition to a ''committee'' that was in no way an agent of the employees or loyal to their interests—although Grey-

[17] Testimony of Senator Wagner on H.R. 6288, II Leg. Hist. 2489.

[18] In his concurrence, Member Devaney interprets the legislative history differently. He sees Congress as proscribing a narrower range of conduct, more closely tied to the historical experience recounted to the Senate, than is stated above, and would not agree that Congress defined ''labor organization'' broadly so as to prohibit a wide range of employer conduct. But the majority agrees that, whatever weight is attached to the wording of the definition of labor organization, Congress' goal was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion, even where that interference or coercion took the form of appearing to anticipate and provide an outlet for the impulse of employees to organize for collective bargaining. Thus, despite differences in the respective readings of the language and legislative history, the majority agrees that analysis of an employee committee's status under the Act must center on the group's purpose and function in light of NLRA's goal of protecting the right of self-organization from the specific abuse of employer-dominated organizations set up by employers.

[19] Sec. 8(a)(2) refers to domination of ''any labor organization.''

[20] Because we find, as explained below, that employee-members of the Respondent's Action Committees acted in a representational capacity, it is unnecessary to the disposition of this case to determine whether an employee group could ever be found to constitute a labor organization in the absence of a finding that it acted as a representative of the other employees. As set forth in his separate concurrence, Member Devaney would reach this issue, and he concludes that such a finding is essential to a determination that a group is a labor organization within the meaning of Sec. 2(5).

hound management certainly intended that the committee appear to possess both those attributes.

In considering the interplay between Section 2(5) and Section 8(a)(2), we are guided by the Supreme Court's opinion in *NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959). In *Cabot Carbon* the Court held that the term ''dealing with'' in Section 2(5) is broader than the term ''collective bargaining'' and applies to situations that do not contemplate the negotiation of a collective-bargaining agreement.[21] The Court also found that the 1947 amendment of Section 9(a),[22] and the defeat of a proposed amendment to the 1947 Taft-Hartley Act that would have permitted an employer to form or maintain a committee of employees to discuss with it conditions of employment in the absence of an established bargaining representative, demonstrated that there was nothing in the 1947 amendments indicating that Congress intended to eliminate dominated employee representation committees from the term ''labor organization'' as defined in Section 2(5) and as used in Section 8(a)(2).

As the *Cabot Carbon* Court explained in detail, Taft-Hartley House and Senate conferees rejected a proposed new Section 8(d)(3) passed by the House that would have expressly permitted ''forming or maintaining by an employer of a committee of employees and discussing with it matters of mutual interest, including grievances, wages, hours of employment, and other working conditions'' in the absence of a certified or recognized bargaining representative. The conference report as finally approved by the House and Senate did not contain the House's proposed new Section 8(d)(3) or any similar language. Instead, Section 9(a) was amended. Examining this legislative history, the *Cabot Carbon* Court noted that Section 8(a)(2) remained wholly unchanged and, with respect to Section 9(a), the Court found that there was nothing in the amendment of Section 9(a) that authorized an employer to engage in ''dealing with'' an employer-dominated ''labor organization.''[23]

Notwithstanding that ''dealing with'' is broadly defined under *Cabot Carbon*, it is also true that an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5). In those circumstances, it is irrelevant if the impetus behind the organization's creation emanates from the employer. See *General Foods Corp*., 231 NLRB 1232 (1977) (employer created job enrichment program composed of work crews of entire employee complement); *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977) (committee decided validity of employees' complaints and did not discuss or deal with employer concerning the complaints); *John Ascuaga's Nuggett*, 230 NLRB 275, 276 (1977) (employees' organization resolved employees' grievances and did not interact with management).

Although Section 8(a)(2) does not define the specific acts that may constitute domination, a labor organization that is the creation of management, whose structure and function are essentially determined by management, as in *Pennsylvania Greyhound Lines*, supra, and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2). In such an instance, *actual* domination has been established by virtue of the employer's specific acts of creating the organization itself and determining its structure and function.[24] However, when the formulation

[21] As Member Devaney notes, witnesses cautioned the Senate committee that limiting ''labor organization'' to groups that engage in collective bargaining with an employer might fail to capture employer-dominated organizations, many of which never wrested a single concession, let alone a bargaining agreement, from the employer. Referring again to the abuses Congress meant to proscribe in enacting the Wagner Act, we view ''dealing with'' as a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those 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.''

[22] The proviso to Sec. 9(a) was modified by the addition of the right to have 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: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.''

[23] In view of this legislative history, we do not agree with Member Raudabaugh that the Taft-Hartley amendments fundamentally altered the import of Sec. 8(a)(2) or the collective-bargaining model of the Wagner Act. Even with the safeguards proposed by Member Raudabaugh, the legislative history lends no support to the notion that an employer permissibly may now deal with a dominated Sec. 2(5) labor organization concerning terms and conditions of employment.

[24] Sec. 8(a)(2) does not require a finding of antiunion animus or a specific motive to interfere with Sec. 7 rights. In *NLRB v. Newport News Shipbuilding Co*., 308 U.S. 241 (1939), the Supreme Court found that an employer had dominated a statutory labor organization even though the ''Committee'' in question operated to the apparent satisfaction of the employees who had signified their desire for its continuance. The Court also noted that there was no evidence that the employer objected to its employees joining labor unions and that there had been no discrimination against them because of membership in outside unions. See also *Garment Workers' Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961) (good-faith belief in union's majority status is no defense under Sec. 8(a)(2) to the grant of exclusive recognition to a union that does not have support of the majority of employees). We respectfully disagree with Member Raudabaugh's view that *Newport News* is no longer viable law. In *Newport News*, the Court held that, even if a concededly employer-dominated organization were altered to remove the elements of unlawful domination, the Board had not erred in ordering the organization disestablished. In our view, *Newport News* is not a barrier to the resolution of mutual problems between employees and employers through cooperation and other peaceful methods,

*Continued*

and structure of the organization is determined by employees, domination is not established, even if the employer has the potential ability to influence the structure or effectiveness of the organization. See *Duquesne University*, 198 NLRB 891, 892–893 (1972). Thus, the Board's cases following *Cabot Carbon* reflect the view that 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. See, e.g., *Ambox, Inc*., 146 NLRB 1520, 1530–1531 (1964); *Grafton Boat Co*., 173 NLRB 999, 1002–1003 (1968); *Clapper's Mfg*., 186 NLRB 324, 334 (1970), enfd. 458 F.2d 414 (3d Cir. 1972); *Liberty Markets*, 236 NLRB 1486, 1492 (1978); *Ona Corp*., 285 NLRB 400, 406–407 (1987).

The Board's analysis of Section 2(5) and Section 8(a)(2) generally has met with judicial approval. See, e.g., *NLRB v. Pennsylvania Greyhound Lines*, supra; *NLRB v. Newport News Shipbuilding Co*., supra; *NLRB v. Cabot Carbon Co*., supra; *NLRB v. Clapper's Mfg*., supra; *NLRB v. Fremont Mfg. Co*., 558 F.2d 889 (8th Cir. 1977); *NLRB v. Walton Mfg. Co*., 289 F.2d 177 (5th Cir. 1961); *NLRB v. Stow Mfg. Co*., 217 F.2d 900 (2d Cir. 1954); *NLRB v. Standard Coil Products Co*., 224 F.2d 465 (1st Cir. 1955).[25] The Board, however, has been less than successful in the Sixth Circuit. See, e.g., *NLRB v. Scott & Fetzer Co*., 691 F.2d 288 (6th Cir. 1982); *Airstream, Inc. v. NLRB*, 877 F.2d 1291 (6th Cir. 1989).

In *Airstream*, the employer had formed a ''President's Advisory Council,'' told employees to choose representatives, and discussed with these representatives an attendance bonus system. In *Scott & Fetzer*, the employer had established an in-plant committee, provided for representatives, and adjusted its vacation eligibility policy after a committee meeting. The Sixth Circuit found that neither of the organizations at issue was a labor organization under Section 2(5). In *Scott & Fetzer*, the court relied on the absence of antiunion animus or evidence that the employees viewed the Committee at issue as anything other than a communication device. In addition, the court relied on views expressed in two earlier cases from the circuit that had turned on the absence of evidence showing domination within the meaning of Section 8(a)(2). 691 F.2d at 293. In *Airstream*, the court held that the employee council was similar to the committee in *Scott & Fetzer*, and it also relied on its finding that the employer took no action regarding employee complaints during the course of a union campaign. 877 F.2d at 1297–1298.

As noted previously (fn. 24), Board precedent and decisions of the Supreme Court indicate that the presence of antiunion motive is not critical to finding an 8(a)(2) violation. We also see no basis in the statutory language, the legislative history, or decisions apart from *Scott & Fetzer* to require a finding that the employees believe their organization to be a labor union.[26] Instead, our inquiry is two-fold. First, we inquire whether the entity that is the object of the employer's allegedly unlawful conduct satisfies the definitional elements of Section 2(5) as to (1) employee participation, (2) a purpose to deal with employers, (3) concerning itself with conditions of employment or other statutory subjects, and (4) if an ''employee representation committee or plan'' is involved, evidence that the committee is in some way representing the employees. Second, if the organization satisfies those criteria, we consider whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2).

Of course, Section 2(5) literally requires us to inquire into the ''purpose'' of the employee entity at issue because we must determine whether it exists ''for the purpose of dealing'' with conditions of employment. But ''purpose'' is different from motive; and the ''purpose'' to which the statute directs inquiry does not necessarily entail subjective hostility towards unions. Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or fostered its cre-

as our colleague believes. It is, however, a frank and practical acknowledgement that 10 years of recognition and bargaining with an organization owing its very existence to the whim of the employer and whose every alteration was subject to employer veto cannot simply vanish—when it suddenly appears to be in the employer's interest that it should. Thus, the Court acknowledged that the employee organization in *Newport News* was incapable of instantaneous transformation into an organization not violative of the Act. Its history was simply too strong and its functioning too clearly imprinted with the will of the employer. To us, disestablishment of dominated labor organizations remains a useful remedy today, where necessary. Member Devaney believes that Member Raudabaugh's approach would be most helpful if the Board were a legislative body not bound by prior precedent and Supreme Court direction. Such sweeping changes in interpretation of the Nation's labor policy are a task for Congress or the courts and not a function for an administrative agency of limited powers.

[25] In *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979); *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974); and *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955), the courts denied enforcement in circumstances where the impetus behind the organizations emanated from the employees themselves. Without passing on the merits of the underlying Board decisions in those cases, we find those cases distinguishable from the cases cited in our discussion herein, and from the instant case.

[26] We also agree with the General Counsel that in both *Scott & Fetzer* and *Airstream*, the Sixth Circuit appeared to equate indicia of employer control—relevant only to the domination issue—with the indicia used to identify a Sec. 2(5) ''labor organization.''

ation, in order to avoid unionization or whether employees view that organization as equivalent to a union.[27]

## IV.

Applying these principles to the facts of this case, we find, in agreement with the judge, that the Action Committees constitute a labor organization within the meaning of Section 2(5) of the Act; and that the Respondent dominated it, and assisted it, i.e., contributed support, within the meaning of Section 8(a)(2).

First, there is no dispute that employees participated in the Action Committees. Second, we find that the activities of the committees constituted dealing with an employer. Third, we find that the subject matter of that dealing—which included the treatment of employee absenteeism and employee remuneration in the form of bonuses and other monetary incentives—concerned conditions of employment. Fourth, we find that the employees acted in a representational capacity within the meaning of Section 2(5). Taken as a whole, the evidence underlying these findings shows that the Action Committees were created for, and actually served, the purpose of dealing with the Respondent about conditions of employment.

As discussed in section I, the Action Committees were created in direct response to the employees' disaffection concerning changes in conditions of employment that the Respondent unilaterally implemented in late 1988. These changes resulted in a petition that employees presented to the Respondent. President Howard testified that after a January 11 meeting with a group of employees selected by management, he realized that the Respondent had serious problems with the employees and that ''it was very unlikely that further *unilateral* management action to resolve these problems'' would succeed. (Emphasis supplied.) Accordingly, the Action Committees were created in order to achieve a *bilateral* solution to these problems. Employees on the Action Committees, according to Howard, were to meet with their management counterparts and, ''try to come up with ways to resolve these problems.'' Howard also explained what would happen to any solutions that came out of the Action Committees. Howard testified that if the Committee's solutions satisfied the Respondent's budgetary concerns, ''we would implement those suggestions or proposals.''

Discussions that ensued in the Attendance Bonus Committee, for example, were fully consistent with the process that President Howard envisioned. Thus, an initial proposal formulated by employees was rejected by the Respondent's controller as too costly. A second proposal was presented and deemed fiscally sound by the controller. The proposal was to be reduced to writing, but because of the onset of the union campaign, its presentation to Howard for formal acceptance was sidetracked. The failure to implement any proposals, therefore, was not attributable to the manner in which the Action Committees were created or functioned but rather was due to the unanticipated onset of the union campaign.

The evidence thus overwhelmingly demonstrates that a purpose of the Action Committees, indeed their *only* purpose, was to address employees' disaffection concerning conditions of employment through the creation of a bilateral process involving employees and management in order to reach bilateral solutions on the basis of employee-initiated proposals. This is the essence of ''dealing with'' within the meaning of Section 2(5).[28]

It is also clear that the Respondent contemplated that employee-members of the Action Committees would act on behalf of other employees. Thus, after talking ''back and forth'' with their fellow employees, members were to get ideas from other employees regarding the subjects of their committees for the purpose of reaching solutions that would satisfy the employees as a whole. This could occur only if the proposals presented by the employee-members were in line with the desires of other employees. In these circumstances, we find that employee-members of the Action Committees acted in a representational capacity and that the Action Committees were an ''employee representation committee or plan'' as set forth in Section 2(5).[29]

There can also be no doubt that the Respondent's conduct vis a vis the Action Committees constituted ''domination'' in their formation and administration. It was the Respondent's idea to create the Action Committees. When it presented the idea to employees on January 18, the reaction, as the Respondent's President Howard admitted, was ''not positive.'' Howard then informed employees that management would not ''just

[27] In this we differ from Member Raudabaugh's view that employee perception of an employee committee is a significant element in evaluating its lawfulness. Much of the harm implicit in employer-dominated organizations is that, when they are successful, they appear to employees to be the result of an exercise of statutory freedoms, when in fact they are coercive by their very nature. Thus, we cannot agree that employee perceptions of the nature of an employee committee are significant indicators of their lawfulness.

[28] We find no basis in this record to conclude that the purpose of the Action Committees was limited to achieving ''quality'' or ''efficiency'' or that they were designed to be a ''communication device'' to promote generally the interests of quality or efficiency. We, therefore, do not reach the question of whether any employer initiated programs that may exist for such purposes, as described by amici in this proceeding, may constitute labor organizations under Sec. 2(5). Cf. *General Foods Corp*., supra.

[29] Because the Action Committees dealt with the Respondent concerning conditions of employment and were established for the specific purpose of reaching acceptable solutions to identified problems, the Action Committees were distinguishable in pertinent respects from the employee communication meetings that the Respondent previously had conducted with employees. The Action Committees were not a continuation of those earlier meetings.

unilaterally make changes'' to satisfy employees' complaints. As a result, employees essentially were presented with the Hobson's choice of accepting the status quo, which they disliked, or undertaking a bilateral ''exchange of ideas'' within the framework of the Action Committees, as presented by the Respondent. The Respondent drafted the written purposes and goals of the Action Committees which defined and limited the subject matter to be covered by each Committee, determined how many members would compose a committee and that an employee could serve on only one committee, and appointed management representatives to the Committees to facilitate discussions.[30] Finally, much of the evidence supporting the domination finding also supports a finding of unlawful contribution of support. In particular, the Respondent permitted the employees to carry out the committee activities on paid time within a structure that the Respondent itself created.[31]

On these facts, we find that the Action Committees were the creation of the Respondent and that the impetus for their continued existence rested with the Respondent and not with the employees. Accordingly, the Respondent dominated the Action Committees in their formation and administration and unlawfully supported them.

We also agree with the judge that the Respondent did not effectively disestablish the Action Committees upon receipt of the union's bargaining demand. Thus, some of the Committees continued to meet and President Howard, in his speech to employees on March 15, implied that the Respondent would be involved with the Action Committees ''after the election.''

In sum, this case presents a situation in which an employer alters conditions of employment and, as a result, is confronted with a work force that is discontented with its new employment environment. The employer responds to that discontent by devising and imposing on the employees an organized Committee mechanism composed of managers and employees instructed to ''represent'' fellow employees. The purpose of the Action Committees was, as the record demonstrates, not to enable management and employees to cooperate to improve ''quality'' or ''efficiency,'' but to create in employees the impression that their disagreements with management had been resolved *bilaterally*. By creating the Action Committees the Respondent imposed on employees its own *unilateral* form of bargaining or dealing and thereby violated Section 8(a)(2) and (1) as alleged.

[30] As Member Devaney notes in his concurrence, the ''bargaining'' going on through the Action Committees was not between the employees and management. Rather, each committee contained supervisors or managers and the committee charged with compensation issues had its proposals evaluated by the Respondent's controller before they were presented to the Respondent. Thus, the situation here put the Respondent in the position of sitting on both sides of the bargaining table with an ''employee committee'' that it could dissolve as soon as its usefulness ended and to which it owed no duty to bargain in good faith.

[31] We do not hold that paying employee members of a committee for their meeting time and giving that committee space to meet and supplies is per se a violation of Sec. 8(a)(2). Here, however, the Respondent's assistance was in furtherance of its unlawful domination of the Action Committees and cannot be separated from that domination. Because the Respondent's conduct in supplying materials and furnishing space to the Action Committees occurred in the context of the Respondent's domination of these groups, this case is distinguishable from instances where an employer confers such benefits in the context of an amicable, arm's-length relationship with a legitimate representative organization. See *Duquesne University*, 198 NLRB at 891. (Certain employer benefits resulting from ''friendly cooperation'' with a lawfully recognized labor organization do not constitute an 8(a)(2) violation (dictum).)

## ORDER

The National Labor Relations Board orders that the Respondent, Electromation, Inc., Elkhart, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dominating, assisting, or otherwise supporting the Action Committees created in January 1989 at its Elkhart plant.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately disestablish and cease giving assistance or any other support to the Action Committees.

(b) Post at its facility in Elkhart, Indiana copies of the attached notice marked ''Appendix.''[32] Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places were notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that all allegations contained in the complaint found not to constitute unfair labor practices are dismissed.

MEMBER DEVANEY, concurring.

I agree that the Respondent violated Section 8(a)(2) and (1) by ''dominating or supporting'' the Action

[32] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Committees, which were ''labor organizations'' under Section 2(5). I write separately in response to concerns, raised by the parties and amici on both sides of the issue, over the lawfulness under Section 8(a)(2) of contemporary employee participation programs.

Like my colleagues, I acknowledge that a genuine ''employee participation program'' is not before the Board today, and, in agreeing that the Respondent violated Section 8(a)(2), I do not pass on the status of any other arrangement.[1] It is my position, however, notwithstanding the concerns of some amici, that legislative history, binding judicial precedent, and Board precedent provide significant latitude to employers seeking to involve employees in the workplace. In my view, Section 8(a)(2) prohibits a specific form of employer conduct. It is not a broad-based ban on employee/employer communications.[2] Thus, adjudication of the dealings between an employer and an employee organization must begin with an understanding of exactly what harms to Section 7 rights Section 8(a)(2) was intended to prevent and a targeting of Section 8(a)(2) enforcement at exactly those harms.

I base these conclusions on the following observations. First a ''pure'' employee participation plan was not before Congress in 1935 and has never been before the Supreme Court. Second, the legislative history of the Wagner Act, although replete with expressions of outright alarm over the development of employer-dominated sham ''unions,'' shows virtually no concern over employer-initiated programs concerned with efficiency, quality, productivity, or other essentially managerial issues. Third, Board law itself has also recognized that employer-supported ''committees'' may take forms that are lawful under Section 8(a)(2). Based on the above, I would answer the question, posed by one amicus, thus: Section 8(a)(2) should not create obstacles for employers wishing to implement employee involvement programs—as long as those programs do not impair the right of employees to *free choice of a bargaining representative.*

### 1. Legislative history

Section 8(a)(2) originated in Congress' conviction that ''company unions'' interfered with free exercise of the right of organization for collective bargaining, recognized in Section 7(a) of the National Industrial Recovery Act (NIRA).[3] The 1934 and 1935 Wagner Act hearings of the Senate Labor and Education Committee, as well as the Committee report and the floor debate on the bill, evince three characteristics especially relevant to today's debate over employee participation. First, Wagner Act supporters roundly condemned employer-dominated company unions for undermining Section 7(a) rights by usurping the right of employees to choose their own collective-bargaining representative, if such were the will of the majority. This substitution of the employer's will for the employees', witnesses charged, resulted in two practical injuries relevant here: by creating the illusion of a bargaining representative without the reality, it denied employees wishing representation the service of a loyal and effective agent, and it frustrated employees' impulses toward genuine self-organization and the securing of a representative of their own choosing. Second, critics of so-called ''employee representation plans or committees,'' as well as their defenders, understood by those terms a particular type of organization, discussed in detail during the hearings. Third, condemnation of the employer-dominated union was accompanied by assurances to critics of the bill that the Wagner Act would not outlaw all forms of employer-employee communications.

More than 75 separate ''employee representation plans'' were discussed during the 1935 hearing alone. See testimony of NLRB member Edwin S. Smith on the post-1933 development of the plans. Hearings be-

[1] Indeed, given the diversity of employee involvement programs, no one plan—or corresponding analysis—could be said to be typical. In discussing employee involvement programs, I have drawn on the descriptions of such programs in the arguments and briefs of the parties and the amici as well as the efforts and experiences of other branches of the Federal government to promote employee participation in areas such as safety, quality control, and productivity.

I am in agreement with much of what my colleagues have to say. My differences with the majority are, in general, ones of emphasis. On the few points where our differences are substantial, my concurrence will so indicate.

With respect to Member Raudabaugh's concurrence, I applaud his careful examination of the scholarship in the area of employee empowerment programs and his thoughtful analysis of some of the most demanding issues facing the American workplace today. I read the case law and legislative history differently than he does, but I find his views both challenging and instructive.

[2] As the Supreme Court noted,

> Respondents argue that to hold these employee committees to be labor organizations would prevent employers and employees from discussing matters of mutual interest concerning the employment relationship, and would thus abridge freedom of speech in violation of the First Amendment of the Constitution. But the Board's order does not impose any such bar; it merely precludes the employers from dominating, interfering with or supporting such employee committees which Congress has defined to be labor organizations. [*NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 218 (1959).]

[3] Sec. 7(a), the precursor of the National Labor Relations Act, provided in pertinent part that:

> Every code of fair competition . . . shall contain the following conditions: (1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers or labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities . . . (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing, or assisting a labor organization of his own choosing . . . .

Sec. 7(a) was the quid pro quo for NIRA provisions permitting employers to join together and set industry ''codes'' fixing prices and production in violation of the antitrust laws.

fore Senate Committee on Education and Labor on S. 2926, 73d Cong., 2d Sess., reprinted in I Legislative History of the National Labor Relations Act (Leg. Hist.), 1935, p. 1546.

With respect to employee committees or plans, the Senate committee heard that the creation of company unions, sometimes by force, accelerated dramatically after passage in 1933 of the NIRA. By 1934, ''employee representation plans'' covered over 1 million employees and, in some cases, purported to represent employees who had had no say in the matter at all. Testimony before the Committee refers repeatedly to ''employee representation plans,'' the phrase used as a term of art to describe scores of organizations, similar in structure, initiated by employers in response to Section 7(a). Employer organizations drafted and circulated documents entitled ''employee representation plans.'' The ''plans'' included in the record of the hearings are remarkably similar in structure and contain numerous paragraphs with virtually identical wording. For example, 6599 workers under a ''plan of employee representation'' at the Sparrows Point, Md. Bethlehem Steel plant elected 78 representatives in March 1933. The plan's aims, as stated by an employee representative, were

> to adjust grievances and prevent injustice; to serve as a means for collective bargaining on wages, hours, and working conditions; to provide for the exchange of information and opinions between management and employees; to educate employees and executives to understand the viewpoint and problems of each other; to promote efficiency, economy, safety, and to strengthen morale.

Hearings, S. 2926, I Leg. Hist. 836 ff.

These employees were usually paid for representing their fellows; as a Bethlehem Steel representative testified, ''[w]e are reimbursed for the time spent on committee work which we think is fair and it certainly does not bias us in any sense of the word.'' Id. at 845.

Such assurances failed to convince Congress that ''employee representation plans'' adequately provided for—or left substantially unharmed—free exercise of employees' right to organize and bargain collectively through representatives of their own choosing. In wording the statute, therefore, the Senate followed the counsel of Edwin Witte, who criticized the proposed statutory definition of a labor organization, ''[a]ny organization, labor union, association, corporation or society of any kind, in which employees participate to any degree whatsoever, which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, or hours of employment,'' as unlikely to encompass the ''employee representation plan'':

> I am not certain that [the proposed language] includes what is known as the ''employee representation'' committee, which is the most prevalent form of company union. There are two forms of company unions, the employee association and the employee representation committee, a mere election of representatives, no organization whatsoever, and of course, no dues. . . . [M]y own preference would be to distinguish between labor organizations and employee representation committees.

Id. at 272.

Witte then assured the Committee chairman that his suggested language, which was ultimately adopted, embraced ''practically all of the new company unions that have been started since the [NIRA] was passed, [which] are not unions in any proper sense of the term at all, they are loose plans for the election of representatives only.'' The statutory language ultimately passed reflects Witte's caution that the law should cover, not just independent labor unions, but the ''unions'' employers were establishing for employees—the ''employee representation committees.'' It appears, then, that the definition of ''labor organization'' is intended to bring under the purview of Section 8(a)(2)'s strictures the phenomenon of the company-imposed sham bargaining agent, without reference to other types of employer-employee communication with purposes other than bargaining. Thus, it appears that Congress intended to outlaw a particular type of employer/employee dealing—that which involved unfair pressure on employees in their choice of a bargaining representative through the substitution, in full or in part, of the will of the employer for the will of a majority of employees.[4]

Yet the company union was not viewed as an evil in every incarnation; as the Committee reported to the Senate, ''these abuses do not seem . . . so general that the Government should forbid employers to indulge *in the normal relations and innocent* communications which are part of all friendly relations between employer and employee. . . . The object . . . is to remove from the industrial scene *unfair pressure, not fair discussion*.'' Senate Report No. 1184, 73rd Cong., 2d Sess., 1 Leg. Hist. 1104. The Report makes the point that other forms of employer-dominated employee organizations, e.g., benefit funds, would not be affected.

[4] For similar reasons, the Wagner Act defined a ''labor organization'' as an entity ''dealing with'' employers rather than ''bargaining'' or ''negotiating with'' them. As William Green, president of the American Federation of Labor, testified to the Senate Committee, ''Show me a company union through which a wage agreement, signed and sealed by the representatives of the union and management, has ever been consummated. Never one.'' *To create a National Labor Board*: Senate Hearings, 73d Congress (1934), p. 72.

In light of this history, I read the statutory definition of ''labor organization'' in Section 2(5) as encompassing two general types of organizations: first, an external organization or agency (reflecting the focus of the prior proposed definition) and second, an ''employee representation committee or plan'' (representing Witte's additions), the nature of which, as discussed above, is to act as an in-house representative of employees, but which may have no other purpose, and indeed, no other existence. There is no indication that Congress intended to outlaw all forms of communication, and in fact, there is very strong evidence to the contrary. As the Committee explicitly stated, ''normal relations and innocent communications'' are *not* prohibited.

2. Supreme Court interpretation

Although the Supreme Court has noted the breadth of the statutory language of Section 8(a)(2), its construction of the statute provides no basis for concluding that Section 8(a)(2) outlaws broad areas of employer/employee communication. In *NLRB v. Cabot Carbon Corp*.,[5] the Court faced an organization markedly similar to the ''employee representation plan.''[6] Cabot established employee committees, drafted bylaws for them, submitted the bylaws to employees for approval, and, in describing the committees in its employee handbook, in essence accorded them limited recognition. The bylaws charged the committees with considering employee ideas and areas of mutual interest, including grievances.[7] In finding the committees to be labor organizations, the Court relied on their grievance handling: ''these Committees existed, at least in part, for the purpose of 'dealing with employers concerning grievances . . . .' This alone brings the Committees squarely within the statutory definition of 'labor organizations.'''[8] The Court did not reach the issue, critical to contemporary employee participation programs, of whether the committee's discussion of other ''problems of mutual interest'' such as ''safety; increased efficiency and production; conservation of supplies, materials and equipment; encouragement of ingenuity and initiative'' would have resulted in a finding that the committees were labor organizations.[9]

Thus, the early history of Section 8(a)(2) is replete with condemnations of sham unions, in whatever form they might take, that purport to represent employees in bargaining. This same early history, however, is devoid of condemnation or criticism of organizations wherein employees provide input with respect to issues such as ''safety; increased efficiency and production; conservation of supplies, materials and equipment; encouragement of ingenuity and initiative.''

3. Board law

As I suggested above, the Board has recognized that the role, the areas of concern, and the composition of employee committees, among other factors, affect their status under Section 8(a)(2) and that committees of employees can and do function in ways that are not unlawful. Although these cases are few in number, their results should be encouraging to those who would foster genuine employee empowerment and participation. In these cases, a surprisingly broad range of employer/employee communications have been found compatible with Section 8(a)(2).

a. *Employee goal-setting and self-regulation*

In *General Foods*,[10] the Board upheld the finding that employee ''teams,'' implemented as part of a job enrichment plan, were not labor organizations. Each team ''acting by a consensus of its members, [made] job assignments to individual team members, assign[ed] job rotations, and schedule[d] overtime among team members.''[11] In finding these ''committees of the whole'' not to be labor organizations, the judge, adopted by the Board, found that ''the essence of a labor organization . . . is a group or a person

[5] 360 U.S. 303 (1959).

[6] The administrative law judge commented on the similarity between the Cabot ''committees'' and the earlier plans. 117 NLRB 1633, 1648 (1957).

[7] In practice the committees also discussed and made proposals on wages, overtime, and paid time off.

[8] 360 U.S. 203, 213. Thus, I respectfully disagree with the many commentators who have described *Cabot Carbon* as a ''broad'' interpretation of Sec. 8(a)(2). Its holding is of a piece with the numerous early Board cases in which ''employee representation plans'' were, one after another, found unlawful. It is worth repeating here that *Cabot Carbon* involved employer recognition and *bargaining* with committees whose existence had nothing to do with the will of a majority of employees. In my view, *Cabot Carbon* is not a borderline case, and does not stand for a sweeping prohibition of employer/employee communications.

[9] Id. at fn. 2. In fact, no Supreme Court case construing Sec. 8(a)(2) deals with an employee organization oriented to the discussion of subjects such as these ''other areas of mutual interest'' mentioned by the Court. *NLRB v. Greyhound Lines*, 306 U.S. 261 (1937), involved a classic ''employee representation plan.'' In *Greyhound*, the respondent in 1933 ''decided, after discussions with . . . employers in other industries, that the employees should be organized into some form of employee association'' and announced its decision to set up a plan, telling employees that ''[b]efore the plan can be set up the Management must be requested by the employees to do so,'' circulating a sample petition, and suggesting that employees refrain from voting for anyone ''radical.'' 1 NLRB 303, 307 (1937). In *NLRB v. Newport News Co*., 308 U.S. 241 (1939), the respondent decided in 1927 to effectuate an employee representation plan, charged with providing ''effective'' collective-bargaining representation to employees. The plan could be amended only with the consent of the management. *Garment Workers v. NLRB*, 366 U.S. 730 (1961) (Recognition and bargaining with union chosen by minority of employees is unfair labor practice, even where employer had good faith but mistaken belief that recognized union had majority support), is a further step away from the employee participation program, involving two conventional outside labor unions.

[10] 232 NLRB 1232 (1977).

[11] Id. at 1233.

which stands *in an agency relationship* to a larger body on whose behalf it is called upon to act.''[12] The judge found that the teams' authority to regulate themselves resulted not from ''dealings'' between the teams and the company, but from unilaterally delegated authority; thus, the powers constituted simple job duties, albeit rather unusual ones.[13]

b. *Delegated managerial functions: grievance resolution*

In *John Ascuaga's Nugget*,[14] the Board reversed findings that an ''Employees Council'' initiated by the employer to resolve employee grievances and consisting of both managers and rank-and-file employees was a statutory labor organization. The Board found that the council did not ''deal with'' the employer by acting ''in some sense as the employees' advocates.''[15] Instead, the Board found, the council performed the managerial function of adjudicating employee grievances.

In *Mercy-Memorial Hospital*,[16] a similar grievance committee involving employee and managers was found not to be labor organization where ''the committee was created simply to give employees a voice in resolving the grievances of their fellow employees . . . not by presenting to or discussing or negotiating with management but by itself deciding the validity of the employees' complaints . . . .''[17]

c. *Communication as a management tool*

In Sears, Roebuck & Co.,[18] the Board upheld a judge's finding that the employer's ''communications committee'' was not a labor organization. The committees were composed of one employee from each department, selected by a rotation system. Although the judge credited testimony that employees raised matters relating to wages and benefits, the purpose of the committee was to be a management tool intended to increase company efficiency, rather than an employee representative or advocate.[19]

I am in wholehearted agreement with the thrust of these cases, and I find in them guidelines for consideration of future cases involving alleged violations of Section 8(a)(2). Most importantly, contrary to my colleagues, I would not be inclined to find that an employee group constituted a statutory labor organization unless the group acted as a representative of other employees. *General Foods*, supra.[20] My reading of the legislative history fully supports the judge's conclusion in *General Foods* that a ''labor organization'' purports to be, first and foremost, an agent or advocate for employees, and should be a loyal and exclusive agent. Where an employee committee does not act as the agent or advocate of other employees, an employer's dealings with the committee will not cause the harm Section 8(a)(2) is intended to correct: the usurpation by the employer of the employees' right to choose their own bargaining representative and the concomitant frustration of their fundamental freedom of choice and action guaranteed by Section 7. In determining whether an employee organization functioned as a representative of employees, I would look to the organization's authority: have the employees, the employer, or both empowered this group to speak for other employees? Thus, contrary to the arguments of some amici, I can envision that an organization would have a representation function even where employees themselves did not view it as such; I note that part of the harm Section 8(a)(2) was intended to correct arose out of the attempt to create in employees the perception that they were enjoying the benefits of bargaining representation when in fact they were not.

Further, I would not be inclined to find that an employer's mere solicitation of ideas or suggestions from an employee group constitutes ''dealing with'' that group. *Sears, Roebuck, & Co.*, supra. I note that *Cabot Carbon*'s rejection of the notion that ''dealing with'' is synonymous with collective bargaining failed to delineate the lower limits of the conduct: if ''dealing with'' is less than bargaining, what is it more than?[21] The legislative history indicates that the term ''bargaining'' was viewed as too narrow in light of the fact that many ''employee representation plans'' never cul-

[12] Id. at 1234 (emphasis added).
[13] Id. at 1235.
[14] 230 NLRB 275 (1977).
[15] Id. at 276.
[16] 231 NLRB 1108 (1977).
[17] Id. at 1121.
[18] 274 NLRB 230 (1985).
[19] Id. at 244.

[20] In cases in which an employee committee's function as a representative of employees is an issue, I suggest that consideration of the issue of the committee's agency status could be helpful. I note that the amici favoring finding a violation of Sec. 8(a)(2) here have stressed that employer-dominated committees injure employee rights because employees have the right to representation by a bargaining agent with allegiance to their interests alone, and that such loyalty cannot arise when the committee's existence is dependent on the whim or will of the employer. In my view, the confusion over the relation of a committee to the employees—and the injury to employee rights—arises when the employer usurps the authority, vested by the Act in a majority of employees, to appoint an agent to represent their interests. Thus, I would consider evidence that a committee was established and unambiguously served as an agent of the employer to be evidence that the committee lacked a representational purpose. Such situations might arise where an employer made use of communication conduits, brainstorming groups, and groups dealing with production, efficiency, or other employer problems. In my view, committees or groups acting unambiguously as employer agents would be less likely to appear to provide employees with representation and therefore less likely to cause the harm to their rights contemplated by Sec. 8(a)(2).

[21] *NLRB v. Scott & Fetzer Co.*, 691 F.2d 288, 291–292 (6th Cir. 1982).

minated in collective-bargaining agreements or even in the alteration of a single term or condition of employment, regardless of the frequency of meetings or the ostensible authority of the employee committees.[22] There is, however, no basis for concluding that Congress intended to include under ''dealing with'' communication of information or ideas. Further, as in *Sears*, I would be reluctant to find that the occasional discussion of mandatory subjects of bargaining by a ''communication committee,'' the purpose of which was clearly communication or brainstorming, meant that the committee ''dealt with'' employers concerning those subjects. In keeping with *Sears*, then, I would be inclined to interpret ''dealing with'' as involving a process more bilateral in nature than soliciting and/or accepting employee suggestions or ideas.

4. The Action Committees

The record here indicates overwhelmingly that the Action Committees are not ''normal relations and innocent communications'' between employer and employee that Congress intended to leave undisturbed. Instead, the facts demonstrate why Congress couched the prohibition of company unions in broad terms. The Action Committees do not correspond to the historical ''employee representation plans.'' Yet the Action Committees' effect on Section 7 rights is precisely the harm Congress sought to avert in Section 8(a)(2). In this regard, the Respondent, in spite of the expressed reluctance of employees and with no assurance of majority support, established the Action Committees for the purpose of ''bargaining'' with them over terms and conditions of employment. The Respondent itself chose the Action Committee members and charged them with representing their fellows, overriding employee preferences as to how the representatives would be chosen. By these acts, the Respondent substituted its will for that of a majority of employees and usurped their right to choose their own representative. In addition, the Action Committees effectively put the Respondent on both sides of the bargaining table; the company excluded the subject of wages from the committees' agenda, in spite of employee preference that it be discussed, and the controller ''pre-screened'' employee proposals so that the Respondent would have only palatable proposals to consider. Thus, the Action Committees gave employees the illusion of a bargaining representative without the reality of one. Further, the subject matter of the Action Committees, as set out by the Respondent, did not consist of concerns about productivity, efficiency, materials conservation, safety, and the like: instead, the Committees were set up to bargain over terms and conditions of employment. Nor did they constitute employee participation or empowerment committees: they were intended to give the impression that decisions resulting from their activities were ''bilateral,'' yet the Respondent was in control of their subject matter and of the content of their proposals. By establishing committees that purported to act as the agent of employees in the bilateral consideration of problems, but in reality acted as its own agent, the Respondent unlawfully ''dominated and supported'' a labor organization in violation of Section 8(a)(2).

The Respondent, joined by some amici, maintains that the Action Committees were not formed with knowledge of a union campaign or to avoid unionization. Several amici urge that the Board require a showing under Section 8(a)(2), as it does under Section 8(a)(3), that an employer's actions were motivated by antiunion animus. Without passing on whether a lack of antiunion animus can never be a factor in a successful Section 8(a)(2) defense,[23] I would find the issue of the Respondent's motivation irrelevant, in light of the clear evidence that the Respondent actually bargained with the committees. In essence, the Respondent recognized for purposes of collective bargaining a labor organization that did not represent a majority of its employees. In such cases, unlawful motive is immaterial.[24]

This discussion of current law under Section 7 is certainly not exhaustive—it is not meant to be and cannot be. It is meant to indicate that current binding precedent under Section 8(a)(2) requires an approach sensitive to the damage to employee Section 7 rights that sham bargaining agents inflict and to the realization, present both in Congressional deliberations and in Board law itself, that genuine employee involvement is in no way inimical to the free exercise of the right of employees to choose a bargaining representative, if one is desired.

MEMBER OVIATT, concurring.

American companies, their employees, and labor unions representing those employees are at present confronted with diverse competitive forces requiring an array of different responses if those companies are to remain competitive in the world economy. To the extent present laws are interpreted to apply restrictions and roadblocks to companies' ability to perform more

[22] See also *Cabot Carbon*, supra, 360 U.S. at 213–214.

[23] For example, I would be inclined to accept an employer's assurances *to employees* that an employee committee was not intended as a substitute for a bargaining representative and that employees were free, under the law, to select a bargaining representative as evidence of a lack of unlawful motivation that would affect the nature of the committee's purpose. Contrast *Ampex Corp.*, 168 NLRB 742 (1967), enfd. 442 F.2d 82 (7th Cir. 1971), cert. denied 404 U.S. 939 (1971), in which the Board, in finding that employee committees were statutory labor organizations where the employer argued that they functioned as personalized suggestion boxes, the Board emphasized that the respondent had told employees that the committees were substitutes for union representation and were better than unions.

[24] *Garment Workers v. NLRB*, 366 U.S. 730 (1961).

efficiently and to respond promptly to competitive conditions, the more difficult will be the common task of achieving or retaining equality. This is a time of testing for the American and world economies and we must proceed with caution when we address the legality of innovative employee involvement programs directed to improving efficiency and productivity. I view the violations found here as clear cut, however. Accordingly, I join in the majority opinion, but I do so as much for what the opinion does *not* condemn as an unfair labor practice as for what it *does* find to be a violation of Section 8(a)(2) and (1). Thus, I write separately to stress the wide range of lawful activities which I view as untouched by this decision.

In my view, the critical question in most cases of alleged violations of Section 8(a)(2) through domination or support of an entity that includes employees among its membership is whether the entity is created with any purpose[1] to deal with ''grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work'' as set forth in the Section 2(5) definition of ''labor organization.'' In this case, I have no doubt that the subject matter of the Action Committees falls comfortably within the definition. The Committee's purpose was to address and find solutions for issues related to absenteeism, pay progression, attendance bonuses, and no-smoking policies. These are plainly among the subject matters about which labor organizations traditionally bargain since they involve ''wages'' or ''conditions of work.''[2]

There is, however, an important area of industrial relations where committees and groups of employees and managerial personnel act together with the purpose of communicating, addressing and solving problems in the workplace that do not implicate the matters identified in Section 2(5).[3] Among the employee-participation groups that may be established by management are so-called ''quality circles'' whose purpose is to use employee expertise by having the group examine certain operational problems such as labor efficiency and material waste. See, Beaver, *Are Worker Participation Plans ''Labor Organizations'' Within the Meaning of Section 2(5)? A Proposed Framework of Analysis*, Lab. L. J. 226 (1985). Other such committees have been dubbed ''quality-of work-life programs.'' These involve management's attempt to draw on the creativity of its employees by including them in decisions that affect their work lives. These decisions may go beyond improvements in productivity and efficiency to include issues involving worker self-fulfillment and self-enhancement. See, Fulmer and Coleman, *Do Quality-of Work-Life Programs Violate Section 8(a)(2)?*, 35 Lab. L. J. 675 (1984). Others of these programs stress joint problem-solving structures that engage management and employees in finding ways of improving operating functions. See, Lee, *Collective Bargaining and Employee Participation: An Anomalous Interpretation of the National Labor Relations Act*, 38 Lab. L. J. 206, 207 (1987). And then there are employee-management committees that are established by a company with the purpose of creating better communications between employer and employee by exploring employee attitudes, communicating certain information to employees, and making management more aware of employee problems. See, Beaver, supra.

Where there is a labor union on the scene, these employee-management cooperative programs may act as a complement to the union. They can not, however, lawfully usurp the traditional role of the Union in representing the employees in collective bargaining about grievances, wages, hours, and terms and conditions of work. Where no labor union represents the employees, these programs are often established to open lines of communication so that the operation may take advantage of employee technical knowledge and expertise. See, Note, *New Standards For Domination and Support Under 8(a)(2)*, 82 Yale Law Journal 510, 511 (1973).[4]

Certainly, I find nothing in today's decision that should be read as a condemnation of cooperative programs and committees of the type I have outlined above. The statute does not forbid direct communication between the employer and its employees to address and solve significant productivity and efficiency problems in the workplace. In my view, committees and groups dealing with these subjects alone plainly fall outside the Section 2(5) definition of ''labor orga-

[1] As noted in the opinion, purpose, which is different from motive, may be shown by what management intends the organization to accomplish as well as for what it actually does, and that purpose may change over time.

[2] In my view, this case presents little more than garden variety 8(a)(2) conduct. For that reason, it is difficult to extrapolate and to speculate about the knotty problems that may arise in connection with the benign kinds of cooperative programs I outline below. Not in this case, for example, is the question of how to treat a situation where a legitimately established committee, whose purpose is to improve productivity, recommends changes whose implementation results in job loss. It was thus only with the greatest reluctance that I agreed to the decision to single out this case for oral argument. Nonetheless, now that expectations have been raised, I consider it necessary at the least to emphasize how narrow and unremarkable is today's holding.

[3] I do not agree with Member Raudabaugh that ''most'' committees of this sort will necessarily address in a significant way Sec. 2(5) subjects. In my experience, one can carefully structure an employee participation committee with a clearly articulated purpose to cover those matters that do not implicate Sec. 2(5) topics and scrupulously operate the committee so that it remains true to that purpose.

[4] I see no reason to distinguish between the situation where a cooperative program or committee is established by an employer, and a labor organization already represents the employees, and the situation where no labor organization has been recognized, so long as the program or committee does not deal with the employer on those subjects that Sec. 2(5) identifies as being within the province of a ''labor organization.''

nization'' since they are not concerned with grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Indeed, in this age of increased global competition I consider it of critical importance that management and employees be able, indeed, are encouraged, to engage in cooperative endeavors to improve production methods and product quality.

It is with this understanding of the scope of the majority decision that I join in its reasoning and result.[5]

MEMBER RAUDABAUGH, concurring.

## I. INTRODUCTION

My colleagues find a violation of Section 8(a)(2) in this case. I concur. However, because I believe that this case genuinely raises the broader issue of whether Section 8(a)(2) should be reinterpreted and because of the significance of this issue as applied to employee participation programs, I write this separate concurrence.[1]

The Respondent set up the employee committees as a means of resolving disputes with its employees. The committees were designed to function as a communications device between management and the employees. The Respondent's employees were not represented by a union. The Respondent was not motivated by antiunion reasons. The complaint alleges that this conduct was unlawful under Section 8(a)(2). The case therefore raises the question whether Section 8(a)(2) should be reinterpreted in light of the growing importance of cooperative labor-management efforts.

Cooperative programs are seen by many as a necessary response to competition in a global economy. That is the reason this case was selected for oral argument. That is the reason so much attention has been focused on it. And that is the reason I expressly address the issues of law and policy that have been raised by the parties and the amici concerning employee participation programs in situations like that of the instant case where employees are not represented by an exclusive collective-bargaining representative.

In writing separately, I suggest an analytical approach for reinterpreting Section 8(a)(2), and I offer practical guidance to employees, unions, employers, and the public concerning what may be permitted and what is forbidden by Section 8(a)(2) in situations where employees are not organized. There are also many EPPs in organized settings.[2] My analysis, however, is limited to the factual context of the instant case and I do not, therefore, address the questions raised by EPPs in the context of collective-bargaining relationships. A different set of questions, including the application of Section 8(a)(5), arises when EPPs are considered in a setting where the employees have selected an exclusive collective-bargaining representative.

## II. THE EMERGENCE OF EMPLOYEE PARTICIPATION PROGRAMS

Employee participation in decision-making in the workplace and cooperative efforts between employers and employees began to emerge as significant phenomena in the late 1970s.[3] Although a wide variety of fac-

[5] Like the majority, I reject Member Raudabaugh's efforts to rewrite Sec. 8(a)(2). In my view his 4-part test significantly erodes Congressional intent as understood by the Supreme Court. Thus, Member Raudabaugh would be guided in part by the extent to which the ''employees do not view the committee'' as a substitute for collective bargaining. Under Member Raudabaugh's approach the employees' perception must be ''reasonable.'' This, however, simply encourages a separate contest over ''reasonableness,'' a factor not contemplated by Congress or the statute.

Member Raudabaugh also would give persuasive weight to the fact that an employer expressly assures employees that, notwithstanding the existence of an employee participatory program, they are free to ''select traditional union representation . . . .'' No authority is cited for giving weight to this kind of a statement when the Board is adjudicating an 8(a)(2) case. Such an assurance would be hollow indeed if the employees have already been unlawfully influenced not to choose an outside organization by the establishment of an in-house committee in violation of 8(a)(2). Further, exactly what the Employer said, how he said it, and to whom and when it was said, could well be disputed, creating the potential for additional trial issues. Thus, Member Raudabaugh's test, however well-intentioned provides a road map for increased litigation, not cooperation. In my view, today's Employer does not need to be confronted with the possibility of more litigation and the costs associated therewith, but should be free, within the limits of our Statute, to encourage problem solving though cooperation so as to better compete in the world marketplace.

Finally, as the majority opinion shows, *Newport News Shipbuilding*, supra, is still good law. That case, and *Garment Workers Union (Bernhard Altmann)*, supra, wisely reject the employer good-faith-motive principle embraced by Member Raudabaugh. The employer's subjective intent in no way dissipates the impact on the employees of the presence of an employer-dominated, in-house committee that substitutes for a legitimate labor organization's collective bargaining function. Sec. 8(a)(2) addresses that impact, not the employer's intentions.

[1] I have used the term ''employee participation programs'' (EPPs) to refer to labor-management cooperative efforts. Although such programs cover a broad gamut, they all involve the concept of employee participation. See Eaton and Voos, ''Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation,'' *Unions and Economic Competitiveness* (M.E. Sharpe, Inc., 1992) at 208–210 for a description of the different forms of EPPs.

[2] See, e.g., *The New Work System Network: A Compendium of Work Innovation Cases* (Bureau of Labor-Management Relations and Cooperative Programs, U.S. Dept. of Labor, Pub. No. BLMR 136 (1990).

[3] ''The New Industrial Relations,'' Business Week, (May 11, 1981), p. 85. The current surge in cooperation, however, is not the first time that worker participation has occurred in the United States. Significant cooperative efforts also occurred in the unionized sector at a much earlier period in the history of labor relations. See, e.g., Golden and Ruttenberg, *The Dynamics of Industrial Democracy* (New York: Harper & Brothers Publishers, 1942). See also Hogler, *Worker Participation, Employer Anti-Unionism, and Labor Law: The*

*Continued*

tors may have converged to create the conditions for these phenomena, some stand out more clearly than others. The preeminence of the United States in world markets began to face a serious and growing international challenge, productivity of our domestic industry began to decline, and the composition and nature of work underwent enormous changes.[4] Partly because of the use of cooperative methods by the Japanese, U.S. firms began to consider such methods for their own workplaces.[5]

The interest in EPPs has generated much discussion in the legal community about the potential conflict between labor-management cooperation and the National Labor Relations Act.[6] The central concern of the parties and amici in this case is whether EPPs are compatible with the Act. That is the focus of my separate opinion.

## III. LEGAL ANALYSIS

### The Board's Power to Interpret the Act

The Board is the body established by Congress to interpret the Act. The Board's power is broad but it is not without limits. The Supreme Court has stated:

> [It] is the Board on which Congress conferred the authority to develop and apply fundamental national labor policy. . . . The function of striking [the balance between competing interests] to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the [Board], subject to limited judicial review.[7]

The Board has been given the ''special function of applying the general provisions of the Act to the com-

*Case of the Steel Industry, 1918–1937*, 7 Hofstra Lab. L.J. 219 (1989).

[4] Kochan, Katz, and McKersie, *The Transformation of American Industrial Relations* (New York: Basic Books, 1987).

[5] Hale, *The New Industrial Relations in a Global Economy*, 37 Lab. L.J. 539 (1986); Kochan, McKersie, & Katz, ''U.S. Industrial Relations in Transition: A Summary Report,'' *Proceedings of the Thirty-Seventh Annual Meeting of the Industrial Relations Research Association*, 261, 264–268 (B. Dennis ed. 1984).

The advent of contemporary employee participation programs has generated a large body of interest and research from the disciplines of law, human relations and personnel management, economics, business, and organizational behavior. A small cross-section of this literature includes ''America's Best Plants: IW's Third Annual Salute,'' *Industry Week*, October 19, 1992; *Unions and Economic Competitiveness*, supra note 1; McCleod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 Indus. Rel. L.J. 233 (1990); Hoerr, ''The Payoff from Teamwork,'' Business Week, July 10, 1989; Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 Cath. U.L. Rev. 1 (1989); Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. Chi. L. Rev. 73 (1988); *Review Symposium, The Transformation of American Industrial Relations*, 41 Indus. & Lab. Rel. Rev. 439 (1988); Kochan, Katz, and McKersie, *The Transformation of American Industrial Relations* (New York: Basic Books, 1987); *Advances in the Economic Analysis of Participatory and Labor-managed Firms: A Research Annual*, Vol. 1 (Jones and Svejnar eds) (Greenich, Conn.: JAI Press, Inc., 1985); *Human Resource Management and Industrial Relations: Text, Readings, and Cases* (Kochan and Barocci, eds.) (Boston, Toronto: Little, Brown & Co., 1985); Siegel and Weinberg, *Labor-Management Cooperation: The American Experience*, The W.E. Upjohn Institute for Employment Research (1982); Stone, *The Post-War Paradigm in American Labor Law*, 90 Yale L.J. 1509 (1981); *Participative Management: Concepts, Theory and Implementation* (Ervin Williams, ed.), Pub. Ser. Div., Col. of Bus. Ad., Georgia State Un. (1976); *Perspectives on Job Enrichment and Productivity* (Waino W. Suojanen, W. William Suojanen, G.L. Swallow, and M. McDonald, eds.), Pub. Ser. Div., Col.of Bus. Ad., Georgia State Un., (1975); Hammer, *New Developments in Profit Sharing, Gainsharing, and Employee Ownership*, Cornell Un. ILR Reprint from John P. Campbell, Richard J. Campbell, and Associates, *Productivity in Organizations: New Perspectives from Industrial and Organizational Psychology* (San Francisco: Jossey-Bass, 1988); Brett and Hammer, *Organizational Behavior and Industrial Relations*, Cornell Un. ILR Reprint from *Industrial Relations Research in the 1970s: Review and Appraisal* (Madison, Wis.: IRRA, 1982); Hammer, Currall, and Stern, *Worker Representation on Boards of Directors: A Study of Competing Roles*, Cornell Un. ILR Reprint from Vol. 40 Indus. Lab. Rel. Rev. No. 4 (July 1991); Hammer and Stern, *A Yo-Yo Model of Cooperation: Union Participation in Management at the Rath Packing Company*, Cornell Un. ILR Reprint from Vol.39 Indus. Lab. Rel. Rev. No. 3 (April 1986).

[6] See, e.g., Kafker, *Exploring Saturn: An Examination of the Philosophy of ''Total'' Labor-Management Cooperation and the Limitations Presented by the NLRA*, 5 Lab. Law. 703 (1989); Sockell, *The Future of Labor Law: A Mismatch Between Statutory Interpretation and Industrial Reality*, 30 B.C.L. Rev. 987 (1989); Note, *Labor-Management Cooperative Programs: Do They Foster or Frustrate National Labor Policy?* 7 Hofstra Lab. L.J. 219 (1989); Fetter & Reynolds, *Labor-Management Cooperation and the Law: Perspectives from Year Two of the Laws Project*, 23 Harv. C.R.–C.L. L. Rev. 3 (1988); Gardner, *The National Labor Relations Act and Worker Participation Plans: Allies or Adversaries?* 16 Pepperdine L. Rev. 1 (1988); Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 Harv. C.R.–C.L. L. Rev. 39 (1988); Note, *The Future of Labor-Management Cooperative Efforts Under Section 8(a)(2) of the National Labor Relations Act*, 41 Vand. L. Rev. 545 (1988); *Special Project: Labor-Management Cooperation*, 41 Vand. L. Rev. 539 (1988); Note, *The Viability of Distinguishing Between Mandatory and Permissive Subjects of Bargaining in a Cooperative Setting: In Search of Industrial Peace*, 41 Vand. L. Rev. 577 (1988); Deitsch, *Participatory Management and Labor Law: A Collision Course*, 38 Lab. L.J. 786 (1987); Note, *Rethinking the Adversarial Model in Labor Relations: An Argument for the Repeal of Section 8(a)(2)*, 96 Yale L.J. 2021 (1987); *U.S. Labor Law and the Future of Labor-Management Cooperation—First Interim Report* (U.S. Dept. of Labor Publication No. BLMR 113, 1987); Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C.L.Rev. 499 (1986); Schlossberg and Fetter, *U.S. Labor Law and the Future of Labor-Management Cooperation* (U.S. Dept. of Labor Publication No. BLMR 104, 1986); Note, *Participatory Management Under Sections 2(5) and 8(a)(2) of the National Labor Relations Act*, 83 Mich. L. Rev. 1736 (1985); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 Harv. L. Rev. 1662 (1983); Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, 28 Syracuse L. Rev. 809 (1977); Note, *New Standards for Domination and Support Under Section 8(a)(2)*, 82 Yale L.J. 510 (1973).

[7] *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501 (1978).

plexities of industrial life.''[8] However, in construing the statute the Board must determine whether Congress has clearly spoken to the issue and whether the Board's construction of the Act is consistent with prior interpretations of the statute by the Supreme Court.[9] The Supreme Court made this aspect of the Board's duty very clear in *Lechmere Inc. v. NLRB*:

> Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of stare decisis, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning.[10]

Under this standard, the Board lacks the authority to reinterpret Section 8(a)(2) of the Act in light of changed circumstances (e.g., the advent of modern EPPs) if that reinterpretation is inconsistent with a prior Supreme Court interpretation of Section 8(a)(2).

In light of the above, the threshold question for any analysis of Section 8(a)(2), in the context of modern EPPs, is whether the Supreme Court has determined a clear meaning of the Act which precludes accommodation of EPPs within the statutory scheme. If it has, then the Board is barred from reinterpreting the Act to accommodate EPPs, and those seeking a lawful place for EPPs must seek new legislation. If the Court has not made such a determination, then the Board is free to reinterpret the Act in light of changed circumstances.

For the reasons set forth below, I believe that the Supreme Court's decision in *NLRB v. Cabot Carbon Co*.,[11] precludes a reinterpretation of the *definition of labor organization* set forth in Section 2(5) of the Act. However, I believe that the Supreme Court's decision in *NLRB v. Newport News Shipbuilding Co*. ,[12] does not bar a reinterpretation of *the proscriptions of* Section 8(a)(2).

## IV. THE 2(5) DEFINITION OF ''LABOR ORGANIZATION''

Section 2(5) defines ''labor organization'' as: ''any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.''

There are three critical elements in this definition of a labor organization: (1) employees must participate in it; (2) it must exist for the purpose, in whole or in part, of ''dealing'' with an employer; and (3) the subject of the ''dealing'' must be ''grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.''[13]

The first element is almost always present in EPPs and has not been the subject of litigation. By definition and by practice, employees participate in these programs.

The most important decision interpreting the second element is the Supreme Court's opinion in *NLRB v. Cabot Carbon Co*., 360 U.S. 203 (1959). The Court held that the term ''dealing'' in Section 2(5) is broader than the term ''collective-bargaining'' and includes such activities as presenting grievances and making recommendations. That holding set the parameters for an analysis of whether EPPs are labor organizations.

The committees at issue in *Cabot Carbon* were established by the employer pursuant to a suggestion of the War Production Board in 1943. The committee bylaws, as summarized by the Court, stated: ''The purpose of the Committees is to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management.''(Footnote omitted.).[14] It was undisputed that the committees met regularly with representatives of management, handled grievances, and made proposals and requests to management on a wide range of subjects including seniority, working schedules, and improvement of working facilities and conditions.

In construing the term ''dealing'' in Section 2(5), the Court rejected the contention that the phrase was synonymous with the phrase ''bargaining.'' Reviewing the legislative history of the Wagner Act, the Court concluded: ''It is therefore quite clear that Congress, by adopting the broad term 'dealing' and rejecting the more limited term 'bargaining collectively,' did not intend that the broad term 'dealing with' should mean only 'bargaining with.'''[15] The Court then noted that, under the terms of the committees' bylaws, the committees had the responsibility to handle grievances at nonunion plants and departments, and in fact had done so. The Court concluded that the committees therefore existed, at least in part, for the purpose of dealing with

[8] *NLRB v. Erie Resistor Corp*., 373 U.S. 221, 236 (1963).

[9] *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 842–845 (1984).

[10] 139 LRRM 2225, 2229 quoting from *Maislin Industries, U.S., v. Primary Steel*, 110 S.Ct. 2759 (1990) (slip op. 13).

[11] 360 U.S. 203 (1959).

[12] 308 U.S. 241 (1939).

[13] The term ''representation'' also appears in Sec. 2(5). In enumerating the types of entities that may be labor organizations, Sec. 2(5) refers to an ''employee representation committee or plan.'' An argument can be made that the factor of representation is an additional defining characteristic and must be present before a finding of labor organization status can be made under Sec. 2(5). I do not find that argument persuasive. The term ''representation'' does not modify the other entities listed in the statutory definition and does not appear in the latter part of the definition along with ''participation'' and ''dealing with.'' I would, therefore, reject arguments that certain EPPs fall outside Sec. 2(5), to the extent that those arguments rely on the premise that representation is a necessary element in a labor organization.

[14] 360 U.S. at 205.

[15] Id. at 211.

employers concerning grievances and that this, alone, brought them within the statutory definition of a labor organization.

The Court then set forth an additional basis for the finding of labor organization status. It noted that the committees regularly made proposals and requests to management on many matters involving the employment relationship. The employer argued that these activities did not constitute ''dealing'' because the proposals were only recommendations, with the final decision left to the employers' discretion. The Court rejected the argument, noting that the power to accept or reject is inherent in all ''dealing.''

The Court's construction of the term ''dealing'' is very broad. Consistent with the breadth of the Court's holding, the Board's exceptions to the *Cabot Carbon* standard have been narrow. For example, the Board has found that if the employee committee can *itself* resolve grievances, with no need to go to the employer, there is no ''dealing.''[16] Similarly, the Board has determined that if employees are divided into work crews which have the power to resolve employment-related problems, there is no ''dealing'' between those crews and the employer.[17]

It would appear that most EPPs would fit within the broad *Cabot Carbon* standard of ''dealing with.'' Most EPPs involve the presentation of proposals or ideas to management, and a management response to those proposals or ideas. Further, a review of the literature on EPPs suggests that the facts of the above-described exceptions are atypical. As noted, most EPPs involve some interaction between the committee and management.[18] It is rare for full grievance-handling authority to be delegated to a committee without any further interaction with management. To date, it is uncommon for production teams to have managerial functions fully delegated to them without interaction with management.

For these reasons, I believe the *Cabot Carbon* standard of ''dealing'' will be met by most EPPs. It is likely that the exceptions to the standard will cover only a small number of such programs.[19]

The third element of ''labor organization'' status concerns the subject matters with which the committee deals. As noted above, the list of subjects in Section 2(5) is a lengthy one. It includes such broad terms as ''conditions of work'' and ''labor disputes.'' It is hard to imagine an employee committee that would be able to avoid these matters completely. Even if the committee's stated purpose is to deal only with such entrepreneurial concerns as product quality or workplace efficiency, it seems clear that the committee, in order to achieve its purpose, would have to consider one or more of the subjects listed in Section 2(5). As one commentator has observed:

> A ''discussion of work problems'' may include almost anything, including, for example, poor lighting or inadequate ventilation in work areas. When employees present to management ''specific solutions and improvement recommendations'' regarding such matters, the ''dealing with'' standard of *Cabot Carbon* will always be satisfied. Moreover, the subject matter of such ''dealings'' will usually include matters which clearly fit within the examples enumerated in Section 2(5), such as ''grievances'' or ''conditions of work,'' if these terms are construed broadly.[20]

For these reasons, it seems to me that the subject listings in Section 2(5) are sufficiently numerous and broad to cover most EPPs.[21]

In sum, I believe that most EPPs will possess the three elements of the Section 2(5) definition of ''labor organization.'' This conclusion is consistent with clear

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[16] *John Ascuaga's Nugget*, 230 NLRB 275 (1977), and *Mercy-Memorial Hospital*, 231 NLRB 1108 (1977).

[17] *General Foods*, 232 NLRB 1232 (1977).

[18] See, e.g., *The New Work System Network: A Compendium of Work Innovation Cases* (Bureau of Labor-Management Relations and Cooperative Program, U.S. Dep't. of Labor, Pub. No. BLMR 136, 1990); Verman, ''Exploring the Team Form of Work Organization in Human Resource,'' *Human Resource Management and Industrial Relations: Text, Readings, and Cases*, supra, fn. 4 at 425–451; ''Industrial Relations Systems at the Workplace,'' *Participative Management: Concepts, Theory and Implementation*, supra, fn. 4 at 81–108.

[19] Although the Court's focus was on the term ''dealing,'' its analysis also sheds light on the related term ''purpose'' in the statutory definition. In order for an entity to constitute a labor organization, at least one of its purposes must be that of dealing with the employer. If, as in *Cabot Carbon*, the entity in fact ''deals with'' the employer, it would seem clear that a ''purpose'' of that entity is to deal with the employer.

The term ''purpose'' in Sec. 2(5) is to be distinguished from motive (which does not appear in the section). As discussed above, the term ''purpose'' *concerns the aims of the entity involved*. The aim or purpose must be to deal with the employer. By contrast, ''motive'' concerns *the employer's reasons* for establishing the entity. As discussed, infra, I believe that motive is relevant to the 8(a)(2) issues.

[20] Note, *Participatory Management Under Section 2(5) and Section 8(a)(2) of the National Labor Relations Act*, supra fn. 5 at 1747, fn. 65.

[21] An argument can be made that such subject matters as safety and increased efficiency do not fit within the Sec. 2(5) definition and that EPPs created to address such matters would fall outside the statutory definition of labor organization. The proponents of this argument point to the fact that the Supreme Court in *Cabot Carbon* did not address the question whether proposals to an employer concerning safety and increased efficiency would constitute ''dealing with.'' From this, they conclude that the Court intended to leave open the issue of whether a committee would be a labor organization if it confined itself to matters not expressly addressed by the Court.

For the reasons stated in the text above, I believe that this argument ultimately fails or has very limited applicability. An EPP addressing safety or increased efficiency is very likely to take up matters which were discussed by the Court or are expressly included in Sec. 2(5). If it does, then its purpose, at least in part, is to deal with the employer on these matters and it falls within the statutory definition.

legislative history. As my colleagues have observed in the principal opinion, Congress deliberately abandoned a narrow definition of ''labor organization'' and chose a broader one that expressly covered employee representation committees and plans.[22] Accordingly, in my opinion, any reinterpretation of Section 8(a)(2) which relies on excluding EPPs from Section 2(5) would be beyond the Board's authority.

This conclusion is also based on sound policy. For the reasons stated earlier, many EPPs address conditions of work and embody, at least to some degree, a form of labor relations. Placing them under the Board's jurisdiction protects the interest of all parties involved. Employees, and unions seeking to represent them, will be assured that the EPPs are subject to Board review and cannot be used to circumvent statutorily protected rights. At the same time, employers will be assured that they are not being prevented from using methods which might improve their competitive status. In this regard, a finding that an EPP is a labor organization does nothing more than raise the issue of whether the employer's conduct is proscribed under the interpretation of Section 8(a)(2) set forth below.

In sum, if EPPs are to be lawful, Section 2(5) will have to be changed legislatively unless Section 8(a)(2) can be reinterpreted so as to accommodate such programs. I now turn to that 8(a)(2) issue.

## V. SECTION 8(A)(2)

Section 8(a)(2) makes it an unfair labor practice for an employer ''to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.'' The legislative history of the Wagner Act of 1935 shows that employer conduct with regard to employee committees was placed in the same category as creating ''company unions'' and was one of the evils that Section 8(a)(2) was designed to combat.[23]

The only Supreme Court decision interpreting this aspect of Section 8(a)(2) is *NLRB v. Newport News Shipbuilding Co.*, 308 U.S. 241 (1939). Any analysis of Section 8(a)(2), in the context of EPPs, must come to grips with the Supreme Court's construction of the Act in that case.

The employee committee at issue in *Newport News* was set up by the employer in cooperation with its employees for the purpose of giving employees a voice concerning their working conditions and to provide a means for preventing and adjusting differences. The employees elected representatives, and the representation plan was administered by joint committees consisting of equal numbers of employee and management representatives. The plan could be amended only with the agreement of the employer. It was uncontradicted that labor disputes were settled under the plan. The employer never forbade its employees to join independent unions and did not discriminate against them because of membership in such unions. A majority of employees had indicated by secret ballot their desire for the representation plan to continue.

The Board found that the employer's involvement in the plan violated Section 8(a)(2) and ordered, inter alia, that the employer disestablish the plan. The only issue before the Court was the propriety of the disestablishment order. However, to resolve that issue, the Court discussed the Board's ultimate conclusion of domination and interference by the employer.[24] In this regard, the Court focused on the requirement that any amendment to the plan would be subject to the employer's approval. The Court stated: ''Such control of the form and structure of an employee organization deprives the employees of the complete freedom of action guaranteed to them by the Act, and justifies an order such as was here entered.''[25] The Court further concluded that a disestablishment order would be appropriate even if the plan had been recently altered to delete the requirement of employer approval of all changes to the plan. The Court found that the existence and continuation of a plan which had once been unlawfully dominated might hinder employees' freedom to choose any form of representation they desired. On this remedial issue the Court stated:

> The law provides that an employee organization shall be free from interference or dominance by the employer. . . . In applying the statutory test of independence it is immaterial that the plan had in fact not engendered, or indeed had obviated, serious labor disputes in the past, or that any company interference in the administration of the plan had been incidental rather than fundamental and with good motives. It was for Congress to determine whether, as a matter of policy, such a plan should be permitted to continue in force. We think the statute plainly evinces a contrary pur-

[22] See supra at 993 of principal opinion.

[23] Thus, for example, Senator Wagner stated during the hearings and debates over the terms of the Act: ''The development of the company-dominated union has been one of the great obstacles to genuine freedom of self-organization. It is extremely significant that these spurious unions have sprouted most prolifically in the form of various employee representation plans devised after the enactment of the law designed to insure that very freedom. Over 69 percent of the plans now in existence have been inaugurated since the passage of the Recovery Act. It is worthy of note also that these plans are most prevalent in the largest plants. This means that in the very instances where the bargaining power of the employer is strongest, the worker is least free to attempt to improve his position by unrestricted affiliation with others of his kind.'' 1, NLRB, Legislative History of the National Labor Relations Act, 1935 (hereafter Leg. Hist.) 1416.

[24] There was no contention before the Court that the committee was not a labor organization.

[25] 308 U.S. at 249.

pose, and that the Board's conclusions are in accord with that purpose.[26]

It is not surprising that courts advocating a change in the interpretation of Section 8(a)(2) make no reference to *Newport News*.[27] The Court's decision appears to leave little room for contemporary EPPs. The Court set forth a requirement that the employee committee be independent of the employer. Since the employer had controlled the committee, it was irrelevant, for remedial purposes, that: (1) the employer had a lawful motive in establishing and working with the committees, (2) the plan had obviated serious labor disputes, and (3) employees approved of the committees.

Contemporary EPPs are often set up by employers with the lawful motives of enhancing morale, communication, product quality, and increasing productivity. To achieve these goals, the employers usually retain some degree of control over the EPPs. The plans often obviate serious labor disputes. Further, because they are generally designed to be in the interest of employees and the employer, they are acceptable to both.[28] *Newport News* suggests that such EPPs are unlawful under Section 8(a)(2). The question, then, is whether *Newport News* retains its vitality. Because of legislative changes occurring after the issuance of the decision, I have concluded that it does not.

I believe that *Newport News* is to be understood in the context of the Wagner Act of 1935, the legislation upon which the decision is based. The theory underlying the Wagner Act was that employees and employers were locked in an adversarial struggle. In this struggle, the economic power of the employer completely overmatched the power of the individual employee. However, if employees were permitted to combine their strength and form a labor organization, they could more effectively confront the economic power of the employer. Accordingly, Section 7 of the Act gave employees the right to form and join labor organizations, and Section 8(a)(5) required employers to bargain collectively with a labor organization chosen by a majority of unit employees.

Section 8(a)(2) was an important part of the Wagner Act. If employees, acting through labor organizations, were to wage an adversarial battle against the employer, it was essential that the labor organization be wholly independent of employer control. Otherwise, the bargaining between the two would be a sham and true collective bargaining could not exist. As Senator Wagner explained:

> The greatest obstacles to collective bargaining are employer dominated unions. . . . [T]he very first step toward genuine collective bargaining is the abolition of the employer dominated union as

[26] Id. at 251.

[27] Various courts of appeals have posed new interpretations of Sec. 8(a)(2) in the context of labor management cooperation. These decisions, however, have failed adequately to address either the legislative history or the Supreme Court's ruling in this area and thus, provide insufficient guidance.

The first of these decisions was rendered by the Court of Appeals for the Seventh Circuit in *Chicago Rawhide Mfg. Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955). In that case, the company and a group of employees together created an association (Employee Committees) for handling grievances and other employment matters. The company permitted elections and committee meetings to be held on company property during work hours, and made financial contributions to the shop recreation committee. The Board found unlawful support by the company. The Seventh Circuit, however, refused to enforce the Board's order on the ground that the Board had failed to distinguish between unlawful support and lawful cooperation. The court stated:

> Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their representatives in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer's fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor. [221 F.2d at 167.]

The court cites no support for this rationale. The decision is silent with respect to the legislative history of the Act and the *Newport News* decision.

Several other courts of appeal have taken Seventh Circuit's approach with the same absence of discussion of legislative history and Supreme Court precedent. Indeed, these decisions take into account such factors as employee satisfaction with the committees and the employer's lack of antiunion sentiment which the Supreme Court expressly found immaterial in *Newport News*. See, e.g., *Hertzka & Knowles v. NLRB*, 503 F.2d 625 (9th Cir. 1974). *Modern Plastic Corp. v. NLRB*, 379 F.2d 201 (6th Cir. 1967); *Coppus Engineering Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957).

Only one court of appeals decision in this area has expressly addressed *Newport News*. In *NLRB v. Homemaker Shops*, 724 F.2d 535 (6th Cir. 1984), the Sixth Circuit applied the ''free choice'' analysis and referred to *Newport News* as setting forth a ''rigid rule'' requiring a ''per se prohibition on employer support of unions'' which may have had value in early cases arising under the Act, but which ''runs contrary to more recent trends'' such as ''the change in public policy from nurturing the nascent labor movement to regulating and limiting management and labor excesses alike.'' 724 F.2d at 547 fn. 12 (citations omitted). Without any discussion of the legislative history of the Act, the Court's treatment of *Newport News* amounts to little more than a pronouncement that times have changed.

[28] My colleagues in the majority appear to read *Newport News* for the narrow proposition that disestablishment is an appropriate remedy for a labor organization that has been unlawfully dominated for 10 years. I believe that the case stands for more than that. The plan in that case was lawful from its inception in 1927 until the passage of the Wagner Act in 1935. In 1937, the employer sought to bring the plan into compliance with the Act. The Supreme Court held that this effort failed. The Court made it clear that, notwithstanding the 1937 amendments, the plan remained unlawful under the Act. In this regard, the Court pointed to the fact that the plan required the employer's approval for any changes. In view of the Court's declaration that this provision was unlawful, and in light of the broad language used by the Court in condemning the plan, I think it clear that many of today's EPPs would not pass muster under *Newport News*. For, as noted above, under these plans, the employer retains the power to make changes in the plan.

> an agency for dealing with grievances, labor disputes, wages, rules, or hours of employment.[29]

The adversarial model, upon which the Wagner Act was based, is at odds with a cooperative model of labor relations. In the adversarial model, there is an inherent conflict between management and labor which may lead to industrial strife and unrest. Collective bargaining is the means by which this conflict can be constructively contained. In that collective-bargaining struggle, each side has different interests, and each faces the other across a wide divide. As one commentator has phrased it:

> The term ''adversarial model'' is used to describe a system in which management and labor maintain a strict separation, and approach collective bargaining as competing entities with opposing interests, involved in a struggle over limited resources.[30]

The Wagner Act signified a choice of the adversarial over the cooperative model.[31] Thomas C. Kohler observes that the cooperative approach to labor relations was fully argued to the Congress in the hearings preceding the Wagner Act. He particularly points to the remarks to the Senate's Committee of Education and Labor of Henry Dennison, whose firm initiated an employee representation plan as early as 1919:

> ''Employee representation,'' Dennison stated, ''is an essential supplementary and a necessary competing type of unionism,'' through which ''a sound system of joint and mutual participation in management has developed or is developing.'' Wagner's bill, Dennison warned, would cause these schemes ''for a wholesome mutual business relationship between management and workers'' to be ''dug up with the tares'' instead of permitting them ''to be cultivated as seeding ground or laboratories from which we may learn.'' Out of the ''slowly freeing competition and the gradual comparison of the two forms,'' stated Dennison, ''we shall be able to develop modifications of each'' that will permit the ''realization . . . of the truth that any business organization that can knit itself into a single organism will prove superior as an institution of broad social value, to one which must exist in two somewhat stiffly cooperating and sometimes actively conflicting segments.'' [Footnotes omitted.][32]

Dennison's view was rejected. As Kohler concludes, Congress was confronted with a clear choice between two competing models of labor relations and chose the adversarial model.

By 1947, the labor-management world had undergone major change. The Taft-Hartley amendments of that year were enacted *not* to further strengthen unions but in response to legislative concern that unions had become too strong. The focus of Taft-Hartley was to assure employees of their right to make a free choice for or against unionization. The Federal government was no longer necessarily in favor of unions as a means of countering the economic strength of employers. The Federal government was now neutral on the question. The government simply wanted to insure employee free choice on the question.

> [T]he enactment of the Taft-Hartley Act ushered in a period of marked change in the government's attitude towards unionization. The amendments represent an abandonment of the policy of affirmatively encouraging the spread of union organization and collective bargaining. This appears most strikingly in Section 7, which now places the right to refrain from such activities on an equal footing with the rights originally guaranteed, and in the provisions subjecting the organizational activities of labor unions to restrictions similar to those imposed on the activities of employers. The remnants of the earlier approach may still be found in the declaration of policy and in the compulsion placed upon employers to recognize and bargain with representatives designated by their employees; but even in this respect a new balance was achieved by imposing corresponding obligations on labor organizations. The government, instead of aiding one side, now stands in the center.[33]

In addition, the economic warfare of strikes and lockouts was no longer seen as a prudent means of settling disputes. Although these weapons were still available, Congress sought to limit them through the use of notice and waiting provisions (Sec. 8(d)), and the encouragement of mediation and conciliation through the Federal Mediation and Conciliation Service (Sec. 203).

In short, Taft-Hartley emphasized (1) employee *free choice* rather than governmental encouragement of unionism; and (2) the encouragement of peaceful methods for resolving labor-management disputes, rather

[29] 1 Leg. Hist. 16.

[30] *Rethinking the Adversarial Model in Labor Relations: An Argument for Repeal of Section 8(a)(2)*, supra, fn. 5 at 2011 fn. 7 (1987).

[31] Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, supra, fn. 5 at 518–534. For a contrary view, see note, *Participatory Management Under Section 2(5) and 8(a)(3) of the National Labor Relations Act*, supra, fn. 5 at 1759–1765.

[32] Id. at 532, quoting from the remarks of Henry Dennison, 1 Leg. Hist. 435–438.

[33] A. Cox, D. Bok, R. Gorman, *Cases on Labor Law* 93–94 (1977), as quoted by Jackson, *An Alternative to Unionization and the Wholly Unorganized Shop: A Legal Basis for Sanctioning Joint Employer-Employee Committees and Increasing Employee Free Choice*, supra, fn. 5 at 835 (1977).

than strikes and lockouts. There was a concomitant de-emphasis of the concept that employees and employers are forever locked in an adversarial struggle and there was a rejection of the notion that the government's role was to assure that employees have power through unionism.[34]

In light of the Taft-Hartley Act and the socio-economic changes on which it was based, I believe that there is a substantial doubt that the Supreme Court would now decide *Newport News* exactly as the Court decided it in 1938. That decision could not take into account the substantial changes wrought by the enactment of Taft-Hartley in 1947. Today, if employees freely choose to participate in an EPP, that would seem consistent with their Taft-Hartley right to refrain from choosing traditional union representation. Similarly, if employers and employees can amicably resolve their differences through cooperation, that would seem consistent with Taft-Hartley's encouragement of peaceful methods of resolving disputes. Finally, since EPPs are based on a recognition that employers and employees have mutual interests and need not always be adversaries, that would seem to reflect the shift away from the philosophy underlying the Wagner Act.

In short, Taft-Hartley recognizes that adversarial labor relations and collective bargaining through unions are not the only approaches to workplace relations. In this regard, Judge Wisdom has criticized the Board for having an inflexible attitude toward EPPs. He observed:

> [A]n inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees, penetrable only by the bargaining agent of a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. The Act encourages collective bargaining, as it should, in accordance with national policy. The Act does not encourage compulsory membership in a labor organization. The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in the particular plant, if there is so much as an intention by an employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their ''general welfare.'' [*NLRB v. Walton Mfg. Co.*, 289 F.2d 177, 182 (5th Cir. 1961) (Wisdom, J., dissenting in part.]

I recognize that there are counter-arguments.[35] Most particularly, I am keenly aware that Senator Taft specifically pointed out that the conferees rejected all attempts to ''amend . . . the provision of 8(2) relating to company-dominated unions'' and had left its prohibitions ''unchanged.''[36] Thus, it can be argued that *Newport News*, being the Supreme Court's gloss on Section 8(2) of the Wagner Act, was unchanged in 1947. I do not believe that the argument is a valid one. In the first place, the attempts to amend Section 8(a)(2) were principally addressed to the Board's alleged disparate treatment of affiliated and unaffiliated unions.[37] Congress dealt with this problem in Section 10(c) and left Section 8(a)(2) ''unchanged.'' Further, I do not believe that this piece of legislative history, standing alone, is sufficient to outweigh all of the countervailing considerations set forth above. In sum, I believe that the Board is free to take into account all of the changes that have occurred since the Wagner Act of 1935, including particularly the passage of Taft-Hartley in 1947 and the growing recognition that labor-management cooperation is a valid approach to industrial disputes. In short, *Newport News* is not a straightjacket, and the NLRB, as the agency charged with interpreting the Act to reflect industrial reality, can and should interpret the Act to reflect the changes described herein.

This view of legislative intent is further supported by more recent legislative developments. In 1975, Congress passed the National Productivity and Quality of Working Life Act which emphasizes the importance of such cooperative efforts to improving the productivity of U.S. industry. That Act states that the ''laws,

[34] This is not to say that Congress chose the cooperative model to the *exclusion* of the adversarial model, or vice versa. Rather, there can be elements of both in any relationship. Thus, for example, in the context of a collective-bargaining relationship, labor and management may have mutual interests as well as conflicting ones. Although the issue is not presented in this case, it would appear to me that the law does not forbid labor and management from engaging in cooperative efforts which have been arrived at through the process of collective bargaining. See, e.g., Golden and Ruttenberg, *The Dynamics of Industrial Democracy*, supra, fn. 2. See also Cooke, *Product Quality Improvement Through Employee Participation: The Effects of Unionization and Joint Union-Management Administration*, 46 Industrial and Labor Relations Review 119 (1992).

[35] See, e.g., Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, supra, fn. 5; note, *Collective Bargaining as an Industrial System: An Argument Against the Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, supra, fn. 5.

[36] See *Cabot Carbon*, supra at 281. With respect to the Supreme Court's discussion in *Cabot Carbon* of the legislative history of the Taft-Hartley amendments, I note that the Court was addressing the question whether the Taft-Hartley amendment to Sec. 9(a), permitting the presentation directly to the employer of individual or group grievances, effectively eliminated employee committees from the 2(5) definition of labor organization and thus removed employer conduct with respect to them from the proscriptions of Sec. 8(a)(2). The Court found that it did not. The Court's holding is confined to the interpretation of Sec. 2(5) which was the only issue before it. The Court did reach any other aspect of the interpretation of Sec. 8(a)(2).

[37] The proposed amendments are in H.R. 3020, 1 Leg. Hist. (1947) 50. The amendments are explained in House Report No. 245 on H.R. 3020, 1 Leg. Hist. (1947) 319–320.

rules, regulations and policies of the U.S. shall be interpreted as to give full force and effect to this policy.''[38] In 1978,[39] Congress passed the Labor-Management Cooperation Act which recognizes labor-management cooperation as a means of achieving organizational effectiveness. This statute established a grant program to be administered by the Federal Mediation and Conciliation Service for organizations that develop labor-management committees at the plant level and on an area and industry basis.

The Board has an obligation to take such legislation into account when construing the Act. The Supreme Court stated in *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942):

> [T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

For the reasons stated above, I believe that the Act can be interpreted to accommodate at least some EPPs. I recognize that others, including particularly the courts, may have a different view. If so, those who favor EPPs will have to resort to the legislative process. My view is not a rejection of collective bargaining and the underlying adversarial model but a recognition of changed statutory language making room for a variety of choices for shaping workplace relations with employee free choice charting the course.

## VI. THE TEST FOR EVALUATING EPPS UNDER SECTION 8(A)(2)

I conclude that *Newport News* does not foreclose a fresh interpretation of Section 8(a)(2), at least with respect to EPPs. Of course, this is not to say that all EPPs are lawful. As discussed above, they are labor organizations and hence an employer may not ''dominate, interfere with, or support them.''[40] The question before me is how to interpret these words in a way that will accommodate labor-management cooperation and the Section 7 rights of employees. In my view, the answer to the question turns on the following factors: (1) the extent of the employer's involvement in the structure and operation of the committees; (2) whether the employees, from an objective standpoint, reasonably perceive the EPP as a substitute for full collective bargaining through a traditional union; (3) whether employees have been assured of their Section 7 right to choose to be represented by a traditional union under a system of full collective bargaining, and (4) the employer's motives in establishing the EPP. I would consider all four factors in any given case. No single factor would necessarily be dispositive.

With respect to the first factor, the fact that an employer initiates the idea of an EPP is not sufficient to condemn it. Under Section 8(c) of the Act, an employer is free to voice an opinion on labor-management matters. Thus, for example, an employer can tell its employees that it favors or disfavors traditional union representation. By the same token, an employer should be able to tell its employees that it favors an EPP. I also note that the original version of the Wagner Act made it unlawful for an employer to ''initiate'' or ''influence the function of'' a labor organization. The provision was rejected.[41] Thus, even under the Wagner Act, it would appear that such conduct was lawful.

However, the employer cannot coerce an employee into becoming part of an EPP. Consistent with Taft-Hartley, the choice must be that of the employee. Similarly, if the employees on a committee are to be the representatives of other employees, they must be selected by the employees, not by the employer.

In addition, although the employer can set forth the broad purpose of the committee, the committee must be free to consider any and all matters that are germane to that purpose. Thus, for example, the employer may say that the purpose of the committee is to enhance product quality or improve production efficiency. However, the committee must be free to consider any and all matters which are germane to those broad goals.

Further, managers and supervisors can be on the committee. In this regard, I note that the original version of the Wagner Act made it unlawful for the employer to ''participate in'' the labor organization. The provision was rejected.[42] Thus, even under the Wagner Act, such conduct was lawful. However, managers and supervisors cannot be given a dominant role.

In addition, the employer can give support to the committee by providing it with meeting rooms, writing materials, secretarial assistance, etc., and it would be

[38] National Productivity and Quality of Work Life Act of 1975, 15 U.S.C. § 2401 et seq.

[39] The Labor-Management Cooperation Act of 1978, 29 U.S.C. §§ 173(e), 175(a), 175(b) (grants confined to employers with collective-bargaining relationships), 186(c).

[40] Contrary to the suggestion of my colleagues, I do not assert that ''an employer permissibly may now deal with a dominated Section 2(5) labor organization.'' Clearly, an employer cannot do so. The issue concerns the kinds of conduct that will constitute ''domination'' of the labor organization.

[41] 1 Leg. Hist. 3; 2 Leg. Hist. at 2309–2310. See also the remarks of Senator Wagner at 1 Leg. Hist. 352.

[42] Id.

permissible to allow the committee to meet on company time.[43]

Finally, the mere fact that the employer may suggest the rules and policies of the labor organization is not sufficient to condemn the EPP. In this regard, I note that the original version of the Wagner Act made it unlawful for an employer to ''influence . . . the rules and other policies of a labor organization.'' The provision was rejected.[44]

The second factor seeks to accommodate the Section 7 right of employees to choose traditional unions to represent them in resolving their disputes with their employer. If the committee is set up in response to employee grievances and complaints, and if it functions as a vehicle for presenting those matters to the employer, it can reasonably be viewed as a substitute for traditional union representation. However, if the committee is set up by the employer to accomplish *its own entrepreneurial interests*, e.g., enhanced product quality and improved production efficiency, it can reasonably be viewed as a vehicle for addressing *employer interests*, rather than as a substitute for traditional union representation. Similarly, to the extent that employees reasonably perceive the committee as their representative concerning employment related matters, the committee may be viewed as a substitute for collective bargaining. Conversely, to the extent that the employees do not view the committee in this way, the committee would not be viewed as a substitute for collective bargaining.[45]

The third factor also seeks to accommodate Section 7 rights. I would consider it significant that the employer expressly assures its employees that, notwithstanding the EPP, they are free to select traditional union representation and full collective bargaining.

As to the fourth factor, if the employer establishes the EPP for a purpose of stifling an ongoing union campaign, the impact on Section 7 rights is obvious. Conversely, if the employer's motive in establishing the committee is solely to enhance lawful entrepreneurial goals, there would be no impact, under this factor, on Section 7 rights.[46]

I believe that these four factors properly balance interests in labor-management cooperation and employee Section 7 rights. In addition, they reflect the Taft-Hartley goals of (1) insuring employee free choice and (2) promoting harmony and cooperation in the sphere of labor-management relations. Finally, they reflect the national interest in taking steps to insure that American firms successfully compete in a global economy.[47]

## VII. THE INSTANT CASE

I now apply the foregoing analysis to the instant case.

Based on my analysis of Section 2(5), and on the facts recited by my colleagues, it is clear that the committees are labor organizations.

With respect to the 8(a)(2) question, I apply the four factors set forth above and conclude that the Respondent's conduct was unlawful.

As to the first factor, the evidence recited by my colleagues establishes that the Respondent completely dictated the structure of the committees and controlled their operations. Indeed, the employees had very little,

[43] Under Board precedent, support of this sort has been found permissible, in certain circumstances, by application of a de minimis rule. See, e.g., *S. W. Motor Lines*, 236 NLRB 938 (1978); *Monon Trailer*, 217 NLRB 257 (1975); *Coamo Knitting Mills*, 150 NLRB 579 (1964).

[44] 1 Leg. Hist. 3.

[45] This factor is based on an objective standard: whether the EPP may reasonably be perceived by employees as a substitute for full collective bargaining through a traditional union. It is virtually the same standard the Board has long used to determine interference, restraint, and coercion in 8(a)(1) cases: ''The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.'' *American Freightways Co.*, 124 NLRB 146, 147 (1959). This test does not allow for evidence concerning individual employees' subjective reactions to the conduct. Similarly, the objective standard in the test I have set out above does not allow for evidence concerning individual employees'subjective feelings about the EPP, and cannot, therefore, become mired in litigation over the reasonableness of each employee's view. Instead, the test requires a review of the *facts* concerning the function and operation of the EPP and a determination *on the basis of those facts* as to whether the EPP may reasonably be viewed by employees as a substitute for traditional collective bargaining.

[46] I do not believe that *Newport News* precludes an analysis that considers motive. As discussed above, I think that the case is no longer viable. Further, even if it is viable, the Court's conclusion that motives were irrelevant was in the context of an analysis of the propriety of the Board's dissolution order. In essence, the Court was saying that the dissolution order was appropriate in light of the fact that the plan had existed since 1927. The employer's benign motives did not preclude such an order. This is not to say that the issue of motive is irrelevant on the question of whether *there is a violation* in a case involving a relatively new plan. Finally, I do not think that *Garment Workers Union (Bernhard-Altmann Texas Corp.) v. NLRB*, 366 U.S. 731 (1961), precludes an inquiry into motive. If an employer recognizes a union as the exclusive bargaining representative of employees, and the union has not been selected by a majority of the employees, that conduct, in and of itself, has a significant impact on Sec. 7 rights. However, that situation is distinguishable from one in which an employer deals with an employee committee but does so in a way that leaves the employees free to choose or reject an exclusive bargaining representative.

[47] Member Oviatt has expressed concern that the test I propose would lead to increased litigation, and not cooperation. For reasons stated earlier, the test does not require litigation of as many matters as he suggests. Further, I think it is more likely that the majority position will result in increased litigation. The majority has decided this case on its narrow facts. The majority therefore offers virtually no guidance as to whether different plans in different circumstances would be lawful or unlawful under the Act. Employers wishing to know those answers must look to case by case litigation in the future. By contrast, I have at least provided a framework for analysis and I have listed the factors which should be considered in that analysis.

if any, voice in the structural design and operation of the committees.

As to the second factor, the Respondent set up these committees as a mechanism to respond to and address employee complaints and grievances. The Respondent acted because the employees had voiced complaints about employment-related matters. Further, the employees on the committees were perceived as representatives by their fellow employees. In these circumstances, the employees could reasonably view these committees as a substitute for collective bargaining through traditional union representation.

As to the third factor, the employees were never given assurances of their right to choose collective bargaining through traditional union representation.

As to the fourth factor, antiunion motive was not established.

Weighing all of these factors, I believe that the impact of Respondent's conduct on Section 7 rights outweighs the Employer's lawful motives. Accordingly, I would find a violation in this case.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT dominate, assist, or otherwise support the organizations known as Action Committees created in January 1989.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL immediately disestablish and cease giving any assistance or support to the Action Committee.

ELECTROMATION, INC.

*Walter Steele, Esq.*, for the General Counsel.
*Kathleen K. Brickley* and *Scott A. Moorman, Esqs. (Barnes & Thornburg)*, of South Bend, Indiana, for the Respondent.
*Jimmy Skipper*, President, of Elkhart, Indiana, for the Charging Party.

## DECISION AND REPORT ON OBJECTIONS

GEORGE F. MCINERNY, Administrative Law Judge. Based on a charge filed on March 13, 1989, by Local Union No. 1049, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) the Regional Director for Region 25 of the National Labor Relations Board (respectively, the Regional Director and the Board) issued a complaint on April 24, 1989, alleging that Electromation, Inc. (the Company or Respondent) had violated provisions of Section 8(a)(1) and (2) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to this complaint denying the commission of any unfair labor practices.

Concurrently, on February 15, 1989, the Union filed a petition with the Regional Director for an election among certain employees of the Company, Case 25–RC–8676. Under the provisions of Section 9 of the Act, the parties, and the Regional Director joined in an agreement for an election, and an election was conducted under the Regional Director's auspices on March 31, 1989. The results of the election showed that 82 employees cast their votes for the Union-Petitioner, and 95 voted against the Union.

Thereafter, the Union filed objections to conduct affecting the results of the election, claiming that the same conduct alleged as unfair in Case 25–CA–19818 unlawfully interfered with the election. On May 1, 1989, the Regional Director issued a report on objections, finding that the Union's objections to the election were based on the same conduct alleged to be unfair in the complaint issued on April 24, 1989, in Case 25–CA–19818. Accordingly, the Regional Director ordered that Cases 25–CA–19818 and 25–RC–8676 be consolidated and that they be set down for hearing before an administrative law judge for determinations of fact and credibility.

Pursuant to a notice dated August 9, 1989, a hearing was held before me at Elkhart, Indiana, on October 2 and 3, 1989, at which all parties were represented, and all had the opportunity to present testimony and documentary evidence, to examine and cross-examine witnesses, and to argue orally. Following the conclusion of the hearing the General Counsel and the Respondent filed briefs, which have been carefully considered.

Based on the entire record, including my observations of the witnesses and their demeanor, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

There is no dispute over the jurisdiction of the Board in this matter. The Company is an Indiana corporation having its usual place of business in the City of Elkhart, where it is engaged in the manufacture of electrical components and related products. During the calendar year ending on March 31, 1989, the Company sold and shipped from its Elkhart location manufactured products valued at more than $50,000 directly to points outside the State of Indiana. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. THE LABOR ORGANIZATIONS INVOLVED

A. The complaint alleges that the Union (Teamsters Local Union No. 1049) is a labor organization within the meaning of Section 2(5) of the Act.

The Company's answer alleges that the ''respondent is without sufficient information to either admit or deny'' this allegation. I find it difficult to understand how counsel can say this where there has been a petition filed by Local 1049, a stipulation for an election entered into, an election campaign conducted, and an election held, all involving the same Local 1049, the same Respondent, and, presumably, the same counsel. The quoted portion of the answer does not even rise

to the level of casuistry. I find it frivolous and it is hereby stricken from, the answer.[1]

There being no valid answer to the allegation that Local 1049 is a labor organization within the meaning of Section 2(5), I so find.

B. The complaint further alleges that certain ''Action Committees'' formed early in 1989 are, collectively, a labor organization within the meaning of Section 2(5) of the Act. The Respondent, with more validity this time, denies the allegation. The facts are not in dispute, and will be discussed at greater length below. Those undisputed facts show that the committees were established early in 1989; that employees as well as supervisory and managerial people served as members of the committees, and that discussions were held about conditions of employment at the Company. On these bases I find that the Action Committees were, and may still be, a labor organization (or labor organizations, depending on whether they are considered a single unit or separate and distinct entities), within the meaning of Section 2(5).

## III. THE ALLEGED UNFAIR LABOR PRACTICES

### A. *Background*

Electromation has been in business for some years in Elkhart, manufacturing small electrical and electronic items such as seatbelt restraint solenoids, solenoids for outboard engines, and chainsaws, switches, and harnesses, primarily for the automobile industry and for power equipment manufacturers. It has about 200 employees engaged in production divided up into five or six departments. The Company is one of several subsidiaries of American Electronic Components, a privately held corporation formed in 1985.[2]

The chairman and chief executive officer of American Electronic Components is David Webster, and its president and chief operating officer is John Howard. Howard is also president of Electromation, and as such he figures largely in the facts of this case. Webster was not mentioned at all, other than to identify him as chairman.

Electromation was acquired by Durakool in 1986, and both were then brought into American Electronic Components late in 1987. A new president, Keith Dixon, was hired at Electromation, and he instituted a more personal and open style to management with the Company's employees. During late 1977 and continuing through 1988, a number of ad hoc committees were established by management in which employees participated, and which discussed matters of mutual interest. Loretta Dickey, at that time the personnel manager of Electromation, acted as the coordinator and liaison in this endeavor.[3]

As 1988 drew to a close, the management of American Electronics Components became increasingly more disturbed by unacceptable financial losses at Electromation. In November, Keith Dixon left the president's job and Howard took over. He continued the formal and informal meetings with employees, but decisions were made to cut expenses where possible. One area chosen to cut costs was a plan which Dixon had set up to combat absenteeism by means of financial rewards for faithful attendance. It was also decided that there would be no general wage increase in 1989.

These changes in benefits were announced at an employee Christmas party on December 23, 1988. Notices of the changes were distributed to the employees, together with checks representing length of service bonuses, designed to take the place of wage increases. The employees seemed happy, and the plant closed until January 2, 1989.[4]

### B. *The Action Committees*

Over the shutdown week, the employees, recognizing the impact of the changes in the attendance policy, and the lack of a pay increase, had second thoughts and, on their return, indicated to management their unhappiness with these new policies. Sometime between January 2 and 10 the Company received a handwritten request signed by 68 employees for reconsideration of the attendance policy. Howard was given a copy of this petition by Company Vice President Charles Vickerman. Howard then called a meeting of supervisors on January 10, at which they discussed the petition and also the complaints being voiced by employees in the plant. It was decided to hold an employee information meeting to hear from the employees directly and find out what they saw as problems and what the Company should do about the problems.

So, on the January 11, a meeting took place in the plant between Howard, Vickerman, and Loretta Dickey, representing management, and a selected group of eight employees.[5] A number of issues were discussed, including overtime, tardiness, wages, bonuses, attendance, bereavement leave, sick leave, and incentive pay.

After this meeting, management and supervisors met again and concluded according to Howard, that these were substantive, serious, issues; that management had ''possibly made a mistake in judgment in December in deciding what we ought to do,'' and that ''the best course of action would be to involve the employees in coming up with solutions to these issues.'' It was decided to do this by means of ad hoc committees to study separate problems, as the Company had done under the Dixon administration.

Accordingly, another meeting was scheduled for January 18 between the same people who attended the January 11 meeting. Before the meeting, management had ''distilled'' the areas of employees discontent down to five specific areas. Then, at the meeting, the management people present proposed that for each of the five areas of concern an ''Ac-

[1] See Fed.R.Civ.P. 11.

[2] The other subsidiaries of American Electronic Components are Alliance Plastics, Durakool, Hermaseal, Switch Systems, Inc., and Electronic Devices. These companies have no connection with the issues in this case, but it is noted that all of them are unionized and according to undenied testimony, enjoy good relations.

[3] In December 1988, Dickey became employee benefits manager at American Electronic Components. She was described as ''Personnel Manager'' of Electromation in the complaint, and the Respondent denied the allegation. At the hearing the parties stipulated that Dickey was, at all times material, a managerial employee and an agent of the Respondent.

[4] All dates hereafter are in 1989.

[5] Howard testified that during 1988, they had held several such meetings, selecting the rank-and-file employees by dividing their whole number in half, between high and low seniority people, and selecting three from each group. In the case of this January 11 meeting, Howard said that two other employees asked to attend, so the total number of hourly employees was eight.

tion Committee'' with membership composed of employees be established. These committees would meet and consider the problems and come up with recommendations for management. The Company would then analyze these recommendations in the eight budgetary considerations as well as to the employees, and, if acceptable, they would be implemented.

The employees at this January 18 meeting were not receptive to the idea of Action Committees. They just wanted action and did not want any more committees. But eventually they accepted the idea and the meeting concluded.

Having decided what issues would be studied by the Action Committee, the Company then decided how the members of the committees would be chosen. On January 19, a memorandum from Vice President Chuck Vickerman was posted, for all employees, describing what had happened at the meeting the day before and announcing that five Action Committees would be formed. The committees were named:

Absenteeism/Infractions
No smoking policy
Communication Network
Pay Progression for Premium Positions
Attendance Bonus Program

The committees were described as being made up of ''up to six hourly employees and one or two management personnel along with Loretta Dickey who will coordinate all the Action Committees.'' Employees interested were instructed to sign up on ''volunteer sign-up sheets'' located in the plant, by January 24. Selection of the members of the committee would be made by management from the names of those who signed up.

As it turned out, there were no long waiting lines to sign up for the committees, and some who did sign up later crossed out their names. The signup sheets submitted in evidence show that six people signified an interest in the absenteeism/infractions committee; three for no smoking policy; five for communication network; five for pay progression for premium positions; and six for attendance bonus program. One employee, Barb Church, signed up for four committees and was chosen for only one, communication network. Another, Gayle Barker (later Gayle Bango) who testified here, signed up for three, and was limited to one, attendance bonus program.[6]

As the notice of the establishment of the Action Committees stated, Loretta Dickey was put ''in charge of the action committee program.'' Howard testified that he had no direct contact with the Action Committee program after their initial establishment. Loretta Dickey testified that she was involved in the preliminary meetings and in the preparation of the signup sheets. She also stated that nonbargaining unit people, salaried employees, and supervisors, volunteered and were permitted to serve on the committees. The Company's controller, Dan Mazur, was invited by Dickey to act as financial and technical adviser to the attendance bonus committee. A senior engineer, Bill Roberts, served on the communication network committee; Line Supervisor Charlie Graves on the absenteeism group, and Line Supervisor Sandy Grier on the pay progression for premium, pay committee.

[6] In order, as Howard testified, to give everybody a chance.

Meetings were scheduled to begin on January 31 for the absenteeism/infractions group, February 1 for communication network, February 1 for pay progression, and February 2 for the attendance bonus committee.[7] The committees were scheduled to meet on a weekly basis in a company conference room. Employees were paid for their time in attendance and were supplied with writing materials and a calculator in situations where they might be discussing costs.

Dickey attended all the meetings of all the committees. She said that she did not really direct the meetings,[8] and there is no testimony by the employee witnesses which contradicts that.

From what testimony we have about the actual functioning of the committees it seems that the management representatives did not run the meetings exclusively. There was a lot of discussion, everyone joined in, and there were no complaints even from the employee witnesses in this case about the conduct of the meetings. At the attendance bonus committee, Mazur, the controller, did tell the committee members, at one meeting, that a proposal would not be acceptable to management because of the costs, but later he costed out another proposal and pronounced it fiscally sound.

The committees continued the meetings until about February 21, when Dickey was informed by Howard that the Union had asked for recognition. Dickey waited until the next scheduled meeting of each committe and informed the members that the Company had been advised by its attorneys that they could no longer meet with the committee. Dickey added that the committees could continue to meet if the members wished. The absenteeism/infraction and the communications network committees decided to continue to meet, the pay progression group disbanded, and the attendance bonus committee members told Dickey that they could write up a proposal they had discussed and did not need to meet any more. With respect to those committees which continued to meet, they used the Company's facilities and were paid for time spent in committee meetings.

The union demand for recognition mentioned by Dickey in her testimony, and referred to above, was dated February 13. A petition for an election was filed in the Board's Regional Office on February 15. Notification of the petition and the Union's letter must have been received at the Company within a few days. A stipulation for an election was executed by the parties on March 3 and an election was conducted on March 31.

The activity leading up to the mailing of the demand for recognition and the petition must have begun sometime earlier. Ellen Calender testified that she called Jimmy Skipper, the Union's president, during the middle of January. She said she signed a card at the union hall (in Elkhart) on January 12, then attended a meeting at another employee's house on the next Sunday, January 15 where several cards were passed out. In the following week more cards were passed out and an organizing committee was appointed. Lori Schiltz testified that she signed a card around January 12 or 21, and that she passed out a card to another employee while at work.

[7] The no-smoking committee was never organized and never met.

[8] I think she may have moved the meetings along if they strayed from the subject. See testimony of Gayle Bango and Lorinda Schiltz (also spelled Schultz or Schlitz).

There is some question in my mind about the timing of the union campaign relative to the Company's meetings and appointment of the Action Committees. No cards were introduced and Jimmy Skipper, who made an appearance on the record here, and was present throughout, did not testify. However, the times mentioned by these two witnesses are logically consistent with the preliminaries necessary to the filing of the petition on February 15.

Whatever the time when the union campaign started, there is no evidence in the record that the Company knew of this activity before receiving the demand for recognition, or the petition, sometime in the week of February 13–17, and there is no indication here that the Company's actions in holding employee meetings and establishing the Action Committees between January 11 and 24 was taken in response to, or even with knowledge, that union activities were going on.[9]

The fact of whether or not the Company knew of its employees' union activities does not, however, alter the legal effects of Company's actions. I have found that the Action Committees are labor organizations within the meaning of Section 2(5) of the Act. Section 8(a)(2) of the Act provides in pertinent part 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.''

The Board has found domination by an employer where the employer organized the functions, nature and structure of employee committees, supervisors conducted committee meetings, meetings took place on company premises, supplies and materials used were donated by the company, and committee members were paid for time spent conducting committee business.[10]

The facts as set out above show that all but one of these factors were present in the formation and operations of the Action Committees. I do not think there is any question that, after the two informational sessions on January 11 and 18, the Company organized the committees. Their functions, nature and structure were purely the creation of management. The meetings took place on company property. Supplies and materials were supplied by management. Committee members were paid for their time spent at committee meetings. The only missing factor is the supervisor domination of the discussions at the meetings. *Camvac International*, 288 NLRB 816 (1988); *Comet Corp.*, 261 NLRB 1414 (1982). This criterion is not controlling, and I find that the Company dominated these (or this) labor organizations from their inception. *Wahlgreen Magnetics*, supra.

The Company argues, first, that the intention of its management was to draw its employees, on a cooperative basis, into the decision-making process, to afford employees a responsible as well as responsive forum at which their grievances could be considered, to repair what Howard admitted were mistakes in the Company's unilateral reduction of benefits; and, second, that as soon as it found out about the Union's petition, it withdrew its participation on the Action Committees.

I accept the fact that both of these arguments accurately reflect what actually happened. As to the first, I do not, as I have already stated, agree with the General Counsel that the employee meetings and the establishment of the Action Committees were designed to interfere with its employees' union activities. However, experience had shown, whether in wage boards set up during the first and second world wars, or in the industry committees established under the National Industrial Recovery Act of 1933, that the maintenance of employer-sponsored employee unions, committees, or whatever, tend to induce the adherence of employees ''in the mistaken belief that'' this kind of organization ''was truly representative and afforded an agency for collective bargaining.'' *Federal-Mogul Corp. v. NLRB*, 394 F.2d 915 (6th Cir. 1968). The harm which Section 8(a)(2) is intended to remedy thus does not depend solely on motive, but on the inherent injury to the rights of employes to bargain collectively through representatives of their own choosing.[11]

As to the second argument, the Company did withdraw its managers and supervisors from participation in the meetings of the Action Committees. But the Company did not go far enough. I have already found that the supervisors and managers did not control or dominate the deliberations of the committees. The committees remained in existence. They were encouraged by Dickey to continue to meet, on company time, on company premises, and with materials and supplies supplied by the Company. One committee disbanded, one continued to have meetings, one did not have more meetings, but it had already developed a proposal, approved by the Company's controller and by Dickey, to amend the attendance bonus policy of the Company. Only one committee remained which remained in existence without having completed its task or continuing to meet. Finally, I note that Howard, in his speech to employees of March 15, implied very plainly that the Company would again participate on the committees ''after the election.''

As the General Counsel has pointed out, the Company should have disestablished these committees on learning of the filing of the petition and so informed its employees, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

Accordingly, I find that by maintaining its support and its domination of the Action Committees after February 15, 1989, the Company has violated Section 8(a)(2) and (1) of the Act.

### C. *The Plant Closure Threat*

The Company conducted a series of meetings with employees. At one of these meetings, that of March 15, the complaint alleges, President John Howard threatened that the Company would move and the plant would be closed if the Union came in. Three employees, Ellen Callander, Linda Smith, and Linda Elliot, testified about this alleged threat. Callander and Smith testified that at some meeting, they were not sure, Howard said either that he could move the plant or that he could close the plant down, and there was nothing anybody could do about it. These witnesses were

[9] Despite the General Counsel's intimations in his brief and at the hearing. Cf. *St. Vincent's Hospital*, 244 NLRB 89 (1979).

[10] *Wahlgreen Magnetics*, 132 NLRB 1316 (1961); *Memphis Truck & Trailer*, 284 NLRB 900 (1987); *Superior Container*, 276 NLRB 521 (1985); *North American Van Lines*, 288 NLRB 38 (1987); *Airstream, Inc*., 288 NLRB 220 (1988).

[11] The fact that the Company in early 1989 was following a past practice of meetings and committee consideration of problems is not controlling. This is not an arbitration case, where unclear contractual provisions may be elucidated and explained by the parties' actions thereunder.

confused and imprecise, and at no point do their versions of the incident corroborate each other. Elliot, presented as a witness by Respondent, did not remember what Howard had said. Howard denied that he had threatened that the plant would close.

I found Howard to be a credible and candid witness. He testified that on March 15, he had prepared remarks from which he read. Those remarks are included in the record. I think that the problem came up when, as a tactical device, Howard used as a prop a poster, a placard, with a drawing of a graveyard and a series of tombstones bearing the names of deceased employers in the Elkhart area. Howard referred to this poster in his prepared remarks, and spoke the name from each tombstone, adding the word ''dead.'' He added with reference to two of the names ''represented by Jimmy Skipper's Local 1049, dead.'' He concluded this sequence of his speech by saying ''Again, and this is very important, we are not saying that the Teamsters caused these companies to go out of business, but we are saying that the unions just can't provide job security.''

It is easy to understand how employees, particularly a large number gathered together, some not paying much attention, faced with this tombstone poster, could think that they heard Howard make the threats they later attributed to him. I do not believe that he said what they said he did, and I find no violation of Section 8(a)(1) in Howard's presentations, either on the March 15, or an other occasions, *Blue Grass Industries*, 287 NLRB 274 (1987).

### D. *The Interrogation of Employees*

In respect to these incidents, I have carefully evaluated the testimony of Lorena Clark and Lori Schiltz concerning incidents when Supervisor Don Gonsoski, allegedly interrogated employees and I do not credit their version of events. Gonsoski was apparently a friendly, humorous type of supervisor who enjoyed kidding with the employees under his supervision.[12] It is entirely possible that he may have engaged in some light conversation about the Union during the course of the campaign, but, based on his demeanor during his testimony, I credit his denials that he questioned employees about who they supported, or how they were going to vote.

The testimony of Clark, like that of Callander and Smith, was vague and imprecise and reflected a poor memory of what had occurred. Schiltz' testimony was plan enough, but her actions, while this case was pending, in going to her supervisor Juanita Bussard, to Vice President Vickerman, and to company counsel Kathleen K. Brickley, with a story about wanting to change her story, indelibly stamp her as an unreliable witness.

Based on the credibility of Gonsoski, and the lack of credibility of Clark and Schiltz, I find no violation of Section 8(a)(1) in the alleged interrogation of employees by Gonsoski.

### E. *The Objections*

Since I have found merit in the complaint allegation that the Respondent has violated Section 8(a)(1) and (2) of the Act by dominating and assisting the Action Committees during the period from and after February 15, 1989, I find merit to the portion of the objections which reflects these actions. This type of conduct, violative of Section 8(a)(1) and (2) is a fortiori interference with a representation election. I, therefore, recommend that objection be sustained, *De Paul Community Health Center*, 221 NLRB 839 (1975).

Answering the Respondent's argument that its conduct in discontuining some support for the Action Committees after February 15 rendered any violation as trivial and de minimis, I take note of the following facts: The committees continued, or three of them did, after Loretta Dickey informed the members that management would no longer participate in their deliberations. At least one committee continued to meet to discuss the Company's agenda for that group, on companytime and premises, and with company-supplied materials; another committee had a plan for changing the attendance bonus plan as a substitute for the plan which had been canceled by management in December 1988. The six members of this committee, and, inevitably, other employees, must have known of this revision; Howard had announced on March 15 that the Company would in effect, revive the committees after the election. The Union lost the election on March 31 by a vote of 95 to 82; by my calculations, a switch of 7 votes would have altered the outcome.

In the light of these facts I do not believe the objectionable conduct I have found here is de minimis, and I recommend that these election be set aside. *Video Tape Co*., 288 NLRB 646 (1988).

## IV. THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Respondent immediately disestablish and cease all support to the Action Committees created in January 1989.

I shall further recommend that the election held on March 31, 1989, be set aside and that Case 25–RC–8676 be remanded to the Regional Director for Region 25 for the purpose of conducting a new election at such time as he deems that circumstances permit a free choice of bargaining representatives.

## CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union and the Action Committees are labor organizations within the meaning of Section 2(5) of the Act.

3. The Respondent has engaged in an unfair labor practice in violation of Section 8(a)(1) and (2) of the Act by dominating and assisting the Action Committees from February 15, 1989, to the present time.

4. The above-described unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not otherwise violated the act.

[Recommended Order omitted from publication.]

[12] In my experience, a sense of humor is a dubious asset in the field of labor-management relations.