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LEGAL PROBLEMS IN MULTI - UNION SITUATION IN JAPAN

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Introduction

Multi-union situation means that there are two or more labour unions organized in one plant or company. In Japan it is now supposed that multi-union situation can be found in about 3 percent of unionized plants[1]. And according to the survey of labour unions organizing more than 30 members by the Labour Ministry in 1993, two or more unions can be found at 16.6 percent of unionized private plants. Multi-union situation has occurred from some reasons. Union split has happened due to confrontation about union's strategy. Especially when the strike was prolonged, the conflict between military group and moderate group has brought about union split. When the two companies have merged, one union refused to combine with the other union. National unions having different ideological or political opinions have tried to organize the workers in the same plant and as a result two or more unions were standing side by side.

Percentage of multi-union situation is not so large, but unfair labour prac-

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1 Yasuhiko Matsuda, "Legal Problems in Multi-Union Situation" , 54 Journal of Labour Law Association 22

tice cases which arise from multi-union situation occupies nearly one half of all the cases in the private companies dealt at the Labour Relations Commission. The Commission has reported statistics on unfair labour practice cases in multi-union situation at Annual Report of the Labour Relations Commission since 1969. They are shown at Table 1. According to Table 1, we can find that percentage of cases is higher at the companies employing more than 500 workers. This shows that the problems resulting from multi-union situation are more serious in the larger companies.

In the following the author wants to analyse main legal problems resulting from multi-union situation.

1 Collective bargaining in multi-union situation

(1) Refusal to bargain with a minority union

Japanese labour union is generally based on an enterprise or a plant. So collective bargaining is conducted between an enterprise union and the corresponding management. When there is only one union in the enterprise, the employer must bargain with the labour union collectively. If two or more unions exist in an enterprise, the employer must bargain with all of them in Japan. Therefore multiple labour unions can each engage in collective bargaining for their members. The employer can not refuse to bargain with a minority union because it is a minority union. In Japan exclusive bargaining representative system is not introduced in the Labour Unions Act.

Article 28 of the Constitution guarantees to workers the right to organize, bargain and act collectively. The Labour Unions Act prohibits as an unfair labour practice an employer to refuse to bargain collectively with a labour union without fair and appropriate reasons. If he refuses to bargain with a minority union, it is judged that there is no fair reason to do that. So it is an unfair labour practice to refuse to bargain with a minority labour union.

In some collective agreements we can find a provision that an employer will negotiate with only the labour union and will not bargain with the other unions. This provision is understood as legally null and void because it denies right of the other unions to bargain collectively, which is guaranteed by Article 28 of the Constitution and Article 7, Section 2 of the Labour Unions Act. Therefore it is an unfair labour practice for an employer to refuse to bargain

with the other unions based on this provision.

(2) Neutrality obligation of an employer in multi-situation

In Japan there is no system of exclusive bargaining agent like U.S.A. This situation is called competitive unionism. Under competitive unionism an employer shall treat a majority union and a minority union equally and shall not treat them discriminatively. He must remain neutral in relation with every union, in spite of each union's nature and strategy, and attitude toward the employer. This is called as neutrality obligation of an employer in the rival union situation. This obligation raises some questions. We will discuss two important types of problems in the following.

(a) One is Japan Mail Order Co., case[2]. In this company there were two labour unions. One is a minority union with about 20 members and the other is a majority with about 120 members. The minority union was militant towards the employer, but the majority union was cooperative with the employer. In 1972 spring offensive, receiving unions' proposal on bonus, the employer answered to both unions that he would pay 310 yen as additional bonus with the condition that union members cooperate with increasing productivity. The majority union agreed with the condition without delay. So the employer paid the agreed amount of bonus to the members of the majority union. But the minority union refused to accept the condition because the condition would result in reduction of labour forces, intensive work and subordination of the union to the employer. So they could not reach an agreement and the employer did not pay the bonus. The minority union demanded him to pay the bonus because it is discriminatory treatment for him not to pay it.

In this case the Supreme Court, decided on May 29, 1984, held that it should have been expected by the employer that the condition might not be accepted by the minority union which has a different policy from the majority union. So it was found that the different result of negotiation was caused by the employer's insistence on the condition which could not be acceptable to the minority union. The process of bargaining

2 Tokyo Metropolitan Labour Relations Commision v. Japan Mail Order Co., Supreme Court (Third Petty Bench) Judgment, May 29, 1984, 430 Rodo Hanrei (Court Decision on Labour) 15. Outline and comment of this case can be seen at 4 International Labour Law Reports 278 written by Kazuo Sugeno.

was a form of discrimination against members of the minority union through the manipulation of negotiations.

The judgment of the Supreme Court met with opposition from academic groups. The employer proposed the same legal condition to both labour unions. And the minority union has chosen to refuse to accept the condition. Therefore the members of the minority union could not get bonus only as a result of their choice. Because it should be thought that the employer's neutrality obligation was enough conducted only by his proposal of the same condition. If not, the employer could not adhere to the condition and would be sacrificed unilaterally at negotiating tactics. According to the above mentioned reason, it would not be an unfair labour practice so long as the employer proposed the same legal condition to both unions.

As we have seen, there are two confronting opinions on this problem[3]. The conclusive factor is whether a different treatment comes from the bargaining policy of the minority union or the employer's anti-union motive. To determine the factor it is necessary not only to examine the employer's action in question superficially, but also to gain an insight deeply into such factors as the employer's past attitude towards both labour unions, the circumstances which resulted in the action in question, the mode of negotiation between the employer and both unions, and the influence of this action upon the labour relations in the plant and union activity. The decision must be totally made from above mentioned considerations.

(b) The other is represented in Nissan Auto Co. case[4]. In this case the company introduced a day and night shift system and a scheduled overtime work plan only after consultation with the majority union with over 7600 members. But the minority union with about 150 members expressed opposing to compulsory overtime work plan including night shift. So the company did not try to negotiate with the minority union. Under the agreement with the majority union the

3 Koichiro Yamaguchi, Rodo-Kumiai-ho Kowa (Lectures on Labour Union Law) pp.62-83.

4 Nissan Auto Company Ltd. v. Central Labour Relations Commission. Supreme Court (Third Petty Bench) Judgment, April 23, 1985, 450 Rodo Hanrei 23. Outline and comment of this case can be seen at 5 International Labour Law Reports 329 written by Kazuo Sugeno and Yasuhiko Matsuda. Kazuo Sugeno, "Collective Bargaining With Rival Unions", Japan Labour Bulletin, October 1, 1985.

company assigned overtime work only to the members of the majority union. The company restrained from assigning overtime work to the members of the minority union. As a result the members of the minority union got less wages than those of the majority union. So it was disputed whether the company's conduct would be an unfair labour practice.

This problem can arise also when there is only one labour union in the workplace. An employer has discretionary power to assign or not to assign overtime work. But it is economically detrimental to the members that they have not been assigned overtime work for a long time since earnings from overtime work amount to a considerable part of their income. Therefore an employer's refusal to order overtime work to union members shall be regarded not only as a discriminatory treatment, but also as an interference with the management on the labour union unless there is a reasonable ground for such a conduct.

Would the above mentioned theory be applied to multi-union situation? The Supreme Court in Nissan Auto Co. case delivered the following judgment.

(i) An employer must keep a neutral attitude towards multiple unions to respect their negotiating rights equally. And he can not treat both unions discriminatively because of a difference in their ideology or strategy.

(ii) But an employer must take into consideration the difference in number of members and bargaining power between the majority and minority union. So it is natural for an employer to take a different attitude towards both unions in negotiating process depending upon actual bargaining power. An employer can put emphasis on the negotiation with the majority union organising the greater part of the employees in the workplace in order to make unified rules on working conditions. For that purpose he may put pressure the minority union to agree with the same agreement. His action is not condemned as unfair. In this negotiating process, even if the employer and the majority union would adhere to their opinions and fail to conclude an agreement, economic disadvatages resulting from exclusion from application of the agreement are due to free decision of the minority union.

(iii) But when it can be found exceptionally that the employer has an intent of anti-unionism, his attitude should be regarded as an unfair labour practice. In deciding whether an intent of anti-unionism would be found, we must

investigate not only the content of the proposal and the reasonableness of his adherence to the proposal, but also the cause and background of his action in bargaining process, the meaning of his action giving impact on the labour relations and the behaviour of both parties after the bargaining issue was raised. In a word, we must totally consider series of acts of both the parties and the circumstances around the process of collective bargaining.

Based on the above mentioned standards, the Supreme Court examined concrete facts in this case. When the employer introduced scheduled overtime work system, he did not try to consult with the minority union and excluded its members from overtime work. After that the employer gave little explanation on scheduled shift work and did not try to persuade the minority union at bargaining process. So the Supreme Court found that he did not engage in bargaining in good faith and that there was no reasonable reason for the employer to exclude members of the minority union from overtime work. Rather it was clear that the employer manipulated the collective bargaining with the intent to discriminate against and weaken the minority union.

In this judgment neutrality obligation of the employer was for the first time referred by the Supreme Court. Under this obligation the employer can get balanced code of conduct to handle with multi-union situation.

2 Wage Increases and Bonuses Difference owing to Personnel Evaluation in Multi-Union Situation

In Japan most companies adopt personnel evaluation system to decide wage increases and bonuses. This system applies not only to white-collar but also blue-collar. At Shunto offensive average wage increases and bonuses are concluded. The average ones show total amount of payment defrayed from an employer to all employees. But an individual wage increases and bonuses do not become evident from average ones. A part of wage increases and bonuses is decided owing to personnel evaluation. So the employees will receive an annual increase and bonus which is varying with their appraisal.

There are some reasons for personnel evaluation system: to develop emplyees' ability; to make fair treatment to employees in proportion to their merits and attitude of working; to make sure that employees know plainly what the company wants. The standard for

appraisal is, in general, willingness to innovate work, knowledge, ability to judge, creativity, leadership, ability to negotiate with others, situation of attendance and etc. Appraisals are conducted on a point system by supervisors based on daily observation and his impression. So they can not be free partly from subjective evaluation. The result of evaluation is usually kept secret and not shown to the employees.

Discriminatory increases of wages or bonuses are found to come under unfair labour practices if the employer do that by reason that the employees are members of a labour union or that they have tried to join or organize a labour union or that they have performed proper actions of a labour union under Article 7, Section 1 of the Labour Unions Act. And also it is found that discriminatory treatment of wages or bonuses itself consitutes control or interference with the management of a labour union under Article 7, Section 3 of the Labour Unions Act.

The above mentioned interpretation applies to multi-union situation. In this case procedural problems are discussed when the Labour Relations Commission decides whether discriminatory treatment of wages or bonuses between both labour unions comes under an unfair labour practice. The author will clarity the procedural problems in the following.

(1) A complainant has the burden of proof that the above case is an unfair labour practice in multi-union situation. He must prove that (a) the employer opposes his labour union, (b) the members of his union individually have received lower increase of wages than those of the other labour union, and that (c) their performances are not different from those of the other union.

Point (a) relates to the intension of the employer. A petitioner can not prove it easily. He must prove it from external actions of the employer and his past actions to the labour union. Against that the employer tries to prove just cause for his actions. The Labour Relations Commission must judge which is the decisive factor to find his intension.

In relation with point (b), he cannot normally present evidences enough to prove that it is true since the employer has materials and results of personnel evaluation to himself. Because he can not usually get its results and he can only suppose them from the amount of wages and bonuses actually paid to him. Therefore the Labour Relations

Commission admits easier way of proof named "mass observation method" [5]. Under this method a petitioner shall prove that the employer opposes his union, and that the members of his union as a group have received lower increase of wages than those of the other union as a group. Opposing to this proof, the employer can prove special reasons by which difference of wage increase has a reasonable cause. For example, he can call managerial officers to witness to prove that personnel evaluation is fair and reasonable. Unless the employer's proof is successful, it shall be found that the employer would be guilty of an unfair labour practice.

(2) What remedial order can the Labour Relations Commission issue ? The Commission has developed three types of remedial measures in discriminatory personnel evaluation cases[6]. As the first the Commission may order the employer to discuss with the union in good faith to correct discriminatory appraisal. The second type is to order the employer to conduct re-evaluation under the standard provided by the Commission. The third is the scheme to order the employer to pay the differences of wages calculated under re-evaluation conducted by the Commission. Generally speaking, the second type is deemed to be more desirable than the third because the employer has a disrectionary right to assess performance of the employees. The third has possibility of invading his right. But the Commission has a wide discretionary power in making remedial order. So it is considered that there is no illegality in the third type of order.

(3) The Labour Relations Commission shall not accept the complaint when more

5 Beniya Commercial Co. v. Central Labour Relations Commission, Supreme Court (Second Petty Bench) Judgment, January 24, 1986, 467 Rodo Hanrei 6. Outline and comment of this case can be seen at 6 International Labour Law Reports 241 written by Kazuo Sugeno and Kozo Kagawa. Hokushin Electric Co. Ltd. v. Tokyo Labour Relations Commission, Tokyo District Court Judgment, October 22, 1981, 374 Rodo Hanrei 55.

6 The representative case on this problem is Dainihato Taxi Co. v. Tokyo Labour Relations Commission, Supreme Court (Grand Bench) Judgment, February 23, 1977, 31 Minshu (Supreme Court Report on Civil Cases) 93. It is judged that the Labour Relations Commission has broad discretionary powers to issue the proper corrective orders. But this does not mean that they are not limited. The limits shall be determined by the purposes of unfair labour practice system. Its purpose is to restore and maintain the normal order of industrial relations. Namely the Commission can issue appropriate orders in lights of achievement of the purpose. So it comes under the abuse of discretionary power if the Commission's exercise of direction has exceeded the limit or been remarkably unreasonable.

than one year has elapsed since the day on which the practice concerned with the said complaint was done (as for such practice as continues, since the date of its termination) under Article 27, Section 2 of the Labour Unions Act. It would be difficult to collect evidences and to find actual facts when the practice occurred more than one year ago. And the order issued more than one year later would be in danger of invading stable industrial relations. This provision is stipulated for the above mentioned purpose.

It is now discussed whether discriminatory wages resulting from performance appraisal is a continuing practice. There are three types of interpretation.

The first denies existence of a continuing practice[7]. Usually personnel evaluation is conduced twice per a year. One evaluation is one practice and the payment of wages each month under the evaluation is independently one practice. Evaluation and payment of wages shall be considered not to be continuous.

The second answers in the affirmative[8]. Amount of wage increase is calculated under personnel evaluation. So the evaluation is followed by the payment of amount of wages. Difference of wages shall continue once discriminatory evaluation would be conducted. Because the amount of wage is accumulated each year on that of the preceding year. Therefore unless difference of wages would be amended, they shall be a continuing practice. Moreover there is another reason on this conclusion. Discriminatory evaluation has a tendency to be repeated and differences of wages are accumulated every year. Under this circumstance nonperformance to amend differences of wages shall be continuing.

The third affirms the existence of a continuing practice, but the period of a continuing practice is limited[9]. In Japan wage increase is made once a year. It is usually conducted on April. The payment of wages is relative with personnel evaluation because amount of wages is partly determined under the result of personnel appraisal. The amount of wages is effective for one year till next March. Namely discriminatory payment of wages

7 Shigeyori Tsukamoto, Radoiinkai Seido to Tetsuzuki, (The Labour Relations Commission System and Procedure). The Japan Institute of Labour, 1978, p. 117

8 Sadao Kishii, Danketsu katsudou to Futourodokooi (Union Activities and Unfair Labour Practices) Sogorodokenkyusho, 1978, p.289.

9 Joju Akita, "Continuance of Wages Difference As Unfair Labour Practices" 294 Rado Hanrei 5.

continues till the next amendment of wage increase. Therefore the third theory thinks that the period of complaint continues for one year after the last payment of wages on next March. The Supreme Court affirmed the third theory in Beniya Commercial Co. case decided on June 4, 1991.

Just now three interpretations are standing in a row. The author's interpretation is similar with the first[10]. But the intent of the employer can be found actually from the payment of wages each month. And monthly payment is one practice. Therefore the Labour Relations Commission shall have a decision on the monthly payment of wages only within one year before the complaint. This is one of the limits on remedial procedure of the Labour Relations Commission. If the complainant wants a remedy for discriminatory wages before more than one year, he must sue for damages to the court or ask the labour union to negotiate with the employer or submit it to grievance procedure.

3 Union Activity Using Company Facilities in Multi-Union Situation

Japanese labour unions are based on enterprises. Their activities are conducted at the enterprises in most cases. So labour unions have necessity to use company facilities for union activities. For example union office, union meeting room and union bulletin board is often provided in the company building. But the employer has a right to own and manage company facilities. On the other hand activities of labour unions are guaranteed by the unfair labour practices system. It is an unfair labour practice for an employer to control or interfere with union activities. Therefore we must consider how right of union activities and employer's right to own facilities should be harmonized.

According to the judgment of the Supreme Court[11] decided October 30, 1979, labour unions are not entitled to use facilities without permission of the employer or without an agreement between the employer and the labour union. It is truly convenient for labour unions to

10 Kozo Kagawa, "Discrimination of Wages and Job Qualification Grading and Unfair Labour Practices", 54 Journal of Labour Law Association 55.

11 Japan National Railway Corporation v. Minoru Ikeoka et al., Supreme Court (Third Petty Bench) Judgment, October 30, 1979, 329 Rodo Hanrei 12. Central Labour Relations Commission v. Japan Ciba-Geigy Co., Supreme Court (First Petty Bench) Judgment, January 19, 1989, 533 Rodo Hanrei 7. Outline and comment can be seen at 9 International Labour Law Reports 464 written by Kozo Kagawa.

make use of company facilities for union activities. But only this convenience does not give labour unions right to use facilities. And the employer does not have duty to endure labour unions' utilization of them. Therefore the use of them without permission or an agreement is not a proper union activity unless special circumstances render the employer's refusal of the union's use of company facilities an abuse exertion of his right. This abuse exertion constitutes an unfair labour practice under Article 7, Section 3 of the Labour Unions Act.

One academic theory criticizes the judgment of the Supreme Court on the ground that propriety of union activities shall be objectively considered from the view point of all the relevant circumstances including its purpose and method to attain the purpose in spite of the employer's consent or an agreement[12]. It is questionable that only his consent or an agreement with the union can make its activities proper. In case of industrial actions proper industrial actions are given indemnity from criminal and civil liability by Article 1, Section 2 and Article 8 of the Labour Unions Act. Their propriety are usually judged from all the relevant circumstances including their purposes and means to get them. Right to conduct union activities are also guaranteed by Article 1, Section 2 and Article 8 of the Labour Unions Act as industrial actions. So union activities shall be judged from the same standard with industrial actions. Permission by an employer and an agreement with a labour union to use company facilities shall be one factor to judge propriety of union activities. Therefore the Supreme Court has a narrow view to judge the limit of propriety of union activities. The author thinks this academic theory is better than that of the Supreme Court.

Next we will discuss union activities using company facilities in multi-union situation. We can find a representative case in Nissan Auto Co., case decided on May 8, 1987 by the Supreme Court[13]. In this case the majority union was provided union office but the company refused to provide union office to the minority union because negotiation

12 Koichiro Yamaguchi, op. cit., p.263.
----------, " Union's Affixing Posters at Company Facilities and Employer's Right to Manage Them" , Hozo Jiho, vol. 32, no. 7, pp. 1063-83.

13 Nissan Motor Co., v. Tokyo District Labour Relations Commission, Supreme Court (Second Petty Bench) Judgment, May 8, 1987, 496 Rodo Hanrei 6. Outline and comment of this case can be seen at 7 International Labour Law Reports 462 written by Fujio Hamada.

was not concluded. The problem arose whether this refusal would amount to an unfair labour practice stipulated in Article 7, Section 3 of the Labour Unions Act. The Supreme Court held the judgment in the following.

In principle a labour union can use company facilities on an agreement with the employer. An employer has not an obligation to provide union office at company facilities. He is free to decide whether or not to lend them to the labour union. But in multi-union situation he must keep neutral stance to both unions. This neutrality obligation must be maintained in case of lending company facilities for union activities. When he consents to lend them to one union, but declines to do that to the other union, it is an unfair labour practice unless he has any reasonable ground for discriminatory treatment. In deciding reasonable ground the Court must consider all the relevant circumstances including the process by which he has lent to one union, the content of the conditions for lending company facilities, the process and content of negotiation with the other union, and the impact of his refusal to the other union.

In conclusion, the crucial standard is whether reasonable ground can be found or not. When there can be found an employer's refusal to lend company facilities without reasonable ground, the Labour Relations Commission judges that it amounts to control or interference in the organization or management of a labour union with anti-union motive to weaken it.

Next problem is what remedial orders the Labour Relations Commission can issue to an employer. The Commission is given broad discretionary power to restore and maintain normal labour relations. There are two types of orders to remedy the union. One is that an employer must negotiate or consult with the union on the problem whether he would lend company facilities to the union. The other is that an employer must provide company facilities for the union. The latter order corrects directly discriminatory situation. But usually the condition of lending is not evident in this order. So this order naturally leads to negotiation on the concrete condition and content of lending between the employer and the union[14].

4 Check-off Agreement in Multi-Union Situation

A union member has an obligation to pay union dues to the labour union. It

is an important task for the labour union to collect union dues. But this is a charge on the labour union. So the check-off system is utilized to free the labour union from the burden of collecting union dues. To do that the check-off agreement must be concluded under Article 24, Section 1 of the Labour Standards Act.

Article 24, Section 1 of the Act stipulates that wages must be paid in cash and in full directly to the workers, provided that payment other than in cash may be permitted in case otherwise provided for by law and regulation or labour agreement; and partial deduction from wages may be permitted provided for by law or regulation or in case of a written agreement with the labour union which is composed of a majority of the workers at the workplace or with a person representing a majority of the workers when there is not such a union. Check-off is a partial deduction from wages by the employer. So a written agreement is necessary to conduct check-off. The employer can be criminally fined if he would deduct union dues from the union members' wages without a written agreement.

Under Article 24, Section 1 proviso, a written agreement must be provided with the labour union whose members are composed of a majority of the workers at the workplace. Therefore a minority labour union organizing less than a majority of the workers cannot conclude a written agreement on check-off required by the proviso of Art. 24, Sec. 1. Furthermore the effect of this agreement covers only members of the concerned labour union. Therefore the members of the minority union can not take advantage of check-off system. This would give rise to discriminatory treatment between the majority union and the minority union.

There are two solutions on this problem. One interpretation on this article is that the proviso of this article shall not apply to chek-off since check-off is not unfavourable deduction for the workers[15]. Under the Labour Standars Act the employer has a duty to observe the minimum standards. Even if the check-

14 There is another type of conflict between two unions. In National Fund for Social Medical Insurance, one union unilaterally removed posters affixed by the other union because the other union criticized the policy of one union in the posters. The other union claimed damages as torts to one union since one union obstructed proper union activities conducted by the other union. The Court affirmed the allegation of the other union. National Fund for Social Medical Insurance Labour Union, Osaka Branch v. Osaka Fund for Social Medical Insurance Labour Union, Osaka District Court, February 27, 1978, 293 Rodo Hanrei 34

off is removed from the minimum standards, union members would not suffer from the employer's action.

Another is that the minority union shall be allowed to conclude a written agreement on check-off in spite of the proviso provision[16]. In principle, an agreement under the proviso provision applies to all the workers in the workplace and the labour union concludes the agreement as representative of all the workers in the workplace. But the check-off agreement is different on this point. So it shall be interpretated that both labour unions can conclude a written agreement on check-off.

The Supreme Court in Japan decides that the proviso of Art. 24, Sec. 1 shall be applied to check-off[17]. But it does not respond to this problem in multi-union situation.

5 Union shop clause in multiple labour union situation

In Japan a union shop clause is common. In general it has a clause that the company shall dismiss an employee who has withdrawn or was expelled from the labour union. It means that a union member must be dismissed by the employer if he loses his union membership. Namely it has the function to extend and strengthen labour union organization by enforcing the employer to terminate its contractual relationship with an employee losing his union membership. In other word it is an arrangement for union security attained by the employer's cooperation with the labour union[18].

Article 7, Section 1 proviso of Labour Unions Act stipulates that this shall not prevent an employer from concluding a labour agreement with a labour union to require, as a condition of employment, that the workers must be members of the labour union if such labour union represents a majority of the workers in the particular plant or working place in which such workers are employed. This section permits an employer

15 Kazuhisa Nakayama, "Check-Off" , I Rodoho Taikei (Collected Works of Labour Law) 170.

16 Koichiro Yamaguchi, op. cit., p.274.

17 Saiseikai Social Welfare Corporate v. Central Labour Relations Commission, Supreme Court (Second Petty Bench), December 11, 1989, 552 Rodo Hanrei 10. Outline and comment of this case can be seen at 10 International Labour Law Reports 360 written by Kozo Kagawa.

18 Mitsui Warehouses and Harbour Works Ltd. v. Hiromi Miura and Masami Fukui, Supreme Court (First Petty Bench) Judgment, December 4, 1989, 552 Rodo Hanrei 6. Outline and comment of this case can be seen at 10 International Labour Law Reports 357 written by Kozo Kagawa. In this case expulsion from one union is treated equally with withdrawal from it.

to conclude union shop clause with a labour union representing a majority of the workers in the particular plant. It is interpreted that this section lays down the condition to make valid union shop clause. In a word, an employer shall conclude union shop clause with a labour union representing a majority of the workers (majority labour union) in the particular plant. But the union shop clause shall be null and void when it is concluded between an employer and a labour union which does not represent a majority of workers (minority labour union) in the particular plant.

A worker has a freedom to choose a labour union. The union shop clause can not force him to join one union. Also the union shop clause must not be allowed to operate so as to impair another union's right of organization in accordance with Article 28 of the Constitution. To keep the freedom and to maintain the meaning of the Constitution, the range of application of union shop clause shall be limited. We can find five patterns of labour law cases on the limited range of application[19].

(1) There are two unions in the establishment. When "A" labour union concludes union shop clause, it does not apply to "B" labour union members. A worker is free to choose union membership at either the majority union or minority union. If the union shop clause concluded with the majority labour union applies to minority union, he cannot have a freedom to enter the minority labour union. Therefore it is interpreted that the union shop clause with the majority union shall not be applied to the minority union.

(2) The union shop clause does not apply to a worker who withdraws from "A" labour union and immediately gets union membership of "B" labour union after "A" labour union concludes the union shop clause with an employer.

(3) The union shop clause does not apply to a newcomer who gets union membership of "B" labour union after "A" labour union makes the union shop clause. But if a newcomer does not enter either "A" labour union or "B" labour union, it shall apply to him.

(4) There is only one "A" labour union which concludes union shop clause. When so many union members withdraw from "A" labour union as the result of organizational split, the union shop clause does not apply to them. Because the labour union loses organizational basis for

19 Koichiro Yamaguchi, op. cit., pp. 160-61

applying union shop clause to them.

(5) There is only one labour union which has union shop clause. When a worker withdraws from that union and organizes a new labour union, the union shop clause dose not apply to him.

As mentioned above the union shop clause applies to only limited cases; namely a newcomer who does not enter any labour union and a small group of seceder at the time of organizational split.

6 Overtime Work Agreement in Multi-Union Situation

In Japan shortening working hours is a major problem among the government, the management and the labour union. The government has a plan to establish 1800 working hours per a year in near future since Japanese long working hours are criticised by American and European countries as they unfavourably affect their balance of trade. And above all, Japanese workers gradually want shorter working hours rather than wage increases. But the progress to reduce working hours is slower than expected. In 1994 yearly working hours are 1904 including 132 overtime work hours according to the survey of the Labour Ministry. One of the plan to reduce working hours is how to reduce overtime work hours.

In this paper the problem on overtime work agreement in multi-union situation merely will be discussed in the following.

Overtime work or work on holidays is allowed under the two conditions prescribed at Article 36 of the Labour Standards Act. One condition is to conclude a written agreement between the employer and the labour union whose members are composed of a majority of the workers at the working place, or the persons representing a majority of the workers at the working place when there is not such a union. Another condition is to submit the agreement to the Labour Standards Inspection Office.

When there are two labour unions at the working place and one is composed of a majority of the workers, the majority union may be a party to overtime work agreement. The minority union can not be a party to the agreement. When each of both labour unions are not composed of a majority of the workers, but they in all are composed of a majority of the workers, representatives would be selected on the consultation of both labour unions.

The effect of overtime work

agreement covers not only members of both labour unions but also non-union members. This is different from check-off agreement.

It is mandatory that the agreement makes provisions for some matters, namely a concrete situation requiring overtime work, the type of work for which overtime work will be permitted, the number of workers required and overtime work hours permitted.

Nowadays it is interpreted that overtime work agreement has effect to give the employer immunity from criminal responsibility. In other word, the employer shall be criminally fined if he orders the workers to do overtime work without overtime work agreement. But it is commonly understood that this agreement has no effect in private law to the workers. Namely the workers are not obliged to obey overtime work order made by the employer under only overtime work agreement. How does overtime work order by the employer bind the worker in private law ?

This problem in a private company was answered by the recent judgment of Supreme Court[20]. The main content of the judgment can be summarized in the following. In principle overtime work duty comes from the labour contract between the employer and the worker. But in general the labour contract does not provide concrete provision on worker's duty and working conditions. From the reality of modern enterprises employing substantial numbers of workers, the workers must accept a uniform, standardized contract embodying working conditions. The uniform wroking conditions are regulated by work rules made by the employer. When the work rules provide that the employer may order the workers to do overtime work on the ground of business reasons under the sphere of overtime work agreement, the provision constitutes the content of labour contract so long as the provision is reasonable. Therefore the workers who are under the application of the work rules have an obligation to do overtime work duty provided in the labour contract under the stipulation of the work rules.

Usually the work rules have effect on all the workers in the workplace. Members of a minority labour union are naturally bound by the work rules. Eventually they shall be obliged to do

20 Hideyuki Tanaka v. Hitachi Manufacturing Co., Supreme Court (First Petty Bench) Judgment, December 28, 1991, 594 Rodo Hanrei 7. Outline and comment of this case can be seen at 12 International Labour Law Reports 150 written by Hiroya Nakakubo.

overtime work under the extent of overtime work agreement concluded by the majority labour union. If the minority union would dislike to be actually bound by overtime work agreement made by the majority union, it must bargain collectively and conclude a collective agreement with the employer. In the collective agreement it may be stipulated that the employer can order the members of the minority union to do overtime work under the extent of overtime work agreement of Article 36. The provision on overtime work in the collective agreement controls the content of the labour contract as the normative effect of the collective agreement under Article 16 of the Labour Unions Act[21]. Moreover the effect of the collective agreement has an advantage over that of the work rules under Article 92 of the Labour Standards Act[22]. Therefore the provision on overtime work in the labour contract of the members of the minority union is controlled by that in the collective agreement concluded by the minority union. But the provision on overtime work in the collective agreement, for example time limit of overtime work, shall not be less advantageous for the members of the minority union than overtime work agreement concluded by the majority union.

Next problem is discrimination of overtime work in multi-union sutuation. Namely is it a discriminatory treatment for the employer not to order overtime work to union members when there is only one labour union in the workplace ? The employer has discretionary power to order or not to order overtime work. But in Japan overtime work gives the workers to get more earnings. It is economically detrimental to the workers that they have not been assigned overtime work for a long time since earnings from overtime work amount to a considerable part of their income. Therefore the employer's refusal to order overtime work to union members shall be regarded not

21 The provision of Article 16 of the Labou Unions Act is the following. "Any stipulation of an individual labour contract contravening the standards concerning the standards conditions of work and other treatment of workers provided for in a labour agreement shall be null and void. In this case, the invalidated part of the individual contract shall be replaced by the stipulations of the standards. The same rule shall apply to the part which is not laid down in the individual labour contract."

22 The provision of Article 92 of the Labour Standards Act is the following.
"1. The Rule of Employment must not infringe any law and ordinance or labour agreement applicable to the working place.
2. The administrative officer is authorized to order changes in the Rule of Employment, if it is not in accordance with the laws and ordinances or labour agreement."

only as a discriminatory treatment, but also as an interference with management of the labour union unless ther is a reasonable ground for such a conduct.

The problem arises whether the above mentioned theory would be applied to multi-union situation. The most representative case on this problem is Nissan Auto Company Ltd. case. The company introduced a day and night shift system and a scheduled overtime work plan after consultation with the majority union. The minority union opposed compulsory overtime work plan. So the company restrained from assigning overtime work to members of the minority union. It was disputed whether the company's conduct would be an unfair labour practice. This case is discussed under Chapter 1.

7 Extension of the Effect of a Collective Agreement in Multi-Union Situation

The effect of a collective agreement covers both parties to the agreement and their members[23]. This comes from the nature of a collective agreement. But the Labour Unions Act provides for two kinds of extension of the effect of a collective agreement. This provision has two purposes; (1) protecting working conditions of union members by regulating those of non-union members and (2) strengthening power of the labour union to control working conditions.

One of two kinds is called as the extensive application of a collective agreement in the plant. Article 17 of the Labour Unions Act provides that when three fourths or more of the workers of a similar kind normally employed in a plant or other working place are covered by a single collective agreement, the remaining workers of a similar kind employed at that factory or working place must ipso facto be bound by the same agreement.

The most important problem arises when minority labour union is organising less than one fourth of employees and majority union is organising more than three fourths of employees in the plant. Can the effect of a collective agreement of the majority union be extended to

23 A collective agreement is not completely the same with an agreement mentioned at Chapter 5, 6 and 7. An agreement mentioned at Chapter 5, 6 and 7 is concluded between the employer and the labour union when there is a union composed of a majority of the workers at the working place, or with persons representing a majority of the workers when there is not such a union. So the labour union whose members are including a majority of the workers at the working place can reach collective agreement with the employer.

members of the minority union ? Labour cases answer in the affirmative[24] and in the negative[25]. But the author thinks that it shall be interpreted in the negative. The reason is the following[26]. (1) If Article 17 is applied to the minority union, it may be deprived of its independence from the employer. Because the employer may have chance to regulate working conditions regardless of the intent of the minority union. (2) The minority union is free to bargain collectively and pursue better working conditions than those which would be applied under Article 17. If Article 17 is applied, the minority union would lose the chance to get better working conditions. (3) If Article 17 is applied, the minority union can get the same working conditions without its effort although the majority union endeavours to conclude a collective agreement. And the majority union must keep peace obligation since it is inherent in the collective agreement. On the other hand the minority union has not duty to obey peace obligation. This is unfair treatment between both labour unions.

24 Tetsuo Yamamoto et. al. v. Fukui Broadcasting Co., Fukui District Court, March 26, 1971, Rominshu (Civil Cases on Labour Relations) vol. 22, no. 2, p. 355.

25 All Japan Federation of Shipbuilding and Machine Unions, Sanoyasu Branch v. Sanoyasu Dock Co., Osaka District Court, May 17, 1979, Rominshu vol. 30, no 2, p. 661. Osaka High Court, April 24, 1980, Rominshu vol. 31, no. 2, p. 525.

26 Koichiro Yamaguchi, op. cit., p. 172.

Conclusion

There are three kinds of legal problems in multi-union situation. One is the problems relating to unfair labour practice cases. They are discussed in Chapter 1, 2 and 3. In these chapters the crucial point is the neutrality obligation of an employer. He must keep neutral stance towards both labour unions. This obligation gives heavy burden to the employer. This is caused by the provisions on unfair labour practice system. In Japan only the employer shall be disallowed to conduct unfair labour practices. There is no system on the workers' side. Therefore it is very important for an employer to get balanced code of conduct to handle with multi-union situation under his neutrality obligation.

The second type is relative to agreements between the majority union and the employer. They are discussed in Chapter 4, 5 and 6. The point on this problem is disputed whether the agreements would apply to the members of the minority union. The answer is in the

negative since the rights of the minority union must be respected.

The third type discussed in Chapter 7 is relative to the extension of the effect of a collective agreement. Nagative answer shall be received to this problem since it must be respected for the minority union to conclude a collective agreement on her own initiative.

In this article the author discusses mainly on legal problems arising from conflicts between an employer and multi-union. Therefore conflicts among the multiple labour unions are not focused in this article.

Table 1 Numbers of Complaints on Unfair Labour Practices in Multi-Union Situation of Private Companies

year	Total Numbers of Complaints	Numbers in Multi-Union Situation (percentage)	Numbers per Company Size (employees' number)		
			less than 99	100 - 499	more than 500
1969	489	229 (45)	51	87	91
1970	513	236 (46)	54	96	86
1971	495	219 (44)	52	69	98
1972	650	307 (47)	59	125	123
1973	564	244 (43)	57	86	101
1974	625	263 (42)	50	99	114
1975	745	268 (36)	52	92	124
1976	675	228 (34)	43	82	103
1977	615	213 (35)	50	82	81
1978	634	262 (41)	67	98	97
1979	529	222 (42)	45	84	93
1980	474	193 (41)	45	71	77
1981	540	197 (36)	58	72	67
1982	524	183 (35)	53	66	64
1983	483	177 (37)	45	51	81
1984	402	165 (41)	38	55	72
1985	405	134 (33)	37	57	40
1986	401	160 (40)	37	62	61
1987	555	313 (56)	31	65	217
1988	404	187 (46)	36	41	110
1989	303	152 (50)	32	41	91
1990	250	118 (47)	29	28	61
1991	251	106 (42)	18	27	61
1992	243	85 (35)	19	20	46
1993	317	110 (37)	18	37	55