ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS IN SWEDISH LAW

FOLKE SCHMIDT* AND HENRY HEINEMAN†

AMERICAN and Swedish labor laws deal largely with differing subject matters.¹ The main body of American law concerns such matters as the use of economic coercion in labor disputes and the employee's right of organization. These subjects are not important issues in Swedish law. The main body of Swedish labor law deals with a problem to which little attention has been paid in America, namely, the binding force of collective agreements. The paucity of settled law in America on this subject has been referred to as "arrested development."² The lack of a clear pattern in the law relating to the interpretation and enforcement of collective agreements is revealed by the course taken by the dispute last fall between the United Mine Workers, the mine owners and the government.

A few introductory notes as to the political situation in Sweden will give the background of its labor law. The trade unions in Sweden are a factor of very high importance. Swedish manual workers are organized in the Confederation of Swedish Trade Unions, which has a total membership of about 1,100,000 workers. Salaried employees, foremen, white collar workers, civil servants, and others have their own confederation, with some 200,000 members. These figures indicate that every fifth Swede is a trade union member, as against every ninth American. The trade unions in Sweden are probably stronger than in any other country in the world.

The Swedish labor movement is powerful politically, too. The Swedish Social Democratic Labor Party has throughout the last fourteen years either formed the cabinet or held the key positions in a coalition cabinet. It now has the majority of seats in the First Chamber and exactly half of the seats in the Second Chamber of the Parliament. Further, there is in Sweden a Communist Labor Party representing about 11 per cent of the voters.

* Professor of Law, Lund University, Lund, Sweden.

† Member of the Illinois Bar, formerly Attaché at the United States Legation in Stockholm.

¹ For further information about Swedish labor relations see: Robbins, *The Government of Labor Relations in Sweden* (1942); Norgren, *The Swedish Collective Bargaining System* (1941). A popular study is Marquis W. Childs' *This Is Democracy: Collective Bargaining in Scandinavia* (1938). See also Reports of the Commission on Industrial Relations in Sweden, U.S. Dept. of Labor (1938).

² Gregory, *Labor and the Law* 379 (1946).

In Sweden, the majority of the employers are organized in the same way as their employees. Dominant is the Swedish Employers Federation, which represents about 8,500 employers employing a total of about 500,000 workers. The Employers Federation consists of a number of branch associations which do nation-wide collective bargaining for their members.

The strategy of organized employers, as well as of organized workers, has, during the past decade, been that of co-operation and not that of warfare. Both management and labor recognize that they have a common interest in settling a dispute by themselves, thus avoiding governmental interference. The trade unions have voluntarily accepted certain restriction of their activity, and employers have given some concessions in return. The outcome of negotiations reflect the actual political situation at the time.

Of special importance are the Basic Agreement of 1938 and the Agreement on Company Councils of 1946 between the Confederation of Swedish Trade Unions and the Swedish Employers Federation. The Basic Agreement establishes a uniform procedure for settling of grievances and fixes a practice to be followed with respect to dismissals and furloughs. Furthermore, it provides a set of rules restraining the use of certain kinds of direct action. Special consideration is given to third parties who have no economic interest in the actual dispute. The Basic Agreement thus meets a demand which otherwise might have called for the enactment of special legislation. The object of the Agreement on Company Councils is to promote industrial democracy through active participation by the employees in the management. Upon the request of the employer or of the local union a company council is to be established in each enterprise employing twenty-five workers or more. The company councils are intended to serve many of the purposes served by the labor-management committees fostered by the War Production Board during the war.

The policy of the Swedish government has consistently been that of non-interference in the making of collective agreements. This policy was earlier due partly to liberal *laissez faire* theory, partly to an inability of those in political power to agree upon the proper means to restrict the activity of labor unions. During the last decade, when the Swedish Labor Party has been in the government, the policy of non-interference has been based upon the theory that the Labor Party and the trade unions have different tasks which ought to be distinctly separated from one another. In the opinion of the Swedish labor leaders, labor must principally rely upon union activity. Workers may resort to political action mainly for the solution of those problems which cannot be solved by collective

bargaining or when the process of collective bargaining would be too slow. Government has to provide such benefits as workmen's compensation, sick and unemployment insurance, old age pensions, and regulations of hours of work, but ought not to fix minimum wages or the amount of overtime pay. The labor leaders are definitely opposed to any kind of compulsory arbitration of wage disputes. Even during the war, wage stabilization was accomplished by voluntary co-operation between the Swedish Federation of Trade Unions and the Employers Federation, rather than by any agency similar to the National War Labor Board in the United States.

I. SWEDISH "COMMON LAW"

In Sweden, strikes, lockouts, boycotts, and even sympathetic actions are considered legal in the absence of violence, damage of property, libel, or slander. In the making of a collective agreement, a party may freely use direct action in order to bring the other party to accept his demands. Swedish courts have never accepted the English doctrine of conspiracy or the American doctrine of illegal purpose. Nor have the Swedish courts granted orders comparable to injunctions as used by American courts in labor disputes. The right of the employees to organize for collective bargaining purposes has been an issue of minor importance. There was no demand for a statute protecting the right of association before the organizational drive in the middle of the thirties reached the white-collar jobs. An act providing for a right of self-organization was passed in 1936. This statute defines certain acts of an employer as unfair labor practices and secures a discharged employee reinstatement with back pay in case of discrimination. The Swedish statute does not establish any machinery similar to that of the Wagner Act. Special precautions to secure the workers free elections have not been found necessary.

The Swedish labor law makes a definite distinction between contractual and extra-contractual relations. While few or hardly any special rules govern extra-contractual relations, a very elaborate body of rules applies to situations where contractual relations have been established. Relatively early it was decided by the courts that a collective agreement was binding upon the parties and that a union could sue and be sued under the common law as a legal person, irrespective of incorporation. In the case *Aftonbladet v. Svenska Typograförbundet*³ the Supreme Court was confronted with a situation in which unions had struck in order to support the Confederation of Swedish Trade Unions in a general strike which took place in 1909. The Court expressed the opinion that as a matter of principle the

³ N.J. A. 1915, 233 (Swedish Supreme Court Reports).

collective agreement was binding and rendered the union liable for damages upon breach. However, no redress was granted in the case at bar, because the collective agreement, as interpreted by the Court, did not, in the absence of an express stipulation, restrain the right of sympathetic action.

To bring a suit in the courts was no practicable remedy, due to the fact that the case, through appeal, could be delayed for years. In the case just mentioned over five years elapsed before the case was decided by the Supreme Court. As in the United States, few cases were brought to court, either by unions or employers. The collective agreements under the Swedish common law system were virtually only gentlemen's agreements. It became an important issue to establish special judicial machinery to deal with suits for the enforcement of collective agreements. The disputing parties otherwise could not be expected to abstain from the use of economic coercion.

II. THE LEGISLATION OF 1928

In order to meet this problem, two acts were passed in 1928, the Labor Court Act and the Collective Agreements Act. At that time, the Swedish Labor Party had not yet reached its present dominant position. The statutes were enacted with the blessing of employers and conservative groups but over the protest of the workers. Organized workers demonstrated all over the country, and the labor press labeled the proposed legislation as an act of persecution of the trade unions. After some years of experience with the operation of the statutes the opinion, however, changed. Nowadays most unions are in favor of the legislation. The Swedish Labor Party and the Swedish Confederation of Trade Unions have successfully opposed proposals by individual representatives to repeal the two acts.

THE LABOR COURT

The Labor Court has seven members. Three of them represent an impartial element, the chairman and the vice-chairman who are lawyers with long experience as judges and one member who has to be a specialist on labor relations—generally an officer of the Social Board, a governmental agency exercising functions similar to those of the American Department of Labor. Of the remaining four members, two represent organized employers and two organized employees.

One single tribunal in the country has been adequate because the organizations on both sides thoroughly screen grievances by informal processes and therefore generally present to the court only cases involving new legal aspects. The Labor Court Act, in order to promote such screening, stipu-

lates that an association which has concluded a collective agreement may bring the action in the Labor Court on behalf of its members and that a member may not act himself unless he establishes that his association has refused to take action on his behalf.⁴ The court handles from 100 to 150 cases each year. The Labor Court is a trial court, but for the sake of effective administration its decisions are made final and not subject to appeal.

The Labor Court has jurisdiction in disputes involving the interpretation of a collective agreement, such as disputes over rights and obligations accruing from the agreement, whether the agreement is in force or has expired, or involving the redress to be granted an offended party. The parties, however, are free to submit their disputes to arbitration. Clauses providing for private arbitration of grievances have been rather common in Sweden, but there is at present a tendency to exclude such clauses from contracts since the parties recognize that the Labor Court is better qualified for this job than private arbitrators.

THE PEACE OBLIGATION

The object of the Swedish Collective Agreements Act is to promote a peaceful settlement of disputes arising during the life of a collective agreement. The parties may not resort to strike, lockout, boycott, or any kind of direct economic action in four types of disputes described in the statute. Such action may not, during the effective period of a collective agreement, be undertaken (1) to settle disputes concerning the validity, existence, or correct interpretation of the contract, or involving questions as to whether a particular act constitutes an infringement of the contract, or of the statute itself; (2) in order to bring about an alteration of the terms of the contract; (3) in order to force the other party to accept an agreement as to the contents of a future contract; and (4) in order to assist by sympathetic action others who are involved in illegal action.

The rule referred to under (1) simply means that the government has provided compulsory arbitration for all disputes concerning interpretation of contracts. Suppose that one of the parties claims that the other party has violated the contract. The wronged party is not allowed to resort to direct action to force the violator to live up to the contract, if the violator claims that his action is consistent with a correct interpretation of the contract. The same rule applies when one of the parties claims that the contract has expired, but the other party contends that the contract is

⁴ This attitude of the Swedish law with regard to the relationship between an association and its members is in marked contrast to the attitude of the American courts which have been loath to accord associations any status. Cf., e.g., *Elgin, J. & E. Ry. Co. v. Burley*, 325 U.S. 711 (1945), *reaff'd*, 327 U.S. 661 (1946), in which a settlement negotiated by a union was held not binding upon the employees under the Railway Labor Act.

still alive. An action similar to that of John L. Lewis in the recent coal dispute declaring that the contract was terminated would consequently have been held illegal by the Swedish Labor Court. The validity of the other party's argument is of no concern. The party has to delay his action until the court has declared that the contract is no longer operative.

The second rule, that action is not allowed in order to bring about an alteration of the contract, simply expresses the principle of *pacta sunt servanda*—a principle, simple in itself, but often involving intricate problems as to the existence or nature of implied covenants in the contract. There are no special implications in the principle that a party may not resort to direct action in order to force the other party to accept an agreement as to the content of a future contract. The economic struggle to bring about new concessions may not be started before the existing contract has expired.

Rule (4) aims at one kind of sympathetic action which, had it been allowed, should have completely undermined the foundation of the Collective Agreements Act. Outsiders cannot be permitted to support a party who has violated his own obligations.

It should be pointed out that the peace obligation on the parties during the life of the contract is not absolute. One party may resort to direct action to force the other to live up to the contract as long as there is no dispute concerning its interpretation. The statute does not prohibit a union from strikes, picketing and boycotts directed against an employer who is in default of wages admittedly due. Further, there is no rule prohibiting sympathetic action in general. The act only prohibits support given to an illegal action. The proposal to expand the peace obligation so as to outlaw completely all sympathetic action was opposed not only by labor but by management. Organized employers consider the sympathetic lockout their most valuable weapon, and its use or potential use plays a much larger role than in the United States.

NATURE OF THE COLLECTIVE BARGAINING CONTRACT

Many attempts have been made both in American and European jurisprudence to adapt common-law principles to collective agreements, whether the theory has been that the contract establishes only a usage reflecting itself in the individual contract, or that the union acts as an agent for its members, or that the members are third-party beneficiaries.⁵ The shortcomings of these attempts are evident and have in American literature recently been treated by Professor Gregory.⁶ The collective agreement

⁵ Consult Rice, *Collective Labor Agreements in American Law*, 44 Harv. L. Rev. 572 (1931).

⁶ Gregory, *op. cit. supra* note 2, at 379-412.

needs rules of its own which in an appropriate way solve the political and social problems involved in a situation where an employer and a union have set up rules to determine the relations between the employer and the union, and the relations between the employer and his employees.

The collective agreement, according to the Swedish Collective Agreements Act, establishes contractual relations not only between the contracting parties, the employer and the union, but also between the employer and the members of the union. The relations between the employer and the union come to the front in disputes as to bargaining procedure, the peace obligation during the life of the contract, or notice of termination of the contract, the relations between the employer and members of the union in disputes as to wages, sick benefits, working conditions, or dismissals.

On the other hand, individual members may, depending upon the circumstances, also be involved in those disputes which primarily involve the unions. In case of a "wildcat" strike, the employer may sue both the union and its members—the union because it has called the strike or has not taken proper precautions to prevent it, and the members because they have quit their jobs. Nor is it true that matters principally referring to the terms of the individual contract are of no concern to the union. Suppose a member gets a lower wage than that prescribed by the contract. The union may then take an action of its own to force the employer to live up to the contract, no matter whether the member claims his rights or not.

The rule that the contract establishes contractual relations both with the union and its members is equally applicable to the situations in which, on the employer's side the contracting party is an association of employers, a rule of great practical importance, since in Sweden most collective bargaining is done by such associations.

In order to secure efficient enforcement of a collective agreement, the Swedish act extends the dominion of the peace obligation during the life of the contract to include a specific group of outsiders. An association whose members are bound by a collective agreement is not allowed to arrange or to render assistance in an illegal action by its member. The practical application of this rule occurs in cases where a collective agreement is signed by a local union. The extended peace obligation then extends to the national union. A similar situation arises when a group of individuals resign from one union and join another union. According to the Swedish act, the change of union adherence does not in itself waive earlier obligations. Consequently, the union may find that it is not allowed to support its newly admitted members in a strike. The rule which extends the peace

obligations to a group of outsiders is parallel in its effect to the Anglo-American theory that a tort action may be based upon the inducing of a breach of contract between others, a theory which has no general application in Swedish law.

III. SANCTIONS

The problem as to applications of sanctions for violation of collective agreements involves many troublesome aspects. The employer is likely to look upon the collective bargaining agreement as any other business contract which should be capable of enforcement under the ordinary rules of civil liability. Some employers look upon a strike as such a serious matter that ordinary rules of civil liability do not furnish a solution. In earlier days the view was often stated that since neither the union nor its members generally are able to pay damages compensating the employer for the actual loss arising from an illegal strike, some measure of redress ought to be provided which gives more effective relief than a cause of action at law. In American law this attitude has often been shared by the courts and expressed through the use of the injunction, which, by the subsequent exercise of contempt power, in effect provides imprisonment or threat of imprisonment as a sanction. In American law, the Norris-LaGuardia Act and the various state anti-injunction acts bear witness to the fact that this view came into disfavor during the twenties and thirties.

Union officers are inclined to look upon a collective agreement as a peace treaty which has no enforceable legal effect (at least against the union or its members), but which gives rise only to a moral obligation. This is in effect the status of collective agreements under English law. If special sanctions are to be considered, labor opposes any kind of criminal liability or civil sanction which may ultimately result in incarceration. However, even the ordinary rules of damages for breach of contract, it is frequently claimed, lay too heavy a burden upon labor, inasmuch as the union and its members are financially much weaker than the employer. On the other hand, in cases where the employer is the wrongful party, the ordinary principles of damages are often unsatisfactory for the reason that proper redress is not afforded against many types of violations by employers, the result of which cannot be measured in pecuniary terms. For instance, no actual loss or a very slight loss is involved in cases where an employer may breach an agreement by failure to observe grievance procedure, or by violating stipulations as to hours of work, or the number of apprentices in a given shop. Very slight pecuniary loss but substantial injury to the union may often result from the inclusion of a single employee in an improper job classification. From the union's point of view, therefore, the

adoption of ordinary rules of civil liability create an unfair situation involving heavy responsibility on the part of the union and highly inadequate opportunities for redress against the employer.

THE MEASURE OF DAMAGES

The Swedish Collective Agreements Act provides a system of legal responsibility based upon principles of contract law, although in important respects departing from the rules obtaining in other types of cases under Swedish law. No consideration was given to proposals making violations criminal offences. Earlier drafts of the act provided for the discretionary award of punitive damages in case of deliberate and flagrant violations. This idea was rejected, too. The sponsors of the legislation were anxious to avoid every suggestion of criminal law, and the imposing of punitive damages could be interpreted as involving an element of that kind.

The principle adopted is that the Labor Court has authority to award remedial damages against unions, individuals, employers and employers' associations,⁷ based principally on direct financial loss.

However, special damages may be awarded to compensate for "the interest of the person concerned in the maintenance of the contract and circumstances other than those of a purely economic nature." These special damages are not punitive in character. They are determined with reference to the injury of the defendant, not the guilt of the plaintiff.

The court is expressly authorized to reduce the damages if the degree of culpability is slight and to take the financial position of the parties into account. Individual defendants are granted a special exemption, limiting any judgment against them to 200 crowns (a sum equivalent on the average to three weeks' pay for an unskilled laborer).

A study of the court's decisions during the seventeen years of its existence indicates that, as a general rule, the court has exercised its discretionary right to award special damages, principally in those cases in which no financial loss of any kind could be established. In instances where an individual employee has claimed ordinary direct damages (for example, for exclusion from work) and his union has claimed special damages, the court in general has refused to award any damages to the union,

⁷ Judgments for money damages against unions or union members based upon violations of collective agreements are rarely found in the United States law. Probably judgments against unions would have to be predicated upon very specific penalty provisions in collective agreements. Such penalty provisions do not appear to be frequent, at least judging from an examination of the volume of Labor Disputes Settlements containing reports of significant arbitration awards published by the Bureau of National Affairs. An apparently isolated court case in which damages were awarded against the union is *Powers v. Journeyman Bricklayers Union*, 30 Tenn. 643, 172 S.W. 284 (1914).

considering that the judgment for actual loss sustained is a sufficient remedy.

The Labor Court has frequently exercised its prerogative to reduce the total potential amount of damages either by reference to the defendant's inability to pay or to the relatively slight degree of culpability on the part of the employee. In so doing, the court is applying principles analogous to the doctrine of comparative negligence, not used outside of admiralty in the United States, but generally adopted in Continental and Scandinavian law. As an example, the court in one case referred to the fact that the employer "by indecisiveness in bargaining before the beginning of the conflict to a certain extent has been a contributor to the injury."⁸ In another case, the court declared that the damages should be reduced "giving weight to the youth of the workers, their inexperience with respect to the duties imposed by the collective agreement and their position economically."⁹

DIVISION OF LIABILITY

The principle of degree of culpability finds particular application in the many questions arising where there are several defendants. In such cases, the principle of degree of culpability makes it improper to render joint and several judgments for fixed amounts against several defendants. The law provides that "if two or more persons are responsible for the loss, the liability to pay damages shall be divided among them in proportion to the degree of culpability established against each."

Prior to the enactment of the legislation there was some considerable discussion of the question whether the union should be responsible for the damages assessed against its members with a right, upon payment of such damages, to be subrogated to the employer's claim against the members. The Swedish Federation of Trade Unions militantly and successfully opposed this suggestion on the ground that such a situation would be bound to create one of two results: either the union would have to act as creditor vis-à-vis its own members, which would have a demoralizing effect, or the union would itself absorb the total burden of the damages with the result that in effect the principle of individual responsibility would be eradicated.

The Labor Court has had many occasions to consider questions of division of damages between several defendants. Questions have arisen as to the allocation of damages between a national union and its local. In such cases, the court seems in general to have placed the primary responsibility

⁸ A.D. 1938, N. 42 (A.D. refers to the Labor Court Reports.)

⁹ A.D. 1931, N. 42.

on the national union and, in many instances, awarded two-thirds of the damages against it.¹⁰ The court has been especially prone to place the primary responsibility on the national union where according to its by-laws it has the final authority to determine whether any given action may be taken. Where the question is the distribution of damages as between a local and its member, the court has generally followed the principle of assessing the primary responsibility against the local, at least in those cases where the members have simply acted in conformity with the decision of the union. In most such cases, damages have been assessed only against the local and not against individual members.¹¹ In fact, damages against individuals have been normally awarded only in those cases where individuals themselves have taken the initiative in an unlawful strike. The union has in some instances become jointly responsible by approving the illegal action. As between various individuals, the court has generally divided responsibility equally, with the exception that damages have been reduced by reason of the youth of individual employees.¹²

The principles of division of damages apply with equal force to employers and employers' organizations, but to the knowledge of the authors, only one case has arisen in which the principle was considered. In that case, for undisclosed reasons, the damages were equally divided between the employers' association and the individual employer.¹³

AFFIRMATIVE ORDERS

Every Swedish court has the right to issue orders of an injunctive character calling for specific performance or other affirmative action. This is done by requiring or prohibiting certain named acts on penalty of the forfeiture of a sum of money, the amount of which is determined in the injunctive order itself. Upon failure to follow the order, the defendant may suffer forfeiture of the bond. The forfeited sum is commuted into a jail sentence in case of failure to pay.

The Labor Court in general has available to it the same sanctions as other courts. However, in order to prevent physical force ultimately being used against employees violating a contract, the Labor Court Act contains a special exemption provision which states: "A sum forfeited as a result of the violation of any Court order relating to the performance of an agreement shall not be commuted to imprisonment." The ultimate sanction available to the Labor Court falls short, therefore, of the means

¹⁰ A.D. 1932, N. 63; A.D. 1934, N. 146.

¹¹ A.D. 1934, N. 118.

¹² A.D. 1930, N. 74b; A.D. 1931, N. 42; A.D. 1932, N. 33.

¹³ A.D. 1934, N. 156.

of enforcement available to an American court in a contempt of court proceeding.

In the normal course of activity, the Labor Court does not base its orders, however, on any penalty of forfeiture. The general practice is to issue plain orders without penalty provisions, which consequently are without any formal legal sanctions. Only in cases where it can be anticipated that the court's authority may be flouted are formal sanctions employed. Very few such instances have occurred.

DISCHARGE OF WRONGED PARTY FROM OBLIGATION OF CONTRACT

The Labor Court has available to it an additional course of action which it has very seldom employed; it may, in certain instances, declare all or a portion of the collective agreement null and void and thereby restore to the parties their rights to use those direct means of action (strike, lockout, boycott, etc.), which normally are prohibited by the peace obligation imposed by the Collective Agreement Act.¹⁴

The general Swedish law is comparable to the American in ordinary breach of contract with dependent covenants, in that a substantial breach by one contracting party frees the other from his obligations under the contract. However, the effect of the legislation generally is to make all covenants in a collective agreement independent. Only by the court's specific order can violations by one party be used to free the other party from his or its obligations under the contract. Obviously, this power is one to be used only as a last resort. It has had no important practical application. In the overwhelming majority of cases before the court, the other sanctions available to it have been quite adequate to meet any situation. The availability of the ultimate right to declare the contract null and void, however, is to be looked upon as a logical corollary of the fact that physical compulsion (except execution against property based on judgment for damages) is unavailable to the Labor Court. In an extreme situation, the court may be confronted with no other alternative than to nullify the contract and leave the parties to a contest of economic power.¹⁵

¹⁴ The right of one party to an award to take direct action upon failure of the other party to abide by it is apparently the only means of securing compliance with compulsory arbitration awards under a plan for the adjudication of grievance disputes by an Industrial Board of Adjustment suggested in the recently published prize-winning Ross essay, Gerhardt, *Labor Disputes: Their Settlement by Judicial Process*, 32 A.B.A.J. 752, 803, 806 (1946).

¹⁵ Compare the situation under the Railway Labor Act, as amended, 48 Stat. 1185 (1934), 45 U.S.C.A. § 151 et seq. (1943). The awards of the Adjustment Board are binding and enforceable by application to the United States District Court. However, the party in favor of whom an award has been granted may resort to direct action without seeking the aid of the court. In fact, unions normally obtain compliance by taking a strike vote. It has been stated that an actual strike has been found unnecessary. See Spencer, *The National Railroad Adjustment Board* 56 (1938).

IV. COMPARISONS AND SUGGESTIONS

It is not within the province of this article to suggest the extent to which the Swedish experience can be incorporated into American law. Attempts to transplant legal institutions from one country to another are, at best, beset with many hazards. The Swedish system must be evaluated in context with the long established practices of collective bargaining in Sweden where the almost complete organization of both employers and employees, makes possible and practicable the exercise on both sides of economic sanctions of a most extreme character. Since economic power is relatively stable and known to both parties in advance, the circumstances are favorable for avoiding a show of force. It must also be remembered that struggles for union recognition, union security and jurisdictional fights within and between unions have been of negligible importance in Sweden during recent years. The energies of both labor and management have been directed to the making and applying of collective agreements and not to collateral issues which still give impetus to a good deal of labor unrest in the United States. Pressures tending to thwart orderly enforcement of agreements are therefore stronger in the United States. All of these factors, as well as the wide divergence in legal and governmental background, and the difference in the degree of homogeneity of union membership, make it dangerous to engage in any direct reasoning by analogy and even more dangerous to make any recommendations for copying Swedish procedure.¹⁶

Nonetheless, a few general observations may be justified by way of comparison between the Swedish and American systems:

1. It must be remembered that the Swedish system for insuring industrial peace deals with justiciable disputes, i.e., differences susceptible of resolution by reference to contractual provisions. The Swedish law, as the American, leaves the parties free to assert their economic strength in arriving at the terms of new contracts. A system such as the Swedish one, if successfully adopted in the United States, would therefore be effective in preventing certain types of disputes such as those giving rise to "wildcat"

¹⁶ It is significant that William B. Davis, a member of the President's Commission which investigated labor law in England and Sweden has the following to say: "For legislation and legislative policy, I think the findings of the Commission have no application at all. . . . It is my opinion that the facts set forth in the British and Swedish reports show that what this country needs is well-directed pressure, from all interested parties, toward the extension of trade unionism and collective bargaining beyond individual plants or companies until it reaches, in every important industry in America, that mature state in which the basic standards of wages, hours, and working conditions are negotiated by national unions and groups of unions, not with each employer individually but with associations of employers." 3 Labor Relations Reference Manual 951 (1939).

strikes occurring during the effective period of a contract, and controversies such as the coal strike in the fall of 1946, involving the existence or interpretation of a contract. Such a system would, of course, not guarantee the prevention of all or even most strikes.

2. It will be observed that the Swedish system embodies what most writers mean by the phrase "compulsory arbitration" (although many doubtless find implicit in that term the notion of physical compulsion in the enforcement of the award). Much of the vigorous opposition to "compulsory arbitration," both on the part of management and labor, stems from the fact that the proponents of such plans frequently fail to draw the line, so clearly drawn in Swedish law, between justiciable and negotiation disputes.¹⁷ The argument against "compulsory arbitration" in negotiation disputes is very clear. Such arbitration would involve a clear-cut surrender of the freedom of bargaining and the substitution of the authority of the state for the freedom of the individual parties in an important field of activity. But the basis for the opposition is not as strong in the case of justiciable disputes. There is far less reason why such disputes should not be subject to binding decision by some governmental body. The limitation on freedom of action which is involved by such a procedure is relatively slight. It is a limitation against the use of self-help in situations where legal redress is possible. The law has constantly moved in this direction (and without any appreciable loss of freedom on the part of those affected by this growth). It is difficult to see why anyone either on the labor or management side should be indignant over a system of control which forces both parties to a contract to live up to that contract at the risk of incurring liability for civil damages or the obligation to specifically perform.

3. There may be injustice in the fact that union treasuries are rendered liable for the actions of union officials as is the case in Sweden. Instances will occur when an individual member's equity in the union treasury will be reduced as a result of damages leveled against the union because of wrongful acts performed by union officials in which the member would not have concurred had he been consulted. But this danger is one which is inherent in any group responsibility. It must, of course, be met by a wise exercise of discretion on the part of the judicial body in authority (and, in fact, exercised by the Swedish Labor Court in the judgment of most ob-

¹⁷ The Swedish terms "rättstvister" and "intressetvister" literally mean "legal disputes" and "interest disputes." "Justiciable" and "negotiation" disputes are terms which, while not genuine antonyms, suggest the difference which is to be stressed, i.e., controversies under an existing contract capable of solution by application of the judicial process in contradistinction to controversies as to what the terms of a contract should be, capable of solution only by negotiation or other non-judicial process.

servers). But, there is nothing inherently offensive to accepted notions of legal responsibility in the fact that individual members of a group, or a group as a whole, will on occasion suffer by reason of errors in judgment or abuses of authority by those persons to whom the group has delegated power to act. To take the most obvious example, stockholders often are made to suffer because of unwise decisions on the part of officers or directors of corporations. Labor unions have, perhaps, already achieved the degree of organizational maturity which can justify a system of collective responsibility.

4. Those who look upon the Swedish system primarily as one which meets the demands of "union responsibility," so often stressed in public discussion at the present time, should bear in mind that the Swedish system imposes correlative obligations on the employer, which in some respects are more severe than those to which the employer is subjected under American law.¹⁸ The duty to pay special damages, discussed earlier, is an important obligation of such a character. Under Swedish law, moreover, the peace obligation imposed on the employer prevents him from discharging employees guilty of unlawful action and in other respects prohibits him from taking matters in his own hands to meet violations by unions. Such action (in the absence of an unfair labor practice) is, of course, permitted in the United States. While a system like the Swedish one would impose legal responsibility on unions for "wildcat" strikes, slowdowns, etc., it would also tend to limit the employers' freedom of direct action in meeting such violations by employees. In fact, such a system would be subject to the same objections which employers often have to any system of arbitration under existing contracts. The increasing use of arbitration clauses in collective agreements indicates on the one hand a fertile ground for an orderly system of enforcing collective agreements. On the other hand, a further increase in the use of arbitration, whether by impartial umpire or other means, may create a situation in which formal governmental arbitration will no longer be a matter of great importance. Certainly it may be said that the adoption of a system such as the Swedish one will by no means be a complete boon either to the employers or unions.

5. Insofar as the federal courts, a special labor court, or any other body charged with power to enforce collective bargaining agreements under a hypothetical American adaptation of the Swedish system would have power to compel specific performance of collective bargaining agreements

¹⁸ It is of interest to note that of 2,835 cases filed in the Labor Court during the years 1929-1945, 2,477 were filed by employees or unions, 346 by employers or employers' associations, and 12 by both sides. Employees have been plaintiffs in more than four-fifths of all cases.

and issue orders prohibiting strikes and boycotts, labor would undoubtedly raise the familiar objection of "government by injunction." Indeed, some of the restraints of the Norris-LaGuardia Act would have to be removed. Any effective plan would have to involve the use of powers analogous to those used by a court of equity in injunction cases. But the grievances which labor in the past has had against the use of injunctions could not legitimately be held against the use of the injunctive process to compel adherence to commitments freely entered into by unions themselves. The classic type of injunction, against which the Norris-LaGuardia Act and state injunction acts were directed, did not involve situations in which collective agreements existed. Its vice lay in the fact that it represented a partisan act on the part of government, restricting the freedom of action of one party to a dispute in favor of the other party. "Government by injunction" to enforce a collective agreement is government in the performance of one of its basic functions: the substitution of legal processes for self-help in compelling adherence to undertakings voluntarily entered into.

The real question is whether the sanctions involved in the injunction procedure under American law are not excessively severe. Perhaps something may be learned from the Swedish experience which relies heavily upon the imposition of damages against employers, unions and employees alike, but does not make use of the ultimate sanction of physical force. The latter is, of course, the factor which has made injunctions, as well as the Smith-Connolly Act, so obnoxious to American labor.

It is perhaps worthy of note, that just as the Swedish labor movement originally opposed the Labor Court Act, but now staunchly defends it, so the railway unions—which once accepted the Railway Labor Act with many misgivings—now operate successfully under the Railroad Adjustment Board. The orders of the Board and the referees appointed by the Board, are generally adhered to without question. Litigation involving formal sanctions has been almost non-existent.¹⁹ Similarly, in those shops in which impartial umpires are employed, the awards have usually been accepted, and few suits have been necessary to compel enforcements of such awards. This is in accord with the Swedish experience in which sanctionless orders have, for the most part, been found adequate. The prospects, therefore, appear good for the extension of systems embodying machinery for the orderly adjudication and enforcement of justiciable labor disputes.

¹⁹ See Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 *Yale L.J.* 567 (1937); Spencer, *op. cit.* *supra* note 15.