1 An Overview

AMERICAN LABOR LAW AND THE AMERICAN INDUSTRIAL relations system have a symbiotic relationship, and neither can be understood without reference to the other. This should come as no surprise; after all law, lawyers, and litigation play a major role in our society. Our collective bargaining system has been devised predominantly by labor and management, however, not by the government and the courts. In fact we often forget – and foreign observers fail to grasp – that our most important tool in the resolution of labor disputes is our private arbitration system, which operates outside the formal legal system of courts and administrative agencies. Before examining the history and substance of American labor law, then, let us begin with their impetus in the American industrial relations system: organized labor.

As a result of the evolution of the industrial relations system in the United States, the unions have a remarkably different attitude toward law than, for instance, those in Britain. This is not to say that American trade unions do not have a healthy and often well-founded distrust of lawyers; one can see this attitude manifested in countless ways. But the unions are not against the law here. And this is because the American unions – especially the industrial unions that emerged during the Great Depression of the 1930s – obtained political power before industrial power. American unions were willing and eager to look to the law as a

useful adjunct to their growth and the achievement of recognition and bargaining relationships with employers.

Trade unionism came late to the United States. There were stirrings among American workers toward the end of the nineteenth century (particularly in the 1880s), first under the banner of the Knights of Labor, which attempted to organize unskilled as well as skilled workers (a venture doomed to failure). The second major effort was by the American Federation of Labor (AFL), initially led by Samuel Gompers, who espoused an approach to trade unionism that focused on what labor could achieve at the bargaining table. The AFL, a central federation to which various unions were attached, strove to avoid becoming formally affiliated with a political party as the European unions had. Gompers's refrain, "We shall reward labor's friends and punish its enemies," reflected a philosophy that involved labor in the political process with political parties but did not provide for formal affiliation. To this day, however, the AFL-CIO, the umbrella organization for national unions, plays an active political role; except in 1972, the AFL-CIO has supported every Democratic Party presidential candidate since Adlai Stevenson.

At the turn of the century, the power and prestige of Gompers and of the AFL were being used on the behalf of skilled craftsmen organized on an occupational basis. The masses of workers, who had often been shunned by the craft unions as unorganizable, were not affiliated with major industrial unions (or with unions of any kind) until the 1930s. At that juncture new unions, such as the United Auto Workers, the United Steelworkers, and the United Rubber Workers, came forward. They sought to organize and represent production workers and skilled tradesmen under the umbrella of a new federation, the Congress of Industrial Organizations (CIO), and they grew with the law. To some extent their structure was shaped by the law as the National Labor Relations Board, operating under the National Labor Relations Act, fashioned units or categories of job classifications, for the purpose of bargaining on an industrial basis that permitted the inclusion of semiskilled and unskilled workers

in the same bargaining unit with tradesmen.[1] All of this is in contrast with the history of organized labor in Britain, where great general unions that organized workers without regard to job classification or industry reached out to organize the semiskilled and the unskilled through the "new unionism" of the 1880s. In Britain the unions had industrial power before political power, and so they used their position and strength to fend the law off and to keep it out of their affairs. This was a central thrust of labor legislation in the first Asquith the Liberal government, in which the trade unions had some influence. The Trades Disputes Act of 1906 was designed to create immunity in the courts for trade-union activities.[2] In the United States a similar policy of laissez-faire was adopted at the time of the Norris-LaGuardia Act[3] but was quickly abandoned in 1935 with the passage of the National Labor Relations Act, which provided for the right to engage in collective bargaining. For better or for worse, to this day the American trade unions continue to look to the law, and to the National Labor Relations Board in particular, for sustenance.

Another important feature of the American industrial relations system is that it is (again, by European standards) a decentralized bargaining structure. In Europe, particularly on the Continent, the pattern is multiemployer or industrywide bargaining. In Germany the primary function of the unions since World War II has been to bargain regional tariffs or agreements establishing a minimum rate for a geographical area of the country. In Sweden wage bargaining takes place on a centralized basis – initially between the Central Labor Federation (LO) and the Swedish Employers Federation – and along industrywide lines with the involvement of the major industrial unions.[4] Historically, industrywide bargaining has been the rule in Britain, although to a lesser extent. In all of these countries there is a local organization to represent employees, but the local entity usually does not possess nearly as strong a presence or as much

[1] *American Can Co.*, 13 NLRB 1252 (1939).
[2] Edw. 7, ch. 47.
[3] Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932), 29 USC §§101–15 (2012).
[4] T. C. Johnston, *Collective Bargaining in Sweden* (1962).

contact with the national trade union as in the United States. In Britain shop stewards bargain for pay rates and sometimes for other conditions of employment, often in committees that are independent of the national trade-union structure. In Germany *Betriebsrate* (shop committees or works councils) are involved by statute in a wide variety of employment decisions and sometimes have veto power over employers' decisions.[5] In recent years German unions, particularly in the metals industry, have come to play a more substantial role in the plant and to be more integrated with the system of works councils as a matter of law. In Sweden there are local clubs (roughly equivalent to American local unions) that operate on a plant basis, but many plants are too small to have one.

In the United States the percentage of eligible workers who are organized into trade unions is lower than the percentages in Europe and Japan.[6] Where organization exists, though, it is clear that a plant-level presence tied to the national union structure is much stronger in the United States than in any of the other industrialized countries. The local union, which has a formal affiliation in its dues-sharing structure with the national or international union, is often organized at the plant level. Depending on the number of members and the amount of dues, some of the officials of the local, such as the president and the secretary-treasurer, may be employed full time by the local and paid out of the workers' dues. However, in many locals all of the officials are full-time employees of a

[5] Works Constitution Act of 1952, Bundesgesetzblatt, Teil 1, 681.

[6] In 2012 the percentage of union members in the workforce was 11.3 percent in the United States; the comparable 2011 figures were 18 percent in Australia; 26 percent in the United Kingdom; and 29.7 percent in Canada. See generally U.S. Department of Labor, Bureau of Labor Statistics, www.bls.gov; Australian Bureau of Statistics, www.abs.gov.au; UK Department of Business Innovation & Skills, www.bis.gov.uk; Statistics Canada, www.statcan.gc.ca. The decline has been going on for some period of time. See, for instance, W. Serrin, "Union Membership Falls Sharply; Decline Expected to Be Permanent," *New York Times*, May 31, 1983, at 1. Compare Steven Greenhouse, "Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%," *New York Times*, January 24, 2013, at B1. But see Kathleen Miles, "Unions Gain Latino Members, Could Be Unions' Saving Grace," *Huffington Post*, Jan. 25, 2013, www.huffingtonpost.com/2013/01/25/unions-latino-members-saving-grace_n_2543486.html?1359100934.

company; when they are involved in negotiations or grievance handling, their wages may be paid either by the company (the collective bargaining agreement often provides for this) or from the local union's treasury.

Most collective bargaining agreements in the United States are negotiated at the plant level, with the involvement of the local union. The agreements are relatively detailed and comprehensive. One of the most important functions of locals relates to the processing of grievances over an agreement's interpretation. Locals are sometimes involved in the final step of the procedure, arbitration. The local usually pays the union's share of the costs of arbitration, and if the local and the employer are particularly disputatious, this can be a considerable drain on the local's treasury. However, because most disputes are resolved at the lower steps of the process, the local is quite dependent on members of grievance committees, which are composed of full-time employees. Similarly the local depends for grievance processing on the shop stewards, who are also full-time employees involved in a vital function on behalf of the union.[7]

Another structural variation arises from the union's basis of organization and its organizing rationale. So far we have considered only locals that are organized on a single-plant basis. Locals may also be organized on a multiplant or a multicompany basis ("amalgamated locals"). More broadly, they may be affiliated with a national craft, industrial, or general union. General unions are somewhat exceptional in the United States; the best example is the International Brotherhood of Teamsters, the largest American union (which does, however, have a base in one industry: transportation). Officials of national unions may be involved in the bargaining of the agreement, but most of the negotiating staff will be local officials.

Today most unions are affiliated with the merged AFL-CIO, which was formed in 1955. This federation has a no-raiding agreement that is binding on its affiliates. The craft unions play a dominant role in its leadership and policy. Although the International Brotherhood of Teamsters,

[7] L. Sayles and G. Strauss, *The Local Union* (1953).

United Mine Workers, International Longshoremen and Warehousemen (West Coast dock workers), and United Auto Workers have been, at various times, outside of the AFL-CIO, they subsequently returned to the fold. Some unions, such as the Service Employees International Union, the International Brotherhood of Teamsters, and the United Food and Commercial Workers, have created a new coalition called Change to Win, which nonetheless remains close to the AFL-CIO.[8] On the other hand, the United Brotherhood of Carpenters has withdrawn from the AFL-CIO and, contrary to the rest of organized labor except the Teamsters, was supportive of the policies of the second Bush administration of 2001.

Another important aspect of the American system is the wage consciousness of the trade unions.[9] Historically American trade unionism has been hard-hitting in its economic demands. In part this is thought to be attributable to the lack of class solidarity among many American workers.

Because a labor organization cannot appeal to workers on a class basis, the appeal must be based on wages and fringe benefits. This has helped produce what some have called "business unionism" or "bread-and-butter unionism."

Many of the matters handled by labor and management at the bargaining table in the United States are dealt with legislatively in Europe. This is particularly true of fringe benefits, such as vacations and vacation pay, holidays, unemployment compensation, medical insurance, and hospitalization benefits.

Traditionally, protection against dismissal without cause, and compensation of workers laid off or dismissed because of plant closure or the contracting out of work, have been addressed by collective bargaining in the United States. In Europe "unfair dismissals," whether for economic

[8] See generally Ruth Milkman, "Divided We Stand," *New Labor Forum* (Spring 2006), at 38.

[9] S. Perlman, *A Theory of Labor Movement* (1928).

reasons or on disciplinary grounds, are dealt with through legislation. But recently a number of state courts, following the lead of the Supreme Court of California,[10] have held that employers cannot dismiss employees without just cause, arbitrarily, or in bad faith.[11] (Chapter 11 contains a more thorough discussion of this development.) The United States and some states have enacted legislation regulating plant closures and layoffs attributable to them.[12] In Japan, in contrast to both America and Europe, lifetime employment for "permanent" workers in large companies has been guaranteed under a system that is promulgated unilaterally by the companies, outside the collective bargaining system.[13] But Japan's economic difficulties in the 1990s eroded this practice to an unprecedented extent.

Thus the number of subjects to be discussed and resolved through collective bargaining is considerably greater in the United States than in Europe and Japan. Without a welfare state system like those in Europe and without paternalism like that in Japan, American unions must (or should) be active in their negotiations with management. The appeals that the unions make to recruit workers cover many items. The American system encourages unions to push for more at the bargaining table. It encourages management to install laborsaving devices to increase productivity (a phenomenon that seems to have declined in recent years). The decentralized system of bargaining and the wage-conscious behavior of unions also encourage American employers to resist union organizational activities. Accordingly there are many more organizational and

[10] *Tameny v. The Atlantic Richfield Co.*, 27 Cal. 3d 167 (1980).

[11] See generally "Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith" (comment), 98 Harv. L. Rev. 1816 (1980); "Implied Contract Rights to Job Security" (note), 26 Stan. L. Rev. 335 (1974), C. Summers, "Individual Protection against Unjust Dismissal: Time for a Statute," 62 Va. L. Rev. 481 (1976).

[12] Twenty states have plant-closing legislation of their own: California, Connecticut, Hawaii, Illinois, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Montana, Oregon, South Carolina, Tennessee, and Wisconsin.

[13] See generally W. Gould, *Japan's Reshaping of American Labor Law*, at 94–116 (1984).

recognition disputes than in other industrialized countries. Anticipated labor costs and potential competition problems promote such resistance, which is in part responsible for the heavy caseload of the National Labor Relations Board. Most of the more than 25,000 unfair labor practice charges per year[14] that have been processed by the NLRB involve allegations of discriminatory discipline and discharge of workers, frequently during organizational campaigns. The NLRB is engaged in more litigation than any other federal agency.

In Germany or Scandinavia a dispute can be resolved on an industry-wide basis, and the parties are bound to the solution. But in the United States essentially the same kind of dispute can come before the NLRB again and again because different employers and workers see their situation as slightly different from that considered in an earlier decision, and they are not bound by any adjudication or decision on an association or industrywide basis. Moreover, because most of the cases involve discipline or dismissal, they are essentially questions of fact, and no general rule can dispose of most of them.

The American industrial relations system has myriad characteristics. Which of those touched on here are primary, secondary, and so on has been debated extensively, but few would debate that our body of labor law rests firmly on the system's fundamental characteristics. How has that come to be?

[14] For up-to-date statistics on unfair labor practice charges and other activity, see the National Labor Relations Board's website at http://www.nlrb.gov/news-outreach/graphs-data/.

2 Industrial Relations and Labor Law before Modern Legislation

IN THE UNITED STATES AND IN EUROPE THE INDUSTRIAL Revolution brought competition between employers for distant markets. This created an environment in which labor was increasingly treated as a raw material or a commodity, and it is therefore hardly surprising that a profound sense of discord was generated between workers and their employers. This historical development cannot be divorced from any consideration of industrial relations and labor law in the United States today.

American and European workers sought to band together and to protect themselves against the attempts of business combinations, trusts, and monopolies to reduce labor costs. The courts in the United States and the parliament in England, through their "anticombination" statutes, sought to brand such worker combinations as unlawful conspiracies in restraint of trade – a restraint that might diminish free competition between employers. In the United States the law of conspiracy was criminal law, and indictments were obtained against combinations of workers trying to raise wages. The leading case in which the criminal conspiracy doctrine was applied was the Philadelphia *Cordwainers* case of 1806.[1]

[1] *Commonwealth v. Pullis (The Philadelphia Cordwainer's Case)*, Mayor's Court of Philadelphia (1806). See J. Commons, *Documentary History of American Society* 59 (1910).

Certain issues raised in the *Cordwainers* case remain with us today:

> How could individuals who had no "permanent stake" in the business become substantially involved in making decisions relating to it? As the prosecution said in *Cordwainers*, "Will you permit men to destroy it [business] who have no permanent stake in the city; men who can pack up their all in a knapsack or carry them in their pockets to New York or Baltimore?"

What is to be the proper and appropriate sphere of interest for workers? What could be regarded as a management prerogative with which employees could not interfere? Very much involved in any consideration of this question was the Tory idea – promoted by America's first secretary of the treasury, Alexander Hamilton – that private organizations such as unions interfered with the rapid increase in manufacturing and therefore with national prosperity.

How could prices of products be set safely if the workers were to wait until order books were swelled to capacity – when the time would be propitious – to put pressure on employers for higher wages? How could commercial contracts be negotiated in distant markets under such circumstances?

What was to be done about the emergence of these new combinations of private societies and their pressure on individuals to comply with the combination's notion of the collective interest? As Job Harrison testified in the *Cordwainers* case, "If I did not join the body, no man would sit upon the seat where I worked … nor board or lodge in the same house, nor would they work at all for the same employer."

These were but some of the issues raised in *Cordwainers*. The case did not decide definitively whether the combination itself was an unlawful conspiracy or whether it was necessary to prove that its object was the improvement of wages and working conditions, but it served as a legal weapon for employers and thus stultified union growth.

Numerous judicial decisions in the nineteenth century made efforts by workers to improve their wages and working conditions through combinations an unlawful criminal conspiracy. In 1842 a landmark decision