Notre Dame Law Review

Volume 35 | Issue 4 Article 5

8-1-1960

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Although the controversy that accompanies any mention of right-to-work legislation usually concerns itself with ideological and moral considerations, these considerations do little to solve the practical problems that exist in those states that have committed themselves to a right-to-work policy. These states, with the possible exception of Indiana, are not heavily industrialized, and thus some of the problems raised by this kind of legislation may be more truly problems of the future than of the present. Whether this legislative commitment is actually motivated by democratic principles or is rather a thinly-disguised enticement to industry and its attendant economic stimuli is a question beyond the intended scope of this Note. But, regardless of the motivation, the status of the collective bargaining agreement — what types of agreements are permissible and what are prohibited by this legislation — is largely undetermined.

The principle pressed upon legislators, both national and local, a quarter of a century ago was that employees had a right to belong to unions; a different proposition, that employees have a right *not* to belong to such organizations, is being urged today. This shift in policy, or perhaps rather in perspective, is noticeable on both a national and a local level, but it is in those states that have made it illegal to compel union membership as a condition of employment that the collective bargaining agreement is most immediately affected.

Whereas unions could formerly insure the continuity of complete membership and financial support for their bargaining activities by insisting upon a union security provision in the collective bargaining agreement, they are now prohibited under right-to-work legislation from either effecting or demanding these provisions. This situation results in a double burden. The union must now not only retain its existing membership, but it must also organize continuously. And, secondly, it must represent under law, as the majority representative, even those who refuse to lend the organization their moral or financial support. The organizing problem appears to be one that the unions will simply have to live with. But as a means of combatting the "free rider" problem — the employee who derives the benefits of representation but refuses to pay for them — unions are attempting to write into their agreements with employers a provision making employment contingent upon the payment of the cost of representation. This, the agency shop, is a somewhat ignominious solution — ignominious because, whereas only thirty years ago unions demanded the *right* to represent *all* the employees in the bargaining unit, today they insist upon a right to the financial support of all those so represented, whether or not they are at the same time members of the union.

The purpose of this Note, however, will not be to examine the merits or disadvantages of agency shop arrangements. Rather, it will attempt to explore simply the question of whether or not states can, with right-to-work legislation of any type, prohibit the execution or enforcement of these arrangements.

Background of the Problem

When Congress met in 1947 to thrash out a change in the national labor policies, one of the most pressing problems to be resolved was the degree and the form of union security which sound national policy should allow. The Wagner Act had permitted all types of union security agreements — closed shop, union shop, maintenance of membership, preferential hiring — but twelve years of experience under this Act had suggested unavoidable changes. Allegations and denials of unscrupulous union power and the derogation of individual rights are numerous in the debates and in the reports,[1] and the Labor Management Relations Act[2] is largely a corrective response to situations and practices that had been nurtured by the previous policy.

1 See, *e.g.*, 93 Cong. Rec. 4885-90 (1947).

2 Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), 29 U.S.C. § 141 *et. seq.* (1952).

Congress realized, however, the value — in terms of stabilizing the collective bargaining process — of some form of union security.[3] In an effort to retain its advantageous aspects, and at the same time provide the safeguards and changes deemed necessary, Congress framed Sections 8(a)(3) and 8(b)(2).[4] Section 8(a)(3) provides that the union shop, in which all employees in the bargaining unit must join the union within 30 days after employment or be subject to discharge, is to be the most restrictive legitimate form of union security. The proviso to this section adds, however, that even under this form an employer may not discharge an employee for reasons other than a failure to pay regular dues and initiation fees, and makes a violation of this provision an unfair labor practice. Section 8(b)(2) makes it illegal for a union to cause or attempt to cause an employer to violate Section 8(a)(3).

It is made clear in the debates and in the committee reports that Congress intended that the Act prohibit all forms of union security not in strict accordance with the provisions of 8(a)(3), and that employment could be conditioned *only* upon the payment of dues and initiation fees.[5] Senator Taft himself said

> The bill provides that if the man is admitted to the union, and subsequently is fired from the union for any reason other than the non-payment of dues, then the employer shall not be required to fire that man.[6]

He also stated that, under the bill as he envisioned it,

> The union could refuse the man admission to the union, or expel him from the union and pay the same dues as the other members of the union, he could not be fired from his job because the union refused to take him.[7]

It should be emphasized here that even though Congress would not sanction *membership* in the union as a requisite of employment under such an agreement, nevertheless the *payment* of dues was made necessary, because "[t]hat in effect, is a kind of a tax, if you please, for union support, if the union is the recognized bargaining agent for all the men."[8] The distinction between membership and payment is thus clear and inescapable, at least insofar as the co-sponsor of the Act viewed the union security agreement.

That Congress had intended to so distinguish *membership* and the *payment* of the costs of representation was early recognized by both the courts and the National Labor Relations Board. In *Union Starch & Refining Co. v. NLRB*,[9] where two employees were fired because they had not joined the union, both the Board and the Court agreed that there had been a violation of the Act. Both individuals had tendered initiation fees and dues, but on religious grounds had refused to take the oath of allegiance to the union. The union thereupon refused to admit them, and demanded that the employer discharge them in accordance with the contract, containing a union security clause. The Court held that the legislative history of the Act clearly indicated that, while the union may have the right to prescribe its own conditions of membership, it could not compel the discharge of employees who were willing *to pay the dues and fees* but were unwilling to comply with the other requisites of *membership*. The Board, also, has held strictly to the language of Section 8(a)(3), and has refused to include within the cover of that section general assessments,[10] fines,[11] or even back dues incurred before the execution of a union security contract.[12]

3 See 93 CONG. REC. 4885 (1947) (remarks of Senator Taft).
4 LABOR MANAGEMENT RELATIONS ACT (Taft-Hartley Act), 61 Stat. 136, (1947), 29 U.S.C. § 158(2)(3); 158(b)(2) (1952).
5 See, *e.g.*, H.R. REP. No. 510, 80th Cong., 1st Sess. 41 (1947); H.R. REP. No. 245, 80th Cong., 1st Sess. 32 (1947); S. REP. No. 105, 80th Cong. 1st Sess. 6-7 (1947).
6 CONG. REC. 3837 (1947).
7 CONG. REC. 4272 (1947).
8 93 CONG. REC. 4887 (1947) (remarks of Senator Taft).
9 108 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951).
10 International Harvester Co., 95 N.L.R.B. 730 (1953).
11 Pen and Pencil Workers Union, 91 N.L.R.B. 883 (1950).
12 N.L.R.B. v. UAW, 194 F.2d 698 (7th Cir. 1952).

Thus this distinction between membership and payments has commended itself both to the Board and to courts enforcing Board orders, and was justified in the *Union Starch* case, where the Court said

> We agree that the Union had the right, under the statute here involved, to prescribe nondiscriminatory terms and conditions for acquiring membership in the Union, but we are unable to agree that it may adopt a rule that requires the discharge of an employee for reasons other than the failure of the employee to tender the periodic dues and initiation fees. We think the Board construed the statute in a reasonable manner and gave effect to all its provisions, and that its interpretation was in harmony with the purpose of Congress to prevent utilization of union security agreements except to compel payments of dues and initiation fees. . . .[13]

In meeting the problem of union security, however, Congress did not confine its consideration solely to federal policy. Section 14(b) was included expressly to negate the impression that federal policy in this area was to be exclusive, and the states were given the explicit authority to establish their own restrictions. This section provides that

> Nothing in this Act 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.[14]

A reading of the legislative history of this section of the Act indicates that Congress was influenced by arguments which struck at the morality of compelling membership in any organization as a condition of employment,[15] but it should be noted that there is no suggestion in the debates or the records that the term *membership,* not qualified by a proviso as it was in § 8(a)(3), was intended to have any meaning different from literal union membership.[16]

The Supreme Court has had several occasions to consider the validity of state legislation of the type authorized by 14(b). In the first case to reach the Court,[17] right-to-work legislation was upheld against arguments grounded in the First and Fourteenth Amendments. Justice Black wrote for the majority that in so doing the Court was returning "closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law."[18] In *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Bd.,*[19] the Court held that where the state law required approval by two-thirds of affected employees for a valid union security contract, an employee who had refused to pay dues could not be discharged pursuant to the provisions of the contract involved because this contract had not been approved in the requisite manner. And in *Plumbers Union v. Graham*[20] the Court upheld the power of Virginia to enjoin picketing for a purpose in conflict with the state's right-to-work law. That case concerned a "local" dispute, however, and was decided on the

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13 186 F.2d 1008, 1012 (7th Cir. 1951), *cert. denied,* 343 U.S. 815 (1951).

14 LABOR MANAGEMENT RELATIONS ACT (Taft-Hartley Act), 61 Stat. 151 (1947), 29 U.S.C. § 164(b) (1958).

15 See, *e.g.,* H.R. REP. No. 245, 80th Cong., 1st Sess. 52 (1947); H.R. REP. No. 510, 80th Cong., 1st Sess. 41 (1947).

16 But see, Chicago Tribune, Feb. 1, 1960, for interview with Mr. Hartley, co-sponsor of the Act, relative to the legality of the agency shop:

> The intention of Congress in enacting the Taft-Hartley Act was to completely outlaw the closed shop, but to permit other forms of union security agreement only where they were permissible under state law. Fred A. Hartley Jr. stated he was "utterly astonished" by interpretations that states have no power under 14(b) to ban agency shops.

17 Lincoln Federal Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949).

18 *Id.* at 536.

19 336 U.S. 301 (1949).

20 345 U.S. 192 (1953).

grounds that such legislation was not an abridgement of the free speech provision of the First Amendment, over dissents by Justices Black and Douglas.

Where the question presented to the Court has been one of conflict with federal law, the seemingly broad interpretations suggested by the *Algoma* and *Graham* cases have been severely constricted. In *Teamsters Union v. Kerrigan Iron Works, Inc.*,[21] the Court of Appeals of Tennessee had affirmed an injunction compelling a common carrier to continue rendering service to a customer whose employees were picketing. The state court had held that the right of a union to refuse to cross a picket line was not beyond the reach of a state court where such activity was being conducted for a purpose contrary to state law imposing the duty on carriers to render service to the public without discrimination. On *certiorari*, the Court, in a *per curiam* opinion, reversed, citing two cases[22] which hold that where the National Labor Relations Board has potential jurisdiction over a dispute the states are pre-empted from asserting their own jurisdiction. And in another case appealed from Tennessee, the Court held, again *per curiam*, that the state could not enjoin peaceful picketing affecting commerce when the purpose of the picketing was contrary to the state's right-to-work law.[23]

Several State courts, nevertheless, have followed the *Graham* case, and have affirmed orders enjoining union activity in contravention of express state legislation.[24] These decisions seem sound, however, only where the disputes concerned were not potentially subject to the jurisdiction of the N.L.R.B.[25]

The Agency Shop

The agency shop agreement is written into the collective bargaining contract in much the same manner as a union shop provision, and requires, in its simplest form, that employees in the unit represented by the union pay the same fees as are demanded of union members.[26] The check-off is not used, however, probably because of the constitutional problems that would be involved. Employees are required, rather, to pay their share of the costs of collective bargaining directly to the union, and upon failure to do so, the employer is obliged under the contract to discharge them on demand of the union. Employment is contingent, then, not upon membership but rather upon payment of the costs of representation.

Agreements of this nature were first approved in the decisions of the War Labor Board,[27] but it was not until the decision of a Canadian judge in an arbitration award that the arrangement achieved real notice.[28] In this opinion, Justice I. C. Rand of the Canadian Supreme Court said that he could not, in the circumstances of the case, award a union shop in a dispute between the United Automobile Workers and the Ford Motor Company of Windsor, Canada, because "it

21 353 U.S. 968 (1957).

22 Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955); General Drivers Union v. American Tobacco Co., 348 U.S. 978 (1955). *Weber* indicates the area of pre-emption to include rights protected by federal legislation, actions declared to be unfair labor practices and problems centering around certification by the Board, thus effectively distinguishing *Algoma*, which permitted the state to grant remedies in disputes affecting commerce where the acts complained of were neither sanctioned nor forbidden under federal law.

23 Local 420, International Bhd. of Elec. Workers v. Farnsworth & Chambers Co., 353 U.S. 969 (1957), citing *Weber* and Garner v. Teamsters Union, 346 U.S. 485 (1953). *Garner* held that state was precluded from exercising equity powers to remedy an unfair labor practice within the jurisdiction of the Board.

24 See, *e.g.*, Minor v. Building Trades Council, 75 N.W.2d 139 (N.D. 1956); Building Trades Council v. Bonito, 71 Nev. 84, 280 P.2d 205 (1955). J. A. Jones Constr. Co. v. Local 755, International Bhd. of Elec. Workers, 246 N.C. 481, 98 S.E.2d 852 (1957).

25 See, *e.g.*, Asphalt Paving, Inc. v. International Bhd. of Teamsters, 18k Kan. 775, 317 P.2d 349 (1957). Douglas Aircraft Co. v. Local 379, International Bhd. of Elec. Workers, 247 N.C. 620, 101 S.E.2d 800 (1958).

26 For an example of a typical agency shop clause, see Meade Elec. Co. v. Hagberg, 159 N.E.2d 408, 409-10 (Ind. App. 1959).

27 See, *e.g.*, 12 WAR LABOR BOARD REPORTS 510; 21 WAR LABOR BOARD REPORTS 219.

28 *In re* Ford Motor Co. of Canada and UAW, 1 L.A. 439, 17 L.R.R.M. 2782 (1946).

would deny the individual Canadian the right to such work and to work independently of personal association with any organized group."[29] He went on to add, however, that

> I consider it entirely equitable then that all employees should be required to shoulder their portion of the burden of expense for administering the law of their employment, the union contract; that they must take the burden along with the benefit.[30]

This decision, or, more realistically, this concept of union security, was widely noted, and Senator Taft indicated that Congress was well aware of such a plan when he said in debate that Section 8(a)(3) was intended to reach a result similar to that reached under the "Canadian" rule.[31]

The National Labor Relations Board has passed on the validity of the agency shop under the provisions of Section 8(a)(3), and held that

> because the legislative history of the amended Act indicates that Congress intended not to illegalize the practice of obtaining support payments from non-union members who would othewise be "free riders," we find that the provision for support payments in the instant contract does not exceed the union security agreements authorized by the Act.[32]

The federal courts have yet to rule upon the question.

In those states with right-to-work legislation,[33] the question of the validity of an agency shop has risen in only two instances, and in both decisions the courts found other grounds upon which to decide the case. The Supreme Court of Arizona held[34] that where a union struck a restaurant and picketed to compel acceptance of a contract containing, among other things, both a "one-owner" clause[35] and an agency shop provision, that such activity by the union violated the state law. The decision rested on the invalidity of the "one-owner" clause; the court expressly refused to pass on the legality of the agency shop.

In Indiana, the Appellate Court has affirmed the holding of a lower court that union picketing for the purpose of compelling acceptance of a contract including a support payment clause could not be enjoined as a violation of that state's right-to-work law.[36] The court, stressing the penal nature of the statute, felt bound to a strict interpretation of the wording which would permit such agreements in the absence of an express prohibition. Because several other states had enacted right-to-work legislation when Indiana framed its own law, and because in many of those states compulsory payment agreements are expressly prohibited,[37] the court reasoned that the legislators could not be said to have intended such a prohibition by implication and held therefore, that the purpose of the picketing did not violate the statute. No other instances where a right-to-work state has con-

29 *Id.* at 1 L.A. 444.

30 *Id.* at 1 L.A. 445.

31 93 CONG. REC. 4887 (1947).

32 American Seating Co., 98 N.L.R.B. 800, 802 (1952); see also *In re* Public Service Co., 89 N.L.R.B. 418 (1950).

33 ALA. CODE tit. 26 § 375 (Supp. 1955); ARIZ. REV. STAT. ANN. § 23-1302 (1956); ARK. STAT. ANN. § 81-202 (1960); FLA. CONST. DECL. OF RTS. § 12 (Supp. 1959); GA. CODE ANN. § 54-902 (Supp. 1958); IND. STAT. ANN. § 40-2703 (Supp. 1959); IOWA CODE ANN. § 736A (1950); KAN. CONST. art. 15 § 12 (1958), cited in 4 LAB. L. REP., Kan. para. 41,025 (1958); MISS. CODE ANN. § 6984.5 (Supp. 1958); NEB. REV. STAT. § 48-217 (1952); NEV. REV. STAT. § 613.250 (1957); N.C. GEN. STAT. § 95-79 (1959); N.D. REV. CODE § 34-0114 (Supp. 1957); S.C. CODE § 40-46 (Supp. 1959); S.D. CODE § 17.1101 (Supp. 1952); TENN. CODE ANN. § 50-208 (1955); TEX. REV. CIV. STAT. art. 5154(g) (Supp. 1959); UTAH CODE ANN. § 34-16-4 (Supp. 1959); VA. CODE ANN. § 40-69 (1953).

34 Baldwin v. Arizona Flame Restaurant, 82 Ariz. 385, 313 P.2d 759 (1957).

35 A "one owner" clause provides that not more than one working owner can perform work within the jurisdiction of the union. All other working owners, if any, must be employed under terms of the working agreement. *Id.* at 766.

36 Meade Elec. Co. v. Hagberg, 159 N.E.2d 408 (Ind. App. 1959).

37 "Indiana, Arizona, Nevada and North Dakota do not have specific provisions against the payment of fees or charges to a labor organization, although the Right to Work statutes specifically outlaw agreements conditioning employment upon membership in a union." *Id* at 413-14.

sidered the question have been discovered, although the attorney generals of several states, anticipating the problem, have gone on record as either approving or condemning the plan.[38]

The Problem

Having considered, therefore, legislative, judicial, and administrative interpretations of the Taft-Hartley Act with regard to the permissible forms of union security, and having surveyed the existing state law on the subject, the status of the agency shop in right-to-work states is still undetermined. In its simplest form, the question is not whether the states have proscribed this kind of agreement, but rather whether they *can*. This legislation, at least where it is applicable to interstate commerce, derives its authority from 14(b). However, as was indicated above, the legislative history of this section bears no evidence that Congress was thinking in terms of anything but *compulsory membership,* the words in fact used by Congress in this authorization. And, as was stated, Congress was aware that an agency shop could be, and had been, implemented as a substitute for compulsory membership in a jurisdiction where the latter was considered undesirable.

If it can be said with accuracy, then, that Congress did not expressly include the power to prohibit support payments within the authorization of 14(b), should, nevertheless, this authorization be inferred?

The question invites contradictory answers. On the one hand, the right to work is indeed a hollow right if it is one that must be paid for, especially where the purpose of the recipient of such a payment may not commend itself to him who is compelled to pay. But the argument as to compulsory representation of all the employees in the unit by the majority representative—to the exclusion of all other agents — would seem to be well settled in favor of the majority representative.[39] On the other hand, the representing union must by law represent all the employees in the unit, regardless of whether or not they are at the same time members of the union, and whether or not they pay their share of the cost.[40] The free rider argument has received both Congressional[41] and judicial support,[42] and there is little indication that the Supreme Court would approve an extension of 14(b) to proscribe a principle that has commended itself to the Court in such terms as

> Thus Congress recognized the validity of the unions' concern about "free riders" . . . and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.[43]

Beyond considerations of purpose, however, is the question alluded to previously—that of federal pre-emption. Since the *Guss*[44] and the *Garmon*[45] decisions, it seems clear that the Court will not sanction state action in labor disputes that affect commerce and are potentially within the jurisdiction of the National Labor Relations Board.[46] Where state action pursuant to a right-to-work statute has been approved by the Court, the disputes involved have been local in nature, and

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38 Approving: Ops. Att'y Gen. (Nev.) No. 184 July 11, 1952. Condemning: Ops. Atty Gen. (N.C.) June 13, 1952.

39 See, *e.g.*, Order of R.R. Telegraphers v. Railway Express Agency, 321 U.S. 342 (1944); J. I. Case Co. v. N.L.R.B., 321 U.S. 332 (1944); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944).

40 *Cf.*, Steele v. Louisville & N. R.R. Co., 323 U.S. 192 (1944).

41 See, *e.g.*, 93 Cong. Rec. 4887 (1947) (remarks of Senator Taft).

42 See, *e.g.*, Pennsylvania R.R. Co. v. Rychlik, 352 U.S. 480 (1957); Railway Employees Dept. v. Hanson, 351 U.S. 225 (1956); Radio Officer's Union v. NLRB, 347 U.S. 17 (1954); Union Starch and Refining Co., 186 F.2d 1008 (7th Cir. 1951), cert. denied 342 U.S. 815 (1951).

43 Radio Officers' Union v. NLRB, 347 U.S. 17, 41 (1954).

44 Guss v. Utah Labor Relations Bd., 353 U.S. 1 (1957).

45 San Diego Bldg. Trades Council v. Garmon, 353 U.S. 26 (1957).

46 Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20 (1957); Local 429,

the question put to the Court one of the abrogation of free speech, the *Algoma* case notwithstanding. In that case, it should be remembered, the state had prescribed *conditions* requisite to the adoption and maintenance of a union security agreement, and not the *form* of the security itself.[47]

Whether or not the amendments to the Taft-Hartley Act contained in the Labor Management Reporting and Disclosure Act[48] will alter this situation remains to be seen. Section 701 of the new Act allows the states to assert jurisdiction over those cases which the Board refuses to hear.[49] It must be emphasized here, though, that Section 701 cannot extend authority which Section 14(b) of the Taft-Hartley Act did not cede, namely, the power to regulate anything more or less than the degree of permissible compulsory union *membership*. And it can be argued that where the purpose of federal labor legislation is to establish and to maintain a uniform national labor policy, the effect of such a delegation of authority to the states could result in as many different policies as there are states, the applicability of such policies being dependent, in areas affecting commerce, solely upon a determination of jurisdiction by the Board. When this consideration reaches the Court, as it appears destined to do, the Court may also be called upon finally to decide the question of whether or not the Board can so limit its jurisdiction where commerce is affected.

Conclusion and submissions

In analyzing the status of the agency shop, one cannot be unaware of a fundamental problem referred to above — of what meaning is a legislatively-protected right to work if that right must be contingent upon a payment to an organization whose activities and expenditures may range far beyond simple representation in the collective bargaining process.[50] This enigma may in some respects be more theoretical than real. The union must still be selected by a majority of the affected employees,[51] and if it does not perform its functions satisfactorily, it can be decertified[52] and removed. And it should be noted that the provision in the Taft-Hartley Act, as originally enacted, requiring three-fourths approval by the affected employees of a union security contract was repealed in 1951 because the vast majority of these referendums had been decided in favor of compulsory unionism.

In summary, then, it is submitted that an analysis of the validity of the agency shop agreement in right-to-work states results in the following conclusions:

1. The policy underlying Section 8(a)(3) of the Taft-Hartley Act, as evidenced both by its legislative history and subsequent interpretations by the courts and

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International Bhd. of Elec. Workers v. Farnsworth & Chambers Co., 353 U.S. 969 (1957); Teamsters Union v. Kerrigan Iron Works, Inc., 353 U.S. 968 (1957); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).

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

48 Labor Management Reporting and Disclosure Act, 73 Stat. 519 (1959).

49 Section 701 amends § 14 of the Taft-Hartley Act to read in the part pertinent here:
> 14(c)(2) "Nothing in this Act shall be deemed to prevent or bar any agency or the courts of any State . . . from assuming and asserting jurisdiction over labor disputes over which the Board declines . . . to assert jurisdiction."

50 See generally 105 CONG. REC. 16416 (daily ed. Sept. 3, 1959). The Supreme Court may soon settle the question of whether or not political expenditures by a labor organization are a legitimate exercise of the rights of a union as a bargaining agent in International Ass'n of Machinists v. Street, *probable jurisdiction noted,* 361 U.S. 807 (Oct. 12, 1959). Earlier opinion by Supreme Court of Georgia *sub nom.* Looper v. Georgia So. & Gla. Ry., 213 Ga. 279, 99 S.E.2d 101 (1957).

51 LABOR MANAGEMENT RELATIONS ACT (Taft-Hartley), 61 Stat. 36 (1947), 29 U.S.C. § 159(2) (1952).

52 LABOR MANAGEMENT RELATIONS ACT (Taft-Hartley), 61 Stat. 136 (1947), 29 U.S.C. § 159(c)(1)(A)(ii) (1952).

by the National Labor Relations Board, was to establish a uniform degree of permissible union security. But employment may not be conditioned upon membership in a labor organization if such membership is denied for any reason other than a failure to tender dues and initiation fees. Thus it is the payment or at least tender of the costs of representation, and not membership per se, upon which employment may be conditioned. It is compulsory unionism, so qualified, that constitutes the Federal policy.

2. There is neither legislative nor judicial authority for extending the language of Section 14(b) beyond its literal meaning. Such an extension would effect not only a contravention of the expressed congressional purpose of establishing a uniform policy for labor relations affecting commerce, but also would be an obvious contradiction of the language and intent of Section 8(a)(3), and of the expressed distinction on the latter section between membership and payment of representation costs.
3. Concerning labor relations not affecting commerce, states may set their own policies, restricted only by the guarantees of the Fourteenth Amendment.
4. Where interstate commerce is affected and the dispute is one within the potential jurisdiction of the NLRB, federal policy must prevail.

Although the effect of Section 701 of the Labor Management Reporting and Disclosure Act is as yet undetermined, it is safe to assume that the states still have no more authority in the matter of regulating collective bargaining agreements affecting commerce than was originally ceded by 14(b)—to determine for themselves the permissible forms of compulsory *union membership* to be tolerated in their own jurisdictions.

Although the purpose of this Note has not been to suggest a policy, but rather to analyze a problem, reference to policy is unavoidable. Both the Wagner and Taft-Hartley Acts reflect a congressional consideration and determination of a policy committed to the principle that collective bargaining, engaged in by parties of at least potentially equal strength, is necessary to a sound economy in our present society. Right-to-work legislation, however, represents a concern with the rights of individuals to choose — without having their employment be contingent upon the choice — whether or not to ally their own interests with those of their fellow employees in an organized society acting as their representative. Whereas compulsion by the will of the majority in this matter of choice is approved and fostered as a means necessary to the achievement of the end desired under one approach, such compulsion is rejected and specifically prohibited by those whose efforts and aspirations are directed toward the implementation of a different policy to realize a different end.

Whether or not the motivation behind the right-to-work movement is a sincere and truly democratic one is immaterial in this context, though, because the conflict between these contradictory policies has already produced an ignominious and anomalous result — the agency shop. A uniform national policy cannot remain if states are allowed to substitute their own judgments in matters deemed to require an identity of treatment. But a right to work is indeed a right in name only if it must be purchased from the organization against whose domination that right was intended to be freely exercised.

And thus, it is submitted, the agency shop is an enigma that ought not be permitted to endure. The question to be determined is not so much one of the particular means employed, however, as it is of the end to be achieved. Since federal pre-emption is too well settled to contest in those matters deemed by Congress to be of national concern and requiring national regulation, the policy must rest with Congress. There must be either a reaffirmation of the purposes of existent federal legislation, or a recognition at the national level that the changed conditions of labor and management and the needs of the individual employee demand a different national commitment.

To resolve the validity of the agency shop is, in reality, to choose between these conflicting principles of labor-management relations. Such a choice is most properly that of Congress, rather than of the courts or state legislatures. The enigma would seem destined to remain, however, until Congress makes that choice.

J. Michael Guenther