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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 9

## Trade Unionists and Social Democrats

## I. Trade Unionists

Two groups of cases involving trade unions and their members from the pre-Nazi period came before the court. First, like some Social Democrats, a number of trade unionists were dismissed because of their past political affiliation. In both reported decisions concerning this issue, RAG held that such discharges, not having been the fault of the plaintiffs, did not justify the loss of a pension. (RAG 10/34, 20:241-47, No. 49, 21 March 1934; RAG 9/34, 21:119-24, No. 23, 21 March 1934.)

Second, in connection with the dissolution of the old trade unions and the formation of the German Labor Front,<sup>21</sup> a question arose as to whether the latter was the legal successor to the former and to what extent it assumed the former's liabilities. In the first case decided in this area, plaintiff was an employee of a union who in May 1933 had been given notice that he would be terminated at the end of September but who was in June dismissed without notice. He then sued for his salary through September. The court held that the old union and DAF were not identical. The court took judicial notice of the fact that the organizational transformation of the unions had taken place without reference to their internal statutes, but rather by virtue of the intervention of the Nazi party as the holder of power in the State ("*Inhaberin der Macht im Staate*") with approval of the legal State power ("*legale Staatsgewalt*"). It also noted that the Nazi party combated Marxism and strove to eliminate all institutions based on the notion of class struggle; the Nazi movement perceived the free trade unions to be among the most important such organizations. Whereas power in the old unions lay in membership meetings, in DAF the *Führer*-principle prevailed. That the membership had remained unchanged as had many of the tasks of the unions was not deemed crucial. RAG also relieved DAF of any liability within

<sup>21</sup> On the events leading to the physical occupation of the trade union buildings on 2 May 1933 and the early history of the German Labor Front, see Hans-Gerd Schumann, *Nationalsozialismus und Gewerkschaftsbewegung* (Hanover, 1958); Timothy Mason, *Sozialpolitik im Dritten Reich* (Opladen, 1977), pp. 42-123; Gerhard Beier, *Das Lehrstück vom 1. und 2. Mai* (F., 1975).

the meaning of § 419 BGB because it had not assumed the unions' assets by contract. (RAG 274/33, 20:102-14, No. 19, 28 February 1934.)

In further litigation the court held that an employment relationship was necessary to create liability on the part of the new organization (RAG 57/34, 21:72-82, No. 15, 6 June 1934), and that a contractual relationship did not exist if plaintiff had merely been continued to be employed by a representative of NSBO and had been in protective custody at the time DAF actually assumed control of union affairs. (RAG 287/33, 21:82-88, No. 16, 6 June 1934.) Where, in another case, plaintiff had been continued in employment for two months following the takeover by NSBO and was then summarily dismissed, the lower courts awarded him his salary for the duration of the six-month notice period. Characterizing its aforementioned decision of 21 March 1934 as controlling, RAG overturned these decisions, holding that one could not speak of employment within a DAF-organization until June-July 1933. (RAG 77/34, 21:183-88, No. 36, 4 July 1934.)<sup>22</sup> On somewhat different grounds RAG also held that a leading functionary of a former free trade union could be dismissed without notice: since the Nazi party could not realize its goals in the unions with leaders who did not agree with it, one could not reasonably demand of it that it continue to employ plaintiff. (RAG 44/34, 21:188-91, No. 37, 4 July 1934.)<sup>23</sup>

Although the court denied that DAF was the legal successor to the free trade unions with respect to the assumption of their business liabilities, it did recognize a legal successorship in a less strict sense for the periods of notice for salaried employees.<sup>24</sup> The crucial criterion here was not whether the plant or business was dominated by the same persons (or same capital), but rather whether the plant's technical-economic purpose (*Zielsetzung*) could be regarded as the continuation of that of the previous plant or business. Although the free trade unions and DAF adhered to different world-views, to a substantial degree their purpose was the same – to promote the workers' welfare by means of strict organizational unity. (RAG 68/34, 22:77-87, No.16, 29 September 1934.)<sup>25</sup>

In a case that it remanded for further fact-finding, RAG, widening the scope of judicial notice, pointed out that defendant-DAF had at its

<sup>22</sup> See the consistent application of this ruling – in favor of the plaintiff – in RAG 131/34, 23:203-12, No. 44, 9 March 1935.

<sup>23</sup> Nipperdey, the commentator, approved of this decision; see RAG 21:191.

<sup>24</sup> Gesetz über die Fristen für die Kündigung von Angestellten, 9 July 1926, RGBI I, 399.

<sup>25</sup> The court upheld its holding despite scholarly criticism; see RAG 244/34, 23:158-61, No. 31, 6 February 1935. Cf. Nipperdey's commentary, *ibid.* at 161.

inception faced a Hobson's choice in the sense that it needed experts in order not to injure the members' interests but that its old opponents, the Marxist union officials, monopolized this expertise. Since those concerned were said to have been aware of this situation, the Marxist officials were also said to have realized that they could count on further employment only to the point at which they had trained their Nazi successors to replace them. (RAG 100/34, 22:91-93, No. 18, 29 September 1934.)

Rooted in the transition period establishing Nazi domination by means of organizational *Gleichschaltung*, these dismissals and their judicial after-throes soon ceased. Although the court for expressly articulated political-ideological reasons relieved DAF as an organization of liability for claims incurred against the old unions as well as for claims arising through the actions of subordinates during the 'uncoordinated' *Gleichschaltung* in the spring of 1933, thus creating hardship for many discharged employees of the unions, once the DAF-organizations became institutionalized, the court interpreted statutorily and contractually protected rights positivistically unless prominent "Marxist" leaders were involved.<sup>26</sup>

## II. Social Democrats

With the same virtual uniformity with which RAG denied relief to Communist plaintiffs it decided in favor of Social Democrats. Since all the cases arise out of dismissals, they will be discussed chronologically.

Plaintiff in the first case was a master machinist who had served as a member of a plant council and as an SPD district delegate. He was dismissed with three months' notice and sued for the additional six months' salary which the collective bargaining agreement secured to those with a certain level of seniority who were dismissed involuntarily and without fault on their part. All three tiers of courts found in plaintiff's favor. RAG held that the exercise of constitutionally protected rights during the Weimar period protected plaintiff against loss of this entitlement. It specifically rejected the view that SPD membership and activity were to be judged after the fact from the standpoint of the national revolution: even as late as 23 March 1933, at a time when the SPD was under attack

<sup>26</sup> For judicial reflection of the more favorable treatment accorded Christian trade unions subject to *Gleichschaltung*, see RAG 73/39, 21:192-98, No. 38, 4 July 1934.

from the national government,<sup>27</sup> no liability could attach to plaintiff's actions. (RAG 327/33, 20:196-200, No. 40, 14 March 1934.)<sup>28</sup>

In the next case, plaintiff, who had worked for an SPD organization for invalids and widows that was subsequently *gleichgeschaltet*, was dismissed for alleged theft of an office typewriter. At a prior proceeding arranged to work out an amicable settlement, plaintiff characterized the SA as "wild hordes" from whom he had tried to protect the machine. Defendant adduced this remark as proof of plaintiff's attitude as an enemy of the State justifying his dismissal. Although RAG acknowledged that disparagement of the prestige of the combat troops of the national uprising (i.e., the SA) would have to give rise to immediate dismissal of an employee of a Nazi organization, the particular circumstances indicated that plaintiff had not meant to implicate the SA *per se*; rather, he had had in mind merely that autocratic and irregular intervention of individuals which is in some measure inevitable at the beginning of every revolution but of which the *Führer* strongly disapproved. (RAG 17/34, 20:201-202, No. 41, 28 March 1934.)

Plaintiff in another case had been the regional manager of an association of socialized homebuilding firms but also SPD minister of the interior in Thuringia as well as a member of the state parliament there and of the *Reichstag*. He was dismissed without notice for being politically untenable. The court remanded the case for factual determinations concerning the reasonableness of demanding that defendant give plaintiff the ordinary period of notice. (RAG 179/34, 23:107-14, No. 21, 12 January 1935.)<sup>29</sup>

In the next case plaintiffs had been bookbinders at the printing plant of the SPD newspaper *Vorwärts* the assets of which had been seized by the *Gestapo* and transferred to another firm. The latter continued to employ plaintiffs to whom it subsequently gave one month's notice instead of the six months required by statute.<sup>30</sup> In justifying its decision in favor of plaintiffs, RAG declared that it was the goal of National Socialism that the national revolution not affect the individual employee if at all possible. (RAG 249/34, 23:127-29, No. 24, 20 February 1935.)

<sup>27</sup> The SPD and all other parties except the Nazi party were finally outlawed by G. gegen die Neubildung von Parteien, 14 July 1933, RGBI I, 479. Cf. Erich Matthias and Rudolf Morsey, eds., *Das Ende der Parteien 1933* (Düsseldorf, 1960).

<sup>28</sup> Cf. RAG 118/34, 22:87-91, No. 17, 17 October 1934.

<sup>29</sup> Since plaintiff had sued on the contract rather than for damages, the case did not fall under G. über den Ausgleich bürgerlich-rechtlicher Ansprüche, 13 December 1934, RGBI I, 1235.

<sup>30</sup> Gesetz über die Fristen für die Kündigung von Angestellten.

Where defendant as the successor-employer knew at the time it decided to continue to employ plaintiff that the latter had previously been an SPD member, it forfeited the right to use that membership as cause for dismissal if it allowed a long time to pass before making use of it. (RAG 139/34, 23:212-13, No. 45, 9 March 1935.)

In one of two cases decided against a former SPD member, a non-profit homebuilding company managed by Social Democrats modified the business manager's contract shortly before the company's *Gleichschaltung*. The new management contested this extension of plaintiff's contractual rights as unconscionable since one had known that plaintiff would most probably be dismissed. (RAG 23/35, 24:155-61, No. 24, 18 May 1935.) Two considerations may have shaped this outcome: 1. plaintiff, as a top executive, did not fall within that group of SPD-oriented workers whose passive support the regime needed to gain; and 2. the fact that plaintiff had been "dispatched" to Dachau for nine months may have signaled to the court that caution was appropriate.

Plaintiffs in another case were employees of a freethinkers' organization that performed cremations for its members. The SA occupied its building, all employees were given three months' notice and the Gestapo, after having seized the organization's assets, released them on the condition that the organization not indemnify or reimburse its members. Plaintiffs sued for severance payments guaranteed by the collective bargaining agreement. They lost at all three levels because they were unable to produce the relevant addendum to the agreement. But they came before RAG once again on the basis of a restitution suit after they had found the missing document.<sup>31</sup> RAG held that since both plaintiffs and the original employer were Social Democrats, it could not have been the will of the contracting parties that plaintiffs' political views might constitute cause for denying them severance payments. Despite different organizational functions, defendant was identical with the original employer and had to abide by the agreement. (RAG 299/35, 27:353-66, No. 61, 25 July 1936.)

The managing director of a local health insurance fund was dismissed because of financial management detrimental to the fund as well as his long association with the SPD. The court held the discharge void because plaintiff had not received the hearing prescribed for disciplinary discharges by the employment regulations of the *Reich* insurance

<sup>31</sup> § 580 para. 7(b) ZPO provided for a new trial.

regulations. Here the violation consisted in informing plaintiff of certain grounds for dismissal but then adducing others when he was formally discharged. (RAG 41/36, 28:10-16, No. 2, 27 June 1936.)

The employment contract of a physician who worked part-time at a municipal hospital provided that, if plaintiff were dismissed without notice for an important cause, his entitlement to a pension would remain unaffected insofar as that cause did not inhere in his person. During the first half of July 1933 plaintiff was placed in protective custody because of his prior political activity as a Social Democrat. Shortly after his release defendant-employer dismissed him for an important cause (namely his political past and imprisonment), denying his entitlement to the pension. Thus began a five and one-half year litigational odyssey for plaintiff whose administrative petition was rejected on the grounds that the ordinary courts had jurisdiction of the case.

After the trial court had found for plaintiff and the appeals court for defendant, the case came up to RAG for the first time. It rejected LAG's view that judicial review was not available in cases involving political discharges pursuant to BBG. RAG declared that although judicial review was foreclosed in disputes involving the permissibility of discharges of salaried and hourly employees in the public sector and possible earnings due them,<sup>32</sup> as to tenured civil servants judicial review was precluded with regard only to discharges.<sup>33</sup> Since plaintiff was not contesting the discharge but only the loss of his pension, the courts had jurisdiction.

This overruling remained dictum insofar as the court held on the facts that the discharge was not based on BBG at all but on the contract. Specifically citing the guarantee in the Weimar constitution (art. 129 para. 4) of the inviolability of vested rights and the availability of the courts to civil servants seeking to secure their contractually defined financial emoluments, the court remanded with instructions to determine whether the discharge for a reason inhering in plaintiff's person was justified. (RAG 106/36, 28:253-58, No. 50, 14 October 1936.)

On remand LAG found that the discharge was unjustified since plaintiff's political activity as far back as 1929 had become "bourgeoisified" and plaintiff had never been a communist. But it was also revealed that between the time of discharge and the filing of suit defendant rested the discharge also on the claim that plaintiff was no longer qualified to per-

<sup>32</sup> See no. 5 para. 5 Zweite VO zur Durchführung des BBG, 4 May 1933, RGBI I, 233.

<sup>33</sup> See § 7 para. 1 BBG.

form his work. RAG held that an employer could subsequently extend the basis for an immediate discharge provided that one could not conclude from his behavior during the intervening period that he had waived the use of this new cause. Again RAG remanded for a determination as to whether the political sovereign, which according to defendant had demanded plaintiff's discharge, would not have been agreeable to a termination with the customary period of notice provided that plaintiff had been given immediate leave. In this connection RAG instructed LAG that the plant-leader's duty of loyalty dictated that he stand up for and shield his Follower insofar as that was reasonable. (RAG 79/1937, 31:37-43, No. 8, 21 August 1937.)

On remand LAG found in favor of plaintiff and RAG affirmed. Defendant's claim before the appeals court that plaintiff had been a leading Marxist as late as 1933 was disallowed on procedural grounds<sup>34</sup> because it should have been submitted to the trial court and its consideration would have led to unnecessary delay in the appellate court. (RAG 66/38, 34:353-57, No. 56, 23 November 1938.)<sup>35</sup>

The former chairman of the salaried employees' section of a plant council, who had also been an SPD member, was given six months' notice on 30 March 1933 without any indication of the reasons. Plaintiff filed suit for his pension which defendant had denied him because the cause of the discharge had inhered in plaintiff's person. Specifically, defendant claimed that plaintiff had agitated against the Nazis in such a manner that his continued employment after the national upheaval was impossible. The case was remanded – both lower courts had found in favor of defendant – for determination of defendant's attitude to plaintiff's activity before the Nazi ascendancy to power. For if defendant approved of plaintiff's activity, then it would violate good faith to revoke the pension. RAG instructed LAG that it must consider plaintiff's claim that both the plant and its management had been SPD-oriented, and that an order issued in 1930 requested information on Nazi party members for the purpose of dismissing them. Also to be considered was plaintiff's charge that eighty-five per cent of the plant's 6,000 employees had voted for the free (i.e., Social Democratic) trade union candidates in the

<sup>34</sup> See § 529 para. 2 ZPO.

<sup>35</sup> In a subsequent case RAG held that even as to non-tenured public employees, the courts had jurisdiction over the question as to whether a Social Democrat dismissed for political unreliability had been discharged pursuant to BBG at all. (RAG 85/36, 31:361-67, No. 62, 22 July 1936.) The court was thus interpreting the provision referred to in n. 32 above.

plant council election in February-March 1933 while only eight per cent voted for Nazi candidates. (RAG 120/37, 32:303-307, No. 43, 16 February 1938.)

An employee of the employment office was discharged in 1933 with three months' notice. Three years later defendant conceded that plaintiff had not been politically active within the meaning of no. 4 of the second implementing order (issued pursuant to BBG), but claimed that the discharge fell under no. 6 because in light of plaintiff's long association with the SPD his continued employment could not be answered for.<sup>36</sup> RAG overruled LAG – which had awarded plaintiff backpay – on the grounds that the discharge was valid because it could have been supported by no. 4 and in fact subsequently (1936) was. An amendment to no. 6<sup>37</sup> provided that a discharge pursuant to no. 4 could be sustained pursuant to no. 6 if the employee was thereby favored. But RAG held that not only was the administrative ruling of the employer not subject to judicial review, but that the court could also not inquire as to whether the ruling meant that no. 4 had been unjustly applied to plaintiff or even whether the ruling operated in plaintiff's favor. (RAG 95/38, 35:3-8, No. 1, 19 November 1938.)

On the whole the SPD cases reveal an effort by the courts to apply constitutional, statutory, contractual and procedural (including due process) standards to dismissal-related claims by former Social Democrats. So long as the plaintiffs had ceased being members or activists before such status or behavior was proscribed, the courts strictly rejected *ex post facto* applications of statutes.<sup>38</sup> Although the court generally pursued a positivistic approach, it freely made use of general clauses as to opportunistic employers who saw the new regime's policy as a pretext for avoiding obligations as well as to successor-employers who at first knowingly assumed the contracts of Social Democratic employees. The court generally asserted its jurisdiction and even displayed a certain measure of civil courage in resisting attempts by the SA and others to engage in uncoordinated vigilante actions. To be sure, the judges were presumably aware of the fact that ultimately they could rely on the sup-

<sup>36</sup> No. 6 permitted the discharge of employees in the interest of administrative "simplification" and management.

<sup>37</sup> Vierte VO zur Änderung und Ergänzung der zweiten VO zur Durchführung des BBG, 5 June 1934, RGBI I, 477. No. 5 para. 7 of the Zweite VO (see n. 32 above) permitted the retroactive application of the law.

<sup>38</sup> As late as 1942 LAG found in favor of a former SPD editor who had been dismissed for not having responded appropriately to the plant-leader's greeting, "Heil Hitler." (LAG 24 Sa 21/42, 45:65-67, No. 12, 2 June 1942, Leipzig.)

port of the dominant Nazi leaders in controlling extra-legal spontaneous "revolutionary" acts.