

Winter 2012

Moving Beyond the Zero-Sum Game: Joint Management-Employee Committees in the Twenty-First Century

Karl G. Nelson

Gibson, Dunn & Crutcher, LLP, knelson@gibsondunn.com

Follow this and additional works at: <http://www.repository.law.indiana.edu/ilj>

 Part of the [Labor and Employment Law Commons](#)

Recommended Citation

Nelson, Karl G. (2012) "Moving Beyond the Zero-Sum Game: Joint Management-Employee Committees in the Twenty-First Century," *Indiana Law Journal*: Vol. 87: Iss. 1, Article 8.

Available at: <http://www.repository.law.indiana.edu/ilj/vol87/iss1/8>

This Symposium is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in *Indiana Law Journal* by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.



JEROME HALL LAW LIBRARY

INDIANA UNIVERSITY
Maurer School of Law
Bloomington

Moving Beyond the Zero-Sum Game: Joint Management-Employee Committees in the Twenty-First Century

KARL G. NELSON*

With the return to divided government following the 2010 midterm elections, it appears that the prospects for passage of legislation similar to the Employee Free Choice Act¹ (EFCA) have receded. Whether this is cause for despair or relief depends largely on one's political leanings and view of the need for greater unionization in today's workplaces. Similarly, the perceived explanations for the Act's failure to secure adequate support for passage among the former supermajority of Democrats in the Senate likely vary depending upon one's perspective. Nevertheless, setting aside political arguments on each side of the debate, one core concern proved to be a significant impediment to the bill and its backers. Ultimately, given the tenuous state of the U.S. economy, there was enough concern over the potential impact of the bill on economic growth and recovery to cause erstwhile supporters to hesitate. When it most mattered, key legislators concluded that they could not impose additional burdens on the nation's employers in order to advance the interests of organized labor.

That aspect of the EFCA's failure points to a significant challenge confronting labor law today. As a number of recent commentators have suggested, the debate over federal labor policy is mired in an "us versus them," zero-sum approach to labor-management relations.² In order to advance the interests of one camp in the labor-business dynamic, many participants, observers, and policy makers continue to assume that they must necessarily impair the rights and benefits enjoyed by the other. Particularly as the National Labor Relations Board ("Board") has grown increasingly politicized, driven in no small part by the highly partisan appointment and confirmation process, federal labor policy has more and more resembled an

* Mr. Nelson is a partner in the firm Gibson, Dunn & Crutcher, LLP, where he practices in the areas of labor and employment law and serves as partner-in-charge of the firm's Dallas office. This Comment benefited from the substantial assistance and contributions of Benjamin D. Williams, an associate attorney in Gibson Dunn's Dallas office.

1. Employee Free Choice Act of 2009, H.R. 1409, S. 560, 111th Cong (2009).

2. See, e.g., Lawrence E. Dubé, *NLRB: Member Peter Schaumber Leaves the NLRB After Eight Years He Calls a "Successful Run,"* DAILY LAB. REP. (BNA), Aug. 27, 2010, at 166 DLR B-1 (noting that "labor organizations should 'rethink the union model' and give up the notion some have that labor relations must be an 'antagonistic, zero-sum' process"); see also Richard N. Block, *Rethinking the National Labor Relations Act and Zero-Sum Labor Law: An Industrial Relations View*, 18 BERKLEY J. EMP. & LAB. L. 30, 39-40 (1997) (arguing that the zero-sum model of modern labor relations makes labor law reform "extremely difficult to accomplish"); Kenneth T. Lopatka, *A Contemporary First Amendment Analysis of the NLRA Section 8(A)(2)-2(5) Anachronism*, 2 CHARLESTON L. REV. 1, 3 (2007) (noting the voluminous commentary surrounding the debate over whether a depression-era scheme—which is based on an adversarial labor-management model—should apply to modern-day employment relationships, which are focused on employee interaction and employee-management cooperation).

endless tug-of-war. With each change in administration, the interests of either business or labor advance, yet seemingly always at the expense of the other. One must wonder whether, a decade into the twenty-first century, there is not a better answer to labor relations than to continue to play this zero-sum game.

One area in which this tug-of-war is particularly pronounced and that has grown particularly out of touch with the realities of the modern workplace is the Board's approach to the National Labor Relations Act's (NLRA) prohibition against employer domination or interference with a labor organization under NLRA section 8(a)(2).³ Section 8(a)(2) prohibits employers from "dominat[ing] or interfer[ing] with the formation or administration of any labor organization or contribut[ing] financial or other support to it."⁴ The Board has generally interpreted the concepts of "domination" or "interference" with a "labor organization" liberally, such that even seemingly innocuous and well-meaning efforts at cooperation through joint employee-management teams or committees run the risk of being found in violation of the provision's proscriptions.⁵

Experience tells many practitioners and commentators that the typical workplace of this millennium has outgrown the rigid constraints of section 8(a)(2)'s restrictions on joint employee-management committees.⁶ Consider the following:

- According to one recent survey, 85–90% of workers want a greater say in their workplaces.⁷ Nevertheless, union membership rates continue to fall, reaching a historical low in 2010 of 14.7 million workers or only 11.9% of the U.S. workforce (and only 6.9% of the private sector workforce).⁸
- While a minority of workers responding to a recent survey expressed the desire for union representation, a majority expressed support for

3. 29 U.S.C. § 158(a)(2) (2006).

4. *Id.*

5. *See generally* Electromation, Inc., 309 N.L.R.B. 990 (1992).

6. *See* Lawrence E. Dubé, *NLRB: Marking NLRA Enactment's 75th Anniversary, Speakers Offer Board Suggestions for Change*, DAILY LAB. REP. (BNA), Nov. 1, 2010, at 210 DLR B-1 (citing remarks of Prof. Cynthia Estlund that "'it can't continue to be' that the basic idea of employee participation and voice in the workplace is linked exclusively to an all-or-nothing choice for or against collective bargaining"); Dubé, *supra* note 2 (according to Schaumber, "[m]ost workers would like to see a more cooperative relationship between their employers and unions"); Jeffrey M. Hirsch & Barry T. Hirsch, *The Rise and Fall of Private Sector Unionism: What Next for the NLRA?*, 34 FLA. ST. U. L. REV. 1133, 1133 (2007) ("The best opportunity for the NLRA's continued relevance is the modification of its language and interpretation to enhance worker voice and participation in the nonunion private sector without imposing undue costs on employers."). *See also* Charles B. Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant*, 27 HOFSTRA LAB. & EMP. L.J. 311, 346 (2010) ("Corporate leaders who want to improve employee morale should recognize the potential benefits of meaningful worker participation programs.").

7. Richard B. Freeman, *Do Workers Still Want Unions? More Than Ever*, ECON. POL'Y INST., Briefing Paper No. 182, Feb. 22, 2007, at 1, available at <http://www.sharedprosperity.org/bp182/bp182.pdf>.

8. News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Union Members—2010 (Jan. 21, 2011), available at <http://www.bls.gov/news.release/pdf/union2.pdf>.

independently elected workplace committees that meet and discuss issues with management.⁹

- As one outside observer of U.S. labor relations commented, “It is difficult to imagine why employers and groups of their [employees] cannot sit together and craft improved working conditions that meet both their needs (especially since statutory health and safety committees have had an excellent record of achievement[]).”¹⁰

And it is not only workers who desire greater opportunity for constructive workplace dialogue. While it is undeniable that there are still employers who retain a reflexive opposition to “union-like” employee committees, they are rapidly being left behind by more progressive employers who seek to bridge twentieth-century notions of “management” versus “labor” interests. In fact, more than ever before employers in an increasingly competitive and global economy are recognizing the need for a flexible, interactive, and team-oriented approach to the workplace in order to respond quickly and effectively to changing business conditions and market demands.

There are ample potential benefits of a more modern approach to the notion of employer interference or domination with a labor organization under section 8(a)(2). Among the benefits, it would allow us to move beyond the antiquated notion that there is a bright line dividing labor and management in the modern workplace. While that distinction may have made intuitive sense in the middle of the last century, it is a poor fit for today’s workplace where project teams draw from a spectrum of workers across different disciplines, and roles such as “team leader” or “project manager” can be highly context-specific.¹¹ Moreover, a more current and practical approach to labor-management cooperation offers hope of moving workplace relations beyond a zero-sum game to one that offers the potential for a “win-win” for both employers and their employees. Employers would gain the potential for increased quality, responsiveness, and productivity they need to remain competitive while employees would enjoy the benefits of a greater voice and personal investment in the success of the organization.

Moving beyond traditional, antagonistic approaches to employer-employee workplace committees would require revising fundamental assumptions about how

9. Freeman, *supra* note 7, at 7.

10. Daphne Taras, *Reconciling Differences Differently: Employee Voice in Public Policymaking and Workplace Governance*, 28 COMP. LAB. L. & POL’Y J. 167, 188 (2007).

11. In updating its regulations governing the “white collar” overtime exemptions, the Department of Labor expressly acknowledged the blurring lines between management and nonmanagement roles, noting that “[a]n employee who leads a team of other employees assigned to complete major projects for the employer . . . generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.” 29 C.F.R. § 541.203(c) (2010). Indeed, Thomas Kochan, professor of work and employment research at the MIT Sloan School of Management, observed on the occasion of the NLRB’s recent seventy-fifth anniversary that distinctions between the organizing rights of employees based on traditional legal distinctions between supervisors and nonsupervisory employees no longer make sense; accordingly, because “we can’t tell where supervisors end and workers begin . . . we should stop trying.” Dubé, *supra* note 6.

the two constituencies interact. Significantly, change would require a heightened level of trust by all involved. Employers must trust the benefits of such an arrangement and overcome any lingering reluctance to facilitate and empower employee groups in the workplace. Employees must trust that employers are motivated by legitimate (and mutually beneficial) business interests and do not simply seek to create a façade of cooperation to quell support for traditional unions. Perhaps most importantly, policy makers must be willing to accept that the overwhelming majority of workers today are sophisticated, articulate, and mobile enough to no longer require the same level of paternalistic protections that originally motivated section 8(a)(2). Indeed, entrenched notions of employer interference with or domination of joint employer-employee groups ignore profound changes in the characteristics of the nation's workforce over the last several decades. By and large, today's employees are more informed and connected—through the internet, social media, and wireless devices¹²—and less tied to a single employment opportunity¹³ than prior generations. Accordingly, while there must continue to be consideration given to protecting the nation's most isolated and vulnerable workers, allowing such considerations to dominate labor policy discussions to the exclusion of recognizing the profound changes occurring in the workforce amounts to a “lowest common denominator” approach that forecloses enormous opportunities for mutual gain.

Following the 2010 midterm elections, we heard a lot of (seemingly short-lived) talk about the need to find common ground and bipartisan solutions. Whether such talk eventually translates into action, much less whether it yields significant change to federal labor law, is far from certain. Yet, if one aspect of federal labor-relations policy holds real opportunity for mutual benefit and escape from the legacy of zero-sum struggles, it is the need for modernization of the Board's restrictions on cooperative labor-management workplace committees.

12. For example, a recent report by the Pew Research Center found that nearly 80% of American adults report using the internet, and nearly 60% of those internet users utilize one or more social networking sites such as Facebook, MySpace, or Twitter. KEITH N. HAMPTON, LAUREN SESSIONS GOULET, LEE RAINIE & KRISTEN PURCELL, PEW RESEARCH CENTER, SOCIAL NETWORKING SITES AND OUR LIVES: HOW PEOPLE'S TRUST, PERSONAL RELATIONSHIPS, AND CIVIC AND POLITICAL INVOLVEMENT ARE CONNECTED TO THEIR USE OF SOCIAL NETWORKING SITES AND OTHER TECHNOLOGIES 3 (2011), *available at* <http://pewinternet.org/~media/Files/Reports/2011/PIP%20-%20Social%20networking%20sites%20and%20our%20lives.pdf>. Significantly, the same report estimates that more than half of all adult social network users in 2010 were over the age of thirty-five. *Id.* At the same time, social network users are far more politically and socially active than the average American population; for example, internet users reported being over twice as likely to attend a political meeting as non-internet users. *Id.* at 4.

13. According to a recent report by the U.S. Department of Labor's Bureau of Labor Statistics, the average worker aged forty-three to fifty-two when surveyed in 2008–09 had held eleven different jobs between the ages of eighteen and forty-four. News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Number of Jobs Held, Labor Market Activity, and Earnings Growth Among the Youngest Baby Boomers: Results from a Longitudinal Survey (Sept. 10, 2010), *available at* <http://www.bls.gov/news.release/pdf/nlsoy.pdf>.