Labor Law in Japan and the United States: A Comparative Perspective*

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This Article surveys Japanese and American labor law. Professor Gould examines the ways in which cultural differences have prompted variations in industrial relations, administrative procedures, and remedies. In particular, he uses these differences to illuminate the strengths and weaknesses of the United States’ approach to labor law.

I
INTRODUCTION

Ever since Commodore Perry sailed into Tokyo Bay more than a century ago and emblazoned Japan upon America’s consciousness, Americans—indeed the entire West—have expressed alternately (and sometimes simultaneously) puzzlement, frustration, and anger with the Land of the Rising Sun. In part, of course, Japan is difficult for Americans to understand simply because she is one spoke in the mysterious wheel we call the Orient. But Japan is much more as well. Japan is a modern nation with an advanced industrial economy. Japan is the first non-white country in the world to develop the technological expertise which is a prerequisite first of military and then of economic power—a self-sufficiency which permits her to denounce all slights, imagined and real, as attempts to deny her the first class status to which she is entitled.

Most Americans find it difficult to think about Japan dispassionately. For those over forty-five the mere mention of Japan triggers bitter memories—Pearl Harbor, Guadalcanal, Tarawa, Iwo Jima and Okinawa. In the wake of World War II hostilities, however, a special

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The undying myth of "cheap labor" as the explanation of Japan's success—a proposition so frequently advanced by American unions, companies, and industries assaulted by Japanese competition—is vivid testimony to this point. In any event, if the very real barriers of language, race and culture are to be hurdled, a fuller mutual knowledge of our societies and their cultural underpinnings is essential.

This is an article that uses the law to compare Japanese and American industrial relations systems rather than one designed to provide a detailed analysis of Japanese law as such; however, a preliminary sketch of the Japanese legal terrain and its relationship to the Japanese industrial relations system is in order before all else. This relationship between law and industrial relations is important because Japan and America have similar labor laws, which, in some respects, seem identical. In practice, however, they are quite different.

In many respects, the Japanese legal system seems almost "Dickensish." Its protracted delays spawn litigation covering decades—an enormous deficiency even by American standards. A primary cause of this phenomenon is that Japan has only 15,000 lawyers in a country with half the population of America, where there are more than

500,000 lawyers. This reflects Japan's preference for a society in which law is subordinated to human considerations. As Jiro Tokuyama has noted, "The very precision of the law is alien to the Japanese."\(^2\) Says Tokuyama: "If a Japanese is involved in an automobile accident, his first reaction is often to send apologies and perhaps a gift to the victim. But such gestures should in no way be interpreted as an admission of guilt; it is simply a matter of form.\(^3\)

Nonetheless, Japanese unions do not have the same deep-rooted distrust of the judiciary which has so long characterized their American and British brethren. Japanese workers trust judges, even though, prior to World War II, the judiciary applied statutes obviously injurious to the basic existence of organized labor, and, since the war, to the consternation of the contemporary militant left, that same judiciary has set limitations upon the rights of public employee unions.

The Japanese judiciary, as well as the administrative agencies similar to those in America, is thus in the mainstream of labor-management conflict resolution. This is so despite the potentially (and in many cases actual) paralytic effect of a small number of lawyers on the operation of the Japanese judicial system. But as has been suggested, this apparent scarcity may be less of a hindrance than Americans suppose. Indeed, the relatively small number of attorneys may encourage conciliation and negotiation, for which the Japanese are properly renowned.

Similar paradoxes abound in the Japanese industrial relations system. The system discourages inter-firm mobility for employees but encourages certain kinds of job mobility inside the company itself. In both respects, the Japanese system stands in sharp contrast to those found in America and the West—especially in the Western countries where unions are strong. The Japanese provide security and wages for their older workers. But in times of economic crisis—Japan, like the West, has begun to see such times recently—the worker who is forty-five or older is more likely to be the object of pressures, both direct and indirect, to leave the company so that younger, more vigorous workers might be continuously employed. In America, and to a lesser extent in Europe, it is the junior worker who must make way for his elder under the seniority system negotiated in most union collective bargaining agreements. This tendency has become more pronounced with the advent of age discrimination legislation, and its impact upon mandatory retirement policies.\(^4\) In Japan, however, the junior worker does not


\(^3\) Id.

Almost all the pressure to depart is placed on middle-aged and older workers.

Governmental intervention in wage negotiation and thus in the collective bargaining process itself—an American trend which has been promoted by recent Presidents from Richard M. Nixon through Jimmy Carter—is alien to Japan. Yet no government more effectively inserts itself into the parties’ negotiations (through behind-the-scenes maneuvering and discussions, and through budgetary allocations for public employee wages, thus dictating the parameters of negotiated settlements) than Japan. In 1978, wage settlements were squeezed dramatically as the yen appreciated. The Fukuda Government projected wage increases of 8 to 9% in January 1978. By April, that figure was 5 to 6% as was the actual wage settlement. In 1982 the Suzuki Government announced a formal wages or incomes policy, the impact of which cannot yet be properly estimated.

Finally, perhaps no people complain about employment conditions as much as the Japanese. According to the Ministry of Labor, however, Japanese are allotted an average of twenty days vacation, but they take only 61.4% of that time; and, if one considers the days accumulated from the previous year, they use only 37.5%. Counting national and special holidays, weekends, and vacations, the average Japanese worker takes ninety-two days off a year, or thirty-six fewer than his American counterpart. Although Japanese auto workers on the assembly lines of Toyota, Nissan, Honda and Toyo Kogyo may wear Western clothes and shoulder-length hair, the work ethic is still dominant. Perhaps this is because leisure facilities are simply unavailable to the average Japanese worker. In any event, this behavioral pattern helps nurture the Japanese belief that the West penalizes laborers for working hard. (Indeed, Japanese unions and workers are continuously exhorted by Western trade unionists not to work so hard.)

5. Regarding the Carter Administration, one analysis has noted: “In announcing his anti-inflation program on October 24, 1978, the president was careful to state that, this is a voluntary program, [but the Federal Government will limit government procurement activities insofar, as feasible, to firms that observe the wage and price standard. Under the program, firms seeking federal contract awards in excess of $5 million are required to certify that they are complying with the wage and price standards.” See 44 Fed. Reg. 17,910, 17,912-14, 17,916 (1979).


Japanese workers voice their boredom and discontentment with their jobs as often as Americans. Whether younger workers' dissatisfaction with depressed beginning wages will result in demands for fundamental change in the system—as observers like Professor Alice Cook have predicted⁹—remains to be seen.

In an attempt to compare labor law in these very different countries, this Article will offer an overview of industrial relations in Japan and the United States. Next, administrative procedures in the two countries will be compared. Finally, the legal remedies of the countries will be contrasted.

II

AN OVERVIEW OF INDUSTRIAL RELATIONS IN JAPAN AND AMERICA: A TALE OF TWO COUNTRIES

Group solidarity remains in Japan because people work at it, whether in villages, towns, urban neighborhoods, or work places, leaders exert themselves to retain the loyalty of group members by responding to their needs. Children are taught the virtue of cooperation for everyone's benefit, and, however annoying they may find group pressures, adults remain responsive to group attitudes for they are convinced that everyone gains from restraining egoism.¹⁰

The Japanese system of industrial relations differs fundamentally from the system in this country. American trade unionism, for example, has traditionally sought to keep labor out of the competition between companies or plants. The extent to which this philosophy has translated into demands for wage parity (or closely comparable wages and conditions) can be seen from the UAW's negotiations with the beleaguered Chrysler Corporation in both the United States and Canada.

This contrasts sharply with Japan, where such an attitude has never taken root. The unions have not focused upon uniform rates and conditions of employment and have not sought to eliminate differentials between industries and job classifications. Despite such slogans as "equal wages for equal work," Japanese unions have not affected existing wage structures.¹¹ Rather, the principal concern has been the so-called "base-up" or percentage wage increases. Japanese negotiations do not concern themselves with comparability as it relates to the actual rate of pay. Negotiations therefore permit individual companies broad latitude and discretion. To the American or Westerner, this appears to be an inward-looking attitude which does not promote worker solidar-

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¹⁰ E. Vogel, Japan As Number One 98 (1979).
ity. It is in substantial part attributable to the Japanese system of enterprise or company unions which are organized on a corporate basis. This system of union organization reflects not only traditional Japanese paternalism, but also "the structure of industry and the structure of labor markets." In the primary sector of the Japanese economy—an environment of large companies which can provide benefits such as permanent employment in an internal labor market—company unions have flourished; they constitute 94.2% of all Japan's unions. Employees in the secondary labor and industrial market of multi-layered subcontractors and small enterprises have more difficulty. So do unions which seek to represent them. Although 30.8% of the work force is organized into trade unions (significantly more than the approximately 20% represented by American unions) the percentage of the Japanese workforce represented by unions has fallen sharply, from 31.6% in 1979, and 35.4% in 1970.

While Japanese union membership constitutes a larger percentage of the eligible workforce than the percentage of organized workers in America, union coverage does not extend to temporaries and frequently not to the employees of subcontractor firms which are in the corporate family. These groups of employees are part of the second tier of the Japanese dual economy; they receive inferior wages and tolerate poorer working conditions. Japanese unions are reluctant to organize workers in the second tier of the economy. The New York Times has noted:

[In Japan, far more than in the West, bonuses and fringe benefits, and especially job security and union protection, produce entirely different environments in the two tiers. The big companies find this "dual structure" profitable. It provides a cheap, flexible pool of unorganized workers at their subcontractors for which the "mother" company is not legally responsible. Japanese companies such as Toyota and Nippon Steel have many more subcontractors than General Motors or United States Steel. In hard times, these workers can be laid off at a distance.]

The significance of this dual economy is not inconsiderable. Twenty-three per cent of the work force is employed in businesses with more than 500 employees. In addition, 12,000,000 workers are in companies with between 30 and 500 workers, while 13,750,000 work with even smaller companies. Since 1973, the average pay earned by employees of concerns with fewer than 30 employees has fallen from 63%
to only 58% of the average pay earned by employees of companies with more than 500 employees. "Cash handouts and bonuses average close to $1,666 a month in the big companies, but are little more than half that at small factories." The enterprise union is generally a union of regular full-time workers. This means the exclusion of so-called temporary workers—a disproportionate number of whom are women. According to the Ministry of Labor, in 1976 there were four times as many permanent employees as temporary workers. Among newly hired employees the ratio was almost five to one. But among women workers there are 1.5 as many temporaries as permanent workers. In any country where union organization exists, the structure and scope of membership coverage by trade unions has enormous implications.

American unions are generally organized on an industrial, craft, or occupational basis. Even industrial unions like the United Auto Workers, United Rubber Workers, and United Steelworkers, which organize production workers and skilled workers together, are much more job conscious than they are company conscious. American union representation is tied to particular job categories which are part of an appropriate unit or grouping of employees who have a "community of interest." In Japan, the structure of enterprise unionism precludes such analytical rigidity. Lack of job consciousness makes it possible to have a more flexible transfer system inside the company, which contributes to undercutting strict job categorization. Jurisdictional disputes between contending unions are unknown in Japan. Although jurisdictional disputes do not present as big a problem in the United States as in multi-union Britain, the regulation of these disputes and the stoppages they cause has been a major concern of American industrial relations.

This lack of job consciousness and the flexibility of Japan's enterprise unions are also reflected in the degree to which management is distinguished from labor. Part and parcel of enterprise unionism is employee solidarity with and loyalty to the firm. Essential to an understanding of Japanese employee loyalty is this very different relationship between foreman and employee in that country—a relationship which Cole has characterized as in loco parentis. The contact between foreman and worker is the lineal descendant of a "labor boss" system that developed with the advent of industrialization. Cooperation has its origins in homogeneity and cohesiveness and in the workplace oyakata-

15. T. Hanami, supra note 13.
kokata (master-apprentice) relationship practiced by craftsmen of the Tokugawa period. This relationship, co-opted by management with the advent of industrialization, connotes a family or parental bond. In a sense, the concept of amae (a desire to be dependent) is related to this notion. Dependency, the archetype of which is the need of the infant to be near the parent, manifests itself in the industrial relations system through employee reliance upon companies for housing, transportation allowances, and leisure-time activities—features which are generally alien to the Western system. This may also explain employee compliance with company discipline to an extent unparalleled in America.

What makes this all the more puzzling to Westerners is that Japanese labor law excludes so-called supervisors from union membership by excluding them from the definition of “employee”; unions, nonetheless, do represent workers who are labeled supervisors but who are regarded as working foremen and are responsible on personnel matters to so-called section chiefs, or kacho (who are excluded from the union). The considerable number of supervisory ranks blurs the demarcation between supervisors and employees. Robert Clark states: “[T]he actual work of supervisor, which in a Western company would have been done by a single set of foremen, was shared by employees in a number of ranks.”

The overlap or slight blurring of hierarchy is reflected even among company directors. One out of six Japanese company directors was once a union leader. “Of 313 major Japanese companies . . . 74.1 percent had at least one executive director who once served as a labor union leader. The figure was 66.8 percent in 1978. In Japanese management, executive directors are the top day-to-day decision makers.” This means that Japanese unions have an abundance of supervisory members who supply a disproportionate amount of the leadership. Managerial personnel not only have held positions of leadership in company unions; in some instances they have climbed the ladder to a high-level corporate position from the national federation itself. For instance, the International Affairs Secretary for the Japan Auto Workers (Jidoshasoren) in 1975 was in charge of sales for Nissan in 1978.

The Japanese pattern of mobility between labor and management means that union presidents and leading officials are sometimes (though not frequently) graduates of the University of Tokyo and other leading universities in Japan. It also means that almost anyone who has worked for a Japanese company has been a member of the union at some point in his employment. It affects the style and attitude of trade unions in Japan by inhibiting militance, providing expertise, and creat-

ing more contact and a greater spirit of egalitarianism between blue- and white-collar employees. The fact that Japanese corporate executives' salaries are considerably lower than those of their American counterparts tends to support this homogeneity, as does the relatively narrow differential between blue- and white-collar salaries. Professor Ezra Vogel notes in his important book, Japan as Number One:

Those with higher positions continue to dress like others, often in company uniforms, and peers retain informal terms of address and joking relationships. Top officials receive less salary and fewer stock options than American top executives, and they live more modestly. It is easier to maintain lower pay for Japanese top executives, because with loyalty so highly valued, they will not be lured to another company. This self-denial by top executives was designed to keep the devotion of the worker, and it undoubtedly succeeds.

All of this is in stark contrast to the United States, where the exclusion of supervisors from the National Labor Relations Act (NLRA) has been predicated upon the assumption that the supervisor-employee relationship is necessarily an adversarial one. In a dissenting opinion which appears to form the rationale for the exclusion of supervisors under the 1947 Taft-Hartley amendments to the NLRA, Justice Douglas said:

We know from the history of that decade [the 1930's] that the frustrated efforts of workingmen, of laborers, to organize led to strikes, strife and unrest. But we are pointed to no instances where foremen were striking; nor are we advised that managers, superintendents, or vice-presidents were doing so . . . If foremen were to be included as employees under the Act, special problems would be raised—important problems relating to the unit in which the foremen might be represented. Foremen are also under the Act as employers. That dual status creates serious problems. An act of a foreman, if attributed to the management, constitutes an unfair labor practice; the same act may be part of the foreman's activity as an employee. In that event the employer can only interfere at his peril.

Supervisors are not generally organized into American trade unions, although occasionally there are supervisory unions. Under law, however, private sector American employers are not obliged to bargain with such unions because supervisors are excluded from the definition of employee under the NLRA and under many state laws regulating public employees. (To a limited extent which the Supreme Court has not defined, supervisors are, however, protected from discharge and

21. E. Vogel, Japan as Number One 141 (1979).
discipline under the NLRA when employer-imposed discipline has a coercive impact upon employees.\(^24\) Additionally, American unions have had great difficulty organizing nonsupervisory white-collar employees in the major industrial unions, which are overwhelmingly blue-collar in membership. Although the 1981-82 recession has created such difficulties for white-collar employees that some may yet turn to the unions, the distinction between blue-collar and white-collar remains real and is perhaps a distinctive feature of the American industrial relations scene.

A. National and Local Union Relationships in Japan and the U.S.

American and Japanese unionism contrast dramatically in the relationships between the national federations and the local unions (in the United States) and between the national federations and enterprise unions (in Japan). So company conscious are the Japanese that, according to a Ministry of Labor survey conducted in 1974, only 5% of 1,362 unions surveyed engaged in negotiations involving union officials from outside the company—a rather sharp contrast to the involvement of the Detroit, Akron, and Pittsburgh offices (and regional offices as well) of the United Auto Workers, the United Rubber Workers, and the United Steel Workers in negotiations of their local unions.

Despite this major difference, over the last twenty years Japan has seen the emergence of *shunto* (or “spring offensive”), a form of centralized wage bargaining organized by the relatively weak national federations with which approximately 72% of the Japanese company-wide or enterprise unions are affiliated. *Shunto* means coordination of bargaining efforts between weak and strong unions for wage bargaining on a national basis, and its preservation has been facilitated by the substantial economic growth which Japan enjoyed in the 1960’s and early 1970’s. Most important of all, *shunto* means coordination between the public sector unions, which have been more militant, left-wing and sometimes Marxist in their rhetoric, and the private sector unions, which have tended to be more like business unions (conservative even by the standards of American trade unionists). The wage negotiations are actually conducted at the plant or company level; this means coordination of uniform wage demands coupled with a strategic decision to apply pressure to a particular industry or company nationally. The wages which are negotiated in the spring comprise only about 65% of the total wage payments. The other portions consist of bonuses (negotiated later in the year) and overtime. Based on the particular firm’s financial well-being, the bonus can amount to six months wages in a

good year, but considerably less\textsuperscript{25} in a bad one. Thus “concession bargaining” is built into the bargaining system, which provides for a wage swing upward or downward of as much as 30% a year.

Japanese federations generally transcend company plants throughout the country and are organized along the lines of the particular industry. However, the staff of these national federations is usually small, reflecting their relatively inferior status vis-a-vis the company unions themselves. The two principal national centers—Sohyo (General Council of Trade Unions of Japan) and Domei (Japanese Confederation of Labor)—are the equivalent of the American national federation, i.e., the AFL-CIO. Out of a national union membership of 12,369,000, 36.6% are members of unions affiliated with Sohyo, 17.8% with Domei, and 10.7% with a third center, Churitsuroren (Federation of Independent Unions of Japan). A fourth and smaller center is Shin-sambetsu (National Federation of Industrial Organization).

The International Metalworkers Federation-Japan Council (IMF-JC), the Japanese branch of the international trade secretariat for various metal workers unions throughout the world, has both Sohyo and Domei affiliates. During the past few years, it has played an increasingly prominent role in shunto.

Until the oil crisis of 1973-74, Shitetsuroren (the General Federation of Private Railway Workers’ Unions of Japan) was the leader or, as the Japanese say, “first batter.” Quite often, Gokaroren (the Japanese Federation of Synthetic Chemical Workers’ Union) vied for the leadership position, but the Japanese Federation of Iron & Steel Workers’ Unions, or Tekkororen, became the pattern setter until steel’s recent decline in international markets. Interestingly, steel continues to establish the framework for wage settlements in shunto. In 1978, the steel offer and settlement (the two are usually identical) had greater impact than any other industry. Other federations, however, like the Auto Workers, Jidoshasoren, and the Electrical Workers, Denkiroren, roared ahead with percentage increases twice as high as steel’s.\textsuperscript{26} These federations were fortunate enough to escape the full impact of the “first batter’s” wage negotiations.

Although the AFL-CIO is not normally seen as directly involved in collective bargaining, the American Federation’s prominent role in combating the efforts of both the Nixon and Carter administrations to establish wage and income policies might be viewed as collective bargaining activity.\textsuperscript{27} Nonetheless, at this political level, one difference be-

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\textsuperscript{25} Work on a Pay Cut, Economist, Nov. 27, 1982, at 11-12.  
\textsuperscript{26} Crabbe, Japan’s Steel Industry Suffers From Glut, Japan Times, Feb. 6, 1978, at 1.  
\textsuperscript{27} J. Goulden, Meaney: The Unchallenged Strongman of American Labor (1972). For a scholarly examination of the subject generally from the European vantage point, see R.
tween the American and Japanese federations is obvious. Japanese federations have a reputation for involvement in politics—particularly left wing or Marxist politics (Sohyo supports the Japan Socialist Party (JSP), and Domei does the same with the more moderate Democratic Socialist Party); however, while this involvement seems more institutionalized than that which exists between the AFL-CIO and the Democratic Party in the United States, these political commitments do not penetrate the heart of the union movement at the enterprise level.

Enterprise unionism in Japan has many strengths. As Professor Cole has noted, one is that the union is aware of the peculiar needs of the company or enterprise itself. For example, unions have engaged in promotional and sales efforts which originate with management. In 1978, leaders of the Electrical Workers' Union flew to the United States to explain the industry's position and to argue against barriers to Japanese imports. The president of the Auto Workers, Ichiro Sioji, has engaged in sales efforts on Nissan's behalf in both the Soviet Union and Mexico. The Iron & Steel Workers have used their affiliation with left-wing Sohyo to good advantage in sales promotional efforts in The People's Republic of China. Perhaps a similar measure of American convergence is taking place as the United Auto Workers and other unions join ranks with management to protect themselves against the foreign competition which imperils both.

Enterprise unionism also has its weaknesses: (1) it is easy for the company to manipulate the union and the leadership and the union is inevitably dependent upon the company; (2) the white-collar employees, particularly the leadership, are more likely to support the company than the workers in many areas of dispute.28

B. Permanent Employment and Wage Payment to Displaced Workers

If the structure of enterprise unionism is the first pillar of the Japanese industrial relations system, the second and third are permanent employment, or shushin koyo, and the method of wage payment (nenko, the seniority wage system based upon years of service).

The permanent employment system guarantees employment until somewhere between the ages of fifty-five and sixty. Employers with more than 500 workers on their payroll, and it is generally the larger companies which provide permanent employment, employ 23% of the work force. (According to a 1974 Ministry of Labor Retirement Study, approximately 85% of these workers are able to find some kind of employment after the retirement age.)


While considerable strains are being placed on the permanent employment system, both because of the larger number of older workers in Japan and the increase in the retirement age from fifty-five to sixty, there is still a substantial difference between the attitude of Japanese and American employers. In America, dismissals and layoffs are ordinary, if regrettable, events and there has not been much of a search for alternatives in times of economic stress. In Japan, employers have undertaken the most extraordinary efforts to provide alternatives to unemployment. For instance, employers often institute kikyu (which means to return home for a rest). This translates to one, two or three days off a month when the plant is shut down, and the employees receive 90 to 95% pay.

Another alternative to dismissal is shukko—the detachment or farming out of workers to subsidiaries or subcontractors of major companies. This is the method resorted to by the better established companies, and it means that the employees of subcontractors or subsidiaries may be bumped from their positions, much as junior employees in basic manufacturing are bumped by senior co-workers at a time of layoff under the “last hired-first fired” seniority system in America. In Japan, the displaced employee may not be a junior worker. Indeed, it is more likely that he or she will be an older employee.

Shushin koyo has been a special privilege enjoyed by permanent employees of large corporations—and no reference to the subject is ever found in any collective bargaining agreement or in the Rules of Employment. Accordingly, it is not the product either of law (Japan’s Labor Standard Law provides a worker with thirty days notice) or of collective bargaining agreement, but is rather a unilateral decision of the employer. Nonetheless, a departure from the practice, where it is in effect, would thwart the deeply ingrained expectations of the workers. Women—who now constitute approximately 40% of the work force—are not generally beneficiaries of this system.

Whereas younger workers are the victims of an economic downturn in the United States and Europe—a problem exacerbated by age discrimination legislation in the United States—the older worker is more vulnerable under the Japanese system. The katatataki or literally the “tap on the shoulder,” has meant the subtle pressure by management for “voluntary” early retirement for workers over forty-five. This practice contradicts American policies against age discrimination

30. H. KAHN & T. PEPPER, supra note 1, at 53-54.
which are predicated on the assumption that older workers can be at least as productive as their younger counterparts.

Two developments in the United States may serve to narrow some of these differences. The first is agreements, like those in the automobile industry, which have established 60% income guarantees for employees with ten to fifteen years seniority and have placed limits on plant closures, contracting out of work, and layoffs—and actually have provided permanent employment for 80% of the work force in six plants. The second is that a number of jurisdictions, California and Michigan being among the leaders, have placed legal limits upon the ability of employees to dismiss workers.32

Despite the fact that shushin koyo is by no means universal in Japan, employment security—or more accurately, a reluctance to dismiss when other measures are available—is more prevalent than in the United States. An attitude of corporate responsibility for the worker is “in the social atmosphere to which all parties respond.” Accordingly, even though the lifetime employment system may not be universal, it affects the thinking and policies of most employers in Japan.33

C. Dealing With Industrial Conflict

In light of the differences between the American and Japanese industrial relations systems outlined so far, it is not terribly surprising that American unions and management have been more conflict-oriented and less given to the Japanese style of cooperation. Japanese labor agreements contain grievance-arbitration clauses which resemble in language and form the comparable contract provisions contained in American collective bargaining agreements, and Japanese law makes arbitration available to unions and employers that request it under the auspices of the Central (Chuo Rodo Inkai or Churoi) and Local (Chiroi) Labor Relations Commissions (the Japanese analogue to the NLRB). The fact, however, is that arbitration is rarely used in Japan—whereas in the United States it has become the generally accepted method for resolving most disputes that arise during the term of the collective bargaining agreement. Individual grievances which are so integral to the American grievance-arbitration process appear to be regarded as inconsistent with the Japanese penchant for group consen-


33. E. Vogel, supra note 10, at 133.
as a general proposition, the arbitration process is inconsistent
with the Japanese desire to avoid confrontation or open conflict involv-
ing issues which are in dispute. To the extent that parties are dispu-
tious, the controversy will generally be resolved by reference to the
Rules of Employment. These Rules are fairly voluminous documents
which Japanese labor law—the Labor Standards Law—requires man-
agement to promulgate—albeit in consultation with the union, where
there is one, or a majority of the workers where no union is on the
scene. They cover a wide variety of matters, including dismissals, disci-
pline and transfers—subject matter which Americans usually deal with
through arbitration and which the collective agreement often addresses
in the West. In Japan, the collective bargaining agreement is apt to be
in the appendix to the Rules.

Just as peculiar, from the Western perspective, is the fact that dif-
ferent agreements may address different subject matters. For instance,
the parties may negotiate a separate wage agreement and separate
agreements relating to fringe benefits such as transportation or housing
allowances, the wage agreement constituting a separate document.

Finally, in treating dispute resolution, one cannot ignore so-called
joint consultation machinery, roshikyogiseido, which exists in 63% of
the labor-management relationships where there are more than 100
employees. This machinery—which many Japanese brand as an attack
on collective bargaining rather than an adjunct to it—deals with mat-
ters ranging from transfers necessitated by technological innovation to
the provision of information by management on sales and even profit-
ability. Roshikyogiseido prizes informality and behind the scenes dis-
cussions—characteristics which are deeply ingrained in Japanese
behavior. This penchant for informality is consistent with the Japanese
reluctance to sanction confrontation between adversaries.

The 1982 collective bargaining agreements that the United Auto
Workers negotiated with General Motors and Ford provide for joint
union-employer committees which are designed to provide advance in-
formation and discussion on business decisions. European countries
provide for similar machinery by law and, it is required, to some ex-
tent, at the European Economic Community level.

Equally important are the statistics relating to strikes—or the rela-
tive absence of them. With only twice the population, America lost
almost twelve times as many working days to strikes and lockouts in
1976 as did Japan; specifically, the United States lost 38,000,000 work-

34. OCED Study Group Report, supra note 12, at 25.
35. Labor Standards Law, Chapter IX: Rule of Employment, see art. 90, reprinted in La-
ing days due to disputes whereas Japan lost 3,253,715. These statistics are hardly a conclusive test for determining industrial relations maturity or even, for that matter, industrial peace. For instance, Great Britain, whose industrial relations are far more chaotic and inefficient than those of either the United States or Japan, had a smaller number of disputes than either of the two countries (2,016 as compared to 2,720 for Japan and 5,600 for the United States) and approximately the same number of working days lost as Japan (3,284,000). However, in many of Japan’s major firms, in industries like automobile (Toyota, Nissan, Mitsubishi and Toyo Kogyo), steel (Nippon Steel and Kawasaki), as well as shipyards (Kawasaki, Mitsubishi, Ishikawajima, Harima and Sumitomo) and rubber (Sumitomo and Bridgestone), there has not been a strike or industrial action since the 1950’s. When strikes have occurred, they were of relatively brief duration. Professors Levine and Taira have noted that the number of disputes in relationship to union membership has increased substantially in recent years, prompting them to argue “that Japan resembles France closely in important strike characteristics [and that this] belies Japan’s reputation as a country of ‘consensus culture.’” However, the same authors have conceded that more than strike statistics are required to determine which relationships are harmonious:

The Japanese appear to be more at peace with their working conditions than workers in some other countries. But the individual expression of conflict may be substituted by the collective expression. For example, Sweden has a lower strike volume than Japan, but its absenteeism is much higher than Japan’s. One could say that Swedish workers, instead of collectively expressing their dissatisfaction through strikes, individually ‘strike’ by not showing up for work. By contrast, Japanese workers do not individually ‘strike’ but collectively do so more frequently than Swedish workers.

The attachment of loyal Japanese workers to the firm makes it less likely, in the final analysis, that they will vote with their feet or express their grievances through resignations. To this extent, conflict which might manifest itself through quits in an American company is contained in the Japanese workplace. Moreover, Japanese unions frequently use other methods, “acts of dispute” as the Japanese call them, as alternatives to the strike. This reflects what Professor Tadashi Hanami has characterized as the “competition and class conflict” which, along with “fundamental paternalism,” is, in his view, part of

40. Id. at 65-66.
the Japanese system.\textsuperscript{41} With regard to the strike itself, Professor Hanami writes:

If you look at the Japanese union movement from the viewpoint of the Western unions, the Japanese way of striking looks like a stupid act of suicide. But the meaning and function of the strike is completely different in Japan. Most of the Japanese strikes are not strikes in the Western sense. Strike is a means of protest, or more precisely, it is the only means of showing their will. When they go on strike, they do not mean that they will never return to their jobs until they are satisfied or completely defeated. Rather, sometimes they first go on strike and then start to bargain. Employers also start to bargain seriously only after the union carries out some short-term strikes and shows how serious they are. Members of labor relations commissions often complain that both of the parties to the dispute bring them the case for conciliation or mediation without bargaining for themselves at all.\textsuperscript{42}

Not much of Japan's industrial strife turns violent. When there is violence, however, feelings of bitterness can run deep. Generally, violent disputes arise in situations where two unions are involved and the second union has returned to work rather than remain on strike. Nevertheless, on balance, the general Japanese industrial relations topography is smooth and indicates a tranquility which does not prevail in the West.

What illustrates the approach of the two countries towards conflicts even more graphically are their different attitudes toward litigation and law. Both Japan and the United States have unfair labor practice machinery and administrative agencies that are responsible for implementation of the law. In the United States, the caseload of the NLRB, which has responsibility for unfair labor practices, has become one of the major labor law problems in this country. With approximately 40,000 cases involving unfair labor practice charges coming before the Board, the Board's caseload has caused the delay and has contributed to pressure for labor law reform. Japan is confronted with many of the same problems—and it may well be that labor law reform will soon become a major part of the labor policy debate in that country—particularly if reform should ever be enacted in America. But the number of cases filed with the administrative agencies in that country—both the Central Labor Relations Commission which sits in Tokyo and the Local Labor Relations Commissions which exist in each of Japan's forty-seven prefectures—is miniscule when one considers the caseload of our Labor Board. In Japan, just over 1,000 cases were filed

\textsuperscript{41} T. HANAMI, supra note 13, at 122-123.

\textsuperscript{42} Hanami, The Characteristics of Labor Disputes and Their Settlement in Japan, in SOCIAL AND CULTURAL BACKGROUND OF LABOR-MANAGEMENT RELATIONS IN ASIAN COUNTRIES 209 (1971).
in 1975, and only 828 were filed in 1976.\textsuperscript{43}

The fundamental reason for these differences lies in the attitudes of workers and their unions. In the United States, particularly since the 1966 rejection of the negotiated pact between the International Association of Machinists and American Airlines, numerous commentators have noted the rebelliousness of the rank and file and the “frequent unwillingness” to accept agreements negotiated by the leadership. There is hardly an industry immune from “blue collar blues” or a “discontent” which has manifested itself in refusals to ratify negotiated agreements in wildcat strikes. In Japan, it is likely to be the other way around. That is to say, it is the rank and file who are likely to be tugging at the sleeves of the union leaders in Tokyo, advising them that a leadership far away from the economic problems of individual firms should exercise more restraint. Japanese workers, being company-oriented like their unions, are more concerned about the real prospect of job losses if the unions become too strident or undisciplined. That most certainly is a lesson of the 1978 negotiations when Japanese workers in the private sector (with the exception of the Japan Auto Workers Union, the most profitable and export-oriented segment of Japanese manufacturing) knowingly accepted an actual reduction in their standard of living.\textsuperscript{44} This concession contrasts with the 1982 American auto negotiations where 48% of union members in General Motors withheld their approval of the agreement.

Finally, Japanese workers may lodge suits in courts of general jurisdiction on their own initiative even though the subject matter is covered by labor law. This is in sharp contrast to the United States, where the doctrine of preemption and exclusive jurisdiction, as well as the exclusive nature of the grievance-arbitration machinery, removes a large number of cases from the courts.\textsuperscript{45}

These then are some of the basic differences in the industrial relations system of Japan and the United States. It is difficult to imagine two systems that are more dissimilar or based on more divergent cultural attitudes. It is, therefore, ironic that Japan and the United States have shared much (but by no means all) of the same labor law framework since the conclusion of World War II. As previously noted, both countries have unfair labor practice machinery in the labor law and

\textsuperscript{43} The imbalance remains even when one takes into account the relatively large number of unfair labor practice cases in which the courts assert overlapping jurisdiction. Hanami, \textit{The Function of the Law in Japanese Industrial Relations}, in \textit{Contemporary Industrial Relations in Japan} 177 (1983).


administrative agencies charged with enforcement. Similarly, both countries have labor legislation aimed at public employees which generally withholds the right to strike—and in both countries violation of this prohibition is a continuing and vexatious problem. However, the details of the bodies of law, as well as their actual interpretation and implementation, help us to see that the legal systems of the two countries, like the industrial relations systems, are identical only when observed from the most superficial of vantage points. This article attempts to focus upon administrative and judicial procedure and substantive law and to identify problems that have arisen in both systems and to demonstrate how differently the legal and industrial relations systems function in the two countries. This article does not attempt to present a comprehensive treatise-like picture of the Japanese system—any more than of the American system. But perhaps it can highlight some of the differing basic assumptions that exist in these two countries—specifically, through examination of the administrative processes and handling of unfair labor practices in Japan and the United States.

III

THE ADMINISTRATIVE PROCESS IN THE TWO COUNTRIES: THE COMMISSION AND THE BOARD

Basic to any understanding of the way in which the Japanese Commissions function is an assessment of their role in arbitration, mediation and conciliation. The adjustment department of the Central Labor Relation Commission handles these processes. There are three different sections inside the adjustment section: (1) a section that determines jurisdiction; (2) a section that specializes in hospitals, railways and airlines, where advance notice of differences is required; and (3) a research section.

In the last several years, out of 110 cases, only four have gone to mediation and none to arbitration. Of all the procedures, conciliation is the most popular because of the Japanese penchant for informality, and because of its speed and success ratio, as well. Only the public members are involved in conciliation, and often the dispute will go to an outside part-timer, this processing being the speediest, generally taking only fourteen days. Conciliation relies heavily upon sakusen or informality—literally "manipulations." Mediation, on the other hand, must be tripartite and will generally take between thirty-five and forty days. The procedure is more formalized and legalistic. Recommendations by the third party may be issued under either conciliation (assen) or mediation (chotei) and the recommendations may be verbal or written. However, under mediation there are very few verbal recommendations; and, as one might expect, there are many more
recommendations of this kind under conciliation. Most cases are successfully resolved with the Central Commission's assistance, the success ratio reaching a high of 77% five years ago. (Since then, the success ratio of Local Commissions has been 62.3%, 66.1%, 60.9%, 62.6% and 59.6% in each year.)

There is close coordination between the adjustment and the unfair labor practice sections of the Commission at the local level but this does not appear to be the case at the Central Commission. This tends to infuse local unfair labor practice case handling with a more practical dispute-resolution orientation than would otherwise be present. The reason for this coordination at the local level is that the Local Labor Relations Commission is more likely to be close to the parties involved,
being responsible for the investigation (*chosa*) as well as the actual trial of unfair labor practice cases. (A second hearing or trial of unfair labor practice cases takes place before the Central Commission in Tokyo.) However, there is contact between the unfair labor practice and adjustment sections at the Central Labor Relations Commission. Each Monday, a secretariat meeting is held where reports are provided on all cases, and the potential for additional contact exists. Figure 1 outlines the Japanese charging procedure while Figure 2 sketches the American scheme.

It is important to consider these additional functions which are not carried out by the NLRB to understand the very different ways in which the Japanese and Americans handle unfair labor practice cases.

Complaints or charges are filed by private parties in both countries, but after that basic differences are apparent. In the first place, the number of cases coming before the Japanese Local Labor Relations Commissions and the Central Labor Relations Commissions is much smaller than the caseload before the NLRB—a fact dramatized by the statistics contained in Table 1.
Table 1: Number of Unfair Labor Practice Cases Filed

<table>
<thead>
<tr>
<th>Year</th>
<th>Local Commission</th>
<th>Central Commission</th>
<th>NLRB</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>929</td>
<td>93</td>
<td>31,253</td>
</tr>
<tr>
<td>1976</td>
<td>730</td>
<td>98</td>
<td>34,509</td>
</tr>
<tr>
<td>1977</td>
<td>729</td>
<td>95</td>
<td>37,828</td>
</tr>
<tr>
<td>1978</td>
<td>685</td>
<td>64</td>
<td>39,652</td>
</tr>
<tr>
<td>1979</td>
<td>563</td>
<td>83</td>
<td>41,259</td>
</tr>
<tr>
<td>1980</td>
<td>778</td>
<td>84</td>
<td>44,063</td>
</tr>
</tbody>
</table>

† Source: Annual Reports of the National Labor Relations Boards.

The caseload for the Central and Local Commissions, as one can see, is considerably less than in the United States. Moreover, the data indicate that the American caseload increases more consistently and relentlessly than that of the Japanese.

On the average, there have been thirty times as many cases filed in the United States as in Japan. But, as noted, in Japan there is no doctrine of preemption applicable to labor law cases which would deprive the courts of jurisdiction over subject matter addressed by the Trade Union Law and the Commissions. In the United States, the Supreme Court in *San Diego Building Trades Council v. Garmon* has held that all unfair labor practices "arguably" protected or prohibited by sections 7 and 8 of the NLRA are within the exclusive jurisdiction of the Board, and this doctrine remains intact today albeit with some significant limitations. In Japan, however, there is no doctrine of exclusive jurisdiction for either the Local Labor Relations Commission or the Central Labor Relations Commissions. Cases which involve unfair labor practices, as well as discipline or dismissals, can go directly to the District Courts—and in Tokyo and Osaka, the cases are assigned to the special labor bench of the District Court. It is not clear to what extent the courts duplicate the jurisdiction of the Commissions, but the overlap appears to be considerable.

Statistics of the Tokyo Labor Bench show that in 1976, thirty-six

cases involving alleged breach of individual contract of employment were received by the Tokyo court; for 1977 the number was fifty-six. This suggests that the Japanese statistics are somewhat understated if one looks solely at the Commissions. On the other hand, many suits filed in this country alleging a breach of the collective bargaining agreement can be heard in the federal district courts as well as the state courts under section 301 of the Labor Management Relations Act thus permitting parties to sue for "violations" of collective bargaining agreements. 48 Yet the judiciary in Japan has a larger role in hearing cases involving both the individual contract of employment and an unfair labor practice issue. The cases frequently involve both discharges and alleged refusals to bargain. Japanese courts are apparently not the least bit reluctant to decide issues which involve an interpretation of article 7 of the Trade Union Law when the case is presented to them directly. The unions do not appear to object or allege usurpation, perhaps because (1) they do not distrust the judiciary, and because (2) sometimes the courts may move more expeditiously than the administrative process.

In America, the NLRB is presumed to have discretion provided it as the expert agency in connection with law as well as fact 49—the test for review is whether substantial evidence on the record as a whole supports the Board’s findings—when the case is reviewed by the Court of Appeals. In Japan, possession of original jurisdiction over unfair labor practice cases undoubtedly contributes to duplication and undermines the role of the Commissions as expert agencies. Moreover, the lack of any well-defined standard for judicial review further erodes the agencies’ authority. But resort to the judiciary has become critical in cases where expeditious relief is needed because of the nature of many unfair labor practice cases in Japan, the slow moving nature of the administrative machinery, and the fact that the same procedure, including a hearing, is invoked at both the Prefectural and Central level.

When a case is filed with one of the Commissions, a staff member is assigned to hold meetings with the parties to investigate and find facts. But even prior to this, a written complaint must be filed by the individual worker in order to trigger this process—and, according to

48. Section 301(a), 29 U.S.C. § 185(a) (1976), provides: “Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.”

49. Section 10(e) of the Act, 29 U.S.C. § 160(e) (1976), provides, in relevant part: “The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive.” For a discussion of the application of this section, see Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951).
Professor Ishikawa, some Commissions require as many as twenty copies. (While oral complaints are permitted, as a practical matter the Commissions are not set up to receive them—and unlike the NLRB, there is no standardized form on which the charge can be filed.) As Professor Ishikawa has noted, this may tend to discourage the filing of charges in some instances and thus may be a factor (albeit a minor one) in Japan’s relatively small caseload. In America, a written charge is required, but the Board will provide assistance in preparing and writing it where an individual worker is involved. The worker does not have to prepare copies at his own initiative, since a standardized form is available.

In Japan, at the meeting held after the filing of the charge, if one party refuses to answer questions or does not wish to reveal information that is within its possession, article 22 of the Trade Union Law makes the Commission anything but impotent. That provision states that whenever the Commission deems it necessary, it may require the employer, the trade union, or others to attend or present reports, “or it may require the presentation of necessary books and documents, or it may also have its members of staff . . . inspect factories and other working places concerned or inspect the conditions of business, books and papers, and other objects.” However, article 22 is rarely if ever invoked by either the Central or Local Commissions.

The NLRB is unlikely to subpoena evidence in the course of an investigation, but it will do so prior to or during a hearing. The Commissions in Japan will rarely do so because this upsets the consensus between labor and management. The view is that, if necessary, doubts will be resolved against the party that has possession of the evidence but refuses to produce it at the hearings. It is at the hearing that the facts come out—and the greatest potential for settlement exists both during and after the hearing. The Japanese investigation is additionally handicapped, according to Professor Ishikawa, since on-the-spot field investigations are infrequently undertaken on the grounds that “a fair judgment may not be possible when [one is] engulfed by the atmosphere of the place of the dispute. Also, there is a hazy notion that it is too hard on part-time officials to require them to travel to the place of the dispute.” Moreover, the assumption appears to be that even full-time staffers do not have the authority or prestige to elicit information during on-the-spot interviews or other forms of investigation. Field investigations are the rule and not the exception in the United States—

51. Id at 18-19.
52. Id at 21.
53. Id.
and Board agents in the field are expected to ask questions and obtain information.

In sharp contrast to the procedures in Japan, the Board holds a very thorough investigation when a charge is filed at one of its regional offices throughout the United States. Traditionally, most settlements, whether Board-approved or not, have taken place at this stage of the proceeding. (See Table 2.) Often the Board urges a compromise or solicits a withdrawal—although in recent years, particularly in the San Francisco office, a larger number of settlements is taking place a bit later in the process—apparently because of the pressure for prompt resolution of whether a complaint should be issued.

Table 2: Number of Unfair Labor Practice Cases Settled by the NLRB, Fiscal Year 1980*

<table>
<thead>
<tr>
<th>Method and Stage of Disposition</th>
<th>Number</th>
<th>Percent of Total Closed</th>
<th>Percent of Total Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of cases closed</td>
<td>42,047</td>
<td>100.0</td>
<td>0.0</td>
</tr>
<tr>
<td>Agreement of the parties</td>
<td>11,531</td>
<td>27.5</td>
<td>100.0</td>
</tr>
<tr>
<td>Informal settlement</td>
<td>11,357</td>
<td>27.0</td>
<td>98.5</td>
</tr>
<tr>
<td>Before issuance of complaint</td>
<td>7,424</td>
<td>17.7</td>
<td>64.4</td>
</tr>
<tr>
<td>After issuance of complaint, before opening of hearing</td>
<td>3,848</td>
<td>9.2</td>
<td>33.4</td>
</tr>
<tr>
<td>After hearing opened, before issuance of administrative law judge's decision</td>
<td>85</td>
<td>0.2</td>
<td>0.7</td>
</tr>
<tr>
<td>Formal settlement</td>
<td>174</td>
<td>0.5</td>
<td>1.5</td>
</tr>
<tr>
<td>After issuance of complaint, before opening of hearing</td>
<td>118</td>
<td>0.3</td>
<td>1.0</td>
</tr>
<tr>
<td>Stipulated decision</td>
<td>60</td>
<td>0.2</td>
<td>0.5</td>
</tr>
<tr>
<td>Consent decree</td>
<td>58</td>
<td>0.1</td>
<td>0.5</td>
</tr>
<tr>
<td>After hearing opened</td>
<td>56</td>
<td>0.2</td>
<td>0.5</td>
</tr>
<tr>
<td>Stipulated decision</td>
<td>17</td>
<td>0.1</td>
<td>0.2</td>
</tr>
<tr>
<td>Consent decree</td>
<td>39</td>
<td>0.1</td>
<td>0.3</td>
</tr>
</tbody>
</table>

*Source: NLRB Annual Report, 1980, Table 7, p. 256.

In Japan, there is an adversary proceeding between the union and the employer with the Commission acting as judge. It is the union which comes forward with the evidence, and this helps explain the Commission's relatively diffident attitude towards fact-finding.
theless, the Study Group on Labor Management Relations Law, appointed by the Japanese Ministry of Labor, criticized the present mode of investigation in a report issued in 1982.\textsuperscript{54} The Study Group recommended that Commissions “make the most” of field investigations and that investigations be conducted by staffers.

The NLRB, on the other hand, is divided into two parts: (1) the General Counsel (a Presidential appointee acting as a kind of civil prosecutor) whose agents for unfair labor practice cases are in regional offices throughout the country and (2) the judicial side of the Board, i.e., the Administrative Law Judges (formerly known as Trial Examiners) at the trial level and the five members of the Board (also Presidential appointees), who sit in Washington, D.C., reviewing decisions of the Administrative Law Judges—just as the Japanese Central Commission reviews decisions of the Local Commissions. Once the complaint issues, the line between General Counsel and the Respondent begins to harden considerably. The Administrative Law Judge, unlike the Commissions in Japan, is not really in a position to facilitate a settlement. A formalized judicial process is at work at this stage, and the likelihood of settlement diminishes appreciably.

NLRB statistics shed some light on this process. In 1980, the Board closed 11,721 cases pursuant to agreement between the parties. (The Board can enter into an agreement with the charged party over the objection of the charging party—but if a complaint has been issued, the General Counsel’s exercise of discretion may be attacked by the charging party in the federal courts.)\textsuperscript{55} Informal settlement resolved 11,547 cases, including cases where a private agreement resulted in a withdrawal of the charge and cases where the informal agreement has been reduced to writing and approved by the Regional Director. One hundred seventy-four cases were the products of formal settlements where the agreement was in the nature of a consent decree, the future violation of which could result in contempt penalties.

A majority of the small number of formal agreements are entered into either after a complaint has issued or the hearing has commenced. On the other hand, this is true of only about one-third of the informal settlements—although this one-third represents an increase from the 20% resolved at this point in 1975. These figures seem to indicate that the complaint and hearing produce an atmosphere considerably more adversarial. Of course, the prospect of extended liability is frequently apparent only after a complaint or hearing has brought the cold light of

\textsuperscript{54} Study Group on Labor Management Relations Laws, Report to the Minister of Labor (May 22, 1982): Promotion of Rapid Examination in Unfair Labor Practice Cases (English translation provided by the Ministry of Labor).

\textsuperscript{55} See, e.g., Leeds & Northrup Co. v. NLRB, 357 F.2d 527 (3d Cir. 1966).
day to bear upon the case; typically, however, the more formal procedure reduces the prospect for settlement.

However, in Japan, a far greater percentage of settlements take place after a hearing has been concluded. Tables 3 and 4 show the number and stage of Japanese settlements.

In Japan a very different pattern is manifested from that in the United States. The facts have emerged and the parties tend to cool off after the proceeding. At the Central Commission level, this hearing is, of course, a “re-examination,” or second hearing, inasmuch as it duplicates the fact-finding process that already has taken place before the Local Commission. The startling difference between America and Japan is that the number of cases in which there is a settlement or withdrawal rivals the number of cases in which the Commissions are required to issue a decision.

In any event, after the hearing has concluded, the Commission will begin to work actively on settlement possibilities with labor and management representatives of the Commission—and sometimes the public member will meet with the Deputy Director and Section Chief to discuss these possibilities. It is the Section Chief and/or the Deputy Director who is likely to make contact with the parties. Two staff members of the Commission generally will have taken evidence and they may also discuss settlement with the parties. The rules and regulations of the Commission provide for public member proposals for settlement and at the conclusion of the hearing or just prior to the issuance of an order. Article 38 contemplates the possibility of written recommendations. This is a rare procedure, however, and less than 10% of the cases are resolved this way. Verbal recommendations may be provided, although they are usually based upon the decision of the Local Labor Relations Commission itself. Finally, as with the case of the American Board, the parties may settle on their own initiative without the involvement of the Commission—although the Commission must be notified.

Negotiations can take place after the verbal recommendations but not after the written recommendations. However, the Commission will sanction any settlement or withdrawal that takes place—once again in sharp contrast to the Board, which will scrutinize the contents of the settlement or withdrawal to determine whether public rights have been adequately protected. In sum, the Japanese Commission has no veto. Moreover, the success of the Japanese at the time of the hearing may
Table 3: Number of Unfair Labor Practice Cases Settled in Japan, Fiscal Year 1976*

<table>
<thead>
<tr>
<th>Classification</th>
<th>Number</th>
<th>Percent of Total Closed</th>
<th>Percent of Total Method</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of cases closed</td>
<td>864</td>
<td>100.0</td>
<td>0</td>
</tr>
<tr>
<td>Agreement of the parties</td>
<td>432</td>
<td>63.7</td>
<td>100.0</td>
</tr>
<tr>
<td>Informal settlement</td>
<td>195</td>
<td>28.8</td>
<td>45.1</td>
</tr>
<tr>
<td>Formal settlement (with Commission intervention)</td>
<td>237</td>
<td>35.0</td>
<td>54.9</td>
</tr>
</tbody>
</table>


Table 4: Number of Cases Withdrawn and Amicably Settled by Seven Local Labor Relations Commissions, Fiscal Year 1977

<table>
<thead>
<tr>
<th>Classification</th>
<th>Number of Cases</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withdrawn</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After charges filed</td>
<td>9</td>
<td>24.3%</td>
</tr>
<tr>
<td>After start of investigation</td>
<td>17</td>
<td>46.0</td>
</tr>
<tr>
<td>After start of hearing</td>
<td>8</td>
<td>21.6</td>
</tr>
<tr>
<td>After end of hearing</td>
<td>3</td>
<td>8.1</td>
</tr>
<tr>
<td>Total</td>
<td>37</td>
<td>100.0</td>
</tr>
<tr>
<td>Amicable settlement by parties</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After charges filed</td>
<td>21</td>
<td>24.1</td>
</tr>
<tr>
<td>After start of investigation</td>
<td>20</td>
<td>23.0</td>
</tr>
<tr>
<td>After start of hearing</td>
<td>31</td>
<td>35.6</td>
</tr>
<tr>
<td>After end of hearing</td>
<td>15</td>
<td>17.3</td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>100.0</td>
</tr>
<tr>
<td>Amicable settlement with Commission intervention</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After charges filed</td>
<td>75</td>
<td>35.6</td>
</tr>
<tr>
<td>After start of investigation</td>
<td>53</td>
<td>25.1</td>
</tr>
<tr>
<td>After start of hearing</td>
<td>58</td>
<td>27.5</td>
</tr>
<tr>
<td>After end of hearing</td>
<td>25</td>
<td>11.8</td>
</tr>
<tr>
<td>Total</td>
<td>211</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
</tr>
<tr>
<td>After charges filed</td>
<td>105</td>
<td>31.3</td>
</tr>
<tr>
<td>After start of investigation</td>
<td>90</td>
<td>26.9</td>
</tr>
<tr>
<td>After start of hearing</td>
<td>97</td>
<td>29.0</td>
</tr>
<tr>
<td>After end of hearing</td>
<td>43</td>
<td>12.8</td>
</tr>
<tr>
<td>Total</td>
<td>335</td>
<td>100.0</td>
</tr>
</tbody>
</table>
reflect a natural incentive to settle, which, at least in part, is prompted by the poor quality of pre-hearing settlement procedures.

The NLRB has no provision for recommendations of any kind during the hearing or after its close. Indeed, the tendency of the General Counsel and the Board to veto agreements which are acceptable to labor and management—a practice never countenanced in Japan—has sparked considerable controversy in the United States. In *Community Medical Services of Clearfield, Inc.* a majority of the Board reiterated its view that public rights at stake in unfair labor practice proceedings can override private agreements in a wide variety of circumstances. In *Clearfield*, the Administrative Law Judge approved a non-Board settlement which provided for the execution of a collective bargaining agreement and the future reinstatement of a number of strikers, although some of them did not return to the same or equivalent jobs. The settlement agreement did not provide for back pay for employees who, it was alleged by the General Counsel, had been discriminatorily denied reinstatement. Nor did it provide for the posting of a notice in the employer's plant advising employees that the employer would not violate the law in the future.

Believing that "labor relations harmony between the parties would not be fostered by rubber stamping inadequate settlement agreements," the Board attacked the failure of the settlement to provide for back pay or for the posting of a notice at the plant advising the employees of the employer's wrongdoing. The Board said:

> [W]e are at a loss to understand how a settlement agreement that surrenders employees' entitlement to back pay can be said to protect their interests . . .

> [T]here is an overriding public interest in the effectuation of statutory rights which cannot be cut off or circumvented at the whim of individual discriminatees.57

In *Clearfield*, however, a collective agreement had been negotiated in lieu of back pay. Neither American labor law nor Japanese labor law obligates labor and management to consummate a collective bargaining agreement. Given that a contract (particularly with wage increases as in the instant case) is the most important asset a union can possess, that the employer is not legally obligated to negotiate one with the union, that it may be difficult to obtain, and that the employees supported the settlement, the factors appear to mitigate against the Board's decision. The Board stated: "[W]e think it is clear that we would encourage wrongdoers to subvert the collective-bargaining process by flouting their obligation to bargain in good faith if we approved

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56. 236 N.L.R.B. 853, 98 L.R.R.M. (BNA) 1314 (1978) (also known as *Clear Haven*).
57. *Id.* at 855, 98 L.R.R.M. (BNA) at 1316.
settlements whereby they could wipe the slate clean by offering to execute a contract on condition that employees be denied full remedial relief."\textsuperscript{58}

True, the Board has distinguished *Cleatfield* from subsequent decisions on the ground that "massive violations" had been committed and that back pay had been relinquished.\textsuperscript{59} Yet, the position of the dissenters, former Members Penello and Murphy, seems the better one. Their denunciation of the majority opinion as encouraging "litigation for litigation's sake" rings true. The dissenters stressed the fact that the contract was negotiated with back pay liability in mind and that the union gained more through settlement than litigation. Indeed, the NLRB Task Force, recognizing that settlements have reached a plateau and that the Board’s resources have been stretched to the limit in recent years, has recommended that the Agency accept private settlements unless individual discriminatees have "reasonable objections."\textsuperscript{60}

In part, the Japanese preference for settlement over litigation is attributable to the type of unfair labor practices which come before the Commissions. In the United States the overwhelming number of cases that come before the Board involve organizing campaigns or union employer relationships that are new or shakey. These cases invariably involve employer discharges and dismissals where it is alleged that union activity is the cause of the employer's conduct. In such cases, the unions are generally concerned with obtaining speedy hearings and relief, and in a large number of cases there simply is no opportunity or scope for settlement, inasmuch as the parties do not acknowledge a bilateral relationship.

The number of such cases seems to be increasing in Japan too—but more in the context of two-union discrimination. Straightforward union organizational struggles, so prominent on the American litigation landscape, simply do not occur with frequency in Japan. As in Europe, employer resistance to unions is less severe since, without the exclusivity-majority rule doctrine, it becomes virtually impossible to avoid the union altogether.

Given Japan's divided union movement, the two-union discrimination cases are plentiful. In the early 1950's, the phenomenon of the so-called second union meant a moderate cooperative union formed in response to the more militant, confrontationist stance taken by the collective bargaining representative for the workers. Quite often such a union was promoted and encouraged by supervisory personnel. There

\textsuperscript{58}Id. at 855, 98 L.R.R.M. (BNA) at 1317.


was a recurrence of these cases in the late 1960's and the 1970's in much the same form as their predecessors. It is not entirely clear why the two-union cases have become so important again, but they pose considerable problems for the Japanese when it comes to fashioning remedies for violations of labor law. It is likely that a number of factors has been responsible for this trend.

The first is the rapid economic growth which Japan experienced in the 1960's and the increased rationalization and job dislocation that went with it. It appears that new conflicts arose out of these problems and with that conflict came schism and an increased number of breakaway unions. The unions which are at the center of conflict find it increasingly difficult to bargain with their employers and thus bring a large number of charges alleging discrimination against their members in wage payments, merit and job evaluations, and other matters.

One of the most difficult cases involving two-union discrimination is Japan Mail Order Inc. v. Tokyo Labor Relations Commission decided by the Tokyo High Court. In this case, the first union had entered into collective bargaining with the company, demanding a lump sum bonus payment of five month's base pay plus a uniform amount for all workers. The company responded by stating that the union should “cooperate with an increase in productivity” as a quid pro quo for the payment. Meanwhile, it offered the second union, the JMO union, a similar payment with the same conditions, and that union signed the agreement. (The JMO union, as one might suspect, had the allegiance of a majority of the workers.) The first union resisted, alleging that the phrase “cooperation with an increase in productivity” would inevitably lead to rationalization accompanied by a “reduction of employees, intensification of labor, real wage decrease, elimination of the labor union and converting the union into a company union (goyo kumiai).” The company disputed this characterization.

The union charged that the failure to provide the workers with a lump sum payment that had been provided the other union was an unfair labor practice inasmuch as it constituted discrimination on the basis of union membership. Rejecting this argument, the Tokyo High Court said:

[T]he company decided that in order to increase the payment it would have to pay in advance the amount received for the next year’s increase in productivity to be attained based upon harder work by the employees. Therefore it is with good reason that the company added the condition of ‘cooperation with increase in productivity,’ making it difficult to accept the view of the relief order [formulated by the Labor Rela-

61. Tokyo High Court Decision, 26 Rominshu (1975).
The Court noted that if the union obtained the payments without signing the productivity agreement, this might constitute discrimination against JMO, the union which had signed the agreement. The absence of an exclusivity doctrine makes this kind of rival union bargaining a continuing problem in Japan.

However, in many cases where the union is unable to assert itself as an effective collective bargaining representative, the Commission becomes a kind of substitute for the bargaining table. In such cases, the union may not be too concerned about speedy relief. Quite the contrary, the union may want to keep the employer at the hearing and involved in the procedure as long as is possible. Only in such prolonged negotiations will any real collective bargaining take place. This tactic is not unknown to the United States, but it is far more typical on the other side of the Pacific.

This sort of situation leads to a very different kind of hearing from that which takes place in America before an Administrative Law Judge. Particularly at the Prefectural or Local Commissions level, the hearing can be, to speak euphemistically, quite informal. Even though lawyers are present, union members will interrupt both questions and answers by the other side as well as their own witnesses' testimony during cross-examination. A good deal of shouting and applause comes from the union side—particularly when the witness has finished testifying and the union members believe that the testimony has helped the case. Union members will not hesitate to excoriate the management representatives and to attack them for their alleged misdeeds. In short, this is a forum for the union and its members to exhibit a show of solidarity and to rally the union members in response to the employer's campaign against them. Because the procedures take on these characteristics, it is fair to say the in a good many instances the aims of the unions will be quite different from those of their American counterparts. When one considers the fact that anti-union animus in discrimination cases is always difficult to show and that the Commissions' discovery authority is rarely utilized, one can see that the aims and objectives of the unions may be anything but a formal order. A compromise or settlement will make it much more likely that the union will be able to engage in the collective bargaining process to some limited extent in the future.

It is therefore not surprising that Japan, like America, has suffered from a heavy backlog of cases here. Table 5 shows the backlog in each

Table 5:  Number of Unfair Labor Practice Cases Pending at the Start of Each Fiscal Year

<table>
<thead>
<tr>
<th>Year</th>
<th>Japan *</th>
<th>U.S. †</th>
</tr>
</thead>
<tbody>
<tr>
<td>1975</td>
<td>1173</td>
<td>9,711</td>
</tr>
<tr>
<td>1976</td>
<td>1417</td>
<td>11,156 **</td>
</tr>
<tr>
<td></td>
<td></td>
<td>(July-September 1976) 13,259 ††</td>
</tr>
<tr>
<td>1977</td>
<td>1469</td>
<td>14,256</td>
</tr>
<tr>
<td>1978</td>
<td>1302</td>
<td>14,482</td>
</tr>
<tr>
<td>1979</td>
<td>1358</td>
<td>16,942</td>
</tr>
<tr>
<td>1980</td>
<td>1357</td>
<td>16,657</td>
</tr>
</tbody>
</table>

* Source: Japan Ministry of Labor.
† Source: Annual Reports of the National Labor Relations Board, Table 1.
** Transition quarter.
†† The fiscal year had ended in June and was changed to end in September.

Table 6:  Average Number of Days for Unfair Labor Practice Case Settlement in Japan*

<table>
<thead>
<tr>
<th></th>
<th>Local Labor Relations Commission</th>
<th>Central Labor Relations Commission</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total Order</td>
<td>Withdrawn</td>
</tr>
<tr>
<td>1975</td>
<td>544</td>
<td>387</td>
</tr>
<tr>
<td>1976</td>
<td>624</td>
<td>366</td>
</tr>
<tr>
<td>1977</td>
<td>700</td>
<td>893</td>
</tr>
<tr>
<td>1978</td>
<td>777</td>
<td>477</td>
</tr>
<tr>
<td>1979</td>
<td>650</td>
<td>393</td>
</tr>
<tr>
<td>1980</td>
<td>758</td>
<td>653</td>
</tr>
</tbody>
</table>

* Source: Annual Reports, Japanese Central Labor Relations Commission.

country. For an administrative process, the record in both countries is horrendous. This becomes more obvious when one considers that (1) the Japanese statistics in Table 6 (which include some cases which have been to both the Central and local commissions) fail to take into account the time involved in the increasing number of cases which proceed to all three levels of the Japanese judiciary, and (2) thus do not reflect the long delay comparable to that set forth on the American side in Table 7. Professor Ishikawa described the delays built into the Japanese statutory scheme this way, “Those who contemplate pursuing Justice through all the labyrinthian paths along with it totters are generally
Table 7: Median Number of Days Elapsed for Processing Unfair Labor Practice Cases in the United States*

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Issuance of complaint to close of hearing</td>
<td>55</td>
<td>75</td>
<td>90</td>
<td>116</td>
<td>142</td>
<td>15</td>
</tr>
<tr>
<td>Close of hearing to ALJ decision</td>
<td>72</td>
<td>89</td>
<td>113</td>
<td>140</td>
<td>157</td>
<td>158</td>
</tr>
<tr>
<td>ALJ decision to Board decision</td>
<td>134</td>
<td>120</td>
<td>134</td>
<td>128</td>
<td>123</td>
<td>13</td>
</tr>
<tr>
<td>Board for decision to regional office referral for enforcement</td>
<td>39</td>
<td>37</td>
<td>39</td>
<td>40</td>
<td>38</td>
<td>36</td>
</tr>
<tr>
<td>Referral for enforcement to filing of petition for enforcement in Court of Appeals</td>
<td>34</td>
<td>38</td>
<td>29</td>
<td>29</td>
<td>29</td>
<td>30</td>
</tr>
<tr>
<td>Filing of petition to issuance of Court of Appeal’s opinion</td>
<td>292</td>
<td>317</td>
<td>330</td>
<td>331</td>
<td>365</td>
<td>391</td>
</tr>
</tbody>
</table>

* Source: Letter and enclosed charts from Joseph E. DeSio, Associate General Counsel, NLRB, to the author.

believed to be millionaires’ sons or psychopathic personalities with a passion for litigation."

In addition to the delays already mentioned, other factors are at work in Japan. In the first place, hearings are scheduled sporadically, and the result may be that hearings are held for only one or two days each month before adjourning for a month. The reason given is that lawyers’ calendars are full. In America, while private labor arbitration hearings are frequently scheduled in this manner, the rule is that those of the Labor Board are held on consecutive days. The only Commission which appears to have attempted to resolve this problem is the Fukuoka Labor Relations Commission. The Fukuoka Commission, which at one time excluded lawyers altogether on the ground that their presence fostered delay, sets a firm timetable for hearings to which lawyers are required to adhere as a condition of being admitted to practice before the agency.

Another factor responsible for delay is that many of the Commissioners fail to apply evidentiary standards and thus allow the parties to control the hearing. The Study Group on Labor-Management Relations Law recommended that the presiding Commissioner “take the initiative” in questioning witnesses and in other matters. Moreover, the

Study Group recommended that more skilled staffers assist in this process.

In order to put this problem of delay in perspective, the Study Group also noted that some of the statistics look worse because of a disproportionate backlog at the Tokyo and Osaka Labor Relations Commissions. Nevertheless, the Study Group noted that there had been (1) a rapid increase in charges filed between 1965 and 1974, and (2) an increase in complicated allegations of promotions and salary discrimination. Accordingly, the Study Group also recommended that the Central Labor Relations Commission make the most of “on the spot” investigations by the Secretariat of the Central Commission. Further, it recommended rapid case handling for refusal to bargain charges. Other recommendations, along with proposals put forward in the United States to deal with the backlog, are more appropriately discussed in Part IV, which examines remedies. Common themes, however, run through Parts III and IV. First, in both countries, employers appear to be taking more administrative decisions to the courts with a better prospect for reversal or modification than existed previously. The administrative process is deferred to less and less often.

The second is that the American process, more adversarial and confrontationist than its Japanese counterpart, responds in different ways to the relative avalanche of charges with which it is confronted. Once the General Counsel determines that a complaint must issue, he has an incentive for disclosure through discovery if necessary (although discovery is rarely invoked by the NLRB in America) and, more importantly, for an expeditious process—incentives which are simply absent from the Japanese administrative environment. In part, the reasons are institutional. There is no General Counsel in Japan. The labor unions must initiate proceedings. The small number of lawyers, crowded calendar dates, the need for creating a new forum for collective bargaining through the administrative process, and discovery powers placed in the hands of the Commission, rather than the unions, more frequently than not make their pursuit of remedies a desultory one.

The fact that America was not afflicted with the same kinds of problems before the General Counsel was separated from the Board by the 1947 Taft-Hartley amendments and before authority for pursuing complaints was placed in the hands of a Review Section suggests that the differences between the two countries are more cultural than institutional. Accordingly, whatever the recommendations of the Study Group, it may be that the process in Japan cannot be expedited appreciably; however, it may also be that the delay enhances the potential for settlement. Delay may provide more opportunity for dialogue and ulti-
mate compromise. Americans, despite their legitimate concern with streamlining the administrative process, may find much that is useful in the Japanese post-hearing settlement procedures. The culture on this side of the Pacific is more likely to inhibit conciliation once the gauntlet has been thrown down. The principal difficulty, however, is that responsibility would fall in the hands of the Administrative Law Judge—where delays are growing most alarmingly because of an ever increasing caseload and inadequate staff. When these problems are resolved, the Japanese experience should bear closer scrutiny by American labor lawyers and scholars. Even at that juncture, however, the attempt to devise effective remedies, so closely related to the number of cases and the Agency's ability to process them rapidly, must still be addressed. That is the matter to which this article turns next.

IV

REMEDIES-KYUSAI

The problem of remedies lies at the heart of any discussion of law—particularly labor law, which deals with complex practical problems in both the establishment and administration of the collective bargaining process. Both American and Japanese labor law have specific sections in their organic acts addressing this subject. Section 10(c) of the NLRA authorizes the NLRB to order parties which have violated the unfair labor practice provisions of the statute "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act."64 Article 27(4) of the Trade Union Law states that the "Labor Relations Commission shall make the finding of fact and issue its order in accordance therewith either granting in full or in part the relief sought in the complaints or dismissing the complaint."65

The NLRB must base its findings upon a preponderance of evidence and, under the Universal Camera test,66 the Court of Appeals must enforce the order if there is "substantial evidence" in the record as a whole to support the facts upon which the Board relies. (Of course, while the Board is the expert administrative agency to which the judiciary must defer in interpretations of law,67 the courts have not hesitated to reverse the Board when they believe the agency has strayed from the statutory mandate.)68 The Labor Relations Commission's orders are also enforceable in the courts—although the appeal is to the

68. First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); American Shipbuild-
District Court—and no substantial evidence test or standard of review is to be found in the law or in the decisions of the courts. Americans find the absence of any statutory standard both puzzling and perplexing.

Ever since 1938, the United States Supreme Court has expressed the view that the relief provisions of the NLRA are designed only to authorize orders which are “remedial” in nature and not “punitive,” even though the latter may be designed to deter future violations of the statute.69 This is a distinction which has hobbled the Board in its administration of the statute and which is largely responsible for the promotion of and debate about the Labor Reform Bill of 1977, which was designed not only to expedite the NLRB’s administrative process,70 but also to provide more effective remedies. These remedies include double damages or double back pay awards in the case of unfair dismissals of workers in organizational struggles and “make whole” remedies which would provide workers with damages in lieu of wages that they would have received through a collective bargaining process which was unlawfully thwarted.71 Yet the distinction between remedial and punitive orders is found neither in the language of section 10(c) nor in the legislative history. Indeed, Justice Frankfurter has referred to the debate about distinctions between what is remedial and what is punitive as a “bog of logomachy.”72 Both American and Japanese labor law cases indicate that the purpose of remedies is to preserve the status quo ante or to create that which would have been had there been no unlawful activity by the respondent. Both American and Japanese decisions, however, recognize that remedies necessarily involve more than recreating the status quo ante or creating what would have been. Both countries recognize that remedies play a critical role in deterring future violations and in establishing a healthy labor-management relations environment.

These themes run through many of the remedies problems faced by both countries. The Japanese article 27 speaks of “relief sought,” but there is no similar limitation contained in section 10(c). While the Board and the courts take the view that remedies in the U.S. may be fashioned by the agency or courts sua sponte, the assumption appears to be different in Japan because of the statutory language. In the view of

72. Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941).
Japanese scholars, however, the matter is at this point by no means resolved.

A. The Appropriate Breadth of Administrative Orders

In *NLRB v. Express Publishing Co.*, the Supreme Court struck down a blanket order of the Board which contained general language ordering the employer to stop violating the Act (cease and desist order) in any manner whatsoever. The Court said:

*It is obvious that the order of the Board, which when judicially confirmed, the Courts may be called on to enforce by contempt proceedings, must, like the injunction order of a Court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.*

The Court further stated that a court, when affirming a Board order, has broader authority and power to restrain conduct which has either been committed or which may be "fairly . . . anticipated from the defendant's conduct in the past." The Court noted that it was "salutary" that when one unlawful act had been committed a defendant might be prohibited from committing others. The Court said:

The breadth of the order, like the injunction of the court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. . . . To justify an order restraining other violations, it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past.

The Court noted that the subtleties of labor relations might lead the Board to conclude that discriminatory discharges of union members could be anticipated from an unlawful refusal to bargain in the past. Professor Jaffee has pointed out that the decision has two "equally significant facets": (1) that where a violation is "isolated" the order must be restricted to repetition of the particular type of illegal conduct; (2) where the violation is not isolated, the prohibition should be explicitly directed at future violations which may go beyond those

73. 312 U.S. 426 (1941).
74. *Id.* at 433.
75. *Id.* at 435.
76. *Id.* at 436-37.
established in the record." After *Express Publishing* the Board has had to limit its remedies: "[A]utomatic adoption of broad orders in every discharge case is not warranted, but rather a narrow order, responsive to the particular actions of a violation of the Act, would usually be more appropriate." 78

In Japan, the position is that article 27 of the Trade Union Law does not authorize cease and desist orders (*chusoteki fusakui meirei*) which are really broad and "abstract" orders of "forebearance," the kind condemned in *Express Publishing*. The accepted view is that remedies are to be aimed at the conduct which is actually occurring. However, the Supreme Court of Japan, in the *Tochigi Kasai* 79 decision in 1961 held—for reasons similar to those put forward in *Express Publishing*—that where there is a likelihood that particular unfair labor practices will be repeated, the Commission may, in its discretion, issue so-called orders of forebearance. Such orders prohibit practices which are similar to those that have occurred in the past even though the specifically objectionable conduct may have been eliminated.

The reason for caution in Japan is similar to that in America. If a broad order is issued containing prohibitions of unrelated practices, an employer that violated it would be subject under article 28 of the Trade Union Law to both a "correctional fine" (*karyo*) and possibly to imprisonment (*bakkin or kinko*). Under such circumstances the law would be enforced by punitive measures without prior resort to the administrative process.

Actually, the practices of the NLRB in the United States and the Labor Relations Commissions in Japan differ more substantially than the cases indicate. The normal practice in the United States is for the Board and its Administrative Law Judges to issue an order which contains fairly broad language, although this language is tempered by the dictates of *Express Publishing*. In Japan, the situation is just the opposite. The normal practice is to issue carefully tailored orders prohibiting the specific conduct which was found to be unlawful in the proceeding. Perhaps the explanation can be found if one examines the penalties for violation of an order.

In America, both civil and criminal contempt penalties may be imposed upon a contumacious defendant if the NLRB initiates a proceeding before the Court of Appeals which has enforced its order. However, even where the Board initiates a proceeding—and it appears that the agency has been somewhat conservative in initiating such ef-

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forts—\(^\text{80}\)—the proof that is necessary for civil contempt is "clear and convincing" evidence. Where criminal sanctions are sought, the normal criminal standard of "beyond a reasonable doubt" applies. Both standards are more demanding than the "preponderance of evidence" standard in Board administrative proceedings. Moreover, the courts will refuse to impose contempt sanctions where defendants have acted in "good faith" even though their conduct violates the terms of the decree. Moreover, because the Courts of Appeals—as appellate courts rather than trial courts—are not used in contempt proceedings, they are often uninitiated and must necessarily rely upon appointment of masters. In many instances, this has tended to complicate and delay the proceedings.

The contempt concept is alien to Japanese law. Article 28 operates almost automatically. Article 28 states where there is a violation of the order and where the order has been sustained by the fixed judgment of the court in accordance with the provision of article 27, those who commit violations are "liable to imprisonment not exceeding one year or to a fine not exceeding 100,000 yen, or to both." Thus, the penalties are established in the statute itself. Rather than requiring a more exacting standard of proof, as the American courts do, under the circumstances of article 28 the Japanese courts require a less demanding standard of proof once the question of a violation of a court decree arises.

This standard of proof helps explain why the Japanese Commissions are more careful about issuing broad orders—and why the Commissions generally limit the order to the specific violation involved. By no means, however, is this the only factor which explains the difference; the Japanese also prefer to leave the parties to their own resources. The narrower the order, the more likely this objective will be realized.

\section*{B. Notice Posting}

The two countries also differ considerably on their approaches to notice posting. This is a remedy through which employees (and sometimes members of the public) who venture on to plant premises are advised that they have violated the law and have been ordered not to engage in similar misbehavior in the future. In the United States, employers (today labor organizations as well) are invariably subjected to notice posting. This has been required as an automatic remedy under the provisions of section 10, which permits the Board to order "affirmative action." In its Second Annual Report, however, the Board appears to have understated the matter:

In most of the cases in which it was found that an employer had en-

\footnote{80. See generally Bartosic & Lanoff, Escalating the Struggle against Taft-Hartley Contemnors, 39 U. CHI. L. REV. 255 (1972).}
gaged in an unfair labor practice, the Board ordered the employer to post notices to his employees in conspicuous places in his plant, or place of business, stating that he would cease and desist as required by order of the Board. In some cases, the Board has desired to make certain that a particularly important fact will be brought to the attention of the employees, and has ordered the respondent to state specifically that it will cease and desist from committing the particular unfair labor practice, or that it will take the necessary affirmative action to remedy the situation.81

Some of the American courts have concluded that an employer should not be required to confess to an illegal act or to make an implied admission of guilt.82 The Board, on the other hand, has sometimes insisted on oral admissions or apologies to assembled employees when the employer's conduct is egregious.83

As might be expected, the Japanese are more cautious. While the percentage of cases requiring notice posting is increasing, (see Table 8), the remedy is by no means automatic.

Table 8: Number of Relief Orders for Unfair Labor Practices and Number of Relief Orders With Notice Postings by Local Labor Relations Commissions*

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of relief orders</th>
<th>Number of relief orders with notice postings</th>
<th>Percent of relief orders requiring notice postings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>34</td>
<td>1</td>
<td>2.9</td>
</tr>
<tr>
<td>1955</td>
<td>23</td>
<td>2</td>
<td>8.6</td>
</tr>
<tr>
<td>1960</td>
<td>23</td>
<td>7</td>
<td>30.4</td>
</tr>
<tr>
<td>1965</td>
<td>71</td>
<td>9</td>
<td>12.6</td>
</tr>
<tr>
<td>1970</td>
<td>84</td>
<td>14</td>
<td>16.6</td>
</tr>
<tr>
<td>1975</td>
<td>128</td>
<td>32</td>
<td>25.0</td>
</tr>
<tr>
<td>1976</td>
<td>123</td>
<td>35</td>
<td>28.5</td>
</tr>
<tr>
<td>1977</td>
<td>101</td>
<td>36</td>
<td>35.6</td>
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<tr>
<td>1978</td>
<td>90</td>
<td>32</td>
<td>35.5</td>
</tr>
<tr>
<td>1979</td>
<td>107</td>
<td>36</td>
<td>33.6</td>
</tr>
</tbody>
</table>

*Source: The Secretariat of Central Labor Relations Commission.

Representatives of the Hiroshima Labor Relations Commission have indicated that frequent use of this remedy would make the employer "lose face." While many American employers are extremely unhappy about notice posting, it is doubtful that their feelings are as

82. Cf. J.P. Stevens Co. Inc. v. NLRB, 668 F.2d 767 (4th Cir. 1982).
strong as those of their Japanese counterparts. The increasing percentage of Japanese cases in which posting is required, coupled with the fairly recent caution the American judiciary has demonstrated in this area, suggests a degree of convergence between practices in the two countries.

C. Reinstatement

Under Japanese labor law, both the courts and the Labor Relations Commissions have jurisdiction over dismissals, i.e., the judiciary dealing with individual contract of employment cases (though often interpreting unfair labor practice law in the process) and the Commissions deciding unfair labor practice matters. In cases of original jurisdiction, the Japanese courts have the authority to determine whether the dismissal has validity. Although the Commission will use relief orders which contain provisions to the effect that “dismissal is nullified . . .,” the effect of the Commission’s order is simply to provide for reinstatement and not to conclude that the dismissal is without legal effect. This is why the courts order back pay as a remedy and do not specifically provide for reinstatement, although the practical effect of the order is to provide for reinstatement. The Commission’s order simply provides for reinstatement with back pay.

In America, while under common law reinstatement was regarded as an inappropriate remedy because it would compel the performance of personal services, the NLRA and specifically its section 10(c) reversed this rule in labor-management relations, at least where the protection of section 7 rights to protest working conditions and to join unions and engage in union activity are involved. Even prior to the NLRA, under the Railway Labor Act, where no specific mandate from Congress was provided, the Court compelled reinstatement of workers who had been discriminated against so as to implement the legislative policy against such discrimination contained in the Railway Labor Act. Moreover, in Phelps Dodge Corporation v. NLRB, the Court held that reinstatement was an appropriate remedy where workers have obtained “regular and substantially equivalent employment” despite the fact that section 2(3) excludes such persons as “employees.”

Although Japanese law provides for reinstatement, this remedy

84. Churyen Gun Tachikawa Kichi (Forces Stationed at Tachikawa Base), Tokyo District Court, Feb. 8, 1960, GYO No. 78 (1960).
87. Phelps Dodge v. NLRB, 313 U.S. 177 (1941).
does not extend to workers who have faced discrimination in hiring. The Commissions cannot order that they be rehired. However, there are situations where a refusal to rehire has been deemed to have the same practical effect as a dismissal; therefore, reinstatement in such cases has been regarded as appropriate. Perhaps Japanese labor law on this subject can best be explained with reference to shushin koyo. Since large Japanese employers provide permanent employment and a greater measure of job security than is provided in the United States one might assume that the courts and Commissions have been reluctant to interfere with their right to hire or select employees. In this area, Japanese management must exercise judgment and discretion; these are areas in which the Commissions and courts are loathe to interfere. Only where rehiring is involved—frequently when the courts find the termination of a business to be “dissolution camouflage” (giso kaisan)—will the judicial or administrative bodies be willing to intervene.

On the other hand, the United States Supreme Court has taken the position in the Phelps Dodge case that “[r]einstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other.” Said the Court in Phelps Dodge: “To differentiate between discrimination in denying employment and terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.”

Both countries’ rules of law may well reflect societal practices. Phelps Dodge represents an interventionist posture which the Japanese are unwilling to accept—even though the price is tolerance of discrimination.

D. The Adequacy of Reinstatement and Back Pay

For almost twenty years, there has been a continuous debate about the adequacy of back pay and reinstatement, beginning with the so-called Cox Report chaired by Professor Archibald Cox of Harvard Law School, who was appointed by President Kennedy. The principal problem relates to the delay in administrative process. Today, approximately 40,000 unfair labor practice charges are filed with the Board each year, almost quadruple the 11,325 charges that were filed before

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90. 313 U.S. 177, 187 (1941).
91. Id. at 188.
the Board in 1960. The number of complaints issued by the Regional Directors and General Counsel went from 2,141 in 1960 to 3,793 in 1976. From the filing of a charge through the decision of the Administrative Law Judge and finally on to a decision by the Board itself, approximately a year is required for the case to be processed. But, as has been indicated, the average is well in excess of a year if the case goes beyond the administrative process to the Court of Appeals.

The statistics for the Japanese Commissions seem to be even worse. For instance, in 1976 it averaged more than four years (without any kind of appeal to the courts) for the Tokyo Labor Relations Commission to complete a case where a so-called partial remedy was issued. For those cases in which complete remedies were fashioned, the Commission took 613 days; for those in which there was formal settlement, 592 days; and where there was an informal settlement, 256 days.

The unlawfully dismissed worker suffers more than delay. In the first place, as the Pucinski Report of the U.S. House Labor Committee demonstrated, some employers have dismissed employees who identified with the union as a kind of “license fee.” That is to say, it is much cheaper to provide back pay for a few workers than to negotiate a collective bargaining agreement with a union. It is also more unlikely that the agreement will be negotiated where workers are dismissed, because their fellow workers will get the message very quickly, particularly if those who are dismissed remain unemployed, and the victims of discrimination themselves become demoralized. Thus, the workers’ collective interest in unionization may be undermined even though an ostensible remedy is provided.

Second, delay quite obviously harms those who have been discharged. In addition to possible loss of income, the workers may not be able to pay installments on furniture and household goods and appliances and may lose them to repossession. If payments are not made on homes, mortgages may be foreclosed. In addition, the worker may suffer “humiliation and embarrassment in the eyes of his wife and children.”

Damages beyond back pay, however, have not been provided in either American or Japanese labor law. Petitioners have sometimes requested damages (isharyo) in the form of property damages or damages for personal injury (physical or emotional) suffered as a result of unfair labor practices. However, the Commissions have uniformly taken the view that orders for such damages are not within their discretion, and are therefore invalid.

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93. *Nihon Kamotsu Kensu Kyokai Kobe (Kobe Japan Freight Inspection Cooperative)* case, Kyogo District Labor Commission, Order of March 18, 1952, Fu. no. 14-16 (1951); *Sawa Taxi*
Under American labor law, while it seems clear that the reference to reinstatement with back pay in section 10(c) is merely illustrative of affirmative action and does not exhaust all possible remedies, damages beyond back pay have been rejected by the Board ever since its decision in *National Maritime Union*. In truth, the basis for the rejection of the damages remedy has not been clearly articulated in either America or Japan. In Japan, it is not clear why damages lie beyond the “relief sought” mentioned in article 27, just as it is unclear why damages are outside the language of section 10(c). Within the context of a duty of fair representation suit in *St. Clair v. Local 515*, Judge McCree (later Solicitor General) stated:

Generally in contract law consequential damages will not be awarded unless the consequences were clearly contemplated by the parties as being at the heart of the contract. Accordingly, the usual monetary measure of damages for wrongful discharge at common law, under the National Labor Relations Act, at arbitration, and under the Equal Employment Opportunity Act, is back pay less interim earnings.

This leads to a second problem, the limitations American labor law itself places upon back pay. Under Anglo-American law, there is a duty to mitigate damages. Although that concept is not specifically written into section 10(c), the Supreme Court accepted the mitigation approach in *Phelps Dodge*. The Court found that the rule fulfilled “the healthy policy of promoting production in employment” and that it advanced the remedial purposes of the statute. Speaking for the Court, Justice Frankfurter wrote:

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred.

Thus, the worker has a duty to mitigate through reasonable diligence, and interim income that should have been obtained is deducted from back wages. The *Phelps Dodge* rule is based in part upon the view that unless such deductions were actually made, the remedy would be punitive. But an equally plausible view would be to examine the question from the standpoint of the employer. “Thus, it could be argued that a back pay award is not punitive unless an employer is required to pay out a sum greater than he would have paid if he had

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95. 422 F.2d at 132 (footnotes omitted).
96. 313 U.S. at 197-98.
never committed the violation." Curiously, under American law unemployment compensation, as distinguished from wages, is not deducted, even though it is difficult to draw a clean, logical demarcation line between the two.

The consequences of this rule are unfortunate in two respects. First, the worker, already unable to claim recompense for losses in addition to wages, is saddled with an additional burden, i.e., the loss of interim or potential income; the employer who is often able through unlawful dismissals to undermine the worker's interest in unionism may thus profit in other areas not directly related to the individual discrimination. He may thereby get something of a windfall. Moreover, as a practical matter, the effect of the rule is to require additional hearings after the unfair labor practice case itself on the question of what should constitute back pay. It is not merely a question of examining the employer's records. The inquiry must focus upon the kinds of jobs which were available and which the worker might reasonably have obtained during the interim. An additional complicating factor is created by the rule that the worker, while initially obligated to seek substantially equivalent employment, must seek jobs beneath his qualifications. This means more delay and a further frustration of the statute's policies.

In Japan, the rule is now quite different. In the Dai Ni Hato Taxi decision issued by the Grand Bench in early 1977, all of the Justices took the position that at least under certain circumstances, interim income could not be deducted from an award of back pay. When an employer is able to remove the worker from the workshop, the Court said, all types of union activity are threatened.

For this reason the relief order is considered not only from the perspective of offering remedy for individual damages wrought by the encroachment on the discharges, but also is considered together with the obstruction to overall union activities. The conditions of obstruction are thus removed and corrected and restoration of normal order in the industrial relations between the collective groups which was the intent of the law takes place.

Under the majority opinion in this case, the initial focus must be upon the individual worker and the kind of work through which he obtained his interim income, and whether that work involved greater "psychological or physical requirements" which would make the work undesirable or unpleasant. If the work is less desirable, an argument
could be made against deducting interim income earned from it. The Court majority found that the work obtained by the discharged cab drivers in this case—taxi driving with other companies—was not so difficult as to warrant a remedy precluding the deduction of interim income.

The Court stated that there must be a tight relationship between the individual harm and the impact upon the collective interest in order to avoid the deduction of interim earnings. The Court also said that the "ultimate effect of restrictions on general union activities has a close relationship to the severity of the harm actually done to the worker in question who was discharged." In assessing the harm done, the Court found that factors such as the "ease or difficulty" of finding other work, the nature and content of the job and working conditions at the interim place of work, and the kind of wages and allowances offered are all to be taken into account. The Court specifically stated that the question whether the worker has earned interim income "will make a difference in fashioning the back pay remedy."

Opposing this is the dissenting opinion of Justice Seiichi Kishi. Justice Kishi finds that interim income can never be deducted from back pay. In essence, Justice Kishi insists that the appropriate vantage point from which to assess the remedy is the employer rather than the employee. Interim income, in Justice Kishi's view, "has nothing to do with the employer and is something which is purely coincidental."101

The objective in Justice Kishi's dissent is to establish industrial relations "order." Deducting interim income involves considerations purely from the employee's side which have nothing to do with the employer who has committed the statutory violation. However, attempts to fashion effective monetary remedies cannot be viewed merely as efforts to restore the status quo ante. Rather, they must be seen as attempts to structure good industrial relations for the future, as well as to provide compensation. As Justice Kishi stated, the objective is to restore and secure "normal labor relations order between labor and management . . . ." In this respect the opinion seems sound. One cannot say the same about that portion of the dissent which finds that the unfair labor practice system is designed to "obligate and require the employer to restore conditions to what would have been without the unfair labor practice . . . ."102 What "would have been" is arguably more speculative than the restoration of good industrial relations.

The dissenting opinion of Justice Shigemitsu Dando, joined by three other Justices, points out that article 7 is not designed "primarily" to protect the rights and interests of individual workers in the em-

101. *Id.* at 317.
102. *Id.* at 315.
ployer-employee relationship. Rather, it is designed to prevent managerial interference in organized activities, as such interference undermines the collective bargaining process. In the paper "Why Back Pay?", K. Hiraga argues that the union incurs organizational and financial expenses in connection with protesting unfair labor practices for which it should be compensated. This argument approaches the problem from a different angle than used by either Justice Dando or Justice Kishi, but highlights the same collective interests which are intertwined with the issue of individual compensation. This focus on collective interests argues in favor of expansive interpretation of statutory remedies.

Justice Dando also differs from the majority conclusion that consideration of the interim working environment may properly preclude the deduction of interim income.

Justice Dando's dissent emphasizes the discretion given the Labor Relations Commission by the Trade Union Law, and finds that the judiciary should defer to the Labor Relations Commission's order unless the order was "unmistakably and clearly irrational." This view comports with the broad discretion the United States Supreme Court has generally accorded the NLRB in the remedial sphere. The Japanese approach to this matter, however, remains vague and undefined.

E. The "Make Whole" Case

A further area of American labor remedies law raises some of the same points discussed in connection with the Dai Ni Hato Taxi case. In this area the employer, after losing an NLRB election, refuses to bargain with the union certified as the exclusive bargaining representative. Because unit certifications are not directly enforceable or appealable to the courts (as distinguished from unfair labor practice cases), the employer may seek a review of the dispute only by refusing to bargain. This, in turn, triggers an unfair labor practice proceeding alleging a refusal to bargain which then goes through an Administrative Law Judge, the Board, and on to the Circuit Court of Appeals. The difficulty is that when the employer is finally obliged to bargain with the union, many of the workers may have lost interest in pursuing the matter—just as they may have lost interest where dismissals occur for reasons prohibited by the NLRA or, in the case of Japan, the Trade Union Law.

Where no bargaining has taken place for a long period of time, a

105. AFL v. NLRB, 308 U.S. 401 (1940).
Board order requiring the employer to negotiate with the union, while no insignificant remedy, 106 does not make the workers whole for losses attributable to the unfair labor practice. Nevertheless, the Board in Ex-Cell-O Corp. 107 held that damages to replace wages which would have been received under a collective bargaining agreement are an inappropriate remedy under the NLRA. The Board found that such a remedy would involve the imposition of collective bargaining agreement terms something which is prohibited by the applicable statute as interpreted by the Supreme Court. 108 However, subsequent to Ex-Cell-O Corp., the Court accepted the view that a union can be recompensed for litigation and organizational expenses attributable to the employer’s unfair labor practice, where the employer’s refusal to bargain and the consequent appellate litigation are based upon “frivolous” grounds.

The Labor Reform Bill, which was passed by the House of Representatives in October 1977 but did not receive consideration on its merits before the Senate because of the inability of its supporters to obtain cloture against a filibuster, would have revised the law in a number of relevant respects. First, it would have eliminated the Phelps Dodge interim earnings deduction and mitigation of damages rule. Second, double damages would have been awarded in cases of dismissals arising in organizational and first contract situations. Moreover, the Ex-Cell-O rule would have been overruled so as to award workers income lost during the period of time that an employer would not bargain with a certified collective bargaining representative. Third, as an additional sanction, the Secretary of Labor would have been required to bar employers designated by the Board as guilty of recidivist behavior in unfair labor practice litigation from bidding for future government contracts.

The bill also would have dealt with the problem of administrative delay by permitting Administrative Law Judge decisions to be summarily affirmed by the Board where, in its judgment, the issues presented did not involve an unresolved question of law. Most of the cases coming before the Board concern factual issues presenting questions of credibility on dismissals and disciplinary action. Moreover, the Board’s orders would have been self-enforcing: unless the respondent moved to reverse the Board’s order within fifteen days in the Circuit Court of Appeals, the order would be summarily enforced without argument on law or fact.

This reform would have provided effective remedies which might have deterred wrongdoers, and ameliorated the problem of delay. Op-

ponents of the Bill have argued that the prospect of double damages would make unions and workers more litigious and that the employers, whose backs would be more to the wall, would be similarly less inclined to settle and more prone to adjudicate. However, recent years have seen the advent of increasing recidivism as well as appeals of Board orders to the courts. If anything, the major deficiency with the Labor Reform Bill is that its remedies may not be effective enough. One appropriate addition might be to impose contracts in the first contract situation where employers have unlawfully refused to bargain or in some other way have substantially interfered with the collective bargaining process. In any event, if one can judge by the back pay litigation, Japan seems to be considerably ahead of America in its refusal to become bogged down in the remedial-punitive "logomachy" and in its willingness to see the tight relationship between so-called individual discrimination and the collective interest.

Two lines of authority demonstrate some of the difficulties that Americans have had with remedial problems and with fashioning orders that would have a meaningful impact upon labor-management relations. The first area is reflected in former Board Member Walther's perceptive dissent in *Atlas Tack Corporation*. In that case, a Board majority followed its traditional approach and ordered that employees be reimbursed for benefits unilaterally and unlawfully discontinued by the employer. As the dissent noted, the majority's traditional remedy required the employer to "(1) restore the status quo ante with respect to the changed terms and conditions of employment should the employees through their Union so desire, (2) make the employees whole for any loss of pay they may have suffered due to the unilateral changes, and (3) bargain collectively with the Union, upon request, and embody any understanding reached in a signed agreement."

Member Walther's dissenting opinion noted that the "unfair labor practices here strike at the heart of the collective bargaining process" inasmuch as bargaining had been suspended for more than two years prior to four months of negotiations before the unilateral changes were made, and it had been four years since the parties had been able to reach any agreement. Walther argued that "[t]he effect of such conduct is predictable—a longstanding collective-bargaining relationship is destroyed, and the employees' respect for the Union is so totally undermined that when Respondent chooses—or is ordered—to return to the bargaining table, the Union does not have the support necessary to bar-

111. *Id.* at 223, 93 L.R.R.M. (BNA) at 1238.
gain effectively.”¹¹² Therefore, the focus of the remedy, according to Member Walther, must be to make “every effort” to provide unions in such circumstances with “economic clout and to create an environment in which it is economically advantageous for the employer to engage in meaningful collective bargaining.”¹¹³

Member Walther’s imaginative response to the violations in *Atlas Tack* was to provide the union with authority to bargain the back pay award in exchange for other management concessions. Such a “remedy,” in the dissent’s view, would more effectively protect the collective interest of all workers in self-organization and collective bargaining. Said Member Walther, “I view restoration of the union’s ability to engage in meaningful collective bargaining to have a higher priority than direct economic restoration of theoretical employee losses.”¹¹⁴

The Board majority said that empirical data supporting the conclusion that the union would obtain more economic muscle under the dissent’s scenario was a prerequisite to acceptance of the dissenting opinion. But the dissent takes better account of the prospects for a working collective bargaining process in the future. The fact that the relationship was a “long standing one,” in contrast to union organizational campaigns or a first contract situation, makes a remedy aimed at the injury to the collective interest particularly appropriate. The union needs to function as a credible bargaining agent that is likely to deliver a contract. The Board’s inability to impose a contract notwithstanding, the establishment of a harmonious labor-management environment—a theme articulated by some of the opinions in the *Dai Ni Hato Taxi* case as well as by the dissenters in *Clearfield* (where the significance of contractual and established relationships was stressed in relation to a settlement’s adequacy)—is an important element in the remedial statutory scheme.

A second important area, which has already been referred to, is the Board’s involvement in back pay computation hearings. The Japanese Commissions, aside from the mitigation of damages arena, do not fashion specific rules on back pay. They simply do not involve themselves, even though their position might properly be characterized as adversarial once liability is established. The underlying assumption appears to be that their involvement would be inconsistent with the role of conciliator and would disrupt the harmony which unions and employers are more likely to preserve if they resolve such difficulties themselves.

However, while the Japanese approach to remedies is in some re-

¹¹². *Id.*
¹¹³. *Id.*
¹¹⁴. *Id.* at 224, 93 L.R.R.M. (BNA) at 1239.
pects imaginative and foresighted, in other respects it may be regarded as deficient or entirely lacking. The back pay cases may even represent something of an aberration when one considers the Japanese refusal (elaborated more fully below) even to consider the applicability of these cases to other crisis areas in Japanese labor law. Justice Kishi's explanation of the anti-mitigation of damages rule may best explain the differences between the American and Japanese approach. In the United States, it is relatively easy to change jobs. Interim income can therefore be seen as wages the worker would have received in the worker's previous position. However, in Japan, with its system of lifetime employment, it is much harder to secure an interim job with the equivalent status and benefits of a previous position.\textsuperscript{115}

Further, Justice Kishi points out that an assumption exists in Japan that dismissal is invalid under private civil law. In America, not only is this not so, but for the most part the judiciary is involved only to review administrative decisions.

\subsection*{F. Two-Union Discrimination}

In the United States, numerous problems arise over real or imagined discrimination practiced by an employer in favor of one union's members over those of another whom the employer may regard as less cooperative or more militant. To some extent, these problems are made less troublesome by the system of secret ballot election in appropriate units and by the doctrine of exclusivity. A period of stability usually exists for the term of the exclusive bargaining representative or collective bargaining agreement.

However, the situation is complicated where two competing unions demand recognition from the same employer for the same group of employees, when the representation issue has not been resolved by the Board through its secret ballot election procedures. From 1945 until 1982 the Board adhered to its ruling in \textit{Midwest Piping} \textsuperscript{116} and precluded an employer from recognizing and bargaining with either union until the representation issue had been resolved by the Board. The principal rationale for the Board's ruling in \textit{Midwest Piping} appears to be that the union enjoying the benefits of the bargaining relationship would have an unfair advantage in any further contest for the workers' allegiance.

While the bargaining relationship would appear to give the union enjoying it considerable advantages in Japan, this may not be the case in America. Contests in America between industrial unions and craft unions may make the agreement negotiated by the former the floor or

\textsuperscript{115} See \textit{Hato Taxi}, supra note 99, at 320-28 (Justice Kishi dissenting).

minimum for future demands by the latter where skilled work or skilled workers are concerned. Again, however, a sense of occupation or job consciousness not present in Japan may account for this American phenomenon.

In any event, the Board has now retreated from Midwest Piping by refusing to find a statutory violation where there is no resort to the Board's ballot procedures by one union seeking certification. Part of the reasoning is that a competing union could immobilize an employer even though it had only de minimis support among the work force. A representation petition needs a 30% showing to invoke the Board's ballot procedures. This means that employers will be precluded from recognizing or bargaining with one union only when there is a serious rivalry.

Moreover, when an employer has a relationship with an incumbent union, it may continue to bargain with the union and sign a contract even though a representation petition has been filed by an outside union. This is so, the Board said, because the filing of a representation petition by an outside union "in and of itself, should not overcome the strong presumption in favor of the continuing majority status of the incumbent and should not serve to strip it of the advantages and authority it could otherwise legitimately claim."

The most unassailable portion of the Board's rationale—and that which is surely in line with the Japanese experience—is that neutrality simply cannot be assured where a bargaining relationship has previously existed and where it is under challenge. Its continuation could mean unfair advantage; discontinuation could be equally unfair.

In both America and Japan, with contrasting statutory schemes for union recognition, it would seem that the major focus must be on remedies rather than on determining the circumstances under which statutory violations can be found.

The different statutory scheme in Japan, and perhaps even more important, the rivalry between the major federations based in large part on ideological considerations, has made this a more pressing problem there. Although expulsion of the International Brotherhood of Teamsters (America's largest union) from the AFL-CIO has contributed substantially to union rivalry in the United States, the AFL-CIO's "No Raiding Agreement" takes most union recognition disputes away from the Board. No comparable mechanism exists in Japan.

Ever since the late 1960's, the number of so-called two-union discrimination cases has increased substantially in Japan. Generally,

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118. RCA Del Caribe, 262 N.L.R.B. No. 116 at 9, 110 L.R.R.M. (BNA) at 1370.
these cases arise where an employer is providing wages or fringe benefits to one union’s members which are superior to those received by the other union’s members. The cases are difficult because the criteria, as one might expect, are subjective; sometimes the employers refuse to disclose records and relevant evidence. The Commissions have dealt reasonably effectively with these problems, however, by simply resolving all doubts against those who refuse to provide evidence and by allowing discrimination to be evidenced by statistics. However, the problem of remedy has been much more elusive.

The difficulty is that the Commissions only consider whether individual workers have been discriminated against in connection with wage and fringe benefit payments. If the answer is in the affirmative, back pay or restitution is provided. Meanwhile, the employer’s basic objective has in most cases been achieved, i.e., he has eliminated the troublesome first union which led him to cooperate in the creation of the friendly “second union.” When the hearing has been concluded and appeals have been taken, the first union has few members. It is no longer able to function as a collective bargaining representative.

One would think that the Japanese commissions and courts, accustomed to dealing with the collective interest in the back pay cases, would devise effective remedies to deter employers from using such tactics to avoid bargaining with first unions. This has not happened. Discretion has prompted the Japanese to steer away from inter-union rivalry and employer manipulations. The NLRB could not avoid the issue because it is so closely involved with certification and recognition proceedings.

As noted, the United States has had similar problems with company sponsored unions. In both countries, the law prohibits unions which are company dominated or assisted, although the Japanese do not draw negative connotations from the words “company union.” In America, however, when unlawful company unions have been found to be formed and dominated by the company, the remedy has been disestablishment of the union itself. At one point, prior to the Taft-Hartley Amendments, disestablishment orders were only used in connection with unions which were unaffiliated with the American Federation of Labor or the Congress of Industrial Organizations. The Supreme Court specifically approved of the disestablishment remedy as an appropriate vehicle through which all vestiges of company control could be eradicated in Pennsylvania Greyhound Lines and Pacific Greyhound Lines.

119. Matsuda, Wage Discrimination and “Continuing Practice” (unpublished material drafted at the Yokohama National University Faculty of Business Administration).
The same debate about disestablishment that took place in the United States has evolved in Japan. In America, the question has not been essentially whether the Board has the power to devise disestablishment or dissolution remedies under section 10(c)—but rather whether such a remedy is practicable. In Japan, the Commissions apparently have similar authority to dissolve so-called company-dominated unions. However, the prevailing view is that such an order would be ineffective (muko) and impracticable inasmuch as the existence of the union is a matter to be decided by the union itself. Therefore, the reasoning goes, the matter cannot be effectively addressed by outsiders. The question has been litigated, but not successfully.\(^\text{123}\)

Again, the law cannot be understood without reference to societal factors. The deep divisiveness of the Japanese trade union movement and its lack of solidarity is responsible for the Commission's attitude. Just as exclusivity has never taken root in Japan, the dissolution remedy flounders. Under legislation which is similar to that of the United States, the Commission has reacted quite differently. Because the Commission's reasoning is based on practical considerations, the approach must be viewed as a reaction to societal conditions.

### G. Preliminary Injunctions and Kinkyu Meirei

Under the NLRA, the Board may obtain temporary or preliminary injunctive relief. Where certain kinds of union unfair labor practices, such as secondary boycotts, jurisdictional disputes, and various kinds of picketing are involved, the statute mandates the Board to proceed immediately into federal district court to obtain such relief.

The view is that a remedy at a later date would be academic. But the same is not true of certain kinds of employer unfair labor practices which gave rise to the demand for the Labor Reform Bill. For instance, dismissals during organizational campaigns spawn cases where speedy relief is the only effective remedy, given the likelihood that workers will be so intimidated that they will be unable or unwilling to express their free choice. Under the Labor Reform Bill, the Board would have been mandated to proceed in federal district court to obtain temporary or preliminary relief under such circumstances.\(^\text{124}\) The Bill would have provided for temporary relief with the Board considering, but not limited to, the following criteria: (1) whether the unfair


\(^{123}\) Showa Seisaku Sho (Showa Factory), Saitama District Labor Commission, Fu. no. 6 (1961); Ringin Shiki Insatsu (Ringin Paper Article Printing), Osaka District Labor Commission, Fu. no. 17 (1954).

labor practice is committed during the course of an organizing campaign; (2) whether the alleged violations are reasonably apparent and are widespread or repetitious; (3) whether the efficacy of the Board's final order is likely to be nullified in the absence of such interim relief; (4) whether the career opportunities are short-lived or the employment seasonal; and (5) whether the unfair labor practices adversely impact the charging party, other persons seeking to exercise rights guaranteed by this Act, or the public interest.125

These criteria are considerably more specific than those used under the statute as presently written. The first requirement now is that there be "reasonable cause" to believe that a violation has been committed, a factor generally satisfied so long as the Board's theories on fact and law are neither insubstantial nor frivolous.126 The second criterion is more troublesome. Under section 10(j) of the Act, injunctive relief must be "just and proper."127 The courts have applied five standards in determining what is "just and proper": (1) irreparable harm; (2) public interest; (3) extraordinary circumstances; (4) legislative purpose; (5) status quo. The standards are vague, and their application leads to unpredictable results. Some courts have taken the position that injury to the collective interest128 or dissipation of majority status129 before the administrative process is exhausted constitutes extraordinary circumstances, but there is confusion about what such an open-ended term means. Similarly, the courts are divided about how the term status quo is to be defined. Should it be the situation which existed before the onset of the unfair labor practices130 or the last uncontested status before the litigated controversy arose131?

Irreparable harm itself is difficult to gauge because it involves both

125. Id.
126. See Angle v. Sachs, 382 F.2d 655 (10th Cir. 1967). Here the court contended a reasonable cause requirement was necessary to prevent a frustration of the purposes of the LMRA.
127. National Labor Relations Act § 10(j), 29 U.S.C. § 1600 (1976). In pertinent part, the Act states:

"The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

129. See, e.g., Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (2d Cir. 1975); Seeler v. Trading Post, 517 F.2d 33 (2d Cir. 1975).
an estimation of union support in the work force as well as an assessment of continuing unfair labor practices and of the impact of continuing unfair labor practices upon that union support. Neither factor is readily discernible as a general proposition. Nonetheless, a number of courts seem willing to impose bargaining orders where majority status was clearly demonstrated through union authorization cards. They have been similarly activist when an incumbent union has been unlawfully recognized. Yet the elusiveness of standards—a matter not yet resolved by the Supreme Court—has been an obstacle to utilization of temporary relief under the NLRA.

The difficulties in this area also relate to lack of will on the part of the Board in seeking injunctions and to problems with the Board's own internal processes. Before the General Counsel or Regional Director can move in court for injunctive relief, he must obtain the advice and consent of the five-member board in Washington. This is a cumbersome and time-consuming procedure which has handicapped the Board in its efforts.

The best analogue to temporary or preliminary injunctive relief in Japanese law is *kinkyu meirei*, which is unique in the Japanese system. The English translation for *kinkyu meirei* provided by the Japanese is "emergency order," but that label does not really describe what is meant. The more accurate translation would be "interim order." *Kinkyu meirei* is designed to preserve the Commission’s order while the appellate process is pursued. In contrast to the American preliminary injunction, it has virtually nothing to do with an emergency of any kind. The statutory basis is article 27(8) of the Trade Union Law, which states that when an employer files an appeal of a decision from the Labor Relations Commission with the court, the court may, at the request of the Labor Relations Commission concerned, "issue [an] order in the form of a decision to require the employer concerned to comply in full or in part with the order of the said Labor Relations Commission pending final judgment by the Court or it may reverse or modify the decision on application from the parties concerned or ex-officio." Article 27(9) states that if no petition is filed by the employer—and subsection 6 provides a period of thirty days in which to appeal—the order of the Commission shall become final, and in the event of non-compliance an obligation is placed upon the Labor Relations Commission to inform the court.

Unlike the United States, where preliminary relief can be obtained against both unions and employers, *kinkyu meirei* is applicable to em-

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In America, however, most of the problems arise under section 10(j), which is used against employers more than unions. The principal statutory basis for temporary or preliminary injunctions against unions provides for their imposition with relative automaticity.

*Kinkyu meirei* has been utilized in connection with back pay, reinstatement, orders to bargain, cease and desist orders, and orders requiring notice posting. Under article 47 of the Commission's Rules, whenever it is aware that one of its orders has been disobeyed, a public members conference must be convened to determine whether a request for *kinkyu meirei* is to be filed with the court. As a practical matter, however, there generally must be notice of non-compliance from the union which is affected before the Commission will seek *kinkyu meirei*. In almost all cases, the unions will notify the Commission where a discharge or back pay is involved. Interestingly, the percentage of cases in which *kinkyu meirei* is sought and obtained (and invariably it is obtained) is relatively small. For instance, from 1973 through 1977, all of the Local Labor Relations Commissions throughout Japan submitted only thirty-six petitions for *kinkyu meirei*. Of these, the order was granted in thirty-four. During the same period of time, the Central Labor Relations Commissions submitted thirty petitions, and *kinkyu meirei* was granted in twenty-nine of them.

In most cases Japanese employers appear to provide reinstatement and back pay as well as other remedies in accordance with the Commission's order while the case is being appealed to the courts. Apparently, this is similar to the practice of Japanese litigants in other areas of law where orders are complied with—even involving the payment of damages—while the appeal is pending. The ultimate victor will take great satisfaction in the result even though he or she may not be able to recover damages that have already been paid. Thus, while the term "emergency order" is an inaccurate translation, it is an unusual order by virtue of the almost universal employer compliance with Commissions orders. This contrasts substantially with the American situation, where such provisions of Board orders as reinstatement and back pay are rarely honored while an appeal is pending.

Although *kinkyu meirei* is generally assumed to be borrowed from the Americans—it first appeared in Japanese law as part of the 1949 amendments to the Trade Union Law—it differs fundamentally from temporary or preliminary injunctions. It is not a temporary or preliminary order pending some final relief. It stands on its own and is designed to provide for speedy and thus effective enforcement of Commission orders; however, no showing of irreparable harm or anything

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133. Section 10(e) of the American statute mandates temporary relief against union unfair labor practices.
remotely like it is necessary. The theory is that delay would undermine the effective implementation of the right to engage in collective bargaining protected by the Trade Union Law. Only where there is clear and serious error, or when a change of circumstances has taken place subsequent to the order, can such relief be denied.

Generally, the District Court will examine the documents submitted by the Commission. If there is a *prima facie* case based on the documents themselves, an order will be issued without any hearing whatsoever. This is what happens in most cases. Infrequently, when the judges have some doubts about the matter, they will postpone the decision and neither grant nor deny relief. In such cases, the Court will usually reverse the order. Occasionally, the judge will postpone the case and then issue *kinkyu meirei* at a later date simultaneous with consideration of the case on its merits.

Reflecting the general Japanese attitude toward remedies, the courts will not hesitate to provide reinstatement and back pay as part of *kinkyu meirei*. But they will treat orders containing notice posting or requiring apologies with more care. Here it is thought that the loss that an employer would suffer would be irreparable and could not be recovered in the event that *kinkyu meirei* was reversed by the court when it considered the case on its merits. In America, the priorities are exactly the opposite. The result is one of comparative disadvantage for American unions and workers.

If an order of *kinkyu meirei* is disobeyed, a fine may be imposed. There is no appeal from an order of *kinkyu meirei* issued by the District Court. This procedure makes relief all the more expeditious, and thus back pay is frequently small—although as noted above, delays before the administrative agencies can be considerable.

**H. Conditional Relief—Jokentsuki Kyusai Meirei**

*Jokentsuki kyusai* is conditional relief. Conditional relief is made available only if the party seeking the relief adheres to conditions established by the Commissions and the courts. Because Japan has only employer unfair labor practices, many of the conditional orders seem to be aimed primarily or exclusively at the unions. Essentially, the view inherent in *jokentsuki kyusai* is that remedies are designed primarily to structure good industrial relations in the future rather than to recreate the past. In this respect, the rationale for the remedy mirrors the back pay and reinstatement cases in Japan. Both remedies are concerned with the creation of ongoing harmonious relationships. The view articulated in *jokentsuki kyusai* is that the unfair labor practice system is designed to further the collective bargaining process and that, because the party who prevails often can not be considered blameless, a remedy
should be designed which reconciles the disputants. It is a kind of no-fault view of labor law and the unfair labor practice system which has no real analogue in American labor law at all. The American case most analogous to Jokentsuki kyusai is the Board’s Times Publishing Company\textsuperscript{134} decision, issued shortly before the enactment of the Taft-Hartley Amendments in which the Board said:

The test of good faith in bargaining that the Act requires of an employer is not a rigid but a fluctuating one, and is dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table. It follows that, although the Act imposes no affirmative duty to bargain upon labor organizations, a union’s refusal to bargain in good faith may remove the possibility of negotiation and thus preclude the existence of a situation in which the employer’s own good faith can be tested. If it cannot be tested, its absence can hardly be found.\textsuperscript{135}

Opponents of jokentsuki kyusai believe it is an attempt to obtain the equivalent of Taft-Hartley through the back door. That is, since there are no union unfair labor practices in Japan, any remedy which imposes obligations upon the unions is opposed to the basic statutory policy. Moreover, they argue, conditional relief that imposes legal obligations upon unions as in America is inconsistent with the constitutional protections given to Japanese unions. Revealingly, the opponents of conditional relief claim that the Trade Union Law provides exclusive adjudicative relief. Conditional relief, argue its opponents,\textsuperscript{136} is inconsistent with the concept of adjudication and takes on characteristics of mediation and conciliation.

One case which imposed an obligation upon the unions as a condition to obtaining relief as the result of an employer unfair labor practice is the Nobeoka Post Office case,\textsuperscript{137} a 1965 decision of the Public Enterprise and National Corporations Labor Relations Commission. In this case, the post office workers, Zentei, had disobeyed the management’s order prohibiting entry into the offices of the postal building. Apparently, the union executives had “carried on in loud voices and committed other indiscretions.” Therefore, although the refusal to permit the union officials entry was itself unlawful and was an unfair labor practice by the employer, the union’s behavior warranted a letter of regret and apology on their part. The commission \textit{[Koroi]} conditioned the order against the employer’s unfair labor practices on the union’s

\textsuperscript{135} \textit{Id} at 682-83.
\textsuperscript{136} For a view against conditional relief, see Themes and Prospects On Labor Suits, Bessatsu, Hanrei Times, No. 5; K. Tanaka, Conditional Relief, chap. III, Various Views on Conditional Relief, \textit{Hiteisetsu’s} (Negative Therories) 19-32 (author’s unpublished transcript).
\textsuperscript{137} Nobeoka Post Office case, Tokyo District Court, Aug. 6, 1971, 670 v. no. 742 (1970).
apology. The Tokyo district court reversed. However, the Tokyo high court reversed the district court and affirmed Koroi.

A second variation on this same theme is similar to the Japanese approach to back pay proceedings. Here the example applies to orders against employers. Quite frequently, orders are framed in the most general and imprecise language, e.g., a floor for benefits to be negotiated subsequent to consultation between the union and employer. The overriding considerations in both situations are (1) the need to bring the parties together through conciliatory vehicles in the future and (2) the view that the charging party is frequently as blameworthy as the respondent.

Related to these concerns is the question of whether reinstatement and back pay should be an automatic part of the remedy once a violation has been found. American arbitrators frequently deny all or a portion of back pay, although where an employer has dismissed a worker in violation of the collective agreement the arbitrator does not believe that the employee is completely without fault. Curiously, arbitrators have rarely denied reinstatement while awarding back pay where a violation has been found. Ever faithful to the adjudicative model, the NLRB has generally awarded both reinstatement and back pay in discharge cases. Reinstatement has been denied only where it is clear that the employee does not desire it. Back pay has been denied where the amount was unsubstantial, or where the employer made an honest but mistaken interpretation of the collective agreement. These exceptions demonstrate that back pay and reinstatement are awarded almost automatically.

It may be that this lack of imagination in fashioning remedies in the United States has contributed to a reluctance to find statutory violations. The courts may very well be wary of finding statutory violations if such a finding automatically results in the reinstatement of the employee involved.

Until 1981 the Board took the position that if a portion of the em-

ployer's motivation for dismissal or discipline of a worker was based upon union considerations, the employer conduct was unlawful. This was the so-called "in part" test. The "in part" test created considerable confusion and was resisted by the Circuit Court of Appeals in many instances. The Japanese approach which determines whether "the dominant motive" of the dismissal was union activity is an equally imprecise test.

In 1981 the Board, relying upon the statutory language which requires the General Counsel to establish a violation through a "preponderance of evidence" and that portion of section 10(c) which states that the Board shall not order reinstatement or provide back pay where an individual was "suspended or discharged for cause," changed the rules and adopted the so-called "but for" test. In the important *Wright-Line* case, the Board said:

First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.\(^4\)

The American approach is considerably less vague than that of the Japanese. The Court of Appeals for the Third Circuit has taken the position that the employer's burden subsequent to the establishment of a *prima facie* case by the General Counsel must not consist of a burden of proof, as such a burden would be inconsistent with section 10, insofar as it protects employers against employees who have been dismissed for cause.\(^4\) But according to the Court of Appeals for the Ninth Circuit, the legislative history of the Taft-Hartley amendments indicates that the burden of proving good cause for discipline remains on the employer.

In 1983, a unanimous Supreme Court decision held that the Board could reasonably construe the statute to require that the employer prove that the discharge would have occurred in any event despite the General Counsel's *prima facie* case. Speaking for the Court, Justice White observed: "[Under the Board's holding] proof that the discharge would have occurred in any event and for valid reasons amounted to an affirmative defense on which the employer carried the burden of proof by a preponderance of the evidence."\(^4\)

\(^{145}\) See, e.g., *Royal Dev. Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983); *NLRB v. New York Univ. Medical Center*, 702 F.2d 284 (2d Cir. 1983); *NLRB v. Webb Ford*, 689 F.2d 733 (7th Cir. 1982).


\(^{147}\) *Behring Int'l, Inc. v. NLRB*, 675 F.2d 83 (3d Cir. 1982).

Despite the burden that is thrust upon the employer, workers still must take care to maintain selectively unblemished records to prevail in an American unfair labor proceeding. Curiously, the Court observed that the Board's "in part" test as applied to mixed motive discharges was also a rational one. This tighter standard which now tolerates the dismissal of workers who are discharged for both legitimate and illegitimate reasons might have been less likely to emerge if the Board had exhibited more flexibility in the remedy arena. If reinstatement is not automatic, a violation might be found with more ease.

The theme that cuts through American and Japanese treatment of the remedy problem is that on this side of the Pacific we seem insufficiently attuned to the no-fault characteristics of industrial relations. The Japanese approach to deduction of interim earnings in back pay cases, conditional relief, and notice posting is strong evidence of a concern and care for preservation of a relationship which is designed to be lasting and harmonious.

*Kinkyu meirei* is a Japanese device which is responsive to the need for prompt enforcement—another problem which plagues Americans and one about which the unions have manifested concern in the debates on the Labor Reform Bill. Yet there are areas, such as two union discrimination, in which the Japanese have been totally immobilized. Rejection of *Phelps Dodge* with regard to hiring discrimination, while arguably sensible in Japan, would be an enormous step backward in this country. Even though there may be a considerable amount to emulate in Japanese job security, it hardly seems to follow that prohibitions against discrimination in hiring should be eliminated. What is needed in the United States is a better blend of effective remedies which support the promotion of self-organization, while remaining sensitive to the formulation of specific orders which take the labor-management relationship into account.