Recent Trends in Collective Bargaining in the Federal Republic of Germany

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The scope and effects of bargaining autonomy

IN ORDER TO UNDERSTAND the evolution of collective bargaining in the Federal Republic of Germany it may be useful first to consider the most important of the legal and constitutional provisions in this area. Collective bargaining between employers' and workers' associations occupies a particularly important place in the social and economic life of the country because the wide degree of autonomy in negotiation allows these associations a relatively free hand. Generally speaking, the only limits are set by the need to observe the interests of the public and the State and by certain inalienable rights of the individual citizen enshrined in the Federal Constitution. Article 9, paragraph 3, of the Federal Constitution, and the Collective Agreements Act, 1949 [2], endow employers' and workers' associations with far-reaching powers and latitude of action, corresponding fully to the requirements of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98), of the ILO, both ratified by the Federal Republic of Germany, the Collective Agreements Recommendation, 1951 (No. 91), of the ILO and the European Social Charter. Under the Collective Agreements Act the validity of a collective agreement is not conditional upon government approval. Although collective agreements must be communicated to the Federal Minister of Labour, neither this formality nor that of the registering of agreements is a condition for their effective operation. Similarly, the freedom of action of the contracting parties is not restricted

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[2] For the consolidated text, as amended up to 1969, see ILO: *Legislative Series*, 1969—Ger.F.R. 4.

by the establishment of minimum conditions of employment, since the relevant Act of 1952 [1] expressly recognises the precedence of collective agreements.

Since German statute law has nothing to say regarding the actual process of collective bargaining or the settlement of disputes arising in that connection, any rules in this respect have largely been worked out in the past twenty years by court decisions, mainly by the Federal Labour Court and the Federal Constitutional Court. Rulings of this kind are accordingly very important for relations between employers' and workers' associations.

The course of collective bargaining in recent years has raised new problems of substance and law with which the associations, the Government, legal experts and the courts are confronted. New and tougher forms of bargaining tactics and labour disputes have been seen to develop. Many established practices have been upset and need to be reconsidered. Positions that seemed to have been set for years have been called into question. There is increasing uncertainty in the relations between the social partners as well as in the relations between the associations on either side and their respective members. It is still impossible to say how or when this situation will be resolved.

The following observations are intended to give a brief but by no means complete outline of significant aspects and practices in the field of collective bargaining and industrial disputes in the Federal Republic.

The influence of the occupational associations

Collective bargaining and the conclusion of collective agreements in the Federal Republic are characterised by the fact that the trade unions are mainly organised at industry level. Each of the sixteen trade unions that together make up the German Confederation of Trade Unions (DGB) aims at covering a particular branch of activity (e.g. the chemical industry or commerce) and everyone employed in that branch, irrespective of the actual type of work performed. This means, for example, that the Metalworkers' Union includes not only metalworkers, both wage earners and salaried employees, but also masons, joiners and commercial and technical staff employed in this industry. The exception to this rule is the German Union of Salaried Employees (DAG) [2], whose membership is open to all salaried employees, whatever branch of the economy they are employed in. Consequently, the employer deals only with one union in respect of matters affecting wage earners, and with the same union plus the DAG in regard to salaried employees. Apart from strengthening these unions' bargaining power, this arrangement normally facilitates the course

[1] *Legislative Series*, 1952—Ger.F.R. 1.

[2] The DAG, however, is not affiliated to the German Confederation of Trade Unions.

of negotiations as well. In this respect there has been little change in recent years.[1]

Principal among the central organisations of the employers' and workers' associations are the Confederation of German Employers' Associations (BDA) and the German Confederation of Trade Unions (DGB). Neither of these normally acts as a contracting party in collective bargaining, and neither has ever yet included in its statutes any provision with binding effect on the bargaining activities of its individual affiliates. Naturally, however, it is common for consultation to take place between the central organisations and their affiliates as well as among individual member associations. One reason for this has been the desire to create and maintain a uniform general position in the negotiation of agreements involving comparable territorial, occupational and individual circumstances. For the same reason the DGB and the BDA have special departments concerned with collective bargaining matters from which their affiliates can obtain information and advice. The possibility for a central organisation to bring indirect influence to bear on its member associations exists in the provision contained in the statutes of the DGB empowering it to issue guidelines on direct action that are binding on its affiliates, and it has done so.

The central organisations have rendered substantial services to their affiliated associations through newspaper, radio and television publicity campaigns, some of them with very wide coverage. In addition they have organised polls and surveys through their economic and public information institutes. In some instances they have been able to strengthen the economic position of a member association—for instance, in the case of an affiliated trade union involved in an industrial dispute, by contributing to the strike fund, or, in the case of an affiliated firm, by arranging for risk-sharing among the undertakings affected or by supporting the strike-hit employer through the transfer, or alternatively the non-transfer, of orders, deliveries and so on.

Another way in which the central organisations have been able to play a more or less direct role is through occasional top-level meetings at which the representatives of both sides have come together to exchange views on matters of topical concern.

In some branches of activity there has been a preference for collective agreements covering specified areas rather than the whole of the country. But even where this has been the case the executive committee of the respective industrial trade union has retained certain powers of guidance over the local constituents in regard to the negotiation, signature or termination of regional agreements and the initiation and conduct of labour disputes.

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[1] Cf. E. G. Erdmann, Jr.: " Organisation and work of employers' associations in the Federal Republic of Germany ", in *International Labour Review*, Vol. LXXVIII, No. 6, Dec. 1958, pp. 533-551, and in particular pp. 536-540; and F. Lepinski: " The German trade union movement ", ibid., Vol. LXXIX, No. 1, Jan. 1959, pp. 57-78, and in particular pp. 66-67.

Deciding which trade union should be recognised as bargaining partner for a particular industry or undertaking has become a matter of increasing practical importance. This is due principally to the fact that technical and economic progress has caused firms to pursue new purposes or to engage either wholly or partly in operations that may make it difficult to determine to which branch they predominantly belong. This has been of special importance for the trade unions because most of them are, as indicated above, organised on industry lines.

Since the DAG covers all salaried employees in every branch of private enterprise and the public service, it is entitled to sit at the bargaining table alongside the other unions concerned, and in particular those affiliated to the DGB. It is common, particularly in the public service, for both of these central organisations to be signatories to a collective agreement, although separate agreements also exist.

In 1970 the Federal Labour Court issued a decision that has had a considerable impact on collective bargaining, whereby it ruled that each union's statutes would determine the question of competence for negotiation.

The question whether specific collective agreements should be sought for the whole of the country, or only for limited areas, such as particular Länder, smaller regions or individual firms was obviously a matter of top-level policy decision in the national organisation concerned. Agreements having a broader territorial and occupational coverage have normally fixed the limits for supplementary agreements of more restricted scope, but the local or Länder associations have had a reasonable say in the negotiations leading up to the signature of a more comprehensive agreement. In addition to laying down general provisions governing such matters as the conclusion and termination of the contract of employment, regular hours of work, or holidays with pay, it has become accepted practice for country- or industry-wide agreements to standardise occupational classifications, wage categories and other factors so that the regional agreements can then establish the appropriate earning schedules. This has produced a firm basis of action for the parties to supplementary agreements at regional or enterprise level.

As part of a move towards enterprise-level agreements, the trade unions have been endeavouring for some time to negotiate separate arrangements for firms already covered by a regional agreement. This is something quite different from the attempts by works councils, as distinct from trade unions, to by-pass collective agreements and settle certain matters direct with the employer; further reference will be made to this subject later on. As regards enterprise-level agreements, the trade unions have particularly in mind some large and powerful firms that pay rates well above those laid down in collective agreements, because regional collective agreements have generally tended to make things easier for the less powerful firms. The unions' primary concern has been to guarantee

continued high wage levels for the employees of the more powerful firms, but this policy is liable to jeopardise the smaller firm and the livelihood of those employed there. Even within the respective associations, attitudes towards separate agreements for individual undertakings tend to diverge. The principal misgiving expressed in this connection is that this tendency may undermine the position of employers and their associations as spokesmen for the whole industry, as well as the strength of the individual firm in its dealings with a union having a broader area of reference; this is seen as a threat to the theoretical parity of position and power which are normally regarded as a vital condition for autonomy in collective bargaining. Enterprise-level and local considerations might affect the interests of the community at large, which are balanced between the various regions and industries.

There are also legal problems, involving such aspects as the lawfulness and enforceability of clauses in regional agreements that authorise supplementary arrangements at the level of the undertaking. In the first part of 1970 a significant endeavour launched in this direction by a major union with specific reference to the rubber industry was thwarted primarily through the combined resistance of the firms concerned and their employers' association. In joining the association these firms had renounced their right to engage in negotiations or conclude collective agreements without the association's consent. In so doing they were guided by compelling tactical considerations as well as by feelings of solidarity with the other affiliated firms, but at the same time they were not prepared to empower the association to conclude separate agreements for the firms. In the event, the trade union did not force the matter to a dispute. Following further talks between the two sides it was agreed that the industry-level agreement for the whole of the country should be reinstated but that wage rates should in future be fixed not by a single national agreement but by regional agreements.

Collective agreements which, on the employers' side, cover individual undertakings are something quite different. These are not infrequent and, as of 31 March 1970, out of the roughly 20,000 collective agreements in force about one-third were at enterprise level, only a small number of these being of any importance for the rest of the economy. Most of these enterprise-level agreements concern employers who are outside the competent association and are therefore not bound by its negotiated agreements. Here again the principle of the industrial peace obligation inherent in any collective agreement is applicable to both sides. The most celebrated instance in this connection concerned a dispute which occurred in 1963 between the Federal German subsidiary of the Ford Motor Company, which did not belong to the employers' association, and the Metalworkers' Union. The union called a lawful strike against Ford because it refused to enter into an enterprise-level agreement proposed by the union. The collective agreement covering other firms in the industry in

the same area was still in force, and the parties to it were bound by its industrial peace clause. Fords then joined the employers' association, which meant that it was automatically covered by the agreement in question and was thereby protected by the industrial peace clause obliging the union to call off the strike.

Some observations are called for at this point regarding the application of collective agreements to employers or workers who are not automatically covered because they do not belong to one of the contracting associations. Any employer is free to apply the collective agreement appropriate to the industry and the locality to all of his employees, and this is often done. It is particularly common in times of labour shortage because workers cannot be recruited or retained if the wage rates remain below the contractual levels. The parties to a collective agreement cannot prevent its provisions from being applied to outsiders. Conversely, it is often in their interest to force non-affiliated employers to apply the provisions of an agreement, with the purpose of depriving such employers of the competitive advantage of paying lower wages, or alternatively of securing contractual advantages for members of the trade union concerned who would otherwise have no legal entitlement to them. Special statutory powers exist whereby the Government may in specified circumstances declare an agreement to be generally binding and thus extend its applicability also to outsiders. For this procedure to be put into force an appropriate request must be made by at least one of the parties to an agreement, and a committee composed of representatives of the respective central organisations must also give its approval. In recent years such requests have generally been made only in a small number of industries, and except in the case of the building industry they have related almost entirely to small territorial areas. But this procedure is becoming more widespread: there were 42 such requests in 1967, 59 in 1968, 120 in 1969, and 159 in 1970.

A particularly interesting agreement was concluded some time ago with a major undertaking which has branches in a number of different areas in the Federal Republic. It was agreed that the higher rates for the central factory should be paid in the other works as well, even if the collective agreement normally applicable where they were located provided for lower rates. This arrangement may have set the tone for a new policy approach which could result in a further reduction in regional differences in conditions of employment, especially in regard to wages and salaries.

Participation by outside bodies or persons in collective bargaining

Since the end of the Second World War the Government has not seen any reason to restrict the bargaining autonomy so jealously guarded by the employers' and workers' associations, and in particular to exert

direct influence or impose binding instructions. The Government has in fact repeatedly proclaimed its intention of further strengthening bargaining autonomy. While this relieves the two sides of any danger of forcible state intervention, it also places on them a heavy burden of public responsibility.

Neither side objects to the fact that the Government sees itself as entitled and obliged in its function of protecting public interests to give the organisations and authorities concerned its views on the present economic situation and probable developments, provided this is not felt to be a form of pressure.

The same applies to the annual reports on the over-all economic situation that have been submitted by government order since 1963 by a neutral expert council. The Government publishes these reports and transmits them to Parliament together with its own comments. The council's terms of reference are to report on any undesirable trends and to recommend ways of avoiding or overcoming them; its mandate obviously covers wage policy as well, but its reports are not supposed to make any recommendations respecting specific economic or social action.

In 1970 the Federal Minister of Labour and Social Affairs initiated a system of social policy talks at which problems are discussed with representatives of the trade unions, the employers' associations and social insurance institutes as well as economists. Here again there is no question of any direct influence being brought to bear on the two sides in regard to the provisions of collective agreements.

In 1966, when there was a temporary economic recession, legislation was enacted requiring the Government to formulate and interpret guidelines for maintaining or restoring economic stability through what was termed " concerted action " by the regional authorities, the trade unions and the employers' associations. This procedure has been repeated at irregular intervals as needed, particularly by means of talks between the Federal Minister of Economic Affairs and the associations concerned. Although the data produced in this way are not binding on the employers' associations or the trade unions, they can prove useful to them in the bargaining process, both in making matters clear to their members and in showing the foreseeable effects of their agreements on the economy and therefore on the whole nation. The Minister has described the process in the following terms: " The purpose of this ' concerted action ' is not to negotiate specific prices and wages; it is to promote understanding, and especially the realisation that there is a limit between the reasonable interests of individual groups and economic necessities. " At the meeting of 12 October 1970 the participants " agreed with the Minister that the talks within the framework of the ' concerted action ' procedure were designed to bring about collaboration among all concerned in order to combine stability with growth, by means of an exchange of information and opinions between the Government, the Federal Bank, employers,

trade unions and the council of experts regarding the general economic situation ".

So far the Government's role has been merely to address appeals to the two sides within the framework of the " concerted action " procedure, in Parliament and through public information media. The Government has expressed the hope that collective agreements will avoid endangering the economy, particularly through rising costs due to higher wage bills.

Not everywhere did the Government encounter the response it had anticipated [1], and when it found that its requests were not sufficiently heeded in wage negotiations, it issued urgent and strong appeals to the respective associations. It was not until the 21st Concerted Action Meeting on 4 June 1971 that the two central organisations came to a loose general arrangement laying the foundations for co-ordinated action to promote economic stability. The central organisations plan to set up a standing committee to examine profit and cost trends so that the same basic figures will be available as the point of departure in negotiations. They want to describe and clarify the economic situation and its anticipated evolution to their member associations, which have to conduct the actual negotiations. In recognition of their own responsibilities they want to bring it home to their members that the criterion for action should not be dictated by price and income expectations in a boom period but rather by the necessities of a phase of general economic consolidation. It remains to be seen to what extent the various associations will follow these admonitions in their bargaining procedure. Neither on the employers' side nor on the trade union side are the central organisations empowered to dictate policy to their member associations.

In the public service the Government is anxious to maintain some degree of uniformity, especially in regard to wage and salary groups and the relevant rates of remuneration. In this way it hopes to prevent trouble in any branch of the various administrations and public undertakings. Negotiations involving federal competence are conducted by the Minister of the Interior, with the participation of two bargaining bodies representing respectively all the Länder and all the municipalities in their capacity as employers. The railway and postal authorities each deal separately with their own trade unions but they consult the federal authorities. Public corporations generally join in the negotiations and subscribe to their results.

The actual workers whose conditions of work are under discussion have no right of direct participation in these meetings. They are represented by their organisations, to which they grant full powers in this respect through the act of joining the union and accepting its statutes;

[1] Although the Government had indicated that average wage increases of 7 to 8 per cent at the most would be tolerable, the wage levels negotiated in industry in June 1971 were on the average 16 per cent higher than in June 1970.

this means that they have really agreed to accept whatever results are forthcoming. But this has not prevented workers from availing themselves of the principles of internal democracy in order to state their personal views to the association and perhaps influence the line of conduct followed. The workers have often shown their own union and the employer exactly what they feel by voting for or against a move to begin or to end a strike.

In 1969 a number of wild-cat strikes, warning strikes and other forms of action in the metalworking industry clearly demonstrated to the employers and to the union concerned what the workers expected, but the effect was also felt in other industries as well as by the public at large. This behaviour went on in meetings after the collective agreement had been signed, and there were some quite vehement statements by union members and lower-level union officials.

It is only the members of the associations directly concerned who are entitled to participate in bargaining discussions. Workers who are covered by the negotiations but who are not union members, or who belong to a different union, have no say, officially at least. But they have quite often been able to play a part by joining a strike called by one of the competent organisations. If the proportion of the particular union's members in the workforce is fairly small, the decision of other workers either to join or to stay out of a strike can be of vital importance.

Reference should be made here to the efforts of some trade unions to secure advantages for their own members that are not granted to non-organised workers. Their desire is perfectly natural, although the unions affirm in other connections that they speak for all workers. In regard to the collective settlement of conditions of work, however, the unions consider it their primary responsibility to defend the material interests of their members, who expect appropriate representation in return for paying their dues. There have been several attempts to introduce a distinction in collective agreements as between workers belonging to the contracting union and those belonging to another organisation or to none at all. In a basic ruling given in 1967 the Federal Labour Court held any such distinction to be incompatible with the Federal Constitution.

In metalworking, agreements have been concluded to ensure a certain amount of freedom of action in the undertaking for union shop stewards and youth representatives and to protect them against reprisals on account of such action, where such protection is not already afforded by law.

The workers' interests in matters outside the scope of the undertaking are represented only by the trade unions. This is also true as regards negotiations and the conclusion of agreements in respect of a single undertaking. In the fixing of general conditions of work, including wage rates, collective agreements take precedence over plant-level agreements, so that there is no formal direct participation of other representa-

tives or spokesmen of the workers in the collective bargaining procedure. This applies in particular to works councils as elected by the employees under the Works Constitution Act, 1952 [1], and their individual members as such.

The Act limits the extent to which the works council, as distinct from the trade union, can negotiate with the individual employer regarding conditions of work and the conclusion of agreements between the two of them, but in practice the limits laid down have been exceeded. It is usual for these so-called plant-level agreements to cover such matters as normal hours of starting and finishing work, breaks, the time and place of payment of wages (remittances to workers' accounts in savings banks are becoming increasingly common), the establishment of the holiday schedule (which now frequently involves a collective shut-down of the whole works or of individual units), vocational training in the light of new statutory requirements, the administration of welfare facilities at plant or enterprise level, and internal regulations including workers' conduct. The last of these items covers such delicate subjects as clocking-in, checks to prevent filching, no-smoking rules, and fines for offenders.

Other matters that have been paid particular attention include the fixing of time and piece rates, the establishment of principles of remuneration, the introduction of new methods of remuneration, and to an increasing extent the evaluation of jobs newly created or radically altered as a result of rationalisation.

Wages and other conditions are not usually dealt with in enterprise-level agreements but rather in a collective agreement, this principle being followed in the interests of the respective associations; and it is rare for a collective agreement specifically to authorise supplementary enterprise-level arrangements on these matters. This clearly shows the desire to leave the collective settlement of conditions of work to the bargaining parties. Nevertheless, because such questions are not always covered by collective agreements, there has recently been an increase in the number of arrangements between individual employers and works councils designed to soften the hardships liable to affect older workers or long-service employees as a result of rationalisation, automation, production changes or mergers. There have been instances of comprehensive social plans providing for certain wage guarantees in the event of transfer to lower-paid jobs, retraining grants, or lump-sum compensation in the event of unavoidable redundancy.

Union shop stewards in undertakings (who may also be members of the works council or of the staff council in the public service) are not empowered by virtue of their status to participate in their respective unions' collective bargaining activities. Some who also belong to their union's negotiating committee for individual firms' collective agreements

[1] *Legislative Series*, 1952—Ger.F.R. 6.

have, however, had a considerable say, even after the conclusion of negotiations. Nor is there any reason why they should not offer their union useful hints about the feelings of the workers on the basis of their own experience and their close contacts with the firm's employees. On this basis they can advise on any changes they think should be introduced in the collective agreement; they can also say whether the workers, including those who are not union members or who belong to another union, would be willing to take action to support the union's claims or to vote in favour of the bargaining results obtained by the union. Employers are showing increasing willingness to recognise the status of these union shop stewards in the undertaking. Some collective agreements, especially in the metalworking industry, provide for the recognition and protection of such trade union representatives at plant level. It has sometimes proved difficult to establish a demarcation line between a worker's activity as a member of the works council or staff council, in which he is bound to observe strict neutrality even in regard to trade union matters, and his functions as the union shop steward, and there have even been occasional clashes in this connection.

Negotiating tactics

Collective bargaining tactics have become more sophisticated and tougher in the past twenty years, with a distinct hardening of positions in recent times. This has sometimes caused increasing difficulty for the individual association, especially when it has to take the interests of members in different categories into consideration, while bearing in mind the position of other associations and allowing for the fact that nowadays, as a result of the increasingly close links between the different branches of the economy, collective agreements have repercussions far beyond the particular industry concerned. The associations on either side have not always found it easy to arouse or maintain sympathy among the workers themselves and the officers in close contact with them, or among member firms, for the tactical and general economic considerations underlying the actions of their executive bodies. In the recent past the unions have not been able to take it for granted that the workers would be satisfied with what has been negotiated with the employers or achieved through conciliation, or that a vote on the negotiating committee's proposals would be favourable. Negotiating tactics have also been affected in some cases by more or less spontaneous action that cannot always be averted. On the employers' side this has taken the form of a refusal by individual firms to toe the line, either by accepting trade union demands that were still in dispute or by paying wages for working time lost through strikes. On the workers' side it has taken the form of wild-cat or warning strikes. The employers have not taken any action against the unions or the workers

involved, but where such events have occurred during a period of application of the contractual industrial peace obligation resulting from a collective agreement in force, they have reminded the unions of their obligation to dissuade the workers from taking such action.

In the normal course of negotiations the two sides generally agree finally on a set of provisions which the leaders of the bargaining teams then submit for approval to the competent committees of their respective organisations. If approval is forthcoming the procedure is formally concluded by having the text of the agreement set down in writing and signed by the authorised representatives, as required by law. The text is then deposited for entry in the register of collective agreements kept by the Federal Ministry of Labour and Social Affairs. This means that the individual members of the trade union or the employers' association concerned are not asked to endorse it, the leaders of the bargaining teams or the executives being fully empowered to act on their behalf. But if a negotiating committee decides that it cannot give its consent because it is not certain of finding majority support among the association's members, it submits the proposals to the membership for a vote, normally adding its own opinion, recommending either the acceptance or the rejection of the draft agreement or the proposed conciliation award. Then the proposals are considered to be approved by the workers' side unless at least 75 per cent of the members entitled to vote call for their rejection and in some cases for direct action as well. Voting is by secret ballot. A contracting union is not bound to follow a declaration of opinion in this respect by workers coming within the scope of such an agreement but not belonging to the union. It can happen that the vote by union members reaches the minimum prescribed under union rules but represents only the minority view in the workforce, as when the proportion of union members in the firm or the industry is relatively small.

Instances have become more frequent of trade unions having given notice of the cancellation of a collective agreement but not having said straight away what provisions they wanted instead, and particularly what wage and other claims they intended to submit. It was not until later, and sometimes when negotiations were already under way, that they advanced specific proposals, once they had tried to get the employers to say how far they were prepared to go.

In the metalworking and chemical industries, which are the pacesetters for the other branches of the economy in the field of collective agreements, there has recently been a tendency to get away from country-wide agreements in favour of agreements concluded at the Land level. This was not just a matter of district union officers wanting to assert their authority vis-à-vis their membership and the other side. It was also a question of bargaining tactics consisting of seeking out and dealing with a weaker opponent first. Another justification advanced was that contractual wage rates and thus actual earnings had not moved at the same

pace in different Länder, with substantial variations in some cases. The Metalworkers' Union also found that the circumstances were no longer such as to justify a uniform approach to the payment of additional allowances such as annual bonuses, Christmas bonuses or holiday bonuses. Nevertheless, the main claim by this union in the autumn of 1970 was the same in all of the Länder, namely a straight 15 per cent rise in wage rates. It has also been found that regional negotiations and settlements may confront the organisations concerned with difficulties of a kind that they do not encounter where there is national coverage.

In the meantime both sides have recognised the importance of securing public support for their bargaining tactics. They have made increasing use of interviews in the press, radio and television, and have recently taken to buying considerable space in major newspapers, often eliciting counter-attacks from the other side. The results of these propaganda campaigns have enabled them to adapt their future line of action in this running conflict according to the reactions of workers and employers, the general public, the newspapers, radio commentators, the Government, and economic authorities and institutes.

Up to now collective agreements have tended to be established for a fairly long period, especially master agreements dealing with general conditions such as hours of work, holidays or periods of notice. Two years or more remains a very common period of validity. Agreements governing joint arrangements such as supplementary old-age provident schemes are invariably contracted for a considerable period of time because otherwise they would be incapable of attaining their ends. So long as there was little danger that the rates laid down in wage or salary agreements would be rapidly outstripped by the development of the national economy or the industry or undertaking concerned, it was by no means unusual for the period of validity to be fixed at two years and almost always adhered to in practice. More recently, however, since the situation has started to evolve at an accelerating pace, leading to a more rapid growth of productivity, a rising cost of living and a tightening of the supply of manpower, some unions have pressed for shorter-term agreements. Their motives have been not only to catch up with wage rates in some undertakings going beyond the collectively agreed rates but also to prevent any discontent among members for whom the adjustment of earnings to higher prices or improved productivity has not been taking place quickly enough under long-term agreements.

The resulting uncertainty has caused concern on both sides. The employers have feared that their longer-range pricing systems would be undermined. The unions have not wanted to be caught off their guard by a repetition of the sort of wild-cat strike that occurred in the autumn of 1969.

At the same time the unions have not seen fit to ask that collective agreements should be of indefinite duration so that they would be subject

to immediate termination at any time and the obligation to respect industrial peace would no longer apply in practice at all. Any such development would also release employers from their obligations or make them less willing to enter into such agreements. In fact the whole system of collective bargaining would be threatened.

Other ways of overcoming these difficulties have therefore been discussed, and some measures have already been cautiously put into effect. The idea has been to introduce regulations permitting an immediate change in contractual wage rates or early amendment or renewal of a collective agreement by mutual consent. Although sliding scales linking wages to changes in the cost-of-living index have not yet been introduced into collective agreements, the parties to an agreement have occasionally contracted to get together for an exchange of views or for actual negotiations before the expiry of the current agreement if a particular index, generally for the cost of living but sometimes for productivity, changes to the extent specified by the parties. In some instances provision is made for early termination or expiry of the collective agreement in these circumstances.

One particular case is so unusual and significant as to call for separate mention. In April 1971 secret talks were held to establish a new collective agreement for the financially languishing and publicly subsidised Ruhr coal-mining industry, in contrast to the clamorous publicity that usually surrounds such negotiations on both sides and despite the fact that the existing agreement still had a fair time to go. A settlement was reached remarkably quickly, providing for substantial wage increases. Thanks to the unusual legal structure of the industry and of its principal undertaking, the trade union concerned plays a decisive role on the employers' side as well, a feature which does not fit in easily with the existing national system of bargaining autonomy and the nature of collective agreements. The employers' willingness to consent to an indisputably heavy extra financial burden was partly due to their expectation—based both on the law and on past experience—that they would not have to foot the bill themselves, because the State, meaning the community at large, would provide further subsidies. Shortly after the conclusion of these negotiations it was admitted that the undertaking had, within a period of two years, suffered losses amounting to DM 700 million which their creditors had to write off; a few weeks afterwards the undertaking had to ask the federal and Land authorities to stand surety for more than DM 900 million in order to obtain further credit.

The settlement reached may be held to mark the farthest extent of what can be accommodated in a genuine collective bargaining system as hitherto conceived in the Federal Republic of Germany, especially in view of the obligation incumbent upon both sides to use their supreme and jealously guarded right of bargaining autonomy strictly within the limits of their duty to respect the interests of the whole community.

Mediation and conciliation in collective disputes

There is no statutory provision in the Federal Republic for mediation prior to direct action affecting all or particular industries.[1] There have never been any cases of compulsory government arbitration, and this is not provided for in law either. Accordingly there is no means whereby the Government or one of its representatives, in the case of a collective dispute, can impose a binding decision, particularly one laying down conditions of employment, on all concerned against their will. Nor is there any legal basis for the Government to prohibit direct action or to defer it for a specified or unspecified number of days.

Voluntary mediation and conciliation have played an important role in the Federal Republic. The procedure may be freely chosen or it may be laid down in the relevant collective agreements. The employers' and workers' central organisations were soon at pains to promote voluntary conciliation machinery in order to avert serious disputes, and especially direct action, wherever they could. In so doing they were anxious to maintain the contractual arrangements and to avoid provoking the Government into imposing compulsory conciliation or arbitration or some other form of intervention if things came to a head.

On 7 September 1954 the BDA and the DGB agreed on a model conciliation procedure, which their respective affiliates were recommended to include in their collective conciliation agreements, with or without amendment.[2] Conciliation agreements of this kind abound, but only a handful are of any significance for the establishment of employment conditions in general or for the national economy. Among these are the conciliation agreements for the metalworking industry[3], the building industry, printing and allied trades, the chemical industry, and seaports and maritime transport. Such agreements are remarkable by their absence in the iron industry, coal mining, textiles, and the public service.

In recent years formal procedures have not always proved satisfactory in achieving the peaceful settlement of disputes. Sometimes one of the sides has rejected the conciliation board's findings, but in certain of these instances, and in other wage disputes with direct implications for the public, prominent independent personalities, mainly politicians, have managed to arrive at a settlement by unconventional means and so avert a clash. It has often been the federal or Land minister of labour or of economic affairs who has undertaken this task, naturally with the political consequences of any breakdown particularly in mind. In some cases the

[1] See H. C. Nipperdey: " The development of labour law in the Federal Republic of Germany since 1945 ", in *International Labour Review*, Vol. LXX, No. 1, July 1954, pp. 26-43, and No. 2, Aug. 1954, pp. 148-167.

[2] See *Industry and Labour* (Geneva, ILO), Vol. XIII, No. 3, 1 Feb. 1955, pp. 121-122.

[3] See *International Labour Review*, Vol. XC, No. 4, Oct. 1964, pp. 380-381.

associations involved in a dispute have requested this form of assistance, while in others the minister has himself intervened in view of the political or economic importance of the issue.

Direct action

Since there is no statutory law regulating the right of employers' and workers' organisations to engage in direct action, the onus has been laid on the judiciary and the Federal Labour Court in particular to derive this right from the Federal Constitution, especially from the right of association, and they have thereby had a decisive influence in determining the way in which such action should be conducted. The number of working days lost through strikes in the Federal Republic of Germany in the past ten years has, in fact, been relatively small.[1]

Collective agreements for the public service and for public institutions and utilities (hospitals, gas-works, water supply, etc.) can be concluded along the same lines as for private undertakings, so that the right to strike exists in principle there too, provided there is no danger of serious harm to the public. But major disputes have never yet occurred in this sector, although not so long ago there was a phase of working to rule in the postal services, and something of the same sort in the air traffic control service, the effects being to some extent comparable to those of a strike.

With the above exception, just about every group of employees has participated at some time in a strike movement, and they are normally entitled to take part in a lawful strike. This holds good equally for wage earners and salaried employees, whatever their grade, and even for university people, but can hardly be held to apply to top managers and certainly not to board members in undertakings governed by company law. Although borderline cases could well be difficult to decide no serious cases of dispute have yet been notified.

In order to rally their members' combative spirit in the event of a strike or a lock-out, both sides take more positive action than just threatening them with personal disadvantages under the association's statutes if they ignore a strike call or similar appeal. When members are on strike or locked out, their unions pay them strike money; over the years the rates of assistance have risen closer to net earning levels and in exceptional cases have drawn almost level. In certain circumstances the DGB's strike rules provide for financial assistance for unions heavily hit by strike payments. The employers have in turn begun to promote the idea of solidarity among their affiliated associations and member firms, and guidelines have been issued in this respect in a number of industries. The intention is that the firms concerned should in their mutual interest

[1] *Year book of labour statistics, 1970* (Geneva, ILO), p. 790.

help strike-hit undertakings to keep their losses down to a minimum and should refrain from aggravating the situation by taking over their orders. Members are asked not to steal away customers, transfer their own orders to other firms or employ workers from strike-hit firms. Employers' organisations now have support funds as well.

The right of public servants to strike has so far been denied by the Government, and this attitude has also been very largely upheld by public opinion, although recently certain views were expressed suggesting a possible change. There have been some impressive protest demonstrations by tax officials, teachers, policemen and regular soldiers. Apprentices also have taken part in strikes involving their undertakings and have been affected by lockouts. It is after all difficult to provide proper training in an establishment where there is a complete stoppage of work and the instructors are also absent.

Under the strike guidelines issued by the DGB, a strike involving the collective settlement of employment conditions (not a political strike) may be called by an affiliated union if a secret ballot shows at least 75 per cent of the members eligible to vote to be in favour of it. Identical or similar provisions were included in the statutes of most of the affiliated unions. More recently the statutes of some unions have been amended so as to authorise a strike without a prior vote in special circumstances.

Every union's statutes stipulate that the members then have to follow their executives' instructions. There is no union that recognises the right of non-members affected by a strike call to be heard.

Very recently there have been quite a few brief warning strikes without a preliminary vote among the members concerned.

According to a ruling by the Federal Labour Court a wild-cat strike is a collective stoppage of work by a group of employees where such stoppage has not been authorised in advance and initiated by a competent trade union, or subsequently approved and sponsored by it, or which is pursued against the wishes of that union.

Recently, collective bargaining has no longer been conducted by the two sides merely in the knowledge that they could always fall back on the traditional weapons of strike or lockout in the event of a breakdown. In some industries there has also been a greater or lesser element of pressure coming from the danger of an unofficial strike or of certain employers breaking rank. The pattern of negotiations, which had hardly ever strayed from the normal and predictable course, was disrupted in the autumn of 1969 by a series of wild-cat strikes in the metalworking industry, where the existence of current collective agreements involving an obligation to abstain from direct action did not deter workers in some undertakings from advancing claims without union endorsement or even against their union's wishes. Although these local or plant-level clashes were rapidly settled, partly because the employers concerned met the claims without delay and paid for lost time, it was clear that the calm and steady course

of negotiations had been interrupted by a new sort of unrest. These events also led writers on the subject to question the propriety of continuing to outlaw unofficial strikes.

In 1955 the Federal Labour Court confirmed that, alongside the lawful right of trade unions to call a strike, there also existed the right of employers and their organisations to impose a lockout as a legitimate form of direct action. In this way employers were given the possibility of terminating the employment relationship of striking employees without notice as a means of self-defence if the trade union, as normally happens in practice, had called the strike without observing the proper period of notice for termination of the employment relationship. It was understood that, once the dispute had been settled, and if no express provision had been made concerning reinstatement this should lie within the employer's fair discretion. This has in fact been the regular procedure, except that the trade unions have usually insisted that new collective agreements should guarantee the reinstatement of those concerned, thereby affording them general protection against any adverse effects.

One case that was of no consequence in itself (a lockout against croupiers on strike at a casino) nevertheless caused the Federal Labour Court to reconsider this question, which is of vital importance for the continuation of the employment relationship and the workers' willingness to strike. The Court's fundamental decision of 21 April 1971 was in some ways a reversal of its earlier position, because it ruled that lockouts should in principle, just like strikes, not terminate employment relationships but simply suspend their effects. But in order to ensure a fair balance of bargaining power, a lockout terminating the employment relationship may be allowed if there are aggravating circumstances, which may have to be confirmed by judicial inquiry. The normal procedure is for the court to recognise the right of the workers concerned to immediate reinstatement, with the possibility of judicial supervision of the employer's compliance. But in special cases the employer may be allowed to refuse reinstatement, particularly if a post no longer exists or has been given to someone else.

In recent years lockouts have only been imposed as a rejoinder to strikes already under way, and no cases have been notified of employers taking the first step.

The position of workers' representatives in the event of direct action

Members of works councils are certainly in the most difficult position if it comes to direct action. As workers they will generally be in favour of a strike designed to improve their own economic situation and will want to join it themselves. But as members of the works council they are bound to observe strict neutrality. The law requires the employer and the

works council to refrain from any action liable to jeopardise the operation of the undertaking or industrial peace; it specifically forbids them to engage in any direct action one against the other. But there is nothing to stop members of the works council from participating in a strike in their capacity as employees. Shop stewards in an undertaking will naturally be inclined to back a strike called by the union to which they belong, and union rules require them to give their support even if they do not personally approve of the strike or some lawful action proposed by the strike committee.

Workers serving on their undertaking's supervisory board [1] must not misuse this function in the event of direct action because they have the same obligations as the representatives of the shareholders in this respect. As employees, on the other hand, they can join a strike.

Interim injunctions

In some cases courts have responded to a plea from one of the parties by issuing an interim injunction forbidding certain forms of action. The infringements against which this protection was sought were connected not with the actual determination of the members' employment conditions but with such matters as violation of a statutory or contractual obligation to maintain industrial peace, failure to follow the agreed conciliation procedure, and so on. Where courts have provisionally banned direct action in such circumstances they have exerted a decisive influence on the relations between the two sides.

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[1] See Professor Wilhelm Herschel: " Employee representation in the Federal Republic of Germany ", in *International Labour Review*, Vol. LXIV, Nos. 2-3, Aug.-Sep. 1951, pp. 207-215.