WHAT IS INDUSTRIAL DEMOCRACY? THE DEBATE OVER EMPLOYEE PARTICIPATION PLANS

TEAM

Amend § 8(a)(2) of the NLRA by striking the semi-colon and inserting the following:

Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate to at least the same extent practicable as representatives of management participate, to address matters of . . . quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements. . . between the employer and labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply.

Johanna Oreskovic
CAPTURING VOLITION ITSELF: EMPLOYEE INVOLVEMENT AND THE TEAM ACT

. . . In the minds of the Act’s framers, a bargaining equation heavily weighted in management’s favor rendered the classical contract model of negotiation between two individuals inapplicable to labor contracts, because the bargaining power of employers greatly exceeded that of the individual worker. Inequality of bargaining power tainted the employment contract with duress and coercion, and rendered meaningless the concept of mutual assent. Collective bargaining, however, could strike a balance between equality and inequality of bargaining power and help to legitimate the employer-employee authority relationship. Specifically, the threat of collective action would act as an inducement for management to negotiate in good faith; therefore, collective empowerment in the labor market was necessary to enable the parties to forge agreements based on genuine consent. In this way, collective bargaining would facilitate the “development of a partnership between labor and management in the solution of national problems.” The increased bargaining power of organized labor would also result in more equitable division of the fruits of production, thereby enabling workers to participate meaningfully in the economic life of the society as well. Thus, the adoption of collective bargaining as the national policy of the United States would serve as an indispensable complement to political democracy.

Charles J. Morris
A [SIMULATED] DIALOGUE WITH THE CHAIRMAN OF THE LABOR BOARD
15 Hofstra Lab. & Employment L.J. 319, 1998

[William] Gould [Then Chairman, National Labor Relations Board]:
My view is that the dignity of work can best be realized through some form of representation or
involvement by employees at the workplace.

[Charles] Morris [Professor of Law, emeritus]:
Your emphasis on dignity of work is well placed, because pride in one’s work is indeed important
to the human process as well as to the production process. If employees are to have an effective
voice in the typical workplace, representation is essential, therefore this is an ideal concept with
which to begin our discussion.

Gould:
The TEAM Act . . . should be called the Employee Domination Act since it would allow employers
to impose representational arrangements . . . upon employees regardless of their wishes, appointing
the workers’ representatives for them, determining what issues should be taken up, and
what the structure of the system would be. The TEAM Act is contrary to the democratic assumptions
of America’s society which presuppose our ability and basic right to select representatives of
our own choosing—assumptions which ought to be applicable to the employment relationship.

Morris:
I could not agree with you more. From its inception as a hastily drafted response to the Labor
Board’s Electromation decision, it was apparent that the TEAM Act would effectively repeal section
8(a)(2) and provide a legal means for employers to give "employees the illusion of a bargaining
representative without the reality of one." Passage of the TEAM Act would effect a substantial
change in the American system of labor law, dramatically altering the democratic principle contained
in the NLRA that allows employees to decide for themselves whether they desire to join a
union or some other form of labor organization, who their representatives will be, and whether
they even wish to be represented. The TEAM Act would permit substitution of an authoritarian
model under which the employer can mandate employee representation and dictate the selection of
the employees’ representatives.

Gould:
Notwithstanding the flawed nature of the TEAM Act, the National Labor Relations Act is badly in
need of revision . . . . [T]he need [is] to provide for a more level playing field between unions and
employers as they compete in the marketplace of ideas for the allegiance of workers in organizational
campaigns. The lawfulness of employee committees in a nonunion workplace is i
mportant
as well. Congress can and should do more to build the bridge of communication between such employees
and employers.

Morris:
Yes, the NLRA could and should be improved to make its processes more effective in order to
achieve the level playing field to which you refer. I question, however whether there is a need to
amend the Act to establish the lawfulness of employee committees in the nonunion workplace. The
present Act already permits a wide range of lawful employee committees. The Labor Board’s General
Foods Corp, and Sears, Roebuck & Co. decisions affirmed that employee committees in
which employees participate in day-to-day decision- making or in communications concerning
their work are not labor organizations within the meaning of section 2(5). And as for employee
committees that deal with the employer regarding compensation and other conditions of employment,
the Act clearly allows such committees when they are genuinely representative of the employees
and not controlled by the employer— conditions that you agree ought to be deemed
essential in a democratic system.

Gould:
[In a] bizarre way, the Act makes it unlawful to dominate or assist an organization that is concerned
with employment conditions.

Morris:
I suspect you are not really objecting to the prohibition of employer domination. It certainly is not bizarre to prohibit an employer from dominating, i.e., controlling, a labor organization that is supposed to be the free and voluntary voice of the employees. But whether it is bizarre to prohibit an employer’s assistance to such an organization is another matter. It depends on the nature of the assistance. Present statutory language and applicable case law recognize that there is a fine but perceptible line between assistance in the nature of cooperation and assistance that unduly interferes with employee freedom of action and decision-making. And, notwithstanding certain allegations that purported to express conventional wisdom during the TEAM Act debates, the tests which the Board and courts have developed to distinguish lawful cooperation from unlawful influence are now firmly established. Indeed, the law has been exceptionally clear on these issues for many years, as I shall spell out later in this dialogue.

Gould:
The principal deficiency of the current law lies in its ambiguity. First, while the Act prohibits "financial" assistance or other "support," these terms are not self-defining. Literally, if an employer were to grant an employee committee the use of plant facilities, such as copying machines and meeting rooms, it would run afoul of the statute—although it is unusual to find a violation on this basis.

Morris:
I would go further and say that it would be impossible rather than unusual to find a violation on that basis, absent other critical factors. In situations where the labor organization belongs to the employees and is not controlled by the employer, the employer is free to cooperate in a variety of ways, such as providing "the use of plant facilities such as copying machines[,] and meeting rooms," and much more, even compensation to union members and employee representatives for their time spent in representational activities. You presumably believe that there is nevertheless some danger that the statutory phrase "contribute financial or other support" might be applied in a manner which neither the Board nor the courts have ever contemplated, or which Congress, by its use of the limiting term "support" never intended. I say presumably, because in an earlier presentation about this issue you argued that "the NLRA’s strict prohibitions against financial and other forms of assistance, as well as domination, makes repeal of section 8(a)(2) a desirable objective." That seems an odd assessment of the existing state of the law, for numerous Board decisions make it abundantly clear that there is no strict prohibition against an employer providing financial or other forms of assistance to employees’ labor organizations, for the cases clearly hold that such contributions are not per se violative of the Act. The prohibition in section 8(a)(2) applies only to financial and other support, not to cooperation, as the Seventh Circuit explained in its Chicago Rawhide Manufacturing Co. v. NLRB decision:

"Support" is proscribed because, as a practical matter, it cannot be separated from influence. A line must be drawn, however, between support and cooperation. Support, even though innocent, can be identified because it constitutes at least some degree of control or influence. Cooperation only assists the employees or their bargaining representative in carrying out their independent intention. If this line between cooperation and support is not recognized, the employer’s fear of accusations of domination may defeat the principal purpose of the Act, which is cooperation between management and labor. . . .