



NORTH CAROLINA LAW REVIEW

Volume 33 | Number 4

Article 9

6-1-1955

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Recommended Citation

James A. House Jr., *Labor Law -- Railway Labor Act -- Federal-State Conflict Over Union Shop*, 33 N.C. L. REV. 626 (1955).

Available at: <http://scholarship.law.unc.edu/nclr/vol33/iss4/9>

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an action for damages¹⁴ against the carrier could be brought by the government official in charge. These methods are still widely used, and the Supreme Court decision¹⁵ apparently does not encompass them in its prohibition. But, when the penalty imposed results in a complete obstruction of interstate commerce, as in the *Hayes Freight Lines* case,¹⁶ by suspending the carrier's right to use the highways of the state, the courts will strike the penalty. However, in the twilight area of balancing the state's interest in the safety and maintenance of its highways, against the national interest in protecting the free flow of interstate commerce, the Supreme Court will probably uphold reasonable state regulations which fall short of preventing interstate commerce. This conclusion would seem to follow from the provision¹⁷ in many state statutes for a construction not in conflict with federal legislation or the Constitution.

LOUIS A. BLEDSOE, JR.

Labor Law—Railway Labor Act—Federal-State Conflict Over Union Shop

In 1951 Congress amended the Railway Labor Act¹ to permit carriers and the union representative of their employees to enter into "union shop" agreements² under certain conditions. The amendment specifically states the agreements may be entered into "notwithstanding any other provisions of the Act, or of any other statute or law of the United States or territory thereof, or any state."³ The problem is thus

¹⁴ IOWA CODE ANN. c. 321, § 321.475 (1949). In such case the superintendent of Public Works sues the owner of the vehicle for the damages the vehicle does to the highway, and the recovery goes to the highway fund.

¹⁵ *Castle v. Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954).

¹⁶ *Ibid.*

¹⁷ ALA. CODE, tit. 48, § 28 (1940); N. C. GEN. STAT. § 62-121.39 (1950). The North Carolina statute reads: "(1) This article shall apply to persons and vehicles engaged in interstate commerce over the highways of this state and the Commission may, in its discretion, require such carriers to file with it copies of their respective interstate authority, registration of their vehicles operated in this State, and the observance of such reasonable rules and regulations as the Commission may deem advisable in the administration of this article and for the protection of persons and property upon the highways of the State, except insofar as the provisions of this article may be inconsistent with, or shall contravene, the Constitution and laws of the U. S. (2) The Commission or its authorized representative is authorized to confer with and hold joint hearings with the authorities of other states or with the Interstate Commerce Commission or its representatives in connection with any matter arising under this article, or under the Federal Motor Carrier Act which may directly or indirectly affect the interests of the people of this state or the transportation policy declared by this article of the Interstate Commerce Act."

¹ 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

² "Union shop" agreements permitted by the Act are agreements requiring, as a condition of continued employment, that within 60 days following the beginning of such employment, or of the effective date of such agreements, whichever is later, all employees shall become members of the labor organization representing their craft or class.

³ 64 STAT. 1238, 45 U. S. C., § 152 (eleventh) (1951).

presented: What effect will the amendment have in those states, as North Carolina, which have "Right-to-Work" laws⁴ or constitutional provisions, which in substance outlaw the union shop contract?

There have been several lower court decisions on the problem and from these cases two principal questions have emerged: (1) is the amendment a constitutional exercise of the commerce power by Congress, and (2) has it pre-empted the field to be regulated and thus superseded state laws on the subject? Three lower state court cases ruling on these and related questions have reached divergent results, with two decisions⁵ upholding the constitutional validity of the amendment, while a third case⁶ questioned its constitutionality and held that, irrespective of this issue, the state constitutional prohibition against union shop agreements was not so inconsistent with the federal law as to be superseded.⁷

⁴ The North Carolina "Right to Work" statute is G. S. §§ 95-78 to 95-84 (1950). By the statute any agreement between the employer and a labor organization whereby membership in the labor organization is made a condition of employment is declared to be against public policy of the state, and an illegal combination or conspiracy in restraint of trade. The statute also declares that it is the public policy of the state that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization or association.

As of 1950, seventeen states and the Territory of Hawaii had enacted statutes regulating union-security agreements. The following twelve states appear to have outlawed all forms of union security: Arizona, Arkansas, Florida, Georgia, Iowa, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Texas and Virginia. Colorado, Kansas, and Wisconsin and the Territory of Hawaii require certain voting procedures as a condition precedent to the execution of valid union-security agreements. Colorado, Massachusetts, Pennsylvania and Wisconsin and the Territory of Hawaii specifically outlaw certain kinds of discrimination in the enforcement of union-security agreements. See MATTHEWS, LABOR RELATIONS AND THE LAW 484 (Boston: Little, Brown and Co., 1953). Within the past year "Right to Work" laws prohibiting union shop agreements have also been enacted in Alabama, Mississippi, and South Carolina and the Virginia law has been made more stringent. See 23 U. S. L. WEEK 2103 (Aug. 24, 1954).

⁵ International Association of Machinists v. Sandsberry, 23 U. S. L. WEEK 2229 (Tex. Civ. App., Nov. 23, 1954) reversing 22 U. S. L. WEEK 2370 (Texas, Feb. 16, 1954); and Moore v. Chesapeake and Ohio Ry., 23 U. S. L. WEEK 2106 (Va., Richmond Hustings Court, Aug. 31, 1954). Both cases held that the 1951 amendment permitting the union shop contracts was a constitutional exercise of the commerce power by Congress. The Texas court cited the following cases to sustain its finding: United States v. Carolene Products Co., 304 U. S. 144 (1938); Virginian Ry. v. System Federation No. 40, 300 U. S. 515 (1937); Brotherhood of Railroad Shop Crafts v. Lowden, 86 F. 2d 458 (1936); and Texas & New Orleans Ry. v. Brotherhood of Railroad and Steamship Clerks, 281 U. S. 548 (1930). The Virginia court relied on the Virginian Ry. case *supra*.

⁶ Hanson v. Union Pacific Ry., 22 U. S. L. WEEK 2346 (Neb., Feb. 2, 1954). The Nebraska court reasoned that the federal act merely permitted such contracts, while the Nebraska Constitution takes the definite position of forbidding them. Thus the direct conflict of position, if any, lies between private contracting parties who determine that such contracts shall be made and the state which has proscribed them. Under this interpretation, the court concludes that the state law will prevail.

⁷ A North Carolina Superior Court case (Hudson v. Atlantic Coast Line RR, Jan. 6, 1955. In the Superior Court of New Hanover County, not officially reported) faced a similar problem when asked to enjoin the operation of a union shop agreement between the carrier and the unions representing its employees. However, in its findings and conclusions of law, the court did not discuss or even refer to the 1951 amendment to the Railway Labor Act permitting such agreements. Injunc-

The broad scope of the Commerce power of Congress has been established since *Gibbons v. Ogden*,⁸ and the power has been recognized to embrace labor relations⁹ and more specifically the relations of carriers and employees subject to the Railway Labor Act.¹⁰ This Act was passed in 1926, and under it union shops were not illegal. However, company dominated unions began to control the field, and in 1934 organized labor pressed for federal legislation outlawing the company union. In response to this request, Congress outlawed the union shop entirely, irrespective of type.¹¹ With the disappearance of company unions and substitution therefor of organized labor unions, the latter began to press for the repeal of the prohibition against union-shop agreements, and finally succeeded in securing passage of the 1951 amendment.

tion was issued apparently on the grounds that the unions had failed properly to represent the employees, and had exceeded their authority in negotiating the agreements and that such contracts were contrary to the laws and public policy of the state. Since there was no consideration given to the Railway Labor Act amendment authorizing such contracts, it is uncertain what the court would have done if the amendment had been considered, and what the North Carolina Supreme Court will hold when faced with the problem.

A similar suit was instituted in another Superior Court of North Carolina by non-union employees of the Southern Railway to enjoin the enforcement of a union-shop contract. Defendant unions sought removal to the U. S. District Court for the Western District of North Carolina. A three judge court convened and the petition for removal was denied and the case remanded since the complaint did not set forth a cause of action arising under the 1951 amendment or under the Constitution or laws of the United States and thus no federal questions were involved. In his opinion, Judge Parker said: "The amendment to the Railway Labor Act of which we take judicial notice must unquestionably be considered in passing upon the case; but the complaint states no cause of action arising under that statute, the effect of which is to destroy any cause of action which plaintiff might otherwise have had under state law. . . . So long as plaintiff's cause of action does not arise under the laws of the United States, the case is not removable, even though when these laws are considered plaintiff has no cause of action and is not entitled to an injunction. The defendant in such case must rely for protection of his rights upon action by the state courts, which are just as much bound as are the federal courts to give effect to the laws of the United States, and in a case involving these laws are subject to review by the United States Supreme Court." *Allen v. Southern Ry.*, 114 F. Supp. 72, 73, 75 (W. D. N. C. 1953).

The course of the litigation in the Sandsberry case, *supra* note 5, presents a problem similar to that faced by the North Carolina court. See *Sandsberry v. Gulf, Colorado & Santa Fe Ry.*, 114 F. Supp. 834 (N. D. Tex. 1953) where the case was remanded for lack of a federal question, and *International Association of Machinists v. Sandsberry*, 22 U. S. L. WEEK 2370 (Tex., Feb. 16, 1954) where the union shop agreement was enjoined and the 1951 amendment declared unconstitutional, which decision was reversed by Texas Court of Civil Appeals, 23 U. S. L. WEEK 2229 (Tex., Nov. 23, 1954).

⁸ 9 Wheat. 1, at 196 (U. S. 1824).

⁹ *Jones & Laughlin Steel Corp. v. N. L. R. B.*, 301 U. S. 1 (1937).

¹⁰ *Virginia Ry. v. System Federation No. 40*, 300 U. S. 515 (1937).

¹¹ "They [the 1934 prohibitions against union shop contracts] were enacted into law against the background of employer use of these agreements as devices for establishing and maintaining company unions, thus effectively depriving a substantial number of employees of their right to collective bargaining. . . . It was because of this situation that labor organizations agreed to the present statutory prohibition against union security agreements." SEN. REP. No. 2262, 81st Cong., 2d Sess. 2 (1950).

Both the Railway Labor Act of 1926 and the Railway Labor Act of 1934 were upheld by the Supreme Court as valid legislation under the commerce power soon after the passage of each.¹² It is thus a matter of history that union shop agreements have been regulated in the interstate railroad industry (by section 2, paragraphs fourth and fifth of the Act of 1934) for some seventeen years prior to the enactment of the amendment of 1951. It is also history that the Wagner Act¹³ legislated with reference to union security agreements for the non-railroad industry in that section 8 (3) of the Wagner Act did not prohibit union shop agreements, but permitted them, as well as the so-called "closed shop" agreements.¹⁴ The constitutionality of the Wagner Act, and specifically of section 8, was upheld in *Jones & Laughlin Steel Corp. v. N. L. R. B.*¹⁵

If the provisions of the Wagner Act under which the even more restrictive "closed shop" contract could be entered into were constitutional, then it seems that section 2, paragraph eleventh, of the Railway Labor Act (the 1951 amendment), permitting "union shop" contracts would be valid. Throughout the period of the operation of the Wagner Act, the Supreme Court did not question the constitutionality of the closed shop proviso of the Act.¹⁶ In 1947 Congress amended the Wagner Act by enacting the "Taft-Hartley" amendments.¹⁷ At that time the subject of union shop agreements was thoroughly reviewed, and Congress restricted, but did not eliminate, the right of unions and employers to include union shop provisions in their contracts. The proviso of section 8 (a) (3)¹⁸ of Taft-Hartley allowed union shop agreements on specified

¹² *Texas & New Orleans Ry. v. Brotherhood of Railroad and Steamship Clerks*, 281 U. S. 548 (1930); and *Virginian Ry. v. System Federation No. 40*, 300 U. S. 515 (1937). Note also that in *Brotherhood of Railroad Shop Crafts v. Lowden*, 86 F. 2d 458 (10th Cir. 1936) the court held the Congressional prohibition of check-off contracts contained in Section 2, fourth, of the Railway Labor Act of 1934 was a valid regulation under the commerce clause.

¹³ 49 STAT. 449, 29 U. S. C. § 151 *et seq.* (1935).

¹⁴ Under "closed shop" agreements, the employer contracts not to hire anyone except members of the appropriate union, and to discharge any employee who does not remain a union member in good standing throughout the life of the agreement. See MATTHEWS, *LABOR RELATIONS AND THE LAW* 447 (Boston: Little, Brown and Co., 1953).

¹⁵ 301 U. S. 1 (1937).

¹⁶ In *Colgate-Palmolive-Peet Co. v. N. L. R. B.*, 338 U. S. 355 (1949) the Court enforced a closed shop contract executed pursuant to the authority of the Wagner Act and said "Congress knew that a closed shop would interfere with the freedom of employees to organize in another union and would, if used, lead inevitably to discrimination in tenure of employment. Nevertheless, with full realization that there was a limitation by the proviso of section 8 (3) upon the freedom of section 7 [section guaranteeing right of self-organization and right to join union of choice], Congress inserted the proviso of section 8 (3). It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Id.* at 362-363.

¹⁷ 61 STAT. 136, 29 U. S. C. § 151 *et seq.* (1947) (Labor-Management-Relations Act).

¹⁸ The section provides *inter alia* "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 (not established, maintained, or assisted by any

conditions and is substantially similar to the union shop proviso of the 1951 amendment to the Railway Labor Act. The Court in *Radio Officers Union, C. T. U. v. N. L. R. B.*¹⁹ did not question last year the validity of the union shop proviso of section 8 (a) (3) as a proper regulation by Congress under the commerce power. The Court has not indicated that the Wagner or Taft-Hartley union shop provisions were invalid; rather the Court has indicated that it is a problem over which reasonable men will differ and over which Congress is to legislate.²⁰ Since the question is "at least debatable"²¹ whether union shop agreements in the interstate railroad and airline industry should be left unregulated, restricted, or wholly prohibited, Congress may legislate on the subject, and the courts may not re-evaluate the judgment of Congress and strike down the legislation on the grounds that it was not in their opinion wise or reasonable.

Assuming, then, the 1951 amendment to be a valid exercise of the commerce power by Congress, does the amendment represent a pre-emption of the field and supersede state legislation on the subject? Two of the three lower court decisions held that it did, in ruling on this and related problems.²²

action defined in Section 8 (a) of this Act as an unfair labor practice) 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. . . ."

¹⁹ 347 U. S. 17 (1954).

²⁰ See *Radio Officers' Union, C. T. U. v. N. L. R. B.*, 347 U. S. 17, 41 (1954): In enacting the Taft-Hartley union-shop amendment which is similar to the Railway Labor Act union-shop amendment, "Congress recognized the validity of the union's concern about 'free riders,' *i.e.*, employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave the unions power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason."

²¹ The problem of whether Congress should permit union shop agreements or prohibit them altogether is similar to the problem the Court faced in *United States v. Carolene Products Co.*, 304 U. S. 144 (1938), as to whether Congress might prohibit the shipment of filled milk in interstate commerce. There the Court said the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted or wholly prohibited, and as that decision was for Congress, the court's decision could not be substituted for it.

²² *International Association of Machinists v. Sandsberry*, 23 U. S. L. WEEK 2229 (Texas, Nov. 23, 1954) and *Moore v. Chesapeake and Ohio Ry.*, 23 U. S. L. WEEK 2106 (Va., Aug. 31, 1954).

Other objections raised and ruled against by both courts included the contention that the 1951 amendment deprived non-union workers of rights guaranteed by the Bill of Rights. The Texas court said the agreement was between private parties and did not represent governmental action to which the Bill of Rights applied. Both courts noted a recent case, *Otten v. Baltimore & Ohio Ry.*, 205 F. 2d 58 (1953), in which Chief Judge Learned Hand said that an argument to the effect that the 1951 amendment deprived an employee of right of religious liberty guaranteed under the first amendment did not even raise a substantial question. The Virginia court pointed out that whenever one becomes the employee of another, he does so by virtue of his contract, and while he has an absolute right to quit or work as he may see fit, his remaining rights are governed by all lawful conditions of the contract.

In previous labor relations cases,²³ the Supreme Court has upheld the power of Congress to supersede state legislation in a field subject to its regulation, and found that it does so when it enacts specific governing legislation. It is also the general rule that whether Congress has preempted the field and made the state law inapplicable is to be determined by the intention of Congress.²⁴

The intention of Congress that the 1951 amendment should prevail over state legislation on the subject seems manifest in the language of the statute itself. While under the Wagner Act and Taft-Hartley amendments reference to state laws was omitted in the union shop provisos [and under Taft-Hartley, by section 14 (b) a proviso was inserted that union shop agreements were not authorized in states which had laws to the contrary], section 2, paragraph eleventh, of the Railway Labor Act (the 1951 amendment) expressly states, "notwithstanding . . . any statute or law . . . of any state . . . to the contrary," the carrier and the union may make union shop agreements. There is no proviso, as 14 (b) of Taft-Hartley, which makes the authorization of union shop contracts inapplicable in states with laws to the contrary; rather, the language is express and plain that the amendment shall prevail in such instances. The reports of the Committees of the House and Senate are likewise clear that the amendment was intended to supersede state regu-

Examining the 1951 amendment more specifically the Virginia court held the act valid against the following objections: (1) That there was no "regulation" within the meaning of the commerce clause. The Court pointed out that paragraphs fourth and fifth of the Act, which prohibit the carrier from requiring employees to join a labor organization as a condition of employment are regulatory, and paragraph eleventh (the 1951 amendment) recites a special situation in which paragraphs fourth and fifth are suspended. The Court concluded that when viewed in the light of creating an exception to a given regulation, while the language is permissive in a sense, it is regulatory in its character. (2) That there had been a delegation of legislative power. The court answered this by stating that Congress had spelled out a definite standard and left no discretion to the contracting parties. (3) That the amendment discriminated against "non-operating" employees (those who are not involved in actual operation of the trains, as yard and shop workmen) of the carriers. Under the amendment "operating" employees are deemed to have met the requirements of union membership if they belong to any one labor organization, while "non-operating" employees are required to be members of the labor organization which is the bargaining representative of their craft. The court said that this was a proper classification of the subject to be regulated by Congress, and noted that the Congressional committee hearings demonstrated that the application of the "union-shop" section to "operating employees" would have resulted in chaotic administrative situations, because they shuttle back and forth from one craft to another, while no such situation prevails among non-operating employees.

²³ *International Union, U. A. W. v. O'Brien*, 339 U. S. 454 (1954); *Garner v. Teamsters Union*, 346 U. S. 485 (1954); *Amalgamated Association v. Wisconsin Employ. Bd.*, 340 U. S. 383 (1951).

²⁴ *Allen Bradley Local v. Wisconsin Employ. Bd.*, 315 U. S. 740 (1942); *United States v. Darby*, 312 U. S. 100 (1941). Also see *Algoma Plywood Co. v. Wisconsin Employ. Bd.*, 336 U. S. 310 (1949) in which the union-shop proviso of the original Wagner Act was involved.

lation on the subject.²⁵ And, as was noted by the Virginia court in the *Chesapeake and Ohio* case, attempts by Congressmen and Senators to amend the section to make it inoperative in those states which have the "Right to Work" laws were defeated by large majorities.²⁶

The conclusion is rather inevitable that the patent intent of Congress was that the 1951 amendment should prevail over any state laws to the contrary. The trend of decisions surveyed here has been to recognize that conclusion and to apply the amendment in spite of laws of the state prohibiting union shop agreements. Whether to permit union shop contracts, and how to regulate them, is a problem to which neither the states nor Congress have found a clear-cut, definitive solution, and the states and Congress have taken varying positions with respect to it over a period of years. Undoubtedly there will be further legislation on the subject in the future.²⁷ Until there is further legislation, the 1951 amendment is the law of the land, and state "Right to Work" laws in conflict must yield to the Congressional Act.²⁸

JAMES ALBERT HOUSE, JR.

Adverse Possession—Intent as a Requisite in Mistaken Boundary Cases

In a recent Texas case,¹ the court, in denying defendant's claim of title by adverse possession, reaffirmed the Texas rule as regards the intent necessary to acquire title by adverse possession in cases where there

²⁵ "It will be noted that the proposed paragraph eleventh would authorize agreements notwithstanding the laws of any state. For the following reasons, among others, it is the view of the committee, that if, as a matter of national policy such agreements are to be permitted in the railroad industries it would be wholly impracticable and unworkable for the various states to regulate such agreements. Railroads and airlines are direct instrumentalities of interstate commerce; the Railway Labor Act requires collective bargaining on a system-wide basis; agreements are uniformly negotiated for an entire railroad system and regulates the rates of pay, rules of working conditions of employees in many states, the duties of many employees require the constant crossing of state lines; many seniority districts under labor agreements extend across state lines, and in the exercise of their seniority rights employees are frequently required to move from one state to another." H. R. REP. No. 2811, 81st Cong., 2d Sess. 5 (1950).

The Senate Committee report stated that there was no disagreement that the right of unions generally in industry to enter into union shop contracts should be extended to labor organizations subject to the Railway Labor Act; but three members of the Committee reserved the right to introduce and support amendments on the floor, premised on asserted differences between the provisions of the amendment and corresponding provisions of Taft-Hartley. The majority felt that the terms of the two Acts were substantially the same, and "such differences as exist are warranted either by experience or by special conditions existing among employees of our railroads and airlines." SEN. REP. No. 2262., 2d Sess. 3 (1950).

²⁶ See 96 CONG. REC. 536 (1951).

²⁷ For varying state and federal legislation on the subject, see MATTHEWS, LABOR RELATIONS AND THE LAW 475 *et seq.* (Boston: Little, Brown and Co., 1953).

²⁸ See discussion of *Allen v. Southern Ry.*, 114 F. Supp. 72 (W. D. N. C. 1953), note 7 *supra*.

¹ *Orlando v. Moore*, 274 S. W. 2d 86 (Tex. Civ. App. 1954).