

MEMORANDUM GC 93-4

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Guideline Memorandum Concerning Electromation,
Inc., 309 NLRB No. 163.

TABLE OF CONTENTS

1.	Introduction1
2.	Statutory definitions1
3.	Section 2(5) Labor Organization2
	a. Employee Participation and Purpose of the Committee3
	b. "Dealing With" Employers Concerning Terms and Conditions of Employment4
	(1) "Dealing With"4
	(2) Terms and Conditions of Employment8
	c. Representative Capacity	10
4.	Section 8(a)(2)	11
	a. Domination	11
	b. Assistance	13
5.	Remedies	15
6.	Section 8(a)(1)	16
7.	Section 8(a)(5)	16
	a. Direct Dealing	16
	b. Bargaining Over Employee Committees	18

MEMORANDUM GC 93-4

April 15, 1993

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jerry M. Hunter, General Counsel

SUBJECT: Guideline Memorandum Concerning Electromation, Inc., 309 NLRB No. 163.

1. Introduction

Since the Board's decision in Electromation, much discussion has been generated as to the impact of Electromation on various types of employee involvement programs, such as "quality circles", including those that deal with efficiency and productivity, or that are designed to be a "communication device" to promote the interests of quality or efficiency. In this regard, the Board in Electromation stated that its decision did "not reach the question of whether any employer initiated programs that may exist for such purposes ... may constitute labor organizations under Section 2(5)." Id. slip op. at 8, n.28. The purpose of this Guideline Memorandum is to provide a general overview of the General Counsel's position on various issues that may be affected by Electromation, with guidance from prior Board cases, and with an emphasis on both what Electromation actually holds, and on the issues that remain open for the Board to decide. Unless otherwise indicated, references herein to Electromation are to the principal decision (Chairman Stephens, Members Devaney and Oviatt).

2. Statutory definitions

Section 2(5) of the Act defines a labor organization as "any organization of any kind, or any agency or employee representation committee or plan, ^{1/} 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."

^{1/} For a description of traditional employee representation plans, see Pennsylvania Greyhound Lines, 1 NLRB 1, 7-13 (1935), enf. denied in part 91 F.2d 178 (3rd Cir. 1937), revd. 303 U.S. 261 (1938); Bethlehem Steel Co. v. NLRB, 120 F.2d 641, 644-646 (D.C. Cir. 1941); Wilson & Co., 31 NLRB 440 (1941), enfd. 126 F.2d 114 (7th Cir. (1942)).

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. 2/

Thus, labor organization status is a threshold issue in every Section 8(a)(2) case.

3. Section 2(5) Labor Organization

In Electromation, 3/ the Board stated that

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.

If the organization satisfies those criteria, the Board considers whether the employer has engaged in any of the three forms of conduct proscribed by Section 8(a)(2).

2/ "The proviso is designed to permit employees to confer with their employer during working hours on grievances and similar matters without loss of time or pay; it is not intended to serve as a cloak for an employer's support of a labor organization of its employees." Wilson & Co., 31 NLRB at 455.

3/ 309 NLRB No. 163, slip op. at 5 (Dec. 16, 1992). See also Research Federal Credit Union, 310 NLRB No. 13 (January 8, 1993).

a. Employee Participation and Purpose of the Committee

Given the broad definition of labor organization in the Act, often various forms of employee committees, or other groups of employees not traditionally viewed as unions, may be statutory labor organizations. Section 2(5) does not require labor organizations to have any formal structure. A group of individuals may comprise a labor organization even though it lacks a constitution or bylaws, elected officials, formal meetings, dues, or other formal structure. ^{4/} Therefore, an organization is a labor organization if, among other things, employees participate, and the organization exists, at least in part, for the purpose of "dealing with" employers on mandatory subjects of bargaining. Thus, in the absence of any participation by "employees" as defined in Section 2(3) of the Act, no statutory labor organization can exist. ^{5/} As to purpose, the Board in Electromation stated that

'[p]urpose' 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 creation, in order to avoid unionization or whether employees view that organization as equivalent to a union. 309 NLRB No. 163, slip op. at 7.

Accordingly, the employer's motive in either setting up the employee involvement committee or in assisting in its formation or administration is not determinative in deciding if an organization is a statutory labor organization. Further, employee perception of an employee committee is not a significant element in evaluating its lawfulness. In this regard, the Board stressed that "[m]uch of the harm 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." Id., 309 NLRB No. 163, slip op. at 7, n.27.

^{4/} S & W Motor Lines, Inc., 236 NLRB 938, 942 (1978), enfd. in relevant part, 621 F.2d 598 (4th Cir. 1980); Columbia Transit Corp., 237 NLRB 1196 (1978).

^{5/} See, e.g., North Am. Van Lines v. NLRB, 869 F.2d 596 (D.C. Cir. 1989), denying enf. to 288 NLRB 38 (1988).

b. "Dealing With" Employers Concerning Terms and Conditions of Employment

(1) "Dealing With"

In NLRB v. Cabot Carbon Co., ^{6/} 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. The Court cited legislative history that

'The term 'labor organization' is phrased very broadly in order that the independence of action guaranteed by section 7...and protected by section 8 shall extend to all organizations of employees that deal with employers in regard to 'grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.' This definition includes employee-representation committees and plans in order that the employers' activities in connection therewith shall be equally subject to the application of section 8. ^{7/}

In Cabot Carbon, the "dealing with" requirement was met where employee-committees made proposals and requests respecting such matters as seniority, job classification, job bidding, working schedules, holidays, vacations, sick leave, a merit system, wage corrections, and improvements of working facilities and conditions. Employer officials participated in the discussions of these matters and frequently granted the committee's requests.

The Board has held that this "dealing with" requirement is met where the employee group made proposals, recommendations, or suggestions to the employer regarding working conditions. ^{8/}

6/ 360 U.S. 203, 211-14 (1959).

7/ Cabot Carbon, 360 U.S. at 211, n.7, citing 2 Leg. Hist. (1935) 2306.

8/ See Ona Corp., 285 NLRB 400, 405 (1987) (employee action committee made proposals regarding vacations and floating holiday schedules); St. Vincent's Hospital, 244 NLRB 84, 85-86 (1979) (employee committee made proposals on several issues including wages, hours and vacations); Predicasts, Inc. 270 NLRB 1117, 1121-1122 (1984) (employee committee made recommendations to employer regarding productivity standards and nepotism in hiring); Airstream, Inc., 288 NLRB 220, 226-227 (1988), enf. denied 877 F.2d 1291 (6th Cir. 1989) (advisory council was labor organization where it presented grievances, proposals, and requests, some of which were acted upon); Mooreville IGA Foodliner, 284 NLRB 1055, 1067-1068

Also, the Board in Thompson Ramo Wooldridge, Inc., 9/ held that the employee association's "presentation to management of employee 'views', without specific recommendations as to what action is needed to accommodate those views, constitutes 'dealing' with management under Section 2(5)." The Board, however, went on to note that the employer there had consulted the association about its preference as to the selection of the day to be designated a paid holiday and that the association had presented individual employee grievances to the employer. In Memphis Truck & Trailer, 10/ the Board held that an employee advisory committee that had "discussions" with management involving employee benefits and working conditions possesses all the elements of a labor organization. 11/ Consequently, it appears that an employee group which has as a purpose the discussion with the employer of terms and conditions of employment is at least arguably a labor organization.

On the other hand, the Board stated in Electromation that an employee committee "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." 12/ Thus, the Board has found that committees of managers and employees which exist for the sole purpose of adjudicating grievances, i.e., making managerial

(1987), enfd. 129 LRRM 2061 (7th Cir. 1988) ("conference committee" that is composed of elected employee representatives from employer's four stores is a labor organization where committee presented employees' complaints, grievances and suggestions that were considered and acted on by management); Ampex Corp., 168 NLRB 742, 746-747 (1967), enfd. 442 F.2d 82 (7th Cir. 1971), cert. denied 404 U.S. 939 (1971) (committee presented suggestions to the employer on behalf of all employees upon subjects pertaining to conditions of work).

9/ 132 NLRB 993, 995 (1961), enfd. in relevant part 305 F.2d 807 (7th Cir. 1962).

10/ 284 NLRB 900, 901 (1987).

11/ See Camvac International, 288 NLRB 816 n.3, 846-848 (1988) (Board specifically agreed with the Administrative Law Judge's conclusion that the employer violated 8(a)(2) where it dominated and assisted an employee committee which was a labor organization. This employee committee discussed with management representatives matters relating to terms and conditions of employment and reached decisions concerning many of those issues.)

12/ Electromation, 309 NLRB No. 163, slip op. at 6.

decisions as to an employee's grievance, are not Section 2(5) labor organizations. For example, in John Ascuaga's Nugget, 13/ the Board dismissed a Section 8(a)(2) allegation in circumstances where the employer established a representative committee of employees, along with management representatives, to make final decisions as to employee grievances. In finding no Section 8(a)(2) violation, the Board reasoned that nothing in the committee's rules and procedures or in its functioning "indicates that the Council performs any but an adjudicatory function regarding employee grievances. Nor is there evidence that the Council has ever initiated grievances, recommended for management's consideration changes in terms and conditions of employment, or acted in any manner as an advocate of employee interests." 230 NLRB at 276. In short, there was no evidence that the committee "dealt with the [employer] in some sense as the employees' advocate." Id. Rather, the Board reasoned that the committee

performed a purely adjudicatory function and does not interact with management for any purpose or in any manner other than to render a final decision on the grievance. Therefore, it cannot be said that the Employees' Council herein 'deals with management'. Rather, it appears to perform a function for management; i.e., resolving employee grievances. 14/

Similarly, in Mercy-Memorial Hospital, 15/ the Board held that an employer did not violate Section 8(a)(2) by forming and administering an employee grievance committee, since the committee was not a statutory labor organization. The Board reasoned that the grievance committee was not formed for the purpose of dealing with the employer on behalf of employees concerning their grievances nor did the committee function in that manner. Rather, the committee merely permitted employees a voice in resolving grievances at the third step of the grievance procedure, and did not discuss or negotiate with the employer concerning grievances. 231 NLRB at 1121. 16/

13/ 230 NLRB 275, 276 (1977).

14/ Id. at 276. The Board held, however, that the employer violated Section 8(a)(5) by unilaterally establishing the committee for the purpose of adjudicating employee grievances.

15/ 231 NLRB 1108, 1118-1121 (1977).

16/ The Board added that an isolated instance of the grievance committee making a recommendation regarding uniform application of the employer's service pin award policy was

Further, aside from grievance adjudication, the Board has held that groups of employees are not statutory labor organizations in circumstances where "in their aggregate, [the groups] constitute the entirety of the nonsupervisory work force", 17/ and their purpose is limited to performing essentially managerial responsibilities on a team basis. Id., at 1235. In General Foods, supra, the employer established teams of all employees in the bargaining unit, divided according to job assignments. Each team, acting by consensus, made job assignments, assigned job rotations and scheduled overtime. Each team had meetings to discuss such topics as implementation of the compensation system and the objectives of each team or group of employees. The teams operated under the control of a supervisor. A psychologist was hired to improve internal communications among team group members and to build trust among the team members, and members discussed conditions of work, such as compensation, at their meetings. The Board adopted the Administrative Law Judge's findings and conclusions that the teams were not labor organizations, since

the entire bargaining unit, viewed as a 'committee as a whole', has never been accorded de facto labor organization status. [It does not] stand[] in an agency relationship to a larger body on whose behalf it is called upon to act. When this relationship does not exist, all that can come into being is a staff meeting or the factory equivalent thereof. 231 NLRB at 1234.

Thus, although on occasion certain employees in General Foods voiced their complaints individually to the management representatives who were present at those meetings, "there was no evidence that the team as such ever acted as an agent on behalf of any irate employee to assist him on pressing his case." Indeed, the ALJ noted that "[i]n all of the functions involving the implementation of the ATG total compensation system, the employee [sic] dealt directly with their supervisors in a one-on-one relationship." 231 NLRB at 1235. Further, the ALJ stressed that the functions given to the teams were "managerial in character" and did not "involve any dealing with the employer on a group basis within the meaning of Section 2(5)..." Id. In short, there was an "entire history and pattern of events in which teams existed as unstructured assemblies of [all] employees, without spokesman or leadership and without any agency relationship to its components, while team meetings served as occasions for management to communicate directly with its employees and vice versa." Id. Although the basic underpinning

insufficient to convert its status to that of labor organization.

17/ General Foods Corp., 231 NLRB 1232, 1234 (1977).

of the holding in General Foods was that the four teams collectively included all employees in the bargaining unit, in Electromation, the Board cited General Foods for the proposition that "an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a labor organization under Section 2(5)". 309 NLRB No. 163, slip op. at 6. Thus, it would appear that even if a committee rather than the entire bargaining unit is involved, if the organization is concerned exclusively with managerial functions, it may not constitute a statutory labor organization. 18/

Similarly, in Sears Roebuck, 19/ the Board adopted an ALJ's conclusion that an employees' communications committee was not a statutory labor organization, notwithstanding the fact that the communications committee discussed work performance matters that "could have a direct impact on working conditions". The ALJ reasoned that all employees participated in committee meetings on a rotation basis and "participated in meetings with management to give input in order to help solve management problems." The committee was used as a management tool that was intended to increase company efficiency. Further, the committee members did not serve as employee representatives or advocates or deal with the company on behalf of employees. Indeed, when employees raised questions concerning wages and benefits, the employer consistently refused to discuss such matters. Id. at 243.

Consequently, in order to meet the "dealing with" requirement of the statutory definition of a labor organization, an employee group must have at least some interaction with the employer and not solely in the performance of managerial functions which have been delegated by the employer to the employee group.

(2) Terms and Conditions of Employment

Under Section 2(5), a labor organization includes any organization in which employees participate and which deals with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Since these delineated topics all involve mandatory subjects of bargaining, it may be argued that if an employer deals with a committee only over permissive subjects of bargaining, the committee may not be a labor organization under Section 2(5) and there may not be a violation of Section 8(a)(2).

As to mandatory subjects of bargaining, one of the current issues is whether employee involvement committees that deal

18/ See, e.g. John Ascuaga's Nugget, 230 NLRB 275.

19/ 274 NLRB 230, 244 (1985).

exclusively with safety constitute labor organizations. Employee safety issues are mandatory subjects of bargaining. 20/ Thus, an employee committee that otherwise satisfies the criteria for statutory labor organization status may not be exempt from constituting a Section 2(5) labor organization merely because its purpose is to deal exclusively with safety concerns, or because it was formed to comport with OSHA Guidelines. 21/

Further, an employee involvement committee that is formed by the employer to deal exclusively with efficiency or productivity may constitute a statutory labor organization if it engages in direct dealing over mandatory terms and conditions of employment, 22/ or over matters that will have a substantial impact upon mandatory working conditions.

The Board has left open the issue of whether any employer initiated programs that may exist for the purpose of achieving quality or efficiency, or that were designed to be a communication device to promote generally the interests of quality or efficiency may constitute labor organizations under Sec. 2(5). 23/ In analyzing whether complaint should issue over

20/ Oil, Chemical & Atomic Workers Local Union v. NLRB, 711 F.2d 348, 360 (D.C. Cir. 1983) and cases cited therein. See Fibreboard Paper Prod. Corp. v. NLRB, 379 U.S. 203, 222 (1964).

21/ See E.I. DuPont de Nemours & Co., Cases 4-CA-18737-1 et al, JD-30-92 (May 13, 1992), where the ALJ rejected the employer's argument that OSHA Guidelines privileged its unilateral formation of safety committees. This issue is pending before the Board.

22/ Salt Lake Division, A Division of Waste Management of Utah, Inc., 310 NLRB No. 149 (March 29, 1993.)

23/ 309 NLRB No. 163, slip op. at 8, n.28. Member Oviatt states in his concurring opinion that "we must proceed with caution when we address the legality of innovative employee involvement programs directed to improving efficiency and productivity", and notes that the majority opinion should not "be read as a condemnation of cooperative programs and committees", id., slip op. at 15, such as where "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)." Id., slip op. at 14. Member Devaney, in his concurring opinion, states that "a genuine 'employee participation program' [was] not before the Board" and that "legislative history, binding judicial precedent, and Board precedent provide significant latitude to employers seeking

such committees, the Region should first determine whether such committees meet the Section 2(5) and Section 8(a)(2) criteria, i.e., employees participate, the organization exists, at least in part, for the purpose of "dealing with" the employer, and these dealings concern mandatory subjects of bargaining (conditions of work, such as grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work), or matters that have a substantial impact upon mandatory subjects of bargaining. If the committees do not meet the Sections 2(5) and 8(a)(2) criteria, the charge should be dismissed, absent withdrawal. However, where the necessary criteria are met, complaint should issue so that the Board may resolve this issue.

c. Representative Capacity.

The issue of whether employee committee members must serve in a representational capacity in order for the committee to constitute a 2(5) labor organization appears to be an open issue that may have to be resolved by the Board. In Electromation, the Board stated that because the employee-members of the action committees acted in a representational capacity, it was 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". 309 NLRB No. 163, slip op. at 5, n.20. 24/

to involve employees in the workplace," such as 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." Id., slip op. at 9, 12. In Member Devaney's view, "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." Member Raudabaugh, in his concurrence, states that "most EPP's [including those that deal with safety and increased efficiency] will possess the three elements of the Section 2(5) definition of 'labor organization'". Id., slip op. at 18 and n.21. He therefore proposed an "analytical approach for reinterpreting Section 8(a)(2)" in situations where employees are not organized, in light of the growing importance of cooperative labor-management efforts. Id., slip op. at 15.

24/ Member Devaney, in his concurring opinion, makes it clear that, in his view, an employee committee must act in a representational capacity for other employees in order to be a labor organization. Member Oviatt does not discuss this issue in his concurring opinion. Thus, it appears that he agrees with the principal decision that it was not necessary to reach the issue. Member Raudabaugh would find employee committees to be labor organizations without regard to their

Representational capacity is not, as yet, a precise term. Member Devaney, in his concurring opinion, looks to the committee's authority; that is, has it been empowered by the employer or the employees to speak for other employees. 25/ The principal opinion found it sufficient that the employer contemplated that the committee act on behalf of other employees. However, it may be significant to note that in Electromation management contemplated that the committee would talk back and forth with other employees; further, the employees were so informed. 26/

Based on these respective tests, both the principal opinion and Member Devaney's opinion found that the committees in Electromation acted in a representational capacity within the meaning of Section 2(5). The factual underpinning for these findings consisted of the management coordinator's testimony that management expected the committee members would "kind of talk back and forth" with other employees in the plant to get their ideas, and that the purpose of the employer's posting of the committee members' names was to ensure that other employees could go to these committee members to find out what was going on. Additionally, one committee member testified that the committee members of one of the committees were informed that they were to go out among the other employees to get their ideas. 27/

This factual basis, together with the findings of representational status based thereon, indicates that, should the Board ultimately conclude the statute requires employee committees to act in a representational capacity, such a factual test may not be difficult to meet. Accordingly, the issue of whether representational status is necessary may not be an issue in many cases, since it may be that a substantial number of committees under the Electromation standards will in fact be acting in a representational capacity. All cases involving this issue should be submitted to the Division of Advice.

4. Section 8(a)(2)

a. Domination

Section 8(a)(2) prohibits employer domination or interference with the formation and administration of any labor

representational status, if they meet the test articulated in that concurrence. 309 NLRB No. 163, slip op. at 17, n.13.

25/ 309 NLRB No. 163, slip op. at 13.

26/ Id. at 8 and 2.

27/ Id. at 2, n.7.

organization, or the giving of financial or other support to it. 28/ In Electromation, the Board noted that:

[a]lthough 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 ... 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. 29/

The Board added that Section 8(a)(2) does not require a finding of antiunion animus or a specific motive to interfere with Section 7 rights. 30/

In Electromation, the Board found domination in circumstances where it was the employer's idea to create the action committees; the employees were not given any real choice in the committees' formation; the employer drafted written purposes and goals of the committees which defined and limited the subject matter to be covered by each committee; the employer determined the committees' composition, and appointed management representatives to the committees.

"An employer dominates a labor organization if employer cooperation with the employee committee 'inhibit[s] self-organization and free collective bargaining'". 31/

28/ Homemaker Shops, 261 NLRB 441, 442 (1982), enf. denied in relevant part, 724 F.2d 535 (6th Cir. 1984) (employer's activity in the formation of a labor organization is not a prerequisite to a finding of domination of a labor organization.)

29/ 309 NLRB No. 163, slip op. at 6.

30/ Id., slip op. at 6, n.24.

31/ Lawson Co. v. NLRB, 753 F.2d 471, 477 (6th Cir. 1985), enfg. in part 267 NLRB 463 (1983). For other employer domination cases, see, e.g., NLRB v. Link-Belt Co., 311 U.S. 584, 7 LRRM 297 (employer dominated and supported employee committee where foremen solicited for the committee and threatened employees with discharge if they did not sign up); Homemaker Shops, 261 NLRB at 442 (domination found where labor organization exists essentially at will of the employer); Clapper's Manufacturing, 186 NLRB 324, 332-334 (1970), enfd.

b. Assistance

Although Electromation involved employer domination, not mere assistance, there is nothing in that decision to indicate that the Board will not continue to adhere to extant law concerning unlawful assistance.

The difference between "unlawful assistance and unlawful domination is one of degree, as is the difference between permissible cooperation and unlawful assistance." 32/ Employer assistance, as opposed to domination, exists when an employer interferes with the formation or administration of a labor organization, but when that organization is not subjugated to the employer's will. Cases involving unlawful assistance generally involve situations where employees, on their own, attempt to organize in order to deal with the employer as a group concerning mandatory subjects of bargaining, and at some point the employer provides assistance to the employees, to the point of interference, in the formation or administration of their organization. For example, in Duquesne University, 33/ the Board found that the employer unlawfully assisted an "employee committee" in circumstances where the committee had no charter, bylaws, or provision for payment of dues; there were instances of less than arm's length dealings (although the committee did bargain about many proposals); and the employer paid the employees for time spent working on the committee and provided administrative support. 34/

458 F.2d 414 (3rd Cir. 1972) (employer suggested the form and structure of the committee, established its purpose, and retained power to determine its composition); Fire Alert Co., 182 NLRB 910, 915-917 (1970), enf. 77 LRRM 2895 (10th Cir. 1971) (employer instructed the employees to elect three representatives, assigned each employee to a particular representative who would present grievances for that employee and so told employees); Han-Dee Spring & Mfg. Co., 132 NLRB 1542 (1961) (employer organized and determined nature, structure and function of employee grievance committee); Wahlgren Magnetics, 132 NLRB 1613 (1961) (employer initiated and sponsored employee representation committee, permitted the use of company time and property for meetings and paid employees while they met with their representatives).

32/ Homemaker Shops, 261 NLRB 441, 442.

33/ 198 NLRB 891, 896 (1972).

34/ See also Newman-Green, Inc., 161 NLRB 1062, 1065-66 (1966), enf. denied in relevant part 401 F.2d 1 (7th Cir. 1968).

The Board has held that "the use of company time and property does not per se establish unlawful employer support and assistance." 35/ Rather each case must be decided on the totality of the facts. 36/ This rule applies to both nonmajority labor organizations (e.g., employee involvement committees) and to Section 9(a) representatives. In Coamo Knitting Mills, the Board applied the de minimis rule, and held that a union did not receive unlawful assistance from an employer during organizing when it was permitted to use company property, and company time for 5 out of 170 employees, for the selection and meeting of an employee shop committee. 37/

However, it appears that a wider latitude is permitted for lawful cooperation where the labor organization is the lawful majority representative. In BASF Wyandotte Corp., 38/ the Board rejected an employer's reliance on Section 8(a)(2) to justify its unilateral discontinuance, in violation of Section 8(a)(5) and (1), of certain benefits (e.g., an office and furnishings, unrestricted use of a copying machine for union business, and generous paid time for conducting union business) accorded the Section 9(a) representative. The Board reasoned that:

[t]he use of company time and property does not per se establish unlawful employer support and assistance. [citations omitted]. 'Where a union lawfully has been established as the employees' bargaining representative, and has been accorded lawful recognition by an employer who, following recognition, deals with that representative at arm's length,' the Board has regarded the use of company time and property, in the absence of deeper employer involvement or intrusion in union affairs, to be merely 'friendly cooperation growing out of an amicable labor-management relationship.' [citation omitted]. Indeed, permitting the use of company time and property (to a lawfully established bargaining representative) ... 'serve[s] to permit an otherwise legitimate labor organization to perform its functions for the benefit of all concerned more effectively than otherwise might be the case.' 39/

35/ BASF Wyandotte Corp., 274 NLRB 978, 980 (1985), enfd. 123 LRRM 2320 (5th Cir. 1986).

36/ Coamo Knitting Mills, Inc., 150 NLRB 579, 582 (1964).

37/ Id. at 581-582.

38/ 274 NLRB 978 (1985), enfd. 123 LRRM 2320 (5th Cir. 1986).

39/ 274 NLRB at 980.

Indeed, the Board recognized this distinction in Electromation. The Board stated that "[c]ertain employer benefits resulting from friendly cooperation' with a lawfully recognized labor organization do not constitute an 8(a)(2) violation". Id. slip op at 8, n.31, citing dictum in Duquesne University, 198 NLRB at 891. However, the Board noted that supplying materials and furnishing space violates Section 8(a)(2) in circumstances where the employer's assistance is in furtherance of its unlawful domination and cannot be separated from that domination.

5. Remedies

The Board and the courts have consistently applied the remedy of complete disestablishment where an employer is found to have dominated a labor organization. 40/ Indeed, the Board ordered disestablishment of the employer-dominated action committees in Electromation, 41/ and stated in its opinion that "[t]o us, disestablishment of dominated labor organizations remains a useful remedy today, when necessary." 42/

However, where the employer's conduct does not rise to the level of domination, but nevertheless constitutes unlawful assistance, the Board generally issues a cease and desist order that prohibits the employer from the unlawful support, and orders the employer to withdraw and withhold recognition from the labor organization (including employee committee labor organizations) until such time as the labor organization is certified by the Board as the exclusive representative of the employer's employees in the appropriate unit. 43/

40/ NLRB v. Pennsylvania Greyhound Lines, Inc., 303 U.S. 261 (1938).

41/ 309 NLRB No. 163, slip op. at 9.

42/ Id., slip op. at 6, n.24. See, e.g., Ona Corp., 285 NLRB 400, 407 (1987); Jet Spray Corp., 271 NLRB 127 (1984); Homemaker Shops, 261 NLRB 441, enf. denied in relevant part 724 F.2d 535 (6th Cir. 1984); Metropolitan Alloys Corp., 233 NLRB 966 (1977), enfd. 624 F.2d 743 (6th Cir. 1980); Memphis Truck & Trailer, 284 NLRB 900, 901, n.5 (1987) ("[i]f a group is a labor organization within the meaning of Section 2(5) of the Act, then the Board is not free to order disestablishment of the group without making a finding that it is 'dominated' within the meaning of Section 8(a)(2)." NLRB v. Mine Workers District 50, 355 U.S. 453, 458-459 (1958).")

43/ Dusquesne University, 198 NLRB at 893; Newman-Green, Inc., 161 NLRB 1062, 1074 (1966); Texas Bus Lines, 277 NLRB 626, 627-628 (1985).

6. Section 8(a)(1)

Even in situations where no Section 8(a)(2) violation is found, an employer may violate Section 8(a)(1). In Modern Merchandising, 44/ the Board dismissed the Section 8(a)(2) allegation, but found that the employer committed an independent violation of Section 8(a)(1) with regard to both union-represented and non-union employees, by posting a letter to employees setting forth a plan instructing managers to set up a committee comprised of nonmanagement personnel elected by all employees at each store to represent them in making suggestions regarding working conditions. The Board stated that "[i]n proposing to both union and nonunion employees that they form these committees, the Respondent has abrogated the right of employees to make their own decisions regarding organizing activities." Id. at 1379-80. Thus, although the mere initiation of the concept of an employee committee, without evidence of how the committee actually will function, may not constitute domination or interference within the meaning of Section 8(a)(2), 45/ the employer may violate Section 8(a)(1) where its plan includes such details as how the employee representatives are to be selected and the topics that are to be addressed by the committee.

7. Section 8(a)(5)

While in both union-represented facilities and non-union facilities, employee committees may lawfully exist without running afoul of Section 8(a)(2) even if they constitute Section 2(5) labor organizations so long as the employer does not dominate or unlawfully assist the committee, in union-represented facilities, the inquiry must also take into account Section 8(a)(5).

a. Direct Dealing

It is well settled that the Act requires an employer to meet and bargain exclusively with the bargaining representative of its employees, and that an employer who deals directly with its unionized employees or with any representative other than the designated bargaining agent regarding terms and conditions of employment

44/ 284 NLRB 1377, 1379-80 (1977).

45/ In Electromation, 309 NLRB No. 163, slip op. at 4, the Board cited 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".

violates Section 8(a)(5) and (1). Direct dealing need not take the form of actual bargaining [T]he question is whether an employer's direct solicitation of employee sentiment over working conditions is likely to erode 'the Union's position as exclusive representative.' 46/

Since Medo, it has been generally recognized that "[t]o allow direct bargaining would eviscerate the mandate of Section 9(a) of the Act that representatives duly elected by majority vote be the exclusive bargaining agents of all the employees in a bargaining unit." 47/ In Modern Merchandising, 48/ for example, the Board held that an employer violated Section 8(a)(5) by suggesting to employees that they set up employee committees to solicit suggestions regarding working conditions and by bypassing the union in formulating a letter that set forth a plan creating these employee committees. The Board reasoned that the creation of the committees had the effect of eroding the union's position as exclusive representative. Id. at 1379. 49/ Thus, both establishing and "dealing with" an employee committee regarding "grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work" violates Section 8(a)(5) where the employees are represented by an exclusive bargaining representative. 50/

A question arises as to whether an employer will violate Section 8(a)(5) by eroding the status of an incumbent union if it deals with an employee committee regarding permissive subjects of

46/ Allied-Signal, Inc., 307 NLRB No. 118, slip op. at 3 (May 29, 1992); Medo Photo Supply, 321 U.S. 678, 684 (1944).

47/ Hajoca Corp. v. NLRB, 872 F.2d 1169, 1176 (3rd Cir. 1989), enfg. 291 NLRB 104 (1988).

48/ 284 NLRB 1377 (1987).

49/ The Board dismissed the Section 8(a)(2) allegation since the record was "devoid of any evidence of circumstances attending the implementation of the letter, including evidence of how the suggestion committees were actually set up, which topics were discussed, and the degree to which the committees interacted with management." Id. at 1379.

50/ This includes employers who have a Section 8(f) contract with a union, since a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5). John Deklewa & Sons, 282 NLRB 1375, 1377 (1987), enfd. 843 F.2d 770 (3rd Cir. 1988), cert. denied 488 U.S. 889 (1988).

bargaining. All cases involving this issue should be submitted for advice.

b. Bargaining Over Employee Committees

Employers and incumbent unions are free to voluntarily bargain about employee involvement committees. However, an employer may violate Section 8(a)(5) if it insists to impasse on a proposal to create employee committees that will deal with the employer on mandatory subjects of bargaining. 51/

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. 52/ In Boise Cascade, for example, the Board held that an employer proposal "that would consolidate the maintenance employee units, thereby effectively requiring shared representation by the maintenance Unions" 53/ was a nonmandatory subject of bargaining. And in Latrobe Steel, 54/ the Board affirmed the conclusions of the ALJ that an employer's proposal to make the local union co-representative of

51/ All cases where the employer insists to impasse on a proposal to create employee committees that will deal with the employer regarding permissive subjects should be submitted for advice.

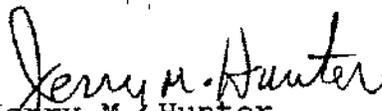
52/ Modern Mfg., 292 NLRB 10, 11 (1988); Boise Cascade Corp., 283 NLRB 462, 469 (1987), enfd. 860 F.2d 471 (D.C. Cir. 1988); Latrobe Steel Company, 244 NLRB 528, 532 (1979), modified on other grounds 630 F.2d 171 (3d Cir. 1980). See also Plumbers, Local Union No. 387 (Mississippi Valley Chapter, Mechanical Contractors Association of Iowa), 266 NLRB 129, 136 (1983) (the Board upheld the ALJ's finding that an employer proposal to create a second-tier of bargaining is a permissive subject of bargaining since it constituted a demand to bargain over the selection or substitution of negotiators. Such a separate bargaining procedure "would amount to an unreasonable constraint upon not only the right of a party to negotiate through negotiators of its own choice, but also with the party's internal decisional process as to how its bargaining position will be determined and who will determine it."); Sheet Metal Workers, Local 59 (Employers Association of Roofers and Sheet Metal Workers, Inc.), 227 NLRB 520, 520-521 (1976) (future contract dispute resolution by a third party is a permissive subject of bargaining.)

53/ 283 NLRB at 462.

54/ 244 NLRB 528, 532.

employees with the international union, the Section 9(a) representative, is a permissive subject of bargaining.

Similarly, an employer may violate Section 8(a)(5) if it insists to impose on a proposal to create an employee participation committee, even with union involvement in that committee, since such a plan would dictate to a union how it would represent employees or would require shared representational status.


Jerry M. Hunter
General Counsel