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**EFCO Corporation and United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Employee Benefit Committee, Employee Policy Review Committee, Safety Committee, Employee Suggestion Screening Committee, Parties-in-Interest.** Case 17-CA-6911

December 31, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On March 7, 1995, Administrative Law Judge George F. McInerny issued the attached decision. Thereafter, the Respondent filed exceptions and a supporting brief and the Parties-in-Interest filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order, and to adopt the recommended Order as modified and set forth in full below.

I. THE 8(A)(2) ALLEGATIONS

The issues presented are whether the Respondent's Employee Benefit Committee, Employee Policy Review Committee, Safety Committee, and Employee Suggestion Screening Committee are labor organizations and, if so, whether the Respondent dominated or interfered with their formation or administration or contributed financial and other support to them, in violation of Section 8(a)(2) and (1) of the Act. The judge found that all four committees were labor organizations and that the Respondent unlawfully dominated or interfered with each of them.

We agree with the judge for the reasons set forth below that the Employee Benefit Committee, the Policy Review Committee, and the Safety Committee are labor organizations unlawfully dominated by the Employer in violation of Section 8(a)(2) and (1). While the Respondent's stated aim of involving employees in decision making may be commendable, we find with regard to these three committees that the particular means chosen by the Respondent to achieve that end were unlawful. Contrary to the judge, however, we find that the Respondent did not violate Section 8(a)(2) and (1) with respect to the Employee Suggestion Screening Committee, as we find that it is not a labor organization. In forming and operating this Committee, the Respondent chose a means of obtaining employee input that did not impinge on the employees' rights under the Act.

A. *Factual Background*

The facts, as found by the judge or undisputed in the record, follow. The Respondent manufactures aluminum windows, door systems, curtain walls, and storefronts at two plants in Monett, Missouri, with additional manufacturing and distribution facilities in Chicago, San Francisco, and Oklahoma City. Principal responsibility for formulating company policy is vested in the Management Committee, composed of the Respondent's president, Chris Fuldner, and its vice presidents. However, in the 1980's, the Respondent began implementing what it termed a "Manufacturing Resources Planning" program, which sought to attain higher levels of efficiency through, inter alia, improvements in quality and inventory control, implementation of a "just-in-time" production system, and greater employee involvement. As part of that program, the Respondent began a reappraisal of its personnel practices that resulted in the establishment of four employee committees at various times in 1992 and early 1993. According to Fuldner, these committees were created, in part, to educate employees, to keep the Management Committee informed, to assist management in making policy and benefit decisions, and to increase productivity by encouraging employee involvement in decision making. Each of the committees met on the Respondent's premises during working time, and employees were paid for time spent on committee activities. In each case, the Respondent selected the initial members of the committees.

In 1993, after the committees were formed, the Respondent became aware of union organizing activity among its employees. On July 26, 1993, a representative of the Union wrote a letter to Chris Fuldner stating that the Union was attempting to organize the Respondent's employees, but the Union never filed a petition for an election.

B. *Formation and Operation of the Committees*

1. The Employee Benefit Committee

Fuldner announced the creation of the Employee Benefit Committee in a memorandum to employees dated September 8, 1992. As he explained in the memorandum and at the first committee meeting, the Committee's purpose and function was to evaluate existing employee benefit plans and to make recommendations to the Management Committee to improve the plans. According to the memorandum, the Benefit committee members were to investigate plans, analyze costs, and solicit ideas and comments from other employees.

The Respondent's chief financial officer, Bret Baker, selected 10 employees out of 20 volunteers to be members of the Committee and tried to include representatives from the various shifts and departments. At the first meeting, Fuldner informed the Committee that it was to choose "its own route," but that it must first address changes in the medical insurance plan and evaluate

the dental plan. The committee members, who included at least one statutory supervisor, elected Mark Hardwick, a nonsupervisory employee, as chairman and contact with the Management Committee.

For the first few months, the Benefit Committee held meetings nearly every week, but the meetings later tapered off to about once a month. Baker and Mona Workes, the Respondent's personnel director, attended almost every meeting. In June 1993, after a request from the Committee, the Respondent's comptroller, Don Kellhofer, began attending the meetings and acted as a liaison between the Committee and Fuldner.

Although, according to Hardwick, the Committee did not engage in "negotiations" or "give-and-take" with management about the merits of committee proposals, the Committee considered a wide range of matters, including life insurance, a psychology program, employee-of-the-month awards, sick pay, dental and prescription eye care plans, flextime, "jeans" day, an employee credit union, savings bond plans, cancer insurance, a cookout and a party for employees, an employee seat on the board of directors, and a Good Friday holiday, and made recommendations to management regarding these matters. The Respondent's management reviewed and accepted the Benefit Committee's proposals concerning a health plan, dental plan, and an employee party, but rejected its proposals for an employee credit union and a prescription plan, among others.

The Committee also studied, developed, presented, and recommended a long-term disability plan that management considered and adopted. With respect to the disability plan, Baker took bids on various plans, suggested a carrier to the Employee Benefit Committee and, after the Committee approved the plan, presented the proposal to management. According to the Employee Benefit Committee's minutes, the plan took effect December 1, 1993. Further, in a memorandum to the Respondent's executive committee dated March 25, 1994, Hardwick proposed on behalf of the Benefit Committee that the Respondent provide supplemental compensation to employees in the National Guard and military reserves should they be called into active duty.

## 2. The Employee Policy Review Committee

In a January 15, 1993 memorandum to all employees, Personnel Director Workes announced the formation of the Policy Review Committee and asked for volunteers to serve as its members. The memorandum stated that the Committee's purpose would be to help the Respondent review and establish policies and to "gather comments and ideas from employees regarding existing policies, or needs for implementation of new policies and make specific recommendations to EFCO's management committee."

From volunteers, the Respondent selected 13 employees to be members of the Policy Review Committee to

represent various areas of its operations. Its membership later increased to 15 and, when positions became vacant, the Committee circulated a memorandum on the Respondent's letterhead dated September 30, 1993, seeking five volunteers to "represent all EFCO employees and work with the management committee, reviewing existing policies and procedures and implementing new ones." Interested employees were invited to contact a particular member of the Committee or the personnel department. At the request of the Committee, Workes attended the meetings and was listed as a committee member in the minutes, but she did not vote.

Fuldner attended the Policy Review Committee's first meeting on February 9, 1993, and told the members that their mission was to examine existing policies, review them, and make recommendations to the Management Committee concerning how policies should be changed, but that the committee members should determine their own methods, scope of inquiry, and areas of concerns. Later, the Respondent's Management Committee asked the Committee to devise a no-smoking plan that would conform with a new state law and address health concerns. In response, the Committee solicited views from employees, expanded management's proposed no-smoking ban to a wider no-tobacco policy, and published its proposal in the Respondent's newspaper. On June 1, 1993, after receiving the Committee's proposal, the Respondent promulgated the no-tobacco policy.<sup>1</sup>

The Policy Review Committee also considered and developed a 4-day workweek proposal. It sought and received input from employees and contacted other companies with 4-day workweek programs and advanced its proposal to the Management Committee, which agreed to a limited trial of the program. The Committee also addressed other matters, including sick leave and personal days, the dress code, overtime, holidays, vacations, work hours, job bidding, and timeclocks, and raised other issues on its own initiative. The Respondent adopted the Committee's proposed policies on sick leave and personal days.

## 3. The Safety Committee

On April 21, 1992, Plant Facilitator Mike Washik sent a memorandum to EFCO employees announcing the formation of the Safety Committee, composed of shop and office employees. The memorandum explained that the Committee was broadly charged with the duty of handling "safety problems" and that committee members were to set safety policies and find ways of enforcing them. The memorandum further stated that the Respondent was seeking volunteers but did not want more than one member from any one department.

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<sup>1</sup> William Stegman, the Policy Review Committee chairman, whom the judge credited, testified that the Management Committee adopted the Policy Review Committee's proposed policy with only minor changes in wording.

Washik selected 11 employees from the volunteers as members of the Committee. At its first meeting on June 4, 1992, Washik informed members that the Committee's purpose was to involve employees in solving safety problems, meeting OSHA requirements, reviewing safety rules, and receiving employees' input in enforcing these rules.<sup>2</sup> Washik thereafter notified committee members of the meetings, which were held monthly or bimonthly. Washik set out issues to be addressed by the Safety Committee in some of the meeting notices.

Washik directed the work of the Committee until August 1993, when Lora Saffer was named safety director and assumed his role with the Safety Committee. In a memorandum to all employees dated September 3, 1993, Saffer requested new volunteers for the Safety Committee and included herself in a list of committee members. Saffer prepared and distributed the Committee's agendas, minutes, and memoranda to employees and committee members until December 1993, when the committee members elected a coordinator. Saffer abstained from this vote but collected and counted the ballots. The Respondent concedes that Washik is a statutory supervisor and Saffer was stipulated to be an agent of the Respondent.

The Safety Committee reviewed and addressed policies covering such matters as safety awards and incentives,<sup>3</sup> and the wearing of safety shoes and glasses. It also addressed a wide range of problems including the need to replace dirty and broken light fixtures, a lack of fans in certain areas of the facility, the repair or replacement of a miter saw, the need for additional ventilation, meeting OSHA requirements, emergency planning in case of natural disaster, and the need to correct a number of safety hazards.

#### 4. Employee Suggestion Screening Committee

In a memorandum to six employees dated December 28, 1992, the Respondent announced the creation of the Employee Suggestion Screening Committee and their selection as members. An outline of the employee suggestion program and the Committee's functions was attached.

<sup>2</sup> Washik's handwritten minutes of the meeting state that the committee members were informed that the Respondent was seeking shoe distributors who could service the employees and that it was considering reinstating payroll deductions for the shoes. The minutes further state that "things . . . reported that needed [work]" included a written injury prevention program, improved housekeeping, an incentive program to improve safety, an emergency evacuation plan, and OSHA approved containers for flammable material.

<sup>3</sup> With respect to awards and incentives to employees, the June 17, 1993 minutes note that the Committee discussed safety incentives and the "Safety Buck" program and that after the Committee reviewed all the programs, a submission would be made to management. The Committee's October 11, 1993 minutes record that the Committee again reviewed the Safety Buck program and that Safety Director Lora Saffer was to establish criteria for "rewarding individual, departmental and plant safety to present to Fuldner, along with the cost proposal."

Under the new program, all employees were encouraged to submit suggestions and were informed that they would be paid \$5 for each "valid" suggestion, up to a maximum of five suggestions. As set forth in the memorandum, the purpose of the Suggestion Screening Committee was to make recommendations about the screening plan, receive all suggestions, make recommendations on especially good suggestions, reject "frivolous or otherwise invalid" ones, and submit remaining suggestions to the appropriate management group including the engineering review board, manufacturing review board, or the Management Committee.<sup>4</sup> According to the memorandum, the Suggestion Screening Committee was also charged with notifying the employees submitting the suggestions within a week of action taken on their suggestions and recommending the best suggestions to the Management Committee based on criteria established by management for "special recognition." The Management Committee retained authority to award any special recognition.

At the first meeting in December 1992, the Respondent set the agenda and the Committee elected employee Mark Kaiser as chairman.<sup>5</sup> In a memorandum dated January 14, 1993, the Respondent notified all employees about the formation of the Suggestion Screening Committee and solicited suggestions.<sup>6</sup> The memorandum further noted that two Management Committee members would sit in on each committee meeting as advisors and ensure that the Committee received necessary resources. The Suggestion Screening Committee later selected its own replacement members.

In practice, the Committee did not make decisions about the implementation of suggestions but merely decided which ones were not frivolous and forwarded them to the relevant management group. The evidence reflects, contrary to the Respondent's December 28, 1992 memorandum, that the Committee did not recommend the "best" suggestions or, for that matter, any suggestions, to management. In addition, the Management Committee, not the employee committee, was given re-

<sup>4</sup> The memorandum also stated that the Suggestion Screening Committee was to determine whether a suggestion was "reasonable" but that such a designation would not mean it would be accepted or implemented. The suggestion form has a section for Screening Committee members to mark the appropriate box noting that the suggestion is a "reasonable proposal," an "unreasonable proposal," or that it was "previously suggested."

<sup>5</sup> Kaiser later became a statutory supervisor and remained as chairman of the Committee. The evidence does not reflect that any other member of the Committee was a statutory supervisor, although the senior vice president and the chief financial officer attended the first meeting.

<sup>6</sup> In that memorandum, the Respondent noted that it was "particularly interested in ideas that reduce costs, improve processes (either manufacturing or administrative) or eliminate inefficiencies [sic] (things we now do that are not necessary, that are a duplication of something we do elsewhere or activities that don't add value to the products and services that we deliver to our customers)."

sponsibility for following up with employees on the status of their suggestions.

The Committee collected suggestions during two periods from mid-January through February 1993 and in October 1993. During the first period, 95 suggestions were collected, 7 were rejected as unreasonable, 3 were returned for classification, and 4 duplicated previous suggestions.<sup>7</sup> In the second period, 19 suggestions were gathered and only 1 was rejected as unreasonable. Most of the suggestions recommend specific improvements in the production process.

### C. Analysis

In determining whether an employer has violated Section 8(a)(2) and (1) of the Act by interfering with, dominating, or supporting an employee committee, the Board engages in a two-step inquiry. The first step involves examining whether the committee is a “labor organization” as defined in Section 2(5) of the Act. If not, the allegation is dismissed. If the committee meets Section 2(5)’s criteria for a labor organization, the second inquiry is whether the Respondent has dominated or interfered with the formation or administration of the committee. *Electromation, Inc.*, 309 NLRB 990 (1992), enf. 35 F.3d 1148 (7th Cir. 1994).

#### 1. The labor organization issue

Under the definition set forth in Section 2(5), a committee is a labor organization if (1) employees participate, (2) the organization exists, at least in part, for the purposes of “dealing with” the employer, and (3) these dealings concern “grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” As an initial matter, the facts recited above leave no doubt that each Committee is an organization in which employees participate.<sup>8</sup>

The primary question is whether the Committees exist for the purpose, at least in part, of “dealing with” the employer concerning the matters set forth in Section

<sup>7</sup> One suggestion marked “unreasonable” was resubmitted with more information and found “reasonable” and another so marked included the comment that the suggestion should be resubmitted with more detail. A third suggestion recommending classes was marked unreasonable with the notation that the classes had already started.

<sup>8</sup> The judge found, and we agree with respect to the Benefit Committee, the Safety Committee, and the Policy Review Committee, that these committees acted in a representational capacity. Thus, the Respondent sought to secure representation on the committees from all sections and shifts and urged these committees to canvass employees for their opinions regarding policy matters and the committees’ proposals. In light of our finding that these committees acted in a representational capacity, 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 *Electromation*, supra, 309 NLRB at 994 fn. 20.

As noted below, we find that the Suggestion Screening Committee, in contrast to the other committees, did not act in a representational capacity. However, for the reasons described below, we also find that it did not “deal with” the Respondent over Sec. 2(5) issues and that for that reason it is not a labor organization.

2(5). The concept of “dealing with” essentially involves a bilateral process, ordinarily entailing a pattern or practice by which a group of employees makes proposals to management, and management responds to these proposals by acceptance or rejection by word or deed. *E. I. du Pont & Co.*, 311 NLRB 893, 894 (1993). In *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 210–211 (1959), the Supreme Court held that the term “dealing with” in Section 2(5) is broader than the term “collective bargaining” and applies to situations outside the negotiation of collective-bargaining agreements.

The evidence reflects that the Respondent engaged in “dealing with” the Employee Benefit Committee, the Policy Review Committee, and the Safety Committee with respect to subjects covered by Section 2(5), supra. The Employee Benefit Committee evaluated existing employee benefit plans, investigated alternative plans, solicited ideas and comments from other employees, and recommended to management how the plans could more effectively meet employees’ needs.<sup>9</sup> While the Employee Benefit Committee’s proceedings may not have risen to the level of formality usually seen in collective bargaining, it is well settled that such formal proceedings are not necessary to a finding that an employer has dealt with a committee. *NLRB v. Cabot Carbon*, supra; *E. I. du Pont*, supra. It is undisputed that this Committee formulated and presented numerous proposals to management for its consideration, some of which management adopted and others it rejected.<sup>10</sup> As the court observed in *Electromation, Inc. v. NLRB*,<sup>11</sup> the employee committees in *Cabot Carbon* were found to deal with the employer because they “made proposals and requests respecting such matters as seniority . . . working schedules, holidays, vacations, sick leave, . . . and improvement of working facilities and conditions.” Thus, there can be no doubt that the Respondent and the Employee Benefit Committee dealt with each other over Section 2(5) subjects.

Similarly, the Policy Review Committee solicited comments and ideas from employees regarding existing policies on a wide range of employment matters and the need for implementation of new ones. Using feedback from employees, the Policy Review Committee made

<sup>9</sup> The Respondent’s practices in this regard are distinguishable from those in *NLRB v. Peninsula General Hospital Medical Center*, 36 F.3d 1262 (4th Cir. 1994), where the court found that an employer-formed committee of nurses was not a labor organization. In *Peninsula General*, the employer also wished to involve employees in the updating and improvement of benefit plans. While the employer there discussed the benefits issues with the committee, a consultant reviewed the benefits policy, and management itself surveyed the views of all the nurses in order to set priorities for the upcoming budget year. *Id.* at 1267–1268.

<sup>10</sup> The court noted in *Webcor Packaging, Inc. v. NLRB*, 118 F.3d 1115, 1121 (6th Cir. 1996), cert. denied 118 S.Ct. 1035 (1998), that such an arrangement constitutes “a paradigm case of dealing.”

<sup>11</sup> 35 F.3d 1148, 1160 (7th Cir. 1994), citing *NLRB v. Cabot Carbon*, supra, 360 U.S. at 213.

recommendations to management about such matters as a no-tobacco policy and a 4-day workweek. The Respondent also considered the Committee's recommendations concerning similar subjects, accepting some and rejecting others. Thus, the Respondent engaged in dealing over Section 2(5) matters with the Policy Review Committee as well as the Employee Benefit Committee, both of which therefore constitute labor organizations as defined in the Act.

A significant portion of the purposes and functions of the Safety Committee, such as the reporting and correction of safety problems, would not contribute to a finding that it is a labor organization. As the Board noted in *du Pont*, supra,<sup>12</sup> the Act does not prevent an employer from "encouraging its employees to express their ideas and to become more aware of safety problems in their work." Moreover, an employer's *delegation* of safety duties, such as the reporting of safety hazards, the imparting of safety information or the planning of educational programs, by itself, does not constitute dealing. In the present case, therefore, the Safety Committee's reporting of broken light bulbs and other more serious safety hazards to management and informing it of the need to replace broken pieces of equipment does not constitute "dealing with" the employer over statutory terms and conditions of employment.

However, the Respondent did not simply delegate safety inspection or reporting duties to the Safety Committee. Rather, the Committee's functions included reviewing safety rules and policies, developing safety incentive programs, and, most significantly, making proposals to management about such policies and programs, including proposals respecting employee compensation.<sup>13</sup> *NLRB v. Cabot Carbon*, supra, 360 U.S. at 212. In short, the Safety Committee was an integral part of a bilateral process falling under the rubric of Section 2(5) and involving employees and management with the purpose of affecting safety issues. Accordingly, we find that the Respondent engaged in "dealing with" the Safety Committee and that this committee thus is a labor organization as defined in Section 2(5) of the Act.

In contrast, we find that the Respondent did not "deal with" the Employee Suggestion Screening Committee. Unlike the others, this committee did not formulate proposals or present them to management. Rather, it reviewed and forwarded suggestions made by individual employees to the appropriate management committee. In short, the Respondent created an employee suggestion program in which the Employee Suggestion Screening

Committee performed a clerical or ministerial function which facilitated the Respondent's consideration of suggestions made by employees. In practice, it essentially operated as a screening portion of an employee "suggestion box" program.<sup>14</sup> We support an interpretation of the Act which would not discourage such programs in their various forms. See *E. I. du Pont & Co.*, supra, 311 NLRB at 894; *Electromation*, supra, 309 NLRB at 995 fn. 21.

In theory, an employee committee could "deal with" an employer by weeding out proposals it does not wish to advance and recommending others that pertain to Section 2(5) matters, a process which would, in essence, put the committee in the position of making proposals to management based on the suggestions of other employees. However, the Employee Suggestion Screening Committee did not serve such a function, as neither in practice nor in effect did it "recommend" or provide an opinion about the adoption or modification of any suggestion.<sup>15</sup> As noted above, the Committee deemed very few suggestions unreasonable, and sent on the vast majority of suggestions to management. Thus, as the Respondent did not deal with the Committee, we find that the Employee Suggestion Screening Committee is not a labor organization.<sup>16</sup>

In sum, we conclude that the evidence establishes that the Employee Benefit Committee, the Policy Review Committee, and the Safety Committee existed, at least in part, for the purpose of making proposals to management which would be considered and accepted or rejected, and in fact that was the practice. We therefore find that the element of "dealing with" is present with regard to these three committees and that they are Section 2(5) labor organizations. We further conclude that the Suggestion Screening Committee is not a labor organization under Section 2(5) and therefore its operation does not violate Section 8(a)(2) of the Act.

## 2. The employer domination issue

A labor organization that is the creation of management, whose structure and function are essentially deter-

<sup>14</sup> Moreover, because this Committee did not canvass employees but only informed them as to the action taken on their suggestions, it did not act as the employees' representative.

<sup>15</sup> Although the Respondent's memorandum announcing the formation of this committee stated that its duties would include recommending the best suggestions to management, in practice it did not do so. Thus, we determine the Committee's purpose from its actual performance rather than only from the Respondent's original written policy. See *Electromation*, supra, 309 NLRB at 996 ("[p]urpose is a matter of what the organization is set up to do, and that may be shown by what the organization actually does"); *Keeler Brass Co.*, 317 NLRB 1110, 1114 fn. 16 (1995) (even though stated policy was that grievance committee decisions were final, in practice they were not, and therefore the respondent engaged in dealing with the committee).

<sup>16</sup> We also note that the Respondent has used this program primarily as a mechanism for employees to express their ideas about ways in which production might be improved rather than to address Sec. 2(5) matters.

<sup>12</sup> 311 NLRB at 897.

<sup>13</sup> See *Simmons Industries*, 321 NLRB 228, 254 (1996) (unlawful safety committee not limited to identifying and reporting hazards); *Waste Management of Utah*, 310 NLRB 883 (1993) (subject matter of some of the committees, e.g., routing, productivity, and safety, might under other circumstances place the purpose of the committee outside the ambit of Sec. 8(a)(2)).

mined by management, and whose continued existence depends on the fiat of management, is one whose formation or administration is dominated under Section 8(a)(2) of the Act. *Electromation*, supra, 309 NLRB at 995.<sup>17</sup> The record establishes that each of these elements is present with regard to the Policy Review Committee, the Employee Benefits Committee, and the Safety Committee.

The Respondent concedes that it created all three committees, announced their formation, and explained to employees their goals and purposes, and held the committee meetings on its premises during working hours. The record evidence also establishes that the Respondent essentially determined the structure and function of the committees, selected the initial members, and chose the subjects they were to address. For example, the Respondent informed employees that the Employee Benefit Committee was to evaluate benefit plans, recommend new plans, and solicit input from employees. The Respondent chose the initial members from volunteers and management officials attended committee meetings. Although the Respondent told committee members that the Benefit Committee was to choose its own route, it explicitly directed them to address important benefit issues presented in the medical insurance plan and the dental plan.

The Respondent also directed the Policy Review Committee to gather comments and ideas from employees and then review and recommend policies to management. The Respondent selected the initial members of the Committee from volunteers and directed them to devise a no-smoking policy. The Respondent charged the Safety Committee with the duty of reviewing safety rules, developing safety policies and incentives, and receiving employee input in enforcing safety rules. Management representatives played a major role in directing the Safety Committee's work, including preparing and distributing its agendas, minutes, and memoranda. Thus, we agree with the judge that the Respondent dominated the Employee Benefit Committee, the Policy Review Committee, and the Safety Committee in violation of Section 8(a)(2) and (1) of the Act.<sup>18</sup>

<sup>17</sup> See also *Webcor Packaging*, supra, 118 F.3d at 1123 (finding committee to be dominated by employer where committee was established by employer and employer had retained discretion over committee's continued existence).

<sup>18</sup> We find no merit in the Respondent's contention that it did not violate Sec. 8(a)(2) because the committee members are managerial employees by virtue of their committee work. We note, inter alia, that authority over all corporate decision making is vested in the Management Committee, and that even with regard to the particular limited issues as to which it solicited proposals from the employee committees, the Respondent retained the authority to decide whether to accept the committees' recommendations, reject them, or modify them. See *St. Thomas University*, 298 NLRB 280, 286 (1990). For the reasons set forth by the judge, we also find no merit in the Respondent's argument that its employees are excluded from the Act's protections because, as minority shareholders in the Respondent's ESOP, they are its owners.

## II. THE 8(A)(1) ALLEGATIONS

The Respondent excepts to the judge's finding that it violated Section 8(a)(1) by creating the impression of surveillance. We find merit in this exception. On August 3, 1993, several employees met with a union representative outdoors in a city park at lunch. During the meeting, Supervisor Randall Adams and employee Randy McGlothlin drove by and, when they passed again some time later, waved at the employees, one of whom waved back. The judge credited Adams' and McGlothlin's testimony that they had gone out to lunch and on the way back noticed the employees, whom they knew, standing in the park. He noted that there was no evidence that Adams and McGlothlin knew the employees were union activists or that they were engaged in a union meeting. He also credited their testimony that they did not mention having seen the employees in the park to anyone.

That afternoon, the Respondent's president, Chris Fuldner, approached employee Carol Baker, who had been in the park, and stated that he had heard that she and some others would like to talk to him and that, if she did, his door was always open. Baker thanked Fuldner and he left. Although the judge found that Fuldner knew nothing about the meeting in park and had approached Baker only because another employee had told him Baker might wish to talk to him, he also found that it was "reasonable and logical" for Baker to *assume* that Fuldner had approached her because he had heard about the meeting. He then concluded that even though there was no actual link between the events in the park and Fuldner's approach to Baker, the Respondent had violated the Act by creating the impression of surveillance. We disagree. Regardless of the coincidental timing of Fuldner's approach to Baker, the Respondent in fact engaged in no conduct that reasonably could have caused Baker to believe that her union activities were under surveillance. Thus, we find that the General Counsel has failed to demonstrate that the Respondent violated Section 8(a)(1) in this regard, and we shall dismiss this allegation.<sup>19</sup>

See *Science Applications Corp.*, 309 NLRB 373 (1992) (rejecting employer's claim that no collective-bargaining unit is appropriate because employees are stockholders); *S-B Printers, Inc.*, 227 NLRB 1274 (1977) (evidence does not support a finding that stock ownership gives employees an effective voice in formulation and determination of policy). Finally, we agree with the judge's rejection of the Respondent's argument that any interpretation of Sec. 2(5) and 8(a)(2) used as a basis for finding its committees unlawful infringes upon the participant's First Amendment rights. See *NLRB v. Cabot Carbon Co.*, 360 U.S. at 218 (rejecting employer's argument that finding employee committees to be labor organizations prevents employees and employers from discussing matters of mutual interest in violation of the First Amendment).

<sup>19</sup> The judge inadvertently omitted from his recommended Order and notice provisions reflecting his findings that the Respondent violated Sec. 8(a)(1) by threatening employees with the loss of Employee Stock Ownership Plan (ESOP) in the event they became represented by a union. The finding was based on the Respondent's posting of a notice consisting of an application to the Internal Revenue Service for approval of its ESOP which stated, without further explanation, that all

We also find merit in the Respondent's contention that the judge erred in finding that it violated Section 8(a)(1) by soliciting grievances and, accordingly, we shall dismiss that allegation. Employee Mike Williams, a union committeeman, asked employee Steve Carpenter if he wished to discuss problems with Fuldner. They went to Fuldner with other employees and did so. There is no evidence that Fuldner asked Williams to solicit grievances or that Williams is a statutory supervisor or the Respondent's agent. In fact, Fuldner testified without contradiction that he did not ask Williams to solicit grievances and that he maintained an "open door" policy as to employee concerns.

This is not the case of an employer initiating a new policy or practice of soliciting grievances during a union campaign. See *Noah's New York Bagels*, 324 NLRB 266 (1997). There is no evidence here that the Respondent initiated a new policy, or that any of its supervisors or agents actually solicited grievances. *Mast Advertising*, 286 NLRB 955 (1987), on which the judge relies, is distinguishable. In *Mast*, employer representatives urged employees to voice grievances and held unprecedented meetings soliciting employee complaints. Compare *Mast Advertising & Publishing*, 304 NLRB 819 (1991) (employees' approaching employer with problems and discussing them is protected activity). Thus, an employer does not unlawfully solicit grievances where, as here, employees on their own accord approach management to discuss problems, and a fortiori where, as here, the employer maintained a prior open door policy and there is no evidence that any promises were made to the employees.

#### ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, EFCO Corporation, Monett, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and enforcing an overly broad no-solicitation rule prohibiting unauthorized solicitations of employees, or unauthorized distribution of literature of any kind on company premises at all times.

(b) Publishing and maintaining memoranda setting out an overly broad interpretation of a no-solicitation rule unlawfully limiting union activities to nonwork areas and prohibiting union activities in work areas during non-working time.

(c) Reprimanding an employee for passing out union literature inside the plant under an overly broad no-solicitation rule.

(d) Dominating, assisting, or otherwise supporting the Employee Benefit Committee, the Employee Policy Review Committee, and the Safety Committee.

(e) Threatening employees with loss of Employee Stock Ownership Plan in the event they become represented by a union.

(f) Posting and maintaining a notice to employees consisting of an application to the Internal Revenue Service for approval of Employee Stock Ownership Plan stating, without further explanation, that all employees are eligible to participate under the plan except members of a collective-bargaining group.

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

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

(a) Within 14 days from the date of this Order, remove from the files of its employee, Dennis Wolf, any record of a reprimand given him on July 27, 1993 concerning violations of a no-solicitation rule, and within 3 days thereafter notify the employee in writing that this has been done and that the reprimand will not be used against him in any way.

(b) Immediately disestablish and cease giving assistance or any other support to the Employee Benefit Committee, the Employee Policy Review Committee, and the Safety Committee.

(c) Within 14 days after service by the Region, post at its facilities in Monett, Missouri, copies of the attached notice marked "Appendix."<sup>20</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved 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 August 20, 1993.

(d) 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 at-

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employees are eligible to participate under the plan except members of a collective-bargaining group. We shall include appropriate provisions in our Order and notice. We shall also include modifications in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB No. 14 (Nov. 7, 1997).

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<sup>20</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

testing to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 31, 1998

Sarah M. Fox,	Member
Wilma B. Liebman,	Member
J. Robert Brame III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or enforce an overly broad no-solicitation rule prohibiting unauthorized solicitations of employees, or unauthorized distribution of literature of any kind on company premises at all times.

WE WILL NOT publish or maintain memoranda setting out an overly broad interpretation of a no-solicitation rule limiting union activities to nonwork areas and prohibiting union activities in work areas during nonworking time.

WE WILL NOT reprimand an employee for passing out union literature inside the plant under an overly broad no-solicitation rule.

WE WILL NOT support, dominate, or assist the organizations known as the Employee Benefit Committee, the Employee Policy Review Committee, and the Safety Committee.

WE WILL NOT threaten employees with loss of Employee Stock Ownership Plan in the event they become represented by a union.

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

WE WILL remove from the file of Dennis Wolf a reprimand he received on July 27, 1993 for distribution of union literature.

WE WILL immediately disestablish and cease giving any assistance and support to the Employee Benefit Committee, the Employee Policy Review Committee, and the Safety Committee.

EFCO CORPORATION

*Stephen E. Wamser, Esq.*, for the General Counsel.  
*Ransom A. Ellis Jr., Esq.*, and *Ransom A. Ellis III, Esq.*, (*Ellis, Ellis and Black*), of Springfield, Missouri, for the Respondent.

*Jim Tudor*, Representative, of Fort Smith, Arkansas, for the Charging Party.

DECISION

GEORGE F. MCINERNEY, Administrative Law Judge. Based on a charge filed on August 20, 1993, by United Brotherhood of Carpenters and Joiners of America (the Union), which charge was amended on August 30, October 12 and November 29, 1993, the Regional Director for the Seventeenth Region of the National Labor Relations Board (the Regional Director and the Board), issued a complaint on December 15, 1993, alleging that EFCO Corporation (the Company, or Respondent), had violated certain provisions of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint, denying the commission of any unfair labor practices.

Pursuant to notice contained in the complaint, and as postponed by orders of the Regional Director, a hearing was held before me in Monett, Missouri on July 12, 13, and 14, 1994, at which the parties except the four named Parties-in-interest, the Employee Benefit Committee, the Employee Policy Review Committee, the Safety Committee, and the Employee Screening Committee, were represented, and all parties had the opportunity to introduce testimony and documentary evidence, to examine and cross-examine witnesses, to offer motions, and to argue orally. Following the close of the hearing the General Counsel and the Respondent submitted briefs, which have been carefully considered.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent maintains an office and manufacturing plant in Monett, Missouri and in several other locations where it engaged in the manufacture and sale of industrial and commercial aluminum windows and related products. During a 12 month period ending November 30, 1993, the Respondent purchased and received at its plant in Monett goods valued at over \$50,000 directly from points outside the State of Missouri. The complaint alleges, the answer admits, and I find that the com-

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

## II. LABOR ORGANIZATIONS

The complaint alleges, the answer admits that the Union and the Committees are labor organizations within the meaning of the Act.

### III. THE ALLEGED UNFAIR LABOR PRACTICES

#### A. Background

EFCO Corporation is a privately held company, incorporated under the laws of the State of Missouri, with the majority (around 75 percent) of the stock owned by the Fuldner. Terry Fuldner is the chairman of the board of directors. His son, Chris Fuldner, is president, and, from all of the evidence here, seems to be the chief executive officer. John Fuldner, Chris' brother, is employed by the Company and, along with his sister, Fuldner serves on the Board of Directors.<sup>1</sup>

The Company was founded in 1953 in St. Louis by Terry Fuldner with a partner, George Everly, hence the "E" and the "F" in EFCO. In 1958, the Company moved to Monett, a small city, population of about 6000 in the southwest corner of Missouri. It now has two plants in Monett, referred to in the record as the old plant and the new plant, with additional manufacturing and distribution facilities in Chicago, San Francisco, and Oklahoma City. Chris Fuldner, whose testimony is the source for this background information, estimated that the Company now employs about 700 production employees, with an additional 200 or so in support and administrative positions.

The Company's business is the manufacture of architectural grade aluminum windows used in hospitals, schools, office buildings, and high-rise apartments. The Company also makes and sells curtain wall systems, storefronts, entry door systems, automatic doors, automatic sliding doors, swinging doors, and automatic balance doors. The manufacturing process is almost all custom work, not standard. The Company buys aluminum in billet form, then extrudes the shapes required, finishes and glazes the product and, in some cases, even sends crews out to install the product at the jobsite. In 1993, its gross sales were about 87 to 88 million dollars.

During the times that the events in this case took place, the Company was not unionized, but Chris Fuldner testified that there had been a unit of shop employees represented by the Carpenters' Union which was recognized by and bargained with the Company from around 1963 to 1971 or 1972, when the Union was decertified. Between that time and the summer of 1993, there had been occasional rumors and reports of union activity, but there was no noticeable union organizational activity until July 1993. On July 26, Jim Tudor, a representative of the Union's general president, wrote to Fuldner stating that the Union was attempting to organize the Company's employees. The attempts to organize were not reported in this record, nor were the Company's plans, if any, to meet the Union's organizational efforts. There is no mention in the record here of the filing of a petition for an election with the Regional Director. There are, however, allegations in the complaint herein concerning the existence of a no-solicitation rule, and several incidents involving employees and supervisors. These will be discussed later in section III(G) of this Decision.

<sup>1</sup> Neither Terry Fuldner, nor John or Sandy, figure in the events making up this case.

Apart from this momentary ripple on the placid surface of the Company's pond, Chris Fuldner explained in detail his management philosophy and his actions taken in pursuance of his philosophical and economic goals, including the formation of the employee committees which are also at issue in this case.

From his personal experience, Chris Fuldner described his return to Monett in 1977, from his job as a salesman for the Company, to assist his father in management. Fuldner noted that his father was working 16-hour days trying to manage all aspects of the Company's operations, without accomplishing as much as he should have in any of these activities. Starting by taking over the engineering department, Fuldner developed a philosophy of delegating management responsibility wherever possible, and pushing responsibility for decision making as low through the administrative channels of the Company as efficiency and productivity would allow. He himself used a management committee composed of company vice presidents as the principal policymaking body, with almost total responsibility for management decisions.

Having described the relationship between the Company and its employees during the union years from the 60's to the early 70's as "extremely adversarial" Folder testified that the relationship changed. He expressed his feeling that a business could not succeed in today's global economy, and even against domestic competition, if management was fighting with its own workers. The management at EFCO has tried to combat that image. For example, Fuldner pointed out, EFCO was the first employer in the area to set up an employee health insurance plan. Thus, under Fuldner's leadership, the Company set up an employee profit-sharing plan in 1979 and, in 1982, an Employee Stock Ownership Plan (ESOP). Since 1992, about 25 percent of the Company stock has been transferred to the ESOP account in a joint ESOP-profit-sharing plan.

James F. McLeod, an attorney who has represented the Company since 1979, and is also a member of its Board of Directors, testified that he drafted the ESOP for the Company. Employees having a year of service with the Company are eligible to participate in the ESOP-profit-sharing plan.<sup>2</sup> The ESOP-profit-sharing plan is a combination of two different plans, both administered by a trustee, United Missouri Bank of Kansas City, and is entirely funded by the Company. McLeod testified that the bulk of the employer contributions go into the ESOP fund, with the remainder to the profit-sharing plan. The Plans are 100 percent vested after 7 years.

Under the ESOP portion of the funds, shares of common stock in EFCO are purchased for the account of each employee. Since the Company is privately held, there is no market for the stock whereby its value can be ascertained. Therefore, the value is appraised annually by an outside firm to determine the stocks' fair market value for that year.

Shares of stock purchased for the account of an employee are held in the name of the Trustee, which has power to vote those shares in its discretion, except that the beneficial owner-employee may direct the Trustee to vote his individual shares in

<sup>2</sup> The plan specifically excludes employees who are members of a collective-bargaining unit and covered by an agreement which the Secretary of Labor finds contains retirement benefits resulting from good-faith bargaining between the employer and representatives of employees. McLeod testified that this exception is allowed under the Federal Employee Retirement Income Security Act of 1974 (ERISA) in order to avoid double coverage of an ESOP and a negotiated pension plan. (See below, sec. III(G)(8)).

matters such as corporate merger or consolidations, recapitalization, reclassification, liquidation, dissolution, sale of substantially all assets as other transactions as the Treasury (IRS) may prescribe. In all other matters, the employee shareholder has no voice in voting his shares.

The employee shareholder may sell his accumulated shares back to the Company during certain periods at their fair market value, but, if the employee wishes to sell at other times, he must first offer the shares to the Company. The Company, in either event, may pay for the shares over a period not exceeding 5 years. However, the ESOP is basically constructed as a retirement plan, and the return to individuals who remain with the Company through their working lives, assuming, of course, that the Company thrives over the years, would provide substantial benefits.<sup>3</sup>

But the goals that the Company envisioned as flowing from the plans were not entirely accomplished. Fuldner stated that he had hoped that employees would feel like the Company by bringing them in as “partners” in the business cared about their future as well as its own, and, that the employees would join with management and help it in maintaining and even enhancing productivity. Fuldner expressed his disappointment that the plans did not produce the results he expected, but, philosophically, he reasoned that it was a youthful work force, and that young people just didn’t look enough ahead to appreciate the benefits provided by the ESOP and the profit-sharing plan.

The Company did not abandon the ESOP and profit-sharing plan, but rather turned to other programs to try to attain higher levels of efficiency. Fuldner became interested in a management rubric called Management Resource Planning II (MRP II). This is executive shorthand for programs, including Just-in-time (JIT) inventory control, and Total Quality Control (TQC), an encyclopedic series of studies of all aspects of a business, using techniques developed world-wide by the most efficient and productive companies, and then applied to domestic situations. Fuldner was enthusiastic about this process and he instituted it at EFCO.

It is not necessary for purposes of this Decision to follow the steps followed by the Company in each stage of the MRP II program. Fuldner explained what was done, and the efforts required of management people to even get to the point of implementing the program. Suffice it to say, as Fuldner did at the hearing, that some of the MRP II recommendations were followed, and some were still in process, but that a “mechanism for continuous improvement” had been instituted. The process itself inevitably led to consideration of the human factor in the equation. Since this is what we are interested in here, we must first note Chris Fuldner’s explanation of the involvement in the MRP II program, of employees, and his development of his reasons for setting up the Committees which are named as Parties-in-Interest.

#### *B. The Establishment of the Committee*

Fuldner testified that the MRP II program led to the development of human or employee relations. He felt that employees on the shop floor, production workers, or janitors, could become more self-directed in solving day-to-day problems, as

<sup>3</sup> In 1993, Fuldner testified, the Company contributed \$880,000 to the plans, most of which went to the ESOP, with about 900 employees sharing in their benefit, each would have received nearly \$1000. Compounded over a 30-year work career, this would indeed be a real benefit.

they arose, among themselves, without having to summon a supervisor every time a problem came up. In the last few months, he said, the Company has begun encouraging interdepartmental exchanges of employees. Management needs employees to feel good about themselves and their jobs, and management should try to keep employees happy with their benefits, and to appreciate these benefits.

One way to accomplish this last is for employees to “become involved in every decision the Company makes. Employees determine what the benefit plans are. They determine what the compensation levels are going to be, or they have a vast say in it. But they are also educated to the point where they know where the Company’s finances are.”

In implementing this sort of collegial management concept, Fuldner noted that it was hard, with so many employees to keep everyone informed. Thus, it was decided to use a committee concept, a smaller, workable, group of employees to tell management what they like or don’t like about existing benefits and policies. Fuldner doesn’t want policies if those policies are alienating people. If there is a problem, maybe they can find a way to change it so it doesn’t alienate people. The same theory applies to benefits, if the employees don’t appreciate the current benefits, “what benefits would they appreciate?”

Summing up his reasons for creating the Committees, Fuldner said he created them to assist management in making important policy and benefit decisions. He wanted the committee member to “buy into it” and have them develop programs and put them together themselves. He indicated that he trusted these committee members to the extent that they would be honest with the themselves and with him. They would not recommend anything they didn’t like, or wouldn’t want to have.

Looking back from the date of his testimony on July 14, 1994, to the work for the Committees since early in 1993, Fuldner reflected that if you tell the committee members enough about how the business is working and where they are going with it, they are smart enough, and have enough common sense to come up with programs that aren’t going to be “bank-busters,” or totally unrealistic. With a few exceptions, Fuldner said, that is how it had worked out. Concluding, Fuldner described the Committees as a tremendous growth tool for some people, and a wealth of information coming to the management group. “I really think it’s . . . something similar to this, provided the law doesn’t stand in its way, is going to be the thing of the future.”

Fuldner’s testimony did not specifically identify the employee committees set up under his management concepts, but he did mention benefits and policies, which would include two of the four Committees. It would logically follow that both employee safety, and the suggestions of individual employees for improvement of conditions in their workplace would fit in to Fuldner’s broad strategy for improvement of the Company. Since there are four Committees named as Parties-in-Interest in the complaint, I will consider the formation, membership, and activities of all four in the following sections.

#### *C. The Safety Committee*

There had been a safety committee in existence at EFCO in 1988 and 1989, but it apparently lapsed into inactivity sometime after June, 1989.<sup>4</sup>

<sup>4</sup> This earlier committee was at first directed by Mona Workes, then personnel director, later director of human resources. Later Safety Director Allen Lusby sent out the notices of meetings.

Mike Washick, plant facilitator and an admitted supervisor, testified that he was asked by former Vice President Scott Beckwith to revive the Safety Committee (SC). Washick sent out a memorandum to EFCO employees on April 21, 1992, announcing the formation of a work force safety committee "made up of people from the shop floor and office areas." The purpose of this committee was to be responsible for handling safety problems. Washick explained in the memo that the people on the SC would have the task of setting safety policies and finding ways of enforcing those policies. The memo stated that "we feel that if the people are able to be a part of the policy setting group they will have a better understanding of why things have to be done and why they need to be enforced." While this language sounds like some of Chris Fuldner's ideas noted above, Washick testified that he composed the memo and that it was not reviewed by any other company official.

Washick also testified that he selected the 11 initial members of the SC himself from volunteers who had contacted him. The first meeting was held on June 4, 1992. Ten of the 11 members were present. Washick outlined for them the purpose of the SC, to get employees involved in solving safety problems, in getting employees involved in helping meet OSHA (Occupational Safety and Health Administration) requirement, in reviewing safety rules, and in getting employees' input in enforcing these rules. David Harris, described as the maintenance supervisor spoke to the group about OSHA requirements and what maintenance was doing to correct some safety problems. After a meeting held on July 2, Washick circulated minutes describing a "new safety shoe policy" requiring all people who spend 4 hours or more on the shop floor to wear safety shoes. There was no indication in the minutes where the new policy came from—was it from management or from the SC? How was it arrived at. was there any discussion? It is difficult to understand what went on at these early meetings, and whether Washick was actually setting the agenda and directing the discussions at the meeting, or even bringing for discussions action which had already been decided upon, or actually implemented by management.<sup>5</sup> Washick continued to direct the work of the committee up to August 1993. At that time, Lora Saffer<sup>6</sup> had been named safety director for the Company, and she began to prepare and distribute the agendas for meetings, minutes, and memos to employees concerning the committee. Saffer continued in this position until December 2 1993, when one of the SC members was elected coordinator by the membership. Lora Saffer to the abstained from voting, but she did according to the minutes of that meeting, called for and tabulated the ballots.

The SC, more than the Employee Benefits Committee, or the Employee Policy Review Committee, considered a variety of problems, or situations, some very minor, such as dirty or broken light fixtures, fans in shipping areas, repairs to a miter saw,<sup>7</sup> to policy matters such as a system of awards for safety related achievement by employees,<sup>8</sup> policies for the wearing of

safety glasses and safety shoes,<sup>9</sup> emergency planning in case of a natural disaster, tornado, fire or flood, safety training, and others.

The SC needed new members from time to time and it seems clear that after the original members were appointed by Washick, their successors were appointed by the SC membership without input from management. There is no evidence that any of the members were, themselves, supervisor or managerial employees. the Committee did discuss obtaining authority to enforce its decisions. There was apparently, widespread disregard, even ridicule, of the SC's efforts to improve plant safety, and a note of disillusionment by some members creeps into the minutes. There is, however, no record those minutes that the SC itself was ever granted authority to enforce, or punish violations of policies which it had recommended and which had been adopted.

#### *D. Employee Suggestion Screening Committee*

The Employee Suggestion Screening Committee (ESSC) was established in a memorandum dated December 28, 1992, from Chris Fuldner to six employees, John Ballinger, John Putzner, Chuck Dunn, Mark Porter, Mark Kaiser, and Richard Van Vorst. The memorandum informed these employees that an employee suggestion program was being instituted (by management) and that they had been selected (by management) to serve on the Screening Committee.

The December 28 memorandum instituted a suggestion program open to all employees. Rank-and-file employees would be paid \$5 dollars for each valid suggestion, up to a maximum of five, suggestions. Supervisors would not be paid for their suggestions but would be given credit and recognition for their submissions. The initial program would run for about 6 weeks, from mid-January to the end of February 1993. It was contemplated that similar programs would follow.

The ESSC set up in this memorandum would have the responsibilities to review and make recommendations about the plan itself; would receive all suggestions, review them and summarily reject "frivolous or otherwise invalid" suggestions; would submit suggestion, depending on the subject matter, to an engineering review board, a manufacturing review board, or to the Management Committee; would notify the employees who submitted the suggestion of their action on the suggestion within 1 week; would make recommendations to the Management Committee on especially good suggestions, with the Management Committee having authority to make any decisions on "special recognition;" and, generally to run the program effectively, with maximum employee participation.

The ESSC was not responsible for making decisions an implementation of suggestions, but merely had to decide which suggestions deserved to be considered further by one of the groups to which the suggestions were sent. Nor was the ESSC responsible for following up on the progress of the suggestions after they were referred. The Management Committee was given responsibility for following up, and notifying the employees of progress, or lack of progress with their suggestions.

A memorandum dated January 14, 1993, was sent by Fuldner to all employees, announcing the formation of the ESSC, soliciting suggestions from the employees, and concluding by informing the employees that "[W]e are in the midst of a major

<sup>5</sup> See e.g. mention of a breathing apparatus required of employees in the anodyzing department in the minutes of the August 13, 1992 meeting (G.C. Exh. 10, p. 21).

<sup>6</sup> Saffer was stipulated to be an agent of the Company with the title of Safety Director of Safety Manager.

<sup>7</sup> Some of these problems were reported as solved in the SC minutes, some were reported progress of solution, and nothing was said or done about others.

<sup>8</sup> This was taken up by Washick with the Management Committee. Washick brought up two plans submitted by outside consultants the

Management Committee sent the matter back for further study. The idea apparently died after Washick was replaced as safety officer.

<sup>9</sup> Both of these policies were adopted.

change in the way we operate EFCO. One of our major company-wide objectives for Fy 1993 is to establish effective employee involvement at all levels and in all areas of our business. This is an important step in that process. Help us make it happen!"

There are no minutes in this record of the first meeting of the ESSC on December 29, 1992, but Mark Kaiser, a salaried project manager,<sup>10</sup> was elected as chairman of the Committee at that meeting. Kaiser testified that Senior Vice President Jack Appel and Chief Financial Officer (CFO) Bret Baker attended that first meeting.

Appel and Baker presented the ESSC members with an agenda, told them that "we want you to cover," the agenda items and that they could discuss anything else in order to get the program going. At this same meeting, a suggestion form was devised by Kaiser, and adopted by the Committee. Kaiser also worked up a tracking form which would be used to follow up on suggestions. This form was to be submitted to the Management Committee by CFO Baker.

There are no minutes of a meeting held on January 4, 1993.<sup>11</sup> No other minutes were made a part of the record, but the progress of the ESSC was reported in memoranda from Mark Kaiser, dated January 13, and February 8 and 9, 1993.<sup>12</sup>

Kaiser testified that the primary purpose of the ESSC was to determine if suggestions submitted were reasonable or not, then the Committee forwarded those which seemed reasonable on to other committees as set out in Fuldner's December 28 memorandum. In the first group, submitted in January and February, 1993, there were 95 suggestions. Out of these, only seven were rejected as unreasonable, three were returned for classification, and four were duplicates of previous suggestions.<sup>13</sup> In the second go-around, in October, 1993, only 1 out of 19 suggestions was found unreasonable.<sup>14</sup>

Chris Fuldner noted in his January 14, 1993 memorandum to all employees that "Two management committee members will sit in on each screening committee meeting as advisors and to make sure the committee gets the resources it needs." However, Kaiser testified that Baker and Appel sat in on some of the

committee's early meetings, but, later no one other than committee members were involved in meetings.

Suggestion boxes were placed by the Committee in four locations in the plant. Forms developed by the ESSC and printed by the Company were placed on or near the boxes. All times spent by committee members in gathering suggestions, meeting to evaluate suggestions, and all other meetings, are performed on company time, on company premises, and using materials supplied by the Company.

#### *E. The Employee Benefit Committee*

The formation of an Employer Benefit Committee (EBC) was announced in a memorandum for Chris Fuldner to all EFCO employees dated September 8, 1992. Fuldner explained to the employees that "we (management) are establishing an Employee Benefit Committee to help us make EFCO employees benefit plans more effective in meeting the needs" of employees. The EBC was to get ideas and comments from employees, to contact other employers outside of EFCO, and to make recommendations to the Management Committee. In this initial memo, Fuldner listed two areas that the EBC "will address," first, changes in the Company's medical insurance plan, and, second, to evaluate an employee paid dental plan.

Human Resources Manager Mona Workes was asked by Vice President and CFO Bret Baker to screen the people who would volunteer for service on the EBC. Workes processed about 20 volunteers and forwarded their names to Baker, who selected 10 people as members of the Committee.<sup>15</sup>

Mark Hardwick, a senior buyer in the purchasing department, not alleged or shown to be a supervisor, was elected Chairman of the EBC at its first meeting on October 1, 1992. Sharon Privett, a production worker, was elected as recorder of the meetings.

At this first meeting Chris Fuldner gave a talk to the members of the Committee. He said that the Committee was to choose "its own route." He gave them two problems to look at initially, group insurance and a dental plan. The purpose of the committee was to suggest various benefits, to investigate plans, analyze costs, talk to people in the various departments in the plant and solicit opinions as to existing or new plans, and forward recommendations to the management committee. The memo stated that Bret Baker and Mona Workes would attend committee meetings but they had no power over committee activities, and did not have the right to vote on committee decisions. The EBC was to look at benefits, see whether the benefits were worthwhile, whether the Company would be better off staying with existing benefits as they were, whether they should be changed, and in what way those changes should be made.

Hardwick was the contact between the EBC and the Management Committee. He testified that he did not view himself as an "advance" before the Management Committee, as he described it, there were no negotiations, no "give and take" about the merits or faults of any particular proposal. Hardwick

<sup>10</sup> Kaiser was not a supervisor at that time, but he was promoted to be a project manager/supervisor in the summer of 1993, and gained supervisory status. He remained as chairman of the ESSC. From Kaiser's testimony, I do not believe any of the other members except, possibly, Van Vorst were supervisors or managers.

<sup>11</sup> I would not at this point that the parties prepared, before the hearing started, a number of documents drawn from the Company's files, and the files of the four Committees which are Parties-in-Interest here. These materials were collated, page-numbered, and submitted into evidence as General Counsel's exhibits. I appreciate the labor involved in preparing these materials, and the consideration the parties have thus shown for those who must read this record. The incidence of some omissions or deletions was inevitable and these are, in my opinion, not material nor harmful to a fully developed record.

<sup>12</sup> Some 410 pages of exhibits (G.C. Exh. 12) were submitted as part of the record. These consist of all of the suggestions received by the ESSC up to the time of this hearing, together with notations of actions taken on these suggestions.

<sup>13</sup> Fifteen suggestions were deemed reasonable, but no \$5 payments were made. This may be because some of them were submitted by supervisors who were ineligible for the \$5 payments.

<sup>14</sup> These figures are not important in evaluating the status of the ESSC, but they do show a high level of interest, awareness and intelligence on the part of the EFCO work force, and a lot of work by the ESSC in screening their suggestions.

<sup>15</sup> Baker attempted to get representation from a broad spectrum of shifts and departments, but couldn't cover all department because he did not want too large a committee. The original 10 members included Keith Ridenour, who was identified as a supervisor in the glass shop by Mark Hardwick, the chairman of the EBC, and Judi Walker, executive secretary to Chris Fuldner and his father, Board Chairman Terry Folder, Kay Shelly, who later volunteered for the EBC, was the Company's insurance benefit clerk in the payroll department. There is no indication in the record that she was a supervisor or a confidential employee.

would “clarify” points in EBC proposals, and he did admit that “everyone likes to think their idea is a good one.” This brief description of Hardwick’s contacts with the management committee does not establish that he actually bargained about EBC recommendations with management, but he certainly discussed, clarified, and supplied information from EBC to the management group.

For the first few months after the EBC was established the Committee met on almost a weekly basis, later tapering off to monthly meetings. Both Bert Baker and Mona Workes attended almost all the meetings with Baker assuming a more active role than Workes. Baker left the Company, in the spring of 1993. Workers continued to attend meetings. In June 1993 the EBC, through Mark Hardwick, extended an invitation to Comptroller Don Kellhofer to attend the Committee’s June 3, meeting, Kellhofer was a frequent attendee from then on, acting, according to the minutes of October 8, 1993, as a liaison between Chris Fuldner and the EBC. Minutes for meetings up to June 30, 1994, are included in the record here, albeit there are a number of omissions and/or duplications.

The EBC met, as did all four committees involved here, on company time and property. What supplies were needed, pencils, notepads, and other housekeeping and stationery items were supplied by the Company. As I have noted, Mona Workes attended almost all of the meetings of the EBC, with Bret Baker having taken a prominent role in the early days of the Committee’s existence, and Don Kellhofer attending a number of later meetings. Workes was called as a witness but she was unable or unwilling to discuss the extent of management participation (including her own) in committee deliberations or decisions. Baker did take an active role at first, but Workes and Kellhofer acted, as far as I can discern from the record, only as persons providing resources to the Committee.<sup>16</sup> Aside from the October 1 memorandum, there is no indication that, once Baker left, management people had any influence over EBC activities. However, Supervisor Keith Ridenour and Executive Secretary Judi Walker continued to serve as members.

After reviewing and making recommendations on the Company’s medical plan, and the dental plan, the EBC went on to discuss and make recommendations in a number of the areas, including a long-term disability program, life insurance, a psychology program, employee-of-the-month awards, sick pay,<sup>17</sup> eye care plans, flextime, “jeans” day, savings bond plans, and cancer insurance. The Committee also expressed concern that the needs of people working in the shop were not being properly addressed. There was a proposal for a cookout, and a “watermelon feed” party for shop employees.

<sup>16</sup> One incident, reported in a memorandum from Hardwick to the Executive Committee (Management Committee), dated October 1, 1993, showed that Hardwick asked members of the EBC questions about insurance review, and the advisability of adding new members to the EBC. Both Workes and Kellhofer were polled on these questions, and the record shows Workes recorded as negative on the questions and Kellhofer as affirmative. Neither Workes nor Hardwick, who were asked about this, remembered anything about it. The vote turned out affirmative, seven to four, and later, four new members were appointed to the EBC in a memo from Mona Workes stating, in making the announcement, that “We are pleased to welcome” the newcomers.

<sup>17</sup> This topic was later referred to the Employee Policy Review Committee (q.v.).

The record is not clear, but I think it can be said that some of the EBC recommendation were adopted by the Management Committee and implemented by management. These would include the Company health plan, dental plan, long-term disability, and the watermelon feed. Others, according to Workes’ testimony, were still pending before the Management Committee at the time Workes testified on July 10, 1994, including the cookout, a seat on the Board of Directors for an employee, and a Good Friday holiday. Still others were rejected including a proposal for employee credit union, and a prescription plan for employees.

The EBC continued to function at least down to the time of this hearing, the last set of minutes received in evidence here was dated June 30, 1994.

#### F. The Employer Policy Review Committee

The Fourth and last of the Committees formed in accordance with Chris Fuldner’s vision for the future of EFCO was more broadly empowered, and more oriented directly toward management-type powers than the others. The Employee Policy Review Committee (EPRC) was established in a memorandum from Mona Workes, then Personnel Director, on January 15, 1993 to all EFCO employees. Using what sound like the managerial “we,” Workes informed the employees that:

We are establishing an Employees Policy Committee to help us review and establish company policies. The committee will gather comments and ideas from employees regarding existing policies, or needs for implementation of new policies and make specific recommendations to EFCO’s management committee.

This will be an on-going committee of fifteen employees, selected to represent all areas of our operation.

Employees wishing to volunteer for service on this committee were asked to notify Workes, Lora Safer, or Vice President Bret Baker.

William Jeffrey (B.J.) Stegman is a salaried production planner. He volunteered for service on the EPRC, was selected, and was notified of his selection by Mona Workes. He was elected cochairman of the EPRC along with Phil Short.<sup>18</sup>

The other members of the EPRC, except for Terry Postalwait, another supervisor in the old plant, were rank-and-file employees, some hourly rated, and some salaried.

Stegman was a candid and reliable witness, although there is really no dispute of fact as to the origin, makeup, or activities of the EPRC. Stegman testified that Chris Fuldner came to the Committee’s first meeting. Fuldner told the committee members that they were appointed to examine standing policies, to review those policies that needed review, and present their recommendations to the Management Committee. If they had a policy they wanted implemented they had to take it to the Management Committee, but their scope, concerns, and methods were left up to them.

As noted, the EPRC elected B.J. Stegman and Short as co-chairman,<sup>19</sup> and Lynn as salaried clerical employee in the con-

<sup>18</sup> Short was an employee at EFCO’s storefront department in the old plant in Monet. Short later was made a supervisor, but continued to service as cochairman.

<sup>19</sup> It is clear from the testimony and the documents in evidence that when he was available, Stegman acted as chairman, and Short took over only at times when Stegman was not available.

tract estimating department, as secretary.<sup>20</sup> Stegman testified that the Committee wanted Mona Workes to attend their meetings. Many situations came up where committee member did not know what current policy was and they could ask her to help find out what it was. Workes also served as a resource person in areas under discussion. Stegman stated that Workes did not have a vote, and that she and Bret Baker were “guests” at committee meetings.<sup>21</sup>

The first meeting of the EPRC was held on February 9, 1993. The committee was greeted with a memorandum dated February 5 from the Management Committee which began as follows:

We have decided that we must eliminate smoking in EFCO's facilities, considering the increasing health and legal issues<sup>22</sup> in this area, and in response to employee suggestions and comments.

The memo went on to say that management wanted the EPRC in on the problem “from the beginning” and requested that the EPRC have a draft plan to implement this decision ready to present to the Management Committee at a meeting on February 22. The EPRC went to work and obtained views of employees, of EFCO'S regional offices, and from other companies. Meetings were held on February 16 and 22. Discussions concerned a ban on smokeless tobacco, nicotine patches, incentives, designated smoking areas, and support groups. A number of drafts of a policy were prepared, including some with reasons for the policy, and some first stating the policy, including a schedule of disciplinary actions for violating the policy, up to and including termination. The final policy was promulgated over Fuldner's signature on June 1, 1993.

Before the smoking policy issue was finally finalized, the committee began considering other issues, and their views and actions on matters such as sick leave/personal days,<sup>23</sup> dress code, 4-day work week, overtime, holidays, vacations, work hours, and timeclocks. The minutes report considerable discussion on the nonsmoking policy and, the personal/sick leave days, both of which eventuated in written company policies. The 4-day week also engendered much discussion but it and the other policies suggested or considered had not been converted into final form at the time of this hearing. Mona Workes testified that as of July 12, 1994, policies on transfers, dress codes, payroll records, overtime and one-half-day vacation selection had not been acted on by management.

While Mona Workes was present at most EPRC meetings, and described in the minutes as a member for most of the year-and-a-half history of the Committee, it does not appear that other management people attended meetings or participated in discussions with the Committee about policies. Stegman and Short did meet with the Management Committee from time to

<sup>20</sup> The secretary prepared agendas in advance of meetings, and reported the minutes afterwards.

<sup>21</sup> I note, however, that the minutes of meetings in evidence here show that Workes was present at most meetings at least through August 1993, and that she was listed as a committee member in those minutes.

<sup>22</sup> The “legal issues” involved probably are connected with possible legal complications under the Missouri Clean Air Act, Missouri Statutes 191.765 et seq.

<sup>23</sup> Both the EPRC and the Employee Benefits Committee had independently started looking into this issue. The EBC felt the matter was really a policy issue, and Mark Hardwick, the EBC Chairman, agreed with Stegman to let EPRC handle it. This policy became effective on August 1, 1993.

time, and, while no one was asked the content of those meetings, I can and do infer that the EPRC member and the management committee members did discuss the content of the proposals EPRC had studied and was recommending for adoption.

The EPRC, according to Stegman, chose its own new members, and at one point set up standards for the replacement members who didn't keep up attendance, or were forced to resign for other reasons. In October 1993, five new members were appointed to fill vacancies on the committee. Stegman testified that they received no input from management on the makeup of the Committee. A memorandum dated September 30, 1993, would indicate that volunteers should express their interest to Teri Fields, who was then a member of the EPRC. Travis Clevenger, one of the five new members, testified, however, that he was informed by Mona Workes that he was selected. A memo dated October 11, announcing the selection of the five new members, was sent to all EFCO employees over Works' name.

This Committee's work was continuing at the time of this hearing, the minutes of the June 29 meeting were introduced into evidence, and these minutes was an announcement that the next meeting was to be held on July 13, 1994.

#### G. The 8(A)(1) Allegations

##### 1. The no-solicitation rule

The complaint here alleges that the Company promulgated and maintained an unlawful no-solicitation rule in an employee handbook issued on February 20, 1993. The rule reads as follows:

Unauthorized solicitations of employees, or the unauthorized distribution of literature of any kind on company premises is strictly prohibited at all times. This prohibition applies both to employees during working hours and to non-employees. Any such incident should be reported to Personnel immediately.

In some instances the collection of money for presents, flowers, parties, donations, or for cases of particular hardship can be considered appropriate. All such approved solicitations should be made during regularly scheduled rest and lunch periods.

This rule was alleged to be a violation of Section 8(a)(1) of the Act in paragraphs 5(a) and 7 of the complaint. After receiving the notice from the Union that it was engaged in organizational activities at the plant, Chris Fuldner sent a memorandum to all plant supervisors. This memo read, in part:

In-plant union sympathizers are allowed to do certain things, but they are prohibited from certain activities. The following is a guideline:

1. They may promote the union on break, lunchtime, and off-hours in *non-work* areas only—i.e. lunchroom and break areas and off premises.

2. They may hand out literature at the times and places mentioned in No. 1.

3. They may *not* promote the union during working hours.

4. They may *not* promote the union in work areas at any time.” [Emphasis in original.]

In paragraphs 5(c) and 7, the complaint alleges that this memo violated Section 8(a)(1) of the Act.

There were two instances mentioned in the complaint, one of which arose out of the non-solicitation rule itself, and the other from Fuldner's July 28 memo.

In the first instance, the complaint in paragraph 5(b), alleges that the rule was enforced selectively and disparately by prohibiting union solicitations and distributions, while permitting non-union solicitations and distributions. On July 27, Dennis Wolf, a small parts fabricator on the storefront line had passed out copies of a union letter to employees in working areas of the plant, up and down the aisles, at a time before his shift was scheduled to begin that morning.<sup>24</sup> In the afternoon Wolf was approached by Plant Manager Donny Sorensen and Assistant Plant Manager John Stricklin. Sorensen told Wolf to stop passing out the letters inside the plant. He told Wolf to take the letters outside, and do it on his own time. Sorensen testified that he was told that Wolf was passing out literature on working time and that this was "bothering people." He and Stricklin went to see Wolf in Wolf's work area and Sorensen told him not to pass out literature on worktime and to restrict the distribution of literature to the breakroom or outside the building. Stricklin testified substantially as Sorensen had, Wolf was to pass out his literature on his own time while on break or at lunch. Wolf did not argue with these orders, and henceforth confined his union activities to areas outside the plant.

Travis Clevenger, a former bead saw operator, Carol Baker, a fabricator, Joe Cain a debridge saw operator, Jesse Black, a saw man, and Dennis Wolf, all employees on the first shift in the old plant, were unanimous in their testimony that collections for people who were ill or in financial trouble were routinely conducted in the plant, or worktime as well as breaks or lunch periods. These were also the usual things, baseball pools, candy sales, Avon, Little League sales, farm product sales, all routinely conducted in work areas without interference from supervisors who were on the scene. Carol Baker added that antiunion literature was distributed in working areas during worktime.

Both Donny Sorensen and John Stricklin testified that they have observed, or are told about such activities, they tell employees involved to stop, and confine such activities to break time, lunchtime, or off the work floor. Stricklin did admit that collections for people sick or in trouble occasionally were conducted on worktime.

Travis Clevenger reported on another incident which happened about August 1, 1993. The complaint, in paragraph 5(d) alleges that two persons named as agents of the Company in paragraph 4(b) of the complaint, threatened employees with discipline if they were seen (or heard, presumably) talking about the union.

Clevenger testified that Rodney Johnson, who he described as a lead man in his department, showed him Fuldner's July letter on union activity, and told Clevenger that "if he caught us talking or soliciting for the union anywhere on Company premises that we would be wrote up."

While there was no objection to this testimony as hearsay, I noted that the Company has denied Rodney Johnson's status as its agent and no evidence was introduced on that issue by the General Counsel.

## 2. Surveillance and impressions of surveillance

Paragraph 5(e) of the complaint alleged that Supervisor Randy Adams engaged in surveillance of employees engaged in union activities on August 3, 1993.

Dennis Wolf testified that he and several other EFCO employees met during their lunch hour, about noontime, on August 3, in Monett City Park with Union Representatives Jim Tudor and John Overman. The other employees were Carol Baker, Joe Cain, and Charlie Riedle. The meeting was outdoors on a hill near a small building known as the casino.

While the meeting was going on, Wolf stated that he saw a pickup truck driven by the shipping supervisor for the old plant, Randy Adams, go by near where the meeting was taking place. Adams had with him a rank-and-file employee, Randy McGlothlin. Two or 3 minutes later, the truck came back around and the occupants waved at Wolf, who waved back. Wolf's testimony was corroborated by Carol Baker and Joe Cain, who also testified that they saw Adams and McGlothlin pass by twice while they were at the meeting in the park.

Randall Adams, the supervisor of shipping at the old plant, supervises about 14 people on days and 8 at night. He testified that like all day-shift employees, he goes to lunch from 12 noon to 12:30. In the summer, he said, he likes to go up to the public swimming pool in the Monnett City Park and park in a shady sport by the pool, eat his lunch, and look at the girls. Randy McGlothlin, formerly a shipper, at the time of the hearing a lead man in the shipping department, testified that he went to lunch twice a week with Randall Adams. When the weather was good they would leave the plant, buy their lunch, and go up to the pool in the park to watch the women and listen to Paul Harvey on the radio. On August 3, McGlothlin said, they left the plant at 12 noon, brought lunch at a Subway sandwich shop between 12:03 and 12:10, then drove up to the park, arriving at the pool about 12:15. They stayed at the pool for 10 minutes, leaving at 12:25 to go back to the plant. On the way back McGlothlin stated, he saw Carol Baker with Dennis Wolf and two other people he didn't know standing in a group. He waved at Baker and she waved back. Adams asked who he was waving at, McGlothlin told him, and Adams also waved.

This incident was alleged to be unlawful surveillance in paragraph 5(e) of the complaint.

This incident might have passed unnoticed if it were not for the fact that during the same afternoon, between 2 and 2:30, Chris Fuldner came up to Carol Baker's work station and said that he had heard that she "and some others" would like to talk to him. He told her that he just wanted her to know that if she did, his door was always open. She thanked him, and he left.

Chris Fuldner testified that no one told him anything about Adams and McGlothlin's observation of people in the Monett City Park on August 3 until much later. He did not know about that incident when he approached Carol Baker at her work station. He said that he stopped by to see her because an employee named Mike Williams had told him that Dennis Wolf and Carol Baker would like to talk to him. He went to the old plant on another matter and as he was leaving, he saw Baker and said he understood she might want to talk to him, and if she did, his door was always open. She thanked him and he left.

This last was alleged to have created an impression of surveillance in paragraph 5(f) of the complaint.

<sup>24</sup> There was no third shift working at that time in that part of the plant.

### 3. Solicitation of grievances

There were two allegations in the complaint concerning solicitation of employee complaints and grievances. The first was contained in paragraph 5(g) alleging solicitation of complaints and grievances by William J. (B.J.) Stegman, on behalf of Chris Fuldner. Dennis Wolf testified that Stegman asked him if he wanted to serve on a grievance committee to be set up by Fuldner. Wolf said he would serve only if he had a union representative present. The matter was then dropped. There was no argument concerning it made in the General Counsel's brief on this issue.

The second incident was set out in paragraph 5(h), alleging that Mike Williams solicited complaints and grievances on behalf of Chris Fuldner.

Steve Carpenter, a lead man on the storefront line in the old plant testified that Mike Williams, a worker "out on the line" came up to him sometime around the end of August or first of September just after they had started work on the second shift. Williams asked Carpenter if he would be interested in going to a meeting in Chris Fuldner's office and discussing problems at EFCO. Carpenter agreed and he, Mike Williams, another employee named Ronnie Williams, and a fourth employee. Carpenter did not know, sat down with Fuldner in the latter's office. Carpenter quoted Mike Williams as saying at the meeting that he had invited Dennis Wolf, but Wolf said no because he wanted a union representative present.

The meeting itself started with the unknown employee asking about insurance, Carpenter talking about quality on the storefront line, and problems with beads which mold glass in the frames. Fuldner took notes, promising to look into the insurance matter and telling Carpenter that they were looking into the problems he had raised. There was some general talk about tools and quality problems in the storefront. According to Carpenter the meeting lasted about 20 minutes to a half hour.

Fuldner testified that Mike Williams worked, not on the line, but in receiving. He would receive rush packages or mail from Federal Express, and, presumably, other companies, and would bring these to the front office. While he was there he would engage Fuldner in conversation. Williams identified himself to Fuldner as a union committeeman, and during the union campaign in the summer and fall of 1993, Fuldner admitted that they talked about Williams' reasons for wanting a union. These conversations also concerned other matters, and according to Fuldner, were still continuing at the time of this hearing. Fuldner denied that he had ever asked Williams to solicit employee complaints or to solicit individuals to form a grievance committee. Fuldner was not asked directly about the meeting described by Carpenter. Mike Williams, who according to Fuldner's testimony was still employed by EFCO, was not called on to testify.

### 4. Granting of transfers

Paragraph 5(i) of the complaint alleged that Chris Fuldner granted job transfers to employees in order to induce them not to aid or assist the Union, or to select it as their bargaining representative.

Kathy Perriman, an employee of EFCO from July 1991 to November 1993, testified that she was having problems with

her supervisor.<sup>25</sup> She complained up the line, and, on August 25, found herself in Chris Fuldner's office. She told him about her problems and he replied that he didn't want anyone to have bad work experiences.

Fuldner said he would work on a transfer for Perriman. He added that there were a lot of union people out there who believed that he didn't care about employees and would like other EFCO employees to believe differently. He said that they (the Company) didn't get this far by mistreating employees.

Fuldner called in Perriman's supervisor and a transfer was arranged for her.<sup>26</sup> His testimony on this occurrence was not materially different from Perriman's.

## H. Discussion and Conclusions

### 1. The no-solicitation rule

The General Counsel maintains that the no-solicitation rule quoted above in section (G)(1) of this decision, violates Section 8(a)(1) of the Act, because it bans all solicitation or distribution of literature "on company premises—at all times." the mere existence of such a broad rule, even if, as the General Counsel points out, it is not enforced, carries with it the possibility of enforcement against a statutory right to engage in union activities. *Our Way, Inc.*, 268 NLRB 394 (1993). I believe that the rule unreasonably tends to interfere with, restrain and coerce employees in the exercise of their rights under Section 7 of the Act. *Soltech, Inc.*, 306 NLRB 269 (1992).

The second paragraph of the no-solicitation rule authorizes collection of money for certain specified purposes, provided such collections are approved (by management). The authorized collections do not, in my opinion, alter my view that the rule is invalid, and I so find. I, therefore, find that by promulgating and maintaining this rule, the Respondent has violated Section 8(a)(1) of the Act.

### 2. Enforcement of the rule

The warning to Dennis Wolf by Plant Manager Sorensen on July 27 is alleged as a separate violation of Section 8(a)(1). The facts were substantially undisputed. Wolf was passing out union literature in working areas inside the plant before the start of the first shift. There were no employees actually working at that time. Later, Sorensen had heard from unnamed sources that Wolf was passing out union literature inside the plant, on working time. So Sorensen, accompanied by Assistant Plant Manager John Stricklin, came up to Wolf at his work station sometime before the afternoon break. There is no disagreement that Sorensen began the conversation, not by asking Wolf what he had done, but by telling him that he was not to pass out "those letters you are passing out." There is a difference between Wolf's recollection of the extent of the prohibition, and Sorensen's. The latter said he told Wolf to confine the distribution to the breakroom, or outside the plant. Wolf did not mention the breakroom but stated that Sorensen told him not to pass out the literature "anymore, inside the plant—take them outside, on your own time."

<sup>25</sup> The nature of these problems was not described here, and I do not view that as important to the issue of the complaint allegation in paragraph 5(i).

<sup>26</sup> She worked a little over 2 months, then was terminated for failure to call in to report her absence from work. This also has no bearing on the issue involving her and Fuldner.

Stricklin, the witness, gave a third version, saying that Sorensen told Wolf to stop passing out the literature during company time, to do it on his own or outside the Company.

Looking at these three statements, I note that the only version which is consistent with the existing no-solicitation rule is Wolf's. The rule prohibits all solicitations "on company premises." It would be unlikely for a plant manager, or an assistant, to reprimand an employee and tell him he had to pass out literature on his own time, in the breakroom, a location most assuredly located on the Company's premises. I, therefore, credit Wolf's version of what he was told. Since I have found the rule invalid, I likewise find this reprimand, issued under the strictures of that rule, to be an additional violation of Section 8(a)(1).<sup>27</sup> See *Our Way, Inc.*, supra.

### 3. The July 28 memorandum

In what may have been an effort at damage control after the Wolf incident on July 27, Chris Fuldner issued a memorandum on July 28 to all plant supervisors. The memo is set out at section III (G)(1), above.

Limiting the union activities to nonwork areas, the memorandum prohibits any union activities in work areas even on nonworking time. There are no special circumstances justifying such restrictions. *Burger King Corp.*, 265 NLRB 1507 (1982). Therefore, this restriction is overly broad, and a further violation of Section 8(a)(1) of the Act, *Republic Aviation Corp. v. NLRB.*, 324 U.S. 793 (1945).

### 4. The Clevenger incident

Since there was no evidence of the supervisory status of Rodney Johnson, the person who allegedly threatened Travis Clevenger, and no evidence that Johnson was acting as an agent of the Company, even though I found Clevenger to be a credible witness, I cannot find that the statements by Johnson to Clevenger are any more than remarks made by one employee to another, and are not violative of the Act.

### 5. The Monett Park incident

There are only minor inconsistencies in the description of this incident by witnesses called by the General Counsel and by the Company. Moreover, all of the testimony seems to me to express the best recollection of each of the witnesses, albeit their memories differ slightly in whether Adams' truck was approaching from, or moving away from the group meeting there in the park. The General Counsel's witnesses agreed that the truck was seen twice, and that the second time, the occupants, who were known to the participants of the meeting, waved to them and they waved back. I credit these facts, but I also credit the testimony of Adams and McGlothlin that they were just heading for lunch, then after eating their lunch, they

<sup>27</sup> There was testimony by a number of employee witnesses attesting to all manner of collections for sick employees, for an employee billed while at work for needy employees, and the usual Little League, Avon, Church and school related drives and collections, all conducted out in the open, in the plant, with supervisor participation, and some conducted at least in part on work time. Sorensen maintained that whenever he saw these things going on during worktime, he told the people involved to stop. Stricklin said the same thing, but did admit that he had seen collections for deceased or injured worker being conducted or working time. I think both Sorensen and Stricklin were sincere, but in a large plant these things will go on in the absence of vigorous and constant enforcement by all levels of supervision. See *Raytheon Co.*, 277 NLRB 1528 (1986).

were proceeding back to the plant when they noticed the employees, whom they knew, standing in the park. I also credit Adams and McGlothlin in their assertions that they did not speak to anyone about what they saw. There is no indication that they knew that Wolf and Baker were union activists, or that what they saw was a union meeting in progress.

On the basis of these findings, I do not believe that the General Counsel has established by a preponderance of the credible evidence that through the actions of Randall Adams, an admitted supervisor, the Company has violated Section 8(a)(1) in this situation.

The postscript to this incident, Chris Fuldner's approach to Carol Baker at her work station later that afternoon probably gave rise, as I have mentioned earlier, to the allegation of surveillance just discussed. There is no evidence that Randall Adams, or Randy McGlothlin told anyone in management about their observation of Carol Baker, and others, in the park. Indeed, Fuldner testified that he got the idea of talking to Carol Baker from Mike Williams, an employee in the receiving department, whose work required him frequently to go to the President's office. When Williams was there, according to Fuldner's testimony, they talked about the Union. At one point Williams said he was a union committeeman, although there is no corroboration of this claim, and around August 3, Fuldner says, Williams told him that Wolf and Baker might like to talk with him. Soon after that conversation Fuldner happened to be in Baker's work area, and he stopped to invite her to come and see him to talk about problems.

Baker naturally assumed that Fuldner's visit was prompted by a report of the union meeting in the park that noontime. This assumption is certainly reasonable and logical, even though I have found that it did not happen that way. But there was a union campaign going on, and Fuldner, by his own testimony, would not have approached Baker if he had not been advised by Williams, a self-described union committeeman, that Baker and Dennis Wolf "might want to talk to" Fuldner. I think an inference may be fairly drawn that Fuldner viewed Williams' remark as an invitation to meet with union supporters.<sup>28</sup>

Thus, even in the absence of a tie-in between the events the park with Fuldner's visit to Baker, the tie-in between the Williams identification of Baker along with Wolf, and Fuldner's followup on Williams's suggestion would serve to justify Baker's fear that his union activities were under surveillance. I find, in these circumstances, that Fuldner did create an impression of surveillance by inviting Baker to his office to discuss whatever she wanted. This I find is an additional violation of Section 8(a)(1). *United Charter Service*, 306 NLRB 150 (1992).

### 6. Solicitation of grievances

I have noted that there was no followup on the complaint allegation in paragraph 5(g) that B.J. Stegman had solicited grievances from employees,<sup>29</sup> but in another allegation, paragraph 5(h), the matter of grievance solicitation developed more fully. Steve Carpenter's testimony that Mike Williams had invited him and two other employees to Fuldner's office where,

<sup>28</sup> Fuldner certainly knew of Wolf's activity on behalf of the Union (see sec. III(G)(1), above), and the coupling of Baker's name with Wolf's would lead to identification of Baker with the Union as well, even if Folder had no other information on her position or activities.

<sup>29</sup> I do not find any violation of Sec. 8(a)(1) in this incident.

in Fuldner's presence and with his participation, they discussed grievances concerning employee benefits and working conditions. This testimony was not disputed, and I credit it in its entirety. I find, therefore, that at about the end of August or the beginning of September 1993, three employees went to Fuldner's office, at Mike Williams's invitation, and discussed grievances. I find this to be another violation of Section 8(a)(1) of the Act, *Mast Advertising*, 286 NLRB 955 (1987).

#### 7. Grant of a job transfer

As I have described above, employee Kathy Perriman was having problems with her supervisor. She appealed to Chris Fuldner and he agreed to transfer her to another location. There is no indication that the new position was in any way better or more advantageous to Perriman than the one she left, other than the fact that she was getting away from a supervisor who was, for whatever reason, giving her problems. Now, in the course of her interview with Fuldner, Perriman reported that he said to her that there were a lot of "Union people out there who believed that he didn't care about employees and these Union people would like other EFCO employees to believe that, but he did not want employees to have bad work experiences and he implemented Perriman's transfer in order to help her.

The General Counsel argues that this statement served to couple Perriman's transfer to abandoning support for the Union. I did not agree. I view Fuldner's statement to Perriman as arguing to her that the Union was unjustly accusing him of neglecting his employees. I do not view this as a violation of law. It merely was an expression of his own impression of what he thought the Union felt, and a celebration of his own generosity and open-handedness.

#### 8. The ESOP announcement

Sometime in October 1993, according to the testimony of Dennis Wolf, a notice as posted on a bulletin board in the old plant consisting of an application to the Internal Revenue Service for approval of an Employee Stock Option Plan (ESOP). Among the features of the proposed plan was a statement of which employees were to be eligible to participate in the plan: "The employees eligible to participate under the plan are all employees except members of a collective bargaining group."

The Respondent does not disagree with paragraph 8(k) as added to the complaint by amendment dated May 9, 1994, but argues that there are mitigating circumstances.

These circumstances derive from Section 2.01 of the plan, which reads as follows:

An employee is an excluded employee if he is a *member of a collective bargaining unit, unless the collective bargaining agreement provides otherwise*. An employee is a member of a collective bargaining unit if he is included in a unit of employees covered by an agreement which the Secretary of labor finds to be a collective bargaining agreement between employee representatives and one or more employers if there is evidence that retirement benefits were the subject of good faith bargaining between such employee representatives and employer [sic.]. The term "employees representatives" does not include an organization more than one-half of the members of which are owners, officers or executives of an employers. [Emphasis added.]

The ESOP itself, as well as the notice complained of in paragraph 5(k), were both prepared by James F. McLeod, an attor-

ney who has represented EFCO for some years. It is clear from the wording of the notice, describing the excluded employees as members of a "collective bargaining group," that McLeod, whose professional skills in drafting the ESOP itself are nothing less than remarkable, is obviously not familiar with terms of art used by labor law practitioners. In summarizing the status of excluded employees, McLeod used the word "group" instead of "unit" which has a technical meaning quite different from the word "group." McLeod did not perhaps for reasons of economy, go in to the rest of section 2.01 of the ESOP (which looks like an excerpt from a statute or regulation) a complicated delineation of employee eligibility which, generally, provides for exclusion of persons specifically excluded by collective-bargaining agreement or included in a unit of employees about which there has been good-faith bargaining concerning retirement benefits.<sup>30</sup>

After the issuance of the amendment to the complaint on May 9, 1993, the Respondent issued another notice, on July 7, 1994, stating that the JRS had approved the plan quoting section 2.01 of the ESOP in full. Without admitting any error in the original notice<sup>31</sup> the 1994 notice rescinded the description of excluded employees in the old notice and stated that it was not the Company's intention to suggest that employees would be ineligible for coverage under the ESOP if they became members of a union.

This memorandum seems clear enough, but the original notice, presented to the employees, according to the Company's own representation in May, 1993, was an display at least until October 1993, during the union campaign in the summer of that year. Thus, its impact would not have been totally removed, or recalled retroactively, by the publication of a correction just before the opening of this hearing in July 1994. The error may or may not have been inadvertent, but the impact on employees by its display for over a year, constitutes a further violation of Section 8(a)(1) of the Act, *Lynn-Edwards Corp.*, 290 NLRB 202 (1988).

#### I. The 8(a)(2) Allegations

##### 1. Position of the parties

The General Counsel argues, in his brief, based on the facts I have summarized above in section III(B) through (F), that the four committees set up by management; the Safety Committee (SC), described in section III(C), the Employee Suggestion Screening Committee (ESSC), described in section III(D); the Employee Benefits Committee (EBC), described in section III(E); and the Employee Policy Review Committee (EPRC), described in section III(F), admit employees to participate and exist, in whole or in part, to deal with the Company concerning "grievances, labor disputes, wages, rates of pay, hours of employment or conditions of worth."<sup>32</sup> They thus qualify as labor organizations within the meaning of Section 2(5) of the Act.

The General Counsel further maintains that the actions of the Respondent EFCO created dominated the Committees similar

<sup>30</sup> This description, like McLeod's, is an oversimplification. Sec. 2.01 is strewn with legal beartraps, but the issue here is really the effect of the posted notice, not the intent of McLeod, or the Respondent in its preparation.

<sup>31</sup> Which, according to the July 7, 1994 memo actually was posted "around May 21, 1993."

<sup>32</sup> Sec. 2(5) of the Act, 29 U.S.C. 125(5).

to the employer's creation and domination<sup>33</sup> of the committees in *Electromation, Inc.*, 309 NLRB 990 (1992),<sup>34</sup> aff'd. 35 F.3d 1148 (7th Cir. 1994), in violation of Section 8(a)(2) of the Act.

The Respondent, on the other hand, makes a number of arguments in opposition to the General Counsel. First, the Respondents argue that its employees, because of their participation in the Company's ESOP program, and the owners of something under 25 percent of the Company's stock are thereby owners of a substantial interest in the equity of the Company, and are not eligible to be considered as members of a labor organization; Second, that these employees by their participation in the Committees are managerial employees within the meaning of the Act as interpreted by such cases as *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); Third, that the Committees here are not labor organizations within the meaning of the Act; that the Company did not dominate the committees; that the facts in this case clearly distinguish it from *Electromation*; and, finally, that any decision holding that Respondent has violated Section 8(a)(2) in establishing and dominating these committees is, itself, an unlawful infringement on the Committee members' and Respondent's freedoms of speech, assembly, and association under the United States Constitution.

## 2. The managerial employee argument.

This portion of the argument is based on the Company's view that the employee members of the Committees are persons who represent "management interests by taking or recommending discretionary actions that effectively control or implement employee policy." *NLRB v. Yeshiva*, supra.

This argument, that employees serving on these committees are managerial, is combined in the Company's brief, with the argument that because all of the employees of EFCO are participants in the ESOP plan, owning, collectively, some 25 percent of the Company's common stock, they are owners of the Company admitting that this 25-percent ownership is restricted by the ESOP document itself (R. Exh. 17).

As to the first argument, I do not believe that there is any valid analogy between the four committees in existence at EFCO, and those considered by the Supreme Court in *Yeshiva*.<sup>35</sup> In the latter case, standing committees, established by the faculty and made up of faculty members functioned at departmental, school, and University levels. All faculty members participated in one or more standing committees. These committees were supplemented by ad hoc committees established, again by the faculty, for special purposes such as the recommendations for the selection of deans, the establishment or discontinuance of university or school programs, and other extraordinary matters.

These committees effectively determined what was going to be taught at the university; who would teach in the various courses of study; who would be admitted to the university and to particular courses of study; what grades would be given to students; who would be retained and who would be dismissed; who would be hired to teach; what faculty members would be retained, promoted or granted tenure; what grants would be applied for; how these grants should be used; and, in some instances, what schools or departments should be established,

maintained or discontinued, and what tuition should be charged for attendance at the university.

In short, as they Court found in *Yeshiva*, the faculty effectively and pervasively controlled the actual governance of the university.

The situation at EFCO is quite different. The committees in question here were established unilaterally by management. The employees originally selected by management, as in *Electromation*, supra, from volunteers. These committee members, originally 43 to 50 in number,<sup>36</sup> were only a small proportion of the total employee complement, and their participation was and is confined to employee benefits, employee policies, employee suggestions, and employee safety. The committees have absolutely no say in what the Company produces; who will produce it; how it will be marketed or advertised; what materials shall be purchased; how these materials should be used; nor in any other way these committees exercised any authority, or even any concern, over fundamental questions concerning the management of the enterprise.

I find that these committees considered and made recommendations only concerning matters of employee-employer interest. Thus, the argument based on *Yeshiva* is not applicable to the facts of this case.

In its argument that the existence of the ESOP at EFCO makes the participants in the plan, in effect, owners of a substantial portion of the business, the Company admits that the plan does not provide for employee participation in the election of directors, or the "transaction of routine cooperate business at shareholder meetings," not to mention the day-to-day running of the Company. Nor does the individual participant have a right to instruct the Trustee if the plant to vote in any way, except with regard to certain major corporate issues such as merger or consolidation, recapitalization, liquidation, dissolution, reclassification, sale of substantially all assets, or similar transactions (R. Exh. 17, sec. 10.17).

The Company argues that the combination of the 25-percent strength of the employees' stock interest, albeit in limited areas of corporate governance, combined with the policy making powers of the committees, render all of the employees, as participants in the ESOP, to be managerial employees.

The Board cases cited by the Company for this position are all representation cases where the issue was whether employees would or would not be eligible to vote in a Board-conducted election. *Sida of Hawaii, Inc.*, 191 NLRB 194 (1971); *Brookings Plywood Corp.*, 98 NLRB 794 (1952).

There are two basic problems I find with this argument. This is not a representation case. There is no issue here of employees voting or not voting in an election. Moreover, the 25 percent of the Company's stock is owned by all of the participants in the ESOP. The alleged managerial functions are exercised by a small percentage of those participants. Therefore, I do not believe the Company can pyramid one upon the other to vest the 43 or so committee members with the whole weight of the 25-percent ownership.

Second, the Company's claim that the 25-percent ownership is sufficient to influence company policy (or at least to caution management not to ignore it) demonstrates only a potential influence. The Board has held that the power of stock ownership must be more than potential. It must reflect actual control,

<sup>33</sup> See *E. I. du Pont de Nemours & Co.*, 311 NLRB 893 (1993).

<sup>34</sup> Referred to throughout the record in this case as "*Electromation*."

<sup>35</sup> An in other cases considered by the Board and the courts under *Yeshiva* principles laid down by the Supreme Court.

<sup>36</sup> These numbers varied as members dropped out and new members were added, but the numbers remained fairly constant.

or an effective voice in the formulation and determination of cooperate policy. These has been no showing that any such actual control, or an effective voice in company policy has been shown here.<sup>37</sup> *S-B Printers*, 227 NLRB 1274, 1275 (1977); *Science Applications International Corp.*, 309 NLRB 373 (1992).

The Company's argument on these issues must fail. I see no connection between the activities of the committees here and the criteria laid down by the Court in *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974).

### 3. Are the Committees labor organizations?

The Company argues in this section of its brief that the Board was in error in finding the committees in *Electromation* to be "labor organizations" within the meaning of Section 2(5) of the Act. Further, the Company argues that in order to come within the statutory definition of Section 2(5), the organization in question it must have been authorized by other employees in a unit to represent them.<sup>38</sup>

The Company's position does not, in my opinion take into account the several different types of entities included in the Section 2(5) definition of a "labor organization," and does not currently interpret the legislative history of the Wagner Act showing the interest of the frames of that law in this definition.

In affirming the Board's decision in *Electromation*, the Circuit Court agreed that the "action committees would constitute labor organizations if: (1) the Electromation employees participated in the committees; (2) the committees existed, at least in part, for the purposes of 'dealing with' the employer; and (3) these dealings concerned 'grievances, labor disputes, wage, rates of pay, hours of employment or conditions of work.'" *Electromation, Inc. v. NLRB*, 35 F.3d 1148 (7th Cir. 1994). A narrow construction of Section 2(5), such as that urged on us here by the Company, was rejected by the Court, citing the Legislative History of the Wagner Act, S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935), reprinted in 2 Leg. Hist. 2306 (LMRDA 1959, reprinted 1985). Under the Court's interpretation of the Legislative History, a labor organization need not have offices, a constitution, by-laws dues, or a treasury. *Electromation Corp. v. NLRB*, supra at 1159.

These committees in this case likewise had no constitutions or by-laws, no dues, and no treasuries. Each of them did have a statement of their duties and functions issued to them in the cases of the EBC, the ESSC and the EPRC by letters establishing them and outlining their duties.<sup>39</sup> They had officers, in the case of the ESSC, EBC, and the EPRC, elected by the membership, in the case of the SC, Mike Washick, the plant coordinator assumed the role of chairman.

In the cases of three of the Committees, EBC, EPRC, and SC, the members were urged by Fuldner and Washick to talk to

other employees to obtain ideas and suggestions from other employees in the plant.<sup>40</sup>

In the light of all the evidence here, I think it is clear that these four committees are, each of them, labor organizations within the meaning of Section 2(5). They each had employees as members; they were established by the Company, in furtherance of Chris Fuldner's vision for a more productive, more profitable, and a more satisfying place for employees to work. In furtherance of these goals, Fuldner had set up the FSOP and profit sharing plan, but seeing that those benefits were to far in the future for most employees, he set up committees to look to improvement of employment policies (EPRC); employee benefits (EBC); employee safety (SC); and employee suggestions (ESSC). All of these committees dealt with conditions of employment. All were directed to talk to employees in the shops and offices to solicit, suggestions in one case, and ideas or proposals by the other three. The proposals were then discussed among committee members, then brought to the Management Committee for approval. While there was no direct testimony about bargaining, there is no question that there were discussions about benefits, policies, suggestions and safety matters. There were dealings about the proposals brought forward by the committees, there were amendments suggested, and revisions made, and several of the proposals eventually became company policies.

I, therefore, find that these committees, labor organizations within the meaning of Section 2(5) of the Act, have engaged in dealing with their employer, even though they never actually engaged in collective bargaining, or concluded a bargaining agreement (other than agreement made on separate policies, employee benefits, safety programs and suggestion. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203 (1959).

### 4. Did the Company dominate the Committees

In this section of its brief, the Company argues that the case law and the Legislative History of the Wagner Act require that, in order to establish employer domination of a labor union, there must be a showing of actual domination, and a showing that the employer's action subverted employee free choice, citing *Chicago, Rawhide Manufacturing Co. v. NLRB*, 221 F.2d 165 (7th Cir. 1955).

In affirming the Board's decision in *Electromation* the Seventh Circuit distinguished its *Chicago, Rawhide* decision from *Electromation*. In the former case the employee initiated the first meeting with the employer, and proposed a procedure for handling employee grievances. In addition, in *Chicago Rawhide*, the meetings of employees were held on company time, but outside of the presence of management. Company representatives did not determine the subject matters to be considered, or select the members of the committees, or exercise a veto over what committee recommendations would be presented to management. (*Electromation*, 7th Cir., supra at 1168.)

In this case, as in *Electromation*, management unilaterally established the committees, chose the initial membership, participated in almost all of the meetings of the various commit-

<sup>37</sup> Even if either the ESOP participants, or the Committees here, had any impact on any cooperate policies other than employee-employer relations.

<sup>38</sup> Citing *United States v. Ryan*, 350 U.S. 299 (1956) and Former Board Devaney's concurring opinion in *Electromation*. Neither the Ryan case, nor Member Devaney's concurrence are controlling here.

<sup>39</sup> The letter establishing or rather reestablishing the SC gave a statement of the Committee's mission, but was signed by Mike Washick rather than by Fuldner.

<sup>40</sup> Mona Workes and Mike Washick also indicated that the selection of members for the committees was, at least in part, guided by a desire to have as broad a membership from all parts of the operation as was possible, given the limited number of members felt to be practical.

tees, and chose in some instances the issues which committees would consider.<sup>41</sup>

In the 7th Circuit's decision in *Electromotion*, the Court pointed out that the distinction between support and domination is applied only where the labor organization has "some reasonable claim to being an independent entity composed of employees and distinct from management. In *Electromotion*, unlike Chicago Rawhide, the Court found that the initial creation, the structure, and the administration was substantially under the control of the company.

The same distinction may be made by in this case. The committees were created and structured by the Company, and administrated with the assistance in the cases of the EBC and the EPRC, of Workes who attended most of their meetings, and with respect to the SC, headed by Supervisor Mike Washick, and the ESSC under the chairmanship of Mark Kaiser, a supervisor since the spring of 1993.

As the Board found in its *Electromotion* decision, 309 NLRB at 996-997:

Purpose is different from motive; and the "purpose" to which the statute directs inquiry does not necessarily entail subjective hostility towards unions. Purpose is a matter of what the organization is setup to do, and that may be shown by what the organization actually does. If a purpose is to deal with an employer concerning conditions of employment, the Section 2(5) definition has been met *regardless of whether the employer has created it, or fostered it creation, In order to avoid unionization, or whether employees view that organization as equivalent to a union.* [Emphasis added.]

On these facts, I find that the Company did in fact create, structure, and dominate the four committees as alleged in paragraph 6 (A), (B), (C) and (D) of the complaint.

##### 5. Distinguishing this case from *Electromotion*

The Company, noting in its brief that I had observed during the course of the hearing that I "perceived certain similarities" between this case and *Electromotion* asks that I consider a number of significant dissimilarities and distinctions between the two cases.

There are several paragraphs in the brief in which the Company sets out what are viewed as distinctions and dissimilarities. I will set these out as follows:

(a) The Company asserts that the committees in this case were not formed in response to any employee discontent. Well, they were formed, according to Chris Fuldner, in response to what he felt was a failure of the employees to appreciate the benefits he had provided them through the ESOP and profit sharing. He wanted their closes participation in the employees benefit process in order to increase their involvement with company goals. In *Electromotion*, the employee discontent resulted from unilateral negative alterations to the benefit and wage programs.

But, in *Electromotion* there was no union campaign when the committees were formed, or until some weeks after they were in operation. Nor was there any atmosphere of hostility toward the union by management. Indeed, I recommended that two allegations of 8(a)(1) violations be dismissed, and my recommendations were followed by the Board. The violation of Sec-

tion 8(a)(2) found in *Electromotion* was the continued maintenance of the committees, or a couple of them, after the union demand for recognition.

(b) The Company argues that the purpose of the committees was different here than in *Electromotion*. I think that there may be a distinction here, but of form, not of substance. The *Electromotion* committees were set up a little differently, from those involved here, but essentially the purposes were the same; to draw the employee closer to an understanding of company policies and lend their cooperation to overall company strategy for its continued successful operation.

(c) To the argument that the committees at EFCO were non-representational in nature, I respond that I disagree. All of the committees here were urged by Chris Fuldner or Mike Washick to contact other employees, to get their proposals and their views to use in committee deliberations. Efforts were made in several of the committees to secure representation from all sections and shifts of the two Monett plants. There was, perhaps (I am not entirely sure of this), no actual bargaining, but there was give-and-take discussion and proposals were back and forth.

The next paragraphs in this section of Respondent's brief do not concern my statements that there were similarities between this case and *Electromotion*, but rather are addressed to the Board's decision in the latter case, matters about which any discussion by me would be inappropriate.

##### 6. Constitutional argument

The Company maintains that any interpretations of Section 2(5) and 8(a)(2) of the Act, resulting in an invalidation of its employee committees constitutes an unlawful infringement upon the participant's freedom of speech, assembly, and assembly under the First Amendment to the United States Constitution.

To this argument I can best reply by paraphrasing the 7th Circuit's opinion in the *Electromotion* case, 35 F.3d 1148, 1162 fn. 2 (7th Cir. 1994):

With all due respect to the company, its actions in creating and administrating the . . . committees can hardly be described as the "expressing of any views, argument or opinion." Without a doubt [EFCO's] actions in this case went far beyond mere encouragement of its employees to. arrange a collective means of expression.

To follow up, the establishment and maintenance of these committees here can hardly be described as an exercise of First Amendment rights, and to hold that the strictures against the formation of committees, found to be labor organizations under Section 2(5) of the Act, and the domination of such committees a violation of Section 8(a)(7) of the Act, constitute unconstitutional restraints against free expression either by employees or the employer, is manifestly inappropriate.

##### THE REMEDY

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

I shall recommend that the Respondent immediately disestablish and cease all support to the committees established by it for purposes of studying employee benefits, employee policies, employee suggestions, and safety.

<sup>41</sup> The nonsmoking policy for the EPRC, suggestions for the ESSC, safety policies for the SC, and choices among health benefit plans, and a dental plan for the EBC.

## CONCLUSIONS OF LAW

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

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Employer Policy Review Committee is a labor organization within the meaning of Section 2(5) of the Act.

4. The Employee Benefit Committee is a labor organization within the meaning of Section 2(5) of the Act.

5. The Employee Suggestion Screening Committee is a labor organization within the meaning of Section 2(5) of the Act.

6. The Safety Committee is a labor organization within the meaning of Section 2(5) of the Act.

7. The Respondent has engaged in unfair labor practices by promulgating and maintaining an overly broad no-solicitation rule; by warning an employer for an alleged violation of that rule; by publishing a memorandum containing an overly broad interpretation of the said no-solicitation; by giving an employee the impression that the employee's union activities were under surveillance; and by soliciting grievances from its employees.

8. The Respondent has engaged in an unfair labor practice by dominating and assisting the Employee Policy Review Committee, the Employee Benefit Committee, the Employee Suggestion Screening Committees and the Safety Committee from February 28, 1993, to the present time.

9. The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended<sup>42</sup>

## ORDER

The Respondent, EFCO Corporation, Monett, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing an overly broad no-solicitation rule.

(b) Publishing and maintaining memoranda setting out overly broad interpretations of a non-solicitation rule.

(c) Reprimanding an employee from alleged violations of an overly broad non-solicitation rule.

(d) Giving an employee the impression that the employee's union activities were under surveillance.

(e) Soliciting grievances from its employees.

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

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

(a) Remove from the files of its employee, Dennis Wolf, any record of a reprimand given him on July 27, 1993 concerning violations of a non-solicitation rule.

(b) Immediately disestablish and cease giving assistance or other support to the Employee Policy Review Committee, the Employee Benefit Committee, the Employee Suggestion Screening Committee and the Safety Committee.

(c) Post at its facilities in Monett, Missouri, copies of the attached notice marked "Appendix."<sup>43</sup> Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

Dated, Washington, DC, March 7, 1995

## 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.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT promulgate or enforce an overly broad non-solicitation rule.

WE WILL NOT reprimand employees for alleged violations of such a rule.

WE WILL NOT publish an overly broad interpretation of a no-solicitation rule.

WE WILL NOT give our employee the impression that their union activities are under surveillance.

WE WILL NOT solicit grievances from our employees.

WE WILL NOT support, dominate, or assist the organizations known as the Employee Policy Review Committee, the Employee Benefit Committee, the Employee Suggestion Screening Committee, and the Safety Committee.

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

WE WILL remove from the file of Dennis Wolf a reprimand he received on July 27, 1993 for distribution of union literature.

WE WILL immediately disestablish and cease giving any assistance and support to the Employee Policy Review Committee, the Employee Benefit Committee, the Employee Suggestion Screening Committee, and the Safety Committee.

EFCO CORPORATION

<sup>42</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>43</sup> 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."