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Markets and politics: the regulation of the right to strike in the United States and Poland

I. Introduction

From an international perspective, the Solidarity trade union movement in Poland during 1980–1981 is best known for fighting for (and temporarily winning) the right to strike against the Communist regime. In that sense, Poland is identified with the right to strike – it’s illegal repression by a dictatorial regime and the fight of Solidarity to preserve this right. Of course, the Solidarity movement was not just about the right to strike and other labor law issues. It was about political freedom, an objective that was finally satisfied when the Communist government agreed to (and lost) free elections in 1989. The right to strike was, in one sense, a means to a political end. Even in early 2013, the much reduced Solidarity labor union is still wielding the right to strike for political aims (this time, to promote the establishment of a new labor-aligned political party or movement).

The United States is less known for the right to strike. While there was a long struggle of organized labor to attain this right in the early 20th century, in the past 50 years strikes have become less and less common and/or notable. This is not by accident. In general, the United States has a very restrictive view on the right to strike. While strikes are legally protected in a formal sense, the law actually contains many limitations that are unfavorable to striking employees. This is consistent with the free market approach underlying American labor law, which in general places less restrictions on employers than, for example, European labor law. The American approach is based upon the expectation that employers that have less regulation will grow more and ultimately
hire more employees. Even for employees, the right to strike – however limited it may be – is seen more as a means to obtain direct economic objectives, then any wider political goal.

These different approaches to the right to strike will be analyzed in this article, with a focus on what Polish and U.S. labor law may learn from each other with respect to the regulation of strikes. Notwithstanding the different theoretical and historical foundations of this right, there are interesting innovations and best practices on both sides that should be considered for adoption in both countries.

II. The meaning of the right to strike in the U.S. and Poland

A basic definition of the right to strike is the right of employees to voluntarily withhold their labor from their employer. However, this relatively simple and clear definition is more complex than it may seem at first glance. In different ways, both Polish and American labor law fall short of protecting this right as defined above.

A. A meaningless right?

A legal right presupposes that employees are protected in exercising this right; i.e., they cannot be retaliated against or otherwise punished for engaging in a strike. In the United States, the federal National Labor Relations Act (NLRA) does indeed legally guarantee a right to strike. Technically, an employee cannot be fired for participating in a lawful strike. Practically, however, this right is almost completely undermined by the American approach of distinguishing being fired and being permanently replaced from your job. While an employee cannot be fired for engaging in a lawful strike, he or she may be permanently replaced by another new employee in most strike situations.

In making this rule, the United States Supreme Court focused on an employer's right to keep its business operating during a strike. In order to do this,

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3 NLRB v. Mackay Radio and Telegraph Co., 304 U.S. 904, 911 (1938) (an employer has "the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them").
it might not be sufficient to attempt to hire temporary employees as replacements. Instead, applicants might need the incentive of a permanent position in order to be persuaded to take a job while a strike was taking place. Consequently, with two exceptions, an employee in the United States who exercises his or her right to strike faces the very real prospect of permanently losing their job if the strike is not successful. The exceptions to this rule are not many. First, this rule only applies to economic strikes — strikes with the aim of improving the wages, hours and working conditions of the employees. It does not apply to unfair labor practice strikes, which are strikes called to protest the employer’s violation(s) of labor law. Employees engaged in unfair labor practice strikes cannot be permanently replaced. Second, employees who make an unconditional offer to return to work after the strike has begun have certain protections. At the point in time that the offer to return was made, if they have not yet been permanently replaced, they do have a right to have their job back. If they have already been permanently replaced, they have a certain priority to be rehired (if, for example, one of the permanent replacements has resigned or was fired, or if the employer later needs to hire new employees).

In Poland, in contrast, as is the case of most of Europe, employees engaged in a lawful strike may not be fired or permanently replaced. An employer may hire temporary replacements to perform the work of the strikers, but employees do not risk losing their jobs solely because of their decision to strike. Moreover, there are restrictions in place in the process of hiring temporary replacements. Employers may not hire replacements en masse though an

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7 See: e.g., Laidlaw Corp. v. NLRB, 414 F.2d 99 (7th Cir. 1969).
8 See: Art. 23, Act on solving collective disputes, "u.r.s.z." (Ustawa z dnia 23 maja 1991 r. o rozwiązywaniu sporów zbiórowych, Dz.U. 1991, nr 55, poz. 236 ze zm.). Participation in a lawful strike is not considered a form of misconduct that would warrant an employee's discharge. Engaging in an illegal strike, on the other hand, would be considered cause for termination.
9 One commentator has suggested that it would be permissible under Polish law to hire strike replacements on the basis of a fixed term contract, or a contract for completing a specific task. See: K. Baran, Komentarz do ustawy o rozwiązywaniu sporów zbiórowych, [in:] Zbiorowe prawo pracy. Komentarz, wyd. II, 2010, p. 461–463.
10 Art. 8 (3) Act on the employment of temporary workers (Ustawa z dnia 10 lipca 2003 r. o zatrudnianiu pracowników tymczasowych (Dz.U. z 2003 r. Nr 166, poz. 1608, ze zm.).
employment agency, thereby making it more difficult to quickly replace their entire workforce at the start of a strike. This is a more balanced approach. During a strike, both the employer and employee should feel some economic pain – the employee, in the form of lost wages\textsuperscript{11}, the employer, in the form of lost profits as a result of the closure of their business. In Poland, an employer does face more hurdles in keeping the business open during a strike, and at the same time employees do not risk everything (the permanent loss of their jobs) in exercising the right to strike.

**B. Employees eligible to exercise this right**

Whatever the value of the right to strike, this right is in any case not available to all individuals in both the United States and Poland. The American NLRA, which is the source of the right to strike in U.S. labor law, only applies to certain private sector employees. In addition to public employees (i.e., government employees – federal, state and municipal), private sector agricultural workers, owners, managers and supervisors are excluded from the NLRA, and thus do not enjoy the right to strike under that law\textsuperscript{12}. Private sector health care workers are covered by the NLRA, and thus can strike, but this right is subject to a number of restrictions. Most significantly, such health care workers must give at least 10 days notice of any planned strike to their employer, so that the employer may take necessary precautions to ensure the safety of its patients\textsuperscript{13}.

\textsuperscript{11} Striking employees in both the U.S. and Poland are not paid wages by their employer during the duration of the strike. In some states in the U.S., and in certain situations, strikers may receive unemployment benefits. See: *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979). This is not the case in Poland. However, striking American workers feel additional economic pain in the form of lost health insurance benefits. In the U.S., health insurance benefits have been traditionally provided by employers, and when an employee goes on strike the employer is no longer obligated to pay for the employee’s health insurance. There is a mechanism for striking employees to continue their employer-provided health insurance at their own expense, but of course this is a costly option for employees who are not receiving any wages. In Poland, strikers continue to receive health insurance benefits provided by the Polish state. During the term of a lawful strike, Polish employees continue to receive all social security benefits and retain their rights as an employee, except their right to wages. See: Art. 23 (2) Act on solving collective disputes – u.r.s.z.

\textsuperscript{12} See: 29 U.S.C. § 152(2) and (3).

Such actions might include transferring the patients to another facility or arranging for supervisory staff or replacement workers to care for these patients.

Simply because employees do not have the right to strike under the NLRA, because they are excluded from the scope of coverage of that law, does not mean they may not gain this right through another law. For example, public employees (including government workers, most teachers, police officers and firefighters) are regulated by different, often state, laws. States may determine whether their own public employees have the right to strike or not. In a number of cases, states have granted public school teachers a limited right to strike. In Pennsylvania, for example, teachers may strike for a limited number of days, but no longer, in order to ensure that students receive a minimum number of days of classroom instruction during the school year. On the other hand, public safety officers, including police and fire, are universally denied the right to strike by the states. In exchange for the deprivation of this right, some states provide police and firefighters the right of binding “interest” arbitration.

Interest arbitration is a process whereby police and firefighter unions, and their employers, have the right to resolve any disputes about a new labor contract through binding arbitration, instead of through a strike. Thus, if the parties cannot agree on the wages the employees will receive for the next collective agreement, this issue will be submitted to a neutral arbitrator for resolution. In deciding this issue, the arbitrator will look at the financial health of the public employer, the difficulty of the employees’ working conditions, and most importantly, how much similarly situated employees of other public employers are being paid. The arbitrator’s decision is typically final and binding, with only limited possibilities for appeal. In this way, a strike – which is used as a means to pressure the employer to provide more a generous contract – is unnecessary, as a neutral arbitrator theoretically provides a fair resolution of the labor dispute.

Most other public employees in the U.S., however, in practice have neither a right to strike nor a right to interest arbitration under current state and federal law. This does put them in a kind of limbo when an impasse occurs in labor negotiations. Nevertheless, unlike private employees, government workers can use the political and electoral process to influence labor negotia-
tions. If the employer acts unreasonably the labor organizations representing certain public employees may encourage their members to vote for a different governor, school board, mayor, and so on. Consequently they do have some means to pressure the employer during negotiations, even without the ability to strike.

Poland has a less fragmented approach to who may strike. There is a general right to strike, with two major exceptions. First, employees who fall into specific excluded categories may not strike. There are three main exclusions under Polish law: 1) employees and members of the Polish armed forces, firefighters, police, customs officers, and border patrol officers 2) employees whose work affects vital interests of public health and safety, and 3) prosecutors, judges, and employees in public administration. The health and safety exception has proved to be the most vague. The controversy has centered around whether health care workers — especially doctors and nurses — fall under this exception, and therefore lack the right to strike. The short answer is that it depends on the facts and circumstances of each case. If health care workers can go out on strike without endangering the safety of patients under their care, the strike would be permissible. Under this standard, emergency room personnel would not have the right to strike, because even their temporary absence could jeopardize patients' lives.

Second, even if these exclusions do not apply, in order to strike an employee must be a member of a labor union. Put another way, only a labor union may call a strike — unrepresented employees do not have this right. The purpose of this rule seems to be to promote order in the workplace. If unrepresented employees could strike, it would be unclear for the employer how to end the dispute, as there would be no labor union with which it could negotiate a resolution. This rule may be in conflict with the provisions of Article 6 (4) of

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16 According to Article 19, u.r.s.z. 1) Any work stoppage as a result of strike action in the workplace, devices, and systems, in which the interruption of work is life-threatening, harmful to human health or the safety of the state is prohibited. 2) It is prohibited to organize a strike in the Internal Security Agency, Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau in the Police and the Polish Armed Forces, Prison Service, the Border Guard, the Customs Service and the organizational units of fire protection. 3) The right to strike is not provided to workers employed in the organs of government, central and local government, courts and prosecutors.


18 See: Article 59 (2) and (3) of the Constitution or Polish Republic (Konstytucja Rzecz...
the European Social Charter, which suggests that the right to strike should be held by employees, and not just unions. However, Polish commentators have argued that because the strike is the ultimate weapon in a labor dispute, it should be entrusted only to labor unions.\(^\text{19}\)

The Polish approach as to who may strike is actually more restrictive than that used by the United States. Part of the reason for this is simply the federal structure of the American legal system, as compared to Poland, which is a unitary state. While Poland has a blanket prohibition on strikes by police, firefighters, and employees in public administration (among other categories of workers), the United States’ legal system leaves this decision up to its constituent states (at least with respect to workers employed by the states themselves). A minority of states have used this discretion and do grant some public employees the right to strike, and some have provided police and firefighters with interest arbitration as a substitute for striking. Still, despite this fact, it is also true that most public employees in the United States, in practice, likewise do not have the ability to strike, making the differences in this area with the Polish model not as wide as they first might appear.

A more significant difference is how health care employees are treated in the two countries. In the United States, private sector health care workers do have the right to strike, so long as a special 10 day advance notice is given prior to the strike. Polish law is more ambiguous here: no strike is permitted if it would endanger the public health or safety, but there is no bright line rule as to how this standard is satisfied. While Polish commentators have suggested that doctors (for example) could strike in certain circumstances if patient safety was otherwise guaranteed\(^\text{20}\), this ambiguity in the law acts to discourage any such strikes. Health care workers may not want to risk engaging in an illegal strike, and therefore might not take the chance of striking in an unclear situation. Thus, the United States standard in this area is actually more protective of the right to strike. As long as the requisite notice is given, it is assumed that


the employer hospital can make necessary arrangements to ensure the safety of its patients.

Whether this practice should be adopted by Poland is not as apparent, at least at first glance. Again, in the United States, it is easier to replace striking employees — even permanently. Polish law places much greater burdens on employers who even temporarily would like to replace their employees to keep their operations running. Thus, while an American hospital could theoretically engage replacement workers during the 10 day notice period of the strike, it would be more difficult for a Polish hospital to do so\(^\text{21}\). A wholesale adoption of the American 10 day notice standard may therefore not ensure patient safety in Poland. As a result, some variant of this standard — i.e., a 20 or 30 day notice provision — would be better suited to Poland. If Polish public policy deems health care personnel such as nurses to be indispensable to public safety (like police), it could also introduce the concept of mandatory interest arbitration for these employees.

Another limitation in Polish law, not found in the United States, is the limitation of the right to strike to members of labor unions. Under American labor law, a strike may take place without any labor union. There have been numerous examples of unrepresented employees striking to protest poor working conditions, and these strikes have been found to be lawful\(^\text{22}\). The theoretical foundation for this rule is that labor law protects the rights of employees to engage in "concerted" activity. Concerted activity is the collective activity of employees (or an act taken by one employee to benefit a group of employees) taken "for their mutual aid or protection regarding terms and conditions of employment"\(^\text{23}\). This activity may be expressed in the form of strike, whether or not a labor union is involved. Unions, in a sense, are one form of employees' expression of their concerted activity, and unions have certain rights largely because of this fact. They are not the only way employees may express their concerted activity.

The American approach on the latter issue seems to be better reasoned. The right to strike is really the right of employees; unions are the means by which employees often exercise this right, but need not be the exclusive means. It

\(^{21}\) Still, even though it is legally easier for U.S. employers to replace striking nurses during the 10 day notice period, as a practical matter this is difficult to do, given the high skill level of many nurses.

\(^{22}\) See: e.g., *Roseville Dodge, Inc. v. NLRB*, 882 F.2d 1355 (8th Cir. 1989).

has been argued that since it is a relatively simple process for employees to form and join a union in Poland, the requirement that an employee must belong to a union in order to strike is not so onerous. Even if it was true that it is a simple matter to create a Polish union, it is still an additional hurdle to cross and thus an unwarranted restriction on the right to strike. As the examples from United States case law show, strikes by unrepresented workers often take place spontaneously, provoked by unfair working conditions (i.e., working without heat during a cold winter day). The employees’ right to protest would be limited under Polish law, forcing the employees to first form a labor union before any strike could take place.

III. Types of permissible strikes

Both the United States and Poland regulate the timing, manner and purpose of a strike: in other words, when the strike is called, the form of the strike and the reason for the strike. Depending upon these three factors, the strike may not be lawful.

A. The timing of the strike – mandatory pre-strike procedures

Before a strike takes place, certain procedural requirements must be satisfied under both U.S. and Polish labor law. If they are not met, any subsequent strike will be illegal.

In the United States private sector, these procedural requirements are only in place where the labor union and employer have an existing collective bargaining agreement. During the term of the contract, employees may not strike if the agreement contains a no-strike clause. Rare exceptions to this rule exist for work stoppages caused by abnormally dangerous working conditions. Prior to the contract’s expiration date, a party seeking to terminate or modify the agreement must give 60 days notice of their intention to do so, and offer to meet and negotiate a new contract. 30 days after such notice is given, the party must notify the Federal Mediation and Conciliation Service (FMCS) and any

24 Analyzing a related issue, the Committee of Social Rights found that the Polish requirement of needing at least 10 employees to form a trade union (Ustawa z dnia 23 maja 1991 r. o związkach zawodowych, t.j. Dz.U. 2001, nr 79, poz. 854 ze zm.) is in accordance with Article 5 of the ESC. Therefore, it is arguable that the Polish rule that gives only trade unions the right to strike is in compliance with the ESC. Addendum to Conclusions XV-1, www.coe.int; M. Kurzynoga, Warunki legalności..., p. 102.
aplicable state mediation agency of the existence of a labor dispute. Upon notification, the FMCS will assign a mediator to help the parties try to reach an agreement. The terms and conditions of the contract will remain in force for the entire notice period or until the expiration date of the contract, whichever is later. With respect to collective bargaining agreements involving private sector health care institutions, the notice period is extended to 90 days, and the FMCS must be notified 60 days after the initial notice is given. Any strike during this notice period is illegal\textsuperscript{25}.

The procedural prerequisites for strikes in the public sector in the U.S. vary from state to state (where such strikes are legal). Generally, such requirements are much more onerous than those found in the private sector. In Pennsylvania, for example, public sector employees may not strike until 1) an impasse in contract negotiations has occurred, 2) the parties have attempted to mediate the dispute for a period not less than 20 days, and 3) if the labor relations board so decides, a fact finding board is empaneled and makes findings and recommendations, that are ultimately rejected by the parties\textsuperscript{26}.

Poland also has existing pre-strike requirements. The union has the obligation to notify the employer of a labor dispute (which may include various issues concerning wages and other working conditions). The employer has three (3) days to respond, either agreeing that a dispute exists or acceding to the union's demands. At that point, the parties must begin good faith negotiations to resolve the dispute. If these negotiations do not appear to be making progress, the parties must proceed to mediation. During mediation, if the union believes that the employer is simply misusing this process to delay a strike, it may call a two-hour warning strike. Upon the failure of mediation, the parties may agree to arbitrate their dispute, although this option is rarely chosen\textsuperscript{27}. That means there are only two mandatory procedures before strike takes place: negotiations and mediation. Most often, the union proceeds to strike, so long as 1) it gave a notice to do so in mediation, and 2) at least 14 days have past since the commencement of negotiations.

If a collective agreement between the union and the employer exists, the union may not strike during the term of the contract over issues that are resolved by that contract. For example, if the contract sets a monthly wage of 2,000 PLN per month, the union cannot strike for higher wages during the

\textsuperscript{25} See: 29 U.S.C. § 158(d).
\textsuperscript{26} See: 43 P.S., Sections 1101.101 to 1101.2301.
\textsuperscript{27} Articles 7–16 u.r.s.z.
length of the contract. The union could only strike over wages after the con-
tract expired or otherwise was terminated by the parties.\textsuperscript{28}

On the whole, the Polish mandatory pre-strike procedures are mild. A union
intent on going on strike need only wait approximately 14 days – after
going through required negotiation and mediation procedure – until it may do
so.\textsuperscript{29} It seems that this is not an excessive restriction of the right to strike. This
may be due to historical reasons. After the communist government of Poland
declared martial law in December, 1981 it revoked Solidarity’s right to strike.
The Trade Unions Act of 8 October 1982, technically restored this right, but
set forth procedures excessively restricting the exercise of the right to strike, so
as to discourage strikes from ever taking place.\textsuperscript{30} When communist rule ended,
the new democratically elected government was reluctant to place excessive
restrictions on the right of independent trade unions to strike.

It is difficult to say whether the American or the Polish pre-strike pro-
cedures are more effective or desirable. They both reflect the different legal
positions of labor unions in each country. In the United States, the 60 or 90
day negotiation and mediation periods are viewed favorably (and are generally
taken seriously) by unions, as an opportunity to reach a new agreement and
at the same time avoid a costly, risky strike. In contrast, Polish labor unions
most often simply go through the short, 14 day negotiation/mediation period
as quickly as possible en route to a strike. The strike is a more effective weapon

\textsuperscript{28} In accordance with Article. 4 (2) u.r.s.z., a trade union may not strike over matters
related to the content of the collective bargaining agreement, until the termination of
that agreement. This is called the principle of social peace. A strike during the term of
a collective agreement is legal if it is over issues not covered by the agreement, or if it is
conducted by a union that is not a party to that agreement. See: M. Kurzynoga, \textit{Warunki
legalności...}, p. 176.

\textsuperscript{29} See: Art. 7 (2) u.r.s.z. The ILO Committee of Experts and the Committee on Free-
dom of Association has stated that such a pre-strike negotiation/mediation procedure may
lawfully even be up to 40 days, when it is connected with “essential services”, or 20 days for
“other important social services and the public sector”. B. Paździor, \textit{Strajk w orzecznictwie

\textsuperscript{30} See: REPORT OF THE COMMISSION OF INQUIRY instituted under article 26
of the Constitution of the International Labour Organization to examine the complaint
on the observance by Poland of the Freedom of Association and Protection of the Right
to Organize Convention, 1948 (No. 87), and the Right to organize and Collective Bar-
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for Polish labor unions given the additional legal protections they enjoy (at least as compared to the situation in the United States).

Certainly, it might be more helpful if Poland adopted a more structured approach to required pre-strike negotiation and mediation procedures, so that they would not be effectively ignored. Poland only has a list of approved mediators published (and selected) by the Minister of Labor, and lacks a separate labor mediation agency such as the FMCS in the United States. The creation of a similar body to that of the FMCS, with staff mediators, would professionalize the pre-strike negotiation/mediation process. This, in turn, might lead to more peaceful resolution of labor disputes and less strikes. The 14 day negotiation/mediation period could be extended somewhat, but more important would be to increase the quality and respect of the mediation process.

B. The manner and form of the strike

In its traditional form, a strike involves a group of employees stopping their work for the employer, until such time as the labor dispute is resolved (one way or another – a compromise is reached, or the employer or union largely concedes their respective position). However, a number of variations of the traditional strike have developed over time, some of which are legal and some not under American and Polish labor law.

The basic rule in the United States is that a strike is a total work stoppage. Thus, partial strikes – where the employees refuse to perform some, but not all, work – are generally illegal and unprotected under American labor law31. A limited exception to this rule exists in the case of a one-time refusal to work mandatory overtime, and refusing to work voluntary overtime. Likewise, intermittent strikes – stopping work one day, returning to work the next, and then going on strike again – are also unlawful. Like a partial strike, an intermittent strike is a state of neither work nor a complete stoppage of work32.

For similar reasons, work slow downs – where workers are purposely less productive and perform their work at a slower pace than what is required – are also considered a partial strike and therefore unprotected under American labor law33. However, "work to rule" strategies, where workers do not do less than that which is required, but only what is required, are more problematic for employers. If an employee had voluntarily been more productive, it is dif-

31 See: Vencare Ancillary Services v. NLRB, 352 F.3d 318, 322 (6th Cir. 2003).
32 See: e.g., Roseville Dodge, supra, 882 F.2d at 1359.
it is difficult to argue that he or she should be permitted to only perform his or her job duties as set forth in the employer’s job requirements. In other words, an employee cannot be forced to volunteer for additional work.

Finally, sit down strikes, which take place when the striking workers seize the employer’s premises and refuse to leave, are unprotected. Such a strategy might be attractive to workers who wish to prevent the employer from resuming operations during the strike, or who wish to gain maximum publicity. This is not surprising from an American perspective, given the priority U.S. law places on protecting private property.

Polish law is less clear on the issue of the legality of partial strikes and sit down strikes. One view is that slow downs and related actions are not actually strikes, but are instead non-strike actions. They seek to pressure the employer through means other than refraining from work. Such job actions may also be a useful, and lawful, tool for employees who do not possess the right to strike under Polish law. Theoretically, these types of actions are more appropriately described as protests (since they do not involve a work stoppage), even though they may have the same objective and purpose as a strike. Consequently, they must be evaluated under Article 25, u.r.s.z. Other commentators disagree with this analysis, and argue that since these actions have the same purpose as a strike, they must be evaluated as a strike. This distinction is significant, as the requirements for a strike are much more stringent than are the lawful requirements for other forms of industrial actions. In the final analysis, each case must be analyzed on an individual basis.

Still, the very ambiguity of the legality of partial strikes in Poland is harmful to both unions and employers – to unions, because there is a risk a work slowdown is unprotected, and to employers, because they do not have a clear legal right to stop such actions. The strike (or "job action") of customs officials in

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34 See: e.g., Roseville Dodge, supra.
35 Art. 25 u.r.s.z.
37 A.M. Świątkowski, [in:] Zbiorowe prawo..., ed. J. Wratny, K. Walczak, p. 378–380. In the interesting opinion of M. Kurznynoga, such behavior can only be described as a strike when the behavior slows down operations to such an extent that they are closer to abstaining from work than its performance. M. Kurznynoga, Warunki legalności..., p. 64.
Poland in 2007 and 2008 illustrates this point. By slowing down their work, the customs officers caused extremely long delays at the Ukrainian and Belarusian borders. This effectively forced the Polish government to negotiate, and eventually a resolution of the labor dispute on favorable terms to the union was reached. At the same time, the questionable legality of the "strike" caused it to last longer than necessary, and potentially put the union and its members at risk.

To the extent Poland were to tighten its regulation of partial strikes, it should at the same time offer interest arbitration to certain categories of affected employees (such as customs officers). That is, if it is too harmful to the public interest in Poland for customs officers to slow down their work (by limited national and international trade and transport), they should be given the right of interest arbitration instead. Such a solution would channel potentially dangerous strikes or job actions (irrespective of their legality) into a formal dispute resolution process that both sides could accept.

C. The purpose of the strike

Both Poland and the United States limit the ability of employees to strike for certain reasons. In the United States, strikes that amount to secondary boycotts, and sympathy strikes under certain circumstances, may be illegal.

A secondary boycott is when a union seeks to unlawfully pressure one employer to stop doing business with (or otherwise influence the actions of) another employer. It is a rather complex doctrine in American labor law, with a number of limited, technical exceptions. In a secondary boycott, there is a primary employer and a secondary employer. The primary employer is the employer which has the original, and main, dispute with a labor union. For example, Ford Motor Company ("Ford") and the United Auto Workers Union ("UAW") have a labor dispute, in which the UAW goes out on strike against Ford for economic reasons (i.e., for higher wages in the next contract). Ford is the primary employer. In order to pressure Ford, the UAW also goes out on strike against a parts supplier to Ford. The parts supplier is the secondary employer – the UAW’s primary dispute is with Ford. This strike would be illegal under the secondary boycott rule in U.S. labor law.

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A secondary boycott for political reasons would also be unlawful. Thus, when a dock workers' union refused to unload ships carrying goods from the Soviet Union to protest the U.S.S.R.'s invasion of Afghanistan, this was likewise an unlawful secondary boycott. The union's primary dispute was with the Soviet Union. The shipping companies were neutral, secondary employers, and the union was attempting to unlawfully pressure them (by striking) in order to convince them to cease doing business with the Soviet Union.

Finally, and uniquely in U.S. labor law, a union is liable for consequential damages (including lost profits) incurred by an employer as a result of an unlawful secondary strike.

The overall effect of the secondary boycott rule is to weaken the power of labor unions. Unions may only strike against the primary employer, and not enmesh other neutral, secondary employers in the dispute. Of course, if unions could pressure such secondary employers through strike actions, it would likely put additional pressure on the primary employer to give in to the union's demands. In addition, as a result, a lawful general strike is no longer possible in the United States. Unions can not call a national strike against every employer in support of one union's strike with a particular employer.

A sympathy strike is distinct from a secondary boycott. Using the earlier example involving Ford and the UAW, assume that the UAW represents the manufacturing workers at Ford, and these workers go out on strike in support of their economic demands. If the cleaning personnel (janitors, etc.) at Ford go out on strike in sympathy with the striking manufacturing workers, this would be a sympathy strike. Under U.S. labor law, such a strike is theoretically legal.

The janitors' union is not engaged in a secondary boycott, since its dispute is with the primary employer -- Ford. However, it is possible for a union to waive its right to engage in a sympathy strike. This is most often done through a no-strike clause in a collective bargaining agreement. The union waives its right to strike in exchange (for example) higher wages or some other concession. As a practical matter, most unions have agreed to a no-strike provision in their contracts with employers, and have waived their right to call a sympathy strike.

A sympathy strike conducted in violation of a no-strike clause is a prohibited illegal strike.

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41 See: Mahon v. NLRB, 808 F.2d 1342, 1344 (9th Cir. 1987).
42 Some courts have suggested that a no-strike clause must specifically indicate that a union has waived its right to engage in a sympathy strike, and thus a generally worded
Polish law is less strict than U.S. law on the question of prohibited reasons for strikes. The general rule in Poland is that a union may strike for economic reasons (including wages and working conditions), social benefits, union rights and to protest the unlawful conduct of an employer towards the union. A purely political strike would therefore be illegal, but if the strike had mixed economic and political motives, it may be permitted if the social and economic aspects of the strike are more dominant. The primary part of the motivation for the strike should be a lawful one, for the entire strike to be lawful. In addition, the ILO's Committee on Freedom of Association, has clearly indicated that the strikes of the socio-political cannot be prohibited.

Polish law appears to encompass both secondary strikes and sympathy strikes under the broader term solidarity strikes. Such strikes, curiously, are generally not permitted under Polish national law. One exception involves the ability of unions to strike in support of employees who do not have the right to strike. Such secondary strikes must be limited in duration, lasting no more than one-half of a day. However, notwithstanding this general rule, various experts have argued that this prohibition is not valid under international law. Since Poland (unlike the U.S.) has ratified the relevant International Labor Organization (ILO) conventions, and these conventions permit secondary strikes, some commentators have suggested that the ILO standard should prevail over any conflicting interpretation made by the Polish national courts.

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43 According to art. 17 (1) u.r.s.z., in order to strike, the subject of the dispute must include working conditions, wages, social benefits and union rights and freedoms.
44 M. Kurzyna, Warunki legalności..., p. 146-147.
46 K. Baran, Zbiorowe prawo..., p. 464.
47 “In defense of the rights and interests of employees who do not have the right to strike, the trade union of another establishment may organize a solidarity strike for no more than half of the working day” Article 22 u.r.z.
48 As M. Kurzyna, Warunki legalności..., p. 134 “accordance with the Articles 59 (4) of the Constitution, limiting the right to strike can not be greater than permitted by international agreements binding for Poland. Therefore, it seems reasonable to appeal to the ILO supervisory authorities guidance on the solidarity strike. The Committee of Experts in 1983 has defined a sympathy strike, indicating that during this type of strike workers speak out in support for another strike. In the opinion of the Committee of Experts, the general prohibition of sympathy strikes could lead to abuse and mis-use dealing with these issues. The Committee believes that employees should have the right to such strikes if the strike they supported is lawful.”
Described above sympathy strikes are permitted in Poland, and again, as distinct from the United States’ practice, most unions do not waive this right. To the extent that the United States and Poland both do not permit secondary strikes, there is not a great divergence in this area of law on its face. Much depends on whether or not the ILO standard – permitting secondary strikes – is controlling on Poland, or not. This issue aside, one major practical difference is the extent in which strikes in Poland have a political purpose. While this may not be the sole reason for a strike, in many cases strikes are in fact related to the labor law policies or budget of the Polish government.

IV. Conclusion

In many ways, Polish and American law on strikes is related to the political culture and history of each country. In Poland, as in much of Europe, there is a stronger tradition protecting the right to strike. Strikes also have a greater political purpose in Poland, and sometimes attempt to influence the government’s labor and economic policy. Unions in the United States also have an important political role, but, in marked contrast to Poland, the strike weapon is rarely used for broader political ends.

Still, this fact should not prohibit the U.S. and Poland from borrowing specific practices from each other in this area of law. Poland might find the American practice of offering interest arbitration to categories of employees who may not strike quite helpful. Similarly, creating a specific, high quality labor mediation body (a government agency, for example) to help resolve labor disputes before a strike takes place, and adopting the U.S. practice of permitting health care workers to strike so long as adequate advance notice is given, could also be helpful additions to Polish labor law. On the American side, the U.S. would do well to follow Polish law on the ability of strikers to retain their jobs. The U.S. doctrine of permanent replacements is too harsh, and skews the balance of power in labor negotiations too much in favor of employers.