MANDATORY CONCILIATION BEFORE STRIKES AND OTHER JOB ACTIONS

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I. Introduction

The mass strike called by the General Confederation of Labor (CGT)[1] **is *undeniably unlawful*. The right to strike is a restrictive right, intended for specific grievances. It must be exercised by a representative union, as**

[1] The Mass Strike of April 10, 2025 was joined by most unions, except for UTA because it was under a mandatory conciliation process according to Act No. 14786 prohibiting any form of protest while undergoing this process.

established in re "Orellano" (Supreme Court of Justice of Argentina[2]), to make specific collective demands in a company or sector.[3]

In the light of these developments, precedents can be found under administrative law. The most recent cases date back to the thirteen (13) general strikes organized by the CGT under Alfonsín administration.

The Department of Labor at the time declared them illegal due to issues of legitimacy and legality since they were based on general political issues that did not affect all workers. Therefore, the protest did not meet the requirements of the right to strike under Article 14 bis of the Argentine Constitution.

The resolutions of the Department of Labor lacked legal support and were issued as a result of the Executive's administrative, police powers in pursuit of the common good and general well-being.[4]

The Courts were split on the issue involving what constitutes an unlawful strike action but agreed that since it was an administrative act, there is a presumption of legality and may only be reviewed if the decision is found to be arbitrary or contains material errors.[5]

In other words, the Court hearing the case should rule based on these parameters.

Workers who take part in unlawful strike actions may be terminated with fair cause, without entitlement to severance pay, based on precedents and now in accordance

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[2] "Orellano, Francisco Daniel v Correo Argentino" on summary proceedings, June 7, 2016. SUPREME COURT OF JUSTICE OF ARGENTINA. CITY OF BUENOS AIRES. Justices LORENZETTI - HIGHTON DE NOLASCO – MAQUEDA Id SAIJ: FA16000089. The Right to Strike under the Argentine Constitution: According to Article 14 bis, the right to strike is a union right. The right to strike was expressly enshrined in the Argentine Constitution as a result of the 1957 reform through Article 14 bis granting a series of labor and social rights. Article 14 bis of the Argentine Constitution placed special emphasis on ensuring that unions representing workers in collective bargaining could organize protests in accordance with the principles of labor law. Unions, as mentioned in the second paragraph of Article 14 bis have the right to call a strike as a derivative of their freedom of association, their right to organize, and collectively pursue shared interests, which is validated with their mere registration in a special registry. The collective exercise of the right to strike conditions workers' right to join the strike action or not in that they cannot join a strike that is not called or organized by a union. By impairing the normal course of business and the production of goods or services where workers work, the strike harms not only companies but also third parties' services that are affected by this job action. In other words, Article 14 bis (Argentine Constitution) gives unions the right to call a strike, regardless of workers' individual choice or right to join or not join the protest.

[3] Julián A. de Diego's article: *"Paro general del 24 de enero (2025) y los daños a los trabajadores y a la producción"*. Published on iProfesional.com, on January 22, 2025

[4] JUDGEMENT 22 December 1989. Case File No. 0000014655. INTERNAL BULLETIN National Labor Court of Appeals No. 129 1990000008 DT 6 1990001207. National Labor Court of Appeals. City of Buenos Aires. Panel 08 Judges: CARLOS ALBERTO PIGRETTI - HORACIO E. ARCAL - HORACIO V. BILLOCH.

[5] Julian A. de Diego's article *"Conflictos Laborales. La Huelga. Medios de Solución"*. Editorial ERREIUS. Buenos Aires. 2022 (300 pages).

with the new wording of Section 242 Employment Contract Act (LCT) approved under Ley de Bases, which is in full force and effect.[6]

Mass strikes are unlawful mainly because of the nature of their claims, which are general political and economic demands, and not specific collective grievances.

So, for a strike to be lawful it must meet four requirements in accordance with rulings by the Supreme Court of Justice of Argentina:

1. Collective grievance directly affecting the workers represented by the striking union;

2. The strike action must be organized by the representative union;

3. It must imply a concerted work stoppage (no road blocking or obstruction to the right to work); and

4. Compliance with the rules of the mediation, conciliation and/or arbitration process.

Most strikers protest in solidarity or for general, social or economic reasons. Under comparative law these strike actions have also been declared to be illegal and contrary to the principles and defense of workers' professional interests.

A mandatory conciliation process is also a special step mandated by the law enforcement authority for a sector or activity to resolve conflict. Based on Act No. 14786 of 1958, disputes should be resolved in a context of social peace and negotiation with retroactive effects, i.e. things should go back to the way they were the day before the conflict, and whose aim is for the parties to listen to their grievances and find a solution to their disagreements.

Therefore, *those who are undergoing a mandatory conciliation process cannot join a general strike since it is incompatible.* Participation in such an action carries legal consequences.

This rule, inspired by Perón's ideas in the 1950s, was intended to avoid wildcat strikes, especially transit strikes, which hurt the entire population at so many different levels.

The most qualified comparative law scholars, like Otto Kahn-Freund (for many people he is considered the father of contemporary British labor law) define strike as

[6] Court of Appeals in Civil, Commercial and Labor Matters in Rafaela. District Panel II. July 5, 2023 "Villarruel Juan Eduardo v Dellasanta S.A. on collection of monies for labor dispute". Employment termination is justified in the event that workers take part in job actions such as blocking access to company premises through acts of violence, although they do not join a strike.

a deviation from labor law, similar to bankruptcy under commercial law, or divorce under family law.[7]

This is because *striking is a constitutional right that legitimizes multilateral damage: employers' business is stopped and workers do not get paid because they decide to cease work for a certain period of time, while the community's and consumers' most basic rights are also affected.*

What is paradigmatic is that the Bus Drivers' Union (UTA) was undergoing a Mandatory Conciliation Process at the discretion of the Department of Labor and Department of Human Capital, which had been accepted by both the union and the business chambers, and still wanted to join the mass strike. Please note that the role of the transportation sector is key to a successful strike.

To avoid any *ad nutum* or untimely measures, the law stipulated the so-called "alternative collective conflict resolution methods", but the only one that has survived from the second half of the twentieth century up to date is Act No. 14786 of Mandatory Conciliation Process. It aims to prevent the parties -employers and unions- from taking actions against each other during the time frame set forth by the law enforcement authority.

This time frame includes general strikes.

It is worth mentioning that in the Province of Buenos Aires, provincial Act No. 7565 of 2024 (Section 17) established that if the striking union fails to comply with the Mandatory Conciliation Process, it shall be subject to penalties, including the suspension or cancellation of its legal status to act on behalf of its members and even its intervention (through administrative and/or judicial means). This rule is similar to Section 56 of the National Unions Act No. 23551 (dealing with judicial proceedings only).

To get a bigger picture under comparative law, it is worth mentioning that all core countries have limited the right to strike to a series of necessary conditions for its validity. None of them considers a general strike legally valid if it is called for political

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[7] Otto Khan Freund, "Labour and the Law" 1972, Steven London Publishing House. (17 November 1900 - 16 August 1979) was a scholar of labor law and comparative law. He was a professor at the London School of Economics and the University of Oxford. He was appointed Professor of Comparative Law at the University of Oxford, and fellow of Brasenose College, Oxford in 1964 and elected FBA in 1965. He became an honorary bencher of the Middle Temple in 1969 and a QC in 1972. He was knighted in 1976. He played an important part in the establishment of labour law as an independent area of legal study, and is credited as the doyen of British Labour Law. He laid the groundwork of a philosophical approach toward Labor Law in British scholarship, which had hitherto been characterised by empiricism. In particular, his concept of "collective *laissez-faire*" was both a description of the British model of industrial relations in the 1960s and a normative model of how industrial relations should be. Industrial relations is conceived as tripartite, with Employers, Employees (through Trade Unions) and the State all engaged as actors. "The relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination." The concept of collective laissez-faire sets out the idea that the law (and the State) should be abstentionist, meaning that the state should allow capital and collective labor to negotiate freely, without extensive legislative interference, unless collective representation is unlikely to yield industrial justice or stability. Philosophically, this can be contrasted with the "market individualism" approach or the "floor-of rights" approach.

reasons or heterogeneous grievances accompanied by physical or psychological violence.

I. International Agreements

The ILO has never passed a convention on the right to strike. In its reports, the Committee of Experts has repeatedly rejected general strikes in different consultation cases, and accepted that essential services must be ensured to protect citizens' lives, health and safety.

The ILO, through its Committee of Experts on the Application of Conventions and Recommendations (CEACR), does not have a specific position on the right to call general strikes. However, the CEACR has always recognized the right to strike by workers and their organizations as a legitimate means of defending their economic and social interests[8].

Since the Committee on Freedom of Association first laid down its earliest principles on the subject of strikes, and given that strike action is one of the fundamental means for rendering effective the right of workers' organizations "to organize their … activities" (Article 3 of Convention No. 87), the Committee has chosen to recognize a general right to strike, with the sole possible exceptions being those which may be imposed for public servants and workers in essential services in the strict sense of the term. The Committee on Freedom of Association also accepts the prohibition of strikes in the event of an acute national emergency (ILO, 1996d, para. 527). The Committee excludes strikes of a purely political nature from the scope of international protection provided by the ILO, sympathy strikes or those based on minor discrepancies among the parties involved.

Strikes of a purely political nature do not fall within the protection of Conventions Nos. 87 and 98, and are found to be illegal (see related cases in the Republic of Korea). Strikes of a purely political nature are excluded from the scope of protection provided by Conventions No. 87 and 98 about freedom of association and are unrelated to collective claims of an occupational nature (see cases in Romania, Uruguay, Iran and Turkey).

In one case where a general strike against an ordinance concerning conciliation and arbitration was certainly one against the government's policy, the Committee considered that it seemed doubtful whether allegations relating to it could be dismissed at the outset on the ground that it was not in furtherance of a trade dispute, since the trade unions were in dispute with the government in its capacity as an important employer following the initiation of a measure dealing with industrial relations which, in the view of the trade unions, restricted the exercise of trade union rights.

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[8] See opinions of the CEACR Committee of Experts on the Application of Conventions and Recommendations in the official register of the ILO NAPLEX.

The Committee [on Freedom of Association] has stated on many occasions that strikes at the national level are legitimate in so far as they have economic and social objectives and not purely political ones; the prohibition of strikes could only be acceptable in the case of public servants exercising authority in the name of the State or of workers in essential services in the strict sense of the term (i.e. services whose interruption could endanger the life, personal safety or health of the whole or part of the population).

With regard to the majority vote required by law for the calling of a legal strike (two-thirds of the total number of members of the union or branch concerned), non-compliance with which might entail a penalty by the administrative authorities, including the dissolution of the union, the Committee recalled the conclusions of the Committee of Experts on the *Application of Conventions and Recommendations* that such legal provisions constitute an intervention by the public authorities in the activities of trade unions which is of such a nature as to restrict the rights of these organizations, contrary to Article 3 of Convention. No. 87.

The establishment of minimum services in the case of strike should only be possible in: (1) services the interruption of which would endanger the life, personal safety or health of the whole or part of the population (essential services in the strict sense of the term); (2) services which are not essential in the strict sense of the term but where the extent and duration of a strike might be such as to result in an acute national crisis endangering the normal living conditions of the population; and (3) in public services of fundamental importance (see related cases in France, Colombia, Greece, Venezuela and Romania).

It would be desirable if, in cases of industrial action which would have brought a service that is not essential in the strict sense of the term but a very important sector in the country in this case the oil and gas sector to a standstill, the concerned parties could reach an agreement on minimum services sufficient to address the concerns of the Government about the consequences of a full shutdown of oil and gas production, while preserving respect for the principles of the right to strike and the voluntary nature of collective bargaining. The Committee therefore encouraged the Government to examine the possibility of introducing a minimum service in that sector in the event of industrial action, the scope or duration of which may result in irreversible damages (see related cases in Norway).

II. *Ley de Bases* Act No. 27742/2024

As Act No. 27742 (Section 94) amended Section 242 of the Employment Contract Act (LCT), it now enables that - after verification (checking who participates in the strike action) and notice (addressed in a personalized way to those employees involved), striking workers may be terminated if they:

- affect non-strikers' right to work through acts of intimidation or threats.
- impair or obstruct access of people or goods to the company premises, whether in whole or in part.

In addition, if collective or concerted strike actions cause damage, the law authorizes strikers' direct employment termination after verification without advance notice:

- If they cause damage to persons, or property owned by the company or third parties located in the employer's premises such as facilities, goods, supplies or raw materials, tools, etc. or use tools and equipment inadequately.

By definition a mass strike is illegal when it has nothing to do with the concept of "strike" enshrined in Section 14 bis of the Argentine Constitution. The Mandatory Conciliation Process was created for the parties to negotiate in a context of social peace that may lead to an agreement. Today what we see is a series of actions with clearly political goals.

As a matter of fact, these actions are closely related to opposition groups contrary to the Government's strategy that is gradually producing positive results, which one way or another may stamp out Argentine decadence and bring the much-desired prosperity.

I. Strikes and Essential Services

Considering transit strikes like the one organized by the Transport Workers Union (UTA), public transportation should be considered essential services or at least services of transcendental importance because any disruption affects the life, health and safety of the population **(see Section 24 of Act No. 25877; Executive Order 70/2023). Strikes hold society hostage and cause suffering for the entire population, especially the working class.**

Undoubtedly, the National Congress is taking too long to address the regulations it should discuss according to the National Constitution. This is completely unjustifiable, and in practice means that congresspersons are breaching their duties as lawmakers. Strictly speaking, rights must be exercised in accordance with the rules that regulate their exercise (Section 14 Argentine Constitution) without altering them through regulatory exceptions (Section 28 Argentine Constitution).

No doubt transit strikes cause extraordinary damage to the entire working community, those who seek employment, those who carry out any professional activity, anyone who exercises their freedom in a democracy, and obviously jeopardize constitutional guarantees.

It also affects the transportation and care of sick or injured people, the supply of water and other essential products, the supply of fuel or gas, the delivery of medicine, students' school attendance and jeopardizes the right to education, the

safety of citizens, the administration of justice, consumers' rights, which should be guaranteed (Section 42 of the Argentine Constitution) and many others.

It also affects sports, recreation, tourism and services to third parties.

It flagrantly violates historical principles, such as Ulpian's Digest "*Honeste Vivere"* i.e. to live honestly,alongside *"Alterum Non Laedere"* not to injure another *and "Suum Cuique Tribuere"* to give each his due*.*

As to constitutional rights, it affects the right to work, and to engage in any lawful industry (Section 14 Argentine Constitution), the right to property (Section 17 Argentine Constitution), the right to enter and leave the country (Section 14 Argentine Constitution), and the damages and the right to compensation that these measures produce at all levels and require special treatment.

Mass strikes, particularly transit strikes, are unlawful because in the public transportation sector there are those who have legitimate grievances, but more than 50% of striking workers do not have a reason to join the job action because they are not reached by these collective claims. They are in the upper quartile earning high wages. There are also those who for different reasons do not agree with this form of protest.

Note that most claims are not directed at employers (passive subjects of the strike), but at the National Government challenging its subsidy policy and various internal dissident groups and sectors.

The same goes for the business sector, which is divided between those who support the strike, those who are indifferent, and those who passively sympathize with the union.

The ILO has always made a restrictive interpretation about the right to strike but never addressed it in any convention or recommendation. It provided an opinion only through the Committee of Experts and the Committee on Freedom of Association.

So in relation to essential services for the community, the right to strike may be subject to restrictions, including prohibitions, when it comes to public services in the strictest sense, which would ultimately lose all meaning if too broad a definition were adopted in the law (CLS 1985, paragraph 393; CE 1983 paragraph 214). The ILO Committee of Experts defined essential services as those "the interruption of which would endanger the life, personal safety or health of the whole or part of the population". This definition was established in 1983. (ILO, 1983b, paragraph 214). As for minimum services, they can be considered essential services (where striking is forbidden) or non-essential services (where striking is not forbidden).

The ILO supervisory bodies use an intermediate concept of services of "transcendental importance" (terminology of the Committee on Freedom of

Association) or "minimum services in public utility services" (terminology of the Committee of Experts), which are non-essential services where in the opinion of the ILO supervisory bodies striking cannot be forbidden and minimum service should be provided by the company or institution in question.

In other words, As mandated by the National Constitution, this job action must comply with the laws that regulate its exercise, but at this point both Houses of Congress are in default.

Wildcat strikes and the rules forbidding road blocking were already established in Section 242 (Employment Contract Act, LCT) by Ley de Bases punishing blockades, intentional actions affecting the right to work, and employers' right to terminate strikers without entitlement to severance pay if as a result of the strike action, they damage the property of the company or third parties.

Undoubtedly, like education, public transportation should also be considered essential services, with restrictions on the right to strike, so that citizens don't end up victims or hostages of unlawful job actions that do not adhere to constitutional rights.

II. Lost Wages During Strikes

By definition, strikes produce twofold damage: on the one hand, there is the loss of production of goods and services, and on the other, there is no pay for strikers during industrial action.

A General Strike is an unlawful form of protest, totally contrary to the constitutional right to strike, and produces severe damage, especially *because strikers and organizers do not get paid their wages as they do not work as a result of their unilateral decision to cease work altogether.*

The right to strike was enshrined in the National Constitution under Section 14 bis as a result of the reform brought about by the Liberating Revolution in 1957. Work stoppage automatically meant no pay as workers do not meet their duty to work under their employers' control.

As a matter of fact, based on the legal definition, employers pay wages only in return for workers' work.

Strictly speaking, the essence of any employment contract lies in the mutual obligations of the parties as workers work under their employers' control.

These concepts, which are indisputable under the law, scholars' opinions and precedents, have been distorted as a result of the often anomalous and extortive negotiations that companies went through after industrial actions. Sometimes companies accepted agreements for back pay provided workers worked and compensated for the time they were off the job. Sometimes they reached an agreement considering irrecoverable lost production. Sometimes the union was so

powerful and the damage was so great that the company was compelled to negotiate to put an end to the conflict.

The Courts have ruled that despite any inconsistencies, those workers who participate in strikes, and in particular general strikes, do not get paid as the decision to stop working is unilateral, in clear breach of their job duties.

In re "ATE v. Hospital Garrahan" (National Labor Court of Appeals, Panel II, July 15, 2013) the Court found that strikers should not get paid during the strike as they did not work.

The Supreme Court of Justice of Argentina in re "Buhler Erico v. Talleres Gale" (LT XI PAGE 253 August 5, 1963), clearly ratified its own precedents and those by the Labor Courts, and established that workers should not get paid during the strike because of the principle "no work, no pay".

The Courts' decisions state that striking workers should not get paid their wages or any voluntary compensation or benefits, including rewards and incentive plans for perfect attendance or productivity, and overtime or other regular additional payments.

In other cases, the Courts have ruled that it is not necessary to inform striking workers in advance about lost wages, as they shall not get paid if they do not work. Lost wages is not a disciplinary action, but the natural consequence of their work stoppage. (See "Avalo Martinez Norma on Amparo claim" Highest Court September 21, 1988 SAIJ).

The ILO never approved any convention or recommendation about strikes. The reports by the Committee of Experts show that there is no obligation to pay wages to striking workers. (See ILO Report by the Committee of Experts).

For the ILO Committee of Experts…Salary deductions for days of strike give rise to no objection from the point of view of freedom of association (see related cases in USA, Argentina, Peru, Brazil, Venezuela, Bolivia, Chile and Costa Rica).

In the case of general strikes, any absent worker who does not justify their absence shall be subject to lost wages without any notice or clarifying note in advance.

Naturally, any leave of absence for sickness, occupational hazards, maternity, or force majeure events are excused and analyzed with restricted criteria.

There is no mitigating factor for workers' absence if the Company provides shuttle services on the strike day for the performance of regular or exceptional contracted services.

In addition, striking workers may be subject to further disciplinary actions, including employment termination, especially after notice, for example, to provide essential services during industrial action, when failure to provide such services may endanger

the life, health and personal safety of the population (emergency rooms in hospitals and clinics, ambulances, coronary care units, intensive care units, maternity wards, surgical emergencies, etc).

After verifying workers' involvement in the industrial action and notifying them, the employer may terminate those striking workers who affect or hurt non-strikers' right to work or coerce them to join the strike through threats or intimidation (see Section 242 LCT as amended by Ley de Bases No. 27742) against their will.

Those who prevent people and/or goods from entering or leaving the company premises in whole or in part (regulations prohibiting blocking access) after verifying their involvement and notifying them may be terminated with fair cause and without severance pay.

Act No. 27742 (see Section 242 LCT) also provides for employment termination after verification but without notice, whether for direct participants involved in actions that may damage persons or company property or that of third parties at the company premises, affecting its facilities, goods, supplies, raw materials, tools or equipment, or those who may take tools or equipment without authorization.

The terminated workers shall not be entitled to severance pay. They shall be subject to criminal actions for the crimes and damages caused, and emotional distress and other consequences duly proven, which may involve workers, unions and union officers who may have encouraged or promoted these conducts.

Strictly speaking, a general strike is unlawful and unconstitutional, produces irreparable damage to the entire society, and in particular the companies that produce goods and services, all public and private services, especially affecting strikers' pay, with the unclear objective to introduce changes in the social, economic and strategic policy of the National Government with minimal chances of success.

III. Conclusions

In summary, we must conclude:

1. General or mass strikes are unlawful, and do not comply with the right to strike enshrined in Article 14 bis of the Argentine Constitution.
2. The Mandatory Conciliation Process under Act No. 14786 and similar regulations in the provinces, create solutions subject to special rules, the most important of which is that the situation returns to its prior state before the strike, ensuring social peace and dialogue during conciliation;
3. Strikes produce unmeasurable damage to the entire population, especially those who are not involved in the conflict. Therefore, it is imperative that essential services ensure their continuity; otherwise their disruption may affect the life, health and safety of the entire community;

4. Work stoppage by definition does not accrue wages and other additional payments because they are paid in exchange for services. Any participant of a strike - whether lawful or unlawful - is not entitled to wages.