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# The Right to Work Imbroglio: Another View

Leslie W. Bailey Jr.

Dan C. Heldman

# "THE RIGHT TO WORK IMBROGLIO": ANOTHER VIEW

LESLIE W. BAILEY, JR.*

DAN C. HELDMAN**

In an article, "The Right-to-Work Imbroglio", which appeared in the *North Dakota Law Review*,[1] Professor James R. Eissinger states some opinions concerning the current value to workers of right to work laws. In the course of his article, Professor Eissinger asks the following questions:

> What continuing validity does the right-to-work issue have against the background of a constantly evolving federal labor legislation? More precisely, what rights accrue to a working person by passage of a right-to-work law in addition to those rights already assured by federal legislation? How does a right-to-work law affect the overall scheme of federal labor legislation?[2]

Professor Eissinger concludes that, although state right to work laws may have been beneficial to the American worker in the formative stages of United States labor policy, fostered by the National Labor Relations Act, such laws are no longer useful "[a]s an adjunct to the federal scheme of labor regulation . . . [and they now add] very little of value to the panoply of protections accorded the individual worker."[3] The authors of this article disagree with that conclusion and with much of the reasoning employed by Professor Eissinger.

The first section of this article will comment on and explain disagreements with certain of Professor Eissinger's statements and

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* Staff Attorney, National Right to Work Legal Defense Foundation; Member of the Virginia Bar; B.A., 1965, University of North Carolina; J.D., 1973, Marshall-Wythe School of Law, College of William and Mary.

** Studies Coordinator, National Right to Work Legal Defense Foundation; Assistant Professor of Political Science and Chairman of Comparative Studies Degree Program, Texas Christian University; B.A., 1965, Southern Illinois University; M.A., 1966, Southern Illinois University.

1. Eissinger, *The Right-to-Work Imbroglio*, 51 N.D. L. REV. 571 (1975).
2. *Id.* at 572.
3. *Id.* at 594. Neither Professor Eissinger's article nor this article deals with the question of compulsory unionism for public employees. For a comprehensive and scholarly treatment of that subject, *see* Petro, *Sovereignty and Compulsory Public-Sector Bargaining*, 10 WAKE FOREST L. REV. 25 (1974).

assertions in the order in which they appear in his article. The second and concluding section of this article will be devoted to a discussion of why state right to work laws are valuable and necessary to the implementation and protection of the right to work.

## I. CRITIQUE OF PROFESSOR EISSINGER'S ARTICLE

Professor Eissinger states that "political controversy has beset the [right to work] movement since 1944 . . .",[4] as if to imply there is somehow something undesirable about such controversy. The Constitution, however, shows the imprint of quite a contrary conviction held by the Founding Fathers.[5] This tolerance for dissent was deemed essential by them for the government to remain effective, yet responsive to the popular will.

Eissinger erroneously declares that this "controversy peaked as a national issue in the decade of the fifties. . . ."[6] He chose to ignore the grassroots political protest that erupted nationwide in opposition to the major effort in 1965[7] to repeal section 14(b) of the National Labor Relations Act, more commonly known as the Taft-Hartley Act.[8]

### A. EXPLODING SOME MYTHS ABOUT EXCLUSIVE REPRESENTATION AND COLLECTIVE BARGAINING

Professor Eissinger justifies certification of a union as exclusive representative by pointing out that "[i]f a majority of employees at the place of work do not see this advantage [of exclusive representation], there is no organization and hence no exclusive bargaining representative."[9] That statement, however, is not accurate. Much less than a majority of the employees at a given place of work may elect an exclusive representative, since the National Labor Relations Board has ruled that winning a representation election requires only a majority of the number of persons actually voting, and not a majority of the employees who are eligible to vote in the election.[10]

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4. Eissinger, *supra* note 1, at 571.
5. U.S. CONST. amend. I provides:
   Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
6. Eissinger, *supra* note 1, at 571.
7. *See* L. EDWARDS, YOU CAN MAKE THE DIFFERENCE 75-92 (1968); Dirksen, *Individual Freedom Versus Compulsory Unionism: A Constitutional Problem*, 15 DEPAUL L. REV. 259, 262 (1966). More recently, in 1976, retention of the Arkansas constitutional provision on right to work was a hotly contested referendum item.
8. National Labor Relations Act § 14(b), 29 U.S.C. § 164(b) (1970) [hereinafter cited as NLRA].
9. Eissinger, *supra* note 1, at 583.
10. NLRB v. Whittier Mills Co., 111 F.2d 474, 477-78 (5th Cir. 1940); North Electric Co., 165 N.L.R.B. 942, 942-43 (1967); East Ohio Gas Co., 140 N.L.R.B. 1269, 1270 (1963); RCA Mfg. Co., 2 N.L.R.B. 159, 173-79 (1936).

It is true, as Professor Eissinger points out,[11] that if a certified bargaining representative does not effectively do its job, it can be decertified.[12] But, that option may be little consolation to workers who are dissatisfied with the performance of the "bargaining representative", since that option cannot ordinarily be exercised within the one year period following a valid representation election,[13] nor during the life of a collective bargaining contract.[14] Moreover, dissatisfied workers often lack the institutional and financial resources possessed by an incumbent certified bargaining representative in waging a decertification campaign.

While it is true that workers in a given bargaining unit may revoke a union's authorization to execute collective bargaining contracts with union security provisions, such de-authorization requires the vote of at least a majority of the employees eligible to vote in such election, not just a majority of those actually voting.[15] Furthermore, a de-authorization petition may not be filed more than once per year.[16]

The following argument employed by opponents of right to work urges that it is fair to compel financial support of an exclusive bargaining representative by employees who did not vote for it in a representation election:

> It is only logical that employees benefiting as a result of the bargaining agent's work should pay a pro rata share of the costs. To allow some employees to escape their financial obligation (be "free riders") by making membership voluntary necessarily increases the financial burden of other employees. Allowing "free riders" would be basically unfair.[17]

A major defect in that argument is its assumption that employees substantially benefit from the exclusive bargaining representative's work.

Whether an individual employee has reaped a net benefit from efforts supposedly made on his behalf is a question that cannot be answered without a careful examination of a complex array of factors, both subjective and objective. *And, it would seem that each employee would be the best judge of whether he is personally benefited.*[18]

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11. Eissinger, *supra* note 1, at 584.
12. Decertification is authorized by NLRA § 9, 29 U.S.C. § 159 (1970).
13. *Id.* § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).
14. *See* C. MORRIS, G. BODLE, & J. SIEGEL, THE DEVELOPING LABOR LAW 167-80 (1971).
15. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).
16. *Id.* § 9(e)(2) 29 U.S.C. § 159(e)(2) (1970). *See, e.g.*, Monsanto Chemical Co., 147 N.L.R.B. 49 (1964).
17. Eissinger, *supra* note 1, at 584.
18. *See generally* E. CHAMBERLIN, P. BRADLEY, G. REILLY & R. POUND, LABOR UNIONS AND PUBLIC POLICY, 47-91 (1958).

Whether the employee has reaped a net benefit would necessitate deciding in what order of priority a given employee would place such interests as wage level, fringe benefits, working conditions, job security, working hours, personal contact and relations with an employer, opportunity for advancement, personal interest in and commitment to quality and quantity in production, sense of personal worth, and desire to avoid entangling associational commitments.

Granting officials of a single union the power to decide for all the workers in a bargaining unit what interests will be promoted seems to deny that adult human beings are capable of making basic choices which determine not only their individual economic well-being, but also the personal fulfillment derived from their jobs.

Why should employees be compelled to pay a *pro rata* share of the costs of so-called benefits and services, which they may not want or feel really benefit them, to a union they have not chosen or may even have actively opposed? Furthermore, the assumption that the employees in a collective bargaining unit enjoy even a net economic benefit as a result of collective bargaining ignores the wage losses and other tangible and intangible suffering which accompany long strikes.[19]

### B. EXPENDITURES BY EXCLUSIVE REPRESENTATIVES OF COMPELLED DUES: A PRIOR RESTRAINT ON FIRST AMENDMENT FREEDOM?

The first amendment[20] guarantees freedom from state interference with the individual's right to think, speak, and write only his own convictions concerning politics, religion, philosophy, economics, or any other subject. It also guarantees that each individual may support any lawful cause, political or otherwise, which he chooses and that he may communicate his grievances to his government. But, his right to refrain from these activities and withhold his support, whether financial or otherwise, is equally guaranteed by the first amendment.[21]

Since the National Labor Relations Act now clothes unions certified as exclusive bargaining representatives with power to contract for compulsory dues and fees,[22] the forced collection of dues and fees from non-union workers pursuant to union security established with

19. *See* S. PETRO, THE KINGSPORT STRIKE (1967). To illustrate the financial loss caused the individual worker by a strike, consider this example. Joe Doaks works in a factory, putting in a 40-hour week. His union strikes in support of its demand that Joe's wages be increased just 6% from $5.00 to $5.30 per hour. Even if this strike lasts only 6 weeks, Joe will lose $1,200.00 in wages while manning the picket line. It will be 100 weeks, just shy of 2 years, before Joe can break even, i.e., recoup the $1,200.00 wages lost during the strike, and begin enjoying his $.30 per hour pay increase. Such wage losses are only partially and temporarily offset by strike benefits.

20. U.S. CONST. amend. 1, set forth at note 5 *supra*.

21. Good v. Associated Students of Univ. of Wash., 86 Wash. 2d 94, 542 P.2d 762 (1975). *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

22. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

the aid of that power is a form of quasi-taxation. If union exclusive "bargaining representatives" collect more money from non-members than such non-members' *pro rata* share of the costs of negotiating and administering collective bargaining agreements, these "representatives" are exceeding their statutory authority.

Furthermore, if such excess funds are spent in support of political candidates, for lobbying, in support of political or social causes, or indeed for any non-bargaining purposes, it can be argued that such expenditures constitute a prior restraint on the exercise of first amendment freedom by those from whom the funds are extracted under color of contractual authority. This restraint occurs because non-collective bargaining expenditures of compelled dues and fees effectively force their true owners to support with these funds causes, ideas, and persons which they have not chosen to support. Unwilling donors may thereby face the sad spectacle of seeing their votes cancelled by dollars forcibly extracted and spent in support of candidates and issues which they oppose.

Professor Eissinger[23] cites the Supreme Court's decision in *International Association of Machinists v. Street*[24] as adequate protection for the first amendment freedom of political expression. In that case the Court held that monies which employees are compelled to pay to an exclusive bargaining representative may not be spent over their objections for political purposes.[25]

Eissinger questions where the line is to be drawn between union activity acceptable for expenditure of compulsory agency fees, such as costs of collective bargaining and grievance processing, and activity which is not.[26] The question might be asked why a worker should even have to object in order to have the law protect his right to refrain from subsidizing someone else's political activism. No line would have to be drawn if unions were forbidden to exact compulsory fees from non-supporters.

Why should a private association have its salesmanship aided by the force of federal law? Why not require unions to earn the support of their adherents just as other private associations and enterprises are required by law to do?

Exempting "majority" unions from having to continue to earn employee support by services rendered gives them a monopoly power of compulsion in the workshop and reduces the incentive to increase efficiency, effectiveness, or level of service. Such exemption gives union officials power unequalled by that possessed by anyone, except sovereign governments. This power and accompanying role of ex-

23. Eissinger, *supra* note 1, at 589-91.
24. 367 U.S. 740 (1961).
25. *Id.* at 768-69.
26. Eissinger, *supra* note 1, at 590.

clusive representative is not likely to be used with equal regard for the interests of all employees.[27]

Eissinger concludes that the question of which union expenditures of compulsory fees are appropriate and which are inappropriate should be decided on a case-by-case basis, placing the burden of proof on the individual workers to show after objections that particular expenditures were inappropriate.[28] He argues that, by deciding where to draw the line according to the circumstances of the individual case, this procedure "would allow some protection for the individual, contingent upon his objection, and yet would permit the union to carry out its objectives within the law."[29] Why shouldn't the law be primarily concerned with the interests of the individual worker, instead of lavishing so much attention upon the interests of unions and their bosses?

Professor Eissinger indicates he believes it would be fair to hold expenditure of compulsory dues for campaign contributions to political candidates illegal and expenditure of such money for legislation benefiting all members of the collective bargaining unit legal.[30] Who is to decide what legislation benefits the individual employee? A union official? An executive board? The employee himself? An argument that legally permissible expenditures of compelled dues and fees should include expenditures for universally beneficial legislation ignores the real problem of how and by whom the lobbying policy is to be determined: what types of legislation, if indeed any, are universally beneficial?

Is it just or wise to deprive non-union members of the right to determine for themselves what legislation would be in their own best interest as workers? Who is better qualified than the individual employee to make such a determination? If one argues that people should not be entitled to determine for themselves what legislation best benefits their interests on the job, could not one also argue that

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27. "[T]he union is not neutral, but is controlled by one employee group or another from among the conflicting interests." Schatski, *Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity be Abolished?* 123 U. PA. L. REV. 897, 902 (1975). Schatski also states:

> The almost universal fact that the union was opposed by a minority of the employees who now must look to that organization for representation in their individual grievance proceedings compels one to come face to face with a real novelty in our law, to which reference has already been made: An individual is forced to use a representative not of his or her own choosing to settle an individual grievance or complaint. Indeed, the representative may be antagonistic to the employee, either personally or ideologically. Nevertheless, the law tells us that these individuals must be represented by such unsympathetic institutions.

*Id.* at 904. In light of these sobering realities, Eissinger's concern with the criteria to govern proper expenditures of compelled dues is misdirected. He should instead be concerned about the injustice of forced payment to an unchosen and unsympathetic master.

28. Eissinger, *supra* note 1, at 590-91.

29. *Id.* at 591.

30. *Id.*

people should have no vote, because they are not competent to decide what governmental policies are in their best interest?

Consider also the argument that a person's right to vote is fatally eroded if he can be required to support financially a union lobby or campaign contribution which effectively cancels the intent of his vote. For example, the power of my vote for candidate X is diluted if a union forced upon me is contributing my money to candidate Y.[31]

### C. "FREE RIDER", "FAIR SHARE": MYTHS AND GOBLINS?

It is occasionally conceded that individual workers do get some benefit from right to work legislation. But, it is often argued that this legislation confers its benefit at the expense of those workers who choose to organize. Eissinger believes that this expense is the greater *pro rata* share of collective bargaining costs that must be borne by union members than their *pro rata* share of such costs if everyone in the bargaining unit were forced to contribute to pay such expenses.[32]

This argument, however, assumes too much. It assumes that all persons who enjoy any incidental spin-off benefits from the private associational activities of others have a moral responsibility to contribute to paying the costs of those activities. It matters not that the supposed gratuitous beneficiaries have not sought the alleged benefits, that the alleged benefits, if any, may have no ascertainable money value, and that, with respect to certain alleged beneficiaries or in certain situations, such as prolonged strikes, there are in fact no net benefits at all.

Suppose the impact of the exclusive representative's activities is a net detriment to total worker welfare? In that event should all employees receive a *pro rata* reimbursement for losses occasioned them by the violence and economic dislocation of prolonged strikes?

Persons who cry "free rider" assume the continued existence of the "fair representation" doctrine.[33] If that doctrine became defunct and unions were required to represent and process grievances *only for their members,* then the share of costs assessed to each

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31. *See* Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970). The court stated:
> The diversion of the employees' money from use for the purposes for which it was exacted damages them doubly. Its utilization to support candidates and causes the plaintiffs oppose renders them captive to the ideas, associations, and causes espoused by others. At the same time it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

*Id.* at 1004.

32. Eissinger, *supra* note 1, at 593.

33. NLRA § 9, 29 U.S.C. 159 (1970) imposed upon the exclusive bargaining agent the duty of granting representation to all the employees of the unit. The duty of fair representation itself is a judicially created doctrine. *See* Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

member would be a true *pro ration* of the union's costs of doing business in behalf of its voluntary members.

If every private association which claimed to confer gratuitous benefits upon others were deemed to have the authority to tax all persons arguably benefited, whether they have sought the benefits or not, surely individual freedom would vanish.

It is inevitable in a free society, indeed a part of its price, that some uncompensated spin-off benefits will accrue to society at large, or even to identifiable portions thereof, as a result of many efforts exerted by private individuals or groups in the productive exercise of their freedoms of enterprise and association.[34]

### D. EXPOSING FALLACIES IN THE "LABOR PEACE" ARGUMENT

Eissinger argues that right to work laws are an indirect threat to the achievement of our national policy goal of industrial peace.[35] Apparently, this argument is based on the assumption that voluntary union members working in an open shop will so resent others exercising their freedom not to join the union that the workshop atmosphere will be permeated by tension, irritation and resentment.

It is implied that such a workshop atmosphere is a breeding ground for labor strife. However, it can also be argued that tense atmospheres are caused largely by those persons who want to force upon others their value judgments concerning pay, working conditions, and other job related interests.

An attempt is made to minimize the burdens of compulsory unionism by asserting that, if a dissenting worker is required by law to pay his so-called "fair share" of the expenses, "his fellow workers do not care whether he is a member or not."[36] That statement, however, just does not square with reality.[37]

Agency fee payers are not lawfully subject to strike discipline, and union partisans are almost invariably threatened by the specters of the diluted bargaining power and strike discipline, which they feel will be caused by the exercise by non-member agency fee payers of their right to continue working during a strike. Union partisans,

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34. Churches, civic clubs, Red Cross, United Givers Fund, YM & WCA, etc. are examples of other private associations that confer benefits on those from whom they have no right to reimbursement.

35. Eissinger, *supra* note 1, at 593.

36. *Id.*

37. Union activists care deeply when a fellow union member resigns and attempts to return to work during a strike. This deep concern is shown by such resentful retaliation as scab signs and harassment on the picket line, and by attempts to subject "defectors" to such "union discipline" as trials, fines, or discharges. *See* NLRB v. Granite State Joint Bd., 409 U.S. 213 (1972); Allis-Chalmers Mfg. Co. v. NLRB, 388 U.S. 175 (1967); Local Lodge No. 1994, Int'l Ass'n of Machinists, 215 N.L.R.B. 110 (1974).

who have felt their collective power wielded through a strike was being diluted by persons working during a strike, have therefore resorted to obstructive and violent picket lines as an instrument of coercion.[38]

Eissinger concludes his article with several speculative statements. The two most significant of these statements are: "[T]he right-to-work law adds very little of value to the panoply of protections accorded the individual worker [by federal law]";[39] and (2) "[T]he right-to-work movement has made contributions to the development of American labor law, but its period of usefulness has been spent. Section 14(b) which gave the movement life at the state level has also served its purpose."[40]

The remainder of this article will be devoted to an exposition of the indispensable contributions of right to work laws to the freedom of the American worker.

## II. CONTINUING VALUE AND NECESSITY OF STATE RIGHT TO WORK LAWS.

### A. RIGHT TO WORK: A DEFINITION

Before discussing the continuing value of state right to work laws, it would be useful to sketch a profile of the right to work itself. Professor Eissinger states that the term "right to work" is a "misnomer".[41] He elaborates this argument by saying that, "These laws do not and were never intended to guarantee a right to work or a right to a job."[42]

"Misnomer" is defined as "a use of a wrong name" or "a wrong name or designation."[43] Therefore, unless the term right to work is used in a context suggesting that it means a job guarantee or something else other than its dictionary meaning, it is incorrect to say that the term right to work is a misnomer. If it is used only to refer to the right to be employed without joining, paying or supporting a union, then such use is not a misnomer.

The term also refers to the right to not have one's employment terminated for failure to join or support a union. Right to work thus has a clear, concise meaning *within its own terms*, remembering also that it is a "slogan" with the same ellipsis problems as any other slogan—"New Frontier", "Remember the Alamo", etc. and that no slogan is meant to be taken absolutely literally.

The "right to work" is no more a misnomer than the "right of

38. *See* J. CAMPAIGNE, CHECK-OFF: LABOR BOSSES AND WORKING MEN 29-35 (1961).
39. Eissinger, *supra* note 1, at 594.
40. *Id.* at 594-95.
41. *Id.* at 573.
42. *Id.*
43. WEBSTER'S NEW COLLEGIATE DICTIONARY 735 (1974).

free speech." The latter right does not guarantee an audience, and in the same way, the right to work does not guarantee a job.

Therefore, the term is not a misnomer when used to refer to state statutes prohibiting union security arrangements. "Right-to-work laws" have been defined as "any of various state laws banning the closed shop and the union shop."[44]

The right to work principle has been properly understood and stated by the late Senate Minority Leader, Everett McKinley Dirksen.[45] Senator Dirksen defined right to work as follows:

> The right to work is not a guarantee of employment by a paternalistic system controlling all means of production. It only signifies the inherent right of every man to an opportunity to seek and retain the gainful employment which he deserves. This is all that state Right to Work laws ever were intended to preserve for the individual.
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> . . . .
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> It is, of course, evident that compulsory unionism [whose various forms purport to condition exercise of the Right to Work upon some form of support to a certified union] is an abnormal departure among private associations. No other organizations, not even churches, have the right to conscript members. So, the public asks, why should unions? If a man can be compelled to join a union or contribute to its financial suppport, what other private organization may conscript members, or in effect levy taxes on the privileges of citizenship?[46]

### B. THE PRACTICAL VALUE OF RIGHT TO WORK LAWS

Of what practical value are such right to work laws to the individual worker in protecting his right to work and earn his livelihood? This question may be answered by describing how a right to work law substantively protects an employee's freedom to choose concerning the terms and conditions of his employment. Such protection is not effectively provided by federal law. The answer will be completed by describing how state right to work laws rectify certain inequities in the procedures and remedies provided by the National Labor Relations Act.[47]

#### 1. *Substantive Protection.*

Pursuant to section 8(a)(3) of the National Labor Relations Act,[48] an employer may agree with a labor organization, certified as

44. *Id.* at 998.
45. Dirksen, *supra* note 6, at 263.
46. *Id.* at 264.
47. NLRA § 10, 29 U.S.C. § 160 (1970).
48. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970).

the bargaining representative of the employer's employees, to require as a condition of employment, that employees join the labor organization on or after the thirtieth day following the beginning of such employment or on the effective date of the collective bargaining agreement, whichever is later.[49] Even though federal courts have ruled that a collective agreement under this provision of the National Labor Relations Act can require nothing more than financial support of a union,[50] such compelled support is a substantial imposition on worker freedom, and is effectively blocked by state right to work laws.

The protection given the individual worker from having to pay financial tribute to a private association for the exercise of his right to earn a living is indeed a valuable and distinctive feature of state right to work laws.

In states without right to work laws labor organizations may subject workers to a burdensome exaction of monthly dues and initiation fees for supposed benefits, which are often non-existent, unsought, and undesired. Agency fees or dues, and especially initiation fees, can heavily burden such part-time workers as college students who are trying to supplement an inadequate income in order to earn their way through school. Unless he has specifically and individually contracted to do so, as in the case of a placement service, no person should have to pay a private association in order to enjoy the fruits of his labor. In those right to work states where laws prohibit the agency shop, this situation cannot occur.

State right to work laws provide valuable protection to laymen who, unlearned in the niceties of labor law, are easy prey to union organizers. These union organizers often deceive the worker by claiming or implying in overly aggressive recruiting tactics that a union security clause requires formal union membership to avoid discharge.

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49. This requirement may be imposed only:
(i) if such labor organization is the representative of the employees as provided in section 159(a) of this title . . . and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement. . . .

*Id.* It has been held, however, that a labor organization may not require the discharge of an employee, who has refused to obey a collective bargaining contractual provision requiring him to join the union within 30 days, as long as such employee continues to pay the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership. *See, e.g.*, Union Starch & Refining Co., 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951). This sole type of membership required as a condition of employment has been described by the United States Supreme Court as "financial core" membership. NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963).

The National Labor Relations Act does not cover farm workers or public employees. NLRA §§ 2(2), (3), 29 U.S.C. §§ 152(2), (3) (1970).

50. *See* cases cited in note 49 *supra*. *See* Haggard, *A Clarification of the Types of Union Security Agreements Affirmatively Permitted by Federal Statutes*, 5 RUT.-CAM. L.J. 418 (1974).

Professor George Schatski has well described the susceptibility of the lay worker to being misled to believe that a union security clause requires him to join the union if he wants to keep his job:

> It is true that sophisticated lawyers know that employees do not have to become real members in order to retain their jobs in shops which have union security clauses: all the employees need do is tender dues and fees uniformly required of all union members. However, the statute does not read quite so clearly, and it would not be surprising for employees, most of whom have never read the law, to believe that they must join the union in order to keep their jobs. Moreover, many employees are going to feel intimidated into joining the union in order to avoid having the union prejudiced against them when it comes to questions of their work status.[51]

Where a worker is protected by a comprehensive right to work law, he can rest assured that to keep his job he need pay no homage to a union, either by joining or by suffering a raid on his wallet. In such an atmosphere of workshop freedom, his lay ignorance of the fine distinctions between various union security arrangements has no coercive consequences on the free exercise of his right to work.

One of the greatest benefits to the individual worker of right to work laws is that they provide much more protection for his right of free association than is provided by federal law.[52] In *Railway Employees Dep't v. Hanson*,[53] the Supreme Court held that it is within the power of Congress under the commerce clause to authorize collective bargaining contracts between employers and labor organizations which establish a union shop.[54]

*International Association of Machinists v. Street*[55] provided very little protection for the worker's first amendment associational right not to have his compelled union dues or fees spent for ideological or political causes with which he does not agree. In *Street*, the Court held that Congress, in enacting the Railway Labor Act,[56] intended to authorize union shops, but did not intend that unions, pursuant to union shops authorized by that Act, have the power to use funds generated by compulsory dues or fees to support political causes opposed by employees over their objections.[57]

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51. Schatski, *supra* note 27, at 914.
52. This right is guaranteed to him by the first amendment. *See* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958).
53. 351 U.S. 225 (1956).
54. *Id.* at 238. The Court reasoned that this authorization promulgated in the Railway Labor Act, 45 U.S.C. § 152 (1970), does not violate the first or fifth amendments, because as a practical matter under such a union shop provision, employees are required only to pay dues and initiation fees in order to keep their jobs. *Id.* at 238.
55. 367 U.S. 740 (1961).
56. 45 U.S.C. §§ 151-162 (1970).
57. 367 U.S. 740, 768-69 (1961).

The *Street* decision offers little encouragement to the individual worker who wishes to avoid having his forced payments spent by the union in any way it sees fit for political and ideological causes with which he is not in sympathy. *Street* places the burden upon an employee to object to union expenditures, and to show that they are impermissible.[58] Even if a worker successfully makes this showing, he must still go through the time-consuming and tortuous process of getting the union to give him a rebate and proportionately reduce his monthly dues.[59]

A right to work law, which forbids any compelled payments to a union as a condition of getting or keeping a job, would appear effectively to protect the individual worker from being taxed by private associations who are prone to engage in massive political activities with the aid of his involuntary subsidy.[60]

### 2. *Procedural Protection.*

Right to work laws not only provide invaluable substantive protection to the right to work, they also provide more reliable and effective sanctions against union infringement of this right than is provided by the unfair labor practice procedure promulgated by section 10 of the National Labor Relations Act,[61] and by the procedure provided by that Act for filing a de-authorization petition.[62]

Since right to work laws prohibit the union and employer from conditioning employment on compulsory support of a union, the individual worker need not be concerned whether he can muster the vote of a majority of all eligible employees in his bargaining unit. His freedom of association is guaranteed by state constitutional provision or statute. Union compulsion is better forbidden by law than battled in the workshop with the dice loaded against the individual worker after union security is entrenched.

Perhaps the greatest advantage of a state right to work law over the National Labor Relations Act is that a worker in a right to work state may be fairly certain of redressing the harm done to him by a violation of a right to work law, since he may usually file a lawsuit and collect damages for injury done him by the violation.[63] A worker whose rights are injured by conduct that is arguably an unfair labor

58. *Id.* at 774.
59. Brotherhood of Ry. Clerks v. Allen, 373 U.S. 113, 122 (1963).
60. Dirksen, *supra* note 7, at 266-67.
61. NLRA § 10, 29 U.S.C. § 160 (1970).
62. *Id.* § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970); *id.* § 9(e)(1), 29 U.S.C. 159(e)(1) (1970). As previously noted, employees may rescind the authority of labor organizations to contract for union security provisions by winning de-authorization elections. NLRA § 8(a)(3)(ii), 29 U.S.C. § 158(a)(3)(ii) (1970).
63. *E.g.*, ALA. CODE tit. 26 § 375(6) (1958); S.C. CODE ANN. § 40-46.8 (1962); UTAH CODE ANN. § 34-34-13 (1974); VA. CODE ANN. § 40.1-63 (1970).

practice, pursuant to section 8 of the National Labor Relations Act,[64] has no assurance that his grievance will be redressed.

It has been held that the General Counsel for the National Labor Relations Board has non-reviewable discretion to issue or to refuse to issue a complaint,[65] based upon charges filed by a worker who feels he has been wronged. The charging party, therefore, is at the mercy of the General Counsel on whether he will ever have a hearing on his claim that his rights have been violated by an unfair labor practice.

The General Counsel may decline to issue a complaint for any reason, budgetary, political, or otherwise, or for no reason at all.[66] It seems settled that the charging party has no right to judicial review of such a decision, for courts have generally ruled that he does not.[67] A worker seeking redress for a violation of a right to work law need not rely on the conscience of a single man for justice. Under right to work statutes, and the common law, an injured party generally enjoys the protection of appellate review,[68] should a trial judge arbitrarily dismiss a meritorious suit for violation of his right to work, or commit other prejudicial error.

Right to work laws presently exist in at least twenty states,[69] and they are ably serving the individual worker as a bulwark against invasion of his right to earn a living by self-serving private associations who seem to have little concern for the impact of that ambition on the individual working American.

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64. NLRA § 8, 29 U.S.C. § 158 (1970).

65. Hourihan v. NLRB, 201 F.2d 187 (D.C. Cir. 1972). *See* Vaca v. Sipes, 386 U.S. 171 (1967).

66. NLRA § 3(d), 29 U.S.C. § 153(d) (1970); Wellington Mill Div. West Point Mfg. Co. v. NLRB, 330 F.2d 579 (4th Cir. 1964), *cert. denied*, 379 U.S. 882 (1964). *See* cases cited in Saez v. Goslee, 463 F.2d 214, 214-15 (1st Cir. 1972).

67. *E.g.*, United Elec. Contractors Ass'n v. Ordman, 366 F.2d 776 (2d Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967); Sokolowski v. Swift & Co., 286 F. Supp. 775 (D. Minn. 1968).

68. *Cf.* Ludwig v. Armour & Co., ——Iowa——, 159 N.W.2d 646 (1968); Sand v. Queen City Packing Co., 108 N.W.2d 448 (N.D. 1961); Machinists Local 924 v. Goff-McNair Motor Co., 223 Ark. 30, 264 S.W.2d 48 (1954).

69. ALA. CODE tit. 26 § 375 (1968); ARIZ. CONST. art. 25; ARIZ. REV. STAT. §§ 23-1301 to 1307 (1971); ARK. CONST. amend. 34; ARK. STAT. ANN. §§ 81-210 to 217 (1976); FLA. CONST. art. 1, § 6; GA. CODE ANN. §§ 54-901 to 908 (1974); IOWA CODE ANN. §§ 736A.1 to A.8 (Supp. 1976); KAN. CONST. art. 15, § 12; LA. REV. STAT. §§ 981-987 (Supp. 1977); MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 71-1-47 (1973); NEB. CONST. art. 15, §§ 13-15; NEB. REV. STAT. §§ 48-217 to 219 (1974); NEV. REV. STAT. §§ 613.230 to .300 (1974); N.C. GEN. STAT. §§ 95-78 to 83 (1975); N.D. CONST. art. 1, § 23; N.D. CENT. CODE § 34-01-14 (1972); S.C. CODE ANN. §§ 40-46 to 46.8 (1962); S.D. CONST. art. 6, § 2; TENN. CODE ANN. §§ 50-208 to 212 (1966); TEX. REV. CIV. STAT. ANN. arts. 5154g, 5207a (Vernon 1971); UTAH CODE ANN. §§ 34-34-1 to 16 (1974); VA. CODE ANN. §§ 40.1-58 to 69 (1976); WYO. STAT. ANN. §§ 27-245.1 to 245.8 (1967).