

EMPLOYEE PARTICIPATION IN THE USA: A LEGAL AND MANAGERIAL CONSIDERATION

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1. Introduction

In some of the Member States of the European Union employees participate in the management of the enterprise through representatives on the boards. Under the relevant legal provisions, employees have a potential voice in naming the directors, declaring dividends, and making important investment decisions concerning the company. Moreover, employee participation, for example in Germany, has been generally accepted by employers.

In the USA, there is no employee participation at board level. More importantly, the unions reject any such role, for they view their function as one of confrontation of management through collective bargaining, and any participation in management would be inconsistent with that function.¹

The USA labour law draws a sharp distinction between traditional managerial prerogatives and legitimate union interests. Thus, management need not consult with or even give notice to workers of a decision to close a particular plant but must bargain in good faith concerning the effects on the decision.²

However, in the USA, employee participation in the decisions of the enterprise is solely through collective bargaining as it is in the UK.

¹ SUMMERS Clyde W., 1980, *Worker Participation in the U.S. and West Germany: A Comparative Study from an American Perspective*, 28 The American Journal of Comparative Law, pp. 367-392.

² DOOLEY Michael P., 1983, *European Proposals for Worker Information and Codetermination: An American Comment* in *Harmonisation of Laws in the European Communities: Product Liability, Conflict of Laws and Corporation Law*, edited by Peter E. Herzog, The University Press of Virginia, pp.103-112. Dooley gives the case of First National Maintenance Corp. v National Labor Relations Board, 452 U.S. 666 (1981) as an example to above mentioned rule.

2. Legal and Managerial Concept

Employees and management in an enterprise have common as well as competing interests; and the employment relation is envisioned not so much as one of confrontation between workers and management as one of integration of workers in the enterprise.

The concept of employee participation has become popular in American business. Two surveys of Fortune 1000 companies completed in 1987 and 1990 suggested that the single most important motive behind establishing employee involvement plans was a desire to increase profitability. To this end, factors that weighed heavily in implementing these plans included an interest in increased productivity, in improved quality and employee morale, in reduced cost, and in better adaptability of future environmental changes. The reasons that were considered least important as motivating factors were ethics and values.³

In the USA, there is no legal provision directly concern employee participation. Employee participation programs are defined by collective bargaining agreement. Since, there is no comprehensive system of industry agreements between unions and employer associations; collective agreements are typically negotiated between a union and a single employer.⁴ Because the union typically bargains separately with each employer, participation in decisions made at the industry level in some of the Member States, the best example is Germany, occurs at the company level in the USA. It is also possible in the USA that a single employer may have separate contracts with several unions. Therefore, even in a particular company some of the employers may participate in management some of them may not. In other words, everything depends upon the concluded collective bargaining agreement.

Section 7 of the National Labor Relations Act 1935⁵ of the USA provides basic rights of employees by saying "Employees shall have the right to self-organisation ... to bargain collectively through representatives of their own choosing ...". This principle of free choice is qualified by majority rule. Section 9 of the Act provides that the representative chosen

³ NUNN Sandra L., 1995, *Are American Business Operating Within the Law? The Legality of Employee Action Committees and Other Worker Participation Plans*, 63 University of Cincinnati Law Review, pp.1379-1445.

⁴ SUMMERS, 1980, p..371.

⁵ The Act is also known as the Wagner Act codified at 29 U.S.C. In 1947, it was amended and renamed the Labor Management Relations Act. In 1959, it was further amended by the Landrum-Griffin Act. Although the official name of this legislation in its entirety is the Labor Management Relations Act, it is still commonly referred as to the National Labor Relations Act.

by the majority in the "bargaining unit" shall be the exclusive representation of all employees in the unit. The "bargaining unit" is determined by the National Labor Relations Board⁶, which conducts a secret ballot election in the unit to determine what, if any, union has majority support.

The EU's efforts to create a unique employee participation structure through the Member States have dominantly been affected from Germany's one. In Germany, at the industry level employees participate through their unions in making collective agreements; at the shop level they are represented by the works councils in making shop agreements and resolving shop problems. The present EU proposals on employee participation and implemented Work Council Directive simply divide representation of employees in management between the Work Council and the Union. In the USA, however, it is unified in the majority union. In other words, all representation of workers, if there is, in the USA is solely through the union.

In the USA the system of employee participation covers only a minor part of the all of the work force. Since participation comes only through the union negotiating a collective agreement, and less than 30% of all employees are covered by collective agreements.⁷ Collective agreements differ significantly from industry to industry in what they regulate, they will commonly include scheduling of working hours, scheduling of vacations, prescribing safety rules and devices, establishing job classifications, determining piece rates and incentive pay, distributing overtime work, regulating training programs, promotions, transfer and dismissals, and elaborating personnel policies and shop rules. In some respects, worker participation at this level may be wider in the USA than Germany which would represent the EU's proposals because in the USA certain subjects are not regulated by statutes but are left to collective bargaining.

The relevant law of the USA requires an employer to bargain with a union concerning wages, hours, and other terms and conditions of employment.⁸ Under this legal rule there is no right in the USA to participate in those decisions which would be made by the EU's proposed

⁶ The National Labor Relations Board also defines a "labour organisation as any organisation 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, labour disputes, wages, rates of pay, hours of employment, or conditions of work.

⁷ SUMMERS, 1980, p.377.

⁸ 29 U.S.C. Section 2(5).

board which employees are supposed to take chairs in them, such as selection of managers, declaration of dividends, issuing of new shares, or allocation of capital investment.

The legal rules in the USA do not prohibit the scope of employee participation from being as broad as proposed board structure of the EU. The employer and union are free to bargain concerning matters which are not terms and conditions of employment. In other words, if the employer is willing to the collective agreement can cover every subject includes employee representation in the company's board. The important point is that the law does not require the employer to grant these broader participation rights nor permit the union to compel the employer to grant them. In other words, everything depends upon the bargaining powers of the both sides.

3. Proposals in the USA

In the absence of any kind of legal participation rules, a number of proposals have been made by the academics. Professor Weiler in his book, *Governing The Workplace*, has proposed establishing, by statutory mandate, "Employee Participation Committees" (EPC) built on the model of the German works council.⁹ Professors Freeman and Rogers would move in the same direction, but without a statutory mandate. They would encourage employers to create EPCs by tax breaks and other government incentives, and allow less than a majority of employees to trigger their formation.¹⁰ Professor Summers believes that a work council system modelled on the German system could be structurally superimposed on the USA collective bargaining system. He suggests that it could be done in a way which would provide a form of representation to those not now represented by unions without undermining or weakening their present collective bargaining system, and perhaps substantially strengthening it. He adds that the obstacle is not structural, but political.

A federal commission on the Future of Worker-Management Relations¹¹ finds that a variety of employees, managers, and local and national leaders support of the goal of enhancing employee

⁹ SUMMERS Clyde W., 1993, *Employee Voice and Employer Choice: A Structured Exception to Section 8(a)(2)*, Chicago-Kent Law Review, Vol. 69, No. 129, p. 130.

¹⁰ FREEMAN Richard B. and ROGERS Joel, 1993, *Who Speaks for us? Employee Representation in a Nonunion Labor Market* in Employee Representation: Alternatives and Future Directions edited by KAUFMAN Bruce E. and KLEINER Morris

¹¹ A commission which was sponsored by the USA Departments of Commerce and Trade. An article is excerpted from the complete 1994 report on Challenge, Vol. 38, pp.-38-45.

participation.¹² According to the Commission's report a majority of American workers want to have opportunities to participate in decisions effecting their job, the organisation of their work, and their economic future. A number of managers testified that employee participation and worker management partnerships are not only desired by workers but essential to being competitive in their markets and industries.

4. The Effect of Employee Participation on Quality and Productivity

The Commission received considerable examples on productivity and quality improvement. For example, a team from Federal Express composed of both management and non-management employees described how it changed the way packages are sorted in its Memphis distribution centre and thereby improved the company's on-time delivery performance, reduced staffing required for this operation from 150 to 80 employees, and achieved annual savings of approximately \$702,000.¹³

In Atlanta, Bell South and representatives from the Community Workers of America described how their quality-of-working life program that carried over from the early 1980's later embraced Total Quality Management practices, and has evolved to the point where employees and workers meet with key customers to demonstrate their commitment to total customer satisfaction.¹⁴

When employees are treated as members of the company, they come to think of themselves as belonging to and having a stake in the company. They develop loyalty to the company and concern for its welfare. When they are granted the right to participate in management, they are more ready to promote its productivity and profitability.

5. CONCLUSION

What conclusion might be drawn from above-mentioned characteristics of the USA practices? American employers generally do not accept that employees are entitled, as a matter of right, to collective representation. Many employers favour employee involvement programs, but these are largely limited to communications systems or quality circle type programs which give employee no voice in larger decisions that vitally effect their working life.

¹² Ibid., p. 39.

¹³ Ibid., p.42.

¹⁴ Ibid.

The concept of employee participation in the USA seems to me a bit different from what is known by the majority in Europe. Employee values, attitudes, and behaviours which are mainly depend on traditions vary across countries. It is not unreasonable to expect, therefore, that employee participation in decision-making is to be differently defined and have different views as to effectiveness. Their main concern is to increase production by the way of employee participation, but not to grant employees a real legal right, at least for a while, to participate in decision-making process on the board level.

Employee participation often increases productive efficiency and quality, and enhances democratic values and personal dignity. As a result, of course, the competitive power of a company and the country which the company is located can be maintained.

Since the 1980s, there has been a substantial expansion in the number and variety of employee participation efforts and workplace committees in both establishments governed by collective-bargaining agreements and those without union representation. Although there is argument on employees' participation in management, the debate is largely over how much participation they should have.

In practice, quality of work life programs¹⁵ with quality circles¹⁶, production teams, and employee involvement programs may provide some participation in performance of tasks, daily work assignments, production goals and minor shop floor problems. In the case of major problems of a company, these problems could be better solved, if employees are granted legal rights to participate in management.

Finally, the EU, unlike America, tended to assess participation not in terms of improving productivity, but in terms of its value for fulfilling a social obligation to employees.

¹⁵ Professor Lawler defines "quality of work life programs" as a joint union-management committee, usually existing at multiple organisational levels, alongside the established union and management relationships and collective bargaining committees. QWL committees usually are prohibited from directly addressing contractual issues such as pay, and are charged with developing changes that improve both organisational performance and employee quality of work life. NUNN Sandra L., p.1391.

¹⁶ Professor Lawler defines "quality cycles" as:
structured type of employee participation groups in which groups of volunteers from a particular work area meet regularly to identify and suggest improvements to work-related problems. The goals of QCs are improved quality and productivity, there are no direct rewards for circle activity, group problem solving training is provided, and the groups' only power is to suggest changes to management. Ibid.