Canada-United States Law Journal

Volume 14 | Issue

Article 9

January 1988

Competitiveness and Labor Law: Are We Talking about Legal Issues

Richard Martin Lyon

Competitiveness and Labor Law: Are We Talking About Legal Issues?

*Richard Martin Lyon**

In keeping with the theme of this conference I would like to ask: When we look at the impact of labor management relations on global competitiveness, *are* we talking about *legal* issues?

I will try to answer this question in three steps. First, I will examine the leading themes in the employment relations law of the United States and Canada, and compare them with similar laws in Japan and Great Britain. Second, I will look at what happens when businesses shift their strategies to human concerns. Do they become more competitive? Third, I will introduce you to some new thoughts and new ways of looking at competitiveness that transcend national or legal environments. These ideas come mostly from across the Pacific but are available to us for the cost of a library card.

To begin with, let us define competitiveness: "National competitiveness . . . [is a nation's] ability to produce, distribute and service goods in the international economy of competition with goods and services produced in other countries, and to do so in a way that earns a rising standard of living."[1] Note that this definition leaves out a favorable balance of trade, a positive current account, or an increase in foreign exchange reserves. It simply refers to an increase in the standard of living. This means rising earnings, steady employment and growing purchasing power — not job scarcity and a minimum wage in the service industries.

I. Employment Relations Laws & Practice

A. The United States

International competitiveness was never a consideration when the National Labor Relations Act ("NLRA") became law in 1935. The years before had seen labor violence and work stoppages. Undoubtedly productivity also suffered, but even in the midst of depression our huge margin for waste was still working for us. The rationale for the new law was to end unrest, to make labor relations relatively peaceful and predictable.[2] The NLRA was not a framework for encouraging a creative part-

* Partner, Seyfarth, Shaw, Fairweather & Geraldson, Chicago, Illinois. Past Management Co-Chair of the American Bar Association's Committee on International Labor Law.

1 B. Scott & G. Lodge, U.S. Competitiveness in the World Economy 14-15 (1985).

2 NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

nership between management and labor. That law saw labor and management as natural adversaries and that is still true of the Act to this very day.

Only recently, in 1986-87, did the United States Department of Labor decide to find out whether U.S. labor law hampered or encouraged a cooperative relationship between management and labor. The Secretary of Labor hastened to reassure both the business and labor constituencies that there was no hidden intent here to change the laws; just to look at them from the perspective of labor management cooperation.[3]

The experts who volunteered their views to the Secretary fell into three major groupings. There were those, mostly from management, who felt that U.S. labor law contained too many impediments to cooperation; the law makes it extremely difficult for employers to be other than "totally adversarial" in their relations with the unions, they said.[4] Others, mostly from the union side, found labor law to be the source of power in the marketplace and wanted the law changed to increase union bargaining power and impose restrictions on the employers.[5]

A third group, mostly people from the universities, complained of the excessive juridification of labor law. They believe the law has become the goal, losing sight of social and economic purposes. In general the academics would force employers to recognize *unions*, not *workers*, as equal partners in labor-management relations.[6]

There were a few management spokespersons who disagreed with all of this on the basis of their experience with cooperative labor-management relations with their unions within the frame work of the current labor law.[7]

B. Canada

Canada and its provinces operate under a labor law system very similar to the U.S. system.[8] In Canada each province has its own labor relations system, reflecting the general political will of the electorate. Ontario, for instance, can be characterized as giving the unions more advantages than can be found in the United States, while British Columbia, in its most recently rewritten labor relations statute, returns to a position more closely resembling that in the United States.[9] Ontario, for

---

[3] BUREAU OF LAB. MGMT. REL. AND COOPERATIVE PROGRAMS, U.S. LABOR LAW AND THE FUTURE OF LABOR-MANAGEMENT—FIRST INTERIM REPORT—A WORKING DOCUMENT 28 (Feb. 1987).

[4] *Id.* at 2-3.

[5] *Id.* at 4-5.

[6] *Id.* at 5-11. Of particular interest are the remarks on the "excessive juridification" of American labor law by Professor Myron J. Roomkin. *Id.* at 7.

[7] *Id.* at 12.

[8] *See generally* G. ADAMS, CANADIAN LABOUR LAW (1985).

[9] British Columbia Industrial Relations Act, *reprinted in* CANADIAN LABOUR LAW REPORTS ¶ 2501.

example, bolsters the unions by imposing contractual terms by way of an arbitrated agreement if the employer and the union cannot work out their first contract. Ontario also imposes a union shop on the new parties. To my mind the most important advantage that unions have in Ontario and in many other Canadian provinces is that they need not prove their majority status through a secret ballot election if they have authorization cards of forty-five percent of the workforce in the bargaining unit. Generally no questions are raised as to how these cards were obtained.

We should not leave the subject of the labor relations law of Canada and the United States without noting the growing influence of the courts in both countries on the new employment law, the "post-employment-at-will" law. The courts now extend to white collar employees (and this includes business executives and clerks) a degree of job security enjoyed historically only by workers under negotiated grievance procedures. Viewed from the competitiveness aspect, this has probably resulted in employers being forced to retain substandard employees at least until ample documentation is developed to convince judges and juries of the correctness of the initial discharge decision. Poorly executed dismissals over a six-year period in California have cost employers more than half a million dollars in each case of the seventy-two percent which has gone to a jury.[10]

C. Japan

Japan, our most notable international competitor, also operates under North American style labor law — in theory. American or Canadian labor lawyers reading the Trade Union Act of Japan[11] for the first time are likely to pronounce themselves experts by nightfall. The similarities are striking although in some respects Japan goes much further than either the United States or Canada. Japan, for example, provides Japanese workers with a constitutional guarantee and a fundamental human right to organize and to bargain collectively.[12] These guarantees, as well as the law of unfair labor practices, are based on the old Wagner

---

[10] *Wrongful-firing Lawsuits Are on the Rise*, Investor's Daily, Feb. 3, 1988, at 1. *See also* BUREAU OF NAT'L AFF., DAILY LAB. REP., CALIFORNIA STATISTICS FOR 1987 SUGGEST STABILIZATION IN PLAINTIFF AWARDS A-3 (Feb. 8, 1988).

[11] Trade Union Act, No. 174 (Japan 1949).

[12] KENPO (Constitution) art. XXVIII (Japan). Professor Tadashi A. Hanami writes that the "eternal and inviolable" right of workers to organize which is guaranteed by article 28 of the Constitution is according

> to most Japanese labor law scholars . . . sacred and holy — a mythology that can be found in hardly any other civilized country. Article 28 of the Constitution states that the workers' right to bargain and to act collectively, together with their right to organize, are fundamental human rights. Japanese labor lawyers are proud of this constitutional provision, since few countries other than socialist and developing nations recognize as human rights in their constitutions the right to bargain and to act collectively.

T. HANAMI, *The Function of the Law in Japanese Industrial Relations*, in CONTEMPORARY INDUSTRIAL RELATIONS IN JAPAN 162 (T. Shirai ed. 1983).

Act, that is, U.S. law as it existed before 1946. The constitutional status of the right to organize and bargain collectively in Japan has legalized the use of nearly any means to force workers to join unions, even where this involves activities which under other circumstances would be considered unlawful. Mass picketing, which blocks the flow of traffic into a plant is generally permitted, as is picketing of the homes of executives.[13]

You would think that all this would translate into a very strong union movement. The fact is that this has not happened in the private sector, and the unions continue to lose strength in Japan as they do in the rest of the industrial world.[14] In part this is due to the perception of unions as unsophisticated. To combat this public perception the annual union wage offensive called *shunto* (spring offensive) has been given a less militant name, *seikatsu toso*, which translates into "campaign for a better life," and instead of the traditional headbands worn in the past, protesting workers now wear yellow baseball caps "to signify both corporate loyalty and a cheerier image."[15] Another factor is the rather relaxed attitude Japanese society has about law. At the beginning of the twentieth century, Japan easily adopted a formal system of law, such as the commercial codes of West Germany and France, precisely because the Japanese had no deep commitment to those systems.[16]

Finally, Japanese managers, through the sheer act of *purposeful managing*, never gave up their considerable control over fundamental employment policies, most of which are *not* discussed with the unions at the bargaining table. Japanese companies do not bargain over new technology, changes in plant organization, the relocation of factories, the merger of firms, the closure of plants, subcontracting and the details of daily production management.[17] Although companies keep these issues off the bargaining table, they strongly believe in keeping workers well

---

13 *See* T. HANAMI, LABOR RELATIONS IN JAPAN TODAY (1979).

14 The unionization rate in Japan is down to a record low of 27.6%.

> [T]he number of union member in Japan [in 1987] was 12,272 million, a decrease of 71,000 from the previous year. In addition, the estimated unionization rate [the rate of the number of labor unionists to the number of employees] decreased 0.6 percentage points to 27.6% for the [twelfth] consecutive year-to-year decline since 1975, when it stood at 34.4%.

JAPAN INST. OF LAB., 27 JAPAN LAB. BULL. 3 (Mar. 1988). *See Bitter Days for Japan's Unions*, N.Y. Times, Jan. 14, 1987, at D-1. In 1949 union members constituted 56% of the workforce. ECONOMIST 60 (Nov. 28, 1987).

15 ECONOMIST, *supra* note 14.

16 For a practical understanding of the Japanese legal scene, see Woodward, *Legal Definitions: Lawyers in U.S. Not What They Are Here — Contrasts in Training, Career Development Reflect Very Different Concept of Law Itself*, Japan Times, Oct. 3, 1982. *See also* C. Mayer, *Japan Behind The Myth of Japanese Justice*, AM. LAW. 113-24 (July-Aug. 1984); J. RAMSEYER, *Japan's Myth of Non-Litigiousness*, NAT'L L.J. 13, 46 (July 4, 1983). *See generally* Kawashima, *The Status of the Individual in the Notion of Law, Right and Social Order in Japan*, in THE JAPANESE MIND 261-87 (C. Moore ed. 1967); Nakamura, *Basic Feature of the Legal, Political, and Economic Thought of Japan*, in *id.* at 143-63; R. RABINOWITZ, LAW AND THE SOCIAL PROCESS IN JAPAN (1964).

17 Shirai, *Recent Trends in Collective Bargaining in Japan*, 123 INT'L LAB. REV. 312 (1984).

informed. Union representatives are given detailed and often confidential information on company plans and objectives. Information is regarded as a working tool and not as a scarce resource hoarded by a status-driven manager.

My study of the Japanese industrial relations scene tells me that the top union leadership has no stomach for rocking the boat; nor have the events of the 1950s been entirely forgotten by the union leaders. In those years the automobile companies and other industries demolished the ideologically radical national labor unions.[18] In their place, they promoted their own brand of non-ideological, cooperative, company unions. These received the honorific title of "enterprise unions" and they lived happily ever after as such.[19]

Today, the handbook of the All Toyota Federation of Automobile Workers speaks of the interdependence of labor and management "comparable to the right and left wheels of the car. Both wheels are required for the automobile to move, and they move synchronously in whichever direction the car is headed for." In the long run, overlooking the letter of the law, and forging close personal relations between management and labor proved beneficial to the permanent workforce which joined the new type of bread and butter unions.

D. The United Kingdom

Thirty, twenty and even ten years ago, British union shop stewards were often more powerful than company presidents. Who would have predicted that a new scenario "From Turmoil to Cooperation" would begin a long run on the British stage? That is what is happening now. Probably, the people at Ford Motor Company in the United Kingdom[20] would *not* agree that the millennium has arrived; or that a major cure for the "English disease" has been found, but few would doubt that the coming of the Japanese has made a difference, even in England. British labor law now holds unions responsible for damages in tort, and limits picketing, secondary boycotts, and restricts work stoppages not preceded by a secret strike ballot.[21] But to this day English law does not require companies to recognize unions or bargain with them, or when bargaining, to

---

[18] *See generally* M. CUSUMANO, THE JAPANESE AUTOMOBILE INDUSTRY ch. 3 (1985) (This chapter contains much of Cusumano's original research.); Shimada, *The Perception and the Reality of Japanese Industrial Relations*, in THE JAPANESE MANAGEMENT CHALLENGE (L. Thurow ed.).

[19] Shimada, *supra* note 19, at 58-60. "Japanese style company union' systems also work to let labor and management have common purpose." OVERSEAS DEP'T SUMITOMO CORP. 11 (March 1987).

[20] *See* Basset, *A Nettle That Unions Must Grasp*, Fin. Times, Mar. 19, 1988, at 7; Buxton, *Body Blow for Dundee's Economic Revival*, Fin. Times, Mar. 19, 1988, at 7; *Ford Drops Scotland Plant Plans Following Dispute With Unions*, Investor's Daily, Mar. 18, 1988.

[21] Townshend-Smith, *Labor Law In Great Britain and America: the Similarity of the Underlying Themes*, 9 GEO. MASON U.L. REV. 245-308 (1987). *See* Napier, *Strikes and the Individual Worker — Reforming the Law*, 46 CAMBRIDGE L.J. 287-302 (1987).

define mandatory subjects as in the United States. British labor agreements still are not enforceable contracts.

What has changed is that the law no longer predominates; the practice increasingly does. The entry of Japanese manufacturing companies into Great Britain, as well as that of a number of non-Japanese corporations, was conditioned upon the recognition of a single union per plant and on an agreement containing no-strike guarantees. In return for that, English workers were given Japanese style management, emphasizing information sharing and egalitarian plant cultures.

For example, the three year old agreement between Nissan and the principal engineering union ("AUEW") provides for sole bargaining rights for one union; a Company Council made up of managers and directly elected employee representatives to consult and negotiate; the option of settling disputes by mutually agreed upon, binding interest arbitration or striking upon expiration of the agreement; complete flexibility in the use of labor by the company and acceptance of technological change and all necessary training by employees; a few labor grades, no rigid job descriptions, merit pay progressions for all employees; and egalitarian employment conditions, including monthly pay, common hours of work, sick pay, no time clocks, and layoff procedures.[22]

The spread of the Nissan concept had the predictable effect on British organized labor. In January 1988, the leaders of the Transport and General Workers Union went to the Japanese Embassy in London to urge the Government to use its influence and convince the Japanese companies to drop their insistence on reaching strike-free agreements under an arrangement whereby British unions were competing in a coordinated way for sole bargaining rights. The union pleaded for a "return to what . . . was a previous and successful method of establishing good industrial relations."[23]

What is it that successful competitors do that the less successful companies do not do? Would less successful companies be better off if restrictions were placed on their competitors? On the contrary; experienced business strategists tell us that the structure of the business firm must be changed in order to operate in the business environment of the 1980s. There are several trends which dominate this business environment, according to Kenichi Ohmae, of McKenzie & Company: slow domestic growth; slowdown in market growth for key industries; the uneven distribution of resources between nations; and growing international complexities due to the many legal, tax and monetary systems, not to mention demanding political systems and ideologies.[24]

---

[22] *Nissan: A Deal For Teamwork and Flexibility?*, INDUSTRIAL RELATIONS RESEARCH REPORT (U.K.) 2-7 (May 21, 1985).

[23] Basset, *TGWU Appeals to Japan Against Strike-Free Deals*, Fin. Times, Jan. 20, 1988, at 10.

[24] K. OHMAE, THE MIND OF THE STRATEGIST 165 (1983).

II. WINNING STRATEGIES

Firms respond to these conditions in various ways. Of particular interest to us are (1) the shifts from being *labor-intensive* to becoming *capital-intensive*; (2) the shift from *multinational* to what Ohmae calls *multilocal*; and (3) the shift to an entirely new business value-system.[25]

The shift from *labor-* to *capital-intensive* industries can be observed in the automobile, appliance, and semi-conductor industries; it expresses itself in a reduction of labor content from about 25% to 10%. "The labor-intensive industries of yesterday are becoming capital-intensive. They no longer absorb large amounts of labor."[26]

Ohmae writes:

> Managers . . . who have failed to catch onto what has been happening find their companies suffering excessive labor costs. There is nothing to prevent them from investing to become more capital-intensive; but it will do them no good, because they don't know how to get rid of the people or how to generate enough jobs.[27]

The shift from being *multinational* to becoming *multilocal* explains, for example, why a company like Honda enters a foreign high labor cost market. Ohmae points out that at one time multinational corporations established plants in low labor cost areas and focused their attention on bringing down variable costs. Today they are shifting their operations to fewer locations where they can secure large local markets. "In other words they are turning into *multi-local* companies."[28]

But even these successful local operations (IBM & Pepsico are examples) encountered difficulties in coping with changes that confronted them. What has happened, Ohmae suggests, is that in these global firms "brains and muscles . . . [kept being] separated, destroying the entire body's coordination. . . . On one hand there were the brains; on the other there was the muscle — the people of the enterprise. They were there to make the plan a reality, to carry out the brains' instruction."[29] Here is where Western companies differed from their Japanese counterparts. In the West we were told:

> there were smart people and dumb people. The smart people were so smart that they had to spell out every detail of the corporation's strategy for three to five years into the future. They planned everything; they knew the job description of every function. Thus the dumb people never got the big picture. Instead of giving up on the smart people, they just concentrated on the boring little details that they were still allowed to control.[30]

---

25 *Id.* at 189-214.

26 *Id.* at 190.

27 *Id.*

28 *Id.* at 199.

29 *Id.* at 206.

30 *Id.*

This did not happen in Japan "where people take their career paths for granted . . . [and the] separation of brain and muscle rarely happens."[31] Instead, the leading companies:

> offer job security, tenure-based promotion, and internal development of people instead of global recruiting campaigns. They provide endless opportunities for employee participation. They regard their people as members, not mere employees. They promote a common value system. Knowing the critical importance of the corporation's long-term well-being, they display a real commitment to the business they are in instead of pursuing strictly financial objectives with only the stockholders in mind.[32]

The people value system of which Ohmae writes is not limited to labor-management relations. This was brought home to me on my last trip to Japan with a group of mid-western business people. We met Isamu Sakamoto, whose name is not a household word unless you are in the aluminum wire business or a Sumitomo stockholder. Sakamoto, a retired executive and now senior advisor, talked to us about the different way in which Japanese and Americans think about product quality and delivery time.[33]

In the United States, he said, the relationship between buyers and sellers is closely defined by contract and the position of buyers and sellers is equal. Not so in his country, where the buyer's position is usually *superior* to that of the seller. "[I]n the [United States] the responsibility of a seller is to supply products which are made in compliance with the specifications provided . . . no more . . . no less."[34] But according to Japanese trade customs, merely to supply products complying with the contract is just not enough. There is implied that sellers are expected to supply *better* products than specifications require, even if the contract does not say so. If the seller supplied a product which only satisfies the *specifications* and did not satisfy the buyer's *expectations*, the seller could lose a chance at the next bid, even though the contractual responsibility was fulfilled. Consequently, there is quality competition in Japan, according to Sakamoto, which could probably never occur in the United States. This quality competition may be done within a very small range "like increasing the electrical conductivity of aluminum from 61.4% to 61.6% when the minimum value required by the standard is 61%."[35] Although this is a very small range, Sakamoto assured us that enormous efforts on the part of Sumitomo are required for such an improvement. Why do not buyers specify their expectations explicitly in the first place, we asked? "Regrettably," said Sakamoto, "such an idea is useless, be-

---

[31] *Id.*

[32] *Id.* at 207.

[33] Address by Isamu Sakamoto, Senior Advisor, Sumitomo Corp., Osaka, Japan (Oct. 17, 1986).

[34] *Id.* at 3.

[35] *Id.* at 4.

cause the new standard would merely become a new start line for new competition."[36]

As for delivery times, he noted another subtle difference.

> In the [United States], if a seller is delayed in delivering goods, he only has to pay a penalty, because that is what's in the contract. . . . This . . . is not accepted in Japan even under the same contract conditions. . . . [B]uyers expect sellers to prevent delayed deliveries, trying to make every possible effort at any cost, even when it is economically advantageous to the sellers . . . [t]o delay . . . delivery and [just] pay a penalty for it.[37]

Sakamoto told us he has never seen a domestic contract in Japan containing a *force majeure* clause excusing delivery because of unexpected delays due to labor disputes. In his country it is the management's "most important and sacred responsibility to avert labor disputes by all available means so that delivery delays do not occur."[38]

For a lawyer, I have strayed far from the law. This is not because I believe that law is unimportant in determining competitive success internationally. Of all legal categories, international trade agreements will get our closest scrutiny at this conference, but it appears to me that the labor relations *laws* of the major competing nations are not so very different from one another that they affect competitive edge. The labor relations *practices*, however, do make a difference — a big difference.

III. INVISIBLE ASSETS

I would like to conclude by bringing to your attention an exciting idea which contains the answer to the challenge of competitiveness. Hiroyuki Itami, a Japanese scholar from Hitotsubashi University in Tokyo, also specializes in competitive strategies. He recently authored a study entitled *Mobilizing Invisible Assets*,[39] in which he distills the common factors in Japanese competitive success. Itami arrived at two useful concepts.

First, that of *invisible assets* of a firm, which is simply defined as the knowledge, skills, and experience of committed people.[40] Itami believes that in the West we have tended to define assets too narrowly "identifying only the assets which can be measured such as plants and equipment."[41] "Yet," he tells us, "the intangible assets, such as a particular technology, accumulated consumer information, brand names, reputation, and corporate culture, are invaluable to a firm's competitive

---

36 *Id.*

37 *Id.* at 5.

38 *Id.* at 6.

39 H. ITAMI, MOBILIZING INVISIBLE ASSETS 1 (1987).

40 *Id.* vii.

41 *Id.* at 1.

power."[42] In fact he believes that "these invisible assets are often a firm's only *real* source of competitive edge that can be sustained over time."[43] Itami offers a vivid analogy:

> To make a painting, the artist has to be physically present in the room and has to have enough money to buy brushes, canvas and paint. Human, physical and monetary resources are needed to paint a picture, but not even resources will make the painting a masterpiece. For that, something extra is needed, the painter's artistic sense and his technique — his invisible assets.[44]

You can visualize a lawyer writing a brief!

The accumulation and depreciation of invisible assets are determined by a firm's strategy. Itami believes that the manager must discover the logic that will influence people's psychology, for it is people who make or break the strategy. People are the invisible asset and people also develop and maintain invisible assets. When Ross Perot assures us that his thirteen points for a renewed GM will not cost a penny, he will find Itami in full agreement. Invisible assets, according to Itami, can often be generated with no additional effort in the course of the everyday operation of the firm.

Itami's second concept is also quite uncomplicated. He speaks of "*overextension*" as a growth strategy. This idea can be best described by the adage that *a company's reach should exceed its grasp*. Itami explains: "One reason to take an overextension strategy is to get a headstart in an area the firm intends to enter later. The invisible assets acquired in an early attempt, through tension and crisis, become the driving force as the company becomes competitive in that field."

Economists of the past emphasized demand, capital investment, production and so forth; all important, measurable aspects of competitiveness, but Itami's insights as well as those of Sakamoto, and Perot suggest that it is the "soft, behavioral, dynamic" elements that make the *real* difference. They all speak of companies that create people.

Ford is now advertising on TV that among *American-made* cars Ford rates highest on dependability. Is this not a strangely weak advertisement offered to us as an alternative to Honda and Toyota, which regularly run off with the honors in *Consumer Reports*? There is no *labor law* that stands in the way of *making American cars the most dependable in the world.*

Successful businesses (and law firms) must have a clear picture of the effect of daily operations on accumulating invisible assets. If your firm decided on buying a TV ad, it could have its name in front of millions of people in no time at all. On the other hand, having and maintaining a great reputation for excellence in your specialty of the law is a

---

[42] *Id.*
[43] *Id.* at 12.
[44] *Id.* at 14-15.

superior, invisible asset of perhaps global significance. Group purpose, creativity, information processing, training and developing people — these count most of all, and, we can all agree, are relatively unaffected by the legal climate.