Organization Development and Labor Law: Implications for Practice/Malpractice

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ABSTRACT

This article suggests that organization development (OD) interventions can inadvertantly violate federal labor law. This is most likely to occur in nonunion settings with OD interventions aimed at creating participative structures for employee involvement. Unwary OD consultants can unintentially create "labor organizations" which are illegally dominated, interfered with, or assisted by management. Client organizations may then be charged with an unfair labor practice under the law.

The past decade has witnessed a growing interest in strategies for improving organizational effectiveness and employee fulfillment. There has been a not-so-quiet revolution in business, involving serious attempts to make organizations more open, more participative, and more productive (Lawler, 1978). Organization Development (OD) has been central to this change process. It has increasingly developed interventions aimed at decentralized decision making and greater participation by employees at all organizational levels. These change programs have focused more on organization structure and human resource systems than traditional OD interventions, and include such innovations as self-regulating work groups, quality circles, gainsharing, and parallel organizations (Huse & Cummings, 1985).

Ironically, these trends may be bringing OD practice into a direct confrontation with federal labor law. As the focus of OD shifts to include issues of structure and participation, the risks of OD malpractice increase--risks that OD practitioners will involve themselves and their clients in systematic, if inadvertent, violations of the National Labor Relations Act (NLRA).

Although NLRA is typically associated with formal union-management relations, its specific provisions apply in nonunion settings as well. Indeed, the risk of inadvertent violation of the law may be greatest in the nonunion sector because consultants and managers may be unaware that change programs can serve to create "labor organizations." Where labor organizations, as defined in NLRA Section 2(5), exist, employers are prohibited from a number of practices common to efforts to increase employee participation, improve internal communications systems, and develop more intrinsically-satisfying and motivating work. The sections

which follow describe some relevant aspects of federal labor law, discuss their application in view of current trends in OD practice, and consider implications for OD consultants.

THE LEGAL FRAMEWORK

The principal law affecting the private sector is the National Labor Relations Act. As first passed in 1935, and subsequently amended, NLRA sets basic public policy toward labor relations. It establishes federal jurisdiction over most of the private sector, and creates the administrative machinery by which the terms and provisions of the statute are interpreted and enforced. In its present form, NLRA establishes rights and protections for employers, employees, and employee organizations.

NLRA is administered by the National Labor Relations Board (NLRB), which has as one of its most important functions the protection of the rights granted to various groups under the law. Violations of these rights, known as "unfair labor practices," are both investigated and adjudicated by the NLRB. When a formal charge is made that an employer or a union has violated the NLRA, the Board has the power to investigate the allegation and to hold an administrative hearing. If violations are found, the Board can order the cessation of prohibited practices and, in addition, require the violator to take specific affirmative steps to correct the situation. NLRB decisions may be appealed to federal courts. In addition, the Board may ask the courts to enforce its orders, thereby exposing recalcitrant offenders to citations and penalities for contempt. Among the various rights and protections accorded by NLRA are the rights of employee organizations, called "labor

organizations," to be free of undue interference or domination by employers.

NLRB DOCTRINE AND DECISIONS

In organization development programs aimed at increasing employee participation, employers may be charged with an unfair labor practice under Section 8(a)(2) of the statute. Then, the Board must decide two questions: Does a "labor organization," within the meaning of NLRA, exist; and, has the employer illegally dominated, interfered with, or assisted that organization?

Defining Labor Organizations

In deciding whether a labor organization exists, the Board relies on Section 2(5) of NLRA, which defines a 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 part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

This definition does not restrict itself to employee organizations which call themselves unions, or to organizations started by employees. It is a broad, inclusive definition which says, in essence, that any employee group which exists, even in part, to discuss with the employer essential conditions of the employment relationship is a labor organization and, as such, is entitled to the protections afforded under the law. The breadth of this definition suggests that the term labor organization could include some types of employee representation committees, or other

participatory structures common to OD interventions. Indeed, the legal decisions discussed below suggest that this is the case.

Legal scholars have identified three tests or criteria which the Board uses to determine whether a bona fide labor organization exists; these tests relate to structure, subject matter, and function.

First, the structural requirement is satisfied where there is any "meaningful" employee participation in the organization [Tuller, 1973]. Or, to tie the test more clearly to statutory language, where there exists any organization of any kind through which employees participate. The Board and the courts have consistently refused to establish any extrastatutory formal requirements in defining a labor organization which might limit the application of Section 2(5) to "established" unions. Thus, the statutory provisions tend to be applied as broadly as written. "Organizations" which lack even such traditional structural features as bylaws, officers, dues and continuity of existence over time, may qualify [Sangerman, 1973; Jackson, 1977].

Second, the subject matter requirement is satisfied if interchanges between the employer (management) and employees concern any of the following: grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. Because these categories are quite broad in scope, and because employer-employee interaction on even a single issue which is within these categories is sufficient, this second test is easily satisfied.

Third, the test of the function of the employee organization refers to whether the organization exists, in whole or in part, for the purpose of "dealing with" the employer. As NLRA has been interpreted by the Board and the courts, the term "dealing with" has not been construed to

mean only "bargaining with," in a manner typical of union-employer interaction. Rather, the Supreme Court has rejected such a narrow construction, and the Board has held that employee organizations which inform, counsel or advise management, which make suggestions or recommendations, or which merely ask questions, may meet this functional requirement [NLRB v. Cabot Carbon et al., 360 U.S. 203, (1959)].

Each of the three tests for determining whether a labor organization exists is easily met. In fact, as one legal authority notes, "...the Board has interpreted Section 2(5) so broadly that most organizations through which employers communicate with their employers are held to be Section 2(5) labor organizations," [Jackson, 1977, p. 814]. This legal net has been cast broadly enough, it would appear, to include many OD interventions intended to alter organizational structure or to enhance organizational communications and employee participation.

Determining Unfair Practices

If the board finds that a labor organization, as defined by Section 2(5), exists, it must then decide whether the employer has violated Section 8(a)(2) by illegally dominating, interfering with, or assisting that organization.

Section 8(a)(2) was primarily intended to prevent employers from creating company unions or similar internally-controlled representational mechanisms as substitutes for established, free-standing external unions. Certainly, one concern of the statute's authors was that employers not be able to restrict the growth of "bona fide" unions, where employees desired such external representation. It is important to keep in mind, however, that no such intent need exist on the part of the employer for the provisions of the law to have force and effect.

The general responsibility of the Board under 8(a)(2) is to proscribe employer actions which unlawfully interfere with employees exercising their rights to create viable organizations which can vigorously represent their perspective to the employer. Unfortunately, the NLRB and the courts have not developed clear tests as to when illegal employer domination, interference, or assistance occur. The Board itself has resisted the formulation of such standards, and prefers to examine each situation individually, rendering a decision based on the "totality" of circumstances. This ad hoc approach implies an openness and flexibility on the part of the Board, but some legal scholars have argued that the NLRB has been too harsh and rigid in its interpretation of employer behavior.

In its decisions over the years, the Board has not been hospitable to employer actions which appear to dominate or interfere with employee organizations. Illegal domination/interference have been found in instances where the employer initiated or implemented employee representation mechanisms, where management participated in the development of statements of employee organization goals or agendas, where the employer controlled membership, or selected members, or where management participated in meetings of the "employee" organizations. The Board has also been restrictive in its definitions of illegal support or assistance, finding violations to include such employer behavior as providing office space, supplies or clerical support to employee groups, providing refreshments, or paying employees for time spent in organizational meetings.

Brief summaries of a few illustrative Board cases may be useful in understanding how the language and logic of the law serve as barriers to some forms of organizational change.

- In Kurz-Kasch, Inc. the NLRB found that the employer had illegally dominated an employee Personnel Review Board by conceiving of the idea, paying members for meeting attendance, instructing departments to elect representatives, and preparing and distributing meeting minutes. The employer was ordered to disband the Review Board and to recognize and bargain with an external union which had lost a previous representation election [100 LRRM 1118 (1978)].

- In Janesville Products the Board ordered the employer to disestablish an employee committee even though the administrative hearing record showed no evidence of improper employer intent [100 LRRM 1383 (1979)].

- In Ace Manufacturing the Board found the employer guilty of dominating an employee Communications Committee by sponsoring the committee's formation, conducting representatives' elections, and dictating the committee's function [98 LRRM 1462 (1978)].

- In Northeastern University the employer was ordered to dissolve a staff advisory committee, and the Board found it "immaterial" that [235 NLRB 858 (1978), 98 LRAM 1347]:

  - there was no outside labor organization;

  - there was no strong union movement among employees;

  - useful work of the group would go undone;

  - other remedies might have been more appropriate (but were not possible under the law).

From an OD prespective, these cases are clearly troublesome, particularly because the Board has generally made its decisions without giving great weight to the employer's intention. The result is that even well-meaning employers are precluded from developing and supporting employee representation programs beyond some critical, if ambiguous minimum level.

The kinds of OD programs that seem most likely to run afoul of Section 8(a)(2) include employee-participation interventions aimed at helping groups of employees discuss or recommend organizational changes. For example, a quality circle or an employee steering committee formed to guide a socio-technical work design program might be construed as "labor organizations," especially if participants discussed conditions of employment and voiced the views of others not involved in the circle or committee. The client organization could be charged with an 8(a)(2) violation if it helped to set up the circle or committee, or if it paid for time off of work, or if it supplied a meeting room and resource support. Exhibit 1 provides a real-life example of an OD intervention that constituted a potential unfair labor practice.

EXHIBIT 1 ABOUT HERE

Employer domination of such potential "labor organizations" seems especially troublesome when the employee groups constitute a parallel or collateral structure appended to the formal organization. Parallel groups are intended to supplement the formal organization by tackling complex and ill-structured issues that are not easily resolved by the formal organization (Zand, 1974; Stein & Kanter, 1980). Because such groups are more likely to resemble representational structures than on-going work groups, the Board and the courts are likely to be particularly sensitive to employer actions that seem to dominate those structures.

More promising decisions

A general review of the 8(a)(2) decisions made by the Board paints a fairly bleak portrait for those interested in and committed to building more participative organizations, so it is important to give attention to some court cases and to one Board decision which reflect a less rigid approach. It is also important to remember, however, that these decisions can as yet be considered only as isolated cases, and have not changed the general doctrines on which the board relies in considering 8(a)(2) violations.

In a small number of cases, the federal appeals courts have relied less on the "strict hands off" approach typically taken by the NLRB, and more on the construct of "cooperation". In sum, these cases have paid greater attention to employer intent or motives, and to the actual consequences for employees, including levels of employee satisfaction with representational mechanisms created with employer assistance. In Chicago Rawhide, the first important case of this type, the 7th circuit over-turned a Board order, citing employer intent and employee preference. The court held that the employer had not dominated an employee committee, but had cooperated with it, and the committee was allowed to continue [221 2d 165 (7th Cir., 1955)].

Similarly, in Hertzka & Knowles the court refused to disestablish a series of employee committees because they had been "overwhelmingly approved by the employees..." The court argued that to dissolve the committees would be repugant to the law because, "...it might prevent the establishment of a (representational) system the employees desired," [503 2d 625 (9th Cir., 1974)]. Further, the U.S. Appeals Court reversed the Board's finding of illegal domination in the Northeastern University

case because, it held, the NLRB had improperly relied on a test of "potential" rather than "actual" domination [101 LRRM 2767 (1979)]. However, while these cases are promising, it can not be assumed that the standards suggested by them have been universally recognized. The more traditional approach continues to guide the Board and, most frequently, the courts.

There is also promise in one Board case in which the status of one type of employee organization, the autonomous work group, was directly confronted. The Board found that the work teams created at the General Foods plant in Kankakee were not labor organizations under the Section 2(5) definition, and therefore, the provisions of 8(2)(2) were inapplicable [96 LRRM 1204 (1977)]. In reaching this conclusion, the Administrative Law Judge acting for the Board relied primarily on the fact that the teams existed "to do work" rather than to "deal with" the employer over working conditions or other protected issues, and on the fact that there was no "agency" function. That is, all team members participated as "individuals" in discussions with management. Lacking any representation function, the Board found there was no labor organization.

This decision appears to stake out the end of the continuum of legal organization change. But it does little to clarify the exact point along that continuum where the boundaries of acceptable practice begin. In most instances, the creation and functioning of work teams would involve representational participation, and there is nothing in the General Foods case to suggest that the Board would be any more sympathetic to this than they have traditionally been.

CONFLICTS BETWEEN OD PRACTICE AND LABOR LAW

The aspects of federal labor law discussed here stand as clear warnings about some types of organizational change programs used by OD practitioners, particularly those aimed at increasing employee participation in nonunion settings. It is worth noting that the conflict between OD and labor law is not accidental. Obviously, the promulgators of the NLRA did not, in 1935, intend to bar specific, contemporary OD practices; however, they set about shaping the law using an underlying set of values which are, in many ways, inconsistent with those underlying OD. It is this basic value conflict that put labor law and OD on a collision course.

Organization development generally focuses on improving organizational effectiveness and quality of work life. Among its core values are: a concern for human growth, development, and self-control; creation of open, problem-solving climates; reduction of dysfunctional competition and maximization of collaboration; integration of personal and organizational goals (Huse & Cummings, 1985).

However noble these goals and values, there are many in the industrial relations community who regard them as naive and suspicious. The feeling is that in reality OD serves management better than it does employees, and that it overestimates the extent to which internal organizational conflict can be or should be eliminated.

This is the perspective which informs the National Labor Relations Act. The law is grounded on the beliefs that there are inherent and fundamental conflicts of interest between employers and employees, and that, in general, the nature of the employment relationship is that the balance of power grossly favors the employer. The law builds on these

assumptions by establishing the right of workers to join together in opposition to some management goals or decisions and to use their own representative organizations to wield power against the employer within the institution of collective bargaining. The law does not assume mutuality of goals, and it does not favor what it can only consider paternallism, beneign or otherwise. In short, where members of the OD community see a potential for humanistic management and collaboration, framers and supporters of NLRA see a potential for employer manipulation and domination.

Historically, the law was written partly in reaction to the use of company unions or other forms of in-house representation schemes by employers as defenses against the struggling trade union movement. Whether or not these protections are needed today, they remain part of the basic fabric of the law. We do not intend to imply that the law is without its critics, even within the industrial relations community, but as yet disagreement with the basic tenents of 2(5) and 8(a)(2) has not been strong enough to bring about change either in the law itself or the accompanying administrative doctrines. Nor, as we write, does such change appear likely.

IMPLICATIONS FOR OD PRACTICE

Indeed, there are some indications that the incidence of conflict between labor law and OD will increase rather than abate, as long as the law remains unchanged. A number of trends in OD thought and practice suggest this.

First, there appears to be greater emphasis on "structural" as opposed to "process" interventions. Second, the substantive scope of OD activities appears to be increasing, suggesting a greater likelihood

that issues involving the "terms, hours and conditions of work" will be included. Third, there is increased emphasis on change programs which include the active participation of rank-and-file employees as well as line managers and executives.

Increased structural focus

Since the 1960s, there has been a substantial growth in OD programs aimed at the structural features of organizations, including division of labor, hierarchical arrangements, work flow, and work design. Intervention activities on the structural end of the process-structure continuum (e.g., job enrichment, organization design, collateral organizations, and socio-technical work design) are more likely to be in conflict with sections 2(5) and 8(a)(2) than process interventions. They are more likely to create, often inadvertantly, participative structures which can be construed under NLRA as "labor organizations." Management attempts to help the development and on-going functioning of those structures could constitute unfair labor practices.

Substantive scope

Change efforts intended to make organizations more participative typically involve employees in discussion about, or decisions over the terms and conditions of employment--for example: who does what work, the form and size of the compensation package, job content, work hours, and the resolution of complaints and grievances. Nothing in labor law prevents employers form discussing such issues with workers. But, as we described earlier, what is discussed with employees also serves as a test for whether a labor organization in the legal sense exists; OD change activities which involve rank and file employees in such discussions may well satisfy this test.

More widespread participation

As the field OD has branched out into structural and participative interventions, practitioners have increasingly engaged with the lower-levels of the organization. One implication of this "bottom up" approach to change has been that the role of the OD practitioner has changed from working almost exclusively with management to working with both management and employees at lower organizational levels. This is consistent with the tenant that OD involves the whole organization, but the point is that as the population actively involved in change is expanded to include blue- and white-collar employees, greater attention must be paid to the manner and form of change to ensure that provisions of the NLRA are not being violated.

In addition, it appears reasonable to expect that organized labor will become more aggressive in seeking out and filing formal objectives to OD efforts which may violate 8(a)(2). The AFL-CIO is engaged in an ongoing campaign to combat what it perceives as a growing army of labor-management consultants whose goals are to destroy the American labor movement. The American trade union movement has been injured not only by the shift of the economy geographically, demographically and to the service sector and areas traditionally more difficult to organize, but by the increasing sophistication of employers and consultants in competing with unions for the loyalty of employees. Indeed, labor leaders have legitimate fears that, "...often management uses worker participation programs as a weapon to get rid of unions or to keep them out of companies rather than for the purpose of giving them a legitimate voice in company operations" (Berstein, 1985, p. 3). Whether or not OD consultants view themselves as anti-labor, actions which threaten the

ability of the labor movement to attract new members will understandingly be viewed with hostility. Labor can increase the number of unfair labor practice charges both by the direct action of filing charges and by educating employees as to their individual rights and prerogatives under the NLRA.

The conflict between NLRA and OD practice cannot easily be resolved, but OD practitioners can serve their clients more effectively by broadening their knowledge sufficiently to develop intervention strategies which are informed by the substance of existing labor law. In part, better preparation will include consultation with a competent labor law advisor. It may also include taking a case history from the client which attempts to document any history of union organizing and current employee attitudes both toward the employer and toward the union movement.

The design of interventions may permit choices among modes of employee involvement which have "agency" or representative functions, and those which do not. If the consultant and the client wish to minimize the likelihood of 8(a)(2) violations, limiting employee participation schemes to those involving only direct, individual involvement are clearly safer. If representative participation is desired, careful preparation involving competent legal advise, can make for a stronger case in the event of litigation.

Finally, OD practitioners and clients may want to involve themselves in efforts to reform the National Labor Relations Act in a way which lessens the potentional conflict between OD and labor law. While the likelihood of a radical departure form the existing 8(a)(2) provisions and case doctrine does not now appear great, an active debate

about these issues could be meaningfully informed by the participation of experienced OD consultants.

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Exhibit 1

ANATOMY OF A POTENTIAL UNFAIR LABOR PRACTICE

In the early 1970s, the second author was the external consultant on a socio-technical systems work restructuring project at a large, nonferrous forging work in the Midwest. The project was part of a larger OD effort, and involved nonunion, white-collar employees in the estimating and die design department of the company. The major function of this department was to provide customers with cost estimates of potential forgings, and once a contract was signed, to design the dies which guided the actual forging process. Preliminary diagnosis suggested that the department was suited to socio-technical redesign: employees were dissatisfied with their jobs and had difficulty producing quality work.

Like most socio-technical interventions, the project was initiated and managed with heavy employee involvement. Because the size of the department was too large to have all members participate directly in the analysis and design phases of the project, the estimators and die designers were asked to elect representatives to form an "action group" to manage the project on their behalf. The action group included six employees from a total of about 40 in the department. It met regularly on company time, for about two hours per week over the course of a year. The consultant, who was paid by the company, helped the action group develop its problem-solving skills and carry out a detailed diagnosis and redesign of the department. This process entailed detailed discussions among members of the action group about several features of their work, including work flow, work hours and wages, management styles, job designs, environmental demands, and a myriad of employee

complaints and suggestions. Members of the action group voiced their own views, as well as those from departmental members who had elected them to the action group. Indeed, careful attention was given to assure that the action group accurately represented the concerns and ideas of its constituents. Out of this process came a departmental restructuring that was subsequently implemented.

In retrospect, this intervention could have been construed under NLRA as an unfair labor practice. Although it was neither the company's nor the consultant's intent to create a "labor organization" and to illegally dominate or assist that organization, the Board and the courts could reasonably decide otherwise. Under Section 2(5) of NLRA, the action group could be judged a "labor organization"--its members served a representation function and discussed wages, hours of work, and working conditions. In terms of Section 8(a)(2), the action group could be seen as illegally dominated or assisted by management. It held its meetings on company time and property, and was facilitated by a company-paid consultant. Thus, this intervention seems to have violated both conditions of NLRA needed to determine an unfair labor practice--does a labor organization exist, and has the employer illegally dominated or assisted it.

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