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UNFAIR LABOR PRACTICES UNDER THE TRADE UNION LAW OF JAPAN

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I

In Japan, the Trade Union Law of 1949 now remains in practice, and Article 7 and 27 of the said Law provide for the prohibition of unfair labor practices and the procedures for solving them. At the time when the old Trade Union Law of 1945 was amended in 1949, the present system of unfair labor practices was adopted, modelling after the Wagner Act of America (the National Labor Relations Act). According to the Law of 1949, a certain specified acts of an employer are prohibited as unfair labor practices, just in the same manner as in case of the Wagner Act. When there are offensive acts on the part of the employer, the employees may be allowed to resort to a legal measure for the relief against the employer after going through a certain fixed procedure. For this purpose, the Labor Relations Commissions are created as enforcement organs. In this case, however, the intrinsic nature of acts which the Trade Union Law prohibits as unfair labor practices, and the procedure for securing the relief, are not necessarily the same as those of the Wagner Act. The main object of this article is to make clear these points and to introduce the system of unfair labor practices in Japan.*

II

The Japanese system of unfair labor practices was definitely established by

* Regarding the U. S. system of unfair labor practices, refer to: Teller, Labor Disputes and Collective Bargaining, Vol. II, 1940; Rothenberg, on Labor Relations, 1949; Gregory, Labor and the Law, 1949; Millis and Brown, From the Wagner Act to Taft-Hartley, 1950; Werne, The Law of Labor Relations, 1951.

the enactment of the Trade Union Law in 1949. However, the old Trade Union Law of 1945 had a provision corresponding to Article 7 (1) of the Law of 1949 prohibiting unfair labor practices. That is to say, Article 11 of the Law of 1945 provided that (1) the employer shall not be allowed to discharge or give discriminatory treatment to a worker by reason of his being a member of a trade union, for his having tried to join or organize a trade union, or for his having performed proper acts of a trade union, and (2) the employer shall not be allowed to make it a condition of emloyment that the worker must not join or must withdraw from a trade union, and moreover Article 33 provided that in case of a violation of the said provision, such an emplyer shall be liable to be punished at the request of the Labor Relations Commission. These old provisions are often called a system of unfair labor practices. In truth, however, it is considered that they are not the direct reception of the American Law.

After World War I, in Japan, the establishment of the labor union law became a public opinion with the development of independent labor union movements. After all, the bills of the labor union law were often introduced into the Diet, but the labor union law was not actually enacted for many years. In 1925, the Department of Home Affairs made public a bill which included such provisions as the followings: "the employer or the agent shall be disallowed to discharge a worker by reason of his being a member of a trade union", and "the employer or the agent shall be disallowed to make it a condition of employment that the worker must not join or must withdraw from a trade union". Moreover, the said bill had a punitive provision against a violator. As a matter of fact, however, when the bill was laid before the Diet by the government, the said punitive provision was deleted and it was simply declared that the discharge violated the law and a yellow dog contract should be void.

After World War II, the Trade Union Law became law in 1945 for the first time in Japan and the origin of this law can be traced back to the bills presented after 1920. The old Law of 1945, however, conditioned the request of the Labor Relations Commission for the punishment of a violator, and this point is believed to be referred to the American Law.

As explained above, the provisions themselves of the old Trade Union

Law can be traced back to the bills presented after 1920. After the enforcement of this law, however, as it happened to be the occupation period, the Japanese law in general were greatly affected by the American law both in legislation or interpretation. Consequently, it was quite evident that the above provisions of the old Trade Union Law were interpreted just the same as the unfair labor practices of the American Law, and moreover, that the function and management of the Labor Relations Commission in Japan were considered always in comparison with those of the National Labor Relations Board in America. In 1949, this tendency resulted in the total amendment of the Trade Union Law, in which the system of unfair labor practices modelling after the Wagner Act was established. Besides the discriminatory treament and a yellow dog contract which were prohibited by the old Law, the refusal of collective bargaining and control or interference with a labor union and financial support to it were prohibited as unfair labor practices. Moreover, the procedure to prevent violations of the Law was also changed from the principle of punishment by penalty to the remedial principle, the Labor Relations Commission being authorized to eradicate the effects of unfair labor practices of an employer. Then, in 1952 when the occupation period came to an end, in amending the Trade Union Law, there were varied discussions about the system of unfair labor practices. The discussions finally ended only by adopting the provisions of the old Labor Relations Adjustment Law in the system of unfair labor practices —— item 4 of Article 7 of the Trade Union Law. This Law of 1949 is now in existence.

III

The system of unfair labor practices in Japan, as explained above, was established following the American Law. It is not proper, however, to consider that the substance of unfair labor practices is also copied from those of the American Law.

It was in 1935 when the system of unfair labor practices in America was first established in accordance with the Wagner Act. Its original form, however, could be traced back to the National Industrial Recovery Act of 1933 (NIRA). The NIRA was the core law of the New Deal which was introduced by Franklin D. Roosevelt, President of the U. S. A., with the aim

of overcoming that great financial crisis broken out at the end of 1929. Thus, the aim of this legislation was to prevent unfair competitions in the industry and to recover industrial activities by promoting cooperations between employers and employees and also among various enterprises. As a means of attaining these objects, code of fair competitions was required to be established in every industry. These codes were the regulations which stipulated the actual standards as to the working conditions and the methods of dealings, such as wages, working hours, limitation of production, price control, etc. It was so arranged that principally these codes were voluntarily set up by each industry and they had to be approved by the President. Naturally, these codes became the legal standards in each particular industry. In case when an employer violated any one of them, the matter was dealt as an unfair method of competition, just in the same manner as in the Federal Trade Commission Act of 1914.

With regard to the relations between labor and management, this code of fair competitions was required to contain the fundamental labor provisions of Sec. 7 (a) of the NIRA. This provisions of the NIRA were followed after Sec. 6 of the Clayton Act of 1914 and succeeded to the substance of Sec. 2 of the Norris-La Guardia Act of 1932. This provisions of the NIRA were the immediate back ground of the system of unfair labor practices. And in order to adjust industrial conflicts in the light of the provision, the National Labor Board, which was replaced in 1934 by the first National Labor Relations Board having stronger and wider authority, was created. The NIRA was a temporary legislation having the life of only two years' enforcement, but it was declared unconstitutional by the U. S. Supreme Court toward the end of its life of enforcement. Then, the Wagner Act became law in 1935.

The Wagner Act was enacted in order to give employees the bargaining power to bring about the equality between employees and employers by guaranteeing the right of employees to organize and to bargain collectively, wherein it was aimed to eliminate the causes of certain labor disputes burdening or obstructing the free flow of commerce. And for this purpose, the system of unfair labor practices was established. Unfair method of competition, set forth by the provisions of Section 7 (a) of NIRA, were prohibited as unfair labor practices; the National Labor Relations Board (NLRB) was created to carry out the provisions of this Act and its procedures were provided by this

Act.

As is explained above, the Wagner Act guarantees workers the right of organization to recover the equality of bargaining power between employers and employees, and excludes the practices which may bring the unequality of the bargaining power between them. While the violation by some employers of the right of employees to organize and to bargain collectively are considered as unfair competition between industries in the NIRA, such a violation was regraded as unfair competition between employees and employers in the Wagner Act. In this sense, therefore, the idea of unfair competition was enlarged herein. It may reasonably be said, however, that in America the unfair labor practices are essentially regarded as a kind of unfair competitions in labor relations. From this view-point, the problem of unfair labor practices by unions is logically open for discussion. Accordingly, the Taft-Hartley Act of 1947 (the Labor Management Relations Act) that is the amended Act of the Wagner Act, set forth unfair labor practices by unions as well as unfair labor practices by employers.

Different from this, Article 28 of the Constitution of Japan guarantees the right of workers to organize, to bargain and to act collectively. The guarantee of these rights, however, must always be made against the abuse of the national authority, and also against the illegal conduct of employers, because the workers' organization opposes to employers. For this purpose, the system of unfair labor practices have been adopted by the Trade Union Law. For this reason, the interference with the right of workers to organize and to bargain collectively is regarded as an unfair labor practice in Japan. From this view-point, unfair labor practices in Japan are considered only for these of employers, and the idea of unfair labor practices by unions as in the Taft-Hartley Act is not considered proper, because it restricts in the exercise of the right of workers to organize. It is in this sense that there is a fundamental difference between the American Law and the Japanese Law.

IV

Article 7 of the Trade Union Law prohibits to do the following acts on the part of the employer as unfair labor practices:

(1) "To discharge or give discriminatory treatment to a worker by

reason of his being a member of a trade union, for his having tried to join or organize a trade union or his having performed proper acts of a trade union; or to make it a condition of employment that the worker must not join or must withdraw from a trade union."

Corresponding to subdivision 3 of Section 8 of the Wagner Act, this provision obviously purports to ban such acts as an infringement of the right of workers to organize, and it should be noted that the same conception, as already mentioned above, has been known also in Japan. Outstanding among the alleged unfair labor practices should be mentioned such discriminatory treatment. While discriminatory treatment is usually interpreted like the case of the Wagner Act, the discrimination at the time of employing a new worker is not generally considered to constitute an unfair labor practice, for, different from the case of the Wagner Act, with subdivision 3 of Section 8, which provides: "by discrimination in regard to hire... to encourage or discourage membership in any labor organization," the Japanese Law fails to contain any specific provisions. In most cases, the labor unions in Japan are organized as company unions, and consequently, as a matter of fact, the problem is seldom taken up as an issue. However, in case a company is dissolved and all its employees are discharged, to be replaced by a new company, which proceeds to employ only those of the old employees who were not members of the labor union, explicitly for the purpose of evading the charge of acts in violation of the provision of item 1 of Article 7 of the Law, the Labor Relations Commissions take the stand that such constitutes an unfair labor practice of discrimination in regard to discharge.

The case of "Yellow Dog Contrat" is seldom known in Japan. The proviso of item 1 of Article 7 of the Law provides: "Provided, however, that this shall not prevent an employer from concluding a trade agreement with a trade union to require, as a condition of employment, that the workers must be members of the trade union if such trade union represents a majority of the workers in the particular plant or working place in which such workers are employed", which, in effect, affirms that, in case a union represents a majority of workers, such will be recognized as either a closed shop contract or a union shop contract. In a majority of cases in Japan, however, a labor union is organized on the basis of the particular company, and, therefore, a closed shop

contract is seldom concluded.

(2) "To refuse to bargain collectively with the representative of the workers employed by the employer without fair and appropriate reasons."

Item 2 of Article 7 corresponds to subdivision 5 of Section 8 of the Wagner Act. The Constitution of Japan guarantees the right of workers to bargain collectively by Article 28, and the Law fails to set forth the system of decision of the appropriate unit for the purposes of collective bargaining and designation of selection of representatives for such purposes, as is seen in Section 9 of the Wagner Act, and, as a consequence, all labor organizations (not necessarily required to be a labor union) will be entitled to bargain collectively. Representatives of a labor union, or those to whom the powers are delegated by the labor union in accordance with the provision of Article 6 may act in the capacity of representatives for collective bargaining. Such persons, moreover, are not necessarily required to be employees employed by the employer.

(3) "To control or interfere with the formation or management of a trade union by workers or to give financial support to it in defraying the trade union's operational expenditure."

Item 3 of Article 7 of the Law corresponds to subdivision 2 of Section 8 of the Wagner Act. Article 7 of the Labor Union Law lacks any general provisions, as seen in subdivision 1 of Section 8 of the Wagner Act, regarding unfair labor practices, and, consequently, the concept of control or interference with the formation or management of a labor union is usually interpreted in a broader sense, so the employers who interfer with, restrain or coerce employees in the exercise of the right of workers to organize and to bargain collectively are regarded to commit unfair labor practices.

The Japanese Law admits more exceptions regarding financial support extended to a labor union, as compared with the Wagner Act. The Law does not prevent the employer from permitting his employees to engage in a conference or negotiation with the employer during working hours without loss of time or pay. It is lawful, moreover, that the employer contributes to welfare funds or other similar funds, or furnishes the minimum office space.

(4) "To discharge or give discriminatory treatment to a worker for his having filed a complaint with the Labor Relations Commission that the employer has violated the provisions of this Article; for his having requested the Central

Labor Relations Commission to review the order issued under the provisions of Article 27 paragraph 4; or for his having presented evidence or having made testimony at the investigation or hearing conducted by the Labor Relations Commission in regard to such complaint or request or at the adjustment of labor disputes provided for in the Labor Relations Adjustment Law (Law No. 25 of 1946)."

Item 4 of Article 7 corresponds to subdivision 4 of Section 8 of the Wagner Act. This provision was newly added to the Law after it was amended in 1952. To discharge or give other discriminatory treatment to a worker for his having made testimony at the adjustment of labor disputes was punishable under the old Labor Relations Adjustment Law. While no specific provision exists in regard to filing petition with the court or making testimony before the court, the Labor Relations Commissions regard such as an unfair labor practice which is a violation of the provision of item 1 of Article 7.

V

The Trade Union Law provides that Labor Relations Commissions shall be set up to prevent unfair labor practices and prescribe remdies for workers. The Labor Relations Commition is often considered in reference to the NLRB of the Wagner Act or the Taft-Hartley Act, but the organization and functions of the Commission are entirely defferent from the NLRB.

(1) The Central Labor Relations Commission and Prefectural Labor Relations Commissions set up in each prefecture are empowered to adjust the labor relations of private enterprises in general. Maritime labor relations, in view of special properties attending them, are adjusted by the Mariners' Central Labor Relations Commission and several Mariners' Local Labor Relations Commissions, the organization and functions of which are, in the main, the same with those of the Labor Relations Commissions mentioned above (Art. 19).

Besides, the Public Corporation and National Enterprise Labor Relations Law provided for the establishment of the Public Corporation and National Enterprise Labor Relations Commission to adjust the labor relations of public corporations and national enterprises.

(2) The Labor Relations Commission is consisted of equal number of persons representing employers, workers and public interest. The Central Labor

Relations Commission comprises seven members each of such representatives, while the Prefectural Labor Relations Commission consists of seven or five members each. The members representing employer in accordance with the recommendations of the employers' organizations, the members representing labor with the recommendations of labor unions and the members representing public interest with the agreement of the members representing of both employer and labor are appointed either by the Labor Minister in case of the Central Labor Relations Commission, or by the prefectural governor in case of the Prefectural Labor Relations Commission. The term of office of each member is one year, and the members may be re-appointed.

In each of these Commissions, an Executive Office is established to handle the administrative affairs of the Commission.

(3) The Central Labor Relations Commission and each of Prefectural Labor Relations Commissions are placed under the jurisdiction of the Labor Minister and the prefectural governor concerned, but each of the Commissions performs independently its functions.

The powers granted to the Commission is devided into two main parts. One is the functions of adjustment including conciliation, mediation and arbitration of labor disputes under the provisions of the Labor Relations Adjustment Law, while the other is the quasi-judicial functions, which include the inquiry whether or not a labor union in question fills the conditions provided in Article 2 and paragraph 2, Article 5 of the Labor Union Law (Para. 1 of Art. 5, Art. 11), the resolution on the general regional binding force of a collective bargaining agreement (Art. 18), and the inquiry into and remedying of the unfair labor practices (Art. 27). Such quasi-judicial functions are performed only by the members representing public interest of the Commission. (Art. 24).

As far as the functions of adjustment are concerned, the Central Labor Relations Commission and Prefectural Labor Relations Commissions stand on the same footing, with the only difference in their jurisdiction, while, in regard to their quasi-judicial functions, the Central Labor Relations Commission is vested with the power to review the adjudications of the Prefectural Labor Relations Commission (Art. 25). Besides, the Central Labor Relations Commission is empowered to formulate and promulgate rules of procedures for the Labor

Relations Commissions (Art. 26) as well as to state the opinion about the emergency adjustment according to the provisions of Chapter IV-2 of the Labor Relations Adjustment Law.

VI

In case an employer violates the provisions of Article 7 of the Trade Union Law, for instance, in case he dischages a worker in violation of the provision of item 1, Article 7 of the Law, the worker may file a petition with the court to assert the invalidity of such discharge (Para. 11 of Art. 27), while he may file a complaint with the Labor Relations Commission through the following procedure.

(1) Jurisdiction

The Prefectural Labor Relations Commission with jurisdiction over the domicle, or the locality of the main office, of the worker, labor union, or of the employer, who is the party of the unfair labor practice, or the Prefectural Labor Relations Commission with jurisdiction over the area where the unfair labor practice was done, will be able to deal with the matter. When a case of unfair labor practice is pending at two or more Commissions, the case will be dealt with by the Commission which accepted the complaint first, while in such a case the Central Labor Relations Commission may designate any other Commission having jurisdiction to deal with it. When two or more cases of unfair labor practice related to each other are separately pending at two or more Commissions, the Central Labor Relations Commission, if necessary, may designate one Commission having jurisdiction to deal with it. If the case is deemed to be of national importance, the Central Labor Relations Commission itself may deal with it or designate one of the Commissions concerned to deal with it (Art. 27 and 28 of the Enforcement Order of Trade Union Law).

(2) Filing Complaint

While the Trade Union Law is provided with no specific provision on who may file a complaint, it is generally held that the worker and labor union directly affected by alleged unfair labor practices are naturally vested with the right to file complaint. Although a complaint will be made in a written form covering certain fixed items, an oral complaint may also be allowable (Art. 32 of the Rule of Central Labor Relations Commission). A complaint is required

to be filed within a year from the date an unfair labor practice is committed (or as for such practice as continues, from the date of its termination) (Para. 2 of Art. 27). In filing a complaint, the labor union is required to prove that it is in compliance with the provisions of Article 2 and paragraph 2, Article 5 of the Trade Union Law (Para. 1, Art. 5).

(3) Investigation and Hearing

Whenever a complaint is filed that an employer has violated the provision of Article 7 with a Labor Relations Commission, the Labor Relations Commission shall make an immediate investigation and shall have a hearing of the issues on the merits of the complaint. Such hearing shall be made public in the presence of the parties concerned. And at such hearing, sufficient opportunity to present evidence and cross-examine the witnesses shall be given to the employer concerned as well as the complainants (Para. 1 and 3 of Art. 27 of the Law, Art. 40 of the Rule). The hearing will be conducted by the members representing public interest, although those members representing labor or employer may also be allowed to participate (Art. 24 of the Trade Union Law). At the conclusion of the hearing, a conference by the members representing public interest will decide whether or not an unfair labor practice has been committed. Prior to such conference, however, the opinions of the labor and employer members who have participated in hearings must be asked (Art. 42 of the Rule).

In the course of investigation and hearing, the chairman of the Commission, whenever such is deemed proper and appropriate, may advise both parties of labor and employer to settle the case. The case terminates with the conclusion of such conciliation (Art. 38 of the Rule).

(4) Order

In case it is adjudged after investigation and hearing that an unfair labor practice has been committed, an order granting a relief will be issued by the Commision, while, in case the complaint is adjudged groundless, an order dismissing the complaint will be issued (Para. 4, Art. 27 of the Trade Union Law, Art. 43 and 44 of the Rule). And, in case the complaint is considered to fall under the provisions of Article 34 of the Rule, a decision refusing to accept the complaint will be made. The order will be in a written form, copies of which are served on the employer concerned and the complainants. The

order is in full force and effect from the date of service, which, however, does not mean that it is immediately vested with a compulsory binding force (Para. 4, Art. 27 of the Trade Union Law).

While, with regard to the substance of relief granted by the Commission, the Trade Union Law fails to provide for a general principle as seen in Section 10 (c) of the Wagner Act, it is generally understood that the employer will be directed to take effective steps to eradicate the effects of particular illegal acts, such as reinstatement with or without back pay, posting notices, etc. In case of such unfair labor practices as refusal of collective bargaining, domination or interference with union activity, the employer will be directed to cease and desist from these acts because they are liable to be repeated in future. In such a case, a cease and desist order may be issued regarding a specific act in relation to the past acts, while no broad and general cease and desist order may be issued.

In filing a complaint in a written form, the subtance of the remedy must be described by a complainant (item 4, Paragraph 2, Article 32 of the Rule). It is doubtful, in this connection, if the remedy to be granted by the Commission is allowed to go beyond the remedy in complaint. Paragraph 4, Article 27 of the Trade Union Law provides that the Labor Relations Commission must issue an order granting in full or in part the relief sought by the complainant. The remedy of unfair labor practices, however, is effective if it is granted elastically in accordance with the nature of illegal acts committed, and, thus, it is evident that the relief granted by the Commission may not necessarily be confined within the remedy sought by the complainant, but should be adapted to the illegal acts committed so far as it does not run counter to the meaning of the complaint.

(5) Review by the Central Labor Relations Commission

The employer, the worker or the labor union dissatisfied with the order issued by a Prefectural Labor Relations Commission may file a request for review by the Central Labor Relations Commission within fifteen days from the date of service (Para. 5 and 11, Art. 27 of the Trade Union Law, Para. 3, Art. 51 of the Rule). The Central Labor Relations Commission is empowered to initiate such review (Para. 2, Art. 25 of the Trade Union Law). Even after a request for review has been filed, the order issued by the Prefectural Labor Relations Commission remains in force. In the review, the Central Labor Relations

Commission may take an independent stand to conduct investigation and hearing and make a finding of fact. As a result of review, the Commission may reverse or modify the order issued by the Prefectural Labor Relations Commission, or dismiss the request to support the order.

(6) Administrative Suit

The employer, in case he does not elect to request a review by the Central Labor Relations Commission, or in case he receives an order or other decision from the Central Labor Relations Commission, may file his petition according to the provisions of the Exceptional Law for Administrative Suit Cases within thirty days from the date of service of such order or decision (Para. 6 and 8 of the Trade Union Law). Opinion differs on whether a worker or a labor union may likewise file such a petition. The court has held that such is possible, but that the petition may be filed by a worker or a labor union only after undergoing the review by the Central Labor Relations Commission.

When the employer files a petition, the court may judge not only on the lawfulness of the procedures taken by the Labor Relations Commission but also on the contents of the order issued. Nor will it be bound by the findings of fact made by the Commission.

In case the employer files such a petition with the court, a considerable period of time will be needed before a judgement is fixed, and such will be only too liable to deprive the remedy granted by the Commission of its efficacy, so the court, with which the petition is filed, may issue, on appeal from the Commission concerned, an emergency order requiring the employer concerned to comply in full or in a part with the order of the said Commission pending final judgement by the court (Para. 7, Art. 27 of the Trade Union Law). In case an employer has violated this order, he will be liable to a fine (Art. 32).

(7) Ensuring of the Remedy

While the order issued by a Labor Relations Commission is not in itself vested with a binding force, in following two cases the order is fixed and its efficacy is ensured with punishment:

(i) In case all or a part of an order issued by a Commission has been sustained by the fixed judgement of the court, its violator will be liable to imprisonment not exceeding one year or to a fine not exceeding 100,000 yen or to both (Art. 28 of the Trade Union Law).

(ii) In case the employer fails to file an administrative suit within the presribed period, the order issued by the Commission will be fixed, violator of which will be liable to a fine not exceeding 100,000 yen (Art. 32 of the Labor Union Law).