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THE NEW HUNGARIAN LABOR LAW: A MODEL FOR MODERN DISPUTE RESOLUTION

Leonard Bierman*

INTRODUCTION

The changes in Eastern Europe over the past two years are nothing short of remarkable,¹ with the People's Republic of Hungary at the forefront of economic and political reform.² In 1989, as part of its move to a non-socialistic economy, Hungary enacted a major reform of its labor laws focusing on workers' right to strike.³ The new Hungarian law [the Act] is particularly notable for its unique model of dispute resolution.⁴ The following presents a brief analysis of the Act, with an emphasis on its potential role as a model for modern dispute resolution.

I. HISTORICAL OVERVIEW

A. POLITICAL AND ECONOMIC REFORM

The thirty-two year rule of Hungarian leader Janos Kadar came to an end in May 1988.⁵ The end of the Kadar regime signaled the demise of centralized bureaucratic rule in Hungary.⁶ Free political elec-

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1. See generally Pierce, *The United States and the New Europe*, 89 CURRENT HIST. 353 (1990) (commenting that after the *annus mirabilis* of 1989 the United States needs to adopt a flexible, creative, and patient policy regarding Eastern Europe).

2. See generally MONEY, INCENTIVES, AND EFFICIENCY IN THE HUNGARIAN ECONOMIC REFORM (J. Brada & I. Dobozi eds. 1990) (collecting essays evaluating the rapid changes in the Hungarian economy).

3. See Law on the Right to Strike in Hungary, State Office for Labour and Wages (1989) [hereinafter 1989 Hungarian Labor Law] (copy on file at the offices of The American University Journal of International Law & Policy) (detailing revision in post-communist Hungary's labor laws).

4. See *infra* notes 97-114 and accompanying text (discussing the conciliation provisions of the 1989 Hungarian Labor Law).

5. See Volgyes, *Hungary: Dancing in the Shackles of the Past*, 88 CURRENT HIST. 381 (1989) (describing the Hungarian people's struggle to transform the state into a politically pluralist, economically capitalist society). Volgyes notes the desire of the Hungarian leaders to achieve a Western-style multi-party system by 1990. *Id.* at 382. The success of political transformation, however, depends largely on management of the economy, a task of enormous magnitude. *Id.* at 383.

6. See generally Volgyes, *supra* note 5 (examining the rise and fall of Kadar). Hungarians quickly removed evidence of Soviet influence, but the challenges accompanying the transformation to a free market economy have not been as easily solved. See Kenez, *Building a Democracy: Hungary at the Dawn of a New Era*, THE NEW

tions held in 1990, brought to power a three party, conservative, "middle of the road" government.⁷ Economic reform is also proceeding quickly with an independent central bank forming, and considerable foreign capital flowing into the country.⁸ Hungary is scheduled to become an associate member of the European Economic Community in 1992.⁹ The nation's move toward a market driven economy is clearly underway.¹⁰

B. LABOR REFORM

The new Hungarian law is clearly a part of the nation's overall post-Kadar reforms.¹¹ It appears that during the multi-decade Kadar regime the right to strike was an "anathema to the official doctrine."¹² As a substitute for the right to strike, the government gave trade union enterprise organizations certain veto powers over management decisions.¹³ But the goal of post-Kadar labor reforms is to replace this bureaucratic union enterprise organization approach with true collective bargaining through which workplace rules will be set forth in detailed collective agreements.¹⁴ In establishing the workers' right to strike and significant conciliation requirements, the 1989 Act embodies the nation's move toward true union power and bargaining rights.¹⁵

LEADER, Oct. 1-15, 1990, at 14 (noting that the biggest issue facing post-communist Hungary is the ailing economy). Moving towards democracy involves developing new political parties and encouraging new leaders. *See* Tokes, *Will the Party Survive? Hungary on the Way to Democracy*, THE NEW LEADER, Sept. 18, 1989, at 9 (evaluating what political entities will fill the vacuum left by the crumbling Hungarian Socialist Workers' Party (HWSP)).

7. *See* Fin. Times (London), Oct. 30, 1991, § III, at 2 (discussing encouraging signs of economic reform in Hungary).

8. *Id.* at 1.

9. *Id.*

10. *Id.*

11. *See generally* Halmos, *Political and Economic Reform and Labour Policy in Hungary*, 129 INT'L LAB. REV. 41, 42 (1990) (detailing policies promoted by the Hungarian National Assembly and their effects on the economy and labor force). Halmos is president of the State Office for Labour and Wages. *Id.* Hungarian labor policy states that each worker must have a job, be equipped with the skills and education to perform this job, earn sufficient income to ensure a socially acceptable standard of living, and try to reach the highest possible quality of working life. *Id.* at 54.

12. *See* H. HEINRICH, HUNGARY: POLITICS, ECONOMICS AND SOCIETY 153 (1986) (examining changes in the Hungarian way of life from the Hapsburgs to reforms of the communist regime).

13. *Id.*

14. *See* Halmos, *supra* note 11, at 53 (assessing the proposed new labor code's impact on employer-employee relations).

15. *See id.* (discussing the results of the proposed labor legislation and its focus on dispute resolution through compromise).

II. THE RIGHT TO STRIKE

A. VOLUNTARINESS

Section one of the 1989 Act sets forth the right of workers to take economic action "in order to secure their economic and social interests."¹⁶ This section also declares that employers and employees must "cooperate" in exercising the right to strike.¹⁷ The purpose of this provision is to underscore as "theoretically important" the fact that an obligation of employer/employee "cooperation" exists even during the exercise by workers of the right to strike.¹⁸ This notion of "ongoing cooperation" is, as will be developed below, highlighted in the law's novel impasse/dispute resolution mechanisms.

The concept of "voluntariness" is at the heart of section one of the Act.¹⁹ The law specifically states that participation in a strike is "voluntary," and that "nobody can be forced to participate in or to stay away from" a strike.²⁰ Thus, the Act appears to take a considerably different position on this subject than does the United States' National Labor Relations Act as interpreted by the Supreme Court in *NLRB v. Allis-Chalmers Manufacturing Co.*²¹

In *Allis-Chalmers*, the Supreme Court upheld the right of unions to fine members who crossed the union's picket line and went to work during an authorized strike against the employer.²² The Court held that the imposition of such fines by the union did not violate the rights of employees under section 7 of the National Labor Act to "refrain from" engaging in concerted activities, and so did not constitute an

16. 1989 Hungarian Labor Law, *supra* note 3, § 1.1.

17. *Id.* § 1.3.

18. *Id.* at 5-6.

19. *Id.* § 1.2.

20. *Id.*

21. 388 U.S. 175 (1967) (interpreting the National Labor Relations Act with respect to actions impinging on the voluntariness of a union member's crossing a strike line).

22. *Allis-Chalmers*, 388 U.S. at 195. In reaching the decision, the Court examined the application of the National Labor Relations Act §§ 7, 8(b)(1)(A), as amended, 29 U.S.C. §§ 157, 158(b)(1)(A). *Id.* at 176-77. Title 29, section 157 of the United States Code states that "[e]mployees shall have the right to . . . engage in concerted activities . . . and shall have the right to refrain from any such activities. . . ." 29 U.S.C. § 157 (1990). Title 29, section 158 of the United States Code states that "[i]t shall be unfair labor practice for a labor organization or its agents to restrain or coerce employees in the exercise of rights guaranteed in section 7 . . . [p]rovided that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158 (1990).

unfair labor practice under section 8(b)(1)(A).²³ Later Supreme Court cases have affirmed the Court's holding in *Allis-Chalmers*.²⁴

Under the new Hungarian law's strong language, a union that fines strike-breaking members can expect different treatment from the American union in *Allis-Chalmers*.²⁵ The legislative commentary on the Act states that "actions aimed at forcing the support of strikes are considered to be offenses against the voluntary principle."²⁶ Because fining union strike-breakers helps to force participation,²⁷ workers who choose not to participate in a strike cannot, under the Act, be disciplined for this action. The legal limits on union discipline in this context are considerable.

23. *Allis-Chalmers*, 388 U.S. at 194-95. *Allis-Chalmers* has been cited as an example of judicial legislation, where the Court strayed from the literal reading of the Taft-Hartley Act. See Note, *Section 8(b)(1)(A) From Allis-Chalmers to Pattern Makers' League: A Case Study in Judicial Legislation*, 74 CAL. L. REV. 1409 (1986) (concluding that the first 20 years of the Taft-Hartley Act proved more true to the Act's intent than the last twenty).

24. See, e.g., *NLRB v. Boeing Co.*, 412 U.S. 67 (1973) (holding that when called to determine whether a union's fining of its strike-breaking members constitutes an unfair labor practice, the National Labor Relations Board is not authorized to inquire into the reasonableness of the fine imposed). When the union discipline neither interferes with the employer-employee relationship, nor otherwise violates a policy of the National Labor Relations Act, Congress does not permit the Board to evaluate the fairness of union discipline meted out to protect the union's legitimate interest. *Id.* at 79. But see Craver, *The Boeing Decision: A Blow to Federalism, Individual Rights and Stare Decisis*, 122 U. PA. L. REV. 556 (1974) (challenging the Court's holding in the Boeing case as one ignoring the possibility that unreasonably large union fines for union strike-breakers will constitute an unfair labor practice, breaching § 8(b)(1)(A) of the National Labor Relations Act). Workers can, however, apparently escape such liability if they can effectively resign from the union. See *NLRB v. Granite State Bd.*, 409 U.S. 213 (1972) (ruling an unfair labor practice existed when a union fined members previously in good standing who resigned membership during a lawful strike authorized by members and then broke the strike). See also *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985) (confirming that a union may not fine a union member who resigns from a union during a lawful strike and then breaks the strike by returning to work). For an article challenging the view that *Pattern Makers* constituted a victory for individual choice over union coercion, see Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strike-breaking in the New Economy*, 63 N.Y.U.L. REV. 1268 (1988) (promoting the idea of mutual reliance and the presence of organic solidarity among workers in the United States). This already weakened solidarity is further threatened when employers hire strike-breakers. *Id.* at 1339.

25. See *infra* notes 26-27 and accompanying text (discussing fining of strike-breakers).

26. 1989 Hungarian Labor Law, *supra* note 3, at 5-6.

27. See generally Alteson, *Union Fines and Picket Lines: The NLRA and Union Disciplinary Power*, 17 UCLA L. REV. 681, 683 (1970) (discussing the assumption that collective bargaining and the effectiveness of unions will be compromised by recognizing the protection of individual employee interests).

B. REPLACEMENT WORKERS?

In the seminal 1938 case, *NLRB v. Mackay Radio and Telegraph Co.*,²⁸ the Supreme Court interpreted the National Labor Relations Act as generally permitting employers to hire permanent replacements for striking workers.²⁹ It did so even though the hiring of permanent replacements clearly impinges on the rights of employees under section 7 of the National Labor Relations Act to engage in "concerted activities."³⁰

The Supreme Court reasoned that the right of an employer to "protect and continue his business" overrules these employee rights.³¹ The AFL-CIO is, however, currently sponsoring legislation in the United States Congress to overrule the *Mackay* holding and amend the National Labor Relations Act to prohibit the hiring of permanent strike replacements by employers.³² Under the proposed legislation striking workers would all be able to get their jobs back at the end of a strike.³³ As the proposed act does not impinge on the employers' right to maintain business operations, employers would continue to be able to hire "temporary replacements," *i.e.*, replacements who will be fired once the strike is over.³⁴

The Act is unclear in its treatment of replacement workers, with neither the statutory language nor the relevant interpretative commentary directly addressing the subject. Nevertheless, language in section

28. 304 U.S. 333 (1938).

29. See 304 U.S. 333 (1938) (holding that although the National Labor Relations Act should not be construed to diminish in any way the right to strike, it does not follow that an employer conforming with the Act loses the power to continue operations by filling places left vacant by strikers). After a strike ends, the employer is not bound to make room for returning workers by dismissing the replacement workers. *Id.* at 345-46. It is not an unfair labor practice to either give replacements the option to keep their new jobs, or to allow returning strikers to fill only those positions currently open. *Id.* at 346.

30. See generally Weiler, *Striking a New Balance: Freedom of Contract and the Prospect for Union Representation*, 98 HARV. L. REV. 351, 391 (1984) (recording the hurdles unions face to form an effective first collective bargaining contract with management and to establish the union's legitimacy within a plant). Even though promoting the idea that free collective bargaining is the most suitable method of establishing the employment contract, Weiler notes that the collective bargaining process is flawed because the process hampers the waging of an effective first strike to achieve a profitable first contract. *Id.* at 352. An employer's ability to hire permanent replacements has an obvious chilling effect on the workers exercising their statutory right to engage in "concerted activities." *Id.* at 390.

31. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. at 345.

32. See S. REP. NO. 2112, 101st Cong., 2d Sess. (1990) (proposing to amend the National Labor Relations Act by prohibiting employers from offering status of permanent replacement to individuals willing to work during a labor dispute).

33. *Id.*

34. *Id.*

one of the new law which prohibits "coercive measures" aimed at "finishing the strike"³⁵ would seem, at the very least, to outlaw the hiring of permanent strike replacements as currently permitted in the United States under the *Mackay* doctrine. This interpretation is particularly compelling because the new statute emphasizes that "coercive measures" "cannot be used against workers" who are participating in legal strikes.³⁶ It would seem reasonable to view the permanent replacement of striking workers as a "coercive measure."

C. SYMPATHY STRIKES

"Sympathy strikes," strikes by non-striking workers in sympathy with another strike, are legally protected activities under the United States' National Labor Relations Act.³⁷ The National Labor Relations Board and the courts determined that employees who honor a picket line are accorded the same rights as employees engaged in the primary strike.³⁸ Local unions can sanction sympathy strikes and they can also waive the right of members to engage in a sympathy action by entering a collective bargaining agreement with an employer.³⁹

The right of employees to engage in sympathy strikes is a right which is specifically emphasized and protected in the new Hungarian law.⁴⁰ Indeed, the new statute refers to such strikes as "solidarity strikes" in recognition of the special role strikes of this kind play in establishing solidarity within the trade union movement.⁴¹ While noting the importance of solidarity strikes, the Act also recognizes the significant deleterious impact such strikes can have on employers.⁴² Thus, in a significant departure from the approach taken under United States labor laws, the new Hungarian law mandates that sympathy strikes

35. 1989 Hungarian Labor Law, *supra* note 3, § 1.2.

36. *Id.*

37. *Butterworth-Manning-Ashmore Mortuary v. Local 783, IBT*, 270 NLRB 1014 (1984) (noting that the Board has long recognized that an employee who participates in a sympathy strike engages in conduct which is protected).

38. *See, e.g., NLRB v. Southern Greyhound Lines*, 426 F.2d 1299, 1301 (5th Cir. 1970) (ruling that a non-union employee who refused to cross a picket line remained an employee entitled to reemployment when the strike ended unless the employer had a legitimate business reason to dismiss her).

39. *See NLRB v. Rockaway News Supply Co.*, 345 U.S. 71, 80 (1953) (holding that discovery of an invalid union-security clause does not warrant setting aside an entire employment contract when it contained a separability clause).

40. 1989 Hungarian Labor Law, *supra* note 3, § 1.4.

41. *Id.*

42. *Id.* at 6.

cannot be sanctioned by local unions.⁴³ Under the Act, only parent national unions can initiate sympathy strikes.

According to legislative commentary, the idea is that by requiring the imprimatur of national unions before sympathy actions can be lawfully commenced, possible "wildcat" strike damage to employers will be limited.⁴⁴ Parent national unions are not, however, required to submit sympathy disputes to conciliation procedures under the law.⁴⁵

III. ILLEGAL STRIKES

A. NO-STRIKE CLAUSES

Most collective bargaining agreements in the United States have both grievance arbitration clauses and no-strike clauses with each of these clauses being viewed as the *quid pro quo* of the other.⁴⁶ Consequently, if an employer agrees to submit all contractual disputes to a grievance arbitration process during the term of a labor contract, the union, in turn, agrees not to strike over such issues during the contract's term.⁴⁷ The precise legal parameters and enforceability of labor contract no-strike clauses have been one of the most controversial issues in United States labor relations,⁴⁸ and have occupied a considerable amount of the time of the Supreme Court.⁴⁹

43. *Id.* § 1.4.

44. *Id.* at 6.

45. *Id.* § 1.4.

46. *See generally* *Boys Markets v. Clerks Union*, 398 U.S. 235, 247-48 (1969) (finding that in the particular facts of this case, the Norris-LaGuardia Act does not bar the granting of injunctive relief); *Local 174 Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962) (upholding an order to end a union strike based on grievances covered by a collective bargaining agreement, a strike which disregarded the agreement's compulsory arbitration provision).

47. *See* *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368 (1974) (finding that when union and management pledge to a compulsory arbitration agreement covering the union's strike grounds, a district court may enforce the agreement and enjoin the strike).

48. *See generally* Gould, *On Labor Injunction Pending Arbitration: Recasting Buffalo Forge*, 30 STAN. L. REV. 533 (1978) (criticizing the holding in *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 404 (1976), which forbids a district court's enjoining a sympathy strike pending an arbitrator's decision as to whether the strike is forbidden by the collective bargaining agreement's no-strike clause); Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 636 (1973) (attempting to develop a definitive theory of the rights created by a collective bargaining agreement). In an exhaustive account, Feller examines both the legal and the practical applications of collective bargaining. *Id.* at 655.

49. *See, e.g.*, *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976) (finding no authority under the Norris-LaGuardia Act to enjoin a sympathy strike pending the arbitrator's decision as to whether the no-strike clause forbade such action). Section 4 of the Norris-LaGuardia Act provides in part:

The new Hungarian labor law deals much more directly with this issue. The law labels any strike "organized during the effective period of the collective agreement in order to change the agreement" as "illegal."⁵⁰ Thus, the Act imposes a statutory no-strike obligation on unions with respect to strikes addressing contractual provisions during a labor contract's term. The Hungarian Labor Courts have jurisdiction over violations of this statutory provision, and they have up to five days to render a decision.⁵¹

The approach in the new Hungarian law differs considerably from the approach taken by the United States. In Hungary, the duty not to strike during the term of a labor contract is imposed directly on unions by national legislation,⁵² and is directly enforceable on an expeditious basis in federal court.⁵³ In the United States, however, the no-strike obligation of unions is viewed as a distinctly independent obligation,⁵⁴ and is not completely coterminous with the contract's grievance procedures.⁵⁵ This view of the union no-strike duty as an "independent" obligation is one which has commanded considerable scholarly attention in the United States,⁵⁶ even though such a view has not generally been adopted by the courts.⁵⁷

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute . . . from . . . ceasing or refusing to perform any work or to remain in any relation of employment.

29 U.S.C. § 104 (1985). *See also* *Jacksonville Bulk Terminals v. ILA*, 457 U.S. 702 (1982) (ruling that the Norris-LaGuardia's policy against enjoining labor disputes pending the results of arbitration could include a politically motivated work stoppage).

50. 1989 Hungarian Labor Law, *supra* note 3, § 3.1(d).

51. *Id.* §§ 5.1, 5.2.

52. *Id.* § 3.1(d) (stating that a strike is illegal if organized during any period covered by the collective agreement).

53. *Id.* § 5. When more than one court has jurisdiction, the Court of Labor in Budapest is authorized to decide the case. *Id.* The proceedings are non-legal; no trial is held but evidence can be ordered upon the court's request. *Id.*

54. *See Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 382 (1974) (explaining that although a no-strike obligation is usually linked with an arbitration agreement, each provision depends on the express intent of the contracting parties).

55. *Id.* Absent an express intent by the contracting parties, however, a no-strike obligation and arbitration agreement are construed as coterminous. *Id.*

56. *See Gould*, *supra* note 48, at 548 (contending that limiting the enforcement of no-strike clauses to situations when the strike concerns an arbitrable dispute has no basis in federal labor policy or statutory law); Cantor, *Buffalo Forge and Injunctions Against Employer Breaches of Collective Bargaining Agreements*, 1980 Wisc. L. Rev. 247, 248-61 (evaluating arguments for and against resolution of employer efforts to enjoin breaches of no-strike clauses by unions).

57. *See, e.g., Delaware Coca-Cola Bottling Co. v. General Teamsters Local 326*, 624 F.2d 1182, 1185 (3d Cir. 1980) (holding that a union's no-strike clause may be implied from the existence of an arbitration clause); *Gateway Coal Co. v. United Mine*

B. PUBLIC EMPLOYEE STRIKES

The new Hungarian law clearly proscribes strikes by various groups of public employees including military forces, police, and court employees.⁵⁸ Other public employees are given the right to strike only by way of special agreement between the Council of Ministers and the given trade union.⁵⁹ Legislative commentary makes clear that absent such agreement no strikes by these employees can be lawfully initiated.⁶⁰

The Act generally parallels United States law on the public employee strike issue. Public employees in the United States generally do not have the right to strike,⁶¹ although some states have granted non-essential public employees (employees deemed not essential to the provision of mandatory public services) a limited right to strike.⁶² One problem some United States governmental entities have, however, is the effective enforcement of no-strike prohibitions on public employees,⁶³ leading some observers to point to an evolving *de facto* right of public employees to strike.⁶⁴ The expedited Labor Court enforcement procedures set forth in the new Hungarian statute would appear to obviate the emergence of any problems of this kind.⁶⁵

Workers, 414 U.S. 368 (1974) (concluding that a no-strike obligation and an arbitration agreement are coterminous absent express intent by the contracting parties to the contrary); *United States Steel Corp. v. United Mine Workers*, 548 F.2d 67, 72 (3d Cir. 1976), *cert. denied*, 431 U.S. 968 (1977) (determining that absent an express no-strike clause, a union's duty not to strike depends on whether the dispute at issue is arbitrable).

58. 1989 Hungarian Labor Law, *supra* note 3, § 3.2.

59. *Id.*

60. *Id.* at 7.

61. *See, e.g., School Comm. v. Burlington Educators Ass'n*, 7 Mass. App. Div. 41, 385 N.E.2d 1014, 1018 (1979) (holding that strikes by public employees are illegal); *St. Louis Teachers Ass'n v. Board of Education*, 544 S.W.2d 573, 575 (Mo. 1976) (concluding that strikes by public employees in furtherance of contract demands are statutorily prohibited); *Nichols v. Bolding*, 291 Ala. 50, 277 So. 2d 868, 871-72 (1973) (recognizing that states have the right to prohibit strikes).

62. *See* ALASKA STAT. § 23.40.200(a) (1990) (discussing three classes of public employees and their corresponding right to strike in accord with the services they perform); MINN. STAT. ANN. § 179A.18 (West Supp. 1992) (identifying several circumstances that must exist before nonessential, nonmanagerial employees may strike).

63. *See* Note, *The Emerging Right to Strike and Suggestions for Statutory Reform*, 9 RUT.-CAM. L.J. 733 (1978) (noting that despite the ban on public employee strikes in most American jurisdictions, the number of such strikes has increased drastically in recent years).

64. Bernstein, *Alternatives to the Strike in Public Labor Relations*, 85 HARV. L. REV. 459, 463 (1971).

65. *See* Hungarian Labor Law, *supra* note 3, § 5.2 (stating that the Labor Court has five days to decide whether the strike is illegal).

C. OTHER STRIKES

Various other types of strikes are also prohibited under the Act. The statute specifically prohibits strikes which would "directly and seriously threaten human life, health, security, and environment or hinder the prevention of elementary damage."⁶⁶ Legislative commentary implies that this provision would outlaw strikes by health-care workers at hospitals, as well as strikes by engineers which would hinder "flood protection" or otherwise obstruct the "prevention of elementary damage."⁶⁷ The precise parameters of this provision, however, are quite unclear and will have to be worked out by the Hungarian Labor Courts.

IV. RIGHTS OF STRIKERS

A. "EMPLOYEE" STATUS

Lawful strikers clearly retain their status as "employees" under the new Hungarian law,⁶⁸ just as such strikers do in the United States under section 2(3) of the National Labor Relations Act.⁶⁹ But the Hungarian law seems to go further than United States law on this point. The Hungarian law directly states that "no disadvantageous measures can be applied against the employee" as a consequence of his or her strike action.⁷⁰

The Act also states that aside from compensation and benefits, "rights originating from employment are due to workers participating" in a legal strike.⁷¹ Legislative commentary makes clear that time spent participating in a legal strike is thus part of the employee's "period of service."⁷²

In the United States, employers are generally permitted to distinguish between a lawfully striking employee's "seniority" and "service."⁷³ Because lawful strikers are still employees under the National Labor Relations Act they must continue to accrue their seniority, or the time elapsed from their date of hire.⁷⁴ On the other hand, employers may stop the accrual of a striker's net credited service during a

66. *Id.* § 3.3.

67. *Id.* at 7.

68. *Id.* § 6.1.

69. 29 U.S.C. § 152(3) (1990).

70. 1989 Hungarian Labor Law, *supra* note 3, § 6.1.

71. *Id.* § 6.2.

72. *Id.* at 9.

73. C. PERRY, A. KRAMER & T. SCHNEIDER, OPERATION DURING STRIKES 18 (1982).

74. *Id.*

strike,⁷⁵ and it is such service which is generally used by employers to determine entitlement to pensions, length of vacations, termination pay, and various other benefits.⁷⁶ Under the new Hungarian law, though, employers will apparently not be able to distinguish between seniority and service in this manner — employee service will continue to be credited even during a strike.⁷⁷

B. UNEMPLOYMENT, WELFARE, AND OTHER SOCIAL INSURANCE BENEFITS

The issue of granting or not granting unemployment compensation and welfare benefits is one of the most controversial aspects of United States labor law.⁷⁸ While a couple of states specifically permit strikers to receive unemployment compensation benefits,⁷⁹ numerous states only permit strikers to receive such benefits under limited circumstances.⁸⁰ In *New York Telephone Co. v. New York State Department of Labor*,⁸¹ the Supreme Court held that state regulation of this area is not preempted by federal labor laws.⁸² Since 1981, striking employees have not been able to register for food stamps,⁸³ but other welfare and relief funds are still available to striking workers.⁸⁴

The new Hungarian law appears to take a somewhat more liberal tack with respect to the rights of lawful strikers to social insurance benefits, although the precise parameters of the new law are unclear. The Act and its commentary state that lawfully striking employees are considered insured for social insurance regulation purposes, and are entitled to Hungarian family allowances.⁸⁵ Other benefits, such as sick leave, however, are not afforded to Hungarian strikers.⁸⁶

75. *Id.*

76. *Id.*

77. 1989 Hungarian Labor Law, *supra* note 3, § 6.

78. See Haggart, *Unemployment Compensation During Labor Disputes*, 37 NEB. L. REV. 668 (analyzing the propriety of providing unemployment compensation to strikers); Comment, *Welfare for Strikers: ITT v. Minter*, 39 U. CHI. L. REV. 79, 81 (1971) (examining the conflict between the purposes of the NLRA and welfare legislation).

79. C. PERRY, *supra* note 73, at 20-22.

80. *Id.*

81. 440 U.S. 519 (1979).

82. *Id.* at 540 (concluding that although federal law sometimes requires the preemption of state law, Congress did not intend for the NLRA to deny the states power to provide unemployment benefits).

83. C. PERRY, *supra* note 73, at 22-23.

84. *Id.*

85. 1989 Hungarian Labor Law, *supra* note 3, at 9.

86. *Id.* Sick pay is not granted to Hungarian strikers because during the strike period there is no loss of earnings. *Id.*

V. DISPUTE RESOLUTION

A. OVERVIEW

The Act's most unique feature is its dispute resolution mechanism. The statute emphasizes conciliation. The conciliation envisioned, however, is not the traditional mediation/conciliation practiced in the United States by the Federal Mediation and Conciliation Service, the various public employment relations boards, or other agencies.⁸⁷ Instead, the Act's conciliation is really more like a factual inquiry and as such, may serve as a useful paradigm for dispute resolution reform in the United States.⁸⁸ Another fascinating innovation in the new Hungarian law is its limited sanction of the mini-strike.⁸⁹

B. THE MINI-STRIKE

According to the Act a union cannot lawfully engage in a full-scale strike prior to a seven day conciliation period.⁹⁰ During this conciliation period, however, the Act does permit one mini-strike which can last no longer than two hours.⁹¹ Statutory commentary states that the idea behind permitting this mini-strike is one of "promoting agreement."⁹² The theory is that by way of this mini-strike, the union can telegraph to the employer the seriousness of its concerns and its willingness to strike over them; little concrete damage can be done to either side during such a limited period. The future effectiveness of this technique will be of considerable empirical interest.

One reason this development will be so interesting is that prominent scholars have long advocated the possible implementation of a similar approach in the United States,⁹³ particularly in the public sector.⁹⁴ The

87. See Gould, *Public Employment: Mediation, Fact Finding and Arbitration*, 55 A.B.A.J. 835, 836 (1969) (stating that the Federal Mediation Council Service provides expert assistance in the private sector while *ad hoc* mediators or full-time Labor Relations Board staffers are used in the public sector).

88. See Bierman, *Factfinding: Finding the Public Interest*, 9 RUT.-CAM. L.J. 667, 676-82 (1978) (examining the viability of factfinding as a public sector dispute resolution process and issues of who should bear the costs associated with factfinding).

89. 1989 Hungarian Labor Law, *supra* note 3, § 2.3.

90. *Id.* § 2.1(a). A strike may be initiated even if the conciliation period did not take place, however, as long as the initiator of the strike is not responsible for the lack of conciliation. *Id.* § 2.1(b).

91. *Id.* § 2.3.

92. *Id.* at 6.

93. See McCalmont, *The Semi-Strike*, 15 IND. & LAB. REL. REV. 191, 192-98 (1962) (discussing the practicality, flexibility and advantages of the first "semi-strike" occurring in the United States); Marshall & Marshall, *Non-stoppage Strike Proposals — A Critique*, 7 LAB. L.J. 299, 299, 304 (1956) (comparing various nonstoppage and

mini-strike gives employees a strong voice outlet⁹⁵ while avoiding, particularly in the public sector (or in essential industry/national emergency type situations), undue harm and disruption.⁹⁶ In this context, the developments in Hungary will be worthy of close scrutiny.

C. CONCILIATION

In the United States, three types of dispute resolution procedures have generally evolved as ways of resolving labor impasses. These procedures are: mediation/conciliation, interest arbitration, and factfinding.⁹⁷ Mediation or conciliation is usually the first step in an attempt to resolve a labor impasse and usually involves the appointment of a neutral person who informally tries to bring about an agreement through compromise.⁹⁸ Interest arbitration, on the other hand, is the final resolution of an impasse by an impartial individual acting in a quasi-judicial role who imposes a solution on the parties.⁹⁹ The third procedure, factfinding, is something of a hybrid of both mediation/conciliation and interest arbitration.¹⁰⁰ Factfinders go beyond conciliation/mediation and actually investigate the dispute and make factual determinations.¹⁰¹ Recommendations and determinations by factfinders are not binding, and the ultimate goal of the factfinding process is to encourage voluntary settlement by the parties.¹⁰²

statutory strike proposals which would allow continuation of the labor-management conflict while abating cost to the public).

94. See Bernstein, *supra* note 64, at 470-71 (suggesting that implementation of a nonstoppage strike system would be advantageous to both employers and employees).

95. See R. FREEMAN & J. MEDOFF, *WHAT DO UNIONS DO?* 217-20 (1984) (concluding that even though a strike is costly to parties directly involved, the economy is affected relatively little in terms of lost output).

96. See Marcear & Musgrave, *Strikes in Essential Industries: A Way Out*, 27 HARV. BUS. REV. 287, 292 (1949) (explaining that statutory strikes lead to an absence of public pressure to conclude the dispute because the public is not inconvenienced since production continues).

97. See Gould, *supra* note 87, at 836 (noting that of the three approaches to impasse resolution, mediation is the most reliable).

98. See Armbrust, *Impasse Resolution Procedures in Public Employment Negotiations*, 8 URB. LAW. 449, 450 (1976) (stating that mediation is the most reliable and common resolution procedure because it is the most effective means by which to establish viable and practical public employee labor relations).

99. See Coughlin & Rader, *Right to Strike and Compulsory Arbitration: Panacea or Placebo?*, 58 MARQ. L. REV. 205, 207 n.6 (1975) (explaining that interest arbitration differs from grievance arbitration because interest arbitration involves impasse in the bargaining process of new contract terms, rather than a dispute arising under the existing labor contract which involves grievance arbitration).

100. Bierman, *supra* note 88, at 668.

101. *Id.*

102. *Id.* at 668-69.

The new Hungarian labor law mandates that seven days of conciliation must occur before a union can lawfully go on strike,¹⁰³ and refers to the Hungarian Labor Code of 1967 for further explication of what such conciliation entails.¹⁰⁴ The type of conciliation referred to in the 1967 Hungarian statute,¹⁰⁵ however, is not consistent with the United States' concepts of conciliation/mediation.

Under the 1967 Hungarian law, labor and management each appoint one representative to a conciliation board, and the members of the board then elect a chairman.¹⁰⁶ A governmental representative gets to sit on the board without a vote.¹⁰⁷ The conciliation board is statutorily instructed to "mediate between the parties" and to attempt to obtain their voluntary agreement to end the dispute.¹⁰⁸ To this end, the board is empowered to rely on experts and witnesses.¹⁰⁹ The board cannot, however, make binding decisions unless the parties "by written declaration, submitted themselves thereto in advance."¹¹⁰

Thus, it seems that the conciliation process spelled out under the Hungarian law is really more or less one of factfinding with the addition that the conciliation board can engage in binding interest arbitration if the parties so agree. This view of the conciliation process as enunciated in the 1967 law appears to be supported by the statutory language in section 4(2) of the present Act.¹¹¹ This section limits the right of unions to strike in certain critical industries such as public transportation and telecommunication, and provides that the right to strike can be exercised in such industries only if "it does not restrain the performance of still satisfactory services."¹¹² The statute then states that the determination of whether such "restraint of services" will occur is the subject of the "conciliatory meetings preceding the strike."¹¹³ It is thus up to the conciliation board to make factual determinations regarding the possible lawfulness of a strike. This obviously is not traditional conciliation — at a minimum it is factfinding.

103. 1989 Hungarian Labor Law, *supra* note 3, § 2.1(a).

104. *Id.*

105. Hungarian Labor Code, Act II of 1967.

106. *Id.* § 66/A(2).

107. *Id.*

108. *Id.* § 66/A(4).

109. *Id.* § 66/A(3).

110. *Id.* § 66/A(5).

111. *See* 1989 Hungarian Labor Law, *supra* note 3, § 4.2 (stating that conciliatory meetings before the strike determine the extent and conditions where the right to strike may be exercised).

112. *Id.*

113. *Id.*

The new Hungarian law's emphasis on factfinding is potentially a very valuable experiment in the use of a dual impasse resolution technique.¹¹⁴ Imposing a solution on the parties by way of interest arbitration may exacerbate future relations between the parties, while traditional mediation/conciliation is sometimes inadequate. Factfinding can indeed be a very useful dispute resolution technique, and Hungary portends to be a fascinating laboratory where its effectiveness can be studied.

CONCLUSION

A new day is dawning in Eastern Europe, and Hungary has been at the vanguard of reform. Its new labor law focusing on the right of workers to take concerted economic action is a fascinating document, and one which is very much a part and parcel of the nation's post-Kadar reforms. The rights that the Act affords workers are broader than those currently given workers in the United States. These rights, however, are in many respects similar to those that the AFL-CIO proposes to Congress in its attempts at labor law reform. The Act is extremely innovative in many respects, including for example, provisions for mini-strikes and emphasis on factfinding. Additionally, the statute contains the flexibility necessary to facilitate the move to true collective bargaining in Hungary. The new Hungarian labor law is a statute worth watching as a paradigm for future reforms in other Eastern European countries and perhaps, even the United States.

114. See Bierman, *supra* note 88, at 667-69 (explaining the unique role factfinding plays as well as an impasse resolution procedure because it allows for voluntary settlements due to its lack of finality).