CHAPTER

9 *Shared Governance and Collective Bargaining; Integration, not Confrontation*

David G. Crocker
R. Michael Kirkpatrick
Laura Lentenbrink

Collective bargaining evolved as a peaceful method to transfer power from employers to employees. In most cases it involved a for-profit employer and employees who could be replaced with little training. The employer was concerned with maximizing profits and the union with maximizing wages, benefits, and job security.

The laws that allowed collective bargaining in the for-profit industrial setting are now applicable to hospitals and professional nurses. The total self-interest on the part of the employer and employees that drove the collective bargaining process into the industrial environment has been weakened in the hospital-nurse relationship. The majority of hospitals are not-for-profit institutions. Registered nurses are skilled professionals. The product is not a car but a human life.

A professional nurse is concerned with the total patient care environment, not simply wages, hours, and working conditions. A union can require that a hospital negotiate with respect to wages, hours, working conditions, and the terms and conditions of employment. A hospital is not required to bargain with regard to staffing, services provided, quality of care, and other areas of importance to the professional nurse. Even if a hospital was willing to negotiate these issues, a collective bargaining agreement is an unsatisfactory vehicle to use in resolving them. Patient census and mix change daily, government payments and demands for services fluctuate, new procedures are implemented and the old discarded. Patient care cannot be adequately addressed on a triennial basis as can normal collective bargaining concerns. The adversarial process, with unmet demands enforced by lockouts and strikes, requires a period of labor peace to work properly. Therefore collective bargaining cannot be continuous, but must result in a written agreement that will govern the relationship of the parties in certain limited areas for a specific period.

Shared governance addresses the concerns of hospitals and professional nurses that cannot be adequately embodied in the static terms of a collective bargaining agreement. The implementation of shared governance impinges on such traditional management rights as staffing and nurse performance. It also must not evolve into a replacement of the union as the exclusive collective bargaining representative of its bargaining unit nor take away the rights of the individual professional nurses. Because of the reasons for the collective bargaining process, the state and federal legislature and courts have been more protective of employees than employers. Unions and employees are prohibited from engaging in certain conduct and contracting away certain rights in order to preserve a balance of power at the bargaining table. This chapter examines the legal implications of implementing a shared governance model in a collective bargaining environment. Because of variations among hospitals, the assistance of a labor attorney will be needed for successful implementation.

HISTORICAL PERSPECTIVE

The National Labor Relations Act (the Act) is the federal law that controls labor-management relations in the private sector of our nation's industries. Inequality of bargaining power between employees and employers; denial by some employers of the right of some employees to organize and collectively bargain; and certain practices by some labor organizations, their officers, and members were all found by Congress to burden or obstruct commerce (Section 1).

Congress therefore declared it to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce by encouraging the practice of collective bargaining (Section 1).

Section 7 of the Act grants employees the right to form labor organizations, to deal collectively through such organizations regarding terms and conditions of employment, and to engage in concerted activities in support of these and other rights.

The Act has evolved in four major cycles: the Wagner Act in 1935, the Taft-Hartley Act in 1947, the Landrum-Griffin Act in 1959, and the Health Care Amendments of 1974.

In the early nineteenth century, concerted labor activities were treated as common law conspiracies and were met with criminal prosecution. Later, the civil injunction became the favored method of combating unionization. The injunction was more effective against labor activities than the criminal proceeding because an injunction could ordinarily be secured from a state court on the basis of affidavits presented to the judge, without notice to the employees (Gorman, 1976).

The federal courts also became active through diversity-of-citizenship jurisdiction and federal antitrust laws. The Sherman Act of 1890 declared illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several states" (Section 1). It provided for government injunction, criminal prosecution, and private treble-damage action. It was applied more frequently by the lower federal courts to labor unions than to corporate conspirators. Any strike that might shut down a major plant could be treated as a conspiracy interfering with interstate trade (Sherman Antitrust Act, 26 Stat. 209, 1890).

The National War Labor Board, created during World War I, was the first federal body to announce the principle of employee freedom to organize in and bargain collectively through trade unions, free from employer interference.

The Clayton Act of 1914 was designed to withdraw the power of the federal courts to regulate labor activities through the antitrust laws. Section 20 of the Clayton Act listed the conventional concerted activities such as strikes, picketing, and boycotts, and declared these to be nonenjoinable and not violative of the Sherman Act. However, Section 20 of the Clayton Act was very narrowly construed by the Supreme Court in *Duplex Printing Press Co. v. Deering* (1921). Congress took an additional step in 1932 by enacting the Norris-LaGuardia Act. That statute declared it to be the public policy of the United States that employees be permitted to organize and bargain collectively, free of employer coercion, and sought to achieve that goal by regulating, and in most cases barring, the issuance of injunctions in a labor dispute. Peaceful strikes, picketing, and boycotts were sheltered against the injunction. The Norris-LaGuardia Act imposed severe limitations on the use of restraining orders and provided for full and fair hearings before the issuance of preliminary injunctions.

In 1940 the Supreme Court limited the reach of the Sherman Act as applied to labor unions in *Apex Hosiery Co. v. Leader*. Closely following that decision, in *United States v. Hutcheson* (1941), the Court held the broad protection of the Norris-LaGuardia Act not only barred injunctions against labor activities but also immunized such activities from antitrust actions for treble damages and criminal relief.

Congress enacted the Wagner Act, or National Labor Relations Act of 1935. This act enumerated certain rights, privileges, and proscriptions regarding both employers and employees.

The Wagner Act also established the National Labor Relations Board (NLRB). The NLRB was authorized to order the employer and the union to remedy unfair labor practices, with such orders enforceable or reviewable in the United States Courts of Appeals. The Wagner Act was sustained by the Supreme Court against a constitutional attack in *NLRB v. Jones & Laughlin Steel Corp.* (1937). The Wagner Act embodied the spirit of the new age of labor-management relations and served as a basis on which later acts and court cases would build and evolve into our nation's labor relations policy.

As a response to the rapid increase in union membership, greater use of the strike, and some corruption and undemocratic practices in internal union affairs, Congress enacted the Taft-Hartley Act in 1947. As a result, the prosecutorial and quasijudicial functions of the NLRB were separated. Supervisors and independent contractors were removed from the coverage of the Act. Limitations were placed on the NLRB in handling election cases, and the federal courts were given greater authority to review and set aside findings of the NLRB. The Taft-Hartley Act reintroduced the labor injunction, but limited it to use against unfair labor practices and only at the behest of an official of the NLRB. It also provided federal court jurisdiction over suits to enforce labor contracts, while giving unions the right to sue or be sued in federal actions. Congress also enumerated several unfair labor practices by labor organizations: restraining or coercing employees in the exercise of their Section 7 rights; causing an employer to discriminate illegally against em-

ployees; refusing to bargain in good faith; striking or inducing a strike in support of a secondary boycott; demanding recognition when another union is certified as the employee representative; demanding the assignment of work that is the subject of a jurisdictional dispute; and causing a employer to pay for services not performed.

The Act was further amended in 1959. The Landrum-Griffin Act, also known as the Labor-Management Reporting and Disclosure Act, was enacted to address the problems of corruption within union leadership, which was addressed by elaborate union reporting requirements, and of undemocratic conduct of internal union affairs, which resulted in a "Bill of Rights" for union members in such matters as union meetings and elections, eligibility for office, and union disciplinary procedures.

Not-for-profit hospitals were excluded from the Act until Congress passed the Health Care Amendments of 1974, which eliminated the statutory exclusion for not-for-profit medical institutions. Supporters of the Amendments noted that the exemption of not-for-profit hospitals from the Act had resulted in numerous instances of recognition strikes and picketing. Coverage under the Act should, it was thought, completely eliminate the need for any such activity, since the procedures of the Act would be available to resolve organizational and recognition disputes.

Congress attempted to meet the needs of the hospitals' patients by adding certain notice requirements and mediation before strike. No other recognition of the unique product of all hospitals or health care facilities has been enacted. Thus the Act, which was designed to encourage the peaceful settlement of disputes in the industrial sector by economic warfare (i.e., strikes and lockouts), has been extended to hospitals and professional nurses essentially unchanged.

ORGANIZED NURSES AND PROFESSIONALISM

A concern raised by the history of collective bargaining is the flexibility allowed by the law within which to exercise the responsibilities of professionalism. The federal statutes that protect union activities are designed for the nonprofessional worker. The areas specified as being of legitimate concern to these employees by the law were limited to wages, hours, and other terms and conditions of employment. These same rights are now the limitations on the professional nurse in the union setting.

Nurse managers and staff registered nurses are members of the same profession. A profession is defined as self-governed and self-determining (Cleland, 1978). A profession controls its own credentialing process, exerts influence on professional behavior, and strives to expand its body of knowledge.

Autonomy and control are major components of professional practice. Professionalism requires control over practice to include entry, recruitment, and self-evaluation or discipline (Jacox, 1980; Sheridan, 1982; Stern, 1982). Autonomy is a prerequisite to self-governance, professional independence, and self-regulation (Jacox, 1980; Kiereini, 1980; McGilloway, 1980; Stern, 1982).

The elements of professionalism are not usually attainable in the normal collective bargaining process. Autonomy and control of the nursing environment are not

the same as wages, hours, and working conditions. Because of this limitation, collective bargaining as a process to maintain and enhance the professionalism of organized nurses has been criticized. One view is that the predominant efforts of the unions representing professional nurses in bargaining have been directed toward salaries, fringe benefits, working conditions, and job security at the expense of a service ideal (Colangelo, 1980; Rotkovitch, 1980). Personal gain seems, apparently, to be placed before professional service in the adversarial process of bargaining.

The mandatory subjects of collective bargaining—those subjects that may be bargained to impasse and can be the reasons for lawful strikes—do not include many issues that should be addressed by organized nurses to maintain their professionalism. Hospitals are cautious about bargaining on nonmandatory subjects, such as staffing, patient mix, staff mix, peer review, and self-evaluation or discipline of the profession by its members, for at least two reasons. First, these issues are perceived as traditional management rights that must be protected for the well-being of the hospital. Second, the system of collective bargaining normally ends in a written agreement that is not subject to change for its term, which may be 3 years. The attempt to specify such topics as staffing, patient mix, staff mix, and others of a similar nature in the changing hospital environment is considered futile or counterproductive.

There are several methods that could be used to address the subjects vital to nurses. Bargaining on the professional issues could be continuous during the term of the contract. This approach may not be acceptable to hospital management because of the consumption of resources by the process and the possibility that the normal no-strike clause could be nullified. This would result in unrest and insecurity on the part of both management and nurses. Some hospitals and unions have specified committees that are charged with considering and recommending solutions to professional issues. These committees may normally only make recommendations that management may elect to ignore. No actual power is transferred by the usual committee process.

Another approach is to recognize that nursing managers and staff nurses are part of the same profession, filling different roles within a hospital. A collective bargaining agreement could empower the hospital's professional nurses, both management and staff, to resolve the professional nursing issues with the solutions limited only by the constraints of the hospital budget. Committees composed of nurse managers and staff nurses could be given control of issues such as staffing, patient mix, staff mix, peer review, and self-evaluation or discipline of the professional nurse. Such an arrangement does not result in a total transfer of power from the hospital to the organized staff nurse, but is a sharing of power.

There are legal issues raised by this sharing of power or shared governance approach by the Act and the interpretations of the Act by the NLRB and the courts.

LEGAL ISSUES RAISED BY SHARED GOVERNANCE IN AN ORGANIZED HOSPITAL

An agreement between a hospital and a union of staff nurses to empower the professional nurses employed by the hospital to resolve professional nursing issues

crosses the grain of the Act and the historical management-union traditions. Because of the usual imbalance of power between an industrial employer and a nonprofessional work force, the law protects the rights of unions and the individual employees. This protection has most clearly surfaced in the protection against unions that are tools of management or that violate the trust of their members for other reasons, such as leadership self-interest or ties with organized crime. These concerns are commonly abbreviated as "employer-domination," "exclusive representation," and "the duty of fair representation."

Employer Domination

Section 8(a)(2) of the Act prohibits an employer from assisting or dominating a labor organization. This section was enacted to protect employees from the possibility that their union would "sell out" to their employer. However, labor organizations are not limited to unions as commonly understood. Section 2(5) of the Act has defined labor organization to include any employee representation committee or plan in which employees participate and that has as one of its purposes dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours, or other terms and conditions of employment.

One of the legal issues facing the creation and implementation of shared governance by agreement between a hospital and union is the question of whether the committees or councils inherent in such sharing of power are separate labor organizations and whether such organizations are employer dominated. The drafters of the Act envisioned a system in which the norm would be labor against management. A pure dedication to the self-interest of management and unions was understandable to these legislators—employers dedicated to maximizing profits and unions dedicated to higher wages, fewer hours, and better working conditions. It was not envisioned at the time that conditions would change to the degree that would require, or at least create a situation that was conducive to, a less adversarial model of labor-management cooperation. Neither was it foreseen that the members of a union would have a higher professional calling than merely better wages, or that an employer would not always be concerned solely with higher profits.

In several cases the NLRB has ruled that a labor organization exists if a group of employees deal with their employer even if there are no officers, no charter, no dues paid, or no regular meetings held. The NLRB also has said a labor organization can exist even if there are management members on the committee that is determined to be a labor organization (*Labor Relations Week,* 1990).

The courts have taken a more liberal view than the NLRB of what constitutes a labor organization and have found that some joint labor-management groups, such as quality circles, are not always illegal. The courts have looked at the free choice of employees to determine if participation is voluntary, and if the employees looked on the operation of the committee with favor, and did not view it as a substitute for a union. The courts also have studied whether the involvement of employees in committees is in representative capacities, whether committee members are elected, or if management designates members (*Labor Relations Week,* 1990).

These contrasting views have created uncertainty regarding the status of shared governance committees and other cooperative labor-management programs.

In a February 1990 conference, NLRB member Mary Miller Cracraft noted that the move toward labor-management cooperation counters the underpinning of the Act and traditional adversarial labor relations. Cracraft said "the New Deal was built on the centrality of collective bargaining, formal grievances, and a tacit agreement that strategic business decisions would be left to management. Employees were to organize in their own independent units and conflict was viewed as natural" (*Daily Labor Report*, 1990, p. A-11). Cracraft also noted that cooperative programs are supported by the Department of Labor as a way to enhance the nation's competitive edge. Although cooperative labor-management programs are increasing, Section 8(a)(2) of the Act may also prohibit some such programs. Cracraft said "the central issue seems to be whether such committees are employer-dominated and initiated. The tension between the Act and the cooperative programs will have to be resolved so that they can be more uniformly adopted" (*Daily Labor Report*, 1990).

Section 2(11) of the Act defines a supervisor as "any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment." This section is to be read as though supervisory elements are separate so that possession of any one of the enumerated attributes of management is sufficient to confirm supervisory status (*NLRB v. Edward G. Budd Mfg. Co.*, 1948). This definition includes most nurse managers. Supervisors are management representatives. Their actions and words are attributable to their employers. If supervisors dominate an employee committee, the committee is employer dominated.

The leading court decision regarding employer-dominated employee committees is *NLRB v. Cabot Carbon Co.* (1959). In *Cabot Carbon*, the employer decided to establish an Employee Committee at each of its plants. The employer prepared, in collaboration with employee representatives from its several plants, a set of bylaws stating the purposes, duties, and functions of the proposed employee committees, for transmittal to and adoption by the employees in establishing such committees. The bylaws were adopted by a majority of employees at each plant and by the employer, and the Employee Committees were established.

In essence the bylaws stated that the purpose of the committees was to provide a procedure for considering employees' ideas and problems of mutual interest to employees and management; that each plant committee should consist of a stated number of employees; that each plant committee should meet with the plant management at regular monthly meetings and at all special meetings called by management; should assist the plant management in solving problems of mutual interest; that time so spent would be considered time worked; and that it was the committees' responsibility to handle grievances at nonunion plants and departments according to procedures established at these plants and departments.

A union that represented workers at several of the employer's plants filed unfair labor practice charges against the employer, alleging in part that the employer was unlawfully dominating, interfering with, and supporting labor organizations,

called Employee Committees, at its several plants. In its investigation the NLRB discovered the committees made and discussed proposals and requests respecting many aspects of the employee relationship, including seniority, job classifications, job bidding, makeup time, overtime records, time cards, a merit system, wage corrections, working schedules, holidays, vacations, sick leave, and improvement of working facilities and conditions.

Based on these findings, the NLRB found the Employee Committees to be labor organizations within the meaning of the Act, and that during the period involved the employer dominated and supported the labor organizations in violation of Section 8(a)(2).

The employer then petitioned the Court of Appeals to review and vacate the NLRB's finding and order. The Court of Appeals denied enforcement of the NLRB's order and set it aside. It found the employer dominated and supported the committees but held that they were not labor organizations within the meaning of the Act because (1) dealing with, as used in Section 2(5) of the Act, means bargaining with, and these committees avoided the usual concept of collective bargaining, and (2) the provisions and legislative history of the 1947 amendment of Section 9(a) of the Act show that Congress, in effect, excluded such committees from the definition of labor organization. The Board appealed to the Supreme Court.

The Supreme Court held that an employee committee that does not formally bargain with an employer in the usual manner of collective bargaining can engage in dealing with an employer, and, if the committee does deal with an employer concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, it is a labor organization within the meaning of Section 2(5). The Court's study of the matter found nothing in the plain words of Section 2(5), in its legislative history, or in the decisions construing it, that supported the Court of Appeals conclusion to the contrary. Certainly nothing in that section indicates that the broad term "dealing with" is to be read as synonymous with the more limited term "bargaining with," the Court held.

The Court found in 1937 that the House of Representatives passed the Hartley bill; proposed items included a new section of the Act to be designated 8(d)(3), providing "(3) forming or maintaining by an employer of a committee of employees and discussing matters of mutual interest, including grievances, wages, hours of employment, and other working conditions, if the Board has not certified or the employer has not recognized a representative as its employees' representative under Section 9," shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act.

The Court also found the Senate amended the Hartley bill by substituting its own bill, known as the Taft bill. The Senate's bill contained no provision corresponding to the new Section 8(d)(3) proposed by the House, but it did propose an amendment to Section 9(a) of the original Wagner Act by adding that employees have the right to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, if the adjustment is not inconsistent with the terms of the collective bargaining agreement and the bargaining representative has been given opportunity to be present at such adjustment.

After Senate and House joint conferences, the bill as finally agreed upon by the conferees did not contain the House's proposed new Section 8(d)(3) or any similar language, but it did contain the Senate's proposed amendment to Section 9(a).

The Supreme Court concluded that there is nothing in the amendment of Section 9(a), or its legislative history, to indicate that Congress thereby eliminated or intended to eliminate such employee committees from the term labor organization as defined in Section 2(5) and used in Section 8(a)(2).

Accordingly, the Supreme Court reversed the Court of Appeals and reinstated the order of the NLRB.

The NLRB continues to rely heavily on the principles set forth in *Cabot Carbon*. However, recent court decisions seem to indicate the willingness on the part of some courts to find some employee committees not to be labor organizations.

In *NLRB v. Streamway Division of Scott and Fetzler Co.* (1982), the Appellate Court discussed the effect of *Cabot Carbon* and concluded that an employee committee intended to define and identify problem areas and to elicit suggestions and ideas for improving operations was not a labor organization. The committee in *Streamway* included elected employee representatives with rotating terms and was formed after one unsuccessful union campaign and several months before another such campaign. The company changed its vacation policy after discussions with the committee. The Court stated in *Streamway* that "not all management efforts to communicate with employees concerning company personnel policy are forbidden on pain of violating the Act. An overly broad construction of the statute would be as destructive of the objects of the Act as ignoring the provisions entirely" (*NLRB v. Streamway Division of Scott and Fetzler Co.*, 1982, 691, F.2d, 292).

In support of that rationale, *Streamway* adopted with approval the language of Judge John Minor Wisdom:

> *An inflexible attitude of hostility toward employee committees defeats the Act. It erects an iron curtain between employer and employees penetratable only by a bargaining agent by a certified union, if there is one, preventing the development of a decent, honest, constructive relationship between management and labor. The Act encourages collective bargaining, as it should, in accordance with national policy. The Act does not encourage compulsory membership in a labor organization. The effect of the Board's policy here is to force employees to form a labor organization, regardless of the wishes of the employees in a particular plant, if there is so much as an intention by an employer to allow employees to confer with management on any matter that can be said to touch, however slightly, their "general welfare." There is nothing in* Cabot Carbon, *or in the Labor Management Act, or in any other law that makes it wrong for an employer "to work together" with employees for the welfare of all. It is only when management's activities actually undermine the integrity of the employees' freedom of choice and independence in dealing with their employer that such activities fall within the proscriptions of the Act.*
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> Streamway, pp. 292-93

Similarly, the 6th Circuit Court of Appeals reversed the NLRB and found that an advisory committee formed to facilitate communication between management and employees was not an illegal employer-dominated labor organization within the meaning of Section 2(5) of the Act (*Airstream, Inc. v. NLRB*, 1989).

The Appeals Court found the committee did not constitute a labor organization