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Charles E. Hopfi

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THE AGENCY SHOP QUESTION

Charles E. Hopst†

BACKGROUND OF THE AGENCY SHOP

In order to recognize adequately the services of the Union as the exclusive bargaining agent of the employees in said unit, for the convenience of all concerned and to make this agreement secure, the Company upon the written request of the bargaining agent, namely, the Union, will collect from each of such employees such sum as may be specified by the Union for this purpose not in excess of \$ per employee per month¹

This quotation illustrates an agency shop clause. First appearing in 1940 when it was inserted in a labor contract,² it then went relatively unnoticed until 1946 when it appeared in an arbitration case in Canada.³ Canadian Justice I. C. Rand ruled against a demand for a closed shop, but permitted a requirement that all employees within the bargaining unit pay a certain fee to the union regardless of whether or not they were members of the union. This was an early manifestation of the idea that nonunion employees could be required to pay a union for representing them. Since 1946, usage of the agency shop clause has increased greatly and it has become a primary issue in the controversy over compulsory unionism.

The agency shop is one of several forms of union security.⁴ Security, which has slowly become one of the issues over which unions are most

† B.S. 1957, N.Y.U.; LL.B. 1960, N.Y.U.; LL.M. 1961, N.Y.U. Formerly Attorney, Federal Trade Comm'n; Counsel & Ass't Sec. of General Time Corp. Member of the New York Bar.

¹ Contract Between P. Lorillard Co. and Tobacco Workers Int'l Union (AFL) (1940).

² *Ibid.*

³ *Ford Motor Co. v. UAW*, 1 Lab. Arb. 439 (1946); see Stark, "Union Security and Its Implications," *Annals* 65-66 (Nov. 1946).

⁴ The types of union security, from strongest to weakest, are as follows:

(1) Closed shop—requires union membership at the time of hiring as a condition of employment for the duration of the contract.

(2) Union shop—requires union membership after hiring as a condition of employment for the duration of the contract.

(3) Preferential shop—requires the employer to give preference in hiring to union members.

(4) Agency shop—requires, as a condition of employment for the duration of the contract, that a worker pay a fixed sum each month to defray expenses of the union, whether or not he is a member of the union.

(5) Maintenance of membership—requires, as a condition of employment for the duration of the contract, union membership of (a) those who are members of the union on a certain day and of (b) those who subsequently join the union.

(6) Maintenance of dues—requires that a union member's dues be checked off during term of contract as a condition of employment. If he withdraws or is expelled from the union, check-off continues but he cannot be discharged for loss of membership.

(7) Check-off—requires the employer to deduct union dues from union members' wages for the benefit of the union.

(8) Harmony clause—employer agrees to encourage union membership without making union membership a condition of employment.

Union Cont. Rep. ¶ 53121 (1961).

concerned,⁵ exists in various degrees. Although the unions want the strongest kind of security, they will often settle for much less. There is no compromise, however, when it comes to the right to bargain for security; this, the unions feel, is a common-law right which must be jealously guarded.⁶

Prior to 1935, there were no limitations on the right to bargain for union security. The National Labor Relations Act of 1935⁷ restricted the unions with which employers could enter into contracts requiring compulsory membership to those which were not company dominated and which represented a majority of the employees in an appropriate unit. Section 7 of the Wagner Act guaranteed that employees would "have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." Employers and qualified unions still had freedom to select any form of union security upon which they agreed.

In 1947 Congress amended section 7 of the Wagner Act by the Labor Management Relations Act,⁸ which guaranteed the right of employees to refrain from any or all such union activities. If an employee refrained from union activity, the union's security would be endangered. To afford the unions some protection union shops and maintenance of membership agreements were authorized in section 8(a)(3) of this new legislation. Since employees and employers were not always willing to give the unions maintenance of membership or union shop agreements, the unions sought still other arrangements which would be more palatable yet would provide the type of security they wanted. Such arrangements would not only have to be acceptable to both the employees and the employers, but also would have to be legal. The only real alternate arrangement was the agency shop. As it began to be used more frequently, questions arose concerning its legality and its justification.

The rationale behind the agency shop was obvious. Although the employee could refrain from any and all union activities, the bargaining agent was required to represent him without charge⁹ and "without hostile discrimination, fairly, impartially, and in good faith."¹⁰ Achiev-

⁵ "Another Year of Hard Bargaining," *Business Week*, Dec. 29, 1962, p. 47.

⁶ *Matter of Public Serv. Co.*, 89 N.L.R.B. 418 (1950).

⁷ National Labor Relations Act (Wagner Act) § 8(3), 49 Stat. 449 (1935), 29 U.S.C. § 158(3) (1958) [hereinafter cited as Wagner Act].

⁸ Labor Management Relations Act (Taft-Hartley Act) § 7, 61 Stat. 136 (1947), 29 U.S.C. § 151 (1958) [hereinafter cited as Taft-Hartley Act].

⁹ *Hughes Tool Co. v. NLRB*, 147 F.2d 69 (5th Cir. 1945); *Hughes Tool Co.*, 104 N.L.R.B. 318 (1953).

¹⁰ *Wallace Corp. v. NLRB*, 323 U.S. 248 (1944); *Steele v. Louisville & N.R.R.*, 323 U.S. 192, 204 (1944).

ing and maintaining benefits for its members cost money, and the unions felt that if these same benefits were to be enjoyed by nonmembers, the members were being penalized. The unions considered these nonmembers to be free-riders and felt they should be forced to pay for the union's representation.¹¹ Although the nonmembers did not seek to have the union represent them, and may be personally strongly opposed to the union,¹² the fact remains that they are benefited by the union's activities along with the members.

If contributions from the nonmembers are required, however, the payment should be only for those functions which benefit the nonmember. Unions use fees and dues for a variety of purposes. Since the nonmember only gets the services of a bargaining agent he should not be forced to pay for union institutional expenses, such as promoting legislation or favorable political candidates, financing litigation or low cost housing, and providing scholarships and charity to needy members. Since the nonmember is only paying for the collective bargaining function, he should naturally only pay a portion of the fees and dues of the member. Just as multilevel businesses must break down their various cost factors and allocate them to numerous divisions and subsidiaries, so must unions break down their costs so that members and nonmembers can pay their fair shares. Although the accounting involved might be a little burdensome, it is not an impossible task. This is especially true if it provides a solution acceptable to the two contending parties—the unions, who feel they should receive payment for representing nonmembers, and the nonmembers, who feel that such payment should not be required.¹³

The number of employees affected by this type of union security is demonstrated by the following listing of some agency shop agreements. In industry units, the Steel Workers have 164 agency shop agreements covering approximately 111,000 employees, and the Rubber Workers have fourteen agency shop agreements, covering 7,900 employees.¹⁴ In company units, unions have agency shop contracts with American Cable and Radio, covering 1,350 employees; American Seating, covering 1,200 employees; Campbell Soup, covering 3,450 employees; Corn Products Refining, covering 4,400 employees; Hershey Chocolate, covering 3,000 employees; Kelly Springfield, covering 1,750 employees; Ohio Edison,

¹¹ Hearings Before the Select Committee of the Senate on Improper Activities in the Labor or Management Field, 85th Cong., 2d Sess. 10103 (1958) (remarks of Walter Reuther).

¹² It may be noted that dissenting nonmembers are effectively precluded from doing their own negotiation. *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

¹³ In Switzerland under an agency shop arrangement, nonmembers pay only approximate costs of collective bargaining, normally around 50%. Duda, "The Swiss System of Union Security," 10 *Lab. L.J.* 165 (1959).

¹⁴ "Supreme Court asked to Review Agency-Shop Case," 51 *Lab. Rel. Rep.* 35 (1962).

covering 1,550 employees; Pacific Maritime Association, covering 15,000 employees; Utah Power and Light, covering 1,350 employees; Western Union Telegraph, covering 30,000 employees; and Wisconsin Motor Company, covering 1,450 employees.¹⁵

With the emergence of the agency shop, the question has arisen whether the agency shop is a form of compulsory unionism and an allowable form of union security. Of the twenty states presently having right-to-work provisions in their laws, twelve specifically ban the agency shop,¹⁶ three have court rulings that declare the provision illegal,¹⁷ four have rulings declaring the provision illegal or nonenforceable,¹⁸ and one state declares the agency shop clause legal.¹⁹

The popularity of the agency shop is demonstrated by the fact that only recently a difficult labor controversy was resolved by the negotiation of an agency shop agreement.²⁰ The National Labor Relations Board cited this agreement as illustrative of the practicality of the agency shop as a solution to an impasse between an employer and a union over union security.²¹ Undoubtedly, demands will be pressed for agency shop agreements with the aerospace companies in southern California, where recent bids for union shop agreements were turned down by the employees.²²

¹⁵ *Ibid.* See generally Hammond & Nix, "Union-Status Provisions in Collective Agreements, 1952," 76 Monthly Labor Rev. 383 (1953); Theodore, "Union Security Provisions in Major Union Contracts, 1958-59," 82 Monthly Labor Rev. 1348 (1959); Theodore, "Union-Security Provisions in Agreements, 1954," 78 Monthly Labor Rev. 649 (1955).

¹⁶ Ala. Code tit. 26, § 375(5) (1958); Ark. Stat. Ann. § 81-202 (1960); Ga. Code Ann. § 54-903 (1961); Iowa Code Ann. § 736A.4 (1946); Miss. Code Ann. § 6984.5 (Supp. 1960); Neb. Rev. Stat. § 48-217 (Supp. 1961); N.C. Gen. Stat. § 40-46.2 (Supp. 1960); Tenn. Code Ann. § 50-210 (1955); Utah Code Ann. § 34-16-10 (Supp. 1961); Va. Code Ann. § 40-72 (1953); Wyo. Stat. Ann. § 27-245.5 (Supp. 1963).

¹⁷ *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (Fla. 1962), *aff'd*, 373 U.S. 746 (1963); *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

¹⁸ Nev. Att'y Gen., Opinion No. 407 (Sept. 22, 1958); S.D. Att'y Gen., Opinion (Sept. 3, 1958); Tex. Att'y Gen., Opinion No. WW1018 (March 14, 1961). These rulings hold the agency shop to be illegal. N.D. Att'y Gen., Opinion (Jan. 13, 1956) (declaring that although the agency shop might be legal, it is nonenforceable); see N.D. Att'y Gen., Opinion No. 135 (Aug. 24, 1959).

¹⁹ *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

²⁰ This controversy was between the Machinists Union and Douglas Aircraft Company. In another controversy involving Boeing Company and the union, new workers did not have to join the union but had to notify management and the union within 15 days after commencing work; otherwise they had to join by the twentieth day.

²¹ "Supreme Court Asked to Review Agency-Shop Case," 51 Lab. Rel. Rep. 35 (1962).

²² On this issue, the unions expected at least 80% of the voters to support the union shop instead of the necessary two-thirds. The voting showed, however, that not even two-thirds of the employees in the following companies wanted union shops.

Company	Percent of employees voting for union shop
North American Aviation Inc.	59%
Convair Div., General Dynamics Corp.	54%
Ryan Aeronautical Co.	60%

Another question about the agency shop was raised by section 8(a)(3) of the Taft-Hartley Act, which outlawed the closed shop, but allowed the union shop.²³ The act provided, in section 14(b), that nothing in the act permitting the union shop should be construed as authorizing such agreements where they were prohibited by state law. This section led to controversy as to whether the states should ban the union shop²⁴ and, if they did ban it by passing a right-to-work law, whether the agency shop would be banned by inference or whether it would have to be named specifically.²⁵

The right-to-work issue has reached the ballot or the legislatures in at least forty states. Twenty have adopted right-to-work laws; four have first adopted and then repealed them; and twenty states have rejected them.²⁶ In those states where the right-to-work law has been defeated or has not been introduced, there is current planning to bring about its passage. Right-to-work laws obviously interfere with union security, and the unions view them as a real threat. Labor groups have announced their plans to seek repeal of such state laws where they exist, or the amendment of that portion of the federal law which permits their enactment.²⁷

While fighting to repeal the state laws having right-to-work provisions, the unions have also tried to find a way to circumvent these laws. The agency shop is by far the most popular method at this point. Clauses allowing agency shops have been negotiated in some six per cent of all contracts and the trend indicates that attempts will be made to negotiate the clause in many more.²⁸

Today the agency shop clause is the center of a great deal of controversy. This has been particularly true since January 1960 when a new provision was added to steel company agreements. It provides that employees in right-to-work states must pay a monthly service charge as a contribution toward the administration of the agreement and the representation of the employees.²⁹ The service charge happens to be the same as the regular union dues. As a result of this agreement, the United Auto Workers sought a similar arrangement from the General Motors

²³ Taft-Hartley Act § 8(a)(3).

²⁴ Sultan, *Right-to-Work Laws: A Study in Conflict* 56-61 (1958).

²⁵ See *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (Fla. 1962), *aff'd*, 373 U.S. 746 (1963); *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961); *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

²⁶ Pollitt, *Right-to-Work Law Issues: An Evidentiary Approach* 36 (1959); see notes 16-19 *supra*.

²⁷ "New Drive Against Union Shop," *Business Week*, Nov. 4, 1961, pp. 145-46.

²⁸ "Big Test for Agency Shop," *id.*, Nov. 12, 1960, pp. 120, 122.

²⁹ There has been a union shop arrangement in nonright-to-work states for some time.

Corporation. The decision in the ensuing case³⁰ called into question both the growth and the very existence of agency shop agreements.³¹

Many people are affected by agency shop agreements, and much is at stake in the agency shop controversy. Some of the more crucial questions that have arisen involving the agency shop clause will be discussed in this article.

THE AGENCY SHOP UNDER FEDERAL LAW

Congress was certainly aware of the existence of the agency shop when it amended the Wagner Act in 1947,³² but whether it eliminated the agency shop as a permissible form of union security with respect to which unions and employers could exercise their freedom to contract is another question. One can argue that it was not necessary for Congress expressly to invalidate the agency shop because it accomplished the same thing by not including it among the forms of union security specifically permitted in section 8(a)(3).

Another argument contends that since the right to enter into an agency shop contract was an existing common-law right, and since this right was not specifically taken away, it remained even though not expressly authorized. Supporting this proposition is the rule of statutory construction which is generally stated as follows:

The courts, in construing these statutes, have held that the common law will not be changed by doubtful implication . . . and will be no further abrogated than the clear import of the language necessarily requires. While such statutes must be strictly construed, it is equally clear that the court must ascertain and give effect to the legislative intent, and the construction must not be so strict as to lessen the scope plainly intended to be given the statute, or to defeat the obvious intention of the legislature, as found in the language actually used according to its true and obvious meaning; nor can it be applied to change the meaning of the statute.

The courts will not presume that a change was intended by the legislature unless the language used clearly indicates such intention, and, if the statute makes an innovation in the common law, it will be presumed that the legislature did not intend to make any innovation further than required by the mischief to be remedied, or further than specified or clearly implied.³³

This rule does not necessarily conflict with the first proposition. One must decide whether the noninclusion of the agency shop as a permissible

³⁰ *General Motors Corp.*, 130 N.L.R.B. 481, rev'd on rehearing, 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963).

³¹ *Heineman v. Douglas Aircraft Co.*, 211 F. Supp. 76 (S.D. Cal. 1962); *Grajczyk v. Douglas Aircraft Co.*, 210 F. Supp. 702 (S.D. Cal. 1962).

³² See Hearings Before the Senate Committee on Labor and Public Welfare, 80th Cong., 1st Sess. 66-67 (1947) (remarks of Secretary of Labor Schwollenbach); Hearings Before the House Committee on Education and Labor, 80th Cong., 1st Sess., vol. 3, at 1149, 1158, 1184 (1947) (remarks of Cecil B. DeMille); 93 Cong. Rec. 4887 (1947) (remarks of Senator Taft).

³³ 82 C.J.S. Statutes § 393, at 940-41 (1953).

form of union security under section 8(a)(3) is sufficient to remove it from its common-law protection. For an answer, one must look at the committee reports connected with the compulsory union security provisions.

Congress was very much aware of the agency shop in 1947 because it heard testimony concerning it and other forms of compulsory membership agreements before passing the Taft-Hartley Act.³⁴ The legislative history of the Taft-Hartley amendments shows that the controversial issue of compulsory union membership was the problem which received the greatest deliberation.³⁵ Congress heard much testimony about the abuses resulting from arrangements involving compulsory membership in unions,³⁶ and, as a matter of fact, it is difficult to find in the legislative history any complaints against forms of union security that are not based on compulsory membership.

In the Taft-Hartley amendments, Congress expressly permitted voluntary agreements requiring such forms of compulsory membership as the union shop and the maintenance of membership shop, and it would not have been a difficult task similarly to validate the agency shop. Congress did not make any affirmative statements regarding the agency shop, however, and thus the problem persisted. Senator Robert A. Taft talked about free-riders, and explained section 8(a)(3) as eliminating them to the extent that they would be compelled to acquire membership in a union as a condition of employment pursuant to a union shop or maintenance of membership clause.³⁷ Should the union be allowed to further eliminate free-riders by conditioning employment upon the practical equivalent of union membership, namely, paying fees and dues?

The failure of section 8(a)(3) to mention the agency shop has been mentioned as strong evidence that Congress wished not to legalize it.³⁸ Congress was most explicit in what it would allow; namely, the union shop and maintenance of membership agreement, both of which required membership in a labor organization as specified by section 8(a)(3). Presumably, then, an agreement which required the same financial bur-

³⁴ See authorities cited note 32 *supra*.

³⁵ See S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947); 93 Cong. Rec. 5089 (daily ed. May 9, 1947) (remarks of Senator Hawkes); 93 Cong. Rec. 5088 (daily ed. May 9, 1947) (remarks of Senator Donnell); 93 Cong. Rec. 3534-35 (daily ed. April 17, 1947) (remarks of Rep. Hartley).

³⁶ See 93 Cong. Rec. 5291 (daily ed. May 13, 1947) (remarks of Senator Kerr); 93 Cong. Rec. 5088 (daily ed. May 9, 1947) (remarks of Senator Taft); 93 Cong. Rec. 4496 (daily ed. May 1, 1947) (remarks of Senator Hawkes); 93 Cong. Rec. 4317 (daily ed. April 29, 1947) (remarks of Senator Taft); 93 Cong. Rec. 3952-53 (daily ed. April 23, 1947) (remarks of Senator Taft).

³⁷ 93 Cong. Rec. 4887 (1947) (remarks on the floor of Congress).

³⁸ *General Motors Corp. v. NLRB*, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963).

den to the employees as a union shop, but did not require membership, would not be allowed.

These divergent lines of reasoning continued to be separately championed by labor and management. In an attempt to gain support for their contentions, each group looked toward the courts for cases subsequent to the Taft-Hartley amendments which might shed further light on the agency shop question.

In *Public Serv. Co.*³⁹ the NLRB held that the compulsory payment of two dollars per month support money to a union by all the employees in a bargaining unit as a condition of employment was not unlawful under section 8(3) of the Wagner Act. But because the contract containing the provision was executed before August 22, 1947, the effective date of the Taft-Hartley Act, the saving clause in section 102 of this act preserved the legality of the support money provision since that provision was valid under the Wagner Act. Hence, the Board did not consider the provisions of the Taft-Hartley Act in deciding this case.

The next case presented to the NLRB was the *American Seating Co.*⁴⁰ case. The union, which had a basic agreement with the employer requiring membership as a condition of employment, had allowed certain religious objectors who did not want to become union members to make support money payments without joining the union. The union had, in other words, waived the requirement of membership for certain employees and had allowed them to continue working in the union shop by merely paying support money in lieu of dues. The Board had no objection to the union allowing these objectors to stay on their jobs if they paid the equivalent of membership dues and initiation fees.

A similar pair of cases appeared before and after the *American Seating Co.* case. First, in the case of *Union Starch & Ref. Co.*,⁴¹ two employees were willing to fulfill all their union obligations including becoming members. They objected, however, to swearing an oath of loyalty to the union on religious grounds. This oath was a condition of membership, and therefore they were dismissed. On appeal to the Board, they were ordered reinstated because they were discharged for nonmembership on some ground other than those allowed by the Taft-Hartley Act.⁴²

³⁹ 89 N.L.R.B. 418 (1950).

⁴⁰ 98 N.L.R.B. 800 (1952).

⁴¹ 87 N.L.R.B. 779 (1949), approved, 136 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

⁴² The Taft-Hartley Act, § 8(a)(3) states that:

[N]o employer shall justify any discrimination against an employee for non-membership in a labor organization . . .

(B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Second, in the *Marlin Rockwell Corp.*⁴³ case, the union sought to obtain the discharge of some employees because they voluntarily resigned from the union even though they continued to pay dues. The Board cited the *Union Starch*⁴⁴ case and stated that membership terminated by voluntary resignation was membership "terminated for reasons other than the failure of the employee to tender the periodic dues"⁴⁵ and therefore not grounds for a legal discharge.

These three cases all had factors in common. They occurred in states where there were no right-to-work laws, and the controversy arose from recognized forms of union security agreements under section 8(a)(3). The mere fact that in these cases a slight variance was allowed to a few employees who were willing to pay the equivalent of dues and initiation fees, does not equate their situations with an agency shop. An agency shop relationship was not contemplated by any of the parties, or the Board; otherwise specific reference would surely have been made to it.

Finally, specific reference was made to agency shop agreements in a series of cases involving General Motors and the United Auto Workers.⁴⁶ In these cases, the UAW had asked GM to bargain over terms of a supplementary agreement. These terms required new employees, hired after the agreement, to pay to the UAW a sum equal to the initiation fee charged by each of its local unions, and a monthly sum equal to the regular dues required of union members at each location. GM declined to bargain over these terms because it felt that to do so would violate the Taft-Hartley Act.

The union brought an unfair labor practice action against GM because of its refusal to bargain. In its first decision, the Board decided that the agency shop was prohibited by federal law and thus GM need not bargain.⁴⁷ Shortly thereafter, however, the Board reversed itself.⁴⁸

The basic question presented to the NLRB was whether the agency shop arrangement was one which is approved by section 8(a)(3) of the Taft-Hartley Act, and whether it infringes upon the rights guaranteed to employees in section 7 of the same act. Section 8 states:

(a) It shall be an unfair labor practice for an employer—

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership

⁴³ 114 N.L.R.B. 553 (1955).

⁴⁴ *Supra* note 41.

⁴⁵ Taft-Hartley Act § 8(a)(3).

⁴⁶ *General Motors Corp.*, 130 N.L.R.B. 481, rev'd on rehearing, 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963).

⁴⁷ 130 N.L.R.B. 481 (1961).

⁴⁸ 133 N.L.R.B. 451 (1961).

in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later

Section 7 states:

Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3).

Ostensibly, the language of these sections indicates that the only type of permissible infringement upon the rights of employees guaranteed in section 7 is when continued employment is contingent upon membership in a labor organization. Strict construction of this type of wording had been advocated by both the United States Supreme Court and the NLRB. The NLRB expressed such a view in the *Bryan Mfg. Co.*⁴⁹ case. It stated:

Union-security clauses authorized by the proviso clause of Section 8(a)(3) are in derogation of the rights guaranteed employees in the definitive statement of national policy contained in Section 7. That section emancipates employees from coercion and restraint by labor and management alike. Their right to engage in or refrain from concerted activity at their own election has been enacted into law. But while that section enacted into law their right to engage in or refrain from concerted activities at their election, the proviso clause allows a contractual compulsion of union membership and thus restricts the free choice otherwise provided by Sections 7 and 8(a)(3). The authority so conferred by the proviso is, however, carefully circumscribed by conditions precedent to and by limits upon its exercise. As an exception to declared public policy, a union-security clause, the conditions under which it was executed, and action pursuant to it merit, when subject to dispute, strict scrutiny.⁵⁰

The Supreme Court had construed the restrictions of the first proviso of section 8(3) of the Wagner Act in 1942.⁵¹ It stated:

The provision for a closed shop, as permitted by § 8(3), follows grammatically a prohibition of discrimination in hiring. These words of the exception must have been carefully chosen to express the precise nature and limits of permissible employer activity in union organization.⁵²

⁴⁹ 119 N.L.R.B. 502 (1957).

⁵⁰ *Id.* at 510-11 (concurring opinion).

⁵¹ NLRB v. Electric Vacuum Cleaner Co., 315 U.S. 685 (1942).

⁵² *Id.* at 694-95.

The principle spelled out was that exceptions to a general rule must be strictly construed. With this principle in mind it is difficult to construe the language of section 8(a)(3) to allow agreements which require something other than membership as a condition of employment.⁵³ Nevertheless, as is explained presently, the Supreme Court did in fact find a way around this difficulty.

Reiterating a bit, the NLRB initially declared that the agency shop was prohibited by federal law.⁵⁴ Due to the prodding of labor, the Board decided to review its decision. Membership on the Board had changed since the original decision earlier in the year⁵⁵ and the new majority felt no great compunction about overruling the initial decision.⁵⁶ It now thought that Congress wanted the agency shop embraced within section 8(a)(3). It felt that the courts had construed congressional intent the same way as it was now construing it and cited as support for its decision the *Public Serv.*,⁵⁷ *American Seating*,⁵⁸ *Union Starch*,⁵⁹ and *Radio Officers*⁶⁰ cases. The new Board disregarded the reasoning adopted in its original decision and the facts which differentiated the cited cases from the problem at hand.⁶¹

An appeal was taken to the Sixth Circuit Court of Appeals; this court proceeded to reverse the new Board's decision. It based its action on the wording of sections 7, 8(a)(1), and 8(a)(3), and section 14(b) of the Taft-Hartley Act, and the definition of membership in section 3(o) of the Landrum-Griffin Act.⁶² The court did not think that an agency shop arrangement was a lesser form of union shop. Since there was no membership involved, it was an entirely different concept of compulsory union security. Being a different concept, and one not specifically allowed by section 8(a)(3) as was the union shop agreement, it could not be bargained for by the union and the employer. The provisions, sup-

⁵³ Boyd Leedom, chairman of the NLRB when it reached its original decision in the General Motors case, and member of the NLRB when it reversed its decision in the reconsideration, supported this view.

⁵⁴ General Motors Corp., 130 N.L.R.B. 481, rev'd on rehearing, 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963).

⁵⁵ Frank W. McCulloch became the new chairman in the latter part of 1961, replacing Boyd Leedom who remained as a member of the Board. Gerald A. Brown replaced Joseph A. Jenkins who resigned.

⁵⁶ General Motors Corp., 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963); see Krock, "The 'Agency Shop' versus Taft Act, Section 7," N.Y. Times, Oct. 5, 1961, p. 36, col. 4.

⁵⁷ Public Serv. Co., 89 N.L.R.B. 418 (1950).

⁵⁸ American Seating Co., 98 N.L.R.B. 800 (1952).

⁵⁹ 87 N.L.R.B. 779 (1949), approved, 186 F.2d 1008 (7th Cir.), cert. denied, 342 U.S. 815 (1951).

⁶⁰ Radio Officers' Union v. NLRB, 347 U.S. 17 (1954).

⁶¹ Boyd Leedom wrote a dissenting opinion.

⁶² General Motors Corp. v. NLRB, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963).

posedly, were clear, unambiguous, and were not subject to judicial construction. The court reasoned that Congress would have provided for an agency shop if it had wanted to approve such an arrangement, since it had dealt specifically with various forms of organization that it would allow to the unions.

The final answer was soon in coming. A decision rarely satisfies both parties, and so the loser, in this instance the union, sought review by the United States Supreme Court. Because of the importance of the agency shop question, that Court decided to review the case and make a final determination which would alleviate the dilemma that had befallen both parties.

Men's minds often differ on questions of importance and there was no exception with the agency shop. The Supreme Court could not accept the findings of the court of appeals and adopted the reasoning of the second NLRB decision; namely, that the agency shop was valid.⁶³ This Court envisioned a strong congressional declaration toward union security and maintained that the amendments were intended to remedy only the most serious abuses of compulsory union membership. Upon reflection it is readily apparent that this Court's decision was not in keeping with the general rule that strict construction of a statute should govern. Instead, it was saying that although membership was not actually obtained in the agency shop, what was given was the equivalent of membership. Since the equivalent of membership was given to the employees, the agency shop was practically the same as a union shop and therefore allowed by section 8(a)(3). The amendments found in the Taft-Hartley Act served two purposes. They attempted to curb the serious abuses of compulsory unionism and at the same time wanted the cost of collective bargaining shared by as many employees as possible. Neither of the purposes was thwarted by the agency shop.

Yet to be mentioned is the effect of the Supreme Court decision in the *General Motors* case. Basically, the decision only affects states without right-to-work laws except for the State of Indiana. As was described earlier, the other nineteen states with right-to-work laws bar the agency shop, specifically,⁶⁴ by court decision,⁶⁵ or by administrative opinion.⁶⁶ In the nonright-to-work law states, an agency shop is legal and can be negotiated.

Since a majority of the Indiana employees of General Motors seem-

⁶³ NLRB v. General Motors, 373 U.S. 734 (1963).

⁶⁴ Note 16 supra.

⁶⁵ Note 17 supra.

⁶⁶ Note 18 supra.

ingly wanted an agency shop, General Motors had to bargain with the union concerning this problem. Prior to this Supreme Court decision, General Motors contended that it would be in difficulty whether or not its employees eventually joined the union because its negotiations with the union for an agency shop had tended to encourage actual membership in the union. Had not the Supreme Court stated⁶⁷ that if the encouragement of membership is a necessary and foreseeable consequence of the employers' discriminatory acts, then the employer was in violation of section 8(a)(1)?⁶⁸ This contention fell by the wayside once the Court decided that the agency shop was essentially equivalent to the union shop. Under section 8(a)(3), the company could negotiate for a union shop and now for its equivalent, the agency shop, even though the latter could be proved to encourage formal membership.

Encourage formal membership it would. One Board member⁶⁹ recognized that when union members received benefits over and above the benefits received by nonmembers, the latter would be encouraged to seek membership. A similar view was taken in the *Gaynor News*⁷⁰ case.

Another Board member⁷¹ was impressed with the contents of the UAW's Constitution, and with the testimony of the union's Vice President.⁷² The testimony showed that the Constitution was written with only members in mind. Nonmembers could not participate in union meetings, did not have the right to vote on ratification of agreements negotiated by the union, did not have the right to vote on how dues were to be allocated within the union, and could not, as a matter of right, obtain the union's publication. The union decided whether nonmembers received such things as strike benefits, the opportunity to participate in programs for retirees, and educational benefits. The unions made all these decisions even though nonmembers were partially supporting these activities with their money.⁷³

The Constitution itself provided that local unions would cooperate

⁶⁷ *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954).

⁶⁸ The section states:

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of this title.

⁶⁹ Joseph Alton Jenkins, member of the NLRB concurring in the original majority decision disallowing an agency shop agreement. For a similar view, see Justice I. C. Rand's opinion in *Ford Motor Co. v. UAW*, 1 Lab. Arb. 439 (1946).

⁷⁰ *NLRB v. Gaynor News Co.*, 197 F.2d 719 (2d Cir. 1952), *aff'd*, 347 U.S. 17 (1954).

⁷¹ This was Arthur A. Kimball, a member of the NLRB concurring in the original majority decision disallowing an agency shop agreement.

⁷² The UAW's Vice President in charge of the General Motors Department of the Union was Leonard Woodcock. The testimony referred to was at the hearing of the union's charges, held Feb. 10, 1960, in Detroit, Michigan, before Trial Examiner Albert P. Wheatley.

⁷³ *General Motors Corp.*, 130 N.L.R.B. 481, *rev'd on rehearing*, 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), *rev'd*, 373 U.S. 734 (1963).

with community groups where these groups existed, and would promote and support programs benefiting retired members and other retired workers. Portions of each month's dues were set aside by the local union as a retired members' fund and turned over to the community groups. The fund was earmarked by the Constitution to be used only to promote and support programs benefiting retired members. There was no obligation for the locals to establish community groups where they did not exist. If these groups did exist, they could only apply the union's contributions to the benefit of retired members, not merely former contributors, of whom the nonmembers were a part.⁷⁴

One must ask whether union membership should in fact be encouraged. Certainly, Congress seemed to encourage membership when it passed its latest labor legislation, known as the Landrum-Griffin Act,⁷⁵ where Congress enumerates certain rights guaranteed to members.⁷⁶ Section 3(o) of the Landrum-Griffin Act defines "member" or "member in good standing" as "any person who has fulfilled the requirements for membership in such organization." This section would seem to mean that the employees must actually be sworn union members and not merely pay dues. Nonmembers, despite the fact that they would be required, in an arrangement like the agency shop, to pay the equivalent of dues and fees required of members, would be wholly outside the guarantees of the act because they are not specifically mentioned in the act.

In the sections guaranteeing rights,⁷⁷ the nonmember would be interested in sections 101(a)(1)-(2), especially with regard to expressing his views on business before the meeting. He would definitely be interested in meeting and assembling freely with other employees, who were members, and in voting on measures affecting his investment. Although these rights would be vital to the nonmember, they would not be guaranteed to him; therefore, they might be taken away from him.

Section 101(a)(3)⁷⁸ provides that union dues, initiation fees, and assessments can only be increased by the secret vote of the union members in good standing after reasonable notice of intention to vote on this question. No issue would be more important to the nonmember than this one, and he would want to be heard. But the act does not guarantee the nonmember the right to be heard and again, the right might be taken away and the nonmember left without any protection.

⁷⁴ *Ibid.*

⁷⁵ Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.) [hereinafter cited as Landrum-Griffin Act].

⁷⁶ See 105 Cong. Rec. A8569 (1959) (comments of Senator Goldwater).

⁷⁷ Landrum-Griffin Act tit. 1 [Bill of Rights of Union Members].

⁷⁸ Landrum-Griffin Act § 101(a)(3).

Perhaps the solution lies in changing union constitutions and the Landrum-Griffin Act to include benefits for nonmembers who pay the fees and dues of members. If this change occurs, then it cannot be said that a majority of fifty-one per cent can deprive the other forty-nine per cent of their basic rights and benefits. In those states where compulsory unionism can be obtained, and this includes the agency shops, perhaps a rule should be passed which would require that all affected workers must vote on the question. In this way we would follow the American tradition of majority rule after freedom of choice.

STATUS OF STATE RIGHT-TO-WORK LAWS NOT SPECIFICALLY MENTIONING AGENCY SHOPS

At the time the NLRB was struggling with its agency shop problem, a related question arose in the state courts of Kansas and Florida. In Kansas, a group of nonunion employees was seeking an injunction against the enforcement of a collective bargaining agreement containing an agency shop.⁷⁹ The union tried to obtain their discharge for failure to pay the equivalent of dues, assessments, and fees. The trial court held that the nonunion members' petition for an injunction did not state a cause of action and the agency shop provision was ruled not to come within the scope of the Kansas right-to-work law.

An appeal was taken to the Kansas Supreme Court which showed that it recognized the philosophical problem involved in the case by stating:

The issue of union security presented by this case brings into focus a conflict between two firmly-held American beliefs: The belief that a worker should not be required to support an organization which he may oppose, and the belief that a worker should not be a "free rider" who takes advantage of benefits secured by a union without contributing his share to its support. That issue has been the subject of legislation at both the state and national levels.⁸⁰

Over the years, states have enacted laws that prohibit requiring membership in a labor organization as a condition of employment. Congress recognized the states' right to pass such laws in section 14(b) of the Taft-Hartley Act where it provided:

Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

⁷⁹ *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

⁸⁰ *Id.* at 16, 360 P.2d at 460.

This section is directed at section 8(a)(3) of the same act which authorizes agreements conditioning employment on membership in labor organizations. Were it not for section 14(b), states could not enact right-to-work laws applicable to companies involved in interstate commerce because the federal law would preempt the area.⁸¹ By removing the bar imposed by preemption, states gained the right to enact right-to-work laws, and some of them did.⁸²

Typical of these state laws was the one enacted by the people of the state of Kansas as a constitutional amendment providing:

No person shall be denied the opportunity to obtain or retain employment because of membership or nonmembership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into any agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or nonmembership in any labor organization.⁸³

The amendment did not refer to contracts requiring the payment of the equivalent of dues to the union. It only prohibited the enforcement of collective bargaining contracts that required membership or nonmembership in labor organizations.

Aside from Kansas, of the nineteen states enacting right-to-work laws, twelve expressly prohibited the collection of fees or charges without the employee's consent.⁸⁴ It might have been that the other seven states did not intend the prohibition of the collection of amounts in lieu of union dues and fees. The opposite is true, however; six of these seven states have prohibited agency shop provisions or rendered them unenforceable.⁸⁵

As was discussed before, section 14(b) of the Taft-Hartley Act expressly authorized states to adopt laws which outlaw agreements requiring membership in a labor organization as a condition of employment. Neither section 14(b) nor the Kansas amendment⁸⁶ contains any

⁸¹ *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949).

⁸² Ala. Code tit. 26, §§ 375(1)-(7) (1958); Ariz. Rev. Stat. Ann. §§ 23-1301 to -1307 (1956); Ark. Stat. Ann. §§ 81-201 to -205 (1960); Fla. Const. § 12; Ga. Code Ann. §§ 54-901 to -908 (1957); Ind. Ann. Stat. §§ 40-2701 to -2706 (Supp. 1963); Iowa Code Ann. §§ 736A.1-.8 (1950); Miss. Code Ann. § 6984.5 (Supp. 1962); Neb. Rev. Stat. § 48-217 (Supp. 1961); Nev. Rev. Stat. §§ 613.230-300 (1961); N.C. Gen. Stat. §§ 95-78 to -84 (1962); N.D. Cent. Code § 34-01-14 (1960); S.C. Code Ann. §§ 40-46.1 to -46.8 (1962); S.D. Code § 17.1101 (Supp. 1960); Tenn. Code Ann. §§ 50-208 to -212 (1955); Tex. Rev. Civ. Stat. Ann. art. 5207a, §§ 1-5 (1962); Utah Code Ann. §§ 34-16-1 to -18 (Supp. 1963); Va. Code Ann. §§ 40-64, 40-68 to -70 (1950); Wyo. Stat. Ann. §§ 27-245.1-.8 (Supp. 1963).

⁸³ Kan. Const. art. 15, § 12 (enacted into law on Nov. 4, 1958).

⁸⁴ These states were Alabama, Arkansas, Georgia, Iowa, Mississippi, Nebraska, North Carolina, South Carolina, Tennessee, Utah, Virginia, and Wyoming.

⁸⁵ Arizona, Florida, Nevada, South Dakota, and Texas prohibit the agency shop; Indiana and North Dakota allow it, but North Dakota does not allow such an agreement to be enforced.

⁸⁶ Kan. Const. art. 15, § 12.

specific provision forbidding agreements that require nonmembers to pay union fees, dues, and assessments. The question is whether such a prohibitory provision was necessarily implied. The Kansas Supreme Court went along with other states in similar situations⁸⁷ and ruled that it was.⁸⁸

Another problem confronting the Kansas court was whether it should construe the constitutional amendment narrowly or broadly. In a prior Kansas case, *Clark v. Murray*,⁸⁹ the court had said:

When a resort to extrinsic evidence becomes necessary, in the construction of a statute, it is proper to consider the facts of contemporary history, the previous state of the law, the circumstances which led to the enactment, and especially the evil which it was designed to correct, and the remedy intended.⁹⁰

The court had also stated that:

When the interpretation of a statute according to the exact and literal import of its words would lead to absurd or mischievous consequences, or would thwart or contravene the manifest purpose of the legislature in its enactment, it should be construed according to its spirit and reason, disregarding or modifying, so far as may be necessary, the strict letter of the law.⁹¹

Looking for further evidence that the amendment prohibited the agency shop, the Kansas court looked for other views on the construction of constitutional amendments. It felt that amendments dealt broadly with general subjects, and it was wrong to give these general subjects narrow or subtle interpretations. Should not amendments be construed to mean what their language implied to the common man?

Joseph Story would have answered affirmatively to the above question. In his treatise on the Constitution,⁹² he stated:

Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common . . . wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them, with the help of common-sense, and cannot be presumed to admit in them any recondite meaning or any extraordinary gloss.⁹³

⁸⁷ Note 85 supra.

⁸⁸ *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

⁸⁹ *Clark v. Murray*, 141 Kan. 533, 41 P.2d 1042 (1935).

⁹⁰ *Id.* at 536, 41 P.2d at 1044 quoting Black, *Interpretation of Laws* § 91 (2d ed. 1911).

⁹¹ *Id.* at 536, 41 P.2d at 1044 quoting Black, supra note 90, § 29. This was cited by the court in *Higgins v. Cardinal Mfg. Co.*, supra note 88, at 21, 360 P.2d at 464.

⁹² Story, *Commentaries on the Constitution of the United States* (5th ed. 1891).

⁹³ 1 *Id.* at 345, also cited in *State v. Sessions*, 84 Kan. 856, 862, 115 Pac. 641, 643-44 (1911).

The right-to-work amendment was ratified by the people of Kansas to end forced membership in unions with resulting forced dues. Could these dues still be demanded if the nonmember were not forced to join the union? This would be the effect of the agency shop if the court allowed it to exist. The court felt that the people had spoken clearly enough and therefore answered "no" to the agency shop proposal.⁹⁴ The law was such that any interpretation allowing the agency shop would have defeated the meaning given to this law by the common man. At this point the Kansas court was the first court so to hold. Not until two years later did it get the backing of the highest court in the land.⁹⁵

In a similar case in Florida,⁹⁶ four employees challenged the agency shop clause in their company's contract with a Florida local of the Retail Clerks International Association. The case, based on a section of the state constitution,⁹⁷ finally reached the Florida Supreme Court early in 1962. The Florida constitution states:

The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization; provided, that this clause shall not be construed to deny or abridge the right of employees by and through a labor organization or labor union to bargain collectively with their employer.⁹⁸

The court ruled that the working man was given the right to join, or not to join, a labor union as he saw fit. He might make this decision without jeopardizing his job. The Florida constitution had granted this right and it could not be denied by an agency shop clause which would be repugnant to the constitution. If the agency shop clause were enforced, it would require the nonunion employee to purchase from the labor union the right that the constitution had already purported to give him. Yet, the intent of the section was to leave for individual determination and preference the question of whether one would derive any benefits from an association with a labor union. It was the employee's choice to make and could not be decided by anyone else.

As in *Higgins v. Cardinal Mfg. Co.*,⁹⁹ the question of state court jurisdiction in this field was challenged. Both courts agreed that section 14(b) expressly dealt only with agreements requiring membership in a labor organization as a condition of employment. In their minds there was no

⁹⁴ *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

⁹⁵ *Retail Clerks v. Schermerhorn*, 373 U.S. 746 (1963).

⁹⁶ *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (Fla. 1962), aff'd, 373 U.S. 746 (1963).

⁹⁷ Fla. Const. § 12.

⁹⁸ *Ibid.*

⁹⁹ *Supra* note 94, at 34, 360 P.2d at 473.

question that the state courts could deal with this type of agreement. Now, could Congress have preserved the states' rights in right-to-work legislation and presumably the right of state courts to interpret this legislation while at the same time intending that unions and management could, through an agency shop clause, circumvent these rights? Both courts thought not.¹⁰⁰ As is discussed presently, the Supreme Court approved this judgment. At that time, however, support for these decisions was found in a decision by a federal district court¹⁰¹ which concluded that section 14(b) of the Taft-Hartley Act did give the states the power to prohibit the agency shop as well as the union shop. It stated:

Section 14(b) would be bereft of meaning if we were to construe it in a fashion which would render the states powerless to make illegal that type of union security agreement which imposes liabilities on the workingman which, realistically, are the same liabilities which, under the section, the states may remove.¹⁰²

Usually right-to-work laws expressly banned the agency shop, but when they did not do so, the positions of the states were that the law prohibited the agency shop anyway, or that the agency shop was unenforceable.¹⁰³ The only state that allowed the agency shop to survive by court decision was Indiana. This case¹⁰⁴ might be examined to determine whether there were any special circumstances involved which caused the court to rule as it did. The Indiana appellate court stated:

The above-quoted Right to Work Law contains a penalty provision. The law is well settled that penal statutes will be strictly construed, and not construed to include anything *beyond its letter, though within its spirit*, and it cannot be enlarged by construction, implication or intendment beyond the fair meaning of the language used.¹⁰⁵

Perhaps the court was saying that if a penal statute were not involved it would construe the law more liberally, and probably hold that the agency shop was banned.¹⁰⁶ Because of this case, Indiana is the only right-to-work law state which presently concurs with the Supreme Court's decision holding the agency shop valid.¹⁰⁷ With a penal provision involved in a statute, however, the statute must be strictly construed.¹⁰⁸

¹⁰⁰ Both the Florida court and the Kansas court relied on *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1954) and *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*, 336 U.S. 301 (1949).

¹⁰¹ *Amalgamated Ass'n of Street Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc.*, 202 F. Supp. 726 (D. Nev. 1962).

¹⁰² *Id.* at 732.

¹⁰³ See notes 16-19 *supra*.

¹⁰⁴ *Meade Elec. Co. v. Hagberg*, 129 Ind. App. 631, 159 N.E.2d 408 (1959).

¹⁰⁵ *Id.* at 639, 159 N.E.2d at 412. [Emphasis in original.]

¹⁰⁶ Krock, "More Light on the Agency-Shop Legal Issue," *N.Y. Times*, Oct. 20, 1961, p. 32, col. 4.

¹⁰⁷ *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

¹⁰⁸ *Evansville & O.V. Ry. v. Southern Ind. Rural Elec. Corp.*, 231 Ind. 648, 109 N.E.2d 901 (1953).

Failure specifically to ban the agency shop has resulted in it being legalized.

The states without penal right-to-work statutes could decide whether the exact wording of their statutes or amendments would defeat the spirit that existed when they were enacted. If this spirit were violated, the courts had to decide whether to give a more liberal interpretation to the wording. A liberal construction is always favored over a strict construction of a statute if it does justice to the spirit of the law.¹⁰⁹ This rule applies with even greater force to the interpretation of a constitutional provision which, of necessity, is more general in its terms.¹¹⁰

The unions naturally were dissatisfied with decisions ruling that the agency shop was banned by particular state right-to-work laws. They were most upset by the Florida and Kansas cases. An appeal of the Kansas court decision¹¹¹ was taken to the Supreme Court of the United States. That Court, on October 9, 1961, refused to review the ruling that the agency shop agreements were illegal under the state law,¹¹² and the court's ruling remained binding upon the parties; each state had the right to determine individually whether the agency shop was legal under its law. With the recurrence of the conflict over the legality of the agency shop arising from the Florida cases,¹¹³ the Supreme Court decided to take a closer look at the whole situation.

The Supreme Court had just decided the *General Motors* case, where it held that the agency shop was essentially equivalent to a union shop.¹¹⁴ If that be the case, then consistency would require it to hold that a right-to-work law, stating the rights of persons to work cannot be denied because of nonmembership in a labor union, bans the same membership mentioned in section 8(a)(3). And consistency ruled. The Supreme Court stated:

It follows that the *General Motors* case rules this one, for we there held that the "agency shop" arrangement involved here—which imposes on employees the only membership obligation enforceable under § 8(a)(3) by discharge, namely, the obligation to pay initiation fees and regular dues—is the "practical equivalent" of an "agreement requiring membership in a labor organization as a condition of employment." Whatever may be the status of less stringent union-security arrangements, the agency

¹⁰⁹ *Higgins v. Cardinal Mfg. Co.*, 188 Kan. 11, 360 P.2d 456, cert. denied, 368 U.S. 829 (1961).

¹¹⁰ The court in *Taylor v. Hoisting Engineers Local*, 189 Kan. 137, 368 P.2d 8 (1962) agreed with this view.

¹¹¹ *Higgins v. Cardinal Mfg. Co.*, supra note 109.

¹¹² *General Drivers Union v. Higgins*, 368 U.S. 829 (1961) (denying certiorari).

¹¹³ *Schermerhorn v. Local 1625, Retail Clerks*, 141 So. 2d 269 (Fla. 1962), aff'd, 373 U.S. 746 (1963).

¹¹⁴ *Labor Board v. General Motors Corp.*, 373 U.S. 734 (1963).

shop is within § 14(b). At least to that extent did Congress intend § 8(a)(3) and § 14(b) to coincide.¹¹⁵

Finally, a decision was rendered. The states now have the right to ban the agency shop,¹¹⁶ even when it is not specifically mentioned in the right-to-work provision.

STATE COURT ENFORCEMENT OF STATE LAWS BANNING THE AGENCY SHOP

Prior to 1947, Congress knew that some states had statutes that prohibited the requirement that employees be members in, or make payments to, a labor union as a condition of employment.¹¹⁷ When the Taft-Hartley Act was promulgated in 1947, the report from the managers for the House of Representatives recognized these state statutes as follows:

Under the House bill there was included a new section 13 of the National Labor Relations Act to assure that nothing in the Act was to be construed as authorizing any closed shop, union shop, maintenance of membership or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called "closed shop" proviso in section 8(3) of the existing Act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a provision having the same effect.¹¹⁸

Recognizing that some states would have more restrictive laws than others in regard to allowing unions to force employees to become members and/or pay dues or lose their jobs, Congress felt that if these states wished to pass such laws, it would not interfere.

A doctrine had developed under article VI of the federal constitution¹¹⁹

¹¹⁵ Retail Clerks v. Schermerhorn, 373 U.S. 746, 751-52 (1963).

¹¹⁶ John H. Fanning, a member of the NLRB, had stated before the Annual Association of State Labor Relations Agencies that "the Board did not reach the question whether the National Act authorized an agency shop in a state in which such provision is banned under state law. This most difficult agency shop question is still to come." The Supreme Court answered the question for the Board and the answer was the national act did not so authorize an agency shop in this situation.

¹¹⁷ Statutes in Georgia, Iowa, North Carolina, Tennessee, and Virginia forbade both the union shop and the agency shop prior to the promulgation of § 14(b) of the Taft-Hartley Act in 1947.

¹¹⁸ 93 Cong. Rec. 6378 (1947).

¹¹⁹ Article VI of the United States Constitution reads: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme

that when Congress passed a law on a matter within its jurisdiction, it preempted the field. It deprived the states of jurisdiction over matters covered in the law regardless of whether the state laws coincided with, were complementary to, or were in opposition to federal law.¹²⁰ As such, congressional action in a specific area, such as in the area of union security, would prohibit the states from promulgating and enforcing their own legislation in the same area.¹²¹ The federal government can, however, legislate to allow states to act in areas where it would normally be deemed to have preempted the field. Section 14(b) of the Taft-Hartley Act is such legislation.¹²²

In *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.*¹²³ the United States Supreme Court said:

Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union-security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union-shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive.¹²⁴

The federal government expressly yielded to the states when they sought to enact right-to-work laws, and it would seem natural that state courts be granted authority to process violations of such laws. As logical as this conclusion seems, the question was in doubt¹²⁵ until the Supreme Court agreed with this reasoning in *Retail Clerks v. Schermerhorn*.¹²⁶ In ruling that the agency shop was valid under section 8(a)(3)¹²⁷ the Court had followed the view of the NLRB. In the *General Motors*¹²⁸ case, the Board had decided that the agency shop was valid, and the Supreme Court affirmed this decision. In the *Schermerhorn* case, the Board did not have an opportunity initially to assess the agency shop arrangement under section 14(b). Were it not for the *General Motors*¹²⁹ case

Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

¹²⁰ *Bethlehem Steel Co. v. New York State Labor Relations Bd.*, 330 U.S. 767 (1947).

¹²¹ See *Local 24, Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Bus Employees v. Wisconsin Employment Relations Bd.*, 340 U.S. 383 (1951); *Atlantic Coast Line R.R. v. Georgia*, 234 U.S. 280 (1914).

¹²² *Gregory, Labor and the Law* 539 (2d ed. rev. 1961) agrees with this view.

¹²³ 336 U.S. 301 (1949).

¹²⁴ *Id.* at 313-14.

¹²⁵ It was in doubt because it could be argued that if there was a violation of a state union security law authorized by § 14(b) it was a federal unfair labor practice to be remedied by the federal system.

¹²⁶ 373 U.S. 746 (1963).

¹²⁷ *Labor Board v. General Motors Corp.*, 373 U.S. 734 (1963).

¹²⁸ *General Motors Corp.*, 133 N.L.R.B. 451 (1961), enforcement denied, 303 F.2d 428 (6th Cir. 1962), rev'd, 373 U.S. 734 (1963).

¹²⁹ *General Motors Corp.*, supra note 128.

preceeding the *Schermerhorn* case and coming to the Board with connected issues and via the proper judicial route, the Supreme Court could easily have reversed the *Schermerhorn* case on procedural grounds.

The Court tackled the question of the state's right to enjoin the operation of an agency shop arrangement which the state had declared to be unlawful. It had to sidestep its decision in *San Diego Bldg. Trades Council v. Garmon*¹³⁰ which held that actions arguably under either sections 7 or 8 of the act¹³¹ were actions which were within the exclusive jurisdiction of the NLRB. It did so by deciding that problems relating to section 14(b) were in a special category. While uniformity was a goal which Congress sought in the field of labor relations, the promotion of uniformity was abandoned in dealing with the various state laws barring the enforcement of union security agreements.

While acknowledging the state court's right to enforce a state law barring the agency shop or other union security arrangements, the Court made clear that state power, recognized by 14(b), arose only after the contract between the employer and union authorizing the agency shop was signed. If an attempt was made to enjoin the negotiation and execution of such an agreement prior to its being completed, the state courts would not have jurisdiction; only the Board could act in this situation. Employees and other interested parties would have to wait until the contract was completed in order that they could seek an injunction in the state courts which usually were more sympathetic to their cause. Even if the union were picketing for an agency shop in violation of a state's union security statute, the employer or employee would have to wait until after such a contract was executed in order to air their grievances before the state court.¹³² The Court did not consider the practical problems involved in waiting until after an agreement was signed. Better labor relations can be maintained if a proposal is rejected before, rather than after, it becomes part of a contract.

Giving the state courts this limited right to enforce laws barring union security arrangements once the agreements are actually made effectuates the congressional intent to allow a number of attitudes and philosophies on the subject of compulsory unionism. There is nothing wrong with this approach because compulsory unionism is a subject touching on the very principles of democracy on which this country was founded.

¹³⁰ 359 U.S. 236 (1959).

¹³¹ Taft-Hartley Act.

¹³² *Local 438, Construction Union v. Curry*, 371 U.S. 542 (1962); *Local 429, Electrical Union v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957).

Whether a person must join a union in order to work because a simple majority so desires is not an easy question to answer.

CONCLUSIONS

The legality of the agency shop as a form of union security has been a controversial issue for some time. In the last few years, great progress has been made in clarifying this area of uncertainty which vitally effects the welfare of a significant portion of American management and labor. The agency shop has been declared allowable under federal law. In states which have right-to-work laws, the agency shop is banned whether or not it is specifically mentioned, except when the right-to-work law contains penal provisions and the agency shop is not specifically banned. Finally, the state courts can enjoin the operation of an agency shop arrangement which the state has declared to be unlawful providing the arrangement has been made.

No doubt the unions consider section 14(b) the cause of their problems with the agency shop arrangement. Congress can certainly expect the unions to seek its repeal. Whether the union's efforts will be successful or will lead to compromise legislation, only time will tell. It is this author's opinion that compromise legislation will result. Legislation which would limit payments, by a nonmember, to the union for services rendered as bargaining agent would be just. The nonmember has, and always will, accept the gains obtained by the bargaining agent for him and he cannot complain if he is called upon to bear his share of the expense. Auditing procedures could be set up to ensure that the expense was properly allocated.

It is to the benefit of all employees whose bargaining agents are unions that their agents are financially sound. A union with uncertain or inadequate financing would be a weak and timid representative and would be unable to carry out its function of representing the employees in an equitable manner. Knowing that it is supported by all, members and nonmembers, the union can maintain a responsible attitude throughout its dealing with the management; an attitude so important to the further development of the national economy.