

Fighting It Out in Court

After months of negotiations between Deutsche Bahn AG (German Rail) and the train drivers' union (GDL), a settlement finally seems to be in sight. This long, drawn-out conflict shows that wage disputes in Germany are becoming more aggressive and more likely to be fought out before the labor courts in much the same way as in the US. This trend could have unpleasant consequences for society as a whole, as **BRITTA REHDER** of the **MAX PLANCK INSTITUTE FOR THE STUDY OF SOCIETIES** shows in her analysis.

Few, if any, internal conflicts in 2007 caused tempers to flare as vehemently as the wage dispute between Deutsche Bahn AG and GDL, the train drivers' union. Two aspects in particular stand out: first, the hostility between the two sides who were ostensibly supposed to negotiate with one another; and second, the high degree of court intervention. In the public eye, the dispute was frequently reduced to an exercise in stubbornness, even to personal animosity between two vain men approaching retirement. The FRANKFURTER RUNDSCHAU newspaper even went so far as to describe the



In mid-November, train drivers paralyzed freight traffic for three days – as here, at Europe's largest railway yard in Maschen.

adversaries, Manfred Schell and Hartmut Mehdorn, as the “irritating bores of the year.” However, this interpretation underestimates the significance of the conflict. Far from being a comic sideshow, it signals a trend in German labor relations, the causes of which are primarily structural in nature.

The fact that political conflicts can be played out in a predominantly

hostile climate before the courts is a phenomenon we are all too familiar with from the US. It even has an American name: adversarial legalism. Political scientists from various European countries are currently studying the extent to which this judicialized style of conflict resolution is establishing itself in Europe and how this development can be explained. We at the Max Planck Insti-

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tute for the Study of Societies are also working on this issue. The following analysis presents some of the results of our research.

In the world of political science, the term adversarial legalism describes a specific style of policy-making and conflict resolution. Its most important identifying feature is the systematic use of the legal system as an alternate means of enforcing par-

ticular interests. In other words, it is an attempt by social groups, whether organized or otherwise, to assert their interests, not merely by political means, such as through lobbying, exerting influence over parliamentary legislative processes or even negotiating directly with the state, but rather by appealing to the courts, whether as an additional measure or as an alternative.

As a result, both courts and lawyers take on a central role in the political process. Under these circumstances, it becomes difficult to reach binding decisions or even to at least temporarily settle conflicts, since there is always an incentive for those with vested interests to switch from one arena to another – from the political to the legal system and back – in order to just possibly achieve a more attractive result. Consequently, political disputes can mark time for years, seemingly without any prospect of resolution.

TEN YEARS OF DISPUTE, LAWSUITS AND STRIKES

This is precisely what we have seen in the German Rail pay dispute. Management and the various trade unions have been in dispute over an independent wage agreement for train drivers for nearly 10 years, with continual involvement of the courts. The GDL has been fiercely critical of the pay policies of the larger rail workers' union Transnet for years, wanting instead to negotiate independently. The first strike in pursuit of this aim was in 2004. The employers' representatives and Transnet attempted to block such action through the courts. In response, the GDL went to the labor courts to fight for recognition as a union capable of negotiating its own pay agreements, and was successful.

Despite this, no positive negotiations took place. Deutsche Bahn management and Transnet aimed to

isolate the GDL politically. The latter, in turn, filed complaints over various agreements reached without its participation. In the summer of 2007, the employer's side went to court to protest the union's right to strike, but without success. In addition, there have been numerous petty lawsuits over procedural matters, such as whether the GDL's attorney should keep his fax machine permanently set to 'receive' so that notices could be served on time, or to what extent GDL members, in the event of a strike, could be called on in an emergency. As time went on, the conflict became increasingly antagonistic (adversarial). There was never a situation in which the parties were genuinely compelled to negotiate with one another, because there were no alternatives left to explore. The conflict became progressively more deeply embedded in the legal system (legalism) since, for at least one of the two adversaries, this held greater attraction than attempting a political solution.

In the US, where the phenomenon of the judicialized assertion of interests has been around for a long time, there has been much discussion among political scientists in recent years regarding its causes. The central explanation is that adversarial legalism occurs in areas in which the structures of the political system make it difficult to otherwise assert interests and obligatory standards, and where the legal system offers an alternative and attractive route.

In what areas is the American political system deficient? We Europeans perceive the US government through its foreign policy as highly capable of action, and the US president is generally accepted as the most powerful man in the world. Domestically, however, the situation is entirely different. The decision-making structures within the US political system are highly fragmented and

decentralized. Responsibilities are divided both horizontally and vertically, between various government bodies and between the federal government and the individual states. This structure creates situations that demand negotiation and requires a high degree of coordination. Moreover, in many policy areas, the Federal Supreme Court, the highest court of law in the US, is the only national-level body that can make a rule that is binding on the entire country. This is what makes the court so at-



The FRANKFURTER RUNDSCHAU newspaper bestowed the title of "irritating bores of the year" on Hartmut Mehdorn and Manfred Schell.

tractive to groups that wish to assert their own interests.

Excessive pluralism among parties and lobby groups also makes it difficult to assert interests by political means. Parties in the US play no great role outside of election campaigns. Their organizational structures tend to be loose, and party discipline slack. As a result, ideological differences are broad, making it difficult for party leaders to direct policy formulation. The same applies to the system of lobby groups. The number of competing micro-organizations is legion, while corporatism is absent. Thanks to

this hyper-pluralism, there is no institutionalized venue for the assertion of social interests. One small group or another is always dissatisfied and may attempt to enforce its interests through the courts. It need not be capable of winning a majority or fighting a battle, it just needs to win the case.

WHEN COURTS MAKE NEW LAW

However, defects in the political system can be bypassed by court action

only in areas where the legal system offers an attractive alternative means of asserting one's interests. Here, too, the US serves as a model. The US legal system is a common law system in which the courts not only apply the law but, through their judgments, make new law themselves. The courts are a de facto branch of government, which is why judicial office is regarded as a political appointment. Even the judges who preside over the lower courts are elected, with the party-political orientation of the candidates generally being transparent.

But it is not only the power of the

courts that makes them more attractive as a means to a political end. Many of the rules of procedure actually encourage citizens to go to court. One of these is the due process clause in the American constitution, which guarantees that no citizen shall be deprived of his or her life, liberty or property without a fair trial. In the course of American history, this rule has provided the basis for millions of lawsuits.

In addition, a class action allows organized interest groups or groups



Schell is seen here with attorney Ulrich Fischer, preparing for a court hearing.

of individuals to bring a collective suit that can be of benefit, for example, in matters of consumer protection. There is also another advantage in that the risk of losing is shared between several individuals. Employees may be reluctant to take their employers to court if they have to do it on their own, but they are more likely to do so if they have the support of their trade union or can join with other employees as part of a group.

And not least, there is a group of players who have a highly individual interest in going to court: the attorneys. Given the very lucrative, per-

formance-based system of fees, it is worthwhile for law firms to actively drag disputes into the legal system and adopt aggressive tactics in order to win. The legal profession is also seen as one reason why this strategy is spilling over into Europe. Multinational law firms of American origin are increasingly setting up shop in Europe and bringing their domestic litigation tactics with them.

How much of this is reflected in the German Rail conflict? Quite a lot. As in the case of the US political system, we are faced with fragmented decision-making on matters of pay policy and with an increasing degree of pluralism. It is generally the case that the state, or more accurately the government, has no central national role as a maker of pay policy – due to the constitutionally guaranteed autonomy in these matters that is enjoyed by the employers' and employees' associations.

HOMOGENOUS WAGE LEVELS – FEW CONFLICTS

This point was brought home to attentive observers and sorely-tried passengers night after night on the TV news: in answer to the question of when the government would finally put its foot down, Minister of Transport Wolfgang Tiefensee was forced to repeat the mantra that the government could do nothing.

Despite this, collective pay agreements in Germany have long exhibited an astonishingly homogenous wage level and have been accompanied by minimal disputes, because the associations that are party to them have exerted a controlling and coordinating influence over their members. However, this era is rapidly coming to an end, as exemplified by Deutsche Bahn AG. Following the deregulation of rail transportation, pay negotiations were effectively decentralized. There is no single industry-wide agreement. Instead, a vari-

ety of company-specific agreements exist alongside each other.

In this situation, the pluralism among trade unions and the competition between Transnet and GDL have become markedly more significant. This is also the case with other companies in the industry, such as AKN Eisenbahn AG in Schleswig-Holstein, and in the local public transportation sector, where the aggressive politics of the train drivers' union have lured numerous tram and bus drivers away from the services trade union ver.di. Against this background, the labor courts are becoming central players in the process of setting fixed standards.

In the legal system, too, there are parallels with the US, since German collective labor law has similarities with US common law. The corpus of statutory rules is small and the importance of case law is great. Particularly in the areas on which the Deutsche Bahn AG dispute was centered, namely the recognition of an employees' association as a trade union and the law relating to labor disputes, there is little if any legislation: these areas are subject almost exclusively to legal precedent, giving the labor courts a central role in mediating interests.

Even the procedural instruments exhibit certain parallels with the US. It is true that the possibility of a class action does not exist in Germany, and most political parties reject it for fear of it taking on American proportions. Nevertheless, German law recognizes parties that act collectively. This applies in particular in the field of labor law, which is why the legal system can be used by organized interests for their strategic purposes. The collective right of action is actually supplemented by the right of associations to take action, not just in matters pertaining to pay, but in other areas of law as well. ►

And what about the lawyers? A market has developed in the field of German labor law for specialized attorneys who see themselves primarily as independent, freelance entrepreneurs. This can be explained by the sharp rise in the number of non-trade-unionized employees who, in the event of conflict, rely on commercial providers of legal services. What is more, as the world of employment law becomes progressively more complex and beyond the capacity of trade union legal advisers

of the attorney for the GDL, who may not belong to a multinational outfit, but whose small law firm in Frankfurt has a perfect grasp of American tactics.

MORE AND MORE NEW PLAYERS ON THE STAGE

The proceedings before the labor court in Chemnitz alone took 12 hours as the attorney assaulted the court with hour-long speeches, insinuations of bias on the part of the professional judge and complaints

– of employers and employees – are steadily losing influence in the pay policy arena. Their most important tool, the industry-wide collective agreement, is eroding, and at the same time, more and more players are emerging, especially on the trade union side. The GDL is not the first craft union to act on its own account – pilots, doctors and air traffic controllers also have their own unions – and they are unlikely to be the last.

Second, the trade unions are engaged in a heated debate as to how

recipients on reduced pensions. This is likely to have contributed in no small measure to the government’s decision to withdraw the proposal.

CONCEALED POLITICAL DECISIONS

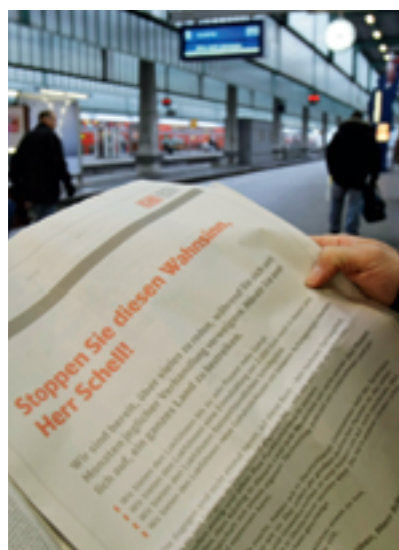
Third, this example is paralleled by similar developments in adjacent areas of politics. In the aftermath of the Hartz-IV legislation, there is evidence of a steadily rising wave of actions in the social courts that can be traced back to the fact that numerous dissatisfied social-democratic and trade union organizations at the local level – and in eastern Germany the far-right NPD as well – are offering legal advice for Hartz-IV recipients.

Corporatism – that is, the participation of various social groups in political decisions – and the self-regulation granted to associations have

been sharply criticized in Germany in recent years, including, and above all, with reference to the parties to collective pay agreements. However, the debate over adversarial legalism in the US and Europe has shown that restricting the corporatist assertion of interests leads to consequences that are out of step with the very theory of democracy. In the US, the concept of political decisions being made by the courts is accepted as a given fact. Judges are political players given democratic legitimacy by election. The courts’ decision-making processes are relatively transparent and very publicly documented.

In Germany, on the other hand, the transfer of political conflicts to the judicial sphere leads to uncertainty: it would be a mistake to believe that the courts here simply implement the law as they interpret it. Here, too, the

courts make political decisions, but the political interests behind them are not overt. The appointment of judges is largely devoid of transparency and has been subject to criticism for decades. Judges’ decisions are made in secret and are largely beyond parliamentary control. It is questionable whether this method of political decision-making and conflict resolution is any more compatible with democracy than corporatism.



Deutsche Bahn AG placed ads in the daily papers in an effort to persuade the GDL to back down. Back in August, Manfred Schell personally collected ballots for the pre-strike action.

to keep track of, the unions themselves are turning with increasing frequency to external experts.

Even though many law firms now pursue offensive marketing strategies, until the train drivers’ strike, it might have been supposed that aggressive American-style attorneys were absent from the German system. No win, no fee arrangements are prohibited, and even if they existed, an attorney out to make a fortune would never specialize in labor law. Nevertheless, in the rail dispute, the proceedings were dominated to some extent by the aggressive role of the attorneys. This is especially true

that the slightest omissions were in fact procedural errors. Both sides were highly aggressive in their use of formal legal techniques, with the result that the debate shifted away from a dispute over content to issues of the strategic interpretation of technicalities. Under such circumstances, the political result is ultimately decided by whichever lawyer is more legally shrewd.

I claimed at the outset that the Deutsche Bahn AG dispute was not so much a comic sideshow as a clearly developing trend. There are three reasons to believe that this is not an isolated case. First, the associations

to revitalize the labor movement and how to restore the ability of the unions to mobilize and fight. Their strategy is to follow the example of the American unions, for whom adversarial legalism is a key weapon in their armory. Just as German trade unions learn from their American colleagues, so the assertion of interests by legal process will acquire greater significance in Germany.

This is already plain to see. For example, the IG Metall union has already threatened to bring a mass suit against what it calls the compulsory retirement of Hartz-IV (unemployment and social security benefit) re-

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PHOTOS: AP (2)