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The Supreme Labor Court
in Nazi Germany:
A Jurisprudential Analysis

For the University of Michigan Library

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Chapter 6

Discipline, Obedience and Entrepreneurial-Managerial Authority

The virtually dictatorial rights of control which AOG conferred on employers vis-a-vis their employees, the organizational atomization of the working class and the powers of supervisory intervention reserved by the State (in the form of the trustees of labor) reveal that the Nazis attributed great importance to restructuring class relations within the process of production. The general clauses that empowered the courts to insure that individual employees were justly benefited by entrepreneurial benevolent despotism represented one safety valve used by the Nazis to forestall and contain unrest. The cases in this chapter are discussed with a view toward exploring the nature of this paternalism. In particular, attention is focused on the extent to which statutorily conceded judicial intervention interfered with managerial control of employees as well as on whether the court exhausted its possibilities for curtailing the expanded powers of individual employers.

A cautionary word is in order regarding the representativeness of the cases. More so than cases in other areas, they are likely to present a skewed picture of the universe of actionable acts. Given the transparent bonds between all fractions of the capitalist class on the one hand and the Nazi State apparatus on the other, plant-level worker opposition assumed an immediately political character for the Nazis. As such it was subject to suppression by the *Gestapo*.⁶⁴ Consequently, employers did not sue on the contract or in tort in the politically most interesting instances of insubordination. The labor courts' jurisdiction was also restricted by the establishment of the independent system of social honor courts, which were empowered to mete out punishment to employers who abused their position of power and to employees who disturbed the (labor) peace or consciously interfered with managerial functions.

⁶⁴ See Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen 1977), pp. 312-22; Karl Heinz Roth, *Die "andere" Arbeiterbewegung* (Munich, 1977, ch. 3 [written by Elisabeth Behrens]; Stefan Karner, "Arbeitsvertragsbrüche als Verletzung der Arbeitspflicht im 'Dritten Reich,'" 21 *A/S* 269-328 (1981). Cf. BA R 22/2063, fol. 240-53.

Many of the most egregious examples of entrepreneurial domination of employees were thus also eliminated from the civil court.⁶⁵

As a result, the cases that were litigated in the labor courts were the politically least destabilizing and – with the exception of those arising under special wartime statutes – thus approximated the situation in Weimar as well as everyday industrial life in Nazi Germany could.⁶⁶

I. Weimar Adjudications

During Weimar the court constructed a modern pluralist version of what has, for the era of Anglo-American labor law antedating collective bargaining, been termed the prerogative contract: “By the end of the nineteenth century the employment contract had become a very special sort of contract – in large part a legal device for guaranteeing to management the unilateral power to make rules and exercise discretion.”⁶⁷ The first American treatise on the law of master and servant, published in 1877,⁶⁸ summarized the state of the decisional law as guaranteeing the master’s “right to manage his own affairs” and the servant’s obligation “to obey all the master’s lawful and reasonable commands . . . unless they require the doing of acts outside the line of his engagement, and expose him to dangers not contemplated in the service for which he was hired.”⁶⁹ That this relationship was viewed as contain-

⁶⁵ See ch. 2 § VI. The social honor courts – and Mansfeld in his annotations – emphasized the need to extirpate the vestiges of the “liberalistic lord-in-my-castle standpoint.” (EG 9/34, 22:190-96, No. 18, 21 December 1934, Nordmark.) Wolfgang Spohn, “Betriebsgemeinschaft und innerbetriebliche Herrschaft,” *Angst, Belohnung, Zucht und Ordnung* (Opladen, 1982), pp. 140-208 at 195-96, strains his interpretation of social honor as a reflection of the needs of capital.

⁶⁶ The cases in this chapter should be read in connection with those discussed in ch. 7 on dismissals.

⁶⁷ Philip Selznick, *Law, Society, and Industrial Justice* (n.p., 1969), p. 135.

⁶⁸ For earlier British treatises, see J. Huntingsford, *The Laws of Masters and Servants Considered* (L., 1790); Charles Manley Smith, *A Treatise on the Law of Master and Workmen* (Philadelphia, 1852 [L., 1852]); David Gibbons, *Rudimentary Treatise on The Law of Contracts for Works and Services* (2nd ed.; L., 1857); W.A. Holdsworth, *The Law of Master and Servant* (new and revised ed.; L., 1876).

⁶⁹ H.G. Wood, *A Treatise on the Law of Master and Servant* (Albany, 1877), p. 224. There is no comparable contemporary treatise analyzing the case law relating to labor in Germany in the eighteenth and nineteenth centuries; nor are modern comprehensive monographs available. The following works may be consulted for purposes of orientation: Horst Gellbach, “Arbeitsvertragsrecht der Fabrikarbeiter im 18. Jahrhundert” (Diss., Bonn, 1939); Eckhardt Frh. v. Vietinghoff-Scheel, “Gewerbliches Arbeitsvertragsrecht in Preussen während des 19. Jahrhunderts” (Diss., Göttingen, 1972); Paul Holdheim, “Der Arbeitsvertrag in seiner systematischen Stellung,” 30 *ZfdgStw* 247-64 (1874); Rich. Lipinski, *Das Recht im gewerblichen Arbeits-Verhältnis* (B., 1902); Franz Burchardt, *Die Rechtsverhältnisse der gewerblichen Arbeiter* (2nd ed.; B., 1911 [1901]); Emil Unger, ed.,

ing elements that antedated the rise of capitalist rationality emerges from the author's statement that:

It is no excuse for disobeying the master's orders that such disobedience resulted in no loss to him, nor even that obedience thereto would have involved him in loss, or that such disobedience really resulted to the master's benefit. It is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation⁷⁰

RAG approved of this extra-economically grounded claim to discipline in 1930.⁷¹

Although in nineteenth-century Anglo-American law the master was "not bound to consult the interest, convenience or wishes of the servant, but his own," "a servant must not be over fastidious about slight or casual departures from the usual service, but must have due regard for the Masters necessities. . . ." ⁷² Whereas a farm laborer, that is, one regarded as not being specially employed, could be dismissed for refusing to carry mortar, those hired to exercise special skills could not be treated fungibly.⁷³ But in all such cases, "if the worker sees fit to put himself upon his strict legal rights," a standard of reasonableness was used to determine whether he had committed a breach of contract.⁷⁴ Similar considerations applied to refusals to work more than a certain number of hours per day.⁷⁵ Finally, the master was subject to "an implied obligation to treat the servant humanely" ⁷⁶

Virtually all of these rules and general clauses have analogues in RAG's Weimar adjudications.⁷⁷ Thus the court held in a series of cases that every employer was, on the basis of entrepreneurial and managerial functions and prerogatives (*Direktionsrecht* and *Weisungsrecht*), entitled to assign an employee another job where he considered such a change required by or desirable in the interest of the plant; and every

Entscheidungen des Gewerbegerichts zu Berlin (B., 1898); Andreas Kaiser, "Zum Verhältnis von Vertragsfreiheit und Gesellschaftsordnung während des 19 Jahrhunderts, insbesondere in den Auseinandersetzungen über den Arbeitsvertrag" (Diss., [West] B., 1973); Konrad Hofmann, "Der Arbeitsvertrag im 19. und 20. Jahrhundert in geistesgeschichtlicher Sicht" (Diss., Würzburg, 1972); Conrad Bornhak, "Das deutsche Arbeiterrecht," 1892 *Annalen des Deutschen Reiches* 501-690; W. Endemann, "Die rechtliche Behandlung der Arbeit im Privatrecht," 67 *JfNuS* 641-708 (1896). See also the literature cited in chs. 3 and 4 above.

⁷⁰ Wood, *Treatise*, p. 225.

⁷¹ RAG 516/29, 9:41-45, No. 10, 26 March 1930.

⁷² Wood, *Treatise*, pp. 225, 180.

⁷³ *Ibid.*, pp. 180-81.

⁷⁴ *Ibid.*, p. 181.

⁷⁵ *Ibid.*, pp. 171-72.

⁷⁶ *Ibid.*, p. 165.

⁷⁷ The controlling statute was § 121 GewO, which obligated employees to obey their employers' orders concerning the work assigned to them.

employee had to put up with (*sich gefallen lassen*) such a reassignment provided that it was not associated with a reduction in wages and did not constitute an unjustified disciplinary measure. (RAG 191/29, 7:253-58, No. 57, 30 January 1929; RAG 555/29, 8:504-509, No. 104, 1 March 1930.)⁷⁸

What is remarkable about these decisions is that the semi-official commentators were in accord with the radical critic Otto Kahn-Freund. Characterizing the demarcation of the employer's sphere of domination from that of contract, that is, the issue of the scope of the employee's obligations absent express contractual provision, as one of the most difficult in labor law, Kahn-Freund noted that the court had construed the sphere of domination very expansively.⁷⁹ Thus one of the commentators, Hermann Dersch, believed that the employer's prerogative had to be subject to the general clause of good faith (§ 242 BGB), which would limit reassignments to jobs that employees of the same kind customarily assumed according to the usages of the trade (RAG 7:257-58). H.C. Nipperdey, another commentator, also adhered to this position, which he illustrated by reference to the proposition that one employed to do skilled work need not perform unskilled work, or that one employed on a salaried basis need not assume the job of an hourly employee (RAG 8:508-509). The commentator Alfred Hueck added that in the absence of express provisions, managerial prerogatives concerning reassignments would have to be limited by reference to that which could reasonably be expected of an employee; this issue, in turn, had to be resolved in the context of contractual interpretation guided by a standard of good faith (§ 157 BGB). The court's position would be justified only where an employee had obligated himself to perform work generally without more detailed substantive specifications. Hueck viewed this possibility as unlikely to occur in practice except among unskilled workers. (RAG 242/30, 11:85-88 at 87-88, No. 20, 26 November 1930.)

By the end of the Weimar period, then, the court had created a solid precedential tradition in support of what even mainstream labor law scholars understood to be an extraordinarily broadly conceived set of entrepreneurial/managerial rights and a correspondingly broadly con-

⁷⁸ Alternatively, the court held that an employee was required to submit to an employer's instructions in the interest of the preservation of order and smooth (*reibungslos*) management. (RAG 297/29, 7:476-82, No. 107, 16 November 1929; RAG 8:508.)

⁷⁹ Otto Kahn-Freund, *Das soziale Ideal des Reichsarbeitsgerichts* (Mannheim, 1931), pp. 38-43.

ceived duty of employees to obey.⁸⁰ A favorable point of departure thus existed at the outset of the Nazi period.⁸¹

II. Adjudication during the Nazi Period

AOG began where RAG had left off. It made the employer the sole decision-maker vis-a-vis his employees, subjecting the exercise of that right only to a paternalistic welfare duty (§ 2). As an illustration of the employer's powers, §§ 26-27 provided that in plants with at least twenty employees the employer was required to promulgate a set of plant rules and regulations (*Betriebsordnung*) including, *inter alia*, information concerning working hours, mode of compensation, reasons for discharge and provisions for fines, which § 28 permitted the employer to levy for infractions of the order and security of the plant.⁸²

The same commentators who had adopted a relatively critical position towards the expansive adjudications of the Weimar years declared in their standard commentary on AOG that these entrepreneurial rights had to be interpreted more expansively and elastically than had previously been the case.⁸³ In this connection the shift from the synallagmatic view of the employment relationship to anchoring the latter in the plant-community was regarded as justifying a new framework for the employee's duty to obey.⁸⁴

⁸⁰ See also Alfred Hueck and H.C. Nipperdey, *Lehrbuch des Arbeitsrechts*, vol. I (3rd-5th eds.; Mannheim, 1931 [1927]), pp. 105-107. For an overview of the situation at the end of the nineteenth century, see Arthur Stadthagen, *Das Arbeitsrecht* (4th ed.; Stuttgart, 1904 [1895]), pp. 208-209; Philipp Lotmar, *Der Arbeitsvertrag*, I (Leipzig, 1902), 93-97. Cf. Ulrich Haug, *Direktionsrecht zwischen Sachzwang und Demokratie* (West] B., 1979); Rolf Birk, *Die arbeitsrechtliche Leitungsmacht* (Cologne, 1973); Ernst Scheld, "Das Direktionsrecht des Arbeitgebers im alten Arbeitsrecht, gegenübergestellt den Befugnissen des Betriebsführers nach dem Gesetz zur Ordnung der nationalen Arbeit" (Diss., Giessen, 1934).

⁸¹ Indeed, it was Kahn-Freund's thesis that the court had adopted a fascist social ideal that triggered the most hostile critiques of his book. See Anthes, "Das soziale Ideal des Reichsarbeitsgerichts," 1931 *Der Arbeitgeber* 524-26, 557-58; Clemens Nörpel, "Ein Sozialideal des Reichsarbeitsgerichts," 8 *Die Arbeit* 561-66 (1931); Heinz Potthoff, review of *Das Soziale Ideal des Reichsarbeitsgerichts*, 17 *Arbeitsrecht* cols. 539-42 (1931); Lutz Richter, "Bemerkungen zu Kahn-Freunds Sozialem Ideal des Reichsarbeitsgerichts," 11 *Neue Zf Arbeitsrecht* cols. 657-66 (1931).

⁸² For an example of the *Betriebsordnung* of a very large plant (IG Farbenindustrie Frankfurt-Höchst), see Wolfgang Hromadka, *Die Arbeitsordnung im Wandel der Zeit am Beispiel der Höchst AG* (Cologne, 1979), pp. 126-49.

⁸³ Hueck-Nipperdey-Dietz, *Gesetz zur Ordnung der nationalen Arbeit. Kommentar* (4th ed.; Munich, 1943 [1934]), § 2 n. 5 at p. 28.

⁸⁴ *Ibid.*, § 2 n. 24 at p. 57.

The cases that reached RAG in this area of capital-labor relations will be dealt with under the following headings: A. disciplinary infractions; B. refusal to work; and C. job reassignment.

A. Disciplinary Infractions

The court uniformly decided against employees in cases involving serious acts of disobedience. Where an easily excitable handicapped employee of twenty-four years hit the plant-leader and was fired on the spot,⁸⁵ the court was unimpressed by the employee's argument before it that, "today managers and workers have the same rights." On the contrary, the court found that order and discipline had to prevail in the plant. (RAG 135/37, 31:218-21, No. 38, 6 October 1937.) Also fired on the spot was an engineer who had gravely insulted the plant-leader. In the course of litigation it was discovered that he had been schizophrenic at the time. Appealing the overturning of the favorable judgment of the trial court – plaintiff had sued for six months' salary – the employee protested that LAG's decision was at odds with the Nazi Weltanschauung, which protected the economically weaker party especially where he, his wife and child were being made to bear the consequences for statements for which he could not legally be held responsible. The court formulated a balancing-cum-reasonableness standard taking into account the disadvantages and dangers for each party; in this calculus the general and special prerequisites of the orderly continuation of work in a plant with numerous Followers were accorded the highest priority. Although RAG conceded that the justification for the dismissal depended on the actual state of affairs as revealed by hindsight and not on the false perceptions at the time of the dismissal, plaintiff's insulting remarks made continued employment unreasonable; for defendant-employer's prestige would have been undermined to an intolerable degree among the other Followers. (RAG 12/40, 40:3-10, No. 1, 19 June 1940.)

Where discord between two employees (physicians) made it necessary that one leave, the court authorized the employer to exercise his reasonable discretion (*verständiges Ermessen*) in selecting one for discharge. Provided that the discharge was not an inappropriate measure, the employer was not required to dismiss the predominantly guilty employ-

⁸⁵ See § 123 no. 5 GewO.

ee. (RAG 222/39, 40:52-64, No. 9, 22 May 1940.) The court's notion of the employer's discretionary powers led it to hold that an employer's toleration of minor infractions did not justify an employee in committing greater ones. In a case where the employer and employee were relatives, the court upheld docking the latter a whole day's wages for several hours' lateness even if the employer had merely been using this opportunity to punish the employee for his continual unpunctuality in an effort to educate him. (RAG 112/42, 46:42-45, No. 8, 20 November 1942.)

The only case in which the court significantly relativized the employee's duty to obey involved an employee who managed his employer's business in the Netherlands and who was fired on the spot for refusing to speak to defendant-employer when he was called on the telephone. The court held that disobedience on the part of an executive employee was in general not so serious a matter as it was among more subordinate employees. (RAG 36/35, 24:140-41, No. 22, 25 May 1935.) But late in the war the court was not inclined to apply this principle to the very highly paid technical director of an armaments plant who was fired on the spot for having forbidden the manager-owner entry to his department without his permission and the employees direct contact with the owner. (RAG 1/44, 47:229-32, No. 42, 6 June 1944.)

A worker who was fined for unexcused absence from work (as provided for in the *Betriebsordnung*) sued because the amount deducted from his wages had exceeded the statutory limit on garnishment. Referring to the statutory words, "order and security" (§ 28 para. 1 AOG), the court concluded that the plant-leader's power to fine derived from his right to preserve order and security and not from a contractual agreement with his Followers.⁸⁶ Since the court imputed police-like character to this coercive means peculiar to the plant-community, it rejected the quantitative limit on garnishment because it would have made it impossible to punish workers in certain cases. (RAG 167/41, 44:228-34, No. 38, 14 April 1942.)

That the court sanctioned a return to the structure of capital-labor relations that had prevailed in Germany before World War I emerged from its rejection of a claim – that had been accepted by both lower

⁸⁶ Controversy concerning the legal source of the employer's penal power continues to the present in German juristic literature. For a summary of the discussion before 1933, see Carl-Heinz Dittmann, "Das Strafrecht des Arbeitgebers" (Diss., Erlangen, 1931). Werner Mansfeld, "Die Buße," 2 *DAR* 273-76 (1934), adopted the contractarian view, which had predominated during Weimar. See also Hueck-Nipperdey-Dietz, *Kommentar*, § 27 at pp. 379-89.

courts – by an employee that the fines levied on him were impermissible because he had not had a prior hearing. Noting that AOG did not expressly provide for such a hearing, RAG pointed out that the corresponding sections of the Industrial Code also required no hearing.⁸⁷ It thus ratified the Nazis' repeal of the power of partial intervention which BRG had conferred on the plant council.⁸⁸ It also paternalistically justified its holding on the grounds that no conscientious plant-leader would impose a fine without first having determined whether a hearing could be dispensed with; alternatively, the preservation of order and security could in some instances require immediate action that would make hearings intolerable. On the other hand, the court did remand the case for determination as to whether the fine was objectively founded, a criterion that was subject to judicial review.⁸⁹ The court thus considered it necessary to provide the affected Follower with a kind of due process in order to secure him not only against "arbitrary" but also innocently erroneous measures of a plant-leader for which the social honor courts would not have offered a remedy. (RAG 171/41, 44:285-90, No. 50, 17 April 1942.)⁹⁰

B. Refusal to Work

Although the decisions in this area were generally favorable to employees, they did not go beyond making explicit what the court had already implied during Weimar. Thus a handicapped worker was justified in refusing to do work constituting an immediate danger to his life. (RAG 59/33, 19:19-21, No. 6, 24 May 1933.) In the case of a plant foreman (who also shared in the profits of the company) who was fired for refusing to perform work he considered technically impracticable, RAG remanded to LAG, which had held against him. RAG held that in order to trigger a discharge, a refusal to work had to be associated with a consciousness of the possibility of the existence of a duty to obey. (RAG 137/36, 28:273-75, No. 55, 7 November 1936.)⁹¹

The most interesting of these cases turned on the court's evaluation of the underlying facts. As a result of technical problems in a mine, a

⁸⁷ §§ 120a para. 4 and 134c GewO. Cf. Dittmann, "Strafrecht," pp. 1-14.

⁸⁸ § 80 para. 2 BRG.

⁸⁹ The mere expediency of a fine lay in the employer's discretion. See RAG 44: 232.

⁹⁰ The court also sanctioned corporal punishment of an apprentice as within the scope of § 127 GewO (RAG 81/38, 35: 65-69, No. 12, 7 December 1938).

⁹¹ Cf. RAG 211/38, 4:381-87, No. 99, 12 December 1928.

supervisor sought to induce plaintiff and other employees to work part of an additional shift in order that the entire mine could be fully operative the next day. Plaintiff, who refused, was denied entry to the mine the next day. Had the plant faced an emergency, the court ruled, then the situation would have been different; but the fact that the supervisor had not issued an order, but had merely sought to persuade plaintiff to work, constituted forceful evidence that no such emergency had been at hand. (RAG 17/40, 39:407-12, No. 71, 12 June 1940.)⁹²

C. Job Reassignment

The court tended to apply a much stricter standard to an exercise of entrepreneurial authority in this area that required an employee to move his place of residence. The court so held in the case of an estate overseer whose new employer, having purchased the estate from a non-aryan, dismissed him without notice because he had refused to work on another estate. Referring to this stricter standard, the court held that absent express agreement to the contrary, such an overseer was not subject to dismissal without notice for refusing geographic reassignment. (RAG 38/40, 40:68-74 No 11, 24 July 1940.)⁹³

Generally the court upheld employers who reassigned employees within one plant. (RAG 268/39, 39:167-76, No. 31, 21 May 1940; RAG 241/39, 39:198-206, No. 36, 24 April 1940; RAG 273/39, 40:78-86, No. 14, 31 August 1940.) Although the court had held during Weimar that an employee could be reassigned to a lower-paying job where such reassignment was expressly permitted in a contract or collective bargaining agreement (RAG 21/32, 15:631-34, No. 152, 7 May 1932), it had also held that such a reassignment presupposed an orderly termination and rehiring (which in the case of a member of a plant council required the latter's approval [RAG 8:504-507]). In holding now that such a termination was no longer a prerequisite, the court explicitly abandoned its previous view that such an expansive entrepreneurial right was intolerable as creating too much uncertainty and opportunity for covert disciplinary

⁹² In RAG 68/39, 37:387-92, No. 59, 21 November 1939, the court ruled that a university instructor had the right – pursuant to §§ 273 and 320 BGB – to withhold performance where his compensation had been unjustifiably reduced.

⁹³ While stressing the sacrifice inherent in being forced to abandon one's *Heimat*, Hueck stated that the notion of allegiance could justify such a sacrifice in the presence of very important entrepreneurial interests (RAG 40:73). Cf. RAG 299/38, 35:264-68, No. 49, 15 March 1939 (highly paid branch manager need not change his place of residence when requested by employer to move to town in which he has accepted a new assignment).

measures. The court now characterized that right as indispensable for plants in which the flow of work in various departments depended on different treatment of raw materials and the various work methods required various methods of compensation. If the employer were denied this right, he would be forced to shorten the notice periods for dismissal; as a result, even greater uncertainty would be created for employees. The only requirement imposed by the court was that such a regulation be unambiguous and easily recognizable for employees. (RAG 12/41, 42:163-67, No. 25, 20 May 1941.)

In several decisions in 1942, however, RAG adhered to its traditional position according to which an employer could not, absent a provision in a contract or *Betriebsordnung/Tarifordnung*, reduce an employee's wages in connection with reassigning him to a job for which he was neither hired nor previously trained. (RAG 83/42, 45:219-23, No. 43, 25 September 1942; RAG 32/42, 45:41-43, No. 8, 12 June 1942.)⁹⁴ In the most important of these cases the court ruled that where a *Betriebsordnung* spoke of an employee's duty to accept a temporary transfer, there was no reason to interpret this clause expansively; for it constituted an exceptional legal provision imposing a burden on the Following. Absent a clear statement to the contrary, it could not be assumed that the parties desired to give the employer the unilateral right to impair the employees' social conditions permanently. (RAG 139/41, 44:112-17, No. 17, 20 February 1942.)

This case was, to be sure, complicated by the fact that the court remanded for determination as to whether the wartime wage freeze applied to it. That decree provided that where plants were newly established or converted, or where employees performed other work after the decree went into effect, the prevailing wages for like plants or the new work were controlling.⁹⁵ The court ruled that where the reassignment was necessitated by the war (*kriegsbedingt*),⁹⁶ a wage reduction was permissible. (RAG 151/1940, 41:338, No. 46, 25 March 1941; RAG 98/42, 46:13-18, No. 3, 13 November 1942.) By 1942 it was difficult to deny the force of Hueck's comment that such an interpretation accorded a very considerable scope to the provision in the decree since the war was influencing virtually all economic relations (RAG 44:117). Indeed, the

⁹⁴ For rulings in a distinct but related area, see RAG 262/37, 33:273-84, No. 44, 4 May 1938; RAG 171/39, 38:321-27, No. 60, 27 February 1940; RAG 85/41, 43:18-21, No. 3, 26 August 1941; RAG 38/39, 37:213-18, No. 33, 27 September 1939.

⁹⁵ § 18 para. 2 KWVO, 4 September 1939, RGBI I, 1609.

⁹⁶ § 18 para. 1 KWVO used such language.

question could be raised as to whether under these circumstances the warning issued in 1940 by the ministry of labor to employers not to abuse the decree to reassign workers *ad libitum* had not become moot.⁹⁷

III. Conclusions

The court had gone to such an extreme in conceding unilateral authority to employers during the Weimar years⁹⁸ that its precedents easily lent themselves to deciding cases arising under AOG. In fact, it was not until well into the war (1941-1942) that RAG articulated views that advanced significantly beyond those enunciated before 1933; chief among these were its holdings concerning the police-like character of employers' penal powers and the abandonment of the requirement of an orderly termination for a reassignment involving a wage reduction. In association with the court's conservative-paternalistic and statist tendencies during Weimar, RAG's decisions at least in this area of the law support Kahn-Freund's claim that it had judicially legislated fascism into existence in the 1920s.⁹⁹

⁹⁷ Betr.: Auslegung des § 18 Abs. 2 der KWVO, 11 April 1940, RArbBl I, 187. Shortly after the warning was released RAG assumed for itself (and denied to the trustees of labor) jurisdiction over the question of whether the prerequisites for triggering § 18 para. 2 were present. (RAG 132/40, 41: 67-75. No. 10, 18 December 1940.)

⁹⁸ For a fictionalized representation of the employer's position of strength that catches the legal niceties, see Hans Fallada [i.e., Rudolf Ditzgen], *Kleiner Mann – was nun?* (B., 1932), pp. 299-301. The novel depicts an employer who dismisses one employee because her conduct outside of work allegedly harmed the company's image, and then, literally with the next breath, threatens another with discharge for tardiness, disclaiming any interest in the employee's private life that might exculpate him. Cf. RAG 70/39, 38:223-26, No. 46, 10 January 1940.

⁹⁹ Kahn-Freund, *Das soziale Ideal*, passim. See ch. 1 n. 310 above for the holding of a case decided in the final weeks of the war in which RAG renounced judicial review of the substantive justification of plant fines on the grounds that discipline was no longer the right but rather the statutory obligation of the plant-leader. For inadvertent confirmation of the degradation that befell German workers under the Nazis, see Justus Hedemann, *Deutsches Wirtschaftsrecht* (2nd ed.; B., 1943 [1939]), p. 270.