SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 23 | Issue 3

1972

Right-to-Work Laws: The Current State of Affairs

Dennis R. Morgan

Right-to-Work Laws: The Current State of Affairs

Dennis R. Morgan

During the decade following the passage of the Taft-Hartley Act there was vigorous activity in many state legislatures for passage of "right-to-work" laws prohibiting employment practices which discriminate against the nonunion employee. Since those initial convulsions, a relative calm has prevailed in this legislative field. Now, in view of the growth of organized labor in those states which have adopted right-to-work laws, it reasonably could be predicted that an effective lobbying effort on the part of the unions may renew the controversy. Furthermore, recent federal concern with economic controls may spur other states to reconsider the adoption of similar measures in an attempt to reduce organized labor's hold on the employment market. In this article, the author provides a review of the case law surrounding state right-to-work laws, their constitutionality, and their interaction with federal labor law. The author concludes that states do not enjoy the power that advocates of right-to-work laws had hoped they would have.

I. INTRODUCTION

THE NATIONAL LABOR RELATIONS ACT,[1] popularly known as the Wagner Act, was enacted by Congress in 1935 at the height of the Roosevelt New Deal. It was hailed by the leaders of American labor as greatly promoting the growth of organized labor, particularly by sanctioning the "closed shop."[2] As a result of such favorable legislation, labor organizations grew in strength and number, causing many people to be concerned over the effect of new union security devices such as the closed shop on the independence of the individual worker. Pressure mounted at all levels of government for mitigation of the effects of the Wagner Act.

THE AUTHOR: DENNIS R. MORGAN (B.A., Washington & Lee University; J.D., University of Virginia; LL.M. in Labor Law, New York University) is a member of the law firm of Marshman, Snyder & Seeley, in Cleveland, Ohio. He is admitted to the Ohio, Virginia, Federal, and Supreme Court Bars.

---

[1] 29 U.S.C. §§ 151-68 (1970) (originally enacted as Act of July 5, 1935, ch. 372, 49 Stat. 449).

[2] A *closed shop* is "[a]n establishment where only members of a union in good standing are hired or retained as employees." P. CASSELMAN, LABOR DICTIONARY 60 (1949).

The proviso to section 8(3) of the Wagner Act, Act of July 5, 1935, ch. 372, § 8(3), 49 Stat. 452, *as amended* 29 U.S.C. 158(a)(3) (1970), provided in pertinent part:

> [N]othing in . . . [sections 151-66 of this title] or in any other statute of the United States, shall preclude an employer from making an agreement with a

In 1947 Congress responded to the wave of criticism leveled at the unions' strength by enacting the Taft-Hartley Act,[3] which, in part, specifically amended the closed shop provision, section 8(3), of the Wagner Act. The new provision, section 8(a)(3),[4] outlawed the closed shop, and authorized, at most, a limited union shop. Also

---

labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section [159(a) of this title], in the appropriate collective bargaining unit covered by such agreement when made.

The closed shop is merely one, albeit the strongest, of several union security devices which include the following. First, in the *full union shop*, the employer may select any employee, union or nonunion, but the new employee must join the union within a specified time and remain a member in good standing. Second, the *modified union shop* exempts old employees who are not already members, or allows escape periods for withdrawal from membership. A third device is the *maintenance of membership*, requiring employees who are members of a union on a specified date, or who thereafter become members, to remain members during the term of the contract as a condition of employment. Often, there is a 15-day period at the beginning of the contract term during which members may withdraw from the union if they do not wish to retain membership for the duration of the agreement. A fourth device is *preferential hiring* which requires the employer to hire union members if they are available. The union usually undertakes to supply them, and if it cannot, the employer is free to hire employees wherever he can find them. (This can be used in conjunction with one of the other devices.) Other devices which may be considered involving union security are the *agency shop*, in which nonmembers of the contracting union are generally required to pay to the union a sum equal to union dues, and the *maintenance of union dues* under which the employer can "checkoff" or withhold the union dues from a union member's paycheck and deliver it directly to the union.

It should be noted that such devices have enjoyed not only long (some going back to 1675 in the United States), but common use. In 1946 slightly over 11 million of the approximate 15 million employees working under collective bargaining agreements were covered by some form of union security device: maintenance of membership agreements — 3,695,000; closed shop agreements — 3,357,000; union shop agreements — 2,597,000; union shop with preferential hiring — 1,497,000. Pollitt, *Right to Word Law Issues: An Evidentiary Approach*, 3 N.C. L. REV. 233, 236 (1959).

[3] Labor Management Relations Act of 1947, Act of June 23, 1947, ch. 120, §§ 1-502, 61 Stat. 136 (*amending* the National Labor Relations Act, 29 U.S.C. §§ 151-66 (1940)), *as amended*, 29 U.S.C. §§ 141-47, 151-68, 171-87 (1970).

[4] 29 U.S.C. § 158(a)(3) (1970). For purposes here, the pertinent part of this section reads:

Provided, That nothing in the subchapter 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 action defined in this subsection [§ 158(b)] 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. . . . *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

a part of the Taft-Hartley revisions was section 14(b),[5] which made it clear that the states were free to pass more restrictive laws in regard to union security contracts.[6]

The states, meanwhile, had already begun to enact legislation covering union security agreements. The traditional state approach to union security agreements, until the middle 1940's, was to leave the area to the courts, which had mainly manipulated common law principles in devising their policies.[7] In 1944, however, Florida passed the first "right-to-work" law.[8] By the end of 1947, 10 other states had followed suit.[9] Since that time another 10 states have en-

---

[5] 29 U.S.C. § 164(b) (1970) (originally enacted as Act of June 23, 1947, ch. 120, § 14(b), 61 Stat. 151). Section 14(b) declares:

> 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.

[6] There was at that time an unanswered question as to whether the states could pass such legislation in view of the Wagner Act. Congress therefore added the section 14(b) proviso in order to assure that such legislation was not deemed preempted by the Federal Act. *See* H. CONF. REP. NO. 510, 80th Cong., 1st Sess. 60 (1947). A year later, in a case arising under the Wagner Act, Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board, 336 U.S. 301 (1948), the Supreme Court upheld a back pay award made by the Wisconsin Employment Relations Board upon grounds that a state could properly legislate on the issue of union security. The majority declared that section 8(3) "merely disclaims a national policy hostile to the closed shop or other forms of union security agreement." *Id.* at 307. The court supported its declaration by quoting from the following legislative history concerning the section: "[T]he bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal; it does not interfere with the status quo on this debatable subject but leaves the way open to such agreements as might now be legally consummated . . . ." S. REP. NO. 573, 74th Cong., 1st Sess. 12, *quoted in* 336 U.S. at 309.

[7] By 1942, it was estimated that of the states that had ruled on the legality of the closed shop, the number of states upholding it numbered more than twice as many as those forbidding it. Skinner, *Legal and Historical Background of the Right-to-Work Dispute*, 9 LAB. L.J. 411, 417 (1958). For some examples of cases holding that such contracts were allowed in the states, see, *e.g.*, C. S. Smith Metropolitan Market Co. v. Lyons, 16 Cal. 2d 389, 106 P.2d 414 (1940); McKay v. Retail Auto. Salesmen, 16 Cal. 2d 311, 106 P.2d 373 (1940); Hudson v. Atlantic Coastline R.R., 242 N.C. 650, 89 S.E.2d 441 (1955); Crosby v. Rath, 136 Ohio St. 352, 25 N.E.2d 932 (1940). For some examples of cases holding that such contracts were forbidden in the state, see, *e.g.*, Connors v. Connally, 86 Conn. 641, 86 A. 600 (1913); Roth v. Retail Clerks Local 1460, 216 Ind. 363, 24 N.E.2d 280 (1939).

[8] *See* FLA. CONST. art. I, § 12 (1944), *as revised* FLA. CONST. art. I, § 6 (1968). The term "right-to-work" is normally used to describe statutes or constitutional provisions that prohibit the requirement of union membership as a condition of employment.

[9] *See* ARIZ. REV. STAT. § 23-1302 (1971); ARK. CONST. amend. 34, § 1 (1947); GA. CODE ANN. §§ 54-901 to -909 (1961); IOWA CODE ANN. § 736A.1-.8 (1958); NEB. REV. STAT. § 48.217 (1960); N.C. GEN. STAT. § 95-78 (1965); S.D. CONST. art. VI, § 2 (1967); S.D. CODE § 17.1101 (1960); TENN. CODE ANN. § 50-208 (1966); TEX. STAT. ANN. art. 5207a (1971); VA. CODE §§ 40.1-58 to -69 (1970).

It is worth noting that the enactment of section 14(b), in all probability, did not *cause* the enactment of right-to-work laws, but rather that the section was added as the *effect* of pressure from some of the states. It is difficult to believe that the ten state leg-

acted such laws,[10] although Indiana repealed its act in 1965 and Louisiana restricted the application of its act to agricultural workers in 1956.

Analyzing the various right-to-work laws, one is struck by the wide variance in the state laws with respect to scope and remedies. Some of the laws consist merely of a state constitutional amendment to the effect that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor organization.[11] Most go on to declare agreements in conflict with that policy unlawful.[12] Some further prohibit: (1) "combinations" or "conspiracies" to deprive persons of employment because of nonmembership;[13] (2) strikes or picketing for the purpose of inducing an illegal agreement;[14] (3) the denial of employment to any person because of membership or nonmembership;[15] and (4) conspiracy to cause the discharge or denial of employment to an individual by inducing other persons to refuse to work with him because he is a non-member.[16] As for remedies available in case of a violation, most right-to-work laws provide for damages to persons injured by a violation.[17] Others provide for injunctions[18] and criminal sanctions.[19]

---

islatures that passed such laws in 1947 were actuated by foreknowledge of what Taft-Hartley was to contain. Mayer, *Union Security and the Taft-Hartley Act*, 1961 DUKE L.J. 505, 515.

In Virginia the passage of the right-to-work law can be attributed to five factors: (1) the loss of 1.24 million man-days because of work stoppages in 1946; (2) a threatened strike at the VEPCO plant, supporters of the bill claiming that it was needed to meet that emergency; (3) the predominantly rural nature of the economy; (4) the historic attitude of the South toward unions and unionism — the paternalism of the employer and the fact that any attempt to organize a union is looked upon as evidence of ingratitude and disloyalty; (5) the belief that the passage of such a law would attract new industry to the state. Kuhlman, *Right-to-Work Laws: The Virginia Experience*, 6 LAB. L.J. 453-54 (1955).

[10] ALA. CODE tit. 26, § 375 (1958); KAN. CONST. art. 15, § 12 (1958); LA. REV. STAT. § 23.881 (1964); MISS. CODE ANN. § 6984.5 (Supp. 1971); NEV. REV. STAT. c. 613.230-.300 (1967); N.D. CODE § 34-01-14 (1962); S.C. CODE § 40-46 (1962); UTAH CODE ANN. § 34-16-1 to -18 (1966); WYO. STAT. § 27-245.1 -.8 (1967).

[11] *See* FLA. CONST. art. I, § 6 (1968); KAN. CONST. art. 15, § 12 (1958).

[12] *See* GA. CODE ANN. § 54-905 (1961); IOWA CODE ANN. § 736A.3 (1958).

[13] *See* ALA. CODE tit. 26, § 375(2) (1958); NEV. REV. STAT. c. 613.280 (1967).

[14] *See* ARIZ. REV. STAT. ANN. § 23-1303(B) (1971); S.C. CODE § 40-46.6(1) (1962).

[15] *See* UTAH CODE ANN. § 34-16-2 (Supp. 1963).

[16] *See, e.g.*, ARIZ. REV. STAT. ANN. § 23-1305 (1971); NEV. REV. STAT. § 613.280 (1967).

[17] *See* MISS. CODE ANN. § 6984.5(f) (Supp. 1971).

[18] *See* IOWA CODE ANN. § 736A.7 (1958); GA. CODE ANN. § 54-908 (1961).

[19] *See* S.D. CODE § 17.9914 (1960); TENN. CODE ANN. § 50-212 (1966).

Many right-to-work laws seemingly go beyond the mere prohibition (as sanctioned by section 14(b) of the Taft-Hartley Act) against making union membership a condition of employment.[20] For example, several laws prohibit

> [a]ny agreement or combination between any employer and any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for said employer, or whereby such membership is made a condition of employment or continuation of employment by such employer or whereby any such *union* or organization *acquires* an *employment monopoly* in any enterprise . . . .[21]

Still others proscribe not only requirements of membership in, but also "affiliation with," a labor organization as a condition of employment.[22] Many right-to-work laws expressly prohibit any requirement that an individual pay dues, fees, or other charges of any kind to a union as a condition of employment.[23] Several others include a prohibition against compelling a person to join a union or strike against his will by threatened or actual interference with his person, family, or property.[24] A few have even gone so far as to sanction individual bargaining in the face of collective bargaining.[25] Thus, it is not easy to deal with these statutes as a whole, for while they are akin to one another, they are certainly not identical. The Virginia statute,[26] however, comes about as close as is possible to bringing the various concepts involved under one statute. Thus, for purposes of discussion, reference will frequently be made to examples drawn from that statute.

---

[20] This has indeed caused a great deal of concern, because it is in these areas that the greatest potential for conflict with, and negation of, federal labor policy exists. In fact, numerous state courts have upheld actions based on such statutes with little or no regard to whether the statutes are sanctioned by § 14(b) and, hence, not subject to federal preemption.

[21] ALA. CODE tit. 26, § 375(2) (1958); N.C. GEN. STAT. § 95-79 (1965) (identical statutes) (emphasis added).

[22] *See* ARK. STAT. ANN. § 81-202 (1960); TENN. CODE ANN. § 50-208 (1966).

[23] *See* N.C. GEN. STAT. § 95-82 (1965); UTAH CODE ANN. § 34-16-10 (1966).

[24] *See* ARIZ. REV. STAT. ANN. § 23-1304 (1971); S.D. CODE § 17.1101(4) (Supp. 1960).

[25] *E.g.*, ARK. STAT. ANN. § 81-201 (1960); TEX. STAT. ANN. art. 5207a(1) (1971). Likewise, a South Dakota Attorney General's ruling interpreted the South Dakota law as barring a union from acting as the sole bargaining agent for nonunion and nonconsenting employees. 43 L.R.R.M. 73 (1958). It would appear that this is completely contradictory to the "exclusive bargaining principle" incorporated in the National Labor Relations Act, but, as yet, no case has arisen thereunder. *See* Grodin & Beeson, *State Right-to-Work Laws & Federal Labor Policy*, 52 CAL. L. REV. 95, 96n.6 (1964) (from which much of this summary was developed).

[26] The Virginia right-to-work statute [VA. CODE ANN. §§ 40.1-58 to -69 (1970)] is reproduced in the appendix.

For 10 to 15 years following the passage of the Taft-Hartley Act in 1947, vigorous political battles were waged in the state legislatures over the adoption of right-to-work laws. Management and labor both shared the belief that such laws would weaken the unions' ability to organize and maintain strength in the face of determined opposition by management. And both sides were therefore vigorous in their activities respectively for or against any proposed legislation. The pro right-to-work law forces were successful in the 19 states presently having such laws, plus Indiana and Louisiana.[27] Passage was secured in these states primarily because of the relative weakness of the unions; but proponents failed to obtain passage in the more industrial states despite bitter battles in some states such as California and Ohio.

During this period of implementation, the repeal of section 14(b) of Taft-Hartley was never seriously considered. Most Republicans and Southern Democrats agreed with the position of management. And the latter, who were either in control of the Presidency or had positions of power in the Congress, were able to maintain the status quo. Beginning with the election of President Kennedy, however, and increasing in intensity with the landslide victory of President Johnson and the Democrats in 1964, the unions began in earnest to lobby for the repeal of section 14(b). Despite the tremendous pressure which the unions were able to exert, especially on Democrats, the attempt to repeal section 14(b) fell short, and with the ascendancy of Richard Nixon to the Presidency, the issue became dormant.

Labor leaders still view section 14(b) as a threat to their existence and their ability to expand membership. Consequently, it is likely that the unions will once again seek the repeal of section 14(b). It is the purpose of this article to examine the validity and substance of existing right-to-work laws and their impact on American labor law today. That inquiry will provide valuable insights into the question of their continued vitality.

II. CONSTITUTIONALITY

Soon after their inception, the right-to-work laws were challenged on constitutional grounds. In the initial judicial consideration, *Lincoln Federal Labor Union v. Northwestern Iron & Metal*

[27] In Indiana, the right-to-work law was repealed in 1965. In 1956 the right-to-work law of Louisiana had been limited in application to agricultural workers.

Co.,[28] the union attacked the statutes as violating the constitutional guarantee of free speech, impairing the obligation of contracts, depriving unions and members of the equal protection of the laws, and constituting a deprivation of due process. The United States Supreme Court found the union's first amendment contention "rather startling."[29] Rejecting the union's arguments, Mr. Justice Black declared: "It is difficult to see how enforcement of this state policy could infringe the freedom of speech of anyone, or deny to anyone the right to assemble or to petition for a redress of grievances."[30] The Court likewise curtly dismissed the contention that such laws impair the obligation of contracts.[31] In response to the argument that the state enactments denied equal protection of the laws, the court simply observed that since the statutes prohibited discrimination against union as well as nonunion workers the Court could find no denial of equal protection.[32]

The final argument offered by the unions in *Lincoln Federal* was that the state laws violated the due process clause of the 14th

---

[28] 335 U.S. 525 (1949). The case consolidated two cases arising under the right-to-work laws of Nebraska and North Carolina. Both the Nebraska Constitutional amendment (NEB. CONST. art. XV, § 13-15 (1964)) and the North Carolina statute (N.C. GEN. STAT. c.95, art. 10 (1947)) provided no person should be denied employment because of membership or nonmembership in a labor organization, and prohibited contracts which excluded persons from employment because of such membership or nonmembership. The Nebraska case arose out of an action for a declaratory judgment on the constitutionality of the amendment, while the North Carolina case arose from a criminal prosecution of a building contractor and local union officials for violation of the statute.

[29] 335 U.S. at 531. The appellant's contention was based on the proposition

> that the right to work as a non-unionist is in no way equivalent to or the parallel of the right to work as a union member; that there exists no constitutional right to work as a non-unionist on the one hand while the right to maintain employment free from discrimination because of union membership is constitutionally protected. *Id.*

The Court answered by declaring: "The constitutional right of workers to assemble, to discuss and formulate for furthering their own self interest in jobs cannot be construed as a constitutional guarantee that none shall get and hold jobs except those who will join in the assembly's plans." *Id.*

[30] *Id.* at 530.

[31] Justice Black declared: "That this contention is without merit is now too clearly established to require discussion." *Id.* at 531. To support this statement, he cited Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398 (1934), which upheld, against an attack under the contract impairment clause, a state statute empowering courts to extend, within limitations, the time for redeeming from mortgage foreclosure sales.

[32] 335 U.S. at 532. The court issued a separate opinion in A.F.L. v. American Sash & Door Co., 335 U.S. 538 (1949), since the Arizona right-to-work amendment to its constitution prohibited only discrimination against nonunion workers. The constitutionality of the Arizona amendment was upheld under reasoning that even though the amendment itself did not prohibit discrimination against union workers, a state "anti-yellow-dog-contract" statute afforded the same protection to union workers that the right-to-work amendment provided for nonunion workers.

amendment by interfering with the "liberty of contract" of the employer and the union. The unions thus sought to invoke a philosophy which had been in vogue at the turn of the century and was expressed in the cases of *Adair v. United States*[33] and *Coppage v. Kansas*.[34] The Court refused to revive that philosophy. Justice Black declared:

> This court beginning at least as early as 1934, when the *Nebbia* case was decided, has steadily rejected the due process philosophy enunciated in the *Adair-Coppage* line of cases. . . . Under [the current] constitutional doctrine the due process clause is no longer to be so broadly construed that the Congress and state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare. . . . Just as we have held that the due process clause erects no obstacle to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers.[35]

The *Lincoln Federal* decision did not signal an end to the constitutional assault on right-to-work laws. Labor's next attack came under the various state constitutions. An excellent example is *Finney v. Hawkins*,[36] where the state constitutional issue was presented to the Virginia Supreme Court of Appeals. Hawkins was employed as a pressman by Finney. On July 31, 1947, after the effective date of the Virginia right-to-work law, Finney entered into a contract with the Newport News Building and Trades Council to print and publish a labor journal. One of the provisions of the contract was that Finney would employ only union labor in his shop. Hawkins refused to join the union, and, consequently, he was discharged with the proviso that he would be rehired if he joined the union. Hawkins finally joined and was subsequently rehired. Shortly there-

---

[33] 208 U.S. 161 (1907). The case centered around a federal statute which made it a criminal offense for a carrier engaged in interstate commerce to discharge an employee on the basis of union membership. The Court struck down the statute as an invasion of personal liberty — the liberty to contract — because it interferred with the *employer's* rights to set his own contractual terms.

[34] 236 U.S. 1 (1914). This case revolved around a Kansas state statute substantially similar to the federal statute at issue in *Adair*. Here, however, the statute made it a misdemeanor for an employer to require an employee to agree not to remain a union member. The court again struck down the statute in question and posed the rhetorical question: "Granted the equal freedom of both parties to the contract of employment, has not each party the right to stipulate on what terms only he will consent to the inception, or to the continuance, of that relationship?" *Id.* at 12.

[35] 335 U.S. at 536-37.

[36] 189 Va. 878, 54 S.E.2d 872 (1949). Two other states faced similar contentions in 1950. In both, the constitutionality of the right-to-work laws was upheld. *See* Construction & Gen. Labor Union v. Stephenson, 148 Tex. 434, 225 S.W.2d 958 (1950); Local 519 v. Robertson, 44 So. 2d 899 (Fla. 1950).

after, he left that job and went to work for another employer. He then brought suit and recovered a $330 judgment against his prior employer and the Trades Council for damages sustained by reason of his being unemployed for a period of four weeks. The theory of his action was, of course, that the agreement which had led to his being fired was invalid in view of the right-to-work law. The Supreme Court of Appeals agreed and upheld Hawkins' judgment. The court found that the right-to-work law was entirely consistent with a state constitutional guarantee of the right to enjoy life and liberty, and that it was clearly a proper exercise of the state police power to promote the public welfare.[37] Declaring the contract provision to be in fatal conflict with the state's constitutional guarantee, the majority emphasized:

> Basically, agreements involving such discrimination are hostile to our free enterprise system and to individual liberty of choice and action. Legislation that protects the citizen in his freedom to disagree and to decline an association which a majority would thrust upon him on the ground that it knows what is best for him, does no violence to the spirit of our fundamental law.[38]

Thus, the validity of right-to-work laws under both federal and state constitutions appears settled, and likely to remain so.

III. Specific Applications

A. *Picketing*

Many of the decisions interpreting right-to-work laws have arisen in situations wherein an employer seeks injunctive relief from union picketing.[39] At common law the test for an injunction in such a

[37] The court cited Young v. Commonwealth, 101 Va. 853, 45 S.E. 327 (1903), in which "liberty" was defined to include the right of a citizen to "work where he will, and to earn his livelihood by any lawful calling." 189 Va. at 884, 54 S.E.2d at 875.

[38] 189 Va. at 888, 54 S.E.2d at 877.

[39] Injunctions have been sought in other situations, usually where employees seek reinstatement to their jobs or seek to prevent the discharge of union members. The incidence of these cases is small.

Some courts have allowed mandatory injunctions in discharge cases. *See, e.g.*, Dallas Independent School Dist. v. Daniel, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959). Other courts have disapproved such injunctions. *See, e.g.*, Sandt v. Mason, 208 Ga. 541, 67 S.E.2d 767 (1951).

There are several reasons why so few cases have arisen in this area. First, if you are fired for any reason, it is easier to obtain another job rather than fight for the old one. Even if you are reinstated, your chances of promotion within the company are slight. Second, and most important, most employees take their case to the NLRB, if it has jurisdiction, since its procedure is cheaper and more effective. Moreover, sections 8(a)(3) (29 U.S.C. § 158(a)(3) (1970)) and 8(b)(2) (29 U.S.C. § 158(b)(2) (1970)) of the Taft-Hartley Act provide similar protection and remedies as does the discharge clause of the typical right-to-work law. *Cf.* Leiter Mfg. Co. v. Intl. Ladies' Garment Workers,

case was whether the union had an "unlawful purpose" or was using "unlawful means." Passage of right-to-work laws complemented the common law by adding another unlawful purpose. Now injunctive relief, under the common law test, could issue for picketing which had as its purpose the gaining of an objective which would be in violation of the right-to-work law. Logically, only two of the many purposes for picketing would fall within the ambit of the right-to-work law — the demand for a closed shop or a lesser union security clause in a collective bargaining agreement, and the demand that an employer fire his nonunion employees.[40]

Prior to 1953 many state courts declared that a state may properly enjoin peaceful picketing which was conducted for the purpose of inducing such violations of a right-to-work statute.[41] In 1953 the unlawful purpose rationale was endorsed by the United States Supreme Court. In *Plumbers Local 10 v. Graham*,[42] a Virginia general contractor had obtained several nonunion subcontractors for work on a construction job. After preliminary negotiations with the contractor in which the union asked that nonunion employees be dismissed, the Richmond Trades Council began quietly picketing the construction site with signs which simply stated, "This is Not a Union Job." As a result of that picketing, the union laborers refused to work further. The contractor sought an injunction against

269 S.W.2d 409 (Tex. Civ. App. 1954), where the state court dismissed such a suit upon grounds that the remedy sought was preempted by the Taft-Hartley Act. The court's decision was based on reasoning that a discharge for union membership is an unfair labor practice under the federal law and should be brought before the NLRB since the United States Supreme Court had previously stated the necessity for centralized administration in Garmon v. Teamsters Local 776, 346 U.S. 485 (1953).

[40] The basic theory for granting injunctive relief is that any demand for a union security agreement is made for an unlawful purpose since it is contrary to the public policy of the state as enunciated in its right-to-work law. Hence, picketing to demand violation of the state policy is unlawful and may be enjoined. *See, e.g.*, Alabama Highway Express Inc. v. Local 612, Intl. Bhd. Teamsters, 268 Ala. 392, 108 So. 2d 350 (1959); IAM v. Goff-McNari Motor Co., 223 Ark. 30, 264 S.W.2d 48 (1954); Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1950); Minor v. Building and Constr. Trades Council, 75 N.W.2d 139 (N.D. 1956). For an additional situation in which a demand that an employer fire his nonunion employees was held to violate the right-to-work provision which prohibited employers from firing employees because of membership, see, *e.g.*, Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

[41] *E.g.*, Self v. Taylor, 217 Ark. 953, 235 S.W.2d 45 (1950); Local 509 v. Robertson, 44 So. 2d 899 (Fla. 1950); Mascari v. Teamsters, 15 CCH LAB. CAS. 73,779 (Tenn. 1948); Sheet Metal Workers Local 175 v. Walker, 236 S.W.2d 683 (Tex. 1951). These decisions were generally based upon then recent decisions in the United States Supreme Court which had declared that any unlawful purpose would defeat a union's right to picket. *See* Building Service Local 262 v. Gazzam, 339 U.S. 532 (1950); Teamsters Local 309 v. Hanke, 339 U.S. 470 (1950); Hughes v. Superior Court, 339 U.S. 460 (1950); Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

[42] 345 U.S. 192 (1953).

the picketing, introducing testimony to the effect that the picketing was intended to cause the employer to discharge nonunion workers. The trial court granted an injunction on the finding that the picketing was "carried on . . . for *aims, purposes and objectives in conflict with provisions of the Right to Work laws of the State of Virginia and, therefore [was] illegal* . . . ."[43] The Virginia Supreme Court of Appeals affirmed, stating that the finding of the trial court was plainly correct.[44] On certiorari, the Supreme Court of the United States affirmed.[45] Speaking for the majority, Mr. Justice Burton noted:

> Based upon the finding of the trial court, we have a case in which picketing was undertaken and carried on with at least one of its substantial purposes in conflict with the declared policy of Virginia. The immediate results of the picketing demonstrated its potential effectiveness, unless enjoined, as a practical means of putting pressure on the general contractor to eliminate from further participation all nonunion men or all subcontractors employing nonunion men on the project.[46]

The *Graham* decision ostensibly concluded that a state court could enjoin picketing that violated or sought violation of the state's right-to-work statute. But, in a series of cases starting with *Hill v. Florida*,[47] reaching maturity with *Garner v. Teamsters Local 776*[48] and *Weber v. Anheuser-Busch, Inc.*,[49] and culminating in *San*

---

[43] *Id.* at 195 (emphasis by the Court).

[44] This is an odd statement in light of a subsequent case, Painters and Paperhangers Local 1018 v. Rountree Corp., 194 Va. 148, 72 S.E.2d 402 (1952). As in *Graham*, the case involved: union and nonunion subcontractors on the same construction project; peaceful picketing, which was honored by union employees; and placards announcing that nonunion men were employed on the premises. Here too, an injunction was sought against the picketing. The only difference in the cases seemed to be that in *Rountree* no demand was made that nonunion employees be discharged, whereas such a demand was made in *Graham*. The Virginia Supreme Court of Appeals reversed the lower court and denied the injunction in *Rountree*, accepting the union's contention that it was merely conducting an organizational picket. This distinction was rather tenuous. See the dissent of Justice Douglas, note 46 *infra*.

[45] It is extremely important to note that while it appears that *Graham* (where, in essence, a closed shop was being sought) was arguably within the jurisdiction of the NLRB, neither counsel raised the issue, nor did counsel for the Board take any part in the case; hence, the Supreme Court did not consider the issue at all.

[46] 345 U.S. at 201. The case was decided over the strong dissent of Justice Douglas, who declared: "The line between permissible and unlawful picketing will . . . often be narrow or even tenuous. A purpose to deprive nonunion men of employment would make the picketing unlawful; a purpose to keep union men away from the job would give the picketing constitutional protection." *Id.* at 202. (Douglas J. dissenting).

[47] 325 U.S. 538 (1945).

[48] 346 U.S. 485 (1953).

[49] 348 U.S. 468 (1955).

Diego Building Trades Council v. Garmon,[50] the Supreme Court applied the doctrine of federal preemption in the field of labor-management relations. If it were *reasonably arguable* that an action of labor or management was either protected or prohibited by the Taft-Hartley Act, and if the business of the employer affected interstate commerce, the state courts were to decline jurisdiction in favor of the National Labor Relations Board, even if the Board declined jurisdiction because of budgetary or other reasons.[51]

Thus, preemption problems would arise in picketing situations wherein a union demanded a security agreement prohibited by the state right-to-work law, if that picketing were itself a prohibited activity under section 8(b) of the Taft-Hartley Act. Such a case was brought before the United States Supreme Court in *I.B.E.W. v. Farnsworth & Chambers Co.*,[52] where union picketing was aimed at compelling the hiring of union members. The Court, merely citing the *Garner* and *Weber* decisions, issued a per curiam reversal of the Tennessee court decision which had declared the picketing to be in violation of the right-to-work law.[53] Unfortunately, since neither of the cases cited by the Court involved a right-to-work law, the precedential value of the case may be doubted.[54] Yet the case can only be explained upon the grounds that section 14(b) of the Taft-Hartley Act does not permit the states to regulate pre-agreement activities otherwise subject to the preemption doctrine.

In spite of the uncertainty surrounding the rationale of the *Farnsworth* holding, some state courts felt compelled to rule against jurisdiction in these picketing situations.[55] Others, however, continued to exercise jurisdiction by either ignoring the preemption issue[56] or finding that the employer's business did not affect inter-

[50] 359 U.S. 236 (1959).

[51] This apparent lack of equitable relief was later remedied by the 1959 amendments to the Taft-Hartley Act. Now, under section 14(c) (29 U.S.C. § 164(c) (1970)), the states may exercise jurisdiction where the Board has declined to do so.

[52] 353 U.S. 969 (1957).

[53] 201 Tenn. 329, 299 S.W.2d 8 (1957).

[54] This is especially true since the state court injunction was much too broad and counsel for the union in the petition for certiorari argued that union security was not at issue.

[55] *E.g.*, Asphalt Paving v. Intl. Bhd. of Teamsters, 181 Kan. 775, 317 P.2d 349 (1957); Douglas Aircraft Co. v. Elec. Workers Local 379, 247 N.C. 620, 101 S.E.2d 800 (1958).

[56] *See, e.g.*, Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957); Alabama Highway Express v. Teamsters Local 612, 268 Ala. 497, 108 So.2d 350 (1959), where the Alabama court was careful not to rely on 14(b) alone, but noted an alternate basis for the decision, *i.e.* that the employer hired no employees, only independent

state commerce.[57]

But any continuing uncertainty[58] regarding preemption was ended by *Construction & General Laborers Local 438 v. Curry*,[59] where the Supreme Court held that picketing to obtain security agreements was the subject matter of section 8(b)(2) of Taft-Hartley and hence cognizable only by the Board. This case, in conjunction with *Retail Clerks Local 1625 v. Schermerhorn*,[60] made it crystal clear that a state cannot enjoin picketing intended to achieve a union security clause in violation of a state right-to-work law, since "state power . . . begins *only with actual negotiation and execution of the type of agreement described by section 14(b).*"[61]

---

contractors. *See also* Hescom, Inc. v. Stalvey, 155 So. 2d 3 (Fla. Dist. Ct. App. 1963). There the court affirmed the issuance of an injunction prohibiting picketing intended to force an employer to employ only union men. This decision was later held to be overruled by Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96 (1963). *See* Kitchens v. Doe, 172 So. 2d 896 (Fla. Dist. Ct. App. 1965). *Accord*, Dugdale Constr. Co. v. Plasterers Local 538, 257 Iowa 997, 135 N.W.2d 656 (1965).

[57] *See, e.g.*, Pruitt v. Lambert, 201 Tenn. 291, 298 S.W.2d 795 (1957). In recent years similar techniques have been employed to create state court jurisdiction. *See, e.g.*, Teamsters Local 769 v. Fountainbleau Hotel Corp., 222 So. 2d 54 (Fla. Dist. Ct. App. 1969). In that case the court declared:

> The appellant seeks reversal of an interlocutory injunction which restrained certain picketing activity at the appellee's business premises. Appellants contend that the matter involved was such as to have required the circuit court to cede jurisdiction to the National Labor Relations Board, and therefore that the trial court acted without jurisdiction. We hold otherwise. The circumstances presented did not reveal a labor dispute, or facts upon which to arguably conclude, with reason, that one existed. *Id.*

[58] DeVries v. Baumgartner's Electric Construction Co., 359 U.S. 498 (1959), should have ended any speculation. In that case picketing was designed to force an interstate contractor into signing a union shop agreement. The Supreme Court of South Dakota declared that injunctive relief was precluded by preemption, but an action for damages caused by the picketing was not. 77 S.D. 273, 91 N.W.2d 663 (1958). The Supreme Court reversed, citing only the *Garmon* decision. In effect the Court held that if picketing cannot be enjoined by the states because of preemption, then an action in tort based on such picketing is likewise preempted.

[59] 371 U.S. 542 (1963). In *Curry*, an "open shop" employer undertook performance of a construction contract which required the payment of wages commensurate with those being paid on similar projects in the area. Evidence was introduced showing that the contractor's wage scale was below the area standard, and that he had refused to hire union workers on the job. Consequently, a picket sign, stating that the contractor was violating his contract as to the wage rate, appeared at the construction site. The trial court refused to issue an injunction but the Georgia Supreme Court, finding that the picketing was designed to signal economic pressure from other unions, reversed, holding that the record demanded a finding that the real purpose of the picketing was to force the contractor to employ only union labor. 217 Ga. 512, 123 S.E. 653 (1962).

[60] 375 U.S. 96 (1963). This case stems from an earlier decision, Retail Clerks Local 1625 v. Schermerhorn, 141 So. 2d 269 (Fla. 1962), *decided in part and set for reargument on one issue*, 373 U.S. 746 (1963), in which the Court directed further argument on the question of state court jurisdiction over agency shop arrangements. *See* notes 110-14 *infra* & accompanying text.

[61] 375 U.S. at 105 (emphasis by the Court).

Since 1963 all state supreme courts, with a single exception,[62] have uniformly declined to enjoin picketing where the object was to secure a union security provision in the collective bargaining agreement. Yet, numerous state trial courts have continued to award injunctive relief against such picketing on the authority of the right-to-work legislation.[63] The rationale of those decisions seems to be grounded on a desire to uphold what the courts consider to be state public policy rather than with a concern over determining the extent of their jurisdictional powers.

The Supreme Court decisions in *Curry* and *Schermerhorn*, however, in no way inhibit a state from enjoining picketing where the National Labor Relations Board has declined jurisdiction.[64] Nor do

[62] Hattiesburg Bldg. & Trades Council v. Broome, 247 Miss. 458, 153 So. 2d 695 (1963). But the United States Supreme Court, on the authority of *Garmon* and *Curry*, summarily reversed this decision the next year. 377 U.S. 126 (1964). *But see* ILGWU Local 415 v. Scherer & Sons, 163 So. 2d 306 (Fla. Dist. Ct. App. 1966) (for further history, see note 63, *infra*).

[63] *See, e.g.*, Hogue Produce Co. v. Farm Workers, 78 L.R.R.M. 2153 (Ariz. Super. Ct. 1971); Hodcarriers Local 1282 v. Cone-Huddleston, Inc., 241 Ark. 140, 406 S.W.2d 366 (1966); Mitcham v. Ark-La. Constr. Co., 239 Ark. 1162, 397 S.W.2d 789 (1965); Wood Lathers Local 345 v. Babcock Co., 132 So. 2d 16 (Fla. Dist. Ct. App. 1961); Painters Local 567 v. Tom Joyce Floors, Inc., 398 P.2d 245 (Nev. 1965); Carpenters Local 1097 v. Hampton, 74 L.R.R.M. 2918 (Tex. Civ. App. 1970); T.W.U. Local 502 v. Tuscon Authority, 11 Ariz. App. 296, 464 P.2d 367 (Tex. Civ. App. 1970).

Even though the decisions of the lower courts, granting the injunctions, were usually reversed, the issuance of the injunction, even if effective for a short duration, may break the union's back and defeat its purposes. Moreover, the duration may not be that short. Consider, for example, the time-consuming peregrinations of the case of *Local 415, ILGWU v. Scherer & Sons.* A temporary injunction granted by a Florida state circuit court was affirmed by the Florida district court of appeals. 132 So. 2d 359 (Fla. Dist. Ct. App. 1961). The Florida Supreme Court affirmed the injunction and remanded the case to the district court on the substantive issue. 142 So. 2d 290 (Fla. Sup. Ct. 1962). The circuit court's resulting dismissal of the amended complaint was subsequently reversed by the district court of appeals. 163 So. 2d 306 (Fla. Dist. Ct. App. 1964). The circuit court issued a permanent injunction against the union, which injunction was affirmed by the district court of appeals. 188 So. 2d 380 (Fla. Dist. Ct. App. 1966). On appeal, the Florida Supreme Court dismissed the appeal in a per curiam opinion. 67 L.R.R.M. 2540 (Fla. Sup. Ct. 1967). On certiorari, the United States Supreme Court issued a per curiam reversal of the Florida Supreme Court. 389 U.S. 577 (1968). The Court later vacated that order, considered the case as certiorari to the Florida district court of appeals, and remanded the case to that court. 390 U.S. 717 (1968). The district court of appeals finally reversed the lower court's grant of the injunction. 211 So. 2d 24 (Fla. Dist. Ct. App. 1968).

The gravity of the situation may have been reduced, however, by the recent Supreme Court decision of NLRB v. Nash-Finch Co., 402 U.S. 928 (1971), where the Court held that the NLRB may seek, and is entitled to, a federal court injunction against the enforcement of a state court injunction against picketing, where the Board's federal power preempts the field. *Id.* Thus, if the Board elects to assert its jurisdiction in the type of cases discussed above, it could successfully thwart the intrusion of the state courts into this area of the law.

[64] This seems to be the remaining vitality of *Graham*, which was decided without any discussion of preemption. *See* Flatt v. Barber's Union, 304 S.W.2d 329 (Tenn. 1957) (picketing can be enjoined by state courts if it affects only intrastate commerce).

they prohibit the enjoining of picketing carried on to enforce the provisions of an already executed union security agreement. The Supreme Court has concluded that, since "it is plain that Congress left the States free to legislate in [the union security] field, we can only assume that it intended to leave unaffected the power to enforce those laws."[65] The extent of a state's ability to enforce its right-to-work laws in respect to postagreement situations, however, is still an unresolved preemption issue.[66]

Not only were preemption issues left unresolved by *Curry* and *Schermerhorn*, but a new problem was created by them. While the *Curry* court applied the preemption doctrine to picketing designed to obtain a union security contract which violates the state right-to-work law, the *Schermerhorn* court tacitly refused to pronounce that such picketing would be considered an unfair labor practice under the Taft-Hartley Act. Thus, the Board alone has jurisdiction over the picketing since it *may* be an unfair labor practice under section 8(b)(2): but the Board could subsequently find that the picketing is legitimate under the federal law since it sought to secure a union security agreement that is not outlawed by section 8(a)(3). Consequently, the picketing is not enjoined. Thus, employers in right-to-work law states could face a serious dilemma. If an employer signs a closed shop agreement, he is in violation of state law and subject to any damage suit or criminal prosecution that could arise out of his execution of the contract; if he refuses

But this apparently simple analysis raises the extremely difficult question of what body should decide whether the NLRB has declined jurisdiction over a particular case. In Local 1264 v. Broadcast Service, 380 U.S. 255 (1965), the Supreme Court denied jurisdiction to the state court since it was not a case which the Board had *announced* it would decline to hear. The majority declared: "Although a state court may assume jurisdiction over labor disputes over which the National Labor Relations Board has, but declines to assert jurisdiction . . . there must be a proper determination of whether the case is actually one of those which the Board will decline to hear." *Id.* at 256. Determination by whom? In a case similar to *Broadcast Service*, IBEW Local 1264 v. Jemcon Broadcasting Co., 281 Ala. 515, 205 So. 2d 595 (Ala. 1967), the Alabama Supreme Court evidently decided that the determination was for the state courts to make. It upheld the lower court's acceptance of jurisdiction, grounding its decision on the reasoning that NLRB's intention to preempt state court jurisdiction was unclear and the state courts must act in every doubtful case for the protection of its citizens. Whether this was a proper determination is subject to some doubt.

The Florida Supreme Court, noting the conflict in the decisions of its lower appellate courts, has held that such a determination is initially to be made by the NLRB. Recently the court declared: "[W]hen the question of possible or arguable federal jurisdiction arises it is for various reasons best left to be answered by the National Labor Relations Board." Sheetmetal Workers Local 223 v. Florida Heat & Power, Inc., 214 So. 2d 783 (Fla. Dist. Ct. App. 1968), *rev'd*, 230 So. 2d 154 (Fla. Sup. Ct. App. 1970).

[65] Retail Clerks Local 1625 v. Schermerhorn, 375 U.S. 96, 102 (1963).

[66] For some further discussion of this special problem, see text accompanying notes 76-87 *infra.*

to sign and is picketed, he must endure any economic loss the picketing might induce. An injunction against the picketing seems preempted out of the state courts, but the strike may not be enjoined under the federal laws. While the employer's predicament should not be understated, the situation is not as bad as it appears at first glance. More than likely the employer can sign the agreement and immediately ask for a declaratory judgment advising him of his rights and duties under the agreement, whereupon the state court could declare the agreement void as contrary to state law and release the parties from their obligations under the contract.[67] If the employer acts promptly, the consequences of his signing the agreement will, in all likelihood, be minimal unless criminal sanctions are imposed by the state.

B. *Damages*

Actions for damages under right-to-work laws have thus far been rare.[68] Although most states, by statute, permit such actions,[69] a few have imposed some limitations, either statutorily or judicially enunciated. For example, in *Sandt v. Mason*,[70] a case involving the discharge of employees for union membership, the Georgia Supreme Court explicitly stated that a discharged employee was not entitled to damages under the right-to-work law in that state, but could recover damages only under the general contract law for breach of his contract of employment. In *Sandt*, however, no damages were awarded even under that approach. The court reasoned that the cause of action was for breach of contract and that the measures of damages should be the actual loss. Since the discharged employees had been paid for the term of their contracts,[71] they suffered no measurable loss. Likewise, in *Dukes v. Painters Local*

---

[67] *See* Plumbers Local 234 v. Henley & Beckwith, Inc., 66 So. 2d 818 (Fla. 1953). Here the union, oddly enough, sought to have a contract calling for a closed shop declared illegal. The court agreed with the union, stating: "[T]he Defendant (union) may assert the invalidity of the contract even though [it] is a participator in the wrong. . . . [O]ne who has entered into a contract or undertaking which is violative of public policy owes to the public the continuing duty of withdrawing from such an agreement." *Id.* at 823.

[68] *See* note 39 *supra*. The reasons discussed there for the scarcity of cases involving injunctions other than those involving picketing are also applicable in explaining the relative scarcity of damage claims.

[69] *See, e.g.*, VA. CODE ANN. 40.1-63 (1970).

[70] 208 Ga. 541, 67 S.E.2d 767 (1951).

[71] The court found that the fact wages were payable weekly raised a presumption that the contract of hiring was by the week; there were no allegations to the contrary. 208 Ga. at 546, 67 S.E.2d at 771.

437,[72] where an employee sued the *union* for maliciously causing his discharge, the Tennessee Supreme Court found no cause of action under the right-to-work statute since it expressly applied only to employers. The court found, however, that the contract of employment did involve a valuable property right and, accordingly, a suit against one who maliciously causes the discharge of an employee should be allowed at common law. Regarding damages, the court declared that a discharged employee would be entitled to receive in damages the amount he would have earned had he not been discharged, mitigated by such amount as he actually earned at other employment.

In jurisdictions that provide for recovery of damages sustained by reason of deprivation of employment in violation of the right-to-work statute, courts have given little indication as to how to measure those damages. In *Finney v. Hawkins*,[73] the Virginia Supreme Court approved, without discussion, the trial court's judgment of $330 damages against both the union and the employer. Apparently this award was based on the loss suffered during four weeks of unemployment brought about by the discharge of Hawkins for failure to join the union. Likewise, in *Willard v. Huffman*,[74] the North Carolina Supreme Court, reversing on other grounds, did not object to a jury award of $625. On retrial the jury increased that award to $1,000 and, on appeal once again, the state supreme court did not even question the theory upon which damages were based.[75]

The federal preemption doctrine has influenced the question of damages as well. It now seems clear that if pre-agreement activity is arguably within the jurisdiction of the National Labor Relations Board, a state action for damages resulting from such activity, even though violative of the state right-to-work law, is preempted. In *Baumgartner's Electric Constr. Co. v. DeVries*,[76] the South Dakota Supreme Court upheld an award of $3,177.84 actual damages and $20,000 exemplary damages for picketing which sought to obtain a union security agreement that would have violated the right-to-work statute. The court reasoned that although the exclusive jurisdiction of the NLRB over labor disputes affecting interstate commerce deprives a state court of the power to grant injunctive relief

[72] 191 Tenn. 495, 235 S.W.2d 7 (1950).

[73] 189 Va. 878, 54 S.E.2d 872 (1949). *See* text accompanying notes 33-35 *supra*.

[74] 247 N.C. 523, 101 S.E.2d 373 (1958).

[75] 250 N.C. 396, 109 S.E.2d 233 (1959).

[76] 77 S.D. 273, 91 N.W.2d 663 (1958).

against such picketing, it leaves unaffected the jurisdiction of the state court to impose sanctions by way of actual or punitive damages for injuries inflicted upon the employer by the picketing. On appeal,[77] the Supreme Court issued a per curiam reversal, citing as authority the case of *San Diego Building Trades Council v. Garmon*.[78] This result was, of course, later reinforced by *Schermerhorn*,[79] where, as noted earlier, the Supreme Court held that state power under legislation pursuant to section 14(b) begins only with the actual negotiation and execution of agreements described therein. In recent years the state courts, for the most part, have abided by those decisions and have declined jurisdiction.[80]

Occasionally, a court will skirt the preemption issue when considering a damage suit. For example, in *Branham v. Miller Electric Co.*,[81] the South Carolina Supreme Court reversed a lower court de-

---

[77] 359 U.S. 498 (1959).

[78] 359 U.S. 236 (1959).

[79] 375 U.S. 96 (1963).

[80] *See, e.g.*, White v. IAM, 58 L.R.R.M. 2206 (Tenn. Ct. App. 1964) (suit, brought by nonunion employee for discharges allegedly instigated by the union by unlawfully threatening the employer with labor difficulties and work stoppages, dismissed by the state court); Burris v. Electro Motive Mfg. Co., 247 S.C. 579, 148 S.E.2d 687 (1966) (state court lacked jurisdiction over an action brought by discharged employee against employer under the state's right-to-work law since the action was based on the theory that the employee was wrongfully discharged because of interest in forming a union at the employer's plant, and that such a matter was clearly within the exclusive jurisdiction of the NLRB); Hanna v. Woodworkers, 68 L.R.R.M. 2855 (Miss. Ch. Ct. 1968).

Thus where a union picketed for the purpose of obtaining a nondiscriminatory hiring hall arrangement, the Nevada Supreme Court, in Painters Local 567 v. Tom Joyce Floors, Inc., 81 Nev. 1, 398 P.2d 245 (1965), refused to pass on the question of the validity of such an arrangement since, on the authority of *Schermerhorn*, it was without jurisdiction to enjoin the picketing or award damages. In a similar case, Electrical Workers Local 1264 v. Broadcast Service of Mobile, 278 Ala. 29, 175 So. 2d 460 (1965), the Alabama Supreme Court reversed a lower court award of damages upon grounds of no jurisdiction. Earlier in that case jurisdiction to enjoin the picketing had been upheld as the court noted that the NLRB had declined to take jurisdiction over the matter. After the United States Supreme Court's pronouncement in *Schermerhorn*, however, the Alabama court felt compelled to reverse itself on the matter. That reversal included the setting aside of an intervening damage judgment that had been awarded by a lower court.

[81] 118 S.E.2d 167 (S.C. 1961). *See also* Taylor v. Hoisting Engineers Local 101, 189 Kan. 137, 368 P.2d 8 (1962). In this case, decided before Plumbers Local 100 v. Borden, 373 U.S. 690 (1963) (*see* note 82 *infra* & accompanying text), the Kansas Supreme Court affirmed the lower state court's finding of jurisdiction for a common law suit for alleged discriminatory discharge for nonmembership in a union. The court believed the allowance of this suit was mandated by a right-to-work constitutional amendment in Kansas. In light of *Borden*, however, this decision would likely be reversed today.

Recently, in Moore v. Plumbers Local 10, 211 Va. 520, 179 S.E.2d 15 (Sup. Ct. App. 1971), the Virginia Supreme Court of Appeals upheld state court jurisdiction over a damage suit brought by an employee against his employer and the union where the employee claimed that he was discharged solely because he was not a union member.

cision and ordered that the damage suit brought for violation of the state right-to-work law be permitted. The court based its refusal to consider the preemption question on the fact that the lower court had not passed on it.

As is apparent, the extent of state court jurisdiction over such damage suits is still unclear. It may well be limited to situations involving the execution or application of a prohibited union security agreement. Even discharges for membership or nonmembership, not made pursuant to a union security agreement, although illegal under most right-to-work laws, are quite possibly outside the purview of section 14(b), since that subsection speaks only in terms of allowing states to prohibit agreements which treat membership in a labor organization as a condition of employment. At any rate, the scope of preemption is growing. On the same day that *Schermerhorn* was decided, the Supreme Court declared, in *Plumbers Local 100 v. Borden*,[82] that the preemption doctrine would operate where employees were suing unions for damages arising out of practices that *arguably* were unfair labor practices subject to regulation by the National Labor Relations Board. The Court emphasized that a sufficient basis existed for it to conclude that the actions involved were "arguable" violations of the federal act, and that it did not need to determine whether they were, in fact, violations.

A difficult problem yet to be considered is whether damage suits for a discharge pursuant to a federally invalid union security agreement are also preempted. The issue was raised in *Sheet Metal*

The court felt that even though the conduct of the employer and the union was arguably an unfair labor practice under sections 8(a) and (b) of Taft-Hartley, section 14(b) of that Act gave the state court subject matter jurisdiction. The court reasoned that section 14(b) encompassed oral as well as written union security agreements, and that although the written collective bargaining agreement did not contain a union security clause, the discharged employee may be able to prove a separate oral union security agreement between the employer and the union.

[82] 373 U.S. 690 (1963). In Borden, the plaintiff, a union member seeking employment, was refused referral to a specific job by the local's agent. He then sued for damages in a Texas court. According to Justice Harlan, the failure to refer the plaintiff to a specific job was an "arguable" infringement of Taft-Hartley section 8(b)(1)(A). He distinguished the earlier case of Int'l Assoc. of Machinists v. Gonzales (356 U.S. 617 (1957)), which had held to the contrary, on the grounds that it had dealt with internal union affairs while the present case dealt with external union functions. Furthermore, he did not find any significance in the fact that *Borden* sounded in contract as well as tort. He declared:

> It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather as stated in *Garmon* . . . "[O]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." *Id.* at 698.

Workers v. Nichols.[83] There, an employee sought recovery of damages resulting from a denial of employment in violation of the state right-to-work provision. The damages allegedly resulted from a conspiracy by a union and certain employers to deprive the plaintiff of employment by enforcing an existing compulsory union contract. The Arizona Supreme Court upheld state jurisdiction even though it found that the allegations, if proved, would indicate a violation of the National Labor Relations Act. Relying on federal case law, the Arizona court declared:

> The exception from federal preemption for which [*Algoma v. Wisconsin Board*[84]] stands relates to an executed union security agreement and not picketing to force the execution of such an agreement. Such a distinction is justified under the language of subsection 14(b) as interpreted by *Algoma*.[85]

The court gleaned further support for its position from the analysis of a leading writer in the field of labor law. Quoting from Professor Neltzer, the majority declared:

> The legislative history of subsection 14(b) suggests that its purpose was not merely to sanction state regulations more restrictive than the federal prohibitions, but rather to preserve concurrent state regulation without regard to whether it supplemented or overlapped the federal scheme. In other words, the legislative history indicates that subsection 14(b) was designed to preserve for the states the same power to deal with union security arrangements which they had under the Wagner Act.[86]

After deciding that the state courts could properly exercise jurisdiction, the court dismissed the complaint because of the employee's failure to make out a prima facie case of conspiracy based on competent evidence. The dismissal of the case was unfortunate

---

[83] 89 Ariz. 187, 360 P.2d 204 (1961). *See also* Moving Pictures Operators Local 236 v. Cayson, 281 Ala. 468, 205 So. 2d 222 (1967). In that situation the court allowed suit for reinstatement and damages suffered from the denial of continued employment. The court found that, in reality, a seniority provision in the collective bargaining agreement based seniority on longevity of union membership. Although, the court held that such a provision was contrary to the state right-to-work law, it did not speak to the preemption issue. Thus, it is impossible to determine if the case fell within the jurisdictional guidelines established by the Board, or whether all parties felt that, under *Schermerhorn*, the state had concurrent jurisdiction with the Board over cases arising under an already existing contract. The case does appear to at least "arguably" fall within the Board's jurisdiction.

[84] (Footnote added.) 336 U.S. 301 (1948) (Taft-Hartley does not make closed shop agreements legal in states where they have been declared illegal). *See* note 6 *supra*.

[85] 89 Ariz. at 192, 360 P.2d at 208. Note, however, that the court treated an alleged oral agreement as executed.

[86] *Id.* at 182-193, 360 P.2d at 208, *quoting from* Neltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6, 41-42 (1959).

since it clearly raised the issue of the extent to which a state could prohibit or regulate already executed agreements that also violate federal law. The issue is a significant one and sooner or later must be definitively settled.[87]

IV. Scope of Coverage

Section 14(b) of the Taft-Hartley Act is limited by its terms to "agreements requiring membership in a labor organization as a condition of employment."[88] Since the closed shop, the union shop, and "maintenance of membership" agreements all require union membership, they fall within the literal coverage of section 14(b). The only real issue as to them, so far as section 14(b) is concerned, is whether state jurisdiction can attach immediately or whether it can be exercised only when federal jurisdiction is not asserted.[89] Other agreements banned by state right-to-work laws, however, are not so clearly within the scope of section 14(b). And it is, of course section 14(b) from which the states derive their power to prohibit agreements which the federal act permits. Consequently, the status of those agreements must be studied more thoroughly.

A. *The Agency Shop*

Since its first appearance in 1940,[90] the agency shop has grown significantly in popularity.[91] The reason for such growth is quite simply that unions, unable to secure a union shop agreement with

[87] *See* discussion on preemption in text accompanying notes 150-59 *infra.* The court in *Nichols* adopted an interpretation of this situation which gives the states the most latitude. An alternative interpretation, based on Plankington Packing Co. v. Wisconsin Board, 338 U.S. 953 (1950) would be more restrictive. In that case, the Supreme Court reversed a decision of the Wisconsin Supreme Court which had upheld an order of the state labor board against the packing company based on discharge of an employee, because of union pressure, following the employee's resignation from the union during an escape period sanctioned by a War Labor Board order. The only way to distinguish this case from *Algoma* is that in *Plankington* the discharge was also illegal under the Wagner Act, hence, the NLRB could provide a remedy. In essence, then, under this interpretation, if the discharge violates both the federal act and the state law, the state is preempted. If it does not violate the federal act, but does violate the state law, then the state can act.

Still another interpretation would incorporate Taft-Hartley section 14(b) into section 8(a)(3). But this argument was rejected by the Court in *Schermerhorn*, 375 U.S. at 103.

[88] 29 U.S.C. § 64(b) (1970).

[89] *See* text accompanying notes 150-59 *infra.*

[90] The first agency shop provision in a collective bargaining agreement was between P. Lorillard and the Tobacco Workers International Union in 1940.

[91] *See* Theodore, *Union Security Provisions in Major Union Contracts*, 1958-59, 82 MONTHLY LAB. REV. 1348, 1352 (1959).

a particular employer, have settled for an agency shop arrangement which eliminates the "free rider."[92] But, despite its wide acceptance and continued use, the permissibility of the agency shop has been questioned under both federal and state law.

Despite awareness of the increasing usage of the agency shop in 1947, Congress chose to not make any affirmative determination regarding its permissibility, but rather left the courts and the NLRB to struggle with the problem.[93] When the issue of validity under section 8(a)(3) of the Taft-Hartley Act was first presented to the NLRB, the Board declared that an agency shop was prohibited by federal law.[94] Under pressure from organized labor, however, the Board, which had since undergone a change in membership, undertook a review of its decision. A majority of the "new" Board, relying on a much earlier line of decisions on analogous problems,[95] reversed its earlier decision in the case and ordered the employer to bargain with the union on the agency shop provision.[96] On appeal,

---

[92] An employee who accepts the benefits of the union bargaining without paying dues and initiation fees to the union for the costs of such bargaining is termed a free rider.

[93] *But see* 93 Cong. Rec. 4887 (1947) (remarks of Senator Taft concerning adoption of Taft-Hartley), where the late Senator Robert Taft, Sr. stated that the rule adopted by the Conference Committee was substantially the rule then in effect in Canada. He declared that rule to be that the employee must, nevertheless, pay dues, even though he does not join the union, and that if he pays the dues without joining he has the right to be employed. *Id.* The Supreme Court, in NLRB v. General Motors, 373 U.S. 734 (1963) reasoned that this part of the legislative history supported its finding that the proposal made by the union was the practical equivalent of union "membership," as Congress used the term with respect to section 8(a)(3).

[94] General Motors Corp., 130 N.L.R.B. 481 (1961).

[95] Radio Officers' Union v. NLRB, 347 U.S. 17 (1954); American Seating Co., 98 N.L.R.B. 800 (1952); Public Service Co., 89 N.L.R.B. 418 (1950); Union Starch & Ref. Co., 87 N.L.R.B. 779 (1949), *approved* 186 F.2d 1008 (7th Cir. 1950), *cert. denied,* 342 U.S. 815 (1951).

None of those cases really touched on the validity of the agency shop, but each had factual aspects that made the eventual result look much like an agency shop. In *American Seating*, there was a union shop agreement which allowed certain religious objectors who did not want to become union members to make support money payments without joining the union. The Board did not object to the union allowing these objectors to stay on the job so long as they paid the equivalent of membership dues and initiation fees. In *Union Starch*, two employees, willing to fulfill all other union obligations, objected, on religious grounds, to swearing an oath of loyalty to the union. Since the oath was a condition of membership, that membership was denied and they were dismissed for not being union members. The Board ordered reinstatement because their discharges for nonmembership were, in effect, based on grounds other than those allowed by the proviso to section 8(a)(3).

[96] 133 N.L.R.B. 451 (1962). The case originally arose out of General Motors' refusal to bargain on the issue of the UAW's proposal for an agency shop at General Motors' Indiana plants. The union made its proposal after the Indiana courts had upheld the permissibility of the agency shop under the state's right-to-work law. General Motors based its refusal on the ground that the agency shop was outlawed by federal

the Sixth Circuit Court of Appeals reversed the NLRB decision.[97] The court reasoned that an agency shop was not a lesser form of the union shop since it was not an agreement requiring membership, and concluded that the agency shop is therefore not specifically authorized by section 8(a)(3) of the Taft-Hartley Act.[98]

On certiorari, the Supreme Court reversed the decision of the court of appeals and upheld the validity of the agency shop under the Taft-Hartley Act.[99] Rather than insisting on *express* legislative approval of the agency shop, Justice White, writing for the Court, declared that he could find nothing in section 8(a)(3) indicating a congressional desire to prohibit the agency shop. Furthermore, he found no real difference between the union shop and the agency shop devices. Submitting that the meaning of "membership" held no magical qualities, Justice White declared:

> Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues. . . . "Membership" as a condition of employment is whittled down to its financial core. . . .
>
> We are therefore confident that the proposal made by the union here conditioned employment upon the practical equivalent of union "membership," as Congress used that term in the proviso to § 8(a)(3).[100]

Although the Supreme Court thus upheld the permissibility of the agency shop under the federal law, the permissability of agency shop agreements in states having right-to-work laws remained considerably more uncertain for a period of time. The two most significant unanswered questions were (1) whether an agency shop

---

law. Once the Board decided otherwise, it was clear that General Motors had violated section 8(a)(5), and, thus, it could be ordered to bargain over the proposal.

It has been held that a demand for a union shop in violation of a right-to-work provision does not relieve the employer of his duty to bargain with the union under the federal act. *See* NLRB v. White Const. & Eng'r Co., 204 F.2d 950 (5th Cir. 1953).

[97] General Motors v. NLRB, 303 F.2d 428 (6th Cir.), *cert. granted*, 371 U.S. 908 (1962), *rev'd*, 373 U.S. 734 (1963).

[98] 303 F.2d at 430. The court analyzed sections 7, 8(a)(1), 8(a)(3), 14(b) of the Taft-Hartley Act, and the definition of "membership" in section 3(o) of the Landrum-Griffin Act, Pub. L. 86-257, § 3(o), 73 Stat. 520 (1959) (codified at 29 U.S.C. § 402(o) (1970)). On the basis of that analysis, the court concluded that the union security agreements contemplated under section 8(a)(3) of Taft-Hartley were premised on employee "membership" in a labor organization. An agency shop on the other hand is premised on the payment of charges in lieu of such membership, and could not be considered one of the protected security devices under 8(a)(3). *Id.* at 429-430.

The court also felt that the failure of Congress to mention the agency shop in section 8(a)(3) was strong evidence that Congress did not intend to legalize it. *Id.* at 430.

[99] NLRB v. General Motors, 373 U.S. 734 (1963).

[100] *Id.* at 742-43.

agreement violated the right-to-work law; and (2) whether a state court had jurisdiction over agency shop questions on the basis of Taft-Hartley section 14(b), which expressly covered only agreements requiring membership as a condition of employment.

In response to the first question, several states specifically banned the agency shop by statute.[101] Another four have Attorney General's rulings declaring the provision illegal or unenforceable.[102] In the remaining four states which have spoken to the issue, the validity of the agency shop was decided by litigation in the state courts. In three instances the agency shop arrangement was prohibited.[103] One court upheld it.[104] In two of those cases, the state courts deemed it necessary not only to pass on the validity of the agency shop under their right-to-work law, but to address themselves to the difficult question of whether the agency shop fell within the ambit of Taft-Hartley section 14(b).[105] In one of the cases, *Higgins v. Cardinal Manufacturing Co.*[106] a group of nonunion employees sought an injunction against the enforcement of a collective bargaining agreement containing an agency shop provision, under which the union was attempting to secure their discharge for failure to

---

[101] ALA. CODE tit. 26, § 375(5) (1958); ARK. STAT. ANN. § 81-202 (1960); GA. CODE ANN. § 54-903 (1961); IOWA CODE ANN. § 736A.4 (1950); MISS. CODE ANN. § 6984.5 (Supp. 1971); NEB. REV. STAT. § 48-217 (Supp. 1960); TENN. CODE ANN. § 50-210 (1966); UTAH CODE ANN. § 34-16-10 (Supp. 1961); VA. CODE ANN. § 40-72 (1950); WYO. STAT. ANN. § 27-245.5 (1967).

[102] OP. NEV. ATT'Y GEN. No. 407 (Sept. 22, 1958); OP. S.D. ATT'Y GEN. (Sept. 3, 1958); OP. TEX. ATT'Y GEN. No. WW 1018 (March 14, 1961). These rulings hold the agency shop to be illegal. *But see* OP. N.D. ATT'Y GEN. (Jan. 13, 1956) (declaring that although the agency shop might be legal, it is not enforceable); OP. N.D. ATT'Y GEN. No. 135 (Aug. 24, 1959). North Dakota took this position so as not to subject the parties to such an agreement to the criminal sanctions of the law.

[103] Baldwin v. Arizona Flame Restaurant, 82 Ariz. 383, 313 P.2d 759 (1957); Schermerhorn v. Retail Clerks Local 1625, 141 So. 2d 269 (Fla. 1962), *affirmed*, 373 U.S. 746 (1963); Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456, *cert. denied*, 368 U.S. 829 (1961).

[104] Meade Elec. Co. v. Hagberg, 129 Ind. App. 631, 159 N.E.2d 408 (1959). The Indiana Court held that its law merely prohibited conduct and agreements relating to membership or nonmenbership in a union, but contained no prohibition against the requirement of the payment of fees or charges to a union. The court placed great emphasis on the fact that a penal statute was involved, stating: "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 cannot be enlarged by construction, implication or intendment beyond the fair meaning of the language used." *Id.* at 412 (emphasis by the court). Indiana, however, repealed its right-to-work law in 1965. IND. STAT. ANN. § 40-2701 (repealed 1965).

[105] Schermerhorn v. Retail Clerk's Local 1675, 141 So. 2d 269 (Fla. 1962); Higgins v. Cardinal Mfg. Co., 188 Kan. 11, 360 P.2d 456 (1961). Of the two cases not to consider the question, *Baldwin* ignored the problem, while *Meade*, having upheld the validity of the agency shop in Indiana, did not need to discuss it.

[106] 188 Kan. 11, 360 P.2d 456 (1961).

pay the equivalent of dues, assessments, and fees. The trial court had found that the agency shop provision was beyond the scope of the Kansas right-to-work law, which only prohibited the enforcement of contracts requiring membership in a labor organization. The Kansas Supreme Court disagreed with the trial court. The court noted that the Kansas right-to-work law was in the form of a constitutional amendment and thus should be broadly interpreted to implement its intended purpose. That purpose, according to the majority, was clear: "[W]ithout question the people felt by adopting the amendment the decision would prevent the payment of forced tribute to any labor organization by any worker within the boundaries of this state."[107] Under such a broad interpretation, the court concluded that the agency shop violated the public policy of the state of Kansas as provided in its constitution.

The court then turned its attention to the question of whether the Kansas right-to-work amendment, as above construed, was consistent with section 14(b) of the Taft-Hartley Act. It answered this question in the affirmative on the basis of the legislative history which showed congressional intent to leave the states free to prevent all forms of compulsory unionism.[108] The majority believed that Congress had found the agency shop to be such a form. It noted:

---

[107] *Id.* at 16, 360 P.2d at 463. The right-to-work provision involved in this case was quite similar to the Indiana statute involved in the *Meade* decision. *See* note 104 *supra* & accompanying text. But the Kansas court approached the construction of the language differently than did the Indiana court. In *Meade*, the Indiana court had emphasized that strict construction of the law was required since penal sanctions were involved. 129 Ind. App. at 639, 159 N.E.2d at 412. In *Higgins*, however, the Kansas court noted that it was a state constitutional amendment, with no penal sanctions attached, that was being challenged. Consequently, it felt that the rule of broadly interpreting a constitutional provision should be followed. 188 Kan. at 19, 360 P.2d at 462, *citing* 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 451 (5th ed. 1891).

[108] The court in *Higgins* relied mainly on the report of the Conference committee, which declared:

> 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 agreements 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.

> [T]here [was] little question that Congress and many state legislatures [had] construed the words "membership in a labor organization as a condition of employment" as embracing and including forced payments to unions of dues, fees and other charges regardless of the appellation applied thereto.[109]

A similar case arose in Florida when four employees challenged the "service fee" arrangement that had been agreed to by their company and the union.[110] While the agreement merely called for a "service fee," that fee was equal to the initiation fee and monthly dues required of union members. Thus, for all practical purposes, it was an agency shop provision. The trial court had dismissed the action on the grounds that the agreement did not violate the Florida right-to-work law. On appeal, the Supreme Court of Florida reversed, holding that an agency shop violates the state right-to-work law since it forces the worker to purchase from the union his right to work, a right guaranteed by the Florida constitution regardless of union affiliation. As in *Higgins*, the jurisdiction of the state court was challenged as being outside the scope intended in Taft-Hartley section 14(b). The Florida court agreed that section 14(b) dealt only with "membership" agreements, but overruled the objection to its jurisdiction, concluding that Congress would not have preserved to the states the field of right-to-work legislation, while, at the same time, intending that unions and management could,

---

The conference agreement, in section 14(b), contains a provision having the same effect. 93 CONG. REC. 6378 (1953) [H. Conf. Rep. 510, 80th Cong., 1st Sess. 60 (1947)].

While this court did not allude to it, there was even more recent legislative history supporting the contention that Congress wished to leave the agency shop arrangements to state control. In the Landrum-Griffin Act, section 302 of Taft-Hartley was amended so as to make it unlawful for an employer to pay any money or other thing of value to a union except for designated purposes, one of which was "money deducted from the wages of employees in payment of membership dues in a labor organization." Act of Sept. 14, 1959, Pub. L. No. 86-257, § 505, 73 Stat. 537, *amending* Taft-Hartley Act § 302(c)(4) (1956) (codified at 29 U.S.C. § 185(c)(4) (1970)). The earlier Kennedy-Ervin bill (S. 505, 86th Cong., 1st Sess. (Jan. 20, 1959)), had proposed that employees be allowed to pay not only membership dues to unions, but other periodic dues in lieu of membership dues as well. Senator Goldwater objected upon grounds that such a proposal would give tacit approval to agency shop agreements in right-to-work states which had banned it. 105 CONG. REC. 6848 (1959). In apparent response to the Senator's testimony, this House Committee struck the proposed amendment to section 302(c)(4).

In determining that an agency shop clause was within the provisions of 14(b), a federal district court in Nevada used this bit of legislative history to support its decision. *See* Amalgamated Assn. of Street Employees v. Las Vegas-Tonopah-Reno Stage Line, Inc., 202 F. Supp. 728 (D. Nev. 1962).

[109] 188 Kan. at 27, 360 P.2d at 468.

[110] Schermerhorn v. Retail Clerks Local 1625, 141 So. 2d 269 (Fla. 1962), *cert. granted*, 371 U.S. 909 (1962), *decided in part and set for reargument on one issue*, 373 U.S. 746, *aff'd*, 375 U.S. 96 (1963).

through the use of an agency shop clause, circumvent such legislation. To support its position, the Florida court quoted from a prior decision in a federal district court, which had found that section 14(b) of Taft-Hartley gave the states the power to prohibit the agency shop as well as the union shop.

> 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.[111]

Accordingly, the "service fee" arrangement was held unenforceable. In response to the increasing frequency of litigation in the state courts regarding the legality of the agency shop under state right-to-work laws, the United States Supreme Court granted certiorari on the Florida decision.[112] On the authority of *General Motors Corp. v. NLRB*,[113] which it decided on the same day, the Court declared that states did have the power under Taft-Hartley section 14(b) to ban the agency shop. In *General Motors* the court had found that an agency shop was essentially the equivalent of a union shop. Thus in deciding the Florida case, the majority declared:

> 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 shop is within § 14(b). At least to that extent did Congress intend § 8(a)(3) and § 14(b) to coincide.[114]

B. *The Service Fee Shop*

In *Retail Clerks Local 1625 v. Schermerhorn*[115] the Supreme Court left open the possibility that a pure service fee arrangement

---

[111] Amalgamated Ass'n of Street Employees v. Las Vegas-Tonopah-Reno Stage Lines, Inc., 202 F. Supp. 726 (D. Nev. 1962) *quoted in* 141 So. 2d at 273.

[112] Retail Clerk's Local 1625 v. Schermerhorn, 371 U.S. 909 (1962), *decided in part and set for reargument on one issue*, 373 U.S. 746, *aff'd*, 375 U.S. 96 (1963). The issue under discussion here was decided in the first reported Supreme Court opinion, 373 U.S. 746 (1963).

[113] 373 U.S. 734 (1963).

[114] 373 U.S. 746, 751-52.

[115] *Id.* The Supreme Court dismissed the union's contention that the case was one of a service fee and not an agency shop. The majority noted that since the payments of nonunion employees were equal to the payments required of members, it made no dif-

requiring nonunion employees to pay a fee as a condition of employment may be valid, notwithstanding a right-to-work law, if the service fee were limited in amount to the nonunion employee's pro rata share of "exclusive agency" functions, *i.e.* those services which a union must perform for both members and nonmembers under its statutory duty of fair representation. To uphold the validity of such an arrangement one would necessarily have to conclude that the "fee" did not fall within the scope of Taft-Hartley sections 8(a)(3) and 14(b). Such a conclusion could be reached by viewing the fee as supporting only union functions which in no way relate to "membership." An additional necessary conclusion is that such a fee would not violate the right of an employee under Taft-Hartley section 7 to refrain from assisting a labor organization except as provided in section 8(a)(3). This conclusion might be reached by drawing an analogy between the service fee shop and another already upheld device, the hiring hall.[116] The Supreme Court, in upholding the hiring hall, ignored the NLRB's contentions that it required employee assistance within the meaning of section 7.[117] Moreover, the NLRB has declared that the hiring hall is a mandatory subject for bargaining irrespective of a state right-to-work law.[118] Consequently, if one is willing to draw such an analogy before the courts, its acceptance would seem to ensure the validity of a service fee arrangement.[119]

C. *The Hiring Hall*

Hiring hall arrangements, under which a union-run organization refers workers to various jobs at the request of the employers with whom the arrangements are negotiated, have come under much

---

ference if the money from nonunion employees was allocated exclusively for collective bargaining. According to the Court, under this arrangement the nonunion employee would be paying "more of these expenses than his pro rata share," thus indirectly subsidizing the union's institutional activities. *Id.* at 752-54.

[116] *See* text accompanying notes 120-35 *infra.*

[117] *See* Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). *See also* H. J. Homan Co., 137 N.L.R.B. 1043 (1962). There the Board upheld the legality of charging nonmembers a fee equivalent to their proportionate share of the cost of running an exclusive union hiring hall.

[118] Associated Gen. Contractors of America, 143 N.L.R.B. 409 (1963).

[119] This is probably, but not necessarily, true. As the Court stated in *Schermerhorn*: "The connection between the § 8(a)(3) proviso and § 14(b) is clear. Whether they are perfectly coincident, we need not now decide. . . . Whatever the status of less stringent union-security arrangements, the agency shop is within § 14(b)." 373 U.S. at 751-52. The argument to the contrary is, of course, that the fee represents assistance within the meaning of Taft-Hartley section 7, and thus is invalid unless it falls within the purview of section 14(b).

the same scrutiny as the agency shop. There is a clear possibility that such an arrangement could be considered one of the "unfair labor practices" parenthetically excluded from the permissible "agreements" under the proviso to section 8(a)(3) of the Taft-Hartley Act.[120] But the Supreme Court has upheld, under federal law, the permissibility of a *nondiscriminatory* hiring hall agreement — one in which the union acts as a job referral agency without regard to union membership.[121] In deciding the issue, the Court reasoned that although a hiring hall may in fact encourage union membership, the encouragement or discouragement of union membership is not banned by Taft-Hartley unless it is accomplished through those discriminatory mechanisms expressly banned by the federal laws. Thus, unless evidence of actual discrimination in the operation of the hall can be shown, the arrangement will not be barred by the federal laws.

Many states having right-to-work laws, however, have seemingly outlawed hiring halls without regard to whether they are in fact discriminatory.[122] For example, in Arkansas the state supreme court, operating under a statute that prohibits the denial of employment for failure or refusal to "affiliate with" a union, declared that a hiring hall arrangement which makes the union the sole and exclusive source of referrals violates the statute.[123] The court con-

---

[120] Section 8(a)(3), 29 U.S.C. 158(a)(3) (1970), provides that an employer shall not be precluded "from making an agreement with a labor organization (not . . . assisted by any action defined . . . as an unfair labor practice) to require as a condition of employment membership therein . . . ." Those unfair labor practices pertinent here are defined in sections 8(b)(1)(A) and 8(b)(2), 29 U.S.C. §§ 8(b)(1)(A), (2) (1970). The pertinent point is that an unfair labor practice on the part of the union (under section 8(b)) in pursuance of an otherwise permissible agreement (under section 8(a)(3)) will make *that* agreement an unfair labor practice. The issue in the hiring hall arrangement thus hinges on the possibility of the unions using some unfair discriminatory practice in the selection of workers to fill employment vacancies.

[121] Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961). The court noted that: "[S]urely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against 'casual employees' because of the presence or absence of union membership." *Id.* at 675.

[122] *See, e.g.*, ARK. STAT. ANN. § 81-202 (1960); WYO. STAT. ANN. § 27-245.5 (1967). The latter provision states: "No person is required to have any connection with, or be recommended or approved by, or be cleared through, any labor organization as a condition of employment or continuation of employment." This section was struck down by the Supreme Court of Wyoming on the basis that a bargaining agent must necessarily have some "connection" with nonunion employees and, therefore, the section, being in conflict with the exclusive representation provisions of section 9(a) of the National Labor Relations Act, must yield under the supremacy clause of the United States Constitution. *See* Electrical Workers Local 415 v. Hanson, 400 P.2d 531 (Wyo. 1965).

[123] Kaiser v. Price-Fewell, Inc., 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963). *But see* Ketcher v. Sheet Metal Workers, 115 F. Supp. 802, 807

cluded that job applicants were being forced to "affiliate" with the union since they were required to register with the union and pass qualifying examinations given by the union in order to be employed on a construction project. Similarly, the South Carolina Supreme Court has declared the hiring hall invalid under its state right-to-work provisions on the theory that the arrangement results in an "employment monopoly" in favor of the unions.[124] The South Carolina decision necessarily implies that hiring hall arrangements are inherently discriminatory.

Other courts have taken an equally skeptical view of hiring hall arrangements. For example, in *Building Trades Council v. Bonito*,[125] the Nevada Supreme Court found that the hiring hall agreement violated the state's right-to-work laws. The agreement provided that the employer would first apply to the union for employees, but if the union had not supplied the needed employees within 48 hours, the employer could use any other hiring source available to him. The court reasoned that so long as the union was able to supply needed employees within the 48 hour period, nonunion workers would be deprived of an opportunity to obtain employment because of their nonmembership. Obviously, the court was assuming, rightly or wrongly, that only union members would be referred from the hiring hall. Since a union hiring hall can be of real value to both an employer and employees,[126] especially in the maritime and construction industries, the better approach in these cases would be to consider such an arrangement valid unless proof were offered as to actual discriminatory practices. However, the few state courts that have passed on the issue have been consistent in

---

(E.D. Ark. 1953), where a federal district court found that an agreement which required the union to furnish qualified journeymen "at the request" of the employer did not violate the Arkansas right-to-work law since it appeared that the employer was free to hire nonunion employees from other sources.

[124] Branham v. Miller Elec. Co., 237 S.C. 540, 118 S.E.2d 167 (1961). The court further declared:

> So far as the applicability of our statute is concerned, we can perceive no sound distinction between an agreement to hire only through the union and one to hire only such persons as have been cleared through or referred or approved by it. In either case, it would be certain, as a practical matter, that only union members in good standing would be employed. In either case the "employment monopoly" forbidden by Section 2 of our statute would be assured. *Id.* at 547, 118 S.E.2d at 170.

[125] 71 Nev. 84, 280 P.2d 295 (1955).

[126] Both the majority and dissenting opinions in *Kaiser v. Price-Fewell, Inc.*, agreed that hiring halls serve a beneficial purpose.

finding that the hiring hall violates their right-to-work statutes,[127] notwithstanding any lack of proof of actual discrimination.

It could easily be argued that these state decisions have allowed state power to go beyond the scope envisioned by section 14(b). As noted earlier, the permissibility of the hiring hall under federal law turns on the question of "discrimination" rather than the question of "membership" under the Taft-Hartley section 8(a)(3) proviso.[128] Under the federal interpretation a "nondiscriminatory" hiring hall is permissible since it does not coerce, and is not limited to, union membership. Thus, it would seem that such an agreement is not one requiring "membership" within the meaning of either section 8(a)(3) or section 14(b). This is certainly the position of the NLRB, which has held that a nondiscriminatory hiring hall provision is a mandatory subject of bargaining under federal law;[129] and that its alleged illegality[130] under a state right-to-work statute is no defense to a section 8(a)(5) refusal to bargain charge since the arrangement is not a form of union security under section 8(a)(3) and thus, not within section 14(b).[131] The Board's position has been upheld by the United States court of appeals on the theory that a hiring hall is not the practical equivalent of com-

---

[127] *See, e.g.*, Sheet Metal Workers Local 175 v. Walker, 236 S.W.2d 683 (Tex. Civ. App. 1951), where the Texas court, dealing with a provision, similar to the one in *Bonito*, declared that such an agreement clearly violated the state act. *See also* Hogue Produce Co. v. Farm Workers, 78 L.R.R.M. 2153 (Ariz. Super. Ct. 1971). In *Hogue* the court limited the union to informational picketing only, declaring that mass picketing by a union seeking a hiring hall provision must be enjoined since a hiring hall as such is illegal under state law.

[128] *See* Assoc. Gen. Contractors of America, 143 N.L.R.B. 409 (1963), where the Board explains the reasoning behind this interpretation.

[129] 143 N.L.R.B. at 414. As to this part of the Board's decision, two members dissented.

[130] In this case the state court had already found the proposed clause unlawful, and had issued a temporary restraining order against a strike in support of the union's demands.

[131] In support of their decision, the members of the Board declared:

> It is abundantly clear that a union operated non-discriminatory hiring hall does not, by definition, require membership in that union as a condition of referral and thus employment. Rather, the non-discriminatory hiring hall operates to serve both members and non-members of the Union, and also services employers. An employee seeking a job referral to an employer having an appropriate contract need not become a member of the union which is running the hiring hall, nor must he even tender "agency shop" payments to the union in lieu of membership. In sum, there are no union-oriented conditions of employment which he is required to satisfy, which might arguably be considered forms of union security. Furthermore, a review of both Board and court cases which have dealt with the issue warrants no inference that a nondiscriminatory hiring hall bears any of the characteristics of a union-security agreement. 143 N.L.R.B. at 414.

pulsory unionism.[132] Under the federal interpretation the inference is clear, however, that if the hiring hall is administered so as to discriminate against nonunion employees, it would constitute compulsory unionism and presumably fall within the ambit of section 14(b). Yet, if a hiring hall is operated in a discriminatory manner, a federal unfair labor practice, within NLRB jurisdiction, has been committed.[133] Whether the states, under section 14(b), have concurrent jurisdiction with the NLRB in such a situation is a question that is still unanswered.[134]

D. *The Checkoff*

Many state right-to-work statutes purport to regulate or prohibit so called "checkoff" arrangements under which an employer is required by contract to deduct from employees' paychecks an amount equivalent to union dues.[135] State prohibition of the checkoff can be challenged on two equally convincing theories. First, the area may have been preempted since Congress has specifically legislated in the area. Section 302 of the Taft-Hartley Act specifically permits checkoffs so long as the individual employee provides his employer with a written authorization which is not made irrevocable for a period of more than one year, or beyond the contract termination date, whichever occurs first.[136] Secondly, the power of the states to regulate the checkoff seemingly cannot be derived from section 14(b) since the latter speaks only to agreements which require membership in a labor organization as a condition of employment. It is difficult to see how the checkoff could be said to require such conditional membership.

One of the first cases in which the issue of preemption arose

---

[132] *See* NLRB v. Associated Gen. Contractors of America, 349 F.2d 449 (5th Cir.), *cert. denied*, 382 U.S. 1026 (1965). As to the applicability of section 14(b) the court merely declared:

> Sec. 14(b) contemplates only those forms of union security which are the practical equivalent of compulsory unionism. . . . Membership in the union is not compulsory under the clause here in question . . . . No doubt union membership will be encouraged under the arrangement, indeed it may be a boon to the union; nevertheless, such an arrangement does not constitute compulsory unionism so long as the arrangement is not employed in a discriminatory manner. . . . Accordingly, we find that the hiring hall clause in question is not envisaged in section 14(b) and it follows that Texas is without authority to proscribe it. 349 F.2d at 453.

[133] *See, e.g.*, Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961).

[134] *See* text accompanying notes 150-59 *infra*.

[135] *See, e.g.*, ARK. STAT. ANN. § 81-202 (1960); IOWA CODE ANN. § 736A (1958); S.C. CODE ANN. § 40-46.4 (1962).

[136] 29 U.S.C. § 186(c)(4) (1970).

as to checkoff regulations was *Utah v. Montgomery Ward & Co.*[137] In that case the Utah Supreme Court was faced with an employer who refused to comply with state law in regard to checkoffs on the grounds that compliance would subject him to prosecution for violation of the Taft-Hartley Act. The Utah state provision conflicted with the federal act in two ways. First, it provided for a different time limit as to irrevocability of the checkoff agreement. Second, it provided for the checkoff of dues, initiation fees, fines, and assessments while the federal statute merely permits the checkoff of dues. A majority of the court agreed with the employer that Congress had preempted any state regulation. The court reached its decision after analyzing the then recent decision of *Algoma v. Wisconsin Board.*[138] One should recall that in *Algoma* the jurisdiction of a Wisconsin court was upheld in a dispute involving the question of the scope of state authority to legislate in the area of union security agreements in view of Taft-Hartley section 8(a)(3). The *Algoma* court upheld state jurisdiction since, in the opinion of the court, section 8(a)(3) merely disclaimed hostility to union security agreements but neither authorized nor prohibited them. In *Montgomery Ward*, however, the court found that section 302 was explicit as to what was permitted and what was forbidden, thus indicating that Congress intended to preempt the area.[139] The court further noted that if Congress had intended to leave the states free to legislate as to the checkoff, it certainly would have manifested that intention as it had done with respect to union security agreements.

One of the first federal cases to consider the preemption question was *Operative Potters v. Tell City Chair Co.*[140] In that case the union sued for specific performance of its checkoff agreement with the employer. Earlier the union had obtained from its members checkoff authorizations which were irrevocable for a period of one year, or until the expiration of the collective bargaining agreement, whichever came sooner. Before expiration of either the time period or the contract, some of the union members requested the employer in writing to cease checking off their dues; the employer obliged. In an action brought by the union, the employer defended his ac-

---

[137] 120 Utah 294, 233 P.2d 685 (1951). Two other cases, both from Rhode Island, have also considered the question. Both concluded that states were not preempted from checkoff regulation. Chabot v. Prudential Ins. Co., 77 R.I. 396, 75 A.2d 317 (1950); Shire v. John Hancock Mut. Ins. Co., 76 R.I. 71, 68 A.2d 379 (1949).

[138] 336 U.S. 301 (1948). *See* note 5 *supra.*

[139] 120 Utah 294, 300, 233 P.2d 685, 688 (1951).

[140] 70 L.R.R.M. 2790 (S.D. Ind.), *withdrawn*, 295 F. Supp. 961 (S.D. Ind. 1968).

quiescence on the ground that the checkoffs were never valid under the state law of Indiana which required authorizations to be revocable at any time upon written notice to the employer.

The federal district court which heard *Tell City Chair* first decided that state law was not preempted since the state and federal statutes could be reconciled.[141] The court agreed with the employer that section 302 does not evidence a congressional intention of completely preempting the area of checkoffs. Here, the court decided, the state is merely regulating an activity which is neither protected nor prohibited by the federal statute. On rehearing, however, the court reversed itself.[142] It found that the Indiana statute really was inconsistent with the federal enactment and, after noting the degree to which Congress had extended federal control over checkoffs, concluded that "congressional regulation of the area of check-offs [was] sufficiently pervasive and encompassing to preempt the force of [the Indiana statute]."[143]

Shortly after the *Tell City Chair* decision a federal district court in Georgia was faced with the same issue under the Georgia right-to-work law provision which made all checkoff authorizations revocable at the will of the employee and invalid if irrevocable for any period.[144] That court agreed with the Indiana decision and declared that the state was preempted from regulating the checkoff. The court indicated that it was confident that "Congress did not conceive that checkoff of dues for a limited time after an employee's revocation of authorization therefor could amount to compulsory union membership as interdicted by state 'Right-to-Work' laws."[145] The district court opinion was affirmed by the Fifth Circuit.[146] On appeal to the United States Supreme Court, the issue was finally resolved when that Court, in a memorandum opinion, affirmed the

---

141 The court found the standard previously announced in Kelly v. State of Washington, 302 U.S. 1 (1937) applicable. Quoting from that decision, the majority declared:

> [T]he principle is thoroughly established that the exercise by the state or [sic] its police power, which would be valid if not superceded by federal action, is superceded only where the repugnance or conflict is so "direct and positive" that the two acts cannot be reconciled or consistently stand together. 70 L.R.R.M. at 2791.

142 Operative Potters v. Tell City Chair Co., 295 F. Supp. 961 (S.D. Ind. 1968).

143 *Id.* at 965.

144 SeaPAK v. National Maritime Union, 300 F. Supp. 1197 (S.D. Ga. 1969).

145 *Id.* at 1200-01.

146 SeaPAK v. National Maritime Union, 423 F.2d 1229 (5th Cir. 1970).

lower courts.[147] Thus, in the area of checkoffs, there is no longer any doubt that state right-to-work laws will not be controlling.

V. SPECIAL PROBLEMS

A. *Unresolved Preemption Problems*

The extent of a state's power to enforce a right-to-work law in post-agreement situations, a problem previously mentioned,[148] remains unsettled.[149] It is one thing to conclude, as the Supreme Court has, that Congress intended to allow states to pursue their own policies in regard to agreements *not prohibited* by federal law, and quite another to conclude that the states may pursue those policies with regard to agreements *forbidden* by federal law. If the states have concurrent jurisdiction with the NLRB over the latter, then certainly duplication of effort will occur, and conflict between state and federal remedies will arise. The closed shop is the obvious situation that could create such a dilemma.[150] If concurrent jurisdiction were allowed, complaints could be lodged with either the state court or the NLRB or both. In that situation it seems likely that neither the state nor the Board[151] would be required to defer to the other, except perhaps on the basis of comity. Consequently, the Board and the state courts may find themselves in conflict over fact finding, application of legal principles, and the effectuation of their respective remedial powers.[152] The gravity of

---

147 SeaPAK v. National Maritime Union, 400 U.S. 985 (1971).

148 *See* note 86 *supra.*

149 It has been previously demonstrated that because of the potential interference with uniform federal labor policy, *pre-agreement* activities arguably within the scope of the federal act are not subject to state enforcement. For example, picketing for a union security provision may conflict with the federal law in numerous areas. "Stranger" and minority picketing to compel an employer to agree to a union security contract is arguably a violation of section 8(b)(2). Alternatively, the conduct may come within section 8(b)(7) dealing with organizational and recognitional picketing. Or if the picketing involves a neutral, section 8(b)(4) may be brought into play. On the other hand, the activity may be protected within the contemplation of section 7 of the National Labor Relations Act.

150 State courts have on numerous occasions applied a right-to-work law on the ground that a closed shop was being practiced or sought. *E.g.*, Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957); Kaiser v. Price-Fewell, Inc., 235 Ark. 295, 359 S.W.2d 449 (1962), *cert. denied*, 371 U.S. 955 (1963).

151 Section 10(a) of the Act provides that the Board's decisional "power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a) (1970).

152 This contention is supported by prior experience. Some state courts have seemed eager to find facts which will support the finding of a violation of the right-to-work laws. An excellent example is Curry v. Construction Local 438, 217 Ga. 512, 123 S.E.2d 653 (1962), *reversed*, 371 U.S. 542 (1963), where "area standards" picketing

such a situation is obvious and it surely is inimical to the purposes of the Taft-Hartley Act.

Obviously, the problem is a complex one. The easiest solution, of course, is to hold that the Board alone has adjudicatory authority with respect to union security agreements that violate federal law. Thus, the state courts would be required to decline jurisdiction in all union security cases except those in which the validity of the agreement under federal law is established beyond question.[153] If this proposition is unacceptable, then adequate guidelines or accommodations must be established in order to avoid potentially harmful conflicts between state courts and the Board.[154]

Still another subject which must be given some particular attention is the meaning of the word "agreement" in section 14(b). In particular, does "agreement" refer only to written agreements? Congress was not explicit about the nature of the agreements which could be subjected to state power under section 14(b). The resulting lack of certainty is a significant problem because most right-to-work provisions prohibit oral as well as written agreements, and many even reach "implied agreements or practices" which discriminate in some form on the basis of union membership. It is under conditions such as these that the potential for conflict between state and federal regulation is at its greatest.

An interpretation holding that states have concurrent jurisdiction only over written agreements would greatly reduce the potential for conflict,[155] and make it much easier to determine whether federal law has been violated. If there is a federal violation, the state courts may wish to defer to the NLRB on the basis of comity. Or, since the area would be a rather limited one, the Board may treat state decisions arising thereunder in a manner similar to its

---

was enjoined. The Supreme Court of Georgia found that the record "demanded" a finding that the real purpose behind the picketing was to force the contractor to employ only union labor. It is quite probable that the NLRB would have found the picketing legal under its present rules regarding such picketing.

[153] The Supreme Court may adopt this solution. *Compare* Algoma v. Wisconsin Board, 336 U.S. 301 (1948) *with* Plankington Packing Co. v. Wisconsin Board, 338 U.S. 953 (1950). *See also* note 86 *supra.*

[154] As the Supreme Court declared in *Schermerhorn*: "As a result of § 14(b), there will arise a wide variety of situations presenting problems of the accommodation of state and federal jurisdiction in the union-security field." 375 U.S. at 105.

[155] *Compare* section 14(b) ("the execution or application of agreements") *with* section 8(e) ("any contract or agreement, express or implied"). It is at least arguable that the wording of section 8(e) indicates that Congress knew how to include an implied agreement in its regulation, and that section 14(b) is thus limited to express contracts. One state court considers oral agreements covered by section 14(b). Moore v. Plumbers Local 10, 211 Va. 520, 179 S.E.2d 15 (1971).

treatment of decisions by arbitrators under collective bargaining agreements.[156]

It is impossible to predict the direction the Supreme Court will take, but if it follows the route most calculated to preserve federal labor policy from state interference, it is clear that, in effect, section 14(b) will be emasculated, or, in reality, repealed *sub silentio*. The Court conceivably may conclude that states are free to act only in those cases where a written agreement, clearly valid under federal law, requires union membership. Since it is highly doubtful that an employer and a union would be foolish enough to put such an agreement in writing in a state having a right-to-work statute,[157] section 14(b) would become meaningless.

B. *Severability*

Once a state court has found that a particular union security agreement violates its right-to-work law, it must then determine the effect of such invalidity, *i.e.*, whether the illegal union security provision renders the entire contract invalid. Generally speaking, the courts have adopted an approach frequently used in contract law under which the validity of the remainder of the contract depends on whether the illegal provision is so integrated into the contract that it is impossible to sever it from the other provisions. The problem of an invalid union security clause was first considered in 1950 by the Supreme Court of North Carolina in the case of *In re Port Publishing Co.*[158] In that case the court allowed employees to sue for back wages despite the existence of an illegal union security clause. The majority declared that unless there was a *clear interdependence* between the various clauses, the invalidity of one provision would not render the others unenforceable. In Florida, however, the state supreme court in a similar case reached a different result, holding that the closed shop provision of a contract was indivisible from the other provisions concerning wages, hours, and

---

[156] *See, e.g.*, International Harvester Co., 138 N.L.R.B. 923, *aff'd*, Ramsey v. NLRB, 327 F.2d 784 (7th cir.), *cert. denied*, 377 U.S. 1003 (1964).

[157] Perhaps such foolishness does exist. *See* McDowell v. Clement Bros. Co., 260 F. Supp. 817 (N.D. Ga. 1966), where the court held that a state court action by employees against an employer and union for entering into a union shop contract in violation of the Georgia right-to-work law was not removable to federal district court since the action was not within that court's original jurisdiction. The court reasoned that the action in question did not arise under the Taft-Hartley Act, but rather under state law. No indication was given, however, as to whether the union shop agreement was oral or written.

[158] *In re* Port Publishing Co., 231 N.C. 395, 57 S.E.2d 366 (1950).

conditions of employment.[159] The Florida court simply could not accept the fact that a union security clause could be entirely eliminated from the contract without destroying the original understanding between the parties.

Diverse results were also reached in federal interpretations of the severability question. In *Lewis v. Jackson & Squire, Inc.*,[160] the trustees of the United Mine Workers Welfare and Retirement Fund brought suit under the National Bituminous Coal Wage Agreements of 1947 and 1948 to recover unpaid sums from certain mine operators. The defendants asserted the invalidity of the entire contract since it included a union shop agreement. A federal district court found that the union shop clause was invalid under the Arkansas right-to-work law and, hence, the entire contract was void. In supporting its conclusion, the court noted that the United Mine Workers had struck the mine industry in order to obtain the illegal clause and that the union would not have entered into the agreement without the insertion of the union shop provision. But nearly a decade later, in a virtually identical fact situation, the result was different. In *Lewis v. Fentress Coal & Coke Co.*[161] a federal court in Tennessee permitted the United Mine Workers to collect on their welfare fund agreement despite the presence of an illegal union shop clause. The reason for the opposite result is quite simple. During the intervening years the United Mine Workers had written into their national contract a severability clause to protect them from state right-to-work laws and possible rulings such as *Jackson & Squire*. Since the court found the severability clause to be sufficient, it did not have to consider any other theories of severability.

Since the early decisions holding the entire contract invalid for containing a union security clause, the parties to modern contracts have adopted "saving clauses" in order to prevent a recurrence of such adverse judgments. Moreover, the parties have often agreed to a conditional union security clause, which simply provides that the clause will become effective when, and if, such a clause becomes legal and valid under both federal and state law.[162] These new

---

[159] Plumbers Local No. 234 v. Henley & Beckwith, 65 So.2d 818 (Fla. 1953).

[160] 86 F. Supp. 354 (W.D. Ark. 1949), *appeal dismissed*, 181 F.2d 1011 (8th Cir. 1950).

[161] 160 F. Supp. 221 (M.D. Tenn. 1958), *aff'd*, 264 F.2d 134 (6th Cir. 1959). *See also* Lewis v. Hixson, 174 F. Supp. 241 (W.D. Ark. 1959).

[162] See Meyers, *Effects of "Right-to-Work" Laws: A Study of the Texas Act*, 9 IND. & LAB. REL. REV. 77, 82 (1955), where it is noted that a study of 125 collective bargaining agreements in Texas indicated that 18 of those agreements contained some form

mechanisms have eliminated most of the serious problems of severability.

C. *Right to Work Laws and Public Employment*

In *Potts v. Hay*[163] the Arkansas Supreme Court was required to consider a state statute requiring all prospective policemen to terminate any union membership. The majority declared that the right-to-work amendment to its constitution did protect public employees, union as well as nonunion. The court felt that union membership by policemen did not present such a threat to public welfare that an implied exception must be written into the right-to-work amendment. Under this application of the right-to-work law the court is saying that a man may not be denied employment because of his membership in a labor organization. The South Dakota Supreme Court, in *Levasseur v. Wheeldon*,[164] agreed with the Arkansas decision, holding that the South Dakota right-to-work law invalidated a municipal regulation requiring public employees to terminate membership in any union which admitted other than public employees. Likewise in *Lunsford v. City of Bryan*,[165] the Texas Supreme Court applied that state's right-to-work law to the public sector by declaring that the discharge of a public employee who had signed an application for membership in a union was prohibited by state law if the reason for the discharge was that the municipal employer believed he was a member of a union, even though the employee's membership in the union had not been fully consummated at the time of his discharge.

But at least one decision has held that right-to-work laws do not protect public employees. In *Keeble v. Alcoa*,[166] a Tennessee court dismissed an action for damages brought by a public employee for wrongful discharge under the right-to-work law. In holding the law inapplicable to public employees, the court observed that they were not mentioned in the law and that prior state decisions in other areas of the law supported the conclusion that the sovereign was intended to be excluded from right-to-work legislation.

---

of conditional union security clause, or agreement to negotiate on union security in the event of a change in the law.

163 229 Ark. 830, 318 S.W.2d 826 (1958).

164 79 S.D. 442, 112 N.E.2d 894 (1962).

165 156 Tex. 520, 297 S.W.2d 115 (1957). *See also* Beverly v. City of Dallas, 292 S.W.2d 172 (Tex. Civ. App. 1956).

166 204 Tenn. 286, 319 S.W.2d 249 (1958).

D. *The Railway Labor Act*

In 1951 Congress amended the Railway Labor Act[167] to specifically authorize the execution of agreements between railroads and their employees irrespective of state law.[168] State right-to-work laws were thereby made inapplicable to the railroad industry.

The validity of the congressional action was tested in *Railway Employees' Dept. v. Hanson*,[169] where it was claimed that the amendment violated the first and fifth amendments by depriving employees of their freedom of association and forcing them to pay for costs other than those incurred in the conduct of collective bargaining. The Supreme Court rejected these contentions, emphasizing that the commerce clause of the Constitution grants the Congress sufficient power to enact such legislation. Yet, the Court issued a caveat, expressly stating that its present ruling on the first amendment issue was not to prejudice any case that might go beyond the *Hanson* fact situation.

VI. CONCLUSION

This discussion has analyzed the present status of the more important aspects of state right-to-work laws and the major state and federal court decisions made pursuant thereto. Hopefully, it has provided some insight into the turbulence created by the enactment of section 14(b) of the Taft-Hartley Act. Final judgment as to the continued value of right-to-work legislation must ultimately depend upon whether the laws redistribute union power in any significant way or meaningfully protect the freedom of the individual employee. The author has not undertaken such an evaluation but it is clear that the states do not enjoy the degree of power that advocates of section 14(b) had hoped they would have.[170] When the next evaluation of the laws is undertaken this fact may weigh heavily upon the minds of the decision makers.

---

[167] 45 U.S.C. §§ 151-63, 181-88 (1970), 15 U.S.C. §§ 21, 45 (1970), 18 U.S.C. § 373 (1970), 28 U.S.C. §§ 1291-94 (1970) (originally enacted as Act of May 20, 1926, ch. 347, 44 Stat. 577, and frequently amended).

[168] Act of Jan. 10, 1951, ch. 1220, 64 Stat. 1238, 45 U.S.C. § 152 (1970).

[169] 351 U.S. 225 (1956). Other courts had reached the same conclusion earlier. *See, e.g.*, Hudson v. Atlantic Coast Line R.R., 242 N.C. 650, 89 S.E.2d 441 (1955).

[170] A number of studies have concluded that the right-to-work laws are of little consequence today. *See, e.g.*, Gilbert, *A Statistical Analysis of the Right-to-Work Conflict*, 19 IND. & LAB. REL. REV. 533 (1966); Kuhlman, *The Right-To-Work Laws: The Virginia Experience*, 6 LAB. L.J. 453 (1955); Meyers, *supra* note 162; Warshal, *Right-to-Work; Pro & Con*, 17 LAB. L.J. 131 (1966). But for some arguments to the contrary, see Glasgow, *That Right-to-Work Controversy Again?*, 18 LAB. L.J. 112 (1967); McDarmott, *Union Security & Right-to-Work Laws*, 16 LAB. L.J. 667 (1965).

APPENDIX

RIGHT-TO-WORK LAW OF VIRGINIA

[VA. CODE ANN. §§ 40.1-58 to -69 (1970)]

Section 40.1-58. Policy of article.— It is hereby declared to be the public policy of Virginia that 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.

Section 40.1-59. Agreements or combinations declared unlawful.— Any agreement or combination between any employer any labor union or labor organization whereby persons not members of such union or organization shall be denied the right to work for the employer, or whereby such membership is made a condition of employment or continuation of employment by such employer, or whereby any such union or organization acquires an employment monopoly in any enterprise, is hereby declared to be against public policy and an illegal combination or conspiracy.

Section 40.1-60. Employers not to require employees to become or remain members of Union.— No person shall be required by an employer to become or remain a member of any labor union or labor organization as a condition of employment or continuation of employment by such employer.

Section 40.1-61. Employers not to require abstention from membership in union.— No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment.

Section 40.1-62. Employer not to require payment of union dues, etc.— No employer shall require any person, as a condition of employment or continuation of employment, to pay any dues, fees or other charges of any kind to any labor union or labor organization.

Section 40.1-63. Recovery by individual unlawfully denied employment.— Any person who may be denied employment or deprived of continuation of his employment in violation of secs. 40.1-60, 40.1-61, or 40.1-62 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation or association acting in concert with him by appropriate action in the courts of this Commonwealth such damages as he may have sustained by reason of such denial or deprivation of employment. . . .

Section 40.1-65. Agreement or practice designed to cause employer to violate article declared illegal.— Any agreement, understanding or practice which is designed to cause or require any employer, whether or not a party thereto, to violate any provision of this article is hereby declared to be an illegal agreement, understanding or practice and contrary to public policy.

Section 40.1-66. Conduct causing violation of article illegal; peaceful solicitation to join union.— Any person, firm, association, corporation or labor union or organization engaged in lock-outs, layoffs, boycotts, picketing, work stoppages or other conduct, a purpose of which is to cause, force, persuade or induce any other person, firm, association, corporation or labor union or organization to violate any provision of this article shall be guilty of illegal conduct contrary to public policy; provided that nothing herein contained shall be construed to prevent or make illegal the peaceful and orderly solicitation and persuasion by union members of others to join a union, unaccompanied by any intimidation, use of force, threat of use of force, reprisal or threat of reprisal, and provided that no such solicitation or persuasion shall be conducted so as to interfere with, or interrupt the work of any employee during working hours.

Section 40.1-67. Injunctive Relief against violation; recovery of damages.— Any employer, person, firm, association, corporation, labor union or organization injured as a result of any violation or threatened violation of any provision of this article or threatened with any such violation shall be entitled to injunctive relief against any and all violaters or persons threatening violation, and also to recover from such violator or violators, or person or persons, any and all damages of any character cognizable at common law resulting from such violations or threatened violations. Such remedies shall be independent of and in addition to the penalties and remedies prescribed in other provisions of this article.

Section 40.1-68. Service of process on clerk of State Corporation Commission as attorney for union.—

. . .

Section 40.1-69. Violation and penalty.— Any violation of any of the provisions of this article by any person, firm, association, corporation, or labor union or organization shall be a misdemeanor and punishable by fine not exceeding five hundred dollars. Each day of continued violation after conviction shall constitute a separate offense and shall be punishable as herein provided.