

Polaroid Corporation and Charla Scivally, and Employee Advocates, Parties in Interest and Employee-Owners' Influence Council, Parties in Interest. Cases 1-CA-29966, 1-CA-30063, and 1-CA-30211

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN, HURTGEN, AND BRAME

The principal issue presented in this case is whether the Employee-Owners' Influence Council (EOIC) established by the Respondent, Polaroid Corporation, constitutes a labor organization within the meaning of Section 2(5) of the Act.¹ We have carefully examined the entire record and conclude that it supports the judge's key finding that the EOIC is a statutory labor organization. The Respondent concedes that it has dominated and supported the EOIC. We accordingly find, for the reasons stated by the judge, and for the additional reasons set forth below, that the Respondent has violated Section 8(a)(2) of the Act.

I. ANALYTIC FRAMEWORK

Section 8(a)(2) of the Act is designed to ensure that employer-dominated groups do not rob employees of their right to select a representative of their own choosing. *Electromation, Inc.*, 309 NLRB 990, 993-994 (1992), *enfd.* 35 F.3d 1148 (7th Cir. 1994). "Congress' goal [in enacting Section 8(a)(2)] was to preserve for employees the right to choose their bargaining representative free of employer interference or coercion[.]" *Id.*, 309 NLRB at 994 fn. 18. Section 8(a)(2) thus implicates the fundamental concepts that are integral to national labor policy: the right to engage in—or refrain from engaging in—self-organization and other concerted activities, and the right of employee free choice in selecting bargaining representatives. *Novotel New York*, 321 NLRB 624, 640 (1996). "[T]he principal distinction between an independent labor organization and an employer-dominated organization lies in the unfettered power of the independent organization to determine its own actions." *Electromation*, *supra* 35 F.3d at 1170; *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 214 (1959). We are ever mindful, when called upon to distinguish between a lawful employee participation process and an unlawfully dominated labor organization, of the Board's fundamental statutory responsibility to "insure the fair and free choice of bargaining representatives by employees." *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330

¹ On June 14, 1996, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel resubmitted to the Board its brief to the judge, and filed an answering brief to the Respondent's exceptions. The Charging Party filed exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief to the Respondent's answering brief.

Member Fox is recused from participating in this case.

(1946); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973).

The Board conducts a two-pronged inquiry to determine whether a violation of Section 8(a)(2) of the Act has occurred. First, we inquire whether the employee group at issue satisfies the definitional elements of a "labor organization" set forth in Section 2(5) of the Act. Second, if the organization satisfies the statutory criteria and thus constitutes a labor organization, we consider whether the employer has dominated, interfered with, or supported the labor organization as proscribed by Section 8(a)(2) of the Act.² *Electromation, Inc.*, *supra*, 309 NLRB at 996.

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

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, 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.

Under this statutory definition, the organization at issue is a labor organization if (1) employees participate; and (2) the organization exists, at least in part, for the purpose of "dealing with" employers; and (3) these dealings concern conditions of work or concern other statutory subjects, such as grievances, labor disputes, wages, rates of pay, or hours of employment.³ In past decisions, the Board has found it unnecessary to determine whether an employee group could be found to constitute a labor organization in the absence of a finding that it acted as a representative of other employees. In those cases it was clear that the organizations involved were in fact acting in a representative capacity. *Electromation, Inc.*, *supra*, 309 NLRB at 994 fn. 20; *Webcor Packaging*, 319 NLRB 1203, 1204 fn. 6 (1995), *enfd.* 118 F.3d 1115 (6th Cir. 1997), *cert. denied* 118 S. Ct. 1035 (1998).

The Board has explained that "dealing with" contemplates "a bilateral mechanism involving proposals from the

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

to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That . . . an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay[.]

³ Contrary to our dissenting colleague's contention, "real perceptions at the work place" as to the nature of an employee committee are irrelevant to a determination of whether the committee constitutes a statutory labor organization. *Electromation*, *supra*, 309 NLRB at 996-997 and fn. 27. The issue is what the committee actually does. "Purpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met regardless of whether the employer has created it, or has fostered its creation, in order to avoid unionization or whether employees view that organization as equivalent to a union." *Id.* at 996-997 (footnote omitted).

employee committee concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management.” *Electromation, Inc.*, 309 NLRB at 995 fn. 21. The bilateral mechanism ordinarily entails a pattern or practice in which a group of employees, over time, makes proposals to management, and management responds to those proposals by acceptance or rejection by word or deed. *E. I. du Pont & Co.*, 311 NLRB 893, 894 (1993). “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.” *Id.*

Finally, Section 2(5) of the Act requires that the dealings concern conditions of work or other statutory subjects such as grievances, labor disputes, wages, rates of pay, or hours of employment. See *Webcor Packaging*, supra, 319 NLRB at 1205 (unlawful employee committee designed to deal with topics listed in Section 2(5) rather than issues of production problems or plant efficiency); *Electromation, Inc.*, supra, 309 NLRB at 998 (purpose of the unlawful Action Committee was “not to enable management and employees to cooperate to improve ‘quality’ or ‘efficiency,’ but to create in employees the impression that their disagreements with management had been resolved bilaterally.”)⁴

“Safe Havens” for Employee Participation Programs

The Board has articulated certain “safe havens” in order to provide guidance for those seeking to implement lawful employee involvement programs between employees and management. The Board has underscored these safe havens in order to demonstrate that there is room for lawful employee-involvement under the Act. *E. I. du Pont & Co.*, supra, 311 NLRB at 893. The Board supports an interpretation of the Act, which would not discourage employee participation programs in their various forms. See *E. I. du Pont*, supra at 894; *Electromation*, supra, 309 NLRB at 995 fn. 21.

The Board has thus clarified that the proscriptions embodied in Section 8(a)(2) are not infringed under a “suggestion box” procedure where employees make specific proposals to management, because under such a unilateral mechanism there is no “dealing with”; *Electromation, Inc.*, supra, 309 NLRB at 995 fn. 21; and because the proposals are made individually and not as a group. *E. I. du Pont*,

⁴ See *Vons Grocery Co.*, 320 NLRB 53, 54 (1995) (Quality Circle Group devoted solely to operational matters, with deviation in only one instance involving conditions of work, not a labor organization). We have observed that it may be difficult to distinguish such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of a labor organization. *Stoody Co.*, 320 NLRB 18, 20 (1995). Such a determination is to be made in light of the factual circumstances at issue in each case.

supra, 311 NLRB at 894. Employee free choice cannot be infringed under such a procedure because any individual employee may participate.⁵ The Board likewise explained in *E. I. du Pont* that 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.” *Id.* Similarly, 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. *Id.*

The facts of *E. I. du Pont* provide a good example of how an employer can involve employees in important workplace matters, such as plant safety, without running afoul of the Act. The respondent there held 1-day safety conferences on a quarterly basis in which it sought safety suggestions and ideas from the employees and encouraged them to talk about their experiences with safety issues. Employees were free to make whatever safety suggestions they had. The Board concluded that these “safety conferences” were permissible brainstorming sessions and declared that “[n]othing 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.” *Id.* at 897. There was no “dealing” because the respondent did not structure the conference as a bilateral mechanism designed to make and respond to specific proposals.⁶

II. FACTUAL BACKGROUND

A. The Record Evidence

The Respondent correctly observes that the inquiry of whether an employee involvement group constitutes a statutory labor organization focuses on the evidence showing what the organization actually does. *Electromation, Inc.*, supra, 309 NLRB at 996. “The Committee’s purpose

⁵ We have additionally observed that there is an issue as to whether a “suggestion box” procedure is an organization, committee, or plan within the meaning of Sec. 2(5) of the Act. *E. I. du Pont*, supra, 311 NLRB at 894 fn. 11.

⁶ Similarly, in *EFCO Corp.*, 327 NLRB 372 (1998), the Board found that the respondent did not “deal with” the employee suggestion screening committee which therefore was not a labor organization. This committee did not formulate proposals or present them to management. Rather, it reviewed suggestions made by individual employees and forwarded the vast majority of them to management without providing any recommendations. The Board concluded that this committee functioned essentially as a screening portion of an employee “suggestion box” program.

The court of appeals identified another “safe harbor” in *NLRB v. Peninsula General Hospital*, 36 F.3d 1262, 1273–1274 (4th Cir. 1994): an employer survey that is distributed not only to the members of the employee committee, but also to the employee population in general.

is shown by what the organization is set up to do and by what it actually does.” *Keeler Brass Co.*, 317 NLRB 1110, 1113 (1995) (examining actual functions of the employee committee). Approximately 200 meetings of the EOIC were videotaped by the Respondent, and made available for viewing to the Respondent’s work force. The parties have entered 16 videotapes into the record, which show 10 separate meetings of the EOIC.⁷ Each videotape has been carefully reviewed in its entirety, as urged by the Respondent in its exceptions. Our evidentiary findings set forth below regarding what the EOIC actually does are based primarily on the videotapes.⁸ We have also reviewed the testimony of those who directly participated in the EOIC: Rick Williams, an organizational development specialist for the Respondent who administered the EOIC; Sherene Aram, the sole EOIC member to testify; and Mac Booth, chief executive officer of the Respondent, who participated in several EOIC meetings, including the October 20, 1993 videotaped meeting. The relevant evidence is set forth below.

B. Factual Background

In 1950, the Respondent established an employees’ committee, whose charter stated that its purpose was to “provide a medium of determining the will of the employees concerning their welfare and the welfare of the company; [and] to speak for employees on these matters in discussions with the management of the company.”⁹ In

⁷ The following 16 videotapes are in evidence: (1) August 1993 Polaroid quarterly business meeting; (2) August 13, 1993 EOIC introductory meeting with Polaroid’s chief executive officer, Israel MacAllister “Mac” Booth; (3) September 15, 1993 meeting regarding family and medical leave issues; (4) September 16, 1993 meeting regarding the Employee Stock Ownership Plan (ESOP); (5) September 16 meeting continued; (6) September 21, 1993 meeting regarding the ESOP; (7) September 21 meeting continued, ending with discussion of legal issues with the Respondent’s house counsel specializing in labor relations, Anne Leibowitz; (8) September 22, 1993 meeting regarding ESOP; (9) October 5, 1993 meeting regarding ESOP; (10) October 20, 1993 meeting regarding ESOP with Mac Booth; (11) October 20 meeting continued; (12) October 20 meeting continued; (13) November 23, 1993 meeting regarding the Respondent’s termination policy; (14) March 8, 1994 meeting regarding medical benefits; (15) April 21, 1994 meeting regarding medical benefits; and (16) composite tape submitted by the General Counsel showing excerpts of various meetings. Although most of the videotapes are fully audible, certain portions are inaudible or difficult to hear. Some of the videotapes show the complete duration of an EOIC meeting, while others show portions of a meeting.

⁸ By contrast, in determining whether the “purpose” element of Sec. 2(5) has been shown, our dissenting colleague focuses primarily on what he claims the Respondent “designed,” “desired,” and “want[ed]” the EOIC to do. He appears to accord little, if any, weight to the extensive evidence of what the EOIC actually does, i.e., the videotapes of the EOIC meetings.

⁹ As the Respondent’s house counsel stated to the EOIC at their September 22, 1993 meeting, in explaining the proscriptions of Sec. 8(a)(2) of the Act:

[Senator] Wagner was quite determined that these quote sham labor unions—as he called them—were to be wiped off the face of the country, and for the most part he was pretty successful, [except for] a few quietly but passionately held examples, our own Employees’ Committee being one of them.

May 1992, the Charging Party in this proceeding filed complaints with the U.S. Department of Labor, Office of Labor-Management Standards (OLMS), alleging that the employees’ committee violated certain provisions of the Labor-Management Reporting and Disclosure Act.¹⁰ Following an administrative investigation by the OLMS, Chief Executive Officer Booth, by letter dated June 18, 1992, to all company employees, announced his decision “to dissolve the Employees’ Committee,” and to “reassign its [the Employees’ Committee] roles and functions elsewhere in the corporate structure, effective immediately.”¹¹ Booth further announced in the letter that the Respondent would convene an internal critical process team (CPT) to design the new organization. On December 2, 1992, the CPT issued its final recommendation to Booth to create the EOIC.

1. The Respondent establishes the EOIC

Chief Executive Officer Booth announced the formation of the EOIC by letter dated January 28, 1993, to all of the Respondent’s approximately 8000 employees. The Respondent thereafter distributed applications at approximately eight locations and invited all employees to apply to become members of the EOIC. The application provided that the EOIC members would serve staggered 3-, 4-, or 5-year terms. Approximately 150 employees applied. The Respondent interviewed the applicants, and selected 30 employees to serve on the EOIC. The Respondent provided the facilities for the EOIC and paid all its expenses.

The first meeting and orientation of the EOIC took place on August 13, 1993. The EOIC thereafter met for 2 days approximately every 2 weeks. Each meeting was led and conducted by the Respondent’s organizational specialist, Rick Williams, who administered the EOIC. At each meeting, Williams was accompanied by additional management personnel, who made a presentation on the specific topic under consideration by the EOIC. The record shows that the EOIC met regularly in approximately 62 meetings from its creation in August 1993 through the end of 1994, and was scheduled thereafter to meet regularly and be an ongoing process.

The videotape evidence establishes that the EOIC addressed four main issues during the period at issue in the complaint: the type of medical insurance benefits available to employees; the disposition of millions of dollars of

¹⁰ 29 U.S.C. § 401 et seq.

¹¹ The Respondent has not excepted to the judge’s finding that the employees’ committee constituted a labor organization within the meaning of Sec. 2(5) of the Act, and that the Respondent unlawfully dominated the employees’ committee in violation of Sec. 8(a)(2) and (1) of the Act. The Respondent has likewise not excepted to the judge’s findings that the employee advocates program for grievance adjustment, established by the Respondent after the dissolution of the employees’ committee and composed of the 25 former employee-members of the employees’ committee, constituted a statutory labor organization and that the Respondent unlawfully dominated the employee advocates program. The record shows that the Respondent has dissolved each of these organizations.

funds from the Employee Stock Ownership Plan (ESOP),¹² and the Respondent's employment policies respecting termination, and time off for family and medical reasons. Documentary evidence establishes that the EOIC additionally addressed topics such as the Respondent's policy regarding vacation benefits and employee transfers within the Company.

The EOIC process typically functioned as follows. First, EOIC members would "throw out" ideas relating to the topic under consideration. These would be written down by the management presenter and taped to a wall for display. Second, the ideas would be discussed by the EOIC members and the Respondent's management presenter. Finally, as EOIC Administrator Williams testified, a poll would be taken of the EOIC members by the management representative "to see how many people agreed with [a] particular opinion" and to determine the majority sentiment of the EOIC. Thereafter, the Respondent's representative would return to the EOIC and announce the decision that had been made by the Respondent on the topic under consideration.

2. The Respondent's use of polling to determine the majority sentiment of the EOIC

The Respondent's practice of polling the EOIC is documented in the EOIC's consideration of the medical benefits issue. The videotape of the EOIC's March 8, 1994 meeting shows the Respondent's manager presenting the Respondent's proposed new medical plan. The manager stated to the EOIC that "this is what it will cost under our [Polaroid's] recommendation," and an overhead projector displayed on a wall the costs to the Respondent if different percentages of the employee population enrolled in health maintenance organizations (HMO). A group discussion ensued and, inter alia, the manager stated that the Respondent would offer a monetary award to employees enrolled in an HMO.¹³ The record evidence concerning medical benefits next chronologically shows a document entitled "EOIC—March 23, 1994 Polling Results." It states that the "polling is in answer to summary of recommendations, part of the plan manager 3/23/94 presentation, with some expansion." The poll records a "yes" or "no" vote of the EOIC members in 23 separate categories of specific medical benefits under consideration.

The Respondent's use of the polling technique to determine the majority sentiment of the EOIC is further documented in the videotape of the EOIC's November 23, 1993 meeting considering a draft proposal of the Respon-

dent's termination policy. The Respondent's management presenter displayed by an overhead projector on a screen the Respondent's proposed policy. A wide-ranging group discussion ensued regarding whether sexual harassment should be included in the policy, catalyzed in particular by one member expressing his view that it should not be included. The management presenter stated his view that sexual harassment should be included in the policy. EOIC Administrator Williams then asked the management presenter, "*Do you want to get a sense of where people are on this?*" (Emphasis added.) Williams stated to the presenter that "what we do is go around [the room and] say it's OK, or pass, or make a comment." An EOIC member remarked they could "do a show of hands, if you want to do it faster," followed by laughter from the group. Thereafter, the first member at the table stated that sexual harassment should be included in the policy, the next member agreed, and the third member agreed with the previous member. The next few members expressed an opinion or made a comment, confirming that a certain discussed change in the policy language would occur, to which the management presenter said, "Yes, I'm doing that." The remaining eight members either stated "ditto" or nodded their heads in agreement. The last member to speak is the one who earlier had expressed his view that sexual harassment should not be included in the policy. He stated that, after listening to the views of the other members, he now agreed that sexual harassment should be included in the policy.

The videotape evidence of the EOIC meetings considering the ESOP issue further documents that the Respondent's management representatives frequently sought to ascertain the position of the majority of the EOIC. At the September 16, 1993 meeting regarding the ESOP, Management Presenter Doug Mitchell presented five questions that had been discussed with Chief Executive Officer Booth at the previous EOIC meeting regarding the ESOP. Management Presenter Mitchell sought to "touch base" with what he considered a "reflection" of the group's views at the previous meeting with Booth. Mitchell stated that at the earlier meeting he had "heard frequently" the phrase "that it [the ESOP money] would be given back in one form or another," but that he was less clear about other things, such as was there "an expectation that 5 percent seniority reduction would come back?" Mitchell asked the group, "Does anyone disagree with that?" A member responded: "I felt the tenor in the room was a little bit stronger than that." Mitchell again asked the group, "This is too soft a statement? I think we have to vote." EOIC Administrator Williams added, "We can poll [the EOIC]." Following further group discussion, Mitchell again sought to summarize the group view:

I'm not going to say it represents anyone's views. It reflects what I heard. . . . There were other things said that are not up there. Rather than try to get the totality of it, I sort of summarized it. . . . It's key to get your sense of how you react.

¹² The ESOP had originally been financed, in part, by a 5-percent reduction in pay for all employees as well as a further reduction in 401(k) benefits. As the loan that financed the ESOP was to be paid off in the near future, the EOIC addressed how the Respondent should use what was described as potentially millions of dollars of surplus ESOP money, in the context of the employee pay and benefit reductions that had occurred.

¹³ One EOIC member remarked, "When would you give it to us?" The manager responded, "When would you like to get it?"

Mitchell conducted votes as to whether his current articulation of the five questions originally addressed in the previous meeting was “a fair reflection” or “a broadly acknowledged view” of the EOIC. He added: “My take away [from the last meeting] was this was the sense of the group. *Does this capture the sense of the group?* It’s not to say that there weren’t other views expressed, but it captures the sense of the group.” (Emphasis added.) Mitchell persisted that he needed “some measure of how people feel” and further “you can always keep stirring the pot forever and ever. . . . I’m trying to find a way to put a stake in the ground and say all right, we’ve got something, and then we move on to the next issue.”

3. The Respondent exhorts the EOIC to narrow its position

At the September 21, 1993 meeting on the ESOP issue, Management Presenter Mitchell emphasized that 30 individual solutions (from the 30 members) to the ESOP question was not acceptable. Mitchell stated:

We’re aiming for a as group statement, directed by [chief executive officer] Mac [Booth]’s charge, there will be a few alternatives that will be acceptable. That doesn’t mean 30. It doesn’t mean 60. It means some number probably less than double digits, but there will be a few alternatives. That’s our charge. We need to figure out the mechanism to find the few. . . . The mechanism is the criteria we work on, that then says some ideas get floated, some don’t, but we do it in a group—in a public sharing way, as opposed to individually.

An EOIC member asked, “If we have 30 ideas to discuss with Mac, that’s fine? . . . It doesn’t have to be 5 ideas—if we have 30 ideas that’s fine. Is that wrong?” Mitchell responded:

I would expect 5 or 6 alternatives, not 30, that would be viewed as essentially acceptable broadly by all 30 people in the EOIC, not by vote, not by consensus. But not 30, 5 or 6. . . . More than that would be organizationally dysfunctional.

EOIC Administrator Williams likewise stated to the group at the September 21, 1993 meeting:

If I were the decisionmaker, the fewer, the more critical the criteria, the fewer the recommendations, the better off I would be. That doesn’t limit you. That’s just what I’d like. Is that clear?

At the September 21, 1993 meeting, the Respondent also emphasized that the EOIC was to create “criteria” by which to narrow down solutions “to a few alternatives.” Mitchell stated at the September 21 meeting:

The process of arriving at criteria that we can use, together, I would argue, is a very important step in getting that solution. Otherwise, it becomes an unworkable process. . . . It doesn’t give you a means by which

we can look at relative strength or weaknesses of solutions. . . . The value of criteria . . . is to see whether or not you share values—whether or not there is in fact some joining—not eliminating ideas—but some joining—that’s really the point of this whole thing.

Indeed, the EOIC engaged in vigorous debate at the September 21, 1993 meeting over whether or not to combine the 31 criteria into a smaller number. The vote was 16 votes to do so and 6 votes against. Contrary to the Respondent’s exceptions, EOIC Administrator Williams and Management Presenter Mitchell persistently exhorted the EOIC to formulate limited criteria to evaluate limited solutions, as we have set forth in the margin.¹⁴ The record evidence does not support the Respondent’s contention that the judge cited the statements of Williams and Mitchell from these meetings out of context. Rather, these statements were made with such frequency that their import is clear in any context.

III. THE ISSUES PRESENTED

The Respondent does not dispute that the EOIC is employer dominated. As the judge found:

¹⁴ Mitchell stated at the September 16, 1993 meeting:

The choices for solutions must meet some standards or criteria. Let’s develop the characteristics of acceptable solutions using these characteristics. Using these characteristics, we will begin to review alternatives. . . . [We had] a strong encouragement from the [Sept. 2 session] with Mac [Booth] that we figure out what is the basis by which we judge all of these alternatives which we’ll have and that will be the screen with which we will narrow down the broad range to some few alternatives.

EOIC administrator Williams stated at the Sept. 21, 1993 meeting:

You have essentially two opportunities to impact on the final decision. One is by giving some indication of what you think are the critical criteria, or rank, order. . . . One way to influence is criteria. Another way is particular recommendations. With the criteria—you can say all 30 of them and say good luck, we hope you make a good decision OR [emphasized] you can have more discussion, narrow it down, prioritize, and so on essentially you get more power that way. The fewer you have the more power. That doesn’t mean you have to leave anything off the list.

Williams added:

What Doug [Mitchell] is saying is—each individual is here to make a recommendation. . . . That’s accurate. . . . Doug is saying any recommendation is going to get evaluated according to the criteria. So you can put anything forward you want, it’s going to get evaluated according to the criteria. The other trend which we are hoping will happen, and with most groups it does happen, the more discussion you have amongst yourselves, the fewer the alternatives there tends to be. Nobody is saying it has to be. . . . What happens by group discussion, it gets narrowed down to 2 or 3 options that seem to fit the most people. Naturally, if I were the decisionmaker, I would prefer to have a few options, rather than a million of them.

Mitchell stated respectively at the meetings held on September 21 and 22, 1993:

You use the criteria as a cross-talk vehicle, not consensus, but the more you talk about it, there will be some common denominators that will evolve out of this discussion, is that all right. We will find the denominators of acceptable solutions.

I may choose . . . to look for some common themes [among the criteria], as it will help me to work through these things, as opposed to literally coming out with 30 different solutions.

The Company does not dispute that management dominates, interferes with the formation and administration of, and contributes financial and or other support to [the] EOIC. The Company organized EOIC, and determined the number of members and their manner of selection. The Company sets the agenda for EOIC, and managerial personnel conduct and lead its discussions. The Company sets the rules for its proceedings, or decides how such rules shall be set, e.g., by vote. The Company provides the facilities for EOIC, and pays its expenses. EOIC exists at the Company's sufferance.

The Respondent has not excepted to these findings. The record thus establishes that the EOIC is an organization "that is the creation of management, whose structure and function are essentially determined by management . . . and whose continued existence depends on the fiat of management." *Electromation, Inc.*, supra, 309 NLRB at 995.¹⁵ Our analysis in this proceeding is accordingly limited to whether the EOIC constitutes a labor organization under Section 2(5) of the Act.

There is no dispute that employees participate in the EOIC. The Respondent invited all of its employees to apply to become members of the EOIC, and 30 employees were ultimately selected to serve on the EOIC. The Respondent likewise does not dispute that the EOIC addresses statutory conditions of work. In its brief in support of exceptions, the Respondent concedes that the EOIC addresses topics which include terms and conditions of employment as set forth in Section 2(5) of the Act. As the Respondent's house counsel told the EOIC at their meeting held on September 22, 1993, "Of course you're going to talk about terms and conditions of employment. That's what you've been established to do."

The Respondent, despite these concessions, asserts in its exceptions that the EOIC is not a labor organization for two principal reasons. First, the EOIC does not "deal with" the Respondent within the meaning of Section 2(5) of the Act. Rather, the Respondent maintains that the EOIC was a unilateral mechanism limited to brainstorming or information sharing that falls within the safe havens articulated in *E. I. du Pont* set forth above. Also, the EOIC does not make group proposals, but is a forum limited to ascertaining views of individual members of the EOIC, and hence cannot satisfy the "dealing with" criterion. Second, the Respondent contends that the EOIC does not represent other employees, which, the Respondent submits, is a necessary element for finding an employee group to be a statutory labor organization.

¹⁵ As the Respondent's house counsel told the EOIC at their meeting held on September 22, 1993, "The Company is paying for it, this is for [chief executive officer] Mac [Booth] as the customer, so we are clearly dominating in the legal sense. *That is, Polaroid Company is in charge.*" (Emphasis added.)

IV. DISCUSSION

A. The EOIC Meets the Statutory Criterion of Dealing with the Respondent

We agree with the judge's finding that the EOIC constitutes a statutory labor organization within Section 2(5) of the Act because it exists, in whole or in part, for the purpose of *dealing with* employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Contrary to the Respondent's exceptions and our dissenting colleague's contention, the record evidence establishes that the EOIC was not limited to a unilateral mechanism of brainstorming, information sharing, suggestion box, or survey of the employee population, by which the Respondent gained knowledge regarding its employees' preferences. Nor was the EOIC simply a mechanism by which the Respondent communicated information to its employees, or equipped selected employees to answer questions regarding existing policies or programs. The evidence establishes that the EOIC functioned, on an ongoing basis, as a bilateral mechanism in which that group of employees effectively made proposals to management, and management responded to these proposals by acceptance or rejection by word or deed. *E. I. du Pont*, supra, 311 NLRB at 894. See *Webcor Packaging*, supra, 118 F.3d 1122 ("dealing with" element satisfied by ongoing continuous bilateral interaction between employer and committee). Thus, even if, as the dissent contends, one of the purposes of the EOIC was information sharing, we find, for all the reasons set forth infra, that that was not the only purpose and that another, substantial purpose of the EOIC was to deal with the Respondent concerning conditions of employment.

The Proposals made by the EOIC

The record evidence does not support the Respondent's contention that the EOIC presented only proposals of its individual members, rather than group proposals. Rather, the record evidence clearly shows that the Respondent would often poll the group to determine majority sentiment on the particular issue under consideration. We have set forth above the Respondent's use of this technique with respect to EOIC consideration of the Respondent's medical benefits, termination policy, and ESOP disposition. In our view, the Respondent's practice of polling the group to ascertain the majority position of the EOIC, is tantamount to the group itself voting and presenting the majority view as its group proposal.¹⁶

The Respondent has presented no satisfactory explanation which reconciles its polling and recordation of EOIC group sentiment in order "to get a sense of where people are," with its contradictory assertion in its exceptions that the EOIC was a forum limited to ascertaining views of

¹⁶ The Respondent's internal polling of the EOIC must be distinguished from the "safe harbor" of an employer poll or survey that is distributed to the employee population generally. See fn. 5, supra.

individual employees. On the contrary, the testimony of the Respondent's own chief executive officer confirms that the Respondent polled the EOIC to determine "their position on an issue." As Booth testified at length:

Q. When you attended the meetings and you solicited individual views, did you try to compile those views somehow.

A. After listening to everyone's individual views, and they all . . . there was some commonality between some of the people. And we might have put them in some sort of order. . . . I think at times we might have said well, how many of you think we ought to give the 5 percent [ESOP money] back now. And raise your hands. And somebody would raise their hands and things like that. I—I do remember some process like that.

Q. But you did that because you wanted to see whether there were any common themes. Isn't that true?

A. Well I think when you're in a process where everybody is talking and—and free-wheeling discussion, that's sometimes helpful to me to get a flavor if there's any common thoughts [W]e asked at times, how many of you people think the same as Charlie here? or Sam here? And raise your hand. That would be the kind of poll we would take. Or we took It was helpful to me to—because it gave me a flavor—well, see—in those processes of—at times you might be saying, gee, that's a good idea. And then later someone is saying, gee that's a good idea. And I never knew that idea was better than the one before. So the only way to close on that was to ask if, do you think this is a better idea than that. And to raise your hands if you did.

Q. [Y]ou were trying to spot trends and clusters of ideas. That's what you were trying to do? Correct?

A. At that moment and time, yes.

Q. And you were trying to spot cross trends and clusters of ideas because you were trying to see whether there were any—there were any common threads in what the employees believed. Isn't that true?

A. They can go all over the place. And I try to find out, is there anything that many of them agree or disagree on.

Q. And that would be of more value to you, wouldn't it, if there were some certain things that a group could agree on?

A. I did that as a leader for the cub scouts. I mean that—that's the way I operate. That's the way I deal with groups like that.

Q. And why do you do it.

A. To try to see if—if at that moment and time, there's—that's *their position on an issue*.

Our finding that the EOIC made group, not individual proposals, is further supported by the evidence discussed above that the Respondent's officials consistently encouraged the EOIC to narrow its position to a limited number of alternatives. For example, Management Presenter Mitchell told the EOIC that 30 individual solutions (from the 30 EOIC members) to the ESOP question would be "organizationally dysfunctional." Instead, Mitchell "expect[ed] 5 or 6 alternatives . . . that would be viewed as essentially acceptable broadly by all 30 people in the EOIC." Similarly, EOIC Administrator Williams stated at an EOIC meeting that he is was "hoping" that as a result of "group discussion" the number of options would be narrowed to "2 or 3" that "seem to fit the most people."

We have carefully reviewed the record as a whole, including painstaking review of the videotape evidence, and we find that substantial evidence establishes that the Respondent operated the EOIC as a group, consistently polled or otherwise questioned the group to determine the majority view of the group, which effectively constituted the proposal of the EOIC, to which the Respondent thereafter responded by word or deed.

The Respondent's contention that the EOIC process did not effectively result in a group proposal is premised on two flawed analytical propositions. First, the Respondent suggests that a group proposal can only be achieved by unanimity. Groups can and do make proposals based on majority, rather than unanimous, view, however. And the record evidence establishes that, while directly engaged with the EOIC, the Respondent's management officials were consistently focused on determining that majority view. While the Respondent is correct that it did not require unanimous consensus, unanimity is not a requirement for a group proposal.¹⁷ The record evidence indeed establishes that the EOIC members understood that the majority view of the EOIC was tantamount to the "sense of the EOIC." The videotape of the September 21, 1993 meeting shows EOIC member Sherene Aram objecting to Management Presenter Mitchell's consistent search for the "sense" of the EOIC. Aram stated to Mitchell: "Please don't use the word sense of the EOIC, because we're not a consensus group. If you're going to say that, use the word majority opinion of the EOIC."

Second, the Respondent asserts in its brief that its consistent use of polling, and the gauging of the majority view, did not convert individual views into group views. As Aram testified:

Q. In one of the early meetings, you mention that you weren't supposed to reach consensus. Correct?

A. Yep.

Q. And that employees should, if they want to, say that it's a majority opinion of the EOIC.

¹⁷ Indeed, consensus is defined as both "unanimity" as well as "the judgment arrived at by most of those concerned." Webster's Third New International Dictionary (1981).

A. Yeah.

Q. And, in fact, at times during the meetings, was it said that, well this is the majority of how people feel.

A. I think it was a majority of the individuals felt this way.

We reject that assertion. In our view, polling individual viewpoints, or otherwise ascertaining the majority view, inherently constitutes a compilation of the collective “sense of where people are.” Simply stated, polling gauges group opinion. Indeed, that the EOIC process cannot reasonably be characterized as effectively producing other than group proposals was well stated by Chief Executive Officer Booth at the October 20, 1993 EOIC meeting:

I get so frustrated. Maybe . . . we shouldn't even work . . . these specific issues with this group—*because then I don't know how to do it as an individual thing.* [Emphasis added.]

In assessing the substantiality of the evidence supporting our conclusion, we have abided by the Supreme Court's instruction to take into account whatever in the record fairly detracts from its weight. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). We have thus carefully reviewed the videotape of the April 21, 1994 EOIC meeting concerning medical benefits, which shows five EOIC members presenting their individual “recommendation” regarding medical plans. However, this followed meetings with extensive group discussion, and the Respondent's recorded detailed poll of the EOIC as to medical benefits.¹⁸ We accordingly do not find that the presentations made on April 21, 1994, materially altered the Respondent's process of ascertaining the majority view of the EOIC. We have also considered the videotape of the October 20, 1993 meeting, which shows 15 individual EOIC members separately presenting their proposals as to how the Respondent should distribute the ESOP funds.¹⁹ These individual presentations were prefaced, however, by Sherene Aram explaining to Chief Executive Officer Booth that the proposals fall into three basic categories. Many presenters indicated which of the three categories they adhered to. Chief Executive Officer Booth and Vice President Leblanc on occasion “tested where the group is” on a particular point.²⁰ Following Booth's departure, the

¹⁸ Indeed, we note that even during the presentations on April 21, 1994, the management presenter responded at one point by stating, “If that's a common concern, there are ways we can smooth that out.” Aram testified that the presentations took approximately 10 hours.

¹⁹ The Respondent has specifically requested that the Board “review th[ese] videotapes independently, because the evidence shows the presentation of individual views.”

²⁰ Leblanc stated:

Mac made an assertion about where the group is . . . about the finances. I think we should just test that.

Booth: That a portion—30 million—should not be included?

EOIC member: Many of us have expressed that.

EOIC conducted a group critique in which many members protested that not all members had an opportunity to make an individual presentation. The meeting ended with EOIC Administrator Williams stating, “I regret that there was not an opportunity for everyone to express their opinion. . . . In the future, everyone will have an opportunity to express [his or her] view.” We have carefully searched the record, however, and we find no evidence of any subsequent EOIC meeting when each EOIC member made an individual presentation. The presentations on October 20, 1993, occurred after numerous meetings at which Chief Executive Officer Booth and Management Presenter Mitchell sought to ascertain the “sense” of the EOIC on specific ESOP issues, as we have set forth above, such as whether the “5 percent seniority reduction would come back.”

In sum, having carefully evaluated the entire record, we find that the weight of the evidence does not support the Respondent's contention that the EOIC members simply expressed their individual views on the topic under discussion.²¹ Substantial evidence supports the conclusion that the actual practice of the EOIC was to ascertain the majority view of the EOIC, and that the EOIC thereby effectively made group proposals to management.

B. The EOIC is a Bilateral Mechanism

The record further establishes that the Respondent's management responded to EOIC proposals by acceptance or rejection by word or deed, and therefore that the element of “dealing with” is satisfied. *E. I. du Pont*, supra at 894. Chief Executive Officer Booth specifically stated to the EOIC at the end of the October 20, 1993 meeting that he would “come back to this group and discuss solutions with you This is what I propose.” EOIC Administrator Williams confirmed that the actual practice of the EOIC was for the decisionmaker to return to the EOIC and announce the decision that had been made. Williams testified:

Q. And then with Mr. Booth, whoever the decisionmaker was, he would go back, take this input and probably come back at another meeting. Correct?

A. Right. And tell what his decision was.

The judge accurately summarized the operation of the EOIC as a bilateral mechanism with respect to medical benefits. The judge found:

²¹ Nor is the individual nature of the EOIC process established by written submissions of recommendations made by some—but not all—members on only two topics: ESOP and medical benefits. EOIC Administrator Williams specifically testified that the usual practice was for members to give their recommendation orally, and only “sometimes” by a written submission. Williams testified with respect to proposals, “They usually do orally. Sometimes they will support that with a written document.” We cannot assign controlling evidentiary weight to something that was not the standard method of EOIC operation.

EOIC proceedings with regard to health care coverage were particularly illustrative and significant of EOIC's function. The Company made proposals and EOIC members expressed agreement or made counter proposals (labeled as responses). The Company determined member sentiment, and urged members to reach collective positions. Management and EOIC discussed and sometimes modified their views in light of their respective arguments. After this procedure was completed, [chief executive officer] Booth announced the Company's decision on the matter at issue.

In internal publications to its work force, the Respondent repeatedly emphasized the significant input and influence of the EOIC on the decisions that were made by management.

The record does not support the Respondent's contention that the EOIC operated simply as a unilateral mechanism in which the group brainstormed a host of ideas, or shared information, from which the Respondent might glean some ideas, and might adopt some of them. It is true that the EOIC process commenced with what fairly may be characterized as a brainstorming or information sharing period. However, the EOIC process went far beyond this initial phase. Thereafter, the EOIC effectively made group proposals, and were urged on by EOIC Administrator Williams and the management presenters to refine and narrow their position in order to obtain the sense of the EOIC. The record further confirms that the Respondent pledged to respond to these proposals and in fact did so. The Respondent's "consideration of and action upon" the proposals of the EOIC constitute "dealing with" within the meaning of Section 2(5) of the Act. *Keeler Brass Co.*, supra, 317 NLRB at 1113, quoting *NLRB v. Cabot Carbon Co.*, supra, 360 U.S. at 213-214.²²

Nor can we agree with the Respondent's assertion that the EOIC is tantamount to a permissible "suggestion box" procedure. Such a procedure—which typically permits any employee to submit to management a proposal for consideration—cannot be construed as infringing employee free choice in selecting a representative to make proposals, because all employees remain free to participate. In the instant case, however, it is clear that only employees who are selected by the Respondent are permitted to participate in the EOIC process.

Based on our review of all the record evidence, we are compelled to conclude that the EOIC was operated so as "to create in employees the impression that their disagreements with management had been resolved *bilater-*

ally." (Emphasis in original.) *Electromation, Inc.*, supra, 309 NLRB at 998.²³

C. The EOIC Acted in a Representational Capacity

The record further supports the judge's finding that the EOIC acted in a representational capacity, contrary to the Respondent's exceptions. As discussed below, we find that the Respondent encouraged the EOIC members to communicate with other employees about issues under consideration by the EOIC and to report back to the EOIC on the sentiments of these employees. It is well established that such "back and forth" conduct between employees and members of an employee committee evidences a representational purpose.²⁴ *Electromation, Inc.*, supra, 309 NLRB at 997.

The videotape of the October 20, 1993 meeting shows that the Respondent's chief executive officer, Mac Booth, emphasized to the EOIC members the importance of obtaining the "thoughts" or the "flavor" of the Polaroid work force. Booth stated: "I wonder what some of the other thoughts would be out there . . . How to communicate whatever we do? How reflective a group like this—how representative of thoughts a group like this is versus the rest of the company?" When one EOIC member stated he felt they differed from other employees because of the extensive education they received about the ESOP, Booth responded: "That doesn't mean you can't help educate the rest, somehow." Booth continued:

If we keep using this group as a group to help in this . . . how are we collectively going to make sure we're getting all the right flavor? . . . All you folks work with other people. Sit down to have coffee with them. You absorb . . . from these discussions. . . . Is this reflective of what you think you hear?

Booth continued to stress the need to consider the sentiments of the Respondent's other 8000 employees: "I can relate to what you folks [the EOIC] talked about this morning . . . [We could] reach the point easily where we could agree. What I'm worried about is the other 8,000 employees, how they're going to feel, how to communicate it so that we do it well."

This emphasis placed on the need for input from other employees elicited the following response from an EOIC member:

Just the fact that I've been involved in this group and learned what I learned. I go back and talk to the people I work with. I've seen the shift in . . . attitudes about what we're doing here—what this ESOP is—I've seen that shift. *They start thinking we can't just*

²² Compare: *E. I. du Pont*, supra, 311 NLRB at 897 (respondent at lawful safety conferences sought only suggestions and ideas from employee participants and did not engage in subsequent extensive refinement, proposals, and responses).

²³ We do not adopt, however, the judge's finding that the EOIC process contained an element of coercion.

²⁴ The record, however, does not appear to support the judge's finding that the Respondent repeatedly indicated to employees that they should convey their views to the EOIC members. Rather, as discussed infra, the record shows that the Respondent stressed to the EOIC members that they should obtain the opinions of their fellow employees.

do this or that, because of the information I brought back. There's 30 people here—they all bring that information back—they all talk about it. I think that will happen through[out] the corporation.

Booth [addressing the group]: *You didn't hear that, did you?* [group laughter] *I'm just kidding.*

The EOIC member continued: I mean I absorb from what they [the employees] say. I bring that here. I think everyone else does too, and it works the other way too. [Emphasis added.]

Another EOIC member subsequently stated with great sincerity to Booth, "I'll take [you] up on your offer . . . I'll explain it to the rest of the employees . . . because I feel they need to have it explained to them . . . [ESOP] neutral-ity is a serious problem."

At one point in the October 20, 1993 meeting, Booth asked the EOIC for the views of their fellow employees with respect to cutbacks management was considering. Booth stated to the EOIC, "What I want to do is go around the room . . . [state the] things that you're hearing that we're [management] doing or thinking about as it relates to 1994." One EOIC member objected that "I do not believe we can do this lawfully" in light of the instructions given to the EOIC by house counsel Anne Leibowitz.²⁵ EOIC Administrator Williams advised Booth that "Anne [Leibowitz] has talked to them" about the issue of representational capacity. Booth responded, "*Who let her?*" followed by group laughter. Williams further advised Booth that "this comes right up to the line, no question about that, my advice is, this is what I have heard." Another EOIC member declared, "Last time, you were here, you [Booth] asked three or four times, 'Did other folks hear that?'" Following this discussion, the EOIC members in order sitting around the table answered the question posed by Booth. Thus, the videotape of this meeting documents that Booth encouraged the EOIC members to tell him what other employees were expressing and the EOIC members did so.

The videotape of the September 16, 1993 EOIC meeting further documents the intended interaction between EOIC members and other employees. Presenter Doug Mitchell, the Respondent's management expert who led the discussions on the ESOP asked how many EOIC members understood all the information that had been presented. Mitchell asked: "If you were going to have a conversation tomorrow with three or four people that you work with, about what you learned today, do you have enough information to do that?" Numerous members responded by describing their ability to explain the ESOP issue to fellow employees. One member stated:

This package of [agenda slides distributed by Mitchell] allows me to go out and talk to the people I

²⁵ That EOIC member stated, "When I looked at the stuff Anne gave us as caselaw, I am extremely worried about stepping over a bound."

work with, reasonably intelligently, so they and I can both understand it . . . If everyone had this information in front of them, [there would be] a lot less apprehension about the ESOP.^[26]

Management presenter Mitchell summed up by stating that about one-third of the EOIC members "feel comfortable that you can go have a conversation." Mitchell further expressed his concern to "start scoping out what the educational plan might be. . . . How do we take all this stuff and put it into a form that all 8,000 people can grasp? . . . It's a serious dilemma. . . . I don't know how to do that. I need help on that one."

The testimony of Sherene Aram, the only EOIC member to testify at the hearing, confirms the representational role of EOIC members. She testified:

Q. [D]id you ever approach an employee—and discuss with them, what the EOIC had been discussing?

A. Yes.

Q. And how many times did that happen, if you can recall?

A. Reasonably regularly. I mean, I—I work in a work group and I'm gone two days out of the week. People know I'm gone and they ask me what happened.^[27]

. . . .

Q. And when they expressed to you their concern, isn't that because—did they tell you that these are things that will affect them, that are being discussed in the EOIC.

A. No one's ever said that to me. *But if—you're talking about a benefit, it's obvious that it will affect all employees.* [Emphasis added.]

The record evidence thus establishes that employees "obviously" understood that the EOIC was addressing with management important employee benefits—such as the type of medical insurance offered and the distribution of millions of dollars of surplus ESOP money—that would affect all employees. The record also shows that EOIC members would speak "reasonably regularly"—as Aram testified—to other employees concerned about the EOIC's conduct regarding critical employee benefits, and would "absorb from what they [the employees] say" and "bring

²⁶ Other responses by EOIC members included:

I understand a lot of the information . . . To explain it to someone else . . . that's a problem . . . I'll only talk about it to other people when I'm sure [about it] . . . I won't try to fake it.

I'm sure I haven't learned enough in one morning . . . to say that I could be an expert out in the field and explain all these numbers to fellow workers.

I'm very comfortable with what I've learned this morning, and taking some of the information back if I was asked about it.

²⁷ The EOIC typically meets for 2 days approximately every 2 weeks.

that information back,” as the EOIC member explicitly stated to Booth at the October 20, 1993 meeting.

Indeed, the videotapes document the EOIC members referring to and considering the views of coworkers. For example, the videotape of the March 21, 1994 EOIC meeting regarding medical benefits shows Sherene Aram stating:

I’m going to talk to the one thing that I think is a real key issue in this which is what I’ve heard the reason why people think PHP [Polaroid Health Plus, the then existing medical plan] is valuable.

Another EOIC member stated at that meeting:

In talking with folks I find a lot of folks don’t realize that [one health plan costs Polaroid more than another]. . . . Folks will be angry if you make this change. Folks have said that they’re going to view it as a takeaway . . . I don’t agree with [management’s recommended] plan.

At the October 20, 1993 EOIC meeting one member explained to Booth:

I’m struck by the universality of employee sentiment in reaction to the imposition of the ESOP. To this day it goes pretty much like this, in quotes “I know the decision to create the ESOP probably saved this company, and I admit I would never have put away an amount remotely approaching the money in my ESOP [account], but I’m still mad about not being consulted. That just isn’t the Polaroid way.” End quote. What’s the learning from this? We are right to be up front about the [ESOP] neutrality issue and to begin communicating with employees ASAP.

Another EOIC member stated at that meeting with respect to the five percent reduction that “people feel that was taken from their pay.”

We recognize that the Respondent advised its employees in internal publications that the EOIC was not to act in a representational capacity. We find, however, that the probative value of this evidence is outweighed by the substantial evidence detailed above documenting that the Respondent’s most senior officials tacitly and openly encouraged the long-term EOIC members to obtain the views of fellow employees about issues the EOIC was considering.²⁸

Similarly, we acknowledge that the Respondent’s house counsel stated to the EOIC members at their September 21, 1993 meeting that it was “not their job . . . to go out and communicate to people and to bring communications

²⁸ Compare *NLRB v. Scott & Fetzer Co.*, 691 F.2d 288, 290, 294–295 (6th Cir. 1982) (continuous rotation of committee members for 3-month terms suggested that members acted as individuals rather than representatives). See *Webcor Packaging*, 118 F.3d at 1121.

back.” This message was equivocal, however, because she added that “hopefully” EOIC members will “talk to people in [their] office[s]” and when “buttonholed in the cafeterias,” and that if an employee “has a good idea, that good idea will make it to this forum.”

In sum, having carefully examined the record as a whole, we find that it supports the judge’s finding that the EOIC acted in a representational capacity.²⁹

D. The Additional Contentions of the Respondent and the Charging Party

The Respondent additionally contends that a finding that it violated Section 8(a)(2) with respect to the EOIC would prevent it from having any forum in which to encourage employer-employee communication and cooperation. We disagree. “[L]ogic and experience under the Act. . . dictate that not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act.”³⁰ Indeed, the record evidence here documents that the Respondent utilizes numerous other employee communication and involvement techniques, none of which are alleged by the General Counsel to be unlawful.

For example, the Respondent has a “yellow draft” program, in which a draft of a new policy is sent to employees in order to solicit comments. The Respondent utilized the yellow draft program with respect to subjects that were addressed by the EOIC, such as the Respondent’s policy regarding vacation benefits and employee transfers within the Company. The record documents the important role ascribed by the Respondent to the communication and information sharing obtained through the yellow drafts. One internal memorandum stated, “We have completed our evaluation of the yellow draft feedback [regarding work force rebalancing] sent to us by over two hundred and fifty members of the company. We believe that employees were very thoughtful in their comments and constructive with their suggestions.” The Respondent’s monthly news publication *Update* stated on another occasion:

We will be moving into 1993 with a new and improved pay plan, thanks to the extensive involvement

²⁹ We accordingly find it unnecessary to pass on the judge’s additional rationale that the Respondent’s operation of the EOIC to “reflect” the views of the employee population was tantamount to the EOIC acting in a representational capacity vis-à-vis the employee population.

In light of our findings, it is unnecessary to the disposition of this case to determine whether an employee group could be found to constitute a labor organization absent a finding that it acted as a representative of other employees. See *Aero Detroit, Inc.*, 321 NLRB 1101, 1102 (1996).

Member Brame observes that express statements by an employer that an employee committee is not a substitute for a bargaining representative and is not to act in a representative capacity, absent other contrary evidence as in this case, constitutes probative evidence in the 8(a)(2) context. See *Electromation*, supra, 309 NLRB at 1003 fn. 23 (former Member Devaney, concurring).

³⁰ *NLRB v. Scott & Fetzer Co.*, supra, 691 F.2d at 292.

of employees. Surveys were conducted throughout the company to determine ways to improve the plan. Your feedback was crucial to this effort.

The Respondent's management officials frequently initiate and conduct so-called "small group meetings" with employees on a variety of workplace and personnel topics. The Respondent's employees may likewise initiate requests for such small group meetings for their work area. As the Respondent's counsel stated at the hearing:

The company has a long history of having direct face-to-face meetings between senior management and small groups of employees on an ad hoc basis to get those employees' ideas, to share information with them and to find out what they think is going on within the company.

In addition, the Respondent conducts quarterly business meetings held throughout the company for all employees.

The record also shows that the Respondent operates a corporate employee communications office, which maintains numerous publications and programs providing extensive opportunity for employer-employee communication and involvement. These publications and programs include: *Update*, a monthly news publication; *Viewpoint*, an employee news magazine; *Polaroid Newslines*, with recorded news updated twice weekly; communications network representatives, who provide local and corporate news at Polaroid locations and whose contact telephone number is listed in the Respondent's publications; and a quarterly videotape that explains the Respondent's business plans and what it expects of employees. The Respondent additionally operates a confidential interact program, under which employees are free to submit a question or comment to officers or senior managers on any subject. Employees are also reminded in the Respondent's publications that "you can write, phone or request appointments with officers or senior managers." All these above-described programs are well publicized in publications to the work force, which also remind employees that they can contact the corporate employee communication office to speak with someone directly, and list a contact telephone number.

The record thus establishes that the Respondent maintains numerous employer-employee communication programs that are not challenged under Section 8(a)(2). We accordingly must deem meritless the Respondent's assertion that finding the EOIC to be a labor organization would prevent the Respondent from having any forum in which to encourage employer-employee communication and cooperation. Chief Executive Officer Booth indeed testified that he gets the ideas of employees in the company in "lots of forums. I don't rely just on the EOIC as my only vehicle to find that out."

We recite in detail the Respondent's programs, along with our earlier discussion setting forth "safe havens" to

underscore that Section 8(a)(2) "is not a broad-based ban on employee/employer communications"³¹ and that the Act does leave untouched a "wide range of lawful activities."³² Indeed, the variety of communication methods successfully utilized by the Respondent highlights "the difference between communication of ideas and a course of dealings" as embodied in the EOIC. See *NLRB v. Peninsula General Hospital*, supra, 36 F.3d at 1272. The Board is mindful of its responsibility to preserve this distinction "in order to ensure not only the protection of employees' Section 7 rights, but also the protection of legitimate employer-employee cooperative efforts." Id.

The Respondent additionally argues that its operation of the EOIC is protected under the First Amendment. In construing the NLRA, the Board is sensitive to First Amendment values. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 741 (1983). As the Supreme Court has instructed in *Cabot Carbon*, supra, however, a finding of an 8(a)(2) violation does not infringe First Amendment values:

Respondents argue that to hold these employee committees to be labor organizations would prevent employers and employees from discussing matters of mutual interest concerning the employment relationship, and would thus abridge freedom of speech in violation of the First Amendment of the Constitution. But the Board's order does not impose any such bar; it merely precludes the employers from dominating, interfering with or supporting such employee committees which Congress has defined to be labor organizations.

360 U.S. at 218.

The Charging Party asserts that the judge wrongly precluded her from presenting evidence in support of her request at the hearing for a broad remedial order. The Charging Party made an offer of proof in this regard at the hearing, and additionally presented evidence to the Board in her exceptions.³³

It is well established that a broad order is warranted only when a respondent "is shown to have a proclivity to violate the Act or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard

³¹ *Electromation, Inc.*, supra, 309 NLRB at 999 (former Member Devaney, concurring).

³² *Electromation, Inc.*, supra, 309 NLRB at 1004 (former Member Oviatt, concurring).

³³ The evidence sought to be introduced pertained to the Respondent's payments to members of the employees' committee, the circumstances surrounding the dissolution of the employees' committee, and the preliminary investigative findings by the Office of Labor-Management Standards regarding the propriety of the elections held for officers of the employees' committee. The letter of the investigatory findings is included in the record.

The record evidence further shows, as urged by the Charging Party, that the Federal court lawsuit brought against the Respondent by the Charging Party was dismissed for lack of standing.

for the employees' fundamental statutory rights." *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979). We have reviewed the evidence sought to be submitted by the Charging Party, and we find that it would not warrant issuing a broad order under the *Hickmott* standard.³⁴ We accordingly find that the Charging Party was not prejudiced by the judge's evidentiary ruling.³⁵

V. CONCLUSION

We have carefully examined all of the record evidence and find that substantial evidence supports the judge's finding that the EOIC is a statutory labor organization. As the Respondent concedes that it has dominated and supported the EOIC, we find, in agreement with the judge, that the Respondent has violated Section 8(a)(2) of the Act.³⁶

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Polaroid Corporation, Cambridge, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Substitute "May 24, 1992" for "November 24, 1992" in paragraph 2(b).

³⁴ The Charging Party has not cited a prior Board decision finding that the Respondent has violated the Act, and we are not aware of any such case.

³⁵ We further find that the judge did not err by approving the stipulation of the General Counsel and the Respondent to strike the majority of the Charging Party's testimony, in light of her failure to appear as a witness after the first day of trial, and the failure of her representative to attend the hearing on June 21 and 22, 1995, when the ruling was made. We do not adopt the judge's findings, however, that the Charging Party "intentionally avoided being cross-examined" and that she "demonstrated a propensity to editorialize rather than give facts, and to accommodate her testimony to what she believed was legally needed to make a case." We further observe that while there may have been some confusion at the last day of the hearing as to whether the judge requested a "physician" statement or a "position" statement to explain the Charging Party's absence, the Charging Party acknowledges in her exceptions that she did attend work on some days during the week of the hearing. We find it unnecessary to reopen the record to include the medical records appended to her exceptions, dated in November 1995, as requested by the Charging Party.

We have carefully reviewed the judge's conduct of the hearing and find that it does not support the Charging Party's contention in her exceptions that the judge was biased against her or her representative. We accordingly deny Charging Party's request for an additional hearing before another administrative law judge.

Finally, we find it unnecessary to adopt the judge's findings that no other employee joined the Charging Party's efforts to reconstitute the employees' committee as an independent union and that she was willing to continue the employees' committee as a company union provided that she was the person in charge.

³⁶ We further agree with the judge, for the reasons set forth by him, that the Respondent violated Sec. 8(a)(1) of the Act by using the critical process team to assist in creating the EOIC.

We shall modify the judge's recommended Order in accordance with *Excel Container*, 325 NLRB 17 (1997).

MEMBER BRAME, concurring.

As American businesses expand two-way communications with their employees, the scope of Section 8(a)(2)¹ becomes increasingly critical. Accordingly, in deciding whether a given management innovation falls within the prohibition of Section 8(a)(2) the Board must be measured in its judgment and precise in its language. In view of the lengthy majority decision in this case, the voluminous record and the issues raised by the dissent, I believe it is important to summarize what the Board has and has not held in its decision today.

I. BACKGROUND

A. Factual Background

The Respondent is a publicly owned company. In 1992 when this case arose, the Respondent employed approximately 8000 employees at a number of locations in Massachusetts and at least two other states.

By the late 1940s, the Respondent had established an employees' committee (EC). Its charter, adopted in 1950, stated that its purpose was to "provide a medium of determining the will of the employees on matters concerning their welfare and the welfare of the Company; to speak for employees on these matters in discussions with the management of the Company; [and] to serve as a medium for the interchange of information and opinion between the employees and the management." As of June 1992, the EC was composed of 25 employees elected for 3-year terms by employees from, respectively, their building and/or shift. These employees represented fellow employees in the Respondent's grievance procedure but also discussed and made recommendations to the Respondent concerning wages, hours, and working conditions. The Respondent responded to and sometimes adopted these recommendations.

In 1988, the Respondent established an Employee Stock Ownership Plan (ESOP) financed by 5-percent deductions from employees' wages in order to avoid issues concerning shareholder neutrality which might be raised by outside shareholders. The way in which the Respondent instituted the ESOP generated some employee resentment. By 1992, the deduction had generated a surplus no longer needed to finance the ESOP and the Respondent was considering what to do with that surplus. Also in 1992, the Office of Labor-Management Standards at the U.S. Department of Labor, prompted by an employee complaint, issued a preliminary finding that the EC was not in compliance with the law.

On June 18, 1992, Respondent's CEO, Booth, wrote a letter to company employees informing them that he had decided "to dissolve the Employees' Committee and reas-

¹ Sec. 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."

sign its roles and functions elsewhere in the corporate structure, effective immediately.” He explained that he felt the corporatwide elections for EC officers that would be required by the Department of Labor “would be disruptive, divisive and contrary to the collaborative heritage that we value at Polaroid and that we are striving to build into our Total Quality Ownership initiative.” He also noted among other things that he had been “advised by legal counsel that there are other irreconcilable problems with the way the [EC] is constituted.”

In his letter, Booth informed the employees that he was forming a critical process team (CPT) to examine existing company committees, including the EC, and make recommendations on organizational change, including “[w]hat institution or institutions, new or existing, can best meet our leadership advisory needs in the 1990s and beyond.” Booth noted that the EC had played an increasingly significant role on issues concerning pay, benefits, and policy and charged the CPT with recommending what structure “can best accomplish their functions in the future.” Booth cautioned, however, that “[a]ll recommendations from the [CPT] must be compatible with our corporate values.”

About a week after Booth’s letter, *Polaroid Update*, a periodic newsletter published by the Respondent for employees published an interview with Respondent’s vice president for human resources, LeBlanc. It quoted LeBlanc that having a union “would mean we would be heading in an entirely different direction from what we’ve been working toward.” He added that the Respondent was “working to establish a culture where all employees are increasingly having a direct say” and that it wanted to maintain the collaborative spirit of the EC.

On December 16, 1992, the Board issued its long awaited decision in *Electromation, Inc.*, 309 NLRB 990 (1992), in which it attempted to rationalize and articulate more fully the law on employee participation committees in nonunion settings. By letter to all employees dated January 28, 1993, Booth informed them that he had accepted the CPT’s recommendation to form an employee owners influence council (EOIC). Although he noted that EOIC members would be representing their own individual ideas, Booth also stated that it was essential that EOIC’s membership embody the broadest possible diversity of race, gender, culture, organizational level, opinion, and experience. “In this way, the voice of the EOIC can be taken to reflect the opinions held within the Polaroid community as a whole.” Booth added that “once issues have been decided, there is a responsibility to communicate to all employee owners, not only the recommendations and decisions made, but also the reasons behind them.”

All employees were urged to apply to become a member of the EOIC. In the membership application package, the Respondent stated: “The sum of the [EOIC] members’ opinions will be assumed to reflect the diverse views of

the Polaroid population.” At the same time, CEO Booth stated in an interview in *Update*, “I’m aware that they are not spokespeople for others and we can’t assume that they reflect the opinions of all other employees.”

As ultimately constituted, the EOIC consisted of 30 out of the Respondent’s approximately 8000 employees. They were selected by the Respondent from about 150 employees who applied. The employees were designated to serve, respectively, staggered 3-, 4- and 5-year terms. They attended meetings regularly for 2 days at a time approximately every 2 weeks during the period under scrutiny from August 1993 through 1994, meeting approximately 62 times in total. Issues discussed at these meetings included medical insurance benefits, the ESOP and family and medical leave. About 200 of these meetings were videotaped.² The Respondent made the videotapes available in the library for viewing by the entire work force. Additionally, *Update* featured information on the issues being considered by the EOIC and also informed employees that the videotapes were available in the library. All employees were welcome to attend EOIC meetings although employees who were not members were encouraged to speak only during the breaks.

After the initial orientation meetings in August 1993, the Respondent’s in-house counsel, Anne Leibowitz, spoke in September to the EOIC and explained that they were not expected to act in a representative capacity in the sense of making group proposals or acting as a conduit between management and the employees and vice versa. At the same time, she mentioned to EOIC members that employees would want to discuss the issues being considered by the EOIC with them, “hopefully” they would respond in kind and if an employee “has a good idea, that good idea will make it to this forum.” Similarly, although Leibowitz told the EOIC it was not expected to make group proposals, she broadly suggested that they could have a unanimous or majority recommendation and that individual recommendations would be of more interest to management if they were advocated by others as well.

B. Legal Background

The basic law applicable to a finding of a violation of Section 8(a)(2) is not in dispute. Thus where, as here, the employer concedes that it dominates the employee entity in question, the only question remaining is whether or not that entity is a labor organization. Under Section 2(5)³ of the statute, an 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)

² Sixteen of these video tapes have been made a part of the record in this proceeding.

³ Sec. 2(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.

these dealings concern terms and conditions of employment. Two of the three elements of this inquiry are easily established as to the EOIC. Indeed, the Respondent does not contest that its employees participated in the EOIC and that the EOIC considered matters that are terms and conditions of employment. Respondent, however, challenges the judge's finding that the EOIC "exists for the purpose, in whole or in part, of dealing with" the Respondent concerning terms and conditions of employment.

II. WHAT THE BOARD HAS DECIDED

The EOIC's nature can only be determined by examining how it actually functioned on a day-to-day basis. Fortunately, the record has ample evidence of its functioning including videotaped portions of EOIC meetings. The meetings were usually facilitated by the Respondent's organizational specialist, Rick Williams. As shown by videotapes, written agendas and other record evidence a management official would usually offer a proposal on an issue to the group. Respondent's senior managers or company experts would then brief the EOIC on the proposal in depth, and a debate ensued. Members were asked to propose criteria for solutions and then to propose solutions. The EOIC members submitted recommendations, in various formats, on the different issues proposed by the Respondent, which the Respondent then considered and either accepted or rejected.

The EOIC spent more time discussing health care coverage and the ESOP than any other issues. An examination of the EOIC's handling of the ESOP is particularly instructive.⁴

CEO Booth presented the question of what to do with the surplus money no longer needed to finance the ESOP to the EOIC, and it devoted about 70 to 80 hours to the problem. Mitchell, the Respondent's management expert on the subject, led most of the discussions. First, there was a lengthy phase during which the EOIC members were educated on the complexity of the problem. Then the employees were asked to propose criteria for solutions. After discussion, members were requested to and did submit proposed solutions.

During one videotaped meeting on the ESOP, CEO Booth told EOIC members of the importance of getting the "thoughts" or the "flavor" of the Polaroid work force. He wondered aloud "how reflective a group like this—how representative of thoughts a group like this is versus the rest of the company?" When told that they were not representative in that EOIC members were better educated on the problem, Booth responded, "[t]hat doesn't mean you can't help educate the rest, somehow." He continued to stress the importance of obtaining the sentiments of other employees. "What I'm worried about is the other 8,000

employees, how they're going to feel, how to communicate it so that we do it well." The discussion continued in this vein with employees agreeing with Booth about the importance of two-way communication on this complex issue.

Later in the same meeting, Booth expressly asked for the views of employees outside the EOIC on cutbacks the Respondent was considering. One EOIC member suggested that it might be unlawful for them to provide feedback from other employees, apparently referring back to the earlier briefing given them by the in-house counsel, Leibowitz. Booth responded, apparently in jest, "Who let her?" Ultimately, the EOIC members did respond to Booth's query about employee sentiments during this meeting.

At another meeting, Mitchell also stressed to the EOIC members that the ESOP issues were exceptionally complex and engaged them in a discussion of how best to educate the entire work force. He questioned the members about whether they had enough information to do that and numerous employees responded by discussing how they would educate others about the ESOP.

In addition to encouraging the EOIC members to educate and gauge the sentiments of other employees, the Respondent also frequently suggested to the members that a group or at least a majority recommendation from the EOIC was more desirable than a host of individual views. As shown by videotapes of the ESOP discussions, Mitchell repeatedly attempted to narrow down the number of views in the group on the five questions relating to the ESOP and to get a "fair reflection" of the "broadly acknowledged view" of the EOIC by summarizing what he felt was the sense of the group and then taking a vote on whether that was a fair articulation of "the sense of the group." Mitchell and Williams both repeatedly exhorted the group to narrow down solutions to "a few alternatives." The videotapes and written recommendations from EOIC members in evidence show that, upon completion of the deliberative process facilitated by Mitchell and Williams, most employees were in favor of some form of cash dividends for employees. This was duly communicated to the Respondent's management.

In early 1994, the Respondent announced its decision to issue cash dividends to employees on shares in their ESOP accounts. In a letter to all employees Vice President Parham stated that: "As you know, the [EOIC] members had a notable impact on [that] decision." Parham added that the EOIC had also exerted significant influence on other issues including pay and performance, family leave policy, and their "movement of people" policy.

As illustrated by the ESOP discussion, the facilitators repeatedly attempted to solicit not just the individual views of EOIC members but to have them reflect the opinions of fellow workers, and then to narrow the range of proposed solutions. Legal warnings against acting as representatives were juxtaposed with requests that EOIC members were to

⁴ The ESOP was a term and condition of employment inasmuch as it had been financed by 5-percent deductions from employees' wages and salaries and EOIC was asked to aid Respondent in dealing with a surplus resulting from the 5-percent deduction.

discuss the issues being considered by EOIC with fellow employees, glean their views and, in some fashion, reflect back these views. Thus while the Respondent's management stated in internal publications and even to the EOIC itself that it was not to act as a conduit, in fact these same officials emphasized in EOIC meetings both the importance of members communicating with other employees on a regular basis about the workings of the EOIC and the expectation that EOIC members take active roles in insuring that the Respondent was aware of the views of their fellow employees. In the face of Respondent's conflicting admonitions, the EOIC members in fact functioned as a conduit and transmitted the desired information back and forth. As one EOIC member testified, members would speak "reasonably regularly" to other employees about what was being discussed at EOIC meetings, "absorb from what they [the employees] say" and "bring that information back."

Once the EOIC had made its recommendations on the Respondent's proposal, the Respondent considered these recommendations and responded to them. Typically, in announcing resulting policy changes to all the employees, the Respondent stressed to the employees that input of the EOIC had been significant in management's decisions on these issues.⁵

In determining whether the Respondent's relationship with the EOIC constituted one proscribed by Section 8(a)(2), we must begin with the Supreme Court's decision in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959). After reviewing the legislative history of Section 2(5) which defines "labor organization," the Court recognized that the term "collective bargaining" is more narrow than the term "dealing with" found in the statute and concluded that the Congress purposely used this broader term in order to reach activities beyond the traditional practice of collective bargaining. *Id.*, at 211. In *E. I. du Pont & Co.*, 311 NLRB 893 (1993), the Board set forth further signposts for defining "dealing with" under the statute. First, relying on *Cabot Carbon's* holding that "collective bargaining" is in fact a subset of the broader concept of "dealing with," *E. I. du Pont* contrasts the two terms by noting that, unlike collective bargaining, "dealing" does not require the element of employers and employees seeking to compromise differences but encompasses any "bilateral mechanism" en-

tailing "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." *E. I. du Pont*, supra at 894. The decision further contrasts situations in which an employee group makes proposals to which the employer responds as a pattern or practice with those in which such instances are isolated or ad hoc, suggesting that the latter would not be unlawful.

The dissent, in effect, correctly recognizes that *E. I. du Pont* (as well as other cases such as the more recent *EFCO Corp.*)⁶ involved a situation in which the employee organization initiated the discussion of issues, whereas here the Respondent initiated the discussions. From that correct factual observation, the dissent draws the improper legal conclusion that the employee organization's initiation of the discussion is relevant to the determination of whether the employer is "dealing with" a "labor organization." It then reasons that the EOIC falls short of a labor organization because this practice is evidence that the EOIC is designed to fulfill the employer's purpose of obtaining information rather than the employees' purpose of presenting proposals to the employer on behalf of employees. Such an analysis fails on several counts. First, nothing in the statute, legislative history, or Board or court holdings so limits either term. Second, "dealing with" is a functional concept which turns on the type of interaction, rather than the identity of the initiator. Thus, the statutory question is whether the organization engages in a bilateral process whereby over time the parties discuss issues relating to terms and conditions of employment and the employees propose resolutions to the questions or problems discussed to which the employer responds. (Indeed, EOIC's proposals or recommendations were ultimately presented to Respondent.) Third, we would exalt form over substance if we held that discussions between the employer and the employer-dominated organization would be illegal if initiated by the organization but legal if it were initiated by the employer. A well counseled employer which established and dominated a suspect organization would surely have formal initiatives originate with the employer representative, thereby avoiding 8(a)(2) by the very practice that Congress sought to prohibit—an employer domination of the bilateral process.

Nor can the defining element of labor organization status be whether the employee group was created with the intent of undermining union organization. In this regard, the majority opinion correctly posits that the inquiry as to the "purpose" of an organization turns on what the alleged labor organization actually does—not its stated or pre-

⁵ Indeed, the Respondent had dissolved the EC with substantial reluctance and, as set forth above, the evidence strongly suggest that one of the Respondent's objectives in creating the EOIC was to continue many of the bilateral functions of the earlier EC while attempting to avoid its legal liabilities. Hence, for example, the organization's name and method of selecting members were changed and the grievance handling function was eliminated. Additionally, in creating and maintaining the EOIC, the Respondent's officials often gave lip service to what they understood to be the limitations placed on employee organizations by the Board's decision in *Electromation*, supra. Nonetheless, in practice Respondent persisted in using the EOIC as a bilateral mechanism to address terms and conditions of employment much as it had its predecessor, the EC.

⁶ 327 NLRB 372 (1998) (creation of safety committee by the employer found to be unlawful where it was ongoing and bilateral in that it was used by management to solicit the views of employees outside the committee, made recommendations to management on terms and conditions of employment, and management, in turn, responded to these recommendations).

sumed purpose—and such inquiry does not require a finding of specific antiunion motivation.⁷ Accordingly, the Board and the courts have long held that a labor organization need not be devised by the employer in bad faith in order to be found unlawful.⁸ By the same token, the fact that a group may have been created, in whole or in part, for the legitimate purpose of obtaining information and ideas from employees or imparting information to them, cannot insulate the organization from the statutory proscription if a review of its actual functioning shows that it in fact is continued with the purpose of “dealing with” the employer on terms and conditions of employment. Moreover, this argument on the Respondent’s behalf is particularly unavailing here as the judge in this case did affirmatively find that, in creating the EOIC, the Respondent was motivated, in part, by its opposition to the possible advent of an independent, outside union which it feared was more likely once it dissolved the EC.

In sum, on the evidence before us regarding the day-to-day functioning of the EOIC, the Board must accept the administrative law judge’s finding that the EOIC was an organization “dealing” with the Respondent concerning terms and conditions of employment. EOIC members were expected to spend nearly 2 days out of every 2 weeks for 3- to 5-year terms considering issues raised by management. Thus, the EOIC represented an ongoing “pattern or practice” of the Respondent rather than an ad hoc occurrence. See *Webcor Packaging, Inc.*, supra.⁹ Additionally, pursuant to management’s own instructions, EOIC members both reflected and represented their coworkers attitudes concerning the issues being discussed. In this regard, they were instructed to ascertain their fellow employees’ views and report back to management officials at EOIC meetings. See *Webcor Packaging, Inc.*, supra at 1121–1122, and *Electromation Inc.*, 35 F.3d at 1161. When the views expressed by the EOIC members were many and diverse, management’s facilitators urged and aided the EOIC members to narrow their recommendations which were then considered by the Respondent. These recommendations on issues such as health care coverage and the disposition of the ESOP surplus fall within the “wages, rates of pay, hours of employment, or conditions of work” which Section 2(5) uses to define the term “labor organization.” Also, the Respondent considered and responded to the EOIC recommendations and in communicating its decisions to the employees particularly

⁷ This is required by statutory language stating that an employee group is a “labor organization” if it “exists for the purpose” [emphasis added] of dealing with employer.

⁸ See, e.g., *Newport News, Shipbuilding & Dry Dock Co.*, 308 U.S. 241, 251 (1939); *Webcor Packaging, Inc.*, 118 F.3d 1115, 1122–1123 (6th Cir. 1997), and *Electromation, Inc.*, 35 F.3d 1148, 1167–1168 (7th Cir. 1994).

⁹ 118 F.3d at 1122 (court distinguishes *NLRB v. Scott & Fetzer*, 691 F.2d 288 (6th Cir. 1982), on the grounds that the committee found not to be a labor organization there lacked “continuous interaction between the employer and the committee.”). See also *Vons Grocery Co.*, 320 NLRB 53, 54 (1995).

decisions to the employees particularly stressed the significant role the EOIC recommendations had played in its decision making. See, *Webcor Packaging, Inc.*¹⁰ Accordingly, I do not believe that the Board’s decision on these facts expands established interpretations of Section 8(a)(2).

III. WHAT THE BOARD HAS NOT DECIDED

Our dissenting colleague argues that the mere fact that the Respondent desired to narrow down the recommendations of the EOIC to something less than 30 individual views, i.e., to a sense of the predominate view or views of the group, does not convert the EOIC into a statutory labor organization. Likewise, our colleague argues that the Respondent’s attempt to obtain through the EOIC the views of employees beyond those in the EOIC itself reflected the Respondent’s legitimate purpose of making management decisions that are informed by employee opinion and, in itself, did not render the Respondent’s conduct unlawful. He concludes that today’s decision restricts legitimate employer attempts to gather information or make more rational, informed decisions.

However, it was not the Respondent’s use of the EOIC participants to gauge employee attitudes by itself, but, as described in the previous section, it was the ongoing pattern or practice whereby the Respondent engaged in a bilateral course of dealing, with the same group of employees, and for well more than a year that rendered its conduct unlawful.

Nothing in the Board’s decision today forecloses the range of options long available to employers to communicate with, learn from, or inform employees or even to delegate management functions. Thus, an employer still possesses a multitude of unilateral mechanisms to elicit the views of its work force as a whole including suggestion boxes, surveys and general employee polls. See, e.g., *E. I. du Pont*, supra at 894. Similarly, employers possess a range of mechanisms which focus on smaller, select groups of their employees, including brainstorming sessions or focus groups, even though participants may be chosen to reflect employee demographics, as long as these groups are assembled as needed to communicate to employees or garner feedback. See, e.g., *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262, 1271 (4th Cir. 1994); and *E. I. du Pont*, supra at 894. In the same vein, surveys or polls which use random sampling and other sampling techniques to gauge work force attitudes remain lawful.

Additionally, the employer retains all currently lawful means of educating and informing its work force. Thus, meetings called by management to share or impart information are fully consistent with the Act. Moreover, nothing herein prevents an employer from training or educating a cross section of its work force on particular issues so

¹⁰ 118 F.3d at 1122 (court notes significant policy changes made as a result of the labor organization’s recommendations).

that they will, in turn, educate their coworkers. Likewise, as well demonstrated by the Respondent here, publications, videotapes, and designating offices or individuals to answer questions and serve as sources of information on relevant topics are among the many legitimate means available to employers to educate employees. See, generally *NLRB v. Scott & Fetzer*, supra at 292.

And finally, this decision does not circumscribe an employer's ability to delegate management functions, such as fact-finding, or grievance resolution, to an employee group. See, e.g., *John Ascuaga's Nugget*, 230 NLRB 275 (1977) (employee organization found lawful where it served only the adjudication function of resolving grievances but did not interact with management).

In short, today's decision does not restrict the current scope of lawful unilateral management activities. Rather, it should only serve to remind employers that the strictures of Section 8(a)(2) may not be avoided by changing the name, charter and formal structures of an employer dominated employee organization if it continues to serve as a bilateral mechanism to refine and present proposals to management, for management's action.

MEMBER HURTGEN, dissenting.

I conclude that the EOIC is not a labor organization under Section 2(5) of the Act. Accordingly, Respondent did not violate Section 8(a)(2) of the Act by its actions regarding EOIC.

An essential element of "labor organization" status is that the entity "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."

Thus, under Section 2(5), the inquiry must focus upon the *purpose* of the employee group. In this regard, I would distinguish between two purposes. If a group is designed to serve the purpose of making proposals to the employer, on behalf of employees, concerning employment-related concerns, I would conclude that the "purpose" element of Section 2(5) has been shown. On the other hand, if the group is designed to serve *the employer's* purpose of obtaining information and ideas upon which to make a management decision, I would conclude that the group is not a labor organization.¹

In essence, a labor organization is designed to express employee concerns to management (through proposals). If the employer interferes with the independence of the entity, Section 8(a)(2) is violated. By contrast, an employer may create an entity designed to obtain information and ideas *for its own purpose*, i.e., to use as a factor in employer decision-making. The employer's control of this mechanism is consistent with the fact that the mechanism is designed to achieve an employer purpose.

A group serving the latter purpose is not inimical to the aims of the Act. Employers must make decisions every

day, and many of these decisions involve the subjects listed in Section 2(5) of the Act. In a nonunion context (as here), the employer can make these decisions unilaterally. However, many employers find it useful to ascertain the views of their employees before making any final decisions. For, as many employers have found, employees can be intelligent sources of knowledge and experience. Clearly, an employer could go to each of its employees and ascertain his/her views. I believe that an employer can also use the more efficient method of going to a selected group of employees to ascertain employee views.

I conclude that EOIC falls into the second category of groups and is therefore not a labor organization. Significantly, the Respondent chose the topics to be discussed. That is, the Respondent had decisions to make regarding four subjects (family and medical leave, termination policy, medical benefits, and ESOP). It desired employee input as to these matters. The EOIC was the group that would provide that input. The employer would take that input, consider it with other relevant information, and make a decision.

In receiving employee input, Respondent did not necessarily want only one view. On the other hand, Respondent recognized that too many views would be awkward to assimilate in its decision-making process. Thus Respondent sometimes sought to winnow down the number of views, and on occasion would seek a majority position. In my opinion, this was consistent with the purpose of the group. Obviously, an employer decision-maker can assimilate one or a few views into its decision-making processes more easily than it can assimilate a large number of conflicting views.²

Further, I note that Respondent did not conceal the fact that EOIC was its creation, and that Respondent would control it.³ Concededly, those factors would establish an 8(a)(2) violation if EOIC were a labor organization. However, in the context of this case, these factors also show that the group was *an employer mechanism* designed to assist the employer in the making of employer decisions.

My colleagues make much of the fact that employees in the EOIC were asked to ascertain the views of their fellow employees. In my view, this does not alter the essential function of the group, viz., to give the employer information and ideas on which to base decisions. Obviously, the Respondent wanted to get a broad spectrum of information and ideas. By having EOIC members transmit the views of others, Respondent was better able to achieve its purpose.

Finally, the EOIC was not presented to employees as a surrogate or substitute for a union. Nor was it presented to employees as a surrogate or substitute for a union. As discussed above, EOIC was a mechanism to serve em-

² Contrary to the suggestion of my colleagues, I have taken into account all of the record evidence, including what the EOIC does.

³ Respondent has readily conceded in this proceeding that it created and dominated EOIC.

¹ See *E. I. du Pont & Co.*, 311 NLRB 893, 894 (1993).

ployer ends. I do not believe that employees would reasonably regard EOIC as “the union.” My colleagues have done an admirable job of trying to fit the EOIC into the legal definition of a union. However, at bottom, that view does not comport with real perceptions at the work place.⁴ Nor does it satisfy the “purpose” element of Section 2(5) of the Act. And, pragmatically, that view fails to allow employers to efficiently use their most important resource, the people who work for them. I believe that the Act can and should accommodate a mechanism by which employers can use their most important assets, their employees, in the making of employer decisions. Where, as here, that mechanism does not interfere with Section 7 rights, I would not condemn it.

Response to Concurring Opinion

The concurring opinion begins the analysis of my dissent by saying that I have drawn an “improper legal conclusion.” The assertedly “improper” legal conclusion is that “the employee organization’s initiation of the discussion is relevant to the determination of whether the employer is dealing with a ‘labor organization.’” I do not agree that the legal conclusion is improper. Surely, the fact that the employee organization initiates the discussion with the employer is at least a relevant piece of evidence indicating that the organization wants to deal with the employer on behalf of the employees. However, in the instant case, the exact opposite is true—the employer initiated the discussion. Surely, this is, at least, a relevant piece of evidence indicating that the employer intends to use the organization for his own purposes, viz to gather information to assist in the making of employer decision.

The concurring opinion also states that “the defining element” of labor organization status is not whether the employee group was created with the intent of undermining union organization. I agree that there is no one defining element of labor organization status. The Board must consider all the circumstances. However, contrary to the concurring opinion, I believe that one such circumstance is whether the employer presented the organization to employees as a surrogate or a substitute for a union. The fact that Respondent did not do so here is simply one of many circumstances that are consistent with the proposition that the organization here was designed to serve an employer purpose.

In sum, the concurring opinion’s discussion of my dissent is based on incorrect premises. It follows that the ensuing discussion, based thereon, is similarly flawed.

⁴ My colleagues point to a statement in *Electromation*, 309 NLRB 990 at fn. 27, that employee perception of an employee committee is not “a significant element in evaluating its lawfulness.” Even if the statement is correct, I believe that reasonable employee perceptions of the committee are at least an *element* in evaluating whether the committee is a labor organization. The statute, after all, is designed to protect employee rights. Thus, I would not ignore employee perceptions.

Avrom J. Herbster, Esq., for the General Counsel.
Scott Moriearty and Robert Buhlman, Esqs., of Boston, Massachusetts, for the Respondent.
Kenneth B. Krohn, Ph.D., of Cambridge, Massachusetts, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. These consolidated cases were heard at Boston, Massachusetts, on June 19–23, 1995. The charge and amended charge in Case 1–CA–29966, the charge and amended charges in Case 1–CA–30063, and the charge in Case 1–CA–30211 were filed respectively on November 24, 1992, May 13, 1993, December 24, 1992, May 13 and November 12, 1993, and February 16, 1993, by Charla Scivally, an individual. The consolidated complaint, which issued on September 15, 1994, and was amended at the hearing, alleges that Polaroid Corporation (Respondent or the Company) violated Section 8(a)(1) and (2) of the National Labor Relations Act. The gravamen of the complaint is that the Company allegedly unlawfully: (1) dominated, interfered with, assisted, supported, and dissolved a labor organization known as Employees’ Committee (EC); (2) dominated, interfered with, assisted, and supported a group of employees known as employee advocates, who individually and collectively comprised labor organizations within the meaning of the Act; (3) informed employees about its plans to replace EC with another employee participation committee, and used an employee entity known as the Critical Process Team to create another labor organization known as Employee Owners’ Influence Council (EOIC); and (4) dominated, interfered with, assisted, and supported EOIC, and has continued to do so. The Company’s answer denies commission of the alleged unfair labor practices except, as will be discussed, with respect to EC. The answer further asserts in sum, by way of affirmative defense, that allegations of the complaint are time barred, defective, or addressed to constitutionally protected free speech.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. By ruling and order dated May 14, 1996, I rejected Charging Party Scivally’s contrary contention, in part for reasons which I gave at the hearing. The General Counsel, Scivally, and the Company each filed a brief. The Company also submitted proposed findings of fact. On the entire record in this case,¹ and from my observation of the demeanor of the witnesses, and having considered the briefs and proposed findings submitted by the parties, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a Delaware corporation with a principal office and place of business in Cambridge, Massachusetts, is engaged in the manufacture and distribution of instant photographic equipment and other imaging products. In the operation of its business, the Company annually sells and ships products valued in excess of \$50,000 directly from its Cambridge facility to points outside of Massachusetts. The Company admits, and I so find, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

¹ By my ruling and order dated May 14, 1996, I directed that the stenographic transcript of proceedings be corrected in certain respects.

II. THE LABOR ORGANIZATION INVOLVED

The Company admits that until June 18, 1992, EC was a labor organization within the meaning of Section 2(5) of the Act. The complaint alleges and the answer denies that employee advocates, individually or collectively, and EOIC were or are labor organizations within the meaning of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background, the Employees' Committee (EC), and Dissolution of EC

The Company has some 8000 employees in the United States, most of whom work in the greater Boston area. Since 1986, Israel MacAllister Booth, known as "Mac" Booth, has been company chairman, president, and CEO. In 1988, the Company established an Employee Stock Option Plan (ESOP). As of the present hearing, the employees owned an aggregate of 20 percent of the Company's stock. The Company sometimes refers to its employees as "employee-owners" or "members." However at the hearing, the Company conceded that such terms are synonymous with employees. As indicated, the Company admits that it is an employer under the Act. The Company's shareholding nonsupervisory employees are employees within the meaning of the Act, and entitled to the protection of the Act, including Section 8(a)(2). See *Science Applications Corp.*, 309 NLRB 373 (1992); *Upper Great Lake Pilots*, 311 NLRB 131, 132 (1993).

In the late 1940's the Company's founder and then Chief Executive Edwin H. Land established the EC. By 1950, EC had adopted a charter which declared that its purpose was to "provide a medium of determining the will of the employees on matters concerning their welfare and the welfare of the Company; to speak for employees on these matters in discussions with the management of the Company; (and) to serve as a medium for the interchange of information and opinion between employees and the management." In 1983, the charter was revised to declare EC's purpose "to foster at Polaroid an ideal working relationship among employees at all levels of responsibility within Polaroid, by being involved in the initiation, formation, interpretation and application of all company policy, practices and benefits affecting employees." The charter also provided that EC representatives could represent employees in Polaroid's grievance procedure, known as PP-810.

Regular employees (as defined by company policy), except those with disciplinary responsibilities, were eligible to serve as EC representatives. Members were elected for 3-year terms, by secret ballot, from the building and/or shift to which they were assigned. The EC in turn, elected a chair, vice chair, and coordinators. (The charter contained special provisions for reelection of committee members and officers.) As of June 1992, there were 25 EC representatives.

The EC could and did, make recommendations to management concerning Company policies, practices and benefits affecting employees. The EC also discussed and made recommendations concerning wages, hours, and working conditions. The Company considered and sometimes implemented such recommendations.

The Company's grievance procedure (PP-810) provided for informal discussion, and failing resolution in that manner, a 5-step formal appeal procedure, culminating in final and binding arbitration as the fifth step. The first four steps comprised review, respectively, by the department manager, division manager, the Company's personnel policy committee, and the company president. Most nonsupervisory employees could utilize the formal appeal procedure. EC representatives were available to assist

grievants in preparing and presenting their cases. PP-810 provided that such assistance was customary, and most grievants requested assistance from an EC representative. However, grievants could call upon any other company member to help them, and could retain an attorney at the arbitration stage.

It is undisputed that during the 10(b) period pertinent to EC (May 24 to June 18, 1992), the Company continued to render assistance and support to EC by completely financing the full-time positions of EC representatives and officers, EC's clerical salaries, supplies, and other expenses, paying all internal election expenses, and permitting EC to use the Company's facilities and equipment without charge. The Company also agreed to the number of EC positions to fund. The Company spent about \$2 million per year on EC.

On February 5, 1992, Charging Party Scivally, then a Company employee, was elected as an EC representative. At that time, William Graney and Vincent Tognarelli were chair and vice chair respectively, of EC.² Scivally filed a written protest with EC, challenging the most recent elections of Graney and Tognarelli, in sum, on the ground that they were not EC representatives at the time of such elections, and therefore were ineligible to serve as EC officers. On March 25, Scivally filed an amended protest, based on the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA). EC voted to reject both protests.

On May 4 and 20, Scivally filed a complaint and amended complaint, respectively, with the Department of Labor, alleging that the elections of Graney and Tognarelli violated Section 401 of Title IV of LMRDA. On June 11, the office of Labor Management Standards of the U.S. Department of Labor (OLMS) issued a preliminary finding that EC's elections did not comply with the provisions of LMRDA governing a "labor organization" as defined in LMRDA.

By letter dated June 18 to all company employees, CEO Booth announced his decision "to dissolve the Employees' Committee and reassign its roles and functions elsewhere in the corporate structure, effective immediately." Booth explained his belief that companywide elections for EC officers (as required under LMRDA) would be disruptive, divisive, and contrary to the collaborative heritage that we value at Polaroid and that we are striving to build into our Total Quality Ownership initiative." Booth added that he was "advised by legal counsel that there are other irreconcilable structural problems with the way the (EC) is constituted." Booth testified that he dissolved EC because EC was an elected body that was representing people, and "we wanted to make sure that we didn't make a mistake again."

The General Counsel and the Company stipulated that on or about June 18, Booth disestablished EC. At subsequent points in this Decision, I shall refer back to Booth's June 18 letter. As will be discussed, the complaint alleges that by this and subsequent communications to employees, the Company violated Section 8(a)(1), in that the Company informed employees about its plans to replace EC with another employee-participation committee, by which employees would advise the Company on issues or wages, benefits, and other terms and conditions of employment.

On June 19, Booth met with the former EC representatives and discussed disestablishment of EC. Booth also met with certain managers for the same purpose, and some former EC representatives attended. Both also sent a letter to OLMS advising that he had dissolved EC.

² All dates in this sec. III,A are for 1992, unless otherwise indicated.

Charging Party Scivally testified that she was present at the June 19 meetings. She was the only witness to testify concerning those meetings. Her testimony was rambling and confused. However, the substance of the remarks which she attributed to Booth was as follows: He said he was going to dissolve EC. He said EC was going to leave a vacuum in the Company. He reminded those present about the rubber union that tried to organize the Company in 1971. He was concerned about the vacuum that was being left. Booth said he'd let the fox in the chicken coop, and he wanted to make sure that didn't happen again.

For reasons which will be discussed, I credit Scivally's testimony, in that it probably reflects the substance of part of Booth's remarks. Booth may have used slightly different phraseology, but Scivally probably captured the essence of what Booth was saying.

On June 24, Graney and Tognarelli filed a "Terminal Report" with OLMS, notifying the Department of Labor of EC's disestablishment. (At the present hearing, charging party conceded that EC was disestablished as of that date.) Scivally contested Booth's authority to dissolve EC, and authority of Graney and Tognarelli to file the Terminal Report. On July 16, OLMS notified Scivally that because EC was dissolved, EC was no longer a viable entity, and no meaningful remedy could be effectuated concerning the alleged election violations. Therefore, OLMS was closing its file on the matter.

In July, Scivally filed a complaint in the United States District Court for the District of Massachusetts, alleging in sum that EC should not have been dissolved, and, in five RICO counts, that she and other employees had been damaged by the Company's support of EC. On June 8, 1993, the District Court dismissed the complaint, except insofar as the Court remanded Scivally's claims against the Department of Labor, with instructions to reconsider its decision not to pursue her administrative complaint. The Department did so, and reaffirmed its earlier decision. Scivally did not further challenge that decision. On April 15, 1994, the United States Court of Appeals for the First Circuit affirmed the Decision of the District Court.

Meanwhile, on or shortly after June 22, 1992, Scivally distributed a petition among the employees, which in sum called for reconstituting EC as an independent union, free from company domination or support, but with Scivally as temporary "sole administrator." No credible evidence was presented which would indicate that any other employee or employees joined with or supported Scivally's endeavors in this regard. By letter dated June 29, to CEO Booth, Scivally proposed to continue the EC "on substantially the same basis as previously through creative accounting." It is evident that Scivally was willing to continue or revive EC as a company union, provided that she was the person in charge.

At the present hearing, the Company admitted that as alleged in the complaint, the Company dominated and interfered with the formation and administration of EC, a labor organization, and rendered unlawful assistance and support to EC, all in violation of Section 8(a)(2) and (1) of the Act. The Company agreed to submit to summary judgment. I granted summary judgment on the complaint allegations pertaining to EC, and indicated that I would recommend appropriate relief, if warranted, in my decision and recommended order in the consolidated case.

On the first day of this hearing, Charla Scivally testified as a witness for the General Counsel and the Charging Party. Thereafter, she failed to show up for cross-examination. Her representative asserted that she was ill. He proposed no alternative date

or time when she could complete her testimony. Pursuant to stipulation of the parties, approved by me, Scivally's testimony was stricken, except for her testimony concerning the June 19 meetings. I also permitted the Company to introduce portions of her affidavits in evidence.

At the close of the hearing, I requested Charging Party's representative to furnish a physician's statement concerning the reasons for her absence. He provided only his own statements, and an unsigned form pertaining to hospitalization in November 1995, i.e., nearly 5 months after the hearing. The Company offered to present evidence that Scivally was at work on some days during the week of hearing.

I find that Scivally intentionally avoided being cross-examined at the hearing. Even absent cross-examination, she did not impress me as a credible witness. Scivally demonstrated a propensity to editorialize rather than give facts, and to accommodate her testimony to what she believed was legally needed to make a case. However, although CEO Booth was presented as an adverse witness for the General Counsel, he did not testify concerning what he said at the June 19 meetings. Therefore, with the qualifications indicated, I have credited Scivally's testimony concerning the meetings. The significance of the June 19 meetings, and Scivally's activities, will be discussed in the section of this decision dealing with the Critical Process Team and alleged unlawful company statements.

B. The Employee Advocates (EA's)

1. The Facts

The material facts pertaining to the Employee Advocates are undisputed.

After EC was dissolved, all of the former EC representatives and officers, including Scivally, numbering 25 in total, were resigned to a new position created by the Company called "Employee Advocate." Employee Advocates (EA's) were each assigned to the Human Resources division where each reported to a Human Resource Director within that division.

At the time EC was dissolved, its members were involved in a number of grievances for certain employees, in accordance with PP-810. The EA's, including Scivally, continued to represent employees in those grievances which they were handling at the time EC was dissolved.

Company employees could also choose to be represented by an EA in any new individual grievance. When asked to do so by that employee, EA's would discuss and attempt to resolve grievances with the employee's supervisor and grievances were, on occasion, resolved in this manner.

When asked to do so by the employee, EA's would represent the employee during any and all of five steps of the formal grievance procedures set forth in PP-810, and grievances were resolved through the step 5 process in the course of this representation. As before, the employee was free to call on any other member of the Company to help prepare and present the case; the Personnel Administrator was at the member's service and the employee could choose to be represented by an attorney at step 5.

In situations involving possible discipline the employee was informed that he or she could have the assistance of an EA. The EA could invoke the status quo, subject to reversal by a Company officer.

The Company continued to pay the salaries of the former EC representatives and officers who became EA's. All of the supplies and materials used by the EA's were supplies and materials of the Human Resources Division furnished by the Company.

Prior to dissolution of EC, its representatives or officers some times worked together in processing grievances, and sometimes assisted in processing class grievances. However, the EA's were restricted to acting individually in processing grievances, and could process grievances only on behalf of individuals. In all other respects concerning grievances, EA's functioned in the same manner as the former EC representatives.

EA advocacy work took precedence over the EA's other job duties. However, beginning on June 18, 1992, the day the EC was dissolved, the Company offered EA's opportunities for job placement and skills training in career fields within the Company unrelated to any grievance processing function, and encouraged EA's to seek new job placements.

In February 1993, the Company requested that Scivally not attend EA group meetings, assertedly because her pending litigation placed her in an adversarial position. However, the Company permitted Scivally to continue serving as a EA, and told her she would be kept informed concerning the meetings. Scivally continued to function as an EA until assigned to another job, with a pay increase.³

As of January 1, 1995, all former EA's had been reassigned to permanent or temporary new positions. The function of Employee Advocate was abolished and no longer exists at the Company. The Company has since utilized a dispute resolution system, which is not a subject of this proceeding.

2. Analysis and Concluding Findings

Employee Advocates, insofar and to the extent that they performed their functions as such, plainly did so under Company dominance, and at the company's sufferance, and were dependent upon Company assistance and support. As discussed, the Company established and set up rules for the EA procedure, determined and designated who would be EA's, and eventually terminated the EA system. EA's reported to the Company's Human Resources directors. The Company conducted periodic meetings for EA's, unilaterally excluded Scivally from such meetings, and instructed EA's concerning limitations on their functions. The Company continued to pay their salaries, and provided their supplies and materials. Such conduct constitutes domination and interference within the meaning of Section 8(a)(2). See *Reno Hilton*, 319 NLRB 1154 (1995). In its brief, the Company does not contend otherwise. Rather, the Company argues that Employees Advocates did not either collectively or individually, constitute a labor organization or labor organizations under the Act.

As indicated, General Counsel argues in the alternative, that each Employee Advocate constituted a labor organization. The cases discussed by the parties in this regard, involved situations in which an individual sought certification as collective bargaining representative. See, *Legal Services for the Elderly Poor*, 236 NLRB 485 (1978); *Grand Union Co.*, 123 NLRB 1665 (1959), enf. denied sub. nom. *Schultz v. NLRB*, 284 F.2d 254 (D.C. Cir. 1960). I find it unnecessary to decide whether each individual EA did or could constitute a labor organization. For the reasons now discussed, I find that Employees Advocates constituted a "agency" or "plan" in which employees participated, and which

existed in whole or part for the purpose of dealing with the Company concerning grievances. Therefore, Employee Advocates was a labor organization under the Act.

The Company contends that Employee Advocates materially differed from grievance handling under the EC, because (1) each EA acted individually in processing grievances, and (2) the EA's could process grievances only on behalf of individual employees. Those are differences without any material distinction in law. In terms of the Acts history, that has literally been true since the year one.

In *Pennsylvania Greyhound Lines*, 1 NLRB 1 (1935), aff'd, 303 U.S. 261 (1938), the Board's first reported decision, the Board, with Supreme Court approval, held that a "Joint Reviewing Committee" established by the employer, was a labor organization in that it constituted a "plan," which "like other employee representation plans" was obviously designed primarily, if not solely to handle individual employee grievances, rather than to provide an avenue for collective bargaining." (1 NLRB at 12-13). Therefore, as the committee was management controlled, the employer violated the Act by establishing and maintaining the committee. The Supreme Court in affirming the Board, specifically pointed out that the committee "functioned only to settle individual grievances." (303 U.S. at 269).

In the recent case of *Keeler Brass Co.*, 317 NLRB 1110 (1995), the Board again applied the principle of *Pennsylvania Greyhound Lines*. The Board held in sum, that the employer violated Section 8(a)(2) by dominating a "Grievance Committee," including employees, which made recommendations to management concerning resolution of individual and other employee grievances. The Board concluded that the Grievance Committee thereby engaged in "dealing" with the employer, within the meaning of Section 2(5). The Board distinguished its earlier decisions in *John Ascuaga's Nugget*, 230 NLRB 275 (1977), and *Mercy-Memorial Hospital Corp.*, 231 NLRB 1108 (1977), on the ground that in those cases, the employer delegated to employee committees, authority to "definitively resolve grievances without dealing with management." (sl. op. at 5). That distinction would also apply to the present case. Here, unlike *John Ascuaga's Nugget* and *Mercy-Memorial Hospital Corp.*, Employee Advocates had no authority to adjudicate grievances. Rather, EA's represented employees in the grievance procedure, and attempted to resolve grievances with management, which at all stages except the final arbitration stage (step 5, which historically was seldom involved) made the decision. Employee Advocates thereby engaged in "dealing" with the Company concerning grievances.

As indicated, the Company attaches significance to the fact that EA's acted individually rather than collectively in representing employee grievants. That factor is immaterial. Union stewards may also act individually in presenting grievances, but this does not render their union any less of a labor organization under the Act. Moreover, the alleged distinction is misleading. Employee Advocates acted collectively in that they functioned under management supervision, and pursuant to rules and procedures established by the Company. The Company also conducted periodic meetings for EA's.

The Company also attaches significance to: (1) the proviso to Section 8(a)(2) that "an employee shall not be prohibited from permitting employees to confer with him during working hours without loss of pay"; (2) the *Legislative History* regarding that proviso; and (3) the *Weingarten* doctrine, under which employees have a Section 7 right to refuse to submit, without union repre-

³ Scivally filed an unfair labor practice charge with respect to her exclusion from the EA group meetings. The Board's Regional Office declined to proceed on the charge, and that determination was affirmed by the Board's General Counsel. In May 1994 the Company discharged Scivally. She filed a charge over her discharge, but the Regional Office also declined to proceed on this charge.

sentation, to an interview by employer representatives that the employee reasonably fears may result in discipline (*NLRB v. J. Weingarten*, 420 U.S. 251 (1975)).

The Company's reliance on the above authorities is misplaced. Insofar as pertinent to the present case, the proviso to Section 8(a)(2) simply means that when an employee or employees, including an employee's chosen employee representative, meet and confer with their employer, the fact that they do so on their paid working time, does not in itself constitute unlawful domination, interference or support within the meaning of Section 8(a)(2). The *Legislative History* so makes clear. See, in particular: Comparison of S. 2926 and S. 1958, reprinted in *I Legislative History of the National Labor Relations Act, 1935 (Leg. Hist.)* at 1353 (G.P.O., 1949); *II Leg. Hist.* at 1780 and 2041 (remarks of Senator Wagner; *House Conference Rept. No. 510, on H.R. 3020*, reprinted in *Legislative History of the Labor Management Relations Act, 1947 (G.P.O., 1948)*; and *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 217–218 (1959). The same is true of the *Weingarten* doctrine, regardless of whether that doctrine applies in a non-union setting.

The proviso to Section 8(a)(2) protects the right of employees to confer with their employer and, if they wish, to be accompanied by an employee of their own choosing. However, the proviso does not immunize an employer who establishes an employer-dominated structured system, in which employees participate, for the purpose of processing grievances through dealing with the employer. If it did, as suggested by the Company, then the proviso would largely nullify the proscription of Section 8(a)(2). Such a result would be contrary to the intent of Congress, and Supreme Court decisions interpreting that section, specifically, *Pennsylvania Grayhound Lines*, *supra*, and *NLRB v. Cabot Carbon Co.*, *supra*.

As indicated, the Company's PP-810 grievance procedure permitted grievants to call upon non-EA's to help prepare and present their cases. However, the Company made clear that it was "customary" to use an EA. The Company also limited non-EA's in performing their functions. Non-EA representatives, unlike EA's, could make inquiries or presentations on behalf of the grievant only with the grievant present. Also, only an EA could invoke the status quo on behalf of the grievant. It is evident that the Company made clear that it preferred that prospective grievants use EA's, and that such grievants had good reason to believe that their chances for success would be considerably improved if they sought assistance from EAs. Therefore, it is not surprising that most grievants sought assistance from EAs, as they previously did from EC representatives. In sum, the Company predictably coerced prospective grievants both to use the PP-810 procedure, and to seek assistance from EA's in doing so.

For the foregoing reasons, I find that Employee Advocates was a labor organization within the meaning of the Act, and that the Company violated Section 8(a)(2) and (1) by establishing, controlling, and supporting Employee Advocates.

C. The Critical Process Teams (CPT) and Alleged Unlawful Company Statements

In CEO Booth's letter of June 18, 1992, he informed the employees of his decision "to create a Critical Process Team with Ower Gaffney (then company group vice president) serving as its leader." The purpose would be to consider "What institution or institutions, new or existing, can best meet our leadership advisory needs in the 1990's and beyond." Noting that members of EC "have had an increasingly significant influence on issues of

pay, benefits, policy and practice during the past decade," Booth asserted that the CPT would examine EC and other existing and proposed company committees, "and recommend what structure can best accomplish their functions in the future." Asserting that "we must have company-wide participation in finding the answer, Booth proposed a CPT membership of 12 to 15 people," drawn from all levels and organizations within the Company. The CPT would hold open meetings throughout the Company "to gather the thoughts and suggestions of all who wish to contribute to this important change process."

Booth further asserted that although management bore final responsibility for making final decisions and the impact of those decisions, "as employee—owners, you have a right to participate in the design of these and other institutional changes." Booth stated that CPT members would be chosen by a nominating committee. He urged employees either to volunteer to serve on the CPT, or to participate in the "data gathering forums" conducted by the CPT.

By letter dated June 24, Vice President Gaffney invited all employees to volunteer to serve on the CPT. Nonofficer employees who served on the step 3 (personnel policy committee grievance panel under PP-810) would select the CPT membership. He reiterated CEO Booth's intention that the CPT would "advise him on what committee(s) or team(s) would best serve Polaroid by providing advice and counsel to Polaroid's leadership on matters of pay, benefits, policy and practice." As indicated, Booth used similar language in describing the function performed by EC. Gaffney opined that "this can be a powerful exercise of our rights and responsibilities as owners to be architects of Polaroid's future."

Polaroid Update (Update) is a periodic newsletter published by the Company and distributed to its employees. In the June 26, 1992 issue, *Update* included an interview with then-Vice President for Human Resources Michael LeBlanc. In the interview, LeBlanc stated that having a union "would mean we would be heading in an entirely different direction from what we've been working toward." He added that the Company was "working to establish a culture where all employees are increasingly having a direct say," and wanted to maintain the "collaborative" spirit of EC. In Booth's June 18 letter, he said that: "All recommendations from the (CPT) must be compatible with our corporate values."

In subsequent company publications, the Company reiterated the same or substantially similar themes concerning the Company's motivation for forming the CPT. These include a July 16, 1992 letter from LeBlanc to all employees, and *Update* issues of July 13, September 25, and December 21, 1992, all alleged by the General Counsel, like the above-described publications and Booth's June 19, 1992 statements, to be violative of Section 8(a)(1).

The Company has from time to time established Critical Process Terms, under the direction of a corporate officer, to address in some specified manner issues of corporate concern. With respect to the instant CPT, 280 employees applied to participate. The nonofficer grievance panelists selected 30 to serve on the CPT. The selections were announced on July 15, 1992.

After a number of meetings, the CPT, on December 2, 1992, issued its final recommendation for an "Employee Influence Structure." By letter dated January 28, 1993, Vice President LeBlanc distributed copies of the recommendation to all employees, together with CEO Booth's response. The CPT recommended establishment of a single, 30-person group comprising a

diverse cross-section of employee-owners, known as the Employee Owners Influence Council (EOIC). The EOIC would address issues of pay, policy, benefits and practice. It would have "partnership" with Booth with regard to those matters, although Booth would have the final decision where they did not agree on a resolution. The EOIC would also serve as a "sounding board" for the corporate leadership around issues affecting the Company's business practices and direction. The CPT recommended dissolution of the Company's existing benefits and policy committees. The EOIC would also be a vehicle for initiating high impact issues, and act as a conduit through which employees could bring such issues to the table. Such issues could include quality of work life, productivity improvements, and corporate operational considerations. The process by which decisions are made would be "collaborative." EOIC would fill the void created by dissolution of the EC.

The CPT further recommended as follows: The EOIC would be comprised of a diverse group of employees that credibly reflects the nature of the Company's population. However, each individual member would represent his or her own opinion and point of view. They would reflect, not represent, the views of the population. The nonofficer grievance panel would select EOIC applicants, initially for staggered terms, and thereafter for 3-year terms. The Company would reimburse EOIC and its members for their expenses, but would not pay them anything in addition to their wages and salaries. Participation would probably take 10 to 20 percent of members' time.

The CPT reported that through a process of discussion and collaboration, its members reached unanimous consensus on all but one of its recommendations. A substantial majority reached agreement on the recommendation for EOIC as a vehicle and conduit on high impact issues. The CPT also recommended ongoing, frequent two-way communication with employees concerning EOIC's activities, in order to allow all employees to have a voice in the operation of the Company's business.

By letter dated January 28, 1993, to all employees, CEO Booth responded to the CPT's recommendation. He described the CPT as a group which closely reflected the diversity of the Polaroid family. Booth stated that he was in fundamental agreement with the CPT's recommendation. He intended to proceed to create an EOIC. Members would represent their own individual ideas on pay, policy benefits and practice, acting in partnership with Booth. The EOIC would also act as a sounding board in issues of corporate strategy beyond those matters. Booth reserved decision on the proposal that EOIC act as conduit and filter for employees who wished to place before management issues outside the domain of pay, policy and practice. He declared that it was essential that EOIC's membership embody the broadest possible diversity of race, gender, culture, organizational level, opinion and experience, as did the CPT. "In this way, the voice of the EOIC can be taken to reflect the opinions held within the Polaroid community as a whole." Booth added "that once issues have been decided, there is a responsibility to communicate to all employee owners, not only the recommendations and decisions made, but also the reasons behind them."

By letter to all employees dated January 22, 1993, Vice President LeBlanc briefly summarized the mailing which he sent 6 days later. LeBlanc referred to Scivally's charge alleging that the proposed EOIC was unlawful. LeBlanc asserted that the CPT proposal differed from the former EC, noting that the proposed EOIC would not engage in grievance representation, or "direct representation of other employees' opinions by elected officials."

The complaint alleges that the Company violated Section 8(a)(1) by LeBlanc's letter, and by using the CPT to create EOIC.

The General Counsel presented CEO Booth as an adverse witness. Booth testified as follows: The Company created EOIC upon the CPT's recommendation for a "diverse group of people that represented demographically and otherwise, the kinds of people that were in the Company." However, the members of EOIC represented themselves. Booth has used the terms "representative" and "reflect" interchangeably. He approved the CPT's recommendation. CPT received input from different sources. Management hoped that by listening to EOIC, "we would hear a reasonable reflection of what the people in the Company were thinking." To Booth's knowledge, Scivally's petition of June 22, 1992 was the only union activity after dissolution of EC.

Richard (Rick) Williams is company human resources manager. From 1991 to 1994 he was senior human relations administrator, specializing in organizational development. He was not involved in the CPT. However, he directed the selection process for EOIC and has administered EOIC since its inception. Williams devotes 60 to 80 percent of his time to EOIC.

Williams was also called as an adverse General Counsel witness. Notwithstanding Booth's January 28, 1993 letter and testimony, Williams testified that the Company did not adopt all of the CPT's proposals. Specifically, Williams testified in sum as follows: EOIC does not attempt to reach closure on all issues. Booth has never delegated authority to EOIC to make the final decision on any matter. EOIC did not replace the Company's policy and benefits committee's. EOIC has not acted as a sounding board on high impact or strategy issues, or act as a vehicle for employees to raise such issues, or devise rules for screening employee originated issues. EOIC has no authority as a group to initiate discussion of pay, policy, benefits, or practice. Individual employees can suggest topics to Booth or Company Vice President for Human Resources Joseph Parham, who decide whether to place the topic on the EOIC agenda.

In late June, about the time that Scivally was distributing her petition, the Company gave instructions and guidelines to its supervisors, concerning appropriate responses to a union organizing campaign. The Company advised the supervisors as to what conduct would be illegal, and told them to refrain from such conduct. The Company advised them that they did not have to be neutral, and could explain why the Company did not believe that a union would be in the employees' best interest. The record evidence fails to indicate that the Company advised or instructed its supervisors to engage in any illegal activity.

I find that in establishing EOIC, the Company was principally motivated by its longstanding participative and collaborative culture, whereby employees would be collectively involved in the decisional process concerning terms and conditions of employment. As indicated, that culture dates back to the early years of the Company's operation.

I further find that in establishing EOIC, the Company was also motivated in part by its opposition to any outside union, or union not dominated by the Company, and by its concern that in the absence of a Company dominated structure for collective employee participation in the decisional process, the resulting void might leave an opening for such unwanted union. CEO Booth demonstrated the Company's attitude in this regard by his June

19, 1992 statements, as did Vice President LeBlanc in the June 26, 1992 *Update*.⁴

The General Counsel correctly argues (Br. 30), that an employer may be found to violate Section 8(a)(1) by encouraging and assisting employees to form an entity to deal with the employer concerning terms and conditions of employment. The employer thereby interferes with the right of employees to make their own decisions regarding organizing activities regardless of whether the entity ever comes into existence. *Modern Merchandising*, 284 NLRB 1377, 1379-1380 (1987), *Firefighters*, 297 NLRB 865, 870 (1990).

In the present case, unlike *Modern Merchandise* and *Firefighters*, the proposed entity did come into existence. If EOIC were not a labor organization, that would establish, or at least evidence that CPT and the Company statements were not unlawful. Conversely, if the Company violated Section 8(a)(2) by establishing and maintaining EOIC, then it would arguably follow that the Company's statements and utilization of the CPT were also unfair labor practices. Moreover, the CPT's activities, and the Company's statements, may properly be considered as evidence concerning the legal status of EOIC. Therefore, at this point I am deferring my concluding findings concerning the CPT and company statements, pending consideration of EOIC itself.

D. The Employee Owner Influence Counsel (EOIC)

1. The Facts

In May 1993, the Company invited all employees to become members of the new EOIC. The Company distributed application packages.⁵ Applications were available throughout the Company. Some 150 employees applied to become EOIC members.

In June and July, the nonofficer grievance panelists interviewed the applicants, and selected 30 employees to serve on EOIC. On August 5, their names were announced. The EOIC orientation and first meeting took place on August 13. Both before and after commencement of EOIC, the Company informed its employees of the purpose and function of EOIC through companywide publications, including *Update*, the Company *Bulletin*, an employee "newslines" telephone system, and in a videotaped presentation by CEO Booth.

In numerous communications to EOIC and to the Company's employees at large, the Company repeatedly asserted or implied that in order to avoid the legal pitfalls which did in the EC, the EOIC members would not represent other employees, would present only their own views, and were not expected to reach consensus or reach a group consensus on matters presented to them by the Company. In fact, while giving lip service to this approach, the Company indicated otherwise. The Company repeatedly made clear that it expected EOIC to be representative or reflective of the view of Company employees at large, the Company looked to EOIC as a vehicle to ascertain those views, and the EOIC members were expected to strive to reach a com-

mon or shared positions on matters concerning terms and conditions of employment.

I have previously referred to CEO Booth's description of the purpose and functions of EOIC in his letter of January 28, 1993. Booth made the same statements in a previous letter to all employees, dated December 22, 1992. In a subsequent letter to all employees dated March 22, 1993, Booth and Vice President LeBlanc reiterated the same theme. They stated as follows:

We urge each member (employee) to consider submitting his or her name for consideration as a possible member of the EOIC. Participation in these kinds of activities is a responsibility of ownership. In addition, though each member of the EOIC will present his or her own ideas, as a group they will address issues, such as pay, policy, benefits, and practice, which affect all of us. On such issues, the EOIC's partnership with us will be as important as our partnership with the Operations and Strategy Team.

In the EOIC membership application package, the Company stated: "The sum of the (EOIC) members' opinions will be assumed to reflect the diverse views of the Polaroid population." In an interview in the December 9, 1993 issue of *Update*, CEO Booth stated that he saw EOIC "as a sounding board or focus group that can help us get a sense of how employees feel on important issues. . . . I'm aware that they're not spokespeople for others and we can't assume that they reflect the opinions of all other employees. But groups like this have been shown to be very helpful in signaling trends and providing good ideas and insights. Though we can take polls, we can't ask for a vote on issues and the Counsel doesn't take a collective position on matters. This requires me—and others who work with them—to listen harder and try to spot trends and ideas."

The Company's Employee Stock Option Plan (ESOP), and specifically disposition of money accumulated under the plan, was a major topic of Company initiated and guided discussion by EOIC. CEO Booth actively participated in some of these discussions. Booth testified in sum and follows: There was some "commonality" of views among the EOIC members. Some ideas were similar. "We (management) might have put them in some sort of order." Booth told EOIC that in his opinion, money should be made available, in accordance with a decision making process, which would result in increased wages or benefits, or some other activity which would relate to the employees. He sometimes asked for a show of hands on how many wanted immediate return of the moneys (5 percent of employees' pay), which had been deducted for the employees' pay, to finance the plan.

Booth further testified in sum as follows: Recently, management has taken fewer polls of EOIC members. However, management wants to see if a member's position is shared by others. EOIC members are encouraged to listen to the views of non-member employees, and initially (but no longer) to solicit their ideas.

Manager Williams, who as indicated administers EOIC, echoed Booth's view of that entity. Williams testified that management sometimes polled EOIC members concerning their ideas, "to see how many individual people agreed with that particular opinion." Management did so because they were looking for "some commonalities amongst opinions." In a 1993 hand out to "attendees" at EOIC meetings (meaning any employee who wished to attend such meetings), Williams stated that EOIC members "discuss, debate, strive for understanding of different

⁴ I am not persuaded that Scivally's activity in distributing her petition, played any role in the Company's decision to proceed toward formation of what eventually became EOIC. Booth made clear his intention to replace the EC, before Scivally engaged in that activity. The Company had no reason to believe that any other employees aided or supported Scivally in her endeavors. However, the Company did have a long-range concern that a void would open the possibility of a serious union organizational campaign.

⁵ All dates in this sec. III, D, are for 1993, unless otherwise indicated.

views amongst themselves.” Williams added that Booth may poll individual members. Williams recommended “ongoing, frequent communication about EOIC activities to Polaroid members,” i.e., the employee population. He stated that two-thirds of EOIC members constituted a quorum for making decisions on procedural issues, and two-thirds of those attending were a majority for making such decisions. He further declared that EOIC was an equal partner with management on matters of pay, benefits, policy and practice. Company Senior Manager for Finance Doug Mitchell, who led much of discussion on ESOP, generated a worksheet for determining “common threads” in assessing the consequences of alternative solutions.

Anne Liebowitz is company house counsel specializing in labor relations. Liebowitz lectured to EOIC at meetings on September 21 and 22, 1993. Liebowitz discussed pertinent Board law. She explained that in order to avoid being categorized as a labor organization, i.e., as “dealing” with management, EOIC did not represent employees, and its members were not expected to make group proposals. She added that management, and not EOIC, was responsible for fully informing the employee population concerning EOIC’s activities.

As did CEO Booth, Liebowitz spoke on two levels. While giving lip service to what she referred to as legal obligations, Liebowitz dropped broad hints that in fact, the Company expected the EOIC members (1) to be representative or reflective of the employee population, (2) to communicate with other employees in order to effectively perform that function, and (3) to strive for consensus among themselves.

Liebowitz told the EOIC members sum as follows: They were selected to be a diverse reflection of the Company’s demographics. Communication with employees was part of their job. Employees will, “buttonhole you,” and “likely will knock on your door.” It is impossible not to discuss employees’ questions. Their ideas “will make way to this forum.” Sometimes, many will like such ideas. If not, then so be it. Although it was not EOIC’s job to make group proposals, they could have a unanimous opinion, or refer to majority feeling or opinion. Criteria for decisions advocated by a member, but ignored by others, would be less likely to be acceptable to management.

Managers Williams and Mitchell sounded the same themes when discussing the EOIC process at the September 21 and 22 meetings. Mitchell told the EOIC members that they would work teams, rather than 30 solutions. Williams said that one member could get another to change his or her mind, they could reflect other employees’ ideas, and they were expected to impart formation. Williams added that the more discussion, the fewer alternatives.

In August 1993, the Company issued written guidelines to EOIC members entitled “Stages of Group Development,” as part of their training. Without using the prohibited word “consensus,” the Company told them to work toward resolutions which were best for the group as a whole, to resolve differences by reason and data, and to move away from conflict within the group, toward intergroup focus.

All EOIC meetings were videotaped, and the tapes made available for viewing by all employees. The General Counsel and the Company collectively presented in evidence some 15 to 20 hours of tapes, which I viewed. It is evident from the tapes, and members’ written presentations on issue before EOIC, that the EOIC members were a well informed, articulate, and sophisticated group. In one sense, they were not typical of the employee population. As one member stated, they were a “cross sec-

tion of politically active people.” (The same might be said of stewards and other functionaries in any union.)

The EOIC members plainly understood the Company’s two-level message. Sherene Aram, an EOIC member, and the Company’s only witness, testified that it was important to note “common feelings,” she heard and reported common feelings among employees, and the members discussed “shared themes.” Aram talked “reasonably regularly” with nonmember employees concerning EOIC discussions, and reported sentiments to Booth.

EOIC proceedings generally followed a set pattern. The Company announced the topic for discussion. Company experts made presentations on the topic. Members were next asked to propose criteria to be used in resolving the problem. After criteria were thoroughly discussed, the members were asked to propose solutions for the problem. Sometimes the members were asked to, and did, present their proposed criteria or solutions in writing. The Company took votes on procedural matters (which were followed). The Company did not take formal votes on substantive resolution of problems, although as indicated, Booth sometimes called for a show of hands. After the proposed solutions were discussed, the Company announced its decision. Management representatives were always present at EOIC meetings. The meetings were conducted by Manager Williams or the Company’s pertinent expert. The employee population was regularly and systematically kept informed of EOIC proceedings.

EOIC discussed a wide range of matters covering terms and conditions of employment. Topics included the profit sharing retirement plan (ESOP), health care coverage, movement of people, (i.e., transfers within the Company) family leave, pay and performance, and termination for cause. EOIC also discussed its role as a focus group, and the next CEO.

The manner in which EOIC dealt with health care coverage, is both illustrative and particularly significant with regard to EOIC’s functions. The Company was concerned with rising health care coverage costs, in particular, the cost of “Polaroid Health plus,” a conventional insurance plan. The Company also provided coverage through its HMOs. On March 8, 1994, the Company’s health care plans manager presented a formal proposal concerning health care coverage. The manager proposed in sum, that the Company would encourage enrollment in HMO’s by paying 80 percent of the cost of such coverage.

EOIC discussed the proposal. Members referred to each other’s views. On March 24, 1994, the Company took a formal, recorded poll of EOIC members on their recommendations concerning cost containment and other aspects of health care coverage (including domestic partner coverage). The poll indicated that most members favored encourage HMO membership by company payment of 80 percent or more of the cost. In addition to extensive discussion, the Company requested and the members presented written statements and explanations of their views. The members presented their written statements in late April 1994. The members expressly or impliedly characterized their statements as responses to the plan manager’s proposal. For example, Sherene Aram captioned her statement as “Response to the 1995 Medical Benefits Proposal.” The views expressed by the members reflected the same preponderant sentiment as the earlier poll. Manager Williams testified that the members probably spent time on health care coverage than on any other issue presented to EOIC.

On July 6, 1994, CEO Booth announced the Company’s decision in a letter to all employees. As proposed by the plans manager and agreed by most EOIC members, the Company would

encourage HMO membership by increasing the subsidy for such coverage. However, the Company would contribute fixed amounts, rather than a percentage of HMO coverage. Such coverage would cost less to the employees. The employee cost for Polaroid Health Plus or major medical would substantially increase.

In his letter, Booth expressed thanks to the members of EOIC “who provide feedback and ideas,” which “added greatly to the quality of the 1995 medical plan.” By previous memo dated June 27, 1993, Manager Williams informed CEO Booth and Vice President LeBlanc that EOIC would advise management and make recommendations on issues before it, including health care cost containment proposals.

It is evident from the foregoing facts, that the Company was unwilling to make significant changes in employee health care coverage, without first ascertaining whether such changes would be generally acceptable to its employee population, or at least, would not encounter serious opposition or resentment. Therefore, the Company used EOIC as a vehicle to make its decision. The Company, through a back and forth process, presented a proposal to EOIC, solicited the members’ views and counter proposals, and engaged in discussion of all proposals. By this process, and constant communication among management, EOIC and the employee population, the Company determined that most employees would not object to Company plans which encouraged membership in HMO’s by increasing the Company contribution to such plans, while increasing the cost of other health insurance. Having made that determination, the Company announced and implemented its plans. The Company initially proposed, as did most employees, employer contributions in the form of a percentage of HMO fees. As implemented, the Company plans provided for fixed amount contributions. However, the basic concept, as proposed by the Company and agreed to by most EOIC members, remained intact; namely, to encourage HMO membership by increasing the Company contribution for such coverage.

The Company’s motivation for using EOIC as an instrumentality for reaching resolution of important or controversial matters involving terms and conditions of employment, is further demonstrated by the discussions concerning ESOP. Health care coverage and ESOP were the principal issues initially addressed by EOIC. The Company had unilaterally instituted ESOP, financed by 5-percent deductions from employees’ wages and salaries, without consultation with the employees. The Company believed that such financing was necessary in order to maintain shareholder “neutrality,” the absence of which could invite litigation by outside shareholders. Nevertheless, the procedure generated considerable employee resentment. When the Company confronted the question of what should be done with surplus money which was no longer needed to finance ESOP, CEO Booth decided that he would not make the same mistake again. He presented the question to EOIC.

EOIC devoted some 70 to 80 hours to the ESOP problem. The first, or educational phase of discussions, was extensive, as the problem was complex. Manager Mitchell led most of the discussions. In accordance with the usual procedure, EOIC members were next called upon to propose criteria for solutions. After discussion of criteria, the Company requested, and the members submitted their proposed solutions.

Notwithstanding its assertions that EOIC was not called upon to reach consensus, management advised and encouraged the members to do just that. Mitchell told EOIC that 5 or 6 alterna-

tives would be acceptable, but 30 would be “organizational disfunction” Manager Williams told the members that they reflected, but not represented employee opinion, but that it was all right to say “this is what I have heard.” He stated that “recommendations” was a problem word, but they could “respond” to company proposals. He said that members could get others to change their minds.

The EOIC members got the message. One member asserted that NLRB decisions were “archaic,” and “we have to function as a group,” otherwise it was “not worth doing.” Sherene Aram said they were not a consensus group, but could refer to majority feeling. In their discussion and statements of view, members were demonstrably influenced by opinions expressed by others. As a result, some changed their views, including proposed solutions. Some members declined to propose solutions, pending further discussion. Aram used the phrase “we all say” in referring to the amount of money involved, thereby indicating that she spoke for the others. Another member said that as a group “we teach one another.”⁶

In early 1994, the Company announced its decision to issue cash dividends to employees on shares in their ESOP accounts. In a letter to all employees dated April 18, 1994, Vice President Parham stated that: “As you know, the (EOIC) members had a notable impact on (that) decision.” Parham declared that EOIC also had a significant influence on other issues, including pay and performance, family leave policy, and movement of people policy. CEO Booth testified that his decision to pay dividends was the result of discussions with EOIC on ESOP.

As indicated by Parham, the Company repeatedly credited EOIC with significant involvement in company decisions with respect to terms and conditions of employment. In a memo dated April 18, 1995, the Company’s Vacation Policy Task Force stated that its draft policy on vacations “was developed after discussion with the (EOIC) and the Corporate Leadership Team.” Manager Williams testified that Booth has sometime modified his views (as with movement of people policy) after consulting with EOIC. In a memo dated December 22, 1993, Booth and Vice President LeBlanc stated that EOIC “is very important to us in shaping our decisions on corporate issues related to pay, policy, benefits and practice.”

2. Analysis and Concluding Findings

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

any organization of any kind, or any agency or employee representation committee or plan, 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.

Plainly, EOIC was and is an entity in which employees participate. The Company contends in sum, that EOIC is not a labor organization because it does not “represent” employees, and does not exist for the purpose of “dealing with” the Company.

The term “representation” in Section 2(5) modifies the words “committee” and “plan.” The term does not modify “any organization of any kind.” Therefore, if EOIC is an “organization,” then it would not be necessary to determine whether it is a “rep-

⁶ In EOIC’s discussion of termination for cause, on November 23, 1994, EOIC members demonstrably reached consensus, as indicated by head nodding and comments, that sexual harassment should be grounds for such termination.

resentation” organization. An organization is “group of people that has a more or less constant membership, a body of officers, a purpose, and usually, a set of regulations.” *Webster’s Third New International Dictionary* (1981).

In the present case, EOIC has a more or less constant membership, a purpose (as defined by the Company), and is governed by the Company’s written and oral regulations. EOIC has no formal officers, but there is a person in charge of its activities (Manager Williams), and other designated Company personnel who direct its proceedings. Therefore, EOIC falls within the definition of an “organization.”

If EOIC falls short of being an organization, then it clearly would constitute a “committee” or “plan.” By definition, a committee is “a body of persons delegated to consider, investigate or take action upon, and usually to report concerning some matter of business.” A plan is “a method of achieving something.” *Websters*, id. Both definitions described the functioning of EOIC.

Assuming that EOIC is not an organization within the meaning of Section 2(5), I would nevertheless find that EOIC constitutes “an employee representation committee or plan.” Unlike the former EC, EOIC’s members are appointed rather than elected. The Company attaches significance to that difference. However, the membership of such entity need not be elected in order to constitute a representation committee or plan. In *E. I. Dupont & Co.*, 311 NLRB 893 (1993), the employer determined who would serve on the committees at issue. In *Reno Hilton*, supra, employees volunteered to serve on the quality action teams (QAT’s) there involved. Nevertheless, the Board in *Dupont* held that “the employee-members of the committee acted in a representational capacity” (fn. 7). In *Reno Hilton*, 319 NLRB at 1156, the Board referred to the QAT’s as organizations, (as with the committees in *Dupont*), and did not discuss whether they acted in a representative capacity.

Notwithstanding the Company’s protestations to the contrary, the Company repeatedly conveyed to both EOIC members and the employees generally, that the Company expected EOIC to represent or reflect the views of the employee population. As indicated, Booth admitted that he used the terms “representative” and “reflect” interchangeably.

In fact, as administered by the Company, there was no real distinction between the terms in the way EOIC functioned. The Company directed that EOIC’s membership be carefully selected, in order that the members represented a cross-section of the employee population as to race, gender, culture, organizational level, opinion and experience. The EOIC selection committee even reopened and extended the selection process, because they believed that initial applicants, although qualified, did not adequately reflect the diversity of the employee population.

By constant communication with the employee population, and by indicating to EOIC members that management expected them to hear and report on the views of non-member employees, the Company endeavored to assure itself that the views and attitudes expressed by EOIC members, actually represented or reflected those of the employee population. Management further urged the EOIC members to reach consensus on issues (which process would include communication with nonmember employees), while avoiding use of that prohibited word. The Company took action only after determining that the opinions and recommendations which it heard from EOIC, were in fact those of the employee population. The Company thereby sought to avoid the kind of employee dissatisfaction caused by the unilateral ESOP

payroll dedication, which kind of dissatisfaction might well lead to a union organizational campaign.

Moreover, the EOIC process contained an element of coercion. Through its constant communications with the employee population, the Company made clear to the employees that if they wished to have any voice in shaping company policy and practices, they had best do so through the mechanism of EOIC. The Company repeatedly indicated to both EOIC and the employees generally, that management regarded EOIC as the voice of the employee population, that collective recommendations would carry greater weight than individual proposals, and that employees should convey their views to EOIC members. In sum, the Company was telling the employees that if they were not satisfied with the Company’s ultimate decision on an issue, they had no cause to complain if they had failed to communicate their views through EOIC.

I further find that (1) the Company represented to its employees that EOIC was formed and existed for the purpose of dealing with the Company concerning terms and conditions of employment, and (2) EOIC did in fact exist for that purpose. As indicated, the Company repeatedly credited EOIC as a collective body, with significant impact with regard to the Company’s ultimate decision on such matters as distribution of ESOP dividends, health care coverage, pay, and performance, vacation and family leave policies, and transfer policy.

As discussed, EOIC proceedings with regard to health care coverage were particularly illustrative and significant of EOIC’s functions. The Company made proposals and EOIC members expressed agreement or made counterproposals (labeled as responses). The Company determined member sentiment, and urged members to reach collective positions. Management and EOIC discussed and sometimes modified their views in light of their respective arguments. After this procedure was completed, CEO Booth announced the Company’s decision on the matter at issue.

The fact that management made the final decision does not detract from a conclusion that EOIC engaged in dealing with the Company. In this regard, the Supreme Court’s analysis in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 214 (1959), of the Employee Committees there involved, is equally applicable to EOIC. The Court stated:

Respondents say that these activities by the Committees and respondents’ officials do not mean that the Committees were “dealing with” respondents in respect to those matters, because, they argue, the proposals and requests amounted only to recommendations and that final decision remained with respondents. But this is true of all such “dealing,” whether with an independent or a company-dominated “labor organization.” The principal distinction lies in the unfettered power of the former to insist upon its requests. . . . Whether those proposals and requests by the Committees, and respondents’ consideration of and action upon them, do or do not constitute “the usual concept of collective bargaining” . . . we think that those activities establish that the Committees were “dealing with” respondents with respect to those subjects, within the meaning of § 2(5). [Citations omitted.]

See also, *Electromation, Inc.*, 309 NLRB 990, 997 (1992), enf. 35 F.3d 1148 (7th Cir, 1994). In sum, EOIC engages in dealing with the Company, and its functions are not limited to

“brainstorming” or a “suggestion box” procedure. See *E. I. DuPont & Co.*, supra 311 NLRB at 893 (1993).⁷

For the foregoing reasons, EOIC is an organization, or representation committee or plan, in which employees participate, and which exists for the purpose, in whole or in part, of dealing with the Company concerning terms and condition of employment. Therefore, EOIC is a labor organization within the meaning of the Act.

The Company does not dispute that management dominates, interferes with the formation and administration of, and contributes financial and other support to EOIC. The Company organized EOIC, and determined the number of members and their manner of selection. The Company sets the agenda for EOIC, and managerial personnel conduct and lead its discussions. The Company sets the rules for its proceedings, or decides how such rules shall be set, e.g., by vote. The Company provides the facilities for EOIC, and pays its expenses. EOIC exists at the Company’s sufferance. Therefore, the Company violated Section 8(a)(1) and (2) by establishing EOIC, and has violated and is violating Section 8(a)(1) and (2) by maintaining EOIC. *Electromation, Inc.*, supra, 309 NLRB at 998. Although not necessary to the finding of an unfair labor practice, I find, for the reasons previously discussed, that in establishing and maintaining EOIC, the Company was motivated in part by an intention to discourage or prevent union organizational activity.

As the Company has unlawfully established and maintained EOIC, it follows that as alleged, the Company violated Section 8(a)(1) by using the CPT as an employer entity for the purpose of assisting in creating EOIC. As the complaint does not allege a violation of Section 8(a)(2) in this regard, it is not necessary to decide whether the CPT was a labor organization.

I further find that the Company violated Section 8(a)(1) by its communications to the employees, previously discussed, in which the Company solicited employees to volunteer for or cooperate with the CPT, in order to form an employee entity which would deal with the Company concerning matters of pay, benefits, policy and practice. The Company thereby interfered with the employees’ right to self-organization. *Modern Merchandising*, supra, *Firefighters*, supra. Moreover, for the reasons previously discussed, the communications were, like those after establishment of EOIC, coercive in that they indicated that in order to have a meaningful say on company policy and practices, the employees should participate in or cooperate with the CPT and the future entity. The Company thereby implied that the employees would benefit by such cooperation and participation. Therefore the communications did not constitute noncoercive expressions of opinion.

CONCLUSIONS OF LAW

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

⁷ In *Sears Roebuck & Co.*, 274 NLRB 230 (1985), relied on by the Company (Br. 56), the Board did not pass on whether the communications committee there involved was a labor organization. The Board decided only a separate unfair labor practice issue. In *Coppus Engineering Corp. v. NLRB*, 240 F.2d 564 (1st Cir. 1957), also cited by the Company (Br. 71), and *Chicago Rawhide Mfg. Co.*, 221 F.2d 165 (7th Cir. 1955), the respective courts declined to enforce the Board orders on the basis of their determinations that there was insufficient evidence of employer domination or support. In the present case, the Company does not dispute that EOIC is employer dominated.

2. Employees Committee (EC) and Employee Advocates (EA) were labor organizations within the meaning of Section 2(5) of the Act.

3. Employee Owners Influence Council (EOIC) is a labor organization within the meaning of Section 2(5) of the Act.

4. By dominating, interfering with the formation and administration of, and rendering unlawful assistance and support to EC, EA, and EOIC, the Company has been and is violating Section 8(a)(2) of the Act.

5. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (2) of the Act, I shall recommend that it be required to cease and desist therefrom and from like or related conduct, and to post appropriate notices. I shall further recommend that the Company be ordered to withdraw all recognition from and to and to completely disestablish EOIC, and refrain from recognizing it, or any successor thereto, as a representative of any of the Company’s employees for the purpose of dealing with the Company concerning wages, grievances, rates of pay, or other conditions of employment.

Charging Party Scivally requests that I recommend a broad injunctive order. The General Counsel takes no position in this regard.

The Company has demonstrated a proclivity to form and maintain company dominated labor organizations. I agree with General Counsel that the Company never fully remedied its admittedly unlawful conduct in maintaining EC. Rather, the Company followed up dissolution of EC by forming and maintaining other company dominated labor organizations. See *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978).

However, I am not persuaded that the evidence demonstrates the Company has a proclivity to generally violate the act, or has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ statutory rights. All of the Company’s unlawful conduct either involved or related to its proclivity to form and maintain Company-dominated labor organizations. Therefore, I am recommending the Board’s standard “like or related” language.

On these findings of fact and conclusions of law and on the entire record, and issue the following recommended⁸

ORDER

Respondent, Polaroid Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Forming, dominating, administering, or contributing financial or other support to Employees Committee (EC), Employee

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

Advocates, Employee Owners Influence Council (EOIC) or any other labor organization.

(b) Telling employees that it intends to form such labor organizations, or suggesting to or encouraging employees to form, participate in or cooperate with committees to deal with management concerning terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

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

(a) Immediately withdraw all recognition from and completely disestablish Employee Owners Influence Council (EOIC), and refrain from recognizing EOIC or any successor thereof as representative of any of its employees for the purpose of dealing with Respondent concerning wages, grievances, rates of pay or other conditions of employment.

(b) Within 14 days after service by the Region, post at its Cambridge, Massachusetts facility and at each of its facilities in the United States, copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof and maintained by it 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed any facility involved

⁹ If this Order is enforced by a Judgment of the 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."

in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 24, 1992, at the pertinent facility or facilities.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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 form, dominate, administer, or contribute financial or support to Employees Committee (EC), Employees Advocates, Employee Owners Influence Council (EOIC), or any other labor organization.

WE WILL NOT tell you that we intend to form such labor organizations, or suggest to you or encourage you to form, participate in or cooperate with committees to deal with management concerning terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights to engage in union or concerted activities, or to refrain therefrom.

WE WILL withdraw all recognition from, and completely disestablish EOIC, and refrain from recognizing EOIC or any successor thereof as representative of any of our employees for the purpose of dealing with us concerning wages, grievances, rates of pay, or other conditions of employment.

POLAROID CORPORATION