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One of the most controversial issues that has followed in the wake of organized labor's phenomenal rise to a position of eminence during and since the war has centered around the much debated right to work legislation. Although the American worker has probably felt that he was heir to the right to pursue the occupation of his choice since the yoke of English colonialism was first discarded, there has been no positive manifestation of the right in legislation and court decisions until the last decade. Until then it was merely a privilege that nebulously but omnipresently enveloped a people who, though suspicious of fetters, are often too smug in their freedom. The industrial revolution and collective security notwithstanding, a few were still confident that the right was theirs when the gasping phantom that once was King Industry and his strange new bedfellow, the individualistic toiler, sought to rouse it from its slumber to rescue the embattled bastions of free enterprise from the new ogre of the Sunday editorial pages, organized labor.

Congress turned a deaf ear to the rumbling from without, but the halls of sundry state assemblies, which echoed the croaking when it became a local clamor, rushed to the rescue in the name of the public health, wealth, and welfare.

The result to date of the inevitable backswing of the pendulum is that thirteen states have constitutional amendments or legislation passed with the purpose of curtailing union security. Florida passed a constitutional amendment guaranteeing the right to work in 1944. Since then Arizona, Arkansas, Nebraska, and South Dakota have followed suit. Legislation accomplishing approximately the same result has been passed in Georgia, Iowa, Nevada, North Carolina, North Dakota, Tennessee, Texas, and Virginia.

Although all of the states' laws are not identical in detail, the one major provision that no person shall be denied employment because of non-membership in a labor union or organization may be found in all of the legislation.

Some of the acts define the meaning of a labor union or organization. Most of them specifically outlaw provisions in contracts entered into by employers and unions that make union membership compulsory.

A violation of the act is made a misdemeanor punishable by fine and imprisonment by most of the laws. Enforcement by injunction is afforded in four states [1] and an action for damages is given to any person who is refused employment because of non-membership in a union in three states.[2]

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[1] Arizona, Georgia, Iowa and South Dakota.

[2] Arizona, North Carolina and Virginia.

According to a recent survey by the Missouri State Chamber of Commerce,[3] the right-to-work laws of the thirteen states have not proven uniformly practicable in actual application. Based on the opinions of the labor commissioners of the various states, it would appear that the acceptance of the laws so far as evidenced by public opinion and court litigation runs the gamut from wholehearted support to grudging, temporary acquiescence. It is undoubtedly too early in the respective and collective history of the acts to gauge their effectiveness and feasibility. In some states the legislation has had the expected opposition from labor, and in others the attitude on the part of both labor and management seems to be one of cautious acceptance. No information on the decrease of union shop clauses in contracts involving purely intrastate industries in the thirteen states is available at this time.

The United States Supreme Court upheld the right-to-work laws of Nebraska and North Carolina on just about every count upon which they might be challenged in 1949.[4] Justice Black spoke for the court in an opinion in which it was held that they do not abridge freedom of speech, the right to assembly does not include the right to drive others from employment, they do not unconstitutionally impair obligations of contract, they do not deny equal protection under the law to unions as against employers and non-union workers, they do not deny liberty without due process of law and they are not without the domain of legitimate state powers if not in opposition to federal law. Justice Frankfurter stated that it should be up to the voters of the individual states to have the final decision in such legislation. The desirability of such restrictions on union security was not passed on by the court because it felt that such was a political question.

The Taft-Hartley Act does not exclusively occupy the field in its entirety. It does outlaw the closed shop while permitting the union shop.[5] The Act further provides:[6]

> 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 territory in which such execution is prohibited by State or Territorial law.

In light of the pertinent provisions in the Taft-Hartley Act and the decisions by the United States Supreme Court in 1949, it appears that any argument pro or con that is directed to the advisability of such legislation must be confined to the field of desirable political action.

Experts (both legitimate and otherwise) have waxed hot and eloquent in debates over the rejuvenated corpse of the individual

[3] See "State Protection of the Right to Work," W. R. Brown, *Labor Law Journal*, Jan. 1953, p. 32.

[4] Lincoln Federal Labor Union No. 19129 v. Northwestern Iron and Metal Co., 385 U. S. 525; Algona Plywood and Veneer Co. v. W. E. R. B., 336 U. S. 301.

[5] Sec. 8(a)(3), Labor Management Relations Act, 1947, as amended in 1951.

[6] Sec. 14(b), Labor Management Relations Act, 1947.

working man in their zealous attempt to espouse or disclaim his right to work. Some have likened compulsory union membership to the yellow dog contract.[7] One of the oracles has prophesied that the inevitable result of union shop contracts will be a totalitarian state.[8] The issue has been defined as one in which "America is at the crossroads, (because) to freedom-loving people it means the closed shop and compulsory unionism." [9]

It has been said that the unions are attempting to establish an extra-constitutional pseudo-political status in their fight for the union shop. This is apparently based on an analogy between their attempt to exact dues and the power to tax, which has always been reserved to the state. It has also been said that the claim that this right is necessary to give strength and stability to the union is merely to plead expediency and to confess the failure of the union to win democratic support.[10]

Many feel that such a limitation upon the individual's right to work where he can find employment will lead to the undermining of our democracy. To bolster their contention that this right is a "primary" right and not subordinate to the right to organize and bargain collectively, they point with righteous indignation to America's "spirit of democracy" and our "sense of fair play." To further confuse the issue they quote ambiguous dicta from U. S. Supreme Court decisions that are hardly relevant and that were never intended to be *stare decisis* on the point at issue.[11]

Since much of the criticism directed toward the union shop is tinged or pervaded with rank emotionalism, it is difficult to separate the chaff from the wheat. In no other sphere of the gargantuan struggle between management and labor is it as necessary to discard the emotional surplusage and to pierce to the core of the matter before the parties in particular and the public in general can give direction and purpose to their myriad and often conflicting views.

The proponents of right-to-work legislation have, to the author's way of thinking, one (and only one) argument that can be forceably submitted and maintained. This is the often repeated charge of monopoly by unions. The statement that compulsory union membership is espoused by labor in contradistinction to the basic right to work is not supported by union activity, state or

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[7] "Union Shop in the Steel Crises," Rev. Jerome L. Toner, *Labor Law Journal*, Vol. 3, p. 589.

[8] Benjamin Fairless, in a radio address, "Your Stake in the Steel Crises," April 6, 1952, p. 9.

[9] Clarence B. Randal, in a radio address, "These Are the Facts, Mr. President," p. 9.

[10] See "The Right to Work," George Rose, *Labor Law Journal*, Vol. 1, pp. 293, 295.

[11] An excellent, recent example of misquoting cited the following:

The very idea that one man may be compelled to hold his life, or means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery. Yick Wo v. Hopkins, 118 U. S. 356 (1886).

federal laws, or judicial precedent. The union shop does not require compulsory membership, although it may require the paying of dues on the part of the worker to help bear the cost of the activity which has played such a prodigious part in his economic and social advancement in the past. The Taft-Hartley Act does not require union membership. There are no court decisions in point that set down an unqualified right on the part of the American citizen to pursue the occupation of his choice or to sell his labor on his own terms.

The principle that the union shop agreement gives the union a monopoly can be met with equally convincing arguments to the contrary. The best rebuttal can be simply stated by declaring that those unions that have had the benefit of union shop clauses in their contracts in the past have not enjoyed a monopolistic control over the supply of labor or over wages, hours, and conditions of work. The employer has been free to hire and fire employees as long as he did not thereby "discriminate to encourage or discourage membership in any labor organization." [12] The monopoly control over wages, hours, and conditions of work has never come from, and cannot come from, the union shop clause in a labor-management contract. This control, which never has merited the epithet "monopolistic", came solely and exclusively from the legal collective-bargaining agreement and not from any union shop clause in any contract.

There is no reason to suspect that this will not continue in the future as it has in the past. To the author, it is inconceivable that this fact, as evidenced by past experience, could ever be otherwise in the future.

Thus, the right-to-work legislation that has so far been passed is not directed toward the tool of organized labor that most merits the charge of monopoly, the collective-bargaining power. The American myth to the effect that the individual worker has the unalienable right to work when, where, and on such terms as he may wish is true only where there is no collective-bargaining agreement. The irrefutable truth of this statement has been recognized and given eloquent expression by judicial tribunals.[13]

In passing I might comment that although the collective-bargaining agreement might constitute a monopolistic control of hours, wages, and conditions of work, it is a majority monopoly that follows the time-honored principle of majority rule. "The importance of the broad public purpose sought to be served justifies the means employed." [14]

It should be remembered that the right to join a union is not the same thing as the right not to join a union. Nor is the right not to join a union, if it exists, the same thing as the right to reap the benefits of concerted action without meeting its attendant

[12] Sec. 8 (a) (3), N.L.R.A.
[13] J. I. Case Company v. N. L. R. B., 321 U.S. 322 (1944).
[14] National Maritime Union of America v. Herzog, 78 F. Supp. 146 (1948).

individual obligations. Critics of the union shop would do well to remember that federal law compels every union that legally represents the majority of the employees in a valid bargaining unit to expend its time and money to obtain and retain rates of pay, wages, hours of employment and conditions of work for employees working under the contract who will not join the union in equality with those who have joined the union. Why can it be said that it is unjust or inequitable to legally force and compel those same non-union employees to at least offer to bear a fair share of the cost of maintenance of the union that must work for all alike?

In the last analysis, the controversy centering around right-to-work legislation resolves itself into the problem of balancing conflicting rights. Those reasonable restraints on the rights of liberty and property that the common weal and general welfare demand include the union shop. The author submits that the right-to-work legislation is a wholly arbitrary and ineffective deterrant to whatever monopolistic activities that organized labor may be guilty of practicing. The author further submits that unions should not be compelled to expend their time and money for the benefit of non-union employees without the correlative right of contribution from those who refuse to join their ranks through either justifiable principle or dogged recalcitrance.

The unalienable right to work cannot be found in either the natural law of our social, economic, and political web or the constitutional and legislative canons that theoretically reflect the mores of the citizenry. Some who in the not so distant past were quick to tread upon the hand and spirit of the laboring man suddenly feel the clarion call to rescue him from the tentacles of the one institution that has so effectively espoused his cause. Some more cynical than the author might suspect that their motives are not entirely charitable.

CASE COMMENTS

LABOR LAW: DISCRIMINATION BY EMPLOYER BECAUSE OF UNION ACTIVITY—The ruling of the Colorado Industrial Commission, which was upheld by the district court, was affirmed by the Supreme Court when it ordered Bennett's Restaurant to offer reemployment and compensation for financial loss to four waitresses who were discharged in violation of the Colorado Labor Peace act.[1] The court ruled that the waitresses were selected for discharge because of their union activity and to intimidate other employees from joining the union.

[1] Bennett's Restaurant v. Industrial Commission, (March 23, 1953) Colorado Bar Association Advance Sheet for March 28, 1953.