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The Labor Court Idea

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WHEN the War Labor Board first began to exert pressure on companies and unions to adopt grievance arbitration clauses during World War II,[1] there was a considerable hesitance on both sides. Both groups worried that while third party decision making might momentarily improve productive efficiency, it would do so at the price of a long-run loss in institutional integrity and autonomy, and peace at any price held little fascination for either side. Nevertheless, grievance arbitration was accepted and gradually became the normal mechanism for resolving contractual disputes in the United States.

Other industrialized nations have been less attracted to arbitration and instead often have established a system of labor courts.[2] The relative merits of the two systems thus naturally come into question. This question is worthy of consideration not because of Judge Hays' superficial and intemperate attack upon arbitration,[3] but because collective bargaining is dynamic, rather than static, and because both arbitrators and arbitration are expendable if there is a better solution. Professor Aaron, of the UCLA Law School, and a group of European scholars are presently engaged in a broad study which will doubtless furnish us with better documented answers to this question than now exist, but in the meantime some of us who have a modest exposure to labor problems in certain European countries may engage in preliminary analyses.

I. THE SWEDISH SYSTEM

Sweden is frequently cited as a desirable industrial relations model for the United States to follow. It is much smaller and more homogeneous than the United States, but it is highly industrialized, has maintained a remarkable record of full employment, and has a standard of living much like that found in this country.

The Swedes first established a labor court in 1929, though its jurisdiction was increased by subsequent legislation.[4] It is exclusively

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1. Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945).

2. See generally MCPHERSON & MEYERS, THE FRENCH LABOR COURTS: JUDGMENT BY PEERS (1966).

3. HAYS, LABOR ARBITRATION: A DISSENTING VIEW (1966).

4. SCHMIDT, THE LAW OF LABOUR RELATIONS IN SWEDEN 39 (1962).

competent to handle cases falling within its jurisdiction, and other courts must thus refuse to take such cases. It is essentially a trial court, but its decisions are final and not subject to appeal. The Swedish Constitution does, however, permit the Supreme Court to grant permission for a new trial in cases decided by the Labor Court. The conditions which must be fulfilled in order to obtain a new trial are stringent: gross miscarriage of justice, new evidence of a decisive character, and so forth.

The Court consists of a chairman and seven members, all of whom are appointed by the King. The normal term of office is three years, and members are usually reappointed. None but the chairman is full time. Three members, including the chairman and the vice-chairman, are what we would call "public" members. Both the chairman and the vice-chairman must be learned in the law and have judicial experience. The third "public" member must have special knowledge and experience in the field. The other members of the Labor Court are laymen—two of them representing management and three representing labor. The three union men do not sit simultaneously: one of them is from the salaried employees' organization, and he replaces one of the other two union members when the Court is considering a case involving salaried employees. Thus, there are never more than four laymen sitting at the same time, and the Court can act when only one layman from each side is present. Nominations for the lay members of the Court come from the employers' association and the union federation. This is less complicated than it would be in the United States, because for all practical purposes there is a single employers' association, a single large federation for production workers, and only one organization for salaried employees. Despite their representative character, these Court members are expected to be objective, and they do not view themselves as committed in advance to the position of one side or the other. The logic behind their appointments is to secure the benefit of their specialized knowledge and to create a tie between the Court and the major employer and employee organizations. Europeans seem to have been notably more successful than we have in establishing the principle that the labor and management members of such courts are expected to be objective, and such objectivity will not bring recrimination down around their heads.[5]

Since there are seven members of the Court, the four lay members can theoretically outvote the neutrals. At an early time this did in fact happen: employer and employee members once joined in an

5. McPherson & Meyers, *op. cit. supra* note 2, at 52.

interpretation of the rules concerning the right of association and produced an opinion very unfavorable to the syndicalist unions. However, complaint was made to the Ombudsman, that guardian of rights against the civil authorities about whom we have heard so much in this country lately,[6] and the Court then unanimously swung into line.

In the early years, dissenting opinions showed up in approximately forty per cent of the cases, but at the present time they are said to run more nearly ten to seventeen per cent. Labor dissents are more common than those from the management members, but it must be noted that almost ninety percent of the cases are brought to the court by workers. This is not strange since in Sweden, as in the United States, the employer is normally free to act, subject to a protest on the part of the union or the employee.

The rules of procedure before the Labor Court are relatively simple.[7] The chairman convenes a preliminary meeting of the parties before the actual hearing. He does not, however, attempt to encourage a settlement; rather, the principal purpose of the meeting is to weed out the issues and to be sure that the parties know what they are going to present. In advance of the hearing, each party submits a statement of his case: the aggrieved party files a complaint which is answered by the other side within a period of two or three weeks. The complainant may respond to the answer, and the other side may file an additional response, so that four papers—two from each side—may be in the hands of the Court members before the hearing is held. No party is permitted to add new materials at the hearing. The Court could, on its own motion, adjourn in order to permit the examination of alleged new evidence, but this power is more academic than real, since the problem rarely occurs. No transcript is made in a routine Labor Court case, but law clerks (young men attached to the Court) take notes of the testimony of witnesses and then prepare a summary. After the hearing, the members of the Court convene in executive session to discuss the decision. If they are able to agree, the chairman is asked to have a draft of the decision prepared. The law clerks frequently help in the drafting of decisions; once such a draft is prepared it is circulated to the members for approval. Frequently the decision is approved without a further meeting of the Court, but, in more complex cases,

6. See generally GELLHORN, WHEN AMERICANS COMPLAIN (1966); GELLHORN, OMBUDSMEN AND OTHERS (1966).

7. For this and other information, the author is indebted to Johan Von Holten, Assistant Director of the Swedish Employers' Confederation, and Stig Gustafsson, Legal Adviser to the Swedish Confederation of Trade Unions, for time they spent with him in Stockholm in the summer of 1965.

several drafts reflecting different points of view may be prepared and the members then meet to thrash out a decision. The format of the decisions is not unlike our own arbitration opinions and awards.

Costs are assessed at the end of a case and consist principally of lawyers' fees and expenses for the witnesses. Under Swedish law, the losing side may be asked to assume the lawyers' fees incurred by the winning side, but the employer and employee federations, which frequently represent the parties, usually decline to ask for costs unless they believe that the other side has proceeded with a case which is without merit for the purpose of harassment. It is hard to get estimates of the cost of a typical Labor Court case, but informants suggested that it might run somewhere between 800 and 1200 krona, which at the present exchange rate would be roughly $150 to $235. It apparently takes between two and three months from the time an average complaint is filed to the date of the hearing, and then another four to six weeks before the decision is released.[8] Most of the hearings are held in Stockholm, even though the case may arise in some other part of the country.

The exact jurisdiction of the Swedish Labor Court is not easy to describe, but in general it is oriented toward the collective agreements, as is arbitration in this country. The Swedes have, however, resolved without difficulty one problem that has always given us trouble: the right of the individual to process his grievance despite the disinterest or unwillingness of his union.[9] In Sweden, the individual can carry his case forward if he wishes.[10]

The case load of the Labor Court is not very heavy. During the first twenty-four years it handled 2,858 cases, an average of about 120 cases per year.[11] Once certain key principles were enunciated, the strong employer and employee federations settled many disputes without referring to the court. Many of the current cases are said to involve small employers which have contracts with the unions, but which are not members of the employers' federation.

So much for the broad surface manifestations of the Swedish Labor Court. The picture is inadequate, but the overall outline is clear. It would not be unreasonable to conclude at this point that the Swedish Labor Court and the American voluntary grievance

8. For this information, the author is indebted to Richard Peterson who spent the summer of 1965 in Stockholm while working on his Wisconsin Ph.D. thesis.

9. Summers, *Collective Power and Individual Rights in the Collective Agreement—A Comparison of Swedish and American Law*, 72 YALE L.J. 421, 453 (1963).

10. The United States Supreme Court has recently decided that an individual employee does not have an absolute right to have his grievance taken to arbitration. Vaca v. Sipes, 35 U.S.L. WEEK 4213 (Feb. 27, 1967).

11. SCHMIDT, *op. cit. supra* note 4, at 42.

arbitration tribunal serve much the same function, and that which forum one prefers may be a matter of taste. Both appear to be oriented toward collective bargaining, the arbitration board is frequently tripartite for the same reason as is the Court (but with a different tradition as to objectivity from its members), both tribunals tend to be informal (though the Court appears to be better organized than the *ad hoc* arbitration hearing), the Court firmly espouses the adjudicatory approach which many feel should characterize the arbitration tribunal, and the Court seems to be more successful in achieving expeditious hearings at a lower cost. This last point may be due as much to the kinds of cases which come before the Court (about which more will be said later) as to the fact that the state picks up the bill for the judges.

Even without probing below the surface, however, it is clear that an attempt to transplant the Swedish Labor Court system into the United States would raise significant problems. The case load of the Court is low by comparison with what it would have to be in this country, and it would be impossible to make Washington the counterpart of Stockholm for the purpose of holding all the hearings. Some kind of regional system would have to be established in America, and in our federal framework this might be troublesome. Even more fundamental problems result from the fact that the industrial relations framework in the two countries, about which nothing has been said so far, is vastly different. Over a period of time each country evolves its own institutions and they are, like human beings, partly a product of their environment. Thus, in order to have any understanding of the true role of the Labor Court in Sweden, one must first take an overall look at the pattern of industrial relations in that country.

A principal characteristic of the Swedish system of industrial relations is that it is based much more upon agreement than upon legislation.[12] Such a system presupposes powerful federations, and this is exactly what one finds. One big bargaining association dominates each side. The Swedish Employers' Confederation (SAF) represents the employers, and the Swedish Confederation of Trade Unions (LO) represents the employees. The union confederation got started first, in 1898, with the immediate objective of organizing and administering a joint strike insurance fund. The employers responded, in 1902, by establishing a confederation of their own, and it too was a sort of mutual insurance society. A few tumultous years followed in

12. JOHNSTON, COLLECTIVE BARGAINING IN SWEDEN: A STUDY OF THE LABOUR MARKET AND ITS INSTITUTIONS 115-75 (1962).

which the employers were particularly suspicious of the tie between the union confederation and the Labor Party, particularly since the communists had not yet split off to form their own party. Nevertheless, in 1906 the employer and union confederations did reach an agreement at the national level which has been the basis of their system of employer-employee relations ever since. This so-called "December Compromise" consisted of three basic points:

1. the mutual recognition of the right to organize;
2. the recognition by the union confederation of the right of the employer to direct and distribute the work of his enterprise, and to engage and dismiss workers regardless of whether they belonged to a particular union, or to no union at all; and
3. the tacit understanding of the two confederations that both would insist on the right of employers and workers to fix wages and other terms of employment by means of free bargaining.

In 1936, the first point in the above compromise was incorporated in legislation. This extended that part of the agreement beyond the sphere of the two confederations, which did not, in and of themselves, cover the entire economy. Point two has been made a part of the constitution of the employers' confederation, so that every collective contract to which an SAF affiliate is a party must contain a clause safeguarding the management rights enumerated in the December Compromise. Over the years there have been some modifications in this clause, as will be shown later, but it remains substantially intact and is a point of significance in any comparison between the Swedish and American dispute tribunals because it plays a large role in determining the kinds of cases which come before the Swedish Labor Court.

Since the two powerful confederations play so important a part in Swedish industrial relations, it is necessary to say a brief word about them. The employers' confederation consists of approximately forty-four national trade associations which employ over one-third of the total work force of Sweden. According to the constitution of the SAF, an individual employer becomes a part of the confederation by joining one of the national trade associations. Moreover, all applications for membership in an association have to be approved by the SAF. Unlike the practice in the United States, where collective agreements are typically signed by the employer and the union, collective agreements in Sweden are, as a rule, signed by the associations on behalf of their members, and the SAF has a considerable amount to say about such agreements. The agreement must be approved by the SAF before being signed by either an association or an employer.

The SAF may even instruct an individual employer on the solution of a particular problem which is deemed to have importance beyond the employer's individual situation, though this power is rarely used. Discipline within the employers' confederation is maintained in a variety of ways. There is a mutual insurance fund to which a member can be denied access if the loss results from an unauthorized lockout or a strike provoked by unjustified action on his part. Furthermore, an association or individual employer is liable for a heavy fine or expulsion if it violates the SAF constitution or a decision rendered by the SAF in conformity with that constitution. On the affirmative side, the SAF has the power to order a lockout on behalf of a part or all of its membership.

The union confederation includes approximately forty-two national unions. Its central powers are less than those of the SAF, but it does have the right to be represented in every union negotiation and to make proposals if it wishes. The LO may also deny strike benefits out of its mutual insurance fund to any union which rejects a proposal put forth by the LO for the purpose of ending a dispute. In principle, the decision to accept a contract or to strike rests with the particular union, but before striking the union must, on pain of being denied access to the joint fund, apply to the LO for a special authorization to strike if the strike would involve more than three per cent of the union's membership.

It is apparent from the above that in Sweden both employer and union confederations represent a centralized power in collective bargaining which has no counterpart in the United States. This special structure obviously has an impact upon the handling of grievances. Moreover, unlike the rule in the United States, the courts in Sweden have held that a collective contract is binding not only upon the organizations, but also upon their individual members. Thus, a breach of the contract exposes the offender to civil law suits for damages. Early in the twentieth century, strikes were more frequent and the legal recourse of employers (since the injunction was not available) was to bring the offenders before the general law courts, where the proceeding might last for several years before the Supreme Court finally decided the case. By 1929, contract violations were sufficiently serious to cause the Parliament to establish the Labor Court. This legislation, in addition, provided that the parties to a collective agreement are bound to refrain from certain kinds of coercive conduct during the life of the contract. Thus, from the very outset, the Labor Court in Sweden was far more than a tribunal designed to resolve differences over the interpretation of collective

bargaining contracts. Moreover, although private arbitration does exist in Sweden, and is in fact contemplated by the legislation, it cannot be used to bypass the Labor Court in contract breach or invalidation cases.

This sketchy outline of collective bargaining in Sweden, and the role which the powerful confederations play, is obviously inadequate to do more than suggest some of the difficulties in trying to compare American grievance arbitration and the Swedish Labor Court, but it may help to emphasize points of difference. A point which remains to be made, and which requires explanation, is that the jurisdiction of the Labor Court is in some senses immensely broader than that of the arbitration tribunal. On the other hand, the Labor Court does not handle many kinds of disputes which constitute the bulk of the business before American arbitrators.

In the United States, organizational problems (which for all practical purposes means organizational problems on the union side, since we do not have many organizational problems with management) involve unfair labor practices which are within the jurisdiction of the National Labor Relations Board (NLRB). On occasion, a state labor relations board may be involved in similar cases. Sweden has no counterpart to the NLRB, and organizational cases go to the Labor Court. Additionally, in the United States, certain kinds of wage problems—minimum rates, maximum hours, and overtime pay—would be covered by the Fair Labor Standards Act and would be enforceable by the Secretary of Labor in the federal courts. Similar cases in Sweden would come before the Labor Court. Finally, as mentioned above, in Sweden the collective agreement is binding not only upon the corporate parties, but also upon the individual members; whereas, in the United States, the status of the individual vis-à-vis the collective contract is much more ambiguous.[13] Thus, Swedish Labor Court has an effective weapon against coercive tactics, such as strikes and boycotts. In the United States, some of these tactics would properly fall within the jurisdiction of the NLRB, others could come before state or federal courts, and a few might come before arbitrators. Damage suits against individual union members would be almost wholly ineffective in American courts, and damage suits against unions have, with some exceptions, been tactical maneuvers rather than real attempts at getting monetary awards.

Perhaps more important, however, than the items handled by the Labor Court and not by American arbitrators, are the items

13. See FLEMING, THE LABOR ARBITRATION PROCESS 107-33 (1965).

which constitute the bulk of the business before arbitrators but which do not come before the Labor Court. In theory, both have jurisdiction over interpretations of the collective agreement. In fact, several of the most contentious issues on the American scene do not come before the Swedish Labor Court at all. Indeed, as a rough approximation, it seems likely that about sixty per cent of the issues which come before arbitrators in the United States do not come to the Labor Court in Sweden. Thus, in a 1957 sample of American Arbitration Association cases, roughly twenty-five per cent of the total were discipline and discharge cases, approximately seventeen per cent were seniority items, and another twenty per cent involved such things as job evaluation, incentives, and union security.[14] As a general rule, none of these items comes to the Labor Court. Seniority is simply not a concept which has been embodied in Swedish collective bargaining contracts. It is apparently practiced to a certain extent, but it is not provided for by contract. Doubtless, one reason for this is that the Swedes have been extraordinarily successful in maintaining full employment, so that a worker has little difficulty in finding a new job. Another and more fundamental reason, which applies equally to the other issues mentioned above, is that another forum is available for handling such disputes.

As was said earlier, a principal characteristic of the Swedish industrial relations system is that, starting with the December Compromise of 1906, it has relied more upon agreement than upon legislation. In 1938, the December Compromise was amplified into what was known as the "Basic Agreement"; it has been amended since then in 1947, 1958, and 1964. The agreement calls for the creation of a Labor Market Council on which the SAF and the LO have equal representation. Normally there are three regular representatives and six alternates from each side. On occasion, the Labor Market Council sits as an arbitration tribunal and, when it does, an impartial chairman (usually the chairman of the Labor Court acting in a private capacity) is appointed jointly by the SAF and the LO. One need only look at the charter of the Labor Market Council, which is a wholly private organization perched at the pinnacle of the Swedish collective bargaining structure, to understand its importance and to put the role of the Labor Court in better perspective. The Basic Agreement is too long to outline in detail, but in brief it gives the bipartite Labor Market Council jurisdiction over the following: contract negotiations; the right of either party to terminate an em-

14. *Procedural and Substantive Aspects of Labor-Management Arbitration*, 12 ARB. J. (n.s.) 131 (1957).

ployment contract of indefinite duration; the right to lay off labor due to a shortage of work; coercive acts by either party; conflicts threatening essential public services.

The 1906 agreement established the principle that the employer is entitled to engage and dismiss workers at his own discretion. Fairly early in its existence, the Labor Court interpreted this principle to mean that a dismissed worker could not bring the matter before the Labor Court or any other court. Thus discharge cases, which are so common before American arbitrators, do not come to the Labor Court. This is a rather shocking idea to those who are accustomed to American industrial jurisprudence, because one of the prime benefits of the collective agreement in America is generally thought to be the protection that it gives the individual against arbitrary or unjust discharge. In practice, however, the situation in Sweden is not quite as it may sound. In the first place, the fact that there has been full employment in Sweden means that it has been relatively easy for the dismissed worker to find another job. Second, the bargaining relationship between the two giant federations is such that their members are unlikely to behave capriciously. Third, the Labor Market Council is empowered, when a discharge case is referred to it, to award damages to the worker if it finds that there were no material grounds for dismissing him.[15]

A somewhat similar situation prevails with respect to reductions in force. If the employer implements a proposed reduction, the labor side can bring this to the Labor Market Council. Once the dispute is before the Council, the agreement provides:

> In its appraisal of the action the Council shall pay due consideration both to the extent to which production is dependent on the skill and suitability of the labor employed and to the worker's legitimate interest of security of employment. Accordingly, consideration shall be given to the necessity for the employer to be served, so far as is possible, by skilled labor suited for the job. Further, when the choice is between workers of equal skill or suitability, the length of service of the individual worker and also any especially heavy family obligations he must meet shall be borne in mind.
>
> The Council shall seek to arrive at a concerted opinion in judging disputes referred to it, and to devise means for settling the differences between the contesting parties. Any decision upheld by the majority of the Council shall be communicated to the trade federations concerned, and it shall rest with the latter, in consultation with the SAF and the LO, respectively, to resort to any such measure as may be prompted by the decision.[16]

15. Basic Agreement Between the Swedish Employers' Confederation and the Confederation of Swedish Trade Unions, chapter III, article 4.

16. *Id.* chapter III, article 7.

Union security cases, which are not frequently heard by American arbitrators, are totally absent in the Swedish set-up, because the 1906 agreement provided that an employer could hire a worker regardless of whether he belonged to a particular union or to no union at all. Since this early agreement still obtains, if an employer who is bound by a closed shop contract wishes to join the SAF, he is required to remove this provision from the contract. The LO, true to the December Compromise, will see that the union does so.

Incentives are important in the Swedish industrial complex, and some sixty-five per cent of the workers are on some sort of piecework. But once again, disputes in this area are handled by a special tribunal set up by the SAF and the LO. A separate agency, called the "Time and Motion Study Board" is assigned the following tasks:

a. following and furthering collaboration in questions relating to time and motion studies, as well as time and motion study councils, and promoting a sound and suitable practice of time and motion studies;
b. handling and deciding, as an arbitration board, disputes concerning, first, the validity or the meaning of the provisions contained in this agreement; secondly, the question whether certain procedures conflict with these provisions; and, thirdly, the consequences entailed by procedures that are found to be conflicting.[17]

The Time and Motion Study Board is composed of three members from each of the organizations, plus an equal number of deputies. The SAF and the LO agree upon an impartial chairman for a period of three years.

In addition to the Labor Market Council and the Time and Motion Study Board, there are other ways in which the SAF and the LO cooperate in establishing joint panels for one purpose or another, but they are not immediately relevant to the subject at hand.[18]

II. Some Conclusions About the Swedish Labor Court

Having now looked briefly at the Swedish Labor Court, both as to organization and operation, and at the overall bargaining structure and industrial relations climate in Sweden, we can, with a much better perspective, return to the question of how labor courts compare with the American labor arbitration tribunal.

Initially, if the labor court is viewed in isolation, it is possible to conclude that it and the arbitration tribunal serve much the same function, namely, to resolve differences over the meaning and in-

17. Agreement Concerning Time and Motion Studies Concluded by Swedish Employers' Confederation and Confederation of Swedish Trade Unions, article 5.

18. Johnston, *op. cit. supra* note 12, at 216.

terpretation of collective bargaining contracts. There are even common philosophical tenets: the tribunal should be tripartite; the proceedings should be informal; appeals may be taken or decisions reviewed on extremely limited grounds; and the mediation function is generally subordinated to the adjudicatory function.

As we have seen, however, there are below the surface very important differences between the Swedish Labor Court and the American arbitration tribunal. For one thing, the Labor Court has jurisdiction over matters that in this country would typically come before the NLRB or the courts. For another, issues which in America would constitute the major part of the business before arbitrators do not come to the Labor Court at all. Significantly, this is because the Swedes have created other agencies, such as the Labor Market Council and the Time and Motion Study Board, to handle such problems; and these agencies are, in case of disagreement, essentially private arbitration boards set up under the aegis of the parties to the contract. Stated differently, what the Swedes have done is to take the issues which would normally come to arbitration in the United States and send them to bipartite review boards which can, in the event of disagreement, turn themselves into impartial arbitration boards. Nevertheless, it would be erroneous to jump to the conclusion that any attempt to compare the labor court, in a country like Sweden, with grievance arbitration in America is misleading and that the real comparison should be between grievance arbitration and the Labor Market Council or the Time and Motion Study Board. The fact is that, while the Swedes have a formula for turning their bipartite boards into tripartite boards for the purpose of resolving deadlocked disputes, they rarely have to resort to this procedure. Thus, there is more arbitration in theory than in practice, and if one attempted to compare the experience in Sweden with the experience in America, he would find almost no cases in Sweden.

One could conclude from all this that any attempt to compare grievance arbitration in America with similar institutions in Sweden is an exercise in futilty. The Labor Court is not really the same kind of an animal, and the Swedish arbitration boards are more theoretical than real, simply because the parties find it unnecessary to use them to any substantial degree. But there is a difference between saying that comparisons are difficult and saying that there are no lessons to be learned. Whether the Swedes have anything to learn from us, I leave to them. Clearly, in my view, we have some things to learn from them.

First, their bargaining confederations, while operating in a much

smaller geographical area and a much less complex industrial economy than exist in the United States, exercise a degree of industrial statesmanship and discipline which is hard to find in this country. It may be that some of the strife now found on the labor-management scene in the United States could be alleviated if we were to develop larger bargaining units with greater powers of discipline. This is one of the factors which makes it possible for the Swedes to handle so many of their conflicts over contract interpretations on a bipartite basis.

Second, the collective bargaining climate in Sweden tolerates, and indeed expects, objective participation on the part of all the partisan members on the court or in the arbitration process. On the other hand, any objectivity from partisan members of an American arbitration tribunal is generally covert. This is not to suggest that there is anything subversive about the American approach; it is simply to say that the traditions in the two countries are different. Perhaps in the last analysis it makes no difference, since the underlying philosophy of having partisan members may be simply to gain the advantage of their expertise and greater familiarity with the job. Since that can be obtained whether or not partisan members ultimately dissent from an award, it may not be of great significance that partisan members in America do not pretend to be objective. On the other hand, wear and tear on neutral members of arbitration tribunals would often be saved if their colleagues were in a position to take a completely objective view of the issues without respect to the feelings of their constituents.

Third, there are procedural standards set by the Swedish Labor Court which are clearly superior to those found in most of our *ad hoc* arbitration situations. The Labor Court does have a preliminary hearing, not for the purpose of mediating the issue but in order to clarify the issue and to sharpen the presentation. No complaint is more familiar among American *ad hoc* arbitrators than that the parties so often badly prepare and present their cases. Additionally, costs are kept low and the time-lag is not serious under the Swedish procedure.

Fourth, the delicate problem of whether to permit the individual to bring an action which the union either opposes or is unwilling to process has been resolved in favor of the individual, and no serious damage to the collective relationship has resulted.[19] (It should be noted that the circuits are now in conflict on whether it is an unfair labor practice for a union unfairly to refuse to prosecute a grievance;

19. Summers, *supra* note 9.

if the NLRB is upheld in its view that this constitutes an unfair labor practice, we may have a remedy in this country.[20])

If these general observations about grievance arbitration in America and the Labor Court in Sweden are valid, a legitimate question remains as to whether Sweden is sufficiently illustrative of the general labor court pattern in Western Europe to justify generalizations. A recently published book on the French labor courts throws some light on that question because it includes some material on such other European labor courts as the ones in Austria, Germany, Belgium, Norway, Sweden, Denmark, and Finland.[21] There are major variations among the European labor courts in both structure and procedure. Several, for instance, rely heavily on mediation techniques, although, as has already been pointed out, the Swedish Court does not. However, there are also many common denominators, including a wish to accelerate decisions, reduce expenses, and rely, at least in part, on lay members who come from the contending parties. Thus, in at least four broad areas it does seem possible to generalize about labor courts in Europe.

First, the jurisdiction of the court normally includes areas beyond the pale of the grievance arbitrator in America. Almost nowhere else is there a counterpart of the NLRB or of the wage machinery under the Fair Labor Standards Act; their functions are absorbed, insofar as they exist, by the labor court. In addition, some matters are brought to the labor court in Europe which would come before civil courts in America.

Second, many subjects which constitute a large segment of the grievance arbitrator's load do not come to the labor court. Probably the most important example is the firm rule of law in most European countries that the court is without power to order the reinstatement of an individual who has been unfairly discharged. The most that such an individual can expect is damages. The individual who is dismissed may in all probability be entitled to severance pay, but what Americans would consider to be the most appropriate remedy, reinstatement, is not available.

Third, labor courts invariably have lay members from labor and management, and the principle that these members are expected to be unbiased is now well established. France illustrates this aspect in the most spectacular fashion by having a labor court which is bipartite, though there is a provision to add a neutral member from the

20. *Cf.* NLRB v. Miranda Fuel Co., 362 F.2d 172 (2d Cir. 1963); Local 12, Rubber Workers v. NLRB, 63 L.R.R.M. 2395, 368 F.2d 12 (5th Cir. 1966).

21. McPherson & Meyers, *op. cit. supra* note 2, at 2-7.

local judiciary in case of deadlock.[22] At an early date, a struggle took place in France over the freedom of the lay members to vote objectively, rather than voting on the instructions of their respective constituents, and it was ultimately made illegal for the parties to instruct court members.

Fourth, under the labor court system, workers may normally bring cases whether or not they are members of the union and whether or not they are covered by a collective agreement. This is so partly because some benefits which one would derive from the collective agreements in America are provided by statute in Europe, and partly because, as McPherson and Meyers explain:

> [T]he agreements are typically negotiated not by single employers but by employers' associations. They apply to the establishment of all member firms in the particular industry for a region or, more frequently, the nation. The negotiating associations normally have a comprehensive membership that includes many establishments where only a minority of the workers are organized, except in the Scandinavian countries, where few such establishments can be found. Consequently, a number of firms are subject to the agreement that would not, in the American context, negotiate with a union.
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> Second, most European countries provide by law for the compulsory extension of agreements under certain circumstances to establishments that were not originally parties to it. The typical provision is that the government, at the request of the parties to an agreement that was applicable originally to a large majority of the employees in an industry, will extend to the entire industry, within the area covered, those parts of the agreement that relate directly to the terms of employment.[23]

III. Conclusion

From the preceding analysis, it is fairly evident that European labor courts do not offer a ready alternative to the American grievance arbitration tribunal. They do not serve the same function, nor do they exist in the same industrial relations climate. They can, of course, provide some valuable lessons. Most of all, however, the comparative exercise should serve to remind all of those who have a stake in the grievance arbitration system that its long-run viability depends upon its capacity to change. Institutions, like individuals, are forever called upon to meet new problems under new and different conditions.

More than anything else, grievance arbitration needs a system of self-examination and self-renewal, and this can only be done by a joint enterprise in which arbitrators, labor, management, and the

22. *Id.* at 48.
23. *Id.* at 5.

appointing agencies participate. I once suggested that this might be done by borrowing from the courts the idea of the "judicial conference."[24] The suggestion was not well understood by non-lawyers because the word "conference" sounded like it meant some kind of periodic meeting similar to that of the annual meetings of the National Academy of Arbitrators. The word "committee" would have been better understood. The purpose of the judicial conference is simply to give advice upon the needs of the circuits and upon other matters concerning the administration of justice in the courts of the United States. The analogous "arbitration conference" would give advice on the needs of grievance arbitration tribunals and upon other matters concerning the administration of the voluntary arbitration system in the United States. The work of the judicial conference is done through committees which are composed of judges, practicing lawyers, and scholars. The work of the arbitration conference would likewise be done through committees composed of arbitrators, experienced representatives of labor and management, and scholars.

Two very practical problems stand in the way of establishing an arbitration conference—assuming, of course, that the idea is a good one in the first place. The first is that there is no counterpart of the statutory framework which brings the judicial conference into being; the second is that the United States Treasury is not available to pay the expenses which would be incurred. As to the first, since grievance arbitration is private, the framework for the arbitration conference should logically remain private. This implies that labor and management, more specifically companies and unions, must be sufficiently interested in the idea to give it financial support. If they are, a ready administrative mechanism should not be hard to find. The American Arbitration Association, with its network of regional offices, is already in existence. Alternative possibilities would be to establish a program under the auspices of the National Academy of Arbitrators, or the Federal Mediation and Conciliation Service. The Academy is not presently equipped to carry out such a function, and perhaps should not undertake it. The Federal Mediation and Conciliation Service could do the job; however, if it did, the task would lose something of its private character. This is not necessarily fatal, and it may be that the Service should both act as the catalytic agent for such a program and obtain the support for it from public funds.

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24. FLEMING, *op. cit. supra* note 13, at 199.

In the last analysis, the question is not whether a mechanism can be found for carrying out the proposed purpose of an arbitration conference, but whether there is a felt need for it. The argument that there is rests on two propositions: (1) the rule that institutions remain viable and socially constructive only insofar as they build in a capacity for change; and (2) the observable fact that there are many areas of the arbitration process which need exploration and fresh thinking. Enumeration of a few of these areas may be helpful in making the point.

Grievance systems which lead ultimately to arbitration are often deficient in at least two respects: first because the screening mechanism is inadequate, and second because the issues remain ill-defined, or are badly presented. The implications of poor screening and ill-defined, badly presented grievances are great, both for the relationships of the parties and for the acceptability of impartial decision-making. Those who want to make the arbitration tribunal a respected last step in the grievance procedure would do well to join in improving the preliminary steps, because the output of the arbitrator, like that of the computer, is heavily dependent on the nature of the input.

Despite a great deal of discussion of the subject, we do not yet know how we should handle individual rights under the collective agreement. Some argue that the individual should have a vested right in the grievance and arbitration provisions of the contract; others believe that the union must be allowed to refuse to process grievances so long as it acts in good faith; and still others think that the individual should be permitted to force the union to take grievances involving "critical job interests" to arbitration.[25] Meanwhile, the courts and the NLRB are troubled by the same problem. Perhaps it is best that the problem be left to the courts or to the NLRB, but until a clear resolution of the issue is made, it will remain a prickly thorn for arbitrators and for the parties to the collective agreement.

Decisions of the United States Supreme Court in recent years, mostly in connection with section 301 of the Taft-Hartley Act, have greatly expanded the sphere of influence of the arbitrator. One result of this has been that the arbitrator has been asked to play a more active role with respect to contract enforcement than in the past. Specifically, damages and the injunction, which were once

25. See generally Aaron, *The Individual's Legal Rights as an Employee*, 86 U.S. MONTHLY LABOR REV. 666 (1963); Blumrosen, *Legal Protection for Critical Job Interests: Union-Management Activity Versus Employee Autonomy*, 13 RUTGERS L. REV. 631 (1959); Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601 (1956).

practically solely in the province of the courts, now frequently appear before the private arbitrator. Their very presence may inject a new note of contention into the arena. The parties have it within their power to define the jurisdiction of the arbitrator, and, for that reason alone, some thoughtful consideration should be given to how much and what kinds of power they want the arbitrator to have.

Furthermore, recent decisions of the NLRB and the courts have resulted in new and unexplored areas of overlap or interaction between those tribunals and the arbitration process. A good example is the Supreme Court's decision in the *Westinghouse* case,[26] which cleared the way for arbitrators to resolve grievances between a company and one union even though such resolution might have an impact upon a second union not a party to the proceeding. Some interesting experimentation with "trilateralism" has resulted, but the question of how arbitrators' decisions and orders of the NLRB are to be made compatible remains. This example could be repeated in other areas, and it suggests that there should be a continuing examination of the inter-relationship of the various tribunals.

It may also be time to re-evaluate the role played by partisan members of the arbitration board. At the moment, the pattern ranges from total disregard of the contractual provision which calls for the appointment of such members to nomination of the partisan members after the case has been heard. In any event, we have no tradition of impartiality among our representative members. Perhaps this is not important, but it is relevant to the question of what role such members are supposed to play. As the make-up of labor courts in Europe shows, there is a fairly widespread conviction, which is shared in this country, that industrial tribunals will serve a more useful function if their membership includes representatives of both labor and management. If this is a sound conception, the anticipated advantages to be derived from partisan members should not go by default.

In summary, the thrust of my argument is that there is nothing sacred about our present system of grievance arbitration; that it will remain a useful institution only insofar as it adjusts to new times and new circumstances; that its capacity to make this adjustment will be enhanced by the existence of a mechanism such as the arbitration conference; and that in the long-run the reward from this approach will be greater than from trying to shift to a labor court system taken from another context.

26. Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964).