

National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: November 26, 1993

TO: Rosemary Pye, Regional Director, Region 1

FROM: Robert E. Allen, Associate General Counsel, Division of Advice

SUBJECT: The Globe Newspaper Co., Case 1-CA-30117

177-3200, 512-5006-5040, 518-2017-1400, 518-2083-8300, 518-4030-4200, 530-6067-2040-2033, 530-6067-2040-8029

This case was submitted for advice on the issue of whether the Employer violated Section 8(a)(1), (2) and (5) of the Act, by creating and dealing with its Employee Advisory Committee and its Race and Gender Workshops, in view of the Board's decision in Electromation, Inc. [\(1\)](#)

FACTS

The Employer and Union were parties to a collective-bargaining agreement, which expired December 31, 1990. The Union has filed several meritorious charges which in general allege that the Employer has been undermining the Union's status by making unilateral changes and by directly dealing with unit employees. At the time of the filing of the instant charge, the Employer and Union were negotiating a successor agreement.

In 1982, the Employer established an employee assistance plan (EAP) in order to provide employees with confidential counseling services. In May 1991, the Employer changed its EAP affiliation to a new provider, Mt. Auburn Hospital. Mt. Auburn officials suggested that the Employer establish an employee advisory board to provide them with feedback on how the program was being received by employees. As a result, in November 1991, the Employer sent a memorandum to certain unit and non-unit employees, including supervisors, inviting them to serve on such a committee (EAC) and scheduling a meeting later that month. According to the Employer, the invited employees either had served on a similar committee in 1982, which soon thereafter disbanded, or had been involved in EAP-related issues over the years.

On October 30, 1992, the EAC met again to hear a report on the EAP's first year. The EAC then focused on ways of promoting employee awareness of the EAP. The members agreed it would be useful to meet quarterly and to have their names published in various brochures and newsletters so that they could be accessible to answer employees' questions and provide information about the EAP. To this end, their names were published in the in-house newsletter. The Union first became aware of the EAC when it received a copy of the newsletter in November 1992.

With regard to the Race and Gender Workshops, in December 1991, as the result of racial friction in its editorial department, the Employer made a commitment to its employees to attempt to improve relations among the employees. Ultimately, the Employer decided to hire outside consultants to conduct race and gender workshops during the spring of 1993.

On November 17, 1992 at a regularly scheduled staff meeting of the editorial department, the Employer announced to the editorial employees that it had engaged a facilitator, the Race and Gender Group, to conduct a "diversity training program." It described in detail the nature of the program, a five-phase process in which the participants explore their own identity within their racial or gender group, examine similarities and differences in their experiences in the organization, and engage in discussions to compare each participant's own experience with his or her colleagues. The final phase, entitled "System Planning," is described in part as follows:

Using all that has been learned from the workshop, this phase of the work challenges the group to develop organizational outcomes for managing diversity that are specific, concrete and measurable. The degree of rigor required in this planning is greater than that typically expected of managers when establishing human resource goals and objectives. This planning phase

brings an emotional and cognitive resolution to the Workshop as a whole and concludes with a plan for the next steps, replete with assignments and target dates.

In addition, the Race and Gender Group states in its promotional materials that its program is designed to produce certain specific outcomes, including the following:

Participants will develop an action plan for the organization that (1) maps a strategic course for successfully managing diversity; and (2) alters policies and practices impeding organizational effectiveness.

The development of the "action plan" was to occur during the one-day follow-up seminars for each of the groups.

In a letter dated December 14, 1992, the Employer announced to its employees that it would sponsor workshops over a period of two days with a third day of organizational planning to deal with diversity issues at the newspaper. The workshops were scheduled to take place away from the workplace, and the Employer would pay expenses for all participants. According to the letter, the purpose of the workshops was:

[T]o begin a dialogue about diversity among three different Globe communities - people of color, women and white males. . . . Each workshop will include fifteen Globe people from each of these three communities. . . . Some small committees have already been formed to recommend people for invitation to the workshops.

The dialogue will take place during the two and one-half days of each workshop. After a two-week hiatus, each large group will reconvene for a full day of organizational action planning for dealing with these issues at the Globe.

Three days later, on December 17, the Employer first informed the Union that the workshops would be conducted and invited the Union to discuss the matter.

At various times in January and February 1993, the Employer met with the Union to provide information about the training and again invited the Union to discuss any and all aspects of the program, including which employees should be selected as participants. The Employer advised the Union that it would not implement any workshop recommendations affecting terms and conditions of employment without first bargaining with the Union over those changes. The Union did not request that the Employer bargain with it over any aspects of the program. Rather, it expressed its dissatisfaction that it was notified about the workshop program only after the Employer told its employees. The Union stated that it regarded the Employer's actions as unlawful direct dealing with the unit employees.

On March 1, several employees were notified by the Employer that they had been chosen to participate in the workshops. The employees whom the Employer selected from the business and editorial departments were equally divided among three groups - women, white males and "people of color." The Employer's selection of members of the groups was based on workshop guidelines, which called for the participation of "representative" members of these groups. The Employer divided the workshops into two overall groups, which were drawn from the "editorial" side and the "business" side of the newspaper operation.

The workshops were held for the editorial group from March 21 through March 23, and that group held its follow-up session on April 12. On the business side, the workshops took place from April 4 through 6, with the follow-up session on April 20. At the follow-up sessions, participants divided into groups based on five subjects extrapolated from the workshops by the consultant.⁽²⁾ Each group produced a "problem statement" defining its subject matter, an "outcome statement" specifying the group's goal, and a document identifying what indicia would determine whether the goal had been achieved. Subsequently, both the business and editorial workshops formed separate subcommittees, consisting of volunteer workshop participants, to work on how to achieve the identified goals and then report back to the larger workshop.

According to the Employer, each subcommittee was chaired by a manager nominated by the workshop participants, was composed of approximately equal numbers of managerial and unit employees, and met about seven or eight times on the Employer's premises. Based upon ideas formulated during open discussions, each subcommittee chairman apparently set forth written recommendations.

On July 7, both the business and editorial workshop participants met jointly for the first time, and the Employer's publisher was present. Each group reviewed the work of its own subcommittee and then the two groups together reviewed all of their recommendations. It appears that the workshop participants formulated and adopted recommendations only when each workshop reached a consensus on particular items. In other words, each participant apparently could veto recommendations that would be presented to the Employer's publisher. During this meeting, after a manager suggested that the group ratify the ideas and send them to the publisher and the Union, certain employees expressed concern that contacting the Union would slow down the process, and the consultant began to suggest ideas that essentially would force the Union to "get with the program." At that point, certain managerial employees and the publisher stepped outside and determined what recommendations the publisher could implement without bargaining. The publisher returned and informed the group which of its recommendations he would unilaterally implement, which he would first have to negotiate with the Union, and that he decided not to implement or propose during negotiations the business workshop's recommendation for a task force on diversity.

In a memorandum dated July 12, 1993 to the Union, the Employer's Vice President for Employee Relations reported on the July 7 workshop meeting. The vice president assured the Union that the recommendations that involved mandatory subjects "could not be undertaken or implemented in anyway [sic] without being brought to the Union first for negotiation." (Emphasis in original.) The memorandum categorized those recommendations that, in the Employer's view, required bargaining and those that did not. These recommendations involved changes in Employer practices regarding, inter alia: career opportunities; job descriptions; hiring, promoting, and disciplining of employees; rewards for good job performance and the need to hold employees accountable for poor performance; on-the-job training and career development; "mentoring" of employees; a new evaluation process; and a new affirmative action policy. The Employer subsequently invited the Union to discuss the recommendations, as well as to participate in the process, and promised to set up a meeting in the future.

ACTION

The Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by announcing the formation of the Race and Gender Workshops, including specifically the seminars to develop action plans, to employees before informing the Union, and violated Section 8(a)(2) and (5) by creating and dominating the action plan seminars aspect of the workshops, which constitute Section 2(5) labor organizations, and by directly dealing with employee participants in the action plan seminars. The Region should dismiss, absent withdrawal, the portions of the charge alleging violations concerning the formation and the activities of the EAC.

Section 8(a)(2) Principles

The Board and the courts have generally taken an expansive view of what constitutes a labor organization under Section 2(5). (3) As the Board reiterated in *Electromation, Inc.*, (4) three essential elements must be present: (1) that employees participate in the organization or committee; (2) that the committee exists for the purpose, in whole or in part, of "dealing with" the employer; and (3) that these dealings concern such statutory subjects as grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. The Act may require the existence of a fourth element, namely, a showing that the employees participating on the committee are acting in a representational capacity. Section 2(5) defines a labor organization as including an "employee representation committee" (emphasis added). In *Electromation, Inc.*, the Board found an employee committee to be "representational," and thus found it unnecessary "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." (5)

In *NLRB v. Cabot Carbon Co.*, the Supreme Court held that the term "dealing with" is not synonymous with the more limited term "bargaining with," but rather must be interpreted broadly. Under Board law, the "dealing with" requirement may be satisfied by consultations between an employer and a group of its employees that look toward the resolution of grievances or the improvement of terms and conditions of employment. Subsequent to *Cabot Carbon*, the Board has held the following to be labor organizations that deal with employers: an employee council which made proposals to management regarding employees' facilities and benefits; (6) a personnel committee which made recommendations to the employer on working conditions and grievances; (7) and an employee action committee which made proposals to the employer regarding vacations and floating holiday schedules. (8)

In E.I. du Pont & Co., seven committees were composed of both managers and employees, and each committee addressed different workplace issues. The Board found that each committee was "dealing with" the employer because each of them "involved group action and not individual communication" and "made proposals and management responded by word or deed."⁽⁹⁾ The Board observed that in all committees, there was "dealing" under Section 2(5) because there were discussions about proposals among committee members, representing both management and employees, following "consensus decision-making" rules.⁽¹⁰⁾ On the other hand, the Board observed that mere management presence on a committee would not constitute "dealing with" an employer.

For example, there would be no "dealing with" management if the committee were governed by majority decision-making, management representatives were in the minority, and the committee had the power to decide matters for itself, rather than simply make proposals to management. Similarly, there would be no "dealing" if management representatives participated on the committee as observers or facilitators without the right to vote on committee proposals.⁽¹¹⁾

In particular, the Board held that employer-organized employee safety conferences did not violate the Act because the sessions amounted to "brainstorming," not bargaining as defined under the Act. The Board noted that the employer had warned the conferees that, if matters came up regarding bargainable issues, those matters should be placed on a "bucket list" and were not to be considered at the conference. The facilitator for each group was instructed to ensure the exclusion of such issues from consideration by the conferences. Based on these facts, the Board concluded that the employer "sought suggestions and ideas from the employees, but did not structure the conference as a bilateral mechanism to make specific proposals and respond to them."⁽¹²⁾ It contrasted those conferences with the employer's safety and fitness committees where "the Respondent did not take care to separate [the committees'] activities from those properly within the [u]nion's authority;" the employer's conduct with regard to those committees violated Section 8(a)(2) and (5).⁽¹³⁾

In earlier cases, the Board found groups of managers and employees not to be labor organizations where the groups performed the management function of grievance adjudication,⁽¹⁴⁾ or where the groups together included the entire bargaining unit and performed managerial functions such as making job assignments, assigning job rotations and scheduling overtime.⁽¹⁵⁾ Similarly, the Board adopted an ALJ's conclusion that an employees' communication committee was not a labor organization where all employees participated in committee meetings on a rotation basis and the committee served as a management tool to increase company efficiency.⁽¹⁶⁾

Finally, an employer violates Section 8(a)(2) when it dominates a Section 2(5) labor organization. As the Board noted in *Electromation*:

[A] labor organization that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management, is one whose formation or administration has been dominated under Section 8(a)(2).⁽¹⁷⁾

In E.I. du Pont, the committees, which engaged in "consensus" decision-making, could "do nothing in the face of management members' opposition" due to the ability of any member to veto an action by the committee. Further, the Board noted that, on each committee, a management member served in "a key role in establishing the agenda and in conducting the meeting."⁽¹⁸⁾

The Employer Advisory Committee

The Employer created the EAC at the instigation of Mt. Auburn Hospital to provide employee feedback to the hospital on how the EAP was being received. The EAC also decided that it should promote employee awareness of the program. While there were some contacts between the EAC and the Employer, there is no evidence that they involved anything other than promotion of the EAP. Thus, even assuming that the EAP is a Section 8(d) subject, the EAC did not recommend substantive changes in the program. Because there were no consultations concerning the resolution of grievances or the improvement of terms and conditions of employment, the EAC did not exist for the purpose, in whole or in part, of "dealing with" the Employer concerning such terms and conditions. Therefore, the EAC is not a Section 2(5) labor organization.

With regard to the Section 8(a)(5) allegation, the idea for the formation of the EAC came from Mt. Auburn, not the Employer. And, as stated above, the evidence is insufficient to establish that a function of the EAC is to deal with the Employer about terms and conditions of employment. Rather, the EAC apparently only suggests to the Employer ways to promote and encourage use of the EAP. Under these circumstances, the Employer neither directly dealt with employees regarding, nor made unilateral changes in, terms and conditions of employment, and therefore did not violate Section 8(a)(5).

In sum, we conclude that the EAC is not a labor organization because its purpose is not to deal with the Employer concerning terms and conditions of employment and, therefore, there can be no Section 8(a)(2) violation. Similarly, because there is insufficient evidence that the EAC dealt with the Employer about terms and conditions of employment, as opposed to the promotion of the EAP, we also conclude that there is no Section 8(a)(5) violation.

Race and Gender Workshops

First, we conclude that the Employer violated Section 8(a)(1) by announcing to employees on November 17, 1992 and later in its December 14 letter that the workshops, including specifically the action plan seminars, would take place. In *Modern Merchandising*, an employer violated Section 8(a)(1) by posting a letter to employees setting forth its plan to have managers set up a committee comprised of nonmanagement personnel, elected by all employees at each of the employer's stores, to represent them for making suggestions to the employer regarding working conditions.⁽¹⁹⁾ In addition, an employer violated Section 8(a)(1) where it asked a supervisor to create an employee association to negotiate with it over pension benefits, the supervisor prepared the association agreement, and then solicited employees to sign it.⁽²⁰⁾ In this case, the Employer went further than simply suggesting that the employees set up the workshops. It advised employees that it was forming the workshops which, if implemented as it described, would constitute a Section 2(5) labor organization. Thus, after the November 17 meeting, employees knew that the workshops would formulate an organizational action plan which, as presented by the Employer and described by the facilitator, would "alter[] policies and practices impeding organizational effectiveness." By making such an announcement, the Employer violated Section 8(a)(1) of the Act.

With regard to the Section 8(a)(2) allegation, the action plan seminars aspect of the workshops meets the criteria of a labor organization. First, employees participated in the action plan seminars. Second, the Region should argue that the employees are acting in a representational capacity, an element that may be a prerequisite to finding a committee to be a labor organization.⁽²¹⁾ Specifically, the Employer and the facilitator structured the workshops which necessarily preceded the action plan seminars in accord with the established guidelines, which require participation by sufficient "representative" communities of women, "people of color," and white males. In selecting employees for the various groupings, the Employer apparently chose employees who were representative of each group so that the participants could express, and learn about, each other's experiences and perceptions of the other groups. Thus, in December, Employer-created selection committees relied on this criterion in recommending who should participate in the workshops. Third, the action plan seminars gave the Employer's publisher, and he considered and took action on, a recommended action plan to alter numerous policies and practices, such as an updated affirmative action statement; training; job descriptions; criteria for hiring, promotions, and discipline; and performance appraisals. Additionally, proposals regarding these 8(d) subjects were discussed within the action plan seminars, and were submitted to the publisher only after management and employee members had reached consensus. See *E. I. du Pont*, supra.⁽²²⁾ The workshops thus went well beyond the "brainstorming" sessions found permissible in that case, as discussed above.

Furthermore, in contrast to the manner in which the employer in *E.I. du Pont* attempted to prevent the safety conferences there from even considering matters within the scope of the union's duties as representative, the Employer in this case failed to instruct the action plan seminar participants that they were not to discuss such issues. Rather, the Employer merely stated that, after the action plan seminars had completed their work and to the extent that the action plan seminars' recommendations concerned bargainable issues, the Employer, at that late date, would offer to "bargain" with the Union. Thus, from the beginning, the action plan seminars were "structure[d] . . . as a bilateral mechanism to make specific proposals and respond to them."⁽²³⁾ Based on this body of evidence, the action plan seminars were "dealing with" the Employer on matters concerning terms and conditions of employment, and each group therefore constituted a Section 2(5) labor organization.

Finally, the Employer has created and dominated the action plan seminars in violation of Section 8(a)(2). In this regard, the

Employer hired consultants to set the agenda for the workshops which included the action plan seminars. The Employer ultimately chose whom to invite to the sessions, announced the agenda to employees, and paid for the entire program. Additionally, managerial employees at the highest levels attended and participated fully in the action plan seminars. Further, because the action plan seminars formulated and finalized their recommendations only after arriving at a "consensus" of the participants, the Employer participants retained ultimate "veto power over any actions the committee [wished] to take."⁽²⁴⁾

Moreover, we conclude that the Employer dealt directly with the employees who participated in the action plan seminars concerning terms and conditions of employment in violation of Section 8(a)(5). The list of recommendations shows that many issues discussed in the workshops concerned terms and conditions of employment. The complaint, therefore, should include the appropriate direct dealing allegation. It is irrelevant that the Employer met and offered to bargain with the Union about the workshops, including the action plan seminars, but the Union refused to do so. The Board and the courts have found that proposals to alter or dilute the representative status or authority of a union are permissive subjects of bargaining that cannot be implemented absent the union's consent.⁽²⁵⁾ Therefore, the Union was privileged to refuse to bargain about the establishment of the workshops because the proposal does not involve a mandatory subject.⁽²⁶⁾

R. E. A.

¹309 NLRB 990 (1992).

²For example, the topics for the editorial meeting included: culture, training and development, values, affirmative action, and women's issues.

³NLRB v. Cabot Carbon Co., 360 U.S. 203 (1959); Ona Corp., 285 NLRB 400 (1987); American Tara Corporation, 242 NLRB 1230, 1241 (1979).

⁴309 NLRB at 994. Accord, E.I. du Pont & Co., 311 NLRB No. 88, slip op. at 2 (May 28, 1993).

⁵309 NLRB at 994 n.20. In their concurring opinions, Member Devaney clearly would require a finding that an employee committee acts in a representational capacity to satisfy the requirements of Sec. 2(5), while Member Raudabaugh would not consider the representational status of employee committees to be relevant. Id. at 1001-02, 1007 n.13. Accord: E.I. du Pont & Co., supra, slip op. at 2 n.7.

⁶St. Vincent's Hospital, 244 NLRB 84, 86 (1979).

⁷Predicasts, Inc., 270 NLRB 1117, 1122 (1984).

⁸Ona Corp., 285 NLRB at 405.

⁹311 NLRB No. 88, slip op. at 2-3.

¹⁰In E.I. du Pont, slip op. at 3, the relevant handbook stated, "consensus is reached when all members of the group, including its leader, are willing to accept a decision."

¹¹Id., slip op. at 3.

¹²Id., slip op. at 4-5.

¹³Id., slip op. at 5.

¹⁴Mercy-Memorial Hospital Corp., 231 NLRB 1108 (1977); John Ascuaga's Nugget, 230 NLRB 275 (1977).

¹⁵General Foods Corp., 231 NLRB 1232 (1977).

¹⁶Sears Roebuck and Co., 274 NLRB 230, 244 (1985).

¹⁷Electromation, 309 NLRB at 995.

¹⁸E.I. du Pont & Co., 311 NLRB No. 88, slip op. at 3-4.

¹⁹Modern Merchandising, 284 NLRB 1377, 1379-80 (1987).

²⁰International Ass'n of Firefighters, 297 NLRB 865, 870

(1990). On the other hand, the mere suggestion of the concept of an employee committee, without evidence of how the committee actually will function, may not violate Section 8(a)(2) or 8(a)(1) because that conduct is de minimis and not coercive. In *Electromation*, 309 NLRB at 993-994, the Board quoted Senator Wagner in distinguishing "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 representative of their own choosing." (Emphasis in original.)

²¹Electromation, Inc., 309 NLRB at 994 n.20.

²²[FOIA Exemption 5

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²³E.I. du Pont & Co., 311 NLRB No. 88, slip op. at 5.

²⁴*Id.*, slip op. at 3.

²⁵Modern Mfg., 292 NLRB 10, 11 (1988); *Boise Cascade Corp.*, 284 NLRB 462, 469 (1987), *en'd* 860 F.2d 471 (D.C. Cir. 1988); *Latrobe Steel Co.*, 244 NLRB 528, 532 (1979), *en'd* as mod. 630 F.2d 181 (3d Cir. 1980).

²⁶This case is distinguishable from *Amoco Oil Company*, Case 14-CA-21651, Advice Memorandum dated December 30, 1992, because, rather than merely addressing a specific charge of unlawful discrimination in hiring and promotion, as in that case, the Employer empowered the workshops including the action plan seminars to deal with a broad spectrum of company practices and elements of the corporate culture in its operation. Thus, unlike *Amoco*, where one could point to a strong governmental policy, under Title VII of the 1964 Civil Rights Act, favoring the recruitment of Afro-American employees, in this case there is no countervailing government policy favoring dealing with employees about, and making changes in, general terms and conditions of employment, aside from hiring and promotion, merely because conflicts may arise within a "diverse" group of employees.