Expanding Voice for Professional and Managerial Employees

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Abstract

The paper contrasts U.S. private sector labor law with both public sector and European labor law with regard to how it conceives of, and treats, managerial representation. In both Europe and the public sector, managers are often represented as employees and nonetheless act loyally as agents of the employer. Professionals who have some supervisory responsibilities should not lose their representation rights; this is an area of U.S. labor law that is ripe for reconsideration.

Introduction

Today a large number of U.S. employees are not covered by the National Labor Relations Act (NLRA) and have no legal protections should they attempt to organize. Sue Cobble (1994), using 1990 data, has estimated that the NLRA excludes as much as 33 percent of the private sector workforce; approximately half of the excluded are supervisory or managerial workers. The problem is particularly acute for nurses, along with other professional and technical workers (Abraham, Eaton, and Voos 2006). Law in the public sector and western Europe provides a model for an alternative approach to this issue.

U.S. Law Regarding Managerial Representation

When the Taft-Hartley Act was passed in 1947, the Foremen's Association of America was beginning to recruit additional members, with union organizing activity especially high among first-level supervisors in the automobile industry. Taft-Hartley added Section 2(11) to the NLRA. It excluded individuals who had the authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or to effectively recommend such action" from the concerted activity protections of the NLRA. An individual

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who did one of these thirteen things using "independent judgment" and "in the interests of the employer" was a supervisor and hence not an employee whose rights are protected by the NLRA. An individual need only do any one of these things a small part of the day, or even one day a month, to be considered a supervisor.

The Supreme Court reaffirmed and extended this exclusion in a number of cases (*NLRB v. Bell Aerospace* 1974; *NLRB v. Yeshiva University* 1980; *NLRB v. Heathcare and Retirement Corp.* 1994; and *Kentucky River Community Care* 2001). The bottom line is that professionals, who are explicitly granted rights to representation in Section 2(12) of the NLRA, lose their rights if they exercise independent judgment in the direction of other employees (Abraham and Voos 2005). Licensed practical nurses and tugboat pilots, as well as college professors, have been found to be supervisors.

As this paper is being written, the Bush NLRB is considering potential extensions of this line of reasoning. Three cases have been designated by the Board as "lead cases": *Oakwood Healthcare, Beverly Enterprises-Minnesota, d/b/a Golden Crest Healthcare Center* and *Croft Metals.* Since *Croft Metals* involves in part "load supervisors" (an employee who tells others where to place boxes in a delivery van using information about the delivery schedule), it appears that the "limbo bar" of supervisory status could be lowered even further.

The situation is very different in the public sector. Even though public sector labor relations statutes commonly have been modeled after the NLRA in many respects, they also have major differences both from that law and from one another. When Adrienne Eaton and I reviewed these statutes in 2002, we found that eleven of them provided collective bargaining rights not only for first-level supervisors but also for individuals at higher levels in the management hierarchy; these states were Alaska, Connecticut, Florida, Hawaii, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, and Washington. New Jersey, for instance, gives rights to employees up to the level of "managerial executive." Hence, a greater proportion of the workforce is eligible for union representation in the public sector. In New Jersey about 95 percent of all state employees are eligible—only 5 percent are considered "managerial executives" (Eaton and Voos 2003). A further set of sixteen states gave collective bargaining rights to first-level supervisors, but not higher levels of management, or had mixed practices (such as allowing for representation at higher levels in police/fire units but not in state government). Hence a majority of states (and many of the most populated) have passed public sector collective bargaining statutes that are more expansive with regard to coverage than is the NLRA itself. While we have not done a comprehensive study of how public sector law has evolved since 2002, we

believe that little has changed with regard to the issue of supervisory/managerial representation.[1]

Loyalty: An Idea Central to U.S. Labor Law in the Private Sector

It would be easy to explain the absence of collective bargaining rights for private sector managers by simple reference to corporate interest in minimizing the number of union-represented employees. Nonetheless, employers have advanced their cause—the denial of fundamental rights to large numbers of employees—through a conceptual lens that has been persuasive both in Congress and in the courts. Their argument centers on the concept of loyalty.

Employers have argued that managers and supervisors owe undivided loyalty to the employer as part of their job. Union membership, under this logic, should be banned because it would take away or divide that loyalty when the union and management had different interests.

This theoretical framework has been challenged by research demonstrating that employees are capable of "dual loyalty" and that often employees are committed to both the union and the company. It also ignores the reality that no manager or supervisor is entirely loyal to the company and the company alone—they are also loyal to themselves, to their families, and often to a variety of other things like their work group or department, community, religion, and so forth. All of us juggle multiple commitments in complex lives.

Because many managers and supervisors are union members in the public sector, it was possible for Adrienne Eaton and me to investigate how they juggle multiple roles and loyalties (Eaton and Voos 2003). We found evidence of pragmatic accommodation—managers can "wear two hats" successfully. For instance, in strike situations, represented managers and supervisors crossed picket lines with the blessing of the union when their labor was essential. Represented managers and supervisors continued to discipline subordinates when that was necessary, even up to the point of participating in grievance arbitrations, sometimes while maintaining union membership in the same organization as the employee filing a grievance against them. There were few insurmountable problems for the employer stemming from managerial representation.

It may be, of course, that middle managers and supervisors in public agencies have somewhat different jobs than their counterparts in the private sector. They may have less actual authority, may be bounded more by rules from the vast bureaucracy that employs them, and may be less "loyal" to those at the top of the organization because they conceive of themselves as serving the "public good" rather than the political appointee who happens to head the agency at the moment. These attributes of public sector managerial

jobs may make union membership more attractive to those who hold them. Nonetheless, it is clear that managers can be members of labor organizations at the same time they faithfully perform their managerial responsibilities. The fact that managers in other advanced industrial nations also deal with the labor organizations of their employees on behalf of their employer—at the same time they themselves are represented as employees—demonstrates the fallacy underlying this aspect of American legal reasoning

Managerial Representation in Other Advanced Nations

Professional and technical workers are often simultaneously managers. In the U.S. private sector this means that they are denied the opportunity for union representation. But in other advanced nations this overlap between the two groups has been resolved in a different way, one that provides more opportunity for voice on the part of employees. Table 1 contains relevant information on the situation for these workers in western Europe.

Representation is, of course, most extensive in the Scandinavian countries, where only top executives are not eligible for union representation. Historically separate labor organizations representing more educated workers (both managers and professionals) emerged in these nations; these organizations combine the functions of unions and professional societies. This results in a type of unionism that combines collective and individual representation. For instance, SIF, the Swedish union for white collar workers in industry (including engineers and managers), has emphasized expanded individual career assistance for its members in recent years (Bjorkman and Huzzard 2005), in addition to more traditional means of collective representation. In Norway some unions representing public sector managers have utilized individual salary negotiations in order to attract and retain top managers in the public sector.

In other nations managerial and professional unions also have worked to integrate collective and individual services. Munro and Rainbird (2000) provide evidence from Britain that innovative efforts by such unions to serve members as individuals fosters, rather than hinders, workplace activism and collective representation. In the United Kingdom, moreover, more managers (and professionals who simultaneously have managerial responsibilities) are represented by labor organizations than in the United States; Poole et al. (2005) report that membership among British managers is up slightly in 2000 from levels in 1990, with 17.5 percent of those they surveyed reporting union membership.

Managers and supervisors have representation rights in Europe that far surpass their rights in the United States; unionization rates are correspondingly higher. In several nations these groups are more organized in the public

TABLE 1

Professional and Managerial Employees (PMES) and Union Representation in Western Europe

Country	Collective bargaining agreement (CBA) coverage, where such an agreement exists, and union structure for PMES
Austria	PMES generally covered by CBA; sometimes separate agreements. PMES part of white collar sections of both private and public sector unions; also some separate organization by profession or sector. Only top executives do not have rights to representation; public sector PMES more highly organized.
Belgium	PMES covered by CBAs in public sector, hospitals, retail trade, and banking; two main union federations with white–collar sections that include PMES; also independent PMES unions. PMES and white–collar rates of unionization are estimated at 30%.
Denmark	PMES generally covered by CBA; three main confederations for blue collar, white collar, and PMES employees; white collar union also has some PMES who work in finance or the public sector.
Finland	PMES generally covered by CBA; three main confederations for blue collar, white collar, and PMES employees; white collar union also has some PMES.
France	PMES usually covered by special sections of general CBA for sectors/enterprises; four main union confederations each have a PMES section; also an independent representing only PMES.
Germany	PMES generally covered by CBA, but some contain provisions for voluntary or automatic exclusion. PMES typically part of major industrial unions; some are part of a white collar federation.
Greece	PMES generally covered by CBA; some additional agreements for PMES only in certain sector/firms. Two main unions—public and private sector—and PMES part of each. About 25% of PMES unionized in both sectors.
Ireland	PMES generally covered by CBA. Wide range of organizational modes: industrial, occupational, independent, and/or sections of other unions, both white collar and industrial. About 90% of PMES unionized in public sector; about 25% in private sector.
Italy	PMES generally covered by CBA; specific supplements offer advantages for training, mobility, working time; three main union confederations each have a professional/managerial section; also independents representing only PMES. Top managers (Dirigenti) have separate representation from most PMES; one agreement covering all Dirigenti in various industries.
Norway	PMES generally covered by CBA; three major organizations represent PMES; also separate organizations for blue and white collar workers. Certain PMES in the public sector are subject to individual salary negotiations.
Netherlands	PMES generally covered by CBA; PMES typically part of major industrial unions.
Portugal	PMES generally covered by CBA; two main confederations; some PMES in other unions; some in independents.
Spain	PMES generally covered by CBA; two main union confederations each with PMES section; some in independents.
Sweden	PMES generally covered by CBA; three main confederations for blue collar, white collar, and PMES employees. Among professionals, unionization about 90% in the public sector, but lower in the private sector (Keller and Darby 2003).
U.K.	Professionals covered by CBA where recognized. Legislation limits coverage of working time limits for PMES. Wide range of organizational modes: industrial, occupational, independent, and/or sections of other unions, both white collar and industrial.

Source: Table created by author with assistance from Kathleen Kurpiel, Based on Mermet 2000, except where otherwise noted.

sector than in the private. Also, rates of unionization for managers and professionals tend to be somewhat lower than for blue collar workers in the same nation. In Belgium, for instance, it has been estimated that only 30 percent of professional, managerial, and white collar workers are represented by unions, well below the overall average of 53 percent (Mermet 2000). Nonetheless, evidence from Europe clearly supports the lesson from the U.S. public sector that there is nothing incompatible about managerial/supervisory jobs and union representation of individuals in those jobs.

Concluding Observations

Finally, one might reasonably ask whether or not managers and supervisors want union representation rights, or even greater opportunities for voice than they are now afforded in the U.S. private sector. Adrienne Eaton and I (2004) surveyed contemporary evidence on that issue and concluded that U.S. managers do want greater voice, although only a minority want union representation at present. Nonetheless, professionals are now among the most highly unionized occupations in the United States; the way American labor law now handles the considerable overlap between managerial and professional positions is a particular problem for many professional workers seeking to organize. For this reason alone, reform of this aspect of American labor law is long overdue.

Note

1. Collective bargaining rights for state employees in Missouri and Indiana were withdrawn this year (2005), when governors in those states rescinded earlier Executive Orders mandating bargaining; unions can still represent employees in civil service appeals but they have lost many members. Obviously, these actions did not just affect managers and supervisors.

References

Abraham, Steven E., Adrienne E. Eaton, and Paula B. Voos. 2006. "Supreme Court Supervisory Status Decisions: The Impact of Union Organizing of Nurses under the NLRA." In Richard Block, Sheldon Friedman, Michelle Kaminski, and Andy Levin, eds. *Justice on the Job: Perspectives on the Erosion of Collective Bargaining in the United States.* Kalamazoo, MI: Upjohn.

Abraham, Steven E., and Paula B. Voos. 2005. "The Market's Reaction to Two Supreme Court Rulings on American Labor Law." *Journal of Labor Research,* Vol. 26, no. 4 (Fall), pp. 677–87.

Bjorkman, Hans, and Tony Huzzard. 2005. "Membership Interface Unionism: A Swedish White-Collar Union in Transition." *Economic and Industrial Democracy,* Vol. 26, no. 1 (February), pp. 65–88.

Cobble, Dorothy Sue. 1994. "Making Postindustrial Unionism Possible." In S. Friedman, R. W. Hurd, R. A. Oswald, and R. L. Seeber, eds., *Restoring the Promise of American Labor Law.* Ithaca, NY: Cornell University Press.

Eaton, Adrienne E., and Paula B. Voos. 2003. "Wearing Two Hats: The Unionization of Public Sector Supervisors." In Jonathan Brock and David B. Lipsky, eds., *Going Public: The Role of Labor-Management Relations in Delivering Quality Government Service.* Urbana/Champaign, IL: IRRA, pp. 295–315.

Eaton, Adrienne E., and Paula B. Voos. 2004. "Managerial Unionism: Prospects and Forms." *Labor Studies Journal*, Vol. 29, no. 3 (Fall), pp. 25–56.

Keller, William L., and Timothy J. Darby, eds. 2003. *International Labor and Employment Laws.* 2nd ed. Washington, DC: BNA Books.

Mermet, Emmanuel. 2000. *Professional and Managerial Staff in Europe.* Brussels: European Trade Union Institute.

Munro, Anne, and Helen Rainbird. 2000. "The New Unionism and the New Bargaining Agenda: Unison-Employer Partnerships on Workplace Learning in Britain." *British Journal of Industrial Relations*, Vol. 38, no. 2 (June), pp. 223–40.

Poole, Michael, Roger Mansfield, Julian Gould-Williams, and Priya Mendes. 2005. "British Managers' Attitudes and Behavior in Industrial Relations: A Twenty-Year Study." *British Journal of Industrial Relations,* Vol. 43, no. 1 (March), pp. 117–34.