HUNGARIAN LABOUR LAW
E - J O U R N A L

What the German Bundestag might have learned from the U.S. Congress on workers' right to strike

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If the workers took a notion they could stop all speeding trains, every ship upon the ocean they can tie with mighty chains. Every wheel in the creation every mine and every mill, fleets and armies of the nation, will at their command stand still.
Joe Hill (Swedish-American labor activist, 1879-1915 and advocate for the Industrial Workers of the World)

The intermittent recent strikes by the *Gewerkschaft der Deutschen Lokfuehrer* (German Association of Locomotive Drivers, hereinafter GDL) virtually brought the German economy to a productive nadir. This union called nine strikes between September 1, 2014, and May 26, 2015, before finally reaching a settlement with *Deutsche Bundesbahn* (German Railways, hereinafter DB).

During this time of continuous strike activity by a seemingly unending number of other German labor unions,[1] the GDL's work stoppages in particular stand out as efforts of questionable effect in achieving their goal. Moreover, such strike activity has been the cause of considerable public hostility within Germany toward labor unions in general.

From an American legal perspective, Germany, as is typical of European countries, is a labor-friendly social state, with management often seemingly relegated to second place. In an arguably more balanced fashion, the 1947 U.S. Congress achieved a statutory equilibrium between labor and management regarding the right to strike and management prerogatives and in mutual collective bargaining obligations in general. Because of the resulting frustration and adverse economic effect of these recent work stoppages, the German *Bundestag* (Parliament) has endeavored to align its industrial relations laws in a manner more similar to the American version, with the hope that it will survive a constitutional challenge.

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1 Announcer Ulrich von den Osten, asked the rhetorical question, reporting on major television news program N-TV on June 10, 2015, on the 8,000 *Ver.di* workers unrestricted postal strike (a number that grew to 17,500 in the same station's report three days later) and referring to recent strikes by hospital and kindergarten workers in addition to the railroad strikers, asked, the rhetorical question, "*Ist Deutschland zu einem Streikland geworden*?" ("Has Germany become a land of strikes?")

This article will draw comparisons between the German Constitution (*Grundgesetz*) and labor legislation pre-July 1, 2015, and the U.S.A's 1926 Railway Labor Act and 1935 Wagner Act (as amended by the 1947 Taft-Hartley Act). Most likely, such unilateral control over a labor dispute as the GDL achieved through intermittent strikes would not have occurred in an American work setting.

1. Statutory Framework for Collective Bargaining in the United States

1.1. Federal union-management legislation

The first union-management legislation in the United States was the 1926 Railway Labor Act (hereinafter RLA).[2] This statute, originally applicable to railroad workers that was extended in 1936 to apply also to airline workers.[3] The railroad industry was the target of the first such labor-management legislation because of its impact on the U.S. economy. Railroads used more than 75% of the country's steel production and were the country's largest employing unit.[4] Much of the RLA, both procedurally and substantively, is similar to the later enacted legislation that applies to the remainder of American private sector workers. As the oldest continuing collective bargaining statute in American history, the RLA has specific procedures regarding the extent of negotiation and mediation efforts that must be exhausted before a strike is lawful.[5] In contrast, the later-enacted National Labor Relations Act a less governmentally interventionist approach.[6]

There was no statutory right for non-railroad private sector workers to organize until the enactment of the Wagner Act (National Labor Relations Act) in 1935.[7] As part of President Franklin D. Roosevelt's New Deal legislation, this law erased decades of management opposition to unions that the judiciary had affirmed as lawful.[8] The 1935 comprehensive statute included the duty of the employer to bargain with a designated union representing a majority of workers in the specified bargaining unit.[9] The anticipated urging by management that the Congress create a more equal bargaining setting resulted in passage of the comprehensive 1947 Taft-Hartley Act amendments. [10] For example, added to Wagner's

2 45 U.S.C. sec 151 et seq.

3 RLA, 49 Stat. 1189 (1936).

4 Alexandra Hegji: *Federal Labor Relations Statutes: an Overview.* Congressional Research Service, Nov. 26, 2012. , at note 2 (citing Frank N. Wilner: *The Railway Labor Act and the Dilemma of Labor Relations.* Simmons-Broadman Books, Inc., 1991.) at 25.

5 *See* 45 U.S.C. secs 154 *et seq.*

6 *See infra* notes 9, 14, 15, and 49 and accompanying text.

7 29 U.S.C. secs 151–169 (hereinafter Wagner).

8 *See, e.g.,* Loewe v. Lawlor, 208 U.S. 274 (1908), in which the U.S. Supreme Court held that a labor union to have violated federal antitrust legislation, and Hitchman Coal and Coke Co. v. Mitchell, 245 U.S. 229 (1916), in which the Court held that a union had tortiously interfered with a company's contractual relations with its non-union workers.

9 *See* 29 U.S.C. sec 158(5), now sec. 158(a)(5) (hereinafter T-H).

10 *Id.* secs. 151 et seq.

sec. 7 that had vested workers with the right to join a labor union[11] was the converse right of a worker to decide against union membership. Additionally, the five employer unfair labor practices[12] were augmented by seven union unfair labor practices (hereinafter ULPs).[13] Among these ULPs was failure of the union to bargain in good faith with the employer in an effort to reach a collective bargaining agreement (hereinafter CBA). [14] Taft-Hartley also added a section specifying the three mandatory subject of bargaining as wages, hours, and terms and conditions of employment.[15] The RLA and Taft-Hartley function in similar manners regarding the certification of a union as bargaining representative and CBA negotiations.

The 1947 amendments enlarged the size of the formerly three-member National Labor Relations Board (hereinafter NLRB or Board) to its current five members. This administrative body is charged with conducting union elections and certification of the result and with filing ULP charges on behalf of a union or employer and making the determination in such charges.[16] Charges are filed by the advocacy part of the Board[17] and determined by the judicial side.[18] Appeal is to the Circuit Court of Appeals of the region where the determination was rendered.[19]

Although not of direct relevance, a comparative mention should be made of rights of public sector labor organizations. American federal workers did not have the right to bargain collectively until the 1962 executive order issued by President John F. Kennedy,[20] codified in 1978.[21] However, striking by federal workers is strictly forbidden. Upon hire, all federal employees are required to take an oath that they will engage in no work stoppage during their work for the United States, a general ban that includes by inference sympathy strikes.[22] Violation of the oath is criminally punishable by fine up to $1,000 fine and/or up to one year in prison.[23] Additionally, any federal worker who participates in a strike against the government forfeits his employment and is ineligible for re-employment with the federal government in any capacity for a three-year period.[24]

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11 Wagner sec. 157.

12 In T-H, former sec 158 became sec. 158(a).

13 T-H Sec. 158(b).

14 T-H sec. 158(b)(3). Wagner had obligated the employer to bargain in good faith with the union. Wagner sec. 8(5), now sec. 8(a)(5.

15 T-H sec. 158(d).

16 *Id.* sec 153(a).

17 This portion of the NLRB is comprised of a Director, appointed by the President for a four-year term. The functioning of this side is divided into 26 geographical regions, each with a Regional Director.

18 The five members of the adjudicatory body are appointed by the President for five-year staggered terms. T-H sec. 153(a).

19 T-H sec 160(f).

20 Executive Order 10988 (1962).

21 The statute was the Federal Service Labor-Management Relations Act of 1978, an amendment to the Civil Service Reform Act. 5 U.S.C. secs 7101 et seq.

22 5 U.S.C.sec. 3333.

23 18 U.S.C. sec 1918.

24 5 U.S.C. sec 118p-r.

Since the individual state governments have jurisdiction over state workers, these issues are governed by fifty different bodies of law. In general, only three states absolutely prohibit collective bargaining by state workers, Virginia, North Carolina, and South Carolina.[25] Additionally, Texas prohibits collective sector bargaining in the public sector except for police and firefighters, and Georgia, for all except firefighters.[26] Only eight states permit public workers to strike, and most are on a limited basis. Virginia, for example, absolutely prohibits state workers from striking.[27]

1.2. Certification of a union as the bargaining representative for all workers in a unit

The process of certification of a union as the official bargaining agent for a unit differs dramatically from union recognition in European countries. The NLRB has the authority to determine the confines of a bargaining unit.[28] Since the statute contains few restrictions on this authority[29] and does not specify factors the Board is to consider, the NLRB has considerable latitude in this determination.

Traditional factors it considers are closeness of physical facilities for a multi-plant business (that is, the Board is more inclined to designate a single unit for workers in several parts of a multi-plant facility with plants in a close proximity); skill requirements for jobs (because of wage disparities); ownership and managerial policies and/or integration; collective bargaining history of the company; and the extent of organization of workers.[30]

Either a union or an employer initiates the process by filing an election petition with the NLRB.[31] If the petitioner is a union, the document, a federal form, must be accompanied by so-called authorization cards signed by at least 30% of the workers in the bargaining unit.[32] An employer petition typically is a preemptive move when management questions the majority support claim of a union.

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25 *See*, for example, Va. Code sec. 40.1-57.2.

26 Mila Sames – John Schmitt: *Regulation of Public Sector Bargaining in the States*. Center for Economic and Policy Research, Washington, D.C., March, 2014.

27 Va. Code sec. 40.1-55. This statute provides for immediate termination of any state worker who, with two or more other workers, engages in any work stoppage against the state. Such striker is ineligible for re-employment in any capacity by the Commonwealth of Virginia for a twelve-month period.

28 T-H sec 159(a).

29 The only limits on this NLRB authority are its inability to group professional employees with non professionals unless a majority of professionals in that unit agree to be in the same group; and/or to include guards in a unit with any other workers. Sec. 159(b).

30 David P. Twomey: *Labor Law and Legislation*. 7th ed. Cincinnati, Ohio South-Western Publishing Co., 1985.

31 T-H sec. 159(c). The union petition is referred to as an RC petition, and the employer petition, an RM one. These designations are those of the official NLRB forms.

32 This 30% rule is a procedural one of the NLRB, Statements of Procedure, Part 101, Subpart C, sec. 101.18. Note that a more judicious union will acquire signed authorization cards from at least 51% of the workers. This is because of a U.S. Supreme Court decision permitting the board to certify a union even after it has lost the election if there is clear evidence of majority support for the union and if the employer has engaged in unfair labor practices before the election that were so egregious as to make a fair election impossible under the circumstances. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).

The Board schedules the election approximately 30 days after the filing of the petition. It is the NLRB that conducts the election, counts ballots, and certifies the result. Once this Board has so certified, no subsequent election might be held within a 12-month period.[33]

Eligible voters in an NLRB-conducted union election are workers in the unit as of the latest pay period, and the result is determined by a majority of voters. [34] Once the result is certified by the NLRB, the two parties must commence discussion on the content of a CBA. So absolute is the duty to bargain that once certified, the union remains the official bargaining representative for at least twelve months after the election.[35] Even should a majority of workers who had given the petitioning union their support renounce that allegiance to the union shortly after the election, the employer's duty is to bargain with that union until and unless decertified. For example, in *Ray Brooks v. NLRB,*[36] although the International Association of Machinist (IAM) had supportive authorization cards signed by nine of thirteen workers in a bargaining unit, and the union won the election by an 8-5 vote. Six days after the election and one day prior to certification, nine of those workers presented the employer with a letter clearly stating that they did not desire IAM to be their representative. When the employer consequently refused to bargain, the NLRB filed an unfair labor practice against the company. The U.S. Supreme Court held that both the employer and the union were under a statutory duty to bargain until such time as those workers might file a successful decertification petition. Such procedure must wait at least twelve months after the election resulting in certification.

1.3. The process of bargaining

Significantly, a union and the employer are not obligated to reach an agreement. However, the statute does require good faith bargaining on both sides in an attempt to reach a consensus that culminates in a CBA.[37]

The necessary length of bargaining when no agreement has been reached is problematic. An employer might lawfully unilaterally implement changes to an expired CBA or to existing rules in a newly organized unit if bargaining has led to an impasse. The determination of whether an impasse exists is decided by objective evidence that any further discussions would be non-productive and futile.[38] The Supreme Court has held that such unilateral action by the company cannot be taken

33 T-H sec. 159(c) (3).

34 Taft-Hartley sec. 159(a).

35 The 1947 amendments to Taft-Hartley included a process of decertification of a union, that is, removing its status as the official bargaining representative. Initiating a decertification election is in the realm of the workers, who may file a petition that will determine whether the union has lost the support fo a majority in the bargaining unit. T-H-sec 9(c) (1)(A)(ii).

36 348 U.S. 96 (1954).

37 *See supra,* notes 9 and 14 and accompanying text.

38 NLRB v. Tex-Tam, 318 F.2d 472, 482 (5th Cir. 1963).

unless there is in fact an impasse,[39] but there are no hard and fast rules regarding when this exists. It is settled law that no impasse can exist unless and until the parties have discussed the disputed issue and the employer has made an offer that the union rejected.[40]

If the Board views an employer's offered change as an "economic necessity" to the company, it will declare an impasse[41] and permit the company to impose its desired change. Some legal commentators have been critical of this rule as improperly subordinating the union's demands to the employer's economic needs.[42]

1.4. The 80-day "cooling off" period

A pertinent Taft-Hartley amendment with the vesting in the President of the right to initiate a so-called 80-day "cooling off" period in situations of imminent or existing strikes or lockouts. The process begins with his appointment of an investigative body to determine whether such a work stoppage would adversely affect the health or security of the country or of a significant region. If so, he then directs the Attorney General to petition a federal district court for a temporary restraining order (hereinafter TRO) to suspend the strike or lockout for a three-step total of 80 days.[43] A body created by Taft-Hartley, the Federal Mediation and Conciliation Service (hereinafter FMCS), is then directed to meet with the two sides in conciliatory efforts.[44] A similar procedure is part of the RLA.[45] A distinction between Taft-Hartley and the RLA dispute settlement processes is the former's deferral to the parties to establish arbitration procedures in the CBA, whereas the latter relies on the statute.[46] Indeed, the first of five purposes of the RLA listed in the statutes is the prevention of interruption of rail services.[47] Moreover, the RLA separates disputes into two categories, "minor" (i.e., disputes regarding interpretation of an expired CBA) and "major" (i.e., disagreements arising out of the making of or changing of an expired CBA), and the Supreme Court has held that strikes over a minor dispute are impermissible.[48] Additionally, the RLA requires parties to a major dispute to submit to using the services of a statutory body, the three-member National Mediation Board before the 60-day deferral

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39 NLRB v. Katz, 369 U.S. 736 (1962).

40 NLRB v. Intracoastal Terminal, 286 F.2d 954 (5th Cir. 1961).

41 Dahl Fish v. Seapac, 279 NLRB No. 150 (May 23, 1986).

42 *See, e.g*, Peter Guyan Earle: The Impasse Doctrine. *Chicago-Kent Law Review,* 64., (1988) 407, 409.

43 T-H sect. 176–180.

44 The FMCS members are appointed by the President and confirmed by the Senate. T-H sec.172. They are trained in mediation techniques and must have at least seven years' experience in mediation work. See www.fmcs.gov .The FMCS also may be used by any parties to labor dispute that request its services.

45 The RLA provides for a similar suspension of a threatened or existing strike or lockout, but for a period of sixty, rather than eighty, days. Railway Labor Act, 45 U.S.C. sec 160.

46 Barry E. Simon: *Grievance Arbitration under the RLA*. American Bar Association seminar materials,(2012) accessible at apps.americanbar.org/labor/lel-annualcle/08/materials/data/papers/…

47 45 U.S.C. sec 151a, RLA sec. 151a. The second is granting employees the right to organize unions.

48 Brotherhood of Railroad Trainmen v. Chicago River & Indiana R.R., 353 U.S. 30 (1957).

of strike activity might begin. Finally, Congress created in the RLA the National Railway Adjustment Board (hereinafter NRAB), a 34-member body with an equal number of representatives chosen by management and union (with an NMB-appointed neutral vote in case of a tie, which is usually the result). This body renders a binding decision, but is used only when both parties agree to ask for its services.[49] The most recent usage of the 60-day deferral of strike section was in the 2008 injunction of a strike by the Transportation Communications International Union.[50]

Some historical perspective on the effectiveness of the Taft-Hartley suspensions of industrial action is instructive. By 2012, chief executives had used this tool thirty-five times. In 70%, the 80 days proved sufficient time for the dispute to be settled. [51] Interestingly, President Truman, who had opposed the enactment of the Taft-Hartley amendments and whose veto of the bill was overridden,[52] decided to us his powers to stop a massive steel strike in 1952 with an executive order, rather than the statutory investigatory body-petition to a federal court route.[53] However, this tactic proved ineffective when the Supreme Court held in *Youngstown Sheet and Tube Co. V. Sawyer*[54] that the president had exceeded his constitutional powers. Tacitly, this left a president with only the statutory option.

President Eisenhower's use of his statutory powers was met by a union challenge of the constitutionality of this provision of Taft-Hartley.[55] The President's request for a TRO was granted after 500,000 steelworkers had struck over job security measure and use of technological advances. The statute was upheld in *U.S. Steelworkers v. U.S.*, [56] when the Supreme Court in an 8-1 decision affirmed the federal district court's TRO.

One of the unsuccessful efforts was President Jimmy Carter's 1978 request for a federal court to enjoin a threatened coal strike.[57]

In 2002, President George W. Bush invoked his statutory power to prevent an announced work stoppage in the shipping industry, the first time the provision had been used in a lockout, rather than a strike, situation. In a labor dispute between West coast ports and the longshoremen's union, President Bush's justifications for his move were the impeding of movement of military supplies and commercial

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49 45 U.S.C. sec 153, RLA sec 3.

50 *See* Amtrak deal with union averts strike. *NBC News online, U.S. Business News,* Jan. 18, 2008, accessible at www.nbcnews.com.../t/amtrak-deal-union-averts-strike

51 Steven Wagner: How Did the Taft-Hartley Act Come About? *History News Network* at George Mason University (Oct. 14, 2002), accessible at www.historynewsnetwork.org/article/1036

52 See Charles Pope: Charges of politics have dogged the Taft-Hartley Act. *Seattle Post-Intelligencer* (Oct. 7, 2001), accessible at www.seattlepi.com/business/article/Charges-of-politics-have-dogged... The 1946 Democrat opposition to the bill was founded on a fear that strikes would become politicized. The President's veto referred to Taft-Hartley as a "slave-labor" bill.

53 Michael Streich: *President Truman Seizes Steel Mills During the Korean War* (Sept. 26, 2010), accessible at http://suite.io/michael-streich/485z2nv

54 Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

55 Today in labor history: Supreme Court used Taft-Hartley to break a steel strike. *Peoples World online* (Nov. 7, 2013), accessible at peoplesworld.org/today... supreme-court-used-taft-hartley-act-to-break-a-steel-strike

56 United Steelworkers v. United States, 361 U.S. 39 (1959).

57 *Id*. Author's note: A personal opinion is that the likely reasons were two: (i) since this strike had been foreseeable, coal companies had stored a stockpile of reserves to use during the work stoppage; and (ii) the strike did not occur during cold winter months when demand would have been at its peak.

shipments to retailers during the pre-Christmas season that would dramatically impair the nation's economic recovery following the events of September 11, 2001[58] and the need to ship materials to the troops fighting the war on terror. Interestingly, in addition to a demand for a limit to management's use of technology, union members who were earning an average of $100,000 yearly also insisted upon a pay increase.[59] The President's request was granted by a federal court on October 8, 2002, and the parties settled in November, considerably before the 80-day period was to expire December 27, 2002.[60]

Finally, in late 2012, President Barack Obama had requested an investigative body in a looming longshoremen strike on the Florida Atlantic and Gulf coasts when the parties settled before any court action had been taken. Having participated in negotiating sessions since March, 2012 over a CBA that had expired at the end of September, 2012, the parties agreed to a 90-day extension (until December 29, 2012), after they had voluntarily invoked the assistance of the FMCS.[61] The parties resolved their differences before the investigative report.

1.5. An employer's right to replace economic strikers permanently

An economic striker is one who is engaged in a work stoppage during a labor dispute over wages, hours, or terms and conditions of employment. Both the employer's and workers' rights differ in an economic strike and an unfair labor practice strike, the latter being based on the union's allegation that the employer is acting in violation of federal law. On the other hand, the economic strike is in response to a dispute between the employer and the union over the content of a CBA, when an original contract for a recently certified union or a renewed contract to take the place of an expired CBA is being negotiated. Understandably, the employer's rights are greater in case of the latter, which is the type of strike with which this article is concerned.

In 1938, the U.S. Supreme Court held in *NLRB v. Mackay Radio and* Telegraph[62] that an employer can permanently replace economic striking workers in order to carry on its business. This is a powerful incentive to dissuade union workers from calling a strike, and it is most effective in common labor situations where workers need little, if any, training to do the strikers' jobs.

Nonetheless, economic strikers retain some vestige of their identification as "employees." Suppose that workers were not replaced during the strike. In 1956, the Supreme Court held that strikers still have reinstatement rights after the strike has terminated, provided they had not waived this right and

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58 Carolyn Lochhead: Cooling-off period likely in port fight. *San Francisco Gate* (Oct. 2, 2002). www.sfgate.com/news/article/Cooling-off-period-likely-in port-... www.cbsnews.com/news/dockworkers-report-back-work

59 Joseph R. L. Sterne, The Baltimore Sun (Nov. 29, 2002), accessible at articles.baltimoresun.com>Carter

60 Brian Dakase: Dockworkers Report Back to Work. *CBS News*, www.cbsnews.com/news/dockworkers-report-back-work

61 Chris Reese: Dock worker strike looms despite cooling-off period request. *Reuters* (Dec. 23, 2012) www.reuters.com/article/2012/12/23/us-usa-ports-strike-idUSBRE8BMC

62 304 U.S. 333 (1938).

provided the company has not downsized during the strike.[63] In a slightly altered factual situation, the Court addressed whether former strikers had any replacement rights after the employer had informed them after the strike and when they applied for reinstatement that no jobs were available. Six months later, the company hired replacements. The Supreme Court held that those former strikers whose reinstatement applications were on file with their former employer were entitled to first option regarding these positions if the company decided later to fill them.[64] A final development in this issue involved whether economic strikers had any right to their former jobs if any replacements left. A year after the Supreme Court's first-right-of-refusal holding, the NLRB held that even replaced strikers had first rights to their former jobs in such case, unless they had accepted regular and substantially similar positions in the meantime (the implication is that they thereby divested themselves of any remaining status as employees of this employer) or the employer can meet the burden of showing its refusal to reinstate was for a legitimate and substantial reason.[65]

In brief, the employer has the trump card in such situations, since it can permanently replace economic workers. Only those who submit applications for reinstatement and who have not accepted alternate employment have any right to reinstatement and then only in the event the company later decides to rehire or if the employment contracts with replacements hired during the strike are terminated.

2. Collective bargaining and industrial action under German law

The post-World War II German Constitution, or *Grundgesetz* (hereinafter GG), contains a litany of fundamental rights, in a fashion typical of a civil law system, such as Germany's (and other continental European countries'). Among those is the right to associate,[66] not in the sense of the U.S. Constitution's right to assemble for the purpose of petitioning the government for a redress of grievances.[67] Rather, the German constitutional right solidifies workers' rights to associate, that is, to form unions.

2.1. A brief summary of the history of trade unions in Germany

A bit of German labor union history is informative. The Industrial Revolution transformed Germany from an agrarian society into an industrial economy. In 1871, 63.9% of Germans lived in rural areas. This figure decreased to 50.1% by 1895, to 39.98% by 1910, and to 35.6% by 1925.[68] Trade unions emerged shortly thereafter, but they were not recognized within Germany as organizations that

63 Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956).

64 NLRB v. Fleetwood Trailer Col, Inc., 389 U.S. 375 (1967).

65 Laidlaw Corp., 171 NLRB 1336 (1968).

66 GG Article 9(3).

67 U.S.CONST. AMEND. I.

68 Kurt F. Reinhardt: *Germany: 2000 Years.* New York, Frederick Ungar Publishing Company, 1950., 1961., Vol. 2., at 550.

officially represented workers until 1918, at the end of World War I. Interestingly, the first to organize into lasting groups were the Christian trade unions, created to counteract the Marx-Engels-inspired antireligious unions.[69]

The social legislation that was the first successful body of such laws had been the brain child of *Kanzler* (Prime Minister) Otto von Bismarck, who served from 1871 until his dismissal by Kaiser Wilhelm in 1880. Bismarck had advanced the 1883 *Gesundheitsgesetz* (health insurance for workers), the 1884 *Arbeitsunfallgesetz* (work accident law; an analogy is the American state workers compensation statutory programs), and the 1889 *Pensiongesetz* (the statutory basis for workers' state-provided pensions). Shortly after Bismarck's departure came the *Arbeiterschutzgesetz* in 1891, a law that prohibited work on Sundays and/or federal holidays, established rules for safety measures for workers, and restricted work for women and children, the latter which was ultimately prohibited. All these were unified and incorporated into one statute in 1911, the *Reichsversicherungsordnung* (Order of Insurance in the Reich).[70]

The demise of the Bismarck-Kaiser Wilhelm government, the Second Reich, came at the end of World War I (1914-1918). Volumes have been written about the causes for the short shelf-life of its successor, the Weimar Republic,[71] but to its credit, the Weimar Constitution attempted to assure economic democracy. [72] It also protected freedom of association.[73] One legal scholar described the German courts' view of the Article 159 right of association as "hard juridical law" and the Article 165 economic recovery provision as an "aspirational declaration whose realization depended upon legislative implementation that never materialized."[74] In 1933, the Weimar Republic was replaced by the *Nationalsozialismus* (Nazi) government, Adolf Hitler's Third *Reich*.

The Hitler government adopted the *Ermaechtigungsgesetz* (Enabling Act)[75] in March, 1933, a law that abolished all political parties with the exception of the *NSDAP* (*Nationalsozialistische Deutsche Arbeiterpartei*, i.e., the National Socialist German Workers Party, or Nazi Party). The statute vested Hitler as *Reichskanzler* with plenary powers, a broad authority that he used with a vengeance. On May 2, 1933, he abolished all existing labor unions, which were subsumed into a government institution, *Deutsche Arbeitsfront* (German Labor Front).[76]

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69 Ibid. at 556.

70 Ibid. at 617.

71 For a thorough explanation of trade unions during the Weimar Republic existence, *see, e.g.,* Otto Kahn – R. Lewis Freund – J. Clark (eds.): *Labour Law and Politics in the Weimar Republic.* Social Science research Council, 1981. Ch. 3, 108–161.

72 Weimar Constitution Article 165.

73 Weimar Constitution Article 159.

74 Eric Tucker: Labor's Many Constitutions (and Capitals too). *Comparative Labor Law and Public Policy Journal,* 33, (2012) 355., 359.

75 *Gesetz zur Behebung der Not von Volk und Reich*, (Law to Address the Needs of the People and the Government) Articles 1–5 (1933).

76 *Arbeitsordnungsgesetz, Gesetz zur Ordnung der nationalen Arbeit vom* 20 Januar. 1934.

With the defeat of *Nationalsozialismus* in 1945, each of the four Allied Powers (the United States, the United Kingdom, the U.S.S.R., and France) assumed control over one of four geographically designated sectors of Germany (and four sectors within the cities of Berlin and Vienna, Austria). All four permitted the founding of political parties (forbidden under *Nationalsozialismus*), and the U.S.S.R. was the first to resume alloving the founding of trade unions. This June 10, 1945, act of the Soviets was followed by the American and British governments later that summer and by France at the end of the year.[77] The concept of unions and management as so-called *Sozialpartners* began in the post-Nazi rebuilding of Germany.[78] It was in this setting that the right to unionize was included in the new post-World War II German constitution (*Grundgesetz*, or Basic Law).[79]

2.2. Labor protective statutes

It is significant that Germany is decidedly labor-friendly. There are detailed protections against termination without cause,[80] limitations on the employment of pregnant workers,[81] additional protections for disabled workers in terminations,[82] a right to occupational training,[83] and a multitude of social rights for workers in a modern-day version of the Bismarck programs.[84] The most recent such legislation is the minimum wage act, effective January 1, 2015, providing for a minimum wage of 8.50 Euros (approximately US $9.60).[85]

In the area of labor law, referred to as *kollektives Arbeitsrecht,* or collective workers law (as contrasted with employment law, referred to as *individuales Arbeitsrecht, or* individual workers law), statutes are sparse. Hence, much of German labor law has been crafted by the courts. There is, however, a Collective Bargaining Act,[86] which generally defers to the parties to determine contractual content, similarly to American collective bargaining law. Contrary to American labor law, there is

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77 *Fragen an die Deutsche Geschichte.* (Questions on the History of Germany) Bonn, German Bundestag Publication Section, 1992. at 368.

78 Heinrich Kronstein: Collective Bargaining in Germany: Before 1933 and After 1945. *The American Journal of Comparative Law,* 1, (1952) 199.

79 A good summary explanation of German labor law is Manfred Weiss – M. Schmidt: *Labour Law and Industrial Relations in Germany*. 4th ed., Kluwer, 2008.

80 *Kuendigungsschutzgesetz* [KSchG] August 25, 1969 (BGBl. I S. 1317).

81 *Mutterschutzgesetz* [MuSG] June 20, 2002 (BGBl. I S. 2318).

82 *Soziales Gesetzbuch,* [SGG] *Neuntes Buch, June 19, 2001*, containing the *Schwerbehinderngesetz,* or Disabled Persons Statute, June 19, 2001 (BGBl. I S. 1046).

83 *Berufsbildungsgesetz* [BBiG] March 23, 2005 (BGBl. I S. 9311).

84 *See, e.g., SGB Zweites Buch*, May 13, 2009 (BGBl. I S. 850, ber. S. 2094) and SGB Viertes Buch, November 12, 2009 (BGBl. I S. 3710, ber S. 3973 and BGBl. 2011 I S. 363).

85 *Mindestlohngesetz* [MiLoG], August, 2014.

86 *Tarifvertragsgesetz* [TVG], August 25, 1969 (BGBl. I S. 1323).

no statutory duty on the parties to bargain. There is no statute on the status of unions, their rules of organization, or right of a union to assume the role of representative of workers.[87]

One right of German workers that has no counterpart in American federal labor law is the right to form a *Betriebsrat*, or Works Council.[88] Workers in a business with at least five employees have the right to select a body (works council)[89] with which the employer must negotiate over plant rules, working hours, use of technology, health and safety rules, and termination of workers.[90] Some American legal academics have compared the works council to the union in the United States, particularly in smaller businesses.[91]

Finally, the *Mitbestimmungsgesetz*, or Codetermination Act, requires that a company with at least 2,000 workers have a specified number of workers on the board of directors.[92] This right to a participatory role in management affairs is anathema to American law.

2.3. The German Constitution and the courts: collective bargaining and the right to strike

Collective bargaining in Germany traditionally has been done at the industry level. The contract is between a trade union and an employer organization, analogous to the American concept of a multi-employer group, such as Major League Baseball and other professional sports teams and the Bituminous Coal Operators Association (BCOA). The largest union in Germany is *Industrie Gewerkschaft Metal* (IGM), with about 2 ½ million members.[93] Most unions belong to the *Deutscher Gewerkschaftsbund* (German Federation of Unions, hereinafter DGB), including the 2,000,000-member *Ver.di* (*Vereinte Dienstleistungsgewerkschaft,* United Service Workers Union) and the *Deutscher Beamtenbund* (union for Germany's civil service workers), with membership in excess of 1,000,000.[94] IG Metall is also a member of DGB.

Notably, the constitutional protection of the right to form associations is concise. Article 9 sec 3 reads (in English):

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

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87 Bertram Zwanziger: Collective Bargaining in a Changing Environment: Aspects of the German Experience. *Comparative Labor Law Journal,* 26., (2006) 303, 304. The author is a judge on the *Bundesarbeitsgericht,* [BAG] *i.e.*, Federal Labor Court.

88 *Betriebsverfassungsgesetz* [BetrVG] 2001 (BGBl. I S. 2518).

89 BetVG sec 1(1).

90 BetrVG sec 87.

91 *See, e.g.*, Carol Daugherty Rasnic: Germany's Statutory Works Councils and Employee Co-determination. *Loyola of Los Angeles International and Comparative Law Journal,* 24., (1992) 275.

92 [MitbeG], March 4, 1976 (BGBl. I S. 1153).

93 *Union membership grows at IG Metall and Unite,* (Jan. 31, 2013), accessible at www.industrial-union.org/union-membership-grows-at-ig-metall-and...

94 Nils Zimmermann: *Germany's collective bargaining rules in focus, Deutsche Wella.* (Germany's international broadcaster, hereinafter DW), May 22, 2015. Accessible at http://www.dw.com/en/germanys-collective-bargaining-rules-in-focus/a-18467967

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

Therefore, if there is a constitutional right to strike, it must be derived from this language, and the *Bundesverfassungsgericht* (Federal Constitutional Court, hereinafter, BVerfG) has drawn this inference. In 1954, this Court held that the constitutional right to form associations would have been only a vacuous formality unless a union were entitled to participate in activities that would fulfill its function.[95] Consequently, this constitutional provision implicitly protects certain activities by both the employer and the union in furtherance of achieving a collective bargaining agreement to serve the interests of both parties. Some legal commentators take the position that, without a constitutional amendment permitting such, there can be no legislation that might curtail these rights.[96] This position was judicially stated in a 1984 decision of the *Bundesarbeitsgericht* (Federal Labor Court, hereinafter BAG).[97]

German court structure provides for six highest courts, five according to subject matter in the designated areas of labor (*Bundesarbeitsgericht*, Federal Labor Court, hereinafter BAG), administrative law (*Bundesverwaltungsgericht*, Federal Administrative Court), social law (*Bundessozialgericht,* Federal Social Law Court), financial matters (*Bundesfinanzgericht,* Federal Financial Court), and general civil and criminal law issues (*Bundeszivilgericht,* Federal Court).[98] The sixth high court is the Federal Constitutional Court (*Bundesverfassungsgericht,* hereinafter BverfG) which has jurisdiction over questions of constitutional law, regardless of the legal area. Therefore, most labor law questions are settled at the BAG level.[99]

The BAG has held that it is illegal under Article 9(3) to interfere with the activities of unions.[100] Nonetheless, the BfVG held in 1995 that the legislature might impose limitations on the exercise of this constitutional right, provided this is in accordance with the general constitutional principle of freedom of association.[101] The extent of what is permissible is not completely clear.

The courts have imposed some general rules on which circumstances will justify a strike or lockout. First, it must be proportional and not too intrusive on the employer's property rights.[102] This requirement was announced by the BAG in 1971,[103] a case that addressed the situation of likely damage to this property right when a company cannot perform emergency or necessary work that affects the welfare

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95 1954 B VerfG 18. 11. 1951, 1 BvR 629/52; BVerfG E 4, 96.

96 David Westfall – Gregor Thuesing: Strikes and Lockouts in Germany and Under Federal Legislation in the United States: A Comparative Analysis. *Boston College International and Comparative Law Review,* 22, (1999) 28., 40.

97 1984 BAG von 14.2.1978–IAZR 76/76 *NJW,* 1979. 236.

98 GG Article 95(1).

99 *See* Matthew M. Bodah – Martin R. Schneider: Politics, Ideology, and Adjudication: the German Federal Labor Court and the U.S. NLRB. *Comparative Labor Law and Policy Journal,* 36, (2015) 293, for a comparison of the BAG with the NLRB.

100 BAG, September 17, 1988, 1 AZR 364/97.

101 BVerfG, November 14, 1995, 1 BvR 601/92.

102 In two 2007 decisions, the European Court of Justice held that an employer's property right prevailed over a union's right to take industrial action. See International Transport Workers' Union Federation et al. v. Viking Line ABP [2007] Case 438/05 (decided Dec. 11, 2007) and Laval un Partneri v. Svenska Byggbadsarbetareforundet et al. [2007] Case 341/05 (decided Dec, 17, 2007).

103 *See Arbeitsrechtliche Praxis* number 43 zu Art. 9 GG: *Arbeitskampf* (Apr. 21, 1971) (Federal Labor Court [BAG] *Grosser Senat*).

of the public. Even in this event, the employer does not have a free rein to hire temporary (and clearly not permanent) replacement workers, as would an American business. [104] Rather, it must confer with the striking union and agree upon details of the required work, such as the number of workers. It is the union that specifies which of its members will return to perform this necessary work. [105] Striking workers' employment contracts are not terminated, but rather only suspended during the duration of the work stoppage. They are not entitled to compensation because they are performing no services,[106] but their retained status as employees and the inability of the employer permanently to replace them differs from American law.[107] Examples of employers that provide necessary services to the public are garbage disposal companies, funeral homes, and hospitals. Notably, hospital workers are permitted to strike[108] as long as critical services are rendered. The concept of "critical" does not include surgeries that might be postponed without posing a danger to the patient's health.[109] A related requirement is that a strike or lockout must be the *ultima ratio*, i.e., the last possible decision. A collateral side to this principle is the *Friedenspflicht*, i.e., duty of peace that prevents strike or lockout activity as long as negotiations between the parties continue.[110]

The BAG has held that political strikes are unlawful.[111] Since the fundamental reason for a strike is to reach a CBA, any purpose that is political, i.e., an attempt to induce legislative action, is unlawful.

Comparing the relative strengths of unions in Germany and in the United States, although fewer than 25% of German workers are union members,[112] 61% of workers in the former West Germany and 49% in the former East are covered by collective agreements.[113] Once a CBA has been reached, an employer cannot treat a member of the union any worker less favorably than the agreement assures.[114] Although there is no requirement under German law that non-union members must benefit from CBA terms,[115] general practice is for a company subject to a CBA to use standard individual contracts that incorporate the terms of the agreement.[116] The union membership figure in the United States is

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104 *See supra* notes 62–65 and accompanying text.

105 *See* Klass et al. *infra* n. 119 at 55 and Westfall and Thuesing, *supra* n. 96, at 54 n. 128, citing *Enscheidungssammlung zum Arbeitsrecht Nr. 119 u Art. 9 GG Arbeitskampf (BAG).*

106 1 *Entscheidungen des Bundesarbeitsgerichts* [BAGE] 291 (1955 FRG).

107 *See supra* notes 62–65 and accompanying text.

108 In the United States, this is governed by state law. In Virginia, for example, there is a blanket prohibition of strikes by hospital workers. VA. CODE sec. 40.1–54.1 (1970).

109 *See* Westfall–Thuesing op. cit. at 62 n. 171, citing Wolfgang Daeubler et al.: *Arbeitskampfrecht*. (Labor Dispute Law) 2d ed. 1984. at 366.

110 Klass et al., *infra* n. 119.

111 *Arbeitsrechtliche Praxis Nr.* 1 zu Art. 9 GG *Arbeitskampf* (BAG). Cited in Westfall and Thuesing, *supra* n. 96 at 46 n. 94.

112 Zimmermann (DW) op. cit.

113 Thomas Haipeter – Steffen Lehndorff: Decentralisation of collective bargaining in Germany: Fragmentation, coordination and revitalization. *Economia & lavoro*, (Jan. 2014) at 48.

114 TVG op. cit. sec. 4(3).

115 *Cf.* with Taft-Hartley Act, sec. 8(a)(3), making it an unfair labor practice for an employer to discriminate against a worker because of union or non-union membership.

116 Zwanziger op. cit. at 306.

dramatically lower. In 2013, only about 11.3% of American workers were union members, continuing a long-time pattern of increasingly lower union membership numbers.[117] The Bureau of Labor Statistics in the U.S. Department of Labor reported the 2014 figures as 35.7% unionization of public sector workers and only 6.6% of private sector workers.[118]

Germans view the large number of strikes (from an American perspective) as comparatively small within Europe. The *IG Metall* strikes in 1971, 1978, and 1984 are generally cited as exceptions (the number of work days lost due to strikes in those three years were 4483, 4281, and 5617, respectively).[119] Interestingly, the right to call a strike is that of the union, not individual workers,[120] a position that seems at odds with the wording of Article 9(3) that gives this right to "everyone," inferring the people.

This fragmented judicial journey has been a common-law fashion of determining the scope and limits of the constitutional right of association. Traditionally, German unions have cooperated with each other as a means of strengthening the union as an entity and have applied the "*ein Betrieb, eine Gewerkschaft*" –"one company, one union"– principle. Without a statute such as the Taft-Hartley authorization of the NLRB to determine which workers constitute a bargaining unit,[121] this *Tarifeinheit*, or single CBA within one company system, has been a tacit and voluntary one. This general rule was fundamentally changed by a BAG ruling in 2010 that provided instead for – instead for a possibility of more than a single union in what would be one bargaining unit under U.S. law.[122]

This plurality of unions led to the series of GDL strikes during 2014 and 2015, including the longest one in German history. The reaction of the *Bundestag* was to enact legislation that in practicality would limit the number of unions within a company to the one with majority support, similar, but not identical, to the American system.

2.4. The 2014-2015 GDL strikes

2.4.1. Deutsche Bundesbahn

The railroad industry in Germany has had a checkered history. Railroads were gradually nationalized during the 1930's,[123] but in 1994, the federal government, then headed by Chancellor Helmut Kohl, made the decision to turn operations over to private enterprise. The eventual plan was to make

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117 James G. Kelleher – Lisa Lambert – Bernie Woodall: Union membership falls to lowest percentage in 76 years. *Reuters* (Jan. 23, 2013), accessible at www.reuters.com/article/2013/01/24/us-usa-unions-membership...

118 BLS report of Jan. 25, 2015, accessible at www.bls.gov/news.release/union2nr0.htm

119 Franziska Klass, Hilmar Roelz, Sebastian Rabe, and Stefan Reitemeyer on Germany, Chapter 4 in a monograph from papers presented at an April 15-18, 2008 University of Leicester conference of the Institute of Employment Rights, published April 4, 2009 as Arabella Stewart – Mark Bell (eds.): *The Right to Strike: a Comparative Perspective: A study of national law in six EU states* [Belgium, France, Germany, Italy, the Netherlands, and the United Kingdom] at 53. Accessible at www.ier.org.uk/.../The+Right+to+Strike+A-Compar...

120 Ibid. at 56 and Westfall–Thuesing op. cit. at 41.

121 *See supra* n. 28–30 and accompanying text.

122 *Beschluss des* 10 *Senats vom* 23.6, 2010–10 AS 3/10, BAG.

123 Reinhardt op. cit. Vol. II, at 519–520.

shares available by a public offering in 2006.[124] After the plan was deferred, the 2008 financial crisis suspended action. Currently, it operates as *Deutsche Bundesbahn AG* (Germany Railway, Incorporated, hereinafter DB), privately managed, with the federal government owning all shares. To indicate the depth of Germans' use of this vast railway system, a comparison with the U.S.' Amtrak is instructive. In 2013, Amtrak served 31.6 million passengers,[125] while DB serviced 2.016 billion.[126] These statistics are more emphatic when viewed alongside the relative populations of nearly 310 million in the United States, and somewhat less than 82 million in Germany.[127]

2.4.2. GDL

There currently are two unions at DB, the *Gewerkschaft der Deutschen Lokfuhrer* (GDL), which has approximately 35,000 members, and the considerably larger *Eisenbahn-und Verkehrsgewerkschaft* (Railroad and Transportation Union, hereinafter EWG), with more than 200,000 members.[128] It is relevant that EWG, but not DGB, is a member of *Deutsche Gewerkschaftsbund* (DGB), the large federation of unions. Although GDL also sought higher wages, the implicit competition between these two representatives is the root cause of the underlying labor strife at DB.

The goal of GDL (together with the omnipresent demand for a wage increase) is bargaining agent status for all DB workers. Particularly polarizing has been GDL's insistence on representative status for both *Lokfuehrer*, or train drivers, as well as *Lokrangfuehrer* and train attendants (conductors and waiters in food cars). *Lokrangfuehrer* perform a series of duties, including overlooking train cars and assuring that all are in the proper position, testing brakes and other train apparatuses, and communicating between drivers of trains on tracks in close proximities. These duties also involve driving trains to their proper starting positions on tracks and preparing trains for journeys.[129] A sizeable majority of these train workers are represented by EVG, but a minority of drivers are members of GDL. Friction between two competing bargaining agents within the same unit has been the legacy of the 2010 BAG decision interpreting the Article 9(3) right of association as permitting multiple unions.

GDL head Claus Weselsky has been noted for his irascible intractability, a trait that some view as having widened the gulf between the two unions. This viewpoint sees Weselsy's "ego trip" as the best

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124 *See* Dirk Loehr: *German Railway Company: a failed privatization*, accessible at rent-grabbing.com/…/13/german-railway-company-a-failed-privatization and *Germany Agrees to Partly Privatize Railway System*, Deutsche Welle (Germany's international broadcaster), accessible at www.dw.com/en/germany...to-partly-privatize-railway-system/a-2230836

125 www.amtrak.com/servlet/COntentServe4?c=Page&pagename=am/Layout&...

126 www.deutschebahn.com/.../660932/bilanz_pressekonferenz_2014.html

127 www.worldatlas.com/aatlaw/populations/ctypopls.htm

128 Bundestag schwaecht mini-Gewerkshcaften(Parliament weaken mini-unions). *Sueddeutsche Zeitung* (Southern Germany Newspaper), May 22, 2015, accessible at http://www.sueddeutsche.de/wirtschaft/tarifeinheitsgesetz-bundesta...

129 The author thanks Prof. Dr. Eberhard Eichenhofer, Professor of Labor and Social Law and Christina Hellrung and Marc Dietrich, assistents, all at Friedrich-Schiller Universitaet, Jena, for clarifying this distinction.

advertisement for the large employer groups in their pressing for a federal law that only a CBA with the union representing a majority of workers will be enforceable and binding for all workers.[130]

Weselsky presents an interesting personality study. Described as a classic Type A, much has been made over his being as "Ossi," a West German derogative term for one from the former East. Epitomizing the "enemy Ossi," this revolutionary 56-year-old has been at the helm of GDL since 2008.[131] He has been called unmovable and incorrigible, yet incorruptible, disliked by management, politicians, train customers, and even other unions, but this public persona seems not to trouble him.[132] One commentator compared him to Greek Minister of Finance Gianis Varoufakis because both have alienated the public by prompting their respective governments to act, Varoufakis as a result of Greece's financial crisis, and Weselsky because of his demands on behalf of the GDL that have given the German government a necessary wake-up call. This writer for the popular German news magazine *Der Spiegel* sees Weselsky's demands as something that DB alone cannot do, without some statutory aid.[133] Moreover, he has been seen as trying to convert the public's view of the railway service, an entity to which Germans have a special relationship because of the volume of use, into the enemy of the people. By May 19, 2015, upon the GDL's calling its ninth strike in as many months, a poll revealed that 68% of the public disapproved of the strike, with only 25% in favor.[134] Even Weselsky's predecessor at GDL, Manfred Schell, described by the media as no pushover, expressed displeasure over Weselsky's being the face of the GDL, saying that his concern is not with the interests of workers (especially train restaurant workers), but rather with ousting EVG. According to Schell, Weselsky is a leader whose aim is to feed his own ego, and one who sees the dispute as a 'holy war'.[135] Referring to Weselsky's tactics, one journalist called GDL "*Deutschlands duemmste Gewerkschaft*" ("Germany's dumbest union").[136]

To be sure, Weselsky has his advocates. Winfried Wolf, a self-described expert on trains and a union member since the age of 19 who also worked for 15 years against the privatization of DB, noted that since 1994, DB has cut its workforce by half. He accused train management of causing increased

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130 Yasmin El-Sharif: Lokfuehrer-Streik der GdL: Deutschlands duemmste Gewerkschaft (Train Drivers Strike by the GDL: German's Dumbest Union). *Spiegel Online* (Oct. 6, 2014), accessible at http://www.spiegel.de/wirtschaft/soziales/lokfuehrer-gdl-gewerkschaft-provoziert-gesetz-zur-tarifeinheit-a-995541.htm

131 Jana Hensel: Der Ossi als Feinbild (The Easterner as a Model Enemy). *Die Zeit* (May 30, 2015), accessible at http://www.zeit.de/2015/22/bahnstreik-ramelow-platzeck-weselsky-...

132 Michael Kroeger: Unbeugsam, unkorrumpierbar, unbelehrbar. *Speigel Online* (November 5, 2014), accessible at http://www.spiegel.de/wirtschaft/unternehmen/claus-weselsky-war...

133 Sven Boell: Gelobt seist du, Giani Weselsky! (Praise to you, 'Gianis Weselsky'!), *Spiegel Online* (April 22, 2015), accessible at http://www.spiegel.de/wirtschaft/unternehmen/demokratice-braucht-rebellen-wie-weselsky-und-varoufakis-a-1029839.html

134 Geburt eines Buhmanns (Birth of a bogey-man). *Die Zeit* (May 19, 2015), accessible at http://222.zeit.de/wirtschaft/2015/05/claus-weselsky-gdl-streid-b...

135 Kroeger op. cit. 132.

136 Yasmin El-Sharif: Lokfuehrer-Streik der GDL. *Spiegel Online* (Oct. 6, 2014), accessible at http://www.spiegel.de/wirtschaft/soziales/lokfuehrer-gdl-gewerkschaft-poviert-gesetz-zur-tareinhei-a-995541.html

stress on workers and failing to maintain trains and tracks properly, and he strongly supported Weselsky's efforts and tactics.[137]

Despite the general perception that GDL is a fledgling organization (as are other smaller unions, such as Cockpit Pilots Organization and the Marburger Doctors Union, GDL is successor to the *Verein Deutscher Lokomotivfuehrer* (Association of German Locomotive Drivers, hereinafter VDL), founded in 1867, and, as such, is Germany's oldest labor union. [138] The purpose of VDL was to improve governmental provisions for pensions and care for sick railroad workers, whose stressful jobs often led to illnesses and early retirements. The year after the commencement of the 1918 Weimar Republic, the VDL became the GDL. Suspended along with all unions during the Nazi regime, GDL resumed its earlier status in 1946 in the former West Germany, and in 1990, became the first recognized labor union in East Germany. In the 1991 German reunification, the east-west segments of GDL were combined.[139]

In mid-2015, DB's woes compounded. The larger of the two unions, EVG, threatened to strike DB on June 1, if there were no agreement to its expired contract by May 27. EVG demanded a 6% increase in wages and a 150-Euro social component, together with a shortened time frame for the new agreement.[140] At the same time, after a long and adamant refusal, GDL was participating in mediation talks.[141]

EVG leader Alexander Kirchner was publicized in a favorable light as the opposite of Weselsky. Kirchner was described by one media report as the type of union member to whom Germany had become accustomed, reserved and open-minded, a so-called "anti-Weselsky." Because the 59-year-old Kirchner once worked for DB as a non-union employee, having joined the predecessor of EVG later and becoming head in 1991, Weselsky's mordant opinion was that he is an agent of DB management. [142] Nonetheless, Kirchner's conciliatory attitude was productive, and after 13 rounds of talks, EVG and DB settled the following day.[143] The pay increase agreed upon was 5.1%, in incremental stages, beginning July 1 with 3.5% (to be at least €80 per worker), with another 1.6% forthcoming on May 1,

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137 Jens Wernicke: Spin Doctoring im GDL-Arbeitskampf. *Telepolis* (May 23, 2015), accessible at http://www.heise.de/tp/artikel/45/45015/1.html

138 GDL website, *Ursprung und Entwicklung der GDL* (Origins and Development of GDL), accessible at http://www.gdl.de/UeberUns/Geschicte

139 Ibid.

140 WAZ, *EVG will EInigung bis Mittwoch und droht mit Streik* (EVG wants agreement by Wednesday and threatens strike) (May 26, 2015), accessible at http://www.derwesten.de/wirschaft/evg-will-einigung-mit-mittwoc...

141 Bahn-Gewerkschaft EVG droht mit Streik (Train union EVG threatens stike). *Reuters* (May 26, 2015), accessible at http://de.reuters.com/articlePrint?articleId=DEKBN0OB0EN20150526

142 Patrick Wehner: Anti-Weselsky auf dem Weg zum Erfolg. *Sueddeutsche Zeitung* (Munich newspaper) (May 22, 2015), accessible at http://www.sueddeutsche.de/wirtshcaft/2.220/evg-chef-kirchner-ant...

143 Deutsche Bahn einigt sich mit EVG. *Die Zeit*, May 27, 2015, accessible at http:www.zeit.de/wirtschaft/2015-05/deutsche-bahn-tarifverhandl…

2016 (at least €40 per worker, in an agreement that would expire September 30, 2016.[144] This 16-month contract is short by American standards, where most CBAs are of two-year durations.[145]

During these seemingly interminable work stoppages, DB continued to lose money. Back in February, 2015, upon the calling of the seventh of the series of nine strikes, the *Deutsche Industrie- und Handelskammer* (German Industrial and Trade Bureau) estimated the company's lost income as about 500 million Euro at that point.[146] One daily television news show, *Tagesschau*, reported on October 28, 2014, that, although a union's five words during a strike are traditionally "*Unsere Streikkasse ist gut gefuellt*" ("our cash register is amply filled"), many economists queried as to how long the union could afford to pay its strikers and how long the strikers could afford not to work. The maximum strike benefit was 50 Euro per day, and with the estimated 4,000 workers on strike, the payments were calculated at €200,000 per each workless day. From the strikers' perspective, most of them usually earned €2500-3,000 per month, so the €2,000 per month (figuring according to a 40-hour work week) left a notable discrepancy in their customary disposable income.[147] In May, 2015, DB reported that because of the work stoppages, it will have operated at a loss for fiscal year 2015 and that the company is not the "cash cow" that the public perceives it to be. [148] Moreover, Klaus-Dieter Hommel, Vice-President of EVG, GDL's rival union, reported that these persistent strikes deepened the animosity between the two unions, a friction that would only worsen.[149]

Meanwhile, a bellicose Weselsky had finally relented on his earlier staunch refusal to mediate. Despite pleas from DB and all political parties, GDL repeatedly had refused mediation.[150] There is no German statute directing parties to mediate except in the building industry, in which one party can force the other into the process. If both agree to mediate, there are statutory regulations: (1) there must be an estimated time frame; and (2) there must be an impartial chair, with one mediator chosen by each side. Usually these are experienced politicians or former labor court judges, provided only that they have the trust of each party. The general rule is that there will be no strike activity during the mediations (the so called *Friedensplicht*, or duty of peace). In general, mediators achieve

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144 Deutsche Bahn einigt sich mit EVG (DB and EVG reach agreement). *Die Zeit Online* (may 27, 2015), accessible at http://www.zeit.de/wirtschaft/2015-05/deutsche-bahn-tarifhandl...

145 The NLRB has held that no petition can be filed during a valid collective bargaining agreement. Direct Press Modern Litho, 328 NLRB 860 (1999). However, such an agreement cannot preclude a rival union from filing a petition for longer than a three-year period. The Board has imposed the rule that 90 days prior to the expiration of a three-year agreement or any time after three years into a longer agreement, a rival union might file an election petition. It must do so within 30 days, since the last 60 days prior to the expiration of a CBA is reserved for bargaining between the two parties. Crompton Co., 260 NLRB 417 (1982).

146 RNN online (Radio) Berlin-Brandenburg) (Feb. 19,, 2015), accessible at http://www.rbb-online.de/wirtschaft/beitrag/2015/02/gdl-entscheidet-ueber-neuen-stre...

147 See *Die teuren Streiks der GDL* (The expensive strikes of the GDL), October 28, 2014, accessible at http://www.tagesschau.de/wirtschaft/gdl-113.html

148 *Die Welt*, May 30, 2015, Lokfuehrer-Streiks fressen den Gewinn der Bahn auf (Train driver strikes gobble up DB's profits), http://www.we.t.de/wirtschaft/article141673379/Lokfuehrer-Streiks-fressen-den-Gewi

149 See *Tagesschau* online, October 18, 2014, *GDL-Streik legt Zugverkehr lahm* (GDL strike stops train travel) http://www.tagesschau.de/wirtshcaft/gdl-streik-113.html

150 Maria Marquart: Tarifstreit bei der Bahn: Warum Weselsky keinen Schlichter will (Bargaining strife at DB: why Weselsky does not want to mediate). *Spiegel Online* (May 4, 2015), accessible at http://www.spiegel.de/wirtschaft/soziales/bahn-streik-warum--claus

a settlement in approximately two-three weeks. The likely reason that Weselsky was so obstinately opposed to mediation is that he did not trust turning over to third parties what he viewed as basic rights, that is, the GDL presumed right to represent all train workers.[151] Unlike the provisions of Taft-Hartley in case of an 80-day cooling-off period where the parties are required by statute to meet with the FMCS, German law does not mandate such a process unless both parties to the dispute agree.[152] Perhaps increasingly negative perceptions of GDL and Weselsky induced him finally to reverse his persistent refusal to bring in third parties. [153] On May 26, the GDL's ninth strike since September, 2014, and the longest in the history of DB,[154] was suspended, and sessions began with two, rather than the more usual three, mediators, GDL choice Bodo Ramelow (*Links Partei*), President of the state of Thueringen, and DB selection Matthias Platzeck (SPD, *Sozial Partei Deutschland*), former President of the State of Brandenburg. Ramelow was a former union leader who had referred to the union as the "backbone of a company" (*Rueckgrat der Gesellschaft*). [155] DB's choice of a mediator with a union background was puzzling, a fact that also surprised the German public.[156] The announced projected length of the mediations was three-weeks, from May 27 until June 17. Ramelow made the public statement just a few hours following his selection that DB had acted "unprofessionally,"[157] a remark that patently indicated in lack of impartiality. Platzneck appeared more conciliatory, conceding to the *Rheinische Post* that the talks would be "rocky," but expressing confidence that they would be successful.[158] Weselsky appeared ineffably triumphant even before mediations began, saying that the union had finally gotten through the proverbial Gordian knot, reasoning that mediation foresaw the willingness of DB to reach an agreement with GDL, in addition to its CBA with EVG.[159] At this point, GDL sought a wage increase of 5% and a one-hour per week shorter working time. Ulrich Weber, Director for Personnel at DB, adamantly reminded that the mediation process with GDL and the talks with EVG were completely unrelated.[160]

Addressing this issue, the Bundestag adopted a statute, the *Tarifeinheitsgesetz* (Collective Bargaining Unity Act), effective July 1, 2015. Andrea Nahles, *Arbeitsministerin* (Secretary of Labor), was the

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151 Ibid.

152 Tarifstreit bei der Bahn: Warum Weselsky keinen Schlichter will (Bargaining strife at DB:Why Weselsky does notw ant to mediate). *Spiegel Online* (May 4, 2015), accessible at http://www.spiegel.de/wirtschaft/soziales/bahn-streik-warum-claus...

153 See, *e.g.* Janko Tietz: Masslosigkeit ist kein Grundrecht (There is no basic right to be immoderate and uncompromising). *Spiegel Online* (May 22, 2015), accessible at http://www.spiegel.de/wirtschaft/tarifeinheitsgesetz-gdl-und-cockpi...

154 Tarife: Chronologie, Tagesthema. *FOCUS* (May 18, 2015), http://www.focus.de/tagesthema/tarife-chronolgie-die-streiks-der-gdl-im-bahn-tarifst...

155 Die Hoffnungstraeger der Bahnkunden. *Handelsblatt online,* May 21, 2015, accessible at http://www.handelsblatt.com/politik/deutschland/platzeck-und-ramelow-die-hoffnung...

156 Ramelow und Platzeck sollen Bahnstreit schlichten. *MSN,* May 21, 2015, http://www.msn.com/de/de/nachrichten/other/ramelow-und-platzeck-sdollen-bahnstreit...

157 Ibid.

158 Deutsche Nahn und EVG einigen sich auf Tarifvertrag. *Spiegel online,* May 21, 2015, accessible at http://www.spiegel.de/wirtschaft/unternehmen/bahn-streik-abgewen...

159 Ibid.

160 Bahn und EVG einigen sich auf Abschluss (DB and EVG conclude with agreement). *MDR,* accessible at http://www.mdr.de/nachrichten/tarifabschluss-bahn-evg-schlichtung...

instigator of the bill that would return collective bargaining in Germany to its pre-2010 status. This law specifies that, in the event of a conflict of interests between or among more than one union for a single employer, the company might enter into a CBA only with the union holding majority support. For example, the organization representing the majority of train drivers and any others deemed to be in a similar bargaining position would be the negotiator on wages and other conditions of employment.[161] Any CBA concluded between that labor union and the employer would then be binding upon all workers within that unit, preventing wage disparity among workers, similar to the method operable under the U.S. Taft-Hartley Act.[162] To be sure, an American company might have more than one union in cases of separate bargaining units as determined by the NLRB. Nonetheless, within a group that shares bargaining interests, a union must have majority support.[163] Many German legal scholars believe the law to be an unconstitutional interference with the Article 9(3) right to associate,[164] but the legislature has justified the law as a necessary means to prevent conflicts posed by multiple CBAs and a resulting malfunctioning of the desired contractual autonomy of workers. [165] The statute expressly states that the legislature has this constitutional authority through its authorization to adopt labor law statutes.[166] Professor of Labor Law Hermann Reichold at Eberhard-Karls Universitaet Tuebingen, criticized the statute as using the arm of government to stifle competition, rather than simply to establish procedures for the settlements of labor disputes. Accordingly, his prediction is that the new law will have a brief constitutional shelf life.[167]

In the meantime, the parties continued mediation sessions by agreement until June 25, 2015 and on that date, announced yet another continuance, a guarded but hopeful indication that progress was positive. On July 1, 2015 after 420 hours of meetings, the parties finally reached agreement. Overtime would be limited to 80 hours per year; DB would employ an additional 300 train drivers and 100 conductors; beginning 2018, DB would enforce a 38-hour workweek; pay would be increased per the clauses in the EVG agreement; and, most significant to Weselsky, the *Lokrangierfuehrer* would be included in the CBA.[168] It is significant that these monetary terms mirror precisely those in the EVG contract.

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161 *Tarifeinsheitsgesetz* Article 1(4a)(2).

162 T-H Sec. 109(a).

163 See*, supra* note 34 and accompanying text.

164 See*, e.g.,* Zimmermann (DW) op. cit., stating that this is the opinion of "many legal experts."

165 See A. *Allgemeiner Teil*, I. *ZIelsetzung und Notwendigkeit der Regelungen, Tareinheitsgesetz* (A. General Part: I. purpose of and necessity for the statute.

166 Sec. IV. *Gesetgebungskompetenz* (Legislative capacity) cites GG Article 74(1) as empowering the Bundestag to pass legislation in specified areas, including labor law. Article 64(1)(12). Additionally, in a 1995 decision, the Federal Constitutional Court, *supra* n. 95, held the Article 9(3) right to be one not without limitation.

167 Hermann Reichold: Tarifeinheit als Danaergeschenck? Ausschlagen ist erlaubt! *Neue Zeitschrift fuer Arbeitsrecht,* editorial, Heft 13, 2015 (9. July. 2015).

168 See Einjaehriger Tarifkonflikt mit der DB erfolgreich beendet, July 1, 2015, *GDL* website, and Bahn-Tarifkonflikt beendet, *Die Zeit Online,* July 1, 2015, http://www.zeit.de/wirtschaft/2015-07/bahn-tarifkonflikt-beendet

Shortly following the settlement, the newly effective statute was officially challenged in an action filed with the BVfG by Cockpit (the small union for airline pilots) and *Marburger Bund* (the small union for physicians).[169] Several other unions, including the 36,000 member *Deutsche Journalisten-Verband* (German Journalists Association, DJV), filed similar challenges shortly thereafter. [170] Each of the petitions included a request for a preliminary injunction that would postpone the effective date of the statute until the Court had decided the merits. On October 6, 2015 the BVerfG denied this request, finding no evidence of irreparable harm to the petitioning unions if the date of enforcement were not deferred.[171] The Court expressly stated in its opinion that the projected time for that final decision would be late 2016.

Should the BVfG adopt the same philosophy toward basic constitutional rights as has the United States Supreme Court, the statute likely will be upheld. For example, the American Court has recognized several exceptions even to the revered American First Amendment right to freedom of speech. The Court has held that defamation is not constitutionally protected,[172] nor is a communication that constitutes a clear and present danger.[173] Other exceptions to the First Amendment free speech right include "fighting words," *i.e.,* messages that would induce a reasonable person to react violently,[174] obscenity,[175] or materials harmful to minors.[176] Additionally, although the most recent time the Court addressed a Second Amendment challenge to a ban on guns in *District of Columbia v. Heller*,[177] the ban was held unconstitutional, the holding was predictable. The D.C. Firearms Regulations Act of 1975 was a total ban on personally owned guns in any form. Nonetheless, the same Court recognized that the right secured by the Second Amendment is not unlimited. [178] It is a moot point whether the BVfG will take the same limiting approach to one of the basic rights in the *Grundgesetz*.

It is conceivable that the BVerfG will take a course similar to that of the U.S. Supreme Court in addressing basic constitutional rights, that is, that they are not absolute. It might be significant that the decision that the legislature cannot restrict the right to associate was from the BAG, rather than the BVerfG.[179] Possible hope for constitutional survival is a different interpretation of that basic right and

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169 Tarifeinheitsgesetz tritt in Kraft—Gewerkschaften klagen. *Die Westdeutsche Allgemeine* (July 10, 2015), www.derwesten.de>Politik/tareinheitsgesetz-tritt-in-draft-gewerkschaften-klagen-id10868577

170 Pressemitteilungen. *DJV* website, 10 July, 2015. http://www.djv.de/starteite/profil/der-djv/pressebereich-download/pressemitteilungen...

171 1 BvR 1571/15, 1BvR 1588/15, 1BvR 1582/15.

172 See New Times v. Sulllivan, 376 U.S. 254 (1976).

173 See Schenck v. U.S., 249 U.S. 47 (1919), an Alien and Sedition Act case. *Schenck* contains Justice Oliver Wendell Holmes' oft-cited phrase that the First Amendment d oes not protect one from "falsely shouting fire in a crowded theatre and causing a panic." 249 U.S. 52.

174 See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

175 Miller v. California, 413 U.S. 15 (1973).

176 Ginsberg v. New York, 390 U.S. 629 (1968).

177 554 U.S. 570 (2008).

178 Ibid. At 624–626.

179 See *supra* n. 97 and accompanying text.

a holding that a reasonable limitation by the legislature might be constitutionally acceptable. When, and how, the Court will decide is conjecture.

2.4.3. Primary points of distinction between American and German strike and collective bargaining laws

First, one of the responsibilities of the U.S.A.'s NLRB is to determine the contours of a collective bargaining unit. Workers with like interests from a bargaining perspective are in a single such unit unlike pre-*Tarifeinheitsgesetz* Germany, where the courts have approved of a multiplicity of unions within a group of workers who perform like duties for a single employer. This could not occur under the Taft-Hartley Act.

Second, if the parties to a labor dispute in Germany had the respective duties to bargain as are imposed upon both labor and management under U.S. law, the probability of such recurring work stoppages such as those called by GDL would be dramatically reduced. Contrary to what would have been required under American law, GDL was under no obligation to negotiate or to mediate. Moreover, both mediators, once the union finally agreed to participate in sessions after a lengthy period of industrial strife that took a substantial toll on the national economy, had backgrounds and positions aligned with labor, lending at least the impression of a disadvantage for management. Neutrality rather than this one-sidedness would have presented a more equitable setting, but DB's choice of Platzeck was presumably influenced by his positive mediation experience and his being a "jovial politician," [180] a near oxymoron. In contrast, the U.S.' FMCS is a federal neutral body with expertise in reaching agreements in labor disputes, not a team chosen by the disputing parties. Moreover, its intervention is mandatory if the 80-day statutory executive suspension has been invoked. Under the American statutory scheme, there would have been no obstruction to the process by one side, as the GDL had achieved for such a protracted period.

This suspension of industrial action, The Taft-Harley provision for an 80-day "cooling off" period and/or the Railway Labor Act period of 60 days, is a third difference between the labor-management statutes. In an industry where a work stoppage would have a substantial negative effect upon a large sector of the national health, safety, or economy as is the German railway system, American federal labor law provides for intervention by the president. This intervention could result in a court-ordered deferral of strike activity for the statutory specified period, during which time both parties are required to meet with the federal mediating body,

Finally, the right of an American employer to replace economic workers permanently acts as a deterrent to strike activity. Because of this right, striking GDL workers likely would have faced the loss of their jobs, if DB had replaced them after the first work stoppage in September, 2014.

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[180] Diese beiden sollen den Streit endgueltig beenden (These two men are hoped to end the strife), Die Welt, May 21, 2015, accessible at http://www.welt.de/wirtschaft/article141245991/Diese-beiden-sollen-den-Streit-endgu...

Two years ago, acting U.S. Secretary of Labor Seth Harris, AFL-CIO President Richard Trumka, Communication Workers of America President Larry Cohen, and United Auto Workers President Bob King, met with Germany's then-Labor Minister Ursula von der Leyen at the residence of the German Ambassador to the United States to discuss what the U.S.A. might learn from the German CBA model. The view was that Germany's method was preferable, giving unions "greater legal rights and clout,"[181] from which the inference to be drawn was that American unions present a more combative relationship with employers than is the case in Germany. That viewpoint appears to be a canard in light of the succession of recent strikes in Germany and the obstinate refusal of GDL even to mediate until public opinion impliedly coerced it to do so. Arguably, the contrary is so. Perhaps it is Germany that has much to learn from the American system.

3. Conclusion

This article has taken the position that the German collective bargaining and right to strike statutory scheme is a fractured and arguably unworkable one. From an American perspective, the right of workers to strike—or even to bargain collectively—is not one that is guaranteed by the constitution, but rather by more easily alterable legislation. The *Bundestag* has made a recent effort to change dramatically the structure of unions, but this new statute must meet judicial scrutiny under the constitutional challenge that was inevitable. One might surmise that members of the legislature felt themselves to be in a Scylla and Charybnis situation. One dilemma was an industrial relations nightmare with conflicting rival unions disrupting peace in the workplace. The converse problem was an inherent concern that the statute enacted to resolve this unworkable setting would be short-lived if the Court construed it as violating the right to associate. If this new legislation does survive a constitutional challenge, it would follow the American direction of permitting only one bargaining representative for workers in a single bargaining unit.

It is submitted that the oft-used designation in Germany of labor and management as *Sozialpartners*[182] is a myth. The labor sector clearly holds the trump card in this non-balance of labor and management powers. The late Vanderbilt Law Professor Paul Hartman often said in reference to corporate mismanagement, "That's no way to run a railroad," and in this case the railroad is powerless under Germany's structure that favors labor. Whether the *Bundestag*'s attempt to improve, at least in part, the manner of "running" not only railroads but also other industries in the more highly-unionized Germany will depend upon the *Bundesverfassungsgericht*'s interpretation of the new statute.

181 Mark Gruenberg, Peoples World (Mar. 7, 2013), accessible at http://peoplesworld.org/collective-bargaining-easier-in-germany

182 See Kronstein op. cit.