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LEGAL ASPECTS OF COMPULSORY ARBITRATION IN GREAT BRITAIN

*Jean Trepp McKelvey**

On August 2, 1951, Alfred Robens, then Minister of Labour in Great Britain, announced to the House of Commons that a new Industrial Disputes Order would shortly be adopted. It would replace the Conditions of Employment and National Arbitration Order which had been passed in the gloomy days after the fall of France in 1940, but which had survived with few changes into the postwar period.¹ Under the new Order, which is frankly labelled "experimental," strikes and lockouts are no longer to be illegal. Instead the government is expected to aid the parties to develop their own means of adjustment through regular channels of collective bargaining and voluntary arbitration, with reference to the new Industrial Disputes Tribunal only as a last resort, and under conditions which are designed to preserve voluntary means of settlement, discourage breach of existing contracts, and minimize the need for work stoppages to effect a change in wages and conditions of employment. It is the purpose of the present article to analyze the legal aspects of compulsory arbitration, especially those which have a bearing on the revisions contained in the new Order, to trace the circumstances leading up to the change, and to appraise the strengths and weaknesses of the current system of handling industrial controversy.

LEGAL FRAMEWORK OF COMPULSORY ARBITRATION

The Conditions of Employment and National Arbitration Order of 1940² represented the most sweeping application of compulsory arbitration to industry and labor in modern British history. As in the first World War, compulsory arbitration was resorted to only after the nation found itself in serious peril, and only after the government had obtained the consent of both industry and labor to abandon resort to direct economic conflict for the duration of the emergency. After the fall of France, the Minister of Labour and National Service asked the National Joint Advisory Council, composed of representatives of the British Employers' Confederation and the Trades Union Congress, to recommend means of settling labor disputes without stoppages of work. The Council appointed a subcommittee consisting of seven represen-

* See Contributors' Section, Masthead, p. 439, for biographical data.

¹ 491 H. C. DEB. 1624-1630 (5th ser. 1951).

² S. R. & O., 1940, No. 1305. Made under powers granted in Reg. 58AA of the Defense (General) Regulations, 1939.

tatives from each side, the Joint Consultative Committee, which in June made a unanimous report to the Minister urging that the regular machinery of conciliation and voluntary arbitration in any trade or industry continue to be used, but that where no such machinery existed, or where its use had not produced agreement, there should be provision for compulsory arbitration as a substitute for strikes and lockouts.

Accordingly, on July 18, 1940, the Minister issued Order No. 1305 to take effect a week later. Part I of the Order established a National Arbitration Tribunal for the purpose of settling those trade disputes which could not otherwise be determined. Any party to a dispute could report its existence to the Minister. A trade dispute was defined as "any difference between employers and workmen, or between workmen and workmen connected with the employment or non-employment, or the terms of the employment or with the conditions of labour of any person." Here it is important to note that the definitions were so worded as to include disputes between individual workers and their employers as well as disputes between organizations of employers and organizations of workers. Moreover, the term "organization" was not restricted to associations or unions representing a substantial proportion of employers or workers in the trade or industry concerned, but was defined simply as "an organization representative of employers or an organization representative of workers as the case may be." Thus break-away unions, dissident groups, minority factions and rival organizations were not excluded from access to the Minister.

When a dispute was reported by any party, the Minister was directed first to consider whether there existed suitable means for its settlement which had not been fully utilized. Where in his opinion such means were available he was obliged to refer it to the established procedures for adjustment. This provision was an attempt to safeguard the regular machinery of collective bargaining and to prevent the parties from rushing to the government for help without first engaging in their own efforts at adjustment. Where, however, no such machinery existed, or when its use failed to produce a settlement or resulted in undue delay, the Minister was to take any other steps which seemed to him expedient, including reference to the National Arbitration Tribunal within twenty-one days from the date on which the dispute was reported. Any decision made by the Tribunal, or by the parties themselves or by other agencies handling the dispute, was to be final and binding as an implied term of the contract³ between the employers and workers to whom it applied

³ Enforcement of awards was thus limited to suits for breach in the Civil Courts.

from a date not earlier than that on which the dispute first arose, and to run until modified by a subsequent agreement or award. Under Part II no strike or lockout was permitted unless a dispute had first been reported to the Minister and he had failed to refer it for settlement within twenty-one days.

While the prohibition on strikes was subsequently to arouse protests from some unions in the postwar period, another part of the Order, Part III, Article 5, dealing with the obligation of employers to observe recognized terms and conditions of employment, was later to evoke criticism from some sections of industry. This part of the Order represented an effort to minimize dissension and unfair competition by requiring all employers, whether or not they were members of an employers' association or parties to a trade agreement, to observe in their own establishments those terms and conditions of employment which had been settled through collective bargaining or arbitration by employer and union organizations representing respectively "substantial proportions of the employers and workers engaged in that trade or industry in that district," or, alternatively, terms and conditions not less favorable than the recognized terms and conditions.⁴ This represented in effect an attempt to broaden the scope of minimum wage determination by giving collective bargaining agreements the status of law. Any question as to the nature of these recognized terms and conditions or as to their observance by an employer could be reported to the Minister, but only by an employers' association or union which habitually negotiated settlements in the trade or industry concerned.

As originally constituted in the Order, the Tribunal was to consist of five members, three being persons appointed by the Minister as independent members, and the other two being representatives respectively of industry and labor selected from panels established by the Minister after consultation with the British Employers' Confederation and the Trades Union Congress. The appointed members were to be permanent, the Chairman coming from this group, with the other designees serving *ad hoc*. A quorum could consist of three members, one being an appointed member and the other two, representative. Thus the Tribunal could sit with three, four, or five members. The Tribunal was given the

⁴As enumerated in the Order, these included decisions of joint industrial councils or conciliation boards, awards of the Tribunal, the Industrial Court or other arbitrators, or any statutory provisions relating to wages, hours or working conditions unless these were less favorable than those established by collective bargaining. The Industrial Court is a permanent tripartite arbitration tribunal established by the Industrial Courts Act, 1919, 9 & 10 Geo. 5, c. 69, to decide disputes which are voluntarily submitted by both parties.

responsibility of formulating its own rules of procedure⁵ and of deciding the cases referred to it within fourteen days wherever practicable.

Such were the new provisions which governed the adjustment of labor disputes in Great Britain until the summer of 1951. Only a few modifications were made in the Order after its promulgation. Two changes were made in the provision dealing with appointed members. When it soon proved impossible for the government to secure the full-time services of three persons, the Order was amended in 1941 to provide for a panel of not more than five appointed members to be designated by the Minister.⁶ A year later even this limitation on numbers was removed.⁷ When the Order was revoked in the summer of 1951 there were thirteen persons on the panel of appointed members, six of whom were lawyers, including the Chairman, Lord Terrington, and the rest, retired Civil Servants, university administrators and professors, only one of whom, however, was an economist. Still another change to expedite hearings was made in 1950 when an amendment permitted the Tribunal to sit in two divisions, each constituted on the tripartite pattern.⁸

A minor change in 1942 provided that the report of a dispute to the Minister had to be in writing.⁹ A fifth and more significant amendment was made in 1944 relating to Article 5. This limited the time for raising questions concerning an employer's observance of recognized terms and conditions to twelve months from the date on which the question first arose—an effort to obviate stale claims. On the other hand it was provided that awards under this section might be made retroactive to a date not earlier than that on which the dispute was reported, except that where the Tribunal was satisfied that the employer had been aware of these terms and conditions and of his obligation to observe them, the award could be made retroactive to the date of his knowledge.¹⁰ This was an attempt to make the obligation imposed upon all employers self-enforcing.

Although the Order had originally been drawn only for the duration of the emergency, it was twice extended with the consent of both sides of the Joint Consultative Committee, first in 1945 for a five-year

⁵ The Tribunal had no power to administer oaths or to subpoena parties or witnesses.

⁶ S. R. & O., 1941, No. 1884.

⁷ S. R. & O., 1942, No. 2673.

⁸ S. INSTRS., 1950, No. 1309.

⁹ S. R. & O., 1942, No. 1073.

¹⁰ S. R. & O., 1944, No. 1437. The language of the Order making awards retroactive to the date on which the dispute first arose did not clearly apply to disputes which were reported under Article 5, since the employer's obligation to observe recognized terms and conditions of employment was a continuing one, although his failure to do so might not be made the subject of a report until some time later.

period,¹¹ and again in 1950.¹² One other statutory modification should be noted. When the Wages Council Act was passed in 1945, Section 3 provided that in the event of the Arbitration Order being revoked, there should be a transition period lasting until the end of 1950 during which the obligation of employers to observe recognized terms and conditions of employment would continue, but questions arising thereunder would be referred to the Industrial Court. Since the Arbitration Tribunal remained in existence during this period the Court never had to assume this additional function.¹³

JUDICIAL REVIEW

No method of appeal from the decisions of the Tribunal was provided; its awards, as noted above, were binding upon the parties. Moreover, any question concerning the interpretation of an award was likewise to be answered by the Tribunal itself upon reference of the issue by the Minister, or by either party, and such interpretations were binding in the same manner as the original award.

Despite the absence of specific provisions for judicial review, the Tribunal was, of course, subject to the control of the courts through orders of prohibition should it act outside of the jurisdiction conferred upon it by the Order, or certiorari, should it act in excess of that jurisdiction. Attempts to challenge the jurisdiction of the Tribunal were made in a few instances, as will be noted, but only one case resulted in a significant curtailment of the Tribunal's powers.

A number of cases grew out of the definition of a trade dispute. The Tribunal itself refused to accept cases involving union recognition and jurisdiction since disputes between unions were not explicitly covered by the definition of a trade dispute. An early case before the courts involved the question whether a wage dispute between a municipal corporation and its workers came within the scope of the Tribunal's powers. When the Court of Appeal held that the Tribunal had no power to overrule the discretion given to a local authority by the War Service Act, 1939, the Tribunal announced that it would follow the spirit of the decision by renouncing its authority over *any* dispute involving local gov-

¹¹ S. R. & O., 1945, No. 1620.

¹² S. INSTS., 1950, No. 1769. Both these extending Orders were made under Section I of the Supplies and Services (Transitional Powers) Act, 1945.

¹³ The text of these Orders and amendments can be secured from His Majesty's Stationery Office or can be found in M. TURNER-SAMUELS, *INDUSTRIAL NEGOTIATION AND ARBITRATION* (London, Solicitor's Law Stationery Society, Ltd., 1951). For a summary of the changes see Ministry of Labour and National Service, *Report for the Years 1939-1946*, Cmd. No. 7225 at 279 (1947).

ernments. On further appeal, however, the House of Lords reversed the Court of Appeal and gave a broad scope to the term "trade dispute," pointing out that its etymology derived from "tread," which indicated a way of life or an occupation, and as such encompassed the entire range of wage-earning or salaried employments, including those in local government.¹⁴ The Tribunal thereupon resumed the processing of disputes involving the employees of local authorities.

Another question relating to the definition of a trade dispute arose in the refusal of a newspaper, the *Daily Worker*, to reinstate a former employee on its staff when it resumed operation after a period in which its publication had been banned. The union to which the employee belonged insisted on his reinstatement and called a strike to enforce its demand. When this controversy was submitted to the Tribunal, the newspaper challenged the reference on the ground that this was a dispute between an employer and a union, and not one between an employer and his employees. In this case the Court of Appeal found that the Tribunal did have power to entertain the reference since there was indeed a dispute between the workers and the employer.¹⁵ Whether the Tribunal had the power to order reinstatement was not, however, decided until 1947 in the most famous case arising under the Order, the *Crowther* decision.¹⁶

The question here arose out of claims by certain workers, members of the Chemical Workers' Union, who had previously been employed by the company, for reinstatement following their dismissal after a wage dispute. Although the Tribunal directed their reinstatement, the High Court set aside this order as *ultra vires*. The Chief Justice reasoned that even if the employer obeyed the order the remedy was an idle one since nothing could prevent the employer from firing the employees the day after their reinstatement so long as he gave notice in accordance with the contract. In other words, the court apparently held that while the Tribunal could alter a contract it had no power to create a new one. The practical consequence of this decision, from which no appeal was taken, was to exclude disputes over reinstatement from the jurisdiction of the Tribunal. Did

¹⁴ National Association of Local Government Officers v. Bolton Corporation, [1942] A. C. 166 *et seq.*

¹⁵ R. v. National Arbitration Tribunal, *ex parte* Keable Press, Ltd., [1943] 2 All E. R. 633. The Court argued: "The point is: is there a dispute between the workmen and the employer? What better proof of the existence of a dispute in relation to the reinstatement of Howard can one have than the fact that the men come out on strike because he has not been reinstated I really do not know."

¹⁶ R. v. National Arbitration Tribunal, *ex parte* Horatio Crowther and Co. Ltd., [1947] 2 All E. R. 693.

this mean then that unions were free to strike over the issue of reinstatement? The perplexities aroused by this question were reviewed at the annual Trades Union Congress in 1948 when the General Council reported that two alternatives were under consideration: 1) to amend the Order to give the Tribunal power to order reinstatement, the difficulty of which course was that it would not solve the problem mentioned by the Chief Justice, that of making the reinstatement "stick"; or 2) to amend the definition of a trade dispute so as to exclude disputes over reinstatement, thereby freeing workers to conduct legal strikes over the issue. The difficulty of the latter course was that of isolating disputes over reinstatement from the other issues which were likely to be present in a particular case.¹⁷ Although the trade union side of the National Joint Advisory Council tended to favor the second alternative, their employer counterparts supported the policy of referring disputes over reinstatement to the Tribunal for recommendation rather than for decision. No agreement on this problem was ever reached. Instead the whole question of policy was left hanging in the air. What is more important is that it contributed to a feeling of uneasiness in government circles after 1948 over having the responsibility for administering an Order which could not really dispose of disputes of this kind. It was this circumstance, as noted below, which ultimately led to the specific exclusion of such questions as hiring and reinstatement from the jurisdiction of the successor Tribunal.

A few other court decisions raised some interesting points of law but lacked the significance for industrial disputes of the *Crowther* opinion. One case involved a potential conflict between the minimum wage boards and the Tribunal when certain tobacco companies raised the question whether the language in Article 1 of the Order directing the Minister

¹⁷ PROCEEDINGS OF TRADES UNION CONGRESS 214-216 (1948). It may be difficult for American students to understand this problem of reinstatement unless they recognize that the practice and concept of collective bargaining in Great Britain are in many ways different from our own. Thus the concept of the exclusive majority representative set forth in our labor relations statutes finds no parallel in Great Britain where workers in a single establishment may belong to and be represented by a number of different unions. Moreover, the terms and conditions of employment established through collective bargaining become implied minimum terms of employment for each worker covered by the agreement, but the employer remains free to bargain individually with each worker to establish wages and conditions superior to these minima. The whole development in American collective bargaining of the concept of discharge only for just cause is quite foreign to British contract procedure. Although workers may and do protest discharges through strike action, so long as the employer gives proper notice under the terms of the agreement his judgments in selecting and retaining his employees are not generally subject to challenge through arbitration or through suits in the courts.

to refer to the Tribunal those trade disputes "which cannot otherwise be determined" did not preclude the Minister from certifying cases which could be settled by the determination of a Trade Board already established for the industry under the Trade Boards Act of 1918. Here the court held that the Trade Board was not only an inappropriate body to decide the issue in question, but that the Minister had discretion to decide whether existing machinery was or was not suitable for resolving a dispute.¹⁸

There were a few questions arising out of Article 5 which also reached the courts. Two of these, involving a single company, resulted in orders of prohibition against the Minister, first for referring to the Tribunal the question whether an employer was obliged to observe recognized terms and conditions of employment—an issue which the court held could not properly be referred since the Order by its own terms required such observance; and the second arising, after the terms of reference had been revised to conform to the court's ruling, when the court held that the twenty-one day time limit for reference had expired and that consequently the Minister was without power to refer the case in any terms.¹⁹

The other case involving Article 5 posed the question of the Tribunal's power to decide what terms and conditions of employment were the recognized terms which the employer was bound to observe. Certain female employees of the Midgley Harmer Company argued that they should receive the same increases in pay as were provided in a collective bargaining agreement to which their own employer was not a party. It was the company's contention that, since its existing rates exceeded those set forth in the agreement, even when the increases were taken into account, it was in fact observing recognized terms and conditions of employment. Hence there was no question under Article 5 which could be submitted to the Tribunal. The court here upheld the Tribunal's jurisdiction to consider the matter as a trade dispute, pointing out that only after an award had been issued could the question of jurisdiction be raised by means of an order of certiorari to set the award aside.²⁰

Thus with the exception of the substantive issue presented by the

¹⁸ R. v. Imperial Tobacco Co. Ltd., [1943] 2 All E. R. 162.

¹⁹ R. v. National Arbitration Tribunal, *ex parte* G. A. Cramp and Sons, Ltd. [1946] 62 T. L. R. 509. The second decision was unreported. See Ministry of Labour and National Service, *Report for the Years 1939-1946*, CMD. No. 7225 at 283 (1947).

²⁰ R. v. National Arbitration Tribunal, *ex parte* Midgley Harmer, Ltd., [1947] 1 All E. R. 196. For a brief analysis of some of these cases see an article by J. B. S. in *THE LAW JOURNAL* (an unofficial British publication), issue of February 4, 1949. A longer analysis can be found in M. TURNER-SAMUELS, *op. cit. supra* note 13, c. 11.

Crowth case and the minor procedural rulings noted above, the Tribunal was able to decide the issues referred to it for settlement without interference from the judiciary.

OPERATIONS OF THE NATIONAL ARBITRATION TRIBUNAL

Over 4000 disputes were reported under the Order from its inception until the end of 1950; all except a handful of these were reported by or on behalf of workers.²¹ Less than half of the reported disputes were, however, referred to the Tribunal. The rest yielded to other methods of settlement including conciliation and collective bargaining. There were thousands of other cases during this period which were adjusted through voluntary machinery of negotiation without ever reaching the Minister. Thus the Tribunal was in fact, as it was supposed to be in theory, only a court of last resort superimposed upon the normal structure of collective bargaining.

During the war about one-half of the Tribunal's awards dealt with claims for improved wages. Others concerned questions arising out of manpower shortages, such as transfer allowances, shelter time pay and women's wages. In the post-war period wages continued as the most important issue, although a considerable number of cases involved hours, holiday pay, incentive systems and severance pay allowances. So far as the parties to the disputes were concerned a study of all awards issued for the period August 1, 1947 to December 31, 1950 indicated that the largest proportion, 39% of the total number of cases, involved a single employer and all or a substantial number of his employees, while 26% comprised claims involving only one or a few employees. Awards having regional or national scope were made in less than one-third of the cases,—those in which an employers' association was one of the parties to the dispute.²² These figures provide further evidence that the bulk of the Tribunal's case load was concentrated in situations where no effective collective bargaining machinery existed.

Because the Tribunal, like the Industrial Court which handles voluntary submissions, followed a practice of handing down awards without accompanying opinions, it is difficult to trace any consistent line of reasoning or of precedent in its decisions. In fact one of the reasons impelling the Tribunal to refrain from the writing of opinions was its

²¹ Out of over 4000 cases only 97 were reported by employers, while 16 were joint submissions. See *The Times* (London), Feb. 14, 1951, p. 7, col. 2.

²² I am indebted for this analysis to an unpublished seminar paper presented at the London School of Economics by Mr. John E. Barry of Tulsa, Oklahoma. The balance of the awards covered more than one employer but not an employers' association.

desire to avoid the creation of precedent, as well as its wish to achieve unanimity through anonymity in making its awards.²³

ENFORCEMENT AND SANCTIONS

Part II of the Order, as noted above, made strikes and lockouts illegal unless the dispute had been reported to the Minister and he had failed to refer it for settlement within twenty-one days of the date of the report. Violation of this rule constituted an offense under the Defense (General) Regulations which was punishable in the case of each offender by a sentence of imprisonment up to three months or a fine not exceeding £100 upon summary conviction, and up to six months or £200 on conviction after indictment. During the war there were only 109 instances of prosecutions of workers, involving 6,281 individuals, and two of employers, for causing illegal stoppages of work. Since the average number of workers involved in strikes each year during the period, 1940-1945, was 500,000 with an average of almost 2,000,000 man days lost each year because of strikes,²⁴ it is apparent that for the most part the government refrained from general enforcement of the ban against stoppages, reserving its powers in order to deal with those cases where workers were acting in defiance of their leaders and directly impeding the war effort. After the war this policy of moderation was carried further, with no prosecutions occurring, despite the incidence of stoppages which were technically still illegal, until late in 1950 and early in 1951.

The first instance of a post-war prosecution occurred in the fall of 1950 when the Attorney General charged ten employees of London's municipal gasworks, who were unofficial leaders of a strike, with a violation of an 1875 statute making it a crime for utility workers to break their contracts of service. When the men instead pleaded guilty to a violation of Order 1305, the original charge was dropped. After sentence of a month in jail for each of the ten had been pronounced, a mass meeting of the strikers voted by only a narrow margin to return to work. Some months later, upon appeal, the jail sentences were reduced to fines.²⁵

The second case arose early in February, 1951 when the government arrested seven dockworkers who had persuaded 450 men to walk off their jobs in protest against their union's acceptance of a compromise

²³ For a lengthier analysis of the operations of the Tribunal see an article by this writer in 7 *ARB. J.* 31-38 (1952).

²⁴ See A. M. Ross and D. Irwin, *Strike Experience in Five Countries, 1927-1947: An Interpretation*, 4 *INDUSTRIAL AND LABOR RELATIONS REVIEW* 323 (1951).

²⁵ *The Times* (London), Nov. 22, 1950, p. 3, col. 6. The strike was a protest against the amount of a wage increase granted by the utility.

wage adjustment. This time the original indictment charged a violation of Order 1305. The arrests signalled the beginning of a chain reaction of protest which erupted into major stoppages on the docks in Liverpool, where the walkouts began, and spread to London and Manchester. The men arrested were leaders of a rank and file Port Workers Defense committee who were denounced as Communists by the Transport and General Workers Union in its efforts to end the walkout.²⁶ By February 10, the strike had spread to one-third of the entire London dock force, with a far larger percentage out in the other two ports. The strike was temporarily suspended pending developments in the prosecution of the seven leaders.

In April the jury found the men guilty on one count of the indictment but failed to agree on the other count. This verdict set off a resumption of the strike by 9000 London dockworkers. Within a day, however, further trouble was averted when the government abandoned the prosecution because of the "illogical" findings of the jury.

The government's policy on enforcement had been set forth at some length in the House of Commons by the Attorney-General, Sir Hartley Shawcross, a few days before the prosecution of the seven dockworkers. The government's toleration of illegal disputes, he explained, was grounded in the belief that prosecutions might impede settlement, make martyrs of the men arrested, and cause the whole fabric of law to fall into disrepute. Moreover, some strikes could not be prosecuted because they did not fall within the technical definition of a trade dispute, such as strikes over recognition and reinstatement. On others, he stated, the government had been ready to take action when the strike collapsed. In the exceptional instance of the gas strike, however, the Attorney-General said that he had felt it necessary to move because the strike had caused great public hardship and inconvenience and because the Communists were attempting to prolong the stoppage.²⁷ What stands out most significantly in this analysis is the assertion that it was not necessary to prosecute *every* case in order to promote law and order. But despite the moderation revealed by this statement, the next dispute, which arose a few days later—that of the dockworkers described above—showed that in peacetime at least *any* attempt to enforce the penal sanctions of the Order was apt to provoke disrespect for authority.

²⁶ Despite the leadership provided by the Communists, it was the opinion of informed observers that the dispute resulted from genuine hardships among lower-paid workers. See *N. Y. Times*, Feb. 4, 1951, p. 21, col. 1.

²⁷ The *Times* (London), Jan. 30, 1951, p. 4, col. 6. It should be noted, however, that the government had met crises caused by stoppages in essential industries such as shipping and meat handling by using troops to perform necessary services. In this connection see note 29 *infra*.

The consequence of these attempts at peace-time prosecution was a widespread protest in the ranks of the unions against the continuance of the Order, now that it had been shown to have teeth that could bite. Although the Trades Union Congress had voted overwhelmingly in the fall of 1950 to retain the Order, the prosecutions forced the union executives to seek its revision. In January, 1951 the new Minister of Labour, Aneurin Bevan, called a meeting of the Joint Consultative Committee to discuss modifications in the Order. It was reported that a number of items were on the agenda, including the inability of the Tribunal to deal with disputes over recognition and the closed shop;²⁸ the right of workers to use the arbitration machinery without the support of their own union leaders; the failure of the government to prosecute the master printers of London for a lockout;²⁹ and finally the prosecution of the gas strikers outlined above.³⁰ At a subsequent meeting of the trade union side of the Committee it was voted to support a revision of the Order which would delete the prohibition on strikes and lockouts, but would retain the jurisdiction of the Tribunal over trade disputes excluding disputes over recognition, the closed shop and reinstatement; and would keep without modification Article 5: the stated obligation of employers to observe recognized terms and conditions of employment. With the removal of sanctions the obligation to use the arbitration machinery would thus become a moral rather than a legal one.³¹

A few days later the General Council of the Trades Union Congress decided to press for a revocation of the Order and the creation of a substitute designed to encourage voluntary arbitration.³² At the same time the London *Times* condemned the Order as inadequate, pointing out that it was not practical to prosecute all illegal strikers.³³ The employers' side of the Council which had not hitherto offered any strong objections to the continuation of the Order now protested against the one-sided

²⁸ These disputes have recently become increasingly important in Great Britain. One would almost think that British unions are here following the pattern set by American unions; there are, however, important reasons for the growth of these issues stemming especially from the nationalization statutes—a subject which cannot be dealt with here.

²⁹ Bitter and sarcastic resentment over the government's failure to act in the lockout of 5000 workers in the London printing industry in 1950 by taking over the plants was expressed by a delegate from the London Society of Compositors to the Trades Union Congress in 1950. If this had been a strike, he said, the Minister would have acted with more speed. "I recognise that he is in a quandary: troops in the employers' printing houses are not nearly so effective as in a meat market, but they could have been officer class only." PROCEEDINGS OF TRADES UNION CONGRESS 483 (1950).

³⁰ The *Times* (London), Jan. 20, 1951, p. 6, col. 5.

³¹ The *Times* (London), Feb. 27, 1951, p. 4, col. 7.

³² The *Times* (London), March 1, 1951, p. 6, col. 6.

³³ The *Times* (London), March 2, 1951, p. 7, col. 2.

revision suggested by the unions, particularly against the unfairness of freeing the unions to take strike action while maintaining the employers' obligation to observe recognized terms and conditions of employment.³⁴

Meanwhile rank and file workers' protests continued to mount, fresh fuel being added to the fire with the dockworkers' prosecution. Toward the end of April the dockworkers, together with self-styled "militants" of several other unions, staged a big demonstration for repeal of No. 1305. In the next few months after numerous meetings, the government was finally able to obtain the consent of all groups in the Council to the revocation of No. 1305 and the substitution of the New Industrial Disputes Order.

ATTITUDES OF UNIONS AND EMPLOYERS TOWARD COMPULSORY ARBITRATION

Why had the unions been willing to retain the Order for six years after the end of the war? One answer has already been given above—the lack of enforcement by the government until the end of 1950. More important, however, was the feeling of the smaller unions and of the two large general unions³⁵ that the workers could gain more through arbitration than they could from strikes. Although the Order was debated in the Congress every year from 1946 on, all motions to revoke it were defeated by large majorities. Even as late as February 1951, Tom Williamson, general secretary of the National Union of General and Municipal Workers was writing in the union journal that it would be madness to insist on withdrawal of No. 1305 since the only alternative would be to strike. "A lost strike," he asserted, "is more damaging to the trade union movement than a failure at arbitration."³⁶ Another reason for the acceptability of arbitration lay in the British practice, so unlike the American, of concluding agreements without a time limit and with no bar to re-opening. Thus a union which failed to receive all its claims in an arbitration proceeding could press new claims the day after an award was made, thereby starting another case along the assembly line to the Tribunal. The fact that in most cases the unions won all or part of their wage claims also helped to make the arbitration process acceptable.³⁷

³⁴ The *Times* (London), April 2, 1951, p. 6, col. 7.

³⁵ Despite their numerical size the general unions (the Transport and General Workers Union and the National Union of General and Municipal Workers) are for that very reason often weak in bargaining power in individual establishments and industries. The jurisdiction of the Transport Workers, for example, ranges from midwives to gravediggers!

³⁶ The *Times* (London), Feb. 1, 1951, p. 3, col. 1.

³⁷ For example, from 1947-1950 out of 104 wage claims heard by the Tribunal, only 24 were rejected. See LABOUR 45-46 (Oct. 1950) (official publication of the TUC).

Finally the desire of the trade union leaders to cooperate with the Labour government in controlling inflation and encouraging output was another important reason for official support of the Order.

So far as the employers were concerned, it can be noted that the rise in wages which was permitted by the Tribunal lagged behind the increase in prices, so that compulsory arbitration imposed no economic hardship. Moreover very few cases involving Article 5 arose during the period, primarily because manpower shortages made employers willing to raise wages without pressure in order to hold and attract labor.³⁸ Apart from the wartime prosecutions of two employers no action against lockouts was taken in the post-war years.

Thus it is fair to conclude that the Order would probably have been continued without major modification had it not been for the use of sanctions, and had not certain legal gaps arisen in the matter of handling disputes which did not come under the jurisdiction of the Tribunal. Such disputes, particularly those over union recognition, the closed shop, and dismissals and discharges have been growing in importance in recent years.³⁹

THE INDUSTRIAL DISPUTES ORDER

In the light of these developments it is possible to understand the provisions of the new Industrial Disputes Order which came into operation last August.⁴⁰ Part I of the Order deals with the reporting of disputes to the Minister. But such reporting is now limited to 1) an organization of employers acting on behalf of employers who are parties to the dispute; 2) an employer where the dispute involves his own workers; or 3) a trade union acting on behalf of workers who are parties to the dispute. In addition there is the further requirement that where machinery exists for the voluntary settlement of terms and conditions of employment, the party reporting the dispute must be one which habitually takes part in these negotiations; or where no such machinery exists, the employers' or union organization must represent a substantial proportion of employers or workers, as the case may be, in the trade or industry or section involved. This represents a major change from practice under the old Order which permitted individual workers, minority groups, breakaway unions and dissident factions to have access to the Tribunal, and shows a desire to enhance the status, prestige and control of the established unions and employers' associations.

³⁸ In 1948 only 10 out of 154 awards involved Article 5. Ministry of Labour, *Report for Year 1948* 111 (1948).

³⁹ See note 28 *supra*.

⁴⁰ S. INSTRS., 1951, No. 1376.

Another major change is in the definition of a trade dispute, so as specifically to exclude controversies over "the employment or non-employment of any person or as to whether any person should or should not be a member of any trade union," thereby confining the scope of the Order solely to economic disputes over the terms and conditions of employment.

A third change—in language, however, rather than in substance—removes the general obligation of employers to observe recognized terms and conditions of employment, but makes provision for organizations of employers or unions representing a substantial proportion of those engaged in the particular trade or industry in a district to report such an issue involving a particular employer to the Minister.

The shift in emphasis in the new Order can be detected in the Title to Part II: "Voluntary Negotiation and Arbitration," although the specific sections merely repeat in substance the provisions of the old Order requiring the Minister to refer disputes back to voluntary machinery, where such exists, and making the settlements so arrived at, including those of the Industrial Court, final and binding upon the parties.⁴¹

Part III of the new Order establishes, or in reality, continues, the Tribunal with a change of name to the Industrial Disputes Tribunal. The time for reference of disputes by the Minister to the Tribunal is, however, shortened from twenty-one to fourteen days in an effort to expedite the disposition of cases. The most important change here is in the provision that the Minister need not refer cases to the Tribunal if a dispute has resulted in a work stoppage or a substantial breach of an agreement, unless it appears to him desirable to do so. The Minister is also empowered to direct the Tribunal to suspend action on a dispute should a stoppage or breach occur during its consideration. These provisions are designed to replace the former ban in stoppages by more subtle pressures for adjustment.

The purposes of the new Order are thus clearly those of promoting voluntary negotiation, strengthening collective bargaining, and encouraging the establishment of voluntary arbitration machinery within each trade or industry or section thereof. In view of the continued existence of the Industrial Court the question may be raised as to why it is necessary for a second Tribunal to exist. The only difference now between the Industrial Court and the Tribunal is that *ex parte* reports or

⁴¹ As in the old Order, awards are to be implied terms of the contract between the employers and workers to whom they apply, the remedy for violation being through a suit for breach in the Civil Courts. One additional reason for excluding disputes over union affiliation lies in the fact that such cases cannot be enforced through suits for breach.

submissions may be made to the latter, with one party taking the other to arbitration, whereas submissions to the Court require the consent of both sides. However, since no sanctions are provided in the new Order, what looks like a persisting degree of compulsory arbitration in effect marks a return to voluntary measures.

How the new Order will work in practice cannot yet be predicted. The London *Times*, in a long and thoughtful editorial, expressed some misgivings the day after the Order had been announced. While welcoming the removal of the non-enforceable sanctions against stoppages and the substitution of provisions looking toward a strengthening of voluntary adjustment, the editor nevertheless expressed anxiety lest non-union workers, minority unions and dissident factions be left without recourse to any pacific means of expressing their grievances, and lest the limitations placed on the Tribunal's jurisdiction over non-economic issues force reliance upon direct economic conflict as the principal arbiter of these questions. In the final analysis, however, as the *Times* pointed out, the success of the Order will depend upon the sense of responsibility of individual employers and rank and file trade unionists. "Without new efforts to consolidate this loyalty and discipline, the new Order will be no more conducive to progress in peaceful industrial relations than that which it replaces."⁴²

As the Minister of Labour, Alfred Robens, emphasized to the House of Commons, "The new Order is experimental. That is our way of doing things in this country."⁴³ It will be interesting to watch this experiment from our side of the Atlantic, for as Americans we share with the British a common faith in the voluntary principles upon which our industrial relations system rests.

⁴² The *Times* (London), Aug. 3, 1951, p. 5, col. 3.

⁴³ 491 H. C. DEB. 1624-1630 (5th ser. 1951).