

Dispatch Work in China: A Study from Case Records, Part I

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Abstract

This article employs all basic-level court cases adjudged in 2012 involving “labor disputes” over “dispatch work” 劳务派遣 (in the Supreme People’s Court’s large database of court judgments) to clarify the practical and theoretical implications of the new legal category of “dispatch work relationships” 劳务派遣关系, as opposed to the old-style “labor relationships” 劳动关系. The article examines also disputes between the new dispatch agencies and the workers they contract with to clarify how that dispatch-agency-to-workers-relationship is different both from the new “dispatch work relationship” and the old “labor relationship” between enterprises and their workers. These comparisons of the three different kinds of work relationships bring to light a black hole in labor law theory and practice, related to its construction of a severing of contracting from management and of the laborer’s “person” from the laborer’s “work.” The article concludes by placing dispatch work into the context of the globalized social and legal history of labor.

Keywords

“dispatch work relationship” versus “labor relationship,” “user of the work” versus “employer of the person,” dispatch-agency-to-workers relationship, contracting entity versus managing entity, black hole in labor law and theory

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“Dispatch work” was a new Chinese legal category introduced by the 2007 Labor Contract Law (implemented 2008). The core concept is that “dispatch work is generally temporary, supplementary, or substitute work,” which is sharply distinguished from regular, long-term labor. The law characterizes dispatch work as a “dispatch work relationship” 劳务派遣关系, with very different legal implications from a regular “labor relationship” 劳动关系. It also separates out the “user of the work” 用工单位 from the “employer of the person” 用人单位. By June 2011, according to the best data available to date, dispatch workers had come to number 37 million in enterprises (All-China Federation of Trade Unions, 2012). The commonly used figure by the media today is 60 million or more. Although more precise data need to await more systematic tracking of this new phenomenon, there can be no doubt that “dispatch work” is becoming more and more widely used by Chinese companies, for new employees as well as for changing the status of existing employees.

Much can be and has been written just on the basis of analysis of codified law. But the text of the law is in fact murky, confusing, and even self-contradictory; mere textual analyses will not be able to clarify either the practical or theoretical implications of the new law. What this article proposes to do is to examine closely how the law has actually been applied, and to demonstrate on that basis how labor laws and relations have changed in practice, in order to clarify both the nature of dispatch work and also its underlying theoretical precepts.

The empirical basis of the article is the Supreme People’s Court’s excellent database for court judgments. It includes more than 1.4 million civil cases dating back to year 2000, and is readily searchable by topic, issue, level of court, province/city, and year. A search in October 2016 under the topic dispatch work 劳务派遣 turned up 32,393 cases dating back to 2007. Under the key word “labor disputes” 劳动争议, the number came down to 6,267, then under “basic-level courts” 基层法院 down to 3,649 cases.

We need to note here that court cases represent but a small proportion of labor disputes involving dispatch work. The law provides for three avenues of labor dispute resolution: by mediation, by arbitration, and by lawsuit. Disputants may opt to skip mediation and proceed directly to arbitration, but no lawsuit may be filed until a dispute has already undergone arbitration (Labor Law, 1994: Article 79). The great majority of labor disputes are in fact resolved through arbitration by local labor dispute arbitration boards (of the Ministry of Human Resources and Social Security), not by the courts. Thus, court cases are merely the tip of the iceberg of dispatch work disputes.

The Supreme Court database shows that labor dispute lawsuits involving dispatch work in basic-level courts rose rapidly between 2007 and 2015: just 3 cases in year 2007, 6 in 2008, 13 in 2009, 10 in 2010, 22 in 2011, 59 in 2012, 248 in 2013, 1,255 in 2014, and 1,190 in 2015. The year I have selected

for focused analysis is 2012, with a total of 59 cases (of which two were duplicates). That year was the first of several years of sharp increases, and the relatively small number of cases permits substantive analyses of individual cases as well as some quantitative sense of the relative proportions of different types of cases. They tell about both the nature of the new dispatch work relationship and the reasons for the increasing incidence of such cases.

The 2012 cases can be broken into several main categories. First, those involving labor disputes between large state-owned enterprises (SOEs) or their subsidiaries and dispatch workers (both those newly hired through dispatch agencies and those who have been switched from regular laborer status to dispatch worker status), a total of 16 cases. China today, after its “grasp the big and let go of the small” 抓大放小 privatization of small- and medium-sized SOEs in the late 1990s and early 2000s, still has an estimated total of 120 large SOEs, each with a thousand-odd subsidiaries to make for a total of about 120,000 SOEs (that together account for 40% to 50% of non-agricultural GDP) (Szamosszegi and Kyle, 2011; cf. Huang, 2012: 594). Quite a number of the major well-known SOEs are involved in these cases. This group of cases tells about how enterprise-to-worker relations have been changed by placing them under an intermediating dispatch agency. It shows the practical implications of the new legal distinction between “user of the work” and “employer of the person,” and between the new “dispatch work relationship” and the old “labor relationship.”

The second group are cases between dispatch agencies and the workers they have contracted with, altogether 14 cases.¹ They tell about the new dispatch-agency-to-workers relationship. We look first at cases in which workers successfully asserted claims against the dispatch agencies, and then at cases that illustrate the multiple obstacles standing in the way of workers’ assertion of claims against dispatch agencies. These cases show us how the new dispatch agencies do have to bear some measure of legal obligations to their contracted workers, mainly for violations of contract rules, but also how difficult it is for workers to assert claims against the dispatch agencies.

The article then turns to cases that help illustrate and distinguish between dispatch work relations and the other important categories of work relationships still in common use. First, between a subcontracting firm and its laborers (23 cases), which turns out to have been treated by the courts as the same as any typical old-style labor relationship not intermediated by a dispatch agency. It serves to clarify further the nature of the old-style labor relationship. There is also a case involving a leasing entity and a worker who was adjudged to be part of a “leasing relationship” 租赁关系 and two cases involving employers and their agents, adjudged to be in an “agent relationship” 代理关系.² Those help to clarify further the practical and theoretical implications of the three

major relationships this article addresses: the new dispatch work relationship (between an enterprise and its workers), the new dispatch-agency-to-workers (contracted by it) relationship, and the older labor relationship (between an enterprise and its workers).

Particularly important, it will be seen, is how in the old-style labor relationship, the employer is both the contracting party and the managing entity. In the new dispatch work relationship, the contracting and managing entities are constructed to be severed from one another, to leave a vacuum, a gaping black hole of management practices that are not regulated by law, in theory, or in practice. These findings set the basis for the concluding section, which places dispatch work into a larger context of the globalized social-economic and legal history of labor in China.

State-Owned Enterprises, Dispatch Agencies, and Their Workers

Sixteen of the 57 cases studied involve the relationships between SOEs and their workers. All of them tell about how SOEs used the dispatch work category (by contracting with workers through the intermediary dispatch agencies) as a shield against workers' claims. The cases show how two legal provisions in the Labor Contract Law were most frequently called upon by the workers in their claims, because they provide for the most substantial compensation. One is the provision for financial compensation (severance pay) 经济补偿 in the event of unilateral termination of a worker: "financial compensation shall be paid according to the worker's length of service: of one month's salary for each year of service. . . . The total financial compensation shall not exceed a maximum term of 12 years" (Labor Contract Law, 2007: Article 47). The second also has to do with violation of contract rules: "if the employer has not, within the time frame of one month to a year after the laborer has begun work, signed a written contract with the laborer, it should pay the laborer double wages for every month worked without a contract" (Article 82). However, all of the plaintiff workers in our cases failed to prevail in their claims against the SOEs, because the SOEs had all anticipated such claims and had early on switched or placed the workers under a dispatch work arrangement.

China Eastern Airlines and Three Water and Power Maintenance Workers

The first group discussed here are those involving China Eastern Airlines' 东方航空 subsidiary Northwest Airline Company 西北航空公司 and three workers. Worker Zhou Hongli 周宏礼 (b. 1975) had worked with the

company from 2000 on, and belonged to its water and power maintenance crew. According to Zhou, he found himself having to be on call on Saturdays and Sundays, and was often worked overtime. He worked all those years without a formal contract (but would have by law been considered in a de facto labor relationship 事实劳动关系, protected by law, with the company). In 2005, however, the company had him sign a contract with a dispatch agency, the Qihang agency 启航公司. Zhou said he had little choice and no understanding of what it meant. But he was in fact switched by that new dispatch contract from the de facto labor relationship to a casual dispatch work relationship with the company, so that the company became legally merely the user of his work and not the employer of him as a person, in the legalese of the Labor Contract Law (Article 58), and therefore no longer responsible for him in terms of benefits, legal work hours and overtime pay, and so on. In July 2011, after Zhou had worked eleven years for the company, he was notified by the Qihang dispatch agency that his work contract was terminated (Case 1).

Zhou tried to appeal his termination, first by “petitioning” 申请 the local labor arbitration board as per required procedure, and then to court after his arbitration petition was rejected. He argued that he was in a de facto labor relationship with the company and that he should be protected by law as a regular laborer. On that basis, he sought severance compensation of one month’s pay for each year worked (up to twelve years) for unilateral termination, totaling 12,510 yuan, in accordance with Articles 46 and 47 of the Labor Contract Law. He claimed also overtime pay due him, and pay for weekends and holidays, amounting through his entire period of work to a total of more than 216,000 yuan.

The court found against him in a rather convoluted written judgment, but basically on the grounds that his de facto labor relationship with the Northwest Airline Company had ended automatically when he signed a dispatch work contract with the labor dispatch agency Qihang in 2005. His new contract with Qihang had in it the following sentence, which the court cited in support of its judgment: “If the employer of the person’s mode of management should be adjusted, I agree to follow the agreements of this contract to implement the termination of the contract.” And, as for the overtime he claimed, the court ruled that he had only his work diary to show as evidence, without authentication by the company, and “that is not sufficient to prove the fact of the existence of overtime work.”

Substantially the same happened with Hui Xuqing 惠绪庆 (b. 1959) who had begun work in 1999, and Cao Chenghui 曹成会 (no birth date given), in 2007 (Cases 2 and 3). The issue was the same: once signed on and contracted with the dispatch agency Qihang, their legal status changed to dispatch

workers, rather than regular laborers, and the provisions that applied to a regular labor relationship no longer applied to them and the original employing company.

The Northwest Airline subsidiary of China Eastern, it is clear, had acted deliberately well before the promulgation of the Labor Contract Law in 2007 by making the workers sign a contract with the dispatch agency Qihang already in 2005. Once the company had redefined the workers' status as dispatch workers, it became by law only the "user of the work, and not employer of the person" 只用工, 不用人. It could unilaterally terminate them without liability. It was also not bound by legal provisions with respect to overtime work and augmented pay for weekends and holidays. So the three workers, who had worked, respectively, eleven, twelve, and five years for the company, were in effect simply dismissed.

China National Petroleum Corporation and an Oil Drill Worker

A case involving the China National Petroleum Corporation 中国石油天然气集团公司 tells a similar story, though with a twist involving work injury. Shi Yonggang 石永刚 had been trained for one year at the technical school of China Petroleum itself in oil drilling, and then worked as an intern of the company for a year. In the intern period, he received a subsistence stipend of 300 yuan a month. Then he was assigned to the company's subsidiary in Gansu, the Changqing Oil Field Company 长庆油田分公司, specifically its Number Two Oil Refinery 采油二厂. On January 30, 2009, Shi accidentally got his hand caught in the equipment and lost four fingers (index to small finger) of his right hand. Shi had evidently received compensation (details not specified in the case record) for his injury, and his lawsuit did not seek compensation for that. What he wanted in the lawsuit was to establish his status as a regular employee of the company, so that he could receive severance pay compensation as well as two times his pay for the two years he was worked without a labor contract.

It turns out Shi had actually been contracted for work under a dispatch agency, the Hongtian agency 宏田劳务中介公司. Perhaps because Hongtian was an insubstantial firm that did not have the wherewithal to compensate Shi properly, or perhaps Shi and his lawyer simply believed that the actual employer and not the dispatch agency should be responsible, Shi's lawsuit named his actual employer, the Number Two Refinery, as the defendant. But it turns out that the Number Two Refinery had already been legally separated out into two companies, the original Number Two Refinery, and another, the Number 4 Project 第四项目部, to which Shi had been assigned to work through the dispatch agency. The local arbitration

board, and then the court, therefore held that the oil company Shi brought suit against was not the appropriate defendant party 不适格, that Shi needed to bring his complaint against the dispatch agency and the Number 4 Project instead (Case 4).

Shi then brought suit again, this time against the Number 4 Project, and named the dispatch agency Hongtian as the “third party” involved, with possible joint liability. But the Number Two Refinery had protected itself well, by setting up the Number 4 Project as something separate, and also by contracting for its workers entirely under the dispatch agency. And so Shi’s follow-up lawsuit was also rejected, on the grounds that he had only a dispatch work relationship with the company and “not a (regular) labor relationship” 不存在劳动关系. The court ruled, therefore, that the legal provisions about severance pay and contract violation did not apply (Case 5).

China Communications Construction Group and Four Tanker Drivers

Much the same story occurred with four tanker drivers who worked for the subsidiary of the large SOE China Communication Construction Group 中交一航 (a major builder and developer of harbors), the Number Two Engineering Company 第二工程有限公司 in Qingdao, Shandong. Jia Xiusheng 贾秀生 (b. 1979) had begun work in 2007, Zhang Yuchun 张玉春 (b. 1978) also in 2007, Wang Xin 王信 (b. 1979) in 2008, and Qiu Hongwei 邱洪维 (b. 1986) in 2009. All had been signed up under the Huimin 惠民 dispatch agency in year-by-year dispatch work contracts. All were unilaterally terminated in 2011 (Cases 6, 7, 8, 9).

All four drivers brought suit against the Number Two Engineering Company, seeking compensation/severance pay for being unilaterally terminated. All claimed that they had been worked more than 5 days a week and 8 hours a day, and therefore also sought overtime pay.

The court rejected all four claims on the grounds that the Number Two Company was only the “user of the work” entity, not the “employer of the person.” That was the crucial distinction drawn by the new Labor Contract Law between a mere “dispatch work relationship” and an actual “labor relationship.” Therefore, “labor relationship” laws did not apply. The court elaborated further by stating that the drivers had really been contracted for on a piece-work basis, “the more times they drive, the higher their pay,” and not as regular full-time employees. Therefore, overtime pay did not apply. Moreover, the court found, their overtime claims were denied by the Number Two Company, and the workers themselves could offer no acceptable proof of overtime work.

Bank of China and Two Long-time Drivers

The two cases involving the Bank of China 中国银行 also tell a similar story. Wang Zhigang 王志岗 (b. 1965) began working for the bank's Shandong branch 中国银行山东省分行 as a driver in 1993, and was assigned first to its subsidiary Zhongyuan Group 中苑集团 (in Qingdao) and worked there for two years, under one-year contracts. Thereafter, he was assigned successively to a host of related companies, mostly under one-year contracts, two of those explicitly under dispatch work contracts 劳务派遣合同, and the rest with "labor contracts" 劳动合同. On March 18, 2011, Wang's final employer, the Zhongfang Company 中房物业公司, terminated Wang, but then did not bother to provide him with the usual necessary paperwork for termination (proof of dissolution of contract, his work record, and so on), such that Wang (now 46 years old) could not in the interim take on another job or receive unemployment benefits.

What Wang sought to establish was that he in fact had a long-term regular labor relationship with the Bank of China, being assigned by it to numerous different companies, and that his real labor relationship was with the Bank of China and not with the companies he had been assigned to on a temporary basis. He claimed double pay for the period he was worked without a contract, more than 95,600 yuan, overtime pay of 119,164 yuan, and compensation of 100,000 yuan for his losses due to non-completion of the termination of contract paperwork.

The court ruled, however, that he did not have a labor relationship with the Bank of China, and that he had been properly contracted for throughout the years. The only contractual violation in evidence was that his last employer failed to complete the required paperwork for termination, thereby harming his ability to take on other employment or receive unemployment benefits. The court therefore ordered the final employer, the Zhongfang Company, to pay Wang compensation for his period of unemployment, from March 2011 until November 2012, a total of 18,600 yuan (computed at 80% of the local Qingdao average standard for awaiting-employment pay). That was for violation of contract rules. The court rejected all the rest of Wang's claims (Case 10).

The other case, involving driver Pu Lei 蒲磊 (b. 1974), parallels Wang's case closely. Pu had begun work in 1993 and had been assigned to a host of successive firms. He and the last employer, the same Zhongfang firm, agreed to his termination on June 30, 2011, but Zhongfang had failed to properly complete the termination paperwork. With Pu, the court found that his relationship with the Bank of China's subsidiary was throughout a dispatch work relationship, and that there was no basis for claiming a regular labor relationship. The only item the court granted, from Pu's long list of six claims, was for

losses sustained due to the last employer's failure to properly complete the paperwork for termination, for the period July 2011 to November 2012, a total of 15,528 yuan (Case 11).

And so both workers, who had worked for the Bank of China for nearly twenty years, found themselves dismissed and unemployed at middle age, each with just a modest compensation, and only because the company had egregiously disregarded rules governing standard paperwork procedures to be followed after termination of employment.

Shaanxi Auto Group and Four Peasant Workers

The next set of cases again tell a similar story of how the SOEs used dispatch agencies as an effective shield against workers' claims. They involve a provincial SOE, the Shaanxi Auto Group's 陕西汽车集团 subsidiary, the Huazhen Company 陕西华臻三产工贸有限责任公司 (华臻公司), an assembler and maker of autos and motorbikes and parts with 900 employees (Shaanxi Huazhen, 2016). Zhou Xiquan 周喜全 (b. 1965), explicitly identified as a peasant 农民, 47 years old at the time of the court judgment, worked for the company without contract from 2006 to 2011. In May 2010, he was made to sign a dispatch agreement 劳务派遣合同 with the Baoji dispatch agency 宝鸡伯乐人力资源有限公司. He was advised, he said, by one Li Chunjiang 李春江 of the company, that if he signed he would get all kinds of social insurance, and that if he did not, he would lose his job. Thus, he signed even though he was not even allowed to see the contract. The dispatch agency Baoji did make social insurance payments for him, but only for a few months. He was later unilaterally terminated, in July 2011.

Zhou had taken his case first to the local arbitration board and failed, and then brought suit to court for make-up payments of insurance for the five plus years worked, for double wages for two years for having him work without a contract, and compensation for unilateral termination, altogether about 40,000 yuan (Case 12).

The court found that he had indeed established a *de facto* labor relationship with Huazhen during the years 2006 to 2010, but that once he signed the contract with the dispatch work agency Baoji in 2010, his "*de facto* labor relationship with the company was automatically dissolved," making him a dispatch worker, because "one labor relationship is exclusive of another." Moreover, he had signed the new dispatch work contract in May 2010, and did not bring a complaint to the arbitration board until more than a year later, in November 2011, past the one-year time limit for filing arbitration petitions. Therefore, the court rejected his claims. And so this peasant worker found himself without a job at age 47, after working for the Huazhen

Company for more than five years as a full-time worker, and after having early on established himself by law as in a de facto labor relationship with his employer.

Three other cases followed the same outlines, all involving workers explicitly identified as peasants: Chen Jianjun 陈建军 (b. 1968), who worked from 2005; Zhu Jiangtao 朱江涛 (b. 1977), from 2007; and Li Ganggang 李刚刚 (b. 1980), from 2007. All had established a de facto labor relationship with Huazhen, but were then made to sign a dispatch work contract in May 2010. All were induced and pressured by the same Li Chunjiang of the company to sign the new dispatch work contract. All hoped they could base claims on having established legally a de facto labor relationship with Huazhen, but all were found to come under their new dispatch work status once they signed a contract with the dispatch agency. All their claims were rejected (Cases 13, 14, 15).

Yantai Public Transportation Group and a Bus Driver

Our last case example here involves another local level SOE, the Yantai City Public Transportation Group 烟台市公交集团 and a bus driver, Zhao Bin 赵斌. Zhao had been signed on by the dispatch agency Yongde 永德人力资源服务有限公司 to work for the Yantai City Public Transportation Group, from November 2008 to June 2011, but was then unilaterally terminated. Zhao brought his complaint, first to arbitration as required and then to court, to seek overtime payments for working Saturdays, Sundays, and public holidays, a total of 27,700 yuan, plus severance pay for unilateral termination of contract (Case 16).

The court found that his legal relationship was with the Yongde dispatch agency, not the Public Transportation Group, and that the latter had obtained permission earlier from the city to use workers on a flexible time schedule basis, and had signed a contract with Yongde for hiring such workers on its behalf. Hence there could be no question that Zhao was under a dispatch work arrangement and not a regular laborer relationship. The court therefore rejected his claims. Zhao, in effect, found himself up against not just the company, but also the local government and the court.

The Meanings of Dispatch Work and Dispatch Agencies

The main patterns of the sixteen SOE cases summarized above are clear enough: large SOEs, including some of China's largest, had early on switched some of their workers to dispatch work status under dispatch agencies, including the water and power maintenance workers of China Eastern, the oil

drill worker of China Petroleum, the tanker drivers for China Communications Construction Group, the chauffeurs of the Bank of China, peasant workers of the Shaanxi Auto Group, and a bus driver of Yantai Public Transportation. In so doing, the SOEs made themselves, by law, merely the “user of the work” and not the “employer of the person,” thereby shedding their legal obligations toward the workers. All of the workers’ claims for compensation for unilateral termination and for being worked without a contract were rejected by the courts on the basis of dispatch work law.

We need to note also that, while the workers involved were largely relatively low-level employees, they were by no means limited to just unskilled manual workers: they included trained workers with technical skills (such as the oil drill worker, who had attended the company’s own technical school for a year, and worked as a trainee for another year), and water and power maintenance-repair workers, tanker drivers, long-time chauffeurs, and a bus driver.

The term “dispatch work” 劳务派遣 had been used earlier to refer to workers assigned by the state to foreign families and entities in China (and hence involved a certain degree of national security concerns). Later, around the turn of the century, it was used to some degree to refer to agencies set up by the government to help disemployed 下岗 workers find alternative employment. With the 2007 Labor Contract Law, however, it came to be used to refer to “temporary, supplementary, or substitute” workers, placed under an informal “dispatch work relationship” rather than a formal “labor relationship” with their actual employers. As we have seen, the SOEs increasingly resorted to such dispatch work, not just for temporary workers but also for long-term workers. Indeed, dispatch work amounted to the newest and latest form of expansion of “informal employment”—that is, with little or no protection by law and few or no social insurance benefits, as well as unregulated times and conditions of work (Huang Zongzhi, 2013: 60; Huang Zongzhi, 2017; cf., Huang 2017; Huang 2013).

We need to note, finally, the new emphasis on contracts in terms of legal theory. The older Reform period Labor Law of 1994 had been organized mainly around the concept of protecting industrial workers from abusive treatment by their employers-managers: reasonable work hours and rest days and holidays, overtime pay, decent and safe conditions of work, protection against arbitrary dismissal, health and retirement benefits, requirements against use of child labor, and of female labor for heavy work, and so on. Contracts played a relatively minor role: the 1994 Labor Law gave just one chapter (out of 12) to requirements with respect to contracts (Labor Law of the People’s Republic of China, 1994). The new Labor Contract Law of 2007, however, as its name suggests, was organized mainly around the logic of

contracts, which is now driven through the entire law. The fundamental principle had become: labor relations would be governed by contracts, not the older concerns of protection of labor against capital. One part of that picture, of course, was the new dispatch work contract, which in effect placed the enterprise employer-manager outside the purview of the labor protection laws, making it now only the “user of the work, and not employer of the person,” without legal obligations to the workers.

In addition to the new dispatch work legal category, the well-known liberties that are taken with contracts in China, what many people dub “dictatorial contracts” 霸王合同 (in the signing of which the prospective employee is sometimes not even shown the contract, or else is given just hours or minutes of turnaround time to sign a contract, with a clearly implied message that it is non-negotiable—a practice that is very widespread in employer-employee contract-making in China in virtually all types of units), is also part of the cause for the phenomena occurring in the above cases. The theory is that contracts are voluntary agreements between two equal parties in a market relationship, but the reality is usually a gross imbalance in power between the employer and the prospective or continuing employee (more below). We have seen how the 2007 Labor Contract Law was in fact deliberately redefining the older enterprise-to-worker labor relationship for many employees into a new dispatch-agency-to-worker relationship.

Contractual Obligations of Dispatch Agencies

Since under the new contract logic, the entity that must bear legal obligations to the workers is not the original enterprise-employer, but rather the new contracting dispatch work agency, those obligations—limited though they be, as we will see—need to be studied carefully and their boundaries delineated clearly and concretely.

The law is ambiguous, perhaps deliberately so. On one hand, it provides that dispatch labor is “generally used for temporary, supplementary or substitute labor,” and provides that companies using dispatch work are in a “user of the work, not employer of the person” relationship with the worker, and that they do not bear legal obligations to their workers, as has been shown in the above case examples. On the other hand, the Labor Contract Law speaks also self-contradictorily (in the second article of the section dealing with dispatch work): “The dispatch entity is what this law terms the ‘employer of the laborer’ 用人单位. It should fulfill the obligations of an employer to the laborer” (Article 57). We want to ask: just what has that meant in actual legal practice? The answer to that question can only be given with the specific and concrete case examples to be discussed below.

In addition, work injury forms something of a special category. It is covered more by state administrative regulations that had been adopted in response to an epidemic of work injuries than by laws. Dispatch agencies, it will be seen, are held strictly liable in the event of work injury of the worker under contract to them.

To some readers, the surprise might be that, under the new Labor Contract Law, workers are in fact more likely to gain satisfaction by bringing claims against the dispatch agency than against the actual employer-manager company that has a dispatch work shield; the former needs to bear some responsibility toward the workers it contracts with; the latter need not. The key to asserting claims against a dispatch agency, as will be seen, is to demonstrate violations of contract rules. Contract logic is a sword with a two-sided blade: on one hand, it serves to guard the actual employer-manager enterprise from obligations to workers, as we have seen; on the other hand, it can also be used by workers against dispatch agencies for violations of contracting rules.

Dispatch Agencies May Not Disregard Contracting Rules

We begin with a case showing how a dispatch agency was held to account for blatant violations of contract rules. The Panzhihua City XX dispatch agency 攀枝花市XX公司 (the name is redacted in the record) sent eleven Sichuan workers to the petrochemical facility of the Chengdu XX Company in Huizhou city 惠州市 (大亚湾经济技术开发区), in Guangdong, to maintain, inspect, and repair the firm's petrochemical equipment. The workers arrived for work on November 17, 2010 (a few later in December) and worked until the following August, but still had not been given a contract for work. In July 2011, Panzhihua also stopped paying the workers' wages.

In August, the workers brought their complaint to the local labor arbitration board in Huizhou, for wages owed, for financial compensation for being worked without a contract, and for unlawful termination of contract. The local arbitration board found for the workers. That arbitration ruling, in turn, prompted the Panzhihua dispatch agency to bring suit against the workers to try to overturn the arbitration ruling. Panzhihua also named the actual employer, the Chengdu XX Company, as the third party involved, possibly also liable.

The court found that since the Chengdu Company had already legally paid the dispatch agency its fee according to the agreement between them, it was not responsible or liable for any further obligations; it was the Panzhihua dispatch agency as the "employer of the person" that was in a "labor relationship" with the workers and therefore must pay the penalties for failure to meet its contractual obligations to the eleven workers. Compensation for the

months when the laborers worked without a contract (at two times their monthly wage) came to a total of about 25,000 yuan per worker; for owed wages for the months of July and August, about 6,000 yuan per worker; and for compensation for unilateral termination of contract, about 3,700 yuan per worker (Case 17). The sum total for the eleven workers amounted to nearly 400,000 yuan.³ In this instance, the Labor Contract Law turned out to have some real import for the workers.

Dispatch Agencies May Not Terminate a Contract without Legal Cause

Once a “labor relationship” was established, albeit rather self-contradictorily between a dispatch agency and a worker, it did allow the worker to become eligible also for protection against unlawful dismissal or termination of contract, as has been shown in part by the above Panzhuhua example. A still more explicit example is driver Zhang Xucheng 张绪程, who had signed a labor contract 劳动合同 with the dispatch agency Ningbo Jie'ai Human Resources Company 宁波杰艾人力资源有限公司 in 2009 and was dispatched to work at the Shunheng Express Shipment Company in Wenzhou 温州顺衡速运有限公司. The contract was later renewed by the dispatch agency, effective for three years from August 19, 2011, to August 18, 2014. On December 15, 2011, however, the dispatch agency Jie'ai notified Zhang that his contract was being terminated because he had engaged in an altercation “involving bodily conflict” with a fellow worker, and that such behavior constituted grounds for his dismissal. The court found that, although “there was indeed a dispute involving bodily conflict,” the dispatch agency did not provide sufficient proof to show that Zhang had violated the provision of Article 39 of the Labor Contract Law: “serious violation of the firm’s regulations and requirements.” The court therefore upheld Zhang’s claim for compensation for arbitrary dismissal, at two times one month’s salary for each year of the total of 2.5 years he worked, a sum of 16,395 yuan. In this case, the Labor Contract Law also showed some regulatory teeth against a dispatch agency’s violation of a specific contractual agreement (Case 18).⁴

Dispatch Agencies Have Obligations for Work Injury

Another important area in which dispatch agencies bore legal responsibility to their contracted workers was for work injuries. Work injuries in China had reached epidemic proportions with the rise of informal employment of peasant workers, especially in construction and manufacturing. In 2014, the

number of work injuries that received formal classification with respect to degree of injury and incapacity 评定伤残等级人数 totaled a whopping 558,000, out of a total of 1.15 million reported injuries (Ministry of Human Resources and Social Security, 2015). In response to the mounting incidence of work injuries and widespread complaints and media coverage, the government had set up in 2003 a national Work Injury Insurance Fund 工伤保险基金 and instituted strict guidelines and procedures (revised in 2010, and again in 2016) with respect to the determination of the extent of work injury, involving ten graduated levels with ten being the lowest, and the degree of disability afterward, pegged to different scales of one-time compensation in terms of multiples of a worker's monthly wage. Those with the most severe levels 1 to 4 injuries (who would be unable to continue working) are to receive from the state's Work Injury Fund a one-time lump sum injury subsidy 伤残补助金 up to a maximum of 24 months' pay for level 1 injuries (and 48 to 60 months' wages for deaths), plus monthly disability subsidies 伤残津贴 from 90% down to 75% for the different levels. Those with levels 5 and 6 injuries are to receive one-time compensation of 16 months' and 14 months' pay, and employers are expected to arrange suitable work for them considering their partial disability. Those whose contracts have expired or are terminated by mutual agreement are to receive from the employer monthly disability subsidies of 70% and 60% of pay. And so on (Regulations on Work Injury Insurance, 2003). Under the state's administrative regulations (more than codified laws), work injury compensation and subsidies came to be rigorously enforced.

There are two cases in our group in which the dispatch agency was charged by the court with responsibility for providing injury subsidies and medical fees to workers contracted with them. Zhang Zhengcai 张正才 had been sent by the dispatch agency Chengda 巴中市诚达人力资源有限公司 to work at the Dajita Company (in Nanjing) 大吉塔制造有限公司, beginning February 14, 2011. He was injured at work (details not specified) on April 19, 2011, was hospitalized 21 days at a major hospital, and then another 77 days at a hospital near home, with medical expenses totaling more than 200,000 yuan. The court held the dispatch agency Chengda responsible as the employer of the person, specifying also that Dajita, as the user of the work, bore "joint responsibility." The court further ordered that Chengda give Zhang 10,000 yuan in wages during the disability period before the expiration of his contract, plus a one-time injury subsidy of 32,500 yuan, and a one-time "seeking-employment" disability subsidy of 45,444 yuan (Case 20).

In another case, Wu Dajin 鄢大金 was sent by the dispatch agency Haihua in Chengdu 成都海华 to work as a cook at the Sichuan Province Athletics Skills School 四川省运动技术学校, beginning on August 26, 2007. On

January 18, 2011, Wu was run over by a small truck on his way to work. His injury had been found to fall under the category “work injury,” and determined to be a Level 6 injury. Wu had received for the accident insurance payments totaling about 120,000 yuan to cover his medical expenses, and brought suit to court against both the dispatch agency and the school for the balance. The court found, first, that the school was not liable because it was not the “employer of the person,” the dispatch agency was. The injury had occurred outside the school, and the school had not violated any laws in its use of Wu’s work. The court therefore ordered the dispatch agency, Haihua, to pay the roughly 120,000 yuan balance in Wu’s medical expenses (Case 21).⁵

Obstacles to Workers’ Obtaining Satisfaction of Their Claims against Dispatch Agencies

Lest one hastily conclude from the above case examples that workers are securely protected by their contracts with the dispatch agencies, we need to look closely also at the multiple obstacles that stood in the way of workers’ asserting their claims against the dispatch agencies.

Social Insurance Issues Are Outside the Purview of the Courts

Social insurance disputes were generally considered outside the purview of the courts, and workers found it well-nigh impossible to assert claims for non-payment of fees for retirement and health benefits, among others. Wang Hongping 王红萍 had worked for the Baoji City (Shaanxi province) Zhongxin Communications Company 宝鸡市忠信通讯有限公司 since December 1, 2006, but had entered into a dispatch work contract with the dispatch agency Zixin 宝鸡市资信劳务派遣有限公司 from January 1, 2009 on. Wang petitioned the local arbitration board on June 29, 2011, asking her employer to make up for retirement benefits insurance that had not been paid for her between 2006 and 2008 and for compensation for unilateral termination of her contract. The arbitration board upheld her claim, but the Zhongxin Company brought suit to overturn the arbitration ruling, arguing that Wang, as a dispatch worker, did not have a labor relationship with itself, and hence was not eligible for retirement benefits or compensation for dissolving of her contract. Moreover, the company contended, Wang had not sought arbitration (for the 2008 benefits) until 2011, after the one-year time limit had passed (Case 23).

The court upheld the Zhongxin Company’s contentions that Wang’s relationship with Zhongxin was one of dispatch work and hence Zhongxin was not obligated to compensate her for terminating her contract. As for social

insurance payments, the court noted that “disputes over social insurance programs fall outside the purview of the courts.”⁶ Its position is consistent with the policy that had been in effect during the privatization of small- and medium-sized SOEs at the turn of the century: the government had simply ordered that all social insurance disputes be handled between the enterprises and the workers themselves, and would not be accepted by the courts. As was seen, the case between Lin Di and the Yuanwang shop (Case 19, Note 4 in the “Notes” section) above was adjudged the same way with respect to social insurance. In another case involving mainly other issues, the court ruled with regard to the item of dispute involving payments for retirement insurance: “as for the plaintiff’s claim for back payments for retirement insurance, that is not something within the purview of the courts, this court hence will not deal with it” (see Case 25, Note 7 in the “Notes” section).

Local Provisions against the National Labor Contract Law

The next case tells us that even if national law shows every intent of protecting workers in a certain way, local governments can, for the sake of “drawing in businesses and investments” and “developing the economy,” set national law aside with local laws and regulations. Xu Jinhan 许锦汉 was sent by the Bitu dispatch agency in Jiangmen city (Guangdong) 江门市蓬江区碧图贸易有限公司 to work at the Junyi Shop 君艺装饰商行 from June 29, 2009 on. He worked without a written contract and was terminated on May 11, 2012. He brought a complaint for compensation for unilateral termination, at one month’s pay per year worked, totaling 5,809 yuan, and for double pay for the uncontracted period of work, for 88,400 yuan. His first claim was upheld by the local labor arbitration board, but the second was rejected (for reasons unexplained). Xu therefore brought his claims to court.

The court followed what the arbitration board had done, approving the first claim and denying the second. On the second claim, it acknowledged the provision in the Labor Contract Law about a worker being worked without a contract after one month and within one year of beginning work, but then cited a local (Guangdong) regulation issued jointly by the provincial court and the provincial labor arbitration board 《广东省高级人民法院、广东省劳动人事争议仲裁委员会关于审理劳动人事争议若干问题的座谈会纪要》, Article 14, section 3, to the effect: “Where an employer has not signed a contract with an employee between one month after and up to one year after work begins, it shall be viewed as having contracted with the employee for an unfixed time period, and shall not have to pay double wages for the period worked” (Case 24).⁷

Time Limits in the Arbitration Requirement

The courts were very strict on the requirement that workers file their petitions to arbitration boards within the prescribed time limit of one year. Two cases in our group illustrate the difficulties involved for workers. In one, Sun Bingxiu 孙丙修 sued the dispatch agency, the Qingdao Jinyitong dispatch agency 青岛金颐通, for double pay during the period he had been worked without a written contract. Sun had begun work March 2006, and sought double pay compensation from July 2009 to May 2010. He had brought a complaint to the local arbitration board in September, 2011, but the board had refused to accept the case. Sun then brought suit. The court ruled simply that he had exceeded the time limit of one year for filing such a complaint, and rejected his claim (Case 26).

The second case shows that even if a worker managed to prevail in his claim, he could find his compensation greatly reduced by the one-year time limit. Gang Mouwen 刚某文 had begun work at the electronics company Xin X Si (深圳)新X斯电子有限公司 on December 26, 2009, arranged by a dispatch agency Jie X Da 捷X达人才服务有限公司. The dispatch agency signed a six-month trial period contract with him, until June 25, 2010. He stayed on afterward, working until March 15, 2012, but no new contract was made after the trial period.

The work was apparently very taxing. Gang stated that he was responsible for examining tiny electronic parts with his bare eyes, having to remain standing throughout. His vision was harmed during the period of work, and his legs swelled badly. He therefore went home to rest on March 25, 2012, with the dispatch agency's approval. Gang brought his case to the local arbitration board on March 28, 2012, and sought compensation from the actual employer, the Xin X Si electronics firm, for double pay for the months the firm worked him without a contract, and for financial compensation from the dispatch agency for unilateral contract termination. The arbitration board only approved part of his claims. Gang therefore brought his case to court.

The court upheld in principle the claim for double pay for being worked without a contract. However, in applying that law, the court also followed the standard requirement that, in addition to the requirement that all such claims must first be taken up by the local arbitration board, there was the one-year time limit for the filing of such complaints, which is also a time limit for the applicability of arbitration rulings—violations occurring more than one year before the filing of the arbitration complaint would not be considered. On that basis, the court ruled that Gang's complaint for compensation for double pay for time worked without a contract could only take effect from the date of one year before his filing of his arbitration petition, namely March 28, 2011.

Thus, Gang's work before March 28, 2011, for the 15-month period from the beginning of 2010 to March 2011, was to be excluded. Therefore, Gang could only receive double pay compensation for three months of working without a contract, from March 28 to June 25, 2011, for the amount not yet paid to him, which totaled just 8,575 yuan. (The court rejected the claim for compensation for contract termination, since the labor contract had been dissolved by mutual agreement.) Thus, even though Gang succeeded in asserting a contractual violation claim against the dispatch agency, because of the intricacies of time limitations, he was able to obtain satisfaction for only a fraction of his claims (Case 27).

Informal Agreements in Construction Work Are Not Recognized as Contracts

The construction industry, using mainly peasant workers, is accustomed to relying on personal contacts, middle persons, verbal agreements, and informal IOUs, as is typical of rural transactions, but those are not recognized by the formalistic courts as legal contracts. Zhang Huajun 张华军 and six other workers had agreed, verbally, with a middle person, Li Dongming 李冬明, to take on the plastering of the underground rooms of a development in Chengdu's Beverly International City 比华利国际城, which was being developed by the Nanxin Real Estate Development Company 四川南欣房地产开发有限公司. Nanxin had subcontracted the plastering project out to the Sichuan Fangyuan Company 方圆公司, which in turn had asked the dispatch agency Fude 富德劳务建筑有限公司 to arrange for the work. Fude relied on a middle person, Li Dongming (with no formal status in the agency), who reached a verbal agreement with Zhang and the others for them to undertake the work, which was done in the months between November 2009 and February 2010. At the conclusion of the work, middle person Li had signed an IOU note 欠条 to Zhang, for "20,000 yuan wages owed, 3,000 yuan paid, and 17,000 yuan still owed." When Zhang and the workers were not paid, they brought a complaint to the local arbitration board, which upheld their claim, ordering the Fude dispatch agency to pay them 17,000 yuan (Case 28).

Fude, however, brought the matter to court to overturn the arbitration, on the grounds that there was in fact no contract for a dispatch work relationship between itself and the workers, that the IOU was not sufficient to prove the existence of such a relationship, and that the arbitration ruling had been based on an inappropriate defendant.

The court verified that the developer Nanxin had indeed subcontracted with the Fangyuan Company, but that there was no legally acceptable proof

that Fangyuan had in turn contracted with either the dispatch agency Fude or with the workers. As for the individual Li Dongming, since he had no formal capacity, he was simply left out of the court's deliberations. The upshot was, the dispatch agency Fude's claims were upheld, and the arbitration ruling in favor of Zhang and the workers was overturned. Middle persons, verbal agreements, informal IOUs, and such simply had no legal status before a formalistic court that emphasized written contracts. And so Zhang Huajun and the six workers concerned ended up with no further recourse for payment for the work they had done.

Difficulties in Claiming "Equal Work, Equal Pay"

The Labor Contract Law provides (in Article 63) that the dispatch worker has the right to "equal work, equal pay" 同工同酬 with regular employees of "the entity using its work" 用工单位, but that has in practice been a difficult claim to assert because of the murkiness of the concept "equal work."

Guo Weidong 郭维东 was sent by the dispatch company Anhua (in Yantai city) 烟台安华人力资源顾问有限公司 to work in the Lubao Company 烟台鲁宝工贸有限责任公司, which produced and dealt mainly in steel piping. He worked there for two years, and brought suit for two claims. One, that other workers in the company doing his kind of work were paid 6,000 yuan per month, but he was paid only 1,500 yuan. He should be receiving equal pay for equal work. And two, that the dispatch agency had failed to do the proper paperwork after his contract was terminated, from February 2011 on, causing him to be unable to take on other employment for twelve months. The court rejected the first claim, but upheld the second. With regard to the first, the court wrote, with no apparent sense of irony: "equal work, equal pay is a basic principle of our nation's labor laws. However, equal work refers not just to the same kind of work, but also to equal labor ability, skill, and equal results and so on. Those issues are not within the capacity of the court to determine" (Case 29). Thus did the court declare in effect that portion of the text of the Labor Contract Law to be empty words that cannot be enforced in actual practice.

Difficulties in Claiming Overtime Pay

For workers under dispatch work relationships, overtime pay and weekend and holiday pay have turned out to be extremely difficult to claim. That is a problem not limited to just lower-level or unskilled workers. A doctor Li Hongning 李红宁 had contracted with a dispatch agency and was sent to the Nanjing Pukou Hospital 南京市浦口区中心医院 to work in the

emergency room, beginning July 8, 2011. Li was put on the following schedule: day one, on from 8 a.m. to 5 p.m., and days two and three, a 24-hour shift from 8 a.m. to 8 a.m. the following day. A group of three doctors and six drivers were organized into three successive shifts, without any breaks on weekends or holidays. Plaintiff Li pointed out that his work amounted to 9 hours on day one, and 12 hours each on days 2 and 3, on a recurring basis without any time off in between the three-day cycles. He resigned after a total of 352 days, and sued for overtime and holiday pay during that period which, based on his income of 3,500 yuan/month, worked out to a total of about 108,000 yuan. He named both the dispatch agency and the hospital as defendants, the former having paid him 1,800 yuan/month in wages, and the latter 1,700 yuan/month.

The two defendant parties countered that the nature of hospital emergency work is such that most of the time is spent waiting and not working. Those on-duty hours cannot be counted in conventional terms. Moreover, the hospital had already paid Dr. Li more than 18,000 yuan in overtime pay (how those sums were arrived at was not explained). The court upheld the defendants' arguments and ruled against Dr. Li (Case 30).

While it is true that emergency medicine often involves different schedules from regular 8-hour workdays, it is clearly exploitative to use a doctor for 352 days straight without any time off in between the three-day cycles. We do not know how the hospital and the dispatch agency counted up the 18,000 yuan they did pay for overtime and/or holiday pay, but that was certainly very far from the way Dr. Li counted his time.

The point here is perhaps more clearly illustrated by the SOEs' treatment of dispatch workers discussed earlier: the enterprises (or the hospital in the above case), as the "user of the work only, and not employer of the person," are effectively protected by the dispatch work shield from legal obligations toward workers with regard to work hours and overtime pay. As for the dispatch agency, as merely the contracting party and not the actual employer-manager, in theory and in fact it has no say over management of work schedules and overtime pay, and therefore logically also no obligation for those. This is a subject we will return to below.

Varieties of Work Relationships and Their Implications

We have seen above how SOEs used the new dispatch work provisions to shed legal obligations to their workers. We have also seen how dispatch agencies can be held liable to their workers to some degree, based mainly on contract logic, effective only when the dispatch agencies violate contracting

rules or specific and concrete contractual terms, but that there are multiple legal and procedural difficulties that workers must overcome before they can assert claims against dispatch agencies. We need here to clarify further just what the conceptual boundaries of the “dispatch work” relationship are, not only in practice but also in theory. To do so, we need to look more closely at just how the old-style labor relationship between companies and their workers is different from the new dispatch work relationship as well as the dispatch-agency-to-workers relationship, and also how leasing relationships and agent relationships are different from all of those. Such comparisons will help us delineate more precisely the boundaries and implications of dispatch work.

Labor Relationship

The largest group of cases (23 cases) in our total of 57 cases concerns a subcontracting company that turns out to have been treated by the courts and the law as being in an old-style labor relationship with its workers, like any other old-style enterprise without the benefit of the dispatch work shield. That company had in fact long treated its workers in accordance with old-style labor laws. As such, the cases are particularly helpful for illustrating the differences between the old-style enterprise-to-laborers relationship, the new-style dispatch work relationship when enterprises are shielded from workers by dispatch agencies, and, finally, the new dispatch-agency-to-workers contractual relationship.

The Lion Transport Workers' Company 狮子劳动运输公司 had subcontracted 承包 in 1997 with the SOE Chengdu Railway Bureau's 成都铁路局 subsidiary Chengdu Railway Transport Company (of the Nanhuochang area) (Chengdu Railway Transport Company, 2016), which operated that area's storage facilities and distribution and transport of goods. The agreement was termed a “subcontract” 承包协议书, by which Lion was to take on the loading and unloading of goods 委托装卸协议书 for Chengdu Railway. For that purpose, the Lion Company had hired 73 loading and unloading workers, including a cleaning woman. Many of the workers involved had begun work in the 1990s, long before the promulgation of the new dispatch work legislation in 2007. And the Lion Company had provided the workers with a range of social insurance, plus regular, steady work hours and days off and holidays, typical of any enterprise-employer of labor “in the old days.”

In 2010, however, the entire Nanhuochang storage-distribution area was torn down to make way for new urban development. The Chengdu Railway Transport Company of Nanhuochang shut down, and the Lion Company had to lay off its workers. The resulting dispute between Lion and the 73 workers came to be adjudged by the court as a group case, though with separate

judgments issued for each worker—23 of which were handed down in 2012 (Cases 31–53).

The workers had petitioned the local labor arbitration board for compensation from Lion, calling in particular upon the two newly specified (by the 2007 Labor Contract Law) provisions discussed above: double wages for the time (in the last two years) when the laborers were worked without a contract, and financial compensation for unilateral termination, amounting to one month's pay for each year worked, up to a maximum of 12 years. The total sum involved for all 73 workers was very large (more below) for a modest loading and unloading company like Lion. The arbitration board had upheld the workers' claims. The Lion Company then brought matters to court to try to overturn the ruling.

A representative case is that of Liu Shijun 刘世均 (Case 31), who had begun work for Lion in 1998. He had signed a "labor contract" 劳动合同 with the firm and worked until 2010. But Lion had let the contract lapse in the last two years (perhaps because it knew of the impending shutdown and redevelopment). Liu, like the other laborers, sought double pay for contractual lapse for two years and termination compensation.

From the perspective of the court, the key issue was what kind of work relationship Liu et al. were under. The Lion Company tried to argue that it was in reality acting as a dispatch agency for the SOE Chengdu Railway, and that Liu and others were in fact under the new law's dispatch work arrangement. It even tried as a last resort to set up a Xinguang 欣光 dispatch agency for the purpose, but that effort was not made until 2008, presumably because Lion, unlike Chengdu Railway, had not been fully aware of the implications of the new 2007 Labor Contract Law.

The court found in this case, as with all the other workers, that Liu was in a regular "labor relationship" with Lion, the subcontracting firm, not with Chengdu Railway. In support of its judgment, the court cited the host of subcontracting agreements that Chengdu Railway had early on concluded with Lion (from 1997 on). Therefore, the court ruled, there was no labor relationship between Chengdu and the workers, and Chengdu was not liable for the workers' claims, even though Lion tried to argue that Chengdu was at least partly responsible.

At the same time, the court ruled that Lion was not a labor dispatch agency, because it was not just the contracting party with the workers but also the managing party. As such, Lion was obligated by law to follow labor regulations that would apply to any regular enterprise (that hires laborers directly without an intermediating dispatch agency), including the obligation to not let work contracts lapse and to not unilaterally terminate workers. Lion's claim that the workers actually were hired through the dispatch agency

Xinguang was rejected by the court, since Lion was not able to provide contracts and documentation to prove that assertion. Xinguang was clearly just a belated last-ditch effort by Lion to avoid having to compensate the workers under labor protection laws.

Therefore, the court found, Articles 46–47 and 82 of the Labor Contract Law applied, as the workers claimed and as the arbitration board had ruled. Liu was therefore given, for termination compensation, a total of 9.5 months of salary (at 2,000 yuan per month), or 19,000 yuan, plus the unpaid portion of double pay for the 11-month period when he worked without a contract, 22,000 yuan, making for a total of 41,000 yuan. To judge by the other 22 cases in our group, the court ruled on all the others substantially the same way, and presumably was going to do the same for the remainder of the 72 workers. If we take an average compensation of about 40,000 yuan per worker, the total obligation for all 72 workers would come to nearly three million yuan.

As for the cleaning woman, Lin Bihua 林碧华, the principles governing her case were the same. She had worked for Lion since 1996, employed and treated in the same way as Liu and the other workers. The court ruled that she should be paid 12 months at her salary of 500 yuan per month for the 12 years she had worked, or 6,000 yuan, for compensation for unilateral termination, plus the unpaid portion of double her salary for the 11-month period when she was worked without a contract, or 5,500 yuan (Case 33).

The issues of overtime and holiday pay and of social insurance did not come up at all. Those were simply not mentioned in any of the workers' complaints, because Lion had evidently behaved entirely according to older regulations governing regular labor relations.

The key jurisprudential principle here, according to the court, was that Lion was not just the contracting party for the workers (in the manner of dispatch agencies) but also the actual employer-manager of those workers. That was the reason the court cited for adjudging that Lion was in an old-style enterprise's "labor relationship" with its workers, not that of an enterprise that had availed itself of the dispatch work escape clause against laborers' claims, nor like a dispatch agency that only contracted for, but did not actually manage, the workers.

Thus did Lion's earlier law-abiding behavior, plus its clumsiness in trying belatedly to use the dispatch work ploy, make it obligated to the workers for the compensations they sought, which ultimately caused the company's collapse.⁸ The injustice here, we might observe, consists not in the compensation paid to the workers, which was actually modest considering the fact that they had worked ten to twenty years for the company, but rather that the truly big and powerful SOE entity Chengdu Railway bore no responsibility at all for the workers.

Leasing Relationship

In addition to distinguishing old-style labor relationships from new dispatch work relationships as well as new dispatch-agency-to-workers relationships, we need also to distinguish all of those from leasing entities, whose workers are seen as part of the leasing relationship, as the following case shows.

The Hongyun Materials Company 宏运物资有限公司 in Hefei city, Anhui province, contracted with the Lihua Transport Company 利华交通运输有限公司 (of Feixi county 肥西县) on January 1, 2011, to transport dangerous materials for it with a semi-trailer tractor. A vehicle leasing agreement 车辆租赁协议 was signed between the two firms, setting the leasing cost at 120,000 yuan a year. The driver, Zhao Chuanguang 赵传广, was to be paid by the Hongyun Company, from part of the leasing expense agreed upon.

Zhao had petitioned on May 10, 2012, to the local labor dispute arbitration board that he was in fact an employee of Hongyun, because his wages were paid by Hongyun and because he had to have its permission to take time off. But the Hongyun Company never gave him a contract, Zhao said, and was therefore liable for the two times wages penalty for failing to contract with a laborer. The arbitration board had found for Zhao, convinced by the argument that because his wages were paid by the company and that he was under the company's control for holidays, he was in a labor relationship with the company (Case 54). The Hongyun Company then brought suit against Zhao to overturn the arbitration ruling.

The court determined that the actual owner of the truck was a certain Mr. Xi—to whom it was registered, that Xi had affiliated 挂靠 himself with the Lihua Company to lease through Lihua his truck to the Hongyun Company, and had asked Hongyun to pay Zhao in his stead from the leasing fee. Therefore, the court found, driver Zhao was actually an employee of Mr. Xi, and was not in a labor relationship with Hongyun, but was rather part of a leasing relationship 租赁关系 Mr. Xi had with Hongyun, through Lihua. Hence, there should be no obligation for Hongyun to pay Zhao double pay for working him without a contract. Thus did the court distinguish between a regular employer-worker labor relationship and an employer-worker relationship that was part of a leasing agreement.

Agent Relationship

The above work relationship needs to be further distinguished from the relationship between a company and its agents, to whom legal protections for a labor relationship are also deemed not to apply. Zhang Jun 张军 had been signed on to sell insurance policies for the China Life Insurance Company's

Yantai branch 中国人寿保险公司烟台分公司 from May of 2007 on, with a contract to act as a selling agent for the company 保险营销员保险代理合同. He reached the position of an assistant manager. In May 2009, he signed a contract with the dispatch agency Yantai Qiaomeng 烟台桥梦文化有限公司. In April 2010, he was notified that his work contract was terminated. He petitioned the local arbitration board, arguing that he was in fact in a labor relationship with the insurance firm, and should be compensated for being worked without a labor contract and for unilateral termination. His petition was rejected by the arbitration board, and he brought suit to court (Case 55).

The court found that his relationship with the insurance company was in fact that of an agent (for his employer) relationship 代理关系 and not that of a labor relationship. A labor relationship, the court explained, involves “a relationship of domination-subordination between the company and the worker” 支配与被支配的关系, whereas the agent relationship does not. Moreover, the court ruled, Zhang had contracted with the dispatch agency Qiaomeng for the period May 2009 through April 2010. Therefore, there was no basis for his claim of a labor relationship with the insurance company.⁹

The Black Hole in the Law

The 23 Lion Company cases help to clarify more fully the difference between the old-style labor relationship and the new dispatch work relationship. The dispatch agency, as the intermediary between the actual employer-manager enterprise and its workers, is merely the ostensible contracting entity, not the actual employer-manager. As such it does not manage the workers directly. Therefore, although it comes under some regulations about contract violations, such as those detailed above, it cannot really be held accountable for actual management practices, most especially with regard to work hours, overtime, weekends, and holidays, because it is not the actual employer-manager. As for the actual employer-manager enterprise, it has now been legally redefined as “employers of the work and not of the person,” and is therefore also not responsible for the multiple obligations of management toward workers required by law. Thus did the law allow the actual employer-manager enterprises to shield themselves behind the dispatch agencies, in effect freeing management of its legal obligations toward workers.

As for dispatch agencies, they are in theory obligated to their workers by contract. Yet, the core definition of dispatch work is that “It is generally used for temporary, supplementary, or substitute work” 劳务派遣一般在临时性、辅助性或者替代性的工作岗位上实施 (Article 66), thereby freeing the dispatch agencies almost completely from laws that protect regular, long-term workers. Where we see the principle of contract violations take on some genuine effect against dispatch agencies is mainly with the most egregious

violations of contracting rules or else very specific terms spelled out in the contract.

On the level of legal theory, the main problem here is the constructed severing of contracting from management, and by extension, also the laborer's person from his or her work. Since the dispatch agencies are only the contracting entity and not the managing entity, they cannot be held responsible for management practices involving work hours, overtime, weekends, and holidays. Yet, the actual manager-employer companies are also freed from obligations to the workers on those scores, because they are effectively shielded by the dispatch agency from any claims by workers. They have become only the user of the work, and not of the person. Thus does the new dispatch law leave actual management practices in a black hole that is not under the purview of either labor law or contract law. And that black hole is what in effect allows employer-managers to engage in illegal abuses, such as making their workers work overtime without pay, and/or with no weekly days of rest or holidays. The same applies to disregard of the principle of "equal work, equal pay," which the court can interpret to mean individual quality that can only be assessed by management, as we have seen.

As for social insurance benefits, they fall in a dark gray area in between. If the dispatch agencies should spell out in a contract specifics about social insurance benefits, they become liable to some degree for contract violation if they fail to provide those. But they can of course maneuver to avoid doing so, not least by leaving things unclear as to whether it would be they or the actual employer-manager that would pay. Given the tendency of the courts to consider social insurance disputes to be outside the purview of the courts, as shown in our case examples, workers under dispatch contracts cannot but have a hard time asserting claims for social insurance lapses.

We can now understand more fully how and why it is that the SOEs considered in the first part of this article could so egregiously abuse their dispatch workers in forcing them to do overtime work without compensation, and why and how the workers had so much difficulty asserting claims for such abuses. The SOEs involved, we have seen, simply denied that there was any overtime. The workers, on the other hand, could only provide things like their own work diaries as evidence, not the kind of proof authenticated by the employer or by employer documents that the courts required.

The Supreme People's Court had actually attempted to address the issue in its 2010 "Explanations, III," pointing out the difficulties for workers to prove overtime in court when the employer denies it, and urging that the courts grant workers greater flexibility on this issue. As Justice Du Wanhua 杜万华, head of the First Civil Court of the Supreme Court 最高法院民一庭庭长, explained to reporters on the promulgation of the Explanations (in passages that were appended to the Explanations and published together with them):

When laborers claim overtime pay . . . , in consideration of the real difficulties for them to provide proof, the courts should not be unreasonably strict in demanding proof, should appropriately lighten the burden of the responsibility of proof on the part of the laborer. . . . Work inspection tables, records of change of shifts, notices about overtime, or wage payment receipts, witness testimonies, and so on, should be accepted as evidence of overtime work. (Supreme Court, 2010)

Despite Justice Du's good intentions, however, it should be clear that a savvy employer knowingly exploiting its workers would find it only too easy to keep them from obtaining company records of their work, as our case examples have shown.

The same applies to the legal provision of "equal work, equal pay" for dispatch workers and regular employees of the same firm. If "equal work" is interpreted to mean not just the general category of the work, but also the quality and contribution of an individual worker's work, as was asserted by the court in our case example, then they become things that can only be determined by the management, not the dispatch agency. Yet management has come to be reclassified by dispatch work theory as just the "user of the work, and not of the person" and therefore not obligated to the workers at all, including the legal principle of "equal work, equal pay."

We are now in a position to understand more fully some of the details narrated in the first part of this article: how China Eastern Airlines' subsidiary, the Northwest Airline Company, could make its three water and power maintenance workers work overtime and on weekends and yet get their claims dismissed by the court; how the China Communications Construction Group's subsidiary Number Two Engineering Company could get its four tanker drivers' claims for overtime pay dismissed; and how the Yantai City Public Transportation Group could similarly get its bus driver's claims for overtime dismissed. So too with the hospital that used Dr. Li for 352 days straight without a break in his three-day cycles of work. We can also see how and why the Yantai steel pipe company could pay a dispatch worker just a quarter of the wage of its regular employees doing the same kind of work, without any possibility for that dispatch worker to assert a claim for "equal work, equal pay."

What Justice Du Wanhua does not mention in his elaborations on the Supreme Court's 2010 Explanations is this gaping hole in the theoretical formulations of the new Labor Contract Law: it adopts the dispatch work theory that constructs a separating out of the actual (managing) company from the contracting dispatch agency intermediary, thereby freeing the company from its legal obligations to the workers. Then, it tries to regulate dispatch agencies that do the contracting through the principle of contract enforcement. In that kind of formulation, the actual employer-manager is in fact not liable for

management abuses and the dispatch agency is similarly not liable because it is not the actual managing entity, only the contracting intermediary party. The result is the gaping hole that allows, in effect, unregulated management abuses. Thus have the legal protections of workers from management exploitation—the heart of modern labor legislation—been gutted from labor laws.

On the level of theory, that black hole is the source of the growing abuse of workers under dispatch work contracts, all surface protestations and attentions to other kinds of constraints and protections notwithstanding. The net import of the dispatch work formulation in the Labor Contract Law has been to free management to engage in the worst forms of abuses, especially when it comes to the most vulnerable among the workers. It has set aside, in effect, all the labor protections that had been put in place by China's Revolution, much of it similar to those established through the long-term contentions between labor and capital in the Western world. Until and unless that gaping theoretical gap is filled, there can be little hope in reversing the tide of growing management abuse of dispatch workers.

A possible corrective would be to make the use of contract theory in labor relations supplementary or additive to the old labor protections, not a replacement for them. Once protections against management abuses are set aside as they have been in the current contract-theory-based formulation of dispatch work, there can be little genuine redress against management abuses. What needs to be done is to reconfirm legal protections against management abuses of workers, whether dispatch workers or regular laborers, and whether in dispatch work relationships or regular labor relationships. Genuine labor unions that can engage in collective bargaining with management to equalize the grossly unequal power relations between them would of course also help greatly. The present conceptualization in the Labor Contract Law of contract as a relationship between equal parties in a market context is based on fiction and not reality. It is a fundamentally faulty theoretical premise.

The 2013 Amendments to the Labor Contract Law and the 2014 Temporary Regulations on Dispatch Work

At this point, we need to ask, how have the recent, post-2012 changes in labor law and regulations affected things? The Amended Labor Contract Law of 2012 (implemented on March 1, 2013), first of all, raised the registration capital requirement of dispatch agencies from a minimum of 500,000 yuan to 2,000,000 yuan (Labor Contract Law, 2012: Article 57). Although our cases above provide no direct illustration for what meaning such a change might have, the case involving the insubstantial Hongtian dispatch agency and the

oil drilling worker Shi Yonggang (Case 4), contrasted with the case involving the substantial Panzhihua dispatch agency and eleven workers (Case 17), suggests that the measure would likely have an effect. A firmer and more precise conclusion on just how raising the capital requirements for dispatch agencies might or might not change things needs to await studies of cases from years after the amendment has taken full effect.

Second, the amended law, after reiterating the original sentence “The dispatch worker has the right to equal work, equal pay with the workers of the ‘user of the work’ unit [i.e., the company to which the worker has been dispatched],” goes on to add the sentence, “The unit using the work 用工单位 should on the basis of the ‘equal work, equal pay’ principle use the method of equal distribution to remunerate the dispatch worker in the same way as a laborer of the company working in the same kind of post” 实行相同的劳动报酬分配办法 (Article 63). However, given that the dispatch agency has no authority over management practices, and that the managing entity has been largely freed of legal constraints over its management practices by the dispatch work escape clause, it is difficult to imagine just how such a principle could be implemented. The phrasing of “the method of equal distribution,” though obviously intended to be somehow clarifying, also seems rather murky and open to different interpretations. The amendment, moreover, does not address the problem posed in the case example above (involving Guo Weidong—Case 29) by the court’s interpretation of “equal work,” as “equal” in the sense of the skills and contribution of a particular individual worker, something that can really only be assessed by the management on an individual basis and not by the court. The actual implementation of this amendment, one fears, might be difficult.

Third, the amendment rewrites the earlier provision that “Dispatch work is generally applied to work posts that are temporary, supplementary, or substitutive” into “Employment by contract is the basic form of employment by our nation’s enterprises. Dispatch work is merely a supplementary form, and may only be used for temporary, supplementary, or substitutive work” (Article 66). In the unlikely event that the “may only be . . .” provision should turn into actual reality, instead of extensive use for long-term posts as shown in our case records, that would of course mean the effective containment of the tide of dispatch work. But one wonders, without fundamental change in the guiding principles of the labor contract law, could such a result really be attained? A firm conclusion must of course await detailed analyses of court cases of the coming years.

Finally, the amended law changed the fines specified for legal violations by dispatch agencies, from the earlier limit of “not less than 1,000 yuan nor more than 5,000 yuan per person” to “not less than the amount nor more than five times the amount of the illegal gain,” and, where no illegal gain is involved, then “a penalty of less than 50,000 yuan” (Article 92). Our cases above contain not one example of how penalties levied on dispatch agencies might have

impacted labor disputes over dispatch work. One would in any case need different kinds of evidence to assess how the threat of an enlarged penalty for legal violations might or might not alter what dispatch agencies do.

As for the Temporary Regulations on Dispatch Work issued by the Ministry of Human Resources and Social Security in 2013 (implemented on March 1, 2014), much of which is a reiteration or further explication of the amendments to the Labor Contract Law, the most important new requirement is that “the user of the work entities should strictly limit the number of their dispatch workers, such that dispatch workers not exceed 10 percent of their total workforce” (Ministry of Human Resources and Social Security, 2013: Article 4). As for enterprises that have already exceeded the limit of 10%, “they must adjust their employment plans, so that their proportion is lowered to the limit set by two years from the date of implementation of this regulation” (Article 28). These two provisions, should they actually be enforced, would of course constrain the spread of dispatch work, but, given the obvious policy intent to use dispatch work as an escape hatch to lighten the “burden” on enterprises, one must wonder how, realistically speaking, such a rule might actually get enforced effectively.

What we can be certain about at this moment is that the new amendments and regulations are both still very much in the vein of a shift from the older model of labor protection to the new model of contract. There is no consideration of the theoretical and practical “black hole” problem discussed above. Once “contracting” and “management” are contrived to be severed from one another, there is really little possibility of using contracts to control management abuse, since that power lies not with the contracting dispatch agency, but rather with the managing company, and that company has been effectively “freed” from legal obligations to workers by the dispatch agency escape clause. Our cases above have shown that management abuse of workers is the most prominent and serious problem, but nothing new has been said in the amendments or the regulations about this crucial problem.

Of course, we can also understand this “black hole” problem to be a consequence of two contradictory purposes in the recent labor legislation: one, the primary purpose, is to free enterprises from their “burden” of obligations to workers, as has been shown above; and the other is to protect workers against dispatch agencies through the logic of contract. The latter looks still to be an afterthought, rather than any genuine modification of the former.

Dispatch Work in Light of the Social-Economic and Legal History of Labor

We are now in a position to put dispatch work into the larger context of the social-economic and legal history of labor. In most Western countries, labor

legislation was born of the long-term contentions and accommodations between management and labor movements, which lie at the heart of much of labor history. In China, however, the provisions of modern Western labor legislation were put in place by the triumph of the revolutionary party-state. Still, there is much that is shared in common with the West, in terms of protections for child and female labor, work hours, wages, overtime and rest days and holiday pay, health and retirement benefits, protections against arbitrary dismissal, and so on. The establishment of those legal provisions was a high priority in the agenda of the Chinese Communist Party from its very inception. They became state policy and law through the triumph of the Revolution (Huang Zongzhi, 2013; cf. Huang, 2013).

In actual practice, despite the Chinese Communist Party's original theoretical formulation of the "laboring people" as "peasants and workers," including "hired agricultural workers, forest workers, seasonal workers, coolies, women servants," and so on (Labor Law of the Chinese Soviet Republic, 1933: Article 4), sharp distinctions came to be drawn between the cities and the countryside, such that rural workers were soon no longer included among "laborers," as they had been in the original Chinese Soviet Labor Law of 1933 (Huang Zongzhi, 2013; Huang, 2013). Given the reality of a wide gulf in incomes and standards of living between city and countryside, and the tremendous pressures on cities from rural immigration, there came by 1958 the institution of a sharp differentiation between peasants and urbanites in a two-tiered legal status system. Peasants were restricted to the registration of their mothers rather than their fathers, lest even more peasants flood the cities. It was under those urban-rural and worker-peasant differences that "peasant work" 民工 was widely used for infrastructural construction, water works construction and maintenance, transport, urban construction, and so on, often on an obligatory or semi-obligatory basis 义务工, and all on a different standard of remuneration and status from those of urban workers.

It was from that tradition that "informal employment" (i.e., with little or no protection by labor laws and few or no social security benefits such as those enjoyed by formal urban workers) grew explosively with China's rapid urban and industrial development in its Reform era, and the massive entrance of peasant workers 农民工 into urban employment, first in rural industries in towns (with wages paid in workpoints at first) and then in the cities. By 2010, the proportion of urban employees who were informal peasant workers had come to account for about three-quarters of all urban employed. (Just one-sixth of the 277 million peasant workers today enjoy the two crucial benefits of retirement pay and health insurance and may be considered formal workers.) (For up-to-date documentation and analysis, see Huang, 2017.) They work largely *outside* the purview of labor legislation and the courts. The "informal economy," which an earlier ILO study in 2002 showed to amount to half to three-quarters of all

non-agricultural, urban employees in the developing world, came to be true of China also in the new century (Huang, 2009).

As part of that gigantic process of “informalization” of urban employment, there came in the late 1990s and early 2000s also the massive privatization of small- and medium-scale SOEs, under the strategic policy of “grasp the big and let go of the small” 抓大放小. An estimated 40 to 50 million formal employees of SOEs were disemployed during those years, left to join the informal economy. That amounted to the second big wave of informalization in Chinese urban employment, in reality deformatization of SOE workers (Huang Zongzhi, 2013).

The dispatch work movement, begun with the implementation of the Labor Contract Law in 2008, has been the third wave of deformatization and informalization, this time involving first and foremost the 120 or so giant SOEs and their thousand-odd subsidiaries each. We have seen through the above case-record illustrations how the SOEs have sought to gain “flexibility in labor use” by deformatizing many of their workers, in processes not unlike what happened to small- and medium-sized SOEs more than a decade earlier, dubbed at that time “dumping their burden” 甩包袱 of obligations to their workers. We have also seen how dispatch work has been used not just for casual workers but also for long-term employees, and not just for new employees but also for old employees. Through it all, the new legal category and theory of “dispatch work” has been the key (Huang, 2017).

Today, we still have no firm figures for dispatch work. The best data are still just the fairly systematic National Labor Union’s tallying done in 2010 and 2011, based on a survey of 1,000 enterprises and branch labor unions, and 10,000 workers, which concluded that there were 37 million dispatch workers in enterprises in June 2011 (All-China Federation of Trade Unions, 2012). At the moment, so far as reliable data are concerned, we are in a situation regarding dispatch work that is similar to where we were before 2009 with respect to peasant workers, before the institution of systematic annual tracking by the State Statistical Bureau (based in 2015 on a sampling of 236,000 peasants in 31 provinces [and municipalities], 1,527 counties, and 8,906 villages—for a more detailed discussion, see Huang, 2017). Until a similar effort is launched for dispatch workers, we have to make do with rough guesstimates, much as we did back before 2009 with figures for peasant workers. But there can be no question of the explosive spread of dispatch work, for which the growing numbers of court cases involving dispatch work provide auxiliary evidence.

Through all this, there has been a crucial difference between China and the West in the nature of labor unions and collective bargaining. A cornerstone of labor legislation in the West has been the acknowledgment of gross imbalances in power between management and workers, seen as a relationship of domination

and subordination, and the consequent tendency for management to engage in abuses of workers. That forms the core of the logic of the legal provision of rights for labor to organize and engage in collective bargaining. In China, however, because labor legislation was instituted through the triumph of the Chinese Communist party-state, there have come the paradoxical practices of party-state organized and controlled labor unions and of inclusion of party-state cadres and officials as workers under labor protection laws. Add to that the further paradoxical coincidence of a Communist party-state's leadership of the turn to marketization, privatization, and even capitalist development, and we have the deeply ironic current situation in which the Communist party-state is aligned on the side of enterprises, especially SOEs, and in which labor unions are official entities, often serving management's and not workers' interests. Now, with the 2007 Labor Contract Law and its support for lightening the "burden" of enterprises in their obligations to workers, even labor legislation itself is coming largely to serve party-state and enterprise interests rather than workers' interests.

What this article tells about, then, are the broad outlines of the overall process and of the legal changes involved. The main import of the dispatch work formulation is the further informalization and deformalization of old and new urban employment. The actual employer-manager enterprises, we have seen, have come to be well shielded from legal obligations to their workers by the use of dispatch agencies as contracting intermediaries. As for the dispatch agencies, we have seen, there has been a modicum of protections for workers contracted with them, mainly having to do with protections against egregious violations of contracting rules and specific, concrete contractual provisions. But those protections do not extend to employee relations with management at the work site, the authority over which remains with management (the actual employer-manager) and not the dispatch agency, which is only responsible for the contracting with the worker. Absent effective checks from genuine labor unions and collective bargaining, that is the sphere in which the worst abuses have occurred, abuses that will likely continue to spread and expand, because today almost all large companies are being powerfully drawn to join the global competition to minimize labor costs and enlarge profit margins.

"Globalization" had begun with the multinational corporations of the developed economies "outsourcing" work to cheaper labor in the developing economies. The Apple company is paradigmatic. By engaging mainly in the high-profit ends of design and marketing, and subcontracting out (especially to Foxconn) the labor-intensive and low-profit intermediate stages of making components and assembling products like the iPhone, Apple has been able to attain high rates of net profit that are the envy of all capitalist companies, bringing sustained double digit returns to its shareholders and becoming the largest company (in terms of the market value of its outstanding shares) in the world. The success of firms like Apple, in turn, has put tremendous pressure

on other Fortune 500 companies to match those profit rates and returns to shareholders, for that is the nature of the game in the globalized capital markets. (For a fuller discussion, see Huang, 2017.)

That tide of globalization, in turn, has been accompanied by an undertow that has profoundly impacted the labor markets of the developed economies themselves. It is the social-economic root of the doctrine of “flexibilization” of labor use in neoliberal economic thought, ostensibly to enhance employment but most certainly to lower the cost of labor for enterprises competing to lower labor costs and increase their profit margins. That undertow of globalization is what has led to the rise of ever larger numbers of a “precarariat” without security of employment and with few or no benefits—mostly women, the young, minorities, and immigrants.¹⁰ They are the Western equivalent of China’s peasant workers, disemployed SOE workers, and now, dispatch workers, although the proportions they occupy are very much smaller than in China. Ironically, it is the Western theory of flexible labor use that has lain at the heart of China’s new dispatch work law.

As China gets ever more deeply drawn into the globalized capital market, as its leading SOEs compete to make the Fortune Global 500 list through initial public offerings (IPOs) in the New York Stock Exchange, they are drawn ever more into competition with Western capitalist corporations. The Chinese firms on the Fortune Global 500 list (now numbering a whopping 110, the great majority of them SOEs—“110 of nation’s firms on Fortune Global 500 list,” 2016) are there mainly because of the size of their total revenues (the standard used by *Fortune* magazine), which have little to do with what is even more important to capitalist companies, the price earnings ratio per share. But there can be no mistaking the mounting appeals and pressures of joining in the globalized competition to enlarge profit rates by lowering labor costs, almost like using foreign firms’ tricks against themselves, and the more so because of the rising costs of Chinese labor. That, perhaps, is the true source of the rise of dispatch work. In law, the now unmistakable trend is toward the legalization of informal employment of peasant workers, disemployed SOE workers, and dispatch workers. That is why the older labor protection model has been overturned in favor of the new contract model. That is what makes us ask: can that mounting tide really be checked? How?

Appendix

Cases Cited

The cases below come from the website China Judgements Online 中国裁判文书网, <http://wenshu.court.gov.cn/>, entering first “dispatch labor” 劳务派遣,

then “labor disputes” 劳动争议, then “basic-level courts” 基层法院, then year 2012. Cases are listed by their titles, numbered from 1 to 57, in the order they are discussed in the article. The dates are the day the judgments were rendered 裁判日期.

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56. 周莲霞与马迪先服饰（香港）有限公司杭州代表处、杭州市对外经济贸易服务有限公司劳动争议一审民事判决书。2012.11.25
57. 付彦诉吉林市泰和劳务派遣有限公司劳动争议一案民事裁定书。2012.5.15

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Notes

1. The Chinese term for dispatch agencies is *laowupaiqian gongsi* 劳务派遣公司. The term *gongsi* 公司 is applied to enterprises, both state-owned enterprises and private companies, as well as (dispatch) agencies. I use in this article “agencies” because it captures more precisely the actual meaning than the terms “dispatch companies” or “firms.”
2. The last case, no. 57, concerned merely a matter of a case being brought to a court that did not have proper jurisdiction.
3. Panzhihua, it turns out, was a sizable entity with substantial means. It had a close relationship with Panzhihua city’s petrochemical firm, an SOE. Panzhihua, apparently, was able to meet the required financial compensations for the workers without going under (Panzhihua, 2016).
4. In another, rather exceptional case, a dispatch agency contracted with a worker Lin Di 林娣 in elaborate detail, tantamount to a regular employer-manager labor relationship. She had signed on with the dispatch agency 文博 and was sent to work at a shop under the Yuanwang Company 远望 in Hangzhou. Uncharacteristically, the dispatch agency’s contract spelled out in unusual detail not only the wage Lin was to receive but also specific percentages of commissions

for products sold—5% for sundry cleaning products and 3% for oral protection products. The contract also spelled out work hours down to details about rest days and so on. In addition, Lin's wages were to be paid by the dispatch agency; the commissions were to be figured by the store, but also to be paid by the dispatch agency. And the dispatch agency was also to provide and pay for social insurance (Case 19). Lin Di had petitioned the local arbitration board for unpaid overtime wages and unpaid commissions, totaling about 2,000 yuan over a period of two years of work. Her petition had been upheld. The Yuanwang shop then filed a lawsuit to overturn the arbitration ruling. The court found, first, that the Yuanwang Company's shop was not responsible for Lin's claims, but that the Wenbo dispatch agency was, due to its contractual agreement with the worker. It ordered Wenbo to pay the overtime wages and commissions owed. (The court, however, rejected Lin's claim for back payments of social insurance at a higher level, on the grounds that "disputes over social insurance payments fall outside the purview of the court in labor disputes.")

5. In a third related case, Liang Mingsheng 梁明声 worked as a security guard 保安 and sales person for the defendant Huihuang Real Estate Development Company (in Guangxi) 广西辉煌房地产咨询服务有限公司, responsible for the night shift from 8 p.m. to 8 a.m., beginning September 30, 2009. On March 26, 2011, Liang died suddenly at 11 p.m. while on duty. An arbitration ruling had found against the argument that Wang was in a labor relationship with the real estate company at the time of his death. His mother and widow, plus two other relatives, brought suit to establish that he was in a labor relationship with the company when he died. The court accepted as proof that he was an employee of the firm on the basis of the records of the wage payments into his account with the Bank of China's local branch, certified by the official seal of the company, along with proof from the emergency clinic of his time of death. On that basis, the court overturned the earlier arbitration ruling, and confirmed that Liang was in a labor relationship with the firm at the time of his death (Case 22).
6. The court cited Article 1 of the Supreme Court's "Explanation Concerning Certain Problems in Applying Laws to Labor Disputes, III" as part of its justification. On examination, however, we find that those Explanations issued in 2010 actually provided for the opposite, in Article 1: "the courts should hear such complaints" 人民法院应予受理 (Supreme Court, 2010). There is no use in speculating here about what might have caused this discrepancy between the text of the Explanations and the judges' interpretation of it. Regardless, in the three cases cited above, the local judges were all unequivocal in their posture toward social insurance disputes.
7. But even within Guangdong province, there could be different interpretations. Hu X 胡某 worked as a sales clerk for the Shenzhen City X Electronics Company 深圳市X电科技有限公司 from May 23, 2011 on, but was dismissed on October 23 for unsatisfactory (sales) performance. The company claimed that it had hired Hu under a dispatch work arrangement. Hu petitioned the local arbitration board for unpaid wages and commissions totaling more than 1,700 yuan, and for double pay for the months beyond one month that he was worked without a contract,

for 6,800 yuan. The board approved the first claim, but denied the second (reasons not explained). Hu therefore brought the case to court. The court found that Hu was in fact under a *de facto* labor relationship with the electronics company, since the company had not been properly registered as a dispatch agency. The court therefore upheld both Hu's first and second claims, and granted an additional 4,000 yuan in legal fees (Case 25).

8. A web search in October 2016 under 狮子劳动运输公司 showed that the firm described itself on its website as "no longer operating normally" 非正常状态. And a search under the name of the Chengdu Company used in the court records, 成都铁路国通物流有限责任公司, turns up what is now an express delivery firm cum "map bar" entity, different from the old firm. The old firm, it seems, might have actually been named the 成都铁路国运物流公司成都南货场, which ended with the tearing down and redevelopment of the Nanhuochang goods storage and redistribution area.
9. In another case, Zhou Lianxia 周莲霞 had worked for the Hong Kong company Marc de Champeaux 马迪先服饰有限公司 in Hangzhou beginning March 8, 2010. She received two bonuses over and above her salary (of 5,500 per month) totaling 15,500 yuan in the first year, but received nothing in the second. She had petitioned the local arbitration board for the unpaid bonus, but was denied. She then brought suit. The court found, however, that her contract with the firm had not specified any fixed amount of bonus, and therefore ruled against her claim (Case 56). (Case 57, the last case in our group of cases, concerned only the court's ruling that the plaintiff should bring the complaint to another district court, and therefore is not discussed in the text.)
10. On the concept and content of a "precariat," see Standing, 2011. For a fuller elaboration of "the undertow of globalization," see Huang, 2017.

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