

E. I. du Pont de Nemours & Company and Chemical Workers Association, Inc., International Brotherhood of Dupont Workers and Chambers Works Central Safety and Occupational Health Committee; Antiknocks Area Safety Committee; Jackson Lab Programs and Publicity Committee; Freon Central Safety Committee; Chambers Works Fitness Committee a/k/a Chambers Works Recreation/Activities Committee; Control Unit Safety Committee; and Physical Distribution Safety Committee a/k/a Environmental Resources Safety Committee, Parties-in-Interest. Cases 4-CA-18737-1, 4-CA-18737-2, 4-CA-18737-3, 4-CA-18737-4, 4-CA-18737-5, 4-CA-18737-6, 4-CA-18737-7, 4-CA-18792, 4-CA-18835, 4-CA-18840-2, and 4-CA-19078

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND
RAUDA BAUGH

The central issues in this case are whether six safety committees and one fitness committee are employer-dominated labor organizations within the meaning of Section 2(5) and Section 8(a)(2) of the Act and whether the Respondent bypassed the Union in dealing with the committees and in dealing with unit employees during safety conferences, in violation of Section 8(a)(5).¹ The judge found that the seven committees at issue are labor organizations and that the Employer dominated the formation of one of the committees² and the administration of all the committees, in viola-

¹ On May 13, 1992, Administrative Law Judge Marion C. Ladwig issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent and the General Counsel also filed answering briefs. The Charging Party filed a brief in opposition to the Respondent's exceptions. Amicus curiae briefs were filed by International Union, United Mine Workers of America, Labor Policy Association, and by the National Association of Manufacturers, the Chamber of Commerce of the United States of America, the American Iron and Steel Institute, and the Coalition of Management for Positive Employment, Training and Education.

Chairman Stephens is recused from participating in this case.

² The judge found that the Respondent dominated the formation of the Freon Committee. He then found it unnecessary to reach the allegation that the Respondent dominated the formation of the Fitness Committee because such a finding would not affect the remedy. The General Counsel excepts to the judge's failure to pass on the Fitness Committee allegation and urges that the remedy is affected by this failure because there is no remedial provision regarding domination of the formation of committees. We agree with the General Counsel's contention that the remedy does not address domination of formation. In this regard, the judge inadvertently failed to include a remedial provision for the violation he found concerning the formation of the Freon Committee. We correct this oversight and accordingly find it unnecessary to rule on the allegation that the Respondent dominated the formation of the Fitness Committee, as it would not affect the corrected remedy.

tion of Section 8(a)(2). He found that the Respondent bypassed the Union by dealing with these committees, in violation of Section 8(a)(5).³ The judge, however, dismissed the allegations that the Respondent violated Section 8(a)(5) by holding safety conferences.

We agree with all the judge's rulings.⁴ We add rationale to his decision because we wish to provide guidance for those seeking to implement lawful cooperative programs between employees and management. Our recent decision in *Electromation*⁵ addressed certain issues raised by employee participation committees in a nonunion setting. The instant case provides the opportunity to address issues raised by employee participation committees which exist in circumstances where employees have selected an exclusive collective-bargaining representative. The Respondent here ran afoul of the Act. We clarify the basis for these violations and suggest what the Respondent could have done to avoid unlawful conduct. The Respondent also engaged in some lawful cooperative efforts. We emphasize those efforts because they show that there is some room for lawful cooperation under the Act.⁶

³ Although the judge found that the Respondent unlawfully bypassed the Union by dealing with the safety committees and the fitness committee concerning numerous proposals for safety awards and recreational facilities, the judge inadvertently failed to address the allegations that the Respondent violated Sec. 8(a)(5) by implementing these proposals without affording the Union the opportunity to bargain. We correct this oversight and find that the Respondent unlawfully implemented proposals concerning safety incentives and prizes and fitness facilities. (See G.C. Exh. 36 which contains the parties' stipulation to the items provided by the Respondent.) We shall order the Respondent to cease and desist from unilaterally providing such items. We shall also order the Respondent, on request by the Union, to rescind these unilateral changes. However, our Order should not be construed as requiring the Respondent to cancel any benefit without a request from the Union. See, e.g., *Columbia Portland Cement Co.*, 303 NLRB 880, 885 (1991).

⁴ The Respondent argues, and the General Counsel agrees, that the judge provided an overbroad remedy for the Respondent's unlawful prohibition of the use of the electronic mail system for the distribution of union literature and notices. We find merit in the Respondent's exception and shall limit the remedy to discriminatory prohibition of the use of the electronic mail system for distributing union literature and notices. See *Storer Communications*, 294 NLRB 1056, 1099 (1989).

⁵ 309 NLRB 990 (1992).

⁶ As is clear from the decision and his concurring opinion in *Electromation, Inc.*, supra, Member Oviatt agrees in many respects with the comments of his concurring colleague, particularly those regarding the efficacy and usefulness of employee-management cooperative programs and the rationale used to determine whether Sec. 8(a)(2) has been violated. *Electromation, Inc.*, also highlights areas in which Member Oviatt's approach differs from that of his concurring colleague, in particular the issue whether employee-members of a committee must act in a representational capacity before the committee can be found to be a Sec. 2(5) labor organization.

Member Raudabaugh shares his concurring colleague's interest in encouraging and allowing employees, employers, and unions lawfully to pursue employee participation and cooperation between management and employees in the workplace. He stresses here, however, as he did in his concurring opinion in *Electromation*, that the Board

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1. Labor organization status under Section 2(5) of the Act

The threshold question for a determination of whether an employer has violated Section 8(a)(2) is whether the entity involved is a labor organization. Under the statutory definition set forth in Section 2(5), the entity 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,” grievances, labor disputes, wages, rates of pay, or hours of employment.⁷ There is no question that each committee at issue herein is an organization in which employees participate. In addition, the committees discuss subjects such as safety, incentive awards for safety, or benefits such as employee picnic areas and jogging tracks. These subjects fall within the categories of subjects listed in Section 2(5).⁸ The committees, therefore, meet the first and third requirements for labor organization status. We turn now to the second requirement.

_____ must evaluate all such efforts under the strictures of applicable Federal law. The Board does not have the power to rewrite the 1935 National Labor Relations Act. At best, the Board may reinterpret that statute in light of subsequent developments, as suggested by his *Electromation* concurrence and his four-factor test for determining whether there is an 8(a)(2) violation.

Member Raudabaugh finds that the Respondent’s conduct in this case with respect to the safety and fitness committees violates Sec. 8(a)(2) under his four-factor test. He notes, with appreciation, that Member Devaney’s concurrence here seems to be consistent with much of Member Raudabaugh’s *Electromation* four-part test. When all is said and done, however, the question is whether the 1935 Act prohibits far more of today’s employee participation activities than it permits.

⁷We agree with the judge’s conclusion that the employee-members of the committee acted in a representational capacity. Member Oviatt, therefore, finds it unnecessary to determine whether labor organization status under Sec. 2(5) could be found in the absence of a finding that the organization acted as a representative of other employees. Member Raudabaugh believes that representation is not a necessary element for labor organization status.

The Respondent contends that an element of proof necessary to finding that a committee is a Sec. 2(5) labor organization is a showing, in the form of credible testimony by nonparticipating employees, that the “totality of circumstances surrounding the composition and functioning of the committee led [nonparticipating employees] to believe that the employee members were there to represent the interests of non-participating employees.” The Respondent essentially urges the use of a subjective standard based on direct affirmative evidence concerning the state of mind of nonparticipating employees. The Board has rejected such a standard in other contexts. See, e.g., *Electra Food Machinery*, 279 NLRB 279, 280 (1986). We reject it here also. We find that the documentary and testimonial evidence supports the judge’s finding that the committees in fact acted in a representational capacity.

⁸See, e.g., *Postal Service*, 302 NLRB 767, 776 (1991), holding that the term “wages” does not merely refer to a sum of money given for actual hours worked but also refers to other forms of compensation and benefits.

The Limits of “dealing with”

The principal issue is whether the committees exist for the purpose, at least in part, of “dealing with” the employer on statutory subjects. The Supreme Court held in *NLRB v. Cabot Carbon Co.*⁹ that the term “dealing with” in Section 2(5) is broader than the term “collective bargaining.” The term “bargaining” connotes a process by which two parties must seek to compromise their differences and arrive at an agreement. By contrast, the concept of “dealing” does not require that the two sides seek to compromise their differences. It involves only a bilateral mechanism between two parties.¹⁰ That “bilateral mechanism” ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required. If the evidence establishes such a pattern or practice, or that the group exists for a purpose of following such a pattern or practice, the element of dealing is present. However, if there are only isolated instances in which the group makes ad hoc proposals to management followed by a management response of acceptance or rejection by word or deed, the element of dealing is missing.

Just as there is a distinction between “bargaining” and “dealing,” there is a distinction between “dealing” and no “dealing” (and a fortiori no “bargaining”). For example, a “brainstorming” group is not ordinarily engaged in dealing. The purpose of such a group is simply to develop a whole host of ideas. Management may glean some ideas from this process, and indeed may adopt some of them. If the group makes no proposals, the “brainstorming” session is not dealing and is therefore not a labor organization.

Similarly, if the committee exists for the purpose of sharing information with the employer, the committee would not ordinarily be a labor organization. That is, if the committee makes no proposals to the employer, and the employer simply gathers the information and does what it wishes with such information, the element of dealing is missing, and the committee would not be a labor organization.

Likewise, under a “suggestion box” procedure where employees make specific proposals to management, there is no dealing because the proposals are made individually and not as a group.¹¹

The committees at issue here do not fall within any of these safe havens. They involve group action and not individual communication. They made proposals and management responded by word or deed. The

⁹360 U.S. 203 (1959).

¹⁰See *Electromation*, 309 NLRB at 995 fn. 21.

¹¹There is also an issue as to whether the “suggestion box” is an organization, committee, or plan, within the meaning of Sec. 2(5).

committees made proposals to management representatives in different ways.

Some of the committees submitted proposals, concerning safety and fitness or recreational matters, to representatives of management outside the committees. Management representatives responded to these proposals. For example, the Antiknocks Committee proposed to various supervisors and managers that safety problems be corrected, and the managers responded to these proposals. The Fitness Committee proposed to higher management that tennis courts and a pavilion be constructed, and management rejected this proposal on the ground that it was too costly at the time. This activity between committees and management is virtually identical to that found to be “dealing” in *Cabot Carbon*.

All the committees discussed proposals with management representatives inside the committees. Each committee has management representatives who are full participating members. These representatives interact with employee committee-members under the rules of consensus decision-making as defined in the Respondent’s Personal Effectiveness Process handbook. The handbook states: “consensus is reached when all members of the group, including its leader, are willing to accept a decision.” Under this style of operation, the management members of the committees discuss proposals with unit employee members and have the power to reject any proposal. Clearly, if management members *outside* the committee had that power, there would be “dealing” between the employee committee and management. In our view, the fact that the management persons are on the committee is only a difference of form; it is not a difference of substance. As a practical matter, if management representatives can reject employee proposals, it makes no real difference whether they do so from inside or outside the committee. In circumstances where management members of the committee discuss proposals with employee members and have the power to reject any proposal, we find that there is “dealing” within the meaning of Section 2(5).

The mere presence, however, of management members on a committee would not necessarily result in a finding that the committee deals with the employer within the meaning of Section 2(5). 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.

As noted above, if a committee exists for the sole purpose of imparting information, there would be no dealing. In addition, if a committee exists for the sole purpose of planning educational programs, there would be no dealing. The Central Safety Program Committee and the Jackson Lab Program Committee, however, did not limit their activities to imparting information or planning educational programs. Both committees also decided on incentive awards to be given to unit employees, either in recognition of, or to encourage, safe work practices. Such awards are benefits and compensation which are mandatory subjects of bargaining¹² and fall within the subjects set forth in Section 2(5). In light of this, and because the management representatives and unit employees on the committee determined incentive awards under the rules of consensus decision-making, we find that the committees existed for the purpose, in part, of dealing with the employer on a statutory subject.¹³

2. Domination of the administration and/or formation of the committees

The structural operations of the committees warrant the finding that the Respondent dominated the administration of the committees.¹⁴ As discussed above, the

¹² See e.g., *St. Vincent’s Hospital*, 244 NLRB 84, 85–86 (1979) (free coffee and meals); *Southern Florida Hotel Assn.*, 245 NLRB 561, 569 (1979) (providing beer, soft drinks, and snacks); and *Poletti’s Restaurant*, 261 NLRB 313, 317 fn. 16 (1982) (free desserts).

¹³ We reject the Respondent’s argument that the committees were performing narrowly defined tasks that historically had been performed by either management committees or by management directly and, thus, that they were “dealing for,” not “dealing with” the Respondent. This contention is contrary to the evidence, which shows a significant change in the composition, operation, and responsibility of the committees from the Employer’s previous unilateral safety and audit programs. Thus, we have found, contrary to the Respondent’s contention, that the Safety and Fitness Committees were not charged with performing delegated management functions. In any event, setting wages, hours, and terms and conditions of employment, etc., can be both management functions and mandatory subjects of bargaining. In either case, bilateral discussions of these statutory subjects constitute “dealing with” within the meaning of Sec. 2(5).

Member Oviatt notes that the Respondent has raised a “de minimis” argument only in the 8(a)(5) context. The Respondent has not excepted that the committees’ impact on terms and conditions of employment was de minimis in the 8(a)(2) context and that issue is not before the Board. Therefore Member Oviatt does not address that issue.

Our concurring colleague concludes that the committees in this case were engaged in “bargaining.” Because “bargaining” is included within the broader term “dealing” (see *Cabot Carbon*, supra), we assume that our colleague also finds “dealing” in this case. We find it unnecessary to resolve the issue whether there is “bargaining.” In our view, it is sufficient, for 2(5) purposes, that there is “dealing.”

¹⁴ To the extent that the Respondent reads Secs. 8(c) and 9(a) of the Act to confer on employers an unlimited right to communicate

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Respondent ultimately retains veto power over any action the committee may wish to take. This power exists by virtue of the management members' participation in consensus decision-making. The committee can do nothing in the face of management members' opposition. In addition, the record shows that in each committee, a management member serves as either the leader or the "resource" (monitor or advisor) and therefore has a key role in establishing the agenda for each meeting and in conducting the meeting.¹⁵

The Respondent also controls such matters as how many employees may serve on each committee. In addition, the Respondent determines which employee volunteers will be selected in the event that the number of volunteers exceeds the number of seats designated for employees on the committees. Unit employees had no independent voice in determining any aspect of the composition, structure, or operation of the committees. In fact, as the record demonstrates, the Respondent can change or abolish any of the committees at will. In our view, all of these factors, taken together, establish that the Respondent dominated the administration of the committees.

Further, the Respondent dominated the formation of the Freon Committee. Management representatives made the decision to reorganize the old Freon safety committee, made plans for structuring the new safety committee, and called the organizational meeting to establish the new committee. Management representatives determined who would serve on the committee by inviting certain unit employees to attend the organizational meeting. Finally, management representatives chaired the meeting and, along with participating employees, created the new safety committee and determined its structure and purpose. Thus, the Respondent had substantial control over all aspects of the formation of the Freon Safety Committee.

3. The 8(a)(5) issues

In 1989, the Respondent began to hold quarterly all-day safety conferences. The stated objective of the conferences was to "increase personal commitment, responsibility, and acceptance of safety as our #1 concern." In 1990, the unit manager of Environmental Resources held a separate conference called "Safety Pause" for similar reasons. Each conference was structured according to PEP methods. After supervisors and managers made opening remarks, the conferees broke

directly with employees, it is mistaken. See *Electromation*, 309 NLRB at 995 fn. 22.

¹⁵ The committees operated under the Personal Effectiveness Process (PEP). The Respondent's PEP handbook indicates that each committee has a leader, a resource, and a scribe (note taker) who confer before each meeting and determine the agenda. The leader and the resource chair the meeting and keep it "on track." After the meeting, the leader, resource, and scribe evaluate the meeting and discuss how to improve the next meeting.

into small groups to discuss specific topics such as communication of safety information. They were told that bargainable matters could not be dealt with, that the conference was not "a union issue." In the small groups, employees shared their experiences on the topic, stated what they thought the ideal situation would be, and discussed what barriers there were to reaching the ideal, how to overcome the barriers, and how to implement improvements. The conferees were told that if comments or questions came up concerning bargainable issues or items that required more information, these matters should be placed in a "bucket list" to indicate that they could not be considered at the conference. The resource or facilitator for each group was responsible for ensuring that bargainable issues were not discussed. In each small group, conferees expressed their ideas and their comments were recorded. The comments and suggestions from the conference were forwarded to the Central Safety and Occupational Health Committee for consideration.

The General Counsel maintains that the Respondent's conduct of these conferences amounts to bypassing the Union and dealing directly with the employees on mandatory subjects of bargaining in violation of Section 8(a)(5).¹⁶ The judge rejected the General Counsel's argument, finding that the conferences constituted permissible communication between an employer and its employees. We agree with the judge's conclusion.

In our view, the conferences amounted to brainstorming sessions where employees were encouraged to talk about their experiences with certain safety issues and to develop ideas and suggestions. The Respondent did not charge the conference with the task of deciding on proposals for improved safety conditions. As discussed above, this style of brainstorming does not constitute "dealing with." Because there is no "dealing," there can be no "direct dealing" with the employees in violation of Section 8(a)(5).

We also note that the Respondent mentioned the Union at each conference and told the employees that the conference was not a union matter. It provided a mechanism for seeking to keep bargainable issues out of the discussion. The Respondent made clear to the employees that it recognized the Union's role and that bargainable issues should be handled only by the Union. Although the Respondent thus sought to keep bargainable issues out of the discussion, we are not wholly persuaded that it succeeded in doing so. The subject matter of such discussions was safety in the workplace, and that subject is a mandatory subject of bargaining. However, for the reasons discussed above, we conclude that the Respondent was not directly deal-

¹⁶ The General Counsel does not contend that the Respondent violated Sec. 8(a)(1) by soliciting grievances. Accordingly, we express no view on that issue.

ing with its employees. In addition, the good-faith effort to separate out bargainable issues and the assurances that the Union had the exclusive role as to such issues are further indications that there was no undermining of the Union's status as the exclusive representative.

Although the above discussion concerning safety conferences involves only Section 8(a)(5), the safety conferences are a good example of how an employer can involve employees in important matters such as plant safety, without running afoul of Section 8(a)(2) or Section 8(a)(5) of the Act. Nothing in the Act prevents an employer from encouraging its employees to express their ideas and to become more aware of safety problems in their work. In the case of the conferences, the Respondent informed the employees of the Union's role and sought to prevent the conference from considering matters within the scope of the Union's duties as the exclusive collective-bargaining representative of its employees. The Respondent 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.¹⁷

By contrast, in the case of the safety and fitness committees, the Respondent did not take care to separate its activities from those properly within the Union's authority. On the contrary, some committees dealt with issues which were identical to those dealt with by the Union, and they brought about resolutions that the Union had attempted and failed to achieve. The Antiknocks Area Safety Committee got a new welding shop for a welder who complained of poor ventilation in the welding shop. The Union's efforts to resolve the problem had failed and the welder took his complaint to the committee instead. The Fitness Committee developed a recreational area with picnic tables, a volleyball area, a horseshoe pit, a jogging track, and sanitary facilities. The Union had sought similar fitness facilities in negotiations with the Respondent and had failed. Finally, all the safety committees established incentive awards. In the past, the Union had negotiated with the Respondent when employees had wanted better incentive awards for safety. As noted, the Respondent dealt with the committees on these subjects. In sum, the Respondent bypassed the incumbent labor organization in violation of Section 8(a)(5) and domi-

nated other labor organizations in violation of Section 8(a)(2).

AMENDED CONCLUSIONS OF LAW

1. Insert the following as Conclusion of Law 3 and renumber the subsequent paragraphs accordingly.

“3. By unilaterally implementing the proposals of the committees concerning safety awards and fitness facilities without affording the Union an opportunity to bargain, the Company has violated Section 8(a)(5) and (1).”

2. Substitute the following for renumbered Conclusion of Law 4.

“4. By discriminatorily prohibiting bargaining unit employees from using the electronic mail system for distributing union literature and notices, the Company has violated Section 8(a)(1).”

ORDER

The National Labor Relations Board orders that the Respondent, E. I. du Pont de Nemours & Company, Deepwater, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Dominating the formation and administration of the Freon Central Safety Committee a/k/a Fluorochemicals Central Safety Committee and Fluorochemicals Safety and Health Excellence Committee or any other labor organization.

(b) Dominating the operation and administration of the following safety and fitness committees or any other labor organization:

Antiknocks Area Safety Committee
Chambers Works Fitness Committee a/k/a
Chambers Works Recreation/
Activities Committee
Control Unit Safety Committee
Jackson Lab Programs and Publicity Committee
Physical Distribution Safety Committee
a/k/a Environmental Resources
Safety Committee
Programs and Publicity Committee of the
Chambers Works Central Safety and
Occupational Health Committee
Freon Central Safety Committee

(c) Dealing with any of these committees or with any reorganization or successor.

(d) Bypassing the Chemical Workers Association as the exclusive collective-bargaining representative of employees in the appropriate bargaining units.

(e) Unilaterally implementing the proposals of the committees concerning safety awards and fitness facilities without affording the Union an opportunity to bargain.

¹⁷We note the judge's finding that in announcing the safety conferences, the Respondent informed employees that 30 volunteers would attend the first conference but that all employees would be attending a safety conference in the near future. Thus, there is no evidence that the safety conferences were representational in nature. In that regard, here the Employer's conferences, although more limited in scope and time, were comparable to the "committees of the whole" established by the employer in *General Foods Corp.*, 231 NLRB 1232 (1971).

(f) Discriminatorily prohibiting unit employees from using the electronic mail system for distributing union literature or notices.

(g) 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) Completely disestablish the seven committees.

(b) On request, bargain with the Union concerning plant safety and fitness facilities.

(c) On request, rescind the safety awards and fitness facilities implemented unilaterally without affording the Union an opportunity to bargain.

(d) Post at its facilities at Deepwater, New Jersey, copies of the attached notice marked "Appendix."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 4, 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 where 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.

(e) 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.

1. Introduction

I join my colleagues in adopting the judge's rulings.¹ This case provides an opportunity to shed further light on the range of employer-employee committee involvement permissible under the Act. I write separately, as I did in *Electromation, Inc.*,² in part to supplement and support my colleagues' comments, but also to emphasize that the conduct the majority finds

¹⁸ 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."

¹ I also agree with my colleagues' correction of the judge's inadvertent failures to include a remedy for the domination of the formation of the Freon Committee and to address the allegations that the Respondent violated Sec. 8(a)(5) by implementing proposals generated by the committees without bargaining with the Union. Further, I agree with the majority's correction of the judge's overbroad remedy with respect to the use of the electronic mail system for union notices.

I do not agree, however, with the discussion by Members Oviatt and Member Raudabaugh of "the limits of 'dealing with'" in sec. 1 of the majority opinion. See fn. 10, below.

² 309 NLRB 990 (1992) (Devaney, concurring).

unlawful is also unlawful under my narrower and more historically focused perspective. Like the judge and the majority, I reject the Respondent's characterization of the six area safety committees and the Fitness Committee at DuPont's Deepwater plant as management tools the operation of which was outside the Union's scope and to which the employee members brought only their individual interests and concerns rather than those of their fellow employees. I find ample basis in the record for Judge Ladwig's conclusion that the Parties-in-Interest were statutory labor organizations and that the Respondent's conduct with respect to them violated Section 8(a)(2) and Section 8(a)(5). I further find that the Respondent attempted to use the committees to freeze the Union out of areas in which it had a vital and legally recognized interest: employee health and safety³ (including onsite facilities for fitness), bonuses, and employee grievances over safety. As a practical matter, the Respondent's conduct as to the safety and fitness committees comes close to a textbook example of an employer's manipulation of employee committees to weaken and undermine the employees' freely chosen exclusive bargaining agent. By contrast, I find, as do my colleagues, that the "safety conference" or "safety pause" meetings did not violate the Act; employees were encouraged there to raise their own issues and propose their own ideas while "bargainable" issues were tabled. The Respondent's different conduct in the two employee participation settings provides a

³ In finding that DuPont violated the Act in dominating the administration of the six safety committees, my colleagues state that "employee health and safety" is a mandatory subject of bargaining. I agree. With respect to the safety committees, however, I note that the degree to which bargaining representatives involve themselves in the details of choosing equipment, procedures, and processes relating to safety varies widely; moreover, many negotiated management-rights clauses reserve such choices to management. In this case, the Union, which is composed entirely of employees at the plant, took an active role in issues of employee safety; the record indicates that employees went through the Union respecting matters such as obtaining up-to-date equipment (the welding shop), and in 1989 the Union unsuccessfully proposed the establishment of a joint management-labor safety committee to discuss or bargain all health and safety issues and to investigate injuries and accidents and determine how to avoid them. The Respondent's rejection of the proposal out of hand and failure to offer a single counterproposal on the issue of a joint safety committee was certainly disingenuous, especially as it had created and was continuing to create its own employee committees with virtually the same functions.

The term "safety," however, is extremely broad and could cover decisions and policies generally viewed as managerial and which unions frequently leave to the employer's discretion, e.g., changes in lighting in a plant or switching vendors to obtain a more comprehensive maintenance plan to minimize the possibility of employee injury. I do not interpret the holding that, under the unique circumstances of this case, the Respondent violated Sec. 8(a)(2) by dominating the administration of the safety committees as a broad ban on an employer's bringing employees together with managers, in other circumstances, to tackle the nuts and bolts of safety issues or any of the myriad of technical decisions involved in maintaining a safe, efficient physical plant and in quality control.

useful contrast that helps to outline the boundaries of Section 8(a)(2) more clearly.

In *Electromotion* I expressed the view that Section 8(a)(2), read together with the definition of “labor organization” in Section 2(5), does not proscribe broad areas of employer-employee communication; that Congress targeted certain well-defined evils in enacting Section 8(a)(2); and that the Board should focus enforcement of the provision on the specific evils Congress had targeted. In this case, as in *Electromotion*, amici curiae have argued that a conclusion that DuPont’s handling of its safety and fitness committees violated Section 8(a)(2) depends on an “indiscriminate” application of the prohibition against employer-dominated unions that would “thwart the myriad efforts being undertaken by labor unions, employee groups, and employers to develop human resource policies to meet the challenges of the 21st Century.”⁴ In my view, such characterizations are not a fair description of the Board’s holding. As in *Electromotion*, the record here demonstrates that where the Board has found an 8(a)(2) violation, it has been faced with employer abuse of an employee committee to the detriment of the Section 7 right to choose the bargaining representative; where, however, the record indicates that DuPont established an employee organization that acknowledges that the choice of the bargaining agent resides solely with the employees, the Board has dismissed the complaint allegations.

I bring the same approach outlined in my concurrence in *Electromotion* to the facts here. I read Section 8(a)(2)’s legislative and precedential history as leaving employers significant freedom, through interaction with groups of more than one and fewer than all employees, to involve rank-and-file workers in matters formerly seen as management concerns, to call on employees’ full ability and know-how, and to increase their enthusiasm for and commitment to quality and productivity through implementing recent developments in worker effectiveness training and empowerment, whether these developments occur through hierarchical employer-structured entities or through “democratization” of the workplace, whereby employees become, in a sense, their own supervisors and managers. In *Electromotion*,

⁴Brief amicus curiae of the Labor Policy Association in support of the Respondent, pp. 2–3.

I recognize the importance of the concerns expressed by management spokespersons and the negative effects of a perception that, with respect to employee participation programs, employers’ hands are tied under Sec. 8(a)(2) and the Board’s interpretation of it. The reality, however, should allay such concerns: 8(a)(2) complaints constitute a very small percentage of the General Counsel’s caseload. Between fiscal year 1990 and fiscal year 1992, the last year for which complete figures are available, complaints alleging violations of Sec. 8(a)(2) constituted approximately 0.21 percent of the total number of complaints issued by the Office of the General Counsel. In fact, out of over 9300 complaints issued in that 3-year period, only 20 involved allegations of Sec. 8(a)(2).

I noted that the early history of the Act, although vigorously condemning sham unions that prevented employees from exercising their right to choose their own bargaining representative, was silent as to organizations through which employees provide input on “problems of mutual interest” such as “safety; increased efficiency and production; conservation of supplies, materials and equipment; encouragement of ingenuity and initiative.”⁵ On the other hand, I acknowledged then, and I do so here, that employer-controlled “sham unions,” which Congress intended to outlaw in passing Section 8(a)(2), are by no means extinct, although they may now appear in guises quite different than those of 1935. Thus, although Section 8(a)(2) is, in my view, narrower in application than some commentators have argued, it does prohibit a particular type of employer conduct.

In analyzing the issues presented by the facts of this case, which contains both lawful and unlawful conduct, my starting point and assumptions are somewhat different from my colleagues.’ My reading of the briefs here and in *Electromotion* indicates that, for many amici, concern over Section 8(a)(2)’s possible interference with the implementation of employee involvement programs centers on the legal status of employee committees, such as the six safety committees and the fitness committee here, that are the creation and tool of management. Accordingly, my focus will be on employee groups that are established and dominated by the employer and on the fundamental choices Section 8(a)(2) requires employers to make with respect to such groups. I find no statutory bar to such committees or to employer domination of them, as long as the committees are not labor organizations or, relevantly, “employee representation committee[s] or plan[s] in which employees participate and which exist[] for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” As in *Electromotion*, then, I answer questions concerning the effect of Section 8(a)(2) on employee involvement programs as follows: Section 8(a)(2) should not create obstacles for employers wishing to implement such plans—as long as such programs do not impair employees’ free choice of a bargaining representative. Section 8(a)(2) does not ban agenda-setting, establishing or dissolving committees, or mixing managers and statutory employees on a committee. It does, however, outlaw manipulating such committees so that they appear to be agents and representatives of the employees when in fact they are not. Thus, an employer using employee committees lawfully will have chosen to keep the committees in proper perspective as management tools. It will not accord silent, partial, and revocable recognition to a committee by bargaining (or

⁵*NLRB v. Cabot Carbon Corp.*, 360 U.S. 303, 313 (1959).

“dealing”) with it and it will not usurp the employees’ exclusive right to choose a representative by such bargaining or dealing. In this case, I find that the Respondent did manipulate the safety and fitness committees to inhibit employees’ free choice. The Respondent undermined the freely chosen bargaining agent by establishing, tacitly recognizing, and bargaining over mandatory subjects with employer-controlled employee representation committees. Thus, I find that the Respondent’s domination of the operation and administration of the safety and fitness committees and the bypassing of the Union violated Section 8(a)(2) and (5).

The lesson to be gleaned from the violations found and the allegations dismissed here is simply that, under current law and precedent, employers cannot establish and use employee committees with the flexibility, discretion, and authority inherent in the creation and use of a management tool *and* lead employees to believe, either directly or indirectly, that the “management tool” is the employees’ tool.

2. Factual background⁶

The DuPont Deepwater plant employs over 3500 employees and produces over 750 chemical products. The Union, the membership of which is limited to Deepwater employees, has represented clericals and production and maintenance employees at the facility for 50 years.

Until 1987, the Deepwater plant’s safety program was administered through area safety committees composed solely of managerial personnel. The committees planned monthly safety meetings in the various areas of the plant, and exercised the authority to award compensation such as cash, tools, shirts, and the like to employees as an incentive to safe work habits. Employees occasionally expressed dissatisfaction with the small value of the incentives; the Union successfully negotiated increases in the value of the items several times.

In 1984, the Respondent instituted a personal effectiveness program for employees (PEP), which encouraged decision-making through consensus. The Respondent used PEP as its organizing principle when, in 1987, it revamped its safety committees to include unit employees as members. PEP provides a parliamentary structure for meetings and goal-setting in which every group has a “facilitator” (chairperson) and a “resource” (adviser) who, between them, exert extensive control over the group’s agenda and the conduct of the meetings and one of whom is invariably a member of management. PEP requires that all group members, including the managerial members, agree on any deci-

⁶This factual background is intended only to provide some of the key facts on which my analysis is based. I fully agree with the judge’s findings of fact, and I have not attempted to present an exhaustive picture here.

sion made by the group, whether the decision be to clarify policy, to propose a new way of handling a problem, or to decide on a problem-solving strategy. Thus, as the judge found, no employee proposals could leave the committee without the assent of the management members.

The management/employee area safety committees operate independently of each other, but share some features: managers serve on each committee; management decides which employees who volunteer for the committees would serve on them; the continuation of the safety committees is dependent on management, which can abolish them at any time; employee members serve on the committees for indefinite periods, without rotations; and management provides all funds for the activities of the committees. The Respondent also provides meeting places and equipment, pays the employee members for their time, and has authorized the committees to use electronic mail to communicate with employees.⁷

The committees’ activities differ, despite their common characteristics. For example, the Central Safety Programs Committees has developed monthly safety information programs and established safety awards. The Antiknocks Area Safety Committee has urged unit employees to inform committee members of their safety problems and touted the committee as “the fastest way to get things fixed”; the committee took employee complaints and concerns to management for correction. The Antiknocks Committee is one of the most successful and efficient of the employee committees. It has arranged for improvements in the procedure for handling welders’ protective clothing and secured a new, better-ventilated welding shop for a welder after the Respondent denied the Union’s repeated attempts to get the welder’s complaints about the ventilation in the shop corrected. The committee also, often on information from unit employees, got potholes repaired, personnel assigned to clean air hoses, and new procedures in the handling of safety garments put into place, to name only a few of the goals it achieved. When it learned of or observed safety hazards, the Antiknocks Committee tried to correct some situations itself; when it could not, a member presented the problem to the supervisor or manager in the area on the committee’s behalf. If the problem was not resolved there, the committee would pursue it to higher levels of plant management.

All of the safety committees decided on safety awards to employees in recognition of or to encourage safe work habits. These awards ranged in value from the nugatory (e.g., sunglass holders) to the substantial (e.g., breakfasts, dinner dances, evenings on the town, corduroy jackets, cash awards of \$50 and \$25, and

⁷Deepwater employees were forbidden to use electronic mail for union business or messages.

\$100 savings bonds). Employees on the committees pressed for larger awards for their fellow employees; the committees also sought higher awards from management. During the operation of the committees, the Respondent never bargained with the Union over the amounts of the safety awards.

In 1989, in the course of contract negotiations, the Union proposed that a joint labor-management health and safety committee be established to discuss and negotiate such issues and to investigate and attempt to prevent accidents. The Union proposed 21 items concerned with employee safety. The Respondent “commended the Union for its interest in the subject,” but told the Union that discussions on health and safety should take place outside contract bargaining. When the Union insisted that bargaining on health and safety issues was part of contract negotiations, the Respondent rejected the Union’s proposals, characterizing them as “not . . . additive to our business.” The Respondent offered no counterproposal on the subject of a safety committee.

Management initiated the formation of the Fitness Committee in late 1989 or early 1990, with employee members chosen to represent various areas of the plant. The Respondent admits that the manager in charge told an employee member that the committee sought a “representative” from each area, and the judge credited an employee member’s testimony that he asked why certain employees were on the committee and was told that their presence, regardless of their personal interest in fitness, gave the committee a more representative cross-section of plant employees. The Union was not notified of the committee’s formation. Before the committee was formed, the Union had unsuccessfully proposed the establishment of an employee fitness facility comparable to the one at another DuPont plant. As the judge found, the Respondent rejected the proposal on the grounds that it was not interested. In a memo dated September 26, 1989, a management assistant recommended that the employee activities budget be increased \$10,000 for employee events. The memo stated that the Respondent’s practice of not funding employee teams “just drives employees to the Union for assistance—I would like to change that.”

In January 1989 the Respondent approved the Fitness Committee’s proposal for outdoor facilities at a former parking lot and budgeted money for a jogging track. The minutes of the committee’s May 11, 1989 meeting indicates that the Respondent rejected an employee member’s proposal for tennis courts as too expensive. An employee member pressed for tennis courts through the electronic mail system in a June 1989 message sent to plant managers and other management personnel and committee members. In the summer of 1989, the Respondent added picnic tables

and bathrooms. When employee committee members proposed a horseshoe pit and a volleyball court, the Respondent implemented both proposals. In January 1990 employee member Ebert proposed the addition of an outdoor pavilion and two tennis courts to the committee. The committee agreed and a manager on the committee suggested that Ebert make a presentation to plant management for funding. Ebert made the proposal, which was denied on the grounds that the budget contained no funds for the projects.

3. Did the Respondent dominate the administration of Deepwater’s six safety committees and the fitness committee?

I agree with my colleagues and the judge that the Respondent dominated the operation of the seven committees. The Respondent started the committees; the suggestions, proposals, and actions of the committees depended on the approval of the management members; the implementation of such proposals and plans depended entirely on the Respondent’s will; the Respondent maintained complete control over the continued existence of the committees, and, in some cases, set the agendas for the committees. DuPont’s portrait at the hearing and in its brief of committees formed solely as management tools to solve narrow management problems, some of which, in fact, had grown out of previously all-management structures virtually concedes this “domination.”⁸ Further, although I am open to persuasion by the right set of facts, I find it difficult to conceive of a situation where the very existence of an employee committee depends on the will of the employer that would not merit a finding that the employer “dominated” the committee.

I hasten to add, however, that an employer’s domination of the administration of an employee committee is not, taken alone, an unfair labor practice. In my view, the concerns voiced by amici about the effect of Section 8(a)(2) on legitimate employee participation plans relate almost entirely to committees whose usefulness *depends* on a type of employer domination, in the sense that an employer brings employees together

⁸ Even under the Respondent’s cited standard, a finding of domination is virtually inescapable here. The Respondent cites *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 630 (9th Cir. 1974): “the question is whether the organization exists as the result of a choice freely made by the employees, in their own interests and without regard to the desires of their employer . . . or whether the employees . . . supported the organization . . . because they knew their employer desired it” In this case there is no question that the organizations did *not* exist as the result of the employees’ choice. The organization which the employees had empowered to speak for them on the issues of safety and health was the Union. For better or worse, the fact that management can pick the employees who participate, countermand any decision of a committee, and dissolve the employee committee at will implies, as a necessary corollary, that employees are not exercising free choice over the operation of the committee.

to work on and, if possible, to solve, management-designated problems, but retains the flexibility to dissolve the committee when its effectiveness has ended, to start it or another up when needed again, to set its agenda, and to include managers and supervisors on it if these factors would increase the committee's effectiveness.

Further, the success of many types of employee involvement programs depends on persuading employees—or freeing them—to turn their full attention and intelligence to the solution of management problems; to forget, in a sense, for the duration of the committee's work that they have their own separate interests in the workplace and to do the employer's work. Employers “dominate” employees every time a supervisor or manager issues work instructions to statutory employees; employers “dominate” groups of employees every time a group is instructed to perform a task.

Without more, I see no unlawful behavior or threat to employees' Section 7 rights when employers form employee committees with management members, provide such committees with funds, time, space, and compensation, assign the committees agendas, and dissolve them at will. Such committees need not interfere with the employees' exclusive right to choose a representative—if they do not pretend to represent the interests of employees as distinct from those of the employer. Under the statute, an employer violates Section 8(a)(2) by “dominating” only one of the many types of employee groupings or committees that employers have found valuable: a labor organization dealing with the employer with respect to conditions of employment. In my view, the crucial issue in every case where an employee committee is alleged to violate Section 8(a)(2) is whether the employer has usurped the exclusive right of the employees to choose their own representative to deal with the employer with respect to conditions of work. As I noted in *Electromation*,⁹ I would interpret evidence that an employer represented a dominated committee to employees as its exclusive agent and made it clear that employees who served on it did so to further the employer's managerial goals as indications that the committee in question was not a labor organization dealing with the employer over conditions of employment.

I find the contrast between the operation of the six safety committees and the “safety conferences” and “safety pauses” instructive. The latter two types of meetings were, like the seven committees discussed above, structured according to the PEP principles and employees were divided into small groups to work on specific topics relating to safety. The employees were informed that bargainable issues could not be discussed, and when bargainable issues arose, they were placed on a “bucket list” and were not discussed dur-

ing the meetings. I see little distinction, with respect to the issue of employer domination, between the safety committees discussed above and the safety conferences here. In all cases, the Respondent created the employee groups and included supervisors in them. The safety conferences and pauses are, however, quite different from the safety committees in a crucial respect: the Respondent did not establish the safety conferences and pauses as representatives of the employees and did not bargain or “deal with” them over mandatory subjects of bargaining; in fact, the Respondent took pains to inform the employees who participated that the conferences were not a substitute for union representation and that bargainable issues could not be discussed. Thus, the status of the safety conference and pauses remained clear: they were managerial tools for solving managerial problems, and there was no effort to make them appear to be acting on behalf of the employees. Here the Respondent made the right choices. It used “employee committees”—the safety conferences and pauses—that were management tools as management tools, without tacitly according them the status of bargaining agents in their areas of concern. Thus, there was no usurpation of the employees' exclusive right to designate their own representative.

4. Did the Respondent “deal with” the dominated employee committees over mandatory subjects of bargaining?

In my view, it is unnecessary to reach the question whether DuPont “dealt with” the dominated committees, inasmuch as the record clearly demonstrates that the Respondent *bargained* with those entities.¹⁰ As the

¹⁰I am uncomfortable with the majority's discussion of the meaning of “dealing with,” especially here, where the higher level of involvement, bargaining, is so clearly present. In my view, bargaining is a bilateral process, but “dealing with” is not necessarily bilateral, as employers can use an ostensibly bilateral process as a strictly unilateral one by appearing to consider employee proposals without actually considering them. I agree that a “suggestion box,” in which employees acting as individuals, with or without managers, come up with a range of suggestions and recommendations for management to consider would not be bargaining or “dealing with.” Similarly, a brainstorming group of employees who work together, with or without managers, to come up with suggestions and recommendations for management, is not “dealing with.” In both situations, bargaining or “dealing with” is not present in part because the employees have no expectation other than that management will consider their suggestions and they understand that they are acting on management's behalf in participating. But I disagree with the majority when it characterizes a proposal and its immediate acceptance as not constituting bargaining. In my view, that two-step process can indeed constitute bargaining, and under some circumstances some might say it is bargaining at its most successful and efficient.

Rather than attempting to outline the differences between “dealing with” and “bargaining” in the abstract, I find it instructive to return to the legislative history. After hearing the testimony of witnesses in the 1934 and 1935 Wagner Act hearings before the Senate Labor and Education Committee that the “bargaining” going on between

⁹See 309 NLRB at 994 fn. 20 (Devaney, concurring).

judge found, for example, employees on each of the safety committees sought and obtained safety awards of greater value for employees who satisfied certain goals. Further, as in *Cabot Carbon*, the safety committees resolved employee grievances respecting safety, even taking some grievances to the plant manager level and above. As described above, the success of the Antiknocks Committee in alleviating the welder's difficulties with the ventilation in his shop by persuading the Respondent to move the shop; the Antiknocks Committee's self-advertisement as the quickest way to get safety and health complaints resolved; the Respondent's provision of a fitness facility through working with the Fitness Committee; and the presentation to higher management of proposals regarding a tennis court and outdoor pavilion by a unit employee committee member constitute bargaining over mandatory subjects of bargaining. Other committees, such as the Central Safety Committee and Jackson Lab Committees, did not handle grievances or solve employee-generated problems. These committees were generally responsible for establishing and disseminating safety programs. If these committees had confined their activities to such programs, I do not believe that they would have violated Section 8(a)(2). However, these committees also established safety incentives and awards in connection with these programs and distributed them to employees. In some cases, bargaining went on within the committees as employee members sought larger awards for their fellow employees. This common thread of bargaining over employee compensation runs through each of the committees. As the Union had previously bargained over such matters, the Respondent's recognition of the committees as the employees' bargaining agent with respect to safety bonuses is especially egregious, in that it weakened the selected representative both in fact and in the eyes of the employees and substituted the employer-controlled committee for that elected by the employees.

5. Are the Dupont "safety" and "fitness" committees "employee representation committees or plans" as Congress understood those terms in 1935?

When an employer-sponsored group is at issue, the "employee representation committee or plan" is the applicable category in Section 2(5)'s definition of a labor organization. In my view, as I discussed more extensively in *Electromation*, supra, the statutory formula "employee representation committee or plan"

employers and their "employee representation committees or plans" was a sham that rarely if ever resulted in a fairly negotiated contract, Congress found it necessary, in outlawing company unions, to word the bill to cover the false bargaining between the powerless company unions and the employers that created them. See *Electromation*, supra, 309 NLRB at 990 fn. 4 (Devaney, concurring).

was, for Congress in 1935, a term of art describing a "sham" union through which employers usurped employees' exclusive power to choose a bargaining representative by establishing a "representative" for the employees and dealing with that "representative." In this case, I find that the six safety committees and the fitness committee are such "employee representation committee[s] or plan[s]." In my view, three key findings by the judge, all of which I find well supported by the record, mandate such a finding. First, the committees were clearly—and improperly—vested by management with the authority to act as agents for the employees.¹¹ Second, DuPont caused each committee to become a structure for negotiating employee compensation in the form of safety bonuses, and in the case of some of the committees, other benefits that were clearly mandatory subjects of bargaining, with the purpose and effect of excluding and weakening the Union, which had previously negotiated these matters. Third, DuPont further usurped the employees' exclusive right to a loyal bargaining agent by salting the committees with members from managerial or supervisory ranks with the power to veto any employee suggestion or proposal. Thus, Dupont was on both sides of the bargaining table: instead of receiving proposals from a bargaining agent strictly loyal to the employees, Dupont received proposals "pre-negotiated" by the managerial committee members.¹² Finally, although I do not consider this factor essential to a finding of an 8(a)(2) violation, I find the clear showing of union animus and the deliberate bypassing and undercutting of the Union here to clinch the matter: the six safety committees and the fitness committees were "employee representation committees or plans" like those condemned in 1935, albeit more limited in subject matter.

Thus, I agree with my colleagues that the Respondent violated Section 8(a)(2) and (5) in its handling of the seven committees, and that it did not violate the Act in its handling of the safety conferences or safety pauses. In my view, the difference between the two

¹¹ I would require that an employee committee act in a representative capacity in order to be found a statutory labor organization.

¹² Thus, although I formulate the issue in different terms, I agree with the majority that, with respect to a finding that an employer bargained with or "dealt with" a committee, it does not matter in the final analysis whether the bargaining or "dealing" occurred between employees and managers on the committee or between employees and managers outside the committee. Both situations usurp employees' right to choose a bargaining representative that is exclusive and loyal. In circumstances where employees bargain or "deal" with manager/committee members with the right to alter or veto their proposals, the employer has put itself on both sides of the bargaining table and the committee is not the loyal representative of employees. Where employee committees bargain or "deal with" managers on the staff level, the employer has tacitly recognized a bargaining agent not chosen by the employees. As in *Electromation* (supra; Devaney, concurring), both forms of usurpation occurred here.

sets of circumstances is that with respect to the safety and fitness committees, the Respondent tried to have it both ways: it tried simultaneously to maintain control, discretion, and flexibility in its use of the committees and also to create the illusion of an employee representative that undercut and weakened the chosen representative. Although I believe that Section 8(a)(2) provides employers with somewhat greater scope for utilizing employee committees than do my colleagues in the majority, the Respondent's conduct here is plainly unlawful under my practical and historically derived standard.

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 the formation or administration of the Freon Central Safety Committee a/k/a Fluorochemicals Central Safety Committee and Fluorochemicals Safety and Health Excellence Committee or any other labor organizations.

WE WILL NOT dominate the operation and administration of the following committees or any other labor organizations:

- Antiknocks Area Safety Committee
- Chambers Works Fitness Committee a/k/a
Chambers Works Recreation/
Activities Committee
- Control Unit Safety Committee
- Jackson Lab Programs and Publicity Committee
- Physical Distribution Safety Committee
a/k/a Environmental Resources
Safety Committee
- Programs and Publicity Committee of the
Chambers Works Central Safety and
Occupational Health Committee
- Freon Central Safety Committee

WE WILL NOT deal with these committees or their successors.

WE WILL NOT bypass the Chemical Workers Association as your bargaining agent.

WE WILL NOT unilaterally implement these committees' proposals concerning safety awards and fitness facilities without affording the Union an opportunity to bargain.

WE WILL NOT discriminatorily forbid you to use the electronic mail system to distribute union literature or notices.

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 completely disestablish the seven committees.

WE WILL bargain on request with the Union concerning plant safety and fitness facilities.

WE WILL, on request, rescind the safety awards and fitness facilities implemented unilaterally without affording the Union an opportunity to bargain.

E. I. DU PONT DE NEMOURS & COMPANY

Scott C. Thompson and Richard Wainstein, Esqs., for the General Counsel.

Hastings S. Trigg Jr., Esq., of Wilmington, Delaware, for the Respondent.

Theodore M. Lieverman, Esq., of Haddonfield, New Jersey, for the Union.

DECISION

STATEMENT OF THE CASE

MARION C. LADWIG, Administrative Law Judge. These consolidated cases were tried in Philadelphia, Pennsylvania, on June 10–14 and 17–20, 1991. The charges were filed March 19, April 2 and 18, and July 20, 1990, and consolidated complaints were issued March 20 and April 22 and 25, 1991 and amended at the trial (Tr. 5–8, 1933).

The Company created (or reorganized) at its Deepwater, New Jersey plant, six safety committees and one fitness committee in the pattern of its quality of work life committees, which are not involved in this proceeding. The basic question is the legality of these seven employer-employee committees.

The General Counsel and the Union contend that the committees are company-dominated labor organizations and that the Company is unlawfully bypassing the Union in dealing with them. The Company denies that the committees deal with it as representatives of the employees, contending that they function "only as a management vehicle to enhance the safety of employees through labor-management communication or to carry out similar management functions."

The primary issues are (a) whether the Company's affirmative defenses have merit, (b) whether the safety and fitness committees are labor organizations, and (c) whether the Company, the Respondent:

(1) Dominated the formation of one of the safety committees.

(2) Dominates the administration of all seven committees.

(3) Bypasses the Union by dealing with the committees concerning working conditions.

(4) Discriminatorily denies employees' use of the plant's electronic mail for union literature and notices.

(5) Bypassed the Union and dealt directly with employees during safety conferences and a "Safety Pause."

(6) Adjusted employee grievances without affording the Union an opportunity to be present, violating Section 8(a)(1), (2), and (5) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs

filed by the General Counsel, the Company, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, manufactures chemicals at its large Chambers Works chemical plant in Deepwater, New Jersey, where it annually receives goods valued over \$50,000 from outside the State. It admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5).

II. ALLEGED UNFAIR LABOR PRACTICES

A. Safety and Fitness Committees

1. Background

a. Prior case

The legality of the Company's Jackson Lab Design Team was litigated in a prior case before Administrative Law Judge Arline Pacht. The Design Team was one of the quality of work life committees that the Company created in its OE/PEP employee-involvement program. As discussed later, the Company relies in its brief (at 121-128) on allegations in this prior case to support its Jefferson Chemical affirmative defense. It also relies (at 139) on the judge's conclusion—that employee members of the Design Team “were encouraged and did act in a representative capacity”—in its argument that the safety and fitness committees do not function as representational bodies.

On January 30, 1990, the Board, in the absence of exceptions, adopted Judge Pacht's findings and conclusions. *E. I. du Pont & Co.*, Case 4-CA-16801, JD-208-89 (G.C. Exh. 2A). The Board ordered the Company to cease and desist from dominating the “formation, operation and administration” of the Jackson Lab Design Team or “any other labor organization” and from “Bypassing the Union.” The Board also ordered the Company to “completely disestablish the Design Team.”

The adopted findings and conclusions in the judge's December 22, 1989 decision include the following.

Over the Union's repeated objections, the Company in the spring of 1987 created the Design Team “to function as a problem-solving body . . . to identify and propose solutions to problems in the work place” and “to initiate changes which would improve [Jackson Lab's] working environment and increase individual job satisfaction.”

At the time, from the fall of 1985 to July 1987, all 2200 or 2300 bargaining unit employees at the plant were being given a 11-day PEP training course. PEP (Personal Effectiveness Process) is the employee version of MTP (Management Training Process). The Company had begun implementing MTP and OE (Organizational Effectiveness) in August 1984. The objective, in part, was to promote “a lot of [employee] involvement and wide participation throughout the organization.”

The Company “determined the Design Team's membership by hand-picking” volunteers to serve. The Design Team

was “wholly dependent” on the Company for financial support.

Guidelines in the training material contained recommendations for avoiding “special problems” that could be posed when implementing OE/PEP “at unionized sites.” One recommendation was to “Ensure management control,” with “authority and responsibility for decision making” remaining “with management, for they are accountable for the results.” Another was that “Any union officer who may be asked to participate will . . . do so as an individual.”

Two of the other recommendations were to “Assure that all participants will be offering their thoughts as individuals and will be speaking only for themselves” and to “Maximize the number of participating employees . . . to avoid the appearance of permanent ‘representative’ groups.” Yet minutes of Design Team meetings indicated that the voluntary, nonelective employee members “were expected to represent their co-employees in the areas in which they worked.”

The judge concluded that the record in that case provided “ample evidence that the members of the Design Team were encouraged to and did act in a representative capacity” and were urged “to find problems and devise solutions” to be presented to the Jackson Lab director. Also, “apart from [dealing with management by] transmitting formal proposals” to the chief executive officer, “the rank and file members of the Design Team ‘dealt with’ management in the course of their meetings,” because half the Design Team were members of management.

Judge Pacht also concluded: “By exhorting the Team to propose solutions to workplace problems, and by adopting the Team's proposals before putting them on the bargaining table, [the Company] created and fostered an organization whose purpose and functions competed with those of the Union Moreover, by giving the Team favored treatment, management signalled to the employees that this rival entity could bring about change more effectively than the designated bargaining agent.”

On December 29, 1989, the plant manager (Works Manager Richard Stewart), acknowledging receipt of the decision, stated in an electronic mail message to all employees (C.P. Exh. 4):

The case only involved the Jackson Lab Design Team, a small group formed to give employees an opportunity to improve their work environment, thereby improving productivity and competitiveness of the Laboratory.

. . . .

We do not believe the decision is well-founded nor is it representative of the way we need to operate a Research Laboratory today. At no time did Chambers Works Management or the Design Team ignore or hinder the bargaining process. . . .

Management feels employees should have input concerning their jobs and the daily operation of the plant. There will be no change in our efforts to encourage and support your active participation in the running of our business here at Chambers Works.

b. *Safety program at Chambers Works*

For years before the advent of the OE/PEP program, the Company operated its safety program with management committees.

The Chambers Works Central Safety and Occupational Health Committee (Central Safety Committee), the policy-making body on safety matters (R. Exhs. 2, 41; Tr. 45), had a number of subcommittees, including the Programs and Publicity Committee (Central Safety Programs Committee). That subcommittee planned the monthly area safety meetings (Tr. 90, 1822–1823). The Jackson Lab Central Safety Committee (Tr. 604; G.C. Exh. 3B at 4) also had a programs and publicity subcommittee (Jackson Lab Programs Committee). Management personnel served on the various committees and conducted the safety meetings.

Through the years the Company gave employees door prizes, other prizes in safety-meeting drawings and safety contests, and awards for safety milestones. The evidence shows that these gifts included coffee and doughnuts, change purses, coffee mugs, key chains, small tool kits, and T-shirts (Tr. 187–188, 367, 394, 495, 685–686, 1620–1621, 1637; R. Exhs. 19, 48, 49). They also included a \$25 savings bond in 1978 (R. Exh. 16) and a \$20 gift certificate in 1980 (R. Exh. 17). The evidence does not disclose what other safety awards were (Tr. 188, 367, 394, 1599–1600, 1638–1640).

Area Representative Arthur Maurizio credibly testified (Tr. 367) that jackets had not been given (contrary to Union President William Golt's recollection, Tr. 495), but are now being given (after the PEP-style safety committees were formed). Former President Leslie Morris credibly testified (Tr. 1637) that "Pizza parties really came into view as a result of the PEP program." Before then, coffee and doughnuts were given for "small celebrations in the areas when they reached various milestones." Employee David Muntz vaguely recalled (Tr. 723) that "something like" pizza was given.

At times, when employees complained to the Union that "the safety prizes were becoming insignificant in value, or they were being reduced in value," the Union would bargain with the Company in regular labor-management executive meetings for "a greater prize for [the employees'] accomplishments." (Tr. 1626–1627, 1639–1640.) On occasion, awards given by management at the business unit level were discussed by the business unit manager and the Union's area representative (Tr. 1640–1641).

In 1984, when the employee-involvement program began, the Company gave \$400 gift certificates to three winners in a contest on Family Awareness of Unsafe Acts (R. Exh. 47). Between then and the trial, the Company gave some expensive and different kinds of safety awards.

c. *Safety and fitness committees formed*

Beginning about 1987 the Company created (or reorganized) the following six safety committees and one fitness committee in the pattern of its PEP-style quality of work life committees (Tr. 203–204, 211–214, 217–219, 505–507, 807; R. Exh. 9). All seven of the committees are alleged to be unlawfully dominated labor organizations.

The *Antiknocks Area Safety Committee* (also called *Petchem Area Safety Committee*) was created in the summer of June 1987 (R. Exh. 7; Tr. 159–160).

The *Central Safety Programs Committee* was reorganized in 1988 and again in 1989, becoming a PEP-style committee with 20 to 25 members (G.C. Exh. 5 at 85; Tr. 62, 1458–1459). It had operated as a management committee until 1984, when it accepted three employees (William McKie, Oscar Mulford, and James Scott) as members (R. Exh. 19; G.C. Exh. 4; Tr. 536–537).

The Chambers Works *Fitness Committee* (also called Chambers Works Recreation/Activities Committee) was created in December 1988 (G.C. Exh. 3B at 6) or January 1989 (R. Exh. 28; Tr. 1104–1106).

The Control Unit Safety Committee was created in late 1987 (G.C. Exh. 3B at 8) or early 1988 (Tr. 1588).

The *Freon Central Safety Committee* was created December 5, 1989, to replace committees that had previously existed in the Freon business unit (G.C. Exhs. 3B at 7, 11 at 13–14). It was later renamed Fluorochemicals Central Safety Committee and again renamed Fluorochemicals Safety and Health Excellence Committee (G.C. Exh. 11 at 101, 108). This committee (formed during the 10(b) limitation period discussed below) is alleged to have been unlawfully dominated in its formation as well as in its administration.

The *Jackson Lab Programs and Publicity Committee* began operating as a PEP-style committee sometime in the same period as the other safety committees. About 1985, when employees first became members, the committee met monthly with a member of management who "oversaw the meetings." (G.C. Exh. 24; Tr. 605–608, 661–665.)

The *Physical Distribution Safety Committee* (also called Environmental Resources Safety Committee) was created in March 1989 (G.C. Exh. 3B at 9).

The *Monastral Area Safety Committee*, created in early 1988 and abandoned in February 1990 when the employee members resigned upon the Union's request (Tr. 1003–1004, 1939), is not alleged to have been an unlawfully dominated labor organization.

d. *Joint labor-management safety committee refused*

The Union repeatedly informed the Company, as discussed below, that health and safety at the Chambers Works were its No. 1 priority.

On October 31, 1989, the Union made a health and safety proposal (R. Exh. 22 at 1, item 2) that "The parties will create a joint labor-management health and safety committee," which would meet regularly and discuss all health and safety issues. The Union also proposed (at 5, item 20) that the committee members would be paid for "all time spent in attending meetings, making inspections . . . and otherwise engaging in legitimate duties for health and safety purposes."

Explaining the proposal for a joint committee at the negotiations (R. Exh. 50 at 2–3), the Union told the Company:

Health and safety is a mandatory [subject of bargaining]. Most industrial sites that have a union have a joint health and safety committee. . . . This should be the forum where all health and safety [problems] can be aired and potential resolutions and solutions can come out. A joint committee is critical; if in fact Management and the Union are going to work together. A unilateral employer committee is not sufficient. . . . The Union represents the needs of the employees

Before responding to the Union's proposal for a joint labor-management health and safety committee, the Company (as discussed above) announced to all employees by electronic mail that they did not believe the judge's decision in the prior case was "well-founded" and that "There will be no change in our efforts to encourage and support your active participation in the running of our business here at Chambers Works."

In turn, the Union on January 19, 1990, notified its members (G.C. Exh. 38) that "Until the Union and Management can settle this issue, no one should volunteer and no one should continue to serve on any committee or team."

On March 7, 1990, the Company rejected in writing the Union's proposals that a joint labor-management health and safety committee be created and that committee members be paid for this committee work (as employee members of the Company's safety and fitness committees were being paid). The Company's letter, rejecting these and other union proposals, stated (C.P. Exh. 13):

The Union's proposals on . . . health and safety . . . are rejected by Management. These proposals in their present format are not viewed as additive to our business.

The Company offered only to *supplement* the safety committees with discussions on safety—either between Area Safety Manager Homer Turney and the union president (Tr. 520) or between union and management representatives "to continually improve the safety and health environment for all employees" (C.P. Exh. 12 at 2)—but not to replace the safety committees as the Union was seeking.

e. *OSHA guidelines for employee involvement*

The Company argues in its brief (at 142–143) that the use of its safety committees is

entirely consistent with the approach urged by the federal agency charged with overseeing employers, maintenance of safe and healthful work places. In its Safety and Health Program Management Guidelines [R. Exh. 4], the Occupational Safety and Health Administration (OSHA) urges employers to "provide for and encourage employee involvement in the structure and operation" of the employer's safety and health program. . . . OSHA recognizes these functions can be carried out in a number of "organizational contexts" including committees or teams. [Emphasis added.]

I note, however, that in making this argument, the Company ignores the relevant sentence in the OSHA guidelines, immediately following the words "in a number of organizational contexts." As quoted at length nearly 120 pages earlier in the Company's brief (at 26), the OSHA guidelines state in part:

Such functions can be carried out in a number of organizational contexts. Joint labor-management committees are most common. Other means include labor safety committees, safety circle teams, rotational assignment of employees to such functions, and acceptance of employee volunteers for the functions. [Emphasis added.]

Yet, as discussed above, the Company rejected the Union's proposal for a joint labor-management committee, stating that the proposal, as made, was "not additive to our business."

f. *Complaints of competing parallel structure*

After lengthy negotiations with the Union, the Company implemented the OE/PEP employee-involvement program over union objections that "management was in the process of setting up a parallel union on the site, bargaining directly with people in meetings and reaching conclusions on . . . working conditions" (Tr. 1623, 1908).

On December 22, 1988, after the Company began establishing the new safety committees, the Union complained in a letter to the Company (G.C. Exh. 37) about this "obvious" bypassing of the Union. The Union first referred in the letter to its earlier requests that the Company stop implementing the "PEP Team concepts until disposition was made by the General Counsel . . . of the charge of unfair labor practices." Then, noting that the General Counsel had sustained the Union's appeal in the Design Team case, the Union requested that "all committees be ordered disbanded"—including the "safety and health committees" [emphasis added]—as a *parallel structure* (to the Union).

It is undisputed that the Union repeatedly complained orally to the Company about the new committees: that the Company was "taking working people and making them union representatives" and that "the PEP process is nothing but a union-busting tactic" (Tr. 1610–1611).

In a January 12, 1989 letter (G.C. Exh. 15A) the Union, referring to alleged management domination of the "parallel labor organization," requested the Company to stop implementing "OE, PEP, Design Teams, and any other like programs" until their legality was determined by the NLRB. The Union attached a resolution, signed by 18 members of the union executive board, stating that the "Quality of Work Life Program . . . has as its effect the displacement and undercutting of the [Union] as the duly recognized collective bargaining representative." It urged the Company to abolish all the programs and urged all bargaining unit employees not to participate in them.

Human Resources Unit Manager Bruce Fitzgerald admitted that he knew by May 1989 that the Union's position was that the *safety and health committees* "ought to be disbanded" (Tr. 1888–1889).

It is undisputed that the Union informed the Company early in 1989 that health and safety were the Union's No. 1 priority (Tr. 460–462). The Company was also aware (Tr. 111) of the Union's March 1, 1990 letter to all its members in the Specialty Intermediates Area regarding "Resigning Voluntary Committees" (R. Exh. 3). In the letter the Union again stated that health and safety were its No. 1 priority at the facility. It added: "The Federal Government has found that this type of activity by committees set up on a volunteer basis and dominated by Management and given rewards is *illegal, they replace your Union* with committees which are given that authority by Management."

On July 2, 1990 (after the Company rejected the Union's proposal for a joint labor-management health and safety committee), the Union again complained about the safety committees. The complaint, in a letter to the Company (G.C. Exh. 17), stated that the Company was "going behind the

Union's back to create Company-dominated 'PEP' teams to address health and safety issues.'

g. Company motivation

As an explanation for staffing the safety and fitness committees with employee volunteers—not following the “most common” practice of having “Joint labor-management committees”—the Company contends in its brief (at 139 fn. 23) that the answer is “Quite simple.” It contends that such volunteers “would be highly motivated and individually committed to bring their individual interests and talents to bear on committee matters.”

I note, however, that the Company's own records reflect another explanation—an antiunion motivation.

An interoffice management memorandum dated September 26, 1989 (G.C. Exh. 41 at 71), regarded “Support for Employee Recreational Events—1990” in the Fitness Committee budget. Management Assistant Gerald Ferguson, with a copy to the unit manager, stated in the memorandum:

I think we should budget some funds in 1990 for the support of employee activities, e.g. softball. . . .

If we don't have some type of limited funding system, the alternative is to perpetuate the current practice where some organizations aggressively sponsor their employee teams (J[ackson]L[ab]) and others take a hard line. It seems that this practice *just drives employees to the Union for assistance—I would like to change that. How's \$10000 sound?* [Emphasis added.]

Thus, the Company was considering a Fitness Committee recreation budget of \$10,000 for an antiunion purpose of competing with the Union.

2. Affirmative defenses

a. “*Jefferson Chemical*” defense

The Company contends in its brief (at 121):

Under principles set forth in *Jefferson Chemical Co.*, 200 NLRB 992 (1972), the General Counsel was dutybound to investigate and to litigate all matters encompassed by the broad charge alleging violations of Section 8(a)(2) and 8(a)(5) in [the earlier Design Team case] which was tried in May 1989. His failure to do so requires that any matters which were known, or should have been known, by the General Counsel in May 1989 be dismissed.

The Company points out (at 122–123) that the amended charge in the earlier case alleged that the Company “formed, dominated and assisted employee organizations,” that “by forming, assisting and dominating *this organization*” it violated Section 8(a)(2), and that “in dealing with *other entities*” it violated Section 8(a)(5). (Emphasis added.) The Company also points out that the complaint “focused upon one alleged labor organization, namely the Design Team.”

Regarding the six safety committees, however, the consolidated complaint alleges only later conduct occurring since the beginning of the 10(b) limitation periods in September and October 1989.

These limitation periods began September 22, 1989 (6 months before the May 22 date of service of the charges

filed May 19, 1990), for Antiknocks Area Safety Committee, Central Safety Programs Committee, Freon Central Safety Committee, and Jackson Lab Programs Committee; October 4, 1989, for the Control Unit Safety Committee; and October 20, 1989, for the Physical Distribution Safety Committee.

Thus, the limitation periods for the six safety committees began months *after* the trial in the Design Team case on May 2–4, 1989. The allegations that the Company unlawfully dominated the formation of the Freon Central Safety Committee on December 5, 1989, and dominated the administration of all six safety committees since the beginning of the limitation periods could not have been litigated in the earlier proceeding.

Although five of the six safety committees were in existence before the May 1989 trial of the Design Team case, the alleged domination of their administration would be a continuing violation. *Ampex Corp.*, 168 NLRB 742 fn. 2 (1967), *enfd.* in relevant part 442 F.2d 82 (7th Cir. 1971). The Board held in that case that its “finding of an 8(a)(2) violation is limited to the Respondent's unlawful domination of, support of, and interference with the *administration* of the Committee, and does not extend also to Respondent's conduct in regard to its *formation*” outside the limitation period. Similarly in *Castaways Management*, 285 NLRB 954, 956 (1987), *enfd.* 870 F.2d 1539 (11th Cir. 1989), the Board affirmed violations of Section 8(a)(2) on the basis of “continuing misconduct” within the limitation period.

As specifically held in *Alamo Cement Co.*, 277 NLRB 1031, 1037 (1985), *enfd.* mem. 810 F.2d 196 (5th Cir. 1987), *Jefferson Chemical* does not preclude litigating unfair labor practices of a continuing nature that occur in part after the conclusion of the previous case. To hold otherwise “would be granting [the respondent] a license to interfere” with protected employee rights. Of course, *Jefferson Chemical* could not preclude litigating the allegation that the Company dominated the formation of the Freon Central Safety Committee in December 1989, 7 months after the close of the May 1989 Design Team trial. *Great Western Produce*, 299 NLRB 1004 fn. 1 (1990) (unlawful unilateral conduct “long after” the earlier trial).

The General Counsel and the Union contend that the *Jefferson Chemical* principle against piecemeal litigation is not applicable in the circumstances of this case. But even assuming that *Jefferson Chemical* would be applicable, I find that the principle does not apply to the allegations of 8(a)(2) and (5) conduct toward the six safety committees within the limitation periods, months after the Design Team trial in May 1989.

Regarding the Fitness Committee, the General Counsel has alleged that the Company continued to dominate its administration after the close of the May 1989 trial. I find that the *Jefferson Chemical* principle does not preclude litigation of this conduct. The 10(b) defense relating to the conduct is discussed below.

I deem it unnecessary to rule on the allegation that the Company unlawfully dominated the formation of the Fitness Committee in 1988 (before the trial in May 1989). I do rule on the merits of alleged domination of the formation of the Freon Central Safety Committee in December 1989 (long after the close of that trial). A ruling involving the formation of the Fitness Committee would not affect a remedial order.

b. *The 10(b) defense*

The Company contends in its brief (at 128–129) that the 8(a)(2) allegations relating to the six safety committees and the Fitness Committee should be dismissed because the underlying charges filed in March and April 1990 were untimely under Section 10(b) of the Act.

Regarding the safety committees, as discussed above, the General Counsel has alleged only conduct occurring since the beginning of the 10(b) 6-month limitation periods in September and October 1989. I therefore reject the contention that the underlying charges were untimely.

Regarding the allegations that the Company unlawfully dominated the administration of the Fitness Committee after the close of the May 2–4, 1989 Design Team trial, I agree with the General Counsel that the underlying charge was timely filed.

As held in *A & L Underground*, 302 NLRB 467, 468 (1991):

[T]he Board's long-settled rule [is] that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. . . . Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent.

If the Union had been on notice of the alleged violation, the limitation period for the Fitness Committee would have begun September 22, 1989 (6 months before the March 19 charge was served March 22, 1990). The Company's inter-office management memoranda dated September 18 and 27, 1989 (5 days after September 22), indicate, however, no company awareness at that time of the Union's being "informed in any manner concerning the Fitness Committee's functions and or activities" (G.C. Exhs. 30, 31; Tr. 1079–1082).

The Union's first knowledge of even the existence of the Fitness Committee came shortly after the committee sent out its September 5, 1989 electronic mail message (G.C. Exh. 34B; Tr. 1133), asking for volunteers to "Bring Your Own Rakes and Shovels" for "our latest undertaking," making flower beds at the C Corral, a former parking lot (Tr. 482, 1084). The Union had been informed in April 1989 that the Company "intended to build a track facility and to provide some additional items for recreation in C Corral" (G.C. Exh. 36, par. 11(e); R. Exh. 29; Tr. 1009–1020, 1153), but nothing about the Fitness Committee.

The Union sent the Company a letter dated September 12, 1989 (G.C. Exh. 34A), stating that it "has no knowledge of what this committee is" and "requesting immediate information" about it. There is no evidence that the Company provided the information until the following March (G.C. Exhs. 3A and 3B at 6).

I find that the Company has failed to meet its burden to show that the Union was on clear and unequivocal notice of the alleged violation before the Company's response in March 1990, the same month the Union filed the charge. I therefore reject the Company's contention that the underlying charge was untimely.

c. *Waiver defense*

Without citing any applicable authority that waiver is a defense to an 8(a)(2) violation, the Company contends in its brief (at 130–133) that the Union has waived the alleged 8(a)(2) violations. I reject this contention as unfounded.

The Company contends (at 130–131) that the Union waived any objections to the safety committees by failing to specifically request their abolition in the company-union negotiations on October 31, 1989 (when the Union proposed a joint labor-management health and safety committee). It further contends (at 132) that the Union's "Broadly worded letters objecting to PEP-style committees as 'illegal' during the pendency" of the earlier Design Team case and after Judge Pacht's "resolution of that charge," should not be regarded as "specific objections to the safety-related committees." In making these contentions the Company overlooks the Union's written December 22, 1988 request, discussed above, that the Company disband the "safety and health committees."

The Company also contends (at 131–132) that "it is clear the [Union] has acceded to, and been involved in, the very system it now objects to in the Antiknocks (Petchem) Area and other units/areas with safety-related committees." It contends that Leslie Morris (the Union's president in 1987, Tr. 1615) "expressly agreed" to the formation of the Antiknocks Area Safety Committee, which would include bargaining unit personnel. In explanation, the Company asserts that Morris had no objection if the committee (quoting from Morris' testimony) "merely [sought] input from the bargaining unit people related to how to better perform in the safety area."

Again, as in its above argument about OSHA guidelines (ignoring the relevant sentence, "Joint labor-management committees are most common"), the Company omits and ignores a relevant portion of Morris' testimony. Over 70 pages earlier in its brief (at 58) the Company did include the relevant portion, as follows (Tr. 1617):

We told them that *as long as they did not infringe on any of the bargaining rights of the collective bargaining agreement*, that if they were merely seeking input from the bargaining unit people relative to how to better perform in the safety arena, we had no objections. [Emphasis added.]

The Company also contends (at 131) that union stewards "actively participated as members" of the Antiknocks Area Safety Committee "from 1987 forward." It is true that four union stewards (Donald Hymer, Philip Muldoon, David Muntz, and Wayne Serfass) volunteered to be members in 1987 when the Company established the committee (Tr. 165, 171–172, 696). The Company admits, however, that stewards served on the committee only as individual employees and did not speak for the Union (Tr. 191–192).

Three of these stewards had left the committee by early 1990 (Tr. 170–171, 328–330). On March 26, 1990, the fourth one (Muntz) was terminated as a union steward "Because I wouldn't get off the safety committee" (Tr. 700, 730; R. Exh. 40 at 18). Another committee member (Grady Fryberger) was appointed steward on January 30, 1989. He was not, however, recognized as a steward after May 15, 1989. His name was inadvertently retained on the stewards,

list until he was removed formally on September 19, 1990 (Tr. 155, 328, 387–388; R. Exh. 40 at 1, 21).

The authorized 110 stewards for the production and maintenance unit and 20 for the clerical unit (both bargaining units represented by the Union) have only limited contractual authority and are not authorized to represent the Union on any of the safety committees. The stewards are contractually authorized to present employee complaints and demands to foremen. They are appointed by the elected area representatives to assist the representatives, whose functions are to “police the contract” and act on the Union’s behalf in grievance meetings and negotiations with the Company. (Tr. 280–281, 477–478, 501, 518–519; R. Exhs. 13 at 14–16, 14 at 15–17; C.P. Exh. 8 at 10.)

The Company further contends (at 132) that two area representatives (James Shields and Fred Clements) “knew of both the composition and the activities of the Control Unit Safety Committee since early 1988,” yet the Union “permitted it to function without objection.” In making this additional waiver contention the Company again overlooks the Union’s December 22, 1988 request that the Company disband all the safety committees.

3. Company-dominated labor organizations

a. Overview

All six safety committees and the fitness committee share the following attributes.

1. The Company—not the employees—initiated the committees. Employees in both the production and maintenance and the clerical bargaining units were already represented by the Union, which was seeking a joint labor-management safety committee.

2. The Company decides which employees to invite, from what working groups or areas and, if the number of volunteers exceeds the desired number, it selects the volunteers to serve on the committees (Tr. 126–128, 796, 1675–1676).

3. Members of management serve on all seven committees (G.C. Exh. 36).

4. These PEP-style committees operate at the will of the Company, who may modify or abolish them at any time.

5. The Company permits the electronic mail to be used to distribute committee literature and notices, but prohibits employees from using it to distribute any union literature or notices.

6. Employees serve on the committees for indefinite periods of time, without any regular rotation (Tr. 607; G.C. Exh. 7 at 135).

7. Employee members receive their regular pay for the time spent in attending meetings and performing committee duties (G.C. Exh. 36; Tr. 693).

8. The Company provides meeting places, equipment, and supplies and pays all expenses of the committees (G.C. Exh. 36).

Section 8(a)(2) of the Act provides:

It shall be an unfair labor practice for an employer—

(2) 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 [Emphasis added.]

A “labor organization” is defined in Section 2(5) as follows:

(5) The term “labor organization” means 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*. [Emphasis added.]

In denying that the safety and fitness committees are statutory “labor organizations,” the Company contends in its brief (at 134) that “They function only as a management vehicle to enhance the safety of employees through labor-management communications or to carry out similar management functions.” Thus, in effect, the Company is admitting that the committees, purportedly functioning only as “a management vehicle,” are under its control.

In view of this position and the persuasive evidence of actual company domination of the formation of one committee and the administration of all seven committees, I find that if the employer-employee committees are labor organizations, they are company-dominated labor organizations. *NLRB v. Scott & Fetzer Co.*, 691 F.2d 288, 291 (6th Cir. 1982). In that case the court stated:

We think there is little question that if [the employer-employee committee] is a “labor organization” under section 2(5) of the Act, the Committee was dominated by the Company. It was expressly mandated by the Company, and the Company controlled the composition and its meetings. Therefore, we think it follows that if the Committee was in fact a labor organization, the Company was guilty of a violation of section 8(a)(2).

I first consider the evidence of domination and then the evidence concerning the status of the committees as labor organizations.

b. Domination

(1) Formation of Freon Central Safety Committee

The evidence shows that the Company created the Freon Central Safety Committee, exercising control over its structure and purpose.

On November 29, 1989, David Moffett, a Freon area manager, sent a memorandum to 9 bargaining unit employees and to 12 members of management, “exempt” personnel, whether titled consultant, coordinator, director, management assistant, manager, or supervisor (G.C. Exhs. 1qq, 3B at 7, 36 at 8; Tr. 83, 1696). In the absence of any objection, I receive in evidence (as R. Exh. 51) the Company’s September 26, 1991 posttrial cover letter and the attached partial list of its supervisors and agents.

In the memorandum (G.C. Exh. 11 at 3) Moffett invited the individuals to a December 5, 1989 meeting “designed to

define the Freon Area's safety process for 1990" and stated: "You were selected to participate based on your demonstrated interest in the continuous improvement of the Freon Area safety performance. . . . Please contact [one of two individuals] if you cannot attend this meeting." Moffett admitted (Tr. 1662-1663) selecting the 21 employees and members of management.

Before the December 5 meeting, as discussed below, Moffett and others met and made plans for structuring a safety committee for the Freon business unit (Tr. 1700-1701; G.C. Exh. 11 at 23).

On December 5, 1989, when all 9 employee "volunteers" and 9 of the 12 management members attended an all-day meeting at a nearby hotel, the Company "established" a new committee (G.C. Exhs. 3B at 7, 11 at 4). On December 11 Area Manager Mark Kaufman, who chaired the meeting, named the committee the "Freon Central Safety Committee" and sent minutes of the meeting to the 21 employees and members of management he had invited to participate (G.C. Exhs. 11 at 13, 36 at 8; Tr. 786, 1696).

Then on December 21, 1989, Kaufman distributed a letter to all Freon personnel, informing them of the decision "to eliminate the old safety steering committee and its sub-committees" and to replace the committees with the new committee. He listed the committee's "key functions," one of which was to "Become a forum for discussion and resolution of safety concerns." (G.C. Exh. 11 at 33; Tr. 1695.)

Thus the Company, through its management, controlled all aspects of the formation of the new committee. It called the organizational meeting, selected employees and members of management to attend, made plans ahead of time for structuring the committee, chaired the meeting, and, with the employees participating, determined the structure and purpose and created the new committee.

I find that the Company dominated the formation of the Freon Central Safety Committee.

(2) Administration of committees

The evidence is clear from the structure and operation of the seven PEP-style safety and fitness committees, that the Company exercises control over the operations of the committees. Under the PEP-style structure, management members of the committees control the subject matter of the meetings and must approve all committee decisions.

As defined in the PEP Glossary, each committee has a leader (chairman), a resource (monitor), and a scribe (note taker). Before each meeting, the leader, resource, and scribe confer and determine the agenda. At the meeting, they "work together as a team." All decisions must be made by "consensus," defined as being "reached when all members of the group, including its leader, are willing to accept a decision." After the meeting, the leader, resource, and scribe confer again and evaluate "how the meeting went and how to make it better next time." (C.P. Exh. 1 at 5, 39-41, 68, 70; Tr. 217-219, 623, 807, 1282.)

A management member serves either as the leader or as the resource, a "facilitator, advisor" who "keeps the meeting on track" (Tr. 59-60, 318, 608, 698-699, 784, 799; G.C. Exhs. 5 at 85, 158, & 202, 11 at 11, and 24 at 21; C.P. Exh. 1 at 39; R. Exhs. 31 at 2 & 5, 51). In either position the management member exercises control over planning the agenda and over conducting the meeting, either by chairing

the meeting or keeping it "on track." By requiring a consensus for all decisions, the Company ensures management control over committee activities. No decision can be reached by the committee unless all management members present at the meeting "accept" the decision.

The employees have no independent voice in determining the existence, structure, or purpose of the committees. The Company can change or abolish any of the committees at will, as it did in reorganizing the Central Safety Programs Committee in 1988 and 1989 and in eliminating the old safety committees in the Freon business unit and creating a new committee on December 5, 1989, as discussed above. The committees are wholly dependent on the Company for meeting places, equipment, supplies, and expenses. The employee members receive their regular pay for time spent in committee activities. (G.C. Exh. 36.)

The Company argues in its brief (at 157-158) that its conduct did not "adversely affect employee freedom of choice and expression," citing *Hertzka & Knowles v. NLRB*, 503 F.2d 625, 626, 629-631 (9th Cir. 1974). That case is distinguishable. There, each of the five in-house committees was composed of five employees and one management representative. In sharp contrast to here, an employee suggested the committee system, which was approved "overwhelmingly" by the employees themselves. Moreover, the employee committee members could "easily outvote" the management representative.

Citing its holding in an earlier case, the court ruled (503 F.2d at 630) that the "question is whether the organization exists as the result of a choice freely made by the employees, in their own interests, and without regard to the desires of their employer." The court further ruled that an 8(a)(2) finding "must rest on a showing that the employees' free choice, either in *type of organization* or in the *assertion of demands*, is stifled by the degree of employer involvement" (emphasis added).

Here, it was the Company that initiated the committees. The employees were already represented by the Union, and the Company rejected the Union's offer to "work together" with the Company on safety matters through the proposed joint labor-management safety committee. The employees had no "free choice" in the "type of organization."

The Company argues (at 160-161): "There is nothing on this record to suggest that, once on the committee, these employees [serving on a voluntary basis] were in any way thwarted in the free expression of their views at committee meetings." It is clear, however, that the employee members had no "free choice" in the "assertion of demands" beyond the committees to the Company. The PEP requirement that all decisions be made by consensus gave the management members an absolute veto.

I find that the Company dominates the administration of the seven committees.

c. Labor organizations

(1) Employee representation committees

In denying that the safety and fitness committees are labor organizations, the Company contends in its brief (at 134) that they "do not function as representational bodies." It argues that they are not understood by either the employees or the Company "as acting on behalf of non-participating bargain-

ing unit employees” and that they function “only as a management vehicle.”

The evidence, however, reveals (a) that both employees and members of management regard employee committee members as representatives of their working groups or areas and (b) that the employee members participate in committee activities on behalf of other bargaining unit employees.

(a) *Freon central safety committee*

Employee representation of each working group was part of the planning for this committee. Before the December 5, 1989 organizational meeting, Area Manager Moffett and others met and planned “Area-wide representation [emphasis added] per the following [12] groups” in the Freon business unit. The groups included (1) 12-hour shift operators, (2) blending and shipping operators, (3) mechanic/insulators, (4) instrument mechanics, (5) electricians, (6) technicians, listed as “Technical Representative [emphasis added],” (7) laboratory personnel, and (8) clerical/planner schedulers. The other groups consisted of members of management in the Freon business unit: (9) shift team managers, (10) team managers, (11) area managers, and (12) safety and environmental consultants. (Tr. 1700, 1709; G.C. Exh. 11 at 23.)

Thus in late 1989, when all six of the other PEP-style safety and fitness committees were already in operation, Area Manager Moffett was planning an employee representation structure for the safety committee in the Freon business unit. As discussed below, those in attendance wanted the committee to be cross-sectional, with a representative from each group, “So everybody would be represented.”

By the time, however, that Area Manager Kaufman named the new committee on December 11, 1989, and announced it to the Freon employees on December 21 and when Area Manager Moffett testified at the trial, the Company was avoiding using the word “representation.”

In Kaufman’s December 21 announcement (G.C. Exh. 11 at 33–34), as well as his December 11 draft of the letter (G.C. Exh. 11 at 14–15), he omitted the phrase, “Area-wide representation per the following groups.” He stated in the announcement: “The area has been divided into 12 groups with the hope of having at least one volunteer from each with a maximum of 20 people on the Central Safety Committee. . . . The groups are as follows” (listing the same 12 groups). He continued to list a “Technical Representative” for the technicians.

When Area Manager Moffett was questioned at the trial about the words “area-wide representation for the following groups” and asked if “what the committee was seeking was representatives from those groups,” he evasively responded (Tr. 1700–1701):

A. What they were seeking was a background of . . . varying experiences. People who were working in different areas . . . a cross section

A. I’m saying that that’s the sense of what this division is.

I worked with four or five people in structuring the questions that we were going to ask and how we were going to do it.

And, what we were looking at all along in our people that we invited, were people that came from varying background, varying of skills. [Emphasis added.]

Moffett did not explain—if this were a complete, candid response—why he used the words “Area-wide representation per the following groups” when planning “how we were going to [structure the committee],” and the Company offers no explanation for the listing of a “Technical Representative” for the technicians. Moffett did not concede that the employee volunteers would in fact be “representing” the first eight listed groups of Freon employees. Finding Moffett to have been less than candid, I discredit his response to that extent.

As the undisputed testimony of employee member Ronald Nipe disclosed, Unit Manager Marvin Reinhart (manager over the Freon areas) also referred to employee representation. Nipe credibly testified (Tr. 782) that Reinhart (who attended the meeting but who did not testify) personally told him before the December 5, 1989 meeting that Reinhart wanted him as a “representative” on the committee. Nipe testified that the committee wanted to be cross-sectional (Tr. 786). When asked what that meant, he credibly answered (Tr. 806–807):

Well, that means you have . . . a representative from the mechanical group, electrical group, the instrument group, the operating group.

Q. And . . . did anyone say why they wanted a cross-sectional representation?

A. So everybody would be represented.

Nipe acknowledged on cross-examination that it was true that he was encouraged to bring his own ideas to the meetings and was not encouraged to canvass and poll people and bring their ideas. He testified, however: “I felt obligated that if there was a problem in the area that I would convey it.” (Tr. 819.) He further testified that area employees submit to the committee written F.U.S.S. (Follow Up Safety Suggestions) safety complaints, which the committee discusses and works on to correct (Tr. 792–793, 850, 853; G.C. Exh. 11 at 26).

The evidence is clear that the employee members participate in the committee activities on behalf of other bargaining unit employees. As discussed below, employee members regularly discuss with management members and seek to resolve employees’ safety complaints, agreed that bargaining unit employees should be assigned to audit teams to improve safety audits, sought exceptions in the safety manual for certain Freon employees, and seek appropriate awards for the employees’ safety accomplishments.

(b) *Antiknocks area safety committee*

Employee member David Muntz, whom the Union terminated as a steward because he refused to leave the committee, credibly testified about contacting nonmember employees. “We talked to fellow employees and if they had a safety item that they thought needed correcting, they would bring it to the committee . . . it was the fastest way to get things fixed.” (Tr. 701, 707.)

An example was the complaint of a welder who was “concerned about his health” because of poor ventilation in

the welding shop. After the Union's efforts failed in getting the problem solved, the welder took the problem to employee committee members. The committee succeeded in getting him a new welding shop. (Tr. 297-303, 702-705, 717, 728-729; G.C. Exh. 7 at 47.)

The employee members' representative role is further indicated by one of the committee's listed "Accomplishments" (G.C. Exhs. 7 at 1, 47): in 1988, "Area People Recognize Committee," and in 1989, "Recognition of Committee."

The evidence, discussed below, further shows that employee members represent nonmember employees in discussing and seeking solutions to their safety complaints and in seeking larger and more appropriate safety awards.

(c) *Central safety programs committee*

This committee is responsible for the monthly safety programs in the plant (Tr. 62). Evidently for better representation, employee membership on the committee is "prorated" according to number of employees in the various business units of the plant (Tr. 126-127).

When Unit Manager Joseph Jenny, the committee's resource, was asked "Who decides the topics that will be addressed in those safety meetings," he answered (Tr. 125): "That committee generally solicits a list of topics."

Employee members act for other bargaining unit employees in seeking more appropriate safety prizes throughout the plant, as discussed below.

(d) *Control unit safety committee*

Clerical employee Ralph Coggovia credibly testified that he joined the committee when management member Nickolas Psaltis personally called him and asked if he wanted to volunteer to be on the committee for the clerical people (Tr. 1261). After he joined, employees approached him about safety problems (Tr. 1216, 1244-1245, 1254-1259).

As a committee member he recognizes his representative responsibility, but only for safety problems in his office. During remodeling in the Specialty Intermediates building, a clerical employee who worked in another part of the building complained to him about a fire extinguisher being on the floor instead of hanging on the wall. He asked, "Why are you asking me?" and suggested that the employee go to the proper person, the landlord of the building. The response was: "You're a member of the control department safety committee, you handle it." He did so, on behalf of the committee. (Tr. 1217, 1245.) Coggovia explained: "I wouldn't want 500 different people coming directly to me" with safety complaints. He added, however, that he "would be involved" if the employee "had a problem in his office." (Tr. 1244, 1258.)

Employees also contact other employee committee members with complaints, and the committee discusses the safety items in its meetings. The committee used the electronic mail to invite employees having "any safety situation to feel free to contact any member of the committee" (Tr. 1312, 1335).

Employee members also act on behalf of other Control Unit employees in seeking more appropriate safety awards, as discussed below.

(e) *Fitness committee*

It is undisputed that management member Everett Sparks, who initiated the Fitness Committee, informed employee member Arthur Ebert that they were seeking a "representative" from each area—even though (Tr. 1112-1113, 1127) many of the employee members on the committee had a special interest in fitness. Sparks (who did not testify) told Ebert that the original membership was developed "through a cross-sectional view You try and incorporate . . . a representative from each area, say a mechanic or whatever, to be on the membership." (Tr. 1414, 1423-1424.)

Ebert further credibly testified that he "specifically asked [Sparks] why certain people were on this committee and [Sparks] said that it would be more representative if it was a cross-sectional view of the site. And it was regardless of what their feelings were personally . . . as far as fitness is concerned." (Tr. 1425.)

The evidence, discussed below, shows that employee members have made continuing efforts on behalf of the employees plantwide to obtain additional fitness facilities. At least one employee outside the committee took a suggestion for an additional fitness facility to the committee through a committee member (Tr. 1390, 1438).

(f) *Jackson lab programs committee*

Employee Joseph Karaskevics credibly testified that he went on the committee when Lab Supervisor Perry Poless (who did not testify) asked if he would like to join the committee, because Poless "needed a representative from his group." There were about 17 working groups in the Jackson Lab and "There's supposed to have been a representative from each work group on the committee." (Tr. 605-607.) Karaskevics explained that "The philosophy is to have each work group send a representative to the committee" (Tr. 652).

Employee committee member Kim Nelson acted on behalf of nonmember employees when she solicited ideas by electronic mail from all 1100 Jackson Lab employees on what they would like for a 25-year safety celebration (Tr. 627-628, 682, 692-693; G.C. Exh. 3B at 4). The committee further demonstrated that it was acting on the employees' behalf in December 1989 when it sent the committee's 1990 safety programs questionnaire to the 1100 Jackson Lab employees (G.C. Exh. 24 at 30-33; Tr. 655-657).

Employee members have dealt with management members in deciding to continue and later to discontinue one of the safety programs, in discussing and deciding on appropriate safety awards, and in determining whether to adopt a program to give company stock as a safety award, as discussed below.

(g) *Physical distribution safety committee*

Employee William Scurry credibly testified that when employees in the truck control center were asked if anybody wanted to join the committee, "I was the only one on day work at the time, so I joined it as our representative" (Tr. 1273). He told employees in his area that "if they had a safety problem" and "if they brought it to me, I would take it to the committee and the committee would look at it." His supervisor was aware that he had permission "to take things to the safety committee." (Tr. 1301-1302.) Other employee

members also “brought problems from the employees to the committee” (Tr. 1305).

The evidence thus shows that although employee members of the seven committees are not elected by the employees, they serve in an agency relationship, representing the bargaining unit employees. In view of this finding I deem it is unnecessary to rule on the Union’s contention in its brief (at 95–100) that because of the statutory language (“any organization of any kind . . . in which employees participate”), “even if the committees here were not considered representational, they would still be labor organizations within the meaning and intent of the Act.”

I reject the Company’s contention that the committees function “only as a management vehicle.” I find that each of the seven safety and fitness committees is a “employee representation committee” and that although the employee committee members are not elected, an agency relationship exists between them and the bargaining unit employees they represent.

(2) Dealing with employer

(a) *In general*

The statutory definition of a labor organization (quoted in full above) requires that the organization exists at least in part for the purpose of “dealing with” employers concerning “conditions of work.”

There is no dispute that the purpose of each of the safety and fitness committees concerns working conditions and that both safety and fitness facilities, as well as benefits, are mandatory subjects of bargaining. “Employee health and safety indisputably are mandatory subjects of bargaining.” *Oil Workers Local 6-418 (Minnesota Mining) v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983).

Contrary to the Company’s contention in its brief (at 134–155) that none of the seven committees “deal with” it within the meaning of Section 2(5) of the Act, I agree with the General Counsel (in his brief at 91–92) and the Union (in its brief at 91–93) that bargaining unit employees on the committees deal with the Company at different levels.

First, at the committee level, the employee members act on behalf of other bargaining unit employees in dealing with the management members, who represent the Company. Second, when approval of higher management is required for proposals on which both employee and management members agree at the committee level, or when action is required by other management, the committee through one or more of its members deals with the Company at the other level.

The dealing consists of various forms. One is when bargaining unit employees take their safety complaints or requests for fitness facilities to the committee or its employee members—rather than through stewards to the Union—as a faster or more effective way of getting results. The employee and management members discuss the matters in the meetings and try to resolve them. One of the stated “key functions” of the Freon Central Safety Committee, for example, is to “Become a forum for discussion and resolution [emphasis added] of safety concerns” (G.C. Exh. 11 at 33).

Another form of this dealing is the employee members acting on behalf of bargaining unit employees in seeking larger or more appropriate safety awards. Previously, as found, when employees complained to the Union that management’s

safety prizes were becoming insignificant in value or were being reduced in value (before the Company created the PEP-style safety committees), the Union would bargain with the Company in executive meetings for “a greater prize for [the employees’] accomplishments.”

Another form is the employee members’ acting on behalf of bargaining unit employees—instead of the Union’s acting on their behalf—in seeking to improve the effectiveness of safety audits by assigning employees to serve with members of management in conducting nonpunitive safety audits. Still another form is discussing and proposing changes in the Safety How manual, which directly affects the employees’ working conditions.

The complaint alleges that the Company unlawfully bypassed the Union in dealings with the committees: since the beginning of the limitation periods for the safety committees and since the May 2–4, 1989 Design Team trial for the Fitness Committee.

(b) *By the seven committees*

(i) Antiknocks area safety committee

This committee clearly substitutes for the Union in handling safety complaints for employees in the business unit since the September 22, 1989 beginning of the limitation period.

Employees take their safety concerns to employee committee members by “word of mouth” or to the committee by dialing its “lead line” (dialing L E A D). They talk to an employee member during the day or leave a message on the answering machine at night. Employee member James Graves and other committee members take turns listening to the answering machine and “would get the problem and write it down on a book and then it would be addressed at one of our meetings.” (Tr. 701–702, 742–743, 753–754.)

Committee minutes for the February 13, 1990 meeting show an example. The minutes state that an employee member reported that “A need has been expressed for a central facility to put on and clean up, and remove acid suits. Object is to localize contamination.” (G.C. Exh. 7 at 74; Tr. 153–154).

As another example, one of the committee’s “1990 Accomplishment” reads (G.C. Exh. 7 at 125): “Welder’s clothing being punched at change house.” The evidence shows that someone had noticed that the flameproof suits were not being punched (to be replaced after being punched and washed 25 times) and “brought it to the attention of the safety committee.” The committee contacted the change house attendant and arranged for the clothes to be properly punched and replaced. (Tr. 748–749; G.C. Exh. 7 at 74.)

Other listed 1990 accomplishments included such safety matters as pot holes fixed, new covers put on ditches, person assigned to clean air hoses, sidewalk along seawall repaired, and exhaust pipe at shop repaired (G.C. Exh. 7 at 125).

Committee members meet, discuss the problems, and try to resolve them. Often a designated committee member “would find out who was in charge of that area and would present the problem” on the committee’s behalf. If the problem can not be resolved or takes too long, the committee goes to the business unit manager. Then if the problem is not resolved, the committee may threaten to go to the plant man-

ager. Something like 90 percent of the problems “got fixed.” (Tr. 701, 743–744, 1033–1034.)

The Union learned in March 1990 that its steward Muntz was involved in this activity and immediately notified the Company in writing to “Please remove” him from the stewards list (R. Exh. 40 at 18). Area Representative John Bowe credibly testified that when Muntz described his involvement with this committee at a safety conference, “I went back to the hall and I asked to have him stricken from the list” (Tr. 1033, 1063). Bowe explained (Tr. 1071) that Muntz had described

basically how they had a grievance procedure built right in . . . to where they would go up the steps [as in a grievance procedure]. They would handle things in the area, then they would go to the business unit manager, and then they would threaten to go to the plant manager.

Sometimes the management members do not agree when the employee members deal with them in committee meetings. An example is the “Update—Hot suit cleaning room” in the January 16, 1990 minutes (G.C. Exh. 7 at 66). The employees wanted new silver fireproof suits for use around molten lead (used in producing the gasoline “antiknocks” additive), “but management didn’t want to give them to us until we had a cleaning facility for them” (Tr. 714–715). Six weeks later management member John Redkoles told the employee members that the new hot suits would be ordered that week (G.C. Exh. 7 at 77).

I infer that Redkoles, a safety consultant in the Antiknocks business unit, serves as the committee’s resource. The documentary evidence shows that he formed the committee in 1987, initially handled the “lead line” calls, prepared (with Area Manager Michael Gilmore) “a proposal for addressing all opportunities” presented by the September 1989 Safety Emphasis survey, and distributed charts (each bearing his name) from the committee’s 1990 planning meeting on November 10, 1989 (G.C. Exh. 7 at 6, 19, 44–54).

Employee members also deal with management members in seeking larger or more appropriate safety awards. If higher approval is required, the committee deals with the Company at the higher level.

The committee has agreed to give some expensive safety awards. Awards given since the beginning of the limitation period included an “Antiknocks Perfect Attendance” dinner dance for 35 people in March 1990 costing \$2223.25 and a dinner dance for 50 people in April 1991 costing \$3404.66 (G.C. Exhs. 7 at 161–162 & 187–194, 36 at 4). The committee awarded 24 jackets costing \$1476 (G.C. Exh. 7 at 195, 197–199). A note on a November 20, 1990 invoice for 20 of the jackets reads (G.C. Exh. 7 at 197): “14 to Bargaining Unit.”

Committee minutes show that the 1990 dinner dance was discussed in meetings on January 27, February 13, and March 13, 1990 (G.C. Exh. 7 at 72, 74, 81). They also show that the 1991 dinner dance was discussed January 15 (with notations, “No time lose (DW days)—No illness” and “No Recordable injuries”), January 22, February 12 (with a notation, “Recordable injuries not eligible”), February 19, March 1, 5, and 12, and April 2, 1991 (G.C. Exh. 7 at 139, 140, 143–146, 148, 153).

There was a dispute in the committee over eligibility for the “perfect attendance” award. The criteria were no lost workdays from disability, no recordable injuries on or off the job, and no recordable occupational illnesses, which includes no KOA (presumably Knock Out of Area), that is, being “removed from the area for a high lead” content in the blood or urine. (Tr. 151, 157). Those were the criteria for the dinner-dance award both in the spring of 1989 (outside the limitation period) and in March 1990 (Tr. 158).

In 1991, employee members sought an expansion of the awards to other employees by eliminating the no-KOA requirement for eligibility, but the management members did not agree and the requirement remained (Tr. 151, 738–740).

The committee agreed to the award of jackets in 1990, but approval of the business unit manager was required (Tr. 714). There have been various other awards approved by the committee since the beginning of the limitation period.

(ii) Central safety programs committee

Since the September 22, 1989 beginning of the limitation period, employee committee members have dealt with the management members in obtaining appropriate safety prizes for employees throughout the plant. In October 1989 the committee approved a safety prize of turkeys to be given to 200 winners of the November “Winter Safety” contest (G.C. Exh. 5 at 66). The committee also approved the award of corduroy jackets, 34 of which were ordered December 20, 1989 at a cost of \$1690 (G.C. Exh. 5 at 295).

In January 1990 the committee approved prizes to be given at the March safety meetings. The employees would be shown a safety video, and all who got correct answers on a quiz would be given a Croakie eyeglass holder as a prize. In addition, there would be drawings for prizes of \$12 driving gloves. The Company purchased 2500 Croakies at a cost of over \$6000. (Tr. 66–70, 92–94; G.C. Exh. 5 at 135, 291–293.) The Company admits in its brief (at 37) that the “prizes may have been unique.”

Among the other prizes the committee approved was a smoke alarm given out in a drawing at the end of each safety meeting in October 1990. Ordered in September, 100 of them cost \$1063. (G.C. Exh. 5 at 184, 282.)

(iii) Control unit safety committee

The evidence shows that since the October 4, 1989 beginning of the limitation period, Control Unit employees have taken safety complaints to employee committee members or to the committee on which the employee members serve.

An example was when an employee took a traffic problem to an employee member who brought it to the attention of the committee, which discussed the problem and acted to resolve it (Tr. 1315–1317). Another example of a complaint that the committee sought to resolve after it was taken by an employee to an employee member was a complaint about unpainted lines on safe walkways (Tr. 1209–1210, 1254–1256).

Employee member Coggovia brought to the committee the problem of empty water bottles floating around in the wind, creating a traffic hazard. He had observed a hazardous situation of an empty water bottle flying across the road near the building where he worked. “We know how people feel about these things . . . because I know I wouldn’t want somebody

hitting . . . my car or vice versa, hitting somebody else.” The committee took the problem to the safety department on the site and the matter was corrected at most locations. (Tr. 1210–1211.)

On the committee’s behalf, Coggovia took to other management two safety problems that an employee had brought to him. One involved the fire extinguisher on the floor, discussed above, and the other involved washbowls in the men’s room “about ready to fall down.” Both problems were taken care of. (Tr. 1217, 1254.)

Employee members, since the beginning of the limitation period, have also dealt with management members in obtaining what they consider more appropriate safety awards.

The committee agreed to give many cash awards. The documentary evidence shows four \$50 and four \$25 awards (totaling \$300) given in March 1990, the same number of cash awards (totaling \$300) in July 1990, five \$50 and five \$25 awards (totaling \$375) in September 1990, and eight \$50 and 10 \$25 awards (totaling \$650) in January 1991 (G.C. Exh. 43 at 28–31). Some of the safety programs were ongoing, and the committee “discussed what would be appropriate gifts or awards to be given out.” For one of the contests, the committee decided that the “runners-up had a choice of a smoke detector or fire extinguisher.” (Tr. 1329–1330, G.C. Exh. 43 at 4.)

In January 1991 the Company gave a \$100 savings bond to the winner of a safety-theme contest. The committee had submitted an electronic mail message to all Control Unit personnel, asking for suggestions for the theme and stating “there would be an award to the winner.” There were “Different suggestions, what the possibilities” were for an appropriate award. The employee and management members of the committee finally decided on the savings bond as something “personal.” (Tr. 1332–1333.)

In 1989 (outside the limitation period) the Company had provided a full breakfast to Control Unit employees, and the plant manager had promised another breakfast in 1990 for an injury-free 1989. The committee started planning the second breakfast around the end of September 1989, and the breakfast was held in January 1990 for around 275 or 300 people. (Tr. 1214–1215, 1322–1325.)

In early 1990 the committee decided to have another breakfast if there were no injuries that year. After some injuries occurred, committee members sought some get-together for the 1991 safety kickoff. The committee agreed on having a continental breakfast, which was approved by Unit Manager James Melville. About 200 people attended. (Tr. 1214, 1324–1328.)

(iv) Fitness committee

Before this committee was formed in late 1988 or early 1990, the Union had been seeking in negotiations with the Company a fitness center like the Company’s health complex at its Mannington Mills plant, where the facilities include a weight room, jogging track, and tennis facility. The Company responded that it was not interested at the time. (Tr. 1607–1610.)

In January 1989 the Company approved the idea of outdoor facilities at the C Corral (a former parking lot) and specifically budgeted a walking/jogging track there (Tr. 1103–1106; R. Exh. 27 at 3). Since the trial of the Design Team case on May 2–4, 1989, employee members of the Fitness

Committee have continued to deal with the management members, and the committee with higher management, seeking additional facilities.

The minutes of the committee’s May 11, 1989 meeting show that the employee members’ proposal for the construction of tennis courts was not accepted by the management members. The minutes state that “Tennis courts may have to be tabled until next season due to their expense.” (G.C. Exh. 41 at 34–36.)

Employee member Edward Forrest continued to press for the tennis courts in an electronic mail message on June 2, 1989. The message was sent to the plant manager, Management Assistant Ferguson, Unit Manager Reinhart, Financial Consultant Richard Jagers, and 67 others, including committee members. (G.C. Exh. 41 at 38–40.)

Later that summer, after picnic tables and sanitary facilities were added, employee member Arthur Ebert suggested a volleyball area, and a plant employee outside the committee suggested that a horseshoe pit also be provided. The committee agreed, Ferguson approved, and the Company provided the funds. (Tr. 1081, 1122–1124, 1390–1392.)

In January 1990, after the track and other facilities were installed, employee Ebert proposed to the committee a 60-by-60 foot open-air pavilion, set on concrete. “I knew at that time that we [were] not going to be getting a separate [indoor] facility per se in the area.” The committee approved the proposed pavilion and two tennis courts, and Ferguson suggested that Ebert make a presentation to the plant staff for funding. (Tr. 1381–1386, 1423.) Ebert made the presentation, informing the staff that the committee was proposing the projects. The response was that “there was no money in the budget for these projects at the time.” (Tr. 1387–1388.)

(v) Freon central safety committee

As found, one of the committee’s “key functions” when it was created in December 1989 was to “Become a forum for discussion and resolution of safety concerns.” Also as found, employees in the Freon business unit submit F.U.S.S. safety complaints to the committee for it to discuss and work on to correct. As employee member Nipe credibly testified (Tr. 792): “Basically F.U.S.S. is . . . a procedure that the Freon [unit] has of correcting complaints.”

Minutes of the committee’s June 15, 1990 meeting (G.C. Exh. 11 at 80–81) show examples of safety problems with which employee and management members dealt. The committee discussed “Comments . . . received from operators on the quality of rubber gloves” and the need “for more air lines and safety showers around the HF storage tanks.” Followups on F.U.S.S. complaints included the “Lack of air masks at HF pumps.”

Concerning safety audits, employee and management members of the committee agreed to the assignment of employees outside the committee to serve with members of management on nonpunitive audit teams to enhance the effectiveness of the safety audits.

When safety plans were being made in November 1989, the old committee for inspections and audits was “not functioning” and audits were “not being done in any established way” (G.C. Exh. 11 at 6, 8). The new committee decided at the December 5, 1989 organizational meeting (at 33) that one of its “key functions” would be to “Perform auditing

on safety performance throughout the area.” Minutes of the committee’s January 18, 1990 meeting state (G.C. Exh. 11 at 45): “At present there is no area wide audit program.”

On January 25 Supervisor Samuel Scull (who “sat on the Central Safety Committee,” Tr. 789–790) made an assessment. In a memorandum sent only to members of management he observed (G.C. Exh. 11 at 50): “The one important thing I think were missing here is a ‘Safety Audit’ using a cross section of people on a routine basis” (Tr. 1710–1711). Area Manager Moffett acknowledged (Tr. 1693) that there was no active audit program at the time and that “Our previous years’ programs had fallen to disuse.” Employee member Nipe confirmed (Tr. 800) that there were no employees on the safety audits at that point.

At the next meeting of the committee on February 15, 1990, the employee members dealt with management members on the subject of assigning Freon employees to serve with members of management in making nonpunitive safety audits. The committee agreed. (Tr. 799–801, 839, 1680; G.C. Exh. 36 at 9.) I find it clear that this change in work assignments of certain Freon employees involved working conditions.

Employee members have also dealt with management members in seeking exceptions to rules in the Safety How manual for certain Freon employees, as shown in minutes of the June 15 and August 10, 1990 committee meetings. On August 10 a management member “stated the proposed exception to allow employees to NOT wear ‘Nomex’ in the Service Bldg. will not be submitted” (by the committee to the Company). (G.C. Exh. 11 at 81, 90.) This vetoed that proposal.

Concerning employee members dealing with management members on appropriate safety awards, the committee discussed future awards at its January 18, 1990 meeting and designated some of its members to make the final determination. On January 22 the committee informed Freon employees that “the area will provide pizzas for lunch to everyone in the area for every quarter of the year that we have a total of one or less injuries” and “If we meet our annual goal, there will be an area-wide dinner.” (Tr. 322–324, 816–817, 1698; G.C. Exh. 11 at 44, 49.) Employees were given pizza when they reached the quarterly goal, but the annual goal was not reached (Tr. 839, 1705).

(vi) Jackson lab programs committee

Employee members dealt with management members, and the committee with Jackson Lab Director Peter Jesson, when the committee planned and handled a major celebration for Jackson Lab’s 25-year safety record. That milestone (of no lost workday injuries) was expected to be reached in early December 1989. (G.C. Exh. 24 at 17, 36 at 5; Tr. 626–627, 684.)

On August 3, 1989 (outside the limitation period), employee member Nelson made tentative reservations at the Riverfront Dinner Theater in Philadelphia for January 25–26 and February 2, 1990 (G.C. Exh. 24 at 120–122).

After September 22 (the beginning of the limitation period), as shown in minutes of its meetings, the committee continued to make the arrangements, publicizing the event among employees both at the plant and at their homes, signing up employees “with a guest,” providing bus transportation, and reserving an additional Friday night on February

9 “to accommodate demand” (G.C. Exh. 24 at 13, 15, 17, 19). Around November the committee sent a flyer to all Jackson Lab employees, soliciting attendance dates (Tr. 629).

A total of 1176 individuals attended, costing the Company \$25,813.20 for the dinner and entertainment at \$21.95 each (G.C. Exh. 24 at 107). Around November 1989 the committee sought and received Director Jessup’s final authorization for the large expenditure (Tr. 628–629).

Employee committee members also deal with management members in adopting appropriate safety awards in various ongoing programs. Minutes of the February 5, 1990 meeting show that “It was decided to continue [the Safety Champion] program in 1990.” Under this program, \$100 dinner tickets were given, costing the Company (including tax) up to \$139 and \$154. (G.C. Exh. 24 at 77, 151–165; Tr. 678). Minutes of the December 10, 1990 meeting show that “Due to the comments [in the committee’s 1990 safety programs questionnaire] and the general unpopularity of this [Safety Champion] program, it was decided to discontinue it for 1991” (G.C. Exh. 24 at 27, 36).

In 1990, for prizes in a safety puzzle contest, the committee approved an employee member’s suggestion of 10 pairs of baseball tickets costing a total of \$180 (Tr. 617–618; G.C. Exh. 36 at 5), but vetoed his suggestion for \$18 Halon fire extinguisher awards as too expensive (Tr. 619).

In an effort to please the employees, after abandoning coffee and doughnuts, the committee decided from time to time to provide pizza, pizza and soda, an ice cream buffet, or an ice cream and fruit buffet for safety award parties. Invoices in evidence show that these parties cost \$2290.24 on October 23, 1989; \$2751.66 on February 6, 1990; \$2966.12 on May 3, 1990; \$2765.95 on October 22–24, 1990; and \$3238.52 on February 4, 1991 (G.C. Exh. 24 at 51–53, 57, 76, 131–133, 137, 139, 145–147; Tr. 647–648). The committee was also “looking for feasible substitutes for the usual pizza or ice cream” (G.C. Exh. 42 at 2).

At its March 1991 meeting the committee discussed the Company’s Belle plant safety awards program, which provided a choice of 4 hour-off or two shares of DuPont stock, but did not approve the program. The Company had referred the program to the committee for “an assessment of the merits of stock as opposed to other forms of recognition.” (G.C. Exh. 24 at 80–83, 130.)

(vii) Physical distribution safety committee

The evidence shows that since the October 20, 1989 beginning of the limitation period, employee members have dealt with management members when the committee discusses employees’ safety problems that the employee members bring to the committee (Tr. 1283, 1301, 1305).

The evidence also shows that when anything is given out, such as the stipulated “\$50, a fire extinguisher or a safety knife and first aid package” about April 1990 (G.C. Exh. 36 at 11; Tr. 1279), the employee and management members agree on the prize or award, because “anything we did was with a consensus” (Tr. 1283). In 1990 the committee specifically agreed to the replacement of one safety program with another (Tr. 1299).

In summary, I find there is persuasive evidence that the employee members of the safety and fitness committees “deal with” the management members, and the employee

representation committees with the Company, concerning safety, benefits, and fitness facilities, which concern working conditions and are mandatory subjects of bargaining.

d. *Concluding 8(a)(2) finding*

The General Counsel in his brief (at 74–94, 102–108) and the Union in its brief (at 85–108) contend that the six safety committees and one fitness committee are company-dominated labor organizations.

To the contrary, the Company contends in its brief (at 156–163) that “At best, there was an unrealized potential,” but “no domination or unlawful support.” Citing a number of Board and court cases, it further contends (at 134–155) that the committees are not labor organizations because they (1) “do not function as representational bodies,” (2) are not understood “as acting on behalf of non-participating bargaining unit employees,” (3) “function only as a management vehicle,” and (4) do not “deal with” it within the meaning of Section 8(5). It argues that no agency relationship exists between employee committee members and other bargaining unit employees who do not elect or select them.

I agree with the General Counsel and the Union. Regarding alleged domination, as found, the Company dominated the formation of the Freon Central Safety Committee and dominates the administration of all seven committees.

Regarding the Company’s contention that the committees are not labor organizations, there is obviously little resemblance between these committees and the organizations involved in the cases on which the Company relies. I find that the cases are clearly distinguishable.

The group of employees in *Fiber Materials*, 228 NLRB 933, 934–935, 941 (1977), met with the employer only twice “merely to raise questions” about the employer’s fringe benefit policies. The four teams in *General Foods Corp.*, 231 NLRB 1232, 1234–1235 (1977), “in their aggregate, constitute[d] the entirety of the nonsupervisory work force” at the employer’s testing and research center. Team members spoke on their own behalf and there was no “agency relationship to a larger body.”

The employees council in *John Ascuaga’s Nugget*, 230 NLRB 275, 276 (1977), did not “deal with” the employer, but merely performed “a purely adjudicatory” function of rendering “a final decision” on employee grievances. Similarly the grievance committee in *Mercy-Memorial Hospital*, 231 NLRB 1108, 1121 (1977), did not “deal with” the employer. The committee “was created simply to give employees a voice in resolving the grievances of their fellow employees at the third level of [the] grievance procedure, not by presenting to or discussing or negotiating with management but by itself deciding the validity of the employees’ complaints and the appropriateness of the disciplinary action, if any, imposed.” The single management member, “who has only one vote like any employee member on the committee, is bound by the decision reached by a majority of the committee.”

Also the communications committee in *Sears, Roebuck & Co.*, 274 NLRB 230, 243–244 (1985), did not “deal with” the employer on behalf of the employees. It was a committee on which a “rotating system was used so that each employee in each department would have an opportunity to sit in on two” meetings with the manager “to give input in order to help solve management problems.”

Likewise in *NLRB v. Scott & Fetzer Co.*, above, 691 F.2d at 289–290, 294–295), the court held that the committee, which no one viewed “as anything more than a communicative device,” did not “deal with” the employer. The committee was established to “provide to as many employees as possible the opportunity” to contribute “ideas for improving operations.” The court found that “The continuous rotation of Committee members to ensure that many employees participate makes the Committee resemble more closely the employee groups speaking directly to management on an individual, rather than a representative, basis as in *General Foods*,” above.

Having found (1) an agency relationship existing between the employee committee members and the bargaining unit employees they represent and (2) persuasive evidence that the employee members and the employee representation committees “deal with” the Company concerning safety, benefits, and fitness facilities, which concern working conditions as well as being mandatory subjects of bargaining, I find that the committees are labor organizations within the statutory definition.

I therefore find, as alleged, that the Company unlawfully dominated the formation of the Freon Central Safety Committee and dominates the administration of all six safety committees and the fitness committee, violating Section 8(a)(2) and (1) of the Act.

4. Bypassing the Union

The General Counsel contends that the Company, in bypassing the Union and dealing instead with the safety and fitness committees concerning matters subject to collective bargaining, “necessarily violated Section 8(a)(1) and (5).” I agree.

The Union is the exclusive bargaining representative of the employees. As held by the Supreme Court in *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 683–684 (1944):

The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive . . . it exacts “the negative duty to treat with no other.”

Citing *Medo Photo*, the Board held in *Modern Merchandising*, 284 NLRB 1377, 1379 (1987):

It is well established that the Act requires an employer to meet and bargain exclusively with the Union. Further, an employer who chooses to deal directly . . . with a representative other than the designated bargaining representative regarding . . . conditions of employment risks violating Section 8(a)(5) of the Act.

It is clear [that the Respondent’s] bypassing the Union . . . has had the effect of eroding the Union’s position as exclusive representative. Accordingly, we find the Respondent has failed in its duty to bargain with the Union and has violated Section 8(a)(5) and (1) of the Act.

Having found that the seven safety and fitness committees are company-dominated labor organizations, I find by dealing directly with them concerning working conditions and man-

datory subjects of bargaining, the Company has unlawfully bypassed the Union and failed in its duty to bargain exclusively with the Union, violating Section 8(a)(5) and (1) of the Act.

B. Denied Employee Use of Electronic Mail

The complaint alleges that the Company maintains “a rule prohibiting employees . . . from using [its] electronic mail system for distributing [union] literature and notices while permitting the employees to use [its] electronic mail system for distributing literature and notices on all other topics,” violating the employees’ Section 7 rights (G.C. Exh. 1RR pars. 7, 22).

The evidence indicates that in this large chemical plant and research laboratories, where a staff of 3700 people are employed producing about 750 different products (Tr. 41), the electronic mail has become an important, if not essential, means of communication. The seven safety and fitness committees, including some of the employee members (G.C. Exh. 41), are permitted to use it. As found, the plant manager used it to notify all employees that they did not believe the judge’s decision in the prior Design Team case was “well-founded.”

The large volume of electronic mail messages in evidence reveals that the Company permits employees to use the electronic mail to distribute a wide variety of material on many subjects. These messages (G.C. Exh. 23), sent from employees’ computer terminals to sometimes hundred of other terminals where the messages can be read on the screen or printed out (Tr. 76–77), include poems, notices, or discourses on such topics as boredom, drugs, educational co-ops, Erich Fromm, Federal Express, higher education, IRS, liberal arts, life, mortality, philosophy, TV programs, religion, riddles and attempted answers, skin cancer, victory, and words of wisdom.

Yet the Company prohibits any employee, whether or not a representative of the Union, from using the electronic mail to distribute any union literature or notice (Tr. 488). I find that this prohibition clearly is discriminatory.

Moreover, whether or not intended, this prohibition tends to diminish the representative role of the Union and to erode union support.

In its dealings with the committees, the Company demonstrates to the employees a greater willingness to grant benefits and solve their safety problems if they go through the committees rather than through the Union. As found, the Company even permitted the Control Unit Safety Committee to use the electronic mail to invite employees having “any safety situation to feel free to contact any member of the committee,” instead of going through the Union. Also as found, an interoffice management memorandum reveals that the Company was considering a Fitness Committee recreation budget of \$10,000 for an antiunion purpose of competing with the Union.

The Company argues in its brief (at 178) that there are “less costly alternative methods” for the Union to communicate with the employees and that there are “legitimate, non-discriminatory bases for the [Company] to deny electronic mail access to the [Union] for Union business.”

I do not deem it necessary, however, to rule on whether the Union would otherwise be entitled to use this common means of plant communications for contacting the bargaining

unit employees it represents. I do find that having permitted the routine use of the electronic mail by the committees and by the employees to distribute a wide variety of material that has little if any relevance to the Company’s business, the Company discriminatorily denies employees use of the electronic mail to distribute union literature and notices.

I rely on the Board’s holding in *Northeastern University*, 235 NLRB 858, 865 (1978), enfd. in relevant part 601 F.2d 1208, 1216–1217 (1st Cir. 1979). The Board held that the employer “violated Section 8(a)(1) of the Act by denying its employees the use of [a room, which was normally available to employees, for a meeting of the 9 to 5 Organization] for purposes of engaging in activities protected by Section of the Act.” It cited its holding in *Columbia University*, 225 NLRB 185 (1976), involving that university’s refusal to permit a union organizing committee composed of its employees to use the facilities of a center that the university made available to both on- and off-campus student groups: “Such discriminatory treatment interferes with employees in the exercise of the rights guaranteed in Section 7 in violation of Section 8(a)(1) of the Act.”

I therefore find that in the circumstances of this case, the rule prohibiting employees from using the electronic mail system for distributing union literature and notices violates Section 8(a)(1) of the Act.

C. Safety Conferences and “Safety Pause”

In March 1983 the Company held an all-day safety conference “to formulate new ideas that would result in a higher level of motivation and commitment for improved safety performance” (R. Exh. 23 at 2). In 1989 the Company resumed such conferences, holding them offsite quarterly in December 1989 and March, June, September, and December 1990 (Tr. 829).

The December 8, 1989 safety conference was announced in a October 25 notice to all employees. The notice (G.C. Exh. 26) stated that the conference was called “to generate new ideas that will improve safety performance,” that this first conference would accommodate about 30 volunteers, and that all employees “will be attending a Safety Conference in the future.” The Company had previously invited the union president to participate (Tr. 1773). About 40 employees and members of management from all the business units in the plant attended the conference (Tr. 759–760).

The stated objective of the conference, which was “run along lines of PEP” (Tr. 804, 1840), was to “Increase personal commitment, responsibility, and acceptance of safety as our #1 concern” (R. Exh. 38). The slogan was: “You make the difference” (Tr. 828, 1775). The employees were asked to give “their personal experiences” and were told “not to act as representatives” to solve problems for their areas. They were permitted to make whatever safety suggestions they had. It was the responsibility of the resource in each session to ensure that the employee and management participants did not discuss or deal with bargainable issues. (Tr. 833, 1055, 1780–1783, 1791, 1824.)

In February 1990 the new unit manager of Environmental Resources decided to hold a separate conference, called a “Safety Pause,” for gathering “a lot of information” to reach the safety goals in that business unit (Tr. 1550; G.C. Exh. 35). Attended by 50 of the 130 employees and members of management, the Safety Pause was held offsite in the

same manner as the plantwide safety conferences (Tr. 1508, 1551–1552; C.P. Exh. 9).

The General Counsel and the Union (in their briefs at 127–129, 113–114) contend that the Company was unlawfully dealing directly with the employees. To the contrary, I agree with the Company (in its brief at 164) that both the safety conferences and the Safety Pause “fall within the ambit of permissible communication between an employer and its employees.” In view of the precautions taken to prevent the participants from discussing or dealing with bargainable issues, I find applicable the Board’s ruling concerning an employee questionnaire in *Logemann Bros. Co.*, 298 NLRB 1018, 1019–1020 (1990):

We find that the distribution of the questionnaire was merely permissible communication between the Respondent and its employees, was consistent with the Respondent’s past practice of communicating with employees, and was motivated by legitimate business concerns.

I therefore find that the holding of the safety conferences and the Safety Pause did not violate the Act.

D. Purported Grievance Adjustment

The complaint alleges that the Company violated Section 8(a)(5) and (1) by meeting with employees in the Jackson Lab Information Services Group “for the purpose of adjusting employee grievances” without giving the Union the opportunity to be present.

This allegation involves informal complaints by employees to the group supervisor about the uncompleted fire protection system being installed, a discussion of the problem at a regular staff meeting, and a meeting with the fire marshal, who showed a video and answered questions (Tr. 1725–1733, 1737–1739; R. Exh. 39).

No grievance was filed and therefore no grievance was adjusted. I find that the allegation lacks merit.

CONCLUSIONS OF LAW

1. By dominating the formation and administration of the Freon Central Safety Committee a/k/a Fluorochemicals Central Safety Committee and Fluorochemicals Safety and Health Excellence Committee and dominating the administration of the

Antiknocks Area Safety Committee,
Chambers Works Fitness Committee a/k/a Chambers Works Recreation/Activities Committee,

Control Unit Safety Committee,
Jackson Lab Programs and Publicity Committee,
Physical Distribution Safety Committee a/k/a Environmental Resources Safety Committee, and
Programs and Publicity Committee of the Chambers Works Central Safety and Occupational Health Committee

all of which are labor organizations within the meaning of Section 8(2)(5), the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

2. By dealing directly with the committees, bypassing the Union as the exclusive bargaining representative of the production and maintenance employees and the office and clerical employees in separate appropriate bargaining units, the Company has violated Section 8(a)(5) and (1).

3. By prohibiting bargaining unit employees from using the electronic mail system for distributing union literature and notices, the Company has violated Section 8(a)(1).

4. The Company has not violate the Act by holding the safety conferences and Safety Pause.

5. The Company has not unlawfully adjusted grievances without affording the Union an opportunity to be present.

REMEDY

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

Still opposing any joint labor-management safety committees, although “most common” in unionized settings, the Respondent urges in its brief (at 180) “that the Board should seriously consider the implications of interpreting and applying the Act to disturb the safety management systems at issue.” The Respondent has not shown why the offered cooperation of the Union, which repeatedly has informed it that health and safety are the Union’s No. 1 priority, would not contribute to “the goal of maintaining and heightening individual employee safety awareness” without eroding the Union’s status as the exclusive bargaining representative.

The Respondent having bypassed the Union and dealt directly with the six safety committees and one fitness committee, which are found to be unlawfully dominated labor organizations, I find that it must cease dealing with and completely disestablish the seven committees.

[Recommended Order omitted from publication.]