

# Participatory Management and Labor Law: A Collision Course?

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As long ago as May of 1981, one respected news weekly chronicled the imminent demise of the traditional labor management relationship in the following fashion: "Quietly, almost without notice, a new industrial relations system with a fundamentally different way of managing people is taking shape in the U.S. Its goal is to end the adversarial relationship that has grown between management and labor and that now threatens the competitiveness of many industries . . . ."

"Increasing numbers of companies and unions are leading a march away from the old, crude, workplace ethos and the adversarial relationship it spawns."<sup>1</sup>

The reports of the death of the adversarial labor management relationship, as Samuel Clemens once observed concerning the reports of his own death, are greatly exaggerated. The adversarial relationship still exists, albeit in a somewhat weakened state. It is hanging on, so to speak, with the aid of a life support system. This life support system is the legal environment—the body of law fashioned and molded to accommodate the adversarial (traditional) system of industrial relations. Quite simply, the adversarial paradigm/view of labor relations permeates all aspects of labor law, federal statutory and case law as well as the accepted body of arbitration case law. Consequently, the legal structure reinforces and sustains the conflict-based system of labor relations.

There are three prerequisites for the successful transition from a conflict-based

to a cooperation-based system of industrial relations. These are: (1) the recognition and acceptance by labor and management that the only system of labor relations conducive to the solution of the serious problems confronting the economy today is one based upon cooperation and trust and acceptance of the view of labor relations as a system of cooperative problem solving encompassing both contract negotiation and contract administration; (2) the modification of judicial and arbitral principles of contract administration/interpretation; and (3) judicial accommodation of participatory management within the framework of traditional employee organizing and bargaining rights.

That labor and management have come to view industrial relations as a system of cooperative problem solving is evidenced by the statements of labor and management personnel cited in *Business Week*, most notably: "It's a real fundamental change in the way we manage people," says Paul W. Chaisson director of human resources at Malden Mills, a textile manufacturer in Lawrence, Mass. "There's no longer management turf and worker turf," he says. "There's just a sharing of the management of the business, and there's such a thirst among the workers for this process, it's amazing."

"We want participation from the bottom up," says Glenn E. Watts, president of the Communication Workers. "I don't want to sit on the board and be responsible for managing the business. I want to

<sup>1</sup> "The New Industrial Relations," *Business Week*, (May 11, 1981), p.85.

be free as a unionist to criticize management.' ”

“Adds Michael Sonduck, corporate manager of work improvement at Digital Equipment Corp.: ‘One of the most dehumanizing assumptions ever made is that workers work and managers think. When we give shop-floor workers control over their work, they are enormously thoughtful.’ ”

“ ‘Before STS started it was always us against them [management].’ Gibson [an 11-year employee of GM’s Inland Div. plant in Dayton, Ohio] says, ‘Now it’s only us.’ ”<sup>2</sup>

GM’s mammoth investment in its new Saturn plant in Tennessee indicates more than lip service commitment on the part of management to the “new industrial relations.” This facility embodies the concept of participatory management.

### **Cooperative Negotiation and Administration**

The view of industrial relations as a system of cooperative problem solving, however, must transcend contract negotiation and include contract administration. Critical to the adoption of this broad view of industrial relations and, thus, to the success of any participatory management scheme is the substitution of the trusteeship or equivalent view of management rights for the currently dominant residualist view. Under the residualist view, management authority is seen as a set of sovereign rights. Accordingly, management retains all rights and prerogatives not wrested from its grasp and set to language (delineated through specific contract provisions) during the table bargaining process.

Nowhere is the negative impact of the residualist view of management rights more clear than in the area of contract administration. Strong management rights clauses are a characteristic feature of labor contracts negotiated by managers

holding the residualist view. Such clauses, designed to prevent unions from encroaching on managerial prerogatives, preclude labor’s assumption of a more active role during contract administration and enforcement. Indeed, the residualist view begets the confrontational type of contract administration so prevalent today, whereunder contractual rights and prerogatives are guaranteed in ad hoc as opposed to a priori fashion through the grievance process. Harm must be sustained by an employee before the mechanism can be activated; activation occurring with the filing of a grievance after managerial misapplication of the terms of the labor agreement. The entire thrust of contract administration is toward remedying damage after it has been incurred rather than its prevention in the first place.

By contrast, the trusteeship view facilitates the adoption of a more balanced, preventive, or remedial approach to contract administration, wherein organized labor is afforded an expanded and a more positive role in policing and enforcing the terms of the labor agreement. Here, management authority is viewed as a set of obligations rather than as a set of sovereign rights. The manager’s role is that of a steward whose duties include, but are not limited to, insuring that the firm is operated in an efficient fashion with adequate consideration paid to both employee and consumer welfare. Unlike under the residualist view, organized labor is not seen as an opponent or as an adversary but rather as a partner whose participation in decision making is valued and whose views are solicited and who shares the responsibility for active contract enforcement and administration.

In short, participatory management mandates a clinical approach to contract administration underpinned by the trusteeship view of management rights. Such an approach views the grievance proce-

<sup>2</sup> “The New Industrial Relations,” pp. 85-96.

ture as the most important communication medium of the labor management relationship, with labor an active partner in contract administration. It is critical to the overall success of cooperative problem solving (participatory management). On the other hand, the traditional action-reaction philosophy of contract administration, underpinned by the residualist viewpoint, by nature breeds mistrust and hostility that nourish and sustain the adversarial system of industrial relations.

### Modification Contract Principles

The Supreme Court paved the way for a more active role for labor unions in contract administration with its 1983 decision in *Bowen v. United States Postal Service*.<sup>3</sup> This decision is but the latest step of an evolutionary process begun in 1967 in *Vaca v. Sipes*<sup>4</sup> and continued in 1970 in *Czosek v. O'Mara*<sup>5</sup> and *Hines v. Anchor Motor Freight, Inc.* in 1976,<sup>6</sup> wherein organized labor has been held increasingly accountable for the proper exercise of rights acquired through collective bargaining. The Court put organized labor on notice, so to speak, that it has responsibilities commensurate with its rights and will be held accountable therefor. The case involved a wrongfully discharged employee who brought suit in federal district court for discharge without cause against his employer, the United States Postal Service, and against his union, the American Postal Workers Union, for arbitrary and capricious handling of the grievance (for breach of its duty to fairly represent employees). Reversing an appellate court decision eliminating the union's responsibility for damages and fees, the Supreme Court upheld the federal district court's apportionment of damages (back pay) between the employer and the union. The employer was deemed liable for back pay from the time of unlawful discharge until

the time when an arbitrator would have reinstated him had the union properly represented the employee, with the union liable for any back pay from that point onward.

In arriving at this conclusion, the Court accepted the argument that, having surrendered its unilateral decision-making authority through bargaining and adoption of grievance arbitration, the employer has a legitimate right to expect the union to discharge its bargained-for responsibility of policing the labor agreement. The Court's view of contract administration, therefore, is that of a joint project, the successful and efficient completion of which is dependent upon a partnership dedicated to the execution of the negotiators' will in particular cases. Accordingly, the Court rejected that view of contract administration wherein the parties engage in a form of guerilla warfare, each attempting to win rights not achieved during contract negotiations, and rejected an adversarial view of contract administration, wherein the union's role is limited to challenging managerial actions.

The arbitration profession can facilitate the transformation of organized labor from a passive to an active partner in contract administration by modifying the principles it currently uses to resolve disputes involving the interpretation and application of labor agreements. The most important of these decisional arbitration principles are the following.

(1) The *jurisdiction construction principle* assumes that, since arbitrators derive their authority from and must look to the contract to render their awards, they cannot exceed nor contradict the language of the contract and the record of evidence developed through the arbitration. The only exception is where past practice has become a part of the contract.

<sup>3</sup> U.S. Sup Ct, No. 81-525, January 11, 1983, 95 LC ¶ 13,910.

<sup>4</sup> 386 U.S. 171 (1967), 55 LC ¶ 11,731.

<sup>5</sup> 397 U.S. 25 (1970), 62 LC ¶ 10,680.

<sup>6</sup> 424 U.S. 554 (1976), 78 LC ¶ 11,284.

(2) The *residual rights construction principle* requires that any rights inherent in the labor-management relationship not modified by law or expressly vested with one of the parties by the labor agreement (including past practice) remain the prerogative of management.

(3) The *parol rules of evidence* require that the arbitrator view the contract as a whole, and, if possible, ascertain from the entire document the meaning of disputed contract provisions, provided the language of the disputed provision is not clear.

Despite judicial and managerial support of labor's assumption of a more active role in contract administration, it will be a long time in coming unless the arbitration profession abandons the *residual rights construction principle*. Indeed, this principle reinforces labor's current passive role. A shift in emphasis from the *residual rights construction principle* to *parol rules of evidence*, on the other hand, is conducive to the role transformation, particularly where labor and management have committed themselves to a cooperation-based system of industrial relations (problem solving) through specific contract language such as that contained in the current *Agreement Between General Motors Corporation and the UAW*. Without this shift in arbitral focus and emphasis, combined labor-management efforts toward fashioning a more positive role for labor in contract administration, short of a specific but encyclopedic delineation of union responsibilities in all contract areas, are destined for an unnecessary degree of frustration, if not outright failure.

### Judicial Accommodation

Irving Bluestone, a retired UAW vice-president and a strong advocate of work innovations, once noted "We can be cooperative on the plant floor and adversarial at the bargaining table,"<sup>7</sup> implying that

the UAW has not forfeited any organizing/bargaining rights through its cooperation in joint problem solving efforts. This, however, may not be the case. It may be that workers cooperating on the plant floor are legally prohibited from approaching the bargaining table. Stated somewhat differently, workers sharing the management of a business may no longer be considered employees entitled to the protective features (i.e., rights) of the National Labor Relations Act, if the Supreme Court adheres to or expands the position it took in *NLRB vs. Yeshiva University*.<sup>8</sup>

In *Yeshiva*, the Court established a two-pronged test for purposes of determining faculty status under Taft-Hartley: whether faculty members were simply professional employees entitled to the protective features of federal labor law or whether they were also managerial employees and thereby excluded from Taft-Hartley. According to Powell and the Supreme Court majority, the determination was and is dependent upon two factors; the nature of faculty input to an institution's decision making process, and the weight assigned to these faculty decisions. When the decisions concern "the academic product" and "the academic market" of the institution and are controlling, they are managerial in nature; those making the decisions assume managerial attributes and qualities. In short, the Court held that faculty members are managers when their decisions are normally determinative of what the institution will offer (that is, "the academic product") and to whom it will be offered (that is, "the academic market").

It is not inconceivable that the Court might develop a similar test for determining worker status under participatory management schemes. The Court could very well hold that workers are managers when their decisions are determinative in areas that have traditionally constituted

<sup>7</sup> "The New Industrial Relations," pp. 86.

<sup>8</sup> 444 U.S. 672 (1980), 87 LC ¶ 11,819.

"the core of entrepreneurial control,"<sup>9</sup> in areas that are central to the operation of the firm and historically reserved to managerial discretion. Such a ruling would impose a significant cost on employees involved in cooperative management programs—the loss of coverage under the National Labor Relations Act. No longer would these workers be considered "employees" entitled to the protective features of the Act. As a result, workers would become more reluctant to participate in such programs. Should the Supreme Court take this tact and should this cost become an obstacle to the continued adoption and maturation of a cooperation-based system of industrial relations, Congressional action would be in order. The National Labor Relations Act would have to be amended to accommodate participatory management while safeguarding traditional employee organizing and bargaining rights.

### Summary and Conclusion

Significant strides have been taken toward implementation of a cooperation-based system of industrial relations. The metamorphosis, however, will remain incomplete until certain prerequisites are met. These are: (1) a firm commitment by labor and management to the concept of cooperative problem solving during both the negotiation and the administration of the labor agreement, (2) a more positive (i.e., active) role for organized labor in contract administration made possible by judicial and arbitral acceptance of contract administration as a cooperative undertaking, and (3) judicial accommodation of participatory management within the framework of traditional employee organizing and bargaining rights.

While labor and management have committed themselves to cooperative problem solving during contract negotiation, they have been somewhat more

reluctant to do the same during contract administration. This stems, in no small measure, from the residualist view of management rights that still influences the thinking of many labor relations practitioners. An active role for organized labor in contract administration will become more common with the widespread substitution of the trusteeship view for the residualist view of management rights.

The Supreme Court's decision in *Bowen v. United States Postal Service* constitutes judicial endorsement of a more active role for labor unions in contract administration. The arbitration profession can do its part to foster the transformation of organized labor from a passive to an active partner in contract administration by modifying long-held decisional arbitration principles, by shifting emphasis from the *residual rights construction principle* to *parol rules of evidence*.

Quite possibly the most serious threat to cooperative problem solving and participatory management schemes is the judicial body of case law governing coverage and protection of the National Labor Relations Act. Should the Supreme Court adhere to the position it took in *NLRB v. Yeshiva University*, denying coverage of the National Labor Relations Act to employees engaged in activities *historically* reserved to managerial discretion, Congressional action would be in order. In short, should the Court refuse to accommodate participatory management schemes within the traditional framework of employee organizing and bargaining rights, the National Labor Relations Act would have to be amended to do so. Otherwise, the cost to employees of participatory management might prove prohibitive.

[The End]

<sup>9</sup> *Fibreboard Paper Products vs. NLRB*, 379 U.S. 203 (1964), 50 LC ¶ 19,384.

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