
What Constitutes “Dealing With” Pursuant to Section 2(5) of the Act Since *Electromation, Inc.*, 309 NLRB 990 (1992)?

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I. Introduction.

Over the years, employers have looked to employee committees to enhance employee involvement in workplace decisionmaking, improve productivity, increase efficiency, and/or simply to bolster morale. The Board’s view of the legality of such committees has not always been a model of consistency. Early on, the Board’s decisions were hostile toward employee committees. In the 1970’s and 1980’s, the Board seemed to relax and become more tolerant of committees. The tide turned again in the 1990’s, and for approximately a decade, employee committees were successfully assailed by unions and the Board as unlawful employer-dominated “labor organizations” under Section 8(a)(2) of the National Labor Relations Act, 29 U.S.C. § 158(a)(2), (“NLRA” or the “Act”).

And then came *Crown Cork & Seal*. This decision, issued by the Board on July 20, 2001, appears to breathe new life into employee committees, and signals a possible departure from the Board’s recent trend toward finding employee committees violative of the Act. Because *Crown Cork & Seal* is recently decided, factually peculiar, and the product of a Board in the midst of political transition, it is unclear whether the decision represents a true shift in Board law. At a minimum, however, the decision is a potentially useful tool for employers currently...
contemplating the use of employee committees, and a signal to employers (and their labor
counsel) to pay close attention to the next several decisions in this area.

This paper provides an analysis of the implications of the Board’s decision in Crown
Cork & Seal. Specifically, it focuses on the Board’s construction of the term “dealing with,” as
that term is used in Section 2(5) of the Act, and as it relates to the broader doctrine of employer
domination under Section 8(a)(2). The paper begins with a look at the statutory framework
underlying the employee committee controversy. It then examines the development of the
Board’s case law leading up to Crown Cork & Seal, with a particular emphasis on
Electromation, Inc., 309 NLRB 990 (1992) and its progeny. Next, the paper identifies questions
left open by the Electromation line of cases, and then discusses the impact of Crown Cork &
Seal on the legal landscape. The paper ends by offering some hypotheses on the future of Board
law regarding employee committees, and some practical suggestions for employers interested in
establishing or maintaining employee committees amid the evolving case authority.

1 A wealth of Board authority discusses issues of employer “domination” of and “interference” with
employee committees. Those issues, and there are many, are not treated here. Rather, the focus of this
paper, and indeed the focus of decisions like Crown Cork & Seal, is on the Board’s construction of the
term “dealing with” under Section 2(5). Consistent with that aim, it is sufficient to note here that
employer “domination” is usually not in dispute in the case of an employer-sponsored employee
participation committee. As the Board aptly stated in Electromation, Inc., 309 NLRB 990, 995-996
(1990): “[A] labor organization that is the creation of management, whose structure and function are
essentially determined by management ... and whose continued existence depends on the fiat of
management, is one whose formation or administration has been dominated under Section 8(a)(2).” Thus,
an employer’s establishment of an employee committee, as well as its power to disband the committee,
determine its format, direct its activities, pay employees for their participation, and furnish office space
and supplies are all factors that indicate impermissible “domination.” See, e.g., Simmons Industries, Inc.,
321 NLRB 228, 253 (1996); Webcor Packaging, Inc., 319 NLRB 1203, 1204-1205 (1995), enf’d, 118
II. The Statutory Framework Applicable to Employer Domination Issues.

The logical starting point for an examination of issues relating to employee committees is the language found in Section 8(a)(2) and Section 2(5) of the Act. Section 8(a)(2) makes it an unfair labor practice for an employer to “dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.” 29 U.S.C. § 158(a)(2) (emphasis added). In turn, the term “labor organization,” as used in Section 8(a)(2), is defined by Section 2(5) of the Act as:

any organization of any kind, or any agency or employer representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.


Congress’ stated goal in enacting Section 8(a)(2) was to preserve for employees the right to choose their bargaining representative free from employer interference or coercion. See, e.g., I Legislative History of the National Labor Relations Act of 1935, 15-16 (Govt. Printing Off. 1949). Accordingly, Section 8(a)(2) is designed to ensure that employer-dominated groups “do not rob employees of their right to select a representative of their own choosing.” Polaroid Corp., 329 NLRB No. 47 (1999) at 1.

The Board applies a two-part inquiry when determining whether an employee participation committee violates Section 8(a)(2) of the Act. First, the Board examines whether the committee in question “deals with” the employer in a manner under Section 2(5) that makes the committee a “labor organization” under Section 8(a)(2). If so, then the Board decides whether the employer has “dominated,” “interfered with,” or “supported” the group. Polaroid
Corp., 329 NLRB No. 47 at 1; Electromation, Inc., 303 NLRB at 996. If the answer again is “yes,” the committee is unlawful.

III. The Evolution of Board Authority in Employee Committee Cases Prior To Crown Cork & Seal.

Crown Cork & Seal is the latest addition to more than 50 years of Board law on employee committee issues. Indeed, the implications of Crown Cork & Seal are best understood when the decision is placed in historical context. Accordingly, it is worthwhile to examine how the Board has approached employee committee cases over the last several decades.

A. The Early Decisions.

In its early decisions considering whether employee committees constituted “labor organizations” under Section 8(a)(2), the Board broadly construed the term “dealing with” in Section 2(5) to encompass many forms of employee committees, even if those committees did not engage in formal collective bargaining. For example, in Standard Coil Products Co., 110 N.L.R.B. 412, 420-421 (1954), modified on other grounds and enf’d., 224 F.2d 465 (1st Cir. 1954), cert. denied, 350 U.S. 902 (1955), the Board examined the legality of a committee called the “Employee-Management Committee.” The committee was formed, sponsored, funded, and promoted by the employer to address safety, quality, working conditions, and employee dismissals. Finding a violation of Section 8(a)(2), the Board affirmed the Trial Examiner’s opinion that the committee was a “labor organization” under Section 2(5) because of the profound impact of the topics addressed by the committees (and controlled by the employer) on the employees’ conditions of employment. Similarly, in General Shoe Corp., 90 N.L.R.B. 1330 (1950), enf’d., 192 F.2d 504 (6th Cir. 1951), cert. denied, 343 U.S. 904 (1952), the Board examined five employee committees established by the employer to address, inter alia, safety, benefits, employee views on company policy, hours, wages, athletic and social events, and
discharges. The Board found all five committees violative of Section 8(a)(2) because, though they did not engage in formal collective bargaining with the employer, they dealt with the subjects of collective bargaining. *Id.* at 1332-1333.

The Board’s view that “dealing” was to be construed broadly was bolstered by the U.S. Supreme Court’s 1959 decision in *Cabot Carbon Co.*, 360 U.S. 203 (1959). There, in affirming a Board decision that committees established by the employer to discuss issues such as safety, efficiency, production, conservation, and grievances were “labor organizations,” the Court adopted the Board’s more expansive view of the term “dealing with” under Section 2(5) of the Act. The Court pointed out that, “[N]othing in [Section 2(5)] indicates that the broad term ‘dealing with’ is to be read as synonymous with the more limited term ‘bargaining with.’” *Id.* at 211. Accordingly, the Court held, where the purposes and functions of employee committees evidences that they “deal with” the employer concerning working conditions, they are “labor organizations” under the Act, even if their “dealings” fall short of actual “bargaining.” *Id.* at 212-213.

In the years immediately following *Cabot Carbon*, the Board and the courts generally continued to construe the term “dealing with” broadly, with some exceptions. Sometimes, they even went overboard. For example, in *Thompson Ramo Woolridge, Inc.*, 132 N.L.R.B. 993 (1961), modified and enf’d., 305 F.2d 807 (7th Cir. 1962) in evaluating the actions of an employee committee established simply “to inform management of employee problems, needs, and desires,” the Board found the committee unlawfully “dealt with” management even though the committee made no specific proposals to management. In reaching this result, the Board stated that “dealing” under Section 2(5) encompasses “the presentation to management of employee ‘views,’ without specific recommendations as to what action is needed to accomplish
those views.”  *Id.* at 995.  Surely, such “information sharing” would not be found unlawful today.  See, e.g., *E. I du Pont de Nemours*, 311 N.L.R.B. 893, 894 (1993) (discussed herein).

**B. The 1970’s and 1980’s.**

In the late 1970’s, the Board decided three cases that demonstrated a definite narrowing of its broad construction of the term “dealing with.”  First was *Sparks Nugget, Inc.*, 230 N.L.R.B. 275 (1977).  There, the employer (a unionized Nevada casino, hotel and restaurant) established a joint employer-employee grievance committee to preside over employee grievance hearings and render binding decisions.  *Id.* at 276.  Because the committee performed a purely adjudicatory function *for* (as opposed to *with*) management, the Board held the committee did not “deal with” management.  *Id.*  Next was *Mercy-Memorial Hospital*, 231 N.L.R.B. 1108 (1977), a case in which the employer (a unionized hospital) established a joint employee-employer grievance committee to address complaints about the grievance mechanism.  The Board ruled that the committee was lawful because, as the Board explained:

> [T]he committee was created simply to give employees a voice in resolving the grievances of their fellow employees…, not by presenting to or discussing or negotiating with management but by itself deciding the validity of employees’ complaints and the appropriateness of the disciplinary action, if any, imposed.

*Id.* at 1121.  That being the case, the committee did not “deal with” management.

The third case was *General Foods Corp.*, 231 N.L.R.B. 1232 (1977), in which the Board examined four employee “job-enrichment” teams that the employer (a non-union pet food manufacturer) established to enhance the powers, responsibilities, and morale of rank-and-file employees.  Each team (two “acceptability” teams, a “methodology” team, and a “nutrition” team) was empowered to make job assignments, assign job rotations, schedule overtime, and occasionally interview applicants for vacant positions.  *Id.* at 1232-1233.  The ALJ (affirmed by
the Board), emphasizing that none of the teams were organized with a labor relations purpose in mind, found they did not “deal with” management because their duties were “managerial functions being flatly delegated to employees.” *Id.* at 1235.

In the 1980’s, the Board appeared to maintain the status quo on Section 8(a)(2) issues. It issued no decisions that undermined the holdings of *Sparks Nugget*, *Mercy-Memorial Hospital*, or *General Foods*, nor did it expand the holdings of those decisions to permit greater flexibility in the establishment of employee committees. Indeed, in many respects, the landscape with respect to employee committee issues remained unchanged throughout the 1980’s. For example, in *Blankenship & Associates, Inc.*, 290 N.L.R.B. 557 (1988), the company president formed a committee of employees to develop and discuss new work rules. The Board, affirming the ALJ, found the committee to be an unlawfully dominated labor organization under Section 2(5) and Section 8(a)(2) because the employer established the committees to “negotiate” and “develop with” the employer a new set of work rules. *Id.* at 557, 569. Similarly, in *UARCO, Inc.*, 286 N.L.R.B. 55 (1987), the employer (a business form manufacturer) established a 15-employee committee to discuss a host of unrelated plant issues (grievances, Saturday work schedules, parking lot security, seniority policies) on a regular basis. *Id.* at 87-92. The committee was found by the Board to be unlawful; by regularly meeting with the employer in a representative capacity to discuss terms and conditions of employment, the committee “dealt with” management. *Id.* at 94.

C. The 1990’s (a.k.a., the “Electromation Years”).

While it appeared in the 1970’s and 1980’s that the Board was stabilizing its approach to employee committee cases, that view changed in 1992 when the Board issued *Electromation, Inc.*, 309 NLRB 990 (1992). *Electromation* was yet another significant decision signaling a shift
in the Board’s construction of the term “dealing with.” Indeed, Electromation and its progeny, including E.I. du Pont de Nemours & Co., 311 NLRB 893 (1993) (discussed below), set the stage for a consistent, restrictive approach by the Board to employee committee issues that prevailed throughout the 1990’s and until mid-2001 when Crown Cork & Seal was decided.

**Electromation**

In Electromation, the employer, a non-union manufacturer of electrical components, established five “Action Committees” in a non-union work setting for the purpose of addressing five issues: absenteeism/infractions, no-smoking policy, communication network, pay progression for premium positions, and an attendance bonus program. Id. at 991. The formation of the Action Committees came after 68 employees signed a petition opposing certain changes unilaterally implemented by management. Id.

The Action Committees were composed of: (1) employees who volunteered to participate on the Committees based on personal interest; and (2) managers. The employer limited the size of each Committee and indicated that employees could not serve on more than one Committee. Id. The employee-participants on the Committees were not elected or otherwise selected by employees. However, they were encouraged to “kind of talk back and forth” with other employees and pass along their ideas. Id.

Although a company supervisor coordinated the Action Committee program, he did not dominate the Committee discussions. Committee meetings took place on Company property, members were paid for time spent in meetings, and various supplies (e.g., writing materials and a calculator) were provided to Committee participants. Id.

On March 13, 1989, a union seeking to represent Electromation employees filed an unfair labor practice charge challenging the legality of the Action Committees under Section 8(a)(2).
Following an evidentiary hearing, on April 5, 1990, the ALJ found all five Action Committees to be unlawfully dominated “labor organizations” under the Act, and the employer appealed to the Board. *Id.* at 1015-1019.

The Board (in a majority opinion and three separate concurring opinions that highlighted the lack of agreement on many issues) found that the Action Committees violated Section 8(a)(2) because they were “labor organizations” that had been unlawfully dominated and supported by management. *Id.* at 997. Drawing on the Act’s legislative history, the Board re-emphasized that an employee committee did not have to engage in formal collective bargaining to violate Section 8(a)(2). In this regard, the Board said that an employee participation committee can be an unlawful “labor organization” even if it “lacks a formal structure, has no elected officers, constitution or by laws, does not meet regularly, and does not require ... initiation fees or dues.” *Id.* at 994. Indeed, said the Board, a committee can violate the Act even if employees do not view it as “equivalent to a union,” and the employer has no “antiunion motive” or “subjective hostility towards unions.” *Id.* at 996-97.

The Board determined that the *Electromation* Action Committees were “labor organizations” because the following conditions were present:

- non-management employees participated on the committees;
- the committees existed in part for the purpose of “dealing with” the employer (as discussed below);
- the committees’ dealings concerned “conditions of work” (*e.g.*, grievances, wages, hours, labor disputes).

Further, the Board defined “dealing with” in *Electromation* as:

*a bilateral mechanism involving proposals from the employee committee concerning the subjects listed in Sec. 2(5), coupled with real or apparent consideration of those proposals by management.*
Id. at 995. (Emphasis added). Under this definition, the Committees in Electromation “dealt with” the employer because their only purpose was to make proposals aimed at addressing employee disaffection with certain conditions of employment. Id. at 997.²

Interestingly (and importantly), the majority opinion in Electromation suggested there would be no violation of the Act where the purpose of a committee was limited to achieving quality or efficiency, without touching on terms and conditions of employment, or where the committee was designed only as a communication device to generally promote quality or efficiency. Id. at 997 n.28. It also noted that “unilateral mechanisms” for employee involvement, such as brainstorming meetings, suggestion boxes, or “analogous information exchanges” would not constitute “dealing with” employers, presumably under the theory that an exchange of information via those means does not rise to the level of a “proposal” to be entertained by management. Id. at 995. Further, citing Sparks Nugget, Mercy-Memorial Hospital, and General Foods – and in language that foreshadowed its decision in Crown Cork & Seal – the Board stated:

Notwithstanding that “dealing with” is broadly defined under Cabot Carbon, it is also true that an organization whose purpose is limited to performing essentially a managerial or adjudicative function is not a “labor organizations” under Section 2(5).

Id. (Emphasis added). The Board did not, however, elaborate on the types of delegated managerial functions it would or would not find lawful.

² An additional key element relied upon by the Board was the representational role played by the employee-members of the Committees, who were expected to “talk back and forth” with their fellow employees concerning the issues discussed during the Committee deliberations. Significantly, however, the Board specifically reserved judgment on whether an employee group could be found to constitute a “labor organization” in the absence of a finding that it acted as the representative of other employees. Electromation, 309 N.L.R.B. at 994 n.20; Polaroid Corp., 329 NLRB No. 47 at 1-2.
Overall, although *Electromation* contained certain statements viewed by employers as favorable to employee-involved committees, more than anything, the decision was viewed as a serious setback for companies that relied on employee committees and truly participative management groups. Indeed, it left in doubt the legality of many management-sponsored employees committees and programs, both for union and non-union employers.

**E.I. du Pont de Nemours**

In *E.I. du Pont de Nemours*, 311 N.L.R.B. 893 (1993), decided six months after *Electromation*, the Board applied *Electromation*’s principles concerning employee participation committees to a union employer setting. At issue in *E.I. du Pont de Nemours* were six “safety” committees and a “fitness” committee the employer established to discuss proposals with management over safety awards and recreational facilities. *Id.* at 893, 895. The committees consisted of employees and supervisors. Under the rules applicable to the committees, each committee developed consensus proposals to present to upper management, which had the power to accept or reject any proposal. *Id.* at 895.

Consistent with its decision in *Electromation*, the Board found all seven committees to be unlawfully dominated labor organizations under Section 8(a)(2). *Id.* at 893. In reaching this conclusion, the Board discussed the concept of “dealing with” in great detail. Echoing *Electromation*, the Board stated that “dealing” involves a “bilateral mechanism” evidenced by “a pattern or practice in which a group of employees, over time, makes proposals to management, management responds to these proposals by acceptance or rejection by word or deed, and compromise is not required.” *Id.* at 894. The Board went on to state, however, that if a committee makes only ad hoc proposals to management in “isolated instances,” after which management accepts or rejects them, “dealing” has not occurred. *Id.*
Further echoing *Electromation*, the Board identified several types of “safe haven” employee participation committees where no “dealing” takes place:

- **“Brainstorming.”** A “brainstorming” session is not “dealing” because it results in “a whole host of ideas” which management may adopt, rather than making “proposals.” *Id.*

- **“Information Sharing.”** A committee existing for the purpose of “sharing information” with the employer would not be “dealing” as long as it made no “proposals.” *Id.*

- **“Suggestion Boxes.”** “Proposals” dropped in an employee suggestion box do not constitute “dealing” because they are made individually and not as a group. *Id.*

- **“Delegation.”** There is no “dealing” where an employee committee has “the power to decide matters for itself, rather than simply make proposals to management.” *Id.*

In sum, *E.I. du Pont de Nemours* extended *Electromation*’s holding to the unionized workplace. Together *Electromation* and *E.I. du Pont de Nemours* established the framework for the next decade of Board decisions in the employee committee area.

**Electromation’s progeny**

As the foregoing discussion of *Electromation* and *E.I. du Pont de Nemours* makes plain, the Board did not intend in those decisions to foreclose every conceivable form of employee participation committee. Indeed, the Board sought to carve out as lawful specific types of communication mechanisms that did not rise to the level of “dealing.” Several examples of such were identified in *Electromation* and *E.I. du Pont de Nemours* (e.g., “brainstorming” groups that merely develop ideas for management’s consideration; “information-sharing” committees; suggestion boxes; groups that serve a purely “clerical” or “ministerial” function; and groups in which management only served as an observer, without any right to vote on proposals). *See E.I. du Pont de Nemours & Co.*, 311 NLRB 893, 894 (1993).
Cases decided in the years following *Electromation* and *E.I. du Pont de Nemours* provided additional examples of lawful committee activity. Together, (either by design or happenstance) these “progeny” cases established additional groundrules for employers considering whether to establish employee-participation programs. For example, the Fourth Circuit held in *NLRB v. Peninsula Gen’l. Hosp. Med. Ctr.*, 36 F.3d 1262, 1272-1273 (4th Cir. 1994), that isolated instances of the discussion of working conditions at an otherwise lawful employee committee meeting do not render the entire committee unlawful under the Act. In *Peninsula General Hospital*, the employer established an employee nursing committee, the purpose of which was to discuss various nursing practice issues and continuing nursing education. On a limited number of occasions, the discussion at the committee meetings centered on the conditions of the nurses’ employment. Denying enforcement of a Board order finding the committee to be a “labor organization,” the Fourth Circuit held that “dealing” did not exist where employees occasionally discussed working conditions during an otherwise lawful brainstorming session. *Id.*

Notwithstanding the existence of safe havens and groundrules for the lawful establishment of employee committees, it was equally clear from *Electromation* and its progeny, that the Board would no longer tolerate many forms of employee participation groups. Thus, in the post-*Electromation* years, the Board and the courts found violations of the Act with respect to several types of committees. For example, in *Waste Management of Utah*, 310 NLRB 883 (1993), the Board found that committees established by the employer (on routing, productivity, and safety) in response to a union campaign violated the Act because the employer exercised so much control over the structure and operation of the committees that “employees could view the committees as a substitute for collective bargaining.” Similarly, in *NLRB v. Webcor Packaging*,
118 F.3d 115, 1121-1122 (6th Cir. 1997), the circuit court enforced a Board order disestablishing an eight-member employee “Plant Council” that discussed work rules, wages and benefits, and made proposals to management. The Sixth Circuit agreed with the Board that the Plant Council “dealt with” the employer in violation of the Act because it made several specific proposals to the company that the employer adopted. In the court’s view, this was “a paradigm case of dealing.” Id. See also Aero Detroit Inc., 321 N.L.R.B. 1101 (1996) (13-employee Continuous Improvement Team unlawfully “dealt with” employer because it acted in a representational manner offering proposals to management on employee grievances, safety, quality, productivity, and production costs); Simmons Industries, Inc., 321 N.L.R.B. 228 (1996) (employee safety committees and “TQM” quality committee “dealt with” employer in violation of Act because their members acted in a representational capacity presenting proposals to management about, inter alia, safety hazards, bonuses, and hours of work); Reno Hilton Resorts Corp., 319 N.L.R.B. 1154 (1995) (employee Quality Action Teams unlawfully “dealt with” employer by forwarding proposals to management regarding safety, compensation, equipment needs, training, and sick days, among other issues); Keeler Brass Co., 317 N.L.R.B. 1110 (1995) (employee grievance committee “dealt with” employer under Section 2(5) by making proposals to management about the company’s “no call/no show” policy).

D. Questions Left Open by Electromation and its Progeny.

Despite the Board’s efforts in Electromation, E.I. du Pont de Nemours, and subsequent decisions to present a coherent definition of “dealing with” under Section 2(5), employers frequently found the Board authority in this area inconsistent and confusing. In part, this was due to several questions that remained unanswered even after Electromation and its progeny. For instance, as noted previously, it remained an open question whether “representation” always
would be a prerequisite for an employee participative group to be determined a “labor organization” under Section 2(5). Further, assuming that a showing of “representation” was required, it was unclear what evidence was needed to prove that representation existed. And, the case law remained murky on issues such as the true level of the Board’s tolerance/acceptance of committees designed to deal with “quality” or “efficiency” issues.

Employers also were confused by the subtle and often elusive distinctions made by the Board in Electromation and later cases between committees considered lawful under Section 8(a)(2) and those that ran afoul of the Act. For example, employers were left to speculate about the point at which lawful “information sharing” or “brainstorming” became an unlawful consideration of committee “proposals.” E.I. du Pont de Nemours, 311 N.L.R.B. at 894. Likewise, employers were forced to guess whether the number of so-called “proposals” they received within a given period of time amounted to lawful “isolated instances” or an unlawful “bilateral mechanism.” Id. Additionally, employers were left to ponder why a proposal received from one or more employees in a suggestion box was more lawful than the same proposal presented to them in person. It was against this background of uncertainty that the Board considered Crown Cork & Seal.

III. Analysis of Crown Cork & Seal and its Implications.

A. Factual Overview.

1. The Employer’s Facility and the Socio-Tech System.

At the time the case arose, Crown Cork & Seal Co. employed approximately 150 employees at its aluminum can manufacturing plant in Sugar Land, Texas. Crown Cork & Seal, 334 N.L.R.B. No. 92 at *2. Like the employees in Electromation, the employees at the Sugar Land plant were not represented by a union. Id. at *2-3. From the time the plant opened in
1984, it operated under an employee-management system known as the “Socio-Tech System.” The Socio-Tech System delegated substantial authority to employees to operate the facility through their participation on numerous standing and temporary committees. To facilitate operation of the system, the plant had seven employee participation committees, each of which consisted of employees and managers, and each of which made decisions concerning a broad range of matters, including production, quality, training, attendance, safety, and maintenance. Committees also decided certain disciplinary issues.

All seven committees made decisions by a process of discussion and consensus. If a committee member could not join in a consensus, he or she would abstain on the issue. The management members of a committee had no greater authority than the other members; nor did they wield veto power over the committee’s determinations. Id. at *3-5. Although ultimate veto authority resided with the Company’s Management Team and Plant Manager, the committees often implemented their own proposals before reaching that level. Id. at *4-6.

2. The Production Teams.

At the heart of the Socio-Tech System were four production committees called production teams. Each team was comprised of 33 members: one team leader (a member of management) and 32 “production technicians” (production and maintenance employees). Id. The production teams held extensive front-line operational authority: teams had the discretion to stop the production lines without management approval; teams were empowered to stop delivery if they were concerned that defective cans may have been shipped to a customer; teams determined which team members were to receive training; teams administered the plant’s absenteeism program and decided whether to grant a member’s request for time off and whether
an absence would be excused; and teams investigated accidents and corrected safety-related problems. *Id.*

The production teams also decided the discipline that team members would receive for failing to meet performance standards. In that function, the team might counsel a particular member and, if necessary, require him or her to enter into a “social contract,” which was a verbal or written agreement designed to modify the team member’s conduct. *Id.* If a social contract did not have the desired effect, and the team believed that suspension or discharge was warranted, it could recommend such action to the plant’s Organizational Review Board (“ORB;” discussed below).

3. The Non-Production Teams.

In addition to the four production teams, the Sugar Land plant had three other employee participation committees at the next highest administrative level (*i.e.*, above the production teams). These were the ORB, the Advancement Certification Board (“ACB”), and the Safety Committee. *Id.* at *5-7. Each of these committees had approximately 12 members, including two employees from each of the four production teams, as well as members of management. Many of the decisions made by the non-production teams were reviewed by the plant’s Management Team, which was comprised of 15 members of management. *Id.* The Management Team, in turn, reported to the Plant Manager, who had the ultimate authority to review all decisions made by the various committees. *Id.*

The ORB monitored plant policies to ensure that they were administered consistently among the four production teams, and suggested modifications to work rules, including hours, layoff procedures, vacations, and other terms and conditions of employment. *Id.* The ORB’s decisions were issued in the form of “recommendations” to the Management Team or the Plant
Manager. The ORB also reviewed production team recommendations to suspend or discipline a member. *Id.* Like the other committees, the ORB was required to operate within established parameters; indeed, one of the roles of management members was to ensure that the committees did not exceed their delegated authority. For example, when the ORB recommended a layoff procedure that contained a provision for seniority, the Management Team returned the matter to the ORB, stating: “We do not have seniority in this plant.” *Id.* The final version of the layoff policy did not include seniority as an independent factor.

Administration of the facility’s “Pay for Acquired Skills Program” was delegated to the ACB. The ACB certified that employees had advanced to higher skill levels and recommended pay increases to the Plant Manager. *Id.* Separately, the Safety Committee reviewed production team accident reports and considered the best methods to ensure a safe workplace. *Id.* at *7-8.

**B. Procedural History.**

The dispute in *Crown Cork & Seal* arose on October 30, 1996, when an individual filed a charge alleging violations of Sections 8(a)(1) and 8(a)(2), and challenging the legality of the Socio-Tech committees. The case proceeded to hearing, and on February 27, 1998, the ALJ ruled in favor of the employer. The Charging Party appealed to the Board. More than three years later, on July 20, 2001, a four-member panel of the Board (the entire Board at the time) issued a unanimous decision. The highlights of the Board’s ruling are set forth below.

**C. The Board’s Decision.**

The Board found that all seven of the employer’s Socio-Tech employee committees were lawful on the grounds that none of them were “labor organizations” under Section 2(5). *Id.* at *1-2. In reaching this conclusion, the Board focused its examination on whether the committees at Crown Cork & Seal were “dealing” with management.
To articulate its view (at least its current one) of “dealing,” the Board contrasted the employee committee in *Keeler Brass* (*supra* at p. 14) to the employee committees/teams in *General Foods* (*supra* at p. 6). In *Keeler Brass*, the employee committee was a grievance committee that, while considering a particular grievance, decided the employer’s decision to discharge a particular employee under its no call/no show policy was too harsh, and recommended that the employee be rehired and that the absenteeism policy be reexamined. 317 N.L.R.B. at 1113. The employer considered the committee’s proposal and changed the policy, but determined that the discharge was justified by past practice. The grievance committee, in turn, heard additional testimony on the past practice issue, reversed itself, and denied the grievance. On those facts, the Board found that statutory “dealing” had occurred over the grievance and the no call/no show policy because the committee and the employer “went back and forth explaining themselves until an acceptable result was achieved.” *Id.* at 1114.

In contrast (and as discussed above), the Board found the element of “dealing” absent in the job-enrichment program in *General Foods Corp.* because the teams’ actions (making job assignments, assigning job rotations, scheduling overtime, interviewing job applicants, making safety inspections of the plant, and, in some cases setting starting and quitting times) were, in fact, “managerial functions being flatly delegated to employees.” 231 N.L.R.B. at 1232-1233, 1235.

Relying on the distinctions between these two decisions and pointing also to *Electromation*’s pronouncement that “dealing” is not present where a committee’s purpose is limited to performing managerial functions, the Board in *Crown Cork & Seal* held that the seven Socio-Tech committees did not engage in “dealing.” Like the teams in *General Foods*, the Board reasoned, Socio-Tech teams were exercising authority that was “unquestionably
managerial.” *Crown Cork & Seal*, 334 N.L.R.B. No. 34 at *11-12. Indeed, the Board found that the authority exercised by the committees was comparable to that of a front-line supervisor and that the decisions of the committees usually carried weight akin to supervisory authority. *Id.*

Significantly, the Board summarily dismissed the General Counsel’s argument that the committees were “dealing” because their authority was neither final nor absolute.\(^3\) On this score, the Board found that the committees’ interaction with upper management was analogous to that of an actual supervisor (who also lacks ultimate authority), who must interact with upper management along a chain of command on a regular basis. *Id.* at *13-14. Such interaction, the Board found, did not qualify as “dealing,” but was simply another example of the delegation of managerial authority to the teams.

In sum, the Board found that rather than “dealing with” management, the seven Socio-Tech committees were management, and were not, therefore, “labor organizations” under the Act. *Id* at *14.

IV. **How Does Crown Cork & Seal Affect the § 8(a)(2) Landscape?**

A. **Possible Interpretations of the Board’s Decision.**

Because *Crown Cork & Seal* sanctions an employee participation committee structure that promotes a significant level of interaction between employees and employers over a host of working conditions, it potentially is the first Board decision representing a dramatic shift away from the construction of “dealing” adopted by the Board in *Electromation* and *E.I. du Pont de Nemours*. Indeed, in comparison to the *Electromation* progeny, *Crown Cork & Seal* surely offers employers a glimmer of hope that, in decisions to come, the Board will expand – or at

\(^3\) Interestingly, neither the General Counsel (in its brief) nor the Board (in its decision) cited authority in direct support of their respective positions on this point.
least better define – the list of employee participation committees that pass muster under Section 2(5) and Section 8(a)(2).

On the other hand, a persuasive argument can be fashioned that *Crown Cork & Seal* does little to alter the existing landscape in this area of Board law. After all, the concept upon which the Board based its holding in *Crown Cork & Seal* – that an employee committee with delegated managerial authority does not “deal with” management – is not a novel or groundbreaking principle; nor does it represent a radical departure from pre-*Crown Cork & Seal* case law. The very same principle appears not only in *General Foods* (decided in 1977), but also in *Electromation* (as the Board acknowledges) and *E.I. du Pont de Nemours*. Viewed this way, *Crown Cork & Seal* merely is the most recent example of a particular employee committee structure that has been lawful for years.

In any event, the road the Board intends to take in future employee committee cases cannot be determined from the *Crown Cork & Seal* decision itself. As a practical matter, because *Crown Cork & Seal* did not address the numerous questions left open by *Electromation* and its progeny, the decision offers little concrete guidance to employers, short of assuring them that a committee structure like the Socio-Tech system would survive scrutiny under the Act. It is unlikely, however, that most employers would be inclined to adopt a structure as elaborate as Socio-Tech, even if those employers did place a high value on sharing production authority with employees (and assuming, of course, that such sharing was possible within the limits of any applicable collective bargaining agreement). Thus, for the vast majority of employers, the best advice in interpreting *Crown Cork & Seal* is to wait and see how further Board decisions treat the case. Obviously, that treatment will hinge significantly on the membership of the Board – which is still undergoing changes in membership as this paper is being written.
In the meantime, however, there are several practical suggestions, outlined in the following section, that employers can follow in accord with the current Board authority interpreting Section 2(5) and Section 8(a)(2).

B. Practical Guidelines for Employers Contemplating Employee Committees Post-Crown Cork & Seal.

Given the broad range of employee participation committees and the array of issues they are designed to address, no set of recommendations can provide complete assurance that a particular committee will be lawful under Section 8(a)(2) of the Act. However, the following guidelines certainly will increase the likelihood that a committee will be lawful in light of the Board’s reasoning as articulated in the foregoing authorities:

1. **The committee should avoid addressing “employment terms.”**

   If an employee participation committee addresses the employment terms and conditions of employment (e.g., wages, hours, grievances, work rules) for individuals or groups of employees, it is encompassed by Section 2(5)’s definition of a “labor organization.” In contrast, a committee focused upon broad operational objectives such as productivity, efficiency, and teamwork is less likely to be deemed a “labor organization.”

2. **The committee should not make “proposals” to management.**

   An employee participation committee should avoid developing “proposals,” which are then presented to management, with management either adopting or rejecting the committee’s recommendations. Under Crown Cork & Seal (and, indeed, prior cases), the committee will be less likely to be found “dealing with” the employer if it acts as the equivalent of a front-line manager or supervisor, e.g., with authority to make and carry out operational decisions. There should be as little “give and take” in the relationship between the committee and management as possible (i.e., where a matter is sent “back and forth” for further consideration). And, to the
extent that management disagrees with the committee’s actions, it should avoid making specific “counterproposals,” suggesting alternative courses of action, or trying to “convince” the committee to accede to its views through a bilateral process. Likewise, if an employee participation committee is simply involved in communicating management directives, or in “information gathering,” “brainstorming” or “generating ideas,” it is less likely to be violative of the Act.

3 The committee should avoid employee “representation.”

The non-management members of an employee participation committee should not “represent” other employees, or be expected to speak on behalf of other employees. In this vein, employees should not be “elected” to serve on the committee; nor should they purport to solicit or “poll” the opinions of co-employees in their capacity as members. The employer should not “select” committee members, but should encourage active involvement by all relevant non-management employees, e.g., committees-of-the-whole, or open participation. A rotational system of membership runs the risk of being deemed representative in nature. Likewise, when a committee discusses ideas or suggestions made by absent individuals, the employee members may be found to be representing co-workers.

3 The authority of management on the committee should be limited.

The employer should delegate complete authority to the committee to make and implement decisions within certain parameters. The employer may then review those decisions as it would those of any front-line supervisor or manager. Management members of an employee participation committee should not have a “veto” over the committee’s actions or recommendations, and should not purport to “negotiate” within the committee on behalf of the employer. Rather, the views of managers or supervisors should be accorded no greater weight
than those of the other committee members. If the committee is governed by majority decisionmaking, the votes of management and non-management employees should count equally. While the committee can make decisions through consensus, complete agreement (including the assent of management members) should not be required. Rather, all participants should have the option of abstaining or dissenting from any committee action. Alternatively, management employees might only serve as “facilitators” or “moderators,” while having no role in committee “voting” or decisionmaking. In “facilitating” discussion, however, management should not try to actively encourage the committee to narrow and refine its views into a majority “proposal.”

The committee should not bypass the union.

In unionized workplaces, the employer should make certain that it complies with any contractual or statutory bargaining obligations prior to establishing an employee participation committee, as well as any contractual requirements (or restrictions). The employer must be careful to avoid any “bargaining” with employees that bypasses the union (and constitutes “direct dealing” in violation of the Act). At unionized facilities, the employer should make clear that it recognizes the union’s role as the exclusive collective bargaining representative for bargaining unit employees with respect to all terms and conditions of employment.

V. Conclusion.

Although Crown Cork & Seal represents a potential turning point for the Board and a relaxation of its view of employee committee issues under Section 8(a)(2), significant doubt still clouds this area of Board law. Traditional labor practitioners should stay tuned to see how the next several Board decisions in this area construe Crown Cork & Seal, and whether the attitudinal change signaled in Crown Cork & Seal solidifies or fades. In the meantime,
employers who wish to establish or maintain employee committees should proceed cautiously under *Electromation*’s handful of tried and true principles, and await further guidance from the Board.