

1959

# Whither Hurried Hence -- The New Right to Work Amendment

Dan Hopson Jr.

*Indiana University School of Law*

Follow this and additional works at: <http://www.repository.law.indiana.edu/facpub>

 Part of the [Labor and Employment Law Commons](#), and the [Legislation Commons](#)

---

## Recommended Citation

Hopson, Dan Jr., "Whither Hurried Hence -- The New Right to Work Amendment" (1959). *Articles by Maurer Faculty*. Paper 1989.  
<http://www.repository.law.indiana.edu/facpub/1989>

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact [wattn@indiana.edu](mailto:wattn@indiana.edu).

## WHITHER HURRIED HENCE—THE NEW RIGHT TO WORK AMENDMENT

*Dan Hopson, Jr.\**

UNION LEADER: "Now they can bust us for sure. We're through."

CHAMBER OF COMMERCE SECRETARY: "It is going to be a long war, but at least we won a battle here in Kansas."

UNION MEMBER: "I'll bet my take-home pay goes down."

MANUFACTURER: "Boy, we showed the unions that they can't be so arrogant."

FARMER: "Now I can take that construction job without having to pay off the union bosses."

HOUSEWIFE: "At least we won't have any more of that horrible violence."

These quotes are probably typical of the varied reactions of Kansas citizens to one of its newest constitutional provisions—the so-called "Right to Work" amendment.<sup>1</sup> Passed by the Kansas voters on November 4, 1958, the new amendment now controls a segment of the labor relations law of Kansas. During the bitter campaign few were neutral. Emotions boiled over. Although voters in five other states<sup>2</sup> rejected similar proposals, the people of Kansas felt the need of adopting a limitation on the bargaining power of unions and employers.

Now that the campaign is over and the vote tabulated, it is time to examine our new Pandora's box. Since many articles have and are being written on the merits of such amendments<sup>3</sup> or on its effect on the relative power of union and employers,<sup>4</sup> this article will ignore such questions. However, the legal question still remains. What have we adopted? How will it effect the existing Kansas labor law? What is still permitted and what is now prohibited? As advisors to both employers and employees, Kansas lawyers or, as decision makers, the district court judges and supreme court justices must now venture into the hazardous waters of constitutional interpretation. This article hopes

\* Associate Professor of Law, The University of Kansas.

<sup>1</sup> Kan. Sess. Laws 1957, ch. 235, which will appear as KAN. CONST. art. 15, § 12.

<sup>2</sup> California, Colorado, Idaho, Ohio and Washington.

<sup>3</sup> SULTAN, *RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT* 2 (1958); Loevinger, *The Case Against "Anti-Union Security" Legislation*, 40 IOWA L. REV. 627 (1955); Pollitt, *Right to Work Law Issues: An Evidentiary Approach*, 37 N.C.L. REV. 233 (1959); Spielmans, *Bargaining Fee versus Union Shop*, 10 IND. & LAB. REL. REV. 609 (1957); Swindler, *The Right to Work, A Decade of Development*, 36 NEB. L. REV. 276 (1957); Teple, *A Closer Look at "Right to Work" Legislation*, 9 W. RES. L. REV. 5 (1957); Torff, *The Case for Voluntary Union Membership*, 40 IOWA L. REV. 621 (1955).

<sup>4</sup> Benewitz, *Nature and Effect of State Right-to-Work Laws*, 1 WAYNE L. REV. 165 (1955); Cohen, *Operating Under State Right-to-Work Laws*, 9 LAB. L.J. 574 (1958); Kuhlman, *Right-to-Work Laws: The Virginia Experience*, 6 LAB. L.J. 453 (1955); Meyers, *Effects of "Right to Work" Laws: A Study of the Texas Act*, 9 IND. & LAB. REL. REV. 77 (1955); *The Right to Work Laws*, Fortune, Sept. 1957, p. 235.

to suggest possible and alternative answers to these questions. Since eighteen other states have similar statutory or constitutional provisions, there is a small body of decisions available as authority for the Kansas Supreme Court. Most of these decisions will be reviewed. The article will suggest other questions, both answerable and purely speculative.

#### BACKGROUND AND AUTHORITY

Congress, in section 8(3)<sup>5</sup> of the original Wagner Act, prohibited an employer from discriminating against an employee on the basis of union membership, but did permit an employer and union to agree that the employer could hire only union members. This proviso allowed in effect the closed shop.<sup>6</sup> In 1947, reacting to waves of criticism leveled against unions, Congress passed the Taft-Hartley Act which amended the Wagner Act by narrowing the provisions of 8(3)<sup>7</sup> to further restrict the contractual rights of the parties. Union security contracts were valid to the extent that they allowed 30 days of non-membership and provided that any discharge was based only on ". . . the failure of the employee to tender the periodic dues and the initiation fees uniformly required . . ." <sup>8</sup>In effect Congress said that the parties could enter into a union security contract, but only a very limited one. The National Labor Relations Board and the courts are still trying to decide just what is allowed.

At the same time Congress said in section 14(b)<sup>9</sup> that the states were free to pass more restrictive laws on union security contracts. Prior to enactment of section 14(b) of the Taft-Hartley Act, state court common law decisions varied as to the validity of closed or union shop contracts.<sup>10</sup> In 1944 the first Right to Work law was passed by Florida.<sup>11</sup> Between 1944 and 1958, when Kan-

<sup>5</sup> 49 Stat. 449 (1935), 29 U.S.C. § 158 (1952).

<sup>6</sup> The Wagner Act proviso reads: "[N]othing in sections 151-166 of this title 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 said sections 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. . . ."

<sup>7</sup> Now renumbered to 8(a)(3). 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>8</sup> The complete limitation reads: "Provided further, that no employer shall justify any discrimination against an employee for non-membership 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; . . ."

<sup>9</sup> "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." 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952).

<sup>10</sup> See, e.g., allowing such contracts, *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); *State v. Van Pelt*, 136 N.C. 633, 49 S.E. 177 (1904); *Chucales v. Royalty*, 164 Ohio St. 214, 129 N.E.2d 823 (1955); *Crosby v. Rath*, 136 Ohio St. 352, 25 N.E.2d 934 (1940); not allowing such contracts, *Connors v. Connolly*, 86 Conn. 641, 86 Atl. 600 (1913); *Roth v. Local 1460, Retail Clerks Union*, 216 Ind. 363, 24 N.E.2d 280 (1939).

<sup>11</sup> FLA. CONST., Declaration of Rights § 12 (1944).

sas adopted its amendment, eighteen other states passed similar statutes or amendments.<sup>12</sup>

These laws differ in both form and substance. Some, especially those in constitutional amendment form, follow substantially the basic wording of the Kansas act and only prohibit the execution of a contract or the hiring or firing on the basis of union membership or non-membership. Others also prohibit payment of any money to a union, prohibit striking or picketing to force such agreement, expressly void such contracts or provide a variety of civil and/or criminal remedies.<sup>13</sup> The effect, if any, of these additions will be discussed later.

The constitutionality of these laws was upheld by the United States Supreme Court and may no longer successfully be challenged.<sup>14</sup>

### THE KANSAS AMENDMENT

Upon approval by the voters, Kansas newspapers raised several basic problems. When did the amendment take effect? Did it apply to existing contracts? These questions were asked of Attorney General Anderson by Mr. R. L. Warkentin, Kansas Commissioner of Labor. In a letter dated December 1, 1958,<sup>15</sup> the Attorney General gave the opinion that the amendment took effect upon passage, and that it applied to existing contracts.

Mr. Leonard F. Banowitz,<sup>16</sup> in a short article in the *Kansas Bar Journal*,<sup>17</sup> concurred in the Attorney General's opinion and added, citing Kansas authority, that no implementing statute was needed for this type of prohibitory constitutional amendment.

There can be little room for disagreement. As pointed out in the Attorney General's opinion, the United States Supreme Court in the *Lincoln Federal*

<sup>12</sup> ALA. CODE tit. 26, § 375 (Supp. 1955); ARIZ. CONST. art. 25 (1946); ARIZ. REV. STAT. ANN. §§ 56-1302 to -1308 (1956); ARK. CONST. amend. 34 (1945); ARK. STAT. ANN. §§ 81-201 to -205 (1949); FLA. CONST., Declaration of Rights § 12 (1955); GA. CODE ANN. §§ 54-901 to -909 (Supp. 1958); IND. ANN. STAT. §§ 40-2701 to -2706 (Supp. 1957); IOWA CODE ANN. §§ 736A.1 to 736A.8 (1950); La. Sess. Laws 1954, Act No. 252, repealed by La. Sess. Laws 1956, Act No. 16; MISS. CODE ANN. § 6984.5 (Supp. 1958); NEV. REV. STAT. § 613.230 to -300 (1953); NEB. CONST. art. 15, §§ 13 to 15 (1956); NEB. REV. STAT. §§ 48-217 to -219 (1952); N.C. GEN. STAT. §§ 95-78 to -84 (1950); N.D. REV. CODE § 34-0114 (Supp. 1957); S.C. CODE § 40-46 to -46.11 (Supp. 1958); S.D. CODE §§ 17.1101 to -1104 and 17.1112 (Supp. 1955); TENN. CODE ANN. §§ 50-208 to -212 (Supp. 1953); TEX. REV. CIV. STAT. ANN. art. 5207a (1947) and 5154G(1) (Supp. 1958); UTAH CODE ANN. §§ 34-16-1 to -16-18 (Supp. 1957); VA. CODE ANN. §§ 40-68 to -74.5 (Supp. 1958).

<sup>13</sup> SULTAN, RIGHT-TO-WORK LAWS: A STUDY IN CONFLICT 2 (1958); "State Right-to-Work Laws: A Text of State Laws Prohibiting Discrimination in Employment Because of Membership or Non-membership in a Labor Organization," prepared by the Labor Relations and Legal Department, Chamber of Commerce of the United States, Oct. 1957; Swindler, *The Right to Work, A Decade of Development*, 36 NEB. L. REV. 276 (1957); Teple, *A Closer Look at "Right to Work" Legislation*, 9 W. RES. L. REV. 5 (1957); Note, 13 WASH. & LEE L. REV. 59 (1956).

<sup>14</sup> *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *AFL v. American Sash & Door Co.*, 335 U.S. 538 (1949). However, a statute allowing an employer and union to enter into a union security agreement is also constitutional. *Railway Employers Dept. v. Hanson*, 351 U.S. 225 (1956). *But see*, *Looper v. Georgia, So. & Fla. R.R.*, 213 Ga. 279, 99 S.E.2d 101 (1957), where the Georgia Supreme Court attempted to distinguish the *Hanson* case.

<sup>15</sup> See Appendix A, for the text of the Attorney General's opinion.

<sup>16</sup> Attorney for the Coleman Company, Inc., Wichita, Kansas.

<sup>17</sup> Banowitz, *Amendment No. 3—Is Compulsory Unionism Now Barred in Kansas?*, 27 KAN. B.J. 207 (1958).

case<sup>18</sup> held that the application of the Nebraska constitutional amendment to an existing contract did not violate the United States Constitution. However, labor lawyers may raise one argument. While it is true that state laws may constitutionally be applied to existing contracts, it is still necessary to determine if that was the intent of the legislature.

The text of the amendment reads:

No person shall be denied the opportunity to obtain or retain employment because of membership or non-membership in any labor organization, nor shall the state or any subdivision thereof, or any individual, corporation, or any kind of association enter into an agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or non-membership in any labor organization.<sup>19</sup>

The amendment is divided into two parts: that portion saying that no person shall be denied the opportunity to obtain or retain employment and that part saying that no individual or group shall enter into a union security contract. The first part obviously was intended to apply to job rights and would prevent the application of an existing contract. The second part prohibits the future execution of a union security contract.<sup>20</sup>

A labor lawyer might argue that while the amendment prohibits the application of an existing contract to obtain the discharge of a non-union employee, the existing contract itself is not void. Only contracts entered into after the date of the amendment<sup>21</sup> are prohibited. This may be unimportant, since in either case an employee may not be fired. However, it will make a difference if the law suit involves the severability of a void clause<sup>22</sup> or the application of the contract bar rule of the National Labor Relations Board.<sup>23</sup>

An argument raised by Mr. Banowitz, but not by the Attorney General, sounds logical. Several states expressly made their Right to Work laws prospective only and expressly exempted existing contracts.<sup>24</sup> The Kansas Legislature was familiar with these other Right to Work laws. Had it desired to exempt existing contracts it could have "borrowed" the exempting clause from one of the states that had such a provision and included it in the resolution. Since the legislature did not, it must have intended to make the amendment retroactive. States with laws that do not expressly exempt existing contracts have held the law applicable to existing contracts.<sup>25</sup>

<sup>18</sup> Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 531 (1949).

<sup>19</sup> Kan. Sess. Laws 1957, ch. 235, which will appear as KAN. CONST. art. 15, § 12.

<sup>20</sup> The Arizona Supreme Court in AFL v. American Sash and Door Co., 67 Ariz. 20, 189 P.2d 912 (1948), *aff'd*, 335 U.S. 538 (1949), interpreted identical language in this manner.

<sup>21</sup> As provided in the second part of the amendment.

<sup>22</sup> Compare Lewis v. Jackson & Squire, 86 F. Supp. 354 (W.D. Ark. 1949), with Lewis v. Fentress Coal and Coke Co., 160 F. Supp. 221 (M.D. Tenn. 1958). See *infra* note 240 and accompanying text for a discussion of severability.

<sup>23</sup> See, e.g., Awning Research Inst., 116 N.L.R.B. 505 (1956); Steel Product Eng'r Co., 116 N.L.R.B. 811 (1956); Industries Freight Service, 116 N.L.R.B. 1164 (1956). See *infra* note 250 and accompanying text for a discussion of the contract bar rule.

<sup>24</sup> Alabama, Arkansas, Mississippi, North Carolina, South Carolina, Tennessee, Texas and Utah.

<sup>25</sup> AFL v. American Sash and Door Co., 67 Ariz. 20, 189 P.2d 912 (1948); Mascari v. International Bhd. of Teamsters, 187 Tenn. 345, 215 S.W.2d 779 (1948).

### INTERPRETATION OF THE AMENDMENT: POPULAR AND LEGAL

The mind of the average "yes" voter is unknowable but he probably thought that the amendment would limit union power, grant a man the "right to work" without joining the union and stop union "violence." Certainly the pro-right to work literature left this impression. This literature suggested that the amendment would accomplish these goals by giving employees the right to withdraw their support from "bad" union leaders. Although the text of the amendment was widely published by the pro-amendment forces, most voters undoubtedly had little comprehension of the actual legal method used to accomplish these goals.

As discussed above,<sup>26</sup> the amendment is divided into two separate sections. The first clause concerns employment. The second clause pertains to contracts. Each clause is aimed at a separate but interrelated problem. Each will be discussed separately.

#### THE DISCHARGE CLAUSE

Apart from any court interpretation, what does the first clause logically and plainly prohibit? What are the questions that may be asked about peripheral meanings?

The first clause reads:

No person shall be denied the opportunity to obtain or retain employment because of membership or non-membership in any labor organization. . . .

#### *Possible Interpretations*

The phrase, "no person," must include all individuals. Would it also include a partnership or corporation? Certainly a corporation is a person under the fourteenth amendment.<sup>27</sup> The general definition section of our statute, KAN. G.S. 1949, 77-201(13), says: "The word 'person' may be extended to bodies politic and corporate." In the Kansas Labor Relations Act appears the following: "The word 'person' when used in this act shall mean and apply to every individual, association, partnership, corporation, employer, employee, collective bargaining union, labor organization, or business agent."<sup>28</sup>

The word "person" is limited, however, by the word "employment" which appears later. Apparently only those persons who are "employed" are protected by the act. Do you "employ" a partnership or corporation?<sup>29</sup>

The clause then says: ". . . shall be denied the opportunity . . ." "Denied" is clear and would probably be synonymous with refused. The amendment, being in the passive voice without a referent, says nothing about "who" is pro-

<sup>26</sup> See note 20 *supra* and accompanying text.

<sup>27</sup> *Wheeling Steel Corp. v. Glander*, 337 U.S. 562 (1949); *Gulf, Colo. & Santa Fe Ry. v. Ellis*, 165 U.S. 150 (1897).

<sup>28</sup> KAN. G.S. 1957 Supp., 44-802(4).

<sup>29</sup> For some other problems with the word employment, see *infra* accompanying text to note 161.

hibited from denying employment. Presumably the prohibition is on anyone who "employs" persons. This would include then, a partnership, a corporation, an unincorporated association, or another individual. Perhaps it would also include the state and its subdivisions.

But does the statute reach a labor union who is not acting as an employer? Or, stated another way, does a statute aimed at those who "employ" labor, control a union that induces an employer to deny employment? On its face, the amendment does not. But if the employer was not free to act because of union pressure, could not a court argue that the union effectively "denied the opportunity?" However, the Kansas amendment does not include the phrase "attempt to deny," as does the Tennessee Act.<sup>30</sup> Would this mean that a union would not violate the act if they failed to induce the employer to hire or fire the non-union man?

"Opportunity" surely implies right. Some may argue that "opportunity" does not include the actual employment, but means only the "chance" for the job. But if you denied the person the job would you not also have denied him the opportunity for the job? Obviously, opportunity also includes more than employment. If an employer told an employee that he could not fill out an application form or take an examination which were prerequisites to the employment, the employer would violate the act even though the employee did not show that the employer said he would not hire him.

The next phrase, "to obtain or retain employment," may raise several problems. Obtain surely means hiring while retain surely applies to firing. However, it is probably limited to "hiring" or "firing." Note that section 8(a)(3) of the Taft-Hartley Act<sup>31</sup> makes it an unfair labor practice for an employer: "by discrimination in any term or condition of employment to encourage or discourage membership in any labor organization . . . ." The Kansas amendment being limited to hiring and firing would allow discrimination in the terms or conditions of employment, so long as it did not result in a constructive discharge.<sup>32</sup>

The Kansas court might conceivably argue that the phrase "deny the opportunity to obtain" would include discrimination in terms and conditions and be equivalent to Taft-Hartley's prohibitions. If the court views these words as authorizing a subjective test as to the employee's state of mind, discrimination could "deny [impinge or restrict] the opportunity to obtain" employment.<sup>33</sup>

But what is "employment?" There is no question about the bricklayer, the

<sup>30</sup> TENN. CODE ANN. § 50-208 (Supp. 1953).

<sup>31</sup> 61 Stat. 136 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>32</sup> See, e.g., NLRB v. Saxe-Glassman Shoe Corp., 201 F.2d 238 (1st Cir. 1953); Olin Industries, Inc., 97 N.L.R.B. 130 (1951), where the National Labor Relations Board held that in making a job so unattractive, the employer had in effect discharged the employee and violated the act.

<sup>33</sup> Likewise, if the subjective effect on the employee is the test, discrimination in terms and conditions could effectively deny him the opportunity to retain employment. However, unless the employee was "constructively discharged," he could not prove that the discrimination kept him from retaining his employment.

shoe store clerk, or the pressman on a newspaper. But does one "employ" a barber to cut his hair? If you do then a citizen violates the amendment if he refuses to go to a non-union barber. Does one "employ" a doctor, a lawyer, a college professor, a fireman, a policeman or a bank president? While literally, the amendment includes all people who receive money for work, the court will probably restrict it to protect only those who normally join unions and exclude professional men, executives, businessmen and supervisors. The court could use the definition of employee as found in section 2(3) of the Taft-Hartley Act,<sup>84</sup> which excludes supervisors and independent contractors. But supervisors, independent contractors and small businessmen are traditional targets for union membership and the court may wish to include them within the statute.

The last part of the clause gives the most trouble and it is here that there has been the most litigation. The final phrase reads "because of membership or non-membership in any labor organization. . . ." The word "because" implies a causal connection. It raises the question of the reason for the discharge or refusal to hire. Does it mean the only reason was union membership, the motivating reason, one of the reasons, or only a possible reason? Since proof of a state of mind is difficult, the court, in choosing its test, can either greatly restrict or expand the statute.

Certainly "membership and non-membership" are fraught with dangers. At what point does an employee become a "member" of a labor organization? When he has paid his dues and initiation fees or not until he has taken the oath to support the union? Do we look to the union constitution to determine when an employee becomes a member? Or, to go even further, does the clause protect the employee who talks with his fellow employees about calling in a union organizer? Here again the court may expand or restrict the protection of the amendment.

Finally we have the problem of the words "labor organization." This phrase has been litigated quite frequently before the National Labor Relations Board and in the federal courts.<sup>85</sup> However, this litigation is based on a definition found in the Taft-Hartley Act. It says: "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions at work."<sup>86</sup> The Kansas Labor Relations Act defines the term "labor organization" in exactly the same manner.<sup>87</sup> If the court reads the definition section of the Labor

<sup>84</sup> 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1952).

<sup>85</sup> See, e.g., NLRB v. Cabot Carbon Co., 79 Sup. Ct. 1015 (1959); A. H. Bull S.S. Co. v. National Marine Eng. B Ass'n, 250 F.2d 332 (2d Cir. 1957); NLRB v. Associated Machs., Inc., 219 F.2d 433 (6th Cir. 1955); NLRB v. Kennametal, Inc., 182 F.2d 817 (3d Cir. 1950); Great Atl. & Pac. Tea Co., 98 N.L.R.B. 355 (1952); Air Line Pilots Ass'n, 97 N.L.R.B. 929 (1951).

<sup>86</sup> 61 Stat. 137 (1947), 29 U.S.C. § 152(5) (1952).

<sup>87</sup> KAN. G.S. 1957 Supp., 44-802(1).



Management Act into the Kansas Right to Work amendment, the federal cases as to the meaning of the term "labor organization" should be persuasive authority.

### *State Court Interpretations*

A few courts have tried to answer some of the questions raised by the first clause.<sup>38</sup> The most important case, *Willard v. Huffman*,<sup>39</sup> decided by the Supreme Court of North Carolina in 1958, involved the interpretation of the causal connection between firing and membership.<sup>40</sup> An employee claimed damages from his employer for discharging him because he and some others discussed joining a union.<sup>41</sup> The employer claimed the plaintiff was fired for drinking on the job. A jury found for the plaintiff upon instruction by the trial court that the plaintiff could collect if union membership was "the sole reason or one of the reasons, why he was discharged."<sup>42</sup> On appeal by the defendant, the Supreme Court of North Carolina held that there was a cause of action, but reversed on the ground that the trial court gave an improper instruction. The test, said the court, is that established by the federal courts in construing section 8(a)(3) of the Taft-Hartley Act.<sup>43</sup> The court stated the federal court test to be: "Where there is a conflict in evidence as to the reason for discharge, in an action brought under the provisions of our Right to Work statute, in order for a plaintiff to recover damages thereunder, the jury must find that the discharge resulted solely from the plaintiff's exercise of rights protected under the act, or that the plaintiff's exercise of such rights was the *motivating or moving cause* of such discharge . . ."<sup>44</sup>

The court did not comment, but of necessity must have adopted the view, that discussing joining a union is the equivalent of union membership. The North Carolina statute reads only "membership or non-membership."<sup>45</sup> There was no finding by the court that this plaintiff was actually a member of the union.<sup>46</sup>

The Texas Court of Civil Appeals avoided an authoritative statement in deciding whether the plaintiffs had sustained the burden of proof as to the cause of their discharge.<sup>47</sup> As to one employee the trial court found that the

<sup>38</sup> Many of these words or phrases appear in the second clause concerning contracts. Their meaning in a contract situation will be discussed *infra* accompanying text to note 158.

<sup>39</sup> 247 N.C. 523, 101 S.E.2d 373 (1958).

<sup>40</sup> N.C. GEN. STAT. § 95-81 (1950), reads: "No person shall be required by any employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment."

<sup>41</sup> Note that the Kansas amendment, as do most of the right-to-work laws, protects an employee discharged for union membership as well as non-membership.

<sup>42</sup> 247 N.C. at 526, 101 S.E.2d at 375.

<sup>43</sup> 61 Stat. 136 (1947), 29 U.S.C. § 158 (a)(3) (1952).

<sup>44</sup> 247 N.C. at 528, 101 S.E.2d at 376.

<sup>45</sup> N.C. GEN. STAT. § 95-81 (1950).

<sup>46</sup> The defendant raised the pre-emption problem, but the court did not decide the issue since a new trial was granted and the defendant could raise it at that time. See *infra* note 348 for how the court resolved the issue on a later appeal.

<sup>47</sup> Local 324, Int'l Bhd. Elec. Workers v. Upshur-Rural Elec. Co-op Corp., 261 S.W.2d 484 (Tex. Civ. App. 1953).

discharge was due to drinking on the job and the appellate court found evidence in the records to sustain that view. It pointed out that the statute:<sup>48</sup> “. . . does not prohibit discharge of an employee for any reason or no reason at all, except for his union membership.”<sup>49</sup> The other employee, who was actually a supervisor, was discharged for helping a union solicit members. The trial court said this was union activity, not membership, so did not fall within the Texas statute. The Court of Appeals would not reverse, but was careful to say, “we are not to be understood as holding that a member of a labor union may be discharged for union activity per se.”<sup>50</sup> The court goes on to argue:

Membership in a union, safeguarded by law, carried with it, at least, the inherent rights named in Section 1 of this Act.<sup>51</sup> Such rights and the benefits of membership necessarily imply the right of some activity. As stated by the learned district judge in the ‘Memorandum’ referred to ‘It would be a barren and too restrictive meaning to say that membership is limited to the bare right of a person to have his name on the rolls of a union.’ The limits of such activity must be determined by the fact of the particular case.<sup>52</sup>

But here the court felt that the evidence supported the trial court’s finding that: “the plaintiff was discharged for union activities, not inherent in his union membership . . . .”<sup>53</sup>

In a later Texas case, the trial court and the Court of Civil Appeals<sup>54</sup> both held that although the plaintiff had filed and sent in his application for membership, paid his dues and was thought to be a member by the employer, he was actually not a member on the date of his discharge. Since the statute protected only membership and not union activity, the discharge was proper. The Texas Supreme Court disagreed.<sup>55</sup> It pointed out that since the statute referred to “. . . membership and non-membership, the intent of the legislature was to protect employees in the exercise of the right of free choice of joining or not joining a union . . . .”<sup>56</sup> If the employer could discharge for application, that purpose would be thwarted.

The court also found an alternative basis for the decision. Since the statute prohibits discharge “by reason of” and “on account of” and since the city manager testified that he believed the plaintiff to be a member, the discharge was prohibited whether the plaintiff was an actual member or not.<sup>57</sup>

<sup>48</sup> TEX. REV. CIV. STAT. ANN. art. 5207a, § 2 (1947). It reads: “No person shall be denied employment on account of membership or non-membership in a labor union.”

<sup>49</sup> 261 S.W.2d at 488.

<sup>50</sup> *Id.* at 487.

<sup>51</sup> Section 1 of the Texas act reads: “The inherent right of a person to work and bargain freely with his employer, individually or collectively, for terms and conditions of his employment shall not be denied or infringed by law, or by any organization of whatever nature. TEX. REV. CIV. STAT. ANN. art. 5207a, § 1 (1947).”

<sup>52</sup> 261 S.W.2d at 487.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Lunsford v. City of Bryan*, 292 S.W.2d 852 (Tex. Civ. App. 1956).

<sup>55</sup> *Lunsford v. City of Bryan*, 297 S.W.2d 115 (Tex. 1957).

<sup>56</sup> 297 S.W.2d at 117.

<sup>57</sup> See *NLRB v. J. G. Boswell Co.*, 136 F.2d 585, 595 (9th Cir. 1943); *Etiwan Fertilizer Co.*, 113 N.L.R.B. 93, 96 (1955); *Trafford Coach Lines*, 99 N.L.R.B. 399 (1952); *Coca-Cola Bottling Co. of*

Several cases consider a basic question not yet raised in this paper. Do these Right to Work acts apply to employees of the state or its subdivisions? Georgia specifically denies public employees the right to join a union.<sup>58</sup> Utah specifically includes public workers in their Right to Work law.<sup>59</sup> Some statutes are phrased in broad terms and apparently make no distinction between public and private employees.

The statute of Tennessee merely says that it "shall be unlawful for any person, firm, corporation, or association of any kind to deny employment to any person by reason of such person's membership in . . . a labor union . . . ."<sup>60</sup> When a clerk in a city electric system was discharged for joining a union she sued for damages. In denying her claim the court invoked a general statutory presumption that unless the sovereign is specifically included in the statute, the court is to presume that the legislature did not so intend.<sup>61</sup> The court also pointed out that it had recently held<sup>62</sup> that public employees cannot engage in picketing against the sovereign, even if acting in its proprietary capacity, to force it to enter into a union collective bargaining agreement. These cases, said the court, expressed the public policy of Tennessee that general labor laws were not to be applied to the state or its subdivisions.<sup>63</sup> In January 1959, the Attorney General of North Carolina ruled that their Right to Work statute did not apply to the state or its subdivisions.<sup>64</sup> Apparently doubting this ruling, the legislature of North Carolina, on June 4, 1959, expressly exempted the state and its subdivisions from the Right to Work law and prohibited any employee from joining a union.<sup>65</sup>

The Arkansas Supreme Court took the opposite tack and held unconstitutional a statute prohibiting union membership to policemen.<sup>66</sup> The court pointed out that the Arkansas Constitution positively said "no person shall be denied employment because of membership . . . in a labor union."<sup>67</sup> The court felt the presumption was overcome since surely the people did not intend to exclude public employment from the constitutional command. Also, the people did not intend to allow the sovereign to enter into closed shop agreements, a necessary result if the state was not included within the amendment. As a

Ashville, N.C., 97 N.L.R.B. 151 (1951); Ohio Fuel Gas Co., 28 N.L.R.B. 667 (1940), for a similar view of the NLRB construing § 8(a)(3) of the Taft-Hartley Act.

<sup>58</sup> GA. CODE ANN. § 54-901 (1957).

<sup>59</sup> UTAH CODE ANN. § 34-16-1 (1959).

<sup>60</sup> TENN. CODE ANN. § 50-208 (Supp. 1953).

<sup>61</sup> Keeble v. City of Alcoa, 319 S.W.2d 249 (Tenn. 1958).

<sup>62</sup> City of Alcoa v. International Bhd. of Elec. Workers, 308 S.W.2d 476 (Tenn. 1957). See Annot., 31 A.L.R.2d 1142 (1953), and Weakley County Municipal Elec. Sys. v. Vick, 309 S.W.2d 792 (Tenn. 1958).

<sup>63</sup> Cf. Miami Water Works Local 654 v. City of Miami, 157 Fla. 445, 26 So. 2d 194 (1946), where the Florida Supreme Court indicated that the general labor laws and the Right to Work amendment did not apply to cities. The case goes off on the right of the union to bring the action and does not expressly decide whether an individual employee is protected against discharge for union membership by a governmental unit.

<sup>64</sup> N.C. Att'y Gen. Op. 4A CCH LAB. L. REP. ¶ 49,502 (1959).

<sup>65</sup> N.C. Laws 1959, H.B. 118 which will appear as § 95-85 to -88. (Effective July 4, 1959).

<sup>66</sup> Potts v. Hay, 318 S.W.2d 826 (Ark. 1958).

<sup>67</sup> ARK. CONST. amend. 34 (1945).

clinker, the court argued that, while the Right to Work amendment gave the right to join a union, it did not give the right to strike or bargain collectively.

Texas arrived at the same result as Arkansas, but had statutory help. As part of their 1947 Right to Work statute, Texas passed a specific article controlling public employment.<sup>68</sup> Section 4<sup>69</sup> says: ". . . [N]o person shall be denied *public* employment by reason of membership or non-membership in a labor organization." Other sections prohibit the right of unions to bargain collectively<sup>70</sup> or to engage in strikes.<sup>71</sup> In a declaratory judgment action brought by a city fireman, the Court of Civil Appeals found the ordinance prohibiting membership in a union invalid as conflicting with the general statute.<sup>72</sup>

Later, in *Lunsford v. City of Bryan*,<sup>73</sup> the Supreme Court of Texas applied the Right to Work statute in a mandamus and damage action brought by a city fireman. The application of the statute to city employees was assumed and the appeal was based on the meaning of the word membership.<sup>74</sup>

The courts in the cases discussed above interpreted several different words. In two cases the court considered the causal connection between the firing and the membership in the union. The North Carolina Supreme Court adopted the test of "the motivating reason"<sup>75</sup> of the federal courts, while the Texas Supreme Court unconsciously adopted the rule of the federal courts that the state of the employer's mind, not the employees actual membership, satisfied the phrase "by reason of" or "on account of."<sup>76</sup> Here all of the authorities available to the Kansas Supreme Court are in agreement.

On the problem of the applicability of the statute to public employees, the two states with Right to Work laws similar to that of Kansas disagreed. Arkansas said the law was applicable to policemen,<sup>77</sup> while Tennessee said it was not applicable to a clerk in a municipal electric works.<sup>78</sup> The reasoning of the courts are diametrically opposed. The Kansas Supreme Court may buy either argument, but since the second clause of the amendment specifically applies to the state and its subdivisions, the court should hold the entire amendment applicable to the state.

<sup>68</sup> TEX. REV. CIV. STAT. ANN. art. 5154c (1947).

<sup>69</sup> TEX. REV. CIV. STAT. ANN. art. 5154c, § 4 (1947).

<sup>70</sup> TEX. REV. CIV. STAT. ANN. art. 5154c, § 2 (1947).

<sup>71</sup> TEX. REV. CIV. STAT. ANN. art. 5154c, § 3 (1947).

<sup>72</sup> *Beverly v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App. 1956). *Cf.* Note, 5 KAN. L. REV. 740 (1957).

<sup>73</sup> 297 S.W.2d 115 (Tex. 1957).

<sup>74</sup> That it was a school district that was being sued did not bother the Texas Court of Appeals in *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959). The membership problem is discussed *supra* note 55 and accompanying text. See Note, 12 Sw. L.J. 126 (1958), where the author says that the common law rule made an exception for firemen and policemen and never allowed their union membership. The author suggested that the court could have found such an exception in the statute and prohibit firemen and policemen from joining a union. The author argues, however, that the court declined because the other sections of the statute prohibited striking or collective bargaining.

<sup>75</sup> *Willard v. Huffman*, 247 N.C. 523, 101 S.E.2d 373 (1958).

<sup>76</sup> *Lunsford v. City of Bryan*, 297 S.W.2d 115 (Tex. 1957).

<sup>77</sup> *Potts v. Hay*, 318 S.W.2d 826 (Ark. 1958).

<sup>78</sup> *Keeble v. City of Alcoa*, 319 S.W.2d 249 (Tenn. 1958).

In four of the cases the court dealt with the word membership. The Texas Supreme Court in the *Lunsford* case<sup>79</sup> held that applying for membership constituted membership. The North Carolina Supreme Court in the *Willard* case<sup>80</sup> assumed that discussing joining a union constituted membership. Two Texas Civil Appeal courts<sup>81</sup> required more proof. In the *Lunsford* case,<sup>82</sup> the court said actual membership, but was reversed by the supreme court. In the *Upshur* case,<sup>83</sup> the court found that the activities, here a supervisor soliciting other employees to join the union, was not the type of "union activity" protected by the Right to Work law. The court indicated however, that mere membership was not all that was protected. Apparently the consensus is that membership includes more than having the employee's name on the role and includes at least discussing joining a union.

These few cases leave many unanswered questions about the word "membership." A great mass of precedent found in the cases before the National Labor Relations Board and the federal courts determining violation of section 8(a)(3) of the Taft-Hartley Act,<sup>84</sup> are probably not too helpful. Section 8(a)(3) talks in terms of "discrimination . . . to encourage or discourage membership." Certainly firing an employee because he has applied for membership would "discourage" membership. Firing for any activities by an employee that aided a union or for any activities that the union did not like would either discourage or encourage union membership.<sup>85</sup> State courts, interpreting a statute that just says membership or non-membership, will have to give an extremely broad meaning to those words to arrive at the same result. But a relatively broad view is probably justified in that it carries out the purpose of the act.

A court could also, assuming it desired to broaden the meaning of the word to a limited extent, point out that the Right to Work statute does not say "his" membership. Therefore a discharge, in order to violate the statute would not have to be based on the individual employee's membership, but only on the employer's desire to prevent the future membership of that employee.

### *Effect on Kansas Law*

Assuming the Kansas Supreme Court adopts the broad majority view expressed above, what has the hiring and firing clause of the Right to Work

<sup>79</sup> *Lunsford v. City of Bryan*, 297 S.W.2d 115 (Tex. 1957).

<sup>80</sup> *Willard v. Huffman*, 247 N.C. 523, 101 S.E.2d 373 (1958).

<sup>81</sup> *Lunsford v. City of Bryan*, 292 S.W.2d 852 (Tex. Civ. App. 1956); *Local 324, Int'l Bhd. Elec. Workers v. Upshur-Rural Elec. Co-op Corp.*, 261 S.W.2d 484 (Tex. Civ. App. 1953).

<sup>82</sup> *Lunsford v. City of Bryan*, 292 S.W.2d 852 (Tex. Civ. App. 1956).

<sup>83</sup> *Local 324, Int'l Bhd. Elec. Workers v. Upshur-Rural Co-op Corp.*, 261 S.W.2d 484 (Tex. Civ. App. 1953).

<sup>84</sup> 61 Stat. 136 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>85</sup> See, e.g., *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). Here the United States Supreme Court expanded the word membership to include the concept of "good standing" in the union. Certainly a state court could find a violation of a right to work law in a discharge because the union told the employer that the employee was no longer in good standing with the union, even though the employee was still a member of the union.

amendment added to existing Kansas Labor Law? Kansas, in 1943, enacted a Labor Management Relations Act.<sup>86</sup> This act was extensively amended in 1955.<sup>87</sup> Although lacking benefit of a Kansas Supreme Court interpretation on the discharge problem, the Kansas Labor Management Relations Act apparently provides more protection to an employee than does the first clause of the Right to Work amendment. KAN. G.S. 1949, 44-803, provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, and such employees shall also have the right to refrain from any or all such activities.

KAN. G.S. 1957 Supp., 44-808 makes it unlawful for any employer to (1) "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 44-803 of the General Statutes of 1949. . . ." KAN. G.S. 1957 Supp., 44-809(12) declares it unlawful for any person "to coerce or intimidate any employee in the enjoyment of his legal rights, including those guaranteed in section 44-803 of the General Statutes of 1949, of any acts mandatory thereof or supplemental thereto. . . ." Finally, KAN. G.S. 1949, 44-813 says: "Except as specifically provided in this act nothing therein shall be construed so as to interfere with or impede or diminish in any way . . . the right of individuals to work. . . ."

Therefore, prior to the Right to Work amendment and in the absence of an "all union agreement"<sup>88</sup> then allowed under KAN. G.S. 1957 Supp., 44-809(4),<sup>89</sup> an employer or union violates the statute by interfering with, restricting, coercing or intimidating any employee for engaging in the right of self organization, forming, joining, or assisting a labor union or for refraining from any or all of such activities. The above language is certainly broader than the amendment's prohibition on denying the opportunity to obtain or retain employment because of membership or non-membership in a labor organization. Of course, today the second clause of the amendment outlaws an all union agreement. But, the first clause of the amendment adds no new rights since the second clause, plus existing statutes give greater protection than do the first and second clauses of the amendment.<sup>90</sup>

<sup>86</sup> KAN. G.S. 1949, 44-801 to -815.

<sup>87</sup> Kan. Sess. Laws 1955, ch. 252. Now appearing as KAN. G.S. 1957 Supp., 44-802, 44-808, 44-809, 44-809a, 44-814, 44-816, 44-817. At the same time the legislature passed a Right to Work bill, H.B. 30, 39th Sess. (1955), but it was vetoed by Governor Hall, H. JOUR. 364 (1955).

<sup>88</sup> This term is defined in KAN. G.S. 1957 Supp., 44-802(5).

<sup>89</sup> It shall be unlawful for any person (4) to enter into an all union agreement as a representative of employees in a collective bargaining unit unless the employees to be governed thereby have, by majority vote of such employees by secret ballot, authorized such agreement.

<sup>90</sup> There is one possible, but weak, argument that the first clause gives a new right to employees. KAN. G.S. 1957 Supp., 44-808 covering six unlawful acts of employers has no section corresponding to 8(a)(3) of the Taft-Hartley Act, the section concerning discrimination because of membership. However, any violation of 8(a)(3) is also a violation of 8(a)(1), which corresponds to KAN. G.S. 1957 Supp., 44-808(1).

### *Remedies for Violation*

The Kansas Right to Work amendment sets a standard of conduct but makes no provisions for enforcement of the rights granted. Many states added either civil or criminal penalties, or both, for violation of their Right to Work statute or constitutional amendment.<sup>91</sup> Since Kansas did not, the supreme court is left with the problem of fashioning appropriate common law remedies and of determining who may enforce against whom the remedies so created.

The basic power question—may the supreme court create remedies—seems to require an affirmative answer.

The history of labor law is reflected in courts finding certain conduct unlawful and fashioning remedies for the injured party.<sup>92</sup> The amendment now sets the standard for finding unlawful conduct. Neither the fact that it is a constitutional provision nor the fact that it provides no remedies should cause any problem. As pointed out by Mr. Banowitz,<sup>93</sup> negative constitutional provisions are held self-executing by the Kansas Supreme Court. Certainly many courts have supplied a remedy when a statute merely sets a standard of conduct.<sup>94</sup>

Some of the other Right to Work statutes make no provisions for remedies.<sup>95</sup> Yet, courts from these states have allowed declaratory judgments, injunctions and damages as discussed in the rest of this section.

In creating new remedies, the Supreme Court of Kansas would have one limitation. Common law crimes do not exist in Kansas.<sup>96</sup> Therefore, a violation of the Right to Work amendment could not be made a common law crime.<sup>97</sup>

### *Actions for Damages*

The Kansas Supreme Court will surely allow an action for damages.<sup>98</sup> Once it decides the basic issue, the court must then determine the measure of damages.

<sup>91</sup> See, e.g., Criminal Penalties: ARK. STAT. ANN. § 81-204 (1947); IND. ANN. STAT. § 40-2705 (Supp. 1959); NEB. REV. STAT. § 48-219 (1952). Civil remedies: IND. ANN. STAT. § 40-2706 (Supp. 1959); MISS. CODE ANN. § 6984.5(f) (Supp. 1958); N.C. GEN. STAT. § 95-83 (1950).

<sup>92</sup> See, e.g., *Vegeahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077 (1896) for an early example. For United States Supreme Court approval, see *Hughes v. Superior Court*, 339 U.S. 460 (1950).

<sup>93</sup> Banowitz, *Amendment No. 3: Is Compulsory Unionism Now Barred in Kansas?* 27 KAN. B.J. 207 (1958).

<sup>94</sup> See, e.g., *Laughlin v. Riddle Aviation Co.*, 205 F.2d 948 (5th Cir. 1953), and the United States Supreme Court cases cited therein. Comment, *Right to Damages Under Statute not Providing a Private Cause of Action*, 9 STAN. L. REV. 791 (1957).

<sup>95</sup> The statutes of Florida, Nebraska, North Dakota, and Texas say nothing about remedies. Arkansas, Iowa, South Dakota, and Tennessee provide only criminal remedies.

<sup>96</sup> *State v. Anderson*, 178 Kan. 322, 329, 285 P.2d 1073, 1079 (1955); *State v. Young*, 55 Kan. 349, 40 Pac. 659 (1895).

<sup>97</sup> North Carolina still has common law crimes. In *State v. Bishop*, 228 N.C. 373, 45 S.E.2d 858 (1947), and in the famous companion case of *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), the court held that a violation of a right to work statute providing only civil remedies constituted a common law misdemeanor since it concerned basic public policy.

<sup>98</sup> In those states when damages are not allowed by statute, only one has held that damages are a proper remedy. *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951). (*But see*, *Collins v. Merritt-Chapman & Scott*, 91 Ga. App. 856, 87 S.E.2d 337 (1955), where Justice Townsend, in a concurring opinion, in a case holding that a suit for damages against a union for failure to issue a union card is pre-empted, argued that the *Sandt* case had held that there was no cause of action for damages when the employment

This is a difficult question and there is little authority to guide the court. To some undetermined extent, it depends on who is the defendant. If the employees sue the employer, one set of problems arise. If he sues a third party, say a union, another set of problems confront the court.

In suing the employer for discharge based on membership or non-membership in a union, the employee must overcome certain common law theories about the employment relation before he collects damages. At common law an employee could be hired for a term or at will. If the employer wrongfully discharged an employee who had a term contract, the employee could sue for damages for the breach of the contract. If wages were paid on a monthly or weekly basis or if the employer agreed to give notice a certain time in advance, the court found the term of employment to be for that period.<sup>99</sup> The damages were based on what he would have made on the contract, less what he could or did make at other employment.<sup>100</sup> If the employment was at will, as were most employment relations, the employer was free to discharge at any time for any reason and would suffer no liability in damages.<sup>101</sup>

When the employer discharges an employee for membership or non-membership in a union and the employment is at will, has the employee suffered any damages? The employer could discharge for any reason the next day. If the employment is on a week to week or month to month basis, has the employee suffered any damages beyond the week or month for which he is employed? Practically speaking, almost all employees who might become union members will be employed at will or on a short term basis.

In a suit against an employer for discharge for membership in a union, the Georgia Supreme Court, in *Sandt v. Mason*,<sup>102</sup> held that although the Right to Work statute did not provide for damages, a common law right to damages existed and the employees could recover. However, the court then said that the employees alleged weekly periods of employment and did not deny that the employer had paid them that week's wages. The court felt that the cause of action was for breach of contract and the measure of damages was the actual

---

contract was at will.) The Florida Supreme Court, in dicta, has said damages are a proper remedy. *Local 519, United Ass'n of Journeymen and Apprentices of the Plumbing Industry v. Robertson*, 44 So. 2d 899 (Fla. 1950); *Miami Laundry Co. v. Laundry Union*, 41 So. 2d 305 (Fla. 1949). A Texas Court of Appeals, also in dicta, said that damages could be recovered. *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959). No court has denied the remedy.

<sup>99</sup> See, e.g., *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 (1931).

<sup>100</sup> See, e.g., *Rench v. Hayes Equipment Mfg. Co.*, 134 Kan. 865, 8 P.2d 346 (1932); *Griffin v. Oklahoma Natural Gas Corp.*, 132 Kan. 843, 297 Pac. 662 (1931); *Manross v. Uncle Sam Oil Co.*, 107 Kan. 71, 190 Pac. 619 (1920).

<sup>101</sup> See, e.g., *Wilkinson v. Erwin Mills, Inc.*, 250 N.C. 370, 108 S.E.2d 673 (1959). In *Brick Co. v. Perry*, 69 Kan. 297, 76 Pac. 848 (1904), the Kansas court said that the right to discharge was a constitutional right and therefore a Kansas statute prohibiting discharge for union membership was unconstitutional. Of course, the constitutional doctrine of this case is no longer valid. The statute, Kan. Sess. Laws 1897, ch. 120, was not included in the Revised Statutes of 1923 and thereby was repealed. See KAN. G.S. 1949, 77-105 and 77-114.

<sup>102</sup> 208 Ga. 541, 67 S.E.2d 767 (1951). Cf. *Deal v. Chemical Const. Co.*, 108 S.E.2d 746 (Ga. Ct. App. 1959), where the Georgia Court of Appeals construed a collective bargaining agreement as not providing for wages during a period of disability.



loss. Since they were paid for the term of this contract, a week, they suffered no loss.

In no other case brought under a Right to Work statute is the measure of damages or the proper theory adequately discussed. In two cases involving suits by an employee against an employer damages were allowed, but the respective supreme courts ignored the measure of damage problem.<sup>103</sup>

In *Finney v. Hawkins*,<sup>104</sup> the Virginia court held the Right to Work statute constitutional and approved, without discussion, the trial court's judgment of \$330 damages against both the union and the employer. According to the statement of facts in the opinion, this amount was based on the loss suffered during four weeks of unemployment brought about by the discharge of the plaintiff for failure to retain union membership. The Virginia statute merely provided that one discharged in violation of the Right to Work statute "shall be entitled to recover . . . by appropriate action . . . such damages as he may have sustained by reason of such denial or deprivation of employment."<sup>105</sup> North Carolina has the same damage statute as does Virginia. In *Willard v. Huffman*,<sup>106</sup> the North Carolina Supreme Court, although reversing on other grounds, entered no objection to the jury finding \$625 damages. After a re-trial, the jury awarded \$1,000 in damages.<sup>107</sup> On appeal, the court wrestled with the pre-emption problem. In neither opinion does the court object to or even discuss the theory upon which damages were based.

In neither of these cases does the court indicate whether the plaintiff was employed at will or for a term. Since one of the employees was a printer and the other a truck driver, they probably were hired at will or from week to week. Certainly there is nothing in the opinions to indicate that the trial court was basing damages on the breach of a term contract.

A Texas Court of Appeals, in a case where a janitor sued a school district for discharging him for union membership,<sup>108</sup> said, in dicta,<sup>109</sup> "Should Daniel prevail upon the . . . merits, he will . . . be compensated by payment of his back salary, or at least payment of the difference between the amount of his earnings in his employment since his discharge and the amount of the salary he would have been paid had he not been discharged."<sup>110</sup> The court gives no reason why it feels that this is the proper measure of damage. Surely a janitor is an at will employee.

Since these courts did not adequately indicate the damage theory used,

<sup>103</sup> In all of the other cases construing the firing clause of the statute, discussed *supra* note 38 and accompanying text, the damage issue was not reached nor had the trial court granted damages.

<sup>104</sup> 189 Va. 878, 54 S.E.2d 872 (1949).

<sup>105</sup> VA. CODE ANN. § 40-74 (Supp. 1958).

<sup>106</sup> 247 N.C. 523, 101 S.E.2d 373 (1958).

<sup>107</sup> *Willard v. Huffman*, 37 CCH Lab. Cas. ¶ 65,529 (N.C. 1959).

<sup>108</sup> *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959).

<sup>109</sup> The appeal court reversed the trial court on the grounds that it should not have issued a mandatory injunction of reinstatement until the case had been heard on the merits.

<sup>110</sup> 37 CCH Lab. Cas. at 66,746.

research into other areas of discharge of at will employees in violation of a statutory duty was pursued without much luck. A review of the standard texts<sup>111</sup> gave no concrete answer to the problem of the measure of damages for unlawful discharge under an at will contract.

The Springfield, Missouri, Court of Appeals, in *Bell v. Faulkner*,<sup>112</sup> agreed with the result of the Georgia court. A Missouri statute made it a felony for an employer to discharge an employee for failure to vote in any election as the employer instructed. Upon discharge the employee sued for damages. The court held that the statute placed no positive duty on the employer. Therefore, the employee suffered no damage. The court agreed with defendant that the trial court should have given a directed verdict since an at will employee may be fired for any reason.

In *Odell v. Humble Oil & Refining Co.*,<sup>113</sup> the 10th Circuit Court held that the employee could not meet the \$3,000 jurisdictional amount. The employee alleged that he was discharged for testifying in a hearing in violation of a federal criminal statute; that he had a property right in his job under a collective bargaining agreement which allowed discharge only for cause; that the discharge was wrongful and that he suffered both actual and punitive damages. The court said that since the statute was passed to protect only the public, the court would create no private right to damage. Therefore, since the contract provided for thirty days termination notice and since an employer was, at most, liable for breach of contract and not in tort, the employee could recover only one month's wages.<sup>114</sup>

There is considerable litigation, however, involving the tort of malicious interference with a contract of employment. Here again the courts are not clear as to the theory of recovery for at will contracts. Occasionally they talk in terms of a tort action for inducing a breach of contract. Frequently they talk of a tort action for interfering with a common law right to employment. Sometimes they will talk of the tort of assault and battery when the employee is physically prevented from working.

In a case where the Right to Work statute was argued, an employee sued a union alleging that the union had maliciously caused the employer to discharge him by falsely telling the employer that he had been expelled from the union and by threatening to strike if he was not discharged. The Tennessee Supreme Court in *Dukes v. Brotherhood of Painters*,<sup>115</sup> found no cause of action

<sup>111</sup> AMERICAN JURISPRUDENCE (1941); CORPUS JURUS SECUNDUM (1948); HARPER & JAMES, TORTS (1956); McCORMICK, DAMAGES (1935); PROSSER, TORTS (2d ed. 1955).

<sup>112</sup> 75 S.W.2d 612 (Mo. Ct. App. 1934).

<sup>113</sup> 201 F.2d 123 (10th Cir. 1953).

<sup>114</sup> *But see*, Hall v. St. Louis-San Francisco Ry., 28 S.W.2d 687 (Mo. Ct. App. 1930), where an employee under an at will contract recovered damages for a longer period, but the theory of the measure of damages is not discussed.

<sup>115</sup> 191 Tenn. 495, 235 S.E.2d 7 (1950), 26 A.L.R.2d 1223 (1952). See *infra* note 137 and accompanying text for a discussion of whom to sue.

under the Right to Work statute since it applied only to employers. However, quoting *Corpus Juris Secundum*,<sup>116</sup> the court found a property right in the contract of employment and allowed a cause of action against one who maliciously caused or without just cause procured the discharge of an employee.

As to the right to damages the Tennessee Supreme Court quoting from an Alabama case,<sup>117</sup> said: "To unlawfully or maliciously interfere therewith, causing the employee to be discharged by his employer, is actionable. That the employment is for no stipulated period, but terminable at the will of the parties, is not of consequence." The court went on to say, quoting from *Corpus Juris Secundum*.<sup>118</sup>

The measure of damages for unlawfully procuring the discharge of employees is based on the direct and approximate results of the wrongful acts of defendant, and not on the breach of contract of employment, and ordinarily plaintiff may recover the amount which would have been earned by him except for defendant's interference, less such sums as were actually earned on other employment.

There are many other cases allowing suits against a union or other third party apart from any Right to Work statute. The court uses many theories. They talk of the tort of interfering with a contract of employment, of interfering with an employment relation, or of interfering with a property right in employment. But these courts do not really analyze the problem of the at will contract.<sup>119</sup>

In the only case involving a Right to Work statute, the Texas Court of Appeals in *Borden v. United Ass'n of Journeymen & Apprentices of Plumbing and Pipefitting Industries*,<sup>120</sup> held that a union member could sue his union for damages for maliciously and without cause refusing to allow the plaintiff to work at the job offered him. The petition alleged that the union's action was in violation of the Texas Right to Work statute. Why the union would not let him go to work is not indicated in the opinion. The court stated that the

<sup>116</sup> 57 C.J.S. *Master & Servant* § 630 (1948).

<sup>117</sup> *Evans v. Swaim*, 245 Ala. 641, 18 So. 2d 400, 402 (1944).

<sup>118</sup> 57 C.J.S. *Master & Servant* § 632 (1948), quoted at 235 S.W.2d at 10.

<sup>119</sup> See, e.g., *Sullivan v. Barrows*, 303 Mass. 197, 21 N.E.2d 275 (1939) (Suit against union for procuring a discharge for failure of employee to pay insurance assessment. Apparently an at will contract. Damages in tort for the loss of wages, the tort being an interference with a contract of employment.); *Kuzma v. Millinery Workers*, 27 N.J. Super. 579, 99 A.2d 833 (1953) (Suit against union for procuring a discharge for failure to contribute for a gift for the union president. Apparently an at will contract. Damages in tort for wrongfully interfering with the employment relation. An intentional wrong will support damages for mental suffering and punitive damages.); *Savard v. Industrial Trades Union*, 76 R.I. 496, 72 A.2d 660 (1950) (Suit against union. Tort of interfering with right of employment. Damages based on weekly earnings, plus mental suffering.); *Hill Grocery Co. v. Carroll*, 104 Fla. 373, 136 So. 789 (1931) (Suit against third party business man for inducing employer to discharge salesman. An at will contract. Damages based on loss of wages plus punitive damages on theory that employment is a "property right." Immaterial that the employment is at will since it is not at the will of others.); *But see, Holder v. Cannon Mfg. Co.*, 138 N.C. 308, 50 S.E. 681 (1905), where the North Carolina court found that since the employee could not sue the employer for discharging him, he could not sue a third party for procuring what the employer had a legal right to do. For other cases and a fair explanation of the theories used, see Annot., 26 A.L.R.2d 1223 (1950); Note, 10 OKLA. L. REV. 97 (1957); Note, 35 TEXAS L. REV. 142 (1956).

<sup>120</sup> 316 S.W.2d 458 (Tex. Civ. App. 1958).

plaintiff was asserting a property right in the right to seek employment. Having decided the case on procedural grounds, the court, without discussion of the damage question, approved the petition alleging as damages the difference in wages of \$4,039.50, \$5,000 for mental anguish and \$1,000 exemplary damages. The court did not explain the theory of the plaintiff as to the applicability of the Right to Work statute. The plaintiff was not denied his right to seek employment because of non-membership, since the plaintiff expressly remained a member. The only possible argument is that the phrase membership includes "good standing" in the union as well as actual membership.<sup>121</sup>

The Kansas Supreme Court has decided only one case in the common law interference with employment area. In *Hilton v. Sheridan Coal Co.*,<sup>122</sup> the court allowed damages for loss of wages, plus punitive damages, against an owner of a mine when he induced the lessee-employer to discharge the plaintiff-employee. The owner had procured the discharge because he wrongfully wished to rid Kansas of "compensation hounds." The court pointed out that it made no difference that the contract was at will. It said: "While an employer may discharge his employee not hired for a specific term for any reason or for no reason, third parties have no such privilege and they are liable in damages for such meddlesome interference . . . ."<sup>123</sup> As to the measure of damages, the court said the plaintiff was entitled to what he might have earned during the three years he was unemployed at his previous wages of \$10 per day and having shown legal malice, was entitled to punitive damages.<sup>124</sup>

Before speculating as to what the Kansas Supreme Court will do in a suit against an employer under the Right to Work statute, mention should be made of those cases allowing back pay, under the National Labor Relations Act or State Labor Relations Acts, when the employee is discharged for membership or non-membership.

Frequently the National Labor Relations Board will order back pay and reinstatement of employees or prospective employees for discrimination because of membership. This practice is approved by the United States Supreme Court.<sup>125</sup> The fact that the employment is at will is immaterial.<sup>126</sup> Under section 10(c) of the Taft-Hartley Act,<sup>127</sup> the Board is specifically empowered ". . . to take affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act . . . ." Section 2(3)<sup>128</sup> says:

<sup>121</sup> See note 85 *supra*. Although the petition alleged a violation of the Right to Work law, the court apparently found a violation in the interference with a common law right of employment. Other than to state in the facts that the petition alleged a violation of the Right to Work law, the court never mentions it in the opinion.

<sup>122</sup> 132 Kan. 525, 297 Pac. 413 (1931).

<sup>123</sup> 132 Kan. at 529, 297 Pac. at 416.

<sup>124</sup> For a discussion of punitive damages in Kansas, see Note, 4 KAN. L. REV. 132 (1955).

<sup>125</sup> See, e.g., *NLRB v. Gullett Gin Co.*, 340 U.S. 361 (1951); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

<sup>126</sup> *NLRB v. Waterman Steamship Co.*, 309 U.S. 206 (1940).

<sup>127</sup> 61 Stat. 146 (1947), 29 U.S.C. 160(c) (1952).

<sup>128</sup> 61 Stat. 137 (1947), 29 U.S.C. 152(3) (1952).

“The term ‘employee’ shall include . . . any individual whose work has ceased . . . because of any unfair labor practice . . .” In effect the Board has authority to treat the discharged worker as an employee and give him back wages. The employee does not receive damages for breach of contract or for a tortious act by the employer.<sup>129</sup> The Board also has power under a proviso of section 10(c) to order a union to pay the “back pay” award when the union violates section 8(b)(2) of the act.<sup>130</sup>

There are several states that have a little Taft-Hartley Act and state boards have ordered “back pay” given to an at will employee who was discharged in violation of a statute prohibiting discrimination because of membership in a union. But even here, the problem of at will contracts is not analyzed. In *Imperial Laundry, Inc. v. Connecticut State Bd. of Lab. Rel.*,<sup>131</sup> the court adopted the view of the federal courts that a discharge constituting an unfair labor practice did not end the relationship of employer and employee and the state Board could order reinstatement and back pay. In Colorado, in *Bennett’s Restaurant, Inc. v. Industrial Comm’n*,<sup>132</sup> the court found the employer had discharged a waitress for union membership and approved the Board’s order of reinstatement and the reimbursement “for any financial loss suffered by reason of discharge.”<sup>133</sup> The court does not even discuss whether the waitress remained an “employee,” or what constituted the financial loss.

These cases indicate that courts are willing to force employers to pay money to a discharged employee, so long as the court is talking in terms of a labor relations act and not in terms of common law master and servant relationship. Although only in dicta and without discussion, the Texas Court of Appeals, under a Right to Work statute, talked in terms of awarding the employee back pay<sup>134</sup> rather than damages for breach of contract or in tort. Even though the court had no statutory definition of employee to rely upon, the approach may prove fruitful as a method of awarding compensation.

What will the Kansas court do with the jumbled mess of half articulated theories of recovery in a case where an at will employee sues his employer for discharge in violation of the amendment? To take the view of the Georgia court that no or only nominal damages are recoverable for discharge in violation of the act effectively emasculates it. The Kansas court should not let common law theories of at will discharges stand in the way of effectuating the policies

<sup>129</sup> In *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941), the Court extended the power of the Board to give “back pay” to a prospective employee indicating that 10(c) allowed the Board to effectuate the policies of the act.

<sup>130</sup> 61 Stat. 140 (1947), 29 U.S.C. 158(b)(2) (1952); *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954).

<sup>131</sup> 142 Conn. 457, 115 A.2d 439 (1955).

<sup>132</sup> 127 Colo. 271, 256 P.2d 891 (1953).

<sup>133</sup> 256 P.2d at 893.

<sup>134</sup> *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959). For a discussion of the facts of the case, see note 107 *supra* and accompanying text.

of the Right to Work amendment. The court could use either one of two theories to sustain a damage action and allow more than nominal damages.

It could reason that while the employer could discharge for any or no reason, he could not discharge in violation of the amendment. Since his reason violated the amendment, he in effect did not discharge and the employee continued to be entitled to the wages he had been earning in the past. This theory fits those used by state courts that protect against discrimination in a labor relations act and that of the Texas Court of Appeals<sup>185</sup> under a Right to Work law.

Or, the Kansas court could follow its own reasoning in the *Hilton* case<sup>186</sup> involving a third party interference and say that the amendment gives a property right in employment. If an employer discharges in violation of the amendment he has committed a tortious act, *i.e.*, he has wrongfully interfered with a constitutional property right. Therefore, the employee is entitled to the damages suffered because of this wrongful act. These damages, as pointed out in *Hilton*, include what he reasonably could expect to earn plus punitive damages. The court, by using a tort theory, instead of a breach of contract theory, removes the problem that the discharge is not in breach of contract, there being no contract. The court is then free to hold, as they did in *Hilton*, that for a tort injury the fact that employment was at will is immaterial.

These damage cases also raise the problem of who is liable. Certainly the court would hold an employer who discharged in violation of the statute responsible. Would the union who induced the employer to discharge the employee also be liable? Many Right to Work statutes expressly so provide in their damage section.<sup>187</sup> But what if the statute includes no such provision? The Tennessee Supreme Court in the *Dukes* case,<sup>188</sup> held, without discussion, that the Tennessee statute was directed toward the employer and not toward a union inducing the employer to fire an employee because the employee did not belong to the union. The statute merely provides that it is unlawful for any person to deny or attempt to deny employment to any person.<sup>189</sup>

The Kansas amendment says nothing about defendants. Written in the passive voice—no person shall be denied—no object is stated. Apparently the only person who could deny would be the employer. However, if a union, through economic or other pressure, induced an employer to discharge an employee, the Kansas court could easily find that the purpose of the statute was to protect employees against the one who actually, or through the use of

<sup>185</sup> *Ibid.*

<sup>186</sup> *Hilton v. Sheridan Coal Co.*, 132 Kan. 525, 297 Pac. 413 (1931).

<sup>187</sup> ALA. CODE tit. 26, § 375(6) (Supp. 1955); ARIZ. REV. STAT. ANN. § 23-1306 (1956); MISS. CODE ANN. § 6984.F (Supp. 1958); NEV. REV. STAT. § 613.290 (1953); N.C. GEN. STAT. § 95-83 (1950); UTAH CODE ANN. § 34-16-13 (Supp. 1957); VA. CODE ANN. § 40-74 (1950). And see *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949), where both the employer and the union were made defendants.

<sup>188</sup> *Dukes v. Brotherhood of Painters*, 191 Tenn. 495, 235 S.W.2d 7 (1950).

<sup>189</sup> TENN. CODE ANN. 50-208 (Supp. 1953).

pressure, was denying the employment. Or, the Kansas court could take the view of the Tennessee court in the *Dukes* case and their own view in the *Hilton* case, and find a common law violation on the part of the union in their procuring a breach of the employment relation. The purpose in inducing the employer to discharge would be unlawful since it would violate the Right to Work amendment.

### *Actions for Injunctions*

Since damages is at best an uncertain remedy and in most cases would be so small as to render a suit unprofitable, a few employees or unions have asked for a mandatory injunction to restore their jobs or to prevent the employer from discharging union members. The Florida Supreme Court refused, in two cases, to permit the union to act as plaintiff in a suit requesting reinstatement.<sup>140</sup> The court argued that the protection of the Florida Right to Work amendment<sup>141</sup> was personal to the employee and the union had no cause of action. But a Texas Civil Appeals case<sup>142</sup> indicated that the union had standing to ask for a mandatory injunction forcing an employer to rehire employees discharged for union membership.<sup>143</sup>

Twice individual employees have attempted to obtain reinstatement. In 1947 a Florida Circuit Court allowed non-union employees to obtain a mandatory injunction for reinstatement when they were discharged under a closed shop clause.<sup>144</sup> The court merely said that this contract violated the Florida Right to Work amendment. In dicta, a Texas Court of Appeals approved a mandatory injunction ordering the employer to reinstate his discharged employee.<sup>145</sup> The court saw no problem in ordering a mandatory injunction of reinstatement for an individual employee. But, the Georgia Supreme Court in 1951 said no.<sup>146</sup> The court construed the Georgia Right to Work statute as providing for an injunction for violation of certain sections of the Right to Work act, but not the section concerning discharge.<sup>147</sup> The court also said that the plaintiff, a union employee, could not rely upon a common law injunction since a mandatory injunction was prohibited by statute in Georgia.<sup>148</sup> The court, in dicta, indicated that they would not issue an injunction in any event, since, according to the Georgia court, an injunction will not issue to remedy a completed act, the discharge.<sup>149</sup>

<sup>140</sup> *Miami Laundry Co. v. Laundry Union*, 41 So. 2d 305 (Fla. 1949); *Miami Water Works Local 654 v. City of Miami*, 157 Fla. 445, 26 So. 2d 194 (1946).

<sup>141</sup> FLA. CONST., Declaration of Rights § 12 (1944).

<sup>142</sup> *Leiter Mfg. Co. v. International Ladies' Garment Workers*, 269 S.W.2d 409 (Tex. Civ. App. 1954).

<sup>143</sup> But the court dismissed the suit on the grounds that the remedy was pre-empted by the Taft-Hartley Act. See *infra* note 273 and accompanying text for a discussion of the pre-emption problem.

<sup>144</sup> *Grimes v. Merrill-Stevens Co.*, 20 L.R.R.M. 2464 (Cir. Ct. Fla.), *subsequent opinion*, 20 L.R.R.M. 2502 (Cir. Ct. Fla. 1947).

<sup>145</sup> *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959).

<sup>146</sup> *Sandt v. Mason*, 208 Ga. 541, 67 S.E.2d 767 (1951).

<sup>147</sup> GA. CODE ANN. § 54-908 (Supp. 1958) is the remedy section.

<sup>148</sup> GA. CODE ANN. § 55-110 (1958).

<sup>149</sup> In this case the Georgia Supreme Court also effectively prohibited a suit for damages, see note 102 *supra* and accompanying text. In effect the Georgia court emasculated the section on discharge by not allowing any remedy.

The Kansas Supreme Court can issue mandatory injunctions.<sup>150</sup> The court may also rely on Kansas legislative policy providing for enforcement of employment rights by injunction.<sup>151</sup> The Kansas Supreme Court should be free to order reinstatement and to give effect to the Kansas amendment.

Despite the fact that Right to Work statutes have existed in many states for over 10 years, there are few reported cases asking for damages and reinstatement.<sup>152</sup> Why? Several reasons are apparent. If you are fired for any reason, it is easier to obtain another job and forget about the old one than it is to see a lawyer, pay a fee and try to collect damages or get reinstated. Even if you are reinstated, your chances of promotion within the firm are slight.

Another and probably more important reason is that most employees will take their case to the National Labor Relations Board. While only protecting employees of employers affecting interstate commerce,<sup>153</sup> a large majority of employees will fall within this protection.<sup>154</sup> Since sections 8(a)(3) and 8(b)(2) of the Taft-Hartley Act<sup>155</sup> gives at least the same if not a broader protection to employees than does the discharge clause of the Right to Work laws,<sup>156</sup> most employees will use the cheaper and more effective procedure of the National Labor Relations Board.

There is one other way that an employee discharged for union membership may attempt to get the employer to rehire him. His union may picket the employer. In *Hotel and Restaurant Employee's Union v. Cothron*,<sup>157</sup> the Florida Supreme Court held that such picketing was proper and was not an attempt to force the employer into a closed shop agreement.

Cutting across this whole discussion of rights and remedies under state Right to Work laws is the bugaboo of federal pre-emption. Since pre-emption is a common problem to both the discharge clause and the contract clause of state Right to Work laws, it will be presented after the examination of the contract clause.

#### THE CONTRACT CLAUSE

The second clause of the amendment reads:

. . . [N]or shall the state or any subdivision thereof, or any individual, corporation, or

<sup>150</sup> KAN. G.S. 1949, 60-1101, and see *State ex rel. Mitchell v. Ross*, 159 Kan. 199, 152 P.2d 675 (1944); *Harder v. Power Co.*, 95 Kan. 315, 148 Pac. 603 (1915); where the action is recognized.

<sup>151</sup> KAN. G.S. 1957 Supp., 44-814 provides: "Any persons violating the provisions of this act shall not be guilty of a criminal offense except as otherwise provided by law, but may be enjoined by the attorney general, the county attorney in the proper county or any aggrieved party from violating the provisions thereof by action of the district court of the proper county."

<sup>152</sup> See *Business Week*, Jan. 19, 1957, p. 72, for a report on a study of damage suits against unions.

<sup>153</sup> The Board does not actually take all cases from employers affecting interstate commerce. It has self-imposed jurisdictional standards. See 5 CCH LAB. L. REP. ¶ 50,086 and 50,092 (1958), for the standards effective on September 1, 1958.

<sup>154</sup> For a discussion of the reach of the Board's power, see Comment, *Labor Law—Interstate Commerce—Pre-emption*, 7 KAN. L. REV. 185 (1958).

<sup>155</sup> 61 Stat. 140 (1947), 29 U.S.C. §§ 158(a)(3) and (b)(2) (1952).

<sup>156</sup> Except, of course, 8(a)(3) allows a discharge pursuant to a modified union shop contract. To this extent a state Right to Work law gives greater protection.

<sup>157</sup> 59 So. 2d 366 (Fla. 1952).



any kind of association enter into an agreement, written or oral, which excludes any person from employment or continuation of employment because of membership or non-membership in any labor organization.<sup>158</sup>

### *Possible Interpretations*

Most Kansans would correctly assume that this clause expresses the heart of the Right to Work restriction. Its main function is to limit the freedom of contract of employers and unions in one important area—that of union security. What does the second clause on its face prohibit? It says that no one, be it the state, an individual (which would include an individual employee), a corporation or an association (which would surely include a labor union) shall enter into an agreement, written or oral, that accomplishes certain purposes. This part of the clause appears relatively clear.

Apparently the agreements that are prohibited are not just those between an employer and a union, but also between employers, and between an employer and an individual employee. The clause prohibits any of the named groups from entering into the agreement. Thus a contractor could not agree with his sub-contractors that the sub-contractor would hire only union labor. Nor could an individual employee sign an agreement with his prospective employer that, as a condition of employment, he would either be a member or non-member of any labor union. The agreement between a union and an employee, that the employee join the union, which is usually considered contractual,<sup>159</sup> is not included since joining is not a condition of employment.

All of the normal contract law on the formation of contracts—is available for interpretation of “enter into an agreement,” and needs no discussion here.<sup>160</sup>

It is the second part of the clause concerning the type of contract prohibited that is litigated. It says that the contract cannot “exclude any person from employment or continuation of employment” for the reasons stated. Here the same questions arise as were discussed above when examining similar language in the first clause—“deny the opportunity to obtain or retain employment.” Usually a difference in language invokes a difference in intent on the part of the legislature, but here the use of different words apparently occurred because of the difference in subject matter, contract instead of hiring and firing, and not any difference of intent. Note that the clause does not prevent discrimination in terms of employment for any reason including membership or non-membership. It only prohibits the parties from agreeing to employ or to continue employment on the basis of membership or non-membership.<sup>161</sup>

<sup>158</sup> Kan. Sess. Laws 1957, ch. 235, which will appear as KAN. CONST. art. 15, § 12.

<sup>159</sup> *International Ass'n of Mach. v. Gonzales*, 356 U.S. 617 (1958).

<sup>160</sup> If the employer as a matter of practice hired only union members or discharged employees who were no longer in good standing with the union, the employee might not be able to prove an agreement, but would be protected under the first clause of the amendment.

<sup>161</sup> See note 32 *supra* and accompanying text for a discussion of the doctrine of constructive discharge. It is possible to argue that if the agreement provided for too great a discrimination, the employee would be “forced” to either not take the job or else quit. But apart from any agreement, to “constructively discharge” would violate the first clause.

Finally, the clause gives the reason for which the parties may not agree to exclude: ". . . because of membership or non-membership in a labor organization." This is exactly the same language which is found in the first clause concerning hiring and firing. But a court's interpretation here presents different issues. The phrase "because of" is not, on its face, as difficult. The terms of the contract will state the reason for which the employer is to discharge.<sup>162</sup>

The root of the problem is in the phrase: "membership or non-membership in a labor organization." There are many relations between employers and unions that are advantageous to the union, but which the union, at least, would not call membership.<sup>163</sup>

### *State Court Interpretations*

How have the courts handled these various clauses? In many cases the contract expressly provides that the employer is to hire only members in good standing with the union. This is an obvious union security agreement and all the courts treat such a clause as a violation of the Right to Work law.<sup>164</sup>

Sometimes the clause is not written in standard form but still clearly provides for a type of union security. In *International Ass'n of Machinists v. Goff-McNair Motor Co.*,<sup>165</sup> the Arkansas Supreme Court found unlawful a demand for a clause reading: "The refusal of any or all employees who are members of the union to work with an employee who is not a member of the union will not be considered a violation of this agreement."<sup>166</sup>

### *The Hiring Hall*

Suppose, however, the employer and the union agree that the employer shall ask the union to supply employees as needed. This is referred to as a union hiring hall agreement. In *Building Trades Council v. Bonito*,<sup>167</sup> an injunction case, the court found that a demand that the employer agree to let the union supply his employees was unlawful. The proposed agreement provided that if the union had not supplied needed employees within forty-eight hours, the employer could look elsewhere. The court felt the agreement would deny non-union men an opportunity to gain employment during the forty-eight hour

<sup>162</sup> Even here, however, if the court is willing to look to the effect of the contract in practice, a mere lack of the phrase because of, on account of, or unless, in the contract would not be controlling.

<sup>163</sup> See note 85 *supra* and accompanying text for a discussion of the idea that "membership" includes good standing in a union.

<sup>164</sup> For typical examples of obviously prohibited clauses see, e.g., *Alabama Highway Express, Inc., v. Local 612, Int'l Bhd. of Teamsters*, 108 So. 2d 350 (Ala. 1959); *Local 235 of United Ass'n of Journeymen and Apprentices of Plumbing Industry v. Henley & Beckwith, Inc.*, 66 So. 2d 818 (Fla. 1953); *Local 519 of United Ass'n of Journeymen and Apprentices of Plumbing Industry v. Robertson*, 44 So. 2d 899 (Fla. 1950); *Lincoln Fed. Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948), *aff'd*, 335 U.S. 525 (1949); *In re Port Pub. Co.*, 231 N.C. 395, 57 S.E.2d 366 (1950); *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947); *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949).

<sup>165</sup> 223 Ark. 30, 264 S.W.2d 48 (1954).

<sup>166</sup> 264 S.W.2d at 48. *But see*, *Flackler v. Brotherhood of Painters*, 26 CCH Lab. Cas. ¶ 68,559 (Tenn. Ct. App. 1954), where the court held valid an agreement between a businessman and a painting contractor that the contractor would use "union men" in doing the job.

<sup>167</sup> 71 Nev. 84, 280 P.2d 295 (1955).

period. In *Sheet Metal Workers Union v. Walker*,<sup>168</sup> the Texas Court of Civil Appeals found that a proposed agreement requiring the employer to hire through the union for forty-eight hours, and if he went outside "it being understood that such additional . . . workers . . . shall comply with the requirements of membership of the union,"<sup>169</sup> clearly violated the act.<sup>170</sup>

On the other hand, a federal district court in Arkansas held<sup>171</sup> that a provision requiring the union to furnish, on request, duly qualified journeymen and apprentices in sufficient numbers as may be necessary to properly execute work contracted for was not an illegal union security device. Apparently the court reasoned that the employer could hire non-union employees at his discretion.<sup>172</sup>

A union hiring hall as such should not violate the contract clause. Mere existence of the hiring hall does not necessarily show that only union members will be referred, although in practice this might be the effect. The Nevada court in the *Bonito* case<sup>173</sup> was willing to assume that this would be the effect of the agreement. A more logical approach for a court would be to hold the agreement valid, but if proof was offered as to discriminatory practices under the agreement, then hold the employer and union liable to any particular employee under the first clause prohibiting hiring on the basis of membership.<sup>174</sup>

Of course, if the agreement provided that the union shall refer only union members, then the agreement would in effect be a closed shop and void.<sup>175</sup>

<sup>168</sup> 236 S.W.2d 683 (Tex. Civ. App. 1951).

<sup>169</sup> 236 S.W.2d at 684.

<sup>170</sup> Even a saving clause did not help when the employer offered proof that he agreed to sign the proposed collective bargaining agreement if the union would state in the agreement that a closed shop was not intended. The Attorney General of North Carolina argued with the Nevada and Texas courts that a hiring hall, valid on its face, tended to produce, in practice, a closed shop and was invalid under the Right to Work law. A specific clause to the effect that there would be no discrimination based on union membership did not save the agreement. N.C. Att'y Gen. Op., 4A CCH LAB. L. REP. ¶ 49,496 (1958).

<sup>171</sup> *Ketcher v. Sheet Metal Workers' Ass'n*, 115 F. Supp. 802 (E.D. Ark. 1953).

<sup>172</sup> The court also relied on a saving clause providing that any unlawful provision would be excluded from the contract.

<sup>173</sup> *Building Trades Council of Reno v. Bonito*, 71 Nev. 84, 280 P.2d 295 (1955).

<sup>174</sup> See Comment, 13 WASH. & LEE L. REV. 59 (1956), for arguments as to the proper interpretation of a hiring hall agreement which might violate the statute in practice. After a long period of vacillation, the National Labor Relations Board standardized their test for the validity of a hiring hall agreement under the proviso of §§ 8(a)(3) and 8(b)(2) of the Taft-Hartley Act. (The difference in wording between state laws and the proviso of 8(a)(3) is immaterial to the validity of a hiring hall.) In *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, 119 N.L.R.B. 883 (1958), the Board stated that it would find a hiring hall invalid on its face unless the agreement specifically provided: 1) that the selection of applicants for job referrals would be on a non-discriminatory basis; 2) that the employer retain the right to reject applicants referred by the union; 3) that the parties post notices of the functioning of the agreement.

These standards are a middle ground approach to the problem of the hiring hall and state courts should give the *Mountain Pacific* case close scrutiny toward possible adoption when faced with the problem under the local Right to Work law. For a good discussion of the Board's view see Tenton, *The Taft-Hartley Act and Union Control of Hiring—A Critical Examination*, 4 VILL. L. REV. 339 (1959).

<sup>175</sup> *Virginia v. Local 10, United Ass'n of Journeymen and Apprentices of the Plumbing Industry, 32 L.R.R.M. 2610* (Richmond Ct. 1953). The court found invalid a clause which required the employer "to employ only journeymen and apprentices who are in good standing in the local union unless the local union fails to supply an adequate number on request."

Likewise, if a contractor agrees to furnish only union labor, the contract is void.<sup>176</sup>

The problem in not following the distinction between an agreement void on its face and invalid upon proof of the way it operates is illustrated by the Arkansas Supreme Court in the case of *Self v. Taylor*.<sup>177</sup> The union demanded, by striking and picketing, a sixty day cancellation clause in the collective bargaining agreement. The union employees testified that they would not work with non-union men and if the employer continued to hire them, the union would cancel under the sixty day provision. The court said that the sixty day cancellation clause was being used to acquire, in practice, if not in form, a closed shop. Therefore, it was invalid under the Arkansas Right to Work law.<sup>178</sup> The dissent pointed out that the strike and picketing was only aimed at acquiring a sixty day cancellation clause. Such a clause is included in many labor contracts and is valid. The dissent suggested that the court should wait. If the union did cancel the contract and then picketed to demand the firing of non-union employees, the court could then enjoin the picketing as having an objective in violation of the Right to Work law.

### *Individual Contracts*

The Tennessee case of *Pruitt v. Lambert*<sup>179</sup> illustrates another type of clause that a court finds unlawful. The union demanded, by picketing, that the employer recognize the union even though none of the employees belonged to the union. The union also demanded that the employer sign a contract with them which provided, among other things, that the head meat cutter be a union member, that there be a journeyman meat cutter on duty at all times and that the employer assist the union in seeing that all employees remain in good standing in the union. The court found the picketing was for an illegal object in that it violated "the spirit if not the letter of their Right to Work statute."<sup>180</sup> A violation would occur, suggested the court because the contract would force the firing of the head meat cutter in order to hire a union member. The clause requiring assistance would be improper since the only way to assist the union would be either to coerce the non-union employees into joining or else discharge them.

The *Pruitt* case properly suggests that a contract requiring only one individual to be a union member or non-member violates the statute as much as a clause requiring all the employees to be union members or non-members.

---

<sup>176</sup> *Finchum Steel Erection Corp. v. Local 384, Int'l Ass'n of Bridge Workers*, 308 S.W.2d 381 (Tenn. 1957). *But see*, *Flackler v. Brotherhood of Painters*, 26 CCH Lab. Cas. ¶ 68,559 (Tenn. Ct. App. 1954), where the court upheld an agreement between a businessman and a painting contractor that the contractor would use "union men" on the job.

<sup>177</sup> 217 Ark. 953, 235 S.W.2d 45 (1950).

<sup>178</sup> ARK. STAT. ANN. § 81-201 (1949).

<sup>179</sup> 298 S.W.2d 795 (Tenn. 1957).

<sup>180</sup> 298 S.W.2d at 797.

Although no court has decided the validity of a contract between an individual and an employer that requires membership or non-membership in a union under a Right to Work law, the Kansas amendment clearly prohibits such an agreement.<sup>181</sup> The turn-of-the-century practice of requiring employees to sign Yellow Dog contracts is now prohibited by the Constitution.

### *The Agency Shop*

One of the most interesting union attempts to avoid the second clause of a Right to Work law is in the so-called agency shop.

The basic idea of the agency shop was suggested in a 1946 Canadian arbitration decision involving the Ford Motor Co.<sup>182</sup> The decision said that the union was not entitled to a union shop, but was entitled to a payment of a bargaining fee. This fee was to represent the non-union member's share of the expenses of the bargaining agent. In the Canadian decision the amount was set at the initiation fee plus normal dues.

Although the idea is not new, only recently has this union security device received much publicity. Apparently few such contracts are presently in existence. Union attorneys are not in agreement on how the contract should read. It will probably contain clauses specifically stating that the employees do not have to join a union, that a bargaining fee is a condition of employment and that the bargaining fee will be a certain amount.<sup>183</sup>

In arguing that an agency shop clause is valid under many Right to Work laws the unions point out that in many of the states<sup>184</sup> only contracts requiring membership or non-membership are prohibited. Union membership is something granted by a union and usually requires acceptance by the union, an oath of allegiance and an initiation ceremony. The mere payment of a bargaining fee does not logically fall within the word membership. The payment of money is just one of many requirements for membership.

To the counter argument that this is mere sophistry and the payment of dues is the whole point of requiring membership, the unions argue that there is a vast difference in the personal freedom and beliefs of the individuals involved. In an agency shop the employee is forced to pay a "tax" to support a bargaining agent given standing by state and federal law. In a union shop, the employee must give his allegiance and become part of an association he may despise.

The union also points out that if it were the intention of the legislature to prohibit the agency shop it should have expressly so stated. Many of the Right

<sup>181</sup> See text accompanying note 158 *supra*.

<sup>182</sup> *In re Ford Motor Co. of Canada and UAW*, 1 L.A. 439 (1946). Also reported at "Award on Issue of Union Security in Ford Dispute," *The Labour Gazette* (Ottawa) Jan. 1946.

<sup>183</sup> See Beaty, *The Agency Shop Agreement and the Right to Work Law*, 27 KAN. B.J. 348 (1959), for a suggested wording of such a clause.

<sup>184</sup> Arizona, Florida, Indiana, Kansas, Nebraska, Nevada, North Dakota, South Dakota, and Texas.

to Work laws provided<sup>185</sup> that the payment of any fees or any other charges to a union is unlawful. Under normal statutory interpretation, the legislature is assumed to be cognizant of existing law and certainly the legislatures of the states that have recently passed such a law, like Indiana and Kansas, knew of and looked to the earlier Right to Work statutes as models. Since it did not expressly prohibit nor does its plain language refer to the payment of fees, the legislature must have intended to allow an agency shop or else did not care to legislate on it. Following the doctrine of *causis omisis*, the state court should not add the word fees to the amendment.

One argument against the agency shop is found in the Taft-Hartley Act. The proviso in section 8(a)(3)<sup>186</sup> only allows discharge for nonpayment of dues and initiation fees. In effect, claim some, the Taft-Hartley Act assumes that membership and the payment of dues are synonymous. In practice only the agency shop is allowed. They argue that since section 14(b)<sup>187</sup> allows stricter union security laws and the Taft-Hartley Act allows only an agency shop, a state Right to Work law must prohibit the agency shop. The unions argue that actually the Taft-Hartley Act requires membership as well as payment of dues,<sup>188</sup> and that an employee must not only tender his dues and initiation fee but also must ask to join the union. But, if the union rejects the employee on any grounds other than nonpayment of dues, it may not request his discharge.<sup>189</sup>

Assuming the agency shop is valid in Kansas, the amount the union could charge presents problems and if the clause is worded improperly a court may find it illegal. There is no magic in basing the amount on any particular formula. To avoid the appearance of evil, the initiation fee might be omitted, although such fees go into the general union treasury. An amount equal to the dues of union members sounds reasonably logical.<sup>190</sup>

<sup>185</sup> ALA. CODE tit. 26, § 375(5) (Supp. 1955); ARK. STAT. ANN. § 81-202 (1949); GA. CODE ANN. §§ 54-903, -904, -905 (Supp. 1958); IOWA CODE ANN. § 736A.4 (1950); MISS. CODE ANN. § 6984.5(e) (Supp. 1958); N.C. GEN. STAT. § 95-82 (1950); S.C. CODE § 40-46.2(3) (Supp. 1958); TENN. CODE ANN. § 11412.10 (Supp. 1952); UTAH CODE ANN. § 34-16-10 (Supp. 1957); VA. CODE ANN. § 40-72 (Supp. 1958).

<sup>186</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>187</sup> 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952).

<sup>188</sup> The pertinent portion of 8(a)(3) reads: "Provided, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment *membership* therein . . . : *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* . . ." (Emphasis added.)

<sup>189</sup> The exact extent of an employee's obligation regarding membership under the Taft-Hartley Act is still in some doubt. See SULTON, *RIGHT TO WORK LAWS, A STUDY IN CONFLICT* 85 (1958); Cogan, *Is Joining the Union Required in the Taft-Hartley Union Shop?*, 5 LAB. L.J. 659 (1954); Toner, *The Taft-Hartley Union Shop Does Not Force Anyone to Join a Union*, 6 LAB. L.J. 690 (1955).

<sup>190</sup> To set the amount at 80 or 90% of dues meets the argument that not all dues money goes for the cost of bargaining. Certainly some money is spent on organization work, union hall upkeep, dances, and social events. But a certain percentage of dues can never be exactly correct and to miss by \$1.00 is as bad as by \$2.00. In *Railway Employees Dept. v. Hanson*, 351 U.S. 225 (1956), the court, in upholding the union shop provisions of the Railway Labor Act said:

The only conditions to union membership authorized by section 2, eleventh of the Railway Labor Act are the payments of "periodic dues, initiation fees, and assessments." The assessments that may be lawfully imposed do not include "fines and penalties." The financial support required relates,

Any amount in excess of initiation fees and dues smacks of extortion and belies the union claim that the fee is charged for the upkeep of the legal bargaining agent.<sup>191</sup> Assessments present a unique problem. If a union member pays a uniform assessment the non-union employee could logically be charged the same amount, assuming the assessment was to pay an expense of the bargaining agent.<sup>192</sup> Although in two cases the contract provided that the bargaining fee would include uniform assessments<sup>193</sup> the union should avoid its inclusion to prevent a possible violation of 8(b)(2) of the Taft-Hartley Act.<sup>194</sup>

To date no supreme court has passed on the legality of the agency shop. Arizona, like Kansas, has no provision prohibiting the payment of fees. The Arizona Supreme Court had an opportunity in a picketing case<sup>195</sup> to pass on the issue but specifically declined.<sup>196</sup> However, the Indiana Appellate Court did reach this problem<sup>197</sup> and held such a clause valid. The court reasoned that the plain language of the act did not prohibit a contract requiring fees, since it used only the word membership. The court pointed out that a court was not to go beyond the plain meaning to supply that which the legislature had omitted. The court suggested that since many states had specifically prohibited the payment of fees and these laws were available to the Indiana legislature, the court would presume that the legislature did not want to prohibit fees.<sup>198</sup>

Five Attorney Generals have issued opinions on the agency shop. The North Carolina Attorney General<sup>199</sup> said that the assessment of a "service charge" in the form of dues was illegal, but based his opinion on the existence of a section in the North Carolina Right to Work statute prohibiting the payment of any fees "or other charges of any kind" to a union.<sup>200</sup> The Attorney General

therefore, to the work of the union in the realm of collective bargaining. No more precise allocation of union overhead to individual members seems to us to be necessary. 351 U.S. at 235.

<sup>191</sup> The union must keep its claim within the framework of the collective bargaining process and union security. To "extort" money under claim of right might violate the Hobbs Act, 60 Stat. 420 (1946), 18 U.S.C. 1951 (1952).

<sup>192</sup> For the view of the United States Supreme Court see 351 U.S. at 235.

<sup>193</sup> See, for the wording of an agency shop clause, including an assessment provision, *Mead Elec. Co. v. Hagberg*, 34 CCH Lab. Cas. ¶ 71,525 (Ind. Super. Ct. 1958), and *Higgins v. Cardinal Mfg. Co.*, unreported. The Cardinal case was filed in the Wyandotte, Kansas, District Court. A copy of the pleadings with the agency provisions attached are on file at the University of Kansas Law School Library. In *Arizona Flame Restaurant v. Baldwin*, 26 CCH Lab. Cas. ¶ 68,647 (Ariz. Super. Ct. 1954), the clause provided that the non-member pay "the sum . . . equal to the amount assessed against union members by the union." Since no dues were mentioned, the contract obviously used the word assessment to be the equivalent of the word dues.

<sup>194</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1952). The National Labor Relations Board has held that assessments collected under threat of discharge, are an unfair labor practice under 8(b)(2) since they violate the proviso of 8(a)(3) which only allows a union to demand discharge for non-payment of initiation fees and dues uniformly required. See, e.g., *Central Pipe Fabricating & Supply Co.*, 114 N.L.R.B. 350 (1955); *Peerless Tool & Eng'r Co.*, 111 N.L.R.B. 853 (1955).

<sup>195</sup> *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957).

<sup>196</sup> The court decided the case on the grounds that apart from any contractual demand, the purpose of the union was to force the employer to discharge non-union employees and hire union employees. This purpose violated the state Right to Work law.

<sup>197</sup> *Mead Elec. Co. v. Hagberg*, 37 CCH Lab. Cas. ¶ 65,511 (Ind. App. Ct. 1959).

<sup>198</sup> The clause provided that the fee was to be equal to the union's regular initiation fees, dues, and uniform assessments. The court made no mention of the propriety of the amount.

<sup>199</sup> N.C. Att'y Gen. Op., 4A CCH LAB. L. REP. ¶ 49,217 (1952).

<sup>200</sup> N.C. GEN. STAT. § 95-82 (1950).

of North Dakota ruled the agency shop valid since their Right to Work statute did not prohibit payment of fees.<sup>201</sup> In 1952, the Attorney General of Nevada ruled the agency shop valid<sup>202</sup> on the theory that the law only prohibited membership agreements. In 1958 a new opinion handed down by the Nevada Attorney General<sup>203</sup> reached a different result. In the latest opinion the Attorney General argued that the purpose of the act was to guarantee everyone the right to work regardless of membership. He felt that the union was merely trying to circumvent the law by use of the agency shop.

There are two district court opinions in point. Judge Stodola of the Superior Court, Lake County Indiana, in a detailed and well argued opinion agreed with the union's arguments set out above and held that the agency shop did not violate the Indiana Right to Work law.<sup>204</sup>

In *Arizona Flame Restaurant v. Baldwin*,<sup>205</sup> the Superior Court of Maricopa County, Arizona, held that an agency shop clause violated the Arizona Right to Work law. The court said that it was the intent of the framers of the law, citing a publicity pamphlet, to free employees from participation in employee representation. The payment of fees is participation, consequently it is unlawful.<sup>206</sup>

One writer has suggested<sup>207</sup> that the agency shop is a good compromise to the union security problem. It prevents the most objectionable features of the union shop, while meeting the union's arguments against "free riders."

Since a case now on file in Wyandotte, Kansas, District Court<sup>208</sup> may be appealed, the first authoritative decision on the question may come from the Kansas Supreme Court. In a state, such as Kansas, that does not prohibit the payment of fees to a union, the court will find it difficult to hold the agency shop invalid.<sup>209</sup> The agency shop solution is workable and if the Kansas legislature feels that on policy grounds it should have included a "no fee" clause, it is free to pass an implementing statute accomplishing that goal.<sup>210</sup>

### *Other Types of Contracts*

There are several other types of contracts that are claimed to violate the Right to Work statute. In *McCann Plumbing Co. v. Plumbing Industries*

<sup>201</sup> N.D. Att'y Gen. Op., 4A CCH LAB. L. REP. § 49,346 (1956).

<sup>202</sup> 30 L.R.R.M. 127 (1952).

<sup>203</sup> Nev. Att'y Gen. Op., 4A CCH LAB. L. REP. ¶ 49,490 (1958).

<sup>204</sup> Meade Elec. Co. v. Hagberg, 34 CCH Lab. Cas. ¶ 71,525 (Ind. Super. Ct. 1958), *aff'd*, 37 CCH Lab. Cas. ¶ 65,551 (Ind. App. Ct. 1959).

<sup>205</sup> 26 CCH Lab. Cas. ¶ 68,647 (1954).

<sup>206</sup> A Wyandotte District Court opinion holding the agency shop valid in the *Cardinal Mfg. Co.* case was issued September 23, 1959. An appeal is anticipated.

<sup>207</sup> Spielmans, *Bargaining Fee versus Union Shop*, 10 IND. & LAB. REL. REV. 609 (1957).

<sup>208</sup> *Higgins v. Cardinal Mfg. Co.*, *supra* note 193.

<sup>209</sup> See Beaty, *The Agency Shop Agreement and the Right-To-Work Law*, 27 KAN. B.J. 348 (1959), for the views of a Kansas attorney on the validity of the agency shop under the Kansas amendment.

<sup>210</sup> But even assuming the agency shop is valid under Kansas law, the unions may not want it unless it can be coupled with a check-off of the fee. A check-off of a bargaining fee presents problems under §§ 302(a), (b), and (c) of the Taft-Hartley Act. 61 Stat. 157 (1947), 29 U.S.C. § 186(a), (b), and (c) (1952). See *infra* note 237 and accompanying text for a discussion of this problem.



*Program*,<sup>211</sup> the Florida Supreme Court denied, as a defense to a suit by a third party beneficiary, that the basic agreement was void because it contained a clause whereby the employer paid to an employer's association for publicity purposes ten cents an hour for each union member. The court said that this clause did not in any way provide for union security in violation of the Florida Right to Work law. A payment of ten cents an hour per union member to employer's association does not, on its face, show that all employees must be union members.

But suppose the contract requires the employer to join the union? This is a common demand when the employer does the same work as his few employees. Two cases involving a barber shop raise this issue. In neither case, however, is the reasoning very clear. In *Head v. Barber's Union*,<sup>212</sup> the Alabama Supreme Court held that a union could withdraw its union shop card from an employer's shop when he refused to join the union. Membership was a condition of the agreement to display the card. The employer defended on the grounds that the agreement violated the Right to Work statute.<sup>213</sup> The court held that the agreement was entered into prior to the passage of the statute and since the statute exempted lawful contracts executed prior to the passage of the statute, the contract was valid. But the court said: ". . . we would not be understood as holding that it [The Right to Work law] would apply to the instant case, even in the absence of section 375(7) [the exempting clause]..."<sup>214</sup>

The Tennessee court in *Flatt v. Barber's Union*,<sup>215</sup> held that stranger picketing against a barber was unlawful since it ". . . would result in depriving complainant of the right to carry on a lawful business."<sup>216</sup> The reasoning is vague but apparently the court felt that under late United States Supreme Court cases,<sup>217</sup> stranger picketing, as such, could be enjoined. Of interest here is the naked statement that: "While they [the unions] are privileged to patronize whomever they please, they cannot by force or intimidation deny to others a free choice. It is contrary to our 'Right to Work' statute . . . ."<sup>218</sup>

The Arizona court in *Baldwin v. Arizona Flame Restaurant*,<sup>219</sup> found a demand for a one owner clause<sup>220</sup> unlawful but based their decision on the common law right of an employer to be free from joining a union<sup>221</sup> and not on the Right to Work statute.

<sup>211</sup> 105 So. 2d 26 (Fla. 1958).

<sup>212</sup> 262 Ala. 84, 77 So. 2d 363 (1955).

<sup>213</sup> ALA. CODE tit. 26, § 375 (Supp. 1955).

<sup>214</sup> 77 So. 2d at 368.

<sup>215</sup> 304 S.W.2d 329 (Tenn.), *cert. denied*, 355 U.S. 904 (1957).

<sup>216</sup> 304 S.W.2d at 331.

<sup>217</sup> *International Bhd. of Teamsters, Local 695 v. Vogt, Inc.*, 354 U.S. 284 (1957); *United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953).

<sup>218</sup> 304 S.W.2d at 330.

<sup>219</sup> 82 Ariz. 385, 313 P.2d 759 (1957).

<sup>220</sup> A "one owner" clause provides that not more than one of the owners of the establishment may perform work done by union employees without meeting all of the conditions of the collective bargaining agreement.

<sup>221</sup> See *International Bhd. of Teamsters v. Hanke*, 33 Wash. 2d 646, 207 P.2d 206 (1949), *aff'd*, 339 U.S. 470 (1950), for state and United States Supreme Court approval of this common law rule.

The validity of these union security clauses sometimes arise in rather strange ways. In the *Finchum Steel Company* case,<sup>222</sup> a contractor claimed that a union forced him to break a contract with another contractor. The contract provided that the plaintiff-employer was to furnish union labor and the union refused to offer him union employees. The union, with the court agreeing, defended on the grounds that the agreement was void. The employer argued, futilely, that the Right to Work law applied only to contracts between employer and employees, not between two employers. The court pointed out that the Right to Work statute says *any* contract.

The Kansas amendment clearly applies to contracts between any of the named groups.<sup>223</sup> An agreement between two employers is prohibited.

The Louisiana court in the now famous *Piegts* case,<sup>224</sup> decided prior to the repeal of the Louisiana Right to Work statute, pushed the statute to its logical limit. Despite the fact that the union did not demand a union security clause, the court held that a union representing a majority of employees could be enjoined for picketing to enforce their right to represent employees. The court reasoned that their picketing demand, a collective bargaining agreement, would "abridge" a non-union employee's right to contract independently of the union.<sup>225</sup> The majority acted despite the fact that the Right to Work statute positively stated that it should not be applied to deny the right of collective bargaining.<sup>226</sup>

The Kansas amendment says nothing about collective bargaining and KAN. G.S. 1957 Supp., 44-803, expressly gives the right of collective bargaining to employees. Since union security and collective bargaining expressed through majority will are two entirely different concepts, the Kansas Supreme Court would have to reach for the moon to arrive at an abolition of collective bargaining.<sup>227</sup>

### *The Validity of the Check-off*

Is a check-off of dues unlawful under a Right to Work statute? A few states specifically restrict the check-off in their Right to Work law,<sup>228</sup> but most states, like Kansas, are silent. The Tennessee Supreme Court held, in *Murtha v. Pet Dairy Products Co.*,<sup>229</sup> that a union could collect from the employer the dues

<sup>222</sup> *Finchum Steel Erection Corp. v. Local 384, Int'l Ass'n of Bridge Workers*, 308 S.W.2d 381 (Tenn. 1957).

<sup>223</sup> See *supra* accompanying text to note 152.

<sup>224</sup> *Piegts v. Amalgamated Meat Cutters Union*, 228 La. 131, 81 So. 2d 835 (1955).

<sup>225</sup> 81 So. 2d at 838. See also S.D. Att'y Gen. Op., 4A CCH LAB. L. REP. ¶ 49,484 (1950), where the Attorney General of South Dakota gave a similar interpretation to the South Dakota Right to Work statute.

<sup>226</sup> LA. REV. STAT. § 23-887 (Supp. 1954).

<sup>227</sup> No proponents of the amendment ever suggested such a result. Of course, for any employer affecting interstate commerce, § 7 of the Taft-Hartley Act, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952), expressly gives employees the right to engage in collective bargaining and the state could not deny that right. *UMW v. Arkansas Flooring Co.*, 351 U.S. 62 (1956); *Hill v. Florida*, 325 U.S. 538 (1945).

<sup>228</sup> See, e.g., ARK. STAT. ANN. § 81-202 (1949); IOWA CODE § 736A.5 (Supp. 1958); S.C. CODE § 40-46.4 (Supp. 1958).

<sup>229</sup> 314 S.W.2d 185 (Tenn. 1958).

that he failed to check-off as required by the collective bargaining agreement. The agreement conformed to section 302(c)(4) of the Taft-Hartley Act requiring a written authorization for a limited period.<sup>280</sup> Even though Tennessee had a provision in their Right to Work law that prohibited an agreement to pay any dues or fees to a union as a condition of employment, the Tennessee Supreme Court felt that an agreement by an employer to check-off dues on a valid Taft-Hartley authorization was enforceable. The employees were not forced but had voluntarily signed the authorizations. In *Lewis v. Fentress Coal & Coke Co.*,<sup>281</sup> the Federal District Court in Tennessee agreed with the Supreme Court of Tennessee that a Taft-Hartley authorized check-off did not violate Tennessee law nor could the existence of the check-off provision show that the parties intended to enter into an invalid union shop agreement.

So long as the authorization conforms to KAN. G.S. 1957 Supp., 44-808(5),<sup>282</sup> the Kansas Supreme Court should agree with the other courts. There is nothing in the Kansas Right to Work amendment to prohibit the check-off of dues of voluntary members of the union.

There is one possible argument against the validity of the check-off. It was not raised in either check-off case, but an attorney might raise it before the Kansas Supreme Court. Both the Taft-Hartley Act and the Kansas statute require written authorization from each employee but make it irrevocable for a certain period.<sup>283</sup> If the employee grants proper authorization, the union and employer may validly agree to the employer checking-off the employee's dues. But, assume an employee revokes the authorization during its life. Would the employer have to give effect to the revocation? There is nothing in the Right to Work law that would allow the breach of the agreement between the employee and the employer. The employer, under the check-off statute, must continue to give effect to the agreement. But assume that the employee not only revokes the check-off agreement, but also withdraws membership in the union. May not an employee withdraw membership in a union at any time since any contract requiring membership is prohibited by the Right to Work law? No, he may not. The amendment only prohibits agreements requiring membership *when such membership is a condition of employment*. The amendment does not apply to contracts between a union and its members, since such an agreement has nothing to do with employment. Therefore, the employer must still give effect to the check-off authorization. The contract would be void only

<sup>280</sup> 61 Stat. 159 (1947), 29 U.S.C. 186(c)(4) (1952).

<sup>281</sup> 160 F. Supp. 221 (M.D. Tenn. 1958), *aff'd*, 264 F.2d 134 (6th Cir. 1959).

<sup>282</sup> "It shall be unlawful for any employer: (5) to deduct labor organization dues or assessments from an employee's earnings, unless the employer has an individual order therefore, presented and signed by the employee personally, and terminable at the end of any year of its life by the employee giving at least thirty (30) days' written notice of such termination." It is arguable that the assignment of union dues need not conform to the Kansas statute. The Taft-Hartley Act restrictions on the check-off may pre-empt the field. See note 239 *infra* for the argument.

<sup>283</sup> Taft-Hartley Act § 302(c)(4), 61 Stat. 157 (1947), 29 U.S.C. 186(c)(4) (1952); KAN. G.S. 1957 Supp., 44-808(5).

where the agreement between the union and the employer provides that an employer shall discharge any employee who both withdraws from the union and revokes his authorization. In such an agreement, membership becomes a condition of employment. But a court would hold this type of clause void whether it was combined with a check-off of dues or not.<sup>284</sup>

The only possible way to argue that the amendment allows the employer to give effect to the revocation and withdrawal of membership is to say that the amendment prohibits the payment of an employee's money to a union as a condition of employment. If the court so holds, then the employer, in refusing to give effect to the revocation, would be requiring membership (the payment of a fee) as a condition of employment.

Whether the Kansas court agrees with this argument or not, the union and the employer may also be in trouble with the National Labor Relations Board. Under section 302 of the Taft-Hartley Act<sup>285</sup> an employer is prohibited from paying and a representative of the employees is prohibited from receiving any money. An exception is made under section 302(c)(4)<sup>286</sup> for money collected, upon written authorization, by the employer from his employees that constitute membership *dues*. If the employee withdraws from membership in the union, the irrevocable check-off is no longer dues and an employer who pays the money or a union representative who receives the money may both be violating the federal act.

This same problem faces any employer and union that attempt to combine an agency shop clause with a check-off of the fees. Even assuming that the state court approves the agency shop fee and assuming the check-off of that fee conforms to the authorization requirements, it will be difficult for the employer and union to argue that the fees are *membership dues*. They have just taken the position before the state court that agency shop fees are not membership dues. Since section 302(c)(4) protects only membership dues, the check-off probably may not be combined with the agency shop.<sup>287</sup> The Labor-Management Reporting and Disclosure Bill of 1959,<sup>288</sup> section 211, would have amended section 302(c)(4) to provide that there is expected, "membership dues in *or other periodic payments to* a labor organization in lieu thereof." Had Congress adopted this new language it would have specifically

<sup>284</sup> In *United Steelworkers v. Knoxville Iron Co.*, 162 F. Supp. 366 (E.D. Tenn. 1958), the Federal District Court held unlawful a check-off provision in a collective bargaining agreement, but the provision also required the employees to remain or become members of the union. While the court talks in terms of check-off, it actually finds the membership provisions unlawful. Since the membership clause was void, the court then took the correct position that check-off provisions fell also and the employer had a duty to give effect to revocations. Therefore, the union could not collect from the employer the dues he did not withhold.

<sup>285</sup> 61 Stat. 157 (1947), 29 U.S.C. 186 (1952).

<sup>286</sup> 61 Stat. 157 (1947), 29 U.S.C. 186(c)(4) (1952).

<sup>287</sup> It is possible to argue that § 302 was not aimed at payments by the employer of moneys collected from employees, but in putting in the exception in 302(c)(4) for dues, Congress showed that they were including this type of money. The only other argument around 302(c)(4) is boldly to say that the phrase "membership dues" includes agency shop fees.

<sup>288</sup> S. 1555, 86 Cong., 1st Sess. (1959).

protected agency shop fee payments. However, the Conference Committee adopted the House version which left that section of the Taft-Hartley Act unchanged.<sup>239</sup> Since the Senate attempted a change which was defeated in the Conference Committee, it will be dangerous for a labor union to attempt to couple an agency shop with a check-off of the agency fee. The inference must now be that the word dues does not include other fees.

### *The Effect of a Void Union Security Clause*

Once the court found that the particular union security clause violated the Right to Work law, it then has to determine what effect the void clause will have on the rest of the contract. This issue frequently arose in suits on a collective bargaining agreement with a defense that the whole contract was void because of an invalid union security clause. In *In re Port Publishing Company*,<sup>240</sup> the North Carolina Supreme Court allowed a suit by employees for back wages despite an illegal union security clause. The court felt that unless there was a clear inter-dependence of the various clauses the other provisions were enforceable. The court pointed out that the Right to Work statute was not aimed at stopping collective bargaining and the provisions on wages were reasonable and should be enforced.

In *Lewis v. Fentress Coal & Coke Co.*,<sup>241</sup> the federal district court in Tennessee allowed the United Mine Workers to collect on their welfare fund agreement despite an unlawful union shop clause. But the court did not have to decide the case on the inter-dependence of the clauses doctrine. The United Mine Workers in their national contract had written in a severability clause<sup>242</sup> to protect against state Right to Work laws. The court found it sufficient. Likewise, a federal district court in Arkansas, in *Lewis v. Hixson*<sup>243</sup> allowed the trustees of the miners welfare fund to collect from the mine owners unpaid contributions to the fund. The owners defended on the grounds that the entire contract was invalid because of the illegal union security clause, but the court found the same severability clause was sufficient.<sup>244</sup> But earlier, the Arkansas

<sup>239</sup> S. 1555, 86th Cong., 1st Sess., 105 CONG. REC. 16629, 16633 (1959).

It is also possible to argue that any state restrictions on the check-off of dues or other payments by any employer to a union, whether they occur in a right to work law or not, are not binding on an employer. Since § 302 of the Taft-Hartley Act occupies the field of employer payments, all state laws are probably pre-empted. The Utah Supreme Court, in *State v. Montgomery Ward*, 120 Utah 294, 233 P.2d 685, *cert. denied*, 342 U.S. 869 (1951), so held, long before pre-emption became popular.

<sup>240</sup> 231 N.C. 395, 57 S.E.2d 366 (1950).

<sup>241</sup> 160 F. Supp. 221 (M.D. Tenn. 1958), *aff'd*, 264 F.2d 134 (6th Cir. 1959).

<sup>242</sup> The clause provided that: ". . . as a condition of employment all employees shall be or become members of the United Mine Workers of America, to the extent and in the manner permitted by law." 160 F. Supp. at 223. In *Ketcher v. Sheet Metal Workers*, 115 F. Supp. 802 (E.D. Ark. 1953), the court, in an alternative holding, said that the clause providing that any section of the agreement that was illegal under state or federal law would be inoperative was sufficient to protect the validity of the rest of the agreement.

<sup>243</sup> 37 CCH Lab. Cas. ¶ 65,547 (W.D. Ark. 1959).

<sup>244</sup> The owners also argued that, in practice, the union demanded that the union shop provisions of the contract be enforced. The court agreed that if the owners could show this to be the practice, it might be a defense. However, the court found that all the proof showed was that the union had attempted to force the owners to hire union employees. This attempt, said the court, may be an independent violation of the Right to Work law, but it did not show an attempt to enforce the union security clause of the contract.

Federal District Court, in *Lewis v. Jackson and Squire*,<sup>245</sup> found the union shop clause invalid and the entire contract void. At that time the UMW contract contained no severability clause. The court applied a test of whether the clause was part of the consideration for the contract and found consideration in that the union had struck to obtain the clause. The Supreme Court of Florida also felt that the parties had intended the closed shop clause to be an integral part of the contract and therefore found the entire contract void.<sup>246</sup>

To hold the entire collective bargaining contract void obviously disrupts labor management relations and courts should avoid it if possible. As suggested earlier,<sup>247</sup> the wording of the Kansas amendment may force the Kansas Supreme Court to protect existing contracts although the employer could not enforce its provisions by firing employees. When a union security clause is negotiated after November 4, 1958, there is not as much reason to protect the entire contract. Yet, the court would gain little in disrupting the labor relations at the plant. Also, innocent employees may be denied honest claims if the court destroys the entire contract. In other contexts the Kansas Supreme Court has held both ways on severability of void clauses,<sup>248</sup> so there is no binding precedent.<sup>249</sup>

A void clause may have other consequences. The National Labor Relations Board may deny requests for a determination of bargaining representatives among employees presently covered by a valid written collective bargaining agreement under the so-called "contract bar rule."<sup>250</sup> But, if an otherwise valid contract has an illegal union security provision, the contract bar rule does not

<sup>245</sup> 86 F. Supp. 354 (W.D. Ark. 1949), *appeal dismissed*, 181 F.2d 1011 (8th Cir. 1950).

<sup>246</sup> Local 234, United Ass'n Journeymen and Apprentices of Plumbing Industry v. Henley & Beckwith, Inc., 66 So. 2d 818 (Fla. 1953). The National Labor Relations Board will find severability, Golden Valley Elec. Ass'n, 109 N.L.R.B. 397 (1954), and will accept a deferral clause as effectively suspending an unlawful union-security provision, H. Muehlstein & Co., 98 N.L.R.B. 723 (1952). However, even where there has been a clear statement of severability, the Board has found the entire contract invalid, A. & M. Woodcraft, Inc., 85 N.L.R.B. 322 (1949), and where a deferral clause has not been specific, it has not prevented invalidity of the whole contract. Sa-Mor Quality Brass, Inc., 93 N.L.R.B. 1225 (1951).

The federal courts have shown a great willingness to find severability in proper cases. The United States Supreme Court in *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), vigorously announced the desirability of finding severability whenever possible, and asserted that it was not necessary for a severability clause to expressly provide for the inoperation of a particular clause. However, where saving clauses have been too vague, the courts have found contracts totally invalid, *NLRB v. Gottfried Baking Co.*, 210 F.2d 772 (2d Cir. 1954); *NLRB v. E. F. Shuck Const. Co.*, 243 F.2d 519 (9th Cir. 1957). Apparently the courts are more willing than the Board to find severability, but recent cases of the Board may indicate that it will follow the lead of the courts.

<sup>247</sup> See note 21 *supra* and accompanying text.

<sup>248</sup> The Kansas court applies the usual tests. Compare *Brumm v. Goodman*, 164 Kan. 281, 188 P.2d 913 (1948); *Cuthbert v. Fortune*, 139 Kan. 510, 32 P.2d 250 (1934); *National Sur. Co. v. Kansas City Hydraulic Press Brick Co.*, 73 Kan. 196, 84 Pac. 1034 (1906) (all holding the clause not severable), *with Rawleigh Co. v. Holt*, 117 Kan. 712, 232 Pac. 866 (1925); *Achen v. Atchison, T. & S. F. Ry.*, 103 Kan. 668, 175 Pac. 980 (1918); *Henshaw v. Smith*, 102 Kan. 599, 171 Pac. 616 (1918) (holding the clause severable).

<sup>249</sup> Of course, when the suit is to enforce the void clause, the court really has no problem of severability. See *United Steel Workers Union v. Knoxville Iron Co.*, 162 F. Supp. 366 (E.D. Tenn. 1958).

<sup>250</sup> *Hardboard Fabricators Corp.*, 117 N.L.R.B. 823 (1957); *Natona Mills, Inc.*, 112 N.L.R.B. 236 (1955); *Oswego Falls Corp.*, 110 N.L.R.B. 621 (1954). See *Bakery Workers, Local 492 v. Schaufliker*, 42 L.R.R.M. 2110 (E.D. Pa. 1958). (Contract bar rule is merely procedural and the Board in its discretion may apply or waive the rule.) The Board has recently clarified and simplified its contract bar rule. *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. No. 125 (1958).

apply.<sup>251</sup> The Board has not yet held that a union security provision invalid under state law but valid under the proviso of 8(a)(3) of the Taft-Hartley Act<sup>252</sup> will not bar an election. But, the Board will probably reason that the Right to Work laws have the effect of removing the union security proviso from 8(a)(3) so that a union security provision invalid under state law will not operate as a bar to an election.<sup>253</sup>

### PICKETING CASES

Many of the decisions interpreting Right to Work laws arise in cases where an employer is seeking an injunction to prevent union picketing. The picketing cases involve a different problem and need to be considered separately. Historically most of our labor law was made in picketing cases. The common law test for an injunction was whether the union had an unlawful purpose or was using unlawful means.<sup>254</sup> This test was rather vague, but the courts were able to find a large variety of demands and means unlawful. Frequently they relied on their own ideas of sound economic policy. At other times they relied on statutory declarations of policy.

#### *Use of Right to Work Laws*

With the passage of Right to Work amendments or statutes, attorneys added another unlawful purpose to their petitions—that the picketing was aimed at violating the Right to Work laws. The courts, in looking at the myriad of fact situations and the many different purposes of the picketing, wrote their opinions not only in terms of Right to Work laws, but also in terms of the large body of common law precedent available. Consequently many of the opinions are not clear as to whether a particular purpose is an independent violation of a Right to Work law.

This problem is particularly acute in the “stranger picketing” cases. As discussed at length elsewhere,<sup>255</sup> stranger picketing occurs when a union having no, or only a few members, as employees, pickets the employer. The basic purpose is to organize the employer, but the particular demand can vary from merely informing the public that the employer has no union employees or pays sub-standard wages to a demand that the employer recognize the union and sign a closed shop or some lesser union security agreement. Falling in between these extremes, the union may have as its purpose that the employees join the union; that the employer recognize the union as the bargaining agent and sign a collective bargaining agreement; that the employer coerce his em-

<sup>251</sup> See *Keystone Coat, Apron & Towel Supply Co.*, *supra* note 250.

<sup>252</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>253</sup> See note 370 *infra* and accompanying text for the Board cases and the argument that section 14(b) of the Taft-Hartley Act, 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952), allows the states to remove the protection of the 8(a)(3) proviso.

<sup>254</sup> FRANKFURTER AND GREENE, *THE LABOR INJUNCTION* (1930).

<sup>255</sup> Hopson, *Kansas Labor Law and District Court Injunction*, 6 KAN. L. REV. 1 (1957).

ployees into joining a union; or that the employer fire all non-union employees or subcontractors who hire non-union employees. At one time or another courts, using common law theories or state statutes regulating collective bargaining, have held all of these purposes unlawful and at least a few courts have held all of them lawful. Logically only two of these purposes would fall within the Right to Work law. They are a demand for a closed shop or lesser union security clause in a collective bargaining agreement and a demand that an employer fire his non-union employees.<sup>256</sup>

The union security demand is an unlawful purpose on a theory that the Right to Work statutes express the public policy of the state,<sup>257</sup> and picketing to demand a violation of the state public policy is unlawful.<sup>258</sup>

If the demand for a union security clause is by the bargaining agent many states hold it lawful at common law, but with the aid of a Right to Work statute find the purpose unlawful and enjoin the picketing.<sup>259</sup>

A demand by a union that an employer either fire his non-union employees or refuse to hire subcontractors that employ non-union workers does not violate, of itself, a clause prohibiting the signing of a union security contract. No contract is being demanded. But that part of a Right to Work law prohibiting employers from firing employees because of membership is a sufficient basis.<sup>260</sup> As the Supreme Court of North Carolina said, "If the threat to destroy one's business by the picketing is to accomplish an unlawful and forbidden purpose, courts may enjoin . . . ."<sup>261</sup>

Yet not all stranger picketing violates Right to Work statutes. If the court finds, as did the Arizona Supreme Court in *International Bhd. of Carpenters v. Storms Constr. Co.*,<sup>262</sup> that the purpose of the picketing was not to induce the employer to fire non-union employees but only to induce him to

<sup>256</sup> The demand that the employer coerce his employees into joining the union could also fall within the statute if "coerce" implies hiring and firing. In *J. A. Jones Constr. Co. v. Local 755, IBEW*, 246 N.C. 481, 98 S.E.2d 852 (1957), the court found an unlawful purpose, under the North Carolina Right to Work law, in a demand that the employer coerce his employees into joining a union.

<sup>257</sup> Some Right to Work laws expressly state that the statutes are expressing the public policy of the state. See, e.g., ARK. STAT. ANN. § 81-201 (1949); IND. ANN. STAT. § 40-2701 (Supp. 1957); MISS. CODE ANN. § 6984.5(a) (Supp. 1958). The Kansas Amendment makes no such reference.

<sup>258</sup> See, e.g., *Alabama Highway Express, Inc. v. Local 612, Int'l Bhd. Teamsters*, 108 So. 2d 350 (Ala. 1959); *Local 519, United Ass'n Journeymen and Apprentices of Plumbing Industry v. Robertson*, 44 So. 2d 899 (Fla. 1950); *Minor v. Building & Constr. Trades Council, 75 N.W.2d 139 (N.D. 1956)*; *Fruitt v. Lambert*, 201 Tenn. 291, 298 S.W.2d 795 (1957); *Texas State Fed. of Labor v. Broan & Root, Inc.*, 246 S.W.2d 938 (Tex. Civ. App. 1952).

<sup>259</sup> E.g., *IAM v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954); *Self v. Taylor*, 217 Ark. 953, 235 S.W.2d 45 (1950). In *Mascari v. International Bhd. of Teamsters Union*, 187 Tenn. 345, 215 S.W.2d 779 (1948), the court found the purpose of the picketing unlawful, but on rehearing declined to enjoin the picketing. Apparently the court thought that peaceful picketing could not be enjoined because of the free speech doctrine.

<sup>260</sup> E.g., *Local 10, United Ass'n Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953); *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957); *Burgess v. Daniel Plumbing and Gas Co.*, 225 Ark. 792, 285 S.W.2d 517 (1956); *Powers v. Courson*, 213 Ga. 20, 96 S.E.2d 577 (1957); *Farnsworth and Chambers Co. v. Local 429, Int'l Bhd. of Elec. Workers, AFL*, 201 Tenn. 329, 299 S.W.2d 8 (1957); *Construction Union v. Stephenson*, 148 Tex. 434, 225 S.W.2d 958 (1950).

<sup>261</sup> *Douglas Aircraft Co. v. Local 379, Int'l Bhd. Elec. Workers, AFL*, 247 N.C. 620, 626, 101 S.E.2d 800, 805 (1958) (dictum).

<sup>262</sup> 84 Ariz. 120, 324 P.2d 1002 (1958).



raise the wages of the non-union employees, it will not enjoin. The Virginia court in *Painter's Union v. Rountree Corp.*,<sup>263</sup> reversed a trial court's finding that picketing to inform the public that a contractor hired non-union employees and to organize them was for an unlawful purpose. The supreme court pointed out that picketing for such purposes did not violate any public policy nor did it violate the state Right to Work law. In *Hotel and Restaurant Employees v. Crothron*,<sup>264</sup> the Florida Supreme Court found the picketing to be aimed at protecting the discharge of three union members and not at forcing the employer to sign a closed shop agreement. Hence the picketing was for a lawful purpose.<sup>265</sup>

### Free Speech

Lurking in the background of all the state picketing cases are the decisions of the United States Supreme Court extending the fourteenth amendment's protection of the right of free speech to the picket line. The United States Supreme Court went the full circle from *Thornhill*<sup>266</sup> to *Vogt*,<sup>267</sup> and now rarely use the free speech argument to cut down a state court injunction.<sup>268</sup>

In *Local 10, United Ass'n of Journeymen Plumbers, AFL v. Graham*,<sup>269</sup> the United States Supreme Court held that peaceful picketing for purposes in conflict with a state Right to Work law could be enjoined by a state court. After the *Graham* case, most state courts no longer worried about issuing an injunction in a picketing Right to Work case, although the courts still feel, on occasion, that they must negate a free speech protection.<sup>270</sup> Occasionally, a court, if there seems to be little evidence of an unlawful purpose, will hold a statute prohibiting all picketing unconstitutional<sup>271</sup> or restrict an injunction to preventing the picketing for the unlawful purpose.<sup>272</sup>

### PRE-EMPTION

Determining rights and liabilities under a Right to Work law is difficult at best. To advise his client, the lawyer is going to need many more decisions. But a line of cases handed down by the United States Supreme Court over the

<sup>263</sup> 194 Va. 148, 72 S.E.2d 402 (1952).

<sup>264</sup> 59 So. 2d 366 (Fla. 1952).

<sup>265</sup> In *Local 802 v. Asimos*, 216 Ark. 694, 227 S.W.2d 154 (1950), the Supreme Court of Arkansas correctly pointed out that a demand for recognition, even though the union does not represent a majority of the employees, is not a demand for a closed shop. Hence, such picketing is not unlawful under a Right to Work law.

<sup>266</sup> *Thornhill v. Alabama*, 310 U.S. 88 (1940).

<sup>267</sup> *International Bhd. of Teamsters v. Vogt, Inc.*, 354 U.S. 284 (1957).

<sup>268</sup> But such cases as *Teamsters Union v. Newell*, 356 U.S. 341 (1958), and *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), show the continuing validity of the free speech approach.

<sup>269</sup> 345 U.S. 192 (1953).

<sup>270</sup> See, e.g., *Henson v. International Union of Operating Eng'rs*, 79 So. 2d 199 (La. Ct. App. 1955); *Minor v. Building and Constr. Trades Council*, 75 N.W.2d 139 (N.D. 1956).

<sup>271</sup> *International Bhd. Carpenters Union v. Storms Constr. Co.*, 84 Ariz. 120, 324 P.2d 1002 (1958); *Baldwin v. Arizona Flame Restaurant*, 82 Ariz. 385, 313 P.2d 759 (1957).

<sup>272</sup> See, e.g., *Local 802 v. Asimos*, 216 Ark. 694, 227 S.W.2d 154 (1950); *Henson v. International Union of Operating Eng'rs*, 79 So. 2d 199 (La. Ct. App. 1955).

past ten years indicates that state courts may not be the forum for the interpretation of the Right to Work laws.

In a series of cases starting with *Hill v. Florida*,<sup>273</sup> reaching maturity with *Garner v. Teamsters Union*<sup>274</sup> and *Weber v. Anheuser-Busch, Inc.*,<sup>275</sup> and culminating in *San Diego Bldg. Trades Council v. Garmon*<sup>276</sup> and *Plumbers Union v. County of Door*,<sup>277</sup> the United States Supreme Court held that if it were reasonably arguable that the activity complained of was either protected or prohibited by the Taft-Hartley Act and if the business of the employer affected interstate commerce, the state court was to decline jurisdiction in favor of the National Labor Relations Board. This is true even if the Board declined jurisdiction because of budgetary or other reasons.<sup>278</sup>

The effect of the pre-emption cases decided prior to the Spring of 1959 are discussed too frequently and too thoroughly to require further mention here.<sup>279</sup> By the Spring of 1959, state courts were declining jurisdiction in most cases, but many were bothered by the apparent special relationship between state Right to Work laws and the Taft-Hartley Act. Section 14(b) of that Act<sup>280</sup> apparently gave to the states specific power to prohibit union security agreements. That section reads:

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.

### *Picketing Cases*

This pre-emption problem arose in cases where, by picketing, the union demanded a prohibited or regulated union security contract. The state courts argued that even though the picketing might be a prohibited activity under section 8(b) of the Taft-Hartley Act,<sup>281</sup> it also violated the state Right to Work law. Since section 14(b) gave the state court jurisdiction to prohibit the execution or application of such contracts, it gave state courts the right to prohibit picketing aimed at violation of these laws.<sup>282</sup> While agreeing with the above arguments, most state courts<sup>283</sup> felt compelled to rule against jurisdiction on

<sup>273</sup> 325 U.S. 538 (1945).

<sup>274</sup> 346 U.S. 485 (1953).

<sup>275</sup> 348 U.S. 468 (1955).

<sup>276</sup> 79 Sup. Ct. 773 (1959).

<sup>277</sup> 79 Sup. Ct. 844 (1959).

<sup>278</sup> *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957); *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957); *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957).

<sup>279</sup> For a discussion of all but the latest cases, see Hopson, *Kansas Labor Law and District Court Injunctions*, 6 KAN. L. REV. 1 (1957); Reynolds, *Some Current Developments in Labor Law*, 27 KAN. B.J. 353 (1959); Reynolds, *Federal Pre-emption and the Twilight Zone in Labor Disputes*, 27 KAN. B.J. 157 (1958).

<sup>280</sup> 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1952).

<sup>281</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(b) (1952).

<sup>282</sup> The problem is presented quite well by Justice Fatzer in his concurring opinion in *Asphalt Paving v. International Bhd. of Teamsters Union*, 181 Kan. 775, 791, 317 P.2d 349, 361 (1957).

<sup>283</sup> See, e.g., *Building Constr. Trades Council v. American Builders, Inc.*, 337 P.2d 953 (Colo. 1959); *Fishermen Workers v. Quaker Oats Co.*, 109 So. 2d 321 (Miss. 1959); *Douglas Aircraft Co. v. Local 379*,

the basis of the United States Supreme Court case of *Local 429, Int'l Brotherhood of Electrical Workers v. Farnsworth & Chambers Co.*<sup>284</sup> *Farnsworth* was a per curiam reversal of a Tennessee Supreme Court decision<sup>285</sup> which had held that stranger picketing to force an employer to hire only union employees violated the state Right to Work law. The Supreme Court of the United States did not discuss section 14(b) and cited as authority only ordinary, non Right to Work pre-emption cases.

The state courts that declined jurisdiction in Right to Work picketing cases also relied on several other United States Supreme Court cases in which the facts showed that the picketing was unlawful under state law restricting union security. In *Amalgamated Meat Cutters v. Fairlawn Meats*<sup>286</sup> and in *San Diego Building Trades Council v. Garmon*,<sup>287</sup> the state court found stranger picketing for a union shop unlawful. The United States Supreme Court said that the picketing could reasonably be said to violate 8(b)(2) of the Taft-Hartley Act,<sup>288</sup> since the demand for a union security clause was made by a union which was not the bargaining agent. It then talked about the problem of pre-emption when the Board declined jurisdiction.<sup>289</sup>

But, in none of these cases did the United States Supreme Court discuss the conflict between section 14(b) and the pre-emption doctrine. As said by Justice Fitzer in his concurring opinion in *Asphalt Paving v. International Brotherhood of Teamsters*,<sup>290</sup> ". . . I should prefer to understand the rationale of the Supreme Court's limitation of § 14(b)."<sup>291</sup>

A few state courts tried to find a way to exercise state jurisdiction. Some

*Elec. Workers*, 247 N.C. 620, 101 S.E.2d 800 (1958), 36 N.C.L. Rev. 502; *Richman Bro. Co. v. Clothing Workers*, 168 Ohio St. 560, 157 N.E.2d 101 (1959) (Ohio has no Right to Work statute, but by case law holds picketing for a closed shop unlawful).

<sup>284</sup> 353 U.S. 969 (1957).

<sup>285</sup> *Farnsworth & Chambers Co. v. Local 429, Int'l Bhd. of Elec. Workers*, 201 Tenn. 317, 299 S.W.2d 8 (1957).

<sup>286</sup> 353 U.S. 20 (1957).

<sup>287</sup> 353 U.S. 26 (1957).

<sup>288</sup> 61 Stat. 140 (1947), 29 U.S.C. 158(b)(2) (1952).

<sup>289</sup> In January 1959, the United States Supreme Court decided *Hotel Employees Union v. Sax Enterprises*, 79 Sup. Ct. 273 (1959). There the Court, per curiam, reversed the Florida Supreme Court in a series of related cases on the grounds that: "They all concern the powers of the courts of Florida to enjoin organizational picketing at twelve Florida resort hotels. . . . The Florida courts were without jurisdiction to enjoin this organizational picketing, whether it was activity protected by § 7 of the National Labor Relations Act . . . or prohibited by section 8(b)(4) of the Act." 79 Sup. Ct. at 273. Whether the Sax case is authority for 14(b) problems is doubtful, but at least one state court thought so.

The Ohio Supreme Court in *Richmond Bros. Clothing Co. v. Clothing Workers*, 168 Ohio St. 560, 157 N.E.2d 101 (1959), said that the Florida Supreme Court had held that the purpose of the picketing was to coerce the hotels through economic sanctions to sign contracts with the union, which contracts were to be used as the basis to compel the hotel employees to become members of the union, citing *Sax Enterprises, Inc. v. Hotel Employees Union*, 80 So. 2d 602, 605 (Fla. 1955).

Actually the original pre-emption case of *Garner v. Teamsters Union*, 346 U.S. 485 (1953), involved a demand by a union that the employer hire only union members. Also, the latest pre-emption case, *Plumbers Union v. County of Door*, 79 Sup. Ct. 844 (1959), involved a demand by a stranger union that a subcontractor sign a union agreement. Most state courts would find either demand a violation of their right to work law. In neither case did the United States Supreme Court mention 14(b).

<sup>290</sup> 181 Kan. 775, 317 P.2d 349 (1957).

<sup>291</sup> *Id.* at 792, 317 P.2d at 362.

found that the employer did not affect interstate commerce.<sup>292</sup> Others, even after *Garner*,<sup>293</sup> but before *Farnsworth*,<sup>294</sup> held that section 14(b) was sufficient to allow them to enjoin picketing for an illegal union security agreement.<sup>295</sup> The Alabama Supreme Court even ignored *Farnsworth* and citing section 14(b) as authority, issued an injunction.<sup>296</sup>

As late as 1957 the Arizona Supreme Court, in *Baldwin v. Arizona Flame Restaurant*,<sup>297</sup> completely ignored the pre-emption issue. The court made no mention of interstate commerce and cited no United States Supreme Court pre-emption case.<sup>298</sup>

Arguments were made to these state courts that found themselves pre-empted in 14(b) type cases that the various holdings of the United States Supreme Court were not controlling since they could be distinguished. *Fairlawn*<sup>299</sup> and first *Garmon*<sup>300</sup> were said to come from states that had no Right to Work laws, so 14(b) did not apply. The per curiam reversal of *Farnsworth* was based on a too broad state court injunction and the attorney for the union in the petition for certiorari argued that union security was not involved.<sup>301</sup> In any event, the argument was that until the United States Supreme Court spelled out the relationship of 14(b) to pre-emption, state courts could act.

While these arguments weaken the force of the earlier United States Supreme Court cases, although they can be met,<sup>302</sup> two decisions handed down in the late spring of 1959 fairly conclusively show that in most picketing cases a state court must decline jurisdiction in favor of the National Labor Relations Board.

In the first of these decisions, the second *San Diego Building Trades Council v. Garmon* case,<sup>303</sup> the Court settled the issue as to whether a state court, al-

<sup>292</sup> See, e.g., *Pruitt v. Lambert*, 201 Tenn. 291, 298 S.W.2d 795 (1957). But see, Comment, *Labor Law—Interstate Commerce—Pre-emption*, 7 KAN. L. REV. 185 (1958), for a discussion of the extensive reach of the commerce clause. Some courts found that since the effect on interstate commerce did not appear on the face of the petition, a demurrer did not raise the jurisdictional issue. E.g., *J. A. Jones Constr. Co. v. Local 755, IBEW*, 246 N.C. 481, 98 S.E.2d 852 (1957).

<sup>293</sup> *Garner v. Teamsters Union*, 346 U.S. 485 (1953).

<sup>294</sup> *Local 429, Int'l Bhd. of Elec. Workers v. Farnsworth & Chambers Co.*, 353 U.S. 969 (1957).

<sup>295</sup> See, e.g., *IAM v. Goff-McNair Motor Co.*, 223 Ark. 30, 264 S.W.2d 48 (1954); *Minor v. Building & Constr. Trades Council*, 75 N.W.2d 139 (N.D. 1956); *Shamrock Dairy v. Teamsters Union*, 36 L.R.R.M. 2748 (Super. Ct. Ariz. 1955).

<sup>296</sup> *Alabama Highway Express v. Local 612, Teamsters Union*, 108 So. 2d 350 (Ala. 1959). The Alabama Supreme Court was careful though to find an alternative basis for a decision that the employer hired no employees, only independent contractors.

<sup>297</sup> 82 Ariz. 385, 313 P.2d 759 (1957).

<sup>298</sup> And see *Roemer v. General Truck Drivers*, 37 CCH Lab. Cas. ¶ 65,444 (La. Ct. App. 1959), where a Louisiana court also ignored pre-emption in a Right to Work picketing case.

<sup>299</sup> *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

<sup>300</sup> *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

<sup>301</sup> The case of *Hotel Employees Union, Local 255 v. Sax Enterprises*, 79 Sup. Ct. 273 (1959), discussed in note 289 *supra*, was said to have too many other issues. The Right to Work argument was hidden and there was no clear showing that Florida found a violation of their Right to Work amendment.

<sup>302</sup> See note 379 *infra* and accompanying text for the argument that 14(b) applies to state laws that regulate as well as prohibit union security agreements. For a short answer, see *Algoma Plywood & Veneer Co. v. WERB*, 336 U.S. 301, 314 (1949).

<sup>303</sup> 79 Sup. Ct. 773 (1959).

though pre-empted from issuing an injunction in a picketing case, could find the picketing a tort and give damages.

An understanding of the importance of this holding, is found by examining several prior United States Supreme Court cases. In 1954, apart from any Right to Work law, the United States Supreme Court, in *United Construction Workers v. Laburnum Construction Corp.*,<sup>304</sup> held that a common law action for damages by an employer for violent picketing was not pre-empted. In 1958 the court decided *International Union, UAW v. Russell*,<sup>305</sup> and *International Ass'n of Machinists v. Gonzales*.<sup>306</sup> In the *Russell* case the Court held that the Georgia Supreme Court could award punitive damages against a union that, by mass picketing, had prevented the plaintiff employees from going to work.<sup>307</sup> In *Gonzales*, the United States Supreme Court allowed a union member to collect damages from his union for a breach of contract, under California law, in expelling him from the union and refusing to refer him to jobs.

In the second *Garmon* case the majority opinion said that the picketing could reasonably be said to be prohibited by section 8(b)(2) of the federal act;<sup>308</sup> that state damage actions were allowed in *Laburnum* and *Russell* because of violence; and that the fact that the Board could not give a complete remedy in damages was immaterial, since a lack of remedy was as much a part of congressional action as the granting of a remedy. The Court distinguished the *Gonzales* case<sup>309</sup> on the grounds that removal from the union, the basis of the action, ". . . was a merely peripheral concern of the Labor Management Relation Act."<sup>310</sup>

Without doubt, therefore, the same pre-emption rules apply to the remedy of damages as the remedy of injunction. Although California found the picketing by a stranger union for a union shop unlawful under state law, it has no formal Right to Work law. Therefore, under the arguments of those who wish to find state court jurisdictions under 14(b), the *Garmon* cases are still not authority for holding a state court with a formal Right to Work law pre-empted.

In the second case decided in the late spring of 1959, *De Vries v. Baumgartner's Elec. Constr. Co.*,<sup>311</sup> a per curiam opinion, the United States Supreme Court cited the second *Garmon* case and reversed the South Dakota Supreme Court. The state court had held<sup>312</sup> that the picketing by the union violated the state Right to Work law. It then held itself pre-empted from issuing an injunc-

<sup>304</sup> 347 U.S. 656 (1954).

<sup>305</sup> 356 U.S. 634 (1958).

<sup>306</sup> 356 U.S. 617 (1958).

<sup>307</sup> Apparently the Georgia Supreme Court based the cause of action in tort on interference with a common law right to work, not on the Georgia Right to Work statute. The employees were not denied the "right to work" because of non-membership in a union.

<sup>308</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1952).

<sup>309</sup> *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

<sup>310</sup> 79 Sup. Ct. at 779.

<sup>311</sup> 79 Sup. Ct. 1117 (1959).

<sup>312</sup> *Baumgartner's Elec. Constr. Co. v. De Vries*, 91 N.W.2d 663 (S.D. 1958).

tion, but did award damages under the supposed freedom granted by the *Russell* case. The United States Supreme Court reversal was of the damage award. Therefore, in a case entirely based on a Right to Work law, the United States Supreme Court ordered the state court pre-empted from issuing an injunction or from giving damages for the unlawful picketing.

Since the United States Supreme Court has never given an explanation for its per curiam reversals in 14(b) picketing cases, several explanations are conceivable. First, 14(b) says only *execution or application* of union security agreements. Picketing to force a closed shop contract is neither execution nor application and therefore 14(b) just does not apply. When 14(b) is not applicable, the general test for pre-emption—is it arguably protected or prohibited activity—controls. Since section 8(b)(2) of the Taft-Hartley Act<sup>813</sup> prohibits a union from causing an employer to violate section 8(a)(3),<sup>814</sup> the proviso of which contains the union security provision of the Taft-Hartley Act, picketing to demand a closed shop or picketing by a stranger union would violate the federal act and be prohibited activity.<sup>815</sup> Since the federal law provides a remedy, state courts may not duplicate.

Even if 14(b) does cover picketing cases, it is arguable that the fact that the picketing is an independent violation of 8(b)(2) would mean that the National Labor Relations Board has the exclusive right to grant a remedy for the independent violation of the federal act.

Under this view it is conceivable that the facts would show a violation of a state Right to Work law, but not of the federal act. Such a case would exist if the union was the bargaining agent for the employees and was picketing to demand the type of union security agreement allowed by the Taft-Hartley Act. Such picketing is not prohibited by the Taft-Hartley Act, but would be unlawful under a state Right to Work law. If 14(b) applies to picketing and it says “. . . [N]othing in this subsection shall be construed as authorizing . . . ,” the activity would not be protected, nor would it be prohibited.<sup>816</sup>

In none of the union security picketing cases decided by the United States Supreme Court did the above fact situation appear. In all cases the picketing would arguably be prohibited by the Taft-Hartley Act.

There are other possible explanations of the rationale of the picketing cases, but they will be considered after a discussion of the discharge cases.

In any event, under the broad language of the second *Garmon* case,<sup>817</sup> the state courts will not have the opportunity to interpret these United States

<sup>813</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(2) (1952).

<sup>814</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>815</sup> If the picketing is aimed at the employees of secondary employers, the means used may be a violation of 8(b)(4), 61 Stat. 140 (1947), 29 U.S.C. § 158(b)(4) (1952).

<sup>816</sup> If 14(b) does not apply to picketing cases, states could not act even if the demand was not prohibited by 8(b)(2) since the picketing might then be a protected activity under § 7, 61 Stat. 140 (1947), 29 U.S.C. § 157 (1952).

<sup>817</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773 (1959).

Supreme Court cases. After deciding the specific issue of the cases, the *Garmon* opinion goes on to paint with a broad brush. It said that any case reasonably coming within the prohibition or protected classes was to be left to the Board in the first instance. This statement was not new, but the Court went on to say that even in those cases where the Board didn't say why they were not acting, the state still could not act.

It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this court to decide whether such activities are subject to state jurisdiction.<sup>318</sup>

Certainly there is no compelling precedent by the United States Supreme Court or the Board as to the status of picketing for a union security contract. What precedent there is lends weight to the argument that it is a prohibited activity and pre-empted from the state courts. Therefore, in following the United States Supreme Court in the second *Garmon* case, state courts will have to decline jurisdiction in favor of letting the National Labor Relations Board decide whether, in that particular case, the picketing is prohibited or protected and the effect of section 14(b) on state court jurisdiction.

As far as Kansas District Courts are concerned, the Kansas Supreme Court has settled the issue in the *Asphalt Paving* case,<sup>319</sup> and, if interstate commerce is affected, will find itself pre-empted even though the purpose of the picketing violates the Right to Work amendment. It is immaterial that this case was decided prior to the Kansas Right to Work amendment, since in the *Asphalt Paving* case the court held that organizational picketing, aimed at inducing all employees into joining the union violated KAN. G.S. 1957 Supp., 44-809(4).<sup>320</sup> The majority and concurring opinion both indicated that 14(b) would be the courts only hope of exercising jurisdiction. Unless the court changes its mind and holds that 14(b) only applies where the state law prohibits, rather than just regulates,<sup>321</sup> union security contracts, it will find itself pre-empted in picketing cases under the new Right to Work amendment.

### *Discharge Cases*

Even though state courts will probably decline jurisdiction in picketing cases, they may try to exercise it in cases involving the execution or applica-

<sup>318</sup> *Id.* at 780.

<sup>319</sup> *Asphalt Paving, Inc. v. International Bhd. of Teamsters*, 181 Kan. 775, 317 P.2d 349 (1957).

<sup>320</sup> In *Binder v. Construction and Gen. Laborers Union*, 181 Kan. 799, 317 P.2d 371 (1957), an intrastate commerce case, the Kansas Supreme Court held that the picketing was conducted to induce the employer to coerce his non-union employees into joining the union and for the purpose of injuring the employer in his business because of his refusal to interfere with the rights of employees to join or not join a union. This purpose, said the court, violated KAN. G.S. 1957 Supp., 44-803, 44-808(1), 44-809(12), and 44-813. See note 85 *supra* and accompanying text for the text of these statutes. See also Hopson, *Kansas Labor Law and District Court Injunctions*, 6 KAN. L. REV. 1 (1957), for a discussion of other late Kansas cases in the picketing pre-emption area.

<sup>321</sup> See note 379 *infra* for this argument and a refutation of it.

tion of a union security agreement. Section 14(b) of the Taft-Hartley Act does talk in terms of execution and application,<sup>322</sup> and if the state courts have any jurisdiction, it will be here.

However, the only hope for state court jurisdiction is in the execution or application of a prohibited union security agreement. Discharges for membership or non-membership, not made pursuant to a union security contract, although illegal under the first clause of the Right to Work amendment, are obviously not within the purview of 14(b), since there is no contract and limitations on contractual rights are not involved. Although the prohibition on such discharge is set out in an amendment called the Right to Work amendment, the activity complained of has no connection with union security contracts of 14(b). Since the language of section 8(a)(3) of the Taft-Hartley Act<sup>323</sup> gives a broader protection to employees than does the first clause of the amendment or any other provision of the Kansas Labor Relations Act,<sup>324</sup> the discharge or discrimination would be a violation of 8(a)(3). Therefore, the activity would arguably be prohibited by federal law and under the rule of the *Garner*<sup>325</sup> and *Busch*<sup>326</sup> cases, the state court could not issue the remedy of reinstatement or enjoin future violations. Under the rule of the second *Garmon* case,<sup>327</sup> the state could not give damages.

Although not specifically discussed therein, the case of *Guss v. Utah Labor Board*,<sup>328</sup> is a directed holding that any remedy for a discharge which might violate 8(a)(3) is pre-empted.<sup>329</sup> Therefore, state courts may no longer give back pay or reinstatement when an employee sues an employer for discharge.<sup>330</sup>

<sup>322</sup> See note 266 *supra* and accompanying text for the provisions of § 14(b).

<sup>323</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (1952).

<sup>324</sup> See note 85 *supra* and accompanying text for the co-existent rights of employers to protection against discrimination found in the Kansas Labor Relations Act.

<sup>325</sup> *Garner v. Teamsters Union*, 346 U.S. 485 (1955).

<sup>326</sup> *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

<sup>327</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773 (1959).

<sup>328</sup> 353 U.S. 1 (1957).

<sup>329</sup> See *Guss v. Utah Labor Relations Bd.*, 5 Utah 2d 68, 296 P.2d 733 (1956), for the state court's view as to the employer's actions that violated the state law.

<sup>330</sup> In suits against the employer or the employer and union together, a few state courts found, after the pre-emption doctrine became established, that they were pre-empted from ordering reinstatement or damages despite a violation of a state law similar to 8(a)(3) of the federal act. See, e.g., *McNish v. American Brass Co.*, 139 Conn. 44, 89 A.2d 566 (1952). *But see*, *Bennett's Restaurant v. Industrial Comm.*, 127 Colo. 271, 256 P.2d 891 (1953); *Imperial Laundry v. Connecticut State Bd. of Lab. Rel.*, 142 Conn. 457, 115 A.2d 439 (1955), where the courts ignored the pre-emption problem entirely.

The fact that the discharge violated the Right to Work law made no difference to a Texas Court of Civil Appeals, *Leiter Mfg. Co. v. International Ladies' Garment Workers*, 269 S.W.2d 409 (Tex. Civ. App. 1954), it still found itself pre-empted. A Florida circuit court allowed reinstatement back in 1947, *Grimes v. Merrill-Stevens Co.*, 20 L.R.R.M. 2464 (Cir. Ct. Fla.), *subsequent opinion*, 20 L.R.R.M. 2502, (Cir. Ct. Fla. 1947), under the Florida amendment, but did not mention pre-emption. A Texas Court of Appeals, in *Dallas Independent School Dist. v. Daniel*, 37 CCH Lab. Cas. ¶ 65,501 (Tex. Civ. App. 1959), avoided a determination of the pre-emption issue by reversing the trial court on other grounds.

The North Carolina Supreme Court, after avoiding the issue on the first appeal, *Willard v. Huffman*, 247 N.C. 523, 101 S.E.2d 373 (1958), held that an employee could obtain damages from his employer despite the second *Garmon* case. *Willard v. Huffman*, 37 CCH Lab. Cas. ¶ 65,529 (N.C. 1959). The court felt that the employee was entitled to a remedy, that the NLRB had declined jurisdiction, and that the United States Supreme Court cases on pre-emption were irreconcilable. Therefore it had jurisdiction. Actually the opinion makes almost no sense.

The recent Kansas case of *Local 774, IAM v. Cessna Aircraft Co.*, 37 CCH Lab. Cas. ¶ 65,623 (Kan. 1959), discussed *infra* note 348, aids the argument that state courts are pre-empted in an ordinary dis-



Assuming that the Right to Work amendment extends to a union causing or attempting to cause a discharge, the fact that the employee sued the union would not give the state court jurisdiction. Section 8(b)(2) of the Taft-Hartley Act<sup>331</sup> makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)." Therefore any activity of a union, apart from a union security agreement, that could fall within the prohibition of a Right to Work law, would also arguably be a prohibited act within the federal law and be pre-empted under the above cases.

There are no state court cases arising from a Right to Work state where a suit against a union was based on the union's attempt, absent a union security agreement, to induce an employer to discharge because of non-membership. In *Borden v. United Ass'n of Journeymen and Apprentices*,<sup>332</sup> the Texas Court of Civil Appeals allowed an action for damages, when the union would not give job clearance, but apparently based the action on a theory of common law interference with employment. The court found no pre-emption, but based their decision on the grounds that under *Gonzales*<sup>333</sup> damages, as a remedy, were not pre-empted.

Prior to *Gonzales*, the Georgia Supreme Court held themselves pre-empted in *Collins v. Merritt-Chapman and Scott*.<sup>334</sup> This was a damage action brought by an employee against his union and employer based upon a conspiracy to deprive him of his union card. The court did not discuss the special nature of union security and merely cited the general pre-emption cases.

There are many suits brought against a union based on a union's arbitrary interference with a member's job opportunities or for wrongful expulsion from the union and consequent interference with job opportunities in non-Right to Work states. Prior to *Gonzales*, most courts held themselves pre-empted on the theory that there was a possible violation of 8(b)(2).<sup>335</sup> The United States Supreme Court, in the *Gonzales* case, agreed with the California court<sup>336</sup> that it could grant reinstatement *in the union* and damages for loss sustained for the wrongful expulsion.

The *Gonzales* case might arguably be authority to sustain suits against unions in Right to Work states. However, in the second *Garmon* case, the

---

charge case. The court found pre-emption when the union alleged violation of a collective bargaining agreement providing that the employer would not discriminate for union activity. Neither the majority or dissenting opinions made any attempt to invoke 14(b) and the Right to Work amendment as a justification for state action.

<sup>331</sup> 61 Stat. 140, 29 U.S.C. 158(b)(2) (1952).

<sup>332</sup> 316 S.W.2d 458 (Tex. Civ. App. 1958).

<sup>333</sup> *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958).

<sup>334</sup> 91 Ga. App. 856, 87 S.E.2d 337 (1955).

<sup>335</sup> See the many cases cited by Chief Justice Warren, dissenting in *Gonzales*, 356 U.S. at 623, 628-29, and see Comment, *Limitations on State Jurisdiction of Unfair Labor Practices: Employee Suits Against Unions in Interstate Commerce*, 10 HAST. L.J. 306 (1959).

<sup>336</sup> *Gonzales v. International Ass'n of Machinists*, 142 Cal. App. 2d 207, 298 P.2d 92 (1956).

Supreme Court indicated that damages were no longer in a special class and distinguished *Gonzales* by saying that it only peripherally concerned the federal act.

While *Gonzales* may still be authority for a state court to order reinstatement in a union and give *damages suffered for the expulsion* from the union, if the employee also claims damages for loss of work because of the non-membership, it is arguably within 8(b)(2) of the Taft-Hartley Act and under the broad language of the second *Garmon* case, the state must decline jurisdiction.<sup>837</sup> Therefore, any rights based on the first clause of the Right to Work amendment must still be pre-empted.

### *Discharge Under a Union Security Agreement*

The toughest problem is to decide whether the remedy for a discharge pursuant to a union security agreement is also pre-empted. There are almost no authorities on this question and the various fragments and dicta are conflicting. An authoritative answer will have to await a proper decision by the United States Supreme Court. There are at least three arguable views as to the proper approach with some bits and hints to support each of them.

*First Theory.*—Remembering that 14(b) says, "Nothing in this subchapter shall be construed as authorizing . . . agreements in any state in which the execution or application is prohibited," it is possible to argue that as to the execution and application of Right to Work, 14(b) still allows a state court to order reinstatement and give damages when an employee is discharged pursuant to an illegal union security clause. The plain meaning would so require. The state would merely be fashioning a remedy in an area expressly reserved to the states. As part of this argument an attorney could distinguish *Farnsworth*,<sup>838</sup> first *Garmon*,<sup>839</sup> and *De Vries*,<sup>840</sup> since they are picketing cases, and do not involve execution or application. This view, if adopted by the United States Supreme Court would allow the states the most freedom to act.

This plain meaning view also finds support in the legislative history of section 14(b),<sup>841</sup> and in *Algoma Plywood & Veneer Co. v. WERB*,<sup>842</sup> where

<sup>837</sup> Compare *Selles v. Local 174, Int'l Bhd. of Teamsters*, 50 Wash. 2d 660, 314 P.2d 456 (1957), with *Mahoney v. Sailors' Union*, 45 Wash. 2d 453, 275 P.2d 440 (1954), for an example of a state court trying to make this distinction before *Gonzales* and second *Garmon*.

<sup>838</sup> *Local 429, Int'l Bhd. of Elec. Workers v. Chambers Co.*, 353 U.S. 969 (1957).

<sup>839</sup> *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957).

<sup>840</sup> *De Vries v. Baumgartner's Elec. Constr. Co.*, 79 Sup. Ct. 1117 (1959).

<sup>841</sup> The Report of the Managers on the part of the House states with reference to § 13 of the House Bill and § 14 of the Conference Committee amendments:

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 or compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law. Many States have enacted laws or adopted constitutional provisions to make all forms of compulsory unionism in those States illegal. It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that Act, to pre-empt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither the so-called 'closed 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

the United States Supreme Court gave direct sanction to state court remedies in the union security area. Unless the proponents of pre-emption are able to distinguish it, *Algoma* will control. The Supreme Court held that the Wisconsin Board had jurisdiction to order reinstatement and back pay to an employee who was discharged for failure to maintain membership. The union and employer had entered into a maintenance of membership agreement under pressure from the War Labor Board. However, no vote, as required by Wisconsin law, was ever taken on whether two-thirds of the employees wanted this clause. Without such a vote the clause was unlawful under state law and no protection to an employer who discharged for non-membership.

Looking at the legislative history of section 8(3) of the Wagner Act,<sup>343</sup> since the discharge occurred prior to the passage of the Taft-Hartley Act, the Court found that Congress did not affirmatively declare a policy favoring union security by the proviso of section 8(3), but it ". . . merely disclaims a national policy hostile to the closed shop or other forms of union security agreement."<sup>344</sup> The states were free to impose stricter union security requirements.

The Court also, in dicta, explained that nothing in section 10(a) of the Taft-Hartley Act<sup>345</sup> required a different conclusion. The Court then said:

Other provisions of the Taft-Hartley Act make it even clearer than the National Labor Relations Act that the States are left free to pursue their own more restrictive policies in the matter of union security agreements. Because § 8(3) of the new Act forbids the closed shop and strictly regulates the conditions under which a union shop agreement may be entered, § 14(b) was included to forestall the inference that federal policy was to be exclusive.<sup>346</sup>

While this case has never been overruled and in fact has been cited by the Court as late as January 1959, in a footnote to the case of *Local 24, Int'l Bhd. of Teamsters v. Oliver*,<sup>347</sup> its authority as a carte blanche to state courts to fashion

---

were contrary to the State policy. To make certain that there could be no question about this, Section 14 was included in the House bill. The conference agreement, in Section 14(b), contains a provision having the same effect. H.R. REP. No. 510, 80th Cong., 1st Sess. 80 (1947). (Emphasis added.)

<sup>343</sup> 336 U.S. 301 (1949).

<sup>344</sup> 49 Stat. 452 (1935), 29 U.S.C. 158(3) (1952).

<sup>345</sup> 336 U.S. at 307.

<sup>346</sup> 61 Stat. 146 (1948), 29 U.S.C. 160(a) (1952). This section provided for a method of ceding jurisdiction to the states. It reads:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This 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: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

<sup>346</sup> 336 U.S. at 313.

<sup>347</sup> 79 Sup. Ct. 297 (1959). The Court said: "In *Algoma*, state law was allowed to operate to restrict a provision of a collective bargaining contract only after it was found after an exhaustive examination of the legislative history of the Wagner Act that Congress intended to leave the special subject of the legality of maintenance of membership clauses up to the State through § 8(3) of the Act . . . . Questions of the nature that we consider today were expressly left open."

remedies for violations of union security agreements has been seriously impaired.<sup>348</sup>

*Second Theory.*—Relying on other hints and implications, there is a second view as to the effect of section 14(b) and pre-emption. In *Plankinton Packing Co. v. WERB*,<sup>349</sup> the United States Supreme Court, reversed, per curiam, a decision of the Wisconsin court upholding an order of the state labor board against the packing company based on the discharge of an employee, because of union pressure, during a maintenance of membership escape period. Here also the contract had been ordered by the War Labor Board. The opinion only said: "The judgment is reversed," and cited *Bethlehem Steel Co. v. New York Labor Board*<sup>350</sup> and *La Crosse Telephone Corp. v. WERB*.<sup>351</sup>

<sup>348</sup> In the early Right to Work cases in which their basic constitutionality was argued, the state courts held, in suits involving discharge under a union security clause, that their Right to Work law was not pre-empted by the federal act. The courts relied on § 14(b) and the legislative history. See *AFL v. American Sash & Door Co.*, 67 Ariz. 20, 189 P.2d 912 (1948) (The problem is not discussed; § 14(b) is only cited.); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 149 Neb. 507, 31 N.W.2d 477 (1948); *State v. Whitaker*, 228 N.C. 664, 45 S.E.2d 860 (1947); *Mascari v. International Bhd. of Teamsters Union*, 187 Tenn. 345, 215 S.W.2d 779 (1948) (The court states that it has jurisdiction, 14(b) is not cited.); *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949). The first three of these cases were appealed to the United States Supreme Court. *AFL v. American Sash and Door*, 335 U.S. 538 (1949); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949) (Decided with *Whitaker v. North Carolina*). Nowhere in the opinions does the Court mention 14(b) or pre-emption. The Court decided only the substantive constitutional questions. Certiorari was dismissed in the *Mascari* case. 335 U.S. 907 (1949).

The only recent case involving a union security clause in which pre-emption is discussed is the Indiana agency shop case. In *Meade Elec. Co. v. Hagberg*, 37 CCH Lab. Cas. ¶ 65,551 (Ind. App. Ct. 1959), the employer sought an injunction to prevent the union from demanding the agency shop clause in their collective bargaining agreement. The court stated that it was not going to decide whether the state court was pre-empted since the demurrer to the petition raised only the validity of the agency shop clause under Indiana law. The court felt that it had jurisdiction to determine at least this question.

The Kansas Supreme Court, on July 10, 1959, handed down the opinion in *Local 774, IAM v. Cessna Aircraft Co.*, 37 CCH Lab. Cas. ¶ 65,623 (Kan. 1959), which, at first blush, is arguably a union security clause pre-emption case. The suit brought by the union as plaintiff, requested an injunction to force the defendant company to use the grievance procedure set out in the collective bargaining agreement. The company had terminated an employee's employment and the employee invoked the grievance procedure, but the company refused to honor the complaint. The complainant claimed that the company had refused to transfer the employee as per the agreement on the basis of his union activities. The agreement provided that there should be no discrimination because of union activities.

The trial court granted the injunction, but the supreme court reversed on the grounds that the employee's complaint, in effect, alleged an unfair labor practice under § 8(a)(3) of the Taft-Hartley Act. Therefore, the state court was pre-empted since the activity was arguably federally prohibited. Justices Jackson and Frazier dissented on the grounds that the suit was based on a breach of a collective bargaining agreement and that such suits are not pre-empted, citing, among others, *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), and *McCarroll v. Los Angeles County Dist. Council of Carpenters*, 49 Cal. 2d 45, 315 P.2d 322 (1957), cert. denied, 355 U.S. 932 (1958).

Both the majority and dissenting opinions correctly ignore § 14(b) and the Right to Work amendment. This contract provided that the employer should not discriminate because of membership. Therefore it was not prohibited by the second clause of the amendment, but rather provided a contractual agreement in harmony with the amendment. Only if the court finds that 14(b) applies to non-contractual discrimination, which is improper, see note 330 *supra* and accompanying text, should it discuss 14(b).

Since this case was decided after this article was written, no attempt will be made to assess the correctness of the court's decision. However, the court should have discussed the almost impossibly difficult issues raised by the case. Certainly the court should not have ignored *Coleman Co. v. International Union, UAW*, 181 Kan. 969, 317 P.2d 831 (1957). For a good discussion of the problems raised by *Association of Westinghouse Salaried Employees v. Westinghouse Elec. Corp.*, 348 U.S. 437 (1955), and *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), see Meltzer, *The Supreme Court, Congress and State Jurisdictions over Labor Relations*, 59 COLUM. L. REV. 269 (1959). For the problem of the conflict between *Lincoln Mills* and the doctrine of federal pre-emption of unfair labor practices, see Meltzer, *supra*, and Dunau, *Contractual Prohibition of Unfair Labor Practices: Jurisdictional Problems*, 57 COLUM. L. REV. 52 (1957).

The possible use of *Lincoln Mills* as a basis for state court action in a suit to enforce a union security agreement will be discussed in a later article.

<sup>349</sup> 338 U.S. 953 (1950).

<sup>350</sup> 330 U.S. 767 (1947).

<sup>351</sup> 336 U.S. 18 (1949).

Why the reversal without opinion in the second case? The language of the *Algoma* case<sup>352</sup> covered discharges in violation of the agreement. Wisconsin should have had jurisdiction. The only possible answer is that since the discharge was illegal under the Wagner Act,<sup>353</sup> being in violation of the union security agreement, the National Labor Relations Board could provide a remedy. Since the discharge violated the agreement, it was not protected by the proviso of 8(3).<sup>354</sup> Therefore, the discharge was a federal unfair labor practice and the state Board had to decline jurisdiction in favor of the national Board. In *Algoma* the discharge did not violate the Wagner Act, only the state law. Therefore, the state court had jurisdiction.

This explanation of the early *Plankinton* case agrees with the suggested rationale of the reversals by the United States Supreme Court of the state court injunctions or damages in Right to Work picketing cases. Since the picketing in these cases is arguably an independent violation of the federal act,<sup>355</sup> the Supreme Court must feel that the Board has exclusive jurisdiction to remedy violations despite the fact that the activity also violates state law.

This explanation of the *Plankinton* and picketing cases would mean that the same test would apply to discharge as to picketing, i.e., if the discharge violates both the federal act and the state law, the state is pre-empted, but if it does not violate the federal act, but does the state law, the state could act, since 14(b) allows the states to pass laws restricting union security.

It is arguable that the picketing cases are not much help to the proponents of the second view, since they can be distinguished on the basis that 14(b) does not apply to picketing but only to execution and application. But this distinction does not hold for *Plankinton* which was a discharge case.<sup>356</sup>

The fact that *Algoma* is still being cited by the United States Supreme Court is of relatively little importance. So is *Plankinton*. In *Weber v. Anheuser-Busch, Inc.*,<sup>357</sup> the Court said of *Algoma*, "The court allowed a state to forbid enforcement of a maintenance-of-membership clause in a contract between employer and union . . . . Since nothing in the Wagner or Taft-Hartley Acts sanctioned or forbade these clauses, they were left to regulation by the State."<sup>358</sup> But the

<sup>352</sup> *Algoma Plywood & Veneer Co. v. WERB*, 336 U.S. 301 (1949).

<sup>353</sup> The discharge would also be illegal under the Taft-Hartley Act.

<sup>354</sup> 49 Stat. 452 (1935), 29 U.S.C. 158(3) (1952).

<sup>355</sup> See text following note 315 *supra*, for further arguments. A Virginia circuit court adopted this view in *Ball v. Columbia Typographical Union*, 37 CCH Lab. Cas. ¶ 65,705 (Va. Cir. Ct. 1959).

<sup>356</sup> The only possible way to distinguish *Plankinton* is to argue that the case does not involve a union security agreement, but is merely a discharge for non-membership type of case. Since the employer discharged the employee during a "free" period in the maintenance of membership agreement, the discharge was not pursuant to a union security contract. Therefore the discharge was only an ordinary 8(a)(3) type of violation. Since 14(b) applies only to execution or application, it does not exempt ordinary 8(a)(3) violations. Therefore the state court is pre-empted.

This argument is weak, however, since the discharge was in violation of the agreement. The discharge involved the wrongful *application* of a union security agreement. To uphold the argument, "execution or application" must refer only to a "rightful" application of the security clause.

<sup>357</sup> 348 U.S. 468 (1955).

<sup>358</sup> *Id.* at 477.

court also cited *Plankinton* after the statement: "A state may not enjoin under its own labor statute conduct which has been made an 'unfair labor practice' under the federal statutes."<sup>859</sup>

In *Local 24, Int'l Bhd. of Teamsters v. Oliver*,<sup>860</sup> the court cited *Algoma* and in the footnote said that, ". . . Congress intended to leave the special subject of legality of maintenance of membership clause up to the states . . ."<sup>861</sup> But the Court also cited *Plankinton* in the body of the opinion as showing that the states may not restrict what Congress has indicated to be free.<sup>862</sup>

How can these two cases stand together? The only reasonable explanation is in the fact that in *Plankinton* the employer also violated the federal law while in *Algoma*, only state law was violated.<sup>863</sup>

Whether or not the United States Supreme Court ultimately adopts this theory, its opinion in the second *Garmon* case<sup>864</sup> must mean that the state court is to decline jurisdiction in favor of a Board determination of the proper theory. The second *Garmon* case is obviously a caveat to the state courts to stop trying to find new areas of jurisdiction. The court said:

We state these principles [of this case] in full realization that in the course of a process of tentative, fragmentary illumination carried on over more than a decade during which the writers of opinions almost inevitably, because unconsciously, focus their primary attention on the facts of particular situations, language may have been used or views implied which do not completely harmonize with the clear pattern which the decisions have involved.<sup>865</sup>

The principle then invoked, as set out more fully above,<sup>866</sup> was that the state court was to decline jurisdiction in favor of the Board in any case involving problems of protected rights under section 7 or prohibited activities under section 8.

At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the

<sup>859</sup> *Id.* at 475.

<sup>860</sup> 79 Sup. Ct. 297 (1959).

<sup>861</sup> *Id.* at 305 n.10.

<sup>862</sup> The fact that the Court cited *Algoma* and said that maintenance of membership was to be left to the states does not show that even as late as January 1959, the Court felt that *Algoma* allowed state courts to enforce Right to Work laws. In the principal case, the Court was arguing that § 7 of the Taft-Hartley Act pre-empted a state court injunction. The state court enjoined the union from bargaining for contracts for truck drivers on the grounds that the drivers were independent contractors and the agreement would be in restraint of trade. The United States Supreme Court found that the union was bargaining for wages and pointed out that state courts could not limit, even by applying anti-trust laws, the subject matter of bargaining, since this was a federally protected activity under § 7. The court then gives the quoted "cf." citation to *Algoma*. Why? To show that in the area of union security, state law could prohibit what the federal law allowed. But this does not show that the state could fashion a remedy and enforce that substantive prohibition when the federal law also prohibited the same activity.

<sup>863</sup> There seems to be no distinction in what the state court did in each case. In *Plankinton*, the state court refused to discuss the pre-emption issue citing *Algoma* as answering all the defendant's arguments. See *WERB v. Plankinton Packing Co.*, 255 Wis. 285, 38 N.W.2d 688, 692 (1949).

<sup>864</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773 (1959).

<sup>865</sup> *Id.* at 777.

<sup>866</sup> See note 318 *supra* and accompanying text.

Act that these determinations be left in the first instance to the National Labor Relations Board.<sup>887</sup>

The only times a state may exercise jurisdiction are after the case has gone to the Board and it has made a clear determination that the activity is neither protected nor prohibited, or if there is "compelling precedent applied to essentially undisputed facts . . . ."<sup>888</sup> Only the most persistent states' rights court would argue that *Algoma*, in the light of later cases, is "compelling precedent" for union security discharge cases.

If the state court must decline jurisdiction in every case, the adoption of the distinction between the *Algoma* and *Plankinton* cases will produce a harsh result. Consider an employee discharged for not joining a union and paying his dues on the 30th day after employment as required by the union security contract in effect at the plant. He brings an action for damages and reinstatement in the court of a state having a Right to Work law. Under the second *Garmon* case, the state court declines jurisdiction. The employee then files a charge with the National Labor Relations Board. By some miracle he obtains a direct ruling from the Board that the discharge did not violate section 8(a)(3) of the Taft-Hartley Act, since the proviso allowed this union security, and also that the discharge was not a protected activity under the proviso since section 14(b) said: "Nothing in this subchapter shall be construed as authorizing the execution or application . . . ." Then the poor employee, months or years later again brings his action in the state court demanding damages and reinstatement which the state court was perfectly willing to allow all along. But, the state court may be stopped again. By this time the statute of limitations may have run.<sup>889</sup> Yet the second and probably correct view of the pre-emption problem creates this result.

*Third Theory.*—A third rationale of pre-emption and 14(b) might solve this problem. This solution is of no comfort to state courts wanting jurisdiction, but will help the discharged employee in Right to Work states. There is certainly no direct authority to mitigate against it. In truth, the National Labor Relations Board and the United States Supreme Court have probably never actually considered it.

Boldly stated, the argument runs like this. Any discharge for membership or non-membership in a labor organization violates 8(a)(3). The proviso, providing for a modified union shop, is a defense to a charge of violating 8(a)(3) because the proviso says: "Provided, That nothing in this Act . . . shall preclude an employer from making an agreement . . . ." Therefore, if the proviso, for some other reason, is removed, it no longer would be a defense to a viola-

<sup>887</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773, 779 (1959).

<sup>888</sup> *Id.* at 780.

<sup>889</sup> In Kansas tort actions are limited to two years. See KAN. G.S. 1949, 60-306.

tion of 8(a)(3). Section 14(b) says: "Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership . . . in any state . . . in which such execution or application is prohibited by State . . . law." What is there in the federal act that could be construed as authorizing the execution or application of union security arguments? Basically the proviso of 8(a)(3). Therefore, under the terms of section 14(b), in any state that prohibits the execution or application of union security agreements, the proviso will not be a defense to a charge of violating 8(a)(3). The plain meaning of the Act would seemingly so require. In effect, Congress authorized both the Wagner Act and the Taft-Hartley Act, to restrict union security contracts. The state amends the federal act and in effect makes federal law.

It would follow from this theory that the National Labor Relations Board in a case brought to it from a Right to Work state, would not allow the proviso of 8(a)(3) to be a defense. The Board would become the agency to enforce state right to work laws and an employee would have a remedy.

This theory is consistent with all of the United States Supreme Court cases except the result in *Algoma*. Since the state law removes the proviso of 8(a)(3), any discharge for membership or non-membership would be a violation of 8(a)(3). Since the discharge is then a federal unfair labor practice, the state courts are pre-empted. But even *Algoma* does not preclude the adoption of this new theory. In *Algoma* the court was arguing that the states had a right, under both the Wagner Act and the Taft-Hartley Act, to restrict union security contracts. They found that the states had this power. The third theory admits this. But the Supreme Court allowed the state to act. Why? In 1950 the Court did not realize the full reach of the pre-emption doctrine. In *Garner*<sup>870</sup> the Court saw that parallel remedy would cause confusion. Concurrent jurisdiction in this area was not possible. By the spring of 1959, in the second *Garmon* case,<sup>871</sup> the Court realized that administration was regulation and that only the Board could act. Surely the force of the *Algoma* case, as to who should provide the remedy, is weakened by these later cases.

Likewise, congressional history of the Taft-Hartley Act is of little help. At best, it shows the Congress wanted the states free to restrict union security. Undoubtedly Congress never realized that they might at the same time be preventing the state from enforcing these restrictions. But then, Congress probably never realized the position that the court would take from *Garner* to second *Garmon*.

To date, the National Labor Relations Board has never found an 8(a)(3) violation based on the fact that the state Right to Work law removed the proviso. The Board has found a violation of 8(a)(3) in cases arising in Right to Work

---

<sup>870</sup> *Garner v. Teamsters Union*, 346 U.S. 485 (1955).

<sup>871</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773 (1959).



states,<sup>372</sup> but in every case, the union security clause independently violated the proviso of 8(a)(3). To invalidate the third theory, the Board would have to decide that the union security clause conformed to the proviso and the fact that the state law prohibited the clause was immaterial. To confirm the theory, the Board would have to hold that there was a violation and base their finding on the state law.

In several 9(c)<sup>373</sup> or 9(e)(1)<sup>374</sup> cases, the Board has discussed the problem of 14(b) and state Right to Work laws. Their discussion is consistent with the third theory, but is not direct authority for it, nor does it preclude the possibility of concurrent enforcement of the state Right to Work laws.

In 1948, when the Taft-Hartley Act still required authorization elections for the right to bargain for a union security clause,<sup>375</sup> the National Labor Relations Board agreed with a trial examiner that a voting unit composed of employees from both Right to Work and non-Right to Work states was improper.<sup>376</sup> The majority of the Board held that as to those employees in the Right to Work state, here Virginia, the election would be futile. Section 14(b) allowed the states to control union security and state law bound the Board. The dissent argued that the majority view was consistent only if they felt the state law became part of the federal act. The dissent argued that a state law could not amend the federal act and felt that the state should enforce its own Right to Work law. The state law should not affect 8(a)(3). This view, which destroys the third theory, was from the dissenting member. The majority view was consistent with the third theory, although it cannot be taken to mean that the Board felt that the state would not have concurrent jurisdiction.

Then, in *Northland Greyhound Lines, Inc.*,<sup>377</sup> the Board affirmed their prior ruling as to the proper unit in a 9(e)(1) authorization election, but restricted its application to states that completely prohibited, rather than just regulated, union security agreements.

The *Greyhound* case supports the argument of those who claim that the picketing cases arising from states that merely regulate, rather than prohibit, union security agreements, are not authority for holding that a remedy for violation of a prohibitory Right to Work law is pre-empted. The argument is that 14(b) says: ". . . in which such execution or application is *prohibited* by state . . . law." A state that merely regulates, say by requiring an authorization vote, is not included within 14(b) and the states have no power to act. Congress only gave them authority to prohibit, not regulate. Two state supreme courts

<sup>372</sup> See, e.g., *Galveston Maritime Ass'n, Inc.*, 122 N.L.R.B. No. 83 (1958) (Texas); *Gibbs Corp.*, 120 N.L.R.B. 1079 (1958) (Florida); *Consolidated W. Steel Corp.*, 108 N.L.R.B. 1041 (1954) (Texas).

<sup>373</sup> 61 Stat. 143 (1947), 29 U.S.C. 159(c) (1952).

<sup>374</sup> National Labor Relations Act § 9(e)(1), 61 Stat. 143 (1947) (amended by 65 Stat. 601 (1951), as amended, 29 U.S.C. 159(e)(1) (1952)).

<sup>375</sup> *Ibid.*

<sup>376</sup> *Giant Food Shopping Center*, 77 N.L.R.B. 791 (1948).

<sup>377</sup> 80 N.L.R.B. 288 (1948).

have taken that position,<sup>878</sup> but in the *Algoma* case, decided subsequent to the Board cases, the United States Supreme Court said, in speaking of the Wisconsin law that required a two-thirds favorable vote for union security:

It is argued, however, that the effect of this section [section 14(b) of the Taft-Hartley Act] is to displace state law which "regulates" but does not wholly "prohibit" agreements requiring membership in a labor organization as a condition of employment. But if there could be any doubt that the language of the section means that the Act shall not be construed to authorize any "application" of a union security contract, such as discharging an employee, which under the circumstances "is prohibited" by the state, the legislative history of the section would dispel it.<sup>879</sup>

Certainly those that rely on *Algoma* as authority for state court action cannot suggest that the state statute must outlaw all union security before 14(b) applies.

Two of the other National Labor Relations Board cases construing section 14(b) involve the contract bar rule<sup>880</sup> to elections under section 9(c) of the Taft-Hartley Act. In *Cyclone Sales Co.*<sup>881</sup> the Board refused, in 1956, to give effect to the Colorado statute requiring an affirmative vote for a valid union security agreement. The intervening union claimed that the existing contract was a bar. The Board agreed on the grounds that since the state law only regulated, but did not prohibit the union security clause, its existence did not void the contract as a bar. The Board argued that 14(b) applied only to state statutes that prohibited such clauses. The Board ignored *Algoma* and cited only *International Bhd. of Teamsters v. Riley*,<sup>882</sup> a 1948 New Hampshire case that had so construed section 14(b).

In *Continental Can Co.*,<sup>883</sup> the Board also refused, in a 9(c) proceeding, to allow an election because of the bar of an existing contract. The petitioner claimed no bar because the contract contained a maintenance of membership clause, prohibited by Florida constitutional amendment. The Board held that the Florida amendment should not be given effect because the Florida Supreme Court had not construed the purpose and effect of the amendment and it would be improper for the Board to do so. In so holding, the Board relied on *American Federation of Labor v. Watson*,<sup>884</sup> decided by the United States Supreme Court in 1946. In a suit brought before a three-man federal district court, the American Federation of Labor challenged the constitutionality of the Florida law. On appeal, the Supreme Court held that the three-judge court had no jurisdiction to determine the constitutionality of the state law until the

<sup>878</sup> *Building Constr. Trades Council v. American Builders, Inc.*, 337 P.2d 953 (Colo. 1959); *International Bhd. of Teamsters v. Riley*, 95 N.H. 162, 59 A.2d 476 (1948), *vacated as moot*, 336 U.S. 930 (1949).

<sup>879</sup> 336 U.S. at 314.

<sup>880</sup> See cases cited note 250 *supra*, for a discussion of the rule.

<sup>881</sup> 115 N.L.R.B. 431 (1956).

<sup>882</sup> 95 N.H. 162, 59 A.2d 476 (1948).

<sup>883</sup> 100 N.L.R.B. 682 (1952).

<sup>884</sup> 327 U.S. 582 (1946).

state court had construed it. The major problem was whether, under Florida law, the amendment was self-executing. The United States Supreme Court specifically stated that they were not reaching the merits. Therefore, the case is no authority as to 14(b) and state action.

These two Board cases, at first blush, indicate that the Board will not give effect to state laws concerning union security. Actually, they only show that the Board feels that the state law on union security is controlling when it has been construed by a state court and when it is prohibitory.

In the only 8(a)(3) case mentioning 14(b), the Board held, in *Nebraska Bag Co.*,<sup>885</sup> that the trial examiner's recommended cease and desist order should be modified to exclude the usual final clause. This clause exempts the employer from the order "to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized in section 8(a), subdivision 3, . . ." They deleted this clause, it was said, because of Nebraska's Right to Work law.

All five of these cases show that the Board reluctantly feels that in some vague and undefined manner, state right to work laws affect their decisions and orders. At most, the Board's position is neutral as to the third theory.

The only other authority that aids the third theory is found in a Colorado Supreme Court decision of April 13, 1959.<sup>886</sup> The court held itself pre-empted in a picketing case. The court said the picketing violated the union security restrictions of Colorado law, but it could not enjoin the picketing because of the United States Supreme Court pre-emption cases. To an argument that 14(b) allowed state action, the court advanced the theory, citing *Guss v. Utah Labor Board*,<sup>887</sup> that section 10(a) was the exclusive means whereby state courts could obtain jurisdiction. Did 14(b) change that rule? No, it did not. Part of 10(a) requires, before the Board may cede jurisdiction, that the state law be consistent with the federal law. Section 14(b) only removes the requirement of consistency. As to union security contracts, the Board could cede jurisdiction under 10(a) despite the fact that the state law did not agree with the federal law. The court said:

. . . [T]he federal authority yields what it recognizes as lawful in certain circumstances to that which the state declares prohibited . . . . But the Act does not in so yielding say in so many words or by implication that there is delegated to the state jurisdiction to enforce the state prohibition.<sup>888</sup>

The theory expressed by the Colorado Supreme Court is consistent with either the second or third theory in this article. But the use of the exclusive nature of 10(a), as the United States Supreme Court did in the *Guss* case, to

<sup>885</sup> 5 CCH LAB. L. REP. ¶ 55,953 (1958).

<sup>886</sup> Building Constr. Trades Council v. American Builders, Inc., 337 P.2d 953 (Colo. 1959).

<sup>887</sup> 353 U.S. 1 (1957).

<sup>888</sup> Building Constr. Trades Council v. American Builders, Inc., 337 P.2d 953, 960 (Colo. 1959).

explain 14(b), bolsters the argument that 14(b) is only substantive and that the National Labor Relations Board must enforce state Right to Work laws.

So long as the United States Supreme Court adopts either the second or third theory or the theory of the Colorado Supreme Court, it will make little difference to state supreme courts. The adoption of any of these theories will pre-empt the state court. The available authority indicates that the United States Supreme Court will at least adopt the second theory and may, if it is argued to them, adopt the third theory.

But whatever theory ultimately is adopted, the state supreme courts will not have the chance to aid in its development. Under the rule of the second *Garmon* case,<sup>889</sup> the states must decline jurisdiction to the national Board for the proper determination.<sup>890</sup>

#### CONCLUSION

In this article the major decisions of state courts having Right to Work statutes were discussed. Several of these decisions are important and should materially aid a Kansas attorney and the Kansas courts in interpreting the new amendment. Many of the decisions are confusing and poorly written. Other than as a source of a quotable quote, they add little to an understanding of the amendment. In using these cases, attorneys must be careful to check that the other state's statutory provisions are consistent with the Kansas amendment. Some of the issues to be decided by the Kansas Supreme Court are specifically answered by some state right to work statutes.

What effect this new amendment will have on labor management relations in Kansas is problematical. The federal pre-emption doctrine has apparently restricted enforcement of these right to work statutes to the vanishing point. Even in those relatively few cases where only intrastate commerce is affected, the Right to Work amendment will have a limited effect. Few, if any, employees will sue. The amendment did change existing Kansas law to the extent that the employees may no longer authorize their bargaining agent to enter into an "all union agreement."<sup>891</sup> While this is of importance to the extent that it is enforced, and to the extent that the employer uses its unlawfulness to resist a union demand for a union shop, the amendment did not give other rights to employees or employers. The other hoped-for rights, prevention of hiring and firing based upon union membership and injunctions against stranger picketing aimed at a union shop, were already prohibited under Kansas law.<sup>892</sup>

In any event, the few available surveys indicate that even in those states with Right to Work laws, many employers and unions still maintain an in-

<sup>889</sup> *San Diego Bldg. Trades Council v. Garmon*, 79 Sup. Ct. 773 (1959).

<sup>890</sup> See notes 318 and 364 *supra* and accompanying text for a discussion of the rule of the *Garmon* case.

<sup>891</sup> See KAN. G.S. 1957 Supp., 44-802(5) for the definition of the term.

<sup>892</sup> See notes 86 and 319 *supra* and accompanying text.

formal closed shop arrangement.<sup>393</sup> As long as no one complains by bringing a court action, the informal arrangement is effective.

To the extent that an employer resists a union demand that an employee be fired for non-membership, the Right to Work amendment will have the effect hoped for by the proponents, that of allowing a union member to withdraw from membership as a protest against the union leadership. But now that the campaign is over and the amendment adopted both sides might sigh: "Whither Hurried Hence?"<sup>394</sup>

After this article had been sent to the printers, Congress passed the Labor Management Reporting and Disclosure Act of 1959. This act was signed by President Eisenhower on September 14, 1959, and the amendments to the Taft-Hartley Act will take effect sixty days thereafter.

From a cursory analysis it appears that most of these amendments will have little or no legal effect on the state Right to Work laws. However, section 701 of the new act adds to section 14 of the Taft-Hartley Act two new paragraphs.

(c)(1) The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: Provided, that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

(2) Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

This amendment meets the problem of the no man's land and allows state courts to take jurisdiction when the volume of interstate business is below the NLRB's standards. Depending on the standard adopted, state courts will now have an opportunity to hear at least a few right to work cases. However, although most employers may fail to meet the Board's standards, the rights of a state court in a right to work case will still depend on which of the three views argued above is adopted by the United States Supreme Court.

Section 705 of the new act amends section 8 of the Taft-Hartley Act to allow greater union security in the building trades. But this amendment will

<sup>393</sup> Cohen, *Operating Under State Right-to-Work Laws*, 9 LAB. L.J. 574 (1955); Kuhlman, *Right to Work Laws: The Virginia Experience*, 6 LAB. L.J. 459 (1955); Myers, *Effect of "Right to Work Laws": a Study of the Texas Act*, 9 IND. AND LAB. REL. REV. 77 (1955); *The Right to Work Laws*, Fortune, Sept. 1957, p. 235.

<sup>394</sup> With apology to the Rubāiyāt of Omar Khayyām, Quatrain XXX, First Edition of the Translation by Edward Fitzgerald.

What, without asking, hither hurried *whence*?  
And, without asking, whither hurried hence!  
Another and another Cup to drown  
The Memory of this Impertinence!

not affect right to work states since section 705(b) states, in exactly the same language as section 14(b) of the Taft-Hartley Act, that states may control the execution and application of these contracts. Therefore, all the problems of interpretation of section 705(b) of the new act will be exactly the same as for section 14(b). Kansas lawyers and Kansas courts must still face the problems raised by this article.

#### APPENDIX A

Letter dated December 1, 1958, and signed John Anderson, Jr., Attorney General. This letter is abridged by the author of the article.

Reference is made to your letter wherein you request the opinion of this office on two questions relating to the amendment of Article 15 of the Kansas Constitution. The questions will be treated separately as follows:

Question 1. What is the effective date of the constitutional amendment?

Article 14, Section 1 of the Kansas Constitution (which pertains to the method of amendment of the Kansas Constitution) provides in part:

... and if a majority of the electors voting on said amendments, at said election, shall adopt the amendments, the same shall become a part of the constitution.

In *Manning v. Davis*, 166 Kan. 278, 281, 201 P.2d 113, 115 (1949), the Court in considering the effective date of the amendment to Section 10, Article 15 of the Kansas Constitution, stated:

Appellant properly contends that when the 1948 amendment was voted upon at the general election of November 2, 1948, and received a majority of the votes cast upon that question, it became a part of our Constitution as of the day of the election. (Const. Sec. 1, Art. 14.)

While it may be conceded that the official results of an election are declared by the State Board of Canvassers in accordance with the election statutes, a constitutional amendment becomes a part of the Constitution as of the date of the election at which it receives a majority vote.

Question 2. Does the amendment effectively abrogate and nullify union security clauses in existing contracts or does the constitutional prohibition not affect existing contracts and terms until the contracts expire under their own terms?

The general law is that where a constitutional amendment imposes a positive constitutional inhibition expressed in a negative form and in such manner as to possess a restrictive meaning, the courts have held such constitutional amendments to be self-executing. In 16 C.J.S. *Constitutional Law* § 49 (1956), it is stated:

... It is a settled rule of constitutional construction that prohibitive and restrictive provisions are self-executing and may be enforced by the courts independently of any legislative action, unless it clearly appears from a construction of the language of the entire provision and the circumstances of its adoption that the enactment of legislation is contemplated as requisite to put it into effect. The scope and purpose of such provisions may not be restricted by adverse legislation; and all statutes then existing, which may thereafter be passed inconsistent with them, are rendered null and void, in the absence of a savings clause in the Constitution.

The foregoing rule was recognized by the Kansas Court in the early case of *Woodworth v. Bowles*, 61 Kan. 569, 574, 60 Pac. 331, 332 (1900).

As a rule, constitutional provisions, unless expressed in negative form or possessed of a negative meaning, are not self assertive.

See also *State ex rel. Fatzer v. Shanahan*, 178 Kan. 400, 286 P.2d 742 (1955), and cases therein cited.

Looking to the law of other states where similar questions have been presented, it is found that the Supreme Courts of Arizona and Nebraska have upheld such amendments, when construed as applicable to contracts executed after enactment and to contracts existing at the effective date of the amendment, against contentions that they were violative of the contract clause (Art. 1, Sec. 10), and the due process and equal protection clauses (14th amendment) of the United States Constitution. The state court decisions were affirmed by the United States Supreme Court. *AFL v. American Sash and Door Co.*, 335 U.S. 538 (1948) (Arizona appeal), and *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 335 U.S. 525 (1948) (the Nebraska appeal). In both instances, the amendments were justified as a proper exercise of the police power of the state.

In *AFL v. American Sash and Door Co.*, 67 Ariz. 20, 39, 40, 41, 189 P.2d 912, 925, 926 (1948), the court said with respect to the effect of the amendment on existing contracts:

The amendment in question provides that from and after its effective date 'No person shall be denied the opportunity to obtain or retain employment . . . or any corporation, individual or association of any kind enter into any agreement, written or oral, which excludes any person from employment. . . .' The latter clause specifically prevents future contracts of a kind inimical to the amendment, while the former clause grants immediately to persons concerned the protection the amendment affords. As has been previously shown, there is reserved to the state the right to regulate and control contracts, and the constitution and laws of the state are a part of each contract.

A consideration of all these fundamental concepts impels the conclusion that this amendment to the Arizona Constitution, when measured by the yardstick fashioned for us by the United States Supreme Court, does not contravene any provisions of the federal organic law. . . . There can be no valid argument made that such legislation is discriminatory or that its effect upon existing contracts should be limited.

A similar conclusion was reached by the Nebraska Court in *Lincoln Federal Labor Union v. Northwestern Iron and Metal Co.*, 149 Neb. 507, 31 N.W.2d 477, 482 (1948):

It will be noted that section 15 makes the amendment self-executing, and it thereby becomes operative upon all such contracts as of its effective date. Therefore, if constitutionally valid as an exercise of the police power of the state, the amendment has application to prevent the enforcement of such provisions in all contracts, whether executed prior to or after the effective date of the amendment.

In disposing of this question on appeal, the United States Supreme Court in the *Lincoln Federal* case said:

There is a suggestion, though not elaborated in briefs that these state laws conflict with article 1, section 10 of the United States Constitution, insofar as they impair the obligation of contracts made prior to their enactment. That this contention is without merit is now too truly established to require discussion. 335 U.S. at 531.

The Court cited in support of the aforementioned statement the case of *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1933), wherein the Supreme Court of the United States upheld a Minnesota law extending the period of redemption in mortgage foreclosures as against the contention that such law impaired the obligation of existing mortgages. The Court, after restating the proposition that proper police legislation may justify state regulation of contract rights, said:

The question is not whether the legislative action affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end. 290 U.S. at 438.

Similar rulings have been made by the Florida Court, *Local 519 v. Robertson*, 44 So. 2d 899 (Fla. 1950), by the Virginia Court, *Finney v. Hawkins*, 189 Va. 878, 54 S.E.2d 872 (1949), and by the North Carolina Court, *State v. Whitaker*, 228 N.C. 352, 45 S.E.2d 860 (1947), *aff'd*, 335 U.S. 525 (1949).

It is therefore my opinion that Article 15, Section 12 (the popularly named Right to Work amendment to the constitution), of the Kansas Constitution became effective upon its receiving a majority vote in the election and that its effect will be to abrogate union security clauses in existing contracts except in those instances where Congress has authorized individuals and companies engaged in activity affecting interstate commerce to make such agreements. *AFL v. Hanson*, 351 U.S. 225 (1946).