

COMMENTARY:

ORGANIZED PROFESSIONALS CAN BE EFFECTIVE
PRODUCERS

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Labor-management relations have been characterized by employers' resistance to any incursion on their ability to make unilateral decisions. The efforts of blue-collar employees to organize, and, more recently, professional employees, have been vigorously opposed. Management resistance has carried over into virtually all labor-management relationships formed. Such relationships, for the most part, may be characterized as adversarial, with employers attempting to limit the scope of bilateral decision making and unions digging in their heels.

As a result of the National Labor Relations Act ("NLRA"), blue-collar employees may organize and bargain collectively.¹ However, few employers have attempted to transform their labor-management relationship from its historically adversarial nature to a more collaborative one. There have been some exceptions, however. The most prominent example of successful collaboration is the relationship between the United Automobile Workers of America ("UAW") and the Saturn Division of General Motors. These parties have negotiated a series of collective bargaining agreements that provide for using the knowledge, skill, and abilities of the employees in making what historically have been management decisions.

Saul Rubinstein conducted extensive research concerning the UAW/Saturn labor-management relationship.² He found that this collaborative labor-management relationship added value to General Motors' performance by improving the quality of the decision making, the speed of decision implementation, and the density of the

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1. See 5 U.S.C. § 7102 (2000).

2. See Saul A. Rubinstein, *The Impact of Co-Management on Quality Performance: The Case of the Saturn Corporation*, 53 INDUS. & LAB. REL. REV. 197 (2000).

cross-organizational communications network.³ Rubinstein found similar results in other “innovative” labor-management relationships.⁴

Professional employees have experienced a fate similar to blue-collar workers. In *The Transformation of the Professional Workforce*,⁵ Professor Crain chronicles their journey from professionals who are individual entrepreneurs to professionals who are commodities to be purchased and governed by an employer.

Crain describes a social phenomenon that she calls the “Taylorization” of professional employees. Fredrick Taylor’s “one best way” obligates the managers to create the most efficient work process and plug in employees to do it. Employees check their knowledge at the door. It is the “system” that creates efficiency, not the use of worker knowledge; in this view, if you want more productivity, reengineer the system. Crain observes that professional employees have lost their status as the repository of specialized knowledge that is used to plan and carry out their work processes. It is now the employer who creates the work processes and standardizes the tasks in the interest of maximizing its own profit.

Thus, professional employees are following in the footsteps of their blue-collar counterparts, who as skilled craft artisans were once independent entrepreneurs who later saw their functions *Taylorized* and converted into “cogs and levers” of scientifically managed production processes. When today’s professional employees’ self image, honed by family, friends, and perhaps graduate school, is based on having a voice in the decisions made and in what work processes are used, meets the reality of the *Taylorized* workplace described by Crain, there is anger, frustration, loss of productivity, and sometimes collective action. Professional employees are seeking to restore their loss of status and pay by organizing collectively and voting for union representation. They face the same employer resistance to organizing and creating collaborative labor-management relationships experienced by the industrial workers of the past.

The private sector remains stuck on whether professional employees will be allowed to organize. In *National Labor Relations*

3. Saul A. Rubinstein, *Unions As Value-Adding Networks: Possibilities for the Future of U.S. Unionism*, 22 J. LAB. RES. 581, 589 (2001).

4. See Saul A. Rubinstein, *The Local Union Revisited: New Voices from the Front Lines*, 40 INDUS. REL. 405 (2001).

5. Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543 (2004).

Board v. Kentucky River Community Care, Inc.,⁶ the Supreme Court, at the behest of an employer, made it much more difficult for employees who define themselves as professional and who traditionally have been defined as professionals (e.g., nurses, accountants, lawyers, doctors) to be represented by a union. The case required the Court to reconcile the NLRA's definition of "professional employee" as one whose work, *inter alia*, "involve[es] the consistent exercise of discretion and judgment," with its definition of supervisor as an individual whose exercise of supervisory authority "requires the use of independent judgment."⁷ The Board, prior to the *Kentucky River* decision, had defined the respective boundaries of "professional" and "supervisor" so that the category of professional employee is not obliterated by the category of supervisor.⁸ The Board distinguished the professional employee's use of ordinary professional and technical judgment in directing lesser skilled employees from the independent judgment the statute required for a finding of supervisor status. The Court, however, disagreed with this approach and expanded the definition of supervisor, sweeping large numbers of heretofore professional employees into the supervisor category, making them ineligible for union representation.

The *Kentucky River* decision means that the Board is now in search of a legal theory to support its policy. Crain provides that theory. She contends that the Taylorization of professional employees means that professionals' tasks have become so standardized and routinized that they lack the authority to use independent judgment with respect to the work process required for supervisory status. Alternatively, she maintains, the professional's work has become so bureaucratically controlled that the professional directs the performance of discrete tasks, but does not direct subordinate employees on an ongoing basis. Crain concludes that because professional employees have been deprofessionalized, they should be included within the definition of employees⁹ who may join unions that negotiate the terms and conditions of their employment, and should

6. 532 U.S. 706 (2001).

7. *Id.* at 720-21.

8. Justice Scalia, writing for the majority, stated that a "tension" exists between the definition of "supervisor" and "professional," but "we find no authority for suggesting that the tension can be resolved by distorting the statutory language in the manner proposed by the Board." *Id.* at 720 (quoting *N.L.R.B. v. Health Care & Retirement Corp. of Am.*, 511 U.S. 571, 581 (1994)) (internal citations omitted).

9. 29 U.S.C. § 152(12) (2000).

not be included in the category of supervisor¹⁰ that may not be unionized.

I believe the Board and eventually the Supreme Court should adopt Crain's theory because it both reflects the reality of the workplace and is legally sound. Such a course of action will give professionals and employers an opportunity to reshape their current relationship to optimize the use of their knowledge rather than assuming that efficiency can be achieved only through the routinization so vividly described by Crain.

Peter Drucker points out in a Harvard Business Review article, *They're Not Employees, They're People*,¹¹ that in 1950, approximately 90 percent of the workforce was non-professional, "subordinates who did as they were told."¹² Today 40 percent of workers are knowledge workers and only 20 percent are non-professional.¹³ This dramatic change in the workforce requires a dramatic change in the way the new knowledge worker workforce is managed:

In a knowledge-based organization . . . it is the individual worker's productivity that makes the entire system successful. In a traditional workforce, the worker serves the system; in a knowledge workforce, the system must serve the worker.¹⁴

In a knowledge-based organization, it is therefore the individual knowledge workers who must work differently to create more value for their employers. We all have a stake in the maximization of employee contribution to organizational effectiveness in this highly competitive global environment. Based on past history, however, it is unlikely that professional employees in an unorganized work place will speak out and that employers will listen and act on the significant change needed to maximize the contribution of knowledge workers.

The federal workplace provides an example of how organization of professional employees, bred by their frustration with their *Taylorization*, can lead to enhanced cooperation and improved

10. The term supervisor is statutorily defined, 29 U.S.C. § 152(11) (2000), as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

11. Peter F. Drucker, *They're Not Employees, They're People*, HARV. BUS. REV., Feb. 2002, at 70.

12. *Id.* at 74.

13. *Id.*

14. *Id.* at 76.

productivity. The federal work force has an even greater percentage of knowledge workers than the private sector. Office of Personnel Director Kay Coles James recently pointed out that in 1950, 70 percent of the federal white-collar work force was clerical, and in 2000, 70 percent was knowledge workers.¹⁵ Correlatively, 41 percent of the federal work force had a bachelor's degree or higher in 2000, up from 35 percent in 1990.¹⁶

Congress created the federal sector labor-management relations program in the Civil Service Reform Act of 1978. It is modeled after the NLRA. For example, the Federal Labor Relations Authority ("FLRA"),¹⁷ analogous to the National Labor Relations Board, determines appropriate units of recognition¹⁸ and decides whether labor practices are unfair.¹⁹ Unlike the NLRB, the FLRA uses a special procedure²⁰ to adjudicate whether a matter is excluded from bargaining by the statute's management rights clause.²¹

The friction between the definitions of "supervisor" and "professional" under the NLRA described by Crain has never been litigated under the Federal Service Labor-Management Relations Act²² that governs federal sector labor-management relations. It is not clear why the issue has not been litigated or what the result would be if were to be litigated.²³ It is clear, however, that federal professional employees are being organized and represented by unions in response to the same forces pushing private sector professional employees to seek union representation. And it is also clear that giving professional employees' "voice" is the key to improved employee satisfaction and employer productivity.

15. Kay Coles James, *A Fresh Start for Federal Pay: The Case for Modernization* 5 (U.S. Off. of Personnel Mgmt., 2002).

16. *Id.* at 10.

17. 5 U.S.C. § 7104-05 (2000).

18. 5 U.S.C. § 7112 (2000).

19. 5 U.S.C. § 7116 (2000).

20. 5 U.S.C. § 7117 (2000).

21. 5 U.S.C. § 7106 (2000).

22. 5 U.S.C. § 7101 et seq. (2000).

23. The definition of a professional employee in the federal sector, 5 U.S.C. § 7103(a)(15) (2000), substantively mirrors the definition used in the private sector. However, the definition of a supervisor in the federal sector, 5 U.S.C. § 7103(a)(10) (2000), requires the "consistent" exercise of independent judgment rather than the "exercise of independent judgment" contained in 29 U.S.C. § 152(11). In addition, in the federal sector, an indicia of supervisor status is that one "directs" employees, 5 U.S.C. § 7103 (a)(10), rather than "responsibly" directs in the private sector, 29 U.S.C. § 152(11). Neither the Federal Labor Relations Authority nor the courts have decided what the import is of these differences.

Although knowledge workers have been difficult to organize in the private sector, in the federal sector 57 percent of the white-collar work force (853,000 employees) and 61 percent of the total workforce (1,050,000 employees) are organized.²⁴ Of the total federal work force that is eligible to be included in units of recognition, excluding managers, supervisors, confidential employees, and those excluded in the interest of national security,²⁵ 80 percent have elected union representation.²⁶

There are many examples of federal professional employees struggling to have a voice in matters that would have been theirs to determine in the past. The frustration of employees in not being heard and the failure of employers to listen leads to successful union organizing. This “threat to identity,” the impetus for private sector organizing described by Crain, is also present in the federal sector. A few examples:

1. The Internal Revenue Service (“IRS”) hired some of the best accounting graduates to conduct audits of the largest U.S. corporations. When some of the most talented were unable to get their work classified at a level that reflected their skills, they organized.
2. Doctors hired by the Food and Drug Administration to conduct research were not given time to write and deliver peer-reviewed research papers. They believed their standing in the research community was diminished by their inability to write and their frustration led to organizing.
3. The attorneys at the Securities and Exchange Commission wanted more involvement in the process of deciding which cases to prosecute and in developing the legal theories to be used to support a prosecution. They organized for union representation.
4. The IRS had a practice of hiring attorneys to perform audits of estate and gift tax returns; however, they classified the attorneys as accountants, stripping them of the recognition of their law degrees, because it was easier for the IRS to transfer employees among divisions if they were classified as accountants. The attorneys joined a union.

24. Office of Personnel Management, *Union Recognition in the Federal Government as of January 2001*, at 44.

25. 5 U.S.C. § 7103(b).

26. National Performance Review, *From Red Tape to Results: Creating a Government that Works Better and Costs Less* 87 (1993).

5. Accountants at the Federal Deposit Insurance Corporation wanted a role in redesigning the procedures they use to audit banks. They sought such a role by organizing a union.

Crain describes the organizing impetus for the Social Security Administration (“SSA”) Administrative Law Judges (“ALJ”) as a “steady stream of SSA efforts to undercut the ALJ’s judicial independence and autonomy”²⁷ I spent a day with the SSA Administrative Law Judges Association, the precursor organization to formally seeking union representation. We discussed how for many, becoming an ALJ was a long sought capstone of a legal career. Instead of exercising discretion, however, the ALJs were told how many hearings to conduct every day, how many decisions to write at what speed, and their secretaries were eliminated—unpleasant new realities unilaterally created by the SSA. We also discussed whether the Association should remain a traditional professional association (akin to the American Bar Association), transform itself into a union and seek recognition (akin to the National Education Association), or affiliate with a larger union to increase its leverage. They chose the third option.

Electing a union, however, does not guarantee that professional employees’ voices will be heard and utilized by employers. The parties must create a collaborative labor-management relationship in order to increase the chances that management will recognize the need of knowledge workers to be heard, and that employees will recognize an employer’s need to make fast decisions. A collaborative labor-management relationship provides an opportunity for each of the parties to understand and accept the role of the other in order to maximize their shared goals and objectives.

There is evidence that these mutual needs, if recognized and addressed, can lead to increased productivity. The National Partnership Council (“NPC”),²⁸ created by President Clinton, issued

27. Crain, *supra* note 5, at 595.

28. The NPC included individuals in the positions of Director of the Office of Personnel Management; Deputy Secretary of Labor; Deputy Director for Management, Office of Management and Budget; Chair, Federal Labor Relations Authority; Director, Federal Mediation and Conciliation Service; President, American Federation of Government Employees; National President, National Treasury Employees Union; Secretary-Treasurer, Public Employees Department, AFL-CIO; and two individuals named by the President: Edwin Dorn, Under-Secretary for Management, Department of Defense; and George Munoz, Assistant Secretary for Management, Department of Treasury. Exec. Order No. 12,871, 58 Fed. Reg. 52,201 (Oct. 6, 1993). Executive Order 12871 was abolished by Exec. Order No. 13,203, 66 Fed. Reg. 11,227 (Feb. 22, 2002).

several reports that identified the significant improvements in agency operations from agency/union collaborative labor-management relationships.²⁹ The most definitive study of agency return on investment from creating and maintaining a collaborative labor-management relationship occurred in the United States Customs Service. Booz-Allen and Hamilton (“BAH”) balanced the specific costs of “partnership management” against the cost savings of fewer grievances and unfair labor practice charges, less time spent by the parties at the bargaining table, and the benefits generated from partnership activities, such as operational improvements and drug seizures. In spite of including all of the start up costs and excluding the long-term benefits, BAH concluded that for every \$1.00 the Customs Service invested, it received \$1.25 in benefits.³⁰

It is possible to have a constructive labor-management relationship that benefits both professional employees and employers. It is not clear whether employers will follow the few examples of collaboration that have maximized the contribution of knowledge workers and enterprise productivity. But, as Peter Drucker points out, sub-optimizing the contribution of professional employees makes us less competitive in the global market.

29. See the National Partnership Council’s *Report to the President on Progress in Labor-Management Partnerships*, issued in September 1995, October 1996, and December 1997. See also Marick Masters, *A Final Report to the National Partnership Council on Evaluating Progress and Improvements in Agencies’ Organizational Performance Resulting from Labor-Management Partnership 5* (Oct. 16, 2001). Masters concluded, *inter alia*, after studying sixty labor-management partnership councils in eight agencies at fifty-four different locations covering 70,000 federal employees, that those partnership councils where unions believed they had an effective voice led to both management and unions believing they collaboratively improved agency performance.

30. Booz-Allen and Hamilton, *Cost Benefit Analysis of the Labor-Management Partnership* 7–8, 10 (Oct. 1998).