

1963

Labour Lore and Labour Law: A North American View of the Danish Experience

Harry W. Arthurs

Osgoode Hall Law School of York University, harthurs@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](https://creativecommons.org/licenses/by-nc-nd/4.0/).

Recommended Citation

Arthurs, Harry W. "Labour Lore and Labour Law: A North American View of the Danish Experience." *International and Comparative Law Quarterly* 12.1 (1963): 247-281.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

LABOUR LORE AND LABOUR LAW: A NORTH AMERICAN VIEW OF THE DANISH EXPERIENCE

By

H. W. ARTHURS *

INTRODUCTION

THE Danish success in achieving industrial peace is so universally acclaimed that a study of it requires no apologies. But apart from the intrinsic appeal of a successfully functioning system, a student of legal institutions and arrangements cannot fail to gain a deeper understanding of his immediate legal environment by examining it from a new vantage-point. It is the latter consideration, as much as the former, which motivates this study. If, as Holmes says, the life of the law is not logic but experience, we should not hesitate to profit vicariously from the experience of others.

I am anxious to point out that I do not read or speak Danish. The presence of this language barrier to primary materials forced reliance upon two other major sources of information: *First*, translations of basic public documents, English-language pamphlets on Danish labour relations and labour law, and the classic study of Professor Galenson.¹ In so far as insights culled from these sources may appear in this study, my debt to them is gratefully acknowledged. I do not, however, feel entitled to claim the scholarly exactitude which can only come from first-hand research. *Secondly*, interviews with persons engaged in labour affairs in Denmark. Interviews often reveal attitudes and subtleties not readily discernible in printed matter; on the other hand the persons interviewed unanimously asked, as the price of frankness, assurances that views expressed would be reported without attribution of source. Accordingly, I ask the reader's indulgence for my failure to identify the source of many statements.

* Assistant Professor, Osgoode Hall Law School, Toronto. This study was made possible by the generosity of the Canadian Department of Labour-Universities Research Committee. Such realism as may flesh the bare bones of statutory analysis is entirely attributable to the intellectual hospitality of officials of the Danish Government, the Danish Employers' Confederation, and the Danish Federation of Trade Unions, together with several individuals professionally engaged in labour relations matters. [For a comparative view of labour law in other European countries, see *Labour Law in Europe: with special reference to the Common Market*, International and Comparative Law Quarterly Supplementary Publication No. 5 (1962).—Ed.]

¹ Galenson, *The Danish System of Labor Relations, A Study in Industrial Peace* (1952).

THE BACKGROUND ²

The roots of collective action in Denmark run deep. The medieval Guild system, with its tradition of organisation for both masters and journeymen, persisted in Denmark, formally, until 1862. By this date the industrial revolution had begun, although industry was still organised primarily in small workshops employing an average of twenty to thirty workers. Significant industrial expansion dates from about 1870, and was from its inception accompanied by the development of organisations of employers and employees. Whether these organisations were directly descended from the Guilds is a matter of controversy; early attempts at unionism certainly stemmed from socialist agitation. There is no doubt, however, that dissolution of the Guilds did leave a vacuum in the labour market which—given the organisational tradition—was filled within twenty-five years by the emergence of centralised union and employers' organisations. These central organisations have played a pre-eminent role in the development of the Danish labour market, and in the rules which govern it.

Without at this point tracing the internal structure of the Danish Employers' Confederation (*Dansk Arbejdsgiversforening* or "D.A.") and the Danish Federation of Trade Unions (*De Samvirkende Fagforbund*, colloquially the "Landsorganisation" or "L.O.") both of these organisations had appeared by 1899, and were in that year to meet in a major test of strength.

A lockout of major proportions was called—involving some 20 per cent. of the non-agricultural work force—for the purpose of waging preventive war against the growing power of the unions. The dispute was bitter, long (some 3 million working days were lost), and costly to both sides. It is the genius—and the good fortune—of the Danes that at this lowest point in their industrial relations they were able to lay the groundwork for a remarkably stable and workable system. The settlement of the lockout, in September 1899, was embodied in a document which has formed the basis of substantive Danish labour law down to the present (subject, only, to a revision in November 1960).

THE BASIC AGREEMENT

A synopsis ³ of the ground rules laid down in this Agreement is useful:

Section 1 (1) In recognition of the desirability of having questions concerning wages and working conditions settled by

² See Galenson, *op. cit.*, c. 1.

³ See Appendix 1, *infra*, for the full text of the "September Agreement" of 1899, as amended in November 1960.

the conclusion of collective agreements, if necessary with the participation of the central organisations, the central organisations bind themselves neither directly nor indirectly to obstruct employers and workers from organising themselves within the organisational framework of the central organisations.

Section 2 (1) When a collective agreement has been concluded, and for its duration, no stoppage of work (strike, blockade, lockout, or boycott) may be effected within the scope of the agreement unless warranted by the "Standard Rules for Settlement of Labour Disputes" or by existing collective agreements. Sympathetic strikes or sympathetic lockouts may, however, be effected in accordance with current agreements and legal practice.

(3) & (4) provide for a vote of any group affected by the work stoppage, and for notice of any proposed work stoppage to the opposite central organisation.

(5) obliges the central organisation "not to support, but by all reasonable means to prevent, unlawful stoppages of work" and to bring such stoppages to an end.

Section 3 The central organisations shall be responsible for ensuring that agreements concluded between them are respected and carried out by all affiliated organisations.

Section 4 (1) guarantees management's rights "to direct and distribute work and to use what labour may in their judgment be suitable" subject to the responsible exercise of this right so as not to violate workers' rights.

(2) prohibits unilateral change of piece rates through job re-evaluation unless the worker is compensated for any loss.

(3) provides protection against arbitrary dismissal, and the remedy therefor.

Sections 5 & 6 draw the line between managerial personnel and employees.

Section 7 (1) provides for three months' notice of termination of collective agreements.

(2) automatically extends the provisions of a lapsed agreement until a new agreement is signed or a work stoppage occurs.

- Section 8 acknowledges the desirability of shop stewards.
- Section 9 (1) The two central organisations will promote co-operation between the organisations and work for peaceful and stable working conditions . . . through joint industrial committees. . . .
- (2) Collective agreements should aim at wage systems which will promote productivity. . . .
- (3) No party may prevent a worker from doing as much and as good work as his abilities and his training permits.
- Section 10 commits breaches of this agreement or of collective agreements to the jurisdiction of the Labour Court ⁴ subject to prior consultation between the parties.
- Section 11 provides that this agreement continues to bind affiliates of the two central organisations notwithstanding their withdrawal from membership.

It is important to note that for over sixty years this Agreement has been virtually the only substantive "law" in the field of labour relations; that this "law" has been self-imposed, by agreement not legislation; and that the enforcement of the rules has been entrusted to the Labour Court, an essentially private tribunal (albeit one with statutory warrant).

With the Basic Agreement as a framework, the functioning of the system can best be understood by a brief description of the two central organisations, the process of collective bargaining, and the network of tribunals erected by the parties to administer the system.

THE CENTRAL ORGANISATIONS

A. The Danish Employers' Confederation

Employer organisation in Denmark has no counterpart in North America. The Danish Employers' Confederation ("D.A.") embraces approximately 18,000 employers who employ approximately 50 per cent. of the work force (including agriculture). Most firms not affiliated to the D.A., either directly or through a trade association, are organised into independent trade associations.

The D.A. carries on an extensive and intensive management training programme at both the supervisory and executive level,⁵ a statistical and research operation, as well as public relations and legislative activities in the general interests of its members. Its primary function, however, is the conduct of industrial relations,

⁴ Properly called the Permanent Court of Arbitration.

⁵ Including two schools which run on a more or less full-time basis offering excellent seminars of varying lengths on a variety of topics.

two of its constitutional objects being "to contribute towards the avoidance as far as possible of disputes between employers and workers or to seek their solution by peaceful means without work stoppages," and "to contribute towards the maintenance of a spirit of solidarity and a common approach on the part of employers' organisations so as to protect employers' common interests in all questions concerning wages and working conditions" (section 2).

The effective achievement of these objectives requires a delegation by individual employers to their association of substantial authority in matters relating to industrial relations. That this has been accomplished has been attributed⁶ to a variety of factors: a tradition of organisation under the Guilds (some of which were actually transformed into employers' associations); the small unit size of many employers requiring organisation for self-protection; the absence of any extreme competitive spirit because of a limited domestic market; and a small and stable community structure.

The D.A. is primarily a federation of trade associations, with provision being made for membership by individual firms ineligible to join any trade association. Its government is hierarchical, with a large general assembly (600 members), a central committee of fifty-four, and an executive committee of fifteen. As might be expected, the latter is the effective policy-maker. Day-to-day affairs are conducted by a substantial secretariat whose knowledge and professional skills in all matters relating to the D.A.'s programme are impressive. The attitude of the professional labour relations personnel towards labour leaders with whom they are in constant contact is, in my opinion, a major factor in the Danish success. Certainly it is radically different from the typical North American attitude and is in advance, as well, of the attitude of many individual Danish employers. As Galenson notes: "The chief work of the secretariat is the amicable adjustment of labour disputes; it is the executive committee and the higher representative bodies that are called upon to conduct industrial warfare."⁷ This devotion to "amicable adjustment" seems to stem not merely from a respect and understanding based upon constant personal involvement. It is rather a considered professional judgment, unclouded by that personal financial or psychological commitment to the outcome of the particular dispute, which an employer inevitably has.

The constitution of the D.A. forbids affiliates (without the consent of the executive committee) to bargain over wages and

⁶ See Galenson, *op. cit.*, c. 5.

⁷ At p. 81.

working conditions, or to enter into collective agreements. The D.A. itself conducts negotiations on behalf of its affiliates and "recommends" wage policies to which they inevitably adhere.⁸ D.A. affiliates are required to attempt to settle disputes with their union counterpart but, failing settlement, carriage of the matter passes to the D.A. which has exclusive authority to deal with the L.O.

The imposition of economic sanctions against trade unions is also regulated by the D.A. which, in its early years, followed a rather aggressive policy. Lockouts (a phenomenon not unknown in Denmark) must be authorised by the unanimous vote of the executive committee or a three-quarters vote of the central committee, upon application by one of the D.A. affiliates. All member employers are required to obey a lockout order, subject to their right to apply for individual exemption in special cases. Employers not involved directly in a work stoppage are required to abstain from profiting by accepting work that would have been performed by the employers engaged in the dispute, and from employing striking or locked-out workers. The D.A. has power to order its members to boycott non-member employers who act contrary to the interests of members involved in a stoppage.

All of these provisions are enforceable by fine (imposed by the D.A. Arbitration Board) and—ultimately—by expulsion. The D.A. maintains a special "Industrial Relief Fund," financed by an 0.25 per cent. payroll levy, from which benefits are paid to employers engaged in work stoppages.

The D.A. also provides representation for its members before the various labour tribunals, provides bargaining data and negotiators, and protects the interests of its members against "unfair" wage competition by non-members.

The D.A.'s extensive activities are financed by compulsory contributions calculated as a percentage of the payroll of each member. The right of members to resign is stringently circumscribed (except where a business is sold or wound up) and neither resignation nor expulsion releases a member from his existing obligations. Structurally, the D.A. is thus designed to withstand internal pressures from dissident members against centrally-formulated policies. In sum, the organisation is a complete, effective labour relations agency armed with the human and material resources to protect the interests of its members.

⁸ While couched in terms of a "recommendation," D.A. wage policy is binding upon all affiliates. D.A. Constitution, s. 27d.

B. The Danish Federation of Trade Unions

The Danish Federation of Trade Unions (the "L.O.") represents approximately 97 per cent. of all organised workers, 60 per cent. of the total work force (including agriculture) and 90 per cent. of those persons employed in manufacturing, construction, transportation, and communications. As the basis of an understanding of its internal organisation, it must be noted that one union (the Labourers' Union) comprises approximately 50 per cent. of the total membership, while the smallest affiliates (comprising 40 per cent. of the total number of affiliates) account for only 4 per cent. of the total membership. Without detailing the development of the present structure,⁹ strong centrifugal forces are obviously to be expected. Complicating the situation are the multiplicity of small unions organised primarily on craft lines.

The L.O. generally offers to its affiliates public relations and legislative representation, adult education and union leadership training, and statistical research. In addition, the L.O. has been active in politics through its affiliation with the Danish Social Democratic Party,¹⁰ and has fostered a number of consumer co-operatives.

Although each affiliated union nominally preserves sovereignty over its own affairs (including the execution of collective agreements) and is not bound by L.O. directives, the L.O. does exercise considerable influence over its affiliates. This influence can only be understood within the context of the Basic Agreement. Because that Agreement demands that the L.O. represent its affiliates in negotiations with the D.A., it has conferred upon the L.O. a position of prestige which enables it to co-ordinate and plot collective bargaining strategy. This is customarily accomplished by an inter-union conference convened by the L.O. in advance of negotiations.

Similarly, the Basic Agreement provides that the L.O. represent its affiliates before various tribunals and thus equips the L.O. with the power of moral suasion in the settlement of disputes which come before those tribunals. In regard to strikes and lockouts the L.O. may (but seldom does) withhold strike assistance if it disapproves of a strike. Finally, the L.O. provides machinery for the adjudication of jurisdictional disputes.¹¹

⁹ See Galenson, c. 3.

¹⁰ This "affiliation" takes the form of consultation, financial contribution, and representation in party councils. It does not involve formal membership on the fashion of the English Labour Party, or Canadian New Democratic Party.

¹¹ See *infra*.

Organisationally, the L.O. resembles the D.A. in several respects. Like the D.A., the L.O. receives a *per capita* levy from its affiliates; as in the D.A., the attitude of the L.O. professional staff¹² can only be characterised as enlightened. However, while the L.O. appears to enjoy a degree of authority over its affiliates far greater than that enjoyed by British¹³ and North American¹⁴ labour federations, its authority falls short of that enjoyed by the D.A. Because the L.O.'s strength derives from the pressure of external forces—those generated by the Basic Agreement—rather than from a constitutional foundation, its ability to advocate and execute policy is often inhibited.

RECOGNITION, THE DUTY TO BARGAIN, THE RIGHT TO ORGANISE

The problem of employer recognition of unions and the refusal to bargain collectively which so vexed North American labour relations prior to the passage of compulsory collective bargaining legislation—with its residue of mistrust and antagonism—has not been a significant problem in Denmark since 1899. The September Agreement of that year is an implicit acknowledgment by each party of the other's right to pursue its legitimate objectives and (in its present draft) expressly recognises the desirability of collective agreements and the rights of self-organisation.

In the few recognition disputes which have occurred in recent decades (with unaffiliated employers) the use of economic pressure has been held lawful. Thus Danish labour, like British labour, has exhibited little interest in constructing an elaborate legal mechanism, on the North American model,¹⁵ to deal with the problem of recognition. Rather, it has been thought that a union too weak to compel recognition lacks the requisite bargaining power effectively to negotiate a collective agreement.

The allied problem of employer interference with union membership was similarly solved by the September Agreement. From its

¹² Unlike the D.A., the L.O. does not employ a lawyer on its staff.

¹³ Flanders and Clegg (eds.), *The System of Industrial Relations in Great Britain* (1960), p. 174 *et seq.*

¹⁴ Goldberg, *A.F.L.-C.I.O.: Labor United* (1956).

¹⁵ In both the United States and Canada an administrative agency (the "labour relations board") is assigned the task of determining whether or not a particular union represents the majority of employees in an enterprise or some convenient portion thereof. Armed with the board's "certificate" of majority status, a union is entitled to require of the employer that he bargain with it, in good faith, with a view to concluding a collective agreement which will bind all employees. While an employer is free to recognise and deal with a union without resort to the "certification" procedure, in Canada, at least, the existence of the legal method of securing recognition from an employer displaces the union's right to assert economic pressure for the same end: *Gagnon v. Foundation Maritime Ltd.* [1961] S.C.R. 435.

inception the Labour Court regarded employer activity designed to discourage union membership as an attempt to derogate from the September Agreement by attempting the destruction of the other party. It is Galenson's thesis that: "[I]t was in removing the troublesome issue of the right to organise from the Danish labor arena that this unique document made its greatest contribution to industrial peace."¹⁶

It may be useful to speculate upon the reasons for the failure of American¹⁷ and Canadian¹⁸ legislation, protecting the right to organise, to bring to an end labour strife caused by the refusal of some employers to recognise unions or to allow their employees to participate in them. Might one reason be the feeling of North American employers that the right to organise, and the corresponding duty to recognise, unions was thrust upon them by an unfriendly legislature at the urging of a politically powerful labour lobby? The attitude of the Danish employer, by contrast, is that he enjoys a proprietary interest in a system based upon a consensus (The Basic Agreement of 1899) to which he has voluntarily subscribed. As a "law-maker" the employer is thus psychologically committed to adherence to the law.

THE CONCILIATION BOARD

The major intrusion of the Government into the system erected by the parties has been in the area of conciliation. The Conciliation Act of 1910, originally passed, and since amended, on the basis of joint management-labour representations to Parliament, establishes a Conciliation Board.

Three Conciliators are appointed by the Minister of Labour, on the recommendation of the Labour Court, for three-year terms, one retiring each year. They elect a chairman from among their number. Obviously, the Conciliators to be effective must enjoy the confidence of the parties, and the recently retired chairman of the Board, Mr. Erik Dreyer, held that position for approximately twenty-five years. In addition, a number of Mediators are appointed to assist the Conciliators, their tenure of office being identical.

The Conciliation Board maintains surveillance of labour conflict by requiring the filing of all collective agreements, and of notices of any work stoppage.

¹⁶ At p. 102.

¹⁷ National Labor Relations Act, 1935, 49 Stat. 449, as amended.

¹⁸ Collective Bargaining Act (Ont.), 1943; P.C. 1003 (Can.), 1944; Ontario Labour Relations Act, R.S.O. 1960, c. 202.

If there is an actual or threatened work stoppage of "social importance" a Conciliator has power to convene the parties for discussion following unsuccessful direct negotiations. He is also empowered to assist the parties in negotiating new agreements even though they have not terminated their direct negotiations. Upon being summoned by the Conciliator, the parties are required to designate their representatives and to attend before him.

As a condition of entering upon his duties, the Conciliator may require the parties to postpone a threatened work stoppage for a period not exceeding two weeks. In cases where the stoppage would affect "essential public institutions or services," is "of far-reaching social importance," or (though *per se* not important) would "be likely to prejudice decisively the possibilities of an amicable settlement of the dispute as a whole," a further two-week postponement may be imposed by the unanimous vote of the three Conciliators. In this special group of cases all three Conciliators may decide to intervene jointly.

To assist the Conciliator in obtaining a factually accurate view of the situation, he may compel the parties to furnish him with statements. Of course, Conciliators are charged with a standing obligation to "keep themselves acquainted with the general situation at the time as regards industrial conditions, and particularly wage conditions." Where, in the course of mediation, the Conciliator finds that matters of a technical nature have not been properly discussed by the parties, he may require them to resume direct negotiations and (subject to a time limit) may meanwhile adjourn the mediation proceedings.

The effective operation of the Act is best seen in the context of a discussion of the mechanics of collective bargaining. It is characteristic that the legislation dovetails with the Standard Rules for Negotiation established by agreement between the L.O. and the D.A.

THE COLLECTIVE BARGAINING PROCESS

Collective agreements in Denmark are usually entered into by "sub-organisations" affiliated to the D.A. or the L.O. (*e.g.*, between an employers' association representing all employers in the woodworking industry, and a group of unions representing (among them) the employees in that industry). Negotiations, however, are carried out under the aegis of the central organisations and subject to the Standard Rules for Negotiation of Agreements established by them.¹⁹ By virtue of these rules, all collective agreements expire on March 1. This date is significant in that it

¹⁹ See Appendix two, *infra*.

represents a compromise between union insistence upon a summer expiry date (timed to coincide with the period of high employment and high production levels) and employer insistence upon a winter expiry date (during the slack season).

Given this uniform expiry date, it was possible for the parties to create, and to adhere to, a tight schedule of negotiations.

The first move for a party desiring revision of an existing agreement is to deliver to the opposite party, prior to November 1, a list of proposed changes. Where no notice is given, the agreement remains in force. Negotiations then commence between the "sub-organisations," and continue until December 1, with or without the assistance of a Mediator. If the negotiations succeed, a new agreement is concluded; if they fail, the central organisations assume the onus at the next stage of negotiations. The "sub-organisations" report to the central organisation the progress of their negotiations, including those questions which have been settled and those still outstanding.

All bargaining from December 1 forward looks towards the submission of proposed collective agreements to both parties for ratification. For purposes of the ratification vote all sub-organisations are lumped together in eight occupational groups²⁰ which together embrace the entire work force. All results achieved at any stage in the bargaining after December 1 are incorporated in the proposed agreements later submitted for ratification.

After December 1 the central organisations appoint six-man negotiating committees which meet forthwith and begin to bargain. Bargaining demands are classified as "general" and "non-general," the former being those "relevant to all or the majority of fields covered by agreements, such as demands relating to hours of work, changes in rates of wages, changes in rules governing . . . holidays . . . , social amenities, and questions about the duration of agreements." The central organisations conduct negotiations on matters so defined, and on other matters mutually conceded to be appropriate for centralised bargaining. The Conciliator may be invited to assist informally at this stage.

These negotiations continue until December 20, at which time the Conciliation Board is advised officially of the state of the negotiations, and is invited to preside over the negotiations, with a view to their completion by January 20. During negotiations, the Conciliator may make proposals respecting concessions which would be conducive to amicable settlements. The dispute then enters the

²⁰ The eight are: metal trades; textile and clothing; food and drink; other industries, including woodworking; building and construction; transportation; graphic industries (including paper goods); office and commercial employees.

mediation stage. The Conciliator, after consultation with the representatives of both parties, prepares a proposed collective agreement, embodying the terms thus far agreed upon, together with terms which he has reason to believe are likely to be mutually acceptable.

While the central organisations are thus engaged in bargaining over "general" demands, the sub-organisations continue their negotiations over "non-general" demands under the supervision of the central organisations. If such negotiations are unsuccessful, the parties may remit outstanding issues to a Joint Committee or to the Conciliation Board. The Conciliation Board may commence to mediate the issues referred to it, or may also remit them to a Joint Committee.

The Joint Committees comprise partisan representatives from each of the central organisations, from each of the parties to the agreement, and from the occupational group within whose framework ratification must take place. All issues are decided by the Joint Committee by majority vote, and, failing a majority, by an umpire. The issues committed to the Joint Committee, which frequently involve the consideration of local conditions, or piece-rate structures peculiar to particular trades, may be decided before or after the conclusion of new agreements. All "non-general" demands not so dealt with are negotiated under the aegis of a Mediator, and his proposals will then be included in the proposed collective agreements to be voted upon by the various occupational groups.

The final step in the process is the submission by the Conciliator to the parties of a proposed collective agreement. In practice, where there is no hope that the parties will agree, the Conciliator usually withdraws. After consulting the parties as to the formal aspects of the proposed collective agreement, the Conciliator fixes a time within which they must accept or reject it. A ratification vote is then conducted by each of the parties by secret ballot which affords a simple negative or affirmative choice. The voting constituencies are the eight occupational groups, although there may be different agreements (with common "general" terms) before the various sub-organisations which comprise a particular occupational group.

The Conciliation Act establishes complex voting rules intended to prevent distortion of the result should a vigorous minority vote and an indifferent majority abstain. Similarly, provision is made for giving proper weight to the result of votes taken at union meetings rather than by membership ballot, since the results of all votes throughout the entire occupational group are pooled and

ratification or rejection is binding on all sub-organisations embraced by the group.

The actual mechanics of the collective bargaining process are, for a North American, irrelevant. What may be instructive is an attempt to distil the essential factors in the system which help to produce successful bargaining. Apart from the characteristic Danish régime of self-imposed law, there is an evident intertwining of the private and the public legal processes. The Conciliation Act is obviously tailor-made to fit the processes agreed to by the parties in the Standard Rules for Negotiation. At the same time, the Conciliator does not merely act as a conduit between the L.O. and the D.A. His ability to draft proposed collective agreements potentially enlists the prestige of the State on behalf of a particular settlement, and subjects the parties to the pressures of public opinion.²¹ This fact must be weighed against strong opposition from both labour and management to direct public intervention in the bargaining process, although the right of the Conciliator to postpone strikes "of far-reaching social importance" may represent some retreat from purely private negotiations. Again, there have been some eighteen occasions in the past fifty years when Parliament has chosen to legislate particular proposed agreements prepared by the Conciliator and rejected by one of the parties (usually management). Increasingly resorted to in recent years (most recently in 1961), parliamentary intervention may be inevitable where nation-wide bargaining has grave repercussions for the national economy.²²

Aside from *ad hoc* public intervention, the parties are free to make their own bargain. It is interesting to note that they have chosen to use the whole range of negotiating procedures from direct bargaining (initially); to conciliation (the Conciliator's role prior to his making a proposal); to arbitration (voluntarily, of non-general demands); to mediation (the proposed collective agreement advanced by the Conciliator). These procedures each are felt to be appropriate at the particular stage and in the particular circumstances in which they are invoked. Each procedure is only invoked when its use is agreed to by the parties—even mediation, since the Conciliator will not submit a proposed agreement for ratification

²¹ On the other hand, the statements made in conciliation proceedings may not be published (except with consent of both parties) and the proposed agreement is not published until it has been accepted or rejected. Thus, the extent to which public opinion can be mobilised is limited.

²² The so-called "Radical" (Centre) Party has from time to time advocated compulsory arbitration of negotiation disputes. The predominant Social Democratic Party, the D.A. and the L.O. have always hitherto resolutely opposed "government intervention" in the bargaining process, although the idea once again is enjoying some currency.

when one of the parties indicates strong opposition. Contrast this diversity of techniques with the North American practice which generally involves only two: direct bargaining (compulsory in both Canada and the United States), and conciliation (compulsory in Canada, voluntary in the United States). No doubt mediation and arbitration are distasteful to Canadian labour and management as general propositions, but their selective use under special circumstances by private arrangement ought to be examined.²³

Thirdly, the Danish process is geared to industry-wide determination of labour standards. Obviously, this avoids ruinous competition based on wage-cutting that has characterised labour strife, at least in some Canadian industries.²⁴ This creates the problem of adjusting general standards to particular circumstances which the Danes have solved by the stratification of negotiations between the central and sub-organisations, on the basis of general and non-general demands. Similarly, centralised negotiations generate pressures for disputes to be confined to major issues with the resultant willingness to sacrifice smaller interests for the general good when settlements are in the balance. This tends to leave pockets of dissatisfaction which may lead to illegal localised strife. On the other hand, centralised bargaining does make it possible for the strong to help the weak by gaining bargaining demands on an industry-wide basis that could never be accomplished by individual participants.

Finally, the Danes have constructed a rigid time table of negotiations. The uniform expiry date of agreements prevents the "escalator" effect of successive bargaining demands. The progression of negotiations automatically from one stage to the next on predetermined dates means that the parties are unable to abuse the legally established process by delays calculated to obtain strategic advantages. (This particular characteristic of the Canadian conciliation process has received considerable adverse criticism.²⁵) Both parties know that agreements must be denounced by February 14, that the agreements expire on March 1, and that a strike or lockout may then occur, subject only to the Conciliator's limited powers to postpone the stoppage. The Basic

²³ The Ontario Labour Relations Act, R.S.O. 1960, c. 202, s. 14, provides that the parties may, by agreement, submit their differences to mediation rather than conciliation.

²⁴ Most notably, perhaps, the residential construction industry in Metropolitan Toronto. See, e.g., Report of the Royal Commission on Labour-Management Relations in the Construction Industry (Ontario, 1962); cf. Carpenter, *Employers' Associations and Collective Bargaining in New York City* (1950), pp. 373-374.

²⁵ Woods, "Canadian Collective Bargaining and Disputes Settlement Policy: An Appraisal" (1955) 21 C.J.E. P.S. 447.

Agreement provides that collective agreements remain in force, although denounced, until a work stoppage occurs or new agreements are executed. This fills a hiatus which would otherwise exist when, after the expiry of a collective agreement, employees apparently revert to the common law master-servant relationship.

ADMINISTRATION OF THE COLLECTIVE AGREEMENT

The Basic Agreement provides:

“ When a collective agreement has been concluded, and for its duration, no stoppage of work (strike, blockade, lockout, or boycott) may be effected within the scope of the agreement unless warranted by the ‘ Standard Rules for the Settlement of Labour Disputes ’ or by existing collective agreements. Sympathetic strikes or sympathetic lockouts may, however, be effected in accordance with current agreements and legal practice.” [Section 2 (1).]

This provision is a reflection of a dichotomy drawn in Danish labour law between “ interest ” disputes and “ legal ” disputes. Interest disputes arise during negotiations, are governed by the Rules for Negotiation of Agreements above referred to, and contemplate resort to economic self-help. Legal disputes involve rights arising from the Basic Agreement or from a collective agreement. The process of settlement is prescribed by the Standard Rules for the Settlement of Labour Disputes, by the Basic Agreement, and by the Labour Court Act. Adjudication of legal disputes is committed to the Labour Court where a breach of a collective agreement or the Basic Agreement is alleged, or to Industrial Arbitration where the question is one of interpretation. As indicated by section 2 (1) of the Basic Agreement, work stoppages in legal disputes are only permitted in the circumstances set forth in the Standard Rules for Settlement of Labour Disputes. The obvious difficulty of drawing a line between interest disputes and legal disputes is best illustrated by controversies arising during the currency of a collective agreement about matters not expressly provided for therein, *e.g.*, wage rates for new types of work. Such disputes are generally regarded as interest disputes, and the right to strike exists unless expressly waived by agreement.²⁶ By contrast the British reluctance to categorise disputes as “ interest ” disputes or “ legal ” disputes

²⁶ Galenson, p. 244. The American position is similar. By contrast, under Canadian legislation all strikes during the currency of an agreement are illegal, although arbitration is only available for questions involving the interpretation, application, administration or violation of an agreement. There is no method for adjusting interest disputes during an agreement.

has precluded the establishment of a system of tribunals to adjudicate at least the latter type. Economic sanctions (or the threat thereof) are thus frequently employed to ensure adherence to collective bargaining obligations.²⁷

The "Standard Rules for the Settlement of Labour Disputes" were adopted in 1908 by the L.O. and the D.A., and since 1934 have been part of every collective agreement which does not specify some other adequate provision for Industrial Arbitration.²⁸ By section 1, the parties "agree to try to settle any trade disputes by mediation, or, if necessary, by arbitration." Disputes are committed in the first instance to a Mediation Committee, and, failing settlement, to negotiations between the two central organisations.

If the dispute involves "the interpretation of an existing price-list with general conditions or a general [collective] agreement" between the parties, either party may refer it to arbitration; in these cases there is no right to engage in work stoppage. In all other cases mediation must precede a work stoppage, subject to three exceptions:

- (a) both parties may agree to arbitration;
- (b) in cases involving "a suspension of payment" or if "the regard for life, welfare or honour affords compelling reasons," there may be a work-stoppage before mediation;
- (c) the Rules are without prejudice to the right to engage in a sympathetic work stoppage ordered by the two central organisations.

The issue of "arbitrability," which turns on the existence of an agreement, is left to the Labour Court. The Rules provide for the selection of an *ad hoc*, tripartite, board of arbitration, familiar in Canada, where arbitration of such disputes is compulsory, and in the United States where, though voluntary, arbitration is almost universal.

There exists, in addition to the *ad hoc* boards of arbitration, a permanent arbitral tribunal known as the Contract Board of 1939, established in that year by agreement between the L.O. and the D.A. The Board readjusts, semi-annually, the cost-of-living supplement which has been enjoyed by Danish workers since the 1930s. One of its most important functions, however, is to hear and determine questions arising out of the interpretation of the proposed collective agreement prepared by the Conciliator, should the parties

²⁷ Kahn-Freund, "Labour Law," in *Law and Opinion in England* (1959), at p. 232 *et seq.*

²⁸ *Cf.* Ontario Labour Relations Act, s. 34 (2), which also provides a standard-form arbitration clause in the event that the parties have failed to include such a clause in their agreement.

be unable, by negotiation, to agree upon an interpretation. Since the Contract Board is charged with the duty of ascertaining the "intent of the parties" in agreeing to the Conciliator's proposal, it is perhaps natural that the members of the Board should be the chief D.A. negotiator, his L.O. counterpart, and the Conciliator.

There is no real distinction between those matters decided by the Contract Board of 1939 and those decided by arbitration, save that the former were usually "general" questions at the negotiation stage, while the latter were "non-general" or local issues, peculiar to particular trades or enterprises. Frequently, too, matters which involve technical knowledge of the industry and its practices are decided by arbitration.

Several problems which form the hard core of contract adjudication in North America are without counterpart in Denmark. The most important of these are seniority and unjust discharge. The absence of disputes on these two issues is easily explained by the broad management rights clause [section 4 (1)] in the Basic Agreement, acknowledging the "employers' right to direct and distribute work and to use what labour may in their judgment be suitable," subject only to exercise in a "responsible manner" and to vested rights under collective agreements.

There has been no significant union pressure for a seniority system (to confer a preference in promotion, in lay-offs, and in rehiring upon senior employees) such as that which North American unionists prize so highly. On the one hand, employers tend to exhibit loyalty to the older worker, partially because he is more skilled, productive and stable, partially because of the more intimate relationships in the smaller-scale Danish enterprises. On the other hand, Denmark's comprehensive and advanced scheme of welfare services (coupled, recently, with full employment) mitigate the harsh consequences of the loss of a job.

The treatment of the unjustly discharged employee is a unique illustration of the Danish attitude towards labour relations. Until 1960 there was no "due process of law" for the discharged employee. The occasional irresponsible acts of individual employers in discharging employees without cause tended to provoke retaliatory wildcat strikes (which were, of course, illegal). In revising the Basic Agreement in November 1960 the D.A. agreed to a restriction on the broad management rights clause by the insertion of a proviso that "the right to dismiss individual workers . . . not be exercised in an arbitrary manner" [section 4 (3)]. A procedure for local (and then central) negotiations in the case of alleged unjust dismissals was established, culminating in adjudication by a permanent, tripartite Board. The Board is empowered to compensate,

but not to reinstate, the unjustly discharged employee, the unions having acknowledged that the continued presence of the discharged employee in the plant would constitute an ongoing challenge to the authority of the employer.²⁹

Thus both sides have realised that unfettered employer discretion may create industrial friction, and by contract have agreed to a moderate restatement of that discretion, neither side pressing for complete control.

In one area of collective agreement administration—displacement caused by technological change—the Danes have since 1947 faced up to a problem which awaits institutional recognition by North American labour. The basic commitment of both parties to increased productivity and efficiency flows from section 9 of the Basic Agreement. In 1947, the L.O. and the D.A. agreed to establish in each enterprise a joint Works Committee, representing both labour and management whose functions are defined as follows [section 5]:

(a) With a view to furthering production the committee shall deal with all matters relating to rational operation, including such questions as the technical equipment, the planning of the work, economy as regards materials, etc., the aim being organisation of the working process so as to increase the productivity to the widest possible extent in order to reduce the cost of production, to bring about lower prices, and to benefit the undertaking, the persons employed in the undertaking and the community as a whole.

The committee shall also promote the vocational training within the undertaking.

(b) For the purpose of creating the best possible conditions of work, thus promoting job-complacency, the committee shall deal with questions of welfare, safety, health, employment security, etc.

If reductions or reorganisation of the working of the undertaking are contemplated, the committee shall as early as possible deal with the matter in order to make the change as easy as possible for the workers concerned.

(c) In order to encourage the workers' interest in the operation of the undertaking it shall be the duty of the employer to provide the committee with such information about the economic conditions of the undertaking and its position within the trade as is of importance for the conditions of production

²⁹ Most North American arbitrators take the view that their jurisdiction extends so far as to enable them to order the reinstatement in employment of an unjustly discharged employee.

and the possibilities of sale in general. Information about the accounts shall be given to the same extent as is normally given to shareholders through the accounts submitted at the annual general meeting of the company. There shall be no obligation to supply information that may be used to the detriment of the undertaking, or information about personal matters.

The Committee has no power to affect in any way the negotiation, interpretation, or termination of collective agreements, and acts entirely by consultation and negotiation. Meetings are held after working hours, but the employer pays the employees an hourly rate for attendance. The Committee is empowered to obtain all relevant information, including confidential management communications, which might affect the company's competitive and collective bargaining position were the Committee members not sworn to secrecy.

The technique of the most successful Works Committees has been to prevent dislocation where possible, by means of a transition period during which redundant employees can be relocated either within or outside the enterprise. At the same time, employee support for innovations is secured by inviting employee suggestions and by making employees feel that they are part of the decision-making process. Unfortunately, the Works Committee system has not met with universal favour amongst either employers or unionists, despite an active educational campaign by both central organisations. To date, a high level of employment has meant that technologically displaced workers could be easily employed elsewhere, and the system has remained relatively untested.

THE LABOUR COURT

At the centre of the network of specialised tribunals which deals with legal disputes is the Labour Court. It was conceived in the provisions of the September Agreement of 1899 as a private Court of Arbitration, and re-established on its present statutory base in 1910 at the joint request of the L.O. and D.A. The Court is composed of six regular partisan members and sixteen deputies (of whom half are nominees of the L.O. and half of the D.A.), appointed for two-year terms. A neutral president and three vice-presidents are elected annually by the partisan members and (together with at least one regular and two deputy members from each side) must possess the legal qualifications for judicial appointment. Indeed, the neutral members of the Court are inevitably drawn from the judiciary, who are statutorily bound to accept

appointment.³⁰ The requirement that the partisan members elect the neutrals annually is in deliberate contrast to the general Danish tradition of life tenure for judges. It is premised on the belief that the annual election assures a moral commitment of the parties to the decisions of their neutral arbiters. In fact only once has a neutral failed of re-election because one of the central organisations chose to wreak vengeance for an adverse decision.³¹

The jurisdiction of the Court is set forth in section 4 of the Act, and parallels the commitments to the Court's jurisdiction contained in the various private arrangements made by the parties. The Court may adjudicate:

- (1) breaches of the Basic Agreement,
- (2) breaches of any agreement between a union and an employers' association or an individual (unaffiliated) employer, except in so far as the parties may by agreement specifically oust the jurisdiction of the Labour Court,
- (3) the legality of any work stoppage, or the adequacy of the notice thereof (including stoppages in violation of existing agreements, or of arbitration awards, or of awards of the Labour Court), and
- (4) on consent, other matters of dispute between employers and workers provided it is founded upon some contractual arrangement.

Proceedings are nominally instituted by or against the central organisation (if any) to which the plaintiff or defendant belongs. However, a central organisation will only assume legal liability where it has been party to the offence or where it has contracted to do so. Individual unaffiliated employers may sue and defend in their own right, but the individual unorganised worker has no status before the Court and must resort to his common law remedies in the regular courts.

The statistics³² of the Court's operations reveal the effect of the pre-eminent position of the L.O. and D.A. Approximately two-thirds of all cases were brought by the L.O. as plaintiff. Of the one-third of employer-plaintiff cases, the D.A. brought about 80 per cent. (although it represents a much lower percentage of employers), the balance being brought by unaffiliated employers.

³⁰ In an interesting contrast to a current Canadian controversy over a proposal to remove county court judges from labour arbitration, the Labour Court Act directs that if a judge's Labour Court duties interfere with his regular duties, he is to be relieved of the latter, not the former.

³¹ Galenson, p. 212. The Labour Court Act provides for appointment of the neutrals by the Chief Justice of the Copenhagen courts, and his colleagues, in the event that the partisan members are unable to agree.

³² See Galenson, c. 10.

Generally speaking, the employer as plaintiff is more often successful than the union as plaintiff. From these facts, several conclusions may be drawn: the L.O. has commenced many cases because it is "politically" unable to refuse its affiliates, with the consequent likelihood of a larger proportion of weak cases; most of the D.A. cases are subject to a filtering by D.A. staff lawyers, and are more likely to have merit; many of the union-plaintiff cases involve the policing of agreements with unaffiliated employers, as appears from the fact that the D.A. is party to barely one-half of the cases before the Court. In sum it does seem clear that, within their constitutional limitations, the central organisations control the Court's business, keep the volume of business within manageable limits, and tend to avoid weak and unimportant cases.

The Labour Court's procedures also tend to channel its energies towards the decision of important and difficult cases. Cases are initiated by complaint, notice is given to the respondent, and the matter set down for preliminary hearing before the president. The purpose of this hearing is "to facilitate mediation between the parties or . . . to obtain further information . . . by way of preparation for the hearing." Some 20 per cent. of all cases are withdrawn before the preliminary hearing, 45 per cent. are withdrawn afterwards, and only approximately 35 per cent. result in a final judgment.³³ The form of the preliminary hearing obviously conduces to settlement. The hearing (usually held on Friday afternoon) is conducted in the presence of the president, the parties and counsel. No witnesses are called, but the parties each state their position. The president then "explains" the law to the parties and may make it clear to them that the matter ought not to be pursued. This device is especially desirable for the L.O. as it provides a ground upon which a hopeless case, prosecuted because of internal "political" pressures, can be dropped. The informality of the hearing also enables the parties to "let off steam," after which they may be content to terminate the matter.

Failing settlement, the case comes on for formal hearing the next morning. Proceedings are held *in camera*, the parties are represented by counsel³⁴ and may, of course, call evidence. Immediately after the hearing, without any preliminary caucuses, the partisan judges are polled (plaintiff first) and the presiding

³³ The figures are taken from Galenson, *supra*, note 32. D.A. statistics indicate that only some 20 per cent. of their recent cases result in final judgment, the balance being withdrawn either before or after the preliminary hearing.

³⁴ The L.O. does not employ legally-trained counsel, although their representative is apparently intelligent and vigorous. This traditional labour suspicion of lawyers may be somewhat obsolescent, as the Vice-President of the L.O., in his 1961 birthday speech, stated his "birthday wish" to be the recruiting for L.O. service of more professional people, including lawyers.

judge votes last. He will then prepare a draft judgment which will be discussed at a later meeting of the Court, and will ultimately be delivered to the parties as the unanimous decision of the Court. The partisan judges are thus able to assist the neutrals by frank discussion in conference, but do not derogate from the authority of their decision by refusing to subscribe to it.

Cases may be withdrawn at any time before final judgment, a consideration of importance to a party faced with the likely prospect of creating an adverse precedent. The Court of its own motion may remit any appropriate case to arbitration (especially where some technical, factual question is involved) or to the Contract Board of 1939, with or without reserving to itself power of final disposition. In its judgment, the Court usually awards costs against the losing party, although in close cases the costs may be evenly divided. Subject to these considerations, it delivers judgment in the familiar fashion of any Court.

What is unique, however, is the remedy employed. Aside from its power to order the payment of money where failure to pay is the basis of the proceeding, the primary remedy is the fine. The measure of the fine is determined both by penal and compensatory considerations, as the fine is paid over to the aggrieved party. Thus the Court considers the actual loss incurred, the existence of aggravating or extenuating circumstances, and the seriousness of the offence. Aggravating circumstances may include a refusal to submit to arbitration, or to obey an award of the Court or of an arbitration board. Extenuating circumstances usually involve some provocative or unjust act of the plaintiff, and the bona fides of the defendant. The discretionary fine was originally adopted at the suggestion of the unions, and has proved to be an effective device for enforcing adherence to legal obligations. Not the least reason for its effectiveness is the fact that it is inevitably collected. Fines awarded against unions³⁵ or employers are levied upon in the same manner as any legal judgment. Fines awarded against individual employees (usually for striking illegally) are calculated in terms of ability to pay, and then are withheld from the employee's salary. If he should change jobs, his new employer is required to make the deduction; if he becomes unemployed, his assets are seized in satisfaction. The employer is forbidden to forgive the fine as a technique of buying peace, and the D.A. polices its own members strictly to ensure that all fines are collected.

One substantive problem which has given the Court difficulty is the vicarious liability of a union for the acts of its members. In

³⁵ A local union may be put into bankruptcy, and its successor nonetheless continues to be liable for the fine.

the case of illegal strikes, any form of union endorsement will invoke liability, as will a failure to take all possible steps to end the strike (including withholding strike pay, and assisting the employer in finding replacements). On the other hand, liability will almost always fall upon the local union with its limited assets, rather than upon the national.

The remedy employed by the Labour Court, like so much of Danish labour law, represents a *quid pro quo*: in return for an effective remedy for employers the unions obtain a cheap, quick and expert forum in which they may pursue their legal rights. The parties are obviously satisfied with the operation of the Labour Court which is, after all, a tribunal of their own making. Section 5B (1) of the Labour Court Act provides: "where there exists a right to take proceedings before the Labour Court proceedings before an ordinary court of law are prohibited. . . ." Neither the L.O. nor the D.A. have attempted to challenge the jurisdiction of the Labour Court, despite the existence in Danish law of procedures analogous to the prerogative writ procedures in the common law. Even Labour Court decisions defining its own jurisdiction have gone unchallenged. In questioning the parties on this point, I received the answer: "Why should we, for the sake of a victory in a particular case, seek to destroy a useful and important institution which we have built ourselves?" This forbearance from the full use of all legal weapons is in sharp contrast to the common North American attitude that every proceeding is a tactical manoeuvre designed not merely to protect legal rights, but to bludgeon the opposite party into submission. The Danish attitude is demonstrated in many ways: a reluctance to frame proceedings in common law terms so as to invoke the strict tort doctrines employed by the regular courts; the refusal of the D.A. to support actions by individual anti-union workmen; above all, a willingness to accept legal defeat as "fortunes of war." The net effect is that virtually the whole body of Danish labour law is found in the decisions of the Labour Court and that the Court's prestige stands high amongst management and labour, professionals and laymen, alike.

The only current criticism of the Court, one which ought not permanently to impair its prestige, stems from its increasing pre-occupation with illegal strikes. In the past few years, largely because of a general inflationary trend, there have been several instances of local "wildcat" strikes. This fact coupled with increased employer adherence to legal obligations and a firm Court policy of remitting cases to arbitration where possible has meant that a disproportionately high number of the Court's decisions in

recent years have involved fines for illegal strikers. Whether this trend will lead workers to adopt an image of the Court as an oppressor remains to be seen.

There does not appear to be extensive criticism indicating a trend towards excessive "legalism" in the Court's decision-making. The requirement that the neutrals and some of the partisan members possess legal qualifications is counter-balanced by the practice of the Court in so constituting the hearing panel as to include partisan members with knowledge of the industry involved. Decisions of the Court are generally handed down within two weeks after hearing, seldom more than three months, and in crisis situations (such as illegal strikes) within a day or two. The Court conducts its hearing with a minimum of formalism, and the role of the judge is more active than is customary in our tradition. Precedent has persuasive weight, and the citation of decided cases might be thought to favour trained D.A. lawyers over untrained L.O. representatives. But although labour from time to time has vaguely suggested that the Court ought not to dispense "law" but "justice," the current L.O. representative (not himself a lawyer) seemed quite prepared to pursue the present practice of reliance upon decided cases.

THE SUBSTANTIVE LAW OF INDUSTRIAL WARFARE

The regular courts, as well as the parties, have chosen to regard the jurisdiction of the Labour Court as exclusive. Thus, cases with a "double aspect" involving a breach of an agreement coming within the Labour Court's jurisdiction, as well as violation of a common law right, have been remitted to the Labour Court. The cases in which the regular courts have been free to develop their jurisprudence have been few in recent years, and largely confined to actions by unorganised workers or unaffiliated employers against unions.

Employers in Denmark have traditionally refrained from widespread use of the blacklist, the "yellow-dog" contract or the "document" (as it is known in Britain), and of strikebreakers, at least since the September Agreement of 1899. All of these tactics are particularly adaptable for "union-busting" campaigns which are not within the ethos of Danish labour relations. On the other hand, the lockout (both primary and sympathetic) is a recognised bargaining device employed to prevent unions from breaking a wage standard by concentrating pressure on weak employers. Occasionally the lockout does set off a chain-reaction of strike-counter lockout-counter strike with the result that minor disputes achieve major proportions. The propriety of economic strikes and lockouts

has been largely determined by the Basic Agreement, and breaches are not litigated in the regular courts.

Picketing is usually unnecessary, since the mere announcement of a strike in the press usually suffices to bring out the work force. Information on picketing designed to advise workers of a dispute is lawful, but that which is intended to procure a customer boycott is unlawful on the theory that the employer's public reputation is permanently damaged. On the same theory, publication of the names of workers who refuse to cease work is forbidden. Danish law recognises a cause of action for the deliberate interference with the rights of another, which is occasionally employed where the union was held to be seeking some improper objective, not related to its normal interests. Organisational strikes are lawful, but (at least in those enterprises affiliated with the D.A.) pressure to compel the closed or union shop is unlawful. There is some case law forbidding union pressure on the employer to discharge non-union employees, but this objective is usually achieved by social ostracism rather than by resort to economic force. In the case of employers not affiliated with the D.A., the closed shop is a lawful labour objective, but unions are compelled to allow non-members to join. Consumer boycotts of employers engaged in a labour dispute have been held to be an unlawful attempt to broaden the range of economic sanctions.

One can only conclude that the Danish common law doctrines are not dissimilar to our own, but that they are seldom invoked because the parties, realising the inherent limitations of the ordinary judicial processes, have chosen instead self-made and self-administered regulation. This approach to the legal regulation of economic warfare stems from a position not unlike that which Professor Kahn-Freund describes as characteristic of British industrial relations—"collective *laissez-faire*."³⁶ Concurred in by the legislature and the courts, it has resulted in an atmosphere of willing acceptance which legislative compulsion has precluded in the United States, and in the consistent and expert analysis of legal problems which is impossible in Canada where common law tort doctrines survive anachronistically in an era of compulsory collective bargaining.

Jurisdictional inter-union disputes³⁷ are settled intramurally by the L.O., the D.A. having early declined to participate in joint procedures for several reasons: an unwillingness to shoulder a thankless task; a refusal to allow, by implication, monopolistic craft claims; a fear of inhibiting new patterns of industrial development.

³⁶ See Kahn-Freund, *op. cit.*, *supra*, note 27 at p. 224.

³⁷ See Galenson, p. 63 *et seq.*

Surprisingly, jurisdictional disputes have not proved to be as much of a problem in Denmark as a North American might anticipate, keeping in mind the number of small, entrenched craft unions whose patterns of organisation antedate industrialisation. The L.O.'s jurisdictional dispute procedures follow the usual Danish pattern of private consultation between the rival parties, followed by an attempt at third-party conciliation, and culminating in private, tri-partite adjudication. The L.O.'s jurisdictional disputes tribunal is composed of two L.O. nominees, a nominee of each of the rival unions, and a chairman (who is a judge). Adjudication is seldom invoked today, however, because of the success of the system in establishing lines of demarcation in the past, and in achieving agreement between the parties. The tribunal, as a matter of substantive law, relies heavily upon established practices and its own precedents, allowing for the desires of employees, comparative wage rates, and the *status quo*, in marginal cases. The significant fact to be noted is, however, the substitution in Denmark of private legal processes for economic self-help, or public adjudication.³⁸

LAW REFORM

Since 1908, the Danes have engaged in continual review and refinement of both their public and private legal arrangements in matters relating to labour relations.

The current law reform agency is the Labour Law Commission whose membership comprises representatives of the L.O., the D.A., of other employee and employer groups, the president of the Labour Court, the Chairman of the Conciliation Agency, representatives of the Ministry of Labour, and members of parliament representing the major parties. The reforms implemented in 1957-60 as a result of the work of the Commission involved revision of the September Agreement of 1899, the Standard Rules for Negotiation of Collective Agreements, and the Conciliation Act.

Once again, the mixed private and public nature of the Danish system becomes apparent, with primary emphasis focused on the consensus of the L.O. and D.A. as a condition precedent to lawmaking.

North American legislators might be well advised to consider

³⁸ The Ontario Labour Relations Act, s. 66, represents a pioneering effort in public adjudication of jurisdictional disputes in Canada. In the United States, since 1949, there has been an experiment in private adjudication by the National Joint Board for Settlement of Jurisdictional Disputes in the Construction Industry. See Crispo and Arthurs, "Jurisdictional Disputes in Canada: A Study in Frustration," (1963) 3 *Current Law and Social Problems* (Univ. West. Ont.).

establishment of a similar institution which, apart from its obvious function of ongoing law reform, provides a forum for the amicable interchange of views between labour, management and government.

CONCLUSION: LABOUR LORE AND LABOUR LAW

This, then, is a synopsis of the Danish system of industrial relations which is conceded generally to be one of the most effective and sophisticated in the world.

To say that the Danes have "solved" labour relations is to overstate the case by far. In 1960, for example, a rash of wildcat strikes occurred, largely as a result of the dissatisfaction of workers who felt that their interests had been submerged in the voting in the preceding general negotiations. But if this disruption revealed one of the danger-spots in the Danish system—bloc voting—its aftermath is equally instructive. Some employers sought to buy peace by granting wage increases, which resulted in the imposition of sanctions by the D.A., for breach of its rules requiring employer solidarity. On the other side, the L.O., realising the illegality of the conduct of the strikers, settled virtually all cases in which the remedies of the Labour Court were sought. In the 1961 negotiations, again, certain structural weaknesses emerged which ultimately required parliamentary intervention to impose a settlement in the transportation industry. No doubt the system will encounter crises in the future as it has in the past. But the relevance for North Americans of the Danish system is not so much its present performance as its demonstrated long-run ability to contain conflict by an imaginative use of institutional devices.

By way of recapitulation, these institutional devices can be grouped under three headings: *First*, centralised industry-wide bargaining conducted by professionals in accordance with agreed-upon and firm procedural rules. *Secondly*, private law-making with its implicit commitment by both parties to abide by the law. *Thirdly*, private processes of adjudication and dispute-settlement in a variety of forums tailor-made for various types of conflicts.

Sceptics, and indeed realists, will properly point out that the Danish system is the result of historical, social and economic forces which have produced a labour lore which is uniquely Danish. Undoubtedly the September Agreement of 1899 was possible because of an existing acceptance of employer and employee organisation which had no parallel in North America. Undoubtedly, too, the September Agreement in turn created an atmosphere in which labour-management adjustments through private law-making were facilitated. Thus, over the years, the parties have accumulated a fund of mutual trust and respect upon which they

may draw in moments of conflict. There can be no doubt that the lore evokes the law, and that in turn the law generates lore. But to conclude that North Americans are by fate debarred from profiting from the Danish experience is to be hypnotised by the chicken-egg conundrum.

If the Danes can teach us no other lesson, they can teach us this: it is possible, beginning from a crisis situation, to build upon the mutual interdependence of labour and management a legal institutional framework capable of accommodating the opposing interests—given only a will to do so.³⁹

APPENDIX ONE

THE MAIN AGREEMENT OF NOVEMBER 18, 1960, BETWEEN THE DANISH EMPLOYERS' CONFEDERATION AND THE DANISH FEDERATION OF TRADE UNIONS

Section 1

Subsection 1. In recognition of the desirability of having questions concerning wages and working conditions settled by the conclusion of collective agreements, if necessary with the participation of the central organisations, the central organisations and their members bind themselves neither directly nor indirectly to obstruct employers and workers from organising themselves within the organisational framework of the central organisations.

Subsection 2. By a collective agreement is understood (*cf.* The Permanent Court of Arbitration Act, sections 4B and 17) an agreement concerning wages and working conditions between a workers' organisation on the one hand and either an employers' organisation or an individual employer (firm) on the other.

Section 2

Subsection 1. When a collective agreement has been concluded, and for its duration, no stoppage of work (strike, blockade, lockout or boycott) may be effected within the scope of the agreement unless warranted by the Standard Rules for the Settlement of Labour Disputes or by existing collective agreements. Sympathetic strikes or sympathetic lockouts may, however, be effected in accordance with current agreements and legal practice.

Subsection 2. Disputes as to whether an agreement exists or concerning the scope of the agreement shall be settled by industrial arbitration.

Subsection 3. No stoppage of work may lawfully be effected unless approved by at least three-quarters of the votes cast by a body competent according to the statutes of the organisation in question and unless notice has been served in accordance with the provisions of subsection 4. The only exceptions to this rule are the cases of stoppage of work mentioned in the Standard Rules, section 5, subsection 2.

Subsection 4. The intent to submit a proposal of stoppage of work of such a body shall be brought to the attention of the Executive Committee of the other central organisation in writing and by registered mail at least fourteen

³⁹ Indeed, there is evidence of widespread interest in Canada, at least, in the Scandinavian industrial relations systems. See, *e.g.*, Report of Fact-Finding Body re Labour Legislation (Province of Nova Scotia, 1962) at p. 27:

"We feel that there is much in the Swedish plan that should recommend it to management-labour bodies in Nova Scotia and elsewhere in Canada. . . . We suggest, therefore, that representatives of management and labour in Nova Scotia undertake an exhaustive study of the Swedish plan . . ."

days before the proposed stoppage of work is to take effect and the decision of the body shall in the same way be made known to the other party at least seven days before the stoppage of work is to begin.

Subsection 5. The two central organisations as well as their affiliated organisations shall be bound not to support, but by all reasonable means to prevent, unlawful stoppages of work and, if an unlawful stoppage of work should take place, to attempt to have it brought to a conclusion.

Subsection 6. A strike or lockout is considered to exist if a workshop or other place of work is systematically being evacuated or gradually closed down as part of a labour dispute.

Subsection 7. During a labour dispute between the parties to the present agreement or their members and unaffiliated workers' or employers' organisations or individual undertakings, no support may be given to the unaffiliated organisation or undertaking by any party bound by this agreement. An organisation or undertaking joining one of the central organisations or an association organised by them shall not be regarded as unaffiliated, provided that no stoppage of work was taking place at the time of application for membership or that such stoppage had not been clearly announced after unsuccessful negotiations.

Section 3

The central organisations shall be responsible for ensuring that agreements concluded between them are respected and carried out by all affiliated organisations.

Section 4

Subsection 1. The parties agree that the employers' right to direct and distribute work and to use what labour may in their judgment be suitable shall, with regard to the workers, be exercised in a responsible manner and in such a way as not to violate their rights under existing agreements.

Subsection 2. In the case where labour has been engaged for a specified piece work without any reservation, the working conditions may not be changed unless the employer concerned compensates the workers for any financial loss resulting from the change. Disputes in this respect shall be settled by customary procedure (joint meeting, mediation or arbitration).

Subsection 3. The right to dismiss individual workers must not be exercised in an arbitrary manner and complaints of alleged unreasonable dismissals shall therefore be dealt with according to the following rules:

(a) In the case of the dismissal of a worker who has reached the age of 20 and has been continually employed at the undertaking concerned for at least one year, the worker in question is entitled to demand information about the cause of his dismissal.

(b) If it is claimed by a worker or his organisation that the dismissal is unreasonable and not founded on circumstances connected with the worker or the undertaking, a local discussion of the dismissal between representatives of the management and of the workers of the undertaking may be demanded.

(c) If no agreement is reached at the local discussion and the national union (or association of unions) concerned insists on the continuation of the case, the organisations shall immediately initiate negotiations.

(d) If such negotiations are unsuccessful, the national union (or association of unions) interested in the case shall, within fifteen days of the negotiations between the organisations, have the right to demand that the case be considered by a permanent board set up by the central organisations. This board is to consist of two representatives selected by each of the central organisations and a chairman and umpire selected by the central organisations from among the members of the Supreme Court. If agreement about the selection cannot be arrived at, the umpire shall be designated by the President of the Supreme Court. The appointments shall be valid for three calendar years at a time and two substitutes shall be appointed for each of the four

board members. Before considering a case, the board shall be joined by a representative from each of the two agreement parties directly involved. No board member may have any direct connection with the management or the workers of the undertaking whose case is being considered.

(e) The board shall hand down a reasoned decision, and in the cases where the board finds the dismissal in question to be unreasonable and not founded on circumstances relating to the worker or the undertaking, the board may decide that the employer shall pay to the dismissed worker a compensation, the amount of which shall depend on the particulars of the case and on the seniority of the improperly dismissed worker, but which cannot exceed thirteen weeks' wages calculated on the basis of the average earnings of the dismissed worker during the preceding year.

Section 5

Subsection 1. Supervisors, foremen, and persons in corresponding positions who represent the employer in relation to the workers, may be required by the employer, after consultation with the person in question, not to become a member of any workers' organisation.

Subsection 2. The right conferred on the employer by subsection 1 cannot be asserted merely because a worker is engaged as a salaried employee, if otherwise he does not fulfil the requirements for being recognised as a foreman in the sense of the Main Agreement.

Subsection 3. The interested supervisors' organisations should be permitted to be represented at meetings held to deal with disagreements about the above provisions.

Section 6

The parties will oppose possible attempts to keep persons out of workers' organisations on the plea of partnership agreements which do not make the persons in question real partners in the firm.

Section 7

Subsection 1. The period of notice to terminate agreements concerning price lists and other working conditions shall be three months, unless otherwise agreed.

Subsection 2. Even if an agreement has been denounced or has expired, the parties shall, nevertheless, be bound to comply with its provisions until another agreement has taken its place or stoppage of work has been effected in accordance with the rules of section 2.

Section 8

The central organisations agree that shop steward rules should be inserted in the collective agreements whenever the character of the working conditions makes it practical.

Section 9

Subsection 1. The two central organisations will promote co-operation among the organisations and work for peaceful and stable working conditions in the undertakings through joint industrial committees or other suitable bodies.

Subsection 2. Collective agreements should aim at wage systems which will promote productivity and in addition give the workers an opportunity for higher earnings than ordinary time rates, because normally, when it is possible to have a job done both as piece work and as work paid by ordinary time rates, a greater amount of work and thereby higher earnings can be expected by piece work rates than by ordinary time rates.

Subsection 3. No party may prevent a worker from doing as much and as good work as his abilities and training permit.

Section 10

In the case of an alleged breach of this Main Agreement as well as in the case of an alleged breach of any other collective agreement entered into by the central organisations or their members, a joint meeting shall be held with the co-operation of the central organisations before a complaint is brought before the Permanent Court of Arbitration.

Section 11

The unions, associations and industrial undertakings affiliated with the two central organisations cannot, by resigning from the central organisations, release themselves from the obligations which they have accepted under the present Main Agreement. They continue to apply until this Main Agreement is denounced by either of the central organisations.

Section 12

Subsection 1. This Main Agreement shall remain in force until it is denounced by a notice of six months to terminate on October 1 of any year, although not earlier than October 1, 1966. The central organisation that might desire to amend the Main Agreement shall inform the opposite party to that effect, six months prior to the denunciation, after which negotiations shall be commenced with the purpose of reaching agreement and thereby avoiding denunciation of the Main Agreement.

Subsection 2. If, after denunciation has been made, negotiations regarding a renewal of the Main Agreement have not been concluded by the October 1 in question, the Main Agreement shall remain in force although the time of denunciation has expired, until the collective agreements in force have been replaced by new ones. The Main Agreement shall cease to apply when the new collective agreements come into force.

Section 13

This Main Agreement, which replaces the Agreement of September 5, 1899, will take effect simultaneously with the renewal of the agreements now in force.

APPENDIX TWO

RULES FOR NEGOTIATION OF AGREEMENTS

AGREEMENT BETWEEN THE DANISH EMPLOYERS' CONFEDERATION AND THE NATIONAL CONFEDERATION OF DANISH TRADE UNIONS, DATED MAY 11, 1960

Section 1

(1) All the fields covered by agreements and comprising organisations and undertakings affiliated to the two central organisations shall be divided into eight groups, *viz.*:

- (i) metal trades;
- (ii) textile and clothing industries;
- (iii) food and drinks, and allied industries;
- (iv) other industries, including the woodwork industry;
- (v) building and construction;
- (vi) graphic industries, including the paper article and cardboard box industries;
- (vii) transport;
- (viii) employees in commerce and offices.

(2) Any disagreements about the placing of the individual agreements in the groups shall be decided by a Board appointed by the central organisations.

(3) Negotiation of agreements within these groups shall, as hitherto, be carried on within each particular field: Provided that the central organisations would recommend that the trades covered by the individual groups consult together about the progress of negotiations and make efforts to provide co-ordination to the widest possible extent.

Section 2

All agreements shall have the same date of expiration, *viz.*, March 1.

Section 3

In order that the period of negotiation may be used to the best advantage for objective negotiations between the parties, the following rules shall apply:

(1) The party wanting an existing agreement to be revised shall before November 1 of the year preceding expiration of agreements submit complete proposals for such revision.

(2) Subject to the provision of section 6, where no proposal for revision is submitted by any of the parties, the agreement shall remain in force as it stands.

(3) Negotiations between the suborganisations shall be commenced immediately on receipt of the proposals for revision. The negotiations shall be carried on intensively and be brought to a conclusion not later than December 1.

(4) If the negotiations lead to a result that is accepted by both parties, the agreements concerned have thereby been brought to a final conclusion. The results achieved shall be without prejudice to any other results.

(5) In the negotiations between the suborganisations as well as with the co-operation of the central organisations, either party (central organisation) may request the co-operation of a subconciliator in the negotiations, and this may take place already from the commencement of negotiations.

(6) If by December 1 no agreement has been reached between the negotiation committees of the suborganisations about new agreements, the matters at issue shall pass immediately to the central organisations for consideration.

Section 4

Immediately on conclusion of negotiations between the suborganisations both parties shall be bound to submit a detailed and precise report to their respective central organisations giving information on

- (a) the agreements hitherto in force;
- (b) any questions on which agreement may have been reached;
- (c) any questions still outstanding, with indication of any proposals and other documents exchanged between the parties.

Section 5

(1) To deal with the remaining disagreements with a particular view to consideration of the general questions, the central organisations shall each appoint a negotiation committee to be composed of six representatives.

(2) The negotiation committees of the central organisations shall immediately after December 1 commence negotiations on the general questions and any other questions that may be selected by the negotiation committees.

(3) By general questions shall be understood such as may be likely to be relevant to all or the majority of the fields covered by agreements, such as demands relating to hours of work, changes in rates of wages, changes in rules governing the annual holiday with pay and governing holidays other than Sundays, social amenities, and questions about the duration of agreements.

(4) Other questions that may be taken up by the negotiation committees shall be such as are of the same nature as the general questions referred to above but which have been raised only within one or more of the groups set out in section 1.

(5) Besides, the negotiation committees of the central organisations shall decide which of the demands put forward may be regarded as general, and what other questions shall be considered by the negotiation committees.

(6) Any disagreements about the rules laid down above shall be decided by the Agreement Board [of 1939, Ed.].

(7) If these negotiations conclude in a result that is accepted by both parties, that result shall form part of the proposals for new agreements between the parties in the eight groups set out in section 1.

Section 6

(1) If during the negotiations between the central organisations or with the co-operation of the conciliator agreement is reached on one or more of the general questions, the result shall apply to the entire field covered by the Confederation of Danish Trade Unions and the Danish Employers' Confederation, unless the nature of the agreement or the preceding negotiations militate against it, or if agreement has been reached during negotiations between the suborganisations also in respect of the general questions.

(2) The intention is to avoid unreasonable or unfair results; in cases of doubt, the matter may be decided by the Agreement Board. The case shall be submitted through one of the central organisations.

Section 7

(1) If the negotiations on the general demands between the negotiation committees of the central organisations have led to no result by December 20, the Conciliation Board shall be requested to join the committee, on the one hand to be informed of the attitude of the parties and, on the other, to preside over the negotiations, which shall be expedited as much as possible in order that a result may be achieved by January 20.

(2) With a view to the best possible utilisation of the period of negotiation, the Conciliation Board shall be requested to commence work immediately in the case of any outstanding issues after January 20.

Section 8

Concurrently with the negotiations between the negotiation committees of the central organisations on the general questions, negotiations on the remaining questions shall be continued under the chairmanship of the central organisations. If agreement is reached, the result shall stand over till the subsequent joint voting in the groups [*cf.* subsection (2) of section 11].

Section 9

(1) Provided agreement cannot be reached on the remaining matters at issue during the negotiations carried on under the chairmanship of the central organisations, the parties may, on conclusion of the negotiations, decide that the remaining disagreements on non-general questions shall be considered, wholly or in part, by a joint committee [*cf.* section 10]. The demands on which agreement for consideration by a joint committee cannot be reached shall be referred to the Conciliation Board.

(2) Following consultation with the central organisations the Conciliation Board shall decide whether the issues shall be subject to direct conciliation by the Conciliation Board, possibly through subconciliators, or be referred for final decision by the joint committee [*cf.* section 10].

Section 10

(1) The joint committees which accordingly shall deal with questions of a non-general nature shall be composed of one representative of each of the two central organisations, one representative of each side of the group concerned [*cf.* section 1] and one representative of each of the parties to the agreement. It shall be the business of the joint committee to mediate between the parties and, in the case of a majority of the members of the committee being in favour hereof, it may decide the question with binding effect on both parties. Any questions which do not get a majority of the members of the committee shall be decided by an umpire appointed by the committee. Where agreement cannot be reached on appointment of an umpire, such appointment shall be left to the Conciliation Board.

(2) In the course of their deliberations for determining the fair price for the work in question, the joint committee may, for purposes of information, require all particulars on conditions of work, prices, wages and piece-work earning in the particular trade. Where local price-lists are concerned, due regard shall be had to the local conditions prevailing.

(3) The joint committee or the umpire shall not be entitled to decide any questions of a general nature [*cf.* section 5]. Any disagreements as to whether a demand is of such nature shall be decided by the Agreement Board.

(4) Any questions being subject to consideration and decision under the above rules shall as far as possible have been considered and decided by the date when new agreements shall come into force, unless the parties agree to postpone the decision till after conclusion of the negotiation of agreements.

Section 11

(1) Each of the eight groups shall decide, by group, on the attitude to adopt to any final drafts for renewal of agreements. In voting, the individual group cannot be linked with others; within each particular group the rules shall be the same as in the Conciliation (Labour Disputes) Act.

(2) The joint group voting shall cover fields for which agreements are concluded subsequent to December 1, irrespective of the date of voting.

(3) The joint group voting shall not cover fields in which the parties have concluded agreements by themselves prior to December 1 [*cf.* subsections (3) and (4) of section 3].

Section 12

In the case of any voting on draft agreements being the result of direct negotiation, the rules of voting shall be the same as in the Conciliation (Labour Disputes) Act.

Section 13

If the negotiations with or without the co-operation of the conciliator fail to provide agreement on the demands put forward, either party shall be entitled to give notice of their intention to effect a stoppage of work as from the date of expiration of the agreements; similarly, a sympathetic conflict may be instituted under the provisions of labour law.

Section 14

(1) The last date of due denunciation of agreements shall be February 14.

(2) Any agreements that have not been denounced shall continue to be in force until they are duly denounced in pursuance of their own rules of denunciation.

Section 15

Provided agreement has been reached on the general questions between the central organisations before March 1, the changes agreed upon relating to wages, overtime payment, payment for work in shifts, or any similar changes in regard to wages shall come into force as from the commencement of the first pay-week after March 1.

Section 16

This Agreement shall remain in force until it is denounced by a notice of six months to expire on a July 1.