

A NEW ORGANIZING PARADIGM?

Works Councils and the National Labor Relations Act



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Workforce Freedom Initiative



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I. Introduction

The American system of labor relations is largely molded by a seminal piece of legislation: The 1935 National Labor Relations Act (NLRA or Wagner Act). The NLRA created an “adversarial” system of labor law, under which employee organizations like unions were essentially pitted against employers. Among other objectives, this system sought to protect workers from company-dominated unions and was created based on the nature of the workplace at the time—large businesses where employees often spent their entire careers and which faced little global competition.

The NLRA put in place numerous rules related to the composition of collective bargaining units and the interactions employers could have with employee committees and even individual employees. Many unions, and some businesses as well, have argued that these rules are too restrictive and over the years have introduced concepts such as members-only unions¹ and the TEAM Act² to loosen them. To date, however, none of these concepts has succeeded in shifting the boundaries established by the NLRA.

Over the past three years, a new approach has been advocated by the United Auto Workers union (UAW). Based on the model of employee engagement found in Europe, and particularly Germany, the UAW has suggested that a “works council” could be established at the Volkswagen plant in Chattanooga, Tennessee. This works council, it is argued, could create a “third way” for

The question, however, is whether a works council actually is a new model for engagement or instead simply a campaign tactic by the UAW. An examination of the legal and practical hurdles facing the establishment of a works council under U.S. law suggests the answer is the latter.

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- 1 The members-only concept would allow unions to represent a minority of a collective bargaining unit without the need for an election.
 - 2 The TEAM Act, considered by Congress in 1995, would have amended the National Labor Relations Act to allow employers to deal with certain types of employee committees.

employee representation and engagement that avoids the constraints of adversarial unionism. The question, however, is whether a works council actually is a new model for engagement or instead simply a campaign tactic by the UAW. An examination of the legal and practical hurdles facing the establishment of a works council under U.S. law suggests the answer is the latter.

This paper will examine the legal restrictions the NLRA places on employer/employee collaboration, analyze how works councils function in Europe, and describe the significant roadblocks U.S. labor law places in the way of establishing a works council.

II. The Adversarial Relationship Between Unions and Employers Under U.S. Labor Law

The NLRA focuses primarily on protecting the right of employees to engage in protected concerted activity and the means of selecting the employees' independent representative.³ A stated purpose of the NLRA is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."⁴ The United States' model is based on the concept of employee representation by one exclusive representative and an adversarial relationship between that union and the employer of the workers it represents.

A. The Historical Underpinnings and Company Unions

The American labor law system traces its roots to the 1800s when employees banded together to strike against their employers for improved working conditions and wages. Employers branded these strikers as criminals and routinely sought court injunctions to end the disputes. This backdrop ignited the adversarial relationship between unions and employers that largely remains in place today.

In 1932, Congress passed the Norris-LaGuardia Act to curb the use of labor injunctions. Three years later, in 1935, Congress passed the Wagner Act, now known as the NLRA, which continues to serve as the model for U.S. labor relations. Senator Robert Wagner, the Act's architect, explained that under

3 29 U.S.C. § 157.

4 29 U.S.C. § 151.



the NLRA “collective bargaining means majority rule.”⁵ Given this concept of majority rule, unions became known as the protectors of “industrial democracy,” a workplace-based system of majority representation that fashioned the unions’ interests against those of the employer.⁶

One of Senator Wagner’s main goals in writing the NLRA was to address the problem of company unions. Employer-controlled “unions” proliferated in the 1920s and 1930s as employers sought to fight off independent union organizing drives.⁷ In his first draft of the statute, Wagner’s “Declaration of Policy” focused only on the elimination of company unionism.⁸ Wagner viewed company unions as the chief barrier to independent unions having any real power to impact wages, hours and conditions of employment.⁹ Thus, to prevent employer domination, he broadly defined the term “labor organization” to include almost anything resembling company unions, eliminating virtually all employer influence in employee groups or committees.¹⁰ Along with Section 8(a)(2) of the NLRA, this broad definition of a labor organization makes it unlawful for the employer to “dominate or assist” any employee group organized to deal with the employer regarding wages, hours or other terms and conditions of employment.¹¹

The Wagner Act was widely criticized for being too one-sided in favor of employees and unions.¹² In response to this criticism, Congress passed the Taft-Hartley Act in 1947. The Taft-Hartley Act amended the NLRA and “balanced” U.S. labor laws. The amendments placed restrictions on the right to strike, excluded supervisors from coverage of the Act, and added union unfair

5 79 Cong. Rec. 7571 (1935); S. Rep. No. 573, 74th Cong., 1st Sess. 13 (1935), reprinted in 2 NLRB, *Legislative History of the National Labor Relations Act, 1935* 2313 (1949).

6 Gordon, Jennifer, *Transnational Labor Citizenship*, 80 S. Cal. L. Rev. 503, 521 (2007).

7 Secunda, Paul et. al., *Mastering Labor Law* at 98 (Carolina Academic Press 2014).

8 Casebeert, Kenneth, *Drafting Wagner’s Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Labor Relations Act*, 11 Berkeley J. Emp. & Lab. L. 73,75 (1989), <http://scholarship.law.berkeley.edu/bjell/vol11/iss1/>.

9 *Id.* at 78.

10 *Id.* at 85. Currently, the NLRA defines labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” 29 U.S.C. § 152(5).

11 29 U.S.C. §158(a)(2).

12 Higgins, John E., Jr., *The Developing Labor Law*, Chapter 2, §III, 6th ed. 2012.

labor practices. Taft-Hartley also enacted the free speech proviso of the NLRA guaranteeing employers the right to discuss unions with their employees.

An amendment to allow employee committees to exist in the absence of a certified or recognized exclusive representative was proposed as part of the Taft-Hartley Act. The provision would have amended the NLRA to allow employers to maintain employee committees to discuss matters of mutual interest, including wages and working conditions, in non-unionized workplaces.¹³ While the legislative history made clear that Congress did not intend for this clause to allow “company unions”¹⁴ and the amendment passed the House, it was removed from the Act during conference with the Senate.¹⁵

However, the TEAM Act was vetoed by President Clinton at the urging of unions, including the UAW, and since that time efforts to define the boundaries of employee participation and the composition of bargaining units have primarily occurred at the National Labor Relations Board or in the courts.

Since passage of the Taft-Hartley Act, there have been many calls to reform U.S. labor law.¹⁶ Among other changes, some reform proponents have sought to give employers more leeway to create employee-participation groups with the goal of increasing employee voice in the workplace and making businesses more productive. Efforts along those lines peaked in 1995 when Congress passed the Team Act.¹⁷ However, the TEAM Act was vetoed by President Clinton at the urging of unions, including the UAW, and since that time efforts to define the boundaries of employee participation and the composition of bargaining units have primarily occurred at the National Labor Relations Board (NLRB) or in the courts.

13 H. Rep. No. 3020 at p. 26 (1947) reprinted at *Legislative History of the Labor Management Relations Act 1947* at 183 (1948).

14 H. Rep. No. 245, at 3-4 (1947), reprinted in *Leg. History 1947* at 294-95.

15 *Id.*

16 Secunda, Paul et. al., *Mastering Labor Law* at 98 (Carolina Academic Press 2014).

17 H. Rep. No. 743, 104th cong. (1996).



B. NLRA Prohibition Against Employer Domination of Unions

As a result of the history of company unions, U.S. labor law establishes a broad prohibition against employer-dominated labor organizations. Section 8(a)(2) of the NLRA makes it unlawful for an employer to “dominate or interfere” with the formation or administration of any labor organization or contribute to it financial or other support.¹⁸ These restrictions prohibit the employer from conceiving of the organization’s creation; writing the organization’s charter; helping the organization conduct elections; providing space for meetings; allowing meetings during work time; selecting the organization’s members; permitting use of company-supplied materials; announcing formation of an organization; or setting the organization’s goals.¹⁹

The term “labor organization,” is broadly defined under the Act as: (1) an organization; (2) in which employees participate; (3) that exists in whole or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”²⁰ While meant to deter company unions as that term was understood in 1935, the NLRA’s broad definition of what constitutes a “labor organization” means that Section 8(a)(2) has the practical effect of banning many types of employee participation programs. The NLRB and the courts have made clear that the prohibition is not limited to labor organizations that engage in collective bargaining, but includes any organizations that engage in an interactive exchange with representatives of management on employee recommendations regarding the terms and conditions of employment.²¹

C. Focus on Exclusive Representation

U.S. labor law is also founded on the concept of exclusive representation. In order to negotiate or deal with employers on employees’ behalf, the NLRA requires a labor organization to be the certified or recognized exclusive representative.

18 29 U.S.C. § 158(a)(2).

19 *Duane Reade, Inc.*, 338 N.L.R.B. 943 (2003); *MGR Equipment Corp.*, 272 N.L.R.B. 353 (1984). See *Electromation, Inc.*, 309 N.L.R.B. 990 (1992) *aff’d*, 35 F.3d 1148 (7th Cir. 1994).

20 29 U.S.C. § 152(5).

21 See *N.L.R.B. v. Cabot Carbon Co.*, 360 U.S. 203, 210-14 (1959); *E.I. du Pont de Nemours & Co.*, 311 N.L.R.B. 893, 894 (1993).

Under NLRA Section 9(a), a union that is certified as the representative of the workers in a bargaining unit has the right of exclusive representation for all workers in that unit.²²

To become the exclusive representative, a labor organization must demonstrate that it enjoys the support of a majority of employees in a bargaining unit. U.S. labor law recognizes two means for this to occur: (1) an NLRB secret ballot election;²³ or (2) voluntary recognition by the employer based on evidence of majority support for representation, such as Card Check.²⁴ This focus on exclusive representation ensures that employees only have one recognized or certified representative under the NLRA.

III. European Models of Workplace Engagement

Unlike the adversarial model of labor relations found in the United States, many countries take a different approach to employee engagement in workplace decisions. For instance, works councils operate at several levels in the European Union. A works council is a body that represents a company's workers for the



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purpose of receiving information from and consulting with the company's management on a range of issues affecting employees. In Europe, a works council differs from a trade union. The union operates at an industry level, rather than a company level,²⁵ while the works council provides an additional, separate path to employee participation at a local level. Perhaps the strongest and most successful works council model is found in Germany.

22 29 U.S.C. § 159(a).

23 *Columbine Cable Co., Inc.*, 351 N.L.R.B. 1087 (2007).

24 *International Ladies' Garment Workers' Union v. N.L.R.B.*, 366 U.S. 731 (1961). Under Card Check an employer recognizes a union based on a majority of workers having signed a card indicating support for a union.

25 Association of Corporate Counsel, *Works Councils in the European Union* (May 18, 2010), <http://www.acc.com/legalresources/quickcounsel/wciteu.cfm>.



A. German Works Councils

Germany provides for a two-tier system of representation to address employer and employee participation at the industry-wide and plant-wide level.

In contrast to the U.S. adversarial model, the German system of works councils focuses on cooperation between all participants in the labor-management relationship.

Under the German system, any collective bargaining agreement between the employer and a trade union is limited to the union's members industry-wide. To balance the possibility of minority representation, German law allows works councils to represent all employees in a particular workplace locally, whether or not they are union members.

In contrast to the U.S. adversarial model, the German system of works councils focuses on *cooperation* between all participants in the labor-management relationship. Indeed, trustful cooperation is the core rule of works council employee representation.²⁶

The works council fills an important role between trade union representation at the national level and local employee representation at the plant level. However, a works council is *not* an arm of the labor union. It is an independent legal organization.

B. The Purpose and Function of Works Councils

Almost every aspect of a works council's structure and function is defined by the 1972 Works Constitution Act. As stated in the Act, the purpose of the works council is to safeguard the employees' interest in the company. Every four years, all employees that work at one company location, whether they are members of a trade union or not, elect the works council.²⁷ A works council is not mandatory, but an employer may not prevent its formation.²⁸

26 Waas, Bernd, *Employee Representation at the Enterprise in Germany* at 17, Klewer Law International (2012).

27 Works Constitution Act § 13, § 15.

28 Buschmann, Rudolf, *Workers' Participation and Collective Bargaining in Germany*, 15 Comp. Lab. L. at 29 (1993); Works Constitution Act § 20.

The works council contains employees from all organizational units at the employer's location including hourly and salaried workers.²⁹ Works councils only exclude those at the highest level of the company who "are legally empowered to represent the corporation."³⁰ The number of representatives on the works council is fixed by statute depending on the number of employees.³¹ Decisions are made by majority vote, but tasks may be delegated to committees and working groups.³²

The employer financially supports the complete works council structure and pays all works council expenses. The employer provides the works council's office, telephones, office staff and other items necessary for the works council's operation³³ and the works council meets during working hours.³⁴ All of this would be considered employer domination and interference under U.S. labor law.



1. Consultation

The German model includes two different works council duties: consultation and co-determination. Consultation requires employers to discuss certain enumerated items with works councils. For example, a works council must be consulted, and given an opportunity to respond, regarding employee dismissals.³⁵ Failure to consult invalidates the dismissal under German law. A works council must also be consulted on matters regarding employee safety.³⁶ Further, the employer must consult with the works council on other "personnel" matters, like job security and personnel planning.³⁷

The works council must consent to any change in the employer's policies

29 Works Constitution Act § 5.

30 Works Constitution Act § 5(2).

31 Works Constitution Act § 38.

32 Works Constitution Act §§ 28, 28a, 33.

33 Works Constitution Act. § 40.

34 Works Constitution Act § 39.

35 Works Constitution Act §§ 90-98, 102.

36 Works Constitution Act § 89.

37 Works Constitution Act § 92.



regarding employee recruitment, classifications, and transfers.³⁸ If a works council refuses to consent to a change, an employer's only recourse is to request a labor court decision in lieu of consent.

2. Codetermination

Co-determination rights are the strongest participation rights granted to a works council, and they entitle a works council to negotiate agreements with an employer on specific subjects. The works council maintains comprehensive co-determination rights on "social matters" affecting more than one employee, such as company rules, work hours, schedules and breaks, time, place and method of payment, holidays and vacations, introduction of technology designed to monitor employee conduct or performance, work performance standards, wage structure, including benefits and bonuses, and hiring and transfers. In the case of a reduction of operations or the closure or transfer of an establishment, the works council may require the preparation of a social compensation plan.³⁹ The works council maintains an independent right to information required to carry out its duties under the Act.⁴⁰

A company may not implement policies impacting codetermination areas without the agreement of the works council. The parties resolve any disputes through a joint employer-employee arbitration committee or a German labor court. The labor court may prevent employer implementation through an interim injunction.⁴¹

The statutory works council system allows workers and employers to cooperate and solve local workplace conflicts. In addition, it provides a mechanism to draw on worker expertise. Separate from the trade union structure, it is intended to improve company decision making and encourage acceptance of employer decisions and policies. The works council resolves everyday issues regarding terms and conditions of employment that are not addressed through trade union collective bargaining.

38 Works Constitution Act § 99.

39 Works Constitution Act § 112.

40 Works Constitution Act § 80(2).

41 Works Constitution Act § 76.

C. The Relationship between Trade Unions and Works Councils

Trade unions represent employee interests on the industry-wide level.⁴² They have a constitutional right to engage in economic action, including strikes. Similar to the U.S., individual employees have a legal right to choose whether or not to be a union member.⁴³

Works councils supplement, rather than supplant, trade unions on the plant level.⁴⁴ The Works Constitution Act and the Collective Agreements Act⁴⁵ define the overlap between works councils and unions and require the union to cooperate with the works council for the benefit of the employees. As a practical matter, many works council members have dual membership in both the works council and the union, although membership is not required in either organization. This dual membership ensures coordination in efforts between groups. The union has certain limited rights in the works council, including nominating candidates for the election, calling for works council elections, and challenging elections before the labor court.⁴⁶

The statutes also define areas where no overlap exists between the works councils and unions. In general, union collective bargaining agreements take priority over local works council agreements and set the floor for employee rights.⁴⁷ While unions enter into collective agreements that span regions or industries, works councils supplement and build on the employee rights on the local company level. Agreements between the works councils and employers cannot deal with remuneration and other conditions of employment that have been fixed by the union's collective agreement, although plant-wide local works agreements may improve terms and conditions of employment.⁴⁸

42 Buschmann, 15 Comp. Lab. L. (1993) at 26-28.

43 *Id.*

44 Befort, S., *A New Voice for the Workplace: A Proposal for an American Works Councils Act*, 69 Mo. L. Rev. 607 (2004); see also Works Constitution Act § 2(3) ("This Act shall not affect the functions of trade unions and employers' associations and more particularly the representation of their members' interests.").

45 Tarifvertragsgesetz (Collective Agreements Act) hereinafter TVG, No. 83, BGBl. 4, 3, 4 (August 1969).

46 Works Constitution Act §§ 3, 14, 16, 17, 19, 23.

47 Buschmann, 15 Comp. Lab. L. at 35.

48 Works Constitution Act § 77.



In addition, unlike a trade union, works councils have no economic right to strike.⁴⁹ Thus, these two groups serve separate, well-defined functions. The union cannot control the works council, or take its place. Similarly, the local works council cannot control a union.⁵⁰

IV. Works Councils Under U.S. Law

A. Volkswagen and the UAW

The most prominent, and recent, example of the pursuit of an alternate means of employee representation in the U.S. involves the UAW organizing campaign at Volkswagen. As part of this campaign, the UAW has promoted the idea of a works council at Volkswagen's factory in Chattanooga, Tennessee.



Due to the company's experience with works councils in Germany and elsewhere, this may seem a viable option. Indeed, Volkswagen itself had explored the idea as the Chattanooga factory is the only Volkswagen plant worldwide without a works council. Moreover, unlike many other union organizing campaigns, the UAW's Chattanooga campaign for a plant-wide bargaining unit has not been met with company opposition.

On January 27, 2014, Volkswagen and the UAW entered into a union representation election agreement.⁵¹ As part of that agreement, the UAW agreed to create a "Dual Model" of representation. This was "conceived as a model of labor relations that would allow for development and establishment

49 *Id.*; Works Constitution Act § 74(2) ("Industrial action between the employer and the works council shall be unlawful; the foregoing shall not apply to industrial action between collective bargaining parties.").

50 Waas, *Employee Representation at the Enterprise in Germany*.

51 United Auto Workers, *UAW VW – Works Council Documents*, Exhibit B at 2, available at <http://www.uaw.org/wcdocs>.

of a robust Works Council through collective bargaining between the Company and a legally recognized/certified labor union that represents a unit of employees.” Under this approach, the union and the works council were to have defined roles and responsibilities, which would be established through future collective bargaining⁵² and the works council would operate on the “basis of authority delegated to it by the Union and Employer.”⁵³

While the UAW portrayed the works council as a means to foster a collaborative relationship between workers and employers, the union also acknowledged that any adoption of the Dual Model was dependent on the UAW winning an NLRB-conducted election and being certified as the exclusive representative of Volkswagen’s employees. On February 14, 2014, however, Volkswagen employees voted 712-626 against UAW representation.

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Although the defeat came as something of a shock, at least to the UAW, neither the UAW nor Volkswagen has given up the pursuit of alternative arrangements for worker participation. The UAW, for its part, chartered a new union local, Local 42, on July 10, 2014. The UAW website states that “Local 42 offers workers the opportunity for a voice in the workplace through the German automaker’s ‘works council’ approach to employee engagement. Volkswagen’s business model is premised on employee representation, and Local 42 will represent any interested employees who join the local as members.”⁵⁴

52 *Id.* at 2.

53 *Id.* at 3.

54 United Auto Workers, *UAW charters Local 42 at Volkswagen in Chattanooga* (July 10, 2014), <http://www.uaw.org/articles/uaw-charters-local-42-volkswagen-chattanooga>.



Behind this rhetoric, however, the UAW hopes that if a majority of workers are persuaded to join the local, Volkswagen will take that as demonstration of majority support and simply recognize the union as exclusive representative without the need for another election.



Credit: Wikimedia Commons

Volkswagen has not indicated that it would voluntarily recognize the UAW. Instead, in November 2014, Volkswagen announced its “Community Engagement Policy.” Under this policy, outside groups representing employee interests obtain certain rights within

Volkswagen based on their level of employee support, including the right to use company space for meetings, post information and announcements, and have regular meetings with representatives of Volkswagen’s management. Groups with the support of 15 percent or more of employees may meet monthly with VW’s human resource officials and those with 45 percent support may meet every two weeks with Volkswagen Chattanooga’s executive committee.⁵⁵ Volkswagen granted rights to both the UAW and a local employee group, the American Council of Employees, under the policy.⁵⁶

On May 7, 2015, the UAW issued a formal plan on its vision for how a works council would function alongside majority union representation.⁵⁷ In announcing this plan, Gary Casteel, the UAW President reiterated that “under U.S. labor law there can be no works council without help from a union.”⁵⁸ Volkswagen has not officially commented on this UAW plan.

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- 55 Greenhouse, Steven, *VW to Allow Labor Groups to Represent Workers at Chattanooga Plant*, The New York Times (November 12, 2014), http://www.nytimes.com/2014/11/13/business/vw-to-allow-labor-groups-to-represent-workers-at-chattanooga-plant.html?_r=0.
- 56 Wayland, Michael, *Anti-UAW group can represent VW workers in Tenn.*, The Detroit News (February 17, 2015), <http://www.detroitnews.com/story/business/autos/foreign/2015/02/17/non-uaw-group-can-represent-vw-workers/23560205/>.
- 57 United Auto Workers, *UAW VW – Works Council Documents* available at <http://www.uaw.org/wcdocs>.
- 58 Morrison, Chloe, *UAW talks about vision for works council* (May 7, 2015), <http://nooga.com/169909/uaw-talks-about-vision-for-works-council/>.

B. Works Councils and Section 8(a)(2)

The UAW's interest in a works council may have been inspired by a desire to soften the image of adversarial unionism, particularly in the wake of the 2008 financial crisis and its impact on U.S. automakers. At the same time, the UAW has acknowledged that a works council would only be possible once a traditional union wins exclusive representation.⁵⁹

This, of course, is a nod to the already mentioned Section 8(a)(2) of the NLRA. However, not only does the structure of a traditional labor union impose extensive legal barriers for the formation of a European-style works council, but a works council, whether formed with a union or not, is impossible under U.S. law. Given these barriers, one wonders if the UAW's focus on a works council is simply a campaign tactic, and whether that focus would last much beyond an election win, should one materialize.

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C. Barriers to Works Councils in the United States

1. Exclusive Representation Rights and the Duty of Fair Representation

The concept of exclusive representation requires one labor organization to be the sole certified or recognized representative of a majority of employees in an appropriate unit. Under Section 9(a) of the NLRA, a representative designated by the majority of employees for the purposes of collective bargaining is their "exclusive representative" regarding "rates of pay, wages, hours of employment, or other conditions of employment." Only employees, not unions or employers, have the right to choose an exclusive representative.⁶⁰

59 Woodall, Bernie, *UAW wants new talks with Volkswagen to recognize union in Tennessee*, Reuters (May 7, 2015), <http://www.reuters.com/article/2015/05/07/us-volkswagen-uaw-idUSKBN0NS26L20150507>; Sherk, James, *Expand Employee Participation in the Workplace*, The Heritage Foundation, Issue Brief #4169 on Labor (March 13, 2014), http://www.heritage.org/research/reports/2014/03/expand-employee-participation-in-the-workplace#_ftn1.

60 *Sisters of Mercy*, 277 N.L.R.B. 1353, 1355 (1985).



Under its works council model, the UAW claims it would delegate to the Works Council certain of the duties, responsibilities and functions that are ordinarily performed by unions. But the statutory language of the NLRA,

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indeed the entire concept of exclusive representation, prevents a union from delegating any of its representational duties to a works council.

The NLRA confers the exclusive power to represent all employees of a bargaining unit on a union elected by a majority of bargaining unit members or voluntarily recognized by the employer based on majority support.⁶¹ The Supreme Court has found that, as a result of a union's status as an

exclusive bargaining representative, it has an additional fiduciary responsibility to the employees known as the "duty of fair representation,"⁶² which protects individuals against arbitrary conduct and prevents the union from placing its institutional interests ahead of the employees it represents.⁶³ The Supreme Court established this duty as a necessary corollary to the status of exclusive representative.

As the exclusive representative, the union maintains the sole power to represent employees' interests, and the duty of fair representation cannot be delegated to another labor organization. Quite simply, the bargaining representative may not "bow out" of its Section 9(a) responsibilities.⁶⁴

2. A Union Cannot Delegate Its Duty of Representation

Section 9(a) identifies the essential elements of representation to include: "rates of pay, wages, hours of employment, and other conditions of employment." Furthermore, Section 8(b)(3) requires a labor organization to "bargain collectively" with an employer if it represents the employees

61 *Vaca v. Sipes*, 386 U.S. 171, 177 (1967).

62 *Id.*

63 *Id.* at 182.

64 *Goad Co.*, 333 N.L.R.B. 677, 680 (2001).

under Section 9(a).⁶⁵ The designated bargaining representative may not transfer its bargaining rights and responsibilities to another union.⁶⁶ A union transfers its representational duties and responsibilities when it delegates the responsibility to negotiate and service the contract, process grievances, and perform “other actions comprising the duty of representation.”⁶⁷ The employer maintains a corresponding obligation to deal “exclusively with the bargaining representative whom employees have chosen.”⁶⁸

This limitation applies even to labor organizations within the same union. Any agreement requiring a sister local to perform representational duties is a transfer in breach of the duty of fair representation.⁶⁹ A union’s delegation of any representational duties regarding wages, hours, or other terms and conditions of employment, including authority to negotiate or process grievances, would be an impermissible delegation of its Section 9(a) responsibility. Therefore, any attempt by a traditional labor union to delegate responsibility to a works council to negotiate over any terms and conditions of employment, process grievances, or any other duty of representation, is impermissible under the NLRA.

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65 29 USC §§ 158(b)(3), 159(a).

66 *Goad Co.*, 333 N.L.R.B. at 680; *Sherwood Ford, Inc.*, 188 N.L.R.B. 131, 133-134 (1971); *Nevada Security Innovations*, 341 N.L.R.B. 953, 955 (2004).

67 *Goad Co.*, 333 N.L.R.B. at 680; For example, in *Sherwood Ford*, Local 1 of the Automobile Salesmen’s Union authorized a Teamsters Local to represent employees in “in collective bargaining and all other matters related to the hours, wages and other terms and conditions of employment of the [unit employees].” The Board concluded that the unions were attempting to substitute Local 604 in place of Local 1 as the statutory bargaining representative. The Board stated, “It was there that the switch became manifest, for the dog had now become the tail, and Local 1 was thenceforth to be wagged at will by Local 604.” *Sherwood Ford*, 188 N.L.R.B. at 134.

68 *Sherwood Ford*, 188 N.L.R.B. at 133.

69 *Goad Co.*, 333 N.L.R.B. 677.



3. Any Transfer of Representational Duties Will Act as A Disclaimer of Interest by the Exclusive Representative

The NLRB will treat any transfer of representational duties as a disclaimer of interest by the union in representing that unit of employees.⁷⁰ An incumbent union may disclaim interest in representing its members through conduct to that effect,⁷¹ for example by transferring its representational rights to another local.⁷²

If a union is certified as the exclusive representative, and the employer deals with employees through the works council rather than through the statutory representative, that may constitute direct dealing in violation of the NLRA.

In *Sisters of Mercy*, a majority of the unit employees signed a petition requesting a change in the local union that represented them. The international union honored the request and transferred the unit. The international sent a letter to the employer advising it that the unit had been transferred to a different local “in accordance with the stated wishes of the majority of those in the bargaining unit.”⁷³ The Board found there was no duty to bargain with the new local and that the original local “unequivocally disclaimed any interest in further representing

unit employees when it transferred jurisdiction.”⁷⁴ The Board concluded that the original local “could not thereafter resurrect its bargaining status” after transferring its representational duties.⁷⁵

70 *Id.* at 681.

71 *Conkle Funeral Home, Inc.*, 266 N.L.R.B. 295 (1983); See also N.L.R.B. Office of the General Counsel Advice Memorandum, *SEIU Local 250 (Assisted Care, Inc.)*, Case No. 32-CB-5400 (June 28, 2002).

72 *Sisters of Mercy Health Corp.*, 277 N.L.R.B. 1353 (1985); *Teamsters Local 595 (Sweet-ener Products)*, 268 N.L.R.B. 1106, 1111 fn. 11 (1984).

73 *Id.*, 277 N.L.R.B. at 1353.

74 *Id.* at 1354.

75 *Id.*

Thus, if a traditional union, certified or recognized as the exclusive representative, transfers representational rights to a works council, that union will effectively disclaim its right to represent that unit of employees.

4. Direct Dealing and the Contract Bar Doctrine

Aside from union obligations, an employer dealing directly with a works council, rather than the certified union representative, would be engaged in bad faith bargaining. The NLRA prohibits an employer from communicating directly with union-represented employees to establish or change the terms and conditions of employment.⁷⁶ If a union is certified as the exclusive representative, and the employer deals with employees through the works council rather than through the statutory representative, that may constitute *direct dealing* in violation of the NLRA. This dealing would be deemed a *per se* violation of the employer's duty to bargain and evidence of bad faith.⁷⁷

Employer recognition of two labor organizations creates additional problems. U.S. labor law contains express mechanisms for ensuring that only one labor organization acts as a representative of employees. If the employer voluntarily recognizes a union, that recognition bars another labor organization from filing an election petition, or being certified as an exclusive representative, for a reasonable period.⁷⁸ Moreover, another union cannot be certified during the term of a collective bargaining agreement. This is known as the contract-bar doctrine.⁷⁹ This doctrine is intended to afford the contracting parties and the employees a reasonable period of stability in their relationship without interruption.⁸⁰

In addition, the Board recognizes the "one year rule." It is the Board's policy to treat a certification as identifying the statutory bargaining representative with certainty and finality for a period of at least one year.⁸¹ The Supreme Court has noted that "Congress has devised a formal mode for selection and rejection of bargaining agents and has fixed the spacing of elections, with a

76 *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 484-485 (1960).

77 *El Paso Electric Company*, 355 NLRB No. 95 (2010); *General Electric Co.*, 150 NLRB 192 (1964) *enfd.* 418 F.2d 736 (2d Cir. 1969) *cert. denied* 397 U.S. 965 (1970).

78 *Lamons Gasket Co.*, 357 N.L.R.B. No. 72 (2011).

79 *Hexton Furniture Co.*, 111 N.L.R.B. 342 (1955).

80 *Roosevelt Memorial Park, Inc.*, 187 N.L.R.B. 517 (1970).

81 *Brooks v. N.L.R.B.*, 348 U.S. 96, 103 (1954).



view of furthering industrial stability and with due regard to administrative prudence.”⁸² The one-year rule may be extended if the employer fails to bargain in good faith.⁸³ Thus, any employer recognition of a union-supported works council would not only raise direct dealing issues, but may also be barred by the legal mechanisms that ensure that only one labor organization represents employees as the exclusive representative.

5. Union Constitution and Bylaw Prohibitions

Union constitutions and bylaws may further restrict a union’s ability to delegate its bargaining obligation to a union-supported works council. As one example, the UAW’s Constitution requires the UAW to be its members’ exclusive representative for *all* conditions of employment.⁸⁴ Under this provision, the UAW is exclusively responsible for the “negotiation and execution of contracts with employers covering such matters.”⁸⁵ This provision makes any agreement by the UAW to transfer even limited non-representational duties to an independent works council invalid. In litigation, the NLRB and the courts will examine these documents to determine whether the union exceeded its authority to act.

Given the legal constraints, and the UAW’s own Constitution, a union-supported works council would function as nothing more than an extension of the union itself — it would in effect simply be a traditional union local.

This interpretation is confirmed by the UAW Ethical Practice Code, which prohibits members from advocating or engaging in in dual unionism.⁸⁶ Dual unionism occurs when a labor organization claims jurisdiction over workers

82 *Id.* at 103.

83 *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 787 (1962); *Lamar Hotel*, 137 N.L.R.B. 1271, 1273 (1962); *Bridgestone/Firestone, Inc.*, 337 N.L.R.B. 133 (2001); and *JASCO Industries, Inc.*, 328 N.L.R.B. 201 (1999).

84 UAW Constitution, Article 6, Section 15.

85 *Id.*

86 United Auto Workers, *UAW Ethical Practice Code* available at <http://uaw.org/page/uaw-constitution-constitution>.

organized by another union.⁸⁷ Accordingly, the UAW’s own governing documents prohibit the union and works council from exercising jurisdiction over the same unit of employees.

Consequently, if the UAW is certified as an employees’ exclusive bargaining representative, the union would be required to act in that capacity with regard to all terms and conditions of employment. The UAW Constitution clearly makes any agreement to transfer representational duties to a works council invalid. A court would find that the UAW was acting *ultra vires* by transferring representation to another labor organization in violation of its Constitution.⁸⁸ Similar provisions exist for other national unions in the U.S.⁸⁹ Given the legal constraints, and the UAW’s own Constitution, a union-supported works council would function as nothing more than an extension of the union itself — it would in effect simply be a traditional union local.

6. The “Appropriate Unit” Limitation

The UAW states that the “Works Council would offer a voice for all employees of the plant” and all Volkswagen employees “would have the right to participate in Works Council elections regardless of whether they are represented by or belong to a union.”⁹⁰ This broad declaration that the works council will contain all employees of the plant conflicts with the NLRB’s notion of an appropriate unit. In fact, there is no automatic determination under U.S. labor law that a labor organization may represent a plant-wide unit of employees. The NLRB determines whether the unit of employees is an appropriate unit for collective bargaining by deciding whether the employees share a “community of interest” and have mutual interests in wages, hours and other conditions of employment.⁹¹

The Board does not view the bargaining unit as a means to foster plant-wide participation by employees. Indeed, the Board is not looking for the most

87 Merriam Webster: Dictionary and Thesaurus, <http://www.merriam-webster.com/dictionary/dual%20union> (last accessed August 25, 2015).

88 See *N.L.R.B. v. Dominick’s Finer Foods*, 28 F.3d at p. 685.

89 See Constitution of the International Federation of Professional and Technical Engineers, Section 17.1(d) (revised August 2012); Amalgamated Transit Union Constitution, Section 22.1 (as amended 2013), and The International Brotherhood of Teamsters, Article XIX, Section 7(b)(4) (adopted 2011).

90 *UAW Vision Statement* at 4.

91 *Morand Bros. Beverage Co.*, 91 N.L.R.B. 409 (1950).



appropriate unit, only an appropriate unit,⁹² and the Board may order elections in extremely small bargaining units.⁹³ Recently, the NLRB moved even further away from the concept of plant-wide units. In *Specialty Healthcare*, the Board found small micro-units appropriate, even when larger and “more appropriate” bargaining units existed in the employer’s workforce. Thus, the Board’s appropriate unit standard contravenes the concept of a plant-wide representative works council.

7. Professional Employees Form a Separate “Appropriate Unit” Under the NLRA

A German-style works council contains all professional and non-professional employees at the workplace. In the U.S., however, a union-supported works council could not represent both professional and non-professional employees in the same unit. Under the NLRA, professional employees share a separate “community of interest” and are not included in a unit with non-professional employees.

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The NLRA imposes additional procedural safeguards to ensure that these individuals remain separate. Section 9(b)(1) prohibits the Board from deciding a unit including both professional and non-professional employees is appropriate unless a majority of the professional employees and non-professional employees vote for inclusion in such a mixed unit.⁹⁴

92 *P.J. Dick Contracting*, 290 N.L.R.B. 150 (1988).

93 *See Overnight Transportation Co.*, 331 N.L.R.B. No. 85 (2000).

94 *Leedom v. Kyne*, 358 U.S. 184 (1958); *Vickers, Inc.*, 124 N.L.R.B. 1051 (1959); *Pay Less Drug Stores*, 127 N.L.R.B. 160 (1960); *Westinghouse Electric Corp. v. N.L.R.B.*, 440 F.2d 7 (2d Cir. 1971), cert. denied 404 U.S. 853 (1971); *A. O. Smith Corp.*, 166 N.L.R.B. 845 (1967); *Lockheed Aircraft Corp.*, 202 N.L.R.B. 1140 (1973).

The UAW has failed to solve this problem in its works council model. Its Vision Statement carved out union membership for only non-professional employees, but then asserts that “Employees not represented by the UAW would participate in the Works Council on the basis of a delegation of authority relative to their employment by the Company.”⁹⁵ Under the express terms of the Act, however, only employees, not the company or the union, may agree to extend representation rights to a unit that includes professional and non-professional employees.⁹⁶

8. Supervisors Excluded from Unit by NLRA

Another unit composition issue for a union-supported works council is the inclusion of managers and supervisors. Managers and supervisors participate in European-style works councils; only high level managers are excluded. By comparison, all levels of supervisors are excluded from representation in a bargaining unit with employees under the NLRA.⁹⁷

In its Works Council Vision Statement, the UAW admitted that supervisors “as those terms are defined by the National Labor Relations Act” would be excluded from any UAW-formed Works Council.⁹⁸ The simple fact is that a union cannot provide a works council system that allows manager and supervisor participation. Yet without management and supervisor participation, a works council faces an almost impossible task in implementing its workplace policies.

9. Unlawful Domination and Support of the Works Council

A final stumbling block to a union-supported works council is the NLRA’s prohibition against unlawful employer domination of a “labor organization.”⁹⁹ The UAW’s Vision Statement notes that the union-supported works council will perform duties normally performed by the union as a bargaining

95 *UAW Vision Statement* at 4.

96 *Russelton Medical Group*, 302 N.L.R.B. 718 (1991) (the Board declined to order bargaining in a combined unit where there had never been a vote under Section 9(b)(1)); *Accord Utah Power & Light Co.*, 258 N.L.R.B. 1059 (1981).

97 29 U.S.C. § 152(11).

98 *UAW Vision Statement* at 4.

99 Section 2(5) of the NLRA defines labor organization as: (1) an organization; (2) in which employees participate; (3) that exists in whole or in part for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.



representative.¹⁰⁰ Those duties include a “participation right” of compulsory consultation and codetermination. Codetermination “means the right of on-site employee representatives to consent, control and take initiative. Prior consent of the works council must be solicited before any measure can be implemented.”¹⁰¹

One area the UAW highlights for works council control is personnel regulation, including hiring, job descriptions, transfers, dismissals, training, use of temporary workers, and performance payments.¹⁰² Thus, the UAW’s Vision Statement provisions, which relate directly to the employees’ terms and conditions of employment, establish that the works council would qualify as a labor organization under U.S. law.



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Section 8(a)(2) of the NLRA, as discussed earlier, makes it unlawful for an employer to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.¹⁰³ An employer-dominated committee is a committee that an employer has the potential to control, either through funding, resources, or other managerial discretion.¹⁰⁴ An employer need not have the *intent* to interfere with employees’ organization rights to be found to have done so.¹⁰⁵

The Vision Statement requires Volkswagen to “commit to providing the necessary training and resources for the Works Council members and their Company counterparts.”¹⁰⁶ Thus, Volkswagen’s required financial support

100 UAW Vision Statement at 2.

101 UAW Vision Statement at 7-8.

102 *Id.* at 18-22.

103 29 U.S.C. § 158(a)(2).

104 *Id.*

105 *N.L.R.B. v. Midwestern Personnel Services*, 322 F.3d 969 (7th Cir. 2003).

106 UAW Vision Statement at 9.

under the Vision Statement would constitute employer domination or interference with the formation or administration of a union under the NLRA.

Overall, the evidence is clear that a works council contradicts the most fundamental aspects of U.S. labor law. First, a works council would be at odds with exclusive representation; second, a union cannot delegate its duty of representation; third, a transfer of this duty would act as a “disclaimer of interest”; fourth, employer engagement with the works council would represent illegal “direct dealing”; fifth, a works council would likely violate union constitutions and bylaws; sixth, legal questions would be raised around the appropriate unit; seventh, professional employees may not automatically be included in a works council; eighth, supervisory employees could not participate in a works council, rendering the concept ineffective; and finally, the NLRA prohibits an employer from providing support to a works council, which would be considered improper domination or assistance. All of these factors effectively negate the possibility of establishing a works council in the United States.

Overall, the evidence is clear that a works council contradicts the most fundamental aspects of U.S. labor law.

V. CONCLUSION

With the unionization rate below 7 percent nationally, it is understandable that unions are looking for new organizing strategies. Adopting the European works council model may seem a promising approach, at least to the UAW. However, the reality is that there are significant legal obstacles that make this an impractical solution. Indeed, both the restrictions on employer interactions with employee committees under the NLRA and the governing documents of the UAW and other unions are simply incompatible with a works council.

As a result, anything calling itself a works council, whether in Chattanooga or elsewhere, would in reality be nothing more than a traditional union local. Unless the NLRA is amended, and history has shown this to be a very difficult task, this will remain the case. In the meantime, unions like the UAW will have to look elsewhere for a new organizing model.



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