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Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis

David Westfall & Gregor Thüsing***

INTRODUCTION

An observer from another planet looking at German and American labor law could not fail to be impressed by the sharp dichotomy in the treatment of strikes and lockouts in each legal system and, perhaps, to wonder whether either system would be improved if it borrowed from the other. Of course, what would constitute an improvement depends upon the purposes the system serves and the interests that it is intended to protect. In both countries, it is a truism that strikes—and, even more importantly, the threat of strikes—play a major role in supporting the demands of employees and insuring that what occurs when unions negotiate with employers is indeed collective bargaining, not “collective begging.”¹ A major challenge is to permit strikes and lockouts to play their role without becoming overly burdensome for some or all of the interested parties—employees, employers, and the public. Thus, regulations that limit such burdens without making these rights meaningless may serve an important public purpose.

A. Possible Uses of Comparative Analysis

Even the most tentative conclusions derived from any attempt at comparative analysis must be qualified by the recognition that there is often a vast gulf between any part of a legal system as it appears in published sources and its operation in the real world. A less obvious qualification is that this difference is highly dependent on the national

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¹ See Samuel Estreicher, *Collective Bargaining or “Collective Begging”?: Reflections on Antistrike-breaker Legislation*, 93 MICH. L. REV. 577, 599 (1994).

culture and value system.² For example, the real-world application of German labor law seems to be affected by two traits that are so widely shared as to constitute part of the national character: a high degree of respect for both public³ and private institutions,⁴ and consistent obedience to legal rules, both on a level often lacking in the United States.

Additionally, German law is, in a variety of ways, far more protective of workers than American law. Prominent examples of this heightened protection include legislatively mandated vacations of as much as four weeks,⁵ paid sick⁶ and maternity leave,⁷ and enhanced protection against discharge.⁸ In contrast, American federal law does not mandate vacations for private sector employees, and the recently enacted Family and Medical Leave Act of 1993 requires only unpaid leave.⁹ Moreover, the higher percentage of union membership in Germany,¹⁰ coupled with the practice of extending collective bargaining

² See Peter L. Murray, Note, *A Comparative Law Experiment*, 8 *IND. INT'L & COMP. L. REV.* 233 (1998), for a comparative analysis of German and American law.

³ For example, Robert B. Reich, the former Secretary of Labor, recently sharply criticized Chairman of the Federal Reserve Board Alan Greenspan, asserting that he "may be wise, but he's not always right." See Robert B. Reich, *Talking Back to Greenspan*, *N.Y. TIMES*, Jan. 26, 1999, at A27. It is impossible to find comparable public criticism of officials of the *Bundesbank*.

⁴ For example, despite an additional tax of approximately 10% of the regular income tax imposed on church members, and the anti-clerical tradition of the former East German government, about 70% of the adult German population belong to a church. See Joseph Listl, 56 *JURIST* 905 (1996).

⁵ Under the *Bundesurlaubsgesetz* (Federal Paid Leave Act), as of 1995, all employees are entitled to paid recreational leave of 20 working days per year (assuming a five-day work week). See *Bundesurlaubsgesetz*, v. 1963 (BGB1.I S.2); see also GÜNTER HALBACH ET AL., *LABOUR LAW IN GERMANY: AN OVERVIEW* 141-42 (5th ed. 1994). This statutory minimum is exceeded in the great majority of collective agreements. In 1993, 70% of employees covered by a collective agreement were granted six weeks' paid leave. See *id.* at 142.

⁶ Under the *Entgeltfortzahlungsgesetz* (Continuation of Payment Act) Art. 4, § 1, employees are entitled to as much as six weeks of full wages during each case of illness. See *Entgeltfortzahlungsgesetz*, v. 1998 (BGB1. I S.3843).

⁷ The *Mutterschaftsschutzgesetz* (Maternity Protection Act), § 3, 6, provides paid maternity leave of a minimum of fourteen weeks—six before the estimated date of birth and eight weeks after (twelve weeks when there are twins or other multiple births). See *Mutterschaftsschutzgesetz*, v. 1997 (BGB1. I S.22.93).

⁸ In an establishment with more than ten employees, after six months' employment a worker can only be dismissed because of his behavior, his incapacity to fulfill his contractual duties, or because of business necessity. See *Kündigungsschutzgesetz*, § 1 v. 1969 (BGB1. I S.1317) (Protection Against Dismissal Act). For a discussion of the general protection against dismissal, see HALBACH ET AL., *supra* note 5, at 176-80.

⁹ See Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1998).

¹⁰ Private sector union membership is about 30% in Germany, see GREGOR THÜSING, *DER AUSSENSEITER IM ARBEITSRECHT* 17 (1996), compared to 10.2% in the United States. See U.S. DEPT. OF LAB., *EMPLOYMENT AND EARNINGS* 213 (1997) (reporting on employed private nonag-

agreements to bind other employers in the same industry whose employees are not represented by a union,¹¹ surely tends to enhance unions' bargaining clout by diminishing the importance of competition from nonunion firms. Thus, the magnitude of the differences just described may mean that the fruits of comparative analysis are unlikely to include anything approaching a conclusive demonstration of the likely consequences of adopting a particular feature of another system.

Moreover, real world uses of the comparative analysis undertaken here are currently limited by what appears to be a high degree of improbability that either German or American law governing strikes and lockouts will be legislatively revised in any fundamental way in the near future. The possibility is at least theoretically greater that German law will be revised by judicial decision, because both the right to strike¹² and the right to lock out,¹³ as well as limitations on those rights, were derived by judicial interpretation of the freedom of association guaranteed by the German Constitution (*Grundgesetz*). Accordingly, expansions or contractions of the right could come from the same interpretative source. In contrast, in the United States, federal courts have not found any such constitutional protection of the right to strike;¹⁴ indeed, the ability to strike is expressly denied by statute to all federal employees,¹⁵ and, either by statute or decision, to many state employees as well.¹⁶ However, judicial and administrative interpretation is often used to define the parameters of the statutory provisions on the sub-

gricultural wage and salary workers). One commentator predicts that the figure will fall by 5% by the year 2000. See CHARLES B. CRAVER, CAN UNIONS SURVIVE? 10-33 (1993).

¹¹ Under Art. 5, § 1 of the *Tarifvertragsgesetz* (Collective Agreement Act), "[i]f so requested by a party to a collective agreement, the Federal Minister for Labor and Social Affairs . . . may declare the agreement to be generally binding . . ." *Tarifvertragsgesetz*, v. 1969 (BGB1. I. S.1323). The effect of such a declaration, under sec. 4, is to cause the rules of law contained in the agreement to apply "within its sphere of application" (that means all employees within the tariff district) "to employers and employees not previously bound by the agreement." *Id.* At the end of 1993, 566 collective agreements, out of a total of 35,000, had been thus made generally binding, so that about 90% of the German work force is now covered by collective agreements, either by normative effect of the agreement or by reference in the employment contracts. See HALBACH ET AL., *supra* note 5, at 311, 316.

¹² See *infra* text accompanying notes 68-72.

¹³ See *infra* text accompanying notes 190-94.

¹⁴ See *Dorchy v. Kansas*, 272 U.S. 306, 311 (1926) (rejecting the argument that the "liberty" protected by the Fourteenth Amendment includes the right to strike).

¹⁵ See, e.g., *United Fed'n of Postal Clerks v. Blount*, 325 F. Supp. 879, 885 (D.D.C. 1971), *aff'd mem.*, 404 U.S. 802 (1971) (upholding a blanket statutory ban on strikes by federal employees); see also *infra* note 31.

¹⁶ See *infra* text accompanying notes 35-36.

ject, again creating the possibility of revised interpretations of American labor law from these sources.

Despite the factors just cited, a comparison of the two legal systems can be useful, since there have been significant instances where the law of one country influenced that of the other. For example, German law has played a major role in the development of American decisional law regarding the reliance interest in contracts.¹⁷ French law similarly influenced the English common law in one of the most famous contract cases, *Hadley v. Baxendale*,¹⁸ which addressed the role of foreseeability in damages actions.¹⁹ More recently, both the European Court of Justice and the German Federal Labor Court have adopted, in the context of gender discrimination, the American recognition of disparate impact as a basis for finding racial discrimination in employment.²⁰ Moreover, the uses of comparativism in labor law need not be limited to guiding or assisting social change at home, but can also provide better insight into one's own national system, forecasting future developments, and serving as an instrument in the formulation and application of international labor standards.²¹

B. Allocation of Legislative Jurisdiction over Labor Relations

It is no surprise that legislative jurisdiction over labor relations is allocated very differently in Germany and the United States, and that those differences have had a major influence on the development of the law. The federal law grants the federal legislators jurisdiction over collective bargaining, even that which concerns state or municipal employees.²² Thus, German law governing strikes provides substantially uniform treatment for all employees, with the exception of the two groups that are denied the right to strike under any circumstances: civil servants (*Beamte*) and church employees.²³ Civil servants are not allowed to strike because they are viewed not as employees, but as bound by a special relationship of loyalty to the state. Pressuring the

¹⁷ See L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 55-56 n.4, 57 n.8 & 86-87 n.54 (1936).

¹⁸ See 156 Eng. Rep. 145 (Ex. Ch. 1854).

¹⁹ See Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249, 257 (1975).

²⁰ See generally GERLIND WISSKIRCHEN, MITTELBARE DIKRIMINIERUNG VON FRAUEN IM ERWERBSLEBEN (1994).

²¹ See COMPARATIVE LABOUR LAW & INDUSTRIAL RELATIONS 18-20 (R. Blanpain ed., 1982).

²² See GRUNDGESETZ [Constitution] [GG] art. 74, nr. 11 (F.R.G.).

²³ See HUGO SEITER, STREIKRECHT UND AUSSPERRUNGSRECHT 508 (1975).

state to improve their working conditions would be inconsistent with that relationship.²⁴ Church employees are not permitted to strike because the church views them as part of a community, with the common aim of promoting the faith. Because of this shared goal, these employees and the church that employs them are not regarded as opposing parties.²⁵ It follows that the employees may not strike, and the church may not lock them out.²⁶ This understanding binds the civil authorities as well because of the constitutional protection of the autonomy of churches, precluding legislative recognition of a right to strike or lock out.²⁷

In contrast, American collective bargaining law, including limitations on the right to strike, is reflected in both federal and state legislation. This article addresses only federal legislation, which includes:

(1) The National Labor Relations Act ("NLRA"),²⁸ which governs private sector unions and employees, with important exceptions derived either from explicit statutory language or judicial or administrative interpretation;

(2) The Railway Labor Act ("RLA"),²⁹ covering railroad and airline employees;

(3) Title VII of the Civil Service Reform Act of 1978,³⁰ applying to federal employees, none of whom may legally strike.³¹

Unlike the German states, American states have legislative jurisdiction over labor relations, limited only by the preemptive effect of the Supremacy Clause of the United States Constitution.³² The precise contours of such preemption, which in the present context has the effect of invalidating state legislation and judicial decisions that are found to be inconsistent with the Congressional design reflected in the

²⁴ See *id.*

²⁵ See Gregor Thüsing, *Die Kirchen als Tarifvertragsparteien*, 41 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT 52 (1996).

²⁶ See *id.*

²⁷ See GC, *supra* note 22, art. 140 (referring to former Art. 137 of the *Weimarer Reichsverfassung*). See also Thüsing, *supra* note 25, at 52.

²⁸ See National Labor Relations Act (NLRA), 29 U.S.C. §§ 151-168 (1998).

²⁹ See Railway Labor Act (RLA), 5 U.S.C. §§ 151-188 (1998).

³⁰ See Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1998).

³¹ See *id.* § 7311(3) (1998). See also 5 U.S.C. § 3333 (1998) (requiring all federal employees to execute an appointment affidavit under oath, which includes a promise not to participate in a strike against the Government of the United States); 18 U.S.C. § 1918 (1998) (making violation of § 7311 a crime).

³² U.S. CONST. art. VI, cl. 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . ."

NLRA and RLA, is one of the most heavily litigated areas of American labor law and is outside the scope of this article.³³ As state and municipal employees are expressly excepted from coverage by the NLRA,³⁴ state constitutions, legislation, and judicial decisions govern collective bargaining by such employees. More often than not, these employees are denied the right to strike,³⁵ although there are wide variations among the states and even with respect to different categories of employees within a single state.³⁶

State legislation thus often deals with collective bargaining by employees in the private sector who are either explicitly excluded from coverage by the NLRA, as in the case of agricultural laborers,³⁷ or over whom the National Labor Relations Board ("NLRB") has declined to assert jurisdiction because it has determined that labor disputes of those employees do not sufficiently substantially affect interstate commerce to warrant the exercise of its jurisdiction.³⁸ Thus, several states

³³ See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6-25 to 6-33 (2d ed. 1988) for a general discussion of preemption. For a discussion of its application in the context of federal labor laws, see 2 *DEVELOPING LABOR LAW* 1654-1728 (Patrick Hardin ed., 3d ed. 1992).

³⁴ See NLRA, 29 U.S.C. § 152(2).

³⁵ See Richard Kirschner, *Labor-Management Relations in the Public Sector: An Introductory Overview of Organizing Activities, Bargaining Units, Scope of Bargaining, and Dispute Resolution Techniques*, SC29 A.L.I.-A.B.A. 229 (1997). The author identifies 13 states, including California (by court decision), Illinois, and Pennsylvania that recognize a conditional right to strike for certain public employees. At least 38 states have not enacted strike laws. See *id.* at 246 (citing DONALD H. WOLLETT ET AL., *COLLECTIVE BARGAINING IN PUBLIC EMPLOYMENT* 10 (4th ed. 1993)). The most stringent anti-strike legislation is New York's Taylor Law, officially known as the Public Employees' Fair Employment Act, N.Y. CIV. SERV. LAW, Ch. 7, Art. 14, §§ 200-214 (McKinney 1997). Section 210 of the statute prohibits strikes, and subsection 2(f) provides what is often referred to as a "two for one" penalty on striking employees, requiring deduction of two days' pay for each day on strike. See *id.* However, since one day's pay is lost because the employee was not working, it might be more accurately described as "one for one." Other penalties include suspension of the dues check-off for the striking union. See *id.* § 210(3)(a). For a discussion of the Act, see RONALD DONOVAN, *ADMINISTERING THE TAYLOR LAW: PUBLIC EMPLOYEE RELATIONS IN NEW YORK* (1990).

³⁶ For example, Pennsylvania prohibits strikes by some categories of employees, see PA. STAT. ANN., tit. 43, § 1101.1001 (West 1998), but allows strikes by other employees unless or until the strike creates a clear and present danger or threat to the health, safety or welfare of the public. See *id.* § 1101.1003.

³⁷ See NLRA, 29 U.S.C. § 152(3) (1998).

³⁸ See *id.* § 164(c)(1), authorizing the NLRB, in its discretion, to decline to assert jurisdiction over any labor dispute where the effect on interstate commerce is deemed insufficient to warrant the exercise of such jurisdiction, provided that the dispute is not one over which it would have exercised jurisdiction under the standards prevailing as of August 1, 1959. Since those standards are expressed in terms of dollar volume of business done by employers, the effect of inflation has been to steadily diminish the number of disputes over which the Board may decline jurisdiction. Section 14(c)(2) authorizes the states to assert jurisdiction over such disputes.

have either undertaken to regulate collective bargaining by agricultural laborers,³⁹ have enacted a more general state statute patterned on the NLRA,⁴⁰ or have undertaken to act when the NLRB does not exercise jurisdiction.⁴¹ Finally, courts have excluded lay teachers in parochial schools from the NLRA's coverage,⁴² so that the church is not required to bargain collectively with them. Accordingly, strikes by lay teachers in church-operated schools and other concerted activities are not protected by federal law and may lead to discipline or discharge.

C. *Judicial and Administrative Roles in Labor Relations*

In Germany, the *Bundesarbeitsgericht*, the Federal Labor Court, is the final judicial tribunal in labor relations, subject only to review by the *Bundesverfassungsgericht*, the Federal Constitutional Court. The latter only has jurisdiction to decide whether the *Bundesarbeitsgericht* correctly interpreted the Constitution and cannot review its interpretation of other law. However, as both the right to strike and the limitations on that right are derived from the freedom of association guaranteed by the Constitution, the Federal Constitutional Court plays a significant role in developing strike law. In fact, in a few cases, the Federal Constitutional Court has reversed the Federal Labor Court.⁴³

³⁹ See, e.g., California Agricultural Labor Relations Act, LAB. CODE §§ 1140–1166.3 (West 1998).

⁴⁰ See, e.g., Pennsylvania Labor Relations Act, PA. STAT. ANN. tit. 43, §§ 211.1–.12 (West 1998).

⁴¹ For a discussion of state responses to the opportunity to exercise jurisdiction provided by NLRA § 164(c)(2), see Joanne K. Guinan, *Notice Requirements: Federal Preemption of State and Local Plant Closing Statutes*, 13 FORDHAM URB. L.J. 333, 347–50 (1985). Some states require proof that the NLRB has declined jurisdiction, and others merely require that the case be one that it would not hear under published decisions and guidelines. See *id.* at 347. Cases sustaining the exercise of jurisdiction by a state agency include *Jackson County Pub. Hosp. v. Public Emp. Rel. Bd.*, 280 N.W.2d 426 (Iowa 1979) (state exercised jurisdiction where NLRB, in the exercise of discretion, declined to do so); *Operation and Maintenance Serv., Inc. v. Labor Relations Comm'n*, 539 N.E.2d 1030 (Mass. 1989) (holding that state commission properly asserted jurisdiction after NLRB dismissed petition).

⁴² See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). The holding was grounded on the Court's desire to avoid resolving the potential conflict between the First Amendment's guarantees of religious freedom and Congressional exercise in the NLRA of its powers under the commerce clause. The lower federal courts have struggled to determine the degree of church involvement required in order for *Catholic Bishop* to apply. For a discussion, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 1572–76.

⁴³ See, e.g., *Entscheidungen des Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court]* 88, 103 (holding that the government as employer can temporarily replace striking public servants only pursuant to an explicit statute). The court itself is not allowed to invent such a right of temporary replacement.

In contrast, the United States does not have a specialized labor court. The NLRB, an administrative agency which has no German counterpart, performs many quasi-judicial functions.⁴⁴ The agency, however, does not have the power to enforce its orders and, absent voluntary compliance, must seek enforcement from a federal court of appeals. Accordingly, federal courts play an active role in labor disputes.⁴⁵ In addition, both federal and state courts have jurisdiction over suits against labor unions⁴⁶ and have a limited role in enjoining some types of strikes.⁴⁷

Notwithstanding this lack of enforcement powers, the Board, its General Counsel, the Regional Directors, and the Administrative Law Judges ("ALJ") together constitute major sources of administrative and quasi-judicial interpretations of the NLRA's definition of "unfair labor practices"⁴⁸ and the NLRB's issuance of "cease and desist" orders⁴⁹ to prevent such practices. Since strikes⁵⁰ and employer responses to strikes⁵¹ may constitute unfair labor practices, both actions may be subject to "cease and desist" orders in certain circumstances. Moreover, the General Counsel's decision either to issue or to refuse to issue a complaint (or, in the great majority of cases which do not present unusual questions, the decision of a Regional Director to whom he has delegated his power in the matter) also may have a major impact on the parties affected by a dispute.⁵² Similarly, if a complaint is issued,

⁴⁴ The Board determines questions concerning representation of employees under § 9 of the NLRA, and seeks to prevent unfair labor practices under § 10. However, it acts only in response to charges filed in accordance with § 10(b). See generally EDWARD B. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB (rev. ed. 1980).

⁴⁵ See NLRA § 10(e), (j), 29 U.S.C. 160 (e), (j) (1998).

⁴⁶ See LMRA § 301(a), 29 U.S.C. § 185 (1998), authorizing suits for violation of contracts between employers and unions to be brought in federal district courts, and LMRA § 303, 29 U.S.C. § 187 (1998), extending such jurisdiction to suits for damages by persons injured by conduct of unions prohibited by NLRA § 8(b)(4), 29 U.S.C. § 158 (1998), which contains a ban on secondary boycotts. In *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962), the Court held that state courts have concurrent jurisdiction over suits under § 301.

⁴⁷ See *infra* text accompanying notes 219–20.

⁴⁸ Unfair labor practices ("ULP") of employers are defined in NLRA § 8(a); union ULPs are defined in § 8(b).

⁴⁹ See NLRA § 10(c), 29 U.S.C. § 160(c) (1998).

⁵⁰ See *id.* § 8(b)(4), 29 U.S.C. § 158(b)(4) (1998).

⁵¹ Employer responses to strikes may constitute unfair labor practices under NLRA § 8(a)(1) (interference with rights protected by NLRA § (7)), NLRA § (3) (discrimination to encourage or discourage union membership), or NLRA § (5) (refusal to bargain). Section 7 protects, *inter alia*, the right of employees to engage in, or refrain from engaging in, concerted activities.

⁵² Under NLRA § 3(d), the General Counsel has "final authority, on behalf of the Board, in respect of . . . issuance of complaints under section 10" The Supreme Court held, in *Vaca*

the action of the ALJ who either dismisses or sustains the complaint, in whole or in part, may have important consequences, even though the ALJ's action is subject to appeal to the Board itself.⁵³

The National Mediation Board ("NMB"), the administrative agency that, pursuant to the RLA, has jurisdiction over labor relations in the airline and railroad industries,⁵⁴ lacks even the NLRB's power to determine what constitutes an "unfair labor practice" or to issue a "cease and desist" order to prevent such practices. Instead, the affected parties are relegated to seeking injunctive relief in the federal courts.⁵⁵ However, the NMB can, by exercising its substantially unlimited discretionary power, hold unions and employers "in mediation" when the two parties disagree over proposed changes in the terms of a collective agreement, thereby postponing the time when the parties are legally permitted to use self-help by calling a strike or unilaterally changing terms and conditions of employment.⁵⁶

v. Sipes, 386 U.S. 171, 182 (1967), that "the General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint."

⁵³ For a discussion of the NLRB's review of decisions of administrative law judges, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 1799-1800.

⁵⁴ Under § 2, ninth of the Railway Labor Act (RLA), 45 U.S.C. § 151-188 (1998), the NMB resolves disputes as to who shall represent employees. Under § 5, either party may invoke the services of the NMB in a dispute concerning changes in pay, rules, or working conditions (so-called "major" disputes), or it may proffer its services if it finds a "labor emergency" exists. Under § 6, carriers generally may not make changes in such matters after the NMB's services have been invoked or proffered until it has finally acted on the controversy. If it determines that further mediation will be unsuccessful, § 5, first, requires the NMB to proffer binding arbitration. If either or both parties refuse the proffer, the NMB is required to notify the parties that its mediation efforts have failed. Such notice has the effect of releasing the parties from mediation and starting a 30-day cooling off period, after which they are free to engage in self-help—the union by going on strike and the carrier by making changes reasonably required to maintain service. *See generally* THE RAILWAY LABOR ACT 216-17 (Douglas L. Leslie, ed. 1995).

⁵⁵ For a discussion of injunctive relief against a carrier that has failed to maintain the status quo in a major dispute, see *id.* at 241-42. For a discussion of similar relief against a union, see *id.* at 250. In these cases, the restrictions on injunctive relief in labor disputes do not apply. *See id.* at 243-45; *see also infra* note 91 and accompanying text.

⁵⁶ For a discussion of the "extraordinarily limited" judicial review of the mediation process, see RAILWAY LABOR ACT, *supra* note 54, at 218-20, discussing *Local 808, Bldg. Maintenance Serv. & R.R. Workers v. National Mediation Bd.*, 888 F.2d 1428, 1433-37 (D.C. Cir. 1989) (finding that a two year period of mediation is not unusual).

I. NATURE AND SOURCE OF THE RIGHT TO STRIKE

A. Definition of "Legal Strike"

The preceding introductory discussion has assumed that the term "strike" has a common meaning in both legal systems. In part, it does, as both countries require joint action by two or more employees in order for a work stoppage to be treated as a legal strike. Some American courts have, however, stretched the definition of a "legal strike" by finding that the requisite joint action exists where a single employee is deemed to be acting on behalf of his co-workers.⁵⁷ Aside from the common requirement of joint action by two or more employees, the term "strike" has a narrower meaning in German law than in American law. Unlike German law, American law does not require that a strike be called by a union or be for the purpose of obtaining a collective agreement in order to be considered a legal strike. This difference stems from the different sources of protection of the right to strike in the two countries.

1. Germany

According to a commonly accepted definition, a legal strike in Germany is the "jointly and deliberately executed cessation of work by a number of employees with the intention that they will resume work once they have successfully forced through their demands in the form of the conclusion of a new collective agreement."⁵⁸ Implicit in the definition is that the strike be called by a union, as only a union can execute a collective agreement. A partial refusal to perform work, the so-called "work-to-rule" or "go-slow," is also a strike, although, as discussed below, it is an illegal one.⁵⁹

2. United States

Section 501(2) of the Taft-Hartley Act, also known as the Labor Management Relations Act of 1947 ("LMRA"), provides that "the term

⁵⁷ See, e.g., *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822 (1984) (holding that truck driver's refusal to drive a truck with allegedly unsafe brakes based on a provision of a collective bargaining agreement was "concerted activity" because the driver was invoking a right rooted in that agreement).

⁵⁸ HALBACH ET AL., *supra* note 5, at 331; see also HANS BROX & BERND RÜTHERS, *ARBEIT-SKAMPFRECHT* 17 (2d ed. 1982) (for further references).

⁵⁹ See *infra* text accompanying notes 112-14.

strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees.⁶⁰ The LMRA extensively amended the NLRA but is expressly inapplicable to the RLA.⁶¹ However, there is no reason to anticipate that the term would be construed differently under that act.

An early NLRB decision stated that “a strike exists when a group of employees ceases work in order to secure compliance with a demand for higher wages, shorter hours, or other conditions of employment, the refusal of which by the employer has given rise to a labor dispute.”⁶² However, the NLRA’s protection of “concerted activities” of employees does not depend on the making and refusal of such a demand, and extends, for example, to a spontaneous walkout of non-unionized employees because they believed it was too cold to work, even though they had not made a specific demand to their employer.⁶³

Whether particular conduct of employees constitutes a strike is not always clear, and important consequences may turn on how that question is resolved. For example, an employer may permanently replace economic strikers,⁶⁴ but conduct of some employees that falls short of the definition of a strike does not afford a legal basis for an employer’s permanently replacing employees. In *Johns-Manville Products Corp. v. NLRB*, a majority of the Fifth Circuit Court of Appeals concluded that acts of sabotage amounted to an in-plant strike, triggering the employer’s right to replace bargaining unit employees permanently.⁶⁵ One judge dissented on the ground that the employer “could not identify a single worker who participated in the alleged strike and could not determine with reasonable definiteness when the strike occurred.”⁶⁶

It should be borne in mind that the present discussion deals only with strikes and not with picketing as such. Although picketing often is carried on in connection with a strike in an attempt to dissuade workers, customers, and suppliers from dealing with the struck firm and thereby pressure it to agree to the employees’ demands, it may also be carried on for other purposes, such as persuading the employ-

⁶⁰ Labor Management Relations Act (LMRA) (Taft-Hartley Act), 29 U.S.C. § 142(2) (1998).

⁶¹ See LMRA § 212, 29 U.S.C. 182 (1998).

⁶² See *American Mfg. Concern*, 7 N.L.R.B. 753, 759 (1938).

⁶³ See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

⁶⁴ See *infra* text accompanying notes 202–04.

⁶⁵ See 557 F.2d 1126 (5th Cir. 1977).

⁶⁶ *Id.* at 1135 (Wisdom, C.J., dissenting).

ees to accept a union as their bargaining representative.⁶⁷ The regulation of picketing, other than in connection with a strike, is outside the scope of this article.

B. *Source of the Right to Strike*

Many of the differences in the application of German and American law to strikes follow from the difference in the source of the right to strike. While the German right to strike is derived from the Federal Constitution, the American right to strike is statute-based. Accordingly, the difference in sources gives rise to important differences in strike law between the two countries.

1. Germany

In Germany, the right of an employee to strike is constitutionally protected. Article 9, Section 3 of the *Grundgesetz* provides:

The right to form associations to safeguard and improve working and economic conditions is guaranteed to everyone and to all trades, occupations and professions.

Agreements which restrict or seek to impair this right shall be null and void; measures directed to this end shall be illegal.

Although the wording of section 3 only provides for the right to form associations, courts have recognized that such a right would be an empty formality if the association could not do anything to serve its purpose. Consequently, constitutional protection of the right would be senseless. Therefore, in 1954, the Federal Constitutional Court decided that the right to form associations enunciated in Article 9, Section 3 of the *Grundgesetz* includes protection of certain activities of both unions and employers' associations that correspondingly cannot be legislatively curtailed without amending the constitution.⁶⁸ These activities include the right to enter into collective agreements, as this is the classical purpose of unions. Since such agreements should give equal consideration to the interests of both parties, the union must have the right to strike so that collective bargaining will not be reduced

⁶⁷ See NLRA § 8(b)(7), 29 U.S.C. § 158(b)(7) (restricting organizational and recognitional picketing). See also 2 DEVELOPING LABOR LAW, *supra* note 33, ch. 21 (discussing such restrictions).

⁶⁸ See *Arbeitsrechtliche Praxis* Nr. 1 zu Art. 9 GG (1954) (Federal Constitutional Court).

to "collective begging." The right is therefore protected, subject, of course, to judicially developed restrictions on its exercise.

In addition to the protection afforded by the German Constitution, some commentators contend that the European Social Charter⁶⁹ also protects the right to strike.⁷⁰ If this conclusion were correct, it would raise interesting issues as to whether the Charter's protection overrides the judicially developed exceptions to the protection provided by the German Constitution, or whether similar exceptions would be applicable to the Charter as well. However, most commentators believe that this international treaty is binding only on governments and does not create rights for nongovernmental organizations or individual citizens.⁷¹ Moreover, since the right to strike is derived from the constitutionally protected right to form associations, it logically follows that only unions, and not individual employees, can exercise that right. Thus, employees who participate in a union's strike enjoy the protection afforded their activities only because of the union's exercise of the right, and not because of any right they have as individuals.⁷²

Although the Constitution of the Weimar Republic contained language almost identical to that of Article 9 Section 3 Basic Law, it was generally regarded as lacking similar protection for the activities of either employee or employer associations.⁷³ Therefore, although employees could join together in terminating their contracts in order to exert pressure on the employer, if they did so they no longer had their jobs. In contrast, when a union today calls a strike, employees who participate do not terminate their employment contracts, but merely

⁶⁹The Charter, signed October 18, 1961, provides: "With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties . . . recognise: the right of workers and employers to collective action in cases of conflicts of interests, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into." EUROPEAN SOCIAL CHARTER, October 18, 1961, part II, art. 6, Europ. T.S. No. 35.

⁷⁰See ROLF BIRK ET AL., GESETZ ZUR REGELUNG KOLLEKTIVER ARBEITSKONFLIKTE 64 (1988); HUGO SEITER, STREIKRECHT UND AUSSPERRUNGSRECHT 129 ff (1975) for an explanation of a draft of an Industrial Action Act made by a group of German professors.

⁷¹See THÜSING, *supra* note 10, at 35 ff. with further references; Horst Konzen, 41 JURISTISCHE ZEITUNG 157, 162 (1986); GÜNTER SCHAUB, ARBEITSRECHT-HANDBUCH 1612 (8th ed. 1996).

⁷²Hugo Seiter has vigorously argued the opposite view. See SEITER, *supra* note 70, *passim*. He believed that the Basic Law also grants the single employee the right to strike. However, though some commentators agree with his reasoning, see, e.g., RUPERT SCHOLZ, in THEODOR MAUNZ ET AL., KOMMENTAR ZUM GRUNDGESETZ Art. 9, sec. 192 (1994), it was never adopted by the courts. See THÜSING, *supra* note 10, at 31 ff.

⁷³See GERHARD ANSCHÜTZ, DIE VERFASSUNG DES DEUTSCHEN REICHES Art. 159 § 5 (14th ed. 1933); HUGO SINZHEIMER, GRUNDZÜGE DES ARBEITSRECHT 86 (2d ed. 1927).

suspend their contractual duties (and right to compensation) for the duration of the strike.⁷⁴

2. United States

Unlike the German Constitution, the American Constitution does not explicitly protect the right to form associations. Thus, constitutional protection of that right has been judicially derived from a variety of sources. For example, in some contexts, freedom of association has been derived by implication from the First Amendment's guarantees of freedom of speech, press, petition, and assembly.⁷⁵ However, those guarantees do not preclude legislative restrictions on picketing, which is judicially viewed as "more than free speech."⁷⁶

Without constitutional protection, the right to strike is alternatively granted, limited, or even categorically denied by both federal and state legislation. In *United Federation of Postal Clerks v. Blount*,⁷⁷ the District Court for the District of Columbia upheld a blanket legislative ban on strikes by federal employees on the basis of public interest and historical tradition, even though the court assumed that such employees have a constitutionally protected right to form labor organizations. In upholding the ban, the court relied on the interest in assuring "the continuing functioning of the Government without interruption, to protect public health and safety, or for other reasons."⁷⁸ The court concluded that the ban was neither arbitrary nor irrationally discriminatory, notwithstanding the general statutory protection of strikes by employees in the private sector afforded by Section 13 of the NLRA. Similarly, a pre-NLRA Supreme Court decision, *Dorchy v. Kansas*,⁷⁹ found that "[n]either the common law, nor the Fourteenth Amendment confers the absolute right to strike"⁸⁰ and accordingly upheld a state statute making it a crime "to induce others to quit their employ-

⁷⁴ This was recognized in one of the first judgments of the Federal Labor Court. *See* 1 Entscheidungen des Bundesarbeitsgerichts [BAGE] [Supreme Labor Court] 291 (1955 FRG).

⁷⁵ For a discussion of First Amendment associational rights, *see* TRIBE, *supra* note 33, §§ 12-26 to 12-27.

⁷⁶ *International Bhd. of Teamsters, Local 695, AFL v. Vogt*, 354 U.S. 284, 289 (1957) (quoting *Bakery & Pastry Drivers & Helpers Local 802 v. Wohl*, 315 U.S. 769, 776 (1942) (Douglas, J., concurring)) ("Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the ideas which are being disseminated.").

⁷⁷ *See* 325 F.Supp. 879 (D.D.C. 1971), *aff'd mem.*, 404 U.S. 802 (1971).

⁷⁸ *Id.* at 883.

⁷⁹ *See* 272 U.S. 306 (1926).

⁸⁰ *Id.* at 311.

ment for the purpose and with the intent to hinder, delay, limit or suspend the operation of" mining.⁸¹

At least one state supreme court, that of California, has held that the statutory prohibition on public employee strikes is arbitrary and thus invalid under the state's common law.⁸² In dicta, the court suggested that the right of all workers to withhold their labor, whether in the public sector or the private sector, may be protected by the right of association found in both the federal and state constitutions, so that it cannot be abridged without a substantial or compelling justification.⁸³ As a practical matter, however, state courts generally treat any rights of public employees to strike as being wholly a matter for legislative determination, or sometimes a question of the common law of the state, rather than presenting a question of constitutional interpretation under either the federal or state constitution.

C. *Effect of a Strike*

Both Germany and the United States treat an employee's participation in a strike as suspending, but not terminating, the employment relationship. In the United States, the duty of the employer and the union to engage in collective bargaining continues during a legal strike.⁸⁴ The employer's duty to engage in collective bargaining is suspended during an illegal strike or during certain other kinds of illegal or unprotected conduct by the union.⁸⁵ In contrast, German law does not impose a duty to bargain collectively at any time, although the union is required to present its contract demands before going on strike.

In the United States, after the parties have bargained to impasse, thereby fulfilling one of their duties under the NLRA, the employer generally may implement earlier proposals without being compelled to bargain further.⁸⁶ A logical exception to the suspension of that duty is when the employer wishes to implement a proposal that reserves the

⁸¹ *Id.* at 307.

⁸² See *County Sanitation Dist. No. 2 of L.A. County v. Los Angeles County Employees Ass'n*, 699 P.2d 835 (Cal. 1985).

⁸³ See *id.*

⁸⁴ See ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 434-38 (1976).

⁸⁵ See 1 *DEVELOPING LABOR LAW* 710-11 (Patrick Hardin, ed., 3d ed. 1992). *But see* GORMAN, *supra* note 84, at 438 (characterizing cases holding that unprotected strike action by a union suspends an employer's duty to bargain as being of "dubious vitality").

⁸⁶ For a discussion of the elements of "impasse," see 1 *DEVELOPING LABOR LAW*, *supra* note 85, at 691-96.

employer the right to make merit wage increases in its sole discretion. Implementation of such a proposal, like a no-strike clause, is inherently destructive of the statutory collective bargaining process and thus falls within a narrow exception to the doctrine permitting implementation of employer offers after impasse.⁸⁷ Other exceptions include dues check-off, union security, and arbitration clauses.⁸⁸ German law does not, however, permit any such implementation of employer proposals before agreement has been reached with the union.

II. LIMITATIONS ON THE RIGHT

Before turning to limitations on the right to strike, it is important to note that in Germany, strikes can be either "legal" or "illegal," and the latter may be enjoined or be the basis for a claim for damages against the union calling the strike or against the individual employees who participate.⁸⁹ In contrast, in the United States, strikes and other concerted activities of employees may be unprotected without being prohibited.⁹⁰ In such cases, the employer may discipline or discharge the employees who participate in the activity without thereby committing an unfair labor practice, but generally has no right to injunctive relief because of the Norris-LaGuardia Act,⁹¹ which severely limits the

⁸⁷ See *McClatchy Newspapers v. NLRB*, 131 F.3d 1026 (D.C. Cir. 1997).

⁸⁸ See *id.* at 1030. In dicta, the Court of Appeals pointed out that dues checkoff and union security clauses are required by NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3), to be authorized by a collective bargaining agreement, and referred to case authority supporting its conclusion that "general principles of contract interpretation under § 301 of the Labor-Management Relations Act" required that arbitration clauses be the result of a voluntary agreement. *Id.*

⁸⁹ See MANFRED LÖWISCH ET AL., 260 ARBEITSKAMPF—UND SCHLICHTUNGSRECHT (2d ed. 1997); criticized by Franz Gamillscheg, *Das deutsche Arbeitsrecht am Ende des Jahrhunderts*, 1998 RECHT DER ARBEIT 2, 4.

⁹⁰ For example, a strike not authorized by the union bargaining representative, where there is one, generally is unprotected but not illegal, although some decisions have held such strikes protected if the object is to protect the union's demands and policies. For a discussion and case authorities, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 1111-12. The best-known example of unprotected activity other than a strike is *Emporium Capwell Co. v. Western Addition Community Org.*, 420 U.S. 50 (1975), in which employees who picketed to protest allegedly racially discriminatory policies of the employer instead of participating in the grievance arbitration procedure provided in the collective agreement, were found to be unprotected by the NLRA. For a discussion of the status of partial and intermittent strikes, see *infra* text accompanying notes 132-38.

⁹¹ See Norris LaGuardia Act, 29 U.S.C. §§ 101-115 (1998). The history of the Act, which reflects a deep distrust of judicial intervention in labor disputes that must be puzzling for many German readers, is summarized in ARCHIBALD COX ET AL., LABOR LAW 46-51 (12th ed. 1996). Although the Act applies only to federal courts, many states have similar acts restricting relief available in their courts. See, e.g., CAL. CIV. PROC. CODE § 527.3 (West 1997). For a discussion of the possible

jurisdiction of the federal courts to issue injunctions in labor disputes. Injunctions are not automatically available against even illegal strikes, again because of the Norris-LaGuardia Act's restrictions. The employer might be able to seek money damages from the employees individually; however, in practice, such claims are rarely pursued. Further discussion of remedies for illegal strikes will be deferred until Part IV.

An important difference between German and American law is the extent to which strikes in the United States are wholly prohibited because the employer is a governmental entity. In Germany, however, governmental employees (but not civil servants) generally enjoy the right to strike unless the purpose of the strike is illegal.⁹² Of course, neither country permits strikes in the armed services. In addition, blanket prohibitions are supplemented by procedural requirements and limitations on the scope, timing, frequency, or duration of strikes that may cause an otherwise legal strike to be or become illegal.

A. *Relevance of the Object of the Strike*

1. Germany

The basic requirement is that strikes are legal only if their purpose is to achieve a collective agreement. Three major types of strikes are typically considered to be illegal: political strikes, strikes to enforce a legal claim, and solidarity strikes in most cases.

a. *Political Strikes*

In German law, a strike is political if its purpose is to exert pressure on governmental administrators or legislators, as distinguished from a strike in support of bargaining demands concerning wages, hours, and other terms and conditions of employment.⁹³ Political strikes have figured prominently in twentieth century German history with the best-known being the strike that started in Kiel, in northern Germany, in 1918, shortly followed by the capitulation of Germany at the end of World War I and the abdication of the German Kaiser Wilhelm II. In contrast, in the "Kapp-Putsch" in 1920, a general strike by all unions in opposition to a *putsch* by nationalistic right-wing radicals led by

consequences of removal to a federal court of a case in which a state court had granted injunctive relief, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 1002-03.

⁹² See *supra* text accompanying note 23.

⁹³ See SCHAUB, *supra* note 71, at 1609; LÖWISCH ET. AL, *supra* note 89, at 16.

World War I Captain Kapp, successfully induced the radicals to abandon their effort to overthrow the Weimar Republic.

In 1952, in a case concerning a strike in the newspaper industry, the Federal Labor Court established the illegality of political strikes.⁹⁴ In that case, the union called the strike in order to influence the German Parliament (*Bundestag*) in its consideration of legislation leading to the Workers Constitution Act,⁹⁵ which provided for and empowered "works councils" of employees to deal with employers concerning certain aspects of working conditions. The court held the strike, which lasted for only two days, to be illegal. Consequently, the employer who subsequently sued was entitled to damages from both the striking union and from the employees who participated in the strike. The court relied on the fact that the strike was not for the purpose of achieving a collective agreement with the employers, the newspaper companies, but rather to put pressure on a legislative body. This result follows logically from the origin of the right to strike in the freedom of association, which carries with it the right to make collective agreements.

A recent example of political strikes includes one called in opposition to proposals to change the law with respect to continuation of wages during an employee's illness. A strike for this goal would generally be regarded as being for an illegal purpose since it is not for the purpose of achieving a collective agreement. In the case in question, the "strikes" were merely demonstrations made outside working time and therefore were not legally "strikes" for the purposes of the labor laws. However, some German jurists who support the goals of unions contend that strikes for the purpose of influencing legislation concerning working conditions, such as that relating to wage continuation during sickness, should be included under the freedom of association.⁹⁶ Additionally, some commentators, invoking the history of the Weimar and the Kapp-Putsch strikes, assert that a political strike to defend democracy should be legal.⁹⁷ That conclusion is sound but does not rely on the freedom of association accorded by Article 9 Section 3 of the *Grundgesetz*, but rather on Article 20, Section 4 which provides that "all Germans shall have the right to resist any person or persons

⁹⁴ See *Arbeitsrechtliche Praxis* Nr. 1 zu Art. 9 GG Arbeitskampf (Federal Labor Court).

⁹⁵ See *Betriebsverfassungsgesetz*, v. 1952 (BGBl.I S.681).

⁹⁶ See WOLFGANG DÄUBLER ET AL., *ARBEITSKAMPFRECHT* 165 (2d ed. 1984).

⁹⁷ See BROX & RÜTHERS, *supra* note 58, at 58 for further references.

seeking to abolish the constitutional order, should no other remedy be possible.”

b. *Strikes to Enforce a Legal Claim*

Again, because the right to strike is derived from the constitutional right to seek a collective agreement, a strike to enforce a legal right, such as a claim to overtime or holiday pay either under the terms of a collective agreement or under provisions of law governing the employment relationship, is illegal.⁹⁸ If either a union or an employee wishes to assert such a right, they must proceed by filing suit, instead of by striking. To allow a strike to enforce such a right would be illogical because it would substitute the law of the jungle for the rule of law—the economically stronger party would prevail, without regard to the merits of the claim.

c. *Solidarity Strikes*

A solidarity strike, which by definition is directed against an employer with whom the union is not seeking a collective agreement but rather to support the demands of another union, is illegal, subject to two narrow exceptions.⁹⁹ Thus, if Union U is on strike against Employer E, the union cannot strike or picket Employer F to put pressure on F to withhold purchases of goods and services produced by E or to refuse to supply goods and services to E in order to induce E to agree to U's bargaining demands. Although the purpose of such a strike or picketing is to help U achieve a collective agreement, Employer F cannot grant U's bargaining demands and thus is in the position of an economic hostage—something the law does not tolerate. In a leading decision that held solidarity strikes to be illegal, the Federal Labor Court noted two exceptions to the general rule. First, solidarity strikes are not illegal where Employer F has given up its neutrality by taking over the production of Employer E and selling to E's customers. Second, a solidarity strike is not illegal where the economic relationship

⁹⁸ See *Arbeitsrechtliche Praxis* Nr. 58 zu Art. 9 GG Arbeitskampf (1978) (Federal Labor Court); LÖWISCH ET AL., *supra* note 89, at 76; BROX & RÜTHERS, *supra* note 58, at 79; SEITER, *supra* note 70, at 406.

⁹⁹ See *Arbeitsrechtliche Praxis* Nr. 85 zu Art. 9 GG Arbeitskampf (1985) (Federal Labor Court); *Arbeitsrechtliche Praxis* Nr. 90 zu Art. 9 GG Arbeitskampf (1988) (Federal Labor Court); LÖWISCH ET AL., *supra* note 89, at 102.

between E and F is such that they can be regarded as a single enterprise.

Although the Federal Labor Court noted the exceptions just described, it has not yet held that the requirements for applying either exception were met. With respect to the first exception, many German commentators believe it is not supported by the logic of the free market, in which it is natural for an enterprise to benefit from a strike against a competitor by taking over its production and selling to its customers.¹⁰⁰

Literally, a solidarity strike would also describe the situation in which Union U is on strike against Employer E, and Union X also goes on strike against the same Employer E, not in support of its own bargaining demands but rather as an expression of solidarity with and support for Union U. In practice, however, the structure of German unions makes the situation just described no more than a theoretical possibility. The norm prescribed by the umbrella organization of unions, the *Deutscher Gewerkschaftsbund* ("DGB"), the German counterpart to the AFL-CIO, is one union per plant, so that two unions would co-exist at the same plant only if one, such as that representing white collar workers, the *Deutsche Angestelltengewerkschaft* ("DAG"), was not part of the organization named.¹⁰¹ In that situation, however, rather than striking in support of Union U, Union X would join with Union U in negotiations seeking a collective agreement covering members of both unions. As there is no major non-DGB blue collar union, there is almost always only one such union in a plant.

2. United States

Unlike German law, American law does not require that strikes, in order to be legal, be for the purpose of achieving a collective agreement. Apart from strikes that are prohibited by such an agreement, if a given strike is illegal it usually is either because the required pre-strike procedures, described at part C below, were not followed, or for one of three reasons:

¹⁰⁰ See Manfred Lieb, 1986 SAMMLUNG ARBEITSRECHTLICHER ENTSCHEIDUNGEN 64, 65; THÜSING, *supra* note 10, at 163.

¹⁰¹ It should be noticed that according to a resolution in 1997 the DAG will join the DGB in the next years and will merge with the *Gewerkschaft für öffentliche Dienste Transport und Verkehr* ("ÖTV"), which is a DGB-union and represents the public employees and several other unions. See DIE WELT, July 14, 1998, at 3.

(1) The strike is by government employees, many of whom are denied the right to strike;

(2) An object of the strike is prohibited by section 8(b)(4) of the NLRA, and the union represents employees who are subject to the Act;

(3) The strike is over an arbitrable dispute, and therefore, generally is illegal under the RLA, and often under the NLRA as well. In addition, both the NLRA and the RLA provide for the President's invocation of emergency powers to defer strikes. A strike during such a period of deferral is illegal.

Before turning to an analysis of the sources of illegality just described, it is appropriate to note that some kinds of strikes that are illegal in Germany are legal in the United States because of section 7 of the NLRA, which generally protects concerted activities by employees and of section 13, which protects the right to strike "except as specifically provided for herein."

a. *Political Strikes*

Political strikes have not played as important a role in American history as they have played in Germany. Indeed, the best-known example of what might be regarded as a political strike was directed at a foreign government, rather than at domestic officials or groups.¹⁰² After the Soviet invasion of Afghanistan on January 9, 1980, the International Longshoremen's Association ("ILA") announced that its members would not handle any cargo going to or coming from the former Soviet Union or carried on Russian ships.¹⁰³ A collective agreement between an ILA local and Jacksonville Bulk Terminals, Inc. ("JBT") contained a broad no-strike clause banning "any strike of any kind."¹⁰⁴ When the local refused to load ships destined for the former Soviet Union, JBT sued for, inter alia, damages and injunctive relief.¹⁰⁵ The Supreme Court rejected JBT's argument that the political motivation of the union took its refusal to load the ships out of the general ban on injunctions in labor disputes contained in section 4 of the Norris-LaGuardia Act.¹⁰⁶ In a later action by a third party for damages it had incurred as a result of the union's refusal, the Court held the union's

¹⁰² See *Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n.*, 457 U.S. 702 (1982).

¹⁰³ See *id.* at 704-05.

¹⁰⁴ See *id.* at 706 n.4.

¹⁰⁵ See *id.* at 706.

¹⁰⁶ See *id.* at 715-20.

action to be a prohibited secondary boycott under section 8(b)(4) of the NLRA.¹⁰⁷

b. *Strikes to Enforce a Legal Claim*

Again, the protection of concerted activities of employees, coupled with the absence of any requirement that a strike be for the purpose of obtaining a collective agreement, leads to the conclusion that strikes to enforce a legal claim are not illegal in the United States. However, closely analogous doctrines, discussed below,¹⁰⁸ permit employers that are subject to the NLRA to seek injunctions against strikes over disputes over matters subject to arbitration under the terms of a collective agreement. These doctrines also permit employers subject to the RLA to seek similar injunctive relief against strikes over so-called "minor" disputes—those relating to interpretation of collective agreements—as distinguished from disputes over proposals to change the terms of such agreements.

It is possible that a strike called to enforce a legal claim does not fall within the scope of these two doctrines. Arbitration clauses in collective bargaining agreements of employers governed by the NLRA may be written either broadly or narrowly, so that some disputes may not be subject to arbitration. Moreover, requests for injunctive relief from strikes over arbitrable disputes may be denied for a variety of reasons.¹⁰⁹ But as a practical matter, strikes to enforce legal rights appear to be relatively infrequent, no doubt due both to the availability of legal processes as an alternative means of enforcement, and to the fact that unsuccessful litigants generally are not liable for their opponent's legal fees.

c. *Solidarity Strikes and Secondary Action*

Strikes against a secondary employer (often referred to as a "secondary boycott") in the situation described above in which Union U strikes or pickets Employer F to put pressure on it to stop doing business with Employer E, with whom the Union is seeking a collective

¹⁰⁷ See *International Longshoremen's Ass'n v. Allied Int'l, Inc.*, 456 U.S. 212 (1982). Eight million dollars of damages were awarded. See *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 814 F.2d 32, 34, 41 (1st Cir. 1987).

¹⁰⁸ See *infra* text accompanying notes 219–22.

¹⁰⁹ For a discussion of the prerequisites for injunctive relief, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 981–93.

agreement, are generally illegal under NLRA section 8(b)(4)(B) (with an exception in section 8(e) for the apparel and clothing industry). The ban on secondary boycotts does not apply to railroad and airline unions governed by the RLA, but such union action is relatively infrequent.¹¹⁰

Due to the different structures and bargaining practices of American unions, as well as the omission in American law of the requirement that strikes be for the purpose of achieving a collective agreement, the situation described above as being only theoretically possible in Germany, where Union X strikes Employer E in support of a strike by Union U, which is seeking a collective agreement with E, does arise in the United States. Such a strike is treated as a legal "sympathy" or "solidarity" strike.¹¹¹

B. *Relevance of Timing and Form of Strike*

A strike for a legal purpose may still be rendered illegal in each country by virtue of its timing and form.

1. Germany

a. *Partial, Intermittent, and Sit-Down Strikes*

The Federal Labor Court has held that partial strikes of all kinds, like go-slow and work-to-rule strikes, in which employees report for work but perform less efficiently, are illegal because the employees attempt to exercise their right to strike but nevertheless maintain their claim to be paid during the strike. This is considered to be "contrary to good morals" and, therefore, illegal under section 138 of the German Civil Code (*Bürgerliches Gesetzbuch*).¹¹² However, some commenta-

¹¹⁰ See, e.g., *Burlington N.R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987).

¹¹¹ The best known example of a sympathy strike, *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 597 (1976), involved employees in separate bargaining units, represented by different locals of the same union. The local representing office and technical workers ("O&T") struck, and members of the local representing the production and maintenance workers ("P&M") refused to cross the O&T picket line. The Supreme Court held that although the parties agreed that their dispute over whether the P&M local's collective agreement prohibited sympathy strikes was an arbitrable dispute, the exception to the Norris-LaGuardia Act that permits strikes over arbitrable disputes to be enjoined did not apply. For a discussion of this exception, see *infra* text accompanying note 219. For a discussion of the treatment of sympathy strikes as being, in effect, an "exception to the exception" to the general ban on injunctions in labor disputes, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 993-95.

¹¹² See *Arbeitsrechtliche Praxis* Nr. 61 au Art. 9 GG Arbeitskampf (Federal Labor Court);

tors believe that if an employee has the right to refuse to work at all, then he or she should also have the right to refuse to work in part, and that the union should be able to choose which kind of strike it prefers.¹¹³ It is difficult to reconcile this view with a requirement that the partial strikers be paid their full wages, as many employees might find attractive an option to work at only a tenth of their usual speed while being paid at their regular rate. Moreover, it would seem to be incompatible with the employer's right to govern the work place, although admittedly the powers of works councils make that right more qualified in Germany than in the United States.¹¹⁴

Both German courts and most commentators consider sit-down strikes, in which employees occupy the employer's premises but perform no work, to be illegal.¹¹⁵ This conclusion rests mainly on the fact that the employer as owner of the establishment need not allow someone to enter it if he does not intend to fulfill his duties under the employment contract, but, as is usually the case, seeks instead to prevent other employees from working and using the work place. Intermittent strikes, in which employees strike for a few hours or days and then return to work, are more problematic than sit-down strikes.¹¹⁶ Though there has been some uncertainty in the past, today, intermittent strikes generally are regarded as legal and have become quite common. Indeed, an intermittent strike can be viewed as merely an expanded version of a "warning" strike, differing only in that the warning is repeated. However, the Federal Labor Court recently held that if the employer cannot use the employees' services when they offer to return because it is afraid of further strikes or anticipates that another short strike will occur soon, the employer can refuse their offer to return to work and is under no duty to pay them during the time they are not working.¹¹⁷ The employer can also hire a temporary replacement until the union calls a halt to the intermittent strike.

Hansjorg Otto, in OTFRIED WLOTZKE & REINHARD RICHARDI, MÜNCHNER HANDBUCH ZUM ARBEITSRECHT § 279, § 58 (1992).

¹¹³ See LÖWISCH ET AL., *supra* note 89, at 125.

¹¹⁴ See Betriebsverfassungsgesetz v. 1972 BGBI.I S.13; see also HALBACH ET AL., *supra* note 5, at 343 ff.

¹¹⁵ See Arbeitsrechtliche Praxis Nr. 59 zu Art. 9 GG Arbeitskampf (1978) (Federal Labor Court); LÖWISCH ET AL., *supra* note 89, at 142; SEITER, *supra* note 70, at 143; DÄUBLER ET AL., *supra* note 96, at 345 (favoring legality under the circumstances).

¹¹⁶ See Volker Rieble, 1997 SAMMLUNG ARBEITSRECHTLICHER ENTSCHEIDUNGEN 286 (for examples and references); Entscheidungssammlung zum Arbeitsrecht Nr. 37 zu Art. 9 GG (1980) (Federal Labor Court).

¹¹⁷ 1997 Sammlung Arbeitsrechtlicher Entscheidungen 281 ff (Federal Labor Court).

b. *Strikes that Injure the Employer's Property*

A full understanding of the restrictions on the right to strike to avoid injury to the employer's property depends on an appreciation of the principle of commensurability, which is a cornerstone of the law governing strikes in Germany. The German Constitution, like the American Bill of Rights, protects from federal or state action the right to life, freedom of expression and press, and freedom of religion.¹¹⁸ A corollary to this protection is that every restraint that limits a constitutionally protected right must be in furtherance of a legitimate goal. Thus, a statute limiting a constitutionally protected right of citizens must be appropriate and necessary to achieve its purpose, and the restraint of the constitutional right must be proportional, or commensurate, to the benefits that the statute can achieve.¹¹⁹

This principle of commensurability was applied to the law of industrial action by some early decisions of the Federal Labor Court. In a decision by the Grand Panel,¹²⁰ the court stated:

In our interwoven and mutually dependent society, strikes and lockouts often have a substantial impact not only on the persons directly involved in the industrial action, but also on non-strikers and other third parties as well as the public at large. Industrial actions must therefore be governed by the rule of commensurability. In this connection the economic facts are to be considered and the public welfare must not be obviously offended.¹²¹

The court said further that the principle of commensurability concerns:

not only the moment when the strike starts and its goal, but also the manner in which it is carried out and the intensity of the industrial action. Thus, [it] is only lawful, if [the union]

¹¹⁸ See GG Art. 2 (Right to Life); Art. 5, §§ 1, 2 (Freedom of Expression, Press); Art. 4, §§ 1, 2 (Freedom of Religion).

¹¹⁹ See H. GOERLICH, *Fundamental Constitutional Rights: Content, Meaning and General Doctrines*, in THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 45 (Ulrich Karpén, ed. 1988); ECKEHARD STEIN, STAATSRECHT 180 ff (13th ed. 1991).

¹²⁰ The Grand Panel decides only the very rare cases that either raise a question of fundamental importance or the view of one senate concerning a distinct problem differs from that of another panel. See Labor Court Act, § 45.

¹²¹ Arbeitsrechtliche Praxis Number 43 zu Art. 9 GG: Arbeitskampf (April 21, 1971) (Federal Labor Court Großer Senat), referring *inter alia* to Arbeitsrechtliche Praxis Number 13 concerning Art. 9 GG (Federal Labor Court).

follows the rules of a fair fight. The industrial action cannot have as its goal to destroy the other side, but must have as its goal to restore the disturbed peaceful labor relations. . . . When the means of production are damaged because of the strike, . . . then the work cannot resume after the strike at the point it stopped before the strike.¹²²

Preventing such damage is the purpose of emergency work (*Notdienstarbeiten*), which is work required to maintain the means of production in the condition they were in before the industrial action.¹²³ An example the court gave of a case in which such work may be required is where a blast furnace or a distinct chemical process must be continued to avoid damages to the plant. Other examples include work that is necessary to protect the public from dangers arising from the firm (e.g. a chemical fabric that might pollute the environment dangerously) and work that is absolutely essential to prevent the employer from incurring utterly disproportionate damage.¹²⁴ It is the common view that a strike is illegal if its aim is to ruin the employer and leads to the closing of the plant.¹²⁵ The commentators disagree, however, over whether the mere fact that the strike might lead to this result is sufficient to make the strike illegal.¹²⁶

The duty to insure that maintenance and other emergency work is carried on during a strike¹²⁷ requires that the union and the employer agree on the details of such work. If the parties try to do so but are unable to reach an agreement in the matter, it is unclear whether the employer has the right to fix such details unilaterally or whether the employer must seek an interim injunction in the labor courts.¹²⁸

¹²² *Id.*

¹²³ *See id.* at 2139.

¹²⁴ *See* HALBACH ET AL., *supra* note 5, at 334. Concerning the impact of this principle on the interests of third parties and the public, see text accompanying notes 168–72.

¹²⁵ *See* Arbeitsrechtliche Praxis Nr. 43 zu Art 9 GG Arbeitskampf (Federal Labor Court); SEITER, *supra* note 23, at 532; Otto, *supra* note 112, at 110 §§ 278, 154.

¹²⁶ *Pro:* Köhler, 1987 RECHT DER ARBEIT 234, 239; Bernd Rütters, 1987 ZEITSCHRIFT FÜR ARBEITSRECHT 1, 42–43; *contra:* LÖWISCH ET AL., *supra* note 89, at 119.

¹²⁷ The draft bill proposed by the professors' group in 1988 included in § 11 such a duty. It has also been recognized, with respect to damage to products, by the Austrian Supreme Court in the "Banana Case." *See* Österreichische Juristenzeitschrift 518 (May 1963).

¹²⁸ For details, see Entscheidungssammlung zum Arbeitsrecht Nr. 119 zu Art. 9 GG Arbeitskampf (Federal Labor Court) with a comment by Gregor Thüsing; *see also* LÖWISCH ET AL., *supra* note 89, at 237 (for references).

2. United States

With statutory and common law sources of the right to strike, rather than constitutional sources, American law, with respect to the legality of different kinds of strikes, differs sharply from German law. In other contexts, American law is less solicitous of workers' interests. In connection with strikes, the NLRA reflects far less concern for adverse effects on other parties—either employers or the public, although substantial concern for the public impact of strikes is reflected in the emphasis under the RLA in avoiding interruptions of commerce.¹²⁹ Moreover, unlike the German Federal Labor Court, the United States Supreme Court has expressly denied the NLRB the power to function “as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands.”¹³⁰ At the same time, particular employer tactics have been denounced as being inherently destructive of collective bargaining.¹³¹

a. *Partial, Intermittent, and Sit-Down Strikes*

Partial, intermittent,¹³² and sit-down strikes¹³³ are not protected concerted activity under the NLRA, and an employer may respond to them with discipline or discharge of the employees involved without thereby committing an unfair labor practice. What may not be clear in some cases is whether the conduct in question comes within the definition of the term. Thus a sit-down strike, in which the strikers cease work but do not leave the employer's premises, is generally unprotected, but a 25-minute in-plant protest has been held to be protected,¹³⁴ as were employees who remained in the plant for several hours in the hope of discussing grievances, without interfering with other employees.¹³⁵

Partial strikes, in which employees remain at work but slow down production or refuse to perform certain tasks or to work overtime, is unprotected concerted activity. The same is true under the NLRA as to “intermittent” strikes, in which employees engage in a coordinated series of strikes. In the former type of strike, employees are seeking the

¹²⁹ See *infra* text accompanying notes 207–08.

¹³⁰ NLRB v. Insurance Agents' Int'l. Union, 361 U.S. 477, 497 (1960)

¹³¹ See *supra* text accompanying note 87.

¹³² See 2 DEVELOPING LABOR LAW, *supra* note 33, at 1112–13.

¹³³ See NLRB v. Fansteel Metallurgical Corp., 306 U.S. 240 (1939).

¹³⁴ See United Merchants & Mfrs., Inc. v. NLRB, 554 F.2d 1276 (4th Cir. 1977).

¹³⁵ See Roseville Dodge, Inc. v. NLRB, 882 F.2d 1355 (8th Cir. 1989).

benefits of employment but are ignoring the employer's directions as to how the job is to be done. In intermittent strikes, they seek to minimize lost wages and the risk of being replaced. However, the mere fact that employees have struck more than once does not automatically make their activity intermittent and unprotected.¹³⁶

Surprisingly, there is some judicial support for the view that intermittent strikes are legal under the RLA. In *Pan American World Airways, Inc., v. Teamsters*, the Second Circuit held that the Norris-LaGuardia Act precluded an injunction against the union after it had engaged in a series of short walkouts and demonstrations, finding nothing in the RLA to prohibit such action.¹³⁷ Additionally, in *Association of Flight Attendants v. Alaska Airlines, Inc.*, the court refused to find that participants in the union's highly successful "Operation CHAOS" were engaging in unprotected activity so as to be subject to discharge.¹³⁸

Alaska Airlines illustrates the potentially devastating consequences of intermittent strikes for employers subject to the RLA. In order to cause maximum disruption to the airline's operations while minimizing wage losses for employees, the union used "rolling strike" tactics, in which strikers would offer to return to work after an hour or two. This technique took advantage of holdings in the Courts of Appeals that although an employer subject to the RLA may, like employers governed by the NLRA, permanently replace economic strikers,¹³⁹ a striker has not been replaced until the replacement has completed training and actually begins work.¹⁴⁰ Thus even if the airline were able to replace employees who struck on Day 1 during the brief period they left their jobs, another group would strike on Day 2 so that there would be vacancies to be filled when the Day 1 strikers sought reinstatement.¹⁴¹

¹³⁶ Thus in *Westpac Electric, Inc.*, 321 N.L.R.B. 1322 (1996), employees who struck three times in one month were protected by the Act, where each strike had its own separate motivating factors and were not all part of a single plan.

¹³⁷ See 894 F.2d 36 (2d Cir. 1990). For a criticism of the decision, see John J. Gallagher & Margaret H. Spurlin, *Chaos: Partial and Intermittent Strikes under the RLA*, SA31 A.L.I.-A.B.A. 559 (1996).

¹³⁸ See 847 F. Supp. 832 (W.D. Wash. 1993).

¹³⁹ See *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 426 (1989). For a discussion of the permanent replacement doctrine, see *infra* text accompanying notes 202-04.

¹⁴⁰ See THE RAILWAY LABOR ACT, *supra* note 54, at 322.

¹⁴¹ See Gallagher & Spurlin, *supra* note 137, at 504.

b. *Strikes that Injure the Employer's Property*

American law does not impose an obligation on a union to maintain the employer's property during a strike, but a few cases have held a strike to be unprotected because of the damage to the employer's property that its timing caused.¹⁴² For example, in *NLRB v. Marshall Car Wheel & Foundry Co.*, the 5th Circuit held that an unannounced strike was unprotected when prolonged retention of molten iron in a cupola could cause costly damage to equipment.¹⁴³ A frequently litigated issue concerns whether misconduct by strikers, including acts of sabotage, is sufficiently serious as to justify their discharge.¹⁴⁴

C. *Required Pre-Strike Procedures*

Required pre-strike procedures may serve any one or more of several important purposes. Notice to the employer, coupled with an opportunity to bargain, may enhance the likelihood of achieving a collective agreement without imposing the economic burdens of a strike on all concerned. In addition, notice gives an employer a chance to prepare to follow alternative courses of action in case of a strike, either by continuing operations with other employees or replacement workers or by preparing to close the plant temporarily in such a way as to avoid physical injury or disruption of services to customers. Just as notice to the employer may facilitate achieving a collective agreement, a strike vote may also help the parties avoid a strike. A strike vote may provide a more accurate measure of employees' sentiments and allow them to express a preference for accepting the employer's offer over striking. Even if a majority votes to strike, the size of the margin may be useful as an indication to both the union negotiators and the employer of the degree of dissatisfaction with its last offer.

¹⁴² See, e.g., *NLRB v. Marshall Car Wheel & Foundry Co.*, 218 F.2d 409 (5th Cir. 1955).

¹⁴³ See *id.*

¹⁴⁴ See, e.g., *Can-Tex Indus. v. NLRB*, 683 F.2d 1183 (8th Cir. 1982) (holding discharge of employees who turned off continuously running machines in order to shut down plant and bring grievances to employer's attention to be unprotected). *But see NLRB v. Thayer Co.*, 213 F.2d 748 (1st Cir. 1954) (holding that the NLRB has the power to order reinstatement of strikers who had been discharged for unprotected activity, including, in some cases, mass picketing and acts of violence and destruction of property, in view of the fact that the strike had resulted from "flagrant" unfair labor practices of the employer). For a discussion of the subsequent history of the Thayer doctrine, see COX ET AL., *supra* note 91, at 565-67. The authors conclude that the NLRB has, in *Clear Pine Mouldings*, 268 NLRB 1044 (1984), *enforced*, 765 F.2d 148 (9th Cir. 1985), returned to its earlier view that it may not order reinstatement of unfair labor practice strikers who engage in violence or other unprotected activity.

1. Germany

Required pre-strike procedures in Germany are not fully defined and may involve the union's informing the employer (or employer's association) what it seeks to achieve in collective bargaining and consequently giving the employer an opportunity to negotiate with the union. Pre-strike procedures may also require obtaining majority support for the strike in a vote by union members.

a. *Giving Employers an Opportunity to Negotiate*

It is clear that a union, before calling a full-fledged strike, must give the employer an opportunity to negotiate. What is less clear is the scope and extent of the right to call a short strike while negotiations are taking place in order to warn the employer of the union's willingness to call a full-fledged strike if negotiations break down. For many years, the legality of warning strikes while negotiations were taking place was unclear despite the principle of commensurability discussed above,¹⁴⁵ or whether such a strike is allowed only after the union has declared that negotiations have broken down.¹⁴⁶ Since the "3rd *Warnstreik-Entscheidung*" in 1988,¹⁴⁷ however, it has been clear that no such formal declaration is required before calling a warning strike. Such a strike is, by its nature, merely intended to emphasize the seriousness of the union's demands and its willingness to strike in order to secure them and normally is of very brief duration—hours or days, rather than weeks or months. However, the Federal Labor Court has not placed any time limit on the duration of warning strikes. Apparently the union can decide for itself, within reasonable limits, how much pressure is necessary to demonstrate the seriousness of its willingness to call a full-fledged strike.

b. *Strike Votes*

Most unions' by-laws require a strike vote, but whether the failure to satisfy the requirement would render a strike illegal has not been decided by the courts, and commentators are divided on the question.

¹⁴⁵ See *supra* text accompanying notes 120–24.

¹⁴⁶ For a thoughtful analysis of this question, see HARALD PETERS, *DIE ERKLÄRUNG DES SCHEITERNS DER VERHANDLUNGEN ALS VORAUSSETZUNG EINES STREIKS* (1996). See also HALBACH ET AL., *supra* note 5, at 333.

¹⁴⁷ See *Arbeitsrechtliche Praxis* Nr. 108 zu Art. 9 GG Arbeitskampf (Federal Labor Court).

In the absence of such a by-law, the prevailing view, both in judicial opinions and from commentators, is that no such vote is required.¹⁴⁸ This conclusion is based on the view that requiring a strike vote does not reduce the likelihood of a strike and that the decision of a union board to call a strike is legitimated because board members are elected by union members in a democratic process. Some commentators who are of the contrary view argue that only when a majority of union members believe that a strike is necessary to improve their working conditions is it really *ultima ratio*.¹⁴⁹ Others argue that the requirement of a democratic structure for unions, which is recognized by the courts, requires that the members, rather than the board, decide whether to strike.¹⁵⁰

2. United States

The NLRA generally does not require either unions or employees not represented by a union (who also have the right to strike) to give employers an opportunity to negotiate before a strike is called.¹⁵¹ However, unions are under a general duty to bargain in good faith¹⁵² and are specifically required to offer to do so¹⁵³ after giving notice to the employer and to government agencies, before terminating or modifying a collective bargaining agreement.¹⁵⁴ Strike votes are required under the LMRA only as part of a Presidentially-initiated procedure to deal with national emergency disputes.¹⁵⁵

In contrast to the NLRA, the RLA mandates compliance with "almost interminable" procedures before either unions or employers are enti-

¹⁴⁸ See LÖWISCH ET AL., *supra* note 89, at 29 (concerning only the strike vote requirement for Warnstreik Arbeitsrechtliche Praxis Nr. 51, zu Art 9 GG Arbeitskampf (1976) (Federal Court)).

¹⁴⁹ See Martin Vorderwülbecke, 1987 BETRIEBSBERATER 750, 755.

¹⁵⁰ See II/2 ALFRED HUECK ET AL., ARBEITSRECHT 1026 (7th ed. 1970).

¹⁵¹ See *supra* text accompanying note 63.

¹⁵² See NLRA § 8(b)(3), 29 U.S.C. § 158(b)(3) (1998).

¹⁵³ See NLRA § 8(d)(2), 29 U.S.C. § 158(d)(2) (1998).

¹⁵⁴ See NLRA § 8(d)(1), (3), 29 U.S.C. § 158(d)(1), (3). Strikes are prohibited during the required period of notice, 60 days or until the expiration of the collective agreement, whichever is later. See *id.* § 8(d)(4). In the case of a health care institution, defined in NLRA § 2(14), the period of notice is 90 days. See *id.* § 8(d)(A). Thirty days' notice of a dispute in bargaining for an initial agreement for employees of a health care institution must be given to the agencies described in NLRA § 8(d)(3).

¹⁵⁵ See generally LMRA §§ 206–210, 29 U.S.C. §§ 176–180 (1998). The provision for strike votes is in § 209(b), 29 U.S.C. § 179(b). Section 212, at 29 U.S.C. § 182, makes these provisions inapplicable to matters subject to the RLA.

ted to use self-help in a dispute over wages, hours, and other terms and conditions of employment.¹⁵⁶

a. *Giving the Employer an Opportunity to Negotiate; Notice*

Although there is no explicit requirement that an opportunity for the employer to negotiate precede a strike unless the union is seeking to terminate or modify an existing collective agreement, providing such an opportunity to meet the union's demands would seem to be an implicit aspect of the duty to bargain in good faith. Of course, unorganized workers are subject to no such bargaining obligation because they are not subject to the NLRA.

If a union plans to strike a health care institution, however, it must, in addition to the requirements described above, give the institution at least ten days' notice, stating the date and time the strike will commence.¹⁵⁷ The notice requirement applies only to unions, and not to unorganized employees who engage in a concerted work stoppage. Where the bargaining is for an initial agreement with such an institution, the notice cannot be given until after the period specified for notice to government agencies has expired.

b. *Strike Votes*

Under the LMRA, strike votes are required only in connection with procedures to deal with strikes that, in the opinion of the President, "will, if permitted to occur or continue, imperil the national health or safety"¹⁵⁸ A union's internal rules often require a strike vote, but the failure to comply with such rules would not make the strike illegal from the standpoint of the employer. Indeed, for the employer to insist on such a requirement in negotiating a collective bargaining agreement is an unfair labor practice, as it is not a mandatory subject of bargaining.¹⁵⁹

¹⁵⁶ See *infra* text accompanying notes 160–64.

¹⁵⁷ See NLRA § 8(g), 29 U.S.C. § 158(g) (1998).

¹⁵⁸ LMRA § 206, 29 U.S.C. § 176 (1998); see also *supra* note 157.

¹⁵⁹ See *NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958). The bargaining obligations of both unions and employers are limited by NLRA § 8(d) to wages, hours, and other terms and conditions of employment, the so-called mandatory subjects, and insistence on a permissive (or illegal) subject is a violation of the duty to bargain in good faith. For an extensive exploration of the respective definitions of mandatory and permissive subjects, see 1 DEVELOPING LABOR LAW, *supra* note 85, at 854–63.

c. *Pre-Strike Procedures Under the RLA*

The “almost interminable” character of pre-strike procedures under the RLA stems chiefly from the statutory role of the NMB. The RLA prohibits strikes over disputes about contract interpretation, which it characterizes as “minor disputes” and requires to be settled by arbitration.¹⁶⁰ However, disagreements over contractual changes that would affect wages, rules, or working conditions are considered “major disputes.”¹⁶¹ Accordingly, both employers and unions must give thirty days written notice of such intended changes,¹⁶² and either party may invoke the services of the Board. The Board may proffer its services if it finds any labor emergency to exist.¹⁶³ Once its services have been invoked or proffered, the parties are said to be “in mediation,” and may not use “self help” until they are released from mediation by the Board.¹⁶⁴ Prior to such a release, the carrier may not make the changes just described and the union may not strike.¹⁶⁵ If a dispute is not resolved by mediation or other procedures provided in the Act and, in the judgment of the Board, threatens “substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation services,” the Board must notify the President.¹⁶⁶ The President has discretion to appoint a board to investigate and report on the dispute. Appointment of such a board, which must report within thirty days, extends the no-strike period until 30 days after it makes its report.¹⁶⁷

¹⁶⁰ RLA § 2, Sixth, 45 U.S.C. § 152, Sixth (1998), provides for arbitration of such disputes and had been held to bar strikes over such disputes. *See, e.g., Railroad Trainmen v. Chicago River & I.R.R.*, 353 U.S. 30 (1957). For cases reaching the same result for the airline industry under a different provision of the Act, see *THE RAILWAY LABOR ACT*, *supra* note 54, at 291 n.185.

¹⁶¹ *See* RLA § 2, Sixth, 45 U.S.C. § 152, Sixth.

¹⁶² *See id.* § 6, 45 U.S.C. § 156 (1998).

¹⁶³ *See id.* at § 5, First, 45 U.S.C. § 155, First (1998).

¹⁶⁴ Technically, the release from mediation is the result of a two-step process. After the Board determines that its efforts to settle the dispute through mediation have been unsuccessful, its final required action is to seek to induce the parties to submit their dispute to arbitration, and if either or both refuse, for 30 days the carrier generally cannot change rates of pay, rules, or working conditions or established practices. *See id.* For a detailed description of NMB mediation procedures, see *THE RAILWAY LABOR ACT*, *supra* note 54, at 213–19.

¹⁶⁵ The ban on changes by the carrier, commonly referred to as an obligation to maintain the status quo, is explicit in RLA § 5 First and § 6. For a discussion, see *THE RAILWAY LABOR ACT*, *supra* note 54, at 231–39. The corollary status quo obligation of unions rests on judicial construction. *See id.* at 246–50.

¹⁶⁶ RLA § 10, 45 U.S.C. § 160 (1998).

¹⁶⁷ *See id.*

D. *Limitations on the Right to Strike to Protect the Interests of the Public*

A recurring dilemma in labor law is how to reconcile the use of strikes by employees to obtain justified improvements in the terms and conditions of their employment with the hardships for third parties that such activities may cause. Obviously, some strikes may continue for a prolonged period without causing significant hardship to very many third parties. A classic example would be a strike by employees of a gas station in an area where there are many others nearby. In contrast, a strike by the employees of the local power company, if it causes a suspension of electric service, would have a substantial and immediate impact. In this situation, German law generally is far more protective of the interests of third parties than is American law.

1. Germany

The principle of commensurability limits the right to strike not only in regard to the interests of the employer, but also in regard to the legitimate interests of society and requires that the elementary needs of the public must continue to be fulfilled during the strike. This is the common view of the Federal Labor Court¹⁶⁸ and almost every German commentator.¹⁶⁹ Hospitals, as well as establishments providing energy or water, garbage disposal, funeral services, the mail or similar work, must always provide a minimum service.¹⁷⁰ For example, during a strike at a hospital, urgent operations must be performed, but not those that can wait without danger to the health of the patient.¹⁷¹ Unions normally accept this necessary minimum work, and the umbrella organization DGB explicitly mentions observance of this duty in

¹⁶⁸ See 1982 Der Betrieb 2139 f (Federal Labor Court); Entscheidungssammlung zum Arbeitsrecht Nr. 119 zu Art. 9 GG Arbeitskampf (1995) (Federal Labor Court).

¹⁶⁹ See LÖWISCH ET AL., *supra* note 89, at 122-23; Wolfgang Rüfner, *Zur Gemeinwohlbindung der Tarifvertragsparteien*, RECHT DER ARBEIT 193 (1985); HORTMUT OETKER, *DIE DURCHFÜHRUNG VON NOT-UND ERHALTUNGSARBEITEN BEI ARBEITSKÄMPFEN* 38 ff (1984).

¹⁷⁰ Section 12 of the draft Industrial Action Act by the German labor law professors describes these areas of important public service as, "the areas to fulfill the fundamental personal, social, and state needs" and includes, in addition to those listed above, telephone, TV, radio, firemen, security and defense (although strikes by policemen and soldiers are illegal anyway because they are public servants similar to "Beamte"). See ROLF BIRK ET AL., *GESETZ ZUR REGELUNG KOLLEKTIVER ARBEITSKONFLIKTE* 6 (1988).

¹⁷¹ See DÄUBLER ET AL., *supra* note 96, at 366.

its rules for industrial action, which are binding on all of its member unions.¹⁷²

2. United States

Apart from the provisions described above which serve to delay, rather than to limit, the scope of strikes, neither the NLRA nor the RLA includes any provision for commensurability similar to that reflected in German law in limitations on the right to strike in order to protect either the employer or the public interest. Thus, it is theoretically possible for a strike by the steel workers to shut down steel production for an indefinite period or a strike by the railroad or airline unions to shut down the operation of a railroad or an airline. As a practical matter, however, industry-wide shut-downs of employers subject to the NLRA have been rare, and Presidential intervention, authorized by the LMRA, has been infrequent. Disputes between unions and railroads or airlines have been more frequent targets of the exercise of Presidential emergency powers under the RLA, the most recent being President Clinton's action in August, 1997 to avert a strike by Amtrak employees.

a. *Under the Taft-Hartley Act (LMRA)*

The President's power under section 206 of the Act in relation to certain strikes and lock-outs that he believes "will, if permitted to occur or to continue, imperil the national health or safety," is limited to appointment of "a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him . . ."¹⁷³ The report "shall not contain any recommendations."¹⁷⁴ The President is required to "make its contents available to the public."¹⁷⁵ The President may, upon receiving the report, direct the Attorney General to seek to enjoin the strike or lock-out, and the district court, if it makes the requisite findings as to the national health and safety, may grant an injunction.¹⁷⁶ However, its term is limited to a maximum of eighty days.¹⁷⁷

¹⁷² See *Arbeitskampfrichtlinien des Deutschen Gewerkschaftsbundes vom 5.5.1974*, reprinted in 1974 *Recht der Arbeit* 306 f.

¹⁷³ LMRA § 206, 29 U.S.C. § 176 (1998).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ See *id.* § 208(a), 29 U.S.C. § 178(a).

¹⁷⁷ See *id.* § 209(b), 29 U.S.C. § 179(b) (mandating procedures within periods adding up to 80

While the injunction is in force, the board must make a further report to the President, including a statement of the employer's last offer, which is then submitted by the NLRB to a secret-ballot vote by the employees of each employer involved in the dispute.¹⁷⁸ Upon certification of the results or the earlier settlement of the dispute, the injunction will be discharged.¹⁷⁹ Thus, the President's power does not include the right to impose terms on the parties. However, the provisions for postponement, during which time the impact of his views, the boards' report, the employees' vote, and the force of public opinion, may in combination create strong pressures for settlement.

Between 1947 and 1978, the President invoked the emergency injunction procedures approximately thirty times.¹⁸⁰ The last such invocation appears to have been by President Carter in March, 1978, after the labor dispute between the United Mine Workers and the Bituminous Coal Operations had continued for 102 days.¹⁸¹ The court issued a temporary restraining order, which the miners generally disregarded. However, the district court declined to renew the injunction, finding insufficient "evidence of irreparable harm to the national health or safety," and the strike ended after 110 days.¹⁸² Since 1978, however, although there have been some long-running strikes in industries subject to the emergency provisions of the LMRA,¹⁸³ there has been little occasion to invoke emergency procedures to deal with them. In an era of down-sizing and globalization, union militancy has been relatively low.

b. *Under the RLA*

Presidential use of emergency boards has been far more extensive under the RLA than under the NLRA, no doubt reflecting the greater

days). In common parlance, when the President invokes these procedures he is said to have sought an "80 day injunction."

¹⁷⁸ LMRA § 209(b), 29 U.S.C. § 179(b) (1998).

¹⁷⁹ *See id.* § 210, 29 U.S.C. § 180.

¹⁸⁰ *See* Peter B. Shipman, *The Scope of the National Emergency Labor Injunction Law*, 9 SETON HALL L. REV. 709, 710 (1978). For references to critical comments on the emergency dispute procedures, see Leo Kanowitz, *American Labor Law and the United States Space Shuttle*, 34 HASTINGS L.J. 715, 732 n.88 (1983).

¹⁸¹ *See Coal Strike Ends on 110th Day After Miners Approve Agreement; 57% Vote for Pact*, FACTS ON FILE WORLD NEWS DIGEST, March 31, 1978, at 217 A1.

¹⁸² *U.S. v. United Mine Workers*, 97 L.R.R.M. (BNA) 3176 (D.D.C. Mar. 9 & 17, 1978).

¹⁸³ A well-known illustration is the recently settled 6-year strike against Caterpillar Tractor. *See* 157 LAB. REL. REP. (BNA) 379 (Mar. 30, 1998).

public unwillingness to tolerate interruption of transportation services, for which there often is no convenient substitute. Through 1997, emergency boards have been appointed in 200 railroad disputes and 34 airline disputes.¹⁸⁴ Apart from the 1997 Amtrak dispute referred to above, the most recent request for an emergency board was the Airline Pilots Association dispute with American Airlines in February, 1997, but the strike effectively ended as soon as the President called for the board.¹⁸⁵ Prior thereto, the last airline emergency board was appointed in 1966 by President Johnson in a dispute involving the International Association of Machinists, but the strike nevertheless took place.

As with the emergency procedures under the LMRA, the emergency procedures under the RLA do no more than provide for fact-finding and delay. However, Congress has intervened seventeen times in railroad disputes through 1994, either to continue emergency board fact-finding, to require the parties to submit to binding arbitration, or to accept the board's recommendations.¹⁸⁶

From the perspective of preventing and limiting the severity of work stoppages, the RLA's emergency dispute procedures have been highly effective. The Act as a whole enjoys strong support from both unions and management, although that may stem from a preference on each side for the status quo, with all of its faults, over the risks of the unknown.¹⁸⁷ Indeed, in many respects, the Act protects the status quo to a far greater extent than the more dynamically-oriented NLRA, making it more difficult to change either the identity of the bargaining representative or the terms of the collective agreement, or for either side to resort to self-help in a labor dispute.¹⁸⁸ Whether, on balance, these consequences are viewed positively, and whether they have led to unreasonably high wage costs and continuation of restrictive work rules, is outside the scope of this article.¹⁸⁹

¹⁸⁴ See Joshua M. Javits, *Emergency Board Procedures under Sections 9A and 10 of the Railway Labor Act*, SC25 A.L.I.-A.B.A. 377, 381 (1997).

¹⁸⁵ See *id.* at 382.

¹⁸⁶ See *id.* at 390.

¹⁸⁷ See *Leave RLA Alone, Say Carriers, Labor*, U.S. RAIL NEWS, vol. 16, No. 19 (Sept. 17, 1993), available in 1993 WL 2916462.

¹⁸⁸ Commentators have characterized the RLA as "interventionist" in dispute resolution and "abstentionist" in other areas. See Dennis Arouca & Henry H. Perrit, Jr., *Transportation Labor Regulation: Is the Railway Labor Act or the National Labor Relations Act the Better Statutory Vehicle?* 1985 LABOR L.J. 145, 146.

¹⁸⁹ For a discussion, see FRANK N. WILNER, *THE RAILWAY LABOR ACT & THE DILEMMA OF LABOR RELATIONS* 63-71 (1991).

III. LIMITATIONS ON EMPLOYER RESPONSES TO A LEGAL STRIKE

Possible employer responses to a legal strike may include continuing to operate with non-striking personnel, providing additional compensation for work done during a strike, replacing strikers, and locking out other employees.

A. *Germany*

An employer's responses to a legal strike are severely limited by the principle of commensurability and the view that the strike merely suspends and does not terminate the worker's employment contract. On the other hand, employers are allowed to pay additional compensation for work performed during a strike, over and above that which was provided in the last offer made to the union before the strike began.

1. Lockouts

In Germany, lockouts are relatively rare. However, they are the principal means with which the employer can respond to a strike. This use of the lockout, as well as the strike itself, must follow the principle of commensurability. In the 1980's, the Federal Labor Court developed from this principle some limits on the number of employees that can be affected by this measure.¹⁹⁰ These are highly criticized by most commentators,¹⁹¹ but have not yet been overruled. If the union calls for a strike of 25% or less of the employer's work force, the employer can legally lock out another 25%. If the union calls out more than 25% but less than 50%, the employer can lock out enough of the work force to bring the percentage up to 50%. If 50% or more of employees strike, the employer lacks the right to lock out, because the right can only be exercised in an "unfair" strike, where the union seeks to disturb the entire enterprise with a partial strike of less than 50% of employees so as to limit wage loss and the cost of strike benefits. However, according to a recent decision of the Federal Labor Court,¹⁹² later affirmed,¹⁹³ the

¹⁹⁰ See *Arbeitsrechtliche Praxis* Nr. 64 und 65 zu Art. 9 GG Arbeitskampf (1980) (Federal Labor Court).

¹⁹¹ See, e.g. MANFRED LIEB, *ARBEITSRECHT* s. 87 (6th ed. 1997).

¹⁹² Federal Labor Court Entscheidungssammlung zum Arbeitsrecht Nr. 115 zu Art. 9 GG Arbeitskampf (1994).

¹⁹³ See Entscheidungssammlung zum Arbeitsrecht Nr. 119 zu Art. 9 GG Arbeitskampf (1995) (Federal Labor Court); 1995 *Neue Zeitschrift für Arbeitsrecht* 209 (1995) (Federal Labor Court).

employer may close the entire enterprise for the time of the strike, even though only part of the work force is on strike. The Court did not consider this a lockout; instead, the court found that such an employer merely refuses to take measures against the pressure of the union. Many commentators, who do not see a difference between locking out the entire work force of a plant and closing a plant, have criticized this decision.¹⁹⁴

2. Additional Wages for Work During a Strike

A rather common means an employer may use to influence the strike and the employee's willingness to strike is offering additional wages to employees who continue to work during the strike. The extent to which such wages are legal and not prohibited as discriminatory against striking workers is unclear. The main view of the courts appears to be that additional wages are allowed when they compensate the working employees for more difficult work conditions experienced during the strike. When an employee earns more money than usual because he or she worked more than usual is not considered to be discrimination.¹⁹⁵ This is a common opinion.¹⁹⁶ Moreover, according to the courts, additional wages are also allowed when they are announced during the strike as an incentive to dissuade workers from striking, and commentators mostly agree.¹⁹⁷ Finally, it is surely not allowed to pay and announce after the end of the strike additional wages for those who have worked during the strike, just because they worked during the strike. Such payments cannot influence the strike and thus cannot be justified by the employer's interest to influence the strike. Their only purpose is to punish the strikers because they took part in the strike. Thus, even if the extra payments are minimal, they are prohibited as discriminatory.¹⁹⁸

¹⁹⁴ See THÜSING, *supra* note 10, at 126 n.444.

¹⁹⁵ See *Arbeitsrechtliche Praxis* Nr. 123 zu Art. 9 GG Arbeitskampf (1992) (Federal Labor Court); see also LÖWISCH ET AL., *supra* note 89, at 208.

¹⁹⁶ See *Arbeitsrechtliche Praxis* Nr. 127 zu Art. 9 GG Arbeitskampf (1993) (Federal Labor Court); LÖWISCH ET AL., *supra* note 89, at 141 (for further references).

¹⁹⁷ Some commentators, however, strongly disagree. See DÄUBLER ET AL., *supra* note 96, § 280 ff.

¹⁹⁸ In the famous decision of the Labor Court of Appeals of Cologne, this additional wage was a bottle of French champagne (worth about \$20). The court decided that the employer must also give a bottle of champagne to the striking employees. See *Landesarbeitsgerichtsentscheidungen* Nr. 39 zu Art. 9 GG (1990). See also *Arbeitsrechtliche Praxis* Nr. 124 zu Art. 9 GG Arbeitskampf (1992) (Federal Labor Court).

B. *United States*

In the United States, employers enjoy greater freedom to lock out striking employees and may permanently replace them during an economic strike. Employers do not enjoy this right, however, in a strike caused or prolonged by the employer's unfair labor practices. Moreover, employers are not permitted to pay wages for work during the strike at a rate higher than that provided in its final offer to the union.

1. Lockouts

An American employer has far more leeway in locking out employees than its German counterpart. The Supreme Court has sustained the defensive use of lockouts in anticipation of a strike,¹⁹⁹ and the District of Columbia Circuit Court of Appeals has held bargaining lockouts to be legal where the employer seeks to strengthen its position in ongoing negotiations with the union.²⁰⁰ In the latter situation, the employer may go further and continue operation by employing temporary replacements.²⁰¹

2. Permanent Replacement of Economic Strikers

As in Germany, the strike does not terminate the employment relationship. But according to language in a sixty year-old Supreme Court opinion, *NLRB v. Mackay Radio & Telephone Co.*, the employer has the right to replace strikers permanently as long as the strike was neither caused nor prolonged by the employer's unfair labor practices.²⁰² The permanently replaced striker has the right to reinstatement whenever there is a suitable vacancy if he or she makes an unqualified offer to return to work and has not obtained other substantially equivalent full-time employment.²⁰³ However, the employee has no right to displace employees with less seniority who chose not to honor the strike or to return before it ends.²⁰⁴

¹⁹⁹ See *American Ship Bldg. Co. v. NLRB*, 380 U.S. 300 (1965).

²⁰⁰ See *International Bhd. of Boilermakers Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988).

²⁰¹ See *Brown v. Pro Football, Inc.*, 518 U.S. 231, 244-48 (1996) (describing an employer's options after an impasse has been reached in contract negotiations). For a discussion of offensive uses of lockouts, see 2 DEVELOPING LABOR LAW, *supra* note 33, at 1146-55.

²⁰² See 304 U.S. 333 (1938). For a discussion, see David Westfall, *Striker Replacements and Employee Freedom of Choice*, 7 LAB. LAW. 137 (1991).

²⁰³ See *Laidlaw Corp.*, 171 N.L.R.B. 1366, *enforced*, 414 F.2d 99 (7th Cir. 1968).

²⁰⁴ See *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 489 U.S. 420 (1989).

3. Additional Wages for Work During a Strike; Changes in Terms and Conditions of Employment

Employers subject to the NLRA are not permitted to pay wages higher than those offered in negotiations with strikers for labor performed during a strike. Moreover, under the NLRA, an employer's duty to bargain with the union representing the employees continues during a legal strike until the parties have bargained to "impasse," a term that is neither referred to in the Act nor susceptible of precise definition. Impasse is said to occur "after good-faith negotiations have exhausted the prospects of concluding an agreement."²⁰⁵ However, impasse on some issues does not suspend the obligation to bargain over other issues. Instead, the effect of reaching impasse is to suspend the duty to bargain with respect to the issues as to which an impasse exists, and, subject to the exceptions noted above,²⁰⁶ to permit the employer to make unilateral changes in working conditions, as long as such changes are not substantially different from, or greater than, offers made during negotiations.

Under the RLA, the carrier's obligation as a common carrier to make all reasonable efforts to continue providing transportation services during a strike permits it to go beyond unilaterally implementing the proposals that have been suggested via the procedures governing major disputes. Indeed, the carrier is permitted to modify existing agreements to the extent that such changes are "reasonably necessary to continue operations."²⁰⁷ These changes may even include paying replacement workers a higher wage than that established by relevant employment contracts applicable to regular employees.²⁰⁸ However, the standard of what changes are "reasonably necessary" is construed strictly, and the right to continue to implement any such changes ends with the end of the strike.²⁰⁹

The Court distinguished its previous holding in *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), that a promise of super-seniority to returning strikers and replacement workers hired during a strike is an unfair labor practice because of the chilling effect on exercise of the right to strike.

²⁰⁵ Taft Broad., 163 N.L.R.B. 475, 478, *enforced on this point*, 395 F.2d 622 (D.C.Cir. 1968); *see also* Atlas Tack Corp., 226 N.L.R.B. 222, 227 (1976), *enforced*, 559 F.2d 1201 (1st Cir. 1977).

²⁰⁶ *See supra* text accompanying notes 87-88.

²⁰⁷ *Empresa Ecuatoriana de Aviacion, S.A. v. District Lodge 100*, 690 F.2d 838, 842 (11th Cir. 1982).

²⁰⁸ *See* *Brotherhood of Ry. & Ss. Clerks v. Florida E. Coast Ry.*, 384 U.S. 238, 248 n.8 (1966).

²⁰⁹ *Id.* at 248.

IV. CONSEQUENCES OF AN ILLEGAL STRIKE

The consequences of an illegal strike are quite different in Germany than in the United States, especially as far as unions are concerned.

A. *Germany*

German law does not distinguish between an unprotected strike and an illegal strike. When a strike is within the scope as described above, it is legal, and if it does not fulfill all these requirements it is illegal; *tertium non datur*. If the strike is illegal, this has consequences for both unions and employees. As a rule, the employer can respond to a threatened illegal strike by going to court to get both a permanent and—usually more important—a preliminary injunction against the strike.²¹⁰ This is the common view, and such injunctions have been so obtained with relative frequency.²¹¹ If an illegal strike actually occurred, the employer can sue the union for damages and—at least theoretically—sue all employees for the full amount, all of whom are jointly and severally liable.²¹² The damages can be based on both a tort theory—against the union and the employees—and also on breach of contract—against the employees.²¹³ The only prerequisite is that the union or the employee knew that the strike was illegal or could reasonably have known it. If a union calls for a strike, it is presumed that the employee did not act negligently when he presumed the strike to be legal.²¹⁴ However, this presumption is rebuttable, and the fact that the employee could be held liable for the whole amount of damages is highly criticized by many commentators because it might unduly threaten the employee's right to strike.²¹⁵ Also, if the strike is illegal and the employee could have known this, he or she can be dismissed by the employer because the breach of contract may be an "important reason" under Article 626 of the Civil Code, which allows the immediate termination of the employment contract for "important reasons."

²¹⁰ See LÖWISCH ET AL., *supra* note 89, at 271–72; Udo Isenhard, *Einstweiliger Rechtsschutz im Arbeitskampf*, in ARBEITSGESETZGEBUNG UND ARBEITSRECHTSPRECHUNG 201 ff. (1995).

²¹¹ See 1997 Neue Zeitschrift für Arbeitsrecht 800 (Labor Court of Appeals of Cologne).

²¹² See LÖWISCH ET AL., *supra* note 89, at 269.

²¹³ See *id.*

²¹⁴ See *id.* at 264.

²¹⁵ See DAUBLER ET AL., *supra* note 96, at 480–81.

B. *United States*

As noted above, strikes may be illegal under American federal law because they violate either the terms of a statute or a provision of a collective agreement. In addition, strikes that do not involve such a violation may fall outside any statutory protection of concerted activities of employees. Because of the different histories of the RLA and NLRA, an employer has different remedies under each Act.

1. National Labor Relations Act

In addition to the remedies afforded employers in legal strikes, additional remedies are available, including actions for damages against the union, injunctions in a limited class of cases, and discharge of striking employees.

a. *Damages*

Section 301 of the NLRA authorizes suits against unions for violation of collective agreements, and section 303 (b) authorizes suits by any party injured by a strike prohibited by section 8(b)(4), which includes secondary boycotts and other kinds of illegal strikes. Suits for damages for breach of contract against individual employees who leave their jobs, as part of a strike are relatively rare, since the employee may be judgment-proof, or the expense of litigation may exceed the expected recovery. Moreover, the prevailing cultural norm generally accords to employees the right to quit.²¹⁶ Additionally, an employer's suing, or threatening to sue an individual employee constitutes an unfair labor practice under NLRA Section 8(a)(1) if the suit is not meritorious or the threat is in retaliation for the exercise of statutorily protected rights.²¹⁷

b. *Injunctions*

Deep-seated suspicion of courts and hostility to judicial intervention in labor disputes led to the enactment in 1932 of the Norris-LaGuardia Act, which deprived the federal courts of jurisdiction to issue injunc-

²¹⁶ See MARK A. ROTHSTEIN, ET AL., *EMPLOYMENT LAW* § 1.10 (1994). Of course the Thirteenth Amendment to the Constitution generally prohibits involuntary servitude, except for judicially implied exceptions for the armed forces and the merchant marine. See *id.*

²¹⁷ See 1 *DEVELOPING LABOR LAW*, *supra* note 85, at 136.

tions restraining peaceful conduct in labor disputes.²¹⁸ However, a judicially-created exception allows injunctions to be issued in appropriate cases against strikes over a matter subject to arbitration under the terms of a collective agreement, if the employer agrees to arbitrate the dispute.²¹⁹ The Act does not apply to state courts, which accordingly remain free to issue injunctions against strikes in breach of collective agreements, in the absence of a state "Little Norris-LaGuardia" Act.²²⁰

2. Railway Labor Act

Although enactment of the RLA preceded the Norris-LaGuardia Act by six years, the Supreme Court has held that the latter act does not bar injunctive relief against a party whose conduct violates an express prohibition in the RLA and an injunction is the only practical way to enforce the statute.²²¹ Another exception to the general ban on injunctions against peaceful conduct in labor disputes is parallel to the similar judicially-created exception under the NLRA, as it permits injunctions against strikes over "minor" disputes over the interpretation of collective agreements.²²²

CONCLUSION

The foregoing discussion seeks to provide a clearer understanding of the similarities and differences between German treatment of strikes and lockouts and the treatment afforded by American law under the highly disparate provisions of the NLRA and the RLA, with only passing references to the federal and state limitations on strikes by public sector employees. A related question is what features of each system are attractive candidates that should be replicated elsewhere, always taking account of the interrelationships which may make it inappropriate to consider adoption of separate parts without others to which they are closely related.

²¹⁸ See *supra* note 91.

²¹⁹ See *Boys Mkts., Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). For a discussion of the requirements for issuance of a so-called "Boys Markets" injunction, see 1 DEVELOPING LABOR LAW, *supra* note 85, at 981-1002.

²²⁰ See, e.g., CAL. CIV. PROC. CODE § 527.3 (West 1998).

²²¹ See, e.g., *Burlington N.R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429 (1987); *Chicago & N.W.R.R. Co. v. United Transp. Union*, 402 U.S. 570, 581-82 (1971); see also *The Railway Labor Act*, *supra* note 54, at 243-45.

²²² See, e.g., *Brotherhood of R.R. Trainmen v. Chicago River & Indiana R.R.C.*, 353 U.S. 30 (1957); see also *THE RAILWAY LABOR ACT*, *supra* note 54, at 290-92.

Both legal systems seek to protect third parties from undue burdens from strikes by private sector employees. However, both pursue this goal in sharply contrasting ways. In Germany, the relevant laws fundamentally seek to prohibit strikes for purposes other than collective bargaining and require that minimum services be maintained to meet the essential needs of the public. The United States has no similar limitation on the permissible purposes of strikes, although the ban on secondary action under the NLRA (but not under the RLA) bars a major category of strikes that does not seek to affect the labor policies of the struck employer. In addition, the right of an employer under the NLRA to replace economic strikers permanently is an important counterweight to the right of workers to strike for reasons other than collective bargaining—or indeed for no reason that is communicated to the employer—as well as serving to check unreasonable bargaining demands by unions. Instead of requiring minimum air and rail services to be maintained during a strike, American law relies on the almost interminable procedures required by the RLA before a strike is considered legal, the National Mediation Board's exercise of its powers under that act to avoid serious interruptions of services, and the backup of Presidential emergency powers to deal with disputes in those industries. Industries governed by the NLRA are also subject to such Presidential powers, if the criteria specified in the applicable statute are met. An additional safeguard to protect both employers and the public from unforeseen strikes is the requirement of notice for some, but not all, strikes under the NLRA.

Maintenance of minimum services to meet the essential needs of the public during a strike appears to work well in Germany, in both private sector and public sector employment, but that may reflect in part the willingness of the DGB to require its constituent unions to act reasonably in keeping with the spirit of this requirement. It is uncertain whether the AFL-CIO would be willing and able to exercise comparable influence over its unions, or how the Teamsters in particular would respond to such a requirement.

If the United States adopted the German requirement that strikes be for the purpose of collective bargaining, sympathy strikes by unionized workers, strikes to protest unfair labor practices, and walkouts by unorganized employees would all become illegal. Such a sweeping curtailment of the right to strike does not seem justified, particularly in view of the potential ability of many employers to continue operations with supervisory personnel or temporary replacements.

A prohibition of partial and intermittent strikes is common to both German law and the NLRA. The problems created by lack of a similar clear prohibition under the RLA were well illustrated by the aptly-named Operation CHAOS against Alaska Airlines,²²³ and the obvious remedy is to extend the prohibition to it as well.

Notice is required of some, but not all, categories of strikes under the NLRA and may appear to be implicit in the almost interminable procedures required before a strike is legal under the RLA. Of course, there is no requirement that the exact time when the strike will occur be specified, leaving both employers and the public in a state of continuing uncertainty about when and to what extent to revise their plans. Still, a general provision in the NLRA for notice that a strike may occur is preferable to no notice at all. A similar requirement might be a useful addition to German law as well.

American experience with a duty to bargain can serve to rebut the contentions of those who base their opposition to its recognition in Germany on the contention that the duty would become a duty to agree to the demands of the opposing party. Section 8(d) of the NLRA explicitly negates that view, and the courts generally have declined to review the substance of the parties' bargaining positions on the mandatory subjects specified in that section: "wages, hours, and other terms and conditions of employment."²²⁴

Similarly, Section 2, First of the RLA imposes a duty "to make every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions." The courts have generally assumed that duty to be at least as stringent as the bargaining obligation under the NLRA, but not to preclude a party's being adamant about its proposals²²⁵ or engaging in "robust, bare-knuckled bargaining."²²⁶ Although some commentators have been skeptical about the practical effectiveness of the bargaining obligation, past experience shows that it clearly has a major impact in a large number of cases and thus may limit the need for unions to go on strike. An exploration of American experience in enforcing the obligation, though beyond the

²²³ See *supra* text accompanying notes 137-38.

²²⁴ See, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). But see *NLRB v. A-1 King Size Sandwiches, Inc.* 732 F.2d 872 (11th Cir. 1984) (finding that "[t]he Board correctly inferred bad faith from the Company's insistence on proposals that are so unusually harsh and unreasonable that they are predictably unworkable").

²²⁵ See, e.g. *Flight Attendants (IFFA) v. Trans World Airlines*, 878 F.2d 254 (8th Cir. 1989).

²²⁶ *Trans Int'l Airlines v. Teamsters*, 650 F.2d 949, 958 (9th Cir. 1980).

scope of this article, might encourage the German courts to adopt a means that fits so well within the principle of *ultima ratio*.

All these are only a few conclusions one might draw; many others could come to mind. Many more aspects might be considered in order to reach a deeper understanding. Comparison of legal systems is a long journey, the end of which might not be foreseeable at the start. However, each journey starts with a first step. Indeed, the foregoing suggestions might serve as a first step toward further exploration of the possibility that each system might benefit if it borrowed from the other, in the quest of each for fair treatment of employees, employers, and the entire community. It surely is worth taking it.