CHAPTER I

AMERICAN AND FOREIGN GRIEVANCE SYSTEMS

I. A COMPARISION OF BRITISH AND AMERICAN GRIEVANCE HANDLING

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There is no one typical British procedure for processing grievances or disputes. This is true largely because labor relations in the private sector are not regulated by law to the extent they are in the United States and a substantial variety of procedures for handling grievances and disputes have been devised. However, because the agreements negotiated by the Engineering Employers' Federation and the Confederation of Shipbuilding and Engineering Unions apply to over 4,500 companies that employ over 2,000,000 persons in manufacturing plants, the methods used in the large and diversified segment of the private sector known as "Engineering" will be considered the British procedure in this discussion of the two systems.

Background

Before describing the disputes procedure, some background information should be sketched in. A committee representing the "federated" employers and a committee representing 34 unions bargain a central agreement applicable to all of the employers and the 2,000,000-plus employees. The union committee is dominated by the six unions which have 84 percent of the members in federated plants.

National Agreements

The agreements that these two committees negotiate do not resemble labor agreements in the United States. Obviously, it is

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quite impossible to negotiate one labor agreement that can regulate the day-to-day administrative details in over 4,500 plants. The agreement can contain only the broadest guidelines. Furthermore, these committees do not negotiate a single agreement to be replaced at the end of a term by a new agreement, but rather they negotiate many separate agreements which are collected into the *Engineering Handbook,* which consists of over 300 printed pages at this time.

These agreements are not enforceable in a court of law[1] and are never interpreted by arbitrators. For this reason the parties are not stimulated by the sting of third-party interpretation to write their agreements with clarity. The hot breath of the arbitrators in the United States blowing down the back of the management and union representatives has been a major reason for the relative clarity of agreements in this country in contrast to those negotiated in the United Kingdom.

The wages and benefits established in these national agreements are fixed at levels that permit the marginal plants to survive, and in many plants these agreements merely establish the minimum or the floor under the real bargaining which occurs at the plant site.

Since the unions are bound together for coordinated bargaining at the central-agreement level, one might assume that this cohesion would also exist at the plant level. However, each union, through its staff representatives ("branch officials"), negotiates separate local agreements and independently processes grievances and other types of disputes with the managements of the individual plants.

The managements of the plants covered in our study negotiate with representatives of seven or eight unions instead of with representatives of one union, which is typical in the United States. Furthermore, the Ford Motor Company at its Dagenham plant negotiates with branch officials and stewards of 21 unions, and many other British plants include a large number of labor organizations.

[1] Trade Union Act 1871, Sec. 4(4).

How Unions Function

On the shop floor the British unions function through shop stewards as they do in the United States. No limit is established in the central agreement on the number of stewards, but our comparative study showed that the ratio of stewards to employees in the United Kingdom was not dissimilar to the ratio typical in the United States. Only eight rather vague sentences in the central agreement refer to stewards and their duties. The agreement stipulates that members in plants may elect stewards; that stewards should conform to the same working conditions as their fellow workers; and that stewards represent only the union members. Stewards are elected or re-elected each year.

In theory, the stewards assist employees with their grievances, complaints, and new demands. In reality, it is the stewards who generate most of the claims because they are plant politicians who must make gains if they are to be re-elected every year. It is common for the employer to pay stewards for the time spent on union duties, although this is not required by the central agreement.

The ability of the union branch official to direct or influence the behavior of the union's stewards varies from plant to plant. It is worth noting that there are over 200,000 union stewards in the United Kingdom and only 4,000 full-time union branch officials. Thus, there is one branch official for each 2,500 union members, whereas in the United States there is one staff official for each 300 members. Hence, contact between the overworked (and, compared to U. S. standards, underpaid) union branch officials and the stewards in a particular plant is often infrequent. As a result, conflicts arise in the handling of plant problems, and the stewards may reject the advice and direction that their branch officials attempt to give.

The independence of the stewards is further supported and encouraged by councils composed of stewards of the various unions which have members in a particular plant. The stewards join together and elect a convenor as their chief. Since the council is composed of stewards of different unions, the branch official of any one union has no influence upon the actions of the stewards council.

In addition to the stewards councils, many of the federated plants have another institution known as the "works council" or "joint consultation council." These councils are an outgrowth of the 1914 Whitley Committee Recommendations, which also led to the employee representation plans that were popular in the United States during the late 1920's and early 1930's. The National Recovery Administration urged employers in this country to establish joint consultation councils, known in the United States as Employee Representation Plans. However, when the NLRA became law, the first decisions of the NLRB declared these councils illegal on the grounds that they infringed on the collective bargaining and grievance-handling monopoly that the Board concluded had been granted to unions by the NLRA.

In the United Kingdom, these joint consultation councils are established by the employer. Employee representatives elected from the various plant departments meet with the management to consult about management's plans for the future. Theoretically, discussions at these council meetings do not involve grievance or collective bargaining matters, but these limitations are rarely respected, and, in many plants, the joint consultation council has become an important part of the grievance and dispute-handling procedure.

Although the joint consultation councils are not legally required in the private sector as they are in the public sector, "joint consultation" or advance discussion of management's plans for change is a practice deeply embedded in the British industrial relations system. Because competition and conflict arose between the stewards council and the joint consultation council, some joint consultation councils have ceased to function, whereas others have been captured by the stewards, who get elected as representatives on these councils. When this happens, the stewards represent not only the members of their own union but also members of other unions working in their department. The multiplicity of stewards' roles in these cases contributes to the problems of branch officials in directing the activities of their union's stewards in a particular plant.

Local Agreements

The labor agreements that are negotiated at the plant level with branch officials, individual stewards, the stewards council,

or the joint consultation council do not resemble labor agreements in the United States any more than the central agreements do. They usually have no term and, if they are in writing, are found in various memoranda, letters of understanding, or minutes of meetings. More often they are oral agreements referring to "past practice" or "custom." Again, it is the *lack* of third-party arbitral interpretation that has permitted this preference for oral agreements to develop in the United Kingdom.

British management and union representatives state that they prefer oral agreements at the plant level because their agreements may provide benefits in excess of those established at the national level or may be in conflict with the national agreements, and hence should not be exposed to view. Managements also contend that an oral agreement does not add as much to the status and influence of the stewards as a written one. A written contract could be displayed to other employers and would be an admission by the manager that he has been forced to accept a modification of a management prerogative. Furthermore, managements believe that an oral agreement may someday be considered a privilege that can be dropped when the tide of business turns.[2]

The stewards also prefer oral agreements. Stewards are day-to-day bargainers and an oral agreement is more flexible than one restricted by precise written language. Stewards believe that their personal influence is enhanced more by an oral agreement than by a written one because the glory of the latter must often be shared with a union branch official.[3]

Clearly, this preference for oral agreements would not be expressed by management or union officials in the United States. Third-party interpretation and enforcement by arbitrators have produced an entirely different environment within which managements and unions bargain. Third-party interpretation and enforcement establishes a discipline which produces more clarity in the agreement-making process, and clarity in the initial agreement produces fewer disagreements later. This difference in the agreement-making process means that grievance and arbitration procedures from the United States could not be exported to the

[2] "The Role of Shop Stewards in British Industrial Relations," Research Paper 1, Royal Commission on Trade Unions and Employers' Associations (HMSO), London, 1966, p. 26.
[3] *Id.*, pp. 27–28, 73.

United Kingdom. An arbitrator from this country could not interpret the meaning of agreements that are carried in the minds of British management and union officials.

Dispute-Settlement Procedure

Because the central agreement covering the 4,500 plants in engineering can only set up general guidelines and cannot solve day-to-day problems, one of the agreements contained in the *Engineering Handbook* is appropriately called the "Procedure for Handling Questions Arising."[4] This procedure, however, is not comparable to grievance procedures in this country. The claims that are processed through the procedure may include claims that a certain new agreement should be made by the management, rather than grievances that a given action by the management violates a specific provision of an agreement between the parties. It is quite futile to try to divide the types of questions dealt with by the "Procedure for Handling Questions Arising" into interpretative matters (sometimes called "rights disputes") and collective bargaining matters (sometimes called "interest disputes"). The combination of the central agreement, local written and oral understandings, and past practices makes it very difficult to determine whether a given dispute is a claim for a new concession or a claim that management has failed to comply with one of the many agreements.

Steps in Procedure

The "Procedure for Handling Questions Arising" starts with a foreman's step. If an employee desires to raise a grievance, complaint, or new claim concerning himself or his group, he may explain it to a foreman without loss of pay. If no settlement is reached, the dispute is then referred to the shop steward, who negotiates it with the plant manager.

If no agreement results, it will then be referred to the procedure works committee, composed of seven employee representatives and seven management representatives from the plant. This committee is separate from the stewards council or the joint consultation council, but there may be an overlap in its membership.

[4] Often called the York Agreement of 1922, amended in 1956.

If the matter remains unsettled, the dispute is referred to the first formal step in the "Procedure for Handling Questions Arising," the "works conference." This meeting is invariably attended by union officials and representatives of the District Employers' Association. Sometimes the employers' association representative is the spokesman on behalf of the management. Normally the branch official and the stewards will be the spokesmen for the union. About 80 percent of all disputes referred into the procedure are either settled or abandoned following the works-conference step.[5] But if the dispute is not settled or abandoned, it is referred to a "local conference," which must be held within seven days of the filing of an application for such a conference by either the secretary of the employers' association or the branch official. A local conference is composed of a panel of employer representatives selected from federated firms that are not involved in the dispute at issue. This panel meets at a location away from the plant, listens to the arguments presented by representatives of the two sides, and then attempts to conciliate the dispute.

The evidence and arguments presented to the local conference are recorded by a shorthand reporter, since the record made at this step will be reviewed by the members of a central conference court at York, England. For this reason, the local conference is more formal than the works conference. One British personnel director stated that the process of "making the record" at this step is a frustrating experience. He explained that ". . . the official representative of the association does the talking; and although you, as chairman, are in charge theoretically, you dare not open your mouth. . . . What everybody is concerned with is not the issue but what goes on the verbatim notes, because the next stage is York. . . . The association official who knows all the traps that lie in agreements and procedure does all the talking, and you can see him maneuvering so that he gets the right things on the notes—never mind the issue."[6] The central conference court at York is the final step in the procedure.

About 12 percent of the disputes that start into procedure are

[5] Marsh, A. I., *Industrial Relations in Engineering*, New York, 1965, p. 130.
[6] Testimony of D. F. Hutchison of Philips Industries, Minutes of Evidence, Royal Commission on Trade Unions and Employers' Associations (HMSO), 1966, p. 1102.

ultimately referred to the top step.[7] A minimum of 14 days' notice of an appeal from the local conference to the central conference is required to give the individuals assigned to the case at the central-conference level an opportunity to study the transcript of the evidence and the arguments taken at the local-conference level. Since the 14-day period starts from the date of appeal and not from the date of the local conference, great delay often occurs between these two conferences. These delays are usually generated by the union. It wants the employer to maintain the status quo, which the employer is obligated to do by the terms of the central agreement until the dispute clears the central conference step at York. No delays occur on the ground that the central conference already has a full agenda, because a heavy case load is accommodated by the establishment of additional "courts" to hear the extra cases.[8]

A "court" consists of four or more staff employees of the Engineering Employers' Federation. In addition, a chairman is selected from a special panel of employer representatives who may not be members of the employer association in the district where the plant is located.

One court will be allocated five or six cases. The members of a particular court meet with the employer representatives of the plant who come to York on Thursday evening to acquaint court members with the issue prior to their negotiation with the union "pleaders" during the court hearing the next day. However, since each court has five or six cases to negotiate during the Friday court sessions, the amount of preparation time that can be allocated to each case is necessarily short. Neither the management representatives, the branch officials, nor the shop stewards from the plant involved are permitted to attend the court sessions on Friday.

The courts are panels of employer-conciliator-negotiators to which the executive members of the union bring their claims.

[7] The final step in the procedure applicable to "federated" plants in Wales is at Bristol and for "questions arising" with the six unions representing office and supervisory employees, in London. The "staff" worker procedure is similar to the manual workers' procedure except that no "fellow employer" is a member of the committee at local conference or chairman of the court at central conference, and no verbatim record is taken at the local conference step.

[8] Marsh, A. I., *Industrial Relations in Engineering,* New York, 1965, pp. 120–131.

However, the members of the court have a power that is greater than that of a conciliator, because a determination made by the court is binding upon the employer directly involved.

These determinations or agreements that court members reach with the union "pleaders" as they stand before the court are known as "joint recommendations to the constituent parties." Where an agreement is reached which disposes of the claim, the claim is "settled." Where an agreement is not reached, the record states that "the parties were unable to arrive at a mutual recommendation." Other disputes may be "referred back to works conference level for further discussion," or "adjourned," "withdrawn," or "not proceeded with."

Settlements Reached

The number of settlements reached at the central conference at York, England, is between 8 percent and 10 percent of the disputes that are referred to that level. Forty-six percent end in a failure to agree and 54 percent are referred back to the parties, sometimes with a private settlement suggestion, or are withdrawn by the union pleaders.[9] The procedure has been criticized because the number of "failures to agree" is so high. Since the procedure is primarily a bargaining procedure, a rise in the percentage of "agreements" would merely mean that the number of concessions by the employer had increased.

The court gives no reasons to support the action it takes to avoid establishing case law or precedent. By tradition, each case is regarded only in terms of its own content and circumstances, and central conference findings on particular issues do not suggest that similar issues will always be dealt with in the same fashion. The concept that a system of precedents should be applied appears to the central authorities to suggest that central conference would become a procedure for making national agreements. This it is not. It is the final stage in a process of stage-by-stage conciliation in grievance settlement.

As noted, the agreement establishing the "Procedure for Handling Questions Arising" provides that the status quo must

[9] Marsh, A. I., *Industrial Relations in Engineering*, New York, 1965, p. 131; Engineering Employers' Federation, "Evidence to the Royal Commission on Trade Unions and Employers' Associations (HMSO), 1965, p. 66.

be maintained until the matter in dispute has been processed through the various levels "up to York." This means that neither employee strike action over the dispute nor an employer-initiated change in conditions is proper during this period. One study showed that 17½ weeks was a typical period for processing a claim to York, but that the time might be as long as 43 weeks. Because the tradition of advance consultation with the union representative before making a change is so deeply impressed on the British system, the status-quo obligation means that management cannot make a change affecting employees, if the change is challenged, for a period that is typically 17½ weeks and might be as long at 43 weeks. Out of sheer frustration, some employers operating under this procedure take the contemplated action without advance consultation and then claim that the "status quo" is the situation that exists after the change rather than before. This tactic, of course, raises the union's temperature and can provoke what is known as an unconstitutional strike, a strike that violates the pledge in the procedure agreement to hold up strike action until the dispute clears through York.[10]

Once a "failure to agree" has been recorded at York, the union is free to strike and the management is free to make the intended change. One study showed that of 335 cases considered at central conference, 157 ended in a failure to agree, with strike action occurring in 29 cases and slowdowns or boycotts in 14 others. Therefore, 27 percent of the "failures to agree" are followed by industrial action.[11]

Discharge Grievances

The resolution of employee-discharge grievances in the United Kingdom requires a brief consideration of the legal relationship created by the individual employment contract between the employee and the employer. The individual employment contract is

[10] Marsh, A. I., "Disputes Procedures in British Industry," Research Paper 2 (Part 1), Royal Commission on Trade Unions and Employers' Associations, HMSO, 1966, pp. 12–13.

[11] Engineering Employers' Federation, "Evidence to the Royal Commission on Trade Unions and Employers' Associations" (HMSO), 1965, p. 67. During a recent three-year period, more than 50 percent of the staff workers' disputes that went to central conference ended in a "failure to agree" and 33 percent of these were followed by industrial action in the manual workers' procedure. The high incidence of industrial action by office and supervisory employees is interesting to note because this militancy in the white collar area is in sharp contrast to U.S. experience.

important in the United Kingdom but of little or no significance in the United States. Even where the employment contract does not provide that the employer must give an employee notice before terminating him, a reasonable notice period is presumed.[12] In 1964, the Contracts of Employment Act standardized the notice that an employer must give an employee before he could terminate an employment contract. This period is from one week to four weeks, depending on the length of service of the employee.

Under these doctrines, an employer may discharge an employee by giving him notice and permitting him to work out the notice period or paying him the wages he would have earned during that period. If the employee is being discharged for cause, no notice or payment in lieu of notice is required. Thus, if an employee can show he was discharged without cause, he is entitled only to the money he would have earned during the notice period. His compensation, therefore, is one to four weeks' pay.[13]

In the United States, the remedy for a discharge without just cause is not a money payment. The labor agreement stipulates that the employee has a contractual right to a job unless he engages in misconduct that justifies his discharge for cause. Based on the concept of contractual right to a job, the arbitrator in the United States has created the remedy of reinstatement when this right has been improperly denied to the employee.

Think what the remedy of reinstatement has done to stabilize industrial relations in the United States. Unless the employee engages in the most serious misconduct, such as striking his foreman, the employer will resort to discharge only as a last resort and only after attempting to correct the employee's misconduct with warnings and suspensions. If the employer does not analyze the facts carefully, an arbitrator will breathe hot flames down his neck and order the employee reinstated. What is or is not just cause for discharge is not found in court decisions in the United States in contrast to the United Kingdom, where claims for money damages for lack-of-notice payment are litigated on the basis of

[12] Meyers, Frederic, "Ownership of Job: A Comparative Study," Institute of Industrial Relations, Univ. of Calif., Berkeley, 1958.
[13] Wedderburn, K. W., *The Worker and the Law*, 1965, pp. 79–80; Mitchell, E., *The Personnel Manager's Lawyer and Employer's Guide to the Law*, Business Publication Ltd., London, 1965, pp. 113, 165.

such discussions. In this country such guidelines and precedents are found in the wealth of written arbitration decisions which discuss employee conduct. These discussions have aided both management and unions to understand what is and what is not improper conduct and to make the procedures used to handle employee discipline more equitable.

In the 4,500 plants that are federated in the United Kingdom, some discharge cases are referred to procedure, but most do not pass beyond the works-conference level.[14] One of the problems has been that the status quo obligation causes the unions to demand that the discharged employee remain on the active payroll until the matter has been processed to York, and when this demand is rejected, the employees are encouraged to take strike action.[15]

In 1966, over 2,000,000 employees were covered by the agreement but only 14 discharge cases reached York. At that level, only five were settled. Most of the cases referred to procedure involve claims that a shop steward has been "victimized." A discharge of a union steward in the United Kingdom is quite a different problem from the discharge of a regular employee, whereas in the United States the arbitrators apply the same standards in ruling on the discharge of a shop steward that they apply to a regular employee.

Because there is no place to go in the United Kingdom to ask for an order of reinstatement when an employee claims that he has been unjustly discharged, union officials frankly state that the only real recourse is a strike to force the employer to reinstate the employee. For this reason, disputes over discharges are a major cause of "unofficial" and "unconstitutional" strikes in the United Kingdom, representing between 10 and 13 percent of all strikes.[16] If a union steward is fired, a rumor may sweep through the plant that a steward has been "victimized" and the employees, who may care little why the steward was discharged, will leave work

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[14] *Dismissals Procedure,* Report of a Committee of the National Joint Advisory Council (HMSO, 1967), p. 63.
[15] Lowthian, "TUC Oral Evidence," Royal Commission on Trade Unions and Employers' Associations, Vol. 61, ¶9876; Meyers, Frederic, "Ownership of Job: A Comparative Study," Institute of Industrial Relations, Univ. of Calif., Berkeley, 1958.
[16] *Ministry of Labour Gazette* (HMSO), May 1961, pp. 188–189.

to force his reinstatement.[17] If the steward was guilty of a serious breach of employee behavior (such as striking a foreman) and is then reinstated, he becomes untouchable and his conduct toward the members of supervision and management becomes progressively more unreasonable. It is the arbitrator in the United States who has prevented a comparable condition from arising in plants in this country. The arbitrator examines the facts dispassionately and has the power to reinstate if the discharge was an unfair action, or sustain if there was cause. As a result, the trial-by-battle condition which exists in the United Kingdom has been avoided.

The British employer clings to his unilateral right to dismiss as his most cherished prerogative.[18] In theory, this should give the British employer great power in contrast to his counterpart in this country, who must disclose his discharge action to an arbitrator with the power to order the employee's reinstatement. However, one observer had this to say: [19]

> . . . one senses a greater reluctance among British employers, despite their insistence on their prerogative unilaterally to terminate employment, than among American employers to dismiss workers individually. This was confirmed in a rather curious way. When discussing the problems involved in reductions in force, many British employers indicated that they selected for separation at such times those workers who had poor records of absenteeism, offenses against company rules, incompetence, and the like. When they were asked why such workers had not been dismissed earlier or at the time of the commission of the offense, the replies indicated a fear of collective action. At the time of a layoff, however, the workers were in a much weaker position to protest. . . .

In the United States, an employer who acts inconsistently about firing his workers may get into trouble because the arbitrator will examine the disciplinary pattern at the particular plant and, if it lacks uniformity, may recommend reinstatement of employees who have been unjustly discharged. Thus, the employer feels compelled to set up standards of employee conduct and to enforce these uniformly, regardless of whether the employee is popular or even a union steward. Furthermore, an employer in this coun-

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[17] Meyers, Frederic, "Ownership of Job: A Comparative Study," Institute of Industrial Relations, Univ. of Calif., p. 27.
[18] London Times Labour Correspondent, *London Times*, June 20, 1960.
[19] Meyers, Frederic, "Ownership of Job: A Comparative Study," Institute of Industrial Relations, Univ. of Calif., p. 29.

try would not even attempt to clean out the undesirables at a time of layoff because the arbitrator would not let him get away with such a misuse of the contractual seniority system—a system which has no real counterpart in the United Kingdom.

In the United States, many arbitrators have contributed even more than they realize to responsible conduct in industrial plants. They have said that when a union steward is involved in an illegal strike—one that violates the no-strike pledge—he is presumed to be a leader of that strike and can be discharged for his leadership, even though his followers are not. This rule of presumption of leadership, which places liability upon the union leaders, fascinates the labor relations officials in Britain. There the national union escapes responsibility for strike action by merely stating that the strike was "unofficial," and the stewards escape responsibility because if they are discharged another strike will start.

Role of Arbitration

Although arbitration is not part of the "Procedure for Handling Questions Arising," which is the process that has been described, it is used to a limited degree in the United Kingdom. Under the Industrial Courts Act procedures, arbitrators may be appointed to determine typical grievance problems and even discharge cases. However, the arbitrators in the United Kingdom do not write opinions explaining the reasons for their determinations, and arbitration awards are not published. This reflects the view that precedent has no place in the dynamics of labor relations.

In the United States, on the other hand, arbitrators explain the reasons for their actions and their opinions are published. Out of this wealth of thoughtful reasoning have come many principles which are today accepted by both management and union representatives. In contrast to the British system, thoughtful reasoning has been brought to bear upon industrial conflict in the United States, rather than leaving the resolution of conflict to bargaining backed up by industrial action.

We are all familiar with these principles. Significantly, an informed and articulate plant manager from Coventry, England, was explaining one of these principles to the members of the

Royal Commission on Employers' Associations and trade unions who have been sitting in London struggling with the problem of reform in the British labor relations law. His testimony before this Commission is well worth reading: [20]

> . . . The major difference between the [industrial relations] system in North America and the system in the U.K. is that the method of collective bargaining in North America assigns to management a precise and specific management function which it may exercise during the term of the contract, subject only to the right of the union [representative] to [object by] filing grievances [and] process them through a procedure culminating in arbitration [if he believes management has acted in a manner inconsistent with the agreement.]
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> The effect is that . . . management is able to produce change at a much faster rate than we are able to do in this country. For example, any change consistent with the terms of the contract may be introduced by management immediately. . . . There is a specific acknowledgement in every agreement with the trade unions that management has the right to make changes. In the U.K. because there is no enforceable recognition of management's specific functions, management must be prepared to negotiate every time it wishes to make a change. The result is that we tend to have to bargain under pressure all the time. . . . Because of this there is a tendency for the U.K. compromise [finally worked out] to be less efficient than the North American equivalent action by management. . . .

Doctrine of Reserved Rights

What was this wise Englishman explaining to the Royal Commission? He was, of course, explaining the construction principle, applied by most arbitrators in the United States, which we all know as the doctrine of reserved rights. It is the simple and understandable view that management, which must have the right to manage, has reserved its right to manage unless it has limited its right by some specific provision of the labor agreement. This is a natural construction of a U. S.-type labor agreement, a code with which the employer has agreed to comply in return for the union's agreement not to strike while management proceeds with its rights and activities.

The Coventry plant manager believes that this reservation of the right of management to make change quickly and efficiently

[20] Testimony of H. J. Hebden of Massey-Ferguson (U.K.) Limited, *Minutes of Evidence,* Royal Commission on Trade Unions and Employers' Associations (HMSO), 1966, p. 1004.

when change is needed, as long as the changes are consistent with the agreement, is the basic reason why management in the United States can operate efficient plants even though its employees are represented by some of the most powerful unions in the world. He believes that the lack of definitive labor agreements, written under the discipline of third-party interpretation and enforcement and stabilizing work rules for the term of the agreement, is the reason why many British managements have not been able to do so. He believes that the long tradition of joint consultation over a proposed management change, which generates debate, slows down change, and produces a compromise, is also a reason why the British plants cannot match the efficiency of those in the United States.

The "reserved-rights principle" has been enunciated by arbitrators in this country for over 30 years and has been accepted by union leadership and employees. One arbitrator has said: [21]

> . . . there are countless hundreds of arbitration decisions, as well as many arbitrators, who follow and accept the residual rights theory of management's rights, ...

NLRB Policy

Against this background of contrast, I must register an alarm. The current NLRB is adopting the view, 32 years after the Wagner Act was passed, that this reserved-rights construction principle is now "old hat" and should be cast aside. In a brief submitted to the Supreme Court, the Board said: [22]

> Many arbitrators . . . apply the so-called "residual rights" theory when management takes unilateral action, holding that it is free to act unless the collective agreement expressly provides otherwise. . . . Such a doctrine, which bestows upon management all "residual rights," *stands on its head* the established rule that a statutory waiver must be express and clear; . . . (Emphasis added)

The Board is now saying, in contrast to United States arbitration doctrine, that an employer can take no unilateral action affecting his employees without first bargaining the proposed change with the union representatives.[23] In Britain this would be

[21] *Mead Corporation,* 46 LA 459 (1966, Arb. Klamon).
[22] Board brief in *NLRB* v. *C & C Plywood,* 385 U.S. 421, 64 LRRM 2065 (1967).
[23] *NLRB* v. *Fibreboard Paper Products,* 138 NLRB 550, 51 LRRM 1101 (1962), 322 F.2d 411, 53 LRRM 2666 (D.C.Cir., 1962), *aff'd* 379 U.S. 203, 57 LRRM 2609 (1964);

called "jointly consulting" with union representatives and maintaining the status quo during procedure.

Instead of presuming that management has reserved all the rights to manage that it has not bargained away, the Board now says that management must bargain over any proposed managerial change up to an impasse, or must show that it bargained for and won the specific right to make the intended change, at some time in the past.

Related to this reserved-rights doctrine enunciated over these many years by arbitrators is the view espoused by most arbitrators that past practice may be referred to in construing an ambiguous provision of a labor contract, but that practice *per se* does not become contractual. Here, again, the Board is marching into the area of contract construction with a different view than most arbitrators have supported for over 30 years. In *Long Lake Lumber Co.,*[24] for example, the Board found that the collective agreement was silent on the employer's right to change the working schedule of maintenance employees, but when the management scheduled a maintenance employee to service a new machine on Saturday that was used continuously during the five normal production days, the Board held that the Monday-through-Friday schedule for maintenance employees had become an "unwritten term of the contract." This concept, implemented through Section 8(d) of the Act, would mean that a maintenance man could not be scheduled on Saturday *unless the union agreed.*[25]

If the Board is successful in destroying the reserved-rights construction principle, makes "past practice" *per se* contractual, and enforces a long period of joint consultation up to an impasse before management can make a managerial change, rigidity will be imposed upon the industrial enterprise system in the United States. The speed of change will be slowed down, and production

NLRB v. *Town & Country Mfg. Co.,* 136 NLRB 1022, 49 LRRM 1918 (1962), 316 F.2d 846, 53 LRRM 2054 (5th Cir., 1963); *NLRB* v. *C & C Plywood,* 148 NLRB 414, 57 LRRM 1015 (1964), 351 F.2d 224, 60 LRRM 2137 (9th Cir., 1965), a situation in which there was no arbitration provision, *aff'd* 384 U.S. 903 (1967).

[24] 160 NLRB 1475, 63 LLRM 1160 (1966), *enf. denied on other grounds,* 380 F. 2d 628, 65 LRRM 2633 (D.C. Cir., 1967).

[25] Section 8 (d) was relied upon to find a violation of the Act when an action taken was found to be inconsistent with a term of the labor agreement in *C & S Industries,* 158 NLRB No. 454, 62 LRRM 1043 (1966); *Anaconda Aluminum Co.,* 160 NLRB 35, 62 LRRM 1370 (1966); *Crescent Bed Co.,* 157 NLRB 296, 61 LRRM 1334 (1966).

plants will become debating societies as we slide into the morass of difficulty that now faces many British managers.

The members of the NLRB may not realize that they are shaping the law to bring the British system here, but that is precisely what is happening. Industry in the United States has been able to absorb wave after wave of increased cost generated by powerful unions only because it has been able to change quickly and continuously and rapidly become more efficient.

It is dangerous to tinker with the principles, developed over the years by arbitrators, which have permitted managements to operate efficient plants and still live with powerful unions. When it comes to interpreting labor agreements, the arbitrators have the expertise. The members of the NLRB should look overseas and see what happens when change in industrial plants is slowed down. If they would do so, they might reach the conclusion, "We should not shape the law so as to create the British condition over here."

The arbitrators in this room may not have recognized the impact of their work on the industrial system in the United States. Their collective actions have caused management and union negotiators to make their labor agreements into written codes that enable day-to-day industrial problems to be solved. The composite of their many carefully reasoned opinions has generated principles which both union and management representatives in this country accept today. Finally, it has been their enunciation of the reserved-rights construction principle that has permitted the changes which are necessary if industrial efficiency is to continue to improve at the fastest possible pace.

It is hoped that this comparison of dispute handling will give American arbitrators an overview of the contributions to the principles and procedures of industrial relations that they have developed and nurtured during the period that powerful U. S. unions were raising labor costs year after year. These principles have substantially prevented union power from eroding industrial efficiency. It is also hoped that, as a result, arbitrators will add their views in protest against any rules that will slow down the speed of change which is essential if the industrial sector of this economy is to remain viable and able to support the continuing rise in wage costs.