because it did not discuss wages, grievances, labor disputes, hours of employment, or conditions of work.

As noted, in contrast to the apparent less restrictive view of the 6th Circuit, the NLRB's view continues, with some exceptions, to be consistent with that first espoused in *Cabot Carbon*.

In *Alta Bates Hospital Institutional Workers Local 250, Service Employees International Union, AFL-CIO and Employee Advisory Committee of Alta Bates Hospital, Party In Interest* (1976), the NLRB considered whether the Employee Advisory Committee of Alta Bates Hospital (Advisory Committee), was a labor organization within the meaning of Section 2(5) of the Act and, if so, whether the employer, in violation of Section 8(a)(2) and (1) of the Act, dominated or interfered with the formation and administration of the Advisory Committee and contributed financial aid or other support to its existence. Also in dispute was whether the employer violated Section 8(a)(5) and (1) of the Act by negotiating with the Advisory Committee over employees' working conditions at a time when those employees were represented by the union.

The hospital's personnel committee created a subcommittee composed of eight employees and four management representatives, all of whom were selected by members of the personnel committee. The purpose of the subcommittee was to recommend to the personnel committee whether it was feasible to have an advisory committee and, if so, what such a committee would do and what its composition would be.

The subcommittee recommendation, as approved, provided for an advisory committee of twelve representatives, eight of whom must be nonsupervisory personnel and four management personnel, and further required that the personnel director have a standing position on the committee as an ex officio member for the purpose of consultation. In connection with the election of these representatives, it was provided that all full-time personnel, including supervisors, were qualified to vote and that the subcommittee would conduct the election.

Employees nominated candidates for positions on the Advisory Committee and the election took place; the ballots were printed and distributed by the employer with the employees' paychecks.

The Advisory Committee approved a set of bylaws drafted by a department head and the personnel director. The bylaws, which were approved by the employer, in pertinent part read:

Article II.

> *1. (a) To facilitate the discussion of any issues that might concern employees and their work environment and to direct these items to the proper source for resolution. (b) To establish better relations between all employees at Alta Bates Hospital irrespective of job description, title, or department. (c) To provide a mechanism for employees to submit ideas concerning new proposals about the hospital's operation, methods for improving the work environment, and/or the identification of possible problem areas at the hospital to administration. (d) To improve communication between departments, medical staff, volunteers, patients and community (pp. 5-6).*

The Advisory Committee had no income and was entirely dependent on the employer in its day-to-day operations. The employer printed and distributed the

ballots for the Advisory Committee election. Meetings were held during working times on the premises, and the employees suffered no loss of pay. The employer allowed the Advisory Committee to use a portion of the hospital bulletin board and the hospital newsletter to publicize its activities and permitted the Advisory Committee to use the hospital's mail system to distribute the minutes of the committee meetings and to use a building to display action request forms for employees to fill out and deposit in a box provided by the employer.

Several action request forms submitted to the Advisory Committee, which the Advisory Committee brought to the attention of management, concerned employees' grievances or conditions of work. For example, one action request complained that the food from the vending machines was often unsatisfactory and of a limited variety. Another was from a nurse who complained that the newly constructed nurses' lounges and locker facilities, where the nurses spent their break periods and changed their clothes, were incompletely furnished.

The NLRB found the Advisory Committee to be an organization in which employees participated and which existed for the purpose, in part, of dealing with the employer concerning grievances, labor disputes, and conditions of work. It was a labor organization within the meaning of Section 2(5) of the Act. The Board also found the Advisory Committee to be employer dominated.

The Board considered the fact that the employer created the Advisory Committee with the best of intentions. It was not motivated by any desire to undermine the union or any of the several other unions with which it had bargaining relations. The employer's motivation was based on its belief that if employees had easy access to an Advisory Committee with their unanswered problems or requests, they would be happier with their work environment, and, since satisfied employees tend to do better work, they would provide better care for the hospital's patients. The Board found this not to be a defense, however, because Section 8(a)(2) prohibits an employer from dominating or interfering with the formation or administration of any labor organization. The statute forbids employer interference or domination of a labor organization regardless of its motives—benevolent or malevolent.

However, regarding the alleged violation of Section 8(a)(5), the NLRB found that although the Advisory Committee was dealing with the employer within the meaning of Section 2(5) of the Act, such dealing did not reach the level of collective bargaining contemplated by Section 8(d) and 8(a)(5) of the Act.

The NLRB ordered the Employee Advisory Committee of Alta Bates Hospital to be disbanded.

Similarly, a hospital's Nursing Advisory Committee, inaugurated at a time when union organizational activities were in progress, and having as its purpose discussion with the hospital executive director of problems of staffing, salary increases, scheduling, weekends off, and lack of supplies, was determined, in *NLRB v. South Nassau Communities Hospital* (1980), to be an employer-dominated labor organization within the meaning of the Act. At various meetings within this committee, the employees had raised questions concerning such matters as the wage increase that they might be receiving, overtime pay, call-in pay for time spent performing professional functions, access to the cafeteria, work shifts, weekend work, and parking. It was clear to the administrative law judge that the Nursing

Advisory Committee was an organization in which employees participated. It was similarly clear, given the range of subjects discussed by the Committee with the hospital's executive director, that the parties were dealing with each other concerning the subjects delineated in Section 2(5) of the Act. That the committee may also have been concerned with discussing professional matters not related to wages, hours, and working conditions did not, in the mind of the administrative law judge, negate the role of the committee in dealing with the employer on those statutory subjects.

Finally, in *NLRB v. E.I. DuPont de Nemours & Co.* (1990), the Board found DuPont violated Sections 8(a)(2) and (1) of the Act by dominating and supporting the Design Team, a labor-management committee that included supervisors and rank-and-file workers represented by a union.

The *Daily Labor Report* (1989) noted that the Design Team was composed of 25 to 30 volunteers chosen by DuPont from a larger pool of applicants and that half were managers and the others were bargaining unit employees.

The Design Team was intended to implement organizational techniques to improve workplace safety, innovation, teamwork, open communication, involvement in problem solving, and sensitivity to customers' needs, ultimately making the company more competitive.

The Board found DuPont bypassed the union and fostered a competing organization by soliciting solutions to workplace problems from the Design Team and adopting the Design Team's proposals before introducing them at the bargaining table. In some cases, the company implemented Design Team proposals that had been rejected when the union proposed them. The administrative law judge found the company gave workers the subtle message that change could more effectively be implemented by the rival entity than by the designated bargaining agent.

If a hospital and its staff nurses, through their collective bargaining representative, wish to implement shared governance, with the necessary management-employee committees, the committees must not be labor organizations and the structure must not be employer dominated.

A clear statement creating the shared governance structure and delineating its authority should be set forth in the collective bargaining agreement. The provision empowering nurse managers and staff nurses to deal with professional issues must recognize the primacy of the terms of the collective bargaining agreement and preserve the status of the union as the nurses' bargaining representative. Individual rights of the nurses should be protected through preservation of access to the grievance procedure. Care must be taken to avoid domination of the committees by nurse managers. Power must be shared in the professional areas, but the rights of the union and the individual nurse must not be infringed upon.

Exclusive Representation

A union is empowered to act as the exclusive representative of all employees within the bargaining unit under Sections 8(b) and 9(a) of the Act (*Richardson v. United Steelworkers of America*, 1989). Section 9(a) states that "a representative . . . designated or selected for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representative of all the

employees in such a unit for the purposes of collective bargaining. . . ." Section 8(a)(5) of the Act requires the employer to bargain with the chosen representative. Under the Act, a union representative is chosen through election and certification by the NLRB.

The rationale underlying exclusive representation is one of majority rule. Thus, although an employee is not required to vote for union representation, that employee is bound by the majority. It is believed that majority rule results in collective strength and bargaining power, thereby subordinating the interest of the minority to those of the majority (Leffler, 1979).

The exclusive representation concept requires that the employer deal directly with the union concerning wages, hours, and other conditions of employment rather than with individual employees. When this requirement is not met, the union may risk loss of control to dissident groups, resulting in increasing competition, dissatisfaction, and conflict due to diverse results in conflict resolution (*Landers v. National Railroad Passenger Corporation et al.*, 1988). The union as exclusive representative controls processing of grievances and contract administration.

In a shared governance structure in an organized hospital, the union, as the exclusive bargaining representative of its membership, cannot be ignored. The active cooperation of the union in the creation of the committees forming the shared governance structure is essential, not only to comply with legal requirements, but to enhance opportunities for successful implementation. The sharing of power in certain areas by management is disallowed when the union is replaced as the exclusive collective bargaining representative for staff nurses.

Wages, hours, seniority, grievances, and other labor disputes should not be topics considered by the shared governance committee. The traditional adversarial negotiating process between management and the union can effectively deal with those issues. The shared governance system in an organized hospital must work within the limits allowed by law and the terms of the collective bargaining agreement.

Fair Representation

A union has a duty to its membership of fair representation. "A union's duty to represent its members fairly is a judicially created doctrine derived to balance the union's exclusive representation of its members, set forth in Section 9(a) of the National Labor Relations Act, 29 USC section 159(1). With this exclusive authority comes a responsibility to the individual members, whose individual bargaining rights are correspondingly limited" (*Walker v. Teamsters Local 71*, 1989, p. 190).

The union's duty of fair representation extends beyond the negotiation of a contract. It includes day-to-day contract adjustments, working with rules, problem resolution in those areas not covered by the existing contractual agreement, and protection of secured rights (*Conley v. Gibson*, 1957). These duties complement the union's duty to fairly represent its membership in contract negotiation, amendment, and modification.

The union's duty of fair representation in the administration of existing contract rights extends to contract modifications. In *Walker v. Teamsters Local 71* (1989),

a union was found to have breached its duty of fair representation when a joint labor-management committee delayed implementation of a contract provision. The court found this action to be a contract modification rather than a contract interpretation; thus the membership should have been offered an opportunity to vote before this modification. By failing to provide this opportunity, the union was found to have failed in its duty to protect the interests of its members. The union breached its duty of fair representation by its failure to diligently seek timely implementation of the contract provision. In effect, the union negotiated away a contract benefit through negligent delegation of its duties to the committee. Furthermore, the delay in implementing the contract provision at issue did not benefit the bargaining unit. The union was criticized by the court for its lack of a review mechanism to ensure contract compliance. The court also noted that the committee had no power under the collective bargaining agreement to modify the contract or negotiate changes.

Employers may be liable when a union breaches its duty of fair representation. "It is well recognized that where an employer has had notice of the lack of authority of the union to enter into an agreement, no agreement is reached. Where the employer has knowledge of the ratification requirement, and this is the basis for the fair representation claim, the employer may also be found liable for breach of the contract or for having joined in the fair representation breach" (*Walker v. Teamsters Local 71*, 1989, p. 193).

The duty of fair representation suggests the inclusion of certain safeguards within a shared governance structure that should be created by contract language. The function and authority of any committees should also be delineated. Committees should not attempt to change contract language beyond the scope of contract authorization. Unions are well advised to maintain a mechanism for review of committee activities. Membership vote for contract modifications should be implemented when questions exist. In areas of peer review and granting of credentials, distinctions that are drawn should be reasonable, relevant, and done in good faith with honesty through use of objective criteria. Access to the grievance procedure by staff nurses must not be impeded.

EMERGING MODELS OF COLLECTIVE BARGAINING

Assuming no changes in the current law, reasonable inferences can be drawn regarding the evolution of collective bargaining encompassing a viable shared governance structure. These are:

1. A union that has been certified as the bargaining agent for registered nurses will be required to continue to perform the functions of exclusive bargaining representative.
2. A union will be required to continue to fairly represent the unit as a whole as well as protecting the individual rights of each of the represented nurses.
3. A union and a hospital will be required to conduct their relations within the law in the implementation and operation of shared governance.
4. A hospital will be required to limit its expenditures for variable and fixed costs to its available funds.

The union will continue to meet its obligations as the exclusive bargaining representative and of fair representation by conducting good faith collective bargaining negotiations with the hospital that result in a written collective bargaining agreement ratified by the bargaining unit, and by taking such actions as may be necessary to ensure that the terms and conditions of the agreement are fully implemented.

The collective bargaining agreement will contain the normal provisions concerning wages, hours, and conditions of employment that affect the bargaining unit uniformly. In addition, the agreement will contain express language authorizing shared governance and empowering the shared governance structure to resolve professional nursing issues. The agreement will require that the resolution of any such issues may not deviate from the terms of the agreement, but will allow referral of necessary changes in the agreement back to the negotiating teams for resolution. If changes in the agreement are then negotiated, they will be presented to the bargaining unit for ratification.

The professional nursing issues expected to be addressed on a continuing basis during the term of the collective bargaining agreement could include staffing, patient mix, peer review, and granting of credentials.

If staffing is used as an example, the collective bargaining agreement will contain the overall methods to be used in increasing and decreasing staff. If staffing is also specified as an issue for shared governance, the specific formulas to determine the number of registered nurses necessary to provide the appropriate level of care within a specific unit and in compliance with budgetary constraints will be provided by the professional nurses using the shared governance structure. The shared governance structure will allow consideration of the individual peculiarities of a nursing unit such as physical configuration, availability of support services, location, type of services provided, and other facts that could not realistically appear in a collective bargaining agreement. In addition, the focus on the individual unit will allow the professional nurses involved to react to unexpected changes in the relevant facts much faster and with more appropriate responses than can be expected from the hospital and the total bargaining unit.

The collective bargaining agreement will contain a mechanism for dispute resolution such as a grievance procedure. The individual nurse, aided by the union, who considers that the change or elimination of the nurse's job as a result of the staffing formula developed by the professional nurses through shared governance and implemented by the hospital is a violation of the collective bargaining agreement, will have access to the grievance procedure to protect the nurse's individual rights.

The models for collective bargaining that should emerge in conjunction with shared governance should allow flexibility to the professional issues. The traditional collective bargaining negotiations will occur on a periodic basis. The issues that will be negotiated should be those that are universal to the bargaining unit. The agreement will specify the universal issues to be at least wages, seniority, union security, methods for use in increasing or decreasing the number of staff nurses employed, work interruption, recognition of the union, shared governance, dispute resolution, and contract term. The shared governance language in the contract will specify those professional issues to be determined by the professional

nurses. This empowerment will allow and encourage continuous self-directed attention to and resolution of the professional issues in a timely, appropriate manner.

The hospital will use and implement the shared governance decisions while complying with the collective bargaining agreement. The union will closely monitor the shared governance procedure and decisions and the hospital implementation thereof. The union will stand ready to protect individual rights through the use of the grievance procedure and by appropriate input to its members who are working in the shared governance structure. The shared governance structure will not be allowed to change the collective bargaining agreement, but can recommend necessary changes to both negotiating teams. The hospital and union teams will meet and conduct good faith negotiations concerning the recommendations even though the contract term has not expired. If agreement is reached, it will be subject to ratification by the bargaining unit.

The anticipated models for collective bargaining will thus recognize the unit-wide issues and incorporate them into the collective bargaining agreement. This agreement, with respect to those issues, can be anticipated to be somewhat static for its term. The professional issues specified for shared governance will be subject to a more dynamic process and will be addressed as necessary by the professional nurses in a less structured, more flexible setting. Action can be expected to replace reaction. A more efficient organization that provides quality patient care should result because of the professional nurse expertise and empowerment to determine professional nursing issues.

SUMMARY

Hospitals may share power with their professional nurses in an organized setting. The use of a shared governance structure to empower nurses to handle the issues of professionalism is feasible. The hospital and the union must recognize that there are binding legal rights and obligations placed on both parties. Compliance with the law is most likely if the shared governance structure is created as follows:

1. The shared governance structure should be sanctioned by the collective bargaining agreement between the hospital and union.
2. The committees created to accomplish shared governance should consider professional issues only and should not deal with issues concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment.
3. The power of the committees must be limited by the budget of the hospital.
4. The membership of the committees should be equally divided between nursing managers and staff nurses, or have a majority of staff nurses.
5. The staff nurses who are members of the committees should be elected by the staff nurses or appointed by the union. The hospital should appoint the nurse managers. All committee members should have specified terms.

6. The decisions of the shared governance committees should not be subject to veto by the hospital.
7. The committees cannot alter, modify, or deviate from the terms of the collective bargaining agreement. If the committees determine that a change is necessary in the agreement to further shared governance, the change should be recommended to the hospital and the union. If, after negotiation, the hospital and the union agree to change the agreement, the change should be submitted to the bargaining unit for ratification.
8. Any shared governance structure must not impede the rights of individual nurses to use the contractual grievance procedure.
9. Peer review, granting of credentials, staffing, and other professional issues are proper areas of concern for the committees if authorized by the collective bargaining agreement. However, the decisions of the committees should be reasonable, relevant, and done in good faith with honesty through use of objective criteria. Adverse impacts on individual staff nurses must be subject to challenge through the use of the contractual grievance procedure.
10. Even though there is language in some decisions concerning the unimportance of the motivating factors of the hospital in creating such joint committees, a hospital should not enter into such an arrangement to circumvent the union as the exclusive bargaining representative or to cause the union to be decertified.
11. The union should implement a method to monitor the committees to ensure that the activities of the committees do not violate the terms of the collective bargaining agreement.

If used properly, the shared governance structure can address those issues of professionalism in nursing that are not easily resolved in the adversarial process of collective bargaining or reasonably subject to inclusion in a collective bargaining agreement. The resolution of these issues can be accomplished within the nursing profession with allowance for economic realities and deference to the terms of the collective bargaining agreement.

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