APPENDIX C

REPORT OF THE COMMITTEE ON OVERSEAS CORRESPONDENTS *

LABOR DISPUTE SETTLEMENT IN THE UNITED KINGDOM, 1972

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The year 1972 was an unusually significant one in British industrial relations, since the Industrial Relations Act, passed in 1971, came into full operation for the first time in the early months of 1972. It is convenient to divide this report into two sections, the first dealing with experience during 1972 under the long-established machinery for dispute settlement, and the second highlighting the main features of those parts of the Act which focused on dispute settlement in the course of the year.

I.

There is a long-established apparatus for conciliation and arbitration in Britain. In 1972 the Department of Employment conciliated in 716 disputes, the highest number ever recorded. In 1971 there were 650 conciliations, and in the five years to 1970 the annual average was 487. In 61 percent of the cases in 1972, the union side requested conciliation, and joint requests were made in 20 percent of the cases. In 71 percent of the cases the conciliation process helped the parties to reach a settlement or enabled a deadlock to be broken. This proportion has remained almost constant over the past 10 years.

Disputes referred by the Department to arbitration with the consent of the parties were the subject of 90 hearings under the Industrial Courts Act 1919 and other relevant legislation. The comparable figure for 1971 was 76, and the average number of hearings in the five years to 1970 was 62.

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Both conciliation and arbitration proceedings in Britain tend to be private matters, and no systematic official or unofficial reporting of cases takes place. (Section 146 (6) of the Industrial Relations Act testifies to the confidential role of the conciliation officer's function by protecting the confidentiality of anything communicated to him in connection with the performance of his function.) Arbitration awards are regarded as the property of the parties and are not published. Again, it is the tradition in Britain, and one which the Donovan Royal Commission on Trade Unions and Employers' Associations 1965-1968 sought to change (see its report, pp. 72-73, pars. 281 to 287), that arbitration awards do not contain the reasons behind the arbitrators' awards. Only major disputes which become the subject of commissions or courts of inquiry have to be published, and their publication is usually intended as a way of informing the public of the facts of a dispute and indirectly as a means of bringing the weight of informed public opinion to bear on the parties to such a major dispute.

Thus, it is not easy to identify the substantive content of disputes which have been reconciled or arbitrated or, for that matter, not reconciled, or to suggest what have been the main areas of disagreement in arbitration cases. One can, however, hazard a guess that the majority of the disputes processed through the Department, either in conciliation or arbitration, refer to wage issues. This may explain the statistical growth in official conciliation and arbitration business in the course of 1972, when rapidly rising prices and feverish wage rounds were the order of the day.

Another point to note is that the Department of Employment does not have a monopoly of dispute settlement machinery, and many private arrangements exist which are regularly utilized but not reported in any comprehensive manner. Your Correspondent, for example, is one of the panel of independent chairmen which resolves differences in the cooperative movement, and this is an independent and largely anonymous activity. Finally, there is no clear distinction in Britain between dispute settlement machinery for handling disputes of "rights" as against disputes of "interest."

Despite this somewhat coy setting of dispute resolution in Britain, it is possible to draw attention to two significant aspects of experience during 1972. The first relates to the use of concilia-

tion and arbitration in the setting of national incomes policy norms. In the course of 1972, the British Government moved from a somewhat imprecise deescalation policy on wage claims—the "*n* minus 1" approach; that is, let each settlement seek to achieve an outcome of 1 percent less increase in pay than the previous one—to a hard wage and price freeze or standstill in November. Under the freeze arrangement, arbitration awards which had not been made or implemented before November 7 were frozen. (Your Correspondent found himself, by a coincidence, arbitrating a wage dispute at a hearing *on* November 7!) In the Government's proposals for the second phase of its prices and incomes policy, due to come into operation in the spring of 1973, it is decreed that all concerned with employment incomes should take into account the provisions of the code which is being produced to guide the process of pay and price setting. Arbitrators and conciliators are clearly expected to pay attention to these norms.

One aspect of the "*n* minus 1" strategy which aroused much adverse comment among employers and unions was that the Department of Employment's official conciliation machinery and its conciliation officers were being used not simply to fulfill the classic function of conciliating the parties, but to insinuate into wage disputes the Government's policy for incomes. The Minister (Secretary of State) responsible for the Department indicated on at least one occasion that the Department could not intervene with a view to conciliating a particularly difficult dispute because the employer's offer was well above the Government's norm. This criticism, in fact, led to the establishment by the Confederation of British Industry and the Trades Union Congress (TUC) of a joint conciliation panel to provide a pure conciliation service unadulterated by the Government's substantive policy. The panel was, however, almost wholly inactive, confirming the view of many seasoned observers that the establishment of the panel was more of a gesture of annoyance than a serious counterbid to the established conciliation machinery. At any rate, as the figures quoted above suggest, the official machinery of conciliation experienced brisk business in 1972, despite such criticism of its lack of impartiality.

It may be worth referring again at this point to the section of the Donovan Report already cited. Donovan was at pains to argue that arbitrators should take account of national incomes policy

criteria, and was led on from this basic proposition to the obvious deduction that it would be easier to know whether they had done so if they were required to give reasons for their awards. The matter is still a source of controversy, though, as indicated, the present Government clearly intends that any national policy should be taken into account by arbitrators and others involved in the settlement of employment incomes.

The second aspect of the 1972 experience that is worthy of note relates to the device of the court of inquiry. Such courts are used sparingly in Britain and are set up only when a dispute is regarded as extremely serious and/or as one in which the pressure of public opinion may serve a useful purpose. In February 1972 such a court of inquiry (the Wilberforce Inquiry) recommended large pay increases for coal miners who had, for some five weeks, been engaged in a national coal strike, the first since 1926. The really significant point about this report was that its recommendations did not set the final framework for a settlement. The recommendations of most courts of inquiry are nearly always accepted with little or no change. In this instance, the leaders of the mineworkers' union were able to bargain significant additional benefits, for example, on holidays, over and above the court's recommendations, through personal negotiation with the Prime Minister, Mr. Heath. The key factor in this unusual episode was, of course, that the country's coal stocks were practically exhausted, and the miners were able to use the court of inquiry as a springboard instead of finding it had imposed a straitjacket on them.

As a tailpiece to the use of arbitration for resolving wage differences, mention should be made of the fact that in April 1972 an independent arbitrator was brought in to help resolve the national railway pay dispute, but his "recommendation" was rejected by the unions. This was certainly unusual, since arbitration of industrial relations disputes in Britain, while voluntary, is founded on the gentlemen's agreement that an arbitrator's award is morally binding on the parties. Subsequently, the national rail dispute came to have significance in the setting of the Industrial Relations Act, which forms the subject of the second part of this report.

II.

The Industrial Relations Act 1971 is the most complex and comprehensive piece of labor legislation ever enacted in Britain.

It is also extremely controversial, and the official attitude of the trade union movement to it continues to be disapproving. In its 138 pages of text plus schedules, the Act seeks to provide a comprehensive statute dealing with four industrial relations principles which it identifies: free collective bargaining, orderly dispute settlement procedures, the right to organize, and protection of the individual worker. In addition to the Act itself, a Code of Industrial Relations Practice has been produced, and this provides practical guidance in pursuit of the general principles. The Code itself is not a legal document, but it can be used in proceedings under the Act, for example, as evidence of the standard of industrial relations behavior of the parties to a matter arising under the Act. It contains a section on grievance and dispute procedures.

Three important institutions are central to the working of the Act: (1) industrial tribunals, which handle many of the matters (for example, relating to redundancy or unfair dismissal) on which an individual worker may wish to pursue a claim against an employer; (2) a Commission on Industrial Relations, whose main functions relate to the investigation of bargaining applications, approved closed-shop applications, the conduct of ballots, and other investigations into industrial relations practices; and (3) the National Industrial Relations Court (NIRC), which has both an appellate jurisdiction (under Section 114) vis-à-vis the decisions of industrial tribunals, etc., and an original jurisdiction in such matters as complaints of unfair industrial practices.

The emphasis in this brief report is on the experience of the Act in 1972 with dispute settlement arrangements. Since the Act is still new, case law is still being made, and it must be stressed that this report is not only selective but very much an interim one. Your Correspondent ought also, in fairness, to disclose his own personal connection with the working of the Act as one of the industrial relations judges appointed to the National Industrial Relations Court under Section 99 (3).

1. Protection of the individual worker against redundancy and unfair dismissal has formed a very large part of the work of the tribunals and the NIRC in 1972. Cases of dismissal from employment, for one reason or another, have traditionally formed a hot area of dispute in industrial relations. The Redundancy Payments Act of 1965 introduced a national scheme of compensation

for dismissal from employment on account of alleged redundancy, and this has been operated through the industrial tribunals already mentioned. Until the Industrial Relations Act was passed, any appeals against the decisions of these tribunals on claims for redundancy payment were processed through the ordinary law courts—in England and Wales in the Queen's Bench Division in London, and in Scotland in the Court of Session in Edinburgh. Under the Industrial Relations Act, the NIRC became the appellate court, and during the early months of its operation, much of its business was concerned with working off the backlog of accumulated appeals from industrial tribunal decisions on redundancy claims. However, the Act went far beyond the concept of termination of employment because of redundancy and introduced a completely new onus on employers, under Sections 22 to 32, to show cause if an employee complains he has been unfairly dismissed. Mention may be made here of some of the main themes that have emerged in the work of the NIRC dealing with claims relating to redundancy and unfair dismissal.

A strike does not break a worker's continuity of employment for purposes of redundancy. The concept of normal hours of work, used as a base for calculating redundancy pay, excludes overtime hours from the calculation unless a certain amount of overtime is obligatory on both the employer and worker. (This ruling has emerged via the Court of Appeal, to which judgments of the NIRC may be appealed.) Unfair dismissal cases have required industrial tribunals to apply their minds to quantifying the compensation for unfair dismissal which is provided for under Sections 116 to 119 of the Act. The NIRC has been at pains to advise tribunals that they should make explicit the criteria they use in assessing compensation. The NIRC has taken the view that tribunals must set out their reasoning in sufficient detail to show the principles on which they have proceeded, so that the parties may not be deprived of their right of appeal on the question of the application of the sections of the Act (116 to 119) dealing with compensation. A particular difficulty which has arisen in the course of implementing the Act concerns the transitional period when the new Act was coming into force. Quite a number of cases have arisen which raise the question, when is a contract of employment terminated? Again, with the aid of the Court of Appeal, the position has now been taken that the effec-

tive date of termination of a contract is the date when the contract expires, not the date when notice of termination is given.

2. In collective labor relations, the Act not only provides machinery for dealing with bargaining units and agents and with sole bargaining rights and recognition procedures (Sections 45 to 55), but it also identifies (Sections 96 to 98) a number of unfair industrial practices. One of these in particular—blacking [refusing to handle] — has been the subject of some much-publicized work before the NIRC. A number of cases arose out of the blacking by dockworkers of traditional dockwork which had been moved inland to container depots. The main issue which appeared to come to the fore in this problem was how far a trade union is to be held responsible for the actions of its shop stewards. The initial NIRC position on this matter was that a union was so responsible. On appeal, the Court of Appeal rejected this thesis, but the House of Lords—the final appellate court in Britain—found that the NIRC was indeed justified in its ruling on the liability of the union for the actions of its shop stewards. At the time, this fundamental proposition about the responsibility of *organizations* in a dispute settlement context was obscured by the fines imposed on the Transport and General Workers' Union for contempt of the NIRC, and by the imprisonment of some dockers' leaders for contempt. In time, however, it may come to be recognized that the Lords' ruling contains significant implications for decision-making in British trade unions in determining who is authorized to initiate industrial action on behalf of a union.

It is worth recalling that the previous (Labor) Government in Britain saw the problem of unofficial actions by shop stewards as one of the most damaging problems of contemporary British industrial relations, and sought in its abortive proposals for industrial relations legislation to deal with the problem via a proposed conciliation pause (see "In Place of Strife, a Policy for Industrial Relations," *Cmnd* 3888, January 1969, par. 93 *et seq.*). Equally, it is now becoming increasingly recognized that the blacking disputes did, through the machinery of the Act, bring into the open the very real problems of technological change, manpower displacement, and unemployment in the traditional docking industry. In the long run, this manpower aspect of the disputes may be as important as the much-publicized aspects at the time.

3. Part VIII of the Act (Sections 138 to 145) contains provisions for emergency procedures. In situations of what may loosely be termed national interest emergencies, the Secretary of State for Employment may apply to the court for relief through orders which can take two forms: either (a) the ordering of a cooling-off period, or (b) an order for a ballot of the workers concerned. These sections of the Act have been invoked once, in the rail dispute already mentioned. Both forms were used. The Secretary of State asked initially for a three-week cooling-off period, but was given a 14-day period on the ground that the railway "work to rule" in progress constituted "irregular action short of a strike Section 34 (4))"; subsequently, after the expiry of the 14 days, he applied for a ballot. The NIRC ordered that a ballot should be conducted, and this was done by the Commission on Industrial Relations. The membership of the railway unions supported their official policy. Subsequently, the dispute was resolved by negotiation.

Much argument and controversy have been generated by the experience of this part of the Act. Was it successful? Some argue that the proceedings under the Act did at least bring to an end the disruption of rail services. Others argue that the outcome of the ballot was a predictable defeat for such a device. Again, the cooling-off period did not appear to serve as a respite during which the parties made serious endeavors to come to an agreed solution of their wage differences.

It is too early to say whether this part of the Act will have a significant part to play as familiarity with the Act and its provisions increases. By definition, these emergency provisions must be used sparingly, and students of Taft-Hartley need no reminding of the difficulties encountered in this vexed territory. Perhaps the most objective comment on this part of the Act at this stage is simply to indicate that it does add another dimension, or choice of procedure, to the range of devices in Britain for bringing pressure to bear in intractable disputes.

Some other summary points may be made about the working of the Act and the court.

First, the TUC made a significant change of tactics in the spring of 1972. Its basic policy remains one of noncooperation with the Act and all its works, but since the spring, affiliated

unions have had discretion to determine for themselves whether to defend their interests at the NIRC when they are under pressure to respond to some action brought before the court.

The second point is that the court has regularly expressed its regret when, through a union boycott, it has not always been able to hear "both sides of the story" from those most directly involved.

A third point, which follows from the second, is quite crucial to an understanding of the court and the whole intention of its operation. The rules of the court explicitly envisage that it will use its powers to seek to have differences brought before it resolved by agreement, through conciliation. In his opening statement when the court was inaugurated, the president (Sir John Donaldson) made it clear that the success of the court would be measured not so much by the number of decisions it gives as by the number of occasions upon which it becomes unnecessary to give a decision. The practice of the court provides opportunity for conciliation. It is the practice to have a private meeting—in the jargon, a "Meeting for Directions"—with the parties before a formal hearing is fixed, and it has proved possible on many occasions for this particular forum to serve as a conciliatory occasion when the parties find that they can go away and resolve their problem on their own. The court encourages this, though, of course, it has to be remembered that the function of the court is to apply the provisions of an act of Parliament. Such conciliation can, of course, take place only if both parties to a case choose to be present, and in that sense the boycott of the Act by the TUC has tended to obscure the conciliatory function which the court can exercise. In addition, conciliation tends not to be news, and the media have paid little attention to this aspect of the Act in operation.

Fourth, a number of cases which are initiated never come to a hearing before the NIRC. No doubt this is for a number of reasons—conciliation, a preference on the part of reluctant unions to settle "out of court," and also the recognition on the part of a party with a weak case that it may be better to yield gracefully before a case goes too far.

Fifth, the machinery under the Act can be brought into action extremely speedily, not least when problems concern dispute

settlement of the kind outlined in this report. Tribunals and the NIRC work quickly and very informally, with a strong emphasis on the industrial relations context in which problems and labor differences arise. Nevertheless, as the references here to the Court of Appeal and the House of Lords indicate, the Act has to be seen as a very major experiment in Britain in blending legal with industrial relations norms.

Included with this report is a brief statistical summary which indicates the size and mix of the NIRC caseload during its first year of life, to end November 1972.

NIRC Statistics—The First 12 Months

The following provisional statistics illustrate the NIRC's caseload during its first 12 months:

Cases transferred from the High Court and the Court of Session in Scotland, December 1, 1971:			
Appeals from industrial tribunals re Redundancy Pay Act 1965			48
Cases received December 1971-November 1972:			
Re Redundancy Pay Act 1965 (Industrial Relations Act, s.114 (1) (b))	113		
Re Industrial Relations Act (Industrial Relations Act, s.114 (1) (d))	63	176	
"Collective bargaining" applications:			
s.7 (closed shops)	1		
s.11 (agency shops)	3		
s.14 (agency shops)	1		
s.17 and Sched. 1 (approved closed shops)	19		
s.37 (procedure agreement)	1		
s.45 (sole bargaining agencies)	27		
s.51 (sole bargaining agencies)	7	59	
Complaints of unfair industrial practice (s.101)		35	
Emergency applications:			
s.138 (discontinuing or deferring industrial action)	1		
s.141 (ballot re industrial action)	1	2	
Application for transfer from industrial tribunals (Rule 26)		3	
Contempt proceedings		6	281
Total cases received to date			329

Cases Disposed of

Appeals from industrial tribunals	*By Withdrawal*		*By Decision*		*Total*	
Re Redundancy Payments Act 1965	55		77		132	
Re Industrial Relations Act	11	66	22		33	165
"Collective bargaining" applications						
s.7			1		1	
s.11	1		2		3	
s.17 and Sched. 1			19		19	
s.45	7		5		12	
s.51	3	11	1	28	4	39
Complaints of unfair industrial practice (incl. interim orders)		14		7		21
Emergency applications				2		2
Applications for transfer				3		3
Contempt proceedings		1		4		5
Totals		91		143		235

Cases Outstanding (incl. adjourned for conciliation)

Appeals from industrial tribunals	*Adjourned*		*To Hear*		*Total*	
Re Redundancy Payments Act	5		24		29	
Re Industrial Relations Act		5	30	54	30	59
"Collective bargaining" applications		7		13		20
Complaints of unfair industrial practice		6		8		14
Contempt proceedings				1		1
Totals		18		76		94

APPENDIX D

ETHICS OPINION *

The committee has been asked to express its view on the following question of ethics:

An arbitrator was about to order new stationery. He wished to use a letterhead which would indicate, besides his profession as an arbitrator, his membership in the National Academy of Arbitrators and his status as a panel member for the American Arbitration Association and the Federal Mediation and Conciliation Service. He sought the committee's opinion as to whether his proposed letterhead was in any way unethical.

Part I, Section 9, of the Code of Ethics states: "Advertising by an arbitrator and soliciting of cases is improper and not in accordance with the dignity of the office. . . ." The committee believes that any reference on a letterhead to membership in the Academy or membership on AAA and FMCS panels would be a gross impropriety. Such references are essentially a self-laudatory device for impressing labor and management with one's accomplishments. They are a form of advertising and are not in keeping with the dignity of the office. For these reasons, the proposed letterhead would be unethical under Part I, Section 9.

* Members of the Committee on Ethics are Richard Mittenthal, chairman; Benjamin Aaron, Leo C. Brown, S.J., Alex Elson, Patrick J. Fisher, Sylvester Garrett, Eli Rock, Ralph T. Seward, Russell A. Smith, Abram H. Stockman, and Seymour Strongin.