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 adversaries, Manfred Schell and Hartmut Mehhorn, 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 Institute 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 particular 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.

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

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.

Ten Years of Dispute, Lawsuits and Strikes

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 protect the union’s right to strike, but without success. In addition, there have been numerous petty legal issues 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. At the same time, 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 corporatism is absent. Thanks to a variety of company-speciﬁc agreements that exist alongside each other. In this situation, the pluralism among trade unions and the competition between the two GDLs have become markedly more signiﬁcant. This is also the case with other companies in the industry, such as Deutsche Bahn AG on the S-Bahn, 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 a lack of any legislation: these areas are subject almost exclusively to legal precedent, giving the labor courts a central role in mediating interests.

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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, situations 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 to restore the ability of the professional judge and complaints 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 legitimism 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.