

JONES DAY COMMENTARIES

New Guidelines from the National Labor Relations Board Regarding Participative Management Initiatives and Employee Committees

A recent decision by the National Labor Relations Board (“NLRB” or “Board”) has opened the door to increased cooperation between managers and employees by setting a precedent for how companies can structure shared governance entities such as employer-employee management committees without fear of violating the National Labor Relations Act (“NLRA” or “Act”). Beginning in the 1980s, due in large part to the influence of Japanese management approaches, employer-employee communication committees, participative management groups, quality circles, and similar approaches have become increasingly popular tools for increasing employee access to and involvement in workplace management decisions. The utility and effectiveness of these approaches is evident from their continued use and popularity among both employers and employees. Despite strong support for these techniques, employers have had to exercise caution in implementing them due to federal court and NLRB interpretations of the NLRA. Those precedents created a confusing and often-changing array of requirements for employers to meet when using these approaches to avoid running afoul of the Act.

In a case called *Crown Cork & Seal Co.*, the Board greatly expanded the prospects for use of these techniques by adopting a more flexible standard for the parameters under which these approaches can be used without violating the Act. Specifically, the Board’s decision recognized that an employer-employee committee that performs certain traditional management functions can be lawful

under the Act even where an employer reserves the right to rescind decisions of the committee. The decision was generally favorably viewed by both employer representatives and labor organization representatives as an important step in enhancing the potential for increased cooperation in the workplace. This article examines *Crown Cork & Seal* and cases prior to it and provides suggestions for steps employers can take to increase employee participation in management decisions.

Facts of the Case

At issue in *Crown Cork & Seal* was the company’s use of seven employee participation committees with responsibility for making decisions and giving recommendations concerning issues ranging from production and product quality to training and safety. Under Crown Cork’s management system, every employee is a member of one of four production teams that make decisions concerning production and safety-related issues. Two members from each team, along with several management representatives, constitute the next level of management—the organizational review board, the advancement certification board, and safety committee. These committees are responsible for ensuring that policies are implemented uniformly throughout the company. Decisions by these entities are reviewed by a management team consisting solely of managers and ultimately by the plant manager.

A Crown Cork employee challenged this system, asserting that the committees were employer-

dominated labor organizations. The Board, in a unanimous decision, upheld the administrative law judge's finding that these seven committees were not labor organizations under the Act because they did not exist for the purpose of "dealing with" the company but instead exercised independent managerial discretion.

Labor Law and Shared Governance Approaches

The Board's decision focused on Section 2(5) of the NLRA, which defines the phrase "labor organization" as:

any organization of any kind, or any agency or employee 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, wage, rate of pay, hours of employment, or conditions of work.

An employer risks violating the Act if an employee-participation committee is deemed to be a "labor organization" because another part 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" Historically, interpretations of Section (a)(2) have precluded employers from playing all but the most limited of roles in such committees if they meet the Section 2(5) test for labor organization, thus severely limiting the ability for these kinds of committees to serve as vehicles for cooperative relationships between management and employees. Historically the Board and federal courts have taken an expansive approach to what constitutes "dealing with employers" under Section 2(5). In a very early case called *NLRB v. Cabot Carbon Company*, the Supreme Court established that the phrase "dealing with" is not limited to situations where actual bargaining occurs but encompasses a broader range of interaction between employer and employees. The Seventh Circuit in *NLRB v. Thompson Rambo Woolridge, Inc.* expanded this broad interpretation

even further to include mere presentation of employee views that were not accompanied by recommendations.

The Board and federal courts began to narrow this broad definition to some extent, beginning with a series of three Board cases in 1977 where there were findings that no labor organization existed. The Board first held that a grievance committee was not a labor organization because it performed a purely adjudicatory function in a case called *John Ascuaga's Nugget*. In the second case, *Mercy Memorial Hospital*, the grievance committee's role involved the further function of recommending workplace changes in addition to adjudicating grievances, but the Board nevertheless found that it was not a labor organization. In *General Foods Corp.*, the Board determined that employee teams were not labor organizations because the employer had delegated managerial authority to them. The employer in *General Foods Corp.* used a "job enrichment program," which delegated control over certain decisions, such as job assignments and overtime schedules, to employee teams.

In the 1990s, the Board and certain courts shifted back toward a broader interpretation of Section 2(5). Beginning with *Electromation, Inc.*, the Seventh Circuit upheld the Board's determination that employee "action committees" created by the employer to determine how best to implement proposed cost-cutting measures constituted a labor organization. In that case, the Board articulated for the first time the "bilateral mechanism" standard, which has become important in later cases. According to the Board, "dealing with" under Section 2(5) means "a bilateral mechanism involving proposals from the employee organization concerning the subjects listed in Section 2(5), coupled with real or apparent consideration of those proposals by management." In addition, the Board reiterated its holding in *General Foods Corp.* that there is no "dealing with" the employer if a committee's purpose is limited to performing managerial functions.

In a later case, *E.I. duPont Nemours & Co.*, the Board expanded on the bilateral mechanism concept, stating that it “ordinarily entails 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.” In addition, the Board cited examples of permissible activities that would not meet the test and, therefore, be lawful, including “brainstorming” groups designed to develop ideas and committees intended to gather information for the employer.

Partially in response to the controversy and confusion generated by these precedents, Congress in 1996 passed legislation titled the “Team Act,” which would have amended the Act to permit teams of employees to work with management to address workplace issues in nonunion settings. The legislation, however, never became law because of a veto by President Clinton.

Significance of *Crown Cork & Seal*

Crown Cork & Seal represents an important shift away from the Board’s broader interpretation of “dealing with” under Section 2(5) toward a more reality-based understanding of the complexities of management structures. *Crown Cork & Seal* builds on the Board’s earlier statements that a committee that exercises managerial discretion is not a labor organization by adding several new dimensions to the analysis of the difference between delegation of authority represented by *General Foods* and the prohibited bilateral mechanisms found in *Electromation* and its progeny.

Several aspects of the Board’s analysis are significant for understanding what constitutes a permissible employee-participation committee. First, the Board established a framework for the analysis for determining whether the function of the committees was truly managerial, as in *General Foods Corp.*, or constituted a bilateral mechanism as represented by another case, *Keeler Brass Co.*

As described above, *General Foods Corp.* involved the use of employee teams that were delegated authority to exercise certain functions within described limits. That case established that there is no dealing under Section 2(5) where a committee exists for the purpose of exercising managerial authority. By contrast, in *Keeler Brass Co.*, the Board found that a bilateral mechanism existed where an employee grievance committee’s decision was partially overturned by management. After management’s reversal, the committee heard additional evidence on the case and ultimately reversed its recommendation. The Board held that this back-and-forth exchange was the sort of bilateral activity that constitutes impermissible “dealing” under Section 2(5).

Crown Cork & Seal examined both these precedents and determined that the committees more closely resembled *General Foods Corp.* because there was a true delegation of managerial authority. In holding that the committees exercised managerial authority, the Board recognized that Crown Cork’s structure “represents a significant variation on the traditional plant organizational structure where authority is delegated to descending levels of managers” It found that despite the substitution of committees for individual managers in Crown Cork’s structure, “at each level the authority being exercised is unquestionably managerial.”

Perhaps more significantly, the Board rejected the argument that the lack of final and absolute authority by the committees due to the potential for veto necessarily meant that “dealing” occurred under Section 2(5). In doing so, the Board took the important step of acknowledging that “[f]ew, if any, supervisors in a conventional plant possess authority that is final and absolute” and that, rather than “dealing” with management, the committees at Crown Cork were engaged in “the familiar process of a managerial recommendation making its way up the chain of command.” This rejection of an inflexible test based on the existence or lack of final

authority is further evidence of a shift in the Board's approach to and understanding of what constitutes managerial authority.

The Board's analysis reveals several factors that are significant in determining whether an employee-participation committee exercises managerial authority. First, the Board stated that the Crown Cork committees were a part of the actual management structure rather than separate entities outside of the chain of command. The Board contrasted this aspect with the situation in *Keeler Brass*, noting that "it is the fact that the interaction is occurring between two management bodies that distinguishes this case from cases such as *Keeler Brass* and persuades us that the statutory element of dealing is absent." This indicates that the role of an employee-participation committee within the regular management structure will be a factor in determining whether its activities constitute impermissible "dealing" or the exercise of managerial authority.

Second, the Board repeatedly emphasized the testimony of the plant manager that he rarely, if ever, overturned recommendations by the committees even when he personally disagreed with them. This is an important limit on the Board's willingness to find managerial authority where veto power exists. It indicates that the Board is likely to look closely to see if, in fact, the committees are given the considerable latitude and autonomy they are purported to possess or if management closely scrutinizes their actions and routinely overturns them.

Conclusion

Crown Cork & Seal represents an important step forward in the evolution of the Board's approach regarding employee-participation committees and creates a promising precedent that should permit increased use of shared-governance approaches in the workplace. The Board's rejection of an inflexible test based on whether veto power over committee

decisions exists is a significant departure from earlier cases and indicates a more realistic understanding of the complexities of modern management structures. Equally important, unlike many issues in the labor law context, both management and unions have hailed the decision as significant for its promise of permitting increased cooperation between employers and employees in the workplace.

In light of *Crown Cork & Seal*, employers have increased opportunities for using shared-governance techniques. Caution should still be exercised, however, whenever establishing employee-participation committees in order to avoid potential liability under the NLRA. Steps that will help avoid conflicts with the Act include the following:

- Integrate committees into the actual management structure.
- Ensure that the committees actually exercise certain closely articulated managerial functions comparable to what an individual manager would at that level.
- Where veto power over committee decisions exists, ensure that it is used sparingly and establish objective guidelines where possible for its exercise.
- Eliminate any aspects of committee review that involve a pattern of proposals, response, and compromise.

Further, employers can reduce their potential of violating the Act when establishing shared-governance entities by adhering to the following guidelines:

- Selection process: Employees self-select or management appoints volunteers.
- Employee member status: Each employee participates as an individual, not as a representative of any others.
- Lengths of terms: Rotate employees after 12 to 18 months.
- Composition: Comprise the committee of a majority of nonsupervisory employees.

- Control: Management suggests the agenda but does not veto or control the agenda.
- Committee activity: Whenever possible, have committee members engage in “brainstorming” and general discussion or development of ideas and thoughts as opposed to development of proposals and specific courses of suggested action.
- Timing: Establish the committee when union organization is not occurring.
- Rationale: Establish the committee to improve employee communication and to discuss work-related issues.
- Union advisement: In unionized settings, discuss formation of the role of the committee with the union and abide by provisions of the collective bargaining agreement; do not attempt to circumvent the union.

Finally, employers should be aware that given the considerable advantages that shared governance brings to the workplace, experimentation in this area, as a general rule, does not create significant potential liability risks under the Act. The general remedy required by the Board and the courts for situations in which a Section 8(a)(2) unlawful domination or control of a committee violation is found is disbandment of the committee. Employers should be aware, however, that the existence of an unlawful committee in an NLRB election situation could be grounds for a valid election objection and the potential basis, therefore, for a second election to be ordered by the Board. The creation and utilization of an unlawful committee, in addition to other serious violations of the Act by an employer in the context of a union organizing campaign (*e.g.*, termination of employee union organizers), could also be the basis of a bargaining order requiring the employer to recognize and bargain with the union, even if the employer prevailed in a Board-conducted election. Unionized employers also could be the subject of unfair labor practice charges and grievances

if such committees are established unilaterally by employers and interfere with a union’s exclusive representation status. Accordingly, employers should pursue a thoughtful approach with the guidance of legal counsel before shared governance entities are established and implemented.

Further Information

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